

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Rosewood Care Center of Inverness,	)	Date: April 30, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-06-540
	)	CCN: 14-5994
Centers for Medicare & Medicaid	)	Decision No. CR1592
Services.	)	
_____	)	

**DECISION GRANTING SUMMARY DISPOSITION**

I grant the motion of the Centers for Medicare & Medicaid Services (CMS) for summary disposition against Petitioner, Rosewood Care Center of Inverness. In doing so I sustain the imposition of civil money penalties against Petitioner of \$300 per day for each day of a period that began on January 6 and which ran through March 2, 2006.

**I. Background**

Petitioner is a skilled nursing facility doing business in the State of Illinois. Petitioner participates in the Medicare program. Its participation in Medicare is governed by sections 1819 and 1866 of the Social Security Act, and by federal regulations at 42 C.F.R. Parts 483 and 488.

Petitioner was surveyed for compliance with Medicare participation requirements on January 6 and February 9, 2006 (January and February surveys) by surveyors employed by the Illinois Department of Health. The surveyors who conducted the January survey found that Petitioner was not complying substantially with two Medicare participation requirements. At the February survey, the surveyors found that Petitioner was not complying substantially with five Medicare participation requirements. CMS concurred

with the surveyors' findings and determined to impose civil money penalties against Petitioner of \$300 per day for each day of a period that began on January 6 and which ran through March 2, 2006.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. The parties filed pre-hearing exchanges including the written direct testimony of all of their proposed witnesses. I scheduled a hearing to take place on May 21, 2007, in Chicago. Then, CMS moved for summary disposition. Petitioner opposed the motion.<sup>1</sup>

## **II. Issues, findings of fact and conclusions of law**

### **A. Issues**

Hearings in cases involving CMS are governed by federal regulations at 42 C.F.R. Part 498. The regulations do not provide explicitly for resolution of cases based on motions for summary disposition. Administrative law judges have held that the authority to grant summary disposition, where appropriate, is part of their inherent authority under the regulations to manage a hearing and neither the Departmental Appeals Board nor federal courts have disagreed with this analysis.

Generally, motions for summary disposition are reviewed and decided within the framework of Rule 56 of the Federal Rules of Civil Procedure. Summary disposition, or judgment, is appropriate only where there are no disputed issues of material fact and where the parties raise only arguments about the conclusions that may be drawn from the undisputed facts. A fact is "material" to a case where its existence is necessary to deciding the case's outcome.

The issues here are whether:

1. Petitioner raises disputed issues of material fact that would preclude me from issuing summary disposition;
2. There are undisputed instances of noncompliance with participation requirements; and

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<sup>1</sup> CMS filed 55 proposed exhibits (CMS Ex. 1 - CMS Ex. 55) as part of its pre-hearing exchange. Petitioner filed 6 proposed exhibits (P. Ex. 1 - P. Ex. 6). I make reference to some of these exhibits in this decision, and I make the exhibits part of the case record so that a reviewing body or court may read them if my decision is appealed. However, all of the fact findings that I make in this decision are based on fact assertions that are not disputed.

3. The undisputed facts establish a basis for imposing civil money penalties of \$300 per day against Petitioner for each day of the January 6 - March 2, 2006 period.

## **B. Findings of fact and conclusions of law**

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

### ***1. There are no disputed issues of material fact.***

I agree with CMS's argument that Petitioner did not dispute the material facts that are the basis for the motion for summary disposition. CMS bases its motion on one of the two findings of noncompliance that were made at the January survey and on all five of the noncompliance findings that were made at the February survey. Petitioner has offered no facts to contest those findings on which CMS relies in support of its motion.

Petitioner's principal argument in opposing CMS's motion for summary disposition is that CMS has not moved for summary disposition with respect to the second finding of noncompliance made at the January survey. Petitioner argues: "Thus, regardless of the ruling on this Motion, the case will proceed to hearing." Petitioner's memorandum of law in opposition to CMS's motion for summary disposition at 1. I disagree with this analysis. It is simply unnecessary that I hear evidence with regard to that finding of noncompliance if CMS's remedy determination may be sustained based on the findings for which there are no disputed issues of material fact. There is no requirement in the regulations stating that a remedy may be sustained only if *all* of CMS's findings of noncompliance are substantiated.

Moreover, Petitioner has not offered facts to challenge CMS's assertion that penalties of \$300 per day are a reasonable remedy. At most, Petitioner argues that the conclusion that penalties of \$300 per day is reasonable is unjustified by the facts of the case. But, that argument is not based on any facts that are disputed, rather it is based solely on Petitioner's asserted interpretation of these facts. That is no impediment to my issuing summary disposition in this case.<sup>2</sup>

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<sup>2</sup> The parties submitted all of their affirmative evidence – including the written direct testimony of all of their witnesses – in their pre-hearing exchanges. Petitioner has not argued that there is any fact that it would present at an in-person hearing relating to the issues of deficiencies or penalty amount that it has not presented to me already.

***2. The undisputed material facts establish that, as of the January survey, Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.13(c)(3).***

The regulation that is at issue requires a facility to show that all alleged incidents involving possible mistreatment, neglect, or abuse of residents, including injuries of unknown source, are thoroughly investigated. 42 C.F.R. § 483.13(c)(3); *see* 42 C.F.R. § 483.13(c)(2). The facts on which CMS relies to support its assertion that Petitioner failed to comply with this requirement are not disputed by Petitioner. They are as follows. On November 16, 2005, a resident identified by CMS as Resident # 2, informed Petitioner's staff that she had injured her right shoulder by bumping it against the frame of her bathroom door. Petitioner's staff investigated this episode, had the shoulder x-rayed, and notified the resident's physician and family of the resident's complaint. CMS Ex. 15, at 2 - 7. The x-ray was negative. CMS Ex. 17, at 1. However, five days later, on November 21, 2005, the resident complained to Petitioner's staff about right lateral side pain and an irregular heartbeat. CMS Ex. 14, at 15. Petitioner's staff sent the resident to the hospital and, later on that day, the hospital notified the staff that the resident had been admitted, suffering from congestive heart failure and a fractured right clavicle. *Id.*, at 16; P. Ex. 1, at 2; P. Ex. 2, at 2.

Petitioner did not conduct an investigation of the cause of Resident # 2's fractured clavicle until after December 27, 2005. Petitioner investigated the cause of that injury only after a surveyor informed Petitioner's staff that the resident had complained to the surveyor about having her arms pulled by a member or members of Petitioner's staff. Petitioner's pre-hearing brief at 6.

I find that Petitioner failed to comply with the requirements of 42 C.F.R. § 483.13(c)(3) because it should have investigated the cause of the resident's fractured clavicle as soon as it learned of the injury on November 21, 2005. The regulation implicitly requires that a facility investigate immediately the cause of a resident's injury, including an injury of an unknown source. The regulation does not allow for a delayed investigation. On November 21 Petitioner's staff knew that the resident had been injured, seriously, and that the cause of the injury was unknown at that point. That triggered a duty for the staff immediately to investigate the cause of the injury. Delaying such an investigation for five weeks, and until only after a surveyor had brought to Petitioner's attention the resident's complaint of possible abuse or mistreatment by Petitioner's staff, is a failure to comply with the regulatory requirement.

Failure to investigate the cause of the resident's fractured clavicle is not justified by Petitioner's investigation of the resident's previous report that she had bumped her shoulder. In that earlier incident x-rays were negative. The staff logically had to conclude – based on the fact that x-rays taken on the 21<sup>st</sup> of November showed a fractured clavicle – that the injury reported on that date was a new occurrence. Given that, a second investigation was mandated by the regulations.

Petitioner argues that, in fact, it *did* conduct the second investigation, after being informed about the resident's complaints by a surveyor on December 27, 2005. But, there was no reason for the staff to wait to conduct an investigation until hearing that the resident had complained of possible staff abuse. The regulation plainly requires that the staff investigate an injury of an unknown cause just as thoroughly and as promptly as it would investigate an allegation of abuse. Here, Petitioner's staff knew about a new injury with an unknown cause on November 21, 2005. It had an obligation to investigate immediately and it failed to satisfy that obligation. Consequently, the fact that Petitioner may have begun an investigation belatedly into the cause of Resident # 2's injury is irrelevant.

***3. The undisputed material facts establish that, as of the February survey, Petitioner failed to comply with several participation requirements.***

The surveyors who conducted the February survey found that Petitioner failed to comply with Medicare participation requirements as follows:

- *Failure to comply with the requirements of 42 C.F.R. § 483.13(c).* The regulation requires a facility to develop and implement written policies and procedures to prohibit mistreatment, neglect, and abuse of residents. The surveyors found that Petitioner had not complied with this requirement because it failed to train at least three of its staff members adequately in the implementation of its anti-mistreatment, neglect, and abuse policies. CMS Ex. 2, at 1.
- *Failure to comply with the requirements of 42 C.F.R. § 483.20(k)(2)(i).* The regulation requires a facility to develop a comprehensive care plan for each of its residents that includes measurable objectives and timetables to meet each resident's nursing needs as are identified in the resident's comprehensive assessment. The surveyors concluded that Petitioner had, in several instances, failed to develop comprehensive resident care plans timely. CMS Ex. 1, at 2 - 3.

- *Failure to comply with the requirements of 42 C.F.R. § 483.25(h)(1)*. The regulation mandates that a facility ensure that its resident environment be as free from accident hazards as is possible. The surveyors concluded that Petitioner failed to comply with this regulation because: its staff left prescription and non-prescription medications in places that were accessible to residents; the staff left oxygen tanks standing unrestrained in a resident's room; and, it exposed residents to other potentially hazardous substances and objects. CMS Ex. 1, at 4 - 6.

- *Failure to comply with the requirements of 42 C.F.R. § 483.35*. The regulation provides that a facility must provide each resident with a nourishing, palatable, well-balanced diet that meets the resident's daily nutrition and special dietary needs. The surveyors found that Petitioner failed to comply with the regulation's requirements in that it failed to develop recipes for pureed food that ensured that the food was of the proper consistency, flavor, and taste. CMS Ex. 1, at 6 - 8.

- *Failure to comply with the requirements of 42 C.F.R. § 483.65(b)(1)*. The regulation directs a facility to isolate each resident in the circumstance where the facility's infection control program determines that the resident requires isolation. The obvious intent of the regulation is to minimize the risk of spread of infections. The surveyors found that Petitioner's staff failed to comply with this regulation's requirements in the following respects. First, they found that Petitioner's staff did not keep equipment such as gloves, gowns, and hazardous waste containers in or near the rooms of those residents who had been isolated as an infection precaution. Second, they observed staff entering the rooms of isolated residents without wearing gloves and having substantial contact with these residents without wearing gloves. Third, they observed the staff assisting other residents after dealing with isolated residents without first washing their hands or cleaning equipment. Finally, the surveyors found that the staff violated isolation protocol by assigning a resident infected with methicillin resistant staphylococcus aureus to be the roommate of another resident who was wearing a Foley catheter. CMS Ex. 1, at 8 - 10.

Petitioner did not dispute any of these findings of noncompliance, either in its pre-hearing brief or in its opposition to CMS's motion for summary disposition. Consequently, I find that the allegations of noncompliance made at the February survey are undisputed and administratively final.<sup>3</sup>

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<sup>3</sup> Petitioner filed declarations by two witnesses that assert, essentially, that there were no injuries or complaints resulting from the lapses that are the basis for the February survey deficiency findings. P. Ex. 1; P. Ex. 2. However, Petitioner did not assert that the absence of actual harm was a defense to CMS's findings of noncompliance. Moreover, none of these findings is premised on the presence of actual harm, but on the potential for

**4. Civil money penalties of \$300 per day are reasonable for each day of the January 6 - March 2, 2006 period.**

CMS is authorized to impose civil money penalties in amounts ranging from \$50 - \$3,000 per day to remedy a deficiency or deficiencies that are not at the immediate jeopardy level of scope and severity. 42 C.F.R. § 488.438(a)(1)(ii). There are regulatory factors for determining where within that range a penalty amount should fall. 42 C.F.R.

§§ 488.438(f)(1) - (4); 488.404 (incorporated by reference into 42 C.F.R.

§ 488.438(f)(3)). These factors include: the seriousness of a deficiency or deficiencies; the interrelationship of deficiencies; a facility's compliance history; its degree of culpability; and, its financial condition.

In this case CMS determined to impose civil money penalties of \$300 per day for each day of Petitioner's noncompliance. I note at the outset that the penalty amount is very modest, comprising only ten percent of the maximum allowable daily amount for non-immediate jeopardy level deficiency penalties.

CMS argues that penalties of that amount are justified by the seriousness of Petitioner's deficiencies. CMS asserts that, when viewed in their totality, the deficiency established at the January survey and the five deficiencies established at the February survey show that Petitioner failed to create a safe environment for its residents. Among other things, according to CMS, the deficiencies prove that Petitioner: failed adequately to train its staff regarding implementation of Petitioner's anti-abuse policy; failed to address several accident hazards in its facility; and failed to protect residents against the possible spread of infections.

I find CMS's contentions to be well-supported by the undisputed facts. Petitioner did not challenge facts that established both the presence and extent of its deficiencies.

Petitioner argues that its noncompliance was minimal and that there was no harm established by its deficiencies. And, it has offered affidavit evidence to support its contention that there was no actual harm. P. Ex. 1; P. Ex. 2. However, CMS's findings are not premised on the presence of actual harm, nor is actual harm a necessary prerequisite in this case for the imposition of civil money penalties. CMS based its findings of noncompliance and its penalty determination on the existence of deficiencies that establish a high *potential* for harm.

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more than minimal harm.

The fact that no resident was injured as a consequence of Petitioner's noncompliance is not a defense against imposition of penalties. Nor does it derogate from evidence establishing the seriousness of Petitioner's noncompliance. Good luck or random chance may have protected residents against harm. So long as Petitioner remained deficient the probability existed that someone would be harmed, sooner or later. For example, the presence of numerous accident hazards in Petitioner's facility – such as unsecured bottles of oxygen and containers of prescription drugs – created a probability that, eventually, an accident would occur with serious consequences.

I find that the deficiencies established by CMS are, in and of themselves, sufficiently serious to support the imposition of the very modest penalties that are at issue here. It is unnecessary to my finding that one deficiency – the second deficiency found at the January survey – is not encompassed by CMS's motion and, therefore, remains unresolved. Sustaining that deficiency would provide added support for the \$300 daily penalty amount but its presence is not necessary to justify the penalty amount.

I base my decision to sustain the penalty amount of \$300 per day exclusively on facts addressing the seriousness of Petitioner's noncompliance. There are no facts before me as to Petitioner's compliance history or its culpability. Nor has Petitioner asserted that it would find it financially difficult to pay the total penalties.

Petitioner has not offered any facts to assert that CMS's determination of duration of noncompliance is incorrect. For that reason I sustain the determination to impose penalties of \$300 for each day of the January 6 - March 2, 2006 period.

/s/

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**Steven T. Kessel**  
**Administrative Law Judge**