Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Grace Healthcare of Benton,	)	Date: October 20, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-06-610
	)	Decision No. CR1676
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

I sustain CMS's determination to impose civil money penalties of $3,500 per day against Petitioner, Grace Healthcare of Benton. I also find that Petitioner is disqualified from participating in a Nurse Aide Competency and Evaluation Program (NATCEP).

I. Background

Petitioner is a skilled nursing facility doing business in the State of Arkansas. It participates in the Medicare program. Its participation in Medicare is governed by sections 1819 and 1866 of the Social Security Act and by implementing regulations at 42 C.F.R. Parts 483 and 488. Additionally, its right to a hearing and the administrative proceedings in this case are governed by regulations at 42 C.F.R. Part 498.

On June 14, 2006 CMS advised Petitioner that it had determined to impose remedies against it based on findings that Petitioner had failed to comply substantially with Medicare participation requirements. CMS based its determinations on the findings made at a compliance survey of Petitioner's facility completed on May 25, 2006 (May survey). The remedies included civil money penalties of $3,500 per day for a period that included May 17 and 18, 2006, and additional civil money penalties of $350 per day for noncompliance after May 18. The May 17 and 18 civil money penalties were based on CMS's determination that, on those dates, Petitioner's noncompliance with participation

requirements was so egregious as to comprise immediate jeopardy for Petitioner's residents.[1] CMS also told Petitioner that, as a consequence of its noncompliance, Petitioner would lose authority to conduct NATCEP.[2]

Petitioner requested a hearing and the case was assigned to me for hearing and decision. I issued a pre-hearing order which instructed the parties to file written pre-hearing exchanges consisting of their proposed exhibits, including the written direct testimony of each proposed witness, and briefs addressing all of the issues in the case. After receiving the parties' exchanges I scheduled an in-person hearing. Then, I conducted a pre-hearing conference with the parties. The upshot of that conference was that the parties agreed to waive an in-person hearing and to have the case heard and decided based on their exchanges. I set a deadline for the parties to submit final briefs.

The parties complied with that deadline. On September 27, 2007 I conducted a second pre-hearing conference with the parties because it seemed that Petitioner, in its final brief, appeared to be expressing second thoughts about its decision to waive an in-person hearing. I offered to schedule an in-person hearing if the parties wanted one. Petitioner then assured me that it did not want an in-person hearing.

At the September 27 pre-hearing conference I also ruled on a motion filed by CMS objecting to the admission into evidence of two written statements submitted by Petitioner. I overruled these objections.

CMS submitted 37 proposed exhibits with its pre-hearing exchange which it identified as CMS Ex. 1 - CMS Ex. 37. Petitioner submitted 38 proposed exhibits which it identified as P. Ex. 1 - P. Ex. 38. I am receiving all of these proposed exhibits into evidence.

Petitioner resubmitted 17 of its proposed exhibits as an attachment to its final brief in this case and it renumbered them. I do not receive any of these into evidence because they are cumulative and it would confuse the record if I were to receive from a party more than one version of the same exhibit, especially inasmuch as Petitioner gave the exhibits in its second submission different identifying numbers than it gave corresponding exhibits in its first submission. I note, however, that all of the 17 exhibits in Petitioner's second

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[1] The term "immediate jeopardy" is defined at 42 C.F.R. § 488.301 to mean noncompliance by a facility that has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident.

[2] CMS mentioned other remedies in its June 14 notice letter but it did not impose any of them.

submission are duplicates of other exhibits contained in its original submission of 38 proposed exhibits, and I have received Petitioner's entire original submission into evidence.

II. Issues, findings of fact and conclusions of law

A. Issues

Petitioner waived its right to challenge CMS's determination to impose civil money penalties of $350 per day for dates beginning with May 19, 2006. Consequently, these remedies, and the deficiencies on which they are based, are not at issue.

What remains at issue is the $3,500 per day civil money penalties that CMS determined to impose for May 17 and May 18, 2006.[3] CMS premised its determination to impose these penalties on the alleged presence of six immediate jeopardy level deficiencies. I find it to be unnecessary that I address all of these alleged deficiencies in order to issue a decision that sustains CMS's remedy determination. As I discuss below, the $3,500 per day civil money penalty that CMS determined to impose is amply justified by the presence of a single immediate jeopardy level deficiency, the failure by Petitioner or its staff to investigate the causes of numerous apparent bruises sustained by one of

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[3] Counsel for CMS created considerable confusion as to the duration and basis of these remedies. The June 14, 2006 notice letter from CMS to Petitioner recited a determination by CMS to impose *daily* civil money penalties of $3,500 for the dates of May 17 and 18, 2007. In her initial brief CMS counsel asserts that this was the remedy that CMS had determined to impose. However, at times, and in particular, in its final brief, CMS counsel talks about "a" $3,500 civil money penalty, suggesting that CMS is seeking that amount to remedy only a single day of noncompliance. I may have been misled by counsel to the extent that, in my July 18, 2007 Order Scheduling Final Briefs, I may have incorrectly assumed, based on counsel's statements, that it intended to impose only "a" civil money penalty of $3,500. CMS's counsel added to the confusion in its final brief by referring to the $3,500 civil money penalty as a *per instance* civil money penalty. I do not resolve this confusion here. Rather, I rely on CMS's notice letter to find that Petitioner's noncompliance at the immediate jeopardy level was for a two day period consisting of May 17-18, 2006 and I sustain the imposition of daily civil money penalties for both of those days. If CMS has, in fact, determined to modify its remedy to a one-day civil money penalty or even to a per-instance penalty then, of course, it may impose such a remedy on the strength of my decision. If, on the other hand, Petitioner believes that CMS has waived imposing a remedy for one of the two days, it may move to clarify my decision. In that event I will, of course, accept argument from CMS as well.

Petitioner's residents. For that reason, I decline to decide whether Petitioner was deficient in other respects.

The issues that I decide, therefore, are whether:

1. Petitioner failed to comply substantially with a Medicare participation requirement;

2. Petitioner proved that CMS's determination of immediate jeopardy was clearly erroneous;

3. Daily civil money penalties of $3,500 are reasonable; and

4. Petitioner must lose its authority to conduct NATCEP.

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 heading. I discuss each Finding in detail.

1. Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.13(c)(2) - (4).

In pertinent part the regulation that is at issue here requires a participating facility's staff to:

• Immediately report to the facility's administrator all alleged violations involving mistreatment, neglect or abuse of a resident, including injuries of unknown origin;

• Thoroughly investigate all such allegations;

• Report all investigation results to the administration or his designated representative and to appropriate official in accordance with State law within five working days of the incident and to take appropriate corrective action as may be required.

The facts concerning the care that Petitioner and its staff gave to Resident #1 are not disputed. The resident was an elderly individual with numerous medical problems, including congestive heart failure, chronic obstructive pulmonary disease, hypertension, coronary artery disease, and Alzheimer's disease. CMS Ex. 6, at 1, 55. Her medications

included anti-coagulant drugs (Plavix and aspirin) and a diuretic (Lasix). *Id.*, at 208. The resident clearly was an extremely frail and dependent individual. She had been assessed by Petitioner's staff to have moderately impaired cognitive skills and to require assistance in daily activites including eating and use of the toilet. *Id.*, at 66 - 75.

The resident's treatment record establishes that her physical condition deteriorated over a period beginning on May 4, 2006. On that date she was discovered by Petitioner's staff to have a fecal impaction which necessitated manual removal. Bruises were noted on her arms on that date. CMS Ex. 4, at 3-5; CMS Ex. 32, at 2-4. On May 5, the staff noted an egg-size bruise on the resident's right hip. *Id.* On May 6, the staff observed blood on the resident's cheek and multiple bruises on her coccyx, the right side of her chest, her legs, and on the left side of her upper arm. CMS Ex. 4, at 5-6; CMS Ex. 32, at 2-4. On May 7, the staff identified blood in the resident's mouth and bruises on her arms. CMS Ex. 21, at 7. One of the certified nursing assistants who provided care to the resident stated that, as of May 7 the resident had:

> bruises on her legs and bottom. The biggest were about the size of eggs. She had different colored bruises on her legs. The darkest was really dark purple on the inside part of her left leg. She had a bruise on the coccyx, one bruise on the right side of her chest, one on the left side of her upper arm. The arm kind of looked like the skin had been roughed. I showed . . . [a licensed practical nurse] the bruise on her left arm, it looked fresh. It was bright purple and had some redness around it. I found the other bruises when we rolled . . . [the resident] and uncovered her . . . There were more bruises than I've ever seen on a person and I had not been told she had a fall or anything.

CMS Ex. 4, at 18.

Resident #1 was sent to the hospital on May 7, 2006 as a consequence of her deteriorated condition. The emergency room physician noted that the resident manifested multiple bruises in a purplish state, as well as dried blood in the resident's mouth. CMS Ex. 4, at 27. A physician at the hospital commented to members of Petitioner's staff about the state of the resident noting that the resident had not been bruised prior to her admission to Petitioner's facility. CMS Ex. 4, at 15-16.

CMS contends that there is nothing documented in Resident #1's treatment record showing that Petitioner or its staff investigated the cause of the resident's apparent bruises. There are no incident reports, no investigative summaries, no statements taken from staff, and no documentation of injuries of an unknown source and a followup investigation being reported to Petitioner's administrator. Nor, according to CMS, did

Petitioner's staff conduct a comprehensive assessment of the resident during the May 4-7, 2006 period in order to determine whether the resident's medical condition was the cause of her injuries or whether some other cause, including abuse, might explain the injuries.

The evidence offered by CMS strongly supports a finding that Petitioner failed to discharge its regulatory responsibility to investigate the injuries manifested by Resident #1 as possible signs of abuse, neglect, or mistreatment. A facility has an absolute duty to treat every resident injury from an unknown source as evidence of possible abuse, neglect, or mistreatment, until it establishes the injury's cause. Here, the evidence offered by CMS shows that Resident #1 manifested obvious – and extreme – external injuries over a three day period that Petitioner's staff did not investigate.

Petitioner's defenses to CMS's prima facie case are that:

> • Resident #1 did not suffer from bruising but, rather, "a lot of ecchymosis", probably as a consequence of the anti-coagulant medication that she was taking. P. Ex. 17, at 1 (cited in Petitioner's final brief as "P. Ex. 1.").
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> • Petitioner and its staff did not view the resident's ecchymosis as an injury of unknown origin or as an allegation of potential abuse, because the resident was receiving anticoagulant medication. Petitioner's staff conferred with the resident's attending physician regarding its determination that the resident's ecchymosis was medically related. Petitioner's final brief at 28.
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> • Resident #1 was in very poor health during the period from May 4-7, 2006 and was terminally ill. Her treatment by Petitioner was appropriate and there is no evidence that the resident was in any way abused or neglected. P. Ex. 17 (cited in Petitioner's final brief as "P. Ex. 1"); P. Ex. 24 (cited in Petitioner's final brief as "P. Ex. 2").

I do not find these defenses to be persuasive. Nothing offered by Petitioner overcomes the prima facie case of noncompliance established by CMS.

Petitioner identified no evidence to show that its staff assessed the nature of the resident's injuries during the May 4-7 period. It is clear from the evidence offered by CMS, which includes statements taken from several of Petitioner's certified nursing assistants, that the staff observed what they thought to be bruises on the resident's body during that period. The staff did not investigate the sources of these injuries during the period. Petitioner has offered no records that document such an assessment having been made.

I have no reason to dispute the conclusion of Petitioner's experts – made from the vantage point of hindsight – that the resident's injuries were ecchymosis caused by a reaction to medication and not bruises caused by trauma. Nor do I find to be unpersuasive Petitioner's contention that the resident suffered from terminal illness. But, there is nothing of record to show that these assessments was made, or even sought by Petitioner's staff, *while the resident was manifesting her injuries.* Petitioner has cited absolutely nothing to support its contention that the staff determined while the resident was at the facility that the resident's injuries were, in fact, ecchymosis.

Petitioner included as an exhibit a very lengthy portion of Resident #1's treatment record at Petitioner's facility. P. Ex. 5, at 1-358. Petitioner did not identify any document in that record which consisted of an assessment made during the May 4-7 period ruling out trauma as a cause of the resident's injuries. Nurses notes made during that period do not identify or describe the full extent of the resident's injuries much less do they assess their cause. *Id.*, at 209-213.

The burden falls squarely on Petitioner to identify an assessment of the resident's injuries made during the May 4-7 period if, in fact, it existed. I infer from Petitioner's failure to do so that no assessment was made. The precise cause of the injuries sustained by Resident #1 during the May 4-7, 2006 period was, in fact, not established by Petitioner's staff prior to the resident being sent to the hospital on May 7.

Nor is there any evidence to support a finding that Petitioner's staff consulted with the resident's attending physician prior to the resident being sent to the hospital and that, prior to the hospitalization, the physician ruled out bruising caused by trauma as a cause of the resident's injuries. The resident's records are devoid of evidence that a consultation took place. The two statements that Petitioner offered from the physician do not support a finding that a consultation occurred. P. Ex. 24; P. Ex. 25. The physician avers that:

> Prior to this [May 7, 2006 hospital] admission, the Resident developed ecchymosis which was caused by the administration of Plavix and aspirin . . . The ecchymosis was not caused by injury or accident.

P. Ex. 24, at 3. But, he does not aver that he made this assessment prior to the May 7 hospital admission.

2. Petitioner did not prove to be clearly erroneous CMS's determination that Petitioner's noncompliance put residents at immediate jeopardy.

It is Petitioner's burden to prove clearly erroneous a determination by CMS that a deficiency puts residents at immediate jeopardy. 42 C.F.R. § 498.60(c)(2). Here, Petitioner failed to offer any evidence challenging CMS's immediate jeopardy determination.

Moreover, there is an obvious likelihood of serious injury, harm, or death to facility residents resulting from a failure by a facility to investigate injuries of unknown origin such as those displayed by Resident #1. Because Petitioner failed to investigate and assess the nature of the resident's injuries it had no way of knowing whether the injuries were caused by a medical condition or by trauma. The resident was extraordinarily vulnerable to possible abuse given her frailty and dependence on Petitioner' staff. Under those circumstances any physical abuse might have been lethal and yet, the facility did nothing to rule out the possibility of abuse.

3. Civil money penalties of $3,500 per day are reasonable.

Regulations establish that daily civil money penalties to remedy an immediate jeopardy level deficiency or deficiencies must fall into a range of from $3,050 to $10,000 per day. 42 C.F.R. § 488.438(a)(1)(i). What is a reasonable penalty amount within that range depends on regulatory factors governing penalty amounts set forth at 42 C.F.R. §§ 488.438(f)(1) - (4) and 488.404 (incorporated by reference into 42 C.F.R. § 488.438(f)(3)). These factors include: the seriousness of a deficiency or deficiency; the relationship between deficiencies; a facility's financial condition; and, a facility's culpability for its noncompliance.

The civil money penalty amount determined by CMS in this case – $3,500 per day – is close to the bottom of the permissible range for immediate jeopardy level penalty amounts. I decide that it is reasonable because it takes into account the seriousness of Petitioner's noncompliance. The risk that a resident suffering from injuries of an unknown source may be a victim of abuse, neglect, or mistreatment, is evident. Residents of nursing facilities include some of the frailest, most vulnerable members of our society. Such individuals are totally dependent on a facility's staff to protect them from possible maltreatment. Here, Petitioner failed to discharge its basic and fundamental obligation to Resident #1 to investigate the source of her then-unknown injuries. That failure

potentially put Resident #1 at risk of great harm. But, it also demonstrated a failure on the part of Petitioner's staff to recognize their duty to serve as residents' guardians and protectors. That failure put all of Petitioner's residents at risk.[4]

As I discuss above, CMS alleged five additional immediate jeopardy level deficiencies at Petitioner's facility which I do not address in this decision. While the presence of one or more additional deficiencies at the immediate jeopardy level certainly would be an added basis of support for the penalty amount the presence of any of them is not necessary to establish a basis here for the penalty amount that I sustain. The seriousness of Petitioner's failure to investigate the cause of Resident #1's injuries is, in and of itself, sufficient to justify the low-end penalties of $3,500 per day.

4. Petitioner loses the authority to conduct NATCEP because it manifested an immediate jeopardy level deficiency.

The presence of immediate jeopardy noncompliance by a facility with the requirements of 42 C.F.R. § 488.413 is defined by regulation to constitute a substandard quality of care mandating that CMS or its representative conduct a partial extended survey of that facility in order to assure compliance with Medicare participation requirements. 42 C.F.R. §§ 488.301; 488.310. A facility's authority to conduct NATCEP must be revoked where a facility is subject to a partial extended survey. 42 C.F.R. § 483.151(b)(2)(iii). Thus, Petitioner's immediate jeopardy level noncompliance with the requirements of 42 C.F.R. § 483.13 is a basis for a finding of substandard quality of care, a mandated partial extended survey, and loss of authority to conduct NATCEP.

/s/
Steven T. Kessel
Administrative Law Judge

[4] Petitioner offered no evidence to show that its financial condition precludes it from paying the civil money penalties that CMS determined to impose.