

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	DENIED	Appeal Number:	2205034
Decision Date:	8/31/2022	Hearing Date:	08/12/2022
Hearing Officer:	Christopher Taffe		

Appearance for Appellant:



Appearance for MassHealth:

Leslie Learned, RN, Clinical Reviewer,
MassHealth/OPTUM (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 – Adult Foster Care Termination
Decision Date:	8/31/2022	Hearing Date:	08/12/2022
MassHealth’s Rep.:	L. Learned	Appellant’s Rep.:	Daughter
Hearing Location:	HarborSouth Tower, Quincy	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 June 15, 2022, MassHealth stated it had denied Appellant’s Prior Authorization request for Level 2 Adult Foster Care (AFC) services as “*the member does not meet the clinical eligibility criteria for MassHealth coverage of AFC as outlined in the Guidelines for Medical Necessity Determination for Adult Foster Care, Section 2(A) and MassHealth regulation 130 CMR 408.416.*” See Exhibit 1; see also 130 CMR 450.204(A)(1). Appellant filed this appeal in a timely manner with the Board of Hearings on June 30, 2022. See CMR 610.032; Exhibit 1. Challenging a MassHealth determination denying a request for assistance is a valid ground for appeal to the Board of Hearings. See 130 CMR 610.032.

Based on the timing of Appellant’s Fair Hearing request, Appellant is entitled to Aid Pending protection and continuation of her current AFC benefits while this appeal decision is pending. See 130 CMR 610.036; Exhibit 1.

Action Taken by MassHealth

MassHealth informed Appellant that it would no longer approve her for continued AFC benefits.

Issue

Was MassHealth correct in determining that the clinical evidence in the record and regulations did not support continued AFC benefits for this Appellant?

Summary of Evidence

Appellant is a [REDACTED] MassHealth member who lives in the community in a house with her husband and daughter's family. Appellant was represented at hearing by her daughter with whom she lives and who has served as Appellant's caregiver through the AFC program the past few years; the daughter appeared by phone. MassHealth was represented by a nurse who is a clinical reviewer, and who also appeared by phone.¹

MassHealth explained that Appellant previously requested and received AFC services through her MassHealth benefits during prior years, with a start date of October 2019. MassHealth testified that such benefits years ago were awarded without a Prior Authorization (or PA) process, but the agency is currently using a PA process to determine medical necessity and the appropriateness of such AFC services today.

Per the regulations regarding continuation of benefits and Aid Pending an appeal decision, Appellant still has her current AFC services in place pending the outcome of this appeal.

Appellant's medical diagnoses and history supporting the claim for AFC services primarily include migraines. Other medical records indicate that Appellant suffers from depression, hypothyroidism, asthma, hyperlipidemia, and hypertension, with limited Range of Motion (ROM) and occasional dizziness, lightheadedness, and shortness of breath during exertion. See Exhibit 3, page 10. MassHealth indicated that the migraines or headaches were described as "1-2x/week" or non-daily. See Exhibit 3, page 16.

MassHealth explained that Appellant's AFC request sought approval of AFC benefits at a Level II level. Consideration for Level II benefits requires a higher level of need than Level I AFC benefits do; specifically to qualify for AFC Level II benefits, there must be a standard met requiring daily need with at least three Activities of Daily Living (ADLs), or two ADLs and management of one behavior requiring frequent caregiver intervention including: Wandering, verbal abusiveness, physical abusiveness, socially inappropriate or disruptive behavioral symptoms, or resisting care.

In explaining its decision, MassHealth stated the agency's primary justification was that the member's medical condition necessitating the AFC need was not a constant medical issue. The application indicated that Appellant was susceptible to migraines, but that they were not every day, and thus there was not a medical need that required daily hands-on care throughout the entirety of an ADL. In theory, the Appellant's need for assistance would be needed on some days, but not

¹ The MassHealth Representative Ms. Learned was also joined at hearing by phone by Ms. Lisa Russell; Ms. Russell was present for observational purposes.

every day. MassHealth also pointed out that while Appellant may need daily help with Instrumental Activities of Daily Living (IADLs) such as cooking and cleaning, those alone could not be used to qualify for AFC benefits. MassHealth also pointed out that while it was very likely that the caregiver was providing assistance on many activities on a daily basis, some of the assistance may not be strictly medically necessary and may instead just be a form or kind, extra assistance that a caregiving family member does for an elder.

The AFC Primary Care Provider Order Form stated that Appellant needed daily hands-on assistance with the ADLs of Bathing, Dressing, Transferring, Mobility, and Eating, as well as cueing and supervision with the ADL of Toileting.

Paperwork submitted by the provider with the PA request describes the level of capabilities for the member with certain ADLs. Specifically, for toileting, Exhibit 3 has pages indicating that Appellant needs help transferring on and off the toilet but is able to wipe independently if the toilet paper is in reach. See Exhibit 3, page 21. The form indicated that for Bathing, Appellant gets assistance sit on floor of the tub and that when she doesn't have an exacerbation of pain, she can wash herself. See id. page 20. Regarding mobility and transfer, the form from the AFC provider states that "Member has a somewhat steady gait unless in an unfamiliar area/ground or when having a headache or dizzy". See Exhibit 3, page 21. As to the activity of Eating, the from the AFC provider states that Appellant has no problems chewing or swallowing food, but has a history of choking so she knows to chew her food well before swallowing; the form also says that the caregiver will provided the food and snacks, and make sure that food is cut in small pieces before serving it to Appellant. See Exhibit 3, page 23.

Appellant's daughter indicated that Appellant had migraines 2 to 3 times per week on average, and that, other than progressive kidney disease and the aforementioned conditions, there were no notable additional medical conditions that were limiting and affected Appellant's ability to do her ADLs on a daily basis. Appellant's daughter testified that Appellant suffered from mostly anxiety and confusion. As one example, with regard to the ADL of Dressing, Appellant's daughter may assist her and she was usually around for her mother on a daily basis, but the daughter stated that if the mother was left alone she could get her clothes on but it would just be at a slower pace.

Prior to the AFC program, Appellant and her spouse lived in the same residence with her daughter, and both the daughter present at hearing and another daughter of Appellant would generally be around on a daily basis to care for their parents.

Findings of Fact

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

1. Appellant is a [REDACTED] MassHealth member who lives in the community and is currently seeking continuation of Level II AFC benefits. (Testimony and Exhibit 3)
 - a. Appellant received AFC services in the past, going back to 2019, before there was a Prior

- Authorization request implemented by the MassHealth agency. (Testimony)
- b. Due to the timeliness of her current appeal, Appellant still has Aid Pending, or AFC services, currently in place pending the outcome of this matter. (Testimony and Exhibits 1 and 3)
2. The primary medical diagnosis supporting Appellant's claimed need for AFC services are migraine headaches. (Testimony and Exhibit 3)
 - a. Although she suffers them frequently, Appellant does not suffer from migraines on a daily basis and they don't limit her ability to attempt to do ADLs on a daily basis. (Testimony and Exhibit 3)
 3. Appellant does not have a need for management of one behavior requiring frequent caregiver intervention such as: Wandering, verbal abusiveness, physical abusiveness, socially inappropriate or disruptive behavioral symptoms, or resisting care. (Testimony and Exhibit 3)
 4. The AFC Primary Care Provider Order Form stated that Appellant needed daily hands-on assistance with the ADLs of Bathing, Dressing, Transferring and Mobility, and Eating, as well as cueing and supervision with the ADL of Toileting. (Exhibit 3)
 5. Appellant does not have a medically necessary need for daily hands-on assistance or cueing and supervision with three ADLs. (Testimony and Exhibit 3)
 - a. As to the ADL of Toileting, Appellant can clean herself but only needs help getting to and from the commode. (Testimony and Exhibit 3)
 - b. As to the ADL of Dressing, Appellant can eventually dress herself if given enough time. (Testimony)
 - c. As to the ADL of Bathing, Appellant needs assistance transferring to and from, and and sitting on, the floor of the tub and, when she doesn't have an exacerbation of pain, she can wash herself. (Testimony and Exhibit 3)
 - d. As to the ADLs of Mobility and Transfers, Appellant has a somewhat steady gait and needs more assistance when in an unfamiliar area outside of the home or during a medical episode involving a headache or dizziness. (Testimony and Exhibit 3)
 - e. As to the ADL of Eating, Appellant can chew her own food and swallow it, and is aware of the need to chew before swallowing. Her family prepares food in small pieces before serving it. (Exhibit 3)
 6. Appellant and her husband continue to live with their daughter, who has provided her parents with appropriate family support over the past three-plus years, including time prior to when the Appellant had AFC services. The love and support provided by the daughter and remainder of family is commendable but is not medically necessary under the MassHealth regulations.

Analysis and Conclusions of Law

Adult Foster Care is a MassHealth benefit offered to eligible members who typically need some sort of long-term support to remain safely in the community. The MassHealth Adult Foster Care regulatory manual is found at 130 CMR 408. AFC is defined in its regulations as “a service ordered by a primary care provider delivered to a member in a qualified setting as described in 130 CMR 408.435 by a multidisciplinary team (MDT) and qualified AFC caregiver, that includes assistance with ADLs, IADLs, other personal care as needed, nursing oversight, and AFC care management, as described in 130 CMR 408.415(C).” See 130 CMR 408.402.

Pursuant to 130 CMR 408.416 (reprinted in relevant part below), to meet the requirements for authorization of Adult Foster Care, a member must have a medical or mental condition that requires daily hands-on assistance or cueing and supervision throughout the entire activity in order to successfully complete at least one of the following activities: bathing, dressing, toileting, transferring, mobility or eating.

130 CMR 408.416 Clinical Eligibility Criteria for AFC

A member must meet the following clinical eligibility criteria for receipt of AFC.

(A) AFC must be ordered by the member’s PCP.

*(B) The member has a medical or mental condition that requires **daily hands-on (physical) assistance or cueing and supervision throughout the entire activity** in order for the member to successfully complete at least one of the following activities:*

- (1) Bathing - a full-body bath or shower or a sponge (partial) bath that may include washing and drying of face, chest, axillae (underarms), arms, hands, abdomen, back and peri-area plus personal hygiene that may include the following: combing or brushing of hair, oral care (including denture care and brushing of teeth), shaving, and, when applicable, applying make-up;*
- (2) Dressing - upper and lower body, including street clothes and undergarments, but not solely help with shoes, socks, buttons, snaps, or zippers;*
- (3) Toileting - member is incontinent (bladder or bowel) or requires assistance or routine catheter or colostomy care;*
- (4) Transferring - member must be assisted or lifted to another position;*
- (5) Mobility (ambulation) - member must be physically steadied, assisted, or guided during ambulation, or is unable to self-propel a wheelchair appropriately without the assistance of another person; and*
- (6) Eating - if the member requires constant supervision and cueing during the entire meal, or physical assistance with a portion or all of the meal.*

(Bolded emphasis added.)

The MassHealth regulation at 130 CMR 408.419(D) establishes the conditions for when an AFC PA request may be approved for both a level I AFC service payment and a level II AFC service payment. Level II services require a higher level of need as they result in a greater monetary benefit.

408.419: Conditions for Payment

...

(D) AFC payments are made as follows:

(1) Level I Service Payment. The MassHealth agency will pay the level I service payment rate if a member requires hands-on (physical) assistance with one or two of the activities described in 130 CMR 408.416 or requires cueing and supervision throughout one or more of the activities listed in 130 CMR 408.416 in order for the member to complete the activity.

(2) Level II Service Payment. The MassHealth agency **will pay the level II service payment rate for members who require**

(a) hands-on (physical) assistance **with at least three of the activities** described in 130 CMR 408.416; or

(b) hands-on (physical) assistance **with at least two of the activities** described in 130 CMR 408.416 **and management of behaviors** that require frequent caregiver intervention as described in 130 CMR 408.419(D)(2)(b)1. through 5.:

1. wandering: moving with no rational purpose, seemingly oblivious to needs or safety;
2. verbally abusive behavioral symptoms: threatening, screaming, or cursing at others;
3. physically abusive behavioral symptoms: hitting, shoving, or scratching;
4. socially inappropriate or disruptive behavioral symptoms: disruptive sounds, noisiness, screaming, self-abusive acts, disrobing in public, smearing or throwing food or feces, rummaging, repetitive behavior, or causing general disruption; or
5. resisting care.

(Bolded emphasis added.)

As a rule, the MassHealth agency and its programs (including the AFC program) generally pay only for medically necessary services to eligible MassHealth members and may require that such medical necessity be established through a prior authorization process. See 130 CMR 450.204; 130 CMR 408.417(B). Per the medical necessity regulation that applies to all providers at 130 CMR 450.204, additional requirements about the medical necessity of MassHealth services may be contained in other MassHealth publications, including written medical necessity and coverage guidelines. See 130 CMR 450.204(D). Such additional AFC guidelines were submitted into the record in this appeal as part of the record. See Exhibit 3, pages 39-44.

With those regulations in mind, I conclude that the MassHealth decision to deny this Appellant the benefit of this requested Level II service was appropriate. The clinical record submitted indicates that Appellant has some level of independence with all the claimed ADLs at issue and does not need constant or continuous support throughout any of the activities. While Appellant needs some higher level of assistance with certain ADLs than others, none of them appear to rise to the level of constant guidance. Toileting does not qualify if someone is just assisted on and off the commode. Dressing can eventually be done independently. The ambulatory activities of Mobility and Transfers show a need for limited to sparse assistance especially inside the house where Appellant would spend most of the day for the essential part of the ADL. Appellant can do some Bathing, and the assistance for Eating is really more based on the IADL portion of Meal Preparation which cannot be used to show that ADL is one that qualifies. Further, and perhaps most importantly, even

though Appellant may understandably on occasion or on certain days need some help, the AFC standard requires the need for ADL assistance to be daily, and in this case, the medical ailment of migraines which may create the temporary need for ADL assistance occur on a less frequent and non-daily rate for this Appellant.

It is also noted that Appellant asked for Level II services, which does not allow supervision or cueing to be used to qualify for any of these activities. Compare 130 CMR 408.419(D)(2)(a) with (D)(1). In summary, I find there is not enough evidence to indicate that Appellant needs constant hands on assistance with any one ADL, and the totality of evidence strongly suggests that she does not meet the higher standard of requiring assistance with three different ADLs in order to obtain approval of the requested Level II benefit.

For these reasons, I conclude that there is no evidentiary basis to rescind or overrule the MassHealth decision. This appeal is DENIED.

Order for MassHealth/OPTUM

Within 30 days of the date of this decision,

- Remove the Aid Pending protection of Appellant's AFC benefits.
- Send a Notice of Implementation or other written notice to Appellant and her AFC provider stating the effective date of termination of her AFC benefits. As this implementation will result in a termination of benefits, Appellant and her AFC provider should be sent this notice at least one week prior to the effective termination date.
- The notice must have language clarifying that the termination of such notice is NOT appealable to the Board of Hearings.

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 @ OPTUM/OLTSS