

Mar 01, 2019

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-00143

PETITIONER,

Vs.

[Redacted]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on December 12, 2018 at 9:23 a.m., at Medicana Nursing & Rehab Center, in Lake Worth, Florida.

APPEARANCES

For the Petitioner:

[Redacted]

For the Respondent:

[Redacted]

STATEMENT OF ISSUE

Federal regulations limit the reasons for which a Medicaid or Medicare certified nursing home may discharge a patient. At issue is whether the nursing home's action to discharge and transfer the petitioner is an appropriate action based on the federal regulations at 42 C. F. R. § 483.15. The nursing home is seeking this action because the petitioner's needs cannot be met in this facility and the safety of other individuals in

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. On November 4, 2017, the petitioner (age, 90) was admitted to the nursing facility. She was admitted to the facility with [REDACTED] of [REDACTED].

[REDACTED] She [REDACTED] [REDACTED].

The petitioner's daughter has durable Power of Attorney and makes decisions for her (Petitioner's Exhibit 1 and Respondent's Composite Exhibit 3).

2. On April 13, 2018, the petitioner was slapped by another resident.

3. On April 20, 2018, the respondent alleged that the petitioner yelled, spit on and was uncooperative with staff.

4. On May 29, 2018, a bruise was discovered on the petitioner's upper arm.

5. On July 26, 2018, August 23, 2018 and August 27, 2018, the respondent alleges the petitioner spit on and grabbed other residents. There is no documentation in the petitioner's medical records of the alleged incidents.

6. A Psychiatry Consultant Report dated August 17, 2018, states that the petitioner is [REDACTED] (Respondent's Composite Exhibit 3).

7. The petitioner's medical records indicate that she engages in simple conversation, able to handle cups without difficulty, and participates in self-feeding (Respondent's Composite Exhibit 3).

8. On August 31, 2018, the petitioner's attending physician determined that she was incapable of making Medical Decisions (Respondent's Composite Exhibit 3).

9. On September 18, 2018, an entry in the petitioner's [REDACTED] [REDACTED] but staff is familiar with these fluctuations and additional assistance may be required (Respondent's Composite Exhibit 3).

10. On September 18, 2018, the petitioner was evaluated. Her Occupational Therapy medical record noted that she chooses not to consume food and throws food at staff and residents (Respondent's Exhibit 3).

11. On October 3, 2018, the petitioner was issued a Nursing Home Transfer and Discharge Notice.

12. On October 9, 2018, the petitioner requested a hearing to challenge the respondent's action.

13. On November 4, 2018 and November 27, 2018, [REDACTED]

[REDACTED]
(Respondent's Composite Exhibit 3).

14. On November 5, 2018, [REDACTED]

[REDACTED].” (Respondent's Composite Exhibit 3).

15. The petitioner's daughter asserted that her mother's behavior is directly related to her medication. [REDACTED]

[REDACTED]
16. On October 2, 2018, the petitioner's daughter met with the petitioner's doctor and discussed prescribing additional medication for her mother. [REDACTED]

[REDACTED] on October 2, 2018. The daughter asserted that she has seen signs of improvement in her mother's behavior since she has been on Seroquel too. The

daughter asserted that her mother poses no threat to the safety of herself or others.

The daughter asserted that she would like her mother to spend the rest of her life at

██████████ (Petitioner's Exhibit 1).

CONCLUSIONS OF LAW

17. 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.

18. Federal Regulations at 42 C. F. R. § 483.15, Admission, transfer and discharge rights in relevant part states:

...
(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.

(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.

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

...
(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.

19. On October 3, 2018, the facility issued a discharge notice to the petitioner. The reason for discharging the petitioner is that her needs cannot be met in this facility and the safety of other individuals in the facility is endangered, which is a reason permitted for discharge from a facility in accordance with the above federal regulations.

20. Section 400.0255, 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:

...

(a) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility, and the circumstances are documented in the resident's medical records by the resident's physician; or...

(10) (a) A resident is entitled to a fair hearing to challenge a facility's proposed transfer or discharge. The resident, or the resident's legal representative or designee, may request a hearing at any time within 90 days after the resident's receipt of the facility's notice of the proposed discharge or transfer.

(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.

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

22. 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 convincing evidence.

23. [REDACTED]
[REDACTED]. The respondent claimed that the petitioner's behavior is combative as she spit on and grabbed staff and other residents. The daughter claimed that she has seen signs of improvement in the petitioner's behavior since the addition of 25 mg of Seroquel. [REDACTED]
[REDACTED]. [REDACTED]
[REDACTED].

24. As to the issue of the safety of others in the facility being endangered, the respondent must prove by clear and convincing evidence that the safety of others is endangered. [REDACTED] The petitioner spits her food out and grabs staff and residents but there was no record or incident report in the medical records of petitioner harming anyone. The respondent has not provided any documented proof in the patient progress notes of any incident that endangered others. [REDACTED]

[REDACTED] The undersigned concludes the respondent's evidence does not rise to the level of clear and convincing.

25. After careful review of the evidence, testimonies and authority, the undersigned concludes that the respondent has not met its burden of proof to show that the petitioner's needs cannot be met at the facility or that the safety of other individuals is endangered.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the petitioner's appeal is GRANTED. The facility must cease the discharge action.

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.

FINAL ORDER (Cont.)

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DONE and ORDERED this 01 day of March, 2019,
in Tallahassee, Florida.



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