

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2311407
Decision Date:	3/13/2024	Hearing Date:	12/15/2023
Hearing Officer:	Alexandra Shube	Record Open to:	02/02/2024

Appearance for Appellant:

Via telephone:



Appearance for MassHealth:

Via telephone:

James Lockwood, Quincy MEC



*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:	Approved	Issue:	Long Term Care – disqualifying transfer
Decision Date:	3/13/2024	Hearing Date:	12/15/2023
MassHealth’s Rep.:	James Lockwood	Appellant’s Rep.:	
Hearing Location:	Quincy Harbor South 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 October 3, 2023, MassHealth denied the appellant's application for MassHealth benefits because MassHealth determined that the appellant gave away assets to become eligible for MassHealth and calculated a period of ineligibility from March 1, 2023 to November 25, 2023 (Exhibit 1). The appellant filed this appeal in a timely manner on November 6, 2023 (see 130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied the appellant’s application for MassHealth benefits because MassHealth determined that the appellant gave away assets to become eligible for MassHealth long-term care benefits and calculated a period of ineligibility from March 1, 2023 to November 25, 2023.

Issue

The appeal issue is whether MassHealth was correct in determining that the appellant improperly transferred or gave away assets to qualify for MassHealth benefits.

Summary of Evidence

The MassHealth representative and the appellant's attorney both appeared at hearing telephonically. The MassHealth representative testified as follows: on April 13, 2023, MassHealth received an application for long-term care benefits on behalf of the appellant, who is over the age of [REDACTED] and a resident in a nursing facility. The facility was looking for a coverage start-date of March 16, 2023. On October 3, 2023, MassHealth informed the appellant that she was not eligible for MassHealth benefits because she gave away or sold assets to become eligible for MassHealth long-term care services. MassHealth calculated a period of ineligibility from March 1, 2023 to November 25, 2023 due to a transfer that occurred on August 18, 2020. The appellant sold her home on August 12, 2020 with the intention of moving in with her daughter. She deposited the proceeds from the sale of her home (\$140,373.28) directly into her daughter's bank account. Some of the money was used for repairs and upgrades to the daughter's home, which MassHealth would consider a valid transfer if it was for the benefit of the appellant; however, \$115,011.93 of the proceeds were used to pay off the appellant's daughter's remaining mortgage. Since the appellant was not listed on the property deed and did not have any ownership interest in the property, MassHealth determined that the transfer of \$115,011.93 was a gift and a disqualifying transfer. Based on the daily nursing facility rate, MassHealth calculated a period of ineligibility from March 1, 2023 to November 25, 2023.

The appellant's attorney responded that there was no consideration given to applying for MassHealth long-term care coverage when the appellant transferred the proceeds to the daughter. She also argued that the appellant received fair market value for the \$115,011.93 that MassHealth is challenging. Initially, the plan was for the appellant's daughter and grandson to move into the appellant's home to help care for her. But due in part to concerns for the grandson's safety and the condition of the appellant's home, the plan changed and the appellant moved in with the daughter with the intention of staying there long-term. The daughter planned to care for the appellant in the community and by moving in with her daughter, the appellant would not need to pay for a private caregiver. The appellant's representative asked for additional time to submit a legal memorandum and supporting documentation. The record was initially held open until January 12, 2024 for the appellant and until January 19, 2024 for MassHealth, but at the request of the appellant, the record open period was extended until January 19, 2024 for the appellant and until February 2, 2024 for MassHealth.

The appellant's memorandum and supporting documentation explained the following: the appellant made the decision to move in with her daughter in March 2019 because she was not taking care of herself and her home, and had been dealing with the aftermath of a severe bacterial infection. At the time, she was only [REDACTED] years-old, and she and her daughter expected that once the appellant was receiving care and assistance in a healthy environment, she would stabilize and live with them for at least the next ten years. Based on medical records and an affidavit provided, the appellant was relatively healthy and stable from April 2019 until the fall of 2021. In the fall of 2021,

her health began to decline. In the summer of 2022, she was diagnosed with congestive heart failure and kidney disease. In October 2022, she was diagnosed with kidney failure and had to start dialysis. In December 2022, she contracted COVID-19 and was hospitalized. She was discharged to a rehabilitation center but did not improve enough to be able to return home and was transitioned to long-term care.

Prior to her health declining, when the appellant first moved into her daughter's home, she did not have a lot of extra money saved in the bank. Rather than pay her daughter rent and a monthly income for the care she provided, they decided that when the appellant sold her home, she would pay off her daughter's mortgage and pay for certain needed repairs and maintenance. The house was sold on August 12, 2020, prior to her health declining, and the appellant deposited the proceeds into the daughter's bank account on August 14, 2020. Of those funds, MassHealth disputes the \$115,011.93 used to pay off the mortgage. MassHealth determined that the portion of the funds used for repairs and upgrades to the home were valid because they were for the appellant's benefit.

On [REDACTED], the appellant and her daughter entered into a personal caregiver agreement which stated that the appellant would pay her daughter for caregiving services and to assist with her daily activities as her health needs progress. Services would include, but were not limited to, providing lodging, utilities, laundry, housekeeping, meals, transportation to and from medical appointments, assisting with personal needs such as showering, bathing, dressing, hair care, daily exercise, shopping, and paying bills. The appellant would pay the daughter \$18 per an hour for her services, and the appellant also agreed to pay for additional household expenses as a result of her moving in with her daughter. The appellant also agreed to assist with payments towards the mortgage and utilities in lieu of paying monthly rent.

From late April 2019 to December 2019, the daughter spent on average 3.5 hours each day providing caregiver services to the appellant, and an additional 6 hours on the weekends doing laundry and cleaning, totaling about 129 hours per month. At a rate of \$18 per hour, this equals \$2,322 per month, or \$18,576 for the eight-month period of May to December 2019. From January 2020 to December 2021, the daughter spent on average 4.5 hours each day providing caregiver services and an additional 6 hours on weekends doing laundry and cleaning. At a rate of \$18 per hour, this equals \$2,862 per month, or \$34,344 per year. For that two-year period, from January 2020 to December 2021, the total amount in services would have been \$68,688. From January 2022 to December 2022, the daughter spent on average 6 hours each day providing caregiver services and an additional 6 hours on the weekends doing laundry and cleaning, or about 204 hours per month. At a rate of \$18 per hour, this equals \$3,672 per month, or \$44,064 for the one-year period from January 2022 to December 2022.

The appellant's attorney broke down the total amounts for caregiver services and household expenses as follows: caregiver services May 2019 to December 2022 at \$18 per hour totaled

\$131,328;¹ one-fifth share of property tax January 2021 to December 2022 totaled \$2,171; utilities from July 2020 to December 2022 at \$20 per month totaled \$600; and power of attorney services provided by the daughter to the appellant at \$20 per hour from April 2023 to January 2024 totaled \$900. In sum, the total amount due and owing from the appellant to her daughter totaled \$134,999, well in excess of the \$115,011.93 in question.

The appellant's attorney argued that there is objective evidence that the appellant received fair market value for the \$115,011.93 that MassHealth is challenging. Pursuant to the Caregiver Agreement, the appellant received a level of care and services from her daughter comparable to the level of care that would be provided by a personal care attendant (PCA) participating in the MassHealth PCA program. The appellant's daughter was essentially a full-time, live-in caregiver. The daughter met the appellant's needs and allowed the appellant to remain in the community. The Caregiver Agreement satisfies the MassHealth transfer regulation. It is an enforceable contract supported by adequate consideration. It specifies the services to be provided and the rate of compensation to be paid. The appellant's daughter committed her time and resources to providing services to her mother, and also incurred additional household expenses while caring for her.

The appellant's attorney also argued that while the \$115,011.93 payment of the mortgage on August 18, 2020 could be considered a transaction involving future performance, it is not a disqualifying transfer of assets. The transaction has an ascertainable fair market value and it is embodied in a valid contract that is legally and reasonably enforceable. The provisions of 130 CMR 520.007(J)(4) apply to all future performance, whether or not some payments have been made or services performed.

The appellant's daughter provided 24-hour care to the appellant, but she only sought compensation for 3.5 hours per day in 2019, 4.5 hours per day in 2020 and 2021, and 6 hours per day in 2022, plus 6 hours each week for housekeeping services. Based on the rate the appellant's daughter received and the hours spent caring for her mother, the appellant received fair market value in return for the cash assets she spent. Alternatively, at the time that the Caregiver Agreement was entered into, the appellant was not seeking or considering MassHealth assistance. The intent of the appellant and her daughter was that once the appellant was receiving care and assistance in a health environment, she would stabilize and live with the daughter long-term (at least ten years). When the appellant provided funds to pay off the mortgage, it was done so that the daughter would not have to worry about working multiple jobs while also trying to care for her mother. Thus, even if a transfer could be shown, it would not have been a disqualifying transfer pursuant to the intent exception set forth at 130 CMR 520.019(F).

¹ The appellant's attorney provided the Genworth Cost of Care Survey to show the 2018 average hourly rate for homemaker service was \$25.75/hour and \$27.10/hour for a home health aide. Per the same survey, in Massachusetts, the average monthly costs for an assisted living facility was \$5,495 in 2018.

Upon review of the appellant's memorandum and supporting documentation, MassHealth responded that because the appellant was not listed on the deed and does not have any other ownership in the property, the MassHealth decision that a disqualifying transfer was made was correct, based on MassHealth regulations.

Findings of Fact

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

1. On April 13, 2023, MassHealth received an application for long-term care benefits on behalf of the appellant, who is over the age of 65 and a resident in a nursing facility (Testimony and Exhibit 5).
2. The facility requested a coverage start-date of March 16, 2023 (Testimony and Exhibit 8).
3. On October 3, 2023, MassHealth notified the appellant that she was not eligible for MassHealth benefits because she gave away or sold assets to become eligible for MassHealth long-term care services (Testimony and Exhibit 1).
4. MassHealth calculated a period of ineligibility from March 1, 2023 to November 25, 2023 due to a transfer that occurred on August 18, 2020 (Testimony and Exhibit 5).
5. On November 6, 2023, the appellant timely appealed the denial notice (Exhibit 2).
6. The appellant sold her home on August 12, 2020 and transferred the proceeds of the sale (\$140,373.28) into her daughter's bank account on August 14, 2020 (Testimony and Exhibits 5 and 7).
7. Some of the funds were used for repairs and upgrades in the daughter's home, where the appellant was living, and MassHealth considered those a valid transfer because they were for the appellant's benefit (Testimony and Exhibit 5).
8. On August 18, 2020, the appellant's daughter paid off her mortgage with \$115,011.93 of the funds transferred to her by the appellant (Testimony and Exhibits 5 and 7).
9. Because the appellant was not on the deed and did not have any ownership interest in the property, MassHealth determined that the \$115,011.93 used to pay off the daughter's mortgage was a gift and a disqualifying transfer (Testimony and Exhibit 5).
10. The appellant moved in with her daughter in March 2019 because she was not taking care of herself or her home (Testimony and Exhibit 7).

11. The appellant was dealing with a bacterial infection, but was otherwise in good health and only [REDACTED] years-old. The appellant and her daughter believed that with appropriate care and assistance in a healthy environment, she would stabilize and be able to live with her daughter for a long time (at least the next ten years). (Exhibit 7).
12. On [REDACTED], the appellant and her daughter entered into a personal caregiver agreement which stated that the appellant would pay her daughter for caregiving services and to assist with her daily activities as her health needs progressed. The appellant would pay the daughter \$18 per an hour for her services, and the appellant also agreed to pay for additional household expenses as a result of her moving in with her daughter. The appellant also agreed to assist with payments towards the mortgage and utilities in lieu of paying monthly rent. (Exhibit 7).
13. In sum, the total amount that was due and owing from the appellant to her daughter for the caregiver services and household expenses totaled \$134,999, broken down as follows:

Service/Expense	Amount
Caregiver Services: 05/2019 – 12/2022 at \$18/hour	\$131,328.00
1/5 share of property tax: 01/2021 – 12/2022	\$2,171.00
Utilities: 07/2020 – 12/2022 at \$20/month	\$600
POA Services: 04/2023 – 01/2024 at \$20/hour	\$900
TOTAL	\$134,999

(Exhibit 7).

14. The daughter provided care services for an average of 3.5 hours per day in 2019; 4.5 hours per day in 2020 and 2021; 6 hours per day in 2022; and 6 hours each week for housekeeping services (Exhibit 7).
15. The record in this appeal was held open until January 19, 2024 for the appellant to submit a legal memorandum, and until February 2, 2024 for MassHealth to review and respond (Exhibit 6).

Analysis and Conclusions of Law

MassHealth considers any transfer during the appropriate look-back period by the nursing-facility resident . . . of a resource, or interest in a resource, owned by or available to the nursing-facility resident . . . for less than fair-market value a disqualifying transfer unless listed as permissible in 130 CMR 520.019(D), identified in 130 CMR 520.019(F), or exempted in 130 CMR 520.019(J). A disqualifying transfer may include any action taken which would result in

making a formerly available asset no longer available. 130 CMR 520.019(C).

In addition to the permissible transfers described at 130 CMR 520.109(D), MassHealth will not impose a period of ineligibility for transferring resources at less than fair market value if the resident demonstrates to MassHealth's satisfaction that the resources were transferred exclusively for a purpose other than to qualify for MassHealth, or the resident intended to dispose of the resource at either fair market value or for other valuable consideration. 130 CMR 520.019(F). Under federal law, an applicant must make a heightened evidentiary showing on this issue: "Verbal assurances that the individual was not considering Medicaid when the asset was disposed of are not sufficient. Rather, convincing evidence must be presented as to the specific purpose for which the asset was transferred." Gauthier v. Dir., Office of Medicaid, 80 Mass. App. Ct. 777, 785 (2011) (citing State Medicaid Manual, Health Care Financing Administration Transmittal No. 64, § 3258.10(C)(2)).

As to transactions involving future performance, 130 CMR 520.007(J)(4) states as follows: Any transaction that involves a promise to provide future payments or services to an applicant, member, or spouse, including but not limited to transactions purporting to be annuities, promissory notes, contracts, loans, or mortgages, is considered to be a disqualifying transfer of assets to the extent that the transaction does not have an ascertainable fair-market value or if the transaction is not embodied in a valid contract that is legally and reasonably enforceable by the applicant, member, or spouse. This provision applies to all future performance whether or not some payments have been made or services performed.

MassHealth's position is that because the appellant was never on the deed and had no ownership in the property, the appellant's payoff of her daughter's mortgage was a gift and a disqualifying transfer; however, the appellant has provided sufficient documentation to show that the \$115,011.93 in question was not a disqualifying transfer. The caretaker agreement entered into in 2019 has an ascertainable fair market value, and it is embodied in a valid contract that is legally and reasonably enforceable. The agreement was undertaken exclusively for a purpose other than to qualify for MassHealth (the goal being to financially compensate her caretaker daughter while remaining home in the community, and receiving appropriate care and housing), and the appellant received fair market value for the monies paid to her daughter under the agreement.

The expenses (personal care services as well as a place to live) were incurred for the appellant's own care and tied to her personal needs. The record supports that the appellant received fair market value for the services, particularly in light of the caretaker agreement signed in [REDACTED], well before her admission to the long-term care facility, and at a time when the appellant and her daughter planned for the appellant to live with the daughter long-term. The daughter's compensation of \$18 per an hour is slightly below the average private rate for homemaker services and home health aides provided by the appellant's attorney, but it is commensurate with the MassHealth PCA rate which ranged between \$15.40 - \$17.71 per an hour from 2019 through

2022, which per 101 CMR 309.03(5)(b) is set by collective bargaining agreement.²

For these reasons, MassHealth incorrectly characterized the \$115,011.93 as a disqualifying transfer, and the appeal is approved.

Order for MassHealth

Rescind the MassHealth notice dated October 3, 2023, and re-determine the appellant's eligibility using the April, 2023 application date, in accordance with this decision and with no disqualifying transfer.

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.

Alexandra Shube
Hearing Officer
Board of Hearings

cc: MassHealth Representative: Quincy MEC, Attn: Tosin Adebisi, Appeals Coordinator, 100 Hancock Street, Quincy, MA 02171

[REDACTED]

² [Union/Training | Mass.gov; https://www.mass.gov/info-details/uniontraining#:~:text=Effective%20July%201%2C%202019%2C%20the,will%20be%20%2415.75%20per%20hour last visited March 13, 2024 and Administrative Bulletin 22-16.](https://www.mass.gov/info-details/uniontraining#:~:text=Effective%20July%201%2C%202019%2C%20the,will%20be%20%2415.75%20per%20hour last visited March 13, 2024 and Administrative Bulletin 22-16.)