



Department of Health

ANDREW M. CUOMO
Governor

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

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

November 21, 2018

CERTIFIED MAIL/RETURN RECEIPT

Robert Heral, Director of Social Work
Cobble Hill Health Center
380 Henry Street
Brooklyn, New York 11201

[REDACTED]
c/o Cobble Hill Health Center
380 Henry Street
Brooklyn, New York 11201

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: cmg
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH

COPY

In the Matter of
[REDACTED] Cobble Hill Health Care Center

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 Cobble Hill Health Care
Center (Facility):

Robert Heral, Director of Social Work

For Resident [REDACTED] (Appellant):

Pro Se

The Facility moved to discharge the Appellant on the grounds that the Appellant's condition has improved sufficiently so that she no longer requires care in a nursing home. The Facility proposed discharge to the [REDACTED] Shelter [REDACTED]. The Appellant opposes discharge from the Facility and discharge to the [REDACTED] on the grounds that she needs a private room. In this proceeding, both parties called witnesses and presented documents into the hearing record. 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 System.

I. Background

Under Title 10 NYCRR § 415.3(h), a nursing home resident holds certain rights regarding 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 June 27, 2018. The Appellant spoke on her own behalf and received assistance from her [REDACTED] who complained about the care the Appellant received at the Facility and about the Facility's failure to find the Appellant housing. At the hearing, the Facility presented as witnesses: Social Work Director Heral, Rehabilitation Director Lewize Attaalla, Nursing Home Administrator Donny Tuchman and Unit Manager Mylene Honpon, R.N. The ALJ received the following documents into the record:

ALJ Exhibit I	Notice of Hearing,
ALJ Exhibit II	Letter to the Parties with Attachment.
Facility Exhibit A	Physician Order,
Facility Exhibit B	Progress Notes,

Facility Exhibit C	Response Letter and Attached Documents,
Facility Exhibit D	Letter Concerning Shelter Acceptance.
Appellant Exhibit 1	Statement by Appellant [REDACTED]
Appellant Exhibit 2	Letter from Appellant [REDACTED] 18,
Appellant Exhibit 3	Physician Orders,
Appellant Exhibit 4	Notice of Motion,
Appellant Exhibit 5	Letter from Robert Forngy, M.D.,
Appellant Exhibit 6	Letter from Downstate Medical Centre OB/GYN Clinic,
Appellant Exhibit 7	Letter from Amy Zorrin, M.D.,
Appellant Exhibit 8	Letter from Moro Salifu, MD and Cover Sheet,
Appellant Exhibit 9	Letter from Appellant with attachments [REDACTED] 8.

The ALJ left the record open following the hearing for the parties to offer additional exhibits into the record (Facility Exhibits C-D and Respondent Exhibits 5-9). The ALJ closed the record initially after the parties submitted some additional Exhibits, but re-opened the record again when the ALJ became aware that the System had issued new procedures relating to referrals to the System from long term care facilities [ALJ Exhibit II]. The ALJ provided the parties with information concerning the new procedures and asked that the parties address the procedures. The Appellant's Exhibit 9 and the Facility's Exhibit D constitute the parties' responses concerning the procedures.

The record also included a digital audio recording from the hearing on two compact discs (CDI and CDII). References to statements from the recordings will reference the time and the CD on which the statement occurs (*e.g.* "CDI at 12:40" means that the statement occurred on the first CD at 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. Under the procedures at SAPA § 306(4), an ALJ may take official notice of all facts, statutes and regulations for which a court may take judicial notice.

II. Findings of Fact

The matters in brackets following the findings reflect statements from hearing recording, exhibits in evidence [Ex] or matters on Official Notice [ON] 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 suffers from a number of chronic conditions such as [redacted] [Ex 1; Ex 7; Ex B].

2. The [redacted] is due to a combination of [redacted] [redacted] which is an [redacted] on the Appellant's [redacted] and [redacted] [Ex 7].

3. This condition results in [redacted] as well as [redacted] [redacted] which makes [redacted] difficult and [redacted] and requires the use of a [redacted] [redacted] Ex 7].

4. The Appellant cannot climb stairs and she suffers from a [redacted] which [redacted] further compromising the Appellant's [redacted] [Ex 7].

5. The Appellant ambulates with [REDACTED] and uses a wheelchair for longer distances [CDII 8:20-8:44].
6. The Appellant receives a number of medications to treat her various conditions, which the Appellant can administer to herself, including [REDACTED] for her [REDACTED] [CDII at 13:09; Ex B].
7. The Appellant makes no requests for assistance from Facility Staff and requires only supervision [CDI at 29:54].
8. Supervision means that staff watch the Appellant and provide direction as opposed to providing hands-on assistance [CDI at 30:55].
9. The Appellant has refused therapy at the Facility [CDI at 7:44; Ex A].
10. The Appellant's treating physician at the Facility, Mohammed B. Bashey, M.D., has determined that the Appellant is stable for discharge to the community [Ex A; Ex C].
11. The Appellant has refused care from health care professionals at the Facility, such as the Facility's [REDACTED] [Ex A].
12. The Appellant leaves the Facility on pass almost every day and makes her own appointments with health care professionals outside the Facility [CDI 31:06].
13. The Facility has applied for public housing for the Appellant [Ex A].
14. Due to the Appellant's relatively young age at [REDACTED] years-old, the Appellant fails to qualify for admission to many adult homes [CDI 17:58].
15. The Facility attempted to obtain a studio apartment for the Appellant, but the Appellant refused the studio as too small [CDI 17:20, 19:57].
16. The Respondent resides in a two-bed or non-private room at the Facility [Ex C].

17. The Facility has contacted the [REDACTED] Shelter as a discharge outlet for the Appellant and the Facility indicates that the [REDACTED] would be able to accommodate the Appellant at that Shelter, with the Appellant's [REDACTED] and wheelchair, but could not provide a private room [Ex D].

18. The New York State Office of Temporary and Disability Assistance (ODTA) regulations which set the admission standards for Adult Shelters require that the administrator of an Adult Shelter shall interview each resident within 24 hours from the resident's entry to determine the immediate needs of the resident and whether or not the shelter could meet or continue to meet those needs [ON 18 NYCRR § 491.4(c)].

19. The ODTA regulations state further that the operator may not accept nor maintain any resident who is incapable of ambulation on stairs without personal assistance, unless such a person can be assigned a room on a floor with ground level egress [ON 18 NYCRR § 491.4(b)(4)].

III. Conclusions

Under the standards at Title 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. Title 10 NYCRR § 415.3(h)(1)(i)(2) allows involuntary discharge if a nursing home resident's health has improved sufficiently so that the resident no longer requires the services that the facility provides. The ALJ concludes that the Appellant's condition has improved so that the Appellant no longer requires skilled nursing care and that the

Facility has grounds to discharge the Appellant. The Facility has also proposed an appropriate discharge plan.

The Appellant offered no evidence to show that she requires skilled nursing care, the services that the Facility provides. The Appellant receives no therapy at the Facility, she administers her own medications, arranges her own outside medical treatment and leaves the Facility almost daily on pass. The Appellant suffers from a number of [REDACTED] conditions that required the Appellant to take medication and to use a [REDACTED] and a wheelchair, but the Appellant offered no medical evidence to indicate that the medical conditions require that the Appellant remain in a skilled nursing facility. The Appellant's treating physician at the Facility has found the Appellant stable for discharge to the community [Ex A; Ex C]. The Appellant stated that her preferred outcome in this case would be obtaining an apartment [CDII at 4:14]. If the Appellant is well enough to live in an apartment in the community, the Appellant does not need to be in a nursing home.

The Appellant's position appears to be that she needs to remain in the Facility until she obtains her desired housing, which would be an apartment or a private room in a larger facility. The Appellant does not live in a private room at the Facility. She failed to mention any problem she suffers due to sharing a room currently. She listed reasons why she wanted a private room in her statement at the hearing [Ex 1], but those reasons appear to result from a desire for privacy rather than any medical necessity. Three of the Appellant's outside treating care givers provided statements endorsing the Appellant's request for a private room, but none of the three statements indicate that the Appellant needs to remain in a skilled nursing facility [Ex 5; Exc 7; Ex 8].

The Appellant may not continue to live the Facility for lodging only. The Facility provides skilled nursing care and for residents to qualify to remain in the Facility, the resident's

diagnosis must justify the stay. The Appellant has no need to receive skilled care in the Facility, so grounds exist for the Appellant's involuntary discharge. The issue now turns to whether the Facility has proposed an appropriate discharge plan.

At hearing, the Appellant's [REDACTED] criticized the care the Appellant received at the Facility and accused the Facility of failing to do its job to find the Appellant housing. The record, however, indicates that the Facility has applied for public housing for the Appellant and has tried to assist the Appellant in obtaining an apartment. The Appellant refused one studio as being too small [CDI at 19:57]. The Facility also indicated that the Appellant is ineligible for placement in most adult homes due to the Appellant's age. The Appellant admitted at hearing that [REDACTED] had also been trying to find the Appellant an apartment, but that landlords withdraw the offer of an apartment when the landlords learn that the Appellant requires a [REDACTED] and wheelchair.

The Facility attests that the [REDACTED] Shelter has indicated that it can accommodate the Appellant with the [REDACTED] and wheelchair, but cannot provide a private room. The Appellant has questioned whether the Facility provided an accurate application to the [REDACTED] Shelter [Ex 9]. Also, the note in evidence from the Appellant's [REDACTED] Amy Zarrin, M.D., indicates clearly that the Appellant cannot [REDACTED] [Ex 7]. The Adult Shelter regulations at Title 18 NYCRR § 491.4(b)(4) prohibit a shelter operator from accepting or maintaining any resident who is incapable of [REDACTED] without personal assistance, unless such a person can be assigned a room on a [REDACTED]. The Appellant's question, Dr. Zarrin's note and the ODTA regulations do raise a doubt about whether the [REDACTED] Shelter will actually accept the Appellant.

The ALJ notes that the Adult Home regulations at 18 NYCRR § 491.4(c) also require a Shelter operator to interview each resident within 24 hours from the resident's entry to determine

the immediate needs of the resident and whether or not the shelter could meet or continue to meet those needs. The ALJ will approve the discharge to the [REDACTED] Shelter on the grounds that the Shelter must accept the Appellant following the interview and review process under § 491.4(c). If the [REDACTED] Shelter rejects the Appellant, then the Facility has failed to provide an appropriate discharge plan and the Facility must take back the Appellant and begin the discharge process once more. As far as the Appellant's request for the private room, the Facility indicated that the [REDACTED] Shelter cannot offer the Appellant a private room. The ALJ notes that the Appellant does not have a private room currently at the Facility. The Appellant can continue seeking a private room through the System, if the [REDACTED] Shelter accepts the Appellant. The Appellant can also continue seeking other housing as well.

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 and to this Order, conditioned on the Appellant's acceptance by the [REDACTED] Shelter.

Dated: Menands, New York
November 21, 2018



James F. Horan
Administrative Law Judge

To: Robert Heral, Director of Social Work
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Brooklyn, NY 11201

 Resident
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