Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Rochelle Gardens Care Center,
(CCN: 14-6152),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-14-532

Decision No. CR4685

Date: August 17, 2016

DECISION

Petitioner, Rochelle Gardens Care Center, is a long term care facility located in Rochelle, Illinois, that participates in the Medicare program. Based on four surveys, completed from June through December 2013, the Centers for Medicare & Medicaid Services (CMS) determined that the facility was not in substantial compliance with multiple Medicare requirements. CMS imposed civil money penalties (CMPs) of $600 per day for 17 days of substantial noncompliance and $200 per day for an additional 13 days of substantial noncompliance ($12,800 total CMP). From September 24 through December 11, 2013, CMS also denied payment for new admissions (referred to as a DPNA).

Petitioner did not appeal three of the four surveys. For the fourth survey, completed November 12, 2013, it appealed six of seven deficiencies cited and the penalties imposed. Based on the deficiencies that Petitioner has not appealed, CMS moves for summary judgment, which Petitioner opposes.

Based on the deficiencies that Petitioner has not appealed, I find that, from June 2013 through December 11, 2013, the facility was not in substantial compliance with Medicare requirements. The very modest penalties imposed are reasonable.

Background

The Social Security Act (Act) sets forth requirements for nursing facilities to participate 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 survey skilled nursing facilities in order to determine whether they are in substantial compliance. Act § 1864(a); 42 C.F.R. § 488.20. Each facility must be surveyed annually, with no more than fifteen months elapsing between surveys, and must be surveyed 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. The state agency must also investigate all complaints. Act § 1819(g)(4).

This case involves four surveys.[1]

June 24, 2013 survey. Surveyors from the Illinois Department of Public Health (state agency) completed a complaint investigation/annual certification survey on June 24, 2013. CMS Exs. 1, 6. They found that the facility was not in substantial compliance with multiple program requirements, specifically:

- 42 C.F.R. § 483.10(b)(3) and 483.10(d)(2) (Tag F154) (resident rights – notice of rights and services and free choice) at scope and severity level D (isolated instance of substantial noncompliance that caused no actual harm with the potential for more than minimal harm);

- 42 C.F.R. § 483.10(b)(11) (Tag F157) (resident rights – notice of rights and services) at scope and severity level D;

[1] On June 18, 2013, state surveyors completed a life safety code (LSC) survey and found that the facility was not in substantial compliance with LSC requirements. The state agency subsequently determined that the facility had corrected those LSC deficiencies, no penalties were imposed, and the LSC findings are not the subject of this appeal. P. Ex. 3. Similarly, in August 2013, the state agency investigated several complaints lodged against the facility. In letters dated August 21 and August 27, 2013, it advised the facility that surveyors found no additional deficiencies but that previously-identified deficiencies continued. P. Exs. 1, 2. These investigations are not subjects of this appeal.

- 42 C.F.R. §§ 483.13(b) and 483.13(c)(1)(i) (Tag F223) (resident behavior and facility practices – abuse and staff treatment of residents) at scope and severity level G (isolated instance of substantial noncompliance that caused actual harm that was not immediate jeopardy;

- 42 C.F.R. §§ 483.13(c)(1)(ii)-(iii) and 483.13(c)(2)-(4) (Tag F225) (resident behavior and facility practices – staff treatment of residents: investigate and report allegations of abuse) at scope and severity level E (pattern of noncompliance that caused no actual harm with the potential for more than minimal harm);

- 42 C.F.R. § 483.13(c) (Tag F226) (resident behavior and facility practices – policies to prohibit abuse and neglect) at scope and severity level E;

- 42 C.F.R. § 483.15(b) (Tag F242) (quality of life – self-determination and participation) at scope and severity level D;

- 42 C.F.R. § 483.15(h)(1) (Tag F252) (quality of life – environment) at scope and severity level D;

- 42 C.F.R. § 483.25(c) (Tag F314) (quality of care – prevention of pressure sores) at scope and severity level D;

- 42 C.F.R. § 483.25(d) (Tag F315) (quality of care – urinary incontinence) at scope and severity level D;

- 42 C.F.R. § 483.25(e)(2) (Tag F318) (quality of care – range of motion) at scope and severity level D;

- 42 C.F.R. § 483.25(h) (Tag F323) (quality of care – accident prevention) at scope and severity level E;

- 42 C.F.R. § 483.35(c) (Tag F363) (dietary services – menus and nutrition adequacy) at scope and severity level E;

- 42 C.F.R. § 483.65 (Tag F441) (infection control) at scope and severity level F (widespread substantial noncompliance that caused no actual harm with the potential for more than minimal harm); and

- 42 C.F.R. § 483.70(h) (Tag F465) (physical environment – other environmental conditions) at scope and severity level E.

CMS Ex. 1.

In a letter dated July 9, 2013, the state agency advised Petitioner that, based on the June survey findings, the facility was not in substantial compliance with Medicare requirements. The letter warned that, unless the facility achieved substantial compliance within three months of the survey, it would be subject to a mandatory DPNA. The letter also mentioned that the state agency would propose that CMS impose a CMP. CMS Ex. 6.

August 2, 2013 survey. The Act directs the Secretary to survey a representative sample of skilled nursing facilities in each state in order to monitor the state agency's survey performance. This "validation survey" must be conducted within two months of a state survey. Act § 1819(g)(3); 42 C.F.R. § 488.301. If, based on the validation survey, CMS determines that the facility is not in compliance, that determination is "binding" and "takes precedence" over the state's contrary determinations. 42 C.F.R. § 488.330(a)(D)(ii).

Accordingly, on August 2, 2013, federal surveyors completed a federal monitoring survey of the facility. They found that the facility's substantial noncompliance continued; many deficiencies had not been corrected and many additional deficiencies were cited. Specifically, the surveyors found that the facility was not in substantial compliance with the following:

- 42 C.F.R. § 483.10(b)(11) (Tag F157) (resident rights – notice of rights and services) at scope and severity level D (**repeat deficiency**); [2]

- 42 C.F.R. §§ 483.10(e) and 483.75(*l*)(4) (Tag F164) (resident rights – privacy/confidentiality and administration – clinical records) at scope and severity level D (**new deficiency**);

- 42 C.F.R. § 483.13(a) (Tag F221) (resident behavior and facility practices – restraints) at scope and severity level D (**new deficiency**);

- 42 C.F.R. §§ 483.13(c)(1)(ii)-(iii) and 483.13(c)(2)-(4) (Tag F225) (resident behavior and facility practices – staff treatment of residents: investigate and report allegations of abuse) at scope and severity level E (**repeat deficiency**);

[2] For purposes of summary judgment, I view repeat deficiencies narrowly, considering a deficiency repeated if cited under the same F-tag. I am not bound by F-tags, however. I am bound by the regulations. Arguably, repeated noncompliance with the same regulation should be considered a repeat deficiency. But that issue is not material in this case, so I need not decide it.

- 42 C.F.R. § 483.13(c) (Tag F226) (resident behavior and facility practices – policies to prohibit abuse and neglect) at scope and severity level E (**repeat deficiency**);

- 42 C.F.R. § 483.15(a) (Tag F241) (quality of life – dignity) at scope and severity level E (**new deficiency**);

- 42 C.F.R. § 483.15(e)(1) (Tag F246) (quality of life – accommodation of needs) at scope and severity level E (**new deficiency**);

- 42 C.F.R. § 483.25 (Tag F309) (quality of care) at scope and severity level D (**new deficiency**);

- 42 C.F.R. § 483.25(d) (Tag F315) (quality of care – urinary incontinence) at scope and severity level D (**repeat deficiency**);

- 42 C.F.R. § 483.25(*l*) (Tag F329) (quality of care – unnecessary drugs) at scope and severity level D (**new deficiency**);

- 42 C.F.R. § 483.35(d)(1)-(2) (Tag F364) (dietary services – food) at scope and severity level E (**new deficiency**);

- 42 C.F.R. § 483.35(e) (Tag F367) (dietary services – therapeutic diets) at scope and severity level D (**new deficiency**);

- 42 C.F.R. § 483.35(i) (Tag F371) (dietary services – sanitary conditions) at scope and severity level F (**new deficiency**);

- 42 C.F.R. § 483.40(a) (Tag F385) (physician services – physician supervision) at scope and severity level D (**new deficiency**);

- 42 C.F.R. § 483.60(b), (d), and (e) (Tag F431) (pharmacy services – service consultation, drug labeling, and drug storage) at scope and severity level E (**new deficiency**);

- 42 C.F.R. § 483.65 (Tag F441) (infection control) at scope and severity level F (**repeat deficiency**);

- 42 C.F.R. § 483.70(c)(2) (Tag F456) (physical environment – space and equipment) at scope and severity level D (**new deficiency**);

- 42 C.F.R. § 483.70(h) (Tag F465) (physical environment – other environmental conditions) at scope and severity level E (**repeat deficiency**);

- 42 C.F.R.§ 483.70(h)(4) (Tag F469) (physical environment – pest control) at scope and severity level F (**new deficiency**); and

- 42 C.F.R. § 483.75(*l*)(1) (Tag 514) (administration – administration/clinical records) at scope and severity level E (**new deficiency**).

CMS Ex. 2.

In letters dated August 6 and 9, 2013, the state agency and CMS advised Petitioner of the June and August survey findings and repeated the warning that a DPNA would be imposed beginning September 24, 2013, if the facility did not return to substantial compliance. The letters advised Petitioner of its right to appeal the findings of substantial noncompliance that led to CMS's imposing a penalty. CMS Exs. 7, 8.

Petitioner did not appeal the June and August survey findings, which are therefore final and binding. 42 C.F.R. § 498.20(b).

Surveyors from the state agency revisited the facility on August 13, and, in a September 12, 2013 letter to Petitioner, the state agency reported that the facility had corrected the deficiencies cited in June – but not those cited in August. CMS Ex. 9; P. Ex. 4.[3]

November 12, 2013 survey. On November 12, 2013, state agency surveyors completed another follow-up survey/complaint investigation. Based on the survey findings, CMS again determined that the facility was not in substantial compliance with multiple Medicare requirements. Specifically:

- 42 C.F.R. § 483.13(c) (Tag F224) (resident behavior and facility practices – abuse and staff treatment of residents) at scope and severity level H (pattern of substantial noncompliance that caused actual harm that was not immediate jeopardy (**new deficiency**);

- 42 C.F.R. § 483.25 (Tag F309) (quality of care) at scope and severity level H (**repeat deficiency**);

[3] In error, the state agency sent two additional letters, both dated October 22, 2013, advising the facility that it had achieved substantial compliance. CMS Exs. 11, 12; P. Ex. 5. In letters dated October 28, 2013, the state agency rescinded those notices. CMS Exs. 13, 14. Petitioner argues that CMS is bound by the state agency's erroneous declaration. P. Br. at 4-5. I discuss below why Petitioner's argument fails.

- 42 C.F.R. § 483.25(j) (Tag F327) (quality of care – hydration) at scope and severity level D (**new deficiency**);

- 42 C.F.R. § 483.65 (Tag F441) (infection control) at scope and severity level H (**repeat deficiency**);

- 42 C.F.R. § 483.75 (Tag F490) (administration) at scope and severity level H (**new deficiency**);

- 42 C.F.R. § 483.75(i) (Tag F501) (administration – medical director) at scope and severity level H (**new deficiency**); and

- 42 C.F.R. § 483.75(o)(1) (Tag F520) (administration – quality assessment and assurance) at scope and severity level H (**new deficiency**).

CMS Ex. 3.

In a letter dated November 19, 2013, the state agency advised the facility that surveyors found additional deficiencies during the revisit completed November 12. Because of these and earlier deficiencies, the letter said, the state agency recommended that CMS impose a $400 per day CMP in addition to the DPNA already in effect. The letter also advised the facility that it had the right to appeal the determinations of noncompliance for which remedies were imposed. CMS Ex. 15.

CMS sent the facility a notice letter dated December 2, 2013, citing the November 12 survey deficiencies and adding a CMP of $600 per day beginning November 12 and continuing until the facility made necessary corrections or was terminated. The letter advised that the DPNA remained in effect. The letter reminded the facility of its appeal rights. CMS Ex. 17.

December 9, 2013 survey. State surveyors revisited the facility on December 9, 2013. They found that the facility was still not in substantial compliance and cited the following deficiencies:

- 42 C.F.R. § 483.13(a) (Tag F221) (resident behavior and facility practices – restraints) at scope and severity level D (**repeat deficiency**);

- 42 C.F.R. § 483.25(j) (Tag F327) (quality of care – hydration) at scope and severity level E (**repeat deficiency**);

- 42 C.F.R. § 483.35(d)(1)-(2) (Tag F364) (dietary services – food) at scope and severity level F (**repeat deficiency**).

CMS Ex. 4.

In a letter dated December 10, 2013, the state agency advised the facility that its substantial noncompliance continued, and the penalties would remain in effect. The letter warned that the facility's Medicare participation would terminate if the facility did not achieve and maintain substantial compliance by December 24, 2013. CMS Ex. 18.

Finally, following a survey completed on December 12, 2013, CMS determined that the facility returned to substantial compliance on December 12. CMS Ex. 19.

CMS imposed against the facility CMPs of $600 per day for 17 days of substantial noncompliance (November 12 – 28, 2013) and $200 per day for an additional 13 days of substantial noncompliance (November 29 – December 11, 2013), for a total CMP of $12,800. CMS Ex. 19.

Petitioner contests six of the seven deficiencies cited during the November 12 survey and the amount of the CMPs. It does not appeal the deficiency cited under 42 C.F.R. § 483.25(j) (hydration). Hearing Request; *see* P. Br. at 7 n.3 (conceding that Petitioner appealed six of the deficiencies cited).

Issue

Based on the June and August surveys, which Petitioner did not appeal, and on the deficiency it did not challenge when it appealed the November survey, the facility was not in substantial compliance with Medicare program requirements from June 24 through December 11, 2013. I must therefore affirm a CMP of at least $50/day. 42 C.F.R. § 488.438(a)(ii).

The remaining issue is whether the CMPs imposed are reasonable ($600 per day for 17 days and $200 per day for 13 days).

Discussion

1. ***From June 24 through December 11, 2013, the facility was not in substantial compliance with Medicare program requirements, and CMS is authorized to impose a remedy. CMS's choice of remedies is not reviewable***.[4]

CMS's findings of noncompliance that result in its imposing a remedy are considered initial determinations that an affected party, such as Petitioner, may appeal. The

[4] My findings of fact/conclusions of law are set forth, in bold and italics, as captions in the discussion section of this decision.

regulations governing such actions dictate that CMS send notice of the initial determination to the affected party setting forth the basis for and the effect of the determination and the party's right to a hearing. 42 C.F.R. §§ 498.3, 498.5, 498.20(a)(1). The affected party may then challenge the determination by filing a hearing request within 60 days of receiving the notice. 42 C.F.R. § 498.40. An initial determination is final and binding unless reversed or modified by a hearing decision (or under circumstances not applicable here). 42 C.F.R. § 498.20(b).

In this case, following the June and August surveys, CMS (or the state agency) sent the appropriate notices. Petitioner did not appeal either survey and CMS's determinations that the facility was not in substantial compliance as to the June and August surveys are therefore final and binding. Following the November survey, Petitioner filed a hearing request but did not challenge the deficiency cited under 42 C.F.R. § 483.25(j) (Tag F327). That deficiency, by itself, put the facility out of substantial compliance. CMS's determination that the facility was not in substantial compliance as of the November survey is therefore final and binding.

Because we have a final and binding determination that the facility was not in substantial compliance, CMS has the discretion to impose one or more of the enforcement remedies listed in 42 C.F.R. § 488.406, which include the DPNA and the per day CMPs imposed here. Act § 1819(h); 42 C.F.R. § 488.402. So long as CMS has a basis for imposing a remedy, I have no authority to review its determination to do so nor may I review CMS's choice of remedy. 42 C.F.R. §§ 488.408(g)(2), 488.438(e), 498.3(d)(14); *Beverly Health & Rehab. Servs., Inc. v. Thompson*, 223 F. Supp. 73, 111 (D.D.C. 2002) (holding that the "determination of what remedy to seek is beyond challenge.").

Petitioner wrongfully infers that the facility must be out of substantial compliance for three months before CMS can impose a DPNA. *See* P. Br. at 3 (arguing that the November survey "was not part of the June 24, 2013 survey cycle and therefore no DPNA results."). CMS *must* impose a DPNA if the facility does not achieve substantial compliance within three months, but that does not preclude CMS from imposing a DPNA – or any other remedy listed in section 488.406 – whenever it finds substantial noncompliance. Act § 1819(h)(2)(D); 42 C.F.R. §§ 488.412(c), 488.417(b)(1).

The state agency's erroneous letters. Nor did the state agency's October 22 letters – which were sent in error – put the facility in substantial compliance, as Petitioner claims. In error, the state agency sent two letters, both dated October 22, 2013, advising the facility that it had achieved substantial compliance. CMS Exs. 11, 12. Within a week, in letters dated October 28, 2013, the state agency rescinded those notices, emphasizing that "**[u]ntil [a] revisit has been conducted, and compliance achieved, the [state agency] CAN NOT recommend to [CMS] . . . that the facility be certified for continuing participation in the Medicare (Title 18) . . . program[ ]**." CMS Ex. 13 (emphasis in original). Further, the letters said that "**[f]ollowing further review, . . . the facility is not**

eligible for a revisit . . . and an onsite revisit will be necessary to determine if the facility has achieved and maintained "Substantial Compliance." CMS Ex. 14 (emphasis in original).

Petitioner points to one of the October 22 letters (CMS Ex. 12; P. Ex. 5) and argues that CMS is bound by the state agency's erroneous declaration that the facility achieved substantial compliance on October 15, 2013. P. Br. at 4-5. Petitioner does not claim that it was prejudiced by the erroneous notices. In fact, Petitioner maintains that it need not establish prejudice. P. Br. at 5.

An erroneous notice cannot put the facility back in substantial compliance. When a facility has been found to be out of substantial compliance (as the facility was here), it remains so until it affirmatively demonstrates that it has achieved substantial compliance once again. *Premier Living & Rehab Ctr.*, DAB No. 2146 at 23 (2008); *Lake City Extended Care Ctr.*, DAB 1658 at 12-15 (1998). As the state agency explained in its October 28 rescission letters, a facility's return to substantial compliance usually must be established through a resurvey. 42 C.F.R. § 488.454(a). Moreover, as Petitioner should have known, CMS, not the state, ultimately decides whether a facility is in substantial compliance. Act § 1819(h)(1)-(2); 42 C.F.R. §§ 488.330(a)(D)(ii), 488.452(a)(2); *Rosewood Care Ctr. of Rockford*, DAB No. 2466 at 9 (2012); *Britthaven of Chapel Hill*, DAB No. 2284 at 6-8 (2009); *see Regency on the Lake*, DAB No. 2205 at 5 (2008) (finding a provider's reliance on statements of state employees "particularly unreasonable" because it should have known that neither a state agency not its employees are empowered to find a facility eligible to participate in the Medicare program: only the Secretary has that authority).

Having concluded that CMS had the authority to impose CMPs, I next consider whether the amounts of those penalties are reasonable.

2. The penalties imposed are reasonable.

To determine whether a civil money penalty is reasonable, I apply the factors listed in 42 C.F.R. § 488.438(f): (1) the facility's history of noncompliance; (2) the facility's financial condition; (3) factors specified in 42 C.F.R. § 488.404; and (4) the facility's degree of culpability, which includes neglect, indifference, or disregard for resident care, comfort, or safety. The absence of culpability is not a mitigating factor. The factors in 42 C.F.R. § 488.404 include: (1) the scope and severity of the deficiency; (2) the relationship of the deficiency to other deficiencies resulting in noncompliance; and (3) the facility's prior history of noncompliance in general and specifically with reference to the cited deficiencies.

I consider whether the evidence supports a finding that the amount of the CMP is at a level reasonably related to an effort to produce corrective action by a provider with the

kind of deficiencies found, and in light of the section 488.438(f) factors. I am neither bound to defer to CMS's factual assertions nor free to make a wholly independent choice of remedies without regard for CMS's discretion. *Barn Hill Care Ctr.*, DAB No. 1848 at 21 (2002); *Cmty. Nursing Home*, DAB No. 1807 at 22 *et seq*. (2002); *Emerald Oaks*, DAB No. 1800 at 9 (2001); *CarePlex of Silver Spring*, DAB No. 1683 at 8 (1999).

Here, CMS imposes penalties of $600 per day from November 12 through 28, 2013, and $200 per day from November 29 through December 11, 2013. These penalties are at the low to very low end of the penalty range ($50 to $3,000). 42 C.F.R. §§ 488.408(d)(1)(iii), 488.438(a)(1)(ii).

With respect to the section 488.438(f) factors, I note first that the facility has an abysmal history. Indeed, given the facility's history, the penalty amounts are surprisingly low. The facility has consistently been out of substantial compliance for every annual survey at least as far back as 2006. CMS Ex. 5. Many of its past deficiencies related to resident abuse and the quality of resident care (42 C.F.R. §§ 483.13, 483.25) and were quite serious. In June 2013, for example:

- the facility failed to protect residents from abuse; surveyors found multiple complaints that a licensed practical nurse physically and mentally abused residents, causing actual harm (CMS Ex. 1 at 5-11);

- it failed to prevent pressure sores for two of four residents in the survey sample (CMS Ex. 1 at 28-31);

- it failed to provide proper catheter care for one resident who suffered a urinary tract infection: "When [the resident] arrived [at] the hospital, they removed her urinary catheter and there was a lot of brown, crusty stuff on the tubing." (CMS Ex. 1 at 31-33);

- it failed to provide a required walking restorative program for one resident and failed to provide required range-of-motion exercises for another (CMS Ex. 1 at 33-37); and

- it failed to provide adequate supervision and assistive devices to prevent accidents; in one case staff did not supervise a resident who was at risk of falling while on the toilet; a second resident fell 11 times in less than 6 months (CMS Ex. 1 at 37-40).

In August, the deficiencies also included multiple instances of the facility failing to protect residents from abuse and failing to provide residents with the quality of care they needed (42 C.F.R. §§ 483.13, 483.25):

- staff restrained residents without physician orders (CMS Ex. 2 at 5-7);
- the facility again failed to protect residents from staff abuse (CMS Ex. 2 at 7-15);
- it did not provide care and services necessary to prevent and treat severe skin rashes afflicting multiple residents and staff (CMS Ex. 2 at 18-23, 44-49);
- it again failed to provide proper catheter care to two residents who suffered urinary tract infections (CMS Ex. 2 at 23-25).

Petitioner does not claim that its financial condition affects its ability to pay the CMP.

Finally, the hydration deficiency, cited during the November survey, is significant and evidences the facility's ongoing failure to provide adequate care. In order to assure that residents receive the care and services necessary to allow them to attain or maintain their highest practicable physical, mental, and psychosocial well-being, the facility must, among other requirements, provide each resident with sufficient fluid intake to maintain proper hydration and health. 42 C.F.R. § 483.25(j). Surveyors found that two of the three residents reviewed suffered severe dehydration.

Resident 3 (R3) was confused and unable to obtain fluids independently. He required 2,300 cc's of fluid daily. Staff were supposed to monitor his meals and provide 240 cc's of fluid at each medication pass. In fact, R3 *never* consumed more than 800 cc's of fluid in a day. Eventually, he exhibited symptoms consistent with dehydration. He suffered an abdominal abscess, requiring antibiotics. He fell several times within 30 minutes and was lethargic and weak. Yet, facility staff neither assessed nor documented skin turgor, oral mucous membranes, or urine output. He was eventually hospitalized, suffering from severe dehydration. CMS Ex. 3 at 14-15.

Another resident, Resident 1 (R1), required nectar-thick fluids. His care plan did not indicate how much fluid he required nor how he was supposed to meet his hydration goal. The plan directed staff to record R1's fluid intake and monitor for changes in appetite, which they failed to do. R1 became increasingly confused and lost his appetite. Staff did not assess his skin turgor, oral mucous membranes, or urine output. He was admitted to the hospital with severe hypernatremia (high sodium) dehydration and severe hyperglycemia. His laboratory results confirmed that he was dehydrated. He required intravenous hydration. One staff member described his appearance as shocking: "His entire body was covered with sores. He was unresponsive when the ambulance first got to him . . . . The physician told me he was dehydrated." CMS Ex. 3 at 15-17.

That two residents became so dehydrated as to require hospitalization shows the facility's high degree of neglect, indifference, or disregard for resident care, comfort, or safety, for which the facility is culpable.[5]

Conclusion

Based on the unchallenged deficiencies, the facility was not in substantial compliance with Medicare program requirements from June 2013 through December 11, 2013. The CMPs imposed are reasonable. I therefore grant CMS's motion for summary judgment.

/s/
Carolyn Cozad Hughes
Administrative Law Judge

[5] I am deeply troubled that the state agency cited this deficiency at scope and severity level D even though these two residents were plainly seriously harmed by the facility's failure to keep them adequately hydrated. However, I have no authority to review CMS's scope and severity finding in this case. 42 C.F.R. § 498.3(b)(14) (providing that the level of noncompliance is reviewable only if a successful challenge would affect the range of CMP amounts or includes a finding of substandard quality of care that results in the loss of the facility's nurse aide training program).