

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	2207541
<b>Decision Date:</b>	11/22/2022	<b>Hearing Date:</b>	11/08/2022
<b>Hearing Officer:</b>	Alexandra Shube	<b>Record Open:</b>	11/15/2022

**Appearance for Appellant:**



**Appearance for MassHealth:**

*Via telephone:*

Jamie Lapa, Springfield MEC



*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

<b>Appeal Decision:</b>	Approved	<b>Issue:</b>	LTC – Disqualifying Transfer; Annuity
<b>Decision Date:</b>	11/22/2022	<b>Hearing Date:</b>	11/08/2022
<b>MassHealth’s Rep.:</b>	Jamie Lapa	<b>Appellant’s Rep.:</b>	Power of Attorney Friend
<b>Hearing Location:</b>	Springfield MassHealth Enrollment Center Remote	<b>Aid Pending:</b>	No

## 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 September 8, 2022, MassHealth denied the appellant's application for MassHealth benefits and assessed a period of ineligibility due to a disqualifying transfer of assets (Exhibit 1). The appellant filed this appeal in a timely manner on October 12, 2022 (see 130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032).

The record was held open until November 15, 2022.

## Action Taken by MassHealth

MassHealth denied the appellant’s application for MassHealth benefits and assessed a period of ineligibility from April 1, 2022 to August 11, 2024 upon determining that the appellant had made a disqualifying transfer of assets by purchasing an annuity that would not completely pay out by the end of his actuarial life expectancy.

## Issue

The appeal issue is whether MassHealth was correct in determining that the appellant's annuity is a disqualifying transfer.

## Summary of Evidence

The MassHealth representative appeared at hearing via telephone and testified as follows: the appellant is a single male over the age of [REDACTED] and a resident of a nursing facility. On February 4, 2022, a long-term care application was submitted on behalf of the appellant requesting a start date of [REDACTED], the day of his admission. On September 8, 2022, MassHealth denied the application due to a transfer of resources pursuant to 130 CMR 520.018 and 130 CMR 520.019. The appellant purchased three annuities in 2001, but they were not annuitized until April and May 2021 when all three annuities started paying out monthly payments for a guaranteed period of 10 years. The appellant was [REDACTED] when the annuities started paying out. Based on the Social Security Administration (SSA) actuarial life tables, the appellant had a life expectancy of 4.8 years at that time. MassHealth explained that with a set payout period of 10 years, the appellant will not recoup the amount he paid for each annuity during his calculated life expectancy. The amount of the transfers are the balance of each annuity as of the date requesting coverage, for a total of \$354,179.93. This resulted in an 864-day period of ineligibility based on the average daily nursing facility rate of \$410 per day.

The appellant was represented at hearing via telephone by his daughter, who is his power of attorney, as well as his daughter's friend. The appellant's representative testified as follows: the appellant purchased three annuities in February 2001 totaling \$227,894.41.<sup>1</sup> The appellant had hip surgery and entered a rehabilitation facility on [REDACTED] for short-term care and rehabilitation. The appellant always intended to return home after his fall and rehabilitation. In anticipation of needing additional care and attendance at home, he began taking payments from his annuity in April and May of 2021. The monthly payments from the three annuities totaled \$3,812.15 before taxes for 121 payments over 10 years.

The appellant argued that pursuant to 130 CMR 520.007(J)(1), payments from an annuity established before February 8, 2006 are countable income in accordance with 130 CMR 520.009. Additionally, under 130 CMR 520.018(B) and 130 CMR 520.019, the annuities were all purchased before the start date of the look-back period, which for transfers occurring before February 8, 2006, is generally 36 months.<sup>2</sup> The appellant provided a Board of Hearings decision (appeal #1811354)

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<sup>1</sup> The appellant provided the purchasing contracts for the three "Flexible Premium Deferred Annuities," two with policy dates of February 9, 2001 and one, February 26, 2001. The initial premiums were \$144,275.37, \$72,630.91, and \$10,988.13, totaling \$227,894.41.

<sup>2</sup> The appellant highlighted that 130 CMR 520.0018(B) states that MassHealth will deny 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 of time referred to as the look-back period**" and the appellant purchased the annuities before, not during or after, the look-back period. Additionally, the appellant noted that 130 CMR 520.019 addresses the look-back period and states that "transfers of resources are subject to a look-back period..."

which approved a similar case because the purchase of the annuity was outside the look-back period, and therefore, not a disqualifying transfer.

Furthermore, the appellant stated that 130 CMR 520.007(J)(1)(c) is applicable because the appellant's annuity payments started more than 60 days after purchase (in the appellant's case, about 20 years after the date of purchase). The appellant argued that according to this regulation, the disqualification of benefits would end at the starting date of the annuity payments (April 2021), which predates the original MassHealth application date of February 4, 2022. In support thereof, the appellant referenced a Board of Hearings decision (appeal #1717373), which approved a similar situation because:

MassHealth's contention that the date the annuity was annuitized constitutes the date the annuity was established is simply not supported by the regulations... application of [130 CMR 520.007(J)(1)(c)] means that a period of disqualification would have run from the date of purchase to the date that payments first began in January 2015. But this period predates Appellant's requested start date by years...

The appellant concluded that because the annuities were purchased prior to the look-back period and the disqualification period pursuant to 130 CMR 520.007(J)(1)(c) would have ended prior to the requested start date, there should not be a disqualifying transfer and the requested start date of April 1, 2022 should be granted.

The appellant also stated that at the request of the MassHealth representative, in May 2022 the appellant named the Commonwealth of Massachusetts as the remainder beneficiary in the first position; however, pursuant to 130 CMR 520.007(J)(1), because the annuities were purchased prior to February 8, 2006, there is no requirement to list the Commonwealth of Massachusetts as first beneficiary. Therefore, the appellant also requested that he be allowed to change the beneficiary back to the original beneficiaries.

MassHealth responded that she did not believe the appellant was intending to qualify for MassHealth when he bought the annuities, but she was bound by the regulations and the annuity is not actuarially sound. She mentioned that she tried to get the appellant to change the payout period to five years instead of ten, but the insurance company would not allow the change. Once the annuities were annuitized, they could no longer be surrendered for their cash value. She also noted that the monthly payout the appellant receives every month is going to the nursing facility.

After hearing, this hearing officer re-opened the record until November 15, 2022 to have MassHealth provide a breakdown of how it calculated the transfer amount. The MassHealth representative provided the following based on the "Annuity Option Agreements" from April and May 2021 (not the original annuity contracts from February 2001):

I've attached copies of the cover pages for each of the three annuities listing the original amount of proceeds as of the settlement dates. [The appellant] was admitted on April 1, 2022:

[Annuity #1] original amount: \$324,539.97 on 4/2/21 (monthly payments of

\$3,097.87 from April 2, 2021 – March 2, 2022) 12 payments from 4/2/21 – admission date of 4/1/22 totaling \$37,174.44 which was deducted from the original amount \$324,539.97-\$37,174.44=**\$287,365.53**

[Annuity #2] original amount: \$16,601.75 on 4/21/21 (monthly payments of \$158.47 from 4/21/21 – 3/21/22) 12 payments from 4/21/21 through admission of 4/1/22 totaling \$1,901.64 which was deducted from the original amount: \$16,601.75-1,901.64=**\$14,700.11**

[Annuity #3] original amount \$58,228.20 on 5/10/21 (monthly payments of \$555.81 from 5/11/21 -3/11/22) Eleven payments from 5/11/21 through admission date of 4/1/22 totaling \$6,113.91 which was deducted from the original amount: \$58,228.20-\$6,113.91= **\$52,114.29**

The highlighted amounts are the transfers.

The record closed on November 15, 2022.

## Findings of Fact

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

1. The appellant is over the age of 65 and a resident of a nursing facility (Testimony and Exhibit 4).
2. On February 4, 2022, MassHealth received an application for long-term care benefits on behalf of the appellant, requesting a start date of April 1, 2022 (Testimony and Exhibit 4).
3. MassHealth denied the application on September 8, 2022 and determined an 864-day period of ineligibility due to a transfer of assets (Testimony and Exhibits 1 and 4).
4. The appellant purchased three annuities in February of 2001 totaling \$227,894.41 (Testimony and Exhibit 5).
5. The appellant began receiving payments from the annuity in April and May of 2021 in the amount of \$3,812.15 per month for 121 payments over a set payout period of 10 years (Testimony and Exhibits 4 and 5).
6. MassHealth calculated that at the time the appellant began receiving annuity payments, he had a life expectancy of 4.8 years (Testimony and Exhibit 4).
7. Based on the proceeds listed on the settlement date of the annuities, MassHealth calculated a transfer amount of \$354,179.93 (Testimony and Exhibits 4 and 6).

## Analysis and Conclusions of Law

MassHealth 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). 130 CMR 520.019(C) (emphasis added).

Furthermore, 130 CMR 520.019(B) states the following regarding the 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).

(Emphasis added).

130 CMR 520.018 states the following regarding transfer of resources regardless of date of transfer:

(A) The provisions of 42 U.S.C. 1396p apply to all transfers of resources. In the event that any portion of 130 CMR 520.018 and 520.019 conflicts with federal law, the federal law supersedes.

(B) The MassHealth agency denies payment for nursing-facility services to an otherwise eligible nursing-facility resident as defined in 130 CMR 515.001: Definition of Terms who transfers or whose spouse transfers countable resources for less than fair-market value **during or after the period of time referred to as the look-back period**.

(C) The denial of payment for nursing-facility services does not affect the individual's eligibility for other MassHealth benefits.

(D) **Circumstances giving rise to disqualifying transfers of resources are also described at 130 CMR 520.007(J).**

(Emphasis added).

The regulation addressing annuities can be found under countable assets at 130 CMR 520.007 and states the following:

(J) Annuities, Promissory Notes, Loans, Mortgages, and Similar Transactions.

(1) **Treatment of Annuities Established Before February 8, 2006.**

**Payments from an annuity are countable income** in accordance with 130 CMR 520.009. If the annuity can be converted to a lump sum, the lump sum, less any penalties or costs of converting to a lump sum, is a countable asset. **Purchase of an annuity is a disqualifying transfer** of assets for nursing-facility residents as defined at 130 CMR 515.001: *Definition of Terms* in the following situations:

- (a) when the beneficiary is other than the applicant, member, or spouse;
- (b) when the beneficiary is the applicant, member, or spouse and **when the total present value of projected payments from the annuity is less than the value of the transferred asset (purchase price)**. In this case, the MassHealth agency determines the amount of the disqualifying transfer based on the actuarial value of the annuity compared to the beneficiary's life expectancy using the life-expectancy tables as determined by the MassHealth agency, giving due weight to the life-expectancy tables of institutions in the business of providing annuities;
- (c) **when the terms of the annuity postpone payment beyond 60 days, the MassHealth agency will treat the annuity as a disqualifying transfer of assets until the payment start date;** or
- (d) when the terms of the annuity provide for unequal payments, the MassHealth agency may treat the annuity as a disqualifying transfer of assets. Commercial annuity payments that vary solely as a result of a variable rate of interest are not considered unequal payments under 130 CMR 520.007(J)(1)(d).

(2) **Treatment of Annuities Established on or after February 8, 2006.** In addition to the requirements in 130 CMR 520.007(J)(1), the following conditions must be met.

- (a) The purchase of an annuity will be considered a disqualifying transfer of assets unless
  - (i) the Commonwealth of Massachusetts is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual;
  - (ii) the Commonwealth of Massachusetts is named as such a remainder beneficiary in the second position after the community spouse, or minor or disabled children; or
  - (iii) the Commonwealth of Massachusetts is named as such a remainder beneficiary in the first position if the community spouse or the representative of any minor or disabled children in 130 CMR 520.007(J)(2)(a)(ii) disposes of any such remainder for less than fair-market value.

(b) The purchase of an annuity is considered a disqualifying transfer of assets unless the annuity satisfies 130 CMR 520.007(J)(1) and (J)(2)(a) and is irrevocable and nonassignable, or unless the annuity satisfies 130 CMR 520.007(J)(2)(c).

(c) The purchase of an annuity is considered a disqualifying transfer of assets unless the annuity satisfies 130 CMR 520.007(J)(2)(b), or unless the annuity names the Commonwealth of Massachusetts as a beneficiary as required under 130 CMR 520.007(J)(2)(a) and the annuity is

(i) described in section 408(b) or (q) of the Internal Revenue Code of 1986;

(ii) purchased with the proceeds from an account or trust described in section 408(a), (c), or (p) of the Internal Revenue Code of 1986;

(iii) purchased with the proceeds from a simplified employee pension described in section 408(k) of the Internal Revenue Code of 1986; or

(iv) purchased with the proceeds from a Roth IRA described in section 408A of the Internal Revenue Code of 1986.

130 CMR 520.007(J)(1) – (2) (emphasis added).

In February 2001, the appellant purchased three annuities for a total purchase price of \$227,894.41. The appellant entered the facility on a short-term basis for rehabilitation after hip surgery. He planned to return home, but needed additional funds to pay for his care and attendance once he was discharged. As such, he began receiving annuity payments in April and May of 2021, totaling \$3,812.15 per month before taxes. When the appellant and his family realized he would need 24-hours care, he applied for MassHealth long-term care benefits on February 4, 2022, more than 20 years after the purchase of the annuities. MassHealth argues that the appellant's purchase of an annuity in 2001 is a disqualifying transfer of assets for less than fair market value because the total present value of projected payments from the annuity was less than the purchase price and, therefore, did not conform to the regulations at 130 CMR 520.007(J)(1) and (2).

While MassHealth did not explicitly argue that the date of the transfer is the date the appellant annuitized the annuities, it is essentially evaluating the transfer based on the annuity option agreements dated April and May of 2021, which lay out the payout terms and rely on values different than the "transferred asset (purchase price)." The MassHealth regulations governing annuities and disqualifying transfers, as well as the provisions of 42 U.S.C. 1396p, do not state that the date of the annuitization is a disqualifying transfer. Rather, the regulations repeatedly only refer to the "**purchase of an annuity**" as being a disqualifying transfer. Furthermore, the regulation clearly states that payments from an annuity are to be treated as income. In applying the regulations here, MassHealth has disregarded the language indicating that it is the purchase of the annuity, not the annuitization, that is the transfer.

MassHealth seems to be interpreting 130 CMR 520.018 to require that all nonconforming annuities are for less than fair market value and disqualifying transfers, regardless of whether they occurred during or before the look-back period. But the regulation states that only those transfers that occurred "*during or after*" the look-back period are disqualifying. The appellant's



annuities were clearly purchased outside of the look-back period and, therefore, even if they may not conform to 130 CMR 520.007(J), they cannot be considered a disqualifying transfer. Transfer regulations at 130 CMR 520.019 state that all 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. For transfers occurring before February 8, 2006, this period generally extends back in time for 36 months. The appellant purchased his annuities in February 2001, over 20 years before he applied for MassHealth benefits.

Therefore, because they were purchased outside of the look-back period, the appellant's purchase of the three annuities in 2001 are not disqualifying transfers and this appeal is approved.<sup>3</sup>

## **Order for MassHealth**

Approve the appellant's benefits as of the requested start date of April 1, 2022.

## **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.

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Alexandra Shube  
Hearing Officer  
Board of Hearings

cc:

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

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<sup>3</sup> The appellant's request to issue a decision regarding naming the Commonwealth of Massachusetts as the remainder beneficiary in the first position is outside the scope of this appeal, which addresses the transfer of assets raised in the September 8, 2022 notice under appeal.