

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved in part; Denied in part; Remanded	Appeal Number:	2206559
Decision Date:	12/20/2022	Hearing Date:	09/29/2022
Hearing Officer:	Scott Bernard	Record Open to:	10/25/2022

Appearance for Appellant:



Appearance for MassHealth:

Jamie Lapa (Springfield 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 in part; Denied in part; Remanded	Issue:	Long Term Care (LTC) Transfer Penalty Life Estate
Decision Date:	12/20/2022	Hearing Date:	09/29/2022
MassHealth's Rep.:	Jamie Lapa	Appellant's Rep.:	
Hearing Location:	Springfield 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 a notice dated July 5, 2022, MassHealth approved the appellant's application for MassHealth LTC benefits with a benefit start date of March 1, 2022. (See 130 CMR 520.019 and Exhibit (Ex.) 1, p. 5). The appellant filed this appeal in a timely manner on September 1, 2022. (See 130 CMR 610.015(B); Eligibility Operations Memo (EOM) 22-10 (Aug. 2022); and Ex. 1, p. 2). Determination of the coverage start date is valid grounds for appeal. (See 130 CMR 610.032).

At the appellant's attorney's request the record was left open to give her an opportunity to submit a memorandum in support of the appellant's position. (Ex. 4). For that reason, the appellant's attorney was given until October 11 to submit the memorandum and MassHealth was given until October 25, 2022 to respond. (Ex. 4). The record closed on October 25, 2022.

Action Taken by MassHealth

MassHealth approved LTC benefits with a start date of March 1, 2022.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.019, in determining that the start date of coverage should be March 1, 2022.

Summary of Evidence

The MassHealth representative testified to the following. The appellant is a ■-year-old individual who was admitted to the nursing facility in the fall of ■. (Ex. 3, pp. 1, 2). MassHealth received a Status Change for a Member in a Nursing Facility or Chronic Disease and Rehabilitation Inpatient Hospital (SC-1) form from the nursing facility on or around December 11, 2021. (Ex. 3, p. 2). The nursing facility was seeking a payment date of December 11, 2021. (Ex. 3, p. 2). The SC-1 form stated that the appellant's date of birth was June 29, 1928. (Ex. 3, p. 2). MassHealth sent the appellant the notice under appeal on July 5, 2022 approving the appellant for LTC benefits with a start date of March 1, 2022. (Ex. 1, p. 5).

The MassHealth representative stated that MassHealth was not able to approve an earlier start date because of a disqualifying transfer of assets. The appellant's house was sold on February 22, 2022 for \$156,041 (after deductions). (Ex. 3, p. 10). The MassHealth representative stated that despite having a life estate in the property, the appellant did not receive any proceeds from the sale. Based on MassHealth's calculations, the value of the appellant's life estate was \$38,529 since the appellant was ■ years old on the date of the sale. (Ex. 3, p. 14). Dividing that amount by the average daily cost of nursing facility services, which MassHealth stated was \$391¹, the appellant was penalized 99 days.

The appellant's attorney's set out her position both in her testimony and in the memorandum that she submitted after the hearing. (Ex. 5). In a deed dated August 8, 2014 and recorded on August 13, 2014 in the local registry of deeds, the appellant and her husband transferred their house to their son while retaining a life-estate in the property. (Ex. 3, pp. 3-6; Ex. 5, p. 1). The appellants husband died on December 2, 2017, and his life estate terminated at that time. (Ex. 3, pp. 7-9; Ex. 5, p. 1). On February 2, 2018, the appellant executed a durable power of attorney naming her son as her attorney in fact. (Ex. 5, p. 1). The appellant lived in her house until her admission into the nursing facility. (Ex. 5, p. 1).

While MassHealth was processing the appellant's LTC application, the appellant's son, as the attorney in fact, listed the appellant's house for sale. The appellant's son received a third party offer and sold the residence for fair market value on February 22, 2022, when the appellant was ■ years old. The net proceeds of the sale were \$156,041.08. The appellant and her son split the proceeds pursuant to the computation of the life estate value as set forth in 26 CFR § 20.2031-7(d)(2)(iii) and IRS Table S (2000CM), which reflects the methodology previously used by MassHealth for the value of life estate as set forth in EOM 07-18. Under EOM 07-18 and the method described by the IRS, the appellant was entitled to receive 5.543% of the net sales proceeds, which equaled \$8,649.35. EOM 20-16, dated August 28, 2020, directs the computation of life estate values based upon a table provided in section SI 01140.120 of the Social Security Program Operations Manual (POMS). Under this method MassHealth's life estate valuation calculates the appellants life estate interest as 24.692%. The appellant received \$9500 from the sale proceeds, and MassHealth approved the appellant for LTC benefits beginning on March 19, 2022, after computing a period of ineligibility from December 11, 2021 through March 18, 2022, asserting that the difference between the amount actually received by the life tenant and the MassHealth evaluation of the life state was tantamount to a transfer of resources for less than fair market value.

¹ But see EOM 21-20 (Dec. 2021).

The appellant's attorney argued that MassHealth's current method for computing the value of a life estate interest is patently wrong, unreasonable, arbitrary, and capricious as it does not reflect the realistic fair market value of such an interest. Following the issuance of EOM 20-16, and departing from the prior longstanding valuation method, MassHealth now uses the computation set forth in EOM 20-16 without having provided notice or allowed for comment thereby self-servingly inflating the value of the appellants life estate.

The appellants attorney did not dispute the underlying concept that MassHealth could penalize those who dispose of assets for less than fair market value during the five-year waiting period prior to submitting a MassHealth application. Rather she contended that the way MassHealth currently values the appellant's life estate interest resulted in an assessment of a life estate value that was far beyond what the appellant could reasonably expect to receive in a fair market transaction. She stated that under the current valuation system MassHealth directs eligibility workers to utilize rates from a table published on April 19, 1999. This POMs table reflects life estate values utilizing a 10% interest rate. The appellants attorney stated that the IRS interest rate in effect at the time the appellant sold her life estate was only 1.6%, which would produce a life estate value drastically lower than the value obtained by using MassHealth's current method of valuation. MassHealth utilized this IRS method until 2019. (See EOM 07-18; EOM 19-12). She stated that there were significant capital gains and estate and gift tax consequence for the remainderman, who would then be required to pay taxes of monies not received and could be subject to a gift tax. The appellant's attorney argued that MassHealth's policy change was, in effect, a regulatory change that was not subject to the notice and comment requirements of MGL ch. 30A.

The appellant's attorney argued that even if the hearing officer finds that MassHealth's valuation method can be upheld, MassHealth did not properly calculate the penalty period in any case. The appellants attorney stated that using MassHealth method of valuing the life estate, the appellant would have been entitled to receive 24.692% of the net sale proceeds (\$156,041.08), which equals \$38,529.66. The appellants attorney stated that the appellant received \$ 9,500.00 from the net proceeds, which leaves a difference of only \$29,029.66. Dividing this figure by the penalty divisor in effect at the time of the application, \$391.00, MassHealth should have reached a figure equaling 74.24, or 74 days of ineligibility. MassHealth, however, has determined the period of ineligibility to be from December 11, 2021 through March 19, 2022, a period of 99 days, which exceeds the period of ineligibility calculated in accordance with the regulation.

At the end of the hearing, the appellant's attorney requested time to submit a memorandum of law detailing her position. The appellant's attorney was given until October 11, 2022 to do so and MassHealth was given until October 25, 2022 to respond. (Ex. 4). The appellant's attorney submitted the memorandum on October 11, 2022. (Ex. 5). MassHealth did not submit a response. Therefore, the hearing record closed on October 25, 2022.

Findings of Fact

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

1. The appellant's date of birth is June 29, 1928. (Ex. 3, p. 2).

2. In a deed dated August 8, 2014 and recorded on August 13, 2014 in the local registry of deeds, the appellant and her husband transferred their house to their son while retaining a life- estate in the property. (Ex. 3, pp. 3-6; Ex. 5, p. 1).
3. The appellant's husband died on December 2, 2017, and his life estate terminated at that time. (Ex. 3, pp. 7-9; Ex. 5, p. 1).
4. On February 2, 2018, the appellant executed a durable power of attorney naming her son as her attorney in fact. (Ex. 5, p. 1).
5. The appellant lived in her house until her admission into the nursing facility. (Ex. 5, p. 1).
6. The appellant was admitted to the nursing facility in the fall of 2021. (Ex. 3, pp. 1, 2).
7. MassHealth received an SC-1 form from the nursing facility on or around December 11, 2021. (Ex. 3, p. 2).
8. The nursing facility is seeking a payment date of December 11, 2021. (Ex. 3, p. 2).
9. The appellant's attorney-in-fact, her son, sold the appellant's house on February 22, 2022 for \$156,041 (after deductions). (Ex. 3, p. 10; Ex.).
10. The appellant and her son split the proceeds. (Testimony of the appellant's attorney; Ex. 5, p. 2).
11. Based on the method of calculation the IRS uses to value life estates, the appellant received \$8,649.36. (Testimony of the appellant's attorney; Ex. 5, p. 2).
12. Based on MassHealth's calculations, the value of the appellant's life estate was \$38,529 since the appellant was ■ years old on the date of the sale. (Ex. 3, p. 14; Testimony of the MassHealth representative).
13. Dividing that amount by the average daily cost of nursing facility services, which MassHealth stated was \$391, the appellant was penalized 99 days. (Testimony of the MassHealth representative).

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)². 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, 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.

...

(G) Period of Ineligibility Due to a Disqualifying Transfer.

(1) Duration of Ineligibility. If the MassHealth agency has determined that a disqualifying transfer of resources has occurred, the MassHealth agency will calculate a period of ineligibility. The number of months in the period of ineligibility is equal to the total, cumulative, uncompensated value...of all resources transferred by the nursing-facility resident or the spouse, divided by the average monthly cost to a private patient receiving nursing-facility services in the Commonwealth of Massachusetts **at the time of application, as determined by the MassHealth agency**.

(2) Determination of the Period of Ineligibility in Special Circumstances [Not applicable]...

(3) Begin Date...For transfers occurring on or after February 8, 2006, the period of ineligibility begins **on the first day of the month in which resources were transferred for less than fair-market value or the date on which the individual is otherwise eligible for MassHealth agency payment of long-term-care services, whichever is later**...

...

(I) Transfer of Life-estate and Remainder Interest The rules pertaining to transfer of life-estate and remainder interest apply in instances involving remainder interest of property including life estates, annuities, wills, and trusts.

(1) [Not applicable]...

(2) If the nursing-facility resident's...life-estate interest or property including the life-estate interest is sold or transferred, the value of the life-estate interest at the time of the sale or transfer is calculated **in accordance with the life-estate tables, as determined by the MassHealth agency**. The MassHealth agency will attribute the value of the life-estate interest at the time of the sale or transfer to the person selling or transferring the life estate.

² This reference to paragraph (J) appears to be an error since paragraph (K) is concerned with exemptions.

(3) [Not applicable].

...[Emphases added].

The parties do not disagree that the sale of the appellant's remainder interest of the appellant's life estate was a transfer subject to a period of disqualification. The appellant's attorney more or less argues that the methodology MassHealth uses to determine the value of the remainder interest is not fair and that a different valuation method should be used.

The regulations state the following, regarding the basis of a fair hearing decision at 130 CMR 610.082:

(C) **The decision must be rendered in accordance with the law.**

(1) **The law includes** the state and federal constitutions, statutes, and **duly promulgated regulations**, as well as decisions of the state and federal courts.

(2) Notwithstanding 130 CMR 610.082(C)(1), **the hearing officer must not render a decision regarding the legality of federal or state law including**, but not limited to, **the MassHealth regulations. If the legality** of such law or regulations **is raised** by the appellant, **the hearing officer must render a decision based on the applicable law or regulation as interpreted by the MassHealth agency.** Such decision must include a statement that the hearing officer cannot rule on the legality of such law or regulation and must be subject to judicial review in accordance with 130 CMR 610.092.

(3) The hearing officer **must give due consideration to Policy Memoranda and any other MassHealth agency representations and materials containing legal rules, standards, policies, procedures, or interpretations as a source of guidance in applying a law or regulation.** (Emphasis added).

MassHealth's regulations do not specifically prescribe a method for determining the value of life estates. Rather, the regulations permit MassHealth to determine the life estate tables that it will use. MassHealth determined, through EOM 20-16, that the SSA's Life Estate and Remainder Interest Tables were the life estate tables it would use. The MassHealth representative then correctly followed the dictate of the regulation *via* EOM 20-16 to calculate the value of the appellant's life estate. The record shows that the MassHealth representative used the correct multiplication factor of .24692 for a person of the appellant's age of [REDACTED] to determine the value of the appellant's life estate under the current MassHealth methodology.

MassHealth, however, also made two errors in determining the value of the appellant's life estate. The first is that MassHealth used the incorrect average daily cost of nursing facility services. As of December 1, 2021, this increased from \$391 to \$410 per day. (See EOM 21-20 (Dec. 2021)). Because the appellant applied for LTC benefits on December 12, 2021, MassHealth should have used the latter number to determine the penalty. The second error is that the date the ineligibility period should have started on February 1, 2022, since this was the first day of the month in which resources were transferred for less than fair-market value and was later than the date on which the appellant was otherwise eligible for MassHealth payment of long-term-care services.

There is also the matter of the proceeds the appellant allegedly did receive. MassHealth did not seem to be aware of the fact that the appellant received some value for her life estate in the sale. Although this amount, which the appellant's attorney stated was \$8,649.36, would place the appellant over the asset limit, it should not be counted towards the transfer penalty if the appellant did receive it.

For the above stated reasons, the appeal is APPROVE IN PART, DENIED IN PART, and REMANDED.

Order for MassHealth

If the appellant is able to verify it, subtract the \$8,649.36 she received from the sale from the amount of the transfer (although that amount should be counted towards her assets). Redetermine the appellant's period of ineligibility from February 1, 2022 using the average daily cost of \$410.

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.

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:

Dori Mathieu, Springfield MassHealth Enrollment Center, 88 Industry Avenue, Springfield, MA 01104

[REDACTED]