Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Foxwood Springs Living Center, (CCN: 26-5803),	)	Date: June 24, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-401
	)	Decision No. CR1966
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

Petitioner, Foxwood Springs Living Center, returned to substantial compliance with program participation requirements on March 9, 2007. The denial of payment for new admissions (DPNA) that was imposed by the Centers for Medicare & Medicaid Services (CMS) effective March 13, 2007 through April 10, 2007, was not reasonable.

I. Background

Petitioner, located in Raymore, Missouri, is authorized to participate in the Medicare program as a skilled nursing facility (SNF) and in the Medicaid program as a nursing facility (NF). The Missouri Department of Health and Senior Services (state agency) surveyed Petitioner's facility on December 1, 2006, January 24, 2007, February 28, 2007, and April 11, 2007. Joint Stipulation of Undisputed Facts, dated August 27, 2007 (Jt. Stip.).

The December 1, 2006 annual survey determined that Petitioner was not in substantial compliance with program participation requirements based on violations of 42 C.F.R. §§ 483.13(c)[1] (Tag F226), 483.15(h)(1) (Tag F252), 483.20(k)(3)(i) (Tag F281), 483.25(i)(2) (Tag F326), 483.35(d)(3) (Tag F365), 483.35(f) (Tag F368), 483.35(i)(2)

[1] References are to the version of the Code of Federal Regulations (C.F.R.) in effect at the time of the surveys unless otherwise indicated.

(Tag F371), 483.65(a) (Tag F441), 483.65(b)(3) (Tag F444), 483.70(c)(2) (Tag F456), 483.70(h) (Tag F465), and 483.75(b) (Tag F492). The state agency notified Petitioner by letter dated December 11, 2006 that, based upon the findings of the December 1, 2006 survey, it would recommend that CMS impose an optional DPNA pursuant to 42 C.F.R. § 488.417(a) if Petitioner did not return to substantial compliance by the date of the revisit survey. Jt. Stip.; CMS Exhibits (CMS Ex.) 1, 23. The state agency also advised Petitioner in its December 11 letter that CMS was required to impose a DPNA if Petitioner did not return to substantial compliance within three months of the last day of the survey that identified that Petitioner was not in compliance with program participation requirements. CMS Ex. 23, at 2.

A revisit survey was completed by the state agency on January 24, 2007. The state agency found that all the deficiencies from the December survey had been corrected but Petitioner continued not to be in substantial compliance due to newly identified violations of 42 C.F.R. §§ 483.13(c) (Tag F226) and 483.20(k)(3)(i) (Tag F281). The state agency advised Petitioner by letter dated February 7, 2007, that it recommended that CMS impose a DPNA. Jt. Stip.; CMS Exs. 24, 29. CMS notified Petitioner by letter dated February 26, 2007, that a DPNA pursuant to 42 C.F.R. § 488.417(b) would be imposed effective March 13, 2007, because the facility was not in substantial compliance with program participation requirements as of completion of the revisit survey on January 24, 2007. CMS Ex. 28. On February 28, 2007, the state agency completed a second revisit survey that identified a new deficiency based on a violation of 42 C.F.R. § 483.25(h)(2) (Tag F324). Jt. Stip.; CMS Exs. 30, 31; Petitioner's Exhibit (P. Ex.) 18.

The DPNA was imposed effective March 13, 2007. Jt. Stip.; CMS Exs. 28, 30. On April 11, 2007, the state agency conducted a third revisit survey and found that Petitioner had returned to substantial compliance as of that date. The DPNA was terminated effective April 11, 2007. Jt. Stip.; CMS Exs. 34, 35.

Petitioner requested a hearing by letter dated April 24, 2007. On May 10, 2007, the request for hearing was docketed and assigned to me for hearing and decision. A Notice of Case Assignment and Prehearing Case Development Order (Prehearing Order) was issued at my direction on May 10, 2007. A telephonic prehearing conference was conducted on January 3, 2008,[2] the substance of which was discussed during the hearing convened on January 15, 2008, in Kansas City, Missouri. Hearing Transcript (Tr.) 4-6. At the hearing, CMS offered and I admitted CMS Exs. 1, 23 through 36, and 38 through 40.[3] Tr. 29. Petitioner offered, and I admitted, P. Exs. 17 and 18. Tr. 30-31. I also

[2] I erred when I stated at the hearing that the conference was conducted on January 3, 2007. Tr. 4.

[3] CMS withdrew proposed CMS Exs. 2 through 22. Tr. 14. Petitioner's objection to CMS Ex. 37 was sustained and that exhibit was not admitted. Tr. 29.

marked and admitted Court exhibit (Ct. Ex.) 1.[4] Tr. 79. CMS called Rhonda Wells, Acting Midwest Consortium Technical Advisor for the Division of Survey and Certification, CMS, as its only witness. Jill Heinerikson, R.N., Petitioner's Director of Nurses (DON), and Cathy Spader, R.N., Petitioner's Director of Staff Development, Education, and Training, testified on behalf of Petitioner. The parties submitted post-hearing briefs and post-hearing reply briefs.

II. Discussion

A. Issues

The issues in this case are:

> Whether Petitioner returned to substantial compliance with program participation requirements prior to March 13, 2007, the effective date of the DPNA; and
>
> Whether the remedy of DPNA imposed from March 13, 2007, through and including April 10, 2007, is reasonable.

B. Applicable Law

The statutory and regulatory requirements for participation by a long-term care facility are found at sections 1819 (SNF) and 1919 (NF) of the Social Security Act (Act) and at 42 C.F.R. Part 483. Section 1819(h)(2) of the Act vests the Secretary of Health and Human Services (the Secretary) with authority to impose enforcement remedies against a SNF for failure to comply substantially with the federal participation requirements established by sections 1819(b), (c), and (d) of the Act.[5] Pursuant to section 1819(h)(2)(C), the Secretary may continue Medicare payments to a SNF not longer than six months after the date the facility is first found not in compliance with participation requirements. Pursuant to section 1819(h)(2)(D), if a SNF does not return to compliance with participation requirements within three months, the Secretary must deny payments for all individuals admitted to the facility after that date – commonly referred to as the

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[4] Ct. Ex. 1 is a May 3, 2001 memorandum from the Director, Survey and Certification Group of the Health Care Financing Administration (predecessor to CMS), to Associate Regional Administrators of the Division of Medicaid & State Operations, Regions I-X, and to State Survey Agency Directors, concerning policies for verifying compliance and setting effective dates for three- and six-month remedies, and is purported to interpret a State Operations Manual (SOM) provision. Tr. 57-58; CMS Post-Hearing Brief (CMS Brief) at 4.

[5] Section 1919(h)(2) of the Act gives similar enforcement authority to the states to ensure that NFs comply with their participation requirements established by sections 1919(b), (c), and (d) of the Act.

mandatory or statutory DPNA. In addition to the authority to terminate a noncompliant SNF's participation in Medicare, the Act grants the Secretary authority to impose other enforcement remedies, including a discretionary DPNA, civil money penalties (CMP), appointment of temporary management, and other remedies such as a directed plan of correction. Act § 1819(h)(2)(B).

The Secretary has delegated to CMS and the states the authority to impose remedies against a long-term care facility that is not complying substantially with federal participation requirements. "*Substantial compliance* means a level of compliance with the requirements of participation 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 (emphasis in original). A deficiency is a violation of a participation requirement established by sections 1819(b), (c), and (d) of the Act or the Secretary's regulations at 42 C.F.R. Part 483, Subpart B. Facilities that participate in Medicare may be surveyed on behalf of CMS by state survey agencies in order to determine whether the facilities are complying with federal participation requirements. 42 C.F.R. §§ 488.10-488.28, 488.300-488.335. The regulations specify the enforcement remedies that CMS may impose pursuant to its delegated authority if a facility is not in substantial compliance with Medicare requirements. 42 C.F.R. § 488.406.

The Act and regulations make a hearing before an administrative law judge (ALJ) available to a long-term care facility against which CMS has determined to impose an enforcement remedy. Act §§ 1819(h)(2)(B) (incorporating Act § 1128A(c)(2)), 1866(h); 42 C.F.R. §§ 488.408(g); 498.3(b)(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); *Emerald Oaks*, DAB No. 1800, at 11 (2001); *Beechwood Sanitarium*, DAB No. 1906 (2004); *Cal Turner Extended Care*, DAB No. 2030 (2006)*; The Residence at Salem Woods*, DAB No. 2052 (2006). A facility has a right to appeal a "certification of noncompliance leading to an enforcement remedy." 42 C.F.R. § 488.408(g)(1); *see also* 42 C.F.R. §§ 488.330(e) and 498.3. However, the choice of remedies by CMS or the factors CMS considered when choosing remedies are not subject to review. 42 C.F.R. § 488.408(g)(2). A facility may only challenge the scope and severity level of noncompliance found by CMS if a successful challenge would affect the range of the CMP that could be imposed by CMS or impact the facility's authority to conduct a nurse aide training and competency evaluation program. 42 C.F.R. §§ 498.3(b)(14) and (d)(10)(i). The CMS determination as to the level of noncompliance "must be upheld unless it is clearly erroneous" (42 C.F.R. § 498.60(c)(2)), including the finding of immediate jeopardy. *Woodstock Care Center*, DAB No. 1726, at 9, 38 (2000), *aff'd, Woodstock Care Ctr. v. Thompson*, 363 F.3d 583 (6th Cir. 2003). The Departmental Appeals Board (the Board) has long held that the net effect of the regulations is that a provider has no right to challenge the scope and severity level assigned to a noncompliance finding, except in the situation where that finding was the basis for an immediate jeopardy determination. *See, e.g., Ridge Terrace*, DAB No. 1834 (2002); *Koester Pavilion*, DAB No. 1750 (2000).

The standard of proof or quantum of evidence required is a preponderance of the evidence. CMS has the burden of coming forward with the evidence and making a *prima facie* showing of a basis for imposition of an enforcement remedy. Petitioner bears the burden of persuasion to show by a preponderance of the evidence that it was in substantial compliance with participation requirements or any affirmative defense. *See Hillman Rehabilitation Center*, DAB No. 1611 (1997), *aff'd, Hillman Rehab. Ctr. v. U.S. Dep't of Health & Human Services*, No. 98-3789 (GEB), slip op. at 25 (D.N.J. May 13, 1999); *Cross Creek Health Care Center*, DAB No. 1665 (1998); *Emerald Oaks*, DAB No. 1800; *Batavia Nursing and Convalescent Center*, DAB No. 1904 (2004), *aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 F. App'x. 181 (6th Cir. 2005); *Batavia Nursing and Convalescent Inn*, DAB No. 1911 (2004).

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by my findings of fact and analysis.

Petitioner does not challenge the deficiency findings of the initial survey completed on December 1, 2006, or the deficiency findings of the revisit surveys completed on January 24, 2007, and February 28, 2007. Petitioner does not deny that it was in violation of 42 C.F.R. § 483.25(h)(2) (Tag F324) as alleged by the survey completed on February 28, 2007. Petitioner requests review of the CMS determination that Petitioner did not return to substantial compliance before April 11, 2007, as determined by the revisit survey completed on that date. Petitioner argues to me that it returned to substantial compliance on March 9, 2007, prior to the March 13, 2007 effective date of the DPNA that CMS imposed.

1. Petitioner filed a timely request for hearing and I have jurisdiction over this matter.

2. Petitioner has a right to review of whether or not it was in substantial compliance or had returned to substantial compliance with program participation requirements because the alleged noncompliance is the basis for imposing or continuing an enforcement remedy.

3. Petitioner is not deprived of its right to review and I am not deprived of jurisdiction by the CMS policy statement in this case.

CMS does not dispute that if the state agency and CMS found that Petitioner returned to substantial compliance on March 9, 2007, the DPNA would not have gone into effect on March 13, 2007. CMS Brief at 6. CMS does not address Petitioner's evidence that Petitioner returned to substantial compliance on March 9, 2007. Rather, CMS argues that: CMS has the discretion to determine when to conduct a revisit survey, and if a third revisit survey is authorized by CMS, the state agency and CMS cannot find as a matter of policy that a facility returned to substantial compliance with program participation

requirements earlier than the date on which the third revisit survey actually occurs. CMS further argues that I must affirm its decision as a matter of law, because Petitioner's return to substantial compliance can be no earlier than April 11, 2007, the date of Petitioner's third revisit survey, pursuant to CMS policy. CMS cites as the source of its policy a table in the State Operations Manual (SOM) at section 7317B (Rev. 1, 05-21-04).[6] The table states that a third revisit is not assured and must be approved by the CMS Regional Office. The table indicates that for a third revisit "[c]ompliance is certified as of the date of the 3rd revisit." SOM § 7317B, Table; Ct. Ex. 1, at 4. CMS argues that the SOM is a policy of the Secretary and CMS that is binding on the state agency, ALJs, and the Board. CMS asserts that the chart establishes the policy that, if CMS conducts a third revisit, Petitioner cannot be found by the state agency or CMS to have returned to substantial compliance prior to the date of the third revisit. CMS argues that my authority to review the duration of the period of substantial noncompliance and the duration of the enforcement remedy based thereon, is limited to determining whether Petitioner returned to substantial compliance on the date of the third revisit and that I am precluded from reviewing and determining that Petitioner returned to substantial compliance prior to the date of the third revisit. CMS Brief at 6-9; CMS Post-Hearing Reply Brief at 2-3; Tr. 36-37. The CMS theory, if accepted, would limit a long-term care facility's right to review by an ALJ or the Board, and would also effectively limit Petitioner's right to judicial review. The CMS arguments in this case reflect an erroneous interpretation of governing law and regulations that, if accepted, would result in an impermissible infringement of Petitioner's right to administrative and judicial review.

The introductory language of the SOM, Chapter 7, section 7000, quoted by CMS in its post-hearing brief (CMS Brief at 6 n.2), specifically states that "[n]o provisions contained in this chapter are intended to create any rights or remedies not otherwise provided in law or regulation." The language reflects the drafters' understanding that the SOM is not a substantive regulation promulgated pursuant to the Administrative Procedure Act (5 U.S.C. § 500 *et. seq.*) and that the provisions of the SOM are not enforceable as law. Rather, SOM provisions reflect the CMS interpretation of the Act and regulations implementing the Act and provide policy guidance for surveyors. *See Vencor Nursing Ctrs., L.P. v. Shalala*, 63 F. Supp. 2d. 1, 11-12 (D.D.C. 1999); *Beverly Health & Rehab. Services, Inc., et al. v. Thompson*, 223 F. Supp. 2d 73, 98-103 (D.D.C. 2002); *Cal Turner Extended Care Pavilion*, DAB No. 2030 (2006); *see also State of Indiana by the Indiana Dep't of Pub. Welfare v. Sullivan*, 934 F.2d 853 (7th Cir. 1991); *cf. Northwest Tissue Ctr. v. Shalala*, 1 F.3d 522 (7th Cir. 1993). While the Secretary and her delegee, CMS, may not seek to enforce the provisions of the SOM as substantive law, the provisions of the Act or regulations as interpreted by the SOM are enforceable. Provisions of the SOM

[6] The table was also distributed to the CMS Associate Regional Administrators and State Survey Agency Directors as an attachment to a May 3, 2001, memorandum from the Director, Survey and Certification Group of the Health Care Financing Administration (predecessor to CMS). The subject of the memorandum is "Policies about Verification of Compliance and Setting 3- and 6-month Remedy Effective Dates." Ct. Ex. 1.

may only be construed and applied consistently and in harmony with controlling provisions of the law – the Act and the Secretary's regulations. CMS argues that it issued a notice of proposed rulemaking on December 28, 2007 that proposes a new regulatory provision that would require the Board and ALJs to follow published guidance of CMS that is not inconsistent with applicable statutes and regulations. CMS Brief at 8, citing 72 Fed. Reg. 73,708, 73,713 (Dec. 28, 2007).[7] CMS asserts that if the proposed regulation is ever adopted, policy statements such as the SOM and Ct. Ex. 1, would "clearly be binding upon this tribunal's decision." CMS Brief at 8. However, CMS overlooks the fact that even under the proposed regulation I may only apply those policies that are not inconsistent with applicable statutes and regulations.[8] In this case, the interpretation of the SOM CMS urges is inconsistent with both the Secretary's regulations and the Act, and cannot be applied to deprive Petitioner of its right to administrative and judicial review provided by the Act and regulation.[9]

The plain language of SOM section 7317B - Revisits, the section on which CMS relies, reflects that the section and attached table provide guidance to the state agency and survey teams. It instructs that while paper reviews and onsite reviews are considered revisits, only "onsite revisits" count for purposes of the revisit policy, the policy established by the section and chart. The section states that "[t]he following chart provides the course of action for certifying substantial compliance and for conducting revisits." Only the state agency or CMS conduct revisits and certify substantial compliance. Thus, the section and chart clearly were intended to direct CMS and state agency actions. *See* 42 C.F.R. §§ 488.305, 488.307, 488.308, 488.310, 488.314, 488.330, 488.332, 488.402(b). The chart specifies that if substantial compliance is determined on the third revisit, then "[c]ompliance is certified as of the date of the 3rd revisit." The instruction is clearly directed at surveyors and there is no indication that by issuing SOM section 7317B, CMS intended to change the regulatory requirements for certifying substantial compliance or a provider's rights to administrative and judicial review.

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[7] Although the period for public comment on the proposed regulatory change closed on January 28, 2008, no final rule has been issued by CMS that includes the change CMS cites.

[8] The foregoing cases reflect that the courts, the Board, and the ALJs have consistently recognized that the Secretary and CMS have the discretion granted by Congress to administer the Act and have treated as weighty CMS policy statements to the extent they are not inconsistent with the law and regulations.

[9] I do not address whether CMS may issue a policy such as that at issue in this case for purposes of administrative convenience or efficiency that controls survey operations as that issue is not within my jurisdiction. This decision only addresses whether the policy statement by CMS in this case may be construed so as to limit Petitioner's right to review granted by the Act and regulations.

Nowhere in SOM section 7317B is there any mention of limiting a provider's rights to have ALJ or Board review of the surveyor or CMS determination of when the noncompliant provider returned to substantial compliance with program participation requirements. Nor is there any suggestion in the language of the SOM that section 7317B or the chart was intended to limit the administrative and judicial review available to a provider under the Act and regulations. SOM section 7303 - Appeal of Certification of Noncompliance discusses requests for review by ALJs and the Board, but it includes no limitation on a provider's right of review such as that advocated by CMS in this case.

The CMS interpretation of SOM section 7317B and its table is also inconsistent with the regulatory provisions regarding when an enforcement remedy ends and the methods by which substantial compliance may be established or demonstrated. The regulations specifically recognize that a DPNA ends and payments may be resumed, on the date that the facility achieves substantial compliance, as indicated by a revisit **or written credible evidence** acceptable to CMS or the state agency. 42 C.F.R. § 488.417(c) and (d). Further, the general rule is that alternative remedies, including a DPNA, continue until the facility achieves substantial compliance, and the determination that a facility returned to substantial compliance may be based on a revisit survey or credible written evidence of a return to compliance that can be verified without an onsite visit. 42 C.F.R. § 488.454(a). Additionally, 42 C.F.R. § 488.454(e) provides that,

> If the facility can supply documentation acceptable to CMS or the State survey agency that it was in substantial compliance and was capable of remaining in substantial compliance, if necessary, on a date preceding that of the revisit, the remedies terminate on the date that CMS or the State can verify as the date that substantial compliance was achieved and the facility demonstrated that it could maintain substantial compliance, if necessary.

These regulations establish that a facility may attempt to prove by acceptable evidence that it returned to substantial compliance with program participation requirements prior to the date of a revisit survey to confirm substantial compliance. The regulations do not preclude review by an ALJ, the Board, or the courts of Petitioner's evidence or the issue of whether Petitioner returned to substantial compliance prior to the date of a revisit survey.

CMS impermissibly seeks to limit Petitioner's right to review and my ability to provide review as required by the Act and regulations. The Act and regulations make a hearing before an ALJ available to a long-term care facility against which CMS has determined to impose an enforcement remedy. Act §§ 1819(h)(2)(B) (incorporating Act § 1128A(c)(2)), 1866(h); 42 C.F.R. §§ 488.408(g); 498.3(b)(13). The regulations provide that a facility may appeal a certification of noncompliance that leads to an enforcement remedy, although the choice of the enforcement remedy is not subject to review. 42

C.F.R. § 488.408(g). In the case before me, CMS cites no provision of the Act or the regulations in 42 C.F.R. Parts 488 or 498 that preclude ALJ or Board review of the issue of when a facility returned to substantial compliance to the extent that the date of return to substantial compliance affects the duration of an enforcement remedy such as a DPNA or a per-day CMP. The Board has stated that CMS need not provide affirmative evidence of continuing noncompliance for each day a remedy is in effect. *Regency Gardens Nursing Center*, DAB No. 1858 (2002). Nevertheless, the Board has consistently recognized that challenges to the duration of remedies such as a CMP or DPNA are permissible even when the facility seeks to prove a return to substantial compliance earlier than the date found by CMS. *Cal Turner Extended Care Pavilion*, DAB No. 2030, at 18-20; *Palm Garden of Gainesville*, DAB No. 1922 (2004). Of course, the burden is upon Petitioner to prove by a preponderance of the evidence the date on which it returned to substantial compliance. *Hermina Traeye Memorial Nursing Home*, DAB No. 1810, at 13 (2002).

Based on the foregoing, I conclude that Petitioner may seek review, and I may review, the duration of the DPNA in this case consistent with the regulations. The SOM imposes no bar to such review. The issue, then, is whether Petitioner has demonstrated that it did return to substantial compliance before March 13, 2007.

4. Petitioner returned to substantial compliance with program requirements on March 9, 2007.

The case before me involves a single violation of 42 C.F.R. § 483.25(h)(2) (Tag F324), which requires that a facility ensure that "[e]ach resident receives adequate supervision and assistance devices to prevent accidents." 42 C.F.R. § 483.25(h)(2). CMS determined that Petitioner failed to follow the care plan and order of Resident 201's physician for non-weight bearing and transfer using a mechanical lift, which resulted in a fracture of Resident 201's left ankle. P. Ex. 18, at 2.

The Board has explained the requirements of 42 C.F.R. § 483.25(h)(2) in numerous decisions. *See, e.g., Eastwood Convalescent Center,* DAB No. 2088 (2007); *Liberty Commons Nursing and Rehab-Alamance,* DAB No. 2070 (2007); *Golden Age Skilled Nursing & Rehabilitation Center*, DAB No. 2026 (2006); *Northeastern Ohio Alzheimer's Research Center*, DAB No. 1935 (2004); *Woodstock Care Center*, DAB No. 1726, at 28 (2000), *aff'd*, *Woodstock Care Ctr. v. Thompson*, 363 F.3d 583 (6th Cir. 2003). Section 483.25(h)(2) does not make a facility strictly liable for accidents that occur, but it does require that a facility take all *reasonable* steps to ensure that a resident receives supervision and assistance devices that meet his or her assessed needs and mitigate foreseeable risks of harm from accidents. *Woodstock Care Ctr. v. Thompson*, 363 F.3d at 589 (a SNF must take "all reasonable precautions against residents' accidents"). A facility is permitted the flexibility to choose the methods of supervision it uses to prevent accidents, but the chosen methods must be adequate under the circumstances. *Id*. Whether supervision is "adequate" depends in part upon the resident's ability to protect

himself or herself from harm. *Id*. Based on the regulation and the case law concerning this issue, CMS meets its burden to show a *prima facie* case if the evidence demonstrates that the facility failed to provide adequate supervision and assistance devices to prevent accidents, given what was reasonably foreseeable. *Alden Town Manor Rehabilitation & HCC*, DAB No. 2054 (2006), at 5-6, 7-12. An "accident" is "an unexpected, unintended event that can cause a resident bodily injury," excluding "adverse outcomes associated as a direct consequence of treatment or care (e.g., drug side effects or reactions)." SOM, App. PP, Tag F324; *Woodstock Care Center*, DAB No. 1726, at 4.

Petitioner does not dispute that it was found in violation of 42 C.F.R. § 483.25(h)(2) (Tag F324) related to its care of Resident 201, by the survey that ended on February 28, 2007. There is no dispute that the violation of 42 C.F.R. § 483.25(h)(2) was the only deficiency finding that caused Petitioner to not be in substantial compliance with program participation requirements after February 28, 2007. Petitioner also does not dispute that it remained in violation of 42 C.F.R. § 483.25(h)(2), until March 9, 2007. The issue is whether Petitioner has met its burden to establish by a preponderance of the evidence that it returned to substantial compliance on March 9, 2007, or some other date before April 11, 2007.

I have considered the allegations of deficiency from the statement of deficiencies (CMS Ex. 31; P. Ex. 18) and evidence proffered by Petitioner, including the testimony at hearing, to demonstrate its return to substantial compliance. I find and conclude that Petitioner has shown that it returned to substantial compliance and, specifically, that it remedied the violation of 42 C.F.R. § 483.25(h)(2) as of March 9, 2007. The evidence shows that Petitioner implemented various actions to remedy the violation including: mandating nursing staff in-service on March 2, 2007, on a new facility policy on transfers; reassessment of all residents and review of resident care plans to ensure ability to transfer, or weight-bearing status and individual need for assistance; initiation of a "dot" system to indicate individualized resident transfer needs (dots were placed on a resident's room door to indicate for staff the extent or level of need of assistance in transfer, e.g., independent, needs assistance of one or two staff persons, or use of mechanical lift); the DON reviewed ADL (activities of daily living) flow sheets of all residents to ensure the flow sheets accurately reflected the weight-bearing status of residents and assistance needed; orientation of new employees on the policy on transfers; implementation of a March 1, 2007 order for Resident 201 to remain bed-bound, and assessed and care-planned consistent with non-weight bearing status; periodic audits of care plans and ADL flow sheets to reflect resident weight-bearing and transfer status; provision of the new transfer policy to all new nursing department employees and addition of the new policy as an annual in-service item; and DON monitoring and auditing of implementation of the new policy. Petitioner asserted in its plan of correction that it completed its plan of correction and returned to substantial compliance on March 9, 2007. P. Ex. 18, at 2-4.

Petitioner called two witnesses, DON Heinerikson and R.N. Spader. DON Heinerikson testified that she participated in the creation and drafting of the Plan of Correction (POC) to remedy the violation of 42 C.F.R. § 483.25(h)(2) (P. Ex. 18, at 2-4 (right column)). Tr. 82-83. DON Heinerikson testified that all the corrective actions required by Petitioner's POC were completed or were in effect on March 9, 2007. She also testified that from March 9, 2007 through April 11, 2007, the date of the revisit survey, there were no residents who did not have their transfer limitations correctly noted in their plan of care; there were no falls due to incorrect recording of weight-bearing status; there were no residents injured due to incorrect notation of weight-bearing status; and staff demonstrated awareness and understanding of the corrective policy and procedures. Tr. 83-91, 94. R.N. Spader testified that she was responsible for training new employees on the resident transfer "dot" system and that, based on her professional experience, the staff demonstrated an understanding of that system and correct implementation of that system. Tr. 98-103. Both witnesses were credible and their testimony was unrebutted.

CMS has proffered no evidence to rebut Petitioner's showing that it implemented all parts of its POC to correct the violation of 42 C.F.R. § 483.25(h)(2) as of March 9, 2007. The CMS witness, Ms. Wells, testified that the reason CMS did not certify a date of return to compliance before April 11, 2007, was the CMS policy that states that in the case of a third revisit, surveyors could not certify a return to substantial compliance earlier than the date of the third revisit. Tr. 56-57, 71. CMS offered no evidence that the surveyors considered whether or not Petitioner returned to substantial compliance earlier than April 11, 2007, and the CMS witness testified that even the CMS Regional Office staff did not have the discretion to consider the issue. Tr. 60, 65-66.

I conclude that Petitioner has shown by a preponderance of the evidence that it returned to substantial compliance with program participation requirements as of March 9, 2007.

5. Because Petitioner returned to substantial compliance on March 9, 2007, the imposition of a DPNA effective March 13, 2007 was unreasonable.

Governing regulations at 42 C.F.R. § 488.417 recognize two types of DPNA. The first is an optional DPNA. 42 C.F.R. § 488.417(a). The second is the mandatory or statutory DPNA, imposed when a facility is not in substantial compliance three months after the last day of the survey identifying the noncompliance, or where the state agency has cited a facility with substandard quality of care on the last three consecutive standard surveys. 42 C.F.R. § 488.417(b); 42 C.F.R. § 488.414(a)(1) and (2); Act § 1819(h)(2)(D). CMS notified Petitioner by letter dated February 26, 2007, that a DPNA would be imposed effective March 13, 2007 pursuant to 42 C.F.R. § 488.417(b), the mandatory or statutory DPNA.[10] CMS Ex. 28, at 1. Because I find and conclude that Petitioner did return to

[10] Petitioner was first found not in substantial compliance by the survey that ended on December 1, 2006. Pursuant to section 1819(h)(2)(D) of the Act, the statutory DPNA should have been triggered effective three months from the date Petitioner was first found

substantial compliance as of March 9, 2007, I also find and conclude that a DPNA should not have been triggered and was not a reasonable enforcement remedy.

III. Conclusion

For the foregoing reasons, I find and conclude that Petitioner returned to substantial compliance with program participation requirements on March 9, 2007. The DPNA, imposed from March 13, 2007, through and including April 10, 2007, was not reasonable as Petitioner returned to substantial compliance prior to March 13, 2007.

/s/
Keith W. Sickendick
Administrative Law Judge

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not in substantial compliance. *See also* Ct. Ex. 1. However, the CMS witness testified that she notified Petitioner that the statutory DPNA would not be imposed until March 13, 2007, 15 days from the date of her February 26, 2007 notice-letter. Tr. 64-65. I express no opinion regarding whether CMS properly implemented section 1819(h)(2)(D) of the Act.