



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
4190 Washington Street, West  
Charleston, WV 25313

Joe Manchin III  
Governor

Patsy A. Hardy, FACHE, MSN, MBA  
Cabinet Secretary

February 19, 2010

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Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held February 17, 2010. Your hearing request was based on Golden Living Center's proposal to discharge you from the nursing facility due to safety issues.

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

The State and Federal regulations that govern the Medicaid Long-Term Care Program state that the facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless certain criteria is met— one of the reasons listed as an exception is when the safety of individuals in the facility is endangered. [Code of Federal Regulations 42 CFR 483.12 (2) (iii) and West Virginia Department of Health and Human Resources Nursing Facility Services Manual §514.11]

Information submitted at your hearing reveals that you violated the smoking policy at ----- on several occasions which endangered the safety of other individuals housed in the center. You are prescribed oxygen therapy daily which increases the risk to fire safety. You were counseled on numerous occasions by staff and instructed to discontinue smoking; however, you failed to comply.

It is the decision of the State Hearing Officer to **uphold** the proposal of Golden Living Center - [REDACTED] to discharge you from the nursing facility.

Sincerely,

Cheryl A. Henson  
State Hearing Officer  
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review  
-----, Golden Living Center [REDACTED]

**WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES  
BOARD OF REVIEW**

-----,

**Claimant,**

v.

**Action Number: 09-BOR-2476**

**Golden Living Center** [REDACTED]

**Respondent.**

**DECISION OF STATE HEARING OFFICER**

**I. INTRODUCTION:**

This is a report of the State Hearing Officer resulting from a fair hearing for ----- . This hearing was held in accordance with the provisions found in the Common Chapters Manual, Chapter 700 of the West Virginia Department of Health and Human Resources. This hearing was convened on February 17, 2010 on a timely request for hearing dated January 5, 2010.

**II. PROGRAM PURPOSE:**

The program entitled Long Term Care Medicaid (nursing facility services) is a medical service which is covered by the State's Medicaid Program. Payment for care is made to nursing homes which meet Title XIX (Medicaid) standards for the care provided to eligible recipients. In order to qualify for Nursing Home Care, an individual must meet financial and medical eligibility criteria.

**III. PARTICIPANTS:**

-----, Claimant

-----, Executive Director, Golden Living Center [REDACTED]

Presiding at the hearing was Cheryl A. Henson, State Hearing Officer and a member of the State Board of Review.

**IV. QUESTION TO BE DECIDED:**

The question to be decided is whether Golden Living Center [REDACTED] is correct in its proposal to involuntarily discharge the Claimant from the nursing facility.

**V. APPLICABLE POLICY:**

Code of Federal Regulations §42 CFR 483.12 (2) (iii), 483.15(b), 483.70  
West Virginia Department of Health and Human Resources' Nursing Facility Services Manual §514.11  
National Fire Protection Association's 2000 Edition of the Life Safety Code 101, §19.7.4

**VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:**

**Claimant's Exhibits:**

None

**Respondent's Exhibits:**

NH-1 Smoking Policy for Golden Living Center [REDACTED]  
NH-2 Federal Regulation §483.70  
NH-3 Interdisciplinary Progress Notes  
NH-4 National Fire Protection Association provisions

**VII. FINDINGS OF FACT:**

- 1) On or about December 9, 2009, the Claimant was notified that Golden Living Center [REDACTED] planned to discharge him from its facility on January 8, 2010. The facility provided the Claimant with a written notice (NH-5) which included the following pertinent information:

This letter is to inform you that ----- will discharge you in thirty (30) days from the date of this letter. The date of discharge will be January 8, 2009 [sic]. This discharge notice is being given to you because you are not following the facility smoking policy and by doing so you are putting yourself and other people at the facility at risk for safety issues, fire hazards, and harm. Although the smoking policy has been discussed with you and you advised you would not smoke, you have continued to do so and have done so with oxygen in use. The facility staff and social worker will assist you in discharge planning to ensure you have a safe and appropriate discharge from the facility.

- 2) The nursing facility enacted a smoking policy on August 1-2006 (NH-1) which provides that residents who are admitted to the facility after August 1, 2006 will not be allowed to smoke either at, outside, or around the facility. The Claimant was admitted to the facility on July 10, 2009.
- 3) The Facility's Executive Director, -----, testified that the smoking policy when originally enacted allowed for individuals admitted to the facility prior to August 1, 2006 to continue any established safe smoking practice; however, she added that the last individual who met this criterion left the facility on October 20, 2009. As a result, the facility is now completely smoke free.

- 4) -----provided that when the Claimant was first admitted to the facility he did not smoke cigarettes. However, she added that on November 25, 2009 he was discovered smoking a cigarette on the property. He extinguished the cigarette, and the staff then discussed the risks involved with this practice, explaining the safety issues involved. The Claimant is prescribed oxygen therapy which increases the risk to fire safety. The Claimant was offered a nicotine patch and he accepted. He allowed the staff to confiscate his cigarettes and lighter. On December 9, 2009 the Claimant was again observed smoking a cigarette in the facility's courtyard. The staff at that time discussed the thirty (30) day discharge process with the Claimant. He refused to surrender his lighter to staff. -----testified that one week prior to this last incident she observed the Claimant outside with a lit cigarette which he dropped to the ground beside his wheelchair; however, at that particular time she stated she did not actually witness him smoking the cigarette but believed he had been smoking.
- 5) -----testified that the Claimant's original discharge date was listed as January 8, 2010 but was postponed after he requested a hearing on the issue. She added that she has exhausted all efforts to bring the Claimant into compliance with the smoking policy and has judged that this practice places both the Claimant and other individuals at the facility in danger.
- 6) The Claimant testified that he is sorry he did not comply with the smoking policy, admits to the smoking incidents, and added that he was dealing with stressful issues at the time which caused him to rebel against the smoking rules imposed upon him at the facility. He asked the Executive Director during the hearing if she would reconsider his transfer and allow him to stay if he promised to discontinue smoking; however, she declined to reconsider, adding that the Claimant had made promises before which were not kept. She added that she regrets this action, however, she is obligated to protect the safety of the other individuals at the facility.
- 7) The Code of Federal Regulations §483.12 (1)(2)(iii) states in pertinent part:
  - (1) Transfer and discharge includes movement of a resident to a bed outside of the certified facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same certified facility.
  - (2) Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless—
    - (iii) The safety of individuals in the facility is endangered;
- 8) The West Virginia Department of Health and Human Resources Nursing Facility Services Manual §514.11 states in pertinent part:

The facility must permit each resident to remain in the facility, and not be transferred or discharged from the facility unless at least one of the following conditions is met:

  - The safety of individuals in the nursing facility is endangered;

- 9) The Code of Federal Regulations §483.15(b) states in pertinent part:

The resident has the right to—

- (1) Choose activities, schedules, and health care consistent with his or her interests, assessments, and plans of care;
- (2) Interact with members of the community both inside and outside the facility; and
- (3) Make choices about aspects of his or her life in the facility that are significant to the resident.

The intent of this requirement is to specify that the facility must create an environment that is respectful of the right of each resident to exercise his or her autonomy regarding what the resident considers to be important facets of his or her life. For example, if a facility changes its policy and prohibits smoking, it must allow current residents who smoke to continue smoking in an area that maintains the quality of life for these residents. Weather permitting, this may be an outside area. Residents admitted after the facility changes its policy must be informed of this policy at admission.

- 10) The Code of Federal Regulations §483.70 states in pertinent part:

The facility must be designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel and the public.

Except as otherwise provided in this section, the facility must meet the applicable provisions of the 2000 edition of the Life Safety Code of the National Fire Protection Association (NFPA). The Director of the Office of the Federal Register has approved the NFPA 101 Rev. 2000 edition of the Life Safety Code, issued January 14, 2000, for incorporation by reference in accordance with 5 U.S.C.

- 11) The National Fire Protection Association's 2000 edition of the Life Safety Code 101 §19.7.4 states in pertinent part:

Smoking regulations shall be adopted and shall include not less than the following provisions:

- (1) Smoking shall be prohibited in any room, ward, or individual closed space where flammable liquids, combustible gases, or oxygen is used or stored or in any other hazardous location, and such areas shall be posted with signs that read NO SMOKING or shall be posted with the international symbol for no smoking.

12) The National Fire Protection Association's Fact Sheets (NH-4) provide in pertinent part:

- When more oxygen is present, any fire that starts will burn hotter and faster than usual.
- More oxygen in the air means that things such as hair, plastic, skin oils, clothing, and furniture can catch fire at lower temperatures.
- In 2003-2006, hospital emergency rooms saw an estimated average of 1,190 thermal burns per year caused by ignitions associated with home medical oxygen.
- Smoking is by far the leading cause of burns, reported fires, deaths, and injuries involving home medical oxygen.
- If oxygen is used in the home, the amount of oxygen in the air, furniture, clothing, hair, and bedding goes up, making it easier for a fire to start and spread. This means that there is a higher risk of both fires and burns.
- Smoking should not be allowed in a home where oxygen is used. Even if oxygen is not being used, it may have saturated the home including clothing, curtains, furniture, bedding, hair, and anything in the area.

#### **VIII. CONCLUSIONS OF LAW:**

- 1) Regulations that govern the Medicaid Long-Term Care Program state that a nursing facility is required to be designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel and the public. The regulations also provide that facilities must meet the applicable provisions of the 2000 Edition of the Life Safety Code 101 of the National Fire Protection Association which states that smoking cigarettes shall be prohibited in any room, ward, or individual closed space where oxygen is used or stored. Fact sheets provide that smoking around or near oxygen is unsafe and increases the risk for fires and injuries.
- 2) Clearly policy requires the facility to protect the health and safety of its residents, and policy is also clear in that smoking around or near oxygen is considered an unsafe practice and shall be prohibited.
- 3) The Claimant utilizes oxygen therapy throughout his daily activities which involves him being in close proximity to oxygen most of the time. The Claimant clearly was smoking cigarettes and utilizing oxygen therapy on numerous occasions at the facility, even after being counseled on the facility's non-smoking policy and the dangers to both him and other individuals. He clearly was informed and given several opportunities to stop this hazardous practice; however, he chose to continue.
- 4) The nursing facility complied with policy when it prohibited the Claimant from smoking, and also followed policy in its decision to involuntarily discharge him in order to protect the other individuals in the facility. The facility clearly has an obligation to protect the health and safety of all residents, and the Claimant's refusal to refrain from a hazardous practice left the facility no alternative other than discharge.

**IX. DECISION:**

It is the decision of the State Hearing Officer to **uphold** the proposal of Golden Living Center - [REDACTED] to discharge the Claimant from the nursing facility.

**X. RIGHT OF APPEAL:**

See Attachment

**XI. ATTACHMENTS:**

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

**ENTERED this 19<sup>th</sup> Day of February, 2010**

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**Cheryl Henson  
State Hearing Officer**