



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Schaeffer, Kenya

ORDER

ML-08-0247

On August 27, 2008, the petitioner filed a hearing request pursuant to 42 U.S.C. §1396r(g)(1)(D) to seek removal of the neglect finding beside her name in the Wisconsin Caregiver Misconduct Registry. Following a prehearing conference, it was determined that this matter would be decided on stipulated facts and briefs. Briefs were due by November 7, 2008, and both parties submitted the same.

The issue for decision is whether the Wisconsin Department of Health Services (Department) correctly declined to remove the neglect finding for the petitioner from the Wisconsin Caregiver Misconduct Registry.

Appearing were the following persons:

PARTIES IN INTEREST:

Petitioner:

Kenya Schaeffer
4881 N. 67th
Milwaukee, WI 53218

Respondent:

Wisconsin Department of Health Services
Office of Legal Counsel
P.O. Box 7850
Madison, WI 53707-7850

By: Attorney Steven Gloe

ADMINISTRATIVE LAW JUDGE:

Nancy Gagnon, Attorney
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.
2. Petitioner was employed as a certified nursing assistant (CNA) at the Marian Franciscan Center (Center) nursing home in the past. On January 20, 2006, while working as a CNA at the Center, the petitioner transferred a resident by herself, without the use of a mechanical lift. That resident's care plan required the use of a mechanical lift for transfers, in addition to the use of two caregivers. As a result of this negligence, the resident sustained a right fibular fracture. After the

injury, the petitioner did not provide any other cares for that resident from 9:00 a.m. to 2:30 p.m. on January 20, 2006. The resident's care plan required the petitioner to attend to her at least every two hours for re-positioning. Due to these two instances of neglect, the Department notified the petitioner in June, 2006, that it intended to place a finding of neglect beside the petitioner's name on the Wisconsin Caregiver Misconduct Registry. The petitioner timely requested a hearing to challenge the substantiated neglect finding. Following hearing, Administrative Law Judge Duren of this office concluded that the substantiated finding of neglect was correct. See Decision ML-06-0138 (Wis. Div. of Hearings & Appeals December 5, 2006)(DHS).

3. On June 30, 2008, the petitioner contacted the Department to request both a Rehabilitation Review and to petition for removal of her substantiated finding from the Registry. On August 13, 2008, the Department issued a decision that concluded that the petitioner failed to demonstrate sufficient evidence to support rehabilitation approval. The petitioner did not appeal from that determination.
4. On August 4, 2008, the Department issued a decision denying the petitioner's request to remove the finding of neglect from the Registry. The basis for denial was that incident(s) of neglect were not a "singular occurrence." On August 27, 2008, the petitioner filed the instant appeal to challenge the Department's denial of her request to remove her name from the Registry.

DISCUSSION

The Wisconsin Caregiver Misconduct Registry was created under state law pursuant to federal mandate. 42 U.S.C. §1396r(e)(2); Wis. Admin. Code ch. DHS 13. The federal statute sets out the conditions under which a person may successfully petition to have a finding of neglect removed from a misconduct registry:

In the case of finding of neglect under subparagraph (C), the State shall establish a procedure to permit a nurse aide to petition the State to have his or her name removed from the registry upon a determination by the State that (I) the employment and personal history of the nurse aide does not reflect a pattern of abusive behavior or neglect, and (II) the neglect involved in the original finding was a singular occurrence.

42 U.S.C. §1396r(g)(1)(D)(i). "Singular occurrence" is not defined in §1396r, or in Wis. Admin. Code chapters DHS 12 (Rehabilitation Review) or 13 (Caregiver Misconduct).

In this case, the substantiated findings and ALJ Duren's decision both show, in my opinion, that the petitioner engaged in two distinct episodes of neglect on January 20, 2006: (1) she improperly transferred the resident, breaking her lower leg, and (2) she failed to provide other, scheduled care to the resident for 5 ½ hours.

The petitioner argues that these two events were one occurrence. I do not agree. The events happened on the same date, but that was the only commonality. The events did not happen at the same time. The events were not the extension of one caregiving deficit. The petitioner's decision to neglect the patient and not provide scheduled care for 5 ½ hours is a distinct event from her earlier negligence that resulted in a broken leg.

The Department's denial is affirmed.

CONCLUSIONS OF LAW

The Department's August 4, 2008, decision, denying the petitioner's request to remove the finding of neglect from the Wisconsin Caregiver Misconduct Registry, was correct.

NOW, THEREFORE, it is ORDERED

That the petition for review is dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. You may petition for an administrative rehearing by submitting a specific written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. This request must be received by the Division within 20 days of the date of this Order. The process for requesting a rehearing petition is contained in Wisconsin Statutes § 227.49.

APPEAL TO CIRCUIT COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of a rehearing, if you ask for one). For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 650, Madison, Wisconsin, 53703. The process for appeals to the circuit court is in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of
Madison, Wisconsin, this _____ day
of _____, 2010.

Nancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals
MLCaregiverRemoval