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Department of Health

KATHY HOCHUL
Governor

JAMES V. McDONALD, M.D., M.P.H.
Commissioner

JOHANNE E. MORNE, M.S.
Executive Deputy Commissioner

February 16, 2024

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o Franklin Center for Rehabilitation
and Nursing
142-27 Franklin Avenue
Flushing, New York 11355

Jason Atlas, Esq.
Schwartz Sladkus Reich
Greenberg Atlas LLP
444 Madison Avenue, 6th Floor
New York, New York 10022

RE: In the Matter of ██████████ – Discharge Appeal

Dear Parties:

Enclosed please find the Decision After Hearing in the above referenced matter. This Decision is final and binding.

The party who did not prevail in this hearing may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the party wishes to appeal this decision it may seek advice from the legal resources available (e.g. their attorney, the County Bar Association, Legal Aid, etc.). Such an appeal must be commenced within four (4) months from the date of this Decision.

Sincerely,

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: cmg
Enclosure

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

In the Matter of an Appeal, pursuant to
10 NYCRR 415.3, by

██████████
Appellant,
from a determination by

**New Franklin Center for Rehabilitation
& Nursing**

Respondent,
to discharge him from a residential
health care facility.

COPY

DECISION
DA24-6246

Hearing before: Kendra Vergason
Administrative Law Judge

Hearing date: January 25, 2024
By videoconference

Parties: New Franklin Center for Rehabilitation & Nursing
142-27 Franklin Ave.
Flushing, New York 11355
By: Jason Atlas, Esq.
Schwartz Sladkus Reich Greenberg Atlas, LLP
444 Madison Avenue, 6th Floor
New York, New York 10022
jatl@ssrga.com

██████████ *pro se*
New Franklin Center for Rehabilitation & Nursing

JURISDICTION

By notice dated [REDACTED] 2023, New Franklin Center for Rehabilitation & Nursing (Respondent), a residential health care facility subject to Article 28 of the Public Health Law (PHL), determined to discharge [REDACTED] Appellant) on [REDACTED] 2024. The Appellant appealed the discharge determination to the New York State Department of Health (Department) pursuant to 10 NYCRR § 415.3(i).

HEARING RECORD

Facility witnesses: Debby Tseng, Director of Social Services

Facility exhibits: 1 – 7

Appellant witnesses: self

Appellant exhibits: none

ALJ exhibits: 1 (Notice of Hearing and Discharge Notice)

A digital recording of the hearing was made. (2h41m.)

SUMMARY OF FACTS

1. The Appellant, age [REDACTED] was admitted to the facility from [REDACTED] [REDACTED] or [REDACTED] 2023, for wound care with [REDACTED] of the [REDACTED] (Exhibit 6.)

2. The Appellant's diagnoses include [REDACTED] [REDACTED] (Exhibits 2, 3, 6, 7.)

3. By notice dated [REDACTED] 2023, the Respondent determined to discharge the Appellant, effective [REDACTED] 2024, because his health had improved sufficiently so that he no longer needs the services of the facility. The notice advised the Appellant he would be discharged to his apartment in the community. (Exhibit ALJ I.)

4. In [REDACTED] and [REDACTED] a [REDACTED] wound on the Appellant's [REDACTED] was assessed by facility physicians to measure [REDACTED] x [REDACTED] m requiring three times per

week care on discharge. By [REDACTED] his condition had deteriorated, and the wound size increased to [REDACTED] x [REDACTED] x [REDACTED] m requiring daily care.

5. The Appellant is currently receiving daily skilled wound care for a [REDACTED] on his [REDACTED]. The treatment plan of care requires daily cleaning of the wound with normal sterile saline, application of Xeroform impregnated sterile gauze to the wound bed and application of clean dressing with ABD, roll gauze and waterproof tape. His treatment is overseen by the facility wound care physician. (Exhibits 6, 7.)

6. The Appellant remains at the facility pending the outcome of this hearing.

ISSUES

Has the Respondent established that discharge is necessary and the discharge plan is appropriate?

APPLICABLE LAW

Respondent, located in Flushing, New York, is a nursing home within the meaning of PHL § 2801(2) and is subject to applicable federal and state laws and regulations relating to the discharge and transfer of residents. 10 NYCRR 400.2. Transfer and discharge rights of nursing home residents are set forth in Department regulations at 10 NYCRR 415.3(i) and federal regulations at 42 CFR 483.15(c).

The Respondent alleged that the Appellant's discharge is permissible pursuant to 10 NYCRR 415.3(i)(1)(i)(a)(2), which states:

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. (42 CFR 483.15(c)(1)(i)(B).)

To demonstrate the discharge is permissible under this circumstance, the facility must ensure complete documentation in the clinical record, made by the resident's physician, of the basis for the discharge. 10 NYCRR 415.3(i)(1)(ii); 42 CFR 483.15(c)(2)(i)-(ii).

The Respondent facility has the burden of proving that the discharge is necessary and the discharge plan appropriate. 10 NYCRR 415.3(i)(2)(iii)(b).

DISCUSSION

The Appellant was admitted to the facility on ██████████ 023, for wound care. He has ██████████ medical illnesses and diagnoses and is currently followed by the facility wound care team for treatment of a ██████████ on his ██████████ his wound care physician is ██████████ (Exhibit 6, 7; T Tseng.)

By notice dated ██████████ 2023, the Respondent determined to discharge the Appellant on ██████████ 2024, because his health has improved sufficiently so that he no longer requires the services provided by the facility. (Exhibit ALJ I.) The Appellant opposes the discharge and contends that his condition recently deteriorated and that he does require the services being provided by the facility.

The Respondent had previously issued a notice of discharge to the Appellant on ██████████ 2023, with the same basis for discharge and discharge plan. The Appellant acknowledges that at that time the wound on his ██████████ was almost healed and he was not initially opposed to his discharge.

Facility medical records supported a conclusion that before ██████████ the Appellant's condition was such that discharge may have been appropriate. A wound assessment by ██████████ dated ██████████ 2023, documented the wound on the Appellant's ██████████ as measuring ██████████ x ██████████ x ██████████ m size with wound dressing daily and as needed, but also stated: "Dressing can be done TIW [three times a week] on discharge." (Exhibit 7.) A ██████████ 2023 medical progress note by Dr. Lumibao, the attending physician at the facility, documents that the Appellant was "seen and examined" and states "[p]atient is physically independent, goes out on pass by himself. He can be safely discharged home with home care services and outpatient wound clinic." There is no description or status of the wound other than "see wound note."

Facility documentation prepared by the Respondent's treating physicians after ██████████ indicates that the wound on the Appellant's ██████████ as markedly deteriorated. It

has more than [redacted] in size, shows [redacted] in the wound bed that was not previously documented, and the [redacted] has increased and changed in color, requiring daily wound care. (Exhibit 7.)

Dr. Lumibao's [redacted] 2023, monthly assessment and plan of care states:

The [redacted] measures [redacted] x [redacted] x [redacted] cm and is managed with Xeroform (impregnated gauze) daily and as needed.

...
Clean [redacted] with NS. Pat dry. Apply XEROFORM – cut to fit wound bed. Cover with ABD, ROLL GAUZE, and secure with waterproof tape, QD [daily], and PRN. (Exhibit 6.)

On [redacted] 2024, one day before the proposed discharge date, [redacted] also performed a wound assessment and documented the wound size as [redacted] x [redacted] x [redacted] cm, requiring dressing changes daily and routine cleaning protocol.

To support the basis for discharge stated in the [redacted] 2023 notice, the Respondent relies on a single medical entry by a [redacted] n [redacted] 2024 that states the Appellant is safe for discharge to the community. (Exhibit 4.) The Appellant disputed this medical note and questioned the basis for the doctor's opinion, claiming he did not know [redacted] and had never seen or been examined by him. [redacted] did not testify at the hearing. The Respondent was asked at the hearing, by the ALJ, if there was other documentation or information to show that the doctor ever assessed or examined the Appellant, or alternatively what [redacted] reviewed to form his opinion about discharge. The hearing was recessed to give the Respondent an opportunity to produce such documentation or information, after which the Respondent was unable to confirm that [redacted] saw or examined the Appellant. Nevertheless, the Respondent concluded the doctor's opinion was based on a review of the medical records.

While there may be situations where documentation prepared under similar circumstances – through review and assessment of the clinical record – would be

sufficient, this is not one of those situations because it is not even clear what records [REDACTED] reviewed. Dr. Lumibao's [REDACTED] note and [REDACTED] note are comprehensive and extremely detailed descriptions of the Appellant's current medical needs and include updated orders and recommendations. Neither of these notes were entered or finalized in the patient's record until [REDACTED] and [REDACTED] 2024, respectively. This was after [REDACTED] purportedly reviewed the medical record and documented his opinion regarding the basis for the discharge. It is therefore unclear whether [REDACTED] was fully informed of the deteriorated state of the Appellant's wound and possible accompanying complications before he created the [REDACTED] note.

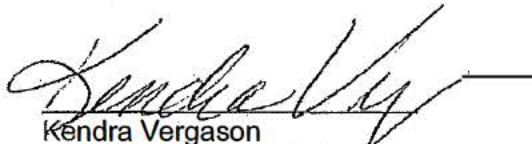
A determination to discharge a resident on the grounds alleged requires complete documentation, in the clinical record, by the resident's physician, and an appropriate discharge plan. The [REDACTED] 2023, and [REDACTED] 2024, physician notes, which are the most recent and relevant medical documentation to this hearing, indicate that the Appellant's condition has deteriorated. The Respondent has failed to establish that the Appellant's health has improved sufficiently so that he no longer needs the services provided by the facility. Furthermore, given the Appellant's deteriorating condition, the proposed discharge plan (returning the Appellant to his apartment) is not appropriate.

DECISION AND ORDER

Respondent has failed to meet its burden of proving that its determination to discharge the Appellant was correct and that the discharge plan was appropriate.

The Respondent is not authorized to discharge the Appellant pursuant to the [REDACTED] 2023 notice.

Dated: February 16, 2024
Rochester, New York


Kendra Vergason
Administrative Law Judge