

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: Denied

Appeal Number: 2300709

Decision Date: 3/20/2023

Hearing Dates: 02/28/2023 and
03/13/2023

Hearing Officer: Paul C. Moore

Appearances for Appellant:



Appearance for MassHealth:

Elizabeth Landry, Taunton MassHealth
Enrollment Center (by telephone)



*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:	Disqualifying Transfer
Decision Date:	3/20/2023	Hearing Dates:	02/28/2023 and 03/13/2023
MassHealth Rep.:	Elizabeth Landry	Appellant Reps.:	Counsel/POA
Hearing Location:	Board of Hearings (remote)		

Authority

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

Jurisdiction

By a notice dated January 24, 2023, MassHealth informed the appellant that he is eligible for MassHealth long-term care coverage, but with a period of ineligibility because he gave away or transferred resources for less than fair market value (130 CMR 520.019; Exhibit 1). The appellant filed a timely appeal with the Board of Hearings (BOH) on January 27, 2023 (130 CMR 610.015; Exhibit 2). Limitation on the amount or scope of assistance is a valid ground for appeal to BOH (130 CMR 610.032(A)).

Action Taken by MassHealth

MassHealth determined that the appellant is eligible for MassHealth coverage, but with a period of ineligibility due to disqualifying transfers of resources.

Issue

The issue is whether MassHealth correctly determined that the appellant made disqualifying transfers of resources.

Summary of Evidence

A MassHealth representative from the Taunton MassHealth Enrollment Center testified by telephone that the appellant, who is over 65 years old, filed an application for long-term care coverage on November 29, 2022. The appellant was admitted to a nursing facility on [REDACTED] 2022. The appellant is seeking coverage for the nursing home stay beginning on [REDACTED] 2022. The MassHealth representative stated that MassHealth sent the appellant a Request for Information on December 6, 2022, and all verifications were timely received. On January 24, 2023, MassHealth sent a written notice to the appellant awarding coverage, but preceded by a period of ineligibility based on a disqualifying transfer of resources purportedly made by the appellant during the relevant five-year lookback period. The coverage start-date awarded by MassHealth is February 17, 2023 (Exh. 1).

The MassHealth representative stated that the disqualifying transfer made by the appellant was a half-interest in real estate located at [REDACTED] (“real estate”). The appellant and another individual, [REDACTED], each owned a half-interest in the property, which they purchased in the 1980s as an investment.¹ The assessed value of one-half of the real estate at the time of transfer ([REDACTED] 2020), less amounts owed on the mortgage, was \$67,271.89. The appellant transferred his half-interest in the real estate to [REDACTED] for \$1.00, according to the MassHealth representative (Exh. 10). The MassHealth representative divided \$67,271.89 by \$410.00 per day, the average daily cost to a private patient receiving nursing-facility services in Massachusetts at the time the appellant filed his MassHealth application. This yielded a 164-day penalty period, so the coverage start-date for the appellant’s nursing facility stay is [REDACTED] 2023 rather than [REDACTED] 2022 (Testimony, Exh. 1).

The appellant was represented at hearing by an attorney, and by his attorney-in-fact, [REDACTED], both of whom testified by telephone. The attorney asserted that the appellant’s transfer of his half-interest in the real estate to [REDACTED] was to compensate [REDACTED] for the appellant having lived rent-free in [REDACTED] home since 2006, and for [REDACTED] having provided hands-on care to the appellant as the symptoms of the appellant’s Parkinson’s disease worsened over time (Testimony).² The attorney referred to an affidavit of [REDACTED] submitted to MassHealth in November, 2022; the hearing officer did not have a copy of this affidavit at hearing. Subsequently, the hearing officer received a copy of this affidavit, and it states in relevant part:

... [t]he value of the rent that [the appellant] owed me for living at [REDACTED] [REDACTED] was \$800 per month before 2019 and \$950 per month after 2019 (see opinion letter of professional realtor, attached).³ Accordingly, the following is a list of the

¹ Initials are used to protect confidentiality.

² The appellant was diagnosed with Parkinson’s disease in approximately 2009.

³ The real estate broker’s letter, dated October 27, 2022, states that the average rental rate for a one-bedroom

amount [the appellant] owed for the rent during the applicable time period until he entered the facility, which totals \$71,600.00.

- A. 2016 -- \$9,600
- B. 2017 -- \$9,600
- C. 2018 -- \$9,600
- D. 2019 -- \$11,400
- E. 2020 -- \$11,400
- F. 2021 -- \$12,000
- G. 2022 -- \$8,800

Due to [the appellant's] mobility issues from his Parkinson's Disease, he needed assistance with bathing, dressing, toileting, eating, meal preparation, ambulating, laundry, grocery shopping, taking him to and from doctors' appointments, and picking up medications, etc. I provided services for [the appellant] beginning on or about January 1, 2020 and provided him with 18-hour daily care for an average of 126 hours per week. As [the appellant's] health continued to decline, [the appellant] signed a contract with Bristol Elders on August 27, 2020, who provided care for [the appellant] roughly 5 hours per day, 25 hours per week. I supplemented the remaining hours of care [the appellant] required above and beyond the services that was (*sic*) provided by Bristol Elders at 143 hours per week (18 hours per day on Saturdays and Sundays, as well as 13 hours per day on Mondays through Fridays). At a reasonable rate of \$25/hr., [the appellant] owed me \$224,200 for the services provided, to keep him out of a nursing facility and safe at home.

Given [the appellant's] limitations, the home we lived in required renovations to make it handicap accessible. On or about July of 2021, I paid for [the appellant's] necessary renovations with money from a loan I took in my name. . . . On that date, a lien was placed on my home for these renovations necessary for [the appellant]. . . . More specifically, the renovations consisted of work to make the bathrooms handicap accessible as well as putting in a ramp for [the appellant's] wheelchair. I do not need a ramp or wheelchair accessibility. The payment that I made (and the loan in my name that I am paying back) for these accommodations for [the appellant's] benefits totaled \$51,720.00.

The value of the transfer of [the appellant's] half of [REDACTED] . . . of \$67,271.89 should not be penalized as it was less than the payment for the services, rent and loan that I provided to him which totaled \$347,520 (rent of \$71,600 plus care services totaling \$224,200 plus payment of \$51,720 for wheelchair ramp and to make

apartment for [REDACTED] in [REDACTED] was \$800.00 a month in 2016, \$950.00 a month in 2019, and \$1,000.00 a month in 2021 (Exh. 6B).

the bathrooms handicap accessible = \$347,520).

(Exh. 6A)⁴

█ testified that he and the appellant did not draw up and sign a written contract for the personal care services █ provided to the appellant. █ testified that there was, however, a verbal agreement between the appellant and █ that the appellant would compensate █ for the personal care services he provided, as well as the rent not charged to the appellant and the modifications to their residence. █ testified that in █, the appellant was admitted to a local nursing facility in █, subsequently was admitted to a hospital geriatric-psychiatric unit, and was then was admitted to an acute care hospital for a blood infection. All of this occurred prior to the appellant's admission to his current nursing facility (Testimony).

According to the MassHealth representative, the appellant is coded as "long-term" at the nursing facility.

The appellant's Parkinson's disease symptoms significantly worsened in 2015, according to █. The appellant has no family members involved in his care, and █ is the sole beneficiary named in the appellant's will (Testimony).

█ stated that he and the appellant did not consult an attorney prior to the transfer of the real estate in 2020. █ was not aware he needed to draw up a written contract for the personal care services he provided to the appellant (Testimony).

█ testified that the \$25/hour figure used to calculate what the appellant owed him for personal care services was not negotiated at the time █ began providing care to the appellant. The appellant's attorney testified that the \$25/hour figure was arrived at by reviewing what private personal care attendants (PCAs) and home health aides are typically paid for providing such services. This hourly rate was current as of the date of █ affidavit submitted to MassHealth, in November, 2022, according to the attorney (Testimony).

The appellant's attorney asserted that the care █ provided to the appellant avoided the need for the appellant to be admitted to a nursing facility at an earlier time. The attorney added that the transfer of the real estate from the appellant to █ was not a "gift" made by the appellant with the intention of qualifying for MassHealth. Instead, the transfer was intended as valuable consideration for services provided by █ for the appellant having lived in █ home rent-free, and for the home modifications made to their residence (Testimony).

Findings of Fact

⁴ Documents submitted by MassHealth regarding the home modifications reflect that █. also has "limited physical mobility" (Exh. 5).

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

1. The appellant is over age 65, unmarried, and entered a nursing facility in [REDACTED] 2022 (Testimony, Exh. 5).
2. The appellant filed an application with MassHealth for long-term care coverage on November 29, 2022 (*Id.*).
3. The appellant is seeking coverage for a nursing facility stay effective [REDACTED] 2022 (*Id.*).
4. MassHealth sent the appellant a Request for Information on December 6, 2022, and all verifications were timely received (*Id.*).
5. On January 24, 2023, MassHealth sent a written notice to the appellant awarding coverage effective February 17, 2023, preceded by a period of ineligibility based on a disqualifying transfer of resources purportedly made by the appellant (Exh. 1).
6. The appellant filed a timely appeal with the BOH on January 27, 2023 (Exh. 2).
7. In May, 2020, the appellant transferred a half-interest in real estate located at [REDACTED] [REDACTED] (Testimony).
8. The appellant and [REDACTED] had purchased the [REDACTED] real estate jointly in the 1980s as an investment property (Testimony, Exh. 6A).
9. The appellant and [REDACTED] transferred a one-half interest in the real estate to [REDACTED] alone for \$1.00 on May 15, 2020 (Exh. 10).
10. MassHealth considered the transfer of the appellant's share of the real estate for less than fair-market value during the five-year lookback period to be a disqualifying transfer of resources (Testimony).
11. The assessed value of one-half of the real estate at the time of transfer (May, 2020), less amounts owed on the mortgage, was \$67,271.89 (Testimony, Exh. 11).
12. MassHealth divided the disqualifying transfer amount of \$67,271.89 by \$410.00 a day, which MassHealth asserted was the average daily cost to a private patient receiving nursing-facility services in Massachusetts at the time the appellant filed his MassHealth application, yielding a disqualification period of 164 days (Testimony, Exh. 5).

13. In November, 2022, the month during which the appellant's MassHealth application was filed, the average cost to a person paying privately for nursing facility services in the Commonwealth was increased from \$410.00 to \$427.00 a day (MassHealth Eligibility Operations Memo 22-13).
14. Beginning in 2006, the appellant lived with [REDACTED] at his home located at [REDACTED], [REDACTED] (Testimony, Exh. 6A).
15. The appellant did not pay rent to [REDACTED] (Testimony).
16. [REDACTED] is the sole beneficiary named in the appellant's will (Testimony).
17. Around 2015, due to his advancing Parkinson's disease, the appellant needed more help carrying out his activities of daily living (Testimony).
18. [REDACTED] began providing personal care services for the appellant beginning on or about January 1, 2020, up to 18 hours of daily care for an average of 126 hours per week (Exh. 6A).
19. In August, 2020, the appellant signed a contract with Bristol Elders to provide care for the appellant roughly 5 hours per day, 25 hours per week (*Id.*).
20. [REDACTED] supplemented the remaining hours of care the appellant required above and beyond the services that were provided by Bristol Elders at 143 hours per week (18 hours per day on Saturdays and Sundays, as well as 13 hours per day on Mondays through Fridays) (*Id.*).
21. [REDACTED] asserted that at a reasonable rate of \$25/hr., the appellant owed him \$224,200.00 for the personal care services provided, to keep him out of a nursing facility and safe at home (*Id.*).
22. [REDACTED] asserted that the appellant owed him rent for the period 2016 through 2022 in the approximate amount of \$71,600.00 (*Id.*).
23. In July, 2021, [REDACTED] took a loan in [REDACTED] name to finance renovations to the home he shared with the appellant, including making the bathrooms handicap-accessible and adding a ramp to accommodate the appellant's wheelchair; the total loan amount is \$51,720.00 (Testimony, Exh. 6A).
24. The appellant and [REDACTED] did not have a written contract governing personal care services [REDACTED] provided to the appellant, nor did they agree in advance on the hourly rate of \$25.00 (Testimony).
25. [REDACTED] asserted that the total amount the appellant owed to him for the cost of unpaid rent,

personal care services provided, and renovations to their home is \$347,520.00 (Testimony, Exh. 6A).

26. The appellant asserts that his transfer of the real estate from to [REDACTED] was not a “gift” made by the appellant with the intention of qualifying for MassHealth, but was instead valuable consideration the appellant gave for services provided by [REDACTED] for the appellant having lived in [REDACTED] home rent-free, and for the home modifications made to their residence (Testimony).

Analysis and Conclusions of Law

MassHealth 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(K).⁵

MassHealth 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. A disqualifying transfer may include any action taken which would result in making a formerly available asset no longer available (130 CMR 520.019(C)).

130 CMR 520.019: Transfer of Resources Occurring on or after August 11, 1993

(A) Payment of Nursing-Facility Services. The MassHealth agency will apply the provisions of 130 CMR 520.018 and 520.019 to nursing-facility residents as defined at 130 CMR 515.001 requesting MassHealth payment for nursing-facility services provided in a nursing facility or in any institution for a level of care equivalent to that received in a nursing facility or for home- and community-based services provided in accordance with 130 CMR 519.007(B).

(B) Look-Back Period. Transfers of resources are subject to a look-back period, beginning on the first date the individual is both a nursing-facility resident and has applied for or is receiving MassHealth Standard. This period generally extends back in time for 36 months. **For transfers of resources occurring on or after February 8, 2006, the period extends back in time for 60 months.** The look-back period for transfers of resources from a revocable trust to someone other than

⁵130 CMR 515.001 defines fair-market value as “an estimate of the value of a resource if sold at the prevailing price. For transferred resources, the fair market value is based on the prevailing price at the time of transfer.”

the nursing-facility resident, or transfers of resources into an irrevocable trust where future payment to the nursing-facility resident is prevented, is 60 months.

(C) 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 will consider the specific circumstances involved. A disqualifying transfer may include 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 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 under 65 years of age 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 under age 21, 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.

...

(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 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.

(G) Period of Ineligibility Due to a Disqualifying Transfer.

(1) 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 monthly 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.

(Emphases added)

In addition, the State Medicaid Manual (HCFA Transmittal letter 64) at Section 3258.10 sets forth the following guidance to address transfers exclusively for a purpose other than qualifying for Medicaid:

2. Transfers Exclusively for a Purpose Other Than to Qualify for Medicaid. -- Require the individual to establish, to your satisfaction, that the asset was transferred for a purpose other than to qualify for Medicaid. Verbal assurances that the individual was not considering Medicaid when the asset was disposed of are not sufficient. **Rather, convincing evidence must be presented as to the specific purpose for which the asset was transferred.**

(Emphasis added)

See also, Gauthier v. Director of the Office of Medicaid, 80 Mass. App. Ct. 777, 785-786 (2011) (Massachusetts Appeals Court held, *inter alia*, that hearing officer correctly affirmed MassHealth's decision that applicant made a disqualifying transfer of resources during the application look-back period; the applicant failed to show that the transfer was made exclusively for a purpose other than to qualify for MassHealth, because applicant did not present convincing evidence as the specific purpose for which the asset was transferred, as is required under federal law).

Here, the appellant filed a MassHealth application in November, 2022. In May, 2020, during the five-year look-back period preceding the filing of his application, the appellant transferred his share of real estate he owned jointly with [REDACTED] to [REDACTED] alone. The assessed value of one-half the real estate, less amounts owed on the mortgage, was \$67,271.89. The appellant transferred the real estate to [REDACTED] for \$1.00, considerably less than fair-market value.

The relevant inquiry is whether the transfer in question was permissible under 130 CMR 520.019 (D)(1) through (6), above. I conclude that the transfer does not meet any of the conditions listed in this portion of the regulation.

Next, under 130 CMR 520.019(F)(1), "Determination of Intent," MassHealth 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 the resources were transferred exclusively for a purpose other than to qualify for MassHealth.

The appellant lived with [REDACTED] in the latter's home since 2006. He did not pay any rent to [REDACTED]. In addition, starting on or before January, 2020, [REDACTED] provided personal care services to the appellant as the appellant's condition worsened. Finally, in 2021, [REDACTED] made renovations to the home he shared with the appellant in order to accommodate the appellant's wheelchair.

The appellant contends that there was a verbal agreement between himself and [REDACTED] that the appellant would compensate [REDACTED] for personal care services, for the cost of home modifications, and for unpaid rent from 2016 through the date of the appellant's institutionalization in 2022. However, no written contract was produced to this effect, and none exists. No negotiation of the

hourly rate to be paid by the appellant to [REDACTED] occurred until well after [REDACTED] provided personal care services to the appellant.

The appellant's health was, unfortunately, continuously in decline since the date of his diagnosis with Parkinson's disease. Without the appellant's testimony, it is difficult to discern what the appellant's intentions were with regard to possibly qualifying for MassHealth in order to cover the cost of future long-term care.

Without question, [REDACTED] selflessly provided hands-on, competent care to the appellant for a number of years so the appellant could remain living at home. [REDACTED] also charged no rent to the appellant for many years. Nonetheless, these facts, without more, do not definitively answer the question of the appellant's intent when he transferred the real estate in 2020 to [REDACTED] for less than fair-market value. There is insufficient evidence in the record to conclude that the appellant intended to dispose of the real estate for valuable consideration at the time of transfer.

MassHealth assessed an ineligibility period due to the disqualifying transfer by dividing the fair-market value of one-half the real estate at [REDACTED] by the average daily cost to a person paying privately for nursing facility services in the Commonwealth. MassHealth testified it used a figure of \$410.00 per day, yielding a 164-day penalty period. However, 164 days from September 13, 2022 (requested start-date) is February 24, 2023, not February 17, 2023.

MassHealth Eligibility Operations Memo 22-13 documents that the daily private pay rate for calculating a period of ineligibility for a disqualifying transfer of resources as of the date of the appellant's application (November, 2022) was \$427.00. Therefore, MassHealth should have divided the value of one-half the real estate (\$67,271.89) by \$427.00 per day, not \$410.00 per day. This would yield a period of ineligibility of 157 days, rather than 164 days.

The start-date awarded in Exhibit 1 is February 17, 2023 – 157 days after the requested start-date of September 13, 2023. Thus, although the MassHealth representative testified she used a divisor of \$410.00 a day to calculate the penalty period, it appears that she actually used the correct divisor of \$427.00 per day.

In view of the above, MassHealth's decision determining that the appellant made a disqualifying transfer of resources was correct. The coverage start-date of February 17, 2023 was also correct.

For these 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.

Paul C. Moore
Hearing Officer
Board of Hearings

cc: Justine Ferreira, Appeals Coordinator, Taunton MEC
