

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: Denied

Appeal Number: 2202314

Decision Date: 4/05/2022

Hearing Date: 04/04/2022

Hearing Officer: Patricia Mullen

Appearances for Appellant:



Appearances for Nursing Facility:

Susan Braid, Dir. Of Nursing; 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:	4/05/2022	Hearing Date:	04/04/2022
Nursing Facility's Reps.:	Susan Braid, Dir. Of Nursing; Samantha White, Social Worker	Appellant's Reps.:	
Hearing Location:	Taunton MassHealth Enrollment Center		

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 of intent to discharge with less than 30 days' notice dated March 22, 2022, the nursing facility informed the appellant that he would be discharged to an address listed on the notice on April 5, 2022, because the safety of the individuals in the nursing facility is endangered due to his clinical or behavioral status. (130 CMR 610.029(B)(1); 610.015(F) and Exhibit 1). The appellant filed this appeal in a timely manner on March 22, 2022. (see 130 CMR 610.015(F); 610.015(B)(5); and Exhibit 2). Notice of discharge from a nursing facility is valid grounds for appeal (see 130 CMR 610.032).

Action Taken by the Nursing Facility

The nursing facility issued a notice of intent to discharge the appellant with less than 30 days' notice.

Issue

The appeal issue is whether the facility satisfied its statutory and regulatory requirements pursuant to 130 CMR 610.028; 610.029(B), when it issued the appellant the notice of intent to discharge.

Summary of Evidence

The appellant appeared telephonically at the hearing. The appellant's ex-spouse appeared telephonically as a witness for the appellant. The skilled nursing facility (hereinafter the "SNF") was represented telephonically by its Director of Nursing, and its Social Worker. The SNF submitted pages from the appellant's nursing facility record which were entered into the hearing record. (Exhibit 5 pp. 1-37).

The appellant is under age 65 and was admitted to the SNF on [REDACTED] from the hospital for treatment of cellulitis, infection of left ankle and foot, and osteomyelitis. (Exhibit 5, pp. 7-8, testimony). The appellant is on 2 liters of oxygen via nasal canula. (Exhibit 5, p. 12). The appellant had an above knee amputation of his right leg in October, 2020. (Testimony). The appellant testified that prior to his hospitalization, he was living in a shelter. The appellant was screened clinically eligible for short term care through April 22, 2022. (Testimony). The Director of Nursing testified that the appellant's infection was treated and cleared, and the only skilled care he receives at this time is physical therapy (PT) three days a week. (Testimony). The SNF's Director of Nursing testified that the appellant could receive outpatient PT in the community. The SNF's Director of Nursing stated that the SNF issued the notice of discharge due to the appellant's violation of the SNF's smoking policy as outlined in Exhibit 5. The Director of Nursing stated that the address on the notice, to which the appellant is to be discharged, is a shelter. (Exhibit 1).

In a letter dated March 29, 2022, the SNF physician wrote that in his professional opinion, the appellant is causing danger to himself and others as he is smoking in the bathroom with residents in the facility who are on oxygen. (Exhibit 5, p. 9). The physician wrote further that it is his professional opinion that there is no medical need for the appellant to remain a resident at the SNF and the appellant is capable and safe to discharge to the community. (Exhibit 5, p. 9). The SNF physician outlined the instances in which the SNF determined the appellant was in violation of the SNF smoking policy. (Exhibit 5, p. 9). The physician wrote that on November 29, 2021, four packs of cigarettes were found in the appellant's room; on December 2, 2021, a nurse smelled a strong odor of marijuana coming from the appellant's room and the appellant voluntarily gave the nurse a rolled marijuana cigarette, a bag of rolling papers, a bag of loose marijuana, and a small marijuana cigarette¹; additional rolling papers and a clear container were found in the appellant's room; on January 22, 2022 and February 3, 2022, staff could smell smoke coming from a common area bathroom which the appellant was in; on March 13, 2022, the appellant was smoking marijuana during smoking break. (Exhibit 5, pp. 9, 19). Nursing facility notes indicate that the appellant was

¹ The SNF physician writes this date as December 2, 2021, however SNF records state that this date was November 30, 2021. (Exhibit 5, p. 19).

found to be under the influence of, and in possession of marijuana on November 30, 2021; staff reported that the appellant insisted on taking a shower at 2:40 am on January 22, 2022 and he was suspected of smoking in the common bathroom at that time as he smelled like cigarettes; he was observed smoking outside on March 22, 2022 when it was not a smoke break; staff reported that the appellant had a strong odor of marijuana on March 15, 2022; and a pipe bowl with unknown residue was found during a room search on September 24, 2021. (Exhibit 5, pp. 19, 30-33).

The appellant was issued a notice of discharge on November 29, 2021, but the SNF rescinded the notice. (Exhibit 5, p. 36, testimony). On November 30, 2021, the appellant signed a non-compliance form attesting that this was his final warning concerning smoking at off times without supervision and the next infraction would result in a notice to discharge. (Exhibit 5, p. 37). The appellant was offered nicotine replacement options. (Exhibit 5, p. 37). The appellant reported that he understood the consequences of violating the smoking policy and would not violate the policy going forward. (Exhibit 5, p. 37).

The SNF Social Worker stated that the appellant is working with the Northeast Independent Living Program to find housing in the community. (Exhibit 5, p. 20).

The appellant signed the SNF's smoking policy on August 12, 2021 acknowledging that he has been educated and understood the SNF's smoking policy. (Exhibit 6). The SNF's smoking policy states that it is the policy of the SNF to not allow smoking of marijuana for either medical or recreational purposes. (Exhibit 6). The SNF's smoking policy states that all cigarettes will be kept in a secure location designated by the facility and residents will not be permitted to retain such items in their possession. (Exhibit 6). The SNF's smoking policy states that smoking will take place under the supervision of a staff member and the staff member will have the responsibility of lighting all cigarettes. (Exhibit 6).

The appellant stated that the last time he got caught with cigarettes and marijuana, the SNF issued a notice of discharge but then rescinded it. The appellant stated that he did not understand why the SNF did not rescind the current notice of discharge because this time he was only caught smoking one cigarette. The appellant state that he does not believe smoking one cigarette warrants a notice of discharge. The appellant stated that other residents have been caught smoking outside and were just asked to put their cigarettes out, not given notices of discharge. The appellant stated that his roommate was smoking in bed and is still in the SNF. The appellant stated that he agrees he broke the rules, but doesn't believe discharge is an appropriate punishment. The appellant stated that he has filled out applications for housing and is on a number of housing lists.

The appellant's ex-spouse stated that the appellant had a traumatic brain injury and suffered cognitive decline which affects his memory. The appellant's ex-spouse noted that the appellant is an insulin dependent diabetic and is on oxygen. The appellant's ex-spouse pointed out that the appellant has mobility issues requiring assistance and she does not believe he could stand and smoke in a bathroom. The appellant's ex-spouse expressed concern for a decline in the appellant's condition if he is asked to leave the SNF.

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 the SNF on [REDACTED] from the hospital for treatment of cellulitis, infection of left ankle and foot, and osteomyelitis.
2. The appellant is on 2 liters of oxygen via nasal canula.
3. The appellant had an above knee amputation of his right leg in October, 2020.
4. Prior to his hospitalization, the appellant was living in a shelter.
5. The appellant was screened clinically eligible for short term care in the SNF through April 22, 2022.
6. The appellant's infection was treated and cleared; the appellant receives PT three days a week; the appellant could receive outpatient PT in the community.
7. The address on the notice of discharge, to which the appellant is to be discharged, is a shelter.
8. In the SNF physician's professional opinion, the appellant is causing danger to himself and others as he is smoking in the bathroom with residents in the facility who are on oxygen.
9. In the SNF's physician's professional opinion, there is no medical need for the appellant to remain a resident at the SNF and the appellant is capable and safe to discharge to the community.
10. On September 24, 2021, a pipe bowl with residue was found in the appellant's room; on November 29, 2021, four packs of cigarettes were found in the appellant's room; on November 30, 2021, the appellant was under the influence of marijuana; on that same date, the appellant voluntarily gave the nurse two rolled marijuana cigarettes, a bag of rolling papers, and a bag of loose marijuana; additional rolling papers and a clear container were found in the appellant's room; on January 22, 2022 and February 3, 2022, staff could smell smoke coming from a common area bathroom which the appellant was in; on January 22, 2022, the appellant took a shower at 2:40 am and staff reported he smelled like cigarettes; on March 13, 2022, the appellant was smoking marijuana during smoking break; staff reported a strong odor of marijuana on March 15, 2022; the appellant was observed smoking outside on March 22, 2022 when it was not a smoking break time.
11. The appellant was issued a notice of discharge on November 29, 2021, but the SNF rescinded the notice.
12. On November 30, 2021, the appellant signed a non-compliance form attesting that this was his final warning concerning smoking at off times without supervision and the next infraction would result in a notice to discharge.

13. The appellant is working with the Northeast Independent Living Program to find housing in the community and is on several housing lists.
14. The appellant signed the SNF's smoking policy on August 12, 2021 acknowledging that he has been educated and understood the SNF's smoking policy.
15. The SNF's smoking policy states, among other things, that it is the policy of the SNF to not allow smoking of marijuana for either medical or recreational purposes; all cigarettes will be kept in a secure location designated by the facility and residents will not be permitted to retain such items in their possession; smoking will take place under the supervision of a staff member and the staff member will have the responsibility of lighting all cigarettes.

Analysis and Conclusions of Law

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) a stay at the nursing facility; or
- (6) the nursing facility ceases to operate.

130 CMR 610.028(A); 456.701(A).

When the facility transfers or discharges a resident under any of the circumstances specified in 130 CMR 610.028(A)(1) through (5), the resident's clinical record must be documented. The documentation must be made by

- (1) the resident's physician when a transfer or discharge is necessary under 130 CMR 610.028(A)(1) or (2); and
- (2) a physician when the transfer or discharge is necessary under 130 CMR 610.028(A)(4).

130 CMR 610.028(B).

In lieu of the 30-day-notice requirement set forth in 130 CMR 610.029(A), the notice of discharge or transfer required under 130 CMR 610.028 must be made as soon as practicable before the discharge or transfer in any of the following circumstances, which are considered to be 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 lived in the nursing facility for 30 days immediately before receipt of the notice.

130 CMR 610.029(B).

If a hearing is requested, in accordance with 130 CMR 610.015(B)(4), and the request is received before the discharge or transfer, then the nursing facility must stay the planned transfer or discharge until five days after the hearing decision.

130 CMR 610.030(B).

The issue on appeal is whether the SNF was correct in issuing the notice of intent to discharge with less than 30 days notice because the health or safety of individuals in the nursing facility is endangered by the appellant's behavior and this is documented in the appellant's record by a physician. The SNF has provided support for this claim in the hearing record.

The appellant does not follow the nursing facility guidelines with regard to supervised smoking in designated areas. The appellant has had cigarettes, marijuana, and marijuana paraphernalia in his room; the appellant has been under the influence of marijuana while a resident at the SNF; the appellant was observed smoking marijuana outside and observed smoking cigarettes outside of the supervised time indicated in the SNF smoking policy. The evidence supports that the appellant was smoking in the bathroom between 2:00 and 3:00 am one night. The appellant's disregard for the facility's smoking policy is all the more dangerous due to the fact that the appellant, as well as multiple residents in the facility are on oxygen and smoking materials create a fire hazard. The appellant has shown no intention of following the SNF's smoking policy. The appellant's nursing facility record supports that the health and safety of individuals in the nursing facility is endangered by the appellant's actions and thus the nursing facility has met the requirements of 130 CMR 610.028(A).

The second issue is whether the nursing facility has met the requirements of MGL Chapter 111, Section 70E and 42 CFR 483.12(a)(7) in providing sufficient preparation and orientation to the appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place. The Federal Centers for Medicare and Medicaid defines "sufficient preparation" within the meaning of 42 CFR 483.12(a)(7) to mean that the facility informs the resident where he or she is going and takes steps under its control to assure safe transportation; the facility should actively involve, to the extent possible, the resident and the resident's family in selecting the new residence. (see *Centennial Healthcare Investment Corp. v. Commissioner of the Division of Medical Assistance*, Appeals Court No. 03-P-879, 2004)

The nursing facility has met its burden of providing sufficient preparation and orientation to the appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place. The nursing facility intends to discharge the appellant to a local shelter. The appellant's ex-spouse expressed concern that the appellant would decline in a shelter, noting that he is status post for a traumatic brain injury, is on oxygen and is an insulin dependent diabetic. The SNF physician has cleared the appellant medically for living in the community. The appellant was homeless and living in shelters prior to his hospitalization and SNF admission. The SNF has provided the appellant support from NILP to assist the appellant with finding appropriate housing in the community.

I determine that the place to which the nursing facility intends to discharge the appellant is safe and appropriate based on the appellant's nursing facility record. The appellant is receiving no skilled services, other than PT, at this time and the appellant can receive PT on an outpatient basis in the community. The SNF physician noted that the appellant is medically cleared for discharge and does not require skilled nursing facility level of care. The nursing facility involved the appellant, to the extent possible, in discharge planning and the fact that the appellant does not want to go back to the shelter and hasn't found an alternative place to live does not negate this fact and is out of the control of the nursing facility. The nursing facility's notice of discharge dated March 22, 2022 meets the requirements of 130 CMR 610.028, 610.029, and MGL Chapter 111, section 70E. The appeal is denied.

Order for the Nursing Facility

Proceed with the discharge as set forth in the notice dated March 22, 2022 after the 5 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 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.

Patricia Mullen
Hearing Officer
Board of Hearings

cc: The Oxford, Attn: Administrator, 689 Main St., Haverhill, MA 01830