Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Miami Shores of Moraine,	)	Date: November 20, 2009
(CCN: 36-5515),	)	
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-157
	)	Decision No. CR2033
Centers for Medicare & Medicaid	)	
Services.	)	
	)	

DECISION

Petitioner, Miami Shores of Moraine (Petitioner or facility), now known as Pinnacle Pointe, is a long term care facility located in Dayton, Ohio, that participates in the Medicare program. After a series of health and Life Safety Code (LSC) surveys, conducted between May 19, 2008, and October 23, 2008, inclusive, the Centers for Medicare and Medicaid Services (CMS) determined that the facility was not in substantial compliance with Medicare program requirements, and imposed a denial of payment for new admissions (DPNA) from August 19, 2008 through October 22, 2008. This appeal is limited to an August 28, 2008 LSC revisit survey, which cited one deficiency – failure to test the facility's generators as required by the LSC – and resulted in CMS's extending the DPNA.

The parties agree that this matter may be decided on the written record, without an in-person hearing. For the reasons discussed below, I find that the facility was not in substantial compliance with the LSC as of August 28, 2008, and CMS was therefore authorized to continue the DPNA until the facility corrected the deficiency.

I. Background

The Social Security Act (Act) sets forth requirements for nursing facility participation in the Medicare program, and authorizes the Secretary of Health and Human Services to promulgate regulations implementing those statutory provisions. Act § 1819. The

Secretary's regulations are found at 42 C.F.R. Part 483. To participate in the Medicare program, a nursing facility must maintain substantial compliance with program requirements. To be in substantial compliance, a facility's deficiencies may pose no greater risk to resident health and safety than "the potential for causing minimal harm." 42 C.F.R. § 488.301.

The Secretary contracts with state survey agencies to conduct periodic surveys to determine whether skilled nursing facilities are in substantial compliance. Act §1864(a); 42 C.F.R. § 488.20. The regulations require that each facility be surveyed once every twelve months, and more often, if necessary, to ensure that identified deficiencies are corrected. Act, § 1819(g)(2)(A); 42 C.F.R. §§ 488.20(a), 499.308.

The surveys. Altogether, this facility underwent five surveys from May through October 2008:

- On **May 19, 2008**, the Ohio Department of Health (state agency) conducted a complaint investigation/survey, and found that the facility was not in substantial compliance with program requirements. Although no remedies were imposed at that time, in a letter dated May 28, 2008, the state agency warned that it would recommend that CMS impose remedies unless the facility achieved substantial compliance before July 8, 2008. CMS Ex. 2.

- On **July 7, 2008**, the state agency conducted the facility's annual LSC survey, citing deficiencies, including failure to test and inspect facility generators (Tag K144), but, again, no remedies were imposed. CMS Ex. 1.

- On **July 10, 2008**, the state agency conducted the facility's annual health survey, concluding that the facility was still not in substantial compliance. By letter dated July 28, 2008, the state agency advised the facility of its conclusion and that CMS had authorized the imposition of a remedy, a DPNA, effective August 19, 2008, to remain in effect until the facility achieved substantial compliance. The letter specifically advised the facility of its appeal rights, warning that a request for hearing "must be filed no later than 60 days from the date of receipt" of the notice letter. CMS Ex. 2. Petitioner did not file a hearing request.

- Surveyors re-visited the facility on **August 28, 2008**. They concluded that the facility remained out of substantial compliance because of a LSC deficiency: the facility could not show that it inspected and tested its generators under load conditions for a minimum of 30 minutes each month, as required by the LSC. CMS Ex. 3, at 2. In a letter dated September 10, 2008, the state agency advised the facility of its determination, and that it was recommending to CMS that the DPNA (effective August 19, 2008) remain in effect. In addition, the letter advised that the state agency

would recommend termination of the facility's provider agreement, effective no later than November 19, 2008. CMS Ex. 7.

- On **October 23, 2008**, the state agency surveyors conducted a follow-up LSC survey and determined that the facility had achieved substantial compliance. CMS Ex. 13.

In a notice letter dated October 28, 2008, CMS advised the facility that, based on the October 23 survey, the facility's program participation would not be terminated and, as of October 23, 2008, the DPNA was no longer in effect. The letter reminded the facility that the state agency had earlier provided notice of its right to appeal the noncompliance that resulted in the imposition of the remedy, but "[a]s of this date, we have not received a request for a hearing." CMS Ex. 14. With respect to the continuation of the DPNA, which was based on the August 28 survey findings, the letter advised the facility of its appeal rights, again cautioning that "**a written request for a hearing must be filed no later than 60 days from the date of receipt of this notice**." (Emphasis in original). CMS Ex. 14.

In a letter dated December 4, 2008 (postmarked December 15), Petitioner requested a hearing.[1]

The parties have filed pre-hearing briefs (CMS Br.; P. Br.).[2] With its brief, CMS submits 22 exhibits. Petitioner has submitted no additional exhibits. In the absence of any objections, I admit into evidence CMS Exs. 1-22.

I held a prehearing conference in this case on June 18, 2009, during which the parties agreed that this matter presents no factual disputes, but presents a legal question regarding the requirements of the LSC. They also agreed that this matter required no additional briefing, and could be decided based on their initial submissions. Order Summarizing Prehearing Conference (June 24, 2009).

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[1] After the hearing request was filed, the facility changed ownership, and the facility's name changed to Pinnacle Pointe. CMS Ex. 19. When a facility's ownership changes, the existing provider agreement (and provider number) automatically transfer to the new owner, subject to all applicable statutes and regulations and to the terms and conditions under which the agreement was originally issued. 42 C.F.R. § 489.18(c), (d). Those terms and conditions include compliance issues. A facility's new owner thus necessarily "acquires the relevant compliance history/issues of the facility if it undertakes to assume the facility's provider number." *Kenton Healthcare, LLC*, DAB No. 2186 at 31 (2008); *See* Order Summarizing Prehearing Conference at 1 (June 24, 2009).

[2] Petitioner mistakenly titled its submissions as CMS documents; however, we have treated the submissions as Petitioner's. *See* June 10, 2009 letter.

II. Issue

No penalties were imposed following the May 19 and July 7 surveys, so Petitioner is not entitled to review of those survey findings. 42 C.F.R. §§ 498.3(b)(13), 498.3(d)(10)(ii); *Schowalter Villa*, DAB No. 1688 (1999). A penalty was imposed following the July 10 survey, but, because Petitioner did not timely appeal, CMS's determination that the facility was not then in substantial compliance is final and its imposition of the DPNA from August 19 through August 27, 2008, are now final and non-reviewable. Act §§ 1819(h), 1866(h), 205(b); 42 C.F.R. §§ 488.400, 488.402, 488.406, 498.20(b), 498.40(a).[3]

Thus, the sole issue before me is whether, at the time of the August 28, 2008 LSC revisit survey, the facility was in substantial compliance with 42 C.F.R. § 483.70 and the LSC. *See* Order Summarizing Prehearing Conference at 2 (June 24, 2009).

III. Discussion

At the time of the August 28, 2008 survey, the facility was not in substantial compliance with the LSC and 42 C.F.R. § 483.70 because it could not show that it tested its generators under load for a minimum of 30 minutes each month.[4]

A facility must be designed, constructed, equipped, and maintained to protect the health and safety of its personnel and the public. 42 C.F.R. § 483.70. It must maintain "all essential mechanical, electrical and patient care equipment in safe operating condition." 42 C.F.R. § 483.70(c)(2). The LSC of the National Fire Protection Association (NFPA) is a set of fire protection requirements designed to provide a reasonable degree of safety from fires. By statute and regulation, its applicable provisions have been incorporated into the program participation requirements. Act § 1819(d)(2)(B); 42 C.F.R. § 483.70(a)(1).

The facility must have in place an emergency electrical power system that, in the event the normal electrical supply is interrupted, is at least capable of lighting all entrances and exists, and supplying power to fire detection, alarm and extinguishing systems, as well as life support systems. Where the facility provides life support systems, it "must provide emergency electrical power with an emergency generator (as defined in NFPA 99, Health Care Facilities), that is located on the premises. The parties agree that, because the

[3] CMS is also correct that the imposition of a DPNA necessarily triggers a two-year prohibition of the facility's conducting its own nurse aide training and competency evaluation programs. CMS Br. at 3, *citing* Act § 1819(f)(2)(B).

[4] I make this one finding of fact/conclusion of law.

facility had residents who were dependent on ventilators, it was required to have such emergency generators. CMS Ex. 18, at 2 (Perry Decl. ¶ 5); P. Br. at 4-5.

To ensure that its generators function during an emergency, the facility must test them at least monthly. The testing must be performed "under load" (i.e., demands must be placed on the system) for a minimum of 30 minutes. NFPA 110 (Standard for Emergency and Standby Power Systems) 6-4.1; 6-4.2 (CMS Ex. 22, at 5).[5] A "written record of inspection, performance, exercising period, and repairs shall be regularly maintained and available for inspection. . . ." NFPA 99 (Health Care Facilities) 3-4.4.2; 3-5.4.2; 3-6.4.2 (CMS Ex. 21, at 7-8). See also, NFPA 99, C-3.2 ("[p]ermanently record all available instrument readings during the monthly test"). CMS Ex. 21, at 13; NFPA 110 6-4.1 ("[r]ecord running time meter reading at start and end of test") CMS Ex. 22, at 7.

Here, the facility had two emergency generators, each equipped with an "hour meter," which records the length of time a generator has run. CMS Ex. 18, at 2-3 (Perry Decl. ¶¶ 4, 7); *see* CMS Ex. 12, at 4-7. But the facility could not show that each generator was tested under load for at least 30 minutes every month. The surveyor, Perry Washburn, testified that the facility used a documentation form that said nothing about whether or how long the generator was run while being tested. CMS Exs. 6, 8; CMS Ex. 18, at 3 (Perry Decl. ¶ 8). According to the survey report form, the facility's maintenance director admitted that he did not use the hour meter to document how long the generator was run, nor was he sure that the hour meter even worked. CMS Ex. 3, at 2, 3.

Petitioner has not come forward with any documentation to establish that it tested each of its generators monthly under load for at least 30 minutes. Indeed, Petitioner has not even produced a witness claiming to have performed the tests as required. Instead, Petitioner declares, without support, that it performed the tests, and claims that the facility was not required to use the hour meter in testing the generators. P. Br. at 16. Whether or not its use is mandatory, the hour meter provides a useful means by which facility staff can assure that they have run the generator for the requisite period of time. If the facility opts not to use it, it must nevertheless have some other means for assuring that the testing is performed as required, and must produce documentation establishing that it has been done. *Crestview Parke Center v. Thompson*, 373 F.3d 743. 751 (6th Cir. 2004); *Price Hill Nursing Home*, DAB No. 1781, at 18-19 (2001). Since the facility has not done so here, it was not in substantial compliance with the LSC and 42 C.F.R. § 483.70.

[5] Operating a system for a shorter period of time can be harmful to the engine. NFPA 99 appendix A, A-3-4.4.1(b)(1).

IV. Conclusion

As of August 28, 2008, the facility was not in substantial compliance with the Medicare requirements for the LSC and CMS was therefore authorized to continue the DPNA from August 28 until October 23, 2008.

/s/
Carolyn Cozad Hughes
Administrative Law Judge