

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

JAMES ANDERSON,

Petitioner,

v.

**LAKE CITY NURSING AND
REHABILITATION CENTER,**

Respondent.

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Docket No.:

**OSAH-DCH-HFR-LTCBOR-1335903-31-
Miller**



JUL 12 2013

Virginia Ramsey
Virginia Ramsey, Legal Assistant

FINAL DECISION

I. Introduction

The Petitioner in this matter has appealed the Respondent’s proposed involuntary discharge of the Petitioner from the Respondent’s long-term care facility. The evidentiary hearing took place on May 23 and 31, 2013,¹ before the undersigned administrative law judge of the Office of State Administrative Hearings. Stephen M. Krumm, Esq., represented the Petitioner, and Howard W. Reese, III, Esq., represented the Respondent.

After consideration of the evidence and the parties’ arguments, and for the reasons stated below, the Respondent is authorized to discharge the Petitioner from its facility pursuant to O.C.G.A. § 31-8-116(a).

II. Findings of Fact

1.

The Petitioner, James Anderson, is a 67-year-old resident of the Respondent’s facility, Lake City Nursing and Rehabilitation Center (“Lake City”), where he has lived for approximately seven years. (Testimony of Melanie DuPont and James Anderson, Jr.)

2.

The Petitioner became disabled in 1999, when he fell from a crane at work and suffered a traumatic brain injury, resulting in significant impairment of his cognitive abilities. He subsequently underwent a right frontal craniectomy to remove two benign brain tumors. Two other benign tumors could not be removed and remain in place at the present time. On December 21, 1999, the Petitioner

¹ At the conclusion of the evidentiary hearing, the Respondent filed a bench memorandum. The record was therefore held open until June 7, 2013, to allow the Petitioner to respond.

was found to be incapacitated, and his son, James Anderson, Jr.,² was appointed as his guardian. (Testimony of Mr. Anderson; Exhibits P-1, P-2, P-11.)

3.

The Petitioner lived with Mr. Anderson and his wife for several years. However, because the Petitioner's condition continued to deteriorate and Mr. Anderson's military duties required him to be absent for extended periods of time, the Petitioner eventually entered a nursing home. He spent four years at a facility in North Carolina before moving to Lake City in 2006. (Testimony of Mr. Anderson.)

4.

The Petitioner has been diagnosed with dementia, and the disease has continued to progress since he became a resident at Lake City. His memory and decision-making skills are impaired. At times, the Petitioner has trouble recognizing Mr. Anderson when he visits. Mr. Anderson is presently stationed at Fort Benning, near Columbus, and visits his father relatively infrequently. However, the Petitioner's ex-wife, Nadine Anderson, lives nearby and visits him on a weekly basis. Although they are no longer married, the Petitioner continues to believe that Ms. Anderson is his wife. (Testimony of Mr. Anderson, Nadine Anderson, and Carolina Black; Exhibits P-2, P-7.)

5.

The Petitioner enjoys smoking cigarettes and customarily participates in each of the seven daily smoke breaks offered at Lake City. For safety reasons, residents are not permitted to keep their own cigarettes and smoking paraphernalia. Instead, each resident's cigarettes are kept in a locked box and are distributed only at smoke breaks, which take place on a partially covered patio outside the facility's dining room. Residents are not permitted to smoke indoors.³ (Testimony of Ms. DuPont and Victoria Robinson.)

6.

Smoke breaks are supervised by one or more staff members, depending on the number of participants. Each resident may smoke up to two cigarettes per break, and only staff members may light cigarettes. At the conclusion of each break, staff members collect any remaining cigarettes or smoking paraphernalia. Partially-smoked cigarettes may be extinguished and left on the ground after breaks, although the area is cleaned periodically. (Testimony of Ms. DuPont and Ms. Robinson.)

² James Anderson, Sr., will be referred to herein as the "Petitioner," while James Anderson, Jr., will be referred to as "Mr. Anderson."

³ The Petitioner argues that the facility's policy prohibiting indoor smoking cannot be enforced because it has not been reduced to writing. The Court finds no merit in this argument.

7.

With the exception of a documented incident in November 2011, the Petitioner was, until recently, compliant with Lake City's rules regarding smoke breaks. However, in or near January 2013, the Petitioner was found smoking inside the facility on several occasions.⁴ Two of these incidents occurred in the dining room in the presence of other residents. When the Petitioner was approached by staff members, he extinguished his cigarette on the floor. A third incident occurred in the shower room. On a fourth occasion, a staff member discovered the Petitioner smoking outdoors, but in a non-designated area and outside a scheduled break time. (Testimony of Ms. DuPont and Ms. Robinson.)

8.

The facility's staff was unable to determine the source of the Petitioner's cigarettes or his method of lighting them. However, potential sources include visitors or the convenience store next door to the facility. It is also possible that the Petitioner retrieved partially-smoked cigarettes that were discarded after smoke breaks. (Testimony of Ms. DuPont and Ms. Robinson.)

9.

After the first incident, Lake City staff members met with the Petitioner and explained the dangers of smoking inside the facility. The Petitioner agreed at that time to comply with the facility's smoking rules. However, when the incidents continued, the facility's administrator, Natalie DuPont, became concerned that the Petitioner's behavior presented a significant risk to the safety of the facility's residents. Specifically, Ms. DuPont was concerned that the Petitioner could cause an explosive and catastrophic fire by smoking in the vicinity of residents using oxygen. Ms. DuPont therefore assigned a staff member to provide round-the-clock, one-on-one monitoring of the Petitioner. (Testimony of Ms. DuPont; Exhibit R-4.)

10.

Paul Harvey, M.D., evaluated the Petitioner on January 22, 2013. Dr. Harvey noted that the Petitioner had declined medication to help him stop smoking. Dr. Harvey further noted that by smoking inside the facility, the Petitioner created an "immediate threat" and a "very high risk of fire." Based on his determination that the Petitioner's behavior "places himself and other residents in direct harm," Dr. Harvey recommended that the Petitioner should be discharged or transferred from Lake City. (Testimony of Ms. DuPont; Exhibit R-2.)

⁴ It is unknown whether the Petitioner is unwilling to follow the facility's smoking rules or whether he is simply unable to do so because of the progress of his dementia. However, the facility's staff members believe that he is cognitively capable of compliance. Although his memory and judgment are impaired, staff members have observed that the Petitioner is able to follow other directions and to transport himself independently to smoke breaks. Further, residents who are impaired by dementia often do not remember that they want to smoke. (Testimony of Ms. DuPont, Ms. Robinson, and Wendy Smiley.)

11.

After contacting numerous facilities, the Lake City social work team identified Jeffersonville Nursing and Rehabilitation (“Jeffersonville”) in Jeffersonville, Georgia, as a nursing home that would accept a transfer of the Petitioner. Jeffersonville offers more smoke breaks than Lake City, and no convenience store is located nearby. (Testimony of Ms. DuPont; Exhibit R-3.)

12.

On March 8, 2013, Lake City issued an involuntary discharge notice, which was delivered to the Petitioner and mailed to Mr. Anderson.⁵ The notice proposed to discharge the Petitioner, effective April 8, 2013, to the Jeffersonville facility. The reason given for the proposed discharge was the Petitioner’s “failure to follow the smoking policy and processes” at Lake City. The notice also notified the Petitioner of his appeal rights, including the right to counsel, and provided him with contact information for the State Long-Term Care Ombudsman, the Long-Term Care Ombudsman coordinator, and the Georgia Advocacy Office. (Testimony of Ms. DuPont; Exhibit R-1.)

13.

In an effort to avoid unnecessary stress to the Petitioner, Lake City staff members have not discussed the proposed discharge with him. At the hearing, Ms. DuPont explained that the facility will begin detailed discharge planning upon a determination that the discharge is authorized. (Testimony of Ms. DuPont; Exhibit R-4.)

14.

Both Mr. Anderson and Ms. Anderson are concerned that the Petitioner’s transfer to Jeffersonville, after seven years at Lake City, will cause him significant stress and accelerate his cognitive decline. Additionally, their travel time for visits will increase, as Jeffersonville is located approximately 100 miles from Lake City. Ms. Anderson prefers not to do any highway driving, and she is concerned that she will be unable to travel to the new facility. Regrettably, Lake City was unable to identify a facility in closer proximity that would accept his transfer. (Testimony of Mr. Anderson, Ms. Anderson, and Ms. DuPont; Exhibit R-3.)

III. Conclusions of Law

1.

The Respondent bears the burden of proof in this matter. Ga. Comp. R. & Regs. r. 616-1-2-.7(1). The burden of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. r. 616-1-2-.21(4).

⁵ The discharge notice was also sent to Ms. Anderson, as well as Dr. Chirag Patel, the Petitioner’s attending physician; the Office of the State Long Term Care Ombudsman; and Karen Boyles, the Long Term Care Ombudsman coordinator. (Testimony of Ms. DuPont; Exhibit R-1.)

2.

Under Georgia law, a long-term care facility is authorized to discharge a resident where “[a] physician determines that failure to transfer the resident will threaten the health or safety of the resident or others and documents that determination in the resident’s medical record.” O.C.G.A. § 31-8-116(a)(1). A discharge under these circumstances may occur only “after other reasonable alternatives to transfer have been exhausted.” O.C.G.A. § 31-8-116(a).

3.

In this case, the Respondent proved, by a preponderance of the evidence, that failure to transfer the Petitioner from Lake City will threaten the health and safety of the Petitioner, other residents, and staff members at the facility. This determination was also made by a physician and documented in the Petitioner’s medical record, as required by O.C.G.A. § 31-8-116(a)(1). Whether or not the Petitioner retains the cognitive ability to remember the facility’s smoking rules is immaterial; the facility must prove only that the statutory requirements for discharge have been met.

4.

The Respondent further proved, by a preponderance of the evidence, that reasonable alternatives to the Petitioner’s discharge have been exhausted, in accordance with O.C.G.A. § 31-8-116(a). Due to the potentially severe, and even fatal, consequences of the Petitioner’s behavior, the safety of residents and staff can be ensured only through the one-on-one monitoring program implemented by the facility. This alternative, however, is not reasonable. Lake City cannot be expected or required to maintain round-the-clock individual monitoring of one resident.

5.

The discharge planning requirements for a resident who is subject to involuntary transfer are set forth in O.C.G.A. § 31-8-116(c), which provides:

The facility shall assist the resident and guardian in finding a reasonably appropriate alternative placement prior to the proposed transfer or discharge. The plan for such transfer shall be designed to mitigate the effects of transfer stress to the resident. Such plan shall include counseling the resident, guardian, or representative regarding available community resources and informing the appropriate state or social service organizations.

O.C.G.A. § 31-8-116(c).

6.

The Respondent proved, by a preponderance of the evidence, that it has complied with the requirements of O.C.G.A. § 31-8-116(c) to the extent appropriate at this time. More specifically, the Respondent presented evidence that it has a reasonably appropriate alternative placement and that it

will develop a detailed discharge plan that is designed to mitigate the effects of transfer stress upon approval of its decision to discharge the Petitioner.

7.

Pursuant to 42 C.F.R. § 483.12(a)(6), notice of a proposed discharge must include the following:

- (i) The reason for transfer or discharge;
- (ii) The effective date of transfer or discharge;
- (iii) The location to which the resident is transferred or discharged;
- (iv) A statement that the resident has the right to appeal the action to the State;
- (v) The name, address and telephone number of the State long term care ombudsman;
- (vi) For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and
- (vii) For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

42 C.F.R. § 483.12(a)(6)(vi); see also O.C.G.A. § 31-8-116(d).

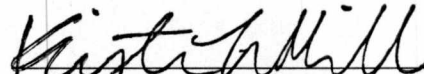
8.

Here, the Respondent proved, by a preponderance of the evidence, that its discharge notice complied with the requirements of 42 C.F.R. §§ 483.12(a)(6) and O.C.G.A. § 31-8-116(d).

IV. Decision

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Respondent is authorized to discharge the Petitioner pursuant to O.C.G.A. § 31-8-116(a), as proposed in the discharge notice dated March 8, 2013. The Respondent shall comply with the discharge planning requirements of O.C.G.A. § 31-8-116(c) prior to completing the Petitioner's transfer to Jeffersonville Nursing and Rehabilitation.

SO ORDERED, this 12 day of July, 2013.


KRISTIN L. MILLER
Administrative Law Judge