

Apr 18, 2023

Office of Appeal Hearings
Dept. of Children and Families

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

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

APPEAL NO. 23N-00015

PETITIONER,
VS.

ADMINISTRATOR

[REDACTED]
[REDACTED]
[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a nursing home discharge hearing in the above-referenced matter on March 29, 2023 at 3:00 p.m. All parties appeared telephonically from different locations.

APPEARANCES

For Petitioner: [REDACTED] pro se

For Respondent: [REDACTED]
[REDACTED]

STATEMENT OF ISSUE

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

SUMMARY OF PROCEEDINGS

Present as a witness for Respondent was [REDACTED] ("Resp't Wit. 1"), Social Services Director and [REDACTED] ("Resp't Wit. 2"), Traveling Business Manager.

Petitioner did not submit any exhibits. Respondent presented four pages of documents, including Nursing Home Transfer and Discharge Notice ("DN") which were entered and marked as Respondents Exhibit one ("1").

The record was left open through close of business on April 5, 2023 for the submission of additional evidence from Petitioner and Respondent. Neither party submitted additional evidence to supplement the record.

The record closed on April 5, 2023.

Petitioner's Position

Petitioner took the position that she only became aware on February 10, 2023 that she owed \$44,160.00 to the Facility when they presented her the DN for non-payment. Petitioner argued she has Medicaid coverage, and that the Facility is billing Medicaid Sunshine HMO for services, which she believes are paid. Petitioner contends she was unaware a different type of Medicaid is needed to pay the Facility and she asserts the Facility has not offered to assist her with the Long-Term Care ("LTC") or Institutional Care Program ("ICP") Medicaid application process. Petitioner contests the diagnosis that her health has improved enough to be discharged. She argues that she has not been cleared of osteomyelitis, which is an infection of the bone, and argues that the Facility has not administered a Magnetic Resonance Imaging (MRI) or a computerized tomography (CT) scan to assess osteomyelitis. Petitioner claims to have

reported to the Facility staff, including the Director of Nursing, a current problem with her toe which includes continuous pain, redness, discharge of pus. Petitioner asserts her health has not improved and that she was not provided with a bill for service prior to the statement Respondent presented to her on February 10, 2023 with the DN.

Petitioner wishes to remain in the Facility.

Respondent's Position

Respondent took the position that Petitioner was reclassified to private pay on December 28, 2022, and has not made payment to the Facility for services.

Respondent asserts Petitioner refused to sign the electronic application for ICP and LTC Medicaid and Petitioner's current level of Medicaid will potentially pay for certain services but does not cover the Facility charges. Respondent asserts they have conducted numerous conversations with Petitioner prior to the February 10, 2023 DN but Petitioner has refused to make payment. Respondent also takes the position that Petitioner's foot is perfectly fine, clear of infection. Respondent argues Petitioner no longer requires services from the Facility, her health has improved and that she is able to be discharged to the community with medications and follow up with podiatry one (1) week after discharge. Respondent argued that Petitioner has not paid for the services received at the Facility after reasonable and appropriate notice and she no longer requires skilled nursing services the Facility provides. Respondent has requested that Petitioner be discharged.

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. Petitioner was admitted to the Facility on November 18, 2022. Petitioner arrived directly from hospital discharge with difficulty walking and a foot infection requiring intravenous (“IV”) antibiotic treatment. (Hr’g R.)

2. On December 28, 2022, Petitioner was notified by Respondent that December 27, 2022 is her final day of medical insurance coverage. Respondent changed Petitioner status to Medicaid pending as Respondent worked to assist Petitioner to apply for the Medicaid application for LTC Medicaid Program coverage. Petitioner refused to sign the written acknowledgement of Respondent’s notification. (Resp’t Wit. 2 Test.) Petitioner disputes receipt of verbal or written notification that her status changed to Medicaid pending. (Hr’g R.)

3. Petitioner refused to provide information required to complete the Medicaid application process, and Petitioner refused to sign the electronic Medicaid application. (Resp’t Wit. 2 Test.) Petitioner disputes that Respondent offered her assistance or opportunity to apply for the LTC Medicaid coverage. (Hr’g R.)

4. On January 11, 2023, IV antibiotic treatment ended, and on January 30, 2023, Petitioner’s white blood count is within parameters for no infection present. (Hr’g R.) Physician order states, “Resident is okay to d/c home with meds on cart. Follow up with

¹ Citations within the Findings of Fact 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.

podiatry one week after d/c.” (Resp’t Ex. 1 at 11; Hr’g R.) Petitioner disputes white blood count is indicator for osteomyelitis not present. (Hr’g R.)

5. On February 10, 2023 Respondent changed Petitioner status to private pay and issued to Petitioner a notice informing her of Past Due Amount: \$32,256.00 and Total Balance Due: \$44,160.00, and states,

We have not yet received payment for [REDACTED]
We have sent prior notifications and attempted contact by phone to resolve this balance without success. We have no other choice but to pursue asset searches and other means to protect our interests.

Please contact our business office immediately to schedule a meeting to resolve this balance. Otherwise, we expect payment either by return mail or by contacting our care center to pay with a debit or credit card.

(*Id.* at 12.) Petitioner disputes Respondent prior notifications or phone calls. (Hr’g R.)

6. On February 10, 2023, Respondent issued to Petitioner DN informing her that she was being discharged for the reasons, “Your bill for services at this facility has not been paid after reasonable and appropriate notice to pay” and “Your health has improved sufficiently so that you no longer need the services provided by this facility.”

(*Id.* at 6.)

7. As of the date of hearing Petitioner has not made payment to the Facility.

(Hr’g R.)

CONTROLLING LAW

8. 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.

9. 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; (emphasis added)

(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. (Emphasis added)

10. 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.

...

(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)

(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;

...

11. Florida Administrative Code ("F.A.C."), 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. . .

12. F.A.C. Rule 28-106.213(3) sets forth that "Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Sections 90.801-.805, F.S."

CONCLUSIONS OF LAW

13. The above controlling authority explains the six (6) allowable reasons for discharge from a nursing facility. The findings show that Respondent issued to

Petitioner the DN on February 10, 2023, citing the reasons for discharge as: “Your bill for services at this facility has not been paid after reasonable and appropriate notice to pay” and “Your health has improved sufficiently so that you no longer need the services provided by this facility”. The undersigned concludes that both reasons are included in the six (6) reasons provided in federal regulations for which a nursing facility may involuntarily discharge a resident.

14. Findings show the for the reason “Your bill for services at this facility has not been paid after reasonable and appropriate notice to pay”, Respondent provided to Petitioner a notice on February 10, 2023 with DN informing her of Past Due Amount: \$32,256.00 and Total Balance Due: \$44,160.00. Respondent testimony is that Petitioner was informed by Respondent in conversation and with prior notices the date her medical insurance ended and when she became private pay, personally responsible for the cost of services. Respondent also testified Petitioner did not cooperate with its attempt to assist Petitioner with LTC Medicaid application process. Petitioner disputes Respondent testimony. Respondent offered no direct witness testimony, and did not provide dates, times, of the alleged notifications and non-cooperation. Respondent submitted no corroborating exhibits to support its testimony that Petitioner refused to apply for the LTC Medicaid program, and no corroborating exhibits to support its testimony that Petitioner was informed of private pay status and accruing balance due prior to February 10, 2023 DN.

15. Findings show the for the reason “Your health has improved sufficiently so that you no longer need the services provided by this facility”, DN is signed by Petitioner’s current primary physician [REDACTED] and includes the discharge order with note,

“Resident is okay to d/c home with meds on cart. Follow up with podiatry one week after d/c.”

16. The above authority explains that the Facility must ensure that the transfer discharge is documented in the resident's medical record when there are medical reasons for the discharge. The findings show Respondent testimony of the existence of clinical records which detail Petitioner health progress leading to discharge. Petitioner disputes testimony. Respondent did not provide direct witness to clinicals, and did not provide exhibits as verification of clinicals, or other medical records. No documentation pertaining to Petitioner's readiness for discharge was submitted to support the Facility's decision to discharge Petitioner. The documents must establish that the Petitioner's clinical records were documented, pursuant to the above authority, prior to the discharge notice. The record was held open to allow Respondent an opportunity to submit doctors note or medical records to supports Respondent's contention that Petitioner's health had improved sufficiently to be discharged. The undersigned finds the evidence submitted does not establish that Petitioner's medical records were well documented and the lack of submission and demonstrate that Petitioner's health has improved sufficiently so that she no longer requires the services provided at the Facility. 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.

17. The testimony provided by Respondent is hearsay. The above authority shows that hearsay may be used to supplement or explain other evidence but shall not be

sufficient in itself to support a finding. The undersigned finds there is insufficient evidence supporting Respondent provided Petitioner reasonable and appropriate notice to pay her bill, and insufficient evidence supporting Respondent's claim that Petitioner's health has improved sufficiently where she no longer needs the services provided by the Facility.

18. 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 convincing².

19. 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

DECISION

Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is GRANTED. The Facility's action to discharge Petitioner is NOT in accordance with Federal Regulations. The Facility may NOT proceed with its proposed discharge action. If Petitioner has been discharged, the Facility is ORDERED to immediately readmit Petitioner to the Facility. If a bed is not currently open to readmit Petitioner, the Facility must readmit Petitioner as soon as a bed becomes available.

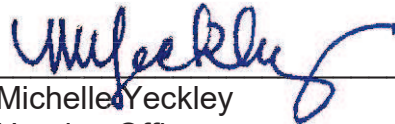
² State v. Graham, 240 So.2d 486 (1974), states, "Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be 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, 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 18 day of April, 2023,

in Tallahassee, Florida.



Michelle Yeckley
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