

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: APPROVED

Appeal Number: 2209604

Decision Date: 1/10/2023

Hearing Date: 01/04/2023

Hearing Officer: Kenneth Brodzinski

Appearance for Appellant:

Pro se

Appearance for Skilled Nursing Facility:

Mark Nugent (Administrator) with Jessica
Prescott (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:	APPROVED	Issue:	Expedited SNF Discharge
Decision Date:	1/10/2023	Hearing Date:	01/04/2023
SNF's Rep.:	Mark Nugent	Appellant's Rep.:	Pro se
Hearing Location:	Quincy		

Authority

This hearing was conducted pursuant to federal law and regulations at 42 U.S.C. §1396r and 42 CFR 483.10-483.206 and Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

The nursing facility issued a notice dated December 28, 2022 of its intent to discharge Appellant with less than 30 days' notice on the grounds that "*the safety of the individuals in the nursing facility is endangered due to your clinical or behavioral status*" (Exhibit A). Appellant filed for an appeal in a timely manner on December 28, 2022 (see 130 CMR 610.015(B)(5) and Exhibit A). Expedited discharge of a nursing-facility patient constitutes valid grounds for appeal (see 130 CMR 610.029(B); 42 CFR Ch. IV, 483.200 et seq.).

Since the request for the hearing was received by the Board of Hearings during the notice period described in 130 CMR 610.015(B)(5), the nursing facility must stay the planned discharge or transfer until 5 days after a denial decision is rendered. While the stay is in effect, or should this appeal be approved, the resident shall not be transferred or discharged from the nursing facility (see 130 CMR 610. 030(B)).

Action Taken by the Nursing Facility

The nursing facility issued notice dated December 28, 2022 of its intent to discharge Appellant with less than 30 days' notice on the grounds that *"the safety of the individuals in the nursing facility is endangered due to your clinical or behavioral status"*.

Issue

Whether or not the nursing facility can proceed to discharge Appellant under notice of December 28, 2022.

Summary of Evidence

Both parties appeared by telephone.

The nursing facility filed a packet of documentation including a copy of the *Notice of Intent to Discharge with Less Than 30 Days* dated December 28, 2022 and Appellant's clinical documentation (collectively, Exhibit B). Appellant filed only his *Fair Hearing Request* (Exhibit A).

The nursing facility was represented by its administrator who was accompanied by a social service worker. The nursing facility representatives testified that the subject notice was issued seeking to discharge Appellant to a specific local shelter on the grounds that the *"safety of the individuals in the nursing facility is endangered due to Appellant's clinical behavioral status"* (Exhibit B, page1). The nursing facility representatives testified that Appellant has a history of being angry, aggressive and suffering falls when he becomes intoxicated while in the facility. They testified that because of his behavior, Appellant has been sent to the hospital three different times. On two of those occasions, the hospital confirmed that Appellant was over the legal intoxication limit. The facility representatives testified that Appellant's behavior violates internal policies known to Appellant.

The nursing facility also testified that Appellant no longer needs the services of a skilled nursing facility and that he can move freely about the facility and comes and goes as he pleases using a wheelchair.

Upon questioning by the hearing officer, the nursing facility representatives testified that Appellant was first admitted to the facility on March 27, 2018 with a primary diagnosis of liver cirrhosis, ascites and encephalopathy. The nursing facility representatives explained that the main factor supporting Appellant's admission in March of 2018 was the encephalopathy which has since been resolved.

Appellant testified that none of what the nursing facility representatives stated was true.

Appellant testified that he has never assaulted anyone, that he is not belligerent and he is well-liked by the staff and other residents. He testified that he mostly likes to stay by himself in his room.

Appellant acknowledged that on two occasions since his admission in March of 2018, he did become intoxicated while at the facility, but it was only those two times over a five-year period.

In response, the nursing facility representatives testified that every time Appellant gets drunk, he becomes belligerent. They acknowledged, however, that when Appellant is not drinking, he is fine and sociable. Nevertheless, they believe that it is not fair to the other residents to be exposed to Appellant's belligerent behavior when he does drink at the facility in violation of the facilities internal policies.

Upon questioning by the hearing officer, the nursing facility representatives testified that Appellant has had a total of three episodes of being intoxicated while in the facility. Two of those episodes occurred in 2021 and one episode, the most recent, taking place on December 26, 2022. During the most recent incident, Appellant's room was searched and a bottle with a label removed was found with approximately 10 cc of clear liquid that smelled like alcohol.

The hearing officer asked if Appellant's intoxication was verified at the hospital and the nursing facility explained that due to an error Appellant received a toxicology screening for drugs, but not alcohol, so whether Appellant was actually intoxicated during this most recent event was not established by the hospital. The nursing facility representatives further noted, however, that the drug screen showed no drugs in Appellant's system. This was concerning because Appellant is prescribed oxycodone and this should have shown up in the toxicology screening. The fact that it did not is concerning to the facility because it is known that patients often trade medications for other things they want, such as alcohol.

In response, Appellant testified that he was not drinking during this alleged episode in December 2022. He explained that when he returned to his room on that day, he found it in disarray with items taken out of his drawers and items thrown on the floor. Appellant acknowledged that this made him extremely angry and he expressed anger to the staff and pushed his drawers into the hallway in frustration. Appellant also denied that the bottle they found belonged to him. Appellant testified that there are no locks on the doors and it is common for people to enter other people's rooms without permission.

Appellant also explained that there were no prescribed drugs found in his system because he was not being administered his medication while at the hospital. Appellant testified that he is always compliant with medications. HE explained that his medication is dispensed by the staff and he takes them in their presence on every occasion. The social worker from the nursing facility acknowledged that Appellant has always been compliant with his medications and has no history of not taking his medication.

Appellant testified that he is afraid to be discharged to a shelter as he feels that being 60 years old with many health issues, he would not survive if he were transferred to a shelter.

Upon questioning by the hearing officer as to the discharge plan of care, the nursing facility representatives testified that the plan is to discharge Appellant to the shelter identified in the subject notice unless Appellant requested a different location. The nursing facility representatives explained that at that time, they would issue a referral for Appellant to receive visiting nursing services while at the shelter. They also explained that during the winter and in bad weather residents can remain in the shelter all day and night.

Lastly, the nursing facility representatives emphasized that Appellant no longer needs skilled nursing services and referenced a letter dated January 3, 2022 drafted by Shiao-Ang Shih, MD, a physician at the facility (Exhibit B, page 8). The letter describes the three incidences since 2018 that Appellant was found to be, or believed to be, intoxicated while in the facility. The letter also states that in the physician's professional opinion, there is no medical need for Appellant to remain at the skilled nursing facility and Appellant is "*capable and safe to discharge to a shelter*" (Id).

Findings of Fact

By a preponderance of the evidence, this record supports the following findings:

1. The nursing facility issued the subject notice dated December 28, 2022 seeking to discharge Appellant with less than 30 days' notice to a specific local shelter on the grounds that the "*safety of the individuals in the nursing facility is endangered due to Appellant's clinical behavioral status*" (Exhibit B, page1).
2. Appellant was first admitted to the facility on March 27, 2018 with a primary diagnosis of liver cirrhosis, ascites and encephalopathy.
3. The main factor supporting Appellant's admission in March of 2018 was the encephalopathy which has since been resolved.
4. Appellant can move freely about the facility and comes and goes as he pleases using a wheelchair.
5. Appellant has a limited history of being angry, aggressive and suffering falls when he becomes intoxicated while in the facility.
6. Appellant has never assaulted any one at the facility.
7. Appellant's intoxicated behavior violated internal policies known to Appellant.

8. Due to a suspicion of being intoxicated, the facility has sent Appellant to the hospital a total of three times since March 2018.
9. Two of those occasions occurred over a three-month period in 2021 and the hospital verified that Appellant's alcohol level was over the legal limit (Exhibit B, page 8).
10. The third and most-recent occasion happened on December 26, 2022 at which time Appellant's room was searched and a bottle with a label removed was found containing approximately 10 cc of clear liquid that smelled like alcohol.
11. After his room was searched on December 18, 2022, Appellant returned to his room and found it in disarray with items taken out of his drawers and items thrown on the floor.
12. Appellant became extremely angry and he expressed anger to the staff and pushed his drawers into the hallway in frustration.
13. Appellant denies that the bottle found in his room belonged to him.
14. There are no locks on the doors and it is common for people to enter other people's rooms without permission.
15. During the December 2022 hospitalization, Appellant's blood alcohol was not assessed but a toxicology screen showed no drugs in his system.
16. Appellant was not given his medication while in the hospital in December 2022.
17. At the facility, Appellant is known to be compliant with his medications and does not have a history of non-compliance.
18. As stated in the subject discharge notice, the facility plans to discharge Appellant to a specific local shelter unless Appellant requests a different location.
19. Upon discharge the facility plans to issue a referral for Appellant to receive visiting nursing services while at the shelter.

Analysis and Conclusions of Law

The issue on appeal is limited to whether the nursing facility is acting in compliance with federal and state law governing the discharge of nursing facility residents in its attempt to discharge Appellant through its notice of December 28, 2022.

Massachusetts's regulations at 130 CMR 610.028, which embody federal regulations at 42 CFR Ch. IV §483.12, require the following:

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 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 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 10.028(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;*
- 5) a statement informing the resident of his or her right to request a hearing before the Division 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.*

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.

A review of the subject notice reveals that it complies with the requirements of 130 CMR 610.028(A)-(C) and 130 CMR 610.029. On this record, however, the purported basis for the discharge is not factually supported.

During the hearing, the facility asserted two grounds for discharge: that Appellant's behavior threatened the safety of individuals in the facility and that Appellant's health has improved so he no longer requires skilled nursing care. The subject notice asserts only the safety threat as a basis for the discharge and not the improved health. The facility cannot support the subject discharge on grounds that were not specified in the notice (130 CMR 610.028(C)(2)). Consequently, only the safety threat is at issue.

This record does not support a reasonable finding that Appellant presently poses a threat to the safety of individuals in the facility. In reviewing the physician's letter and considering the testimony of the facility representatives at hearing, there are only two confirmed cases of Appellant being intoxicated and those both occurred over a three-month period in 2021. Over the course of nearly 5 years, this frequency is both scant and remote. Moreover, there is no evidence that during these two incidences Appellant was anything more than difficult, disruptive and possibly verbally abusive. There are no reports of physical assault or battery. There are no reports of Appellant engaging in dangerous activities such as smoking near oxygen tanks, tampering with other resident's medications or equipment or giving residents inappropriate or dangerous substances. There is no evidence of police having been called or police reports being filed. There is just not enough in this record to conclude that Appellant is an actual threat to the safety of individuals in the facility.

For the foregoing reasons, the appeal is APPROVED.

Order for the Nursing Facility

You may NOT proceed with discharge under notice of December 28, 2022.

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.

Kenneth Brodzinski
Hearing Officer
Board of Hearings

cc:

Respondent: Mark Nugent, Administrator, The Oxford, 689 Main Street, Haverhill, MA 01830