

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2311950
Decision Date:	01/26/2024	Hearing Date:	1/23/2024
Hearing Officer:	David Jacobs		

Appearances for Appellant:



Appearances for MassHealth:

Linda Phillips, Associate Director of Appeals
Leanne Govoni, RN, Associate Director of
Clinical Eligibility



*Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
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APPEAL DECISION

Appeal Decision:	Denied	Issue:	Eligibility for Moving Forward Plan Waivers
Decision Date:	01/26/2024	Hearing Date:	1/23/2023
Appearances for MassHealth:	Linda Phillips, Leanne Govoni	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 notices dated November 14, 2023, MassHealth notified appellant that she is not eligible for participation in MassHealth's Moving Forward Plan Residential Supports Waiver (MFP-RS Waiver) or Moving Forward Plan Community Living Waiver (MFP-CL Waiver) (Exhibit 1). Appellant filed a timely appeal on November 21, 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-RS Waiver or the MFP-CL Waiver.

Issue

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

Summary of Evidence

MassHealth appeared at the hearing telephonically and was represented by the associate director of appeals (“director”) and a registered nurse. Appellant appeared at the hearing telephonically with the director of social services of the rehab center where she is residing (“social worker”).

The director testified that MassHealth has two HCBS Waivers that assist Medicaid-eligible persons move into the community and obtain community-based services; the MFP-RS Waiver, and the MFP-CL Waiver. Both waivers help individuals move from a nursing home 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/day, 7 days per week. The MFP-RS Waiver is for individuals who need supervision and staffing 24 hours/day, 7 days per week. The appellant applied for the MFP-CL Waiver on June 12, 2023 (Exhibit 5, pages 50-54) and the MFP-RS Waiver on August 23, 2023 (Exhibit 5, page 45).

Below are the eligibility criteria for the MFP Waivers (Exhibit 5, pages 6-7):

- 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 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 financial requirements to qualify for MassHealth special financial rules existing for Waivers’ participants;
- The applicant will transition to an MFP-qualified residence in the community; and
- In addition to the above, to qualify for the MFP-RS Waiver, an applicant must need residential support services with staff supervision 24 hours/day, 7 days/week.

At issue in this appeal is where the appellant can be safely served in the community within the terms of these Waivers?

The MassHealth representatives testified, in summary, as follows: The appellant is woman over age 65, currently residing at [REDACTED] after treatment at [REDACTED] for long standing

schizoaffective disorder, anxiety, and bipolar disorder. Records were not available of this hospitalization in [REDACTED]; however, the appellant stated that “she had been homeless and living in a campground” when police had brought her to [REDACTED] for evaluation. The appellant has previously applied five times for the MFP-CL, MFP-RS, and ABI-RH Waivers since 2019, but she was denied each due to medical and psychological instability. Currently, the appellant has applied for the MFP-RS and MFP-CL Waivers.

The appellant has a past medical history that includes Cerebral Infarction, Transient Ischemic Attack (TIA), Residual Left Sided Weakness Following Stroke, Combined Systolic and Diastolic (Congestive) Heart Failure, Chronic Obstructive Pulmonary Disease (COPD), Chronic Kidney Disease Stage IV, Atrial Fibrillation, Type II Diabetes Mellitus, Hypertension (HTN), Retention of Urine, Gastroesophageal Reflux Disease (GERD), Esophageal Stricture, Fibromyalgia, Benign Paroxysmal Vertigo, Glaucoma, Schizoaffective Disorder, Bipolar Disorder, Major Depressive Disorder, and Borderline Personality Disorder.

On October 10, 2023, an assessment for Waiver eligibility was conducted in person at [REDACTED]. In attendance were the appellant; [REDACTED], Social Worker (SW) and Marilyn Hart, RN, MassHealth Nurse Reviewer, representing the ABI/MFP Waiver program.

The Waiver assessment consists of completion of the following MFP documents: Minimum Data Set-Home Care (MDS-HC) (Exhibit C, pages 59-72); ABI/MFP Clinical Determination Assessment (Exhibit 5, pages 73-83); ABI/MFP Waivers Community Risks Assessment (Exhibit 5, pages 84-85); a review of the applicant’s medical record; and a discussion with the nursing facility staff.

Since her previous Waiver assessment in March 2022, the appellant has had one documented fall resulting in a right humerus fracture, she has had [REDACTED] ER evaluations and [REDACTED] hospital admissions. The following current waiver eligibility assessment from the in-person interview dated October 10, 2023, outlines frequent complex medical concerns and noncompliance in care:

- [REDACTED] states that the appellant was transferred to the Emergency Room as she was noted to be confused while eating with other [REDACTED] residents. A bystander at [REDACTED] witnessed a possible tonic-clonic seizure and EMS was called and she appeared confused, hypotensive, hypoxic and with normal glucose. EMTs were unable to start an IV due to combativeness by the appellant. At the hospital, she was able to be adequately treated and displayed signs of respiratory distress. The appellant was admitted to the hospital for IV antibiotics and respiratory distress due to Pneumonia. On [REDACTED], she was discharged back to [REDACTED] (Exhibit 5, pages 114-115, 125).
- [REDACTED] indicates that the appellant was admitted to the ER due to shortness of breath. At the ER, the appellant threatened to leave Against Medical Advice (AMA) but then she decided to stay. She was admitted due to respiratory exacerbation, but she was able to be

stabilized and returned to [REDACTED] (Exhibit 5, pages 127-128 and Exhibit 5, page 64).

- [REDACTED] states the appellant was admitted with shortness of breath, abdominal pain, and pain around spine. The appellant refused to participate in the interview at the hospital and repeatedly stated "leave me alone." Due to multiple symptoms, she was admitted to the hospital for possible Congested Heart Failure (CHF). The physician discussed code status with her and healthcare proxy, [REDACTED]. Code status was changed to DNR/DNI. MOLST form completed August 27, 2023, and palliative care was consulted during this admission. The appellant was discharged back to [REDACTED] on September 1, 2023 (Exhibit 5, pages 180 and 184).
- [REDACTED] note indicates that the social worker met with the appellant to complete consent forms for the MFP-CL Waiver application as she wishes to have her own apartment. "Resident lacks understanding of her complex medical needs as being a reason for her several denials to MFP-RS" (Exhibit 5, page 140).
- [REDACTED] indicates that the appellant was admitted because she was in respiratory distress and on 3L O2 in the ER. She states that she has not been using oxygen all the time, and she has right lower abdominal pain and swelling has increased in both lower extremities. The appellant was treated with diuretics and insulin was adjusted and she returned to the SNF (Exhibit 5, page 192 and Exhibit 5, page 65).

The appellant continues to be medically complex as evidenced by her several ER and hospital admissions this past year. The appellant is at risk for injury related to high-risk behaviors, history of a fall with an injury, and history of seizure and dependence for assistance with her activities of daily living (ADLs). The appellant has been non-compliant with the plans of care, diets, and has limited insight and judgement. In addition, the appellant lacks a live-in caregiver in the community and is at risk for mental decompensation related to several diagnoses and medication management (Exhibit 5, page 67).

On November 2, 2023, the appellant's case was discussed at the MassHealth Waiver Clinical Team review meeting which includes Massachusetts Rehabilitation Commission (MRC) and Department of Developmental Services (DDS). In addition, on November 8, 2023, as part of the MFP Waiver eligibility process, a second clinical review was conducted by the MRC Clinical Team. Based on medical record documentation, and interviews with nursing facility staff, MassHealth, MRC, and DDS determined that the appellant is a significant health and safety risk to herself and others and requires a higher level of medical support and supervision that cannot be provided by the MFP-CL or MFP-RS Waiver. Therefore, the team agreed that the appellant cannot be safely served in the community within the MFP-CL or MFP-RS Waiver. On November 14, 2023, denial notices for the MFP-CL and MFP-RS Waivers were mailed to the appellant (Exhibit 5, pages 46-47 and 55-56).

The appellant appeared during the hearing telephonically with a social worker from the facility where she resides. She conceded to the vast majority of MassHealth's testimony but took issue with three parts. First, the foot injury in March 2022 was due to her foot getting caught in her wheelchair, not a fall. Second, the quote: "Resident lacks understanding of her complex medical needs as being a reason for her several denials to MFP-RS" from September 9, 2023 should not be taken derogatorily. The quoted staff member intended to mean that the appellant was unclear why she was being denied the MFP-CL and MFP-RS waivers by MassHealth. Third, the appellant takes issue that MassHealth looked at her medical history beyond three months from the October 2023 assessment. However, she offered no regulatory authority limiting MassHealth to only look at medical history three months prior, and MassHealth denies such a regulation exists.

The appellant primarily focused her testimony on the fact that MassHealth is wrong to judge her as not being able to care for her medical needs. She emphasized that she has been dealing with health issues for 50 years now and knows how to care for herself. She testified that spends a lot of time socializing with other people and any behavior issues noted by MassHealth are exaggerated. She repeatedly stated that MassHealth's determination that she was hospitalized "a lot" is subjective and she believes she was only hospitalized as much was necessary for her. What is "a lot" for one person might not be so for the next. The hearing officer made note that this hearing was originally scheduled for December 26, 2023, but was rescheduled due to the appellant being hospitalized (Exhibit 4). The appellant responded that it's not her fault she needed to be hospitalized and reiterated she is hospitalized as much as she, an individual, needs.

When the appellant was questioned about her living situation before she resided at the rehab center, she testified that she lived in a trailer park but was evicted unfairly by the landlord along with other low-income families. When she was found by police at a campground, she testified she had just arrived and was not planning on staying long term. She testified that if she was granted the MFP-RS waiver she would be comfortable living in a group home. However, she preferred being granted the MFP-CS waiver as she was an independent person and preferred to live on her own. She testified that had researched housing and believed she could afford subsidized housing with her disability income. When questioned how she would take care of herself in that setting she replied that she was experienced with caring for herself and would have waiver services to support her. She needed the waiver services primarily to help her get started as she owns no furniture for a new apartment. She does not understand why MassHealth is keeping her at the facility.

The registered nurse representing MassHealth responded to the appellant's testimony noting that the evaluation for this waiver is a screenshot in time and if the appellant feels her health has changed, she can reapply. MassHealth decision was made primarily due to the medical instability represented by her documents that show she was hospitalized 15 times in the prior year. She noted that some of the appellant's medical concerns such as congestive heart failure require constant monitoring to maintain the appellant's safety. Furthermore, the appellant is not prohibited from moving out of the rehab center by this decision. If the facility feels

discharge is appropriate, there are other MassHealth and state programs the appellant can utilize to help her get started in the community.

To support her argument that she meets the eligibility requirements for the MFP waivers, the appellant supplied several letters from medical professionals and service staff from the facility where she is staying (Exhibit 6). All the letters support the appellant being found eligible for the MFP waiver program (Exhibit 6). In response, the registered nurse from MassHealth testified that she takes issue with the fact that although the letters support the appellant being eligible for the MFP waiver program, they offer no specifics that address MassHealth's concerns about her medical history. The letters say that the waiver program would generally be good for her, and the only mention of her health is that waiver services will be available to assist her (Exhibit 6). However, there are no specific mentions of the appellant's hospitalizations or her ability to care for specific medical conditions (Exhibit 6).

Findings of Fact

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

1. Appellant is a female over age 65.
2. Appellant has a past medical history that includes Cerebral Infarction, Transient Ischemic Attack (TIA), Residual Left Sided Weakness Following Stroke, Combined Systolic and Diastolic (Congestive) Heart Failure, Chronic Obstructive Pulmonary Disease (COPD), Chronic Kidney Disease Stage IV, Atrial Fibrillation, Type II Diabetes Mellitus, Hypertension (HTN), Retention of Urine, Gastroesophageal Reflux Disease (GERD), Esophageal Stricture, Fibromyalgia, Benign Paroxysmal Vertigo, Glaucoma, Schizoaffective Disorder, Bipolar Disorder, Major Depressive Disorder, and Borderline Personality Disorder.
3. The appellant entered the facility in [REDACTED].
4. The appellant has been hospitalized [REDACTED] times in the year prior to October 2023.
5. Appellant applied for the MFP-RS and MFP-CL Waivers on June 12, 2023.
6. On October 10, 2023, an assessment for Waiver eligibility was conducted in person at [REDACTED]. In attendance were the appellant; [REDACTED], Social Worker (SW) and Marilyn Hart, RN, MassHealth Nurse Reviewer, representing the ABI/MFP Waiver program.
7. During the Waiver eligibility assessment review, the following documentation indicates that the appellant cannot be safely served in the community with the terms of the MFP waiver:

- a. [REDACTED] states that the appellant was transferred to the Emergency Room as she was noted to be confused while eating with other SNF residents. A bystander at [REDACTED] witnessed a possible tonic-clonic seizure and EMS was called and she appeared confused, hypotensive, hypoxic and with normal glucose. EMTs were unable to start an IV due to combativeness by the appellant. At the hospital, she was able to be adequately treated and displayed signs of respiratory distress. The appellant was admitted to the hospital for IV antibiotics and respiratory distress due to Pneumonia. On [REDACTED], she was discharged back to [REDACTED].
- b. [REDACTED] indicates that the appellant was admitted to the ER due to shortness of breath. At the ER, the appellant threatened to leave Against Medical Advice (AMA) but then she decided to stay. She was admitted due to respiratory exacerbation, but she was able to be stabilized and returned to [REDACTED] on [REDACTED].
- c. [REDACTED] states that the appellant was admitted with shortness of breath, abdominal pain, and pain around spine. The appellant refused to participate in the interview at the hospital and repeatedly stated "leave me alone." Due to multiple symptoms, she was admitted to the hospital for possible Congested Heart Failure (CHF). The physician discussed code status with her and healthcare proxy, Paula. Code status was changed to DNR/DNI. MOLST form completed August 27, 2023, and palliative care was consulted during this admission. The appellant was discharged back to [REDACTED].
- d. [REDACTED] note indicates that the social worker met with the appellant to complete consent forms for the MFP-CL Waiver application as she wishes to have her own apartment. "Resident lacks understanding of her complex medical needs as being a reason for her several denials to MFP-RS."
- e. [REDACTED] Summary indicates that the appellant was admitted because she was in respiratory distress and on 3L O2 in the ER. She states that she has not been using oxygen all the time, and she has right lower abdominal pain and swelling has increased in both lower extremities. The appellant was treated with diuretics and insulin was adjusted and she returned to the SNF.

8. On December 26, 2023, a hearing was scheduled for this issue. The hearing was rescheduled when the facility called that day and reported that the appellant was hospitalized and could not attend.
9. The appellant submitted letters from medical professionals and staff from the facility where she resides in support of her eligibility for the MFP waivers. The letters do not address the appellant's hospitalizations or how she will be able to care for her specific medical conditions.
10. On November 14, 2023, MassHealth denied appellant's eligibility for both MFP-RS and CL waivers because "you cannot be safely served in the community within the terms of this waiver."

Analysis and Conclusions of Law

The instant appeal is governed by the MassHealth Regulations, specifically 130 CMR 519.007, which describes the eligibility requirements for MassHealth Standard coverage for individuals who would be institutionalized if they were not receiving home- and community-based services.

The criteria for the MFP Community Living Waiver, for which the Appellant has applied, is found within 130 CMR 519.007(H)(1) and (2):

(H) Money Follows the Person Home- and Community-based Services Waivers.

(1) Money Follows the Person (MFP) Residential Supports Waiver.

(a) Clinical and Age Requirements. The MFP Residential Supports Waiver, as authorized under § 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 or older, psychiatric hospital services to receive residential support services and other specified waiver services in a 24-hour supervised residential setting if they meet all of the following criteria:

1. are 18 years of age or older and, if younger than 65 years old, is totally and permanently disabled in accordance with Title XVI standards;
2. are 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 or 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. must be assessed to need residential habilitation, assisted living services, or shared living 24-hour supports services within the terms of

the MFP Residential Supports Waiver;

5. are able to be safely served in the community within the terms of the MFP Residential Supports Waiver; and

6. are 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 determines income eligibility based solely on 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)(1)(a);

2. have countable income that is less than or equal to 300% of the federal benefit rate (FBR) for an individual;

3. have countable assets of \$2,000 or less for an individual and, for a married couple if the initial Waiver eligibility determination was on or after January 1, 2014, have assets that are less than or equal to the standards at 130 CMR 520.016(B): Treatment of a Married Couple's Assets When One Spouse Is Institutionalized; and

4. not have transferred resources for less than fair market value, 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 Residential Supports 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 Residential Supports Waiver are eligible for the waiver services described in 130 CMR 630.405(C): Moving Forward Residential Supports (MFP-RS) Waiver.

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

(a) Clinical and Age Requirements. The MFP Community Living Waiver, as authorized under § 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 or 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; 130 CMR: DIVISION OF MEDICAL ASSISTANCE 519.007: continued

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 or 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. (*Emphasis added*)

MassHealth evaluated appellant's eligibility for services under both waivers and determined that she is not able to be safely served in the community within the terms of the waivers (130 CMR 519.007(H)(1)(a)(5) and (2)(a)(5)). The appellant has not demonstrated otherwise. MassHealth's primary concern is the medical instability documented in the record. The documentation presents the appellant as a person who is frequently hospitalized and has struggled at times to care for her various medical needs. The appellant responds to these concerns by testifying she has cared for her own medical issues for 50 years and does not believe that you can compare individuals when deciding what is "a lot" of hospitalizations. I will take each of these arguments in turn.

First, the appellant argues she has cared for her own medical issues for 50 years and is adept at doing so. However, as made evident by her frequent hospitalizations, there have been many times that the appellant's care exceeded by what she or a community caregiver can provide. The registered nurse for MassHealth provided the example of the appellant's congenital heart failure which requires constant monitoring that community caregivers cannot necessarily provide. Therefore, it is found that MassHealth was within its discretion to find these circumstances to mean that the appellant cannot be safely served in the community.

Second, the appellant argues that the [REDACTED] hospitalizations that occurred within a year of the assessment in October 2023 either cannot all be considered, or if they can, are not excessive. The appellant argues that MassHealth cannot look back more than three months from the date of the assessment but offers no regulatory support for this position. Therefore, it is found that MassHealth is within its discretion to look back farther than three months. As for the appellant's argument that [REDACTED] hospitalizations are not excessive, it is found that MassHealth was within its discretion to consider the many instances of hospitalizations when making its decision. The fact that the appellant has been hospitalized more than once a month suggests

that the appellant cannot be safely served in the community as her medical condition is severe. Moreover, it is noteworthy that while the appellant attempts to downplay the frequency of her hospitalizations, this very hearing had to be rescheduled due to the appellant being hospitalized.

Finally, the appellant submitted several letters from facility medical professionals and staff in support of her being found eligible for the MFP waivers. It is found that MassHealth was within its discretion to not alter its determination in response to these letters. MassHealth's registered nurse testified that the letters do not address any of MassHealth concerns. They say the appellant will do well in the community but make no mention of her frequent hospitalizations or specific ability to care for her medical conditions. While the letters do have some persuasive value considering that some are from medical professionals, they are conclusory in nature and do not provide any information that specifically rebuts or addresses MassHealth's concerns. As it has been found that MassHealth was in its discretion to deny the appellant because of these concerns, it follows that the submitted letters that do not address them are not enough for a finding that MassHealth abused its discretion.

The record supports MassHealth's conclusion that the appellant is at risk for injury related to high-risk behaviors, history of a fall with an injury, and history of seizure and dependence for assistance with her activities of daily living (ADLs). Further, she has been non-compliant with the plans of care, diets, and has limited insight and judgement. In addition, the appellant lacks a live-in caregiver in the community and is at risk for mental decompensation related to several diagnoses and medication management. The facts all support MassHealth's determination, and the appellant has not demonstrated otherwise.

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.

David Jacobs

Hearing Officer
Board of Hearings

cc:

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