

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

_____)	
In the Case of:)	
)	
Brightmoor Nursing Center,)	Date: June 15, 2007
(CCN: 34-5140))	
Petitioner,)	
)	
- v. -)	Docket No. C-07-125
Centers for Medicare & Medicaid)	Decision No. CR1604
Services.)	
_____)	

**DECISION
GRANTING SUMMARY DISPOSITION**

I grant the motion for summary disposition filed by the Centers for Medicare & Medicaid Services (CMS) against Petitioner, Brightmoor Nursing Center. I premise my decision on Petitioner's failure to challenge 22 findings of noncompliance that were made at a survey of Petitioner's facility that was completed on August 19, 2006 (August survey). In this decision I find that the deficiencies not challenged by Petitioner support imposition of civil money penalties against Petitioner in amounts of \$300 per day for each day of a period that began on August 19, 2006 and which ran through October 15, 2006.

I. Background

Petitioner is a skilled nursing facility in Salisbury, North Carolina. It participates in the Medicare program. Its participation in Medicare is governed by sections 1819 and 1866 of the Social Security Act (Act) and by implementing regulations at 42 C.F.R. Parts 483 and 488.

CMS notified Petitioner that it had determined to impose civil money penalties against it in amounts of \$300 per day for each day of the August 19 - October 15, 2006 period, based on the noncompliance findings that were made at the August survey. On November 29, 2006, Petitioner's administrator filed a written request for a hearing before an administrative law judge. The administrator asserted that Petitioner was requesting a hearing in the matter of citations that were made at the August survey. She stated that:

Specifically, we are requesting a hearing on tags F-224 and F-309.

Hearing request, at 1.

The reference to “tags” in the hearing request is a reference to two of the deficiency citations that were made in the report of the August survey. The request then discusses the findings that were made with respect to each of the two tags and explains Petitioner’s defenses and arguments concerning these findings. The request concludes by stating that:

the citations received at F-224 and F-309 were based on erroneous determinations that have resulted in incorrect findings and conclusions.

Id., at 2.

The request is silent as to the 22 other deficiency citations that were made in the report of the August survey which form a part of CMS’s remedy determination in this case.

The case was assigned to me for a hearing and a decision. On December 12, 2006 I issued a pre-hearing order in which I directed the parties to file pre-hearing exchanges. CMS filed its exchange on April 16, 2007, and its exchange included a motion for summary disposition. Petitioner replied on May 16, 2007. It opposed CMS’s motion. Additionally, it cross-moved for summary disposition as to the noncompliance findings that were made at tags F-224 and F-309 of the August survey report.¹

II. Issues, findings of fact and conclusions of law

A. Issue

The issue in this case is whether there are grounds for imposing summary disposition against Petitioner.

¹ With its pre-hearing exchange CMS filed a total of 46 proposed exhibits, including the written direct testimony of its witnesses. In response, Petitioner filed a total of 37 proposed exhibits, which also included the written direct testimony of Petitioner’s witnesses. The exhibits are identified as CMS Exs. 1 - CMS Exs. 46 and P. Exs. 1 - P. Exs. 37. For the purposes of this decision, I am receiving these exhibits into the record of the case.

1. Petitioner did not request a hearing as to 22 deficiency findings that were made at the August survey and with which CMS concurs and, consequently, these deficiency findings are administratively final.

The regulation governing the content of a hearing request is precise. A hearing request must:

- (1) Identify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees; and
- (2) Specify the basis for contending that the findings and conclusions are incorrect.

42 C.F.R. § 498.40(b)(1), (2).

The regulation imposes on a party requesting a hearing the obligation to state explicitly in its request what aspects of CMS's determination it is challenging and to explain why it is doing so. A hearing request need not be unduly lengthy or complex, but it must at minimum give CMS notice as to what is being contested.

Petitioner's request was explicit in that it challenged only two of the 24 findings of noncompliance made by CMS based on the August survey. It is completely silent as to the other 22 findings of noncompliance. Its failure to challenge them renders them administratively final.

Petitioner argues that its hearing request did not exclude a challenge to the 22 deficiencies not mentioned in the request. According to Petitioner:

While . . . [Petitioner] discussed in more detail . . . F-224 and F-309, they never stated that these were the only tags that they were disputing.

Petitioner's response to CMS's motion for summary judgment, request for partial summary judgment, and pre-hearing brief (Petitioner's response) at 2.

It is true that Petitioner's hearing request did not state that it sought *only* to challenge the two tags that were cited in the request. But, the absence of that disclaimer does not give Petitioner a basis for now raising other challenges subsequent to filing its request. The regulation governing hearing requests does not give a party the right to omit from its request assertions and arguments that are minimally necessary to satisfy regulatory completeness requirements.

Petitioner now belatedly makes arguments concerning the 22 findings that it did not challenge in its hearing request. Petitioner's response at 8 - 17. I find these arguments to be untimely and, for that reason, I do not accept them. A party challenging an adverse determination by CMS has 60 days to file a hearing request. 42 C.F.R. § 498.40(a)(2). Failure to file a request timely absent a showing of good cause for that failure is grounds for dismissal of the request. 42 C.F.R. § 498.70(c). If I were to construe Petitioner's response as a request for hearing concerning the 22 deficiencies that it did not challenge previously I would be obligated to dismiss it as being untimely unless Petitioner could show good cause for its late filing.

Petitioner has not offered any justification for challenging now what it failed to challenge previously. It did not claim that it was misled by CMS into failing to challenge most of the findings made at the August survey nor has it asserted that it was prevented from challenging these findings by circumstances that were beyond its ability to control.

Petitioner's hearing request was made by its administrator who, apparently, is not an attorney. However, Petitioner has not asserted that its administrator failed to understand the regulatory requirements governing hearing requests or that she was not put on notice by CMS about these requirements. Petitioner's counsel made no effort to amend or to expand on the hearing request when she entered an appearance in the case.² Indeed, counsel never addressed the 22 deficiencies not challenged by Petitioner until after CMS filed its motion for summary disposition. Nor has counsel explained why she waited until now to challenge the 22 remaining deficiencies.

Allowing Petitioner now to challenge these deficiencies – more than six months after it filed its hearing request – would prejudice CMS. My initial pre-hearing order directed CMS to brief and to offer evidence addressing each and every issue raised by Petitioner. CMS dutifully did so and it addressed the two deficiencies that Petitioner challenged. Opening the door at this time to allow Petitioner to challenge the 22 additional deficiencies would, by necessity, require me to start the pre-hearing exchange process all over. That would, inevitably, delay the hearing and my final decision in the case and would frustrate the remedial intent of the Act.

I make no findings concerning the two deficiencies that Petitioner challenged, cited at Tags 224 and 309 of the August survey report, because they are not a basis for CMS's motion for summary disposition. *See* CMS Ex. 4. Nor do I address Petitioner's motion for summary disposition as to those two deficiency tags because it is unnecessary that I do so.

² Counsel entered her appearance on March 14, 2007, more than a month prior to the date when CMS submitted its pre-hearing exchange and motion.

2. Civil money penalties of \$300 per day are a reasonable remedy for the 22 deficiencies that Petitioner did not challenge.

The range of permissible daily civil money penalties for deficiencies that are not at the immediate jeopardy level of scope and severity is from \$50 to \$3,000. 42 C.F.R. § 488.438(a)(1)(ii). There are regulatory factors which must be considered in deciding what penalty amount within the range is reasonable. 42 C.F.R. §§ 488.438(f)(1) - (4); 488.404 (incorporated by reference into 42 C.F.R. § 488.404(f)(3)). These factors include the seriousness of deficiencies, a facility's compliance history, its culpability, and its financial condition.

CMS based its remedy determination on the presence of 24 deficiencies including the 22 that Petitioner did not challenge. The daily penalty amount determined by CMS – \$300 – is quite modest, comprising only ten percent of the maximum permissible daily civil money penalty amount for a non-immediate jeopardy level deficiency. What I must decide here is whether that \$300 amount is reasonable predicated on the presence of 22 of the 24 deficiencies originally determined by CMS.

In deciding whether the \$300 daily penalty is justified I must consider only the facts offered by CMS. That is because the 22 deficiencies are administratively final. The final findings of noncompliance encompass not only CMS's determination that deficiencies existed, but its determination as to scope and severity as well. Nor may I consider any challenge by Petitioner as to the duration of these 22 deficiencies because CMS's unchallenged findings of noncompliance encompass findings of duration.

I find that \$300 is a reasonable daily civil money penalty amount. The 22 deficiencies not challenged by Petitioner are sufficiently serious, when considered in combination, as to justify the penalty amount.³ Indeed, two of them, which demonstrate widespread noncompliance by Petitioner with participation requirements, are sufficiently serious in and of themselves to justify penalties of \$300 per day.

My finding that the penalty amount is justified by the 22 unchallenged deficiencies takes into consideration that, during the August 19 - October 15, 2006 period, Petitioner manifested a very large number of deficiencies, 22 in all. Each of these deficiencies posed a potential for more than minimal harm to residents. CMS Ex. 4. In two instances, comprising Petitioner's failure to comply with the requirements of 42 C.F.R. § 483.15(h)(2) and its failure to comply with the requirements of 42 C.F.R. § 483.75(o), Petitioner's noncompliance constituted a widespread occurrence of noncompliance that posed the potential for harm to residents. CMS Ex. 4, at 15 - 25; 80 - 82.

³ CMS offered no facts as to Petitioner's culpability or as to its compliance history.

The widespread noncompliance at Petitioner's facility included a failure by Petitioner's staff to provide housekeeping and maintenance services necessary to maintain a sanitary, orderly, and comfortable interior. 42 C.F.R. § 483.15(h)(2). Several areas of three of Petitioner's principal corridors were dirty, in disrepair, or both. The problems had persisted at Petitioner's facility for some time but had not been addressed. The widespread noncompliance also included failure by Petitioner to implement a quality assurance program, in contravention of the requirements of 42 C.F.R. § 483.75(o). Petitioner failed to conduct quality assurance meetings of its staff notwithstanding regulatory requirements that it conduct such meetings at least quarterly to identify and address quality assurance issues.

These two instances of widespread noncompliance posing a potential for harm to residents in and of themselves justify the extremely modest civil money penalties that CMS determined to impose. But, these deficiencies were, in fact, part of a much larger constellation of noncompliance by Petitioner and its staff. These deficiencies address: elements of care including sanitation and housekeeping; dietary services; administration of medication; infection control; treating urinary incontinence; naso-gastric tubes; and care planning. CMS Ex. 4. The overall image created by these additional unchallenged deficiencies is of a facility that was not closely managed to assure that its residents received care consistent with regulatory requirements.

In order to accomplish the Act's remedial purposes a civil money penalty must be reasonably related both to the deficiencies manifested by facility and to the need to assure that the facility attain compliance with regulatory requirements. *Barnhill Care Center*, DAB 1848 (2002). The extremely modest \$300 daily civil money penalty that CMS determined to impose here meets that test.

Petitioner argues that I may not issue summary judgment finding that the 22 deficiencies that it did not challenge support a \$300 daily penalty because the two deficiencies that it did challenge remain unresolved and their presence or absence forms an integral element of the penalty determination. The two deficiencies challenged by Petitioner were found by CMS to be deficiencies that caused residents to experience actual harm. Petitioner reasons that, if a penalty of \$300 per day is based on the presence of actual harm, then something less than that cannot on its face justify a penalty amount of \$300. Thus, according to Petitioner, a full hearing as to the two deficiencies it challenged must be completed in order to decide whether these deficiencies were, in fact, present. Petitioner implies that penalties of less than \$300 would be necessitated by my decision not to sustain one or both of the two challenged deficiencies.

I find this argument to be unpersuasive. I am certain that the presence of additional deficiencies beyond the 22 that I sustain in this decision would provide additional basis for the \$300 daily penalties that CMS determined to impose. But, I do not find those additional deficiencies to be *necessary* to support penalties of \$300 per day. As I explain above, the 22 deficiencies that Petitioner did not challenge provide ample support for the very modest penalty amount that is at issue here.

/s/

Steven T. Kessel
Administrative Law Judge