

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	DENIED	<b>Appeal Number:</b>	2178030
<b>Decision Date:</b>	1/10/2022	<b>Hearing Date:</b>	11/22/2021
<b>Hearing Officer:</b>	Christopher Taffe	<b>Record Closed:</b>	12/27/2021

**Appearance for Appellant:**



**Appearance for MassHealth:**

Alfred Peach of the Tewksbury MEC  
(by phone)



*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

<b>Appeal Decision:</b>	DENIED	<b>Issue:</b>	Eligibility – Excess Assets
<b>Decision Date:</b>	1/10/2022	<b>Hearing Date:</b>	11/22/2021
<b>MassHealth's Rep.:</b>	A. Peach	<b>Appellant's Rep.:</b>	██████████
<b>Hearing Location:</b>	Taunton MassHealth Enrollment Center	<b>Aid Pending:</b>	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 August 30, 2021, MassHealth denied Appellant's application for MassHealth Standard Long-Term Care (LTC) benefits because MassHealth determined that Appellant had excess countable assets. See 130 CMR 520.003; 130 CMR 520.004 and Exhibit 1. Appellant filed a timely request for a Fair Hearing on October 21, 2021. See 130 CMR 610.015(B) and Exhibit 1.<sup>1</sup> Challenging a denial of MassHealth assistance is valid grounds for appeal to the Board of Hearings. See 130 CMR 610.032.

At the request of Appellant, the Record Open period was initially left open until January 14, 2022 to allow time for Appellant to take action and for MassHealth agency to subsequently respond. See Exhibit 4 and 130 CMR 610.081. The record was closed earlier on December 27, 2021 due to Appellant's failure to produce additional documentation during the Record Open request and when an extension for further time was requested by Appellant and denied by the Hearing Officer. See Exhibit 5.

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<sup>1</sup> Because the usual 30-day filing period from the date of receipt of appealable action in 130 CMR 610.015(B) has been extended to 120 days during the current federal COVID-19 emergency, this appeal is considered timely filed. See MassHealth Eligibility Operations Memo 20-14 (dated September 2021) (confirming 120-day filing period of proper Fair Hearing requests before the Board of Hearings will continue until state of emergency ends).

# Action Taken by MassHealth

MassHealth denied Appellant's application for LTC benefits because of excess countable assets.

## Issue

Are there excess countable assets and, if so, has Appellant timely and permissibly reduced or spent down any excess assets and, if not, are there separate grounds for approving eligibility for this application at this time?

## Summary of Evidence

Appellant is a [REDACTED]-year old unmarried individual who was admitted to his current nursing facility on [REDACTED]. An application seeking LTC benefits was filed on Appellant's behalf on April 8, 2021, and that application is currently seeking a benefit start date of February 15, 2021.

On August 30, 2021, MassHealth denied Appellant's application due to excess assets. The countable assets consisted of one checking account and one annuity. The two assets totaled over \$17,000 as of the admission date; over \$18,000 as of the request start date; and just under \$24,000 as of June 21, 2021. See Narrative Summary in Exhibit 3.

MassHealth explained that even allowing some non-countable portion of assets for Appellant's pension income (\$333.59/month), Social Security monthly benefit (\$1,306/month), and the allowable amount of \$1,400 for non-countable federal stimulus amounts, the Appellant was essentially \$18,888.56 over the \$2,000 asset limit as of June 21, 2021, and, as of the hearing date, there has been no evidence of asset reduction. See id.

Per the text of the August 30, 2021 denial notice, Appellant had 30 days to reduce assets from the date of the excess asset notice. See Exhibit 1.

Appellant purportedly signed and dated the Fair Hearing request form on October 15, 2021. The Fair Hearing Request form listed Brunelle Medicaid Consultants (Brunelle) as the designated Appeal Representative for this appeal, and the Brunelle offices filed the appeal request on behalf of Appellant. At hearing, Ms. Stout, an employee of Brunelle Medicaid Consultants, appeared as the individual Appeal Representative. See Exhibit 1.

At hearing, the Appeal Representative did not contest the fact that Appellant was over asset or that assets had not yet been reduced. Appellant's side asked for an extension of time as they indicated that they were in the process of filing a conservatorship.<sup>2</sup> Appellant's side contended that, once the conservatorship was filed and in place, it was hoped that MassHealth would allow such excess

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<sup>2</sup> Presumably this extension would seek (1) time not only for the filing of conservatorship, but also (2) additional time waiting for the appropriate Probate Court to establish an official Conservator, which in turn would allow MassHealth to theoretically and subsequently take positive action with a re-assessment of countable assets.

assets to be (temporarily) non-countable and allow for eligibility. When asked why Conservatorship had not yet been filed as of the hearing date or prior to the Fair Hearing request filing, Appellant stated that the main reason conservatorship had not yet been filed was because there was a need for a medical certificate in support of the conservatorship action, and that there was a general backlog and delay with obtaining such medical certificates due to the COVID-19 situation.

At the end of hearing, the record was left open for five weeks or until Monday 12/27/2021 to allow Appellant time to provide documentation of a properly filed conservatorship action, including the Medical Letter of Conservatorship. See Exhibit 4.<sup>3</sup>

On December 27, 2021, an associate of the Appeal Representative, Ms. Giberson of the Brunelle office submitted a Record Open response to both the Hearing Officer and the MassHealth Representative stating in relevant part “...I am emailing you both today regarding the open record we have for [Appellant] The facility is waiting for the Med Cert to be completed at this time. Can we have an additional 30 days on our open record?”. See Exhibit 5. The Hearing Officer denied the request on December 27, 2021. See id.

## Findings of Fact

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

1. Appellant is an unmarried individual who was admitted to his current nursing facility on [REDACTED]. A LTC application was filed on Appellant’s behalf on April 8, 2021, and he is currently seeking a benefit start date of February 15, 2021. (Testimony and Exhibit 3)
2. Appellant had more than \$2,000 in countable assets at the time of admission, as of the June 21, 2021 notice date, and as of the hearing date. (Testimony and Exhibits 1 and 3)
3. At no time has Appellant had a conservator and on October 15, 2021, Appellant via his purported signature filed this request for a Fair Hearing. (Testimony)
4. There has been no conservatorship action filed as to Appellant in any appropriate Probate Court as of or prior to the hearing date, and no conservatorship has been filed as of the record close date of December 27, 2021. (Testimony and Exhibits 4 and 5)

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<sup>3</sup> The Record Open form in Exhibit 4 had a typo, stating the deadline was Monday December 28, 2021 when in fact the Monday of that week was December 27<sup>th</sup>. The email sent by the Hearing Officer, with the Record Open form which had the typo, correctly stated the Monday December 27<sup>th</sup> date, see Exhibit 4, and Appellant responded on December 27<sup>th</sup> so the typo caused no harm to any party.

## Analysis and Conclusions of Law

For single or widowed applicants like the Appellant who are applying for LTC benefits, MassHealth has countable asset rules for such individuals and there is an asset limit of \$2,000. See 130 CMR 519.005; 130 CMR 520.003. When an applicant has excess assets, they are generally allowed a limited time period to spenddown asset per 130 CMR 520.004; that time period is typically 30 days although it can be extended at times due to the use of the appeal process. See 130 CMR 520.004 and the denial notice in Exhibit 1.

### 520.003: Asset Limit

*(A) The total value of countable assets owned by or available to individuals applying for or receiving MassHealth Standard, Family Assistance, or Limited may not exceed the following limits:*

- (1) for an individual – \$2,000; and*
- (2) for a couple living together in the community where there is financial responsibility according to 130 CMR 520.002(A)(1) – \$3,000.*

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

At hearing, there was no dispute that Appellant had assets in the form of the bank account and owned annuity that totaled well over the \$2,000 asset limit. Instead, during the Fair Hearing process, Appellant's representative was seeking to use the potential of a future Conservatorship process to create a period of eligibility for the applicant, by using that condition to make certain assets temporarily non-countable. Presumably the Appellant was relying on a favorable interpretation of how the MassHealth agency would apply certain portions of 130 CMR 520.006 to this Appellant. That regulation reads in its entirety as follows:

### 520.006: Inaccessible Assets

*(A) Definition. An inaccessible asset is an asset to which the applicant or member has no legal access. The MassHealth agency does not count an inaccessible asset when determining eligibility for MassHealth for the period that it is inaccessible or is deemed to be inaccessible under 130 CMR 520.006.*

*(B) Examples of Inaccessible Assets. Inaccessible assets include, but are not limited to,*

- (1) property, the ownership of which is the subject of legal proceedings (for example,*

- probate and divorce suits); and*
- (2) the cash-surrender value of life-insurance policies when the policy has been assigned to the issuing company for adjustment.*
- (C) Date of Accessibility. The MassHealth agency considers accessible to the applicant or member all assets to which the applicant or member is legally entitled*
- (1) from the date of application or acquisition, whichever is later, if the applicant or member does not meet the conditions of 130 CMR 520.006(C)(2)(a) or (b); or*
- (2) from the period beginning six months after the date of application or acquisition, whichever is later, if*
- (a) the applicant or member cannot competently represent his or her interests, has no guardian or conservator capable of representing his or her interests, and the authorized representative (which may include a provider) of such applicant or member is making a good-faith effort to secure the appointment of a competent guardian or conservator; or*
- (b) the sole trustee of a Medicaid Qualifying Trust, under 130 CMR 520.022(B), is one whose whereabouts are unknown or who is incapable of competently fulfilling his or her fiduciary duties, and the applicant or member, directly or through an authorized representative (which may include a provider), is making a good-faith effort to contact the missing trustee or to secure the appointment of a competent trustee.*
- (Bolded emphasis added.)**

Even if there were a hypothetical Conservator put in place in the future, the text of the regulation is clear that the applicant should still not be able to take advantage of 130 CMR 520.006(C)(2) to deem the assets in question “noncountable” as of the hearing date. That is because I find 130 CMR 520.006 creates only a six-month period of noncountability, and that such period of noncountability began to run for the six-month period from the application date of April 8, 2021.<sup>4</sup> Even in the present case here, Appellant still had two-plus months after such a hypothetical period, or from October 8, 2021 through the December 27, 2021 record close date, to access and reduce the asset. Appellant was purportedly able to sign and request a Fair Hearing in mid-October 2021. Why the Appellant could not sign paperwork to reduce or access assets before or since remains a bit of a mystery considering he signed an appeal request on October 15, 2021 and that request was filed six days later. See Exhibit 1. If there is no evidence of a conservator action in place, it must be assumed that Appellant still had legal authority as of October 2021. There is also no evidence in this appeal suggesting that the medical need for the Conservator arose on short notice or under unique circumstances (such as a sudden and recent adverse medical event) compelling the need for conservatorship since late October 2021.

As to the idea that the Appellant should be granted more time for a conservatorship that has still not yet been filed despite a Record Open period, I find no reason to allow this. The 520.006 regulation above clearly contemplates that conservatorship should be used sooner and more contemporaneous with the application process, and that was not done in this case. Furthermore, I find the contention

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<sup>4</sup> Exhibit 3 reveals that the bank account and annuity assets both existed (or were “*acquired*”) before the application date, so the more favorable-for-Appellant timespan would be the six-month period running from the April 8, 2021 application date.

raised at hearing, as to why the conservatorship had not yet been filed as of the hearing date, to have been a bit misleading and untrue due to some post-hearing investigation. Research shows that a petition for a conservatorship can be filed without a certificate of medical necessity. Section # 6 of the Petition of Appointment for Conservator used in the Commonwealth's Probate Court system explicitly states that such a Petition can be filed with the appropriate county Probate Court, and that the filing party can "*present a motion requesting that the Court permit it to be filed late or waive the filing requirement.*"<sup>5</sup>

If a conservatorship was seriously being considered and needed, there appears to be little reason or good cause why the Probate Court filing was not done earlier, or by the record close date. To further ask the Board of Hearings more than eight months after the application date in late December 2021, to extend the appeal's Record Open period for a continued and indefinite timespan, without any assurance that the Probate Court petition will ever be filed,<sup>6</sup> seems unreasonable especially when the request for the hearing and standing of the Appeal Representative was created with allegedly proper legal written authority, and when it is unclear how such a future Conservatorship would benefit the Appellant in this action under 130 CMR 520.006.

For those reasons, I conclude that the excess asset notice issued to Appellant is correct and proper, and that Appellant is not entitled to further relief regarding that eligibility determination which denied that April 8, 2021 application for benefits. Therefore, this appeal is DENIED.

## Order for MassHealth

None.

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<sup>5</sup> See <https://www.mass.gov/doc/petition-for-appointment-of-conservator-or-single-transaction-mpc-130/download> (containing the MPC 130 form used since 2015) (last viewed on January 4, 2022) for the form.

<sup>6</sup> Fair Hearing Rules do specifically allow for certain appeals to be filed and put on hold for a time period to allow a Probate Court process to play out. See e.g., 130 CMR 610.016(B)(1)(b) (laying out the rule for holding or delaying Fair Hearings involving a deceased party). Since the implementation of this regulation, the Board of Hearings has extended this rule and ability to put other Fair Hearing requests on hold where the need for an alternative Probate Court action (involving a conservatorship or guardianship) is declared more contemporaneously with the filing and when there is evidence of an appropriate and currently existing filing on a Probate Court docket. Declaring the legal need for a Probate Court action sooner also assists the Fair Hearing Process by allowing other Appellants who have proper and current legal authority to access appeal slots like the one the Appellant took in this matter where, more than one month after the hearing date, no corrective actions have been taken by Appellant's side. If the Appellant's representatives are asking what could have been done differently to have more time, the filing of the Probate matter prior to the filing of the Fair Hearing request and asking the Board of Hearings to consider a hold seems more appropriate.

## 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.

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Christopher Taffe  
Hearing Officer  
Board of Hearings

cc: Appeals Coordinator @ Tewksbury MEC