

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2207155
Decision Date:	1/18/2023	Hearing Date:	October 28, 2022
Hearing Officer:	Brook Padgett	Record Open to:	December 30, 2022

Appellant Representative:



MassHealth Representative:

Karen Ryan, Tewksbury MEC



*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:	130 CMR 520.019
Decision Date:	1/18/2023	Hearing Date:	October 28, 2022
MassHealth Rep.:	K. Ryan	Appellant Rep.:	
Hearing Location:	Tewksbury		

Authority

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

Jurisdiction

The Appellant received a notice dated August 24, 2022, stating: MassHealth has decided you are eligible for MassHealth Standard benefits to cover your care in a nursing facility. Your eligibility begins on June 22, 2022. (Exhibit 1).

The Appellant filed this appeal timely on September 22, 2022. (130 CMR 610.015); Exhibit 2).

Date of eligibility for assistance is valid grounds for appeal. (130 CMR 610.032).

Action Taken by MassHealth

MassHealth determined the Appellant was eligible for Standard long term care benefits beginning June 22, 2022.

Issue

Was the Appellant's date of eligibility correctly determined?

Summary of Evidence

MassHealth testified the Appellant was admitted to a nursing facility on [REDACTED] and submitted a long term care application on May 11, 2021. After preserving the application date though appeals on August 24, 2022, the Appellant was approved for long term care coverage with a patient pay amount (PPA) of \$842.30 beginning June 22, 2022. MassHealth stated the Appellant was determined otherwise eligible for MassHealth beginning July 08, 2021, (Appellant had made private payments in the amount of \$70,119.00) but was denied MassHealth coverage until June 21, 2022 as she transferred \$136,338.84 in assets during the five year look back period. MassHealth submitted into evidence a case narrative. (Exhibit 4).

The Appellant's attorney argued that MassHealth's imposition of the penalty period was made in error as there is no evidence the transfers were for the purpose of qualifying for MassHealth. The representative stated the funds were transferred for the benefit of two individuals [REDACTED] (a family member) and [REDACTED] (a friend) who took advantage of the Appellant's frail condition and wrote themselves checks from her bank account from 2018 to 2020 ([REDACTED] received a total of \$46,000.00 (\$40,000.00 cash + \$6,000.00 check) and [REDACTED] \$74,338.84 (\$61,838.84 car + \$12,500.00 in checks)) in addition to an another unaccounted for \$16,000.00). The representative maintains that during the time of the transfers the Appellant was not in control of her bank accounts or financial situation. The representative stated that immediately after finding that funds had been transferred a conservator was appointed and a civil suit was recently filed against [REDACTED] and [REDACTED]. The representative is requesting MassHealth approve the Appellant's long term care request as of July 08, 2021 as the Appellant was a victim of elder fraud and should not be penalized for the transfer. The Appellant's representative submitted into evidence a pre-hearing brief (Exhibit 5) and supporting documentation consisting of 118 pages: Part 1: Prehearing brief (pp.1-17), the facility physician's letter dated September 06, 2022 indicating the Appellant requires 24 hour care (p.18), Revocable Trust (pp.20-41). Part 2: Health Care Proxy dated June 17, 2020 (pp.1-5), Appointment of Temporary Conservatorship dated August 05, 2021 expires November 03, 2021 (pp.7-14), bank balances as of May 25, 2021 (pp.14-15), Declaration of Conservator dated November 15, 2021 (p.17), MassHealth email of transfer penalty dated August 24, 2022 (p.19), Superior Court filing against [REDACTED] and [REDACTED] dated February 23, 2022 (pp.21-23). Part 3: MassHealth notice dated August 24, 2022 (pp.1-10), Nursing facility Discharge notice dated [REDACTED] (pp.11-13), representative letter to MassHealth requesting a Hardship waiver (pp.14-24). Part 4: Medical Certificate Guardianship or Conservator dated March 05, 2021 (pp.3-9), October 15, 2021 (pp.10-16) and January 19, 2022 (pp.17-23) (Exhibit 6).

At the Hearing Officer's request the record remained open until November 28, 2022, to submit verification of the onset of the Appellant's medical condition and any additional documentation demonstrating the funds were taken without the Appellant's permission. On November 26, 2022, the Appellant's representative requested additional time to submit and the record open period was extended until December 30, 2022. (Exhibit 7). Prior to the close of the record open period the Appellant's representative submitted a check to the nursing facility from [REDACTED] in the amount of \$46,000.00 dated November 20, 2022, an Itemized Patient Settlement printout indicating the Appellant continues to owe the facility \$147,528.00 and a nursing facility screening. (Exhibit 8).

Findings of Fact

Based on a preponderance of the evidence, I find:

1. The Appellant applied for MassHealth long term care coverage on May 11, 2021. (Exhibit 4).
2. On August 24, 2022, the Appellant was determined otherwise eligible for MassHealth as of July 08, 2021 and approved the Appellant's Standard coverage with a start date of June 22, 2022. (Exhibit 1).
3. On September 18, 2018 the Appellant transferred to a friend \$61,838.84 to purchase a car. (Exhibit 6).
4. Between April 19, 2019 and November 07, 2019, the Appellant transferred to a friend \$12,500.00 in checks. (Exhibit 6).
5. Between July 26, 2018 and May 26, 2020, the Appellant transferred \$16,000.00 which cannot be accounted for. (Exhibit 6).
6. Between May 26, 2020 and September 10, 2020, the Appellant transferred to a family member a total of \$46,000.00 (\$40,000.00 cash + \$6,000.00 check). (Exhibit 6).
7. The Appellant was determined ineligible for MassHealth Standard benefits from July 08, 2021 to June 22, 2022 (or 349 days - the transferred amount of \$136,338.84 divided by the Medicaid daily rate of \$391.00). (Exhibit 4).
8. On August 05, 2021, a conservator was appointed with all powers over property and business affairs of the Appellant with "specific authority to take all necessary steps to qualify [the Appellant] for MassHealth benefits. In addition, Conservator is granted all powers necessary to take immediate control over the [Appellant's] bank accounts, income and assets." (Exhibit 6).
9. On November 03, 2021, the August 05, 2021, conservatorship terminated and was reauthorized until February 02, 2022. (Exhibit 6).
10. The Appellant's Conservator's Declaration dated November 15, 2021, states that at the time of the transfers the Appellant was living in the community and making use of her own funds. (Exhibit 6).

Analysis and Conclusions of Law

The Appellant submitted a long term care application on May 11, 2021 and MassHealth approved her Standard coverage on August 24, 2022 beginning June 22, 2022. MassHealth denied the Appellant long term care coverage from July 08, 2021 until June 21, 2022 as she transferred \$136,338.84 in assets within the five year look back period. The Appellant's attorney argued that MassHealth's imposition of the penalty period was made in error as there is no evidence the transfers were for the purpose of qualifying for MassHealth benefits. The funds were transferred to the Appellant's friend as well as a family member who took advantage of the Appellant's frail condition and wrote themselves checks from her bank account from 2018 to 2020. The Appellant's representative testified that immediately after finding that funds had been transferred a Conservator was appointed and a civil suit was recently filed against the friend and family member.

MassHealth may consider as a disqualifying transfer any action taken to avoid receiving a resource to which the nursing-facility resident or spouse is or would be entitled if such action had not been taken. A disqualifying transfer may include any action taken which would result in making a formerly available asset no longer available (130 CMR 520.019(C))¹. MassHealth considers any transfer during the appropriate look-back period by the nursing-facility resident or spouse of a resource, or interest in a resource, owned by or available to the nursing-facility resident or the spouse 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). The regulations allow for a transfer of resources if it can be demonstrated to MassHealth's satisfaction that the transfer was exclusively for some other purpose than to qualify for MassHealth.

¹ 130 CMR 520.019: Transfer of Resources Occurring on or after August 11, 1993 (B) Look-Back Period. Transfers of resources are subject to a look-back period, beginning on the first date the individual is both a nursing-facility resident and has applied for or is receiving MassHealth Standard. (1) For transfers occurring before February 8, 2006, this period generally extends back in time for 36 months. (2) For transfers of resources occurring on or after February 8, 2006, the period generally extends back in time for 60 months. The 60-month look-back period will begin to be phased in on February 8, 2009. Beginning on March 8, 2009, applicants will be asked to provide verifications of their assets for the 37 months prior to the application. As each month passes, the look-back period will increase by one month until the full 60 months is reached on February 8, 2011. (3) For transfers of resources from or into trusts, the look-back period is described in 130 CMR 520.023(A).(C) Disqualifying Transfer of Resources. The Division considers any transfer during the appropriate look-back period by the nursing-facility resident or spouse of a resource, or interest in a resource, owned by or available to the nursing-facility resident or the spouse (including the home or former home of the nursing-facility resident or the spouse) 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). The Division may consider as a disqualifying transfer any action taken to avoid receiving a resource to which the nursing-facility resident or spouse 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 Division will consider the specific circumstances involved. A disqualifying transfer may include any action taken which would result in making a formerly available asset no longer available.

There is no dispute that the Appellant transferred funds for less than fair market value and within the applicable look back period. The question is whether the Appellant can demonstrate that the transfer was exclusively for some other purpose than to qualify for MassHealth.

The Appellant's Temporary Conservator appointed on August 05, 2021, stated on his Declaration dated November 15, 2021, that he “extensively investigated [the Appellant's] financial assets and transaction history”. He indicated it was his knowledge and belief that the Appellant and her Power of Attorney (family friend [REDACTED]) used the Appellant's assets for the Appellant's behalf, and he found “no evidence that the funds were used or transfer (sp.) for Medicaid planning purposes.” He also stated the to the best of his knowledge “at the time of the transfers the [Appellant] was living in the community and making use of her own funds.” This declaration was signed under the penalties of perjury and is an independent third party assessment of the Appellant’s actions at the time of the transfer. In an effort to gain further information regarding the transfers the Hearing Officer’s requested the Appellant’s representative submit verification of the onset of the Appellant’s medical condition and any additional documentation indicating the funds were taken without the Appellant’s permission. The Appellant's representative submitted a facility screening form, a check to the nursing facility and an Itemized Patient Settlement printout of the Appellant’s outstanding balance.

While the Appellant can distribute her assets in any manner she wishes, if she requests to shift the cost of her nursing home care to the publicly funded Medicaid/MassHealth program² which was “designed to provide health care for indigent persons,” it is expected that she depletes her own resources before obtaining assistance from the government. Lebow v Comm’r of the Div of Med. Assistance, 433 Mass. 171, 172 (2001).

In this instance the Appellant (or her representatives) failed to demonstrate the Appellant's transferred funds were used for a purpose **other than to qualify for MassHealth**.³ The burden is to demonstrate that the Appellant who is [REDACTED] years old with numerous health problems, including Alzheimer’s disease, did not distribute her assets to friends and family in anticipation that she would no longer have access to those funds if her health required she enter a nursing facility. Although the Conservator’s Declaration states he found no evidence that the funds were used or transferred for Medicaid planning purposes, he also indicated at the time of the transfers the Appellant was living in the community and making use of her own funds. This would include the purchasing of a car for a friend or the gifting of funds to her family. The Appellant's representative did submit evidence of a demand letter and a civil filing against the Appellant's

² MassHealth is a joint federal and state Medicaid program established in 1965 by Title XIX of the Social Security Act. See 42 U.S.C § 1396 et seq., 42 C.F.R. § 430 et seq.

³ Regulation 130 CMR 520.019(F), which governs intent, states: (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 or spouse 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. (*Emphasis added*).

family member and friend, however there is no determination that confirms she was a victim of elder abuse or fraud nor was there any medical evidence presented that the Appellant did not have the mental capacity to make her own decisions at the time of the transfer.

Based on the record the Appellant and her representatives have failed to present sufficient convincing evidence to demonstrate the transfer of \$136,338.84 for less than fair market value was done exclusively for a purpose other than to qualify for MassHealth and therefore not a disqualifying transfer (130 CMR 520.019(F)). This appeal is therefore DENIED.

If the nursing-facility resident feels the imposition of a period of ineligibility results in undue hardship, the nursing-facility resident must submit a written request for reconsideration and any supporting documentation to the MassHealth Enrollment Center within 15 days of this decision. (130 CMR 520.019(L)).⁴

⁴ 130 CMR 520.019(L): (L) Waiver of the Period of Ineligibility Due to Undue Hardship. In addition to revising a trust and curing a transfer, the nursing-facility resident may claim undue hardship in order to eliminate the period of ineligibility. (1) The MassHealth agency may waive a period of ineligibility due to a disqualifying transfer of resources if ineligibility would cause the nursing-facility resident undue hardship. The MassHealth agency may waive the entire period of ineligibility or only a portion when all of the following circumstances exist. (a) The denial of MassHealth would deprive the nursing-facility resident of medical care such that his or her health or life would be endangered, or the nursing-facility resident would be deprived of food, shelter, clothing, or other necessities such that he or she would be at risk of serious deprivation. (b) Documentary evidence has been provided that demonstrates to the satisfaction of the MassHealth agency that all appropriate attempts to retrieve the transferred resource have been exhausted and that the resource or other adequate compensation cannot be obtained to provide payment, in whole or part, to the nursing-facility resident or the nursing facility. (c) The institution has notified the nursing-facility resident of its intent to initiate a discharge of the resident because the resident has not paid for his or her institutionalization. (d) There is no less costly noninstitutional alternative available to meet the nursing-facility resident's needs. (2) Undue hardship does not exist when imposition of the period of ineligibility would merely inconvenience or restrict the nursing-facility resident without putting the nursing-facility resident at risk of serious deprivation. (3) Where the MassHealth agency has issued a notice of the period of ineligibility due to a disqualifying transfer of resources, the nursing-facility resident may request a hardship waiver. For transfers occurring on or after February 8, 2006, nursing facilities may apply for a hardship waiver on behalf of a resident, with the consent of the nursing-facility resident or the resident's eligibility representative. (4) If the nursing-facility resident feels the imposition of a period of ineligibility would result in undue hardship, the nursing-facility resident must submit a written request for consideration of undue hardship and any supporting documentation to the MassHealth Enrollment Center listed on the notice of the period of ineligibility within 15 days after the date on the notice. Within 30 days after the date of the nursing-facility resident's request, the MassHealth agency will inform the nursing-facility resident in writing of the undue-hardship decision and of the right to a fair hearing. The MassHealth agency will extend this 30-day period if the MassHealth agency requests additional documentation or if extenuating circumstances as determined by the MassHealth agency require additional time. (5) The nursing-facility resident may appeal the MassHealth agency's undue-hardship decision and the imposition of a period of ineligibility by submitting a request for a fair hearing to the MassHealth agency's Board of Hearings within 30 days after the nursing-facility resident's receipt of the MassHealth agency's written undue-hardship notice, in accordance with 130 CMR 610.000. (6) The nursing-facility resident's request for consideration of undue hardship does not limit his or her right to request a fair hearing for reasons other than undue hardship.

Order for MassHealth


None.

Notification of Your Right to Appeal to Court

If you disagree with this decision, in part or whole, 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.

Brook Padgett
Hearing Officer
Board of Hearings

cc: MassHealth representative: Taunton MEC

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