NEW YORK STATE OF OPPORTUNITY. Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

September 27, 2019

CERTIFIED MAIL/RETURN RECEIPT

Kevin Carey, Administrator
Crown Heights Rehabilitation
810-20 St. Marks Avenue
Brooklyn, New York 11213

[redacted]
c/o Crown Heights Rehabilitation
810-20 St. Marks Avenue
Brooklyn, New York 11213

RE: In the Matter of [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

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

[redacted]

Appellant,

from a determination by

Crown Heights Rehabilitation,

Respondent,

to discharge him from a residential health care facility.

ORIGINAL

DECISION

Hearing Before: Ann H. Gayle
Administrative Law Judge

Held at: Crown Heights Rehabilitation
810-20 St. Marks Avenue
Brooklyn, New York 11213

Hearing Dates: August 22, 2019[1] and September 25, 2019

Parties: Crown Heights Rehabilitation
By: Kevin Carey, Administrator

[redacted]
Pro Se

[1] *Appellant was brought to the hospital for emergent treatment at approximately 6 a.m. on this date; the record was opened at 10 a.m., and adjourned.*

Pursuant to Public Health Law ("PHL") §2801 and Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("10 NYCRR") §415.2(k), a residential health care facility or nursing home such as Crown Heights Rehabilitation ("Respondent" or "Facility") is a residential facility providing nursing care to sick, invalid, infirm, disabled, or convalescent persons who need regular nursing services or other professional services but who do not need the services of a general hospital.

Transfer and discharge rights of nursing home residents are set forth at 10 NYCRR §415.3(h). Respondent determined to discharge [redacted] ("Appellant") from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(h)(1)(i)(b), which provides, in pertinent part:

> Transfer and discharge shall also be permissible when the resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare, Medicaid or third-party insurance) a stay at the facility.

Appellant appealed the discharge determination, and a hearing on that appeal was held. The Facility has the burden of proving that the transfer is necessary and the discharge plan is appropriate. 10 NYCRR §415.3(h)(2)(iii)(b). Pursuant to State Administrative Procedure Act, the standard of proof is substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact; it is less than a preponderance of the evidence but more than mere surmise, conjecture or speculation. . . . Put differently, there must be a rational basis for the decision. Stoker v. Tarentino, 101 A.D.2d 651, 652, 475 N.Y.S.2d 562, 564 [App. Div. 3d Dept. 1984], mod. 64 N.Y.2d 994, 489 N.Y.S.2d 43.

A digital recording of the hearing was made part of the record. Appellant appeared and testified on his own behalf. Kevin Carey, Administrator, and Jacob Berelowitz, Director of Social Services/Assistant Administrator, testified for Respondent.

The following documents were accepted into evidence by the Administrative Law Judge ("ALJ") as ALJ and Facility Exhibits:

ALJ
I: Notice of Hearing with attached Notice of Discharge/Transfer
II: September 20, 2019 letter

Facility:
1: Respondent's summary of events
2: Medicaid budget letter

Appellant was given the opportunity but did not offer any documents.

ISSUE

Has Crown Heights Rehabilitation established that the discharge is necessary and the discharge plan is appropriate?

FINDINGS OF FACT

Citations in parentheses refer to testimony ("T") of witnesses and exhibits ("Ex") found persuasive in arriving at a particular finding.

1. Respondent, Crown Heights Rehabilitation, is a residential health care facility located in Brooklyn, New York. (Ex I)

2. Appellant, [redacted], age [redacted] was admitted to the Facility on [redacted] 2019, for short-term therapy and wound care. (Ex 1; T Carey, Berelowitz)

3. By notice dated [redacted] 2019 ("discharge notice"), Respondent advised Appellant that it had determined to discharge him on the grounds of failure, after reasonable and appropriate notice, to pay (or have paid under Medicare, Medicaid, or private insurance) for his stay at the Facility. The outstanding balance on [redacted], 2019, was $[redacted] (Ex I; Ex 1; T Berelowitz)

4. Respondent received Appellant's Medicaid budget letter ("budget letter") in late [redacted] 2019. The budget letter shows Appellant's NAMI (Net Available Monthly Income) to be $[redacted]

effective [redacted]/2019, $[redacted] effective [redacted]2019, $[redacted] effective [redacted]/2019, and $[redacted] effective [redacted]/2019. Appellant was not given the budget letter. (Ex 1; Ex 2; T Berelowitz, Appellant)

5. The Facility's Administrator, Director of Social Services/Assistant Administrator, and others discussed with Appellant his requirement to pay his NAMI, but Respondent has not produced any documentation to demonstrate that the Facility sought payment from Appellant prior to issuing the discharge notice. (T Carey, Berelowitz, Appellant)

6. Appellant has remained at the Facility pending the outcome of this proceeding.

DISCUSSION

It is a resident's responsibility and obligation to pay for a stay at a facility. When a facility seeks to involuntarily discharge a resident on the grounds set forth in 10 NYCRR §415.3(h)(1)(i)(b), and the resident appeals that determination, the facility has the burden of proving that the resident has failed, *after reasonable and appropriate notice*, to pay for a stay at its facility, and that the discharge location is appropriate.

Mr. Carey and Mr. Berelowitz testified that Respondent had numerous conversations with Appellant about payment, but neither of them knew if Appellant was ever shown the budget letter, and they did not produce any bills/statements/invoices despite being given the opportunity at the hearing to locate same. Appellant testified that the first time he saw the budget letter was when Respondent offered it into evidence at the hearing. Appellant further testified that he was given perhaps one bill/statement. Appellant refuses to allow his social security benefits to be paid to the Facility, but he expressed that he would make some payment to the Facility if he could be transported to the social security office and to his bank to make arrangements.

Appellant continues to require wound care at a skilled facility. Respondent identified [redacted] a skilled facility in the [redacted], as the

discharge location for Appellant. Appellant testified that he does not wish to remain at the Facility, but he does not want to go to [redacted] because it is near the [redacted] and he is concerned that he will become ill if he lives near the [redacted] where he believes it is [redacted] than in [redacted] Mr. Berelowitz testified that he sent PRIs (Patient Review Instruments) to seven facilities. Appellant is on a wait list at [redacted], and the other six facilities did not respond and/or accept Appellant.

The ALJ ruled on the record that discharge to [redacted] is an appropriate discharge location as it provides services comparable to Respondent's Facility. The ALJ further ruled on the record that Appellant's appeal was granted because Appellant was not given *reasonable and appropriate notice* that monthly payment of $[redacted] was due the Facility. The parties were encouraged to continue to work together to explore discharge locations and to have Appellant pay for his stay at the Facility.

CONCLUSION

Since 10 NYCRR §415.3(h)(1)(i)(b) requires not just that a resident has failed to pay for a stay at a facility but also that such failure occurred *after reasonable and appropriate notice* was given, I find that the Facility has not met its burden of proving that it gave Appellant *reasonable and appropriate notice* of amounts due the Facility.

DECISION

I find that the Facility has failed to prove by substantial evidence that the discharge is necessary.

The appeal by Appellant is therefore GRANTED.

Respondent, [redacted], is NOT authorized to discharge Appellant in accordance with the [redacted], 2019 Discharge Notice.

This Decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR).

Dated: New York, New York
September 27, 2019

Ann H. Gayle
Administrative Law Judge

TO: [redacted]
c/o Crown Heights Rehabilitation
810-20 St. Marks Avenue
Brooklyn, New York 11213

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