

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Approved in part, denied in part	Appeal Number:	1702226
Decision Date:	5/23	Hearing Date:	03/22/2017
Hearing Officer:	Cynthia Kopka	Record Open to:	04/12/2017

Appellant Representative:

MassHealth Representative:
Shennen Swett, 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 in part, denied in part	Issue:	Long term care eligibility
Decision Date:	5/23	Hearing Date:	03/22/2017
MassHealth Rep.:	Shennen Swett	Appellant Rep.:	
Hearing Location:	Tewksbury		

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 24, 2016, MassHealth determined that Appellant was not eligible for MassHealth because of impermissible transfers of assets, resulting in a disqualification period from September 1, 2016 through March 26, 2017 (Exhibit 1). Appellant filed this appeal in a timely manner on December 20, 2016 (Exhibit 2). 130 CMR 610.015(B). Challenging the denial or scope of assistance is a valid ground for appeal. 130 CMR 610.032.

Action Taken by MassHealth

MassHealth denied Appellant's request for long-term care benefits because MassHealth determined that Appellant made impermissible asset transfers, resulting in a disqualification period of eligibility from September 1, 2016 through March 26, 2017.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.019, in determining that Appellant made disqualifying transfers during the look-back period and in calculating the period of ineligibility.

Summary of Evidence

The MassHealth representative appeared via telephone and testified as follows. On October 20, 2016, MassHealth received Appellant's reapplication for long term care benefits. Appellant entered the nursing facility on June 23, 2016 and seeks September 1, 2016 as the coverage start date.

On November 23, 2016, MassHealth denied Appellant's application because Appellant made disqualifying transfers of assets within the sixty month look-back period. Specifically, Appellant transferred a total of \$73,500.00 as gifts to family members between November 2014 and June 2015. Appellant was diagnosed with Alzheimer's in March 2015 and subsequently required long term care. MassHealth submitted as part of the hearing record a spreadsheet provided by Appellant's attorney as verification, on which MassHealth noted which transactions were considered disqualifying transfers (Exhibit 4). Also part of MassHealth's submission are an affidavit from Appellant's daughter outlining gifts made by Appellant, an email describing past gifts, and copies of a checkbook showing prior gifts made between 2008-2013. MassHealth testified that it did not receive evidence that Appellant has a history of making gifts to family members equivalent to the gifts made in the look-back period. The transfers MassHealth deemed disqualifying were as follows:

11/24/2014	\$14,000.00	Payment to daughter R ¹
11/24/2014	\$2,000.00	Transfer to daughter K
11/24/2014	\$12,000.00	Transfer to daughter K
1/14/2015	\$14,000.00	Payment to daughter K
1/21/2015	\$3,000.00	Payments to grandchildren
1/21/2015	\$14,000.00	Payment to daughter R
5/19/2015	\$3,000.00	Payment for furnace
5/26/2015	\$5,500.00	Transfer for daughter's birthday
6/11/2015	\$6,000.00	Payment to daughter for birthday
Total	\$73,500.00	

MassHealth used the average daily rate of \$354 and calculated a period of ineligibility of 207 days, from September 1, 2016 through March 26, 2017, with a coverage start date of March 27, 2017.

Appellant's attorney, daughter K, and son-in-law appeared in person and testified as follows. Appellant's attorney disputed the amount of the June 11, 2015 payment, which she contended was \$5,500.00. The MassHealth representative agreed to adjust the total disqualifying transfer by \$500. Additionally, Appellant's attorney argued that the disqualifying amount should be reduced by \$1,500.00 because this amount was loaned to Appellant by her daughter. On July 25, 2016, Appellant's daughter deposited \$4,000.00 into her mother's account to help cover expenses such as ambulance bills. Appellant ended up using \$1,500.00 of this amount and her daughter withdrew the

¹ Appellant's family members are labeled with initials for privacy purposes.

remaining \$2,500.00 on August 15, 2016 (Exhibit 5 at Tab 8). MassHealth did not consider either the \$4,000.00 deposit or the \$2,500.00 withdrawal in determining Appellant's eligibility.

Appellant's attorney did not dispute that Appellant made gifts, but argued that the gifts are not impermissible transfers because the gifts were either made for valuable consideration, or exclusively for purposes other than to qualify for MassHealth pursuant to 130 CMR 520.019(F). Appellant lived independently until 2014, when she came to live with her daughter, a registered nurse. At the time Appellant moved in with her daughter, she had not yet been diagnosed with dementia or Alzheimer's. While living alone, Appellant was independent and drove herself around. Appellant's family observed that Appellant was not consuming as much of the food her family prepared for her and was losing weight. Appellant's daughter testified that she also observed that Appellant was not taking her medication correctly. At the time Appellant was independent, she was taking thyroid and blood pressure medication and had hurt her wrist in a fall.

In the year before she moved in with her family, Appellant stopped driving to her daughter's home and would only drive to close, familiar places due to her memory. Appellant moved in with her daughter in September 2014 so that Appellant's daughter could better supervise Appellant's food and medication intake. Appellant's attorney argued that Appellant's daughter as a registered nurse had every expectation of being able to care for Appellant until her death. Appellant was either 88 or 89 years old at the time she moved in with her family.

Appellant was diagnosed with dementia on March 15, 2015 but continued to live with her family for another year. Appellant became aggressive and incontinent of bladder and bowel. Her physician insisted that Appellant be admitted to a nursing facility despite the family's skill and ability to care for Appellant at home. However, Appellant's daughter and son-in-law also experienced their own medical problems and ultimately agreed to Appellant's nursing home admission.

Appellant's argued that Appellant received consideration for some of the transfers. For instance, Appellant paid to replace her daughter's furnace because the old furnace broke and did not heat Appellant's room. Appellant's attorney also argued that case law supports that receiving continued care at home is considered valuable consideration.

Further, Appellant's attorney argued that though some of the transfers were gifts, the transfers are not disqualifying because Appellant did not make the transfers for the purpose of qualifying for MassHealth. Prior to moving in with her daughter, Appellant could not afford to give as generously because she lived independently and paid her own expenses. Once Appellant moved in with the family, Appellant believed she could give away \$14,000.00 at a time under a misguided understanding of gift tax laws. Appellant's attorney argued that Appellant's motivation in giving the money was to benefit her family, and that as a lay person believed that it was legal to give and receive \$14,000.00. Further, the gifts were not for the purpose of qualifying for MassHealth because neither Appellant nor her daughter anticipated that Appellant would require MassHealth. Appellant's legal memorandum includes affidavits from Appellant's daughter attesting to Appellant's intent in making the gifts. Appellant's daughter offered to get a letter from the bank

confirming that Appellant was present for the transactions. Regarding the timing of the transfers, Appellant's attorney asserted that the transfers made before Appellant's diagnosis of dementia in March 2015 need to be reviewed differently than the transfers made after. Appellant's attorney testified that she can "almost acquiesce" that the gifts made after March 2015 were disqualifying.

Appellant's attorney argued that Appellant's family cannot make a complete cure of the disqualifying transfer and can only make a partial cure. Appellant's son-in-law liquidated a 401K account and deposited \$32,900 in escrow to be made available to offset the impermissible payments. Appellant's daughter R, who is indigent, executed a promissory note agreeing to pay Appellant \$150.00 per month over the next 18 years.

The MassHealth representative argued that even though Appellant was not diagnosed with dementia until March 2015, she may have had symptoms that indicated the need for greater care and consideration prior to the diagnosis. Additionally, MassHealth argued that the promissory note executed by Appellant's daughter R is not actuarially sound given Appellant's life expectancy. Appellant's attorney argued that Appellant's daughter, as a registered nurse, was in a better position than MassHealth to determine when Appellant was no longer able to care for herself and when MassHealth was foreseeable. Additionally, Appellant's attorney argued that the promissory note does not need to comply with MassHealth regulations because Appellant's daughter is not repaying a debt.

The hearing record was held open to until April 5, 2017 allow Appellant's representative to produce a copy of the bill for the furnace Appellant purchased, and through April 12, 2017 for MassHealth to review and respond. On April 11, 2017, MassHealth sent an email to the hearing officer seeking guidance on whether to consider the \$12,450.00 furnace purchase a disqualifying transfer. The hearing officer declined to offer guidance, and Appellant's attorney advocated to the MassHealth representative why the furnace purchase should be allowed. The MassHealth representative agreed to deduct \$12,450.00 from the transfer total and determined the new disqualifying transfer amount to be \$60,550.00 (Exhibit 7).

Findings of Fact

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

1. On October 20, 2016, MassHealth received Appellant's application for long term care benefits. Appellant entered the nursing facility on June 23, 2016 and seeks September 1, 2016 as the coverage start date.
2. On November 23, 2016, MassHealth determined that Appellant made disqualifying transfers of assets totaling \$73,500.00 (Exhibit 1).
3. Using the average daily rate of \$354, MassHealth calculated a period of ineligibility of 207 days, from September 1, 2016 through March 26, 2017, with a coverage start date of March 27,

2017 (Exhibit 1).

4. The transfers MassHealth deemed disqualifying were as follows:

11/24/2014	\$14,000.00	Payment to daughter R
11/24/2014	\$2,000.00	Transfer to daughter K
11/24/2014	\$12,000.00	Transfer to daughter K
1/14/2015	\$14,000.00	Payment to daughter K
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5/19/2015	\$3,000.00	Payment for furnace
5/26/2015	\$5,500.00	Transfer for daughter's birthday
6/11/2015	\$6,000.00	Payment to daughter for birthday
Total	\$73,500.00	

5. At hearing, MassHealth agreed to adjust the disqualifying amount by \$500 due to a misprint on June 11, 2015 transfer, bringing the total amount to \$73,000.00.
6. After hearing, MassHealth agreed to adjust the disqualifying amount by \$12,450.00 after Appellant produced a bill showing that she paid to replace the furnace in her residence, bringing the total amount to \$60,550.00 (Exhibit 7).
7. Appellant's daughter loaned \$1,500.00 to Appellant by depositing \$4,000.00 into Appellant's account on July 25, 2016 and withdrawing \$2,500.00 on August 15, 2016 (Exhibit 5, Tab 8).

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. MassHealth considers any transfer of a resource owned by a nursing facility resident for less than fair market value during the appropriate look-back period to be a disqualifying transfer unless the transfer in question is permitted or exempted under the regulations. Specifically, 130 CMR 520.018(B) states that MassHealth "will deny payment for nursing facility services to an otherwise eligible nursing-facility resident ... who transfers or whose spouse transfers countable resources for less than fair-market value during or after the period of time referred to as the look-back period." The look-back period for transfers of resources occurring on or after February 8, 2006 is 60 months. 130 CMR 520.019(B)(2).

According to 130 CMR 520.019(C), set forth in pertinent part,

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.

A transfer may be cured if the full value or a portion of the full value of the transferred resources is returned to the applicant. 130 CMR 520.019(K)(2)(b). Additionally, per 130 CMR 520.019(F), MassHealth will not impose a period of ineligibility for transferring resources at less than fair market value if the resident 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.

The federal Health Care Finance Administration (HCFA) Transmittal No. 64, Section 3258.10 sets forth the following guidance to transfers exclusively for a purpose other than qualifying for Medicaid:

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.

In this case, MassHealth found that Appellant was ineligible for MassHealth long-term care coverage for 207 days because Appellant made impermissible transfers totaling \$73,500.00. After reviewing additional documentation regarding the furnace purchase submitted by Appellant, MassHealth agreed to reduce the disqualifying amount to \$60,550.00. The remaining \$60,550.00 constituted payments and gifts made to Appellant's daughters and grandchildren between November 24, 2014 and June 11, 2015.

Appellant argued that the \$60,550.00 should be offset by \$1,500.00 because this amount constituted a debt owed to Appellant's daughter. The evidence shows that after the transfers in question were made, Appellant's daughter gave \$1,500.00 to Appellant by depositing \$4,000.00 into Appellant's account on July 25, 2016 and withdrawing \$2,500.00 on August 15, 2016. As Appellant's daughter was recipient of over \$28,000.00 in gifts, the \$1,500.00 could be

considered a partial cure according to 130 CMR 520.019(K)(2)(b). The appeal is approved in part and the disqualifying transfer total should be reduced by \$1,500.00.

MassHealth considered Appellant's gifts to her children and grandchildren be disqualifying, as Appellant did not receive fair market value for these transfers and because Appellant did not present evidence of the same extent of gift giving prior to these transfers. Appellant argued that per 130 CMR 520.019(F), MassHealth should not impose a period of ineligibility for the gift transfers because they were made exclusively for a purpose other than to qualify for MassHealth. The regulation imposes a burden on Appellant to show that the transfer was made **exclusively** for a purpose other than to qualify for MassHealth, and the HCFA clarifies that convincing evidence, and not simply verbal assurances, must be presented demonstrating the specific purpose for the transfer.

As evidence of the intent of the transfer, Appellant offered affidavits from her daughter, who attested that she intended to care for Appellant at home until Appellant's death and therefore did not contemplate MassHealth eligibility. However, it is Appellant's intent in making the gifts, and not Appellant's daughter's intent to have her mother remain in the home, that is at issue here and must be proven with convincing evidence. Appellant's attorney also argued that Appellant's daughter, a registered nurse, was in a better position than MassHealth to determine when Appellant was no longer able to live in the community and when it was foreseeable to apply for MassHealth. However, Appellant's daughter was the recipient of many of these gifts and therefore her statement is self-serving and not convincing evidence. Additionally, Appellant argued that Appellant was not able make similar gifts prior to living with her daughter because she was living independently and had to pay her own expenses.

Finally, Appellant argued that the gifts made before Appellant was diagnosed with dementia should not be considered disqualifying. However, even before Appellant was diagnosed with Alzheimer's, the undisputed evidence shows that she was too frail to live alone. At the time Appellant moved in with her daughter, she was either 88 or 89 years old, had lost weight, was not taking her medications, and was a fall risk. Appellant has not met her burden of providing convincing evidence that the transfers were made exclusively for a specific purpose other than to qualify for MassHealth. As such, this appeal is denied in part.

Order for MassHealth

Adjust the total amount of the disqualifying transfer from \$73,500.00 to \$59,050.00 to reflect the amount determined permissible (\$12,450.00) and the amount of the partial cure (\$1,500.00). Redetermine the period of disqualification in accordance with the adjusted impermissible transfer figure.

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: