

Jun 22, 2023

Office of Appeal Hearings
Dept. of Children and Families

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

[REDACTED]

APPEAL NO. [REDACTED]

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter on June 13, 2023 at 2:18 p.m.

APPEARANCES

For Petitioner: [REDACTED], *pro se*

For Respondent: [REDACTED] Nursing Home Administrator (NHA)

STATEMENT OF ISSUE

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

SUMMARY OF PROCEEDINGS

The appeal was continued twice per Petitioner's requests. [REDACTED], Business Office Manager, appeared as Respondent's witness.

On March 3, 2023, the Facility issued a *Nursing Home Transfer and Discharge Notice* ("Notice") informing Petitioner of its intent to discharge him from the Facility effective March 3, 2023 due to the following reasons: his health has improved sufficiently so that he no longer needs the services provided by this Facility; and his bill for services at the Facility has not been paid after reasonable and appropriate notice to pay. Because Petitioner still resides at the Facility, Respondent was allowed to verbally correct the effective discharge date to meet the thirty (30) day notice requirement.

Petitioner did not submit any exhibits. Respondent submitted an evidence packet, which was admitted into evidence marked as Respondent's Composite Exhibit one ("1").

The record was left open through close-of-business on June 13, 2023 for Respondent to submit additional information. Respondent's additional information was timely received, it was admitted into evidence marked as Respondent's Composite Exhibit two ("2"). The record was closed on June 13, 2023.

No representative from the Agency for Health Care Administration ("AHCA") was present for this hearing. At the request of the undersigned, AHCA was notified to conduct an inspection of the facility and provide a written response to the undersigned. As of the day of this order, no written response has been received from AHCA.

Petitioner's Position

Petitioner took the position that he will not apply for nursing home Medicaid because he will not qualify and that he is waiting on a foundation to assist him to pay his entire balance. Petitioner believes Respondent can wait until mid-July for the

foundation funds to be available. Petitioner did not dispute that his health has improved sufficiently so that he no longer needs the services provided by this Facility. Petitioner did not dispute the balance owed to the Facility. Petitioner believes, he will be able to make regular monthly payments once this balance is satisfied in July.

Respondent's Position

Respondent took the position that Petitioner has an outstanding balance of \$55,696.63 as of this hearing date. Respondent has been issuing reasonable and appropriate notices to Petitioner to pay for the services he received at the Facility, but Petitioner has failed to pay. Respondent believes since Petitioner has received notices from his managed care provider terminating his skilled therapy services and has refused to apply for nursing home Medicaid, Petitioner has an obligation to pay the Facility for services he receives as a private pay resident.

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 admitted Petitioner on [REDACTED] under Medicare Part A for short-term skilled nursing therapy services. Petitioner's primary Physician is [REDACTED] [REDACTED] (" [REDACTED] "). (Resp't Comp. Ex. 1 at 4-11.)
2. Petitioner's progress notes are parts of Respondent's business record. The attached record(s) are duplicate copies; made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge

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.

of those matters; are kept in the course of the regularly conducted activity of our business and were made as a regular practice in the course of the regularly conducted activity of our business. (Hr'g R.)

3. On February 3, 2023, the Facility's case manager handed Petitioner a Notice of Medicare Non-Coverage ("NOMNC") from Kepro indicating that Petitioner's coverage for therapy services would end effective February 7, 2023. On February 3, 2023, Petitioner appealed to Kepro and won. Petitioner's coverage was extended for a short time. On February 14, 2023, Kepro issued a second NOMNC to Petitioner informing him that his coverage would end on February 16, 2023. On February 14, 2023, Petitioner appealed the Kepro decision. On February 16, 2023, The Facility received a call from Kepro stating that Petitioner's appeal has been denied and that Petitioner is no longer eligible for any therapy services effective February 17, 2023. On February 16, 2023, Petitioner filed another appeal with Kepro. On February 28, 2023, the Facility received notice from Petitioner's Medicare provider indicating Petitioner notice of termination of service was correct. (Resp't Comp. Ex. 1 at 12.)

4. Petitioner exhausted his coverage limit on February 16, 2023 and became a private pay resident effective February 17, 2023. (Hr'g R.)

5. Petitioner is very alert and is not cognitively impaired. He scores very high on his "Cognitive Pattern" test. (Resp't Wit. Test.)

6. Petitioner has refused to apply for nursing home Medicaid through the Department of Children and Families (DCF) to pay for his services at the Facility. (*Id.*)

7. On March 3, 2023, the Facility issued the Notice informing Petitioner of its intent to discharge him from the Facility to [REDACTED] effective March 3, 2023 due to the

following reasons: his health has improved sufficiently so that he no longer needs the services provided by this Facility; and his bill for services at the Facility has not been paid after reasonable and appropriate notice to pay. (Resp't Comp. Ex. 1 at 3-4.)

Respondent was allowed to correct the effective discharge date to April 3, 2023 on the record due to Petitioner still residing at the Facility. (Hr'g R.)

8. The Notice informed Petitioner that he had "the right to request review of this notice by the Local Long-Term Care Ombudsman Program. They are available to assist you with any questions about this notice or the appeal process (see below). If you wish to request a review of this notice or request assistance from the Local Long-Term Care Ombudsman, call the Ombudsman Office tollfree at (888) 831-0404." (Resp't Comp. Ex. 1 at 2.)

9. Petitioner's primary Physician, [REDACTED], issued a written order approving the discharge. (Reps't Comp. Ex. 2 at 6.)

10. On March 13, 2023, Petitioner timely requested an appeal to challenge Respondent's action. (Hr'g R.)

11. Below is a summary of the charges Petitioner owed to the Facility for room and board, in addition to physical and occupational therapy services with a total amount of \$49,196.63 due as of May 31, 2023:

January 11-31, 2023 (coinsurance)	\$4200.00 (\$200.00 X 21 days)
February 1-16, 2023 (coinsurance)	\$3200.00 (\$400.00 X 16 days)
February 17-28, 2023	\$4800.00 (\$400.00 X 12 days) + \$196.63
March 1-31, 2023	\$12,400.00 (\$400.00 X 31 days)
April 1-30, 2023	\$12,000.00 (\$400.00 X 30 days)
May 1-31, 2023	\$12,400.00 (\$400.00 X 31 days)

(Reps't Comp. Ex. 2.)

12. Respondent has been issuing regular statements to Petitioner requesting payments for its services since Petitioner became a private-pay resident but has not received any payments. Respondent notified Petitioner of his balance due via monthly statements, read over the phone, or hand delivered to his room. (Resp't Wit. Test.)

13. Petitioner acknowledged receiving invoices and not making any payments to the Facility. (Hr'g R.)

14. Petitioner has an outstanding balance of \$55,696.63 as of this hearing date. (Resp't Wit. Test.)

15. As of the day of this hearing, Petitioner is still in the Facility pending a hearing decision. (H'r g R.)

16. Petitioner wishes to remain at the Facility. (*Id.*)

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. Section 400.0255(15)(b), F.S., sets forth the burden of proof and requires that it must be met at the clear and convincing evidence threshold.

19. 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.

...

[Emphasis added]

20. Title 42 C.F.R. Section 483.15, Admission, transfer and discharge rights, in relevant part states:

...

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.

...

[Emphasis added]

21. Title 42 C.F.R. Section 483.40, Behavioral health services, states in relevant part:

Each resident must receive and the facility must provide the necessary behavioral health care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care. Behavioral health encompasses a resident's whole emotional and mental well-being, which includes, but is not limited to, the prevention and treatment of mental and substance use disorders.

(a) The facility must have sufficient staff who provide direct services to residents with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental and psychosocial wellbeing of each resident, as determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with §483.70(e). These competencies and skills sets include, but are not limited to, knowledge of and appropriate training and supervision for:

22. Title 42 C.F.R. Section 483.70, Administration, in part states:

A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident...

(e) Facility assessment. The facility must conduct and document a facility-wide assessment to determine what resources are necessary to care for its residents competently during both day-to-day operations and emergencies. The facility must review and update that assessment, as necessary, and at least annually. The facility must also review and update this assessment whenever there is, or the facility plans for, any change that would require a substantial modification to any part of this assessment. The facility assessment must address or include:

- (1) The facility's resident population, including, but not limited to,
 - (i) Both the number of residents and the facility's resident capacity;
 - (ii) The care required by the resident population considering the types of diseases, conditions, physical and cognitive disabilities, overall acuity, and other pertinent facts that are present within that population;
 - (iii) The staff competencies that are necessary to provide the level and types of care needed for the resident population; (emphasis added)
 - (iv) The physical environment, equipment, services, and other physical plant considerations that are necessary to care for this population; and

(v) Any ethnic, cultural, or religious factors that may potentially affect the care provided by the facility, including, but not limited to, activities and food and nutrition services...

(i) Residents will be transferred from the facility to the hospital, and ensured of timely admission to the hospital when transfer is medically appropriate as determined by the attending physician or, in an emergency situation, by another practitioner in accordance with facility policy and consistent with state law...

23. Section 400.0255, F.S. 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, except, in the following circumstances, the facility shall give notice as soon as practicable before the transfer or discharge:

...
(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.

...

CONCLUSIONS OF LAW

24. On March 3, 2023, Respondent issued an initial discharge notice to Petitioner informing him that he was to be discharged from the Facility effective March 3, 2023 due to the following reasons: his health has improved sufficiently so that he no longer needs the services provided by this Facility; and his bill for services at the Facility has not been paid after reasonable and appropriate notice to pay. These are two of the six reasons provided in the controlling federal regulations for which a nursing facility may involuntarily discharge a resident.

25. The findings show that the initial discharge was addressed in a written notice signed by the Administrator, accompanied by a written order from Petitioner's physician. A same-day notice was given, and discharge location of [REDACTED] was given. The notice includes the reason and effective date of the discharge, the location to which Petitioner is to be discharged, and Petitioner's appeal rights along with other required

assistance information. A copy was provided to Petitioner. Because Petitioner still resides at the facility, Respondent was allowed to remedy the notice to meet the thirty (30) day advance notice requirement.

26. 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 location and sufficiently preparing the resident for a safe and orderly 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 and that the requirements of the controlling authorities have been met.

27. 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.

28. The findings show on February 14, 2023, Kepro issued a NOMNC to Petitioner informing him that his coverage would end on February 16, 2023. The findings show that after Petitioner appealed the decision, there was a short period where the benefits were reopened. The findings show Petitioner's benefits were again terminated and when he appealed it was denied. The findings show the Facility received notice from Petitioner's Medicare provider indicating Petitioner notice of termination of service was correct. The findings show Petitioner's primary physician signed a written order authorizing the discharge. Petitioner did not dispute that his health has improved.

29. The findings show, Petitioner attained private pay status effective February 17, 2023. The findings show Respondent provided monthly billing statements to inform Petitioner of the balance owed. The findings show Petitioner has refused to apply for nursing home Medicaid to cover his bills. The findings show Petitioner has a balance of \$55,696.63 as of the day of the hearing. Petitioner did not dispute the amount owed to the Facility.

30. The above authorities governing admission, transfer, and discharge rights for residents of long-term care facilities provided authority to transfer or discharge a resident when any the of the six allowable reasons is established.

31. The Facility seeks to involuntarily discharge Petitioner on the contention that Petitioner's health has improved sufficiently so that he no longer needs the services provided by this Facility and that Petitioner has not paid the Facility for its services.

32. Based on the evidence presented, the Facility has established that Petitioner's health has improved sufficiently so that he no longer needs its services. Additionally, the Facility has established that Petitioner has not been paying for his stay at the Facility. The undersigned concludes that the Facility has given Petitioner reasonable and appropriate notice to pay for his stay at the facility. These are two of the six reasons provided in the above authority for which a nursing facility may involuntarily discharge a resident.

33. The controlling authorities require a higher standard of proof in nursing home discharge hearings; there must be substantial and credible evidence at the level of clear and convincing.

34. After careful review of the evidence and testimony, the undersigned concludes that Respondent has met its burden of proof in establishing that its proposed action to discharge Petitioner is no longer having needs for its services and for non-payment of bills for services.

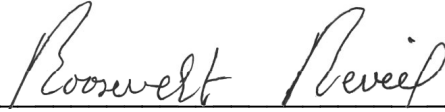
DECISION

Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is DENIED. The Facility's action to discharge 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 Agency for Health Care Administration 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 22 day of June, 2023,
in Tallahassee, Florida.



Roosevelt Reveil
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