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

March 22, 2021

[redacted]

RE: [redacted] v. [redacted]
ACTION NO.: 21-BOR-1183

Dear Mr. [redacted]:

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

In arriving at a decision, the Board of Review 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 that may be taken if you disagree with the decision reached in this matter.

Sincerely,

Tara B. Thompson, MLS
State Hearing Officer
State Board of Review

Enclosure: Resident's Recourse
Form IG-BR-29

cc: [redacted]

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW

[redacted],

Resident,

v. **ACTION NO.: 21-BOR-1183**

[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' (DHHR) Common Chapters Manual. This fair hearing was convened on March 11, 2021 on an appeal filed with the Board of Review on February 5, 2021.

The matter before the Hearing Officer arises from the February 3, 2021 determination by the Facility to discharge the Resident.

At the hearing, the Facility appeared by [redacted], Facility Administrator. Appearing as witnesses for the Facility were [redacted], Facility Social Worker; [redacted], Facility Registered Nurse; [redacted], Facility Nurse Practitioner; and [redacted], Facility Therapist. The Resident appeared *pro se*. All witnesses were sworn and the following documents were admitted into evidence.

Facility's Exhibits:

F-1 Notice of Transfer or Discharge, dated February 3 and February 5, 2021; Board of Review Memorandum, dated February 4, 2021
F-2 DHHR Pre-Admission Screening (PAS), signed by the physician on February 4, 2021
F-3 KEPRO Notice of Denial for Long-Term Care, dated February 4, 2021
F-4 DHHR PAS, signed by the physician on February 4, 2021
F-5 [redacted] Admission Record; Progress Notes, dated January 20 through March 3, 2021; and [redacted] Records, dated January 12 through March 1, 2021

Resident's Exhibits:
None

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 following Findings of Fact are set forth.

FINDINGS OF FACT

1) The Resident was admitted to the Facility on January 20, 2021 from [redacted] due to Chronic Obstructive Pulmonary Disease (COPD) exacerbation, decrease in strength, decrease in transfers, reduced Activities of Daily Living (ADL) participation and pain (Exhibits F-2, F-4, and F-5).

2) Prior to his Facility admission, the Resident was homeless and his personal belongings were located at the [redacted] (Exhibits F-2, F-4, and F-5).

3) Prior to his Facility admission, the Resident was receiving supplemental oxygen (Exhibit F-5).

4) On February 3 and February 5, 2021, the Facility issued a written Notice of Discharge advising the Resident that he would be discharged to the [redacted], effective February 5, 2021, due to the Resident's health having improved sufficiently that he no longer required the services provided by the Facility (Exhibit F-1).

5) The February 3, 2021 Notice of Discharge reflected incorrect telephone contact information for the Board of Review (Exhibit F-1).

6) On February 4, 2021, the Board of Review issued a Memorandum advising the Facility of the correct Board of Review contact information (Exhibit F-1).

7) The February 5, 2021 Notice of Discharge reflected updated Board of Review contact information (Exhibit F-1).

8) On January 19 and February 4, 2021, a Pre-Admission Screening (PAS) was completed to determine the Appellant's medical eligibility for Long-Term Care (Nursing Facility) services (Exhibits F-2 and F-4).

9) The January 19, 2021 PAS reflected that the Resident required assistance with *bathing, dressing, grooming, transferring, walking, wheeling, vision,* and *hearing* (Exhibit F-4).

10) The January 19, 2021 PAS —signed by [redacted], DO— attested that the Resident's prognosis was stable, his rehabilitation potential was good, he may eventually be able to return home or be discharged, and he required a nursing home level of care (Exhibit F-4).

11) The Appellant has a diagnosis of Diabetes Mellitus, Type 2 (Exhibits F-2 and F-4).

12) The February 4, 2021 PAS reflected that the Resident did not require assistance with *eating, bathing, dressing, grooming, continence, orientation, transferring, walking, wheeling, vision, hearing,* or *communication* (Exhibit F-2).

13) The February 4, 2021 PAS —signed by [redacted], MD—attested that the Resident's prognosis was stable, his rehabilitation potential was good, he may not be able to eventually return home or be discharged, and he required a nursing home level of care (Exhibit F-2).

14) At the time of the February 4, 2021 PAS, the Appellant's primary diagnosis was COPD, with acute exacerbation, and his secondary diagnosis included Acute and Chronic Respiratory Failure, with hypercapnia (Exhibit F-2).

15) On February 4, 2021, KEPRO issued a Notice of Denial advising the Resident that his request for Long-Term Care admission had been denied because the PAS failed to establish that he had any of the five areas of care needs (deficits) required to establish Medicaid Long-Term Care benefit eligibility (Exhibit F-3).

16) The Facility's decision to discharge the Resident was based on the February 4, 2021 PAS.

17) On January 20, 2021, the Resident's Room Air Oxygen Value was 93-96% and Oxygen via Nasal Cannula Value was 95% (Exhibit F-5).

18) On February 3, 2021, the Resident's Room Air Oxygen Value was 92-96% and Oxygen via Nasal Cannula Value was 95-97% (Exhibit F-5).

APPLICABLE POLICY

Code of Federal Regulations 42CFR § 483.15(c)(1)(i) provides in part:

> The Facility must permit each Resident to remain in the Facility and not discharge the Resident from the Facility unless the discharge is appropriate because:
> (A) The discharge is necessary for the Resident's welfare and the Resident's needs cannot be met in the facility;
> (B) The Resident's health has improved sufficiently so the Resident no longer needs the services provided by the facility;
> (C) The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;
> (D) The health of individuals in the facility would otherwise be endangered;
> (E) The Resident has failed, after reasonable and appropriate notice, to pay for (or have paid under Medicare or Medicaid) a stay at the facility ….
> (F) The Facility ceases to operate.

Code of Federal Regulations 42CFR §§ 483.15(c)(2)(i)(A)-(c)(2)(ii)(B) provide in part:

> When the facility discharges a resident under circumstances specified in paragraph (c)(1)(i)(B), the facility must ensure that the discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider.
>
> Documentation in the Resident's medical record must include the basis for the transfer and be made by the Resident's physician when discharge is necessary under (c)(1)(i)(C) of this section.

Code of Federal Regulations 42CFR § 483.15(c)(3) through 483.15(c)(7) provide in part:

> Notice must be made as soon as practicable before discharge when the Resident's health improves sufficiently to allow a more immediate discharge or when the resident has not resided in the Facility for 30 days.

DISCUSSION

On February 3, 2021, the Facility issued a written Notice of Discharge advising the Resident that he would be discharged to the [redacted], effective February 5, 2021, due to the Resident's health having improved sufficiently that he no longer required the services provided by the Facility. The Resident contested his discharge from the Facility and argued that the necessary medical treatment he is receiving at the Facility for his medical conditions could not be provided upon discharge to the [redacted] due to his having to be absent from the premises and walking for extended periods each day.

The Facility bears the burden of proof. The Facility had to demonstrate by a preponderance of evidence that at the time of the Facility's February 3, 2021 decision to discharge the Resident, the Resident's health had improved sufficiently such that the Resident no longer needs the services provided by the Facility [42 CFR § 483.15(c)(1)(i)(B)] and that the reason for the Resident's discharge was documented in the Resident's medical record by a physician [42 CFR § 483.15(c)(2)(i)(A) and 42 CFR § 483.15(c)(2)(ii)(A)]. As the Facility's written Notice of Discharge was issued February 3, 2021, submitted evidence dated beyond February 3, 2021 was given little weight in the decision of this Hearing Officer.

The Facility argued that the Resident's discharge was based on the Resident's increased functioning and failure to meet regulatory medical criteria to remain in the Facility —as evidenced by the February 4, 2021 PAS. However, the medical records submitted as evidence repeatedly referenced that the Resident's discharge was due to the Resident's lack of participation and minimal progression. Non-compliance was not the discharge reason noted on the Notice of Discharge and was not considered by this Hearing Officer when determining if the Facility correctly acted to discharge the Resident.

The Resident initially contended that his oxygen needs could not be met at the proposed discharge location, but later agreed that he could manage his needs himself. During the hearing, the Resident's physician testified that to qualify for oxygen treatment, the Resident's oxygen saturation must be below 90%. The Resident's physician's testimony and the medical records verified that at the time of the February 3, 2021 decision to discharge the Resident, the Resident's oxygen saturation levels were above 90%. The Facility argued that if the Resident required continuous oxygen upon discharge, the Resident could manage his oxygen needs. During the hearing, the Resident's testimony affirmed that he would be capable of managing his oxygen and respiratory treatment independently upon discharge from the Facility. Further, the Resident testified that he would be able to independently monitor his diabetes and manage the administration of his diabetes medications. At the time of the Facility's Notice of Discharge, the evidence verified that the Resident did not require a nursing home level of care to meet his oxygen saturation and diabetes management needs.

Federal regulations require that the reason for the Resident's discharge be documented in the Resident's medical record by the physician. While the evidence reflected that the discharge decision was made during a February 2, 2021 care conference with the Resident, Outpatient Therapist, Physical Therapist, Registered Nurse, and Social Worker, no progress note was submitted that reflected the Resident's physician participated in the discharge determination. The physician progress notes entered as evidence did not indicate documented medical improvement or a reason for discharge.

The Facility argued that the February 3, 2021 decision to discharge the Resident was based on his health having improved significantly as evidenced by the Resident's improved functioning reflected on the February 4, 2021 PAS. Although completed a day after the Facility's Notice of Discharge, the February 4, 2021 PAS reflected improvement in the Resident's functioning areas. While the physician's signature on the PAS acknowledged improvement in the Resident's functioning areas, the physician's recommendation indicated that the Resident required a nursing home level of care and was not able to return home or be discharged. The physician's documentation on the PAS was conflicting. Therefore, it cannot be affirmed that the Resident's health improved such that he no longer requires the services provided by the Facility. The physician-signed PAS does not make any notation regarding the reason for the Resident's discharge and does not meet the regulatory requirement for physician documentation. At the time of the Facility's Notice of Discharge, the evidence failed to verify that the reason for the Resident's discharge was documented in the Resident's medical record by a physician.

CONCLUSIONS OF LAW

1) A Resident may be discharged from the Facility when the Resident's health has sufficiently improved such that he no longer requires the services provided by the Facility and when the reason for the Resident's discharged is documented by the Resident's physician in the Resident's medical record.

2) The February 4, 2021 PAS reflected a conflicting assessment of the Resident's functioning improvement and required level of care physician recommendations.

3) The preponderance of evidence failed to verify that the Resident's health had improved sufficiently that he no longer requires the services provided by the Facility.

4) The preponderance of evidence failed to verify that the reason for the Resident's discharge was documented by the Resident's physician in the Resident's medical record.

5) The Facility incorrectly acted to discharge the Resident, effective February 5, 2021.

DECISION

It is the decision of the State Hearing Officer to **REVERSE** the Facility's decision to discharge the Resident.

ENTERED this 22nd day of March 2021.

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Tara B. Thompson, MLS
State Hearing Officer