

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:

Appeal Decision:	Denied	Appeal Number:	1802749
Decision Date:	6/6/18	Hearing Date:	May 29, 2018
Hearing Officer:	Stanley M. Kallianidis		

Appellant Representative:

MassHealth Representative:

Jennifer Carroll for Kyle Bernier, Taunton



*Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, 6th Floor
Quincy, MA 02171*

APPEAL DECISION

Appeal Decision:	Denied	Issue:	Transfer of Assets
Decision Date:	6/6/18	Hearing Date:	May 29, 2018
MassHealth Rep.:	Jennifer Carroll for Kyle Bernier		

Authority

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

Jurisdiction

Through notice dated November 16, 2017, MassHealth denied the appellant's application for MassHealth benefits from September 30, 2017 through December 4, 2017 due to disqualifying transfers (Exhibit 1). On May 25, 2018, MassHealth revised the penalty period downward to August 1, 2017-August 23, 2017 and approved the case beginning August 24, 2017 (Exhibit 2). The appellant filed this appeal in a timely manner on November 21, 2017 (see 130 CMR 610.015) and Exhibit 3). A dispute over the amount of assistance is valid grounds for appeal (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied the appellant's application for MassHealth benefits for the period August 1, 2017-August 23, 2017 due to a disqualifying transfer.

Issue

Was MassHealth correct, pursuant to 130 CMR 520.019 in determining that the appellant made a disqualifying transfer of \$8,000.00?

Summary of Evidence

The MassHealth representative testified that the appellant applied for MassHealth on September 21, 2017. He was admitted to his facility on May 17, 2017 (Exhibit 4). The application was denied August 1, 2017-August 23, 2017 due to a disqualifying transfer of assets of \$8,000.00 that the appellant paid to the daughter in consideration of a "Personal Service Contract" (the Contract). The Contract was entered into on March 1, 2017 and was between the appellant as "Elder" and his daughter as "Provider." The payment for the Contract was considered disqualifying because MassHealth does not allow personal services contracts between family members (Exhibit 5).

According to the Contract: the "Provider" agrees to provide the "Elder" with the following services on an "as needed basis:" Monitor health status, secure health care, personal needs, visitation, financial management, dealing with others, and resident's rights. The value of the contract was determined to be based upon an hourly rate of \$15.00 per hour, six hours per week for three years, based upon the appellant's lifetime expectancy. The "lifetime" value was \$14,404.00, and the "likely" value was \$8,000.00 (Exhibit 5).

The ineligibility period was 23 days. This was determined by taking the amount of the transfer, \$8,000.00 and dividing by the average daily nursing home rate, \$354.00, beginning August 1, 2017, the appellant's otherwise eligible and request date ¹(Exhibit 4).

The appellant's representative testified that the appellant's daughter provided services to the appellant both before after she entered her nursing home. The appellant's daughter testified that she still takes care of the appellant's needs even though he is in a nursing facility. In addition to visiting him and providing personal care, she takes care of his rental property (Exhibit 5).

¹ While the MassHealth representative testified that the request date was August 6, 2017, the MassHealth caseworker who processed the case determined the otherwise eligible date to be August 1, 2017.

Findings of Fact

Based on a preponderance of the evidence, I find:

1. The appellant applied for MassHealth on September 21, 2017. He was admitted to his facility on May 17, 2017 (Exhibit 4).
2. The application was denied August 1, 2017-August 23, 2017 due to a disqualifying transfer of assets of \$8,000.00 that the appellant paid to the daughter in consideration of a "Personal Service Contract" (Exhibit 5).
3. The Contract was entered into on March 1, 2017 and was between the appellant as "Elder" and his daughter as "Provider" (Exhibit 5).
4. According to the Contract: the "Provider" agrees to provide the "Elder" with the following services on an "as needed basis:" Monitor health status, secure health care, personal needs, visitation, financial management, dealing with others, and resident's rights (Exhibit 5).
5. The value of the contract was determined to be based upon an hourly rate of \$15.00 per hour, six hours per week for three years, based upon the appellant's lifetime expectancy. The "lifetime" value was \$14,404.00, and the "likely" value was \$8,000.00 (Exhibit 5).
6. The ineligibility period was 23 days. This was determined by taking the amount of the transfer, \$8,000.00 and dividing by the average daily nursing home rate, \$354.00, beginning August 1, 2017, the appellant's otherwise eligible and request date (Exhibits 1 & 4).

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). MassHealth 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, MassHealth will consider the specific circumstances involved. A disqualifying transfer may include any action taken which would result in making a formerly available asset no longer available (130 CMR 520.019(C)).

130 CMR 520.019(F) provides with regard to intent of transferring assets:

Determination of Intent: 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 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 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.

130 CMR 520.008(J)(2)(4) Transactions Involving Future Performance. Any transaction that involves a promise to provide future payments or services to an applicant, member, or spouse, including but not limited to transactions purporting to be annuities, promissory notes, contracts, loans, or mortgages, is considered to be a disqualifying transfer of assets to the extent that the transaction does not have an ascertainable fair-market value or if the transaction is not embodied in a valid contract that is legally and reasonably enforceable by the applicant, member, or spouse. This provision applies to all future performance whether or not some payments have been made or services performed.

In the instant appeal, I have found that the appellant applied for MassHealth on September 21, 2017. He was admitted to his facility on May 17, 2017. The application was denied August 1, 2017-August 23, 2017 due to a disqualifying transfer of assets of \$8,000.00 that the appellant paid to the daughter in consideration of a "Personal Service Contract." The ineligibility period was 23 days. This was determined by taking the amount of the transfer, \$8,000.00 and dividing by the average daily nursing home rate, \$354.00, beginning August 1, 2017, the appellant's otherwise eligible and request date.

The Contract was entered into on March 1, 2017 and was between the appellant as "Elder" and his daughter as "Provider." According to its terms, the "Provider" agrees to provide the "Elder" with the following services on an "as needed basis:" Monitor health status, secure health care, personal needs, visitation, financial management, dealing with others, and resident's rights. The value of the contract was determined to be based upon an hourly rate of \$15.00 per hour, six hours per week, or \$90.00 weekly, for three years, based upon the appellant's lifetime expectancy. The "lifetime" value was \$14,404.00, and the "likely" value was \$8,000.00.

While I disagree with MassHealth that all personal caregiver contracts are per se disqualifying transfers for less than fair market value, I concur that the appellant has not been receiving any ascertainable fair market value for his purchase beginning with his nursing home admission date to the present as the appellant was already paying for and receiving hands-on care in his facility during this period. Personal care services under the Contract during this time were either unnecessary, duplicative, or both, especially where they were to be provided only on an "as needed basis." While the daughter testified that she has also been managing the appellant's rental property, there is no specificity in the Contract with regard to such duties, and there was no evidence as to what actual property management services the daughter provides. Accordingly, the Contract clearly has no fair market value beginning with the appellant's nursing home admission date going forward and its purchase is a disqualifying transfer under 130 CMR 520.019.

For the first 11 weeks of the Contract the appellant was still in the community and did not have any known outside services available to him. Nonetheless, during this time, the fair market value of the Contract remains uncertain, because as already indicated, services were to be provided only on "an as needed basis." Thus, no fair market value can be assigned for these weeks either given the unknown quantity of personal care services that were deemed necessary and that were actually provided to the appellant. 130 CMR 520.008(J)(2)(4) states that such a transaction involving future performance is considered to be a disqualifying transfer of assets to the extent that the transaction does not have an ascertainable fair-market value.

The appeal is therefore denied given that the Contract had either no fair market value or an unascertainable fair market value for its entire duration.

Order for the 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.

Stanley M. Kallianidis
Hearing Officer
Board of Hearings

cc: