

PRELIMINARY STATEMENT

On February 7, 2011, the respondent issued a Nursing Home Transfer and Discharge Notice to be effective on March 8, 2011. Reason given was "needs cannot be met in this facility." No other reason for discharge was shown. The respondent intended to discharge the petitioner to another skilled nursing facility in the same county. The petitioner timely appealed.

Respondent's Exhibit 1 and 2 were entered as evidence. Petitioner's Exhibit 1 was the hearing request.

FINDINGS OF FACT

1. The petitioner has serious health problems and has been residing at the nursing facility for about the past five years. He does not wish to leave the facility.

2. The petitioner had been using a donated electric wheelchair for several years. He had been falling out of the wheelchair, particularly during position transfers. His doctor requested the physical therapist review to see if the wheelchair was appropriate for the petitioner. Evaluation occurred and the chair was determined to be too small.

3. On January 20, 2011, the petitioner signed a statement saying as follows:

I...understand the risks involved due to my continuing to ambulate with a motorized wheelchair/scooter that has been determined by my physician and our therapy department to be too small for me due to my physical decline and poor safety awareness. I assume all responsibility for any illness, injury or death due to continued misuse of this motorized scooter/wheelchair. ...

4. The respondent repeatedly asked the petitioner to relinquish the power chair. He repeatedly declined to do that. He wrapped a bed cord around the chair in an effort to prevent the chair's removal. Nonetheless, staff removed the wheelchair on

January 29, 2011. The petitioner was informed his name would be placed on a waiting list for a more appropriate donated electric wheelchair or scooter. In the meanwhile, and as of hearing date, he was using a mechanical chair.

5. When the wheelchair was removed, the police were called by someone on behalf of the petitioner but apparently no report was filed.

6. There are other concerns. The petitioner places himself on the floor at inopportune times such as during visits from community officials. He does not wish to have male attendants help him with hygiene. He does not always facilitate sharing of medical or test information for purpose of administering proper Coumadin dosage. In the opinion of facility staff, he is repeatedly uncooperative in his own health care. Behavior has been described as manipulative and harassing. Sometimes he declines his medications and monitoring.

7. The respondent believes the petitioner's needs would be better met elsewhere, perhaps at a facility where there is a younger or more diverse population. The petitioner is 54 years old. The location recommended for discharge has a purportedly younger population. The petitioner and his surrogate do not want him to move there.

8. On February 7, 2011, the respondent issued a discharge letter signed by a doctor and authorizing discharge to another location in the county. Sole reason given was "needs cannot be met in this facility."

CONCLUSIONS OF LAW

9. Jurisdictional boundaries to conduct this hearing have been assigned to the Department by federal regulations appearing at 42 C.F.R. § 431.200. Florida Statute

400.0255 addresses “Resident transfer or discharge; requirement and procedures; hearing...” and section (15) (b) informs that the burden of proof is on the respondent with a standard of clear and convincing evidence.

10. Federal regulations limit the reasons for which discharge may occur and in this situation, “needs cannot be met in this facility” was the sole reason.

11. Relevant to this problem is 42. C.F.R. § 483.12 informing as follows:

Admission, transfer and discharge rights.

(a) Transfer and discharge—

...

(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

...

(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 ...

(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.

(6) Contents of the notice. The written notice specified in paragraph (a)(4) 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;

This federal regulation addresses the situation at hand.

12. The evidence and testimony have been carefully studied. It appears there is mutual dissatisfaction. However, the petitioner does not wish to leave

the facility at this time. The respondent does not give a clear description of what “needs cannot be met” or for what reason the facility cannot meet the needs or for what reason another facility is more likely to meet the specific need(s). No other reason for discharge is shown. The respondent’s surmise that the petitioner would be happier with a younger or more diverse population may not be valid, and it is not clear and convincing evidence that needs cannot be met where the petitioner is. The respondent’s allegation that the petitioner does not comply with medical efforts that are within his best interests, is not an indication of the facility inability to meet needs. It is an indication that a resident is exercising his own preference and he may do that.

13. The wheelchair incident does not demonstrate the facility inability to meet needs. The petitioner’s nonprovision of his blood test results does not establish the facility’s inability to meet needs. The petitioner’s unusual behavior and personal preferences do not clearly and convincingly establish the facility’s inability to meet his needs. These behaviors present significant challenges for the facility, but these problems are not the same as “inability to meet needs.” There are obstacles to providing best possible care, but these obstacles are not the same as facility inability to meet needs.

14. Although there is a physician’s signature on the discharge notice, the evidence does not reflect basis for determining “needs cannot be met.” To the contrary, once the electric wheelchair was removed, it would appear the facility could meet need as the petitioner was no longer using ill-fitting equipment that might place himself or others at risk.

15. While it is clear the facility would like to provide quality care and there may be other concerns which could be addressed in the future, the evidence does not establish adequate justification for the notice issued for the reason shown. Clear and convincing evidence has not established the facility's inability to meet needs or another facility's ability to meet the needs that the respondent allegedly cannot meet. It is concluded that discharge based on the February 7, 2011 notice has not been justified.

DECISION

The appeal is granted and the respondent's action is not upheld.

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 _____ day of _____, 2011,
in Tallahassee, Florida.

J W Alper
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