

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: Approved

Appeal Number: 2207797

Decision Date: 1/4/2023

Hearing Date: 11/16/2022

Hearing Officer: Patricia Mullen

Appearance for Appellant:




Appearance for MassHealth:

Kathy Boileau, Taunton 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

Appeal Decision:	Approved	Issue:	Transfer of assets
Decision Date:	1/4/2023	Hearing Date:	11/16/2022
MassHealth's Rep.:	Kathy Boileau, Taunton MEC	Appellant's Rep.:	
Hearing Location:	Charlestown 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 September 26, 2022, MassHealth approved the appellant's application for MassHealth Standard benefits for long term care residents with a start date of December 26, 2021 because MassHealth determined that the appellant transferred assets for less than fair market value resulting in a period of ineligibility from October 26, 2021 to December 25, 2021. (see 130 CMR 520.019 and Exhibit 1). The appellant filed this appeal in a timely manner on October 19, 2021. (see 130 CMR 610.015(B) and Exhibit 2). Dispute as to a MassHealth start date is valid grounds for appeal. (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth determined a period of ineligibility from October 26, 2021 through December 25, 2021 based on a disqualifying transfer of assets.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.019, in determining that the appellant made a disqualifying transfer of assets resulting in an ineligibility period from October 26, 2021 through December 25, 2021.

Summary of Evidence

The appellant was represented telephonically at the hearing by an attorney authorized by the appellant's conservator. (Exhibit 2). MassHealth was represented telephonically by a worker from the MassHealth Enrollment Center (MEC) in Taunton. In January, 2020, the appellant appointed his daughter as his Health Care Proxy (HCP), with his son as his alternate Health Care Proxy. (Exhibit 7, p. 8). The Health Care Proxy was activated on November 5, 2020 due to the appellant's moderate to severe dementia, encephalopathy, and confusion. (Exhibit 7, p. 7). The appellant's conservator was appointed by the Probate Court on June 30, 2022. (Exhibit 3). The appellant is under age 65 and was open on MassHealth in the community prior to his admission to the nursing facility. (Exhibit 5). The MassHealth representative stated that the appellant was admitted to a nursing facility on [REDACTED] and remained there until [REDACTED]; he then was admitted to another nursing facility on [REDACTED]. The MassHealth representative stated that MassHealth received a long term care conversion on January 27, 2022 and sent the appellant and his daughter a request for information on February 8, 2022. (Exhibit 6, pp. 4, 5). By notice dated March 21, 2022, MassHealth denied the appellant's application based on a determination of excess assets. (Exhibit 6, p. 8). The MassHealth representative stated that the appellant's previous representative appealed the denial notice and a hearing was held on August 31, 2022. The MassHealth representative stated that the appellant reduced his assets by paying for a funeral contract and past due patient paid amounts. The appellant's daughter entered into the contract with the funeral home on January 10, 2022 and cut the checks to the funeral home on August 30, 2022. (Exhibit 6, pp. 10-13). The MassHealth representative noted that the appellant's daughter also made some payments to the nursing facility. (Exhibit 6, p. 19). The MassHealth representative stated that the appellant's nursing facility is seeking a MassHealth start date of October 26, 2021.

The MassHealth representative stated that the appellant was determined disabled with an onset date of 2018 and has been receiving Social Security disability income since September, 2018. The appellant's Social Security income payments were direct deposited into a bank account in his daughter's name since at least May, 2021. (Exhibit 6, p. 9; testimony). The MassHealth representative testified that the appellant received a lump sum Social Security income amount of \$28,795.00 on January 1, 2022. (Exhibit 6, p. 17). The MassHealth representative stated that a total of \$25,000.00 was withdrawn from the bank account with no explanation as to how the funds were spent. The MassHealth representative pointed out that increments of \$5,000.00 were withdrawn from the account on January 22, 2022, January 27, 2022, March 5, 2022, March 11, 2022, and July 21, 2022. (Exhibit 6, pp. 17, 18). The MassHealth representative noted that \$5,000.00 was also withdrawn on July 22, 2022, but the appellant's daughter documented that money was paid to the nursing facility. The MassHealth representative stated that because the appellant did not show that he received fair market value for the withdrawals totaling \$25,000.00, such amount is considered a disqualifying transfer. The MassHealth representative explained that the penalty period was calculated by dividing the total amount transferred by the average daily cost of nursing facility care in the Commonwealth, \$410.00, resulting in a 60 day period of ineligibility ($\$25,000/\$410 = 60$). The MassHealth representative stated that the appellant was otherwise eligible for MassHealth on October 26, 2021 and thus the ineligibility period is from October 26,

2021 through December 25, 2021. The appellant was approved for MassHealth with a start date of December 26, 2021. (Exhibit 1).

The appellant's representative stated that the appellant's daughter/HCP opened a bank account in her own name as representative payee of the appellant's Social Security income. The appellant's representative stated that the appellant's daughter was uncooperative with the MassHealth application process and a petition for conservator was filed in April, 2022. (Exhibit 3). The appellant's representative stated that the appellant's daughter did not object to the appointment of conservator or participate in the appointment process. The appellant's representative stated that the appellant's daughter has not explained the withdrawals and the appellant was not complicit in making the transfers totaling \$25,000.00. The appellant's representative stated that because the appellant is incompetent, he did not have the intent to make the transfers for less than fair market value and there should not be a penalty period. The appellant's representative stated that an application for an undue hardship waiver was filed with MassHealth in October, 2022.

The appellant's representative stated that the appellant's conservator filed an Adult Protective Services Intake Report with Elder Protective Services and the case has been assigned. Subsequent to the hearing, the appellant's representative submitted a copy of the Adult Protective Services Intake Report filed on October 6, 2022. (Exhibit 7, p. 4). The appellant's conservator notes in the report that the appellant's daughter was his representative payee and withdrew \$25,000.00 from the account, for which she has not given an explanation. (Exhibit 7, p. 4). The report was screened in and assigned to a Protective Services caseworker for investigation. (Exhibit 7, p. 5). The appellant's representative argued that the appellant's daughter made withdrawals in her own self interest, without permission from the appellant. The appellant's representative argued that since the transfers were not made with the intent to qualify for MassHealth, there should be no penalty period. The hearing officer noted that the conservator was appointed in June, 2022 and some transfers were made after that date. The appellant's representative stated that the Probate Court did not issue the conservator decree until August, 2022. The appellant's representative stated that the nursing facility has applied to be representative payee of the appellant's Social Security income.

Findings of Fact

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

1. The appellant's conservator was appointed by the Probate Court on June 30, 2022.
2. In January, 2020, the appellant appointed his daughter as his Health Care Proxy, with his son as his alternate Health Care Proxy.
3. The appellant's Health Care Proxy was activated on November 5, 2020 due to the appellant's moderate to severe dementia, encephalopathy, and confusion.
4. The appellant is under age 65 and was open on MassHealth in the community prior to his admission to the nursing facility.

5. The appellant was admitted to a nursing facility on [REDACTED] and remained there until [REDACTED]; he then was admitted to another nursing facility on [REDACTED].
6. MassHealth received a long term care conversion on January 27, 2022 and sent the appellant and his daughter a request for information on February 8, 2022.
7. By notice dated March 21, 2022, MassHealth denied the appellant's application based on a determination of excess assets.
8. The appellant's previous representative appealed the March 21, 2022 denial notice and a hearing was held on August 31, 2022.
9. The appellant's daughter entered into the contract with the funeral home on January 10, 2022 and cut the checks to the funeral home on August 30, 2022.
10. The appellant's daughter further reduced the appellant's assets by making payments of past due PPAs to the nursing facility.
11. The appellant's nursing facility is seeking a MassHealth start date of October 26, 2021 and the appellant was otherwise eligible for MassHealth on that date.
12. The appellant was determined disabled with an onset date of 2018 and has been receiving Social Security disability income since September, 2018.
13. The appellant received a lump sum Social Security income amount of \$28,795.00 on January 1, 2022.
14. The appellant's daughter reduced the assets by paying for the appellant's funeral contract, nursing facility expenses, and withdrawing a total of \$25,000.00 in \$5,000.00 increments on January 22, 2022, January 27, 2022, March 5, 2022, March 11, 2022, and July 21, 2022.
15. MassHealth determined a 60 day ineligibility period from October 26, 2021 through December 25, 2021 and the appellant was approved for MassHealth with a start date of December 26, 2021.
16. The appellant's daughter/HCP opened a bank account in her own name as representative payee of the appellant's Social Security income and the appellant's Social Security income payments were direct deposited into the bank account in his daughter's name since at least May, 2021.
17. The appellant's representative submitted an application for an undue hardship waiver with MassHealth in October, 2022.
18. The appellant's conservator filed an Adult Protective Services Intake Report with Elder Protective Services on October 6, 2022; the report was screened in and assigned to a Protective Services caseworker for investigation.

19. The nursing facility has applied to be representative payee of the appellant's Social Security income.

Analysis and Conclusions of Law

Disqualifying Transfer of Resources. The MassHealth agency 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 MassHealth agency 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 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. (130 CMR 520.019(C)).

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.

(130 CMR 520.019(F)).

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 as defined in 130 CMR 515.001: Definition of Terms of all resources transferred by the nursing-facility resident or the spouse, divided by the average monthly¹ 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. (130 CMR 520.019(G)(1)).

¹ MassHealth uses the average daily private pay nursing facility cost in calculating the ineligibility period.

Begin Date. For transfers occurring before February 8, 2006, the period of ineligibility begins on the first day of the month in which resources have been transferred for less than fair-market value. 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. (130 CMR 520.019(G)(3)).

The appellant's representative argues that the appellant's funds were taken without his knowledge and thus the assets were transferred exclusively for a purpose other than to qualify for MassHealth. The appellant's Health Care Proxy was activated on November 5, 2020 due to the appellant's moderate to severe dementia, encephalopathy, and confusion. The Probate Court approved the petition to appoint a conservator for the appellant in June, 2022. Although the Probate Court deemed the appellant incompetent in June, 2022, based on the activated HCP, the appellant lacked the capacity to make or communicate health care decisions as early as November, 2020. There is no documentation in the record as to when exactly the appellant's daughter set up the bank account in her name into which the appellant's Social Security income was deposited, but bank account statements in the record date back to May 1, 2021. The appellant's daughter's name is the only name on the bank account, and at least as of November 5, 2020, the appellant would have lacked the capacity to consent to the direct deposit of his income into a bank account with only his daughter's name on it. As noted by the appellant's representative, the appellant's daughter's access to the appellant's assets did not raise any concern until the lump sum payment in January, 2022 and the subsequent withdrawals totaling \$25,000.00. There is no dispute that the appellant did not have the capacity or means to make these withdrawals, and based on the activated HCP and Probate Court's determination of incompetence in June, 2022, I determine that the appellant did not have the mental capacity to consent to these withdrawals or direct to whom payments should be made. Once the conservator was appointed and bank accounts accessed, it was discovered that \$25,000.00 in withdrawals was unaccounted for. The conservator filed an Adult Protective Services claim with Elder Affairs Protective Services Agency and the agency determined that based on the allegations of financial exploitation, an investigation would be conducted.

Although the appellant appointed his daughter to be his HCP in January, 2020, he no longer had the capacity to make his own decisions by November, 2020. I determine that the withdrawals totaling \$25,000.00 made by the appellant's daughter in 2022 were made without the appellant's knowledge or consent. It is hopeful that the appellant's conservator will continue to fight in the appellant's best interest in recovering the money taken.

I determine that this is not a case of a person intentionally depleting his funds so that he might qualify for MassHealth. The appellant was not aware of and had no capacity to consent to the withdrawals totaling \$25,000.00 made in 2022. The appellant's money was taken without his permission and thus was transferred for a purpose other than to qualify for MassHealth. Pursuant to 130 CMR 520.019(F), MassHealth shall not impose a period of ineligibility in this case.

The MassHealth representative testified that but for the disqualifying transfer, the appellant was otherwise eligible for MassHealth on October 26, 2021. MassHealth shall approve MassHealth Standard long term care benefits with a start date of October 26, 2021. The appeal is approved.

Order for MassHealth

Modify the notice dated September 26, 2022 and determine that there is no penalty period and the start date for MassHealth Standard for long term care residents is October 26, 2021.

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.

Patricia Mullen
Hearing Officer
Board of Hearings

cc:MassHealth Representative: Jennifer Vitt, Charlestown MassHealth Enrollment Center

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