

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: Denied

Appeal Number: 2203897

Decision Date: 6/30/2022

Hearing Date: 06/07/2022

Hearing Officer: Radha Tilva

Record Open to: 06/08/2022

Appearance for Appellant:

Pro se

Appearance for Nursing Facility:

Judith Wilde, Social Worker

Greg Logan, Administrator

Mary Shay, 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:	Denied	Issue:	Nursing Home Discharge – health improved
Decision Date:	6/30/2022	Hearing Date:	06/07/2022
NF's Rep.:	Judith Wilde, Social Worker; Greg Logan, Administrator; Mary Shay, BOM	Appellant's Rep.:	Pro se
Hearing Location:	Chelsea MassHealth Enrollment Center Room	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

Through a notice dated May 11, 2022, the Nursing Facility sent a Notice of Intent to Discharge the Resident with Less than 30 Days' Notice to appellant seeking to discharge him on June 11, 2022 to a homeless shelter as his health has improved sufficiently and he no longer needs the services provided by the facility (Exhibit 1). The nursing facility also issued an expedited Notice of Intent to Discharge on June 6, 2022 with a June 11, 2022 discharge date as appellant had failed after reasonable and appropriate notice to pay for his stay at the nursing facility (Exhibit __, p. 13). The appellant filed this appeal in a timely manner on May 23, 2022 (see 130 CMR 610.015(B) and Exhibit 2). Challenging a nursing facility discharge is valid grounds for appeal (see 130 CMR 610.032).

At hearing the record was left open for the nursing facility to provide a copy of the clinical record. The nursing facility submitted the documentation on June 7, 2022.

Action Taken by Nursing Facility

The nursing facility issued a Notice of Intent to Discharge the Resident with Less than 30 Days' Notice on the basis that appellant's health had improved sufficiently and he no longer needed the services provided after reasonable and appropriate notice to pay for his stay at the nursing facility.

Issue

The appeal issue is whether the nursing facility is correct in seeking a discharge of appellant to a homeless shelter as his health has improved sufficiently that he no longer requires nursing home care.

Summary of Evidence

The nursing facility was represented telephonically by the Business Office Manager, Administrator, and Social Worker. The appellant also appeared by telephone. On May 11, 2022, the nursing facility sent a Notice of Intent to Discharge the Resident to appellant seeking to discharge him on June 11, 2022 to a homeless shelter as his health improved sufficiently such that he no longer needed the services provided by the facility. Appellant appealed that notice on May 23, 2022 to the Board of Hearings and a hearing was scheduled for June 7, 2022.

The nursing facility issued another Notice of Intent to Discharge the Resident with Less Than 30 Days' Notice on June 1, 2022. The basis of this notice was because the resident failed after reasonable and appropriate notice to pay for his stay at the nursing facility. The place for discharge was to a homeless shelter. At hearing it was determined that MassHealth was still seeking asset verification and no final denial had issued. The nursing facility conceded that the June 1, 2022 notice was for a secondary reason and that they were not seeking an emergency discharge.¹

The nursing facility representative testified that appellant is in his forties and entered the nursing facility in July 2021 initially for rehabilitation. There was some initial likelihood of him getting a liver transplant, but that did not materialize. The appellant received rehabilitation at the facility and did well. He is no longer confused and ambulates independently. The nursing facility feels like he can be managed in the community at this point. Prior to entering the nursing facility, the appellant was homeless.

The nursing facility representative stated that she has been doing discharge planning for 30 years and that appellant has been giving her resistance. The nursing facility contacted agencies and programs that help with housing, but appellant was not interested. Eventually the nursing facility applied for the Moving Forward Waiver on behalf of the appellant, however, that program could take up to a year for approval.

¹ Therefore, this decision will focus solely on the initial Notice of Intent to Discharge.

The appellant stated that he last used drugs 6 years ago. The appellant stated that he ended up in a hospital because he hurt his head from a fall. He had cirrhosis of the liver which was causing him to fall and he could not take care of his medications. The hospital transferred him to a nursing facility and he was told that he would be there for awhile. The appellant stated that he cannot be in a shelter as he has end stage liver disease. The appellant testified that he still needs a visiting nurse and that he cannot overstimulate his liver by walking. He still uses a walker and a homeless shelter would require him to walk as he would have to leave it during the day. The appellant stated that no one warned about the insurance problems until a month and a half ago. The appellant further testified that he would like to leave the nursing facility and find his own housing or apartment, however, needs his next Social Security check which he will hopefully get by July 3, 2022 or July 4, 2022.

The hearing was left open for the nursing facility to submit a copy of the clinical record which was submitted the same day as the hearing, June 7, 2022. The documents included the record of admission which stated appellant's diagnoses is chronic hepatic failure, alcoholic cirrhosis of liver, chronic viral hepatitis C, esophageal varices with bleeding, iron deficiency anemia, thrombocytopenia, hypothyroidism, pancytopenia, chronic pain syndrome, gastrointestinal hemorrhage, and anxiety disorder (Exhibit 5). Also included was a note dated May 10, 2022 from Dr. Diana Arena which states appellant met all of his goals in rehabilitation and his health improved sufficiently such that he no longer needs the services provided by the facility (Exhibit 5). In addition, the note states that appellant's diagnosis is chronic and can be managed in the community with medications and services, as ordered (Exhibit 5). Progress notes were also submitted and support that Dr. Diana Arena is appellant's PCP at the nursing facility (Exhibit 5).

Findings of Fact

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

1. On May 11, 2022, the nursing facility sent a Notice of Intent to Discharge the Resident to appellant seeking to discharge him on June 11, 2022 to a homeless shelter as his health improved sufficiently such that he no longer needed the services provided by the facility.
2. Appellant appealed that notice on May 23, 2022 to the Board of Hearings and a hearing was scheduled for June 7, 2022.
3. The appellant, a male in his forties, entered the nursing facility in July 2021 initially for rehabilitation.
4. The appellant's diagnoses include chronic hepatic failure, alcoholic cirrhosis of liver, chronic viral hepatitis C, esophageal varices with bleeding, iron deficiency anemia, thrombocytopenia, hypothyroidism, pancytopenia, chronic pain syndrome, gastrointestinal hemorrhage, and anxiety disorder.
5. A note dated May 10, 2022 from Dr. Diana Arena, appellant's PCP at the facility, states appellant met all of his goals in rehabilitation and his health improved sufficiently such that he

no longer needs the services provided by the facility.

6. Appellant agrees that he no longer needs the services provided in the nursing facility, however, believes that a homeless shelter is not an appropriate place as he still uses a walker and cannot overstimulate his liver by walking around all day.
7. Appellant agrees to leave the facility by July 3rd or 4th 2022, but is waiting for his Social Security check.

Analysis and Conclusions of Law

The appeal issue is whether the nursing facility is in compliance with state and federal laws and regulations in its attempt to transfer appellant to a different nursing facility. The following regulations govern the requirements of a nursing facility seeking to transfer a resident:

Regulation 130 CMR 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 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.

(D) A nursing facility's failure to readmit a resident following a medical leave of absence shall be deemed a transfer or discharge (depending on the resident's circumstances). The nursing facility must issue notice to the resident and an immediate family member or legal representative in accordance with 130 CMR 456.701(A) through (C), 456.702(C), 610.028, and 610.029.

Regulation 130 CMR 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.

(C) When the transfer or discharge is the result of a nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence, the notice of transfer or discharge, including that which is required under 130 CMR 456.429, must comply with the requirements set forth in 130 CMR 456.701 and must be provided to the resident and an immediate family member or legal representative at the time the nursing facility determines that it will not readmit the resident.

(Emphasis Added).

The regulations above must be read in conjunction with the MassHealth Fair Hearing Rules at Section 610.028, 610.029, and 610.030.² The facts demonstrate that the facility hand delivered the

² 130 CMR 610.028: Notice Requirements Regarding Actions 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 MassHealth agency 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 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).
- (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;

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- (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.
- (D) As provided in 130 CMR 456.429, a nursing facility's failure to readmit a resident following a medical leave of absence will be deemed a transfer or discharge (depending on the resident's circumstances). Upon determining that it will not readmit the resident, the nursing facility must issue notice to the resident and an immediate family member or legal representative in accordance with 130 CMR 456.701(A) through (C), 456.702, and 610.028 through 610.030.

130 CMR 610.029: Time Frames for Notices Issued by Nursing Facilities

- (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).
- (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.
- (C) When the transfer or discharge is the result of a nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence, the notice of transfer or discharge, including that which is required under 130 CMR 456.429, must comply with the requirements set forth in 130 CMR 456.701, and must be provided to the resident and an

notice(s) to appellant and both notices comply with requirements set forth above at 130 CMR 456.701(C). The notice cites permissible reasons for the discharge pursuant to 130 CMR 456.701(A)(2) and 130 CMR 610.028(A)(2).

The nursing facility has asserted that the resident's health has improved sufficiently such that he no longer needs the services provided by the nursing facility which is proper grounds for a transfer or discharge (130 CMR 456.701(A)(2) and 130 CMR 610.028(A)(2). Pursuant to regulation 130 CMR 610.028(B), where the resident's health has improved sufficiently the clinical record must be documented by the resident's physician. Moreover, 130 CMR 456.701(B)(2) imposes an additional requirement that a physician document the reason for the transfer or discharge. The note from Dr. Diana Arena, dated May 10, 2022, adequately documents that appellant is stable and safe for discharge. The progress notes also submitted support that Dr. Arena examines appellant at the nursing facility and is his PCP. Based on the above, the nursing facility has shown sufficient documentation and credible evidence to support the appellant's health has improved sufficiently such that he no longer requires nursing facility level of care.

Pursuant to M.G.L. c.111, §70E, 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.³ The nursing facility has provided sufficient preparation and orientation to ensure a safe and orderly discharge from the

immediate family member or legal representative at the time the nursing facility determines that it will not readmit the resident.

(D) Appeals of discharges and transfers listed in 130 CMR 610.029(B) and (C) will be handled under the expedited appeals process described in 130 CMR 610.015(E) and (F).

130 CMR 610.030: 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 610.015(B)(3), 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 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.

(C) If the request for a hearing, in accordance with 130 CMR 610.015(B)(4), is received within the applicable time frame but after the transfer, the nursing facility must, upon receipt of the appeal decision favorable to the resident, promptly readmit the resident to the next available bed in the facility.

(D) In the case of a transfer or discharge that is the result of a nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence, if the request for a hearing is received within the applicable time period, in accordance with 130 CMR 610.015(B)(5), the nursing facility must, upon receipt of the appeal decision favorable to the resident, promptly readmit the resident to the next available bed.

³ See also, 42 U.S.C. §483.12(a)(7).

facility to a homeless shelter. The appellant can obtain any therapy, physical or occupational, outside in the community. There is no indication that discharge to a shelter will not allow for a safe and orderly discharge. In addition, though the appellant does not agree that a homeless shelter is a safe and appropriate place for discharge, appellant does not contend that he no longer requires nursing facility level of care and has agreed to try to secure housing by July 3rd of 4th of 2022. The nursing facility, however, has satisfied its obligation with respect to the discharge planning regulations and it cannot be penalized for appellant's lack of cooperation. Based on the above analysis the appellant's appeal is DENIED and the nursing facility must stay the planned transfer or discharge until thirty days after the hearing decision (130 CMR 610.030(A)).

Order for the Nursing Facility

Stay the planned discharge until thirty days after the hearing 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 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.

Radha Tilva
Hearing Officer
Board of Hearings

cc: Bourne Manor, Attn: Administrator, 146 MacArthur Boulevard, Bourne, MA 02532