

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	DENIED	Appeal Number:	2200733
Decision Date:	5/3/2022	Hearing Date:	04/06/2022
Hearing Officer:	Christopher Taffe		

Appearance for Appellant:
Appellant, pro se (by phone)

Appearances for Nursing Facility:
Kathleen Stewart (Administrator);
Dr. Akindede Majekodunmi (Medical
Director); and Brian R. Hachey, Esq.,
all on behalf of Saugus Rehabilitation and
Nursing Center (all by phone)



*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 – Failure to Pay
Decision Date:	5/3/2022	Hearing Date:	04/06/2022
Nursing Facility Reps.:	K. Stewart; Dr. A. Majekodunmi; and B. Hachey, Esq.	Appellant’s Rep.:	Appellant, pro se
Hearing Location:	Remote Hearing		

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 titled “30-Day Notice of Intent to Discharge Resident” dated December 29, 2021, the Respondent, a Skilled Nursing Facility (“SNF”) named Saugus Rehabilitation and Nursing Center (hereafter “Saugus Rehab” or “the SNF”) informed Appellant (the nursing facility resident) that Saugus Rehab sought to discharge Appellant to a shelter, Seeds of Hope, at 26 Margin Street in Salem, MA 01970 on January 29, 2022 because Appellant had failed after reasonable and appropriate notice, to pay or have Medicare or Medicaid pay for her stay at the SNF.¹ See Exhibit 1. Appellant filed a timely request with the Board of Hearings for a Fair Hearing on January 29, 2022. See Exhibit 1; 130 CMR 610.015(B). The Board of Hearings has jurisdiction over appeals involving expedited nursing facility discharges per 130 CMR 610.032.

The Board of Hearings had originally scheduled for this hearing to initially take place on February 28, 2022, but the Appellant failed to show. On March 1, 2022, Appellant wrote to the Board of Hearings and explained why she had missed the call for the February 28, 2022 hearing, and the Board of Hearings found sufficient cause to reschedule the hearing, and this hearing was subsequently rescheduled for and held on April 6, 2022. See Exhibit 3 and 4; 130 CMR 610.048.

¹ The text of the reason for the discharge in the discharge notice has a series of minor typos, which have been corrected when reprinted here in the text of this decision. There is no harm caused by this series of typos, as the Appellant was aware of the reasons for the discharge hearing.

This need for a rescheduling and second hearing date contributed to the delay and issuance of this decision.

Per 130 CMR 610.015(B)(4) and 130 CMR 610.030, the nursing facility must stay any planned discharge and not proceed with any discharge action in this matter thirty days after the date of the hearing decision.

Action Taken by Skilled Nursing Facility

Saugus Rehab issued a discharge notice to the Appellant.

Issue

Does the discharge notice and medical record comply with all legal requirements in order to support the proposed discharge action and, if so, should the Appellant be discharged?

Summary of Evidence

Appellant is a [REDACTED]-year old woman who was admitted to this SNF on [REDACTED] for issues related to a Dens Fracture. Saugus Rehab is a skilled nursing facility, licensed by the Department of Public Health, with 76 beds that are dually certified in that they accept both Medicare or Medicaid payment. Appellant has been residing at the SNF for over two years. Appellant had Medicare at the time of her admission and Medicare paid for the initial period of her stay. In April of 2020, via a notice from Tufts Health plan, Appellant received notice that Medicare would not pay for her continued stay. Exhibit 5, pages 53-54. Since her Medicare benefit lapsed, there has been no payment source payment for Appellant's stay since April 26, 2020. Per the record submitted pre-hearing, as of February 2022, Appellant owes \$171,940.47 for her stay for an approximate two year period from April 2020 through April 2022. Exhibit 5, pages 174-175.

Part of the reason Appellant's stay is unpaid is, during her two-plus years, she has never been found to be clinically eligible for MassHealth Standard Long-Term Care (LTC) benefits, nor has she ever been found to be financially eligible for such LTC benefits.²

With regard to her lack of clinical eligibility for Medicaid LTC benefits, on January 22, 2021, MassHealth, via a review and assessment done by Greater Lynn Senior Services (an Aging Services Access Point (ASAP)), found Appellant to not be clinically eligible for LTC benefits, as her medical needs and related services could be met in the community setting. Appellant appealed that decision but, in April of 2021, the Board of Hearings (BOH) issued a decision (#2101413) denying that appeal. Exhibit 5, pages 12-22. Appellant has never had another clinical eligibility assessment or determination in favor of clinically eligible since that last assessment and as of the hearing date.

² One needs both clinical and financial eligibility to get MassHealth payment via LTC benefits. See 130 CMR 519.006(A).

As to MassHealth financial eligibility, on May 8, 2020, MassHealth denied an application of Appellant for LTC benefits for failure to provide verification. This decision was separately appealed to the Board of Hearings and, after a hearing held on August 8, 2020, this appeal (#2006018) was denied on August 15, 2020. Exhibit 5, pages 55-58.

Subsequently, on May 26, 2020, Saugus Rehab tried to discharge Appellant but Appellant appealed that to the Board of Hearings and via another BOH decision (# 2006192) issued on July 17, 2020, the Board of Hearings approved Appellant's appeal and negated the discharge action as the SNF did not include copies of bills in the prior record. Exhibit 5, pages 59-64.

A new application has been filed for MassHealth financial eligibility in January of 2022 and is still pending, but there is no evidence of corresponding clinical eligibility, or any change in status. Even if the January 2022 re-application resulted in MassHealth LTC benefits, the earliest retroactive start date of benefits would be October 1, 2021, which still would leave over a year of costs unpaid. Appellant has also never made any estimated payments, or a good faith anticipated Patient Paid Amount. Appellant stated that she offered to make a payment plan but that the nursing facility wanted monthly payments of at least a few hundred dollars, and she did not want to pay that much.

The SNF has attempted to work with Appellant on finding a discharge location. The proposed discharge location on the appealable notice is a shelter in Salem, Mass. The SNF has stated that multiple social workers have attempted to talk and work with Appellant on the discharge plan, to discuss options, and to let her have input in the process, but the SNF stated that Appellant has been resistant. There are notes in the record, including one from Dec. 27, 2021, which state in part that “[appellant] has refused to access housing resources and work on a discharge plan with the facility”; a note from January 18, 2022 stated that the Social Worker not only asked Appellant whether she needed assistance with anything including discharge and that Appellant stated “...*no one knows her plan and [Appellant] will not disclose this info and for [the Social Worker} to leave her alone. [Social Worker] stated she will respect [Appellant's] wishes but if she would like assistance with appeal or discharge planning [SW] will more than happy to help.*” See Exhibit 5, pp 70-76. Appellant initially claimed that no one had ever reached out to her and provided her with any assistance but, after hearing the documented notes and dates, indicated that the nursing facility had made some outreach. She later claimed that no one helped her with finding a place to live. Appellant stated that she had no current apartment to which she could return to but she also didn't think she needed to be in a long-term care setting forever or the immediate long-term future. Appellant stated she's never been in a shelter and she would not want to go to one and she chooses to not go.

The last page of Exhibit 6 (page 176, but labelled and illegibly noted as “16_”) contains a February 2022 note from Dr. Duran, one of the doctors at the SNF and this was included to speak to as an example of a “*evaluation for the ability to leave independently*”. This note states Appellant uses a wheelchair independently without assistance, and that she is “*able to live independently in a place without stairs; she is able to care for herself, she's a good communicator and would be able to make her needs known if an emergency were to occur....[Appellant] had an open arm fracture and does not have full range of motions, however she is able to complete daily tasks independently [and]*

walking long distances is a problem since her CVA but is very able to navigate her WC.” Appellant confirmed she can walk for short distances without her wheelchair, but she does lean on it for rest or for support. The Medical Director present at hearing stated that he agreed with the medical assessment and that Appellant was able to function independently enough in an appropriate way that she could safely function in the community.

Findings of Fact

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

1. Through a 30-day discharge notice dated December 29, 2021, the Respondent, Saugus Rehab informed Appellant that the SNF sought to discharge her to a shelter, Seeds of Hope, because Appellant had failed after reasonable and appropriate notice, to pay or have Medicare or Medicaid pay for her stay at the SNF. (Testimony and Exhibit 1)
2. Appellant timely appealed this discharge notice to the Board of Hearings. (Exhibit 1)
3. Appellant was admitted to Saugus Rehab on [REDACTED] and has been a resident of the skilled nursing facility on a continuous basis since then. She was admitted to a nursing facility setting to recover and rehabilitate after a Dens Fracture. (Testimony and Exhibit 5)
4. Appellant has never been found clinically eligible for skilled nursing services to cover her care at the SNF. (Testimony and Exhibit 5)
5. Appellant’s prior application for MassHealth LTC benefits was denied. A current application was refiled in January of 2022, but such an application has a maximum or earliest retroactive benefit start date of October 1, 2021. (Testimony and Exhibit 5)
6. Since the expiration of her Medicare benefit, appellant’s stay at Saugus Rehab has been unpaid from April 2020 through the hearing date. Appellant owes over \$159,000 to the nursing facility as a result. (Testimony and Exhibit 5)
7. Appellant has been given repeated notice about her unpaid bills. This is evident in part due to the history of prior discharge attempts by the nursing facility. (Testimony and Exhibit 5)
8. Appellant has not made any partial private payments to cover the cost of her stay, and she did not agree to the nursing facility’s attempt to set up a monthly payment plan for a few hundred dollars to retire her debt. (Testimony and Exhibit 5)
9. Saugus Rehab has made attempts to work with Appellant on discharge planning, but Appellant has not been cooperative. There are efforts by the Social Work team to work with Appellant on discharge planning which are documented within Exhibit 5. (Testimony and Exhibit 5)
10. Dr. Duran, a doctor at Saugus Rehab, has written a progress note in 2022 indicating that

appellant will be able to return to the community. Although Appellant uses a wheelchair on occasion for some of her mobility needs, she should be able to function in the community as she can do most activities and care for herself independently. (Testimony and 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 initiated by a nursing facility. In this Commonwealth, the MassHealth agency 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.

For the purposes of this decision, the definitions found in 130 CMR 456.002 apply³:

“Nursing facility” – a Medicare skilled nursing facility or Medicaid nursing facility licensed by the Department of Public Health to operate in Massachusetts, or a distinct Medicaid- or Medicare-certified unit within a facility.

“Discharge” – 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.

Based on the above information, Saugus Rehab is attempting to discharge Appellant to a community setting via the appealable notice in question. See Exhibit 1 and 130 CMR 456.002.

Some regulatory guidelines that speak to whether and how the Appellant can be so discharged are found in 130 CMR 456.701 of the MassHealth Nursing Facility Manual. This section of the regulations strictly and specifically lists the only circumstances and conditions that allow for transfer or discharge of a resident from a nursing facility as well as the specific and strict requirements of the relevant notice and supplementary paperwork. If these requirements are not satisfied, the facility must permit the resident to remain in the facility. 130 CMR 456.701 through 130 CMR 456.704 read in relevant part as follows:

456.701: 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

³ The regulatory language in the MassHealth Nursing Facility Manual at 130 CMR 456 has regulations which are identical (or “near identical and substantively equivalent”) to counterpart regulations found within the Commonwealth's Fair Hearing Rules at 130 CMR 610.000 as well as corresponding federal government regulations. As an example, the text of regulations in 130 CMR 610.028 and 42 CFR 483.12(a)(2) is identical to that in 130 CMR 456.402. Because there are identical (or near identical) and substantively similar regulations, the remainder of this decision will only cite to the MassHealth Nursing Facility Manual regulations in 130 CMR 456 unless noted.

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. s. 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. s. 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.

456.702: Time Frames for Notices Issued by Nursing Facilities

(A) The notice of discharge or transfer required under 130 CMR 456.701(C) must be made by the nursing facility at least 30 days prior to the date the resident is to be discharged or transferred, except as provided for under 130 CMR 456.702(B).

(B) Instead of the 30-day-notice requirement set forth in 130 CMR 456.702(A), the notice of discharge or transfer required under 130 CMR 456.701 must be made as soon as practicable before the discharge or transfer in any of the following circumstances, which are emergency discharges or emergency transfers.

(1) The health or safety of individuals in the nursing facility would be endangered and this is documented in the resident's record by a physician.

(2) The resident's health improves sufficiently to allow a more immediate transfer or discharge and the resident's attending physician documents this in the resident's record.

(3) An immediate transfer or discharge is required by the resident's urgent medical needs and this is documented in the medical record by the resident's attending physician.

(4) The resident has not resided in the nursing facility for 30 days immediately prior to receipt of the notice. ...

456.703: Time Frames for Submission of Requests for Fair Hearings

(A) Appeals of discharges and transfers will be handled by the Division's Board of Hearings (BOH).

(B) Time Limitation on the Right of Appeal. The date of request for a fair hearing is the date on which BOH receives such a request in writing. BOH must receive the request for a fair hearing within the following time limits:

(1) 30 days after a resident receives written notice of a discharge or transfer pursuant to 130 CMR 456.702(A); or

(2) 14 days after a resident receives written notice of an emergency discharge or emergency transfer pursuant to 130 CMR 456.702(B);...

456.704: Stay of a Transfer or Discharge from a Nursing Facility Pending Appeal

(A) If a request for a hearing regarding a discharge or transfer from a nursing facility is received by the Board of Hearings during the notice period described in 130 CMR 456.703(B)(1), the nursing facility must stay the planned discharge or transfer until 30 days after the decision is rendered. While this stay is in effect, the resident must not be transferred or discharged from the nursing facility.

(B) If a hearing is requested, in accordance with 130 CMR 456.703(B)(2), and the request is received prior to the discharge or transfer, then the nursing facility must stay the planned transfer or discharge until five days after the hearing decision...

(Bolded emphasis added.)

In addition to the MassHealth-related regulations discussed above, the nursing facility also has an obligation to comply with all other applicable state laws, including M.G.L. c.111, §70E. One key paragraph of that statute, which is highly relevant to these types of appeals, reads 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.***

(**Bolded** emphasis added.)

With the above laws in mind, I come to the following conclusions:

There is no dispute that Appellant is aware of, and has been aware of, her unpaid stay at the Saugus Rehab nursing facility. She owes a considerable monetary debt, and there have been no payments made to the facility that has helped to care for her and put a roof over her head for the past two years. Unlike most other nursing facility residents, there is no evidence that she has any skilled medical need, or other need for nursing facility services, which may help either justify her need to stay, or indicate she would be able to provide any payment for it through state medical assistance.⁴ This is also consistent with the lack of clinical eligibility for MassHealth LTC services, an issue which was appealed by Appellant and which was not resolved in her favor. There is no evidence of any adverse medical events since, and the nursing facility medical file, found in part in Exhibit 5, contains current documentation from a doctor that indicates Appellant is fine to return to the community in her current condition. Appellant's appeal and disagreement in this matter does not involve a claim that she does not owe any money or even that she can't return to a community or non-medical setting; instead, it appears that she doesn't like the choice of discharge (a shelter), but it is not incumbent on the nursing facility to provide Appellant with her optimal or personally preferred place of discharge, but to instead to discharge her to a appropriate place with sufficient orientation. It is not this nursing facility's responsibility to solve Appellant's long-term home or residential issues. In this case, the nursing facility, as evidenced by the record in Exhibit 5, had its social workers make multiple attempts to work with the Appellant to plan for the discharge.

Based on the totality of the record and the presentation of testimony, I thus find the preponderance of evidence shows that Appellant has had a more than reasonable chance and opportunity to pay for her stay and has failed to do so. There is thus sufficient ground to discharge her under 130 CMR 456.701(A)(5) and the notice of discharge looks proper and compliant with the other regulatory requirements. See 130 CMR 456.701(B) and (C). There is also evidence of sufficient discharge planning attempts by the SNF in Exhibit 5 with documentation about Appellant's refusal to cooperate with such efforts. Further the testimony and record show no evidence indicating that it would be clinically inappropriate to discharge Appellant to a shelter, and this is also corroborated by the lack of a clinical determination approving her for a need for skilled nursing services. I thus find there is also compliance with M.G.L. c.111, §70E in this matter.

For these reasons I conclude that the discharge action by Saugus Rehab is proper and supported by the record, and that Appellant's appeal should be DENIED.

⁴ As stated at hearing, even if MassHealth approved Appellant's current pending LTC re-application despite the clinical hurdle, the approval could not erase or address the issue involving 17+ months of unpaid nursing facility debt from before October 2021, which total well more than \$100,000.

Order for Nursing Facility

None.

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 decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. 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.

Christopher Taffe
Hearing Officer
Board of Hearings

cc: