Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Hillsborough County Nursing Home
(CCN: 305048),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-186

Decision No. CR2386

Date: June 21, 2011

DECISION GRANTING MOTION OF CENTERS FOR MEDICARE AND MEDICAID SERVICES FOR SUMMARY JUDGMENT

I grant the motion of the Centers for Medicare and Medicaid Services (CMS) for summary judgment against Petitioner, Hillsborough County Nursing Home. I sustain a civil money penalty of $100 per day for each day of a period beginning on August 5, 2010 and continuing through October 31, 2010.

I. Background

Petitioner is a skilled nursing facility that does business in the State of New Hampshire. It participates in the Medicare program. Its participation in Medicare is governed by sections 1819 and 1866 of the Social Security Act and by implementing regulations at 42 C.F.R. Parts 483 and 488. Its hearing rights in this case are governed by regulations at 42 C.F.R. Part 498.

CMS determined to impose the remedies that I discuss in the opening paragraph of this decision, and Petitioner requested a hearing. CMS based its remedy determination on

noncompliance findings that were made at two surveys of Petitioner's facility. These surveys were completed on August 5, 2010 (August 5 Survey) and on October 13, 2010 (October 13 Survey). The case was assigned to me for a hearing and a decision. CMS moved for summary judgment, and Petitioner opposed the motion. With its motion, CMS filed eight proposed exhibits (Ex.) that it identified as CMS Ex. 1 – CMS Ex. 8. In opposing CMS's motion, Petitioner filed six proposed exhibits that it identified as P. Ex. 1 – P. Ex. 6. I receive all of these exhibits into the record.

II. Issues, Findings of Fact, and Conclusions of Law

A. Issues

The issues are whether:

1. The findings of noncompliance that were made at the August 5 Survey are administratively final;

2. Petitioner remained substantially noncompliant with participation requirements as of the October 13 Survey; and

3. CMS's remedy determination is reasonable.

B. Findings of Fact and Conclusions of Law

I make the following findings of fact and conclusions of law (Findings).

1. The findings of noncompliance that were made at the August 5 Survey are administratively final.

I find that the findings of noncompliance that were made at the August 5 Survey are administratively final and may not be challenged by Petitioner. That is so for two reasons. First, Petitioner filed its hearing request challenging the August 5 Survey findings untimely and failed to establish good cause for its failure to file a timely request. Second, Petitioner failed to challenge several findings of substantial noncompliance that were made at the August 5 Survey.

On September 17, 2010, CMS sent a notice to Petitioner advising Petitioner that CMS concurred with findings of noncompliance that were made at the August 5 Survey. The notice advised Petitioner of CMS's determination to impose remedies against it, and it specifically instructed Petitioner of its right to a hearing.

> If you disagree with this determination, you or your legal representative may request a hearing before an administrative law judge of the Department

> of Health and Human Services, Departmental Appeals Board. Procedures governing this process are set out in Federal regulations at 42 CFR Section 498.40, et seq. A written request for a hearing *must be filed no later than 60 days from the date of your receipt of this letter.*

CMS Ex. 2 at 3 (emphasis added).

Petitioner did not file a hearing request until December 21, 2010, about 90 days from the date that it received CMS's September 17, 2010 notice. That is one month outside of the 60-day period during which Petitioner was entitled to a hearing.

Furthermore, Petitioner only challenged some of the findings of noncompliance that were made at the August 5 Survey. The report of the August 5 Survey cites 14 instances of alleged substantial noncompliance by Petitioner. CMS Ex. 7. However, in its December 21, 2010 hearing request, Petitioner challenged only seven of these noncompliance findings.[1]

A party filing an untimely hearing request is not entitled to a hearing absent a showing by that party of good cause for its untimeliness. 42 C.F.R. § 498.40(c)(2). An administrative law judge may dismiss an untimely hearing request absent a showing of good cause for its untimely filing. 42 C.F.R. § 498.70(c). The term "good cause" is not defined in the regulations, but it has been held to be a circumstance that was beyond a party's ability to control that prevented it from timely requesting a hearing.

Petitioner asserts that it was misled by allegedly ambiguous communications to it from CMS. As support for its assertion, Petitioner cites to a letter that CMS sent to it on October 21, 2010. That letter recites again the findings of noncompliance that were made at the August 5 Survey but also recites findings of correction of noncompliance relating to Life Safety Code deficiencies and additional findings of noncompliance that were made at the October 13 Survey. CMS Ex. 4. The October 21 letter advises Petitioner that remedies would be imposed against it, based not only on the findings of noncompliance that were made at the August 5 Survey, but on findings of noncompliance that were made at the October 13 Survey. As with CMS's September 17 letter, the October 21 letter advises Petitioner that it has a right to request a hearing within 60 days.

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[1] In its hearing request, Petitioner challenged findings that it had failed to comply substantially with 42 C.F.R. §§: 483.13(a); 483.13(c); 483.20(k)(3)(i); 483.25(l); 483.25(m)(2); 483.60(b),(d),(e); and 483.75(l)(1). It did not challenge findings that it failed to comply substantially with: 42 C.F.R. §§: 483.13(c)(1)(ii)-(iii), (c)(2)-(4); 483.13(c) (citing other facts than those challenged by Petitioner under a separate deficiency finding citing the same regulatory language); 483.20(d), (k)(1); 483.20(d), (k)(2); 483.25(c); 483.25(h); and 483.35(i).

Petitioner argues that the reasonable interpretation of this letter is that it restarted the clock for appealing *all* of the survey findings of noncompliance *including* those findings that were made at the August 5 Survey. Thus, contends Petitioner, the October 21 letter could be read reasonably as either extending the deadline for challenging the August 5 Survey findings, or superseding the September 17 letter and creating a whole new timeframe for appealing all of the adverse survey findings.

I disagree. The only reasonable interpretation that one may give to the October 21 letter is that it was written to address the findings of noncompliance that were made after August 5, 2010. There would have been no reason for CMS to send this letter if there had not been additional noncompliance findings made on October 13, 2010. I find, consequently, that a reasonable individual reading this letter would know that it was intended to address the findings of noncompliance made after August 5 and that the hearing right recited in the October 21 letter related to the October 13, 2010 findings of noncompliance. I do not find that the October 21 letter created any ambiguity. It does not contain any language to suggest that it superseded CMS's September 17 notice nor does it suggest that the time frame during which Petitioner could appeal the August 5 findings of noncompliance had been enlarged. Consequently, Petitioner could not rely reasonably on the October 21 letter to assume that it had additional time within which to challenge the noncompliance findings made at the August 5 Survey. I find no good cause to grant Petitioner the right to challenge untimely the findings made at the August 5 Survey, and I dismiss Petitioner's hearing request as it relates to those findings.

Moreover, even a finding of good cause for late filing would not now allow Petitioner to challenge seven substantial deficiencies found at the August 5 Survey that Petitioner did not address in its hearing request. As I discuss above, Petitioner only challenged seven of the 14 findings of substantial noncompliance that were made at the August 5 Survey. The seven findings that were never challenged by Petitioner are administratively final and not subject to further review without regard to the issue of dismissal. These unchallenged findings of noncompliance would provide a basis for the remedy that CMS determined to impose, even if I did not dismiss Petitioner's hearing request.

2. Petitioner remained substantially noncompliant with participation requirements as of the October 13 Survey.

The additional findings of substantial noncompliance that were made at the October 13 Survey consisted of alleged failures by Petitioner to comply with the requirements of 42 C.F.R. §§ 483.20(k)(3)(i) and 483.60. I find CMS's allegations of noncompliance to be substantiated by the undisputed facts.

a. Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.20(k)(3)(i).

The regulation at issue requires a facility to provide and arrange services that meet professional standards of quality. CMS offers facts to show that Petitioner failed to comply with this regulation in that its staff administered incorrect medication dosages to two of Petitioner's residents, identified as Residents #s 5 and 19 in the October 13 Survey report. CMS Ex. 3 at 1.

Specifically, CMS identifies facts showing that, in September 2010, a physician ordered that Resident # 5 be administered a daily dose of 5,000 units of vitamin D3. CMS Ex. 3 at 2. However, and due to a typographical error on the resident's medication administration record, the resident was supplied with, and received, a dose of 50,000 units of vitamin D3.

As concerns Resident # 19, CMS offers facts showing that a physician ordered that the resident's dose of OxyContin, a controlled substance, be decreased from 15 to 10 mg. However, review of Petitioner's narcotic administration book establishes that at 8:00 p.m. on September 22, 2010 and at 9:00 p.m. on September 23, 2010, Petitioner's staff continued to administer 15 mg of OxyContin to the resident, notwithstanding the physician's order for a reduced dose. CMS Ex. 3 at 4.

Petitioner does not deny these facts. It does not deny that its staff administered doses of medication to Residents #s 5 and 19 that exceeded the amounts prescribed by the residents' physicians. Rather, it contends that the surveyors who performed the October 13 Survey obtained information that was protected from disclosure, consisting of reports that were generated at Petitioner's quality assessment and assurance committee meetings. Additionally, Petitioner argues that the misadministration of vitamin D3 to Resident # 5 neither harmed the resident nor posed a potential of harm for this resident.

It is true, as Petitioner contends, that quality assurance and assessment records may not be reviewed by surveyors, unless the facility elects to provide those records to the surveyors. *See* 42 C.F.R. § 483.75(o)(3). Furthermore, the good faith efforts of a facility's quality assurance and assessment committee may not be used as the basis to impose remedies against a facility. 42 C.F.R. § 483.75(o)(4).

However, here, Petitioner's staff voluntarily turned over quality assurance records to the surveyors, thus waiving the protection against disclosure of those records. And, even if those records remain protected, the facts that are the basis for the allegations of noncompliance are established by documents that are not protected against disclosure, including Petitioner's medication administration records, nurses' notes, and physicians' orders. The point is that the facts relied on by CMS are established without regard to

quality assurance and assessment records, *and Petitioner does not dispute those facts*. Thus, it is irrelevant that the surveyors may have reviewed documents that ordinarily are exempt from disclosure.

I disagree with Petitioner's assertion that there was no potential for harm in the medication administration errors that are at issue. First, OxyContin is a controlled substance – a narcotic – and by definition, misadministration of this drug has at least a potential for harming the recipient. Second, the undisputed fact that the staff misadministered drugs to two of Petitioner's residents is sufficient for me to infer a propensity on the part of the staff to commit medication errors. That propensity poses a potential for harm to residents, even if the specific errors do not.

b. Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.60.

In relevant part, the applicable regulation requires a skilled nursing facility to provide pharmaceutical services to its residents that assure the accurate acquiring, receiving, dispensing, and administering of all drugs that are necessary to meet the needs of each of its residents. 42 C.F.R. § 483.60(a). CMS alleges – based on the identical facts on which it relies for its allegations of noncompliance with the requirements of 42 C.F.R. § 483.20(k)(3)(i) – that Petitioner failed to comply with this requirement in that Petitioner's staff failed accurately to administer drugs to Residents #s 5 and 19. CMS Ex. 3 at 5-7.

The undisputed facts establish noncompliance. As I discuss at subpart a. of this Finding, there is undisputed evidence establishing that Petitioner failed to comply with physicians' orders in administering medications to Residents #s 5 and 19 and, in fact, administered overdoses of medication to each of the residents. Petitioner's defenses to CMS's allegations are the same as those that I have addressed above, and it is unnecessary that I readdress them here.

3. CMS's remedy determination is reasonable.

CMS determined to impose civil money penalties of $100 per day for each day of a period that began on August 5, 2010 and that continued through October 31, 2010. The penalties that CMS determined to impose are minimal, and I find them to be reasonable.

Civil money penalties for noncompliance that is substantial but that does not put residents of a facility at immediate jeopardy must fall within a range of from $50 to $3,000 per day. 42 C.F.R. § 488.438(a)(1)(ii). There are factors that are used for deciding what may be a reasonable penalty that falls within this range. These factors include the seriousness of a facility's noncompliance, its compliance history, its culpability, and its financial condition. 42 C.F.R. §§ 488.438(f)(1) – (4), 488.404 (incorporated by reference into 42 C.F.R. § 488.438(f)(3)).

The $100 per day penalties that CMS determined to impose against Petitioner fall near the bottom of the range of permissible non-immediate jeopardy level penalties and comprise only three percent of the maximum permissible amount. These are minimal penalties.

I find the penalties to be justified by the relative seriousness of Petitioner's noncompliance. As of August 2010, Petitioner manifested 14 deficiencies (seven of which Petitioner did not challenge) that posed at least the potential for causing harm to residents. After October 13, Petitioner continued to exhibit two potentially harmful deficiencies. This potential for harm is certainly sufficient to justify the minimal penalties that CMS determined to impose. Indeed, five of the deficiencies that were identified at the August 5 Survey that Petitioner did not timely challenge were deficiencies that caused actual harm to residents. These deficiencies were Petitioner's failures to comply substantially with the requirements of 42 C.F.R. §§ 483.13(c), 483.20(k)(3)(i), 483.25(l), 483.25(m)(2), and 483.75(l)(1).

Petitioner argues that there are four reasons why the civil money penalty amount is unreasonable. It contends that: (1) it had a strong record of compliance prior to the two surveys that are at issue here; (2) it is unreasonable to ask it to pay civil money penalties in the amount that CMS determined to impose given that it is a publicly owned facility with a tight fiscal budget; (3) it should be given credit for the fact that none of the deficiencies at issue put residents at immediate jeopardy; and (4) the penalties are unreasonable because none of the deficiencies establish intentional neglect, indifference, or disregard for residents' care, comfort or safety. Petitioner's Brief at 16.

I do not find that any of these arguments establish a fact dispute that would preclude imposition of the minimal civil money penalties that CMS determined to impose. As I have stated, the penalties that are at issue here are only three percent of the maximum allowable civil money penalties for non-immediate jeopardy level deficiencies and are nearly as low as can be imposed for such noncompliance. The minimal penalties take into account the facility's compliance history, the absence of immediate jeopardy, and the absence of facts proving intentional malfeasance by Petitioner's staff. As for Petitioner's financial condition, it has not offered any facts to show that paying civil money penalties as low as those that are imposed here would be a hardship or would adversely impact the care that it gives to its residents.

/s/
Steven T. Kessel
Administrative Law Judge