

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

FILED

Oct 25, 2019

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]
[REDACTED]
[REDACTED]

APPEAL NO. 19N-00096

PETITIONER,

Vs.

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

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, a nursing home discharge hearing in the above-referenced matter convened before the undersigned on October 4, 2019 at 10:00 a.m., a [REDACTED]

[REDACTED]

APPEARANCES

[REDACTED]

[REDACTED]

[REDACTED]

STATEMENT OF ISSUE

At issue is the facility's intent to discharge the petitioner; a Nursing Home Transfer and Discharge Notice was issued on July 18, 2019 with an effective date of August 18, 2019. The nursing home is seeking to discharge the petitioner due to his health improving sufficiently that he no longer needs the services provided by the

facility. The respondent carries the burden of proof by clear and convincing evidence in this appeal.

PRELIMINARY STATEMENT

The hearing was originally scheduled to convene at th [REDACTED] on September 30, 2019 at 11:00 a.m. with Hearing Office [REDACTED]. Due to unforeseen circumstances, this appeal was reassigned to the undersigned hearing officer and reset for October 4, 2019 at 10:00 a.m.

On September 13, 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 did not submit any exhibits. 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 October 14, 2019 for submission of additional evidence from the parties. On October 14, 2019, the respondent submitted additional documents, which were entered into evidence as Respondent's Exhibit "2". The petitioner did not submit any documents. The record closed on October 14, 2019.

FINDINGS OF FACT

1. The petitioner [REDACTED] was admitted into the respondent's skilled nursing facility on February 22, 2019 for rehabilitation after a hospital stay due to back surgery. He was diagnosed with [REDACTED]. He needed occupational and physical therapy services. He received

those services at the facility. The petitioner ambulates with the assistance of a wheelchair.

2. On July 16, 2019, an incident occurred where the petitioner's roommate was unable to get up from the floor. The petitioner assisted the roommate. The petitioner was counseled by the facility's Advanced Practiced Registered Nurse (APRN) regarding the danger of helping a patient with possible injuries. On July 18, 2019, the petitioner was evaluated by the attending pain management specialist [REDACTED] who manages the petitioner's chronic pain. The evaluation notes indicate the petitioner is able to be independent and conclude that his health improved, and he no longer needed the services provided at the facility.

3. On July 18, 2019, the respondent issued a Nursing Home Transfer and Discharge Notice to the petitioner with an effective date of August 18, 2019. The notice allows for a brief explanation to support the action and explains a physician/designee's signature or a physician's written order for discharge are required if the facility is seeking to discharge a resident because he/she no longer requires the services provided by the facility. The brief explanation of the action b [REDACTED] indicated the following:

[REDACTED]

4. The petitioner doesn't feel safe to be alone and feels that the nursing home is the appropriate location for him. Additionally, he has not completed therapy. He is seeking long term care at the facility.

5. The respondent submitted written statements from staff witnessing the petitioner's behavior. The respondent presented progress notes from the pain specialist dated July 19, 2019 through September 26, 2019. These dates were after the petitioner received the July 18, 2019 Nursing Home Transfer and Discharge Notice. There was no testimony from the attending physician and no medical records regarding the petitioner's physical therapy treatment, due t [REDACTED] were submitted into evidence to support the respondent's contention that the petitioner's health had improved sufficiently so that he no longer needs skilled services.

6. The record was held open to allow the respondent an opportunity to submit doctor notes or medical records to support the respondent's contention that the petitioner's health had improved sufficiently to be discharged. The petitioner was also given an opportunity to submit his medical record to support his testimony that he requires continued skill services at the facility. The petitioner did not submit any documents.

CONCLUSIONS OF LAW

7. 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.

8. 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—
...

(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;

...

(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; 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, (emphasis added) 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.

(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—

...

(C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (c)(1)(i)(B) of this section;

...

(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;

...

9. On July 18, 2019, the facility issued a Nursing Home Transfer and Discharge Notice to the petitioner. The reason listed for discharging the petitioner was that his health had improved sufficiently so that he no longer needed the services provided by the facility, which is a reason permitted for discharge from a facility, in accordance with the above federal regulations.

10. 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.**
(emphasis added)

...

(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, ...

...

(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.

11. The above regulations stipulate that before the facility discharges a resident under any of the circumstances referenced above, the resident's medical records must be documented by the resident's physician showing the reason for the discharge/transfer. The Nursing Home Transfer and Discharge Notice was issued to the petitioner on July 18, 2019 with the discharge to be effective August 18, 2019 signed by the facility's APRN. No documentation pertaining to the petitioner's readiness for discharge was submitted to support the facility's decision to discharge the petitioner. The documents must establish that the petitioner's clinical records were documented, pursuant to the above authority, prior to the discharge notice. The respondent presented progress notes from the pain management specialist dated July 19, 2019 through September 26, 2019, after the Nursing Home Transfer and Discharge Notice was issued to the petitioner. The evidence submitted does not establish that the petitioner's medical records were well documented and demonstrate that the petitioner's health has improved sufficiently so that he no longer requires the services provided at the facility.

12. The undersigned concludes that the reason for the discharge was provided in Federal Regulation (42 C.F.R. § 483.15); however, the facility failed to provide adequate documentation to support the discharge in the medical records by the physician, as required by the regulations.

13. 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.

14. After careful review of the evidence and cited controlling authorities, the undersigned concludes the facility has not met its burden to prove, by clear and convincing evidence, that the petitioner's health has improved sufficiently so that he no longer needs the services provided by the facility. The facility's intent to discharge the petitioner is not upheld at this time.

DECISION

Based upon the foregoing Findings of Fact and Conclusion of Law, the petitioner's appeal is GRANTED. The facility may not proceed with the discharge of the petitioner at this time.

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))."

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 25 day of October, 2019,

in Tallahassee, Florida.



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