

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Social Security No.:

Appeal Decision: Denied

Appeal Number: 0402108

Decision Date: 5/19/04

Hearing Date: 03/31/2004

Hearing Officer: Patricia Sheehan-
Mullen

Record Open to: 04/21/2004

Appellant Representative:

MassHealth Representative:

Eileen Smith

Witness:



*Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
Two Boylston Street
Boston, MA 02116*

APPEAL DECISION

Appeal Decision:	Denied	Issue:	Verifications
Decision Date:	5/19/04	Hearing Date:	03/31/2004
MassHealth Rep.:	Eileen Smith	Appellant Rep.:	
Hearing Location:	Revere MassHealth Enrollment Center Room 1		

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 January 28, 2004, MassHealth denied the appellant's application for MassHealth long term care benefits because MassHealth determined that the appellant failed to submit verifications in a timely manner. (see 130 CMR 515.008; 520.007; 517.008; 516.001 and Exhibit 1). The appellant filed this appeal in a timely manner on February 20, 2004 (see 130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied the appellant's application for long term care benefits.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 516.001, in determining that the appellant failed to submit verifications in a timely manner; a second issue is the community spouse's failure to cooperate pursuant to 130 CMR 517.010.

Summary of Evidence

The appellant was represented by his attorney at hearing. Also appearing at the hearing were the appellant's step-son and the appellant's wife's attorney. The MassHealth representative testified that the appellant submitted an application for MassHealth long term care benefits on December 19, 2003. The MassHealth representative noted that although the appellant was admitted to the nursing facility on August 23, 2003, the earliest possible start date on a December 19, 2003 application would be September 1, 2003. On the application, the appellant seeks a September 1, 2003 start date. (exhibit 4) In the application, the appellant lists income information, life insurance information, and health insurance information for both he and his spouse. (exhibit 4) The appellant also lists stock information, automobile information and primary residence information; the appellant's spouse owns the primary residence. (exhibit 4) On page 5 of the application, the appellant did not answer any of the questions regarding bank accounts. (exhibit 4) The appellant's eligibility representative, his step-son, signed the application on December 19, 2003. (exhibit 4)

The MassHealth representative stated that the December 19, 2003 application was denied on January 28, 2004 because the appellant did not submit the following verifications: a current Medex bill; all bank account statements from January, 2003 through December, 2003 (including Eastern account); and a completed page 5 of the application listing all the bank accounts. (exhibit 1) The MassHealth representative stated that she has the Medex bill from 2003 but needs the updated one for 2004. The MassHealth representative noted further that she has verification of a bank account at Eastern Bank, but needs the statements for such account and does not have information regarding any other accounts. The MassHealth representative stated that the appellant has a spouse living in the community and the spouse has provided much information, however has provided little information with regard to bank accounts. MassHealth has received verification of GE stock in the appellant's spouse's name; the appellant's spouse's life insurance information; the deed to the property owned by the community spouse; the real estate tax bill for such property; the community spouse's Social Security benefit and pension information; health insurance cards for the appellant and the community spouse; the community spouse's United States tax returns for 2001 and 2002; and verification with regard to an automobile purchase on December 15, 2003. (exhibit 7)

The MassHealth representative stated that MassHealth received a letter dated December 30, 2003 written by the spouse's attorney addressed to the spouse's son (appellant's step-son/eligibility representative) noting that the spouse was refusing to cooperate with MassHealth. (exhibit 5) The spouse's attorney writes that the community spouse is invoking her "right of spousal refusal" pursuant to 130 CMR 517.010. (exhibit 5) The spouse's attorney writes further that the community spouse will cooperate with the application process only to the extent needed in order for the appellant to secure long term care Medicaid coverage effective September 1, 2003. (exhibit 5) The attorney included with the letter the most recent check for Medex payments, health insurance cards, nursing home and pharmacy bills, and the Eastern Bank joint bank account statement of October 16, 2003. (exhibit 5) The attorney noted that the spouse refuses to provide bank account records beyond the Eastern Bank statement dated October 16, 2003 showing the appellant's direct deposit income. (exhibit 5) The MassHealth representative stated that she contacted MassHealth's legal department regarding the spouse's refusal to provide bank account information. Pamela Worstell from the MassHealth legal department, in an e-mail note, wrote that the regulation section

at 130 CMR 517.010 does not allow for partial refusals or picking and choosing which items to verify and which to not verify. (exhibit 6) Ms. Worstell goes on to write that the appellant's seeking to select and choose which items to verify or not is a manipulation of the regulation and not provided for under the regulation. (exhibit 6)

The appellant's representative submitted a memorandum in support of the appellant's application for MassHealth benefits. (exhibit 8) The appellant's representative reiterates the community spouse's attorney's statements that the community spouse is unwilling to cooperate with the application process and refuses to support the appellant's nursing facility costs from any of her assets. (exhibit 8) The appellant's representative argues that when a community spouse refuses to cooperate, such refusal is not valid grounds to deny the application as provided in the MassHealth regulations at 130 CMR 517.010. (exhibit 8) The appellant's attorney writes that all documents necessary to establish eligibility have been submitted, except for evidence of the marital assets which the community spouse refuses to submit. (exhibit 8) The appellant's spouse's attorney writes in a letter dated December 19, 2003, that the law provides that in light of a community spouse refusal to cooperate, the appellant should be found eligible as of September 1, 2003. (exhibit 8) The appellant's representative stated that the appellant, through his eligibility representative, noted on the application that he understood that by signing the application he gave permission to MassHealth to go after and collect third party payments for medical care and medical support from his spouse who is living at home and refuses to cooperate or whose whereabouts is unknown. (exhibit 4) The appellant's attorney wrote that MassHealth's appropriate action in this case is to approve the appellant's application and pursue such rights as the appellant has authorized in his application against the community spouse. (exhibit 8)

The appellant's attorney stated at hearing that the appellant's eligibility representative, his step-son and the son of the community spouse, has limited access to information and has provided all the information within his control. The appellant's step-son testified that the appellant and his mother have been married about 26 years and lived together in their home until the appellant was hospitalized and then admitted to the nursing facility last summer. The appellant's step-son stated that he does not know why his mother is refusing to cooperate and she suffers from no mental illness that he knows of. The appellant's step-son does not know if his mother has a power of attorney for the appellant and he testified that no guardianship for the appellant is anticipated. The appellant's step-son stated that his mother handles all the bank accounts. The appellant's step-son stated that the spouse visits the appellant in the nursing facility and there are no problems in the marriage and no legal separation or talk of divorce that he knows of. The appellant's representative noted that the step-son cannot pressure his mother because she is represented by counsel. The appellant's representative stated that no one has asked for a guardianship for the appellant. The hearing officer noted that the appellant was competent to hire his own attorney and if such competency was in question would not the attorney look into guardianship proceedings. The appellant's attorney noted that it is not a matter he is handling and would be a question for the nursing facility.

The record was left open until April 21, 2004 to give the appellant's representative the opportunity to submit an affidavit from the community spouse regarding her refusal to cooperate; the federal

regulations corresponding to 130 CMR 517.010; the current health insurance bill for the appellant. (exhibit 9) The Division was to submit a more detailed legal opinion with regard to 130 CMR 517.010. (exhibit 9) The appellant's representative was given 14 days from the date of receipt of such legal opinion to submit a response. (exhibit 9)

On April 16, 2004, MassHealth submitted a legal opinion regarding 130 CMR 517.010 from Ms. Worstell. (exhibit 10) Ms. Worstell wrote that in this case 130 CMR 517.010 does not apply since that regulation does not provide for a spouse to selectively choose certain assets to verify or not. (exhibit 10) Ms. Worstell wrote further that the appellant believes that 130 CMR 517.010 is a regulation which would allow a spouse to invoke a right to pick and choose which assets to verify or hide for MassHealth eligibility purposes, however the regulation does not contain any language which would allow a spouse to partially cooperate and provide partial information about particular assets. (exhibit 10) The opinion states that the regulation does not confer any rights of refusal upon a spouse which a spouse can invoke via an attorney or otherwise; the regulation would apply in a situation where an applicant's spouse is absent or is not cooperating in providing any information. (exhibit 10) In this case, the appellant's spouse is present and is providing information selectively and the regulation does not apply in a situation like this involving selective presentation of the appellant's assets by the spouse. (exhibit 10)

On April 21, 2004, the appellant's representative submitted the affidavit from the community spouse; a copy of 42 USCA section 1396r-5(3)(A); and a health insurance bill and check for payment. (exhibit 11) In her affidavit, the community spouse attested that she has been advised that she has the right under federal and state law and MassHealth regulations to refuse to cooperate with the Medicaid application of her husband; she has been advised that MassHealth may enforce any spousal support rights which the appellant may have against her; and she refuses to cooperate any further than she already has to date with MassHealth in connection with the appellant's application. (exhibit 11)

The section of 42 USCA section 1396r-5 submitted states that as of the beginning of the first continuous period of institutionalization the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest shall be computed as well as a spousal share which is equal to $\frac{1}{2}$ of such total value. See 42 USCA section 1396r-5(1)(A). At the request of the institutionalized spouse or the community spouse at the beginning of the first continuous period of institutionalization and upon receipt of relevant documentation of resources, the State shall promptly assess and document the total value of resources and shall provide a copy of such assessment and documentation to each spouse and shall retain a copy of the assessment for use under this section. See 42 USCA section 1396r-5(1)(B) In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any state laws relating to community property or the division of marital property, all resources held by either the institutionalized spouse, community spouse, or both shall be considered to be available to the institutionalized spouse, to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section. See 42 USCA section 1396r-5(2). The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where the institutionalized spouse has

assigned to the State any rights to support from the community spouse. See 42 USCA section 1396r-5(3)(A). (exhibit 11)

On April 28, 2004, the appellant's representative submitted his response to MassHealth's legal opinion. (exhibit 12) The appellant's representative sets forth as the appellant's argument that pursuant to 130 CMR 517.010, MassHealth cannot deny the appellant benefits since the appellant has assigned to MassHealth any rights of support from the community spouse and furthermore, the denial would result in undue hardship to the appellant. (exhibit 12) In response to MassHealth's legal opinion, the appellant's representative argues that 130 CMR 517.010 does not require a complete denial of cooperation. (exhibit 12) The appellant's representative argues that the federal law cited to above prohibits a determination of ineligibility where the institutionalized spouse has assigned to the State any rights to support from the community spouse. (exhibit 12)

Findings of Fact

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

1. The appellant submitted an application for MassHealth long term care benefits on December 19, 2003.
2. On the application, the appellant seeks a September 1, 2003 start date.
3. In the application, the appellant lists income information, life insurance information, and health insurance information for both he and his spouse; the appellant also lists stock information, automobile information and primary residence information; the primary residence is owned by the community spouse.
4. On page 5 of the application, the appellant did not answer any of the questions regarding bank accounts.
5. The appellant's eligibility representative, his step-son, signed the application on December 19, 2003.
6. The December 19, 2003 application was denied on January 28, 2004 because the appellant did not submit the following verifications: a current Medex bill, all bank account statements from January, 2003 through December, 2003 (including Eastern account); and a completed page 5 of the application listing all the bank accounts.
7. MassHealth has received verification of GE stock in the appellant's spouse's name; the appellant's spouse's life insurance information; the deed to the property owned by the appellant's spouse; the real estate tax bill for such property; the spouse's Social Security benefit and pension information; health insurance cards for the appellant and the spouse; the spouse's United States tax returns for 2001 and 2002; and verification with regard to

an automobile purchase on December 15, 2003.

8. MassHealth received a letter dated December 30, 2003 written by the spouse's attorney addressed to the spouse's son (appellant's step-son/eligibility representative) noting that the spouse was refusing to cooperate with MassHealth; the spouse's attorney wrote that the community spouse is invoking her "right of spousal refusal" pursuant to 130 CMR 517.010.
9. The spouse's attorney wrote further that the community spouse will cooperate with the application process only to the extent needed in order for the appellant to secure long term care Medicaid coverage effective September 1, 2003.
10. The spouse's attorney submitted the most recent check for Medex payments, health insurance cards, nursing home and pharmacy bills, and the Eastern Bank joint bank account statement dated October 16, 2003 showing a direct deposit from one of the appellant's income sources.
11. The appellant and his spouse have been married about 26 years and lived together in their home until the appellant was hospitalized and then admitted to the nursing facility last summer; the spouse visits the appellant in the nursing facility and there are no problems in the marriage and no legal separation or anticipated divorce.
12. The appellant's step-son does not know why his mother is refusing to cooperate and she suffers from no mental illness that he knows of.
13. No guardianship for the appellant is anticipated; the appellant was competent to hire his own attorney; the appellant did not lack the ability to assign rights to spousal support to MassHealth; there is no written statement from a competent medical authority documenting any physical or mental impairment on the part of the appellant resulting in a lack of ability to assign such rights.
14. In her affidavit, the community spouse attested that she has been advised that she has the right under federal and state law and MassHealth regulations to refuse to cooperate with the Medicaid application of her husband; she has been advised that MassHealth may enforce any spousal support rights which the appellant may have against her; and she refuses to cooperate any further than she already has to date with MassHealth in connection with the appellant's application.

Analysis and Conclusions of Law

The applicant or member must cooperate with MassHealth in providing information necessary to establish and maintain eligibility, and must comply with all the rules and regulations of MassHealth, including recovery. See 130 CMR 515.008(A).

Countable assets are all assets that must be included in the determination of eligibility. Countable assets include assets to which the applicant or member or the spouse would be entitled whether or not these assets are actually received when failure to receive such assets results from the action or inaction of the applicant, member, spouse, or person acting on his or her behalf. In determining whether or not failure to receive such assets is reasonably considered to result from such action or inaction, the Division considers the specific circumstances involved. The applicant or member and the spouse must verify the total value of countable assets. However, if he or she is applying solely for MassHealth Buy-In, as described at 130 CMR 519.011(B), verification is required only upon Division request. 130 CMR 520.007 also contains the verification requirements for certain assets. See 130 CMR 520.007.

517.010: Assignment of Rights to Spousal Support

An institutionalized spouse whose community spouse refuses to cooperate or whose whereabouts is unknown will not be ineligible due to:

- (A) assets determined to be available for the cost of care in accordance with 130 CMR 520.016(B); or
- (B) his or her inability to provide information concerning the assets of the community spouse when one of the following conditions is met:
 - (1) the institutionalized spouse assigns to the Division any rights to support from the community spouse;
 - (2) the institutionalized spouse lacks the ability to assign rights to spousal support due to physical or mental impairment as verified by the written statement of a competent medical authority; or
 - (3) the Division determines that the denial of eligibility, due to the lack of information concerning the assets of the community spouse, would otherwise result in undue hardship.

See 130 CMR 517.010.

Treatment of a Married Couple's Assets When One Spouse Is Institutionalized.

- (1) Assessment.
 - (a) Requirement. The Division completes an assessment of the total value of a couple's combined countable assets and computes the spousal share as of the date of the beginning of the most recent continuous period of institutionalization of one spouse.
 - (b) Right to Request an Assessment. When one spouse has entered a medical institution and is expected to remain institutionalized for at least 30 days, either spouse may request the Division to make this assessment, even if the

institutionalized spouse is not applying for MassHealth Standard at that time. The period of institutionalization must be continuous and expected to last for at least 30 days.

- (b) Right to Appeal. The Division must give each spouse a copy of the assessment and the documentation used to make such assessment. Each spouse must be notified that he or she has the right to appeal the determination of countable assets and the community spouse's asset allowance when the institutionalized spouse (or eligibility representative) applies for MassHealth Standard.

(2) Determination of Eligibility for the Institutionalized Spouse. At the time that the institutionalized spouse applies for MassHealth Standard, the Division must determine the couple's current total countable assets, regardless of the form of ownership, and the amount of assets allowed for the community spouse as follows.

(a) Deduct the community spouse's asset allowance from the current combined total countable assets. The community spouse's asset allowance is not considered available to the institutionalized spouse when determining the institutionalized spouse's eligibility for MassHealth Standard. The community spouse's asset allowance is the greatest of the following amounts:

- (i) one-half of the combined total countable assets of the institutionalized spouse and the community spouse, not to exceed \$92,760;
- (ii) \$18,552, if the total combined countable assets of the couple are between \$18,552 and \$37,104;
- (iii) the amount of the couple's total countable assets, if the total combined amount is \$18,552 or less;
- (iv) a court-ordered amount; or
- (v) an amount determined after a fair hearing in accordance with 130 CMR 520.017.

(b) Compare the amount of the remaining assets to the MassHealth asset standard for one person, which is \$2,000. When the amount of the remaining assets is equal to or below \$2,000, the institutionalized spouse has met the asset test of eligibility.

See 130 CMR 520.016(B)(1); (2).

The appellant's attorney argues that MassHealth regulations provide at 130 CMR 517.010 that when a community spouse refuses to cooperate, such refusal is not valid grounds to deny the application. (see exhibit 8) That simplifies the regulation a bit. A community spouse's refusal to cooperate does not in and of itself result in eligibility for an applicant. 130 CMR 517.010 does not confer a *right* on the community spouse to refuse to cooperate with a MassHealth application process. The regulation states that if a community spouse refuses to cooperate and the applicant

has the inability to provide information concerning the assets of the community spouse, the applicant will not be found ineligible if the applicant has the ability to and in fact does assign to MassHealth any rights of support from the community spouse. Such a case would involve a community spouse who has assets separate from an applicant to which the applicant has no access or information. In her affidavit, the community spouse attested that she has been advised that she has the right under federal and state law and MassHealth regulations to refuse to cooperate with the Medicaid application of her husband; she has been advised that MassHealth may enforce any spousal support rights which the appellant may have against her; and she refuses to cooperate any further than she already has to date with MassHealth in connection with the appellant's application. The spouse's attorney wrote that the community spouse will cooperate with the application process only to the extent needed in order for the appellant to secure long term care Medicaid coverage effective September 1, 2003. To have the community spouse "invoke" a "right" to refuse to cooperate for no other reason than to appear impoverished for MassHealth purposes is an improper interpretation of the regulation.

The appellant's spouse's attorney writes in a letter dated December 19, 2003, that the law provides that in light of a community spouse refusal to cooperate, the appellant should be found eligible as of September 1, 2003. That is not true. MassHealth has no information concerning the appellant's assets on September 1, 2003 thus the law does not provide that simply in light of the community spouse's refusal to cooperate would the appellant be eligible for MassHealth on September 1, 2003.

The appellant's attorney writes that all documents necessary to establish eligibility have been submitted, except for evidence of the marital assets which the community spouse refuses to submit. Accordingly not all documents necessary to establish eligibility have been submitted. The appellant must submit verification of his assets to MassHealth so that a determination of financial eligibility for MassHealth might be made. His spouse's cooperation or lack thereof has no bearing on his responsibility to provide verification of all assets in his name, joint and otherwise. If the community spouse has assets in her name only and the appellant can show to the satisfaction of MassHealth that he lacks the ability to provide any information concerning those assets of the community spouse alone, then 130 CMR 517.010 is applicable. Such is not the case here. Furthermore, because the appellant has not verified his assets, there is no evidence that a denial of MassHealth benefits would result in undue hardship to the appellant.

Finally, the appellant's attorney cites to federal law and argues that because the appellant has assigned his rights of support to MassHealth, he should be found eligible for MassHealth. The federal regulation states that the institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where the institutionalized spouse has assigned to the state any rights to support from the community spouse. See 42 USCA section 1396r-5(3)(A). The appellant was not deemed ineligible by reason of resources determined under paragraph (2) to be available for the cost of care. The appellant has not been deemed ineligible for MassHealth substantively. MassHealth denied the appellant's application because there is insufficient information upon which to make a substantive determination of eligibility based on the appellant's failure to verify his assets. Part (A) of 130 CMR 517.010 is inapplicable here as it has not been determined that the

appellant would be ineligible due to assets determined to be available for the cost of care in accordance with 130 CMR 520.016(B). MassHealth is still at the verification stage of the application process and is seeking information concerning the assets of the appellant. Part (B) of 130 CMR 517.010 is somewhat applicable in that MassHealth is seeking information concerning the assets of the community spouse. When a community spouse refuses to cooperate, an applicant will not be ineligible due to his inability to provide information concerning the assets of the community spouse when the applicant has assigned to MassHealth any rights to support from the community spouse. In the present case, the appellant did assign such rights when the eligibility representative signed the application. The appellant did not lack the ability to assign such rights to spousal support as there is no written statement from a competent medical authority documenting any physical or mental impairment resulting in a lack of ability to assign such rights. I am not convinced that the appellant has the inability to provide information concerning the assets of the community spouse. Furthermore, such regulation has nothing to do with providing verification of any assets in his name, including joint accounts.

The appellant has at least one joint bank account with his spouse, the Eastern Bank account, into which he has direct deposited income. There is no evidence that the appellant is incompetent and testimony at hearing supports that no guardianship is being sought. There is no evidence as to why the appellant cannot provide verification of his own joint bank account statements. Clearly the bank would provide him with statements for accounts which he jointly owns. Regardless of any cooperation by the spouse, the appellant needs to provide the names and accounts of all his bank accounts as is required under regulation and he has not done so. The appellant also must provide any information he has concerning the assets of the community spouse as it has not been supported in the record why he has the inability to provide such information. MassHealth denied this case based on lack of verification. Such verification is still outstanding and thus MassHealth's determination is upheld. The 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.

Patricia Sheehan-Mullen
Hearing Officer
Board of Hearings

cc: MassHealth Representative: Mr. Paul Alford