

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2209548
Decision Date:	3/28/2023	Hearing Date:	2/7/2023
Hearing Officer:	Cynthia Kopka		

Appearance for Appellant:



Appearance for MassHealth:

Brad Goodier, BSN, RN
Linda Phillips, RN, BSN, LNC-CSp
Kristen Stahl, RN
Eileen Cynamon, RN (observing)



*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:	MFP-CL Waiver
Decision Date:	3/28/2023	Hearing Date:	2/7/2023
MassHealth's Rep.:	Brad Goodier, Linda Phillips, Kristen Stahl, Eileen Cynamon	Appellant's Rep.:	[REDACTED]
Hearing Location:	Quincy (remote)	Aid Pending:	No

Authority

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

Jurisdiction

By notice dated December 6, 2022, MassHealth notified Appellant that he is not eligible for MassHealth's Moving Forward Plan Community Living Home-and-Community-Based Services Waiver (MFP-CL Waiver). Exhibit 1. Appellant filed a timely appeal on January 3, 2023. Exhibit 2. A determination regarding eligibility for a waiver program is a valid basis for appeal. 130 CMR 610.032.

Action Taken by MassHealth

MassHealth notified Appellant that he is not eligible for MassHealth's MFP-CL Waiver.

Issue

The appeal issue is whether MassHealth correctly determined that Appellant is not eligible for the MFP-CL Waiver because he cannot be safely served in the community within the terms of this waiver.

Summary of Evidence

MassHealth was represented at remote hearing by its Associate Director of Appeals and Regulatory Compliance and other participants. Appellant appeared with his niece and two representatives from Boston Council for Independent Living (BCIL). Documents were submitted in advance of hearing by Appellant, Exhibits 2 and 5, and MassHealth, Exhibit 4. A summary of documentation and testimony follows.

MassHealth offers home and community based service waivers, including the MFP-CL waiver, to help qualified individuals move from a long-term care facility to a qualified residence in the community and obtain community based services. The MFP-CL waiver is for individuals who can move into their own home or apartment, or to the home of someone else, and receive services in the community. Another waiver, the MFP Residential Supports (MFP-RS) waiver is for people who need supervision and staffing 24 hours a day, seven days a week in a provider-operated residence. Exhibit 4 at A1. The MFP-CL waiver is available through MassHealth for people who have been living in a skilled facility and serves members who can move into their own home or apartment or to the home of someone else and receive services in the community. *Id.* To qualify for one of the waivers, an individual must:

- Be living in a nursing facility or in a chronic disease, rehabilitation, or psychiatric hospital for at least 90 days
- Either be
 - 18 years of age or older and have a disability, or
 - 65 years of age or older
- Meet clinical requirements (that is, be at a facility),
- Need MFP waiver services
- Be able to be safely served in the community within the terms of the MFP waivers, and
- Meet the financial requirements to qualify for MassHealth Standard in the community. Special financial rules exist for waiver applicants and participants.

Id. at 7.

Appellant is in his sixties with diagnoses and medical history including alcohol use disorder, septic shock, aspiration pneumonia, gastroesophageal reflux disease (GERD), chronic atrial fibrillation, pulmonary embolus, chronic obstructive pulmonary disease (COPD), osteoporosis, Covid-19, anemia, hypertension, cardiomyopathy, heart failure, seizures, metastatic prostate cancer, anxiety, and depression. Exhibit 4 at 69. On [REDACTED] 2022, a visiting nurse found Appellant down in his home surrounded by alcohol bottles and notified emergency services. *Id.* at 69, 94. Appellant was transferred to the hospital and treated for septic shock thought to be the result of aspiration pneumonia. *Id.* at 69, 94. At the hospital, Appellant was treated with antibiotics and doctors recommended NPO (nothing by mouth) status, given his history aspiration. However, Appellant declined PEG (percutaneous endoscopic gastrostomy) tube placement, an NG (nasogastric) tube placement, or NPO status. *Id.* at 69, 92, 96. Appellant admitted to the nursing facility on [REDACTED] 2022 where he currently resides. *Id.* at 69, 84.

On September 13, 2022, Appellant applied for the MFP-CL waiver after residing at the nursing facility for over [REDACTED] months. *Id.* at 46. On November 1, 2022, a nurse reviewer representing MassHealth’s waiver program performed an eligibility assessment at the facility with Appellant, his niece and health care proxy, and a social worker present. The assessment included an in-person visit and review of documents, including the Minimum Data Set-Home Care (MDS-HC); MFP Clinical Determination Assessment; MFP Waivers Community Risks Assessment; a review of the applicant’s medical record; and a discussion with the nursing facility staff. *Id.* at 50-73. During the assessment, the nurse reviewer noted the following:

- Per the discharge summary dated [REDACTED] 2022, a physician’s assistant indicated that Appellant was treated for septic shock related to aspiration pneumonia after he was found unresponsive by a visiting nurse. *Id.* at 92-96. It was documented that “he was found down with many alcohol bottles around him.” *Id.* at 94.
- Psychiatric evaluations dated from [REDACTED] 2022 through [REDACTED] 2022 indicate that Appellant has a diagnosis of persistent dementia due to alcohol use disorder. *Id.* at 124-128.
- On [REDACTED] 2022, Appellant was readmitted to the hospital for aspiration pneumonia. Speech therapy recommended strict NPO status with alternate means of nutrition, to which Appellant refused. *Id.* at 111.
- Per a mental health progress note dated [REDACTED] 2022, a social worker wrote that “[Appellant] does not have the motivation to use this time of enforced sobriety to stop drinking ... [Appellant] says that once he is home, he is likely to continue using alcohol but hopes to better control his drinking.” *Id.* at 132.
- A physician progress note dated [REDACTED] 2022 states that [REDACTED] “is high risk for aspiration.” *Id.* at 146.

On November 23, 2022, Appellant’s case was discussed at the MassHealth Waiver Clinical Team review meeting. In addition, on November 30, 2022, as part of the MFP Waiver eligibility process, a second clinical review was conducted by The Massachusetts Rehab Commission (MRC) Clinical Team, who oversees the community living waiver. MassHealth and MRC determined that Appellant is not considered to be clinically eligible for participation in the MFP-CL Waiver due to risk for aspiration and alcohol relapse. *Id.* at 72. The MassHealth representative testified that Appellant’s [REDACTED] risk for aspiration, refusal for alternative means of nutrition, and risk for alcohol relapse puts him at significant risk to himself; therefore, he cannot be safely served within the terms of the MFP-CL Waiver.

Appellant’s representatives referenced letters written by Appellant’s providers, including a letter dated [REDACTED] 2023 by a licensed social worker which states that Appellant is “highly motivated

highly motivated to remain sober and utilize all supportive services offered to

accomplish this goal. He is highly motivated to have a successful return to his home. Further, it should be noted that this writer knows of no reason at present to keep [Appellant] in such an extremely restrictive environment as a locked unit nursing home. [Appellant] should be given a chance to return to his home with supportive services in place.

Exhibit 5 at 2. On [REDACTED] 2023, Appellant's primary care physician wrote that Appellant "has consistently expressed a strong desire to return home, and we support him in this plan. In my professional opinion, [Appellant] is not a high risk of relapse." *Id.* at 1. An undated note from the director of social services did not comment on Appellant's likelihood of relapse, but wrote that Appellant's goal is to return to his home with supportive services, and the MFP-CL waiver "would be beneficial for him to return to home with these supportive services." Exhibit 4 at 174.

Appellant testified that he wishes to return to his home, which is a ground-floor level apartment with a back entrance that is accessible to him. Appellant lives there alone and has for eight years. Appellant does not wish to remain in the nursing facility. Appellant feels like a prisoner in the facility and there is no medical reason to remain. Appellant is in a locked facility and does not know whether the facility would grant leaves of absence apart from attending medical appointments. Appellant learned his lesson and it scared him, and he is motivated to change so he does not go through it again. Appellant acknowledges that he screwed up but wants a chance. Appellant testified that he attended AA meetings before Covid-19, though he could not remember the name or location apart from it being on Green Street in Jamaica Plain. Appellant's niece testified that she has done research on AA meetings in Appellant's area and identified a few places to choose from.

Regarding his aspiration risk, Appellant testified that he knows that he has to watch how he eats, making sure to chew and swallow carefully. Appellant has not had one episode of aspiration. He eats three square meals and gained 15 pounds while residing in the facility. He argued that the aspiration pneumonia was all caused by him having a colostomy or colonic, saying "they're the ones who did whatever they did."¹

Appellant's advocates argued that Appellant is very motivated to remain sober and would benefit from the services offered by the waiver, including adult companionship, transportation, and various therapies. Appellant's advocate testified that she works with people in nursing homes transition into the community. The waiver program works and it will work again for Appellant.

The MassHealth representative responded that Appellant's motivation to look into sobriety services is positive but the records provided as part of the application reflect Appellant's status at the time of application. MassHealth representative argued that Appellant was readmitted to the hospital in May 2022 for aspiration pneumonia. Exhibit 4 at 111. MassHealth also noted at the time of application, Appellant expressed to his social worker that he is likely to return to drinking in the community and had no interest in substance abuse counseling or groups. *Id.* at 129. For MassHealth to reverse its decision, it would need to see consistent medical documentation showing this sobriety treatment

¹ The medical records from the hospital admission show that Appellant was diagnosed with stercoral colitis, treated successfully with oral lactulose and subcutaneous methylnaltrexone, and was manually disimpacted. Exhibit 4 at 95.

over a period of time, which was not provided. MassHealth reviewed the February 2023 letters submitted for hearing, but these did not speak to the consistency and length of time needed to show that Appellant would be safe to return to the community. Appellant uses a wheelchair and does not have local informal community supports to assist him in the event of bad weather or cancellation of home services. MassHealth's position is that the MFP-CL waiver would put Appellant in an unsafe position.

Appellant's advocates argued that Appellant, as a disabled person, has the right to live in the least restrictive environment. Additionally, the most recent documentation shows that Appellant is not a high risk of relapse. Therefore, Appellant qualifies for the waiver.

Appellant's niece testified that Appellant is not a high risk, he has come a long way in two years. Appellant's niece argued that Appellant is a wonderful person and driven. She has worked with Appellant this past year to help him identify and understand his goals. Appellant's niece argued the "snapshot" MassHealth reviewed is just that, a snapshot and not who Appellant is as a whole. Appellant is very capable of living on his own and driven to do so. Finally, Appellant and his advocates argued that 12 hours of support in the community would be a better quality of life than continuing to reside in the facility. In the request for hearing, Appellant's niece wrote that Appellant does not receive the therapy he needs to recover at the nursing facility. Exhibit 2 at 2. Appellant's niece wrote that she is an informal support, offering more assistance than just helping with paperwork. *Id.* Without the MFP-CL waiver, Appellant cannot receive the resources he needs to benefit him, which is preventing him from receiving consideration for the waiver in the first place; a catch-22. *Id.*

Findings of Fact

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

1. On September 13, 2022, Appellant applied for the MFP-CL waiver after residing at a nursing facility for over [REDACTED] months. Exhibit 4 at 46.
2. Appellant is in his sixties with diagnoses and medical history including alcohol use disorder, septic shock, aspiration pneumonia, GERD, chronic atrial fibrillation, pulmonary embolus, COPD, osteoporosis, Covid-19, anemia, hypertension, cardiomyopathy, heart failure, seizures, metastatic prostate cancer, anxiety, and depression. *Id.* at 69.
3. In [REDACTED] 2022, Appellant was hospitalized after a visiting nurse found him down in his home surrounded by alcohol bottles. Appellant was treated for septic shock thought to be the result of aspiration pneumonia. *Id.* at 69, 94.
4. At the hospital, Appellant declined PEG tube placement, an NG tube placement, or NPO status despite aspiration risk. *Id.* at 69, 92, 96.
5. Psychiatric evaluations dated from [REDACTED] 2022 through [REDACTED] 2022 indicate that

Appellant has a diagnosis of persistent dementia due to alcohol use disorder. *Id.* at 124-128.

6. On [REDACTED] 2022, Appellant was readmitted to the hospital for aspiration pneumonia. Speech therapy recommended strict NPO status with alternate means of nutrition, to which Appellant refused. *Id.* at 111.
7. Per a mental health progress note dated [REDACTED] 2022, a social worker wrote that “[Appellant] does not have the motivation to use this time of enforced sobriety to stop drinking ... [Appellant] says that once he is home, he is likely to continue using alcohol but hopes to better control his drinking.” *Id.* at 132.
8. A physician progress note dated [REDACTED] 2022 states that [REDACTED] “is high risk for aspiration.” *Id.* at 146.
9. On [REDACTED] 2023, Appellant’s primary care physician wrote that Appellant “has consistently expressed a strong desire to return home, and we support him in this plan. In my professional opinion, [Appellant] is not a high risk of relapse.” Exhibit 5 at 1.
10. On [REDACTED] 2023, Appellant’s social worker wrote that Appellant is

highly motivated to remain sober and utilize all supportive services offered to accomplish this goal. He is highly motivated to have a successful return to his home. Further, it should be noted that this writer knows of no reason at present to keep [Appellant] in such an extremely restrictive environment as a locked unit nursing home. [Appellant] should be given a chance to return to his home with supportive services in place.

Id. at 2.

Analysis and Conclusions of Law

Per 130 CMR 519.007(H)(2), an MFP-CL Waiver allows an applicant or member who is certified to need nursing facility services to receive specified waiver services, other than residential support services, in the home or community instead of in a nursing facility setting. To qualify for the MFP-CL Waiver, the member must meet clinical and age requirements:

(a) Clinical and Age Requirements. The MFP Community Living Waiver, as authorized under section 1915(c) of the Social Security Act, allows an applicant or member who is certified by the MassHealth agency or its agent to be in need of nursing facility services, chronic disease or rehabilitation hospital services, or, for participants 18 through 21 years of age or 65 years of age and older, psychiatric hospital services to receive specified waiver services, other than residential support services in the home or community, if he or she meets all of the following criteria:

- (1) is 18 years of age or older and, if younger than 65 years old, is totally and permanently disabled in accordance with Title XVI standards;
- (2) is an inpatient in a nursing facility, chronic disease or rehabilitation hospital, or, for participants 18 through 21 years of age or 65 years of age and older, psychiatric hospital with a continuous length of stay of 90 or more days, excluding rehabilitation days;
- (3iii) must have received MassHealth benefits for inpatient services, and be MassHealth eligible at least the day before discharge;
- (4) needs one or more of the services under the MFP Community Living Waiver;
- (5) is able to be safely served in the community within the terms of the MFP Community Living Waiver; and**
- (6) is transitioning to the community setting from a facility, moving to a qualified residence, such as a home owned or leased by the applicant or a family member, an apartment with an individual lease, or a community-based residential setting in which no more than four unrelated individuals reside.

130 CMR 519.007(H)(2) (emphasis added).

MassHealth determined Appellant did not meet the requirement at 130 CMR 519.007(H)(2)(v), that Appellant would be safely served in the community. MassHealth relied on documentation of Appellant's ambivalence to maintaining sobriety in the community. MassHealth also pointed to Appellant's high risk of aspiration and refusals to consider alternative means of nutrition. MassHealth also argued that Appellant does not have nearby community supports in case of an emergency.

Though Appellant's desire and motivation to return home are clear and his providers have attested to his low risk of relapse of alcohol use, nothing in the record and argument provided by Appellant address the risk of aspiration. Appellant argument that he has not had an aspiration event since residing in the nursing facility was contradicted by the medical record. Additionally, Appellant has not demonstrated that he has a clear plan in place to maintain sobriety in the community. For instance, Appellant was not able to identify specific AA meetings he would attend. Though Appellant and his representatives are working with the facility to allow Appellant to attend virtual AA meetings, this has not yet been implemented. Appellant and his representatives have provided credible evidence that Appellant's needs are not being met in his current living situation, but have not explored other options such as a group home, residential waiver, or a different facility that can offer appropriate support.

Appellant has not demonstrated that MassHealth's determination that he cannot be safely served in the community as required by 130 CMR 519.007(H)(2)(v) was made in error. Accordingly, this appeal is denied. Appellant is encouraged to continue working towards independent living by addressing the specific concerns raised by MassHealth such as developing plans for maintaining sobriety in the community, and/or by exploring another waiver option such as the MFP-RS waiver.

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.

Cynthia Kopka
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Linda Phillips, UMass Medical School - Commonwealth Medicine, Disability and Community-Based Services, 333 South Street, Shrewsbury, MA 01545-7807

[REDACTED]

[REDACTED]