Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Libertyville Manor Rehabilitation & Healthcare Center,
(CCN: 14-5344),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-14-1122

Decision No. CR4293

Date: October 7, 2015

DECISION

Libertyville Manor Rehabilitation & Healthcare Center (Petitioner or the facility) is a long-term care facility located in Libertyville, Illinois that participates in the Medicare program. Based on a series of surveys initiated between November 19, 2013, and March 6, 2014, the Centers for Medicare & Medicaid Services (CMS) determined that Petitioner was not in substantial compliance with Medicare participation requirements from November 19, 2013 through April 2, 2014. As a result of its determination of the duration of Petitioner's noncompliance, CMS imposed against Petitioner a mandatory denial of payment for new admissions (DPNA) from February 22 through April 2, 2014. Petitioner appealed, and the parties filed cross-motions for summary judgment.

After considering the undisputed material facts, I grant CMS's motion for summary judgment, deny Petitioner's motion, and find that CMS was authorized to impose a mandatory DPNA based on Petitioner's continued noncompliance from November 19, 2013 through April 2, 2014.

I. Background

The Social Security Act (Act) sets forth requirements for long-term care facility participation in the Medicare and Medicaid programs and authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations implementing those statutory provisions. Act §§ 1819 and 1919.[1] The Secretary's regulations governing skilled nursing facility participation in the Medicare program are found at 42 C.F.R. Part 483. Regulations governing survey, certification, and enforcement procedures, and regulations governing provider agreements, are found at Parts 488 and 489, respectively. Regulations governing appeals procedures are found at Part 498.

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 or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301.

The Secretary contracts with state agencies to conduct periodic surveys to determine whether skilled nursing facilities are in substantial compliance with the Medicare participation requirements. Act § 1864(a); 42 C.F.R. § 488.10. Each facility must be surveyed once every 12 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), 488.308.

If a survey finds that a facility is not in substantial compliance with one or more participation requirements, CMS may impose one or more enforcement remedies. Act § 1819(h); 42 C.F.R. §§ 488.402(c), 488.406. Certain remedies are discretionary; other remedies are mandatory. Relevant here, CMS is required to impose a DPNA when a facility "is not in substantial compliance . . . 3 months after the last day of the survey identifying the noncompliance." 42 C.F.R. § 488.417(b)(1).

Surveyors from the Illinois Department of Public Health (state agency) conducted life safety code (LSC) and health surveys of Petitioner on November 19 and 22, 2013, and found Petitioner out of substantial compliance with Medicare participation requirements. *See* CMS Ex. 3 at 1-8 (letters from state agency advising Petitioner of results of November surveys); CMS Ex. 4 (Statement of Deficiencies for November LSC survey); CMS Ex. 12 (Statement of Deficiencies for November health survey). The November surveys identified multiple deficiencies, including a violation of section 9.6.1.3 of the

[1] The current version of the Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp. Table.

LSC (Tag K54), which provides that all required smoke detectors must be approved, maintained, inspected, and tested in accordance with the manufacturer's specifications. *See* CMS Ex. 4 at 8-9.

By letter dated January 17, 2014, the state agency notified Petitioner that CMS would impose a DPNA beginning February 22, 2014, if Petitioner failed to achieve substantial compliance by that date.[2] CMS Ex. 3 at 9. The letter also informed Petitioner that if it wished to appeal the deficiency findings from the November surveys, Petitioner needed to file a request for hearing within 60 days of receipt of the letter. CMS Ex. 3 at 9. CMS ultimately determined that Petitioner had corrected all of the deficiencies identified during the health survey by January 3, 2014, and all of the deficiencies identified during the LSC survey by January 23, 2014, the date that Petitioner finished installing new smoke detectors throughout the facility. CMS Ex. 8 at 4; CMS Exs. 11, 13.

Surveyors from the state agency conducted a complaint survey of Petitioner on March 6, 2014, regarding an incident that took place on January 4, 2014. The state agency found that the facility was out of substantial compliance with 42 C.F.R. § 483.10(b)(11) (Tag F157) based on its failure to immediately consult with a resident's physician and to notify the resident's family when the resident was transferred to the hospital for shortness of breath. CMS Ex. 14. CMS determined that Petitioner corrected the deficiency by April 3, 2014, the date that Petitioner finished in-servicing its employees regarding internal/external transfers. CMS Exs. 21-23.

Based on the results of the three surveys, CMS determined that Petitioner was out of substantial compliance with the Medicare participation requirements from November 19, 2013 through April 2, 2014, and so CMS imposed a mandatory DPNA from February 22 through April 2, 2014.[3] CMS Ex. 1.

On May 8, 2014, Petitioner filed a request for hearing to review CMS's imposition of the mandatory DPNA. The case was assigned to me for hearing and decision. On May 20, 2014, I issued an Acknowledgment and Initial Pre-Hearing Order (Pre-Hearing Order) establishing a briefing schedule. In accordance with that schedule, on August 14, 2014, CMS submitted its pre-hearing exchange, consisting of its pre-hearing brief (CMS Pre-Hearing Br.), exhibit and witness lists, and 27 exhibits (CMS Exs. 1-27). On September 19, 2014, Petitioner submitted its pre-hearing exchange, consisting of its pre-hearing brief

[2] In addition, the state agency notified Petitioner that CMS would terminate Petitioner's provider agreement if the facility failed to achieve substantial compliance by May 22, 2014. CMS Ex. 3 at 9.

[3] Because the facility was subject to a DPNA, it was also prohibited from offering or conducting a Nurse Aide Training and Competency Evaluation Program (NATCEP) for two years from February 22, 2014. *See* CMS Ex. 1 at 3; Act § 1819(f)(2)(B)(iii)(I)(c).

(P. Pre-Hearing Br.), exhibit and witness lists, and six exhibits (P. Exs. 1-6). The parties subsequently filed cross-motions for summary judgment (CMS Br. and P. Br.) and responses to each other's motions (CMS Response and P. Response). In the absence of any objection, I admit CMS Exs. 1 through 27 and P. Exs. 1 through 6 into the record.

II. Issues

The issues presented here are: (1) whether summary judgment is appropriate, and (2) whether CMS had a basis for imposing a mandatory DPNA against Petitioner.

III. Findings of Fact and Conclusions of Law

A. Summary judgment is appropriate.

The Departmental Appeals Board (the Board) has explained the standard for summary judgment:

> Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing law. . . . In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The role of an administrative law judge (ALJ) in deciding a summary judgment motion differs from the ALJ's role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame*, DAB No. 2291, at 4-5 (2009).

Both parties assert that there are no material facts in dispute, and each party contends that it is entitled to judgment as a matter of law. As noted above, under 42 C.F.R. § 488.417(b)(1), CMS must impose a DPNA when a facility fails to return to substantial compliance within three months after the last day of the survey that identifies noncompliance. CMS contends that it was authorized to impose a DPNA because the undisputed facts establish that Petitioner was consistently out of substantial compliance with the Medicare participation requirements from November 19, 2013 through April 2, 2014. CMS further asserts that Petitioner is time-barred from challenging the

deficiencies identified during the November 2013 LSC and health surveys, and cannot challenge the scope and severity of the deficiency identified during the March 2014 complaint survey because Petitioner's request for hearing did not put CMS on notice of the challenge and because the challenge, even if successful, would not affect the range of CMP amounts that CMS could collect or Petitioner's ability to conduct a NATCEP. Petitioner contends that the undisputed facts show that it was out of substantial compliance for less than three months following the LSC and health surveys, so there was no basis for imposing a mandatory DPNA. First, Petitioner argues that it corrected the deficiencies cited during the November LSC and health surveys no later than January 3, 2014 – prior, by a single day, to the events at issue in the March complaint survey – so it returned to substantial compliance less than three months after the November surveys were completed. Second, Petitioner argues that the deficiency identified during the complaint survey should have been cited at the lowest scope and severity level, so it was not out of substantial compliance with the participation requirements based on that deficiency and thus returned to substantial compliance no later than January 23, 2014, the date CMS determined that Petitioner had corrected all of the deficiencies identified during the November LSC and health surveys. Third, Petitioner argues that even if it did not return to substantial compliance with the deficiencies identified in the November LSC and health surveys until January 23, 2014, the survey cycle should have terminated at that point, but CMS improperly used the deficiency identified during the March complaint survey to find that the facility was continuously out of substantial compliance for three months after the November surveys were completed.

The parties' differing views on the appropriate resolution of the case stem from their divergent perspectives on how to apply the law to the undisputed facts. Thus, there are no genuine disputes of material fact as to the date that Petitioner returned to substantial compliance with the participation requirements, and I can resolve the case on summary judgment.

B. The undisputed evidence establishes that Petitioner was out of substantial compliance with the participation requirements from November 19, 2013 through April 2, 2014, so CMS was authorized to impose a mandatory DPNA.

The undisputed evidence establishes that Petitioner was consistently out of substantial compliance with the participation requirements from November 19, 2013 through April 2, 2014. As I explain below, Petitioner's attempt to challenge the duration of the noncompliance identified during the November 2013 LSC and health surveys is in fact a challenge to the noncompliance findings themselves. Petitioner did not timely request a hearing regarding the November survey findings, however, so those findings are administratively final. In addition, Petitioner cannot challenge the scope and severity of the noncompliance identified during the March complaint survey because its challenge, even if successful, would not affect either the range of civil money penalty (CMP)

amounts that CMS could collect or a finding of substandard quality of care that resulted in the loss of approval for the facility's NATCEP. Finally, Petitioner's contention that the survey cycle should have terminated on January 23, 2014, ignores the fact that the March complaint survey found Petitioner out of substantial compliance with an additional participation requirement from January 4 to April 2, 2014. Because Petitioner was out of substantial compliance for a period of more than three months following the completion of the November surveys, CMS was authorized to impose a mandatory DPNA.

1. The noncompliance findings regarding the November 2013 LSC and health surveys are administratively final, so Petitioner cannot challenge those findings in an attempt to contest the date that it corrected the deficiencies identified during the November surveys.

The state surveyors who conducted the November LSC and health surveys of Petitioner identified several deficiencies at the facility. CMS determined that Petitioner corrected all of the deficiencies identified during the health survey by January 3, 2014, and all of the deficiencies identified during the LSC survey by January 23, 2014. More specifically, CMS determined that Petitioner corrected all of the deficiencies identified during the LSC survey except Tag K54, the violation of LSC section 9.6.1.3, by December 31, 2013, and Petitioner corrected Tag K54 by January 23, 2014. CMS Ex. 11. Petitioner's challenge to CMS's determination of the duration of the facility's noncompliance – and attendant imposition of a mandatory DPNA – does not concern any of the deficiency findings from the November surveys other than Tag K54. Thus, I restrict my discussion of the November surveys to the Tag K54 deficiency.

Under section 9.6.1.3 of the LSC, all required smoke detectors must be approved, maintained, inspected, and tested in accordance with the manufacturer's directions. In citing Petitioner under Tag K54, the surveyors determined that Petitioner "failed to provide complete testing and maintenance of the installed smoke detectors." CMS Ex. 4 at 9. Based on a review of Petitioner's smoke detector maintenance logs for the 24 months prior to the November survey, the surveyors found that there was no bi-annual sensitivity test or annual function test of the smoke detectors. CMS Ex. 4 at 9.

In selecting January 23, 2014 as the date that Petitioner corrected the Tag K54 deficiency, CMS adopted the correction date proffered by Petitioner in its approved plan of correction (POC). Petitioner's approved POC for Tag K54 provided:

> A bi-annual smoke detector test report was issued by International Fire Equipment Corporation dated April 11, 2013 and April 12, 2013. Since April 12, 2013 all smoke detectors have been replaced throughout the entire facility. A copy of the

> smoke detector test report is attached for your review. Completion date January 23, 2014 where International Fire Equipment Corp. finished installing all new addressable smoke detectors throughout the entire facility.

CMS Ex. 8 at 4 (emphasis added).

Despite proffering January 23, 2014 as the date that it corrected Tag K54, Petitioner now argues that it "achieved substantial compliance" with LSC section 9.6.1.3 by April 12, 2013, the date that its smoke detectors were last tested. P. Br. at 5. Petitioner contends that replacing its smoke detectors was not necessary in order to comply with section 9.6.1.3; therefore, the date that it finished installing new smoke detectors is irrelevant.

Although Petitioner frames its argument as a challenge to the date that it returned to substantial compliance with LSC section 9.6.1.3, Petitioner is in fact challenging the underlying determination that it ever violated section 9.6.1.3. Petitioner asserts that it was compliant with section 9.6.1.3 as of April 12, 2013, several months before the November 2013 LSC survey during which it was found to be in violation of section 9.6.1.3. In contending that it "achieved substantial compliance" with LSC section 9.6.1.3 on a date prior to the LSC survey, Petitioner is disputing the finding that it was in violation of section 9.6.1.3 during the survey. However, Petitioner's time to contest the finding that it violated section 9.6.1.3 has expired.

A party entitled to a hearing "must file [its] request in writing within 60 days from receipt of the notice of initial, reconsidered, or revised determination unless that period is extended [for good cause]." 42 C.F.R. § 498.40(a)(2). The date of receipt is presumed to be 5 days after the date on the notice. *Id.*; 42 C.F.R. § 498.22(b)(3). The state agency's letter dated January 17, 2014, which informed Petitioner that CMS had decided to impose a DPNA based on the results of the November 2013 surveys, constituted an initial determination of noncompliance as to those surveys. *See* 42 C.F.R. §§ 488.406(a)(2)(ii), 498.3(b)(13). Thus, in order to contest the findings of either the November health survey or the November LSC survey, including the finding that Petitioner violated LSC section 9.6.1.3, Petitioner needed to file a request for hearing by March 24, 2014, or establish good cause for late filing. Petitioner did not file a request for hearing until May 8, 2014, and it has not established good cause for its failure to file prior to the expiration of the 60-day deadline. Accordingly, CMS's findings of noncompliance based on the November surveys are administratively final, and I cannot consider Petitioner's argument that it was

in compliance with LSC section 9.6.1.3 prior to the time the surveys were conducted and that it corrected all of the deficiencies identified in the November surveys no later than January 3, 2014.[4]

2. The undisputed evidence establishes that Petitioner was noncompliant with 42 C.F.R. § 483.10(b)(11) from January 4 to April 2, 2014, and Petitioner cannot challenge CMS's finding of the level of Petitioner's noncompliance during that time.

42 C.F.R. § 483.10(b)(11) provides in relevant part:

> A facility must immediately inform the resident; consult with the resident's physician; and if known, notify the resident's legal representative or an interested family member when there is—
>
> (A) An accident involving the resident which results in injury and has the potential for requiring physician intervention;
>
> (B) A significant change in the resident's physical, mental, or psychosocial status (i.e., a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications);
>
> (C) A need to alter treatment significantly (i.e., a need to discontinue an existing form of treatment due to adverse consequences, or to commence a new form of treatment); or
>
> (D) A decision to transfer or discharge the resident from the facility as specified in § 483.12(a).

42 C.F.R. § 483.10(b)(11)(i). As noted above, the state surveyors cited Petitioner for noncompliance with section 483.10(b)(11) (Tag F157) based on the facility's failure on January 4, 2014, to immediately consult with a resident's physician and to notify the resident's family when the resident was transferred to the hospital for shortness of breath. According to the Statement of Deficiencies (SOD) and the surveyors' notes, the facility did not consult with the resident's physician about her breathing problems and transfer to

[4] I also note that the Board has "long rejected" the idea that a facility "can belatedly claim to have achieved substantial compliance at a date earlier than it even alleged that it had done so." *Cal Turner Extended Care Pavilion*, DAB No. 2030, at 11 (2006). Petitioner alleged in its approved POC that it corrected the Tag K54 deficiency by January 23, 2014, so now it cannot simply disavow that date.

the hospital until January 5, 2014, and never notified the resident's family about her change in condition and transfer. CMS Ex. 14 at 2; CMS Ex. 17 at 8; CMS Ex. 19 at 5. Petitioner's failures clearly violated the requirements of section 483.10(b)(11).

Petitioner does not dispute that its failures on January 4, 2014, provided a basis for finding a Tag F157 deficiency. Nor does Petitioner dispute that it did not correct this deficiency until April 3, 2014, the date that Petitioner finished in-servicing its employees regarding internal/external transfers. Petitioner argues, however, that it should have been cited for the deficiency at scope and severity level A, an isolated incident that constituted no actual harm with a potential for minimal harm, rather than at scope and severity level D, an isolated incident that constituted no actual harm with a potential for more than minimal harm that is not immediate jeopardy. P. Pre-Hearing Br. at 7-8. As noted above, a facility is still considered to be in substantial compliance with the participation requirements so long as 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. Thus, if Petitioner had been cited for Tag F157 at scope and severity level A rather than D, it would not have been found to be out of substantial compliance with the participation requirements three months after the November surveys, and there would not have been a basis for CMS to impose a mandatory DPNA.

Petitioner cannot challenge the level of noncompliance for which it was cited under Tag F157. Under the regulations, a nursing facility may challenge the level of noncompliance found by CMS only if a successful challenge would affect (1) the range of CMP amounts that CMS could collect, or (2) a finding of substandard quality of care that results in the loss of approval for the facility's NATCEP. 42 C.F.R. § 498.3(b)(14). Neither of these criteria is met in this case. CMS did not impose a CMP in this case, nor did CMS make a finding of substandard quality of care resulting in the loss of Petitioner's NATCEP.[5] Thus, there is no basis for disturbing CMS's determination that Petitioner was out of substantial compliance with the requirements of section 483.10(b)(11) from January 4 through April 2, 2014.

3. The March complaint survey identified noncompliance that began on January 4, 2014 and lasted until April 2, 2014; therefore, the survey cycle did not end with Petitioner's correction on January 23, 2014 of the deficiencies identified in the November surveys, and CMS was authorized to impose a DPNA.

[5] "Substandard quality of care" means one or more deficiencies related to participation requirements under 42 C.F.R. §§ 483.13, 483.15, or 483.25, which constitute either immediate jeopardy to resident health or safety; a pattern of or widespread actual harm that is not immediate jeopardy; or a widespread potential for more than minimal harm, but less than immediate jeopardy, with no actual harm. 42 C.F.R. § 488.301.

Petitioner argues that because CMS determined that the facility corrected the deficiencies identified during the November 2013 surveys by January 23, 2014, and did not identify any further deficiencies until the March 2014 complaint survey, the survey cycle should have ended on January 23, 2014. Petitioner relies on 42 C.F.R. § 488.454(e), which provides that, if a facility can supply acceptable documentation that it was in substantial compliance and was capable of remaining in substantial compliance on a date preceding a revisit survey, any remedies imposed terminate on the date verified as the date substantial compliance was achieved. P. Br. at 7-8.

Petitioner's argument lacks merit. As the Board explained in *Meadowbrook Manor – Naperville*, DAB No. 2173, at 13 (2008), "a finding that deficiencies have been corrected is not the same as a determination that a [long-term care facility] has achieved substantial compliance with all participation requirements." CMS determined that Petitioner corrected the deficiencies identified in the November surveys on January 23, 2014, but CMS subsequently determined that Petitioner was out of substantial compliance with the requirements of section 483.10(b)(11) from January 4, 2014 through April 2, 2014 based on the March complaint survey. For purposes of the survey cycle, it is irrelevant that the survey was conducted in March because it identified noncompliance that began in January, prior to the date that Petitioner corrected the deficiencies identified during the November surveys. Thus, Petitioner was continually out of substantial compliance with the participation requirements from November 19, 2013 to April 2, 2014. Based on the duration of Petitioner's noncompliance, a period of approximately four and a half months, CMS was authorized to impose a mandatory DPNA under section 488.417(b)(1).

IV. Conclusion

For the reasons set forth above, I grant summary judgment in favor of CMS and sustain CMS's imposition of a DPNA from February 22 through April 2, 2014.

/s/
Joseph Grow
Administrative Law Judge