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Executive Deputy Commissioner

January 16, 2018

CERTIFIED MAIL/RETURN RECEIPT

Barry Breskin, Administrator
The Pavilion at Queens
36-17 Parsons Boulevard
Flushing, New York 11354

[redacted]
c/o The Pavilion at Queens
36-17 Parsons Boulevard
Flushing, New York 11354

Sara J. Fulton, Esq.
Vera Institute of Justice
PO Box 2-5106
Brooklyn, New York 11202

RE: In the Matter o[redacted]- 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,

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: nm
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH

COPY

In the Matter of	Administrative Law Judge's Decision
RF/Pavilion at Queens Rehabilitation & Nursing	
Appeal from a Nursing Home Resident Involuntary Discharge pursuant to Title 10 (Health) of the Official Codes, Rules and Regulations of the State of New York (NYCRR) §415.3(h)	

Before:	Administrative Law Judge (ALJ) James F. Horan
For Pavilion at Queens Rehabilitation & Nursing (Facility):	Barry Breskin, Administrator
For Residen[redacted](Appellant):	Sara J. Fulton, Esq., Vera Institute of Justice, Inc.

The Facility in Queens County proposes to discharge the Appellant nursing home resident involuntarily to the [redacted] Shelter[redacted] Shelter[redacted]. The Facility states that grounds exist for the discharge because the Appellant's condition has improved sufficiently so that he no longer requires care in a nursing home. The Appellant challenges both the grounds for discharge and the proposed discharge location and alleges that the Facility is actually discharging the Appellant for monetary reasons rather than due to an improvement in condition. After considering the record, the ALJ finds that the Facility has failed to prove that grounds exist for an involuntary discharge.

I. Background

Under Title 10 (Health) of the Official Codes, Rules and Regulations of the State of New York (NYCRR) § 415.3(h), a nursing home resident holds certain rights concerning transfer or discharge. Title 10 NYCRR § 415.3 (h)(1)(i)(a)(2) allows involuntary discharge if a resident's

health has improved sufficiently so that the resident no longer requires the services that the facility provides. Under the standards at 10 NYCRR § 415.2(k), a nursing home provides nursing and professional services twenty-four hours per day for patients who require those services, but do not require services in a general hospital. In effect, this proceeding acts as a stay on any discharge until the decision on the discharge appeal. If a decision approves the discharge grounds and discharge plan, the proceeding ends with the decision and the discharge may proceed pursuant to the discharge plan.

The Facility provided a Discharge Notice to the Appellant on [redacted]2017 [ALJ Exhibit I, Notice of Hearing] and a revised Notice on [redacted] 2017 [ALJ Exhibit II]. As grounds for the discharge, th[redacted] Notice stated that the Appellant no longer requires services in a skilled nursing facility and has no way of paying for his stay at the Facility. The [redacted] Notice stated only that the Appellant no longer requires services in a skilled nursing facility. Both Notices identified the Shelter [redacted] shelter at [redacted] as the discharge location. The Appellant then requested the hearing that took place at the Facility on November 17, 2017. The ALJ conducted the hearing pursuant to New York State Administrative Procedure Act (SAPA) Articles 3-5 (McKinney Supp. 2017) and Title 10 NYCRR Part 415.

At the hearing, the Appellant presented one witness: Paige Speidel, the Appellant's case manager at the Guardianship Project of the Vera Institute for Justice. The Vera Institute is the Appellant's Court Appointed Guardian. The Vera Institute's Director of Legal Services, Sara J. Fulton, represented the Appellant at hearing. The Facility's Administrator, Barry Breskin, presented the case for the Facility. The Facility called no witnesses.

The ALJ received the Notice of Hearing into the record as ALJ Exhibit I. The Notice of Hearing attached the [redacted] Discharge Notice. Th[redacted] 2017 Discharge Notice appears in the Record as ALJ II. The ALJ received five documents into the record from the Appellant at the hearing:

A	Petition for Guardianship,
B	Order Appointing Temporary Guardian,
C	Order & Judgment Appointing a Guardian,
D	Physician Progress Note[redacted] 2017,
E	Empire Authorization Letter.

The Appellant's Counsel submitted a written summation on December 6, 2017 [Exhibit F]. The Facility offered two exhibits into evidence at the hearing, which the ALJ received into the record:

1	Empire Initial Adverse Determination,
2	Physician Progress Note[redacted]2017.

The Facility's Administrator submitted a written summation on November 29, 2017 [Exhibit 3]. The record also included a digital audio recording from the hearing on two Compact Discs (CD). References to testimony from the recording will indicate the time in the recording at which the testimony occurs (*e.g.* "CD at 12:40" means that the testimony occurs on the hearing recording at 12 minutes and 40 seconds into that recording). The record in the proceeding closed on December 11, 2017, when the ALJ received the Appellant's summation.

Under the hearing procedures at §415.3(h)(2)(ii), the Facility bears the burden to prove a discharge necessary and appropriate. Under SAPA § 306(1), a decision in an administrative proceeding must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or fact; less than preponderant evidence, but more than mere surmise, conjecture or speculation and

constituting a rational basis for decision, Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 (3rd Dept. 1984), appeal dismissed 63 N.Y.2d 649.

II. Findings of Fact

The references in brackets following the findings reflect testimony from the hearing recording or exhibits in evidence [Ex] on which the ALJ relied in making the findings. If contradictory information appears elsewhere in the record, the ALJ considered that information and rejected it.

1. The [redacted]ear-old Appellant receives long term care at the Facility [Ex D].
2. The Appellant entered the Facility from [redacted] Hospital on [redacted], 2016 [Ex A].
3. The Appellant's diagnoses include [redacted] and the Appellant's [redacted] change daily [Ex D].
4. The Facility's former Administrator, Richard Sherman, petitioned the New York Supreme Court for Queens County in May 2017 for the Court to appoint a Guardian for the Appellant [Ex A].
5. The Petition at Paragraph 3 stated that the Appellant suffered from [redacted] pain, and [redacted]among other [redacted] and that the Appellant needed assistance with the activities of daily living [Ex A].
6. Justice of the Supreme Court Lee A. Mayerson issued an Order and Judgment, entered on [redacted] 2017, naming the Guardianship Project of the Vera Institute of Justice as the Personal Needs and Property Management Guardian for the Appellant [Ex C].

7. A [redacted] 2017 Facility Physician Progress Note by Bhupinderjit Singh, M.D. (Singh Note) stated that the Appellant's medical care needs could not be met in the community [Ex D].

8. Empire Blue Cross Blue Shield (Empire) informed the Appellant and Facility by letter on [redacted] 2017 (Adverse Letter) that Empire would no longer cover the Appellant for services in a skilled nursing facility because the Appellan[redacted] Ex 1].

9. The Facility then provided the Appellant th[redacted] Discharge Notice, which stated that the Facility was discharging the Appellant because he was no longer appropriate for a [redacted] term care setting and because he was unable to pay for his stay at the Facility [Ex ALJ I].

10. A[redacted] 2017 Facility Physician Progress Note by Bernard Abramovici, M.D. (Abramovici Note) stated that the Appellant had been "sen and evaluated", that the Appellant had "NO real skills to be in a SNF", that the Appellant could be safely discharged t[redacted] where he can have hi[redacted] and blood pressure monitored quite well and that the was no reason why the Appellant "CAN NOT" be discharged [Ex 5].

11. Empire issued an Authorization Letter- Inpatient Services on [redacted] 2017 (Authorization Letter), which indicated that the Appellant had received continued authorization for inpatient services at the Facility for [redacted] days [Ex E].

12. The Authorization Letter indicated that the Requesting Provider for the Continued Authorization was Bernard B. Abramovici [Ex E].

III. Conclusions

Under 10 NYCRR § 415.3(h)(1)(i)(a)(2) a skilled nursing facility may discharge a resident involuntarily if the resident's health has improved sufficiently so the resident no longer needs the facility's services. The Facility bore the burden of proof in this matter and the Facility failed to provide relevant proof to support adequately the conclusion that the Appellant's condition has improved to the point that the Appellant no longer needed services in a skilled nursing facility. The Facility actually offered no proof that there had been an improvement in condition. The Facility provided no proof whatsoever as to when the Appellant entered the Facility, his condition upon admission, the services that the Appellant received during his stay, the change in any services and reason for those changes. The only evidence on the Appellant's condition came from the Appellant's evidence such as the Singh Note [Ex D] and the Petition for Guardianship [Ex A]. The Singh Note indicated that the Respondent continued to need services in the Facility as [redacted] 2017.

The Abramovici Note from five weeks later indicated that there was no reason why the Appellant could not be discharged. There was no testimony at hearing to indicate why there was such a drastic change in the assessment of Appellant's condition from the Facility's own records. The Appellant suggested that the change resulted from the withdrawal of coverage by Empire rather than any change in the Appellant's medical condition. The Appellant noted that the Abramovici Note dates from [redacted] 2017, two days after Empire's Adverse Letter [Ex 1] announcing the coverage withdrawal and the same date as the first Discharge Notice [Ex ALJ I]. The ALJ notes that the Abramovici Note seems hastily or carelessly drafted as it contains a misspelling and refers to "NO real skills to be in an SNF" as opposed to no skilled needs. Only

about two weeks after Empire issued the Adverse Letter, Empire sent a letter Authorization Letter approving coverage for services at the Facility for an additional 113 days [Ex E]. The Authorization Letter indicated that the request for coverage for continued services at the Facility came from Bernard B. Abramovici, the author of the Abramovici Note.

The only documents the Facility submitted were the Adverse Letter from October 16th [Ex 1] and the Abramovici Note [Ex 2]. The ALJ finds that the Appellant provided proof to contradict both the Facility's exhibits. The contradictions appear in Empire's Authorization Letter [Ex E] and the Singh Note [Ex D]. The Facility offered nothing into evidence to explain the contradictions, such as physician testimony that established that there was an actual change in the Appellant's condition betwe[redacted]2017 and [redacted]2017. The failure to provide a credible explanation for the contradictions leads the ALJ to find the Facility's evidence unconvincing.

The Appellant argued that this case was really about payment rather than improvement in condition. The Appellant noted that they have appealed Empire's coverage withdrawal and that the Appellant's discharge can't proceed while there is a hearing pending on coverage. The ALJ sees no reason to consider that issue, as the ALJ has found no convincing proof of an improvement in condition and so no ground exists for discharge. For the same reason, the ALJ sees no need to consider the Appellant's challenge to the proposed discharge location.

ORDER

NOW; after considering the request for Hearing, the testimony and the documents in evidence, the ALJ issues the following Order:

1. The ALJ overturns the Facility's determination to discharge the Appellant.
2. The ALJ dismisses the [redacted] 2017 Discharge Notice and upholds the Appellant's appeal.

Dated: Menands, New York
January 16, 2018

James F. Horan
Administrative Law Judge

To:

Barry Breskin, Administrator
The Pavilion at Queens Rehabilitation & Nursing
36-17 Parsons Blvd.
Flushing, NY 11354

Sara J. Fulton, Esq.
Director of Legal Services
Vera Institute of Justice, Inc., Guardianship Project
P.O. Box 2-5106
Brooklyn, NY 11202