

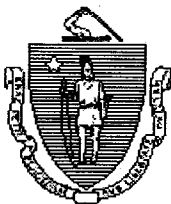
Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Approved	Appeal Number:	1216920
Decision Date:	3/20/13	Hearing Date:	10/31/2012
Hearing Officer:	Thomas J. Goode	Record Open to:	12/28/2012

Appellant Representative:

MassHealth Representative:
Helene Marcum



*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:	Verification
Decision Date:	3/20/13	Hearing Date:	10/31/2012
MassHealth Rep.:	Helene Marcum	Appellant Rep.:	
Hearing Location:	Chelsea MassHealth Enrollment Center Room 1	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 August 3, 2012, MassHealth denied the appellant's application for MassHealth long term care benefits because MassHealth determined that the appellant failed to submit verifications in a timely manner. (see 130 CMR 515.008; 520.007; 517.008; 516.001 and Exhibit 1). The appellant filed this appeal in a timely manner on August 30, 2012 (see 130 CMR 610.015(B) and Exhibit 2). Denial of assistance is valid grounds for appeal (see 130 CMR 610.032). The hearing record remained open until November 28, 2012 for MassHealth to submit a legal memorandum (Exhibit 19). The hearing record remained open until December 28, 2012 for appellant to submit a response (Exhibits 20, 21).

Action Taken by MassHealth

MassHealth denied the appellant's application for long term care benefits for failure to verify eligibility.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 516.001, 515.008 in

determining that appellant failed to submit verifications in a timely manner. A second issue is whether or not the community spouse is required to verify assets pursuant to 130 CMR 517.010.

Summary of Evidence

The MassHealth representative testified that appellant was admitted to a skilled nursing facility on June 9, 2011. A MassHealth long-term care application was submitted on his behalf on June 15, 2012, seeking coverage effective June 22, 2012. A verification check list was issued on July 3, 2012, with a return date by August 2, 2012. MassHealth asserts that the information submitted by the community spouse who is also appellant's power of attorney and eligibility representative, is insufficient to make a substantive determination of appellant's assets and subsequent MassHealth eligibility. The hearing record remained open for MassHealth to submit a legal memorandum in response to the community spouse's refusal to disclose her assets pursuant to 130 CMR 517.010. (Exhibit 18). In its response, MassHealth states that the legal department will not be issuing a decision, as the issue is a procedural issue and not a legal issue. In a memorandum submitted by the MassHealth caseworker, MassHealth asserts that it is seeking verification and ownership of the institutionalized spouse's assets based on the 2011 joint tax return, and that 1099 tax forms which would show MassHealth who owns which assets have not been submitted. MassHealth maintains that it has not made a decision regarding spousal refusal, and that the denial is based on 130 CMR 515.008 for failure to provide verification of the institutionalized spouse's assets. MassHealth also asserts that there is a conflict for the community spouse to be the power of attorney representing the institutionalized spouse and claiming a right of refusal to not supply missing verifications. (Exhibit 19).

The community spouse appeared with her attorney. Appellant counsel stated that the institutionalized spouse and the community spouse have been married for 34 years, and have always maintained their finances separately, although they filed tax returns jointly on the advice of their accountant. Appellant counsel asserts that the community spouse has exercised her right to refuse to disclose her assets; however, all assets attributable to appellant have been submitted to MassHealth. On the MassHealth application, appellant assigned to the Office of Medicaid his rights to spousal support. Counsel argues that pursuant to 130 CMR 517.010, MassHealth cannot find the institutionalized spouse ineligible due to the community spouse's refusal to disclose her assets held individually when the institutionalized spouse has assigned to MassHealth his right to support from the community spouse. Moreover, counsel argues that there is no conflict of interest in that the community spouse's non-cooperation extends only to her own assets and not the institutionalized spouse's assets; and the assignment of the institutionalized spouse's support rights by the community spouse in her capacity as power of attorney is not a breach of her fiduciary duty.¹ During the record open period, appellant counsel submitted a memorandum of law, and provided 1099 tax forms for 2010 and 2011 for the institutionalized spouse, with information pertaining to the community spouse redacted. (Exhibit 21 at exhibits A, B). Counsel also asserts that the issue in the case at hand does involve the community spouse's refusal to disclose her assets as stated in the August 3, 2012 notice. (Exhibit 1).

¹ CITING Morenz v. Wilson-Coker, 321F. Supp. 2d 398, 405 (D. Conn. Space 2004), aff'd, 415 F.3d 230 (2d Cir. 2005).

Findings of Fact

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

1. Appellant was admitted to a skilled nursing facility on June 9, 2011.
2. A MassHealth long-term care application was submitted on his behalf on June 15, 2012, seeking coverage effective June 22, 2012.
3. A verification check list was issued on July 3, 2012, with a return date by August 2, 2012.
4. The community spouse is also appellant's power of attorney and eligibility representative.
5. The community spouse has refused to disclose her assets.
6. The institutionalized spouse's assets have been verified including 1099 tax forms for 2010 and 2011.
7. The community spouse has assigned to MassHealth any rights to support from the community spouse.

Analysis and Conclusions of Law

First, I disagree with the MassHealth determination that the issues at hand are policy and procedural issues, not legal issues. By notice dated August 3, 2012, MassHealth notified appellant that: "You are not eligible for MassHealth because: Failed to submit any & all assets *in either or both client's & or spouse's name* & or SS #, verify assets (sic) balances, activities, proof of all withdrawals of \$1,000 or more from 1-1-2010 to present. (see attached)." (Exhibit 1, emphasis added). Appellant appealed the MassHealth action. An appeal of a notice of denial of a long-term care application yields issues of law, not matters of policy and procedure. It is well within the hearing officer's authority to order the parties to submit written briefs of the issues at hearing.² Although the notice does not specifically cite to 130 CMR 517.010, it is clear from the plain language of the notice that the community spouse's refusal to disclose her own assets is a substantive reason for the denial for failure to provide verification. It is equally clear from the MassHealth application that the community spouse refused to disclose assets held by her individually, and that she had assigned to MassHealth the institutionalized spouse's rights to support. (Exhibit 4). Rather than submitting a legal memorandum briefing these issues of law, MassHealth proceeds to raise additional legal issues concerning conflicts of interest and

² Pursuant to 130 CMR 610.065(B)(11), the hearing officer has the following powers: to order, at his or her discretion, written briefs to be submitted provided that all parties are notified of the submission of the briefs and have opportunity to answer.

fiduciary obligations associated with the community spouse's role as power of attorney, and eligibility representative which are legal matters, not policy and procedure matters. At hearing, the issues between the parties were narrowed to the community spouse's refusal to disclose her assets held individually. It was further established that all of the institutionalized spouse's assets had been verified, and that spousal refusal was the only remaining issue. Thus, the MassHealth response stating that 1099 forms from 2010 and 2011 had not been submitted is puzzling. However, as appellant's representatives have provided this tax information with appellant's information disclosed, and the community spouse's information redacted, I find that the application is complete, and that the community spouse has complied with 130 CMR 515.008(A), 516.001(C) with regard to verifying the institutionalized spouse's assets. As all outstanding verifications have been received during the pendency of the appeal, they are accepted as timely. 130 CMR 610.071(A)(2).

With regard to the community spouse's refusal to verify her assets held individually, 42 U.S.C. §1396r-5(c) provides in pertinent part:

(2) Attribution of resources at time of initial eligibility determination:

In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property—

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) of this section (as of the time of application for benefits).

(3) Assignment of support rights:

The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where—

(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment;
or

(C) the State determines that denial of eligibility would work an undue hardship.

The federal law is mirrored in MassHealth Regulation 130 CMR 517.010: Assignment of Rights

to Spousal Support:

An institutionalized spouse whose community spouse refuses to cooperate or whose whereabouts is unknown will not be ineligible due to:

(A) assets determined to be available for the cost of care in accordance with 130 CMR 520.016(B); or

(B) his or her inability to provide information concerning the assets of the community spouse when one of the following conditions is met:

1. the institutionalized spouse assigns to the Division any rights to support from the community spouse;
2. the institutionalized spouse lacks the ability to assign rights to spousal support due to physical or mental impairment as verified by the written statement of a competent medical authority; or
3. the Division determines that the denial of eligibility, due to the lack of information concerning the assets of the community spouse, would otherwise result in undue hardship.

The community spouse has refused to provide information about her assets that are held individually, and are not commingled with the institutionalized spouse's assets. While federal law and MassHealth regulations impose an obligation on the community spouse to disclose assets, the community spouse's responsibility to disclose assets held individually is waived if the institutionalized spouse's right to support from the community spouse has been assigned to the state. In her capacity as power of attorney for the institutionalized spouse, the community spouse has assigned to MassHealth any rights to support from the community spouse.³ As MassHealth has not cited any authority in support of its position that there is a conflict of interest in the community spouse's role as power of attorney, and eligibility representative, I find no grounds to conclude that there exists a conflict of interest that somehow overrides the clear provisions of federal and state law.

³ The MassHealth application contains language that gives "permission to MassHealth to go after and collect third-party payments for medical care and medical support from my spouse who is living at home and refuses to cooperate or whose whereabouts is unknown." See Exhibits 4 and 14 at p. 10. This is signed by the community spouse. It appears that this language stops well short of a clear assignment to the Commonwealth of all rights to support from the community spouse. However, turning to Rosetti v. Waldman, Essex Superior Court, Civil Action No. 04-1418 (August 17, 2005), "so long as the government has the right, by assignment or otherwise under state law, to proceed against the community spouse to recoup its costs in an action for support, benefits may not be denied." (Exhibit 12, p. 10). It also appears that in this case, as in Rosetti, the assignment is not in dispute.

The appeal is APPROVED. However, the approval does not result in an order to find appellant eligible for MassHealth long term care coverage effective June 22, 2012 as appellant counsel asserts in her legal memorandum. (Exhibit 21, p. 12). The August 3, 2012 denial is for failure to provide verification of eligibility. The matter is approved only in that MassHealth must now proceed with a substantive determination of eligibility based on the verifications submitted while preserving the June 15, 2012 application date.

Order for MassHealth

Issue a substantive determination of eligibility based on the June 15, 2012 application date without regard to assets held individually by the community spouse.

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.

Thomas J. Goode
Hearing Officer
Board of Hearings

cc:

MassHealth Representative: Nancy Hazlett, Chelsea MEC