

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

**FILED**

Jun 12, 2019

Office of Appeal Hearings  
Dept. of Children and Families

[REDACTED]

APPEAL NO. 19N-00003

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-referenced matter on April 11<sup>th</sup>, 2019, at 10:30 a.m.

**APPEARANCES**

For the Petitioner: [REDACTED], pro se

For the Respondent: [REDACTED], Nursing Home Administrator

**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. The burden of proof is clear and convincing evidence and is assigned to the facility.

**PRELIMINARY STATEMENT**

The hearing was originally scheduled for February 27<sup>th</sup>, 2019. However, a continuance was granted at the respondent's request.

By way of a Nursing Home Transfer and Discharge Notice (DN) dated January 4<sup>th</sup>, 2019, the respondent informed the petitioner that the facility was seeking to discharge/transfer him effective the same date. The reason stated on the notice is "Your needs cannot be met in this facility."

On January 9<sup>th</sup>, 2019, the petitioner timely requested a hearing to challenge the discharge/transfer.

Appearing as witnesses for the petitioner were [REDACTED], licensed clinical social worker (LCSW), [REDACTED], [REDACTED] and petitioner's brother, [REDACTED].

Appearing as witnesses for the respondent were [REDACTED], [REDACTED], [REDACTED], [REDACTED], Director of Nursing and [REDACTED], [REDACTED], LCSW.

Appearing as an observer for a portion of the hearing was [REDACTED], supervisor from the Office of Appeal Hearings.

The respondent's Exhibits 1 through 8 were admitted into evidence.

The petitioner's Exhibits 1 and 2 were admitted into evidence.

The record was held open until the close of business April 26<sup>th</sup>, 2019 and then extended to May 10, 2019 to allow the petitioner to review the evidence. The petitioner submitted a one-page document which was admitted into evidence as Petitioner's

Exhibit 3. All documents were received within the allotted time frame , and the record was then closed.

On March 13, 2019, the Agency for Health Care Administration submitted a survey, based on an on-site visit of the Facility, indicating that it determined the Facility committed a violation of the Code of Federal Regulation, Section 483.12, regarding its action to discharge a resident (Hearing Officer's Exhibit 1). The undersigned did not take this survey into consideration regarding the final decision.

### **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. The petitioner was admitted to the nursing facility on June 2016. The petitioner is a quadriplegic with [REDACTED] with a history of [REDACTED] [REDACTED] and [REDACTED].
2. The petitioner independently made an appointment to be seen at the [REDACTED] [REDACTED] on December 26<sup>th</sup>, 2018 and when seen was admitted to the hospital on the same day.
3. The facility was notified that the petitioner was admitted and would not be returning that day.
4. The hospital's social worker spoke with the facilities' admission's office and was advised that there was a 10-day bed hold.
5. The petitioner was to be discharged on January 4<sup>th</sup>, 2019. The social worker at the hospital received a call on January 3<sup>rd</sup>, 2019 from the Admissions Coordinator of the

facility requesting a 3008 form, a Medication reconciliation and updated physician's orders be faxed to the facility the next day. These were faxed on January 4<sup>th</sup>, 2019.

6. On January 4<sup>th</sup>, 2019, the respondent faxed a Nursing Home Transfer and Discharge Notice (DN) to the hospital, effective the same date. The notice stated that the petitioner's needs cannot be met in the facility since he "frequently refuses care which endangers his health. He requires specialized care which can't be provided here."

7. The hospital's social worker and doctor spoke with the nursing home administrator who stated that the discharge orders were too complex for them to follow and that the petitioner would need a psychiatrist assessment due to his difficulties and behavior problems.

8. A psychiatrist evaluation was performed, and he was found to be able to make decisions.

9. The respondent alleges that the petitioner's needs could not be met in its facility as a result of the petitioner's behavior, which involved refusing to take medications and treatments and being verbally abusive to staff. Because of the petitioner's behavior, the respondent is unable to provide the necessary level of care to meet his needs. The staff at the facility has been trained on bowel care and were doing it, but the petitioner did not believe they were doing it appropriately. Due to not taking his medications, his [REDACTED] would be [REDACTED], and he was admitted several times to hospitals. The respondent states that the discharge orders require the petitioner to have specialized care that they cannot provide. The petitioner needs more one to one attention and that they have other patients to attend to and could not give him 24 hour per day attention.

10. The petitioner argued that the facility did not give him any notice that he could not return to the facility and he only found out through the hospital's social worker the day that he was supposed to return to the facility. He explained that he had refused some medications that were for pain that were not doing him any good. He had spoken to the doctor, but since he was unresponsive, he did not take them and felt better.

11. The hospital's social worker also argued that the facility never informed the hospital of the petitioner having any issues or that they needed any documentation during the stay and that there might be issues in the petitioner returning and that they were the last to be notified.

12. The respondent explained that they could not do a determination until the day of discharge because they did not have the medical documentation to decide and that the decision is made after the information is received.

13. The doctors from the hospital argued that the discharge orders sent by the hospital was the same protocol for the treatment in place and that the facility had already been doing it for the past two and a half years. There was no change to his conditions, actually at the hospital his condition improved, and all the stated complaints were already happening.

14. On December 10<sup>th</sup>, 2018, the facility's social worker tried to speak to the petitioner regarding alternative arrangements for him due to his refusal to take his medications but was kicked out of his room and was not able to do it.

15. The petitioner's brother testified that he was given a courtesy call on January 14<sup>th</sup>, 2019 and was told that the facility could not take the petitioner back due not being able the changes in two medications and one bowel care procedure. He was called

again on January 8<sup>th</sup>, 2019 to go pick up the petitioner's belongings. When he arrived at the facility all the petitioner's belongings had already been packed in boxes and taken out of his room. There was no discussion regarding the petitioner.

### CONCLUSIONS OF LAW

16. 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.

17. The Code of Federal Regulations, Title 42, Section 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** (emphasis added);

(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.

(ii) The facility may not transfer or discharge the resident while the appeal is pending, pursuant to §431.230 of this chapter, when a resident exercises his or her right to appeal a transfer or discharge notice from the facility pursuant to §431.220(a)(3) of this chapter, unless the failure to

discharge or transfer would endanger the health or safety of the resident or other individuals in the facility. The facility must document the danger that failure to transfer or discharge would pose.

(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**

(emphasis added):

(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 (emphasis added)...**

...

(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.

18. On January 4<sup>th</sup>, 2019, the facility issued a discharge notice to the petitioner. The facility's reason for discharging the petitioner is that his needs cannot be met at the facility, which is a reason permitted for discharge from a facility in accordance with the above federal regulations.

19. The Florida Statutes, Title 29, Section 400.0255, 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.

...

(c) If the hearing decision is favorable to the resident who has been transferred or discharged, the resident must be readmitted to the facility's first available bed....

(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.

20. However, the evidence submitted does not establish that the petitioner's medical records were well documented with the reasons by which his medical needs could not be met all of a sudden. Progress notes since 2016 show the petitioner not wanting to take his medication. The only entry showing an attempt for alternative arrangement

because of refusal to take medications was on December 10<sup>th</sup>, 2018 where the facilities social worker attempted to speak to the petitioner but was kicked out of his room. The petitioner's welfare may have been in question at the time, but the undersigned concludes that the respondent failed to prove that it could not meet his needs.

21. The facility sought to not readmit the petitioner to its facility for the reason that "[his] needs cannot be met in this facility."

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

23. After careful review of the cited authorities and evidence, the undersigned concludes that the respondent did not meet its burden of proof by clear and convincing evidence indicating that it could not meet the petitioner's needs. The undersigned concludes that the respondent's discharge of the petitioner was improper, as it failed to indicate that the facility could not meet his needs. As such, the facility must readmit the petitioner to the first available bed.

### **DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, this appeal is GRANTED. The facility is ordered to immediately readmit the petitioner to the facility. If

a bed is not currently open to readmit the petitioner, the facility must readmit the petitioner as soon as a bed becomes available.

**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 12 day of June, 2019,

in Tallahassee, Florida.



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