

FILED

JUN 06 2014

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

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DEPT OF CHILDREN & FAMILIES

[REDACTED]

APPEAL NO. 14N-00011

PETITIONER,

vs.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing in the above-referenced matter convened on April 15, 2014, at approximately 2:00 p.m. in Lake City, Florida.

APPEARANCES

For Petitioner: Jennifer Englert, Esq.

For Respondent:

[REDACTED]

ISSUE

At issue is whether the action by Respondent's nursing home facility (NHF) to transfer/discharge the petitioner is an appropriate action based on the federal regulations found at 42 C.F.R. § 483.12. The nursing home seeks to transfer the petitioner because her "needs cannot be met in this facility."

PRELIMINARY STATEMENT

Via Nursing Home Transfer and Discharge Notice dated January 16, 2014, the Respondent notified the Petitioner that she was to be discharged from its NHF effective February 16, 2014, due to an asserted inability to meet her needs. On January 24, 2014, the Petitioner requested a hearing to challenge the Respondent's action.

[REDACTED], Administrator [REDACTED], represented the Respondent. Ms. Delrio presented two additional witnesses: [REDACTED] Director of Nursing, and [REDACTED], Quality of Life Director, both employed at Respondent's facility. The Petitioner was represented by Jennifer Englert, Esq., who presented one witness: [REDACTED] the Petitioner's stepson. [REDACTED] Health Facility Evaluator Supervisor with the Agency for Persons with Disabilities, observed the hearing but did not provide testimony. Persons appearing on behalf of Respondent were present with the hearing officer at the facility, while those appearing on behalf of Petitioner participated, and [REDACTED] observed, via teleconference. Respondent's Exhibits 1 through 11, inclusive, were accepted into evidence without objection.

FINDINGS OF FACT

1. The Petitioner has been a resident of Respondent's facility since September 15, 2012, although she was previously admitted December 17, 2011 following treatment at a psychiatric hospital. Prior to her admission in 2012, Petitioner was transferred to a NHF in Orlando at the request of her son.
2. Petitioner is a 75-year old female, born [REDACTED]. Her diagnoses include Parkinson's disease and dementia. She currently resides at Respondent's

NHF, where her husband is also a resident and shares her room. Petitioner's primary mode of ambulation is a wheelchair.

3. Respondent's facility is not classified as a "secure" facility. Some of its doors do lock, while others do not. The NHF is not specifically geared towards the needs of patients with dementia.

4. Beginning in October of 2013 and continuing through the date of hearing, Respondent observed a change in Petitioner's behavior, including the onset of multiple falls and exit-seeking. Petitioner's first attempt to leave the NHF occurred on or about October 4, 2013, at which point the facility contacted Petitioner's son. Respondent attempted to determine the cause of these behaviors, initially thinking the precipitator was infection or illness.

5. In November of 2013, Petitioner was found to have pneumonia and was discharged to the hospital for treatment. Petitioner had been taking Risperdol prior to entering the hospital, but this medication was discontinued while she was hospitalized. Upon return to the NHF, she was noted to be more active and to exhibit upper body tremors. On November 27, 2013, Petitioner attempted to exit through a facility door, but was redirected inside when an alarm sounded.

6. As Petitioner's behaviors continued, infection was ruled out as a cause. Petitioner's neurologist adjusted her medications in an attempt to avoid falls, as Petitioner sustained five falls in November, alone. Also in November of 2014, the NHF initiated Speech Therapy to assist with Petitioner's communication, judgment, cognitive, functional, safety awareness, and problem-solving skills. Respondent also developed a strategic plan to prevent exit-seeking, including checking Petitioner's whereabouts,

providing diversionary activities as tolerated, redirecting Petitioner when she ventured near exits, and notifying all NHF staff to be on guard due to Petitioner's tendency to exit seek.

7. On December 5, 2013, Petitioner was observed to be pushing on an exit door. On that same date, she fell in the corridor of the facility. Petitioner's Plan of Care was updated on December 18, 2013, to include notation that staff must monitor Petitioner for changes in behavior, approach her in a calm manner to redirect and cue, and order psychiatric consultation, as needed.

8. On December 19, 2013, Petitioner followed a group of holiday carolers out of the facility; she was recognized by someone visiting a different resident, and was redirected back inside. As a result of this incident, Respondent placed signs around the facility which feature a large "STOP" sign, and read:

Attention Vendors and Visitors!!! For the safety of our patients and residents please use caution when entering and leaving the building to ensure that only people in your party are exiting. Thank you for your attention to this matter.

9. Again, Petitioner was checked for precipitating illness, but her blood labs came back within normal limits. On December 24th, Petitioner again tried to follow another family out of the NHF. On December 25th, she was redirected from the exit doors and was later found attempting to leave, but was again redirected. On December 26, 2013, Petitioner was observed to stand up from her wheelchair and push on an exit door. Also in December, Petitioner was discharged from Speech Therapy with recommendations that staff facilitate communication via direct instruction, continued social activities, and visual cues to decrease wandering.

10. Petitioner attempted to exit through the main lobby doors on January 3, 2014, and on January 13th, she was found by the exit doors twice, although she did not attempt to exit on that date.

9. On January 16, 2014, Respondent issued to Petitioner a discharge Notice, which states, in pertinent part:

Reason for Discharge or Transfer:

Your needs cannot be met in this facility. Brief explanation to support this action: Patient is exit seeking and needs a secured unit.

Said Notice was signed by [REDACTED], and attached to the Notice was a Physician's Form Order from [REDACTED] M.D., Petitioner's primary care physician/attending, which notes "Resident to be discharged to a more secure environment."

10. On January 24, 2014, Petitioner requested a hearing to challenge the proposed transfer.

11. On January 28, 2014, [REDACTED], Petitioner's Psychiatrist, issued a prescription for secured unit, noting, "Due to severe elopement risk need to be in secured clinical [unintelligible]."

12. On February 7, 2014, Petitioner attempted to leave through an exit door. On February 11th, the surveillance camera caught Petitioner wandering, and on February 14 and 15, 2014, she was noted to be walking the halls and trying to open exit doors.

On February 15, 2014, Dr. [REDACTED] authored a clinical note which reads:

Patient remains a significant management problem and she continues to be an elopement risk. The staff at the nursing home has been unable to handle her and she's been given a 30 day notice. This would create a crisis as her husband is still in this facility and definitely would not want them separated. Thus, as the

desperate last measure will try her on risperdal to see if it will control her behavior and agitation. Will discontinue Ativan.

13. On February 17, 2014, Respondent updated Petitioner's Activity Care Plan to include additional suggestions for activities, such as a monthly activity calendar, group programs, and an "activity box," for individual diversion. Petitioner was observed repeatedly approaching exit doors from February 17 through 19, wandering into other units within the facility on February 21, and again approaching exit doors on February 26, 2014.

14. On March 15, 2014, Petitioner opened an emergency exit door. While she was being redirected, she stood up and attempted to walk out, but was successfully redirected back into the building.

15. There was considerable discussion at hearing regarding who Respondent contacted with regard to Petitioner's health care decisions and whether the NHF could have done more to address her exit-seeking behaviors before issuing a discharge notice. Previously, Petitioner's stepson indicated that he did not wish to receive frequent calls from the facility, preferring to be contacted only when a serious health issue was present. At times, the stepson has deferred decision-making to Petitioner's husband, or yielded to his preference with regard to such requests as staff not entering the Petitioner's room at night.

16. Petitioner's stepson referenced a meeting with NHF staff in late March, during which he and his sister asked Respondent to install bed alarms and wheelchair alarms & locks. The stepson characterized this request as related to exit-seeking, however, conference notes reflect:

Writer explained that resident continues to wander and exit seeks through out the day, explaining what had occurred just this week. Son stated he did not want to discuss this at this time. Writer explained that was fine but I just needed him to be aware of the latest incident. Daughter and son asked if alarms were on residents chair and/or bed, risk manager did explain that they were not ordered at this time due to in the past they only made it worst [*sic*] due to them agitating her. Son would like for center to try them again at this time... Son also states in the past he has always allowed his dad to make decisions for [Petitioner] regarding outings and healthcare, but is now revoking that and states he would like to be notified to make the final decision of all her care needs. Center expressed to son and daughter that we would ensure this and understand his concern. Advance Directives were reviewed and are in place. Resident has current DNR order signed by son who is the health care surrogate.

17. Since implementing bed and wheelchair alarms, Petitioner was noted to be wandering into other resident's rooms on March 29, 2014, and on April 1st, she stood up out of her wheelchair and pushed on an exit door, but was directed away from same. On April 5, 2014, Petitioner complained to staff that she wanted to go outside, but the doors were locked.

18. It is Respondent's position that Petitioner's diagnoses correlate to her wandering behaviors, and that its in her best interest that she not be physically restrained in place, as this has caused increased agitation and exit-seeking, in the past. Additionally, the NHF is concerned with using restraints or medication to deter exit-seeking, when a secure facility would permit Petitioner the freedom to roam without the risk of elopement.

19. Respondent recognizes the need to keep Petitioner and her husband together, and has made many attempts to facilitate arrangements with a secure facility that can house both residents. Petitioner's stepson has continually declined Respondent's offers to assist in this matter. Although Respondent successfully located at least one secured

facility that was willing to admit both Petitioner and her husband, the stepson declined this transfer, noting that in visiting the facility, he was concerned about his father's ability to navigate to the dining hall.

20. On March 9, 2014, Dr. [REDACTED] noted:

Patient remains cognitively impaired and very difficult to redirect.... I had made arrangements for her to go in a dementia unit where her husband could also be in the same nursing home, but I've been told that apparently the son has not accepted this offer which is invariably result into them getting split which will be bad for both of them.

CONCLUSIONS OF LAW

21. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to s. 400.0255(15), Fla. Stat. In accordance with that section, this order is the final administrative decision of the Department of Children and Families.

22. The burden of proof is clear and convincing evidence and is assigned to the Respondent.

23. Federal Regulations appearing at 42 C.F.R. § 483.12, set forth the reasons a facility may involuntary discharge a resident as follows:

Admission, transfer and discharge rights.

(a)(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.

24. Petitioner has made numerous attempts to exit the NHF, and while she has only successfully opened an exit door on two occasions and successfully exited the building on one, she continues to be a severe elopement risk. It is counterintuitive to wait until Petitioner succeeds in exiting the building a second time, as this puts Petitioner at significant risk of harm.

25. The evidence demonstrates that Respondent has implemented measures to address Petitioner's exit-seeking from a multidisciplinary approach, including medication changes, medical testing, diversionary tactics, staff awareness and monitoring, posted warnings, and Speech Therapy. More recently, Respondent has added wheelchair and bed alarms to prevent falls, but these devices have not precluded Petitioner's attempts to wander. Following installation of the alarms, Petitioner was found standing out of her wheelchair and pushing on an exit door, and, on another occasion, wandering into another resident's room.

26. Respondent has attempted to honor the wish of Petitioner and her family that Petitioner and her husband remain together. Transfer following discharge is primarily an issue for discharge planning, and is thus outside the jurisdictional bounds of this hearing. However, because Petitioner's physician noted that separating her from her husband would cause crisis, Respondent is encouraged to use care when locating an appropriate secure facility.

27. The totality of the evidence demonstrates that Petitioner's needs cannot be met at her current NHF. Respondent has met its clear and convincing burden by proving that the proposed discharge complies with Federal Regulations.

28. Establishing that the reason for a discharge is lawful is just one step in the discharge process. The nursing home must also provide discharge planning, which includes identifying an appropriate transfer or discharge location and sufficiently preparing the affected resident for a safe and orderly transfer or discharge from the facility. As noted, the hearing officer in this case cannot consider either of these issues. The hearing officer has considered only whether the discharge is for a lawful reason.

29. Any discharge by the nursing facility must comply with all applicable federal regulations, Florida Statutes, and Agency for Health Care Administration requirements. Should the resident have concerns about the appropriateness of the discharge location or the discharge planning process, the resident may contact the Agency for Health Care Administration's health care facility complaint line at (888) 419-3456.

DECISION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Petitioner's appeal is DENIED. The facility has established that discharge is permissible under federal regulations, and may proceed with the discharge, in accordance with all applicable federal regulations, Florida Statutes, and 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 6th day of June, 2013,

in Tallahassee, Florida.

Patricia C. Antonucci
Patricia C. Antonucci
Hearing Officer

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