

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	DENIED	Appeal Number:	2176202
Decision Date:	10/28/2021	Hearing Date:	09/24/2021
Hearing Officer:	Christopher Taffe	Record Open to:	09/29/2021

Appearances for Appellant:



Appearances for MassHealth:

Ghislaine Karcouche (Hearing Day, by phone) and Eileen Smith (Record Open period), both of the Chelsea MEC



*The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171*

APPEAL DECISION

Appeal Decision:	DENIED	Issue:	Excess Assets and Start Date – Incurred Medical Bills
Decision Date:	10/28/2021	Hearing Date:	09/24/2021
MassHealth's Reps.¹:	G. Karcouche & E. Smith	Appellant's Rep.:	
Hearing Location:	Chelsea MassHealth Enrollment Center		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a notice dated July 15, 2021, MassHealth approved Appellant for MassHealth Standard Long-Term Care (LTC) benefits with a start date of March 31, 2021 and a monthly Patient Paid Amount obligation of \$6,006.72. See Exhibit 1. Appellant, via his Power of Attorney (POA),² filed a timely appeal with the Board of Hearings on August 12, 2021; the appeal indicated that Appellant was seeking an earlier start date. See Exhibit 1; 130 CMR 610.015(B). Challenging the scope of assistance or determination of a MassHealth start date is a valid ground for filing an appeal with the Board of Hearings. See 130 CMR 610.032.

¹ The MassHealth Representative who appeared at hearing was Ms. Karcouche. Ms. Karcouche indicated that the 9/24/2021 hearing day was her last day of work at the Chelsea MEC, and that her supervisor, Ms. Smith would be handling any post-hearing day issues. Ms. Smith responded on behalf of the agency during the record open period.

² After the conclusion of the hearing, the Hearing Officer reviewed an email he received from his office, sent during the middle of the hearing, indicating that Appellant's daughter/POA was calling and hoping to be joined in the conference call. See Exhibit 4. The Board of Hearings never received a phone number for the POA during the filing process, see Exhibit 1, nor did the Board of Hearings receive any pre-hearing correspondence in response to its September 2, 2021 scheduling letter with any phone number for the POA or instructions to call the POA. At the beginning of the hearing, Attorney Maisenbacher indicated that Attorney Gennis should be called for the hearing. Attorney Gennis indicated at hearing that he was an attorney for the nursing facility in question. There was no mention or other request made during the hearing to have the POA or anyone else join the call for the appeal.

After the conclusion of the hearing, the record was opened by the Hearing Officer to obtain additional information from the parties as to the amount of assets on the January 1, 2021 date. Both parties responded in a timely fashion by the Record Open deadline of September 29, 2021. See Exhibits 4 through 8; 130 CMR 610.081.

Action Taken by MassHealth

MassHealth approved Appellant for LTC benefits with a benefit start date of March 31, 2021.

Issue

Do the regulations allow Appellant to use medical bills incurred more than 3 months prior to the month of application to create an entitlement for an earlier benefit start date?

Summary of Evidence

As of the hearing date, Appellant is a single widowed male who has been admitted and medically institutionalized and residing at a skilled nursing facility since [REDACTED]. Appellant filed an application for MassHealth benefits on April 30, 2021.³ Appellant is currently seeking a January 1, 2021 start date of LTC benefits.

MassHealth testified that Appellant was over the \$2,000 asset limit as of the requested January 1, 2021 benefit start date and that assets were not actually reduced or spent down under the \$2,000 limit until March 31, 2021. The Appellant's representatives at hearing did not contest this March 31, 2021 date as the date of reduction.⁴

The approval notice also contained a monthly Patient Paid Amount (PPA) obligation of \$6,006.72, and the two sides also verified that there was no issue over the PPA figure. There is also no question about any transaction or spenddown action being a disqualifying transfer, as MassHealth did not assess a penalty period.

³ Exhibit 3 states in writing, incorrectly, that the application date was May 10, 2021. The MassHealth Representative corrected that at hearing and verified the earlier application date of April 30, 2021. Because of the earlier month of application (April 2021), the earliest possible start date of LTC benefits to be considered at this appeal is January 1, 2021. See 130 CMR 516.006(A)(2) (containing the three months prior to month of application limit on retroactive benefit requests).

⁴ In addition to statements from two accounts opened in a revocable trust in Appellant's name (showing withdrawal and reduction activity in late March 2021) and an IRA of his wife, Exhibit 3 contains a statement showing a TIAA retirement plan in Appellant's name with a \$2,893.70 balance as of March 31, 2021. See id. at page 12. This TIAA account alone would show an excess asset amount of that March 31, 2021 and was presumably part of the spenddown verified by the MassHealth agency. As the agency indicated via its approval notice and testimony that March 31, 2021 was the date of spenddown and Appellant did not argue for a different date of actual reduction, this question related to whether the spenddown was actually completed by this March 31, 2021 date won't be further investigated by this decision.

Appellant's wife passed away on [REDACTED]. Prior to her passing, Appellant's wife spent some considerable amount of time of the 2020 calendar year in skilled nursing facilities and other settings. At the time of her death, she owed \$68,090 in nursing facility bills, and as of January 1, 2021 the Appellant himself had an outstanding balance of \$35,380 for bills for his nursing facility stay incurred for days before January 1, 2021.

Appellant's side stated that the reduction or spenddown process of excess assets in early 2021 took time due to the death of the wife, the need to liquidate the assets (including some belonging to the deceased spouse), and how the ability to complete financial transactions were delayed or complicated due to the COVID-19 situation.

Appellant argued that under the regulations, the money that was spent down properly went to pay past due medical bills for Appellant and/or his wife, and, if you pay nursing facility bills or other medical bills, it should be treated effectively as if you paid the bills prior to application at an earlier time. MassHealth did not assess a disqualifying penalty for payment of older bills (more than three months before) so Appellant argued how could there be an indirect penalty for such permissible transfers. Appellant argued that there should be no restriction on interpretation of the regulation that the "incurred" bills be limited only to those bills for service dates just within the three-month period prior to the month of application.

One of Appellant's representatives at hearing made a reference to the generic "boilerplate" in an excess asset letter that MassHealth sends to certain applicants, which says an applicant with excess assets can and should pay his or her medical bills as part of a spenddown, without any qualifier as to which bills and from what time period. [The record shows that no such excess asset letter was sent to Appellant in this matter because this Appellant had effectively reduced his assets prior to his application. This occurs sometimes when retroactive benefits are sought and when the spenddown is completed relatively promptly.] Appellant also argued the point that while the regulation is clear that you can't use bills older than 3 months to establish eligibility, once you do establish eligibility, that opens the door to allowing the applicant to then validly pay past due medical bills or debts that may be older than that time period and to get a date adjustment under 130 CMR 520.004(C).

The private daily rate at Appellant's nursing facility was \$595/day for all relevant time periods of 2021.

During a Record Open period, in response to an inquiry of the Hearing Officer, both parties verified that Appellant had more than \$55,000⁵ in excess countable assets as of January 1, 2021. See Exhibits 5 through 7. In its response, MassHealth claimed that the Appellant had approximately \$104,798 in assets as of January 1, 2021, and the agency included account statements showing how that estimated dollar figure was determined. See Exhibit 7.

⁵ The reason \$55,000 was the inquiry was because MassHealth determined Appellant eligible as of March 31, 2021. There are 90 days in January 1, 2021 to March 31, 2021. At \$595/day, Appellant would have incurred \$53,550 in medical expenses for his nursing facility stay for such a 90-day period. By verifying that Appellant had at least more than this \$53,550 figure, this factual finding may help with in the Analysis, *infra*, in determining how to apply the subparts of 130 CMR 520.004(A).

Findings of Fact

Based on a preponderance of the evidence, I find the following:

1. Appellant applied for MassHealth LTC benefits on April 30, 2021 and is seeking benefits with a retroactive benefit start date of January 1, 2021. (Testimony)
2. Appellant has been medically institutionalized in a skilled nursing facility since [REDACTED] (Testimony and Exhibit 3)
3. Appellant's spouse passed away on [REDACTED] after a period of long-term care institutionalization. (Testimony)
4. As of January 1, 2021, Appellant had more than \$55,000 in excess countable assets.
 - a. MassHealth estimated that Appellant had roughly \$104,798 in countable assets as of January 1, 2021. (Testimony and Exhibit 7)
5. As of January 1, 2021, Appellant owed \$35,380 for his nursing facility stay for a time period prior to January 1, 2021. (Testimony and Exhibit 5)
6. As part of his spenddown in 2021, Appellant chose to pay past due debts incurred for his deceased wife. At the time of her death, Appellant's wife allegedly owed \$68,090 to nursing facilities who had provided her care in the months prior to her passing. (Testimony and Exhibits 3 and 6)
7. Appellant did not effectively reduce and lower his assets below the \$2,000 asset limit for a single applicant until March 31, 2021. (Testimony and Exhibit 3)
8. At all relevant times in calendar year 2021, the private daily rate at Appellant's nursing facility is \$595/day. (Testimony)
9. MassHealth did not allege any disqualifying transfers were made by the applicant during the spenddown period, and there is no dispute about this issue. (Testimony)
10. Through a notice dated July 15, 2021, MassHealth approved Appellant for LTC benefits with a retroactive start date of March 31, 2021 and a monthly Patient Paid Amount obligation of \$6,006.72. The PPA is not disputed by the parties. (Testimony and Exhibit 1)

Analysis and Conclusions of Law

For single/widowed applicants like the Appellant who are applying for LTC benefits, MassHealth has countable asset rules and there is an asset limit of \$2,000. See 130 CMR 519.005; 130 CMR 520.003.

With his application from the month of April 2021, Appellant is seeking for MassHealth to approve him for the earliest possible retroactive benefit date of January 1, 2021. See 130 CMR 516.006(A).

516.006: Coverage Date

(A) Start Date of Coverage.

(1) For individuals applying for coverage, the date of coverage for MassHealth is determined by the coverage type for which the applicant may be eligible. 130 CMR 519.000: MassHealth: Coverage Types describes the rules for establishing this date.

*(2) **The begin date of MassHealth Standard, Family Assistance, or Limited coverage may be retroactive to the first day of the third calendar month before the month of application, if covered medical services were received during such period, and the applicant or member would have been eligible at the time services were provided.** If more than one application has been submitted and not denied, the begin date will be based on the earliest application that is approved. Retroactive eligibility does not apply to services rendered under a home- and community-based services waiver provided under section 1915(c) of the Social Security Act.*

(Bolded emphasis added.)

As the countable asset limit is \$2,000, the Appellant must be under \$2,000 on a given day to be eligible for that day, unless an earlier start date is permitted by the regulations. The current version of the 130 CMR 520.004 regulation contains the Haley⁶ or spenddown rules for those who have excess assets, and reads in its entirety as follows:

520.004: Asset Reduction

(A) Criteria.

(1) An applicant whose countable assets exceed the asset limit of MassHealth Standard, Family Assistance, or Limited may be eligible for MassHealth

(a) as of the date the applicant reduces his or her excess assets to the allowable asset limit without violating the transfer of resource provisions for nursing-facility residents at 130 CMR 520.019(F); or

*(b) as of the date, described in 130 CMR 520.004(C), **the applicant incurs medical bills***

⁶ In 1985, an SJC case (James E. Haley v. Commission of Public Welfare, 394 Mass. 466) led to changes in Massachusetts Medicaid law, eventually resulting in new regulations related to excess assets spenddown. The 130 CMR 520.004 regulation is often referred to as containing the agency's "Haley" rules. During the hearing and in Appellant's Record Open response in Exhibit 6, the attorneys for Appellant referred to Haley as supportive of their overall argument. In citing Haley, the Appeal Representative wrote "*The intent of the regulations cannot be to penalize payment of medical bills over 90 days, disregarding the nature of the assets or the specific circumstance.*" See Exhibit 6.

that equal the amount of the excess assets and reduces the assets to the allowable asset limit within 30 days after the date of the notification of excess assets.⁷

(2) In addition, the applicant must be otherwise eligible for MassHealth.

(B) Evaluating Medical Bills.

The MassHealth agency does not pay that portion of the medical bills equal to the amount of excess assets. Bills used to establish eligibility

(1) cannot be incurred before the first day of the third month prior to the date of application as described at 130 CMR 516.002: Date of Application; and

(2) must not be the same bills or the same portions of the bills that are used to meet a deductible based on income.

(C) Date of Eligibility.

The date of eligibility for otherwise eligible individuals described at 130 CMR 520.004(A)(1)(b) is the date that his or her incurred allowable medical expenses equaled or exceeded the amount of his or her excess assets.

(1) If after eligibility has been established, an individual submits an allowable bill with a medical service date that precedes the date established under 130 CMR 520.004(C), the MassHealth agency readjusts the date of eligibility.

(2) In no event will the first day of eligibility be earlier than the first day of the third month before the date of the application, if permitted by the coverage type.

(D) Verification.

The MassHealth agency requires the applicant to verify that he or she incurred the necessary amount of medical bills and that his or her excess assets were reduced to the allowable asset limit within required timeframes.

(Bolded emphasis added.)

In its two subparts, 130 CMR 520.004(A)(1) allows applicants with excess assets time to spenddown their assets and for those who need a retroactive benefit to use one of two methods to find the most favorable retroactive date. The first date in 130 CMR 520.004(A)(1)(a) would be the date of actual reduction below the benefit's asset limit. There is no dispute between the parties here that the actual date assets were reduced below \$2,000 was March 31, 2021. In choosing to use this date of March 31, 2021 in its approval notice, it is inferred that MassHealth determined that there was a less favorable date available to Appellant under 520.004(A)(1)(b). To calculate that alternative date and determine if it is favorable to Appellant, the MassHealth agency must apply the Haley calculation rule in 130 CMR 520.004(A)(1)(b).

Essentially with 130 CMR 520.004(A)(1)(b), a period akin to a "deductible" is calculated. To calculate this period for which the applicant is responsible, MassHealth took the amount of excess assets as of the benefit request date and divide it by the daily nursing facility rate for unpaid nursing facility bills (starting from the date of three months prior to the month of application) to figure out how many days from the request date it would take for Appellant to incur medical bills equal or

⁷ As discussed in the Summary, there was no notification of excess assets because Appellant reduced assets before the final eligibility determination was made. This is not a problem or issue, as Appellant has effectively complied with this last clause of 130 CMR 520.004(A)(1)(b) by reducing assets in a timely manner before being informed of his right to do so.

excess to the amount of excess assets. Because all parties agree that the Appellant had more than \$55,000 in excess assets as of January 1, 2021, the start date under the Haley calculation in 130 CMR 520.004(A)(1)(b) would fall in April 2021 or after.⁸ Thus, MassHealth went with the more favorable date of March 31, 2021 date from 130 CMR 520.004(A)(1)(a) in its approval notice. See Exhibit 1.

Appellant's representatives argue for a different and novel interpretation of 130 CMR 520.004(A)(1)(b). They argue that because Appellant (and his late wife) incurred substantial, legitimate medical bills and debts prior to January 1, 2021, which more than account for the amount of excess assets, then the regulations should allow benefits to begin on January 1, 2021 because their excess assets can be used to pay off their other valid debts. In doing so, the Appellants are essentially asking to be allowed to pay one set of debt while they ask the state to pay the debt the applying Appellant has for January 2021 through March 2021.

I disagree with this interpretation of the regulation. First, it is noted that 130 CMR 520.004(A)(1)(b) uses the verb "*incur*" when referencing the medical bills. That section of the regulations then cites to 130 CMR 520.004(C). 130 CMR 520.004(C) uses the phrase "*incurred allowable medical expenses*".

By introducing and adding the word "***allowable***" in 130 CMR 520.004(C) to describe the incurred bills in question, I find there is clear regulatory intent to (1) make some, but not all, medical expenses allowable for purpose of this section, and (2) not allow certain other medical expenses of an applicant to be factored into the application of this regulation.

The question is now which medical bills are allowable to satisfy the Haley deductible in 130 CMR 520.004(A)(1)(b) and which are not. Logically, the best place to look for guidance would be within the surrounding regulation and, right there in 130 CMR 520.004(B), there is a section titled "*Evaluating Medical Bills*".⁹

In its second sentence, 130 CMR 520.004(B) explicitly states that bills used to establish eligibility must be "*incurred*" from a certain timeframe, and that more specifically they can't be bills or expenses that are older than three months prior to the application date. In other words, the only bills that can be used are those in the "*three months prior to month of application*" period of time, which

⁸ Assuming conservatively that the Appellant had just \$55,000 in excess assets, it would take at least 92 days to incur such medical expenses ($\$55,000 \div \$595/\text{day} = 92.4$ days). See fn. 5, *supra*. 92 days after January 1, 2021 would put the 130 CMR 520.004(A)(1)(b) date in the month of April 2021. It is also noted that MassHealth estimated that Appellant may have a countable excess asset amount that was more than \$100,000, so if the calculation was more exactly done, it would likely lead to a June 2021 date at the earliest. This result is immaterial as 130 CMR 520.004(A)(1)(a) provides a more favorable date to which Appellant is entitled.

⁹ While 130 CMR 515.001 has certain terms defined for use in 130 CMR 515.000 and 130 CMR 522.000 (the "Volume II" regulations, used for the more traditional Medicaid population including those in long-term-care facilities), there is no defined term in 130 CMR 515.001 for medical expenses, allowable medical bills, or anything similar. I have also reviewed all of 130 CMR 515.000 through 130 CMR 522.000 and cannot find any other regulation, beyond 130 CMR 520.004(B), that would appear to possibly be of help in interpreting the "*incurred allowable medical*" phrase in 130 CMR 520.004(C). At hearing, the attorneys stated their argument was generally based on application of the Haley rules resulting from the 1985 SJC decision.

is consistent with those bills which could be potentially covered by MassHealth. See 130 CMR 516.006(A)(2). In that same regulation part of 130 CMR 520.004(B), the first sentence says that MassHealth will not pay “*that portion of bills*”. I conclude that a reading of the totality of 130 CMR 520.004 regulation compels a conclusion that the Appellant’s incurred bills for the period after January 1, 2021 (through the approval date of March 31, 2021) are the ones that MassHealth should not pay per application of the Haley calculation and 130 CMR 520.004(B).

At hearing in making their argument, Appellant’s side at one point conceded that older (Pre-January 2021) bills could not be used to establish initial eligibility but then stated the same (Pre-January 2021) older bills could be subsequently used to justify a post-eligibility adjustment under 130 CMR 520.004(C)(1). Again, 130 CMR 520.004(C)(1) says the medical bills must be “*allowable bills*”. For the same reasons, I do not conclude that the subset of “*allowable bills*” can be opened up to include bills from any point in time in the Appellant’s life, including that just before the three month period prior to the month of application.¹⁰ If that was the case when any medical bill from any time period could be used, what would be the point of 130 CMR 520.004(B)(1) in the first place. Further, to have the outcome that Appellant’s side urges, this would result in the agency paying for the bills from January 1, 2021 to March 31, 2021, in direct contrast to what the very first sentence of 130 CMR 520.004(B) says. It does not feel logical to say, as Appellant suggests, that the bills that MassHealth should not pay would be the ones incurred in 2020. MassHealth is already restricted from not being able to pay those bills from 2020 simply due to Appellant’s application date from the month of April 2021. See 130 CMR 516.006(A).¹¹ The early 2021 bills that MassHealth are not paying are the bills, as 130 CMR 520.004(B) says, that were used to establish eligibility.

Appellant then attempted to make an argument reliant on the readjustment language in 130 CMR 520.004(C)(1) but I believe that regulation is for different situations when the applicant has more timely or more recent medical expenses that might be potentially covered by MassHealth. To illustrate how 130 CMR 520.004(C)(1) would be used, as a hypothetical, assume another institutionalized applicant at this same nursing facility as Appellant. This hypothetical applicant also applied in April 2021 and is seeking a January 1, 2021 start date but, in this case, the applicant has less excess assets and was found eligible with a January 31, 2021 start date under a Haley

¹⁰ There are two separate legal issues that I find do not need to be addressed in light of the current outcome of this appeal. First, could the Appellant really use bills incurred by his wife towards the bills that the regulations indicate the applicant (the husband) must accumulate? His wife did not apply for MassHealth and, if she did, she would have similarly been restricted to receiving assistance for only those bills in the three months prior to application. Second, is Appellant even able to use 130 CMR 520.004(C) to seek a readjusted date if the start date initially approved was approved under 130 CMR 520.004(A)(1)(a) instead of 130 CMR 520.004(A)(1)(b). 130 CMR 520.004(C) mentions the latter (A)(1)(b) but not the former (A)(1)(a) as a condition precedent for use of that regulation. Regardless, as the Appellant’s case focused on one line of argument, the analysis is more centered on why those reasons do not compel the result they seek.

¹¹ Appellant’s side talks about the unfairness of this situation but it is noted that nothing stopped this Appellant from applying for benefits at an earlier time, say during the month of January 2021. The Appellant allegedly had already accumulated over \$100,000 in medical bills for him and his wife as of the new year. By not applying earlier and waiting until the last possible day (April 30, 2021) to potentially ask for January 1, 2021 benefits, the applicant effectively restricted what “older” medical bills could be used in a spenddown. Similarly, by also letting the medical debt accumulate and not paying it off more promptly in 2020, Appellant may have created a more sizable excess asset hurdle on January 1, 2021 that had to be overcome to become eligible.

calculation (130 CMR 520.004(A)(1)(b)). Subsequently after receiving his approval notice, this hypothetical applicant then receives an EMT bill for services received from an ambulance ride on January 25, 2021 for \$1,190 (an amount equal to two days of the nursing facility stay). MassHealth would then determine a revised Haley calculation and find that the applicant incurred the necessary amount of allowable bills two days earlier than previously thought, and MassHealth would adjust the start date to two days earlier January 29, 2021. This also is consistent with the MassHealth Medicaid benefit being the payor of last resort, a principle found in 130 CMR 517.008, in that the Appellant pays his share – the nursing facility stay from January 1, 2021 to January 28, 2021 and the January 25, 2021 ambulance bill – before MassHealth enters the picture and begins to provide medical assistance on January 29, 2021.

I find the above to be the most logical and consistent way to interpret the 130 CMR 520.004 regulations. Appellant's representatives made generic reference as to how this outcome is not what the Haley decision from the SJC intended. I disagree with that implication. A reading of the Haley decision talks about the unjustness in the Commonwealth over three decades ago where only 130 CMR 520.004(A)(1)(a) (or its equivalent in 1985) existed, but where 130 CMR 520.004(A)(1)(b) (or its equivalent) did not exist. In the cases described in Haley, all the plaintiffs were effectively stuck with the actual reduction date (the equivalent of 130 CMR 520.004(A)(1)(a)) which is what led to the SJC ordering the agency to amend and fix its spenddown rule.¹² Since Haley was issued, 130 CMR 520.004(A)(1)(a) and (b) have been created, and that regulation has been essentially unchanged for at least the last 15 years. I have never seen the three-month rule interpreted and applied in a manner urged by Appellant's representatives. Nor have I seen any challenge to the legality or language of 130 CMR 520.004 that would appear to factor in here.

Based on the above analysis, I conclude that MassHealth did not err in determining the March 31, 2021 as the earliest start date this Appellant may receive under the regulations. This appeal is DENIED.

Order for MassHealth

None.

¹² In a footnote in Haley, even while discussing the “*absurd result*” for one of the case’s Plaintiffs who had minimal excess assets but who was not physically able to spend down those resources till months later, the SJC repeatedly referenced the three-month period for allowable bills multiple times. See 394 Mass. 466, 476 n. 8. Nowhere in that decision does the SJC suggest that bills older than the three-month retroactive period associated with Medicaid benefits had to be factored into the spenddown option that the Commonwealth would be ordered to offer. See id.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Christopher Taffe
Hearing Officer
Board of Hearings

cc: Appeals Coordinator @ Chelsea MEC

