

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2305541
Decision Date:	11/16/2023	Hearing Date:	08/10/2023
Hearing Officer:	Mariah Burns	Record Open to:	10/2/2023

Appearance for Appellant:



Appearance for DMH/MassHealth:

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Executive Office of Health and Human Services
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Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171*

APPEAL DECISION

Appeal Decision:	Denied	Issue:	Preadmission Screening and Resident Review (PASRR); Serious Mental Illness
Decision Date:	11/16/2023	Hearing Date:	08/10/2023
MassHealth's Rep.:	Linda Phillips, et. al.	Appellant's Rep.:	
Hearing Location:	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

Through a notice dated May 31, 2023, the Preadmission Screening and Resident Review (PASRR) Unit for the Massachusetts Department of Mental Health (DMH) conducted an annual Level II Resident Review of the appellant and determined that he does not currently meet the definition for serious mental illness under the relevant statute. *See* 42 CFR § 483.102, 130 CMR 456.410, and Exhibit 1). The appellant filed this appeal in a timely manner on July 5, 2023. *See* 130 CMR 610.015(B)(8) and Exhibit 2¹. Challenging a PASRR determination is valid grounds for appeal. *See* 130 CMR 610.032(E).

¹ The regulation provides 30 days after receipt for individuals to appeal PASRR determinations, but states "In the absence of evidence or testimony to the contrary, it will be presumed that the notice was received on the fifth day after mailing." 130 CMR 610.015(B)(8). The Board of Hearings received the appellant's appeal on the 30th day, thus making the filing timely. Exhibit 2.

Action Taken by DMH/MassHealth

The PASRR Unit for DMH determined that the appellant does not currently meet the definition of serious mental illness under the PASRR statute.

Issue

The appeal issue is whether DMH was correct in determining that the appellant does not currently meet the definition of serious mental illness for purposes of PASRR.

Summary of Evidence

The appellant was represented telephonically at the hearing by his attorney. The Commonwealth was represented by a registered nurse from the PASRR Unit, an attorney from DMH, and an attorney from the Executive Office of Health and Human Services (EOHHS) legal department. The following is a summary of the testimony presented and evidence provided at the hearing.

The appellant is an adult over the age of 65 who has had a diagnosis of unspecified developmental disability since birth. He has been a DMH client since [REDACTED] and has been receiving services from the Massachusetts Department of Developmental Services (DDS) since [REDACTED]. He has resided in a locked unit at the nursing facility in question since [REDACTED]. The record is unclear as to his PASRR history, but the parties agree that the appellant was, at some point, determined to meet the definition of serious mental illness (SMI) under the relevant PASRR statutes.

The appellant was last hospitalized in [REDACTED] and has otherwise resided in the same unit at the nursing facility. His current diagnoses include paranoid schizophrenia², schizoaffective disorder, bipolar disorder, autistic disorder, and pervasive developmental disorder. Along with other skilled nursing services, he receives assistance with medication to help manage his mental illness, which DMH reported are in remission or partial remission and managed through the prescription of those medications.

On [REDACTED] the appellant underwent a PASRR Comprehensive Level II Evaluation. Exhibit 6 at 48-64. Since that evaluation, the appellant has received three separate determinations from the PASRR Unit, on [REDACTED], on [REDACTED], and on [REDACTED]. Each of those determinations found that the appellant does not currently meet the definition SMI as defined by PASRR. The DMH attorney reported that, pursuant to DMH/MassHealth policy, the appellant's status is frequently reviewed given his past finding of SMI.

² There is some dispute as to whether this is an appropriate diagnosis for the appellant.

The Commonwealth testified that, although they concede that the appellant has a diagnosis of a major mental illness that results in functional limitations of his major life activities, the reason for the PASRR Unit's finding was that he has not experienced psychiatric hospitalization in the past two years, nor has he had a significant disruption to his living situation during that time. The appellant argued that he meets the definition for SMI because he resides in a locked psychiatric unit and requires psychiatric treatment and medication to remain stable.³

After hearing, the record was kept open until September 8, 2023, for the appellant to submit a memorandum of law and supplement his testimony, which he did.⁴ The Commonwealth submitted its reply memorandum on October 2, 2023.

Findings of Fact

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

1. The appellant has resided in locked psychiatric unit within the nursing facility since October 2016. Testimony, Exhibit 6 at 63.
2. At the time of the appellant's admission, a PASRR Level I Screening was conducted, recommending a Level II Evaluation. Exhibit 6 at 33. Although the record is unclear as to the outcome of that evaluation, at some point the appellant was found to meet the definition of SMI for PASRR purposes after a Level II Evaluation. Testimony, Exhibit 7 at 1-8, Exhibit 8 at 1.
3. Pursuant to the appellant's annual PASRR review, he underwent a PASRR Comprehensive Level II Evaluation on [REDACTED]. Since that evaluation, three separate determinations

³ The appellant argued at hearing that he has not been receiving adequate specialized services from the PASRR program due to the finding that he does not meet the definition for SMI. The Commonwealth objects to this argument on the grounds that it is not properly before the Board of Hearings for not being mentioned within the fair hearing request. For reasons stated herein, I make no legal finding related to the issue of specialized services and thus, make no factual findings regarding the matter.

⁴ It should be noted that, in his supplemental memorandum provided after hearing, the appellant intended to incorporate testimony from a different hearing related to a separate issue heard later the same day as the hearing related to this appeal. See Board of Hearings Appeal Number 2305324 and Exhibit 7 at 4-5. The Commonwealth's objection to that incorporation is sustained. The only testimony considered for this decision shall be the testimony presented at the hearing for this appeal. Although I agree with the Commonwealth's sentiment that the remaining evidence submitted with the memorandum could have been provided prior to the hearing, I will allow its admission pursuant to 130 CMR 610.081.

from the PASRR Unit, on [REDACTED] on [REDACTED], and on [REDACTED], found that the appellant does not currently meet the definition SMI as defined by PASRR. Exhibit 6 at 48-64, 69-74.

4. The appellant filed a timely request for fair hearing on July 5, 2023, challenging the findings of the May 31, 2023, determination. Exhibit 2.
5. The appellant has a diagnosis of a major mental illness that does not include dementia and that also results in functional limitations of his major life activities. Testimony, Exhibit 6 at 56.
6. The appellant's most recent psychiatric hospitalization was in [REDACTED]. Testimony, Exhibit 6 at 55.
7. The appellant has not had any major disruptions to his living situation [REDACTED]. Testimony.

Analysis and Conclusions of Law

The Preadmission Screening and Resident Review (PASRR) is a federally-mandated program that applies to all individuals seeking admission to and residents of Medicaid-certified skilled nursing facilities. 130 CMR 610.004. Its purpose is to screen such individuals for mental illness, intellectual disabilities, or developmental disabilities to ensure that their needs are properly met. *Id.* The federal requirements for PASRR are codified at 42 CFR §§ 483.100-138 and 42 U.S.C. § 1396(e)(7). MassHealth has adopted those requirements as required by 42 CFR § 483.104 within 130 CMR 456.410 and Nursing Facility Bulletin (NFB) 169, the most recent version of which was updated in October 2021.

The PASRR process comprises of two stages: the Level I Screening, and the Level II Evaluation and Resident Review. 130 CMR 456.410. The purpose of the Level I Screening is to determine whether an individual set to be admitted into a Medicaid-certified nursing facility “has or is suspected of having” an intellectual disability (ID), a developmental disability (DD), or serious mental illness (SMI, also known as MI by the federal regulations) as defined at 42 CFR § 483.102. The Level II Evaluation is summarized as follows:

A comprehensive independent evaluation conducted on individuals that have positive Level I Screenings. The Level II Evaluation is a person-centered assessment taking into account all relevant information, including the individual's...goals and preferences for the individual's care. It is required to ascertain 1) whether the referred individual has ID/DD, SMI, or both, and 2) if so, whether community-based services, admission to a nursing facility or other setting is most appropriate, and 3) if a nursing facility is most appropriate, whether specialized services are needed.

MassHealth NFB 109 at 16. If an individual is found to have ID/DD, SMI, or both, federal law requires them to undergo annual evaluations to ensure that the proper services, if necessary, are in place. See 42 CMR § 483.114 and MassHealth NFB 109 at 16.

Federal regulations specifically define SMI for purposes of a PASRR evaluation. See 42 CFR § 483.102(b)(1). For an individual to be considered someone with SMI under the PASRR program, they must meet the following criteria:

1. Has a major mental illness or disorder, such as schizophrenic, paranoid, mood, panic, or other severe anxiety disorder; somatoform disorder; personality disorder; other psychotic disorder; or another mental disorder that may lead to a chronic disability; and
2. Due to the mental illness or disorder, has experienced, within the past two years: 1) more than one instance of psychiatric treatment more intensive than outpatient care, or 2) an episode of significant disruption to the normal living situation for which supportive services were required to maintain functioning at home or in a residential treatment environment, or which resulted in intervention by housing or law enforcement officials; and
3. Due to the mental illness or disorder, has a level of disability that has resulted in functional limitations in major life activities that would be appropriate for the individual's developmental stage within the past six months. An individual typically has challenges in at least one of the following characteristics on a continuing or intermittent basis: interpersonal functioning; concentration, persistence, and pace; or adaptation to change; and
4. Does not have a co-occurring diagnosis of dementia or Alzheimer's disease or related disorder (ADRD) that is both advanced and primary over the mental health diagnosis (i.e., meets the criteria for advanced dementia exclusion (ADE)).

MassHealth NFB 109 at 16 (*summarizing* 42 CFR § 483.102(b)(1)).

Individuals who disagree with their PASRR determination have the right to a fair hearing under 130 CMR 610.032(E). The appellant has the burden of proof at such a hearing "to demonstrate the invalidity of the administrative determination." *Andrews v. Division of Medical Assistance*, 68 Mass. App. Ct. 228, 231 (2006). The fair hearing decision, established by a preponderance of evidence, is based upon "evidence, testimony, materials, and legal rules, presented at hearing, including the MassHealth agency's interpretation of its rules, policies and regulations." 130 CMR 610.082(A) and (B).

In this case, the appellant argues that DMH incorrectly determined, after his annual PASRR review,

that he does not meet the definition of SMI and that, as a result, he did not receive adequate specialized services. For the reasons stated herein, I find that the appellant has not met his burden of proof to establish any error in DMH's May 31, 2023 Level II evaluation, and, as a result, I will not address the adequacy of his specialized services or lack thereof.

The parties agree that the appellant has the requisite mental illness or disorder and functional limitations, does not have a co-occurring diagnosis of dementia or Alzheimer's, and has not been hospitalized for treatment of his psychiatric condition in the past two years.⁵ At issue, then, is whether the appellant has experienced "an episode of significant disruption to the normal living situation, for which supportive services were required to maintain functioning at home or in a residential treatment environment" within the last two years. 42 CFR § 483.102(b)(1)(iii)(B).

The appellant argues that he meets this prong because he currently resides in a locked behavioral unit of a nursing facility and requires medication and supportive services to maintain appropriate functioning. However, the appellant has resided at this facility in a locked unit since [REDACTED]. The evidence shows that his last hospitalization took place in [REDACTED] and that there have been no other changes to his living situation since his admission to the facility. The appellant cites no authority as to the definition of "significant disruption" nor "normal living situation," and I was unable to uncover any case law or guidance related to the matter. Thus, taking the words at their plain meaning, the evidence shows that, since [REDACTED] the appellant's normal living situation has been to reside within the locked unit of the nursing facility. He has experienced no disruption to that situation in the last two years, let alone a significant one. The appellant has provided no evidence to the contrary.

Therefore, I find that the PASRR Level II Determination from [REDACTED], was correctly made, and the appellant does not currently meet the definition of SMI pursuant to 42 CFR § 483.102(1). As stated, *infra*, as a result of that finding, I decline to make a finding as to whether the issue of adequate special services is properly before the Board of Hearings or any substantive finding related to that issue.

For the foregoing reasons, the appeal is DENIED.

Order for DMH/MassHealth

None.

⁵ The appellant seems to argue that his having previously been found to meet the definition of SMI for PASRR purposes, he is not obligated to re-establish that he is an individual with SMI. This argument does not persuade and contraindicates the requirements that individuals found to have ID/DD, SMI, or both undergo an annual PASRR evaluation. See 42 CMR § 483.114 and MassHealth NFB 109 at 16.

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:

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