Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Bella Vita Health and Rehabilitation Center
(CCN: 03-5092)[1],
Petitioner,

v.

Centers for Medicare & Medicaid Services,

Respondent.

Docket No. C-14-1972

Decision No. CR4075

Date: July 28, 2015

DECISION

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS) to impose a per-instance civil money penalty of $8000 against Petitioner, Bella Vita Health and Rehabilitation Center.

I. Background

Petitioner is a skilled nursing facility doing business in the State of Arizona. On July 17, 2014, the Arizona State Survey Agency responded to complaints by residents and their families that Petitioner's facility was uncomfortably hot. The agency found that the facility was indeed uncomfortably hot in some locations, including several residents' rooms. Based on these findings CMS determined that Petitioner had failed to comply substantially with the requirements of 42 C.F.R. § 483.15(h)(6). This regulation requires

[1] I am correcting the case caption to reflect Petitioner's correct CCN, which, according to the Centers for Medicare & Medicaid Services, is "03-5092."

that all skilled nursing facilities maintain "comfortable and safe temperature levels."[2] As a remedy, CMS imposed the per-instance penalty of $8000.

Petitioner requested a hearing to challenge CMS's determination. I held a hearing by video teleconference on May 19, 2015. At the hearing I received exhibits from CMS consisting of CMS Ex. 1 – CMS Ex. 23, and exhibits from Petitioner consisting of P. Ex. 1 – P. Ex. 13. Transcript (Tr.) 10-11.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.15(h)(6); and, if so, whether the per-instance civil money penalty of $8000 is a reasonable remedy.

B. Findings of Fact and Conclusions of Law

CMS's allegations in this case are predicated on complaints that portions of Petitioner's facility – including several residents' rooms – were uncomfortably hot. Those allegations are supported by the complaints of several residents and by temperature readings taken by a surveyor on July 16, 2014. Readings taken by the surveyor showed portions of some of the residents' rooms being as hot as 90 degrees Fahrenheit. CMS Ex. 1 at 2 – 4; CMS Ex. 3 at 1.

Such temperatures plainly exceed what any reasonable person would consider to be "comfortable." On their face they comprise violations of 42 C.F.R. § 483.15(h)(6).

Petitioner raises several arguments in response to CMS's assertions of noncompliance. First and foremost, it attacks the accuracy of the temperature measurements made by the surveyor. It contends that the surveyor utilized a thermometer that was designed expressly to take the temperatures of the surfaces of objects. It contends that this thermometer could not be used reliably to measure air temperature and thus, according to Petitioner, temperature readings that the surveyor made within residents' rooms are of no probative value. Petitioner argues also that there is no evidence proving that the surveyor calibrated the thermometer before using it to measure temperatures at Petitioner's facility. It contends that, absent proof that the thermometer was calibrated prior to being used, there can be no legitimate conclusion that the thermometer's readings were accurate.

[2] The regulation requires additionally that those facilities certified after October 1, 1990, must maintain a temperature range of between 71 and 81 degrees Fahrenheit. Petitioner was certified prior to October 1, 1990.

I find these arguments to be unpersuasive. It may be, as Petitioner contends, that the thermometer in question – an "infrared thermometer" – was designed to record surface temperatures. *See* CMS Ex. 20 at 4. But, that does not necessarily suggest that the room temperatures recorded by the surveyor were inaccurate. Surfaces in a room – floors, ceilings, and walls – absorb the heat that is present in the surrounding air. The temperatures of these surfaces thus indicate the temperatures of air surrounding them (absent proof that the surfaces have their own sources of heating). Taking surface temperatures is one way of determining room temperature. CMS Ex. 19 at 18, Table 5.

Moreover, and ironically, Petitioner's staff used precisely the same technique, as did the surveyor – an infrared thermometer – to register room temperatures. Tr. at 37, 54. It is reasonable to infer that Petitioner's own staff thought that use of infrared thermometers was an accurate way of measuring room temperature and, by extension, determining whether rooms were comfortable.

I note also that the readings taken by the state surveyor and by Petitioner's own staff coincided to a large degree. There was no meaningful difference in these temperature readings. For example, on July 16, the surveyor measured the temperatures in Resident Room 313 at Petitioner's facility to be 85 degrees Fahrenheit at ground level, 87 degrees at mid-level height, and 90 degrees at ceiling height. On the same day a member of Petitioner's staff measured the temperature in Resident Room 313 to be 85 degrees Fahrenheit. CMS Ex. 1 at 2; CMS Ex. 3 at 1; CMS Ex. 8 at 3; Tr. at 53 – 54. In fact, Petitioner's staff measured temperatures in several residents' rooms on that date, at above 80 degrees Fahrenheit. CMS Ex. 8 at 3. These temperatures closely tracked temperatures recorded by the surveyor in the same rooms on the same day. CMS Ex. 1 at 2; CMS Ex. 3 at 1; CMS Ex. 8 at 3.

Petitioner places great reliance on a decision holding that failure by surveyors to calibrate thermometers in advance of measuring water temperatures potentially invalidates their subsequent readings. *Crestview Manor*, DAB CR1350 (2005). Arguably, failure to calibrate a thermometer for accuracy could impugn whatever subsequent readings that thermometer records. But, in the present case, the failure to calibrate is rendered harmless by the fact that there are independently made readings that coincide with those made by the surveyor's thermometer. That is sufficient proof of the accuracy of the readings.

However, the precise accuracy of the thermometer readings in this case is not the outcome-determinative question. There is ample evidence here that residents' rooms at Petitioner's facility were uncomfortably hot. Temperature readings made by the surveyor and Petitioner's own staff serve to corroborate what is known independently. The rooms were so hot that residents were uncomfortable. That is the basis for my finding that Petitioner failed to comply with regulatory requirements.

Indeed, and as Petitioner notes, it – as a facility certified before October 1, 1990 – was not held to an objective standard as to what comprises comfortable temperatures. This is not a case where room temperatures above 81 degrees Fahrenheit are dispositive proof that Petitioner was in violation of regulatory requirements (although the fact that several rooms were substantially warmer than 81 degrees, based on Petitioner's own room temperature readings, is strong evidence of noncompliance). The question that I address in this decision was whether residents' rooms were *comfortable*. Manifestly, they were not.

The overwhelming evidence is that rooms at Petitioner's facility were uncomfortably hot due to the failure of the facility's air conditioning system. Arizona in July is a very hot place. Building interiors in that State that are not adequately air conditioned can become dangerously hot. As Petitioner admits, the air conditioning in its facility had failed to work adequately in July 2014. The failure prompted residents to complain that their rooms had become uncomfortably hot. CMS Ex. 2 at 1; CMS Ex. 3 at 1 – 6; Tr. at 25, 28, 50. Indeed, Petitioner's staff recognized the inadequacy of the air conditioning system and that rooms had become uncomfortable. The obvious reason that the staff recorded room temperatures on July 16 was to verify residents' complaints that the rooms had become uncomfortably hot. The staff took various measures to address the failure of the air conditioning system, including closing curtains in residents' rooms and conducting random temperature checks. CMS Ex. 5 at 1 – 2. Eventually, and after the facility had been surveyed, Petitioner addressed the issue of room comfort by putting portable air conditioning units in residents' rooms pending completion of repairs to the air conditioning system. Tr. at 40 – 41, 50.

Petitioner argues that CMS offered no proof that any of its residents suffered actual harm from being housed in uncomfortably hot rooms. But, that is not the standard for noncompliance. It is sufficient that residents not be comfortable to establish a violation. Implicit in the regulation is a determination that rooms that are not comfortable pose at least the potential for harm for the sick, frail, and elderly individuals who reside in skilled nursing facilities. The evidence that residents were not comfortable is overwhelming, beginning with these residents' complaints and further evidenced by the fact that Petitioner's own staff recognized that there were problems with overheating in the residents' rooms.

In its pre-hearing submissions Petitioner argued strenuously that the evidence did not support a finding that the conditions at its facility were at a level of severity so as to place residents in immediate jeopardy. However, and as I noted at the hearing, immediate jeopardy is not an issue in this case. The civil money penalty that CMS determined to impose is a per-instance penalty that does not depend on a finding of immediate jeopardy. 42 C.F.R. § 488.438(a)(2).

Petitioner did not argue that the specific penalty amount is unreasonable. The penalty that CMS determined to impose, $8000, falls within the range of permissible per-instance penalties. I sustain the penalty as reasonable in the absence of evidence or argument proving that it is not.

/s/
Steven T. Kessel
Administrative Law Judge