

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Approved in part; Denied in part	Appeal Number:	1500851
Decision Date:	4/7/15	Hearing Date:	03/02/2015
Hearing Officer:	Cynthia Kopka		

Appellant Representative:

MassHealth Representative:
Ann Marashio



*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:	Approved in part; Denied in part	Issue:	Long-term care eligibility
Decision Date:	4/7/15	Hearing Date:	03/02/2015
MassHealth Rep.:	Ann Marashio	Appellant Rep.:	
Hearing Location:	Taunton 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 December 23, 2015, MassHealth determined that Appellant was not eligible for MassHealth because she had transferred assets within 60 months of her application, resulting in a penalty period expiring December 17, 2014 (Exhibit 1). 130 CMR 520.018 and 019. Appellant filed this appeal in a timely manner on January 5, 2015 (Exhibit 2). 130 CMR 610.015(B) and Exhibit 2. Challenging the denial or scope of assistance is valid grounds for appeal. 130 CMR 610.032.

Action Taken by MassHealth

MassHealth denied Appellant's request for long-term care benefits because MassHealth determined that there had been an impermissible transfer of assets totaling \$9,977.42 resulting in a period of ineligibility of 33 days.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.019, in

determining that Appellant made disqualifying transfers during the look-back period.

Summary of Evidence

A representative from MassHealth appeared at hearing and testified as follows. MassHealth received Appellant's application on October 4, 2014. Appellant entered the long-term care facility on May 3, 2014 and sought a start date of July 6, 2014 (Testimony). MassHealth originally denied Appellant's first application in September 2014 because Appellant was over the asset limit. The MassHealth representative testified that initial notice was not appealed (Testimony). MassHealth received additional documents related to Appellant's spending of assets and processed a reapplication on December 22, 2014. MassHealth originally approved the case with a start date of December 17, 2014 after calculating a penalty period. However, the MassHealth representative testified that after reviewing the case, she was able to use a retroactive date and thus coverage began on October 31, 2014, not December 17, 2014 (Testimony). The MassHealth representative testified that Appellant had not spent down her assets until December 15, 2014 but using a Haley adjustment, the MassHealth representative could determine eligibility beginning September 28, 2014 (Testimony).

MassHealth was able to verify all but \$9,977.42 of Appellant's transfers during the spend down (Testimony and Exhibit 4). MassHealth divided the daily cost of private nursing home care (\$300) and calculated a penalty period of 33 days, beginning September 28, 2014 and ending October 31, 2014 (Testimony and Exhibit 4). The MassHealth representative determined that one transfer, a check issued to Appellant's representative for \$17,900 pursuant to a care agreement was disqualifying, but also found that enough of Appellant's incurred medical expenses offset (or cured) all but \$9,977.42 of that amount (Testimony). The MassHealth representative testified that MassHealth typically considers transfers pursuant to a care agreement to be disqualifying, especially since here the care agreement was signed in October 2014, four months after Appellant entered the nursing facility in May (Testimony). The MassHealth representative raised no other issue with the Agreement, but simply testified that MassHealth does not allow them (Testimony).

Appellant's representatives (her son and granddaughter) appeared in person and testified as follows. Appellant's representatives dispute that Appellant did not spend down her assets until December 15, 2014 and argue that only the life insurance policies were outstanding through no fault of their own (Testimony). Appellant's representative argued that he received a notice stating that that he had 30 days to spend Appellant's assets. Appellant's representatives assert that Appellant spent the assets within the 30 day time period and should not be penalized (Testimony). The MassHealth representative explained that the regulation gives a member 30 days to show that the assets were reduced, but eligibility is determined based on the actual date

the assets were reduced (Testimony). For instance, though Appellant's representatives argue that July 6, 2014 should be used at the start date, MassHealth testified that as of July 2014, Appellant had \$46,000 in assets (Testimony and Exhibit 4).

Appellant's representatives also argue that the \$17,900 check was issued to Appellant's granddaughter pursuant to a valid agreement (Testimony). Appellant's granddaughter testified that beginning in April 2009, she and Appellant entered into an agreement ("the April 2009 Agreement") whereby Appellant's granddaughter would provide care for Appellant, including driving Appellant and Appellant's dependent son (who is mentally disabled and has diabetes) to medical appointments, shopping for Appellant's food and medications, and performing household tasks. In exchange, Appellant's granddaughter testified that Appellant would compensate Appellant's granddaughter for her services either upon her death or upon being transferred to a nursing facility (Testimony). Appellant's representatives testified that Appellant would not be able to afford to pay her granddaughter on a recurring basis as her limited funds were reserved in case of an emergency (Testimony). Appellant submitted to MassHealth a written agreement that purports to memorialize the April 2009 Agreement (Exhibit 4). Appellant and her granddaughter signed the written codification on October 9, 2014 after Appellant was admitted to the nursing facility (Exhibit 4). The written codification states that Appellant's granddaughter agrees to provide assistance for Appellant's needs for everyday living, specifically:

1. Weekly (or as needed) grocery shopping. Including preparing list, discussing options and storing items
2. Transportation to and from doctor & lab appointments, bank, pharmacy.
3. Picking up lunch.
4. General cleaning and organizing of home
5. Mail pick up
6. Paying of bills and reconciliation of bank accounts
7. Other errands as required...including laundry, shopping for items including toiletries, kitchen supplies and others, assuring that prescribed medications are taken appropriately and other incidental services.

(Exhibit 4). The written codification also states that "Compensation for the above services will be paid at \$20.00 per Hour." (Exhibit 4). The agreement is silent on how much, if anything, Appellant would pay her granddaughter for mileage.

Appellant's granddaughter brought contemporaneous logs of the care she provided to Appellant to the hearing. Appellant's representatives also submitted to MassHealth a summary of these logs, detailing the time per week and mileage incurred by Appellant's granddaughter in so

providing the care (Exhibit 4).¹ Appellant's granddaughter testified that at first, she provided care every other week and in the passing years Appellant's needs became more frequent (Testimony). Per the summary, from April 1, 2009 through April 30, 2014, Appellant's granddaughter provided 753 hours of care to Appellant and traveled 6925 miles. Additionally, the summary lists 42 hours provided for "sort mail/pay bills/bank reconciliation" from January 2013 through September 2014 (Exhibit 4). Finally, the summary lists 46 hours of "cat care & travel (cleaning of house, laundry, organizing, and packing)" with 125 miles. The total amount calculated for 841 hours at \$20/hour is \$16,820.00. Additionally, the total amount calculated for 7,050 miles at \$0.15/mile is \$1,057.50. The grand total is \$17,877.50. Appellant issued a check for \$17,900 to her granddaughter on October 9, 2014 (Exhibit 4). Appellant's representative testified that the time she spent shopping for groceries and medicine was for both Appellant and Appellant's dependent son. Additionally, Appellant's representative also brought Appellant's son to the lab every so often for tests, but testified that the amount caring for the dependent son was "minimal" compared to the care given to Appellant. Appellant's representatives argue that Appellant was her son's guardian and was obligated to ensure that care was provided for him (Testimony).

Appellant's representatives admit that the Agreement was signed in October 2014 after Appellant entered the nursing facility, but argue that actual contract was created when Appellant and her granddaughter verbally agreed on or about April 1, 2009. As such, the written codification reflects the April 2009 Agreement under which the parties were operating (Testimony and Exhibit 4).

Appellant's representatives did not present evidence demonstrating that \$20/hour and \$0.15/mile is fair market value for the services provided. However, Appellant's representatives offered in support of their position a prior Board of Hearings decision that involved a care agreement (Exhibit 5). While hearing decisions are not binding precedent, it is notable that in the decision, the hearing officer determined the fair market value of the services provided (including transportation to medical appointments, daily personal care, and retrieving mail) by using the wage rate for personal care attendants (PCAs) under MassHealth's PCA program.²

Finally, Appellant's representatives expressed displeasure in the nursing facility's failure to

¹ Specifically, Appellant's granddaughter brought stacks of datebooks, which the hearing officer examined. Appellant's granddaughter marked each date care was provided with the number of hours and a brief description of the tasks performed. The notebooks are not part of the appeal record and the hearing officer determined the summary prepared for purposes of appeal are a credible reflection of what was contained in the contemporaneous logs.

² The MassHealth regulations regarding PCA services define activities of daily living (ADLs) and instrumental activities of daily living (IADLs), which include assistance with medications (130 CMR 422.410(A)(2)), household services (130 CMR 422.410(B)(1)), meal preparation (130 CMR 422.410(B)(2)), transportation ((130 CMR 422.410(B)(3)), and other special needs instrumental to the health care of the member (130 CMR 422.410(B)(4)).

properly advise Appellant's representatives about the process as well as the quality of care Appellant receives from the facility. Appellant's representatives state that they received incorrect and deceptive information from the nursing facility about deadlines for the MassHealth application (Testimony).

Findings of Fact

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

1. Appellant entered the long-term care facility on May 3, 2014 (Testimony).
2. Appellant applied for long-term care benefits on October 4, 2014 seeking benefits beginning July 6, 2014 (Testimony).
3. The MassHealth representative testified that she denied Appellant's first application in September 2014 because Appellant was over the asset limit.
4. MassHealth received additional documents related to Appellant's spending of assets and processed a reapplication on December 22, 2014. MassHealth originally approved the case with a start date of December 17, 2014 after calculating a penalty period.
5. The MassHealth representative testified that Appellant had not spent down her assets until December 15, 2014 but using a Haley adjustment, the MassHealth representative could determine eligibility beginning September 28, 2014 (Testimony).
6. Appellant's representatives dispute that Appellant did not spend down her assets until December 15, 2014 and argue that only the life insurance policies were outstanding through no fault of their own (Testimony).
7. Appellant issued a check for \$17,900 to her granddaughter on October 9, 2014 (Exhibit 4).
8. MassHealth determined that the check issued to Appellant's granddaughter was a disqualifying transfer but found that enough of Appellant's incurred medical expenses offset (or cured) all but \$9,977.42 of that amount (Testimony).
9. MassHealth divided \$9,977.42 by the daily cost of private nursing home care (\$300) and calculated a penalty period of 33 days, beginning September 28, 2014 and ending October 31, 2014 (Testimony and Exhibit 4).
10. On or about April 1, 2009, Appellant and her granddaughter entered into an agreement

whereby Appellant's granddaughter would provide care for Appellant, such as:

- Weekly (or as needed) grocery shopping. Including preparing list, discussing options and storing items
- Transportation to and from doctor & lab appointments, bank, pharmacy.
- Picking up lunch.
- General cleaning and organizing of home
- Mail pick up
- Paying of bills and reconciliation of bank accounts
- Other errands as required...including laundry, shopping for items including toiletries, kitchen supplies and others, assuring that prescribed medications are taken appropriately and other incidental services (Exhibit 4).

11. In exchange, Appellant agreed to compensate Appellant's granddaughter for the value of the services provided either upon Appellant's death or upon being transferred to a nursing facility (Testimony).
12. Appellant and her granddaughter signed a written codification of the April 2009 Agreement on October 9, 2014 (Exhibit 4).
13. The written codification states that "Compensation ... will be paid at \$20.00 per Hour" but is silent on how much, if anything, Appellant agreed pay her granddaughter for mileage (Exhibit 4).
14. From April 1, 2009 through April 30, 2014, Appellant's granddaughter provided 753 hours of care to Appellant and her dependent son (who is mentally disabled), broken down as follows
 - April 1, 2009 – June 23, 2010 = 165 hours
 - July 7, 2010 – June 29, 2011 = 151 hours
 - July 13, 2011 – June 21, 2012 = 153 hours
 - July 5, 2012 – June 27, 2013 = 157 hours
 - July 11, 2013 – April 30, 2014 = 127 hours
15. From January 2013 through September 2014, Appellant's granddaughter provided 42 hours for "sort mail/pay bills/bank reconciliation" broken down as follows:
 - January 2013 – June 2013 = 36 hours
 - July 2014 – September 2014 = 6 hours
16. From May 2014 through September 2014, Appellant's granddaughter provided 46 hours of "cat care & travel (cleaning of house, laundry, organizing, and packing)".

17. Appellant's granddaughter provided shopping and transportation services for both Appellant and Appellant's dependent, disabled son (Testimony).

18. The PCA union contracts, which are silent as to mileage reimbursement, set the PCA wage rates are set forth below with their effective dates:

- July 1, 2009 – \$12.00 per hour
- July 1, 2010 – \$12.48 per hour
- July 1, 2012 – \$12.68 per hour
- July 1, 2013 – \$12.98 per hour
- July 1, 2014 – \$13.38 per hour

(Exhibit 6).

Analysis and Conclusions of Law

Issue #1: Date of asset reduction

An applicant whose countable assets exceed the asset limit of MassHealth Standard may be eligible for MassHealth

(a) as of the date the applicant reduces his or her excess assets to the allowable asset limit without violating the transfer of resource provisions for nursing-facility residents at 130 CMR 520.019(F); or

(b) as of the date, described in 130 CMR 520.004(C), the applicant incurs medical bills that equal the amount of the excess assets and reduces the assets to the allowable asset limit within 30 days after the date of the notification of excess assets.

130 CMR 520.004(A)(1).

Here, the MassHealth representative testified that Appellant did not spend down her assets until December 15, 2014. Appellant's representatives dispute this and argued that the only outstanding assets were life insurance policies over which they had no control. As Appellant's representatives admit that there were outstanding assets as of December 15, 2014, I see no error in MassHealth's determination. Regarding the issue of the start date, this appeal is denied in part.

Issue #2: Disqualifying transfer

MassHealth considers any transfer of a resource owned by a nursing facility resident for less than fair market value during the appropriate look-back period to be a disqualifying transfer unless the transfer in question is permitted or exempted under the regulations. Specifically, 130 CMR 520.018(B) states that MassHealth “will deny payment for nursing facility services to an otherwise eligible nursing-facility resident ... who transfers or whose spouse transfers countable resources for less than fair-market value during or after the period of time referred to as the look-back period.” The look-back period for transfers of resources occurring on or after February 8, 2006 is 60 months. 130 CMR 520.019(B)(2).

According to 130 CMR 520.019(C),

The MassHealth agency considers any transfer during the appropriate look-back period by the nursingfacility resident or spouse of a resource, or interest in a resource, owned by or available to the nursingfacility resident or the spouse (including the home or former home of the nursing-facility resident or the spouse) for less than fairmarket 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).** The MassHealth agency may consider as a disqualifying transfer any action taken to avoid receiving a resource to which the nursing-facility resident or spouse is or would be entitled if such action had not been taken.

Per 130 CMR 520.0019(G),

Where the MassHealth has determined that a disqualifying transfer of resources has occurred, the MassHealth will calculate a period of ineligibility. The number of months in the period of ineligibility is **equal to the total, cumulative, uncompensated value** as defined in 130 CMR 515.001 of all resources transferred by the nursing-facility resident or the spouse, divided by the average monthly cost to a private patient receiving nursing-facility services in the Commonwealth of Massachusetts at the time of application, as determined by the MassHealth agency.

(Emphasis added).

MassHealth determined that Appellant made a disqualifying transfer of assets by issuing a check to her granddaughter for \$17,900. MassHealth bases its determination on the fact that the written codification was entered into after the services were rendered, and Appellant did not make contemporaneous payments for the services. MassHealth is supported in its assertion by the federal Health Care Finance Administration (HCFA) Transmittal No. 64, which states that

while relatives and family members legitimately can be paid for care they provide to the individual, HCFA presumes that services provided for free at the time were intended to be provided without compensation. Thus, a transfer to a relative for care provided for free in the past is a transfer of assets for less than fair market value.

However, the presumption may be rebutted with tangible evidence that is acceptable to the State. Here, Appellant's granddaughter testified that she did not perform the services for free; rather, she agreed to perform the services and Appellant agreed to compensate her granddaughter at a later date. In support of this position, Appellant's granddaughter testified as to the April 2009 Agreement and presented contemporaneous logs as well as the written codification of the agreement signed by Appellant. Taking the totality of this evidence, I find Appellant's granddaughter's testimony credible that Appellant and her granddaughter reached an agreement to exchange services for payment in April 2009 and thus have rebutted the presumption that the services were intended to be provided without compensation.

The next determination is whether the \$17,900 reflects fair market value for the services Appellant's granddaughter agreed to provide. Appellant paid her granddaughter \$20 per hour and \$0.15 per mile for the care provided. Appellant did not present evidence that \$20 per hour and \$0.15 per mile are the fair market values of such services, nor did she establish that Appellant's granddaughter has any qualifications to perform skilled care.

In support of her case, Appellant produced a prior Board of Hearings decision that informs the circumstances here (Exhibit 5). Based on the facts of the prior case, the hearing officer determined that the \$25 per hour pay rate was excessive and found that the wage rate for PCAs under MassHealth's PCA program reflected the fair market value for the services provided under a care agreement.

Here, the services provided by Appellant's granddaughter are the same as those provided by PCAs pursuant to 130 CMR 422.410. The PCA wage rates set by union contracts for the operative period of the Agreement are as follows:

- July 1, 2009 – \$12.00 per hour
- July 1, 2010 – \$12.48 per hour
- July 1, 2012 – \$12.68 per hour
- July 1, 2013 – \$12.98 per hour
- July 1, 2014 – \$13.38 per hour

With no other evidence of the fair market value of the services, I find that the PCA wage rate reflects fair market value. Therefore, the \$20 per hour rate Appellant paid her granddaughter is excessive. Additionally, neither the Agreement nor the PCA union contracts provide for

reimbursement of mileage. Therefore, I find that any mileage reimbursement paid to Appellant exceeds the value of the Agreement. Accordingly, I calculate the fair market value of the services provided per the Agreement to be \$10,576.50.³ By transferring \$17,900 to her granddaughter, Appellant exceeded the value of the services by \$7,323.50.

Having determined that Appellant did not receive fair market value for the transfer, the next determination is whether the regulation provides an exception. Per 130 CMR 520.019(F), MassHealth will not impose a period of ineligibility for transferring resources at less than fair market value if the member demonstrates to MassHealth'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 fairmarket value or for other valuable consideration. Valuable consideration is a tangible benefit equal to at least the fairmarket value of the transferred resource.

Here, Appellant clearly contemplated MassHealth eligibility at the time of the transfer, as she agreed to pay her granddaughter either upon her death or upon admission to a nursing facility. However, the regulation allows Appellant to avoid a penalty notwithstanding her contemplation of future eligibility if she intended to provide fair compensation to her granddaughter. *See Gauthier v. Director of the Office of Medicaid*, 80 Mass. App. Ct. 777, 787 (2011).

The services Appellant received were not worth the \$17,900 she paid. However, based on the evidence provided regarding the April 2009 Agreement, I find that Appellant intended to provide fair compensation to her granddaughter in consideration for receiving care. Therefore, I find that the \$17,900 in its entirety is not subject to a period of ineligibility per 130 CMR 520.019(F)(2).

Appellant should only be penalized based the uncompensated value of the transfer – the difference between the amount paid and the value actually received for the services. In other words, only \$7,323.50 of the transfer to Appellant's granddaughter is disqualifying.

³ The breakdown of the calculation is as follows. For the uncategorized general care hours:

- April 1, 2009 – June 23, 2010 = 165 hours x \$12.00 per hour = \$1,980.00
- July 7, 2010 – June 29, 2011 = 151 hours x \$12.48 per hour = \$1,884.48
- July 13, 2011 – June 21, 2012 = 153 hours x \$12.48 per hour = \$19,09.44
- July 5, 2012 – June 27, 2013 = 157 hours x \$12.68 per hour = \$1,990.76
- July 11, 2013 – April 30, 2014 = 127 hours x \$12.98 per hour = \$1,648.46

“Sort mail/pay bills/bank reconciliation” hours

- January 2013 – June 2013 = 36 hours x \$12.98 per hour = \$467.28
- July 2014 – September 2014 = 6 hours x \$13.38 per hour = \$80.28

“Cat care & travel (cleaning of house, laundry, organizing, and packing)”

- May 2014 - September 2014 = 46 hours x \$13.38 per hour = \$615.48

For the foregoing reasons, this appeal is approved in part.

Order for MassHealth

Adjust the total amount of the disqualifying transfer from \$17,900 to \$7,323.50. Redetermine the period of disqualification in accordance with the amended transfer figure.

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.

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.

Cynthia Kopka
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Justine Ferreira