

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2176445
Decision Date:	11/24/2021	Hearing Date:	9/28/2021
Hearing Officer:	Cynthia Kopka	Record Open to:	10/12/2021

Appearance for Appellant:




Appearance for MassHealth:

Linda Phillips, RN



*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:	MFP-CL waiver
Decision Date:	11/24/2021	Hearing Date:	9/28/2021
MassHealth's Rep.:	Linda Phillips	Appellant's Rep.:	
Hearing Location:	Quincy (remote)	Aid Pending:	No

Authority

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

Jurisdiction

By notice dated July 26, 2021, MassHealth notified Appellant that he is not eligible for MassHealth's Moving Forward Plan Community Living Home-and-Community-Based Services Waiver (MFP-CL Waiver). Exhibit 1. Appellant filed a timely appeal on August 13, 2021. Exhibit 2. A determination regarding eligibility for a waiver program is a valid basis for appeal. 130 CMR 610.032. The hearing record was held open through October 12, 2021 for the submission of additional evidence. Exhibit 6.

Action Taken by MassHealth

MassHealth notified Appellant that he is not eligible for MassHealth's MFP-CL Waiver.

Issue

The appeal issue is whether MassHealth correctly determined that Appellant is not eligible for the MFP-CL Waiver because he cannot be safely served in the community within the terms of this waiver.

Summary of Evidence

MassHealth was represented at remote hearing by a registered nurse associate director/manager of appeals and regulatory compliance. Appellant appeared with his social worker, physical therapist, and occupational therapist. Documents were submitted in advance of hearing by both parties. Exhibits 4 and 5. A summary of documentation and testimony follows.

MassHealth offers home and community based service waivers, including the MFP-CL waiver, to help qualified individuals move from a long-term care facility to a qualified residence in the community and obtain community based services. The MFP-CL waiver is for individuals who can move into their own home or apartment, or to the home of someone else, and receive services in the community. Another waiver, the MFP Residential Supports (MFP-RS) waiver is for people who need supervision and staffing 24 hours a day, seven days a week in a provider-operated residence. Exhibit 4 at 1. The MFP-CL waiver is available through MassHealth for people who have been living in a skilled facility and serves members “who do not need 24-hour services and support.” *Id.* at 3.

Appellant has resided in a nursing facility for more than 90 days. *Id.* at 7. Appellant is in his sixties and his conditions and diagnoses include recent amputations of upper and lower extremities due to infections, end stage renal disease, severe calciphylaxis, severe peripheral vascular disease, Type II diabetes, diabetic retinopathy, diabetic nephropathy, history of gangrene, chronic pain, chronic anemia, gastroesophageal reflux disease (GERD), hypertension, sleep apnea, and adjustment disorder with depressed mood in remission. *Id.* at 25-26. On April 9, 2021, Appellant applied for the MFP-CL waiver. *Id.* at 3. Appellant seeks to move to an apartment in the community. *Id.* at 23.

At hearing, the parties agreed that the only issue in dispute is the availability of informal supports in the community. MassHealth agreed that Appellant is otherwise eligible for the MFP-CL waiver and Appellant’s representatives did not dispute that Appellant requires physical care 24 hours per day. See *id.* at 25-28. Prior to the hearing, MassHealth and Appellant’s representatives had exchanged information, including a list provided by Appellant of community members who confirmed that they could each provide support for Appellant in the community in the case of emergency or lack of in-home services. Exhibit 5.

MassHealth testified that in order to determine that Appellant could be safely supported in the community, there would need to be a schedule of when the informal caregivers would be present and available to offer Appellant the care he needs. The MFP-CL waiver would include up to 84 hours a week of paid care, but Appellant’s informal support system would have to fill in the gaps for the remaining time. Ideally there would be a live-in caregiver for someone with Appellant’s needs. Absent a live-in caregiver, MassHealth would need to see a schedule of which individuals would plan to be with Appellant at which times, and who would be available for back-up when either a paid or informal caregiver was unable to work with Appellant on a certain day. The priority is to ensure Appellant is safely served in the community. The available individuals identified by Appellant would have to be reliable and physically capable to provide Appellant care.

Appellant and his representatives testified that Appellant's adult son is currently living in the apartment Appellant would discharge to and would be living with Appellant in the residence. This is information that MassHealth did not have when it made its determination. MassHealth agreed to review this new information, requesting contact information to verify with Appellant's son that he would be providing live-in support. MassHealth also asked for the availability and contact information for back-up caregivers.

After hearing, MassHealth spoke to Appellant's son and back-up caregivers and completed a risk assessment for caregiver supplement. Exhibit 8. Appellant's son reported to MassHealth that he would be living in Appellant's apartment on a temporary basis while saving money for his own place. Appellant's son would be sleeping on the couch in the one-bedroom apartment. Appellant's son was available to provide care to Appellant outside his working hours on Monday, Tuesday, Thursday, Saturday, and Sunday. Appellant's son would not be available Wednesday or Friday, including overnight. *Id.* Appellant's other back-up providers could provide support on Friday afternoon and overnight. *Id.* Other family members and friends had varying levels of availability for support, though some reported not being able to provide care. *Id.* at 2. Based on the discussions with Appellant's informal supports, MassHealth determined that Appellant does not have safe, reliable informal supports that will provide him with a safe live-in 24 hour/7 days a week informal support system. Each informal support reported that there is not a schedule in place for caregivers. MassHealth based its decision on Appellant's medical complexities, significant physical limitations and increased risk of medical decompensation without a strong and reliable 24/7 support system in the community.

Following MassHealth's update, Appellant's representative was given an opportunity to submit additional evidence, with a deadline of November 24, 2021 to decide if and how additional evidence should be presented. Exhibit 9. Appellant's representative did not respond to this request.

Findings of Fact

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

1. On April 9, 2021, Appellant applied for the MFP-CL waiver, seeking to move from a nursing facility to an apartment in the community. Exhibit 4 at 3, 23.
2. Appellant has resided in a nursing facility for more than 90 days. *Id.* at 7.
3. Appellant's conditions and diagnoses include recent amputations of upper and lower extremities due to infections, end stage renal disease, severe calciphylaxis, severe peripheral vascular disease, Type II diabetes, diabetic retinopathy, diabetic nephropathy, history of gangrene, chronic pain, chronic anemia, GERD, hypertension, sleep apnea, and adjustment disorder with depressed mood in remission. *Id.* at 25-26.
4. Appellant requires 24 hours of assistance and personal care per day. *Id.*

5. On July 26, 2021, MassHealth notified Appellant that he is not eligible for MassHealth's MFP-CL Waiver because he cannot be safely served in the community. Exhibit 1.
6. Appellant filed a timely appeal on August 13, 2021. Exhibit 2.
7. Appellant provided a list of individuals who confirmed that they could each provide support for Appellant in the community in the case of emergency or lack of in-home services. Exhibit 5.
8. In the community, Appellant's son planned to live in Appellant's one-bedroom apartment and sleep on the couch five days a week, providing care when not at work. Appellant's son would not be available to Appellant Wednesday or Friday, including overnight. Exhibit 8.
9. Appellant's other back-up providers could provide support on Friday afternoon and overnight. *Id.*
10. Based on the discussions with Appellant's informal supports, MassHealth determined that Appellant does not have safe, reliable informal supports that will provide him with a safe live-in 24 hour/7 days a week informal care, as there was no schedule in place for caregivers. *Id.*

Analysis and Conclusions of Law

Per 130 CMR 519.007(H)(2), an MFP-CL Waiver allows an applicant or member to receive specified waiver services, other than residential support services in the home or community if he or she meets certain clinical and financial eligibility criteria. The clinical and age requirements for an MFP-CL Waiver are as follows:

(a) Clinical and Age Requirements. The MFP Community Living Waiver, as authorized under section 1915(c) of the Social Security Act, allows an applicant or member who is certified by the MassHealth agency or its agent to be in need of nursing facility services, chronic disease or rehabilitation hospital services, or, for participants 18 through 21 years of age or 65 years of age and older, psychiatric hospital services to receive specified waiver services, other than residential support services in the home or community, if he or she meets all of the following criteria:

- (i) is 18 years of age or older and, if younger than 65 years old, is totally and permanently disabled in accordance with Title XVI standards;
- (ii) is an inpatient in a nursing facility, chronic disease or rehabilitation hospital, or, for participants 18 through 21 years of age or 65 years of age and older, psychiatric hospital with a continuous length of stay of 90 or more days, excluding rehabilitation days;
- (iii) must have received MassHealth benefits for inpatient services, and be MassHealth eligible at least the day before discharge;

- (iv) needs one or more of the services under the MFP Community Living Waiver;
- (v) **is able to be safely served in the community within the terms of the MFP Community Living Waiver**; and
- (vi) is transitioning to the community setting from a facility, moving to a qualified residence, such as a home owned or leased by the applicant or a family member, an apartment with an individual lease, or a community-based residential setting in which no more than four unrelated individuals reside.

130 CMR 519.007(H)(2) (emphasis added).

MassHealth determined Appellant did not meet the requirement at 130 CMR 519.007(H)(2)(v), that Appellant would be safely served in the community. The undisputed evidence shows that Appellant requires care 24 hours a day, but the waiver would only provide a maximum of 12 hours of paid services. Without a full-time live-in caregiver, Appellant would have to demonstrate that informal supports would be reliably available to him for the remaining 12 hours per day. The evidence presented does not demonstrate a reliable timetable of care for Appellant, as there were gaps in the week when care was not available. Appellant has not demonstrated that MassHealth's determination that he cannot be safely served in the community as required by 130 CMR 519.007(H)(2)(v) was made in error. Accordingly, this appeal is denied.

Order for MassHealth

None.

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.

Cynthia Kopka
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Waiver Unit, UMass Med School, 333 South Street, Shrewsbury, MA 01545