

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

FILED
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DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09N-00212

PETITIONER,

Vs.

RESPONDENT.

FINAL ORDER

Per notice, a nursing home discharge hearing was first held before the undersigned hearing officer on January 21, 2010, at 9:27 a.m., at the respondent nursing facility. The hearing was held again on February 12, 2010, at 2:40 p.m. at the same location. At the first hearing, the respondent was represented by the facility administrator, _____ testified at both hearing dates. At the second hearing, the respondent was represented by _____ did not testify.

The petitioner was present for the first hearing only, but did not testify. The petitioner was represented at both hearings by _____ r, District manager with the Long Term Care Ombudsman Program. _____ also testified. Another ombudsman, _____, was present only at the second hearing as an observer. The petitioner's son, _____ and daughter-in-law, _____, appeared on both hearing dates. Both testified at the second hearing date.

The following facility staff appeared as witnesses for the respondent on both hearing dates: _____ director of nursing, _____; social services director, and _____ registered nurse and risk manager. _____ administrator in training, observed only at the second hearing date.

Several witnesses for the facility appeared only on the first hearing date:

_____, activities assistant, _____ psychiatrist, _____ licensed practical nurse, _____; unit manager and registered nurse, and _____ activities director. _____ geriatric psychiatrist, appeared as a witness for the petitioner only at the second hearing date.

ISSUE

At issue is the respondent action of December 11, 2009 to discharge the petitioner from the respondent facility because the safety of other individuals is endangered. The respondent has the burden of proof.

FINDINGS OF FACT

1. The petitioner was admitted to the respondent facility in May 2008. The petitioner's date of birth is June 10, 1920. The petitioner is 89 years old.
2. The petitioner had primary diagnoses of dysphagia and esophageal stricture upon admission. She has additional diagnoses to include Alzheimer dementia, asbestosis, hypertension, anxiety, depression, bi-polar disorder, history of stomach cancer, history of esophageal cancer, esophagitis, anemia, osteoporosis, and psychosis.
3. On December 10, 2009, the petitioner's son (and representative) was given written notice of discharge. The listed reason for discharge is the safety of other individuals is endangered. On this notice, the facility listed a discharge location of \

nursing facility in Tampa Florida. The discharge notice contained a signature of the resident's attending physician, Lawrence Petty.

4. The petitioner has had instances of aggressive and inappropriate behaviors since her admission to the facility. In June 2008, she paced up and down the halls calling staff racist names. On October 30, 2008, the petitioner rolled up to other residents in her wheelchair in an attempt to stand up and throw herself on the floor. This episode resulted in a skin tear. In November 2008, she exhibited anger at staff, cursing and making paranoid statements. On May 23, 2009, she restrained both her roommate's hands while she hit the top of this roommate's hand in an attempt to extract a television remote control. The petitioner continued the outburst and was assigned 1:1 observation by a certified nursing assistant as a result. On August 20, 2009, the petitioner was agitated, pacing, yelling and threatening others, and harm or injury to herself. On October 11, 2009, the petitioner was upset with her roommate and made threats, with loud and agitated behaviors. On December 4, 2009, the petitioner made verbal threats to her roommate with threatening gestures in regard to the television, curtains, and lights. On February 11, 2009, the petitioner verbally threatened bodily harm to her roommate.

5. Dr. _____ is a geriatric psychiatrist. He has been the petitioner's treating psychiatrist since the year 2008. Dr. _____ sees the petitioner in his office because the respondent facility uses another psychiatrist, Dr. _____. Dr. _____ is the petitioner's treating psychiatrist. The respondent facility contacts Dr. _____ for a consulting opinion on an as needed basis. Dr. _____ last saw the petitioner in December 2009.

6. On May 6, 2008, Dr. [REDACTED] clarified the petitioner's diagnosis to dementia with psychosis to receive Zyprexa medication. On October 14, 2008, October 21, 2008, and October 28, 2008, Dr. [REDACTED] changed the petitioner's medications. On November 4, 2008, Dr. [REDACTED] determined the petitioner as very agitated and paranoid, but her behavior can be appropriate at times. Dr. [REDACTED] then noted that the petitioner can easily switch to a full manic episode. The dosage of Zyprexa was reduced. Dr. [REDACTED] was consulted again on May 26, 2009, December 8, 2009, December 15, 2009, and January 5, 2009.

7. Dr. [REDACTED] has changed medication orders on: May 22, 2008, June 10, 2008, July 3, 2008, and January 7, 2010. After viewing records on the date of hearing, Dr. [REDACTED] believed he found an explanation for the petitioner's irritability and aggressiveness due to inappropriately treated depression. He recommended further medication changes at the hearing.

8. Both Dr. [REDACTED] and Dr. [REDACTED] similarly believe that the petitioner may not be a danger to herself or others if appropriately treated. Dr. [REDACTED] believes that if the petitioner is stable and in a correct environment, then she would not represent a threat. However, Dr. [REDACTED] questions that the respondent facility is the correct placement for the petitioner. Dr. [REDACTED] believes that more time under a better treatment regimen would correct behaviors.

9. The listed discharge location is the [REDACTED] nursing facility in Tampa, Florida. Unlike the respondent facility, [REDACTED] has specialized geriatric psychiatric facilities. The respondent believes this facility would better meet the needs of the petitioner.

CONCLUSIONS OF LAW

The jurisdiction to conduct this hearing is conveyed to the Department by Federal Regulations appearing at 42C.F.R. §431.200. Federal Regulations limit the reason for which a Medicaid or Medicare certified nursing facility may discharge a patient. In this case, the respondent believes the petitioner should be discharged because the safety of individuals is endangered. Federal Regulations do permit a discharge based on the potential endangerment of other residents, as set forth at 42 C.F.R. §483.12(a)(2)(iii), as follows: "The safety of individuals in the facility is endangered;..."

Federal Regulations also permit a discharge based on the fact that an individuals' needs cannot be met at the facility per 42 C.F.R. §483.12(a)(2)(i), as follows: "The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility..."

Both of the petitioner's psychiatric physicians believe that the risk of endangerment the petitioner poses to others would be lessened with effective treatment. Dr. believes the petitioner also needs to be in the right environment. Dr. believes that the petitioner's problem behaviors can be corrected by allowing time to effect recent medication changes. Even though it is hoped that such recent medication changes may help with dangerous behaviors, it is evident that the petitioner has a history of numerous past dangerous behaviors and incidents that continued to occur in the past, even with multiple medication changes by both psychiatrists.

Florida Statutes 400.0255 (7)(b) requires the resident's physician or medical director to document why the petitioner's needs cannot be met, or why her stay at the facility would endanger the safety of other individuals at the facility, as follows:

(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; or

(b) The health or safety of other residents or facility employees would be endangered, and the circumstances are documented in the resident's medical records by the resident's physician or the medical director if the resident's physician is not available.

The notice of discharge is signed by the resident's physician, _____, to show that other individuals' safety is endangered by the petitioner's continued stay at the respondent facility. Documentary and testimonial evidence clearly corroborates this endangerment. Therefore, the respondent facility has met its burden by clear and convincing evidence to show that the petitioner's stay at the respondent facility endangers other individuals. Based on the available evidence, the petitioner's need for specialized psychiatric services would be better served at the listed discharge location, _____, Florida.

DECISION

The appeal is denied. The respondent facility is permitted to discharge the petitioner pursuant to this discharge action under appeal.


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 5th day of April, 2010,

in Tallahassee, Florida.



Jim Travis
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
850-488-1429

Copies Furnished To