

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



**Appeal Decision:** DENIED IN PART  
(with Order for  
MassHealth)

**Appeal Number:** 2201672

**Decision Date:** 12/20/2022

**Hearing Date:** 10/17/2022

**Hearing Officer:** Christopher Taffe

**Record Closed:** 12/08/2022

**Appearances for Appellant:**



**Appearance for MassHealth:**

Jared Krok of the Springfield MEC



*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 IN PART (with Order for MassHealth)	<b>Issue:</b>	Long-Term Care – Verifications
<b>Decision Date:</b>	12/20/2022	<b>Hearing Date:</b>	10/17/2022
<b>MassHealth's Rep.:</b>	J. Krok	<b>Appellant's Reps.:</b>	[REDACTED]
<b>Hearing Location:</b>	Springfield MassHealth Enrollment Center (held remotely)	<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 November 8, 2021, MassHealth denied Appellant's request for MassHealth Long-Term Care Standard benefits (LTC benefits) because Appellant failed to give MassHealth the information it needed to determine eligibility. See Exhibit 1; 130 CMR 515.008.

On March 4, 2022, a request for hearing was filed with the Board of Hearings (BOH) on behalf of the Appellant. See Exhibit 1. Although it would not ordinarily be a timely appeal under 130 CMR 610.015(B), BOH treated it as timely due to the federal Public Health Emergency status caused by COVID-19. See 130 CMR 610.015(B) and MassHealth Eligibility Operations Memorandum 22-10 (published August 2022) (extending the time period for appeal filing temporarily to 120 days after receipt of the appealable action). The March 4, 2022 appeal request indicated that Appellant had passed away but contained no specificity on the date of Appellant's death. See Exhibit 1. Information received later verified that Appellant had passed away on [REDACTED] prior to the appeal filing. See Exhibit 2.

In June of 2022, more than three months after filing the Fair Hearing Request with BOH, Appellant's representatives submitted proof that a Probate Court filing had been filed in [REDACTED] on [REDACTED] seeking Appointment of a Personal Representative. See Exhibits

2 through 4.<sup>1</sup>

On [REDACTED], a Personal Representative was appointed; this was reported to the Board of Hearings on September 15, 2022. See Exhibit 5.

On September 22, 2022, the Board of Hearings sent a scheduling letter, setting this matter for hearing on October 17, 2022. See Exhibit 7. Upon the request of Appellant, the record was initially left open on that hearing date post-hearing to November 14, 2022 to allow Appellant time to gather and make additional verification submissions. See 130 CMR 610.081; Exhibit 9. The Appellant's deadline for submission was subsequently further extended three different times, or until December 8, 2022. See 130 CMR 610.081; Exhibit 10.

Challenging a denial of an application for MassHealth benefits is a valid ground for appeal to BOH. See 130 CMR 610.032.

## **Action Taken by MassHealth**

MassHealth denied Appellant's application for LTC benefits because of the failure of the applicant to submit all materials needed to determine financial eligibility.

## **Issue**

Has Appellant submitted everything needed by the agency and, if not, is there any avenue of possible relief?

## **Summary of Evidence**

Appellant was a Massachusetts resident who, at some point in 2021, was admitted to a nursing facility in Western Massachusetts. Appellant's estate is currently looking for a MassHealth LTC benefits with a benefit start date of coverage of September 22, 2022; she is seeking LTC benefits for a limited time period for her nursing facility coverage after her admission date; at hearing it was testified that benefits are being sought from September 22, 2021 through October 14, 2021.

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<sup>1</sup> Upon review, it is unclear why the administrative staff of the Board of Hearings did not dismiss or seek to dismiss this appeal per 130 CMR 610.016(B)(1) upon learning of Appellant's date of death, as Appellant had passed away three months prior to the March 22, 2022 appeal filing date, and there was (1) no timely report of the Appellant's passing, (2) no Personal Rep. in existence as of the time of the March 2022 filing; and (3) no pending Probate Court matter in March of 2022. By not filing an earlier and timelier Probate Court petition before or around the time of the Fair Hearing Request form, Appellant's side contributed to much of the delay in this matter, especially that part during the summer of 2022 when both Appellant and BOH had to put this appeal on hold and wait for the Probate Court process to play out. Such delay would have been minimized had the Probate Court matter simply existed prior to the March 2022 filing, which was a possibility that could have happened and should have happened if the Fair Hearing Rules were properly followed by Appellant's side.

As the authority issue became moot by the time the Hearing Officer heard this case in September 2022, the Hearing Officer will ignore this procedural defect.

Although Appellant passed away on [REDACTED], there was no indication of a need for coverage from October 15, 2021 through the date of death given by any of the representatives appointed by the Personal Representative of the Estate.<sup>2</sup> Testimony indicates she left the facility and likely passed while in a hospital.

An application was filed on Appellant's behalf with MassHealth on September 23, 2021. On October 20, 2021, MassHealth sent Appellant a request for additional information needed to complete the application with a due date for a response of November 3, 2021.<sup>3</sup> When no adequate response was received, MassHealth issued the denial notice on November 8, 2021.

As Appellant was married at all times relevant to her request for benefits and prior to her passing, MassHealth must collect financial and other relevant information related to both members of her marriage in order to properly determine Appellant's clinical and financial eligibility for federal LTC benefits.

All application items outstanding and still missing as of the hearing date were listed on the October 20, 2021 verification request. See Exhibit 8. Specifically the items the parties agreed were still outstanding as of the hearing date were: (1) registration information related to a Jeep owned by the couple; (2) the SC-1 and Screening documentation related to the nursing facility stay; (3) a copy of the Appellant's community spouse's current pension statement; (4) a copy of documentation on the Mutual of Omaha life insurance for the community spouse; (5) proof of the community spouse's health insurance information and premium costs; and (6) verification of the community spouse's rent or home expenses.<sup>4</sup>

During the beginning of the Record Open period, all documentation was initially provided except for two documents – both related to the community spouse. The first was a life insurance asset of the community spouse through Mutual of Omaha, and the second was the community spouse's asset with Fidelity (which may be a pension, an investment account and/or some other financial resource). See Exhibit 10, particularly page 25.<sup>5</sup> The life insurance asset was eventually obtained and produced prior to the record close. See Exhibits 10 and 11. However as of the close of the record, no information has been produced to MassHealth regarding the Fidelity resource.

Appellant's representatives claim that Appellant's spouse is non-cooperating, and that they have been told that Fidelity provided the documentation to Appellant's spouse but he has not produced it to the Appeal Representatives.

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<sup>2</sup> Clearly the interested party in this matter for whom the Estate is acting is the nursing facility provider.

<sup>3</sup> This document, in Exhibit 8, is labelled as a VCT2 (or VC-2), which means it was the second verification request sent for this member. It was likely triggered by receipt of some information. The first verification request, typically labelled by MassHealth as a VCT1 (or VC-1) was presumably sent earlier and within 10 days of the application, leading to the November 3, 2021 due date but no VC-1 was produced by MassHealth for the hearing record. See 130 CMR 516.001. Neither side raised an issue with the dates or substantive times to respond to the verification requests of 2021.

<sup>4</sup> Some of the items, most notably the SC-1 form, were allegedly submitted prior to the hearing date, but the Appeal Representative at hearing indicated it could be easily resubmitted.

<sup>5</sup> Exhibit 10 contains a 77-page printout summary of the multiple email conversations between Appellant's side, the MassHealth Representative, and the Hearing Officer, for correspondence exchanged between November 14, 2022 and December 7, 2022.

Appellant's representatives at hearing and during the Record Open claim that they attempted to "contact" the spouse on multiple dates. An Affidavit submitted by the Personal Representative stated that one of the Appeal Representatives (Ms. Keller) reported that she attempted to contact the spouse on the following dates: once in November 2021, once in December 2021, once in January 2022, once in March 2022, once in April 2022, and twice in October 2022. See Exhibit 10A (containing a 23-page fax, and the affidavit from the Personal Representative of the Estate). No detail or facts were provided about what type of contact or communication was made and what response if any occurred. The affidavit also contains from the Personal Representative also states that another Appeal Representative [REDACTED] claims she left voicemail messages for the spouse four times during the 12-month period between November 2021 and November 2022, with the first three taking place between November 2021 and February 2022 and once more in November of 2022. At some point during or prior to the application, the representatives obtained a consent of release from the community spouse, but they have not been able to use it to obtain the document needed from Fidelity. See Exhibit 10A. The Personal Representative stated that if MassHealth denied eligibility to Appellant, this would result in undue hardship to the estate of Appellant. See Exhibit 10.

MassHealth's position is that the case should still be denied as the verifications have still not been provided and, to consider the spouse to be non-cooperative under the regulation, the agency would rather see additional evidence, such as a letter signed by the spouse (about their non-willingness to cooperate) or some additional form of testimony from or about the spouse in hearing. See Exhibit 10, page 25.

## Findings of Fact

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

1. In response to an application for LTC benefits filed on September 23, 2021, MassHealth sent Appellant an Information Request on October 20, 2021, seeking information needed to complete a determination of Appellant's application. (Testimony and Exhibit 8)
  - a. The requested information at that time included pension and/or other account information from Fidelity, for Appellant's community spouse. (Exhibit 8)
2. Appellant had until November 3, 2021 to produce such information but not all responsive information was provided during that time frame, leading to the November 8, 2021 denial notice at issue in this appeal. (Testimony and Exhibit 1)
3. Appellant died on [REDACTED], and has had a Personal Representative appointed, on behalf of a creditor, to help attempt to secure benefits for the limited time period from September 22, 2021 to October 14, 2021, to cover a portion of her nursing facility stay. (Testimony and Exhibit 5)

4. During the appeal period all documents have been produced except for information related to the community spouse's asset or account with Fidelity which may be a pension or which may be some other financial resource. (Testimony and Exhibits 9, 10 and 10A)
5. The Appeal Representatives were able to obtain a written consent from the community spouse in August of 2021 which they used in part to do some communications with Fidelity over the missing verification. (Exhibit 10 and Exhibit 10A)
6. No specific evidence or statement of the Fidelity account has been produced to MassHealth during the period between the application date and the record close date. (Testimony and Exhibits 8 through 12)
7. There is no evidence or detailed specifics of what Appellant's community spouse has said or done in response to any of the communications. (Exhibits 10 and 10A)

## Analysis and Conclusions of Law

The MassHealth regulations are very clear that all applicants seeking LTC benefits must cooperate with MassHealth and provide the agency with the necessary information related to his or her income in a timely manner so that MassHealth can properly determine if Appellant satisfies the medical and financial eligibility requirements for LTC benefits and can be potentially eligible for such federal Medicaid benefits. If the requested information is not provided by Appellant in a timely manner, MassHealth benefits may be denied. See 130 CMR 515.008(A); and 130 CMR 516.001 which are reprinted below:

### 515.008: Responsibilities of Applicants and Members

(A) Responsibility to Cooperate. **The applicant or member must cooperate with the MassHealth agency in providing information necessary to establish and maintain eligibility, and must comply with all the rules and regulations of MassHealth, including recovery and obtaining or maintaining other health insurance.**

### 516.001: Application for Benefits

#### (A) Filing an Application.

##### (1) Application. To apply for MassHealth

....

(b) for an individual in need of long-term-care services in a nursing facility, a person or his or her authorized representative must file a complete paper Senior Application and Supplements or apply in person at a MassHealth Enrollment Center (MEC).

##### (2) Date of Application.

(a) The date of application is the date the application is received by the MassHealth agency. ...

##### (3) Paper Applications or In-person Applications at the MassHealth Enrollment Center (MEC) - Missing or Inconsistent Information.

*(a) If an application is received at a MassHealth Enrollment Center or MassHealth outreach site and the applicant did not answer all required questions on the Senior Application or if the Senior Application is unsigned, the MassHealth agency is unable to determine the applicant's eligibility for MassHealth.*

*(b) The MassHealth agency requests responses to all of the unanswered questions necessary to determine eligibility. The MassHealth agency must receive such information within 15 days of the date of the request for the information.*

*(c) If responses to all unanswered questions necessary to determine eligibility are received within 15 days of the date of the notice, referenced in 130 CMR 516.001(A)(3)(b), the MassHealth agency will request any corroborative information necessary to determine eligibility, as provided in 130 CMR 516.001(B) and (C).*

*(d) If responses to all unanswered questions necessary for determining eligibility are not received within the 15-day period referenced in 130 CMR 516.001(A)(4)(b), the MassHealth agency notifies the applicant that it is unable to determine eligibility. The date that the incomplete application was received will not be used in any subsequent eligibility determinations. If the required response is received after the 15-day period, the eligibility process commences and the application is considered submitted on the date the response is received, provided that if the required response is submitted more than one year after the initial incomplete application, a new application must be completed. (e) Inconsistent answers are treated as unanswered.*

*(B) **Corroborative Information.** The MassHealth agency requests all corroborative information necessary to determine eligibility.*

*(1) The MassHealth agency sends the applicant written notification requesting the corroborative information generally within five days of receipt of the application.*

*(2) The notice advises the applicant that the requested information must be received within 30 days of the date of the request, and of the consequences of failure to provide the information*

*(Bolded emphasis added.)*

In this case, Appellant's side has had over one calendar year to obtain documentation, but the necessary verification of the applicant's spouse's Fidelity resource has still not been produced, and the MassHealth Representative has indicated the agency cannot determine Appellant's retroactive eligibility without this information.

Through the late Appellant's Representatives, an argument has been made that, due to some non-cooperation, MassHealth should not deny Appellant's application per 130 CMR 517.011. That regulation reads in its entirety as follows:

517.011: Assignment of Rights to Spousal Support

***An institutionalized spouse, whose community spouse refuses to cooperate or whose whereabouts is unknown, will not be ineligible due to***

*(A) assets determined to be available for the cost of care in accordance with 130 CMR 520.016(B): Treatment of a Married Couple's Assets When One Spouse Is Institutionalized;*  
*or*

***(B) his or her inability to provide information concerning the assets of the community spouse when one of the following conditions is met:***

*(1) the institutionalized spouse assigns to the MassHealth agency any rights to support from the community spouse;*

*(2) the institutionalized spouse lacks the ability to assign rights to spousal support due to physical or mental impairment as verified by the written statement of a competent medical authority; or*

*(3) the MassHealth agency determines that the denial of eligibility, due to the lack of information concerning the assets of the community spouse, would otherwise result in undue hardship.*

***(Bolded emphasis added.)***

I do not believe 130 CMR 517.011 applies as I do not see evidence or facts which invoke any of the three subparts of 517.011 B(1) through (3). There was no written submission indicating an assignment of rights by the Appellant's Personal Rep. Moreover, it is difficult to see undue hardship for the Appellant in this case. The Appellant is deceased, so there is no risk of her being discharged from a nursing facility, and I do not agree a financial debt for an estate alone should constitute "*undue hardship*" under these regulations. If it was the case that this constituted undue hardship, then such an application of this exception could arguably swallow much of, if not all, of the verification regulatory requirements; there is also a reason that 517.011(B)(3) mentions the necessity of MassHealth weighing in on the hardship and not letting self-interested applicants raise and assert a undue hardship to get out of an obligation.

Moreover and more importantly, even if any one of those three subconditions within 130 CMR 517.011(B) existed, I still would have trouble concluding that 130 CMR 517.011 applies, because the very first sentence of 517.001 implies that there must be a finding that the community spouse has refused to cooperate. Compared to other cases I have heard, where there were more details given about the interactions with the community spouse which support a finding that the spouse has not and will not cooperate,<sup>6</sup> the record here is lacking on the facts I need to conclude this spouse is truly not cooperating.

First of all, the regulation would be meaningless if certain interested parties were able to satisfy the regulation by simply saying, in conclusory fashion, that the spouse didn't cooperate. Thus, I believe there is a need to specifically and adequately detail such non-cooperation in a far greater

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<sup>6</sup> See e.g., BOH decision # 2153762, where the individual appointed by the Probate Court to act on behalf of an Appellant provided great detail about voicemails, threats the Conservator received during his verbal interactions with the community spouse, and where greater testimony about the non-cooperative was given at hearing, to allow the factfinder to better find evidence of a clearer spirit of non-cooperation.



manner than what I see in this case. While there were some attempts at communication, there is no information about whether voicemails were left or whether phone calls that were not picked up were made, or whether the spouse answered and said anything. There was also no information in the record on any attempts to work face to face with the community spouse or what the last conversations with the community spouse involved.

I do not necessarily agree with MassHealth's claim that the community spouse must provide testimony at hearing – I would think that is difficult if the non-cooperation is genuine or if there was some estrangement between a couple – but, at the same time, if the Appellant's side wants to rely on non-cooperation, there should be a lot more in the way of credible and specific facts provided during a Fair Hearing. I will note that this does not appear to be a case where maximum efforts or urgency appeared to have been made by Appellant's representatives. There were over 10 alleged attempts to contact the spouse but the time period in question between application date and the record close date spans well over a year. Further, notice of the October 17, 2022 hearing date was given four weeks prior to the hearing date, and yet there is no evidence of any efforts made by any of the three representatives during that period to reconnect or contact the spouse during that active appeal time period when this issue should definitely have been on the radar and more of a priority.

The three Appeal Representatives here clearly all are involved in this matter due to the nursing facility's interest as suggested by the one month in coverage. In that case though, if they want to assert the late Appellant's right to request more time from the Board of Hearings,<sup>7</sup> then they should be prepared to be held as responsible just as the late individual applicant would have been held to for her spouse's inactions if she were still alive. Here we have a case where ultimately the Appeal Representatives need more time to get one last piece of information but there is nothing detailing efforts from late September 2022 and early October 2022. Further, there is clearly some level of cooperation, even if it's not full cooperation, as Appellant's spouse provided the Appeal Representatives with a release that those representatives were able to try to use to access his records. In fact, the Appeal Representatives were successful in obtaining evidence of the life insurance asset of the spouse. See Exhibit 12. This does not appear to be a case of non-cooperation that should invoke 130 CMR 517.011. It is a case where there was some cooperation from the applicant's spouse and/or family but it was not ideal or timely, and where the total evidentiary record also reveals that greater efforts could have been made. Earlier in the analysis, the responsibility regulation of 130 CMR 515.008 was cited, and I conclude this is a case where those who took the steps to stand legally in the late applicant's place did not act as responsibly or as diligently as such regulations require of applicants.

For those reasons, I find no current evidence that compels me or allows me to overturn the MassHealth denial at this point. However, I am sympathetic to the predicament, time, and efforts of

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<sup>7</sup> A provider has no independent right to have an appeal like this before the MassHealth member, unless they utilize the Probate Court process to step in and be appointed an estate representative. See Centennial Healthcare v. Comm. of Div. of Med., 61 Mass. App. Ct. 320 (Mass. App. Ct. 2004) (holding a provider lacks independent standing to contest eligibility to MassHealth benefits). If the provider's representatives want to avail themselves of the power to make efforts to carry out actions in the name of a deceased one, then there's an argument that they should bear a bit more responsibility in working or at least evidencing more good faith attempts to work with the decedent's family and loved ones.

the Appeal Representatives, so I will allow them one final chance, via the Order below, to complete their task and save the application.<sup>8</sup> This appeal is thus DENIED IN PART.

## **Order for MassHealth**

The denial decision of November 8, 2021 stands and the application may remain closed UNLESS Appellant submits the requested information about the Fidelity resource within 10 business days of the date of the decision.<sup>9</sup>

If and only if Appellant's side submits the missing verification within 10 days, then MassHealth must make a new eligibility determination on this application that honors the September 23, 2021 application date. The MassHealth Representative and agency are allowed on their own to determine whether any such post-appeal submission is detailed and sufficient enough to satisfy the requirement for this verification.

## **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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<sup>8</sup> This option has also been selected in case Appellant's side has been able to obtain the needed documentation during the period between the close of the record on December 8, 2022 and the date this decision is issued.

<sup>9</sup> Per 130 CMR 610.015(C), the term "*business days*" should not include Saturdays, Sundays, legal holidays, or any other day on which BOH is closed (e.g., if there is inclement weather limiting the opening of state executive offices, then the number of days may be correspondingly extended).

## Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact the Appeals Coordinator at the Springfield 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.

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Christopher Taffe  
Hearing Officer  
Board of Hearings

cc: Dori Matthieu, Appeals Coordinator @ Springfield MEC

[REDACTED]

[REDACTED]