



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
4190 Washington Street, West
Charleston, WV 25313

Joe Manchin III
Governor

Patsy A. Hardy, FACHE, MSN, MBA
Cabinet Secretary

November 19, 2009

Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held November 18, 2009. Your hearing request was based on Golden Living Center's proposal to discharge you from the nursing facility due to your needs not being met.

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.

The State and Federal regulations that govern the Medicaid Long-Term Care Program state that the facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless certain criteria is met— one of the reasons listed as an exception is when it is necessary for the resident's welfare and the resident's needs cannot be met in the facility. [Code of Federal Regulations 42 CFR 483.12] A NF is required to employ sufficient staff to meet the mental, physical, and/or psycho social needs even if transfer to another provider is initiated by the NF but not completed. [West Virginia Department of Health and Human Resources Nursing Facility Services Manual §514.6.3]

Information submitted at your hearing reveals that ----- has failed to show that the only attending physician at their nursing facility had the authority to discontinue providing his daily monitoring services to the Claimant without first retaining another physician who could provide those services to the Claimant. The Facility has also failed to show that your needs cannot be met there.

It is the decision of the State Hearing Officer to **reverse** the proposal of Golden Living Center - Riverside to discharge you from the nursing facility.

Sincerely,

Cheryl A. Henson
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
-----, Pat Kelly, Golden Living Center, -----

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

-----,

Claimant,

v.

Action Number: 09-BOR-1699

Golden Living Center - Riverside,

Respondent.

DECISION OF STATE HEARING OFFICER

I. INTRODUCTION:

This is a report of the State Hearing Officer resulting from a fair hearing concluded on November 18, 2009 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 hearing was convened on November 18, 2009 on a timely request for hearing dated August 19, 2009.

II. PROGRAM PURPOSE:

The program entitled Long Term Care Medicaid (nursing facility services) is a medical service which is covered by the State's Medicaid Program. Payment for care is made to nursing homes which meet Title XIX (Medicaid) standards for the care provided to eligible recipients. In order to qualify for Nursing Home Care, an individual must meet financial and medical eligibility criteria.

III. PARTICIPANTS:

-----, Claimant's attorney representation

-----, Claimant's Power of Attorney

Pat Kelly, Department's attorney representation

Cristie Hatfield, Department's witness

Jennifer Jeffrey, Department's witness

Presiding at the hearing was Cheryl A. Henson, State Hearing Officer and a member of the State Board of Review.

IV. QUESTION TO BE DECIDED:

The question to be decided is whether Golden Living Center - Riverside is correct in its proposal to involuntarily discharge the Claimant from the nursing facility.

V. APPLICABLE POLICY:

Code of Federal Regulations Section 42 CFR 483.12
West Virginia Department of Health and Human Resources' Nursing Facility Services Manual §514.12 and 514.12.1

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Claimant's Exhibits:

- C-1 Letter to Dr. [REDACTED] dated November 12, 2009
- C-2 Memorandum from Nursing Home Program dated November 18, 2009, three (3) pages

Respondent's Exhibits:

- F-1 Clinical records for Claimant, eighteen (18) pages
- F-2 Federal Regulation §483.40
- F-3 Discharge Notification letter dated July 28, 2009, three (3) pages
- F-4 Federal Regulation §483.10(d)(1)

VII. FINDINGS OF FACT:

- 1) On or about July 28, 2009, the Claimant's Power of Attorney, -----, was notified (F-3) that Golden Living Center- Riverside planned to discharge the Claimant from its facility on August 27, 2009. The letter included the following pertinent information:

This letter is to inform you that ----- will discharge -----, for whom you serve as Medical Power of Attorney, in thirty (30) days. The date of discharge will be August 27, 2009. Pursuant to 42 CFR 483.12(a), the transfer or discharge is necessary for the resident's welfare because the resident's medical needs cannot be met by the facility.

----- has been without an attending physician since October of 2008. The Federal Regulation 42 CFR 483.40 requires each resident to remain under the care of a physician. The facility and you have not been able to locate a physician willing to become attending physician for ----- . The Medical Director will only see ----- for routine and emergency visits and is not willing to accept the resident back as his patient. We are unable to ensure medical services for ----- because none of the physicians that come to the facility are willing to accept ----- as a patient.

We have attempted to find alternate placement where a physician would be agreeable to accept ----- as a patient. Our efforts have been thwarted because you refuse to allow the facility to send any medical information to potential attending physicians and facilities.

The facility attempted to have a care plan meeting with you on June 16, 2009; however, you did not attend. We attempted to reschedule the meeting, but you were unwilling to give us another date to meet with you.

You will have until August 27, 2009 to find ----- an alternative placement. The facility will assist you in the transfer process. If another health care facility is not identified, we will discharge ----- to your address.

- 2) The Claimant subsequently requested a hearing on August 19, 2009. The hearing request was received by the Hearing Officer on August 19, 2009 and a hearing was scheduled for November 18, 2009.
- 3) The Respondents contend that the Facility's Medical Director and attending physician, Dr. [REDACTED] has chosen to discontinue serving as the Claimant's attending physician, and as a result the Claimant does not have an attending physician looking after her medical needs. They contend the physician drafted a letter declining to continue serving as the Claimant's attending physician. This letter was not entered into evidence during the hearing. The Respondents claim this decision by the physician has placed the Claimant's medical needs at risk because Dr. [REDACTED] is not regularly monitoring the Claimant and is only monitoring her in emergency situations. There are eighty six (86) residents at the facility presently and they all receive their attending physician services from the Medical Director, except for the Claimant.
- 4) The Claimant contends that she does not wish to be transferred to another facility, and wishes to stay at this facility. Although she is unhappy with some of the services provided by the physician and the facility, she does not wish to be discharged. She chooses to continue in the current capacity until another physician can be located to serve her daily medical needs at the facility. She has not asked for another physician, and is only seeking another attending physician because the facility is not providing that service to her. The Claimant has questioned whether Dr. [REDACTED] has the authority to discontinue attending physician services to her before a replacement physician can be secured.
- 5) The Facility's Registered Nurse Assessment Coordinator, [REDACTED] testified that she completes the "Plan of Care" for the residents at the facility. She stated that Dr. [REDACTED] admitted the Claimant to the facility in July 2005. She stated the Claimant's current condition is alert, with severe dementia, and she cannot make her needs known. She added the Claimant can ambulate and propel in a wheel chair. She stated she medically needs a physician due to the fact that she needs weekly blood drawn and has seizures. She has also had increased falls and high blood pressure issues, and needs a physician to monitor her situation. She went on to say that Physical Therapy recommended that the Claimant have a seat belt in her wheel chair for safety reasons and the Claimant's Power of Attorney declined. She stated the Claimant does not have a Plan of Care and may be suited to be in an Alzheimer's Unit. She stated that Dr. [REDACTED] was her physician until two (2) years ago. She added that he offered a letter at some point in 2008 that he was no longer going to be her attending physician. She stated that it is her understanding from the records that he agreed to be her attending physician until another physician was found for the

resident. She states he comes to the facility on Wednesdays and sometimes twice a week. She added he is the attending physician to all residents except the Claimant.

- 6) The Facility's Executive Director, -----testified that she has been employed at the Golden Living Facility since February 2004. She stated she previously held the position of Social Services Director, and was functioning in this capacity on July 7, 2005 when the Claimant was admitted to the facility. -----testified that Dr. [REDACTED] first indicated he would no longer be the Claimant's attending physician in November 2007. She added that in the monthly physician's notes (F-1) dated November 14, 2007 Dr. Kuryla entered written notes to the Claimant's file. She stated in summary that he wrote "POA is very unhappy with his care of the patient – to seek alternate placement as he doesn't feel comfortable caring for her as her attending – and, that labs are to be done at another facility because she doesn't trust the lab results." -----added that she made a note in the Claimant's file on November 14, 2007 and summarized that the physician wrote an order for Social Services to assist the POA in finding another facility to which the resident could move. She stated she spoke with the POA and was advised that she does not want to move the Claimant from the facility but asked for assistance in finding another attending physician for the Claimant. She states that she advised the POA she would check with the Executive Director and determine what needed to be done.

-----testified that she assisted the Claimant's Medical Power of Attorney (MPOA) in attempts to locate another physician but was not successful. She stated that Dr. [REDACTED] continued to serve as the Claimant's attending physician during this time. When asked to review her notes (F-1) dated May 29, 2008, she stated the note indicates the responsible party was questioning the doctor's orders – or lack of – and she was alleging abuse on Dr. [REDACTED] part. She stated she tried to explain to the POA that the labs were normal, and that Dr. [REDACTED] said to the nurse that he would no longer be resident's responsible party, and that he would give a discharge notice saying "he wasn't going to do that anymore". She stated that after this date the physician followed up with a formal letter to the Claimant. She stated there was an error with the first notice so a second notice was drafted and mailed to the POA. -----reviewed physician's note (F-1) dated June 11, 2008 and stated the physician recorded that MPOA refused treatment for the increased ammonia level.

She reviewed another social service note (F-1) dated July 16, 2008 which is a note she recorded after speaking with the Ombudsman. She stated that the Ombudsman had a copy of the discharge letter that had been shared with her. She stated the note also indicates that she spoke with the POA and offered assistance with finding a physician. She notes she spoke with three physicians that the POA was interested in and those physicians declined because they were in practice with Dr. [REDACTED]. She states she also spoke with other doctors the POA was interested in but none of them was confirmed.

She also indicated that she recorded (F-1) on October 3, 2008 that the Executive Director was still working on finding the resident a physician and is trying to get someone by the name of Dr. [REDACTED] to work in the facility. The note indicates that he stated "Dr. [REDACTED] would cover resident for emergencies and such and has already seen her in October, until a physician could be put into place for the resident on a more regular basis."

The note dated January 2, 2009 (F-1) indicated a Dr. [REDACTED] advised that the resident needs a doctor that can see her in the nursing home and that he cannot provide that service. -----indicated that beginning May 28, 2009 she began discussions with POA to develop a Care Plan and that the POA was less than cooperative and missed scheduled meetings.

She indicated she delivered the discharge letter dated July 28, 2009 (F-3) to the POA in person on that date. She stated she contacted seven (7) physicians and the POA talked with two (2). She stated there has been an issue with the resident having an attending physician at the facility since November 2007.

She stated as a licensed Nursing Home Administrator she is familiar with Federal Regulations related to long term care facilities. She reviewed the "Guide to Surveyors – Long Term Care Facilities F-Tag #F385" (F-2) regarding §483.40 Physician Services, which she states are the federal regulations, and she also states they mandate that each resident must remain under the care of a physician. Under the section marked "Intent," it reads:

The intent of this regulation is to ensure the medical supervision of the care of nursing home residents by a personal physician.

-----testified that the Claimant does not have a personal physician at this time, and the facility cannot meet the Claimant's medical needs.

Under cross examination, -----testified that to her knowledge there is nothing in those regulations that states that if this particular criterion is not met the resident is to be removed from the nursing home. She added that she is familiar with the federal regulations and uses them in her capacity as Executive Director. After questioned again, she stated that she would have to read the regulations to determine if they specifically state that a resident can be discharged if they do not have a physician. -----testified that in reading the clinical notes provided for this hearing (F-1) she did not find any indication that Dr. [REDACTED] had any difficulty with the Claimant. She also testified that Dr. [REDACTED] has refused to be the Claimant's personal physician. She stated that in seeking another attending physician for the Claimant, potential physicians must enter into some sort of contract with the Facility in order to have in place specific guidelines as to how their services will be rendered. She could not provide specific details about such a contract. -----answered "because that is the way it is" when questioned about why a contract is necessary. The Claimant has alleged that this requirement has made it impossible for the Claimant to secure another physician.

- 7) The issue was raised as to whether Dr. [REDACTED] the Facility's attending physician and medical director, has the authority to choose to discontinue regular daily attending physician services to the Claimant as he has done. The Facility offered into evidence (F-4) "Guide to Surveyors – Long Term Care Facilities F-Tag 163, regarding §483.10(d) (1) Choose a personal attending physician", which they state supports the physician's ability to choose to discontinue functioning as the Claimant's attending physician. Under the section marked "Interpretive Guidelines §483.10(d)(1) it states:

The right to choose a personal physician does not mean that the physician must or will serve the resident, or that a resident must designate a personal physician. If a physician of the resident's choosing fails to fulfill a given requirement, such as §483.25(l)(1), Unnecessary drugs; §483.25(l)(2), Antipsychotic drugs; or §483.40, frequency of physician visits, the facility will have the right, after informing the resident, to seek alternate physician participation to assure provision of appropriate and adequate care and treatment. A facility may not place barriers in the way of residents choosing their own physicians. For example, if a resident does not have a physician, or

if the resident's physician becomes unable or unwilling to continue providing care to the resident, the facility must assist the resident in exercising his or her choice in finding another physician.

Before consulting an alternate physician, one mechanism to alleviate a possible problem could involve the facility's utilization of a peer review process for cases which cannot be satisfactorily resolved by discussion between the medical director and the attending physician. Only after a failed attempt to work with the attending physician or mediate differences in deliver of care should the facility request an alternate physician when requested to do so by the resident or when the physician will not adhere to the regulations.

If it is a condition for admission to a continuing care retirement center, the requirement for free choice is met if a resident is allowed to choose a personal physician from among those who have practice privileges at the retirement center.

A resident in a distinct part of a general acute care hospital can choose his/her own physician, unless the hospital requires that physicians with residents in the distinct part have hospital admitting privileges. If this is so, the resident can choose his/her own physician, but cannot have a physician who does not have hospital admitting privileges.

If residents appear to have problems in choosing physicians, determine how the facility makes physician services available to residents.

This policy does not address whether the attending physician has the authority to choose to no longer perform as the attending physician for a resident for which he previously served in this capacity; however, it does indicate that when a resident is faced with the task of choosing another attending physician, the facility must assist the resident in this process. It does not address a timeframe for when this assistance is to be stopped. It also states that if the resident appears to have problems in choosing physicians, it is necessary to determine how the facility makes physician services available to residents. Limited testimony has been provided in this regard.

- 8) The Claimant questioned whether Dr. [REDACTED] has signed a contract to work for the Facility. The Respondents have indicated that he did sign a contract with the Facility. The Claimant requested that the document be provided as evidence to show what his responsibilities are, and whether the doctor was permitted by contract to choose to discontinue attending physician services to a resident of the Facility. The Respondents have chosen not to provide the physician's contract as evidence to support that he was within his rights to discontinue those services to the Claimant, and offered that Exhibit F-4 is sufficient evidence to support his actions.
- 9) The Claimant's Power of Attorney, -----, stated the Claimant is her older sister, and when she was admitted to the Facility she weight one hundred two (102) pounds, and was in a catatonic state. She stated that Dr. [REDACTED] stopped the Claimant's Depakote, which she took to prevent seizures, and she had a massive seizure and broke her hip. She stated she has questioned certain treatments given by the physician, but does not want her sister transferred because her health has improved since she has been there.

- 10) West Virginia Department of Health and Human Resources' Nursing Facility Services Manual §514.6.3 states:

A NF is required to employ sufficient staff to meet the mental, physical and psycho social needs of each individual residing within or admitted to the nursing facility. Qualified staff must be employed to address the needs of any and all individuals who may require additional services due to a change in mental, physical, and/or psycho social needs even if transfer to another provider is initiated by the NF but not completed.

The West Virginia Medicaid Program identifies the rules and regulations promulgated by both State and federal survey and certification agencies, whichever is more restrictive, as the standards of participation in the program as a nursing facility with regards to staffing requirements. (Reference 42 CFR PAART 483, 42 CFR 488 and 64 CSR 13)

- 11) West Virginia Department of Health and Human Resources' Nursing Facility Services Manual §514.12 and §514.12.1states:

STAFFING REQUIREMENTS

In order to participate in the WV Medicaid program and receive payment from the Bureau, a NF must comply with the following requirements:

GENERAL

- There must be on duty all hours of each day sufficient staff in number and qualification to carry out the policies, responsibilities, and program of the facility. The number of residents, including Medicaid residents, determines the number and categories of personnel
- The NF must employ and maintain sufficient staff on duty, awake and accessible.
- The facility must assume responsibility for the provision of services directly or through outside resources to meet the needs of the residents. The facility must not depend upon the residents or volunteers to perform direct care services for individuals.
- At a minimum, a NF is required to furnish the following services:

Physician Services
Nursing Services
Pharmacy Services
Dietary Services
Social Services
Activities Services

- 12) Code of Federal Regulations, 42 CFR 483.12(a) (C-1) provides regulatory guidelines regarding admission, transfer and discharge rights for the Medicaid Long-Term Care Program. These regulations state:

(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.

13) Code of Federal Regulations, 42 CFR 483.12(a) (4&6), addresses written notification regarding transfer/discharge and states that the 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 nursing facility is required to employ sufficient staff, including physician services, to meet the mental, physical and psycho social needs of each individual residing within or admitted to the nursing facility.
- 2) The Regulations also state that the facility must permit each resident to remain in the facility, and not transfer or discharge the resident unless they can show, in this instance, that it is necessary for the resident's welfare and that the resident's needs cannot be met in the facility.

- 3) Policy clearly states the facility must assume responsibility for the provision of services, including attending physician services, directly or through outside resources to meet the needs of the residents.
- 4) The evidence shows that the only attending physician at -----, Dr. [REDACTED] chose to discontinue providing attending physician services to the Claimant. It is clear that both the Claimant and the Respondents have made efforts to secure an alternate attending physician for the Claimant, and have been unsuccessful to date.
- 5) It is unclear, however, whether Dr. [REDACTED] has been providing attending physician services in the interim to the Claimant. The testimony in this regard is contradictory in nature; however, the Respondents have gone on record as saying that the Claimant has been without an attending physician.
- 6) The Claimant questioned whether Dr. [REDACTED] was within his rights to refuse to treat the Claimant. The Claimant requested that the physician's contract be provided as evidence to show what his responsibilities are, and whether he is within his authority to refuse attending physician treatment to a resident at the facility. The physician's contract is found to be potentially relevant evidence in this case, and the Respondents have not provided it for review. In doing so they have given credence to the Claimant's contention that he does not have this authority.
- 7) The evidence provided during this hearing supports that ----- has not followed policy in their decision to discharge the Claimant due to her needs not being met. The Facility has the obligation to secure adequate staff to serve each individual with attending physician services, and cannot discharge this Claimant for not having this service.

IX. DECISION:

It is the decision of the State Hearing Officer to **reverse** the proposal of Golden Living Center - Riverside to discharge the Claimant from the nursing facility based on her needs not being met.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 20th Day of November, 2009

**Cheryl Henson
State Hearing Officer**