

**Division of Medical Assistance
BOARD OF HEARINGS**

Appellant Name and Address:

Appeal Decision:	Approved in part; Denied in part	Appeal Number:	1811354
Decision Date:	8/13/18	Hearing Date:	June 11, 2018
Hearing Officer:	Brook Padgett	Record Open to:	July 11, 2018

Appellant Representative:

Division Representative:

Patricia Lemke



*Commonwealth of Massachusetts
Executive Office of Health and Human Services
Division of Medical Assistance
Board of Hearings
100 Hancock Street, 6th floor
Quincy, MA 02171*

APPEAL DECISION

Appeal Decision:	Approved in part; Denied in part	Issue:	130 CMR 520.018
Decision Date:	8/13/18	Hearing Date:	June 11, 2018
Division Rep.:	P. Lemke	Appellant Rep.:	
Hearing Location:	Springfield		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

The Appellant received a notice dated August 11, 2017, stating: MassHealth has decided you are eligible for MassHealth Standard benefits to cover your care in a nursing facility. Your eligibility begins on March 27, 2017. Starting March 2017, you will owe your facility \$0.00. For the period December 20, 2016 to March 26, 2017, you were ineligible for MassHealth due to a transfer of assets. (Exhibit 1). The Appellant filed this appeal timely on September 26, 2017. (130 CMR 610.015(B); Exhibit 2).¹ Termination of assistance is valid grounds for appeal (130 CMR 610.032).

Action Taken by MassHealth

MassHealth approved the Appellant's long term care services beginning March 27, 2017. The Appellant was denied long term care services from December 20, 2016 to March 26, 2017 due to a transfer of assets.

Issue

Is MassHealth correct in determining that the Appellant's annuity is a disqualifying transfer?

¹ The Appellant died on November 06, 2017, and the appeal could not be scheduled until the Appellant's daughter obtained a Voluntary Administration Statement from the Probate Court. (Exhibit 4).

Summary of Evidence

MassHealth testified the Appellant was admitted to the nursing facility on November 29, 2016, and applied for MassHealth on January 10, 2017, with the facility requesting a start date of December 01, 2016. The initial application was denied on March 02, 2017, for lack of verifications. This action was appealed timely on March 30, 2017. Additional verifications were submitted and second denial notice was issued dated April 28, 2017, again for a lack of verification. This second denial was appealed timely on May 24, 2017. On July 13, 2017, a hearing was held and on September 16, 2017, a hearing decision instructed MassHealth to make a determination of eligibility based on the Appellant's application filed on January 10, 2017, after review of missing verifications, specifically an annuity contract and a change of beneficiary form. After review MassHealth approved the Appellant for long term care services on August 11, 2017 with an eligibility start date of March 27, 2017. MassHealth determined a period of ineligibility from December 20, 2016 to March 26, 2017, due to a disqualifying transfer of assets. MassHealth maintains the Appellant's purchase of an annuity on July 29, 2011, for \$49,780.09 was not actuarially sound based on the Appellant's age (70), his life expectancy at the time (10.48 years or 126 months) and the monthly payout (\$246.48). MassHealth requires the value of projected annuity payments to be not less than the purchase price ($\$246.48 \times 126 \text{ months} = \$31,056.48$). MassHealth argues to be actuarially sound the payment needed to be at least \$395.08 per month ($\$395.08 \times 126 \text{ months} = \$49,780.08$). MassHealth calculated the transfer by subtracting the amount of the annuity that has already been paid prior to the approval date (\$47,993.09) and subtracting that from the original purchase price (\$48,780.09) to determine the amount transferred ($\$48,780.09 - \$17,993.09 = \$30,787.00$). MassHealth took the transferred amount and divided by the average daily cost of a nursing facility (\$354.00) to determine 87 days of ineligibility ($\$30,787.00 \div \$354.00 = 87$) or from December 30, 2016, to March 26, 2017. MassHealth submitted into evidence verification of private pay amount and annuity. (Exhibit 5).

The Appellant's representative requested the hearing record remained open until July 11, 2018, to allow the submission of a Memorandum in Support and July 25, 2018, for MassHealth to respond. (Exhibit 6).

The Appellant's representative submitted a Memorandum in Support, affidavit of Appellant's spouse, annuity certificate and *Normand v Director of the Office of Medicaid*, 77 Mass. App. Ct. 634, within the required time limits arguing 130 CMR 520.007(J) does not apply as the purchase of the annuity was for fair market value as it occurred beyond the five-year look-back period. Further, a period of ineligibility cannot be imposed as the purchase of the annuity and the conversion was performed without the intent to qualify for MassHealth. Additionally the annuity is actuarially sound, however cannot name the Commonwealth as a beneficiary in the second position as it does not have a death benefit. The memorandum asserts that if it is determined the annuity is non-compliant based on the Appellant's life expectancy, MassHealth must use the method in the regulations and case law for determining the disqualification period. If the transfer is determined to be disqualifying the annuity should be determined non-countable as it is inaccessible pursuant to 130 CMR 520.006. Finally, the request date for nursing facility services should be revised to November 29, 2016, as December 20, 2016, was requested in error. (Exhibit 7).

Findings of Fact

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

1. On November 29, 2016, the Appellant entered a nursing facility. (Testimony; Exhibit 5).
2. On January 10, 2017, the Appellant applied for MassHealth long-term care benefits. (Testimony; Exhibit 5).
3. On August 11, 2017, the Appellant was approved for long term cares services with an eligibility start date of March 27, 2017. (Testimony; Exhibit 5).
4. On March 08, 2006, the Appellant and his spouse purchased a deferred joint and survivor annuity in the amount of \$43,381.00. (Testimony; Exhibit 5).
5. On July 29, 2011, the Appellant and his spouse surrendered the joint and survivor deferred annuity and purchased a joint and survivor single premium immediate annuity for \$48,780.09. (Testimony; Exhibit 5).
6. The annuity provided monthly payments of \$246.48 beginning July 29, 2011, and ends when the Appellant and spouse have both passed away. (Testimony; Exhibit 5).
7. The annuity cannot be altered, deferred or accelerated and has no cash surrender value. (Testimony; Exhibit 5).
8. As of November 2016, the undistributed value of the annuity was \$30,787.05. (Testimony; Exhibit 5).

Analysis and Conclusions of Law

MassHealth considers any transfer during the appropriate look-back period by the nursing-facility resident or spouse of a resource, or interest in a resource, owned by or available to the nursing-facility resident or the spouse (including the home or former home of the nursing-facility resident or the spouse) 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).²

² 130 520.019: Transfer of Resources Occurring on or after August 11, 1993 (B) Look-Back Period. 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. (1) For transfers occurring before February 8, 2006, this period generally extends back in time for 36 months. (2) For transfers of resources occurring on or after February 8, 2006, the period generally extends back in time for 60 months. The 60-month look-back period will begin to be phased in on February 8, 2009. Beginning on March 8, 2009, applicants will be asked to provide verifications of their assets for the 37 months prior to the application. As each month passes, the look-back period will increase by one month until the full 60 months is reached on February 8, 2011. (3) For transfers of resources

On July 29, 2011, the Appellant and his spouse surrendered a joint and survivor deferred annuity and converted it to a joint and survivor single premium annuity. The Appellant applied for MassHealth on January 10, 2017, more than 60 months after the purchase. MassHealth argues the Appellant's purchase of an annuity in 2011 is a disqualifying transfer of assets for less than fair market value because the total present value of projected payments from the annuity was less than the purchase price and therefore it did not conform to the regulations at 130 CMR 520.019(J)(1) and (2)³. MassHealth maintains that the Appellant's purchase of the annuity is disqualifying regardless of the date of the purchase. (130 CMR 520.018(B) and (D)).

from or into trusts, the look-back period is described in 130 CMR 520.023(A). (C) Disqualifying Transfer of Resources. The MassHealth agency considers any transfer during the appropriate look-back period by the nursing-facility resident or spouse of a resource, or interest in a resource, owned by or available to the nursing-facility resident or the spouse (including the home or former home of the nursing-facility resident or the spouse) 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). 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. Action taken to avoid receiving a resource may include, but is not limited to, waiving the right to receive a resource, not accepting a resource, agreeing to the diversion of a resource, or failure to take legal action to obtain a resource. In determining whether or not failure to take legal action to receive a resource is reasonably considered a transfer by the individual, the MassHealth agency considers the specific circumstances involved. A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available.

³ 130 CMR 520.007: Countable Assets (J) Annuities, Promissory Notes, Loans, Mortgages, and Similar Transactions. (1) Treatment of Annuities Established Before February 8, 2006. Payments from an annuity are countable income in accordance with 130 CMR 520.009. If the annuity can be converted to a lump sum, the lump sum, less any penalties or costs of converting to a lump sum, is a countable asset. Purchase of an annuity is a disqualifying transfer of assets for nursing-facility residents as defined at 130 CMR 515.001: *Definition of Terms* in the following situations: (a) when the beneficiary is other than the applicant, member, or spouse; (b) when the beneficiary is the applicant, member, or spouse and when the total present value of projected payments from the annuity is less than the value of the transferred asset (purchase price). In this case, the MassHealth agency determines the amount of the disqualifying transfer based on the actuarial value of the annuity compared to the beneficiary's life expectancy using the life-expectancy tables as determined by the MassHealth agency, giving due weight to the life-expectancy tables of institutions in the business of providing annuities; (c) when the terms of the annuity postpone payment beyond 60 days, the MassHealth agency will treat the annuity as a disqualifying transfer of assets until the payment start date; or (d) when the terms of the annuity provide for unequal payments, the MassHealth agency may treat the annuity as a disqualifying transfer of assets. Commercial annuity payments that vary solely as a result of a variable rate of interest are not considered unequal payments under 130 CMR 520.007(J)(1)(d). (2) Treatment of Annuities Established on or after February 8, 2006. In addition to the requirements in 130 CMR 520.007(J)(1), the following conditions must be met. (a) The purchase of an annuity will be considered a disqualifying transfer of assets unless (i) the Commonwealth of Massachusetts is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the institutionalized individual; (ii) the Commonwealth of Massachusetts is named as such a remainder beneficiary in the second position after the community spouse, or minor or disabled children; or (iii) the Commonwealth of Massachusetts is named as such a remainder beneficiary in the first position if the community spouse or the representative of any minor or disabled children in 130 CMR 520.007(J)(2)(a)(ii) disposes of any such remainder for less than fair-market value. (b) The purchase of an annuity is considered a disqualifying transfer of assets unless the annuity satisfies 130 CMR 520.007(J)(1) and (J)(2)(a) and is irrevocable and nonassignable, or unless the annuity satisfies 130 CMR 520.007(J)(2)(c)...

130 CMR 520.018: Transfer of Resources Regardless of Date of Transfer

- (A) The provisions of 42 U.S.C. 1396p apply to all transfers of resources. In the event that any portion of 130 CMR 520.018 and 520.019 conflicts with federal law, the federal law supersedes.
- (B) The MassHealth agency denies payment for nursing-facility services to an otherwise eligible nursing-facility resident as defined in 130 CMR 515.001: *Definition of Terms* 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.**
- (C) The denial of payment for nursing-facility services does not affect the individual's eligibility for other MassHealth benefits.
- (D) Circumstances giving rise to disqualifying transfers of resources are also described at 130 CMR 520.007(J).**

While it is clear the Appellant's annuity does not conform to the MassHealth regulations at 130 CMR 520.019(J) it is also clear that the annuity was purchased outside of the look-back period and therefore cannot be considered a disqualifying transfer. Transfer regulations at 130 CMR 520.019 state all 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. For transfers occurring on or after February 08, 2006, the period generally extends back in time for 60 months.

MassHealth interprets 130 CMR 520.018 to require that all nonconforming annuities are for less than fair market value and disqualifying regardless if they occurred during or before the look-back period. However the regulations state that only those transfers that occurred "*during*" or "*after*" the look-back period are disqualifying. The time period that is "*during*" the look-back period is obviously during the 60 months prior to application. The time period "*after*" the look-back period concerns those transfers once the Appellant has been determined eligible for MassHealth benefits. To hold that "*after*" the look-back period is actually for the period "*before*" the look-back period, as in this case, would disqualify *every* transfer for less than fair market value regardless of when it occurred and as a result there would be no need for a look-back period at all.

The Appellant's July 29, 2011, purchase of an annuity is not a disqualifying transfer because it was acquired outside of the look-back period, and this appeal is approved in part.

Regarding the Appellant's request for MassHealth to revise the nursing facility start date from December 20, 2016, to November 29, 2016, this appeal is denied in part. There has been no evidence presented to support the Appellant's assertion. If the Appellant can provide verification from the nursing facility that the current request date is in fact correct, MassHealth will review the documents and make the appropriate changes.

Order for MassHealth

Redetermine eligibility after disregarding July 29, 2011, annuity purchase.

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, MassHealth of Medical Assistance, at the address on the first page of this decision.

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.

Brook A. Padgett
Hearing Officer
Board of Hearings

cc: MassHealth representative: Springfield MEC