

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2204268
Decision Date:	9/23/2022	Hearing Date:	09/07/2022
Hearing Officer:	Scott Bernard		

Appearance for Appellant:




Appearance for MassHealth:

Karen Ryan (Tewksbury MEC) *via* telephone



*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:	Long Term Care (LTC) Asset Transfer
Decision Date:	9/23/2022	Hearing Date:	09/07/2022
MassHealth's Rep.:	Karen Ryan	Appellant's Rep.:	
Hearing Location:	Taunton MassHealth Enrollment Center		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through notices dated June 1, 2022 and July 18, 2022², MassHealth denied the appellant's application for MassHealth LTC benefits because it determined that the appellant had given away or sold assets to become eligible for MassHealth LTC benefits. (See 130 CMR 520.018; 520.109; and Exhibit (Ex.) 1, pp. 3-4; Ex. 6; Ex. 8, p. 2). The appellant filed appeals in a timely manner on June 7, 2022 and August 15, 2022. (See 130 CMR 610.015(B) and Ex. 1, p. 2; Ex. 8, p. 3). Denial of assistance is valid grounds for appeal. (See 130 CMR 610.032).

The hearing was initially scheduled for July 19, 2022 but, at the appellant's attorney's request, was postponed for good cause to the present date. (See Ex. 3; Ex. 4; Ex. 5; Ex. 7).

Action Taken by MassHealth

MassHealth denied the appellant's application because the appellant gave away or sold assets to become eligible for LTC benefits.

¹ The names of the appellant's sons, who were witnesses, have been changed in order to protect the appellant's privacy.

² The July 18, 2022 notice corrected an error in the calculation of the period of ineligibility. (See Ex. 6; Ex. 8).

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.018 and 520.019, in determining that the appellant transferred resources for less than fair market value and whether a period of ineligibility should be imposed.

Summary of Evidence

The appellant is a single individual over the age of 65, who was admitted to the Nursing Facility in the Spring of 2021. (Ex. 9; Ex. 10). MassHealth received the initial application for LTC benefits on June 21, 2021. (Ex. 9). On August 10, 2021, MassHealth denied the application for failure to provide requested verifications. (Ex. 9). This denial was appealed in a timely manner, but the appeal was later withdrawn. (Ex. 9; Ex. 10). On February 16, 2022, MassHealth received a second application for LTC benefits. (Ex. 9). The facility requested coverage starting October 16, 2021. (Ex. 9). On June 21, 2022, MassHealth denied the second application due to a disqualifying resource transfer and then issued a revised notice on July 18, 2022. (Ex. 1; Ex. 8; Ex. 9).

The appellant sold real estate in November 2016. (Ex. 9, p. 14). The cash due to seller on the closing disclosure was \$202,523. MassHealth received Lowell Five bank account statements showing a \$200,000 deposit on November 14, 2016 and a withdrawal of the same amount on December 2, 2016. The \$200,000 withdrawal was explained in a letter dated July 20, 2021 as being used for a series of monetary gifts from 2017 through 2019. (See Ex. 9, pp. 13-14). MassHealth did not receive documentation to verify the exact timing of these gifts.

The penalty amount was determined using the information provided in the letter as follows:

Approx. Date	Amount	Description
2017	\$56,000.00	Gifts to Son Two and his wife; and Son One and his wife.
2018	\$56,000.00	Gifts to Son Two and his wife; and Son One and his wife.
2018	\$15,000.00	Gifts to the appellant's grandchildren
2019	\$56,000.00	Gifts to Son Two and his wife; and Son One and his wife.

February 24, 2022	-\$52,000.00	Cure from Son Two
Total	\$131,000.00	(Ex. 1, p. 5; Ex. 9, p. 14)

As noted in the table of the \$183,000 of gifts payments that were considered disqualifying transfers, \$52,000 was cured by Son Two in a payment made to the nursing facility. The transfer penalty was determined as follows:

$$\$131,000 \div \$410 \text{ (average daily rate)} = 319 \text{ days.}$$

November 1, 2021 + 319 days = September 16, 2022. Therefore the penalty period runs from November 1, 2021 to September 16, 2022.

The MassHealth representative noted that a mistake was made in the original June 1, 2022 determination by using October 16, 2021 as the “otherwise eligible date”. (See Ex. 1 , pp. 3-4). The appellant should not have been eligible for this date based on a February 2022 application. The earliest reachable date is the first day of the month three calendar months before the application was received, therefore the otherwise eligible date should have been November 1, 2021. (See Ex. 6; Ex. 9, pp. 4, 5-12).

The appellant's attorney first argued that the earliest gift should be excluded from the calculation of the disqualifying transfers. The appellant's attorney stated that the application at issue in this appeal was submitted to MassHealth on February 16, 2022. The earliest gift of \$56,000 was given in January 2017. For that reason, this particular transfer was not within the five year look back period for the application at issue in this appeal, and therefore should not be considered as part of this appeal. The appellant's attorney conceded that if the appellant had not withdrawn the appeal of the denial of the first notice, that transfer would have been countable. But since the appellant voluntarily withdrew the withdrawal, this acted as a voluntary withdrawal of that application, which is permitted under the regulations. (Ex. 10, p. pp. 5-6). The voluntary withdrawal of the first application means that MassHealth cannot consider transfers within the five-year lookback window of that application, only the present application.

Secondly, the appellant's attorney argued that the remaining transfers should not be considered disqualifying transfers because the appellant did not make them with the intention of becoming qualified for MassHealth. In each of the instances, the appellant’s annual gifts were made in sums that would not result in taxation under the IRS tax rules. Furthermore, until the appellant’s stroke in 2021, he was in good health as indicated in a letter from the appellant’s medical provider at the Veteran’s Administration. (Ex. 10, p. 8). The appellant’s sons also returned as much of the money as they could, \$52,000, on February 24, 2022. (Ex. 10, p. 27).

The sons of the appellant testified to the following. Until 2016, when he sold his home, the appellant lived on his own. The appellant gifted A, Son One and their wives with money from the sale in 2017, 2018, 2019 partially because they were having money troubles and partially to pay them back for paying to repair the house. Both Son Two and Son One stated that the appellant was in very good health during the period prior to his having his stroke. Son One stated that at some point

during that period the appellant had injured his shoulder after a fall, but he was being seen by a doctor for that. Son One stated that last year the appellant had also been diagnosed with mild Parkinson's disease after he noticed a bit of a tremor and was put on mild medication. The appellant also saw an optometrist for glasses, and a podiatrist. The appellant did use hearing aids. The appellant took a blood thinner, his cholesterol was good, and he ate a good diet. The appellant did use a walker within the last year but did take a walk every day until he had his stroke in March 2021. Son One stated that prior to his admission to the nursing facility after his stroke, the appellant lived with Son One and Son Two. Son Two agreed that the appellant was still physically active and mentally sharp prior to the stroke. Son Two and Son One stated that the only reason that the appellant was in the nursing home was due to the stroke that he had in March 2021.

Findings of Fact

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

1. The appellant is a single individual over the age of 65 who was admitted to the Nursing Facility in the Spring of 2021. (Ex. 9; Ex. 10; Testimony of the MassHealth representative).
2. The appellant had a stroke in March 2021, which resulted in hospitalization and necessitated his admission to the nursing facility. (Ex. 10).
3. Prior to March 2021, the appellant was in good relatively good health for a man of his age. (Ex. 10, p. 8; Testimony of Son One; Testimony of Son Two).
4. MassHealth received the initial application for LTC benefits on June 21, 2021. (Ex. 9; Testimony of the MassHealth representative).
5. On August 10, 2021, MassHealth denied the application for failure to provide requested verifications. (Ex. 9; Testimony of the MassHealth representative).
6. This denial was appealed in a timely manner, but the appeal was later withdrawn. (Ex. 9; Ex. 10; Testimony of the MassHealth representative).
7. On February 16, 2022, MassHealth received a second application for LTC benefits. (Testimony of the MassHealth representative; Ex. 9).
8. The facility requested coverage starting October 16, 2021. (Ex. 9; Testimony of the MassHealth representative).
9. On June 21, 2022, MassHealth denied the second application due to a disqualifying resource transfer and then issued a revised notice on July 18, 2022. (Ex. 9; Testimony of the MassHealth representative).
10. The appellant sold real estate in November 2016. (Ex. 9, p. 14; Testimony of the MassHealth representative).
11. The cash due to seller on the closing disclosure was \$202,523. (Testimony of the MassHealth representative).

representative).

12. MassHealth received Lowell Five bank account statements showing a \$200,000 deposit on November 14, 2016 and a withdrawal of the same amount on December 2, 2016. (Testimony of the MassHealth representative).
13. The \$200,000 withdrawal was explained in a letter dated July 20, 2021 as being used for a series of monetary gifts from 2017 through 2019. (Ex. 9, pp. 13-14).
14. The \$183,000 of gifts payments document were considered disqualifying transfers. (Ex. 1, p. 5; Ex. 9, p. 14).
15. \$52,000 was cured by Son Two in a payment made to the nursing facility. (Testimony of the MassHealth representative).
16. The transfer penalty was determined as follows by dividing \$131,000 (the balance) by the average daily rate of \$410 to reach a penalty period of 319 days. (Testimony of the MassHealth representative).
17. The 319 days would run from November 1, 2021, which was the first day of the third month prior to the date of the application. (Ex. 6; Ex. 9, pp. 4, 5-12).

Analysis and Conclusions of Law

To be eligible for MassHealth nursing-facility services the total value of assets owned by an institutionalized single individual or by a member of an institutionalized couple must not exceed \$2,000. (130 CMR 520.003(A)(1); 130 CMR 520.016(A)). MassHealth denies payment for nursing-facility services to an otherwise eligible nursing-facility resident who transfers countable resources for less than fair-market value during or after the period referred to as the look-back period. (130 CMR 520.018(B)). The look-back period is 60 months and begins on the first date the individual is both a nursing-facility resident and has applied for or is receiving MassHealth Standard. (130 CMR 520.019(B)(2)).

130 CMR 520.019 also states the following, in pertinent part:

(C) Disqualifying Transfer of Resources. The MassHealth agency considers any transfer during the appropriate look-back period by the nursing-facility resident...of a resource, or interest in a resource, owned by or available to the nursing-facility resident...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)³. The MassHealth agency may consider as a disqualifying transfer any action taken to avoid receiving a resource to which the nursing-facility resident...is or would be entitled if such action had not been taken. Action taken to avoid receiving a resource may include...agreeing to the diversion of a resource ... A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available.

³ This reference to paragraph (J) appears to be an error since paragraph (K) is concerned with exemptions.

(D) Permissible Transfers. The MassHealth agency considers the following transfers permissible. Transfers of resources made for the sole benefit of a particular person must be in accordance with federal law.

- (1) The resources were transferred to the spouse of the nursing-facility resident or to another for the sole benefit of the spouse. A nursing-facility resident who has been determined eligible for MassHealth agency payment of nursing-facility services and who has received an asset assessment from the MassHealth agency must make any necessary transfers within 90 days after the date of the notice of approval for MassHealth in accordance with 130 CMR 520.016(B)(3).
- (2) The resources were transferred from the spouse of the nursing-facility resident to another for the sole benefit of the spouse.
- (3) The resources were transferred to the nursing-facility resident's permanently and totally disabled or blind child or to a trust, a pooled trust, or a special-needs trust created for the sole benefit of such child.
- (4) The resources were transferred to a trust, a special-needs trust, or a pooled trust created for the sole benefit of a permanently and totally disabled person who was younger than 65 years old at the time the trust was created or funded.
- (5) The resources were transferred to a pooled trust created for the sole benefit of the permanently and totally disabled nursing-facility resident.
- (6) The nursing-facility resident transferred the home he or she used as the principal residence at the time of transfer and the title to the home to one of the following persons:
 - (a) the spouse;
 - (b) the nursing-facility resident's child who is younger than 21 years old, or who is blind or permanently and totally disabled;
 - (c) the nursing-facility resident's sibling who has a legal interest in the nursing-facility resident's home and was living in the nursing-facility resident's home for at least one year immediately before the date of the nursing-facility resident's admission to the nursing facility; or
 - (d) the nursing-facility resident's child (other than the child described in 130 CMR 520.019(D)(6)(b)) who was living in the nursing-facility resident's home for at least two years immediately before the date of the nursing-facility resident's admission to the institution, and who, as determined by the MassHealth agency, provided care to the nursing-facility resident that permitted him or her to live at home rather than in a nursing facility.
- (7) The resources were transferred to a separately identifiable burial account, burial arrangement, or a similar device for the nursing-facility resident or the spouse in accordance with 130 CMR 520.008(F).

...

(F) 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...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.

...

(K) Exempting Transfers from the Period of Ineligibility.

(1) During the Eligibility Process... [Not applicable]

(2) After Issuance of the Notice of the Period of Ineligibility. After the of the notice of the period of ineligibility, the nursing-facility resident may avoid imposition of the period of ineligibility in the following instances.

(a) Revising a Trust...[Not applicable]

(b) Curing a Transfer. If the full value or a portion of the full value of the transferred resources is returned to the nursing-facility resident, the MassHealth agency will rescind or adjust the period of ineligibility and will apply the countable-assets rules at 130 CMR 520.007 and the countable-income rules at 130 CMR 520.009 to the returned resources in the determination of eligibility...

The record shows that the appellant did make transfers to his family in 2017, 2018, and 2019, a fact that was not disputed. There was no evidence that these transfers could be considered “permissible” as defined above. The appellant’s sons, however, did pay the nursing facility \$52,000 in 2022, which MassHealth properly considered as “exempted” from the total transferred. The record shows, by a preponderance of the evidence, that MassHealth incorrectly counted the earliest transfer from 2017 as being within the five year look back. MassHealth did not dispute that the 2017 transfer occurred on a date hat was five years prior to February 6, 2022 application. MassHealth therefore should have excluded that transfer from its calculation.

As for the remainder of the transfers, the appellant has shown by a preponderance of the evidence that they should not be considered as disqualifying transfers. As stated before, the record shows that the remaining transfers occurred in 2018 and 2019, three and two years prior to the date the appellant was admitted to the nursing facility. These dates were certainly during the five year look back period. The record shows, however, that the appellant was in good health at that time. The appellant's representative’s presented credible evidence that the appellant continued to be in relatively good health until March 2021, when he had a stroke and required long term care in a nursing facility. The appellant’s representatives persuasively suggested that but for that unforeseen occurrence, the appellant would have and could have continued living in the community. These facts support the conclusion that the appellant made the transfers exclusively for a purpose other than to qualify for MassHealth.

For the above stated reasons, the appeal is APPROVED.

Order for MassHealth

Rescind the notices dated June 1 and July 18, 2022, and issue a new notice approving Long Term Care as of November 1, 2021.

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.

Scott Bernard
Hearing Officer
Board of Hearings

cc:

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

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