

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2305273
Decision Date:	*07/27/2023	Hearing Date:	07/24/2023
Hearing Officer:	Alexandra Shube		

*This reflects the correct date of Decision.

Appearance for Appellant:

Via telephone:

Pro se



Appearance for Nursing Facility:

Via telephone:

Darlene Toolin, Esq.

Jasside Carvalho, Administrator

Anita Molta-Forgery, Social Worker

Marc Aube, Nurse Practitioner

Kaylie Giberson, Business Office Manager

Linda Lafleche, Receptionist



*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:	Nursing Facility Discharge
Decision Date:	*07/27/2023	Hearing Date:	07/24/2023
Nursing Facility's Rep.:	Darlene Toolin, Esq., et al	Appellant's Rep.:	Pro se, [REDACTED]
Hearing Location:	Chelsea MassHealth Enrollment Center Remote	Aid Pending:	No

*This reflects the correct date of Decision.

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 Resident dated [REDACTED] 2023, [REDACTED] (hereinafter, "the facility") informed the appellant of its intent to discharge her on [REDACTED] 2023 because her health has improved sufficiently so that she no longer needs the services provided by the facility and she failed, after reasonable and appropriate notice, to pay for (or has failed to have Medicaid or Medicare pay for) services rendered at the facility (see 130 CMR 610.028 and Exhibit 1). The appellant filed this appeal in a timely manner on June 27, 2023 (see 130 CMR 610.015(B) and Exhibit 2). Notification of intent to discharge or transfer an individual from a nursing home facility is a valid basis for appeal (130 CMR 610.032).

Action Taken by Nursing Facility

The facility informed the appellant of its intention to discharge her due to her failure to pay for her stay and because her health has improved sufficiently that she no longer needs the services

provided by the facility.

Issue

The issue is whether the facility is justified in seeking to discharge the appellant, and whether it followed proper procedures in doing so.

Summary of Evidence

The appellant appeared at hearing via telephone along with her representatives, an attorney and ombudsman. The nursing facility appeared at hearing via telephone and was represented by its attorney, administrator, social worker, nurse practitioner, business office manager, and receptionist.

The facility read its memorandum, which was provided to parties prior to hearing, into the record and stated as follows: the appellant is an adult under the age of 65 who was admitted to the facility on [REDACTED] 2022 due to various diagnoses including but not limited to major depressive disorder, anxiety, Arnold-Chiari syndrome, spinal stenosis, Raynaud's syndrome, polyneuropathy, and syndrome of inappropriate ADH production. Commonwealth Care Alliance (CCA) paid for her care in full through [REDACTED] 2022 under a short-term nursing facility benefit; however, the appellant has not paid the facility since she was converted to long-term care on August 1, 2022. Her monthly patient paid amount (PPA) for long-term care coverage in 2022 was \$1,763.53. On December 15, 2022, MassHealth notified her that effective January 1, 2023, her PPA would increase to \$1,884.53, based on her income of \$1,957.33 per month and a personal needs allowance (PNA) of \$72.80. The appellant has not paid and to date, owes \$22,009.36, which is accumulating monthly. At the time of the June 2, 2023 notice, she owed \$18,240.30. The facility testified that the appellant has an apartment in the community that she continues to maintain.

At the time the facility issued its 30-day notice of intent to discharge, the appellant was independent with her activities of daily living (ADLs) and, in addition to her non-payment, the facility believed her health had improved sufficiently that she no longer needed the services it provided. As such, the facility proposed the appellant's apartment in the community as the discharge location. The appellant denied that she could safely return home and refused to participate in the discharge planning initiated by the facility. Since that notice issued, the facility's physicians have reached out the appellant's physicians and determined that discharge to the appellant's home in the community is not safe. On [REDACTED] 2023, the facility issued a second 30-day notice of intent to discharge listing the appellant's failure to pay as the only reason for discharge. The facility's attorney stated this was done to clarify that the reason for discharge is the appellant's failure to pay.

The appellant's attorney stated that the June 2, 2023 notice under appeal was issued for both

failure to pay and the appellant's improved health, with a discharge location to the appellant's apartment in the community. The facility has testified that the appellant's health has not improved sufficiently and her home is not a safe discharge location. The appellant understands she needs to pay her PPA but disagrees with the PPA and tried to appeal that notice.¹ The attorney also argued that the notice is defective because, pursuant to 130 CMR 456.710(C)(9) and 610.028(C)(9), the notice must include the address of the nearest legal services office. The organization listed in the June 2 notice is not the nearest (it is located in Boston) and does not provide actual legal services.

The appellant explained that she has a severe brain condition for which she had brain surgery in [REDACTED] of 2000. She has multiple lesions on her brain and a tumor. She provided letters from two of her treating physicians who documented that she continues to have symptoms from her encephalomalacia brain injury, which is a residual and permanent condition. Her doctor at the Brain Injury Rehab Clinic at Spaulding Rehabilitation Hospital stated that her situation and symptoms have not changed since her admission to the skilled nursing facility. The appellant stated that she has kept her apartment in the community; however, she and her doctors agree that being discharged to the community is not an option given her condition. She requires skilled care. She understands she needs to pay the PPA and knows the balance owed, but she disputes it because MassHealth did not consider her debts or expenses when computing the PPA. She was waiting for a hearing on the PPA issue. Currently, her monthly income is accruing in her checking account. She acknowledged that the facility has attempted, and she has refused to participate in, discharge planning.

Findings of Fact

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

1. The appellant was converted to long-term care on August 1, 2022 and there have been no payments made to the facility since then (Testimony and Exhibit 4).
2. On [REDACTED] 2023, the facility issued a 30-Day Notice of Intent to Discharge because the appellant's health has improved sufficiently so that she no longer needs the services provided by the facility and she has failed, after reasonable and appropriate notice, to pay for (or has failed to have Medicaid or Medicare pay for) services rendered at the facility (Testimony and Exhibit 1).

¹There is no open appeal relating to the PPA. Board of Hearings records indicate that a request for a fair hearing to dispute the PPA was received on April 28, 2023 for a November 8, 2022 notice. The appeal (#2303498) was dismissed for not being timely and Board of Hearings issued a letter on April 28, 2023 informing the appellant of the dismissal, including details on how to vacate that dismissal. The appeal was closed on May 22, 2023, with another letter issuing to the appellant informing her that her request to vacate the dismissal was not received within 10 days of the previous notice.

3. The proposed discharge location is the appellant's apartment in the community (Testimony and Exhibit 1).
4. All parties and their medical professionals agree that the appellant cannot be safely discharged to her apartment (Testimony).
5. The appellant's diagnoses include, but are not limited to, a brain injury, major depressive disorder, anxiety, Arnold-Chiari syndrome, spinal stenosis, Raynaud's syndrome, polyneuropathy, and syndrome of inappropriate ADH production (Testimony and Exhibits 2 and 4).
6. At the time of the discharge notice, the appellant owed the facility \$18,240.30, which, as of hearing increased, to \$22,009.36, based off a 2022 PPA of \$1,763.53 and 2023 PPA of \$1,884.53 (Testimony and Exhibit 4).
7. The facility has attempted discharge planning, but the appellant has refused to participate (Testimony and Exhibit 4).

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.

For the purposes of this decision, the definitions found in 130 CMR 456.002 apply:²

"Nursing facility" - a Medicare skilled nursing facility or Medicaid nursing facility licensed by the Department of Public Health to operate in Massachusetts, or a distinct Medicaid- or Medicare-certified unit within a facility.

"Discharge" - the removal from a nursing facility to a noninstitutional setting of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual; this includes a nursing facility's failure to readmit following hospitalization or other medical leave of absence.

² The regulatory language in the MassHealth Nursing Facility Manual has near-identical regulatory counterparts within the Commonwealth's Fair Hearing Rules under 130 CMR 610.000 et seq., as well as federal regulations found under 42 CFR 483.000 et seq.

“Transfer” — movement of a resident from:

- (1) a Medicaid- or Medicare-certified bed to a noncertified bed;
- (2) a Medicaid-certified bed to a Medicare-certified bed;
- (3) a Medicare-certified bed to a Medicaid-certified bed;
- (4) one nursing facility to another nursing facility; or
- (5) a nursing facility to a hospital, or any other institutional setting.

A nursing facility’s failure to readmit a resident following hospitalization or other medical leave of absence, resulting in the resident being moved to another institutional setting is also a transfer. Movement of a resident within the same facility from one certified bed to another bed with the same certification is not a transfer.

Based on the above definitions, the facility is attempting to discharge the appellant from the nursing facility to a noninstitutional setting (her apartment in the community) via its notice dated June 2, 2023.

The guidelines that apply in a determination of whether appellant can be so discharged are found in 130 CMR 456.701 and 130 CMR 610.028. This section of the regulations lists the only circumstances and conditions that allow for transfer or discharge of a resident from a nursing facility and the requirements of the relevant notice -- if these requirements are not met, the facility must permit the resident to remain in the facility.

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 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).

Emphasis added (130 CMR 456.701(A) and (B)).

130 CMR 610.028(C) lays out the discharge notice criteria and requires, among other things, that the notice contain the address of the nearest legal services office. See 130 CMR 610.028(C)(9).

In this case, according to the notice under appeal, the facility is seeking to discharge the appellant to her apartment in the community for failing to pay for her stay at the facility and because the appellant's health has improved sufficiently so that she no longer needs the services provided by the facility. The facility provided statements showing that the appellant's current outstanding balance owed to the facility is \$22,009.36, based off the appellant's monthly PPA. The facility credibly testified that the appellant has not made any payments since her conversion to long-term care on August 1, 2022. The appellant has been provided these statements and is aware that she owes a PPA, although she disputes the amount of that PPA.³

Through its testimony and documentation, the facility has sufficiently demonstrated that the appellant has failed to pay for her stay at the facility; however, the discharge notice also states that discharge is appropriate because the appellant's health has improved sufficiently so that she no longer needs the services provided by the facility. The facility testified that while the appellant is mostly independent with her ADLs, she cannot be safely discharged to her apartment, the proposed discharge location in the notice under appeal.⁴ In its testimony, the facility also acknowledged that its own physicians agreed with the appellant's physicians that she cannot be safely discharged to her home in the community. The appellant also provided testimony and documentation from two of her physicians supporting her need for skilled care. The testimony and clinical record do not support the assertion that the appellant's health has improved sufficiently where she no longer needs the facility's services and the facility has not satisfied the requirements of 130 CMR 610.028(B)(1).

Furthermore, in addition to the MassHealth-related regulations discussed above the nursing facility also has an obligation to comply with all other applicable state laws, including M.G.L. c.111, §70E, which went into effect in November of 2008. The key paragraph of that statute provides as

³ The PPA is not at issue at this appeal and there is no appeal pending with the Board of Hearings regarding the PPA.

⁴ The fact that the facility tried to circumvent this by issuing a new notice of intent to discharge based solely on the appellant's failure to pay has no bearing on the outcome of this appeal, which is based on the contents of the June 2, 2023 notice.

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.

The facility has proposed a transfer to the appellant's apartment in the community. The record shows that the appellant has a brain injury and other medical issues necessitating skilled care. While the appellant does not have a right to remain in the nursing facility without paying and she clearly owes the nursing facility money, the facility has not shown that the proposed discharge location in the [REDACTED] 2023 notice under appeal is safe and appropriate.

For these reasons, the appellant's appeal is approved.

Order for Nursing Facility

Rescind the 30-Day Notice of Intent to Discharge Resident dated [REDACTED] 2023.

Implementation of this Decision

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.

Alexandra Shube
Hearing Officer
Board of Hearings

cc:

Heritage Hall West, Attn: Jasside Carvalho, Administrator, 61 Cooper St., Agawam, MA 01001

[REDACTED]
[REDACTED]
[REDACTED]

Darlene Toolin, Esq., Stotler Hayes Group, LLC, 297 Willbrook Blvd., Pawleys Island, SC 29585