

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:



Appeal Decision: Denied

Appeal Number: 2415835

Decision Date: 12/17/2024

Hearing Date: 11/14/2024

Hearing Officer: Mariah Burns

Appearances for Appellant:



Appearance for MassHealth:

Linda Philips, RN, BSN, LNC-CSp., Associate
Director Appeals, Regulatory Compliance, &
Complex Cases, MassHealth Disability and
Community-Based Services

APPEAL DECISION

Appeal Decision:	Denied	Issue:	Home and Community Based Services Waiver; Acquired Brain Injury – Residential Habilitation
Decision Date:	12/17/2024	Hearing Date:	11/14/2024
MassHealth's Rep.:	Linda Philips, RN	Appellant's Reps.:	[REDACTED]
Hearing Location:	Tewksbury MassHealth Enrollment Center	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 October 1, 2024, MassHealth denied the appellant's application for the Acquired Brain Injury Residential Habilitation Community and Home-Based Services Waiver because MassHealth determined that he does not meet the clinical eligibility for the program. *See* 130 CMR 519.007(G)(1) and Exhibit 1. The appellant filed this appeal in a timely manner on October 15, 2024. *See* 130 CMR 610.015(B) and Exhibit 2. Denial of acceptance to a Home- and Community-Based Services (HCBS) Waiver Program due to clinical ineligibility is valid grounds for appeal. *See* 130 CMR 610.032(G).

Action Taken by MassHealth

MassHealth denied the appellant's application for the Acquired Brain Injury Residential

Issue

The appeal issue is whether MassHealth acted within the scope of the regulations when determining that the appellant is currently clinically ineligible for the Acquired Brain Injury Residential Habilitation Waiver.

Summary of Evidence

The appellant appeared at the hearing in-person and was joined by two social workers from Tewksbury State Hospital, where he is currently admitted as a patient. MassHealth was represented by a registered nurse from UMass Chan Medical School, which runs MassHealth's HCBS Waiver programs. The following is a summary of the testimony presented, and evidence provided at hearing.

The appellant is an adult MassHealth member under the age of 65 who was admitted to [REDACTED] in [REDACTED]. The appellant was admitted after suffering an apparent overdose, which caused an anoxic brain injury. He has been diagnosed with [REDACTED] disorder with seizures or convulsion, history of sudden cardiac arrest related to overdoses, history of suicidal behavior, Vitamin D deficiency, thrombocytopenia, and polysubstance abuse.

On or around August 27, 2024, MassHealth conducted an in-person assessment of the appellant's eligibility for the Acquired Brain Injury – Residential Habilitation (ABI- RH) Waiver upon his application for the program. MassHealth then reviewed the appellant's submitted medical records and convened multiple meetings of a multidisciplinary team to determine whether he met the criteria to qualify for the program. After review, MassHealth determined that the appellant is not currently eligible for the ABI-RH Waiver because his needs cannot be met safely in the community within the confines of the waiver.

In making this determination, MassHealth relied on the following reported incidents:

- On March 8, 2024, the appellant was involved in two incidents in which a "code grey" was called, resulting in him being sedated and placed in four-point restraints. Exhibit 5 at 93.
- On April 20, 2024, the appellant was "difficult to redirect, impulsive, and recently stated suicidal statements." Exhibit 5 at 104. The appellant was unable to fully participate in the assessment due to drowsiness. *Id.*
- On July 24, 2024, psychiatric notes indicate that the appellant is being treated with an antipsychotic regimen of medications to treat his bipolar disorder. Exhibit 5 at 143

The MassHealth representative testified that members of the ABI-RH waiver typically reside in a

group home run by the Department of Developmental Services. These group homes usually have four bedrooms and two bathrooms and are staffed 24/7 by individuals who are essentially trained as personal care attendants (PCAs) to assist members with their activities of daily living. These staff members are not trained in medical or psychiatric emergencies, and in the event of either of those, 911 would typically be called and the member would be transported to the hospital. The MassHealth representative explained that, when reviewing a waiver application, MassHealth typically prefers to see 9-12 months of stability before recommending an individual for the program. She reported that stability of that length of time is often a greater indicator of success in the program, and they do not wish to set someone up for failure or to put them in a situation that would risk deterioration. In the case of the appellant, this would be 9-12 months of both psychiatric stability and sobriety. The MassHealth representative testified that the appellant meets all other criteria for the program and would otherwise qualify if his needs could safely be met.

In assessing the duration of the appellant's sobriety, the MassHealth nurse reviewing the appellant's application reported that the appellant ingested non-prescription suboxone on March 9, April 2, July 3, and August 5 of 2024. Exhibit 5 at 70.

Review of the medical records provided as evidence reveals several instances of note not referenced by either party at the hearing:

- April 9, 2024 – appellant “extremely agitated” after reported Suboxone use, leading to two code grays being called. The second code gray required four-point restraints and sedation. Exhibit 5 at 101.
- August 9, 2024 – appellant is still on sedation medication though expresses a desire to reduce his medication. Exhibit 5 at 113.
- The appellant underwent many changes in medication from May 2024 to August 2024 in an effort to treat his health conditions and his substance use disorder. See Exhibit 5 at 130-134.

As a note, the records did not report any allegation of suboxone use by the appellant in August of 2024. The appellant self-reported suboxone use in May, which the hospital confirmed through urine analysis. Exhibit 5 at 108. The appellant's providers then prescribed him suboxone as a potential treatment for his substance use disorder, but that was discontinued in June. *Id.* There were no additional reported incidents of alleged or confirmed suboxone use once the appellant's prescription was discontinued.

The appellant testified that he considers himself to have been sober since May and denied any illicit ingestion of suboxone since then. He reported that he feels he has been able to process and regulate his feelings in a more productive manner and that he is no longer exhibiting any behavioral outbursts. He explained that he goes to meetings 5 times per week, has a sponsor, and has not relapsed in the last six months. He feels that he is ready to move on from a hospital setting and that it is time for the next step in his recovery.

The appellant also submitted a letter from his psychiatrist that was written on November 3, 2024. The letter states: “[i]n the last few months, [the appellant] has demonstrated significant progress in meeting [his psychiatric] goals. He has demonstrated insight and motivation to improve his challenging behaviors. Exhibit 6. The letter does not refer to the appellant’s medication or his sobriety.

Findings of Fact

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

1. The appellant is an adult MassHealth member under the age of 65 who was admitted to Tewksbury State Hospital in [REDACTED]. Testimony, Exhibit 5 at 83.
2. The appellant suffered an apparent drug overdose, which caused him an anoxic brain injury. He has been diagnosed with An [REDACTED] [REDACTED] disorder with seizures or convulsion, history of sudden cardiac arrest related to overdoses, history of suicidal behavior, Vitamin D deficiency, thrombocytopenia, and polysubstance abuse. Testimony, Exhibit 5 at 83 to 86.
3. The appellant applied for the MassHealth ABI-RH Home- and Community Based Waiver program. On October 1, 2024, MassHealth denied that application after determining that the appellant’s needs cannot be safely met in the community within the terms of the Waiver. Exhibit 1.
4. The appellant filed a timely request for fair hearing on October 15, 2024. Exhibit 2.
5. In support of his application for the waiver, he submitted, and MassHealth reviewed, medical and psychiatric records from his admission to Tewksbury State Hospital. See generally, Exhibit 5 at 83-151. Those records reflect the following notable incidents and information:
 - On March 8, 2024, the appellant was involved in two incidents in which a “code grey” was called, resulting in him being sedated and placed in four-point restraints. Exhibit 5 at 93.
 - April 9, 2024 – appellant “extremely agitated” after reported Suboxone use, leading to two code grays being called. The second code gray required four-point restraints and sedation. Exhibit 5 at 101.
 - On April 20, 2024, the appellant was “difficult to redirect, impulsive, and recently stated suicidal statements.” Exhibit 5 at 104. The appellant was unable to fully participate in the assessment due to drowsiness. *Id.*
 - On July 24, 2024, psychiatric notes indicate that the appellant is being treated with an antipsychotic regimen of medications to treat his bipolar disorder. Exhibit 5 at 143.
 - August 9, 2024 – appellant is still on sedation medication though expresses a desire to reduce

his medication. Exhibit 5 at 113.

- The appellant underwent many changes in medication from May 2024 to August 2024 in an effort to treat his health conditions and his substance use disorder. See Exhibit 5 at 130-134.

6. The group homes in which members of the ABI-RH Waiver Program reside are staffed 24/7 by individuals trained as personal care attendants. These staff are not trained in medical and psychiatric emergencies. In the event of any incident or emergency, staff will call 911 and the member will be transported to the hospital. Testimony.

7. MassHealth prefers to see 9-12 months of medical, psychiatric, and substance use stability before admitting an applicant to the ABI-RH Waiver Program. Testimony.

8. The appellant submitted a letter from his psychiatrist that was written on November 3, 2024. The letter states, in relevant part: “[i]n the last few months, [the appellant] has demonstrated significant progress in meeting [his psychiatric] goals. He has demonstrated insight and motivation to improve his challenging behaviors.” The letter does not refer to the appellant’s medication or his sobriety. Exhibit 6.

9. The appellant meets all other criteria to qualify for the ABI-RH Waiver. Testimony.

Analysis and Conclusions of Law

MassHealth offers certain Home- and Community-Based Services (HCBS) Waiver programs for MassHealth members requiring nursing home level of care but wishing to reside in the community. Among those programs are the Acquired Brain Injury – Residential Habilitation Waiver for Persons with Acquired Brain Injury (ABI-RH) (found at 130 CMR 519.007(G)(1)).

The sole issue on appeal is whether MassHealth erred in denying the appellant’s application for enrollment in the ABI-RH Waiver program based on its determination that he did not meet clinical eligibility criteria. MassHealth has set the following eligibility requirements for the ABI-RH Waiver program:

The Residential Habilitation Waiver for Persons with Acquired Brain Injury, as authorized under section 1915(c) of the Social Security Act, allows an applicant or member who is certified by the MassHealth agency or its agent to be in need of nursing facility services or chronic disease or rehabilitation hospital services to receive residential habilitation and other specified waiver services in a provider-operated 24-hour supervised residential setting if they meets all of the following criteria:

1. are 22 years of age or older and, if younger than 65 years old, is totally and permanently disabled in accordance with Title XVI standards;
2. acquired, after reaching the age of 22, a brain injury including, without limitation, brain injuries caused by external force, but not including Alzheimer's disease and similar neuro-degenerative diseases, the primary manifestation of which is dementia;
3. are an inpatient in a nursing facility or chronic disease or rehabilitation hospital with a continuous length of stay of 90 or more days at the time of application for the waiver;
4. need a residential support service available under the Residential Habilitation Waiver; and
5. are able to be safely served in the community within the terms of the Residential Habilitation Waiver.

130 CMR 519.007(G)(1)(a) (Emphasis added).¹

At any fair hearing conducted under 130 CMR 610.000, the appellant bears the burden of proof "to demonstrate the invalidity of the administrative determination." *Andrews v. Division of Medical Assistance*, 68 Mass. App. Ct. 228, 231 (2006). The fair hearing decision, established by a preponderance of evidence, is based upon "evidence, testimony, materials, and legal rules, presented at hearing, including the MassHealth agency's interpretation of its rules, policies and regulations." 130 CMR 610.082(A) and (B).

In this case, MassHealth denied the appellant's application for the ABI-RH Waiver because it determined that the appellant did not meet the criteria under subsection (5) above, specifically that his needs cannot be safely served in the community within the terms of the ABI-RH Waiver Program. The appellant argues that his needs can be met safely in the community through the ABI-RH Waiver. After hearing and considering all of the evidence, I find that the appellant has not met his burden of proof to demonstrate error in MassHealth's determination that he is currently ineligible for the ABI-RH Waiver.

The MassHealth representatives credibly testified that the ABI-RH Waiver consists of group homes with staff members trained as Personal Care Attendants who generally provide oral medication administration and assistance with activities of daily living. The staff at these group homes are not psychiatric medical professionals who are capable of safely managing someone with the appellant's needs. I credit the MassHealth representatives in their testimony that, if the appellant exhibited a behavioral issue, he would likely be sent to the emergency room by ambulance, which puts him at risk for further decompensation and would create chaos for him.

¹ The waiver program also has certain financial requirements an applicant must meet. 130 CMR 519.007(H)(2). There is no evidence nor assertion that the appellant does not meet the financial requirements.

Furthermore, the MassHealth representative credibly explained that evaluators typically prefer to see 9 to 12 months of both psychiatric and substance use stability before approving members for any of the waiver programs to ensure greater chance of success. I agree with this assessment and see the value of ensuring that a member will not relapse or risk psychiatric decompensation before sending them to live in a group home with significantly less resources and supervision available than a hospital or a long-term care facility.

It is notable that among the information upon which MassHealth relied in making this determination is its assertion that the appellant illicitly used suboxone in April, May, June, and August of 2024. The records submitted for this appeal do not seem to support that conclusion. They do state that the appellant used unprescribed suboxone in April and May, but they indicate that the appellant was then prescribed suboxone by his psychiatrist in an effort to support his recovery process. *See Exhibit 5 at 102, 105.* When the appellant experienced intoxication from the prescribed suboxone, he and his care team decided to discontinue its use. *See Exhibit 5 at 107.* Nothing in the records provided indicate that the appellant used suboxone, illicitly or legitimately, in the month of August. This is further supported but the appellant's assertion at the hearing that he has been sober since May. However, what the documentation does show is that the appellant's sobriety was still delicate in June. Therefore, the evidence supports MassHealth's conclusion that the appellant's substance use recovery has not been stable for the preferred 9 to 12 months before applying for the ABI-RH waiver.

It is also notable and commendable that the appellant provided a letter from his psychiatrist that states that he has demonstrated significant progress in meeting his psychiatric goals. His appearance at the hearing supported this evidence. The appellant was polite, calm, well-mannered, and able to advocate for himself. However, even if MassHealth had this letter when an eligibility determination was made in August, he still, even as of the issuance of this decision, has not been psychiatrically stable for the preferred 9 months. Additionally, the records submitted indicate that the appellant underwent significant changes to his medication to find the appropriate treatment balance for his needs. Although this letter is helpful, it provides no indication as to whether the appellant remains stable on his medication or whether he has undergone similar fluctuations since the provided records end in August. Though the appellant's desire to move on from a hospital setting after over a year is understandable, it would do him no good to be released to a program that is not suited to care for his complicated needs.

For those reasons, I find that the appellant has not demonstrated that his needs can be met safely in the community within the terms of the ABI-RH Waiver at this time. I find no error with MassHealth's issuance of the denial notice dated October 1, 2024.

The appellant may, at any time, reapply for any of MassHealth's Community-Based Waiver Programs.

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.

Mariah Burns
Hearing Officer
Board of Hearings

CC: [REDACTED]

MassHealth Representative: Linda Phillips, UMass Medical School - Commonwealth Medicine, Disability and Community-Based Services, 333 South Street, Shrewsbury, MA 01545-7807