

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied in part; Remanded	Appeal Number:	2308377
Decision Date:	12/1/2023	Hearing Date:	10/11/2023
Hearing Officer:	Paul C. Moore	Record Closed:	11/14/2023

Appearance for Appellant:



Appearance for MassHealth:

Michelle Benevides for Nicole Conrad, Taunton
MassHealth Enrollment Center (by telephone)



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

APPEAL DECISION

Appeal Decision:	Denied in part; Remanded	Issue:	Eligibility, Disabled Adult Household
Decision Date:	12/1/2023	Hearing Date:	10/11/2023
MassHealth Reps.:	Michelle Benevides for Nicole Conrad	Appellant Rep.:	
Hearing Location:	Board of Hearings (remote)	Aid Pending:	No

Authority

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

Jurisdiction

Through a notice dated September 1, 2023, MassHealth notified the appellant that her coverage would change from MassHealth CommonHealth to Buy-In for Specified Low-Income Medicare Beneficiaries (SMLB), effective September 15, 2023, due to excess income and/or assets (Exh. 1). The appellant filed a timely appeal of the notice with the Board of Hearings (BOH) on September 12, 2023 (130 CMR 610.015; Exh. 2). A change in MassHealth coverage is valid grounds for appeal to the BOH (130 CMR 610.032).

Action Taken by MassHealth

MassHealth determined that the appellant's coverage would change from CommonHealth to Buy-In for SMLB.

Issue

Was MassHealth correct in changing the appellant's coverage to Buy-In for SLMB?

Summary of Evidence

A MassHealth representative from the Taunton MassHealth Enrollment Center (“MEC representative”) testified by telephone that the appellant is over age 65, disabled and lives in a household of one. She is a client of the Department of Developmental Services (DDS). For the time frame December, 1999 through the present, the appellant was enrolled in MassHealth CommonHealth for four discrete time periods, totaling nine years, three months, and twenty-seven days. The MEC representative testified that pursuant to a new MassHealth application submitted by the appellant in July, 2023, the appellant’s gross monthly income is \$1,804.00, consisting of Social Security benefits. The MEC representative stated that the appellant’s assets are less than \$2,000.00. The appellant’s primary insurance is Medicare (Testimony, Exh. 1).

Prior to the appeal hearing, the MEC representative forwarded to the hearing officer a copy of a MassHealth Eligibility Operations Memo 23-19 entitled, “Changes to MassHealth CommonHealth Eligibility for Seniors,” dated August, 2023 (hereinafter, “memo”). The memo states in pertinent part:

Members who were enrolled in MassHealth CommonHealth for at least ten years before turning 65 are now eligible to remain on MassHealth CommonHealth after turning 65 whether they work or not. These members must submit a renewal form for seniors over age 65 (SACA-2-ERV). If the member does not meet the criteria for MassHealth Standard per 130 CMR 519.005(A): *Eligibility Requirements*, they will remain in CommonHealth.

MassHealth members who do not meet the ten-year criteria upon turning 65 may still receive CommonHealth if they continue to work at least 40 hours per month (or have worked at least 240 hours in the six months before the date of the SACA-2-ERV submission). This is per 130 CMR 519.012(A): *Working Disabled Adults*.

Members applying for MassHealth CommonHealth who are aged 65 and older, regardless of working status, will be subject to all other rules for the CommonHealth program per 130 CMR 519.012(A).

(Exh. 5)

Because the appellant was not enrolled in CommonHealth for ten years prior to turning age 65, and because the appellant does not intend to work at least forty hours per month now that she is over age 65, the appellant is ineligible for MassHealth CommonHealth, according to the MEC representative. Also, because the appellant’s gross monthly income exceeds 100% of the federal poverty level (FPL) for a household of one, she is not eligible for MassHealth Standard. Instead, the only benefit for which the appellant is eligible is Buy-In, where MassHealth will pay the cost of the

appellant's monthly Medicare Part B premium (Testimony).¹

The appellant was represented at hearing by her court-appointed conservator, who testified by telephone.² The appellant's conservator stated that the appellant, as a DDS client, lives in a group home where she receives adult foster care. She is unable to work due to her disability. He testified that approximately 75% of the appellant's monthly income is paid to DDS for her housing and care. He does not believe that the appellant's eligibility for MassHealth should be determined based on the appellant's income, but that her eligibility should be granted, *per se*, based on her status as a DDS client (Testimony).

The appellant's conservator disputed the accuracy of the gross monthly income figure for the appellant on file with MassHealth. When the hearing officer asked the conservator what is the correct gross monthly income figure for the appellant, he did not know.

At the close of the appeal hearing, the hearing officer left the record of this appeal open for three weeks for the appellant's conservator to submit: (1) documentary evidence of the appellant's current gross monthly Social Security income; and (2) a legal memorandum addressing why appellant believes her MassHealth eligibility determination is not subject to the regulations at 130 CMR 519.012, and how the appellant believes her eligibility should be determined, citing to relevant MassHealth laws and regulations (Exh. 6). The hearing officer also agreed to leave the appeal record open for two additional weeks for the MassHealth representative to respond (*Id.*).

On October 31, 2023, the appellant's conservator requested, via e-mail, an extension of time for one additional week for the appellant to file a legal memorandum, and documentary evidence of the appellant's income (Exh. 7). The hearing officer granted this request.

On November 8, 2023, the hearing officer and the MassHealth representative received via e-mail from the appellant's conservator a legal memo via in which he confirms that the appellant's current gross monthly income is \$1,803.90 consisting of Social Security benefits (Exh. 8, p. 7).³ The appellant's conservator asserts in the legal memo that the appellant has been in a shared living placement, contracted by DDS and their providers, for more than 14 years. In addition, he notes in the legal memo that "because of the appellant's daily care needs, her current Individual Service Plan (ISP) with DDS, and the contract with DDS. . . to provide services, she is required to pay seventy-five percent (75%) of her income for services and the ability to live in the community safely" (*Id.*, p. 3). The conservator also asserts that "based on

¹ The September 1, 2023 MassHealth notice also states that the appellant can qualify for MassHealth Standard by meeting a six-month deductible of \$5,922.00, for the period July 1, 2023 through January 1, 2024 (Exh. 1).

² A decree of the probate court dated 10/6/1997 reflects that the appellant is mentally retarded and that [REDACTED] has been the appellant's permanent conservator since that time (Exh. 3).

³ Attached to the legal memo is a 2023 Social Security disability benefits award letter corroborating this figure (Exh. 8).

the fact that [the appellant] is required to pay her DDS provider seventy-five percent of her income per month, those funds must be considered part of her eligibility deductible” (*Id.*, p. 7).

The appellant’s conservator also indicates that 130 CMR 630.429 provides that “DDS is responsible for payment to providers shared living – 24-hour supports” (*Id.*, p. 6). He also asserts that under DDS regulation 115 CMR 3.05, DDS is authorized to make and regulate charges for care that either [DDS] operates or funds through a contract” (*Id.*, p. 7).

The appellant’s conservator also asserts that because the appellant pays 75% of her income to DDS monthly, and also pays her monthly Medicare Part B premium of \$164.90 per month, she meets the one-month deductible listed in the September 1, 2023 notice of \$987.10 (Exh. 1; Exh. 8, pp. 7-8).⁴

The appellant’s conservator also states that “the more pertinent rule of law, in this case, should be 130 CMR 519.007(D), “Individuals Who Would be Institutionalized – Home and Community-Based Services Waivers for Persons with Intellectual Disabilities” (*Id.*, p. 8). He asserts:

Using their standards, [the appellant’s] income is well below the 300% federal poverty level of \$3,645.00. She is therefore eligible for MassHealth Standard benefits.

(Exh. 8, p. 8)⁵

Finally, the appellant’s conservator asserts that “I was informed last Monday, November 6 that in order for [the appellant] to be eligible for an Eligibility Waiver, the DDS is to file a waiver request with MassHealth. . . . I have no knowledge that MassHealth has ever requested a waiver request from the DDS and has never requested a waiver be filed by her conservator. Now that [the appellant] has turned 65, all the rules and regulations have been turned sideways, and [the appellant] is no longer eligible for benefits, through no fault of the appellant or her conservator. It is all based on the request of MassHealth to demand a new eligibility application based on her age. On its face, it appears to this attorney that [the appellant] is being discriminated against based on her age” (*Id.*, p. 8).

On November 8, 2023, the hearing officer received the following e-mail communication from the MassHealth representative, which was copied to the appellant’s conservator:

Just to reiterate what was discussed in the appeal and conversations after in regard to the member's benefit. Prior to the most recent senior renewal that resulted in a

⁴ In fact, pursuant to the MassHealth eligibility notice of September 1, 2023, MassHealth is paying the appellant’s Medicare Part B premium (Exh. 1).

⁵ Regulation 130 CMR 519.007(D), governing eligibility for waiver-based services for persons with an intellectual disability, actually specifies that an applicant must have countable income that is less than or equal to 300% of the federal benefit rate (FBR) to be financially eligible for these services, not 300% of the FPL.

downgrade to Senior Buy-In, the member was on MassHealth CommonHealth for a little over 9 years. The benefit ended as the member no longer meets the criteria (not able to work) and we are using community rules. MassHealth has no waiver on file from Department of Developmental Services and there is no evidence at documented at MassHealth that this member had a waiver in the past.

If the member needs a Home and Community Based Waiver through DDS I have attached the information on how to apply.

(Exh. 9)

In e-mail correspondence with the hearing officer dated November 14, 2023, the appellant's conservator stated that he was planning to apply for the DDS waiver program for the appellant (Exh. 10). Despite this fact, the appellant's conservator requested a written decision in this appeal.

Findings of Fact

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

1. The appellant is over age 65, disabled and lives in a DDS home providing group adult foster care (Testimony).
2. The appellant has an intellectual disability and has had a permanent guardian in place since 1997 (Exh. 3).
3. For the time frame December, 1999 through the present, the appellant was enrolled in MassHealth CommonHealth for four discrete time periods, totaling nine years, three months, and twenty-seven days (Testimony).
4. The appellant's primary health insurance is Medicare.
5. The appellant filed a MassHealth senior application in July, 2023 (Testimony).
6. The appellant's gross monthly income is \$1,804.00, consisting of Social Security benefits (Testimony, Exh. 8).
7. Through a notice dated September 1, 2023, MassHealth notified the appellant that her coverage would change from MassHealth CommonHealth to Buy-In for SLMB, effective September 15, 2023, due to excess income and/or assets (Exh. 1).
8. The September 1, 2023 notice apprises the appellant that she can qualify for

MassHealth Standard by meeting a six-month deductible of \$5,922.00, for the period July 1, 2023 through January 1, 2024 (Exh. 1).

9. The appellant filed a timely appeal of this notice with the Board of Hearings (BOH) on September 15, 2023 (Exh. 2).
10. The appellant is unable to work (Testimony).
11. 100% of the FPL for a household of one in 2023 is \$1,215.00 (88 *Federal Register* 3424, pp. 3424-3425 (January 19, 2023)).
12. The appellant pays approximately 75% of her gross monthly income to DDS for her housing and daily care needs (Testimony, Exh. 8).
13. The appellant's income is at 148% of the FPL for a household of one in 2023 (88 *Federal Register* 3424, pp. 3424-3425 (January 19, 2023)).
14. The appellant asserts that she meets the six-month deductible of \$5,922.00 to qualify for MassHealth Standard, through the payments she makes to DDS (Exh. 8).

Analysis and Conclusions of Law

MassHealth regulation 130 CMR 505.000 explains the categorical requirements and financial standards that must be met to qualify for a MassHealth coverage type.

130 CMR 505.001(A) notes in relevant part:

(A) The MassHealth coverage types are the following:

- (1) Standard – for pregnant women, children, parents and caretaker relatives, young adults, disabled individuals, certain persons who are HIV positive, individuals with breast or cervical cancer, independent foster care adolescents, Department of Mental Health members, and medically frail as such term is defined in 130 CMR 505.008(F);
- (2) CommonHealth – for disabled adults, disabled young adults, and disabled children who are not eligible for MassHealth Standard;
- (3) CarePlus – for adults 21 through 64 years of age who are not eligible for MassHealth Standard;
- (4) Family Assistance – for children, young adults, certain noncitizens, and persons who are HIV positive who are not eligible for MassHealth Standard, CommonHealth, or CarePlus;
- (5) Small Business Employee Premium Assistance – for adults or young adults who
 - (a) work for small employers;

- (b) are not eligible for MassHealth Standard, CommonHealth, Family Assistance, or CarePlus;
- (c) do not have anyone in their premium billing family group who is otherwise receiving a premium assistance benefit; and
- (d) have been determined ineligible for a Qualified Health Plan with a Premium Tax Credit due to access to affordable employer-sponsored insurance coverage;
- (6) Limited – for certain lawfully present immigrants as described in 130 CMR 504.003(A), nonqualified PRUCOLs, and other noncitizens as described in 130 CMR 504.003: *Immigrants*; and
- (7) Senior Buy-In and Buy-In – for certain Medicare beneficiaries.

To qualify for MassHealth Standard as a person over age 65, the appellant's countable gross monthly income may not exceed 100% of the FPL. Here, the appellant's countable gross monthly income is \$1,804.00, which exceeds 100% of the 2023 FPL of \$1,215.00. Thus, she is not eligible for MassHealth Standard. Further, because the appellant was not enrolled in MassHealth CommonHealth coverage for at least ten years before turning age 65, she is not eligible for MassHealth CommonHealth as a senior, since she is not working at least 40 hours per month (MassHealth Eligibility Operations Memo 23-19 (August, 2023)).

The appellant's countable gross monthly income is 148% of the FPL for a household of one. MassHealth regulations in effect on the date of the appellant's eligibility determination, 1340 CMR 519.011, "MassHealth Buy-In," stated as follows:

(A) MassHealth Buy-in for Specified Low Income Medicare Beneficiaries (SLMB).

(1) Eligibility Requirements. MassHealth Buy-in for Specified Low Income Medicare Beneficiaries (SLMB) coverage is available to Medicare beneficiaries who meet the eligibility requirements of MassHealth Senior Buy-in coverage at 130 CMR 519.010 with the following exception: the countable income amount of the individual and his or her spouse must be greater than 130% of the federal poverty level and less than or equal to 150% of the federal poverty level.

(2) Benefits. The MassHealth agency pays the cost of the monthly Medicare Part B premium for members who establish eligibility for MassHealth Buy-in for SLMB coverage in accordance with 130 CMR 519.011(A).

(3) Begin Date. MassHealth Buy-in for SLMB coverage, in accordance with 130 CMR 519.011(A), begins with the month of application and may be retroactive up to three calendar months before the month of application.

(Emphases added)

MassHealth's decision that the appellant is eligible for based on her income MassHealth Buy-In for SLMB was correct. MassHealth should pay the appellant's Medicare Part B premium beginning in April, 2023, since the appellant's application was dated July, 2023.

The appellant asserts that she should be eligible for MassHealth Standard because she meets a six-month deductible, as set forth in the September 1, 2023 notice. MassHealth regulations at 130 CMR 520.032, "Submission of Bills to Meet the Deductible," states as follows:

(A) Criteria. To establish eligibility by meeting a deductible, the individual must submit verification of medical bills whose total equals or exceeds the deductible and that meet the following criteria.

(1) The bill must not be subject to further payment by health insurance or other liable third-party coverage, including the Health Safety Net.

(2) The bill must be for an allowable medical or remedial-care expense in accordance with 130 CMR 520.032(B). A remedial-care expense is a nonmedical support service made necessary by the medical condition of the individual or the spouse.

(3) The bill must be unpaid and a current liability or, if paid, paid during the current six-month deductible period.

(4) Any bill or portion of a bill used to meet a deductible may not be applied to any other deductible period. However, any portion of a bill not used to meet the current deductible may be used in a future deductible period. The MassHealth agency will not pay any bills or portions of bills that are used to meet the deductible. These bills remain the responsibility of the applicant.

(B) Expenses Used to Meet the Deductible. The MassHealth agency applies bills to meet the deductible in the following order:

(1) Medicare and other health-insurance premiums credited prospectively for the cost of six months' coverage, deductibles, enrollment fees, or coinsurance charges incurred by the individual and the spouse including copayments imposed under 130 CMR 520.036;

(2) expenses incurred by the individual and the spouse for necessary medical and remedial care services that are recognized under state law but are not covered by MassHealth, including guardianship fees and related expenses as described in and allowed under 130 CMR 520.026(E)(3); and

(3) expenses incurred by the individual, a family member, or financially responsible relative for necessary medical and remedial-care services that are covered by MassHealth.

(C) Expenses That Cannot Be Used to Meet the Deductible. Expenses that may not be applied to meet the deductible include, but are not limited to, the following:

(1) cosmetic surgery;

(2) rest-home care;

(3) weight-training equipment;

(4) massage therapy;

(5) special diets; and

(6) room-and-board charges for individuals in residential programs.

(Emphases added)

It is not clear what portion of the appellant's monthly payment to DDS of 75% of her income may be considered remedial-care expenses, versus room-and-board charges. No breakdown of how the appellant's monthly income was applied to the DDS monthly fee was provided.

MassHealth may determine whether the appellant has met the six-month deductible once it receives evidence of the purposes for which the monthly amount the appellant pays to DDS is used.

It bears noting, however, that 130 CMR 519.007(D), "Home- and Community-based Services Waivers for Persons with an Intellectual Disability," provides three different waiver programs under which persons with an intellectual disability, such as the appellant, may access waiver services. The rules for these waiver programs state that, among other criteria, an applicant must have countable income that is less than or equal to 300% of the federal benefit rate (FBR) for an individual. It appears that the appellant's gross monthly income is well below this figure.⁶

Based on the preceding, and in the absence of a request for waiver services, however, there was no error in MassHealth's decision to change the appellant's coverage to Buy-In for SLMB from MassHealth CommonHealth, effective September 15, 2023.

This appeal is DENIED IN PART.

Order for MassHealth

Pay the appellant's Medicare Part B premium retroactive to April, 2023. Within sixty days of the date of this decision, obtain medical bills paid by the appellant (including any remedial-care expenses) and determine whether she has met the six-month deductible of \$5,922.00 to qualify for MassHealth Standard. Send written notice to the appellant apprising her whether she has met this deductible, with appeal rights.

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.

⁶ The federal benefit rate for an individual in 2023 is \$914.00 per month (see, <https://www.ssa.gov/ssi/text-understanding-ssi.htm> (last checked November 29, 2023)).

Implementation of this Decision

If this decision is not implemented within 60 days after the date of this decision, you should contact your local 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, Office of Medicaid, at the address on the first page of this decision.

Paul C. Moore
Hearing Officer
Board of Hearings

cc: Justine Ferreira, Appeals Coordinator, Taunton MEC