

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: Approved

Appeal Number: 2203312

Decision Date: 6/9/2022

Hearing Date: 05/18/2022

Hearing Officer: Radha Tilva

Record Open to: 05/20/2022

Appearance for Appellant:



Appearance for MassHealth:

Stephanie DeSousa, Taunton MEC Rep.,
on behalf of Jamie Silva



*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	Issue:	LTC – disqualifying transfer
Decision Date:	6/9/2022	Hearing Date:	05/18/2022
MassHealth’s Rep.:	Stephanie DeSousa	Appellant’s Rep.:	[REDACTED]
Hearing Location:	Taunton MassHealth Enrollment Center	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 April 7, 2022, MassHealth denied the appellant's application for MassHealth long-term care benefits because MassHealth determined that appellant made disqualifying transfers resulting in a penalty period of April 1, 2022 to May 8, 2022 (Exhibit 4, p. 31).¹ The appellant filed this appeal in a timely manner on May 2, 2022 (see 130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032).

At hearing the record was left open for appellant to submit supplemental information to support her claim. The appellant submitted supporting documentation on May 20, 2022.

Action Taken by MassHealth

MassHealth determined that appellant made disqualifying transfers resulting in a penalty period of April 1, 2022 to May 8, 2022.

¹ The appellant submitted a notice dated March 14, 2022 with the fair hearing request, however, at hearing it was clear that the issue under appeal was a notice dated April 7, 2022 which was included in MassHealth’s submission.

Issue

The appeal issue is whether MassHealth was correct in determining that appellant made disqualifying transfers resulting in a penalty period of April 1, 2022 to May 8, 2022.

Summary of Evidence

The appellant, a female in her 80s, was admitted to a long-term care facility in April 2022 and applied for MassHealth long-term care benefits on January 27, 2022. The application was originally denied for missing verifications and that denial was appealed, protecting the original application date. The documents were sent in and the applicant was denied on April 7, 2022 for a disqualifying transfer based off the value of two properties that appellant owned and transferred to appellant's niece within the lookback period. The transfer took place in August 2021 and the fair market value of the transfers was \$158,300.00 for the property and \$6,900.00 for the parcel of land abutting the property. MassHealth, thus, calculated a total transfer penalty of \$165,200.00 which divided by the daily rate average of \$410.00 equals 403 days.

The MassHealth representative stated that appellant transferred the property and parcel on August 4, 2021. MassHealth submitted proof of when the property and parcel were transferred to the niece and included it in their submission (Exhibit 4).

The appellant was represented by an attorney who stated the following: he does not dispute that the transfers of the property and parcel happened within the lookback period to appellant's niece. The transfers, however, were for a purpose exclusive of Medicaid planning and should be waived. The property and side parcel fell into disrepair and the applicant wanted the property to go to the niece because it had been too much for her to handle. The niece had money to fix the property. At the time no one discussed or knew about Medicaid rules. An affidavit from the attorney who drafted the deeds was submitted post hearing to show that the appellant transferred the property to save it. The attorney stated that the attorney who helped facilitate the transfer was not a Medicaid planning attorney. The attorney further stated that the appellant was living at the property until about 2018 or 2019. Her niece was taking care of her until April 2022. The attorney stated that appellant's health was "not great" in 2017 when the transfers happened.

The record was left open for appellant to submit supporting documentation which was received on May 20, 2022. Included in the submission was a notarized affidavit from the attorney who drafted the deeds which stated that appellant's goal in originally drafting the 2017 deeds, where she retained a life estate, was to avoid probate and pass the property onto her niece (Exhibit 5, p. 3). Eventually when the property became condemned in 2018 the appellant approached her attorney again stating that she no longer wanted the life estate either and that her niece would handle the expenses and repairs of the property as she could no longer afford the cost of the needed maintenance and repairs. The attorney attested that there was no mention of Medicaid or MassHealth when she made these transfers (*Id.*). The next notarized affidavit was from a close friend of appellant's that reiterated appellant's intent at transferring the property to her niece (Exhibit 5, p. 3). In addition, the affidavit stated that appellant always lived independently until she was ordered by the town to vacate the

premises, at which point, she moved in with her niece (*Id.*). The last affidavit submitted was from the appellant's niece and corroborated that her aunt transferred the property because she could no longer afford it or care for it and it had become condemned (Exhibit 5, p. 7). The niece also mentioned that she helped care for her aunt by providing her groceries, cooking, helping her with activities and inactivates of daily living (*Id.*). A copy of the condemnation letter, dated September 27, 2018, was also submitted with appellant's submission (Exhibit 5, p. 9).

Findings of Fact

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

1. The appellant, a female in her eighties, was admitted to a long-term care facility in April 2022 and applied for MassHealth long-term care benefits on January 27, 2022.
2. Within the lookback period, in 2021 appellant transferred her primary residence and a parcel of land abutting the property to her niece, while retaining a life estate.
3. The property was deemed condemned on September 27, 2018 at which point appellant moved in with her niece.
4. The appellant transferred the remainder interest in 2021 to her niece as she could no longer afford the needed maintenance or repairs.
5. The appellant's niece cared for the appellant during the time she lived with her.
6. The appellant never mentioned Medicaid planning when she met with the attorney who drafted the deeds and helped with the transfer.

Analysis and Conclusions of Law

Regulation 130 CMR 520.019 governing resource transfers states as follows:

(B) Look-back Period. Transfers of resources are subject to a look-back period, beginning on the first date the individual is both a nursing-facility resident and has applied for or is receiving MassHealth Standard.

(1) For transfers occurring before February 8, 2006, this period generally extends back in time for 36 months.

(2) For transfers of resources occurring on or after February 8, 2006, the period generally extends back in time for 60 months. The 60-month look-back period will begin to be phased in on February 8, 2009. Beginning on March 8, 2009, applicants will be asked to provide verifications of their assets for the 37 months prior to the application. As each month passes, the look-back period will increase by one month until the full 60 months is reached on February 8, 2011.

(3) For transfers of resources from or into trusts, the look-back period is described in 130 CMR 520.023(A).

(C) Disqualifying Transfer of Resources. The MassHealth agency considers any transfer during the appropriate look-back period by the nursing-facility resident or spouse of a resource, or interest in a resource, owned by or available to the nursing-facility resident or the spouse (including the home or former home of the nursing-facility resident or the spouse) for less than fair-market value a disqualifying transfer unless listed as permissible in 130 CMR 520.019(D), identified in 130 CMR 520.019(F), or exempted in 130 CMR 520.019(J). The MassHealth agency may consider as a disqualifying transfer **any action** taken to avoid receiving a resource to which the nursing-facility resident or spouse is or would be entitled if such action had not been taken. Action taken to avoid receiving a resource may include, but is not limited to, waiving the right to receive a resource, not accepting a resource, agreeing to the diversion of a resource, or failure to take legal action to obtain a resource. In determining whether or not failure to take legal action to receive a resource is reasonably considered a transfer by the individual, the MassHealth agency considers the specific circumstances involved. A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available.

There was no dispute that appellant transferred otherwise countable assets to her niece within the appropriate look-back period.

Under 42 USC § 1396p(c)(2)(C), when there has been a transfer of resources for less than fair market value, the Agency has discretion not to impose a period of disqualification if the applicant meets his/her burden of proof in that:

a satisfactory showing is made to the State (in accordance with regulations promulgated by the Secretary) that

- (i) the individual intended to dispose of the assets either at fair market value, or for other valuable consideration,*
- (ii) the assets were transferred exclusively for a purpose other than to qualify for medical assistance, ...*

The cognate MassHealth regulation, 130 CMR 520.019(F), states:

Determination of Intent. In addition to the permissible transfers described in 130 CMR 520.019(D), the MassHealth agency will not impose a period of ineligibility for transferring resources at less than fair-market value if the nursing-facility resident or the spouse demonstrates to the MassHealth agency's satisfaction that:

- (1) the resources were transferred exclusively for a purpose other than to qualify for MassHealth; or*
- (2) the nursing-facility resident or spouse intended to dispose of the resource at*

either fair-market value or for other valuable consideration. Valuable consideration is a tangible benefit equal to at least the fair-market value of the transferred resource.

Under subpart 1 of the regulation, it is not enough to demonstrate that the applicant intended to derive a benefit from the transfer other than the benefit of reducing assets and qualifying for MassHealth. Pursuant to the regulation's use of the word "*exclusively*" an applicant must demonstrate "*to MassHealth's satisfaction*" that qualifying for MassHealth had absolutely nothing to do with the matter.

An applicant will often prevail on subpart 1 of "intent" when the facts direct that, at the time the transfer was made, it would have been unreasonable for the applicant to have anticipated a nursing home placement within the foreseeable future.

As a matter of evidence, MassHealth regulation 130 CMR 610.082(C)(3) requires the following:

The hearing officer shall give due consideration to Policy Memoranda and any other MassHealth agency or Connector representations and materials containing legal rules, standards, policies, procedures, or interpretations as a source of guidance in applying a law or regulation.

The *State Medicaid Manual*, Health Care Financing Administration² Pub. 45-3, Transmittal 64 (Nov. 1994), guides state agencies on evaluating evidence relative to 42 USC § 1396p(c)(2)(C)(2) as follows:

Transfers Exclusively for a Purpose Other Than to Qualify for Medicaid: Require the individual to establish, to your satisfaction, that the asset was transferred for a purpose other than to qualify for Medicaid. Verbal assurances that the individual was not considering Medicaid when the asset was disposed of are not sufficient. Rather, convincing evidence must be presented as to the specific purpose for which the asset was transferred.

State Medicaid Manual, HCFA Transmittal 64 § 3258.10(C).

In this case, the state of appellant's health at the time of the transfer was made was "not great" according to her attorney. However, the appellant's submissions support that she never contemplated nursing home care at the time of the transfers. I find the affidavits in conjunction with the attorney's arguments credible that the appellant planned for the niece to care for her (which she did for nearly 5 years). I find it credible that considering the appellant had no funds to pay for the upkeep of her condemned property that it was reasonable for her to transfer the property to her niece out of love and affection. I further find it significant that this was the only

² HCFA [Health Care Financing Administration, now called Centers for Medicare and Medicaid Services, or "CMS"] commonly issues policy transmittals giving direction to the states regarding the application or implementation of the federal statutes.

transfer made within the look-back period that MassHealth testified to. Had the appellant been trying to reduce her assets in anticipation of possibly applying for public assistance one would expect to see other transfers within the look back period as well. Based on these facts, I conclude that appellant transferred the properties to her niece out of love and affection and for a purpose other than to qualify for Medicaid.

For the foregoing reasons, the appeal is approved.

Order for MassHealth

Rescind notice dated April 7, 2022 finding disqualifying transfers in the amount of \$165,200 and redetermine eligibility based on the analysis above.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings, at the address on the first page of this decision.

Radha Silva
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Justine Ferreira, Taunton MassHealth Enrollment Center, 21 Spring St., Ste. 4, Taunton, MA 02780

Appellant Representative: [REDACTED]
[REDACTED]