

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



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| Appeal Decision: | APPROVED | Appeal Number: | 2301686 |
| Decision Date: | 5/8/2023 | Hearing Date: | 04/12/2023 |
| Hearing Officer: | Kenneth Brodzinski | Record Open to: | 04/12/2023 |

Appearance for Appellant:

Pro se

Appearance for Nursing Facility:

Barry Edwards (Administrator) with Evelyn Folk, LCSW and Maureen Curley, RN (Director of Nursing)



*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

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| Appeal Decision: | APPROVED | Issue: | 30-Day Notice of Intent to Discharge |
| Decision Date: | 5/8/2023 | Hearing Date: | 04/12/2023 |
| MassHealth's Rep.: | Barry Edwards | Appellant's Rep.: | Pro se |
| Hearing Location: | Springfield MEC | | |

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a 30-Day Notice of Intent to Discharge Appellant dated [REDACTED] 2023, the skilled nursing facility, [REDACTED], ("facility") informed Appellant of the facility's intent to discharge her to the [REDACTED] Homeless shelter in [REDACTED] on the grounds the safety of the individuals in the nursing facility is endangered due to your clinical or behavioral status (130 CMR 610.028; 130 CMR 456.701; and Exhibit A). Appellant timely filed an appeal on March 29, 2023 (130 CMR 610.015(B); 130 CMR 456.703; and Exhibit A). Challenging a notice of intent to discharge from a skilled nursing facility constitutes valid grounds for appeal (130 CMR 610.032(C)).

Action Taken by the Nursing Facility

The nursing facility issued written notice to Appellant that it seeks to discharge her.

Issue

The appeal issue is whether or not the nursing facility can discharge Appellant under notice dated March 1, 2023 pursuant to the governing state and federal regulations including, but not limited to 130 CMR 610.028; 130 CMR 456.701 and M.G.L. c.111, §70E.

Summary of Evidence

Both parties appeared by telephone. The facility was represented by its administrator accompanied by a licensed social worker and the facility's Director of Nurses. At the time of hearing, the facility submitted Appellant's clinical record (Exhibit B). After the hearing, the facility submitted a written statement from a physician at the facility (Exhibit C).

Appellant provided no documentation other than her Fair Hearing Request (Exhibit A).

The facility administrator testified that Appellant is a [REDACTED]-year old woman who has been repeatedly caught smoking when and where she is not supposed to. According to the Administrator, Appellant has been given many chances to correct her behavior, but has refused to do so. The Administrator testified that Appellant goes outside to smoke by herself, which is not allowed, and has also been caught smoking inside the facility. Facility staff members have also found cigarettes and lighters in Appellant's possession. The facility referenced notes in the clinical record made contemporaneously with the discovered violations (Exhibit B).

The Administrator testified that the facility has gone so far as to issue previous 30-day notices of intent to discharge due to Appellant's smoking and even this has not caused Appellant to correct her behavior. The Administrator testified that in one instance, when he hand-delivered such a notice to Appellant, she crumpled it up and tossed it back at him.

A licensed social worker from the facility provided testimony concerning the [REDACTED], the homeless shelter in [REDACTED] to where the facility intends to discharge Appellant. According to the social worker, [REDACTED] has a robust health care clinic that is staffed by physicians and nurses from the nearby Boston Medical Center. The social worker testified that she worked at [REDACTED] for 14 years and is familiar with the healthcare that residents of the shelter receive. According to the social worker, the health clinic at [REDACTED] would be more than capable of tending to Appellant's healthcare needs.

Appellant testified on her own behalf and denied ever smoking inside the facility. She did acknowledge smoking outside the facility, but asserted that many people smoke both inside and outside of the facility and they are not targeted for discharge. Appellant asserted that she does not get along with the facility administrator. Appellant also testified that male residents are allowed to smoke in and around the facility. Appellant asserted that she is being discriminated against because she is a woman.

Appellant testified that she does not want to go to the [REDACTED]. She asserted that she does not belong there given her health conditions.

In response, the administrator stated that it is his job to make sure all residents are safe

within the facility. He acknowledged that other people in the facility have been caught smoking, but they have been given warnings and they corrected their behavior. The administrator re-emphasized that Appellant has been given multiple warnings and threats of discharge, but simply refuses to correct her behavior. The Administrator also pointedly denied targeting Appellant.

The hearing officer questioned the facility representatives as to whether there are residents on Appellant's floor who require oxygen. The facility representatives testified that there is one resident on Appellant's floor who does use oxygen. The hearing officer also questioned the facility as to discharge planning. The facility stated that if they are permitted to proceed with the discharge, they would notify Pine Street Inn and provide it with Appellant's medical history and clinical information. The hearing officer also questioned the facility as to whether the submitted clinical record contains a statement from a physician at the facility indicating that he/she is aware of the intent to discharge and believes that Appellant can be safely discharged pursuant to the subject notice.

In response, the facility representatives stated they that the clinical record did not contain such a statement and ask for additional time to procure and file such a statement. The facility was given to the close of business on the day of the hearing to provide the Board with a written physician's statement. The facility made such a filing in a timely manner (Exhibit C).

The facility's post-hearing submission consisted of a Vantage Healthcare Progress Note concerning encounter date: [REDACTED] 2023 (day of hearing) signed by the facility's own Nelson Aweh, MD. The Note states that Appellant has the following conditions:

- *Chronic obstructive pulmonary disease*
- *History of alcohol abuse*
- *Generalized weakness*
- *Hypertension*
- *Hyperlipidemia*
- *Gastroesophageal disease*
- *Abnormality in gait and mobility*
- *Displaced fracture of the fourth metatarsal bone left foot*
- *Chronic gastric ulcer without hemorrhage or perforation*
- *Chronic ischemic heart disease*
- *Vitamin D deficiency*
- *Personal history of non-suicidal self-harm*
- *Nicotine dependence*
- *Iron deficiency anemia*
- *Peripheral vascular disease*
- *Chronic total occlusion of the arterial of the extremity*
- *General muscle weakness*

- *Posttraumatic stress disorder PTSD*
- *Personal history of COVID-19*
- *Anxiety disorder*
- *Major depressive disorder*

The Note further states:

*“Patient is seen today for evaluation of the possibility of patient being discharged and able to manage at home. [Appellant] is able to make her own medical decision. Advanced directive status full code. [Appellant] is a heavy smoker has been discovered multiple times smoking in her room and outside the facility unsupervised. She has been educated multiple times and given many opportunities to abide by the rules but she continues to related cycles rehab smoking rules and regulations. [Appellant] continues to be caught with cigarettes and lightest even after smoking material confiscated. For this reason [Appellant] was issued a 30-day notice. **The rehab department and as well as the social worker are all aware and agree that the patient is safe and able to transfer to another facility will be discharged to home.**”*

The Note leads off with the statement: “Patient has the ability to be discharged home or to another facility”

(Exhibit C)

Findings of Fact

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

1. Appellant is a [REDACTED]-year old woman who resides in a skilled nursing facility.
2. The facility has repeatedly caught Appellant smoking when and where she is not supposed to be smoking.
3. Appellant goes outside to smoke by herself and has also been caught smoking inside the facility.
4. Facility staff members have also found cigarettes and lighters in Appellant's possession.
5. One resident on Appellant's floor uses oxygen.
6. The facility has given Appellant multiple chances to correct her behavior, but she has refused to do so.
7. The facility issued the subject 30 Day Notice of Intent to Discharge dated [REDACTED], 2023 to Appellant (Exhibit A).

8. The subject notice states as grounds for the discharge that Appellant's behavior endangers the health and safety of individuals in the facility (Id).
9. The subject notice identifies the [REDACTED] in [REDACTED] as the intended discharge location (Id).
10. A registered nurse and licensed social worker from the facility opined that the Pine Street would be more than capable of tending to Appellant's healthcare needs.
11. Upon being allowed to proceed under the subject notice, the facility's discharge plan is to notify [REDACTED] and provide it with Appellant's medical history and clinical information.
12. The clinical record submitted by the facility at the time of hearing does not contain a statement from a physician at the facility indicating that he/she is aware of the intent to discharge and believes that Appellant can be safely discharged pursuant to the subject notice.
13. At the end of the hearing, the facility was provided time to provide the Board with a written physician's statement.
14. The facility made such a filing in a timely manner (Exhibit C).
15. The facility's post-hearing submission consisted of a Vantage Healthcare Progress Note concerning encounter date: [REDACTED]-2023 (day of hearing) signed by the facility's own Nelson Aweh, MD (Id).
16. The Note leads off with the statement: "Patient has the ability to be discharged home or to another facility" (Id).
17. According to the progress note, Appellant has the following conditions: Chronic obstructive pulmonary disease; History of alcohol abuse; Generalized weakness; Hypertension; Hyperlipidemia; Gastroesophageal disease; Abnormality in gait and mobility; Displaced fracture of the fourth metatarsal bone left foot; Chronic gastric ulcer without hemorrhage or perforation; Chronic ischemic heart disease; Vitamin D deficiency; Personal history of non-suicidal self-harm; Nicotine dependence; Iron deficiency anemia; Peripheral vascular disease; Chronic total occlusion of the arterial of the extremity; General muscle weakness; Posttraumatic stress disorder PTSD; Personal history of COVID-19; Anxiety disorder; and Major depressive disorder (Id).
18. The progress note does not contain a statement from the physician that he believes the Pine Street Inn is an appropriate and safe discharge location for Appellant.

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.

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 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;*
 - 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.*
- (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.*

The nursing facility has set forth proper and adequate grounds to discharge Appellant in that it has adequately demonstrated through testimony and documentation that Appellant repeatedly violates the facility's smoking policy (130 CMR 600.028(A)(3)). Unmonitored smoking inside and outside and near the facility poses a significant risk of harm to other residents, particularly when oxygen is on the premises.

The notice of March 1, 2023 also meets all of the specific notice requirements set forth at

130 CMR 610.028.

In addition to satisfying the above-cited regulations, the nursing facility has an obligation to comply with all other applicable state laws, including M.G.L. c.111, §70E. The key paragraph of that statute reads as follows:

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 supplied)

The nursing facility has failed to satisfactorily meet the requirements of the above-cited statute. Appellant has a number of serious diagnoses including, but not limited to, COPD, an arterial occlusion, anemia, peripheral vascular disease, chronic ischemic heart disease as well as PTSD, major depressive disorder and anxiety. At hearing, a social worker and a nurse opined that the [REDACTED] would be able to meet Appellant's health care needs. The hearing officer requested a supporting statement from a physician.

In his written statement, the physician states that Appellant is appropriate for discharge to another skilled nursing facility or to home. It does not state that Appellant would be appropriate for transfer to the Pine Street Inn or any other homeless shelter. The physician seems to go out of his way not to offer his own independent opinion and instead merely reiterates that *"the rehab department and as well as the social worker are all aware and agree that the patient is safe and able to transfer"* to *"another facility"* or *"home"*. There is no mention of Pine Street Inn or a homeless shelter and the physician does not state that he concurs with the opinion of the rehab department and the social worker (Exhibit C).

On this record, having requested that a physician verify that, at this time, the [REDACTED] would be a safe and appropriate discharge location for Appellant and the facility failing to provide such, the subject 30-Day Notice of Intent to Discharge fails to meet the requirements of the above-cited statute.

For the foregoing reasons, the appeal is APPROVED.

Order for Nursing Facility

The facility may not proceed to discharge Appellant under the notice of March 1, 2023.

This order does not prevent the facility from issuing a new intent to discharge notice if the Appellant continues to behave in a way that endangers others in the facility. Any such notice should identify an appropriate and safe discharge destination supported by a physician's statement.

Implementation of this Decision

If Appellant experiences problems with the implementation of this decision, Appellant 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:

Barry Edwards, Administrator, Saugus Rehab and Nursing Center, 266 Lincoln Avenue,
Saugus, MA 01906