

May 28, 2024

Office of Appeal Hearings
Dept. of Children and Families

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

[REDACTED]

APPEAL NO. 24N-00015

PETITIONER,

VS.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-referenced matter on April 25, 2024, at 2:46 p.m. and continued on May 16, 2024, at 4:00 p.m.

APPEARANCES

For Petitioner: [REDACTED] *pro se*

For Respondent: [REDACTED], Administrator,
[REDACTED]

STATEMENT OF ISSUE

Petitioner appeals Respondent’s Nursing Home Transfer and Discharge Notice dated February 28, 2024. Respondent carries the burden of proof by clear and convincing evidence.

SUMMARY OF PROCEEDINGS

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-referenced matter on April 25, 2024, at 2:45 p.m. Petitioner was present. [REDACTED], Administrator, appeared for Respondent. [REDACTED], Business Manager (“BOM”), was present as witness for Respondent. [REDACTED], Director of Rehabilitation; [REDACTED], RN, Director of Nursing; and [REDACTED], Social Services Director were present as witnesses for Respondent, but provided no testimony. The hearing required additional evidence and the undersigned scheduled the hearing to continue May 8, 2024, at 11:00 a.m.

On May 8, 2024, at 11:00 a.m. the undersigned convened a telephonic administrative hearing in the above-referenced matter. Petitioner appeared. [REDACTED], Ombudsman, resident advocate, appeared, as Petitioner’s witness. Neither the administrator nor the business manager appeared. All parties waited fifteen minutes. The undersigned scheduled the hearing to convene May 16, 2024, at 4:00 p.m.

On May 16, 2024, at 4:00 p.m., the undersigned convened a telephonic administrative hearing in the above-referenced matter. Petitioner appeared. [REDACTED], Ombudsman, resident advocate, appeared, as Petitioner’s witness. [REDACTED], Administrator, appeared for Respondent. [REDACTED], BOM, was present as witness for Respondent.

Petitioner did not submit any evidence.

Respondent submitted evidence marked and entered as exhibits one (“1”) through four (4).

The record closed on May 16, 2024.

Petitioner's Position

Petitioner stated [REDACTED] contacted [REDACTED] Ombudsman about quality of care and two weeks later [REDACTED] received the thirty-day notice for the discharge along with a statement of what [REDACTED] owed. Petitioner took the position that [REDACTED] thought Medicaid and Medicare was covering these costs until January 2024 when Petitioner was first told [REDACTED] owed money. Petitioner could not tell what the amount was or what amount was accruing. Petitioner expressed that no one explained anything to [REDACTED].

Respondent's Position

Respondent took the position that Petitioner was planning to move to Texas, had additional unreported income, and Petitioner still owed \$57,747.57.

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 December 12, 2020, Petitioner became a resident of [REDACTED] [REDACTED] and was skilled care through March 2021. (Hr'g R.)
2. On August 19, 2022, Respondent received a Notice of Case Action ("NOCA") from the Department of Children and Families, stating the following:

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.

Medicaid

Your application for Medicaid benefits dated August 08, 2022 is **approved**. You are eligible for the months listed below.

Name	Jul, 2021	Aug, 2021	Sep, 2021	Oct, 2021	Nov, 2021
██████████	Eligible	Eligible	Eligible	Eligible	Eligible
Your gross countable income	\$2334.00	\$2334.00	\$2334.00	\$2334.00	\$2334.00
Amount you keep for personal needs See(1)	\$130.00	\$130.00	\$130.00	\$130.00	\$130.00
Amount you are expected to pay the nursing facility or provider See(2)	\$2204.00	\$2204.00	\$2204.00	\$2204.00	\$2204.00

Name	Dec, 2021	Jan, 2022	Feb, 2022	Mar, 2022	Apr, 2022
██████████	Eligible	Eligible	Eligible	Eligible	Eligible
Your gross countable income	\$2334.00	\$2447.00	\$2447.00	\$2447.00	\$2447.00
Amount you keep for personal needs See(1)	\$130.00	\$130.00	\$130.00	\$130.00	\$130.00
Amount you are expected to pay the nursing facility or provider See(2)	\$2204.00	\$2317.00	\$2317.00	\$2317.00	\$2317.00

(Resp't Ex. 4.)

3. On May 20, 2023, Respondent received a NOCA from the Department of Children and Families, stating the following:

Medicaid

Your application for Medicaid benefits dated May 26, 2023 is **approved**. You are eligible for the months listed below.

Name	Jun, 2023
██████████	Eligible
Your gross countable income	\$2624.00
Amount you keep for personal needs See(1)	\$130.00
Amount you are expected to pay the nursing facility or provider See(2)	\$2255.00

(Resp't Ex. 4.)

4. On November 21, 2023, Respondent received a NOCA from the Department of Children and Families, stating the following:

Medicaid

A change was reported in your income.

Name	Jan, 2024
██████████	Eligible

Reason: DUE TO A CHANGE IN SOCIAL SECURITY BENEFIT

The law that supports this action is:

(FL Admin. Code = R) (FL Statute = S), 65A-1

Did you know you now have an on-line account with us? Go to www.myflorida.com/accessflorida. You will need your case number, 1661339042, to activate your My ACCESS Account. Then you can get into your account with a user name and password of your choice.

You may keep \$130 of your income for personal needs. The remaining \$2296.00 is the amount you must pay the nursing facility each month for your Medicaid services beginning January 1, 2024.

(Resp't Ex. 4.)

5. On February 28, 2024, Respondent provided Petitioner with a "Nursing Home Transfer and Discharge Notice" ("Discharge Notice") dated February 28, 2024, with an effective date of March 29, 2024, for the following reason: "Your bill for services at █████ facility has not been paid after a reasonable and appropriate notice to pay."

On February 28, 2024, Both Respondent and Petitioner signed the Discharge Notice with copies given to Petitioner, Ombudsman Council, and Resident Clinical Record.

(Resp't Ex. 2.)

6. On March 4, 2024, Petitioner timely requested an appeal of the discharge as provided by Respondent. (Hr'g R.)

7. As of February 29, 2024, Respondent provided a statement showing Petitioner's liability as of February 29, 2024, was a total of \$15,509.71, with resident's ongoing liability of \$2,296.00 per month. The statement also provided for a private balance of \$39,941.88, as of February 29, 2024, and a private HMO B Copay of \$.02 credit as of February 29, 2024. The statement ended in the amount due from Resident of \$57,747.57. (Resp't Ex. 3.)

8. Respondent stated [REDACTED] had been the administrator for [REDACTED] [REDACTED] since September 2023. Respondent believed most of the debt came from the two initial months that Petitioner was over asset limits. Respondent stated Petitioner told facility staff during a January 18, 2024, meeting that Petitioner was planning to get married, move to Texas and Petitioner reported additional income. Respondent stated that none of the additional income was being applied towards the bill. Respondent stated Petitioner had offered to pay \$200.00 a month towards the outstanding balance, but Respondent felt that was unreasonable and there was no agreement in writing. Petitioner had to pay the balance to set precedence. (Hr'g R.)

9. Respondent's witness, [REDACTED], BOM, stated [REDACTED] joined the facility since January 2024 and was unsure where all of Petitioner's debt came from but was working on it. Respondent's witness stated from what [REDACTED] could tell so far, most of the debt came from some initial costs incurred, specifically the first two months. Cigna paid through March 24, 2021, and a Medicaid application was submitted in July 2021. For the period April 2021 through June 2021, Petitioner wasn't covered due to being over asset limits. Respondent's witness stated the Medicaid application took almost a year to be completed. Respondent's witness stated Petitioner received a statement once a month, but didn't know any dates, times, or names of who provided them.

Respondent's witness stated Petitioner's entire social security check was deposited into a Resident Trust Fund Program (RTFP) that went towards Petitioner's bill each month. Respondent's witness did not know yet what the breakout was for the total costs being billed to Petitioner.

10. Petitioner stated [REDACTED] did not find out about the debt until January 2024 and then nothing was explained. Prior to that, Petitioner thought Medicare and Medicaid were covering the costs. Petitioner stated that Respondent was keeping Petitioner's entire social security check of \$2300.00 per month. Petitioner stated [REDACTED] started receiving from New York Life in long term disability payment of \$412.00 per month. Petitioner stated [REDACTED] offered half to the facility to help with the debt. (Hr'g R.)

11. Petitioner stated [REDACTED] did tell the staff [REDACTED] was planning to move to [REDACTED] in the future, but [REDACTED] fiancée was still in the process of looking for and buying a house. [REDACTED] fiancée would then need to make the necessary adjustments to enable Petitioner to live there. Petitioner stated the facility was trying to discharge Petitioner to [REDACTED] father's house who lives on the second floor. Petitioner wouldn't be able to move around there. (Hr'g R.)

12. On May 16, 2024, [REDACTED], Ombudsman, stated [REDACTED] met with Petitioner in January 2024 to discuss some issues [REDACTED] was having. In February 2024, Petitioner notified [REDACTED] received a discharge notice. [REDACTED] stated the current management did receive a mess from the prior management and Petitioner wasn't receiving any bills prior to January 2024. In early March Petitioner requested some detail regarding the bill. Petitioner received some information on March 4, 2024, but the bill still wasn't clear.

CONTROLLING LAW

13. Florida Statutes, Section 400.0255(15), Resident transfer or discharge; requirements and procedures; hearings, provides the Department of Children and Families, Office of Appeal Hearings, jurisdiction over the subject matter of this proceeding and the parties. The burden of proof must be clear and convincing evidence. 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 483.10, Resident rights, in relevant part states:

f. **Self-determination.** The resident has the right to and the facility must promote and facilitate resident self-determination through support of resident choice, including but not limited to the rights specified in paragraphs (f)(1) through (11) of this section.

...

(10) The resident has the right to manage his or her financial affairs. This includes the right to know, in advance, what charges a facility may impose against a resident's personal funds.

...

(iii) Accounting and records.

(A) The facility must establish and maintain a system that assures a full and complete and separate accounting, according to generally accepted accounting principles, of each resident's personal funds entrusted to the facility on the resident's behalf.

(B) The system must preclude any commingling of resident funds with facility funds or with the funds of any person other than another resident.

(C) The individual financial record must be available to the resident through quarterly statements and upon request.

15. Title 42, Code of Federal Regulations, Section 483.15, Admission, transfer and discharge rights in relevant part states:

...

(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.

...

- (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. ...
- (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;

16. Florida Statutes, Section 400.0255, 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.

...

(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, ... 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)

...

(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.

(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. ...

(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.

17. Slomowitz v. Walker, 429 So. 2d 797 (Fla. 4th DCA 1983) states in relevant part:

“clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.”)

18. Owens-Corning Fiberglas Corp. v. Ballard, 739 So.2d 603, 608, 1999, (Florida Supreme Court, No. 92,963), states in relevant part the following:

“Although it is not defined in the statute, this Court defines the standard “clear and convincing evidence” as “an intermediate level of proof [that] entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.” In re Adoption of Baby E.A.W., 658 So.2d 961, 967 (Fla.1995).”

CONCLUSIONS OF LAW

19. The above controlling authorities state the nursing facility can discharge a resident for six different reasons, to include when a resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. The findings show Respondent determined Petitioner had not paid ■■■ bill

for services after reasonable and appropriate notice to pay. The undersigned concludes this is one of the six reasons a nursing facility can lawfully discharge a resident.

20. The above controlling authorities state that 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.

21. The above controlling authorities state that 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. The findings show on February 29, 2024, Respondent provided Petitioner with a billing statement which shows Petitioner owes \$57,747.57. The findings show Respondent's witness was in the process of but had not completed an audit after the facility's new management started in September 2024 and January 2024. The findings show the record is void of any evidence showing what Cigna paid, what Medicare paid, or what Medicaid paid towards the outstanding balance. The findings show as of November 23, 2024, Petitioner started a new certification period effective January 2024. The findings show no evidence that Medicare or Medicaid denied Petitioner's benefits, other than the initial two months of eligibility. The record is void of any evidence Petitioner refused to pay for ■■■ stay. The undersigned concludes Respondent has not finished verifying the debt owed by Petitioner. The undersigned concludes there is no evidence third party coverage is no longer paying towards the

monthly expenses. The undersigned concludes there is no evidence showing what was owed by Petitioner and what should have been covered by third party coverage (Cigna, Medicare, or Medicaid). The undersigned concludes Petitioner has not refused to pay for ■■■ stay. The undersigned concludes it is unknown at this time what Petitioner's actual liability to date is.

22. The above 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 that since the facility has not completed their audit verifying Petitioner's account, what ■■■ owes, and what third-party coverage will pay, this discharge is premature.

23. 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 is proper. Therefore, the undersigned concludes that Respondent may NOT discharge Petitioner from the facility until Respondent has completed their audit verifying Petitioner's account, what ■■■ owes, and what third-party coverage will pay.

DECISION

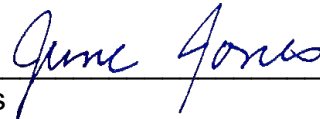
Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is GRANTED. The Facility's action to discharge Petitioner is NOT in accordance with Federal Regulations. The Facility may NOT proceed with its proposed discharge action. If Petitioner has been discharged, the 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. Each party must either pay the court fees required by law or seek an order of indigency to waive those fees. There are no funds to assist in this review, and any financial obligations incurred will be the party's responsibility.

DONE and ORDERED this 28 day of May, 2024,

in Tallahassee, Florida.



June Jones
Hearing Officer
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