

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2202318
Decision Date:	5/25/2022	Hearing Date:	05/02/2022
Hearing Officer:	Rebecca Brochstein	Record Open Date:	05/23/2022

Appearance for Appellant:




Appearances for MassHealth:

Gabe Gillis, 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:	Denied	Issue:	Long-term care eligibility
Decision Date:	5/25/2022	Hearing Date:	05/02/2022
MassHealth's Rep.:	Gabe Gillis, Tewksbury MEC	Appellant's Reps.:	
Hearing Location:	Board of Hearings (Remote)		

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 February 22, 2022, MassHealth denied the appellant's application for long-term care benefits for failure to provide requested verifications (Exhibit 1). The appellant filed this appeal in a timely manner on March 28, 2022 (130 CMR 610.015(B); Exhibit 2). Denial of benefits is a valid basis for appeal (130 CMR 610.032). After hearing on May 2, 2022, the hearing officer reopened the record for additional evidence (Exhibits 6 and 7).

Action Taken by MassHealth

MassHealth denied the appellant's application for long-term care benefits due to his failure to provide requested verifications.

Issue

The appeal issue is whether MassHealth was correct in denying the appellant's long-term care application.

Summary of Evidence

A representative from the Tewksbury MassHealth Enrollment Center appeared at the hearing by telephone and testified as follows: The appellant, who is in his early nineties, is a resident of a nursing facility, and has a spouse in the community. On December 31, 2021, the appellant's daughter (who is his power of attorney) filed a MassHealth long-term care application on the appellant's behalf, seeking coverage as of November 3, 2021. The appellant's daughter listed his wife as a community spouse on the application and submitted bank statements for accounts jointly owned by the appellant and his spouse as well as the spouse and her adult son. In addition, the application included joint tax returns filed by the appellant and the spouse for 2019 and 2020, as well as a deed showing the spouse's home was transferred into an irrevocable trust in 2012.

MassHealth sent the appellant requests for information on January 5 and January 10, 2022. The MassHealth representative explained that the second information request included questions about an irrevocable trust in the community spouse's name, which was not listed on the application but was located by MassHealth's asset verification unit. The January 10 request sought the following information:

Community Spouse:

- TIAA-CREF annuity income: Proof of the current gross monthly amount of this pension.
- Verify the resource behind the quarterly payments from Conference on Jewish Claims and send proof of the current gross amount.
- Health Insurance: Proof of the current monthly premium for this coverage.
- For all accounts, including unreported or newly discovered accounts: Please send financial statements verifying activity, balances and disbursements from 10/2020-current (closed) for all resources which the applicant/spouse has/had ownership interest. Document the source of all deposits and verify the disposition of disbursements of \$1000 or more. Document all disbursements since admission to the facility including all cash withdrawals. Please do not re-submit statements already submitted with application.
- [REDACTED] There was an \$80,000 deposit into [REDACTED] [REDACTED] on 3/16/21 from a [REDACTED]. Please verify the owner of the account and send statements from 10/2020-current (closing) if owned by [appellant] or [community spouse] and refer to the request above regarding documentation required for certain transactions.
- Trust: Please send the instrument of trust and any amendments. List the grantor(s) of the trust and verify the current trustee(s). Please provide a current schedule of beneficiaries and current signed and dated statement from a trustee which includes:
 - Current statements for all trust assets and proof of current income
 - Show all assets transferred in/out of this trust since 1/2017
 - Provide year-end statements from 2017-2021 for all assets in trust.
 - Trust tax returns for last 5 years

Appellant:

- Documentation to verify that [community spouse] or [appellant] received fair market value for payments made to [third party, AB].
- Asset verification located trust involvement. Please send documents requested for the [HR] Irrevocable Trust.
- Health insurance: Proof of the current monthly premium for this coverage.
- For all accounts, including unreported or newly discovered accounts: Please send financial statements verifying activity, balances and disbursements from 10/2020-current (closed) for all resources which the applicant/spouse has/had ownership interest. Document the source of all deposits and verify the disposition of disbursements of \$1000 or more. Document all disbursements since admission to the facility including all cash withdrawals. Please do not re-submit statements already submitted with application.
- PNA: Please send a personal needs account statement from the nursing facility showing activity from admission – current. Please send a private payment history statement from the nursing facility showing the amount paid to date and dates of coverage.
- Trust: Please send the instrument of trust and any amendments. List the grantor(s) of the trust and verify the current trustee(s). Please provide a current schedule of beneficiaries and current signed and dated statement from a trustee which includes:
 - Current statements for all trust assets and proof of current income
 - Show all assets transferred in/out of this trust since 1/2017
 - Provide year-end statements from 2017-2021 for all assets in trust.
 - Trust tax returns for last 5 years
- Notification of admission to facility (SC-1)
- Nursing Facility Screening notification

See Exhibit 4 at 4.

The MassHealth representative testified that on January 31, 2022, following the revised request for information, a second long-term care application was filed on the appellant's behalf. Notes on the form indicated that this was an "amended application" and listed only the appellant's information. It included the following note regarding the community spouse: "Community spouse respectfully declines to provide information about her income and assets. Community spouse invokes her rights of spousal refusal." See Exhibit 4 at 34. The second application also included a "Spousal Refusal and Affidavit" by the spouse, which states as follows:

1. My name is [spouse's name].
2. I am the wife of [appellant] who is a resident of [nursing facility].
3. It is my understanding that [appellant] has or will be making out an application for MassHealth long-term care benefits.

4. While we are married for approximately 40 years, we have been separated and lived apart for the last 10+ years.

a. We have been separated as a marital unit during this time.

5. In or about 1987, my husband and I executed waiver of estate claim even though we remain married. The goal of this was that, even though married, how assets and any future claims would remain separate from each other. *See Exhibit A- Waiver and Release*

a. We both resided at [address] which is a **two-family dwelling**, we consider ourselves living apart and not married. *See Exhibit B- Assessor's Card for Two-Family status* [emphasis in original]

b. We lived in separate areas of the house at [address].

c. We don't have joint assets.

d. We engaged in separate daily activities.

e. We didn't dine together.

f. We didn't share groceries, food or toiletries.

6. We don't have any joint assets. We have always kept separate assets during our marriage including the last 10+ years when we have been separated.

7. I respectfully refuse to participate or sign the application for MassHealth long-term care benefits for my spouse.

8. In addition, I respectfully decline to provide any and all information about my income and assets, and hereby invoke my federal and state rights to refuse to participate in my spouse's application for MassHealth long-term care benefits.

9. This shall be interpreted as a spousal refusal under state and federal law.

The affidavit is signed by the spouse and by her son as her durable power of attorney. See Exhibit 4 at 36-37. The "Waiver and Release" executed by the appellant and the spouse on October 7, 1987, states in relevant part as follows:

NOW THEREFORE, in consideration of the mutual covenants herein contained, the parties mutually agree that each of them shall have the right to dispose of his or her property by will, or otherwise, in such manner as each may, in his or her uncontrolled discretion, deem proper, and neither one will claim any interest in the estate of the other,

whether by waiving the other's will and claiming a share of the deceased spouse's estate pursuant to Massachusetts General Laws Chapter 191, Section 15, claiming a surviving spouse's allowance under Massachusetts General Laws Chapter 196, Section 2, claiming Dower or Curtesy pursuant to Massachusetts General Laws Chapter 189, Sections 1 and 3, claiming Homestead under Massachusetts General Laws Chapter 188, or otherwise.

Despite the above provisions, nothing contained in this Agreement is intended to preclude either party from voluntarily making gifts to the other party or from voluntarily making provision for, or granting powers or rights to, the other party in and by his or her last will and testament, any codicil thereto, or any trust, and the fact that either party may (without being obliged to do so) give, devise, or bequeath to the other party property or any interest therein, or otherwise confer rights or power upon such other party, by gift, will, or trust shall not be construed or deemed as a waiver of any provision hereof or as evidence that there is or was any agreement or understanding between the parties other than as specifically set forth and expressed herein.

Each party has conferred with and received advice from their respective attorneys and is fully aware of the consequences of this agreement and signs it fully understanding and accepting its legal implications. (Exhibit 4 at 39)

The MassHealth representative pointed out that the spouse initially provided information about her income and assets with the first application, but when asked to submit additional documentation, declined to do so. He stated that the agency believes this was done intentionally to enable the appellant to qualify for long-term care benefits. On February 22, 2022, MassHealth denied the original application for failure to provide requested verifications; the MassHealth representative testified that no action was taken on the January 31 individual application.

The appellant was represented at hearing by an attorney, a Medicaid consultant, and his daughter (who is his power of attorney). The attorney described this as a "classic spousal refusal case." He stated that the first application was filed as a regular spousal application, and that it was expected to proceed as such. However, when MassHealth sent the request for information, the spouse, acting through her son and power of attorney, refused to cooperate any further. The spouse then executed an affidavit of spousal refusal, and the appellant assigned his rights of spousal support to MassHealth. See Exhibit 5 at 54. The attorney emphasized that this was a second marriage for the appellant and the spouse, and that they signed a post-nuptial agreement shortly after they were married. Under that agreement, they were each to retain their own assets.

He argued that the spousal refusal law is not new or ambiguous and was created for just this situation. He pointed out that the appellant assigned his right of support to the Commonwealth and has filed all of the documentation necessary to meet the criteria of the regulation. He cited to a Superior Court case which held that the remedy for spousal refusal is not denial of benefits, but subrogation of the institutionalized spouse's support rights against the community spouse. See Rosetti v. Waldman, Essex Super. Ct. Civil Action No. 0477CV1418 (Billings, J.) (August 17, 2005). The attorney also pointed to several previous Board of Hearings decisions that found

in favor of applicants, arguing that they appropriately show consistency in upholding the plain language of the law.¹

The attorney acknowledged that it was “curious” that the appellant and his wife filed their taxes jointly but stated that this was done as a convenience. He added that they have since stopped filing jointly. He also argued that this fact does not contradict the fundamental principle of spousal refusal, stating that he has no control over what she does.

The appellant’s daughter (who is his power of attorney) testified that prior to his admission to the nursing facility, the appellant and his wife lived “in separate areas of the same house.” She stated that they ate, slept, and shopped separately. She noted that the house was in the wife’s name, and that she transferred it into the irrevocable trust in 2012. As to their joint bank account, the daughter testified that this was always just the appellant’s account, and that all income and expenditures into and out of the account were his alone. She explained that he added his wife’s name only as an “old world safety measure.”

While a decision was pending, the hearing officer reopened the record to request that MassHealth provide statements from the joint bank account held by the appellant and his spouse, as well as to confirm whether all other verifications (apart from those held solely by the spouse) had been provided. After some additional documents were provided, the MassHealth representative indicated that the appellant had submitted all of his own verifications. He also pointed out that the verifications show the appellant has health insurance through his spouse.

The appellant’s attorney also sought the opportunity to submit a brief supplemental response, which he did. In his written response, the attorney reiterated that the appellant need only show that he has assigned his right to support from the spouse to the Commonwealth, and that the community spouse refuses to cooperate. He denied that the existence of a joint bank account or shared health insurance changes the legal criteria. He noted that the original application “was submitted with information from her through her attorney-in-fact; he further wrote that “[r]eference to [spouse’s] participation in this process is with the understanding that such participation is through her attorney-in-fact due to her ill health and compromised level of competency.” See Exhibit 7.

The appellant’s attorney also submitted an affidavit from the appellant’s daughter/power of attorney. The affidavit, which has a number of attachments, includes the following statements:

- [Spouse] worked for [employer] for ~30 yrs prior to retiring in ~1996. At that time [employer] offered spouses of retirees a Medex plan free of charge – this coverage was separate and distinct from the coverage offered the retiring employee. My father is the subscriber on the “spouse plan”. The spouse Medex plan is no longer provided by [employer] but my father’s coverage was grandfathered per the document provided by

¹ Specifically, he cited to Appeal Nos. 1800448, 1713783, 1709521, 1601683, 1412045, and 0711322. See Exhibit 5 at 11-12.

[employer]

- My father opened the [joint account] in 1984. . . . This was before he and [spouse] were married. This account was solely in his name for years until he applied for social security [sic] benefits in 1996. At the time he was advised by an employee at the bank that he should have a second person on the account. As shown by statements submitted with this affidavit . . . the only amount ever deposited into this account was his social security. Other than a periodic interest and check written in November 2020 to Comcast the only transactions in the account were transfers to [another bank account] and the social security direct deposits. On January 18, 2022 the balance of this account was transferred to [an account in his name]. It appears one additional social security check for \$930.10 on February 3, 2022 was deposited and remains in the account. His social security benefits are now directly deposited to [the nursing facility].
- [Spouse] did not receive any of the funds from this account and was not even aware it existed as of 2020.
- [Spouse] has been completely bed ridden for at least a year (and possibly longer – a year is what I am specifically aware of).
- She has a 24x7 live-in health aid [sic] and is heavily medicated and even when she is awake, she is not aware or fully responsive.
- She does not manage her own affairs and has not done so since before she has been bedridden – to the best of my knowledge her affairs are managed by her son. . . .
- All interactions I have had regarding the MassHealth application have been with/through [the son/POA].
- When I initially gathered information for my father's application [the spouse's son] provided me with what we submitted.
- When MassHealth asked for additional information, I passed the request on to [the son] who indicated that he, on behalf of [spouse] is not going to cooperate.
- [Medicaid consultant] also contacted him to get information and he again refused to cooperate.
- Because of this I had someone prepare the documents for him to sign stating that he would not cooperate on behalf of [spouse]. These documents were submitted with the Amended Application when I presented specifically listed [sic] that [spouse] would not cooperate and invoked spousal refusal.
- At that time [spouse] was bedridden and under 24/7 care at home.

- Without [spouse's] cooperation or that of [her son] there is no way for me to get the information MassHealth is requesting. (Exhibit 7)

Findings of Fact

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

1. The appellant, who is in his early nineties, is a resident of a nursing facility.
2. The appellant has a spouse in the community. They have been married approximately 40 years, and it is the second marriage for each.
3. In 1987, the appellant and his wife executed a mutual waiver of claims over one another's estates upon their deaths.
4. The appellant and his spouse filed their taxes jointly through the 2020 tax year.
5. For approximately the past ten years, the appellant and his wife have lived in separate areas of the same home. They have engaged in separate daily activities and made separate purchases.
6. For at least the last year, the spouse has been bedridden and receives full-time care. It is unclear whether she is legally competent.
7. On December 31, 2021, the appellant's daughter (who holds his power of attorney) filed a MassHealth long-term care application on the appellant's behalf, seeking coverage as of November 3, 2021.
8. The December application listed the appellant's wife as a community spouse. Included with the application were bank statements for accounts held jointly by the appellant and his spouse, as well as the spouse and her adult son; there were also joint tax returns filed by the appellant and the spouse for 2019 and 2020, along with a deed showing the spouse's home was transferred into an irrevocable trust in 2012. The spouse's adult son, acting as her POA, provided some of the information that was submitted with the first application.
9. On January 5, 2022, MassHealth sent the appellant a request for information. On January 10, 2022, MassHealth sent a second information request, this one including questions about the irrevocable trust in the spouse's name, which was not listed on the application but was located by MassHealth's asset verification unit.
 - a. MassHealth requested the following information related to the appellant: Verification of fair-market value received for payments to a third party, AB; verification of the [HR] Irrevocable Trust; proof of current monthly health insurance

premium; financial statements for all accounts from 10/2020 to present, with verification of transactions of \$1,000 or more; PNA statement with private payment history; trust instrument with amendments, list of grantor(s), trustee(s), and beneficiaries, with statements, transfers, and tax returns for last five years; SC-1; and nursing facility screening.

- b. MassHealth requested the following information related to the spouse: Verification of TIAA-CREF annuity income; verification of resource behind quarterly payments from Conference on Jewish Claims; proof of current monthly health insurance premium; financial statements on all accounts from 10/2020 to present, with verification of transactions of \$1,000 or more; verification of Fidelity account from which \$80,000 deposit was made, with statements; and trust instrument with amendments, list of grantor(s), trustee(s), and beneficiaries, with statements, transfers, and tax returns for last five years.
10. After MassHealth issued the request for information, the spouse's son, acting as her power of attorney, declined to provide further documentation.
 11. On January 31, 2022, the appellant's daughter filed a second long-term care application on his behalf. The form indicated that this was an "amended application," listed only the appellant's information; and included a statement that the "Community spouse respectfully declines to provide information about her income and assets . . . and invokes her rights of spousal refusal."
 12. On February 22, 2022, MassHealth denied the December application for failure to provide the requested verifications. MassHealth took no action on the January application.
 13. After hearing on May 2, 2022, the record was reopened for additional evidence. The MassHealth representative confirmed that the appellant submitted all of the verifications pertaining to his own income and assets, but not those of the spouse.

Analysis and Conclusions of Law

Under 130 CMR 515.008(A), an applicant or member must cooperate with MassHealth in providing information necessary to establish and maintain eligibility. After receiving an application, MassHealth requests all corroborative information necessary to determine eligibility. 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. If the requested information is received within 30 days of the date of the request, the application is considered complete. If it is not received within that time frame, MassHealth benefits may be denied (130 CMR 516.001(C) and (D)).

At issue in this appeal is MassHealth's denial of the appellant's long-term care application due to his failure to provide all requested verifications within the prescribed time frame. There is no

dispute that the appellant did not in fact provide the requested verifications by the regulatory deadline, that the information had not been provided by the time of the hearing, and that several requested items remain outstanding. The issue is whether MassHealth can properly deny the application when all the outstanding information pertains to assets owned by the appellant's spouse, who has stated (either directly or through her POA) that she will not cooperate.

MassHealth argues that a married applicant must verify the assets of *both* spouses during the application process. See 130 CMR 520.016. Because the appellant is legally married to the community spouse, MassHealth contends that the appellant must verify his assets, her assets, and the couple's joint assets. The appellant maintains, however, that he has complied with all aspects of the verification request that pertain to his own information and that the only outstanding verifications are those under the exclusive control of his spouse, who is unwilling to cooperate in the application process. He argues that under these circumstances, MassHealth may not deem him ineligible for benefits pursuant to 130 CMR 517.011. That regulation provides that 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.²

The appellant contends that, pursuant to this regulatory provision, he has satisfied MassHealth's verification request, as the community spouse has refused to cooperate by providing her own information and he has properly assigned his rights to support from her to MassHealth.

In support of his position, the appellant submitted an affidavit from the community spouse purporting to demonstrate her refusal to cooperate in the MassHealth application process. Such evidence need not be taken at face value, however. Rather, it is subject to a credibility determination "such that the institutionalized spouse must sufficiently show that the community spouse will not cooperate and that the institutionalized spouse is unable to provide requested information." See Frenier v. Sudders, Suffolk Super. Ct. Civil Action No. 2084CV00813

² Federal law contains similar provisions at 42 USC §1396r-5-(c)(3).

(Mulligan, J.) (February 7, 2022). After considering the full record, I conclude that there is insufficient evidence that the community spouse is non-cooperative and that the institutionalized spouse is unable to provide any of the requested information independently.

The spouse's affidavit states, in summary, that the appellant and the community spouse have been married for approximately 40 years but separated and living in "separate areas" of the same home for the last ten years; have engaged in separate daily activities; and do not share groceries, food, or toiletries. It also states (twice) that they have no joint assets. In addition, it points to a "Waiver and Release" executed by the parties in 1987, early in their marriage, under which they waived their respective interests in one another's estates. Finally, it states that the spouse "respectfully refuse[s] to participate or sign the application for MassHealth long-term care benefits" for the appellant, or "to provide any and all information about [her] income and assets."

As a preliminary matter, the appellant's daughter indicated that the affidavit was not written by the spouse or the spouse's son; rather the daughter "had someone prepare the documents for him to sign stating that he would not cooperate on behalf of [spouse]." Similarly, it was the appellant's daughter who submitted the second application with a note that the spouse "respectfully declines to provide information about her income and assets." There is no specific evidence of the communications from the appellant or her son which verifies their refusal to participate in the process.

Substantively, the affidavit (along with testimony at hearing) seeks to portray the appellant and the spouse as having wholly separate financial lives, an assertion that is belied by the evidence. For example, the affidavit states (twice) that the appellant and spouse had no joint assets, yet the record includes statements for a bank account that bears both of their names. Even if the spouse did not actively use this account, as the appellant's representatives maintain, it remains a jointly owned asset. In the same vein, and even more important, the appellant's attorney acknowledged at hearing that the appellant and the spouse consistently filed their income taxes jointly through the 2020 tax year. This is evidence of financial interdependence and, notably, a willingness to enjoy some important legal benefits of marriage even while maintaining a de facto separation.³ Moreover, the joint filing also suggests the appellant would have had access to at least some of the spouse's financial information and the records used to file those returns. There is no evidence as to whether he or his power of attorney attempted to independently produce any of this documentation. See Frenier, supra at 12.

The spouse also avers that she "declines to provide *any and all information* about my income and assets" (emphasis added) for purposes of the appellant's MassHealth long-term care application. But the spouse (and/or her power of attorney) did in fact already volunteer some of this information with the original long-term care application. It was only after MassHealth sent a request for information that she claimed she would not cooperate and would instead withhold further

³ The 1987 agreement executed by the appellant and the spouse speaks to their mutual waiver of financial obligations at the time of their deaths. It does not prevent the parties from supporting one another during their lifetimes, and in fact contemplates that they may choose to do so.

documents. The spouse's earlier, voluntary participation in the appellant's MassHealth application weighs against her claim of non-cooperation now.

For the foregoing reasons, the appellant has not provided sufficient evidence of spousal non-cooperation, or of his own inability to access any of the documentation that MassHealth has requested.⁴ As the appellant has not provided all the information necessary to process his long-term care application, this appeal is denied.

Order for MassHealth

None.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Rebecca Brochstein
Hearing Officer
Board of Hearings

cc: Tewksbury MEC

[REDACTED]

[REDACTED]

⁴ As noted above, the appellant's attorney referenced several earlier Board of Hearings decisions (dated between 2007 and 2018) where the appellants prevailed after demonstrating the community spouse was noncooperative. He suggested that the Board of Hearings is obliged to adhere to a consistent line of reasoning and that this case should be approved as well. In a variety of ways, however, each of these cases is factually distinguishable from the instant case. The facts of Frenier (cited supra), which was denied by the Board of Hearings (with the denial recently upheld in Superior Court), is much more factually similar than any of the cases cited by the appellant's attorney. See Frenier v. Sudders, Suffolk Super. Ct. Civil Action No. 2084CV00813 (Mulligan, J.) (February 7, 2022).