

Jun 29, 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-00037

PETITIONER,

Vs.

CASE NO.

[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened before the undersigned on June 14, 2018 at 10:26 a.m. at the [REDACTED] located in [REDACTED], Florida.

**APPEARANCES**

For the Petitioner: The petitioner was not present and was represented by his son, [REDACTED]

For the Respondent: [REDACTED] Executive Director (ED) for [REDACTED] Nursing Home.

**ISSUE**

Federal regulations limit the reasons for which a Medicaid or Medicare certified nursing home may discharge a patient. At issue is whether or not the nursing home's action to transfer and discharge the petitioner is an appropriate action based on the

federal regulations at 42 C. F. R. § 483.15. The nursing home is seeking to transfer and discharge the petitioner because: (1) his needs cannot be met in this facility and (2) the safety of other individuals in this facility is endangered. The burden of proof is clear and convincing evidence and is assigned to the facility.

### PRELIMINARY STATEMENT

By Nursing Home Transfer and Discharge Notice, dated April 16, 2018, the respondent informed the petitioner that he was to be discharged from the facility effective May 16, 2018. On April 19, 2018, the petitioner timely requested an appeal to challenge the respondent's action.

Appearing as a witness for the petitioner was the petitioner's son's girlfriend,

[REDACTED]

Appearing as witnesses for the respondent were Scott Revels, Administrator in training, [REDACTED], Acting Director of Nursing (DON), and [REDACTED], [REDACTED] Social Services Director (SSD).

The Nursing Home Transfer and Discharge Notice was deficient by not including the discharge location. The Social Services Director remedied the Notice during the hearing to include the discharge location.

The respondent submitted evidence which was entered as the Respondent's Exhibit 1 and the Respondent's Composite Exhibit 2.

A letter dated June 5, 2018 from the Agency for Health Care Administration (AHCA) indicated that AHCA did not find the facility in violation of any laws or rules. This was entered as Hearing Officer's Exhibit 1.

The record was closed at the end of the hearing.

### FINDINGS OF FACT

1. The petitioner has been residing in the respondent's facility since July 5, 2017. The petitioner was admitted for long-term care with diagnoses of [REDACTED] and [REDACTED].

2. The SSD contends that she was part of the discharge process and that she discussed with the petitioner's son that the petitioner is in need of a facility with memory care. The DON contends that petitioner's mental condition has deteriorated to the point where he requires the care of a facility which is more skilled to provide care to residents in an advanced stage of [REDACTED]. The DON explained that a long term care facility is different from a facility that provides memory care. The DON explained that a facility that provides memory care is more suitable for the petitioner due to the specialized training the staff receives to care for patients who have advanced stages of [REDACTED]. The SSD explained that memory care facilities provide programs and activities that are geared towards its patients and that they have locked units. The ED contends that the petitioner's [REDACTED] has worsened since his admission. The ED contends that the petitioner needs to be in a locked unit, as he has been exhibiting exit-seeking behaviors; he wears a Wanderguard due to the risk for elopement. The SSD contends that it has to redirect the petitioner when he walks towards an exit.

3. The DON also contends that the petitioner has been put on one on one observation due to his aggressive behaviors, which consist of kicking, hitting, grabbing, and pushing. The DON contends that the petitioner also exhibits exit-seeking

behaviors. The ED contends that the petitioner was placed on one on one supervision due to his aggressive behaviors. The ED explained that the petitioner was placed on one on one supervision to protect other residents from potential harm. The DON contends that several workman's compensation claims have been requested by staff due to the petitioner's aggressive behavior. The DON contends that the petitioner choked a certified nursing assistant (CNA), who had marks on her neck, but chose not to seek medical treatment. The DON notes that the petitioner is tall. The DON contends that the petitioner goes to the other residents' rooms throughout the day, particularly at night, and would stand over their beds. The DON contends that this action would scare many of the residents. The DON contends that some of the residents have discharged from the facility because they felt unsafe due to the petitioner's action.

4. The Respondent's Composite Exhibit 2 includes the progress notes dated from July 7, 2017 through March 29, 2018. The DON explained that the progress notes document the residents' behavior. The DON referred to the progress notes dated July 7, 2017, which state: "...Resident exhibit combative behaviors, and currently on 1:1 observation. SSD spoke to son and scheduled 72 hr meeting on 07/11/17 at 12:30 p.m..." (Respondent's Composite Exhibit 2, page 6 of 6). The DON and ED referred to the progress notes dated October 5, 2017 (page 5 of 6), which state, "...Resident noted to be combative and hitting staff at times. Staff redirects. Resident remains on 1:1 supervision..." The progress notes dated February 23, 2018 at 8:55 state: "Pt was walking with his 1-1 aid and kept pulling her arm and he pulled her into the nutrition

room. Pt was very angry and yelling in Spanish when told that he could not go into the nutrition room.” The progress notes dated February 23, 2018 at 12:17 state: “Resident grabbing at staff. Resident grabbed CNA and pulled her around. PT yelling at the staff. Redirected to dining [sic] area to eat lunch and pt calmed down.”

5. The Respondent’s Exhibit 2 also includes the physician’s progress notes which document the examinations of the petitioner on the following dates: February 20, 2018 at 7:35; February 23, 2018 at 7:39; February 26, 2018 at 7:41; February 28, 2018 at 21:13; March 1, 2018 at 16:20; and March 9, 2018 at 10:13. The physician’s progress notes indicate that the petitioner continues to require 1:1 supervision due to a high risk of harm to himself and others. The physician’s notes also indicate that the petitioner is an elopement risk and requires Wanderguard. The physician’s notes are e-signed by [REDACTED] and [REDACTED] DO.

6. On April 16, 2018, the facility issued a Nursing Home Transfer and Discharge Notice advising petitioner that the effective date of the transfer was May 16, 2016. The reasons cited were, “Your needs cannot be met in this facility” and “The safety of other individuals in this facility is endangered.” The facility included on the notice the explanation that the petitioner “should be in a lock unit.”

7. The Notice was signed by the Administrator on April 12, 2018. The petitioner’s son also signed the Notice on April 16, 2018. The Nursing Home Transfer and Discharge Notice was signed by the petitioner’s physician, [REDACTED] on April 16, 2018.

8. The petitioner's witness and the petitioner's son do not dispute the petitioner's aggressive behaviors or the decline in his mental health. The petitioner's witness contends that the petitioner has significantly declined since April 2018, as he is not walking, is incontinent, and is sleeping most of the day. The petitioner's witness contends that he is losing weight because he is not eating. The petitioner's witness contends that hospice may be explored. The petitioner's witness argues that the petitioner had an untreated [REDACTED] that was not treated, according to the [REDACTED]. The petitioner's witness believes that the untreated urinary tract infection may have caused the petitioner to become physically aggressive. The petitioner's witness believes that the petitioner is no longer a risk to anyone since he sleeps most of the day. The petitioner's witness contends that the petitioner is very weak when he attempts to get out of bed. The petitioner's witness is not sure that [REDACTED] will accept the petitioner due to his physically aggressive behaviors. The petitioner's witness explained that when she contacted [REDACTED], she was informed that it does not tolerate physical aggression, and that a resident is sent to a hospital if it occurs; she is concerned that the petitioner will not have a placement. The petitioner's witness contends that she and the petitioner's son are aware that the petitioner does wander but they were unaware of the exit-seeking behaviors and believe that there is a lack of communication.

9. The petitioner's son believes that the language barrier may cause his father to become frustrated, which may lead him to become defensive and physically aggressive. The petitioner's son does not agree that a new facility will rectify the situation, and that it

will cause more issues since he will not be familiar with his surroundings. The petitioner's son believes that moving the petitioner to a new facility will only put the responsibility on another facility. The petitioner's son contends that if the petitioner is moved to another facility, it will make it difficult for him to assist. The petitioner's son and petitioner's witness contends that the notes include only negative information.

10. The ED acknowledges that urinary tract infections and mental health conditions, such as dementia, anxiety disorders, and psychosis, may lead to behavior issues. The ED believes that a language barrier does not cause one to be physically aggressive.

#### **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. In accordance with said authority, this order is the final administrative decision of the Department of Children and Families.

12. Federal Regulations appearing 42 C.F.R. § 483.15, sets forth the reasons a facility may involuntarily discharge a resident as follows: Admission, transfer and discharge rights.

(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 (c)(1)(i)(C) or (D) of this section.

(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 (c)(5) of this section.

(4) *Timing of the notice.* (i) Except as specified in paragraphs (c)(4)(ii) and (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 (c)(1)(i)(C) of this section;

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

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

(D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (c)(1)(i)(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 (c)(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.

13. On April 16, 2018, the facility issued a discharge notice to the petitioner.

The facility's reasons for discharging the petitioner are: (1) Your needs cannot be met in this facility and (2) The safety of other individuals in this facility is endangered. These

are two of the reasons permitted for discharge from a facility in accordance with the above federal regulation.

14. Section 400.02555, Florida Statutes, Resident transfer or discharge; requirements and procedures; hearings in part states:

(3) When a discharge or transfer is initiated by the nursing home, the nursing home administrator employed by the nursing home that is discharging or transferring the resident, or an individual employed by the nursing home who is designated by the nursing home administrator to act on behalf of the administration, must sign the notice of discharge or transfer. Any notice indicating a medical reason for transfer or discharge must either be signed by the resident's attending physician or the medical director of the facility, or include an attached written order for the discharge or transfer. The notice or the order must be signed by the resident's physician, medical director, treating physician, nurse practitioner, or physician assistant.

(7) At least 30 days prior to any proposed transfer or discharge, a facility must provide advance notice of the proposed transfer or discharge to the resident and, if known, to a family member or the resident's legal guardian or representative, except, in the following circumstances, the facility shall give notice as soon as practicable before the transfer or discharge:

(b) The health or safety of other residents or facility employees would be endangered, and the circumstances are documented in the resident's medical records by the resident's physician or the medical director if the resident's physician is not available.

(10)(b) If a resident requests a hearing within 10 days after receiving the notice from the facility, the request shall stay the proposed transfer or discharge pending a hearing decision. The facility may not take action, and the resident may remain in the facility, until the outcome of the initial fair hearing, which must be completed within 90 days after receipt of a request for a fair hearing.

15. In accordance with the above federal regulation and statute, the notice was signed by a physician. The notice also indicated the reasons and effective date of the discharge, the location to which the petitioner is to be discharged, and the petitioner's appeal rights along with other required assistance information.

16. Based on the evidence presented, the nursing facility has established that the petitioner's "...needs cannot be met in this facility" and "The safety of other individuals in this facility is endangered". These are two of the six reasons provided in federal regulation (42 C.F.R. § 483.15) for which a nursing facility may involuntarily discharge a resident.

17. Establishing that the reason for a discharge is lawful is just one step in the discharge process. The nursing home must also provide discharge planning, which includes identifying an appropriate transfer or discharge location and sufficiently preparing the affected resident for a safe and orderly transfer or discharge from the facility. The hearing officer in this case cannot and has not considered either of these issues. The hearing officer has considered only whether the discharge is for a lawful reason.

18. Any discharge by the nursing facility must comply with all applicable federal regulations, Florida Statutes, and Agency for Health Care Administration requirements. Should the resident have concerns about the appropriateness of the discharge location or the discharge planning process, the resident may contact the Agency for Health Care Administration's health care facility complaint line at (888) 419-3456.

### **DECISION**

Based upon the forgoing Findings of Fact and Conclusions, the appeal is denied and the facility may proceed with its proposed discharge in accordance with the Agency for Health Care Administration's rules and regulations.

**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 29 day of June, 2018,

in Tallahassee, Florida.



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Copies Furnished To:

 Petitioner

  
Agency for Health Care Administration  
