

FILED

Jul 01, 2022

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. 21N-00084

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]
[REDACTED]
[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter on May 23, 2022 at 11:58 a.m.

APPEARANCES

For Petitioner: [REDACTED] Esq., Petitioner's Attorney

For Respondent: [REDACTED], Esq., Respondent's Attorney

STATEMENT OF ISSUE

Petitioner appeals Respondent's action to discharge him from [REDACTED] [REDACTED] (the "Facility"). Respondent carries the burden of proof by clear and convincing evidence.

SUMMARY OF PROCEEDINGS

The only issue before the undersigned is whether the discharge was in accordance with federal regulations. Any issues concerning Petitioner's allegation that the Patient Responsibility (PR) amount is incorrect will not be addressed in this order.

On September 23, 2021, the Facility issued a *Nursing Home Transfer and Discharge Notice* (“Notice”) informing Petitioner of its intent to discharge him from the Facility effective October 23, 2021 due to his “bill for services at the facility has not been paid after reasonable and appropriate notice to pay”.

On September 30, 2021, Petitioner timely filed an appeal challenging the discharge.

An *Order to Produce Notice and Begin Hearing Process* was issued by the Office of Appeal Hearings (“OAH”) on October 6, 2021.

On October 22, 2021, Respondent filed a response with the OAH with the above-mentioned Notice. Respondent’s response includes a Notice of Case Action (“NOCA”) from the Department of Children and Families (“DCF”) indicating Petitioner’s was expected to pay the nursing facility \$1533.00 monthly effective March 2021 and ongoing.

Pursuant to notices, the undersigned scheduled several discharge hearings. The appeal was continued four times at Petitioner’s requests, including Petitioner’s position that the entire DCF file is needed to prove the PR need to be adjusted. This is a separate issue.

On April 29, 2022, Petitioner filed a Third Request for Production with the OAH requesting the undersigned to compel DCF to produce Petitioner’s Medicaid file for inspection.

On May 10, 2022, the undersigned issued an Order Responding to Petitioner’s Requests for Production informing Petitioner he must file a formal hearing if he wishes to challenge the PR amount of \$1533.00.

On May 18, 2022, Petitioner filed an appeal challenging the PR amount. The OAH assigned Appeal Number: [REDACTED] to this issue.

[REDACTED], Nursing Home Administrator (NHA), appeared as Respondent's witness.

Respondent submitted an evidence packet, which was marked and entered as Respondent's Composite Exhibit one ("1"). Petitioner submitted no exhibits. The record was left open through close-of-business on May 24, 2022 for Respondent to submit additional information. The information was timely received, it was marked and entered as Respondent's Composite Exhibit two ("2"). The record closed on May 24, 2022.

Petitioner's Position

Petitioner took the position that he disagrees with the outstanding balance owed to the Facility because the PR amount is incorrect. Petitioner believes once DCF adjusts Petitioner PR using Petitioner's premiums of more than \$300.00 for supplemental health insurance and almost \$1300.00 monthly court-ordered payments to his homeowner's association to avoid foreclosure on his property, Petitioner will probably end up with no balance due. Petitioner believes he should not be discharged until the PR issue is resolved.

Respondent's Position

Respondent took the position that Petitioner has an outstanding balance of \$12,824.61 as of this hearing date. Respondent has been issuing reasonable and appropriate notices to pay for the services he received at the facility, but Petitioner has failed to pay his PR on a regular basis. Respondent believes it can adjust Petitioner's invoice if DCF adjusts his PR amount.

FINDINGS OF FACT¹

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. The Facility admitted Petitioner on December 11, 2020 under Medicare Part A. Petitioner exhausted his coverage limit on March 20, 2021 and became a private pay resident effective March 21, 2021. (Resp't Wit Test.; Hr'g R.)
2. On March 26, 2021, Petitioner applied for Medicaid through DCF to cover his services at the Facility. On May 6, 2021, DCF sent a Notice of Case Action to the Facility indicating it approved Petitioner's Medicaid application and Petitioner is expected to pay the Facility \$1533.00 effective March 2021 forward. (Resp't Comp Ex. 1 at 9.)
3. Respondent notified Petitioner of his balance due via monthly statements, read over the phone and hand delivered. (*Id.* at 15.)
4. The balance due to the Facility as of September 2021 was \$7549.55. (*Id.* at 10.)
5. Petitioner incurs about \$300.00 premiums for secondary medical insurance and a \$1300.00 monthly court-ordered payment due to his homeowner's association to keep his home for being foreclosed on. (Hr'g R.)
6. Respondent has not been receiving regular payments for services provided to Petitioner since the he attained private pay status. Petitioner's bill has not been brought current and continues to accumulate. (Resp't Wit Test.)

¹ Citations within the Findings of Fact, Controlling Law, and Conclusions of Law in this order follow Florida Rules of Appellate Procedure 9.800 and *The Bluebook: A Uniform System of Citation* as the standard for citation.

7. Petitioner's Eligibility History from DCF shows Petitioner's monthly PR amounts as follows: \$1533.00 from March 1, 2021 through September 30, 2021, \$1205.53 from October 2021 through December 2021 and \$1303.53 effective January 1, 2022 forward. (Resp't Comp Ex. 2 at 10.)

8. On September 23, 2021, the Facility issued a Nursing Home Transfer and Discharge Notice ("Discharge Notice") to Petitioner informing him that he would be discharged from the Facility effective October 23, 2021, due to non-payment of bill for services. The discharge location listed on the notice was [REDACTED], [REDACTED]. (Resp't Comp Ex. 1 at 4-5.)

9. Petitioner disputed the balance owed to the Facility. Petitioner believes the PR amount is incorrect and need to be adjusted by DCF. (Hr'g R.)

10. On September 30, 2021, Petitioner timely filed an appeal to challenge Respondent's action. (*Id.*)

11. Petitioner has been trying to get DCF to adjust his PR since April 2021 but has not been successful as of July 2021. The Facility advised Petitioner to arrange a payment plan, or he will be issued a discharge notice. (Resp't Comp Ex. 1 at 15.)

12. Petitioner has been making regular payments for services to Respondent; however, those payments were applied to the outstanding balance owed. Petitioner's bill has not been brought current and continues to accumulate. As of the date of the hearing, Petitioner's outstanding balance owed to Facility was \$12824.61. (Hr'g R.; Resp't Wit. Test.)

13. Petitioner remains in the Facility pending a hearing decision. (Hr'g R.)

CONTROLLING LAW

14. Section 400.0255(15), Florida Statutes, 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.

15. Title 42 Code of Federal Regulations (“C.F.R.”) Section 483.15 sets forth the reasons a facility may involuntarily discharge a resident as follows: Admission, transfer and discharge rights:

- ...
- (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;**
 - ...
 - (F) The facility ceases to operate.
 - ...

[Emphasis added].

16. Title 42 C.F.R. Section 483.70, Administration, in part states:

A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident...

- (e) Facility assessment. The facility must conduct and document a facility-wide assessment to determine what resources are necessary to care for its residents competently during both day-to-day operations and emergencies. The facility must review and update that assessment, as necessary, and at least annually. The facility must also review and update this assessment whenever there is, or the facility plans for, any change that would require a substantial modification to any part of this assessment. The facility assessment must address or include:
- (1) The facility's resident population, including, but not limited to,
 - (i) Both the number of residents and the facility's resident capacity;
 - (ii) The care required by the resident population considering the types of diseases, conditions, physical and cognitive disabilities, overall acuity, and other pertinent facts that are present within that population;
 - (iii) The staff competencies that are necessary to provide the level and types of care needed for the resident population; (emphasis added)
 - (iv) The physical environment, equipment, services, and other physical plant considerations that are necessary to care for this population; and
 - (v) Any ethnic, cultural, or religious factors that may potentially affect the care provided by the facility, including, but not limited to, activities and food and nutrition services...
 - (i) Residents will be transferred from the facility to the hospital, and ensured of timely admission to the hospital when transfer is medically appropriate as determined by the attending physician or, in an emergency situation, by another practitioner in accordance with facility policy and consistent with state law...

17. Section 400.0255, F.S., Resident transfer or discharge; requirements

and procedures; hearings, states in part:

- ...
- (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...

...

(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) (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.

...

18. The Department of Health and Human Services, Centers for Medicaid and Medicare Services, State Operations Manual, Appendix PP – Guidance to Surveyors for Long Term Care Facilities states in part:

A resident cannot be transferred for non-payment if he or she has submitted to a third-party payor all the paperwork necessary for the bill to

be paid. Non-payment would occur if a third-party payor, including Medicare or Medicaid, denies the claim and the resident refused to pay for his or her stay.

CONCLUSIONS OF LAW

19. According to the above authority, the Facility may not discharge except for certain reasons, one of which is when the resident has failed, after reasonable and appropriate notice, to pay for the stay at the facility. The findings show Petitioner owes the Facility \$7549.55 as of September 30, 2021. Petitioner disputed the amount owed on the contention that the PR assigned by DCF is incorrect.

20. The findings show that on September 23, 2021, the Facility issued a *Nursing Home Transfer and Discharge Notice* to Petitioner and Petitioner's representative. Respondent's reason for discharging Petitioner is that a bill for services rendered has not been paid after reasonable and appropriate notice to pay.

21. In accordance with the above Federal Regulation and State Statute, the Notice was signed by the Facility Administrator thirty days prior to the discharge date. The Notice also indicated the reason and effective date of the discharge, and informed Petitioner of his appeal rights. A copy was provided to Petitioner.

22. The findings show that Petitioner's Medicare assistance ended on March 20, 2021. Respondent sent monthly billing statements on the balance owed to the Facility to Petitioner and Petitioner's representative beginning March 2021 when he attained private pay status. The findings show that Respondent received a NOCA from DCF indicating Petitioner was to pay \$1533.00 monthly to the Facility effective March 2021. The finding show Petitioner's PR amount was \$1533.00 from March 2021 through September 2021. The findings show Respondent provided monthly billing statements to

inform Petitioner of the balance owed based on that amount. The findings show DCF adjusted Petitioner's PR twice since it issued the initial NOCA. The findings show the Facility has further adjusted its invoice based on the PR amounts reflected in Petitioner's Eligibility History from DCF. The findings show the Facility reached out multiple times to Petitioner to inquire about any adjustment to the PR and discuss Petitioner's overdue balance. The findings show Petitioner was not successful getting DCF to adjust his PR. The findings show Petitioner has been making regular payments lately. The findings show Petitioner's balance owed to the Facility was \$12,824.61 as of the day of the hearing.

23. Based on the evidence and testimony, the Facility has established Petitioner has not paid what he owes for his care. The undersigned concludes that the Facility has given Petitioner reasonable and appropriate notice to resolve his PR amount with DCF and eventually pay for his stay at the Facility. This is one of the six (6) reasons provided in federal regulations (Title 42 C.F.R. § 483.15) for which a nursing facility may involuntarily discharge a resident. Respondent has met its burden of proof.

24. Establishing that the reason for a discharge is lawful is just one step in the discharge process. The Facility must also provide discharge planning, which includes identifying an appropriate transfer or discharge location and sufficiently preparing the resident for a safe and orderly transfer or discharge from the facility. The undersigned cannot and has not considered either of these issues. The undersigned has considered only whether the discharge is for a lawful reason and meets the requirements of the controlling authorities.

25. Any discharge by the Facility must comply with all applicable federal regulations, Florida Statutes, and Agency for Health Care Administration requirements. Should the resident have concerns about the appropriateness of the discharge location or the discharge planning process, the resident may contact the Agency for Health Care Administration's health care facility complaint line at (888) 419-3456.

DECISION

Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is DENIED. The Facility's action to discharge Petitioner is in accordance with Federal Regulations. The Facility may proceed with its proposed discharge action, as described in the Conclusions of Law and in accordance with all applicable Agency for Health Care Administration 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, 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. 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 01 day of July, 2022,
in Tallahassee, Florida.



Hearing Officer
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