

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2416037
Decision Date:	12/9/2024	Hearing Date:	11/20/2024
Hearing Officer:	Cynthia Kopka		

Appearances for Appellant:



Appearances for MassHealth:

Carlos Mendez-Saravia, Assistant Manager,
Special Projects, OLTSS
Michael Diggins, PCA Special Projects
Manager, OLTSS
Kelly Rayen, R.N., 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

Appeal Decision:	Denied	Issue:	Personal care attendant services (PCA) – termination
Decision Date:	12/9/2024	Hearing Date:	11/20/2024
MassHealth's Reps.:	Carlos Mendez, Michael Diggins, Kelly Rayen	Appellant's Rep.:	Attorney
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 notices dated September 18, 2024, MassHealth notified Appellant that it was terminating her personal care attendant (PCA) services effective October 18, 2024. Exhibit 1. Appellant filed this timely appeal on October 18, 2024 and requested that benefits continue during the appeal process. Exhibit 2. 130 CMR 610.015(B). MassHealth determined that Appellant did not qualify for aid pending because the request for hearing was not received within the deadline, as discussed in the Analysis and Conclusions of Law section below. Termination of assistance is a valid basis for appeal. 130 CMR 610.032.

Action Taken by MassHealth

MassHealth notified Appellant that it was terminating her personal care attendant (PCA) services effective October 18, 2024.

Issue

The appeal issue is whether MassHealth was correct in terminating Appellant's services.

Summary of Evidence

MassHealth was represented at a virtual hearing by a registered nurse/clinical reviewer and representatives from the Office of Long Term Services and Supports (OLTSS). MassHealth submitted records in support. Exhibit 4 and 5.¹ Appellant appeared with counsel, and offered a letter in support. Exhibit 6. A summary of documentary evidence and testimony follows.

On September 18, 2024, MassHealth notified Appellant by letter that it was terminating her participation in the personal care attendant (PCA) services program in 30 days. Exhibit 1. According to the notice, the Massachusetts Office of State Auditor Bureau of Special Investigations (BSI) conducted an investigation and determined Appellant submitted false PCA information to fiscal intermediaries [REDACTED] and [REDACTED]. The letter specifies that Appellant submitted her own banking accounts for direct deposit to receive payment for her [REDACTED]. Appellant's other PCA, [REDACTED] reported never having signed PCA paperwork or timesheets. [REDACTED] payments were delivered to Appellant's home address and Appellant paid [REDACTED] in cash. *Id.* MassHealth determined that these violations violated federal and state laws and regulations prohibiting fraudulent acts and false reporting including but not limited to 43 USC § 1320a-7b³ and 130 CMR 422.420(A)(20).⁴ MassHealth reserves the right to terminate any member's participation in the PCA program for failure to comply with applicable regulations.⁵ MassHealth notified Appellant that her PCM agency would reach out to provide information regarding other MassHealth services for which she may be eligible. *Id.* A second notice from MassHealth to Appellant notified Appellant that her PCA prior authorization would end on October 18, 2024. Exhibit 1, Exhibit 4 at 4.

MassHealth's determination was based on a BSI investigation report dated November 9, 2022. Exhibit 4 at 42. According to the report, on January 13, 2021, LC terminated his employment as Appellant's PCA with the fiscal intermediary [REDACTED] alleging that Appellant had [REDACTED] paychecks and tax returns deposited into Appellant's account and took \$1,000 a month from him. *Id.* The investigative report provided details about the investigation, including examination of tax

¹ Appellant's counsel did not receive a copy of the materials submitted by MassHealth prior to the hearing. Appellant's counsel was offered additional time to review and respond after hearing. Ultimately, Appellant's counsel opted to have the record close without further submission so as not to prejudice his client's access to programs in delaying the hearing decision.

² Appellant's PCAs will be referred to by initials herein for privacy.

³ Federal regulation 42 USC § 1320a-7b sets forth the criminal penalties for acts involving Federal health care programs, including providing false statements or representations of a material fact when applying for a benefit or payment.

⁴ The termination letter incorrectly cites 130 CMR 422.422(A)(20).

⁵ The termination letter incorrectly cites 130 CMR 413.422(B)(1).

records, bank records, public records, state and federal records, and social media. The investigator also conducted field visits and interviews. *Id.* at 42-46.

The redacted investigative report states that [REDACTED] was Appellant's PCA from May 23, 2019 through December 19, 2020. *Id.* at 42. Upon hire, Appellant submitted PCA paperwork for [REDACTED] with two cancelled checks for direct deposit into a [REDACTED] checking account that was determined to be owned by Appellant, not [REDACTED]. *Id.* Appellant also provided email addresses for [REDACTED] that were her personal and business email addresses. *Id.* [REDACTED] changed his direct deposit information to his own account on December 19, 2020. *Id.*

When Appellant hired [REDACTED] on December 22, 2022, Appellant listed her address as [REDACTED] address and provided the same [REDACTED] bank account as was used for [REDACTED] to be used for direct deposits of [REDACTED] PCA pay. *Id.* The investigative report indicates that both [REDACTED] and [REDACTED] only allow direct deposits into accounts in the name of the employee only and not one shared with the consumer. *Id.* The investigator met with [REDACTED] who claimed Appellant had a long pattern of failing to pay people for work, either as PCA or for other work. *Id.* at 46. The investigator met with [REDACTED] who reported that he did not sign any timesheets. He reported that his paychecks are delivered to Appellant, and she paid him cash whenever he worked for her, "which is one [sic] every couple of weeks on average." *Id.*

Part of the investigation included an interview with Appellant. Appellant reported to investigators that [REDACTED] and [REDACTED] "had issues holding bank accounts, and she gave them the option to use her bank account." *Id.* at 46. The examiner's conclusion was that as a result of the information compiled in the investigative report, "evidence of fraudulent activity was determined from 05/23/2019 to Present (08/23/2022) as a result of [Appellant] having the PCA payroll direct deposited to her own checking account, and falsely reporting it to [REDACTED] and [REDACTED] that it was the PCA's checking account." *Id.* at 43. The OTLSS assistant manager testified that 130 CMR 422.420(A)(8) prohibits a member from sharing a bank account with a PCA.

Appellant's attorney asked questions of OTLSS's assistant manager relative to the timeline. The MassHealth representative confirmed that BSI investigative report was dated November 22, 2024 and that is the date the investigation concluded. When asked if the BSI investigator gave Appellant debit cards to use to pay her PCA, the OTLSS representative testified that the debit cards were issued by financial institutions. Appellant's attorney asked if between the time of the conclusion of the investigation in November 2022 and the notice of termination issued in September 2024, Appellant had received PCA services without any payment issue. The OTLSS representative testified that the PCA has been getting paid as long as all the paperwork and timesheets submitted correctly. The OTLSS representative testified that since the investigation concluded in November 2022, there has been no further investigation of Appellant's PCA payments. The OTLSS representative testified that OTLSS did not receive the BSI report in 2022 but rather later in 2024 and issued the notice of termination shortly thereafter. When asked if OTLSS had taken any steps to determine if Appellant has corrected the payment errors or other allegations in the nearly two-

year period since the investigation concluded, the OTLSS representative testified that OTLSS relied on the investigation conducted by the state auditor. When asked if there was any inquiry about whether Appellant had corrected the issue, the OTLSS representative testified that Appellant receives an annual visit by the personal care management agency (PCMA), which includes a skills trainer who goes over the program regulations and other support to ensure Appellant can manage the program independently. When asked if the PCMA has reported any issue or if there was any evidence of inappropriate behavior in the two year period since then, the OTLSS representative testified that OTLSS does not conduct investigations. Investigations must be done by competent state agencies such as the Attorney General's office or state auditor. OTLSS took the BSI's report seriously. Appellant's attorney asked if Appellant cooperated with the fraud examiners, and OTLSS representative testified that she did.

The OTLSS representative was not willing to testify that it was possible that Appellant did not understand the regulations or the payment rules, arguing that it is an important part of the program as the PCA program is self-directed. The OTLSS representative and Optum representative confirmed that Appellant's clinical eligibility for PCA services is not in dispute. However, termination from the PCA program is not a termination of MassHealth benefits and Appellant may be eligible for other programs such as home health. The notice of termination states that Appellant will be provided with guidance from her PCMA to transition care to another program to cover personal needs or other support covered by MassHealth. The PCMA is contractually obligated to help her transition to another program for which she may qualify.

Appellant's attorney argued that Appellant desperately needs PCA care. The termination came seemingly out of left field, as it was over two years ago when Appellant was first told that she may have been doing something that rose to the level of potential fraud. This scared Appellant but it did not deter her from cooperating with the investigators. Appellant felt the matter was resolved at the time of the investigation because the investigator left Appellant with what seemed to be a simple solution to the paperwork problem, which was provide direct debit card payments to the PCA ■■■ Appellant was left with the impression that it was a concluded issue and was shocked to receive the termination. There is no evidence in the record demonstrating that Appellant has not performed correctly since the investigation concluded. Appellant suffers from debilitating conditions rendering her in need of care, the most serious being trigeminal neuralgia which causes severe pain. Appellant is not able to perform simple tasks such as taking a shower or changing her bedsheets without being wiped out. Her conditions have deteriorated since starting the PCA program in 2019. At the time of her termination, she was receiving over 33 hours per week in care. Appellant's attorney argued that the hearing was the first time Appellant learned that she may qualify for other agency-based programs, though Appellant's attorney was hesitant to argue that another program was the appropriate avenue when Appellant had been following the regulations for a two year period. Appellant's attorney argued that there is no recent confirmation by MassHealth of any further issues, and that the corrective measures taken by the investigator did the trick.

The OLTSS representative testified that Appellant could seek readmission into the PCA program after a period of time, and the decision to readmit is done on a case-by-case basis. Appellant would undergo a consumer assessment that would determine her clinical eligibility, her ability to self-direct the program, and/or whether she would require a surrogate or administrative proxy to perform any of the financial or administrative tasks.

When filing the request for fair hearing, Appellant requested that she keep the benefits during the appeal process. Exhibit 2. However, Appellant was told that she submitted her request one day late and therefore did not qualify for aid pending. Appellant was told that [REDACTED] will not discuss moving to a home health program while the appeal is pending. Appellant's attorney argued that Appellant would prefer the PCA program to home health, given the personal nature of the care she needs. Appellant is more comfortable with [REDACTED] providing care than a stranger. Appellant's attorney emphasized that since the investigation, Appellant has followed the process correctly by having the PCA paid with a debit card so the payments go directly to the PCA, and the record does not contain any evidence to the contrary.

Findings of Fact

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

1. On September 18, 2024, MassHealth notified Appellant that it was terminating her participation in the personal care attendant (PCA) services program in 30 days. Exhibit 1. Exhibit 1.
2. Appellant filed a timely appeal on October 18, 2024 and requested to keep her benefits pending the outcome of the appeal. Exhibit 2.
3. MassHealth denied Appellant's request for aid pending benefits as not timely.
4. Pursuant to a BSI investigation report dated November 9, 2022, the BSI examiner concluded that fraudulent activity had occurred from May 23, 2019 to August 23, 2022 as a result of Appellant representing to [REDACTED] and [REDACTED] that her bank account was [REDACTED] and [REDACTED] for purposes of direct deposit.
5. Part of the investigation included an interview with Appellant. Appellant reported to investigators that [REDACTED] and [REDACTED] "had issues holding bank accounts, and she gave them the option to use her bank account." Exhibit 4 at 46.

Analysis and Conclusions of Law

MassHealth's regulations governing the PCA program under MassHealth are found at 130 CMR

422.000 *et seq.* All PCAs, Personal Care Management (PCM) agencies, and fiscal intermediaries must comply with regulations governing MassHealth, including, but not limited to 130 CMR 422.000 and 130 CMR 450.000. 130 CMR 422.401.

Aid pending

MassHealth members have a right to request a fair hearing on “any MassHealth agency action to suspend, reduce, terminate, or restrict a member’s assistance.” 130 CMR 610.032(A)(3). A member may request a fair hearing if MassHealth “denies or modifies a prior authorization request for PCA services.” 130 CMR 422.417(B)(2). Requests for continuation of services during an appeal must be made in accordance with 130 CMR 610.036. *Id.*

When the appealable action “involves the reduction, suspension, termination, or restriction of assistance, such assistance will be continued until the BOH decides the appeal ... if the BOH **receives the initial request for the fair hearing before the implementation date** of the appealable action.” 130 CMR 610.036(A). For Appellant to have been eligible for aid pending, the request for hearing must have been received **before** October 18, 2024. Here, BOH received the request for hearing **on** October 18, 2024. Therefore, the decision to deny aid pending protection was correct.

Regulations relating to the appeal issue

Pursuant to 130 CMR 422.403(C) (emphasis added), MassHealth will pay for PCA services for members appropriately cared for at home when the following conditions are met:

- (1) The personal care services are prescribed by a physician or a nurse practitioner who is responsible for the oversight of the member’s health care.
- (2) The member’s disability is permanent or chronic in nature and impairs the member’s functional ability to perform ADLs and IADLs without physical assistance.
- (3) The member, as determined by the personal care agency, 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/grooming;
 - (d) dressing or undressing;
 - (e) range-of-motion exercises;
 - (f) eating; and
 - (g) toileting.
- (4) The MassHealth agency has determined that the PCA services are medically necessary and has granted a prior authorization for PCA services.

A member's responsibilities in the PCA program are set forth in 130 CMR 422.420. These requirements include completing and signing the appropriate forms, employing PCAs within the hours and scope authorized by MassHealth, and cooperating with MassHealth and the PCM agency during assessments and evaluations. 130 CMR 422.420(A). These requirements also mandate that a member "inform PCAs of the requirement to have PCA payments direct-deposited into the PCA's bank account," 130 CMR 422.420(A)(8) (emphasis added), and "comply with all applicable MassHealth regulations," 130 CMR 422.420(A)(20).

MassHealth reserves the right to

- (1) terminate PCA services if a member fails to comply with any of the requirements listed in 130 CMR 422.420(A);
- (2) terminate PCA services if a member's surrogate becomes unavailable, or the MassHealth agency requires the member to replace the current surrogate, and another surrogate cannot be identified within 30 days of the PCM agency's notification to the member and the MassHealth agency in accordance with 130 CMR 422.422(B);
- (3) require a member who is receiving PCA services to obtain a surrogate or administrative proxy to continue to receive PCA services if the PCM agency or the MassHealth agency determines, based on an assessment conducted in accordance with 130 CMR 422.422(A), that the member is not able to manage the PCA program independently. The MassHealth agency will terminate PCA services if the member does not obtain a surrogate or administrative proxy within 30 calendar days of the date of the PCM agency's assessment, and the PCM agency will refer the member to an appropriate service provider;
- (4) require a member to replace the surrogate or administrative proxy if the surrogate or administrative proxy is not performing PCA tasks on behalf of the member in accordance with MassHealth regulations and after intervention from a skills trainer pursuant to 130 CMR 422.419(A)(17)(g); and
- (5) recover costs of overtime from the member for any activity time scheduled by a member and performed by an individual PCA that is in excess of the weekly hour limit without an authorization from the MassHealth agency for the member pursuant to 130 CMR 422.418(A).

130 CMR 422.420(B).

In this matter, MassHealth terminated Appellant from the PCA program, citing 130 CMR 422.420(A)(8) and 130 CMR 422.420(B)(1). This action was based on the November 2022 BSI report concluding that Appellant had engaged in fraudulent activity for a period of over two years by having the PCA payroll directly deposited into her own checking account and falsely reporting it to be the PCAs' accounts. Per the BSI report, there is no dispute that the [REDACTED] account that Appellant reported to belong to both [REDACTED] and [REDACTED] was owned by her.

Appellant's attorney emphasized Appellant's need for personal care due to debilitating conditions. Appellant's attorney did not refute the allegations, nor did he offer evidence to contradict them. Appellant's attorney argued that Appellant corrected the payroll error when it was brought to her attention and asserted that MassHealth had no evidence that Appellant has failed to comply with all regulations since the BSI investigation. However, it is Appellant who has the burden of affirmatively demonstrating the invalidity of MassHealth's action. See *Merisme v. Bd. of App. on Motor Vehicle Liab.*, 27 Mass. App. Ct. 470, 474 (1989).

MassHealth was within its rights to terminate Appellant's participation in the PCA program based on the BSI report pursuant to 130 CMR 422.420(A)(8) and 130 CMR 422.420(B)(1). Accordingly, this appeal is denied. However, Appellant may seek an alternative program for care in the home and/or reapply for the PCA program in the future.

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

[REDACTED]

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

cc: Appeal representative, OLTSS