

Feb 11 2022

Office of Appeal Hearings
Dept. of Children and Families

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

[REDACTED]

APPEAL NO. 21N-00092

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing telephonically in the above-referenced matter on January 12, 2022 at 11:10 a.m.

APPEARANCES

For Petitioner: [REDACTED] Petitioner's son

For Respondent: Thomas Courtney, Esq., Respondent's Attorney

STATEMENT OF ISSUE

Petitioner appeals Respondent's action discharging Petitioner from [REDACTED]

[REDACTED] (the "Facility") because her needs cannot be met at the Facility.

Respondent carries the burden of proof by clear and convincing evidence.

SUMMARY OF PROCEEDINGS

By *Nursing Home Transfer and Discharge Notice* (“Discharge Notice”), dated September 12, 2021, Respondent informed Petitioner that she was being discharged from the facility effective [REDACTED] 2021. The Discharge Notice was not signed by a physician, as required by Title 42 Code of Federal Regulations Section 483.15. On November 16, 2021, the undersigned issued a *Preliminary Order to Dismiss* (“POD”) to provide Respondent due process to object to the granting of appeal due to faulty Discharge Notice. On November 24, 2021, Respondent submitted a twenty-two (22) page response to POD. The hearing was scheduled for January 12, 2021² at 11:00 a.m.

[REDACTED], Certified Geriatric Care Manager with Advocare Care Management, appeared as a witness for Petitioner. [REDACTED] Administrator with the Facility and [REDACTED] Risk Manager with the Facility both appeared as witnesses for Respondent.

Petitioner’s Exhibit one (“1”) was marked and entered into the record. Respondent’s Exhibits one (“1”) through three (“3”) were marked and entered into the record.

Respondent’s attorney objected to testimony related what a head nurse told HG during a conversation, citing it as hearsay. The undersigned overruled this objection.

Respondent’s attorney objected to testimony related to what Petitioner told HG concerning being placed in a chokehold. The undersigned overruled this objection.

Respondent’s attorney objected to Petitioner’s witness asking questions related to documents and testimony being provided. The undersigned overruled this objection.

Petitioner's Position

Petitioner took the position that the Facility discharged her as retaliation because ■ reported elder abuse by the Facility when his mother was found unconscious on the floor next to her bed. ■ also claims his mother was placed in a chokehold because she refused to be moved from her room to the Hospice unit upstairs. ■ claims he was never consulted about Petitioner being moved to the Hospice unit and does not know why she was not allowed to remain in her room since ■ is one facility. It is HG's wish that his mother return to the Facility because he claims her health is deteriorating in her current facility.

Respondent's Position

Respondent took the position that Petitioner's doctor ordered she be transferred from the Facility to the Hospice In-Patient Unit ("IPU") due to changes in her condition. Additionally, Petitioner's physician determined she moved to the Hospice IPU was the suitable placement for Petitioner.

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. ■ provides three separate services: hospice care, skilled nursing services, and assisted living facility. (Hr'g R.)

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.

2. On August 2, 2021, Petitioner (eighty-eight years old) was transferred from [REDACTED] [REDACTED] to the Facility. She was still under the care of her hospice physician. (Hr'g R.)

3. On September 12, 2021, [REDACTED] found Petitioner unresponsive on the floor of her room. He took pictures of the scene and then requested the nurse come to assist her. (Resp't Ex. 2 at 8 and Hr'g R.)

4. On September 12, 2021, Petitioner had a second fall. [REDACTED] began taking pictures and video as staff assisted Petitioner. Petitioner was assessed and no injuries were found. [REDACTED] was asked to stop taking pictures and video of the employees. Respondent called the police and had [REDACTED] escorted from the property. (*Id.* at 9 and Hr'g R.)

5. The hospice staff contacted Petitioner's physician related to her second fall, vomiting, and increased agitation and confusion. (*Id.* at 9.)

6. Petitioner's physician prescribed Zofran for nausea and vomiting. Physician ordered Petitioner be discharged to Hospice IPU. (*Id.* at 21.)

7. On September 12, 2021, Discharge Notice was issued to Petitioner, with an effective date of [REDACTED] 2021, stating : "Your needs cannot be met in this facility." The physician's name was written on the Discharge Notice. (Resp't Ex. 1.)

8. *Patient Transfer Form* indicates changes in Petitioner's condition including she is more agitated than normal. The physician's signature was included on the form. (Resp't Ex. 2 at 13 – 14.)

9. Petitioner was transferred to [REDACTED] on [REDACTED] 2021. (Hr'g R.)

10. On November 2, 2021, Petitioner timely requested an appeal. (Hr'g R.)

11. As of the date of the hearing, Petitioner is no longer residing in [REDACTED]

[REDACTED] (Pet'r Ex. 1 and Hr'g R.)

CONTROLLING LAW

12. 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.

13. Title 42 Code of Federal Regulations 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; 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.

[Emphasis added]

14. 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.

...

(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:**

(a) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility, and the circumstances are documented in the resident's medical records by the resident's physician;

...

(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.

...

(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...

[Emphasis added]

CONCLUSIONS OF LAW

15. The above cited authority establishes Discharge Notice lists six (6) reasons a resident may be involuntarily discharged from a Nursing Facility. The authority also establishes that when a Facility issues a Discharge Notice, thirty (30) day notice must be given before Petitioner is transferred or discharged unless it meets specific circumstances outlined.

16. The above cited authority further explains Discharge Notice must be made as soon as practicable before transfer or discharge when: (1) needs cannot be met; (2) the health of other individuals is endangered, or (3) the safety of other individuals is endangered.

17. The findings show Petitioner was transferred to the Facility on [REDACTED] 2021, from [REDACTED]. The findings show Petitioner suffered two falls, increased agitation and confusion, and nausea and vomiting on September 12, 2021. Petitioner's hospice physician was notified of Petitioner's fall and increased agitation throughout the day. Petitioner was prescribed Zofran, and a Discharge Notice was issued, transferring Petitioner from the Facility to Hospice IPU to address her increased agitation. In review of the evidence, testimony, and cited authority, the undersigned

concludes the Facility has established that Petitioner's needs cannot be met. This is one of the six reasons provided in federal regulations for which a nursing facility may involuntarily discharge a resident without providing thirty (30) days' notice of the discharge action.

18. [REDACTED] argues he was never notified of his mother's transfer from the Facility to IPU. He additionally contends he doesn't understand why she was moved upstairs since [REDACTED] is one facility. He further argues the Facility administrator forced his mother to be moved.

19. Respondent asserts all three service providers are separate entities operating under the [REDACTED] name. Petitioner's transfer from the Facility to Hospice IPU was not initiated nor controlled by the Facility administrator.

20. Respondent, in accordance with the cited authority, issued Notice as soon as practical and discharged Petitioner based on her physician's orders on September 12, 2021.

21. 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 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.

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

DECISION

Based upon the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is DENIED. Respondent's action is AFFIRMED.

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 11 day of February, 2022,

in Tallahassee, Florida.



Pamela Vance
Hearing Officer
Suite I, Room 129
2415 North Monroe Street
Tallahassee, FL 32303-4190
Office: 850-488-1429
Fax: 850-487-0662
Email: Appeal.Hearings@myflfamilies.com

Copies Furnished To:  Petitioner
 Respondent

Agency for Health Care Administration
