

Aug 12, 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. 22N-00029

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 at 1:45 p.m. on June 30, 2022.

APPEARANCES

For Petitioner: [REDACTED], Ombudsman Manager

For Respondent: [REDACTED], Administrator

STATEMENT OF ISSUE

Petitioner appeals Respondent’s action discharging her 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

The hearing was originally scheduled for June 2, 2022. On June 2, 2022, Petitioner and Respondent appeared, Petitioner requested a continuance due to

because she no longer met the criteria to continue with skilled services as she had improved significantly in therapy.”

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 February 2, 2022, from the hospital, due to requiring physical and occupational therapy. Petitioner’s medical diagnoses include, lower back pain, peripheral vertigo bilateral, sciatica, morbid obesity, chronic sinusitis, muscle spasm of back, gastro-esophageal reflux disease without esophagitis, idiopathic peripheral autonomic neuropathy, insomnia and lymphedema.

(Hr’g R.; Resp’t Ex. 1 at 8.)

2. Physical Therapy PT Discharge Summary and Occupational Therapy OT Discharge Summary documents are medical records. (Hr’g R.)

3. Petitioner was evaluated/treated by the Facility’s physical and occupational therapists. A physical therapist treats the upper body, and an occupational therapist treats the lower body. (Hr’g R.)

4. On February 6, 2022, NC, Physical Therapist, evaluated Petitioner to determine her current condition. On April 9, 2022, NC reevaluated Petitioner and determined that Petitioner had significantly improved and no longer required therapy.

(Wit. Test.; Resp’t Ex. 3.)

5. NC was not present at the hearing. (Hr’g R.)

¹ 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.

6. On February 7, 2022, BC, Occupational Therapist, evaluated Petitioner to determine her current condition. On April 5, 2022, BC reevaluated Petitioner and determined that Petitioner had significantly improved and no longer required therapy.

(Wit. Test.; Resp't Ex. 2 at 1-4.)

7. BC was not present at the hearing. (Hr'g R.)

8. The Facility received a letter from [REDACTED], dated March 25, 2022, notifying that Petitioner's skilled nursing facility benefit was exhausted. (Resp't Ex. 4.)

9. On or about March 29, 2022, the Facility applied for Medicaid Institutional Care Program benefits on behalf of Petitioner. (Hr'g R.)

10. On April 14, 2022, the Facility issued Petitioner a 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 and [REDACTED]. (Resp't Ex. 1 at 1-2.)

11. Petitioner's medical record documenting the reason the Facility is requesting a transfer discharge regarding the Notice was not submitted. (Hr'g R.)

12. Petitioner is unable to walk and uses a wheelchair. Petitioner uses her legs to ambulate backwards because if she ambulates forward, she gets dizzy. (Hr'g R.)

13. The Therapy Department informed Petitioner that she should not ambulate backwards. (Wit. Test.)

14. A therapist was not present nor were entries made in the Facility's medical records to substantiate that the Therapy Department informed Petitioner not to ambulate backwards. (Hr'g R.)

15. The Department of Elder Affairs (“DOEA”) Comprehensive Assessment and Review for Long-Term-Care Services (“CARES”) unit determines medical eligibility for nursing home placement. It completes medical assessments on individuals to determine whether the individual requires nursing home placement. (Hr’g R.)

16. As a result of the Facility applying for Medicaid on Petitioner’s behalf in March 2022 a Notification of Level of Care (“LOC”) from DOEA CARES was completed. A LOC dated May 4, 2022, lists Petitioner’s LOC as skilled and Placement Recommendation as Nursing Home, effective January 31, 2022. (Pet’r Ex 3.)

CONTROLLING LAW

17. 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.

18. 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.]

19. Florida Administrative Code Rule 28-106.213, addresses evidentiary standards for use at administrative hearings and in relevant part states:

(3) 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.

20. Section 90.801(c), F.S. defines hearsay as "... a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

21. Section 90.802, F.S. states that, "[e]xcept as provided by statute, hearsay evidence is inadmissible."

22. Section 90.803, F.S., Hearsay exceptions states:

Hearsay exceptions; availability of declarant immaterial.—The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY. —
(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term “business” as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

23. 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.]

24. 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...

25. F.A.C. R. 59G-1.040 explains DOEA and CARES and in part states:

(b) The Agency for Health Care Administration delegates the following entities to perform Level I...

2. Florida Department of Elder Affairs' (DOEA) Comprehensive Assessment and Review for Long-Term Care Services (CARES) program for individuals age 21 years and older...

26. Section 409.985, F.S., Comprehensive Assessment and Review for Long-Term Care Services (CARES) Program in part states:

...

(3) The CARES program shall determine if an individual requires nursing facility care and, if the individual requires such care, assign the individual to a level of care as described in s. 409.983(4). When determining the need for nursing facility care, consideration shall be given to the nature of the services prescribed and which level of nursing or other health care personnel meets the qualifications necessary to provide such services and the availability to and access by the individual of community or alternative resources. For the purposes of the long-term care managed care program, the term "nursing facility care" means the individual:

(a) Requires nursing home placement as evidenced by the need for medical observation throughout a 24-hour period and care required to be

performed on a daily basis by, or under the direct supervision of, a registered nurse or other health care professional and requires services that are sufficiently medically complex to require supervision, assessment, planning, or intervention by a registered nurse because of a mental or physical incapacitation by the individual;

CONCLUSIONS OF LAW

27. 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.

28. In accordance with the above authority, the Facility Administrator and AM, Physician, signed the Notice.

29. 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."

30. The evidence established that Respondent did not submit Petitioner's medical record(s) documenting the reason it is requesting a transfer discharge.

31. The Findings established that a physical and occupational therapist documented that they evaluated Petitioner and determined that Petitioner had significantly improved and no longer required therapy. Neither the physical nor the occupational therapist appeared to testify or address the medical records.

32. In accordance with the above authority above the therapists documentation is hearsay. Absent testimony from a qualified witness authenticating the alleged incidents, the undersigned cannot rely on this hearsay evidence.

33. 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.”

34. The evidence established that as a result of the Facility applying for Medicaid on Petitioner’s behalf in March 2022 a LOC, dated May 4, 2022, lists Petitioner’s LOC as skilled and Placement Recommendation as Nursing Home, effective January 31, 2022.

35. 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.

36. Respondent’s evidence does not rise to the level of clear and convincing.

37. Respondent’s evidence proves that it is possible that Petitioner’s health has improved. Reasonable certainty that the Facility’s allegations are correct is required to meet the clear and convincing standard.

38. 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 she no longer needs the services provided by the Facility.

DECISION

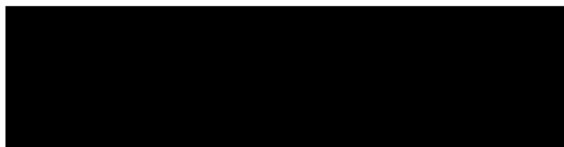
Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is GRANTED. The Facility's action to transfer discharge Petitioner is NOT in accordance with Federal Regulations. The Facility may NOT proceed with its proposed discharge action.

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 12 day of August, 2022,

in Tallahassee, Florida.



Hearing Officer
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