

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2178442
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
Samantha White, 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:	12/7/2021
Respondent's Rep.:	Robert Baker, Samantha White	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 because Appellant does not have an invoked health care proxy.¹ 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 the 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 his fifties and admitted to the facility on [REDACTED]. The admitting diagnoses were cellulitis and leg wounds (unclear whether vascular or lymphedema). Exhibit 4 at 5-6. Dr. Elmi wrote on December 6, 2021 that Appellant's wounds have now healed, and he is no longer receiving any therapy at the facility. *Id.* at 7. Appellant is independent with all activities of daily living (ADLs). With medication teaching, Appellant will be able to be discharged to 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. Appellant's physician at the facility wrote that Appellant's health has improved, and he no longer needs nursing facility services. *Id.* at 7. Appellant recently took a leave of absence from the facility for Thanksgiving and was able to self-administer his medications. *Id.*

Appellant argued that he cannot be safely discharged to the shelter because the shelter requires residents to be out on the street all day. Appellant cannot walk very well, and his conditions exacerbate when he is on his feet for extended periods of time. Appellant's leg swelling and wounds have improved because Appellant is able to elevate his legs and have them wrapped, and he will deteriorate if he is discharged to a shelter.

Appellant argued that he did not receive proper care at the facility. It was only when a state nurse told the facility that he needs to have his legs wrapped that Appellant received proper care. Appellant argued that the facility did not give him Klonopin when he took his leave of absence, which exacerbated his anxiety and caused him to refuse pain medication. Appellant returned to the facility with a toe infection, which he suffered as a result of being on his feet for longer than usual. The facility's administrator confirmed that Appellant has a new toe infection but argued that it can be treated with a once-daily dressing change, which can be provided in the community.

Appellant argued that the physician who signed off on the discharge has only evaluated Appellant once. Appellant disagreed with his diagnoses, arguing that he was diagnosed with MRSA, not lymphedema. Appellant is currently working with a lawyer to secure social security benefits. He

¹ Appellant disputed this but did not offer evidence of an invoked health care proxy.

will not be able to secure housing until he has benefits.

The nursing facility submitted doctors' notes showing that Appellant was seen once by the physician who signed off on the discharge, Dr. Elmi, on [REDACTED]. Every other encounter was with a nurse practitioner, Ying Ma. Exhibit 5. A note from the nurse practitioner dated November 3, 2021, stated that Appellant's leg wound was not healed and was getting worse. The nurse practitioner ordered continuing antibiotics, wound dressing, and a referral to a wound provider. *Id.* at 1-2. Another record, dated October 27, 2021, indicated that Appellant had continuing cellulitis of his lower extremities, for which the nurse practitioner started antibiotics. *Id.* at 3.

The hearing record was held open through December 21, 2021 to allow Appellant and/or his lawyer time to submit additional documentation in support of his position. Additional records were faxed to BOH on December 15, 2021 by the social worker and contain records dated between December 7 and December 14, 2021. Exhibit 6. The records show that Appellant was seen by Dr. Elmi on December 7 and 14, 2021 and Ying Ma on December 8, 2021. Dr. Elmi's records indicate that he informed Appellant that his leg wounds are chronic conditions that will recur. *Id.* at 3, 6. Though Appellant did not have an open wound during the December 7, 2021 visit, he had an open wound during the December 14, 2021 visit. *Id.* The order to address the wound included a 7 day course of oral antibiotic Augmentin, dressing the leg, and keeping it elevated. *Id.* at 6. The additional records also show that Appellant took another leave of absence from the facility on December 10, 2021 and asked to have a vascular appointment cancelled. *Id.* at 1.

As of December 21, 2021, neither Appellant nor his attorney submitted additional records.

Findings of Fact

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

1. Appellant is in his fifties and admitted to the facility on [REDACTED]. The admitting diagnosis was cellulitis, and leg wounds, unclear whether vascular or lymphedema. Exhibit 4 at 5-6.
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 the 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 on December 6, 2021 that Appellant's wounds have now healed, and he is no longer receiving any therapy at the facility. Appellant is independent with all ADLs and capable of taking his own medications. Therefore, Appellant no longer has a medical need to remain in the facility. Exhibit 4 at 7.
7. Appellant's last day receiving physical therapy was August 31, 2021 and last day receiving occupational therapy was August 26, 2021. *Id.*

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. Appellant argued that he cannot be safely discharged to a shelter because he would be on the street for the entirety of the day, which exacerbates his leg condition. This alone is not sufficient to warrant skilled nursing facility care. Appellant also argued that he has a new toe wound that occurred during his prior leave of absence. However, Appellant did not rebut the facility's testimony that Appellant could receive a dressing change as part of visiting nurse services upon his release. 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