

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



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|-------------------------|---------------------|-----------------------|------------|
| Appeal Decision: | Denied | Appeal Number: | 2407476 |
| Decision Date: | 7/22/2024 | Hearing Date: | 06/13/2024 |
| Hearing Officer: | Amy B. Kullar, Esq. | | |

Appearance for Appellant:



Appearance for MassHealth:

Lynn Bloomquist, Tewksbury MassHealth
Enrollment Center



*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; Over 65 |
| Decision Date: | 7/22/2024 | Hearing Date: | 06/13/2024 |
| MassHealth's Rep.: | Lynn Bloomquist | Appellant's Rep.: | |
| Hearing Location: | Tewksbury MassHealth Enrollment Center Room 1 | 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 April 30, 2024, MassHealth approved the appellant's application for MassHealth long-term-care benefits but imposed a period of ineligibility from January 1, 2024 to April 20, 2024 because MassHealth determined that appellant made a disqualifying transfer of resources (see 130 CMR §§ 520.018, 520.019 and Exhibit 1). The appellant filed this appeal in a timely manner on May 9, 2024 (see 130 CMR 610.015(B) and Exhibit 2). Any MassHealth agency action to suspend, reduce, terminate, or restrict a member's assistance is a valid ground for appeal to the Board of Hearings. See 130 CMR 610.032(A)(3).

Action Taken by MassHealth

MassHealth imposed a period of ineligibility from January 1, 2024 through April 20, 2024 due to finding that appellant made a disqualifying transfer of resources.

Issue

The appeal issue is whether MassHealth correctly determined that appellant made disqualifying transfers of resources, and on this basis, correctly imposed a period of ineligibility for long-term care benefits.

Summary of Evidence

A MassHealth representative appeared at the hearing telephonically and provided the following information by testimony and through documentary evidence: appellant is over the age of 65 and has a spouse living in the community. On January 8, 2024, MassHealth received an application, submitted on behalf of appellant, seeking MassHealth Long-Term Care (LTC) coverage with a requested benefit start date of January 1, 2024. On April 30, 2024, MassHealth approved Appellant's application for benefits effective April 21, 2024, because MassHealth determined that Appellant "recently gave away or sold assets to become eligible for MassHealth long-term care services..." See Exh. 1, p. 3. As a result of the disqualifying transfers, MassHealth imposed a period of ineligibility from the requested start date of January 1, 2024 through April 20, 2024. See id.

The MassHealth representative explained that the period of ineligibility was based upon the purchase of an irrevocable, immediate income annuity by the appellant's community spouse in the amount of \$560,000.00. The annuity is a "10 Years Term Certain" contract with monthly income payments of \$5,737.58 to the community spouse yielding total payments of \$512,251.14, which is actuarially unsound based upon the purchase price of the annuity (Testimony)¹. The MassHealth representative testified that the difference between the annuity purchase price and the total projected payments is \$47,748.86; dividing that figure by the average daily private pay rate for long-term care of \$433.00, there would be a period of ineligibility for the appellant of 110 days. (Testimony). The MassHealth representative testified that what the applicant is receiving in return for the purchase of the annuity is too low in value to be actuarially sound.

A Medicaid consultant appeared on behalf of appellant. The appellant's representative did not dispute the facts as stated by MassHealth and asserted that the basis for appeal turned on the issue of community spouse's intent when purchasing the annuity. Citing 130 CMR 520.019(F), appellant's representative argued that a period of ineligibility should not be imposed when a transfer was made for a purpose exclusively to benefit the community spouse and not to transfer the asset to another person. The appellant's representative testified that the community spouse had sold a lakefront home in 2023, used the proceeds to purchase a condominium to reside in, and annuitized the remaining proceeds from the sale that exceeded the 2024 Community Spouse

¹ The MassHealth representative testified that the annuity was purchased on 12/26/2023 for \$560,000.00, with monthly payments of \$5,737.58 to the community spouse and an income start date of 1/5/2024. The caseworker's calculations using the accrual life tables determined that the community spouse will only receive \$512,251.14 over the term of the annuity.

Resource Allowance of \$154,140.00 (Testimony). The appellant's representative testified that the community spouse had worked closely with her family, financial advisor, and attorney leading up to the purchase of the annuity and that due to the age of the community spouse, she selected the annuity for purchase because she would have a difficult time spending that much money. She further stated that the annuity contract was irrevocable and that it would be impossible for the community spouse to make any changes to the terms of the annuity contract at this time (Testimony).

Findings of Fact

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

1. Appellant is over the age of 65 and filed an application for MassHealth long-term care benefits on January 8, 2024, with a requested benefit start date of January 1, 2024.
2. On December 26, 2023, the appellant's spouse purchased an irrevocable, immediate income annuity for \$560,000.00. The annuity is a "10 Years Term Certain" contract with monthly income payments of \$5,737.58 to the community spouse, yielding total payments of \$512,251.14. (Testimony and Exhibit 6).
3. As of the application date, the average daily private rate for a nursing home in Massachusetts was \$433.00 (MassHealth Eligibility Operations Memo 23-25 (November, 2023)).
4. On April 30, 2024, MassHealth approved Appellant's application for benefits, but also determined that Appellant made a disqualifying transfer of resources in the amount of \$47,748.86, based on the difference between the annuity price of \$560,000.00 less projected total payments of \$512,251.14.
5. As a result of the disqualifying transfer, MassHealth calculated a period of ineligibility beginning on the requested start date of January 1, 2024, through April 20, 2024.

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.² 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 at 130 CMR 520.019(D) (permissible transfers), 130 CMR 520.019(J) (exempted transfers), and 130 CMR 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 Appellant at hearing, is found in 130 CMR 520.019(F), which states, the following:³

....

(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:***

² 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).

³ Appellant’s representatives did not argue 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.

***(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)

In this case, MassHealth imposed a period of ineligibility based on the purchase of an annuity by the appellant's community spouse. The purchase of the annuity occurred in late December of 2023 and is well within the 5-year look-back period. The only explanation for the disqualifying transfer that was offered is that because of the community spouse's age, this was the only annuity available to her. This argument is not persuasive since the Appellant's representative submitted documentation that indicated the community spouse had the opportunity to purchase a "5 Year Term Certain" annuity, and there was no explanation offered for why the community spouse selected the "10 Year Term Certain Annuity," except to state that she would have had a difficult time spending the amount of monthly income payable under the 5-year annuity (Testimony).

In determining whether the purchase of the annuity was a disqualifying transfer, the first question is whether 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.

See SMM, Department of Health and Human Services (DHHS) HCFA, Transmittal No. 64, § 3258.1(A) (11-94).⁴

When applying MassHealth's transfer regulations and the federal mandatory instructions to the present case, Appellant has not successfully demonstrated that MassHealth erred in concluding the purchase of the annuity for \$560,000.00, yielding payments to the community spouse totaling \$512,251.14 over the term of the contract, was made for less than FMV. See 130 CMR 520.018(B) and 520.019(B). Here, MassHealth correctly determined that Appellant's community spouse's

⁴ 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).

purchase of an actuarially unsound annuity was a transfer for less than FMV.

The Appellant's representative's main argument was that the appellant should not be penalized for the purchase of the annuity because she meets the "intent" exceptions listed 130 CMR 520.019(F); specifically, that the transfer was made exclusively for a purpose other than to qualify for MassHealth, or that she intended to dispose of the resource at either FMV or for other valuable consideration. CMS has published instructions to assist agencies in interpreting and applying this specific exemption from the disqualifying transfer rules, which the appellant's representative called attention to during the hearing:

2. Transfers Exclusively for a Purpose Other Than to Qualify for Medicaid. --Require the individual to establish, to your satisfaction, that the asset was transferred for a purpose other than to qualify for Medicaid. ***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.***

See SMM, DHHS-HCFA, Transmittal No. 64, § 3258.10(C).

Citing the above provision, the Massachusetts Appeals Court has recognized that "federal law mandates a heightened evidentiary showing on [the issue of demonstrating intent when making a transfer for less than fair market value]." See, Gauthier, 80 Mass. App. Ct. at 785-786.

Appellant has not sufficiently demonstrated that the purchase of the annuity was made for reasons other than to qualify for MassHealth. See 130 CMR 520.019(F)(1). The appellant's representative testified that the community spouse sold real property and used the proceeds of the sale in order to qualify the appellant for MassHealth LTC benefits. Thus, the evidence shows that the community spouse's sole reason for purchasing the annuity was to assist the appellant to qualify for MassHealth LTC Benefits. Because the transfer was made for less than FMV and absent evidence that the transfer met one of the exceptions, MassHealth correctly determined that Appellant made a disqualifying transfer of resources.

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.

Based on the above, the disqualifying transfer amount is \$47,748.86. At the time of his

application in January, 2024, the average monthly nursing home rate in Massachusetts was \$433.00. See MassHealth Eligibility Operations Memo 23-25. In accordance with 130 CMR 520.019(G)(2)(i), MassHealth correctly imposed a 110-day period of ineligibility (47,748.86/433) beginning on Appellant's otherwise eligible date of January 1, 2024 and lasting until April 20, 2024.

As Appellant did not demonstrate by a preponderance of the evidence that MassHealth erred in imposing a period of ineligibility for a disqualifying transfer of resources, this appeal is DENIED.

Order for MassHealth

None.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Amy B. Kullar, Esq.
Hearing Officer
Board of Hearings

[REDACTED]

cc: MassHealth Representative: Sylvia Tiar, Tewksbury MassHealth Enrollment Center, 367 East Street, Tewksbury, MA 01876-1957