

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	APPROVED IN PART; DENIED IN PART; DISMISSED IN PART	Appeal Number:	2202660
Decision Date:	6/16/2022	Hearing Date:	05/18/2022
Hearing Officer:	Christopher Taffe		

Appearance for Appellant:
Appellant, pro se

Appearance for MassHealth:
Donna Burns, RN, Clinical Reviewer on
behalf of OPTUM



*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

Appeal Decision:	APPROVED IN PART; DENIED IN PART; DISMISSED IN PART	Issue:	PA – Personal Care Attendant Hours
Decision Date:	6/16/2022	Hearing Date:	05/18/2022
MassHealth’s Rep.:	D. Burns, RN	Appellant’s Rep.:	Appellant, pro se
Hearing Location:	Quincy (Remote hearing)	Aid Pending:	YES

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 March 15, 2022, MassHealth modified Appellant’s Prior Authorization (PA) request for 66.50 day and evening hours/week of Personal Care Attendant (PCA) services for the period from 4/23/2022 through 4/22/2023 by approving 61.75 day and evening PCA hours/week.¹ See Exhibit 1; 130 CMR 422.410 and 130 CMR 450.204. Appellant filed via telephone a timely appeal request on January 18, 2022. See 130 CMR 610.015(B); Exhibit 1. Challenging a determination of the scope of MassHealth assistance is a valid ground for appeal to the Board of Hearings. See 130 CMR 610.032.

Because of the timing of Appellant’s appeal filing and the effective dates of the PA period related to the request, Appellant received Aid Pending protected benefits for the pendency of this appeal; the amount of day and evening PCA hours protected while this appeal is pending is 66.50 hours/week. See Exhibit 1; 130 CMR 610.036.

¹ MassHealth approved in full the request for 2.0 “nighttime” hours per day (during the period from 12 midnight to 6:00 A.M.) of PCA assistance for the PA period. There is no appealable dispute about this decision and thus the entirety of the remaining text of this decision will focus only on the amount of assistance for the disputed “day and evening” hours, which run from 6:00 A.M. to 12 midnight.

Action Taken by MassHealth

MassHealth approved 61.75 day and evening PCA hours/week of the 66.50 hours requested by making modifications to three areas of PCA assistance.

Issue

Is Appellant entitled to any adjustment which can serve to increase the amount of PCA time previously approved by MassHealth?

Summary of Evidence

Appellant appeared by phone at hearing. Ms. Burns, a registered nurse, also appeared by phone to provide testimony on behalf of the OPTUM, the MassHealth contractor who helps to administer some of the agency's prior approval services, including that of the PCA program.²

The MassHealth Personal Care Attendant program involves unskilled and unlicensed personnel who are hired to assist members with physical disabilities by providing paid time for hands-on assistance with a member's Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs). The PA review process utilized by the MassHealth PCA program allows the agency to determine medical necessity for the minutes requested by the member and make "modifications" where appropriate; the PCA time approved by MassHealth must be based on the member's capabilities, bear a relationship to the member's diagnosis and request, and comply with the applicable MassHealth PCA regulations.

At the time of the PA request in question, Appellant is a [REDACTED] who lives in the community. She primarily needs PCA assistance due to the chronic condition of Multiple Sclerosis (MS), which has affected her since 2004. Her medical history also includes 2 strokes (CVA's), and Devic's Disease. She has left sided weakness including no sensation in her left hand. She has lost peripheral vision and has tunnel vision. She had a catheter put in her chest in 2009 and also uses a separate catheter for toileting with straight catheter use every 2 hours. She has a history of decubiti on her buttocks and heel. In the year prior to the PCA request, she had a hospitalization related to pneumonia and COVID-19. She is now wheelchair dependent, with lots of pain all over her body. She is repositioned frequently. See Exhibit 3, pages 8 to 9. Appellant also uses a Hoyer lift to assist with transfers and her daily baths and body cleanings involve bed baths. See id. at pages 10 to 13.

On or around March 4, 2022, Appellant's PCA provider (Stavros) submitted a request for 66.50 hours/year. Appellant had been approved for 66.50 hours/year in prior years but Appellant indicated that she was unaware of this increase (which the parties suggested occurred during the COVID-19 era of the last two years) and she has only been using 65.00 hours/years currently. Due

² Mr. Doyle from the Board of Hearings, a colleague of the Hearing Officer, also was present at hearing for training and observational purposes.

to the appeal Appellant is protected for 66.50 hours/week of PCA services. The annual PA period at issue in this appeal runs from April 23, 2022 to April 22, 2023.

MassHealth made three modifications which effectively reduced Appellant’s approved time to 61.75 hours/week.³ At hearing, after testimony, MassHealth rescinded one of the modifications to the ADL of “Undressing”. MassHealth thus approved Appellant’s request in full for this ADL, which was approved for 140 minutes/week (20 minutes/activity per day).⁴

The two disputed activities at issue in the request occurred in the ADLs of (1) Passive Range of Motion (PROM) and (2) Toileting.

With regard to the requested assistance with PROMs, Appellant’s provider, using the form established MassHealth, submitted the request as follows::

Tasks	Mins./Episode	Episodes/Day	Days/Week	Total Mins./Week
Upper Extremities - Left Side	7 minutes	2	7	98 minutes
Upper Extremities - Right Side	8 minutes	2	7	112 minutes
Lower Extremities - Left Side	8 minutes	2	7	112 minutes
Lower Extremities - Right Side	7 minutes	2	7	98 minutes
TOTAL				420 minutes

MassHealth approved most of this PCA time requested for PROM exercises, but for the upper right extremities, MassHealth only approved 8 minutes, once per day, thereby reducing the amount of time approved by 56 minutes to 364 minutes/week. MassHealth explained that Appellant has some limited use of her upper right arm, as indicated by the fact that she is independent with the ADL of eating. The PCA packet also suggests that Appellant could do some limited participation with dressing of the upper body garments. Appellant testified to being able to use her right hand with basic utensils for eating and the phone, but that it wasn’t easy and that even the relatively stronger hand would suffer from numbness, and that her condition and pain had gotten worse in general since contracting COVID in January 2022. Her left knee area in particular was signaled out at hearing for feeling worse with age.

The other modification to “Toileting” involved a 210 minute/week cut to Appellant’s hours for the sub-activity of “Bladder Care”.⁵ The request for Bladder Care from Stavros was for 15 minutes of assistance, 8 times per day, 7 days a week for a total of 840 minutes/week. MassHealth approved 15 minutes of assistance per activity, but only 6 times per day, 7 days/week for a total of 630 minutes/week. The PCA comments (which speak to both bladder care and bowel care) state the

³ Due to the Aid Pending protection that went in place pre-hearing, this decrease never took effect, and is pending the outcome of this decision.

⁴ The initial modification of reduction of 2 minutes day for the ADL of Undressing is minor and only cut 14 minutes/week out of the request. So even with this rescind and MassHealth approval action, if none of the other disputed time is approved, Appellant would then be approved for only 62.00 hours/week.

⁵ The PCA time requested for “Incontinence – Bowel Care” was approved in full, 15 minutes/daily.

following: “[PCA] to set up and put away equipment. Max [Assistance] with straight cath every 2 hours, hygiene, barrier cream, and Depends. Consumer unable [to assist] due to weakness and fatigue. Max [Assistance] with hygiene and clothing readjustment after elimination”. The comment for nighttime hours also states that “clothing changed if wet or soiled during night”. See Exhibit 3, page 17.

MassHealth explained that the frequency was adjusted as the agency thought the need for a “straight cath” to be checked every two hours was excessive and beyond the standard of care which would be every 3 hours. MassHealth asked the Appellant to testify how many times she has her catheter emptied daily, and Appellant offered somewhat disjointed testimony indicating the urinary catheter might be emptied, changed, or checked 3 or 4 times daily before 3pm⁶, but her testimony touched on nighttime needs and other activities that may occur around the catheter checks. Appellant is usually awake from 6:00 A.M. to 8:00 P.M. most days. Appellant explained that her catheter may be checked, addressed, or emptied even at night when she is in bed and this is consistent with the comments in the packet in Exhibit 3. [Exhibit 3, page 18 verifies that Appellant requested, and received (partial) approval for time for PCA assistance with the ADL of “toileting” during the nighttime hours from 12:00 Midnight to 6:00 AM.]

Findings of Fact

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

1. Appellant is a [REDACTED] who lives in the community. She primarily needs PCA assistance due to her MS which has affected her since 2004. (Testimony and Exhibit 3)
2. Appellant’s medical history also includes 2 CVA’s and Devic’s Disease. She has left sided weakness including no sensation in her left hand. She has lost peripheral vision and has tunnel vision. She had a catheter put in her chest in 2009 and also uses a separate catheter for toileting with straight catheter use every 2 hours. She has a history of decubiti on her buttocks and heel. In the year prior to the PCA request, she had a hospitalization related to pneumonia and COVID-19. She is now wheelchair dependent, with lots of pain all over her body. She is repositioned frequently. Appellant also uses a Hoyer lift to assist with transfers and her daily baths and cleaning involve bed baths. (Testimony and Exhibit 3)
3. For at least some period of time during the federal state of emergency related to COVID-19, Appellant’s approved amount of PCA hours increased to 66.50 hours/week of day and evening PCA services. (Testimony)
 - a. Due to the appeal, Appellant currently has Aid Pending protection of that amount of 66.50 hour/week of PCA services. (Testimony and Exhibit 1)

⁶ Appellant’s testimony understandably focused a bit on the catheter checks and changes related to other activities, such as when it occurred during or around an activity such as a Transfer, the Bed Bath, or Changing Clothes.

- i. Appellant testified that she was unaware of this increase to 66.50 hours and indicated that she only used 65.00 hours/week. (Testimony)
- 4. On or around March 4, 2022, Stavros submitted a request for 66.50 hours/year for the PA period from April 23, 2022 to April 22, 2023. (Testimony and Exhibit 3)
- 5. In the appealable action notice at issue in this appeal, MassHealth made three modifications, which resulted in an approval notice of 61.75 day and evening PCA hours/week. (Testimony and Exhibits 1 and 3)
- 6. At hearing, MassHealth rescinded its modification to the ADL of “Undressing”. The restoration of this time increased the approved total of PCA hours to 62.00 day and evening PCA hours/week, leaving two modifications in dispute. (Testimony and Exhibit 3)
- 7. The first modification involved a 56 minute reduction to PCA time for assistance with PROMs. The request consisted of this:

Tasks	Mins./Episode	Episodes/Day	Days/Week	Total Mins./Week
Upper Extremities - Left Side	7 minutes	2	7	98 minutes
Upper Extremities - Right Side	8 minutes	2	7	112 minutes
Lower Extremities - Left Side	8 minutes	2	7	112 minutes
Lower Extremities - Right Side	7 minutes	2	7	98 minutes
TOTAL				420 minutes

(Testimony and Exhibit 3)

- a. MassHealth approved all but the Upper Extremities – Right Side in full. MassHealth approved 8 minutes, one time per day daily for this subcategory. (Testimony and Exhibit 3)
- b. Appellant’s history of CVAs has weakened her left side the most. She has limited use of her right hand, which she uses, with some discomfort for simple tasks such as handling a phone or using utensils such as forks or spoons. (Testimony)
- 8. The second and last modification involved the ADL of “Toileting – Bladder Care”. The request from Stavros was for 15 minutes of assistance, 8 times per day, 7 days a week for a total of 840 minutes/week. MassHealth approved 15 minutes of assistance per activity, but only 6 times per day, 7 days/week for a total of 630 minutes/week. (Testimony and Exhibit 3)
 - a. The request from Stavros, in two different places in Exhibit 3, states that Appellant needs assistance in the form of her “straight cath” every two hours. (Exhibits 3, pages 9 and 17)
 - b. Appellant indicates she has her catheter for her bladder changed, attended to, and/or

emptied approximately four times before 3:00 P.M. (Testimony)

- c. Appellant's bedtime or sleeping schedule generally falls from 8:00 P.M. to 6:00 A.M. most days. (Testimony)
- d. Appellant has her catheter changed, attended to, and/or emptied during her nighttime hours. (Testimony)
- e. Appellant has PCA assistance requested, and received approval from MassHealth for, PCA assistance with "Toileting – Bladder Care" during the nighttime hours. (Testimony and Exhibit 3)

Analysis and Conclusions of Law

The regulations concerning PCA Services are found at 130 CMR 422.000 et seq. Pursuant to 130 CMR 422.403(C), MassHealth covers PCA services when "(1) they are prescribed by a physician or a nurse practitioner who is responsible for the oversight of the member's health care; (2) the member's disability is permanent or chronic in nature and impairs the member's functional ability to perform ADLs and IADLs without physical assistance; (3) the member, as determined by the personal care agency, requires physical assistance with two or more of the ADLs as defined in 130 CMR 422.410(A); and (4) MassHealth has determined that the PCA services are medically necessary." It is undisputed that this Appellant is a MassHealth member eligible for PCA services.

All requested PCA services must be medically necessary for prior authorization to be approved. A portion of the MassHealth regulation which applies to all providers, including the PCA program, and which describes what kind of services meet the definition of "medical necessity", appears below:

130 CMR 450.204: Medical Necessity

The MassHealth agency will not pay a provider for services that are not medically necessary and may impose sanctions on a provider for providing or prescribing a service or for admitting a member to an inpatient facility where such service or admission is not medically necessary.

(A) A service is "medically necessary" if:

*(1) it is **reasonably calculated** to prevent, diagnose, prevent the worsening of, alleviate, correct, or cure conditions in the member that endanger life, cause suffering or pain, cause physical deformity or malfunction, threaten to cause or to aggravate a handicap, or result in illness or infirmity; and*

(2) there is no other medical service or site of service, comparable in effect, available, and suitable for the member requesting the service, that is more conservative or less costly to the MassHealth agency. Services that are less costly to the MassHealth agency include, but are not limited to, health care reasonably known by the provider, or identified by the MassHealth agency pursuant to a prior-authorization request, to be available to the member through sources described in 130 CMR 450.317(C), 503.007, or 517.007.

*(B) **Medically necessary services must be of a quality that meets professionally recognized***

standards of health care, and must be substantiated by records including evidence of such medical necessity and quality...

(Emphasis added.)

The relevant portion of 130 CMR 422.410 which further defines the specific ADLs and IADLs covered by this program reads as follows:

422.410: Activities of Daily Living and Instrumental Activities of Daily Living

(A) Activities of Daily Living (ADLs). Activities of daily living include the following categories of activities. Any number of activities within one category of activity is counted as one ADL:

- (1) mobility: physically assisting a member who has a mobility impairment that prevents unassisted transferring, walking, or use of prescribed durable medical equipment;*
- (2) assistance with medications or other health-related needs: physically assisting a member to take medications prescribed by a physician that otherwise would be self administered;*
- (3) bathing or grooming: physically assisting a member with bathing, personal hygiene, or grooming;*
- (4) dressing: physically assisting a member to dress or undress;*
- (5) passive range-of-motion exercises: physically assisting a member to perform range-of motion exercises;***
- (6) eating: physically assisting a member to eat. This can include assistance with tubefeeding and special nutritional and dietary needs; and*
- (7) toileting: physically assisting a member with bowel or bladder needs.***

(B) Instrumental Activities of Daily Living (IADLs). Instrumental activities of daily living include the following:

- (1) household services: physically assisting with household management tasks that are incidental to the care of the member, including laundry, shopping, and housekeeping;*
- (2) meal preparation and clean-up: physically assisting a member to prepare meals;*
- (3) transportation: accompanying the member to medical providers; and*
- (4) special needs: assisting the member with:*
 - (a) the care and maintenance of wheelchairs and adaptive devices;*
 - (b) completing the paperwork required for receiving PCA services; and*
 - (c) other special needs approved by the MassHealth agency as being instrumental to the health care of the member.*

(**Bolded** emphasis added.)

Another regulation often relevant to this type of appeal is found in 130 CMR 420.412.

422.412: Non-covered Services

MassHealth does not cover any of the following as part of the PCA program or the transitional living program:

- (A) social services including, but not limited to, babysitting, respite care, vocational rehabilitation, sheltered workshop, educational services, recreational services, advocacy, and liaison services with other agencies;*
- (B) medical services available from other MassHealth providers, such as physician, pharmacy, or community health center services;*
- (C) assistance provided in the form of cueing, prompting, supervision, guiding, or coaching;*
- (D) PCA services provided to a member while the member is a resident of a nursing facility or other inpatient facility;*
- (E) PCA services provided to a member during the time a member is participating in a community program funded by MassHealth including, but not limited to, day habilitation, adult day health, adult foster care, or group adult foster care;*
- (F) services provided by family members, as defined in 130 CMR 422.402; or*
- (G) surrogates, as defined in 130 CMR 422.402.*

(Bolded emphasis added.)

Although MassHealth made 3 modifications which could be subject to this appeal, one (for the ADL of Undressing) was rescinded and approved in full per the request from the Appellant's provider. There is no remaining dispute to address so this portion of the appeal is DISMISSED per 130 CMR 610.051.

As to the two disputed ADLs, with regard to PROMs, the format within the Appellant's PA request is a bit confusing, as more time is actually asked for the left side for one portion of the body, and right side from the other. In reviewing it all, it appears that what the provider did was ask for 15 minutes for each half of the body (15 minutes for upper and lower, and 15 minutes for the left and right, to be done twice per day, totaling 1 hour per day). MassHealth made one modification which limited the upper right exercise. As the agency pointed out, Appellant is not someone who is completely paralyzed or immobile, so MassHealth has difficulty justifying the full PROM time.⁷ Furthermore, the fact that Appellant does have some limited functional use of her right hand justifies the decision that Appellant may not need as much time for that extremity. Although Appellant and her provider make the case for having PROM time to promote the maintenance of tone, greater joint flexibility, and improved circulation while minimizing spasms, the fact that the same amount of time was requested for the two sides of the body is questionable and hard to justify, especially when Appellant like most stroke patients has greater functional limitations on one side. Based on the evidence in this record, I find the MassHealth decision to modify time here and reduce the frequency to be justifiable. This portion of the appeal is DENIED.

⁷ Historically, MassHealth often only allows PROM for people who are paralyzed or functionally immobile. Others with slightly less severe physical limitations may need exercise or range of motion therapy, but if they can participate it usually is considered Active Range of Motion. Only Passive Range of Motion time should be allowed for use by a PCA. See 130 CMR 422.410(A)(5); 130 CMR 422.412(C). The fact that MassHealth is allowing any PCA time for the ADL of PROM speaks to the severity of Appellant's needs, and MassHealth's awareness of those needs.

As for the issue involving the more substantial amount of disputed time, I find in favor of the Appellant. While I understand and respect MassHealth's argument about the standard of care and its effect on the frequency, for this activity, there is written evidence from the submitting provider repeatedly stating the need to address the catheter frequently and on an every two hour basis. Further, although Appellant's testimony was not completely clear, the testimony given also did not contradict a conclusion that frequent urination and the need to address the catheter regularly for this Appellant was necessary. Appellant also described a situation where she may have her catheter checked four times in the first 9 hours of her day. While not exactly every two hours, this is also somewhat consistent (and certainly not inconsistent) with the toileting assistance ask of 9 times (8 for bladder and 1 for bowel) during the 16-hour period (from 6:00 AM to 12:00 Midnight) that make up the "day and evening" period of the PCA day. In addition, the fact that Appellant asked for, and received PCA toileting assistance during the overnight hours (from 12:00 Midnight to 6:00 AM) adds support for the fact that Appellant and her catheter may need checks, even after she tries to turn in for the night at 8:00 PM but before 12 Midnight. In any event, Appellant's need for assistance with eight times per day is slightly more consistent than MassHealth's suggestion that it be six times per day.

I will also note that if this additional time for Toileting is not approved, this Appellant will see her total PCA approved time go from 66.50 hours/week to 62.00 hours/week. That seems like a substantial drop for this Appellant who not only has severe conditions, especially when the record does not have much in evidence showing that there has been any short-term history of medical improvement which could result in increased functional abilities for the Appellant. For the totality of those reasons, I find the requested frequency for assistance with the ADL of Toileting for this Appellant to be appropriate. This portion of the appeal is thus APPROVED.

In conclusion, this appeal is APPROVED IN PART, DENIED IN PART, and DISMISSED IN PART. With these adjustments, I find the total time approved should be 65.50 hours/week.⁸

⁸ There were 3,985 minutes requested, and all but 56 for PROM were approved. See Exhibit 3, page 28. This results in 3,929 minutes which is 65.48 hours, which is rounded up (per MassHealth protocol, see id.) to the nearest 15-minute increment of 68.50 hours. See id.

As always, MassHealth is encouraged to check the Hearing Officer's math. If MassHealth finds an error that should result in more time for Appellant, the agency may make that correction without notifying BOH. In contrast, if MassHealth believe there was a math error that would reduce Appellant's time to under 68.50 hours, the agency is encouraged to notify the Director or Deputy Director of the Board of Hearings for assistance or questions with appropriate implementation.

Order for MassHealth/OPTUM

Within 30 days of the date of this decision,

- Remove the Aid Pending protection of PCA benefits.
- Adjust the approved PCA time in accordance with this decision to allow for 65.50 day and evening hours/week and 2 hours/night of PCA time for the PA period from 4/23/2022 to 4/22/2023.
- Send written notice to Appellant and her PCA provider verifying the new amount of approved PCA time.

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.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact OPTUM through either the MassHealth Prior Authorization Unit (1-800-862-8341) or general MassHealth Customer Service (1-800-841-2900). 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.

Christopher Taffe
Hearing Officer
Board of Hearings

cc: OPTUM/MassHealth LTSS Appeals Coordinator