

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:

Appeal Decision:	Approved	Appeal Number:	1117214
Decision Date:	4/23/12	Hearing Date:	12/02/2011
Hearing Officer:	Kenneth Brodzinski	Record Open to:	01/10/2012

Appellant Representative:

Nursing Facility Representative:



*The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171*

APPEAL DECISION

Appeal Decision:	Approved	Issue:	Skilled Nursing Facility Intent to Discharge
Decision Date:	4/23/12	Hearing Date:	12/02/2011
Nursing Facility Rep.:		Appellant Rep.:	Son/POA
Hearing Location:	Taunton MassHealth Enrollment Center		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a 30-Day Notice of Intent to Discharge Appellant dated September 29, 2011, the skilled nursing facility, Victoria Haven Nursing Facility, ("the nursing facility") informed Appellant of the facility's intent to discharge to her son's home for failing to pay after reasonable and appropriate notice (130 CMR 610.028; 130 CMR 456.701; and Exhibit A). An appeal was timely filed on October 13, 2011 (130 CMR 610.015(B); 130 CMR 456.703; and Exhibit A). Challenging a notice of intent to discharge from a skilled nursing facility constitutes valid grounds for appeal (130 CMR 610.032(C)).

Action Taken by the Nursing Facility

The nursing facility notified Appellant that it sought to discharge her due to failure to pay.

Issue

The appeal issue is whether or not the nursing facility can discharge Appellant under the notice of September 29, 2011 pursuant to the governing state and federal regulations including, but not limited to 130 CMR 610.028 and 130 CMR 456.701.

Summary of Evidence

The skilled nursing facility was represented by its owner, the administrator and a social worker. The nursing facility representatives testified that Appellant was admitted to the facility directly from the hospital on February 1, 2011. Appellant was admitted with a diagnosis of Alzheimer's disease, dementia and behavioral disturbances.

The nursing representatives testified that facility has not been paid since Appellant's first day of admission. As of the day before the hearing, Appellant owed the facility \$102,275.00 at the private-pay rate

The nursing facility representatives testified that Appellant lived with her son prior to her admission and that they have been apprising the son of the need to pay the outstanding charges and to work with MassHealth to facilitate an application for long term care benefits that Appellant filed while still in the hospital. The nursing facility representatives testified that while they had not been sending Appellant's son formal notices of the accruing bill, they had been in constant contact with him and repeatedly told him about the need to facilitate the MassHealth application. According to the nursing facility representatives they also informed the son that there would be a Patient Paid Amount (PPA) also due to the facility that would be incurred each month even if MassHealth benefits were approved back to February 2011.

The nursing facility provided documentation showing that Appellant's son was not appropriately facilitating the MassHealth the application which was denied on May 24th 2011 for failing to provide requested verifications regarding bank statements and life insurance policies. The denial was successfully appealed, however, and the application date was preserved. The application was denied a second time on August 16, 2011 again for failing to provide verifications. Verifications were eventually filed and MassHealth issued a notice of November 8, 2011 denying the application due to excess assets of \$712.00. The November 8, 2011 denial notice from MassHealth notified Appellant that she had until December 8, 2011 (six days after the date of this hearing) to verify that the excess assets have been spent down (see, MassHealth notices, Exhibit B, Tab 5).

The nursing facility representatives complained that the application process dragged on for a year and they have still not been paid any sums by the date of hearing. The skilled the nursing facility representatives testified that Appellant's son was often unavailable during the application process. At times the son was reported to be out of the country and at other times his telephone number was not active.

Appellant was represented by her son who testified that there is no ability to pay the nursing facility other than MassHealth. Upon questing by the hearing officer, the son could not explain with specificity what was being done with Appellant's income while she has been in the nursing facility. He acknowledged that as of the date of hearing, he

had not directed that Appellant's income be sent directly to the facility to cover the PPA.

The son also testified that he was always under the impression that his mother was covered by MassHealth since being admitted. The son testified about a time when he wanted to take his mother out of the facility for trip. He was told that if she was outside of the facility for more than 14 days she could lose her bed. The son testified that he interpreted this to mean that she had some form of coverage that was paying for the facility.

Upon questioning by the hearing officer, the nursing facility representatives acknowledge that, as indicated in the 30 day intent to discharge notice, the facility intends to discharge Appellant to her former home in Brockton Massachusetts to live with her son. The nursing facility representatives testified that they have been in contact with Old Colony Elder Services and anticipates that Appellant could file for the Frail Elder Program Services and receive MassHealth community benefits and that the facility intends to pursue this for Appellant if this discharge is allowed to proceed. The nursing facility submitted documentation including social service notes and correspondence with Appellant's son (Exhibits B and C).

Upon questioning, the son indicated that he would be unable to care for Appellant in his own home, however, he also testified that he did not believe that Appellant suffered from dementia or Alzheimer's disease. The son also stated he understood Appellant could get MassHealth coverage if she were to reside in the community. He also discussed the possibility that once Appellant was approved for MassHealth Long Term Care Benefits, she could be transferred to another skilled nursing facility instead of returning to the community.

At no time during the hearing or during a subsequent record-open period did Appellant's son indicate that there would be any effort to pay the outstanding accrued patient paid amounts.

The hearing officer advised the son to proceed with the existing application and verify the asset spend down in order to allow Appellant to obtain the maximum amount of MassHealth Long Term Care coverage. The parties were also encouraged by the hearing officer to enter into discussions regarding a mutually acceptable plan for paying off the accrued patient paid amounts.

The record was held open to allow the son time to verify that the assets had been spent down and that MassHealth coverage had been approved for Appellant. During the record-open period, Appellant's son did verify that the assets were spent down by providing a copy of a notice dated December 15, 2011 from MassHealth indicating that Appellant would receive MassHealth Long Term Care benefits as of February 1, 2011 (there was a notation in the records indicating that Appellant's first seven days in the nursing facility would be covered by Tufts health plan). The MassHealth approval

notice also indicated that Appellant would owe the facility a Patient Paid Amount of \$1,623.11 per month as of February 2011 (Exhibit E).

The record was also left open for the skilled nursing facility to advise whether or not any agreement regarding the outstanding PPA had been reached. On January 9, 2012 the nursing facility administrator filed a one-page letter indicating that the facility had been unable to implement an acceptable plan with Appellant's son to repay the PPA arrearage purported by the facility to amount to \$29,492.32 as of the date of the letter (Exhibit F).

Findings of Fact

Based on a preponderance of the evidence, I find the following:

1. Appellant was admitted to the skilled nursing facility directly from the hospital on February 1, 2011.
2. Appellant was admitted with a diagnosis of Alzheimer's disease, dementia and behavioral disturbances.
3. As of the date of hearing, the facility had not been paid since Appellant's first day of admission and owed the facility \$102,275.00 at the private-pay rate
4. Appellant lived with her son prior to her admission.
5. The facility informed Appellant's son of the need to pay the outstanding charges and to work with MassHealth to facilitate an application for long term care benefits that Appellant filed while still in the hospital.
6. The facility also informed the son that there would be a Patient Paid Amount (PPA) also due to the facility that would be incurred each month even if MassHealth benefits were approved back to February 2011.
7. The MassHealth application was denied on May 24th 2011 for failing to provide requested verifications regarding bank statements and life insurance policies.
8. The denial was successfully appealed and the application date was preserved.
9. The application was denied a second time on August 16, 2011 again for failing to provide verifications.
10. Verifications were eventually filed and MassHealth issued a notice on November 8, 2011 denying the application due to excess assets of \$712.00.

11. The November 8, 2011 denial notice from MassHealth notified Appellant that she had until December 8, 2011 (six days after the date of this hearing) to verify that the excess assets have been spent down.
12. As of the date of hearing, Appellant's son had not directed that Appellant's income be sent directly to the facility to cover the PPA.
13. As indicated in the 30 day intent to discharge notice, the facility intends to discharge Appellant to her former home in Brockton Massachusetts to live with her son.
14. During the post-hearing record-open period, Appellant's son verified that the excess assets were spent down by providing a copy of a notice dated December 15, 2011 from MassHealth indicating that Appellant would receive MassHealth Long Term Care benefits as of February 1, 2011.
15. Appellant's first seven days in the nursing facility were covered by Tufts Health Plan.
16. The MassHealth approval notice also indicated that Appellant would owe the facility a Patient Paid Amount of \$1,623.11 per month as of February 2011 (Exhibit E).
17. On January 9, 2012 the nursing facility administrator filed a one-page letter indicating that the facility had been unable to implement an acceptable plan with Appellant's son to repay the PPA arrearage.
18. As of the date of hearing, Appellant's PPA arrearage amounted to \$17,854.21 (PPA of \$1,623.11 for the 11 months on and between February and December 2011.)

Analysis and Conclusions of Law

The issue on appeal is limited to whether the nursing facility is acting in compliance with federal and state law governing the discharge of nursing facility residents in its attempt to discharge Appellant.

Massachusetts's regulations at 130 CMR 610.028, which embody federal regulations at 42 CFR Ch. IV §483.12, require the following:

Notice Requirements Regarding Actions Initiated by a Nursing Facility

(A) A resident may be transferred or discharged from a nursing facility only when:

(1) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the nursing facility;

(2) the transfer or discharge is appropriate because the resident's health has improved sufficiently so that the resident no longer needs the services provided by the nursing facility;

(3) the safety of individuals in the nursing facility is endangered;

(4) the health of individuals in the nursing facility would otherwise be endangered;

(5) the resident has failed, after reasonable and appropriate notice, to pay for (or failed to have the Division or Medicare pay for) a stay at the nursing facility; or

(6) the nursing facility ceases to operate.

(B) When the facility transfers or discharges a resident under any of the circumstances specified in 130 CMR 610.028(A)(1) through (5), the resident's clinical record must be documented. The documentation must be made by:

(1) the resident's physician when a transfer or discharge is necessary under 130 CMR 610.028(A)(1) or (2); and

(2) a physician when the transfer or discharge is necessary under 130 CMR 610.028(A)(4).

(C) Before a nursing facility discharges or transfers any resident, the nursing facility must hand- deliver to the resident and mail to a designated family member or legal representative a notice written in 12-point or larger type that contains, in a language the member understands, the following:

(1) the action to be taken by the nursing facility;

(2) the specific reason or reasons for the discharge or transfer;

(3) the effective date of the discharge or transfer;

(4) the location to which the resident is to be discharged or transferred;

5) a statement informing the resident of his or her right to request a hearing before the Division including:

(a) the address to send a request for a hearing;

*(b) the time frame for requesting a hearing as provided for under 130 CMR 610.029;
and*

(c) the effect of requesting a hearing as provided for under 130 CMR 610.030;

(6) the name, address, and telephone number of the local long-term-care ombudsman office;

(7) for nursing facility residents with developmental disabilities, the 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 (42 U.S.C. § 6041 et seq.);

(8) 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 (42 U.S.C. § 10801 et seq.);

(9) a statement that all residents may seek legal assistance and that free legal assistance may be available through their local legal services office. The notice should contain the address of the nearest legal services office; and

(10) the name of a person at the nursing facility who can answer any questions the resident has about the notice and who will be available to assist the resident in filing an appeal.

(D) As provided in 130 CMR 456.429, a nursing facility's failure to readmit a resident following a medical leave of absence will be deemed a transfer or discharge (depending on the resident's circumstances). Upon determining that it will not readmit the resident, the nursing facility must issue notice to the resident and an immediate family member or legal representative in accordance with 130 CMR 456.701(A) through (C), 456.702, and 610.028 through 610.030.

The nursing facility has set forth proper and adequate grounds to discharge Appellant in that it has demonstrated that Appellant does owe for services rendered to her and that the facility has notified her son/POA of the amount owed (130 CMR 600.028(A)(5)). While MassHealth now covers Appellant's long term care costs as of February 8, 2011, the accumulated PPA's remain outstanding. By the record close date, neither Appellant nor her son have expressed a credible intention to pay the arrearage.

I have also reviewed the notice of September 29, 2011 and find it meets the notice requirements set forth at 130 CMR 610.028.

In addition to the MassHealth-related regulations discussed above, the nursing facility has an obligation to comply with all other applicable state laws, including M.G.L. c.111, §70E, which went into effect in November of 2008. The key paragraph of that statute, which is directly relevant to these types of appeals, reads as follows:

A resident, who requests a hearing pursuant to section 48 of chapter 118E, shall not be discharged or transferred from a nursing facility licensed under section 71 of this chapter,

unless a referee determines that the nursing facility has provided sufficient preparation and orientation to the resident to ensure safe and orderly transfer or discharge from the facility to another safe and appropriate place.

Notwithstanding the above, I find the nursing facility has failed to meet the requirements of the above cited statute. I find that the notice is deficient in that it indicates the intention to discharge Appellant to her former home to live with her son. Appellant was admitted to the nursing facility with a diagnosis of Alzheimer's disease and was clinically determined to require skilled nursing services. Alzheimer's is a progressively debilitating disease. I have no reasonable basis to conclude that Appellant's care needs can presently be met in the community residing in her former home with her son. The facility has been needlessly frustrated by the son's lack of diligence in tending to his mother's needs during the MassHealth application process. Given the son's sporadic effort to date, I have little reason to believe that removing Appellant from a skilled care setting and placing her with her son in the community would be appropriate and safe for Appellant. I find the only safe and appropriate setting for Appellant would be another skilled nursing facility capable of meeting the needs of a resident with Alzheimer's disease. Accordingly, the subject 30-Day Notice of Intent to Discharge fails to indicate a safe and appropriate discharge location.

For the foregoing reasons, the appeal is APPROVED.

Order for Nursing Facility

You may not proceed to discharge Appellant under the notice of September 29, 2011.

This order does not prevent the facility from issuing a new intent to discharge notice if the underlying debt remains unpaid. Any such notice should identify an appropriate and safe discharge destination such as another skilled nursing facility capable of meeting Appellant's care needs.

Implementation of this Decision

If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings at the address on the first page of this decision.

Kenneth Brodzinski
Hearing Officer
Board of Hearings

CC: