

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-022

AUGUST TERM, 2005

Mildred Van Orman	}	APPEALED FROM:
	}	
	}	
v.	}	Human Services Board
	}	
Department of Aging and Independent Living	}	DOCKET NO. FH 19,040

In the above-entitled cause, the Clerk will enter:

Petitioner appeals an order of the Human Services Board upholding the Department of Aging and Independent Living=s approval of a nursing home=s decision to transfer her from her bed in one unit of the facility to a bed in another unit within the same facility. We reverse the Board=s order based upon our conclusion that there was insufficient evidence to support it.

The seventy-five-year-old petitioner began residing at the nursing home in June 2003. She was unable to walk because of osteomyelitis of the foot and ankle, and she was receiving physical and occupational therapies. She was also being treated for an infected wound associated with her medical condition. In April 2004, the nursing home notified petitioner of its decision to transfer her from her bed in the sub-acute unit to a bed in the long-term-care (LTC) unit within the facility. The notice stated that petitioner had the right to appeal the decision first to the Department of Aging and Independent Living and then, if necessary, to the Human Services Board. Petitioner appealed the transfer decision to the Department. In response to the appeal, the Director of Social Services for the nursing home wrote a letter to the Department explaining that petitioner was reluctant to transfer to an LTC bed because of her belief that she would be going home soon, despite her doctor=s recommendation that her foot be amputated. The letter stated that petitioner refused to move even though she had been assured that she could obtain a discharge, if she so desired, from the LTC unit. The letter also stated that petitioner=s wound put both herself and the patients moving in and out of the sub-acute unit at risk for infection. A few days later, petitioner responded with her own letter stating that she feared she would not receive the level of care in the LTC unit that would enable her to return home soon. She also stated that she had developed a friendship with her roommate so that it did not make sense for her to move and try to make new friends for the short period in which she intended to remain at the facility.

In May 2004, the Department=s Licensing Chief denied petitioner=s appeal, finding that petitioner no longer required care within the sub-acute unit and thereby satisfying the regulations governing transfer decisions. See Licensing and Operating Rules for Nursing Homes ' 3.14(b)(2), 4 Code of Vermont Rules 13 110 005-11 (authorizing transfer based on sufficient improvement in resident=s health to point where resident no longer needs services provided by facility). Petitioner appealed that determination to the Board and requested a hearing. A Board hearing officer directed the parties to submit medical evidence and legal arguments related to the proposed transfer. The Department responded with a letter noting that it had accepted the basis for the transfer decision provided by the nursing home, and that petitioner had offered no evidence suggesting that her medical condition continued to require sub-acute care or that the care provided in the LTC unit would be inadequate. Petitioner responded with another letter reiterating that the

Board was required to hold a de novo evidentiary hearing, and that, in any event, there was no evidence in the record setting forth the criteria for moving from one unit to another or indicating how petitioner=s condition had changed to warrant the transfer. Petitioner asked that the transfer be denied or that an evidentiary hearing be scheduled. In December 2004, the Board issued a decision adopting the hearing officer=s findings, conclusions, and recommendation that the Board uphold the Department=s decision to allow the transfer. The Board determined that, by not producing any evidence regarding her continuing need for sub-acute care or the harm that could result from the proposed transfer, petitioner had failed to raise doubts about the nursing home=s professional judgment regarding her care needs or the Department=s approval of the transfer decision.

On appeal, petitioner argues: (1) the Board violated state regulations by failing to hold a de novo evidentiary hearing; (2) the Board erred by requiring her rather than the Department to produce evidence supporting the transfer; and (3) the evidence was insufficient to support the Department=s approval of the transfer. Initially, we note that it is not entirely clear to us that the relevant regulations (1) permit petitioner=s challenge of the decision to transfer her from one bed to another within the facility, or (2) require that the decision meet the criteria contained in ' 3.14(b) of the licensing regulations. Nevertheless, we address petitioner=s arguments because the parties have assumed from the beginning of these proceedings that petitioner could challenge the transfer, which was based upon criterion ' 3.14(b)(2) (A[T]he resident=s health has improved sufficiently so the resident no longer needs the services provided by the facility.@).

Petitioner first argues that the Board violated state law by failing to conduct an evidentiary hearing. In addressing this argument, we necessarily confront petitioner=s second argument that the Board erred in imposing upon her the burden of challenging the transfer decision, as well as her third argument that the evidence was insufficient to support the decision. Upon reviewing these claims of error, we conclude that there was insufficient evidence in the record for the Board to summarily reject petitioner=s challenge of the Department=s order upholding the nursing home=s decision to transfer petitioner to another bed. We find nothing in the record indicating that petitioner=s medical condition has improved sufficiently to transfer her to the LTC unit. Indeed, the Department and the Board relied almost exclusively upon a brief letter from the nursing home=s Director of Social Services. That letter merely describes petitioner=s condition, notes petitioner=s reasons for not wanting to move, and expresses the opinion that petitioner=s wound poses a greater risk of infection to her and her roommates and limits the roommates that can be placed with her. Nothing in the letter or any other evidence submitted to the Department or the Board explains how petitioner=s condition has improved sufficiently to allow her be transferred to the LTC unit. Given the lack of evidence on the criterion that the parties have agreed was the basis for the transfer, the Board erred in summarily upholding the Department=s decision to approve the transfer.

Reversed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice