

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2407715
Decision Date:	07/02/2024	Hearing Date:	06/04/2024
Hearing Officer:	Kimberly Scanlon		

Appearance for Appellant:
Via telephone



Appearance for Nursing Facility:
Via telephone
Andrew Yurack, Administrator;
Jessie McGuinness, Business Office 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:	Approved	Issue:	30-Day Nursing Facility Discharge
Decision Date:	07/02/2024	Hearing Date:	06/04/2024
Nursing Facility's Reps:	Andrew Yurack, Administrator; Jessie McGuinness, Business Office Manager	Appellant's Rep.:	██████
Hearing Location:	Quincy Harbor South 2 (Remote)	Aid Pending:	No

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 ██████████, the nursing facility informed the appellant of its intent to discharge her to the home of her son on ██████████ because she has failed, after reasonable and appropriate notice to pay for (or to have Medicaid or Medicare pay for) a stay in the nursing facility. (130 CMR 456.702(B); 130 CMR 610.029(B); Exhibit 1). The appellant filed this appeal in a timely manner on or about May 13, 2024. (130 CMR 610.015(F); Exhibit 2).¹ Notice of discharge from a nursing facility is valid grounds for appeal. (130 CMR 456.703; 130 CMR 610.032(C)).

Action Taken by the Nursing Facility

¹ The Board of Hearings (BOH) initially dismissed this appeal for failure to include written authorization from the appellant (Exhibit 4). The BOH subsequently received written authorization from the appellant on May 21, 2024 and therefore vacated the dismissal and scheduled a hearing (Exhibits 5-7).

The nursing facility issued a 30-day notice of intent to discharge to the appellant.

Issue

The appeal issues are as follows: whether the nursing facility has valid grounds to discharge the appellant; whether the discharge notice and patient record meet the regulatory requirements; and whether the facility has provided sufficient preparation and orientation to the appellant to ensure a safe and orderly discharge from the nursing facility to a safe and appropriate place.

Summary of Evidence

The appellant's representative appeared telephonically at the hearing. The nursing facility was represented telephonically by its Administrator and Business Office Manager (hereinafter "BOM"). The appellant was admitted to the facility on [REDACTED] Exhibit 8, p. 30). She was admitted for chronic obstructive pulmonary disease, abnormalities of her gait and her mobility, hypertension, and muscle weakness (Exhibit 8, p. 31). The appellant was subsequently diagnosed with dementia. *Id.* She requires long-term care services from the facility. The facility spoke to the appellant's representative on occasion within the past year and met with him in-person regarding payment, unfortunately to no avail. The facility's Administrator explained that the facility previously began to issue a notice of intent to discharge to the appellant in August of 2023, however, her MassHealth coverage had lapsed at that time (See, Exhibit 8, pp. 17-18). The facility's Administrator, BOM, and the appellant's representative collectively assisted in working with MassHealth to have the appellant's coverage reinstated. The appellant's monthly patient-paid amount (PPA) is presently \$2,269.80 (Exhibit 8, p. 15). Currently, the appellant owes the facility \$52,467.08 (Exhibit 8, p. 16). The facility's Administrator testified that payments have not been received from the appellant since the date of her admission.

The appellant's representative testified that the facility was made aware that payment would not be received from the appellant due to the lack of care given to the appellant. He explained there was a significant lapse in the appellant's care at the facility over the past 10-12 months. Therefore, he and the appellant elected to withhold payment to the facility. As examples of the facility's lack of care regarding the appellant, her representative stated that she has not received usable dentures since her admission to the facility. Additionally, on several occasions, the appellant was found to be sitting in her own urine and feces at the facility. As a result, the appellant's representative is in the process of transferring the appellant to another facility. However, his initial efforts to do so were blocked by the current facility. The appellant's representative explained that he was told by the facility that any efforts made to transfer the appellant would be "blacklisted" because of her history of non-payment. Further, the appellant's representative requested documentation from the current facility as part of the transfer process and he was told that the documentation was the property of the facility and is not available to him.

In response, the facility's Administrator clarified that other facilities that they reached out to on behalf of the appellant would not speak to him because of the appellant's MassHealth issue, not because of nonpayment. He reiterated that the facility began the discharge process last year, however, the appellant lost her MassHealth coverage at that time and discharge efforts ceased to help her have coverage reinstated. As to records requests, the facility's Administrator stated that he did not receive any records requests on behalf of the appellant, except for this past Sunday, June 2, 2024. This past Sunday, the facility's BOM received an e-mail from the appellant's representative requesting her records. The facility's BOM retrieved the pertinent records that were requested and sent them to the appellant's representative within 48 hours of receiving his request. As to the testimony regarding sub-par care that the appellant received from the facility, the facility's Administrator testified that when the appellant's dental issue was raised, she ultimately received new dentures. This occurred approximately 6 months ago. Another issue raised to the facility's Administrator concerned the appellant's lost cell phone that occurred in the facility sometime in [REDACTED] or [REDACTED]. The facility's Administrator testified although he was not employed by the facility at that time, he spoke to the appellant's representative when he was made aware of this issue and offered to purchase another cell phone for the appellant or deduct \$1000.00 from the appellant's past due balance to the facility.

The appellant's representative explained that the appellant lost her original dentures at the facility. The facility did not have the appellant's dentures immediately replaced. Eventually, the facility had her dentures replaced; however, she cannot wear them because they do not fit her mouth properly. The appellant's representative testified that he also requested the appellant's nursing records from the facility and was told that said records are not available to the public. He requested the appellant's nursing records on June 2nd. The facility's Administrator and BOM clarified that the appellant's representative received all requested documents, except for the nursing notation. However, the facility's Administrator and BOM will ensure that the appellant's representative receives the appellant's nursing notes because he is her Health Care proxy. Additionally, the appellant's representative inquired about social services notes and the facility's BOM stated that she reached out social services and is awaiting a response. The appellant's representative agreed to reach out to social services as well.

With respect to the discharge plan, the facility's Administrator testified that the discharge location (the home of the appellant's representative and son) is not a safe and appropriate place for the appellant. The appellant's representative agreed, stating that he and his wife are both employed full-time from Monday through Saturday each week. Therefore, there would be no one present during this time frame to care for the appellant. Further, the appellant is a severe fall risk because of her dementia. The facility's Administrator testified that he has contacted other nursing facilities and that they would take it from there. Specifically, the facility will work with the appellant's representative and other facilities to coordinate transportation for the appellant and any requested records if the appellant's representative agreed to release said records. The appellant's representative provided the facility with contact information for a nursing facility that he has

recently researched on the appellant's behalf.

Findings of Fact

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

1. The appellant is a resident at the nursing facility.
2. The appellant currently owes the nursing facility over \$52,000.00.
3. The appellant was previously approved for MassHealth benefits with a patient-paid amount of \$2,269.80.
4. On [REDACTED], the facility notified the appellant of its intent to discharge her for nonpayment. The discharge location is to her son's home.
5. The appellant filed a timely appeal on or about May 13, 2024.
6. The facility has indicated that it will secure community services and make appropriate referrals for the appellant, but as of the date of the hearing, had not done so.
7. The nursing facility has not provided sufficient preparation and orientation to the appellant to ensure that she is discharged to a safe and appropriate location.

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

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

² The regulatory language in the MassHealth Nursing Facility Manual, found in 130 CMR 456.000 et seq. has regulations which are nearly identical to counterpart regulations found within the Commonwealth's Fair Hearing Rules at 130 CMR 610.001 et seq. and corresponding federal government regulations. Because of such commonality, the remainder of regulation references in this Fair Hearing decision will only refer to the MassHealth Nursing Facility Manual regulations in 130 CMR 456.000, unless otherwise noted and required for clarification.

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. 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.

(130 CMR 456.701(C)).

Further, the notice requirements set forth in 130 CMR 456.701(A) state that 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.

(See, 130 CMR 610.028(A); 130 CMR 456.701(A)). (emphasis added).

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).

(130 CMR 456.701(B)).

In the present case, the issue on appeal is whether the appellant has failed, after reasonable and appropriate notice, to pay, or failed to have Medicaid or Medicare pay, for her stay at the nursing facility. Non-payment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid denies the claim and the resident refuses to pay for his or her stay. (See, 42 CFR 483.15(c)(E)). The appellant does not dispute the allegation of nonpayment but maintains that the care received by the facility, or lack thereof, warrants nonpayment. While there is no question that the appellant has failed to meet her financial obligation to the facility and that discharge may be justified for failure to make payment, the facility must persuasively demonstrate the appropriateness of the discharge location. It has failed to do so here.

Specifically, the nursing facility must also comply with all other applicable state laws, including G.L. c. 111, § 70E. The key paragraph of this statute, which is directly relevant to any type of appeal involving a nursing facility-initiated transfer or discharge, 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.³

³ 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.

Here, the facility proposes to discharge the appellant to her son's home. However, the facility's Administrator acknowledged on the record that it is not safe or appropriate for the appellant to be discharged to this location. The appellant's representative testified that no one would be available to assist the appellant with the care she requires because he and his spouse, the appellant's son, and daughter-in-law, both work full-time Monday-Saturday every week. Additionally, the appellant requires long-term care services and is considered a high-fall risk due to dementia. While the appellant's representative and the facility acknowledge that other efforts have been made to discharge the appellant to another facility, the discharge location on the notice is not another facility. Rather, as noted above, it is the son's home, a location that all parties agree is not safe. For these reasons, I do not find, as required by the statute cited above, that the facility 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." Therefore, the notice of intent to discharge must be rescinded.

This appeal is APPROVED.

Order for the Nursing Facility

Rescind the 30-day notice of intent to discharge the appellant.

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 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.

Kimberly Scanlon
Hearing Officer
Board of Hearings

cc:

[REDACTED]

Respondent:

[REDACTED]