

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2202091
Decision Date:	6/9/2022	Hearing Date:	4/15/2022
Hearing Officer:	Thomas J. Goode	Record Open:	06/03/2022

Appearance for Appellant:
Brother

Appearance for Nursing Facility:
Stewart Karger, Executive Director
Tricia Rullo, Business Office Manager



*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:	Approved	Issue:	Nursing Facility- Initiated Discharge
Decision Date:	6/9/2022	Hearing Date:	04/15/2022
Nursing Facility's Reps.:	Stewart Karger, et.al.	Appellant's Rep.:	Brother
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 February 28, 2022, the nursing facility informed Appellant that he would be discharged to his brother's home in the community for failure to pay for his stay at the nursing facility (130 CMR 456.701, 610.028; Exhibit 1). Appellant filed this appeal in a timely manner on March 21, 2022 (130 CMR 610.015(B); Exhibit 2). Nursing facility residents have the right to request an appeal of any nursing facility-initiated transfer or discharge (130 CMR 456.703. 610.032(C)). The hearing record remained open until May 20, 2022, and the record open period was extended to June 3, 2022. (Exhibit 5).¹

Action Taken by the Nursing Facility

The nursing facility notified Appellant that he would be discharged to his brother's home in the community for failure to pay for his stay at the nursing facility.

¹ The hearing record closed on May 20, 2022; however, as late submissions were copied to Appellant's representative, the hearing record open period was extended to June 3, 2022, and the documentation was accepted into evidence. Exhibits 8, 9.

Issue

The appeal issue is whether the nursing facility was correct, pursuant to 130 CMR 456.701, 610.028 and 610.029, in notifying Appellant of its intent to discharge him to his brother's home in the community for failure to pay for his stay at the nursing facility.

Summary of Evidence

The nursing facility was represented by the facility administrator and the business office manager. On February 28, 2022 the nursing facility issued a 30-day notice of intent to discharge Appellant to his brother's home in the community because he had failed to pay the patient paid amount (Exhibit 1). Appellant is [REDACTED] and was admitted to the nursing facility in [REDACTED] with diagnoses including congestive heart failure, Parkinson's disease, anxiety, insomnia, anorexia, and psychosis with paranoid behaviors (Exhibit 4, pp. 23, 57). Appellant is oriented to person, place, and time with some forgetfulness, has a health care proxy in place, but remains his own decision maker (*Id.*, p. 23). Prior to admission to the facility Appellant lived in senior housing. Appellant remains appropriate for long-term care due to his need for assistance with all activities of daily living (*Id.*). Medicare paid for Appellant's nursing facility stay through September 10, 2020. Appellant paid privately from September 11, 2020 through September 30, 2020 and has been MassHealth eligible since October 1, 2020 with a monthly patient paid amount due of \$1,704.11. As of October 1, 2021, Appellant owed the nursing facility \$22,153.43 for the patient paid amount due since October 2020. Appellant's brother agreed to pay the outstanding amount and made a total of 3 payments of \$1,704.11 in March 2022 and April 2022 (*Id.*, pp. 10, 11). No additional payments have been made to the facility, and Appellant currently owes \$18,745.21 in addition to the current patient paid amount. The nursing facility administrator testified to multiple conversations and correspondence with Appellant's brother who on multiple occasions promised to pay the amount owed to the facility (*Id.*, pp. 10-19). The nursing facility administrator testified that the discharge plan to Appellant's brother's home would involve a discharge meeting with the family to establish available services, ordering appropriate equipment for home delivery, transportation by ambulance to the residence, visiting nursing services, setting up a primary care appointment, family and private care services, and a follow up conversation 48 hours after discharge to confirm services are in place (*Id.*, p. 106). The facility representatives testified that Appellant is content to remain in bed and can be cared for in the brother's home.

Appellant was represented by his brother who was appointed by Appellant to represent him at hearing. Exhibit 2. Appellant's representative stated that he is unable to care for Appellant because bedrooms are located on the second floor of his home, which has been sold as he and his family are moving to Texas.² Appellant's brother testified that he paid the facility \$9,000 for the gap in coverage between Medicare and MassHealth in September 2020, and he's withholding Appellant's income from the facility because he wants to be reimbursed for the funds he paid privately to the

² Appellant's brother stated that he sold his home two weeks prior, but no paperwork has been signed.

facility.³ Appellant's brother testified that he has deposited Appellant's income into a CD account currently totaling \$20,000, and that he feels he cannot withdraw the funds for 30 days to pay the nursing facility because penalties will be assessed.

The nursing facility administrator stated that funds in a CD would render Appellant ineligible for MassHealth coverage as assets exceed \$2,000. The hearing record remained open to allow Appellant's representative to pay the nursing facility the amount owed within 30 days which the nursing facility agreed would resolve the issues related to the February 28, 2022 discharge notice which it would rescind upon receipt of the funds. On May 13, 2022 the nursing facility reported that a check for \$18,745.21 had been delivered to the facility and received a request from Appellant asking the facility to not cash the check until May 20, 2022 (Exhibit 6). On May 20, 2022, the nursing facility submitted an update stating that Appellant requested that the check not be deposited until May 23, 2022 (Exhibit 7). On May 26, 2022, the nursing facility submitted a statement that the check was deposited on May 23, 2022 and returned on May 26, 2022 for insufficient funds (Exhibit 8). On June 3, 2022 the nursing facility submitted a final summary stating that the check was returned for insufficient funds, and the past due amount of \$18,745.21 is still owed in addition to \$3,408.22 additional patient paid amount payments not made and that attempts to contact Appellant's brother have been unsuccessful (Exhibit 9).

Findings of Fact

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

1. On February 28, 2022 the nursing facility issued a 30-day notice of intent to discharge Appellant to his brother's home in the community because he had failed to pay the patient paid amount.
2. Appellant is [REDACTED] and was admitted to the nursing facility in [REDACTED] with diagnoses including congestive heart failure, Parkinson's disease, anxiety, insomnia, anorexia, and psychosis with paranoid behaviors.
3. Appellant is oriented to person, place, and time with some forgetfulness, has a health care proxy in place, but remains his own decision maker.
4. Prior to admission to the facility Appellant lived in senior housing.
5. Appellant remains appropriate for long-term care due to his need for assistance with all activities of daily living.
6. Medicare paid for Appellant's nursing facility stay through [REDACTED].

³ The nursing facility administrator explained that Appellant's brother appealed the termination of coverage by Medicare on Appellant's behalf and all appeals were denied.

7. Appellant paid privately from September 11, 2020 through September 30, 2020 and has been MassHealth eligible since October 1, 2020 with a monthly patient paid amount due of \$1704.11.
8. As of October 1, 2021, Appellant owed the nursing facility \$22,153.43 for the patient paid amount due since October 2020. Appellant's brother agreed to pay the outstanding amount and made a total of 3 payments of \$1,704.11 in March 2022 and April 2022. No additional payments have been made to the facility.
9. The discharge plan to Appellant's brother's home would involve establishing services at a discharge meeting with the family, ordering appropriate equipment for home delivery, transportation by ambulance to the residence, visiting nursing services, setting up a primary care appointment, and family and private care services, and a follow up conversation 48 hours after discharge to confirm services are in place.
10. Appellant's brother testified that he has deposited Appellant's income into a CD account currently totaling \$20,000.
11. A check for \$18,745.21 was delivered to the facility with a request from Appellant asking that the facility not cash the check until May 20, 2022. Appellant then requested that the check not be deposited until May 23, 2022.
12. The check was deposited on May 23, 2022 and returned on May 26, 2022 for insufficient funds.

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 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.⁴

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:

⁴ The regulatory language in the MassHealth Nursing Facility Manual, found in 130 CMR 456.400 et seq. has regulations which are identical (or nearly identical) to counterpart regulations found within the Commonwealth's Fair Hearing Rules at 130 CMR 610.001 et seq. as well as corresponding federal government regulations. Because of such commonality, the remainder of regulation references in this Fair Hearing decision will only refer to the MassHealth Nursing Facility Manual regulations in 130 CMR 456.400 unless otherwise noted and required for clarification.

- (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.

(130 CMR 456.701(C))

Further, the notice requirements set forth in 130 CMR 456.701(A) state that 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) (emphasis added); or**

- (6) the nursing facility ceases to operate.

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).

(130 CMR 456.701(B))

The nursing facility must also comply with all other applicable state laws, including M.G.L. c.111, §70E. The key paragraph of this statute, which is directly relevant to any type of appeal involving a nursing facility-initiated transfer or discharge, reads:

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)⁵

The nursing facility is entitled to collect the patient-paid amount which is required to be paid to the facility.⁶ However, this hearing officer cannot conclude that discharging Appellant to his brother's home is a discharge from the facility to another safe and appropriate place. The discharge plan must be considered within the applicable laws and regulations outlined above. The evidence and testimony show that Appellant's brother appears to be deliberately misappropriating Appellant's income by refusing to pay the patient paid amount to the nursing facility on Appellant's behalf which has subjected Appellant to discharge proceedings from the facility, and has potentially jeopardized Appellant's MassHealth eligibility.⁷ Given the evidence and testimony at hearing, it is difficult to envision Appellant's brother acting in Appellant's best interests or that Appellant's brother's home is a safe and appropriate place to implement a discharge plan, much less to maintain that plan for Appellant who is [REDACTED], primarily bed bound, with diagnoses including congestive heart failure, Parkinson's disease, anxiety, insomnia, anorexia, psychosis with paranoid behaviors, is dependent in all ADLs, and has resided in a skilled nursing facility since August 2020.⁸ Appellant's brother's testimony concerning the sale of his home is not credible⁹; however,

⁵ See also 42 USC 1396r(c)(2)(C) which requires that a nursing facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

⁶ The Patient-paid Amount is the amount that a member in a long-term-care facility must contribute to the cost of care under the laws of the Commonwealth of Massachusetts. 130 CMR 515.001.

⁷ The total value of countable assets owned by or available to individuals applying for or receiving MassHealth Standard, Family Assistance, or Limited may not exceed \$2,000 for an individual. 130 CMR 520.003.

⁸ The nursing facility administrator pointed to physician documentation concerning a possible discharge. The physician notes state that discharging Appellant is being considered, and the family has been notified. The notes

the added possibility of the brother's home being sold does not brighten the discharge plan for Appellant and his welfare. Considering the evidence and testimony in this hearing record, it may be entirely appropriate for the nursing facility to pursue other legal avenues to recover the patient paid amount owed¹⁰; however, the evidence and testimony do not support a finding that discharging Appellant to his brother's home is a discharge to a safe and appropriate place. For this reason only the appeal must be APPROVED.

Order for the Nursing Facility

Do not discharge Appellant pursuant to the February 28, 2022 notice, and rescind the February 28, 2022 notice.

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, Office of Medicaid, at the address on the first page of this decision.

Thomas J. Goode
Hearing Officer
Board of Hearings

cc:

Steward Krager, Administrator, Belmont Manor Nursing and Rehabilitation Center, 34 Agassiz Avenue, Belmont, MA 02478

[REDACTED]

state that Appellant has made progress since admission but add that he will require community-based services and close supervision after discharge. Exhibit 4 p. 55.

⁹ See fn. 2.

¹⁰ Although Appellant's brother appears to be responsible for managing Appellant's income, the clinical record states that Appellant is "his own decision maker" and responded to emails and appears to be aware of the circumstances as he responded to emails and the check bears his signature. Exhibits 6-9. It is unclear whether the nursing facility has attempted to collect the PPA from Appellant without his brother's involvement.