Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Royal Care of Avon Park,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-960

Decision No. CR3835

Date: May 6, 2015

DECISION

The Florida Agency for Health Care Administration (AHCA or state agency) found that Royal Care of Avon Park (Petitioner or facility) was out of substantial compliance with Medicare participation requirements, after determining that hazardous physical conditions existed in the facility in violation of the National Fire Protection Association's (NFPA's) Life Safety Code (LSC). The Centers for Medicare & Medicaid Services (CMS) adopted the state agency's findings and imposed a per day civil money penalty (CMP) in the amount of $100, effective December 6, 2013, and continuing until Petitioner returned to substantial compliance on January 30, 2014. Petitioner appealed these findings. I find below that Petitioner was not in substantial compliance with the LSC during the period cited, and the CMP that CMS imposed is reasonable in amount and duration.

I. Background and Procedural History

The Social Security Act (Act) authorizes the Secretary of Health and Human Services to issue regulations "as may be necessary to carry out the administration" of the Medicare program. Act § 1871(a)(1) (42 U.S.C. § 1395hh(a)(1)). One of those regulations, 42 C.F.R. § 483.70, governs the physical environment of long-term care facilities and

requires a facility to be designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel, and the public. With regard to protecting the facility, its residents, personnel, and the public from fire, the regulation states:

> (a) *Life safety from fire.* (1) Except as otherwise provided in this section –
>
> (i) The facility must meet the applicable provisions of the 2000 edition of the [LSC] of the [NFPA]. The Director of the Office of the Federal Register has approved the NFPA 101® 2000 edition of the [LSC], issued January 14, 2000, for incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. . . .

Petitioner is a long-term care facility located in Avon Park, Florida, that participates in the Medicare and Medicaid programs. On December 6, 2013, the state agency conducted a recertification and LSC survey at the facility. The survey determined that Petitioner was not in substantial compliance with Medicare participation requirements, including the LSC requirement documented as Tag K 018 on the survey's statement of deficiencies (Form CMS 2567). CMS Exhibits (Exs.) 5, at 11, 16; 10, at 2; 11, at 1.

On January 14, 2014, the state agency revisited the facility to follow-up on its December 6, 2013 survey findings and also to conduct a complaint investigation survey. The complaint investigation concerned an anonymous complaint the state agency received alleging:

> The facility had constructed a new 4' by 15' closet after the new addition to the building was finished and after AHCA Plan and Construction and the Highlands County Fire Marshall left the facility. Construction on a storage closet began on 12/23/2013. This closet also enclosed a fire alarm strobe light and did not have any fire suppression devices such as sprinkler heads inside of [the] closet for protection. Power Strips or Surge Protector Strips were being attached to medical equipment in the new therapy department. The closet was built with metal frame construction and included new electrical outlets, coaxial and lighting, in which all was done without permits drawings or approval from regulatory agencies.

CMS Ex. 12, at 1. The complainant included a photograph of the storage closet. CMS Brief (CMS Br.) at 3; CMS Ex. 2.

Based on the January 14, 2014 survey visit, the state agency found Petitioner out of substantial compliance with four Medicare participation requirements under 42 C.F.R. § 483.70, documented on the January 14, 2014 statement of deficiencies under: Tag K 018, LSC Standard 101, *Corridor Doors*; Tag K 052, LSC Standard 101, *Fire Alarm*

Systems; Tag K 056, LSC Standard 101, *Sprinkler Systems*; and Tag K 147, LSC Standard 101, *Electrical Wiring and Equipment.* CMS Br. at 2; CMS Closing Brief (CMS Closing Br.) at 1-2; CMS Ex. 1, at 1-7.

On February 10, 2014, CMS notified Petitioner that based on the January 14, 2014 survey findings it was imposing enforcement remedies, including a $100 per day CMP effective December 6, 2013. CMS Ex. 5, at 9-13. On March 28, 2014, CMS notified Petitioner that based on the state agency's second revisit on March 17, 2014, CMS determined Petitioner to be back in substantial compliance effective January 30, 2014, and the only remedy CMS would impose was the CMP, effective up through January 29, 2014. CMS Ex. 5, at 16.

On March 31, 2014, Petitioner appealed, and the case was assigned to me for hearing and decision. In response to my Acknowledgment and Initial Pre-Hearing Order, CMS filed its pre-hearing brief on July 29, 2014, accompanied by CMS Exs. 1-12. On August 27, 2014, Petitioner filed its pre-hearing brief (P. Br.), accompanied by P. Exs. A, B, "CEE," and D.

The parties filed a joint motion for disposition on the written record consistent with 42 C.F.R. § 498.66. The motion documents the parties' agreement that the written record consists of the parties' initial briefs, proposed exhibits, and the direct written testimony of the parties' proposed witnesses: for CMS, Life Safety Code Surveyor and Fire Protection Specialist RG,[1] a member of the survey team surveying Petitioner on January 14, 2014 (CMS Ex. 9); and, for Petitioner, its Environmental Service/Maintenance Director, MR (P. Ex. A). The motion also documents the parties' agreement to forego cross-examination of the two witnesses.

I granted the parties' joint motion and gave them the opportunity to file closing briefs. CMS filed its closing brief on October 15, 2014, and Petitioner filed its closing brief (P. Closing Br.) on November 13, 2014. In the absence of objection, I admit CMS Exs. 1-12 and P. Exs. A, B, "CEE," and D to the record.

CMS alleges that Petitioner failed to comply with four LSC requirements, cited at Tags K 018, 052, 056, and 147, as documented on the January 14, 2014 statement of deficiencies. CMS Ex. 1, at 1-7; CMS Br. at 1-2. CMS alleges that three of the four deficiencies relate to a storage room or closet that Petitioner constructed and began to use without a construction permit.[2] CMS Ex. 1, at 1-5; CMS Br. at 2. CMS states that the storage

[1] I refer to witnesses by their initials.

[2] CMS asserts that the failure to install a door to the storage room created an accident hazard for ambulatory, cognitively impaired residents. *See* CMS Ex. 9, at 3 ¶ 8. CMS argues that Petitioner was therefore also noncompliant with 42 C.F.R. § 483.25(h)(1), which requires a resident's environment to be as free of accident hazards as is possible.

closet measured 15 feet by 4 feet, lacked a door, and was accessible to residents. CMS Ex. 1, at 2; CMS Br. at 2. CMS alleges that the storage room was not protected by the facility's sprinkler system and that a fire alarm strobe light, which should alert staff and residents to a fire, was located in the storage room, not in the corridor or resident area where it could be seen. CMS Ex. 1, at 3-5; CMS Br. at 2; *see* CMS Ex. 9, at 2 ¶ 2. Additionally, it was undisputed that the facility was using a multi-outlet surge protector in a resident area, rather than fixed wiring, to power electrical equipment. CMS Ex. 1, at 5-7; CMS Br. at 2.

II. Issues Presented

1. Whether Petitioner was in substantial compliance with Medicare program requirements between December 6, 2013 and January 29, 2014; and

2. If Petitioner was not in substantial compliance, whether the $100 per-day CMP that CMS imposed is reasonable in amount and duration.

III. Findings of Fact and Conclusions of Law

A. Petitioner was not in substantial compliance with Tag K 018, LSC Standard 101, because Petitioner did not install a corridor door on its storage room to prevent residents from injury due to passage of fire and smoke in the event of fire.

To participate as Medicare providers, long-term care facilities are required to design, construct, equip, and maintain adequate fire protection and alert systems in conformance with the 2000 edition of the NFPA LSC. 42 C.F.R. § 483.70(a). The LSC requires that "spaces larger than 50 [square feet], including repair shops, used for storage of combustible supplies and equipment in quantities deemed hazardous by the authority having jurisdiction" have a "self-closing or automatic closing" door. LSC § 19.3.2.1(7); CMS Ex. 8, at 6.

While Petitioner was not cited for this violation during the survey, CMS argues that CMS may raise, and an administrative law judge may sustain, regulatory citations not contained in the original statement of deficiencies, so long as a petitioner has adequate notice of the factual findings on which the citations are based, citing *Azalea Court*, DAB No. 2352, at 12 (2010), *aff'd, Azalea Court v. U.S. Dep't of Health and Human Servs.*, 482 Fed. Appx. 460 (11th Cir. 2012). Considering that I am upholding Petitioner's noncompliance, and associated CMP, regarding the LSC violations, I do not specifically address whether Petitioner was also noncompliant with 42 C.F.R. § 483.25(h)(1).

Petitioner was required to install an appropriate door to limit access to the closet because its closet was larger than 50 square feet, and the surveyor deemed the situation hazardous due to its storage of combustible supplies and equipment. Specifically, Petitioner's storage closet measured 15 feet by 4 feet, or 60 square feet. CMS Ex. 1, at 2. During the January 14, 2014 survey, the survey team observed the closet, which was in the corridor adjacent to Petitioner's new rehabilitation unit, and saw that the closet was in use but that it lacked a door. CMS Exs. 1, at 1-3; 9, at 2 ¶¶ 2-4. RG testified he photographed the storage closet. CMS Ex. 9, at 2 ¶ 4; *see* CMS Ex. 3. He observed a lot of equipment including a rolling scale, walkers, and other types of rehabilitation equipment. *Id.*, at 3 ¶ 7; CMS. Ex. 3. He opined that if a fire occurred it could easily spread and the large quantity of equipment would create a combustible and hazardous situation. CMS Ex. 9, at 3 ¶ 7. I find RG's opinion credible considering his training as a fire protection specialist and LSC surveyor for CMS and the State of Florida, his education in fire science, his experience as a surveyor, and his 15 years of experience as a volunteer firefighter and emergency technician. CMS Ex. 9, at 1 ¶ 1.

Petitioner does not dispute that, on January 14, 2014, there was no door on the storage closet. Petitioner further does not dispute the statement in the January 14, 2014 statement of deficiencies that its failure "to provide a closet corridor door that would fully close and positively latch when tested by applying minimal force at the latch edge of the door . . . will allow the passage of smoke and fire into the closet and the possibility of reaching into the ceiling area in the event of a fire." CMS Ex. 1, at 2; P. Hearing Request; P. Br.; P. Closing Br. Petitioner also acknowledges, on the survey statement of deficiencies, that the door was not installed until January 30, 2014. CMS Ex. 1, at 1.

However, Petitioner argues that its "rehab area" and "supply closet" were undergoing construction, which the state agency's "Plans and Construction" section[3] had purportedly approved. Thus, Petitioner argues it should not have been held to the "same type of compliance" as areas not under construction. P. Closing Br. at 2-3. Yet Petitioner has not come forward with any relevant evidence to contest that the closet was actually in use storing equipment or otherwise provide any evidence or authority showing why it should be excepted from the LSC requirements during the cited period of noncompliance. I am also not aware of any steps Petitioner took to protect the health and safety of its residents, whom I have no reason to find were not still living at the facility during the construction period.

Petitioner also argues that its noncompliance under LSC Tag K 018 from the December 6, 2013 survey was "cleared" by Surveyor RG before a deficiency at LSC Tag K 018 was

[3] CMS states, and RG testified, that the state agency's Plans and Construction division is a separate division from the Health Quality Assurance division in which state surveyors, such as RG, are employed. CMS Br. at 3; CMS Ex. 9, at 2. Petitioner does not dispute this.

again cited during the January 14, 2014 complaint survey. P. Closing Br. at 1-2; P. Ex. A. During the December 6, 2013 survey, Petitioner was cited under LSC Tag K 018 for blocking its two beauty salon doors with linen carts, which posed a fire hazard.[4] P. Hearing Request; CMS Ex. 10, at 2; CMS Ex. 11, at 1. Petitioner did not request a hearing to contest its noncompliance under LSC Tag K 018 as cited at the December 6, 2013 survey. Accordingly, CMS's finding of noncompliance with regard to that K Tag is final.

Nonetheless, Petitioner argues also that the duration of the CMP should only run through January 14, 2014, relying on the testimony of its Maintenance Director, MR, who testified that:

> On January 14, 2014 AHCA surveyor [RG] came to [Petitioner] for the resurvey of the annual survey completed in December, 2013. [RG] stated he cleared us from the annual surveys citations and would then discuss the complaint received on a closet attached to the rehab building under construction. He stated that the complaint was no part of the survey. The closet was at that time still part of the construction of the new rehab building and had not yet been completed.

P. Ex. A.

Petitioner bears the burden of showing that it returned to substantial compliance earlier than the date cited. *Owensboro Place & Rehab. Ctr.*, DAB No. 2397, at 12 (2011). Here, as of January 14, 2014, CMS found that deficiencies under Tag K 018 still existed under different facts relating to the noncompliant closet, and Petitioner was again found out of substantial compliance with that participation requirement due to the new violation of K Tag 018.

From Maintenance Director MR's testimony, it appears that Surveyor RG was reasonably explaining that Tag K 018 involved two separate situations with the newest noncompliance relating to the storage closet. Surveyor RG credibly testified that there was no closet constructed during the December 2013 annual survey. CMS Ex. 9, at 2 ¶ 3. However, during the January 14, 2014 survey RG observed that the closet was installed and the rehabilitation area was finished. *Id.* He also photographed the closet and surrounding area, and he observed no door but a lot of stored equipment including a rolling scale, walkers, and other types of rehabilitation equipment. *Id.*, at 2-3 ¶¶ 3, 4, 7; CMS. Ex. 3. The noncompliance relating to the closet was not resolved until Petitioner completed all corrective actions as of January 30, 2014. *See* CMS Ex. 1, at 1-3. Petitioner has not

[4] Petitioner was also cited under LSC Tag K 021 for having fire doors that failed to close properly. That deficiency was also determined to be corrected as of January 14, 2014. CMS Ex. 10, at 2; CMS Ex. 11, at 1.

rebutted this persuasive showing by presenting any relevant evidence or otherwise challenging the surveyor's testimony.

B. Petitioner does not contest that it was not in substantial compliance with Tag K 052, LSC Standard 101, because a fire alarm strobe light was enclosed in a storage closet and thus could not function as intended to alert staff and residents to an emergency.

Section 9.6 of the LSC references fire detection, alarm, and communication systems. The systems "are primarily intended to provide the indication and warning of abnormal conditions, the summoning of appropriate aid, and the control of occupancy facilities to enhance protection of life." LSC § 9.6.1.3. The LSC requires that a fire alarm system be installed, tested, and maintained in accordance with NFPA 70 National Electrical Code (NEC) and NFPA 72 National Fire Alarm Code. LSC § 9.6.1.4. Section 9.6.1.9 of the LSC requires that a "complete fire alarm system shall be used for initiation, notification, and control." The notification function is defined as "the means by which the system advises that human action is required in response to a particular condition." LSC § 9.6.1.9. *See* CMS Ex. 1, at 3. Notification signals for occupants to evacuate shall be by audible and visible signals in accordance with NFPA 72, *National Fire Alarm Code*, and CABO/ANSI A1171.1, *American National Standard for Accessible and Usable Buildings and Facilities*, or other means of notification acceptable to the authority having jurisdiction shall be provided. LSC § 9.6.3.6.

During the January 14, 2014 survey, the survey team observed that construction of the storage closet "on the existing wall side of the building [had] enclosed a fire alarm strobe light." The statement of deficiencies alleges that because Petitioner had enclosed the fire alarm strobe light, it failed to "provide the visibility of the device into the corridor and resident meeting area or resident lobby." CMS Ex. 1, at 3-4. Surveyor RG testified "the fire alarm strobe light was enclosed in the closet instead of where staff and residents could see it." Surveyor RG testified that Petitioner's "failure to . . . reposition the fire strobe light outside the closet poses a potential for more than minimal harm to the residents" because it "is used to notify staff and residents of a fire and/or smoke to take the proper steps to evacuate the facility or area. Since the fire strobe light was left in the closet instead of relocated to an adjacent room or corridor, in the event of a fire and/or smoke staff and residents would not be able to see it and would not be alerted to the emergency." CMS Ex. 9, at 2-3 ¶¶ 2, 5, 6.

Petitioner does not come forward with any argument or evidence to contest this citation that the fire alarm strobe light was located in the closet where its staff and residents could not see it. Petitioner also does not contest that it did not relocate the strobe light from the inside of the closet to an outside wall where it could be seen until January 22, 2014. Petitioner did not otherwise complete all corrective measures under Tag K 052 until January 30, 2014. CMS Ex. 1, at 3.

C. Petitioner does not contest it was not in substantial compliance with Tag K 056, LSC Standard 101, because Petitioner did not install a sprinkler in its storage closet.

42 C.F.R. § 483.70(a)(8)(i) requires "an approved, supervised automatic sprinkler system in accordance with the 1999 edition of NFPA 13 . . . throughout [a long-term care facility's] building by August 13, 2013." If there is an automatic sprinkler system, it must be installed and provide coverage throughout the building. LSC § 19.3.5.1; CMS Ex. 1, at 4-5.

Surveyor RG testified that during the January 14, 2014 survey, there was no sprinkler in Petitioner's storage closet. The surveyor testified that he observed "a lot of equipment in this storage closet, including a rolling scale, walkers and other types of rehabilitation equipment. Since there was no sprinkler head in the closet, if a fire occurred it could easily spread and the equipment would be combustible." The surveyor testified that Petitioner's "failure to . . . install a sprinkler inside the closet . . . poses a potential for more than minimal harm to the residents." CMS Ex. 9, at 2-3 ¶¶ 2, 5, 7. Petitioner does not actively challenge this finding nor contend that it had a sprinkler in the closet. P. Hearing Request; P. Br.; P. Closing Br. Petitioner did not install a sprinkler head in the closet until January 22, 2014, and it did not otherwise complete its corrective measures until January 30, 2014. *See* CMS Ex. 1, at 4-5.

D. Petitioner does not contest that it was not in substantial compliance with Tag K 147, LSC Standard 101, because of Petitioner's wiring of medical equipment in a resident care area.

The LSC requires that all electrical wiring and equipment be maintained and installed in accordance with NFPA 70 NEC. LSC § 9.1.2; CMS Ex. 8, at 10; CMS Ex. 9, at 3 ¶ 9. The NEC provides that, unless specifically permitted for uses not indicated here, "flexible cords and cables shall not be used . . . [a]s a substitute for the fixed wiring of a structure." CMS Ex. 8, at 13 (referencing NFPA 70, NEC §§ 400-7, 400-8). The survey statement of deficiencies documents that during the January 14, 2014 survey, the survey team saw "flexible cords, (extension cords, power taps, power strips, surge protectors and surge/UPS, uninterrupted power supply), battery back-up units, being used as a substitute for the fixed wiring of the facility that is prohibited by NFPA 70." The surveyors made these observations in the newly constructed rehabilitation and therapy center, where they saw power strips or surge protector strips attached to three pieces of medical equipment. CMS Ex. 1, at 6.

Surveyor RG testified that:

> I observed that power strip devices were being used instead of fixed wiring as required by the NFPA. Power strip devices, such as surge protectors, were being used in a patient care area. Power strip devices are not permitted in patient care areas, because they can cease working if overloaded by too much equipment being plugged into it. If necessary medical equipment, such as life support, is plugged into a surge protector and service of a medical device is interrupted, it can be life-threatening.

CMS Ex. 9, at 3 ¶ 10. Petitioner does not argue that it is acceptable to use power strip devices instead of fixed wiring in resident care areas. P. Hearing Request; P. Br.; P. Closing Br. Petitioner removed the power strips attached to the three pieces of medical equipment in its therapy room on January 22, 2014. Petitioner also conducted an in-service with its therapy and maintenance staffs regarding the "non-use of power strips." CMS Ex. 1, at 5. Petitioner also had its Administrator and MR inspect the facility to ensure no power strips were utilized as of January 30, 2014. CMS Ex. 1, at 5-6.

E. A $100 per-day CMP is reasonable.

CMS must consider several factors when determining the amount of a CMP, which an administrative law judge considers de novo when evaluating the reasonableness of a CMP imposed by CMS: (1) the facility's history of noncompliance; (2) the facility's financial condition, i.e., its ability to pay the CMP; (3) the severity and scope of the noncompliance; (4) the relationship of the one deficiency to other deficiencies resulting in noncompliance; and (5) the facility's degree of culpability, which includes neglect, indifference, or disregard for resident care, comfort, or safety. 42 C.F.R. §§ 488.438(f), 488.404(b), (c).

A CMP within the range of $50 to $3,000 per day is designated for deficiencies that do not pose immediate jeopardy but either cause actual harm to residents, or cause no actual harm but have the potential for causing more than minimal harm. 42 C.F.R. § 488.438(a)(1)(ii). In assessing the reasonableness of a CMP amount, an administrative law judge looks at the per day amount, rather than the total accrual. *Kenton Healthcare, LLC*, DAB No. 2186, at 28 (2008). The regulations leave the decision regarding the choice of remedy to CMS, and the amount of the remedy to CMS and the administrative law judge, requiring only that the regulatory factors at 42 C.F.R. §§ 488.438(f) and 488.404 be considered when determining an amount within the applicable range. 42 C.F.R. §§ 488.408; 488.408(g)(2); 498.3(d)(11); *see also* 42 C.F.R. § 488.438(e)(2); *Alexandria Place*, DAB No. 2245, at 27 (2009); *Kenton Healthcare, LLC*, DAB No. 2186, at 28-29.

CMS did not find immediate jeopardy to exist regarding the citations of deficiencies here. However, that does not mean that the noncompliance here is not serious or that Petitioner

is not culpable. RG testified credibly that Petitioner's failure to install a door to the storage closet, to install a sprinkler inside the closet, to reposition the fire strobe light from the closet, and to use power strip devices, all posed a risk of more than minimal harm to Petitioner's residents. Surveyor RG credibly testified, for example, that a strobe light in a closet, and not in a corridor, means that residents, staff and visitors might not be alerted to an emergency in the event of fire and smoke. Further, RG credibly explained that with no sprinkler head in the closet, a fire could spread due to combustible equipment being stored in the closet. In addition, RG credibly explained that a power strip device may cease working if it is overloaded with too much equipment plugged into it, which can be life threatening if necessary medical equipment is interrupted. CMS Ex. 9, at 1-4.

Petitioner did not dispute that it had a history of noncompliance under the LSC over multiple prior consecutive survey cycles. P. Hearing Request; P. Br.; P. Closing Br.; s*ee* CMS Br. at 7; CMS Ex. 10, at 2-3. I have no information with regard to whether or not Petitioner's financial condition impacts its ability to pay the CMP. However, it is Petitioner's burden to raise the issue of its ability to pay by submitting evidence of its financial condition, and it has not done so here. Thus, considering all the factors discussed, I find CMS has substantiated the very low $100 per day CMP, which is only $50 more than the minimum, and I find it reasonable.

IV. Conclusion

Petitioner was not in substantial compliance with Medicare participation requirements for the period cited (December 6, 2013 through January 29, 2014), and the $100 per day CMP that CMS imposed for that period of noncompliance is reasonable.

/s/
Joseph Grow
Administrative Law Judge