



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
9083 Middletown Mall
White Hall, WV 26554

Earl Ray Tomblin
Governor

Michael J. Lewis, M.D., Ph.D.
Cabinet Secretary

October 25, 2011

C/O -----

Dear -----:

Attached is a copy of the Findings of Fact and Conclusions of Law on your hearing held October 5, 2011. Your appeal was filed to contest the proposal of Peterson Rehabilitation Hospital to discharge you from its nursing facility.

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.

State and Federal regulations that govern the Medicaid Long-Term Care Program state that the transfer and discharge of an individual includes movement of a resident to a bed outside of the certified facility (area) whether or not that bed is in the same physical plant. Among the reasons for which a facility can recommend transfer/discharge is when the resident has failed, after reasonable and appropriate notice, to pay for (or have paid under Medicare or Medicaid) a stay at the facility or when the transfer or discharge is necessary for the resident's welfare since the needs of the resident cannot be met by the facility. (West Virginia Provider Manual, Chapter 514.11 and Code of Federal Regulations 42 CFR §483.12)

Information submitted at the hearing fails to support discharge based on non-payment, however, because the Resident has repeatedly refused or obstructed medical care prescribed in the treatment plan by the facility's physician - and it is causing the Resident physical and emotional distress - discharge is necessary for the Resident's welfare as the needs of the Resident cannot be met by the facility.

It is the decision of the State Hearing Officer to **uphold** the proposal of [REDACTED] Hospital to discharge/transfer the Resident from its facility.

Sincerely,

Thomas E. Arnett
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
-----, Administrator, [REDACTED] Hospital

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

-----,

Resident,

v.

Action Number: 11-BOR-1841

██████████ REHABILITATION HOSPITAL,

Facility.

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 fair hearing was convened on October 5, 2011 on a timely appeal filed September 2, 2011.

II. PROGRAM PURPOSE:

Medicaid Regulations at 42 CFR §483.12 provide for admission, transfer and discharge rights for residents of Nursing Facilities. A facility must permit each resident to remain in the facility and not be transferred or discharged unless at least one of six specified criteria is met. Further, facility may not discharge or transfer a resident until he or she has received proper and timely advance notice of the proposed action including the right to appeal.

III. PARTICIPANTS:

- , Resident
- , Resident's Daughter/MPOA
- , Regional Ombudsman, Legal Aid of WV
- , Administrator, Peterson Rehabilitation Hospital
- , Director of Social Services, Peterson Rehabilitation Hospital
- , Chief Nursing Officer, ██████████ Rehabilitation Hospital
- , Nurse Manager for Long-Term Care ██████████ Rehabilitation Hospital
- , M.D., Resident's Physician, ██████████ Rehabilitation Hospital

Presiding at the hearing was Thomas E. Arnett, State Hearing Officer and a member of the State Board of Review.

IV. QUESTION TO BE DECIDED:

The question to be decided is whether or not [REDACTED] Rehabilitation Hospital has correctly implemented discharge/transfer procedures against the Resident.

V. APPLICABLE POLICY:

West Virginia [Medicaid] Provider Manuals, Chapter 511.14 (Nursing Facility Services)
Code of Federal Regulations 42 CFR §483.12

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Respondent's Exhibits:

- PRH-1a Certified Mail Receipt verifying delivery of the Notice of Transfer or Discharge
- PRH-1b Sales Receipt from [REDACTED] Post Office (August 4, 2011)
- PRH-1c Correspondence addressed to -----, MD, dated August 3, 2011
- PRH-1d Notice of Transfer or Discharge (pages 1-3), dated August 3, 2011
- PRH-2 Resident Case documentation for period of October 27, 2010 – August 31, 2011 (3 pages)
- PRH-3 Social Service Progress Note dated September 13, 2011 (1 page)
- PRH-4 Social Service Progress Notes dated July 20, 2011 and July 21, 2011, accompanied by Physician Progress Notes dated May 6, 2011 and May 7, 2011
- PRH-5 Correspondence to ----- dated August 31, 2011, accompanied by Room and Board Statement (September 1, 2011), Room and Board Statement (June 1, 2011), Room and Board Statement (July 1, 2011), Room and Board Statement (August 1, 2011), Transaction History Report (August 18, 2010 – April 30, 2011), [REDACTED] Pharmacy Statement of Account (August 25, 2011)
- PRH-6 Correspondence addressed to -----dated February 17, 2011 from ----- (Billing/Collections Representative, [REDACTED] Pharmacy), accompanied by Resident Transaction History (September 6, 2010 – January 25, 2011)
- PRH-7 Room and board, incontinence and oxygen supply statements dated September 6, 2011, accompanied by correspondence to -----(August 19, 2011), Transaction History Report (September 30, 2010 – April 30, 2011), Transaction History Report (April 30, 2011 – September 1, 2011), and duplicates of Room and Board Statements, see PRH-5 (June 1, 2011, July 1, 2011, August 1, 2011, September 1, 2011)
- PRH-8 Electronic Mail (E-Mail) correspondence from -----to -----(September 6, 2011) accompanied by correspondence (June 14, 2011) from----- (Billing/Collections Representative, [REDACTED] Pharmacy) to ----- and monthly statements from September 25, 2010 through August 25, 2011
- PRH-9 Written statements (all drafted in September 2011) from six (6) [REDACTED] Rehabilitation Hospital employees who provide care for ----- - all indicate ----- does not provide incontinent products for -----

Resident's Exhibits:

- R-1 Medicaid Program Instruction 94-MA-23, dated May 1, 1994 [This Medicaid Program Instruction was provided by ----- and viewed at the hearing. While the viewed copy was not secured by the Hearing Officer, a copy of this instruction has been located and marked "R-1." This Medicaid Program Instruction, however, is obsolete and now addressed in the West Virginia Medicaid Provider Manual, Chapter 514.11 (Nursing Facility Services) and cited in the Findings of Fact]
- R-2 Peterson Rehabilitation and Skilled Nursing Center – Resident Rights
- R-3 Peterson Rehabilitation and Skilled Nursing Center - Effects of Restraints

VII. FINDINGS OF FACT:

- 1) On August 3, 2011, [REDACTED] Rehabilitation Hospital, hereinafter [REDACTED] issued a Notice of Transfer or Discharge to -----, Resident's daughter and Medical Power of Attorney (MPOA), in writing (PRH-1a, PRH-1b, PRH-1c and PRH-1d) indicating that – "The transfer or discharge is necessary for your welfare and your needs cannot be met in this facility as you have consistently refused to comply with the physician's recommendations for treatment." This notice goes on to state – "You have failed after reasonable and appropriate notice to pay in a timely manner for medications provided by Guardian Pharmacy (balance as of 7/25/11 = \$4,388.66)." The effective date of transfer is September 3, 2011 and the letter indicates the destination of transfer - "Home or as per daughter's request (Dr. -----)."
- 2) -----, Administrator at Peterson, contends that -----, D.O., Resident's daughter/representative/Medical Power of Attorney (MPOA), has been notified several times of the money owed to [REDACTED] Pharmacy (see Exhibits PRH-5, PRH-6 and PRH-8). Ms. [REDACTED] reported that [REDACTED] and [REDACTED] Pharmacy are both owned by [REDACTED] Elder Care and that is why the Resident's notice included discharge for non-payment. Ms. [REDACTED] noted, however, that Exhibit PRH-5 also shows an unpaid balance in excess of \$26,000 for Room and Board, oxygen, and incontinent supplies provided by Peterson. In addition to the unpaid monies owed to [REDACTED] the Resident continually demonstrates disruptive behaviors (yelling, screaming, demanding pain medications etc...) and that the Resident's needs cannot be met because the Resident's daughter continually disagrees and/or interferes with the plan of care developed by [REDACTED] physicians. It was noted that if the Resident is assessed for pain, and she is reporting pain to be a 10 (on a scale of 1 to 10, 10 being the most severe), Peterson has a responsibility to treat the Resident. ----- has requested that pain medications not be given as prescribed.
- 3) The Resident, by her representative/daughter/MPOA, -----, D.O., contends that the discharge notice issued by Peterson fails to provide a destination of transfer for the Resident, as required by State and Federal Medicaid regulatory requirements. The Resident further contends that pursuant to Peterson's "Resident Rights" policy (Exhibit R-2), the Resident has the right to refuse medical treatment, and asserts that Peterson's

“Effects of Restraints” - physical and chemical (Exhibit R-3) - provides adverse physical and behavioral complications. -----testified that she is concerned for her mother’s well being and does not want to see her chemically restrained. She referenced Exhibit R-2 (Resident’s Rights), #27, wherein it states – “Be free from physical restraints imposed or psychoactive drugs administered for purposes of discipline or convenience and not required to treat the Resident’s medical symptoms.”

- 4) -----, Director of Social Services, testified that it is her position to advocate for each and every resident at [REDACTED]. She testified that the Resident’s behavior (yelling and screaming for pain medication, potty chair etc...) is adversely affecting other residents and their families. -----testified that she attempted to assist ----- with locating another placement for her mother but she was not cooperative.
- 5) [REDACTED] RN, Nurse Manager for [REDACTED] are, provided testimony specific to the Resident’s continuous disruptive behaviors (yelling and screaming for pain medications, banging the phone receiver, etc...) and stated that on one occasion the Resident was observed hiding something in a bag under her covers. It was unclear at first what she was ingesting, but it was determined that ----- gave her jelly beans and told her that it was Advil. This, according to RN [REDACTED] was never discussed, it was not part of the Resident’s plan of care, and in her opinion, it elevated the Claimant’s disruptive behaviors when the candy was taken away.
- 6) -----, Chief Nursing Officer, purported that ----- attended an interdisciplinary team meeting with her and several [REDACTED] staff members on July 20, 2011. The information discussed in the July 20, 2011 meeting was memorialized in a Social Service Progress Note identified as Exhibit PRH-4. The meeting was to focus on ideas to better treat the Resident, but the note states, in pertinent part – “-----’s interference with her mother’s treatment continues to be a barrier in trying to assist -----on an emotional and physical level with her yelling and screaming for pain medication even minutes after she has had her medication.” The Progress Note goes on to say – “-----once again told ----- that if this behavior continues and as a facility we are not permitted to provide her mother with treatment needed to help her, along with the distress that the yelling creates for the other residents, we would be looking at issuing a 30 day notice.” There is also information documented to indicate there was discussion about ----- taking her mother home to care for her, or [REDACTED] would assist in locating a facility that would be able to work with the Resident’s behaviors. According to the notation, ----- denied [REDACTED] offer of assistance to look at another placement for her mother.

At the bottom of Exhibit PRH-4, Dr. -----, M.D., wrote the following note:

I have reviewed and concur with the finding in the note above. I have also reviewed notes and nursing documentation since my May 2011 meeting with staff and family representative. It is apparent that the patients [sic]

needs cannot be met in this facility due to Dr. [REDACTED] [sic] [REDACTED] [sic] continued disruption and interference in treatment.

- 7) -----, M.D., testified that he has continually consulted with -----, but on many occasions when treatment was prescribed, there would be a request by ----- to make a change or a refusal on her part to allow [REDACTED] to carry out the treatment. Because the Resident has demonstrated so many behavioral issues, a psychiatrist consultation was completed by Dr. [REDACTED] and ----- was again not agreeable to the plan of care. ----- indicated that he understands -----'s desire to be involved with her mother's care, but it has created an obstruction with [REDACTED] ability to care for the Resident. ----- purported that [REDACTED] has a responsibility to recommend that the Resident receive medical care elsewhere if they are not permitted to provide necessary patient care. ----- testified that the Resident would best be served in a specialized dementia unit.
- 8) ----- testified that the behaviors demonstrated by her mother are typical for a dementia patient and she believes [REDACTED] should be able to manage her behaviors. She acknowledged that her mother yells but disagrees that it is constant. She indicated that she has refused some medication therapies because she believes her mother gets over sedated and that she is chemically restrained. ----- acknowledged that she brought her mother candy because she repeatedly asks for pain medication and she thought this would help. With regard to non-payment, ----- reported that her mother's room and board was up to date until this summer when they had to transfer some assets around to make payment. At this time, her mother's room and board has been paid and she has been making payments on the money owed for medications.
- 9) The contested costs associated with incontinent supplies, as well as the other items listed in Exhibits PRH-5 and PRH-9 has no bearing in this decision, as these issues developed subsequent to the discharge notice.
- 10) West Virginia Medicaid Provider Manual, Chapter 514.11 (Nursing Facility Services), states - *Replaced Medicaid Program Instruction 94-MA-23, dated May 1, 1994:*

Transfer and discharge of an individual includes movement of a resident to a bed outside of the certified facility (area) whether or not that bed is in the same physical plant. Transfer and discharge does not refer to movement of a resident to a bed within the same certified facility.

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 transfer or discharge is necessary for the resident's welfare since the needs of the resident cannot be met by the facility;
- The transfer or discharge of the resident is appropriate because the health of the resident has improved sufficiently that the individual no longer meets the medical criteria for Medicaid nursing facility services;
- The safety of individuals in the nursing facility is endangered;

- The health of individuals in the nursing facility would otherwise be endangered;
- The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicaid) a stay at the nursing facility including but not limited to the amount of money determined by the financial eligibility evaluation as co-payment for the provision of services; and/or
- The facility ceases to operate or the residents are identified by the state and/or federal certification agency as in immediate and serious danger due to policies, practices and/or services provided by the nursing facility.

Documentation must be recorded in the resident's medical record by a physician of the specific reason and /or condition requiring the transfer and/or discharge if due to health and safety issues of the resident or others, the needs of the resident cannot be met or the medical needs of the resident no longer qualify for nursing facility level of service. Documentation of the reason for discharge must also appear in the record of the resident if the facility ceases to operate or must discharge residents due to certification requirements or financial requirements are not met by the resident or his/her representative.

The facility must notify the resident and/or his/her representative both in a written language and verbal language that is understandable to the parties of the intent and reason for transfer or discharge. The same information must be recorded in the resident's clinical record. Except in the case of immediate danger to the resident and/or others as documented, the notice of transfer or discharge must be provided at least thirty (30) days prior to the anticipated move.

Waiver of thirty day requirement may be appropriate if the safety of individuals in the facility would be endangered, the immediate transfer is required by the resident's urgent medical needs, or a resident has not resided in the nursing facility for thirty (30) days.

The written notice must include the reason for the transfer or discharge; the effective date of the transfer or discharge; the location or person(s) to which or whom the resident is transferred or discharged; a statement that the resident has the right to appeal the action to the State; the name, address and telephone number of the State long term care ombudsman; for nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities and Bill of Rights Acts; and for nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

11) The Code of Federal Regulations, found at 42 CFR §483.12(a) provides regulatory guidelines regarding admission, transfer and discharge rights for the Medicaid, Long-Term Care Program. This regulation states:

(1) Definition: 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 _____

(i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;

(ii) 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;

(iii) The safety of individuals in the facility is endangered;

(iv) The health of individuals in the facility would otherwise be endangered;

(v) The resident has failed, after reasonable and appropriate notice, to pay for a stay at the facility.

(vi) The facility ceases to operate.

12) The Code of Federal Regulations, 42 CFR §483.12(a)(4&6), addressed written notification regarding transfer and discharge and states that notice must include the following:

(i) The reason for transfer or discharge;

(ii) The effective date of transfer or discharge;

(iii) The location to which the resident is transferred or discharged;

(iv) A statement that the resident has the right to appeal the action to the State;

(v) The name, address and telephone number of the State long term care ombudsman;

(vi) For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and

(vii) For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

VIII. CONCLUSIONS OF LAW:

- 1) Regulations that govern the Medicaid Long-Term Care Program state that a resident can be transferred/discharged from a nursing facility when the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility; and/or if the resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicaid) a stay at the nursing facility including but not limited to the amount of money determined by the financial eligibility evaluation as co-payment for the provision of services.
- 2) The Respondent's decision to initiate discharge/transfer proceedings against the Resident for non-payment is not supported by the evidence. This conclusion is supported by the fact that the money owed by the Resident in Exhibit PRH-5 was not cited as the reason for discharge in the August 3, 2011 discharge notice, and - while it is noted that [REDACTED] and [REDACTED] Pharmacy are owned by the same parent company - the regulations specify costs associated with a stay at the facility. Because pharmacy supplies could be provided by any number of sources, and the money owed is not associated with room, board and services provided directly by the facility, discharge based on non-payment for pharmacy products cannot be affirmed.
- 3) With regard to discharge being necessary because [REDACTED]'s unable to meet the Resident's needs, the Resident's reported disruptive behavior alone would not meet this standard. However, the fact that [REDACTED] is unable to treat the Resident for physical and emotional distress due to the interference of the Resident's daughter, despite the right to refuse medical treatment, prevents [REDACTED] and its physicians from providing care deemed medically necessary. Discharge based on [REDACTED] inability to meet the Resident's needs is therefore affirmed.
- 4) The Resident's position that the discharge notice fails to meet regulatory requirements because [REDACTED] did not include a specific discharge location has no merit. Testimony and documentation submitted in this case reveals that [REDACTED] attempted to collaborate with the Resident's daughter and she refused to cooperate with finding a discharge location. Furthermore, the notice indicates that the Resident would be discharged to her home or to a location of her daughter's choice.
- 5) Whereas the evidence clearly demonstrates regulatory requirements have been met - discharge is necessary for the Resident's welfare and the Resident's needs cannot be met by the facility - Peterson's discharge/transfer of the Resident is affirmed.

IX. DECISION:

It is the decision of the State Hearing Officer to **uphold** the proposal of [REDACTED] Rehabilitation Hospital to discharge the Resident from its facility.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this ____ Day of October, 2011.

**Thomas E. Arnett
State Hearing Officer
Member, State Board of Review**