Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Bayou Shores, SNF, LLC d/b/a Rehabilitation Center of St. Petersburg,
(CCN: 10-5772),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-1643

ALJ Ruling No. 2015-6

Date: December 16, 2015

RULING ON MOTION FOR PARTIAL SUMMARY JUDGMENT

This case revisits the well-settled propositions that the Centers for Medicare & Medicaid Services (CMS) may terminate the Medicare participation of a long-term care facility that is not in substantial compliance with program requirements and that CMS need not afford the deficient facility an opportunity to correct first.

Petitioner, Bayou Shores, SNF, LLC, d/b/a Rehabilitation Center of St. Petersburg, is a long-term-care facility, located in St. Petersburg, Florida, that apparently continues to participate in the Medicare program pursuant to a court order.[1] A survey conducted from

[1] *But see Blossom South, LLC v. Sebelius*, 2014 WL 204201 at *4 (W.D.N.Y. January 17, 2014) ("[T]he case law is almost uniformly against plaintiff, in holding that a nursing home has no due process right to a pretermination hearing."), *citing Cathedral Rock of North College Hill, Inc. v. Shalala*, 223 F.3d 354, 366 (6th Cir. 2000); *Northlake Comm. Hosp. v. United States*, 654 F.2d 1234, 1242 (7th Cir. 1981); *Geriatrics, Inc. v. Harris*, 640 F.2d 262, 265 (10th Cir. 1981); *THI of Kansas at Highland Park, LLC v. Sebelius*, No. 2013 WL 4047570 at *8 (D. Kan. August 9, 2013); *GOS Operator, LLC v. Sebelius*, 843 F. Supp.2d 1218, 1233 (S.D. Ala. 2012); *Case v. Weinberger*, 523 F. 2d 602, 606-08 (2d Cir. 1975).

July 8 through 11, 2014, revealed a significant number of deficiencies, seven of which posed immediate jeopardy to resident health and safety. Because the facility was not in substantial compliance with Medicare program requirements, CMS imposed remedies: it terminated the facility's Medicare participation effective August 3, 2014; it denied payment for new admissions effective July 24, 2014; and it imposed a civil money penalty (CMP) of $3,050 per day effective June 21, 2014. Petitioner's Hearing Request (P. Hrg. Req.), Exhibit (Ex.) C. Petitioner appealed.[2] CMS now moves for partial summary judgment.

Petitioner concedes that it was not in substantial compliance at the time of the survey, but challenges the termination, arguing that the facility subsequently corrected its deficiencies. P. Hrg. Req. (July 31, 2014).

As discussed below, I find that the facility had a significant number of serious deficiencies, any one of which put it out of substantial compliance with program requirements. CMS may therefore impose a penalty – including termination. Federal regulations preclude me from reviewing the penalty imposed or CMS's determination to reject the facility's plan of correction. I therefore grant CMS's Motion for Partial Summary Judgment.

Background

The Social Security Act (Act) sets forth requirements for nursing facility participation in the Medicare program and authorizes the Secretary of Health and Human Services to promulgate regulations implementing those statutory provisions. Act §1819. The Secretary's regulations are found at 42 C.F.R. Part 483. To participate in the Medicare program, a nursing facility must maintain substantial compliance with program requirements. To be in substantial compliance, a facility's 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 Secretary contracts with state survey agencies to conduct periodic surveys to determine whether skilled nursing facilities are in substantial compliance. Act § 1864(a); 42 C.F.R. § 488.20. The regulations require that each facility be surveyed once every twelve months and more often, if necessary, to ensure that identified deficiencies are corrected. Act § 1819(g)(2)(A); 42 C.F.R. §§ 488.20(a); 488.308.

[2] This ruling does not resolve the case. I must still consider whether the amount of the penalty imposed is reasonable. *See* 42 C.F.R. § 488.428(e). See briefing schedule at the end of this ruling.

Here, following its annual survey, completed July 11, 2014, CMS determined that the facility was not in substantial compliance with the following Medicare participation requirements:

- 42 C.F.R. § 483.13(c) (Tag F224 – staff treatment of residents) at scope and severity level J (isolated instance of noncompliance that poses immediate jeopardy to resident health and safety);

- 42 C.F.R. § 483.13(c)(1)(ii)-(iii), (c)(2)-(4) (Tag F225 – staff treatment of residents: employee histories of abuse/neglect/mistreatment; reporting and investigating violations) at scope and severity level J;

- 42 C.F.R. § 483.13(c) (Tag F226 – staff treatment of residents: anti-abuse and neglect policies and procedures) at scope and severity level J;

- 42 C.F.R. § 483.20(k)(3)(ii) (Tag F282 – comprehensive care plans/qualified persons) at scope and severity level D (isolated instance of noncompliance that causes no actual harm with the potential for more than minimal harm);

- 42 C.F.R. § 483.25(h) (Tag F323 – quality of care: accident prevention) at scope and severity level J;

- 42 C.F.R. § 483.35(i) (Tag F371 – dietary services: sanitary conditions) at scope and severity level E (pattern of noncompliance that causes no actual harm with the potential for more than minimal harm);[3]

- 42 C.F.R. § 483.65 (Tag F441 – infection control) at scope and severity level D;

- 42 C.F.R. § 483.75 (Tag F490 – administration) at scope and severity level J;

- 42 C.F.R. § 483.75(d)(1)-(2) (Tag F493 – administration: governing body) at scope and severity level K (pattern of noncompliance that poses immediate jeopardy to resident health and safety);

- 42 C.F.R. § 483.75(o)(1) (Tag F520 – administration: quality assessment and assurance) at scope and severity level J.

[3] In the statement of deficiencies, Tags F371 and F441 are cited out-of-sequence, following the other health survey findings and prior to the Life Safety Code (LSC) findings. P. Hrg. Req. Ex. A. Unfortunately, Petitioner did not number the pages of this exhibit.

P. Hrg. Req. Ex. A.[4]

Pursuant to its authority under the statute and regulations, CMS terminated the facility's program participation. Act §§ 1819(h)(2); 1866(b)(2)(A) (authorizing the Secretary to terminate the provider agreement if she finds substantial noncompliance with program requirements); 42 C.F.R. § 488.412; *see also, Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 21 (2000).

In a notice letter dated July 22, 2014, CMS advised the facility of the survey findings and penalties. P. Hrg. Req. Ex. C. Petitioner timely requested a hearing.

CMS has moved for partial summary judgment asking that I affirm its determination to terminate the facility's program participation. Petitioner opposes.

Discussion

1. Because the facility was not in substantial compliance with program requirements, CMS was authorized to impose a remedy – including termination. CMS's choice of remedy is not reviewable.

Petitioner does not challenge any of the survey findings, which are final and binding. 42 C.F.R. 498.20 (b).[5] The facility was therefore not in substantial compliance with Medicare program requirements, and its deficiencies posed immediate jeopardy to resident health and safety. 42 C.F.R. § 488.301 (providing that a facility is not in substantial compliance if its deficiencies pose the potential for causing more than minimal harm).

[4] At the same time, the state conducted an annual LSC survey and found multiple deficiencies. Those deficiencies were cited at scope and severity levels D and E. CMS did not terminate based on the LSC deficiencies. P. Hrg. Req. Exs. B and C.

[5] Immediate jeopardy represents the most serious level of deficiency, and this facility had a whopping number of them – seven – stemming largely from the facility's failure to identify and protect residents who wandered or presented elopement risks. One mentally-impaired resident left the facility on a hot Florida day, wandered through traffic and was later found "at a bus stop." P. Hrg. Req. Ex. A. His departure was not documented, not investigated, and not reported to his physician. Nor were the non-jeopardy-level deficiencies trivial. Among other problems, kitchen personnel and nurse aides, as well as a nurse supervisor, did not follow adequate hand washing techniques, which poses a serious risk of infection among a vulnerable population.

The Medicare statute and regulations allow CMS to terminate a facility's program participation whenever that facility is not in substantial compliance with program requirements. Act §§ 1819(h)(2); 1866(b)(2)(A); 42 C.F.R. § 488.402(b) (providing that remedies are applied based on "noncompliance found during surveys . . ."); *see Blossom South, LLC v. Sebelius and cases cited therein*, 987 F.Supp. 2d 289, 300 (W.D.N.Y. 2013) (holding that the Secretary may terminate a provider when even one condition of participation is not met); *Beverly Health & Rehab. Servs., Inc., v. Thompson*, 223 F. Supp. 73, 111 (D.D.C. 2002) (holding that the agency's authority to terminate "may span all noncompliant facility behavior."). Where, as here, CMS finds that deficiencies pose immediate jeopardy to resident health and safety, it either terminates the provider agreement or appoints a temporary manager. 42 C.F.R. § 488.410(a).

The regulations unambiguously limit my jurisdiction. I may review CMS's finding of noncompliance that results in its imposing a remedy. 42 C.F.R. § 498.3(b)(13). I may *not* review CMS's choice of remedy nor the factors it considered in determining the remedy. 42 C.F.R. §§ 488.408(g)(2); 498.3(d)(14); *Beverly Health & Rehab. Servs., Inc. v. Thompson*, 223 F. Supp. 73, 111 (D.D.C. 2002) (holding that the "determination of what remedy to seek is beyond challenge.")

2. CMS need not afford a deficient facility the opportunity to correct its substantial noncompliance before it terminates program participation. I have no authority to review CMS's rejection of the facility's plan of correction.

Petitioner nevertheless argues that CMS is not entitled to summary judgment because the facility submitted a plan of correction on July 28, 2014, prior to the scheduled termination date. According to Petitioner, CMS should have accepted its plan of correction, and I must deny summary judgment and consider evidence that the facility corrected its deficiencies.

First, it is well-settled that, when a provider's Medicare participation is terminated because of alleged noncompliance, "the critical date for establishing compliance is the survey date, not the subsequent effective date of the termination." *Carmel Convalescent Hosp.*, DAB No. 1584 at 12 (1996); *Rosewood Living Ctr.*, DAB No. 2019 at 11 (2006). A provider's efforts to bring itself into compliance after the date of a survey is "completely irrelevant to the facility's appeal of [CMS's] determination to terminate." *Carmel*, DAB No. 1584 at 13.

Moreover, once a facility has been found out of substantial compliance, it remains so until it affirmatively demonstrates that it has corrected its deficiencies and achieved substantial compliance. *Ridgecrest Healthcare Ctr.*, DAB No. 2493 at 2-3 (2013); *Taos Living Ctr.*, DAB No. 2293 at 20 (2009); *Premier Living & Rehab. Ctr.*, DAB No. 2146 at 3 (2008); *Lake City Extended Care*, DAB No. 1658 at 12-15 (1998). The burden is on the facility to prove that it is back in compliance, not on CMS to prove that deficiencies

continued to exist. *Asbury Care Ctr. at Johnson City*, DAB No. 1815 at 19-20 (2002). It must show that "the incidents of noncompliance have ceased" *and* that it has implemented appropriate measures to insure that similar incidents will not recur." *Libertywood Nursing Ctr.* , DAB No. 2433 at 15, *citing Life Care Ctr. of Elizabethton*, DAB No. 2367 at 16 (2011).[6] A facility's return to substantial compliance usually must be established through a resurvey. 42 C.F.R. § 488.454(a); *Ridgecrest*, DAB No. 2493 at 2-3.

In any event, CMS is not required to afford a provider the opportunity to correct its substantial noncompliance before terminating program participation. *Oaks of Mid City Nursing and Rehab. Ctr.*, DAB 2375 at 29-30 (2011). This is a matter wholly within CMS's discretion and I have no authority to review it. A provider dissatisfied with an initial determination – which includes a finding of noncompliance that results in CMS's imposing a remedy – may request a hearing. But only initial determinations are appealable. The regulations list actions that are initial determination and thus subject to appeal. The determination to reject a provider's plan of correction is not listed as an initial determination and is therefore not reviewable in this forum. 42 C.F.R. § 498.3(b); *see Blossom South*, 987 F. Supp. at 302 (acknowledging that CMS has the authority to order immediate termination, without giving the facility an opportunity "to rectify matters, once that decision had been made."); *Hermina Traeye Memorial Nursing Home*, DAB No. 1810 at 13 (2002) (finding that the ALJ lacked the authority to adjudicate the question of whether [CMS] abused its discretion in deciding to reject the plan of correction).

Conclusion

Petitioner acknowledges that the facility had multiple deficiencies and was not in substantial compliance with program requirements. CMS was therefore authorized to impose remedies – including termination – and I have no authority to review the remedy imposed. CMS was not required to accept Petitioner's plan of correction, and I have no authority to review that rejection.

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[6] Here, Petitioner's plan of correction is based largely on promises of future conduct. *See, e.g.*, P. Hrg. Reg. Ex. D at 1-3 (promising that the facility *will* assess new admissions for their elopement risk; that staff *will* comply with elopement policies because they have now been trained in them; that staff *will* accompany visitors to the secured unit; that new admissions *will* be audited periodically; that investigations *will be* completed timely). Such promises do not establish that the cited deficiencies have been corrected. The facility will not achieve substantial compliance until it shows that it has implemented the promised changes and that they have, in fact, corrected the problems. *See Libertywood Nursing Ctr.*, CR2388 at 16 (2011), *aff'd* DAB No. 2433 (2011); *Premier Living and Rehab. Ctr.*, DAB CR1602 (2007), *aff'd* DAB No. 2146 (2008). This takes time.

I therefore grant CMS's Motion for Partial Summary Judgment.

Briefing Schedule. No later than **February 28, 2015**, CMS will submit its brief, and accompanying exhibits (marked in accordance with Civil Remedies procedures) addressing the issue remaining in this case: whether the CMP imposed – $3,050 per day – is reasonable. Petitioner will submit its brief and exhibits (marked in accordance with Civil Remedies procedures) no later than **April 7, 2015**. CMS may submit a reply brief and exhibits no later than **April 28, 2015**.

/s/
Carolyn Cozad Hughes
Administrative Law Judge