

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	DENIED	Appeal Number:	1604297
Decision Date:	9/9/16	Hearing Date:	05/26/2016
Hearing Officer:	Kenneth Brodzinski		

Appellant Representative:

MassHealth Representative:

Kim McAvinchey – Tewksbury MEC



*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:	DENIED	Issue:	Disqualifying Transfer
Decision Date:	9/9/16	Hearing Date:	05/26/2016
MassHealth Rep.:	Kim McAvinchey	Appellant Rep.:	
Hearing Location:	Tewksbury MEC		

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 March 25, 2016, MassHealth denied Appellant's application for MassHealth benefits upon determining that Appellant made a disqualifying transfer of assets and assessed a period of ineligibility (Exhibit A). Appellant filed this appeal in a timely manner on April 4, 2016 (Exhibit A). Denial of assistance constitutes valid grounds for appeal (see 130 CMR 610.032).

Action Taken by MassHealth

MassHealth denied Appellant's application for MassHealth benefits upon determining that Appellant made a disqualifying transfer of assets and assessed a period of ineligibility.

Issue

The appeal issue is whether or MassHealth properly applied the controlling regulation(s) to accurate facts when it denied Appellant's application for MassHealth benefits upon determining that Appellant made a disqualifying transfer of and assessed a period of ineligibility

Summary of Evidence

The MassHealth representative testified that Appellant is a 96-year-old woman with no community spouse who was admitted to a skilled nursing facility on December 2, 2014. Appellant filed an application for MassHealth Long-Term Care benefits on July 24, 2015 requesting coverage as of October 12, 2015. On July 31, 2015 MassHealth sent a written request for financial verifications. On September 23, 2015 MassHealth denied the application when the requested verifications were not timely filed. Upon receiving some of the missing verifications, MassHealth reactivated the case with a re-stamp date of September 30, 2015. On January 25, 2016 MassHealth denied the application due to Appellant having assets that exceed the eligibility limit. On March 22, 2016 Appellant verified that her assets were reduced and MassHealth was able to make an eligibility determination. On March 25, 2016 MassHealth denied the application upon determining that Appellant made a disqualifying transfer of otherwise countable assets. The MassHealth representative testified that due to the disqualifying transfer, a period of ineligibility was assessed running on and between October 12, 2015 to October 9, 2016.

The MassHealth representative explained that the disqualifying transfer arose from an annuity that Appellant purchased on June 9, 2014 for \$210,015.87. The annuity had a pay-out period of four (4) years at \$2,473.62 per month. MassHealth determined that according to the Social Security Life Expectancy Tables, at the time the annuity was purchased, Appellant had a life expectancy of 3.29 years. Because the annuity's payout period of four years exceeded Appellant's life expectancy, MassHealth deemed the annuity to be unsound for MassHealth eligibility purposes.

The MassHealth representative explained how the amount of the disqualifying transfer was calculated. MassHealth calculated that based on monthly annuity payments of \$2,473.62 per month over the course of 3.29 years, Appellant would receive \$97,658.52. MassHealth deducted this amount from the purchase price of the annuity of \$210,015.57 yielding the transfer amount of \$112,357.35.

Appellant was represented by legal counsel who appeared along with Appellant's adult daughter. Appellant's representatives testified consistent with two typewritten letters dated April 4, 2016 and May 24, 2016 (Exhibits C and D, respectively). Appellant's representatives testified that at the time the annuity was purchased there was no commercially available annuity with a payout term which did not exceed Appellant's life expectancy. Despite this knowledge, Appellant proceeded to purchase an annuity with a payout period closest in duration to her life expectancy. Appellant's representatives argued that the intent was to make a fair-market-value purchase. Appellant's representatives cited regulation 130 CMR 520.019 (F) concerning "intent" relative to asset transfers.

Appellant's noted that the annuity that was purchased from a commercial insurance company, is an immediate annuity, is revocable and non-assignable, pays out in equal

monthly installments at the highest amount that could be secured and that while MassHealth was not made the primary residual beneficiary, Appellant's two children who are the current residual beneficiaries have offered to assign their interest to the extent that medical assistance benefits were provided to Appellant.

Appellant's representatives indicated a desire to discuss the hardship waiver provisions concerning disqualifying transfer, but after acknowledging that Appellant had yet to make an application for such a waiver, the hearing officer concluded that such testimony would not be relevant to this proceeding.

Findings of Fact

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

1. Appellant is a 96-year-old woman with no community spouse who was admitted to a skilled nursing facility on December 2, 2014.
2. Appellant filed an application for MassHealth Long-Term Care benefits on July 24, 2015 requesting coverage as of October 12, 2015.
3. On March 25, 2016 MassHealth denied the application upon determining that Appellant made a disqualifying transfer of otherwise countable assets.
4. Due to the disqualifying transfer, a period of ineligibility was assessed running on and between October 12, 2015 to October 9, 2016.
5. MassHealth determined that a disqualifying transfer arose from an annuity that Appellant purchased on June 9, 2014 for \$210,015.87.
6. The annuity had a pay-out period of four (4) years at \$2,473.62 per month.
7. MassHealth determined that according to the Social Security Life Expectancy Tables, at the time the annuity was purchased, Appellant had a life expectancy of 3.29 years.
8. Because the annuity's payout period of four years exceeded Appellant's life expectancy, MassHealth deemed the annuity to be unsound for MassHealth eligibility purposes.
9. MassHealth calculated that based on monthly annuity payments of \$2,473.62 per month over the course of 3.29 years, Appellant would receive \$97,658.52.
10. MassHealth deducted \$97,658.52 from the purchase price of the annuity of

\$210,015.57 yielding the transfer amount of \$112,357.35.

11. At the time the annuity was purchased there was no commercially available annuity with a payout term which did not exceed Appellant's life expectancy.
12. Despite this knowledge, Appellant proceeded to purchase an annuity with a payout period closest in duration to her life expectancy.
13. The annuity was purchased from a commercial insurance company, is an immediate annuity, is revocable and non-assignable and pays out in equal monthly installments.
14. MassHealth is not a named residual beneficiary of the annuity.

Analysis and Conclusions of Law

The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity (*Merisme v. Board of Appeals of Motor Vehicle Liability Policies and Bonds*, 27 Mass. App. Ct. 470, 474 (1989)).

Regulation 130 CMR 520.019 governing resource transfers states as follows:

(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 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.

There was no dispute that the community spouse used otherwise countable assets to purchase the subject annuities within the appropriate look back period.

MassHealth regulations governing the purchase of annuities are set forth at 130 CMR 520.007(J) which state (emphasis supplied):

(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 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
1. 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;

2. *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*
 3. *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)2. 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 non-assignable, or unless the annuity satisfies 130 CMR 520.007(J)(2)(c).*
- (c) *The purchase of an annuity is considered a disqualifying transfer of assets unless the annuity satisfies 130 CMR 520.007(J)(2)(b), or unless the annuity names the Commonwealth of Massachusetts as a beneficiary as required under 130 CMR 520.007(J)(2)(a) and the annuity is*
1. *described in Section 408(b) or (q) of the Internal Revenue Code of 1986;*
 2. *purchased with the proceeds from an account or trust described in Section 408(a), (c), or (p) of the Internal Revenue Code of 1986;*
 3. *purchased with the proceeds from a simplified employee pension described in Section 408(k) of the Internal Revenue Code of 1986; or*
 4. *purchased with the proceeds from a Roth IRA described in Section 408A of the Internal Revenue Code of 1986.*

Here it is clear that the purchase of the subject annuity, which occurred within the 5-year look back period prior to the month of application, constitutes a disqualifying transfer insofar as the annuity does not meet the requirements of 130 CMR 520.007(J)(2)(a) and (b). There was no dispute that the annuity period is greater than Appellant's life expectancy and that MassHealth was not named a residual beneficiary.

At hearing, Appellant's representatives relied on 130 CMR 520.019(F) and Appellant's intent to avoid imposition of a disqualifying period. Appellant cannot prevail with this argument, however, while failing to explain why she proceeded to purchase an annuity knowing that it did not comply with MassHealth regulations. Appellant's representatives acknowledged knowing that the payout term exceeded Appellant's life expectancy, yet she proceeded to purchase an annuity with a pay-out term closest to her life expectancy. Regulations do not guarantee any applicant the ability to convert otherwise countable assets into annuities. Regulations merely provide that certain annuities can be purchased without violating transfer rules, but this does not include any and all annuities. Appellant argues that because annuities with terms that would have satisfied MassHealth regulations were not available, then she should be excused to purchase annuities that do not comply with MassHealth regulations. This does not constitute evidence of intent of making a purchase for fair market value.

For the foregoing reasons, I find no basis in law or fact to disturb MassHealth's action. The appeal is DENIED.

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.

Kenneth Brodzinski
Hearing Officer
Board of Hearings

cc: