

Nov 20, 2023

Office of Appeal Hearings
Dept. of Children and FamiliesSTATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

[REDACTED]

APPEAL NO. 23N-00084

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter on October 5, 2023 at 11:36 a.m.

APPEARANCESFor Petitioner: [REDACTED], *pro se*For Respondent: [REDACTED]
Nursing Home Administrator ("NHA")**STATEMENT OF ISSUE**

Petitioner appeals Respondent's action to discharge him from Avante at Lake Worth (the "Facility") due to non-pay. Respondent carries the burden of proof by clear and convincing evidence.

SUMMARY OF PROCEEDINGS

The appeal was initially scheduled on September 5, 2023, it was rescheduled per Petitioner's request.

██████████ (Resp't Wit. 1.), Business Office Manager, and ██████████
("Resp't Wit. 2.), Director of Social Services, appeared as witnesses for Respondent.

On June 13, 2023, the Facility issued a *Nursing Home Transfer and Discharge Notice* ("Notice") informing Petitioner of its intent to discharge him from the Facility effective July 13, 2023 due to his bill for services at the facility has not been paid after reasonable and appropriate notice to pay.

Petitioner did not submit any exhibits. Respondent submitted evidence, which was marked and entered into the record as Respondent's Exhibit one ("1").

The record was left open through close-of-business on October 19, 2023 for both parties to develop the record. Respondent submitted additional evidence, which was marked and entered into the record as Respondent's Exhibits two ("2") and three ("3").

On October 19, 2023, Petitioner called the Office of Appeal Hearings ("OAH") to request additional time submit his evidence. The undersigned granted Petitioner additional time through October 26, 2023. Petitioner did not provide any additional information, nor did he contact the OAH for additional time. The record was closed on October 26, 2023.

On October 30, 2023, Petitioner submitted his evidence. The undersigned found it necessary to reopen the record to accept Petitioner's information. It was marked and entered into the record as Petitioner's Exhibit one ("1"). The record was closed on October 30, 2023.

Petitioner's Position

Petitioner took the position he cannot afford the Facility's monthly fee because he has too many personal expenses. Petitioner believes Respondent should deduct about

\$150.00 per week from his monthly bill to compensate for kosher foods he must have due to his religious faith. Petitioner believes he can live independently; however, being wheelchair bound makes it very difficult for him to look for a place.

Respondent's Position

Respondent took the position that Petitioner can pay but refused to meet his monthly patient responsibility ("PR") of \$902.00 as determined by DCF. 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 Petitioner is not dealing in good faith. Respondent is seeking to discharge him from the Facility for refusing to pay.

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. On February 21, 2023, The Facility admitted Petitioner as a Medicaid eligible resident through the Department of Children and Families ("DCF"). (Hr'g R.)
2. On March 10, 2023, DCF issued a Notice of Case Action indicating Petitioner was expected to pay the Facility \$902.00 effective February 2023 for its services. (Resp't Ex. 2). Effective July 2023, Petitioner's monthly amount due to the Facility is \$872.00. (Hr'g R.)
3. Petitioner is very alert, is not cognitively impaired and is responsible for his healthcare decision. (*Id.*)

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.

4. Petitioner has made no payments since he entered the Facility and has not tried to enter into any payment agreements with the Facility. (Resp't Wit. 1 Test.)

5. On June 13, 2023, the Facility issued a *Nursing Home Transfer and Discharge Notice* ("Notice") informing Petitioner of its intent to discharge him from the Facility. The location to which Petitioner was to be discharged: "TBD-resident choice." The Notice informed Petitioner the reason for his discharge was that "his bill for services at the Facility has not been paid after reasonable and appropriate notice to pay." (Resp't Ex. 1 at 4.)

6. 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." (*Id.* at 5.)

7. On July 8, 2023, Petitioner timely requested an appeal to challenge Respondent's action. (Hr'g R.)

8. Petitioner owes the Facility a total of \$8255.68 as of November 1, 2023. The following monthly charges were accrued: \$257.68 for February 2023; \$902.00 for March 2023; \$902.00 for April 2023; \$902.00 for May 2023; \$902.00 for June 2023; \$872.00 for July 2023; \$872.00 for August 2023; \$872.00 for September 2023; \$872.00 for October 2023; and \$872.00 for November 2023. (Reps't Ex. 3 at 1-10.)

9. Respondent issued regular statements to Petitioner requesting payments for its services but has not received any payments. Respondent notified Petitioner of his balance due via monthly statements hand delivered to his room. (Resp't Wit. 1 Test.)

10. Petitioner acknowledged receiving invoices and not making any payments to the Facility. Petitioner would like his monthly food expenses deducted from his monthly invoice to cover his kosher meals before any negotiations. (Hr'g R.)

11. Petitioner received an invoice dated September 1, 2023 indicating balance forward as \$0.00 and the balance due as \$1744.00 for August 2023 and September 2023. (Pet'r Ex. 1 at 5).

12. On October 6, 2023, Respondent spoke to Petitioner regarding establishing a payment plan. Petitioner refused. (Hr'g R.)

13. Petitioner would like to leave the Facility but does not have anywhere to go. Petitioner recalled received a billing statement two and one-half months prior to the hearing and stated that it was not itemized to show him in detail what were the charges owed to the facility. Petitioner could not explain why he had a \$0.00 balance when he had not made any payments. (*Id.*)

14. As of the day of this hearing, Petitioner is still in the Facility pending a hearing decision. (*Id.*)

CONTROLLING LAW

15. 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.

16. 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.

17. 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—

...
(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...

...
(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.

(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...

[Emphasis added].

18. 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

19. On June 13, 2023, Respondent issued an initial discharge notice to Petitioner informing him that he was to be discharged from the Facility effective July 13, 2023 because his bill for services at the facility has not been paid after reasonable and appropriate notice to pay. This is one of the six reasons provided in the controlling federal regulations for which a nursing facility may involuntarily discharge a resident.

20. 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.

21. 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.

22. The findings show that the discharge was in writing and signed by the Director of Social Services and by Petitioner's physician at the Facility. The findings show the Notice includes the reason and effective date of the discharge, and Petitioner's appeal rights along with other required assistance information. A copy was provided to Petitioner. The findings show the notice did not include a discharge location.

23. The findings show, Petitioner has not made any payments to the Facility since he was admitted on February 21, 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 \$8255.68 as of November 1, 2023. The findings show that Petitioner feels his food requirements should be considered when billing for services at the Facility.

24. 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.

25. The Facility seeks to involuntarily discharge Petitioner on the contention that Petitioner has not paid the Facility for its services.

26. Based on the evidence presented, the Facility has established 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 federal regulations (Title 42 C.F.R. § 483.15) for which a nursing facility may involuntarily discharge a resident. However, the undersigned also concludes that Respondent did not follow the proper procedures outlined in federal regulations and provided an inadequate notice to Petitioner due to its failure to list the discharge location.

27. 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. Therefore, the undersigned concludes Respondent's notice is faulty.

28. After careful review of the evidence and testimony, the undersigned concludes that Respondent has not met its burden of proof in establishing that its proposed action to discharge Petitioner from the Facility. Therefore, the undersigned concludes that Respondent may NOT discharge Petitioner from Facility based on the discharge notice at issue.

DECISION

Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is GRANTED. The Facility's action to discharge Petitioner is NOT in accordance with Federal Regulations. The Facility may NOT proceed with its proposed discharge action. If Petitioner has been discharged, the Facility is ORDERED to immediately readmit Petitioner to the Facility. If a bed is not currently open to readmit Petitioner, the Facility must readmit Petitioner as soon as a bed becomes available.

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 20 day of November, 2023,
in Tallahassee, Florida.



Roosevelt Reveil
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