Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Van Wert Manor,	)	Date: June 19, 2008
(CCN: 36-5246),	)	
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-69
	)	Decision No. CR1806
Centers for Medicare & Medicaid	)	
Services.	)	
	)	

DECISION

Petitioner, Van Wert Manor (Petitioner or facility), is a long term care facility located in Van Wert, Ohio that is certified to participate in the Medicare program as a provider of services. Petitioner challenges the Centers for Medicare & Medicaid Services' (CMS's) determination that, at the time of a July 24, 2007 Life Safety Code (LSC) survey, it was not in substantial compliance with program participation requirements because its fire alarm system did not function as required. Petitioner also complains that the penalties imposed – a three month denial of payment for new admissions (DPNA) and the loss of its nurse aide training program for two years – are disproportionately harsh.

The parties have agreed that this matter may be decided based on their written submissions. For the reasons discussed below, I conclude that the facility was not in substantial compliance with Medicare participation requirements. I have no authority to review CMS's selection of remedies in this case.

I. Background

To participate in the Medicare program, facilities periodically undergo surveys to determine whether they comply with applicable statutory and regulatory requirements. The Secretary of Health and Human Services contracts with state survey agencies to conduct those surveys. Social Security Act (Act) § 1864(a); 42 C.F.R. § 488.20. The

regulations require that each facility be surveyed at least once every 12 months, and more often, if necessary, to ensure that identified deficiencies are corrected. 42 C.F.R. § 488.20(a). If a facility is not in substantial compliance with program requirements, CMS may impose a remedy, including a DPNA. 42 C.F.R. § 488.406. The facility may not then appeal CMS's choice of remedy. 42 C.F.R. § 488.408(g)(2).

When a facility is found to be out of substantial compliance for three months or longer, CMS must impose a DPNA. 42 C.F.R. § 488.417. If a facility is subject to a DPNA, its Nurse Aide Training and/or Competency Evaluation Program (NATCEP) may not be approved. Act § 1819(f)(2)(B).

In this case, based on surveys completed on April 12, 2007 and May 24, 2007, CMS determined that the facility was not in substantial compliance with the LSC because (among other deficiencies) its fire alarm system did not operate properly. CMS Exhibits (Exs.) 3, 14, 15, 16. Petitioner does not challenge the deficiency findings from these surveys. Joint Motion for a Decision on the Written Record ¶¶ 1, 2 (March 6, 2008). A surveyor from the Ohio Department of Health (State Agency) re-surveyed the facility on July 24, 2007. Based on her findings, CMS again determined that the facility had not achieved substantial compliance because its fire alarm system did not operate properly. Petitioner appeals this determination.

CMS has imposed a three-month DPNA, effective July 12, 2007, which precludes Petitioner from conducting NATCEP for two years. CMS Ex. 5; *see* Act § 1819(f)(2)(B); 42 C.F.R. § 488.417.

By joint motion, the parties agree that this matter will be decided based on their written submissions, without an in-person hearing. Joint Motion for a Decision on the Written Record ¶ 3 (March 6, 2008); Order (March 7, 2008). CMS filed 16 proposed exhibits which it identifies as CMS Ex. 1 – CMS Ex. 16. Petitioner filed six proposed exhibits marked P. Exs. A - F. To conform to Civil Remedies procedures, we have re-marked them as P. Ex. 1 – P. Ex. 6. In the absence of objections, I admit into evidence CMS Exs. 1-16, and P. Exs. 1-6.

II. Issues

The sole issue before me is whether, at the time of the July 24, 2007 survey, the facility was in substantial compliance with the requirements of the LSC.

III. Discussion

The facility was not in substantial compliance with 42 C.F.R. § 483.70 and the LSC because its fire alarm system did not work properly.[1]

A facility must be designed, constructed, equipped, and maintained to protect the health and safety of its residents, personnel, and the public. 42 C.F.R. § 483.70. With respect to fire safety, facilities "must meet the applicable provisions of the 2000 edition of the [LSC] of the National Fire Protection Association [NFPA]." 42 C.F.R. § 483.70(a)(1). The LSC is a set of fire protection requirements designed to provide a reasonable degree of safety from fires.

The LSC requires that alarm systems automatically actuate [set off] the control functions necessary to make the premises safer for its occupants. LSC § 9.6.5.1; CMS Ex. 10, at 8. Among other functions, the system must release the hold-open devices for doors. LSC § 9.6.5.2; CMS Ex. 10, at 8. Magnetic hold-open devices normally keep doors in an open position, but smoke barrier doors must be closed in the event of a fire.

The LSC also requires that facilities install, test and maintain a fire alarm system, in accordance with the applicable requirements of NFPA 72 (*National Fire Alarm Code*). LSC § 9.6.1.4; CMS Ex. 10, at 7. NFPA 72 requires that all door hold-open release devices be monitored for integrity. NFPA 72 § 3-9.6.3; CMS Ex. 11, at 6.

Resetting or silencing the fire alarm control units should be possible only from the control unit at the protected premises, and not from a remote site. NFPA 72 § 3-8.1.3 (CMS Ex. 11, at 3).

Here, after twice failing its LSC surveys, the facility opted to upgrade its fire alarm panel. P. Ex. 2. On July 24, 2007, State Agency surveyor, Debra Bick, accompanied by the facility's administrator and two maintenance employees, twice tested the alarm system when it was in the silence mode. CMS Ex. 13, at 2-3 (Bick Decl. ¶¶ 11, 12). But the system did not operate properly. The magnetic hold-open devices on smoke barrier doors re-energized and kept the doors in the open position. CMS Ex. 1, at 2-3; CMS Ex. 2, at 2-3. The alarm system should have released the hold-open devices so that the doors would close.

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[1] I make this one finding of fact/conclusion of law.

The next day, the system's installers returned to the facility and determined that the system had not been programmed properly. They re-programmed the relay operation, and thereafter the system apparently functioned properly. P. Ex. 3; CMS Ex. 8, at 3; CMS Ex. 13, at 3 (Bick Decl ¶ 14).

Petitioner argues that the LSC requires that the alarm system be "installed, tested, and maintained," not that it be functional at all times. Petitioner urges me to apply a standard similar to that applied in accident cases: in the event of an incident, the regulations do not impose absolute liability but instead impose upon facilities an affirmative duty designed to achieve favorable outcomes "to the highest practicable degree." P. Brief (Br.) at 4; *See, Woodstock Care Center*, DAB No. 1726, at 25-30 (2000), *aff'd Woodstock Care Center v. U.S. Dept. of Health and Human Services*, 363 F.3d 583 (6th Circ. 2003).

I agree that some alarm system failures are probably unavoidable, and it would not be appropriate to impose penalties for an isolated malfunction that is promptly identified and corrected. But this was not an isolated malfunction. The facility has not demonstrated a properly functioning alarm system since the April 12 survey. A requisition order dated March 16, 2007, calls for by-pass parts to "defeat magnet hold during alarm panel in re-set/silence mode." CMS Ex. 8, at 1. Indeed, the malfunction described by Surveyor Bick is very similar to that found by federal surveyor Gary Cable during the May survey. Surveyor Cable explains that he instructed the maintenance man to silence the audible alarm devices, but to leave the alarm panel in active alarm status. When the maintenance man then set off the alarm, Surveyor Cable observed that the doors' magnetic hold-open devices had been re-magnetized, which allowed the doors to remain in the open position. CMS Ex. 14, at 2 (Cable Decl. ¶ 6).[2]

Moreover, I also agree with CMS that repeated programming errors – as unquestionably occurred here – do not fall into the category of isolated, unforseen and unavoidable malfunctions for which a facility might not be held accountable. If anything, the facility's having earlier discovered a malfunction caused by programming errors, heightened its responsibility to correct the problem and to ensure that it not recur.

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[2] Although Petitioner suggests in a footnote that it was compliant on May 24, 2007, and should not have been cited for a deficiency at that time, it has explicitly waived that argument. *Compare,* P. Br. at 3, n.1 *with* Joint Motion for a Decision on the Written Record ¶ 2 ("Petitioner is not challenging any other deficiency findings."). CMS's determination of noncompliance therefore stands as the final agency determination on the issue. 42 C.F.R. § 498.20(b).

Finally, the alarm system's malfunction created the widespread potential for more than minimal harm. Smoke barrier doors are designed to stay closed during a fire, forestalling the spread of smoke. An alarm system that allows them to remain open jeopardizes the the health and safety of facility residents and staff. CMS Ex. 13, at 3 (Bick Decl. ¶ 15).

IV. Conclusion

For all of the reasons discussed above, I uphold CMS's determination that Petitioner was not in substantial compliance with program participation requirements at the time of its July 24, 2007 survey which authorizes CMS to impose remedies. I have no authority to review CMS's determination to impose a remedy or CMS's choice of remedies.

/s/
Carolyn Cozad Hughes
Administrative Law Judge