

Aug 11, 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. 23N-00073

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-referenced matter on August 1, 2023, at 11:38 a.m.

APPEARANCES

For Petitioner: [REDACTED], Petitioner's daughter

For Respondent: [REDACTED], Nursing Home Administrator

STATEMENT OF ISSUE

Petitioner appeals Respondent's action discharging her from [REDACTED]

[REDACTED] because her needs cannot be met at the Facility.

Respondent carries the burden of proof by clear and convincing evidence.

SUMMARY OF PROCEEDINGS

[REDACTED] Petitioner's grandson appeared as a witness for Petitioner. [REDACTED]

[REDACTED], appeared as a witness for Respondent. Petitioner

did not submit any exhibits. Respondent submitted two exhibits which were accepted into evidence and marked as Respondent's Exhibits one ("1") and two ("2").

Petitioner's Position

Petitioner took the position that the Facility wants to discharge her to her home. Petitioner's daughter cannot care for Petitioner as she needs specialized care. Petitioner's daughter agrees that Petitioner should be admitted to a memory Care Unit, but she is having difficulty finding one.

Respondent's Position

Respondent took the position that Petitioner should be admitted to a Memory Care Unit where she can get the specialized care she needs. Petitioner's cognitive ability is declining, and the Facility cannot care for her. She is currently receiving one-to-one care until she is placed in a facility equipped to care for residents like Petitioner.

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. [REDACTED] provides skilled nursing services for accident, stroke and some cognitive deficit patients. Additionally, it has a Caerus specialized unit where patients are in isolation. (Resp't Test.)
2. On January 18, 2023, Petitioner (seventy-four years old) who suffers with [REDACTED] deficiency was admitted to the nursing facility. In April 2023, Petitioner's cognitive score [REDACTED]. She was tested again in July 2023 and had

¹ Citations within the Findings of Fact, Controlling Law, 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.

a score of zero as she was not able to answer any of the questions on the test. (Resp't Test.)

3. The progress notes for Petitioner on March 12, 2023, indicated that she suffers from confusion. (Resp't Ex. 1 at 15.)

4. The progress notes for Petitioner on March 14, 2023, indicated she suffers with anxiety. (Resp't Ex. 1 at 13.)

5. Petitioner's medical records on March 16, 2023, indicated petitioner is unstable. (Resp't Ex. 2 at 5.)

6. The progress notes on April 21, 2023, indicated Petitioner began to experience restlessness, confusion and exhibits combative behavior. She tried to walk out of the room without a wheelchair or help from the Certified Nursing Assistant (CNA) assigned to her. (Resp't Ex. 1 at 9.)

7. The progress notes on May 5, 2023, indicated Petitioner became combative, aggressive, grabbing and scratching. (Resp't Ex. 1 at 8.)

8. On May 18, 2023, the Nursing Home Transfer and Discharge Notice ("Notice") was issued to Petitioner with an effective date June 17, 2023. The reason for the discharge was "Your needs cannot be met in this facility." A brief explanation was written on the Notice "Resident requires a memory care facility." The Notice was signed by [REDACTED], the Facility's physician. (Resp't Ex. 1 at 20-21.)

9. Progress Notes on May 22, 2023, indicated that Petitioner fell and hurt her shoulder. (Resp't Ex. 2 at 24.)

10. On May 24, 2023, Petitioner timely requested an appeal. (Appeal R.)

11. Petitioner's daughter would like her mother to be in a Memory Care Unit, but she is having difficulties finding a suitable facility. (Pet'r Test.)

12. [REDACTED] does not have a Memory Care Unit. Respondent recommends that Petitioner be admitted to a Memory Care Unit as she suffers with dementia. A Memory Care Unit specializes in assisting patients with [REDACTED]. (Resp't Test.)

CONTROLLING LAW

13. 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.

14. 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;

...

(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).

...

(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.

(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—

...

(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;

(vi) For nursing facility residents with intellectual and developmental disabilities or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with developmental disabilities established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (Pub. L. 106-402, codified at 42 U.S.C. 15001 et seq.); and

(vii) For nursing facility residents with a mental disorder or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with a

mental disorder established under the Protection and Advocacy for Mentally Ill Individuals Act.

[Emphasis added]

15. Section 400.0255, Florida Statutes, Resident transfer or discharge; requirements and procedures; hearings in 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, 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:**

(a) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility, and the circumstances are documented in the resident's medical records by the resident's physician;

...
(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.

...

(12) After receipt of any notice required under this section, the State Long-Term Care Ombudsman Program or local ombudsman council may request a private informal conversation with a resident to whom the notice is directed, and, if known, a family member or the resident's legal guardian or designee, to ensure that the facility is proceeding with the discharge or transfer in accordance with this section. If requested, the State Long-Term Care Ombudsman Program or the local ombudsman council shall assist the resident with filing an appeal of the proposed discharge or transfer.

...

(15) (a) The department's Office of Appeals Hearings shall conduct hearings under this section...

(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]

CONCLUSIONS OF LAW

16. The above cited authority establishes that a Discharge Notice lists six (6) reasons a resident may be involuntarily discharged from a Nursing Facility. The

authority also establishes that when a Facility issues a Discharge Notice, thirty (30) days' notice must be given before Petitioner is transferred or discharged unless it meets specific circumstances outlined.

17. The findings show that Petitioner suffers with dementia and diminishing mental ability. Petitioner's daughter would like her mother to be in a Memory Care Unit. The facility does not have a Memory Care Unit but also recommends Petitioner to be transferred to a Memory Care Unit as it would be in her best interest.

18. In review of the evidence, testimony, and cited authority, the undersigned concludes the Facility has established that Petitioner's needs cannot be met at its facility. This is one of the six reasons provided in federal regulations for which a nursing facility may involuntarily discharge a resident.

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 Agency for Health Care Administration ("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.

21. After careful review of the cumulative evidence and authorities, the undersigned concludes the Facility has met the burden of proof in establishing that Petitioner's needs

cannot be met at the facility. The undersigned concludes Respondent's intended action to discharge Petitioner is proper.

DECISION

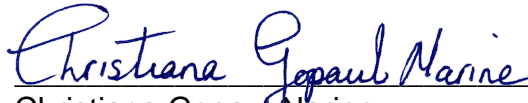
Based upon the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is DENIED. The Facility's action to discharge Petitioner is in accordance with Federal Regulations. The Facility may proceed with its proposed discharge action, as described in the Conclusions of Law and in 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 11 day of August , 2023,

in Tallahassee, Florida.



Christiana Gopaul Narine
Hearing Officer
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Copies Furnished To: [REDACTED], Petitioner
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[REDACTED]