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**Department
of Health**

ANDREW M. CUOMO
Governor

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

LISA J. PINO, M.A., J.D.
Executive Deputy Commissioner

October 2, 2020

CERTIFIED MAIL/RETURN RECEIPT

[REDACTED]
c/o Terence Cardinal Cooke HCC
1249 Fifth Avenue
New York, New York 10029

Amy Ebinger, Esq.
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New York, New York 10022

Vickey Johnson, Finance Director
Terence Cardinal Cooke HCC
1249 Fifth Avenue
New York, New York 10029

[REDACTED] Representative
[REDACTED]

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

█/Terence Cardinal Cooke Health Care Center

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 Terence Cardinal Cooke Health Care Center (Facility):

Amy Ebbinger, Esq.

For Resident █(Appellant):

█ Representative

The Facility provided a Notice to the Appellant stating the intent to discharge the Appellant (Discharge Notice) on the grounds that the Appellant has failed to pay toward her care at the Facility. The Facility proposed discharge to the Appellant's home. The Appellant challenged the discharge arguing that she requires further treatment and that the Facility has failed to present proper documentation to the Appellant's insurer. After reviewing the entire record, the ALJ dismisses the Discharge Notice because the Facility has failed to prove that a physician determined that the Appellant's discharge to home is appropriate.

Background

The Medicaid Act at Title 42 U.S.C. §1396r(c)(2) establishes standards for resident transfer and discharges that nursing homes must meet as a prerequisite to receiving reimbursement from Medicaid, Grammer v. John Kane Regional Centers - Glen Hazel, 570 F.3d 520 (3d Cir 2009). The Act at 42 U.S.C. §1396r(e)(3) requires the States to provide an appeal

process for residents to challenge the discharges and transfers. The New York State Nursing Home Code at Title 10 NYCRR § 415.3(i) establishes the appeal process in this State, which provides nursing home residents certain rights regarding transfer or discharge. Title 10 NYCRR §415.3(i)(1)(i)(b) allows involuntary discharge if a resident has failed, after reasonable and appropriate notice, to pay for (or to have Medicaid, Medicare or private insurance pay for) a stay at the facility. Under the standards at 10 NYCRR § 415.3(i)(1)(ii)(a), a nursing home proposing discharge due to failure to pay must insure complete documentation in the resident's record made by the resident's physician and, as appropriate, interdisciplinary care team.

The Facility provided a Discharge Notice to the Appellant on [REDACTED] 2020 and the Appellant then requested the hearing that took place by Cisco WebEx on August 21, 2020. The Facility presented four witnesses from the Facility staff: Social Work Director Rayna Terry Taylor, Social Worker [REDACTED] Rehab Coordinator [REDACTED] and Medicaid Coordinator [REDACTED]

[REDACTED] The Appellant was present at the hearing but did not testify or make a statement. The Appellant called no witnesses. The Facility offered four documents into evidence at the hearing. The ALJ left the hearing record open following the hearing until September 8, 2020 to receive additional documentation from the parties. The Facility offered twelve more documents at that time. The ALJ received 16 documents from the Facility into evidence:

1. Invoice [REDACTED] 2020,
2. Notice of Medicare Non-Coverage [REDACTED]/2020,
3. Account Correspondence Report [REDACTED]/2020,
4. Resident Face Sheet,
5. Physical Therapy Evaluation and Plan of Treatment [REDACTED] 2020,
6. Occupational Therapy and Plan of Treatment [REDACTED]/2020,
7. Occupational Therapy Progress Report [REDACTED]/2020,
8. Physical Therapy Progress Report [REDACTED]/2020,
9. Occupational Therapy Progress Report [REDACTED]/2020,
10. Physical Therapy Progress Report [REDACTED] 2020,
11. Occupational Therapy Recertification and Updated Plan of Treatment [REDACTED]/2020,
12. Physical Therapy Recertification and Updated Plan of Treatment [REDACTED] 2020,

13. Occupational Therapy Discharge Summary [REDACTED] 2020,
14. Physical Therapy Discharge Summary [REDACTED]/2020,
15. Physical Therapy Treatment Encounter Note [REDACTED]/2020,
16. Occupational Therapy Treatment Encounter Note [REDACTED] 2020.

The Appellant submitted three documents into the record following the hearing, which the ALJ received into evidence:

- A. Health Plan Payment Summary [REDACTED]/2020,
- B. Medicare Summary Notice for Part B (Medical Insurance) [REDACTED] 2020,
- C. Health Plan Payment Summary [REDACTED] 2020.

The Notice of Hearing, with the Discharge Notice appended, appears in the record as Exhibit ALJ I. Prior to the hearing, the ALJ held a conference call with the parties to set the date for the hearing and the ALJ and parties exchanged emails on August 11, 2020 [ALJ Exhibit II] and August 19, 2020 [ALJ Exhibit III] concerning preparation for the hearing. The record also contained the 53:39 audio recording of the hearing on compact disc (CD). References to the testimony from the hearing recording will cite the time on the CD that the testimony occurs. The record closed when the ALJ received the post hearing exhibits on September 8, 2020.

Under the hearing procedures at §415.3(h)(2)(iii)(b), 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.

Findings of Fact

The ALJ reviewed the hearing record and made the following findings of facts. The brackets following the findings refer to information from the hearing transcript [CD] or the hearing exhibits

[Ex] that support the findings. In instances in which evidence in the records conflicts with evidence on which the ALJ based the finding, the ALJ considered the conflicting evidence and rejected it.

1. The Appellant entered the Facility on [REDACTED] 2020 for short term rehabilitation following a [REDACTED] [Ex 4].
2. Payment for the Appellant's treatment at the Facility came through a Medicare Supplemental Plan [Ex A-C; CD 38:45].
3. The Appellant began physical and occupational therapy on [REDACTED] 2020.
4. Both Occupational and Physical Therapy discharged the Appellant from treatment on [REDACTED] 2020 on the grounds that the Appellant had ceased making progress in treatment [Ex 13-14; CD 29:52].
5. The Appellant had not yet exhausted the Medicare days for skilled care under her health plan at the time of the discharges [CD 39:58].
6. The Facility advised the Appellant in [REDACTED] 2020 that Medicare would no longer pay for the Appellant's treatment at the Facility following the discharges from therapy.
7. Nursing staff on the Appellant's unit referred the Appellant back to therapy for possible progress and Occupational and Physical Therapy resumed on [REDACTED] 2020 [CD 18:24, 29:30, 30:25].

Conclusions

As this Determination noted above, the Nursing Home Code at 10 NYCRR §415.3(i)(1)(ii)(a) requires that a nursing home proposing discharge due to improvement in condition must insure complete documentation in the resident's record made by the resident's physician and, as appropriate, interdisciplinary care team. The Facility has failed to provide documentation indicating that the Appellant's physician determined that the Appellant no longer

requires skilled nursing care and failed to provide documentation that the Appellant's physician found discharge to the Appellant's home appropriate.

At the hearing, the Facility offered Exhibits 1-4 into the record. None of these documents constituted physician documentation as required under §415.3(i)(1)(ii)(a). The ALJ advised the Facility at hearing that the physician documentation was missing and left the record open until September 8, 2020 for the Facility to submit such documentation [CD 51:07]. Testimony during the hearing indicated in addition that the Appellant had resumed rehabilitative therapy after the Facility issued the Discharge Notice. The resumption in therapy raised the question of whether the Appellant was actually ready for discharge home. The Facility indicated that there was no timeline for how long the Appellant would continue in therapy [CD 35:22]. The Appellant's Representative indicated that the Appellant's outside treating physician had determined that the Appellant continued to need therapy [CD 46:28]. The ALJ stated at the end of the hearing that the parties should provide an update on the Appellant's condition by September 8, 2020 [CD 53:37].

The Facility offered 12 documents into the record on September 8, 2020 [Exhibits 5-16]. All of those documents related to the occupation and physical therapy the Appellant received from [REDACTED], 2020 until [REDACTED], 2020. None of these Exhibits constituted physician documentation supporting a discharge to home and none related to the treatment the Appellant received from the time therapy resumed on [REDACTED], 2020. The only Exhibits that contained any mention of a physician were the Physical Therapy and Occupational Therapy Evaluation and Plans of Treatment from the period [REDACTED] 2020 to [REDACTED] 2020 [Exhibits 5-6]. Both those Exhibits contain unsigned and undated statements from Erin Marie Sullivan, M.D. certifying the medical necessity for the treatment furnished under the Plans.

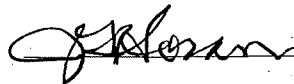
Title 10 NYCRR §415.3(i)(1)(ii)(a) requires that a nursing home proposing discharge for non-payment must ensure complete physician documentation in the resident's record as prerequisite to beginning the discharge process. The Facility must ensure complete documentation even before serving the discharge notice. The Facility had the opportunity to produce the prerequisite documentation at hearing and for more than two weeks following the hearing but failed to do so. The ALJ concludes that the Facility has failed to sustain its burden to prove that grounds exist for the proposed involuntary discharge and to prove that the proposed discharge plan is appropriate.

ORDER

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

The ALJ dismisses the Discharge Notice.

Dated: Menands, New York
October 2, 2020



James F. Horan
Administrative Law Judge

To:

██████████ Representative
██████████
██████████

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