

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:



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|-------------------------|---------------|-----------------------|--------------------|
| Appeal Decision: | Denied | Appeal Number: | 2308280 |
| Decision Date: | 10/16/2023 | Hearing Date: | September 18, 2023 |
| Hearing Officer: | Brook Padgett | Record Open: | October 09, 2023 |

Appellant Representative:
Pro se

Nursing Facility Representatives:
Mark Nugent, Administrator, The Oxford
Rehabilitation & Healthcare
Sara Webber, After Care Coordinator
Wendy Fox, Assistant Director of Nursing



*Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, 6th floor
Quincy, MA 02171*

APPEAL DECISION

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| Appeal Decision: | Denied | Issue: | Expedited Nursing Home Discharge 130 CMR 610.028 |
| Decision Date: | 10/16/2023 | Hearing Date: | September 18, 2023 |
| Nursing Facility Reps: | Administrator | Appellant Rep: | Pro se |
| Hearing Location: | Tewksbury | | |

Authority

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

Jurisdiction

The Appellant received a Notice of Intent to Discharge With Less Than 30 Days Notice (Expedited Appeal) dated September 13, 2023, stating: "The purpose of this letter is to inform you that: The [REDACTED] seeks to discharge you to [REDACTED] MA on September 27, 2023. The reason for the decision to discharge you is: The safety of the individual in the Nursing Facility is endangered due to your clinical or behavioral status." (Exhibit 1). The Appellant filed this timely appeal on September 13, 2023. (130 CMR 610.015(B); Exhibit 2). Discharge or transfer of a Nursing Facility patient is valid grounds for appeal. (130 CMR 610.028(A); 42 CFR Ch IV §483.200 et seq.).

Action Taken by the Nursing Facility

The nursing facility intends to discharge the Appellant to [REDACTED] MA.

Issue

Is the planned discharge correct pursuant to 130 CMR 610.028(A)?

Summary of Evidence

The Administrator of The [REDACTED] testified that the Appellant was admitted to the facility on [REDACTED] 2023 with a diagnosis of pyrogenic arthritis¹, anxiety disorder, bi-polar disorder, depression, along with cocaine/opioid dependence. He stated that the Appellant was admitted due to an infection in right hip prosthesis. On [REDACTED] 2023, the Appellant's room was searched and staff discovered 4 lighters, 1 suboxone strip, 1 suboxone pill, 2 cut straws and 1 silver case containing a white residue. On [REDACTED] 2023 the Appellant tested positive for Fentanyl. On [REDACTED] 2023 the Appellant's room was searched and the Appellant was found in possession of a crack pipe. The Administrator testified the Appellant is able to move in and out of the facility, she receives no assistance with any of her activities of daily living (ADL's) and the facility physician has documented that her rehabilitation is complete and she is capable of managing herself in the community with supported services. The nursing facility submitted as evidence nursing notes. (Exhibit 4).

The Appellant responded that the address the facility is sending her belongings to her boyfriend who is currently in jail so she cannot go there. The Appellant acknowledged that she has made some mistakes and "messed up" but it was only one time and she won't let it happen again. The Appellant stated she gets along with everyone at the facility and the staff likes her. The Appellant stated she requires more surgery in the next few months and she cannot walk on her own without a wheelchair.

The representative from the facility responded that they have a "no drug" policy and that the Appellant can no longer stay but he would work with her to find a suitable alternative placement.

At the request of the hearing officer, the record remained open until October 02, 2024, for the facility to submit verification of the positive Fentanyl test and the physician's letter stating the Appellant is capable of managing herself in the community with supported services as well as any documentation from the Appellant that indicates she continues to require skilled nursing services and cannot live at the facility stated location. (Exhibit 5).

The facility submitted the requested verifications within the time limits. (Exhibit 6).

On September 25, 2023, the Appellant contacted the Board of Hearings (BOH) requesting additional time to submit her medical evidence (Exhibit 7). On September 26, 2023, the hearing officer denied the Appellant's request as she failed to detail any reason for an extension of the record. (Exhibit 8). On September 27, 2023, the Appellant contacted BOH requesting additional time to submit her medical evidence as her doctor was on vacation and she would need to

¹ Pyogenic arthritis, also known as septic arthritis, is a painful infection in a joint that can occur when bacteria, viruses, or fungi enter the joint space. Septic arthritis can develop when an infection, such as a skin infection or urinary tract infection, spreads through your bloodstream to a joint. Less commonly, a puncture wound, drug injection, or surgery in or near a joint - including joint replacement surgery - can give the germs entry into the joint space.

contact her surgeon. (Exhibit 9). On September 28, 2023, the record was extended until October 09, 2023 with the explanation that the Appellant was to obtain current medical records to demonstrate her current need for 24/7 skilled nursing care and there was no reason or need to schedule an appointment with her physician. (Exhibit 10).

On September 29, 2023, the Nursing Facility administrator via email indicated the Appellant decline to assist the facility with locating a suitable alternative placement for her transfer (i.e. a rest home). No additional information was submitted by the Appellant within the required time limits. When contacted, the facility responded that the Appellant has informed them that she was going to live with a friend at [REDACTED] MA.

Findings of Fact

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

1. The Appellant resides at [REDACTED], a licensed nursing facility. (Exhibit 1).
2. On [REDACTED] 2023, the Appellant was admitted to [REDACTED] due to an infection in right hip prosthesis. (Exhibit 4).
3. On [REDACTED] 2023 the Appellant was found to be in possession of 4 lighters, 1 suboxone strip, 1 suboxone pill, 2 cut straws and 1 silver case containing a white residue. (Exhibit 5).
4. On [REDACTED] 2023 the Appellant tested positive for Fentanyl. (Exhibit 5).
5. On [REDACTED] 2023 the Appellant was found to be in possession of a crack pipe. (Exhibit 5).
6. The Appellant receives no assistance with any of her ADL's and is able to ambulate in a wheelchair. (Exhibit 5).
7. The Appellant's physician has documented that the Appellant's rehab is complete and she is capable of managing herself in the community with supported services. (Exhibit 8).

Analysis and Conclusions of Law

On September 13, 2023, the Appellant was issued a Notice of Intent to Discharge With Less Than 30 Days' Notice by the facility. The notice indicated the Appellant was being transferred to her former residence in [REDACTED] for the safety and welfare of the residents of the facility. This determination was made after the Appellant was found in possession of drug paraphernalia and tested positive for Fentanyl.

The Appellant attended the fair hearing and acknowledged she has “messed up” and stated it would not happen again. The Appellant stated she cannot return to the home in [REDACTED] as it belongs to her boyfriend who is currently incarcerated.

The Appellant’s clinical record indicates that her medical issues are chronic in nature, she is medically alert and stable, can ambulate with the use of a wheelchair, and she is currently receiving no acute medical treatments. The record also shows that the Appellant has been noncompliant with facility rules regarding illegal drug use and has tested positive for illegal drugs while in the facility along with possession of illegal drug paraphernalia. Possession of illegal drugs and drug paraphernalia is a danger to the Appellant and endangers the health and safety of other residents of the facility.

A nursing facility may transfer or discharge a resident when the safety of individuals in the nursing facility is endangered, as long as the nursing facility provides reasonable and appropriate notice. (130 CMR 610.028(A)).

130 CMR 610.028: 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 MassHealth agency or Medicare pay for) a stay at the nursing facility; . . . (Emphasis added).

130 CMR 610.028(C) lists the notice requirements for a nursing facility transfer or discharge. This regulation states, in relevant part, that 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 that 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 MassHealth agency 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.

The nursing facility must meet the requirements of all other applicable federal and state regulatory requirements in addition to the MassHealth-related regulations discussed above (including G.L. c. 111, § 70E, which went into effect in November of 2008).² The nursing facility notice lists an address in [REDACTED] as the Appellant's discharge location. This is the Appellant's last resident prior to entering the nursing facility. While the Appellant stated this home may no longer be available, she has submitted no relevant, reliable evidence to demonstrate that she cannot go to the intended placement or that it would not be a safe and appropriate place for her discharge. Further the Appellant has indicated she has an alternative placement with a friend.

There was no credible evidence offered by the Appellant to counter the current position of the nursing facility that the Appellant's medical needs could be safely addressed in the community. Although the Appellant requires a wheelchair, she is able to move in and out of the facility and receives no assistance with any of her ADL's and requires no skilled nursing care. Furthermore, the Appellant is receiving no skilled nursing care in the facility and the health and safety of individuals in the nursing facility is endangered by her continued drug use.

The facility has complied with the applicable state and federal notice requirements including the requirements of G.L. c. 111, § 70E. This appeal is DENIED.

² The key paragraph of that statute, which is directly relevant to this appeal, 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."

Order for the Nursing Facility

Proceed with intended discharge.

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.

Brook Padgett
Hearing Officer
Board of Hearings

cc: