Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Harlingen Nursing and Rehabilitation Center, (CCN: 67-5606),	)	Date: October 13, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-441
	)	Decision No. CR2017
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

The Centers for Medicare & Medicaid Services (CMS) moved to dismiss this appeal or, in the alternative, for summary disposition. I deny the motion to dismiss the case. However, I grant the alternative motion for summary disposition. Accordingly, I uphold the per instance civil money penalty (PICMP) of $2500 imposed against Petitioner by CMS.

I. Background

Petitioner is a skilled nursing facility located in Harlingen, Texas. Following a survey completed on February 4, 2009, the Texas Department of Aging and Disability Services (state agency) determined that there had been an incident of past noncompliance at the facility on January 22, 2009. The state agency found specifically that Petitioner failed to ensure adequate use of assistive devices (a lap seatbelt) during a resident's (Resident 1's) transfer in a facility van. This resulted in the resident falling from the wheelchair and sustaining a leg fracture. The state agency cited this incident as violating the regulations at 42 C.F.R. § 483.25(h) (Tag F323 on the February 4, 2009 statement of deficiencies) at a level G (actual harm that is not immediate jeopardy), because the failure to use seatbelts as designed when transporting residents in a van could affect all wheelchair bound residents so transported and, in this instance, the resident involved suffered actual harm.

The state agency notified Petitioner of its finding by letter dated February 18, 2009. CMS notified Petitioner by letter dated March 5, 2009, that it accepted the state agency's recommendation regarding the finding of noncompliance at a level G and that it adopted the remedy recommended by the state agency, imposition of a $2500 PICMP.

Petitioner filed a request for hearing. The case was assigned to me for hearing and decision on May 14, 2009. CMS filed its motion to dismiss and, in the alternative, its motion for summary disposition (CMS Br.), accompanied by CMS exhibits (CMS Exs. 1-3). Petitioner responded (P. Br.), accompanied by Petitioner's exhibits (P. Exs.) 1-8. In the absence of objection, I admit CMS Exs. 1-3 and P. Exs. 1-8 into evidence.

II. Issues

The issues in this case are:

Whether Petitioner filed a timely hearing request;

Whether summary disposition is appropriate;

Whether CMS has a basis upon which to impose the $2500 PICMP;

Whether Petitioner has a right to contest whether the PICMP imposed is reasonable; and

Whether the amount of the PICMP imposed is reasonable.

III. Applicable Law

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 the statutory provisions. Act §§ 1819 and 1919. The Secretary's regulations governing 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 and Medicaid programs, facilities periodically undergo surveys to determine whether they comply with applicable statutory and regulatory requirements. They must maintain substantial compliance with program requirements and, 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. If a facility is not in substantial compliance with program requirements, CMS has the authority to impose, in addition to termination, one or more of the enforcement remedies listed in 42 C.F.R. § 488.406, including a denial of payment for new admissions, directed in-service training, and imposition of a CMP. *See* Act § 1819(h).

CMS may impose a CMP against a facility either for the number of days during which the facility fails to comply substantially with one or more participation requirements or for each instance in which a facility fails to comply substantially with a participation requirement. 42 C.F.R. § 488.430(a). Therefore, CMS may impose a PICMP within the range of $1000 to $10,000 for each instance of noncompliance regardless of whether or not the deficiencies constitute immediate jeopardy. 42 C.F.R. § 488.438(a)(2). The specific amount of the PICMP must be reasonable, but an ALJ may not reduce the PICMP below $1000.

Scope and severity levels are used by CMS and a state when selecting remedies. The scope and severity level is designated by an alpha character, A through L, selected by CMS or the state agency from the scope and severity matrix published in the State Operations Manual (SOM), section 7400E; *see also* 42 C.F.R. § 488.408. A scope and severity level of A, B, or C indicates a deficiency that presents no actual harm but has the potential for minimal harm. Facilities with deficiencies of a level no greater than C remain in substantial compliance. 42 C.F.R. § 488.301. A scope and severity level of D, E, or F indicates a deficiency that presents no actual harm but has the potential for more than minimal harm that does not amount to immediate jeopardy. A scope and severity level of G, H, or I indicates a deficiency that involves actual harm that does not amount to immediate jeopardy. Scope and severity levels J, K, and L are deficiencies that constitute immediate jeopardy to resident health or safety. The matrix, which is based on 42 C.F.R. § 488.408, specifies which remedies are required and optional at each level based upon the frequency of the deficiency.

IV. Findings of Fact and Conclusions of Law and Discussion

My findings of fact and conclusions of law are numbered and set forth in italics and bold type. My discussion follows each finding.

1. Petitioner's hearing request is timely.

Petitioner had 60 days from its receipt of CMS's March 5, 2009 notice letter to request a hearing. 42 C.F.R. § 498.40(a). CMS alleges that Petitioner's hearing request was filed by FAX on May 11, 2009, and thus was filed out of time. Petitioner's hearing request was mailed timely to the Departmental Appeals Board (Board) on May 4, 2009, as evidenced by the postal stamp on the envelope retained by my office, and as attested to by Robert W. Soliz in P. Ex. 1. Mr. Soliz attests that he mailed the hearing request on May 4, 2009, by U.S. Mail, and that he sent a copy of the hearing request by FAX to

Vilma Acosta at CMS. The May 11, 2009 FAX cover sheet referenced by CMS transmitted CMS's March 5, 2009 notice letter to Petitioner, and was sent because the notice letter was not included with Petitioner's hearing request. P. Ex. 1.

2. Summary disposition is appropriate.

In its decision in *Illinois Knights Templar Home*, DAB No. 2274, at 3-4 (2009), the Board quoted the process and standard for resolving a CMS motion for summary judgment that it set forth in its decision in *Kingsville Nursing and Rehabilitation Center*, DAB No. 2234, at 3-4 (2009). The Board held in *Kingsville* that,

> 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. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986).
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> . . . The party moving for summary judgment bears the initial burden of demonstrating that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. If a moving party carries its initial burden, the non-moving party must "come forward with 'specific facts sowing that there is a genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986) (quoting FRCP 56(e)). To defeat an adequately supported summary judgment motion, the nonmoving 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. *Id.* at 586, n.11; *Celotex*, 477 U.S. at 322. In order to demonstrate a genuine issue, the opposing party must do more than show that there is "some metaphysical doubt as to the material facts. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587. In making this determination, 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. *See, e.g., U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) . . . .
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> [I]f CMS in its summary judgment motion has asserted facts that would establish a prima facie case that the facility was not in substantial compliance, the first question is whether the facility has in effect conceded those facts. If not, the next question is whether CMS has come forward with evidence to support its case on any disputed fact. If so, the facility must aver facts and proffer evidence sufficient to show that there is a genuine dispute of material fact. Ultimately, if the proferred evidence as a whole, viewed in the light most favorable to the facility, might permit a rational trier of fact to reach an outcome in favor of the facility, summary judgment on the issue of substantial compliance is not appropriate.

Illinois Knights Templar Home, DAB No. 2274, at 3-4; *Kingsville Nursing and Rehabilitation Center*, DAB No. 2234, at 3-4; *see also Crestview Parke Care Center*, DAB No. 1836 (2002), *aff'd in part, Crestview Parke Care Ctr. v. Thompson*, 373 F. 3d 743 (6th Cir. 2004).

Petitioner refers to the decision in *Madison Health Care, Inc.*, DAB No. 1927 (2004), in asserting that where the reasonableness of the amount of a CMP is at issue an ALJ may not dispose of the case entirely on a motion for summary judgment. P. Br. at 8-10. However, the Board decision in *Madison Health Care* occurred in the context where the deficiency upheld by the ALJ differed substantially from the deficiency findings on which CMS based the CMP. Here, the $2500 PICMP imposed is based on only one instance of noncompliance and I accept all material facts asserted by Petitioner as true. Below, viewing the entire record in the light most favorable to Petitioner, accepting as true all assertions of fact made by Petitioner, and making all inferences in Petitioner's favor, I still find summary disposition to be appropriate.

3. CMS has a basis upon which to impose a PICMP.

Petitioner does not "contest the facts underlying the deficiency." P. Br. at 4. Instead, it is contesting only "[w]hether the per instance civil money penalty imposed by CMS was reasonable regarding the instance of alleged substantial noncompliance applying the factors found in 42 C.F.R. § 488.438(f)." P. Br. at 3. In its hearing request, Petitioner admitted that,

> This incident involved injury to a resident of the Facility during transport to a Doctor's appointment in a Facility van driven by an employee of the Facility. The employee braked to avoid hitting another vehicle that had run a stop light. When the driver braked the resident slipped under the custom harness assembly that was holding her in her wheelchair in the back of the van. The Facility does not contest that the incident in question occurred or that the driver utilized the custom harness assembly improperly.

CMS Ex. 2, at 1. As noted above, CMS found that this incident violated the regulations at 42 C.F.R. § 483.25(h) (the facility must ensure that the resident environment remains as free of accident hazards as is possible and that each resident receive adequate supervision and assistance devices to prevent accidents) and that a resident suffered actual harm. I find this to be an uncontested incidence of noncompliance. CMS thus has a basis upon which to impose the PICMP.

4. Petitioner has a right to contest whether the amount of the PICMP is reasonable.

CMS asserts that because Petitioner has appealed only the scope and severity level of the deficiency and whether the amount of the PICMP is reasonable, Petitioner has no right to hearing because neither issue is independently subject to appeal. CMS Br. at 3.[1]

CMS is correct that Petitioner cannot challenge the scope and severity level of the deficiency, because, where a PICMP only is imposed, no challenge could affect the range of CMP amount. 42 C.F.R. § 498.3(b)(14)(i); 42 C.F.R. § 488.438(a)(2); *see* 42 C.F.R. § 498.3(d)(10)(ii), 488.438(e). The DAB has held that a provider has no right to challenge the scope and severity level assigned to noncompliance unless the finding was a basis for an immediate jeopardy determination. *See e.g., Ridge Terrace*, DAB No. 1834 (2002); *Koester Pavilion,* DAB No. 1750 (2000).

CMS also asserts that Petitioner cannot contest whether the PICMP imposed in this case is reasonable absent Petitioner's contesting the basis for the deficiency. CMS states:

> Petitioner specifically seeks in its Request for Hearing to contest the amount of the CMP. But there is no authority under the regulations for Petitioner to contest the amount of the CMP that could grant it a right to a hearing in this case. Any authority an ALJ might have to review the reasonableness of a CMP presumes that Petitioner has on other authority the right to a hearing on the merits of a claim upon which the ALJ can grant relief. There is none here.

CMS Br. at 10. CMS cites no authority for this statement.

The regulations provide that a facility dissatisfied with CMS's initial determination of noncompliance resulting in the imposition of a remedy may appeal the determination and receive a hearing. 42 C.F.R. § 498.3(b)(13). Once an ALJ finds a basis for imposing a CMP or PICMP exists, the ALJ may then review whether the remedy imposed is

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[1] CMS also asserts that the failure by Petitioner to contest the facts from which CMS determined to impose a remedy forecloses review of whether the event occurred or whether there was actual harm to the resident. As Petitioner admits the noncompliance and admits that actual harm occurred to the resident in the example cited in the statement of deficiencies, further discussion is unnecessary. CMS Br. at 9-10. CMS asserts further that Petitioner's claim that it reasonably relied on training and instructions given to it by the manufacturer describes an equitable claim for detrimental reliance which I cannot hear. CMS Br. at 10-11. However, as I discuss below, it is more appropriate to review Petitioner's claim that it relied on the manufacturer's training as Petitioner's argument in mitigation of its culpability.

reasonable, evaluating the factors at 42 C.F.R. § 488.438(f) as constrained by the regulation at 42 C.F.R. § 488.438(e) (which states that where an ALJ finds that a basis for imposing a CMP exists, the ALJ may not set a penalty at zero, review the exercise of CMS or the state to impose a CMP, or consider factors in reviewing the penalty other than those specified at 42 C.F.R. § 488.438(f)). If CMS has made an initial determination of noncompliance resulting in a remedy (as here), ALJs have considered whether a CMP or PICMP is reasonable even where a petitioner has conceded the basis for the deficiency. I will consider whether the amount of the PICMP is reasonable in this case. *See The Springs at the Fountain*, DAB CR967 (2002); *Green Acres Manor*, DAB CR1100 (2003).

5. The $2500 PICMP imposed is reasonable.

In determining whether the amount of the PICMP imposed is reasonable, I consider de novo the following factors specified at 42 C.F.R. § 488.438(f): (1) the facility's history of non-compliance, including repeated deficiencies; (2) the facility's financial condition; (3) the seriousness of the deficiencies as determined by the factors set forth at 42 C.F.R. § 488.404; and (4) the facility's degree of culpability.

I have no information regarding the facility's history of noncompliance or its financial condition. I accept as true Petitioner's assertion that the deficiency in question was not the result of Petitioner's indifference or disregard for resident care. Petitioner's Director of Nurses stated in her affidavit:

> (1) That the Harlingen Facility owned a van (the "Van") that was purchased from Atlantic Turtle Top, Inc. (the "Dealership) that had been specially customized for the transportation of wheelchair bound residents." Petitioner's Exhibit 5, Affidavit of Sandra Moreno, paragraph 3.
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> (2) That a "Representative" from the Dealership demonstrated "the proper method to secure wheelchair bound residents in the Van using a custom harness system . . . for all of the Facility employees who would be driving the Van." *Id.*
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> (3) That "the Representative's demonstration included the use of a shoulder harness but no lap belt." *Id.*
>
> (4) That "from that day forward, the Facility continued to instruct drivers to use the custom harness system in the manner that had been demonstrated by the Representative." *Id.*

P. Br. at 9; P. Ex. 5; *see* P. Exs. 6, 7, 8. While Petitioner would assert that it is not culpable here because it simply followed the instructions of the representative from the dealership and that the PICMP is thus unreasonable, the regulations state that the absence

of culpability is not a mitigating circumstance which would lead an ALJ to reduce a PICMP. *See* P. Br. at 7-9;42 C.F.R. § 488.438(f)(4). Thus, I am left to review the seriousness of the deficiency at issue.

It is undisputed that Resident 1 was not properly restrained in Petitioner's van, slipped out of a wheelchair when the van stopped abruptly, and was seriously injured. The deficiency was properly cited at a scope and severity level of "G" – actual harm that is not immediate jeopardy.

I find that it was Petitioner's responsibility to put Resident 1 in a van such that Resident 1's transport was safe. It was Petitioner's responsibility to put a restraint system in the van to ensure Resident 1's safety. To ensure that the system was safe, training on the restraint system needed to be accurate. It was Petitioner's responsibility to ensure that it retained a company that would provide a safe restraint system and accurate training. In not doing so, Petitioner put the resident (and other residents so situated) at risk. The dereliction of this responsibility, coupled with the relatively small PICMP at issue here (being only one quarter of the PICMP that could be assessed) supports a finding that the $2500 PICMP imposed is reasonable.

V. Conclusion

I dismiss CMS's motion to dismiss. I grant CMS's motion for summary disposition and uphold the imposition of a $2500 PICMP.

/s/
Alfonso J. Montaño
Administrative Law Judge