



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

**Bill J. Crouch
Cabinet Secretary**

**BOARD OF REVIEW
433 MidAtlantic Parkway
Martinsburg, WV 25404
Telephone: (304) 352-0805 Fax: (304) 558-1992**

**Sheila Lee
Interim Inspector General**

November 7, 2022

[REDACTED]

RE: [REDACTED] A Protected Individual v. [REDACTED]
ACTION NO.: 22-BOR-2223

Dear [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,

Lori Woodward, J.D.
Certified State Hearing Officer
Member, State Board of Review

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

cc: [REDACTED]

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

IN RE: [REDACTED], A PROTECTED INDIVIDUAL,

Resident,

v.

BOR Action #22-BOR-2223

[REDACTED]
Facility.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for [REDACTED], **A PROTECTED INDIVIDUAL**. 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 November 1, 2022, on an appeal filed October 3, 2022.

The matter before the Hearing Officer arises from the September 9, 2022 decision by the Facility to propose an involuntary discharge of the Resident for improved health.

At the hearing, the Facility appeared by [REDACTED], Regional Administrator for [REDACTED]. Appearing as witnesses for the Facility were [REDACTED], Speech Therapist and Director of the Therapy Department, and [REDACTED], Medical Director. The Resident was present but was represented by her daughter and guardian, [REDACTED]. All witnesses were placed under oath and the following documents were admitted into evidence.

Facility's Exhibits:

- F-1 [REDACTED] Progress Notes from January 2022 to October 2022
- F-2 Occupational Therapy, OT Initial Evaluation, certification period March 14, 2022 – March 14, 2022; Occupational Therapy, OT Initial Evaluation, certification period March 21, 2022 – April 19, 2022; Occupational Therapy, OT Progress Report, dates of service March 21 – March 31, 2022; Occupational Therapy, Treatment Encounter Note (TEN), dates of service March 21, March 25, March 29, March 30, March 31, April 2, April 4, April 6, April 7, 2022; Occupational Therapy, OT Discharge Summary, dates of service March 21, 2022 - April 7, 2022; Occupational Therapy, OT Evaluation, certification period September 6, 2022 – September 6, 2022; Occupational Therapy, Treatment Encounter Note, date of service September 6, 2022

F-3 Physical Therapy, PT Initial Evaluation, certification period February 15, 2022 – March 16, 2022; Physical Therapy, PT Progress Report, dates of service February 15 – 28, 2022; Physical Therapy, Treatment Encounter Note (TEN), dates of service February 16, February 17, February 18, February 21, February 22, February 24, February 25, February 28, March 7, 2022; Physical Therapy, PT Discharge Summary, dates of services February 15 – March 8, 2022; Physical Therapy, PT Initial Evaluation, certification period March 21, 2022 – April 19, 2022; Physical Therapy, PT Progress Report, dates of service March 21, 2022 – April 3, 2022; Physical Therapy, Treatment Encounter Note (TEN), dates of service March 23, March 24, March 25, March 28, March 29, March 30, March 31, April 4, April 6, 2022; Physical Therapy, PT Discharge Summary, dates of services March 21, 2022 – April 7, 2022; Physical Therapy, PT Initial Evaluation, certification period August 18, 2022 – September 16, 2022; Physical Therapy, PT Progress Report, dates of service August 18 – August 31, 2022; Physical Therapy, Treatment Encounter Note, dates of service August 19, August 22, August 23, August 24, August 25, August 26, August 29, August 30, September 1, September 2, 2022; Physical Therapy, PT Discharge Summary, dates of services August 18 – September 5, 2022

Resident's Exhibits:

R-1 Email from [REDACTED] to DHHROIGBORE dated October 25, 2022; Cover letter for 30-Day Notice of Transfer/Discharge dated September 9, 2022 from [REDACTED] to [REDACTED] (page 1 only); Circuit Court of [REDACTED] West Virginia Order of Appointment dated March 12, 2018; [REDACTED] (WV Office) encounter notes for October 18, 2021; Letter from [REDACTED], Au.D. dated January 27, 2022; New Patient visit (undated) partial history note from [REDACTED]; February 25, 2022 complaint letter from [REDACTED] to State of West Virginia Board of Social Work Examiners; Grievance/Complaint Forms dated February 15 and 17, 2021; Office of Health Facility Licensure & Certification Complaint Form for April 13, 2022 problem; Office of Health Facility Licensure & Certification Complaint Form for June 5, 2022 problem; Email from [REDACTED], dated February 18 (no year); [REDACTED], BFCC-QIO Determination Letter dated February 8, 2022; Email from [REDACTED] to unknown recipients dated October 25, 2022; Email from [REDACTED] dated February 23, 2022; Letter signed by [REDACTED] on March 17, 2022 to [REDACTED]; Physical Therapy, PT Discharge Summary dates of service February 15 – March 8, 2022 (page 3 of 3); Physical Therapy, Treatment Encounter Note (TEN), dates of service March 29 – 31, 2022 (page 1 of 3); [REDACTED], Progress Notes, date October 10, 2022 (pages 2-3); Physical Therapy, Treatment Encounter Note (TEN), dates of service February 28, March 7, 2022 (page 1 of 2); [REDACTED], Progress Notes, date October 10, 2022 (pages 1 and 7); Physical Therapy, PT Initial Evaluation, certification period February 15 – March 16, 2022 (pages 1 and 3 of 4); Email from [REDACTED] dated February 19, 2022; undated typewritten correspondence to [REDACTED]; various email exchanges from [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) The Resident was admitted to [REDACTED] (Facility), in [REDACTED], West Virginia, on April 10, 2017. (Exhibit F-1)
- 2) As the Resident had met her occupational therapy (OT) and physical therapy (PT) goals at that time, discussions regarding the possible discharge of the Resident began in January or February 2022 between the Facility and [REDACTED] the Resident's guardian and conservator.
- 3) Due to the Resident contracting COVID in March 2022, the Resident began OT and PT once again as she had a setback from the previously met goals. (Exhibits F-1, F-2, and F-3)
- 4) Because the Resident re-established her previous baseline in OT and PT and met all her goals, she no longer requires the Facility's OT and PT services. (Exhibits F-1, F-2, and F-3)
- 5) The Resident desires to be discharged from the Facility.
- 6) A 30-day Notice of Transfer or Discharge (Notice) along with a cover letter was sent to [REDACTED] on September 9, 2022, with a proposed discharge date of October 8, 2022, indicating that the reason for discharge was the Resident's improved health.
- 7) The Notice indicated that the Resident would be discharged to home.
- 8) [REDACTED] currently resides in the Resident's home.
- 9) The Resident's medical record indicated that she is able to independently toilet, dress, feed herself, transfer, cook light meals at wheelchair level, bathe at sink-level, use her wheelchair, and is aware of her medical conditions and medications. (Exhibits F-1, F-2, and F-3)
- 10) The Resident's physician, [REDACTED], documented in the Resident's medical record on September 4, 2022, that the Resident "does not have any clinical needs that she cannot complete herself when given the appropriate tools and instructions. I feel that being unable to return to her home is causing a negative psychosocial effect on her mental health." (Exhibit F-1)

APPLICABLE POLICY

Code of Federal Regulation Title 42 §483.15 provide that the nursing facility 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:

(1) Facility requirements

(i) The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless-

- (A) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;
- (B) 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;
- (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 to have paid under Medicare or Medicaid) a stay at the facility. Non-payment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for his or her stay. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or
- (F) The facility ceases to operate.

(ii) The facility may not transfer or discharge the resident while the appeal is pending, when a resident exercises his or her right to appeal a transfer or discharge notice from the facility, unless the failure to discharge or transfer would endanger the health or safety of the resident or other individuals in the facility. The facility must document the danger that failure to transfer or discharge would pose.

(2) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (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.

(i) Documentation in the resident's medical record must include:

- (A) The basis for 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.

(iii) Information provided to the receiving provider must include a minimum of the following:

- (A) Contact information of the practitioner responsible for the care of the resident
- (B) Resident representative information including contact information.
- (C) Advance Directive information.
- (D) All special instructions or precautions for ongoing care, as appropriate.

- (E) Comprehensive care plan goals,
- (F) All other necessary information, including a copy of the resident's discharge summary, consistent with §483.21(c)(2), as applicable, and any other documentation, as applicable, to ensure a safe and effective transition of care.

(3) Notice before transfer. Before a facility transfers or discharges a resident, the facility must -
 (i) Notify the resident and the resident's representative(s) of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand. The facility must send a copy of the notice to a representative of the Office of the State Long-Term Care Ombudsman.

(ii) Record the reasons for the transfer or discharge in the resident's medical record in accordance with paragraph (c)(2) of this section; and

(iii) Include in the notice the items described in paragraph (c)(5) of this section.

(4) Timing of the notice.

(i) Except as specified in paragraphs (c)(4)(ii) and (8) of this section, the notice of transfer or discharge required under this section must be made by the facility at least 30 days before the resident is transferred or discharged.

(ii) Notice must be made as soon as practicable before transfer or discharge when -

- (A) The safety of individuals in the facility would be endangered under paragraph (c)(1)(i)(C) of this section;
- (B) The health of individuals in the facility would be endangered, under paragraph (c)(1)(i)(D) of this section;
- (C) The Resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (c)(1)(i)(B) of this section;
- (D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (c)(1)(i)(A) of this section; or
- (E) A resident has not resided in the facility for 30 days.

(5) Contents of the notice. The written notice specified in paragraph (c)(3) of this section 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 of the resident's appeal rights, including the name, address (mailing and email), and 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;

(v) The name, address (mailing and email) and telephone number of the Office of the State Long-Term Care Ombudsman;

(vi) For nursing facility residents with intellectual and developmental disabilities or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with developmental disabilities established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (Pub. L. 106-402, codified at 42 U.S.C. 15001 et seq.); and

(vii) For nursing facility residents with a mental disorder or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with a mental disorder established under the Protection and Advocacy for Mentally Ill Individuals Act.

(6) Changes to the notice. If the information in the notice changes prior to effecting the transfer or discharge, the facility must update the recipients of the notice as soon as practicable once the updated information becomes available.

(7) Orientation for transfer or discharge. A facility must provide and document sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. This orientation must be provided in a form and manner that the resident can understand.

(8) Notice in advance of facility closure. In the case of facility closure, the individual who is the administrator of the facility must provide written notification prior to the impending closure to the State Survey Agency, the Office of the State Long-Term Care Ombudsman, residents of the facility, and the resident representatives, as well as the plan for the transfer and adequate relocation of the residents.

(9) Room changes in a composite distinct part. Room changes in a facility that is a composite distinct part (as defined in §483.5) are subject to the requirements of §483.10(e)(7) and must be limited to moves within the particular building in which the resident resides, unless the resident voluntarily agrees to move to another of the composite distinct part's locations.

DISCUSSION

The Resident was admitted to the [REDACTED] in April 2017 with deficits from a reported stroke she had in February 2017. In January or February discussions began regarding the Resident's possible discharge from the Facility as she had made substantial progress in OT and PT with independent ADLs. However, in March 2022, the Resident contracted COVID and had some difficulty with her previously independent ADLs. After resuming OT and PT services, the Resident was able to return to her baseline independent ADLs and was discharged from OT and PT services. Because the Resident's health had improved, the Facility determined that she was able to be discharged because she no longer required Facility-level services. On September 9, 2022, a 30-day discharge letter was sent to [REDACTED] which explained in detail the basis for which the Facility was discharging the Resident to her home on October 8, 2022. [REDACTED] appealed the Facility's proposed discharge.

The Facility must demonstrate by a preponderance of the evidence that the Resident's health has improved sufficiently such that the Resident no longer needs the services provided by the Facility and that the information was documented in the Resident's medical record by her physician. Additionally, the Facility must show that the September 9, 2022 30-day Transfer or Discharge Notice meets Federal regulations.

The Facility's witnesses testified that the Resident had been screened by OT and PT services who determined that the Resident no longer required skilled nursing services. The Resident's medical record indicated that she is able to independently toilet, dress, feed herself, transfer, cook light meals at wheelchair level, bathe at sink-level, use her wheelchair, and is aware of her medical conditions and medications. Based on a September 4, 2022 examination, [REDACTED], the Resident's physician, documented in the Resident's medical record that the Resident "does not have any clinical needs that she cannot complete herself when given the appropriate tools and instructions. I feel that being unable to return to her home is causing a negative psychosocial effect on her mental health."

██████ was concerned that the Resident cannot ambulate with a rollator/walker without supervision, cannot take a shower without supervision, cannot obtain groceries without assistance, and disputes the Resident's ability to prepare light meals herself. Additionally, ██████ has concerns about the condition of the Resident's home. ██████ who currently lives in the Resident's home, testified that she was planning to move out of state and would not be responsible for the care of the Resident. However, no evidence was provided to show that the Resident's home was unlivable or unsafe for the Resident or that ██████ was out of the Resident's home. The Facility's representative explained that there were several different agencies and programs for individuals who need assistance, and that these would be discussed prior to discharge from the Facility. The Facility's representative explained that no referral had been made to date as the discharge was suspended pending the hearing on the matter.

The Facility showed by a preponderance of evidence that the Resident's health has improved such that she no longer needs the services offered by the Facility as documented by the Resident's physician in her medical records, and that the notice met Federal regulations.

CONCLUSIONS OF LAW

- 1) A Resident may be discharged from the Facility when the Resident's health has sufficiently improved such that the Resident no longer requires the services provided by the Facility and when the reason for the Resident's discharge is documented by the Resident's physician in the Resident's medical record.
- 2) The Facility showed by a preponderance of evidence that the Resident's health had improved sufficiently that she no longer requires the services provided by the Facility.
- 3) The Facility showed that the Resident's physician documented in the Resident's medical record that the Resident's health has improved sufficiently so that she no longer requires the services provided by the Facility.
- 4) The September 9, 2022 30-day Transfer or Discharge Notice met Federal regulations.

DECISION

It is the decision of the State Hearing Officer to **UPHOLD** the Facility's proposal to transfer the Resident.

ENTERED this 7th day of November 2022.

Lori Woodward, Certified State Hearing Officer