

**FILED**

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

Nov 09, 2021  
Office of Appeal Hearings  
Dept. of Children and Families

[REDACTED]

APPEAL NO. 21N-00061

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter at 2:33 p.m. on September 20, 2021.

**APPEARANCES**

For Petitioner: [REDACTED] pro se

For Respondent: [REDACTED] Administrator

**STATEMENT OF ISSUE**

Petitioner appeals Respondent's action discharging him from [REDACTED] [REDACTED] (the "Facility") due to, "Your health has improved sufficiently so that you no longer need the services provided by this facility." Respondent carries the burden of proof by clear and convincing evidence.

**SUMMARY OF PROCEEDINGS**

On September 13, 2021, Petitioner called the Office of Appeal Hearings ("OAH") requesting a hearing continuance. The OAH informed Petitioner to submit his request

in writing. Petitioner did not submit his request in writing. On September 15, 2021, Erik Swenk, Hearing Officer Supervisor, called Petitioner and notified him that the hearing would take place as scheduled at 2:30 p.m. on September 20, 2021, and explained that he could request a continuance at that time.

On September 20, 2021, at approximately 10:30 a.m., Petitioner called the OAH and requested that the hearing take place via Zoom, so his witness could participate. Petitioner did not identify his witness. The OAH informed Petitioner that the hearing was by telephone, and that he could provide his witness with the hearing calling numbers. Petitioner's witness did not appear at the September 20, 2021 hearing. Petitioner did not request a hearing continuance during the September 20, 2021 hearing.

On September 21, 2021, the OAH received an email from [REDACTED], which states, "My name is [REDACTED]. I've been helping [REDACTED] with that above case. I cannot speak and was sent no invite to the hearing. I was told it would be on Microsoft teams. I also sent supporting documents earlier and was not able to find out if they got to the appropriate department." On September 22, 2021, the OAH received a forty-seven (47) page fax from [REDACTED].

Petitioner did not identify Ms. [REDACTED], written or verbal, as his authorized representative or witness. However, on August 10, 2021 the OAH received the Transfer Discharge notice from Petitioner, which included a letter that in part states, "My name is [REDACTED]. I am assisting [REDACTED] in responding to his transfer and discharge note."

Ms. [REDACTED]'s fax was not accepted and/or entered into the record, due to Petitioner not identifying, through written or verbal authorization, Ms. [REDACTED] as his authorized representative.

[REDACTED] Business Office Manager, [REDACTED] appeared as Respondent's witness. Respondent submitted one (1) exhibit, which was entered into evidence and marked as Respondent's Exhibit one ("1"). Petitioner submitted one (1) exhibit which entered into evidence and marked as Petitioner's Exhibit one ("1"). Petitioner was unable to explain the contents of his exhibit.

Respondent requested that the record remain open to submit supporting documents; however, she was unable to explain what the supporting documents were. Therefore, the undersigned denied Respondent's request to leave the record open.

#### **Petitioner's Position**

Petitioner took the position that he did not sign the transfer discharge notice. Petitioner's position is that the Facility "does nothing for him." In addition, the Facility did not provide him with the documents he has requested.

#### **Respondent's Position**

Respondent took the position that Petitioner is independent with all his activities of daily living and does not need to be in a skilled nursing Facility. Respondent's position is that Petitioner's expenses at the Facility were only covered for the first thirty (30) days. And for Petitioner to be eligible for Medicaid Institutional Care Program, the Department of Elder Affairs ("DOEA"), CARES, must evaluate Petitioner and provide a Level of Care ("LOC") approving his stay in a nursing home.

### **FINDINGS OF FACT<sup>1</sup>**

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, date of birth [REDACTED] 1961, was admitted to the Facility on [REDACTED] 2021 from [REDACTED] Medical Hospital, due to extreme alcohol intoxication and seizures as a result of the alcohol intoxication. (Hr'g R.)
2. On August 4, 2021, the Facility issued Petitioner a Nursing Home Transfer Discharge Notice ("Notice"), listing the following reason for discharge or transfer, "Your health has improved sufficiently so that you no longer need the services provided by this facility" The Notice was signed by the Facility Administrator, ("DS"), former Medical Director and Petitioner. (Resp't Ex. 1 at 2-3.)
3. A Notification of LOC from DOEA, dated May 4, 2021, was included with the Transfer Discharge notice. The LOC lists Petitioner's Placement Recommendation as Temporary Nursing Home. (Resp't Ex. 1 at 5.)

### **CONTROLLING LAW**

4. Section 400.0255(15), Florida Statutes ("F.S."), provides the Department of Children and Families, Office of Appeal Hearings, jurisdiction over the subject matter of this proceeding and the parties. This section further prescribes this order as the final administrative decision of the Department of Children and Families.

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<sup>1</sup> Citations within the Findings of Fact and Conclusions of Law in this order follow Florida Rule of Appellate Procedure 9.800 and *The Bluebook: A Uniform System of Citation* as the standard for citation.

5. Title 42 Code of Federal Regulations Section 483.15, Admission, transfer and discharge rights. sets forth the reasons a facility may involuntarily discharge a resident as follows:

...  
(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...

**(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.]

6. Section 400.0255, F.S., Resident transfer or discharge; requirements and procedures; hearings, in relevant 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... 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...

(15)(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.**

[Emphasis added.]

7. Florida Administrative Code, Rule 59G-4.290, Skilled Services, in part states:

(1) Purpose. This rule establishes the level of care criteria that must be met in order for nursing and rehabilitative services to qualify as skilled services under Medicaid.

(2) Definitions as used in this section...

(f) Skilled care recipient. A Medicaid applicant or recipient who requires skilled nursing or skilled rehabilitative services.

(3) Skilled Services Criteria.

(a) To be classified as requiring skilled nursing or skilled rehabilitative services in the community or in a nursing facility, the recipient must require the type of medical, nursing or rehabilitative services specified in this subsection.

(b) Skilled Nursing. To be classified as skilled nursing service, the service must meet all of the following conditions:

1. Ordered by and remain under the supervision of a physician;
2. Sufficiently medically complex to require supervision, assessment, planning, or intervention by a registered nurse.
3. Required to be performed by, or under the direct supervision of, a registered nurse or other health care professionals for safe and effective performance;
4. Required on a daily basis;

5. Reasonable and necessary to the treatment of a specific documented illness or injury; and,
6. Consistent with the nature and severity of the individual's condition or the disease state or stage...

### **CONCLUSIONS OF LAW**

8. Respondent's reason for issuing Petitioner a Notice is, "Your health has improved sufficiently so that you no longer need the services provided by this facility." This is one (1) of the reasons listed in the above authority as a valid reason for a transfer discharge.
9. In accordance with the above authority, the Facility Administrator and DS, Physician, signed the Notice.
10. The above authority explains that the Facility must ensure that the transfer discharge is documented in the resident's medical record when the reason for transfer discharge is "Your health has improved sufficiently so that you no longer need the services provided by this facility."
11. The evidence established that Respondent did not submit Petitioner's medical record(s) documenting the reason it is requesting a transfer discharge.
12. The above authority establishes "the level of care criteria that must be met in order for nursing and rehabilitative services to qualify as skilled services under Medicaid."
13. The evidence established that a LOC, dated May 4, 2021, placed Petitioner in "Temporary Nursing Home."
14. The evidence established that Respondent's reason for transfer discharge is not that he is Medicaid ineligible.

15. The above controlling authority requires a higher standard of proof in nursing home hearings; there must be substantial and credible evidence at the level of clear and convincing.

16. Respondent's evidence does not rise to the level of clear and convincing.

17. Respondent's evidence proves that CARES determined that Petitioner required temporary nursing home placement on May 4, 2021; it is not sufficient proof in nursing home hearings that Petitioner's health has improved sufficiently so that he no longer needs the services provided by the Facility. Reasonable certainty the Facility's allegation is correct is required to meet the clear and convincing standard.

18. In careful review of the cited authorities and evidence, the undersigned concludes Respondent did NOT meet its burden of proof by clear and convincing evidence that Petitioner's health has improved sufficiently so that he no longer needs the services provided by the Facility.

### **DECISION**


Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is GRANTED. The Facility's action to transfer discharge Petitioner is NOT in accordance with Federal Regulations. The Facility may NOT proceed with its proposed discharge action.

**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, Suite I, Room 129, 2415 North Monroe Street, Tallahassee, FL 32303-4190. 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. 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 09 day of November, 2021,

in Tallahassee, Florida.



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