

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2401934
Decision Date:	03/15/2024	Hearing Date:	02/28/2024
Hearing Officer:	Thomas J. Goode		

Appellant Representative:



Nursing Facility Representatives:

Greg Tormey, Director
Hassamacu Bah, Unit Manager
Sarah Kearns, Director of Nursing



*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 Initiated Discharge
Decision Date:	03/15/2024	Hearing Date:	02/28/2024
Nursing Facility Rep.:	Greg Tormey, Director, et al.	Appellant's Rep.:	
Hearing Location:	Remote		

Authority

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

Jurisdiction

On [REDACTED], [REDACTED] ("the nursing facility") issued a "30 Day Notice of Intent to Transfer/Discharge Resident" because "[t]he resident has failed after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility" (130 CMR 610.028, 610.029, 456.701, 456.702 and Exhibit 1). Appellant filed a timely appeal at the Board of Hearings on February 7, 2024 (130 CMR 610.029(C), 456.703(B), and Exhibit 2). A 30-Day Notice of Intent to Transfer/Discharge Resident" because "[t]he resident has failed after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility" is valid grounds for appeal (130 CMR 610.015(B)).

Action Taken by the Nursing Facility

On [REDACTED] issued a "30 Day Notice of Intent to Transfer/Discharge Resident" because "[t]he resident has failed after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility.

Issue

The hearing issue is whether the nursing facility is justified in seeking to discharge Appellant from the facility to a hotel, and whether the discharge plan is safe and appropriate.

Summary of Evidence

The nursing facility administrator appeared by telephone along with the Unit Manager and Director of Nursing. Appellant was admitted to the nursing facility on [REDACTED] following a hospitalization for heart issues. Appellant had been living in the community with family members prior to admission to the facility. The nursing facility representatives stated that Appellant's stay at the facility was paid initially by Medicare, and a conversion to MassHealth long-term care services was denied because Appellant's MassHealth coverage terminated on October 10, 2023. According to the facility representatives, Appellant's MassHealth coverage was denied because she was over income for MassHealth benefits. The nursing facility administrator stated that the facility is currently owed approximately \$36,000 for Appellant's stay. He added that the discharge plan involves transferring Appellant to a nearby handicapped-accessible hotel. The administrator added that a previous hearing decision overturned the previous discharge plan to a homeless shelter that was not handicapped-accessible and was located too far from relatives (Exhibit 5). The administrator noted that the shelter previously selected was handicapped accessible, and that the current discharge plan lists several hotels for the family to choose, all of which are handicapped-accessible. The administrator testified that Appellant does not have a skilled need and can be safely discharged to the community which is documented in physical therapy notes. He added that although Appellant is wheelchair-dependent, she can walk 50 feet independently with a rolling walker, is able to transfer for toileting, and can get in and out of bed. He added that the discharge plan could also include physical and occupational therapy and nursing services in the community which would be covered by Appellant's health insurance. The administrator testified that neither a long-term nor short-term screening has been completed. The Director of Nursing testified that the business office met with Appellant and discussed with MassHealth a long-term conversion which was denied by MassHealth because Appellant is over income. The Unit Manager stated that Appellant is independent and able to care for herself in the community.

Clinical records show that Appellant is [REDACTED] and is diagnosed with chronic obstructive pulmonary disease (COPD), Type 2 diabetes, right knee pain, osteoarthritis, lymphedema, morbid obesity, muscle weakness, and difficulty in walking (Exhibit 4, p. 12). A physical therapy evaluation and treatment plan for a certification period from February 13, 2024 to March 13, 2024 specifies short-term treatment goals: (1) improving ability to safely and efficiently transfer to and from a bed to a chair (or wheelchair) with independence with ability to right self to achieve/maintain balance. Appellant requires supervision or touching assistance for chair/bed-to-chair transfer; (2) at baseline, Appellant's gait is dependent, with a goal to safely ambulate on level surfaces 10 feet using two-wheeled walker with supervision or touching assistance with functional dynamic

balance to increase independence within household environment; (3) decreasing risk for falls as evidenced by a decrease (improved) score on the TUG (timed up and go) to 2.00 minutes. At baseline, Appellant is unable to participate (See Id.).

Appellant's daughter-in-law testified that Appellant was a MassHealth member for many years in the community and was denied because of a one-time \$196 income increase several years ago. She stated that she has been working with a financial office in Gloucester to restore Appellant's MassHealth coverage. Appellant's representative testified that an appeal of the MassHealth denial is pending. She added that Appellant is [REDACTED] and is not capable of living independently in the community because she has difficulty walking and her legs are swollen with fluid. Appellant's representative testified that when she takes Appellant to a methadone clinic once each week, she requires two people to assist her to walk. She added that Appellant is at risk of falling and has fallen from the toilet at the facility.

The hearing record remained open to allow Appellant's representative to provide an update on the status of Appellant's MassHealth eligibility, which she felt she could readily obtain within 2 days. As of the date of this hearing decision, Appellant's representative has not provided an update to the Board of Hearings as instructed at hearing.

Findings of Fact

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

1. Appellant was admitted to the nursing facility on [REDACTED] following a hospitalization for heart issues.
2. Appellant had been living in the community with family members prior to admission to the facility.
3. Appellant's stay at the facility was initially paid by Medicare.
4. MassHealth coverage terminated on October 10, 2023; and Appellant has had no payor source since October 10, 2023.¹
5. Appellant is [REDACTED], wheelchair-dependent, and is diagnosed with chronic obstructive pulmonary disease (COPD), Type 2 diabetes, right knee pain, osteoarthritis, lymphedema, morbid obesity, muscle weakness, and difficulty walking.
6. A physical therapy evaluation and treatment plan for a certification period February 13,

¹ It is unclear whether MassHealth covered any of Appellant's stay at the facility, or whether Appellant's community eligibility ended.

2024 to March 13, 2024 specifies short-term treatment goals: (1) improving ability to safely and efficiently transfer to and from a bed to a chair (or wheelchair) with independence with ability to right self to achieve/maintain balance. Appellant requires supervision or touching assistance for chair/bed-to-chair transfer; (2) at baseline, Appellant's gait is dependent, with a goal to safely ambulate on level surfaces 10 feet using two-wheeled walker with supervision or touching assistance with functional dynamic balance to increase independence within household environment; (3) decreasing risk for falls as evidenced by a decrease (improved) score on the TUG (timed up and go) to 2.00 minutes. At baseline, Appellant is unable to participate.

7. Appellant is unable to walk 10 feet independently; is unable to walk 50 feet with two turns independently; is unable to walk 150 feet independently; is unable to walk 10 feet on uneven surfaces independently.
8. Lower extremity lymphedema has significantly increased in the certification period February 13, 2024 to March 13, 2024.²
9. On [REDACTED], the facility issued a 30-Day Notice of Intent to Discharge because Appellant failed, after reasonable and appropriate notice, to pay for (or has failed to have Medicaid or Medicare pay for) services rendered at the facility.
10. Appellant appealed the November 27, 2023 discharge notice. A hearing was held on January 3, 2024. A hearing decision issued approving Appellant's appeal because the facility's plan to discharge her to a non-handicapped accessible homeless shelter 40 miles from her family was determined to not be safe and appropriate.
11. On [REDACTED], the facility issued a "30 Day Notice of Intent to Transfer/Discharge Resident" because "[t]he resident has failed after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. Pursuant to notice, the discharge location is a handicapped-accessible hotel near Appellant's family.
12. The nursing facility is currently owed approximately \$36,000 for Appellant's stay.

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 action initiated by a nursing facility. Massachusetts has enacted regulations that follow and implement the federal requirements concerning a resident's right to appeal a transfer or discharge, and the relevant regulations may be found in both (1) the MassHealth Nursing Facility Manual regulations at

² See fn. 7.

130 CMR 456.000 et seq., and (2) the Fair Hearing Rules at 130 CMR 610.000 et seq.³

456.701: 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 MassHealth 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 (4), 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 or PCP when a transfer or discharge is necessary under 130 CMR 456.701(A)(1) or (2); and
 - (2) a physician or PCP 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 the authorized 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 their right to request a hearing before MassHealth'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

³ The regulatory language in the MassHealth Nursing Facility Manual, found in 130 CMR 456.701 et seq. is identical (or nearly identical) to counterpart regulations found within the Commonwealth's Fair Hearing Rules at 130 CMR 610.001 et seq. as well as corresponding federal government regulations.

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. s. 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. s. 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 also 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 this statute, which is directly relevant to any type of appeal involving a nursing facility-initiated transfer or discharge, reads:

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.** (emphasis added)^{4,5}

Failure to pay or establish a payor source is a valid reason to discharge a nursing facility resident, which unlike other valid reasons for discharge does not require physician documentation explaining the transfer in the medical record (130 CMR 456.701(A),(B)).⁶

⁴ See also 42 USC 1396r(c)(2)(C) which requires that a nursing facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

⁵ See also 940 CMR 4.00 *et seq.*, promulgated by the Attorney General of the Commonwealth of Massachusetts, which specifies, *inter alia*, that it shall be an unfair or deceptive act or practice, in violation of M.G.L. c. 93A, §2, for a licensee or an administrator: (1) to fail to comply with any existing state or federal statute, rule or regulation which provides protection to or for residents or prospective residents of long-term care facilities.

⁶ The nursing facility asserted that Appellant's health has improved, and a nursing facility placement is no longer

Appellant does not have a right to remain in the nursing facility without paying for her stay or establishing a payor source to pay for her stay at the facility. However, the overarching point throughout the confluence of regulations enacted at both the federal and state levels with the purpose of protecting nursing facility residents on discharge from a facility, is the requirement that nursing facilities engage in sufficient discharge planning to ensure the resident is discharged to a safe and appropriate place regardless of the reason for the discharge. After considering the evidence and testimony in the hearing record, this hearing officer cannot conclude that the nursing facility has provided sufficient preparation and orientation to the resident to ensure safe and orderly transfer or discharge from the facility, or that a handicapped accessible hotel/motel is a safe and appropriate place for Appellant. Despite the facility representative's assertions that Appellant is independent with her wheelchair, can walk independently with a walker, and care for herself in the community, physical therapy records corroborate Appellant's representative's depiction of worsening lymphedema and Appellant's limited ability to ambulate and transfer independently. The applicable regulations establish a threshold for discharge planning that is higher than merely dropping off at a handicapped accessible hotel of the family's choosing, a nursing-facility resident who is wheelchair-dependent, with a limited ability to ambulate short distances, or complete transfers, and a host of other co-morbidities.⁷ Physical therapy notes document concerns about safety and the need for community supports in the medical record on February 13, 2024 "Barriers Likely to Impact Discharge to Next Level = identification of support systems for safe transition, support needed to function safely in community," which the nursing facility appears to ignore in its discharge planning (Exhibit 4, p. 14). Further, the facility's testimony that community supports and therapies would be established at the hotel and would be paid for by Appellant's insurance is specious at best as the discharge was initiated because Appellant's MassHealth coverage ended and has not been restored in advance of returning her to the community. It is unclear whether Appellant has a current MassHealth application pending, or whether appropriate clinical screening to establish MassHealth eligibility has been initiated as a possible precursor to a continued stay at the facility.⁸ Although Appellant's representative did not submit documentation of Appellant's MassHealth status during the record open period, services in the community to be

necessary; however, the January 11, 2024 notice does not state improved health as a discharge reason, which would also require documentation from Appellant's physician (130 CMR 456.701(A)(2), 456.701(B)(1)).

⁷ See supra Finding of Fact Nos. 6 and 7, and 8, and Exhibit 4, p.15: Certification Period 2/13/2024-3/13/2024 Functional Mobility Assessment: sit to stand= supervision or touching assistance; Ambulation: walk 10 feet = dependent; walk 50 feet with two turns = dependent; walk 150 feet = dependent; walk 10 feet on uneven surfaces = dependent; unable to take steps at time of eval, significant increase in B LE lymphedema compared to last PT discharge; wheel 50 feet with 2 turns = independent; wheel 150 feet = independent; picking up object = dependent. *Compare with Prior Levels of Function:* Indoor Mobility (ambulation) = independent; self-care=independent; roll left and right=independent; sit to stand = independent; walk 10 feet = independent; walk 50 feet with 2 turns= independent; walk 150 feet = dependent; walking 10 feet on uneven surfaces = supervision or touching assistance, wheel 50 feet with two turns = independent; wheel 150 feet = independent; picking up object = dependent (Id.).

⁸ See 940 CMR 4.09(2) which identifies as an unfair or deceptive act or practice, in violation of M.G.L. c 93A §2, for a licensee or administrator to discharge or transfer a resident, when a state of federal agency refuses, or ceases to authorize payment for a Medicare or Medicaid resident until all administrative appeals have been exhausted.

purportedly covered by Appellant's terminated health insurance is hardly the cornerstone of a safe and orderly discharge to a safe and appropriate place in light of Appellant's medical conditions. For the foregoing reasons, the appeal is APPROVED.

Order for the Nursing Facility

Do not discharge Appellant pursuant to the [REDACTED] "30 Day Notice of Intent to Transfer/Discharge Resident" because "[t]he resident has failed after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. 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.

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.

Thomas J. Goode
Hearing Officer
Board of Hearings

cc: [REDACTED]
[REDACTED]