

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Dismissed in Part; Denied in Part	Appeal Number:	1107446
Decision Date:	9/15/11	Hearing Date:	07/15/2011
Hearing Officer:	Susan Burgess-Cox	Record Open to:	08/26/2011

Appellant Representative:

MassHealth Representative:
Andrea Pelczar



*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:	Dismissed in Part; Denied in Part	Issue:	Eligibility
Decision Date:	9/15/11	Hearing Date:	07/15/2011
MassHealth Rep.:	Andrea Pelczar	Appellant Rep.:	
Hearing Location:	Tewksbury MassHealth Enrollment Center		

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 March 15, 2011, MassHealth determined that the appellant was not eligible for MassHealth for failure to provide information necessary to complete the application. (130 CMR 515.008; Exhibit 1A). Through a notice dated June 15, 2011, MassHealth determined that the appellant was not eligible for MassHealth from October 2, 2010 to March 21, 2011, due to disqualifying transfers. (130 CMR 520.019; Exhibit 1B). The appellant's son, acting under authority granted through a durable power of attorney, appealed both decisions in a timely manner. (130 CMR 610.015; Exhibit 2A; Exhibit 2B; Exhibit 3). Denial of assistance is valid grounds for appeal (130 CMR 610.032).

At the beginning of the hearing, the parties agreed that MassHealth received information necessary to process the application honoring an application date that the appellant did not dispute. Since MassHealth adjusted their decision, this part of the appeal is dismissed.¹ (130 CMR 610.051(B)). The only issue to be addressed in this decision involves the disqualifying transfers.

¹ Additionally, the appellant filed an appeal on a notice of intent to place a lien issued on June 15, 2011. (Exhibit 1C). Neither party raised this issue at the hearing. Before issuing a decision, the hearing officer received confirmation from the appellant's attorney that they did not dispute the lien determination. (Exhibit 9). Since the appellant did not dispute this determination, this part of the appeal is also dismissed. (130 CMR 610.000).

Action Taken by MassHealth

MassHealth determined that the appellant was not eligible for MassHealth from October 2, 2010 to March 21, 2011 due to disqualifying transfers.

Issue

Whether MassHealth was correct in determining that the appellant made disqualifying transfers.

Summary of Evidence

The MassHealth representative, from the Tewksbury MassHealth Enrollment Center, testified that MassHealth received an application on June 24, 2010. This application was denied on July 29, 2010 for failure to provide information necessary to complete the application. The application was re-logged on December 1, 2010 as some of the missing information was provided by the appellant. The appellant was seeking a start date of September 15, 2010.

The appellant is a 91-year old woman who was admitted to the nursing facility on February 23, 2009. The appellant entered into a Caregiver Service Agreement with her son on April 7, 2009. A copy of this agreement was incorporated into the hearing record as Exhibit 5. Under the terms of this agreement, the appellant paid her son \$23,400 on December 15, 2009 and \$23,400 on March 17, 2010. MassHealth deemed these as disqualifying transfers resulting in a 171 day disqualification period beginning on October 2, 2010 and ending on March 21, 2011. MassHealth used October 2, 2010 as the start date of the disqualification period because it determined that the appellant had privately paid the facility as a way to reduce her assets. Using a private pay rate of \$398, MassHealth determined that the appellant paid from September 15, 2010 to October 1, 2010.

The Caregiver Service Agreement was meant for the appellant to prepay her son to care for property in which the appellant has a life estate and her son is the remainderman. The life estate and remainder interest were created in May 2002. Additionally, the agreement called for the son to provide other services which are also provided by the facility. MassHealth deemed these payments as transfers because they were prepayment of anticipated expenses or services. MassHealth presented a brief from the legal division which was incorporated into the hearing record as Exhibit 5.

The appellant's attorney appeared in person and testified that the only issue on appeal is regarding the payments made under the contract as a disqualifying transfer. The appellant's attorney testified that she asked for the legal opinion back in March 2011 but never received a copy. The appellant's attorney argued

that there is value in the contract as the appellant paid her son to maintain property in which she has a life estate interest. The appellant's attorney argued that the appellant paid her son for management of this property, not for being her caretaker. The appellant's son does not live at this address, he is trying to rent the property and he declared the money received by the appellant as self-employment income. Counsel for the appellant testified that the appellant's son receives \$200 per hour for services that he provides to other property owners while the appellant paid him only \$10.50 for the same services.

The record was held open to give counsel for the appellant the opportunity to review and respond to the brief presented by MassHealth at the hearing. A copy of the brief presented by counsel for the appellant was incorporated into the hearing record as Exhibit 7. MassHealth reviewed this brief and determined that they would not be responding to the brief submitted by the appellant because MassHealth continues to view the disbursements as resource transfers. (Exhibit 8).

In the brief submitted by counsel for the appellant, it is noted that the contract was executed on April 7, 2009 after the appellant entered the nursing facility. (Exhibit 7). The contract required the appellant's son to manage her property. (Exhibit 7). Counsel for the appellant argues that whether or not the services were to be provided now or in the future is irrelevant since the appellant provided evidence that two years of services for property management would cost \$40,000. (Exhibit 7). This evidence was in the form of a letter from a local real estate broker who outlines the services and compensation for the management of a 2-family house. (Exhibit 7). The appellant's son has been delayed in renting the property but is managing it for the appellant because she intends to return home. (Exhibit 7). The appellant's son has done the appellant's laundry once a week since she was admitted into the facility. (Exhibit 7). The goal of the contract was to ensure that the appellant was taken care of both with respect to her personal needs and her property. (Exhibit 7).

Findings of Fact

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

1. MassHealth received an application for long-term care on June 24, 2010.
2. MassHealth denied this application on July 29, 2010 for failure to provide information necessary to complete the application.
3. MassHealth re-logged the application on December 1, 2010 as some of the missing information was provided by the appellant.
4. The appellant is seeking a start date of September 15, 2010.
5. The appellant is a 91-year old woman who was admitted to the nursing

facility on February 23, 2009.

6. The appellant entered into a Caregiver Service Agreement with her son on April 7, 2009.
7. Under the terms of the Caregiver Service Agreement, the appellant paid her son \$23,400 on December 15, 2009 and \$23,400 on March 17, 2010.
8. The Caregiver Service Agreement was meant for the appellant to prepay her son to care for property in which the appellant has a life estate.
9. The appellant's son has the interest of a remainderman in the property for which he is providing services.
10. The life estate and remainder interest were created in May 2002.
11. The appellant's son does not live at the property in question.
12. The appellant's son is trying to rent the property for the appellant.
13. The appellant wants the property to be maintained and managed by her son.
14. The appellant's son declared the money received from the appellant as self-employment income.
15. The appellant's son received payment for services prior to those services being provided.
16. The Caregiver Service Agreement called for the appellant's son to provide additional services to the appellant, other than property management.
17. The additional services are those that are also provided to the appellant by the nursing facility including laundry and other personal care services.
18. MassHealth determined that the appellant made disqualifying transfers on December 15, 2009 and March 17, 2010 as they determined that the appellant was prepaying anticipated expenses or services.
19. MassHealth determined that the disqualifying transfers resulted in a 171 day disqualification period beginning on October 2, 2010 and ending on March 21, 2011.
20. MassHealth determined the start of the disqualification period based on payment the appellant made to the facility as way to reduce her assets.

21. The appellant paid the facility from September 15, 2010 to October 1, 2010.

Analysis and Conclusions of Law

The regulations at 130 CMR 520.019 apply to nursing-facility residents as defined at 130 CMR 515.001 requesting MassHealth payment for nursing-facility services provided in a nursing facility or in any institution for a level of care equivalent to that received in a nursing facility or for home- and community-based services provided in accordance with 130 CMR 519.007(B). Under this section, transfers of resources are subject to a look-back period, beginning on the first date the individual is both a nursing facility resident and has applied for or is receiving MassHealth Standard. (130 CMR 520.019(B)).

MassHealth considers any transfer during the appropriate look-back period by the nursing facility resident of a resource or interest in a resource, owned by or available to the nursing-facility resident for less than fair-market value a disqualifying transfer unless listed as permissible in 130 CMR 520.019(D), identified in 130 CMR 520.019(F), or exempted in 130 CMR 520.019(J). (130 CMR 520.019(C)). A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available. (130 CMR 520.019(C)).

MassHealth does consider certain transfers as permissible. (130 CMR 520.019(D)). Such permissible transfers include a transfer of resources to the spouse of the nursing-facility resident, a transfer from the spouse to a third-party for the benefit of the spouse, a transfer to a permanently and totally disabled or blind child, a transfer to a trust for the sole benefit of a permanently and totally disabled person who was under 65 years of age, a transfer to a pooled trust created for the sole benefit of the nursing-facility resident, certain transfers of the nursing-facility resident's home, and a transfer to a burial account or similar device. (130 CMR 520.019(D)). The transfers totaling \$46,800 do not reflect any such transfer. (130 CMR 520.019(D)).

In addition to the permissible transfers described in 130 CMR 520.019(D), MassHealth will not impose a period of ineligibility for transferring resources at less than fair-market value if the nursing-facility resident or the spouse demonstrates to the MassHealth agency's satisfaction that:

- (1) the resources were transferred exclusively for a purpose other than to qualify for MassHealth; or
- (2) the nursing-facility resident or spouse intended to dispose of the resource at either fair-market value or for other valuable consideration. (130 CMR 520.019(F)).

The regulations state that valuable consideration is a tangible benefit equal to at least the fair-market value of the transferred resource. (130 CMR 520.019(F)).

There was no evidence presented to show that the appellant received fair market value at the time she made the transfers to her son. The payments were done in advance of the services being provided by the appellant's son. There was no testimony or evidence to demonstrate that this is a typical practice of property management. Most individuals providing management or personal care services are paid after the services are provided, not in advance. There was no evidence to demonstrate that the appellant received fair market value for prepayment of services. While it may be acceptable for the appellant to enter into a contract prior to the services commencing, prepayment of such services does not demonstrate that the appellant received fair market value at the time the transfers were made.

The MassHealth regulations at 130 CMR 515.001 define fair market value as an estimate of the value of a resource if sold at the prevailing price. For transferred resources, the fair-market value is based on the prevailing price at the time of transfer. (130 CMR 515.001). Although the appellant may have received services after payment, at the time the payment was made, the appellant did not receive fair-market value for the services as no services were provided at that time. The evidence presented by the appellant with the brief, including a letter from a local broker, do not demonstrate that it is a regular practice to pay a property manager in advance of receiving services. In fact, the letter specifically does not mention when payment is received for services. Instead, it merely discusses the services provided and the typical annual payment received for such services.

Based on the evidence presented at the hearing, it is difficult to conclude that the resources in this case were transferred exclusively for a purpose other than to qualify for MassHealth. MassHealth based their decisions on the regulations which require an individual to demonstrate that the transfers were done exclusively for a purpose other than to qualify for MassHealth. (130 CMR 520.019(F)). While these transfers may have had another purpose, it is difficult to conclude that the transfers were made exclusively for a purpose other than to qualify for MassHealth when the appellant demonstrated that a contract was entered into after entering a facility and payments were made in advance of services being provided.

The purpose of the Deficit Reduction Act of 2005 was to close loopholes and allow Medicaid resources to go to those in genuine need rather than allowing wealthy seniors to qualify for Medicaid. (Cong Record 109-S14209, December 21, 2005). The purpose of the legislation was to prevent seniors from intentionally protecting their assets. (Cong Record 109-S14209, December 21, 2005). As one Senator noted, people should not be allowed to hide their money in order to receive Medicaid nursing home coverage. (Cong. Record 109-S14209,

December 21, 2005). It appears that the appellant may have been taking steps to intentionally protect and spend down her assets in order to qualify for Medicaid nursing home coverage as nothing was presented to show otherwise.

The decision made by MassHealth regarding the transfers totaling \$46,800 was correct.

This part of 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.

Susan Burgess-Cox
Hearing Officer
Board of Hearings

cc:
MassHealth Representative: Dorothy Zamora
MassHealth Representative: Lien Coordinator