

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	DENIED	Appeal Number:	2204052
Decision Date:	8/1/2022	Hearing Date:	07/14/2022
Hearing Officer:	Christopher Taffe		

Appearance for Appellant:
Appellant, pro se (by phone)

Appearance for MassHealth:
Linda Phillips, RN, BSN, LNC-Csp.,
Associate Director - Appeals and
Regulatory Compliance (by phone)



*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:	PA – Clinical Denial – Moving Forward Plan
Decision Date:	8/1/2022	Hearing Date:	07/14/2022
MassHealth’s Rep.:	L. Phillips, RN ¹	Appellant’s Rep.:	Appellant, pro se
Hearing Location:	HarborSouth Tower, Quincy	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 May 10, 2022, MassHealth clinically denied Appellant’s eligibility to participate in the Moving Forward Plan Community Living Home-and-Community Based Services Waiver (MFP-CL) because the Appellant “...cannot be safely served in the community within the terms of this waiver”. See Exhibit 1; 130 CMR 519.007(H)(2). Appellant filed a timely appeal with the Board of Hearings on May 25, 2022. See Exhibit 1; 130 CMR 610.015(B)(2). Challenging a adverse MassHealth determination on clinical eligibility is a valid ground for appeal to the Board of Hearings. See 130 CMR 610.032.

Action Taken by MassHealth

MassHealth denied Appellant’s clinical eligibility for participation in the MFP-CL waiver program.

¹ A colleague of Ms. Phillips, Mr. Brad Goodier, also appeared and joined her on the phone call purely for observational purposes.

Issue

Is the MassHealth decision to deny Appellant's request for clinical eligibility and participation in the MFP-CL waiver program supported by the evidentiary record and regulations?

Summary of Evidence

On February 11, 2022, Appellant applied for the MFP-CL waiver. Appellant is currently residing in a skilled nursing facility (SNF) in Northeastern Massachusetts. Appellant is originally from the Southeastern part of Massachusetts, but a history of transfers and nursing facility closure(s) has led to her being a resident on the other side of Boston. There are two Home and Community-based Service (HCBS) Waivers, the MFP-CL waiver and a MFP-Residential Waiver (MFPRW). Both waivers help individuals move from a nursing home or a long stay hospital to a qualified residence in the community. The MFP-CL waivers is for individuals who can move into their own home or apartment (or the home of someone else), and who can receive services in the community that are less than 24 hours per day.

At the time of her hearing, Appellant is a MassHealth member who is [REDACTED] of age. Her assessment shows that she has been residing in SNF since 2018. Previously she was able to live in the community receiving VNA services. She struggled to live independently due to not having accessible housing on the first floor, as she had multiple falls and some difficulty with stairs. This application is her sixth application to one of the HCBS waiver programs. See Exhibit 3, page 25 (of that Exhibit's Sub-Exhibit E) for details of those prior applications.

Appellant's medical history includes: Post-Traumatic Stress Disorder (PTSD); major depressive disorder; opioid abuse; panic disorder; borderline personality disorder; chronic pain; arthropathy; dorsalgia; muscle weakness; difficulty walking; hypothyroidism; anemia; history of falls; myocardial infarction; COPD; hypertension; multiple prior abdominal surgeries; sleep disorder; tobacco use; partial intestinal obstruction; and COVID-19. Per the Appellant, she has had two colostomies, three heart attacks and 31 surgeries over the past two-plus decades.

During the assessment, the assessing nurse notice that Appellant was easily distracted and had to be frequently re-directed to answer questions. Appellant has a history of abdominal surgeries and/or illnesses. Appellant is currently a smoker, taking breaks at the facility, to use both cigarettes and vaping. The report indicates Appellant wants to see a psychiatrist outside of the one available through the SNF, and that she has providers in the SouthCoast area of the state that she is hoping to reconnect with if she qualifies for the waiver and is able to relocate closer to her home area. She is a former state employee who worked for the DMH, but she has not worked due to disability since approximately 2010. She is currently ambulatory and can move independently most of the time, but she will use a wheelchair when outside the facility to assist with travelling longer distances.

The assessing nurse noted three dates in Appellant's medical record, from January 15, 2022 to February 11, 2022, which stated that Appellant showed at times: an unsteady gait; issues with her attention span; and an occasional sense of entitlement and being in a demanding mood. She called

the nurses names during the January 15, 2022 incident. There are notes indicating that there were seven incidents of verbal abuse by Appellant during the month of January 2022. The assessor also spoke with a nurse of the facility who indicated that Appellant could be demanding where her needs are not immediately met, and that she requires supervision and redirection during any such state of agitation. The Medical Data Set (MDS) pages in Exhibit 3 also indicated that Appellant had been assessed as one who would have “*great difficulty*” taking her medications independently. See Exhibit 3, Page 12 (of that Exhibit’s Sub-Exhibit C). Per physician orders from March 2022, Appellant continues to have an order for 2-staff to assist her with her morphine and Xanax which also involved the signing of a medical form to accept it, due to a history of accusatory/manipulative behaviors regarding the taking of medications.

Page 27 of Sub-Exhibit E of Exhibit 3 has a July 2021 note from Appellant’s doctor and in the “[*History of*] chronic pain/opioid abuse”, it reads “...*We had multiple attempts to do the medications in the same way she used to take them at [prior nursing facility] - once she has transferred to the new unit started to have issues again regarding the timing of her meds - she was taking the PM meds all the time - it was difficult for nurses to keep up with this as she became upset when she had to wait as she was taking the PM anyway every four hours - we decided to schedule the morphine as well as the Xanax she's been doing better like this and it wasn't any change as she was taking over the clock (sic)*” . A more recent notation from the same physician in January 2022 states “*She tends to be drug seeking, it took some time to the prior team to make her agree with current regimen. She starts to tell the story about how much pain meds she took before and how much pain and goes on.*” See Exhibit 3, page 32 of Sub-Exhibit E.

During her portion of the testimony at this Fair Hearing, in response to certain questions and in an unsolicited manner, Appellant did discuss how she disagreed with how certain medications in the past had been lowered (namely Xanax and liquid morphine) or reduced in too rapid of a fashion. [This testimony was similar to, and consistent with, the behavior described in the medical note above.]

In addition, Exhibit 3, page 35 (of that Exhibit’s Sub-Exhibit E) had a physician order indicating that upon review by the assessment team, it was thought she would be a risk to fail if she went out in the community, and she had no known community supports which could assist her.

There are Social Service Progress Notes from February 2, 2022, indicating that Appellant would also be willing to move to a nursing facility in the Fall River area; such a setting would continue to be a medical institution, where Appellant would have a similar level of 24 hours support like she currently has at her current residence. See Exhibit 3, page 21 of Sub-Exhibit E.

An assessment was done after Appellant’s application, and the assessment concluded that it was evident that Appellant required a highly structured environment and 24/7 oversight to maintain her safety. She had a history of failures in the community and does not acknowledge her medicine-seeking behavior as a problem. While she has made some behavioral improvements recently, she continued to exhibit med-seeking behavior. It was believed that if she was discharged into the community she would simply be at an increased risk of medical and psychiatric decompensation. As a results, the various reviewing team members, including that of the agency, believed Appellant

was in continued need of a highly structured environment with more around-the-clock supervision than she would receive in this waiver, and thus she was not an appropriate candidate at the current time for the MFP-CL waiver.

Appellant testified that she realized she could be agitated at times, but that often it was the lateness of medications that played a contributing factor to any irritability. Appellant also testified that her preferred psychiatrist/psychologist is in the Fall River area of the state, and that outside supports for her, while not direct family, are available in the Southeastern Massachusetts area near the Rhode Island border. Appellant stated that she has been given some “death sentences” in terms of diagnoses but has battled through them, and gotten through them, sometimes with the help of the skilled nursing facilities. Appellant testified that she does need some help and would agree that she needs some level of support while on the outside, such as the Visiting Nurse services she received in the past prior to her nursing facility stays. Appellant has continued to work with the nursing home on finding certain emergency housing arrangements with support, and she believes the waiver would assist with reaching this outcome. Appellant testified that she is the healthiest she’s been in years and that it’s time to try to move back to a more independent setting. Appellant wants to try to get to back in the community, where she could maybe resume her ability to work with or spend time with horses and the outdoors, and she is also interested in looking into spending time with grandchildren that are in that more southern part of the state.

Appellant testified that she takes morphine approximately four times a day at set times, and two additional times as needed throughout a given day. Appellant testified that she applied for the MFP-CL waiver after consulting with a case manager but wasn’t sure why that individual talked her into selecting this particular MFP-CL waiver (instead of the MFPRW waiver).

Findings of Fact

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

1. Appellant is a [REDACTED] woman who applied for the MFP-CL waiver on February 11, 2022. (Testimony and Exhibit 3)
2. MassHealth denied the request for the MFP-CL waiver on clinical grounds because the agency review supported a conclusion that Appellant could not be safely served in the community within the terms of the waiver. (Testimony and Exhibits 1 and 3)
3. Appellant has been residing in skilled nursing facilities on a continuous basis since 2018. (Testimony and Exhibit 3)
4. Appellant’s medical history includes: Post-Traumatic Stress Disorder (PTSD); major depressive disorder; opioid abuse; panic disorder; borderline personality disorder; chronic pain; arthropathy; dorsalgia; muscle weakness; difficulty walking; hypothyroidism; anemia; history of falls; myocardial infarction; COPD; hypertension; multiple prior abdominal surgeries; sleep disorder; tobacco use; partial intestinal obstruction; and COVID-19. (Testimony and Exhibit 3)

- a. Per the Appellant, she has had two colostomies, three heart attacks and 31 surgeries over the past two-plus decades. (Testimony)
5. During the assessment, Appellant was distracted and had to be frequently re-directed. (Testimony and Exhibit 3)
6. In the months in the first portion of calendar year 2022, there are medical notes showing that Appellant became agitated with SNF staff when medications were not taken or made available immediately. (Testimony and Exhibit 3)
7. Per physician orders from March 2022, Appellant continues to have an order for 2-staff to assist her with her morphine and Xanax which also involved the signing of a medical form to accept it, due to a history of accusatory/manipulative behaviors regarding the taking of medications. (Testimony and Exhibit 3)
8. Appellant has not demonstrated that she would be capable of managing her medications in the community without greater support around the clock throughout the day. (Testimony and Exhibit 3)
 - a. Among other medications, Appellant takes morphine 4 time per day at set times, and then can have it two additional times as needed. (Testimony and Exhibit 3)
9. There is no evidence of reliable informal supports available to Appellant in the community from friends and family who reside in Massachusetts. (Testimony and Exhibit 3)

Analysis and Conclusions of Law

The issue on appeal is whether MassHealth erred in denying Appellant's application for enrollment in the MFP-CL waiver program, based on its determination that she did not meet clinical eligibility criteria. 130 CMR 519.007 describes the eligibility requirements for individuals who would be institutionalized if they were not receiving or approved for a HCBS waiver. With respect to the MFP-CL Waiver program, MassHealth has set forth the following eligibility requirements at 130 CMR 519.007(H)(2):

519.007: Individuals Who Would Be Institutionalized

130 CMR 519.007 describes the eligibility requirements for MassHealth Standard coverage for individuals who would be institutionalized if they were not receiving home- and community-based services.

(H) Money Follows the Person Home- and Community-based Services Waivers.

(1) Money Follows the Person (MFP) Residential Supports Waiver.

...

(2) Money Follows the Person (MFP) Community Living Waiver.

(a) Clinical and Age Requirements. The MFP Community Living Waiver, as authorized

*under § 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 or 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 or 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.*

(Bolded emphasis added.)

In this case, the agency determined it had a clinical concern because it did not think Appellant would be able to be safely cared for under the program. As testified to and as noted in 130 CMR 519.007, the MFP-CL does not provide a level of support that is there 24 hours/day. In reviewing Appellant's application for this waiver, the agency produced documentation in Exhibit 3 showing that it did a thorough assessment. The agency reviewed Appellant's medical record and other documentation from the SNF where she currently resides; it also did an in-person interview of Appellant and spoke with SNF staff. The review reveals some great and understandable concern about Appellant's potential inability to manage her medications on her own. Although as noted in both the record and the MassHealth testimony, Appellant has shown some improvement in health and behavior, some of that is likely related to, and because she has been, receiving care in such a skilled nursing facility. Additionally, while Appellant is currently in a much better place physically, there are some behavioral concerns documented in the record, particularly regarding her medications. In addition to the events and reactions earlier this year cited by the assessing nurse, Appellant's testimony about her medications and her disagreement with how they have been handled raise some of the same concerns about how she would do in a less structured environment. It is also noted that Appellant currently is on a regimen that requires two staff of the SNF to be involved with distribution of medication, as well as a signature process necessitated by Appellant's past behavior. Further, Appellant did not make any specific reference to anything clinical or her medical regimen which would show that this conclusion is unwarranted. Finally, another contributing factor is that this Appellant does not have any direct family in Massachusetts that appear to be in the picture and would be one form of community support. Without such community support, the agency has some concerns about Appellant's ability to transition to a community living

setting, and they appear to be somewhat well-founded.

For those reasons, I find the decision by the MassHealth team to deny Appellant clinical eligibility at this time for the MFP-CL waiver to be supported by the record and regulations, and I conclude there was no error in this denial decision which I can overrule.

For those reasons, 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.

Christopher Taffe
Hearing Officer
Board of Hearings

cc: Appeals Coordinator @ UMass