

# Office of Medicaid BOARD OF HEARINGS

## Appellant Name and Address:



|                         |               |                       |            |
|-------------------------|---------------|-----------------------|------------|
| <b>Appeal Decision:</b> | Approved      | <b>Appeal Number:</b> | 2179365    |
| <b>Decision Date:</b>   | 01/12/2022    | <b>Hearing Date:</b>  | 12/28/2021 |
| <b>Hearing Officer:</b> | Paul C. Moore | <b>Record Closed:</b> | 01/07/2022 |

## Appellant Representative:

Pro se (by telephone)

## Nursing Facility Representatives:

Corey Beaudette, licensed nursing home administrator; Katrina Gomes, licensed social worker; Irina Ionkina, licensed clinical social worker (all from Webster Manor, and all by 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

|                                |                            |                        |                            |
|--------------------------------|----------------------------|------------------------|----------------------------|
| <b>Appeal Decision:</b>        | Approved                   | <b>Issue:</b>          | Nursing Facility Discharge |
| <b>Decision Date:</b>          | 01/12/2022                 | <b>Hearing Date:</b>   | 12/28/2021                 |
| <b>Nursing Facility Reps.:</b> | Administrator et al.       | <b>Appellant Rep.:</b> | Pro se                     |
| <b>Hearing Location:</b>       | Board of Hearings (remote) |                        |                            |

## Authority

This hearing was conducted pursuant to Massachusetts General Laws (“M.G.L.”) Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

## Jurisdiction

Through a 30-Day Notice of Intent to Discharge Resident dated November 23, 2021 (“discharge notice”), Webster Manor Rehabilitation and Healthcare Center, a skilled nursing facility (“the facility” or “Webster Manor”), notified the appellant that it sought to discharge him effective December 23, 2021 to [REDACTED] because “the [appellant’s] health has improved sufficiently so [the appellant] no longer needs the services provided by the facility” (130 Code of Massachusetts Regulations (CMR) 610.028; Exhibit 1). The appellant filed a timely appeal with the Board of Hearings (BOH) on December 13, 2021 (130 CMR 610.015(B); 130 CMR 456.703; Exhibit 2). Challenging a notice of transfer or discharge initiated by a nursing facility is a valid ground for appeal to BOH (130 CMR 610.032(C)).

## Action Taken by Nursing Facility

The facility notified the appellant that it sought to discharge him because his health has improved sufficiently so he no longer needs the services provided by the facility.

## Issues

The appeal issues are whether: (1) the facility has valid grounds to discharge the appellant; (2) the discharge notice and patient record meet the regulatory requirements set forth in the Fair Hearing

Rules at 130 CMR 610.028 and 610.029; and (3) the facility has provided sufficient preparation and orientation to the appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place.

## Summary of Evidence

### A. Documentary and Testimonial Evidence

The facility submitted, for the appeal record, a copy of some of the appellant's clinical records, including, but not limited to, his admission record, physician progress notes, nursing progress notes, physical therapy progress notes, occupational therapy progress notes, speech therapy progress notes, and a psychiatric consultation and evaluation (Exh. 4).<sup>1</sup>

Ms. Ionkina, a facility social worker, testified that the appellant was admitted to the facility for short-term rehabilitation on [REDACTED] following a hospitalization at [REDACTED].<sup>2</sup> She noted that the appellant has received physical therapy, occupational therapy and speech therapy while at the facility. Ms. Ionkina testified that the appellant is now independent with his activities of daily living (ADLs), and does not need a nursing-facility level of care. She has worked with the appellant on discharge planning, and at least one rest home representative has come to see him at Webster Manor to discuss rest home placement. She indicated, however, that the appellant has a preference for renting an apartment. She added that the appellant has not shared his income figure with the facility, so it is challenging for the facility to locate an apartment for him without that information (Testimony).

A 30-day notice of discharge was issued to the appellant by the facility on November 23, 2021 (Exh. 1).

According to the appellant's admission record, he is under age 65, and his medical diagnoses include pneumonitis due to inhalation of food and vomit, a history of alcohol abuse with withdrawal, insomnia, chronic obstructive pulmonary disease (COPD), atrial fibrillation, atherosclerotic heart disease of his native coronary artery without angina pectoris, dysphagia, muscle weakness, difficulty in walking, and tobacco use (Exh. 4, pp. 11-12).

He uses a walker to ambulate, previously underwent coronary artery bypass surgery, and has a pacemaker (Testimony, Exh. 4).

Ms. Ionkina testified that according to flowsheets completed by Webster Manor certified nursing assistants (CNAs), during the two weeks preceding the hearing, the appellant was independent with

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<sup>1</sup> Although the facility administrator stated that the appellant's patient records were mailed to the Board of Hearings well in advance of the hearing, the hearing officer did not receive them by the hearing date. The hearing officer gave the facility until January 7, 2022 to re-submit the records.

<sup>2</sup> According to a discharge summary from [REDACTED] dated August 24, 2021, the appellant's admitting diagnoses at the hospital were alcoholic ketoacidosis and aspiration pneumonia (Exh. 4, pp.18-19).

showering, required limited assistance on three occasions with bed mobility, required limited assistance with dressing, required extensive assistance with personal hygiene on two occasions, and needed limited assistance with toileting twice (Testimony).

The discharge location the facility designated on the discharge notice is a homeless shelter in [REDACTED]. Ms. Ionkina indicated that the clients of the shelter may receive visits from a nurse if they have an active cell phone number. The appellant responded that he does not have an active cell phone number. The appellant testified that prior to being hospitalized, he lived with his niece in her home. Prior to that, he lived in an apartment, which he asserted that he gave up voluntarily. He stated that he cannot move in with his niece again, because she is going through a “tough time” at present (Testimony).

The appellant stated that he has two important doctors’ appointments coming up, including one with a cardiologist and one with a doctor who will evaluate a lump on his lower right extremity (Testimony).

Ms. Ionkina testified that Medicare sent the appellant a notice entitled, “Notice of Medicare Non-Coverage,” stating the following:

The Effective Date Coverage of Your Current Skilled Nursing Services will end 9/2/2021.

Your Medicare provider and/or health plan have determined that Medicare probably will not pay for your current Skilled Nursing Facility services after the effective date indicated above.

(Exh. 4, pp. 577-578)<sup>3</sup>

The appellant testified that his MassHealth coverage is through Commonwealth Care Alliance (CCA). He stated that the Webster Manor representatives will not give him the name of a case manager at CCA (Testimony).<sup>4</sup>

According to Ms. Gomes, the facility’s director of social services, the appellant is prescribed Melatonin, Eliquis, ondansetron, Trazadone, Methocarbamol, Metoprolol Tartrate, a potassium supplement, lactulose, Albuterol nebulizer treatments, Pepcid, and dicyclomine hydrochloride. Ms. Gomes stated that the appellant was in detox from alcohol intoxication when he was a patient at [REDACTED] in August, 2021 (Testimony).

The appellant testified that he cannot identify all his current medications. He stated that when he

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<sup>3</sup> Medicare is a federal health insurance program for the elderly and/or disabled. MassHealth (Medicaid) is a state program that covers skilled nursing services if an applicant is both clinically and financially eligible for such services. *See*, 130 CMR 515.001 *et seq.*

<sup>4</sup> The hearing officer explained to the appellant that he should have a health insurance card from CCA with a telephone number for him to call.

lived in the community, he was prescribed far fewer medications, and he organized them in a medication box (Testimony).

A licensed nursing summary from Webster Manor for the month of October, 2021 reflects that the appellant is independent with eating, and requires a physical assist of one person for bathing, grooming, dressing, and walking (Exh. 4, pp. 301-302).

B. Content of the discharge notice/patient record

The discharge notice at issue in this matter contains: a specific statement of the reasons for the intended discharge, the location to which the appellant is to be discharged, the effective date of the intended discharge, the right of the appellant to request a fair hearing on the intended discharge, the address, telephone number and fax number of the BOH, the time frame for requesting a hearing, the effect of requesting a hearing as provided for under 130 CMR 610.030 (*to wit*, that the facility cannot discharge the appellant until thirty days after the hearing officer's decision is received), the name of the person at the facility who can answer any questions about the discharge notice and about the right to file an appeal, the name and address of the local legal-services office, the name and address of the local long-term care ombudsman program, and the mailing addresses and telephone numbers of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy for developmentally disabled individuals, respectively (Exhs. 1& 2).

Within Exhibit 4, the appellant's medical record from the facility, there is no progress note by the appellant's physician explaining the reasons for the appellant's intended discharge. There is a social service progress note dated 11/23/2021 stating:

[Ms. Gomes and Ms. Ionkina] met with [appellant] for purpose of issuing a 30 Day Discharge Notice due to [appellant's] needs not requiring nursing home level of care. [Appellant's] needs can be met in a lesser setting.

(Exh. 4, p. 439)

## **Findings of Fact**

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

1. The appellant is under age 65, and was admitted to Webster Manor on [REDACTED] (Testimony, Exh. 4).
2. The appellant was admitted to the facility for short-term rehabilitation following a hospitalization at [REDACTED], where he had been admitted for alcoholic ketoacidosis and aspiration pneumonia (Testimony, Exh. 4).
3. The appellant's medical diagnoses include pneumonitis due to inhalation of food and

vomit, a history of alcohol abuse with withdrawal, insomnia, COPD, atrial fibrillation, atherosclerotic heart disease of his native coronary artery without angina pectoris, dysphagia, muscle weakness, difficulty in walking, and tobacco use (Exh. 4, pp. 11-12).

4. The appellant has received physical therapy, occupational therapy and speech therapy while at the facility (Testimony, Exh. 4).
5. Through a 30-Day discharge notice dated November 23, 2021, Webster Manor Rehabilitation and Healthcare Center notified the appellant that it sought to discharge him effective [REDACTED] to [REDACTED] because “the [appellant’s] health has improved sufficiently so [the appellant] no longer needs the services provided by the facility” (Exh. 1).
6. The appellant filed a timely appeal with the Board of Hearings (BOH) on December 13, 2021 (Exh. 2).
7. A licensed nursing summary from Webster Manor for the month of October, 2021 reflects that the appellant is independent with eating, and requires a physical assist of one person for bathing, grooming, dressing, and walking (Exh. 4, pp. 301-302).
8. The appellant uses a walker to ambulate (Testimony).
9. The appellant is prescribed Melatonin, Eliquis, ondansetron, Trazadone, Methocarbamol, Metoprolol Tartrate, a potassium supplement, lactulose, Albuterol nebulizer treatments, Pepcid, and dicyclomine hydrochloride. Ms. Gomes stated that the appellant was in detox from alcohol intoxication when he was a patient at [REDACTED] in [REDACTED] (Testimony).
10. For a few months prior to his hospital admission, the appellant lived with his niece at her home (Testimony).
11. The appellant, upon discharge from the facility, will not be able to live with his niece (Testimony).
12. The discharge location the facility designated on the discharge notice is a homeless shelter in [REDACTED] (Testimony).
13. As of September 2, 2021, Medicare is no longer covering the cost of the appellant’s nursing-facility stay (Exh. 4, pp. 577-578).
14. The discharge notice at issue in this matter contains: a specific statement of the reasons for the intended discharge, the location to which the appellant is to be discharged, the effective date of the intended discharge, the right of the appellant to request a fair hearing on the intended discharge, the address, telephone number and fax number of the BOH, the time

frame for requesting a hearing, the effect of requesting a hearing as provided for under 130 CMR 610.030 (*to wit*, that the facility cannot discharge the appellant until thirty days after the hearing officer's decision is received), the name of the person at the facility who can answer any questions about the discharge notice and about the right to file an appeal, the name and address of the local legal-services office, the name and address of the local long-term care ombudsman program, and the mailing addresses and telephone numbers of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy for developmentally disabled individuals, respectively (Exhs. 1 & 2).

15. The appellant's medical record from the facility does not contain a progress note by the appellant's physician explaining the reasons for the appellant's intended discharge (Exh. 4).

## 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 initiated by a nursing facility. MassHealth has enacted regulations that follow and implement the federal requirements concerning a resident's right to appeal a transfer or discharge, and the relevant MassHealth regulations may be found in both (1) the Nursing Facility Manual regulations at 130 CMR 456.000 et seq., and (2) the Fair Hearing Rules at 130 CMR 610.000 et seq.

The regulations at 130 CMR 456.002 define a "discharge" as "the removal from a nursing facility to a noninstitutional setting of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual; this includes a nursing facility's failure to readmit following hospitalization or other medical leave of absence." Similarly, 130 CMR 610.004 defines a discharge as "the removal from a nursing facility of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual."

The Nursing Facility Manual regulations at 130 CMR 456.701 provide in relevant part:

Notice Requirements for Transfers and Discharges Initiated by a Nursing Facility

**(A) A resident may be transferred or discharged from a nursing facility 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 Division or Medicare pay for) a stay at the nursing facility; or

(6) the nursing facility ceases to operate.

**(B) When the facility transfers or discharges a resident under any of the circumstances specified in 130 CMR 456.701(A)(1) through (5), the resident's clinical record must contain documentation to explain the transfer or discharge. The documentation must be made by:**

**(1) the resident's physician when a transfer or discharge is necessary under 130 CMR 456.701(A)(1) or (2); and**

**(2) a physician when the transfer or discharge is necessary under 130 CMR. 456.701(A)(3) or (4).**

(C) Before a nursing facility discharges or transfers any resident, 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 Division's Board of Hearings 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 456.702; and

(c) the effect of requesting a hearing as provided for under 130 CMR 456.704;

(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)

Here, the evidence shows that the facility may have grounds to discharge the appellant. His health has improved since his admission in August, 2021, although the appellant continues to need some assistance with his ADLs.

Further, the discharge notice issued by the facility to the appellant meets the regulatory requirements set forth at 130 CMR 456.701(C), above.

However, the appellant's clinical record in evidence does *not* contain documentation by his physician containing the reasons for his intended discharge. There is a social service progress note explaining the reasons for the appellant's intended discharge, but this does not meet the requirements set forth at 130 CMR 456.701(B)(1), above.

Also relevant to this appeal, an amendment to M.G.L. c. 111, §70E, which went into effect November of 2008, states as follows:

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.**

(Emphasis added)

Because I have found that the facility did not meet the requirements in the Nursing Facility Manual regulations regarding physician documentation, I need not decide at this time whether the facility has provided sufficient preparation and orientation to the appellant to ensure his safe and orderly transfer or discharge from the facility to another safe and appropriate place.

Based on the record and the above analysis, this appeal is APPROVED.

## **Order for Nursing Facility**

Rescind notice of November 23, 2021. Do not discharge the appellant under this notice.

## **Implementation of this Decision**

If you experience problems with the implementation of this decision, 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.

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Paul C. Moore  
Hearing Officer  
Board of Hearings

cc: Corey Beaudette, Administrator, Webster Manor Rehabilitation and Healthcare Center, 745 School Street, Webster, MA 01570