

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2203076
Decision Date:	9/22/2022	Hearing Date:	08/22/2022
Hearing Officer:	Susan Burgess-Cox		

Appearance for Appellant:




Appearance for MassHealth:

Linda Phillips



*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:	Denied	Issue:	Clinical Eligibility
Decision Date:	9/22/2022	Hearing Date:	08/22/2022
MassHealth's Rep.:	Linda Phillips	Appellant's Rep.:	
Hearing Location:	All Parties Appeared by Telephone	Aid Pending:	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 March 25, 2022, MassHealth notified the appellant that he was not clinically eligible for the Moving Forward Plan Community Living and Home-and-Community-Based Waiver (MFP-CL Waiver) because he was not an inpatient in a nursing facility or chronic disease or rehabilitation hospital with a continuous length of stay of 90 or more days at the time of the application for the waiver. (130 CMR 519.007(H); Exhibit 1). An appeal was filed on April 22, 2022. (Exhibit 2).

On April 28, 2022, the Board of Hearings dismissed the appeal as the request for hearing form was signed by someone other than the appellant and no records were presented to show that the individual had authority to serve as an appeal representative. (130 CMR 610.034; 130 CMR 610.035; Exhibit 3). In response to this notice, the individual filing the appeal provided a copy of a MassHealth Permission to Share Information Form as well as a Health Care Proxy naming him as an individual with legal authority to act on the appellant's behalf. (130 CMR 610.004; 130 CMR 610.016; Exhibit 4).

On May 5, 2022, the Board of Hearings vacated the dismissal and scheduled a

hearing for June 9, 2022. (130 CMR 610.000; Exhibit 5). On June 7, 2022, the Board of Hearings granted a request to reschedule the hearing as the appellant's representative demonstrated good cause to reschedule the hearing. (130 CMR 610.048; Exhibit 6). On June 13, 2022, the Board of Hearings scheduled a hearing for August 9, 2022. (130 CMR 610.000; Exhibit 7). On July 15, 2022, the Board of Hearings received a second request to reschedule with a list of dates for which the appellant's representative was available. (Exhibit 8). The Board of Hearings determined that the appellant's representative demonstrated good cause to reschedule the hearing. (130 CMR 610.048). On July 22, 2022, the Board of Hearings scheduled a hearing for August 22, 2022. (130 CMR 610.000; Exhibit 9). The appellant's requests to reschedule moved the decision due date to October 13, 2022.

A decision regarding the scope or amount of assistance is valid grounds for appeal. (130 CMR 610.032).

Action Taken by MassHealth

MassHealth notified the appellant that he is not eligible for the MFP-CL Waiver Program.

Issue

Whether MassHealth was correct in their decision regarding the appellant's eligibility for the MFP-CL Waiver Program.

Summary of Evidence

All parties appeared by telephone. Documents presented by MassHealth were incorporated into the hearing record as Exhibit 10 and 12. Documents presented by the appellant's representative were incorporated into the hearing record as Exhibit 11 and 13.

The appellant submitted an application for the Moving Forward Plan Community Living Waiver (MFP-CL Waiver) in March 2022. At the time of the application, the appellant was a patient at Cape Cod Hospital, an acute care facility. The MassHealth representative testified that to be clinically eligible for the waiver, a member must meet all of the following criteria:

- is 18 years of age or older and, if younger than 65 years old, is totally and permanently disabled in accordance with Title XVI standards;

- is an inpatient in a nursing facility, chronic disease or rehabilitation hospital, or, for participants 18 through 21 years of age or 65 years of age and older, psychiatric hospital with a continuous length of stay of 90 or more days, excluding rehabilitation days;
- must have received MassHealth benefits for inpatient services, and be MassHealth eligible at least the day before discharge;
- needs one or more of the services under the MFP Community Living Waiver;
- is able to be safely served in the community within the terms of the MFP Community Living Waiver; and
- is transitioning to the community setting from a facility, moving to a qualified residence, such as a home owned or leased by the applicant or a family member, an apartment with an individual lease, or a community-based residential setting in which no more than four unrelated individuals reside.

The MassHealth representative testified that the appellant did not meet the regulatory requirements for this program. A discussion with a social worker from Cape Cod Hospital confirmed that the appellant was admitted into the acute care facility in [REDACTED] and remained in the facility at the time of the waiver application. While this was a stay of 90-days or longer, it was in an acute care facility, not one of the facilities specifically listed in the regulations. Therefore, MassHealth determined that the appellant did not meet the waiver's clinical eligibility requirements.

Prior to the Cape Cod Hospital admission, the appellant was living in the community and eligible for MassHealth services through the Frail Elder Waiver (FEW) program. The MassHealth representative noted that the FEW provides MassHealth services to individuals at home who need basic to intensive care needs.

Progress notes provided by the appellant from services at the acute care facility in [REDACTED] state that the appellant has a history of posttraumatic quadriplegia with a chronic Foley catheter, pulmonary emboli, urinary tract infections, Clostridium difficile (C. diff) colitis, pneumonia, constipation and a right shoulder fracture. (Exhibit 13). At the time of the assessment, the appellant reported constant right mid to lower abdominal pain at 10/10 but denied abdominal distention, nausea or vomiting and was actively having a bowel movement at the time of the nurse practitioner's arrival. (Exhibit 13). The appellant was not agreeable to having labs drawn or a CT scan, and no vital signs were obtained. (Exhibit 13). The appellant was agreeable to an abdominal X-ray and having his Foley flushed. (Exhibit 13).

The notes indicate a history of the appellant refusing different types of care during his admission including repositioning, being out of bed, deep vein thrombosis (DVT) prophylaxis, having a sand bed, and completing medication regimens. (Exhibit 13). The notes also list a probable mild cognitive impairment regarding executive functioning and judgement. (Exhibit 13). The appellant has a history of traumatic brain injury and the treating provider suspected a mood disorder. (Exhibit 13). A head Computed Topography (CT) scan in 2019 indicated atrophy with frontal predominance. (Exhibit 13). During the admission at Cape Cod Hospital, psychiatry was consulted but the appellant refused to see them at least three times. (Exhibit 13). Notes state that the appellant was found to lack capacity and a Health Care Proxy was invoked. (Exhibit 13). The appellant was provided supportive care for safety. (Exhibit 13).

Counsel for the appellant did not dispute the fact that the appellant was still at an acute inpatient facility following an admission in [REDACTED] due to a lack of discharge options. Counsel noted that individuals at the hospital applied to 153 skilled nursing facilities on the appellant's behalf and none of the facilities offered the appellant a bed. Counsel did not believe that the specific reasons for denying the appellant admission into these facilities were relevant to this case. Instead, counsel simply noted that it was challenging for those at the hospital to find placement for the appellant in one of the settings listed in the regulations.

Counsel argued that the regulations do not specifically prohibit eligibility for the waiver program for applicants residing in an acute hospital setting. Additionally, one should look to the level of care provided to the individual rather than the type of facility. Counsel argued that the appellant was receiving custodial care in the current facility, not an acute level of care. The only notes presented by the appellant are from January 2022 reflecting a history of noncompliance or refusal to receive treatment at the acute facility and the invocation of a Health Care Proxy due to a finding of incapacity. Counsel did not present any daily nursing or other daily notes from the treating source to verify any custodial level of care.

Counsel argued that since the pandemic began, it has been increasingly difficult for hospitals to discharge challenging members due to capacity and staffing issues at skilled nursing facilities. Counsel asked that the Board of Hearings look to the facts of his case and the circumstances related to the pandemic including staffing and space rather than regulatory language that specifies the institutions where an individual must be an inpatient. Counsel asked for the appellant to be provided with the opportunity to have the agency continue the evaluation regarding his clinical eligibility for the waiver.

Findings of Fact

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

1. The appellant submitted an application for the Moving Forward Plan Community Living Waiver (MFP-CL Waiver).
2. To be eligible for the waiver, a member must meet all of the following criteria:
 - is 18 years of age or older and, if younger than 65 years old, is totally and permanently disabled in accordance with Title XVI standards;
 - is an inpatient in a nursing facility, chronic disease or rehabilitation hospital, or, for participants 18 through 21 years of age or 65 years of age and older, psychiatric hospital with a continuous length of stay of 90 or more days, excluding rehabilitation days;
 - must have received MassHealth benefits for inpatient services, and be MassHealth eligible at least the day before discharge;
 - needs one or more of the services under the MFP Community Living Waiver;
 - is able to be safely served in the community within the terms of the MFP Community Living Waiver; and
 - is transitioning to the community setting from a facility, moving to a qualified residence, such as a home owned or leased by the applicant or a family member, an apartment with an individual lease, or a community-based residential setting in which no more than four unrelated individuals reside.
3. The appellant has been in an acute care facility since [REDACTED].
4. Prior to the admission into the acute care facility, the appellant was living in the community and eligible for MassHealth through the Frail Elder Waiver (FEW) program.
5. The appellant applied for admission into approximately 153 skilled nursing facilities and was denied admission to all facilities.
6. The appellant has a history of posttraumatic quadriplegia with a chronic Foley catheter, pulmonary emboli, urinary tract infections, C diff colitis, pneumonia, constipation and a right shoulder fracture.
7. An assessment in January 2022 notes a reporting of constant right mid to

lower abdominal pain at 10/10.

8. The appellant was not agreeable to having labs drawn or a CT scan, and no vital signs were obtained.
9. The appellant was agreeable to an abdominal X-ray and having his Foley flushed.
10. During his stay at Cape Cod Hospital, the appellant had a history of refusing different types of care including repositioning, being out of bed, deep vein thrombosis (DVT) prophylaxis, having a sand bed, and completing medication regimens.
11. The appellant was diagnosed with a probable mild cognitive impairment regarding executive functioning and judgement.
12. The appellant has a history of traumatic brain injury and a treating provider suspected a mood disorder.
13. A head CT scan in 2019 indicated atrophy with frontal predominance.
14. During the admission at Cape Cod Hospital, psychiatry was consulted but the appellant refused to see them at least three times.
15. The appellant was found to lack capacity and a Health Care Proxy was invoked.
16. During the admission at Cape Cod Hospital, the appellant was provided supportive care for safety.
17. MassHealth did not perform any other assessments to determine if the appellant was clinically eligible for the MFP-CL waiver.

Analysis and Conclusions of Law

The MassHealth regulations at 130 CMR 519.000 explain the categorical requirements and financial standards that must be met to qualify for a MassHealth coverage type. The regulations at 130 CMR 519.007 describe the eligibility requirements for MassHealth Standard coverage for individuals who would be institutionalized if they were not receiving home- and community- based services.

The Moving Forward Plan Community Living Waiver (MFP-CL Waiver), as authorized under section 1915(c) of the Social Security Act, allows an applicant or member who is certified by the MassHealth agency or its agent to be in need of nursing facility services, chronic disease or rehabilitation hospital services, or, for participants 18 through 21 years of age or 65 years of age and older, psychiatric hospital services to receive specified waiver services, other than residential support services in the home or community, if he or she meets all of the following criteria:

1. is 18 years of age or older and, if younger than 65 years old, is totally and permanently disabled in accordance with Title XVI standards;
2. is an inpatient in a nursing facility, chronic disease or rehabilitation hospital, or, for participants 18 through 21 years of age or 65 years of age and older, psychiatric hospital with a continuous length of stay of 90 or more days, excluding rehabilitation days;
3. must have received MassHealth benefits for inpatient services, and be MassHealth eligible at least the day before discharge;
4. needs one or more of the services under the MFP Community Living Waiver;
5. is able to be safely served in the community within the terms of the MFP Community Living Waiver; and
6. is transitioning to the community setting from a facility, moving to a qualified residence, such as a home owned or leased by the applicant or a family member, an apartment with an individual lease, or a community-based residential setting in which no more than four unrelated individuals reside. (130 CMR 519.007(H)(1)(a)).

MassHealth also has income and asset eligibility requirements for the MFP-CL program but the only issue raised in the appeal was the clinical eligibility requirement that an individual be an inpatient in a nursing facility, chronic disease or rehabilitation hospital, or, for participants 18 through 21 years of age or 65 years of age and older, psychiatric hospital with a continuous length of stay of 90 or more days, excluding rehabilitation days. (130 CMR 519.007(H)(1); 130 CMR 519.007(H)(2)). Counsel for the appellant did not dispute the fact that the appellant was in an acute care facility rather than one of the facilities listed in the regulations. Instead, counsel argued that an exception should be made for the appellant. The arguments presented by counsel for making such an exception are not valid or persuasive for several reasons.

First, counsel's argument that the appellant was not offered admission to over 153 skilled nursing facilities for reasons beyond his control is not supported by the medical records presented by the appellant. The records show that the

appellant either failed to comply with treatment options or refused treatment throughout his admission in the acute care facility. The records appeared to demonstrate the appellant's continued need for an acute level of care rather than a failure to discharge him to another setting for reasons beyond his control.

Second, counsel's argument that the regulations do not anticipate circumstances such as a staffing shortage or lack of bed availability due to a pandemic is not sufficient to demonstrate that the appellant would be clinically eligible for the waiver program. Counsel did not note any changes in policy to accommodate limitations that may be related to the pandemic or other reasons for making such exceptions. Additionally, as indicated above, records presented by the appellant tend to support the continuance of an acute level of care rather than services available at the type of facility listed in the regulations or a community setting.

Third, counsel's statement that the appellant was receiving only custodial care in the current facility is refuted by records that show a desire to provide care beyond simple custodial care and the reason for not doing so was continued refusal by the appellant. The notes did not include any recommendation for discharge from the acute care facility or change in the level of care within the facility. Counsel did not present any daily nursing or other notes from the treating source to verify a custodial level of care alone. Additionally, the invocation of a Health Care Proxy due to a finding of a lack of capacity demonstrates a possible need for a level of care beyond the simple custodial care noted by counsel.

Finally, the fact that the regulations do not prohibit waiver eligibility for applicants residing in an acute hospital setting does not make an individual eligible for the program without being in one of the settings specifically listed in the regulations. (130 CMR 519.007(H)). The regulations have specific definitions for each type of facility. The definition of an acute inpatient hospital specifically states that it "does not include any facility that is licensed as a chronic disease and rehabilitation hospital, any hospital that is licensed primarily to provide mental health services, or any unit of a facility that is licensed as a nursing facility, a chronic disease unit, or a rehabilitation unit". (130 CMR 415.402). The other institutions listed in the waiver regulations have specific definitions related to their licensure and level of care. A nursing facility is defined as an institution or a distinct part of an institution that meets the provider-eligibility and certification requirements of 130 CMR 456.404 or 456.405. This includes licensure to operate as such a facility. (130 CMR 456.000). The regulations define a chronic disease and rehabilitation hospital as a facility, or a unit within a facility, with a majority of its beds licensed by the Massachusetts Department of Public Health to provide chronic-disease services. (130 CMR 435.402).

The waiver regulations appear to limit the type of facility where a member is admitted because the level of care provided in an acute facility differs greatly from that provided in one of the settings listed in the regulations. Additionally, as noted above, the evidence presented by the appellant demonstrates that he was receiving a level of care beyond what counsel termed as a "custodial" level of care in the acute setting.

For the reasons noted above, the decision made by MassHealth was correct.

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.

Susan Burgess-Cox
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Prior Authorization

Appellant Representative: [REDACTED]

Appellant Representative: [REDACTED]