STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF INSPECTOR GENERAL

Earl Ray Tomblin
Governor

BOARD OF REVIEW
416 Adams St.
Fairmont, WV 26554

Karen L. Bowling
Cabinet Secretary

February 17, 2016

[redacted]

RE: [redacted] v. [redacted]
ACTION NO.: 16-BOR-1001

Dear Ms. [redacted]

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

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.

You will find attached an explanation of possible actions you may take if you disagree with the decision reached in this matter.

Sincerely,

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

Encl: Resident's Recourse to Hearing Decision
Form IG-BR-29

cc: [redacted], LSW, [redacted]

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW

[redacted],

Resident,

v. **Action Number: 16-BOR-1001**

[redacted],

Facility.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for [redacted]. This hearing was held in accordance with the provisions found in Chapter 700 of the West Virginia Department of Health and Human Resources' Common Chapters Manual. This fair hearing was convened on February 9, 2016, on an appeal filed January 4, 2016.

The matter before the Hearing Officer arises from the December 30, 2015 decision by the Facility to propose involuntary discharge of the Resident from [redacted].

At the hearing, the Facility appeared by [redacted], Registered Nurse, Director of Clinical Care Management. Appearing as witnesses for the Facility were [redacted], a Licensed Social Worker (LSW) at [redacted], and [redacted], Physical Therapist, Assistant Rehabilitation Director at [redacted]. The Resident appeared pro se. All witnesses were sworn and the following documents were admitted into evidence.

Facility's Exhibits:

- NF-1 Initial Therapy Evaluation dated 12/9/15
- NF-2 Physical Therapy (PT) and Occupational Therapy (OT) Progress notes for the period of 12/16/15-12/22/15
- NF-3 Physical Therapy (PT) Treatment Notes – six (6) treatments – during the period of 12/23/15 - 1/21/16
- NF-4 Social Service Notes for the period of 12/8/15 - 2/9/16 and Discharge Notice dated 12/30/15
- NF-5 Nursing Notes prior to Discharge Notice 12/8/15 – 1/2/16
- NF-6 Physical Therapy Evaluation and Progress notes - post Discharge Notice
- NF-7 Nursing Notes - post Discharge Notice
- NF-8 Pre-Admission Screening Form dated 12/7/15
- NF-9 Initial Psychiatric Evaluation conducted by [redacted], MD, on 1/21/16

After a review of the record, including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the Hearing Officer sets forth the following Findings of Fact.

FINDINGS OF FACT

1) Resident was admitted to [redacted] (Facility) on December 8, 2015, with a Pre-Admission Screening (PAS) form that authorized a 60-day stay for rehabilitative services.

2) Resident was admitted with pain management, generalized weakness, and post-herpetic shingle pain. Her diagnoses included syncope and dehydration (NF-1), and functional deficits identified on the PAS (Exhibit NF-8) include – vacating (in the event of an emergency), bathing, dressing, grooming, transferring, walking and wheeling.

3) Evidence proffered by Facility representatives contended that because Resident met her occupational and physical therapy goals (Exhibits NF-2, NF-3 and NF-5), and that she no longer demonstrated skilled nursing needs, Resident was provided a 30-day Notice of Discharge on December 30, 2015 (NF-4). This notice indicates – "The transfer or discharge is appropriate because your health has improved sufficiently that you no longer need the services provided by this facility." The notice further indicates that the effective date of transfer is January 5, 2016.

4) Exhibits NF-6, NF-7, NF-8 and NF-9 were submitted in support of Facility's position that Resident has not required skilled nursing services subsequent to the discharge notice.

5) Resident contended that she still requires a nursing facility level of care and that she should not be discharged from the facility.

APPLICABLE POLICY

Medicaid regulations, found in the West Virginia Bureau for Medical Services Provider Manual at §514.9.2, Code of State Regulations 64 CSR 13, and the Code of Federal Regulations (42 CFR §483.12), provide that transfer and discharge of an individual includes movement of a Resident to a bed outside of the Medicaid-certified portion of the facility, whether that bed is in the same physical plant. Transfer and discharge does not refer to movement of a Resident to a bed within the Medicaid-certified portion of the facility.

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

- The transfer or discharge is necessary for the Resident's welfare when the needs of the Resident cannot be met in the facility; or

- The transfer or discharge is appropriate because the health of the Resident has improved sufficiently that the individual no longer meets the medical criteria for nursing facility services; or

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

- The health of individuals in the nursing facility would otherwise be endangered; or

- 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 nursing facility services; or

- The facility ceases to operate; or

- The Resident is identified by the State and/or Federal certification agency to be in immediate and serious danger.

Documentation must be recorded in the Resident's medical record by a physician of the specific reason requiring the transfer or discharge. Discharge documentation is required regardless of the reason for discharge.

Before the nursing facility transfers or discharges a resident, the administrator or designee must notify the resident and/or the responsible party verbally and in writing, in a 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 medical record and a copy of this written notice must be sent to the State Long-Term Care Ombudsman or his/her designee. 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 30 days prior to the anticipated move to ensure a safe and orderly discharge to a setting appropriate to the individual's needs.

Waiver of this 30-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 30 days.

The written notice must include (emphasis added) the following:

- The effective date of the transfer or discharge;

- Reason for the discharge;

- The location or person(s) to whom the Resident is transferred or discharged;

- A statement that the Resident has the right to appeal the action to the State Board of Review, during this time of appeal, the Resident/member may choose to stay in the facility;

- The name, address and telephone number of the State long term care ombudsman;

- The mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled and mentally ill individuals.

According to the West Virginia Bureau for Medical Services Medicaid Provider Manual §514.6.3, to qualify medically for the nursing facility Medicaid benefit, an individual must need direct nursing care 24 hours a day, 7 days a week. BMS has designated a tool known as the Pre-Admission Screening form (PAS) (see appendix II) to be utilized for physician certification of the medical needs of individuals applying for the Medicaid benefit.

An individual must have a minimum of five deficits identified on the PAS. These deficits will be determined based on the review by BMS/designee in order to qualify for the Medicaid nursing facility benefit.

These deficits may be any of the following:

- #24: Decubitus – Stage 3 or 4

- #25: In the event of an emergency, the individual is c) mentally unable or d) physically unable to vacate a building. a) and b) are not considered deficits.

- #26: Functional abilities of the individual in the home.

  Eating: Level 2 or higher (physical assistance to get nourishment, not preparation)
  Bathing: Level 2 or higher (physical assistance or more)
  Grooming: Level 2 or higher (physical assistance or more)
  Dressing: Level 2 or higher (physical assistance or more)
  Continence: Level 3 or higher (must be incontinent)
  Orientation: Level 3 or higher (totally disoriented, comatose)
  Transfer: Level 3 or higher (one person or two persons assist in the home)
  Walking: Level 3 or higher (one person assist in the home)
  Wheeling: Level 3 or higher (must be Level 3 or 4 on walking in the home to use, Level 3 or 4 for wheeling in the home.) Do not count outside the home.

- #27: Individual has skilled needs in one these areas – (g) suctioning, (h) tracheostomy, (i) ventilator, (k) parenteral fluids, (l) sterile dressings, or (m) irrigations.

- #28: Individual is not capable of administering his/her own medications.

This assessment tool must be completed, signed and dated by a physician. The physician's signature indicates "to the best of my knowledge, the patient's medical and related needs are essentially as indicated". It is then forwarded to the Bureau or their designee for medical necessity review. The assessment tool must be completed and reviewed for every individual residing in a nursing facility, regardless of the payment source for services.

DISCUSSION

According to the West Virginia Bureau for Medical Services Medicaid Provider Manual §514.6.3, to qualify medically for the nursing facility Medicaid benefit, an individual must need direct nursing care 24 hours a day, 7 days a week. The PAS is utilized for physician certification of medical needs and must identify a minimum of five deficits in order to qualify for the Medicaid nursing facility benefit. The PAS must be completed, signed and dated by a physician, and then forwarded to the Bureau, or its designee, for medical necessity review. While there was documented evidence submitted in this case to indicate Resident's physical health and activities of daily living have improved, physician certification of the Resident's medical needs must be documented on the PAS (emphasis added) and then forwarded to the Bureau where the deficits will be determined.

Medicaid Long-Term Care Program regulations further provide that a nursing facility can involuntarily transfer/discharge a resident if the resident's medical condition has improved and he/she no longer requires a nursing facility level of care. However, 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 30 days prior to the anticipated move to ensure a safe and orderly discharge to a setting appropriate to the individual's needs. Evidence submitted in this case reveals that the Resident was only given five (5) days of notice of involuntary discharge - notified on December 30, 2015, that she would be involuntarily discharged on January 5, 2016.

CONCLUSIONS OF LAW

1) While facility representatives provided evidence to indicate Resident's health had improved, physician certification of the Resident's medical needs was not documented on a PAS and submitted to the Bureau for Medical Services (BMS), or its designee, to identify functional deficits. Because the Resident disagrees with the Facility's position and contends she continues to qualify medically, a determination of medical eligibility with physician certification is required.

2) Facility failed to meet State and Federal notification requirements – the effective date of involuntary transfer/discharge provided for only five (5) days advanced notice. Pursuant to the regulations, 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 30 days prior to the anticipated move to ensure a safe and orderly discharge to a setting appropriate to the individual's needs.

3) Whereas the evidence clearly demonstrates regulatory requirements have not been met, Facility's proposed discharge/transfer cannot be affirmed.

DECISION

It is the decision of the State Hearing Officer to REVERSE the Facility's December 30, 2015 decision to involuntarily transfer/discharge the Resident effective January 5, 2016.

ENTERED this ____Day of February 2016.

_____

Thomas E. Arnett
State Hearing Officer