

**Office of Medicaid  
BOARD OF HEARINGS**

**Appellant Name and Address:**



|                         |                                     |                          |                 |
|-------------------------|-------------------------------------|--------------------------|-----------------|
| <b>Appeal Decision:</b> | Approved in part;<br>Denied in part | <b>Appeal Number:</b>    | 2304154         |
| <b>Decision Date:</b>   | 08/24/2023                          | <b>Hearing Date:</b>     | June 22, 2023   |
| <b>Hearing Officer:</b> | Stanley M. Kallianidis              | <b>Record Open Date:</b> | August 24, 2023 |

**Appellant Representative:**



**MassHealth Representative:**

Kim McAvinchey, Tewksbury



*Commonwealth of Massachusetts  
Executive Office of Health and Human Services  
Office of Medicaid  
Board of Hearings  
100 Hancock Street, 6<sup>th</sup> Floor  
Quincy, MA 02171*

## APPEAL DECISION

|                         |                                     |                        |                      |
|-------------------------|-------------------------------------|------------------------|----------------------|
| <b>Appeal Decision:</b> | Approved in part;<br>Denied in part | <b>Issue:</b>          | Transfer of Assets   |
| <b>Decision Date:</b>   | 08/24/2023                          | <b>Hearing Date:</b>   | June 22, 2023        |
| <b>MassHealth Rep.:</b> | Kim McAvinchey                      | <b>Appellant Rep.:</b> | Josie Chandler, Esq. |

### 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 21, 2023, MassHealth denied the appellant's application for MassHealth benefits due to disqualifying asset transfers (see Exhibit 1). The appellant filed this appeal in a timely manner on May 19, 2023 (see 130 CMR 610.015) and Exhibit 2). A dispute over the amount of assistance is valid grounds for appeal (see 130 CMR 610.032). On May 19, 2023, notice of the hearing date was sent to the parties (Exhibit 3).

### Action Taken by MassHealth

MassHealth denied the appellant's application for MassHealth benefits for the period May 17, 2022-May 19, 2023.

### Issue

Whether MassHealth was correct, pursuant to 130 CMR 520.019 in determining that the appellant made disqualifying transfers in the amount of \$150,814.00?

## Summary of Evidence

The MassHealth representative testified that the appellant applied for MassHealth on April 15, 2022. The appellant entered her nursing facility in February 2022 (Exhibit 4). The application was denied due to disqualifying transfers of \$150,815.00 made in April 2022 (Exhibit 4). The MassHealth representative explained the calculation of the transfer penalty. The transferred amount of \$150,815.00 was divided by the state's average private nursing home per diem cost, \$410.00, resulting in a penalty period of 368 days starting May 17, 2022 and ending May 19, 2023.

At issue were two transfers that the appellant made to her son in April 2022 for \$145,679.00. Also, there were disbursements of \$5,135.00 in April 2022 that were disqualifying as well. These resulted from the appellant's closed CDs that totaled \$83,724.00 because she only received proceeds of \$78,589.00. All of these transfers were considered disqualifying for purposes of MassHealth long-term care eligibility because there was no consideration received and also due to the fact that they were made during the five-year look-back period (Exhibit 4).

The appellant's attorney submitted a letter from the appellant's credit union which addressed the discrepancy between the appellant's CDs of \$83,724.00 and proceeds of \$78,589.00. The credit union representative explained that the difference was due to penalties, fees and taxes and the fact that one of the CDs was counted twice in the \$83,724.00 figure. Therefore, the \$78,589.00 that the appellant received was the correct amount to which she was entitled (Exhibit 5).

The appellant's attorney did not dispute that there were two transfers that the appellant made to her son in April 2022 for \$145,679.00. However, she contended that these were not disqualifying for MassHealth eligibility purposes because they were permissible transfers made to a disabled child. As proof of his disability, she submitted a letter from the Lynn Retirement Board which granted an "Accidental Disability Retirement" to the son on September 21, 2021. She also submitted a June 7, 2018 letter from the Department of Veterans Affairs (VA) which determined the son to have a 40% service-connected disability. Finally, a doctor indicated in a letter dated February 9, 2021 that it was his opinion that the son was "totally disabled," and a letter from a law office focusing on disability claims was of the opinion that the son could not apply for Social Security Disability because he was a municipal employee, but if he could apply, he would be found disabled due to the doctor's letter (Exhibit 5).

The appellant's attorney also attached an affidavit from the son (unsigned) who indicated that he could not apply for Social Security benefits because he did not pay into the system and that his disability income from the city of Lynn was too high to allow him to qualify for any MassHealth coverage type (Exhibit 5).

The MassHealth representative responded to the son's alleged disability claim. She indicated that a disability determination must come from either Social Security or MassHealth. She could not speak to him applying for Social Security but stated that the son could indeed apply for

MassHealth with a disability supplement to his application. She explained that even if her were over the income limits for MassHealth or did not want to receive such benefits, he would still receive a disability determination from MassHealth's Disability Determination Unit (DDU).

The record was left open for 60 days- 30 days for the appellant to submit a memorandum and 30 days for MassHealth's response. The appellant was to include a signed affidavit from the son, and his MassHealth DDU and/or Social Security Disability application (Exhibit 6).

According to the appellant's record-open memo, the appellant's son meets the requirements of a "permanently and totally disabled child" for purposes of a resource transfer exception and that, therefore, no penalty should be imposed in this case. As evidence of his disability, the attorney again cited letters from the Lynn Retirement Board, the VA, and his physician. The attorney also submitted two prior Board of Hearing decisions in which the hearing officers in those cases both ruled that only the Social Security Administration and MassHealth's DES could determine "permanent and total disability." However, no disability application from the appellant's son to either agency was submitted during the record-open period (Exhibit 7).

According to MassHealth's reply memo, because there was no determination by either MassHealth DDU or Social Security Disability that the son is "permanently and totally disabled," the two transfers to him in April 2022 were not permissible and hence disqualifying for purposes of Medicaid eligibility. The MassHealth attorney argued that 42 CFR 435.540(a) requires that Medicaid state agencies use the Title XVI Social Security Administration SSI disability definition of "permanent and total disability." This requirement is also found in MassHealth regulations 130 CMR 515.001 and 130 CMR 519.006(B) (Exhibit 8).

## **Findings of Fact**

Based on a preponderance of the evidence, I find:

1. The appellant applied for MassHealth on April 15, 2022 (Exhibit 4).
2. The appellant entered her nursing facility in February 2022 (Exhibit 4).
3. The application was denied due to disqualifying transfers of \$150,815.00 made in April 2022 (Exhibit 4).
4. The appellant made two transfers her son in April 2022 for \$145,679.00. Also, there were disbursements of \$5,135.00 in April 2022 that were not accounted for because her CDs totaled \$83,724.00 and she only received proceeds of \$78,589.00 (Exhibit 4).
5. The transferred amount of \$150,815.00 was divided by the state's average private nursing home per diem cost, \$410.00, resulting in a penalty period of 368 days starting May 17, 2022 and ending May 19, 2023 (Exhibit 4).

6. A letter from the appellant's credit union addressed the discrepancy between the appellant's CDs of \$83,724.00 and proceeds of \$78,589.00 and explained that the difference was due to penalties, fees and taxes and the fact that one of the CDs was counted twice in the \$83,724.00 figure (Exhibit 5).
7. A letter from the Lynn Retirement Board granted an "Accidental Disability Retirement" to the son on September 21, 2021 (Exhibit 5).
8. A June 7, 2018 letter from the VA which determined the son to have a 40% service-connected disability (Exhibit 5).
9. A doctor indicated in a letter dated February 9, 2021 that it was his opinion that the son was "totally disabled" (Exhibit 5).
10. A letter from a law office focusing on disability claims was of the opinion that the son could not apply for Social Security Disability because he was a municipal employee, but if he could apply, he would be found disabled due to the doctor's letter (Exhibit 5).
11. No disability application from the appellant's son to either MassHealth DDU or Social Security Disability was submitted at the hearing or during the record-open period (Exhibits 6 & 7).

## **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(J). 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. 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, MassHealth will consider the specific circumstances involved. 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(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 agency 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 younger than 65 years old 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 (130 CMR 520.019(D)).

130 CMR 515.001: Permanent and Total Disability – a disability as defined under Title XVI of the Social Security Act or under applicable state laws. (1) For Adults and 18-year-olds. (a) The condition of an individual, 18 years of age or older, who is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that 1. can be expected to result in death; or 2. has lasted or can be expected to last for a continuous period of not less than 12 months. (b) For purposes of 130 CMR 515.001: Permanent and Total Disability, an individual 18 years of age or older is determined to be disabled only if his or her physical or mental impairments are of such severity that the individual is not only unable to do his or her previous work, but cannot, considering age, education, and work experience, engage in any other kind of substantial gainful work that exists in the national economy, regardless of whether such work exists in the immediate area in which the individual lives, whether a specific job vacancy exists, or whether the individual would be hired if he or she applied for work. "Work that exists in the national economy" means work that exists in significant numbers, either in the region where such an individual lives or in several regions of the country. (2) For Children Younger than 18 Years Old.

130 CMR 519.006(B) Verification of Disability or Pregnancy. (1) Disability is verified by: (a) certification of legal blindness by the Massachusetts Commission for the Blind (MCB); (b) a determination of disability by the Social Security Administration (SSA); or (c) a determination of disability by the MassHealth Disability Determination Unit (DDU). Until this determination is made, the applicant's submission of a completed disability supplement will satisfy the verification requirement.

In the instant appeal, I have found that the appellant entered her nursing facility in February 2022 and applied for MassHealth on April 15, 2022. Her application was denied due to disqualifying transfers of \$150,815.00 made in April 2022. It is undisputed that the appellant made two transfers her son in April 2022 for \$145,679.00. According to MassHealth, there were also disbursements of \$5,135.00 in April 2022 that were not accounted for. However, I have found that a letter from the appellant's credit union sufficiently addressed the \$5,135.00 discrepancy between the appellant's CDs of \$83,724.00 and proceeds of \$78,589.00. Thus, there was no disqualifying transfer with regards to the closing of these CDs.

The issue that remains is whether or not the appellant's transfers her son for \$145,679.00 were permissible under 130 CMR 520.019(D)(3) because they were to a "permanently and totally" disabled child. As proof that her son was a disabled child, the appellant submitted a letter from the Lynn Retirement Board which granted him an "Accidental Disability Retirement" on September 21, 2021, a June 7, 2018 letter from the VA which determined him to have a 40% service-connected disability, and a doctor's opinion that he was "totally disabled."

Unfortunately, notwithstanding the above documentation of the son's disability, there is no evidence that he meets the required definition of "permanent and total disability" set forth under 130 CMR 515.001 and under Title XVI of the Social Security Act. MassHealth's definition mirrors Social Security's, as 42 CFR 435.540(a) requires that Medicaid state agencies use the Title XVI Social Security Administration SSI disability definition of "permanent and total disability."

Pursuant to 130 CMR 519.006(B), verification of "permanent and total" disability is made by either MassHealth's DES or through the Social Security Administration. This is also the conclusion of the BOH decisions cited by the appellant. In this case, neither agency has decided if the appellant's son is "permanent and totally" disabled because the son never applied. Whether or not the appellant's could even apply for Social Security Disability is irrelevant, because he was given the chance to apply to MassHealth's DDU but declined.

In summation, the appellant's transfers of \$145,679.00 were not permissible under 130 CMR 520.019(D)(3), because they were not to her "permanently and totally disabled or blind child."

The appeal is therefore approved in part and denied in part in that the disqualifying figure is revised down to \$145,679.00 from \$150,815.00.

## Order for MassHealth

Revise penalty period based upon disqualifying transfers of \$145,679.00.

## Implementation of this Decision

If this decision is not implemented within 30 days after the date of this notice, you should contact your local office. 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.

## 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.

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Stanley M. Kallianidis  
Hearing Officer  
Board of Hearings

cc:

Tewksbury MEC

