

FILED

Jun 03, 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. 19N-00027

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, a hearing in the above-referenced matter was convened on
May 3rd, 2019 at 10:00 a.m. at [REDACTED] located in

[REDACTED].

APPEARANCES

For the Petitioner: [REDACTED], Petitioner's mother

For the Respondent: [REDACTED], Nursing Home Administrator and
[REDACTED], Director of Nursing

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

By way of a Nursing Home Transfer and Discharge Notice (DN) dated February 12th, 2019, the respondent informed the petitioner that the facility was seeking to discharge/transfer her effective the same date. The reason stated on the notice is "Your needs cannot be met in this facility."

On March 4th, 2019, the petitioner's mother timely requested a hearing to challenge the discharge/transfer.

Appearing telephonically as a witness for the petitioner was the petitioner's father who has power of attorney, [REDACTED], and appearing in person were [REDACTED], District Ombudsman Manager and [REDACTED] also from the Ombudsman program.

Appearing as a witness for the respondent was [REDACTED], Licensed Practical Nurse (LPN) at the nursing home.

The respondent's Exhibits 1 through 4 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 May 10th, 2019 to allow the petitioner to provide additional documents. The petitioner submitted 55 pages which were admitted into evidence as Petitioner's Exhibit 3. All documents were received within the allotted time frame, and the record was then closed.

A letter dated May 13th, 2019 from the Agency for Health Care Administration (AHCA) was received by the Office of Appeal Hearings on May 20th, 2019 stating that the representative did not find the facility in violation of any laws or rules.

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 June 28th, 2018, the petitioner (now age 49) was admitted to the nursing Facility suffering from [REDACTED]. (Respondent's Exhibit 2). The petitioner was transferred to [REDACTED] Hospital on February 12th, 2019 and remained at the hospital as of the date of the hearing. The petitioner's parents both have durable Power of Attorney and make decisions for her.
2. 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 getting out of control, beating the staff and being verbally abusive. Because of the petitioner's behavior, the respondent is unable to provide the necessary level of care to meet her needs. The petitioner has engaged in the services of Vitas, however Vitas only helps in crisis. The respondent states that the petitioner needs a private duty aid to be with the petitioner at all times since the insurance does not pay for that service and they do not have enough staff to sit with the petitioner 24 hours per day and that Vitas only helps in crisis. The respondent alleges that they have changed the petitioner's medications several times and that the medications have stopped working. (Respondent's Exhibits 2 and 3).

3. On February 12th, 2019, the director of nursing from the NH spoke with the petitioner's mother who also has power of attorney and explained that the petitioner needed a psychiatric follow up to adjust her medications and needed to be transferred to a Psych Facility due to her psychotic behavior and the petitioner's mother recommended [REDACTED] Hospital. After the call and before transferring the petitioner to the hospital, the petitioner attacked her roommate with a scissor. There were no injuries due to the intervention of the C.N.A. from Hospice Vitas who was present. (Respondent's Exhibit 2 dated February 12th, 2019). The director of nursing also asserts that they did not have a bed-hold because for that, they need 95% of the facility full and at that time it was not. The petitioner was committed under the Baker Act by [REDACTED] [REDACTED] Hospital and admitted there on February 12th, 2019.
4. On February 12th, 2019 a Nursing Home Transfer and Discharge Notice (DN) was issued. (Respondent's Exhibit 1). The notice is signed by the administrator and the physician, but not by the resident or the resident's designee.
5. The petitioner's mother stated that she did not receive the DN, and nobody at the hospital saw the form when she was admitted.
6. The district ombudsman manager testified that the discharge papers that were faxed to them from the nursing home, was received without a doctor's signature on them. The reason checked off was that the petitioner's needs cannot be met in this facility; however, the reason that the petitioner was sent to the hospital was due to her behavioral condition, and the NH did not use the safety of other individuals is endangered. The petitioner was stabilized at the hospital and was ready to be sent back to the NH six days later when the NH said they did not have any available beds.

The ombudsman explained that the petitioner is covered by Medicaid and that Medicaid pays for up to eight consecutive days of hospitalized bed hold. (Respondent's Exhibit 3 discharge notes dated February 18th, 2019).

7. The NH administrator argued that the respondent sent ombudsman the DN on February 15th, 2019 signed by the doctor, and that the original DN did not have the doctor's signature since it was the initial form sent since they have five days to send the form and then they sent the one with the doctor's signature which he signed on the same day. (Respondent's Exhibit 4). The administrator further explained that they have the physician's order requesting the petitioner be transferred to [REDACTED] and that the "facility was unable to meet patient needs, unable to come back". (Respondent's Exhibit 1). She further explained that the petitioner is a threat to herself and others and that Hospice services were not continued. (Respondent's Exhibit 1).

8. The petitioner's mother argued that before the scissor incident on February 12th, 2019, the petitioner had been aggressive, but that she was given her medication and then she was fine. She claims that the medication that was given to the petitioner to calm her down, [REDACTED] was decreased from 2 mg to 1 mg. (Petitioner's Exhibit 4 dated January 18th, 2019 and February 1st, 2019). She feels that this was done on purpose so that the petitioner would get sick and could be dumped to the hospital. She argued why the psychiatrist at the NH did not see her. She further stated that they cannot afford to pay an aid and that per Florida law, a parent is not responsible for an adult child.

9. The petitioner's father feels that it would have been reasonable for the NH to explain to them that they could not handle the petitioner and discuss discharge. He

argues that he does not see any documentation in the notes regarding the out of control behavior, and that the person from Vitas was not there to testify regarding the scissor incident. He feels it is just a money issue.

10. The petitioner's mother argued that it was her wish for her daughter to be readmitted to the facility because the petitioner felt it was her home and that she had friends there.

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 that section this order is the final administrative decision of the Department of Children and Families.

12. 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.

13. On February 12th, 2019, the facility issued a discharge notice to the petitioner.

The facility's reason for discharging the petitioner is that her needs cannot be met at the facility, which is a reason permitted for discharge from a facility in accordance with the above federal regulations.

14. 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.

15. In accordance with the above Federal Regulation and State Statute, the DN was signed by the Facility Administrator and the Facility Physician in one of the DN's presented as evidence. The second DN presented by the ombudsman was not signed

by the physician. Neither DN was signed by the petitioner or the petitioner's representative. The DN also indicated the reason and effective date of the discharge, the location to which the petitioner was to be discharged, and the petitioner's appeal rights along with other required assistance information.

16. However, the evidence submitted does not establish that the petitioner's medical records were well documented with the reasons by which her medical needs could not be met all of a sudden. Though the petitioner's welfare may have been in question at the time of her discharge on February 12th, 2019, the undersigned concludes that the respondent failed to prove that it could not meet her needs. 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.

17. In accordance with the above authorities, the facility sought to involuntarily discharge the petitioner to [REDACTED] Hospital for the reason that "[her] needs cannot be met in this facility."

18. 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.

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))."

19. 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 the Facility could not meet her 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 03 day of June, 2019,

in Tallahassee, Florida.

FINAL ORDER (Cont.)

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Alma Patino
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
Office: 850-488-1429
Fax: 850-487-0662
Email: Appeal.Hearings@myflfamilies.com

Copies Furnished To: [REDACTED], Petitioner
[REDACTED], Respondent
Agency for Health Care Administration
[REDACTED]