Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

[redacted]

Appeal Decision:	Approved in part; Remanded	**Appeal Number:**	2179664
Decision Date:	02/10/2022	**Hearing Date:**	01/10/2022
Hearing Officer:	Paul C. Moore	**Record Closed:**	01/25/2022

Appearance for Appellant:
[redacted]

Appearance for MassHealth:
Berthilde Franklin, Taunton MassHealth Enrollment Center (via Zoom)

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, Remanded	**Issue:**	Frail Elder Waiver; Countable Income
Decision Date:	02/10/2022	**Hearing Date:**	01/10/2022
MassHealth Rep.:	Berthilde Franklin	**Appellant Rep.:**	[redacted]
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 December 17, 2021, MassHealth notified the appellant that he had more countable income and assets than MassHealth benefits allow (Exh. 1). The appellant filed a timely appeal of the denial with the Board of Hearings (BOH) on December 22, 2021 (130 CMR 610.015; Exh. 2). Denial of MassHealth assistance is valid grounds for appeal to the BOH (130 CMR 610.032).

Action Taken by MassHealth

MassHealth determined that the appellant has more countable income and assets than MassHealth benefits allow.

Issue

The issue on appeal is whether MassHealth correctly determined that the appellant does not qualify for MassHealth benefits due to income and assets.

Summary of Evidence

A MassHealth representative from the Taunton MassHealth Enrollment Center testified via Zoom

that the appellant is over age 65, and lives in the community with his spouse. The appellant applied for benefits under the MassHealth frail elder waiver (FEW) on November 27, 2021. The MassHealth representative testified that in determining eligibility for the FEW, MassHealth counts the appellant's earned and unearned income alone, and does not count the appellant's spouse's earned or unearned income. According to MassHealth regulations, the countable-income amount must be less than or equal to 300% of the federal benefit rate (FBR) for an applicant to qualify. In addition, the MassHealth representative stated that the appellant must reduce his assets to $2,000.00 or less. The MassHealth representative added that if the appellant and his spouse transfer joint assets exceeding $2,000.00 into the spouse's name only, that is acceptable. The MassHealth representative stated that she would need to see recent bank statements showing these transfers from the appellant and his spouse to the spouse only. In making its eligibility determination for the appellant, MassHealth counted as unearned income Social Security benefits the appellant receives monthly, in the amount of $2,650.50, plus amounts of payments made under the appellant's long-term care (LTC) insurance policy to the appellant over a seven-month period, May, 2021 through November, 2021. The MassHealth representative stated that the LTC insurance policy paid $19,204.54 to the appellant during that time, and MassHealth counted this figure as unearned income. The MassHealth representative divided $19,204.54 by seven months, yielding $2,743.50 in monthly unearned income. She noted that adding that $2,650.50 (Social Security benefits) plus $2,743.50 (LTC insurance payments) totals $5,402.00 per month in income, which exceeds 300% of the FBR for an individual in 2021, or $2,382.00 monthly (Testimony).[1]

The MassHealth representative stated that even if MassHealth did not count the LTC insurance payments as income, the appellant's monthly Social Security benefit check amount alone exceeds the countable-income cap for MassHealth Standard under the FEW (Testimony).

As to the couple's assets, the MassHealth representative testified that as of December 17, 2021 (the date of the MassHealth denial notice), the couple had assets in Bank #1 totaling $26,084.02 in a money market account, and $13,969.50 in a joint checking account (Testimony).

The hearing officer pointed out to the MassHealth representative that the denial notice at issue does not contain a breakdown of the appellant's countable income, nor the couple's countable assets.

The MassHealth representative noted that the appellant may still qualify for MassHealth Standard to receive services under the FEW by meeting a six-month deductible, which she noted is $26,562.00 for the period December, 2021 through June, 2022. She stated that if the appellant, and/or his spouse, have unpaid medical bills incurred during that time period totaling $26,562.00 or more, the appellant can qualify for MassHealth retroactive to December, 2021.[2] These bills

[1] For an individual, 100% of the FBR in 2021 was $794.00 (*see*, https://www.ssa.gov/text-benefits-ussi htm).
[2] Again, the MassHealth notice does not contain a calculation of the appellant's six-month deductible.

would have to be produced to MassHealth to determine if the deductible has been met.
The appellant's daughter ("appeal representative") testified by Zoom that the appellant lives in the community with his spouse, and receives hospice services through the VNA. He has a diagnosis of congestive heart failure, and BayPath Elder Services has determined that he needs a nursing-facility level of care (Testimony, Exh. 7). His wishes are to continue to live at home. Hospice services are paid by Medicare. Under his LTC insurance policy, he can receive a maximum of $120.00 per day in benefits while living in the community. Through Bright Star Care, Home Care Solutions and Health Care Staffing, the appellant receives at-home services, such as bathing. The appellant is billed by each home care agency, the appellant and his spouse pay the total amount owed on an American Express card, and then subsequently pay the American Express bill out of their joint checking account. The appeal representative testified that her sister sends copies of the invoices the appellant receives from each home care agency to the LTC insurer, [redacted], and the latter, after review, then direct-deposits reimbursements into the appellant's checking account at Bank #1, approximately every four to six weeks. She testified that only a portion of the home care services are covered by the LTC insurer, and the balance is paid out-of-pocket by the couple (Testimony, Exh. 4).

As an example, the appeal representative submitted a copy of an invoice from Bright Star Care dated October 17, 2021, for services provided to the appellant during the period October 11, 2021 through October 17, 2021 (Exh. 4, pp. 9-14). The invoice contains a list of dates, agency employee names, hours worked, and amounts billed (*Id.*). A "consolidated care note" is attached, reflecting what tasks each caregiver completed for the appellant, including assistance with both activities of daily living and instrumental activities of daily living (*Id.*, pp. 11-14). For each shift, Monday through Sunday, the caregivers documented that they assisted the appellant to dress, undress, toilet, and transfer, applied lotion to his skin, emptied his urinal, and assisted with his personal hygiene and skin care (*Id.*). Some of the caregivers also documented having changed bed linens, made the appellant's bed, cleaned the appellant's bathroom, and done the appellant's laundry (*Id.*). A total charge for the week of $1,511.30 is documented; a receipt from the agency indicates this amount was paid by the appellant (*Id.*).

Also, the appeal representative submitted copies of bills from American Express addressed to the appellant and his spouse, reflecting charges incurred and payments made between February, 2021 through November, 2021 (Exh. 4, pp. 48-63). For the particular invoice in question, a payment to Bright Star Care of $1,511.30 from American Express is documented on October 18, 2021. Recurring payments from American Express to Bright Star Care and Health Care Staffing are evident on the American Express statements (*Id.*).

The appeal representative also submitted copies of various explanations of benefits (EOBs) from Continental Casualty to the appellant reflecting amounts billed by home care agencies, benefits paid on the appellant's behalf, and amounts not paid; all of the EOBs state, "payment has been made to [the appellant]" (Exh. 4).

The appeal representative testified that under the federal Affordable Care Act, the "spousal impoverishment" rules that are used when an institutionalized member is admitted to a long-term care facility are also applicable when a member is receiving services in the community under the FEW. She submitted into evidence a copy of a May 7, 2015 letter from the Centers for Medicare and Medicaid Services (CMS) to State Medicaid Directors offering guidance on this issue; the letter notes in relevant part:

> The Affordable Care Act amended [federal law] to require, for the five-year period beginning January 1, 2014, that states include in the definition of an 'institutionalized spouse' married individuals who are 'eligible for medical assistance for home and community-based services provided under subsection (c), (d), or (i) of section 1915 [of the Social Security Act], under a waiver approved under section 1115 [of the Social Security Act], or who [are] eligible for such medical assistance by reason of being determined eligible under [federal law] or otherwise on the basis of a reduction of income based on costs incurred for medical or other remedial care, or who is eligible for medical assistance for home and community-based attendant services and supports under section 1915(k) [of the Social Security Act]' . . . .

(Exh. 5B)[3]

In other words, according to the appeal representative, the MassHealth regulations that allow a community spouse to keep up to $26,000.00 in assets when a married member is institutionalized also apply when a married member in the community applies for services under the FEW.[4] In addition, she asserted that when determining the appellant's countable-income amount for purposes of eligibility for the FEW, MassHealth is also required to authorize a shift of some of the appellant's income to his spouse if the spousal asset allowance is insufficient to meet the spouse's minimum monthly maintenance needs allowance. She asserted that any income shifted to the spouse for this reason is not countable in the appellant's eligibility determination (Testimony).

The appeal representative testified that in 2020, another BOH hearing officer issued an appeal decision in an unrelated matter in which the hearing officer held that MassHealth's decision to count as income payments made to the member under his LTC insurance policy was incorrect, when that member had applied for services under the FEW. She stated that she did not have the name or appeal number for that other BOH decision, but that she could obtain such information.

The appeal representative testified that the appellant's spouse's income is only $1,400.00 per

[3] The appeal representative submitted into evidence another CMS letter to State Medicaid Directors dated May 4, 2021 reflecting that CMS has extended the authorization of the spousal impoverishment rules for married members applying for services under home- and community-based services waivers through September 30, 2023 (Exh. 5C).
[4] In 2021, the maximum community spouse resource allowance was actually $130,380.00 (86 Federal Register 7732 (February 1, 2021)).

month. The couple lives in an independent living community, and the appellant's children assist the couple with rental payments as needed. The appeal representative did not specify what the appellant's spouse's living expenses are (Testimony).

At the close of the hearing, the hearing officer agreed to leave the record of this appeal open for two weeks for the appeal representative to produce updated bank statements from the appellant showing that his share of the marital assets is equivalent to $2,000.00 or less, as suggested by the MassHealth representative; to forward any prior BOH appeal decisions addressing the countability of LTC insurance payments as income when an applicant applies for the FEW; and to submit any further arguments in support of the appellant's position that LTC insurance payments should not be considered countable income when applying for the FEW, and that the Medicaid spousal impoverishment rules should be applied in the context of a non-institutionalized member applying for MassHealth under a waiver program.[5] The hearing officer also gave the MassHealth representative until February 1, 2022 to report back to him and to the appeal representative whether the appellant's assets have been reduced (Exh. 6).

On January 25, 2022, the hearing officer received correspondence via e-mail from the appeal representative indicating that neither she, nor a legal-services attorney she consulted, were able to locate a copy of any prior BOH decisions on the identified issues, and forwarding copies of updated bank statements from Bank #1 (Exh. 7). The bank statements reflect one joint checking account in the couple's name, with a balance of $992.22 as of January 21, 2022, and one checking account in the appellant's name only, with a balance of $50.00 as of the same date (Exh. 7A). The appeal representative also advanced a new argument as to non-countability of LTC insurance payments to the appellant, *to wit*, that the LTC policy issued is a federally-qualified policy as set forth in the policy terms, and as such, under an explanation of long-term care insurance provided on Mass.gov, benefits paid by a federally-qualified LTC insurance policy generally are not taxable as income (Exhs. 7B, 7C).

On January 26, 2022, the hearing officer received an e-mail communication from the MassHealth representative, copied to the appeal representative, stating the appellant's assets had been reduced to less than $2,000.00 as of January 21, 2022 (Exh. 8).

Findings of Fact

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

1. The appellant is over age 65, and lives in the community in a household of two

[5] Although the hearing officer asked the appeal representative to produce a copy of any prior BOH decisions addressing whether LTC insurance payments are countable income, he explained to the appeal representative that under the Fair Hearing Rules, 130 CMR 610.085(A)(2), facts found and issues decided by the hearing officer in each case are binding on the parties to that case only, and may not be used as binding precedent by other parties in other proceedings.

(Testimony, Exh. 4).

2. The appellant receives hospice services through the VNA, paid by Medicare (Testimony).

3. The appellant applied for MassHealth benefits under the frail elder waiver (FEW) on November 27, 2021 (Testimony).

4. As of December 17, 2021, the appellant and his spouse had assets in Bank #1 totaling $26,084.02 in a money market account, and $13,969.50 in a joint checking account (Testimony).

5. In making its eligibility determination for the appellant, MassHealth counted as unearned income Social Security benefits the appellant receives monthly, in the amount of $2,650.50 (Testimony, Exh. 4).

6. The appellant has a LTC insurance policy issued by [redacted], under which he can receive a maximum of $120.00 per day in benefits for covered services while living in the community (Testimony).

7. From May, 2021 through November, 2021, the LTC insurance policy paid $19,204.54 to the appellant for covered services he received from home care agencies, including Bright Star Care, Home Care Solutions and Health Care Staffing (Exh. 4).

8. MassHealth divided the LTC payments paid, $19,204.54, by seven months, yielding $2,743.50 in monthly unearned income, which it deemed countable to the appellant (Testimony).

9. To be eligible for services under the FEW, the appellant's countable-income amount may not exceed 300% of the 2021 FBR, or $2,382.00.

10. MassHealth did not count the appellant's spouse's income in his eligibility determination.

11. By notice dated December 17, 2021, MassHealth denied the appellant's application for MassHealth benefits under the FEW due to excess assets and excess income (Exh. 1).

12. The appellant filed a timely appeal with the BOH on December 22, 2021 (Exh. 2).

13. For the at-home services the appellant receives, such as bathing and toileting assistance, the appellant is billed by each home care agency, the appellant and his spouse pay the total amount owed on an American Express card, and then subsequently pay the American Express bill out of their joint checking account (Testimony, Exh. 4, pp. 48-63).

14. Copies of the invoices the appellant receives from each home care agency are sent to the LTC insurer, [redacted] and the latter, after review, then direct-deposits reimbursements into the appellant's checking account at Bank #1, approximately every four to six weeks (Testimony).

15. Various EOBs from [redacted] to the appellant reflect amounts billed by the home care agencies, benefits paid on the appellant's behalf, and amounts not paid; all of the EOBs state, "payment has been made to [the appellant]" (Exh. 4).

16. The appellant's spouse has income of approximately $1,400.00 per month (Testimony).

17. No specific living expenses of the appellant's spouse were disclosed.

18. Following the appeal hearing, the appellant produced bank statements reflecting one joint checking account in the couple's name, with a balance of $992.22 as of January 21, 2022, and one checking account in the appellant's name only, with a balance of $50.00 as of the same date (Exh. 7A).

19. MassHealth agrees that the appellant reduced assets to $2,000.00 or less as of January 21, 2022 (Exh. 8).

20. The appellant may qualify for MassHealth Standard to receive services under the FEW by meeting a six-month deductible, in the amount of $26,562.00 for the period December, 2021 through June, 2022 (Testimony).

21. MassHealth has not notified the appellant of his six-month deductible in writing.

Analysis and Conclusions of Law

Pursuant to 130 CMR 519.007(B), "Home and Community-Based Services Waiver – Frail Elder:"

> (1) Clinical and Age Requirements. The Home- and Community-based Services Waiver allows an applicant or member who is certified by the MassHealth agency or its agent to be in need of nursing-facility services to receive certain waiver services at home if he or she
> (a) is 60 years of age or older and, if younger than 65 years old, is permanently and totally disabled in accordance with Title XVI standards; and
> (b) would be institutionalized in a nursing facility, unless he or she receives one or more of the services administered by the Executive Office of Elder Affairs under the Home- and Community-based Services Waiver-frail Elder authorized under § 1915(c) of the Social Security Act.

(2) Eligibility Requirements. In determining eligibility for MassHealth Standard and for 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
(a) meet the requirements of 130 CMR 519.007(B)(1)(a) and (b);
(b) have a countable-income amount less than or equal to 300% of the federal benefit rate (FBR) for an individual; and
(c) have countable assets of $2,000 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
(d) have not transferred resources for less than fair market value as described at 130 CMR 520.018: Transfer of Resources Regardless of the Transfer Date and 520.019: Transfer of Resources Occurring on or after August 11, 1993.
(3) Financial Standards Not Met. Individuals whose income, assets, or both exceed the standards set forth in 130 CMR 519.007(B)(2) may establish eligibility for MassHealth Standard by reducing their assets in accordance with 130 CMR 520.004: Asset Reduction, by meeting a deductible as described at 130 CMR 520.028 through 520.035, or by both.

(Emphases added)

There is no dispute that the appellant meets the clinical and age requirements for the frail elder waiver, set forth at 130 CMR 519.007(B)(1).

Cash payments to a member under a LTC insurance policy for covered services are not explicitly listed in 130 CMR 520.009, "Countable-Income Amount."

Next, 130 CMR 520.015, "Noncountable Income," states that the following types of income are not considered in determining the financial eligibility of the applicant or member:

. . . (I) any other income considered noncountable under Title XIX.

Title XIX of the federal Social Security Act, under which the Medicaid program was created in 1965, provides that for a state Medicaid program, "the single standard to be employed in determining income and resource eligibility for all. . . groups, and the methodology to be employed in determining such eligibility. . . shall be no more restrictive than the methodology which would be employed under the supplemental security income (SSI) program in the case of groups consisting of aged, blind, or disabled individuals in a state in which such program is in effect." 42 U.S.C. §1396a(a)(10)(C)(i)(III).

Turning next to the federal SSI regulations at 20 CFR §416.1103, "What is not income," the following guidance appears:

> Some things you receive are not income because you cannot use them as food or shelter, or use them to obtain food or shelter. In addition, what you receive from the sale or exchange of your own property is not income; it remains a resource. The following are some items that are not income:
> **(a) *Medical care and services.* Medical care and services are not income if they are any of the following:**
> (1) Given to you free of charge or paid for directly to the provider by someone else;
> (2) Room and board you receive during a medical confinement;
> (3) Assistance provided in cash or in kind (including food or shelter) under a Federal, State, or local government program whose purpose is to provide medical care or medical services (including vocational rehabilitation);
> (4) In-kind assistance (except food or shelter) provided under a nongovernmental program whose purpose is to provide medical care or medical services;
> **(5) Cash provided by any nongovernmental medical care or medical services program or under a health insurance policy (except cash to cover food or shelter) if the cash is either:**
> **(i) Repayment for program-approved services you have already paid for;** or
> (ii) A payment restricted to the future purchase of a program-approved service.
> EXAMPLE:
> If you have paid for prescription drugs and get the money back from your health insurance, the money is not income.

(Emphasis added)

Here, the LTC insurance payments the appellant received last year were for medical care and services, *to wit*, assistance with his activities of daily living such as bathing, toileting, and transferring. These services were in the form of cash provided under a health insurance policy as repayment for covered services for which the appellant already paid out-of-pocket. Therefore, because the MassHealth program may be no more restrictive than the SSI program in determining what is countable income, I conclude that MassHealth's decision to count as income the payments the appellant received under his LTC insurance policy from May, 2021 through November, 2021 was not correct.

Pursuant to the above-cited regulations, these payments must be deemed non-countable in the appellant's request for benefits under the frail elder waiver.

This portion of the appeal is APPROVED.

Next, the appellant argues that his spouse's minimum monthly maintenance needs allowance must be considered prior to determining his countable-income amount for purposes of applying for the FEW. Under MassHealth regulation 130 CMR 519.007(B)(2)(c), for a married couple if the initial waiver eligibility determination was on or after January 1, 2014, the applicant must 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. That regulation, in turn, states as follows:

> 130 CMR 520.016 describes the treatment of countable assets when one member of a couple is institutionalized, the post-eligibility transfer of assets, and the allowable income deductions for applicants and members who are residents of a long-term-care facility.
> (A) Institutionalized Individuals. The total value of assets owned by an institutionalized single individual or by a member of an institutionalized couple must not exceed $2,000. (B) Treatment of a Married Couple's Assets when One Spouse is Institutionalized.
> (1) Assessment.
> (a) Requirement. The MassHealth agency completes an assessment of the total value of a couple's combined countable assets and computes the community spouse's asset allowance as of the date of the beginning of the most recent continuous period of institutionalization of one spouse.
> (b) Right to Request an Assessment. When one spouse has entered a medical institution and is expected to remain institutionalized for at least 30 days, either spouse may request the MassHealth agency to make this assessment, even if the institutionalized spouse is not applying for MassHealth Standard at that time. The period of institutionalization must be continuous and expected to last for at least 30 days.
> (c) Right to Appeal. The MassHealth agency must give each spouse a copy of the assessment and the documentation used to make such assessment. Each spouse must be notified that he or she has the right to appeal the determination of countable assets and the community spouse's asset allowance when the institutionalized spouse (or authorized representative) applies for MassHealth Standard.
> (2) Determination of Eligibility for the Institutionalized Spouse. At the time that the institutionalized spouse applies for MassHealth Standard, the MassHealth agency must determine the couple's current total countable assets, regardless of the form of ownership between the couple, and the amount of assets allowed for the community spouse as follows. The community spouse's asset allowance is not considered available to the institutionalized spouse when determining the institutionalized spouse's eligibility for MassHealth Standard.
> (a) Deduct the community spouse's asset allowance, based on countable assets as of the date of the beginning of the most recent continuous period of institutionalization

of the institutionalized spouse, from the remaining assets. The community spouse's asset allowance is the greatest of the following amounts:
1. the combined total countable assets of the institutionalized spouse and the community spouse, not to exceed $109,560;[6]
2. a court-ordered amount; or
3. an amount determined after a fair hearing in accordance with 130 CMR 520.017.
(b) Compare the amount of the remaining assets to the MassHealth asset standard for one person, which is $2,000. When the amount of the remaining assets is equal to or below $2,000, the institutionalized spouse has met the asset test of eligibility.

…

It is clear that the regulations require the spouse of an applicant requesting benefits under a home- and community-based services waiver to be treated as if the applicant has applied for long-term care coverage, with the apparent aim of ensuring that the non-applicant spouse does not become impoverished.

Next, MassHealth regulation 130 CMR 520.017 provides in pertinent part:

(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

[6] This figure is updated annually by CMS. In 2021, it was $130,380.00; *see,* n. 4, *supra*.

> 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 would generate sufficient income to raise the income total to the MMMNA.
> (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.
>
> …

I agree with the appellant that his spouse's asset allowance should be considered when determining his eligibility for the FEW, and that it may possibly entail an income shift from the appellant to his spouse.[7] Such a shift is analogous to the spousal maintenance needs deduction authorized pursuant to 130 CMR 520.026(B) for members approved for long-term care coverage, where the gross income of the spouse of the institutionalized member is less than the amount he

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[7] *See also*, https://www medicaid.gov/medicaid/eligibility/spousal-impoverishment/index html, which states: "Post-Eligibility Treatment of Income: The post-eligibility calculation is made to determine how much an individual in an institution (usually a nursing home) is able to contribute to cost of his/her own care. **It applies only to individuals who are institutionalized (most commonly to those in nursing facilities) and to certain individuals receiving home and community-based waiver services**. The process only applies to those with income and only after their Medicaid eligibility has been established. The contribution is determined by first calculating the individual's total income and then deducting certain amounts from that income. Specifically, the individual's contribution is his or her total income less the following deductions (often referred to as "protected amounts"): • A personal needs allowance of at least $30; **• If there is a community spouse and the spousal impoverishment rules discussed above apply, a community spouse's monthly income allowance (at least $2,002.50 but not exceeding $2,980 for 2016), as long as the income is actually made available to the community spouse;** • A family monthly income allowance, if there are other family members living in the household; • An amount for medical expenses incurred by the spouse who is in the medical facility" (last checked February 9, 2022) (emphases added).

or she needs to live in the community, and a portion of the institutionalized member's income is allocated to the spouse to meet his or her MMMNA.[8]

Here, however, the record contains no information about the spouse's MMMNA, such as her shelter, food, clothing and utilities expenses. Therefore, in order to determine the spouse's MMMNA and any shift of the appellant's income to his spouse, MassHealth should, consistent with 130 CMR 520.016, request such information from the appellant's spouse. If her MMMNA is not met, the appellant or his spouse can request an adjustment to the asset allowance by requesting a fair hearing with the BOH, as set forth at 130 CMR 520.017, above.

This portion of the appeal is also APPROVED IN PART, and remanded to MassHealth for a new decision about the appellant's eligibility, to include an assessment of his spouse's living expenses and her ability to meet her MMMNA based on her earned or unearned income, plus any income of the appellant that may be allocated to her.[9]

Finally, MassHealth regulation 130 CMR 519.007(B)(3) reflects that the appellant can qualify for MassHealth Standard under the FEW by meeting a six-month deductible to be calculated pursuant to 130 CMR 520.028 through 520.035. The appellant's countable-income amount, consisting of monthly Social Security payments of $2,650.50 and excluding the LTC insurance payments, exceeds 300% of the FBR in 2021, or $2,382.00. Although MassHealth offered testimony on the deductible amount at hearing, MassHealth must set forth its deductible calculation to the appellant in writing, with an opportunity for the appellant to request a fair hearing on the deductible calculation if he chooses.

This portion of the appeal is therefore remanded to MassHealth to issue a six-month deductible notice to the appellant in writing.

Order for MassHealth

Rescind notice of December 17, 2021. Do not count any payments to the appellant under his LTC insurance policy as income when determining his eligibility for the FEW. Obtain and review the appellant's spouse's living expenses, and calculate a MMMNA for the spouse. Notify the appellant and his spouse in writing of the spouse's asset resource allowance and whether she is entitled to keep any of the appellant's income, with appeal rights.

If the appellant continues to be ineligible for benefits under the FEW based on excess income, notify the appellant in writing that he may qualify for benefits by meeting a six-month deductible,

[8] However, the spousal maintenance needs deduction under 130 CMR 520.026(B) does not take into account any income that could be generated from the spouse's share of the marital assets to meet the spouse's MMMNA.

[9] If the spouse's MMMNA cannot be met using her own income and an income shift from the appellant to the spouse is deemed appropriate, MassHealth should calculate the appellant's countable-income amount excluding the amount of the appellant's income needed by his spouse.

and notify the appellant of the calculation of the deductible in writing, with appeal rights.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. If you experience 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.

Paul C. Moore
Hearing Officer
Board of Hearings

cc: Justine Ferreira, Appeals Coordinator, Taunton MassHealth Enrollment Center