

FILED

Nov 16, 2018

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

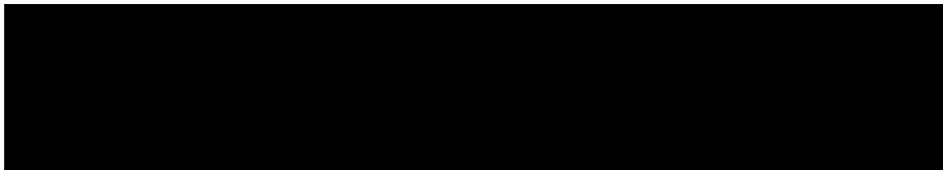
Office of Appeal Hearings
Dept. of Children and Families



APPEAL NO. 18N-00100

PETITIONER,

Vs.



RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing by phone in the above-referenced matter on October 23, 2018 at 10:59 a.m.

APPEARANCES

For the Petitioner:



Petitioner

For the Respondent:



STATEMENT OF ISSUE

At issue is the facility's intent to discharge the petitioner due to "your health has improved sufficiently so that you no longer need the services provided by this facility." A Nursing Home Transfer and Discharge Notice was issued on August 1, 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 as he wanted his hearing to be a phone hearing instead of a face-to-face hearing. The petitioner submitted no exhibits at the hearing. The respondent submitted two exhibits, which were accepted into evidence and entered as Respondent's Exhibits "1" and "2." The hearing officer entered one exhibit, which was accepted into evidence as Hearing Officer's Exhibit "1."

FINDINGS OF FACT

1. The petitioner entered the facility sometime in May 2018. He was discharged from the facility sometime in the same month; however, he returned to the facility at the end of May 2018.

2. The petitioner's diagnoses include:



3. On August 1, 2018, the facility issued a Notice Home Transfer and Discharge Notice indicating the reason for the discharge was "your health has improved sufficiently so that you no longer need the services provided in the facility."

4. On August 1, 2018, [REDACTED] ordered the petitioner to be discharged to the community.

5. The petitioner received occupational and physical therapies while in the facility and finished both therapies on or around August 2, 2018.

6. On August 28, 2018, the petitioner was involved in an incident with another resident, which resulted in police involvement. The facility contacted the police who

were going to arrest the petitioner and trespass him from the facility. The respondent asked the police if the petitioner could be escorted from the facility without arresting him. The police removed the petitioner from the facility on the same day.

7. The respondent explained the petitioner left the facility as he was deemed a danger to others due to the incident with another resident.

8. The petitioner explained the respondent told him to sign some paperwork and voluntarily leave the facility or he would be arrested. The petitioner left on his own accord and he currently resides with a friend. He wishes to return to the facility.

9. On September 4, 2018, the respondent wrote a letter that states in part:

We are requesting that this appeal not be granted to [REDACTED]. It is clear from his record and from the physician's perspective that [REDACTED] is not in need of 24 hour care, skilled care, long term care, nor is he in need of any type of nursing care or services. He most recently took approximately \$1000 of his money and went shopping with a friend for a good part of the day with no need for a wheelchair or assistive device. He is better suited for an independent apartment, hotel, or other living arrangements. He refused to participate in his discharge planning to get him to a lower level of care.

10. The respondent explained the petitioner can ambulate independently; manage his medications independently; and manage his finances independently. The respondent further explained the petitioner is oriented four times and scored a [REDACTED]

11. The petitioner explained he requires physical therapy; is a very sick man whose health is getting worse; believes he is dying; requires the use of a walker and wheelchair for ambulation; requires a payee for his Social Security income; requires assistance with showering, cooking meals, washing clothes, cleaning his room, making his bed, and taking his medications as he often forgets to take his pain medications; and

occasionally requires the use of a back brace to his straighten his back. The petitioner explained he can groom and dress himself independently.

12. The respondent did not submit any of the petitioner's medical records into evidence.

CONCLUSIONS OF LAW

13. 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.

14. 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 his health had improved sufficiently so that he no longer needed the services provided in the facility. The Regulation 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.

15. The respondent's reason for the discharge was that the petitioner's health has improved so much he could be discharged to the community. The respondent argues the petitioner could ambulate independently; manage his medications independently; and manage his finances independently. The respondent also argues petitioner also is oriented four times and scored a fifteen out of fifteen on a cognitive test.

16. The petitioner argues he is a very sick man who health is getting worse; is dying; requires the use of a walker and wheelchair for ambulation; requires a payee for his Social Security income; requires assistance with showering, cooking meals, washing clothes, cleaning his room, making his bed, and taking his medications as he often forgets to take his pain medications; and occasionally requires the use of a back brace to his straighten his back.

17. The hearing officer concludes the petitioner's health has not improved sufficiently enough to be discharged from the facility as the evidence does not indicate the petitioner has made any improvements with his health since May 2018. The evidence indicates the petitioner was escorted by the police from the facility due to his incident with another resident; however, the respondent did not submit any evidence, such as medical records, to indicate he should be discharged from the facility due to his improved health.

18. The facility has not met the burden of proof to establish the petitioner's health has improved sufficiently to be discharged from the facility. The petitioner does not reside in the facility, but he wishes to return to the facility for a variety of reasons.

19. 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's health has improved sufficiently so that he no longer need the services provided 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. Since the petitioner has already been discharged, the respondent is ORDERED to readmit him to the facility to the 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 16 day of November, 2018,

in Tallahassee, Florida.

Mary Jane Stafford

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