

Sep 27, 2018

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

Office of Appeal Hearings
Dept. of Children and Families

[Redacted]

APPEAL NO. 18N-00046

PETITIONER,

Vs.

[Redacted]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on August 10, 2018 at 2:14 p.m. at [Redacted] Florida.

APPEARANCES

For the Petitioner: [Redacted]
Petitioner's Son

For the Respondent: [Redacted]
Administrator

STATEMENT OF ISSUE

At issue is the facility's intent to discharge the petitioner due to "the safety of other individuals in this facility is endangered." A Nursing Home Transfer and Discharge Notice was issued on April 13, 2018. The facility has the burden of proof to establish by clear and convincing evidence that the discharge is appropriate under federal regulations found in 42 C.F.R. § 483.15.

PRELIMINARY STATEMENT

The petitioner requested one continuance. The respondent presented two witnesses who testified: [REDACTED] L.P.N. Unit Manager; and [REDACTED] Social Service Director. The respondent submitted four exhibits, which were accepted into evidence and entered as Respondent's Exhibit "1."

The record was left opened until August 17, 2018 to allow all parties to submit additional evidence. The petitioner did not submit any additional evidence. On August 17, 2018, the respondent submitted additional evidence, which was entered and marked as Respondent's Exhibit "2." The record closed on August 17, 2018.

FINDINGS OF FACT

1. The petitioner entered the facility on June 22, 2007. The respondent does not know when the petitioner was first informed about the smoking policy. The respondent believes the petitioner received the smoking policy information in her admission packet.
2. On August 9, 2014, the facility conducted a smoking assessment on the petitioner. The respondent did not submit in evidence if the petitioner was deemed a safe or unsafe smoker during the 2014 evaluation.
3. On April 13, 2018, the reason for the discharge was "the safety of other individuals in this facility is endangered." The respondent explained the reason for the discharge is the petitioner's repeated incidents of smoking in the facility.
4. On December 14, 2017, the petitioner was educated on the dangers of smoking when the facility's staff observed her smoking in her room. The petitioner has been observed smoking in the facility many times by staff members. The respondent alleges the petitioner comprehends when she is educated on the facility's smoking policy

because she has expressed to the respondent she understands she cannot smoke in the facility and understands the dangers of smoking indoors.

5. From December 2017 and forward, the petitioner has been observed smoking in the facility; refuses to surrender smoking materials when asked by the staff; and secretly stores smoking materials in her room. These behaviors violate the facility's smoking policy.

6. On January 4, 2018, the facility completed a smoking assessment on the petitioner and deemed her an "unsafe smoker" as she refuses to comply with the facility's smoking policy. The respondent explained that when the petitioner is deemed an "unsafe smoker" she requires one-on-one supervision to ensure she does not smoke in the facility.

7. On January 6, 2018, the facility completed an annual assessment on the petitioner. In the progress notes, the facility wrote, in part: "Stmnt of incap in chart...Has hx of refusing care, generally stable, but has recently been non-compliant with smoking policy, smoking in room; no {sic} allowing facility to keep her cigarettes; easily frustrated; shouts; and is difficult to redirect."

8. On January 10, 2018, the respondent documented the petitioner's behavioral issues, such as smoking in the facility; talking to self; and taking food from other's plates.

9. On February 21, 2018, the respondent conducted another smoking assessment and deemed the petitioner a "safe smoker" while receiving one on one supervision. She was then removed from one-on-one supervision.

10. On March 7, 2018 [REDACTED] the former Social Services Director, contacted the petitioner's son and notified him of his mother's failure to comply with the facility's smoking policy. The petitioner's son alleges the March 7, 2018 conversation was the first time the respondent informed him of his mother's non-compliance with the smoking policy and was the only conversation he had with the respondent concerning his mother's smoking.

11. On May 21, 2018, the respondent explained [REDACTED] spoke with the petitioner's son about his mother's placement on one-on-one supervision. The petitioner's son alleges he never had that conversation with [REDACTED] On the same day, another smoking assessment was completed, and the petitioner was deemed to be a "safe smoker" and removed off one-on-one supervision.

12. On June 7, 2018, the petitioner was observed smoking in her bathroom. The respondent determined the petitioner required one-on-one supervision.

13. On July 7, 2018, the petitioner's plan of care was reviewed, and the petitioner remained on one-on-one supervision due to her failure to comply with the facility's smoking policy.

14. The respondent explained that many phone calls were made to the petitioner's son and many times the respondent could not reach him. The respondent also explained staff members could not leave messages on the son's voicemail.

15. The petitioner suffers from [REDACTED]

[REDACTED] She requires medications for the treatments of her psychological issues.

16. The petitioner's son believes if the respondent contacts him every time his mother is observed smoking, he would speak to her in a way she understands she must comply with the facility's smoking policy. He alleges his mother is unable to comprehend the respondent when she is educated about the smoking policy.

17. The respondent alleges the mother is oriented four times or know who she is; where she lives; what day it is; and who is the current president. Also, the petitioner took a cognitive test where she scored in the middle range and based on the test, she has a "gray area of understanding."

CONCLUSIONS OF LAW

18. 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 that section, this Order is the final administrative decision of the Department of Children and Families.

19. The Code of Federal Regulations 42 C.F.R. § 483.15 limits the reasons for which a Medicaid or Medicare certified nursing facility may discharge a patient. In this case, the petitioner was sent notice indicating she would be discharged from the facility as she endangers the safety of others in the facility:

(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.

20. The respondent's reason for the discharge was that the petitioner endangers the safety of others as she does not comply with the facility's smoking policy.

21. The hearing officer concludes the petitioner has violated the smoking policy many times and the respondent has educated her many times about the policy. The evidence indicates the petitioner cannot comprehend the respondent when she is educated about the smoking policy. Furthermore, the petitioner is compliant with the policy when she receives one-on-one supervision. The petitioner's son argues the respondent should contact him when his mother violates the smoking policy as he is able to speak with her to ensure she complies. However, the evidence indicates he is not available every time she is observed smoking in the facility.

22. The facility has not met the burden of proof to establish the petitioner endangers the safety of others when she smokes in the facility. The petitioner does not comprehend the respondent when educated about the facility's smoking policy, and the facility has a procedure in place that ensures the petitioner complies with the smoking policy.

23. The controlling authorities require a higher standard of proof in nursing home discharge hearings; there must be substantial and credible evidence at the level of clear

and convincing¹. The undersigned concludes the respondent's evidence does not rise to the level of clear and convincing and the evidence submitted does not indicate the petitioner endangers the safety of others when she smokes in the facility.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is GRANTED. The facility has not established that this discharge is permissible under federal or state regulations; therefore, the facility may not proceed with the discharge at this time.

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 27 day of September, 2018,

in Tallahassee, Florida.

Mary Jane Stafford

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