



Department of Health

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Governor

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Commissioner

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

May 22, 2019

CERTIFIED MAIL/RETURN RECEIPT

Jennifer Li, Director of Social Work
Gouverneur Nursing Facility
227 Madison Street
New York, New York 10002

██████████
c/o Gouverneur Nursing Facility
227 Madison Street
New York, New York 10002

RE: In the Matter of ██████████ – 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
█ Gouverneur Nursing Facility

Administrative Law Judge's Decision

Appeal from a Nursing Home Resident
Discharge pursuant to Title 10 (Health) of the
Official Compilation of Codes, Rules and
Regulation of the State of New York (NYCRR)
§415.3(h)

Before: Administrative Law Judge (ALJ) James F. Horan
For Gouverneur Nursing Facility
(Facility): Jenny Li, Director of Social Work
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 System (System). The Appellant challenged the basis for discharge and opposed discharge to the System, on the grounds that he wants further therapy. In this proceeding, the Facility 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 on [REDACTED] 2019 and the Appellant then requested the hearing that took place at the Facility in New York County on April 9, 2019. The Appellant testified on his own behalf and called no other witnesses. The Facility presented four witnesses: Social Worker Julie Zhen, Director of Rehabilitation Danny Wong, Charge Nurse Iryna Sydir, R.N. and the Appellant's treating physician, Alexander Kolessa, M.D. The ALJ received the Notice of Hearing into the record as ALJ Exhibit I. The Facility offered five documents that the ALJ received into the record:

Facility Exhibit 1	Physician Note,
Facility Exhibit 2	Therapy Discharge Reports,
Facility Exhibit 3	Progress Notes,
Facility Exhibit 4	Social Work Discharge Summary,
Facility Exhibit 5	Accountability Record.

The Appellant offered no exhibits. The record also included a digital audio recording from the hearing on compact disc (CD). References to statements from the recording will reference the time on the CD at which the statement occurs (*e.g.* “CD at 12:40” means that the statement occurred at 12 minutes and 40 seconds into the 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 statements from the hearing recording and 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 on [REDACTED] 2019 for short-term rehabilitation, after hospitalization at [REDACTED] [Ex 4; CD at 13:40].

2. The Appellant received a [REDACTED] at [REDACTED] to treat a [REDACTED] [REDACTED] [CD at 6:27; Ex 4].

3. The [REDACTED] likely resulted from taking [REDACTED] medication for a [REDACTED] in the [REDACTED] [CD at 6:27; Ex 4].

4. Occupational and Physical Therapy discharged the Appellant from treatment on [REDACTED] [REDACTED] 2019 [Ex 7].

5. The Appellant ambulates with a walker and suffers from [REDACTED] and [REDACTED] [Ex 2].

6. The Appellant receives medication orally, with no injections or intravenous medication [CD at 25:01].

7. The Appellant makes no requests for assistance from Facility staff [CD at 26:30].

8. The Appellant's [REDACTED] has increased during his time in the Facility without a further [REDACTED] [CD at 9:26].

9. The Appellant's treating physician at the Facility, Dr. Kolessa, has determined that the Appellant is stable for discharge to the System [Ex 1].

10. The Appellant's last known address was the intake shelter within the System, but the Appellant testified that he stayed in that shelter only one night [Ex 4; CD at 36:13].

11. The Facility proposes discharge back to the System and Ms. Zhen has confirmed that shelter placement is ready to accept the Appellant upon his arrival at the intake shelter [Ex 4].

12. At discharge, the Facility will provide the Appellant with a rolling walker, arrange ambulette transportation, refer the Appellant to community based occupational and physical therapy for evaluation and arrange follow-up medical appointments in the community [Ex 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 challenged the Facility's conclusions about his condition, claiming that he is unable to dress himself [REDACTED] and that he is in pain when he ambulates. The Appellant submitted no medical evidence to corroborate his claims. The Appellant faulted Dr. Kolessa for failing to prescribe the Appellant sufficient pain medication. Dr. Kolessa testified that he had increased the Appellant's medication in response to the Appellant's complaints about pain [CD at 9:26]. The Appellant challenged the testimony by Nurse Sydir that the Appellant needs no assistant and asked the Nurse when she ever saw the Appellant get up from bed by himself. The Nurse testified that she had just seen the Appellant get up from bed unassisted as he prepared to come down to the hearing [CD at 25:30]. The Appellant challenged the conclusions by Physical Therapy about the Appellant's ability to ambulate. The Physical Therapy Discharge Report noted that the Appellant tends to self-limit by refusing to walk further or train past [REDACTED] steps on stairs [Ex 2]. The Report went on to state that despite the training time, the Appellant has shown the ability to be independent in bed mobility, transfers and ambulation.

The ALJ finds the medical evidence from the Facility credible and concludes that the Appellant's condition has improved to the point that he no longer requires care in a nursing home.

The Appellant opposed discharge to the System and indicated that he might arrange to stay with friends. The Appellant is free to make such arrangements upon discharge. The Facility must only arrange an appropriate discharge, which the Appellant may reject. The Appellant may not, however, remain in the Facility if this Decision finds the proposed discharge location appropriate. The Appellant indicated that he wants to remain in the Facility for more therapy. The evidence indicates, however, that the Respondent can obtain therapy outside the Facility. Under the proposed discharge plan, the Facility will arrange for an evaluation to determine the Appellant's fitness for physical and/or occupational therapy in the community. Ms. Zhen testified that the Appellant might even be able to receive therapy in the shelter. The Appellant objected to shelter-based therapy for fear that he might appear vulnerable to the rest of the shelter population due to receiving medical services. The ALJ notes that Ms. Zhen mentioned shelter-based therapy only as a convenience. Ms. Zhen made no statement to the effect that the Appellant could receive therapy in the community only in the shelter. The Appellant indicated a preference for therapy in an out-patient institutional setting.

The ALJ finds the proposed discharge to the System appropriate.

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.

Dated: Menands, New York
May 22, 2019



James F. Horan
Administrative Law Judge

To: Jennifer Li, Director of Social Work
Gouverneur Nursing Facility
227 Madison Street
New York, NY 10002

■ Resident
c/o Gouverneur Nursing Facility
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