

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved in Part; Denied in Part	Appeal Number:	2178055
Decision Date:	12/02/2021	Hearing Date:	11/08/2021
Hearing Officer:	Rebecca Brochstein	Record Closed:	11/19/2021

Appearances for Appellant:



Appearances for MassHealth:

Michael Rooney, Tewksbury MEC



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

APPEAL DECISION

Appeal Decision:	Approved in Part; Denied in Part	Issue:	Long-Term Care Eligibility
Decision Date:	12/02/2021	Hearing Date:	11/08/2021
MassHealth's Rep.:	Michael Rooney, Tewksbury MEC	Appellant's Rep.:	
Hearing Location:	Board of Hearings (Remote)		

Authority

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

Jurisdiction

By a notice dated October 14, 2021, MassHealth denied the appellant's application for benefits because his countable assets were over the allowable limit for himself and his spouse (Exhibit 1; 130 CMR 520.003, 520.016(B)). The appellant filed a timely appeal on October 22, 2021 (Exhibit 2). After hearing on November 8, 2021, the record was held open for MassHealth to submit additional documentation and for the appellant's representative to respond (Exhibit 8). Denial of benefits is a valid basis for appeal (130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied the appellant's application for benefits because his countable assets were over the allowable asset limit for himself and his wife.

Issue

The appeal issue is whether MassHealth was correct in determining that the appellant's assets exceed the program limit, or whether the appellant should be approved for coverage because the community spouse is entitled to keep the excess assets.

Summary of Evidence

The MassHealth eligibility case worker testified that the appellant is a resident of a nursing facility. A long-term care application was submitted on his behalf on May 19, 2021.¹ MassHealth determined that the appellant and his spouse, who lives in the community, have total countable assets of \$306,059.90. This exceeds the combined limit of \$132,380 that the couple is allowed to keep under MassHealth regulations. On October 14, 2021, MassHealth denied the application for excess assets. The excess asset amount is \$173,679.90. See Exhibit 1.²

The MassHealth representative submitted into evidence a minimum monthly maintenance needs allowance (MMMNA) worksheet. The worksheet shows that MassHealth calculated the appellant's MMMNA at \$8,604.50. However, MassHealth then reduced it to the regulatory maximum, which is \$3,259.³ See Exhibit 9. MassHealth determined that the community spouse, whose total income is \$5,606.83, has sufficient resources of her own to reach her MMMNA.

The appellant was represented by an attorney. She stated that the community spouse lives in the memory care unit of an assisted living facility. The record indicates she has diagnoses that include atrial fibrillation, benign essential hypertension, dementia with behavioral disturbances, depression, idiopathic peripheral autonomic neuropathy, osteoarthritis, osteopenia, and hypercholesterolemia. See Exhibit 6 at 78. A nurse practitioner at a provider agency wrote that the appellant is a fall risk and "also requires care/assistance with meals and medical needs with constant supervision for safety." See Exhibit 6 at 82. The appellant's attorney included a copy of the assisted living facility contract as well as statements showing the monthly fees. The statements show daily charges of \$234, which includes the basic residency fee, the service package, and medication. The monthly charges are \$7,020 for 30-day months and \$7,254 for 31-day months. See Exhibit 6 at 48-56. The attorney also pointed out that the community spouse has monthly health insurance expenses that total \$330.09.

¹ The MassHealth representative testified that the appellant had previously been approved for long-term care benefits in error, after a bank account balance was entered into the system incorrectly. The appellant filed an appeal of that notice, recognizing that the appellant was over-assets, and came to the hearing on October 14 prepared to argue that those assets should be shifted to the community spouse. As MassHealth had not yet issued an over-asset notice, the appellant withdrew that appeal and the MassHealth representative agreed to issue the over-asset notice so the appellant could file an appeal on the proper issue.

² The denial notice erroneously stated the asset limit as \$3,000; that is the limit if both the applicant and spouse are living in the community. See Exhibit 1.

³ The MassHealth MMMNA worksheet mistakenly used 2020 figures for the MMMNA maximum as well as for other parts of the calculation. See Exhibit 9.

The appellant's attorney contended that considering the community spouse's medical needs and related costs, there are exceptional circumstances that justify increasing the MMMNA above the regulatory maximum. She stated that in order to meet the higher MMMNA, the community spouse requires all of the community spouse's income as well as all of the excess assets.

Findings of Fact

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

1. The appellant (institutionalized spouse) is a resident of a nursing facility.
2. On May 19, 2021, the institutionalized spouse applied for MassHealth benefits.
3. MassHealth determined that the institutionalized spouse and his wife (community spouse) had countable assets totaling \$306,059.90.
4. The institutionalized spouse is entitled to keep \$2,000 and the community spouse is entitled to keep \$130,380 in spousal assets.
5. On October 14, 2021, MassHealth denied the appellant's long-term care application on the basis that he and his wife had excess assets. The excess asset amount as of that date was \$173,679.90.
6. The community spouse lives in the memory care unit of an assisted living facility. The monthly charges at the facility, including the basic residency fee, the service package, and medication, is \$234 per day.
7. The average cost of the assisted living facility is \$7,117.50 per month.
8. MassHealth calculated the appellant's minimum monthly maintenance needs allowance (MMMNA) at \$8,604.50 but then reduced this figure to match the maximum MMMNA, which is \$3,259.
9. There are exceptional circumstances which warrant an increase over the maximum MMMNA.
10. The community spouse has additional monthly medical expenses totaling \$330.09.
11. The revised MMMNA is \$7,447.59, which is the average monthly fee at the assisted living facility plus the additional medical expenses.

12. The community spouse's monthly income is \$5,606.83.
13. The average deposit yield quoted in the Bankrate Monitor national index as of the hearing date for money market accounts is .07%.
14. Using this figure, the first \$10,000 of the community spouse's asset allowance generates monthly income of \$.58.
15. The highest yield quoted in the Bankrate Monitor national index as of the hearing date for any term not exceeding two and one-half years is .65%.
16. Using this rate, the community spouse's monthly income from the remainder of her share of the retained spousal assets (\$120,380) is \$65.20.
17. Including the income from retained spousal assets, the community spouse's total monthly income is \$5,672.61.
18. The community spouse has a shortfall of \$1,774.98 between her MMMNA and her income.
19. The institutionalized spouse's gross monthly income is \$1,837. After deducting the personal needs account (PNA) allowance of \$72.80, his remaining income is \$1,764.20.
20. To meet the revised MMMNA of \$7,447.59, the community spouse is entitled to all of the institutionalized spouse's remaining income of \$1,764.20.
21. After the institutionalized spouse's income is shifted to her, the community spouse still has a shortfall of \$10.78 to meet her revised MMMNA.
22. Using the highest yield quoted in the Bank Rate Monitor Index as of the hearing date for any term not exceeding 2½ years (.65%), it will take \$19,901.54 of the excess assets to generate \$10.78 in monthly income.
23. The community spouse is entitled to keep an additional \$19,901.54 from the excess assets.

Analysis and Conclusions of Law

At issue in this case is MassHealth's denial of the appellant's long-term care application due to excess assets. See 130 CMR 520.003. While there is no dispute that the appellant and his spouse had assets in excess of what is allowed by regulation, the appellant contends that his spouse requires the income generated by those assets to remain in the community.

Adjustments to a community spouse's asset allowance are governed by 130 CMR 520.017. The regulation states as follows:

- (A) Request for an Adjustment to the Community Spouse's Asset Allowance. After the institutionalized spouse has applied for MassHealth Standard and has received a notice of approval or denial for MassHealth Standard, either spouse may appeal to the Office of Medicaid Board of Hearings to request an adjustment to the asset allowance. The purpose of the adjustment is to generate sufficient income, as determined by the MassHealth agency, for the community spouse to remain in the community.
- (B) Minimum-Monthly-Maintenance-Needs Allowance. The minimum-monthly-maintenance-needs allowance is the amount needed by the community spouse to remain in the community. This amount is based on a calculation that includes the community spouse's shelter and utility costs in addition to certain federal standards, in accordance with 130 CMR 520.026(B)(1).
- (C) Adjustment of the Amount of Asset Allowance. If either spouse claims at a fair hearing that the amount of income generated by the community spouse's asset allowance as determined by the MassHealth agency is inadequate to raise the community spouse's income to the minimum-monthly-maintenance-needs allowance, the fair-hearing officer determines the gross income available to the community spouse as follows.
 - (1) The fair-hearing officer determines the gross amount of income available to the community spouse. The fair-hearing officer includes the amount of the income that would be generated by the spouse's asset allowance if \$10,000 of the asset allowance were generating income at an interest rate equal to the deposit yield quoted in the Bank Rate Monitor Index as of the hearing date for money market accounts, and if the remainder of the spouse's asset allowance were generating income at an interest rate equal to the highest deposit yield quoted in the Bank Rate Monitor Index as of the hearing date for any term not to exceed 2½ years.
 - (2) If the community spouse's gross income under 130 CMR 520.017(C)(1) is less than the minimum-monthly-maintenance-needs allowance (MMMNA), then the fair-hearing officer allows an amount of income from the institutionalized spouse (after the personal needs deduction described in 130 CMR 520.026(A)) that would increase the community spouse's total income to equal, but not to exceed, the

MMMNA. 130 CMR 520.017(C)(2) applies to all hearings held on or after September 1, 2003 regardless of the date of application.

- (3) If after the fair hearing officer has increased the community spouse's gross income under 130 CMR 520.017(C)(1) and (2), the community spouse's gross income is still less than the MMMNA, then the fair hearing officer increases the community spouse's asset allowance by the amount of additional assets that, if generating income at an interest rate equal to the highest deposit yield in the Bank Rate Monitor Index as of the hearing date for any term not to exceed 2½ years, would generate sufficient income to raise the income total to the MMMNA.

In this case, the community spouse's MMMNA was initially set at the regulatory maximum of \$3,259. However, the appellants have contended that an increase in the MMMNA beyond the regulatory limit is warranted because of the spouse's medical condition and associated assisted living expenses. Pursuant to 130 CMR 520.017(D), either spouse may request an increase in the MMMNA calculated by MassHealth due to "exceptional circumstances," defined in relevant part as follows:

- (1) Exceptional Circumstances. Exceptional circumstances exist when there are circumstances other than those already taken into account in establishing the maintenance standards for the community spouse under 130 CMR 520.026(B) and these circumstances result in significant financial duress. Since the federal standards used in calculating the MMMNA cover such necessities as food, shelter, clothing, and utilities, exceptional circumstances are limited to those necessities that arise from the medical condition, frailty, or similar special needs of the community spouse. Such necessities include, but are not limited to, special remedial and support services and extraordinary uncovered medical expenses. Such expenses generally do not include car payments, even if the car is used for transportation to medical appointments, or home-maintenance expenses such as security systems and lawn care.
 - a) In determining an increased MMMNA, the fair-hearing officer ensures that no expense (for example, for food or utilities) is counted more than once in the calculation.
 - b) If the community spouse lives in an assisted-living facility or similar facility and requests an increase in his or her minimum-monthly-maintenance-needs allowance, the fair-hearing officer reviews the housing agreement, service plan, fee schedule, and other pertinent documents to determine whether exceptional circumstances exist. Additional amounts

are allowed only for specific expenses necessitated by exceptional circumstances of the community spouse and not for maintaining any pre-set standard of living.

- (2) Determination of Increase for Exceptional Circumstances. If the fair-hearing officer determines that exceptional circumstances exist, the fair-hearing officer may increase the community spouse's MMMNA to meet the expenses caused by the exceptional circumstances as follows.
- a) The fair-hearing officer first verifies that the calculation of the gross income of the community spouse in determining the existing spousal-maintenance-needs deduction includes the income generated by the community spouse's asset allowance. If the community spouse has no assets remaining from the allowance, he or she must verify the dollar amount of the remaining assets, if any, and how the money was spent. The fair-hearing officer considers how the assets were spent in determining whether or not significant financial duress exists.
 - b) The fair-hearing officer determines the revised MMMNA by including in the calculation the amount needed to meet the exceptional circumstances.
 - c) The fair-hearing officer compares the revised MMMNA to the community spouse's total income. If the community spouse's total income is less than the amount of the revised MMMNA, the fair-hearing officer first deducts the personal-needs allowance from the institutionalized spouse's countable-income amount and then a spousal-maintenance-needs deduction needed to reach the revised MMMNA.

The appellants' attorney submitted documentation which confirms that the community spouse has substantial medical needs and requires an assisted living environment. Evidence provided at hearing indicates that the spouse pays an average of \$7,117.50 per month for these services. In addition, she has medical expenses for supplemental insurance in the total amount of \$330.09. As it is medically necessary for her to pay for these services in order to remain the community and the current MMMNA does not account for these expenses, there is a sound basis to increase the MMMNA to \$7,447.59. See 130 CMR 520.017(D).

The community spouse's own income of \$5,606.83 per month is plainly insufficient to meet the revised MMMNA of \$7,447.59. To make up the shortfall, the regulation first requires that the interest generated from the community spouse's portion of the assets be added to her income. In this case, the community spouse's asset share is \$130,380. The first \$10,000, at the yield quoted as of the date of hearing in the Bank Rate Monitor Index for money market accounts (.07%), generates

additional monthly income of \$.58. The remainder of the community spouse's asset share, \$120,380, generates \$65.20 per month when invested at the highest yield quoted as of the hearing date for any term not exceeding two and one-half years (.65%).⁴ See Exhibit 6 at 32. Including her own income and the income generated by her share of the spousal assets, the community spouse's income is \$5,672.61. This is still well short of the MMMNA of \$7,447.59.

Next, the analysis turns to 130 CMR 520.026(B), which provides as follows:

Spousal-Maintenance-Needs-Deduction. If the community spouse's gross income is less than the amount he or she needs to live in the community (minimum-monthly-maintenance-needs allowance, MMMNA) as determined by the MassHealth agency, the MassHealth agency may deduct an amount from the institutionalized spouse's countable-income amount to meet this need. This amount is the spousal-maintenance-needs deduction. 130 CMR 520.026(B) applies to the first month of eligibility in an institution and terminates the first full calendar month in which the spouse is no longer in an institution or no longer has a spouse in the community. This deduction is the amount by which the minimum-monthly-maintenance-needs allowance exceeds the community spouse's gross income.⁵

In this case, the community spouse's total monthly income, including interest produced by retained spousal assets, is well under her revised MMMNA. The institutionalized spouse's income, after subtracting his \$72.80 personal needs allowance, is \$1,764.20 per month.⁶ Because the MMMNA shortfall for the community spouse exceeds the institutionalized spouse's total monthly income, the community spouse is entitled to retain the institutionalized spouse's full monthly income after the PNA deduction.

⁴ The appellants' attorney appears to have erroneously used the *average*, not the *highest*, yield for this calculation. See Exhibit 11.

⁵ The spousal-maintenance-needs deduction is the second in a number of general long-term-care income deductions. General income deductions must be taken in the following order: a personal-needs allowance; a spousal-maintenance-needs allowance; a family-maintenance allowance for qualified family members; a home-maintenance allowance; and health-care coverage and incurred medical and remedial-care expenses. These deductions are used in determining the monthly patient-paid amount. See 130 CMR 520.026.

⁶ In her calculation, the appellants' attorney deducted the personal needs allowance (PNA) *and* his health insurance premiums from his income before moving on to determine the spousal maintenance needs deduction. As 130 CMR 520.026 makes clear, the spousal maintenance needs deduction is taken after the PNA, but before all other PPA deductions.

Finally, because a shortfall of \$10.78 remains even after the income shift, we turn to excess assets to generate additional income for the community spouse. Using the highest yield quoted in the Bank Rate Monitor Index as of the hearing date for any term not exceeding 2½ years (.65%), it will take \$19,901.54 of the excess assets to generate \$10.78 in monthly income. The community spouse is therefore entitled to keep \$19,901.54 of the excess assets. This will reduce the amount by which the appellant and the community spouse are over the regulatory asset limit. However, as they remain over that limit, the appellant has not established his financial eligibility for MassHealth. The appellant will have 30 days from the date of this decision to provide evidence that the remaining assets have been spent down to within the regulatory limit.

This appeal is approved in part and denied in part.

Order for MassHealth

- Allocate \$19,901.54 of the excess assets to the community spouse, and redetermine the remaining excess asset amount in accordance with this decision. Send notice of implementation only.
- If the appellant provides documentation that the remaining excess assets have been spent down within 30 days of this decision, redetermine eligibility while preserving the original application date of May 19, 2021.

Implementation of this Decision

If this decision is not implemented within 30 days after the date hereon, you should contact your MassHealth Enrollment Center. If you experience further problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings at the address on the first page of this decision.

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.

Rebecca Brochstein
Hearing Officer
Board of Hearings

cc: Chelsea MEC

