

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

[REDACTED]

APPEAL NO. 11N-00110

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]

FILED

JULY 27, 2011

OFFICE OF APPEAL HEARINGS
DEPARTMENT OF CHILDREN AND FAMILIES

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on June 17, 2011, at 1:27 p.m., at [REDACTED] Center, in [REDACTED] Florida.

APPEARANCES

For the Petitioner: [REDACTED] ombudsman

For the Respondent: [REDACTED], Esq.

ISSUE

The respondent will have the burden to prove by clear and convincing evidence that the petitioner's discharge in the notice dated April 6, 2011 is in accordance with the requirements of Code of Federal Regulation at 42 C.F.R. § 483.12(a)(2)(iii) "The safety of individuals in the facility is endangered".

PRELIMINARY STATEMENT

By notice dated April 6, 2011, the facility informed the petitioner that he was to be discharged. On April 7, 2011, the petitioner timely requested a hearing to challenge the discharge.

The petitioner, the petitioner's representative and the respondent's representative appeared in person. Witnesses for the petitioner appearing in person were [REDACTED] the petitioner's father, and [REDACTED], the petitioner's stepmother. Witnesses for respondent appearing in person were [REDACTED], D.O., medical director for the facility; [REDACTED], certified nursing assistant (CNA); [REDACTED] receptionist; [REDACTED], CNA; [REDACTED], physical therapist assistant; [REDACTED], CNA; [REDACTED], CNA, and [REDACTED], social services director. The administrator [REDACTED] was observing.

FINDINGS OF FACT

1. The petitioner has been a resident at [REDACTED] since April 2010. The petitioner is a [REDACTED]. He has a spinal cord injury. His medical diagnosis is quadriplegia, pain, neurogenic bladder, depressive disorder and anxiety. He cannot move his legs. He has limited movement of his arms with no fine motor skills. He was able to control his motorized wheelchair with his hand.

2. On February 10, 2011, the petitioner was angry as he could not go outside to smoke in the rain. He drove his motorized wheelchair in a fast and reckless manner down the hall to the administrator's office. He banged in to the administrator's desk with the motorized wheelchair, knocking items off the administrator's desk. Per reports, the petitioner was yelling and screaming. Leaving the administrator's office, the petitioner

passed the receptionist's desk. The petitioner placed his right arm on the desk and dragged the arm across the desk knocking all the items off of the receptionist's desk. He then drove out of the building almost hitting a visitor. The receptionist attested that she felt frightened and in danger. The facility called 911, as they felt the situation was getting out of control.

3. On February 10, 2011, the petitioner's medical director observed the petitioner's behavior and actions. The medical director ordered the petitioner for Baker Act. The medical director opined that the petitioner was physically aggressive and demonstrated aggressive behavior. The medical director is also the attending physician for residents at the facility.

4. The speed of the petitioner motorized wheelchair was reduced. On April 5, 2011 as result of the speed reduced, the petitioner approached the physical therapist assistant. The petitioner, using his motorized wheelchair, pinned the physical therapist assistant in his chair against at his desk in the gym area. The physical therapist had bruised ribs. The petitioner threatened the physical therapist assistant's job and threatened to have the physical therapist assistant beaten up. The physical therapist assistant was afraid due to the petitioner's aggressive behavior, threats and profanity.

5. The social services director went to the gym and witnessed the petitioner's aggressive behavior towards the physical therapist assistant. The social services director tried to defuse the situation. The petitioner threatened to hit her and almost hit her with his wheelchair. She was especially afraid as she was pregnant.

6. Based on a report to the medical director by staff and the social services director of the petitioner's aggressive behavior, the medical director order a Baker Act

for the petitioner on April 5, 2011. The hospital determined that the petitioner was not homicidal, suicidal or appropriate for Baker Act.

7. As the facility opined that the petitioner continued to operate his motorized wheelchair in a dangerous and aggressive manner, the facility removed the petitioner's motorized wheelchair. It was replaced with a manual wheelchair. The petitioner is unable to push the manual wheelchair and requires someone to put him in the manual wheelchair.

8. The medical director, the physical therapist assistant, social services director and other facility employees attempted to discuss with the petitioner his aggressive behavior and suggest alternatives of psychiatric consult, psychologist visits, anger management and medication change. The petitioner refused psychiatric consult and some prescribed medication.

9. On April 6, 2011, the facility issued a Nursing Home Transfer and Discharge Notice. The reason listing in the notice was the safety of other individuals in this facility is endangered.

10. On April 13, 2011, the medical director signed an order regarding the petitioner's discharge. He stated in the order that effective April 6, 2011 the facility was to issue a discharge/transfer notice due to the safety of individuals and resident in the facility. The medical director's opinion was that the petitioner's aggressive behavior posed a danger to others in the facility.

11. When asked by the petitioner's representative if the petitioner is a danger in a non-motorized wheelchair, the medical director responded no. However, the medical director asserted that the removal of the petitioner's motorized wheelchair did not

remove the petitioner's aggressive behavior of hitting and spitting. The social services director agreed that the petitioner does not present a danger in a non-motorized wheelchair; however, that does not remove the petitioner's aggressive behavior of spitting and hitting the staff.

12. The CNAs testified at the hearing that the petitioner swears at them, calls them names, spits at them, threatens them urine, and swings his arm at them in an attempt to hit them. There was one incident that when the petitioner spit at the CNA, the spit landed on the CNA's forehead and clothes. Another incident occurred where the petitioner's spit landed on a CNA's leg. The petitioner has hit CNAs. These incidents were reported in the petitioner's medical record and attested to at the hearing by the CNA and witnesses. The CNAs asserted that the petitioner's threats, name calling and swearing are emotionally and mentally abusive, and body fluids such as spit and urine are dangerous due to an infection control issue.

13. The petitioner asserted as follows. He is only aggressive when provoked, and every CNA has provoked him. He has had several urinary tract infections and is in pain. The rehabilitation at the facility is not working for him, as the facility does not have the right equipment. The facility reduced the speed on his motorized wheelchair and then removed his motorized wheelchair without his permission. He was angry on April 5, 2011 when he moved all the objects off the receptionist's desk. He did not hit any CNA. He just jerked his arm. He did spit on one of the CNAs, but not the others. He only threatened to spit on the other CNAs.

14. The petitioner's father asserted as follows. The facility does not document what the petitioner does well or the reason for the petitioner's outbursts. Months of medical record are missing.

15. The petitioner's stepmother asserted as follows. She visits four to five times a day and is at the facility three to seven hours a day. The staff does not provoke the petitioner when she is there. Most incidents are in the middle of the night.

CONCLUSIONS OF LAW

16. Federal Regulation limit the reason for which a Medicaid or Medicare certified nursing facility may discharge a patient. In this case, the petitioner was sent notice indicating that he would be discharged from the facility in accordance with of Code of Federal Regulation at 42 C.F.R. § 483.12(a)(2)(iii) "The safety of individuals in the facility is endangered".

17. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code § 65-2.056.

18. In accordance with Florida Administrative Code § 65-2.060(1) the burden of proof was assigned to the respondent.

19. The petitioner's position is as follows. The petitioner is not a danger to other in the facility. He is not a danger without his motorized wheelchair. The only ability the petitioner has is his voice. Verbal is not a danger. What the petitioner needs is a care plan to modify his behavior.

20. The hearing officer concludes that the petitioner is correct that as long as the petitioner does not have a motorized wheelchair, he does not present a danger to

others in the facility by driving the motorized wheelchair in a fast and reckless manner nor can he hit others in the facility with the wheelchair.

21. The respondent's position is as follows. The petitioner still is a danger without his motorized wheelchair. The petitioner is verbally, emotionally and physically abusive to the staff. The petitioner is a danger to others in the facility by spitting on the staff.

22. The facility opined that the petitioner is verbally abusive. According to U.S. Legal Definitions site, the definition of verbal abuse is: "Verbal abuse is the use of words to cause harm to the person being spoken to. It is difficult to define and may take many forms. Similarly, the harm caused is often difficult to measure. The most commonly understood form is name-calling. Verbal abuse may consist of shouting, insulting, intimidating, threatening, shaming, demeaning, or derogatory language, among other forms of communication."

23. It may be true that the petitioner's only ability is his voice and words alone may be insufficient to cause danger to others. Although words alone may be insufficient to cause danger to others, they carry weight when coupled with some action that indicates the ability to carry out the threat. In this case, the petitioner threatens to spit at the staff at the facility. The petitioner by his own testimony has spit at and the spit landed on one CNA. As the petitioner has the ability to carry out the threat, the threat is then an emotional danger to others in the facility. Spitting, especially in someone's face, is an infectious disease issue. Therefore, spitting is a physical danger to others in the facility.

24. Weight is given to the opinion of an attending physician as set forth in the Code of Federal Regulations at 20 C.F.R. § 404.1527(2)(d). The medical director's opinion was that the petitioner's aggressive behavior posed a danger to others in the facility. No other medical opinion by a physician was offered to the contrary.

25. The hearing officer concludes that the facility has met their burden of proof that the safety of other individuals in the facility is endangered. Therefore, the facility's discharge of the petitioner from the facility is within the regulations.

DECISION

This appeal is denied, as the facility's action to discharge the petitioner is in accordance with Federal Regulations. The facility may proceed with the discharge, as determined by the treating physician and 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 _____ day of _____, 2011,
in Tallahassee, Florida.

Linda Jo Nicholson
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Copies Furnished To: [REDACTED], Petitioner
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