



Department of Health

ANDREW M. CUOMO
Governor

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

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

March 6, 2017

CERTIFIED MAIL/RETURN RECEIPT

Michael Tise, Director SS
Terrace Healthcare Center
2678 Kingsbridge Terrace
Bronx, New York 10463

[REDACTED], Resident
c/o Terrace Healthcare Center
2678 Kingsbridge Terrace
Bronx, New York 10463

Angela C. Bellizzi, Esq.
c/o Legal Department
Fordham Nursing & Rehab.
225 Crossways Park Drive
Woodbury, New York 11797

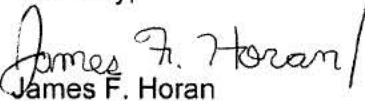
RE: In the Matter of [REDACTED] – Discharge Appeal

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.

JFH: mw
Enclosure

Sincerely,

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

COPY

STATE OF NEW YORK : DEPARTMENT OF HEALTH

In the Matter of
GS/Fordham Nursing and Rehab. Center

Administrative Law Judge's Decision

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

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

For Fordham Nursing and Rehab.
Center (Facility): Angela C. Bellizzi, Esq.

For Resident [REDACTED] (Appellant): Pro Se

The Facility proposes to discharge involuntarily the Appellant nursing home resident to a women's intake shelter in the New York City Shelter System, on the grounds that the Appellant's condition has improved sufficiently so that she no longer requires care in a nursing home. The Appellant appealed the discharge and requested at hearing that she be transferred to somewhere she can receive help, but not to a shelter. The Facility offered testimony and exhibits into the record. After considering the record, the ALJ dismisses the discharge notice, because the Facility has failed to prove that the Appellant no longer requires skilled nursing care or that a shelter would be an appropriate discharge location.

I. Background

Under Title 10 (Health) of the Official Compilation of Codes, Rule and Regulations of the State of New York (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; Appellant Exhibit 2] to the Appellant on [REDACTED], 2016. As grounds for the discharge, the Discharge Notice stated that the Appellant no longer requires services in a skilled nursing facility. The Facility proposed discharge to the [REDACTED] Shelter in the [REDACTED]. The Appellant then requested the hearing that took place at the Facility in Bronx County on February 1, 2017. The ALJ conducted the hearing pursuant to New York State Administrative Procedure Act (SAPA) Articles 3-5 (McKinney Supp. 2017), Title 10 (NYCRR) Part 415 and Title 18 (Family Assistance) NYCRR Parts 490-491 and 494.

At the hearing, the Appellant spoke on her own behalf. The Facility presented as witnesses Social Workers Jennifer Molina and Michael Tise, Physical Therapist Bathla Purnima, Occupational Therapist Marie Anne Alva and Medical Director Dunstan Pulle, M.D. The ALJ received the following documents into the record:

ALJ Exhibit I

Notice of Hearing

Facility Exhibit 1

Interdisciplinary Discharge Summary

Facility Exhibit 2

Transfer Discharge Notice

Facility Exhibit 3

Tise Written Statement

The record also contained the hearing transcript that a stenographic reporter prepared (Pages 1-41). The hearing record closed when the ALJ received the transcript on February 8, 2017.

Under the hearing procedures at §415.3(h)(2)(ii), the Facility bears the burden to prove a discharge necessary and appropriate. Under SAPA § 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 a conclusion or fact; less than preponderant 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 SAPA § 306(4) an agency may take official notice of all facts of which judicial notice may be taken.

II. Findings of Fact

The references in brackets following the findings reflect testimony from hearing transcript [T], 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 Appellant entered the Facility in [REDACTED] 2016 [T 9].
2. The Facility's records show the Appellant with a history of [REDACTED] and [REDACTED], with [REDACTED] use last reported on [REDACTED], 2016 [CD at 36:09].
3. The Appellant uses a wheelchair for mobility [Ex 1, page 4, section 5.c].
4. Physical Therapy at the Facility discharged the Appellant from therapy due to the complaint of [REDACTED] pain [T 26].

5. The Appellant requires a wheelchair accessible discharge location [T 26].
6. The Appellant is awaiting a surgical evaluation for a [REDACTED] [T 17, 34].
7. The Facility's Interdisciplinary Discharge Summary Guide states that the Appellant "should not do" stair climbing [Ex 1, page 3, Section 1.d.e].
8. The Facility attempted discharge to two adult homes, including [REDACTED], but [REDACTED] was unable to accommodate the Appellant's wheelchair [T 9, 21-22].
9. The admission standards for adult homes provide that an operator may not accept any person who chronically requires the physical assistance of another person to climb or descend stairs, unless assignment on a floor with ground-level egress can be made [ON Title 18 NYCRR §490.4(b)(13)].
10. The Facility now proposes discharge to a shelter [Ex 2].
11. The admission standards for adult shelters provide that an operator may not accept any person 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 Title 18 NYCRR §491.4(b)(4)].

III. Conclusions

The ALJ concludes from the exhibits and the testimony that the Appellant received legally appropriate notice about this discharge, pursuant to Title 10 NYCRR § 415.3(b). The ALJ finds that the evidence in the record raises questions about whether the Appellant is ready for discharge and whether a shelter is an appropriate discharge location. The Appellant's own evidence also contained contradictory information on both readiness and appropriate location.

Physical Therapist Purnima testified that Therapy discharged the Appellant due to a complaint of [REDACTED] pain, until the pain subsides [T 25-26]. Ms. Purnima testified further that the goal of therapy was to make the Appellant able to reach what she was doing before, that the Appellant was walking before and that now she is unable to walk independently [T 26-28]. In later testimony, Mr. Purnima indicated that Therapy was unaware that the Appellant was saying that she was able to walk and wants to participate in Therapy again [T 28]. The ALJ finds such testimony raises the question as to whether the Appellant would be able to now return to Therapy at the Facility. Further, in testimony by Occupational Therapist Marie Anne Alva, Ms. Alva at one point referred to discharging a Ms. [REDACTED] from therapy rather than the Appellant [T 31], which raises the question as to whether the Therapist was confused as to which Facility resident she was discussing in her testimony.

There were also contradictions in the Facility's evidence concerning the appropriate discharge location. A letter from Social Worker Tise stated the Facility attempted to obtain placement for the Appellant at [REDACTED], which the letter referred to as an Assisted Living Facility [Ex 3]. The letter went on to state that [REDACTED] approved the Appellant's application, but that the Appellant declined placement at [REDACTED] [Ex 3]. Social Worker Molina, however, testified that [REDACTED] is an adult home [T 9]. The standards for adult homes and assisted living programs differ (see 18 NYCRR Parts 490 and 494). It seems from this evidence that there was confusion in the Social Work Department as to what level of care the Facility was seeking as a discharge location. The Appellant also contradicted the Tise letter by stating that [REDACTED] was unable to accommodate the Appellant due to her wheelchair, rather than that the Appellant rejected [REDACTED] [T 21-22]. The ALJ finds that statement by the Appellant credible and finds that the Facility was likely seeking adult home placement for the Appellant, because

the admission standards for adult homes provide that an operator may not accept any person who chronically requires the physical assistance of another person to climb or descend stairs, unless assignment on a floor with ground-level egress can be made [Title 18 NYCRR §490.4(b)(13)]. The Facility's Discharge Summary for the Appellant states clearly that the Appellant should not do stairs [Ex 1]. The ALJ questions why the Facility sought adult home placement for the Appellant at all considering the admission standards for adult homes and the Facility's own Summary that recommended against stairs [Ex 1].

The record also indicated that the Appellant is awaiting an evaluation for a [REDACTED] [REDACTED]. The Appellant indicated that an evaluation appointment had to be cancelled, because on the appointment date, there was no escort from the Facility to accompany the Appellant to the appointment [T 34]. As of the hearing date, the Appellant was waiting for the Facility to make another appointment with a surgeon for evaluation [T 37].

The ALJ finds the discharge in this case inappropriate. The Facility should determine if the Appellant is ready to return to therapy and should assure that the Appellant receives the surgical evaluation concerning the knee replacement. Further, the Facility's own evidence shows that a shelter would be unable to accommodate the Appellant due to her inability to ambulate on stairs.

ORDER

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

1. The ALJ dismisses the [REDACTED] 2016 Discharge Notice and sustains the Appellant's discharge appeal.

Dated: Menands, New York
March 6, 2017

A handwritten signature in black ink, appearing to read "James F. Horan", written over a horizontal line.

James F. Horan
Administrative Law Judge

To:

Angela C. Bellizzi, Esq.
c/o Legal Department
Fordham Nursing and Rehab. Center
225 Crossways Park Drive
Woodbury, NY 11797

Resident ■
Fordham Nursing and Rehab. Center
2678 Kingsbridge Terrace
Bronx, NY 10463