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

Bill J. Crouch
Cabinet Secretary

BOARD OF REVIEW
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Jolynn Marra
Interim Inspector General

September 15, 2020

[redacted]

RE: [redacted] v. [redacted]
ACTION NO.:20-BOR-1906

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,

Danielle C. Jarrett
State Hearing Officer
Member, State Board of Review

Encl: Appellant's Recourse to Hearing Decision
Form IG-BR-29
cc: [redacted], Esquire, Counsel for the Facility

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW

[redacted],

Resident,

v. **Action Number: 20-BOR-1906**

SUMMERS NURSING
REHABILITATION CENTER,

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' (DHHR) Common Chapters Manual. This fair hearing was convened on August 20, 2020, on an appeal filed July 23, 2020.

The matter before the Hearing Officer arises from the July 2, 2020 determination by the Facility to discharge the Resident from [redacted] because her needs could not be met by the Facility.

At the hearing, the Facility appeared by [redacted], Esq., Bowles & Rice. Appearing as witnesses for the Facility were [redacted], Executive Director, [redacted]; and [redacted], M.D, [redacted]. The Appellant appeared *pro se*. Appearing as witnesses for the Appellant were [redacted], Regional Ombudsman; and [redacted], Regional Supervisor Ombudsman. All witnesses were sworn and the following documents were admitted into evidence.

Facility's Exhibits:

F-1 Admission Agreement, dated May 30, 2019
F-2 [redacted] County Report, dated July 2, 2020; and [redacted] County – Dr. [redacted] - Physical Progress Note, dated June 26, 2020
F-3 30- Day Notice of Discharge, dated July 2, 2020
F-4 Resident Responsibilities; Acknowledgements and Consents, dated May 30, 2019
F-5 [redacted] Progress Notes, dated May 26, 2020

Resident's Exhibits:

R-1 Notification of Transfer/Discharge, dated July 2, 2020
R-2 [redacted] Order Summary Report, dated March 31, 2020

R-3	[redacted] Order Summary Report, dated April 30, 2020
R-4	[redacted] Order Summary Report, dated June 1, 2020
R-5	[redacted] Record
R-6	[redacted] County – Dr. [redacted] – Physical Progress Note, dated June 11, 2020
R-7	[redacted] Progress Notes, dated May 27, 2020 through May 28, 2020
R-8	[redacted] Progress Notes, dated June 12, 2020 through June 13, 2020
R-9	[redacted] Progress Notes, dated July 1, 2020 through July 2, 2020
R-10	West Virginia Department of Health and Human Resources (WVDHHR) Pre-Admission Screening (PAS), dated July 22, 2019
R-11	WVDHHR PAS, dated May 6, 2020
R-12	Copy of a photo of the Resident's stairs in her home

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 [redacted] has been a resident of [redacted] (Facility) since May 24, 2019. (Exhibit F-1)

2) On May 6, 2020, a Pre-Admission Screening (PAS) was completed to determine the Resident's continued eligibility for a nursing home level of care. (Exhibit R-11)

3) The PAS medical eligibility determination indicated that Resident [redacted] is not independent and needs staff help and oversight at all times. (Exhibit R-11)

4) Resident [redacted] is wheelchair-bound and is not independent with bed mobility, transferring and wheeling, is incontinent (bladder and bowel), and requires the level of skilled care and services provided by a nursing home facility. (Exhibit R-11)

5) On June 26, 2020, Resident [redacted] requested to no longer be treated by Dr. [redacted] (Dr. [redacted]) and requested another Facility physician, Dr. [redacted], be her treating physician.

6) Resident [redacted] is diagnosed with Type 2 Diabetes and Dr. [redacted] specializes in Type 2 Diabetes treatment.

7) Case notes documented that Dr. [redacted] was advised that the other facility physician, Dr. [redacted] who specializes in the treatment of diabetics, was no longer accepting patients.

8) On June 26, 2020, Dr. [redacted] verbally advised Resident [redacted] of the Facility's intent to issue her a 30-day discharge due the lack of available physician care. (Exhibit F-2)

9) On July 2, 2020, the Facility issued a 30-day notice to Resident [redacted] advising that she was being discharged from the facility, effective August 1, 2020, to her home, located in [redacted], West Virginia. This notice provided the reason for discharge as Resident [redacted] needs could not be met by the Facility. (Exhibit F-3)

APPLICABLE POLICY

Code of Federal Regulations 42 CFR § 483.10(c)(6) states that a resident has the right to request, refuse, and or discontinue treatment.

Code of Federal Regulations 42 CFR § 483.15(c)(1)(i)(A) states the facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility.

Code of Federal Regulations 42 CFR § 483.15(c)(2) provides in part:

> When the facility transfers or discharges a resident under any of the circumstances specified in paragraph (c)(1)(i)(A) through (F) of this section, the facility must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider. Documentation must be made by a physician when transfer or discharge is necessary.
>
> (A) The basis of the transfer per paragraph (c)(1)(i) of this section.
>
> (B) In the case of paragraph (c)(1)(i)(A) of this section, the specific resident need(s) that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the need(s).
>
> (ii) The documentation required by paragraph (c)(2)(i) of this section must be made by:
>
> (A) The resident's physician when transfer or discharge is necessary under paragraph (c)(1)(A) or (B) of this section; and
>
> (B) A physician when transfer or discharge is necessary under paragraph (c)(1)(i)(C) or (D) of this section.

Code of Federal Regulations 42 CFR § 483.15(c)(5) provides in part:

> The written notice must include: the reason for transfer or discharge, the effective date of transfer or discharge, the location to which the resident is transferred or

> discharged, a statement of the resident's appeal rights, including the name, address (mailing and email), and the telephone number of the entity which receives such requests; and information on how to obtain an appeal form and assistance in completing the form and submitting the appeal hearing request; the name, address (mailing and email), and telephone number of the Office of the State Long-Term Care Ombudsman.

Code of Federal Regulations 42 CFR § 483.15(c)(ii) provides in part:

> The Facility may not transfer or discharge the resident while the appeal is pending unless the failure to discharge or transfer would endanger the health or safety of the Resident or other individuals.

Code of Federal Regulations 42 CFR § 483.15(c)(4) provides in part:

> The notice of transfer or discharge shall be made by the nursing home at least thirty (30) days before the resident is discharged or transferred, except the notice shall be made as soon as practicable before the transfer or discharge when the safety of persons in the nursing home would be endangered, the health of persons in the nursing home would be endangered, health improves, or the resident has been at the facility less than 30 days.

Code of Federal Regulations 42 CFR § 483.10(d) explains that the resident has the right to choose his or her attending physician.

Code of Federal Regulations 42 CFR § 483.10(d)(2) explains that if the physician chosen by the resident refuses to or does not meet requirements specified in this part, the facility may seek alternative physician participation as specified in paragraphs (d)(4) and (5) of this section to assure provision of appropriate and adequate care and treatment.

Code of Federal Regulations 42 CFR § 483.10(d)(4) states the facility must inform the resident if the facility determines that the physician chosen by the resident is unable or unwilling to meet requirements specified in this part and the facility seeks alternate physician participation to assure provision of appropriate and adequate care and treatment. The facility must discuss the alternative physician participation with the resident and honor the resident's preferences, if any, among options.

Code of Federal Regulations 42 CFR § 483.10(d)(5) explains that if the resident subsequently selects another attending physician who meets the requirements specified in this part, the facility must honor that choice.

DISCUSSION

Federal regulations allow for nursing facilities to involuntarily transfer or discharge a resident if such action is necessary because the resident's needs cannot be met by the facility. A physician

must document in the resident's medical record when a transfer or discharge is necessary under these circumstances.

Federal regulations require that before a nursing facility transfers or discharges a resident, written notice must be provided to the resident and/or representative, which must include the reason for the transfer or discharge, the effective date of the transfer or discharge, and the location to which the resident will be transferred or discharged.

Resident [redacted] has been a resident at [redacted] (Facility) since May 24, 2019. On May 6, 2020, a PAS was completed to determine Resident [redacted] continued eligibility for a nursing home level of care. The PAS medical eligibility determination indicated Resident [redacted] is not independent and needs staff physical assistance and oversight at all times. The PAS further indicated Resident [redacted] would not be able to return home. Resident [redacted] is wheelchair-bound and is not independent with bed mobility, transferring and wheeling, is incontinent (bladder and bowel), and requires the level of skilled care and services provided by a nursing home facility.

On June 26, 2020, Resident [redacted] requested to no longer be treated by Dr. [redacted] and requested Dr. [redacted] who specializes in the treatment of diabetics, be her treating physician due to her diagnosis of diabetes. Dr. [redacted] testified that she was advised that the other facility physician, Dr. [redacted] was no longer accepting patients. On June 26, 2020, Dr. [redacted] verbally advised Resident [redacted] of the Facility's intent to issue her a 30-day discharge due to no longer providing her care and Dr. [redacted] declining to accept Resident [redacted] as a patient.

On July 2, 2020, the Facility issued a 30-day notice to Resident [redacted] advising she was being discharged from the Facility, effective August 1, 2020, to her home, located in [redacted] West Virginia. The notice provided the reason for discharge as Resident [redacted] needs could not be met by the Facility. Resident [redacted] argued that she continued to require the services provided by the Facility and contended that the notice of discharge was insufficient because she is unable to return to her residence.

During the hearing, there was discussion regarding a subsequent emergency discharge of Resident [redacted] but counsel for the parties agreed that was not the current issue before the Board of Review.

Cause for Discharge

The Facility's counsel indicated that since her admission in May 2019, Resident [redacted] has become increasingly non-compliant with treatment provided by Dr. [redacted] The Facility's Executive Director, [redacted] (Ms. [redacted]), elaborated that Resident [redacted] was non-compliant in that she sometimes refused to take her prescribed medications, refused proper personal care, and failed to participate in her Activities of Daily Living (ADLs) and instructions with bed mobility. Ms. [redacted] testified Resident [redacted] needed psychiatric care due to reports from staff that she exhibited delusional behaviors. Ms. [redacted] further testified the Facility tried to assist with psychiatric care, but Resident [redacted] declined the services.

Case notes documented that on June 26, 2020, Resident [redacted] told Dr. [redacted] that she no longer wanted her to care for her and that she would like to have Dr. [redacted] as a physician. Case notes completed by Dr. [redacted] indicated that Dr. [redacted] refused to accept the Resident as a patient, however, the Facility failed to provide evidence of documentation from Dr. [redacted] regarding the declination. Resident [redacted] testified Dr. [redacted] told her that if Dr. [redacted] would not accept her as his patient, she "would be evicting me." Resident [redacted] testified that she wanted Dr. [redacted] as her physician because she had Type 2 Diabetes and he is a diabetic specialist.

As a result of the alleged continued non-compliance and the inability to meet her request for a different physician, the Facility determined they could no longer meet Resident [redacted] needs and issued a notice of discharge.

Federal regulations explain the resident has the right to choose her attending physician. There are two physicians available at the Facility to meet Resident [redacted] needs. From the evidence presented, it appears Dr. [redacted] and Resident [redacted] do not agree on the appropriate treatment. The second Facility physician, Dr. [redacted] was reported to have refused to accept Resident [redacted] as a patient. Federal regulations state if the chosen physician by the resident refuses to or does not meet requirements, the Facility may seek alternative physician participation to assure the provision of appropriate and adequate care and treatment.

Besides a third-party report that Dr. [redacted] refused to treat the Resident, there was no evidence that Dr. [redacted] was not available to treat Resident [redacted] Additionally, there was no evidence provided that verified the Facility sought alternative physician participation. The evidence regarding Resident [redacted] non-compliance was vague and may have been related to her lack of confidence with her assigned physician. As such, the Facility failed to prove by a preponderance of evidence the Resident's needs could not be met.

Location of Discharge

The case notes documented that the discharge location listed on the notice was the Resident's home. Counsel for the Facility contended that in order to find an appropriate placement for discharge the Facility required participation by Resident [redacted] but Resident [redacted] refused to participate in the discharge planning prior to the issuance of the discharge notice. As such, it was determined her home would be an appropriate place for discharge. However, the period between the Facility discussing possible discharge until the notice of discharge was only seven days and did not verify sufficient time was spent collaborating with Resident [redacted] to find another Facility or suitable discharge location.

Furthermore, Resident [redacted] PAS clearly reflected that she requires nursing home level of care. Coupled with Resident [redacted] testimony that her residence is not equipped for wheelchair access and the sleeping area in her home is located on the third floor. Therefore, evidence established that her residence was not a suitable choice of location for discharge.

CONCLUSIONS OF LAW

1) Federal regulations allow for an involuntarily discharge or transfer of a resident if the resident's needs cannot be met by the facility.

2) The Facility failed to permit Resident [redacted] to choose her attending physician.

3) The Facility failed to seek alternative physician participation to assure provision of appropriate and adequate care and treatment.

4) The Facility failed to prove that Resident [redacted] residence is a suitable discharge option.

5) The Facility failed to demonstrate that it attempted to secure a suitable discharge location.

DECISION

It is the decision of the State Hearing Officer to **REVERSE** the proposal of [redacted] to discharge the Resident.

ENTERED this _____ day of September 2020.

_____

Danielle C. Jarrett
State Hearing Officer