

FILED

JUL 23 2009

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09N-00049

PETITIONER,

Vs.

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on June 26, 2009, at 11:06 a.m., at the respondent facility in Jacksonville, Florida. The petitioner was not present; he was represented by his wife

The respondent was represented by _____, administrator.

Present as witnesses for the respondent were _____ director of nursing (DON),

_____, care plan coordinator, _____ dietary manager,

_____, unit manager, _____, social services director and

_____, activities director.

ISSUE

The respondent had the burden to prove by clear and convincing evidence that the petitioner's discharge was in accordance with the requirements of the Code of Federal Regulation at 42 C.F.R. §483.12(a).

FINDINGS OF FACT

1. The petitioner has been a resident of the respondent facility since March 20, 2009. The petitioner is 69 years old; his primary diagnosis is Pick's disease (this is a progressive type of dementia which occurs in the cerebral cortex, the outer layer of the brain that controls behavioral and cognitive functions).

2. The respondent asserted that beginning the day of admission (March 20, 2009), the petitioner has repeatedly engaged in aggressive and exit seeking behavior which endangers his health and safety as well as the health and safety of other residents and staff. The facility does not believe it can meet the constant supervision needs necessitated by the petitioner's dementia and believes the petitioner's needs would be best served in a nursing facility with a locked unit. The respondent entered into evidence business records which contemporaneously documented incidents of the petitioner attempting to leave the facility as well as being physically aggressive towards other residents and staff. Some of the incidents occurred on the following dates: March 20, 2009 – "Resident...pushed his way out of the door. Resident refused to come back inside...", March 23, 2009 - petitioner "hit another resident due to other resident being very loud...", May 15, 2009 - "resident combative...grabbed my arm and squeezed my wrist...pushed me out of the way and got out of the room...", June 22, 2009 – "resident...continues to be intrusive and will go into other residents rooms and will open closed doors. Resident also become [sic] agitated at times resulting in physical abuse...." The respondent presented testimony of first hand observations of the

petitioner engaging in behavior potentially dangerous to the safety and well being of the petitioner himself and other residents such as the petitioner repeatedly ramming his wheelchair into the walker of another resident and throwing silverware in the facility dining room.

3. The evidence shows facility staff tried to redirect the petitioner when his behavior was inappropriate. These actions were not successful; the inappropriate behavior continued. The petitioner was assigned to a special facility program for those with cognitive impairments called _____ Eight residents are attended to by one certified nursing assistant (CNA) who engages them in activities. The petitioner would not stay in the _____ room and was repeatedly found wandering the facility halls. The petitioner received therapy and medication also without success. The petitioner's psychiatrist completed his last mental health evaluation on June 19, 2009. The psychiatrist opined that the petitioner exhibits behavior consistent with depression, anxiety, agitation, psychosis and confusion; the petitioner's immediate, recent and remote memories are all impaired; he shows apathy with poor social interaction and is psychotic with delusions. It is the professional opinion of the petitioner's psychiatrist that he be transferred from the respondent facility; he writes "Resident will be better served in a facility with a locked unit..."

4. On April 23, 2009, the respondent, by Nursing Home Transfer and Discharge Notice, notified the petitioner's wife that it was their intent to discharge the petitioner, effective May 23, 2009, because his needs cannot be met in the facility.

5. The petitioner's wife admits that his needs would be better served in a locked facility. She only wants the petitioner to remain at the respondent facility until a bed is available in the nursing facility that she prefers; she was told that he was "next in line for a bed." The petitioner's wife does not approve of the facility shown on the discharge notice because it is 20 miles (40 round trip) away from her home and she would not be able to visit the petitioner as often as she does now. She asked the facility to allow the petitioner to stay until a bed is available in the preferred nursing home. The facility declined; the social services director contacted the preferred nursing home and was told there was no definite date when/if the petitioner would be allowed to move in the nursing home. The facility asserted that the petitioner's safety as well as the safety of the other residents was the upper most concern; waiting indefinitely for a vacancy in the preferred nursing home was not a suitable solution to the issue.

CONCLUSIONS OF LAW

Jurisdiction to conduct this type of hearing is conveyed to the Department by federal regulations appearing in 42 C.F.R. §431.200. Additionally, federal regulations limit the reasons for which a Medicaid or Medicare certified nursing facility may discharge a patient.

Federal regulations at 42 C.F.R. §483.12 states in part:

(a) Transfer and discharge--

- (1) Definition: Transfer and discharge includes movement of a resident to a bed outside of the certified facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same certified facility.

- (2) Transfer and discharge requirements. The facility must permit Each resident to remain in the facility, and not transfer or discharge the resident from the facility unless--
 - (i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;
 - (ii) The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
 - (iii) The safety of individuals in the facility is endangered;
 - (iv) The health of individuals in the facility would otherwise be endangered;
 - (v) The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or
 - (vi) The facility ceases to operate.
- (3) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (a)(2)(i) through (v) of this section, the resident's clinical record must be documented. The documentation must be made by--
 - (i) The resident's physician when transfer or discharge is necessary under paragraph (a)(2)(i) or paragraph (a)(2)(ii) of this section; and
 - (ii) A physician when transfer or discharge is necessary under paragraph (a)(2)(iv) of this section.
- (4) Notice before transfer. Before a facility transfers or discharges a resident, the facility must--
 - (i) Notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.
 - (ii) Record the reasons in the resident's clinical record; and
 - (iii) Include in the notice the items described in paragraph (a)(6) of this section.
- (5) Timing of the notice. (i) Except when specified in paragraph (a)(5)(ii) of this section, the notice of transfer or discharge required under paragraph (a)(4) of this section must be made by the facility at least 30 days before the resident is transferred or discharged.
 - (ii) Notice may be made as soon as practicable before transfer or discharge when--
 - (A) the safety of individuals in the facility would be endangered under paragraph (a)(2)(iii) of this section;

- (B) The health of individuals in the facility would be endangered, under paragraph (a)(2)(iv) of this section;
 - (C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (a)(2)(ii) of this section;
 - (D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (a)(2)(i) of this section; or
 - (E) A resident has not resided in the facility for 30 days.
- (6) Contents of the notice. The written notice specified in paragraph (a)(4) of this section must include the following:
- (i) The reason for transfer or discharge;
 - (ii) The effective date of transfer or discharge;
 - (iii) The location to which the resident is transferred or discharged;
 - (iv) A statement that the resident has the right to appeal the action to the State;
 - (v) The name, address and telephone number of the State long term care ombudsman;
 - (vi) For nursing facility residents with developmental disabilities, the mailing 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; and
 - (vii) 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.
- (7) Orientation for transfer or discharge. A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

Fla. Stat. 400.0255 (8) sets forth the requirements of the discharge notice and states in part:

The notice required by subsection (7) must be in writing and must contain all information required by state and federal law, rules, or

regulations applicable to Medicaid or Medicare cases. The agency shall develop a standard document to be used by all facilities licensed under this part for purposes of notifying residents of a discharge or transfer. Such document must include a means for a resident to request the local long-term care ombudsman council to review the notice and request information about or assistance with initiating a fair hearing with the department's Office of Appeals Hearings. In addition to any other pertinent information included, the form shall specify the reason allowed under federal or state law that the resident is being discharged or transferred, with an explanation to support this action. Further, the form shall state the effective date of the discharge or transfer and the location to which the resident is being discharged or transferred. The form shall clearly describe the resident's appeal rights and the procedures for filing an appeal, including the right to request the local ombudsman council to review the notice of discharge or transfer. A copy of the notice must be placed in the resident's clinical record, and a copy must be transmitted to the resident's legal guardian or representative and to the local ombudsman council within 5 business days after signature by the resident or resident designee.

The Findings of Fact show that the petitioner's exit seeking and physically aggressive behavior would be best served in a facility with a locked unit. Both parties stipulated to this fact. The petitioner's wife would like him to remain at the respondent facility until a bed is available in the facility that she prefers. The legal authorities cited above make it clear that the discharge notice must contain a transfer location. The legal authorities do not convey to the undersigned hearing officer the jurisdiction to decide on the appropriateness of the proposed discharge location. The Agency for Health Care administration has jurisdiction over this issue. The petitioner's wife may wish to pursue this matter by contacting the agency at 1-888-419-3456.

After carefully reviewing all the testimony, evidence and controlling legal authorities, it is determined that the respondent's discharge of the petitioner from the facility is in accordance with the reasons stated in the Federal Regulations.

DECISION

The appeal is denied. The respondent may proceed with the discharge in accordance with applicable Agency for Health Care Administration requirements.

NOTICE OF RIGHT TO APPEAL

The decision of the hearing officer is final. Any aggrieved party may appeal the decision to the district court of appeals in the appellate district where the facility is located. Review procedures shall be in accordance with the Florida Rules of Appellate Procedure. To begin the judicial review, the party must file one copy of a "Notice of Appeal" with the Agency Clerk, Office of Legal Services, Bldg. 2, Rm. 204, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. The party must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The department has no funds to assist in this review, and any financial obligations incurred will be the party's responsibility.

DONE and ORDERED this 22nd day of July, 2009,

in Tallahassee, Florida.



Leslie Green
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
850-488-1429

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DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09F-03827

PETITIONER,

Vs.

CASE NO. 1302046403

FLORIDA DEPT OF CHILDREN AND FAMILIES
CIRCUIT: 15 Palm Beach
UNIT: 88747

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on July 22, 2009, at 8:25 a.m., in West Palm Beach, Florida. The petitioner was not present. Representing the petitioner was _____ power of attorney and healthcare surrogate. Representing the respondent was Idali Hilgenfeldt, specialist II.

ISSUE

At issue is whether the respondent was correct in denying Institutional Care Program (ICP) Medicaid for the months of December 2008 and January and February 2009 due to the petitioner's income exceeding Program eligibility limits. The petitioner has the burden of proof.