

Feb 06, 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]

APPEAL NO. 22N-00082

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 January 10, 2023, at 2:17 p.m.

APPEARANCES

For the petitioner: Thomas Voracek, Esq., attorney for the petitioner

For the respondent: Connie Zuraff ("C.Z."), Nursing Home Administrator

STATEMENT OF ISSUE

The petitioner appeals the respondent's action to discharge him from [REDACTED] [REDACTED] Health and Rehabilitation (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. One continuance was granted as the petitioner and his witnesses did not receive the notice of hearing.

The hearing was originally scheduled for December 6, 2022 at 2:15 p.m. At the scheduled hearing, the petitioner and the respondent appeared, and the petitioner requested a continuance as he did not receive the scheduling notice. The continuance was granted. The hearing was rescheduled for January 10, 2023 at 2:15 p.m.

The petitioner ("G.N.") was present at the hearing, but was represented by Thomas Voracek, Esq. The petitioner's counsel presented three witnesses who testified: [REDACTED] ("T.B."), cousin of the petitioner, [REDACTED] ("J.B."), cousin-in-law of the petitioner, and [REDACTED] ("L.B."), Regional Ombudsman Manager. The respondent presented one witness who testified: Tara Andrews ("T.A."), Social Service Director.

Brandi Williams, with the Office of Appeal Hearings, appeared as an observer without objection.

The petitioner's evidence packet was marked and entered as Petitioner's Exhibits one ("1") and two ("2"). The respondent's evidence packet was marked and entered as Respondent's Exhibits one ("1") through nine ("9").

Administrative Notice was taken of Florida Administrative Code Section 59G-4.180.

The Petitioner's Position

The petitioner's counsel took the position that the petitioner has had a change of heart and no longer wants to leave the facility. He needs to stay in the facility due to his health issues and for the staff members to continue to monitor him and his health.

The Respondent's Position

The respondent took the position that the petitioner expressed to them that he wants to leave the Facility and move into independent living or an Assisted Living Facility ("ALF"). The petitioner is not here for most of the day and his health has improved that he no longer needs assistance. He has denied therapy from the Facility and at this point the Facility only controls/administers his daily medications.

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 petitioner was admitted to the Facility on December 4, 2019, from a facility in Alabama. The Facility accepted his admission based off his previous medical evaluation and did not reassess the petitioner. The petitioner has Medicare and Medicaid coverage. (C.Z. Test.)

2. The petitioner's medical diagnoses include neuropathy from the waist down, numbness in the abdomen, no mobility from the waist down, osteomyelitis, oxygen needed at night, no mobility without a wheelchair, and bladder issues. The petitioner has at times needed assistance bathing and getting dressed. He does not need

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.

assistance with toileting as he is able to drive his power chair into the restroom. (G.N. Test.)

3. On October 22, 2021, the petitioner began seeing a Physical Therapist until December 17, 2021. (Resp't Ex. 4.) At the latter date, the petitioner refused to have restorative therapy. (C.Z. Test.)

4. The petitioner's Physical Therapist was not present at the hearing. (Hr'g R.)

5. As of April 2020, the petitioner had conversations with staff members at the Facility about his interest in moving to independent living as he no longer wished to stay in the Facility. The Facility assisted by making a referral to a Medicaid Transition Team and also offered a Housing application to the petitioner. (T.A. Test.)

6. On October 5, 2022, the Facility issued the petitioner a Nursing Home Transfer and Discharge Notice ("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 Nursing Home Administrator and [REDACTED], MD. The petitioner refused to sign the Notice. (Resp't Ex. 1.)

7. The petitioner's medical record documenting the reason the Facility is requesting a transfer discharge from the doctor who signed the Notice was not submitted. The petitioner's doctor was not present at the hearing. (Hr'g R.)

8. The Department of Elder Affairs ("DOEA") Comprehensive Assessment and Review for Long-Term-Care Services ("CARES") unit completed a Notification of Level of Care ("LOC") form for the petitioner on December 12, 2019, effective December 4, 2019. The petitioner's LOC is listed as Intermediate I and Placement Recommendation as Nursing Facility. (Pet'r Ex. 1.)

9. The Facility has not requested a new LOC for the petitioner as they do not want the petitioner to lose the ability to transfer to an ALF. (C.Z. Test.)

10. The petitioner checks himself out every day for a majority of the day. (Resp't Ex. 3 & 9.) He only eats at the facility occasionally and has only been on his nightly oxygen about two or three times in the last month. (T.A. Test.) The petitioner is only using the Facility as a place to sleep and to administer his medications. He is not present when the doctor comes to the Facility to make assessments or give medical care to the Facility's residents. (C.Z. Test.)

11. The petitioner had a health issue which resulted in him going to the Emergency Room in October 2022 for something that happened to him while he was signed out of the Facility. (C.Z. Test.)

12. The petitioner had a change of heart during the Summer of 2022 and realized he needs the assistance of the Facility and is no longer interested in leaving. The doctor does not come at a certain time so he is not always in the Facility when the doctor comes to see the residents. If the doctor were to give him an actual date and time that he would want to see the petitioner, he would make sure he is at the Facility to be seen by the doctor. (G.N. Test.)

13. The petitioner's family sees the petitioner as needing medical supervision, is a fall risk, and requires nursing oversight. If the petitioner is discharged it would result in him being in an unsafe situation. (L.B. Test.)

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. Section 400.0255(15), Florida Statutes, addresses hearings related to nursing homes and related health care facilities and the burden of proof to be met by stating:

(15)(a) The department's Office of Appeals Hearings shall conduct hearings under this section. The office shall notify the facility of a resident's request for a hearing.

(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 another Medicaid cases, chapter 10-2, part VI, Florida Administrative Code. **The burden of proof must be clear and convincing evidence.** A hearing decision must be rendered within 90 days after receipt of the request for hearing.

(c) **If the hearing decision is favorable to the resident who has been transferred or discharged, the resident must be readmitted to the facility's first available bed.**

(d) The decision of the hearing officer shall be final. Any aggrieved party may appeal the decision to the district court of appeal in the appellate district where the facility is located. Review procedures shall be conducted in accordance with the Florida Rules of Appellate Procedure.

[Emphasis added]

16. 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, 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. . .

(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.

. . .

17. 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]

18. 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.

19. Florida Statutes Section 90.801(c) 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."

20. Florida Statutes Section 90.802 states that, "[e]xcept as provided by statute, hearsay evidence is inadmissible."

21. Florida Statutes Section 90.803, 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.

22. 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. . .

23. Florida Administrative Code Rule 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. . .

24. Florida Statutes Section 409.985, 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

25. On October 5, 2022, the Facility issued the petitioner the Notice. The Facility's reason for discharging the petitioner is that the petitioner's health has improved sufficiently so that he no longer needs the services provided by this Facility. This is one reason permitted for discharge from the Facility in accordance with the above Federal Regulation.

26. In accordance with the above Federal Regulation and State Statute, the Notice was signed by the Facility Administrator and a Physician at least thirty days prior to the discharge date. The Notice also indicated the reason and effective date of the discharge, and appeal rights.

27. The evidence established that the respondent did not submit the petitioner's medical record(s) documenting the reason it is requesting a transfer or discharge.

28. The Findings established that a physical therapist documented that they last evaluated the petitioner on December 17, 2021. The physical therapist did not testify or address the therapist's records that were provided.

29. 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.

30. 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."

31. The petitioner has Medicaid and Medicare coverage. The Level of Care Form dated December 12, 2019, lists the petitioner's Level of Care as Intermediate I and Placement recommendation as Nursing Facility, effective December 4, 2019.

32. 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.

33. The respondent's evidence proves that it is possible that the petitioner's health has improved. Reasonable certainty that the Facility's allegations are correct is required to meet the clear and convincing standard.

34. In careful review of the cited authorities and evidence, the undersigned concludes the respondent did NOT meet its burden of proof by clear and convincing

evidence that the petitioner's health has improved sufficiently so that he no longer needs the services provided by the Facility.

DECISION

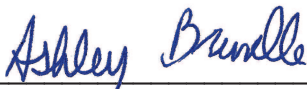
Based upon the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is GRANTED. The Facility is ORDERED to not discharge the petitioner if he has not yet been discharged. If the petitioner has already been discharged, the respondent is ordered to readmit him to the Facility to the first available bed.

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 February, 2023,

in Tallahassee, Florida.



Ashley Brunelle
Hearing Officer
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