

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

FILED

AUG 17 2009

OFFICE OF APPEAL HEARINGS  
DEPT. OF CHILDREN & FAMILIES

) APPEAL NO. 09N-00089

PETITIONER,

Vs.

+

RESPONDENT.  
\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on July 24, 2009, at 10:35 a.m., at the respondent facility. The petitioner was not present. The petitioner was represented by her daughter (and Power of Attorney), \_\_\_\_\_ Present as a witness for the petitioner was \_\_\_\_\_, district ombudsman manager, Florida Long-Term Care Ombudsman Program. The respondent was represented by \_\_\_\_\_ administrator. Present as witnesses for the respondent were \_\_\_\_\_, regional accounts manager and \_\_\_\_\_, business office manager.

**ISSUE**

At issue is whether or not the nursing home's May 15, 2009 proposed action discharging the petitioner from the facility is an appropriate action based on the federal regulations found at 42 C.F.R. § 483.12. The nursing home is seeking to discharge the

petitioner because her "bill for services at the facility has not been paid after reasonable and appropriate notice to pay". The nursing home held the burden of proof at the level of clear and convincing.

### FINDINGS OF FACT

1. The petitioner (age 90) has been a resident at the respondent nursing facility since February 2009. Total monthly charges for the petitioner's stay in the facility are approximately \$6,700. The first 20 days of the petitioner's stay at the nursing facility was paid in full by Medicare Part A. For the next 80 days, Medicare paid 20% of the nursing facility charges. After the initial 100 days, the petitioner was considered private pay (responsible for all facility charges).
2. On May 14, 2009, the facility issued a Nursing Home Transfer and Discharge Notice effective June 16, 2009. The Notice shows the reason for transfer as "your bill for services at this facility has not been paid after reasonable and appropriate notice to pay".
3. As of the date of the hearing, the total balance due to the facility was \$28,099.68. The facility provided evidence which proves that bills were mailed monthly by regular mail to the petitioner's daughter. The petitioner's daughter admitted that she received the monthly billing statements. The facility asserted that in addition to mailing the monthly bills, other written communication was sent to the family; in addition, multiple phone calls were made to discuss payment options. The facility proposes discharging the petitioner to her daughter's home.
4. The petitioner's daughter did not dispute that monies are owed to the facility. She explained that upon advice of counsel, she did not make any payments to the

respondent facility because an application for Institutional Care Program (ICP) Medicaid was pending with the Department of Children and Families (DCF). The attorney advised her to wait until the Medicaid application was approved before making any private payments. The Medicaid application was subsequently denied; another application was filed (in June 2009), but remains in pending status (no determination of Medicaid eligibility has been completed) as of the date of the hearing. The petitioner's daughter explained that she has been using the petitioner's \$1448 monthly social security income to pay household expenses in the community (electricity, lot rent, etc.). She does not have the funds to pay the balance due.

5. The district ombudsman manager asserted that he and the petitioner's daughter met with the facility administrator (prior to the hearing); the parties agreed (verbally) that when the ICP Medicaid application is approved, the petitioner's daughter would "turn over" the petitioner's social security check to the facility and make arrangements to pay the past due balance. The facility stipulated that a verbal "upon Medicaid approval" agreement was reached, but chooses not to rescind the discharge notice because as of the day of the hearing, the petitioner was still private pay; the Medicaid application has not been approved.

#### **CONCLUSIONS OF LAW**

The jurisdiction to conduct this hearing is conveyed to the Department by Federal Regulations appearing at 42 C.F.R. § 431.200. Federal Regulations limit the reason for which a Medicaid or Medicare certified nursing facility may discharge a patient. In this case, the discharge notice indicates the petitioner is to be discharged from the respondent facility based on non-payment.

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

(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;

The legal authority cited above explains the reasons for which a Medicaid or Medicare certified nursing facility may discharge a resident.

Florida Statutes 400.0255, Resident transfer or discharge; requirements and procedures; hearings, states in part:

(15)(b) ...The burden of proof must be clear and convincing evidence...

The facility wishes to discharge the petitioner. The legal authority cited above makes it clear that the facility holds the burden of proof at the level of clear and convincing.

The fact that the petitioner owes a balance to the facility is not disputed. The fact that the facility did give reasonable and appropriate notice to pay for the stay at the facility is not disputed. The facility provided evidence which shows that the petitioner's balance is in excess of \$28,000. The petitioner's daughter asserted that she was advised, by counsel, not to make any payments until the petitioner's ICP Medicaid application has been approved; she has been using the petitioner's income to pay community expenses.

The above controlling authorities make it clear that after reasonable and appropriate notice, a facility may proceed with discharge actions. The findings show that there is no dispute about the facility issuing reasonable and appropriate notice to pay. Therefore, the undersigned concludes that the facility's proposed discharge action is within the federal guidelines and the action is affirmed.

**DECISION**

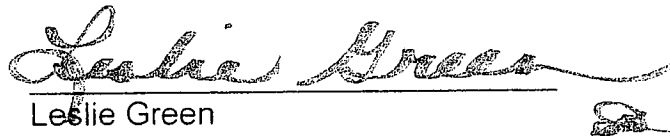
The appeal is denied. The respondent met its burden of proof to show the discharge reason meets the reasons stated in the Federal regulation. The facility may proceed with the discharge in accordance with applicable Agency for Health Care Administration requirements.

**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 17<sup>th</sup> day of August, 2009,

in Tallahassee, Florida.



Leslie Green  
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Copies Furnished To: f