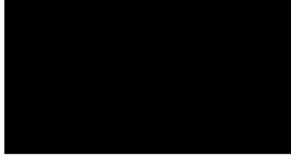


Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2310781
Decision Date:	12/14/2023	Hearing Date:	11/28/2023
Hearing Officer:	Paul C. Moore	Record Closed:	12/01/2023

Appellant Representatives:




MassHealth Representative:

Mary Davies, R.N., clinical reviewer, Optum (by telephone)



*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:	Prior Authorization, Adult Foster Care Services
Decision Date:	12/14/2023	Hearing Date:	11/28/2023
MassHealth Rep.:	Mary Davies, R.N.	Appellant Reps.:	
Hearing Location:	Board of Hearings (remote)		

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 October 19, 2023, MassHealth terminated the appellant's level 2 adult foster care (AFC) services and implemented level 1 AFC services for the appellant, effective October 19, 2023, due to a significant change request (Exh. 1). The appellant filed this appeal in a timely manner with the Board of Hearings (BOH) on November 1, 2023 (130 CMR 610.015(B); Exh. 2). Modification of a PA request is valid grounds for appeal (130 CMR 610.032)

Action Taken by MassHealth

MassHealth terminated the appellant's level 2 AFC services, and implemented level 1 AFC services for him, effective October 19, 2023.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 408.401, in determining that the appellant needs level 1 AFC services.

Summary of Evidence

MassHealth was represented at hearing by a Registered Nurse with Optum, the third-party contractor that adjudicates PA requests for AFC services on behalf of MassHealth (“MassHealth representative”). She testified that MassHealth received a PA request for level 1 adult foster care (“AFC”) services on behalf of the appellant on October 16, 2023, from Waystone Health and Human Services (“Waystone”). Previously, the appellant was receiving level 2 AFC services, effective January 14, 2023. The new PA request from Waystone was based on an in-home evaluation of the appellant conducted by a Waystone nurse that occurred on September 27, 2023, which documented a “significant change” in the appellant’s needs. MassHealth approved the PA request for level 1 AFC services for the appellant by notice dated October 19, 2023, and his level 2 AFC services were terminated on that date (Testimony, Exh. 1, Exh. 3).

The MassHealth representative testified the appellant is a [REDACTED] year-old MassHealth member who lives in the community, with his AFC provider. His diagnoses include a moderate intellectual disability, severe seizure disorder, and obesity. In the past, the Waystone nurse had documented that the appellant needed physical assistance with bathing and toileting, as well as management of wandering, verbally abusive behaviors, and socially inappropriate/disruptive behavioral symptoms (Exh. 3, pp. 12-13). The MassHealth representative testified that as of September, 2023, Waystone documented that the appellant now only needs cueing and supervision for toileting and bathing. This was a significant change in the appellant’s needs, according to the Waystone nurse, warranting a downgrade to level 1 AFC services (Testimony, Exh. 1). MassHealth therefore approved the requested downgrade to level 1 AFC services (*Id.*).

The MassHealth representative explained that under MassHealth regulations, and Guidelines for Medical Necessity Determination for AFC, in order to qualify for level 2 AFC services, a member must require hands-on, physical assistance with three activities of daily living (ADLs) (such as bathing, dressing/undressing, mobility, and toileting), or hands-on, physical assistance with two ADLs, plus management of member behaviors requiring frequent caregiver intervention, such as wandering, verbally abusive behaviors, physically abusive behaviors, socially inappropriate behaviors, or resisting care (Testimony, Exh. 3, p. 19). The MassHealth representative also explained that in order to qualify for level 1 AFC services, a member must require hands-on, physical assistance with one or two ADLs, or require cueing and supervision throughout one or more of these ADLs in order for the member to complete the activity (*Id.*).

In the appellant’s case, the October, 2023 re-evaluation request did not reflect that the appellant needs hands-on, physical assistance with any of his ADLs, but only requires cueing and supervision to complete toileting and bathing, together with behavioral management and redirection (Testimony, Exh. 3, p. 29).¹

The appellant’s AFC provider (who is also his appeal representative) testified by telephone that the

¹ The Waystone nurse documented that the appellant, following a seizure, may need some hands-on physical assistance with his ADLs, but noted that the appellant does not experience seizures every day (Exh. 3, p. 10).

appellant's condition has not improved within the last year, and that he still needs hands-on assistance with toileting hygiene, and with bathing. She stated that she assists the appellant with showering, and that she applies antifungal creams to him after he bathes. He has challenges with his personal hygiene, she testified. She noted that the Waystone nurse, when she evaluated the appellant in September, 2023, did not discuss these issues with her (his AFC provider). She disagrees with the documentation supporting the October, 2023 PA request, and asserted that the appellant still needs level 2 AFC services (Testimony).

The MassHealth representative stated that the AFC provider should discuss the results of the September, 2023 nursing re-evaluation with the Waystone nurse, and if appropriate, have a new evaluation of the appellant conducted by Waystone (Testimony).

With his request for a fair hearing, the appellant submitted an undated letter from his primary care physician, [REDACTED], which states in relevant part:

[The appellant] was seen in my office on 10/20/2023. It is in my medical opinion that [the appellant] has increased seizure activity, increased doses of chronic medications, and continued follow up through Neurology. It is in my medical opinion that he requires the same level of care that he has been receiving for the past 9 years through Waystone Human Health Services. If not, his medical and mental health would likely decline.

(Exh. 5)

At the close of the hearing, the hearing officer left the record of this appeal open for one week, or until December 3, 2023, for the appellant's appeal representative to submit a copy of a recent progress note from the appellant's neurologist attesting to the frequency of his seizures and the purported necessity of his level 2 AFC services (Exh. 6).

On December 1, 2023, the hearing officer received from the appellant's appeal representative, by e-mail, a copy of an October 30, 2023 progress note from [REDACTED], the appellant's neurologist, following an office visit he had with the appellant (Exh. 7). The progress note states in relevant part:

Topamax was increased after the visit of 7/24/2024 (*sic*) for the breakthrough seizure. [The appellant] came with his caregiver on 8/21/23 for followup. His caregiver reported that [the appellant] had no seizure recurrence since prior visit. He had no significant side effects from increased Topamax. [The appellant] came with his caregiver on 10/30/23 for followup. Hie (*sic*) caregiver reported that [the appellant] had three seizures in late 9/23. [The appellant] had progressive decline over the years. He needed more care due to cognitive impairment and intractable epilepsy with intermittent breakthrough seizures. Will increase Topamax for seizure. DMV regulations on driving, the side effects of medications including drowsiness and safety precautions were discussed. . . .

(*Id.*)

Findings of Fact

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

1. The appellant is a [REDACTED] year-old MassHealth member who lives in the community (Exh. 3).
2. The appellant's medical diagnoses include a moderate intellectual disability, severe seizure disorder, and obesity (Testimony, Exh. 3).
3. MassHealth received a PA request for level 1 adult foster care ("AFC") services on behalf of the appellant on October 16, 2023, from Waystone (*Id.*).
4. The PA request from Waystone was based on an in-home evaluation of the appellant by a Waystone nurse that occurred on September 27, 2023, which documented a "significant change" in the appellant's needs (*Id.*).
5. Previously, the appellant was receiving level 2 AFC services, effective January 14, 2023 (*Id.*).
6. MassHealth approved the PA request for level 1 AFC services for the appellant by notice dated October 19, 2023, and his level 2 AFC services were terminated on that date (Testimony, Exh. 1, Exh. 3).
7. As of September, 2023, Waystone documented that the appellant only needs cueing and supervision for toileting and bathing, and caregiver intervention due to his behaviors (*Id.*).
8. In order to qualify for level 2 AFC services, a member must require hands-on, physical assistance with three ADLs (such as bathing, dressing/undressing, mobility, and toileting), or hands-on, physical assistance with two ADLs, plus management of member behaviors requiring frequent caregiver intervention, such as wandering, verbally abusive behaviors, physically abusive behaviors, socially inappropriate behaviors, or resisting care (Testimony, Exh. 3, p. 19).
9. In order to qualify for level 1 AFC services, a member must require hands-on, physical assistance with one or two ADLs, *or* require cueing and supervision throughout one or more of these ADLs in order for the member to complete the activity (*Id.*).
10. The October, 2023 re-evaluation request did not reflect that the appellant needs hands-on, physical assistance with any of his ADLs, but only requires cueing and supervision to complete toileting and bathing, together with behavioral management and redirection (Testimony, Exh. 3, p. 29).

11. The appellant's AFC provider, with whom he lives, testified that he still needs hands-on assistance with toileting hygiene, and with bathing.
12. The appellant's AFC provider assists the appellant with showering, and applies antifungal creams to him after he bathes (Testimony).
13. The appellant submitted an undated letter from his primary care physician, [REDACTED], which states in relevant part: "[The appellant] was seen in my office on 10/20/2023. It is in my medical opinion that [the appellant] has increased seizure activity, increased doses of chronic medications, and continued follow up through Neurology. It is in my medical opinion that he requires the same level of care that he has been receiving for the past 9 years through Waystone Human Health Services. If not, his medical and mental health would likely decline" (Exh. 5).
14. During a record-open period following the hearing, the hearing officer received a copy of a progress note from the appellant's neurologist, [REDACTED] following an October 23, 2023 office visit, which states the following: "Topamax was increased after the visit of 7/24/2024 (*sic*) for the breakthrough seizure. [The appellant] came with his caregiver on 8/21/23 for followup. His caregiver reported that [the appellant] had no seizure recurrence since prior visit. He had no significant side effects from increased Topamax. [The appellant] came with his caregiver on 10/30/23 for followup. Hie (*sic*) caregiver reported that [the appellant] had three seizures in late 9/23. [The appellant] had progressive decline over the years. He needed more care due to cognitive impairment and intractable epilepsy with intermittent breakthrough seizures. Will increase Topamax for seizure. DMV regulations on driving, the side effects of medications including drowsiness and safety precautions were discussed. . . ." (Exh. 7).

Analysis and Conclusions of Law

According to MassHealth regulation 130 CMR 408.402, adult foster care is defined as:

a service ordered by a primary care provider delivered to a member in a qualified setting as described in 130 CMR 408.435 by a multidisciplinary team (MDT) and qualified AFC caregiver, that includes assistance with ADLs, IADLs, other personal care as needed, nursing oversight, and AFC care management, as described in 130 CMR 408.415(C).

MassHealth regulation 130 CMR 408.416 states in relevant part:

A member must meet the following clinical eligibility criteria for receipt of AFC.

(A) AFC must be ordered by the member's PCP.

(B) The member has a medical or mental condition that requires daily hands-on (physical) assistance or cueing and supervision throughout the entire activity in order for the member to successfully complete at least one of the following

activities:

- (1) Bathing - a full-body bath or shower or a sponge (partial) bath that may include washing and drying of face, chest, axillae (underarms), arms, hands, abdomen, back and peri-area plus personal hygiene that may include the following: combing or brushing of hair, oral care (including denture care and brushing of teeth), shaving, and, when applicable, applying make-up;
- (2) Dressing - upper and lower body, including street clothes and undergarments, but not solely help with shoes, socks, buttons, snaps, or zippers;
- (3) Toileting - member is incontinent (bladder or bowel) or requires assistance or routine catheter or colostomy care;
- (4) Transferring - member must be assisted or lifted to another position;
- (5) Mobility (ambulation) - member must be physically steadied, assisted, or guided during ambulation, or is unable to self-propel a wheelchair appropriately without the assistance of another person; and
- (6) Eating - if the member requires constant supervision and cueing during the entire meal, or physical assistance with a portion or all of the meal.

MassHealth regulation 130 CMR 408.419(D) establishes the conditions for an AFC provider to receive a level I service payment versus a level II service payment, as follows:

- (1) Level I Service Payment. The MassHealth agency will pay the level I service payment rate if a member requires hands-on (physical) assistance with one or two of the activities described in 130 CMR 408.416 or requires cueing and supervision throughout one or more of the activities listed in 130 CMR 408.416 in order for the member to complete the activity.
- (2) Level II Service Payment. The MassHealth agency will pay the level II service payment rate for members who require
 - (a) hands-on (physical) assistance with at least three of the activities described in 130 CMR 408.416; or
 - (b) hands-on (physical) assistance with at least two of the activities described in 130 CMR 408.416 and management of behaviors that require frequent caregiver intervention as described in 130 CMR 408.419(D)(2)(b)1. through 5.:
 1. wandering: moving with no rational purpose, seemingly oblivious to needs or safety;
 2. verbally abusive behavioral symptoms: threatening, screaming, or cursing at others;
 3. physically abusive behavioral symptoms: hitting, shoving, or scratching;
 4. socially inappropriate or disruptive behavioral symptoms: disruptive sounds, noisiness, screaming, self-abusive acts, disrobing in public, smearing or throwing food or feces, rummaging, repetitive behavior, or causing general disruption; or
 5. resisting care.

Here, the appellant had received level 2 AFC services in the past. In September, 2023, the agency that requested AFC services for him, Waystone, following an in-home evaluation,

documented that appellant needs no hands-on care, and only needs cueing and supervision for bathing and toileting, and redirection for management of member behaviors requiring frequent caregiver intervention. It was based on this purported change that the agency requested level 1 AFC services for the appellant.

MassHealth acted favorably on this request, granting level 1 AFC services effective October 19, 2023.

The testimony of the appellant's AFC provider, however, indicates that the appellant still needs hands-on, physical assistance with bathing and toileting. In addition, letters from the appellant's primary care doctor and his neurologist, respectively, appear to advocate for a continuation of level 2 AFC services.

In an appeal of agency decision, the appellant bears the burden of demonstrating that the agency's action is invalid or incorrect (Merisme v. Board of Appeals of Motor Vehicle Liability Policies and Bonds, 27 Mass. App. Ct. 470, 474 (1989)).

Here, MassHealth acted on the level 1 AFC services request submitted by Waystone. The appellant argued that the PA request from Waystone was erroneous. However, MassHealth simply acted on the best information it had at the time of the request, and approved level 1 AFC services for the appellant.

There was no error in MassHealth's decision.

As discussed at hearing, if the appellant believes the request for level 1 AFC services was in error, he should work with Waystone to have another in-person evaluation of his care needs. If appropriate, Waystone may submit a new PA request to MassHealth with a more accurate depiction of the appellant's needs, and MassHealth can make a new decision.

However, for the above reasons, at this time, the appeal must be 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.

Paul C. Moore
Hearing Officer
Board of Hearings

cc: Optum appeals coordinator, P.O. Box 159108, Boston, MA 02215