

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

[REDACTED]

Appeal Decision:	Denied	Appeal Number:	2302921
Decision Date:	4/25/2023	Hearing Date:	04/20/2023
Hearing Officer:	Sara E. McGrath		

Appearances for Appellant:

[REDACTED]

Appearances for Nursing Facility:

Jennifer Young, Social Services
Tina Nkrumah, After Care Coordinator



*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:	4/25/2023	Hearing Date:	04/20/2023
Nursing Facility's Reps:	Jennifer Young; Tina Nkrumah	Appellant's Rep:	
Hearing Location:	Board of Hearings, Quincy		

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 April 12, 2023, the skilled nursing facility, Worcester Rehabilitation and Health Care Center ("the facility"), informed the appellant of the facility's intent to discharge him to "25 Queen St. Worc. Ma 01604" on April 14, 2023 (Exhibit 1). The appellant filed a timely appeal with the Board of Hearings on April 12, 2023 (130 CMR 610.015(B); 130 CMR 456.703; and Exhibit 1). Challenging a notice of transfer or discharge initiated by a nursing facility is a valid ground for appeal to the Board of Hearings (130 CMR 610.032(C)). The hearing was rescheduled once at the request of the appellant (Exhibit 4).

Action Taken by Nursing Facility

The facility notified the appellant of its expedited intent to discharge him to a local shelter.

Issue

The appeal issue is whether the facility can appropriately discharge the appellant to the location on its notice.

Summary of Evidence

The nursing facility representatives appeared at hearing by phone and testified, in summary, to the following chronology: The appellant, a male in his late 40s, was admitted to the facility in [REDACTED] for short-term rehabilitation after a hospital admission related to a traumatic brain injury. The cause of the traumatic brain injury is not clear; the appellant does not have a memory of what happened. The facility representative explained appellant has significantly improved and currently has no skilled needs. He remains at the facility because he is still looking for housing. Nursing staff currently assists the appellant with medication administration.

The nursing facility representatives explained that the facility seeks to discharge the appellant for two reasons. First, the appellant's health has improved such that he no longer needs the services provided by the facility. The facility representatives stated that the appellant walks with a cane, but is independent with his daily activities. He leaves the facility frequently. The facility's medical director documented in the appellant's medical record that he is safe for discharge back to the community (Exhibit 3, p. 37). The appellant appeared at hearing by phone along with his health care proxy. The appellant agreed that he has no skilled needs, but explained that he needs time to figure out his housing situation. He explained that he is in recovery and on Suboxone, and also takes several blood pressure medications. He acknowledged that he is able to independently manage all of his medications.

The nursing facility representatives explained that the facility also seeks to discharge the appellant because the safety of individuals in the facility is endangered by the appellant's behavior. Specifically, the appellant has not been compliant with the facility's drug policy, which they define as a "no drug" policy. In early April, after staff noted that the appellant smelled of marijuana, they conducted a room search and found marijuana, as well as several unidentified pills, in appellant's jacket pocket (Exhibit 3, p. 4). The facility representatives also explained that on an earlier occasion in March, the appellant was taken to the emergency department with an altered mental status; staff suspected drug use. The appellant responded and stated that the unidentified pills were melatonin. Further, he stated that the joint had been in his jacket pocket for over a year, well before his nursing facility admission. The appellant's representative explained that she was with him on the date of the room search; he smelled like marijuana because they had been traveling in a car with someone who had been smoking. The appellant stated that he is aware of the facility's drug policy and has been compliant with it at all times since his admission.

The facility social worker explained that the discharge location, a local shelter, requires residents to leave during the day. In the evening, beds are available on a first come, first served basis. She noted that the appellant has previously lived in a shelter, and should be able to handle it. She explained that the facility had secured a bed for the appellant at a sober house, but he declined the placement. The appellant has also been found eligible for one of MassHealth's community-based waivers but is on a waiting list for placement. The appellant explained that he did not go to the sober house because he did not have the \$675 entry fee required. He explained that he is supposed to receive a monthly Social Security benefit, but he has not been receiving most of it. He believes the nursing facility may be receiving his money. The nursing facility representatives responded and

stated that the facility has not been receiving the appellant's Social Security benefit; the appellant has been a nursing facility resident for less than six months and thus does not owe the facility any money.

The appellant does not feel that the shelter is a safe place for him to go. He lived there before, and explained that drug use is rampant. The appellant's representative agreed with the appellant's thoughts about the shelter. The appellant stated that he is working on obtaining housing; he has a relative returning from Costa Rica soon and he may be able to move in with that person.

Findings of Fact

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

1. The appellant, a male in his late 40s, was admitted to the facility in November 2022 for short-term rehabilitation after a hospital admission related to a traumatic brain injury.
2. The appellant currently has no skilled needs; nursing staff currently only assists the appellant with medication administration.
3. The appellant is able to independently manage his medications, which include Suboxone and several blood pressure medications.
4. In early April 2023, staff searched the appellant's room and found marijuana and some unidentified pills.
5. On April 12, 2023, the facility issued an expedited discharge notice, seeking to discharge the appellant to a local shelter because his health had improved and because his behavior has endangered others in the facility.
6. On April 12, 2023, the appellant timely appealed this discharge notice.

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.*

130 CMR 610.028 sets forth the notice requirements for transfers and discharges initiated by a nursing facility, 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.

(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).

In this case, the facility initiated discharge proceedings because it determined that the appellant's health has improved and because his behavior has endangered the safety of individuals at the facility. The facility has not shown that the appellant's behavior has endangered the safety of other individuals. While the one incident discussed at hearing technically violates the facility's drug policy, it falls short of demonstrating that the safety of others is at risk. The appellant was not using marijuana on site, was not distributing it to others, and did not have drugs in plain view. Further, this appears to have been an isolated incident that was remedied when staff confiscated the marijuana. Additionally, the appellant has acknowledged the facility's drug policy and indicated that compliance will not be an issue in the future.

As noted above, the facility also seeks to discharge the appellant because his health has improved such that he no longer needs nursing facility services. The parties agree that the appellant suffered a traumatic brain injury and needed skilled services for a period of time. The parties also agree that the appellant has markedly improved and no longer requires any skilled services. The facility medical director has documented that the appellant is safe for discharge to the community (Exhibit 3, p. 37). On this record, the facility has demonstrated that discharge based on improved health is justified.

Further, the facility has satisfied its obligation under M.G.L. c.111, §70E. The key paragraph of that statute provides 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.

In this case, the discharge location is to a local shelter with which the appellant is familiar as a former resident. While it is understandable that the appellant would prefer an alternative housing arrangement, he has not demonstrated that the shelter poses a safety risk. Importantly, the facility had found an alternative for the appellant – a sober house – but for reasons unknown, the appellant claims that he has not been receiving his income and thus cannot afford this placement. The facility has met its burden and has satisfied the requirements of M.G.L. c.111, §70E.

The appellant's appeal is denied.

Order for the Nursing Facility

Proceed with planned transfer, to be implemented no less than five days after 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

If this nursing facility fails to comply with the above order, you should report this in writing to the Director of the Board of Hearings, at the address on the first page of this decision.

Sara E. McGrath
Hearing Officer
Board of Hearings

cc: Worcester Rehab. And Health Care Center
Attn: Jennifer Young
119 Providence Street
Worcester, MA 01604

