

FILED

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

Aug 21, 2019
Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 19N-00052

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a nursing home discharge hearing in the above-referenced matter on June 28, 2019 at 1:00 p.m., at the [REDACTED]

[REDACTED]

APPEARANCES

For Petitioner: [REDACTED], the petitioner's daughter

For Respondent: [REDACTED], Nursing Home Administrator

STATEMENT OF ISSUE

At issue is the facility's action to discharge the petitioner due to the safety of other individuals in the facility being endangered; a Nursing Home Transfer and Discharge Notice was issued on March 28, 2019 with an effective date of March 28, 2019. The respondent carries the burden of proof by clear and convincing evidence in this appeal.

PRELIMINARY STATEMENT

The petitioner was not present. The petitioner was transferred to [REDACTED] on March 21, 2019 and remains at the hospital as of the date of the hearing. The petitioner's daughter has power of attorney.

[REDACTED], District Ombudsman Manager, with Florida Ombudsman Program and [REDACTED], Certified Long-Term Care Ombudsman, with Florida Ombudsman Program, appeared as witnesses for the petitioner. [REDACTED] Social Worker, [REDACTED], Director Social Services, [REDACTED] (minimal data set) coordinator, [REDACTED] Director of Nursing, appeared as witnesses for the respondent. [REDACTED] Administrator in Training and [REDACTED], Social Worker Intern, observed. [REDACTED] appeared by telephone as a witness for the respondent.

On July 5, 2019, the Office of Appeal Hearings received a letter from the Agency for Health Care Administration (AHCA) which informed that an unannounced visit to the nursing facility was completed and there were no violations. This letter was entered into evidence and marked as Hearing Officer's Exhibit 1.

The petitioner submitted four exhibits, which were entered into evidence as Petitioner's Exhibits "1" through "4". The respondent submitted one exhibit, which was entered into evidence as Respondent's Exhibit "1". The record was left open until close of business on July 12, 2019 for submission of additional evidence from the parties. On July 12, 2019, the respondent submitted additional documents, which were entered into evidence as Respondent's Exhibit "2".

On July 12, 2019, the petitioner's witness provided a Proposed Final Order to the undersigned, included in the Proposed Final Order were documents which were identified as federal regulation 42 CFR 483.30(a). Upon further review of the document, it appears the petitioner's witness is referring, in part, to Title 42 Code of Federal Regulation (CFR) 483.35(a) and not 483.30(a). Accordingly, the undersigned takes administrative notice of Title 42 C.F.R. 483.35(a). These submitted documents were entered into evidence as Petitioner's Exhibit "5". The record closed on July 12, 2019.

FINDINGS OF FACT

1. The petitioner was in the respondent's skilled nursing facility since October 17, 2016. He was a resident in the Memory care unit. The unit includes care for Alzheimer's and dementia residents. The petitioner has been diagnosed with the following: [REDACTED]

2. The petitioner has been transported to the hospital emergency room, due to aggressive and combative behavior, and readmitted multiple times from the hospital on March 9, 2019, March 15, 2019 and March 20, 2019. The petitioner was admitted to the hospital on March 9, 2019 for [REDACTED] and [REDACTED] at the nursing facility, which escalated to threatening a staff member with a knife (Petitioner's Exhibit 2, page 169). The petitioner was discharged and returned to the nursing facility.

3. On March 21, 2019, the petitioner's behavior became unpredictable. The respondent explained the petitioner grabbed a facility employee in the upper extremities and threw the employee onto the floor, which caused the employee to sustain injury. The [REDACTED] Police Department arrived after a 911 call. The employee and the

petitioner were transported by Emergency Medical Personnel (EMS) to [REDACTED] [REDACTED] by ambulance. The decision to voluntarily transfer the petitioner to the hospital was made by the nursing facility and the petitioner's daughter. The nursing facility's physician, [REDACTED] requested the petitioner be Baker Acted and recommended the petitioner should not return to the nursing facility. The petitioner was subsequently Baker Acted by the emergency Department physician and admitted to the hospital's [REDACTED] medical unit on March 21, 2019 and re-initiated on March 27, 2019 throughout the time the petitioner was in the hospital (Petitioner's Exhibit 2, page 84). The petitioner remains in the hospital's psychiatric medical unit.

4. On March 28, 2019, a Nursing Home Transfer and Discharge Notice was issued to the petitioner. The reason listed on the discharge notice indicates "the safety of other individuals in this facility is endangered" (Respondent Exhibit 1). The notice was signed by [REDACTED]. A brief explanation to support the facility's action indicates the following:

Facility cannot meet the health and mental health needs of resident due to [REDACTED]

5. The respondent explained that, prior to the March 21, 2019 hospitalization, the petitioner had been threatening the staff. The petitioner's needs could not be met in its facility because of the petitioner's behavior, which involved unpredictable and unprovoked incidents on three episodes, one resulting in assaultive altercations between the petitioner and staff (Petitioner's Exhibit 2, Pages 52 and 72).

6. Additionally, the respondent explained that the petitioner has [REDACTED] that the facility cannot provide. Due to the petitioner's behavior, the facility is unable to

provide the necessary level of care to meet the petitioner's needs and the safety of others. The respondent presented medical reports which show the petitioner as having an increase in behavioral, psychiatric, or mood related symptoms in the month of March 2019 (Respondent's Exhibits 1 and 2).

7. The petitioner's daughter does not dispute the petitioner's unstable behavior on March 21, 2019. The petitioner's daughter was at the facility on March 21, 2019 and witnessed the petitioner's behavior become unpredictable. The petitioner's daughter testified, after a discussion with the facility staff regarding the petitioner's behavior, she informed the [REDACTED] Police Department to Baker Act the petitioner. The petitioner's daughter assumed the petitioner would be Baker Acted for three days.

8. Additionally, the petitioner's daughter explained she believes medication changes, diagnoses, and treatment may have caused the behavior. The petitioner is showing improvement and is stabilized with his current doses of his medications at the hospital [REDACTED]. She believes the March [REDACTED] incident was an isolated incident. The petitioner was accepted to a nursing home facility in [REDACTED] the petitioner's daughter is requesting the respondent readmit the petitioner to the nursing facility.

9. The nursing facility's physician, [REDACTED] testified, increasing the doses of medication particularly in elders, does not cause disinhibit behavior, it may cause an adverse reaction (allergic). The medication the petitioner is prescribed causes side effects of dizziness, drowsiness and loss of coordination.

10. The District Ombudsman Manager testified the petitioner was stabilized at the hospital and was ready to be sent back to the nursing facility. The respondent refuses

to readmit the petitioner to the nursing facility; therefore, he believes the petitioner was abandoned. The petitioner's witness believes proper training from staff is needed regarding patients who present unstable behavior.

11. The only issue before the hearing officer is whether the discharge was in accordance with federal regulations. Any issues concerning the petitioner's allegations of improper protocol by facility staff, medication changes or diagnoses, or treatment the petitioner received while residing at the facility are not within the jurisdiction of the hearing officer. These issues must be addressed with AHCA.

12. The District Ombudsman Manager presented documents that show a consultation was performed at [REDACTED] hospital on June 5, 2019 by [REDACTED] (Petitioner's Exhibit 2, page 85). The notes indicate a court hearing was done on two occasions for the petitioner, and the last assessment was done on April 29, 2019, at which time it was agreed that the petitioner met the criteria for involuntary placement and needed further stabilization for six weeks as he continued to present episodic [REDACTED] behavior. Furthermore, the June 5, 2019 consultation notes indicate the petitioner has not shown much improvement and his impulse control is unpredictable.

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 said authority, this order is the final administrative decision of the Department of Children and Families.

14. The Code of Federal Regulations at 42 C.F.R. § 483.15, Admission, transfer and discharge rights, states in relevant 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;(emphasis added)

(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.

...

(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 (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.

15. On March 28, 2019, the nursing facility issued a discharge notice to the petitioner.

The facility's reason for discharging the petitioner was the safety of other individuals in

the facility is endangered. This is one of the six reasons permitted for discharge from a facility in accordance with the above federal regulation.

16. 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.

...

(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:

...

(b) The health or safety of other residents or facility employees would be endangered, and the circumstances are documented in the resident's medical records by the resident's physician or the medical director if the resident's physician is not available. (emphasis added)

(8) The notice required by subsection (7) must be in writing and must contain all information required by state and federal law, rules, or regulations applicable to Medicaid or Medicare cases. The agency shall develop a standard document to be used by all facilities licensed under this part for purposes of notifying residents of a discharge or transfer. Such document must include a means for a resident to request the local long-term care ombudsman council to review the notice and request information about or assistance with initiating a fair hearing with the department's Office of Appeals Hearings. In addition to any other pertinent information included, the form shall specify the reason allowed under federal or state law that the resident is being discharged or transferred, with an explanation to support this action. Further, the form must state the effective date of the discharge or transfer and the location to which the resident is being discharged or transferred. The form must clearly describe

the resident's appeal rights and the procedures for filing an appeal, including the right to request the local ombudsman council review the notice of discharge or transfer. A copy of the notice must be placed in the resident's clinical record, and a copy must be transmitted to the resident's legal guardian or representative and to the local ombudsman council within 5 business days after signature by the resident or resident designee.

...

(10)...

...

(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.

...

11) Notwithstanding paragraph (10)(b), an emergency discharge or transfer may be implemented as necessary pursuant to state or federal law during the time after the notice is given and before the time a hearing decision is rendered. Notice of an emergency discharge or transfer to the resident, the resident's legal guardian or representative, and the State Long-Term Care Ombudsman Program or the local ombudsman council if requested pursuant to subsection (9) must be by telephone or in person. This notice shall be given before the transfer, if possible, or as soon thereafter as practicable. The State Long-Term Care Ombudsman Program or a local ombudsman council conducting a review under this subsection shall do so within 24 hours after receipt of the request. The resident's file must be documented to show who was contacted, whether the contact was by telephone or in person, and the date and time of the contact. If the notice is not given in writing, written notice meeting the requirements of subsection (8) must be given the next working day.

(12) After receipt of any notice required under this section, the State Long-Term Care Ombudsman Program or local ombudsman council may request a private informal conversation with a resident to whom the notice is directed, and, if known, a family member or the resident's legal guardian or designee, to ensure that the facility is proceeding with the discharge or transfer in accordance with this section. If requested, the State Long-Term Care Ombudsman Program or the local ombudsman council shall assist the resident with filing an appeal of the proposed discharge or transfer.

...

(15) (a) The department's Office of Appeals Hearings shall conduct hearings under this section...

(b) The department shall, by rule, establish procedures to be used for fair hearings requested by residents. These procedures shall be

equivalent to the procedures used for fair hearings for other Medicaid cases, chapter 10-2, part VI, Florida Administrative Code. The burden of proof must be clear and convincing evidence...

17. In accordance with the above federal regulation and statute, the discharge notice was signed by a physician. The discharge notice also indicated the reason and effective date of the discharge, the location to which the petitioner is to be discharged, and the petitioner's appeal rights along with other required assistance information. A copy was provided to the petitioner's daughter.

18. It is the petitioner's witness's position the nursing facility is required to conduct a comprehensive and accurate assessment to meet the needs of the resident. The petitioner's witness based the supportive findings according to the federal regulations at 483.35. The undersigned reviewed the rule.

19. The Code of Federal Regulations at 42 C.F.R. § 483.35(a), Nursing services, in part states:

The facility must have sufficient nursing staff with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with the facility assessment required at §483.70(e).

20. The above cited authority addresses the sufficient staffing of nurses and qualifications of such personnel in nursing facilities. The facility's reason for discharging the petitioner was the safety of other individuals in its facility is endangered. The issue the undersigned is to address, is whether the discharge was in accordance to the state and federal regulations. The hearing officer only considered whether the discharge was

for a lawful reason(s) and that the requirements of the controlling authorities have been met.

21. The Code of Federal Regulations at 42 C.F.R. § 483.40, Behavioral health services, states in relevant part:

Each resident must receive and the facility must provide the necessary behavioral health care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care. Behavioral health encompasses a resident's whole emotional and mental well-being, which includes, but is not limited to, the prevention and treatment of mental and substance use disorders.

(a) The facility must have sufficient staff who provide direct services to residents with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with §483.70(e). These competencies and skills sets include, but are not limited to, knowledge of and appropriate training and supervision for:

(1) Caring for residents with mental and psychosocial disorders, as well as residents with a history of trauma and/or post-traumatic stress disorder, that have been identified in the facility assessment conducted pursuant to §483.70(e), and

(2) Implementing non-pharmacological interventions.

(b) Based on the comprehensive assessment of a resident, the facility must ensure that—

(1) A resident who displays or is diagnosed with mental disorder or psychosocial adjustment difficulty, or who has a history of trauma and/or post-traumatic stress disorder, receives appropriate treatment and services to correct the assessed problem or to attain the highest practicable mental and psychosocial well-being; (emphasis added)

(2) A resident whose assessment did not reveal or who does not have a diagnosis of a mental or psychosocial adjustment difficulty or a documented history of trauma and/or post-traumatic stress disorder does not display a pattern of decreased social interaction and/or increased withdrawn, angry, or depressive behaviors, unless the resident's clinical condition demonstrates that development of such a pattern was unavoidable; and

(3) A resident who displays or is diagnosed with dementia, receives the appropriate treatment and services to attain or maintain his or her highest practicable physical, mental, and psychosocial well-being.

(c) If rehabilitative services such as but not limited to physical therapy, speech-language pathology, occupational therapy, and rehabilitative services for mental disorders and intellectual disability, are required in the resident's comprehensive plan of care, the facility must—

(1) Provide the required services, including specialized rehabilitation services as required in §483.65; or

(2) Obtain the required services from an outside resource (in accordance with §483.70(g) of this part) from a Medicare and/or Medicaid provider of specialized rehabilitative services.

(d) The facility must provide medically-related social services to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident.

22. In this case, according to the nursing facility and hospital clinical records, the petitioner presented aggressive behavior, which required the respondent to seek appropriate treatment to meet the petitioner's needs outside of the facility. The respondent called the [REDACTED] Police Department (911) and the hospital. The hospital's emergency services department determined the petitioner needed to be admitted to its [REDACTED] medical unit. The petitioner was Baker Acted on March [REDACTED] and another Baker Act was re-initiated at the hospital on March 27, 2019. As of the June [REDACTED], 2019 consultation, completed by [REDACTED] the petitioner had not shown much improvement and continued to have [REDACTED]

The evidence submitted establishes that the petitioner's clinical records were well documented with the behaviors that endanger the safety of other individuals in the facility, which is the basis for his discharge.

23. After careful review of the cited authorities and evidence, the undersigned concludes the respondent met its burden of proof. The undersigned concludes the

respondent's action to discharge the petitioner was proper, as the facility has proven that the safety of other individuals in the facility was endangered.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, this appeal is DENIED, as the facility's action to discharge the petitioner is correct and in accordance with federal regulations.

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 21 day of August, 2019,

in Tallahassee, Florida.

[Redacted Signature]

[Redacted Name]
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