

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2300072
Decision Date:	2/15/2023	Hearing Date:	02/08/2023
Hearing Officer:	Sara E. McGrath		

Appearances for Appellant:



Appearances for MassHealth:

Kathleen Racine, Senior Policy Analyst
MassHealth Eligibility Policy Unit



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

APPEAL DECISION

Appeal Decision:	Denied	Issue:	Hardship Waiver
Decision Date:	2/15/2023	Hearing Date:	02/08/2023
MassHealth's Rep.:	Kathleen Racine	Appellant's Reps.:	██████████
Hearing Location:	Board of Hearings (Remote)		

Authority

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

Jurisdiction

Through a notice dated November 14, 2022, MassHealth denied the appellant's application for a waiver of the penalty period imposed due to a disqualifying transfer of resources (Exhibit 1). The appellant filed a timely appeal of the notice on January 3, 2023 (Exhibit 2). Denial of a hardship waiver application is a valid basis for appeal (130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied the appellant's request for a waiver of the penalty period imposed due to a disqualifying transfer of resources.

Issue

The appeal issue is whether the appellant is entitled to waiver of the penalty period imposed due to a disqualifying transfer of resources.

Summary of Evidence

A representative from the MassHealth Eligibility Policy Unit appeared at the hearing telephonically. Her testimony, in combination with documentary evidence, reveals the following factual background. A MassHealth long-term care application was filed on the appellant's behalf in June 2021 seeking a coverage start date of August 18, 2021.¹ MassHealth denied the application on December 28, 2021, due to a disqualifying transfer of assets in the amount of \$83,123.48. The transfer amount consists of the net proceeds the appellant and his spouse received from the sale of their home in March 2018. MassHealth was unable to determine where the sale proceeds went, and therefore imposed a penalty period between August 18, 2021, and March 18, 2022.

The appellant filed an appeal with the Board of Hearings on January 12, 2022. In his appeal, he argued that his son had misappropriated the sale proceeds. On April 14, 2022, BOH approved the appeal in large part, finding that the appellant had demonstrated that \$67,000 of the sale proceeds had been converted to cash and ultimately spent by the son. Because the appellant could not account for the remaining \$16,123.48 of the sale proceeds, this portion of the appeal was denied with an order that the penalty period should be adjusted accordingly (Exhibit 3). The period of disqualification was revised to run from August 18, 2021 through September 26, 2021. The appellant's MassHealth benefits have been active since September 27, 2021.

The representative from the MassHealth Eligibility Policy Unit testified that the appellant filed a request for a hardship waiver with the Taunton MassHealth office on January 11, 2022 (before the BOH decision had issued); that request was forwarded to MassHealth Eligibility Policy Unit.² On November 14, 2022, MassHealth issued a Transfer of Resources Hardship Waiver Denial Notice, which states that the hardship waiver is denied because "you have not met the requirements of 130 CMR 520.019(L)."

The MassHealth representative testified that 130 CMR 520.019(L) has a four-prong test, and the appellant has not met any of the four prongs. She explained that the first prong requires a showing that "[t]he 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." She noted that related to this requirement is the fourth prong, which requires a finding that "[t]here is no less costly noninstitutional alternative available to meet the nursing-facility resident's needs." The MassHealth representative argued that the appellant has

¹ The record reflects that a second MassHealth long-term care application was filed on the appellant's behalf in October 2021.

² The MassHealth representative explained that due to administrative oversight, the hardship waiver request was not forwarded to the MassHealth Eligibility Policy Unit until November 2022.

not met these two prongs of the test. In support of this position, she referenced a letter to MassHealth from the administrator of the nursing facility where the appellant resides. That letter is dated January 11, 2022 and provides as follows:

[Appellant] was admitted to Hellenic Nursing & Rehabilitation Center on [REDACTED] for Kidney Disease, Heart Disease, and dementia. We are unable to discharge [appellant] as he does not have a suitable home and would be medically unsafe at this time. He would be deprived of shelter, clothing as [appellant] is unable to provide care for himself in the community due to his dementia.

(Exhibit 4, p. 173).

The MassHealth representative argues that this letter does not address any less costly options that may be appropriate for the appellant. MassHealth acknowledged that the appellant could not be discharged home, as his home was sold several years ago. However, the letter does not address other options such as placement in an assisted living facility. Further, MassHealth takes issue with the fact that the letter is from the administrator rather than a physician who could attest to the appellant's medical needs and his level of care.

The MassHealth representative referenced the third prong of the regulation which requires that "[t]he 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." She acknowledges that the record includes a discharge notice dated January 11, 2022, but challenges its validity in light of the fact that it does not include a discharge date (Exhibit 4, pp. 176-179). Further, she stated that to the best of her knowledge, the appellant still resides at the facility.

The MassHealth representative also referenced the second prong of the regulation which requires that "[d]ocumentary 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." She stated that the record contains a letter dated September 17, 2021 from the nursing facility's attorney to the appellant's son, which provides in relevant part as follows:

This office represents Hellenic Nursing and Rehabilitation Center . . . and this is an attempt to collect a debt.

A claim has been placed with this office by Hellenic for collection regarding funds owed to Hellenic for room and board, skilled nursing care and services that has [sic] been provided and continues to be provided to [appellant] from October 11, 2020 to the present. Hellenic is currently owed \$17,600.00. This amount is current through September 30, 2021 and is based on 44 days at the private pay

rate of \$400.00 per day. We have enclosed an invoice that reflects this. This amount will continue to increase pursuant to ongoing room, board, and skilled nursing care that is being provided for which payment will be required. We are writing on behalf of [sic] because Hellenic intends to pursue claims against you, individually, pursuant to the Massachusetts General Law, Uniform Fraudulent Transfer Act, Chapter 109A.

To facilitate payment for the care that [appellant] is receiving, a MassHealth application was filed. Unfortunately, due to the fact that [appellant] “recently gave away or sold assets to become eligible for MassHealth-Long-Term-Care-Services,” the MassHealth application was denied. It is our understanding based on information provided from various sources that the denial was based on your having misappropriated a total of \$83,000.00 of your parents’ money over time. It is our understanding that you have access to their income and bank account and that you have misappropriated their funds for your own use.

It is the position of Hellenic that the transfer/misappropriation of \$83,000.00 constitutes fraudulent transfers within the meaning of Chapter 109A. Pursuant to M.G.L. Chapter 109A, Section 5, any transfer of assets is fraudulent as to a creditor if the transfer was made by the debtor “without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor . . . reasonably should have believed that she would incur, debts beyond her ability to pay as they become due.” The misuse of [appellant’s] funds constitutes fraudulent transfers within the meaning of Ch. 109A as they were made without receiving a reasonably equivalent value and [appellant] reasonably should have believed that he would incur debts for skilled nursing care that would be beyond his ability to pay.

We are writing to provide you with notice of Hellenic’s claims as well as to provide you with an opportunity to discuss a resolution to this matter. We ask that you contact our office by **October 29, 2021**.

If the matter is not resolved by the above date litigation may commence without further notice or delay.

(Exhibit 4, pp. 38-39).

The MassHealth representative argued that because no further attempts were made to recover the funds, the appellant has not satisfied this prong of the regulation.

The appellant’s representative appeared at the hearing telephonically. She indicated that the appellant seeks the hardship waiver because his son misappropriated all of the proceeds from the sale of the home. She referenced a letter in the record from a local protective services

department that states that the appellant was financially exploited from February 11, 2019 through November 15, 2019 (Exhibit 4, p. 172). She also referenced a protective services report that confirms that a protective services worker discussed with the appellant's son the whereabouts of the home sale proceeds (Exhibit 4, p. 29). Further, she referenced an affidavit from the appellant's guardian that provides additional details of the son's financial abuse of his parents (Exhibit 4, pp. 174-175).

The appellant's representative argued that the requirements of the applicable regulation have been met. She stated the letter from the nursing facility administrator is sufficient to satisfy the first and fourth prongs of the regulation. The administrator is aware of the appellant's care needs and would be one the initiating the discharge. Further, she (the appeal representative) feels that the appellant's needs are too great for an assisted living facility. She also indicated that the appellant does not have the funds to pay for this type of care. Regarding the discharge notice and third prong of the regulation, the appellant's representative stated that the facility did not yet initiate discharge because this appeal is still pending. Further, she noted that the missing discharge date is not critical, as one can assume on a 30-date notice that the discharge date is 30 days from the notice date.

The appellant's representative argued that the second prong of the regulation has been met. She referenced the demand letter sent by the nursing facility's attorney, and argued that this letter, coupled with the inquiries made by the protective services worker, constitute sufficient attempts to recover the transferred resource. Although she has never been able to make contact with the appellant's son, she believes that he is precariously housed and may have a substance abuse history. She does not believe he owns real estate or has any significant assets. For these reasons, further attempts at recovery have not been initiated.

Findings of Fact

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

1. In March 2018, the appellant and his spouse sold their home and received net proceeds in the amount of \$83,123.48.
2. In June and October 2021, the appellant submitted MassHealth long-term care applications, seeking a coverage start date of August 18, 2021.
3. On or about September 17, 2021, the nursing facility's attorney wrote a demand letter to the appellant's son, alleging that the son misappropriated \$83,000 of his parent's funds in violation of the Massachusetts Uniform Fraudulent Transfer Act. The letter indicates that if the matter is not resolved by October 29, 2021, litigation may commence.
4. On December 28, 2021, MassHealth denied the appellant's application based on a

disqualifying transfer of \$83,123.48. MassHealth was unable to determine where these funds (the net proceeds from the home sale) went, and therefore imposed a penalty period between August 18, 2021, and March 18, 2022.

5. On January 11, 2022, the appellant filed a request for a hardship waiver with the Taunton MassHealth Enrollment Center; the request was forwarded to MassHealth Eligibility Policy Unit in November 2022.
6. On or about January 11, 2022, the nursing facility administrator wrote to MassHealth and stated that the appellant was admitted to the facility with kidney disease, heart disease, and dementia, and that “[w]e are unable to discharge [appellant] as he does not have a suitable home and would be medically unsafe at this time. He would be deprived of shelter, clothing as [appellant] is unable to provide care for himself in the community due to his dementia.”
7. On or about January 11, 2022, the nursing facility issued a 30-day discharge notice to the appellant based on his failure to pay for his stay at the facility. The notice includes a discharge location but not a discharge date.
8. On January 12, 2022, the appellant filed an appeal of the December 28 denial with the Board of Hearings. In his appeal, he argued that his son had misappropriated the sale proceeds.
9. On April 14, 2022, BOH approved the appeal in large part, finding that the appellant had demonstrated that \$67,000 of the sale proceeds had been converted to cash and ultimately spent by the son. Because the appellant could not account for the remaining \$16,123.48 of the sale proceeds, this portion of the appeal was denied. The period of disqualification was revised to run from August 18, 2021 through September 26, 2021.
10. On November 14, 2022, MassHealth issued a Transfer of Resources Hardship Waiver Denial Notice. It states that the hardship waiver is denied because “you have not met the requirements of 130 CMR 520.019(L).”
11. On January 3, 2023, the appellant filed a timely appeal of the November 14 denial with the Board of Hearings.

Analysis and Conclusions of Law

Under 130 CMR 520.019(L), the nursing-facility resident may claim undue hardship in order to eliminate the period of ineligibility. MassHealth may waive a period of ineligibility due to a disqualifying transfer of resources if ineligibility would cause the nursing-facility resident undue hardship. MassHealth 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.

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 (130 CMR 520.019(L)(2)).

At issue here is MassHealth's denial of the appellant's request for an undue hardship waiver pursuant to 130 CMR 520.019(L). The appellant contends that notwithstanding the disqualifying transfer, MassHealth should waive the period of ineligibility because he meets the four-prong test in the regulation. MassHealth maintains that the appellant has not satisfied any of the four prongs of the regulation.

On this record, the appellant has not demonstrated that he has met the requirements of 130 CMR 520,019(L). At a minimum, there is insufficient evidence to conclude that 130 CMR 520.019((L)(b) has been satisfied. The only evidence in the record that documents an attempt to retrieve the stolen funds is the demand letter from the nursing facility's attorney. This letter is from 2021; the attorney references the son's violation of the Massachusetts Uniform Fraudulent Transfer Act and threatens litigation. There is no documentation in the record to suggest that any

further civil or criminal action was taken against the son. Without more, the appellant has not documented “exhaustive attempts” to retrieve a transferred resource. Furthermore, contrary to the appellant’s assertions, it is not at all clear that there are no means to retrieve *any* part of the transferred funds “or other adequate compensation” from the son. That the son’s whereabouts are currently unknown, and that he does not own property, is not determinative. Absent a more vigorous effort to seek repayment, the appellant cannot reasonably argue that he has made *all* appropriate attempts to retrieve the transferred resource pursuant to 130 CMR 520.019(L)(b) (see *Lusignan v. Secretary Of Executive Office*, 77 Mass.App.Ct. 1107 (2010)).

MassHealth correctly determined that the appellant has not met all of the requirements of 130 CMR 520.019(L).³ This appeal is therefore denied.

Order for MassHealth

None.

³ The conclusion here renders a ruling on the other parts of the regulation unnecessary.

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.

Sara E. McGrath
Hearing Officer
Board of Hearings

cc: Chelsea MEC

[REDACTED]

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