

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2305381
Decision Date:	*07/28/2023	Hearing Date:	07/17/2023
Hearing Officer:	Paul C. Moore		

*This reflects the correct date of Decision.

Appellant Representative:

Pro se, by telephone

Nursing Facility Representatives:

Natasha Malila, assistant administrator; Evelyn Foleke, director of social services; Malik Simpson, R.N., director of nursing; Rachel Bourque, business office manager (all from Twin Oaks Rehabilitation and Nursing Center, and all by telephone)



*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:	30-Day Nursing Facility Discharge
Decision Date:	*07/28/2023	Hearing Date:	07/17/2023
Nursing Facility Reps.:	Assistant administrator et al.	Appellant Rep.:	Pro se
Hearing Location:	Board of Hearings (remote)		

*This reflects the correct date of Decision.

Authority

This hearing was conducted pursuant to Massachusetts General Laws ("M.G.L.") Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a 30-Day Notice of Intent to Discharge/Transfer Resident dated June 26, 2023 ("discharge notice"), [REDACTED] Nursing and Rehabilitation Center ("[REDACTED]" or "the facility") notified the appellant that it sought to discharge her effective [REDACTED] 2023 to [REDACTED] Homeless Shelter because "[the appellant has] failed, after reasonable and appropriate notice, to pay for (or [has] failed to have Medicare or Medicaid pay for) [her] stay at the nursing facility. Nonpayment applies if the resident does not submit the necessary paperwork for the third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay" (130 Code of Massachusetts Regulations (CMR) 610.028; Exhibit 1). The appellant filed a timely appeal with the Board of Hearings (BOH) on July 1, 2023 (130 CMR 610.015(B); Exhibit 2). Challenging a notice of transfer or discharge initiated by a nursing facility is a valid ground for appeal to BOH (130 CMR 610.032(C)).

Action Taken by Nursing Facility

The nursing facility notified the appellant that it sought to discharge her to a homeless shelter because she had failed, after reasonable and appropriate notice, to have Medicare or Medicaid

pay for her stay at the nursing facility.

Issues

The appeal issues are whether: (1) the facility has valid grounds to discharge the appellant; (2) the discharge notice and patient record meet the regulatory requirements set forth in the Fair Hearing Rules at 130 CMR 610.028 and 610.029; and (3) the facility has provided sufficient preparation and orientation to the appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place.

Summary of Evidence

A. Testimony and Documentary Evidence

Prior to hearing, the facility submitted a copy of some of the appellant's clinical records, including her admission record, plan of care, social service progress notes, nursing progress notes, a wound evaluation and management summary, and a breakdown of the balance she owes to the facility (Exhs. 4A through 4F). The facility's business office manager, Ms. Bourque, testified by telephone that the facility issued a notice of discharge to the appellant on [REDACTED] 2023 because the appellant has failed to complete a MassHealth application to cover her nursing home stay, and has not been paying any private payments. As of the hearing date, she owed the facility \$104,247.00 (Exh. 4F). Ms. Malila, the facility's assistant administrator, testified that the appellant was admitted to the facility on May 10, 2022 from [REDACTED] Hospital, where she was treated for a non-healing, non-pressure chronic ulcer of her left lower extremity. According to the facility's nursing director, Mr. Simpson, the appellant's medical history includes a skin graft failure, muscle weakness, pancreatitis, chronic pain syndrome, pyoderma gangrenosum, celiac disease, autoimmune thyroiditis, cellulitis of her right lower extremity, an acute duodenal ulcer without hemorrhage or perforation, alcohol abuse, obsessive-compulsive disorder, anxiety disorder, and post-traumatic stress disorder (PTSD) (Testimony, Exh. 4A). She is still receiving physical therapy and occupational therapy at the facility. She has been under the care of a wound care physician, Dr. Jacob, for her left lower extremity ulcer (Exh. 4A, pp. 50-56). Her wound is cleaned, dressed and rebandaged daily, according to Mr. Simpson (Testimony).

The discharge location designated on the discharge notice is a homeless shelter in [REDACTED] (Exh. 1). The facility's social service director, Ms. Foleke, testified that [REDACTED] is the nearest homeless shelter to the facility. According to Mr. Simpson, the appellant can change the dressing and bandages on her wound independently. He described the process of cleaning, dressing, and rebandaging the wound as follows: the wound is cleansed with normal saline, alginate calcium, Santyl, and an ABD pad are applied to the wound, and subsequently gauze, tape, and an ACE bandage are affixed to the wound (Testimony, Exh. 4A, pp. 50-56).¹ Thus, the appellant would need all of these medical supplies and medications in order to change the wound dressing daily. When asked whether a visiting nurse could see the appellant daily for wound care at the homeless

¹ The physician's order specifies that the wound is to be dressed and rebandaged daily (Exh. 4A, p. 55).

shelter, Ms. Foleke testified that visiting nurses do not see patients at homeless shelters (Testimony).

Ms. Bourque testified that Medicare paid for the first two months of the appellant's nursing home stay, and then MassHealth paid for her stay between July and December, 2022. Since December, 2022, there has been no payor for her stay. Ms. Bourque explained that the appellant was enrolled in community MassHealth, which therefore covered her nursing facility stay on a short-term basis; however, the appellant has refused to cooperate in the MassHealth long-term care application process (Testimony).

The appellant, who is under age 65, testified by telephone that she cannot afford to pay her income to the facility as a monthly Patient-Paid Amount (PPA) if approved for long-term MassHealth.² She needs all of her income to pay her automobile insurance, because she keeps a car at her mother's home in Beverly. In addition, she asserted that she needs to be transferred to a "specialty hospital" until her lower left extremity ulcer is healed. She stated that moving in with her mother once discharged from the facility is "not an option" (Testimony). The appellant's failed skin graft surgery occurred in the [REDACTED] 2022, in [REDACTED]. Prior to that surgery, the appellant lived in a shelter for thirty days. After her surgery in [REDACTED] she was briefly housed in a rehabilitation center, and then lived in her car before moving back to Massachusetts (Testimony).

Mr. Simpson, the nursing director, testified that he was not aware that Dr. Jacob, the wound specialist, recommended that the appellant be transferred to a specialty hospital. The appellant testified that Dr. Jacob recommended another skin graft surgery for the left lower extremity wound, but the appellant believes it will not work. She testified that a facility nurse practitioner, "Julie," recommended a wound care specialty hospital for her, but the nurse practitioner was not available to testify.³

Ms. Foleke, the social services director, testified that it has been challenging to engage in discharge planning efforts with the appellant. The appellant insists that she needs to go to a specialty hospital, and the appellant shuts down all conversations about other possible discharge locations. Ms. Foleke made a referral on the appellant's behalf to [REDACTED] a medical shelter in [REDACTED]. However, the waitlist there is long. The appellant testified that she will not consider the [REDACTED], because she has a car (which contains all her belongings) and there is no parking there. She stated she is on waitlists for Section 8 housing in a number of cities, including [REDACTED] (Testimony).

The appellant and the facility have not discussed a payment plan to address her arrearage to the facility. Ms. Malila testified that the appellant has been presented invoices each month reflecting her balance owed (Testimony).

² Patient-Paid Amount is defined at 130 CMR 515.001 as the amount that a member in a long-term-care facility must contribute to the cost of care under the laws of the Commonwealth of Massachusetts.

³ The medical record in evidence contains no recommendations by any clinician that the appellant needs to be transferred to a specialty hospital (Exhs. 4A, 4B, 4D, and 4E).

Mr. Simpson testified that the appellant is prescribed many oral medications, including Gabapentin, Dicyclomine, Ergocalciferol capsule, omeprazole, loratadine, Ultram, Singulair, ibuprofen, hydroxyzine, and Tylenol, among others. The appellant stated she can take these medications on her own, but if discharged to the community, she has no prescribing physician.

B. Content of the discharge notice/patient record

The discharge notice at issue in this matter contains: a specific statement of the reasons for the intended discharge, the location to which the appellant is to be discharged, the effective date of the intended discharge, the right of the appellant to request a fair hearing on the intended discharge, the address and fax number of the Board of Hearings, the time frame for requesting a hearing, the effect of requesting a hearing as provided for under 130 CMR 610.030 (*to wit*, that the facility cannot discharge the appellant until 30 days after the hearing officer's decision is received), the name and address of the local legal-services office, the name and address of the local long-term care ombudsman office, and the mailing address of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy for developmentally disabled individuals, respectively (Exhs. 1 & 2).

The discharge notice does not contain the name of a specific facility employee who could answer any questions about the discharge notice and about the appellant's right to file an appeal (Exh. 1).⁴

The appellant's medical record contains a copy of a progress note by Ms. Foleke, dated [REDACTED] 2023, stating in pertinent part:

The administrator and this social worker met with [the appellant] to issue 30-Day Discharge Notice for Non-Payment and explicitly explained her rights to appeal. The reason for 30-Day Discharge Notice was explained to her and she was advised of her right to appeal. [The appellant] had been repeatedly spoken to and advised to comply with MassHealth application but she declined. . .

(Exh. 4C, p. 4)

Findings of Fact

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

1. The appellant is under age 65, and has resided at Twin Oaks since May, 2022 (Testimony).

⁴ The notice instead states, "[a] staff member is available to assist you with this process. You should notify us if you request an appeal or if you have any questions about this notice" (Exh. 1).

2. The appellant's medical diagnoses/history include(s) a non-healing, non-pressure chronic ulcer of her left lower extremity, a skin graft failure, muscle weakness, pancreatitis, chronic pain syndrome, pyoderma gangrenosum, celiac disease, autoimmune thyroiditis, cellulitis of her right lower extremity, an acute duodenal ulcer without hemorrhage or perforation, alcohol abuse, obsessive-compulsive disorder, anxiety disorder, and PTSD (Testimony, Exhs. 4A through 4F).
3. Through a 30-Day Notice of Intent to Discharge/Transfer Resident dated [REDACTED] 2023, the facility notified the appellant that it sought to discharge her effective [REDACTED] 2023 to [REDACTED] Homeless Shelter because "[the appellant has] failed, after reasonable and appropriate notice, to pay for (or [has] failed to have Medicare or Medicaid pay for) [her] stay at the nursing facility. Nonpayment applies if the resident does not submit the necessary paperwork for the third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay" (Exh. 1).
4. The appellant filed a timely appeal with the Board of Hearings (BOH) on July 1, 2023 (Exh. 2).
5. The appellant owes the facility \$104,247.00 for the period December, 2022 to present (Exh. 4F).
6. Medicare paid for the appellant's nursing home stay in May and June, 2022 (Testimony).
7. The appellant was enrolled in community MassHealth, and MassHealth paid for a short-term stay at the facility from July through December, 2022 (Testimony).
8. The appellant has refused to cooperate with the facility in filing a MassHealth application for long-term care coverage (Testimony, Exhs. 4A through 4F).
9. The appellant still receives occupational therapy and physical therapy at Twin Oaks (Testimony).
10. The appellant had a failed skin graft surgery for her non-healing, non-pressure chronic ulcer of her left lower extremity in approximately [REDACTED] 2022 (Testimony).
11. After this surgery, the appellant was homeless and lived in her car (Testimony).
12. The appellant's wound care physician at the facility has ordered wound care daily (Testimony, Exh. 4A, pp. pp. 50-56).
13. The process of cleaning, dressing, and rebandaging the wound as follows: the wound is cleansed with normal saline, alginate calcium, Santyl, and an ABD pad are applied to the wound, and subsequently gauze, tape, and an ACE bandage are affixed to the wound (Testimony, Exh. 4A, pp. 50-56).

14. The facility asserts that the appellant can perform her own daily wound care (Testimony).
15. A visiting nurse would not see the appellant for wound care if the appellant were living in a homeless shelter (Testimony).
16. The appellant pays all of her income to maintain a car, in which she stores her belongings (Testimony).
17. The appellant refuses all discharge placements suggested by the facility, including a medical shelter (Barbara McInnis House) (Testimony, Exh. 4A).
18. The appellant insists she needs to be discharged to a “specialty hospital” for wound care, but produced no medical documentation in support of this argument (Testimony, Exhs. 4A through 4F).
19. The appellant has made no arrangements with the facility to attempt to pay her debt to them (Testimony).
20. The discharge notice at issue in this matter contains: a specific statement of the reasons for the intended discharge, the location to which the appellant is to be discharged, the effective date of the intended discharge, the right of the appellant to request a fair hearing on the intended discharge, the address and fax number of the Board of Hearings, the time frame for requesting a hearing, the effect of requesting a hearing as provided for under 130 CMR 610.030 (*to wit*, that the facility cannot discharge the appellant until 30 days after the hearing officer’s decision is received), the name and address of the local legal-services office, the name and address of the local long-term care ombudsman office, and the mailing address of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy for developmentally disabled individuals, respectively (Exhs. 1 & 2).
21. The discharge notice does not contain the name of a specific facility employee who could answer any questions about the discharge notice and about the appellant’s right to file an appeal (Exh. 1).
22. The patient record for the appellant contains a copy of a progress note by Ms. Foleke, social services director, dated [REDACTED] 2023, explaining the reasons for the appellant’s intended discharge (Exh. 4C, p. 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 follow and implement the federal requirements

concerning a resident's right to appeal a transfer or discharge, and the relevant MassHealth regulations may be found in both (1) the Nursing Facility Manual regulations at 130 CMR 456.000 et seq., and (2) the Fair Hearing Rules at 130 CMR 610.000 et seq.

The regulations at 130 CMR 456.402 define a "discharge" as "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.

The Nursing Facility Manual regulations at 130 CMR 456.701 provide in relevant part:

Notice Requirements for Transfers and Discharges 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 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).

(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's Board of Hearings 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 456.702; and
- (c) the effect of requesting a hearing as provided for under 130 CMR 456.704;
- (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.**

(Emphases added)

Based on the evidence in the record, I agree that the facility has sufficient grounds to discharge the appellant, as she owes the facility over \$100,000.00 for the care and services she has received. She has made no effort to cooperate in filing a MassHealth application for long-term care services, she has failed to pay any amounts owed out-of-pocket, and she has failed to enter into a payment arrangement with the facility. The facility is not obligated to provide services to the appellant at no cost.

I also find that the discharge notice issued by the facility to the appellant meets the regulatory requirements set forth at 130 CMR 456.701(C), except for failing to name a specific individual to assist the appellant in filing an appeal.⁵ The appellant's clinical record in evidence also contains documentation by a social worker explaining the reasons for the appellant's intended discharge.

Also relevant to this appeal, an amendment to M.G.L. c. 111, §70E, which went into effect in November of 2008, states 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

⁵ However, it is worth noting that the appellant successfully filed an appeal, so this oversight by the facility is of little consequence.

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 added)

The record reflects that the appellant has a non-healing, non-pressure ulcer of her left lower extremity, which must be cleaned, dressed and rebandaged daily per the physician's order. The facility insists that the appellant can perform her own wound care if discharged to the community. I do not agree. The appellant will need a number of medical supplies and medications on hand to perform this task daily; if discharged to a homeless shelter, it is not at all clear where she could keep these supplies. The non-healing ulcer might become infected if not cleaned, dressed, and rebandaged daily.

If the intended discharge location were not a homeless shelter, it would be possible for a visiting nurse to see the appellant daily for wound care. However, the appellant states that she is unable to move in with relatives, such as her mother, and will not consider a medical shelter location. Thus, she would not be eligible to receive services from a visiting nurse.

There is no question that the appellant must cooperate in the MassHealth application process and in the discharge planning process. It is no defense to state that she must hold onto all her income so she can maintain a car in the community. Her priority for payment *must* be the facility.

However, I conclude that a homeless shelter is not a safe and appropriate place for the appellant's discharge, as she risks additional medical complications arising in this setting.

The facility may re-issue a notice of discharge/transfer to the appellant at any time, with a designated discharge location that is a more safe and appropriate place.

However, at this time, the appellant's discharge to a homeless shelter, in view of her medical conditions, is not appropriate.

For these reasons, this appeal is APPROVED.

Order for Nursing Facility

Rescind notice of June 26, 2023. Do not discharge the appellant to [REDACTED] Homeless Shelter.

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 of this Decision

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.

Paul C. Moore
Hearing Officer
Board of Hearings

cc: Natasha Malila, Assistant Administrator, Twin Oaks Nursing and Rehabilitation Center, 63 Locust Street, Danvers, MA 01923