

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

FILED

AUG 18 2014

OFFICE OF APPEAL HEARINGS
DEPT OF CHILDREN & FAMILIES



PETITIONER,

Vs.

Administrator



RESPONDENT.

APPEAL NO. 14N-00066

FINAL ORDER

Pursuant to notice, an administrative hearing in the above styled matter was convened on June 6, 2014 at 2:51pm in respondent's facility.

APPEARANCES

For the Petitioner:	Michael Phillips, Ombudsman
For the Respondent:	Dante Skourellos, esq.
AHCA Representative:	Carla Beasley, RN Consultant (by telephone)

ISSUE

At issue is the respondent's written notice of March 25, 2014 to transfer the petitioner from the facility to an Assisted Living Facility as "Your health has improved sufficiently so that you no longer need the services provided by this facility."

PRELIMINARY STATEMENT

The petitioner was present. Appearing as witnesses for the respondent were [REDACTED] Administrator of the facility, [REDACTED] petitioner's physician, [REDACTED] Social Services Director, and [REDACTED] Case Manager for Sunshine Health. [REDACTED] Director of Nursing, was called to testify by the petitioner.

Also present as observers were Rita Poff, Ombudsman, and Larry LaBelle, Hearing Officer.

The respondent submitted two exhibits during the hearing. These were entered as Respondent's Exhibits #1 and #2. The petitioner submitted two exhibits during the hearing which were entered as Petitioner's Exhibits #1 and #2. The record remained open through June 20, 2014 to allow both parties to submit additional documentation and, if desired, Proposed Final Orders. The respondent submitted a Memorandum of Law in Support of Discharge on June 12, 2014. The petitioner submitted a Proposed Final Order on June 20, 2014. The petitioner also supplied additional documentation from the petitioner's records at the facility. The records were entered as Petitioner's Exhibit #3.

FINDINGS OF FACT

1. The respondent issued a Nursing Home Transfer and Discharge Notice on March 25, 2014. This notice indicates the reason for discharge or transfer as "Your health has improved sufficiently so that you no longer need the services provided by this facility." A handwritten note of explanation included states the petitioner "is ambulatory

and performs all of her own ADL's. Her medport can be flushed on outpatient services."

The notice is signed by the facility administrator and the petitioner's treating physician.

2. The Agency for Health Care Administration (AHCA) notified the undersigned in writing on May 7, 2014 that an unannounced visit to this facility was made on May 1, 2014. The purpose of the visit was to determine if the facility complied with the requirements of 42 § C.F.R. 483.12 in taking action to discharge a resident. The letter states: "Based on interview and facility documentation, it has been determined that there were no violations."

3. The petitioner is 69 years old and has been a resident of this facility since May 24, 2006 with brief stays in the hospital for treatment.

4. Respondent Exhibit #2, page 1, shows the admission date of September 15, 2013 and lists the allergies and diagnoses of the petitioner.

5. The petitioner maintains that she continues to have the same health problems as when she entered the facility. The petitioner does not believe she has improved and is no better physically now than when she entered the facility at her original admission.

6. The petitioner supplied the Last Care Plan Review completed on April 14, 2014 (Petitioner Exhibit #3 pages 63 through 75). The plan includes an update on May 2, 2014 that the petitioner "has been deemed ALF appropriate by her physician and the facility is seeking placement for her."

7. The petitioner's treating physician testified and provided a written statement (Respondent Exhibit #1, page 1). He has treated petitioner off and on for eight years. It is his opinion that she is appropriate for an Assisted Living Facility and

has no medical needs that require a Skilled Nursing Facility. The petitioner can perform her own activities of daily living (ADL), walk with a rolling walker or walk short distances without it, dress and groom herself, get in and out of bed by herself, toilet herself and is continent. She keeps her medications with her and decides which ones she will take and not take. She is aware of which foods to avoid and which foods to eat. Petitioner contacts her physician's office to make or cancel appointments. She has plants in her room that she tends to. In addition, the petitioner has had a Mediport since her admission to the facility and can have it flushed by a home health nurse or on an outpatient basis at the infusion center. Petitioner attended a portion of the hearing and walked into the conference room on a walker; she walked to the chair without her walker.

8. The petitioner's physician is not the medical director of this facility and has no direct ties to the facility. He confirmed his loyalty is to his patients rather than the facility. He signed the discharge notice on March 25, 2014.

9. The respondent provided a PT Daily Treatment Note dated February 17, 2014 which states "PT evaluation completed. Patient at this time is not appropriate for skilled therapy as she is Independent/Mod I in all ADL's at this time. Mobility Walking and Moving Around Functional Limitation – Current Status is modified Independent base on tinneti score of 23/28. Patient's projected goal is modified Independent."

10. The respondent provided the petitioner's radiology report from March 30, 2014 regarding the petitioner's right knee. The results state: "There is a prosthetic right femoral oondyle [sic] in proper alignment with respect to the tibial plateau. There is no

fracture or acute dislocation. The prosthesis is properly situated without any loosening. No joint effusion is seen."

11. The petitioner maintains she needs assistance with her showering due to her risk for falls. Petitioner indicated she has limited reading ability.

12. The petitioner reports that she is likely to require additional surgery in the near future which will require the skilled nursing care of a nursing facility.

13. The petitioner presented a Notification of Level of Care completed by the Florida Department of Elder Affairs Comprehensive Assessment and Review for Long-Term Care Services (CARES) signed by [REDACTED]. This shows the Level of Care as Skilled with a Placement Recommendation of "Nursing Facility" selected. There were no "Meet Program Requirements for:" options checked in question number four. The effective date is Sept 4, 2013. It shows an approval signature date of June 5, 2014.

14. The respondent presented its Progress Notes for petitioner's record. Ms. [REDACTED] testified and reviewed documentation from March 10, 2014 when she met with the administrator who requested she pursue ALF placement for petitioner. The note indicates the transfer notice was initiated and the physician will be in the next day to sign. Additional documentation entered June 4, 2014 by Ms. [REDACTED] states, "Spoke with [REDACTED], CARES, as she was here to evaluate Ms [REDACTED] for Level of Care. Ms [REDACTED] stated that Ms [REDACTED] needed a level of care to be eligible for the med waiver program going to ALF. Ms [REDACTED] states that it is the same level of care for ALF as is Nursing home. Ms [REDACTED] [sic] spoke with several staff members also about Ms [REDACTED] being able to function on her own in ALF."

15. The respondent began the process of locating Assisted Living Facilities for petitioner to move to. She was evaluated and accepted by ALFs that she can move into.

CONCLUSIONS OF LAW

16. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to s. 400.0255(15), Fla. Stat. In accordance with that section this order is the final administrative decision of the Department of Children and Families. The burden of proof is clear and convincing evidence and is assigned to the respondent.

17. Federal Regulations appearing 42 C.F.R. § 483.12, sets forth the reasons a facility may involuntarily discharge a resident as follows: Admission, transfer and discharge rights.

(a)(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.

18. The nursing facility issued a discharge notice based on its belief that the petitioner's health has improved sufficiently so that the resident no longer needs skilled

services provided by the facility. This is one of the six reasons provided in the above controlling Federal Regulation for which a nursing facility may involuntarily discharge a resident.

19. The petitioner argued there has been no improvement since admission and suggests there could be a different reason that prompted the discharge action. Respondent argues improvement is shown by her discharge from physical therapy in February 2014 and the discussion regarding placing the petitioner in an ALF began in early March 2014. In addition, X-rays obtained in late March 2014 revealed an intact right knee post arthroplasty. Respondent's position is the improvement shown in the first quarter of 2014 led her treating physician to order the discharge from skilled nursing care to assisted living.

20. The reason identified for discharge involves a medical decision regarding petitioner's health. The petitioner's treating physician is very familiar with her and her medical needs. No other physician provided testimony to rebut Dr. [REDACTED] expert opinion. Even though petitioner submitted a level of care prepared by [REDACTED] recommending skilled care, the undersigned has relied on her treating physician's testimony at the hearing to conclude petitioner's health has improved and she can be discharged to an ALF.¹

¹ Due to the reliance on the treating physician's testimony and not the written level of care document, no analysis of hearsay evidence has been made.

21. Establishing that the reason for a discharge is lawful is just one step in the discharge process. The nursing home must also provide discharge planning, which includes identifying an appropriate transfer or discharge location and sufficiently preparing the affected resident for a safe and orderly transfer or discharge from the facility. The hearing officer in this case cannot and has not considered either of these issues. The hearing officer has considered only whether the discharge is for a lawful reason.

22. Any discharge by the nursing facility must comply with all applicable Federal Regulations, Florida Statutes, and Agency for Health Care Administration requirements. Should the resident have concerns about the appropriateness of the discharge location or the discharge planning process, the resident may contact the Agency for Health Care Administration's health care facility complaint line at (888) 419-3456.

23. The undersigned concludes the respondent has complied with both the controlling Federal Regulations (42 C.F.R. § 483.12) and state law (Section 400.0255) and may proceed with the discharge of this resident.

DECISION


Based on the Findings of Fact, and Conclusions of Law, the appeal is denied. The facility may proceed with the discharge of the petitioner in accordance with the Agency for Health Care Administration's rules and procedures.

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 18th day of August, 2014,

in Tallahassee, Florida.


Melissa Roedel
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
Office: 850-488-1429
Fax: 850-487-0662
Email: Appeal_Hearings@dcf.state.fl.us

Copies Furnished To: [REDACTED] Petitioner

[REDACTED], Respondent

Ms. Donna Heiberg, Agency for Health Care Administration

Dante Skourellos, Esq.

MICHAEL Phillips, Ombudsman