

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2176628
Decision Date:	11/10/2021	Hearing Date:	10/26/2021
Hearing Officer:	Thomas J. Goode		

Appearance for Appellant:




Appearance for MassHealth:

Linda Phillips, Associate Director, Appeals &
Regulatory Compliance
Brad Goodier, R.N.
Kristen Petersen, R.N.



*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:	11/10/2021	Hearing Date:	10/26/2021
MassHealth's Rep.:	Linda Phillips, R.N.	Appellant's Rep.:	
Hearing Location:	Quincy Harbor South	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

Through a notice dated July 26, 2021, MassHealth denied Appellant's application for the Moving Forward Plan Community Living (MFP-CL) Waiver because it determined that Appellant is not able to be safely served in the community within the terms of the MFP-CL Waiver (130 CMR 519.007(H)(2)(a)(5) and Exhibit 1). Appellant filed this appeal in a timely manner on August 27, 2021 (130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied Appellant's application for the Moving Forward Plan Community Living Waiver.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 519.007(H)(2)(a)(5) in determining that Appellant is not able to be safely served in the community within the terms of the MFP-CL Waiver.

Summary of Evidence

The MassHealth representative identified herself as a Registered Nurse and Associate Director of Appeals and Regulatory Compliance. MassHealth offers two home and community-based service waivers: the MFP-RS Waiver, and the MFP-CL Waiver. Both waivers help individuals move from a nursing home or long-stay hospital to a MFP-qualified residence in the community to obtain community-based services. The MFP-CL Waiver is for individuals who can move into their own home or apartment, or to someone else's home, and receive services in the community that are less than 24 hours/day, 7 days per week. The MFP-RS Waiver is for individuals who require 24-hour support services in a group setting.

Below are the eligibility criteria for the MFP Waivers (Exhibit 5 at Ex. A, pp. 1-2):

- The applicant must be living in a nursing facility or long-stay hospital, and lived there for at least 90 consecutive days;
- The applicant must be 18 years old or older, and have a disability, or be age 65 and older;
- The applicant must meet clinical requirements for, and be in need of the Waiver services that are available through the MFP Waivers;
- The applicant must be able to be safely served in the community within the terms of the MFP Waivers;
- The applicant must meet the financial requirements to qualify for MassHealth special financial rules existing for Waiver participants; and
- The applicant will transition to an MFP-qualified residence in the community.

At issue for this appeal is:

1. Regulation 130 CMR 519.007 (H) (2)(a) (5): Individuals Who Would be Institutionalized MFP HCBS Waivers (Exhibit 5, Ex. B, p. 1-2).
 - Was MassHealth correct in denying Appellant's application for the MFP-CL Waiver because, he cannot be safely served in the community within the services provided by the MFP-CL Waiver?

On June 21, 2021, an in-person assessment for Waiver eligibility was conducted at the [REDACTED]. The assessment consists of completion of MFP documents including Minimum Data Set-Home Care (MDS-HC) (Exhibit 5 at Ex. C, pp. 9-21); Clinical Determination of Waiver Eligibility (Id. at Ex. C, pp. 22-30); Acquired Brain Injury (ABI)/MFP Waivers Community Risks Assessment (Id. at Ex. C, p. 31); ABI-N/MFP-CL Caregiver

Supplemental Risk Assessment (Id. at Ex. C, pp. 32-34); a review of the applicant's medical record; and a discussion with the nursing facility staff.

Appellant is [REDACTED] and currently resides in a nursing facility. In May 2019, Appellant was determined eligible for the MFP-CL Waiver, and transferred to his apartment in [REDACTED]. Appellant was then admitted to the hospital two times and then to rehabilitation in [REDACTED] and [REDACTED]. From [REDACTED] was admitted to the hospital and rehabilitation centers several times (Exhibit 5 at Ex. C, pp. 25-26). Appellant's medical history includes end stage renal disease (ESRD) with dependence on hemodialysis (HD), antiphospholipid antibody syndrome (APLS), dependence on supplemental oxygen (3 liters), type 2 diabetes mellitus (DM), diabetic retinopathy, neuropathy, coronary artery disease (CAD), cardiomyopathy with ejection fraction 10%, congestive heart failure (CHF), left above-the-knee amputation (AKA), right below-the-knee amputation (BKA), history of deep venous thrombosis (DVT) & pulmonary embolism (PE), calciphylaxis, osteomyelitis, anemia, methicillin resistant staphylococcus aureus (MRSA) infected joints s/p multiple digit amputations (left 2nd, 3rd, 4th, and 5th fingers; right thumb and 4th fingers), legal blindness (full blindness of right eye; partial blindness of left eye), gout, gastro-esophageal reflux disease (GERD), hypertension (HTN), hyperlipidemia (HLD), hypothyroidism, insomnia, depression, and anxiety (Id. at Ex. C, pp. 26-27).

During the Waiver eligibility assessment review, the following documentation indicates that Appellant requires 24/7 skilled nursing care to provide for his medical and chronic care needs:

- [REDACTED] Course notes state "Given cardiac condition and serious comorbidities, patient's long-term prognosis is not favorable. Kidney palliative care had extensive discussions with pt., and he wished to remain full code for now. Outpt. follow-up arranged with kidney palliative care team" (Id. at Ex. D, p. 17).
- [REDACTED] Center-Initial Psychiatry Consult states Appellant is feeling uncomfortable at present due to dyspnea (difficulty breathing) and abdominal tightness. He reported that he is "visited by people at night who are there to bait him. He acknowledged that his hearing is more acute due to vision loss, however he believes that these are not hallucinations." He first experienced them at the Tufts dialysis center, but "they follow me everywhere." There is no documented history of psychiatric hospitalization or suicide attempt (Id. at Ex. D, pp. 43-44).
- [REDACTED] Center Nursing Note states that Appellant has multiple amputation sites being treated for wound care: left hand, 2nd, 3rd, 4th and 5th

partial finger with wounds and right hand, thumb and 4th finger. Sensation is decreased and possible deep infection present (Id. at Ex. D, p. 128).

- [REDACTED] Center Physician progress note indicates that Appellant is treated for chronic hypoxic respiratory failure. Appellant uses oxygen at 2 liters 24 hours/day for comfort and sleep apnea. He is not using a CPAP/BiPap machine. He is treated with Robitussin for his cough and nasal spray to prevent epistaxis (Id. at Ex. D, p. 107).
- MDS-HC Report dated July 15, 2021, indicates that Appellant needs assistance with the following Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs) (Id. at Ex. C, pp. 13-14): meal preparation, housework, medication assistance, shopping, transportation, transfers, eating, bathing, dressing/undressing, bowel/bladder care.
- Appellant is followed by Palliative Care at Hebrew Rehabilitation Center with focus of sessions centered around goals of care related to end of life/quality of life, prognostic awareness, and grief counseling.

On July 18, 2021, Appellant's case was discussed at the MassHealth Waiver Clinical Team review meeting. On July 21, 2021, as part of the MFP Waiver eligibility process, a second clinical review was conducted by the MRC Clinical Team. MassHealth and MRC determined that Appellant is not clinically eligible for participation in the MFP-CL Waiver which provides limited services up to 12-hours per day. Appellant is medically complex and requires 24/7 skilled nursing care to support his comorbidities. The MFP-CI Waiver provides only one visiting nurse visit per week and is not able to provide 24/7 skilled nursing and palliative care necessary to keep Appellant safe and comfortable. Based on the in-person assessment, the completed MFP documentation including: MDS-HC, ABI/MFP Waivers Community Risk assessment, and Clinical Determination of Waiver Eligibility, and a thorough review of Appellant's medical record by both MassHealth and MRC, Appellant does not meet eligibility for the MFP-CL Waiver as he requires 24/7 skilled nursing and continuous palliative treatment. Therefore, MassHealth testified that in its clinical and professional opinion Appellant cannot be safely served in the community within the MFP-CL Waiver. On July 26, 2021, an MFP-CL Waiver denial notice was mailed to Appellant (Id. at Ex. C, pp. 4-6).

Appellant testified that prior to admission to a nursing facility he lived in the same apartment for 20 years, and has close friends who live in the building who have been very involved in his care. Appellant stated that as part of this community of friends who share meals and help each other, he would have sufficient care to reside in the community because everyone helps each other. He

added that although he would need a Hoyer lift, he feels that he would require only 7 hours of care overnight, and 5 hours of care during the day, and that his friends would be able to assist with bandaging and other care as needed. Appellant testified that his medical providers told him in February that he had weeks to months to live, but he has exceeded that expectation. He added that he does not want to die in the nursing facility and would like to return to his apartment for closure with his community of friends.

Findings of Fact

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

1. MassHealth offers two home and community-based service waivers: the MFP-RS Waiver, and the MFP-CL Waiver. Both waivers help individuals move from a nursing home or long-stay hospital to an MFP-qualified residence in the community to obtain community-based services.
2. The MFP-CL Waiver is for individuals who can move into their own home or apartment, or to someone else's home, and receive services in the community less than 24 hours/day, 7 days per week.
3. On June 21, 2021, an in-person assessment for Waiver eligibility was conducted. The assessment consists of completion of MFP documents including Minimum Data Set-Home Care (MDS-HC); Clinical Determination of Waiver Eligibility; Acquired Brain Injury (ABI)/MFP Waivers Community Risks Assessment; ABI-N/MFP-CL Caregiver Supplemental Risk Assessment; a review of the applicant's medical record; and a discussion with the nursing facility staff.
4. Appellant is [REDACTED] and is currently in a nursing facility resident.
5. In May 2019, Appellant was determined eligible for the MFP-CL Waiver, and he transferred to his apartment in October 2019.
6. Appellant was admitted to the hospital two times and then to rehabilitation in [REDACTED] and [REDACTED].
7. [REDACTED], Appellant was admitted to the hospital and rehabilitation centers several times.
8. Appellant's medical history includes end stage renal disease (ESRD) with dependence on hemodialysis (HD), antiphospholipid antibody syndrome (APLS), dependence on supplemental oxygen (3 liters), type 2 diabetes mellitus (DM), diabetic retinopathy,

neuropathy, coronary artery disease (CAD), cardiomyopathy with ejection fraction 10%, congestive heart failure (CHF), left above-the-knee amputation (AKA), right below-the-knee amputation (BKA), history of deep venous thrombosis (DVT) & pulmonary embolism (PE), calciphylaxis, osteomyelitis, anemia, methicillin resistant staphylococcus aureus (MRSA) infected joints s/p multiple digit amputations (left 2nd, 3rd, 4th, and 5th fingers; right thumb and 4th fingers), legal blindness (full blindness of right eye; partial blindness of left eye), gout, gastro-esophageal reflux disease (GERD), hypertension (HTN), hyperlipidemia (HLD), hypothyroidism, insomnia, depression, and anxiety.

9. Appellant requires 24/7 skilled nursing care to provide for his medical and chronic care needs.
10. Appellant has multiple amputation sites being treated for wound care: left hand, 2nd, 3rd, 4th and 5th partial finger with wounds and right hand, thumb and 4th finger. Sensation is decreased and possible deep infection is present.
11. Appellant is treated for chronic hypoxic respiratory failure. Appellant uses oxygen at 2 liters 24 hours/day for comfort and sleep apnea.
12. Appellant needs assistance with the following Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs): meal preparation, housework, medication assistance, shopping, transportation, transfers, eating, bathing, dressing/undressing, bowel/bladder care.
13. Appellant is followed by Palliative Care with the focus of sessions centered around goals of care related to end of life/quality of life, prognostic awareness, and grief counseling.
14. The MFP-CI Waiver is not able to provide 24/7 skilled nursing and palliative care.

Analysis and Conclusions of Law

Eligibility requirements for the MFP-CL Waiver are outlined at 130 CMR 519.007(H):

- (2) Money Follows the Person (MFP) Community Living Waiver.
 - (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:

1. 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;
2. 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;
3. must have received MassHealth benefits for inpatient services, and be MassHealth eligible at least the day before discharge;
4. needs one or more of the services under the MFP Community Living Waiver;
5. **is able to be safely served in the community within the terms of the MFP Community Living Waiver;** and
6. 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.

(b) Eligibility Requirements. In determining eligibility for MassHealth Standard and for these waiver services, the MassHealth agency determines income eligibility based solely on the applicant's or member's income regardless of his or her marital status. The applicant or member must

1. meet the requirements of 130 CMR 519.007 (H)(2)(a);
2. have countable income that is less than or equal to 300% of the federal benefit rate (FBR) for an individual;
3. have countable assets of \$2,000 or less for an individual and, for a married couple, if the initial Waiver eligibility determination was on or after January 1, 2014, have assets that are less than or equal to the standards at 130 CMR 520.016(B): *Treatment of a Married Couple's Assets When One Spouse Is Institutionalized*; and
4. not have transferred resources for less than fair market value, as described in 130 CMR 520.018: *Transfer of Resources Regardless of Date of Transfer* and 520.019: *Transfer of Resources Occurring on or after August 11, 1993*.

(c) Enrollment Limits. Enrollment in the MFP Community Living

Waiver is subject to a limit on the total number of waiver participants. The number of participants who can be enrolled in this waiver may be limited in a manner determined by the MassHealth agency.

(d) Waiver Services. Eligible members who are enrolled as waiver participants in the MFP Community Living Waiver are eligible for the waiver services described in 130 CMR 630.405(D): *Money Follows the Person Community Living (MFP-CL) Waiver*.

(emphasis added)

In the context of an administrative hearing, Appellant bears the burden of proof in demonstrating that the MassHealth action denying his MFP-CL Waiver application is incorrect.¹ Appellant is [REDACTED] years old and is currently a nursing facility resident. Appellant's medical history includes end-stage renal disease (ESRD) with dependence on hemodialysis (HD), antiphospholipid antibody syndrome (APLS), dependence on supplemental oxygen (3 liters), type 2 diabetes mellitus (DM), diabetic retinopathy, neuropathy, coronary artery disease (CAD), cardiomyopathy with ejection fraction 10%, congestive heart failure (CHF), left above-the-knee amputation (AKA), right below-the-knee amputation (BKA), history of deep venous thrombosis (DVT) & pulmonary embolism (PE), calciphylaxis, osteomyelitis, anemia, methicillin resistant staphylococcus aureus (MRSA) infected joints s/p multiple digit amputations (left 2nd, 3rd, 4th, and 5th fingers; right thumb and 4th fingers), legal blindness (full blindness of right eye; partial blindness of left eye), gout, gastro-esophageal reflux disease (GERD), hypertension (HTN), hyperlipidemia (HLD), hypothyroidism, insomnia, depression, and anxiety. Appellant has multiple amputation sites being treated for wound care including the left hand, 2nd, 3rd, 4th and 5th partial finger with wounds and right hand, thumb and 4th finger. Sensation is decreased and possible deep infection is present. Appellant is treated for chronic hypoxic respiratory failure. Appellant uses oxygen 24 hours/day for comfort and sleep apnea. Appellant requires assistance with the following Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs): meal preparation, housework, medication assistance, shopping, transportation, transfers, eating, bathing, dressing/undressing, bowel/bladder care. Appellant also testified that he would require a Hoyer lift in the community. The clinical evidence shows that Appellant was admitted to the hospital twice and then to rehabilitation in [REDACTED]. From [REDACTED] to [REDACTED], Appellant was admitted to the hospital and rehabilitation centers several times. On June 21, 2021, an in-person assessment for Waiver eligibility was conducted and consisted of completion of MFP documents including Minimum Data Set-Home Care (MDS-HC); Clinical Determination of Waiver Eligibility; Acquired Brain Injury (ABI)/MFP Waivers Community Risks Assessment; ABI-N/MFP-CL Caregiver Supplemental Risk Assessment; a review of the applicant's medical record; and a discussion with the nursing facility staff. The clinical evidence

¹ See Fisch v. Board of Registration in Med., 437 Mass. 128, 131 (2002); Andrews v. Division of Medical Assistance, 68 Mass. App. Ct. 228 (2007); Faith Assembly of God of S. Dennis & Hyannis, Inc. v. State Bldg. Code Commn., 11 Mass. App. Ct. 333, 334 (1981); Haverhill Mun. Hosp. v. Commissioner of the Div. of Med. Assistance, 45 Mass. App. Ct. 386, 390 (1998).

conclusively shows that Appellant requires 24/7 skilled nursing care to provide for his medical and chronic care needs including palliative care. As the MFP-CI Waiver is not able to provide 24/7 skilled nursing and palliative care, Appellant is not able to be safely served in the community within the terms of the MFP Community Living Waiver as required at 130 CMR 519.007(H)(2)(a)(5). Therefore, the appeal must be 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.

Thomas J. Goode
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Prior Authorization