

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:



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|-------------------------|-----------------|------------------------|------------|
| Appeal Decision: | Denied | Appeal Number: | 2402119 |
| Decision Date: | 07/26/2024 | Hearing Date: | 04/01/2024 |
| Hearing Officer: | Alexandra Shube | Record Open to: | 06/05/2024 |

Appearance for Appellant:



Appearance for MassHealth:

Via telephone:
Karen Ryan, Tewksbury 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

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|---------------------------|---|--------------------------|--|
| Appeal Decision: | Denied | Issue: | Long Term Care – Disqualifying Transfer |
| Decision Date: | 07/26/2024 | Hearing Date: | 04/01/2024 |
| MassHealth’s Rep.: | Karen Ryan | Appellant’s Rep.: | [REDACTED] |
| Hearing Location: | Taunton MassHealth Enrollment Center 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 January 10, 2024, MassHealth approved the appellant for MassHealth long-term care benefits with a start date of August 9, 2022 and calculated a period of ineligibility from September 11, 2021 to August 8, 2022 due to a transfer of assets (Exhibit 1). The appellant filed this appeal in a timely manner on February 12, 2024 (see 130 CMR 610.015(B) and Exhibit 2). Denial or limitation of assistance is valid grounds for appeal (see 130 CMR 610.032).

At the request of the appellant, the record in this appeal was held open until May 22, 2024. MassHealth was given until June 5, 2024 to review and respond to the appellant’s submission.

Action Taken by MassHealth

MassHealth approved the appellant for long-term care benefits with a start date of August 9, 2022 and calculated a period of ineligibility from September 11, 2021 to August 8, 2022 because MassHealth determined that the appellant gave away assets to become eligible for MassHealth long-term care benefits.

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 appellant's representative (an attorney appointed as personal representative of the appellant's estate) and the MassHealth representative both appeared at hearing via telephone. The MassHealth representative testified as follows: the appellant was an individual over the age of 65 who was a resident of a nursing facility, but is now deceased. On December 2, 2021, MassHealth received an application for long-term care benefits on behalf of the appellant requesting a start date of September 11, 2021. On January 10, 2024, the appellant was approved for long-term care benefits with a start date of August 9, 2022.

MassHealth calculated a period of ineligibility from the otherwise eligible date of September 11, 2021 through August 8, 2022 due to a transfer of resources. Within the lookback period, the appellant transferred his property with a deed recorded on September 14, 2018. The property was sold for \$395,000 which is less than the 2018 fair market value of \$531,000. The difference (\$136,000) is the transfer amount. MassHealth divided that amount by the daily nursing facility rate of \$410 to arrive at a 332-day period of ineligibility and a start date of August 9, 2022.

MassHealth received a signed letter from the appellant's representative stating that upon speaking with the appellant's family, it appears the house was sold to the appellant's friend at a discounted price because of the help and support the friend had given him and would continue to give him. The appellant's representative could not obtain a HUD statement. MassHealth stated that the burden is on the appellant to provide sufficient documentation and the statement provided did not comply with the transfer criteria. MassHealth stated that the HUD could be helpful and maybe show that the whole \$136,000 did not benefit the friend and, instead, some went to pay off a loan or mortgage. Additionally, MassHealth would consider a contract in writing outlining the care the friend provided, including hours worked, wages, and records of services provided.

The appellant's representative testified that according to the appellant's sister, the appellant sold the property to his friend for less than fair market value because the friend had been providing support and help. He did not think that the HUD would show anything helpful, but requested a record open period to locate the HUD and provide additional information on the appellant's caretaking arrangement with his friend, if any. The appellant was given until May 1, 2024 to submit additional information and MassHealth was given until May 15, 2024 to review and respond. On April 29, 2024, the appellant's representative requested additional time because the documents sent to the buyer's last known address were returned to him. The appellant was given until May

22, 2024 and MassHealth, until June 5, 2024.

On May 22, 2024, the appellant's representative responded that he was unable to locate the buyer of the house and find out what, if any, services he provided to the appellant. The phone number he had for him was not in service and the letters sent to his last known address were either returned to him or were not answered. The appellant's family did not know what, if any, services the buyer provided to the appellant to justify the reduction in price. Additionally, the attorney who did the closing stated she had an unsigned HUD with nothing on it. As such, he had no new evidence to present. MassHealth was given the opportunity to respond but had nothing additional to add.

Findings of Fact

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

1. The appellant was an individual over the age of 65 who was a resident of a nursing facility, but is now deceased (Testimony and Exhibit 5).
2. On December 2, 2021, MassHealth received an application for long-term care benefits on behalf of the appellant requesting a start date of September 11, 2021 (Testimony and Exhibit 5).
3. On January 10, 2024, the appellant was approved for long-term care benefits with a start date of August 9, 2022 (Testimony and Exhibit 1).
4. MassHealth calculated a period of ineligibility from September 11, 2021 through August 8, 2022 due to a transfer of resources (Testimony and Exhibit 5).
5. The appellant sold property in September 2018 for \$395,000 which is less than the 2018 fair market value of \$531,000. The difference, \$136,000, is the transfer amount. (Testimony and Exhibit 5).
6. MassHealth divided \$136,000 by the daily nursing facility rate of \$410 to arrive at a 332-day period of ineligibility and a start date of August 9, 2022 (Testimony and Exhibit 5).
7. On February 12, 2024, the appellant timely appealed the January 10, 2024 notice (Exhibit 2).
8. According to the appellant's representative, the appellant sold the property to a friend for less than fair market value because the friend provided, and would continue to provide, support and help to the appellant (Testimony and Exhibits 5 and 7).

9. At hearing, the appellant's representative had no additional information on the services provided by the friend (Testimony).
10. The record was held open for the appellant until May 1, 2024 and then extended until May 22, 2024 for his representative to provide further information and details on the services and value of the services provided by the appellant's friend (Exhibits 6 and 7).
11. On May 22, 2024, the appellant's representative responded that he was unable to locate the buyer of the house and find out what, if any, services he provided to the appellant. The phone number he had for him was not in service and the letters sent to his last known address were either returned to him or were not answered. The appellant's family did not know what, if any, services the buyer provided to the appellant to justify the reduction in price. Additionally, the attorney who did the closing stated she had an unsigned HUD with nothing on it. As such, he had no new evidence to present. (Exhibit 7).
12. MassHealth was given until June 5, 2024 to review and respond to the appellant's submission, but had nothing to add and the record closed (Exhibit 7).

Analysis and Conclusions of Law

To qualify for MassHealth long-term care coverage, the assets of the institutionalized applicant cannot exceed \$2,000.00. See 130 CMR 520.016(A). In determining whether an applicant qualifies for benefits, MassHealth will assess whether he or she has transferred any resources for less than fair market value (FMV). If the individual or their spouse has made a transfer for less than FMV, the applicant, even if "otherwise eligible," may be subject to a period of disqualification in accordance with its transfer rules at 130 CMR §§520.018 520.019. MassHealth's "strict limitations on asset transfers," which were adopted pursuant to federal law, are intended to "prevent individuals from giving away their assets to their family and friends and forcing the government to pay for the cost of nursing home care." See Gauthier v. Dir. of the Office of Medicaid., 80 Mass. App. Ct. 777, 779 (2011) (citing Andrews v. Division of Med. Assistance, 68 Mass. App. Ct. 228, 229, (2007).

With respect to transfers of resources, regardless of the date of transfer, MassHealth provides the following, in relevant part:

The MassHealth agency will deny payment for nursing facility services to an otherwise eligible nursing-facility resident ... 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.

See 130 CMR 520.018(B)

The “look back period”, referred to in § 520.018(B), above, is sixty months, or 5 years, before the first date the individual is *both* a nursing facility resident *and* has applied for, or is receiving, MassHealth Standard.¹ See 130 CMR 520.019(B). MassHealth will deem the individual to have made a “disqualifying transfer” if it finds that during the look-back period, the individual (or their spouse) transferred resources for less than FMV, or, if they have taken any action “to avoid receiving a resource to which the resident or spouse would be entitled if such action had not been taken.” 130 CMR 520.019(C). If it is determined that a resident or spouse made a disqualifying transfer or resources, MassHealth will calculate a period of ineligibility in accordance with the methodology described in 130 CMR 520.019(G).

The transfer provisions also have several exceptions to the general rule governing disposition of assets, which are detailed in § 520.019(D) (permissible transfers), § 520.019(J) (exempted transfers), and § 520.019(F) (exemptions based on intent). See 130 CMR 520.019(C). In the instant case, the only applicable exception, and the sole regulatory exception raised by the appellant at hearing, is found in 130 CMR 520.019(F), which states, the following:²

....

(F) Determination of Intent. In addition to the permissible transfers described in 130 CMR 520.019(D), the MassHealth agency *will not impose a period of ineligibility for transferring resources at less than fair-market value if the nursing-facility resident or the spouse demonstrates to the MassHealth agency’s satisfaction that:*

- (1) the resources were transferred exclusively for a purpose other than to qualify for MassHealth; or***
- (2) the nursing-facility resident or spouse intended to dispose of the resource at either fair-market value or for other valuable consideration. Valuable consideration is a tangible benefit equal to at least the fair-market value of the transferred resource.***

130 CMR 520.019 (emphasis added).

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. of 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)).

¹ Effective February 8, 2006, the look-back period for transfer of assets was extended from 36 months to 60 months and the beginning date for a period of ineligibility will be the date the applicant would otherwise be eligible or the date of the transfer, whichever is later. See MassHealth Eligibility Letter 147 (July 1, 2006)

² The appellant’s representatives did not argue that that the transfer was either “permissible” under 130 CMR 520.019(D) or “exempted” under 130 CMR 520.019(J), nor was any evidence presented to suggest these exceptions would apply to the transfer at issue.

In this case, MassHealth imposed a period of ineligibility based on a transfer totaling \$136,000 from the proceeds of the sale of the appellant's home for less than fair market value (FMV). MassHealth determined the transfer amount by calculating the difference between the 2018 fair market value of the property (\$531,000) and the sale price (\$395,000). The appellant's representative argued that the home was sold to a friend at a discounted price because of the help and support the friend had provided, and would continue to provide, the appellant.

In determining whether the transfer amount of \$136,000 was a disqualifying transfer, the first question is whether the appellant made a transfer of resources for less than FMV. In requiring state Medicaid agencies to adopt the federally mandated transfer regulations, the Centers for Medicare & Medicaid Services (CMS), formerly Health Care Financing Administration Transmittal (HCFA), published mandatory instructions, now compiled in the federal agency's State Medicaid Manual (SMM) which included the following instruction for making determinations on whether a transfer was made for less than FMV:

For an asset to be considered transferred for fair market value or to be considered to be transferred for valuable consideration, **the compensation received for the asset must be in a tangible form with intrinsic value. A transfer for love and consideration, for example, is not considered a transfer for fair market value.** Also, while relatives and family members legitimately can be paid for care they provide to the individual, [CMS] presumes that services provided for free at the time were intended to be provided without compensation. Thus, a transfer to a relative for care provided for free in the past is a transfer of assets for less than fair market value. However, an individual can rebut this presumption with tangible evidence that is acceptable to the State. For example, you may require that a payback arrangement had been agreed to in writing at the time services were provided.

See SMM, Department of Health and Human Services (DHHS) HCFA, Transmittal No. 64, § 3258.1(A) (11-94) (emphasis added).³

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

³ The SMM is a compilation of federal resources and procedural material needed by States to administer the Medicaid Program. The instructions provided therein are CMS's "official interpretations of the law and regulations, and, as such, are binding on Medicaid State agencies." See SMM, Foreword § B(1); see also 130 CMR § 515.002(B).

not some payments have been made or services performed.

It is the appellant's burden to show that the MassHealth determination was in error. In applying MassHealth's transfer regulations and the federal mandatory instructions to the present case, the appellant has not demonstrated that MassHealth erred in concluding the transfer of \$136,000 was made for less than FMV. See 130 CMR §§ 520.018(B), 520.019(B). Here, there was no tangible evidence to establish that the friend provided, or planned to provide, any services to the appellant. The appellant was given additional time after hearing to provide tangible evidence, such as a written agreement. Additionally, MassHealth would have reconsidered the transfer amount if the HUD showed that not all the \$136,000 went to the friend. But at the close of the record open period, no details were presented to indicate the appellant and his friend entered into any caretaker agreement, what the terms would be, the services provided, the rate of compensation, or hours worked. It is for this reason that MassHealth deems a resource transfer made by an applicant in exchange for a future performance a "disqualifying transfer" as such agreements lack an ascertainable fair market value. See 130 CMR 520.007 (J)(4). There is nothing in the appellant's testimony or documentation to establish that the \$136,000 reduction in the sale price of the home was FMV for the services provided, if any.

The appellant has also failed to demonstrate that he *intended* to dispose of assets for FMV or *other valuable consideration*. According to CMS, "valuable consideration" means that "an individual receives in exchange for his or her right or interest in an asset some act, object, service, or other benefit which has a tangible and/or intrinsic value to the individual that is roughly equivalent to or greater than the value of the transferred asset." See SMM § 3258.1(A)(2). This exception allows applicants to avoid a disqualifying period for a transfer for less than FMV, *if* the individual demonstrates that their intention was to transfer assets at FMV or other valuable consideration and there has been satisfactory evidence to show the circumstances that caused the transfer. As stated above, there was no tangible corroboration to establish that the appellant and the buyer of the home had any sort of caretaker arrangement or that the appellant agreed to reduce the sale price in exchange for caretaking services. The only indication that such an arrangement might have existed is the appellant's sister and/or family reporting that the appellant sold it to a friend at the discounted price because of the friend's help and support. But there was no information on what services, if any, were actually provided by the buyer to the appellant. Once again, the federal instruction requires a convincing level of evidence, i.e., evidence beyond "verbal assurances," to show the individual was not considering Medicaid at the time the asset was disposed. Id. at § 3258.10(C). The appellant's representatives did not provide convincing evidence that long-term care planning was not a consideration when the appellant made the transfer.

Once it has been established that an applicant has made a disqualifying transfer of resources, MassHealth calculates the period of ineligibility by adding "the value of all the resources transferred during the look-back period and divid[ing] the total by the average monthly cost to a private patient receiving long-term-care services in the Commonwealth of Massachusetts at

the time of application, as determined by the MassHealth agency.” See 130 CMR 520.019(G)(2). MassHealth then applies the period of ineligibility “beginning on the first day of the month in which the first transfer was made or the date on which the individual is otherwise eligible for long-term-care services, whichever is later.” Id.

The disqualifying transfer amount is \$136,000. According to the relevant MassHealth Eligibility Operations Memo issued in November 2022, for an application received on December 2, 2021, the applicable average daily nursing home rate in Massachusetts was \$410.⁴ In accordance with 130 CMR 520.019(G)(2)(i), MassHealth correctly calculated that there should be a 332-day period of ineligibility (\$136,000/410) beginning on the appellant’s otherwise eligible date of September 11, 2021. As such, MassHealth correctly determined the disqualifying transfer and start date of August 9, 2022.

For these reasons, 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.

Alexandra Shube
Hearing Officer
Board of Hearings

cc: Justine Ferreira, Taunton MassHealth Enrollment Center, 21 Spring St., Ste. 4, Taunton, MA 02780

⁴ According to MassHealth Eligibility Operations Memo 22-13 issued in November 2022, effective November 1, 2022, the average cost to a person paying privately for nursing facility services in the Commonwealth is being increased from \$410 to \$427 per day; however, when calculating the period of ineligibility for a disqualifying transfer of resources, use the date that MassHealth received the application to determine which amount should be used. **For applications received before November 1, 2022, as is the case here, use \$410.** For applications received on or after November 1, 2022, use \$427. See MassHealth Eligibility Operations Memo 22-13 (Nov. 2022), <https://www.mass.gov/doc/eom-22-13-average-cost-of-nursing-facility-services-0/download>, last visited July 25, 2024.