



**Department
of Health**

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

May 25, 2018

CERTIFIED MAIL/RETURN RECEIPT

Ketanya Mitchell, SW
Brooklyn United Methodist Church Home
1485 Dumont Avenue
Brooklyn, New York 11208

[REDACTED]
Brooklyn United Methodist Church Home
1485 Dumont Avenue
Brooklyn, New York 11208

RE: In the Matter of [REDACTED] Discharge Appeal

Dear Parties:

Enclosed please find the Decision After Hearing in the above referenced matter. This Decision is final and binding.

The party who did not prevail in this hearing may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the party wishes to appeal this decision it may seek advice from the legal resources available (e.g. their attorney, the County Bar Association, Legal Aid, etc.). Such an appeal must be commenced within four (4) months from the date of this Decision.

Sincerely,

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: nm
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH

COPY

In the Matter of

██████████ Brooklyn United Methodist Church Home

Administrative Law Judge's Decision

Appeal from a Nursing Home Resident
Discharge pursuant to Title 10 NYCRR
§415.3(h)

Before: Administrative Law Judge (ALJ) James F. Horan

For Brooklyn United Methodist
Church Home (Facility):

Ketanya Mitchell, Social Worker

For Resident ██████████ (Appellant):

Pro Se

The Facility moved to discharge the Appellant on the grounds that the Appellant's condition has improved sufficiently so that he no longer requires care in a nursing home. The Facility proposed discharge to the ██████████ Shelter ██████████. The Appellant claimed that he still needs care in a skilled nursing facility and challenged discharge to the ██████████

In this proceeding, both parties offered documents into the hearing record and the Facility presented witnesses. After reviewing the record, the ALJ finds that the Appellant's health has improved sufficiently so that the Appellant no longer requires skilled care in a nursing home and that the Appellant's condition has improved to the point that the Facility can discharge the Appellant safely to the community. The ALJ finds further that the Facility has identified an appropriate discharge plan to the ██████████

I. Background

Under Title 10 NYCRR § 415.3(h), a nursing home resident holds certain rights in regard to transfer or discharge. Title 10 NYCRR § 415.3(h)(1)(i)(2) allows involuntary discharge if a resident's health has improved sufficiently so that the resident no longer requires the services that the facility provides. Under the standards at 10 NYCRR § 415.2(k), a nursing home provides nursing and professional services twenty-four hours per day for patients who require those services, but do not require services in a general hospital. In effect, this proceeding acts as a stay on any discharge, until the decision on the discharge appeal. If a decision approves the discharge grounds and discharge plan, the proceeding ends with the decision and the discharge may proceed according to the discharge plan.

The Facility provided a Discharge Notice [ALJ Exhibit I] to the Appellant and the Appellant then requested the hearing that took place at the Facility in Kings County on April 12, 2018. The Appellant failed to appear at the hearing, but participated in a conference call with the Facility and the ALJ on April 17, 2018. At the hearing, the Facility presented as witnesses: Adebola Orafidiya M.D., the Appellant's treating physician at the Facility, Case Manager Shannon Spivey-Mayo, R.N., Dietitian Cherie Conliffe, Rehab Director Rene Revillas and Social Worker Ketanya Mitchell. The ALJ received the following documents into the record:

ALJ Exhibit I	Notice of Hearing,
Facility Exhibit 1	Physician Note by Adebola Orafidiya, M.D.,
Facility Exhibit 2	Nursing Note [REDACTED] 2018 ADL (page2),
Facility Exhibit 3	Nursing Note [REDACTED] 2018 Cognitive,
Appellant A	Physician Note by Jeremiah M. Gelles, M.D.

The record also included a digital audio recording from the hearing and the conference call. References to testimony from the recordings will indicate the recording on which the testimony occurs (HD refers to the hearing day and CC refers to the conference call) and the time on the recording (e.g. "HD at 12:40" means that the testimony occurred on the hearing day recording 12 minutes and 40 seconds into that recording).

Under the hearing procedures at §415.3(h)(2)(ii), the Facility bears the burden to prove a discharge necessary and appropriate. Under N.Y. Administrative Procedure Act 306(1), a decision in an administrative proceeding must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support conclusion or fact; less than preponderance of evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision, Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 (3rd Dept. 1984), appeal dismissed 63 N.Y.2d 649.

II. Findings of Fact

The matters in brackets following the findings reflect testimony from hearing recording or exhibits in evidence [Ex] on which the ALJ relied in making the findings. If contradictory information appears elsewhere in the record, the ALJ considered that information and rejected it.

1. The [REDACTED] year old Appellant entered the Facility [REDACTED] 2017 for rehabilitation following [REDACTED] surgery [HD at 3:45].
2. The Appellant has completed rehabilitation successfully [HD at 3:47].
3. The Appellant was able to walk upon admission to the Facility, but he lacked [REDACTED] [HD at 10:03].

4. The Appellant can now ambulate without an assistive device, but uses a [REDACTED] for convenience [HD at 10:05].

5. The Appellant is alert, is oriented to person, place and time and is independent in all activities of daily living [HD 2:49].

6. The Appellant suffers from a number of [REDACTED] medical conditions such as [REDACTED] but those conditions are stable [HD at 4:54, Ex 1].

7. The Appellant's treating physician at the Facility has determined that the Appellant is stable for discharge to the community [Ex 1].

9. The Appellant leaves the Facility almost daily on pass and drives his own car [HD at 11:18].

10. The Appellant also takes his meals outside the Facility [HD at 3:14].

11. The Facility attempted to find placement for the Appellant in an assisted living facility (ALF), but the ALF found the Appellant did not require care at that level [HD at 12:33].

12. The Appellant lacks income, which makes it difficult for the Facility to find the Appellant a placement in the community other than the [REDACTED] [HD at 13:04].

13. The Appellant was [REDACTED] for a period prior to entering the Facility [CC at 6:00].

14. The Appellant applied to Social Security for disability benefits, but was denied [HD at 3:03].

III. Conclusions

The ALJ concludes from the Exhibits and the testimony that the Appellant received reasonable and appropriate notice about this discharge, pursuant to Title 10 NYCRR § 415.3(b). The ALJ concludes that the Appellant's condition has improved so that the Appellant no longer requires skilled nursing care and the Facility has grounds to discharge the Appellant. The Facility has also proposed an appropriate discharge plan.

Notice: During the April 17, 2018 conference call, the Appellant indicated that he failed to appear at the hearing because no one called him to let him know there was a hearing occurring. Ms. Mitchell indicated during the hearing and during the April 17, 2018 conference call that she had placed the Notice of Hearing on the Appellant's bed. Ms. Cheryl Corning, from the Bureau of Adjudication, indicated that she had provided a copy of the hearing notice to Ms. Mitchell to pass on to the Appellant. Ms. Corning indicated further that she had spoken to the Appellant on the telephone to advise him of the hearing date. The ALJ finds that the Appellant received legally sufficient notice of the hearing. The Appellant, for whatever reason, decided against appearing. The ALJ found no reason to convene an additional hearing day, but invited the Appellant to state his position during the conference call. The Appellant did so. The ALJ also left the record open to allow the Appellant to submit a note from his [REDACTED] concerning the Appellant's condition.

Condition: The testimony by the Respondent's treating physician, Dr. Orafidiya, the testimony from Facility's nurse case manager, rehab director, dietitian and social worker, as well medical records from the Facility [Ex 1-3], demonstrate that the Appellant no longer requires skilled nursing services. The Appellant has completed rehab, receives no skilled nursing services,

is independent in ambulation and the activities of daily living, leaves the Facility almost daily on pass, drives his own car and takes his meals outside the Facility.

In opposition to the Facility's evidence, the Appellant presented a [REDACTED] 2018 letter from his [REDACTED] Jeremiah M. Gelles, M.D. [Ex A]. During the conference call on April 17, 2018, the Appellant mentioned that he would see his [REDACTED] that afternoon. The [REDACTED] office [REDACTED] sent the letter to the ALJ by fax transmission later in the day on [REDACTED] 2018. The letter from Dr. Welles indicated that the Appellant must remain in a skilled nursing facility pending transfer to an apartment that is acceptable and accessible for someone with the Appellant's motor limitations and disability. The letter concluded that the Appellant would also need a home health aide to assist the Appellant with activities of daily living that the Appellant was unable to manage on his own.

The information in the Gelles note presents a stark contrast to the evidence from the Facility records and testimony by the Appellant's day-to-day caregivers at the Facility, which leads the ALJ to conclude that Dr. Gelles consulted neither the Appellant's Facility records nor the Appellant's treating physician in preparing the note. The ALJ finds the Appellant's day-to-day care givers at the Facility would know better than an outside [REDACTED] specialist about the Appellant's motor abilities and activities of daily living. The ALJ finds the evidence from the Facility more reliable concerning the Appellant's fitness to manage on his own in the community. The Appellant is already managing a great deal on his own in the community in leaving the Facility almost daily on pass, traveling in his own car and taking his meals outside the Facility. The ALJ concludes that the evidence demonstrates that the Appellant's condition has improved to the point that the Appellant no longer needs care in a skilled nursing facility.

Discharge Plan: The ALJ finds further that the Facility has proposed an appropriate discharge plan. The Facility indicated that few options existed for the Appellant's discharge because the Appellant lacks any income and because the Appellant has no need for the level of services available at an ALF. The Appellant stated during the conference call that he is waiting for housing and estimated that he may have an apartment in a month. It has now been over a month since the hearing and conference call. The Appellant receives no services any longer at the Facility. Skilled nursing facilities exist to provide care to those who require skilled nursing services, rather than to provide supplemental housing. The ALJ finds that the [REDACTED] provides the appropriate discharge location for someone who can live in the community, but who lacks the income for other housing.

The Appellant stated during the conference call that he would rather [REDACTED] than live in the [REDACTED]. No one can force the Appellant to enter the [REDACTED] that is his choice. The Appellant, however, may no longer remain in the Facility.

ORDER

NOW; after considering the request for Hearing, the testimony and the documents in evidence, the ALJ issues the following Order:


1. The ALJ rules that the Facility has demonstrated that the Appellant no longer requires nursing home care.
2. The Facility may discharge the Appellant pursuant to the discharge plan.

Dated: Menands, New York
May 25, 2018



James F. Horan
Administrative Law Judge

To: Kentanya Mitchell, Social Worker
Brooklyn United Methodist Church Home
1485 Dumont Avenue
Brooklyn, NY 11208

 Resident
c/o Brooklyn United Methodist Church Home
1485 Dumont Avenue
Brooklyn, NY 11208