Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Rafael Convalescent Hospital,
(CCN: 05-5310),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-420

Decision No. CR4548

Date: March 17, 2016

DECISION

The California Department of Public Health (state survey agency) cited Petitioner, Rafael Convalescent Hospital, for noncompliance with Medicare participation requirements in a complaint survey based on a determination that one of its certified nursing assistants (hereinafter referred to as CNA 1) yelled at and hit a resident (hereinafter referred to as Resident 1). I find the CNA's conduct constituted abuse and a violation of 42 C.F.R. § 483.13(b), (c)(1)(i). Therefore, I grant summary judgment to the Centers for Medicare & Medicaid Services (CMS) and find that CMS's imposition of a $1,500 per-instance civil money penalty (PICMP) is reasonable.

I. Background

On January 10, 2014, Petitioner self-reported to the state survey agency an incident of suspected abuse by CNA 1 on Resident 1. CMS Ex. 3. The same day, Petitioner's Director of Nursing (DON) began an investigation of the alleged abuse. CMS Ex. 5 at 1. On January 13, 2014, the DON determined that "abuse did occur during [Resident 1's] care" and decided to "proceed with [CNA 1's] termination" based on the DON's interviews with CNA 1 and CNA 2, the witness to the alleged abuse, and his review of their written statements. *Id.*

On January 14, 2014, the state survey agency began a complaint investigation of the incident involving CNA 1 and Resident 1. *See* CMS Ex. 4 at 1. The state survey agency officially concluded its investigation and issued Form CMS 2567, Statement of Deficiencies, to Petitioner. CMS Ex. 1, P. Ex. 1; *see* CMS Ex. 10. CMS also notified Petitioner that, based on the submission of a plan of correction and a follow-up survey completed on May 28, 2014, the facility was back in substantial compliance with applicable federal requirements as of that date. CMS Ex. 10 at 3; *see also* CMS Ex. 9. On November 3, 2014, Petitioner appealed CMS's deficiency finding and the related $1,500 PICMP that CMS imposed.

My November 24, 2014 Acknowledgment and Pre-hearing Order, at ¶ 4, required the parties to come forward with all of their arguments and evidence before I would schedule a hearing in this matter. I later ordered supplemental briefing because CMS brought forth specific, and apparently undisputed, allegations of noncompliance supported by evidence that seemed to preclude the need for a hearing to consider witness testimony because of a lack of disputed material facts. I instructed Petitioner to supplement its prehearing exchange to identify a specific page number or numbers in specific exhibits already in the record as evidence that there was a genuine issue of material fact for me to decide. Thereafter, Petitioner filed a supplemental brief (P. Supp. Br.).

II. Findings of Fact and Conclusions of Law

1. Summary judgment is appropriate because there is no genuine issue of material fact, and Petitioner is liable for the actions of CAN 1 as a matter of law.

Summary judgment is appropriate in this matter despite Petitioner's request to cross-examine CMS's witness. In considering summary judgment, I am procedurally and substantively guided by Rule 56 of the Federal Rules of Civil Procedure. Civil Remedies Division Procedures § 19; *see also Livingston Care Ctr. v. U.S. Dep't of Health and Human Srvs.*, 388 F.3d 168, 172 (6th Cir. 2004). Under paragraph (f) of Rule 56, I may consider summary judgment on my own motion if I identify the material facts not in dispute and give the parties notice and an opportunity to respond.

The Summary of Facts CMS recited at page 1, ¶ 1, of its Prehearing Brief states:

> [Petitioner] was cited under F223 at the actual harm level ("G") in a complaint survey based on a determination that one of its certified nursing assistants (CNAs) yelled at and hit a resident (hereinafter referred to as Resident 1). The CNA admitted to hitting Resident 1 on the back, and another CNA witnessed her "roughly" grab the resident's face, hit her once on her left leg and twice on her right leg, and tell the resident she would kill her if she said anything else. As explained

> more fully below, and as supported by CMS's documentary and testimonial evidence, the CNA's conduct constituted physical and mental abuse, and a violation of 42 C.F.R. § 483.13(b), (c)(1)(i).

Petitioner responded in its prehearing brief:

> Petitioner does not disagree with the Summary of Facts at issue set forth by CMS at page 1, ¶ 1, of its Prehearing Brief. Petitioner supplements said facts with the statement of Petitioner's Director of Nursing . . . and the fact the actions of the CNA in question were unprecedented by any conduct or actions which could remotely constitute physical or mental abuse of any resident at Rafael Convalescent Hospital prior to the incident which gave rise to this citation.

Petitioner's Prehearing Brief (P. Prehearing Br.) at 2 (emphasis in original).

In its supplemental brief, Petitioner maintained that:

> CMS has not shown by [a] preponderance of the evidence that the conduct of the CNA with Resident 1 which led to the issuance of the citation was reasonably foreseeable to Petitioner or the outcome of said conduct was avoidable under the policies and procedures in place at Rafael Convalescent Hospital at the time of the incident which led to the citation at issue.

P. Supp. Br. at 1-2. However, it is undisputed that Petitioner fired CNA 1 after an internal investigation concluded that she abused Resident 1. Even assuming the CNA's behavior was not foreseeable, Petitioner is still responsible for the actions of its employees. For the purpose of evaluating a facility's compliance with the Medicare and Medicaid participation requirements, a facility acts through its staff and cannot dissociate itself from the consequences of its employees' actions. *See, e.g.*, *Beverly Health Care Lumberton*, DAB Ruling No. 2008-5 (denying petition for reopening of DAB No. 2156) at 6-7 (2008); *Emerald Oaks*, DAB No. 1800 at 7 n.3 (2001); *North Carolina State Veterans Nursing Home, Salisbury*, DAB No. 2256 (2009).

Petitioner argues that it cannot be held strictly liable for the actions of its employees that were not foreseeable. P. Prehearing Brief at 4; P. Supp. Br. at 2-3. Holding Petitioner to standards set forth in the Medicare and Medicaid participation regulations, however, is not tantamount to applying "strict liability." *See Tri-County Extended Care Ctr.*, DAB No. 2060 at 5 (2007); *see also Martha & Mary Lutheran Servs.*, DAB No. 2147 (2008),

Lake Mary Health Care, DAB No. 2081 (2007). The Board previously has noted that strict liability is a tort concept that is inapplicable in proceedings conducted under 42 C.F.R. pt. 498. *Briarwood Nursing Ctr.*, DAB No. 2115 at 11 n.8 (2007); *Jennifer Matthew Nursing & Rehab. Ctr.*, DAB No. 2192 (2008).

2. The undisputed evidence establishes that Petitioner violated 42 C.F.R. § 483.13(b) and (c)(1)(i) when its CNA hit and verbally threatened Resident 1.

A resident "has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion." 42 C.F.R. § 483.13(b). A facility must "[n]ot use verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion" against a resident. 42 C.F.R. § 483.13(c)(1)(i). Medicare regulations define the term "abuse" to mean "the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish." 42 C.F.R. § 488.301.

Resident 1 was admitted to Rafael Convalescent on August 20, 2012. She was 89 years old and suffered from multiple serious medical conditions including, but not limited to, Alzheimer's disease, dementia, delusional disorder, left heart failure, cerebral atherosclerosis, and incontinence. CMS Ex. 6.

On January 10, 2014, CNA 2 witnessed CNA 1 "physically abuse" Resident 1 while she was providing care to her. CMS Ex. 5 at 5; P. Ex. 4 at 5; *see* CMS Ex. 7. Specifically, CNA 2 "saw [CNA 1] try to take [Resident 1]'s shirt off in a rough manner," and then CNA 2 heard CNA 1 say to Resident 1, "[I]f you say anything else I am going to kill you." CMS Ex. 5 at 5; P. Ex. 4 at 5. CNA 2 also witnessed CNA 1 grab Resident 1's face "roughly" and hit her "once on the left leg and twice on the [right] leg forcefully." *Id.* Immediately following her observation, CNA 2 notified the charge nurse of what she witnessed. *Id.*; *see also* CMS Exs. 7, 8.

At approximately 2:00 p.m. that day, the charge nurse notified the DON about the abuse allegation that CNA 2 reported. CMS Ex. 5 at 1; P. Ex. 4 at 1; CMS Ex. 7. The DON then reported the abuse allegation to the state survey agency at 3:18 p.m. CMS Ex. 3. He also reported the alleged abuse to the ombudsman, law enforcement, and the California Department of Social Services. CMS Ex. 5 at 1; P. Ex. 4 at 1; CMS Exs. 7, 8. The DON began a three-day evaluation of the incident and conducted an investigation of the abuse allegation, which involved interviewing and obtaining written statements from CNA 2 and CNA 1. CMS Ex. 5; P. Ex. 4. During one interview, CNA 1 admitted to the DON that Resident 1 "was rough and hard to deal with . . . [and] that she hit [Resident 1] on the back only once just to get her attention but not to hurt her." *Id.* at 1. When the DON reviewed the written statement that CNA 1 prepared on January 12 or 13, 2014, he noticed that "she did not mention that she hit [Resident 1] as per her original interview." *Id.* at 1-3.

During CNA 2's interview, CNA 2 told the DON that CNA 1 "was verbally and physically abusive to the confused resident [Resident 1]." CMS Ex. 5 at 1; P. Ex. 4 at 1. The DON found CNA 2 to be believable because she provided a "very accurate [account] without any deviations despite repeated questions from [him]." *Id.* The DON concluded that "abuse did occur during [Resident 1]'s care" and that CNA 1's "behavior was inappropriate and not in line with the standard of care at [Rafael Convalescent]." *Id.* Petitioner's Policy and Procedure Regarding Resident Anti-Abuse states that "[t]he resident has the right to be free from abuse by anyone at Rafael Convalescent Hospital." CMS Ex. 9 at 3. The policy further states that the facility has "zero tolerance for abuse of any nature," and that abuse includes "physical, verbal, emotional . . . and mental abuse . . . ." *Id.* Based on his findings of abuse, Petitioner's DON terminated CNA 1's employment with the facility. CMS Ex. 5 at 1; P. Ex. 4 at 1; P. Prehearing Br. at 4.

3. The undisputed evidence establishes the $1,500 PICMP is reasonable.

CMS must consider several factors when determining the amount of a CMP (factors an administrative law judge (ALJ) considers de novo when evaluating the reasonableness of the CMP that CMS imposed): (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, the "relationship of the one deficiency to other deficiencies resulting in noncompliance," and the facility's prior history of noncompliance; and (4) the facility's degree of culpability. 42 C.F.R. §§ 488.438(f), 488.404(b), (c). In addition, the "absence of culpability is not a mitigating circumstance in reducing the amount of the penalty." 42 C.F.R. § 488.438(f)(4).

The Board has repeatedly concluded that "an ALJ or the Board properly presumes that CMS considered the regulatory factors and that those factors support the amount imposed." *See, e.g.*, *Pinecrest Nursing and Rehab. Ctr.*, DAB No. 2446 at 23 (2012). Thus, CMS did not need to present evidence regarding each regulatory factor. Instead, the burden was on Petitioner "'to demonstrate, through argument and the submission of evidence addressing the regulatory factors, that a reduction is necessary to make the CMP amount reasonable.'" *Id.* (quoting *Oaks of Mid City Nursing and Rehab. Ctr.*, DAB No. 2375 at 26-27 (2011)).

Culpability includes, but is not limited to, neglect, indifference, or disregard for resident care, comfort or safety. 42 C.F.R. § 488.438(f)(4). Although the DON acted quickly and effectively to address the abuse, as set forth above, I find Petitioner culpable because a member of its staff abused an elderly resident, for which Petitioner was cited at the actual harm level. 42 C.F.R. §§ 488.438(f)(3); 488.404. Further, Petitioner has been out of substantial compliance on each of its previous three recertification surveys. *See* CMS Ex. 12. Finally, Petitioner did not submit any information to CMS showing that a $1,500 PICMP would cause the facility financial hardship.

III. Conclusion

I find the undisputed evidence establishes that Petitioner violated 42 C.F.R. § 483.13(b), (c)(1)(i) when one of its CNAs abused a resident by hitting her and verbally threatening her. The $1,500 PICMP that CMS imposed upon Petitioner was reasonable.

/s/
Joseph Grow
Administrative Law Judge