

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:



Appeal Decision:	Approved in part	Appeal Number:	2301466
Decision Date:	4/5/2023	Hearing Date:	03/22/23
Hearing Officer:	Paul T. O'Neill		

Appellant Representative:



MassHealth Representative:

Lindsay Gallant, Taunton MEC



*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 in part	Issue:	Long term care eligibility
Decision Date:	4/5/2023	Hearing Date:	03/22/23
MassHealth Rep.:	Lindsay Gallant	Appellant Rep.:	[REDACTED]
Hearing Location:	Taunton		

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 January 23, 2023, MassHealth denied Appellant's application for MassHealth benefits because Appellant's countable assets exceeded MassHealth limits (Exhibit 2). 130 CMR 520.003. Appellant filed this appeal in a timely manner on February 21, 2023 (Exhibit 2). 130 CMR 610.015(B). Denial of assistance is a valid basis for appeal. 130 CMR 610.032.

Action Taken by MassHealth

MassHealth denied Appellant's application because it determined that Appellant's countable assets exceeded MassHealth limits.

Issue

The appeal issue is whether MassHealth was correct in determining that a bank account was a countable asset and not business property essential for self-support.

Summary of Evidence

The MassHealth representative appeared at hearing and testified as follows. MassHealth received Appellant's application for long term care benefits on October 27, 2022. Appellant seeks July 1, 2022 as the start date of coverage. On January 23, 2023, MassHealth denied the application because Appellant's countable assets exceeded MassHealth's limit of \$2000.00. 130 CMR 520.003 and 520.004. MassHealth

counted a bank account (#6820) (“the Account”) containing \$6000.00 as of January 4, 2023 as part of Appellant’s assets.

The MassHealth representative argued that the Account is a countable asset per 130 CMR 520.007(B), which states that MassHealth “considers funds in a bank account available only to the extent that the applicant or member has both ownership of and access to such funds.” Testimony. During the application process and at hearing, Appellant’s attorney argued that although the Appellant has both ownership and access to this account, the Account should be considered business property essential to self-support, because it contains only the rental income and money for expenses for Appellant’s two-family property (“the Property”). Testimony, Exhibit 4. This Property is Appellant’s long-time home and Appellant lived in one unit of the Property as her primary residence and has always rented the other upstairs unit and received rental income that has allowed her to be self-supporting. Testimony, Exhibit 4. Appellant indicated on her application that she intended to return home, and the first floor apartment that she lived in is not being rented. Testimony. The Property generates a profit for the Appellant of \$5323.00 per year or \$443.58 per month after expenses prior to any needed repairs Exhibit 4.

When queried about why MassHealth determined that the business income exception contained in the regulations at 130 CMR 520.008(D) did not apply to these circumstances, the MassHealth representative cited only the over-asset regulations at 130 CMR 520.003 and 520.004, but did not address the business income exception contained in 130 CMR 520.008(D) or 130 CMR 520.010, or demonstrate why the Appellant’s rental of the other apartment unit in her two-family home under these circumstances did not qualify as business income essential for self-support, instead of an asset. Testimony. Instead, the MassHealth representative highlighted the fact that the Account was only opened in 2022 and suggested that because of the recentness of the Account opening the Property was not being used for business purposes within the meaning of the regulations. Testimony.

Appellant’s attorney appeared for Appellant and submitted a Memorandum of Law and lengthy supporting documents, including an Affidavit from Appellant’s Power of Attorney, her niece, totaling 103 pages in support of her position two days before hearing. Exhibit 4. At hearing MassHealth was offered the opportunity to hold the record open to allow MassHealth a fair and reasonable opportunity to respond to the legal memo and supporting documents. However, MassHealth declined the opportunity to have the record held open to respond to Appellant’s Memorandum of Law. Testimony.

A summary of the Appellant’s legal memorandum and testimony follows. Exhibit 4, testimony. Appellant has lived in and owned the Property and rented the other upstairs unit for years. Appellant lives in the Property in the unit on the first floor. Appellant’s rental of the upstairs unit has always been a business that generates business income for state and federal income tax purposes, and the rental unit qualifies for depreciation. Appellant receives \$700 per month in rental income with gross rents totaling \$8400 per year. In 2022, Appellant had a total of \$1960 in repair expenses for the rented upstairs apartment, and paid total operating costs for the Property including taxes, water and sewer fees and insurance of \$6154.03, half of which totaling \$3077 is related to the upstairs rental unit. Exhibit 4, testimony. Based on these income and expense figures, the Property generates a profit for the Appellant of \$5323 per year or \$443.58 per month prior to any necessary repairs. Appellant relies on this monthly business income, and it is essential to both her self-support and to having a place to live because her social security income is only \$1062 per month and without the rental income, she could not maintain the Property. Exhibit 4.

Prior to entering the nursing home, Appellant always only had one bank account (#2164) which she used for both her personal finances and the real estate and rental unit. See Affidavit of Appellant's Power of Attorney, Ex. 7 of Exhibit 4. After Appellant's POA was appointed in 2022, she was informed that MassHealth rules required a separate bank account for the rental business so on or about December 20, 2022, Appellant's POA established the Account (#6820) solely for the purpose of maintaining the Property and paying the expenses by depositing two rental checks totaling \$1400. Ex. 7 of Exhibit 4. The Account contains only rental income, and the deposits are used to pay the expenses for the Property. Ex. 7 of Exhibit 4. As part of establishing a separate business bank account, Appellant's POA transferred \$4600 in funds previously collected from the rental unit from Account # 2164 to Account # 6820 as those funds were needed to pay upcoming tax and insurance bills. Ex. 7 of Exhibit 4.

Appellant's attorney argued that the Account is a non-countable business asset essential for Appellant's self-support. The MassHealth regulations do not define "business property ... essential for self-support," but recognize that rental income is business income, as 130 CMR 520.009(D) states that gross rental income is "the countable rental income amount received less business expenses described at 130 CMR 520.010(C)," which includes carrying charges, utilities, and maintenance and repair costs. Exhibit 4. Appellant's attorney also argued that the Massachusetts Department of Revenue Code also supports the conclusion that Appellant's rental of real property is a business. As far as "business property essential to self-support," Appellant cited to the Social Security Program Operations Manual (POMS) as guidance for the definition of business property and self-support. "SI 01130.500(B) "Property Essential to Self-Support – Overview" of the Manual indicates that property used in a trade or business is excluded from resources regardless of value (SI 01130.500(B)." Ex. 15 of Exhibit 4. POMS further states that "Liquid resources are not considered property essential to self-support except when used as part of a trade or business." Ex. 15 of Exhibit 4; POMS § SI01130.500(B)(3). Appellant's attorney argued that because the MassHealth regulations do not specifically define the term, applicants should be able to rely on a plain and reasonable interpretation of the meaning of self-support and that because the cash in the Account is used exclusively for the income and expenses of the Property rental business, it is an excluded resource/asset within the meaning of POMS and MassHealth. Exhibit 4.

Appellant's attorney argued that the Account is business property essential for self-support because Appellant could not operate her rental business without the Account. Appellant required the Account to maintain the funds associated with her rental property costs and legal obligations to her tenants, including taxes, water, utilities, and repairs. Appellant presented bank statements and insurance bills, and an affidavit to show that Appellant did not commingle her personal funds in the Account or pay her personal expenses from the Account. Appellant needed the Property (and therefore the Account) to sustain her and keep her living expenses reasonable, and to cover the expenses of the Property. Appellant's attorney estimated that because she owned the Property, Appellant was able to live in her home at a cost of between \$500 and \$700 per month and that there is virtually no where Appellant could have lived for that price. As Appellant's net social security income was only \$1062 per month, it was essential that Appellant have an affordable place to live, and the Property and business income made that possible and was, therefore, essential to Appellant's self-support.

Appellant's attorney also pointed out that Appellant's obligations to her tenants did not end once she was admitted to the facility. Further, the regulation exempting business property from countable assets would have no purpose if MassHealth determined that a property was no longer essential for self-support simply because of an applicant's admission to a nursing facility. Exhibit 4.

Appellant's attorney also argued that because the regulations do not provide sufficient guidance in defining these terms, an applicant should be able to rely on an agency's past practices in addition to POMS. Appellant's attorney cited case law supporting her position that MassHealth may not arbitrarily apply its regulations or change its interpretation of a particular regulation without sufficient explanation. Appellant's attorney cited a prior hearing decision, Appeal No. 1710475, which became the final decision of the Division of Medicaid pursuant to G.L. c. 118E, sec. 48, asserting that it supported her argument that a bank account used in the operation of a rental business is not a countable asset.¹ Finally, Appellant's attorney pointed out that the Property will be subject to a MassHealth estate recovery lien, the Account will also be subject to estate recovery after the Appellant's death, and that any excess income from the Property will get factored into and paid to the facility as part of the Appellant's Patient Paid Amount (PPA).

Findings of Fact

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

1. On October 27, 2022, MassHealth received Appellant's application for long term care benefits.
2. Appellant indicated her intention to return home on her MassHealth application. (Exhibit 4).
3. Appellant seeks July 1, 2022 as the start date of coverage.
4. On January 23, 2023, MassHealth denied the application because Appellant's countable assets exceed MassHealth's \$2000 asset limit (Exhibits 1 & 2).
5. Appellant filed a timely appeal on February 21, 2023 (Exhibit 2).
6. MassHealth counted the Account containing \$6,000.00 as of January 4, 2023, as part of Appellant's countable assets for determining eligibility.
7. Appellant is the sole owner of the Account and does not use the account to pay expenses related to her personal needs. (Affidavit at Exhibit 7 of Exhibit 4).
8. Appellant's Power of Attorney established the Account to separately account for and manage Appellant's business income from the rental unit because she was informed that MassHealth required a separate bank account for the rental business. (Affidavit at Exhibit 7 of Exhibit 4).
9. The \$1400 and \$4600 transferred from the account (#2164) and used to establish the Account by Appellant's Power of Attorney in December 2022 were prior rent that Appellant collected from the rental unit, and these funds were needed in the Account to pay upcoming tax and insurance bills for the Property. (Affidavit at Exhibit 7 of Exhibit 4).

¹ Appellant's attorney cited a second decision, Appeal No. 1610072, but in that decision the Board of Hearings did not rely on 130 CMR 520.008(D) in making its decision.

10. Appellant used the Account as part of her rental business solely to manage the Property, a two-family home in which Appellant resided in one unit and rented the other upstairs unit. (Exhibit 4, testimony).
11. In 2022, the Property provided \$5323 per year or \$443.58 per month of rental income to Appellant, who was the owner of the real property (Exhibit 4).
12. The \$443.58 per month of rental income that Appellant received and continues to receive from the Property is essential to the Appellant's self-support as she only receives net social security income of \$1062.00 per month, and that income alone would be insufficient for the Appellant to obtain a comparable residence and pay the Property expenses. (Exhibit 4, testimony).

Analysis and Conclusions of Law

Per 130 CMR 519.006, to qualify for MassHealth Standard coverage as a resident of a long-term care facility, a member must meet the following requirements.

519.006: Long-Term-Care Residents

(A) Eligibility Requirements. Institutionalized individuals may establish eligibility for MassHealth Standard coverage subject to the following requirements. They must

- (1) be younger than 21 years old or 65 years of age or older or, for individuals 21 through 64 years of age meet Title XVI disability standards or be pregnant;
- (2) be determined medically eligible for nursing-facility services by the MassHealth agency or its agent as a condition for payment, in accordance with 130 CMR 456.000: *Long Term Care Services*;
- (3) contribute to the cost of care as defined at 130 CMR 520.026: *Long-Term-Care General Income Deductions*;
- (4) have countable assets of \$2,000 or less for an individual and, for married couples where one member of the couple is institutionalized, have assets that are less than or equal to the standards at 130 CMR 520.016(B): *Treatment of a Married Couple's Assets When One Spouse Is Institutionalized*; and
- (5) not have transferred resources for less than fair market value, as described at 130 CMR 520.018: *Transfer of Resources Regardless of Date of Transfer* and 520.019: *Transfer of Resources Occurring on or after August 11, 1993*.

Regulation 130 CMR 520.007 sets forth the rules regarding what assets MassHealth considers countable and provides the following guidance regarding bank accounts and real estate assets:

(B) Bank Accounts.

- (1) Definition. Bank accounts are defined as deposits in a bank, savings and loan institution, credit union, or other financial institution. Bank accounts may be in the form of savings, checking, or trust accounts, term certificates, or other types of accounts.
- (2) Determination of Ownership and Accessibility. The MassHealth agency considers funds in a bank account available only to the extent that the applicant or member has both ownership of and access to such funds. The MassHealth agency determines the ownership of and access to the

funds in accordance with 130 CMR 520.005 and 520.006.

(3) Verification of Account Balances. The MassHealth agency requires verification of the current balance of each account at application, during eligibility review, and at times of reported change.

(a) Noninstitutionalized individuals excluding the individuals described at 130 CMR 519.007(B): *Home- and Community-based Services Waiver-Frail Elder* must verify the amount on deposit by bank books or bank statements that show the bank balance within 45 days of the date of application or the date that the eligibility review is received in a MassHealth Enrollment Center or outreach site.

(b) Nursing-facility residents as described at 130 CMR 515.001: *Definition of Terms* must verify the amount on deposit by bank books or bank statements that show the current balance and account activity during the look-back period. ...

(G) Real Estate.

(1) Real Estate As a Countable Asset. All real estate owned by the individual and the spouse, with the exception of the principal place of residence as described in 130 CMR 520.008(A), is a countable asset. The principal place of residence is subject to allowable limits as described in 130 CMR 520.007(G)(3). Business or nonbusiness property as described in 130 CMR 520.008(D) is a noncountable asset. ...

130 CMR 520.008 defines noncountable assets as follows:

520.008: Noncountable Assets

Noncountable assets are those assets exempt from consideration when determining the value of assets. In addition to the noncountable assets described in 130 CMR 520.006 and 520.007, **the following assets are noncountable.** ...

(D) Business and Nonbusiness Property. **Business and nonbusiness property essential to self-support** and property excluded under an SSA-approved plan for self-support **are considered noncountable assets.** (Emphasis added).

130 CMR 520.010 specifically recognizes “Rental Income” as a business and specifies the permissible business expenses that may be deducted from rental income as follows:

520.010: Business Expenses

(C) Rental Income.

(1) Allowable business expenses from rental income include carrying charges, cost of fuel and utilities provided to tenants, and any maintenance and repair costs.

(2) If the individual occupies an apartment in the same building from which he or she receives rental income, carrying charges are prorated per unit. The cost of fuel and utilities are prorated if they are paid through a single heating unit or meter.

(3) The MassHealth agency may deduct actual maintenance and repair costs, other than cosmetic changes, from the amount of rental income if the individual verifies such expenses.

Although the MassHealth regulations do not specifically address whether cash or liquid assets in a bank account used for a trade or business are essential to self-support or how they are to be treated in an asset eligibility calculation, the Social Security Administration's POMS specifically addresses this issue and states:

3. Liquid Resources

Liquid resources are not considered property essential to self-support **except when used as part of a trade or business.** POMS §SI 011300.500(B)(3). (Emphasis added).

The MassHealth program is a part of the Social Security Act and Massachusetts is also a state that accepts the Social Security Administration's eligibility determinations for SSI as eligibility determinations for MassHealth/Medicaid, and as such, it is reasonable and appropriate to use POMS for guidance and to help ensure administrative consistency in areas where there are gaps in the MassHealth regulations.

In this matter, MassHealth considered the Account as a countable asset because it is a recently opened bank account to which Appellant has both ownership and access, but the inquiry cannot end there. MassHealth essentially argued at hearing that 130 CMR 520.007 controls and supersedes 130 CMR 520.008 and that rental income cash on deposit in a bank account is always a countable asset. However, that interpretation is incorrect. The language of 130 CMR 520.008 clearly sets forth **exemptions** for specific assets that would otherwise be considered countable. Furthermore, 130 CMR 520.008 expands upon the enumerated exceptions already contained in 130 CMR 520.007. In other words, 130 CMR 520.007 sets forth the universe of potential assets that are considered countable, and 130 CMR 520.008 narrows that universe. However, both regulations specifically indicate that business or nonbusiness property essential to self-support is "a noncountable asset." 130 CMR 520.007(G)(1); 130 CMR 520.008(D).

Here, the Appellant has a long-standing rental business that generates a profit that is essential to her self-support. Findings of Fact Nos. 8-12. The Appellant also has a bank account that is used exclusively for depositing rental income and paying for the necessary carrying costs and repairs for the Property. Finding of Fact No. 10. Having a segregated bank account with a reasonable balance to cover carrying costs and repairs for a rental property is both a necessary and reasonable business practice that is contemplated by and consistent with MassHealth regulations. 130 CMR 520.010. Moreover, a reasonable amount of cash from a rental business on deposit in a bank account to cover reasonably anticipated annual carrying costs and potential repairs for the rental property business qualifies as a liquid asset that is essential to self-support within the meaning of the Social Security Act as specified in POMS §SI 011300.500(B)(3) and consistent with the business expense provisions of 130 CMR 520.010(C). Accordingly, because the Account in this case is used in Appellant's rental business and is essential to her self-support, pursuant to 130 CMR 520.008(D) the Account is "considered noncountable ..." as an asset for eligibility purposes. Findings of Fact Nos. 7-12; 130 CMR 520.008(D).

MassHealth's arguments to the contrary here are unavailing. As Appellant argued, the Account was an essential part of her rental business, and her obligation to maintain a reasonable balance to pay the carrying costs of the Property and to address potential needed repairs and liabilities to her tenants, also did not end upon her admission to the nursing facility. The Appellant also indicated her intent to return home. Finding of Fact No. 2.

Accordingly, this appeal is approved in part. However, any past or future disposition of the Property or the funds in the Account is subject to further MassHealth review.

Order for MassHealth

Rescind the January 23, 2023 denial notice. Proceed to determine eligibility without counting the Account as an asset preserving the October 27, 2022 application date.

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.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. 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 T. O'Neill
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Justine Ferreira

