

**Office of Medicaid
BOARD OF HEARINGS**

Appellant Name and Address:

Appeal Decision:	Approved	Appeal Number:	1816922
Decision Date:	9/11/18	Hearing Date:	08/27/2018
Hearing Officer:	Paul C. Moore		

Appellant Representatives:

Nursing Facility Representative:
Scott Nickerson, administrator



*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:	Nursing Facility Discharge
Decision Date:	9/11/18	Hearing Date:	08/27/2018
Nursing Facility Rep.:		Appellant Reps.:	
Hearing Location:	Taunton MassHealth Enrollment Center		

Authority

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

Jurisdiction

Through a 30-Day Notice of Intent to Transfer Resident (“discharge notice”) dated July 18, 2018, Hallmark Care and Rehabilitation Center (“Hallmark” or “the facility”) notified the appellant that it sought to discharge him because his health has improved sufficiently that he no longer needs the services provided by the facility, and because the safety of the individuals in the facility is endangered (130 Code of Massachusetts Regulations (CMR) 610.028; Ex. 1). The appellant filed a timely appeal with the Board of Hearings (BOH) on August 15, 2018 (130 CMR 610.015(B); 130 CMR 456.703; Ex. 2). Challenging a notice of transfer or discharge initiated by a nursing facility is a valid ground for appeal to the BOH (130 CMR 610.032(C)).

Action Taken by Nursing Facility

The facility notified the appellant that it sought to discharge him because his health has improved sufficiently that he no longer needs the service provided by the facility, and because the safety of the individuals in the facility is endangered.

Issues

The appeal issues are whether: (1) the appellant's discharge is appropriate because he no longer needs the services provided by Hallmark; (2) the appellant's discharge is appropriate because he presents a danger to the safety of the individuals at Hallmark; (3) the discharge notice meets the regulatory requirements set forth in the Fair Hearing Rules at 130 CMR 610.028; and (4) the facility has provided sufficient preparation and orientation to the appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place.

Summary of Evidence

A. Testimony and documentary evidence

At hearing, the facility submitted a packet of clinical records concerning the appellant, including physician progress notes, nurses notes, social services progress notes, and a minimum data set (MDS) (Ex. 4). The facility administrator testified that the appellant, who is 58 years old, received the discharge notice at issue because the appellant has been non-compliant with the facility smoking policy, and because he had purchased and used alcohol at the facility on a number of occasions, against medical advice, and had shared the alcohol with other residents.¹ The administrator noted that the appellant was originally admitted to the facility in February, 2018 for short-term rehabilitation following a rib fracture. The administrator testified that the appellant also no longer needs skilled nursing care. Thus, according to the administrator, the grounds for the appellant's discharge as set forth in the discharge notice are twofold: (1) he no longer needs the services provided by the facility; and (2) his presence at the facility presents a danger to the safety of other residents at the facility (Testimony, Ex. 1).

In handwritten comments on the discharge notice, the following notation appears: "On multiple occasions, you have endangered yourself and other residents by bringing in and using alcohol despite multiple warnings" (Ex. 1).

The administrator testified that the appellant's medical diagnoses include anemia, a compression fracture of the lumbar vertebrae, a history of alcohol abuse, a history of falls, osteoporosis, major depressive disorder, type 2 diabetes, and alcohol-induced pancreatitis. The administrator added that MassHealth has been paying for the appellant's stay at the nursing facility (Testimony, Ex. 4).

The administrator stated that on at least one occasion, the appellant was caught drinking alcohol on the grounds outside the facility. On another occasion, facility staff located alcohol in the appellant's

¹ Although denominated "a notice of intent to transfer resident," the notice at issue (Ex. 1) is actually a notice of intent to discharge the resident. A "transfer" is defined at 130 CMR 456.702 as movement of a resident from a Medicaid- or Medicare-certified bed to a non-certified bed, or from a Medicaid-certified bed to a Medicare-certified bed. On the other hand, a "discharge" is defined at 130 CMR 456.702 as the removal from a nursing facility to a noninstitutional setting of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual. It is the latter that is contemplated in this matter.

room. The administrator noted that because the appellant had used alcohol at the facility, his physician held his oxycodone medication due to potential negative outcomes (Testimony).

Further, according to the administrator, the facility's smoking policy requires that resident smoking materials be held by the nurses at the nurses station, and that all resident smoking must be supervised by staff at designated times. The administrator noted that the appellant has been seen smoking unsupervised in the parking lot, as well as in a sitting area near the facility's main entrance, where smoking is not permitted (Testimony).

The administrator noted that the appellant has been re-educated repeatedly about not smoking unsupervised and not drinking alcohol at the facility, both by the facility's social worker and by nursing staff (Testimony).

The administrator testified that he believes that the appellant has been granted a Section 8 housing voucher. He added that he does not believe the appellant has been diligent in his efforts to locate housing outside the facility (Testimony).

The administrator testified that the appellant is independent with his activities of daily living (ADLs), including dressing, bathing, toileting, and mobility (Testimony).

The appellant testified telephonically, with the assistance of an independent living specialist. He acknowledged that he had used alcohol at the facility about three times, but denied sharing the alcohol with other residents. He indicated he smokes on the sidewalk in front of the facility, not near the building entrance. He also testified that he has been searching for an apartment in the community, and that he has a Section 8 voucher. He was scheduled to look an apartment on the day following the hearing (Testimony).

An independent living specialist with the Southeast Center for Independent Living also testified telephonically. She has been working with the appellant to get him a Section 8 apartment. She believes that the appellant has been working diligently to find housing, and that he will have a new apartment within a short period of time (Testimony).

The appellant agreed that his rib fracture has healed, and agreed that he is now independent with his ADLs (Testimony).

B. Content of the discharge notice/medical record

The discharge notice states, among other things, "the purpose of this letter is to inform you that [the facility] seeks to transfer you to [location of your choosing or homeless shelter] on 8/17/18" (Ex. 1).

The discharge notice at issue in this appeal contains: a specific statement of the reasons for the intended discharge, the right of the appellant to request a fair hearing on the intended discharge, the address of the Board of Hearings, the effective date of the intended discharge, the name of the person at the facility who can answer any questions about the notice and about the right to file an

appeal, the time frame for requesting a hearing, the effect of requesting a hearing on the discharge notice (*to wit*, that the appellant may not be discharged from the facility until 30 days after the appeal decision is rendered), the name and address of the local legal-services office, the name and address of the local long-term care ombudsman office, the name and mailing address of the agency responsible for the protection and advocacy of mentally ill individuals, and the name and mailing address of the agency responsible for the protection and advocacy of developmentally disabled individuals (Ex. 1).

The appellant's clinical record does not contain documentation by his physician explaining that because his health has improved sufficiently, he no longer needs the services provided by the facility, nor does the clinical record contain documentation by a physician explaining that the appellant's continued presence at the facility presents a danger to the safety of other residents (Ex. 4).

Findings of Fact

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

1. The appellant, who is 58 years old, was admitted to the facility in February, 2018 for short-term rehabilitation following a rib fracture (Testimony, Ex. 4).
2. The appellant has medical diagnoses of anemia, a compression fracture of the lumbar vertebrae, a history of alcohol abuse, a history of falls, osteoporosis, major depressive disorder, type 2 diabetes, and alcohol-induced pancreatitis (*Id.*).
3. Through a 30-day discharge notice dated July 18, 2018, the facility notified the appellant that it sought to discharge him because his health has improved sufficiently that he no longer needs the services provided by the facility, and because the safety of the individuals in the facility is endangered (Testimony, Ex. 1).
4. The appellant filed a timely appeal of the discharge notice with BOH on August 15, 2018 (Ex. 2).
5. The discharge notice states, "the purpose of this letter is to inform you that [the facility] seeks to transfer you to [location of your choosing or homeless shelter] on 8/17/18" (Ex. 1).
6. On at least one occasion, the appellant was caught drinking alcohol on the grounds outside the facility. On another occasion, facility staff located alcohol in the appellant's room (Testimony, Ex. 4).
7. Because the appellant had used alcohol at the facility, his physician held his oxycodone medication due to potential negative outcomes (Testimony, Ex. 4).
8. The facility's smoking policy requires that resident smoking materials be held by the nurses at

the nurses station, and that all resident smoking must be supervised by staff at designated times (Testimony).

9. The appellant has smoked cigarettes at the facility on numerous occasions without supervision, and in areas where smoking is not permitted (Testimony, Ex. 4).
10. The appellant has been re-educated repeatedly about not smoking unsupervised and not drinking alcohol at the facility, both by the facility's social worker and by nursing staff (Testimony, Ex. 4).
11. The appellant's rib fracture has healed (Testimony).
12. The appellant is now independent with his ADLs (Testimony).
13. The appellant has been issued a Section 8 voucher, but as of the hearing date, had not yet located Section 8 housing (Testimony).
14. The discharge notice at issue in this appeal contains: a specific statement of the reasons for the intended discharge, the right of the appellant to request a fair hearing on the intended discharge, the address of the Board of Hearings, the effective date of the intended discharge, the name of the person at the facility who can answer any questions about the notice and about the right to file an appeal, the time frame for requesting a hearing, the effect of requesting a hearing on the discharge notice (*to wit*, that the appellant may not be discharged from the facility until 30 days after the appeal decision is rendered), the name and address of the local legal-services office, the name and address of the local long-term care ombudsman office, the name and mailing address of the agency responsible for the protection and advocacy of mentally ill individuals, and the name and mailing address of the agency responsible for the protection and advocacy of developmentally disabled individuals (Ex. 1).
15. The appellant's clinical record does not contain documentation by his physician explaining that because his health has improved sufficiently, he no longer needs the services provided by the facility, nor does the clinical record contain documentation by a physician explaining that his continued presence in the facility presents a danger to the safety of the other residents (Ex. 4).

Analysis and Conclusions of Law

The federal Nursing Home Reform Act (NHRA) of 1987 guarantees all residents the right to advance notice of, and the right to appeal, any transfer or discharge initiated by a nursing facility. MassHealth has enacted regulations that follow and implement the federal requirements concerning a resident's right to appeal a transfer or discharge, and the relevant MassHealth regulations may be found in both (1) the Nursing Facility Manual regulations at 130 CMR 456.000 *et seq.*, and (2) the Fair Hearing Rules at 130 CMR 610.000 *et seq.*

The Nursing Facility Manual regulations at 130 CMR 456.701 provide in relevant part:

Notice Requirements for Transfers and Discharges 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 456.701(A)(1) through (5), the resident's clinical record must contain documentation to explain the transfer or discharge.

The documentation must be made by:

(1) the resident's physician when a transfer or discharge is necessary under 130 CMR 456.701(A)(1) or (2); and

(2) a physician when the transfer or discharge is necessary under 130 CMR 456.701(A)(3) or(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's Board of Hearings 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 456.702; and

(c) the effect of requesting a hearing as provided for under 130 CMR 456.704;

(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.

(Emphasis added)

Here, the facility issued a discharge notice to the appellant that states two grounds for discharge: (1) he no longer needs the services provided by the facility; and (2) his presence at the facility presents a danger to the safety of other residents at the facility. I conclude that the evidence supports these conclusions. The appellant has completed his rehabilitation and he no longer needs assistance with his ADLs. He does not need to reside at the facility. Also, the appellant's refusal to comply with the facility's rules regarding supervised smoking, and refraining from the use of alcohol, does indeed present a danger to the safety of other residents at the facility. Thus, there are valid legal grounds for the facility to discharge the appellant.

A requirement of the Nursing Facility regulations, above, is that prior to discharging a resident, a facility must issue a notice to the appellant that complies in all respects with the requirements at 130 CMR 456.701(C), including the location to which the resident is to be discharged. The discharge location contained in the notice at issue – "location of your choosing or homeless shelter" – is not specific, and thus does not satisfy this requirement.

Similarly, a requirement set forth at 130 CMR 456.701(B), above, is that before a resident may be discharged, a physician must document the reasons for the intended discharge in the resident's clinical record. The clinical record in evidence does not contain a progress note written by the appellant's physician to document that he is to be discharged because he no longer needs the services of the facility. In the same vein, the clinical record does not contain a progress note by a physician documenting that the appellant's continued presence at the facility (and his ongoing and repeated violations of facility policies) presents a danger to the safety of the other residents.

Also relevant to this appeal, an amendment to M.G.L. c. 111, §70E, which went into effect in November of 2008, states 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.

Because the facility has not designated a discharge location, I conclude that it has not provided the appellant with sufficient preparation and orientation to ensure a safe and orderly discharge from the facility to another safe and appropriate place.

Based on the record and the above analysis, this appeal is APPROVED.

Order for Nursing Facility

Rescind the July 18, 2018 discharge notice. Do not discharge the appellant at this time under this notice.

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.

Notification of Your Right to Appeal to Court

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

Paul C. Moore
Hearing Officer
Board of Hearings