

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2208804
Decision Date:	2/15/2023	Hearing Date:	12/29/2022
Hearing Officer:	Paul C. Moore	Record Closed:	02/02/2023

Appellant Representative:

Pro se (by telephone)

MassHealth Representative:

John Excellent, program coordinator, Personal Care Attendant (PCA) program, Office of Long-Term Services and Supports, Executive Office of Health and Human Services (by 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:	Approved	Issue:	Personal Care Attendant Services; Surrogate
Decision Date:	2/15/2023	Hearing Date:	12/29/2022
MassHealth Rep.:	John Excellent	Appellant Rep.:	Pro se
Hearing Location:	Board of Hearings (remote)		

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 21, 2022, MassHealth notified the appellant that it was terminating the appellant's personal care attendant (PCA) services effective November 4, 2022, because the appellant had been directed to find a new surrogate, and she had not found one (Exhibit 1). The appellant filed this appeal with the Board of Hearings (BOH) in a timely manner on November 28, 2022, stating that she does not need a surrogate (130 CMR 610.015; Exhibit 2).¹ Termination of services is a valid ground for appeal to BOH (130 CMR 610.032).

Action Taken by MassHealth

MassHealth terminated the appellant's PCA services because she did not designate a surrogate.

¹ MassHealth Eligibility Operations Memo 20-09, "MassHealth Response to Coronavirus Disease 2019 (COVID-19)," issued April 7, 2020, states in relevant part: "In response to the current Coronavirus Disease 2019 (COVID-19) national emergency, MassHealth is implementing the following protocols to support the public health efforts to expedite medical care and maintain care for both new MassHealth applicants and existing members. Regarding Fair Hearings during the COVID-19 outbreak national emergency, and through the end of the month in which such national emergency period ends: All appeal hearings will be telephonic; and **Individuals will have up to 120 days, instead of the standard 30 days, to request a fair hearing for member eligibility-related concerns.**"

Issue

Was MassHealth correct in terminating the appellant's PCA services because she did not designate a surrogate?

Summary of Evidence

The MassHealth representative, who is the program coordinator for PCA services in the Office of Long-Term Services and Supports, Executive Office of Health and Human Services, testified by telephone that the appellant is under age 65 and lives alone in the community. He testified that the appellant had been receiving PCA services since 2020. He noted that Tri-Valley, a Personal Care Management (PCM) agency ("Tri-Valley"), reported to MassHealth that the appellant had been mismanaging the PCA program, including asking a PCA to perform tasks that are beyond the scope of what a PCA is authorized to do, and reporting to Tri-Valley that a PCA had not worked for her on certain dates when she had also signed timesheets indicating that a PCA had worked for her on those dates. According to the MassHealth representative, Tri-Valley sent the appellant a letter in September, 2022 notifying her that it had determined that she needed a surrogate to help her manage the PCA program. The letter also stated that if the appellant did not find one by October 14, 2022, Tri-Valley would notify MassHealth of this fact, and that MassHealth could terminate her PCA services as a result (Testimony, Exh. 6A).²

On October 21, 2022, the MassHealth PCA program sent the appellant a letter that reads in relevant part:

It has come to the attention of MassHealth that you require a surrogate to help manage your PCA services, but as of the date of this letter, you have not obtained a surrogate. Your PCM agency, Tri-Valley, conducted an assessment in accordance with 130 CMR 422.422(A) and determined that you need a surrogate to help manage the PCA program. You are therefore required to obtain a surrogate in accordance with 130 CMR 422.420(A)(23). According to 130 CMR 422.420(B)(1), MassHealth reserves the right to terminate PCA services if a member fails to comply with any of the requirements listed in 130.CMR.422.420(A). Further, MassHealth may terminate a member in accordance with 130 CMR 422.420(B)(2) and 422.420(B)(3) if the member does not obtain a surrogate within 30 days of the PCM agency's notice and the clinical assessment. In accordance with 130 CMR 422.422(B)(3), your PCM agency informed you on **September 13, 2022**, that you needed to find a new surrogate within 30 days who can assist you in managing the PCA program. As of the date of this letter, you have not obtained a new surrogate.

² A surrogate is defined at 130 CMR 422.402 as the member's legal guardian, a family member, or other person as identified in the service agreement, who is responsible for performing certain PCA management tasks that the member is unable or unwilling to perform.

Because of these violations of the PCA program requirements, and in accordance with 130 CMR 422.420(B)(1), 422.420(B)(2), and 422.420(B)(3), **MassHealth is terminating your PCA services, effective 14 days from the date of this letter.** Accordingly, MassHealth will not cover, and Tempus Fiscal Intermediary will not pay for, PCA services on and after **November 4, 2022.**

(Exh. 4) (bolded in original)

The appellant's medical diagnoses include congestive heart failure, chronic lymphedema, severe muscle spasms in her neck, back, and shoulders, and bronchial asthma. The appellant did not have a surrogate in the past. Her PCAs assisted her with meal preparation and cleanup, with grooming, with housekeeping, and with showering/bathing. They assisted her 21½ hours per week during the day in the past. She has received PCA services since 2016 (Testimony).³

The MassHealth representative stated that the appellant was deemed clinically eligible for PCA services. He added that the appellant had "36" PCAs over the past several years, and many of them left because the appellant was purportedly asking them to do tasks outside the scope of a PCA (Testimony).

The appellant testified by telephone that two employees of Tri-Valley showed up at her home unannounced in September, 2022 and told her she "might be able to go into a nursing facility." The appellant stated that she declined this offer. The appellant testified that the representatives of Tri-Valley then informed the appellant that she needed a surrogate, or she might lose her PCA services. The appellant testified that she suggested that her brother, boyfriend, or her best friend (who was her PCA in the past) could be her surrogate. However, according to the appellant, Tri-Valley rejected all of these individuals as potential surrogates, and she is not clear why (Testimony).

The appellant stated that when she first had PCA services, she did ask the PCAs to assist with her pets, such as cleaning cat litter boxes. However, she later learned that this task was beyond the scope of what a PCA is authorized to do, so she no longer asked them to do such tasks. She has had many PCAs since March, 2020, because many of them quit during the COVID-19 pandemic. She asserted that one of her PCAs forged her signature on timesheets reflecting that she worked for the appellant on dates when she did not. The appellant stated that she understood that Tri-Valley or any PCM agency is supposed to assist members to find a surrogate, and asserted that Tri-Valley has not done so. She testified that a representative of Tri-Valley met with the appellant and her best friend (and former PCA) for only about ten minutes, and determined that her best friend would not be an appropriate surrogate because the friend could not retain information. The appellant added that she found a new PCA at the end of October, 2022 whom she liked and who worked with her for four days; but then MassHealth terminated her PCA services (Testimony).

³ Exhibit 4, the PCM agency reevaluation of the appellant dated January 21, 2022, reflects that the appellant was approved for 21 hours, 15 minutes of day/evening PCA services per week. The approved PA shows that the appellant received PCA assistance with transfers, bathing, grooming, dressing, undressing, toileting, applying bilateral leg wraps, meal preparation and cleanup, shopping, housekeeping and laundry. No diagnoses of any cognitive deficits are noted (Exh. 4).

At the close of the hearing, the hearing officer left the record of the appeal open until January 12, 2023 for the MassHealth representative to supply copies of notes and other documentary evidence that MassHealth relied on to determine that the appellant's PCA services should be terminated (i.e., narrative explanations by Tri-Valley of what record-keeping requirements the appellant allegedly violated that led to the decision by Tri-Valley to require her to get a surrogate), and any narrative explanations by Tri-Valley why they did not agree to the appellant's alternative choices of a new surrogate (Exh. 5). Further, the hearing officer agreed to keep the record open for two additional weeks for the appellant to file written comments on the MassHealth submission, including whether she agrees with the allegations contained in the documents, whether she believes she needs a surrogate, and if so, who she would propose that surrogate should be (*Id.*).

On January 11, 2023, the hearing officer received from the MassHealth representative, by e-mail, copies of documents about the appellant from Tri-Valley, including a copy of correspondence dated September 14, 2022 from a PCA skills trainer to the appellant, stating as follows:

After meeting with [the appellant] yesterday regarding your PCA services, it was determined that you need a surrogate. MassHealth requires that skills trainers complete an assessment to manage services. This was completed with you yesterday. Consumers that do not comply with this requirement can have their PCA services terminated by MassHealth. It is imperative that you contact me at Tri-Valley upon receipt of this letter to inform Tri-Valley of your surrogate intentions.

If we do not have a response from you by 10-14-22, we will notify MassHealth, and MassHealth may terminate your PCA services.

(Exh. 6A)

In addition, the MassHealth representative sent a copy of internal correspondence from Tri-Valley's manager of PCA and adult foster care programs, which lists six possible surrogates for the appellant, and contains explanations of why these individuals were not acceptable to Tri-Valley (for example, the appellant's brother does not speak to her; the appellant's mother has a surrogate herself; the appellant's best friend and former PCA cannot maintain a job, is unable to understand questions, needs prompting and cueing, and is forgetful; the appellant's boyfriend lives out of state and is not "close enough" to monitor the appellant's daily PCA requests; and two other individuals stated that they were not interested in being the appellant's surrogate) (Exh. 6B).

Also, the MassHealth representative forwarded a copy of call logs from Tri-Valley containing documentation of contacts the agency had with the appellant, with her PCAs, with MassHealth representatives, and with individuals who were suggested as possible surrogates (Exh. 6C). One such call log entry documents a conversation between Tri-Valley's manager of PCA and adult foster care programs, and a PCA program coordinator with MassHealth, on October 21, 2022 (*Id.*). The call log reports that the MassHealth PCA program coordinator requested that Tri-Valley make a "fraud report" based on the fact that two of the appellant's PCAs reported being

asked to perform tasks outside of the PCA responsibilities (*Id.*).⁴ A call log for October 20, 2022 also documents that there was an allegation of the appellant having given an insulin injection in the buttocks to her boyfriend while a PCA was present (*Id.*).

Consistent with the appellant's wishes expressed at hearing, the MassHealth representative mailed these record-open documents to the appellant, and indicated that he received a completed return receipt reflecting that the appellant had received them (Exh. 7).

The hearing officer received nothing from the appellant, by first class mail, e-mail or fax, commenting on MassHealth's record-open submission by close of business on February 2, 2023.⁵

Findings of Fact

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

1. The appellant is under age 65 and lives alone in the community (Testimony, Exh. 4).
2. The appellant's medical diagnoses include congestive heart failure, chronic lymphedema, severe muscle spasms in her neck, back, and shoulders, and bronchial asthma (Testimony, Exh. 4).
3. The appellant was deemed clinically eligible for PCA services (Testimony).
4. As of March 28, 2022, MassHealth approved the appellant for 21 hours, 15 minutes of day/evening PCA services per week (Testimony, Exh. 4).
5. The appellant received PCA assistance with transfers, bathing, grooming, dressing, undressing, toileting, applying bilateral leg wraps, meal preparation and cleanup, shopping, housekeeping and laundry (Exh. 4).
6. Tri-Valley, a PCM agency, sent the appellant a letter in September, 2022 notifying her that it had determined that she needed a surrogate to help her manage the PCA program; that if the appellant did not find a surrogate by October 14, 2022, Tri-Valley would notify MassHealth of this fact; and that MassHealth could terminate her PCA services as a result (Testimony, Exh. 4).

⁴ In the call log for October 20, 2022, a Tri-Valley employee documented that the appellant denied asking PCAs to perform unauthorized tasks (Exh. 6C).

⁵ On February 6, 2023, the appellant sent the hearing officer e-mail correspondence stating as follows: "I know that my time is up to respond. I have been waiting for some proof or evidence against me that I could defend. I did not receive anything of that sort from [the MassHealth representative]. Everything he sent me was after the decision was made that I would need a surrogate. Nothing was sent that had led up to that decision. Right now, I do not have a PCA. I find it very hard and depressing to do daily tasks. I have severe muscle spasms in my neck, back, shoulders, and arms. I also have legs filled with fluid that I have had for 4 decades. It is chronic hyper lymphedema and chronic hyper lipa dema (*sic*)" (Exh. 8).

6A).

7. Tri-Valley documented that the appellant had asked PCAs to perform tasks outside the scope of what a PCA is authorized to do, and that in one case, the appellant had notified Tri-Valley that a PCA did not work for her on days and at times when the time records showed that the PCA had worked for her (Testimony, Exh. 6).
8. The appellant suggested six possible individuals to be her surrogate, four of whom were deemed unsuitable by Tri-Valley (Exh. 6B).
9. The appellant did not designate a surrogate by October 14, 2022, and Tri-Valley reported this to MassHealth (Testimony).
10. On October 21, 2022, the MassHealth PCA program sent the appellant a notice that reads in relevant part: "It has come to the attention of MassHealth that you require a surrogate to help manage your PCA services, but as of the date of this letter, you have not obtained a surrogate. Your PCM agency, Tri-Valley, conducted an assessment in accordance with 130 CMR 422.422(A) and determined that you need a surrogate to help manage the PCA program. You are therefore required to obtain a surrogate in accordance with 130 CMR 422.420(A)(23). According to 130 CMR 422.420(B)(1), MassHealth reserves the right to terminate PCA services if a member fails to comply with any of the requirements listed in 130.CMR.422.420(A). Further, MassHealth may terminate a member in accordance with 130 CMR 422.420(B)(2) and 422.420(B)(3) if the member does not obtain a surrogate within 30 days of the PCM agency's notice and the clinical assessment. In accordance with 130 CMR 422.422(B)(3), your PCM agency informed you on **September 13, 2022**, that you needed to find a new surrogate within 30 days who can assist you in managing the PCA program. As of the date of this letter, you have not obtained a new surrogate. Because of these violations of the PCA program requirements, and in accordance with 130 CMR 422.420(B)(1), 422.420(B)(2), and 422.420(B)(3), **MassHealth is terminating your PCA services, effective 14 days from the date of this letter.** Accordingly, MassHealth will not cover, and Tempus Fiscal Intermediary will not pay for, PCA services on and after **November 4, 2022.**" (Exh. 4) (bolded in original).
11. The appellant filed a timely appeal of this notice with BOH on November 28, 2022 (Exh. 2).
12. The appellant initially asked her PCAs to perform tasks that were not authorized under the PCA program (such as cleaning cat litter boxes), but when she learned that this was not authorized by MassHealth, she no longer asked the PCAs to perform these tasks (Testimony).
13. The appellant asserted, in one instance, that a PCA forged her signature on a timesheet to reflect that she had worked certain hours for the appellant, when she had not (Testimony).
14. The appellant is not diagnosed with any cognitive deficits (Exh. 4).

15. Two representatives of Tri-Valley appeared at the appellant's home in September, 2022 and suggested that she enter a nursing facility (Testimony).
16. The appellant has not had a PCA since November 4, 2022 (Testimony, Exh. 8).

Analysis and Conclusions of Law

MassHealth regulations about PCA services are found at 130 CMR 422.000 et seq. Regulation 130 CMR 422.402 defines a PCA as a person who is hired by the member or surrogate to provide PCA services, which are further defined as assistance with the activities of daily living (ADLs) and instrumental activities of daily living (IADLs) as described in 130 CMR 422.410.

Pursuant to 130 CMR 422.403(C), MassHealth covers PCA services when: (1) they are prescribed by a physician; (2) the member's disability is permanent or chronic in nature; (3) the member requires physical assistance with two or more of the following ADLs as defined in 130 CMR 422.410(A): (a) mobility including transfers; (b) medications; (c) bathing or grooming; (d) dressing or undressing; (e) range-of-motion exercises; (f) eating; and (g) toileting; and (4) MassHealth has determined that the PCA services are medically necessary and has granted a prior authorization for PCA services.

Activities of daily living are listed at 130 CMR 422.410(A) and include mobility, assistance with medications or other health-related needs, bathing/grooming, dressing and undressing, passive range-of-motion exercises, eating, and toileting (including bowel care and bladder care). MassHealth pays for PCA time in physically assisting members to perform the aforementioned activities of daily living.

Pursuant to 130 CMR 450.204(A), MassHealth will 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 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 MassHealth. Services that are less costly to MassHealth include, but are not limited to, health care reasonably known by the provider, or identified by MassHealth pursuant to a prior authorization request, to be available to the member through sources described in 130 CMR 450.317(C), 503.007, or 517.007.

130 CMR 422.402 defines “surrogate” as follows:

the member's legal guardian, a family member, or other person as identified in the service agreement, who is responsible for performing certain PCA management tasks that the member is **unable or unwilling to perform**.

(emphasis added)

Here, MassHealth terminated the appellant’s PCA services, despite a finding that the appellant is clinically eligible for PCA services. The appellant’s PCM agency reported to MassHealth that that appellant needed a surrogate to help her manage the PCA program, and that she had not found one by a deadline date imposed by the PCM agency. As a result of this report from the PCM agency, MassHealth ended the appellant’s PCA services effective November 4, 2022.

In response to the PCM agency’s directive to find a surrogate, the appellant suggested six different individuals for this role, including family members, friends, and a boyfriend. For various reasons, the PCM agency rejected four of these individuals, and two others opted out. The PCM agency did not share details with the appellant of why it deemed these four individuals to be unsuitable.

It is not clear that the appellant is “unable or unwilling” to perform certain PCA managements tasks, such that she would require a surrogate. The PCM agency cited two instances of the appellant asking a PCA to perform tasks outside the scope of what a PCA is authorized to do, but the appellant credibly testified at hearing that she no longer asks her PCA to do such tasks.

Also, the PCM agency cited an instance of the appellant having reported a PCA submitted timesheets for days and times when the PCA did not work. The PCM agency evidently concluded that the appellant was mistaken, as the appellant’s signature appeared on the timesheets in question. However, at hearing, the appellant testified that she believes the PCA forged her signature on these timesheets. It appears that the PCM agency chose not to investigate this possibility, and found the PCA’s explanation of what occurred to be more credible than the appellant’s explanation.

No other evidence was cited by MassHealth of instances where the appellant made errors in managing the PCA program.

It bears noting that if the PCM agency really believed that the appellant needed a surrogate, it should have provided more meaningful assistance to the appellant in finding one.

In short, there is little evidence that the appellant is unable or unwilling to perform certain PCA management tasks, as asserted by the PCM agency. The legal basis on which the appellant’s medically necessary PCA services were terminated was quite thin.

I conclude that at this time, the appellant does not require a surrogate to manage the PCA program. If at any time the PCM agency has reason to believe she does, it may revisit the issue of finding a surrogate for the appellant, and it should assist her to find one that is suitable.

MassHealth's decision to terminate the appellant's PCA services effective November 4, 2022 was incorrect.

This appeal is APPROVED.

Order for MassHealth

Rescind notice of October 21, 2022. Send notice to the appellant apprising her that she will receive 21 hours and 15 minutes of day/evening PCA services, and zero nighttime PCA services, effective November 5, 2022 through March 27, 2023. Ensure that the appellant receives a new PCM agency evaluation on or before March 28, 2023.

Implementation of this Decision

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.

Paul C. Moore
Hearing Officer
Board of Hearings

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