

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

FILED  
JAN 19 2010  
OFFICE OF APPEAL HEARINGS  
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09N-00200

PETITIONER,

Vs.

RESPONDENT.  
\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on January 12, 2010, at 8:45 a.m., in Pensacola, Florida. The petitioner was not present. He was represented by his wife, \_\_\_\_\_ and \_\_\_\_\_ Testifying on behalf of the petitioner were his sons, \_\_\_\_\_ and \_\_\_\_\_ The respondent was represented by \_\_\_\_\_ administrator. Testifying on behalf of the respondent was \_\_\_\_\_, Director of Nursing (DON), \_\_\_\_\_, Assistant Director of Nursing (ADON), \_\_\_\_\_, MSW social worker and \_\_\_\_\_ Dunkelburger, Risk Manager.

**ISSUE**

The respondent will have the burden to prove by clear and convincing evidence that the petitioner's discharge is in accordance with the requirements of the Code of Federal Regulation at 42 C.F.R. §483.12(a).

**FINDINGS OF FACT**

1. The petitioner (Date of Birth \_\_\_\_\_) is a resident of the nursing facility. The petitioner is diagnosed with end stage dementia (Alzheimer's disease).
2. The respondent entered into evidence records of incidents of physically abusive behavior to residents and staff members of the facility. In addition the respondent presented evidence to show the petitioner was sent to the hospital under the Baker Act on at least three separate occasions: September 22, 2009, October 24, 2009 and December 7, 2009.
3. Testimony and clinical notes submitted show that the petitioner behaves violently such as slapping and kicking CNA's, punching a female resident, and punching residents, nurses and aides. This behavior occurred on July 20, 2009, July 24, 2009, July 27, 2009, September 14, 2009, September 22, 2009, October 14, 2009, October 24, 2009, December 5, 2009 and December 7, 2009. He has exhibited behavior potentially dangerous to the safety and well being of the residents and staff of the facility. After returning to the facility from the last Baker Act in December 7, 2009, the nursing facility has provided one-on-one care and supervision to minimize any continued episodes of violent and disruptive behavior. The nursing facility is concerned that providing one-to-one care and supervision will interfere with the facility's ability to provide care to other residents. The petitioner's representative was

contacted on several occasions in reference to the petitioner's behavior. On at least one occasion, the petitioner struck his wife.

4. The facility's physician and psychologist reviewed the medication taken by the petitioner in an effort to alleviate or control his behavioral issues. The facility staff tries to redirect the petitioner when his behavior is inappropriate. These actions were not successful in stopping the petitioner's abusive and inappropriate behavior.
5. The petitioner's medications have included Aricept, Ativan, fluoxetine, HCTZ, Metformin, Namenda, Haldol, and rocephin. The medications have not been successful in controlling the petitioner's behavior. His behavior is under control as long as the facility provides one-to-one supervision, however, the petitioner is ambulatory and poses a flight risk should he manage to get down the stairway to the floor level.
6. On November 23, 2009, the respondent, by Nursing Home Transfer and Discharge Notice, notified the petitioner that it was their intent to discharge the petitioner, effective December 23, 2009, because the safety of other individuals in the facility was endangered. The Nursing Home Transfer and Discharge Notice was not signed by the physician or his designee. A second Nursing Home Transfer and Discharge Notice was sent to the petitioner and his family on December 7, 2009 effective January 7, 2009 and was signed by the nursing home administrator and the physician designee on December 7,

2009. The facility inadvertently used the incorrect year of January 7, 2009 rather than January 7, 2010 as the intended effective date of discharge.

7. The respondent arranged for an orderly transfer to another skilled nursing facility in the local area that has a locked unit for dementia patients.

However, the petitioner's family did not agree with the proposed relocation.

Given the petitioner's limitations, it is not possible to permit him to live alone in the community.

#### **CONCLUSIONS OF LAW**

Jurisdiction to conduct this type of hearing is conveyed to the Department by federal regulations appearing in 42 C.F.R. §431.200. Additionally, federal regulations limit the reasons for which a Medicaid or Medicare certified nursing facility may discharge a patient.

Federal regulations at 42 C.F.R. §483.12 states in part:

(2) Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless--

- (i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;
- (ii) 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;
- (iii) The safety of individuals in the facility is endangered;
- (iv) The health of individuals in the facility would otherwise be endangered;
- (v) 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. 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

(vi) The facility ceases to operate.

(3) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (a)(2)(i) through (v) of this section, the resident's clinical record must be documented. The documentation must be made by--

- (i) The resident's physician when transfer or discharge is necessary under paragraph (a)(2)(i) or paragraph (a)(2)(ii) of this section; and
- (ii) A physician when transfer or discharge is necessary under paragraph (a)(2)(iv) of this section.

(4) Notice before transfer. Before a facility transfers or discharges a resident, the facility must--

- (i) Notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.
- (ii) Record the reasons in the resident's clinical record; and
- (iii) Include in the notice the items described in paragraph (a)(6) of this section.

(5) Timing of the notice.

(i) Except when specified in paragraph (a)(5)(ii) of this section, the notice of transfer or discharge required under paragraph (a)(4) of this section must be made by the facility at least 30 days before the resident is transferred or discharged.

(ii) Notice may be made as soon as practicable before transfer or discharge when--

(A) the safety of individuals in the facility would be endangered under paragraph (a)(2)(iii) of this section;...

In this case, the notice of discharge specifies the reasons for discharge that appear in 42 C.F.R. §483.12(a)(2)(iii), which states, in part:

Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless--...(iii) The safety of individuals in the facility is endangered....(7) Orientation for transfer or discharge. A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

The Findings of Fact show that the petitioner's behavior includes physical abuse and attacks against the staff, residents and family. The facility has completed medication reviews, and made changes to his supervision in an attempt to modify his behavior and to protect other residents of the facility. In spite of the facility's efforts, the petitioner continues to exhibit agitated behaviors. The facility is currently providing one-on-one supervision to prevent the petitioner from assaulting other residents. The Findings show that the petitioner was sent to the hospital on at least three occasions under the Baker Act due to inappropriate behavioral issues.

According to the above authorities, a facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. The facility attempted to complete the required orientation and preparation for the transfer or discharge from the facility but the transfer was not completed because of the objection of the petitioner's representative and because a timely appeal was requested.

Based on the above findings, it is determined that the petitioner's behavior has endangered the safety of other residents in the facility. Therefore, the respondent's proposed discharge of the petitioner from the facility, dated December 7, 2009, is in accordance with the reasons stated in the Federal Regulations.

**DECISION**

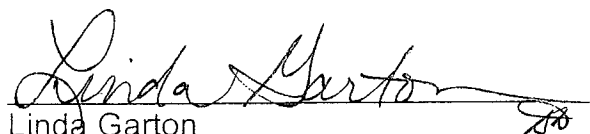
The appeal is denied. The facility may proceed with the discharge and arrange for an appropriate placement for the petitioner in accordance with the Agency for Health Care Administration's rules.

**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 Agency Clerk, Office of Legal Services, Bldg. 2, Rm. 204, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. 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 19<sup>th</sup> day of January, 2010,

in Tallahassee, Florida.



Linda Garton  
Hearing Officer  
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Copies Furnished T