

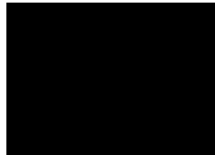
Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2306133
Decision Date:	10/26/2023	Hearing Date:	9/12/2023
Hearing Officer:	Cynthia Kopka	Record Open to:	10/3/2023

Appearance for Appellant:



Appearance for MassHealth:

Linda Phillips, RN, BSN, LNC-CSp
Brad Goodier, BSN, RN



*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:	Denied	Issue:	ABI-RH waiver eligibility
Decision Date:	10/26/2023	Hearing Date:	9/12/2023
MassHealth's Rep.:	Linda Phillips and Brad Goodier	Appellant's Rep.:	Pro se, with representatives
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 notice dated July 3, 2023, MassHealth notified Appellant that he is not eligible for MassHealth's Acquired Brain Injury Residential Habilitation Waiver (ABI-RH Waiver). Exhibit 1. Appellant filed a timely appeal on July 24, 2023. Exhibit 2. A determination regarding eligibility for a waiver program is a valid basis for appeal. 130 CMR 610.032.

Action Taken by MassHealth

MassHealth notified Appellant that he is not eligible for MassHealth's ABI-RH Waiver.

Issue

The appeal issue is whether MassHealth was correct in determining that Appellant does not qualify for the ABI-RH waiver.

Summary of Evidence

MassHealth was represented at remote hearing by its Associate Director of Appeals and Regulatory Compliance and a nurse reviewer. Appellant appeared with his representatives. Documents were submitted in advance of hearing by MassHealth and Appellant, Exhibits 4 and 5. A summary of documentation and testimony follows.

MassHealth offers home and community based service waivers, including the ABI-RH waiver, to help qualified individuals with an acquired brain injury move from a long-term care facility to a qualified residence in the community and obtain community based services. The ABI-RH waiver is for individuals who need supervision and staffing 24 hours a day, seven days a week in a provider-operated residence. Another waiver, the ABI Non-residential Habilitation (ABI-N) waiver is for people who can move to their own home or apartment or to the home of someone else and receive services in the community. Exhibit 4 at 6. To qualify for one of the waivers, an individual must:

- Be living in a nursing facility or in a chronic rehabilitation hospital for at least 90 days
- Meet clinical requirements
- Have experienced an acquired brain injury at age 22 or older. An acquired brain injury can result from a stroke, brain trauma, infection of the brain (such as encephalitis), brain tumor, or anoxia (lack of oxygen)
- Need ABI waiver services
- Be able to be safely served in the community within the terms of the ABI waivers, and
- Meet the financial requirements to qualify for MassHealth Standard in the community. Special financial rules exist for waiver applicants and participants.

Id.

On June 2, 2023, Appellant applied for the ABI-RH Waiver. *Id.* at 45. The application lists Appellant as residing in [REDACTED]. *Id.* Per public records, the full name of the facility is [REDACTED].¹ On June 28, 2023, MassHealth determined that [REDACTED] is part of [REDACTED], an acute care facility. Appellant is currently staying in the hospital in an acute care bed. Appellant's sister, his representative, notified MassHealth that Appellant is in an acute setting because the facility cannot find a long-term care facility for Appellant due to no availability. The MassHealth representative testified that a resource list was emailed to Appellant's representative to provide other options. However, MassHealth denied the application because Appellant has not met the criterion, as he is not an inpatient at a nursing facility or a chronic rehabilitation hospital and had

¹ As described *infra*, the facility at [REDACTED] is also known as [REDACTED]. See Exhibit 8. The multiple names for the facility are confusing, but there was no dispute as to [REDACTED] being the same place. Hereinafter in this decision, the facility will be referred to as "[REDACTED]" wherever possible to limit confusion.

not met the 90 day criteria at the time of application. MassHealth cited 130 CMR 519.007(G)(1).

Appellant's representatives conceded that Appellant had not been at [REDACTED] for 90 days at the time of application, but as of the day of hearing he had been there over 100 days. MassHealth clarified that the denial was based on the clinical setting as well as the number of days. Appellant's representatives testified that [REDACTED] is a community-based hospital. Appellant and the facility cannot find placement in a skilled nursing facility and therefore he has been in the hospital waiting for placement. People Inc., the residential home to which Appellant wishes to reside, has beds available but can only accept Appellant under the ABI-RH waiver.

Appellant suffered a stroke in November 2022 and was admitted to [REDACTED] for a week and a half. He was transferred from [REDACTED] to [REDACTED] for a stay and then discharged home. However, Appellant was not able to manage care at home and became ill, which brought him to [REDACTED] in [REDACTED] 2023. Appellant was transferred from a hospital bed at [REDACTED] to a bed at [REDACTED] on [REDACTED] 2023.

Appellant's representatives argued that Appellant is in a rehabilitation hospital, which meets the regulatory criterion. He is currently at his baseline and is not going to improve. Appellant's representatives were saddened to see Appellant stuck in a hospital room for so long and wish for him to be in a residential, comfortable setting. Appellant's representatives described the care Appellant receives currently. A certified nursing assistant (CNA) bathes him daily, a nurse provides his medicine, and he receives physical and occupational therapy. Appellant's representatives argued that this is rehabilitative care, not acute care.

Appellant's representatives and the staff at the facility have been trying to get Appellant placement in a sub-acute setting, but have not found any facility that has availability and takes Appellant's MassHealth insurance. Appellant's representatives have searched in Appellant's area and widened their search in hopes to find a place, but nothing is available.

MassHealth's representative cautioned Appellant's representatives that the ABI-RH process is long and that it can take one to two years before a waiver applicant is placed in a group home. This inquiry is a threshold matter and even if Appellant meets the 90 day threshold, the eligibility determination would continue.

The hearing record was held open for Appellant's representatives to provide evidence of Appellant's clinical status, such as documents related to his transfer to the rehabilitation wing from the hospital floor or anything confirming his level of care. Exhibit 6.

On September 18, 2023, the Medical Director of [REDACTED] wrote that Appellant

[h]as been a patient on [REDACTED] hospital since 6/2/2023. Despite [Appellant's] involvement in acute rehab services he is no longer

meeting acute rehab criteria. Currently, [Appellant] is receiving, mainly, custodial level of care inclusive of supervision. Physical and occupational therapy services have continued solely for functional maintenance in order to prevent decompensation. [Appellant] has remained consistent on transferring and ambulation for the last 1-2 months. Additionally, his cognition, strength, static/dynamic balance, motor control, and endurance has continued remain limited. In current state, [Appellant] would benefit from either a nursing facility for custodial care or a group home that may specialize in accepting patients with a history of traumatic brain injury.

Exhibit 7.

On September 25, 2023, MassHealth responded and upheld its denial, arguing that [REDACTED], where Appellant resides, is an acute-level rehab unit. MassHealth provided evidence from the facility's website, which contains multiple references to the facility being an acute inpatient rehabilitation center. Exhibit 8 at 7-10.

According to the Department of Public Health's (DPH) directory of Massachusetts Licensed or Certified Health Care Facility/Agency Listing, updated in June 2023, the facility located at [REDACTED], is labeled an acute hospital. An abbreviated version of the list limited to facilities in Fall River is contained in the record as Exhibit 9.

Findings of Fact

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

1. On June 2, 2023, Appellant applied for the ABI-RH waiver. Exhibit 4 at 45.
2. Appellant has resided at [REDACTED], since [REDACTED] 2023.
Id.
3. [REDACTED] and is also known as [REDACTED]. Exhibit 8.
4. DPH lists the facility located at [REDACTED]. This facility is identified as an acute hospital. Exhibit 9.
5. Appellant is between the ages of 22 and 64 and suffered an acquired brain injury in November 2022.

6. On September 18, 2023, the Medical Director of [REDACTED] wrote that Appellant

[h]as been a patient on [REDACTED] hospital since [REDACTED] 2023. Despite [Appellant's] involvement in acute rehab services he is no longer meeting acute rehab criteria. Currently, [Appellant] is receiving, mainly, custodial level of care inclusive of supervision. Physical and occupational therapy services have continued solely for functional maintenance in order to prevent decompensation. [Appellant] has remained consistent on transferring and ambulation for the last 1-2 months. Additionally, his cognition, strength, static/dynamic balance, motor control, and endurance has continued remain limited. In current state, [Appellant] would benefit from either a nursing facility for custodial care or a group home that may specialize in accepting patients with a history of traumatic brain injury.

Exhibit 7.

Analysis and Conclusions of Law

The MassHealth regulations at 130 CMR 519.000 explain the categorical requirements and financial standards that must be met to qualify for a MassHealth coverage type. The regulations at 130 CMR 519.007 describe the eligibility requirements for MassHealth Standard coverage for individuals who would be institutionalized if they were not receiving home- and community-based services.

Per 130 CMR 519.007(G)(1), an ABI-RH Waiver allows an applicant or member who is certified by MassHealth to be in need of nursing facility services or chronic disease or rehabilitation hospital services to receive residential habilitation and other specified waiver services in a provider operated 24-hour supervised residential setting. To qualify for the ABI-RH waiver, the member must meet clinical and age requirements:

(a) Clinical and Age Requirements. The Residential Habilitation Waiver for Persons with Acquired Brain Injury, as authorized under section 1915(c) of the Social Security Act, allows an applicant or member who is certified by the MassHealth agency or its agent to be in need of nursing facility services or chronic disease or rehabilitation hospital services to receive residential habilitation and other specified waiver services in a provider-operated 24-hour supervised residential setting if he or she meets all of the following criteria:

1. is 22 years of age or older and, if younger than 65 years old, is totally and permanently disabled in accordance with Title XVI standards;
2. acquired, after reaching the age of 22, a brain injury including, without

limitation, brain injuries caused by external force, but not including Alzheimer's disease and similar neuro-degenerative diseases, the primary manifestation of which is dementia;

3. **is an inpatient in a nursing facility or chronic disease or rehabilitation hospital with a continuous length of stay of 90 or more days at the time of application for the waiver;**

4. needs a residential support service available under the Residential Habilitation Waiver; and

5. is able to be safely served in the community within the terms of the Residential Habilitation Waiver.

130 CMR 519.007(G)(1)(a) (emphasis added).

Here, MassHealth denied Appellant's application because Appellant is a resident of a facility that is described on its website as an acute inpatient rehabilitation center. Thus, it does not meet the definition of a "nursing facility or chronic disease or rehabilitation hospital" as required by 130 CMR 519.007(G)(1)(a)(3). Appellant's representatives dispute this finding, as Appellant is in a rehabilitation hospital and receives rehabilitation level of care.

MassHealth's provider and member regulations define and distinguish different facilities. The definition of an acute inpatient hospital states that it "does not include any facility that is licensed as a chronic disease and rehabilitation hospital, any hospital that is licensed primarily to provide mental health services, or any unit of a facility that is licensed as a nursing facility, a chronic disease unit, or a rehabilitation unit." 130 CMR 415.402. The institutions listed in the waiver regulations have specific definitions related to their licensure and level of care. A nursing facility is defined as an institution or a distinct part of an institution that meets the provider-eligibility and certification requirements of 130 CMR 456.404 or 456.405. 130 CMR 456.402. The regulations define a chronic disease and rehabilitation hospital as a facility, or a unit within a facility, with a majority of its beds licensed by the Massachusetts Department of Public Health to provide chronic-disease services. 130 CMR 435.402.

The evidence in the record supports that Appellant resides in an acute hospital setting. The DPH defines the facility as an acute hospital and the [REDACTED] website makes multiple references to the rehabilitation center being an acute inpatient facility. Additionally, the letter from the facility's Medical Director provided that Appellant did receive acute inpatient rehab services, but only now receives custodial services.

Appellant's testimony that his care is sub-acute is credible and compelling, particularly as supported by the Medical Director's letter confirming that Appellant is only receiving custodial care. However, even if the letter alone was sufficient to demonstrate a change in Appellant's clinical setting, there is no indication of when this level of care changed and if it falls within the 90 day requirement. Ideally, more evidence, such as nursing notes or discharge summaries, could

have been offered to support a finding that Appellant's care has been at a sub-acute level for more than 90 days or that he would have been transferred to a nursing facility but for shortages in availability. Without more, this appeal is denied.

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.

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

