

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Appeal Decision:	Approved	Appeal Number:	1945382
Decision Date:	JUL 22 2020	Hearing Date:	10/22/2019
Hearing Officer:	Scott Bernard	Record Open to:	4/16/2020

Appearance for Appellant:
Lisa Neeley, Esq.

Appearance for MassHealth:
Nikita Jones (Taunton 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:	Approved	Issue:	Frail Elder Waiver Financial Eligibility
Decision Date:	JUL 22 2020	Hearing Date:	10/22/2019
MassHealth's Rep.:	Nikita Jones	Appellant's Rep.:	Lisa Nealey, Esq.
Hearing Location:	Taunton MassHealth Enrollment Center		

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 September 18, 2019 MassHealth denied the appellant's community-based MassHealth application because MassHealth determined that the appellant had more countable income and assets¹ than MassHealth benefits allow. (See 130 CMR 520.002, 520.028, 520.003, 520.004; and Exhibit 1). The appellant filed an appeal in a timely manner on September 23, 2019. (See 130 CMR 610.015(B) and Ex. 2).

Denial of assistance is valid grounds for appeal. (See 130 CMR 610.032).

At MassHealth's request, the record was left open until October 23, 2019 for MassHealth to submit citations to MassHealth regulations supporting its position and the appellant's attorney was given until October 24, 2019 to respond. (See Ex. 8). Both parties submitted the requested documentation in a timely manner and the record closed on October 24, 2019. (*Id.*). On February 3, 2020 the hearing officer reopened the record pursuant to 130 CMR 610.081 in order to allow both parties to address two questions concerning the appeal (see below). The record was closed for a final time on April 16, 2020. (Ex. 12).

Action Taken by MassHealth

MassHealth denied the appellant's application for MassHealth benefits because she had more countable

¹ As it turns out, this MassHealth eligibility determination does not concern the asset determination. The reference to assets is kept here because it is contained in the notice.

income than MassHealth benefits allow.

Issue

The appeal issue is whether MassHealth was correct, pursuant to 130 CMR 520.009 and 520.015, in determining that the appellant had more countable income than MassHealth benefits permit.

Summary of Evidence

The appellant is an individual over the age of 65 years who has received MassHealth coverage under the Frail Elder Waiver Program since June 30, 2015. (Ex. 3; Ex. 6A, p. 2; Ex. 6B, p. 3). The MassHealth representative stated that on April 29, 2019, MassHealth notified the appellant that it was terminating her coverage because she had assets in excess of the countable asset limit. The appellant appealed this notice, and the Board held a hearing on July 26, 2019. The issue concerning excess assets resolved after the July hearing. Based on this, the Board subsequently dismissed that appeal.² MassHealth issued the notice under consideration in this appeal, informing the appellant that it was terminating her because she had excess income on September 18, 2019. (Ex. 1).

MassHealth asserted that payments the appellant received from a Long Term Care insurance policy³ (LTC policy or LTC insurance policy) should be counted as income. The appellant purchased the LTC policy on September 14, 2001. (Ex. 6A, pp. 3, 53; Ex. 6B, pp. 4, 54). The LTC policy currently pays the appellant approximately \$6,000 per month as reimbursement for caregiving expenses the appellant pays directly. (Ex. 6A, pp. 3, 55-56, 58; Ex. 6B pp. 4, 56-57, 59). The LTC policy reimburses payments for services such as home care, and home health care. (Ex. 6A, pp. 30-31; Ex. 6B, pp. 31-32). Under the LTC policy the appellant will only be paid to reimburse the covered expenses she incurs for care and services that meet the requirements for payment in accordance with the benefits and other provisions of the policy. (Ex. 6A, p. 33; Ex. 6B, p. 34). Payment is made only after the LTC insurance company receives the proper written proof of loss. (Ex. 6A, p. 41; Ex. 6B, p. 42). This proof must be given within 90 days of the end of a 30 day period for which benefits may be payable. (*Id.*).

MassHealth's first termination was based on the fact that the appellant's bank account would swell above the countable asset limit because of the monthly reimbursements from the LTC insurance company. MassHealth now argued that the payments were countable income. MassHealth relied on 130 CMR 517.007, 520.009(D), and 520.015 in making its determination. (Ex. 7, p. 2).⁴

The appellant's attorney argued that the payments from the LTC insurance policy were not countable income under Federal statutes, Federal regulations, and MassHealth regulations. She stated that the insurance proceeds are used to pay for medical expenses. She made reference to a home health care bill which she submitted that showed that the appellant was billed for this medical expense. (Ex. 6A, p. 58; Ex. 6B, p. 59). She then referred to one of the appellant's bank statements, which showed that the LTC

² See Appeal No. 1908919.

³ The appellant's attorney submitted copies of the policy as exhibits supporting her hearing memorandum. (Ex. 6A, pp. 24-53; Ex. 6B, pp. 25-54).

⁴ These citations were provided after the hearing through a brief record open requested in the hearing. (See Ex. 7, p. 3). The appellant's attorney was given an opportunity to respond and did so. (*Id.*)

insurance was deposited into the appellant's bank account and then appellant used that deposit to pay the home health care bill.⁵ (Ex. 6A, pp. 55-56; Ex. 6B, pp. 56-57).

The appellant's attorney stated that under 130 CMR 520.015, non-countable income includes any income considered non-countable under Title XIX of the Social Security Act. She then testified that the Social Security Act states that medical care or services paid directly to the provider by someone else is not income and cited 20 CFR §416.1103(a). The appellant's attorney stated further that cash provided by any non-governmental medical care or medical services program or under a health insurance policy if the cash is either repayment for program-approved service already paid for or pay restricted to the future purchase of program-approved services is excluded as income, citing 20 CFR § 416.1103(a)(5). The appellant's attorney argued that the reimbursements the appellant receives from the LTC insurance policy are repayments for program approved services because she pays for the care services she receives and then is reimbursed under the terms of the insurance policy. (Ex. 6A, pp. 24-53; Ex. 6B, pp. 25-54).

The appellant's attorney also cited to Social Security Programs Operational Manual System (POMS) SI 00815.050 D. 2., which states that any cash provided by a nongovernmental medical or social services organization (including medical and liability insurers) for medical or social services already received by the individual and approved by the organization is not income. (Ex. 6A, pp. 63-69; Ex. 6B, pp. 64-70). The appellant's attorney stated that LTC insurers are nongovernmental medical/social organizations as they insure against the liability of LTC costs and associated medical expenses. The appellant's attorney concluded by stating that the LTC insurance payments the appellant receives are therefore not countable income and the appellant's benefits must be reinstated.

The hearing record was kept open until October 23, 2019 to allow MassHealth to provide citation to the authority supporting its determination that the LTC insurance payments are part of the appellant's countable income and the appellant's attorney was given until October 24, 2019 to respond. (Ex. 8, p. 3). On October 23, 2019, the MassHealth representative stated that 130 CMR 517.007 (Utilization of Potential Benefits); 520.009(D) (Countable income includes the income listed but is not limited to what is listed in the regulations); and 520.015 (Non-countable income) were used in order to support MassHealth's contention that the Long Term Care Insurance payments were countable income. (Ex. 8, p. 2).

On October 24, 2019, the appellant's attorney submitted the following response to both the hearing officer and the MassHealth representative by email:

130 CMR 517.007 is a regulation that relates to "utilization of potential benefits," and does not mention income, whether countable or non-countable. This regulation is inapplicable to the analysis.

130 CMR 520.009(D) provides examples of different types of unearned income that are considered countable. These include Social security benefits, railroad retirement benefits, pensions, annuities, federal veterans' benefits, rental income, interest, and dividend income. Long-term care insurance proceeds are not listed. Furthermore, we are claiming

⁵ As MassHealth legal points out in its memorandum (summarized below), the bill for services and the amount reimbursed shown in the bank statements (both dated in July 2019) do not appear to correspond.

that the long-term care insurance proceeds are not income at all (whether earned or unearned), because it falls under 130 CMR 520.015(I), which lists as non-countable income “any other income considered non-countable under Title XIX” of the Social Security Act.

MassHealth claims that long term care insurance is not includable in any of the categories of 130 CMR 520.015(I) because it is not explicitly listed. 130 CMR 520.015(I) defines non-countable income as “any other income considered non-countable under Title XIX” of the Social Security Act. The Social Security Act states that medical care or services “paid for directly to the provider by someone else” is not income. *See* 20 C.F.R. §416.1103(a). The Social Security Act further excludes as income “cash provided by any nongovernmental medical care or medical services program or under a health insurance policy if the cash is either (i) repayment for program-approved services you have already paid for; or (ii) a payment restricted to the future purchase of a program-approved service.” *See* 20 C.F.R. §416.1103(a)(5)(i)(ii). As an example, the regulations state that “[i]f you have paid for prescription drugs and get the money back from your health insurance, the money is not income.” This is similar to the scenario of an individual, such as [the appellant], submitting claims to the long-term care company for reimbursement, and then receiving those funds. The funds received are not income. They are a reimbursement.

The citations provided by MassHealth do not support their position that the long-term care insurance proceeds are countable as income. (Ex. 8, pp. 1-2).

On February 3, 2020, the hearing officer reopened⁶ the hearing record in order to ask both parties to answer the following questions⁷:

1. The appellant relies on a SSI regulation (specifically 20 CFR 416.1103), which concerns what is and is not income. The SSI regulation is presumably promulgated pursuant of Title XVI of the US Code. Are the SSI regulations (particularly the one cited) applicable to Title XIX (Medicaid)? I have found no cross-reference or anything that would suggest that they are. Title XIX, however, is quite lengthy, and it's possible that I missed something.
2. Absent reference to Title XVI based regulations, are Long Term Care Insurance Payments countable as income? If so, how are they countable as income – please cite specific statutes, regulations, and/or other policies? (Ex. 8).

The appellant's attorney responded by email on February 6, 2020. (Ex. 8, p. 2). The appellant's attorney stated the following:

⁶ Pursuant to 130 CMR 610.081.

⁷ The hearing officer explicitly requested that the MassHealth representative refer these questions to MassHealth Legal. (Ex. 8).

I believe that I have addressed all of these questions in the brief that I filed on October 22nd.⁸ I also answered MassHealth's follow up questions in an email to you which I can forward to all parties.⁹ To date, I have never received a response from MassHealth to my filing, or a further explanation as to why the agency believes that the long-term care insurance premiums are countable as "income." A formal response from MassHealth legal would perhaps clarify the agency's position on this issue. Therefore, I request that MassHealth respond to my brief via a written memorandum, after which time I can respond to their memorandum.

Regarding the interplay of the Social Security rules and Medicaid, please note that in 1965, Congress created Title XIX of the Social Security Act as a cooperative federal-state program to enable states to provide medical assistance to qualifying individuals. The Title XIX program is commonly referred to as Medicaid. *See* 42 U.S.C. §§ 1396–1396v. Medicaid funds are provided to states under plans approved by the Secretary of Health and Human Services. Each state can enact regulations implementing its individual Medicaid program, but must do so in a way that is no more restrictive than the Federal statute. *See Daley v. Exec. Office of Health and Human Servs.*, 477 Mass. 188, 190 (2017).

States, such as Massachusetts, can be no more restrictive than the SSI program in administering their Medicaid programs, specifically where provisions of the Medicaid statute and the SSI program complement and do not contradict each other. *See* 42 U.S.C.A. §1396a(a)(10)(C)(i)(III). The SSI program is regulated by statute, at Title XVI of the Social Security Act, implementing regulations at 20 C.F.R. §416 et seq., and by the Program Operations Manual System (POMS). Consideration of how both the Medicaid statute and POMS treat income in a Medicaid eligibility analysis is therefore relevant to this case. This is especially true considering that the portion of the MassHealth regulation dealing with non-countable income states that "included as noncountable income under the provisions of 130 CMR 520.015 is 'any other income considered non-countable under Title XIX' of the Social Security Act."

I would like to reserve the right to respond to MassHealth's submission in this matter, and have no further documentation to provide until I receive their response. Thank you. (Ex. 8, p. 2).

MassHealth legal submitted its response on March 20, 2020¹⁰ in which it stated the following. (Ex. 9). Medicaid is the payor of last resort and other resources must be exhausted before it will pay for an individual's care. As such, applicants and members are obligated to take advantage of any third party benefits or other resources they may have to provide for their own care. Accordingly, 130 CMR 517.007 specifically requires an applicant to take all necessary steps to obtain benefits to which he or she is legally entitled or for which he or she may be eligible. This includes benefits under a LTC insurance

⁸ This refers to the submissions entered into the record as Ex. 6A and Ex. 6B.

⁹ Ex. 7.

¹⁰ The hearing officer initially requested that both parties submit their responses by March 4, 2020. (Ex. 9). Both parties requested separated extensions, which were granted.

policy. In this case, the appellant is utilizing benefits under her LTC insurance policy. When these benefits began to be paid was not known to the legal unit. Nonetheless, payments are being made to the appellant and deposited to her personal bank account as opposed to being remitted directly to a medical provider. Apparently, MassHealth counted payments the appellant received from the LTC insurance policy as income. In her brief (Ex. 6A, pp. 4-5¹¹; Ex. 6B, pp. 5-6) the appellant claimed these payments should not be counted as income pursuant to 20 CFR § 416.1103(a), particularly (5)(i)(ii). 20 CFR § 11.03 reads, in part:

§416.1103 What is not income?

Some things you receive are not income because you cannot use them as food or shelter, or use them to obtain food or shelter. In addition, what you receive from the sale or exchange of your own property is not income; it remains a resource. The following are some items that are not income:

(a) *Medical care and services.* Medical care and services are not income if they are any of the following:

- (1) Given to you free of charge or paid for directly to the provider by someone else;
- (2) Room and board you receive during a medical confinement;
- (3) Assistance provided in cash or in kind (including food or shelter) under a Federal, State, or local government program whose purpose is to provide medical care or medical services (including vocational rehabilitation);
- (4) In-kind assistance (except food or shelter) provided under a nongovernmental program whose purpose is to provide medical care or medical services;
- (5) Cash provided by any nongovernmental medical care or medical services program or under a health insurance policy (except cash to cover food or shelter) if the cash is either:
 - (i) Repayment for program-approved services you have already paid for; or
 - (ii) A payment restricted to the future purchase of a program-approved service.

Example: If you have paid for prescription drugs and get the money back from your health insurance, the money is not income...

The MassHealth memorandum continued by stating that in accordance with 20 CFR § 416.1103(a)(1), the payments for medical care and services would not be countable income if they were paid by the LTC insurance carrier directly to the appellant's medical services providers. (20 CFR § 416.1103(a)(1)). Here, however, the payments were remitted to the appellant. MassHealth legal suggested that the appellant may want to consider arranging to assign or otherwise allow for direct payments to a provider in accordance with (a)(1), which would also avoid potentially disrupting the appellant's benefits and/or cycling her on and off MassHealth due to excess assets and/or income as well as verification by MassHealth that the provider had not already been billed and paid by MassHealth.

The MassHealth memorandum stated that the provision the appellant specifically cited, 416.1103(a)(5)(i)(ii), only applied if: (i) the appellant has already paid for¹² the program approved services; or (ii) payment is restricted to future payments of program approved services. (Ex. 6A, p. 4).

¹¹ Where, as here, MassHealth legal has cited to material submitted by the appellant, the citation is changed to that in the hearing record.

¹² Emphasis in the original.

For the purposes of the memorandum, it was presumed that the medical services were program-approved services, but, if necessary, it deferred to the MassHealth representative for this and other determinations that may need to be made.

The memorandum stated that in support of her position, the appellant provided a bill from a medical service provider, dated July 1, 2019, for the billing period of June 2019 showing an overdue balance of \$6,496. (Ex. 6A, p. 58; Ex. 6B, p.59). Based on this, MassHealth legal stated that it was not known whether the appellant had already paid for these services. The memorandum argues that if the appellant did not pay for these services or MassHealth paid (or pays) the provider for the services, then (a)(5)(i) would not be applicable to those LTC insurance payments for the services.

MassHealth legal also state the appellant provided a copy of her Bank Statement for the period of June 1, 2019 through June 28, 2019. (Ex. 6A, pp. 55-56; Ex. 6B, pp. 56-57). The statement shows three direct deposits from the LTC insurance company Claims Payments: (1) June 10, 2019 for \$4,532.18; (2) June 17, 2019 for \$2,170.56; and (3) June 24, 2019 for \$2,170.56. (*Id.*). The bank statement, however, did not show checks or corollary withdrawals from the accounts in these amounts. While there were two large withdrawals from the account (June 4 for \$4,058.13 and June 18 for \$6,891.11) there was no indication of the disposition of these funds. Copies of bank checks that have been purchased with the funds were not provided. The appellant apparently did not submit copies of invoices for medical services equal to the amounts of the LTC insurance policy deposits, the withdrawals or receipts showing payments to a medical services provider. Therefore, how the funds withdrawn or payments made under the LTC insurance policy were actually used is not known. To the extent the appellant provided credible evidence demonstrating to the satisfaction of MassHealth that, in accordance with the requirements of 20 CFR § 416.1103(a)(5)(i)(ii), she is being repaid for services she already paid for or the LTC insurance policy payments are restricted to the future purchase of program approved- service, it would not be countable income. (130 CMR 520.015).

MassHealth legal also stated that the appellant cited to POMS SI 00815.050 D. 2. (Ex. 6A, pp. 5, 63-69; Ex. 6B, pp. 6, 64-70). Yet, POMS SI 00815.050 also discusses situations in which medical and social services related cash is counted as income. For example, SI 00815.050(D)(2)(a)(1) regarding services already received states: "Any case provided by nongovernmental medical or social services organizations (including medical and liability insurers(for medical or social services already received by the individual and approved by the organization is not income. However, if the individual alleges (or evidence indicates) *the receipt of amounts in excess of the medical or social services expenses incurred, charged the cash received in excess of the expenses as unearned income.*"¹³ Likewise, SI 00815.050(D)(2)(c)(1) regarding Flat Rate Benefit Payments from an Insurance Policy reads: Cash from any insurance policy which pays a flat rate benefit to the recipient without regard to the actual charges or expenses incurred is income." Thus, if the appellant receives a flat rate benefit, without regard to actual charges or expenses, the payment would be counted as income. (130 CMR 520.009(D)).

MassHealth legal stated that it does not have copies of the actual bills for medical services that the appellant received or evidence that the LTC insurance policy deposits represent payment for a prospective purchase of a program approved services. (20 CFR § 416.1103(a)(5)(i)(ii)). In conclusion, MassHealth legal wrote that the absence of verifications accepted by MassHealth that the LTC

¹³ The emphasis was added by MassHealth legal.

insurance policy payments meet the federal regulatory requirements of 20 CFR § 416.1103, the payments would not qualify for income exclusion. (Ex. 9).

As it was unclear whether MassHealth forwarded the memorandum to the appellant's attorney, the hearing officer did so on April 13, 2020, giving the attorney one week to respond. (Ex. 10). The appellant's attorney requested that the record stay open two additional weeks for her to gather and submit copies of bills used for reimbursement from the LTC insurance company. (*Id.*). The appellant's attorney was given until May 4 to do so. (*Id.*). On April 16, 2020, the appellant's attorney submitted a response. (Ex. 11). The response included a letter from the LTC insurance company confirming that payments made are reimbursements for paid home health aide (HHA) services. (*Id.*). The appellant's attorney wrote in the cover letter that the LTC insurance company requires proof of payment and receipt of payment by the caregiver before they will reimburse claims. (Ex.11, pp. 1, 3-4; *See also* Ex. 6A, p. 33; Ex. 6B, p. 34) The response also included a set of HHA payroll verifications submitted to the LTC insurance company by the appellant for the period March 8 through March 28, 2020, as well as a reimbursement check from the LTC insurance company confirming the dates of services for which the check is providing reimbursement. (Ex. 11, pp. 5-28). These indicate that during the period of March 8 through March 28, 2020, the appellant paid two contractors for LTC services an amount totaling \$6,850.75. (Ex. 11, pp. 5-25). These further indicate that the appellant received a reimbursement on April 2, 2020 for \$6,850.84. (Ex. 11, pp. 26-27).

Findings of Fact

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

1. The appellant is an individual over the age of 65 years who has received MassHealth coverage under the Frail Elder Waiver Program since June 30, 2015. (Ex. 3; Ex. 6A, p. 2; Ex. 6B, p. 3).
2. The appellant purchased the LTC insurance policy on September 14, 2001. (Ex. 6A, pp. 3, 53; Ex. 6B, pp. 4, 54).
3. The LTC policy reimburses payments for services such as home care, and home health care. (Ex. 6A, pp. 30-31; Ex. 6B, pp. 31-32).
4. Under the LTC policy the appellant will only be paid to reimburse the covered expenses she incurs for care and services that meet the requirements for payment in accordance with the Benefits and other provisions of the policy. (Ex. 6A, p. 33; Ex. 6B, p. 34).
5. The LTC insurance policy requires proof of payment and receipt of payment by the caregiver before they will reimburse claims. (Ex. 11 , pp. 1, 3-4; Ex. 6A, p. 41; Ex. 6B, p. 42).
6. For the period of March 8 through March 28, 2020 the appellant paid two contractors for LTC services totaling \$6,850.75. (Ex. 11, pp. 5-25).
7. These further indicate that the appellant received a reimbursement on April 2, 2020 for \$6,850.84. (Ex. 11, pp. 26-27).

Analysis and Conclusions of Law

An individual's gross earned and unearned income less certain business expenses and standard income deductions is referred to as the countable-income amount. (130 CMR 520.009(A)(1)). For community residents, the countable-income amount is compared to the applicable income standard to determine the individual's financial eligibility. (130 CMR 520.009(A)(2)). The types of income that are considered in the determination of eligibility are described in 130 CMR 520.009, 520.018, 520.019, and 520.021 through 520.024 and include income to which the applicant would be entitled whether or not actually received when failure to receive such income results from the action or inaction of the applicant or person acting on his or her behalf. (130 CMR 520.009(A)(4)). Income that does not directly result from an individual's own labor or services is unearned and includes, but is not limited to, social security benefits, railroad retirement benefits, pensions, annuities, federal veterans' benefits, rental income, interest, and dividend income. (130 CMR 520.009(D)).

There are certain types of income, however, that are not considered in determining the financial eligibility of an applicant or a member. (130 CMR 520.015). These include the income of any individual who is a recipient of EAEDC¹⁴ or SSI; income-in-kind; and retroactive RSDI and SSI benefit payments. (130 CMR 520.015(A), (C), (G)). Most importantly for the purposes of this decision¹⁵ non-countable income includes "any other income considered noncountable under Title XIX." (130 CMR 520.015(I)).

Title XIX of the Social Security Act, codified at 42 USC §§ 1396 *et seq.*, is the Medicaid statute. Medicaid funds are provided to states under plans approved by the Secretary of Health and Human Services and each state can enact regulations implementing an individual Medicaid plan but must do so in a way that is no more restrictive than the Federal statute. (*See Daley v. Exec. Office of Health and Human Servs.*, 477 Mass. 188, 190 (2017)). In enacting its individual Medicaid plan, a State can be no more restrictive than the SSI program in administering their Medicaid programs, specifically where provisions of the SSI Statute do not contradict the Medicaid statute. (42 U.S.C. §1396a(a)(10)(C)(i)(III)).

As neither the Medicaid Statute nor the MassHealth regulations contain a standard for assessing whether the payments received from LTC insurance policy are countable or non-countable income, reference to the SSI regulations (20 CFR §416 *et seq.*) is appropriate here. Specifically, 20 CFR §416.1103 states the following in pertinent part:

Some things you receive are not income because you cannot use them as food or shelter, or use them to obtain food or shelter. In addition, what you receive from the sale or exchange of your own property is not income; it remains a resource. The following are some items that are not income:

(a) *Medical care and services.* Medical care and services are not income if they are any of the following:

¹⁴ Emergency Assistance to the Elderly, Disabled, and Children, a cash assistance program administered by the Department of Transitional Assistance.

¹⁵ Since neither the Medicaid Statute nor the MassHealth regulations state whether payments from a LTC insurance policy is countable or non-countable income.

- (1) Given to you free of charge or paid for directly to the provider by someone else;
 - (2) Room and board you receive during a medical confinement;
 - (3) Assistance provided in cash or in kind (including food or shelter) under a Federal, State, or local government program whose purpose is to provide medical care or medical services (including vocational rehabilitation);
 - (4) In-kind assistance (except food or shelter) provided under a nongovernmental program whose purpose is to provide medical care or medical services;
 - (5) Cash provided by any nongovernmental medical care or medical services program or under a health insurance policy (except cash to cover food or shelter) if the cash is either:**
 - (i) Repayment for program-approved services you have already paid for; or**
 - (ii) A payment restricted to the future purchase of a program-approved service.**
- Example: If you have paid for prescription drugs and get the money back from your health insurance, the money is not income.**
- (6) Direct payment of your medical insurance premiums by anyone on your behalf.
 - (7) Payments from the Department of Veterans Affairs resulting from unusual medical expenses... (Emphases added).

POMS SI 00815.050 B. a. defines medical services as “those services which are directed toward diagnostic, preventive, therapeutic, or palliative treatment of a medical condition and which are performed, directed, or supervised by a State licensed health professional.” This is a broad definition that includes such things as “any room and board (i.e., food and shelter) provided during a medical confinement... as well as in-kind medical items such as prescription drugs, eyeglasses, prosthetics and their maintenance... devices intended to bring the physical abilities of a handicapped individual to a par with a non[-]handicapped unaided individual (e.g., electric wheelchairs, modified scooters)...[and] specially trained animals (e.g., seeing eye dogs) and their maintenance (e.g., dog food).” (POMS SI 00815.050 B. 1. a.). POMS SI 00815.050 B. states that “[m]edical services are never income regardless of the source of the service or the source of payment for the service.”¹⁶

The record shows that the appellant receives home care services, which she pays for out of pocket. Specifically, the record shows that for the period from March 8 through March 28, 2020, the appellant paid two individuals a total of \$6,850.75 for home care services. Home care services are a type of medical service that is covered by the appellant’s LTC insurance policy. In order to receive reimbursement for these services from the LTC insurance company, the appellant is required by her policy to both proof of payment and proof of the receipt of those funds by the caregiver. This is explicitly laid out by the LTC insurance company in its letter. But presenting proof of “loss” for a previous 30 day period prior to reimbursement is part of the LTC insurance policy, which the appellant agreed to in 2001 when she purchased the policy. It can be presumed that this has been the only route the appellant has had to be reimbursed for the money that she outlays to pay for service under the LTC

¹⁶ While the POMS, which are internal guidance used by SSA in claims determination, are not considered to constitute binding legal authority, they have been used by courts as both guidance and construed as SSA latest on its policies where they do not conflict with the Social Security statutes or duly promulgated regulations. (See Avery v. Secretary of Health and Human Services, 797 F.2d 19, 23-24 (1st Cir. 1986)). In any case, the POMS used here were treated as valid guidance by both parties and will be treated as such here.

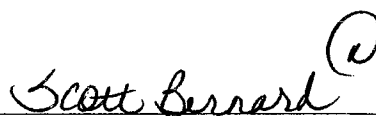
insurance policy since she began utilizing those services.¹⁷ In this case, the appellant submitted the proofs of payments for the two contractors, which were the verifications submitted to the LTC insurance company in order to receive reimbursement through the LTC insurance policy. The appellant received reimbursement from the LTC company, a repayment of services that she already paid for, in the amount of \$6,850.83. With the exception of eight cents, this cash payment should not be considered as income for the purposes of determining eligibility for MassHealth.¹⁸

Order for MassHealth

Issue a new eligibility determination without considering the payments from the LTC insurance policy.

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.



Scott Bernard
Hearing Officer
Board of Hearings

cc: Justine Ferreira, Taunton MassHealth Enrollment Center
Lisa Neeley, Esq., Mirick O'Connell, 100 Front Street, Worcester, MA 01608-1477

¹⁷ MassHealth correctly pointed out that it is currently unclear when the appellant began requesting reimbursements for services under the LTC insurance policy.

¹⁸ The hearing officer has reviewed the payments made to the contractors three times and cannot account for the eight cent differential between what the appellant paid the contractors and the reimbursement for those services.