

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**

<b>Appeal Decision:</b>	Dismissed in part; Denied in part	<b>Appeal Number:</b>	1600798
<b>Decision Date:</b>	4/15	<b>Hearing Date:</b>	02/23/2016
<b>Hearing Officer:</b>	Marc Tonaszuck	<b>Record Open to:</b>	03/25/2016

**Appellant Representative:**

**MassHealth Representative:**  
Rosa Perez-Norman



*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

<b>Appeal Decision:</b>	Dismissed in part; Denied in part	<b>Issue:</b>	Long Term Care
<b>Decision Date:</b>	4/15	<b>Hearing Date:</b>	02/23/2016
<b>MassHealth Rep.:</b>	R. Perez-Norman	<b>Appellant Rep.:</b>	
<b>Hearing Location:</b>	Springfield 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 01/07/2016, MassHealth notified appellant that it denied her application for long term care (LTC) benefits because she did not give MassHealth the information it needed to decide her eligibility within the required time frame (130 CMR 505.008; Exhibit 1A). The appellant filed a timely appeal on 01/14/2016 (130 CMR 610.015(B); Exhibit 2A). Denial of benefits is valid grounds for appeal (130 CMR 610.032).

Through a notice dated 01/26/2016, MassHealth notified appellant that it denied her application for LTC benefits because she recently gave away or sold assets to become eligible for MassHealth services. MassHealth calculated a period of ineligibility from 09/01/2015 to 02/04/2017 (130 CMR 520.018, 520.019; Exhibit 1B). The appellant filed a timely appeal on 01/27/2016 (130 CMR 610.015(B); Exhibit 2B). Denial of benefits is valid grounds for appeal (130 CMR 610.032).



## **Action Taken by MassHealth**

MassHealth denied the appellant's application for LTC benefits on 01/07/2016 because it did not receive the requested verifications. MassHealth denied the appellant's application for LTC benefits on 01/26/2016 and notified her of a period of ineligibility for MassHealth long term care benefits from 09/01/2015 to 02/04/2017 due to a disqualifying transfer during the look back period.

## **Issue**

The first appeal issue is whether MassHealth was correct, pursuant to 130 CMR 515.008 in denying the appellant's application for LTC benefits for failure to provide necessary verifications. The second issue is whether MassHealth was correct, pursuant to 130 CMR 520.018 and 520.019, in calculating a period of ineligibility for MassHealth long term care benefits from 09/01/2015 to 02/04/2017 due to disqualifying transfers during the look back period.

## **Summary of Evidence**

The MassHealth representative testified that the appellant was admitted to a skilled nursing facility on 04/23/2014. An application for long-term-care benefits was submitted to MassHealth on the appellant's behalf on 10/14/2015 seeking eligibility beginning 09/01/2015. The representative testified that this application was first denied because the appellant failed to provide the necessary verifications for MassHealth to make an eligibility determination. However, all verifications were finally received so the first notice is no longer at issue in this appeal. The application was again denied on the basis of two transfers that were made by the appellant during the appropriate look back period. The representative testified that the appellant owned real property until 2002 when she transferred the property to her children. On 09/19/2012, the children transferred the property back to the appellant. The property was sold on 10/17/2012 for \$180,000.00. After expenses, the appellant received \$161,205.00. On 10/30/2012, the appellant transferred the money to her two children (\$81,174.00 to each child). The representative testified that these transfers took place within 60 months of the appellant's application for MassHealth benefits and they are disqualifying transfers of resources resulting in a period of ineligibility of 523 days (\$162,348.00 divided by the average daily private rate of \$310.00), starting on the date the appellant was otherwise eligibly, 09/01/2015 and ending on 02/04/2017 (Exhibits 1 and 4).

Counsel representing the appellant appeared at the fair hearing and testified that the appellant is 90 years of age. On 07/23/2002, the appellant transferred the property to her sons, while retaining a life estate interest. She decided to sell the property. To avoid capital gains, she put the property in the name of her sons. She was acting as a "straw."

She sold the property and put the money in a bank account. She transferred the property to her sons for probate reasons. She did not intend to give ownership to her sons.

Counsel requested an opportunity to submit additional evidence in this matter during a record open period. Her request was granted and the record remained open in this matter until 03/11/2016 for her submission and until 03/25/2016 for MassHealth's response (Exhibit 5).

On 03/10/2016, counsel submitted an affidavit from the appellant's son. In the affidavit, the son swears under the pains and penalties of perjury that at the time the appellant sold the property and transferred the proceeds to her sons, it was in accordance with the 2002 deed and that they still considered the ownership to be consistent with the 2002 deed. The transfer of the property in 2002 from the appellant to her sons was completed to avoid the need to file a probate upon her passing and for capital gains tax planning. The appellant lived in the property from 1968 until 03/29/2012 at which time she moved to an apartment, where she lived until she was admitted to the nursing facility. In 2012, the sons transferred the property back to the appellant as part of the transaction to sell the property based upon advice provided by their attorney. According to the affidavit, the appellant's son "did not intend to transfer permanent ownership to the [the appellant]. The transfer was completed for tax reasons." "The transfer of ownership to [the appellant] was a straw transaction. It was our understanding that the proceeds would be distributed in accordance with the deed dated 07/23/2002, the value of the life estate would be distributed to [the appellant] and the value of the remained interest would be distributed to myself and my brother. It was never our intent that [the appellant] retain the full sale proceeds. I did not file a gift tax return to report the transfer of the property from myself to [the appellant]" (Exhibit 6).

On 03/11/2016, the MassHealth representative informed appellant's counsel and the hearing officer that she did not wish to respond further (Exhibit 7).

## **Findings of Fact**

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

1. The appellant was admitted to a skilled nursing facility 04/23/2014.
2. An application for long-term-care benefits was submitted to MassHealth on appellant's behalf on 10/14/2015 seeking eligibility beginning 09/01/2015.
3. Through a notice dated 01/07/2016, MassHealth notified the appellant that it denied her application for long term care (LTC) benefits because she did not give MassHealth the information it needed to decide her eligibility within the required time frame.



4. At the fair hearing, the MassHealth representative testified that all necessary verifications were received by MassHealth.
5. Through a notice dated 01/26/2016, MassHealth notified appellant that it denied her application for LTC benefits because she recently gave away or sold assets to become eligible for MassHealth services. MassHealth calculated a period of ineligibility from 09/01/2015 to 02/04/2017.
6. The appellant owned real property until 2002 when she transferred the property to her two sons, while retaining a life estate.
7. The appellant lived in the property from 1968 until 03/29/2012 when she moved to an apartment. She lived in the apartment until the time she was admitted to the nursing facility.
8. On 09/19/2012, the sons transferred the property back to the appellant in consideration of "less than \$100.00."
9. On 10/17/2012, the appellant sold the property for \$180,000.00 to a third party.
10. After expenses, the appellant received \$161,205.00 from the proceeds of the sale of the property.
11. On 10/30/2012, the appellant transferred \$81,174.00 to each of her two sons.
12. MassHealth determined that the above transactions were disqualifying transfers of resources totaling \$162,348.00.
13. MassHealth calculated a period of ineligibility of 523 days (\$162,348.00 divided by the average private daily rate of \$310.00), beginning on the date the appellant was otherwise eligible for MassHealth benefits, 09/01/2015 and ending on 02/04/2017.

## **Analysis and Conclusions of Law**

A disqualifying transfer of resources is defined at 130 CMR 520.019:

(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 will consider the specific circumstances involved. A disqualifying transfer may include any action taken that would result in making a formerly available asset no longer available.

Regulation 130 CMR 520.019(G)(3), effective February 8, 2006, provides in pertinent part:

- (1) Begin Date. For transfers occurring before February 8, 2006, the period of ineligibility will begin on the first day of the month in which resources have been transferred for less than fair-market value. For transfers occurring on or after February 8, 2006, the period of ineligibility will begin on the first day of the month in which resources were transferred for less than fair-market value or the date on which the individual is otherwise eligible for MassHealth payment of long-term-care services, whichever is later. For transfers involving revocable trusts, the date of transfer is the date the payment to someone other than the nursing-facility resident or the spouse is made.

Regulation 130 CMR 520.019(F) follows:

Determination of Intent. In addition to the permissible transfers described in 130 CMR 520.019(D), the MassHealth agency 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. Valuable consideration is a tangible benefit equal to at least the fair-market value of the transferred resource.



The State Medicaid Manual (HCFA Transmittal letter 64) at Section 3258.10 sets forth the following guidance to address transfers exclusively for a purpose other than qualifying for Medicaid:

2. Transfers Exclusively for a Purpose Other Than to Qualify for Medicaid.--Require the individual to establish, to your satisfaction, that the asset was transferred for a purpose other than to qualify for Medicaid. Verbal assurances that the individual was not considering Medicaid when the asset was disposed of are not sufficient. Rather, convincing evidence must be presented as to the specific purpose for which the asset was transferred.

This appeal involves two issues. The first is the 01/07/2016 MassHealth notice referencing a denial of long term care benefits on the basis of the appellant's failure to provide verifications. According to the MassHealth representative, this issue was resolved in the appellant's favor. MassHealth preserved the 10/14/2015 application date and proceeded to make an eligibility determination on the merits of the case, specifically MassHealth denied the appellant's application on the basis of disqualifying transfers of resources referenced in a denial notice dated 01/26/2016. For this reason, this portion of the appeal is dismissed.

Undisputed in this case is that the appellant owned property, sold it, and transferred the proceeds to her sons. The date of the transfer, 10/30/2012, and the total amount of the transfers, \$162,348.00 was also not disputed. At the fair hearing, counsel argued that the transfers to the sons were made exclusively for a purpose other than for the appellant to qualify for MassHealth benefits. She stated that the appellant transferred the property to her sons in 2002, while retaining a life estate interest, and that they transferred ownership back to her in September 2012, so that she could sell the property as a straw for capital tax planning reasons only, not to qualify for MassHealth benefits.

At the time that the appellant transferred the property to the third party and then transferred the proceeds to her sons, she was 86 or 87 years of age. She was not living in the property at the time she sold it in 2012. She had recently relocated to an apartment. There was no evidence in the record to show who, if anyone, was living in the property at the time it was sold to the third party. Based on the appellant's advanced age and that she recently moved to an apartment from the property, I conclude that the appellant has not met the burden of showing that the transfer of the resources, specifically the proceeds from the sale of the home, to her two sons was exclusively for a purpose other than to qualify for MassHealth benefits. The family retained counsel, on whose advice the sons relied in making the transfer of the property to the appellant in 2012. The testimony presented shows that the family was concerned with probate and capital gain tax ramifications that would result from the sale of the home. I have to conclude that the same sophistication that the family utilized for estate and tax planning must have included consideration of the appellant's potential need for nursing facility care. Thus, I conclude that MassHealth's denial is supported by the

facts in the hearing record and the above regulations. The appellant did not challenge the average private daily rate for nursing facility care, thus, I conclude that MassHealth's calculation of a 523 day period of ineligibility beginning on 09/01/2015 is also supported by the facts in the record and the regulations.

I find that appellant has not carried the burden of showing that MassHealth eligibility was not contemplated when depleting her assets such that the cost of appellant's nursing home care should be shifted from appellant to the publicly funded Medicaid/MassHealth program<sup>1</sup> that was "designed to provide health care for indigent persons," with the expectation that individuals deplete their own resources before obtaining assistance from the government. Lebow v Comm'r of the Div of Med. Assistance, 433 Mass. 171, 172 (2001). Thus, this portion of the appeal is denied.

For the foregoing reasons, this appeal is dismissed in part; denied in part.

## **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.

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Marc Tonaszuck  
Hearing Officer  
Board of Hearings

cc:

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<sup>1</sup> MassHealth is a joint federal and state Medicaid program established in 1965 by Title XIX of the Social Security Act. See 42 U.S.C § 1396 et seq., 42 C.F.R. § 430 et seq.