

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

[REDACTED]

APPEAL NO. 10N-00199

PETITIONER,
Vs.
Administrator

FILED
Feb 17, 2011
OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN AND FAMILIES

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a nursing home discharge hearing on January 14, 2011, at 11:38 a.m., at the respondent nursing facility.

APPEARANCES

For the Petitioner: The petitioner represented herself and testified.

For the Respondent: [REDACTED] facility administrator, who also testified.

ISSUE

At issue is the correctness of the respondent's action of November 18, 2010 to discharge the petitioner from the facility based on an asserted inability to meet the petitioner's needs.

PRELIMINARY STATEMENT

By notice dated November 18, 2010, the respondent informed the petitioner that she would be discharged to another nursing facility because her needs could not be met

at the respondent facility. On November 19, 2010, the petitioner timely requested appeal of this discharge action. The respondent has the burden of proof.

Most witnesses appeared in person for the hearing. The petitioner's mother, [REDACTED], appeared in person as a witness for the petitioner. [REDACTED] a former social services employee with the facility, appeared as a witness for the petitioner by telephone. The facility director of nursing, [REDACTED] appeared in person as a witness for the facility.

FINDINGS OF FACT

1. The petitioner was admitted to the respondent facility on September 10, 2009. Her date of birth is March 6, 1982. She is 28 years old.
2. The petitioner's mother was a prior power of attorney for the petitioner. The petitioner now represents herself in her decisions.
3. The petitioner smokes and has not requested stop smoking assistance. On June 17, 2010, the petitioner's mother signed a Resident, Family and Visitor Smoking Safety Education and Acknowledgement document in the petitioner's behalf. The petitioner herself signed this document on October 21, 2010. The document advises of the facility policy that smoking be directly supervised by a staff member. The document advises that a staff member assigned to the smoking area will monitor the area and distribute cigarettes, matches and lighters in addition to conducting walking rounds to observe and intervene for safety issues. The document advises that residents, families or visitors should not provide assistance to other residents who wish to smoke. The petitioner demonstrates the ability to verbalize understanding of the smoking guidelines.

4. The petitioner receives treatment for a wound or skin condition. She uses a girichair to assist with ambulation. She is prescribed anti-anxiety medication and complains of pain. She has a foley catheter and colostomy. She is able to hold and maintain control of a cigarette safely when she smokes. However, she is not able to light or extinguish a cigarette safely.

5. On August 15, 2010, facility staff observed the petitioner smoking in the smoking area unsupervised. A visitor had lit the petitioner's cigarette as per the petitioner's request. The facility informed the petitioner that she was no longer permitted to sit on the smoking porch area unsupervised.

6. On November 8, 2010, the petitioner received a cigarette lighter from another resident in the reception area with the apparent intent to light a cigarette in her hand. The facility kept the petitioner's lighter. The petitioner then admitted that she had been smoking. The facility then advised petitioner that her continued non-compliance with the facility smoking policy could result in discharge from the facility.

7. On November 12, 2010, the petitioner was in the front of the nursing facility in her girichair unattended. The petitioner was smoking in this non-designated smoking area. The petitioner advised that a friend had brought her out of the facility and lit her cigarette. The facility advised the petitioner that she was breaking facility smoking policy.

8. The petitioner states that she smoked unsupervised because the facility did not accommodate her desire to smoke every day. The petitioner is not always able or willing to go outside and smoke with other persons during the supervised smoking times, per testimony.

9. On November 18, 2010, the petitioner was given written notice of discharge. The listed reason for discharge is the petitioner's needs cannot be met at the respondent facility. The respondent asserted on the discharge notice that the petitioner is non compliant with facility policy. The discharge notice listed a discharge location of [REDACTED], Florida. The discharge notice contained a signature of the resident's attending physician, [REDACTED].

10. The discharge location is a sister facility to the respondent facility. This discharge facility permits residents to smoke at any time. The petitioner remains at the respondent facility pending the outcome of this hearing decision. She does not desire to be discharged because she receives good care at the respondent facility and does not want to start again at a new facility.

CONCLUSIONS OF LAW

11. The jurisdiction to conduct this hearing is conveyed to the Department by Federal Regulations appearing at 42 C.F.R. §431.200.

12. Federal Regulations limit the reason for which a Medicaid or Medicare certified nursing facility may discharge a patient. In this case, the respondent believes the petitioner should be discharged because the facility asserts that it cannot meet the petitioner's needs. Federal Regulations do permit a discharge for this reason as per 42 C.F.R. §483.12(a)(2)(i), as follows, "The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility..."

13. The petitioner has a history of three documented incidences where she has clearly and willfully violated the respondent policy on smoking. This smoking policy is based on the need to maintain the petitioner's and other resident's safety, given the

resources of the respondent facility. The evidence demonstrates that the petitioner has a continued pattern of violating the facility smoking policy, and there is sufficient reason to believe that the petitioner will continue to violate this smoking policy.

14. Florida Statutes 400.0255 (7)(a) require the resident's physician or medical director to document why the petitioner's needs cannot be met, as follows:

(7) At least 30 days prior to any proposed transfer or discharge, a facility must provide advance notice of the proposed transfer or discharge to the resident and, if known, to a family member or the resident's legal guardian or representative, except, in the following circumstances, the facility shall give notice as soon as practicable before the transfer or discharge:

(a) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility, and the circumstances are documented in the resident's medical records by the resident's physician...

14. The notice of discharge is signed by the resident's physician [REDACTED] to show that the petitioner's needs cannot be met at the respondent facility. Since the petitioner has indicated a need or desire to smoke when facility staff is not present to supervise, it is concluded that the petitioner's needs cannot be met at the respondent facility. Therefore, the respondent facility has met its burden by clear and convincing evidence to show that the respondent is unable to meet the petitioner's needs. Based on the available evidence, the petitioner's need or desire to smoke at more frequent or varied times would be better served at the listed discharge location, [REDACTED] [REDACTED].

DECISION

The appeal is denied. The respondent facility is permitted to discharge the petitioner pursuant to this discharge action under appeal.

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 _____ day of _____, 2011,
in Tallahassee, Florida.

Jim Travis
Hearing Officer
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Copies Furnished To:

[REDACTED]