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Department of Health

ANDREW M. CUOMO
Governor

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

LISA J. PINO, M.A., J.D.
Executive Deputy Commissioner

August 18, 2020

CERTIFIED MAIL/RETURN RECEIPT

Cristina Osorio, Social Work Supervisor
Highland Care Center
91-31 175th Street
Jamaica, New York 11432

[REDACTED]
c/o Highland Care Center
91-31 175 Street
Jamaica, New York 11432

Christopher Renfroe, Esq.
Renfroe Driscoll & Foster, LLP
118-35 Queens Blvd., #940
Forest Hills, New York 11375

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: cmg
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

Highland Care Center,

Respondent,

to discharge him from a residential health care facility.

COPY

DECISION

Hearing Before: Ann H. Gayle
Administrative Law Judge

Held at: Highland Care Center
91-31 175 Street
Jamaica, New York 11432

Hearing Dates: February 18 and 28, 2020
July 21, 2020¹

Parties: Highland Care Center
By: Cristina Osorio, Social Work Supervisor
Highland Care Center
91-31 175 Street
Jamaica, New York 11432

[REDACTED]
By: Christopher Renfroe, Esq.
Renfroe Driscoll & Foster, LLP
118-35 Queens Boulevard, #940
Forest Hills, New York 11375

¹ The hearing was held at Highland Care Center on February 18 and 28, 2020. Due to the Covid-19 pandemic, the hearing on July 21, 2020 was held via Webex videoconference.

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 Highland Care Center (“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(i). Respondent determined to discharge █ (“Appellant” or “Resident”) from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(i)(1)(i)(a)(2) which provides, in pertinent part:

- (a) the resident may be transferred only when the interdisciplinary care team, in consultation with the resident or the resident’s designated representative, determines that:
 - ...
 - (2) 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.

Appellant appealed the discharge determination to the New York State Department of Health, and a hearing on that appeal was held. Pursuant to 10 NYCRR §415.3(i)(2)(iii)(b), the Facility has the burden of proving that the transfer is necessary and the discharge plan is appropriate. State Administrative Procedures Act (SAPA) § 306(1) provides that the standard of proof shall be by 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 February 18 and 28 hearing dates, and a stenographic record of the July 21 hearing date were made part of the record. Appellant appeared at the hearing and was represented by Christopher Renfroe, Esq. Appellant's █, assisted Appellant and participated in the hearing. Appellant and Attending Physician █, M.D., testified for Appellant. Social Work Assistant Patrick Sukhu, Social Work Supervisor Cristina Osorio, Social Work Director Sharon Sklar, Rehab Director Joannarose Bunnell, Nurse Manager Kortney Simmons, Nursing Director Andrea Gibbon, Financial Coordinator Josephine Santiago, and Administrator Donald Morris testified for Respondent.

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

ALJ:

- I: Notice of Hearing with the Facility's Discharge Notice attached
- II: February 18, 2020 letter

Facility:

- 1: Social Work notes
- 2: Rehab Discharge Summary notes
- 3: Nursing notes
- 4: Update on Resident's condition and discharge location

Resident:

- A: Nursing Referral to Therapy
- B: Resident Fall Sheet Log
- C: Consultation Reports, Physician Orders, and other documents

ISSUE

Has Highland Care Center established that the transfer is necessary and the discharge plan is appropriate?

FINDINGS OF FACT

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

1. Respondent, Highland Care Center (“Highland”) is a residential health care facility located in Jamaica, New York. (Ex I)
2. Appellant, █, age █ was admitted to the Facility on █ 2019, for short-term care to include PT/OT (physical and occupational therapies), █, and a █. Appellant’s wound has healed substantially; he does not currently have infections; he is independent in his ADLs (activities of daily living); he does not require skilled services; and he ambulates independently with a rollator. (T Sukhu, Bunnell; Simmons, Gibbon; Tr 21-22, 23, 36-37, 73-74, 78-80)
3. Appellant received PT/OT from █ to █ 2019 when he reached his maximum potential in each discipline. Appellant has not shown further improvement from continued facility/skilled rehab but is a candidate for community rehab. (Ex 2; T Bunnell; Tr 25-26)
4. By notice dated █, 2020, Respondent advised Appellant that it had determined to discharge him on the grounds that his health has improved sufficiently so that he no longer needs the services provided by the Facility. (Ex I)
5. Appellant’s past and present medical conditions include █ █
█
█ These conditions, as well as any need for treatment of wounds and/or surgical or other interventions that might occur or arise going forward do not currently require skilled care, and they can be treated in the community at this time. (Ex 1; Ex 3; Ex 4; Ex A; Ex C; T Bunnell, Simmons, Gibbon; Tr 38)
6. Respondent’s discharge plan is to discharge Appellant to the Homeless Shelter (“Shelter”) located at █ █ █, New York. Appellant was previously in

██████████ / Highland

the Shelter system. Appellant will be discharged with a rollator, a ██████████ or wet-to-dry dressings, and a recommendation for nursing services. The Shelter will provide temporary housing with an assessment to determine the appropriate setting for Appellant, and his case manager will coordinate medical and other services such as CHHA (Certified Home Health Agency) services. (T Sukhu, Bunnell, Simmons, Gibbon)

7. It is the professional opinion of Appellant's caregivers at the Facility that discharge to the community, including the Shelter, is appropriate for Appellant who is independent and capable of managing his medications and medical treatment in the community. (Ex 3; Ex 4; T Sukhu, ██████████ Gibbon; Tr 37)

8. Appellant has remained at Highland pending the outcome of this proceeding.

DISCUSSION

The evidence presented by Respondent demonstrated that: Appellant is independent with his ADLs; he no longer requires skilled care; his chronic and acute medical conditions are stable and can be treated in the community; he is capable of managing his health care needs; he ambulates independently with a rollator; and discharge to the Shelter is an appropriate discharge plan for Appellant. The Shelter will provide assistance with securing housing and other services in the community.

The Shelter was identified as a last resort because Appellant's previous home with his ██████████ is no longer available; he has no income; his plans to move to ██████████ fell through; and he is not eligible for Assisted Living. Appellant testified that he has ██████████ ██████████), and ██████████ is helping him find housing. Ms. Sklar and Mr. Sukhu testified that the Shelter application was prepared but not submitted to DHS because Appellant did not consent to Shelter placement, and he would not agree to learn wound care prior

Highland

then resumed on July 21, at which time Appellant's attorney represented that Dr. ■ would not be called as a witness. At the conclusion of the July 21 hearing date, the record remained open in order to give the parties an opportunity to submit further documentation from Dr. ■ but neither party has done so. As such, Dr. ■ ■ 20 Report of Consultation (Ex C) and the hearsay testimony that both parties presented regarding what Dr. ■ told them is all that will be considered for this decision.

Appellant testified that he believes his wound will not and does not diminish with wet-to-dry dressings, but Ms. Gibbon testified that both wet-to-dry and ■ treatments reduce the size of the wound and that Appellant's wound was reduced to ■ cm by the wet-to-dry treatment. Dr. Akatugba testified that a ■ but does not prevent infection.

Appellant further testified that he does not believe he could properly dress his wound with one hand and he believes he cannot have a ■ in the community. Ms. Gibbon testified that (1) she believes Appellant can properly dress his wound with one hand as "it's a very, very easy dressing ... you wet the gauze, you put it on, you wrap it up, it is that easy" (Tr 80); and (2) a ■ can be used outside of the Facility and there can assistive services in the community. Educational training on how to dress the wound by means of wet-to-dry was previously offered to Appellant, and Appellant testified that he would participate in additional training; when asked "so you'd be willing to get education again?" Appellant responded "I don't need the same education, but if you want me to say yes to that, yes." (T 75).

Appellant further testified that he has problems with balance which has caused several falls (Ex B). Ms. Bunnell and Ms. Gibbon testified that Appellant was evaluated when he fell; no additional PT was required; Appellant was given a rollator (and a replacement rollator) to address his balance issues; and he is a candidate for community rehab services.

CONCLUSION

Respondent has proven that Appellant's health has improved sufficiently that he no longer requires skilled care, and that discharge to the Shelter system is appropriate for Appellant at this time. Speculation that past or current medical conditions might recur or worsen in the future is not sufficient to warrant remaining in a skilled facility when Appellant no longer requires skilled care, and the discharge location has been shown to be appropriate.

DECISION

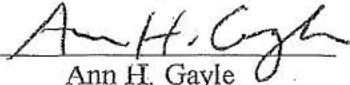
I find that the transfer is necessary and the discharge plan is appropriate.

The appeal by Appellant is therefore DENIED.

Respondent, Highland Care Center, is authorized to discharge Appellant in accordance with the █ 2020 discharge notice if the Shelter accepts Appellant following Respondent's submission of the Shelter application. The discharge shall occur no sooner than █ 2020, in order to give the Parties the opportunity to submit the Shelter application and to provide Appellant additional training with wound care. Appellant may leave the Facility sooner than █ 2020, if he chooses to leave.

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
August 18, 2020


Ann H. Gayle
Administrative Law Judge

██████████ / Highland

TO:

██████████
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