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**STATE OF NEW YORK  
DEPARTMENT OF HEALTH**

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In the Matter of an Appeal pursuant to  
10 NYCRR §415.3 by

[REDACTED]

Appellant,

from a determination by

**Susan Smith McKinney  
Rehabilitation and Nursing Center,**

Respondent,

to discharge him from a residential health care facility.

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**COPY**

**DECISION**

**Hearing Before:**

Ann H. Gayle  
Administrative Law Judge

**Held at:**

Susan Smith McKinney  
Rehabilitation and Nursing Center  
594 Albany Avenue  
Brooklyn, New York 11203

**Hearing Date:**

January 16, 2020

**Parties:**

Susan Smith McKinney  
Rehabilitation and Nursing Center  
By: Ita Parnass, Esq., Of Counsel  
Furman Kornfeld & Brennan LLP

[REDACTED]  
*Pro Se*

Pursuant to Public Health Law ("PHL") §2801 and Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("10 NYCRR") §415.2(k), a residential health care facility or nursing home such as Susan Smith McKinney Rehabilitation and Nursing Center ("Respondent" or "Facility") is a residential facility providing nursing care to sick, invalid, infirm, disabled, or convalescent persons who need regular nursing services or other professional services but who do not need the services of a general hospital.

Transfer and discharge rights of nursing home residents are set forth at 10 NYCRR §415.3(h). Respondent determined to discharge █ ("Appellant" or "Resident") from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(h)(1)(i)(a)(2) which provides, in pertinent part:

- (a) the resident may be transferred only when the interdisciplinary care team, in consultation with the resident or the resident's designated representative, determines that:
  - ...
  - (2) the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility.

Appellant appealed the discharge determination to the New York State Department of Health, and a hearing on that appeal was held. Pursuant to 10 NYCRR §415.3(h)(2)(iii)(b), the Facility has the burden of proving that the transfer is necessary and the discharge plan is appropriate. SAPA § 306(1) provides that the standard of proof shall be by substantial evidence. "Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact; it is less than a preponderance of the evidence but more than mere surmise, conjecture or speculation. ...Put differently, there must be a rational basis for the decision. (Citations omitted)" (*Stoker v. Tarentino*, 101 A.D.2d 651, 652, 475 N.Y.S.2d 562, 564 [App. Div. 3d Dept. 1984], mod. 64 N.Y.2d 994, 489 N.Y.S.2d 43).

A digital recording of the hearing was made part of the record. Appellant appeared and testified on his own behalf. Appellant's █, assisted Appellant and testified. Attending physician Albert Edano, M.D., Social Worker █, and Physical Therapist █ testified for Respondent. Director of Social Work Eslyn Simpson participated at the hearing.

The following documents were accepted into evidence by the Administrative Law Judge ("ALJ") as ALJ and Facility Exhibits:

ALJ:

- I: Notice of Hearing with the Facility's █ 2019 Discharge Notice attached

Facility:

- 1: Notices of Medicaid and Medicare non-coverage
- 2: PT progress notes

Appellant was given the opportunity but did not offer any exhibits.

**ISSUE**

Has Susan Smith McKinney Rehabilitation and Nursing Center established that the transfer is necessary and the discharge plan is appropriate?

**FINDINGS OF FACT**

Citations in parentheses refer to testimony ("T") of witnesses and exhibits ("Ex") found persuasive in arriving at a particular finding.

1. Respondent, Susan Smith McKinney Rehabilitation and Nursing Center ("McKinney") is a residential health care facility located in Brooklyn, New York. (Ex I)
2. Appellant, █, age █ was admitted to the Facility on █ 2019 for short-term care following a hospitalization at █ due to a fall.

Appellant's medical conditions are stable and he has reached his maximum potential in physical and occupational therapies ("PT") ("OT"). (Ex 2; T █ Edano, █)

3. By notice dated █ 2019, Respondent advised Appellant that it had determined to discharge him on the grounds that his health/functional status has improved sufficiently so that he no longer needs the services provided by the Facility. (Ex 2)

4. Appellant's past and present medical conditions include █ with █, and █ █ These chronic conditions, as well as any possible need for treatment in the future do not currently require facility care, and they can be treated in the community at this time. (Ex 2; T Edano, █)

5. Respondent's discharge plan is to discharge Appellant to his home with services to include CHHA (certified home health agency). Appellant will be discharged with DME (durable medical equipment) to include a rolling walker, tub bench, wheelchair, grab bars and commode. (Ex 2; T █)

6. It is the professional opinion of Appellant's caregivers at the Facility that discharge to his home with services is appropriate for Appellant who is capable of managing his medications and medical treatment in the community. (Ex 1; T █ Edano, █)

7. Appellant has remained at McKinney pending the outcome of this proceeding.

#### DISCUSSION

At the beginning of the hearing Appellant expressed that he was not seeking to remain in the Facility for an extended period and he requested that he be allowed to remain in the Facility for an additional two weeks in order to receive additional PT. Respondent agreed to Appellant's request, and a stipulation was drafted by Respondent's attorney. Appellant and his █ then

expressed their reluctance to sign the stipulation, and they requested that the hearing proceed. A full hearing was held. As Appellant and his [REDACTED] were concluding their testimony and giving their closing remarks, Appellant acknowledged that he no longer needs the services provided by the Facility and they reiterated that they were seeking to have Appellant remain in the Facility for two more weeks.

The evidence presented by Respondent demonstrated that although Appellant's conditions are chronic and that he will always be at risk for another fall, he has reached his maximum potential in rehabilitative services, and he is ready for discharge. Appellant's [REDACTED] acknowledged Appellant's and her understanding that "even if he stays here for years he might not improve" any further than his current level of ambulation and strength. Appellant is independent with his ADLs (activities of daily living) and he ambulates independently on even surfaces with a walker. Mr. [REDACTED] testified that Appellant, who was [REDACTED] upon admission and needed much assistance with mobility and transfers, has reached the goal of being able to ambulate at home. Appellant is able to get in and out of bed independently, ambulate more than 200 feet with a walker, and climb and descend [REDACTED] stairs by holding onto a rail. Mr. [REDACTED] testified that although Appellant does not require placement of his hand on Appellant's back during stair climbing, he does so because he is "concerned about" Appellant and that "this is advisable" even when Appellant is in the community. Mr. [REDACTED] further testified that Appellant, who lived independently in his home with [REDACTED] hours of home care services weekly prior to admission, would have to apply to Medicaid for more than [REDACTED] hours of care when he is discharged to his home. Mr. [REDACTED] testified that Appellant has shown no significant improvement for the past few weeks, he met and exceeded rehab goals, and he is ready to be discharged to his home as long as he has an aide several hours a day.



Ms. █ testified that Appellant had DME and home care services in his home prior to admission and that this will continue when he returns home. Ms. █ further testified that she has already arranged for a CHHA to work with Appellant upon discharge; a nurse will evaluate Appellant in his home to determine what services he requires; the services might include PT/OT, a visiting nurse, home care, home attendants, a social worker and/or other services.

Dr. Edano testified that Appellant's █ and █ are chronic conditions that do not require remaining in the Facility and can be addressed in the community. He further testified that: █ causes or could cause █ pain, and █ and the █ when it's severe, and the hospital determined that surgery is not recommended for Appellant at this time. Dr. Edano concluded that medically and cognitively Appellant is ready for discharge to his home as Appellant can make his needs known and his medical conditions, including his █ which was █ at one time, are stable.

Appellant testified that he has more pain than he reports to his caretakers and that he is afraid of his █ which could lead to another fall at home. Mr. █ testified that the █" has been addressed and that Appellant's ability to perform up to █ repetitions of "sit to stand" indicates that Appellant is strong enough to not have █.

#### CONCLUSION

Respondent has proven that Appellant's functional status has significantly improved so that specialized short-term rehabilitation is no longer required, and that discharge to his home with services is appropriate for Appellant at this time. Speculation that past or current medical conditions might recur or worsen and/or that Appellant might fall again is not sufficient to warrant remaining in the Facility.



**DECISION**

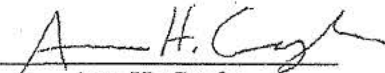
I find that the transfer is necessary and the discharge plan is appropriate.

The appeal by Appellant is therefore DENIED.

Respondent, Susan Smith McKinney Rehabilitation and Nursing Center, is authorized to discharge Appellant in accordance with its █ 2019 discharge notice.

This Decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR).

Dated: New York, New York  
January 23, 2020

  
Ann H. Gayle  
Administrative Law Judge

TO: █  
c/o Susan Smith McKinney Rehabilitation and Nursing Center  
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Brooklyn, New York 11203

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