

**Office of Medicaid
BOARD OF HEARINGS**

Appeal Decision:	Approved	Appeal Number:	1810169
Decision Date:	8/8/18	Hearing Date:	6/4/2018
Hearing Officer:	Cynthia Kopka	Record Open to:	7/28/2018

Appearance for Appellant:

Appearance for MassHealth:
Lucy Gucciardi, via telephone



*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:	Spousal allowance
Decision Date:	8/8/18	Hearing Date:	06/04/2018
MassHealth's Rep.:	Lucy Gucciardi	Appellant's Rep.:	
Hearing Location:	Tewksbury	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 March 5, 2018, MassHealth denied Appellant's application for MassHealth long term care benefits because Appellant's countable assets were over the allowable amount (Exhibit 1). Appellant filed this appeal in a timely manner on March 21, 2018 (Exhibit 2). 130 CMR 610.015(B). Challenging the denial of assistance is a valid basis for appeal. 130 CMR 610.032.

Action Taken by MassHealth

MassHealth denied Appellant's application for MassHealth long term care benefits because Appellant's countable assets were over MassHealth's limit.

Issue

The appeal issue is whether Appellant's spouse is entitled to an adjustment of the asset allowance.

Summary of Evidence

The MassHealth representative appeared in person and testified as follows. Appellant entered the nursing facility on July 22, 2017 and seeks September 1, 2017 as the coverage start date. Appellant's spouse lived in the community ("the community spouse"). On March 5, 2018, MassHealth denied Appellant's application because Appellant's assets exceeded MassHealth's limit. MassHealth determined that Appellant's assets, including bank accounts and securities,

totaled \$499,266.09, which was \$376,366.09 over the asset limit for an applicant with a spouse in the community in 2017.¹ Appellant's monthly income is \$1,266.00 and the community spouse's monthly income was \$2,542.00 (Exhibit 9).

As the issue in dispute is whether the community spouse is entitled to an adjustment of the asset allowance, MassHealth calculated that the community spouse's minimum monthly maintenance needs allowance (MMMNA) would be \$3,022.50, the regulatory maximum, and that he would be entitled to a spousal maintenance needs allowance (SMNA) of \$480.50 per month. Appellant would owe a patient paid amount (PPA) of \$712.70 per month (Exhibit 9).

Appellant's attorney appeared by telephone and requested an increased MMMNA based on exceptional circumstances as per 130 CMR 520.017(D). Additionally, even after the MMMNA is increased, Appellant's spouse would experience a monthly shortfall and therefore requested an increased asset allowance per 130 CMR 520.017(C).

A doctor's note dated November 13, 2017 stated that it was not safe for the community spouse to live alone, due to his multiple hospitalizations, risk of falling, recurrent illness, medication errors, and frailty. This note also documented the spouse's various ailments requiring assistance with activities of daily living (ADLs) and a speech therapist to address concerns swallowing. After suffering a fall on March 30, 2018, the spouse was admitted to a rehabilitation unit with a pubic fracture (Exhibit 5). The doctors' notes demonstrate the spouse's deteriorating health. The community spouse passed away on May 18, 2018 (Exhibit 7).

Appellant's attorney argued that the MMMNA should be increased because the spouse' exceptional medical needs required him to live in an assisted living facility (Exhibit 5). The community spouse entered into a residency agreement with an assisted living facility on May 12, 2016 (Exhibit 8). The community spouse agreed to pay \$169 per day for a basic residency fee of a private studio suite. The spouse's fee did not include fees for a service plan or service package. The residency agreement stated that the facility would provide utilities such as heat, water, and electricity as well as property maintenance. Per Attachment A, the basic services included meals, housekeeping, laundry, social activities, and wellness consultations. Personal services such as assistance with ADLs or medication management were not included in the basic rate (Exhibit 8). Effective January 1, 2018, the daily rate increased to \$189 (Exhibits 8, 10). As part of the daily rate paid, Appellant's spouse received three daily check-ins to assist with safety concerns due to mobility issues, and hands-on, twice daily catheter care and as needed bag changes (Exhibit 10).

Appellant's attorney argued that because the spouse experienced a monthly shortfall of \$2,183.50, the community spouse required a higher asset allowance to generate additional income to meet the shortfall. Appellant's attorney provided national averages on deposit and loan accounts as of May 23, 2018, the most recent update available on Bankrate.com prior to hearing. Based on the interest rate of a 2.5 year CD (0.77%), the amount of assets that would generate the income needed to meet the shortfall would be approximately \$3.4 million dollars (Exhibit 7). Appellant's attorney argued that because there will still be a monthly shortfall with the interest generated from the assets, the

¹ Effective January 1, 2018, the maximum resource standard is \$123,600.00.

community spouse was entitled to keep the entire excess asset amount of \$378,326.09.

Findings of Fact

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

1. Appellant entered the nursing facility on July 22, 2017 and seeks September 1, 2017 as the coverage start date. Appellant's spouse lived in the community in assisted living until the date of his death, May 18, 2018.
2. On March 5, 2018, MassHealth denied Appellant's application because Appellant's assets exceeded MassHealth's limit (Exhibit 1).
3. MassHealth determined that Appellant and her spouse's assets totaled \$499,266.09, which was \$376,366.09 over the asset limit for an applicant with a spouse in the community.
4. Appellant filed a timely appeal on March 21, 2018 (Exhibit 2).
5. The community spouse requested an increased MMMNA due to exceptional circumstances, as he resided in an assisted living facility with an average monthly fee of \$5,140.42 (\$169 daily rate) in 2016 and \$5,748.75 (\$189 daily rate) in 2018.
6. The community spouse was 89 years old with multiple diagnoses, including history of strokes. The community spouse had multiple hospitalizations and required assistance with ADLs and a speech therapist to address concerns related to swallowing. On March 30, 2018, the spouse was admitted to a rehabilitation unit with a pubic fracture after a fall (Exhibit 5).
7. A doctor's note dated November 13, 2017 stated that it was not safe for the community spouse to live alone, due to his multiple hospitalizations, risk of falling, recurrent illness, medication errors, and frailty. This note also documented the spouse's various ailments requiring assistance with ADLs and a speech therapist to address concerns swallowing. A note from the assisted living facility showed that as part of the daily rate paid, the community spouse received three daily check-ins to assist with safety concerns due to mobility issues, and hands-on, twice daily catheter care and as needed bag changes (Exhibits 8 and 10).
8. The community spouse passed away on May 18, 2018 (Exhibit 7).
9. MassHealth determined that the community spouse's MMMNA would be \$3,022.50 (Exhibit 9).
10. Appellant's monthly income is \$1,266.00 and the community spouse's monthly income was \$2,542.00 (Exhibit 9).

11. As of May 23, 2018, the yield quoted in the Bankrate Monitor national index for Money Market Accounts, on average, is 0.18% (Exhibit 5).
12. Using this rate, the first \$10,000.00 of the community spouse's asset allowance generates a monthly income of \$1.50.
13. As of May 23, 2018, the highest deposit yield quoted in the Bankrate Monitor national index for any term not exceeding 2.5 years is 0.78% (Exhibit 5).
14. Using this rate, the community spouse's monthly income from the remainder of his share of the retained spousal assets (\$120,900.00) is \$78.59.
15. Using this rate, the community spouse's excess assets (\$376,366.09) produce additional monthly income of \$244.64.

Analysis and Conclusions of Law

Per 130 CMR 519.006(A)(4), to qualify for MassHealth Standard coverage as a resident of a long term care facility, an individual must have countable assets of \$2,000 or less. If the individual has a spouse living in the community, the combined total assets of the spouses may not exceed \$122,900, per 130 CMR 520.016(B)(2)(a)(i) and 2017 SSI and Spousal Impoverishment Standards.² If MassHealth denies an institutionalized spouse's application for MassHealth Standard, either spouse may appeal to request an adjustment to the asset allowance. 130 CMR 520.017.

MassHealth calculates the minimum monthly maintenance needs allowance (MMMNA) to determine the amount a community spouse needs 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, known as a spousal maintenance needs deduction (SMND). *Id.*

Pursuant to 130 CMR 520.017(D), after an applicant has received notice of either approval or denial for MassHealth Standard, either the applicant or his or her spouse may appeal to the Board of Hearings to request an increase of the spouse's MMMNA based on 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

² In 2018, the community spouse maximum resource standard was \$123,600. This does materially affect the outcome of this decision.

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.

(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.

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

(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).

In this case, the community spouse sought an increase of the MMMNA based on exceptional circumstances. Appellant's representative submitted medical documentation confirming the spouse's diagnoses and medical history, which demonstrate exceptional circumstances. Per the documentation submitted, the monthly fee to reside in the facility includes numerous services that may not be combined with the federal standards that duplicate these costs. However, given the community spouse's exceptional care needs, his MMMNA may be increased to cover the necessities that arise from his medical condition, such as the assistance with ADLs and other

support services. Per 130 CMR 520.017(D)(2)(b), the revised MMMNA should be adjusted to \$5,140.42 and \$5,748.75, the average monthly rates in 2016 and 2018, respectively.

An applicant's spouse may experience a monthly shortfall if the spouse's income combined with the SMND does not reach the MMMNA. MassHealth considers as part of the community spouse's income interest generated by the retained assets. If the amount of income generated by the community spouse's asset allowance is inadequate to raise the community spouse's income to the MMMNA, the regulations allow a hearing officer to take the following steps in determining how to adjust the asset allowance:

- (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).

Here, the community spouse's adjusted MMMNA was (at its lowest) \$5,140.42. The community spouse's total monthly income was \$2,542.00, which left a shortfall of \$2,598.42 per month. Appellant's countable income, after subtracting \$72.80 for her PNA, was \$1,193.20 per month. As the shortfall exceeded this amount, the community spouse was entitled to retain all of Appellant's monthly income after deducting the PNA.

In addition, because a shortfall of \$1,405.22 remains even after the income shift, Appellant argued that the community spouse must retain the excess assets to generate additional income. The allowed assets (\$120,900) generated monthly income of \$78.59 and the excess assets (\$376,366.09) generated additional monthly income of \$244.64. This is insufficient to meet the shortfall. As the income from all available spousal resources is still less than the MMMNA, the community spouse is entitled to keep all of the institutionalized spouse's income and all excess assets. For these reasons, this appeal is approved. Appellant's spouse was entitled to keep the excess assets, and Appellant was eligible for benefits.

However, as Appellant's spouse passed away on May 18, 2018, the asset picture would change depending on the distribution of the spouse's estate. MassHealth may redetermine Appellant's eligibility after May 18, 2018.

Order for MassHealth

Rescind the denial notice dated March 5, 2018 and allocate all income and excess assets to the community spouse. Establish an eligibility start date, and a Patient Paid Amount, in accordance with this decision. Redetermine eligibility beginning May 18, 2018.

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: Sylvia Tiar, Tewksbury MassHealth Enrollment Center, 367 East Street, Tewksbury, MA, 01876-1957, 978-863-9290