

discharges effected on or after October 1, 1989, notice of the resident's right to appeal the transfer or discharge under the State process established under subsection (e)(3) of this section." 42 U.S.C. § 1396r. That subsection requires "a fair mechanism, meeting the guidelines established under subsection (f)(3) of this section, for hearing appeals on transfers and discharges of residents of such facilities; but the failure of the Secretary to establish such guidelines under such subsection shall not relieve any State of its responsibility under this paragraph." 42 U.S.C. § 1396r(e)(3). In turn the Centers for Medicare and Medicaid Services' (CMS) regulations regarding the adequacy of the notice require certain conditions be met. 42 C.F.R. § 483.15(c). The federal regulations require that notice be given in writing no less than thirty days prior to the date of discharge or transfer. 42 C. F.R. 483. 15(c)(4)(i).

Moreover, a resident cannot be transferred 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.

42 C.F.R. § 483.15(c)(1)(i)

Additionally, when a resident is transferred under any of the provisions enumerated in paragraphs (c)(1)(i)(A) through (F) of 42 C.F.R. § 483.15, 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." 42

C.F.R. § 483.15(c)(2). Such documentation must include the “basis of the transfer,” and state “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).” Id. at (i)(A) to (B). When the transfer is made under paragraph (c)(1)(A) or (B) then the documentation must be made by the “resident’s physician.” Id. at (ii)(A). However, when the transfer is made under paragraph (c)(1)(i)(C) or (D) then all that is required is that the documentation be made by “a physician.” Id. at (ii)(B).

The Petitioner was first admitted to Cheshire on December 20, 2021 due to a gunshot wound. The Petitioner is diagnosed with quadriplegia, C-1-C4 complete (G82.51), neuromuscular dysfunction of bladder, unspecified (N31,9), neurogenic bowel, not elsewhere classified (K59, 2), neuralgia and neuritis, unspecified (M79, 2), fusion of spine, cervicothoracic region (M43, 23), other hypertension (195-89), adjustment insomnia (F51, 02), other chronic pain (G89, 29), major depressive disorder, recurrent, unspecified (F33, 9), essential primary hypertension (110), and nicotine dependence, unspecified, uncomplicated (F17, 200). (R-7.) Cheshire initially sought the involuntary transfer of Petitioner due to an incident that occurred on January 19, 2023 where the petitioner’s consumption of cannabis and tobacco contributed to Petitioner being unresponsive while using his motorized wheelchair.

On February 1, 2023, Cheshire requested approval from the New Jersey Department of Human Services (NJ DHS), Office of Community Choice (OCCO) for an involuntary transfer of the Petitioner because “[Petitioner] continues to make poor choices concerning [their] health and [their] use of recreational drugs.” (R-2.) On April 18, 2023, Petitioner was advised by Leah A. Rogers, the Quality Assurance Coordinator for the Division of Aging Services, NJDHS, that an involuntary transfer to Allaire Rehab and Nursing had been approved based upon “the welfare and safety of the beneficiary or other

residents.” (R-3.) Then on April 26, 2023, George Zeitler, the Executive Director of Cheshire gave the Petitioner notice of his impending involuntary transfer to occur on May 18, 2023 because the Petitioner “continued to deny that problems exist and refused help from the professional staff.” (R-4.)

The Administrative Law Judge (ALJ) found in the Initial Decision that Cheshire’s transfer notice was not valid, as it did not provide Petitioner with a thirty-day notice prior to the date of transfer as required by 42 C.F.R. 483.15(c)(4)(i). The ALJ further found that nothing in the record shows that any of these circumstances required less than a thirty-day notice. Additionally, the ALJ found Cheshire failed to demonstrate that it had properly documented Petitioner’s file with an attestation from a physician regarding the necessity of a transfer as required by 42 C.F.R. 483.15(c)(2)(ii)(B).

Here the notice was dated April 26, 2023, and proposed a discharge on May 18, 2023. (R-4.) While the notice from the Division of Aging Services, NJDHS, dated April 18, 2023, was within the thirty-day requirement, the thirty-day notice requirement must be made by the “facility” as per 42 C.F.R. § 483.15 (c)(4)(i). Furthermore, N.J.A.C. 8:85-1.10(g) requires that prior to issuing a discharge notice to a Medicaid recipient or an individual pending a Medicaid determination “the [nursing facility] shall submit to the [Long Term Care Field Office] a written notice with documentation of its intention and reason for the involuntary transfer of a Medicaid beneficiary from the facility.” Only when “the [Long Term Care Field Office] determines that an involuntary transfer is appropriate, the beneficiary and/or the beneficiary’s authorized representative shall be given thirty days’ prior written notice by the [nursing facility] that a transfer is proposed by the [nursing facility] and that such transfer will take effect upon completion of the relocation program.” The Long Term Care Field Office (LTCFO) is now known as the Office of Community Choice Options (OCCO).

The regulations do provide that the thirty-day time period may be shortened to "as soon as practicable" prior to the transfer 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.

42 C.F.R. § 483.15(c)(4)(ii)

However, the notice from Cheshire alleges, "the Interdisciplinary Team met with you on several occasions to offer you assistance with ongoing issues of our concern. You continue to deny that problems exist and refused help from the professional staff." These allegations are ambiguous, vague and not sufficiently clear to allow the Petitioner to defend his position. Nothing in the record shows any of these circumstances that permit less than thirty days' notice.

Furthermore, a transfer under 42 C.F.R. § 483.15(c)(1) requires documentation in the resident's file from either "a physician" or "the resident's physician", depending on the grounds for transfer, attesting to the necessity of the transfer. See 42 C.F.R. § 483.15(c)(2)(B). There is no such documentation in the record.

Cheshire filed exceptions in this matter on January 17, 2024. In the exceptions, Cheshire first argues it did provide proper notice pursuant to 42 C.F.R. 483.15(c)(4)(i) which requires notice is given "at least 30 days before the resident *is* transferred or discharged." (emphasis added). Cheshire claims Petitioner's Fair Hearing appeal, filed on May 5, 2023, stayed the involuntary discharge and satisfied the thirty-day requirement. However, this argument is without merit. While the transfer was stayed due to Petitioner's Fair Hearing request filed on May 5, 2023, it is not proper to count the days after the stay

towards the thirty-day notice requirement. The facility has the responsibility to provide a proper notice of transfer, and the Petitioner's decision to file a fair hearing appeal does not relieve the facility of providing that notice.

Cheshire also claims in the exceptions that the ALJ failed to address the provisions of N.J.A.C. 8:85-2.21, which covers discharge procedures for specialized care nursing facilities (SCNF). Cheshire is an SCNF. (R-9.) This regulation states: "the beneficiary shall be discharged upon achievement of maximum benefit from the specialized programming and maximum level of functioning and when the individual's condition can be appropriately managed in the community or other forms of institutional care. Id. at (e)(1). However, the Petitioner reaching "maximum benefit" was never articulated as a reason for transfer in Cheshire's notice dated, April 26, 2023. In fact, in the Initial Decision the ALJ referenced Cheshire's counsel issuing a brief a week before the hearing that changed the reasoning for the transfer. The ALJ was correct in referencing 42 C.F.R. 483.15(c)(6)¹, and finding that the change of reasoning deprived the Petitioner the opportunity to refute their basis of transfer, depriving them of their due process rights

In the exceptions, however; Cheshire argues that the reason for the discharge was not changed because Cheshire provided notice to the OCCO on February 1, 2023, which merely stated, "[Petitioner's] behavior is affecting [their] welfare" and "[Petitioner] continues to make poor choices concerning his health and recreational drugs." In the exceptions Cheshire also references the discharge notice that stated, "[y]ou continued to deny that problems exist and refused help from the professional staff." Cheshire then argues that aforementioned language amounts to Cheshire's giving notice that the

¹ 42 C. F.R. 483. 15(c)(6) specifically states, "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."

involuntary transfer is based on how the Petitioner's behavior impacted his rehabilitation capabilities. Cheshire also claims that their letter to OCCO, the discharge notice, and the Fair Hearing itself focuses on Petitioner's welfare as it relates to their rehabilitation. This claim is erroneous and without merit.

First, the letter to the OCCO is not proper notice to the Petitioner of the transfer or the reason of transfer. This letter went to the OCCO, not the Petitioner. The facility is required to give notice of the transfer and reason for transfer to the Petitioner directly at least thirty days before the transfer. Second, the Fair Hearing itself cannot be notice of the reason of discharge. Cheshire's argument that the Fair Hearing is notice of the reason of transfer is nonsensical as the Petitioner needs to receive notice of involuntary transfer and the reason why they are being transferred, before the Fair Hearing, so they can properly prepare. Finally, the notice of intent to transfer given to Petitioner on April 26, 2023 merely stated, "[y]ou continued to deny that problems exist and refused help from the professional staff." Such a statement is not consistent with the Respondent's claim that the Petitioner is being transferred because they have achieved maximum benefit from Cheshire's care. The ALJ correctly found that the reason for transfer was changed in the brief. In the exceptions, Cheshire argues that the submission of a pre-hearing brief is common practice. However, there is no requirement for an ALJ to accept a brief. An ALJ may order briefs after the hearing is concluded, based on their discretion. However, all evidence is at the discretion of the ALJ, and here there is no reversible error for not including Cheshire's brief in evidence, and no reason to believe it was excluded arbitrarily or capriciously.

Even if Petitioner reaching "maximum benefit" was articulated as a reason for transfer in Cheshire's notice dated, April 26, 2023, in the Initial Decision the ALJ found that they could not determine if the Petitioner had met the maximum rehabilitation that

Cheshire could offer based upon the testimony presented. In the exceptions, Cheshire stated that Lauren Rosario, Cheshire's Director of Rehabilitation and Occupational Therapy, testified at the hearing that Petitioner had met their rehabilitation goals. While Rosario is not a physician, Cheshire argues that Rosario has a Master's Degree in Occupational Therapy and is qualified to make the determination as to when rehabilitation goals are met because N.J.A.C. 8:85-2.21(e)(1) does not explicitly require a physician to make this determination.

Although Rosario stated that Petitioner has met their maximum potential in their testimony, they also testified to numerous facts that contradict that conclusion. Rosario testified that while Petitioner has made great progress in addressing their goals they have not met their goals of self-feeding, clothing, cleaning and extended balancing within a frame. Rosario also acknowledged that the Petitioner has not met their goals of dressing and washing themselves. On cross examination, Rosario further acknowledged the absence of progress in holding a cup, feeding themselves, and the inability to stand within a frame. ID at 4-5. As such, Ms. Rosario's testimony indicates that the Petitioner has not achieved the "maximum level of functioning" from Cheshire as required under N.J.A.C. 8:85-2.21(e)(1) for a discharge. The records provided by Cheshire are merely attendance and medication records. Cheshire failed to provide any actual occupational therapy records in support of Rosario's testimony that Petitioner has met their maximum benefit.

Nonetheless, even if Ms. Rosario's testimony and the record evidenced that the Petitioner had achieved maximum benefit, that would not satisfy the thirty-day notice requirement prior to an involuntary transfer pursuant to 42 C.F.R. § 483.15.

Due to the timing deficiencies in the notice as well as Cheshire's failure to adequately document in the Petitioner's medical record that a discharge was necessary, I hereby concur with the Initial Decision's findings that the transfer notice was invalid as

it did not comply with the thirty-day notice requirement, and that Cheshire failed to properly document the Petitioner's file with a physician's attestation that the transfer was necessary.

Thus, for the reasons set forth in the Initial Decision and set forth above, I hereby ADOPT the Initial Decision in this matter.

THEREFORE, it is on this 27th day of March 2024,

ORDERED:

That the Initial Decision is hereby ADOPTED.

Gregory Woods

OBO JLJ

Jennifer Langer Jacobs, Assistant Commissioner
Division of Medical Assistance and Health Services