

P0Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: Denied

Appeal Number: 2206736

Decision Date: 11/2/2022

Hearing Date: 10/25/2022

Hearing Officer: Patricia Mullen

Appearances for Appellant:



Appearances for MassHealth:

Linda Phillips, RN, Associate Director,
Appeals & Regulatory Compliance;
Heather Smith, RN, Nurse Reviewer II;
Brad Goodier, RN, Disability Reviewer
(observing)



*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:	ABI Waiver
Decision Date:	11/2/2022	Hearing Date:	10/25/2022
MassHealth's Reps.:	Linda Phillips, RN, Associate Director, Appeals & Regulatory Compliance; Heather Smith, RN, Nurse Reviewer II; Brad Goodier, RN, Disability Reviewer (observing)	Appellant's Reps.:	Pro se; Social Worker, nursing facility
Hearing Location:	Quincy Harbor South		

Authority

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

Jurisdiction

The appellant submitted an appeal to the Board of Hearings (BOH) on September 8, 2022. (Exhibit 1). In a letter dated September 13, 2022, BOH requested a copy of the notice prompting the appeal. (Exhibit 2). On September 20, 2022, the appellant submitted copies of two MassHealth denial notices. (Exhibit 3). Through notices dated August 30, 2022, MassHealth denied the appellant's applications for the Acquired Brain Injury (ABI) Non-Residential Habilitation Waiver (hereinafter "the ABI-N Waiver") and the ABI Residential Habilitation Waiver (hereinafter "the ABI-RH Waiver") because MassHealth determined that the appellant cannot be safely served in the community within the terms of the waivers. (see 130 CMR 519.007(G) and Exhibit 3). The appellant filed this appeal in a timely manner on September 8, 2022. (see 130 CMR 610.015(B) and Exhibit 1). A denial of a requested MassHealth benefit is valid grounds for appeal. (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied the appellant's applications for the ABI-N Waiver and the ABI-RH Waiver.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 519.007(G), in determining that the appellant is clinically ineligible to participate in the ABI-N Waiver and the ABI-RH Waiver programs because he cannot be safely served in the community within the terms of the waivers.

Summary of Evidence

The appellant appeared telephonically with a Social Worker from his nursing facility. MassHealth was represented telephonically by the Associate Director of Appeals & Regulatory Compliance for MassHealth's Waiver unit (hereinafter "the MassHealth representative), and the nurse reviewer who evaluated the appellant for the waiver programs. Another MassHealth nurse observed the hearing.

The MassHealth representative explained that the ABI Waiver programs assist members who have experienced an ABI to move into the community and obtain community based services. The MassHealth representative stated that the ABI-N Waiver is for members who can move into their own home or apartment or the home of someone else. The ABI-RH Waiver is for members who need placement in a residence that has supervision and staffing 24 hours a day, 7 days a week. (Testimony).

The MassHealth representative stated that to be eligible for either of the ABI Waivers, the applicant must meet the following criteria:

- Be living in a nursing facility or chronic or rehabilitative hospital for at least 90 days;
- Have a documented acquired brain injury, acquired at age 22 or older;
- Meet clinical requirements and be in need of the Waiver services that are available through the ABI Waiver;
- Meet financial requirements to qualify for MassHealth Standard in the community;
- Be able to be safely served in the community with the services available under the ABI Waiver; and
- To qualify for the ABI-RH Waiver, the applicant must need residential support services with staff supervision 24 hours a day, 7 days a week.

(Exhibit 10, p. 7).

The appellant applied for the ABI-N Waiver and the ABI-RH Waiver on May 16, 2022. (Exhibit 10, pp. 47-52). On both applications, the appellant attests that he sustained his brain injury at age 22 or older. (Exhibit 10, pp. 47, 50). The MassHealth representative testified that the appellant is under age 65 and has diagnoses including epilepsy, diffuse traumatic brain injury (TBI), hypertension,

major depressive disorder, pulmonary embolism, conversion disorder, morbid obesity, muscle weakness, history of pneumonia, acute respiratory failure, and fracture of left leg. The MassHealth representative noted that while living in the community in 2016, the appellant required hospitalization after he was found in his bathtub calling out for help related to a seizure. The nurse reviewer, who conducted the clinical assessment, reported that EMS noted the apartment was filthy and the appellant was thought to have been in the tub for days. (Exhibit 10, p. 72). The appellant was admitted to a skilled nursing facility after his hospitalization, but was involved in a physical altercation resulting in arrest. (Exhibit 10, p. 72). The appellant noted that he was in the first nursing facility for [REDACTED], but then spent a few days in prison before being admitted to another nursing facility. The MassHealth representative stated that the appellant's second nursing facility closed in [REDACTED] and he was transferred to his current facility.

The MassHealth representative stated that the appellant was previously found ineligible for the ABI-RH Waiver in 2017. At that time, the nurse reviewer noted that the appellant was ineligible due to high risk to cause harm to himself or others. (Exhibit 10, p. 72). The nurse reviewer reported that the appellant was noted to have paranoid and delusional thoughts that people were stealing from him. (Exhibit 10, p. 72). The nurse reviewer noted further that the appellant was involved in an altercation where he punched another resident, was non-compliant with medications, and demonstrated impulsivity and poor judgment and insight. (Exhibit 10, p. 72). The MassHealth representative stated that the appellant was found ineligible for the Money Follows the Person (MFP) Residential Services Waiver in 2018. The nurse reviewer noted that at that time, the appellant was found ineligible because he was a high risk to cause harm to self and others, had behaviors including verbal aggression, exhibited ongoing paranoia and delusions, and was noted to have open court cases for assault and battery. (Exhibit 10, p. 72).

The MassHealth representative state that on July 11, 2022, the nurse reviewer, representing the ABI Waiver Programs, met with the appellant at the nursing facility and conducted an assessment for ABI Waiver eligibility. The assessment consisted of completion of Minimum Data Set-Home Care (MDS-HC), clinical determination of waiver eligibility, ABI Waiver community risk assessment, risk assessment ABI-N caregiver supplement, review of the appellant's medical record, and a discussion with nursing facility staff. (Exhibit 10, pp. 55-67, 68-76, 77-78, 79-81).

In the ABI Waiver clinical assessment document, the nurse reviewer noted that the date of the appellant's ABI was **not** after age 22. (Exhibit 10, p. 68, emphasis added). The appellant testified that he suffered traumatic brain injury after a motorcycle accident when he was 19. The MassHealth representative stated that MassHealth learned from SHIP that the appellant's brain injury occurred before age 22 during the assessment. The MassHealth representative stated that if MassHealth had information that the appellant's ABI occurred before age 22 prior to the assessment, the applications would have been denied on that basis and no assessment would have been done. The MassHealth representative stated that since the nurse reviewer had already completed so much of the assessment and because MassHealth determined that there was a more substantial reason for the denial of the waiver applications, namely its finding that the appellant cannot be safely served in the community within the terms of the waivers, MassHealth denied the applications on that basis.

In the clinical assessment for the ABI-N Waiver, the nurse reviewer noted that the appellant exhibits significant health and safety risks which preclude transition to the community; the appellant's support needs exceed 84 hours per week of the waiver services including homemaker, personal care, adult companion, and individual support and community habilitation; and the appellant does not have a confirmed/qualified ABI. (Exhibit 10, p. 71). In the clinical assessment for the ABI-RH Waiver, the nurse reviewer noted the appellant's need for 24 hour care and/or supervision cannot be safely met with the services available under the RH waiver; the appellant exhibits significant health and safety risks which preclude transition to the community; and the appellant does not have a confirmed/qualified ABI. (Exhibit 10, p. 71).

The nurse reviewer noted that the appellant needed frequent re-direction during the assessment. (Exhibit 10, p. 73). The nurse reviewer reported that the appellant scored 10/15 on a brief interview for mental status (BIMS) conducted in [REDACTED], which indicates moderate impairment. (Exhibit 10, p. 73). The nurse reviewer noted that at the time of the [REDACTED] assessment, the appellant had been hospitalized 2 times since his admission to his current nursing facility. (Exhibit 10, p. 73). The appellant had a third admission on [REDACTED], after the July assessment. (Testimony, exhibit 10, p. 73). The appellant was hospitalized from [REDACTED] after a breakthrough seizure and fall. (Exhibit 10, p. 73). The appellant was found on the floor of his room on [REDACTED] and was transported to the hospital where it was learned he had suffered a seizure. (Exhibit 10, p. 73). The appellant was again admitted to the hospital on [REDACTED] for medication non-compliance after being found on the floor in his room, lethargic. (Exhibit 10, p. 73). The appellant was noted to be having cluster seizures. (Exhibit 10, p. 73). The admitting physician at the hospital requested that social services intervene with the nursing facility to ensure that the appellant remains compliant with medications, before discharge back to the nursing facility. (Exhibit 10, p. 73). Per discussion with the nursing facility Social Worker, the nurse reviewer noted that the appellant self administers his medications and stated he had run out of seizure medications which resulted in the [REDACTED] hospital admission. (Exhibit 10, p. 73). Due to his continued paranoia and mistrust, the appellant's medications are in a locked drawer in his room at the nursing facility and he has the key. (Exhibit 10, p. 76). The appellant's medication compliance is unclear as the appellant refuses to let staff count or check his medication drawer due to his ongoing trends of paranoia and suspiciousness. (Exhibit 10, p. 76).

The nurse reviewer reported that the appellant has a history of paranoia and delusions, and reported that he would attack if someone bothered him. (Exhibit 10, p. 74). Mental status exam indicated speech was pressured and excessive, thought process was disorganized, abnormal thoughts/delusions present, memory impairment, loose associations, limited concentration, and impaired judgment and insight. (Exhibit 10, p. 74). Psychiatric notes indicate the appellant exhibits anger and agitation at times and these behaviors are not always redirectable. (Exhibit 10, p. 76).

The nurse reviewer noted that the appellant had an apartment prior to his nursing facility admission. The appellant stated that he lived in disability housing for 23 years. The appellant repeated a couple of times that the maintenance people in his apartment complex stole from him. The nurse reviewer reported in the clinical assessment that records indicate that EMS reported that the appellant's apartment was full of bugs and filth. (Exhibit 10, p. 75). The appellant has no family or informal supports in the community. (Exhibit 10, p. 75).

The nurse reviewer determined that the appellant has multiple risk factors with regard to returning to living in the community. (Exhibit 10, p. 75). The nurse reviewer noted that the appellant is at risk for physical decompensation due to multiple medical conditions; he is at risk for psychiatric decompensation due to history of depression, paranoia, and delusions; he is at risk for resuming use of alcohol due to history of substance use disorder; he is at risk for falls and injury due to seizures and impaired mobility; he is at risk for self neglect due to needing assistance with activities of daily living (ADLs) and at risk for isolation and exploitation due to lack of informal supports and impaired judgment. (Exhibit 10, p. 75). The nurse reviewer determined that the appellant requires a structured environment to maintain his health and safety noting that he failed living independently in the community setting resulting in hospitalization and has been in long term care facilities since 2016. (Exhibit 10, p. 75). The nurse reviewer noted that the appellant continues to require high level 24/7 supervision and care to maintain his safety as he remains medically and psychiatrically unstable and therefore he cannot be safely served in the ABI-N or ABI-RH Waiver programs. (Exhibit 10, po. 75).

The MassHealth representative testified that on August 18, 2022, the appellant's case was discussed at the MassHealth Waiver Clinical Team review meeting and, a second clinical review was conducted by the Massachusetts Rehabilitation Commission (MRC) clinical team on August 24, 2022. (Exhibit 8, p. 3). The MassHealth representative stated that the MRC clinical team oversees the community living waiver. (Exhibit 8, p. 4). The MassHealth representative stated that MassHealth and MRC determined that the appellant was not considered to be clinically eligible for participation in the ABI-N or ABI-RH Waivers due to the appellant being a significant health and safety risk and because he continues to require an elevated 24/7 level of care and supervision above what is available in the ABI-N or ABI-RH Waiver programs. (Exhibit 8, p. 4). The MassHealth representative testified that the appellant's 7 years of long term care services have been able to keep him safe, as he continues to have significant health and safety risks that the community waivers are not able to mitigate. (Exhibit 8, p. 4). The MassHealth representative stated that it is MassHealth's clinical and professional opinion, based on the available medical records and interviews, that the appellant cannot be safely served in the community within the ABI-N and ABI-RH Waivers. (Exhibit 8, p. 4).

The appellant testified that he has not had a drink since 1993. The appellant stated that he had seizures because his medication was not prescribed properly and he has not had a seizure since the medication dosage was corrected. The appellant stated, more than once, that maintenance people stole from his apartment in the community and that he has been robbed at the nursing facility. The appellant noted that he does not like the shared showers at the nursing facility. The nursing facility's social worker stated that the appellant would have a better quality of life at a group home and she believes he could live in the community with the right supports. The nursing facility social worker stated that the appellant is forgetful at times, but is independent with dressing, hygiene, walking, and toileting, and does not require the nursing facility setting.

Findings of Fact

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

1. The appellant applied for the ABI-N Waiver and the ABI-RH Waiver on May 16, 2022; on both applications, the appellant attests that he sustained his brain injury at age 22 or older.
2. The appellant is under age 65 and has diagnoses including epilepsy, diffuse TBI, hypertension, major depressive disorder, pulmonary embolism, conversion disorder, morbid obesity, muscle weakness, history of pneumonia, acute respiratory failure, and fracture of left leg.
3. While living in the community in 2016, the appellant required hospitalization after he was found in his bathtub calling out for help related to a seizure; EMS reported the appellant's apartment was filthy and filled with bugs; it was believed the appellant had been in the tub for days.
4. The appellant was admitted to a skilled nursing facility after his hospitalization in 2016, but was involved in a physical altercation resulting in arrest for which he spent a few days in prison.
5. The appellant was admitted to another nursing facility where he remained until the facility closed in 2021 at which time he was transferred to his current nursing facility.
6. The appellant was previously found ineligible for the ABI-RH Waiver in 2017 due to high risk to cause harm to himself or others; paranoid and delusional thoughts that people were stealing from him; an altercation where he punched another resident; non-compliance with medications, and impulsivity, poor judgment and poor insight.
7. The appellant was found ineligible for the MFP Residential Services Waiver in 2018 because he was a high risk to cause harm to self and others, had behaviors including verbal aggression, exhibited ongoing paranoia and delusions, and was noted to have open court cases for assault and battery.
8. On July 11, 2022, the nurse reviewer met with the appellant at the nursing facility and conducted an assessment for ABI Waiver eligibility; the assessment consisted of completion of MDS-HC, clinical determination of waiver eligibility, ABI Waiver community risk assessment, risk assessment ABI-N caregiver supplement, review of the appellant's medical record, and a discussion with nursing facility staff.
9. The date of the appellant's ABI was not after age 22; the appellant suffered traumatic brain injury after a motorcycle accident when he was 19.
10. The appellant does not have a qualified ABI.
11. The appellant's support needs exceed 84 hours per week of the waiver services including homemaker, personal care, adult companion, and individual support and community habilitation; the appellant needs 24 hour care and/or supervision cannot.

12. The appellant scored 10/15 on a BIMS conducted in April, 2022, which indicates moderate impairment.
13. As of the date of the hearing, the appellant had been hospitalized 3 times since his 2021 admission to his current nursing facility.
14. The appellant was hospitalized from [REDACTED] after a breakthrough seizure and fall.
15. The appellant was found on the floor of his room on [REDACTED] and was transported to the hospital where it was learned he had suffered a seizure.
16. The appellant was again admitted to the hospital on [REDACTED] for medication non-compliance after being found lethargic on the floor in his room; the appellant was noted to be having cluster seizures.
17. During the appellant's August, 2022 hospital admission, the admitting physician at the hospital requested that social services intervene with the nursing facility to ensure that the appellant remains compliant with medications, before discharge back to the nursing facility.
18. The appellant self administers his medications and reported that he ran out of his medication at the time of the [REDACTED] seizure.
19. The appellant's medication compliance is unclear as the appellant refuses to let staff count or check his medication drawer due to his ongoing trends of paranoia and suspiciousness.
20. The appellant has a history of paranoia and delusions, and reported that he would attack if someone bothered him; mental status exam indicated speech was pressured and excessive, thought process was disorganized, abnormal thoughts/delusions present, memory impairment, loose associations, limited concentration, and impaired judgment and insight; the appellant exhibits anger and agitation at times and these behaviors are not always redirectable.
21. The appellant lived in disability housing for 23 years.
22. The appellant repeated a couple of times that the maintenance people in his apartment complex stole from him.
23. The appellant has no family supports or informal supports in the community.
24. If discharged to the community, the appellant is at risk for physical decompensation due to multiple medical conditions; he is at risk for psychiatric decompensation due to history of depression, paranoia, and delusions; he is at risk for falls and injury due to seizures and impaired mobility; he is at risk for self neglect due to needing assistance with ADLs, and at risk for isolation and exploitation due to lack of informal supports and impaired judgment.
25. The appellant requires a structured environment and requires high level 24/7 supervision and

care to maintain his safety as he remains medically and psychiatrically unstable.

26. The MassHealth Waiver Clinical Team and the MRC determined that the appellant was not considered to be clinically eligible for participation in the ABI-N or ABI-RH Waivers due to the appellant being a significant health and safety risk and because he continues to require an elevated 24/7 level of care and supervision above what is available in the ABI-N or ABI-RH Waiver programs.

Analysis and Conclusions of Law

Home- and Community-based Services Waivers for Persons with Acquired Brain Injury.

(1) Residential Habilitation Waiver for Persons with Acquired Brain Injury.

(a) Clinical and Age Requirements. The Residential Habilitation Waiver for Persons with Acquired Brain Injury, as authorized under section 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 or chronic disease or rehabilitation hospital services to receive residential habilitation and other specified waiver services in a provider-operated 24-hour supervised residential setting if he or she meets all of the following criteria:

1. is 22 years of age or older and, if younger than 65 years old, is totally and permanently disabled in accordance with Title XVI standards;
2. acquired, after reaching the age of 22, a brain injury including, without limitation, brain injuries caused by external force, but not including Alzheimer's disease and similar neuro-degenerative diseases, the primary manifestation of which is dementia;
3. is an inpatient in a nursing facility or chronic disease or rehabilitation hospital with a continuous length of stay of 90 or more days at the time of application for the waiver;
4. needs a residential support service available under the Residential Habilitation Waiver; and
5. is able to be safely served in the community within the terms of the Residential Habilitation Waiver.

(b) Eligibility Requirements. In determining eligibility for MassHealth Standard and for these waiver services, the MassHealth agency determines income eligibility based solely on the applicant's or member's income regardless of his or her marital status. The applicant or member must

1. meet the requirements of 130 CMR 519.007 (G)(1)(a);
2. have countable income that is less than or equal to 300% of the federal benefit rate (FBR) for an individual;
3. have countable assets of \$2,000 or less for an individual and, for a married couple, if the initial Waiver eligibility determination was on or after January 1, 2014, have assets that are less than or equal to the standards at 130 CMR 520.016(B): Treatment of a Married Couple's Assets When One Spouse Is Institutionalized; and
4. not have transferred resources for less than fair market value, as described in 130 CMR 520.018: Transfer of Resources Regardless of Date of Transfer and 520.019: Transfer of Resources Occurring on or after August 11, 1993.

(c) Enrollment Limits. Enrollment in the Residential Habilitation Waiver is subject to a limit on the total number of waiver participants. The number of participants who can be enrolled in this waiver may be limited in a manner determined by the MassHealth agency.

(d) Waiver Services. Eligible members who are enrolled as waiver participants in the Residential Habilitation Waiver are eligible for the waiver services described in 130 CMR 630.405(A): Acquired Brain Injury with Residential Rehabilitation (ABI-RH) Waiver.

(2) Non-Residential Habilitation Waiver for Persons with Acquired Brain Injury.

(a) Clinical and Age Requirements. The Non-Residential Habilitation Waiver for Persons with Acquired Brain Injury, as authorized under section 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 or chronic disease or rehabilitation 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 22 years of age or older and, if younger than 65 years old, is totally and permanently disabled in accordance with Title XVI standards;
2. acquired, after reaching age of 22, a brain injury including, without limitation, brain injuries caused by external force, but not including Alzheimer's disease and similar neuro-degenerative diseases, the primary manifestation of which is dementia;
3. is an inpatient in a nursing facility or chronic disease or rehabilitation hospital with a continuous length of stay of 90 or more days at the time of application for the waiver;
4. needs one or more of the services under the Non-Residential Habilitation Waiver; and
5. is able to be safely served in the community within the terms of the Non-Residential Habilitation Waiver.

(b) Eligibility Requirements. In determining eligibility for MassHealth Standard and for these waiver services, the MassHealth agency determines income eligibility based solely on the applicant's or member's income regardless of his or her marital status. The applicant or member must

1. meet the requirements of 130 CMR 519.007 (G)(2)(a);
2. have countable income that is less than or equal to 300% of the federal benefit rate (FBR) for an individual;
3. have countable assets of \$2,000 or less for an individual and, for a married couple, if the initial Waiver eligibility determination was on or after January 1, 2014, have assets that are less than or equal to the standards at 130 CMR 520.016(B): Treatment of a Married Couple's Assets When One Spouse Is Institutionalized; and
4. not have transferred resources for less than fair market value, as described in 130 CMR 520.018: Transfer of Resources Regardless of Date of Transfer and 520.019: Transfer of Resources Occurring on or after August 11, 1993.

(c) Enrollment Limits. Enrollment in the Non-Residential Habilitation Waiver is subject to a limit on the total number of waiver participants. The number of participants who can be enrolled in this waiver may be limited in a manner determined by the MassHealth agency.

(d) Waiver Services. Eligible members who are enrolled as waiver participants in the Non-Residential Habilitation Waiver are eligible for the waiver service described in 130 CMR 630.405(B): Acquired Brain Injury Non-Residential Habilitation (ABI-N) Waiver.

(130 CMR 519.007(G)).

Medical Necessity

The MassHealth agency does not pay a provider for services that are not medically necessary and may impose sanctions on a provider for providing or prescribing a service or for admitting a member to an inpatient facility where such service or admission is not medically necessary.

(A) A service is medically necessary if

(1) it is reasonably calculated to prevent, diagnose, prevent the worsening of, alleviate, correct, or cure conditions in the member that endanger life, cause suffering or pain, cause physical deformity or malfunction, threaten to cause or to aggravate a handicap, or result in illness or infirmity; and

(2) there is no other medical service or site of service, comparable in effect, available, and suitable for the member requesting the service, that is more conservative or less costly to the MassHealth agency. Services that are less costly to the MassHealth agency include, but are not limited to, health care reasonably known by the provider, or identified by the MassHealth agency pursuant to a prior-authorization request, to be available to the member through sources described in 130 CMR 450.317(C), 503.007: Potential Sources of Health Care, or 517.007: Utilization of Potential Benefits.

(B) Medically necessary services must be of a quality that meets professionally recognized standards of health care, and must be substantiated by records including evidence of such medical necessity and quality. A provider must make those records, including medical records, available to the MassHealth agency upon request. (See 42 U.S.C. 1396a(a)(30) and 42 CFR 440.230 and 440.260.)

(C) A provider's opinion or clinical determination that a service is not medically necessary does not constitute an action by the MassHealth agency.

(D) Additional requirements about the medical necessity of MassHealth services are contained in other MassHealth regulations and medical necessity and coverage guidelines.

(E) Any regulatory or contractual exclusion from payment of experimental or unproven services refers to any service for which there is insufficient authoritative evidence that such service is reasonably calculated to have the effect described in 130 CMR 450.204(A)(1).

(130 CMR 450.204).

One of the clinical criteria for both the ABI-RH and the ABI-N waivers is that the applicant “acquired, after reaching the age of 22, a brain injury including, without limitation, brain injuries caused by external force, but not including Alzheimer’s disease and similar neuro-degenerative diseases, the primary manifestation of which is dementia”. (130 CMR 519.007(G)(1)(a)(2);

519.007(G)(2)(a)(2)). Although the appellant attests on the applications for both waivers that he sustained his brain injury at age 22 or older, such report is not true. The appellant acquired his brain injury after a motorcycle accident when he was 19. This fact would preclude him from participating in the ABI-RH and ABI-N waiver programs. There are other community living waiver programs including the Home- and Community-based Services Waiver for Persons with Traumatic Brain Injury, and the Money Follows the Person Home- and Community-based Services Waivers at 130 CMR 519.007(F) and 130 CMR 519.007(H), which the appellant could apply for, however both also have the criteria requirement that the applicant is able to be safely served in the community within the terms of the waiver. (130 CMR 519.007(G)(1)(a)(5); 519.007(G)(2)(a)(5)).

The home-and community-based services waivers allow individuals currently institutionalized in a nursing facility or hospital to be placed in a residential housing program or live on their own in the community. (130 CMR 519.007(G)(1), (2)). Pertinent here, the waivers require that the applicant “is able to be safely served in the community within the terms of the ... Waiver.” (130 CMR 519.007(G)(1)(a)(5); 519.007(G)(2)(a)(5)).

As the MassHealth representative explained, this involves a comprehensive review to determine whether a particular applicant’s medical needs can be met given the available community resources. MassHealth determined the appellant has multiple risk factors with regard to returning to living in the community. The appellant is at risk for physical decompensation due to multiple medical conditions; he is at risk for psychiatric decompensation due to history of depression, paranoia, and delusions; he is at risk for falls and injury due to seizures and impaired mobility; he is at risk for self neglect due to needing assistance with ADLs and at risk for isolation and exploitation due to lack of informal supports and impaired judgement. The appellant failed living independently in the community setting resulting in hospitalization and has been in long term care facilities since 2016. While living in the community, the appellant suffered a seizure and was calling for help from his bathtub for days. Furthermore, EMS noted that the apartment was filthy and had bugs. Even while a resident of the nursing facility, the appellant has been hospitalized due to seizures 3 times since his 2021 admission, presumably due to medication issues. The appellant self administers his medications. Fortunately the appellant was in the nursing facility when he suffered these seizures and the staff was able to intervene and get him to the hospital. The appellant requires high level 24/7 supervision and care to maintain his safety as he remains medically and psychiatrically unstable.

The appellant exhibits significant health and safety risks which preclude transition to the community; the appellant’s support needs exceed 84 hours per week of the waiver services including homemaker, personal care, adult companion, and individual support and community habilitation. The appellant’s need for 24 hour care and/or supervision cannot be safely met, even with the residential services available under the ABI-RH waiver.

Based on the evidence noted above, the appellant cannot be safely served in the community within the terms of the ABI-N waiver or the ABI-RH waiver. Because the appellant does not meet the criteria in 130 CMR 519.007(G) necessary for eligibility for either of the waiver programs, MassHealth’s denials of the applications are upheld. The 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.

Patricia Mullen
Hearing Officer
Board of Hearings

cc: MassHealth Representative: Linda Phillips, Associate Director of Appeals & Regulatory Compliance, Disability and Community-based Services, 333 South St., Shrewsbury, MA 01545
