

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: Denied

Appeal Number: 2308496

Decision Date: 11/7/2023

Hearing Date: 10/19/2023

Hearing Officer: Sara E. McGrath

Appearances for Appellant:

Appellant;



Appearances for MassHealth:

Brad Goodier, RN, Disability Reviewer II;

Leanne R. Govoni, RN, Associate Director,
Clinical Eligibility, Disability and Community-
Based Services



*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	Issue:	Eligibility for Home- and Community-Based Services Waiver
Decision Date:	11/7/2023	Hearing Date:	10/19/2023
Appearances for MassHealth:	Brad Goodier, RN; Leanne Govoni, RN	Appearances for Appellant:	██████████
Hearing Location:	Board of Hearings (Remote)		

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 August 22, 2023, MassHealth notified the appellant that she is not eligible for participation in MassHealth's Moving Forward Plan Community Living Waiver (MFP-CL Waiver) (Exhibit 1). The appellant filed a timely appeal on September 18, 2023 (Exhibit 1). Denial of eligibility for a waiver program is a valid basis for appeal (130 CMR 610.032).

Action Taken by MassHealth

MassHealth determined that appellant is not eligible for participation in the MFP-CL Waiver.

Issue

The issue is whether MassHealth correctly determined that appellant is not eligible for participation in the MFP-CL Waiver because she cannot be safely served in the community within the terms of this waiver?

Summary of Evidence

MassHealth was represented at hearing by two registered nurses from its Waiver Unit, both of whom participated by phone and presented the following background information: MassHealth offers two home- and community-based MFP service waivers, the MFP-RS Waiver and the MFP-CL Waiver. Both waivers help individuals move from a nursing facility or long-stay hospital to an MFP-qualified residence in the community and obtain community-based services. The MFP-CL Waiver is for individuals who can move into their own home or apartment, or to the home of someone else, and receive services in the community that are less than 24 hours per day, 7 days per week. The MFP-RS Waiver is for individuals who need supervision and staffing 24 hours per day, 7 days per week. The appellant applied for the MFP-CL Waiver on May 17, 2023.

The following are the criteria for the MFP Waivers:

- The applicant must be living in a nursing facility or long-stay hospital, and lived there for at least 90 consecutive days;
- The applicant must be 18 years old or older, and have a disability, or be age 65 and older;
- The applicant must meet the clinical requirements for, and be in need of the waiver services that are available through the MFP Waivers;
- The applicant must be able to be safely served in the community within the terms of the MFP Waivers;
- The applicant must meet the MassHealth financial requirements including the special financial rules for waiver participants;
- The applicant will transition to an MFP-qualified residence in the community; and
- For the MFP-RS Waiver, the applicant must need residential support services with staff supervision 24 hours per day, 7 days per week.

In this case, MassHealth evaluated whether appellant meets the eligibility criteria for the MFP-CL Waiver and determined that she is not eligible for this waiver program because she cannot be safely served in the community within the terms of the waiver.

MassHealth offered the following testimony in support of its position: The appellant is a female in her late [REDACTED] with a past medical history of a left middle cerebral artery stroke ([REDACTED] 2022), right sided weakness, receptive and expressive aphasia (loss of ability to understand or express speech), dysphagia (difficulty swallowing) with percutaneous endoscopic gastrostomy (PEG) tube, dissection of the carotid artery, hypertension, hyperlipidemia, pre-diabetes, urinary tract infection with hematuria, cystitis, and lumbosacral spondylosis. She was living independently in her apartment in [REDACTED] when she contracted COVID-19 in [REDACTED] 2022. On [REDACTED] 2022, she was brought to the emergency department at [REDACTED]. While there, she developed altered mental status and fell. Imaging revealed left internal carotid artery occlusion and a left middle cerebral artery stroke believed to be a result of COVID-induced hypercoagulability. The appellant was intubated and

admitted to the intensive care unit, which was complicated by mixed shock requiring administration of pressors and transfer to the neurology intensive care unit, where she was also treated for a urinary tract infection. On [REDACTED] 2022, the appellant was extubated and on [REDACTED], 2022, a PEG tube was placed for nutrition. On [REDACTED], 2022, the appellant was transferred to [REDACTED]. On [REDACTED] 2023, after an acute rehabilitation course, the appellant was transferred to the skilled nursing facility where she currently resides.

On July 18, 2023, MassHealth conducted an in-person assessment for waiver eligibility at the skilled nursing facility where appellant was residing. The appellant, her sister and a MassHealth nurse reviewer were in attendance. MassHealth reviewed the appellant's medical record and consulted with nursing facility and rehabilitation hospital staff. In its assessment, MassHealth noted the following events and episodes as examples of appellant's medical complexities and as support for its conclusion that she cannot be safely served in the community:

- March 6, 2023: [REDACTED] progress note by [REDACTED], Director of Nursing, provides as follows regarding the appellant: "Totally dependent and full assist with feeding. Poor appetite. Continues on fortified diet, supplements, tube feeding, will consult with dietician for questionable increase of tube feed." (Exhibit 3, p. 134).
- March 9, 2023: [REDACTED] progress note by [REDACTED], Dietician, indicates that the appellant presents with fluctuations in weight loss as well as poor oral intake. Her current diet is puree solids/thin liquids, with tube feed supplementation to support unintended weight loss (Exhibit 3, pp. 133-134).
- March 16, 2023: [REDACTED] progress note by [REDACTED], LPN, states as follows: "Staff were called by roommate to the room to report fall, upon arrival nursing staff saw resident lying on the floor. . . ." (Exhibit 3, p. 132).
- April 21, 2023: [REDACTED] progress note by [REDACTED], Director of Nursing, indicates that the appellant's health care proxy asked that tube feed be discontinued related to patient's poor appetite due to bolus feeding. Due to weight loss, Nurse Practitioner recommending increasing bolus feedings (Exhibit 3, p. 104).
- April 28, 2023: [REDACTED] progress note by [REDACTED], Director of Nursing, indicates that the appellant is not tolerating bolus tube feeds overnight. It is then documented that the appellant's sister/HCP stated, "I don't care if she loses weight, I take full responsibility" (Exhibit 3, p. 94).
- January 12, 2023 – June 15, 2023: [REDACTED] Activities of Daily Living flowsheets indicates that the appellant needs staff assistance with the following activities of daily living (ADLs) and instrumental activities of daily living (IADLs) (Exhibit 3, pp. 228-298):
 - Bed Mobility
 - Out of bed mobility

- Transfers
 - Incontinence care
 - Dressing
 - Bathing and grooming
 - Eating
- July 28, 2023: [REDACTED] physical therapy progress note by [REDACTED], physical therapist, indicates that the appellant refused out of bed activity today by shaking her head. Physical therapy was able to complete in bed therapy, which required minimum to moderate assist to sit at the edge of bed. [REDACTED] then indicates that ½ stands were attempted to improve sit to stand exercises, however unable to offload hips without support. The appellant was then transferred from sitting on the edge of the bed to a supine position with assistance from physical therapy (Exhibit 3, p. 319).

On August 4, 2023, the MassHealth Waiver Clinical Team discussed appellant's case at a review meeting. In addition, on August 10, 2023, a second clinical review was conducted by The Massachusetts Rehabilitation Commission (MRC) Clinical Team. MassHealth and MRC both determined that the appellant is not clinically eligible for participation in the MFP-CL Waiver. The teams determined that because the appellant requires 24/7 care and supervision due to impaired cognition/hemiparesis, and also requires assistance with all of her ADLs, she will not be safe residing alone in her apartment. The MassHealth representatives provided further detail and explained that the appellant will be at risk for weight loss and malnutrition related to the inability to tolerate tube feeding supplements and her dysphagia diagnosis; at risk for aspiration related to her dysphagia diagnosis; at risk for falls related to right sided hemiplegia and mobility deficits; at risk for bleeding related to anticoagulant therapy; at risk for bodily injury in the event of evacuation due to aphasia and reliance on others for mobility; at risk for self-care deficits related to hemiplegia and the inability to independently perform ADLs; and at risk for exploitation related to cognitive impairments. Further, the appellant's sister is at risk for caregiver burnout. Because all of these safety risks exist, MassHealth determined that the appellant cannot be safely served within the terms of the MFP-CL Waiver. On August 22, 2023, MassHealth notified appellant of its denial of her application (Exhibit 1).

The appellant and her sister appeared at the hearing by phone. The appellant's sister, who is in her [REDACTED], testified on behalf of her sister, and stated that she disputes the MassHealth determination that her sister cannot be safely served in the community. She explained that the appellant is no longer at the nursing facility; she was discharged [REDACTED] ago, and has been doing fine in her apartment since that time. She stated that she and the appellant live in the same building, and previously lived on different floors. Prior to her discharge, the appellant relocated to a handicapped apartment directly across the hall from her sister. The sister explained that although she has not let go of her apartment, she has moved in with her sister and provides care for her. She has moved her clothes into a closet in the appellant's apartment and sleeps in the bedroom. The appellant's sister provides some occupational therapy services to her sister, but has been told that she cannot perform physical therapy exercises with her or help her with standing.

The appellant's sister testified that the appellant does not need 24/7 care or supervision; she has been feeding herself since March and no longer has a PEG tube. She can swallow pills and sleeps well. She has good days and other days when she is confused. The sister stated that the appellant's main problem is that she cannot speak in sentences. The appellant's sister helps the appellant out of bed and with dressing, and pointed out that changing the appellant's diaper is difficult for her. She explained that her sister has started both physical and occupational therapy, and that speech therapy will start soon. Visiting nurses come twice per week, and the Visiting Angels come when the sister needs to leave the apartment for an appointment or to run an errand. The appellant's sister is working to get more services in place, but feels that the waiver program would be best for the appellant. She noted that there is a fire station around the corner in case of an emergency, and a nurse practitioner in the building.

The MassHealth representatives responded, and stated that the services available through the waiver program cannot duplicate the care that the appellant received in the nursing facility. At most, the various services provided (such as nursing services and personal care attendant services) would total 12 hours per day, which is less than the appellant requires. Further, staffing shortages and weather issues could leave the appellant alone and unsafe for periods of time. They noted that the appellant's sister still has her own apartment and thus does not officially reside with the appellant, raising concern that the appellant could be alone for periods of time. Further, while MassHealth believes that the appellant's sister provides valuable support and assistance, her age likely renders her unable to provide the physical support the appellant needs. In support of this point, they referenced the sister's comment that she is not permitted to help her sister with standing.

Findings of Fact

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

1. The appellant is a female in her [REDACTED].
2. The appellant has a past medical history of a left middle cerebral artery stroke ([REDACTED] 2022), right sided weakness, receptive and expressive aphasia (loss of ability to understand or express speech), dysphagia (difficulty swallowing) with PEG tube, dissection of the carotid artery, hypertension, hyperlipidemia, pre-diabetes, urinary tract infection with hematuria, cystitis, and lumbosacral spondylosis.
3. In [REDACTED] 2022, appellant fell while at a local hospital's emergency department, resulting in the following chronology:
 - a. Imaging revealed left internal carotid artery occlusion and a left middle cerebral artery stroke believed to be a result of COVID-induced hypercoagulability.
 - b. The appellant was intubated and admitted to the intensive care unit, which was complicated by mixed shock requiring administration of pressors and transfer to

the neurology intensive care unit, where she was also treated for a urinary tract infection.

- c. On [REDACTED] 2022, the appellant was extubated and on [REDACTED], 2022, a PEG tube was placed for nutrition.
 - d. On [REDACTED], 2022, the appellant was transferred to [REDACTED].
 - e. On [REDACTED], 2023, after an acute rehabilitation course, the appellant was transferred to a skilled nursing facility in [REDACTED].
 - f. On or about [REDACTED] 2023, the appellant was discharged home.
4. On May 17, 2023, the appellant applied for the MFP-CL Waiver.
 5. On July 18, 2023, MassHealth conducted an in-person assessment for waiver eligibility at the skilled nursing facility where appellant was residing; MassHealth reviewed the appellant's medical record and consulted with nursing facility and rehabilitation hospital staff.
 6. MassHealth noted the following events and episodes as examples of appellant's medical complexities and as support for its conclusion that she cannot be safely served in the community:
 - a. March 6, 2023: [REDACTED] progress note by [REDACTED], Director of Nursing, provides as follows regarding the appellant: "Totally dependent and full assist with feeding. Poor appetite. Continues on fortified diet, supplements, tube feeding, will consult with dietician for questionable increase of tube feed."
 - b. March 9, 2023: [REDACTED] progress note by [REDACTED], Dietician, indicates that the appellant presents with fluctuations in weight loss as well as poor oral intake. Her current diet is puree solids/thin liquids, with tube feed supplementation to support unintended weight loss.
 - c. March 16, 2023: [REDACTED] progress note by [REDACTED], LPN, states as follows: "Staff were called by roommate to the room to report fall, upon arrival nursing staff saw resident [REDACTED] lying on the floor. . . ."
 - d. April 21, 2023: [REDACTED] progress note by [REDACTED], Director of Nursing, indicates that the appellant's health care proxy asked that tube feed be discontinued related to patient's poor appetite due to bolus feeding. Due to weight loss, Nurse Practitioner recommending increasing bolus feedings.
 - e. April 28, 2023: [REDACTED] progress note by [REDACTED], Director of Nursing, indicates that the appellant is not tolerating bolus tube feeds overnight. It is then documented that the appellant's sister/HCP stated, "I don't care if she loses weight, I take full responsibility."
 - f. January 12, 2023 – June 15, 2023: [REDACTED] Activities of Daily Living flowsheets indicates that the appellant needs staff assistance with the following ADLs and IADLs:
 - Bed Mobility

- Out of bed mobility
 - Transfers
 - Incontinence care
 - Dressing
 - Bathing and grooming
 - Eating
- g. July 28, 2023: [REDACTED] physical therapy progress note by [REDACTED], physical therapist, indicates that the appellant refused out of bed activity today by shaking her head. Physical therapy was able to complete in bed therapy, which required minimum to moderate assist to sit at the edge of bed. [REDACTED] then indicates that ½ stands were attempted to improve sit to stand exercises, however unable to offload hips without support. The appellant was then transferred from sitting on the edge of the bed to a supine position with assistance from physical therapy.
7. The appellant needs 24/7 care and supervision.
8. On August 22, 2023, MassHealth notified the appellant of its denial of her application for participation in the MFP-CL Waiver.
9. On September 18, 2023, the appellant timely appealed MassHealth's determination.

Analysis and Conclusions of Law

The MFP home-and community-based services waivers are described at 130 CMR 519.007(H). In this case, the appellant seeks eligibility for the MFP-CL Waiver. The requirements for the MFP-CL Waiver are set forth below as follows:

(2) Money Follows the Person (MFP) Community Living Waiver.¹

(a) Clinical and Age Requirements. The MFP Community Living Waiver, 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, chronic disease or rehabilitation hospital services, or, for participants 18 through 21 years of age or 65 years of age and older, psychiatric hospital services to receive specified waiver services, other than residential support services in the home or community, if he or she meets all of the following criteria:

1. is 18 years of age or older and, if younger than 65 years old, is totally and permanently disabled in accordance with Title XVI standards;

¹ Although "MFP" now stands for Moving Forward Plan, the applicable regulations still reference Money Follows the Person.

2. is an inpatient in a nursing facility, chronic disease or rehabilitation hospital, or, for participants 18 through 21 years of age or 65 years of age and older, psychiatric hospital with a continuous length of stay of 90 or more days, excluding rehabilitation days;
3. must have received MassHealth benefits for inpatient services, and be MassHealth eligible at least the day before discharge;
4. needs one or more of the services under the MFP Community Living Waiver;
5. is able to be safely served in the community within the terms of the MFP Community Living Waiver; and
6. is transitioning to the community setting from a facility, moving to a qualified residence, such as a home owned or leased by the applicant or a family member, an apartment with an individual lease, or a community-based residential setting in which no more than four unrelated individuals reside.

(b) Eligibility Requirements. In determining eligibility for MassHealth Standard and for these waiver services, the MassHealth agency counts the income and assets of only the applicant or member regardless of his or her marital status. The applicant or member must

1. meet the requirements of 130 CMR 519.007 (H)(2)(a);
2. have countable income that is less than or equal to 300 percent of the federal benefit rate (FBR) for an individual;
3. have countable assets of \$2,000 or less; and
4. not have transferred resources for the purpose of obtaining MassHealth, as described in 130 CMR 520.018: *Transfer of Resources Regardless of Date of Transfer* and 520.019: *Transfer of Resources Occurring on or after August 11, 1993*.

(c) Enrollment Limits. Enrollment in the MFP Community Living Waiver is subject to a limit on the total number of waiver participants. The number of participants who can be enrolled in this waiver may be limited in a manner determined by the MassHealth agency.

(d) Waiver Services. Eligible members who are enrolled as waiver participants in the MFP Community Living Waiver are eligible for the waiver services described in 130 CMR 630.405(D): *Money Follows the Person Community Living (MFP-CL) Waiver*.

(130 CMR 519.007(H)(2)).

MassHealth evaluated the appellant's eligibility for services under this waiver and determined that she is not able to be safely served in the community within the terms of the waiver (130

CMR 519.007(H)(2)(a)(5). On this record, the appellant has not demonstrated otherwise. At the time of the assessment, the appellant was still residing at the nursing facility. As of the hearing date, however, the appellant had transitioned to her apartment and had been living there for [REDACTED]. The appellant's sister provided details about the appellant's progress, including her participation in both physical and occupational therapy, as well as her ability to feed herself. The appellant's sister also explained that she has effectively moved in with her sister and provides care when other professional staff are not present. While these efforts are certainly commendable and likely extremely beneficial, they fall short of ensuring that the appellant receives the level of care and supervision that she needs.

The record supports MassHealth's position that without 24/7 care and supervision, the appellant is at risk for weight loss and malnutrition related to her dysphagia diagnosis; at risk for aspiration related to her dysphagia diagnosis; at risk for falls related to right sided hemiplegia and mobility deficits; at risk for bleeding related to anticoagulant therapy; at risk for bodily injury in the event of evacuation due to aphasia and reliance on others for mobility; at risk for self-care deficits related to hemiplegia and the inability to independently perform ADLs; and at risk for exploitation related to cognitive impairments. When medical professionals are not present in the apartment, her sister's presence likely mitigates some of these risks; the sister can perhaps monitor the appellant's nutrition and can protect her from some risks related to her decreased cognition. Notwithstanding this valuable assistance, however, there is insufficient evidence to show that the sister, a woman in her [REDACTED], can effectively provide the physical assistance that the appellant needs to carry out her ADLs on a daily basis, and to provide immediate assistance in the event of a true emergency. The sister herself noted that she is not permitted to assist the appellant with anything related to physical therapy or standing.

The appellant has not demonstrated that she can be safely served in the community within the terms of the waiver. The current evidence confirms that appellant's medical issues, including hemiparesis, are complex, that her cognition is impaired, and that without 24/7 care and supervision, she is vulnerable and at-risk in the community.

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.

Sara E. McGrath
Hearing Officer
Board of Hearings

cc: Linda Phillips, RN, BSN, LNC-CSp
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