

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2178435
Decision Date:	12/24/2021	Hearing Date:	12/7/2021
Hearing Officer:	Cynthia Kopka	Record Open to:	12/21/2021

Appearance for Appellant:
Pro se

Appearance for Respondent:
Robert Baker, Administrator
Jessica Prescott, Social Worker



*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:	Denied	Issue:	Nursing facility discharge
Decision Date:	12/24/2021	Hearing Date:	12/07/2021
Respondent's Rep.:	Robert Baker, Jessica Prescott	Appellant's Rep.:	Pro se
Hearing Location:	Quincy (remote)	Aid Pending:	No

Authority

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

Jurisdiction

By notice dated October 15, 2021, The Oxford ("Respondent" or "the facility") informed Appellant of its intent to discharge Appellant from the facility on November 14, 2021. Exhibit 1. Appellant filed a timely appeal on November 8, 2021. Exhibit 2. 130 CMR 610.615. Challenging the discharge or transfer from a nursing facility is a valid basis for appeal. 130 CMR 610.032. At Appellant's request, the hearing record was held open through December 21, 2021 for submission of additional evidence.

Action Taken by Respondent

Respondent informed Appellant of its intent to discharge Appellant from the facility.

Issue

The appeal issue is whether Respondent satisfied its statutory and regulatory requirements when it issued Appellant the notice of intent to discharge.

Summary of Evidence

Respondent, a skilled nursing facility licensed in Massachusetts, was represented by telephone by its administrator and social worker. Respondent's representatives submitted documents in support of its position, Exhibit 4. Appellant appeared by telephone. A summary of testimony and supporting records follow.

By letter dated October 15, 2021, Respondent informed Appellant of its intent to discharge Appellant from the facility to an address identified to be a homeless shelter. Exhibit 1. A copy of the notice was not provided to a representative on Appellant's behalf. The notice stated that Respondent sought to discharge Appellant on November 14, 2021 because Appellant's health has improved sufficiently and Appellant no longer needs the services provided by the facility. *Id.* The notice identified a social worker as the person responsible for supervising the discharge and explained Appellant's appeal rights. The notice included contact information for a local long term care ombudsman, the disability law center, centers for public representation (including a disabled persons' protection commission) and a legal assistance corporation. *Id.*

Appellant is in her forties with a primary diagnosis of unspecified adrenal cortex insufficiency, with opioid and alcohol abuse and major depressive disorder. Exhibit 4 at 5. Appellant admitted to the facility on [REDACTED] from an acute care hospital and received physical and occupational therapy at the facility. *Id.* at 7. Appellant was discharged from therapy after plateauing. Appellant is independent with activities of daily living (ADLs) and could discharge to the community with medication teaching. *Id.* Appellant attends a methadone clinic and has a voucher for transportation to and from the clinic, which can be used in the community. As Appellant does not have an address, the facility will discharge Appellant to Mitch's Place, a shelter in town that allows for visiting nurse services in the mornings. The medical director, Appellant's physician at the facility, wrote that Appellant's health has improved, she has no skilled needs, and she no longer needs nursing facility services. *Id.* When the social worker gave Appellant the notice of discharge, Appellant indicated that she planned to discharge to an alternative address. However, the address was never provided. Notes provided after the hearing demonstrated that social workers have been engaging in discharge planning with Appellant for several months, since August 2021. Exhibit 5.

Appellant testified that Exhibit 4 does not contain the same diagnoses as her preadmission screening from the Department of Mental Health dated June 11, 2021. Appellant listed the diagnoses in this screening, including cervical fracture with two rods and a spinal fusion, chronic pancreatitis, adrenal gland insufficiency, lupus. Appellant has ongoing unsteadiness for which she is being followed by neurology. Appellant has other motor insufficiencies such as difficulty opening and closing her hands and lifting her arms above her head. Appellant has suffered several falls in the facility, though only one has required nurse intervention. Appellant's nurse practitioner ordered a physical therapy consultation after the most recent fall on November 16, 2021. Appellant learned she never received the consultation because of the notice of discharge. Appellant disputed that the medical director is her physician at the facility, arguing that she never saw this doctor and only saw the nurse practitioner. Appellant raised care issues with the facility, including missing neurology appointments because the facility was not able to get her to the appointment on time.

Appellant argued that she cannot be safely discharged at this time because she is unsteady on her

feet and suffering falls. Appellant ambulates with a walker but is unsteady, stating that her legs go out under her.

The records provided after hearing included an incomplete nursing note and nursing request/screening form dated November 16, 2021 regarding Appellant's fall. Exhibit 5 at 8-9. The screening form showed that Appellant had no deficits and no occupational needs identified. *Id.* at 9. The screen form log indicates that there was no need for physical or occupational therapy after the screen. *Id.* at 10.

The hearing record was held open through December 21, 2021 to allow Appellant time to submit additional documentation in support of her position. Appellant submitted her PASRR Level II evaluation and hospital medical record from after her visit from May 9, 2021 to June 25, 2021. Appellant also provided a written statement rebutting some information contained in the facility's submission. Finally, Appellant demonstrated that she did not receive a physical therapy evaluation until after the hearing. Exhibit 6. Appellant also wrote an additional letter detailing that her rheumatology appointment at Boston Medical was rescheduled due to the facility's driver's scheduled vacation. Appellant argued that other patients have received transportation to other visits during this scheduled vacation time. Appellant argued that she is being treated differently than other patients and emphasized that the facility has caused her to miss several outside appointments. Exhibit 7.

Findings of Fact

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

1. Appellant is in her forties with a primary diagnosis of unspecified adrenal cortex insufficiency, with opioid and alcohol abuse and major depressive disorder. Exhibit 4 at 5. Appellant admitted to the facility on [REDACTED] from an acute care hospital. *Id.* at 7.
2. By hand-delivered letter dated October 15, 2021, Respondent informed Appellant of its intent to discharge Appellant on November 14, 2021 to the shelter. Exhibit 1.
3. The cited reason for discharge is that Appellant's health has improved sufficiently and Appellant no longer needs the services provided by the facility. *Id.*
4. The notice identified a social worker as the person responsible for supervising the discharge and explained Appellant's appeal rights. The notice included contact information for a local long term care ombudsman, the disability law center, centers for public representation (including a disabled persons' protection commission) and a legal assistance corporation. *Id.*
5. Appellant timely appealed the notice of discharge on November 8, 2021. Exhibit 2.
6. Dr. Elmi, identified as Appellant's physician at the facility, wrote that Appellant was discharged from physical therapy on August 6, 2021 and occupational therapy on July 6.

2021. Appellant is able to perform ADLs and take her medications independently. Exhibit 4 at 7.

7. Notes provided after the hearing demonstrated that social workers have been engaging in discharge planning with Appellant for several months, since August 2021. Exhibit 5.

Analysis and Conclusions of Law

The federal Nursing Home Reform Act (NHRA) of 1987 guarantees all residents the right to advance notice of, and the right to appeal, any transfer or discharge action initiated by a nursing facility. Massachusetts has enacted regulations that follow and implement the federal requirements concerning a resident's right to appeal a transfer or discharge, and some of the relevant regulations may be found in both (1) the MassHealth Nursing Facility Manual regulations at 130 CMR 456.000 *et seq.*, and (2) the Fair Hearing Rules at 130 CMR 610.000 *et seq.*

Per 130 CMR 456.701(A) and 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 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 MassHealth Agency or Medicare pay for) a stay at the nursing facility; or
- (6) the nursing facility ceases to operate.

When the facility transfers or discharges a resident, the resident's clinical record must contain documentation to explain the transfer or discharge. 130 CMR 456.701(B); 130 CMR 610.028(B). For a discharge under 130 CMR 456.701(A)(2), the documentation to explain the discharge must be made by the resident's physician. 130 CMR 456.701(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 (if the resident has made such a person known to the facility), 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 MassHealth 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.

130 CMR 610.028(C).

Pursuant to 130 CMR 610.029(A), the notice of discharge or transfer required under 130 CMR 610.028 must be made by the nursing facility at least 30 days before the date the resident is to be discharged or transferred, except as provided for under 130 CMR 610.029(B) and (C) when the discharge is being made on an emergency basis. *See also* 130 CMR 456.702(A).

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 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.” Finally, federal regulations require that a nursing facility provide sufficient preparation for a safe and orderly discharge. *See* 42 CFR 483.12(a)(7).

Here, the facts show that the facility followed the required regulations in issuing the notice and planning the discharge. The basis for discharge is allowable under the regulations and supported by the physician’s letter which stated that Appellant no longer needs nursing facility services. The record contains evidence that the facility has provided sufficient discharge preparation. Appellant argued that she cannot be safely discharged to a shelter because she continues to suffer falls and is unsteady on her feet. This alone is not sufficient to rebut a physician’s determination that Appellant

no longer needs skilled nursing facility care.

Appellant raised issues with the facility's care, arguing that the facility has caused her to miss appointments and failed to provide the therapy that she needs to address her falls. Appellant also argued that she is being treated differently than other patients regarding transportation to appointments. However, the scope of the appeal is limited to whether the facility met its obligations in issuing the discharge notice. As the regulations here were met, the appeal is denied.

Order for Respondent

Proceed with the discharge as set forth in the notice dated October 15, 2021 after the 30-day stay (from the date 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.

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.

Cynthia Kopka
Hearing Officer
Board of Hearings

cc:

Robert Baker, The Oxford, 689 Main Street, Haverhill, MA 01830