

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: Denied

Appeal Number: 2205709

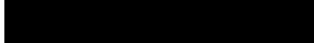
Decision Date: 12/1/2022

Hearing Date: 09/16/2022

Hearing Officer: Radha Tilva

Record Open to: 11/30/2022

Appearance for Appellant:




Appearance for MassHealth:

Nikita Jones, Taunton MEC Rep.



*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:	LTC - Lien
Decision Date:	12/1/2022	Hearing Date:	09/16/2022
MassHealth's Rep.:	Nikita Jones	Appellant's Rep.:	
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

On July 25, 2022 MassHealth issued a notice of intent to place a lien on property in Taunton, Massachusetts (Exhibit 1). The appellant filed this appeal in a timely manner on August 1, 2022 (see 130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032).

This matter was originally scheduled for a hearing on September 1, 2022, however, on August 16, 2022 the appellant requested that the matter be rescheduled (Exhibit 4). The Board of Hearings approved the reschedule request without condition and a hearing was scheduled for September 16, 2022 (Exhibit 5). Post-hearing the record was held open until October 7, 2022 for MassHealth and appellant to submit documentation. The documentation was received electronically from appellant's counsel on October 24, 2022 (Exhibit 6). Based on the Hearing Officer's review of the documentation the record was re-opened on November 28, 2022 for clarification from MassHealth which was received on November 30, 2022.

Action Taken by MassHealth

MassHealth issued a notice of intent to place a lien on appellant's property.

Issue

The appeal issue is whether MassHealth was correct in issuing a notice of intent to place a lien.

Summary of Evidence

The MassHealth representative appeared by telephone and testified to the following: on July 25, 2022 MassHealth issued a notice of intent to place a lien on property in Taunton, Massachusetts. The MassHealth representative testified that the lien was placed on the member's home according to 130 CMR 515.012.¹ The MassHealth representative stated that though appellant has long-term care insurance, the insurance only prevents MassHealth from collecting long-term care for room and board. MassHealth can collect incidental costs such as ambulance, specialist services, hospice care and other unrelated services to long-term care per the regulation.

The appellant was represented by an attorney who testified that appellant falls into an exception under 130 CMR 515.011(B) and 515.012(C). The attorney argued MassHealth does not define incidental services anywhere in its regulations which makes it a violation of due process rights for MassHealth to collect "incidental" costs. The appellant's attorney stated that in the past twenty years she has never had MassHealth place a lien on a property where the applicant has a long-term care insurance policy that meets the requirements. The attorney stated that estate recovery is being expanded through a non-regulatory and unpromulgated process making it a violation of due process. At the end of the hearing the record was left open for appellant to submit a memorandum of law. The memorandum was submitted on October 24, 2022 and argued, in part, the following:

Appellant received no notice confirming that her long-term care insurance policy qualifies for exemptions. In addition, appellant's primary residence is exempted from the estate recovery lien and real estate lien by statute and regulation because she owns a qualified long-term care insurance plan. The relevant estate recovery regulations state that there is no recovery for nursing facility or other long-term care services for appellant as appellant has fulfilled all requirements for exemption listed at 130 CMR 515.011(B)(1)(a)-(c). Moreover, the notice of intent to place a lien is deficient and has violated appellant's rights as both the notice and MassHealth have failed to explain what "other costs will be recovered." Appellant argues that it is impossible to determine what "other costs" may be, leaving the window open for arbitrary and capricious interpretation of the services included and excluded from the exemption.

Both the lack of explicit determination regarding qualification for the long term care insurance plan exemptions and the paucity of notice regarding the services included

¹ It was clarified during the record open period that a lien was not yet placed, but would be based on the Hearing Officer's decision.

and excluded from recovery are due process violations akin to the inadequate notice issue in *EOHHS v. Trocki*, 100 Mass. Ct. 117 (2021).

(see Exhibit 6).

The record was opened again on November 28, 2022 until December 2, 2022 for MassHealth to clarify where the policy or regulation is that allows for estate recovery to recover “incidental” services. On November 30, 2022 MassHealth submitted a response and cited to 130 CMR 515.011(B)(3) which states “no recovery for nursing facility or other long-term care services may be made from the estate of any person who on the date of admission had long-term care insurance that met the requirements of 130 CMR 515.014.” MassHealth explained that the regulation does not state MassHealth is unable to lien a property and recover other costs; it only says MassHealth may not recover long-term care services.

Findings of Fact

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

1. On July 25, 2022 MassHealth issued a notice of intent to place a lien on appellant’s property.
2. On August 1, 2022 appellant filed a timely appeal to the Board of Hearings.
3. It is undisputed that appellant owns a long-term care insurance policy that meets the requirements of 130 CMR 515.014.
4. Appellant is contesting the placement of a lien on the property arguing that it should be exempt as appellant’s long-term care insurance policy meets the exception.
5. MassHealth argues that a lien can be placed on the property and contends that the exception only protects appellant from estate recovery of nursing home and long-term services.

Analysis and Conclusions of Law

It is undisputed that appellant has a qualified long-term care insurance plan that meets the requirements of 130 CMR 515.014. The issue, then, is whether appellant's home is exempt from MassHealth placing a real estate lien. The regulations below discuss MassHealth's placement of a lien:

515.012: Real Estate Liens

(A) Liens. A real estate lien enables the MassHealth agency to recover the cost of medical benefits paid or to be paid on behalf of a member. ***Before the death of a member, the MassHealth agency will place a lien against any property in which the member has a legal interest,*** subject to the following conditions:

- (1) per court order or judgment; or
- (2) without a court order or judgment, if all of the following requirements are met:
 - (a) the member is an inpatient receiving long-term or chronic care in a nursing facility or other medical institution;
 - (b) none of the following relatives lives in the property:
 1. a spouse;
 2. a child younger than 21 years old, or a blind or permanently and totally disabled child; or
 3. a sibling who has a legal interest in the property and has been living in the house for at least one year before the member's admission to the medical institution;
 - (c) the MassHealth agency determines that the member cannot reasonably be expected to be discharged from the medical institution and return home; and
 - (d) the member has received notice of the MassHealth determination that the above conditions have been met and that a lien will be placed. The notice includes the member's right to a fair hearing.

(B) Recovery. If property against which the MassHealth agency has placed a lien under 130 CMR 515.012(A) is sold, the MassHealth agency may recover all payment for services provided on or after April 1, 1995. This provision does not limit the MassHealth agency's ability to recover from the member's estate in accordance with 130 CMR 515.011

(C) Exception. No recovery for nursing-facility or other long-term-care services may be made under 130 CMR 515.012(B) if the member (1) was institutionalized; (2) notified the MassHealth agency that he or she had no intention of returning home; and (3) on the date of admission to a long-term-care institution, had long-term-care insurance that, when purchased, or at any time thereafter, met the requirements of 130 CMR 515.014 and the Division of Insurance regulations at 211 CMR 65.09(1)(e)(2).

515.014: Long-term-care Insurance Minimum Coverage Requirements for MassHealth Exemptions

For purposes of the financial eligibility exemption under 130 CMR 520.007(G)(8)(d), concerning treatment of the former home as an asset, and the exemption under 130 CMR 515.011(B) and 515.012(C), concerning repayment of assistance provided for nursing facility and other long-term-care services (hereafter collectively referred to as "MassHealth

exemptions”), a long-term-care insurance policy must provide certain minimum coverage requirements as determined by the Division of Insurance. 515.014: Long-term-care Insurance Minimum Coverage Requirements for MassHealth Exemptions For purposes of the financial eligibility exemption under 130 CMR 520.007(G)(8)(d), concerning treatment of the former home as an asset, and the exemption under 130 CMR 515.011(B) and 515.012(C), concerning repayment of assistance provided for nursing facility and other long-term-care services (hereafter collectively referred to as “MassHealth exemptions”), a long-term-care insurance policy must provide certain minimum coverage requirements as determined by the Division of Insurance...

(C) Exception. No recovery for nursing facility or other long-term-care services may be made under 130 CMR 515.012(B) if the member: (1) was institutionalized; (2) notified the MassHealth agency that he or she had no intention of returning home; and (3) on the date of admission to a long-term-care institution, had long-term-care insurance that, when purchased, or at any time thereafter, met the requirements of 130 CMR 515.014 and the Division of Insurance regulations at 211 CMR 65.09(1)(e)(2).

Based on the above regulation, 130 CMR 515.012(A)(2), MassHealth did not err in issuing its notice of intent to place a lien on appellant’s property. It is undisputed that appellant has a legal interest in the property, is now living in a nursing facility, has no relatives living in the home that meets the requirements of 130 CMR 515.012(A)(2)(b), cannot reasonably be expected to be discharged from the nursing facility and return to her home, and has received notice of MassHealth’s intent to place a lien. Appellant argues, however, that MassHealth may not place a lien on the property as appellant owns a long-term care insurance policy which meets the requirements of 130 CMR 515.014.

While 130 CMR 515.014 certainly does exempt recovery if the appellant owns a qualifying long-term care insurance policy, the plain language of the regulation is clear in that it only prevents recovery, not placement of a lien. Though MassHealth may have not been, in the past, placing liens on property where the applicant owned a qualifying long-term care insurance policy, the regulations do not explicitly state that a lien cannot be placed in such circumstances. The regulations do prohibit recovery, however, but as this appeal is limited to whether MassHealth erred in issuing the notice of intent to place a lien, dated July 25, 2022, the analysis is limited to that issue. Appellant’s attorney presented the *Trocki* case post-hearing to support the fact that MassHealth has failed to provide adequate notice of estate recovery efforts, however, the *Trocki* decision applies to notice pertaining to members in senior care or managed care organizations where MassHealth is recovering capitation payments. For the reasons set forth above 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.

Radha Tilva
Hearing Officer
Board of Hearings

cc:

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

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