

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Dismissed in part, Denied in part	Appeal Number:	2303055
Decision Date:	7/19/2023	Hearing Date:	5/17/2023
Hearing Officer:	Patrick Grogan	Record Open to:	6/2/23

Appearance for Appellant:



Appearance for MassHealth:

Donna Burns, RN

Interpreter:

N/A



*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:	Dismissed in part, Denied in part	Issue:	PCA Modifications
Decision Date:	7/19/2023	Hearing Date:	5/17/2023
MassHealth's Rep.:	Donna Burns	Appellant's Rep.:	
Hearing Location:	Remote (Tel)	Aid Pending:	Yes

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 April 11, 2023, MassHealth modified the Appellant's prior authorization for PCA services because MassHealth determined that the Appellant lives with another PCA consumer and assistance with instrumental activities of daily living must be calculated on a shared basis and some of the services requested are not covered through the personal care attendant program. (see 130 CMR 422.410(C)(2), 130 CMR 422.412(A), 130 CMR 422.412(B), and Exhibit 1). The Appellant filed this appeal in a timely manner on April 15, 2023 (see 130 CMR 610.015(B) and Exhibit 2). Modification of assistance is valid grounds for appeal (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth modified the Appellant's prior authorization for PCA services because MassHealth determined that the Appellant lives with another PCA consumer and assistance with instrumental activities of daily living must be calculated on a shared basis and some of the services requested are not covered through the personal care attendant program.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 422.410(C)(2), 130 CMR 422.412(A), and 130 CMR 422.412(A), in modifying the Appellant's prior authorization for PCA services because MassHealth determined that the Appellant lives with another PCA consumer and assistance with instrumental activities of daily living must be calculated on a shared basis and some of the services requested are not covered through the personal care attendant program.

Summary of Evidence

The Appellant was represented by his Appeal Representative/mother and an attorney who has represented the family in the past. (Testimony, Exhibit 7). MassHealth was represented by a nurse consultant from Optum. The Appellant is a [REDACTED] year-old MassHealth member whose primary diagnosis is autism. The Appellant, through his Personal Care Management Agency (PCM), requested 30 hours and 30 minutes of Personal Care Attendant services (PCA) for 44.28 school weeks, 32 hours and 15 minutes of PCA services for 8 vacation weeks and 2 hours at night. (Testimony, Exhibit 6, pg. 3). MassHealth modified this request to 29 hours and 30 minutes of PCA serviced for 44.28 school weeks, 31 hours and 15 minutes of PCA services for 8 vacations weeks and 2 hours at night. (Testimony, Exhibit 6, pg. 3). There were 2 modifications to the requested time: one for the Instrumental Activity of Daily Living (IADL) of shopping, and one for the IADL for medical transportation.

Regarding the modification of the IADL shopping, the Appellant requested 90 minutes for shopping, however, MassHealth modified the time to 60 minutes because the Appellant lives with another PCA consumer and assistance with IADLs must be calculated on a shared basis. (Testimony, Exhibit 6, pg. 30). With the modification, 120 minutes is allotted for shopping for both PCA consumers within the Appellant's household. (Testimony). In response, the Appellant Representative testified that the two PCA consumers have very different diets. The Appellant is allergic to most proteins that do not come from meat products. (Testimony) The Appellant's diet requires mostly organic whole foods. (Testimony) This requires multiple shopping trips for the Appellant per week. Based upon this testimony, the Optum consultant agreed to approve the requested time of 90 minutes. (Testimony) This resolved appeal of the modification related to the IADL of shopping.

Regarding the modification of the IADL of medical transportation, the Appellant requested medical transportation to chiropractic appointments on average once per week. (Testimony) The Optum consultant testified that MassHealth generally covers 20 visits, and additional visits require preauthorization. (Testimony, see also 130 CMR 441.411(A)) The Appeal Representative testified that the appointments were not billed through MassHealth, but rather Medicare, because the chiropractic provider is not a MassHealth provider. (Testimony) The Optum consultant testified that the Regulation requires that the PCA medical transportation transports a member to a

MassHealth doctor for the visit. (Testimony). The Optum consultant stated that last service year, the Appellant had only requested 12 visits. (Testimony). The Appeal Representative responded that the Appellant's non-MassHealth chiropractor informed her that the Appellant should be going to the chiropractor once per week. (Testimony) In response to a question for clarification posed by the Attorney/Witness, the Optum consultant stated that the modification was based upon the 20 visit limit, and not because chiropractic visits are excluded. (Testimony, see also 130 CMR 441) The Appeal Representative further testified that the Appellant's chiropractor is not a MassHealth provider because the chiropractor determined that the process for becoming a MassHealth provider was too cumbersome for the chiropractor to complete, and confirmed that the chiropractor is billed through Medicare, and not MassHealth. (Testimony). The Optum Consultant reiterated that the IADL of medical transportation through the PCA program was for transportation to MassHealth providers. (Testimony).

The Optum consultant inquired about the medical necessity for the chiropractic visits. (Testimony) The Appeal Representative testified that the Appellant suffers from right sided hemiplegia and low muscle tone. (Testimony) The Appeal Representative testified that the Appellant participates in track and tennis recreationally and requires the chiropractic visits to continue to perform in the sports that he loves the most. (Testimony) The Appeal Representative testified that the right sided hemiplegia was a prior diagnosis from his neurologist and that the Appellant also has been diagnosed with a seizure disorder among other diagnoses not included within submitted paperwork in this record. (Testimony)

Findings of Fact

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

1. The Appellant is a ■-year-old MassHealth member whose primary diagnosis is autism. (Testimony, Exhibit 6, pg. 8)
2. The Appellant's additional diagnoses include, in part, chromosomal abnormality, intellectual disability, developmental disability, seizure disorder and multiple food and environmental allergies, among other diagnoses. Exhibit 6, pg. 8)
3. The Appellant, through his Personal Care Management Agency (PCM), requested 30 hours and 30 minutes of Personal Care Attendant services (PCA) for 44.28 school weeks, 32 hours and 15 minutes of PCA services for 8 vacation weeks and 2 hours at night. (Testimony, Exhibit 6, pg. 3).
4. MassHealth modified this request to 29 hours and 30 minutes of PCA serviced for 44.28 school weeks, 31 hours and 15 minutes of PCA services for 8 vacations weeks and 2 hours at night. (Testimony, Exhibit 6, pg. 3).

5. There were 2 modifications to the requested time: one for the Instrumental Activity of Daily Living (IADL) of shopping, and one for the IADL for medical transportation. (Testimony)
6. After testimony, the Optum consultant agreed to approve the IADL of shopping for 90 minutes. (Testimony)
7. No compromise was reached regarding the IADL for medical transportation. (Testimony)

Analysis and Conclusions of Law

Personal Care Assistant services requested must meet medical necessity criteria as defined at 130 CMR 450.204, below:

(A) A service is "medically necessary" if:

(1) it is reasonably calculated to prevent, diagnose, prevent the worsening of, alleviate, correct, or cure conditions in the member that endanger life, cause suffering or pain, cause physical deformity or malfunction, threaten to cause or to aggravate a handicap, or result in illness or infirmity; and

(2) there is no other medical service or site of service, comparable in effect, available, and suitable for the member requesting the service, that is more conservative or less costly to the MassHealth agency. Services that are less costly to the MassHealth agency include, but are not limited to, health care reasonably known by the provider, or identified by the MassHealth agency pursuant to a prior-authorization request, to be available to the member through sources described in 130 CMR 450.317(C), 503.007, or 517.007.

(B) Medically necessary services must be of a quality that meets professionally recognized standards of health care and must be substantiated by records including evidence of such medical necessity and quality. A provider must make those records, including medical records, available to the MassHealth agency upon request. (See 42 U.S.C. 1396a(a)(30) and 42 CFR 440.230 and 440.260.)

In addition to being medically necessary as defined above, time requested for PCA services must comport with the following guidelines at 130 CMR 422.410:

(A) Activities of Daily Living (ADLs). Activities of daily living include the following:

- (1) mobility: physically assisting a member who has a mobility impairment that prevents unassisted transferring, walking, or use of prescribed durable medical equipment;
- (2) assistance with medications or other health-related needs: physically assisting a member to take medications prescribed by a physician that otherwise would be self-administered;
- (3) bathing/grooming: physically assisting a member with basic care such as bathing, personal hygiene, and grooming skills;
- (4) dressing or undressing: physically assisting a member to dress or undress;
- (5) passive range-of-motion exercises: physically assisting a member to perform range-of motion exercises;
- (6) eating: physically assisting a member to eat. This can include assistance with tube feeding and special nutritional and dietary needs; and
- (7) toileting: physically assisting a member with bowel and bladder needs.

(B) Instrumental Activities of Daily Living (IADLs). Instrumental activities of daily living include the following:

- (1) household services: physically assisting with household management tasks that are incidental to the care of the member, including laundry, shopping, and housekeeping;
- (2) meal preparation and clean-up: physically assisting a member to prepare meals;
- (3) transportation: accompanying the member to medical providers; and
- (4) special needs: assisting the member with:
 - (a) the care and maintenance of wheelchairs and adaptive devices;
 - (b) completing the paperwork required for receiving PCA services; and
 - (c) other special needs approved by the MassHealth agency as being instrumental to the health care of the member.

(C) Determining the Number of Hours of Physical Assistance. In determining the number of hours of physical assistance that a member requires under 130 CMR 422.410(B) for IADLs, the PCM agency must assume the following:

- (1) When a member is living with family members, the family members will provide assistance with most IADLs. For example, routine laundry, housekeeping, shopping, and meal preparation and clean-up should include those needs of the member.
- (2) When a member is living with one or more other members who are authorized for MassHealth PCA services, PCA time for homemaking tasks (such as shopping, housekeeping, laundry, and meal preparation and clean-up) must be calculated on a shared basis.
- (3) The MassHealth agency will consider individual circumstances when determining the number of hours of physical assistance that a member requires for IADLs.

Although transportation: accompanying the member to medical providers may be approved pursuant to 130 CMR 422.410(B)(3), a provider is exclusively defined as those participating in MassHealth as codified in 130 CMR 450.101:

A number of common words and expressions are specifically defined here. Whenever one of them is used in 130 CMR 450.000, or in a provider contract, it will have the meaning given in the definition, unless the context clearly requires a different meaning. When appropriate, definitions may include a reference to federal and state laws and regulations

...

Provider — an individual, group, facility, agency, institution, organization, or business that furnishes medical services **and participates in MassHealth under a provider contract with the MassHealth agency**. For purposes of applying 130 CMR 450.235 through 450.240, the term "provider" includes formerly participating providers. (Emphasis added)

Here, the definition of Provider for purposes of the PCA program as further delineated in 130 CMR 422 has the meaning of one that participates in MassHealth. No context in 130 CMR 450 nor 130 CMR 422 clearly requires a different meaning. Moreover, 130 CMR 450.102 explicitly covers provider participation in and medical services and benefits available under MassHealth as codified within the Regulations found at 130 CMR 400 through 130 CMR 499:

450.102: Purpose of 130 CMR 400.000 through 499.000

130 CMR 400.000 through 499.000 contain the MassHealth agency's regulations specific to provider participation in, and the medical services and benefits available under, MassHealth and the Emergency Aid to the Elderly, Disabled and Children Program. 130 CMR 450.000 applies to all MassHealth providers and services. The MassHealth agency also promulgates other regulations, and publishes other documents affecting these programs, including other chapters in 130 CMR, statements of policy and procedure, conditions of participation, guidelines, billing and claims submission instructions, provider bulletins, and other documents referenced in 130 CMR. In addition, the regulations in 130 CMR frequently refer to federal regulations, to regulations of the Massachusetts Department of Public Health and other agencies, and to rates and fee schedules established by the Massachusetts Executive Office of Health and Human Services. (Emphasis added)

Additionally, 130 CMR 422.412 lists services that are not included within the MassHealth PCA program, and 422.412(B) explicitly limits services that are available from other MassHealth providers:

422.412: Non-covered Services

MassHealth does not cover any of the following as part of the PCA program or the transitional living program:

...

(B) **medical services available from other MassHealth providers, such as physician**, pharmacy, or community health center services; (Emphasis added)

130 CMR 419(C)(3) requires a PCA to refrain from performing non-covered services:

(C) The PCA. The PCA must provide PCA services pursuant to 130 CMR 422.000 and in accordance with the following: (1) Provide assistance with ADLs and IADLs as described in 130 CMR 422.410 and the service agreement established pursuant to 130 CMR 422.423; (2) **Not provide any non-covered services as described in 130 CMR 422.412 as part of the PCA program**; (Emphasis added)

Although MassHealth may cover chiropractic services, that is limited to MassHealth providers:

441.404: Provider Eligibility

The MassHealth agency pays only chiropractors who are participating in MassHealth on the date of service. Chiropractors must meet the following eligibility requirements.

It is incongruous to interpret the Regulations to require MassHealth to cover transportation to a service which MassHealth is not covering, since the chiropractor in this appeal is not being paid by MassHealth and is not a MassHealth provider. (Testimony) Additionally, based on the record in the instant appeal, it is not clear that the chiropractic services are medically necessary pursuant to 130 CMR 450.204. 130 CMR 450.204(A)(2) requires “there is no other medical service or site of service, comparable in effect, available, and suitable for the member requesting the service, that is more conservative or less costly to the MassHealth agency.” Here, the chiropractor does not participate in MassHealth, and nothing has been submitted to support that the Appellant’s chosen chiropractor is the only medical service comparable in effect, available, and suitable for the member. Moreover, the Appellant has not offered any evidence whether there is a less costly, more conservative chiropractic option available through MassHealth. Additionally, pursuant to 130 CMR 450.204(B), “medically necessary services must be of a quality that meets professionally recognized standards of health care and must be substantiated by records including evidence of such medical necessity and quality” and no evidence has been produced by the Appellant to illustrate how his chosen chiropractor meets that standard nor any records introduced as evidence of such medical necessity and quality of the Appellant’s chosen chiropractic services.

Chiropractic services, if deemed medically necessary, may be covered under MassHealth through a MassHealth provider, but not in the circumstances of the instance appeal, and therefore transportation to the chiropractic services in the instant appeal are not covered under the PCA program.

The Appellant has the burden "to demonstrate the invalidity of the administrative determination." Andrews v. Division of Medical Assistance, 68 Mass. App. Ct. 228 (2007). See also Fisch v. Board of Registration in Med., 437 Mass. 128, 131 (2002); Faith Assembly of God of S. Dennis & Hyannis, Inc. v. State Bldg. Code Commn., 11 Mass. App. Ct. 333, 334 (1981); Haverhill Mun. Hosp. v. Commissioner of the Div. of Med. Assistance, 45 Mass. App. Ct. 386, 390 (1998). Here, the Appellant has not met his burden, by a preponderance of evidence, that the determination of MassHealth is invalid. The regulatory analysis *supra* supports MassHealth's testimony and nothing in evidence invalidates MassHealth's determination. Therefore, the portion of this appeal regarding Medical Transportation is DENIED. Notwithstanding this denial, the portion of this appeal regarding Shopping is DISMISSED, since MassHealth agrees to reinstate the 90 minutes sought by the Appellant.

Order for MassHealth

APPROVE 90 minutes for the IADL of Shopping as agreed by the parties at Hearing

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.

Patrick Grogan
Hearing Officer
Board of Hearings

cc:

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