

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2207010
Decision Date:	10/11/2022	Hearing Date:	10/04/2022
Hearing Officer:	Casey Groff, Esq.	Record Open to:	10/07/2022

Appearance for Appellant:
Pro se

Appearance for Nursing Facility:
Margaret Maroney, LSCW; Sancta Maria
Nursing Home
Georgia Wayne, Director of Nursing, Sancta
Maria Nursing Home



*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:	10/11/2022	Hearing Date:	10/04/2022
Nursing Facility Rep.:	Margaret Maroney, LSCW; DON: Georgia Wayne,	Appellant's Rep.:	<i>Pro se</i>
Hearing Location:	Board of Hearings (remote)	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 nursing facility 30-day discharge notice dated August 26, 2022, The Sancta Maria Nursing Facility (“the nursing facility”) informed Appellant that it sought to discharge him from the facility to a homeless shelter. See Exhibit 1; 130 CMR 610.029(B). Appellant filed a timely appeal on August 26, 2022. See Exhibit 1; 130 CMR 610.015(B)(4). An attempt to discharge a nursing facility resident is valid grounds for appeal. See 130 CMR 610.032(C).

Action Taken by Nursing Facility

The nursing facility sought to discharge Appellant because it determined that the safety of the individuals in the nursing facility is endangered due to Appellant’s clinical or behavioral status.

Issue

The appeal issues are whether the nursing facility properly notified Appellant that she would be discharged, pursuant to 130 CMR 610.028, and whether the intended discharge location is a safe and appropriate place for Appellant pursuant to M.G.L. Ch. 111, § 70E.

Summary of Evidence

At the hearing, the nursing facility was represented by its director of nursing (DON) and licensed social worker. Based on testimony and documentary evidence submitted into the record, the nursing facility provided the following information:

Appellant is over the age of 65. Approximately seven months ago, Appellant was admitted to the Sancta Maria Nursing Facility (“the facility”) after having been hospitalized with a foot infection. The purpose for his admission was to receive short-term rehabilitation, including occupational therapy (OT) and physical therapy (PT) services. See Exhibit 3, p. 1-4. Appellant’s diagnoses upon admission included synovitis and tenosynovitis of the right ankle and foot, parasitic infection of the right ankle and foot, chronic obstructive pulmonary disease (COPD), difficulty walking, muscle weakness, dysphagia, chronic pain syndrome, hypertension, nicotine dependence, schizophrenia/schizoaffective disorder, and depression. Id. at 3.

According to the DON, Appellant exceeded his short-term Medicare benefits several months into his admission. He is currently pending a Medicaid eligibility determination. He received OT and PT and has completed antibiotic treatment for management of his foot infection. Id. at 15-18. His wound has healed completely. See id. at 18. He ambulates independently (with encouragement to use a rollator/walker), has good oral intake at meals, and is continent of bladder and bowel. Id. at 15. Appellant does not require assistance in performing his activities of daily living (ADLs) and he does not have a skilled need. According to the DON, he is independent with all aspects of care.

The DON explained that the facility seeks to discharge Appellant as he poses a safety risk to the facility and its residents. He has been caught smoking in his room on numerous occasions and received warnings about the dangers and risks his actions impose on the residents and staff. Id. at 15. The nursing facility is a no-smoking facility. Appellant receives treatment for nicotine dependence. Id. at 18.

Appellant’s clinical record included the following instances of non-compliance with the facility’s no smoking policy: On August 5, 2022, the facility obtained an order to search Appellant’s room after staff detected an odor of cigarette smoke coming from his room. Id. at 32. Although no smoking materials were found, the facility noted the presence of a “very strong smell of cigarette smoke on [Appellant’s] clothes and hands.” Id. Afterwards, the facility warned Appellant that he may not have any smoking materials in his room due to safety concerns. Id.

On August 16, 2022, facility staff were again notified about an odor of cigarette smoke coming from Appellant’s room. Id. The incident report noted a strong smell of cigarette smoke was detected upon entering the room. Appellant denied smoking and denied possessing any smoking material. Id.

On August 26, 2022, facility staff received another complaint about an odor of smoke coming from Appellant’s room. Id. at 31. The incident report also included an allegation from another resident that Appellant smoked in his room daily. Id. When confronted, both Appellant and his roommate denied that they had been smoking. Id. Pursuant to protocol, the facility searched the room and found two packs of Marlborough cigarettes and three lighters in Appellant’s coat pocket in his

closet. Appellant's roommate was also in possession of a lighter. Both Appellant and his roommate were advised that they were prohibited from having lighters due to safety concerns. Id.

On August 26, 2022, the facility hand delivered a letter to Appellant entitled "30 Day Notice of Intent to Discharge Resident." Exh. 1, p. 4. The notice informed Appellant that the facility sought to discharge Appellant to a nearby homeless shelter on September 26, 2022 because his behavior endangered the "safety of the facility." Id. Appellant made a timely request to appeal the intended discharge. Id. at 5.

Following the alleged violations, Appellant's primary care provider, Asma Tahir, M.D., noted that Appellant may be discharged from the facility and indicated that he no longer requires nursing facility services. The order was documented in Appellant's clinical record. See Exh. 3, at 1.

Both the DON and social worker testified that prior to his admission, Appellant was living primarily with one of his sons, and that Appellant also had an apartment of his own. When Appellant was hospitalized, the son with whom he was living, passed away. Additionally, during this admission, Appellant was evicted from his apartment.¹ The facility social worker has been assisting Appellant in the process of searching for a new residence and submitting various housing applications. However, until a more long-term option is found, there is no reason clinically, why Appellant cannot be discharged to a shelter. The DON reiterated that Appellant is independent with ADLs and does not receive skilled services from nursing staff. He has no clinical need to remain at the facility.

Appellant appeared at the hearing and argued that he cannot be discharged given his age and physical condition. He has a broken back and is constantly in pain. As a result of his back operations, his lumbar region is comprised of titanium and his spine is held together with nuts and bolts. All his limbs hurt. He would not make it outside the facility for one day if he were to be put in a homeless shelter. He does not have any family members he can stay with and is devastated by the loss of his son.

Appellant admitted that on two occasions he smoked in his room, but always had a cup of water when he smoked. Appellant expressed that he was going through a very difficult time with the loss of his son, who was his best friend. The other smoking instances may have been caused by his roommate, who is also a smoker. However, due to back pain, Appellant sleeps a lot during the day, so cannot say for sure whether it was his roommate. Appellant has not smoked since he received the discharge letter.

When asked whether the parties could come to a resolution, the DON explained that having Appellant remain a resident presents a risk to the facility. If he were to repeat the behavior, he could cause a fire. The facility is not willing to further risk the safety of its residents and staff.

¹ According to both parties, the property owner sought to evict Appellant after another son allegedly began occupying, and using illicit substances in, Appellant's apartment. A legal process ensued which resulted in the eviction.

Findings of Fact

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

1. Appellant is over the age of 65 with diagnoses including synovitis and tenosynovitis of the right ankle and foot, parasitic infection of the right ankle and foot, COPD, difficulty walking, muscle weakness, dysphagia, chronic pain syndrome, hypertension, nicotine dependence, schizophrenia/schizoaffective disorder, and depression.
2. Approximately seven months ago, Appellant was admitted to the facility after having been hospitalized with a foot infection, with the purpose of receiving short-term rehabilitation, including OT and PT services.
3. He has received OT and PT and completed antibiotic treatment for management of his foot infection and his wound has healed completely.
4. Appellant has exceeded his short-term rehabilitation Medicare benefits and is currently pending a Medicaid eligibility determination.
5. Appellant is capable of ambulating independently (with encouragement to use a rollator/walker), has good oral intake at meals, and is continent of bladder and bowel; he does not require assistance in performing ADLs and he does not have a skilled need.
6. The nursing facility is a no-smoking facility.
7. On August 5, 2022, the facility staff detected an odor of cigarette smoke coming from Appellant's room, and although no smoking materials were found, the facility noted the presence of a "very strong smell of cigarette smoke on [Appellant's] clothes and hands."
8. On August 16, 2022, facility staff were again notified about an odor of cigarette smoke coming from Appellant's room and staff detected a strong smell of cigarette smoke upon entering his room.
9. On August 26, 2022, following another allegation of smoke emanating from Appellant's room, the facility searched Appellant's room and found two packs of Marlborough cigarettes and three lighters in Appellant's coat pocket in his closet.
10. Appellant received multiple warnings after each instance and was advised that he was not permitted to smoke or possess smoking materials due to safety reasons.
11. On August 26, 2022, the facility hand-delivered a letter to Appellant entitled "30 Day Notice of Intent to Discharge Resident" informing Appellant that the facility sought to

discharge him to a nearby homeless shelter on September 26, 2022 because his behavior endangered the “safety of the facility.”

12. Following the alleged violations, Appellant’s primary care provider, Asma Tahir, M.D., noted, via a physician order, that Appellant may be discharged from the facility and no longer requires nursing facility services.
13. During his admission, Appellant was evicted from his apartment and does not have any family members that he can live with.
14. During his admission, the facility social worker has been assisting Appellant in searching for a new residence.
15. Appellant does not have a clinical need to remain at the facility.

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 mirror the federal requirements concerning a resident’s right to appeal a transfer or discharge, and the relevant MassHealth regulations may be found in the Nursing Facility Manual regulations at 130 CMR 456.000 et seq. and in the Fair Hearing Rules at 130 CMR 610.000 et seq.

MassHealth regulations at 130 CMR 610.028 set forth the requirements that a nursing facility must meet to initiate a transfer or discharge, and provides in part as follows:

(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.

See 130 CMR 610.028(A) (emphasis added); see also 130 CMR 456.701(A).

When the transfer or discharge is sought due to the circumstances specified in (3) above, as it is

here, the resident's clinical record must contain documentation by a physician to explain the transfer or discharge. See 130 CMR 610.028(B)(2). Furthermore, the nursing facility must demonstrate that it has complied with the requirements under M.G.L. c.111, §70E, which states the following:

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.***

Based on the applicable laws and regulations, Appellant failed to demonstrate that the facility inappropriately sought to discharge him through its August 26, 2022 discharge notice. The facility cited proper grounds for discharging a resident under 130 CMR 610.028(A)(3); specifically, that it considers Appellant's behavior to endanger the safety of the individuals in the nursing facility. The evidence indicates that the facility found Appellant smoking in his room on at least three occasions and to be in possession of lighters and smoking material. On each occasion, the facility warned Appellant that his behavior violated the nursing home's non-smoking policy and put the safety of other residents and staff at risk. Appellant's clinical record included a summary of each instance of non-compliance, as well as an order by Appellant's primary care physician indicating that Appellant may be discharged and does not have a skilled need to remain at the facility. See Exh. 3, p. 1. The grounds for the intended discharge have been documented in Appellant's clinical record as required under 130 CMR 610.028(B).

In addition, the facility demonstrated that it satisfied the requirements of G.L. c.111, § 70E, above, by discharging Appellant to a nearby homeless shelter. Documentation from Appellant's physician indicated that he no longer requires a skilled level of care and is capable of being discharged. Id. The facility's social services department demonstrated the efforts it has made in assisting Appellant with a housing search following his recent eviction. While Appellant expressed understandable concerns about being discharged to a homeless shelter, there was ultimately no evidence to otherwise conclude the facility failed to ensure a safe and orderly discharge to a safe and appropriate location. See G.L. c.111, § 70E

Based on the foregoing, the appeal is DENIED.

Order for Nursing Facility

Continue with the discharge plan as stated in the August 26, 2022 notice. Discharge Appellant no sooner than 30 days from the date of this decision pursuant to 130 CMR 610.030(A).

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.

Casey Groff, Esq.
Hearing Officer
Board of Hearings

cc:

Respondent: Administrator, Sancta Maria Nursing Facility, 799 Concord Avenue, Cambridge, MA 02138

Respondent Representative: Margaret Maroney, LSW, Sancta Maria Nursing Facility, 799 Concord Avenue, Cambridge, MA 02138