

Oct 24, 2019

Office of Appeal Hearings  
Dept. of Children and Families

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

[REDACTED]  
[REDACTED]  
[REDACTED]

APPEAL NO.: 19N-00089

PETITIONER,

Vs.

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on October 10, 2019 at 2:05 p.m. a [REDACTED]

[REDACTED]

**APPEARANCES**

[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]

**STATEMENT OF ISSUE**

Petitioner is appealing the nursing home facility's decision to transfer and/or discharge him from the nursing home. The facility has the burden of proving by clear and convincing evidence that the transfer and/or discharge was appropriate under 42 C.F.R. § 483.15.

**PRELIMINARY STATEMENT**

Petitioner did not submit any documents into evidence.

[REDACTED]

[REDACTED]; an [REDACTED]

[REDACTED] appeared as witnesses for Respondent.

The Director of Nursing (“Respondent’s testimony”) was the lead witness at the hearing for Respondent.

Respondent introduced Exhibits 1-10 into evidence.

**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. Petitioner was admitted into [REDACTED] on June 14, 2019. Petitioner was [REDACTED] (See Respondent’s Exhibit 3 marked “C”):

[REDACTED]

2. Petitioner’s wife indicated Petitioner suffers from [REDACTED]

[REDACTED]

3. Petitioner is ambulatory and prone to wandering. (Respondent’s Testimony and Respondent’s Exhibit 6).

4. Petitioner not only wanders, but he is also “exit seeking”. The facility placed a wander guard on Petitioner to prevent wandering. The Director of Nursing explained a wander guard is a band that is worn on the ankle, and when the individual comes within 20 feet of the facility’s door an alarm will sound notifying staff that an individual is trying to leave the building. Petitioner removed his wander guard from his ankle and refused to allow staff to place it back on his ankle. The staff at the facility placed the wander guard on Petitioner’s wheel chair. The staff started a 15-minute check on Petitioner due to him refusing to wear the wander guard. (Respondent’s testimony and Respondent’s Exhibits 3 marked “C”, and 8).

5. The facility decided that due to Petitioner’s wandering and exit seeking behavior a nursing home with a lock unit would be more appropriate for Petitioner. The facility opens out to State Road 52, which poses a safety risk to Petitioner. The facility provided a Nursing Home Transfer and Discharge Notice (“Notice”) to the Petitioner’s wife. (Respondent’s testimony).

6. Petitioner’s wife indicated that she wanted Petitioner to remain at the facility and did not want him discharged. (Petitioner’s testimony).

7. On July 12, 2019, Respondent issued a Notice to Petitioner. The Notice states in relevant parts (Respondent’s Exhibit 1):



8. Petitioner's wife filed a timely appeal contesting the Notice.

9. Pursuant to the Discharge Notice, Petitioner is to be discharged t [REDACTED]

[REDACTED] (See Respondent's Exhibit 1). [REDACTED]

[REDACTED]. (Respondent's testimony).

10. It is recommended Petitioner be transferred to a secured lock unit. (Respondent's testimony).

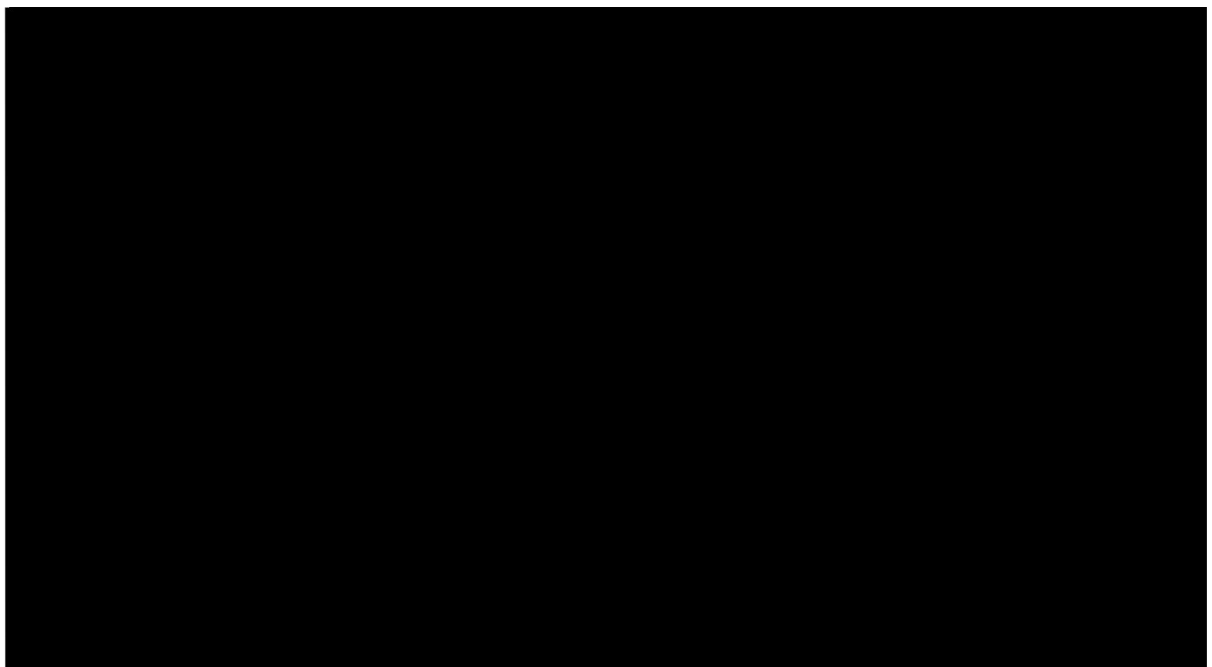
11. On July 18, 2019, Petitioner left his wheelchair with the wander guard attached to it and exited the facility without the alarm sounding. The facility's staff located Petitioner at a pizza establishment down the street from the facility. The facility opens out to State Road 52, which is a busy roadway. The facility's staff brought Petitioner back to the facility, but he refused to enter the facility. Petitioner insisted that he wanted to go home with his wife. The facility contacted Petitioner's wife due to his failure to be redirected into the facility. Petitioner's wife appeared and attempted to help get Petitioner back into the facility. Petitioner refused to enter the facility and his behavior became erratic.

The Director of Nursing was in fear for the wife's safety and her staff that she called the Pasco County Sheriff's Office [REDACTED] (Respondent's testimony and Respondent's Exhibit 3 marked "C").

12. The Pasco County Sheriff's Office [REDACTED] [REDACTED] (Respondent's testimony and Respondent's Exhibit 3 marked "C" and 10).

13. Petitioner's wife admitted that she requested the nursing home facility to contact the police [REDACTED] because he refused to return to the facility and his [REDACTED]. Petitioner's wife indicated that she was not in fear of her safety.

14. Respondent issued an immediate Nursing Home Transfer and Discharge Notice ("Notice") on July 18, 2019 to Petitioner. The facility's Nursing Director approved of the immediate discharge of Petitioner because he was immediatel [REDACTED] and transferred to a Hospital. The Notice states in relevant parts (Respondent's Exhibit 1):



15. On July 25, 2019, the [REDACTED] informed the facility Petitioner is ready to be taken back to the facility. The facility refused to readmit Petitioner into the facility because he elopes, and he requires a facility with a lock unit. (Respondent's Exhibit 5).

16. Petitioner's wife indicate [REDACTED] refused to accept Petitioner because of his dementia. Petitioner's wife eventually found placement for Petitioner at [REDACTED]. Petitioner's wife wants the facility to readmit Petitioner. Petitioner's wife believe [REDACTED] is not qualified to handle and care for a dementia patient who is Type 1 diabetic that needs insulin. (Petitioner's testimony).

17. Petitioner's wife explained the facility advertised as a facility that can handle dementia patients. The symptoms of dementia patients are that they wander and have behavioral problems. Petitioner's wife admitted Petitioner has been in previous Nursing Homes that had secured lock units due to his exit seeking behaviors. Petitioner's wife believes the Assisted Living Facility is not secure for Petitioner because anyone can activate the gate and the facility is four miles down from a main roadway. (Petitioner's testimony).

18. The Director of Nursing went to [REDACTED] to reassess Petitioner for readmission to the facility. Petitioner appeared happy and content with his situation at the Assisted Living Facility. In her opinion, the Assisted Living Facility appeared to be more secure due to its location in a neighborhood and a gated entry way with fencing around the property as oppose to her facility that opens to a three-lane roadway with no gate around the property. (Respondent's testimony).

**CONCLUSIONS OF LAW**

19. 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.

20. Section 400.022, Florida Statutes, provides in relevant part:

400.022 Residents' rights. —

(1) All licensees of nursing home facilities shall adopt and make public a statement of the rights and responsibilities of the residents of such facilities and shall treat such residents in accordance with the provisions of that statement. The statement shall assure each resident the following:

....

(p) The right to be transferred or discharged only for medical reasons or for the welfare of other residents, and the right to be given reasonable advance notice of no less than 30 days of any involuntary transfer or discharge, except in the case of an emergency as determined by a licensed professional on the staff of the nursing home, or in the case of conflicting rules and regulations which govern Title XVIII or Title XIX of the Social Security Act. . .

21. 42 C.F.R. § 483.15 limits the reasons a nursing facility may discharge a Medicaid or Medicare patient and 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.

(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:**

**(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; and**

**(B) A physician when transfer or discharge is necessary under paragraph (c)(1)(i)(C) or (D) of this section.**

**(iii) Information provided to the receiving provider must include a minimum of the following:**

**(A) Contact information of the practitioner responsible for the care of the resident**

**(B) Resident representative information including contact information.**

**(C) Advance Directive information.**

**(D) All special instructions or precautions for ongoing care, as appropriate.**

**(E) Comprehensive care plan goals,**

**(F) All other necessary information, including a copy of the resident's discharge summary, consistent with §483.21(c)(2), as applicable, and any other documentation, as applicable, to ensure a safe and effective transition of care.**

**(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. (emphasis added).

22. In accordance with the above federal regulation and state statute, the Discharge Notice was signed by the facility administrator and physician/designee. A copy was also provided to Petitioner. The evidence indicated the facility did discharge Petitioner when he was transferred to the hospital and did not provide a 30-day Notice. However, based on the above authority there is an exception to not providing a 30-day Notice when an emergency is determined by a licensed professional on the staff of the nursing home. The evidence shows the Director of Nursing determined an emergency had occurred when Petitioner was Baker Acted and transferred to a Hospital. The Discharge Notice also indicated the reason and effective date of the discharge, the location to which Petitioner was to be discharged, and Petitioner's appeal rights along with other required assistance information.

23. The evidence submitted establishes that Petitioner's medical records were documented pursuant to 42 C.F.R. § 483.15. The evidence further indicates that Petitioner is a wanderer who is prone to "exit seeking." The evidence also shows that Respondent has tried implementing safety strategies such as wander guards and 15-minute checks. Yet, as the facility is not a secured facility, the wander guard and 15-minute checks would have to be continuous in nature in order to ensure Petitioner's safety, and Respondent is unable to provide continuous coverage unless Petitioner cooperates in wearing the wander guard. The evidence shows Petitioner does not cooperate in wearing the wander guard. This leaves the only option available, to ensure Petitioner's safety, to be a secured facility.

24. The evidence submitted establishes that Petitioner's clinical records were documented that the facility cannot meet his needs.

25. 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 Respondent's evidence does rise to the level of clear and convincing.

26. Establishing that the reason(s) for a discharge is lawful is just one step in the discharge process. The facility must also identify an appropriate transfer or discharge location and a safe and orderly transfer or discharge from the facility. The Hearing Officer cannot and has not considered either of these issues. 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.

27. Discharge by the facility must comply with all applicable Federal Regulations, Florida Statutes, and Agency for Health Care Administration requirements. Should Petitioner have concerns about the appropriateness of the discharge location or the discharge process, he may contact the Agency for Health Care Administration's health care facility complaint line at (888) 419-3456.

28. After careful review of the cited authorities and evidence, the undersigned concludes that Respondent did meet the burden of proof by clear and convincing evidence. The undersigned concludes that Respondent's action discharging Petitioner is proper, as the facility has proven that it could not meet Petitioner's needs.

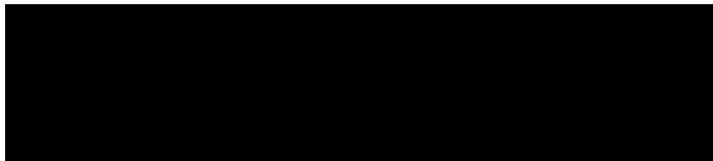
**DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, this appeal is DENIED. Respondent has established that this discharge is permissible under federal regulations or state statutes. Therefore, Respondent may proceed with the discharge, in accordance with all applicable AHCA requirements.

**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 24 day of October, 2019, in  
Tallahassee, Florida.



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FINAL ORDER (Cont.)

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