

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2313398
Decision Date:	4/26/2024	Hearing Date:	01/16/2024
Hearing Officer:	Emily Sabo	Record Open to:	02/27/2024

Appearance for Appellant:



Appearance for MassHealth:

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:	Denied	Issue:	Long Term Care; Over 65: Pooled Trust; Assets
Decision Date:	4/26/2024	Hearing Date:	01/16/2024
MassHealth's Rep.:	James Lockwood	Appellant's Rep.:	
Hearing Location:	Quincy Harbor South (Telephone)	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 November 28, 2023, MassHealth approved the Appellant's application for long-term-care services in a nursing facility. 130 CMR 519.006 and Exhibit 1. The Appellant filed this appeal in a timely manner on December 20, 2023, over the "wrong start date." 130 CMR 610.015(B) and Exhibit 2. MassHealth determinations regarding scope and amount of assistance are valid grounds for appeal. 130 CMR 610.032(A)(5).

Action Taken by MassHealth

MassHealth approved the Appellant's application for long-term-care services in a nursing facility, effective October 18, 2023.¹

Issue

¹ Exhibit 1 states that the Appellant's eligibility began on November 6, 2023. At the hearing, the MassHealth representative testified that the November 6, 2023 date was in error, and that the Appellant's eligibility began on October 18, 2023. *See also* Exhibit 5.

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.001 et seq, in determining that the Appellant was not financially eligible for long-term-care services in a nursing facility prior to October 18, 2023?

Summary of Evidence

The hearing was held telephonically. The MassHealth representative testified as follows: the Appellant is over the age of 65, has a household size of one and is living in a nursing facility.² The MassHealth representative testified that the Appellant submitted a request for long-term-care services on August 31, 2023, and requested a start date of August 1, 2023. The MassHealth representative testified that the Appellant's application was denied on October 17, 2023, for being over assets by \$85,632.47. *See* Exhibit 8. The Appellant submitted documents within 30 days that her assets were reduced through \$59,100 being transferred to an approved pooled trust by check dated October 18, 2023.³ *See also* Exhibit 6 at 6. The MassHealth representative explained that the Appellant's payments to the nursing facility were not considered when determining the date of financial eligibility, but that the transfer to the trust was, and that MassHealth considered the Appellant financially eligible for MassHealth when her countable assets were \$2,000 or less. The MassHealth representative testified that the check for the \$59,100 was considered a noncountable asset upon its transfer to the pooled trust on October 18, 2023, and that the Appellant was then eligible for MassHealth as of October 18, 2023.

The Appellant was represented by her attorney, who verified the Appellant's identity. The Appellant's attorney testified that in his past experience with MassHealth, an individual's MassHealth start date was retroactive so long as the transfer to a pooled trust was effectuated during the eligibility process. The Appellant's attorney requested a record open period to submit a legal brief and supporting materials, which was granted until February 9, 2024. The Appellant's attorney argued that:

Historically and procedurally, MassHealth has allowed for pooled trust transfers to occur before a final determination of eligibility. In the instant matter, the Applicant received her eligibility notice and proposed start date following her funding of her pooled trust account. . . . Similar permissible transfers to a permanently disabled or blind child under the same applicable regulations (130 CMR 520.019(D)) have not resulted in an ineligibility period insofar that the transfer was made prior to an eligibility determination.

Exhibit 10 at 4-5. The Appellant's attorney goes on to cite specific examples of such transfers where MassHealth awarded applicants coverage prior to their transfer of assets to a pooled trust.

² MassHealth did not dispute that the Appellant is medically eligible for nursing facility services.

³ The difference between \$85,632.47 and \$59,100 was not discussed at the hearing or in the record evidence.

Id. at 5-6. The brief argues that the Appellant permissibly transferred her assets under 130 CMR 520.018(I) and 130 CMR 520.023(D) and “should therefore be eligible for long term care benefits through the MassHealth program dating back to June 1, 2023.” *Id.* at 7.

The record was held open until February 27, 2024, for MassHealth to review and respond to the Appellant’s submission. The MassHealth representative stated that October 18, 2023, was the appropriate start date for coverage, and cited 130 CMR 520.003 and 130 CMR 520.004(A). The MassHealth representative explained that he was not imposing a penalty period on the Appellant, but was approving as of October 18, 2023, “the date the assets were reduced as the regulation describes.” Exhibit 12 at 1.

Findings of Fact

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

1. The Appellant is over the age of 65, has a household size of one and is living in a nursing facility (Testimony & Exhibits 1, 4, 5, 10).
2. On October 17, 2023, MassHealth denied the Appellant’s application for long-term-care services in a nursing facility, because she had more countable assets than MassHealth benefits allow. The notice indicated that the Appellant had excess assets of \$85,632.47 (Exhibit 8).
3. MassHealth determined that the Appellant was eligible for MassHealth long-term-care services in a nursing facility as of October 18, 2023 (Testimony & Exhibits 5, 12).
4. MassHealth determined that the Appellant was eligible as of October 18, 2023, because on that date, \$59,100 of her assets were transferred to a noncountable asset, a pooled trust (Testimony & Exhibits 5, 6, 8, 12).
5. As of October 18, 2023, the Appellant’s countable assets were reduced to \$2,000 or less (Testimony & Exhibit 5)

Analysis and Conclusions of Law

The MassHealth regulations provide as follows:

519.006: Long-term-care Residents

(A) Eligibility Requirements. Institutionalized individuals may establish eligibility for MassHealth Standard coverage subject to the following requirements. They must

- (1) be younger than 21 years old or 65 years of age or older or, for individuals 21 through 64 years of age meet Title XVI disability standards or be pregnant;
- (2) be determined medically eligible for nursing facility services by the MassHealth agency or its agent as a condition for payment, in accordance with 130 CMR 456.000: *Long Term Care Services*;
- (3) contribute to the cost of care as defined at 130 CMR 520.026: *Long-term-care General Income Deductions*;
- (4) have countable assets of \$2,000 or less for an individual and, for married couples where one member of the couple is institutionalized, 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
- (5) not have transferred resources for less than fair market value, as described at 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*.

130 CMR 519.006(A).

520.003: Asset Limit

(A) The total value of countable assets owned by or available to individuals applying for or receiving MassHealth Standard, Family Assistance, or Limited may not exceed the following limits:

- (1) for an individual — \$2,000; and
- (2) for a couple living together in the community where there is financial responsibility according to 130 CMR 520.002(A)(1) — \$3,000.

(B) The total value of countable assets owned by or available to individuals applying for or receiving MassHealth Senior Buy-In for Qualified Medicare Beneficiaries (QMB) as described in 130 CMR 519.010: *MassHealth Senior Buy-In (for Qualified Medicare Beneficiaries (QMB))* or MassHealth Buy-In for Specified Low Income Medicare Beneficiaries (SLMB) or MassHealth Buy-In for Qualifying Individuals (QI), both as described in 130 CMR 519.011: *MassHealth Buy-in*, may not exceed the amount equal to two times the amount of allowable assets for Medicare Savings Programs as identified by the Centers for Medicare and Medicaid Services. Each calendar year, the allowable asset limits shall be made available on MassHealth's website.

(C) The treatment of a married couple's assets when one spouse is institutionalized is described in 130 CMR 520.016(B).

130 CMR 520.003.

520.004: Asset Reduction

(A) Criteria.

- (1) An applicant whose countable assets exceed the asset limit of MassHealth Standard, Family Assistance, or Limited may be eligible for MassHealth
 - (a) as of the date the applicant reduces his or her excess assets to the allowable asset limit without violating the transfer of resource provisions for nursing-facility residents at 130 CMR 520.019(F); or
 - (b) as of the date, described in 130 CMR 520.004(C), the applicant incurs medical bills that equal the amount of the excess assets and reduces the assets to the allowable asset limit within 30 days after the date of the notification of excess assets.
- (2) In addition, the applicant must be otherwise eligible for MassHealth.

(B) Evaluating Medical Bills. The MassHealth agency does not pay that portion of the medical bills equal to the amount of excess assets. Bills used to establish eligibility

- (1) cannot be incurred before the first day of the third month prior to the date of application as described at 130 CMR 516.002: *Date of Application*; and
- (2) must not be the same bills or the same portions of the bills that are used to meet a deductible based on income.

(C) Date of Eligibility. The date of eligibility for otherwise eligible individuals described at 130 CMR 520.004(A)(1)(b) is the date that his or her incurred allowable medical expenses equaled or exceeded the amount of his or her excess assets.

- (1) If after eligibility has been established, an individual submits an allowable bill with a medical service date that precedes the date established under 130 CMR 520.004(C), the MassHealth agency readjusts the date of eligibility.
- (2) In no event will the first day of eligibility be earlier than the first day of the third month before the date of the application, if permitted by the coverage type.

(D) Verification. The MassHealth agency requires the applicant to verify that he or she incurred the necessary amount of medical bills and that his or her excess assets were reduced to the allowable asset limit within required timeframes.

130 CMR 520.004.

520.008: Noncountable Assets

....

- (I) Pooled Trust. Effective until sixty days after the end of the maintenance of effort and continuous eligibility provisions of Section 6008 of the Families First Coronavirus Response Act (Public Law No. 116-127), a pooled trust in accordance with the trust rules at 130 CMR 520.021 through 520.024 is considered a noncountable asset.

Effective sixty days after the end of the maintenance of effort and continuous eligibility provisions of Section 6008 of the Families First Coronavirus Response Act (Public Law No. 116-127), a valid pooled trust as determined by the MassHealth agency in accordance with 130 CMR 515.001: *Definition of Terms* and the trust rules at 130 CMR 520.021 through 520.024 is considered a noncountable asset. A pooled trust that does not meet federal Medicaid and state MassHealth requirements may be considered a countable asset or transfers into such trusts may be considered disqualifying transfer of resources.

130 CMR 520.008(I).

520.016: Long-term Care: Treatment of Assets

(A) Institutionalized Individuals. The total value of assets owned by an institutionalized single individual or by a member of an institutionalized couple must not exceed \$2,000.

130 CMR 520.016(A).

520.018: Transfer of Resources Regardless of Date of Transfer

(A) The provisions of 42 U.S.C. 1396p apply to all transfers of resources. In the event that any portion of 130 CMR 520.018 and 520.019 conflicts with federal law, the federal law supersedes.

(B) The MassHealth agency denies payment for nursing-facility services to an otherwise eligible nursing-facility resident as defined in 130 CMR 515.001: *Definition of Terms* who transfers or whose spouse transfers countable resources for less than fair-market value during or after the period of time referred to as the look-back period.

(C) The denial of payment for nursing-facility services does not affect the individual's eligibility for other MassHealth benefits.

(D) Circumstances giving rise to disqualifying transfers of resources are also described at 130 CMR 520.007(J).

130 CMR 520.018.

520.019: Transfer of Resources Occurring on or after August 11, 1993

(A) Payment of Nursing-facility Services. The MassHealth agency applies the provisions of 130 CMR 520.018 and 520.019 to nursing-facility residents as defined at 130 CMR 515.001: *Definition of Terms* requesting MassHealth agency payment for nursing-facility services provided in a nursing facility or in any institution for a level of care equivalent to that received in a nursing facility or for home- and community-based services provided in accordance with 130 CMR 519.007(B): *Home- and Community-based Services Waiver-Frail Elder*.

(B) Look-back Period. Transfers of resources are subject to a look-back period, beginning on the first date the individual is both a nursing-facility resident and has applied for or is receiving MassHealth Standard.

(1) For transfers occurring before February 8, 2006, this period generally extends back in time for 36 months.

(2) For transfers of resources occurring on or after February 8, 2006, the period generally extends back in time for 60 months. The 60-month look-back period will begin to be phased in on February 8, 2009. Beginning on March 8, 2009, applicants will be asked to provide verifications of their assets for the 37 months prior to the application. As each month passes, the look-back period will increase by one month until the full 60 months is reached on February 8, 2011.

(3) For transfers of resources from or into trusts, the look-back period is described in 130 CMR 520.023(A).

(C) Disqualifying Transfer of Resources. The MassHealth agency considers any transfer during the appropriate look-back period by the nursing-facility resident or spouse of a resource, or interest in a resource, owned by or available to the nursing-facility resident or the spouse (including the home or former home of the nursing-facility resident or the spouse) 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). The MassHealth agency may consider as a disqualifying transfer any action taken to avoid receiving a resource to which the nursing-facility resident or spouse is or would be entitled if such action had not been taken. Action taken to avoid receiving a resource may include, but is not limited to, waiving the right to receive a resource, not accepting a resource, agreeing to the diversion of a resource, or failure to take legal action to obtain a resource. In determining whether or not failure to take legal action to receive a resource is reasonably considered a transfer by the individual, the MassHealth agency considers the specific circumstances involved. A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available.

(D) Permissible Transfers. The MassHealth agency considers the following transfers permissible. Transfers of resources made for the sole benefit of a particular person must be in accordance with federal law.

- (1) The resources were transferred to the spouse of the nursing-facility resident or to another for the sole benefit of the spouse. A nursing facility resident who has been determined eligible for MassHealth agency payment of nursing facility services and who has received an asset assessment from the MassHealth agency must make any necessary transfers within 90 days after the date of the notice of approval for MassHealth in accordance with 130 CMR 520.016(B)(3).
- (2) The resources were transferred from the spouse of the nursing facility resident to another for the sole benefit of the spouse.
- (3) The resources were transferred to the nursing facility resident's permanently and totally disabled or blind child or to a trust, a pooled trust, or a special-needs trust created for the sole benefit of such child.
- (4) The resources were transferred to a trust, a special-needs trust, or a pooled trust created for the sole benefit of a permanently and totally disabled person who was younger than 65 years old at the time the trust was created or funded.
- (5) Effective until sixty days after the end of the maintenance of effort and continuous eligibility provisions of Section 6008 of the Families First Coronavirus Response Act (Public Law No. 116-127), the resources were transferred to a pooled trust created for the sole benefit of the permanently and totally disabled nursing-facility resident. Effective sixty days after the end of the maintenance of effort and continuous eligibility provisions of Section 6008 of the Families First Coronavirus Response Act (Public Law No. 116-127), this transfer is no longer permissible.**
- (6) The nursing facility resident transferred the home he or she used as the principal residence at the time of transfer and the title to the home to one of the following persons:
 - (a) the spouse;
 - (b) the nursing facility resident's child who is younger than 21 years old, or who is blind or permanently and totally disabled;
 - (c) the nursing facility resident's sibling who has a legal interest in the nursing facility resident's home and was living in the nursing facility resident's home for at least one year immediately before the date of the nursing-facility resident's admission to the nursing facility; or
 - (d) the nursing facility resident's child (other than the child described in 130 CMR 520.019(D)(6)(b)) who was living in the nursing facility resident's home for at least two years immediately before the date of the nursing facility resident's admission to the institution, and who, as determined by the MassHealth agency, provided care to the nursing facility resident that permitted him or her to live at home rather than in a nursing facility.
- (7) The resources were transferred to a separately identifiable burial account, burial arrangement, or a similar device for the nursing facility resident or the spouse in accordance with 130 CMR 520.008(F).

130 CMR 520.019(A), (B), (C), (D) (emphasis added).

520.023: Trusts or Similar Legal Devices Created on or after August 11, 1993

The trust and transfer rules at 42 U.S.C. 1396p apply to trusts or similar legal devices created on or after August 11, 1993, that are created or funded other than by a will. Generally, resources held in a trust are considered available if under any circumstances described in the terms of the trust, any of the resources can be made available to the individual.

....

(D) Exemptions to the Trust Rules.

(1) Special-needs Trusts and Pooled Trusts. Under federal trust exemption regulations at 42 U.S.C. 1396(p)(d)(4) special-needs trusts and pooled trusts as defined in 130 CMR 515.001: *Definition of Terms* are not subject to the income and asset countability rules at 130 CMR 520.023(B) and (C).

(2) Revision of a Trust to Comply with the Criteria of a Special-needs or Pooled Trust. The MassHealth agency will not deny or terminate MassHealth due to excess assets if a trust is revised to comply with the criteria of a special-needs trust or a pooled trust in accordance with the rules at 130 CMR 520.019(J).

(3) Burial Trust. A burial trust is a trust established to pay solely for various funeral and burial expenses of the individual or the spouse. An irrevocable burial trust meeting the criteria of 130 CMR 520.008(F) is not a countable asset.

130 CMR 520.023(D).

Here, MassHealth determined that the Appellant was eligible for long-term-care services in a nursing facility. The question in dispute is when the Appellant became financially eligible for such services. In order to qualify for long-term care, an institutionalized individual must have \$2,000 or less in countable assets. 130 CMR 519.006(A)(4); 130 CMR 520.003(A)(1); 130 CMR 520.016(A). I credit MassHealth's determination that the Appellant was not financially eligible for MassHealth until her countable assets were reduced to \$2,000 or less, and which did not occur until October 18, 2023, when the Appellant's excess assets were deposited to a pooled trust. Exhibit 5, Exhibit 6 at 5-6, Exhibit 8, Exhibit 12. MassHealth did not consider the deposit to be a disqualifying transfer.⁴ Instead, MassHealth determined that the Appellant was eligible as of October 18, 2023, in accordance with 130 CMR 520.004(A)(1)(a). I have considered the

⁴ While not applicable in the present case, because the Appellant applied for MassHealth before March 1, 2024, Eligibility Operations Memo 23-15 (May 2023) states that MassHealth is revising its regulations to follow federal law and CMS guidance. The revision states that individuals age 65 or older, who transferred assets into a pooled trust at age 65 or older within five years of applying for MassHealth, are subject to a penalty period. See <https://www.mass.gov/doc/eom-23-15-eligibility-changes-concerning-transfers-to-pooled-trusts-0/download>.

Appellant's arguments, but the Appellant has not established that MassHealth erred in its determination that the Appellant was not eligible for MassHealth until October 18, 2023, when the Appellant's countable assets were reduced to \$2,000 or less.⁵ Therefore, the 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.

Emily Sabo
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Quincy MEC, Attn: Appeals Coordinator, 100 Hancock Street, 6th Floor, Quincy, MA 02171

[REDACTED]

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⁵ The other cases cited by the Appellant appear to have involved transfers that occurred prior to "sixty days after the end of the maintenance of effort and continuous eligibility provisions of Section 6008 of the Families First Coronavirus Response Act (Public Law No. 116-127)," unlike the present case. See 130 CMR 520.023(D)(5).