State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
416 Adams St., Suite 307
Fairmont, WV 26554

Earl Ray Tomblin
Governor

Karen L. Bowling
Cabinet Secretary

August 23, 2016

RE:

ACTION NO.: 16-BOR-2238

Dear :

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

cc:

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW

[REDACTED],

Appellant,

v. **Action Number: 16-BOR-2238**

[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 August 17, 2016, on an appeal filed July 5, 2016.

The matter before the Hearing Officer arises from the June 13, 2016 decision by the Facility to propose involuntary discharge of the Appellant from [REDACTED].

At the hearing, the Facility appeared by [REDACTED], Regional Business Office Consultant. Appearing as witnesses for the Facility were [REDACTED], Administrator; [REDACTED], Director of Social Services; and [REDACTED], Assistant Business Office Manager. The Resident was represented by [REDACTED], Regional Ombudsman. Appearing as witnesses for the Appellant were [REDACTED], Appellant's son, and [REDACTED], Appellant's granddaughter-in-law. All witnesses were sworn and the following documents were admitted into evidence.

Facility's Exhibits:

- NF-1 Notice of Discharge dated 6/13/16
- NF-2 Notice of Medicare Non-Coverage – services will end 3/10/16
- NF-3 UMWA Health and Retirement Funds denial of payment dated 6/3/16
- NF-4 Billing statement/Transaction History for the period of 1/1/16 through 8/31/16; electronic mail (e-mail) correspondence with [REDACTED] on 3/21/16; billing statement sent to [REDACTED] on 5/25/16; and a [REDACTED] Request for Services dated 5/25/16
- NF-5 WVDHHR Application for Medicaid benefits submitted by [REDACTED], Attorney in Fact for [REDACTED] dated 3/15/16
- NF-6 Correspondence from [REDACTED] regarding a transfer of $15,000 from [REDACTED] account on January 11, 2016

Appellant/Resident's Exhibits:

R-1 Code of State Regulations 64 CSR 13

R-2 Code of Federal Regulations (42 CFR §483.12)

R-3 Written appeal filed by [redacted], on behalf of [redacted]

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) On June 13, 2016, [redacted] (Facility) notified the Appellant of its intent to initiate involuntary transfer/discharge proceedings (NF-1). The notice advised the Appellant that involuntary discharge from the facility was necessary because "you have failed, after reasonable and appropriate notice, to pay for a stay in the Facility."

2) Appellant was initially placed in the facility on January 25, 2016, with payment for services covered by Medicare. When it was determined that the Appellant no longer required skilled nursing services/therapy, Appellant, through her Attorney-in-Fact, [redacted], was notified on March 9, 2016 that Medicare benefits would terminate effective March 10, 2016 (NF-3).

3) There is no evidence to support Appellant's allegation (R-3, paragraph 5) that Facility was motivated to terminate therapy services, thereby causing Medicare payment to stop effective March 10, 2016, so Facility could receive a larger payment for services through Medicaid.

4) Eligibility for UMWA Health and Retirement Fund benefits for payment of nursing facility care can only begin after the 100 days of Medicare coverage has been exhausted. Because the Appellant became ineligible for Medicare prior to that occurring, UMWA Health and Retirement Fund benefits were denied (NF-3).

5) Effective March 11, 2016, the Appellant became private pay for nursing facility services received at [redacted].

6) Appellant's Attorney-in-Fact, [redacted], completed an application for Medicaid on behalf of the Appellant on March 15, 2016 (NF-5); however, this application was reportedly denied. While a subsequent application for Medicaid was allegedly submitted by [redacted] on July 15, 2016, Appellant's eligibility was unknown at the time of the hearing.

7) Facility's Exhibit NF-4 includes electronic mail (e-mail) correspondence with [redacted] [redacted] regarding the completion of Medicaid forms in March 2016. [redacted] was notified by a billing statement sent to her on May 25, 2016, that the amount owed by Appellant for the period of March 11, 2016 through May 31, 2016 was $15,252.

8) Testimony proffered at the hearing, corroborated by the Transaction History for the period of January 1, 2016 through August 31, 2016, reveals that Appellant/Appellant's representatives have not made any efforts to provide direct payment for services provided by Facility, and Appellant's unpaid balance is now $32,364.

9) Appellant's representatives contended that transferring the Appellant to a different facility would cause a hardship on the Appellant, and that the reason for transfer/discharge has not been documented in her clinical record. Appellant's representatives further indicated that they were not agreeable to transferring the Appellant to [redacted], a facility located approximately five (5) hours away from her home. In her written appeal (R-3, paragraph 7), [redacted] wrote, in pertinent part – "This is not only outrageous; it is unconscionable and illegal. We believe that this is another intimidation tactic to force us to commit Medicaid Fraud."

10) As a matter of record, Facility representatives acknowledged that the reason for transfer has not been documented in Resident's clinical record.

APPLICABLE POLICY

Medicaid regulations, found in the West Virginia Bureau for Medical Services Provider Manual at §514.9.2, Code of State Regulations 64CSR13, 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 [emphasis added] and a copy of this written notice must be sent to the State Long-Term Care Ombudsman or his/her designee. Also see Code of Federal Regulations 42 CFR 483.12(a)(4)(ii). 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 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.

West Virginia Department of Health and Human Resources, Common Chapters Manual §710.20 directs that the Hearing Officer shall weigh the evidence and testimony presented and render a decision based solely on proper evidence given at the hearing. In rendering a decision, the Hearing Officer shall consider all applicable policies of the Department, state and federal statutes, rules or regulations, and court orders. The decision shall include reference to all pertinent law or policy.

DISCUSSION

Appellant, by and through her representative(s), is contesting the decision of ████████████ ████████████████████ to initiate involuntary transfer/discharge proceedings.

The regulations that govern the Medicaid Long-Term Care Program provide that a nursing facility can involuntarily transfer/discharge a resident 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.

The evidence reveals that the Appellant has been aware of the need to secure a method of payment for nursing facility services since March 2016. The Appellant was advised of her ineligible status regarding Medicare and UMWA insurance payment, and a Medicaid application completed on March 15, 2016 was denied. Appellant was again notified on May 25, 2016 that non-payment of nursing facility services (for the period of March 11, 2016 – May 31, 2016) resulted in an unpaid balance of $15,252. The Facility initiated involuntary transfer/discharge proceedings and the notice for non-payment was issued on June 13, 2016. Evidence further reveals that Appellant's unpaid balance, effective August 31, 2016, will have increased to $32,364, as there have been no payments made toward the cost of her care.

Appellant's argument that Facility's notice to transfer/discharge the Appellant is unlawful and an intimidation tactic to force Appellant to commit Medicaid fraud is without merit. The regulations clearly authorize nursing facilities to initiate involuntary transfer/discharge proceedings against a resident for non-payment of services. However, pursuant to the Code of Federal Regulations, found at 42 CFR §483.12(a)(4)(ii), the Facility must record the reason(s) in the resident's clinical record when the resident is notified of involuntary transfer/discharge. Whereas this regulatory requirement was not met, Facility's action to transfer/discharge the Appellant cannot be affirmed.

CONCLUSIONS OF LAW

1) Facility's action to initiate transfer/discharge proceedings against the Appellant based on her failure to pay for a stay in the Facility is permitted by state and federal regulations.

2) The Facility failed to comply with the Code of Federal Regulations – Facility is required to document the reason for transfer/discharge in the resident's record as part of the "notice before transfer" procedure.

3) Whereas Facility has failed to comply with the state and federal regulatory guidelines, Facility's action to proceed with the involuntary transfer/discharge of the resident cannot be affirmed.

DECISION

It is the decision of the State Hearing Officer to REVERSE the Facility's proposal to discharge the Appellant.

ENTERED this ______ Day of August 2016.

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Thomas E. Arnett
State Hearing Officer