

**Office of Medicaid  
BOARD OF HEARINGS**

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Dismissed in part; Denied in part	<b>Appeal Number:</b>	2301898
<b>Decision Date:</b>	7/17/2023	<b>Hearing Date:</b>	05/04/2023
<b>Hearing Officer:</b>	Scott Bernard	<b>Record Open to:</b>	05/18/2023

**Appearance for Appellant:**




**Appearance for MassHealth:**

Mary Jo Elliott, RN *via* 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

<b>Appeal Decision:</b>	Dismissed in part; Denied in part	<b>Issue:</b>	Prior Authorization (PA) Personal Care Attendant (PCA)
<b>Decision Date:</b>	7/17/2023	<b>Hearing Date:</b>	05/04/2023
<b>MassHealth's Rep.:</b>	Mary Jo Elliott, RN	<b>Appellant's Rep.:</b>	
<b>Hearing Location:</b>	Quincy Harbor South		

### 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 February 14, 2023, MassHealth modified the appellant's prior authorization (PA) for PCA services. (See 130 CMR 422.410; 450.204; Exhibit (Ex.) 1; Ex. 8, pp. 4-6; Ex. 11, pp. 4-6). The appellant filed this appeal in a timely manner on March 9, 2023. (See 130 CMR 610.015(B) and Ex. 2). Modification of a PA request is valid grounds for appeal. (See 130 CMR 610.032).

The appellant's representative requested an opportunity to submit a memorandum of law and other documents after the hearing. The record was therefore left open until May 18, 2023. On that date, the appellant's representative submitted the memorandum by both fax and email, at which point the record closed. (Ex. 15; Ex. 16).

### Action Taken by MassHealth

MassHealth modified the appellant's PA request for PCA services.

### Issue

The first appeal issue is whether MassHealth was correct, pursuant to 130 CMR 422.410 and

450.204, in modifying the appellant's PA request. The second appeal issue, which the appellant's representative raised in the appeal, is whether MassHealth or the hearing officer is limited in an appeal to addressing just the MassHealth action modifying the PA request the PCM agency submitted or whether they have the power to consider the PA request as a whole, possibly increasing time for activities beyond what was in the PA request.

## Summary of Evidence

The appellant is an individual under the age of 65 a primary diagnosis of osteo-arthritis. (Ex. 11, pp. 9-11).

The MassHealth representative, a registered nurse and clinical appeals reviewer, testified to the following. This was an initial PA request for PCA services. (Ex. 11, p. 10). The MassHealth representative stated that because this was an initial request, the PCM agency included a report from an occupational therapist. (Ex. 11, p. 7-9). The OT report indicates that for activities of daily living (ADLs) the appellant's need for assistance ran from independent to moderate. (Ex. 11, pp. 7-8). The OT report indicates that the appellant requires maximum assistance with all instrumental activities of daily living (IADLs). (Ex. 11, p. 8). The OT report also states the following:

[The appellant]...lives alone in a first floor apartment with laundry appliances located in basement of building. Consumer's primary Dx [of] (OA) onset years- chronic back pain-history of fracture, (R) frozen shoulder, joint damage to her feet, with bilateral tendinitis wrists/ankles rates pain as moderate to severe. She has impaired AROM of (B) UE's, numbness to fingers and feet, stiffness to hands, impaired standing, impaired endurance/activity tolerance, appears frail. She ambulates today without (AD) and is able to complete home home transfers aside from tub transfers as she takes a bath. She has mental health Dx's (PTSD, MDD, Anxiety)- that greatly affect her life-self-care deficit, isolates, spends increased time in bed, impaired motivation, is a hoarder. She will benefit from the PCA program[.] (Ex. 11, p. 9).

The PCM agency nurse who performed the on site evaluation added the following:

...[The appellant's] home is very cluttered with stuff everywhere her kitchen table is covered with papers. She is seen today not groomed, her hair is unbrushed. She reports she has mental health dx's (PTSD, MDD, Anxiety) that greatly affects her life - (self care deficit). She reports she isolates and spends a great deal of time in her bed, impaired motivation, is a hoarder. She requires PA for some of her ADLs and IADLs and will benefit from the PCA program. Consumer denies any recent hospitalizations or recent falls. (Ex. 11, p. 11).

The PCM agency requested 15 hours of day and evening PCA services per week for one year. MassHealth modified this to 12 hours and 15 minutes per week for dates of service from February

15, 2023 through February 14, 2024. (Ex. 1; Ex. 11, pp. 4-6).<sup>1</sup> MassHealth modified the time for dressing (an ADL); and meal preparation, laundry, and housekeeping (IADLs). (Ex. 1; Ex. 11, pp. 4-6). After considering the appellant's testimony, the MassHealth representative determined that the times the PCM agency requested for dressing, meal preparation, laundry, and housekeeping were medically necessary and overturned the modifications, restoring the time as requested.<sup>2</sup> (See Ex. 11, pp. 21, 31-32).

The appellant's representative argued that MassHealth could and should go beyond merely restoring the time it modified in making its determination concerning the PCM agency's prior authorization request. The appellant's representative stated that the PCM agency itself did not request sufficient time in its PA submission. She argued that MassHealth should add time or order the PCM agency to submit a new evaluation. The MassHealth representative stated that as a clinical appeals representative she was limited to addressing only the modifications that MassHealth made to the PA request, and not analyzing the time the PCM agency requested for other activities that MassHealth approved.

The appellant's representative requested an opportunity to submit a memorandum of law after the hearing in order to better explain this position. The record was therefore left open until May 18, 2023 for her to submit the memorandum. The MassHealth representative declined to receive or respond to the memorandum, as its focus concerned policy and not clinical matters. The appellant's representative accordingly did submit the memorandum on May 18 by email and by fax. (Ex. 15, Ex. 16).

Prior to the hearing, the appellant's representative had also submitted letters from several of the appellant's clinical providers, most arguing that the appellant should receive 20 hours of day and evening services per week. (Ex. 2; Ex. 5, ; Ex. 13, 14). These letters also supported the mental health diagnoses and their effect that the PCM agency noted. (*Id.*). In the memorandum, the appellant's representative argued three main points. (Ex. 16). First, MassHealth beneficiaries are entitled to an opportunity for a hearing to challenge the number of PCA hours requested by the PCM agency. (Ex. 16, pp. 4-7). In support of this, the appellant's representative cited G.L. c. 118E, § 48, and 42 CFR § 431.220(a). Second, the PCM agency's request for a certain number of PCA hours was an action attributable to MassHealth and therefore should be addressed through a hearing. (Ex. 16, pp. 7-8). The appellant's representative cited Mansfield v. Commissioner of the Department of Public Welfare, 40 Mass. App. Ct. 1 (1996), which held that there was a nexus between the state and the PCM agency such that the PCM agency could be considered a state

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<sup>1</sup> The MassHealth representative stated that there were some services in place at the time the PA was submitted, though it was not clear to MassHealth what these services were exactly. For that reason, PCA services were contingent on removal of any services that were duplicative. The MassHealth representative was able to remove the contingency after learning from the appellant and her representative that the services were not, in fact, duplicative.

<sup>2</sup> Thus, dressing was restored to seven minutes, one time per day; meal preparation to 60 minutes per day; laundry to 60 minutes per week; and housekeeping to 90 minutes per week. (Ex. 11, pp. 31-32).

actor and therefore the decisions of the PCM agency were subject to due process. (Ex. 16, p. 7). Third, the appellant required additional time over the amount initially requested by the PCM agency for meal preparation, assistance with medications, dressing, grooming, laundry, and medical transportation. (Ex. 16, pp. 9-11). Based on the above, the appellant's representative requested that the hearing officer increase the appellant's PCA time over the amount requested by the PCM agency to 20 hours of day and evening PCA services per week. (Ex. 16, p. 12).

## **Findings of Fact**

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

1. The appellant is an individual under the age of 65 with a primary diagnosis of osteoarthritis. (Ex. 11, pp. 9-11).
2. The appellant's physical diagnoses include chronic back pain, history of fracture, right frozen shoulder, joint damage to her feet, bilateral tendinitis of her wrists and ankles (rating the pain as moderate to severe), impaired active range of motion of both arms, numbness to fingers and feet, stiffness to hands, impaired standing, and impaired endurance and activity tolerance. (Ex. 11, p. 11; Ex. 16, p. 2).
3. The appellant also has mental health diagnoses of post-traumatic stress disorder, major depressive disorder, and anxiety that greatly affect her life, causing inability to self-care, isolation, impaired motivation, and hoarding. (Ex. 2; Ex. 5, Ex. 11, p. 11; Ex. 13, 14; Ex. 16, p. 2).
4. This was an initial PA request for PCA services. (Ex. 11, p. 10).
5. The PCM agency requested 15 hours of day and evening PCA services per week for one year. (Ex. 1; Ex. 11, pp. 4-6).
6. MassHealth modified this to 12 hours and 15 minutes per week for dates of service from February 15, 2023 through February 14, 2024. (Ex. 1; Ex. 11, pp. 4-6).
7. MassHealth modified the time for dressing (an ADL); and meal preparation, laundry, and housekeeping (IADLs). (Ex. 1; Ex. 11, pp. 4-6).
8. After considering the appellant's testimony, the MassHealth representative determined that the times the PCM agency requested for dressing, meal preparation, laundry, and housekeeping were medically necessary and overturned the modifications, restoring the time as requested. (Testimony of the MassHealth representative).

## Analysis and Conclusions of Law

MassHealth may make an adjustment in the matters at issue before or during an appeal period. (130 CMR 610.051(B)). If the parties' adjustment resolves one or more of the issues in dispute in favor of the appellant, the hearing officer, by written order, may dismiss the appeal in accordance with 130 CMR 610.035 as to all resolved issues, noting as the reason for such dismissal that the parties have reached agreement in favor of the appellant. (Id.). After considering the appellant's representative's testimony, the MassHealth representative overturned the modifications to dressing, meal preparation, laundry, and housekeeping, and approved the times as requested. As these adjustments were in the appellant's favor, with regards to these adjustments the appeal is DISMISSED.

Regarding the argument appellant's representative raised in both the hearing and memorandum, it appears that the hearing officer powers to address this issue are somewhat limited. (130 CMR 610.082). The regulations state that a hearing officer's decision must be in accordance with the law, which includes the state and federal constitutions, statutes, and duly promulgated regulations, as well as decisions of the state and federal courts. (130 CMR 610.082(C)(1)). However, the regulations also state:

Notwithstanding 130 CMR 610.082(C)(1), the hearing officer must not render a decision regarding the legality of federal or state law including, but not limited to, the MassHealth regulations. If the legality of such law or regulations is raised by the appellant, the hearing officer must render a decision based on the applicable law or regulation as interpreted by the MassHealth agency. Such decision must include a statement that the hearing officer cannot rule on the legality of such law or regulation and must be subject to judicial review in accordance with [130 CMR 610.092](#). (130 CMR 610.082(C)(2)).

The PCA regulations describe the due process rights that are created by the various MassHealth determinations:

(A) Notice of Approval. If the MassHealth agency approves a PA request for PCA services, the MassHealth agency will send written notice to the member, the PCM agency, and the fiscal intermediary regarding the frequency, duration, and intensity of care authorized, as well as the expiration date of the authorization.

(B) Notice of Denial or Modification and Right of Appeal.

(1) If the MassHealth agency denies or modifies a prior-authorization request for PCA services, the MassHealth agency will send written notice to the member, the PCM agency, and the fiscal intermediary. The notice will state the reason for the denial or modification and will inform the member of the right to appeal and of the appeal procedure.

(2) If the MassHealth agency denies or modifies a prior-authorization request for PCA

services, a member may appeal by requesting a fair hearing. The request for a fair hearing must be made in writing to the MassHealth Board of Hearings in accordance with the time lines described in 130 CMR 610.015(B): Time Limitation on the Right of Appeal. Requests for continuation of services during an appeal must be made in accordance with 130 CMR 610.036: Continuation of Benefits Pending Appeal. The MassHealth Board of Hearings will conduct the fair hearing in accordance with 130 CMR 610.000: MassHealth: Fair Hearing Rules. (130 CMR 422.417).

These regulations state that when there is an approval, no appeal rights result even if the member disagrees with the amount of time the PCM agency requested. When there is a denial or a modification, appeal rights do attach. However, the implication, at least as indicated by the first paragraph, is that one is appealing only the parts of the request that MassHealth denied or modified. The regulations clearly place the duty of performing the on-site evaluation of the MassHealth member's need for PCA services in the hands of the PCM agency. Although the appellant's representative made a plausible argument the PCM agency is a state actor, the MassHealth regulation do not give a specific right to appeal the underlying amount of time the PCM agency requested through the appeals process laid out in the regulations. There also does not appear to be a power that gives either MassHealth or the hearing officer the opportunity to address this issue.

For the above stated reasons, the appeal is DENIED IN PART.

## **Order for MassHealth**

If it has not done so already, MassHealth must overturn all the modifications it made to the PA request and approve 15 hours of day and evening PCA services from the beginning of the PA period.

## **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.

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Scott Bernard  
Hearing Officer  
Board of Hearings

cc:

Optum MassHealth LTSS, P.O. Box 159108, Boston, MA 02215

[REDACTED]