

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Dismissed	Appeal Number:	2304876
Decision Date:	8/30/2023	Hearing Date:	07/18/2023
Hearing Officer:	Mariah Burns		

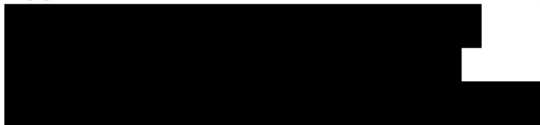
Appearance for Appellant:

Pro se

Appearance for MassHealth:

Rachel Rosenberg, Esq.; Richard J. Barry,
Pamela Murdock, Stephanie Barstow

Appearance for Palmer Healthcare Facility:



*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	Issue:	Jurisdiction; Authorized Representative; PASRR
Decision Date:	8/30/2023	Hearing Date:	07/18/2023
MassHealth's Rep.:	Rachel Rosenberg, Esq., et al.	Appellant's Rep.:	Pro se
Hearing Location:	Virtual	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 May 25, 2023, MassHealth denied authorization for payment of nursing facility services because MassHealth determined that the nursing facility did not make proper referral to the Department of Developmental Services (DDS) or the Department of Mental Health (DMH) for a Level II Preadmission Screening/Resident Review (PASRR). See 130 CMR 456.410 and Exhibit 1. An appeal was filed on the appellant's behalf in a timely manner, however, as discussed, *supra*, the appeal was not filed by an authorized representative. See 130 CMR 610.015(B), 130 CMR 610.016, and Exhibit 2.

Action Taken by MassHealth

MassHealth denied the request for authorization for payment of nursing facility services.

Issue

At issue is whether the attorney for the nursing facility was properly authorized to file a fair

hearing request on the appellant's behalf.

Summary of Evidence

The following is a summary of the documentary evidence and testimony presented at a virtual hearing convened on July 18, 2023:

On [REDACTED] 2023, the appellant was discharged from Holyoke Medical Center to the Palmer Healthcare Center ("Palmer") with a primary diagnosis of dementia and a secondary diagnosis of bipolar disorder. Exhibit 5 at 10. A Level I Preadmission Screening and Resident Review ("PASRR") for the appellant was submitted by Palmer on that date. Exhibit 6 at 5-9. Based on the answers provided on the initial PASRR Level I form, a Level II screening was not conducted. On April 3, 2023, an updated Level I form was submitted, which led to a Level II screening that was submitted on April 24, 2023. Exhibit 7 at 64-67.

On May 25, 2023, MassHealth issued a notice to the appellant denying payment of coverage from [REDACTED] 2023, to April 3, 2023, alleging that the initial 2023 Level I PASRR form submitted by Palmer on [REDACTED] was inaccurate and was not corrected until April 3. Exhibit 1. A timely notice of appeal was filed on the appellant's behalf, but was signed by an attorney retained by Palmer, appointing the attorney's law firm as an appeal representative. Exhibit 2 at 1.

Also included in the appeal record was a form entitled "Authorized Representative Designation" (ARD), which reflects the appellant's name and a signature, and lists Palmer Healthcare as an authorized representative. Exhibit 2 at 2. The form provided is silent as to what purpose an authorized representative would serve, however this hearing officer does take notice that these forms are frequently used to allow MassHealth to communicate with family members or other authorized individuals regarding a member's coverage and care. *Id.* The form also states, "such organization will at all times maintain the confidentiality of any information regarding the applicant or member set forth above" and "any providers, staff members, or volunteers acting on behalf of the organization in connection with this authorized representative designation will at all times adhere to all applicable state and federal laws and regulations regarding confidentiality of information, and conflicts of interest," though it does not indicate whether the appellant was advised of these laws and chose to appoint Palmer regardless. *Id.*

At hearing conducted by video conference, Palmer, reportedly on the appellant's behalf, was represented by an attorney and two members of their management team, while MassHealth was represented by an attorney and several workers for the PASRR Disability and Community-based Services. The hearing officer asked if the appellant would be joining the video call and the lawyer for Palmer reported that she was not. The hearing officer expressed concern that the Palmer's representation of the appellant in this case could constitute a conflict of interest and wanted to hear from the appellant directly. The attorney for the nursing home reported that she did not

believe that the appellant was competent to waive any conflict of interest issues and that, due to the appellant's competence issues, they were not planning on having her attend the hearing. The hearing officer expressed further concern about the validity of the ARD form if questions existed regarding the appellant's competence.¹ After conferring with her clients, the attorney represented that she was mistaken and may have been conflating this with another case, and that the appellant is competent. The appellant was thus brought on the video conference still in her bedroom with a computer set up in front of her, and the Executive Director appeared next to her on screen.

The hearing officer asked the appellant numerous personal questions and questions regarding the appeal. The appellant was able to state her name and date of birth but did not seem to know her Social Security number. She stated the names of her two children and believed she had been in Palmer for about a month. She recognized her name on the top of the ARD form, indicated that she signed it but that she did not know what it was for. She was unsure of whether she had ever met the attorney for Palmer before. She expressed confusion when she was asked whether she authorized Palmer to represent her in hearings before MassHealth. The appellant did not have any memory of filing an appeal in response to a MassHealth decision and did not know why she was in the video conference or what the appeal was about.

Based on the answers given by the appellant, the hearing officer found that the ARD form was not knowingly signed by the appellant, meaning that the fair hearing request form was not properly submitted, and, as a result, the Board of Hearings did not have jurisdiction to hear the appeal. The hearing officer indicated to the parties that the appeal would be dismissed.²

The attorney for Palmer expressed concern that the hearing officer was violating the appellant's due process rights by declining to hear the appeal. She also requested that if the case was not heard as a fair hearing that it instead be heard as an adjudicatory hearing. She stated that Palmer's position was that the appellant knowingly signed the ARD form and represented that a previous assessment found the appellant to be competent and that the appellant's son was involved in the discussion regarding the signing of the form.³ The hearing officer responded that, based on the regulations, the case was properly scheduled as a fair hearing and denied the request

¹ Palmer's attorney briefly took the position that the appellant's healthcare proxy signed the ARD form, and the hearing officer reported that the form received by the Board of Hearings was signed by the appellant herself.

² One of the facility representatives contended that the appellant had difficulty following the questions due to phrasing and background noise. The hearing officer responded that the questions were adequately clear, and that any difficulty the appellant had in responding was representative of the issues at hand.

³ The assessment in question was not provided at the time of or before the hearing, nor was there any indication in the documents provided at the time of hearing that the appellant's power of attorney or healthcare proxy was involved in the signing of the ARD form.

for an adjudicatory hearing. A discussion between the parties resulted in Palmer representing that they would not bill the appellant for the two months for which MassHealth denied payment.

Findings of Fact

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

1. On [REDACTED] 2023, the appellant was discharged from Holyoke Medical Center to Palmer with a primary diagnosis of dementia and a secondary diagnosis of bipolar disorder. Exhibit 5 at 10. A Level I Preadmission Screening and Resident Review ("PASRR") for the appellant was submitted by Palmer on that date, and based on the answers provided, a Level II screening was not conducted. Exhibit 6 at 5-9.
2. On April 3, 2023, an updated Level I form was submitted, which led to a Level II screening that was submitted on April 24, 2023. Exhibit 7 at 29-33.
3. On May 25, 2023, MassHealth issued a notice to the appellant denying payment of coverage from [REDACTED] 2023, to April 3, 2023, due to the facility submitting an inaccurate initial Level I PASRR form. Exhibit 1.
4. A timely notice of appeal was filed on the appellant's behalf but was signed by an attorney retained by Palmer, appointing the attorney's law firm as an appeal representative. Exhibit 2 at 1.
5. Also included in the appeal record was an ARD form which reflects the appellant's name and a signature and lists Palmer Healthcare as an authorized representative. Exhibit 2 at 2. The form provided is silent as to what purpose an authorized representative would serve. *Id.* The form also states that an appointed organization will abide by conflict of interest and confidentiality laws, though it does not indicate whether the appellant was advised of these laws prior to appointing Palmer as an authorized representative. *Id.*
6. At hearing, the appellant was able to state her name and date of birth. She did not have an accurate recollection of the length of her nursing home stay. She recognized her name on the ARD form, signed the form, but did not know what it was for. The appellant had no memory of filing an appeal in response to a MassHealth decision and did not know why she was in the video conference or what the appeal was about. Testimony.
7. No evidence was provided prior to or at hearing that any member of the appellant's family, her healthcare proxy, or her power of attorney were consulted during the signing of the ARD form or the filing of this appeal.
8. Palmer does not intend to bill the appellant for the two months for which MassHealth was

denied payment. Testimony.

Analysis and Conclusions of Law

Federal law requires any individual set to be admitted to a Medicaid-funded nursing facility to undergo screening for mental illness and intellectual or developmental disabilities. See 42 U.S.C. §1396r(b)(3)(F). Massachusetts codified this requirement at 130 CMR 456.410-412 and created a fair hearing appeal right for any MassHealth “*member or applicant*” who is denied “a request for authorization of nursing-facility services.”⁴ Emphasis added. Such an appeal is subject to the provisions of the Fair Hearing Rules found at 130 CMR 610 *et seq.*

Although the Fair Hearing Rules allow an appellant to appoint an organization to represent them during a fair hearing, federal regulations prohibit appeal representatives from having conflicts of interest. See 130 CMR 610.004 and 42 CFR 435.923. Here, Palmer’s attempted representation of the appellant through their retained attorney raises several concerns.

First, there is the question of whose interests the attorney actually represents. The fair hearing request form itself was signed by the attorney, but the right of appeal belongs with the member. 130 CMR 456.412(B). This would require that the appellant appoint Palmer as an appeal representative, and for Palmer then to appoint the lawyer on the appellant’s behalf for legal proceedings. See 130 CMR 610.004 (definition of Appeal Representative). Thus, the only way to logically conclude that the attorney was authorized to sign the fair hearing request form would be, first, to accept the Authorized Representative Designation (ARD) form found in Exhibit 2 at 2 as being properly executed and signed by the appellant and Palmer, and second, to rely upon a notice of appearance filed by the attorney *on behalf of Palmer Healthcare Facility* in the event that the Board of Hearings would allow the appeal to be heard as an adjudicatory hearing.⁵ That, in and of itself, suggests that the attorney was retained to represent the interests of Palmer, not the appellant.

Second, there is the potential for a conflict of interest in Palmer’s representation of the appellant. MassHealth regulations prohibit providers from charging any other person for any medical service “for which payment is available under MassHealth.” 130 C.M.R. 450.203. MassHealth interprets this to mean that providers may not bill MassHealth members when coverage of a specific payment is denied. However, this does not stop a provider from attempting to recoup the unpaid funds from a member, regardless of their chances of success. Such an action would certainly

⁴ For this reason, it would not have been proper for the Board of Hearings to hear this case as an adjudicatory hearing pursuant to 130 CMR 450.241. The only remedy to challenge such a notice is through a request for fair hearing. See 130 CMR 456.412(B).

⁵ To go a step further, the fair hearing request form even appoints the attorney’s firm as an appeal representative *on behalf of Palmer Healthcare Center*. See Exhibit 2 at 3.

create a conflict of interest between Palmer and the appellant.

Third, there are serious questions as to whether this ARD form is legally sound. There have been significant successful legal challenges to the legal efficacy of these forms in the past. See *Colonial Rehab and Nursing Center v. Commonwealth of Massachusetts Office of Health and Human Services*, 2019 WL 6358415 (Mass. Super.) at 1 (citing four instances in which a “Designation of Authorized Representative” form was found to violate federal and/or state law). Although I make no such finding here, I do write to note that the provided form is vague and does not indicate for what purpose a signee (here, the appellant) designate an authorized representative, nor does it state that the signee has been advised of any conflict of interest or privacy laws and has otherwise waived those rights.

Fourth, even if the provided ARD form is legally sound, I do not find that the appellant knowingly signed it and appointed Palmer as her authorized representative.⁶ Prior to the commencement of the hearing, the appellant was sworn in and asked some questions regarding the ARD form. She indicated that her name was on the form, but expressed confusion as to whether she was the person who signed it. She had no knowledge of the purpose of the form and no memory of authorizing Palmer to act on her behalf. She expressed confusion as to whether she had ever met Palmer’s attorney before and had no idea why a hearing was convened or what she was doing on the screen. She did say that she’ll let anyone help her, however, I do not credit this under the circumstances given her clear confusion over the day’s events.

For each these reasons, I cannot, in good conscience, find that the appellant knew for what purpose she signed the ARD form. Therefore, I find that the appellant did not knowingly consent to authorizing Palmer to represent her before the Board of Hearings. As the attorney for Palmer signed the fair hearing request form, the appeal is not properly before the Board of Hearings. See 130 C.M.R. 610.016(A) (“If the person filing the appeal is not the appellant, all documentation required to demonstrate that the person requesting the appeal is an appeal representative in accordance with 130 CMR 610.004 must be submitted either at the time the hearing is requested or before the hearing is scheduled”).⁷ Palmer and its do not have standing to file an appeal on the appellant’s behalf, and the appeal is thereby DISMISSED.⁸

⁶ I make no finding regarding the appellant’s competence at hearing or when the form was signed. This ruling relates only to whether the appellant knowingly signed the ARD form.

⁷ The attorney expressed concern that the decision to dismiss the appeal without a hearing on the merits would violate the appellant’s due process rights. However, the appellant had no knowledge of the hearing, no memory of signing any form related to the request for a hearing, and, for reasons stated at fn. 7, cannot be adversely impacted by this hearing officer’s decision. Palmer cannot exercise due process rights on the appellant’s behalf without her consent, nor do they possess any due process rights of their own under these circumstances.

⁸ Palmer may not bill the appellant for the two months for which MassHealth denied payment coverage pursuant to 130 C.M.R. 450.203(A) and the attorney’s representations that they

Order for MassHealth

None.

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.

Mariah Burns
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Linda Phillips, UMass Medical School - Commonwealth Medicine, Disability and Community-Based Services, 333 South Street, Shrewsbury, MA 01545-7807

[REDACTED]

[REDACTED]

would not do so. Further, Palmer may not issue a notice of discharge pursuant to 130 C.M.R. 610.028 due to nonpayment for those two months.