

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2208140
Decision Date:	2/6/2023	Hearing Date:	11/29/2022
Hearing Officer:	Scott Bernard	Record Open to:	1/24/2023

Appearance for Appellant:




Appearance for MassHealth:

Elizabeth Landry (Taunton MEC) *via* telephone



*The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171*

APPEAL DECISION

Appeal Decision:	Denied	Issue:	Long Term Care (LTC) Transfer
Decision Date:	2/6/2023	Hearing Date:	11/29/2022
MassHealth's Rep.:	Elizabeth Landry	Appellant's Rep.:	
Hearing Location:	Taunton 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 October 25, 2022, MassHealth denied the appellant's application for MassHealth Long Term Care (LTC) benefits because MassHealth determined that she recently gave away or sold assets to become eligible for LTC benefit. (See 130 CMR 520.018; 520.019; Exhibit (Ex.) 1, pp. 3-4; Ex. 4, pp. 14 - 16). The appellant filed this appeal in a timely manner on November 1, 2022. (See 130 CMR 610.015(B) and Ex. 1, p. 2). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032).

On December 9, 2022, after the hearing, this hearing officer sent the appellant's representative a request that she provide further information by January 10, 2023. (Ex. 5). MassHealth was given until January 24, 2023 to respond. (Id.). On December 12, 2022, the appellant's representative did submit some information and the MassHealth representative responded regarding that information. (Ex. 6; Ex. 7). The record closed on January 24, 2023 without either party submitting further information.

Action Taken by MassHealth

MassHealth denied the appellant's application for LTC benefits because she sold or gave away assets to become eligible for LTC benefit.

Issue

The first appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.018 and 520.019, in

determining that the appellant sold or gave away assets and therefore was not eligible for MassHealth LTC benefits. The second issue is whether the appellant was able to demonstrate that she intended to transfer to dispose of the resource at either fair-market value or for other valuable consideration. The third issue is whether the appellant was able to demonstrate that she was eligible for an undue hardship waiver.

Summary of Evidence

The MassHealth representative testified to the following. The appellant is over the age of 65 and has a household of one. (Ex. 2). The appellant applied for MassHealth LTC benefits *via* conversion on September 22, 2022. The appellant was seeking a payment start date of September 13, 2022. As part of the verification process, the appellant submitted bank statements, which showed that on January 12, 2022 the appellant paid out three checks of \$12,000 apiece. (Ex. 4, pp. 9, 11, 12, 13) MassHealth learned that these were paid to two of the appellant's surviving daughters and son. The appellant's daughter A explained the reason for the payments in an email:

...[The appellant's husband]¹, our father, unfortunately was an addictive gambler causing our mother much emotional distress and financial difficulties. I, sisters [B] [and] [C] (who passed in Sept. 2010), and [our brother] wanted to give mother a fresh financial, emotional start after the passing of my father...who passed in Jan. 1996. [The appellant] would only take the money if we insisted it was a loan so that was our agreement. We each loaned her 10,000 dollars soon after the passing of my father. After many years of her insisting she passed back, and us insisting we'll wait till the time is right, we found the timing appropriate after her last insistence which took place just days before the withdrawal period the extra 2000 each we took on top of the 10,000, she asked us to take in order to look after my sister's grave...(Ex. 4, p. 10).

On October 25, 2022, MassHealth notified the appellant that it was denying her application for LTC benefits because of this transfer. The MassHealth representative stated that dividing \$36,000 by the average daily cost of nursing facility services, which was \$410.00 at the time of the determination, the appellant was disqualified until December 9, 2022.

The appellant's representative referred to the email the MassHealth representative included in her presentation. The appellant's husband had a gambling problem which left her with very little money. Her children gave her around \$30,000, which she only would take if it was treated as a loan. In January 2022, the appellant reimbursed her children for the loan, which was the transfer that took place. Daughter A moved from Switzerland to care for the appellant prior to her entering the nursing facility. Prior to the appellant's admission to the nursing facility, daughter A provided compensable PCA type services, which were equivalent to the value of the loan. The appellant's two other children will not speak to anyone, and Daughter A stated that they will not give the money back to the appellant. The appellant's representative stated that she is asking that MassHealth or the Board exercise leniency and

¹ All the names in this email have been redacted in order to protect the privacy of the appellant and her family. The daughter writing the email will be referred to as "A". The other surviving daughter's name has been changed to "B". The third daughter (now deceased) has been changed to "C". The appellant's son will be referred to as "brother" or "son" depending on context.

waive the penalty. The nursing facility is very small as it only has 30 beds. The facility has given the appellant a discharge notice.

At the conclusion of the hearing, the hearing officer informed both parties that he was reserving the right to request further information after the hearing *per* 130 CMR 610.071(E) and 610.081. Indeed, on December 9, 2022, the hearing officer emailed the appellant's representative and the MassHealth representative asking that the appellant's representative provide the information specified in 130 CMR 519.019(I), which was necessary to demonstrate undue hardship. (Ex. 5). The appellant's representative was given until January 10, 2023 to do so and MassHealth was given until January 24, 2023 to respond. (Id.).

On December 12, 2022, the appellant's representative submitted the following documents *via* email to both the hearing officer and the MassHealth representative:

- 30-Day Notice of Intent to Transfer or Discharge Resident dated November 4, 2022, which states that the nursing facility will transfer/discharge the appellant to the community on December 9, 2022 for “Non-Payment/Failure to comply with Medicaid re-determination – no payer source for stay.” (Ex. 6, p. 3).
- Letter dated November 3, 2022 from the Resident Services Coordinator of the nursing facility. (Ex. 6, p. 9). In the letter, the Resident Services Coordinator states that daughter A came to the U.S. from Switzerland in October 2021 and stayed with the appellant through August 2022 and “provided the necessary daily care that [the appellant] required in order to remain safe at home, while actively working to transition [the appellant] to a long-term care facility that would continue to meet her daily needs.” (Id.).
- A two-page spreadsheet or invoice indicating the activities of daily living (ADLs) and instrumental ADLs (IADLs) daughter A provided the appellant from November 1, 2021 through August 26, 2022. (Ex. 6, pp. 11-12). This indicates that daughter A assisted the appellant with bathing, dressing, grooming, toileting, preparing meals, preparing medications, cooking, cleaning apartment, and grocery shopping. (Id.). This also states that daughter A performed these daily tasks from 7:00 a.m. through 7:00 p.m. (12 hours), at a rate of \$30 *per* hour, for a total of \$120.00 *per* day, \$3,600.00 *per* month, and \$36,000 over 10 months. (Id.).

The MassHealth representative responded on the same date stating that MassHealth had previously received these documents and was unable to cure the transfer penalty. (Ex. 7). Neither party submitted further information and the record closed on January 24, 2023.

Findings of Fact

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

1. The appellant is over the age of 65 and has a household of one. (Ex. 2).
2. The appellant applied for MassHealth LTC benefits *via* conversion on September 22, 2022. (Testimony of the MassHealth representative).

3. The appellant was seeking a payment start date of September 13, 2022. (Testimony of the MassHealth representative).
4. As part of the verification process, the appellant submitted bank statements, which showed that on January 12, 2022 the appellant paid out three checks of \$12,000 apiece. (Ex. 4, pp. 9, 11, 12, 13)
5. MassHealth learned that these were paid to two of the appellant's surviving daughters and son. (Testimony of the MassHealth representative; Ex. 4, p. 10; Testimony of the appellant's representative).
6. The family has stated they will not return the money to the appellant. (Testimony of the appellant's representative).
7. After the conclusion of the hearing the record was re-opened to allow the appellant's representative to submit further information. (Ex. 5).
8. The appellant's representative submitted a notice indicating that the facility intended to discharge the appellant, a letter from the nursing facility's the Resident Services Coordinator indicating that daughter A provided PCA services for 10 months prior to the appellant entering the facility, and a breakdown indicating that the total value of those services over 10 months equaled \$36,000. (Ex. 6).

Analysis and Conclusions of Law

To be eligible for MassHealth nursing-facility services the total value of assets owned by an institutionalized single individual or by a member of an institutionalized couple must not exceed \$2,000. (130 CMR 520.003(A)(1); 130 CMR 520.016(A)). MassHealth denies payment for nursing-facility services to an otherwise eligible nursing-facility resident who transfers countable resources for less than fair-market value during or after the period referred to as the look-back period. (130 CMR 520.018(B)). The look-back period is 60 months and begins on the first date the individual is both a nursing-facility resident and has applied for or is receiving MassHealth Standard. (130 CMR 520.019(B)(2)).

130 CMR 520.019 also states the following, in pertinent part:

(C) Disqualifying Transfer of Resources. The MassHealth agency considers any transfer during the appropriate look-back period by the nursing-facility resident...of a resource, or interest in a resource, owned by or available to the nursing-facility resident...for less than fair-market value a disqualifying transfer unless listed as permissible in 130 CMR 520.019(D), identified in 130 CMR 520.019(F), or exempted in 130 CMR 520.019(J)². The MassHealth agency may consider as a disqualifying transfer any action taken to avoid receiving a resource to which the nursing-facility resident...is or would be entitled if such action had not been taken. Action taken to avoid receiving a resource may include...agreeing to the diversion of a resource ... A disqualifying transfer may include

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

any action taken that would result in making a formerly available asset no longer available.

(D) Permissible Transfers. The MassHealth agency considers the following transfers permissible. Transfers of resources made for the sole benefit of a particular person must be in accordance with federal law.

- (1) The resources were transferred to the spouse of the nursing-facility resident or to another for the sole benefit of the spouse. A nursing-facility resident who has been determined eligible for MassHealth agency payment of nursing-facility services and who has received an asset assessment from the MassHealth agency must make any necessary transfers within 90 days after the date of the notice of approval for MassHealth in accordance with 130 CMR 520.016(B)(3).
- (2) The resources were transferred from the spouse of the nursing-facility resident to another for the sole benefit of the spouse.
- (3) The resources were transferred to the nursing-facility resident's permanently and totally disabled or blind child or to a trust, a pooled trust, or a special-needs trust created for the sole benefit of such child.
- (4) The resources were transferred to a trust, a special-needs trust, or a pooled trust created for the sole benefit of a permanently and totally disabled person who was younger than 65 years old at the time the trust was created or funded.
- (5) The resources were transferred to a pooled trust created for the sole benefit of the permanently and totally disabled nursing-facility resident.
- (6) The nursing-facility resident transferred the home he or she used as the principal residence at the time of transfer and the title to the home to one of the following persons:
 - (a) the spouse;
 - (b) the nursing-facility resident's child who is younger than 21 years old, or who is blind or permanently and totally disabled;
 - (c) the nursing-facility resident's sibling who has a legal interest in the nursing-facility resident's home and was living in the nursing-facility resident's home for at least one year immediately before the date of the nursing-facility resident's admission to the nursing facility; or
 - (d) the nursing-facility resident's child (other than the child described in 130 CMR 520.019(D)(6)(b)) who was living in the nursing-facility resident's home for at least two years immediately before the date of the nursing-facility resident's admission to the institution, and who, as determined by the MassHealth agency, provided care to the nursing-facility resident that permitted him or her to live at home rather than in a nursing facility.
- (7) The resources were transferred to a separately identifiable burial account, burial arrangement, or a similar device for the nursing-facility resident or the spouse in accordance with 130 CMR 520.008(F).

...

(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...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.

...

(K) Exempting Transfers from the Period of Ineligibility.

- (1) During the Eligibility Process... [Not applicable]
- (2) After Issuance of the Notice of the Period of Ineligibility. After the of the notice of the period of ineligibility, the nursing-facility resident may avoid imposition of the period of ineligibility in the following instances.
 - (a) Revising a Trust... [Not applicable]
 - (b) Curing a Transfer. If the full value or a portion of the full value of the transferred resources is returned to the nursing-facility resident, the MassHealth agency will rescind or adjust the period of ineligibility and will apply the countable-assets rules at 130 CMR 520.007 and the countable-income rules at 130 CMR 520.009 to the returned resources in the determination of eligibility...

(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 authorized 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 Office of Medicaid 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: *MassHealth: Fair Hearing Rules*.
- (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.

The record shows that the appellant transferred \$36,000 in January 2022 to three of her children. The appellant applied for MassHealth LTC benefits nine months later. The record indicates that the appellant entered the nursing facility at some point on or around the date she applied for LTC benefits. This record supports the conclusion that a transfer did take place within the look-back period. The appellant's representative did not argue that the transfer occurred for the permissible reasons listed at 130 CMR 520.019(D). The appellant's representative stated that the family also stated that they will not cure the transfer by returning the money to the appellant.

The appellant's representative argued that the resources were transferred exclusively for a purpose other than to qualify for MassHealth. An email for the appellant's daughter A stated that the appellant paid the \$36,000 to her three surviving children in order to repay a loan her four children made to her around 1996. The only evidence of this loan agreement is contained within that email, which was submitted to MassHealth after MassHealth determined a transfer occurred. This is not evidence that a reasonable mind would accept as adequate to support the conclusion that the transfer was repayment for a loan.

In the evidence submitted after the hearing, the appellant's representative seemed to also assert that the transfer should be treated as exempted because the appellant intended the transfer as repayment for a tangible benefit she received that was equal to at least the fair-market value of the transfer. The appellant's representative submitted a letter from the

nursing facility's Resident Services Coordinator indicating that daughter A provided PCA (or PCA like) services to the appellant for the 10 months prior to her entering the nursing facility. There was also a breakdown of the cost of those services, which indicated that they totaled \$36,000. The problem with this documentation is that it directly contradicts the testimony and other evidence that the appellant paid \$36,000 to her three children for entirely different reasons. There is no indication that it was the appellant's intention to transfer the monies for the services that daughter A allegedly provided over the 10 months prior to the appellant entering the nursing facility. There is every indication that characterizing the full transfer \$36,000 as payment for PCA was a gloss that was only put in place at some point well after the date the appellant made the transfer.

Finally, the appellant's representative asserts that imposition of penalty for the transfer would cause an undue hardship. The appellant's representative has not demonstrated, however, that all the circumstances listed under 130 CMR 520.019(L)(1) have been met. For instance, no evidence was submitted showing 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. There is only a statement that the family members refuse to repay the appellant the monies she transferred to them, which is not sufficient. Because the appellant's representative has not demonstrated that all the circumstances have been met, there is no undue circumstance that would allow MassHealth (or this hearing officer) to waive all or part of the disqualifying transfer.

For the above stated reasons, 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.

Scott Bernard
Hearing Officer
Board of Hearings

cc:

Justine Ferreira, Taunton MassHealth Enrollment Center, 21 Spring St., Ste. 4, Taunton, MA 02780

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