

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



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|-------------------------|-------------------------------|------------------------|-----------|
| Appeal Decision: | Approved in part; remanded | Appeal Number: | 2304360 |
| Decision Date: | 09/21/2023 | Hearing Date: | 7/19/2023 |
| Hearing Officer: | Cynthia Kopka | Record Open to: | 8/28/2023 |

Appearance for Appellant:

Pro se

Appearance for MassHealth:

Mary Jo Elliott, RN, Optum
John Excellent, Office of Long Term Services
and Support



*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

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|---------------------------|---------------------------------------|--------------------------|--------------|
| Appeal Decision: | Approved in part; remanded | Issue: | PCA services |
| Decision Date: | 09/21/2023 | Hearing Date: | 7/19/2023 |
| MassHealth's Rep.: | Mary Jo Elliott and John Excellent | Appellant's Rep.: | Pro se |
| Hearing Location: | Quincy (remote) | Aid Pending: | No |

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

By notices dated May 16 and 17, 2023, MassHealth notified Appellant that it was modifying/terminating her personal care attendant (PCA) services effective May 30, 2023. Exhibit 1. Appellant filed this timely appeal on May 26, 2023 and requested that benefits continue during the appeal process. Exhibit 2. 130 CMR 610.015(B). Termination and/or modification of assistance is a valid basis for appeal. 130 CMR 610.032. The hearing record was held open and extended multiple times through August 28, 2023. Exhibit 5.

MassHealth determined that Appellant did not qualify for aid pending, as the action taken by MassHealth was "[n]ot an appealable action." Exhibit 11. For reasons discussed below, Appellant should have been granted aid pending pursuant to 130 CMR 610.036.

Action Taken by MassHealth

MassHealth notified Appellant that it was terminating her personal care attendant (PCA) services effective May 30, 2023.

Issue

The appeal issue is whether MassHealth was correct in terminating Appellant's services.

Summary of Evidence

MassHealth was represented at hearing by a registered nurse/clinical reviewer and a representative from the office of long term services and supports (OLTSS). MassHealth submitted records in support. Exhibit 4. Appellant appeared remotely and offered a letter in support. Exhibit 2. Additional records were requested and provided after hearing by both sides, with Appellant providing the final response on August 27, 2023. Exhibits 6-10. A summary of testimony and documents follows.

Procedural history

On May 16, 2023, MassHealth notified Appellant that on March 30, 2023, Appellant's personal care management (PCM) agency, Tri-Valley (hereinafter "the PCM agency" or "Tri-Valley"), conducted an assessment of Appellant. Based on the assessment conducted in accordance with 130 CMR 422.419(A)(4) and 422(A), Tri-Valley determined that Appellant needed a surrogate to help manage her PCA program. Accordingly, it was Appellant's responsibility under 130 CMR 422.420(A)(22) to locate and appoint a surrogate. Per this notice, Tri-Valley notified Appellant on or about March 30, 2023 that she had 30 days to locate and select a surrogate. MassHealth informed Appellant that as of the date of the notice, Appellant had not located or selected any individual who was readily available to perform the tasks described the service agreement. Due to Appellant's failure, MassHealth terminated Appellant's PCA services effective May 30, 2023. Exhibit 1 at 5.

A second MassHealth notice dated May 17, 2023 contained history related to this appeal. Per this notice, on October 21, 2022, MassHealth terminated Appellant's PCA services for failure to find a surrogate. *Id.* at 3. On March 2, 2023, the Board of Hearings (BOH) issued an order to MassHealth to rescind the October 21, 2022 notice and approve 21.25 day/evening PCA hours per week effective November 5, 2022 through March 27, 2022. Per the order, Appellant was to receive a new PCM agency evaluation on or before March 28, 2023. *Id.* On March 31, 2023, Appellant's PCM agency requested, and MassHealth granted, an extension of Appellant's PCA hours through June 25, 2023. *Id.* Finally, the notice stated that that MassHealth modified/terminated Appellant's PCA services on May 16, 2023 at the request of OLTSS, as provided *supra*. The notice stated that Appellant's services would terminate effective 14 days from the date of the letter. "Accordingly, MassHealth will not cover, and Tempus Fiscal Intermediary will not pay for, PCA services on and after May 30, 2023." *Id.* at 2-3.

Appellant's appeal of the October 21, 2022 termination was heard by BOH on December 29, 2022 (Appeal No. 2208804). In a written decision, the hearing officer concluded that MassHealth did not

present sufficient evidence showing that Appellant was unable to manage her PCA program. One allegation raised by MassHealth via the PCM agency was that Appellant would ask PCAs to feed her pets. The hearing officer found that Appellant testified credibly that she no longer asks PCAs to perform such tasks. The hearing officer also found that one cited accusation against Appellant regarding time sheets was not investigated by the PCM agency. The hearing officer determined that there was little evidence to support that Appellant was unable or unwilling to perform PCA management tasks, and that the PCM agency did not provide any assistance to Appellant in finding a surrogate. The hearing officer approved the appeal, finding MassHealth's decision to terminate services on this basis was incorrect. The hearing officer ordered MassHealth to rescind the notice of October 21, 2022; to restore Appellant's prior level of services (21 hours and 15 minutes of day/evening PCA services), effective November 5, 2022; and to ensure that Appellant receive a new PCM agency evaluation on or before March 28, 2023.

Present appeal

As testified to by the MassHealth and OLTSS representatives, a PCM agency performs an annual evaluation of members, which includes a surrogacy assessment. The PCA program is consumer directed and the PCM agency must determine whether a member has the ability to direct all of the areas of the program. The consumer assessment is preliminary to the annual clinical evaluation and is required under the regulations. 130 CMR 422.422(A)(1). The OLTSS representative testified that PCM agency makes the determination of whether a member requires a surrogate based on the consumer assessment. The assessment involves asking questions that the member must answer to demonstrate that they can run the program (e.g. can the member interview, hire, train, and educate staff on her own personal care). If a member is unable to answer questions or if other conduct has occurred demonstrating that the member cannot run the program independently, the member is given the option to stay in the program with a surrogate. Under 130 CMR 422.420(B)(1), MassHealth reserves the right to terminate a member for failing to comply with member responsibilities, including appointing a surrogate when one is deemed necessary.

Here, Appellant's consumer assessment was done on March 30, 2023. At this assessment, the PCM agency's determined that Appellant required a surrogate. Therefore, the annual evaluation of Appellant's clinical status for PCA services was not performed, because Appellant would first need to appoint a surrogate prior to the evaluation. Appellant's most recent clinical evaluation was performed 2 years prior, due to appeals and extensions.

The OLTSS representative cited to the March 30, 2023 consumer assessment submitted into the record after hearing. Exhibit 9. The form lists 4 categories of evaluation: communication and decision making; knowledge of disability and related conditions; knowledge of personal assistance needs; and ability to employ PCAs. If a member cannot perform one or more of the categories, the PCM agency finds that the member will require the assistance of a surrogate for that item. Per Appellant's assessment, the PCM agency found that Appellant required a surrogate in one area of the assessment, the ability to employ PCAs. *Id.* at 3. The evaluators noted that Appellant is not

able to describe how to train and supervise a PCA, cannot describe a backup plan to use in case a PCA is sick or absent, and cannot complete activity forms correctly. *Id.* The evaluators noted that Appellant has had almost 40 PCAs since 2016 and 3 since her services were reinstated. The evaluators noted:

Clt has been very successful at finding PCAs. However, clt has a hard time retaining PCAs as they report they are being accused of things they have not done and being accused of stealing. Occurred with PCA [AB] most recently. Clt has no back up plan and reports she would need to hire another PCA but a few minutes later reports has a friend that could stop in and assist sometimes with a few tasks. Clt is unable to maintain PCAs and Manage the Program appropriately. Consumer has had 39 workers since 2016. Most PCAs report the same information that the consumer requires PCAs to take care of her animals and not the consumer herself and get accused of stealing [sic]. Clt reports that since her PCA reinstatement she has not requested any animal care be done by PCAs and has been very careful to what she asks them to do.

Id.

The OTLSS representative testified the PCM agency's clinical record also contains references to Appellant's inability to manage her PCAs. The notes state that Appellant's PCAs only clean her house and do not perform hands-on tasks. Exhibit 4 at 46-47. Appellant's PCA (initials MH) expressed to representatives at the PCM agency that Appellant would fire MH for taking bereavement leave after a death in the family. *Id.* at 47. Another note indicated that MH reported going to work for Appellant despite experiencing pain because MH was afraid of Appellant firing her. MH ultimately went to the emergency room due to appendicitis. *Id.* at 44. These are examples of recurring issues leading to the PCM agency determining that Appellant is not able to employ and manage PCAs.

Exhibit 4 contains other references to Appellant's issues with her PCAs. On February 27, 2023, one of Appellant's former PCAs (AB) complained to the PCM agency about the sanitary conditions of Appellant's home and that the PCA only performs cleaning and pet duties. Exhibit 4 at 52. Appellant also asked AB to drive Appellant to a lunch date. *Id.* On March 6, 2023, the PCM agency noted that a different PCA (B) was not paid because of a paperwork issue. *Id.* On March 10, 2023, Appellant asked AB to feed her cats. *Id.* at 51. Around this time, AB quit and Appellant docked her pay on the timesheet. The PCM agency paid AB for the hours as reported by AB, not Appellant. *Id.* at 49-50.¹ During the consumer assessment, both Appellant and her most recent PCA, MH, confirmed that Appellant only asks the PCA to perform cleaning tasks and no hands-on care. *Id.* at 46. MH also expressed difficulty being paid when Appellant would not sign or submit time sheets

¹ In her post-hearing surreply, Exhibit 10, Appellant argued that PCA AB acted inappropriately, such as consuming illicit substances and making personal phone calls, and had a criminal record.

correctly. *Id.* at 44.

The notes in Exhibit 4 also show that during the consumer assessment on March 30, 2023, the PCM agency representatives told Appellant that none of the individuals she had previously named as a surrogate can be an option to be her surrogate, because “they did not qualify, was not a good fit for her or they declined the surrogacy responsibilities.” *Id.* at 46. On April 18, 2023, Appellant identified a person to be her surrogate, JK. *Id.* On April 18, 2023 and April 24, 2023, the PCM agency called this candidate, who declined and was not interested. *Id.* at 43. MassHealth pointed to some of these issues in its post-hearing submission, Exhibit 7.

MassHealth agreed that Appellant provided the names of surrogacy candidates, but argued that the proposed surrogates “were not an option as they did not qualify, or they has [sic] already declined the Surrogacy responsibilities.” Exhibit 7 at 3. MassHealth pointed to two other surrogacy candidates declining the responsibility in the past. *Id.* at 5-6. Specifically, the notes show that on November 2, 2022, the PCM agency spoke to the individual identified as Candidate #2 below, who declined. The PCM agency’s note indicated that Candidate #2 declined after learning he would have to be at the house 3-5 times per week, which the PCM agent told Appellant is “required.” *Id.* at 5. Additionally, the PCM agent told Appellant that her brother would not be a good fit as surrogate. *Id.* Finally, on November 7, 2022, the PCM agent wrote that the individual identified below as Candidate #3 was not interested in being Appellant’s surrogate. *Id.* at 6.

Appellant’s presentation is summarized in two arguments. First, Appellant argued that she does not require a surrogate for the PCA program. Second, even if Appellant does require a surrogate, she has provided numerous names to the PCM agency, fulfilling her regulatory obligation to appoint a surrogate. At the beginning of her presentation, Appellant testified that she has not failed to comply or violated any rule or amendment. Appellant did not refuse to sign anything, but was not asked to sign a consumer assessment.

Regarding Appellant’s argument that she does not require a surrogate, Appellant argued that the hearing officer who heard Appeal No. 2208804 ruled that Appellant does not need a surrogate. Appellant expressed confusion as to why this was at issue again. Appellant testified that the PCM agency representatives told Appellant that the prior hearing officer overstepped his bounds. The representatives told Appellant that they did not care about the decision and they would continue to require a surrogate every time Appellant got an affirmative ruling until someone ruled against Appellant.

Appellant denies that she threatened to fire MH over bereavement and did not deny MH time off. Appellant explained that she only questioned how much time MH would need off. MH returned to work the week after and Appellant did not give MH a hard time. Regarding MH working while ill, Appellant argued that she told MH to go to the hospital but MH dragged her feet. Appellant told MH that she thought it was appendicitis. MH was out for almost 5 weeks and Appellant did not question it. MH continued to work for Appellant until Tri-Valley told MH that she would not be

paid for working with Appellant. Appellant provided more details about these situations in one of her post-hearing submissions. Exhibit 6 at 17.

Regarding the PCM agency's assertion that Appellant has had 40 PCAs since 2016 and 3 since the services were reinstated, Appellant disputed each number. In post-hearing submission, Appellant asserted that she only had 2 PCAs since the reinstatement of services, AB and MH. *Id.* Appellant also argued that during the Covid emergency, people were required to stay at home. Appellant acknowledged that she had a lot of PCAs during that time and argued that people would start and then leave to collect \$600 in unemployment. There was also time when Appellant could not find a PCA.

Appellant was frustrated that even though the prior hearing officer decided that Appellant did not need a surrogate, Tri-Valley told her it would keep pushing it until it received a ruling against Appellant. Appellant has been determined to be "category 4 catastrophically disabled" but has been without a PCA for months. Appellant argued that despite her physical limitations, there is nothing wrong with her brain. Appellant has a good memory and is capable of running both her own house and her mother's house. Appellant argued that she is a Marine and she has never failed to submit necessary paperwork to her department of veteran's services and provided a letter in support. Exhibit 2.m Appellant is also a culinary-trained chef and assists clients in helping them lower their blood sugar and A1C levels.

In support of Appellant's second argument, that she has fulfilled her obligation to appoint a surrogate, Appellant testified that she has given her PCM agency 6 or 7 names of potential candidates, 2 of which were her former PCAs. Appellant described some of these candidates at hearing. The first, Candidate #1 (MEP), is a longtime personal friend of Appellant and former PCA of Appellant. Candidate #1 is not able to work due to her own health issues but has known Appellant for 40 years and knows the PCA program. Appellant argued that she was told by the PCM agency representatives that Candidate #1 was not suitable because she did not understand the program. Appellant disputes this. Candidate #2 (MP) was also denied by the PCM agency. Candidate #2 lives 60 miles away but is retired and can make it to meetings at Appellant's house and is at Appellant's house 2-3 times per week. The PCM agency representatives told her that the surrogate is expected to be at the house 4-5 days per week. Candidate #3 (AD) is Appellant's former PCA who has a job and cannot be expected to be at Appellant's home 4-5 days per week. Appellant argued that during last appeal, OLTSS testified that there is no rule about surrogate being at the house 4-5 times per week. Appellant asserts that the PCM agency representatives lied to her chosen candidates and told them they were required to be at the house 4-5 days per week, which caused them to decline to participate. In her post-hearing submission, Appellant submitted letters from the three candidates, discussed below.

The OLTSS representative testified that when someone is identified as a surrogacy candidate, the PCM agency must reach out and first ask if the individual is willing. If the individual is willing, then the agency will go into further detail of the requirements and confirm that the individual is willing.

The surrogate does not need to be at the house 4-5 times per week but must be at all appointments with PCM agency and be able to manage the program, including interviewing, hiring, training, supervising, and managing the PCA. The records indicate that Appellant's candidates were interviewed by the PCM agency but some were either unwilling at the start or became unwilling after hearing about all the surrogate's duties. The MassHealth representative argued that Appellant's candidates were interviewed by the PCM agency and none agreed. Appellant argued that the PCM agency representatives will not accept any of her candidates and lies to them to scare them off. Appellant argued that the regulations state that it is the PCM agency's responsibility to assist members in finding a surrogate. In years prior, Appellant was her mother's surrogate. A surrogate is not a paid position and is a lot of work.

At the end of the hearing, Appellant was advised that if her relationship with Tri-Valley has deteriorated, she could transfer to a different agency. MassHealth has 17 PCM agencies in the state with multiple providers in each area. Appellant could also lodge a provider complaint against Tri-Valley. Finally, Appellant could switch to a different program that is not consumer-directed, such as elder services.

In a post-hearing submission, Appellant provided letters from three of her surrogacy candidates. Candidate #1 wrote that she is willing to be a surrogate and was Appellant's first PCA. Exhibit 6 at 13. Candidate #2 wrote that he worked with Appellant to help control his diabetes. Candidate #2 agreed to be Appellant's surrogate. However, Candidate #2 was told that he would have to be present at her home at least 5 days per week, which would not be possible given his work schedule and fifty mile commute. *Id.* at 1. Candidate #2 expressed his belief that Appellant can manage her own affairs. *Id.* Candidate #3, a former PCA, wrote that she was told by the PCM agency that a surrogate would have to be at Appellant's house 4 days per week. Candidate #3 wrote that she could not meet those expectations as she has a job and family. *Id.* at 3. Candidate #3 also expressed her belief that Appellant is capable of running her own program and does not need a surrogate. *Id.*

The PCA service agreement, Exhibit 8, contains the responsibilities of a consumer and/or the surrogate in managing the PCA program. Duties include but are not limited to: "reviewing and signing the Consumer Assessment to Manage PCA Services form," "ensuring that PCAs perform only the tasks described on the consumer PCA evaluation as authorized by MassHealth," "working with the PCM agency to develop a backup list of persons to contact when the regularly scheduled PCA cannot work," "Working with the FI [fiscal intermediary] and the PCM agency to resolve any disagreements or complaints," "submitting activity forms (timesheets) in the time frame required by the FI," and "ensuring that the consumer's activity forms (timesheets) correctly identify the hours that the PCA worked for each pay period." Exhibit 8. The agreement does not contain a requirement that a surrogate be present on site a certain number of times or days. *Id.*

Findings of Fact

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

1. On October 21, 2022, MassHealth terminated Appellant's PCA services for failure to find a surrogate. Exhibit 1 at 3.
2. Appellant's appeal of the October 21, 2022 termination was heard by BOH on December 29, 2022 (Appeal No. 2208804).
 - a. At this hearing, Appellant testified that she no longer asks PCAs to perform tasks such as feeding pets.
 - b. Having found that MassHealth offered scant evidence of Appellant's inability to manage her PCA program, the hearing officer approved Appellant's appeal, finding that MassHealth's decision to terminate Appellant's services for failure to appoint a surrogate was incorrect.
 - c. The hearing officer ordered MassHealth to rescind the notice of October 21, 2022; to restore Appellant's prior level of services (21 hours and 15 minutes of day/evening PCA services), effective November 5, 2022; and to ensure that Appellant receive a new PCM agency evaluation on or before March 28, 2023.
3. MassHealth implemented BOH's order on or about March 2, 2023. Exhibit 1 at 3.
4. On March 31, 2023, Appellant's PCM agency requested, and MassHealth granted, an extension of Appellant's PCA hours through June 25, 2023. *Id.*
5. On March 30, 2023, the PCM agency completed a consumer assessment of Appellant and found that Appellant requires the assistance of a surrogate to employ personal care attendants. Exhibit 9 at 3.
6. On the assessment, the PCM agency wrote that Appellant is not able to describe how to train and supervise a PCA, cannot describe the backup plan she will use if a PCA is sick or absent, and cannot complete activity forms correctly. *Id.*
7. On the assessment, the PCM agency wrote that Appellant has had 39-40 PCAs since 2016 and 3 since her PCA services were reinstated. Appellant has no back up plan and would need to hire another PCA and has refused to submit PCA activity forms or subtracted hours on days, not paying them fully. *Id.*
8. The notes of the assessment state that Appellant has accused PCAs of stealing and has asked PCAs to take care of her animals. *Id.*
9. Notes from the PCM agency provide that:
 - a. On February 27, 2023, one of Appellant's former PCAs (AB) complained to the PCM

- agency about the sanitary conditions of Appellant's home and that the PCA only performs cleaning and pet duties. Exhibit 4 at 52.
- b. AB reported to the PCM agency that Appellant asked AB to drive Appellant to a lunch date. *Id.*
 - c. On March 6, 2023, the PCM agency noted that a different PCA (B) was not paid because of a paperwork issue. *Id.*
 - d. On March 10, 2023, Appellant asked AB to feed her cats. *Id.* at 51.
 - e. In March 2023, AB quit and Appellant docked her pay on the timesheet. The PCM agency paid AB for the hours as reported by AB, not Appellant. *Id.* at 49-50.
 - f. On March 24, 2023, Appellant's PCA MH expressed difficulty being paid when Appellant would not sign or submit time sheets correctly. *Id.* at 44.
 - g. On March 30, 2023 and April 24, 2023, Appellant and PCA MH confirmed that Appellant only asks the PCA to perform cleaning tasks and no hands-on care. *Id.* at 43, 46-47.
 - h. On March 30, 2023, MH reported to the PCM agency that Appellant said she would fire MH for taking time off for bereavement. *Id.* at 47.
 - i. On April 18, 2023, MH reported to the PCM agency that she was going to work for Appellant despite experiencing pain because MH was afraid of Appellant firing her. MH ultimately went to the emergency room due to appendicitis. *Id.* at 44.
10. On March 16 and 17, 2023, MassHealth notified Appellant that it would terminate her PCA services effective May 30, 2023 pursuant to 130 CMR 422.420(B)(1), (2), and (3) for failure to locate and select a surrogate as required by 130 CMR 422.420(A)(22). Exhibit 1.
11. Appellant filed a timely appeal on May 26, 2023 and elected to keep her benefits pending the outcome of the appeal. Exhibit 2.
12. Appellant has named multiple candidates to be a surrogate for her, including but not limited to Candidate #1 (MEP), Candidate #2 (MP), Candidate #3 (AD), JK, and Appellant's brother. Exhibit 4 at 46; Exhibit 6 at 1, 3, and 13; Exhibit 7 at 5-6.
13. Both Candidate #2 and Candidate #3 wrote that they were told by the PCM agency that Appellant's surrogate would need to be at Appellant's house at least 4-5 days per week. Exhibit 6 at 1, 3.
14. A PCM agency note states that the agency representative told Candidate #2 that it was required for the surrogate to see the consumer and PCAs 3-5 days per week. Exhibit 7 at 5.
15. No assessments of any of Appellant's surrogacy candidates were submitted into the record.
16. The PCA service agreement contains the responsibilities of a consumer and/or the

surrogate in managing the PCA program. Duties include but are not limited to: “reviewing and signing the Consumer Assessment to Manage PCA Services form,” “ensuring that PCAs perform only the tasks described on the consumer PCA evaluation as authorized by MassHealth,” “working with the PCM agency to develop a backup list of persons to contact when the regularly scheduled PCA cannot work,” “Working with the FI [fiscal intermediary] and the PCM agency to resolve any disagreements or complaints,” “submitting activity forms (timesheets) in the time frame required by the FI,” and “ensuring that the consumer’s activity forms (timesheets) correctly identify the hours that the PCA worked for each pay period.” Exhibit 8.

17. The agreement does not contain a requirement that a surrogate be present on site a certain number of times or days. *Id.*

Analysis and Conclusions of Law

MassHealth’s regulations governing the PCA program under MassHealth are found at 130 CMR 422.000 et seq. All PCAs, Personal Care Management (PCM) agencies, and fiscal intermediaries must comply with regulations governing MassHealth, including, but not limited to 130 CMR 422.000 and 130 CMR 450.000. 130 CMR 422.401.

Aid pending

MassHealth members have a right to request a fair hearing on “any MassHealth agency action to suspend, reduce, terminate, or restrict a member’s assistance.” 130 CMR 610.032(A)(3). A member may request a fair hearing if MassHealth “denies or modifies a prior authorization request for PCA services.” 130 CMR 422.417(B)(2). Requests for continuation of services during an appeal must be made in accordance with 130 CMR 610.036. *Id.*

When the appealable action “involves the reduction, suspension, termination, or restriction of assistance, such assistance will be continued until the BOH decides the appeal ... if the BOH receives the initial request for the fair hearing before the implementation date of the appealable action.” 130 CMR 610.036(A). However,

[t]he provisions of 130 CMR 610.036(A) and (B), regarding assistance pending a hearing decision, will not apply to assistance requiring prior authorization where such assistance terminates as the result of the expiration of the specified, finite authorization period, and the member's provider has failed to timely submit a new prior authorization request.

130 CMR 610.036(E).

Here, MassHealth notified Appellant that her PCA services, extended by notice through June 25, 2023, would terminate on May 30, 2023. The termination was not due to the expiration of the authorization period (set to expire June 25, 2023 after an extension) but because MassHealth determined that Appellant failed to appoint a surrogate. Appellant filed this appeal on May 26, 2023 and specified that she wished to keep her level of benefits pending the outcome of the appeal. Appellant's termination from PCA services is an appealable issue.² Appellant submitted the request for a fair hearing on May 26, 2023, before the appealable termination on May 30, 2023. As such, Appellant was entitled to keep her PCA services pending the outcome of this appeal. This is addressed in the order below.

Regulations relating to the appeal issue

Pursuant to 130 CMR 422.403(C) (emphasis added), MassHealth will pay for PCA services for members appropriately cared for at home when the following conditions are met:

- (1) The personal care services are prescribed by a physician or a nurse practitioner who is responsible for the oversight of the member's health care.
- (2) The member's disability is permanent or chronic in nature and impairs the member's functional ability to perform ADLs and IADLs without physical assistance.
- (3) The member, as determined by the personal care agency, **requires physical assistance with two or more of the following ADLs as defined in 130 CMR 422.410(A):**
 - (a) mobility, including transfers;
 - (b) medications,
 - (c) bathing/grooming;
 - (d) dressing or undressing;
 - (e) range-of-motion exercises;
 - (f) eating; and
 - (g) toileting.
- (4) The MassHealth agency has determined that the PCA services are medically necessary and has granted a prior authorization for PCA services.

PCM agencies are organizations that contract with MassHealth to perform the functions specified in the PCM agency contract and contained in 130 CMR 422.000, including but not limited to functions described in 130 CMR 422.419(A). 130 CMR 422.405(A)(1). The regulation at 130 CMR 422.419(A) includes a list of required duties of a PCM agency, including maintaining records, performing assessments and evaluations, submitting prior authorization requests, and aiding members in recruiting PCAs. Per 130 CMR 422.419(A), the PCM agency's management functions

² Though 130 CMR 422.417 does not mention termination as an appeal issue, the May 17, 2023 describes MassHealth's action taken as a modification of the prior authorization request. In any event, 130 CMR 610.032(A)(3) makes clear that any termination of assistance is appealable.

include:

conducting a formal, written assessment of the member's ability to manage the PCA program independently and, if applicable, conducting a formal, written assessment of the ability of the surrogate or administrative proxy to manage the PCA program on behalf of the member in accordance with 130 CMR 422.422(A) and the PCM agency contract, and in the form and format required by the MassHealth agency

130 CMR 422.419(A)4. The regulations define the "assessment" as follows:

Assessment — a PCM agency's determination of a member's ability to manage the PCA program independently and the ability of a surrogate or administrative proxy, if any, to manage the PCA program on behalf of the member. **The PCM agency conducts an assessment of a member and surrogate** or administrative proxy, if any, in accordance with 130 CMR 422.422(A) and the contract for PCM functions. The result of an assessment of the member is a determination that the member either requires a surrogate or administrative proxy to receive PCA services or can manage the PCA program independently. The result of an assessment of the surrogate or administrative proxy, if any, is a determination about whether the surrogate or administrative proxy can appropriately and effectively manage the PCA program on behalf of the member.

130 CMR 422.401 (emphasis added).

The PCM agency must request prior authorization from MassHealth as a prerequisite to payment for PCA services. Prior authorization determines only the medical necessity of the authorized service and does not establish or waive any other prerequisites for payment. 130 CMR 422.416. The initial request for prior authorization for PCA services must include, *inter alia*, "the completed and signed assessment of the member's ability to manage the PCA program independently." 130 CMR 422.416(A)(4). The PCM agency is also required to submit this assessment upon requesting continuation of PCA services. 130 CMR 422.416(C).

The PCM agency's operating procedures are contained at 130 CMR 422.422 (emphasis added):

422.422: PCA Program: Personal Care Management Agency Operating Procedures

(A) Assessment. For each member determined initially eligible for PCA services in accordance with 130 CMR 422.421(A)(2), the PCM agency must conduct a written assessment of the member's capacity to manage PCA services independently and, if applicable, a written assessment of the ability of the surrogate or administrator proxy to manage PCA services on the member's behalf. If a member has a court-appointed legal guardian or is a minor child, a surrogate is required, and the agency

is not required to conduct an assessment of the member, but is required to conduct an assessment of the surrogate. **The PCM agency must document the assessments in the application for PCA services and in the member's record. The assessments must be in a form and format required by the MassHealth agency.** The process for assessment of the member must include the member and may include participation of family members or other member representatives. **The PCM agency must:**

(1) based on an in-person visit with the member, conduct a written assessment of the member's ability to manage PCA services and to function as an employer of PCAs. **The assessment must be conducted before submitting an initial request for prior authorization for PCA services to the MassHealth agency, at least annually thereafter, and whenever necessary due to a change in circumstances that may affect a member's ability to manage PCA services independently or function as an employer of PCAs.** The result of an assessment of the member is that the member either:

(a) is able to perform independently all tasks required to manage the PCA program (The PCM agency will conduct a PCA evaluation and submit the request for prior authorization to the MassHealth agency); or

(b) requires the assistance of a surrogate or administrative proxy to perform some or all of the PCA management tasks that the member is unable or unwilling to perform. (A surrogate or administrative proxy must be **identified before the PCM agency submits a prior-authorization request to the MassHealth agency**);

(2) if the member requires the assistance of a surrogate or administrative proxy, **based on an in-person visit with the surrogate or administrative proxy, conduct a written assessment of the ability of the surrogate or administrative proxy to manage PCA services on behalf of the member. The assessment must be conducted before submitting an initial request for prior authorization for PCA services to the MassHealth agency and whenever necessary due to a change in circumstances that may affect the ability of the surrogate or administrative proxy to manage PCA services on the member's behalf. The result of an assessment of a surrogate or administrative proxy is that the surrogate or administrative proxy is either:**

(a) able to perform the tasks designated to the surrogate or administrative proxy to manage the PCA program on behalf of the member; or

(b) unable to perform the tasks designated to the surrogate or administrative proxy to manage the PCA program on behalf of the member;

(3) complete an assessment of the member at the time of the member's reevaluation, which must occur at least annually and whenever necessary due to a change in circumstances that may affect a member's ability to manage

PCA services independently or function as an employer of PCAs;

(4) complete an assessment of any new surrogate or administrative proxy;

(5) review the assessment of the member and modify it, as appropriate, when:

(a) the member's medical, cognitive, or emotional condition changes in a way that affects the member's ability to manage PCA services independently;

(b) the member exhibits a pattern of overutilization of authorized PCA services, an inappropriate use of PCA services, or potential fraud, and does not discontinue such behavior after intervention from a skills trainer; or

(c) the member, the fiscal intermediary, or the MassHealth agency requests review of an assessment;

(6) review the assessment of the surrogate or administrative proxy and modify it, as appropriate, when:

(a) there is a change in circumstances that may affect the ability of the surrogate or administrative proxy to manage PCA services on behalf of the member; or

(b) the member, the surrogate or administrative proxy, the fiscal intermediary, or the MassHealth agency requests review of an assessment;

(7) review the assessment of the member with the member **and obtain the signature of the member. If the member does not agree with the assessment, provide a process for resolving the disagreement;** and

(8) notify the MassHealth agency and the fiscal intermediary in writing of any change in the member's assessment findings.

Pursuant to 130 CMR 422.422(B), a PCM agency must "must assist the member or legal guardian in locating a surrogate or administrative proxy."

A member's responsibilities in the PCA program are set forth in 130 CMR 422.420. These requirements include completing and signing the appropriate forms, employing PCAs within the hours and scope authorized by MassHealth, and cooperating with MassHealth and the PCM agency during assessments and evaluations. 130 CMR 422.420(A). These requirements also mandate that a member:

if assessed by the PCM Agency to require a surrogate or administrative proxy in accordance with 130 CMR 422.422(A)(1)(b), locate and appoint a surrogate or administrative proxy to assist the member in performing the PCA management tasks or related administrative functions that the member is unable or unwilling to perform as described in the service agreement in accordance with 130 CMR 422.423(A)(1) and (2). In appointing a surrogate or administrative proxy, the member must select a surrogate or administrative proxy who is not the member's PCA or an employee or contractor of the member's PCM agency or fiscal intermediary, and who must live in proximity to the member and be readily available to perform the tasks described in

the service agreement. A member may not appoint both a surrogate and an administrative proxy ...

130 CMR 422.420(A)(22).

MassHealth reserves the right to

- (1) terminate PCA services if a member fails to comply with any of the requirements listed in 130 CMR 422.420(A);
- (2) terminate PCA services if a member's surrogate becomes unavailable, or the MassHealth agency requires the member to replace the current surrogate, and another surrogate cannot be identified within 30 days of the PCM agency's notification to the member and the MassHealth agency in accordance with 130 CMR 422.422(B);
- (3) require a member who is receiving PCA services to obtain a surrogate or administrative proxy to continue to receive PCA services if the PCM agency or the MassHealth agency determines, based on an assessment conducted in accordance with 130 CMR 422.422(A), that the member is not able to manage the PCA program independently. The MassHealth agency will terminate PCA services if the member does not obtain a surrogate or administrative proxy within 30 calendar days of the date of the PCM agency's assessment, and the PCM agency will refer the member to an appropriate service provider;
- (4) require a member to replace the surrogate or administrative proxy if the surrogate or administrative proxy is not performing PCA tasks on behalf of the member in accordance with MassHealth regulations and after intervention from a skills trainer pursuant to 130 CMR 422.419(A)(17)(g); and
- (5) recover costs of overtime from the member for any activity time scheduled by a member and performed by an individual PCA that is in excess of the weekly hour limit without an authorization from the MassHealth agency for the member pursuant to 130 CMR 422.418(A).

130 CMR 422.420(B).

In this matter, MassHealth terminated Appellant from the PCA program, citing Appellant's failure to locate and select a surrogate in accordance with 130 CMR 422.420(A)(22). MassHealth wrote that Appellant failed to locate and select any individual who was readily available to perform the tasks as described in the service agreement within 30 days from the date of the PCM agency's assessment. MassHealth terminated Appellant's PCA services for failure to comply with the member responsibilities listed in 130 CMR 422.420(A). MassHealth also terminated Appellant in accordance with 130 CMR 422.420(B)(2) and (B)(3) for failure to obtain a surrogate within 30 days of the PCM agency's assessment.

Surrogate requirement

Regarding her first argument that a surrogate is not necessary, Appellant argued that she has the mental capacity to run her own program. Appellant disputed the allegations made by former PCAs (and relied upon by Tri-Valley and MassHealth) regarding her ability to employ PCAs. Appellant argued that BOH determined that she does not require a surrogate in a prior hearing decision.

The evidence presented in the record supports the PCM agency's and MassHealth's finding that Appellant requires a surrogate to manage her PCA program. There was no dispute as to Appellant's cognitive function or knowledge of her disability or needs; the PCM agency did not find that these categories were the basis for its determination. The PCM agency found that Appellant does not have the ability to employ PCAs, as per the consumer assessment, Exhibit 9. The documents in Exhibit 4 support this determination, as it includes findings that the PCM agency had to step in on numerous occasions to assist Appellant's PCAs in getting paid, limiting the scope of the PCA's duties, and handling conflicts.

In the prior BOH decision, Appeal No. 2208804, the hearing officer ruled in Appellant's favor because he was not presented with sufficient evidence that Appellant was unwilling or unable to perform PCA management tasks. However, the records submitted by MassHealth for the present appeal show that Appellant's issues with PCA management have continued since the prior hearing was held. Even though Appellant testified to the prior hearing officer that she would not ask PCAs to feed her pets anymore, Exhibit 4 contained references to two other occasions after the prior hearing when Appellant allegedly asked her PCA to provide pet care. Moreover, the fact that both Appellant and her PCA MH reported to the PCM agency that the PCA only provided housecleaning tasks, and not hands-on care, also demonstrates that Appellant is not utilizing the PCA program properly. According to 130 CMR 422.403(C), a member is not eligible for PCA services unless that member "requires physical assistance with two or more" activities of daily living (e.g. mobility, medications, bathing/grooming, dressing, range-of-motion, eating, and/or toileting). If a member only requires assistance with housekeeping, that member does not qualify for MassHealth to cover PCA services as housekeeping is not an activity of daily living defined by the regulation.

Accordingly, the PCM agency's and MassHealth's determination that Appellant requires a surrogate to participate in the PCA program is upheld.

Surrogate location and appointment

The next question is whether Appellant satisfied her duty under 130 CMR 422.420(A)(23) and whether MassHealth had a basis for terminating Appellant pursuant to 130 CMR 422.420(B)(1), (2), or (3). Appellant argued that she provided names of numerous candidates to be her surrogate to the PCM agency. MassHealth agreed that Appellant provided the names of candidates to be surrogate but argued that the proposed surrogates "were not an option as they did not qualify, or they has [sic] already declined the Surrogacy responsibilities." Exhibit 7 at 3. Case notes reflect that

the representatives of the PCM agency called the people identified by Appellant and some of them refused. However, Appellant presented letters from her candidates confirming that they were told of obligations that are not contained in the service agreement, and others were rejected as candidates without having been assessed. The three candidates who submitted letters on Appellant's behalf were either not assessed or declined after receiving incorrect information from the PCM agency. There is basically no dispute in the record that the PCM agency provided incorrect information to the candidates about the requirement of being in Appellant's home 3-5 days per week, as the agency's own notes state this.

Pursuant to 130 CMR 422.422(A)(2), a PCM agency **must** "conduct a written assessment of the ability of the surrogate or administrative proxy to manage PCA services on behalf of the member" after an in-person visit and in a form and format required by MassHealth. Appellant named multiple candidates to be her surrogate. Here, the PCM agency and MassHealth asserted that some of Appellant's candidates did not "qualify," but failed to present the required assessment of these surrogate candidates showing the reason why the surrogates did not qualify. There were no assessments presented of any of the candidates identified by Appellant, and the notes relied upon MassHealth and the PCM agency refer to phone calls to candidates, not in-person visits.

In other words, there is no evidence that any of Appellant's proposed surrogates did not qualify to be a surrogate on Appellant's behalf because the assessments that the PCM agency are required to perform for surrogates was not submitted into the record (and presumably not done as required by regulation). Any decision made by MassHealth or the PCM agency that a surrogate does not qualify requires an assessment that documents what, if any, requirement under the regulation or agreement the surrogate is unable to perform. Without that, MassHealth's decision that that Appellant failed to locate and appoint a surrogate as required under 130 CMR 422.420(A)(23) is premature, and therefore termination of Appellant from the PCA program pursuant to 130 CMR 422.420(B)(1), (2), or (3) is also premature.

Accordingly, this appeal is approved and remanded back to MassHealth to ensure that a proper written assessment is performed of Appellant and/or any of her surrogacy candidates pursuant to 130 CMR 422.422(A)(2).

Order for MassHealth

Rescind the May 16 and 17, 2023 notices. Reinstate Appellant's prior level of services (21.25 day/evening PCA hours per week) effective May 31, 2023 through a minimum of 30 days from the date of this decision. Allow 30 days for the PCM agency to submit a consumer assessment for each of Appellant's surrogacy candidates, addressing the surrogate's ability to provide Appellant's assistance in the area of employing PCAs and whether the candidate can fulfill the requirements of a surrogate in the regulations and service agreement.

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.

Cynthia Kopka
Hearing Officer
Board of Hearings

cc:

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

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General Counsel's Office –Sharon Boyle