

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2402785
Decision Date:	05/17/2024	Hearing Date:	4/2/2024
Hearing Officer:	Cynthia Kopka		

Appearance for Appellant:



Appearance for MassHealth:

[Redacted], ASAP:
Kerrie Braley, RN, Clinical Director
Jessica Perez, RN, RN Team Manager
Jessica Constant, RN, ASAP RN



*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:	Clinical screen, FEW
Decision Date:	05/17/2024	Hearing Date:	4/2/2024
MassHealth's Rep.:	Bristol Elder Services	Appellant's Rep.:	██████
Hearing Location:	Quincy (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

By notice dated February 13, 2024, MassHealth notified Appellant that Appellant is not clinically eligible for participation in the Frail Elder Waiver because Appellant does not meet level-of-care requirements. Exhibit 1. Appellant filed this appeal in a timely manner on February 23, 2024. Exhibit 2. 130 CMR 610.015(B). Challenging an eligibility determination is a valid basis for appeal. 130 CMR 610.032.

Action Taken by MassHealth

MassHealth notified Appellant that Appellant is not clinically eligible for participation in the Frail Elder Waiver.

Issue

The appeal issue is whether MassHealth was correct in determining that Appellant is not clinically eligible for participation in the Frail Elder Waiver.

Summary of Evidence

MassHealth utilizes Aging Services Access Point (“ASAP”) organizations to perform clinical evaluations of MassHealth members to determine members’ clinical eligibility for home and community based waiver services. A nurse, nurse manager, and clinical director from [REDACTED] (“[REDACTED]” or “the ASAP”) (collectively “the ASAP” representatives”) appeared at hearing by phone. Appellant appeared by phone and was joined briefly by her sister. The parties submitted records in support, Exhibits 4-8. A summary of evidence and testimony follows.

On January 23, 2024, [REDACTED] received a request for clinical screening for the Frail Elder Waiver (FEW) on Appellant’s behalf. Appellant had recently [REDACTED] and was losing her MassHealth and Commonwealth Care Alliance insurance because she was over the income limit and would not qualify for MassHealth Standard without the FEW. Appellant is currently approved for MassHealth’s Medicare Savings Program (Buy-In).

On February 13, 2024, the ASAP nurse performed an assessment by phone to Appellant. On February 15, 2024, the ASAP nurse performed an on-site assessment (OSA). At the time of the OSA, Appellant lived with a roommate who had several pets.

Appellant is over the age of 65 with diagnoses and medical history including history of syncope, tobacco use, chronic obstructive lung disease, bipolar disorder, history of attempted suicide, asthma, helicobacter pylori gastrointestinal tract infection, osteopenia, migraine, osteoarthritis, hypothyroidism, compression fracture of thoracic vertebra, hyperlipidemia, essential hypertension, depression, anxiety, neuropathy, two foot surgeries, two back surgeries with hardware placement, and osteoporosis. Exhibit 4 at 2. Though Appellant’s medication list is extensive, Appellant is independent with medication management and knowledgeable about her medications. *Id.* at 2-3. During the OSA, the nurse observed Appellant transfer from sitting to standing safely and ambulate with the walker in her home slowly and hunched. The nurse observed that Appellant’s bed sloped, and Appellant reported falling from the bed. Appellant denied any recent emergency room (ER) visits. Appellant reported independence with positioning, transfers, mobility indoors and outdoors, toileting/incontinence, and dressing with difficulty. Appellant reported sitting to dress and taking time to complete tasks safely. Appellant required assistance to shower and can sponge bathe independently. The ASAP RN was unable to observe Appellant in the bathroom during the OSA due to her roommate taking a shower. Appellant reported to the nurse that there was safety equipment in the shower. Appellant reported independence with eating and that she receives home delivered meals. Her roommate also assisted with meal preparation. Appellant reported independence with laundry and finance management. Appellant denied that she was appropriate for nursing home services. *Id.* at 2-3.

The ASAP representatives determined that based on MassHealth’s clinical eligibility criteria, 130 CMR 456.409, Appellant is not eligible for the FEW program. Appellant does not have a daily skilled need pursuant to 130 CMR 456.409(A). Additionally, Appellant is independent in all of most of her activities of daily living (ADLs) under 130 CMR 456.409(B) and does not require nursing services

under 130 CMR 456.409(C). Though the ASAP determined that Appellant requires assistance with bathing, this alone is not sufficient to qualify for the FEW.

The ASAP representative reported that the ASAP made multiple follow-ups with Appellant, as she had no formal supports at the time of the OSA. In phone calls, meetings, and screenings with Appellant from February and March 2024, the ASAP developed a plan for formal supports consisting of five home delivered meals per week, two hours of homemaker services per week, a cellular personal emergency response system (PERS), and personal care (PC) assistance one hour twice per week for assistance with bathing. *Id.* at 5. On March 21, 2024, an ASAP nurse conducted another OSA. At the time of the second OSA, Appellant's roommate and her pets had moved out and Appellant's sister was planning to move in. Appellant had replaced the bed that had caused her to fall daily and reported no additional falls. *Id.* at 7. Appellant was observed transferring from sitting to standing and ambulating with her walker with a slow steady gait in a hunched position. Appellant reported independence with positioning, transfers, and indoor mobility with difficulty due to chronic pain in back and lower extremities. Appellant dresses independently with difficulty and was observed taking off socks and slippers. *Id.* Appellant reported independence with eating and simple meal preparation. Appellant's neighbor offered informal assistance with shopping. Appellant reported that she is not appropriate to live in a nursing home. *Id.* The ASAP nurse reported that Appellant has impairments in bathing, transportation, shopping, laundry, housework, and meal preparation. *Id.* Appellant reported that she is "now utilizing prescribed 2 liters of oxygen at night occasionally." *Id.*

The ASAP representative testified that based on the updated OSA, Appellant is not clinically eligible for FEW. Appellant requires some assistance with bathing; however, Appellant is independent with the remaining ADLs and does not require a skilled nursing need. The ASAP will continue to track Appellant for 60 days and Appellant may request another screening if there is a significant change in status.

Appellant testified that she should qualify for the FEW. Before she turned [REDACTED] Appellant received 17 hours of PCA assistance per week for assistance with bathing, dressing, cleaning, and cooking. Appellant has had her back fused and she cannot move around without her walker. Appellant wrote that she uses a walker at all times and needs transportation to doctor's appointments. Appellant needs more than the 4 hours of services she is getting from [REDACTED] Appellant testified that she has gone weeks without a shower and rarely changes out of pajamas. Appellant cannot go anywhere or do tasks such as make her bed. Appellant requires assistance because her roommate recently moved out and her sister moved in. Appellant's sister is disabled and cannot assist Appellant with anything. Appellant had to stop her physical therapy because the co-pays were too high.

Documents from Appellant's providers were included in the appeal record. Appellant's providers wrote that Appellant would benefit from the FEW due to financial burden with medications. Exhibit 8. Appellant has a combination of medical, mobility, and mental health concerns that limit

her ability to function independently. *Id.* Another provider documented in a note dated March 29, 2024 Appellant's difficulties with mobility, leaving the house, bathing, cleaning, and cooking. Exhibit 7 at 11. This physician recommended continuing with physical therapy (PT) and using her walker, documenting that Appellant has difficulty ambulating due to abnormalities with gait and mobility. *Id.* The doctor's note lists in Appellant's medications "o2 at night 2L." *Id.* at 7.

The ASAP representatives informed Appellant that her case manager could refer her to a SHINE representative and explore potential options for coverage to allow for more services, such as MassHealth's CommonHealth coverage.

Findings of Fact

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

1. Appellant is over the age of 65 with diagnoses and medical history including history of syncope, tobacco use, chronic obstructive lung disease, bipolar disorder, history of attempted suicide, asthma, helicobacter pylori gastrointestinal tract infection, osteopenia, migraine, osteoarthritis, hypothyroidism, compression fracture of thoracic vertebra, hyperlipidemia, essential hypertension, depression, anxiety, neuropathy, two foot surgeries, two back surgeries with hardware placement, and osteoporosis. Exhibit 4 at 2.
2. On January 23, 2024, [REDACTED] received a request for clinical screening for the FEW on Appellant's behalf.
3. On February 13, 2024, the ASAP nurse performed an assessment by phone to Appellant. On February 15, 2024, the ASAP nurse performed an OSA.
4. During the OSA, Appellant ambulated independently with a walker and transferred independently from sitting to standing. Appellant requires assistance with bathing. Appellant reported having difficulty dressing. *Id.* at 2-3.
5. In February and March 2024, the ASAP developed a plan for formal supports consisting of five home delivered meals per week, two hours of homemaker services per week, a cellular PERS, and PC assistance for one hour twice per week for assistance with bathing. *Id.* at 5.
6. On March 21, 2024, an ASAP nurse conducted another OSA. The ASAP nurse reported that Appellant has impairments in bathing, transportation, shopping, laundry, housework, and meal preparation. *Id.* at 7.
7. Appellant reported that she is "now utilizing prescribed 2 liters of oxygen at night occasionally." *Id.*

8. On March 29, 2024, Appellant's physician ordered Appellant continue with physical therapy. Exhibit 7 at 11.
9. The doctor's note lists in Appellant's medications "o2 at night 2L." *Id.* at 7.
10. Appellant's provider wrote that Appellant would benefit from the FEW due to financial burden with medications. Appellant has a combination of medical, mobility, and mental health concerns that limit her ability to function independently. Exhibit 8.

Analysis and Conclusions of Law

A Frail Elder Waiver allows an applicant or member in need of nursing facility services to receive certain waiver services at home if he or she meets both clinical eligibility criteria and financial eligibility criteria. 130 CMR 519.007(B). At issue in this appeal is Appellant's clinical eligibility for Frail Elder Waiver services.

(1) Clinical and Age Requirements. The Home- and Community-Based Services Waiver allows an applicant or member who is certified by the MassHealth agency or its agent to be in need of nursing-facility services to receive certain waiver services at home if they

(a) is 60 years of age or older and, if younger than 65 years old, is permanently and totally disabled in accordance with Title XVI standards; and

(b) would be institutionalized in a nursing facility, unless he or she receives one or more of the services administered by the Executive Office of Elder Affairs under the Home- and Community-Based Services Waiver-Frail Elder authorized under section 1915(c) of the Social Security Act.

Id. To meet the requirements of 130 CMR 519.007(B)(1)(b), an applicant must require one skilled service listed in 130 CMR 456.409(A) daily or the applicant must have a medical or mental condition requiring a combination of at least three services from 130 CMR 456.409(B) and (C), including at least one of the nursing services listed in 130 CMR 456.409(C):

(A) Skilled Services. Skilled services must be performed by or under the supervision of a registered nurse or therapist. Skilled services consist of the following:

(1) intravenous, intramuscular, or subcutaneous injection, or intravenous feeding;

(2) nasogastric-tube, gastrostomy, or jejunostomy feeding;

- (3) nasopharyngeal aspiration and tracheostomy care, however, long-term care of a tracheotomy tube does not, in itself, indicate the need for skilled services;
- (4) treatment and/or application of dressings when the physician or PCP has prescribed irrigation, the application of medication, or sterile dressings of deep decubitus ulcers, other widespread skin disorders, or care of wounds, when the skills of a registered nurse are needed to provide safe and effective services (including, but not limited to, ulcers, burns, open surgical sites, fistulas, tube sites, and tumor erosions);
- (5) administration of oxygen on a regular and continuing basis when the member's medical condition warrants skilled observation (for example, when the member has chronic obstructive pulmonary disease or pulmonary edema);
- (6) skilled nursing observation and evaluation of an unstable medical condition (observation must, however, be needed at frequent intervals throughout the 24 hours; for example, for arteriosclerotic heart disease with congestive heart failure);
- (7) skilled nursing for management and evaluation of the member's care plan when underlying conditions or complications require that only a registered nurse can ensure that essential unskilled care is achieving its purpose. The complexity of the unskilled services that are a necessary part of the medical treatment must require the involvement of skilled nursing personnel to promote the member's recovery and safety;
- (8) insertion, sterile irrigation, and replacement of catheters, care of a suprapubic catheter, or, in selected residents, a urethral catheter (a urethral catheter, particularly one placed for convenience or for control of incontinence, does not justify a need for skilled nursing care). However, the insertion and maintenance of a urethral catheter as an adjunct to the active treatment of disease of the urinary tract may justify a need for skilled nursing care. In such instances, the need for a urethral catheter must be documented and justified in the member's medical record (for example, cancer of the bladder or a resistant bladder infection);
- (9) gait evaluation and training administered or supervised by a registered physical therapist at least five days a week for members whose ability to walk has recently been impaired by a neurological, muscular, or skeletal abnormality following an acute condition (for example, fracture or stroke). The plan must be designed to achieve specific goals within a specific time frame. The member must require these services in an institutional setting;
- (10) certain range-of-motion exercises may constitute skilled physical therapy only if they are part of an active treatment plan for a specific

state of a disease that has resulted in restriction of mobility (physical therapy notes showing the degree of motion lost and the degree to be restored must be documented in the member's medical record);

(11) hot pack, hydrocollator, paraffin bath, or whirlpool treatment will be considered skilled services only when the member's condition is complicated by a circulatory deficiency, areas of desensitization, open wounds, fractures, or other complications; and

(12) physical, speech/language, occupational, or other therapy that is provided as part of a planned program that is designed, established, and directed by a qualified therapist. The findings of an initial evaluation and periodic reassessments must be documented in the member's medical record. Skilled therapeutic services must be ordered by a physician or PCP and be designed to achieve specific goals within a given time frame.

(B) Assistance with Activities of Daily Living. Assistance with activities of daily living includes the following services:

(1) bathing when the member requires either direct care or attendance or constant supervision during the entire activity;

(2) dressing when the member requires either direct care or attendance or constant supervision during the entire activity;

(3) toileting, bladder or bowel, when the member is incontinent of bladder or bowel function day and night, or requires scheduled assistance or routine catheter or colostomy care;

(4) transfers when the member must be assisted or lifted to another position;

(5) mobility/ambulation when the member must be physically steadied, assisted, or guided in ambulation, or be unable to propel a wheelchair alone or appropriately and requires the assistance of another person; and

(6) eating when the member requires constant intervention, individual supervision, or direct physical assistance.

(C) Nursing Services. Nursing services, including any of the following procedures performed at least three times a week, may be counted in the determination of medical eligibility:

(1) any physician- or PCP-ordered skilled service specified in 130 CMR 456.409(A);

(2) positioning while in bed or a chair as part of the written care plan;

(3) measurement of intake or output based on medical necessity;

(4) administration of oral or injectable medications that require a registered nurse to monitor the dosage, frequency, or adverse reactions;

(5) staff intervention required for selected types of behavior that are generally considered dependent or disruptive, such as disrobing,

screaming, or being physically abusive to oneself or others; getting lost or wandering into inappropriate places; being unable to avoid simple dangers; or requiring a consistent staff one-to-one ratio for reality orientation when it relates to a specific diagnosis or behavior as determined by a mental health professional;

- (6) physician- or PCP-ordered occupational, physical, speech/language therapy or some combination of the three (time-limited with patient-specific goals);
- (7) physician- or PCP-ordered nursing observation and/or vital signs monitoring, specifically related to the written care plan and the need for medical or nursing intervention; and
- (8) treatments involving prescription medications for uninfected postoperative or chronic conditions according to physician or PCP orders, or routine changing of dressings that require nursing care and monitoring.

Here, Appellant is over the age of 65. In order to qualify for the FEW, she must have a skilled need as listed in 130 CMR 456.409(A). Alternatively, she must have three needs listed in 130 CMR 456.409(B) and (C), one of which must be from 130 CMR 456.409(C).

The evidence in the record does not show that Appellant's need for oxygen meets the skilled need requirement of 130 CMR 456.409(A)(5) ("administration of oxygen on a regular and continuing basis when the member's medical condition warrants skilled observation (for example, when the member has chronic obstructive pulmonary disease or pulmonary edema)"). Appellant reported that she was prescribed 2L for night use occasionally and the updated medication list from the doctor's note dated March 29, 2024 does not contain additional information.

Appellant provided evidence that she requires PT, which is a service listed in 130 CMR 456.409(C)(6). However, the evidence does not reflect that this is something she requires at least three times per week, as required by 130 CMR 456.409(C). Therefore, the evidence in the record does not demonstrate that Appellant has a need listed in 130 CMR 456.409(C).

Finally, the evidence shows that Appellant requires assistance with bathing, an ADL listed in 130 CMR 456.409(B). Appellant offered evidence that she has difficulty with dressing, but the summary provided by the ASAP does not indicate that she requires either direct care or attendance or constant supervision during the entire activity as required by 130 CMR 456.409(B)(2). Similarly, Appellant has difficulty with mobility, but the record does not show that she "must be physically steadied, assisted, or guided in ambulation, or be unable to propel a wheelchair alone or appropriately and requires the assistance of another person." 130 CMR 456.409(B)(5). Other areas of care for which Appellant needs assistance (such as shopping) are instrumental activities of daily living (IADLs), which are not considered in the FEW evaluation.

As the evidence in the record indicates that Appellant's needs do not rise to the requirements listed for the FEW, Appellant does not meet the clinical eligibility requirements for MassHealth's Frail Elder Waiver. Accordingly, this appeal is denied. Appellant is encouraged to apply for MassHealth CommonHealth or request an updated screening for the FEW with updated information about her need for oxygen, PT, or additional ADLs.

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.

Cynthia Kopka
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Desiree Kelley, RN, BSN, Massachusetts Executive Office of Elder Affairs, 1 Ashburton Pl., 3rd Floor, Boston, MA 02108, 617-222-7410