Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
The Jewish Home of Eastern Pennsylvania (CCN: 39-5103),	)	Date: November 13, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-06-613
	)	Decision No. CR1863
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

I sustain the determinations of the Centers for Medicare & Medicaid Services (CMS) to impose civil money penalties (CMP) against Petitioner, Jewish Home of Eastern Pennsylvania, for failure to comply substantially with federal requirements governing participation of long-term care facilities in the Medicare and the Medicaid programs. Therefore, I sustain the CMP of $350 per day for the period effective December 9, 2005 through January 26, 2006 and the CMP of $400 per day for the period effective October 16, 2006 through November 16, 2006.

I. Background

Petitioner is a long-term care facility located in Scranton, Pennsylvania, and certified to participate in the Medicare program as a skilled nursing facility (SNF) and the Medicaid program as a nursing facility (NF). On December 9, 2005, the Pennsylvania Department of Health, the state survey agency, conducted a survey of Petitioner's facility, the results of which are reported in a Statement of Deficiencies (SOD) dated that same date. CMS Exhibit (Ex.) 2. The State agency determined that Petitioner was not in substantial compliance with federal program requirements finding eight deficiencies with a scope and severity level of D or higher, with the most serious being a scope and severity level G, indicating an isolated instance of actual harm that is not immediate jeopardy. CMS Ex. 2.

As a result of these deficiencies, on June 12, 2006, CMS imposed a civil money penalty in the amount of $350 per day, effective December 9, 2005 and continuing through January 26, 2006, for a total CMP of $17,150.[1] CMS Ex. 5. On September 25, 2006, the state agency notified Petitioner that it would lose the approval of its Nurse Aide Training and Competency Evaluation Program (NATCEP) because a CMP of more than $5,000 has been imposed against Petitioner. Petitioner made a timely request for a hearing of this matter, the case was docketed as C-07-60, and was subsequently consolidated with the earlier case under its docket number, C-06-613. The state agency again surveyed Petitioner's facility on October 20, 2006, and found 12 deficiencies with a scope and severity level of D and higher, with the most serious again at a level G. CMS Ex. 16. In both cases, the level G deficiency was for noncompliance with respect to Tag F324, the regulatory provision, 42 C.F.R. § 483.25(h)(2), which requires the facility to provide each resident with adequate supervision and assistance devices to prevent accidents. On December 12, 2006, CMS informed Petitioner that as a result of the deficiencies found in the October 2006 survey, it would impose a CMP of $400 per day for each day that Petitioner was not in substantial compliance with the participation requirements. CMS Ex. 18. CMS determined that the facility came back into substantial compliance on November 17, 2006, and, thus, the CMP totaled $12,800. CMS Ex. 19. Petitioner timely requested a hearing with respect to these findings and this case, docketed as C-07-221, was also consolidated with the earlier cases under docket number C-06-613.

Petitioner filed a Motion in Limine to suppress evidence which I denied.[2] *See* December

---

[1] CMS determined that Petitioner had regained compliance on January 27, 2006. CMS Ex. 5.

[2] Petitioner contended that I must exclude certain CMS exhibits pursuant to 42 C.F.R. § 483.75(o)(4). I denied the motion because I found no basis that the exhibits Petitioner wished to exclude were records created or acquired by Petitioner's Quality Assessment committee during the course of its work. Rather, the documents that Petitioner tried to exclude were documents and information that were part of each patient's records and/or were documents provided to the surveyors at the time of the survey by facility staff members. Specifically, the exhibits Petitioner sought to suppress were incident reports which are filled out at the time of an incident whenever a particular patient has an unexplained accident or fall within the facility. They are not generated by the Quality Assurance Committee (QAC), although the occurrence of an accident or several may later trigger a QAC study. In the alternative, Petitioner contended that the same exhibits should be excluded because the surveyors gathered this evidence in violation of Petitioner's equal protection rights because the state survey agency held Petitioner's facility to a higher standard than other facilities in the same area because of

(continued...)

29, 2006 Ruling Denying Motion. Petitioner later requested subpoenas for three witnesses which I denied in a ruling dated June 11, 2008, because Petitioner did not show that their testimony was necessary or relevant for the resolution of any facts in controversy. On November 21, 2007, I issued a ruling granting CMS's motion for partial summary judgment finding that Petitioner did not request a hearing with respect to any deficiency tag cited other than Tag F324. Therefore, I granted summary judgment with respect to the unchallenged deficiencies and indicated that the only disputed deficiency for me to resolve for both surveys involved the deficiency cited under Tag F324. In so ruling, however, I declined to determine whether the unchallenged deficiencies were sufficient to support the CMP's imposed, deciding that I would reserve judgment with respect to the issue of whether the amount of the CMP imposed is reasonable until I made my decision on the merits with respect to the contested deficiency. I also accepted as an offer of proof of witness testimony affidavits of three of Petitioner's proposed witnesses. However, I determined that these witnesses' presence to give in-person testimony at any hearing in this matter was unnecessary as the substance of their testimony would not be relevant to the resolution of the issues presented in this case. I incorporate my previous orders and rulings here.

I held a two-day hearing in Philadelphia, Pennsylvania, on June 24-25, 2008. At the hearing, I received into evidence CMS Exs. 1-40 and Petitioner exhibits (P. Ex.) 1-10 (Petitioner's Exhibit 9 has 26 sub-tabs). Transcript (Tr.) 2-3. At the hearing, Petitioner conceded the deficiencies with respect to Residents 157 and 56 cited in the Statement of Deficiencies for the December 2005 survey with respect to Tag F324 and the deficiency with respect to Resident 133 cited in the Statement of Deficiencies for the October 2006 survey with respect to Tag F324. Tr. at 1; CMS Ex. 2, 19-29; CMS Ex. 20, at 20-23. Each party submitted a posthearing brief, CMS Brief and P. Brief. CMS filed a posthearing reply brief (CMS Reply), but Petitioner advised me that it did not intend to file a reply to CMS's posthearing brief.

---

[2](...continued)
religious bias. First of all, I find this argument to be wholly irrelevant to my decision making here. My review as an administrative law judge is a *de novo* review. Any question then of discrimination or bias on the part of any surveyor is irrelevant in light of that and certainly does not require the suppression of the kind of documentary evidence that Petitioner asks to suppress here. Moreover, in any event, if I were to consider Petitioner's argument relevant here, I do not have the authority to adjudicate constitutional questions. My authority is limited to the applicable statute and regulations and whether Petitioner was in substantial compliance with the applicable law.

II. Applicable Law

Petitioner is a long-term care facility that participates in the Medicare and Medicaid programs. The statutory and regulatory requirements for participation by a long-term care facility are found at sections 1819 and 1919 of the Social Security Act (Act), and at 42 C.F.R. Part 483. Such facilities are subject to survey and enforcement procedures on behalf of CMS by state survey agencies to determine if they are in substantial compliance with the program requirements. 42 C.F.R. §§ 488.10- 488.28; 42 C.F.R. §§ 488.300 - 488.335. "Substantial compliance" means a level of compliance such that "any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Noncompliance," in turn, is defined as "any deficiency that causes a facility to not be in substantial compliance." 42 C.F.R. § 488.301

Sections 1819 and 1919 of the Act invest the Secretary of Health and Human Services with authority to impose various enforcement remedies against a long-term care facility for failure to comply substantially with participation requirements. 42 C.F. R. §§ 488.402(s), 488.408. Among other remedies, CMS may impose CMPs ranging from $50 - $3000 per day of noncompliance for one or more deficiencies that do not constitute immediate jeopardy but that either cause actual harm or create the potential for more than minimal harm. 42 C.F.R. §§ 488.406, 488.408, 488.430, and 488.438(a)(1)(ii). The penalty may start accruing as early as the date that the facility was first out of compliance until the date substantial compliance is achieved or the provider agreement is terminated. 42 C.F.R. § 488.440.

The Act and regulations make a hearing available before an administrative law judge (ALJ) to a long-term facility against whom CMS has determined to impose a CMP. But the scope of such hearings is limited to whether an *initial determination* made by CMS is correct. Act, section 1128A(c)(2); 42 C.F.R. §§ 488.408(g), 498.3(b)(12) and (13). The hearing before an ALJ is a de novo proceeding. *Anesthesiologists Affiliated, et al*, DAB CR65 (1990), *aff'd* 941 F.2d 678 (8th Cir. 1991).

III. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. Petitioner was complying substantially with federal participation requirements; and

2. if noncompliance is established, the amount of the penalty imposed by CMS is reasonable.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate numbered heading.

1. Petitioner was not in substantial compliance with participation requirements for the periods from December 9 2005 through January 26, 2006 and from October 16, 2006 through November 16, 2006.

2. Petitioner was not in substantial compliance with the quality of care requirement of 42 C.F.R. § 483.25(h)(2) (Tag F324) which requires that the facility ensure that each resident receives adequate supervision and assistance devices to prevent accidents.

Despite all the paper filed in this matter, this is really a very simple case. First, Petitioner did not contest seven deficiencies with a scope and severity level of "D" and above cited for the December 2005 survey and 11 deficiencies at the scope and severity level of "D" and above for the October 2006 survey.[3] I granted partial summary judgment for CMS

---

[3] A scope and severity level of "D" - "F," is for a deficiency that caused no actual harm but has the potential for causing more than minimal harm; scope and severity level of "G" - "I" is for a deficiency that does not constitute immediate jeopardy but which caused actual harm. 42 C.F.R. § 488.438(a)(1)(ii); State Operations Manual (SOM), section 7400E. For the December 2005 survey, the uncontested deficiencies with their scope and severity (SS) levels are as follows: Tag F155 - Notice of Rights and Services (SS=D); F157 - Notification of Changes (SS=D); F309 - Quality of Care (SS=E); F314 - Pressure Sore (SS=D); F315 - Urinary Incontinence (SS=D); F385 - Physician Services (SS=D); and F430 - Drug Regimen Review (SS=D). CMS Ex. 2. For the October 2006 survey, the uncontested deficiencies and their respective scope and severity levels are as follows: F157 - Notification of Changes (SS=D); F253 - Housekeeping and Maintenance (SS=E); F279 - Comprehensive Care Plans (SS=D); F282 - Comprehensive Care Plans (SS=D); F315 - Urinary Incontinence (SS=D); F329 - Unnecessary Drugs (SS=E); F334 - Influenza and Pneumococcal Immunization (SS=E); F371 - Sanitary Conditions - Food Prep & Service (SS=F); F387 - Frequency of Physician Visits (SS=D); F441 - Infection

(continued...)

with respect to these deficiencies. Thus, under the applicable law, my decision to grant partial summary judgment amounted to a determination of substantial noncompliance and was sufficient as a basis to impose a CMP.

At the time, however, I declined to decide whether the uncontested deficiencies for both surveys were sufficient to support the CMPs imposed. Although Petitioner initially only disputed the deficiencies cited with respect to Tag F324 (Accidents), which was cited at a scope and severity level "G" for both the December 2005 and October 2006 surveys, at the beginning of the hearing it then stipulated that it was deficient with respect to that tag for Residents 157, 56, and 133. Tr. at 1; P. Brief at 5. Thus, even though Petitioner continued to contest that citation of the deficiencies for the rest of the residents cited in the SODs (eight other residents from the December 2005 survey and one other resident from the October 2006 survey) the stipulated deficiencies, like other uncontested deficiencies, is enough to establish that Petitioner was not in substantial compliance with the required participation requirements for the relevant periods. As a matter of law, if Petitioner is not in substantial compliance with even one program requirement for even one patient, CMS may impose a CMP. Here, Petitioner has conceded the only deficiency remaining for both the surveys at issue. Thus, the only remaining decision left for me to decide is whether the amount of the CMPs imposed are reasonable.

Nevertheless, I examine on the merits at least one disputed resident under Tag F324 for the December 2005 survey and the one remaining disputed resident from the October 2006 survey, and find that Petitioner failed to rebut the preponderance of the evidence that it was not in substantial compliance.[4]

Resident 98. With respect to the findings during the December 2005 survey, Resident 98 fell on June 17, 2005, when one nurse aide working alone, instead of the two aides required under her plan of care, attempted to turn her. The resident fell to the floor and

---

[3](...continued)
Control (SS=D); and F514 - Clinical Records (SS=D).

[4] Petitioner's sole witness, who was the Assistant Nursing Home Administrator, was less than credible and forthright in her testimony and she refused to answer the questions that were asked her. There were several instances where the witness appeared to contradict herself or make conclusions that were not supported by the evidence. Tr. at 348-352; 355 -357; 360-362; 389-392; 392-394, 396, 398,401-403 compared with 518. There are instances where this witness argued that certain treatments or interventions were performed by the facility even though there were no medical records submitted in the record or given to the surveyors to support such a determination. Tr. 444-450.

the aide called for help. Resident 98 suffered an abrasion to her left elbow and a 4 by 3 cm size bruise. CMS Ex. 6, at 4. The resident's care plan and medical records clearly state that this resident required the assistance of two staff members for transfers as well as for all activities of daily living. CMS. Ex. 6, at 4, 7, 8, 20. Resident 98 also fell again on September 24, 2005, under similar circumstances.[5] The CNA was performing the morning care to the resident, apparently without assistance as required by the plan of care, when the resident fell off the bed to the floor. CMS Ex. 6, at 6. Resident 98 again suffered some injury– a bump to her forehead, bruising and abrasions. Petitioner's failures to implement the interventions planned for this resident resulted in two falls which clearly could have been prevented. As CMS's expert indicated, the fact that this resident required a two-person assist at all times is recognition that this resident's lack of mobility made her at particular risk of falls because she had little or no control over her positioning. Dr. Osterweil, CMS's expert, noted, "We know that somebody who is lying in bed, who had mobility problems, always can roll and those are things which they are care-planned for. So the real culprit of the fall is the fact that there was nobody there to hold that individual." Tr. at 12-13. Petitioner did not rebut this finding. I thus conclude that the preponderance of the evidence for this patient indicated that Resident 98's falls were the result of Petitioner's failure to implement her plan of care requirement that two staff members assist this resident. Petitioner's failure resulted in this avoidable accident.

Resident CR2. Resident CR2 had diagnoses that included ambulatory dysfunction, risk for falls and status post right hip fracture. Her care plan indicated that she was at risk for falls due to mental status changes and ambulatory dysfunction. CMS Ex. 20, at 22. The circumstances of the CR2's accident were unwitnessed. CMS Ex. 23. What is clear is that this wheelchair-bound resident attended Sunday mass in the facility auditorium. After the service, a family member of another resident found CR2 on the floor and called out to the staff. If it were not for the visitor finding CR2, it is unclear how long she would have remained on the floor before it was realized that she was even missing. *Id.* CR2 was taken to the Emergency Room for evaluation and was admitted with a fracture of the right hip. Only after her return from the hospital did Petitioner determine to use a chair alarm and a geri lounger to prevent CR2 from trying to stand on her own. CMS Ex. 23. CMS's expert witness explained that this resident was not adequately supervised in the auditorium based on her pre-existing behaviors and her diagnoses. Tr. at 15. He noted that CR2 had a previous bleed in the prefontal lobe of her brain which impaired her judgment, particularly her awareness with respect to her own safety. As a result of the lack of supervision of this resident, she fell. This resident was known to be at particular

---

[5] I find it disturbing that there is no incident report that was filed with the State for the September 2005 fall. The Nurses Notes, however, provide contemporaneous information regarding the incident.

risk for falls, yet Petitioner did not supervise her or provide any particular assistance devices before her fall that would have protected her from such an incident. There is no reason why CR2 was not provided with a chair alarm or a lap buddy prior to the incident to protect her from such danger. I therefore agree with CMS that Petitioner was not in substantial compliance with respect to CR2 and Petitioner has not rebutted that finding.

3. CMS's remedy determinations are reasonable.

a. CMS's determination to impose CMPs of $350 per day for Petitioner's noncompliance for the period of December 9, 2005 through January 26, 2006 is reasonable.

b. CMS's determination to impose CMPs of $400 per day for Petitioner's noncompliance for the period from October 16, 2006 through November 16, 2006 is reasonable.

The range of permissible civil money penalties for non-immediate jeopardy level deficiencies is from $50 to $3,000 per day. 42 C.F.R. § 488.438(a)(1)(ii). There are regulatory criteria for deciding what is reasonable within this range. The criteria include: the seriousness of a facility's noncompliance; its compliance history; its culpability; and its financial condition. 42 C.F.R. §§ 488.438(f)(1) - (4); 488.404 (incorporated by reference into 42 C.F.R. § 488.438(f)(3)).

The undisputed material facts of this case provide ample support for a penalty amount of $350 per day for the initial survey and $400 per day for the deficiencies found during the revisit survey, which include a repeat deficiency for Tag F324. First of all, I do not have any information on Petitioner's past history of compliance so I need not consider that here. Second, Petitioner did not raise its financial condition or inability to pay, and therefore that is not an issue before me.

I do find that the seriousness of Petitioner's noncompliance and its culpability with respect to the noncompliance are sufficient to justify the penalty amounts. The $350 per day CMP and $400 per day CMP imposed by CMS are minimal and reasonable given the relative seriousness of Petitioner's noncompliance. The deficiency and repeat deficiency with respect to Tag F324 are significant and sufficient to support the CMPs imposed. For the December 2005 survey, ten separate residents were cited for Petitioner's failure with respect to accidents due to Petitioner's lack of supervision and provision of assistance devices to prevent accidents (one resident had over 11 falls in as many months), many of which resulted in significant harm to the residents. In many instances, the deficiencies

were accidents which could have been avoided altogether if Petitioner's staff had followed the prescribed plan of care for the resident. I conclude that the deficiencies with respect to Tag F324, as well as the other uncontested deficiencies for the other tags, were more than sufficient and reasonable given the breadth of Petitioner's noncompliance. As for the CMPs of $400 per day for the revisit survey, I too find the amount of the CMP reasonable given the seriousness of Petitioner's noncompliance with respect to the repeat deficiencies cited for Tag F324, as well as the other uncontested deficiencies cited for the period in dispute.

IV. Conclusion

Based on the above findings and analysis, I sustain the determinations of CMS to impose CMPs against Petitioner, Jewish Home of Eastern Pennsylvania, for failure to comply substantially with federal requirements governing participation of long-term care facilities in the Medicare and the Medicaid programs. Therefore, I sustain the CMP of $350 per day for the period effective December 9, 2005 through January 26, 2006, and the CMP of $400 per day for the period effective October 16, 2006 through November 16, 2006.

/s/

José A. Anglada
Administrative Law Judge