

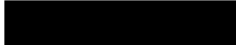
**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2304584
Decision Date:	9/13/2023	Hearing Date:	7/13/2023
Hearing Officer:	Patrick Grogan	Record Open to:	8/4/23

Appearance for Appellant:



Appearance for MassHealth:

Jennifer Carroll

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:	Approved	Issue:	Disqualifying Transfer, Misappropriation of Assets
Decision Date:	9/13/2023	Hearing Date:	7/13/2023
MassHealth's Rep.:	Jennifer Carroll	Appellant's Rep.:	
Hearing Location:	Remote (Tel)	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

Through a notice dated April 20, 2023, MassHealth approved the Appellant's application for MassHealth Standard long term care benefits effective January 12, 2023 (see 130 CMR 520.019 and Exhibit 1). MassHealth calculated a period of ineligibility from September 1, 2022 through January 11, 2023. (See 130 CMR 520.019 and Exhibit 1). The Appellant filed this appeal in a timely manner on June 5, 2023 (see 130 CMR 610.015(B) and Exhibit 2). Challenging the scope of assistance is valid grounds for appeal (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth approved the Appellant's application for MassHealth Standard long term care benefits effective January 12, 2023 (see 130 CMR 520.019 and Exhibit 1). MassHealth calculated a period of ineligibility from September 1, 2022 through January 11, 2023. (Exhibit 1).

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.019, in determining that Appellant made disqualifying transfers during the look-back period and in calculating the period of ineligibility.

Summary of Evidence

The Appellant is a MassHealth member over the age of 65. (Testimony, Exhibit 2) The Appellant, along with her Husband¹, applied for MassHealth to cover the cost of Long Term Care (LTC) for her. (Testimony, Exhibit 5, pg. 1) The Appellant is seeking coverage to begin September 1, 2022. (Testimony, Exhibit 5, pg. 1) On April 20, 2023, the Appellant was approved for MassHealth Standard benefits to cover her care in a nursing facility, with an effective date of January 12, 2023 (Testimony, Exhibit 1) MassHealth determined a period of ineligibility due to a transfer of assets. (Testimony, Exhibit 1) The period of ineligibility extend from September 1, 2022 through January 11, 2023. (Testimony, Exhibit 1, Exhibit 5, pg. 1) MassHealth had determined that the Appellant had sold the house she had owned with her Husband, in May of 2022. (Testimony, Exhibit 5, pg 1, Exhibit 7, pg.25-26)

From this sale, \$173,798.99 was due to the sellers, the Appellant and her husband. (Testimony, Exhibit 5, pg. 1, Exhibit 7, pg. 26) From this total, \$86,899.49 is attributable to the Appellant. (Testimony, Exhibit 5, pg. 1) In June of 2022, \$26,108.00 dollars were paid to the nursing facility by check from the Appellant's bank account on behalf of the Appellant, signed by the Appellant's former attorney in fact. (Testimony, Exhibit 5, pg. 1, 8). In November 2022, \$4,000.00 dollars were paid to the nursing facility on behalf of the Appellant. (Testimony, Exhibit 5, pg. 1, 6). Based upon this information, MassHealth calculated an outstanding amount of \$56,791.49 dollars remained attributable to the Appellant from the sale of the former home. (Testimony, Exhibit 5, pg. 1) Dividing this amount by the daily room rate of \$427.00 dollars, calculated a penalty of 133 days attributable to the Appellant. MassHealth converted this penalty to an ineligibility period spanning from September 1, 2022 through January 11, 2023. (Testimony, Exhibit 5, pg. 1)

A conversation between the parties prior to the Hearing revealed that in December of 2022, an additional \$25,000 dollars were paid to the nursing facility. (Testimony, Exhibit 5, pg. 1) MassHealth recalculated the outstanding amount of \$56,791.49 dollars which had remained attributable to the Appellant from the sale of the former home. (Testimony). MassHealth calculated an outstanding amount of \$31,791.49 dollars remained attributable to the Appellant from the sale of the former home. (Testimony, Exhibit 1A²) Dividing this amount by the daily room

¹ The Appellant's husband is not subject to this Appeal and has filed a separate appeal with the Board of Hearings which is pending at the time of the date of this decision.

² During the Hearing, MassHealth indicated that new calculations had been computed, and a new notice adjusting the amounts had been generated. The updated notice dated July 13, 2023 was received after the Hearing, and

rate of \$427.00 dollars, calculated a penalty of 74 days attributable to the Appellant. MassHealth converted this penalty to an ineligibility period spanning from September 1, 2022 through November 14, 2022. (Testimony, Exhibit 5, pg. 1, Exhibit 1A)

The Appellant does not dispute these calculations. (Testimony) The Appellant's Representative stated the outstanding funds had been misappropriated by the Appellant's son and daughter-in-law. (Testimony). The Appellant Representative testified that the son was the Appellant's attorney-in-fact pursuant to a power of attorney she had executed in the past. (Testimony) The Appellant's Representative stated that once she had found out about the home sale, she attempted to contact the Appellant's son and daughter-in-law six times before the Appellant's Representative received a response in September. (Testimony) The Appellant's Representative further testified that she then attempted to contact the Appellant's son and daughter-in-law an additional nine times before she received a copy of the settlement statement from the sale of the home. (Testimony, Exhibit 7, pg.25-26) Despite requests, the Appellant's son and daughter-in-law refused to provide bank statements of the Appellant's accounts. (Testimony)

Due to refusal of the Appellant's son and daughter-in-law to cooperate with the nursing facility, the Appellant's Representative testified that she informed the Appellant of the problems posed by her son and daughter-in-law. (Testimony) The Appellant was able to request her bank statements herself. (Testimony). After the bank had furnished the statements in January of 2023, the Appellant's Representative was then able to more fully assess the financial misappropriation perpetrated by the Appellant's son and daughter-in-law. (Testimony) The statements provided by the bank revealed multiple checks written out to "cash" as well as individuals unknown to her. (Testimony, Exhibit 7) Additionally, transfers had been made directly to the daughter-in-law's bank account. (Testimony) A check in excess of \$41,000 had been written payable to the daughter-in-law. (Testimony, Exhibit 7, pg. 65)

The Appellant's Representative, along with a social worker, explained what she had uncovered to the Appellant. (Testimony) Upon learning this information, the Appellant was distraught, the Appellant confirmed that she had not authorized these disbursements, and the Appellant stated that she had understood that the money would be paid to the nursing facility. (Testimony) The Appellant indicated she wished to file a report with Elder Services, which was promptly accomplished. (Testimony, Exhibit 7, pg. 98) The Appellant, with the help of the nursing facility, revoked the Appellant's Power of Attorney that had appointed her son as attorney in fact, and executed a subsequent Power of Attorney appointing someone else as her attorney in fact. (Testimony)

The Appellant's Representative calculated the total misappropriation at \$61,345.84 dollars. (Testimony, Exhibit 7, pg.1-2) The Appellant's Representative had contacted the daughter-in-law and attempted to explain the ramifications of the misappropriation. (Testimony) This appeared to

without objection, incorporated within this Record and consolidated within this appeal.

have prompted the \$25,000 dollars payment to the nursing facility on behalf of the Appellant in December of 2022 (Testimony, Exhibit 7, pg. 21-22) The Appellant's Representative had explained to the daughter-in-law that these misappropriations would cause the Appellant to be financially penalized through the MassHealth calculus of payment of benefits, but despite this warning, the son and daughter-in-law continued to disburse money from the Appellant's accounts after this conversation. (Testimony)

Based upon the testimony and exhibits presented, the Appellant, through this appeal, is seeking that the penalty attributable to the Appellant be removed. (Testimony) The Appellant's Representative explained that the Elder Services complaint that had been filed and screened in, was ultimately referred to the Hampshire County District Attorney's Office. (Testimony, Exhibit 7, pg. 98) The Appellant's Representative testified that the Hampshire County District Attorney's Office issued a subpoena to the nursing facility. (Testimony, Exhibit 7, pg. 99) The subpoena sought the nursing facility to produce:

- i. Any power of attorney of health care proxy documents
- ii. Any records from Sept 1, 2021 to March 31, 2023 of private payments (i.e. not payments from insurance) made on either account, including:
 - 1) The dates and times when any payments were made;
 - 2) Any records of the manner in which the payment was made (e.g. check, cash, debit or credit card, or direct transfer from a bank account);
 - 3) Copies of any checks, if any;
 - 4) Any records that indicate whether a single payment or transaction was allocated to multiple accounts or debts. (Exhibit 7, pg. 99)

The Appellant's Representative testified that the nursing facility had cooperated with the subpoena and would continue to cooperate with the grand jury investigation and the Hampshire County District Attorney's Office. (Testimony, Exhibit 7, pg. 99)

Findings of Fact

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

1. The Appellant is a MassHealth member over the age of 65. (Testimony, Exhibit 2)
2. The Appellant applied for MassHealth to cover the cost of Long-Term Care (LTC). (Testimony, Exhibit 5, pg. 1)
3. On April 20, 2023, the Appellant was approved for MassHealth Standard benefits to cover her care in a nursing facility, with an effective date of January 12, 2023 (Testimony, Exhibit 1)

4. MassHealth determined a period of ineligibility due to a transfer of assets. (Testimony, Exhibit 1) The period of ineligibility extend from September 1, 2022 through January 11, 2023. (Testimony, Exhibit 1, Exhibit 5, pg. 1)
5. MassHealth had determined that the Appellant had sold the house she had owned with her Husband, in May of 2022. (Testimony, Exhibit 5, pg 1, Exhibit 7, pg.25-26)
6. From this sale, \$173,798.99 was due to the sellers, the Appellant and her husband. (Testimony, Exhibit 5, pg. 1, Exhibit 7, pg. 26) From this total, \$86,899.49 is attributable to the Appellant. (Testimony, Exhibit 5, pg. 1)
7. In June of 2023, \$26,108.00 dollars were paid to the nursing facility by check from the Appellant's bank account on behalf of the Appellant, signed by the Appellant's former attorney in fact. (Testimony, Exhibit 5, pg. 1, 8). In November 2023, \$4,000.00 dollars were paid to the nursing facility on behalf of the Appellant. (Testimony, Exhibit 5, pg. 1, 6). Based upon this information, MassHealth calculated an outstanding amount of \$56,791.49 dollars remained attributable to the Appellant from the sale of the former home.
8. MassHealth calculated a penalty of 133 days attributable to the Appellant. MassHealth converted this penalty to an ineligibility period spanning from September 1, 2022 through January 11, 2023. (Testimony, Exhibit 5, pg. 1)
9. A conversation between the parties prior to the Hearing revealed that in December of 2022, an additional \$25,000 dollars were paid to the nursing facility. (Testimony, Exhibit 5, pg. 1) MassHealth recalculated the outstanding amount with \$31,791.49 dollars remained attributable to the Appellant from the sale of the former home. (Testimony, Exhibit 1A³)
10. MassHealth calculated a penalty of 74 days attributable to the Appellant. MassHealth converted this penalty to an ineligibility period spanning from September 1, 2022 through November 14, 2022. (Testimony, Exhibit 5, pg. 1, Exhibit 1A)
11. The Appellant does not dispute these calculations. (Testimony) Rather, the Appeal Representative testified that the outstanding monies have been misappropriated by the Appellant's son and daughter-in-law. (Testimony)
12. The Appellant's Representative calculated the total misappropriation at \$61,345.84 dollars. (Testimony, Exhibit 7, pg.1-2)
13. A complaint was filed with Elder Services, was screened in, was ultimately referred to the

³ During the Hearing, MassHealth indicated that new calculations had been computed, and a new notice adjusting the amounts had been generated. The updated notice dated July 13, 2023 was received after the Hearing, and without objection, incorporated within this Record and consolidated within this appeal.

Hampshire County District Attorney's Office. (Testimony, Exhibit 7, pg. 98)

14. The Hampshire County District Attorney's Office issued a subpoena to the nursing facility. (Testimony, Exhibit 7, pg. 99) The documents sought through the subpoena included financial records from the Appellant and her husband.

Analysis and Conclusions of Law

In accordance with 130 CMR 519.006(A)(4), to qualify for MassHealth Standard coverage as a resident of a long-term care facility, an individual must have countable assets of \$2,000 or less. MassHealth considers any transfer of a resource owned by a nursing facility resident for less than fair market value during the appropriate look-back period to be a disqualifying transfer unless the transfer in question is permitted or exempted under the regulations. Specifically, 130 CMR 520.018(B) states that MassHealth "will deny payment for nursing facility services to an otherwise eligible nursing-facility resident ... who transfers or whose spouse transfers countable resources for less than fair-market value during or after the period of time referred to as the look-back period." The look-back period for transfers of resources occurring on or after February 8, 2006 is 60 months. 130 CMR 520.019(B)(2).

According to 130 CMR 520.019(C), set forth in pertinent part,

The MassHealth agency 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). The MassHealth agency 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.

Pursuant to 130 CMR 520.0019(G),

Where the MassHealth has determined that a disqualifying transfer of resources has occurred, the MassHealth will calculate a period of ineligibility. The number of months in the period of ineligibility is equal to the total, cumulative, uncompensated value as defined in 130 CMR 515.001 of all resources transferred by the nursing-facility resident or the spouse, divided by the average monthly cost to a private patient receiving nursing-facility services in the Commonwealth of Massachusetts at the time of application, as determined by the MassHealth agency.

A transfer may be cured if the full value or a portion of the full value of the transferred resources is returned to the applicant. 130 CMR 520.019(K)(2)(b). Additionally, per 130 CMR 520.019(F), MassHealth will not impose a period of ineligibility for transferring resources at less than fair market value if the resident demonstrates to MassHealth's satisfaction that

- (1) the resources were transferred exclusively for a purpose other than to qualify for MassHealth; or
- (2) the nursing-facility resident or spouse intended to dispose of the resource at either fair-market value or for other valuable consideration. Valuable consideration is a tangible benefit equal to at least the fair-market value of the transferred resource.

The federal Health Care Finance Administration (HCFA) Transmittal No. 64, Section 3258.10 sets forth the following guidance to transfers exclusively for a purpose other than qualifying for Medicaid:

Transfers Exclusively for a Purpose Other Than to Qualify for Medicaid.--Require the individual to establish, to your satisfaction, that the asset was transferred for a purpose other than to qualify for Medicaid. Verbal assurances that the individual was not considering Medicaid when the asset was disposed of are not sufficient. Rather, convincing evidence must be presented as to the specific purpose for which the asset was transferred.

In this case, MassHealth found that Appellant was ineligible for MassHealth long-term care coverage for 74 days because of the sale of the former home during the lookback period totaling \$31,791.49 that were not paid to the nursing facility. The Appellant has the burden of demonstrating that the transfers were made for fair market value or that the transfer was permissible or exempted. Alternatively, the Appellant could establish that the transfer was made exclusively for a purpose other than to qualify for MassHealth and must meet this burden by providing convincing evidence of the specific purpose for which the asset was transferred.

The Appellant, through her Appeal Representative has argued that her son and daughter-in-law wrongfully withdrew the amount from her account. The Appellant, therefore, did not receive fair market value, and none of the regulatory exemptions fit the circumstances here. The Appellant's Representative's statement that the money was withdrawn wrongfully by her son and daughter-in-law needs to rise to the level of convincing evidence. The Appellant Representative's testimony, under oath at the hearing, that Appellant's son was the Appellant's attorney in the fact in the past is damaging to the Appellant's position. According to Appellant's Representative, the Appellant's daughter-in-law was aware that Appellant was applying for Medicaid at the time the transfers were made. No reason for the transfer, apart from suspected theft, was offered for the transfer.

However, it is the subsequent actions of the Appellant (and her Representatives) that provide the convincing evidence in this case. After moving into the long-term-care facility, the Appeal Representative repeatedly contacted the Appellant's son and daughter-in-law in an attempt to cure the transfer. The Appellant's Representative communicated with the Appellant's daughter-in-law, informing her of the consequences of the transfer to the Appellant's MassHealth benefits application. After the last payment was made to the facility from the daughter-in-law and after the Appellant's bank records were received, the malfeasance of the son and daughter-in-law were clear to the Appellant's Representative. (Testimony) Additional steps were taken.

The Appellant was informed of the actions of her son and daughter-in-law and revoked her Power of Attorney which had named her son attorney-in-fact. (Testimony). The Appellant executed a new Power of Attorney naming a new attorney-in-fact. (Testimony) The Appellant contacted Elder Protective Services and a complaint was filed. (Testimony, Exhibit 7, pg.98) As a result of this contact, the Hampshire District Attorney's Office became involved. (Testimony) A Grand Jury Subpoena was issued to the long-term-care facility requesting financial information of the Appellant and her spouse. (Testimony, Exhibit 7, pg.99) The long-term-care facility has complied with the subpoena (Testimony.)

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, based upon the testimony and supporting documentary evidence provided, the Appellant has provided convincing evidence regarding the intent and the subsequent actions taken to pursue the theft collimating with the Grand Jury Investigation in Hampshire County.

The instant appeal is distinguishable from the controlling caselaw in this area. In Gauthier v. Director of the Office of Medicaid, 80 Mass. App. Ct. 777, 785-786 (2011) The Massachusetts Appeals Court held, inter alia, that the Hearing Officer correctly affirmed MassHealth's decision that applicant made a disqualifying transfer of resources during the application look-back period; where the applicant had failed to show that the transfer was made exclusively for a purpose other than to qualify for MassHealth, because the applicant did not present convincing evidence as the specific purpose for which the asset was transferred, as is required under federal law. Here, the Appellant provided both convincing testimony as well as supporting documentary evidence that the transfer was a misappropriation. Additionally, in Kaptchuk v. Directory of the Office of Medicaid, 83 Mass. App. Ct. 1134 (2013) (Rule 1:28 Decision) the Court held, in part "[Appellant] bore the burden to prove by convincing evidence that the money was transferred for an exclusive purpose other than to qualify for Medicaid, and verbal assurances...were insufficient to satisfy that burden." Here, more than verbal assurances were given: documentary evidence of the Appellant's bank accounts corroborated

the testimony, the Elder Protective Services letter corroborated the testimony, and the Hampshire County Grand Jury Subpoena corroborated the testimony. Based upon the specific evidence presented in this appeal, the Appellant has met her burden to show the invalidity of MassHealth administrative determination. Accordingly, this appeal is APPROVED.

Order for MassHealth

Exclude the outstanding amount of \$31,791.49 dollars from the Appellant's asset calculus and APPROVE the Appellant for MassHealth Standard long term care benefits coverage to begin September 1, 2022.

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: Justine Ferreira, Taunton MassHealth Enrollment Center, 21 Spring St., Ste. 4, Taunton, MA 02780, 508-828-4616