

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

[REDACTED]
[REDACTED]
[REDACTED]

APPEAL NO. 22N-00075

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 October 19, 2022 at 3:33 p.m.

APPEARANCES

For the petitioner: [REDACTED] pro se

For the respondent: [REDACTED] Nursing Home Administrator

STATEMENT OF ISSUE

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

SUMMARY OF PROCEEDINGS

To ensure the safety of all individuals during the Coronavirus pandemic and per the Governor's directive, this hearing was changed from an in-person hearing to a telephone hearing.

██████████ Assistant Administrator of the Facility, appeared as a Spanish translator for the petitioner.

██████████ ██████████ ██████████ Ombudsman Manager, appeared as a witness for the petitioner.

The respondent presented six witnesses who testified: ██████████, Social Services Supervisor, ██████████ Physical Therapist Supervisor, ██████████, Nurse Unit Manager, ██████████ Social Worker, ██████████ ██████████ the petitioner's Medical Doctor, and ██████████, Medical Director.

The petitioner did not submit any evidence at the hearing. The respondent's submitted evidence was marked and entered as Respondent's Exhibits one ("1") through three ("3"). The record was held open through October 20, 2022 for the respondent to submit progress notes with no parts highlighted. On October 20, 2022, the requested information was received from the respondent and it was marked and entered as Respondent's Exhibit four ("4"). The record was closed on October 20, 2022.

The Petitioner's Position

The petitioner took the position that she doesn't consider herself as independent. She considers herself semi-independent as she still needs help to bathe and toileting. She receives lots of help at the Facility and needs that and additional time to get better.

The Respondent's Position

The respondent took the position that the petitioner has received physical therapy and medical assistance over the last four years to improve her quality of life out in the community. The petitioner no longer requires twenty-four-hour care. The petitioner does have many chronic medical conditions but these can be managed outside of the Facility. She no longer meets the criteria for the level of care provided by the skilled nursing facility.

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 is a long-term care center that offers skilled nursing and rehabilitation services. (Resp. Ex. 1.)
2. On February 28, 2018, the petitioner was admitted to the Facility. The petitioner is currently sixty years old. She has an above the left knee amputation, insulin dependent diabetic, deteriorating vision and almost blind in her right eye, chronic ear problems, and previous bladder and constipation issues. (████ and Pet'r Test.)

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.

3. On August 30, 2022, a Nursing Home Transfer and Discharge Notice (“Notice”) was issued to the petitioner, with an effective date of September 29, 2022, stating “Your health has improved sufficiently so that you no longer need the services provided by this facility.” ██████████ both signed the Notice while the petitioner refused to sign. (Resp’t Ex. 2.)

4. On September 7, 2022, the petitioner timely requested an appeal. (Appeal R.)

5. The petitioner has been receiving physical therapy since admission following her above the left knee amputation. During the course of her stay, the petitioner has received therapy exercises to strengthen functional mobility and to be more independent. In December 2021 the petitioner was measured for a prosthesis and has attempted to stand and ambulate. The petitioner has had irritation and skin breakdown on her left leg and has difficulty putting weight on her right foot. The petitioner has improved her Activities of Daily Living (“ADLs”). She is able to transfer from the bed to the wheelchair and dress herself independently and perform hygiene independently. She is not able to handle the prosthesis at this time and has been explained that it is just for cosmetic purposes. When the petitioner came to the Facility, she required extensive to total assist and was fearful of falling but has since improved. (██████ Test.)

6. The petitioner can wash in her bed as opposed to the sink. She has gotten attached to the facility and staff and may see it as stressful with leaving this situation. She acts as a mentor to new residents and assists other residents with obtaining assistance when needed. (██████. Test.)

7. The petitioner was evaluated by [REDACTED] for an appropriate facility according to her choices. The Facility identified an Assisted Living Facility that was close to the petitioner's church and let her speak to the facility owner. ([REDACTED] Test.)

8. The petitioner moves independently but has other medical issues. The petitioner's doctor agrees with the testimony from the other Facility staff members. It all depends on the petitioner's comfort level as patients with her health issues can be discharged but she does not seem comfortable leaving the Facility. ([REDACTED] Test.)

9. The petitioner does not consider herself as independent. She considers herself as semi-independent as she gets help once a week with her bathing and needs help toileting as she was told she doesn't do it correctly. She has ear pain and it could be a possible infection and it's preventing her from sleeping. She receives a lot of help here at the Facility and needs additional time to get better. (Pet'r Test.)

10. The petitioner's witness did not agree with the petitioner being discharged to an Assisted Living Facility as she is not ambulatory as stated in the petitioner's progress notes. The undersigned reminded everyone on the call that discharge planning would need to be addressed with the Agency for Health Care Administration ("AHCA") at (888) 419-3456. (Resp't Ex. 4.)

CONTROLLING LAW

11. 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.

12. Section 400.0255, Florida Statutes addresses Resident transfer or discharge; requirements and procedures; hearings and 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... 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.

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. .

. ; 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]

14. 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

15. The above-cited authorities set-forth the nursing facility discharge process.

In this instant case, the medical reason the petitioner is being discharged for is that the respondent believes the petitioner's health has improved sufficiently so that she no

longer needs the services provided by the facility. The petitioner's medical doctor signed the Notice.

16. 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."

17. The findings show the petitioner has many medical conditions and has been receiving physical therapy since admittance in February 2018. The respondent and witness have testified that the medical conditions she has are not major and can be managed outside of the Facility. The petitioner does not see herself as independent and still needs assistance from the Facility before she leaves.

18. After reviewing the evidence, testimony, pertinent rules and regulations, the undersigned does find that the petitioner no longer needs twenty-four-hour care in the skilled nursing facility. The improvement of her health issues and ability to walk with the prosthesis can be achieved outside of the Facility.

19. 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.

20. 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 on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is DENIED. The Facility's action to discharge the 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 AHCA 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 06 day of December, 2022,
in Tallahassee, Florida.

Ashley Brunelle

Ashley Brunelle
Hearing Officer
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Copies Furnished To: [REDACTED], Petitioner
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[REDACTED]