

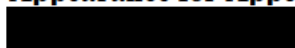
Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



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|-------------------------|-------------|-----------------------|------------|
| Appeal Decision: | Approved | Appeal Number: | 2155806 |
| Decision Date: | 9/24/2021 | Hearing Date: | 08/30/2021 |
| Hearing Officer: | Casey Groff | | |

Appearance for Appellant:



Appearance for Nursing Facility:

Stewart Karger, Administrator, Belmont Manor
Nursing & Rehab Ctr.
Lorraine Curtain, Director of Social Work,
Belmont Manor Nursing & Rehab Ctr.



*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

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|-------------------------------|---|--------------------------|------------------------|
| Appeal Decision: | Approved | Issue: | Nursing Home Discharge |
| Decision Date: | 9/24/2021 | Hearing Date: | 08/30/2021 |
| Nursing Facility Rep.: | Stewart Karger, Administrator; Lorraine Curtain, Dir. S.W. | Appellant's Rep.: | ██████ |
| Hearing Location: | Remote | | |

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 July 20, 2021, the skilled nursing facility, Belmont Manor Nursing & Rehabilitation Center ("the facility"), informed Appellant of its intent to discharge him to his brother's residence because he failed, after reasonable and appropriate notice, to pay for services rendered at the facility. See 130 CMR 610.028 and Exhibit 2. On August 2, 2021 Appellant's brother appealed the discharge notice in a timely manner; however, his hearing request did not include Appellant's signature or proof of authorization to appeal on Appellant's behalf. See Exh. 1. On August 9, 2021, the Board of Hearings (BOH) dismissed the appeal for lack of authority under 130 CMR §§ 610.034; 610.035 with the options to vacate the dismissal. See Exh. 3. On August 16, 2021, Appellant signed the fair hearing request to challenge the nursing facility discharge /notice and designated his brother as his appeal representative. See Exh. 4. BOH scheduled a hearing for August 30, 2021. See Exh. 5.

Action Taken by Nursing Facility

The nursing facility notified Appellant that it sought to discharge him due to his failure, after reasonable and appropriate notice, to pay for his stay.

Issue

The issue on appeal is whether the nursing facility met the statutory and regulatory requirements set forth under 130 CMR §§ 610.028, 610.029 and 42 CFR Ch IV, subpart B, 483.12(a) to discharge Appellant from the nursing facility pursuant to its July 20, 2021 discharge notice.

Summary of Evidence

The nursing home administrator and director of social work appeared at the hearing via telephone and testified on behalf of the nursing facility as follows: Appellant is an [REDACTED] resident of Belmont Manor Nursing & Rehabilitation Ctr (the “facility”). He has several ailments and is unable to care for himself, such as preparing meals. He was admitted to the nursing facility after being transferred from a hospital. From August 10, 2020 through September 10, 2020, Appellant’s nursing home care was covered by Medicare. After his Medicare benefits ended, Appellant’s brother who is also his designated power of attorney (POA), submitted a MassHealth application on Appellant’s behalf, seeking long-term care benefits to cover his stay. There were numerous delays in the application process, and it had been denied multiple times for missing verifications. On August 3, 2021, MassHealth approved Appellant’s application for benefits with a retroactive start date of October 1, 2020 and imposed a monthly patient-paid amount of \$1,704.11.¹ See Exh. 6, p. 4.

The Administrator testified that when a resident’s MassHealth application is pending, it is standard protocol for the facility to notify the resident, and/or their family, of the estimated monthly patient paid amount (PPA) that they will owe the facility. This way, the resident can pay the facility the estimated PPA each month, rather than having to pay a much larger bill that accumulates over the application process. The facility will also provide the resident and/or family with the monthly private pay bill when there is a pending application. The facility does not mandate they pay the private pay amount in full while the application is pending; however they provide it to ensure the resident is aware of the cost of nursing facility services.

The Administrator testified that the above process is exactly what the facility did in the present case. Specifically, the Administrator explained, that he had numerous conversations with MassHealth eligibility regarding Appellant’s estimated PPA, which they knew would be approximately \$1,700. He then informed Appellant’s brother of this obligation numerous times and requested that he pay the estimated PPA, noting that the facility would resolve any discrepancy if the final PPA amount was different. The Administrator testified that Appellant’s pension and social security go into a joint account he holds with his brother. The facility has no

¹ At hearing, there was discussion as to why Appellant’s MassHealth benefits became effective on October 1, 2020 when his Medicare coverage ended on September 10, 2020 thus causing a gap in coverage. According to the administrator, Appellant’s brother submitted the MassHealth application within the time to request a September 11th start date; however, he specifically requested October 1st on the application. Appellant’s brother argued that the nursing home was at fault for causing the gap because Medicare could have paid longer. Specifically, Appellant’s brother suggested that the nursing home detailed Appellant’s behaviors in a way that caused Medicare to end short-term coverage before he exceeded his 100-days.

access to Appellant's money and does not know where it is going or what his brother is doing with it. The Administrator testified that Appellant's brother made one payment of approximately \$9,300 to cover Appellant's care as a private pay patient between his gap in Medicare/Medicaid coverage from 9/11/20 and 9/30/20. In July of 2021, after having numerous conversations, the administrator told Appellant's brother that he would seek to discharge Appellant if his PPA remained unpaid.

On July 20, 2021, after having not received any payment for Appellant's care from October 1st to the present, the facility issued a "30-Day Notice of Intent to Discharge Resident" to Appellant. The Administrator and social work director hand delivered the notice to Appellant and mailed a copy to Appellant's brother. The notice, which was dated July 20, 2021, informed Appellant that the facility would discharge him on July 20, 2021, to an address that was identified at hearing as his brother's residence. The notice specified that the reason for the discharge was because Appellant had *"failed, after reasonable and appropriate notice, to pay for (or have failed to have Medicare or Medicaid pay for) your stay at the nursing facility...You have failed to pay PPA of \$17,347.60 while appealing Medicaid."* See Exh. 2. Prior to hearing, the nursing facility submitted a seven page document consisting of the BOH hearing notice, MassHealth's approval notice, emails from Appellant's brother proposing an 8-month repayment plan, and Appellant's most recent invoice dated 8/30/21 with a total unpaid balance of \$20,449.32. See Exh. 6.

Appellant's brother appeared at the hearing and testified that he was aware he owed money and had proposed several repayment plans to the Administrator which were rejected as unacceptable and not fast enough. Appellant's brother also argued that the \$9,300 that he paid the facility should be applied to the current balance rather than the 20-day gap in coverage from September of 2020. According to Appellant's brother, this amount should have been paid by Medicare and any gap was due to the error of the nursing facility.

Findings of Fact

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

1. Appellant is a resident of the facility and due to his condition, is unable to care for himself.
2. On September 10, 2020, Appellant's Medicare coverage for his nursing home care ended.
3. After his Medicare benefits ended, Appellant's brother who is also his designated power of attorney (POA), submitted a MassHealth application on Appellant's behalf, seeking long-term care benefits to cover his stay.
4. On August 3, 2021, after numerous delays in the application process, MassHealth approved Appellant's application for benefits with a retroactive start date of October 1, 2020 and imposed a monthly patient-paid amount of \$1,704.11.

5. While Appellant's MassHealth application had been pending, the facility advised Appellant's brother of the estimated PPA of approximately \$1,700 per month and requested he pay the estimated amount pending MassHealth approval.
6. Appellant's pension and social security go into a joint account he holds with his brother.
7. Appellant's brother has made one payment to the facility of approximately \$9,300 to cover Appellant's care as a private pay patient between 9/11/20 and 9/30/20.
8. In July of 2021, after issuing numerous requests for payment, the facility administrator told Appellant's brother that he would seek to discharge Appellant if his PPA remained unpaid.
9. On July 20, 2021, after having not received any payment for Appellant's care from October 1st to the present, the facility issued a "30-Day Notice of Intent to Discharge Resident" to Appellant.
10. The notice, which was dated July 20, 2021, informed Appellant that the facility would discharge him on July 20, 2021, to an address that was identified at hearing as his brother's residence, and specified that the reason for the discharge was because Appellant had *"failed, after reasonable and appropriate notice, to pay for (or have failed to have Medicare or Medicaid pay for) your stay at the nursing facility...You have failed to pay PPA of \$17,347.60 while appealing Medicaid."*
11. The parties have been unable to agree on an acceptable repayment plan.
12. Appellant's most recent invoice dated 8/30/21 has a total unpaid balance of \$20,449.32.

Analysis and Conclusions of Law

The federal Nursing Home Reform Act (NHRA) of 1987 – now codified in 42 CFR Ch IV, subpart B, 483.12(a) - guarantees all residents the right to advance notice of, and the right to appeal, any transfer or discharge initiated by a nursing facility. MassHealth has enacted regulations that mirror the federal requirements concerning a resident's right to appeal a transfer or discharge, and the relevant MassHealth regulations may be found in the Nursing Facility Manual regulations at 130 CMR 456.000 et seq. and in the Fair Hearing Rules at 130 CMR 610.000 et seq.

According to these statutory and regulatory requirements, nursing facilities can *only* initiate a transfer or discharge of a resident when one of the following circumstances applies:

- (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 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 Division or Medicare pay for) a stay at the nursing facility;** or
- (6) the nursing facility ceases to operate.

See 130 CMR 610.028(A) (emphasis added); see also 130 CMR 456.701(A).

When the discharge or transfer is being made pursuant the reasons specified in subsections (1) through (5), above, the resident's clinical record must contain documentation to explain the transfer or discharge. See 130 CMR 610.028(B); 130 CMR 456.701(B).

Additionally, before initiating the discharge or transfer, the nursing facility must issue a notice of the intended action to the resident (via hand delivery) and to a designated family member or legal representative (via mail). See 130 CMR 610.028(C). The content of the notice must include specific information, such as (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; among many other requirements relating to the resident's rights and available resources to contest the notice. Id.

Finally, any notice of discharge or transfer, as described above, "**must be made by the nursing facility at least 30 days before the date the resident is to be discharged or transferred...**" 130 CMR 610.029(A). MassHealth recognizes limited exceptions to this rule, such as "emergency" circumstances where there is typically a health or safety component prompting the discharge,² in which case the notice "must be made as soon as practicable before the discharge..." Id.

The nursing facility, through a July 20, 2021 notice, sought appropriate grounds to discharge Appellant from the facility. The evidence presented at hearing demonstrated that Appellant has a current balance of over \$20,000 from unpaid PPA charges, which Appellant's brother, as Appellant's POA, has refused to pay. According to testimony, the facility has repeatedly made Appellant and his brother aware of his monthly obligation to pay approximately \$1,700 to cover the cost of his skilled nursing care. Thus, the facility appropriately demonstrated that Appellant "has failed, after reasonable and appropriate notice, to pay for a stay at the nursing facility" and thus is subject to be discharged from the facility. See 130 CMR 610.028(A).

Notwithstanding this fact, however, the facility did not comply with all regulatory mandates to proceed with the discharge as specified in its notice. Specifically, the notice sought to discharge Appellant on July 20, 2020 – the same day it was issued. Where Appellant is being discharged

² The regulations set forth the following four circumstances that constitute a need for an "emergency" discharge or transfer: (1) the health or safety of the other residents would be endangered; (2) the resident's health improves sufficiently; (3) an immediate transfer is required by the resident's urgent medical needs; and (4) the resident has not lived in the nursing facility for 30 days. See 130 CMR 610.029(B). None of these circumstances apply in this case.

on grounds of failure to pay – which is one of the enumerated “emergency discharge” exceptions - the facility must provide at least 30 days’ notice before initiating the action. See 130 CMR 610.029. Whether or not the facility intended to discharge him on that date, is irrelevant. The regulations, which were adopted from federal law, are designed to give residents the right to advance notice of an intended discharge. This includes the requirement that the notice contain the effective discharge date, which, in this case, must be at least 30 days from the date of issue. Id. Moreover, the nursing facility did not submit any evidence to show that “the resident’s clinical record... contain[s] documentation to explain the transfer or discharge” as required under 130 CMR 610.028(B). While the facility did submit Appellant’s most recent invoice showing an outstanding balance of over \$20,000, there was no underlying evidence to indicate how the anticipated discharge is reflected in his clinical record.

While Appellant does not have a right to remain in the facility without paying, the facility must first provide Appellant with a proper discharge notice in accordance with 130 CMR §§610.028 - 610.029.³

Based on the foregoing, this appeal is APPROVED.

Order for Nursing Facility

Rescind the 30-Day Notice of Intent to Discharge/Transfer Resident. The facility may issue a new discharge notice at any time if Appellant’s PPA remains unpaid.

Notification of Your Right to Appeal

The Medicaid Director’s adopted decision is the final agency action reviewable Chapter 30A of the Massachusetts General Laws. If you disagree with this decision, you have the right to appeal to Superior Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a civil action with the Superior Court for the county in Massachusetts where you reside or have your principal place of business, or with the Suffolk County Superior Court, within 30 days of your receipt of this decision. You may apply to the Superior Court to extend the time for filing within the 30-day period or any extension granted by the Superior Court, and the Superior Court may, for good cause shown, extend the time.

Implementation of this Decision

If this 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.

³ As an additional requirement to proceed with a discharge, a nursing facility must also demonstrate at hearing, that it “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” as required under M.G.L. c.111, §70E. Because the facility did not meet the preliminary notice requirements to proceed with the discharge, this Decision need not address whether the facility met this standard.

Casey Groff
Hearing Officer
Board of Hearings

cc:

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