

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2313255
Decision Date:	12/22/2023	Hearing Date:	12/20/2023
Hearing Officer:	Marc Tonaszuck		

Appearance for Appellant:

Pro se

Appearances for Skilled Nursing Facility:

Lynn Wilson, Social Worker; Ernestina Nkrumah, Aftercare Specialist; and Jessica Coffman, Unit Manager.



*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:	Expedited Nursing Home Discharge
Decision Date:	12/22/2023	Hearing Date:	12/20/2023
Skilled Nursing Facility's Reps.:	Lynn Wilson, Social Worker; Ernestina Nkrumah, Aftercare Specialist; and Jessica Coffman, Unit Manager.	Appellant's Rep.:	Pro se
Hearing Location:	Quincy Harbor South		

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 of Intent to Discharge Resident With Less than 30 Days' Notice ("discharge notice" or "notice") dated 12/14/2023, Worcester Rehabilitation & Health Care Center ("the nursing facility" or "the facility") notified the appellant of its intent to discharge him to [REDACTED], MA on 12/21/2023. The nursing facility indicated that the discharge is necessary because the appellant's health has improved sufficiently so he no longer needs services provided by the facility (130 CMR 610.029; Exhibit 1). An appeal was filed in a timely manner on the appellant's behalf on 12/18/2023 (130 CMR 610.015(B); Exhibit 2). Notice of intent to transfer or discharge a nursing home resident is valid grounds for appeal (130 CMR 610.032).

Action Taken by the Nursing Facility

The skilled nursing facility intends to discharge the appellant from the facility to [REDACTED], MA on 12/21/2023.

Issue

Has the nursing facility complied with relevant statutes and regulations in its planned discharge of the appellant?

Summary of Evidence

The appellant and the representatives from the nursing facility participated in the fair hearing by telephone. The nursing facility was represented by Lynn Wilson, Social Worker; Ernestina Nkrumah, Aftercare Specialist; and Jessica Coffman, Unit Manager. The appellant appeared pro se.

The nursing facility submitted a packet of documents prior to the hearing (Exhibits 4 and 5). The record contains a copy of an expedited discharge notice dated 12/14/2023 from the nursing facility to the appellant informing him of its intent to transfer him to [REDACTED], MA on 12/21/2023. The packet provided by the nursing facility contains the appellant's clinical record (Exhibits 4 and 5).

The representatives from the nursing facility testified that the appellant was admitted to the facility in October 2023 from a hospital setting with a primary diagnosis of ascites (buildup of fluid in the stomach) and pnemoperitoneum (presence of air in the peritoneal cavity). He has diagnoses that include anxiety disorder, anemia, alcohol and opioid abuse, nicotine dependence, and protein calorie malnutrition. He initially received physical and occupational therapy; however, those services discontinued because the appellant no longer needs them. He is independent with his activities of daily living (ADLs), including personal care with his colostomy bag.

The discharge plan is for the appellant to transfer to a medical shelter, where a case worker will manage his care until a placement can be found for him in a half-way house. Since he is independent with his ADLs and requires no assistance; any services he may require in the future can be managed by the shelter or half-way house.

The facility submitted a copy of a letter from Dr. Fajana that states the appellant no longer requires nursing home level of care. He is scheduled for a surgery to reverse the colostomy. Dr. Fajana also writes that the appellant has been cleared by the wound doctor; his stoma has healed. He has not complained of pain to the staff of the nursing facility. Additionally, his needs can be met in the community setting and he no longer requires nursing home level of care.

The appellant testified that he cannot be discharged because he is scheduled for a surgery in February. Also, he needs a CAT scan in January. He reports that his colostomy bag "leaks on him all day," and that no shelter will admit him because "he will put people at risk." He testified that he has not gained weight, as was the plan when he was admitted. He stated he cannot shower on his own and cannot put on his shoes. Prior to going to the hospital, the appellant lived in respite

program that is no longer available to him. He does not wish to be discharged to a shelter so far away from [REDACTED], where he is from.

The facility representatives testified that the appellant is able to go outside and smoke cigarettes on his own. He does not use an assistive device to ambulate and he is independent with all ADLs. He can go up and down 15 stairs without assistance. His colostomy bag may leak; however, his wound is healed no longer has an external open wound. He has no signs of sepsis.

Findings of Fact

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

1. The appellant was admitted to the nursing facility in October 2023 from a hospital setting (Testimony; Exhibit 4).
2. The appellant has a primary diagnosis of ascites (buildup of fluid in the stomach) and pnemoperitoneum (presence of air in the peritoneal cavity). He has diagnoses that include anxiety disorder, anemia, alcohol and opioid abuse, nicotine dependence, and protein calorie malnutrition (Testimony; Exhibit 4).
3. Prior to his admission to the hospital, the appellant lived in a respite program that is no longer available to him (Testimony; Exhibit 4).
4. When he was admitted to the facility, the appellant received physical and occupational therapy. Those services terminated when the appellant no longer required them (Testimony; Exhibit 4).
5. The appellant is independent with his activities of daily living (ADLs). He can go up and down 15 stairs without assistance and he does not use an assistive device to ambulate (Testimony).
6. Through a Notice of Intent to Discharge Resident With Less than 30 Days' Notice ("discharge notice" or "notice") dated 12/14/2023, the facility notified the appellant of its intent to discharge him to [REDACTED], MA on 12/21/2023. The nursing facility indicated that the discharge is necessary because the appellant's health has improved sufficiently so he no longer needs services provided by the facility (Testimony; Exhibit 4).
7. The intended discharge location is a medical shelter where the appellant's care will be managed and he will await placement into a half-way house (Testimony; Exhibit 4).
8. In support of the proposed discharge, the nursing facility representatives cited to a physician

letter in the appellant's clinical record, dated 12/20/2023, signed by a physician, documenting that the appellant no longer has a clinical need for skilled nursing services and that his care can be managed in the community setting (Testimony; Exhibit 4).

9. The appellant appealed the discharge notice on 12/18/2023 (Testimony; Exhibit 2).

10. On 12/20/2023, a fair hearing was held before the Board of Hearings (Testimony; Exhibit 3).

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 Fair Hearing Rules at 130 CMR 610.004 define a "transfer" as

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.

Movement of a resident within the same facility from one certified bed to another bed with the same certification does not constitute a transfer.

The same regulation defines "discharge" as the removal from a nursing facility of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual. A "discharge" is defined in the same regulation as "the removal from a nursing facility of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual."

MassHealth 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 C.M.R. 456.701(A)(1) or (2);*** and
- (2) a physician when the transfer or discharge is necessary under 130 CMR 456.701(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'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.

(Emphasis added.)

Further, MassHealth regulations at 130 CMR 456.702 and 130 CMR 610.029 provide as follows:

(A) The notice of discharge or transfer required under 130 CMR 456.701(C) must be made by the nursing facility at least 30 days prior to the date the resident is to be discharged or transferred, except as provided for under 130 CMR 456.702(B).

(B) Instead of the 30-day-notice requirement set forth in 130 CMR 456.702(A), the notice of discharge or transfer required under 130 CMR 456.701 must be made as soon as practicable before the discharge or transfer in any of the following circumstances, which are emergency discharges or emergency transfers.

(1) The health or safety of individuals in the nursing facility would be endangered and this is documented in the resident's record by a physician.

(2) *The resident's health improves sufficiently to allow a more immediate transfer or discharge and the resident's attending physician documents this in the resident's record.*

(3) An immediate transfer or discharge is required by the resident's urgent medical needs and this is documented in the medical record by the resident's attending physician.

(4) The resident has not resided in the nursing facility for 30 days immediately prior to the notice.

(Emphasis added.)

Finally, MassHealth regulation 130 CMR 456.704 provides:

(A) Appeals of discharges and transfers will be handled by the Division's Board of Hearings (BOH).

(B) Time Limitation on the Right of Appeal. The date of request for a fair hearing is the date on which BOH receives such a request in writing. BOH must receive the request for a fair hearing within the following time limits:

- (1) 30 days after a resident receives written notice of a discharge or transfer pursuant to 130 CMR 456.702(A); or
- (2) 14 days after a resident receives written notice of an emergency discharge or emergency transfer pursuant to 130 CMR 456.702(B); or
- (3) 14 days after a resident receives written notice of a transfer or discharge that is the result of a nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence.

Also relevant to this appeal, an amendment to 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 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.

Through a notice dated 12/14/2023 the nursing facility seeks to discharge the appellant to a medical shelter on 12/21/2023. The basis of the notice is that the discharge is necessary because the appellant's health has improved sufficiently so he no longer needs services provided by the facility. The appellant's clinical record and a letter from the physician state that the appellant no longer requires skilled nursing level of care, that he no longer requires physical or occupational therapy, he is independent with ADLs, and he is able to ambulate independently without an assistive device. Therefore, the reason for the appellant's discharge is substantiated by the hearing record.

The Notice of Intent to Discharge the appellant meets the regulatory requirements set forth above. Additionally, the nursing facility has provided evidence that appellant's clinical record was appropriately documented.

The proposed discharge location is to a medical shelter, where the appellant's care will be managed by a case manager. There he will await placement in a half-way house. The appellant did not object to ultimate placement in a half-way house; however, he did not want to be discharged to a shelter because his colostomy bag leaks. He expressed concern for others in the shelter. He also stated that he needs to be in a nursing home because he is awaiting a CAT scan and another surgery.

Ideally, the appellant may find that another community setting may be more appropriate where his needs may be better met; however, the nursing facility has met its burden of providing the appellant with the appropriate notice and documenting his clinical record properly. Additionally, because the appellant is independent with ADLs and has no skilled nursing needs; the discharge plan meets the above statutory requirements. Thus, the nursing facility may discharge the appellant pursuant to the 12/14/2023 discharge notice. Accordingly this appeal is denied.

Order for the Nursing Facility

Proceed with discharging the appellant as planned pursuant to regulations.

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.

Marc Tonaszuck
Hearing Officer
Board of Hearings

cc: [REDACTED]