Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Holy Cross Village at Notre Dame, Inc., (CCN: 15-5745),	)	Date: May 14, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket Nos. C-09-46
	)	C-09-53
	)	Decision No. CR1951
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION GRANTING SUMMARY JUDGMENT TO CENTERS FOR MEDICARE & MEDICAID SERVICES

I grant the motion of the Centers for Medicare & Medicaid Services (CMS) to impose summary judgment against Petitioner, Holy Cross Village at Notre Dame, Inc. I find that Petitioner failed to comply with two participation requirements and that its noncompliance was so egregious as to pose immediate jeopardy for Petitioner's residents. I sustain remedies against Petitioner consisting of civil money penalties of: $3750 per day for July 30 and 31, 2008; and $100 per day for each day of a period that began on August 1, 2008 and which ran through August 28, 2008. Additionally, Petitioner loses the authority to conduct nurse aide training for a period of two years as a consequence of my finding the presence of immediate jeopardy level deficiencies.

I. Background

Petitioner is a skilled nursing facility in the State of Indiana. 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 federal regulations at 42 C.F.R. Parts 483 and 488. Its right to a hearing in this case is governed by federal regulations at 42 C.F.R. Part 498.

Petitioner was surveyed for compliance with Medicare participation requirements on August 6, 2008 (August survey). The surveyors concluded that Petitioner had contravened several Medicare participation requirements. The deficiencies included findings of immediate jeopardy level noncompliance. The term "immediate jeopardy" is defined at 42 C.F.R. § 488.301 to include noncompliance that is so egregious as to cause, or is likely to cause, serious injury, impairment, harm, or death to a resident or residents of a facility.

CMS accepted the surveyors' findings and determined to impose the remedies that I cite in the opening paragraph of this decision. Petitioner requested a hearing and I was assigned to hear and decide the case. CMS moved for summary judgment and Petitioner opposed the motion.

CMS filed a total of 37 proposed exhibits, which it identified as CMS Ex. 1 – CMS Ex. 37. Petitioner filed 11 proposed exhibits, which it identified as P. Ex. 1 – P. Ex. 11. I receive all of the parties' exhibits into the record and I cite to some of them in this decision for purposes of explanation. However, I make no evidentiary findings from the exhibits. I base my decision entirely on the undisputed material facts as are averred by the parties.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether the undisputed material facts show that:

1. Petitioner failed to comply substantially with Medicare participation requirements;

2. CMS's determination of immediate jeopardy is clearly erroneous;

3. CMS's remedy determinations are reasonable.

As I discuss above, the August survey resulted in findings that Petitioner failed to comply with several participation requirements. Some but not all of the alleged deficiencies are at the immediate jeopardy level of scope and severity. I base my decision on two of these immediate jeopardy level findings of noncompliance. These are Petitioner's failure to comply with the requirements of 42 C.F.R. § 483.13(b) and 42 C.F.R. § 483.25(h)(2). I make no findings about other alleged deficiencies because it is unnecessary that I do so.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading.

1. The undisputed material facts establish that Petitioner failed to comply substantially with the requirements of 42 C.F.R. §§ 483.13(b) and 483.25(h)(2).

The following undisputed material facts are the basis for my decision concerning the two deficiencies that I address in this Finding.

All of the allegations of noncompliance relate to a resident who is identified in the August survey report as Resident # 7. This resident is an elderly individual whose medical conditions include Alzheimer's dementia with behavioral disturbance, congestive heart failure and coronary artery disease. CMS Ex. 7, at 14, 85; CMS Ex. 8, at 1, 61, 72. The resident is wheelchair bound but is mobile and was able to move about Petitioner's facility without the assistance of Petitioner's staff. CMS Ex. 7, at 17; CMS Ex. 8, at 83, 98.

Resident # 7 has a long and well-documented history of engaging in inappropriate sexual behavior. In September 2007 a psychiatrist noted the resident's recurrent inappropriate behavior which included attempts to grab at young males and male staff members of Petitioner's facility. CMS Ex. 8, at 97. Another psychiatric evaluation conducted in June 2008 concluded that the resident was "sexually very inappropriate." His inappropriate behavior included fondling another male resident of Petitioner's facility. *Id.* at 118.

In April and May 2008, the staff documented numerous incidents of inappropriate sexual conduct by Resident # 7. These included several attempts by Resident # 7 to grope or fondle other male residents and several sexually inappropriate comments directed by Resident # 7 towards members of Petitioner's staff. CMS Ex. 8, at 14 – 17. On one occasion Resident # 7 sat naked in front of an open window at Petitioner's facility and fondled himself. CMS Ex. 8, at 118. In July 2008 Resident # 7 was again seen by a psychiatrist who noted the resident's history of sexually inappropriate behavior and who observed that the resident admitted that he had sexual fantasies. *Id.* at 112. On July 16, 2008, Resident # 7 began receiving Depo Provera, a medication that is intended to curb an individual's sexual activity.

Many of Resident # 7's sexual activities were directed at a resident who is identified as Resident # 163 in the report of the August survey. Resident # 163, who died on June 18, 2008, was an elderly individual who was identified by

Petitioner's staff as being cognitively impaired and who engaged in sexually inappropriate behavior. CMS Ex. 10, at 3, 7 – 20. Facility notes document many occasions in March, April, and May 2008 during which Resident # 163 engaged in inappropriate sexual activity. *Id.* at 7 – 19. This inappropriate behavior was directed at more than one person but Resident # 163 and Resident # 7 were also observed by Petitioner's staff seeking each other out for sexual activity.

After Resident # 163's death, and on at least one occasion, Resident # 7 directed his sexual advances towards another resident who is identified in the August survey report as Resident # 11. Resident # 11 suffers from a variety of medical problems including vascular dementia, dementia with behavioral disturbance, Alzheimer's disease, and expressive aphasia. CMS Ex. 7, at 7, 68, 81, 96; CMS Ex. 9, at 1, 75 – 78. Petitioner's staff have assessed Resident # 7 as having severely impaired cognitive skills. CMS Ex. 9, at 64.

Resident # 11's physical and mental problems have left him profoundly impaired. Essentially, this resident is helpless to fend for or to protect himself. He is unable at most times to make himself understood. *Id.* During his stay at Petitioner's facility the resident manifested signs of anxiety for which he was prescribed medications including Ativan. I take notice that Ativan is a medication that frequently causes the user to become lethargic or to sleep. Resident # 11 suffers from pressure sores and is often asleep. His mobility is extremely limited and his various medical problems, coupled with his lethargy, make it difficult for the resident to move. CMS Ex. 7, at 6 – 9, 80 – 81, 95 – 96; CMS Ex. 9, at 28.

Sometime during the week prior to July 30, 2008, Resident # 7 made sexual advances towards Resident # 11. These occurred despite the fact that Resident # 7 was taking Depo Provera. A certified nursing assistant (CNA) reported Resident # 7 was observed attempting to grab Resident # 11 by the crotch. Resident # 7 also was observed reaching for Resident # 11's hand and attempting to pull it to him before being stopped by staff. CMS Ex. 7, at 39, 47, 90.

The undisputed facts are that Petitioner's staff, while not indifferent to Resident # 7's sexual proclivities, provided only limited interventions. On numerous occasions the staff redirected the resident when he was observed making sexual advances towards other residents or when he engaged in other inappropriate sexual activity. CMS Ex. 8, at 14 – 17. Redirection often consisted of escorting the resident back to his room. *Id.* Petitioner's staff also had the resident seen by a psychiatrist and, in July 2008, the resident began taking Depo Provera. But, the undisputed facts do not show that the staff undertook heightened surveillance of the resident despite his frequent inappropriate sexual acts. The record does not show that Petitioner's staff made a focused effort to either curb Resident # 7's actions or, failing that, to segregate the resident from those who were his intended

or actual victims. Nor do the facts show that the staff undertook special measures to protect those individuals who were the targets of Resident # 7's sexually aggressive behavior. For example, there is nothing to show that the staff provided enhanced surveillance of Resident # 11 after the July 2008 episode in which Resident # 7 attempted to grope Resident # 11.

a. Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.13(b).

The governing regulation states that a resident of a skilled nursing facility has the right to be free from, among other things, sexual, physical, and mental abuse. CMS argues that the undisputed material facts of this case establish that Petitioner, by failing to supervise Resident # 7 effectively, either allowed this resident to perpetrate sexual abuse against other residents or tolerated the likelihood that the resident would perpetrate abuse.

The facts that I describe above provide strong support for CMS's assertion. As early as September 2007 Petitioner's staff knew that Resident # 7 had manifested proclivities for engaging in inappropriate sexual conduct which included making advances towards and attempting to grope other residents at Petitioner's facility. On numerous subsequent occasions the resident continued to behave inappropriately. Petitioner's staff thus knew that there was a strong likelihood at almost any time that Resident # 7 would engage in sexually abusive conduct.

Yet, the undisputed material facts show that Petitioner's staff did not contemplate or initiate more forceful interventions after it became apparent to them that the interventions that they had attempted were failing to protect other residents from Resident # 7's abusive conduct. The resident's abusive behavior culminated with his attempted groping of Resident # 11 – an essentially helpless individual – in late July 2008. The attempted groping of Resident # 11 was nothing out of the ordinary in the sense that Resident # 7 had attempted or succeeded in achieving such acts so many times previously.

The undisputed material facts in this case show that staff essentially limited its interventions to referring Resident # 7 for psychiatric consultation and redirecting the resident when they observed him acting abusively. Often, the redirection involved escorting the resident to his room. Redirection may have terminated the specific episode of abusive behavior that prompted the action but it did nothing to protect Petitioner's residents from future episodes of abuse at the hands of Resident # 7. And, indeed, the undisputed facts clearly show that such episodes continued to occur or were attempted with regularity. Petitioner's staff failed to address the resident's sexual aggression by developing a specific plan to assure that this resident would remain under surveillance at all times when he was in

close proximity to those individuals who might comprise a target for his aggression. Nor did the staff specifically plan to keep other vulnerable residents, such as Resident # 11, under enhanced surveillance when Resident # 7 was in their vicinity.

Petitioner asserts that there are disputed material facts which prohibit summary judgment. First, Petitioner contends that the sexual relationship between Resident # 7 and Resident # 163 was consensual. Petitioner's brief at 11. Therefore, according to Petitioner, the relationship between the two residents was not abusive. For purposes of this decision I accept as true Petitioner's characterization of the nature of the relationship between Resident # 7 and Resident # 163 and I make no finding that Resident # 7 abused Resident # 163. But, even if the relationship between these two residents was not abusive, the undisputed facts showing an open sexual relationship between the residents coupled with the many undisputed incidences of inappropriate conduct by Resident # 7 directed towards other residents, the staff, and even the public, provided ample evidence to Petitioner's staff that Resident # 7 posed a threat to other residents. The staff's failure to plan and implement specific and effective measures to protect other residents in the face of this evidence is the basis for support for my conclusion that Petitioner was not complying with regulatory requirements.

Next, Petitioner argues that Resident # 7's attempted groping of Resident # 11 was not abusive because it was merely an unsuccessful attempt and not an executed act. Petitioner's brief at 12. For purposes of this decision I will assume that Resident # 7 did not actually grope Resident # 11 but merely attempted to do so. However, that Resident # 7's attempt to grope Resident # 11 may have been unsuccessful does not support a conclusion that Petitioner was providing adequate protection to its residents. CMS's case is based on a whole series of sexually aggressive acts by Resident # 7 – some carried out, some not – which put Petitioner on notice that it was not adequately supervising the resident or providing adequate protection to other residents.

The incident involving Resident # 11 is a graphic illustration of Petitioner's failure to provide adequate protection to its residents. Resident # 7's attempted groping of Resident # 11 put Petitioner's staff on notice that Resident # 11 – a helpless individual – had become a target of Resident # 7's aggression. The staff *knew* that Resident # 7 had a sexual interest in Resident # 11. And, they *knew* that Resident # 11 would be absolutely helpless to fend off Resident # 7 in the event of another sexual attack. But, Petitioner's staff did nothing to guarantee the long-term security of Resident # 7 after the July 2008 attack. When Resident # 7 attempted to grope Resident # 11 Petitioner's staff removed Resident # 7 temporarily from Resident # 11's presence. That may have protected Resident # 11 for the short term but it did nothing to assure that future attacks would not occur. Such

assurances could only have been provided by either segregating Resident # 7 from other residents or from increased supervision of Resident # 7 and/or Resident # 11, neither of which occurred.

Petitioner then argues that Resident # 7's sexually inappropriate behavior directed against members of Petitioner's staff or other non-residents cannot be considered as abuse because the regulations were intended only to protect residents. Petitioner's brief at 13. I agree with Petitioner that 42 C.F.R. § 483.13(b) does not explicitly protect staff members of a facility from abuse perpetrated by a resident. But, CMS does not allege that Petitioner is noncompliant because Resident # 7 abused or attempted to abuse staff. The undisputed material facts showing that Resident # 7 was sexually aggressive towards staff are relevant here because they illustrate the resident's propensity for sexual aggression, not just against staff, but against others in general including residents. The only reasonable inference that I can draw from these facts is that they show that Resident # 7 had proclivities to engage in sexually abusive behavior. Those facts coupled with the undisputed facts showing that residents were, indeed, a target of Resident # 7 should have put Petitioner on notice that it needed to become more assertive in protecting other residents against Resident # 7's predatory behavior.

Petitioner asserts that its staff "protected . . . [Resident # 11] from . . . [Resident # 7] at all times." Petitioner's brief at 14. It argues that this conclusion is reasonable based on facts showing that: Resident # 7 did not actually grope Resident # 11; Petitioner provided supervision and counseling to Resident # 7; and Petitioner followed through on orders of the resident's attending physician to administer Depo Provera to the resident along with other medications including Prozac and Seraquil. Additionally, according to Petitioner, it sought the expert advice of medical professionals concerning Resident # 7 and adhered to these professionals' orders. *Id.*

I accept all of these assertions as true for purposes of this decision. But, they do not call into question any of the facts asserted by CMS nor do they support a conclusion other than my conclusion that Petitioner did not adequately protect its residents against Resident # 7's predatory behavior. I have explained above why Resident # 7's attempted groping of Resident # 11 put Petitioner's staff on notice that it had to increase its surveillance of Resident # 7 and to do more to protect Resident # 11. The fact that Resident # 7 attempted to grope another resident – even if he didn't achieve his objective – should have been enough to trigger an urgent response from Petitioner's staff that exceeded simply redirecting Resident # 7 on that occasion.

Moreover, that incident occurred about two weeks *after* Resident # 7 began taking Depo Provera. That put Petitioner's staff on notice that they could not rely on the resident's medication regime as adequate protection against his predatory behavior.

Petitioner has not offered any facts that suggest that a physician limited the staff's actions to those which were stated in his or her treatment orders. The staff in this case was in possession of facts showing that the regime ordered by Resident # 7's physician – consisting of medication intended to curb the resident's sexual aggression – was inadequate to protect other residents. They could have taken additional measures that were not in conflict with physician orders to protect those residents. Indeed, the facts establish that such additional measures were obligatory given the failure of the medication regime to bring a halt to Resident # 7's sexual aggression. These measures certainly could have consisted of additional consultation with the resident's physician, perhaps, to seek an adjustment of the resident's medication. Or, they could have consisted of actions that were independent of physicians' orders, such as increased surveillance of Resident # 7 and other vulnerable residents or of segregating Resident # 7 from the general resident population. Petitioner explored none of these possibilities.

b. Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.25(h)(2).

The applicable regulation requires that a facility must ensure that each of its residents receives adequate supervision and assistance devices to prevent accidents. This regulation imposes several duties on a long term care facility. First, it must assess each of its residents to determine that resident's vulnerabilities and needs. Second, it must plan each resident's care so as to develop all reasonable interventions to prevent the resident from sustaining accidents. And, finally, the facility must implement the protective measures that it has developed.

CMS contends that Petitioner failed to meet these requirements in providing care to Resident # 7. The gravamen of CMS's assertion is that Petitioner's staff were well aware of Resident # 7's proclivities for sexual predation but failed to develop or implement effective measures that protected other residents from Resident # 7.

I find CMS's argument to be supported by the undisputed facts of this case. As I have discussed above, Petitioner's staff knew that Resident # 7 remained a predator despite receiving medication that was specifically intended to curb his sexual appetites. The staff knew also that Resident # 7 had begun to focus his interest on another, helpless resident, Resident # 11. But, in spite of that, the staff did not develop or implement measures that offered reasonable guarantees that Resident # 7 would not continue to engage in sexual predation.

My conclusion is underscored by the undisputed facts pertaining to Resident # 7's attempted groping of Resident # 11. The event put the staff on notice that Resident # 7 remained a sexual predator notwithstanding the fact that he'd begun Depo Provera therapy about two weeks previously. The event also put the staff on notice that Resident # 11 had become a target of Resident # 7. However, these events, and the demonstrated ineffectiveness of Petitioner's interventions, did not spur the staff to even consider more forceful and, perhaps, more effective interventions.

Petitioner makes essentially the same arguments here as it makes in opposition to the allegations that it failed to prevent abuse. It asserts that: the relationship between Resident # 7 and Resident # 163 was consensual; and Resident # 7 did not successfully grope Resident # 11 but was stopped while attempting to do so. I have previously addressed these arguments and find it unnecessary to address them again.

Petitioner argues that Resident # 7, albeit mobile in his wheelchair, moved slowly. Petitioner's brief at 16. The inference that it apparently wants me to draw from this is that staff always had time to intervene in order to protect other residents from Resident # 7's sexual predation. However, although I accept as fact that Resident # 7 could not move rapidly, that fact in and of itself is no assurance that the resident could not engage in predatory behavior. The undisputed facts are that Resident # 11 – a target of Resident # 7 – could not move independently. He was unable to escape Resident # 7's advances and, due to his aphasia, could not call out for help. Even if Resident # 7 moved very slowly, he had the opportunity to abuse Resident # 11, if neither he nor the other resident were under supervision or segregated from each other.

Petitioner asserts also that its staff effectively supervised Resident # 7 and that the staff had, in fact, been in-serviced on May 30, 2008 to supervise residents as part of a team effort. Petitioner's brief at 16. However, merely asserting that adequate supervision occurred without offering facts that describe what was done is to state a conclusion without offering a material fact. Petitioner does not describe either the concept of team supervision or how it was implemented to protect other residents from Resident # 7's predatory behavior. Petitioner offers no facts showing precisely what surveillance or supervision its staff made of Resident # 7, Resident # 11, or any other resident, in order to protect residents from sexual abuse. Moreover, Petitioner does not address any of the undisputed facts showing that Resident # 7 continued to engage in sexually aggressive conduct well after May 30, 2008. His attempted groping of Resident # 11 occurred sometime around the end of July 2008.

2. The undisputed material facts establish that CMS's determination of immediate jeopardy level noncompliance was not clearly erroneous.

I find that the undisputed material facts support the conclusion that the two deficiencies that I discuss in this decision were at the immediate jeopardy level of noncompliance. These facts show that the probability of serious harm or injury resulting from Resident # 7's unchecked sexual aggression was extremely high. Resident # 11, for example, was totally at the mercy of any individual who sought to abuse him. The resident is unable to speak and unable to move without assistance. Consequently, Resident #7, not properly supervised, and given his proclivities, posed a serious threat to the psychological and physical well-being of Resident # 11.

Petitioner argues that Resident # 7 posed a threat to no one. It asserts, without citing any facts, that "[n]o evidence has been presented to substantiate the allegation that . . . [Resident # 163] or . . . [Resident # 7] ever made sexual advances toward any resident other than each other." Petitioner's brief at 17. I find this assertion raises no genuine fact dispute in that Petitioner has cited to nothing to support its contention. Petitioner asserts also that "[c]areful supervision by Petitioner's staff prevented the incident [involving Resident # 7's attempted groping of Resident # 11] from escalating to the point of abuse." *Id.* However, Petitioner offers no facts to describe the "careful supervision" that its staff allegedly provided to Resident # 7 or to Resident # 11. Its contention that there was "careful supervision" of these residents is simply a naked assertion without factual support.

Petitioner has in fact offered nothing to show that CMS's determination of immediate jeopardy level noncompliance is clearly erroneous. As I have discussed, the undisputed facts of this case show a high probability of harm – at least insofar as Resident # 11 is concerned – resulting from Resident # 7's sexually aggressive conduct.

3. The undisputed material facts establish CMS's remedy determinations to be reasonable.

At issue in this case are two remedy determinations. CMS determined to impose civil money penalties of $3750 per day for July 30 and 31, 2008. Additionally, CMS determined to impose civil money penalties of $100 per day for each day of a period that began on August 1, 2008 and which ran through August 28, 2008.

There are regulatory criteria governing the amount of civil money penalties. Penalties for immediate jeopardy level deficiencies must fall within a range of from $3050 to $10,000 per day. 42 C.F.R. § 488.438(a)(1)(i). Penalties for non-immediate jeopardy level deficiencies must fall within a range of from $50 to $3000 per day. 42 C.F.R. § 488.438(a)(1)(ii). The regulatory criteria for deciding what is a reasonable penalty amount within a range of possible penalties include: the seriousness of a deficiency or deficiencies; the relationship of one deficiency to another; the facility's compliance history; the facility's culpability for a deficiency or deficiencies; and the facility's 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)).

Petitioner has not challenged the duration of its noncompliance. Although it has denied any noncompliance it has not argued that, if it was compliant, it came back into compliance on a date or dates that are earlier than those established by CMS as the dates when compliance was attained. Therefore, I find that Petitioner was noncompliant at the immediate jeopardy level on July 30 and 31, 2008 and remained noncompliant at a less than immediate jeopardy level from August 1 through August 28, 2008.

What remains to be decided is whether the penalties determined by CMS are reasonable. I find that they are, based on the undisputed material facts of this case.

First, I note that Petitioner has offered no argument that CMS's penalty determinations are unreasonable assuming that it is noncompliant as alleged by CMS. It would be reasonable for me to sustain the penalty determinations based simply on Petitioner's failure to contest the remedies.

However, the reasonableness of CMS's remedy determinations is sustained also by the undisputed material facts. These facts establish, first, that the penalty amounts are justified by the seriousness of Petitioner's noncompliance.

The two immediate jeopardy level deficiencies in this case justify civil money penalties of at least $3050 for the two days that Petitioner was noncompliant at that level. A penalty amount of $3750 constitutes only a very modest augmentation of the regulation's minimum allowable immediate jeopardy level penalty amount. Here, the seriousness of Petitioner's noncompliance amply justifies that modest augmentation. The probability of at least psychological harm to other residents resulting from Resident # 7's unchecked sexual aggression was very high. A penalty of $3750 per day clearly reflects that level of probable harm.

A penalty amount of $3750 per day is also supported by Petitioner's compliance history. Facts not challenged by Petitioner establish that it does not have an unblemished record, having been found to be deficient in 2006. CMS's brief at 21 – 22.

As for the non-immediate jeopardy level noncompliance running from August 1 – August 28, 2008, I find that the penalty amount of $100 per day is amply justified by the undisputed material facts establishing the relative seriousness of the deficiencies even after immediate jeopardy was abated. $100 per day is, in fact, a minimal civil money penalty constituting only three percent of the maximum possible non-immediate jeopardy level penalty amount.

/s/
Steven T. Kessel
Administrative Law Judge