

Jun 25, 2018

Office of Appeal Hearings
Dept. of Children and Families

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

[REDACTED]

APPEAL NO.: 18N-00009

PETITIONER,

Vs.

Administrator

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing by phone in the above-referenced matter on May 9, 2018 at 10:00 a.m.

APPEARANCES

For the Petitioner:

[REDACTED]
Petitioner's Daughter

For the Respondent:

[REDACTED]
Administrator

STATEMENT OF ISSUE

Petitioner is appealing the nursing home facility's decision to transfer and/or discharge her from the nursing home. The facility has the burden of proving by clear and convincing evidence that the transfer and/or discharge was appropriate under 42 C.F.R. § 483.15.

PRELIMINARY STATEMENT

A telephonic administrative hearing was held on March 19, 2018 at 2:30 p.m. and was continued, by agreement of the parties, to exchange and submit evidence for this appeal.

██████████, Petitioner's Son-In-Law, appeared as a witness for Petitioner. Petitioner introduced Composite Exhibit "1," which was accepted into evidence.

██████████, R.N., Director of Nursing with ██████████
██████████ appeared as a witness for Respondent. ██████████, Nursing Home Administrator with ██████████ appeared as a witness for Respondent.

Respondent introduced Composite Exhibits "1" and "2," which were accepted into evidence.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. Petitioner is a 67-year-old male who is a Medicaid recipient that is eligible for Medicaid nursing facility services.
2. On October 26, 2017, the nursing home transferred Petitioner, who was ventilation ("vent") dependent at the time, to Mease Countryside Hospital due to being unresponsive. The decision to transfer was made by the nursing home's Medical Doctor.
3. The Mease Countryside Hospital transferred Petitioner to Kindred Hospital for further treatment on November 17, 2017.

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4. On December 28, 2017, the nursing home facility refused to readmit Petitioner because the facility was no longer accepting vent dependent patients, and he was gone from the nursing home facility for ninety (90) days, which exceeded their bed hold policy.

5. Respondent's Bed Hold and In-House Transfer Policy dated October 26, 2017 states:

Medicaid Residents

A vacant bed may be held for you while you are in the hospital or on therapeutic leave, depending on your individual state's policy on payment for bed hold. Medicaid pays for the following in this state: Hospitalization Days eight (8) and Therapeutic Leave Days sixteen (16) During this time, you are permitted to return and resume residence in the facility.

If your hospitalization or therapeutic leave exceeds the number of days indicated above, you will be readmitted immediately upon the first availability of a vacant bed in a semiprivate room if: (1) You require the services provided by the facility, and (2) You are eligible for Medicaid nursing facility services. (See Respondent's Exhibit 2).

6. Respondent admitted the above notice was provided to Petitioner when he went to the hospital and a copy was mailed to Petitioner's daughter on October 26, 2017. The bed hold policy notice was not signed by Petitioner or Petitioner's daughter.

7. The nursing home administrator for [REDACTED] provided testimony, which is summarized as follows: He admitted that the nursing home did not provide a discharge notice to Respondent. The basis for discharging Petitioner was on their bed hold policy. The nursing home facility is under new management and they have decided to remove the ventilation unit. The nursing home is currently discharging vent dependent patients to other nursing home. Petitioner is ventilation dependent and the nursing home will not have the capability to care for him.

The State has reviewed their discharge policy and bed hold policy and did not find any deficiencies in the nursing home's practice.

8. The nursing home administrator for [REDACTED], who at the time of Petitioner's transfer to the hospital was the administrator for [REDACTED] [REDACTED], provided testimony, which is summarized as follows: Petitioner was ventilation dependent at the time he was sent to the hospital via 911 and placed in the intensive care unit. He was not inappropriately discharged because the facility could not provide him the care he needed, which was the basis for sending him to the hospital. The nursing facility decided to close their vent unit and no longer accept vent patients around November of 2017. The nursing home decided not to readmit Petitioner to the nursing home facility because their vent unit was closing. The nursing facility would not accept Petitioner because he had the potential to become vent dependent and they will not have the facility or staff to care for him once the vent unit is closed.

9. Petitioner's witness stated that she did not receive a discharge notice or a bed hold policy from the nursing facility. Petitioner witness indicated this is not the first time Petitioner has left the nursing facility to go to the hospital and has always returned to the nursing facility after his hospital stay.

10. Petitioner's witness indicated Petitioner is no longer vent dependent and is stable with his trach and should be able to remain at the facility because he is no longer on a vent.

CONCLUSIONS OF LAW

11. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to

Section 400.0255(15), Florida Statutes. This order is the final administrative decision of the Department of Children and Families under Section 400.0255(15), Florida Statutes.

12. Section 400.022(1), Florida Statutes, provides standards for residents' rights in nursing facilities as follows:

(i) The right to be fully informed, in writing and orally, prior to or at the time of admission and during his or her stay, of services available in the facility and of related charges for such services, including any charges for services not covered under Title XVIII or Title XIX of the Social Security Act or not covered by the basic per diem rates and of bed reservation and refund policies of the facility.

....

(u) The right to be informed of the bed reservation policy for a hospitalization. The nursing home shall inform a private-pay resident and his or her responsible party that his or her bed will be reserved for any single hospitalization for a period up to 30 days provided the nursing home receives reimbursement. Any resident who is a recipient of assistance under Title XIX of the Social Security Act, or the resident's designee or legal representative, shall be informed by the licensee that his or her bed will be reserved for any single hospitalization for the length of time for which Title XIX reimbursement is available, up to 15 days; but that the bed will not be reserved if it is medically determined by the agency that the resident will not need it or will not be able to return to the nursing home, or if the agency determines that the nursing home's occupancy rate ensures the availability of a bed for the resident. Notice shall be provided within 24 hours of the hospitalization.

13. 42 C.F.R. § 483.15 provides standards for notifying residents of bed-hold policies and allowing residents the right to return to a facility even though hospitalization or therapeutic leave has exceeded the bed-hold. In this case, Petitioner was provided a written notice of the bed-hold policy pursuant to 42 C.F.R. § 483.15(d). The regulation states in part:

(d) Notice of bed-hold policy and return---(1) Notice before transfer. Before a nursing facility transfers a resident to a hospital or the resident goes on therapeutic leave, the nursing facility must provide written information to the resident or resident representative that specifies—
(i) The duration of the state bed-hold policy, if any, during which the resident is permitted to return and resume residence in the nursing facility;

(ii) The reserve bed payment policy in the state plan, under §447.40 of this chapter, if any;

(iii) The nursing facility's policies regarding bed-hold periods, which must be consistent with paragraph (e)(1) of this section, permitting a resident to return; and

(iv) The information specified in paragraph (e)(1) of this section.

(2) **Bed-hold notice upon transfer.** At the time of transfer of a resident for hospitalization or therapeutic leave, a nursing facility must provide to the resident and the resident representative written notice which specifies the duration of the bed-hold policy described in paragraph (d)(1) of this section.

(e)(1) **Permitting residents to return to facility.** A facility must establish and follow a written policy on permitting residents to return to the facility after they are hospitalized or placed on therapeutic leave. The policy must provide for the following.

(i) A resident, whose hospitalization or therapeutic leave exceeds the bed-hold period under the State plan, returns to the facility to their previous room if available or immediately upon the first availability of a bed in a semi-private room if the resident

(A) Requires the services provided by the facility; and

(B) Is eligible for Medicare skilled nursing facility services or Medicaid nursing facility services.

(ii) If the facility that determines that a resident who was transferred with an expectation of returning to the facility cannot return to the facility, the facility must comply with the requirements of paragraph (c) as they apply to discharges. [Emphasis Added]

14. 42 C.F.R. § 483.15 limits the reasons a nursing facility may discharge a Medicaid

or Medicare patient and states in part:

(c) Transfer and discharge— (1) Facility requirements—(i) The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless—

(A) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;

(B) The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;

(C) The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;

(D) The health of individuals in the facility would otherwise be endangered;

(E) The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility.

Non-payment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including

Medicare or Medicaid, denies the claim and the resident refuses to pay for his or her stay. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or
(F) The facility ceases to operate.

(2) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (c)(1)(i)(A) through (F) of this section, the facility must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider.

(i) Documentation in the resident's medical record must include:

(A) The basis for the transfer per paragraph (c)(1)(i) of this section.

(B) In the case of paragraph (c)(1)(i)(A) of this section, the specific resident need(s) that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the need(s).

(ii) The documentation required by paragraph (c)(2)(i) of this section must be made by—

(A) The resident's physician when transfer or discharge is necessary under paragraph (c)(1)(A) or (B) of this section; and

(B) A physician when transfer or discharge is necessary under paragraph (b)(1)(i)(C) or (D) of this section.

(iii) Information provided to the receiving provider must include a minimum of the following:

(A) Contact information of the practitioner responsible for the care of the resident

(B) Resident representative information including contact information.

(C) Advance Directive information.

(D) All special instructions or precautions for ongoing care, as appropriate.

(E) Comprehensive care plan goals,

(F) All other necessary information, including a copy of the residents discharge summary, consistent with §483.21(c)(2), as applicable, and any other documentation, as applicable, to ensure a safe and effective transition of care.

(3) Notice before transfer. Before a facility transfers or discharges a resident, the facility must—

(i) Notify the resident and the resident's representative(s) of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand. The facility must send a copy of the notice to a representative of the Office of the State Long-Term Care Ombudsman.

(ii) Record the reasons for the transfer or discharge in the resident's medical record in accordance with paragraph (c)(2) of this section; and

(iii) Include in the notice the items described in paragraph (b)(5) of this section.

(4) Timing of the notice. (i) Except as specified in paragraphs (b)(4)(ii) and (b)(8) of this section, the notice of transfer or discharge required under this section must be made by the facility at least 30 days before the resident is transferred or discharged.

(ii) Notice must be made as soon as practicable before transfer or discharge when—

(A) The safety of individuals in the facility would be endangered under paragraph (b)(1)(ii)(C) of this section;

(B) The health of individuals in the facility would be endangered, under paragraph (b)(1)(ii)(D) of this section;

(C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (b)(1)(ii)(B) of this section;

(D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (b)(1)(ii)(A) of this section; or

(E) A resident has not resided in the facility for 30 days.

(5) Contents of the notice. The written notice specified in paragraph (b)(3) of this section must include the following:

(i) The reason for transfer or discharge;

(ii) The effective date of transfer or discharge;

(iii) The location to which the resident is transferred or discharged;

(iv) A statement of the resident's appeal rights, including the name, address (mailing and email), and telephone number of the entity which receives such requests; and information on how to obtain an appeal form and assistance in completing the form and submitting the appeal hearing request;

(v) The name, address (mailing and email) and telephone number of the Office of the State Long-Term Care Ombudsman;

(vi) For nursing facility residents with intellectual and developmental disabilities or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with developmental disabilities established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (Pub. L. 106-402, codified at 42 U.S.C. 15001 et seq.); and

(vii) For nursing facility residents with a mental disorder or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with a mental disorder established under the Protection and Advocacy for Mentally Ill Individuals Act.

(6) Changes to Notice. If the information in the notice changes prior to effecting the transfer or discharge, the facility must update the recipients

of the notice as soon as practicable once the updated information becomes available.

15. The above-cited authority sets forth the conditions, which must exist for a nursing home to involuntarily discharge a resident. Petitioner is a Medicaid recipient who did not receive a proper discharge notice. Respondent effectively discharged Petitioner when it failed to readmit him upon his release from the hospital due to the closing of their ventilation unit.

16. Respondent believed it did not have to provide a discharge notice to Petitioner because it provided Petitioner with a bed hold policy. The above authority clearly states, "If the facility that determines that a resident who was transferred with an **expectation of returning** to the facility cannot return to the facility, the facility must comply with the requirements of paragraph (c) as they apply to discharges."

17. Petitioner had an expectation of returning to the nursing home facility after his hospital stay, if not to his same bed because he exceeded his bed hold days, then to the next available bed. Respondent admitted that the nursing home would have accepted Petitioner back in December of 2017, but it was closing its ventilation unit. The bed hold policy does not negate the fact that Respondent is required to provide a discharge notice once it has determined Petitioner is not allowed to return to the facility. Therefore, a discharge notice should have been provided according to 42 C.F.R. § 483.15(c).

18. Based on the totality of the evidence, Respondent has not met its burden of proving by clear and convincing evidence¹ that its action was proper. The undersigned Hearing Officer will not address the merits of this case because the nursing home facility did not comply with procedural requirements as outlined in the authority above. The facility failed to provide a discharge notice to Petitioner as required by the Code of Federal Regulations. Therefore, Petitioner must be allowed to return to his previous room if available; otherwise, he must be admitted to the next available bed in a semi-private room. If not, the facility must provide Petitioner with a proper discharge notice.

DECISION

Based upon the foregoing findings of fact and conclusions of law, Petitioner's appeal is GRANTED. Petitioner must be readmitted to the facility's first available bed.

¹ State v. Graham, 240 So.2d 486 (1974), states, "Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. (Id. quoting Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983))."

NOTICE OF RIGHT TO APPEAL

The decision of the hearing officer is final. Any aggrieved party may appeal the decision to the district court of appeals in the appellate district where the facility is located. Review procedures shall be in accordance with the Florida Rules of Appellate Procedure. To begin the judicial review, the party must file one copy of a "Notice of Appeal" with the Office of Appeal Hearings, Bldg. 5, Rm.255, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. The party must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The department has no funds to assist in this review, and any financial obligations incurred will be the party's responsibility.

DONE and ORDERED this 25 day of June, 2018,

in Tallahassee, Florida.



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Agency for Health Care Administration
