Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Mariner Health Care of Toledo (CCN 36-5070),	)	Date: July 16, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-04-197
	)	Decision No. CR1623
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

I summarily affirm the imposition of a per-instance civil money penalty (CMP) of $1,800 against Petitioner, Mariner Health Care of Toledo, by the Centers for Medicare & Medicaid Services (CMS).

I. BACKGROUND

Petitioner is a long-term care facility located in Toledo, Ohio, participating in the federal Medicare program as a skilled nursing facility. On November 25, 2003, the Ohio Department of Health (state agency) completed a complaint survey of Petitioner's facility. The survey resulted in a citation for past noncompliance with the requirements of 42 C.F.R. § 483.13(b), Tag F 223, which provides that a resident of a facility has the right to be free from verbal, sexual, physical, and mental abuse, at the scope and severity level of "G" (actual harm). The state agency recommended a per-instance CMP of $1,800, which CMS adopted by notice to Petitioner on December 13, 2003.

Petitioner requested a hearing before an administrative law judge (ALJ) by letter dated February 9, 2004. On February 24, 2004, the request was docketed and assigned to me for hearing and decision. On July 3, 2004, CMS submitted a Motion for Summary Judgment, along with six proposed exhibits designated as CMS Ex. 1 - CMS Ex. 6. On

August 23, 2004, Petitioner submitted its Reply to the Motion for Summary Judgment, along with five proposed exhibits designated as P. Ex. 1 - P. Ex. 5. On September 13, 2004, CMS submitted a Reply Brief. In the absence of any objections, I admit all of CMS's and Petitioner's exhibits into the record.

II. APPLICABLE LAW

The statutory and regulatory requirements for participation by a long-term care facility such as Petitioner are found at sections 1819 and 1919 of the Social Security Act (the Act) and at 42 C.F.R. Part 483. Sections 1819 and 1919 of the Act vest the Secretary of the Department of Health and Human Services, with authority to impose CMPs against a long-term care facility for failure to comply substantially with federal participation requirements.

Pursuant to the Act, the Secretary has delegated to CMS and the states the authority to impose remedies against a long-term care facility that is not complying substantially with federal participation requirements. Facilities that participate in Medicare may be surveyed on behalf of CMS by state survey agencies in order to determine whether the facilities are complying with federal participation requirements. 42 C.F.R. §§ 488.10-488.28, 488.300-488.335. Pursuant to 42 C.F.R. Part 488, CMS may impose a per-instance or per day CMP against a long-term care facility when a state survey agency concludes that the facility is not complying substantially with federal participation requirements. 42 C.F.R. §§ 488.406; 488.408; 488.430. The regulations in 42 C.F.R. Part 488 also give CMS a number of other remedies that can be imposed if a facility is not in compliance with Medicare requirements. *Id.*

The regulations specify that a CMP that is imposed against a facility on a per day basis will fall into one of two broad ranges of penalties. 42 C.F.R. §§ 488.408, 488.438. The upper range of CMP, of from $3,050 per day to $10,000 per day, is reserved for deficiencies that constitute immediate jeopardy to a facility's residents, and in some circumstances, for repeated deficiencies. 42 C.F.R. §§ 488.438(a)(1)(i), (d)(2). The lower range of CMP, 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 cause no actual harm, but have the potential for causing more than minimal harm. 42 C.F.R. § 488.438(a)(1)(ii). There is only a single range of $1,000 to $10,000 for a per instance CMP, which applies whether or not immediate jeopardy is present. 42 C.F.R. §§ 488.408(d)(1)(iv); 488.438(a)(2).

The Act and regulations make a hearing before an ALJ available to a long-term facility against whom CMS has determined to impose a CMP. Act, section 1128A(c)(2); 42 C.F.R. §§ 488.408(g); 498.3(b)(13). The hearing before an ALJ is a de novo proceeding.

Anesthesiologists Affiliated, et al, DAB CR65 (1990), *aff'd*, 941 F2d. 678 (8th Cir. 1991). A facility has a right to appeal a "certification of noncompliance leading to an enforcement remedy." 42 C.F.R. § 488.408(g)(1); *see also* 42 C.F.R. §§ 488.330(e) and 498.3. However, the choice of remedies by CMS or the factors CMS considered when choosing remedies are not subject to review. 42 C.F.R. § 488.408(g)(2). A facility may only challenge the scope and severity level of noncompliance found by CMS if a successful challenge would affect the amount of the CMP that could be collected by CMS or impact upon the facility's nurse aide training program. 42 C.F.R. §§ 498.3(b)(14) and (d)(10)(i). CMS's determination as to the level of noncompliance "must be upheld unless it is clearly erroneous." 42 C.F.R. § 498.60(c)(2). The Departmental Appeals Board (the Board or DAB) has long held that the net effect of the regulations is that a provider has no right to challenge the scope and severity level assigned to a noncompliance finding, except in the situation where that finding was the basis for an immediate jeopardy determination. *See, e.g., Ridge Terrace*, DAB No. 1834 (2002); *Koester Pavilion*, DAB No. 1750 (2000). Review of a CMP by an ALJ is governed by 42 C.F.R. § 488.438(e).

III. ISSUES

The issues presented in this matter are:

1. Whether summary judgment is appropriate here;

2. Whether there is a basis for the imposition of an enforcement remedy; and,

3. Whether the remedy imposed is reasonable.

IV. 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 and I discuss each finding in detail.

1. Summary judgment is appropriate under the circumstances of this case.

I am deciding this case on CMS's motion for summary judgment. An ALJ may decide a case on summary judgment, without an evidentiary hearing, if the case presents no genuine issue of material fact. *Crestview Parke Care Center v. Thompson,* 373 F.3d 743, 750 (6th Cir. 2004); *Livingston Care Center v. Dep't. of Health & Human Services,* No.

03-3489, 2004 WL 1922168, at 3 (6th Cir. Aug. 24, 2004). By interpretive rule, this tribunal has established a summary judgment procedure "akin to the summary judgment standard contained in Federal Rule of Civil Procedure 56." *Crestview Parke Care Center*, 373 F.3d 743, 750. Under that rule, 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 Center,* No. 03-3489, 2004 WL 1922168, at 4, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, at 322 (1986). The nonmoving party must then act affirmatively by tendering evidence of specific facts showing that a dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, at 586 n.11 (1986). *See also Vandalia Park,* DAB No. 1939 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004). A mere scintilla of supporting evidence is not sufficient. "If the evidence is merely colorable or is not significantly probative summary judgment may be granted." *Livingston Care Center*, No. 03-3489, 2004 WL 1922168, at 4, quoting *Anderson v. Liberty Lobby,* 477 U.S. 242, at 249-250 (1986). In deciding a summary judgment motion an ALJ may not make credibility determinations or weigh conflicting evidence but must instead view the entire record in the light most favorable to the non-moving party, all reasonable inferences drawn from the evidence in that party's favor. *Innsbruck HealthCare Center,* DAB No. 1948 (2004); *Madison Health Care, Inc.,* DAB No. 1927 (2004).

In evaluating the parties' submissions, I find that even if I construe the entire record in the light most favorable to Petitioner, as discussed below, I would find that Petitioner was out of substantial compliance in this instance. Moreover, Petitioner has tendered no specific facts to support that a material fact is in dispute, and CMS has made a prima facie case that it is otherwise entitled to judgment as a matter of law. *See Carrier Mills Nursing Home*, DAB No. 1883, at 3-4 (2003). In fact, Petitioner joined in a Joint Stipulation of Facts, dated July 23, 2004, in which it assented save for a few minor details, to the accuracy of all the facts set forth in Statement of Deficiencies, leaving no material facts in dispute.

2. Petitioner was not in substantial compliance with the requirements set forth in 42 C.F.R. § 483.13(b).

A resident in a facility participating in the Medicare program has –

> the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion.

42 C.F.R. § 483.13(b).

The statement of deficiencies (CMS Ex. 1) identified findings by the state agency of two incidents which involved two different State Tested Nurse Aides (STNAs). The CMS motion for summary judgment focused solely on an incident that took place on either the night of October 20, 2003, or the early morning of October 21, 2003, in which a nurse aide (STNA #1) employed by Petitioner allegedly struck a resident (CR #1) in the back, resulting in bruises to the resident. On October 23, 2003, CR #1 informed another aide that STNA #1 punched her in the back. CMS Ex. 4, at 3. The aide caring for the resident notified Petitioner's Administrator and Director of Nursing of the incident involving STNA #1. *Id.* The Administrator began an investigation, directing the Director of Social Services and another nurse to interview the resident. In a number of interviews, CR #1 was consistent in her account of how she was punched by STNA #1. CR #1 later identified STNA #1 in a photo array as the person who struck her. *Id.* The Administrator immediately suspended STNA #1, who was later terminated. While the investigation was continuing, Petitioner's staff conducted a head-to-toe assessment of CR #1, with the assessment revealing two bruises on the resident's left side. P. Ex. 1, at 3.

Petitioner maintains that CMS is applying what is in effect a strict liability standard by finding that Petitioner is liable for the acts of an employee who Petitioner had no reason to expect would abuse residents. Petitioner insists that it immediately corrected the problem once it was identified, and that CMS's imposition of a CMP would have a chilling effect on facilities who self-identity and self-report problems. Petitioner argues that facilities will fear that the results of internal investigations will be used to punish them for acts that they were not aware even existed. Petitioner asserts that, as contemplated by the regulations, it identified the potential for abuse, reported the incident, and immediately implemented corrective action to ensure that its residents were free from abuse or neglect. Petitioner refers to Interpretive Guidelines issued by CMS to state surveyors (P. Ex. 2) and other ALJ decisions as support for its position that a facility should not be held responsible for an isolated act of abuse committed by one of its employees.

Petitioner's arguments are unavailing. This matter is not about whether Petitioner acted expeditiously once it discovered that one of its residents had been injured allegedly at the hands of one of its employees. That is undisputed. Nor is this matter about whether Petitioner took corrective action. That too is undisputed. Rather, this matter is solely about whether there is convincing evidence that one of Petitioner's employees, acting in the scope of her employment, abused one of Petitioner's residents in violation of 42 C.F.R. § 483.13(b). I find that there is convincing evidence that STNA #1 abused CR #1.

CR #1 complained about being hit by a nurse's aide. CR #1 was consistent in her description of the event. CR #1 identified STNA #1 in a photo array. A physical examination of CR #1 revealed bruises on her back. Petitioner's own internal investigation confirmed the event. Petitioner terminated STNA #1 as an employee. None of these facts are disputed. I find this to be convincing evidence that the resident suffered physical abuse.

Moreover, I do not find that CMS is applying here, as Petitioner alleges, a strict liability standard. The plain language of 42 C.F.R. § 483.13(b) states that a resident has the right to be free from physical abuse. This language iterates the Act's provision at section 1819(c)(1)(A)(ii) that a resident has the "right to be free from physical or mental abuse." There is nothing in either the statutory or regulatory language qualifying that right. Petitioner's position is essentially that it should not be held responsible for the acts of its employees. This flies in the face of explicit statutory language. Section 1819(h)(2)(B)(ii) of the Act, which gives the Secretary of the Department of Health and Human Services the authority to imposes CMPs, incorporates the provisions of section 1128A(a) of the Act, which states at subpart (l), "A principal is liable for penalties . . . for the actions of the principal's agent acting within the scope of the agency." Here, the nurse aide was acting within the scope of her employment by providing resident care when the incident involving the resident occurred. To follow Petitioner's argument to its logical end would mean that any aberrant behavior by an employee that physically or mentally harmed a resident would be excusable. It is doubtful that that was the intent of Congress when it enacted the provisions of the Act cited above.

Furthermore, decisions of the Board have consistently held that the doctrine of *respondeat superior* applies to determine whether a facility is in compliance with a Medicare requirement. *See, e.g., Cherrywood Nursing and Living Center*, DAB No. 1845, at 10 (2002).

Petitioner's reliance on the ALJ decisions it has cited is misplaced, as those cases are readily distinguishable from this matter. Petitioner refers to *Life Care Center of Hendersonville,* CR542 (1998), where, according to Petitioner, the ALJ concluded that actual harm cannot be attributed to abuse absent evidence that the injury was inflicted willfully. Petitioner's Reply at 10. Here the evidence demonstrates that the nurse aide did assault the resident willfully. Petitioner also cites *Life Care Center of Hendersonville* for the argument that "a facility that can demonstrate that it has done whatever is within in its control to prevent abuse from occurring should not be cited with a violation of Section 483.13, even if there is evidence of actual abuse." *Id.* at 10 - 11. As CMS correctly points out, this proposition was taken from a discussion by the ALJ for a deficiency found under 42 C.F.R. § 483.13(c), not under 42 C.F.R. § 483.13(b) as is the case here.

Similarly, Petitioner's reference to *Hermina Traeye Memorial Nursing Home*, CR757 (2001), where the ALJ rejected the imposition of a strict liability standard on a facility, is irrelevant to this matter. In *Hermina Traeye*, the ALJ was discussing a deficiency assessed for accidents under 42 C.F.R. § 483.25(h), not resident abuse under 42 C.F.R. § 483.13(b).

Lastly, Petitioner's reliance on Interpretive Guidelines issued by CMS and a January 13, 2000 letter from CMS's predecessor (Health Care Financing Administration) to a private attorney in Ohio (P. Ex. 3) is misplaced. First, the Interpretive Guidelines cited by Petitioner (P. Ex. 2) concern 42 C.F.R.§ 483.13(c), not 483.13(b). The other Interpretive Guidelines cited by Petitioner (P. Ex. 4) concern the quality assessment and assurance committee a facility must have pursuant to 42 C.F.R. § 483.75(o). Petitioner asserts that as its quality assessment and assurance procedures discovered and corrected the underlying incident, it should not be sanctioned, in the form of a CMP, for discovering and reporting the incident. Again, I do not find the provisions of section 483.75(o) relevant to the facts of this matter. As to the January 13, 2000 letter, the ALJ in *Greenery Extended Care Center*, CR707 (2000), explicitly rejected the argument that the letter prevented the imposition of a CMP for resident abuse, finding that CMS's predecessor agency's interpretation of the Act and 42 C.F.R. § 483.13 as mandating the imposition of a CMP was reasonable and consistent with the anti-abuse provisions of the Act, and therefore entitled to deference. I see no reason to disturb that holding.

Accordingly, I find that Petitioner was not in substantial compliance with the requirements set forth in 42 C.F.R. § 483.13(b).

3. The remedy imposed is reasonable on the facts of this case.

If a facility is not in substantial compliance with program requirements, CMS has the authority to impose one or more of the enforcement remedies listed in 42 C.F.R. § 488.406, including a CMP. 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 minimum amount for a per-instance CMP is $1000 and the maximum is $10,000. CMS imposed a per-instance penalty here of $1,800, which is at the low end of the range. I must consider whether the proposed CMP is reasonable.

In determining whether the amount of the per-instance CMP is reasonable, the following factors specified at 42 C.F.R. § 488.438(f) must be considered: (1) the facility's history of non-compliance, 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.

Petitioner has not argued that the proposed CMP is unreasonable, but focused upon whether there is a basis for imposing such a remedy. The CMP amount is at the low-end of the range. Petitioner has not argued or submitted any evidence that it is unable to pay the CMP. CMS has offered no evidence of past noncompliance for me to consider. The deficiency is serious and supports the proposed CMP. Petitioner has not contested that one of its residents suffered actual harm at the hands of one of its employees. While Petitioner did act quickly to initiate immediate corrective action to prevent further harm to any of its residents, the fact remains that Petitioner bears ultimate responsibility for the actions of its employees while they are acting within the scope of their employment, as was the case here. Therefore, I conclude that, given all the factors, a per-instance CMP of $1,800 is reasonable.

V. CONCLUSION

I conclude that Petitioner was out of substantial compliance with federal participation requirements in that a resident suffered physical abuse by one of Petitioner's employees. I further find that the amount of the CMP imposed is reasonable.

/s/

Alfonso J. Montano
Administrative Law Judge