

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	2411476
<b>Decision Date:</b>	9/23/2024	<b>Hearing Date:</b>	09/03/2024
<b>Hearing Officer:</b>	Amy B. Kullar, Esq.		

**Appearance for Appellant:**  
Pro se

**Appearances for MassHealth:**  
Nahumirys Sanabria, Office of Long-term  
Services and Supports (OLTSS)  
Kelly Rayen, R.N., Clinical Reviewer, Optum



*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

<b>Appeal Decision:</b>	Approved	<b>Issue:</b>	Personal Care Attendant Services; Surrogate
<b>Decision Date:</b>	9/23/2024	<b>Hearing Date:</b>	09/03/2024
<b>MassHealth's Reps.:</b>	Nahumirys Sanabria, OLTSS; Kelly Rayen, R.N., Optum	<b>Appellant's Rep.:</b>	Pro se
<b>Hearing Location:</b>	Quincy Harbor South 2	<b>Aid Pending:</b>	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 July 15, 2024, MassHealth notified the Appellant that it was terminating the Appellant's personal care attendant (PCA) services effective July 29, 2024, because the Appellant had been directed to find a surrogate, and she had not found one (Exhibit 1). The Appellant filed this appeal with the Board of Hearings (BOH) in a timely manner on July 24, 2024 (130 CMR 610.015; Exhibit 2). Termination of services is a valid ground for appeal to the BOH (130 CMR 610.032).

### Action Taken by MassHealth

MassHealth terminated the Appellant's PCA services because she did not designate a surrogate.

## Issue

Was MassHealth correct in terminating the Appellant's PCA services because she did not designate a surrogate?

## Summary of Evidence

MassHealth was represented by an individual from the Office of Long-Term Services and Support (OLTSS) and by a registered nurse and clinical appeals reviewer<sup>1</sup>; they both appeared telephonically. The Appellant also appeared at hearing via telephone and verified her identity. The parties' testimony and record evidence are summarized as follows:

The Appellant is an adult over the age of [REDACTED]. The Appellant's medical history includes chronic pain: stenosis of the cervical and lumbar spine; osteoarthritis of the neck, shoulders, hands, and hips; fibromyalgia; diabetes mellitus type 2; macular degeneration<sup>2</sup>; colitis; COPD; and rheumatoid arthritis. Testimony, Exhibit 6. The Appellant was re-evaluated for PCA services on January 8, 2024<sup>3</sup>, and her PCM agency, [REDACTED], requested 47 hours and 45 minutes per week for the service period of 2/25/2024-2/24/2025. This request was modified on February 19, 2024, to 43 hours, 45 minutes per week for the service period of 2/25/2024-2/24/2025. Testimony, Exhibit 6.

According to MassHealth's testimony, on June 7, 2024, the Appellant called her PCM agency, and the encounter notes state the following: "The consumer complained about her current PCA that she is billing for work she didn't do. The consumer requested confidentiality because she is worried about what PCA can say or do to her. [REDACTED] has been no." Exhibit 7<sup>4</sup>. On June 10, 2024, the Appellant left a voicemail for her PCM agency stating that she was having an "emergency" and the PCM agency called her back that day. The note from that call is categorized as "Skills Training" and states:

[REDACTED] received a VM from [the Appellant] requesting a call

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<sup>1</sup> Only the representative from OLTSS offered testimony during the hearing and references to the MassHealth representative or OLTSS representative are used interchangeably. When asked if she had anything to place on the record, the clinical reviewer stated that she had nothing to add. Testimony.

<sup>2</sup> "Macular Degeneration, also known as Age-related Macular Degeneration (AMD), is the leading cause of irreversible vision loss in adults over [REDACTED]" American Macular Degeneration Foundation. What Is Macular Degeneration? (<https://www.macular.org/what-macular-degeneration>) Accessed 9/18/2024.

<sup>3</sup> The Appellant's re-evaluation for PCA services was conducted by [REDACTED]. She and the Appellant signed the Evaluator sign-off dated 1/8/2024. See Exhibit 6, page 37.

<sup>4</sup> Exhibit 7 is a one-page document emailed to the hearing officer pre-hearing on 8/20/2024. The contents of the document are the narratives of three encounters the PCM had with the Appellant prior to terminating her PCA services.

back reporting that she was 'having an emergency.' [REDACTED] called [the Appellant] back, she reported that a PCA she had working for her, [REDACTED] stopped working on 5/30/2024 and hasn't returned. [The Appellant] reported that her back up PCA/daughter, had filled in a few days while [the Appellant] didn't have anyone but wasn't able to submit the timesheets online. [REDACTED] offered to confirm with Tempus if [REDACTED] had submitted time for hours not worked. [REDACTED] also informed [the Appellant] that [REDACTED] would need to contact Tempus to be reinstated since it was reported on the Tempus site that she is no longer an active PCA.

While on the phone [the Appellant] mentioned that [REDACTED] had gotten her to sign up and submit timesheets using e-timesheet portal, [the Appellant] reported that she wasn't able to manage that on her own and often relied that [REDACTED] was submitting the correct hours worked. [REDACTED] informed [the Appellant] that she would benefit having a surrogate or an AP assist her with managing the PCA program. [REDACTED] discussed the roles of a surrogate or an AP, [the Appellant] asked to think about it. [REDACTED] offered to follow up with her tomorrow to further discuss the surrogate and AP roles. [REDACTED] also emailed Tempus requesting a copy of the last timesheet.'

(Exhibit 7)

The final entry on Exhibit 7 is dated June 13, 2024, and states:

'[REDACTED] called [the Appellant] in reference to following up with her about identifying a surrogate or AP to assist her with managing the PCA program. [The Appellant] reported that if she doesn't have a PCA then she is unable to do anything for herself. [REDACTED] highly recommended that [the Appellant] appoint a surrogate to assist her with managing the program and hiring an appropriate PCA. [REDACTED] discussed if [the Appellant] was interested in having MOW temporarily while she is waiting to have a PCA start, she reported that she is not interested at this point. [REDACTED] informed [the Appellant] that a 30 day certified letter will be mailed to her discussing her need to appoint a surrogate to assist her with managing the program. [REDACTED] reported that there is a deadline of 7/13/2024 to appoint a surrogate.'

The 50-page pre-appeal submission from Optum that documents the Appellant's clinical reevaluation for PCA services includes a four-page MassHealth form entitled: Consumer Assessment to Manage PCA Services (hereinafter, the "Assessment"). Exhibit 6, page 40. This form is signed by [REDACTED] Assessor<sup>5</sup> and by the Appellant and is dated 8/23/23. The first page of the form is marked as an "Initial Assessment" and states that the Appellant does not have a court-appointed legal guardian. On page 1, the introduction to this form states:

The Personal Care Management (PCM) agency must conduct a written assessment to determine the consumer's ability to manage PCA services independently. This assessment must be completed face-to-face for each new consumer before the submission of the prior-authorization request for PCA services to MassHealth or the Massachusetts Commission for the Blind (MCB). **A full assessment must also be completed during the PA year and at the time of reevaluation if:**

- the consumer's **medical, cognitive, or emotional condition changes in a way that affects the consumer's ability to manage PCA services independently;**
- **the consumer is not managing the PCA program effectively as evidenced by the consumer exhibiting a pattern of overutilization, or inappropriate use of PCA services, and not responding to intervention from a skills trainer; or**
- at the request of the fiscal intermediary or MassHealth.

The result of the Consumer Assessment to Manage PCA Services is a decision that either:

- the consumer can manage PCA services independently; or
- the consumer requires the assistance of a surrogate

(Exhibit 6, page 40)

The next two pages of the Assessment contain four sections that requires the Assessor to evaluate the Appellant's ability to manage the administration of the PCA program. The last page of the Assessment is a Summary and a Decision.

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<sup>5</sup> The Introduction on page 1 of the Assessment states "Personal Care Management (PCM) agency must conduct a written assessment to determine the consumer's ability to manage PCA services independently," so I conclude that [REDACTED] is the agent of [REDACTED] however, he did not include a title or credential or affiliation with his signature, only his printed name. Exhibit 6, page 40. The testimony and written record do not show that an Assessment of the Appellant occurred after the Initial Assessment on 8/23/2023. Exhibit 6.

The categories that the Appellant was assessed under are:

1. Communication and Decision Making; here, the Assessor answered “No” to the question of whether the Appellant has cognitive/behavioral disabilities that would impair the consumer’s ability to self-direct [her] care. The Assessor answered “Yes” that the “Appellant remembers important information,” “can communicate [her] needs effectively,” and manage[s] her own finances. Exhibit 6 at 41.

2. Knowledge of Disability and Related Conditions; here, the Assessor answered “Yes” that the Appellant could describe her own disability, “Yes” she can describe a plan to manage medications (scheduled and dosages) and “Yes” that the [Appellant] was able to describe the use of any assistive adaptive devices. These answers resulted in the Assessor checking the box in this section that reads: “The consumer does not require the assistance of a surrogate to understand [her] disability and related conditions.” Exhibit 6 at 41.

3. Knowledge of Personal Assistance Needs; the instruction on this category states: “a ‘no’ response to [any question] indicates that the consumer requires the assistance of a surrogate to understand personal assistance needs and routines. The Assessor answered “yes” to all the questions in this section and selected for the Result: “The consumer does not require the assistance of a surrogate with knowledge of personal assistance needs.” Exhibit 6 at 42.

4. Ability to Employ Personal Care Attendants; Here, the form states “[a] ‘no’ response to any question indicates that the consumer requires the assistance of a surrogate to employ personal care attendants.” The Assessor is asked, Can the consumer describe how to recruit, hire, and schedule a personal care attendant? The Assessor answered “Yes.” The Assessor also selected “Yes” in response to three questions, as follows: “Is the consumer able to describe how to train and supervise a personal care attendant?” “Can the consumer describe the backup plan he or she will use if a personal care attendant is sick or absent?” and “Can the consumer complete activity forms correctly?”. Exhibit 6 at 42.

In completing the rest of the Assessment, under section II, “Assessment Summary,” the Assessor did not check any areas as being areas where the Appellant would require the assistance of a surrogate. The last section of the Assessment, the III, Decision, the Assessor selected, “The consumer is able to independently perform all tasks required to manage the PCA program and does not require the assistance of a surrogate.” Exhibit 6 at 43. Both the Assessor and the Appellant signed the Assessment on August 23, 2023.

The representative from OLTSS testified to the following: via notice sent on June 13, 2024, the Appellant’s PCM agency informed the Appellant that she would need to obtain a surrogate. The Appellant did not locate a surrogate within 30 days, and the regulations require the termination of PCA services. The termination was processed as of July 15, 2024. Through a notice dated July 15,

2024, MassHealth notified the Appellant that it was terminating the Appellant's PCA services effective July 29, 2024. As of July 29, 2024, there was no update from PCM Agency that the Appellant had been able to locate a surrogate. Testimony.

In response to the OLTSS testimony, the Appellant testified, "I had a PCA that was very, very mean and hateful and lied about everything, and she stole from me; she is so convincing; she told the PCM agency that she was doing the timesheets on the paper; not over the Internet; then the PCM told her that everyone needs to go on electronic recording of time for PCA program." Testimony. The Appellant stated that she suffers from macular degeneration, that she could not locate a surrogate, that she is blind in one eye and that the other eye is going bad. When questioned, the Appellant stated that she has no one in her life that could help her and serve as her surrogate. Testimony. She stated her custom when her former PCA entered her home was to write down the time she arrived and do the same thing when her PCA left the home. This was the Appellant's system for recording her PCA's hours. Testimony. The Appellant and the PCA would review the hours at the end of each week, and the PCA would verbally agree with the hours that the Appellant had recorded. She was then submitting different hours to the PCM agency and forging the Appellant's agreement to the falsified hours. Testimony.

The OLTSS representative responded that, at this point, the Appellant needs an administrative proxy. This is new, she can tell the worker what her task needs are but she needs help with the administrative proxy. Testimony. The OLTSS representative also stated that MassHealth will provide the tablet for consumers to communicate with their program and manage their PCA hours. Testimony.

The Appellant concluded her testimony by stating she feels this whole situation was just unlucky. Her first PCA stayed with her for four years, and she never had an issue until the most recent PCA. Testimony. She cannot hire a new PCA at this point since her services might be canceled. Testimony. As a result, she cannot go out and she does not drive. She is used to being in the community, and worked as a hairstylist for many years and she does not like that she needs so much help now; however, she has no choice. Testimony.

## Findings of Fact

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

1. The Appellant is over age [REDACTED] and lives alone in the community. Testimony, Exhibit 4.
2. The Appellant's medical diagnoses include chronic pain: stenosis of the cervical & lumbar spine; osteoarthritis of the neck, shoulders, hands, hips; fibromyalgia; diabetes mellitus type 2; macular degeneration; colitis; COPD; and rheumatoid arthritis. Testimony, Exhibit 6.

3. The Appellant was deemed clinically eligible for PCA services. Testimony, Exhibit 6.
4. As of February 25, 2024, MassHealth approved the Appellant for 43 hours, 45 minutes of day/evening PCA services per week. Testimony, Exhibit 6.
5. [REDACTED] a PCM agency, sent the Appellant a letter in June, 2024, notifying her that it had determined that she needed a surrogate to help her manage the PCA program; that if the Appellant did not find a surrogate by July 14, 2024, [REDACTED] would notify MassHealth of this fact; that MassHealth could terminate her PCA services as a result. Testimony, Exhibit 6.
6. Prior to terminating the Appellant's PCA services, [REDACTED] documented two conversations that the agency staff had with the Appellant after she self-reported that her current PCA was submitting incorrect hours to Tempus. Testimony, Exhibit 7.
7. The Appellant did not designate a surrogate by July 14, 2024, and was terminated from the PCA program by MassHealth effective July 29, 2024, via notice to the Appellant dated July 15, 2024. Testimony, Exhibit 1.
8. MassHealth did not perform a full assessment of the Appellant's ability to manage the PCA program administratively, even though there is evidence that her medical situation (her blindness) has changed significantly since the Initial Assessment on 8/23/2023. Testimony, Exhibit 6.
9. The Appellant filed a timely appeal of the July 15, 2024 termination notice with BOH on July 24, 2024. Exhibit 2.
10. The Appellant asserted that her PCA was forging her consent to the hours the PCA was reporting to Tempus. Testimony.
11. The Appellant is not diagnosed with any cognitive deficits. Exhibit 6.
12. The Appellant has not had a PCA since May, 2024. Testimony.

## **Analysis and Conclusions of Law**

MassHealth regulations about PCA services are found at 130 CMR 422.000 et seq. Regulation 130 CMR 422.402 defines a PCA as a person who is hired by the member or surrogate to provide PCA services, which are further defined as assistance with the activities of daily living (ADLs) and instrumental activities of daily living (IADLs) as described in 130 CMR 422.410.

Pursuant to 130 CMR 422.403(C), MassHealth covers PCA services when: (1) they are prescribed by a physician; (2) the member's disability is permanent or chronic in nature; (3) the member requires physical assistance with two or more of the following ADLs as defined in 130 CMR 422.410(A): (a) mobility including transfers; (b) medications; (c) bathing or grooming; (d) dressing or undressing; (e) range-of-motion exercises; (f) eating; and (g) toileting; and (4) MassHealth has determined that the PCA services are medically necessary and has granted a prior authorization for PCA services.

Activities of daily living are listed at 130 CMR 422.410(A) and include mobility, assistance with medications or other health-related needs, bathing/grooming, dressing and undressing, passive range-of-motion exercises, eating, and toileting (including bowel care and bladder care). MassHealth pays for PCA time in physically assisting members to perform the aforementioned activities of daily living.

Pursuant to 130 CMR 450.204(A), MassHealth will not pay a provider for services that are not medically necessary; and may impose sanctions on a provider for providing or prescribing a service or for admitting a member to an inpatient facility where such service or admission is not medically necessary. A service is "medically necessary" if:

- (1) it is reasonably calculated to prevent, diagnose, prevent the worsening of, alleviate, correct, or cure conditions in the member that endanger life, cause suffering or pain, cause physical deformity or malfunction, threaten to cause or to aggravate a handicap, or result in illness or infirmity; and
- (2) there is no other medical service or site of service, comparable in effect, available, and suitable for the member requesting the service, that is more conservative or less costly to MassHealth. Services that are less costly to MassHealth include, but are not limited to, health care reasonably known by the provider, or identified by MassHealth pursuant to a prior authorization request, to be available to the member through sources described in 130 CMR 450.317(C), 503.007, or 517.007.

130 CMR 422.402 defines "surrogate" as follows:

the member's legal guardian, a family member, or other person as identified in the service agreement, who is responsible for performing certain PCA management tasks that the member is unable or unwilling to perform.

Here, MassHealth terminated the Appellant's PCA services, despite a finding that the Appellant is clinically eligible for PCA services. The Appellant's PCM agency reported to MassHealth that that Appellant needed a surrogate to help her manage the PCA program, and that she had not found one by a deadline date imposed by the PCM agency. As a result of this report from the PCM agency, MassHealth ended the Appellant's PCA services effective July 29, 2024.

It is unclear that the Appellant is “unable or unwilling” to perform certain PCA managements tasks, such that she would require a surrogate. The PCM agency only documented one instance of where the Appellant had an issue with a PCA in reporting the PCA’s hours worked. The Appellant credibly testified at the hearing that she was able to manage the administrative pieces of the PCA program if she was properly supported by MassHealth despite her worsening blindness. There is no evidence that MassHealth offered the Appellant a tablet to monitor and report her PCA’s hours worked, even though the MassHealth representative stated that the Appellant was eligible to receive one for that purpose.

Also, the encounter notes that the PCM agency submitted in support of this termination were shockingly thin. At the hearing, the Appellant testified that she believes the PCA forged her consent on the electronically submitted timesheets. It appears that the PCM agency chose not to investigate this possibility and found the PCA’s explanation of what occurred to be more credible than the Appellant’s explanation. There was no evidence in the record that the PCM agency took any steps to work with the Appellant to resolve this situation, other than beginning the termination of the Appellant’s PCA services.

No other instances where the Appellant made errors in managing the PCA program were cited by MassHealth. Additionally, MassHealth failed to properly reassess the Appellant’s ability to manage the PCA program before terminating her PCA services. If the PCM agency really believed that the Appellant needed a surrogate, it should have provided more meaningful assistance to the Appellant in finding one.

In short, there is little evidence that the Appellant is unable or unwilling to perform certain PCA management tasks, as asserted by the PCM agency. The legal basis on which the Appellant’s medically necessary PCA services were terminated was quite thin.

I conclude that currently, the Appellant does not require a surrogate to manage the PCA program. If at any time the PCM agency has reason to believe this is the case, it may revisit the issue of finding a surrogate for the Appellant and should assist her to find one that is suitable.

MassHealth’s decision to terminate the Appellant’s PCA services effective July 29, 2024 was incorrect.

This appeal is APPROVED<sup>6</sup>.

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<sup>6</sup> The Appellant is also urged to contact the Office of the Attorney General’s Elder Hotline at (888) 243-5337 to report any instance in the future where she is made to feel unsafe or financially exploited by anyone that enters her home. She may also consider reaching out to [HelpSteps.com](https://www.helpsteps.com), which is a Massachusetts 2-1-1 service. "HelpSteps connects individuals to local health and human resources." This hotline provides information about elder care, including help applying for Medicaid and Medicare, and transportation resources. She may also consider calling the Executive Office of Elder Affairs and speaking with the "Volunteer Lawyers Project of Boston providing free legal information and referral services to

## Order for MassHealth

Rescind notice of July 15, 2024. Send notice to the Appellant apprising her that she will receive 43 hours and 45 minutes per week for the service period of 2/25/2024-2/24/2025, effective February 25, 2024. Issue a tablet to the Appellant and ensure that she knows how to use it to report her PCA's hours worked.

## 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.

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

Respondent Representative: Nahumirys Sanabria, OLTSS, One Ashburton Place, 5th Floor, Boston, MA 02118

MassHealth Representative: Optum MassHealth LTSS, P.O. Box 159108, Boston, MA 02215

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Massachusetts residents who are ■ years old or older." Senior legal helpline: (800) 342-5297, Monday-Friday, 9AM -12PM.