Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Lake County Nursing & Rehabilitation Center,
(CCN: 15-5653),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-514

Decision No. CR2642

Date: October 5, 2012

DECISION

Petitioner, Lake County Nursing & Rehabilitation Center, appeals the determination of the Centers for Medicare and Medicaid Services (CMS) that, based on a survey completed on February 15, 2011, it was not in substantial compliance with Medicare program requirements. CMS has moved for summary judgment.

The stipulated facts establish that Petitioner was not in substantial compliance with Medicare program requirements from February 15 through March 16, 2011. I grant CMS's motion for summary judgment and find there is a basis for the imposition of a civil money penalty (CMP) of $200 per day from February 15 through March 16, 2011. The undisputed evidence further substantiates the CMP considering Petitioner did not follow a physician's order to administer pain medication to a resident.

I. Background

Petitioner is a long-term care facility, located in East Chicago, Indiana, that participates in the Medicare program. Based on a survey completed on February 15, 2011, CMS

determined that Petitioner was not in substantial compliance with 16 Medicare program requirements, the most serious of those deficiencies was a violation of 42 C.F.R. § 483.25, Tag F309, cited at a scope and severity level of G (an isolated instance of actual harm to resident health and safety that is not considered immediate jeopardy[1]).

By letter dated April 14, 2011, CMS advised Petitioner that it would impose certain remedies for the noncompliance that included a CMP of $200 per day for 30 days, beginning February 15 and continuing through March 16, 2011, for a total amount of $6,000; a denial of payment for new Medicare and Medicaid admissions (DPNA) effective May 15, 2011; a mandatory termination of Petitioner's provider agreement if Petitioner did not achieve substantial compliance by August 15, 2011; and loss of any nurse aid training and competency evaluation program (NATCEP) for a period of two years. A revisit survey conducted on April 5, 2011, determined that Petitioner returned to substantial compliance as of March 17, 2011. Consequently, CMS did not pursue the DPNA and termination remedies.

By letter dated June 9, 2011, Petitioner requested an administrative law judge (ALJ) hearing. The Civil Remedies Division received Petitioner's request, assigned it to me for hearing and decision, and on June 14, 2011, an Acknowledgment and Initial Prehearing Order was issued at my direction.

On June 24, 2011, the parties filed a joint stipulation (Jt. Stip.) agreeing that Petitioner only challenges the F309 deficiency from the February 2011 survey. The stipulation specifically notes that Petitioner is not appealing the remaining citations from that survey.

CMS filed its prehearing exchange (CMS Br.) on September 9, 2011, accompanied by CMS exhibits (CMS Exs.) 1-32. Petitioner filed its prehearing exchange (P. Br.) on October 14, 2011, accompanied by Petitioner exhibits (P. Exs.) 1-3. On October 26, 2011, CMS moved for summary judgment (CMS MSJ), and on November 29, 2011, Petitioner filed its opposition to the motion (P. Opposition).

The Social Security Act (Act) sets forth requirements for a long-term care facility's participation in the Medicare program and authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations implementing those statutory provisions. Act § 1819, 42 U.S.C. § 1395i-3. The Secretary's regulations are found at 42 C.F.R. Part 483. To participate in the Medicare program, a facility must maintain substantial compliance with program requirements. To be in substantial compliance, a facility's

[1] "Immediate jeopardy" is defined as "a situation in which the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident." 42 C.F.R. § 488.301.

deficiencies may pose no greater risk to resident health and safety than "the potential for causing minimal harm." 42 C.F.R. § 488.301.

The applicable state agency, or CMS, conducts surveys of nursing facilities to determine whether they are in compliance with the requirements of Part 483. 42 C.F.R. §§ 488.301; 488.330. If a facility is found out of substantial compliance, then CMS has the authority to impose one or more of the enforcement remedies listed in section 1819(h) of the Act, 42 U.S.C. § 1395i-3(h), and 42 C.F.R. § 488.406, including a per day CMP and loss of NATCEP. Remedies are applied on the basis of the scope and severity of the noncompliance found during a survey. 42 C.F.R. § 488.402(b). The factors CMS considers when selecting remedies are set forth at 42 C.F.R. § 488.404.

A facility has a right to appeal a certification of noncompliance leading to an enforcement remedy. However, the choice of remedies by CMS, or the factors CMS considered when choosing remedies, are not subject to my review. 42 C.F.R. §§ 488.408(g)(1); 488.330(e); 488.408(g)(2); 498.3. I may not review the scope and severity level of noncompliance that CMS determines unless: (1) a successful challenge would affect the range of the CMP amounts that CMS could collect; or (2) there was a finding of "substandard quality of care" that resulted in the loss of approval for a facility's NATCEP. 42 C.F.R. § 498.3(b)(14)(i), (ii). Neither of those contingencies apply here.

CMS notified Petitioner by letter dated April 14, 2011, that it was ineligible to conduct a NATCEP for two years. CMS asserts that Petitioner did not have a NATCEP in place at the time and Petitioner does not dispute this assertion. CMS MSJ at 12 n.8; CMS Br. at 11; CMS Exs. 31, at 1; 32, at 1. Because Petitioner notes that it is appealing the penalty and remedies imposed (specifically, the CMP *and* the loss of NATCEP), I note that a state may not approve and must withdraw any prior approval of a NATCEP offered by a nursing facility that has been: (1) subject to an extended or partial extended survey under sections 1819(g)(2)(B)(i) or 1919(g)(2)(B)(i) of the Act; (2) assessed a CMP of not less than $5,000; or (3) subject to termination of its participation agreement, a DPNA, or the appointment of temporary management. 42 C.F.R. § 483.151(b)(2) and (e)(1). In this case, the state is required to withdraw any approval given or deny any approval sought by Petitioner to conduct a NATCEP for a period of two years because the CMP imposed here is $6,000, which is in excess of the $5,000 threshold amount.

II. Issues

The issues before me are whether:

> Petitioner was in substantial compliance with Medicare participation requirements; and, if not, whether the imposed CMP is reasonable.

III. Summary Judgment Standard

Summary judgment is appropriate when a case presents no issue of material fact, and its resolution turns on questions of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Livingston Care Ctr. v. United States Dep't of Health & Human Servs.*, 388 F.3d 168, 173 (6th Cir. 2004); *see also Illinois Knights Templar Home*, DAB No. 2274, at 3-4 (2009) (*citing Kingsville Nursing Ctr.*, DAB No. 2234, at 3-4 (2009)). The moving party may show the absence of a genuine factual dispute by presenting evidence so one-sided that it must prevail as a matter of law, or by showing that the non-moving party has presented no evidence "sufficient to establish the existence of an element essential to [that party's] case, and on which [that party] will bear the burden of proof at trial." *Livingston Care Ctr.*, 388 F.3d 168, 173 (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). To avoid summary judgment, the non-moving party must then act affirmatively by tendering evidence of specific facts showing that a dispute exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (1986); *see also Vandalia Park*, DAB No. 1939 (2004); *Lebanon Nursing & Rehab. Ctr.*, DAB No. 1918 (2004). To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but it must furnish evidence of a dispute concerning a material fact. *Illinois Knights Templar*, DAB No. 2274, at 4; *Livingston Care Ctr.*, DAB No. 1871, at 5 (2003).

In examining the evidence for purposes of determining the appropriateness of summary judgment, I must draw all reasonable inferences in the light most favorable to the non-moving party. *Brightview Care Ctr.*, DAB No. 2132, at 2, 9 (2007); *Livingston Care Ctr.*, 388 F.3d at 168, 172; *Guardian Health Care Ctr.*, DAB No. 1943, at 8 (2004); *but see Cedar Lake Nursing Home*, DAB No. 2344, at 7 (2010); *Brightview*, DAB No. 2132, at 10 (upholding summary judgment where inferences and views of non-moving party are not reasonable). However, drawing factual inferences in the light most favorable to the non-moving party does not require that I accept the non-moving party's legal conclusions. *Cedar Lake*, DAB No. 2344, at 7*; Guardian*, DAB No. 1943, at 11 ("A dispute over the conclusion to be drawn from applying relevant legal criteria to undisputed facts does not preclude summary judgment if the record is sufficiently developed and there is only one reasonable conclusion that can be drawn from those facts.").

I have accepted all of Petitioner's factual assertions as true. In addition, I have drawn all reasonable inferences in Petitioner's favor. No dispute exists that Petitioner was not in substantial compliance with program participation requirements based on the 15 stipulated deficiencies at the scope and severity of D and E. Further, when resolving all disputed facts in Petitioner's favor relating to Resident 33's pain management and the F309 deficiency, I find the undisputed evidence supports a finding in favor of CMS.

Accordingly, for the reasons set out further below, summary judgment is appropriate in this case.

IV. Discussion

A. Petitioner's stipulation that it was not in substantial compliance with 15 deficiency citations supports the CMP that CMS imposed.

I agree with CMS's position that the 15 uncontested deficiencies from the February 2011 survey provide a fully adequate and independent basis for the CMP imposed.

CMS's determination that Petitioner was not in substantial compliance with those uncontested, non-appealed program participation requirements is final and binding. 42 C.F.R. § 498.20(b). Because there is a final and binding determination that the facility was not in substantial compliance, CMS has discretion to impose one or more of the enforcement remedies listed in 42 C.F.R. § 488.406, which include the per day CMP imposed here. Act § 1819(h), 42 U.S.C. § 1395i-3(h); 42 C.F.R. § 488.402. I have no authority to review CMS's decision to impose a remedy, if a basis exists for its imposition, nor may I review CMS's choice of remedy. 42 C.F.R. § 488.438(a)(1)(ii), (e).

The administratively final 15 deficiencies include 11 deficiencies at a scope and severity level of D (isolated instances with the potential to cause more than minimal harm to the health and safety of residents but not considered immediate jeopardy) and four deficiencies at a scope and severity level of E (a pattern of instances with the potential to cause more than minimal harm to the health and safety of residents but not considered immediate jeopardy):

Eleven Uncontested Deficiencies at a Scope and Severity Level of D:
- 42 C.F.R. § 483.10(b) (5)-(10) (Tag F156) – Notice of Rights, Rules, Services, Charges
- 42 C.F.R. § 483.10(b)(11) (Tag F157) – Notification of Changes
- 42 C.F.R. § 483.20(d), (k)(1) (Tag F279) – Comprehensive Care Plans
- 42 C.F.R. § 483.20(d) and 483.10(k)(2) (Tag F280) – Care Planning Participation
- 42 C.F.R. § 483.20(k)(3)(i) (Tag F281) – Services Meeting Professional Standards
- 42 C.F.R. § 483.20(k)(3)(ii) (Tag F282) – Services by Qualified Persons
- 42 C.F.R. § 483.25(h) (Tag F323) – Accident Hazards/Supervision/Devices
- 42 C.F.R. § 483.25(*l*) (Tag F329) – Unnecessary Drugs
- 42 C.F.R. § 483.35(i) (Tag F371) – Sanitary Conditions for Food
- 42 C.F.R. § 483.55(b) (Tag F412) – Dental Services
- 42 C.F.R. § 483.60(b), (d), (e) (Tag F431) – Records, Labeling/Storage of Drugs and Biologicals

Four Uncontested Deficiencies at a Scope and Severity Level of E:
- 42 C.F.R. § 483.15(h)(2) (Tag F253) – Housekeeping and Maintenance Services
- 42 C.F.R. § 483.20(d) (Tag F286) – Maintaining 15 Months of Resident Assessments

- 42 C.F.R. § 483.25(c) (Tag F314) – Pressure Sores
- 42 C.F.R. § 483.75(*l*)(1) (Tag F514) – Clinical Records

See CMS Ex. 1.

B. The CMP that CMS imposed is reasonable.

CMS may impose a CMP for the number of days that the facility is not in compliance, or for each instance that a facility is not in substantial compliance. 42 C.F.R. § 488.430(a). The lower range of CMPs, from $50 per day to $3,000 per day, is reserved for deficiencies that do not constitute immediate jeopardy but either cause actual harm to residents or have the potential to cause more than minimal harm. 42 C.F.R. § 488.438(a)(1)(iii). In this case, CMS proposed a 30-day CMP of $200 per day, an amount in the lower end of the non-immediate jeopardy range.

An ALJ determines de novo whether the amount of a CMP is reasonable based on evidence in the appeal record concerning certain factors. *See* 42 C.F.R. § 488.438(e), (f); *Senior Rehab. and Skilled Nursing Ctr.*, DAB No. 2300, at 19-20 (2010), *aff'd, Senior Rehab. and Skilled Nursing Ctr. v. Health & Human Srvcs.*, 405 F. App'x 820 (5th Cir. 2010); *Lakeridge Villa Healthcare Ctr.*, DAB No. 2396, at 14 (2011). These factors are: (1) the facility's history of noncompliance, including repeated deficiencies; (2) the facility's financial condition; (3) the seriousness of the deficiencies as set forth at 42 C.F.R. § 488.404; and (4) the facility's degree of culpability, which includes neglect, indifference or disregard for resident, care, comfort, or safety. The factors in 42 C.F.R. § 488.404 include: (1) the scope and severity of the deficiency; (2) the relationship of the deficiency to other deficiencies resulting in noncompliance; and (3) the facility's prior history of noncompliance in general and specifically with reference to the cited deficiencies. Unless a facility contends that one of these regulatory factors does not support the CMP amount imposed, the ALJ must sustain it. *Coquina Ctr.*, DAB No. 1860 (2002). Petitioner does not contest the length of time during which CMS imposed the CMP or claim that its financial condition affects its ability to pay. Therefore there is no basis for me to consider either of these factors to mitigate the reasonableness of the penalty.

I find that Petitioner has a history of substantial noncompliance. A summary report that CMS submitted, covering the survey cycles beginning December 10, 2004 through July 12, 2010, shows that Petitioner was cited for some of the same deficiencies cited in this case (F157, F281, F282, F323, F314, F371 and F514), as well as a number of other deficiencies cited by surveys completed during that time period, many of which posed the potential for more than minimal harm.[2] CMS Ex. 3.

[2] In prior survey cycles from 2004 through 2010, Petitioner was cited under various Tags: in July 2010, F224 at a scope and severity level (s/s) of G; in November 2009,

In reviewing the seriousness of the deficiencies and the facility's degree of culpability, I find that the 15 uncontested deficiencies cited were serious. Eleven of the 15 uncontested deficiencies cited in the February 2011 Statement of Deficiencies were at a D scope and severity level and four deficiencies were at a E level. 42 C.F.R. § 483.25(h)(2).

These deficiencies involved a pattern of not ensuring proper treatment for residents at risk for pressure sores. Specifically, based on surveyor observation, record reviews and interviews, Petitioner failed to ensure treatment when a pressure sore developed for two residents. Further, Petitioner did not timely notify the facility's Registered Dietician to implement related dietary recommendations. CMS Ex. 1, at 39-42.

The deficiencies also included a pattern of failing to ensure resident records were complete and accurate, such as, assessments for pain, risk of falling, and skin integrity. CMS Ex. 1, at 14-17, 30-33, 54-59. Other examples of uncontested deficiencies include a lack of adequate supervision when moving a resident who was a fall-risk and failing to ensure non-pharmacological interventions were attempted prior to the use of an anti-anxiety medication on a resident. CMS Ex. 1, at 43-48.

Some of the deficiencies also show that Petitioner did not ensure a clean environment for its residents. For example, surveyors noted that walls and floors were marred, paint on doors, walls, ceilings and bed frames was peeling, there were gouged bed boards and walls, closet doors were off track, and there was spillage on walls. CMS Ex. 1, at 14-17. In addition, resident Minimum Data Set (MDS) Assessments were at times not kept in residents' records and were therefore not accessible to staff for review. CMS Ex. 1, at 30-33.

Further, Petitioner failed to provide necessary dental services for a resident after a dentist indicated the resident needed two teeth extracted due to decay. CMS Ex. 1, at 50.

Petitioner did not deny that all of these deficiencies, which only represent examples of the total 15 undisputed deficiencies, posed the potential for more than minimal harm to residents. A revisit survey shows Petitioner did not come back into compliance with the

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F323 and F490 at s/s of K, F50, F54, F130, F144 at s/s of F, and F157, F250, F272, F314, F322, F514 at s/s of D; in October 2008, F282 and F514 at s/s of E, and F250, F279, F323 at s/s of D; in November 2008, F14, F27, F51, F67, F144 at s/s of F; in April 2008, F272, F323 at s/s of D; in April 2007, F250, F309, F314 at s/s of G; in July 2007, F315 at s/s of G, F38, F50, F53, F54 at s/s of F, and F253 at s/s of E; in April 2006, F309, F314, F325 at s/s of G, F18, F45, F46, F50, F72, F147 at s/s F, and F281 at s/s of E; in November 2005, F281 and F324 at s/s of D; in February 2005, F157, F248, F253, F281, F371, F514 at s/s of E; and in December 2004, F324 at s/s of G. CMS Ex. 3.

15 uncontested deficiencies until March 17, 2011. CMS Ex. 2. Petitioner also does not dispute this date. Accordingly, I find that these 15 uncontested deficiencies alone are sufficient to justify the CMP imposed, $200 per day for 30 days of noncompliance, from February 15 through March 16, 2011.

C. Undisputed evidence establishes that the facility was not in substantial compliance with 42 C.F.R. § 483.25 (Tag F309) and further supports the reasonableness of the CMP.

CMS claims Petitioner violated 42 C.F.R. § 483.25 and cites instances involving Residents 33 and 38. An ALJ need not make more findings than is necessary to support the remedies imposed, even if the ALJ does not address every deficiency cited in a survey. *See, e.g., Beechwood Sanitarium*, DAB No. 1824, at 22 (2002). Therefore I am not required to address noncompliance findings that are not material to the outcome of the appeal. However, I choose to address CMS's allegations relating to Resident 33's pain management, considering I find that evidence to be undisputed and further support for the reasonableness of the CMP although not material to the outcome of the appeal.

Resident 33 was initially admitted to Petitioner's facility in September 2008. She was 82 years old during the relevant time and had a diagnosis of, among other things, osteoarthritis. CMS Ex. 7, at 1. A pain assessment, updated on November 9, 2010, notes that Resident 33 suffered from generalized pain that was controlled through the use of pain medication – Hydrocodone APAP – ordered to be administered three times per day. CMS Ex. 8, at 1-2. Resident 33's plan of care, as updated February 2010, addresses the resident's risk of "pain" and "stiff episodes" related to her diagnosis of arthritis and requires staff to "[a]dminister medications as ordered . . . ." CMS Ex. 7, at 1. Resident 33's November 2010 physician's order contains a standing pain medication prescription for Hydrocodone-APAP 7.5-325 mg (Norco) to be administered three times per day (8 a.m., 4 p.m., and 8 p.m.). The order also contains an "as needed" (PRN) provision of the pain medication. CMS Ex. 9, at 1, 2.

It is undisputed that, from January 1 through 13, 2011, Petitioner's staff failed to comply with Resident 33's physician's order to administer pain medication three times per day, as documented in Resident 33's January 2011 Medication Administration Record (MAR). CMS Ex. 14. Petitioner admits there was a pharmacy transcription error and does not dispute that the resident did not receive her standard pain medication at the three ordered times per day during the first several weeks in January 2011. P. Opposition at 1; P. Br. at 4. Petitioner argues, though, that the "as needed" aspect of the physician's order resulted in Resident 33 receiving the equivalent of what the Resident would normally receive. P. Opposition at 2.

From January 1 through 13, 2011, the time period during which Resident 33's standard pain medication order was not followed, she required the administration of her PRN pain

medication eight times due to complaints of leg pain (January 5, 6, 7, 9 (twice), 12 (twice), and13 (twice)). CMS Ex. 14, at 4. A social service progress note entry for January 12, 2011 states that the resident "has had complaints of pain" and also notes that the resident had a foot infection. CMS Ex. 11, at 2. It was not until January 13, 2011 that Petitioner added Resident 33's standard pain medication prescription to the MAR, and the Resident began receiving it again. CMS Ex. 13, at 1.

Each resident must receive care and services necessary to attain and maintain the highest practicable physical, mental, and psychosocial well-being of the resident. The care and services are to be based upon the resident's comprehensive assessment and plan of care. *See* 42 C.F.R. § 483.25. Further, the Board has held that failure to follow a physician's order amounts to a violation of 42 C.F.R. § 483.25. *Venetian Gardens*, DAB No. 2286, at 4 (2009) ("The Board has repeatedly stated that a facility's failure to follow its care plan or a doctor's order may be grounds for concluding that the facility is not in substantial compliance with section 483.25 quality of care standards."); *Lakeridge Villa Health Care Ctr.*, DAB No. 1988, at 22 (2005) (*citing The Windsor House*, DAB No. 1942, at 55-56 (2004); *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904, at 35-36 (2004)). A facility must carry out *every* order and ensure the sufficiency of resident care plans so that each resident receives all of the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being. *Alexandria Place*, DAB No. 2245, at 7-8 (2009).

Here the resident's physician clearly ordered pain medication three times a day at set times. In spite of the unambiguous instructions, the facility did not provide the ordered medications at the ordered times. Petitioner claims the end result was the same because the order allowed her to receive medication on an "as needed" basis. However, I do not find these two parts of the physician's order to be equivalent. The "as needed" part of the order was to be in addition to, not in place of, the standing three times per day part of the order. This difference is fundamental and had the potential to result in untreated pain symptoms for Resident 33.

V. Conclusion

For the reasons set forth above, I grant summary judgment in favor of CMS. The stipulated facts show that Petitioner was not in substantial compliance with several program requirements from February 15, 2011 through March 16, 2011. I also find that a $200 per day CMP from February 15 through March 16, 2011 is reasonable. The reasonableness of the CMP amount is further supported by an additional violation of

program requirements relating to Petitioner's failure to follow a physician's order to administer pain medication to a resident.

/s/
Joseph Grow
Administrative Law Judge