

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Approved	Appeal Number:	1701267
Decision Date:	11/8/17	Hearing Date:	06/27/2017
Hearing Officer:	Samantha Kurkji	Record Open:	10/06/2017

Appellant Representative:

MassHealth Representative:
Kim McAvinchey



*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	Issue:	Eligibility— MMMNA
Decision Date:	11/8/17	Hearing Date:	06/27/2017
MassHealth Rep.:	Kim McAvinchey	Appellant Rep.:	
Hearing Location:	Tewksbury MassHealth Enrollment Center	Aid Pending:	No

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 November 21, 2016, MassHealth informed the appellant that she is not eligible to receive MassHealth benefits because her countable assets are over the program limit. (Exhibit 1.) The appellant filed an appeal with the Board of Hearings on December 13, 2016. (130 CMR 610.015(B); Exhibit 2.) The appellant passed away on January 30, 2017. (Exhibit 5.) A fair hearing was scheduled for March 1, 2017. (Exhibit 4.) A certificate of voluntary administration was issued on April 13, 2017. (Exhibit 5.) The fair hearing was rescheduled for June 27, 2017. (Exhibit 3.) The hearing record was re-opened to allow the appellant to submit additional information by October 6, 2017. (Exhibit 8.) Denial of assistance is a valid ground for appeal. (130 CMR 610.032.)

Action Taken by MassHealth

MassHealth determined that the appellant is not eligible to receive MassHealth benefits due to excess countable assets.

Issue

Whether MassHealth was correct in determining that the appellant is not eligible for MassHealth benefits due to excess countable assets.

Summary of Evidence

The MassHealth representative appeared in person and testified that the appellant, who, at the time of application, was over 65-years-old, was admitted to a nursing facility on August 17, 2016.¹ There is a community spouse who is over 65-years-old and lives in an assisted living residence. The appellant submitted a long-term care application to MassHealth on September 27, 2016 and requested a benefit start date of August 17, 2016. On October 13, 2016, MassHealth sent an Information Request to the appellant. MassHealth issued a denial to the appellant on November 21, 2016 for excess countable assets. On November 21, 2016, MassHealth also sent an Agreement to Sell Property form for a property in Reading, MA at the previous attorney's request.² The appellant filed an appeal with the Board of Hearings on December 13, 2016.

As the community spouse resides in assisted living, the appellant's assets include a Reading, MA property with an assessed value of \$340,500. The appellant and her spouse also have a joint bank account with a balance of \$64,458.67. The community spouse has an IRA worth \$7,426.89, as well as two life insurance policies with cash values of \$2,652.87 and \$868.20. The appellant and her spouse's total assets are \$415,906.63. As MassHealth allows \$121,220 in assets for a couple (\$2,000 for the appellant and \$119,200 for the community spouse),³ the appellant has \$294,686.63 in excess countable assets.

The MassHealth representative explained that the values to which she testified differ from the values listed on the November 21, 2016 denial notice. She testified that another MEC worker sent out the denial notice and the MassHealth representative noticed some small discrepancies between the amounts listed on the denial notice and the documentation provided by the appellant. The denial notice states that the appellant has excess assets in the amount of \$297,317, but her excess assets are in fact \$294,686.63. The MassHealth representative also stated that the amount of rent (\$5,275) listed for the spousal maintenance needs allowance ("SMNA") was for a previous residence and not the residence in which the community spouse currently lives.

MassHealth used the community spouse's expenses to calculate the Minimum Monthly Maintenance Needs Allowance ("MMMNA"). MassHealth added the community spouse's rent (\$5,275) to the food stamp allowance (\$376, because he is not paying heat or utilities), for a total of \$5,651. MassHealth then deducted the standard shelter expense of \$601, yielding \$5,050. The addition of the standard maintenance allowance (\$2,003) resulted in an MMMNA of \$7,053.

¹ The appellant passed away on January 30, 2017 and the community spouse was appointed personal representative of the appellant's estate on April 13, 2017. (Exhibit 5.)

² The appellant's representative testified that the Reading, MA property was not sold and that she believed the family did not have an intention to sell.

³ The community spouse resource allowance as of January 1, 2017 is \$120,900. (<http://www.mass.gov/eohhs/docs/masshealth/memlibrary/eligibility-figures-for-residents-of-a-long-term-care-facility.pdf>) (last visited Nov. 6, 2017).

However, the MMMNA was reduced to \$3,022.50 because the MMMNA cannot exceed \$3,022.50 unless a fair hearing determines that "exceptional circumstances" require a higher MMMNA. (130 CMR 520.017(D).) Deducting the community spouse's Social Security income of \$1,696.60 from the MMMNA yields a SMNA of \$1,325.60.

MassHealth then determined the appellant's PPA. The appellant receives \$1,041 in Social Security benefits.⁴ A deduction of \$188.20 was allowed for health care coverage. As the SMNA is \$1,325.60 and the personal needs allowance ("PNA") is \$72.80, the final deduction was \$1,586.60. Since this amount exceeds the appellant's income, the patient-paid amount ("PPA") is \$0.

The appellant's representative appeared telephonically and confirmed that the rent listed for the community spouse is from his prior residence but noted that his new rental amount is not much different. She submitted a letter from the community spouse's physician, which reads, in pertinent part, as follows:

[The community spouse] suffers from Coronary Artery Disease with Ischemic Cardiomyopathy, Hypertension, Chronic Kidney Disease, Osteoarthritis, Diffuse Idiopathic Skeletal Hyperostosis [*sic*] and Spinal Stenosis.

In June of 2016 he developed septic shock from Osteonecrosis of his right hip complicated by infection with Psoas abscess. He required a prolonged ICU stay for this critical illness. He required surgical drainage of the Psoas abscess as well as Right Total Hip Replacement with an antibiotic cemented prosthesis. He required a prolonged course of intravenous antibiotics. He may still require additional surgery.

His course was also complicated by a Deep Venous Thrombosis [*sic*] which necessitated treatment with blood thinners [*sic*] and Depression.

He lives at an assisted living facility.

He cannot walk on uneven ground but can ambulate on flat ground with a cane. His balance is impaired.

In my opinion, it's medically necessary for him to live in a supervised setting where he can receive daily assistance with his medication, meal preparation and meals, help with daily chores [*sic*] and have access to an elevator.

(Exhibit 6.)

⁴ The community spouse's gross monthly income is \$1,696.90. (Exhibit 7.)

The appellant's representative stated that the appellant is over assets by approximately \$300,000, but the community spouse requires residence in an assisted living facility because of his medical conditions. Due to the assisted living facility's high cost, the community spouse is entitled to an increase in the MMMNA. The Community Spouse Resource Allowance ("CSRA") can also be increased to cover the shortfall between the community spouse's income and the increased MMMNA.

The appellant's representative submitted an MMMNA worksheet which listed the same values as MassHealth's MMMNA sheet to determine an MMMNA of \$7,053.⁵ The appellant's representative also submitted a CSRA worksheet which included the standard spousal resource allowance of \$120,900. The income deemed to be earned from the first \$10,000 of the resource allowance is \$12, as the current money market rate is .12%. This income (\$12) is added to the appellant and community spouse's combined income (\$3,022.50) for a total income of \$3,034.50. There is a shortfall of \$4,018.50 per month (\$7,053 - \$3,034.50) and an annual shortfall of \$48,222 per year.

The appellant's representative explained that she then used the bank rate monitor index one-year CD account (as of June 21, 2017). In the past, 2.5 year CD accounts have been used, but the bank rate monitor stopped publishing and the 2.5 year CD rates are not available. However, under 130 CMR 520.017(C)(3), using a one-year CD rate is permissible. The current rate for one-year CD accounts is .35%. In order to generate the income needed to make up the shortfall, the community spouse would need \$13,777,714.29 in assets, which he does not have.

The hearing record was reopened to allow the appellant to submit further information. On October 5, 2017, the appellant submitted a copy of the community spouse's residency agreement, an amendment to the residency agreement, and a document showing an assessment of his functional needs/service plan. The residency agreement shows that the appellant paid \$4,800 per month for his assisted living residence from July 1, 2016 through December 31, 2016.⁶ The amendment to the residency agreement shows that the appellant has been paying \$5,378 (\$5,078 for rent and \$300 additional medication fee) per month since January 1, 2017. He also paid \$278 in January 2017 to bring his security deposit up-to-date. Per the residency agreement, the monthly fee to reside in the facility includes services such as rent, meals, and utilities.

Findings of Fact

⁵ The appellant's representative testified that although the community spouse's current rent is slightly more than the \$5,275 that he paid at the last facility, the outcome of the MMMNA calculation would not change.

⁶ The community spouse's original lease, from May 25, 2016 through December 31, 2016, shows that his rent was \$5,500. A total cost of \$6,765.75 (the full amount of rent for June 2016 and a prorated amount for May 2016) was credited to the community spouse on or about May 25, 2016. The community spouse moved into another apartment which has a monthly rent of \$4,800 on July 1, 2016, as noted above. This move occurred prior to the appellant's admission to the nursing facility on August 17, 2016.

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

1. The appellant, who, at the time of application, was over 65-years-old, was admitted to a nursing facility on August 17, 2016. (Exhibit 7; Testimony.)
2. There is a community spouse who is over 65-years-old and lives in an assisted living residence. (Exhibit 7; Exhibit 9; Testimony.)
3. The appellant submitted a long-term care application to MassHealth on September 27, 2016 and requested a benefit start date of August 17, 2016. (Exhibit 7; Testimony.)
4. On October 13, 2016, MassHealth sent an Information Request to the appellant. (Exhibit 7; Testimony.)
5. On November 21, 2016, the appellant's application for benefits was denied for excess countable assets. (Exhibit 1; Exhibit 7; Testimony.)
6. On November 21, 2016, MassHealth sent an Agreement to Sell Property form for property located in Reading, MA at the previous attorney's request. (Exhibit 7; Testimony.)
7. The appellant filed a timely appeal with the Board of Hearings on December 13, 2016. (Exhibit 2.)
8. The appellant passed away on January 30, 2017 and the community spouse was appointed personal representative of the appellant's estate on April 13, 2017. (Exhibit 5.)
9. The appellant's gross monthly income is \$1,041 and the community spouse's gross monthly income is \$1,696.90. (Exhibit 7.)
10. The appellant and community spouse's assets consist of the following: a Reading, MA property with an assessed value of \$340,500; a joint bank account with a balance of \$64,458.67; an IRA worth \$7,426.89, belonging to the community spouse; and two life insurance policies with cash values of \$2,652.87 and \$868.20, belonging to the community spouse. The appellant and her spouse's total countable assets are \$415,906.63. (Exhibit 7; Testimony.)
11. The asset limit for a couple is \$121,220 (\$119,220 for the community spouse) in 2016 and \$122,900 (\$120,900 for the community spouse) in 2017.
12. The community spouse resides in an assisted living facility. From July 1, 2016 through December 31, 2016, the community spouse paid \$4,800 per month in rent. He has paid \$5,378 (\$5,078 for rent and \$300 additional medication fee) per month since January 1, 2017. (Exhibit 9.)

13. A letter from the community spouse's physician reads, in pertinent part, as follows:

[The community spouse] suffers from Coronary Artery Disease with Ischemic Cardiomyopathy, Hypertension, Chronic Kidney Disease, Osteoarthritis, Diffuse Idiopathic Skeletal Hyperostosis [sic] and Spinal Stenosis.

In June of 2016 he developed septic shock from Osteonecrosis of his right hip complicated by infection with Psoas abscess. He required a prolonged ICU stay for this critical illness. He required surgical drainage of the Psoas abscess as well as Right Total Hip Replacement with an antibiotic cemented prosthesis. He required a prolonged course of intravenous antibiotics. He may still require additional surgery.

His course was also complicated by a Deep Venous Thrombosis [sic] which necessitated treatment with blood thinners [sic] and Depression.

He lives at an assisted living facility.

He cannot walk on uneven ground but can ambulate on flat ground with a cane. His balance is impaired.

In my opinion, it's medically necessary for him to live in a supervised setting where he can receive daily assistance with his medication, meal preparation and meals, help with daily chores [sic] and have access to an elevator.

(Exhibit 6.)

Analysis and Conclusions of Law

MassHealth calculates the MMMNA to determine the amount a community spouse requires to live in the community. (130 CMR 520.026(B).) "If the community spouse's gross income is less than the [MMMNA]...MassHealth...may deduct an amount from the institutionalized spouse's countable-income amount to meet this need." Id. This amount is referred to as the spousal-maintenance-needs deduction. Id.

(1) The MassHealth agency determines the MMMNA by adding the following amounts:

(a) \$1,822 (the federal standard maintenance allowance);
and

(b) an excess shelter allowance determined by calculating the difference between the standard shelter expense of \$547 and the shelter expenses for the community spouse's principal residence, including

(i) the actual expenses for rent, mortgage (including interest and principal), property taxes and insurance, and any required maintenance charge for a condominium or cooperative; and

(ii) the applicable standard deduction under the Supplemental Nutrition Assistance Program for utility expenses. If heat is included in the rent or condominium fee, this amount is \$375. If heat is not included in the rent or condominium fee, this amount is \$611.

(2) The maximum-monthly-maintenance-needs allowance is \$2,739.00 per month, unless it has been increased as the result of a fair-hearing decision based on exceptional circumstances in accordance with 130 CMR 520.017(D).⁷

Id.

Pursuant to 130 CMR 520.017(D), after an applicant has received notice from MassHealth of his or her denial or approval for MassHealth Standard benefits, either the applicant or the community spouse may submit an appeal to the Board of Hearings, requesting an increase of the community spouse's MMMNA based upon exceptional circumstances, defined as follows:

(1) **Exceptional Circumstances.** Exceptional circumstances exist when there are circumstances other than those already taken into account in establishing the maintenance standards for the community spouse under 130 CMR 520.026(B) and these circumstances result in significant financial duress. **Since the federal standards used in calculating the MMMNA cover such necessities as food, shelter, clothing, and utilities, exceptional circumstances are limited to those necessities that arise from the medical condition, frailty, or similar special needs of the community spouse. Such necessities include, but are not limited to, special remedial and support services and extraordinary uncovered medical expenses.** Such expenses generally do not include car payments, even if the car is used for transportation to medical appointments, or home-maintenance expenses such as security systems and lawn care.

⁷ The numerical amounts listed in the regulations change according to cost-of-living adjustments.

(a) In determining an increased MMMNA, the fair-hearing officer ensures that no expense (for example, for food or utilities) is counted more than once in the calculation.

(b) If the community spouse lives in an assisted-living facility or similar facility and requests an increase in his or her minimum-monthly-maintenance-needs allowance, the fair-hearing officer reviews the housing agreement, service plan, fee schedule, and other pertinent documents to determine whether exceptional circumstances exist. Additional amounts are allowed only for specific expenses necessitated by exceptional circumstances of the community spouse and not for maintaining any pre-set standard of living.

(Emphasis added.)

Here, the community spouse seeks an increase in his MMMNA based on exceptional circumstances. The community spouse presented evidence of his medical conditions in the form of a letter from his physician, who found his residence in an assisted living facility medically necessary, as well as the pertinent documents relating to his assisted living facility. He has established that his medical needs constitute exceptional circumstances.

If exceptional circumstances exist, the hearing officer may increase the MMMNA to cover the expenses caused by the community spouse's exceptional circumstances:

(a) The fair-hearing officer first verifies that the calculation of the gross income of the community spouse in determining the existing spousal-maintenance-needs deduction includes the income generated by the community spouse's asset allowance. If the community spouse has no assets remaining from the allowance, he or she must verify the dollar amount of the remaining assets, if any, and how the money was spent. The fair-hearing officer considers how the assets were spent in determining whether or not significant financial duress exists.

(b) The fair-hearing officer determines the revised MMMNA by including in the calculation the amount needed to meet the exceptional circumstances.

(c) The fair-hearing officer compares the revised MMMNA to the community spouse's total income. If the community spouse's total income is less than the amount of the revised MMMNA, the fair-hearing officer first deducts the personal-needs allowance from the institutionalized spouse's countable-income amount and then a spousal-maintenance-needs deduction needed to reach the revised MMMNA.

(130 CMR 520.017(D)(2).)

The income generated by the community spouse's asset allowance is determined as follows:

(C) Adjustment of the Amount of Asset Allowance. If either spouse claims at a fair hearing that the amount of income generated by the community spouse's asset allowance as determined by the MassHealth agency is inadequate to raise the community spouse's income to the minimum-monthly-maintenance-needs allowance, the fair-hearing officer determines the gross income available to the community spouse as follows.

(1) The fair-hearing officer determines the gross amount of income available to the community spouse. The fair-hearing officer includes the amount of the income that would be generated by the spouse's asset allowance if \$10,000 of the asset allowance were generating income at an interest rate equal to the deposit yield quoted in the Bank Rate Monitor Index as of the hearing date for money market accounts, and if the remainder of the spouse's asset allowance were generating income at an interest rate equal to the highest deposit yield quoted in the Bank Rate Monitor Index as of the hearing date for any term not to exceed two and one-half years.

(2) If the community spouse's gross income under 130 CMR 520.017(C)(1) is less than the minimum-monthly-maintenance-needs allowance (MMMNA), then the fair-hearing officer allows an amount of income from the institutionalized spouse (after the personal-needs deduction described in 130 CMR 520.026(A)) that would increase the community spouse's total income to equal, but not to exceed, the MMMNA. 130 CMR 520.017(C)(2) applies to all hearings held on or after September 1, 2003, regardless of the date of application.

(3) If after the fair-hearing officer has increased the community spouse's gross income under 130 CMR 520.017(C)(1) and (2), the community spouse's gross income is still less than the MMMNA, then the fair-hearing officer increases the community spouse's asset allowance by the amount of additional assets that, if generating income at an interest rate equal to the highest deposit yield in the Bank Rate Monitor Index as of the hearing date for any term not to exceed two and one-half years, would generate sufficient income to raise the income total to the MMMNA.

(130 CMR 520.017(C).)

The community spouse has demonstrated that the monthly cost of the services that he requires to meet his exceptional needs is \$4,800 per month (from July 1, 2016 through December 31, 2016) and \$5,378 per month (beginning January 1, 2017). Per the residency agreement, the monthly fee to reside in the facility includes services such as rent, meals, and utilities. The fee may not be combined with the federal standards that duplicate these costs. Given the community spouse's exceptional care needs, his MMMNA may be increased under the MassHealth regulations.

The calculation of the community spouse's MMMNA, using the updated income information, is as follows:

Sept.-Dec. 2016 (*Appellant admitted to the nursing facility on August 17, 2016*)

Rent	\$4,800
	+
Food Stamp Allowance	\$376 ⁸
	<hr/>
	\$5,176 (Total Shelter Expenses)
	-
Shelter Expense Standard	\$601
	<hr/>
	\$4,575
	+
Standard Maintenance Allowance	\$2,003
	<hr/>
MMMNA	\$6,578 ⁹

⁸ The food stamp allowance for September 2016 was \$381. While this amount slightly changes the MMMNA for that month to \$6,583, it does not alter the ultimate outcome of this decision.

⁹ This amount exceeds the 2016 MMMNA standard of \$2,980.

Jan. 2017 (*Appellant died on January 30, 2017*)

Rent	\$5,378 ¹⁰
	+
Food Stamp Allowance	\$376
	<hr/>
	\$5,754 (Total Shelter Expenses)
	-
Shelter Expense Standard	\$601
	<hr/>
	\$5,153
	+
Standard Maintenance Allowance	\$2,003
	<hr/>
MMMNA	\$7,156 ¹¹

Below is the calculation of the income from the community spouse's asset allowance:

Sept.-Dec. 2016

Asset Allowance:	\$119,200
Income Earned:	\$12 (interest on first \$10,000 at .12%)
Income Earned:	\$31.85 monthly (\$109,220 at .35%, per testimony)
Gross Income:	\$1,696.90 monthly (community spouse)
Total Income:	\$1,740.75 monthly (gross amount available to community spouse) ¹²

Jan. 2017

Asset Allowance:	\$120,900
Income Earned:	\$12 (interest on first \$10,000 at .12%)
Income Earned:	\$32.34 monthly (\$110,900 at .35%, per testimony)
Gross Income:	\$1,696.90 monthly (community spouse)
Total Income:	\$1,741.24 monthly (gross amount available to community spouse)

Because these amounts are less than the MMMNA calculations for their respective years, 130 CMR 520.017(C)(2) must be considered. Deducting the personal-needs amount (\$72.80) from

¹⁰ This amount does not take into account the community spouse's security deposit.

¹¹ This amount exceeds the 2017 MMMNA standard of \$3,022.50.

¹² I am puzzled by the calculation submitted by the appellant. The appellant does not seem to consider all of the interest income to be added to the gross income pursuant to 130 CMR 520.017(C)(1). It also appears that the appellant used the MMMNA standard (\$3,022.50) in her calculation instead of the community spouse's actual income, as required by the regulations.

the appellant's income (\$1,041) yields \$968.20, which can be applied to the community spouse's shortfall:

$\$1,740.75$ (community spouse's gross income) + $\$968.20$ (appellant's income) = $\$2,708.95$ total income (Sept.-Dec. 2016)

$\$1,741.24$ (community spouse's income) + $\$968.20$ (appellant's income) = $\$2,709.44$ total income (Jan. 2017)

As the MMMNA for Sept.-Dec. 2016 is \$6,578 and for Jan. 2017 is \$7,156, 130 CMR 520.017(C)(3) must be applied. The asset allowance must be increased to cover the shortfall between the community spouse's income and the MMMNA.

Sept.-Dec. 2016

MMMNA (\$6,578) – Income (\$2,708.95) = \$3,869.05 (monthly shortfall)

Assets: \$415,906.63

Excess Assets: $\$415,906.63 - \$121,220 = \$294,686.63$

$\$294,686.63 \times .35\% = \$1,031.40$

$\$1,031.40 / 12 = \85.95 interest income per month

Jan. 2017

MMMNA (\$7,156) – Income (\$2,709.44) = \$4,446.56 (monthly shortfall)

Assets: \$415,906.63

Excess Assets: $\$415,906.63 - \$122,900 = \$293,006.63$

$\$293,006.63 \times .35\% = \$1,025.52$

$\$1,025.52 / 12 = \85.46 interest income per month

Adding the interest income to the community spouse's total income (for a total of \$2,794.90 for Sept.-Dec. 2016 and \$2,794.90 for Jan. 2017) results in amounts that are insufficient to meet the community spouse's MMMNAs. Therefore, the community spouse is entitled to keep all of the assets under either of the above calculations. The appeal is approved insofar as the appellant no longer has excess assets preventing eligibility for MassHealth benefits. MassHealth shall rescind the notice dated November 21, 2016, re-open the application dated September 27, 2016, and determine the appellant's eligibility as of the requested benefit start date of August 17, 2016 based on the determination that the excess asset amount is now \$0. The community spouse is entitled to retain all assets over \$2,000. If the appellant is determined to be otherwise eligible for MassHealth long-term care benefits, the community spouse is entitled to a spousal maintenance needs allowance of \$968.20 per month and the appellant's PPA is \$0.

Order for MassHealth

Rescind the notice dated November 21, 2016, re-open the application dated September 27, 2016, and determine the appellant's eligibility as of the requested benefit start date of August 17, 2016 based on the determination that the excess asset amount is now \$0. The community spouse is entitled to retain all assets over \$2,000. If the appellant is determined to be otherwise eligible for MassHealth long-term care benefits, the community spouse is entitled to a spousal maintenance needs allowance of \$968.20 per month and the appellant's PPA is \$0.

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.

Samantha Kurkijy
Hearing Officer
Board of Hearings