

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved in Part	Appeal Number:	2312908
Decision Date:	2/21/2024	Hearing Date:	01/11/2024
Hearing Officer:	Susan Burgess-Cox	Record Open to:	01/31/2024

Appearance for Appellant:



Appearance for MassHealth:

Linda Phillips, Leanne Govoni & Anne Arlig-Camejo



*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 in Part	Issue:	Prior Authorization
Decision Date:	2/21/2024	Hearing Date:	01/11/2024
MassHealth's Reps.:	Linda Phillips et. al.	Appellant's Rep.:	
Hearing Location:	All Parties Appered Virtually Utilizing Microsoft Teams		

Authority

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

Jurisdiction

Through four notices dated October 10, 2023, MassHealth informed the appellant that he is not clinically eligible for the following waivers: Acquired Brain Injury Residential Waiver (ABI-RH Waiver); Acquired Brain Injury Non-Residential Habilitation Waiver (ABI-N Waiver); Moving Forward Plan Residential Supports Home- and Community – Based Services Waiver (MFP-RS Waiver); and Moving Forward Plan Community Living Home -and Community-Based Services Waiver (MFP-CL Waiver). (Exhibits 1A-1D). Each decision was based upon a finding that the appellant could not be safely served in the community within the terms of the waiver. (130 CMR 519.007(G)(1); 519.007(G)(2); 130 CMR 519.007(H)(1); 519.007(H)(2)). The appellant's Health Care Proxy filed a timely appeal on December 8, 2023. (130 CMR 610.004; 130 CMR 610.15; Exhibit 2; Exhibit 3). A decision regarding the scope or amount of assistance is valid grounds for appeal. (130 CMR 610.032).

At the request of the parties, the record was held open to provide the appellant with the opportunity to review and respond to MassHealth's submission and submit any additional evidence or arguments. (Exhibit 6). Approving this request extended the decision due date to April 4, 2024.

Action Taken by MassHealth

MassHealth notified the appellant that he is not eligible for the ABI-RH Waiver; ABI-N Waiver; MFP-RS Waiver; and MFP-CL Waiver. (130 CMR 519.007(G)(1); 519.007(G)(2); 130 CMR 519.007(H)(1); 519.007(H)(2)).

Issue

Whether MassHealth was correct in their decision regarding the appellant's eligibility for the ABI-N Waiver; ABI-RH Waiver; MFP-RS Waiver; and MFP-CL Waiver Program.

Summary of Evidence

All parties appeared by telephone. Documents presented by MassHealth were incorporated into the hearing record as Exhibits 5 and 6.

The appellant is under 65 years of age and has a history of: hypertension; left lacunar stroke without deficits and right parietal parenchymal hemorrhage; right compartment syndrome-status post fasciotomy; seizures; an assault in 2020 with traumatic brain injury (TBI) presented with status epilepticus requiring sedation and intubation; prior assault with head strike and nasal fractures (2010); Attention Deficit Hyperactivity Disorder (ADHD); insomnia; social and emotional deficits; anxiety; difficulty walking; cognitive communication deficit; weakness; nontraumatic intracerebral hemorrhage; encephalopathy; transient ischemic attacks; and sleep apnea.

In the spring of 2023, the appellant presented to a hospital due to seizure activity. After assessment and testing at the hospital, the appellant was found to have a right temporal lobe hemorrhage. The appellant was sedated, intubated and transferred to a hospital in Boston where he underwent several tests and procedures. During the hospitalization, the appellant was confused and unaware of his location. Hospital records show that the appellant attempted to leave the hospital. The appellant did not remember this incident. The appellant was weaned from sedation and extubated without difficulty.

Following extubation, the appellant was transferred to neurology to manage his seizures. The appellant remained in that unit for almost a full month. Upon stabilization, the appellant was transferred to the facility where he was at the time of the assessment. At the time of the transfer to the facility, the appellant's mother stated that she was unable to ensure the appellant's safety at home. At the time of the transfer to the facility, it was determined that the appellant was not a harm to others but due to his confusion and poor short-term memory, he was a danger to himself. The stroke caused a decline in the appellant's baseline mental status.

Prior to the hospitalization, the appellant was living in the community with his mother. Records show that the appellant's brother and alternate health care proxy was residing at the same address at the time of the execution of a Health Care Proxy in March 2023.

In September 2023, MassHealth performed an assessment for waiver eligibility in person at the facility where the appellant currently resides. (Testimony; Exhibit 5; Exhibit 6). The appellant was at the assessment as well as his mother, a nurse from the facility and the MassHealth nurse reviewer. (Exhibit 5; Exhibit 6). During the assessment review, MassHealth noted a number of incidents where the appellant attempted to exit the facility to return home. The appellant was not redirectable by staff and at times became combative. During an incident at the beginning of his stay, staff called 911. Police and EMTs attempted to talk to the appellant in-person but he remained non-compliant. Staff contacted the appellant's brother who came and helped the appellant relax and return to his room. Following other incidents where the appellant became agitated, the appellant contacted his mother and she was able to calm him down. The facility placed the appellant on a 15-minute check related to exit seeking behaviors.

Records presented at hearing indicate that the appellant prefers to provide his own care and can independently perform activities of daily living. Physician progress notes show an assessment where a review of the appellant's anxiety, behavioral outbursts, agitation and aggressive behavior led to an adjustment to the appellant's psychotropic medications. That assessment and medication adjustment was performed approximately 10 days prior to the assessment for waiver eligibility.

The MassHealth representative testified that the appellant has many risks upon a return to the community such as: a risk for falls due to a seizure disorder; a risk of elopement due to cognitive impairment; a risk of exploitation due to cognitive loss; a risk for self-care deficits due to physical and neurological limitations; and mood changes due to cognitive loss. As part of the Moving Forward Plan (MFP) waiver eligibility process, a second clinical review was conducted by the Massachusetts Rehabilitation Commission (MRC) clinical review team. Based on a review of the in-person assessment, review of medical records and interviews with facility staff, the MassHealth waiver team, MRC clinical review team and representatives from the Department of Developmental Services (DDS) concluded that the appellant requires 24/7 care and the services provided, including the 15-minute check to ensure safety, cannot be duplicated in the community. Representatives from the three agencies determined that the appellant continues to be a risk to himself and others and requires a higher level of support than what can be provided within the terms of the ABI or MFP waiver program.

It was noted that the appellant was hospitalized due to a urinary tract infection on the day of the hearing. The appellant's mother testified that the hospitalization was likely due to facility staff not recognizing or acknowledging symptoms. The appellant's mother noted that the chronology presented by MassHealth was extensive and likely accurate. The appellant's mother acknowledged that the appellant has complexities but did not believe staying in a nursing facility

was appropriate for someone with of age, diagnoses and abilities. The appellant's mother noted that appellant is able to perform all activities of daily living on his own and while he has confusion and is experiencing a cognitive decline, the current environment is not appropriate. Counsel argued that while the appellant may require extensive supervision, it should be in a more home-like setting such as a residential facility rather than a long-term care nursing facility.

The appellant's mother testified that a lot of the agitation and incidents recorded in notes of care provided prior to the clinical assessment were likely due to side effects of the medication Keppra. The appellant's mother testified that the appellant's medications have changed, and he has shown improvement. The appellant told his mother on more than one occasion that he feels like he is in jail. The appellant is staying in a geriatric dementia unit and has limited social interactions. The appellant's mother testified that the appellant receives occupational and speech therapy but only one day each week.

Counsel for the appellant noted that changes in medications and overall behavior should be grounds for a new clinical assessment. The MassHealth representatives at hearing did not object to having the appellant reapply and the agency performing a new clinical assessment. Counsel did not want the appellant to reapply. Instead, he wanted the hearing record to be held open for the agency to perform a new assessment, have the Board of Hearings order a third-party assessment, without clarity as to who would perform such an assessment, or keep the record open to provide the appellant with the opportunity to present medical records and arguments regarding the appellant's current condition. Counsel noted that the appellant's ultimate goal is to return home. However, at this time even residing at a residential facility is more appropriate than a long-term care facility.

The MassHealth representatives present at hearing did not dispute the fact that a residential setting would likely be best for the appellant's social and emotional well-being. However, at hearing, neither party could confidently name an alternative setting that would offer appropriate supervisory and behavioral services for the appellant. Both parties acknowledged that the appellant's safety is most important and the MassHealth representative noted that the exit-seeking behavior noted in the records presented at the time of the initial evaluation is not something that can be safely or effectively monitored in a residential or community setting. The MassHealth representative testified that a residential setting does not have the locks or staff that would allow for the appropriate protections. The MassHealth representative noted that if the appellant has improved and no longer has the same behavioral limitations, the agency will perform a new evaluation and the appellant may be approved for a waiver. However, the MassHealth representative stated that such would be a new agency decision, not related to findings from an assessment performed in September 2023.

Counsel for the appellant argued that the appellant has a right to present evidence of recent findings and medical records for the Board of Hearings to take into consideration. Counsel argued that recent findings and medical records showing a change in the appellant's condition are

relevant. Counsel argued that the Board of Hearings is not required to only look to the appellant's condition at the time of the assessment performed by the agency and could look to changes in the appellant's condition since the time of the assessment. As noted above, the agency was willing to perform a new assessment but would require the appellant to undergo the application process for a new waiver request.

As counsel did not have the opportunity to review the records presented by MassHealth at hearing and wanted the opportunity to present additional evidence, the record was held open to provide counsel with the opportunity to present additional evidence or arguments for the Board of Hearings to consider in issuing a hearing decision. Counsel did not provide any additional evidence or arguments during the record open period. As MassHealth did not have any additional records or arguments for a review and response, the agency rested on what was presented at hearing.

Findings of Fact

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

1. The appellant is under [REDACTED] years of age.
2. The appellant's medical history includes: a history of: hypertension; left lacunar stroke without deficits and right parietal parenchymal hemorrhage; right compartment syndrome-status post fasciotomy; seizures; an assault in 2020 with traumatic brain injury (TBI) presented with status epilepticus requiring sedation and intubation; prior assault with head strike and nasal fractures (2010); Attention Deficit Hyperactivity Disorder (ADHD); insomnia; social and emotional deficits; anxiety; difficulty walking; cognitive communication deficit; weakness; nontraumatic intracerebral hemorrhage; encephalopathy; transient ischemic attacks; and sleep apnea.
3. On the day of the hearing the appellant was hospitalized.
4. In the spring of 2023, the appellant presented to a hospital due to seizure activity.
5. After assessment and testing at the hospital, the appellant was found to have a right temporal lobe hemorrhage.
6. The appellant was sedated, intubated and transferred to a hospital in Boston where he underwent several tests and procedures.
7. During the hospitalization, the appellant was confused and unaware of his location.
8. Hospital records show that the appellant attempted to leave the hospital.

9. The appellant was weaned from sedation and extubated without difficulty.
10. Following extubation, the appellant was transferred to the neurology unit to manage the seizures.
11. The appellant remained in the neurology unit for almost a full month.
12. Upon stabilization, the appellant was transferred to the facility where he was at the time of the assessment.
13. At the time of the discharge from the hospital, the appellant was not a harm to others but due to his confusion and poor short-term memory, he was a danger to himself.
14. At the time of the discharge from the hospital, the appellant's mother stated that she was unable to ensure the appellant's safety at home.
15. Prior to the hospitalization, the appellant lived in the community with his mother.
16. At the time of the execution of a Health Care Proxy in March 2023, the appellant's brother was residing at the same address as the appellant's mother.
17. In September 2023, MassHealth performed an assessment for waiver eligibility in person.
18. The appellant was at the assessment as well as his mother, a nurse from the facility and the MassHealth nurse reviewer.
19. Records indicate a number of incidents where the appellant attempted to exit the facility to return home.
20. The appellant was not redirectable by staff and at times became combative.
21. During an incident at the beginning of his stay, staff called 911, police and EMTs attempted to talk to the appellant in-person but he remained non-compliant.
22. Staff contacted the appellant's brother who came and helped the appellant relax and return to his room.
23. Following other incidents where the appellant became agitated, the appellant contacted his mother and she was able to calm him down.
24. The facility placed the appellant on a 15-minute check related to exit seeking behaviors.

25. At the time of the assessment, this order was still in place.
26. At the facility, the appellant prefers to provide his own care and can independently perform activities of daily living.
27. Physician progress notes show an assessment where a review of the appellant's anxiety, behavioral outbursts, agitation and aggressive behavior led to an adjustment to the appellant's psychotropic medications.
28. The assessment and medication adjustment was performed approximately 10 days prior to the assessment for waiver eligibility.
29. The report of outbursts and other behavioral changes resulted in a change in seizure medications from Keppra to Depakote.
30. As part of the MFP waiver eligibility process, a second clinical review was conducted by the Massachusetts Rehabilitation Commission (MRC) clinical review team.
31. Based on a review of the in-person assessment, review of medical records and interviews with facility staff, the MassHealth waiver team, MRC clinical review team and representatives from the Department of Developmental Services (DDS) concluded that the appellant requires 24/7 care and the services required for the appropriate care, including the 15-minute check to ensure safety, cannot be provided in the community.
32. The appellant is staying in a geriatric dementia unit.
33. The appellant's social interaction with others is limited.
34. At the current facility the appellant receives occupational and speech therapy.

Analysis and Conclusions of Law

The MassHealth regulations at 130 CMR 519.000 explain the categorical requirements and financial standards that must be met to qualify for a MassHealth coverage type. The regulations at 130 CMR 519.007 describe the eligibility requirements for MassHealth Standard coverage for individuals who would be institutionalized if they were not receiving home- and community-based services. As noted above, the appellant submitted applications for four different waivers. All four decisions were based upon the agency deciding that the appellant did not meet the clinical requirements for each waiver.

The Residential Habilitation Waiver for Persons with Acquired Brain Injury (ABI-RH 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 or chronic disease or rehabilitation hospital services to receive residential habilitation and other specified waiver services in a provider-operated 24-hour supervised residential setting if they meets all of the following criteria:

1. are 22 years of age or older and, if younger than 65 years old, is totally and permanently disabled in accordance with Title XVI standards;
2. acquired, after reaching the age of 22, a brain injury including, without limitation, brain injuries caused by external force, but not including Alzheimer's disease and similar neuro-degenerative diseases, the primary manifestation of which is dementia;
3. are an inpatient in a nursing facility or chronic disease or rehabilitation hospital with a continuous length of stay of 90 or more days at the time of application for the waiver;
4. need a residential support service available under the Residential Habilitation Waiver; and
5. are able to be safely served in the community within the terms of the Residential Habilitation Waiver. (130 CMR 519.007(G)(1)(a)).

The Non-Residential Habilitation Waiver for Persons with Acquired Brain Injury (ABI-N 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 or chronic disease or rehabilitation hospital services to receive specified waiver services, other than residential support services, in the home or community if they meet all of the following criteria:

1. are 22 years of age or older and, if younger than 65 years old, is totally and permanently disabled in accordance with Title XVI standards;
2. acquired, after reaching age of 22, a brain injury including, without limitation, brain injuries caused by external force, but not including Alzheimer's disease and similar neuro-degenerative diseases, the primary manifestation of which is dementia;
3. are an inpatient in a nursing facility or chronic disease or rehabilitation hospital with a continuous length of stay of 90 or more days at the time of application for the waiver;
4. need one or more of the services under the Non-Residential Habilitation Waiver; and
5. are able to be safely served in the community within the terms of the NonResidential Habilitation Waiver. (130 CMR 519.007(G)(2)(a)).

The Moving Forward Plan (MFP) Residential Supports Waiver (MFP-RS 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 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 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. 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. (130 CMR 519.007(H)(1)(a)).

The Moving Forward Plan (MFP) Community Living Waiver (MFP-CL 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 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 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. are able to be safely served in the community within the terms of the MFP Community Living 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. (130 CMR 519.006(H)(2)(a)).

MassHealth also has income and asset eligibility requirements for each waiver but the only issue raised in this appeal was appellant's the clinical eligibility. (130 CMR 519.007(G)(1); 130 CMR 519.007(G)(2); 130 CMR 519.007(H)(1); 130 CMR 519.007(H)(2)).

The testimony and evidence presented by both MassHealth and counsel for the appellant clearly demonstrate that the appellant requires appropriate services and/or support. Records presented by MassHealth show that the appellant was residing in the community with his mother prior to this most recent admission, it appears that the appellant's brother was residing with the appellant and his mother at the time of an execution of a health care proxy in March 2023 which was close to the time of the admission. The appellant's mother testified that the appellant is now taking new medications and his behavior has changed. Records show that the appellant's contact with his mother and brother tended to be more calming and reassuring following behavioral incidents than interactions with staff and legal authorities.

The parties did not dispute the fact that the appellant's current location is likely not the most appropriate setting for someone of his age and abilities. The parties did not dispute the fact that the appellant does not require assistance with activities of daily living only that there were questions about his being able to be safely served in a community or residential setting due to reported behavioral incidents.

Counsel and the appellant's mother acknowledged that the appellant required a high level of care but felt such care could be provided in a more appropriate setting. MassHealth did not dispute the fact that the appellant would likely benefit from being in a setting other than a long-term care facility but at hearing neither party effectively proposed an alternative option.

Counsel argued that the regulations provide a hearing officer, when appropriate, the authority to direct MassHealth to pay for the costs of an independent medical examination. In referring to this regulation, counsel did not directly request such an independent examination, only that the agency perform a subsequent examination as the appellant's condition has changed. Counsel argued that the appellant should not be required to go through the waiver application process for the second time if he can demonstrate that there was a change in his condition. While MassHealth agreed to perform a new assessment, they wanted to do so after the submission of new waiver applications.

As the regulations governing the fair hearing process allow a hearing officer to rule on any requests that may be made during the hearing, the request for a subsequent evaluation without having to undergo the application process for a waiver is approved. (130 CMR 610.065(B)).

This appeal is approved in part as the agency is not ordered to approve one of the waiver requests only to perform a subsequent clinical evaluation and make a new determination regarding the appellant's clinical eligibility for the four waiver requests at issue.

Any subsequent decision will be a new agency determination and the subject of a new appeal.

Order for MassHealth

Perform an assessment of clinical waiver eligibility for the appellant for the following waivers without requiring the appellant to reapply for any of the waiver programs: ABI-RH Waiver; ABI-N Waiver; MFP-RS Waiver; and MFP-CL Waiver.

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.

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.

Susan Burgess-Cox
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Linda Phillips, UMass Medical School - Commonwealth Medicine, Disability and Community-Based Services, 333 South Street, Shrewsbury, MA 01545-7807

