

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2155610
Decision Date:	9/30/2021	Hearing Date:	08/27/2021
Hearing Officer:	Scott Bernard		

Appearance for Appellant:
Pro se via telephone

Appearance for the Nursing Facility:
Kathleen Stewart, Administrator *via* telephone
Nancy Serozynsky, Director of Nursing *via* telephone
Brian Hachey, Esq. *via* telephone



*The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171*

APPEAL DECISION

Appeal Decision:	Approved	Issue:	Nursing Facility Discharge
Decision Date:	9/30/2021	Hearing Date:	08/27/2021
The Nursing Facility's Rep.:	Kathleen Stewart; Nancy Serozynsky; Brian Hachey, Esq.	Appellant's Rep.:	<i>Pro se</i>
Hearing Location:	Taunton MassHealth Enrollment Center		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a notice dated June 28, 2021, the Nursing Facility informed the appellant of its intent to discharge the appellant by July 28, 2021. (See 130 CMR 610.028(A)(2); 610.029(B)(2); Exhibit 1; Ex. 2). The appellant filed this appeal in a timely manner on July 25, 2021. (See 130 CMR 610.015(B) and Ex. 1; Ex. 2). A discharge initiated by a nursing facility is a valid ground for appeal. (See 130 CMR 610.032).

Action Taken by the Nursing Facility

The Nursing Facility initiated the appellant's discharge from the facility.

Issue

The appeal issue is whether the Nursing Facility was correct, pursuant to 130 CMR 610.028, in determining that the appellant should be discharged from the facility.

Summary of Evidence

The facility's attorney testified that the appellant entered the facility in the spring of 2020. The appellant was admitted from a hospital status post hand surgery. The appellant has received physical therapy. The facility's attorney stated that the appellant has completely plateaued in her treatment. The facility's attorney referred to the discharge note from the nursing facility's Medical Director dated August 17,

2021. (Ex. 4, pp. 9-11). The notes states that the appellant's past medical history includes dissection of vertebral artery, generalized anxiety disorder, contracture of muscle left upper arm, adult failure to thrive, cerebral infarction due to thrombosis of vertebral artery in 2013, hypoxemia, chronic pain syndrome, other diseases of the biliary tract, anterior displaced type II odontoid fracture, osteoporosis, pneumonia, polysubstance abuse disorder (alcohol, opiates, and fentanyl), hyperlipidemia, SI, hypertension, rheumatoid arthritis, pneumothorax, previous psychiatric admission. (Ex. 4, p. 9). The Medical Director also wrote the following:

[The appellant] is [an over-65 individual] with PMH as listed above who has been living in this facility since [early] 2020. She is s/p recent hand surgery that is completely healed. She was followed by PT here who recommends that patient is safe to be discharged with VNA and PT at home/ shelter. She reports seeing occupational therapy in the community once a week. She reports her independent [sic] in scheduling her own appointments and getting herself to and from the appointments. She is independent with ADL[s] and therefore it [sic] does not require any further skill services. During my encounter today, she reports feeling anxious and [sic] her desire to continue living in this facility. She denies any acute pain, fever, chills, night sweats, lightheadedness, or dizziness. She denies any negative thoughts, any suicidal or homicidal ideations. She will be getting discharged to shelter. (Id.).

The facility's attorney stated that there is no clinical need for the appellant to continue residing in the nursing facility. This is the reason the nursing facility sent the appellant the Notice of Intent to Discharge.¹

The Notice of Intent to Discharge was dated June 28, 2021 and stated that the nursing facility sought to discharge the appellant to a particular named shelter and included the address of that shelter.² The sole reason for discharge was that "[t]he Transfer or discharge is appropriate because the residents health has improved sufficiently, and the services provided by our facility are no longer necessary." (Id.). The Notice informed the appellant that to appeal the discharge notice she needed to submit a request in writing within ten days of the notice to the Board of Hearings and included the Board's contact information. (Ex. 4, p. 6-7). The notice also informed the appellant that the facility cannot discharge a resident until a decision is rendered when the resident has requested a fair hearing within 10 days of the intent to discharge notice. (Ex. 4, p. 6). Finally, the Notice informed the appellant of her right to be represented. (Ex. 4, p. 6). The Notice contained no other relevant information. (Ex. 4, pp. 6-7).

The Director of Nursing stated the following. The appellant only requires some assistance with morning care. This means assisting the appellant with buttons and anything having to do with her left hand. The appellant does not require assistance with her right hand. The appellant also does not require assistance with items of clothing that are pull-on or pull-over. This is a one-person minimal assist.

¹ The appellant's attorney also tried to inform the hearing officer of past appeals concerning the appellant and the Board of Hearings. The appellant's attorney included several hearing decisions from these appeals in the facility's appeal packet. (Ex. 4). The hearing officer informed the attorney that this hearing was not an opportunity for the facility to relitigate past appeals but rather an opportunity to submit evidence concerning the current discharge notice.

² The actual name and location of the shelter are omitted here for reasons of confidentiality. (Ex. 4, p. 6).

The appellant takes care of herself except for receiving assistance in the morning. The appellant makes own appointments, arranges her own rides. The appellant can feed herself and administer her own medicines. The appellant does use a wheelchair but can ambulate short distances. The appellant cannot climb stairs, but the nursing facility is fully accessible. The appellant can shower without assistance. The Director of Nursing explained that a skilled level of care included, for example, assisting the resident with IV injections and other activities because of the resident's physical disability when the resident had no other assistance available. Other assistance could be rendered with the resident was unable to get around to get towels, or required assistance toileting, or had to be monitored for blood sugar and fevers. None of these situations apply here.

Referring to the note from the appellant's occupation therapist, the Director of Nursing confirmed that she reviewed the note. The Director of Nursing stated that the appellant has used her left hand for some activities that do not require bearing weight. The Director of Nursing thought that the appellant could use that hand to some extent. The Director of Nursing concluded that the appellant's condition has plateaued. The appellant is no longer receiving therapeutic benefit from continuing to live in the nursing facility. The Business Office Manager stated that prior to coming to the facility, the appellant had been living in a shelter. The Business Office Manager stated that the shelter to which the appellant will be discharged is wheelchair accessible.

The appellant stated that she has no use of her left arm. The appellant referred to the letter from her OT, which states:

I have been treating [the appellant] in OT intermittently over the past two years period she is unable to use her left arm except for light grasping of small objects in front of her period she is unable to extend her fingers or thumb which prevents her from holding onto larger objects. Her wrist is fused. She is unable to straighten her elbow due to spasticity and a joint contracture. She cannot raise her arm up beyond 40 degrees due to shoulder spasticity and paralysis.

[The appellant] uses her right arm to perform self-care tasks. She is unable to put on upper body garments, hook her bra, button or zip, all of which she receives help for in Rehab. She would need to perform all cooking and home management tasks with her right hand.

Due to the severity of dysfunction of her left arm, it is my professional opinion that [the appellant] would benefit from staying in Rehab. (Ex. 5).

The appellant stated that she still needs help in the shower. The nursing facility just approved assistance for two shower days per week. The appellant stated that she is not supposed to use her left arm for weight bearing. The appellant stated that her left hand is pried closed and she cannot pick up anything with it. The appellant did state that she was right-handed, however. The appellant confirmed that the discharged was hand-delivered to her. The appellant stated that the suggestion that she could use her left hand was completely wrong.

In response to a question from the hearing officer, the facility's attorney stated that he does not have information to present from the appellant's doctor in the community. The facility's attorney stated

that to communicate with outside medical providers concerning the appellant, the facility would require consent from the appellant. The facility's attorney stated that he did not believe that the facility needed to provide evidence from the appellant's medical provider in the community. The facility's attorney stated that the facility's Medical Director oversaw the appellant's treatment while she was residing in the facility, and that his statement should be considered sufficient under the regulations. The Director of Nursing commented that when a resident is at the nursing facility and are being treated by a doctor at the facility, the PCP is generally not consulted.

After the hearing, the appellant submitted a further document to the Board of Hearings. Because this document was introduced after the hearing record closed, the hearing officer has not added it to the hearing record and will not consider that document in the rendering of this decision.

Findings of Fact

Based on a preponderance of the evidence, I find the following:

1. The appellant is an individual over the age of 65. (Ex. 4, p. 9)
2. The appellant entered the nursing facility in the spring of 2020. (Ex. 4, p. 9; Testimony of the facility's attorney).
3. The appellant was status post recent hand surgery when she entered the facility. (Ex. 4, p. 9).
4. The appellant's past medical history includes dissection of vertebral artery, generalized anxiety disorder, contracture of muscle left upper arm, adult failure to thrive, cerebral infarction due to thrombosis of vertebral artery in 2013, hypoxemia, chronic pain syndrome, other diseases of the biliary tract, anterior displaced type II odontoid fracture, osteoporosis, pneumonia, polysubstance abuse disorder (alcohol, opiates, and fentanyl), hyperlipidemia, SI, hypertension, rheumatoid arthritis, pneumothorax, and previous psychiatric admission. (Ex. 4, p. 9).
5. The facility to discharge the appellant based on the medical opinion of the facility's Medical Director and the Director of Nursing that the appellant's condition had improved to the point she could be discharged. (Testimony of the facility's attorney; Testimony of the Director of Nursing; Ex. 4, pp. 6-8).
6. The Notice of Intent to Discharge was dated June 28, 2021 and stated that the nursing facility sought to discharge the appellant to a particular named shelter and included the address of that shelter by July 28, 2021. (Ex. 4, p. 6).
 - a. The sole reason for discharge was that "[t]he Transfer or discharge is appropriate because the residents health has improved sufficiently, and the services provided by our facility are no longer necessary." (Ex. 4, p. 6).
 - b. The Notice informed the appellant that to appeal the discharge notice she needed to submit a request in writing with ten days of the notice to the Board of Hearings and included the Board's contact information. (Ex. 4, p. 6).

- c. The notice also informed the appellant that the facility cannot discharge a resident until a decision is rendered when the resident has requested a fair hearing within 10 days of the intent to discharge notice. (Ex. 4, p. 6).
 - d. Finally, the Notice informed the appellant of her right to be represented. (Ex. 4, p. 6).
 - e. The Notice contained no other relevant information. (Ex. 4, pp. 6-7).
7. The Notice of Discharge was hand delivered to the appellant. (Testimony of the appellant).

Analysis and Conclusions of Law

610.030. According to 130 CMR 610.028(A), a Nursing Facility resident may be transferred or discharged only when:

- (1) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the Nursing Facility;
- (2) the transfer or discharge is appropriate because the resident's health has improved sufficiently so that the resident no longer needs the services provided by the the Nursing Facility;**
- (3) the safety of individuals in the Nursing Facility is endangered;
- (4) the health of individuals in the Nursing Facility would otherwise be endangered;
- (5) the resident has failed, after reasonable and appropriate notice, to pay for (or failed to have the Nursing Facility Agency or Medicare) a stay at the Nursing Facility; or
- (6) the Nursing Facility ceases to operate. (Emphasis added).

When the facility discharges a resident under any of the circumstance specified in (1)-(5), above, the resident's clinical record must be documented. (130 CMR 610.028(B)). The documentation must be made by "the resident's physician when a...discharge is necessary under 130 CMR 610.028(A)(1) or (2)". (130 CMR 610.028(B)(1)).

Prior to discharge or transfer, the Nursing Facility must hand deliver to the resident and mail to a designated family member or legal representative a notice written in 12-point or larger type that contains, in a language the member understands, the following:

- (1) the action to be taken by the Nursing Facility;
- (2) the specific reason or reasons for the discharge or transfer;
- (3) the effective date of the discharge or transfer;
- (4) the location to which the resident is to be discharged or transferred;
- (5) a statement informing the resident of his or her right to request a hearing before the Nursing Facility agency including:
 - (a) the address to send a request for a hearing;
 - (b) the time frame for requesting a hearing as provided for under 130 CMR 610.029; and
 - (c) the effect of requesting a hearing as provided for under 130 CMR 610.030;
- (6) the name, address, and telephone number of the local long-term-care**

ombudsman office;

(7) for Nursing Facility residents with developmental disabilities, the address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. § 6041 et seq.);

(8) for Nursing Facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act (42 U.S.C. § 10801 et seq.);

(9) a statement that all residents may seek legal assistance and that free legal assistance may be available through their local legal services office. The notice should contain the address of the nearest legal services office; and

(10) the name of a person at the Nursing Facility who can answer any questions the resident has about the notice and who will be available to assist the resident in filing an appeal. (Emphasis added). (130 CMR 610.028(C)).

Additionally, the notice must be made by the facility at least 30 days before the date the resident is to be discharged or transferred, except when the circumstances for an emergency discharge or emergency transfer are met. (130 CMR 610.029).

Further, Mass. Gen. Laws ch. 111, §70E provides that “[a] resident, who requests a hearing pursuant to section 48 of chapter 118E, shall not be discharged or transferred from a the Nursing Facility licensed under section 71 of this chapter, **unless a referee determines that the Nursing Facility has provided sufficient preparation and orientation to the resident to ensure safe and orderly transfer or discharge from the facility to another safe and appropriate place.**” (Emphasis added). Finally, federal regulations require that a Nursing Facility provide sufficient preparation for a safe and orderly discharge. (See 42 CFR 483.12(a)(7)).

The record shows that the nursing facility’s notice of discharge is deficient in several respects. While the notice contains the information from 130 CMR 610.028(C))(1)-(5), it contains none of the information listed in (6)-(10). The regulations require the notice to have all the elements listed in 130 CMR 610.028(C). The notice is therefore deficient, and no action must be taken in accordance with it.

A preponderance of the evidence also does not support the nursing facility’s justification for discharging the appellant. When the underlying reason for a discharge is due to a resident’s improved health, that discharge must be documented in the clinical record by that resident’s physician. The nursing facility representatives did submit documentation from the facilities Medical Director, and the Director of Nursing testified concerning the appellant’s condition. Neither of these individuals is the appellant’s physician, however. The facility’s attorney argues that it was not necessary for the facility to present this sort of documentation, citing confidentiality concerns and the inability to get the appellant to provide consent. This is not an argument against the clear statement in the rules.

For the above stated reasons, the appeal is APPROVED.

Order for the Nursing Facility

Rescind the June 28, 2021 notice. Do not discharge the appellant under this notice.

Implementation of this Decision

If the Nursing Facility fails to comply with the above order, you should report this in writing to the Director of the Board of Hearings at the address on the first page of this decision.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Scott Bernard
Hearing Officer
Board of Hearings

cc:

[REDACTED]