Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Meadowbrook Manor – Naperville,	)	Date: September 14, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-06-614
	)	Decision No. CR1648
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS) to impose remedies against Petitioner, Meadowbrook Manor – Naperville. These remedies include: civil money penalties of $300 per day for each day of periods that ran from January 13, 2006 through April 24, 2006 and from April 26, 2006 through June 11, 2006; and, a one-day immediate jeopardy level civil money penalty of $3,050 that CMS determined to impose for April 25, 2006. The remedies also include a denial of payment for new admissions for a period beginning on April 13, 2006 and running through June 11, 2006, and directed in-service training.

I. Background

Petitioner is a skilled nursing facility doing business in the State of Illinois. It participates in the Medicare program and its participation is governed by sections 1819 and 1866 of the Social Security Act (Act) as well as by regulations at 42 C.F.R. Parts 483 and 488. Additionally, there are regulations which govern my hearing and decision in this case. These are at 42 C.F.R. Part 498.

Petitioner was surveyed several times between January and June 2006 in order to determine whether it was complying with Medicare participation requirements. At several of these surveys Petitioner was found not to be complying substantially with participation requirements. CMS based its remedy determinations on these

noncompliance findings. The surveys at which noncompliance was found were completed on: January 13, 2006 (January 13 survey); January 27, 2006 (January 27 survey); February 2, 2006 (February 2 survey); March 17, 2006 (March 17 survey); April 7, 2006 (April 7 survey); and April 28, 2006 (April 28 survey).

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I issued an initial pre-hearing order which directed the parties to file pre-hearing exchanges including briefs and proposed exhibits that included the written direct testimony of all proposed witnesses. The parties complied with the exchange requirements. In its pre-hearing brief CMS asserted that Petitioner's hearing request was untimely as to the determination to impose denial of payments for new admissions against Petitioner.

I scheduled an in-person hearing. However, prior to the hearing and after a telephone pre-hearing conference, the parties agreed that the case could be heard and decided based on their written exchanges. Therefore, I cancelled the hearing but directed the parties to file additional briefs. In its brief CMS, among other things, moved that Petitioner's hearing request be dismissed in part due to its allegedly untimely challenge of the denial of payment remedy. Petitioner opposed this motion.

With its pre-hearing exchange CMS filed 67 proposed exhibits which it identified as CMS Ex. 1–CMS Ex. 67. Additionally, CMS filed a lengthy collection of documents, not marked as exhibits, which it labeled "Prior Statements and Other Miscellaneous Documents . . . ." With its exchange Petitioner filed 11 proposed exhibits which it identified as P. Ex. 1–P. Ex. 11.

Neither party objected to my receiving into evidence any of the proposed exhibits. I receive into evidence CMS Ex. 1–CMS Ex. 67 and P. Ex. 1–P. Ex. 11. I do not receive into evidence CMS's "Prior Statements and Other Miscellaneous Documents . . ." because CMS did not move that these documents be admitted into evidence.

II. Issues, findings of fact and conclusions of law

A. Issues

At first blush this case would appear to be complicated by the numerous surveys and the several noncompliance findings that were made at these surveys on which CMS based its remedy determinations. In fact, it is not so complicated because Petitioner does not challenge much of what CMS determined to be noncompliance and, moreover, the parties have stipulated as to the findings of the February 2 survey.

In fact, Petitioner does not challenge CMS's determination to impose civil money penalties against it, in amounts of $300 per day, from January 13 through January 26, 2006. Nor does it challenge CMS's determination to impose civil money penalties against it from March 17 through June 11, 2006 (which consist of penalties of $300 per day from March 17 through April 24, a $3,050 immediate jeopardy penalty for April 25, and penalties of $300 per day from April 26 through June 11). Thus, all that is at issue here are the $300 daily penalties that CMS determined to impose from January 27 through March 16, 2006 and the denial of payment for new admissions that CMS determined to impose beginning April 13, 2006 and running through June 11, 2006.[1]

Petitioner offers no substantive challenge to the deficiency findings that were made at the January 13 survey. It challenges only CMS's determination that Petitioner failed to correct the January 13 deficiency findings until February 12, 2006, arguing that it should be "deemed" to have corrected the January 13 findings by January 27, 2006. Consequently, the *only* issue emerging from the January 13 survey is whether Petitioner corrected its deficiencies by January 27, 2006, as it contends, or not until February 12, 2006, as was determined by CMS.

Petitioner challenges the two deficiency findings that were made at the January 27 survey. The issues which emerge from this survey are whether Petitioner failed to comply substantially with one or more participation requirements as of that survey, and the date or dates when Petitioner corrected any deficiencies that might have existed as of the date of the survey.

As for the February 2 survey (a Life Safety Code survey), as I note above, the parties agree that Petitioner attained compliance with all of the deficiencies that were identified at that survey by February 3, 2006, the day after the survey. That leaves open only the issue of whether Petitioner was noncompliant on February 2 with any of the regulations that were cited on that date. However, it would be unnecessary for me to address those findings if I conclude that Petitioner's noncompliance at earlier surveys (January 13 and January 27) was not corrected prior to the March 17 survey or, alternatively, if I conclude that deficiencies found at the March 17, April 17, or April 28 surveys originated prior to February 2, 2006 and continued through June 11, 2006.

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[1] The remedies that CMS determined to impose against Petitioner also included directed in-service training. Petitioner has not challenged CMS's authority to impose this remedy. Additionally, Petitioner lost approval of its nurse aide competency evaluation and training program for a two-year period as a consequence of the immediate jeopardy deficiency finding made at the April 28 survey. It has not challenged this outcome.

Petitioner does not challenge the findings of noncompliance that were made at the March 17, April 7, and April 28 surveys, including the finding of immediate jeopardy that was made at the April 28 survey. Consequently, the noncompliance findings and the remedy determinations made on the basis of these findings (including the imposition of a $3,050 immediate jeopardy level civil money penalty) are not at issue in this case.

In summary, what remains to be decided in this case is the following:

1. Whether Petitioner corrected all of the deficiencies that were found at the January 13 survey by January 27, 2006, as it contends;

2. Whether Petitioner failed to comply with one or more participation requirements as of the January 27 survey and, if so, the duration of its noncompliance with these requirements;

3. Whether there was a continuous period of noncompliance beginning in January 2006 and extending until June 11, 2006; and

4. Whether Petitioner timely challenged CMS's determination to impose the remedy of denial of payment for new admissions and, if Petitioner failed to do so, it established good cause for its untimely challenge of that remedy.

B. 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 it in detail.

1. Petitioner did not prove that it corrected the deficiencies that were identified at the January 13 survey before February 12, 2006.

It is well established that the burden falls entirely on the noncompliant facility to prove the date when it corrected its deficiencies. Where a facility challenges CMS's determination as to the date when compliance is attained – as is the case with Petitioner – a finding of noncompliance as of a particular date establishes a presumption that the noncompliance continues until the facility alleges and establishes that it has corrected the noncompliance. *Regency Gardens Nursing Center*, DAB No. 1858, at 9-10 (2002).

CMS's determination that Petitioner was not complying substantially with participation requirements as of January 13, 2006 included finding: a failure by Petitioner to investigate resident injuries of an unknown source in contravention of the requirements of 42 C.F.R. § 483.13(c); and a failure to provide adequate supervision and assistance devices to residents to protect them against sustaining accidents in contravention of the

requirements of 42 C.F.R. § 483.25(h)(2). CMS Ex. 3, at 1-7. Petitioner contested neither of these findings. Rather, it has focused on the date when CMS determined that Petitioner corrected these two deficiencies, February 12, 2006. According to Petitioner, this compliance date is incorrect. Petitioner asserts that, in fact, it corrected the January 13 deficiencies by January 27, 2006. Petitioner's brief on remaining issues at 3; Petitioner's reply brief at 2.

Petitioner offers no affirmative evidence to prove that it corrected its deficiencies by January 27. It points to nothing to establish the measures it implemented by that date in order to attain compliance. Indeed, Petitioner averred in its own submissions that it had not corrected the January 13 deficiencies prior to February 12, 2006. On February 2, 2006 Petitioner's administrator signed and filed a plan of correction which represented that the completion date for all corrections of the January 13 deficiencies would be February 12. CMS Ex. 3, at 1, 8-9.

Notwithstanding, Petitioner argues that it should be "deemed" to have attained compliance by January 27 solely because the surveyors who conducted the January 27 survey of Petitioner's facility failed to cite the two January 13 deficiencies as ongoing in their survey report. Petitioner's brief on remaining issues at 2.

Petitioner bases this argument on the language of a CMS program memorandum. S & C-01-23, August 5, 2001. P. Ex. 1, at 5. The document is an advisory document to surveyors which contains the following hypothetical question and response:

> 17Q: A complaint survey starts a certification cycle. One month later, the State conducts a standard survey but does not recite the violations found a month earlier. The State does not technically conduct a revisit because the plan of correction dates are later. If it is determined that the deficiencies do not exist at the time of the standard survey, should [a Form CMS-2567B] be prepared to clear the original deficiencies? Would the clearing of the tags be considered a revisit and count toward the 2-revisit policy?
>
> 17A: The fact that the standard survey did not find the same regulatory deficiencies as those cited during the complaint survey establishes that those deficiencies have been corrected and so a [Form CMS-2567B] should be prepared to clear the original deficiencies. The standard survey is not considered a revisit and should not be included in the revisit count. That is because the intent of a standard survey is not the same as that of a revisit; the standard survey is broader in scope and performed to evaluate the facility's compliance with a comprehensive set of requirements.

Petitioner's brief on remaining issues at 3; P. Ex. 1, at 5.

According to Petitioner this document must be read unequivocally to mean that, where a report of standard survey (the January 27 survey report) does not state that deficiencies from a prior complaint survey (the January 13 survey) persist then, and as a matter of law, the deficiencies from the prior survey must be deemed to have been corrected as of the date of the standard survey.

I find this argument to be unpersuasive. First, the hypothetical stated in the program memorandum departs from the facts of this case and, for that reason, the guidance given by that document is inapplicable to this case. In the hypothetical question the noncompliant facility has prepared and submitted a plan of correction prior to the standard survey stating correction dates that occur after that survey. The question emanating from this circumstance is whether the surveyors should prepare a specific form showing that the deficiencies had been cleared *if, at the standard survey they find that the deficiencies were, in fact, cleared*. The answer given to that hypothetical is that, in that very narrow circumstance, the surveyors should prepare a specific form showing that the deficiencies were cleared.

Here, Petitioner did not file a plan of correction prior to the standard survey. It filed the plan of correction nearly a week *after* the date of the standard survey. Under that circumstance it would be entirely reasonable – indeed, expected – that the surveyors who conducted the standard survey on January 27 would not consider whether Petitioner had attained compliance with previously cited deficiencies. More important, there is nothing in the report of the January 27 survey to suggest that the surveyors actually did look at the issue of continuing noncompliance. The report is entirely consistent with the fact that Petitioner did not submit its plan of correction for the January 13 deficiencies until a later date and, so, did not trigger a revisit to consider whether those deficiencies had been corrected until after the January 27 standard survey.

Had the surveyors found at the January 27 survey that the January 13 deficiencies had been cleared, then, pursuant to the guidance cited by Petitioner they should have prepared a form stating that finding. It is not unreasonable to infer from their failure to prepare such a form that they made no such finding on January 27.

Furthermore, the document cited by Petitioner does not in any sense describe the *legal or evidentiary significance* of a survey report. It merely consists of guidelines to surveyors as to how to fill out a report. Assuming that the document should be read to instruct surveyors to document continuing noncompliance at a standard survey that follows a complaint survey, it does not mean that a failure by surveyors to do so means, axiomatically, that noncompliance has been corrected. It means only that the surveyors failed to follow the guidelines in preparing follow-up documentation.

Finally, I find Petitioner's argument to be without merit because it exalts form over substance. In this case the undisputed facts are that Petitioner did not even allege that it had corrected the January 13 deficiencies before February 12, 2006. In light of that, it would be absurd to deem Petitioner to have attained compliance at an earlier date simply because the January 27 survey report fails to discuss the issue of correction of pre-existing deficiencies.

2. Petitioner manifested additional deficiencies as of January 27, 2006.

The surveyors who conducted the January 27 survey found two instances of failure by Petitioner to comply substantially with participation requirements in addition to those that were cited on January 13. Specifically, they found that Petitioner failed to comply: with the requirements of 42 C.F.R. § 483.15, which mandates that a skilled nursing facility provide care for its residents in a manner and in an environment that promotes maintenance or enhances each resident's quality of life; and with 42 C.F.R. § 483.25(b), which requires a facility to ensure that residents receive proper treatment and assistive devices to maintain vision including, if necessary, assisting the resident in making necessary appointments, and arranging transportation to and from the office of a practitioner specializing in vision care.

As I discuss below CMS offered persuasive proof showing that Petitioner failed to comply substantially with these two regulations. I find that Petitioner did not affirmatively rebut that evidence.

a. Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.15.

CMS's evidence concerning Petitioner's failure to comply with 42 C.F.R. § 483.15(e)(1), which requires skilled nursing facilities to provide reasonable accommodation of individual needs and preferences, except where the health or safety of the individual or other residents would be endangered, relates to the care that Petitioner gave to a resident who is identified as Resident # 28 in the report of the January 27 survey. CMS Ex. 17, at 1, 6-13, 15-16. The evidence offered by CMS concerning the care that Petitioner gave to Resident # 28 is powerful proof that Petitioner failed to address this resident's communications needs and failed to show an overall sensitivity and understanding of the need to deal on an individualized basis with communication-impaired residents.

The resident is an elderly, demented individual with severely impaired vision. Petitioner's staff assessed the resident as being incapable of effective verbal communication with the staff due to the aforementioned deficits but also due to a language barrier. Resident # 28 is Korean and, evidently, understands and speaks very little English. *Id*. On September 30, 2005 Petitioner's staff determined that:

> She is rarely understood and responds to simple direct communication only. She would answer yes, no or sometimes nod her head and give you a smile. [She] is Korean speaking but appears to understand little English. Resident is *not able to verbalize needs all the time* but would reply with 1 word when talked to . . . .

CMS Ex. 17, at 25 (emphasis added). Petitioner's staff concluded that it was necessary to prepare a care plan to address the resident's communication problem. *Id.*

However, the evidence offered by CMS shows that Petitioner did not, after making this assessment, prepare a care plan to address the resident's communication problem. Petitioner's staff prepared an activities care plan for Resident # 28 but this document actually predates the September 30, 2005 assessment. And, it is evident from the face of the September 30 assessment that Petitioner's staff concluded that more needed to be done in order to facilitate communications with Resident # 28. CMS Ex. 17, at 25. Consequently, the staff's own assessment of the resident shows that pre-existing efforts to facilitate communication were inadequate.

Moreover, the pre-existing activities care plan is, on its face, inadequate to address the problems that the staff identified on September 30, 2005. The interventions that were identified in the activities care plan consisted of the following:

> 1) Provide activity calendar monthly.
> 2) Invite and encourage resident to actively participate in activities.
> 3) Assist resident to activities areas.
> 4) Use gestures, hand over hand assist/touch when explaining the programs.
> 5) Mech. Soft/NTL diet.
> 6) Praise and thank for all efforts made.

CMS Ex. 17, at 36. Only one of the six items in the activities plan addresses specifically the resident's communication problem. And, that item was designed only to assist the resident in the context of engaging in the facility's activities. There was nothing in the activities plan that addressed the broader question of the resident's ability to communicate. For example, there was no care plan established for dealing with needs and desires that the resident might express while in her room or when she was receiving medical treatment from Petitioner's nursing staff for her various infirmities.

The inadequacy of Petitioner's efforts to address the resident's communication problem become more apparent when that problem is seen in the context of the medical care that Petitioner's staff gave to the resident. For example, the staff prepared a pain management plan for Resident # 28. The plan instructed the staff to encourage the resident to verbalize her feelings and concerns, to answer her questions and concerns carefully and accurately,

and to explain procedures and interventions in order to motivate the resident to be cooperative and to educate her about pain and pain management. CMS Ex. 17, at 39. On its face the plan assumes that the resident is an individual who is capable of effective communication with Petitioner's staff. The plan did not account for the resident's language and communications barriers nor did it explain how Petitioner's staff would surmount these barriers.

Furthermore, the evidence offered by CMS shows that Petitioner's staff failed to provide the resident with even the assistance that it represented that it was providing to her. A surveyor asked a member of Petitioner's staff how the staff communicated with the resident and the employee responded that there was a communications board in the resident's room. CMS Ex. 10, at 1-2. I take notice that a "communications board" is a device on which a communications-impaired resident may post images which correspond to the resident's needs of the moment. However, when the surveyor went to the resident's room to look at the communications board she found none to be present. *Id.* at 2.

On January 26, 2006 the day before the completion of the January 27 survey, Petitioner's staff presented the surveyors with a new care plan for Resident # 28. CMS Ex. 17, at 67. The plan represented, among other things, that Petitioner's staff would thoroughly assess the resident's communication strengths and deficits, that it would provide a translator to assist the resident in communicating, and that the translator would assist Petitioner's staff in developing a personalized communications board. *Id*. But, none of these promised measures had been implemented by the completion of the January 27 survey.

Petitioner's response to CMS's case is unconvincing. First, Petitioner avers without offering any supporting evidence that it accommodated the needs of Resident # 28. Petitioner's brief on remaining issues at 3. In connection with this assertion Petitioner argues that CMS's allegations refer to services and approaches that a hypothetical resident might benefit from but which Petitioner did not offer to Resident # 28. *Id.* at 3-4. According to Petitioner, there is no evidence that Resident # 28 needed such services and approaches. To the contrary, according to Petitioner, Resident # 28 communicated non-verbally with Petitioner's staff successfully to meet her needs. *Id*.; *see* P. Ex. 7, at 1-2.

This argument and the evidence that supports it – a declaration by one of Petitioner's nurses – is wholly unpersuasive. *See* P. Ex. 7. The evidence adduced by CMS, consisting of Petitioner's own treatment records, shows that Petitioner's staff was concerned that Resident # 28 was unable to verbalize her needs and to communicate effectively. CMS Ex. 17, at 25. The staff determined in September 2005 that this

problem was so significant that it required specialized care planning for the resident's communication needs. *Id*. Consequently, to assert now that the resident communicated adequately with Petitioner's staff belies Petitioner's own assessment of what needed to be done for the resident.

Furthermore, the declaration on which Petitioner relies is internally inconsistent and, for that reason, not credible. On the one hand, it asserts that, when Petitioner's staff talks to Resident # 28: "she looks at us and smiles", suggesting that she is unable to communicate anything beyond the most simple expressions of emotion. P. Ex. 7, at 1. But, on the other hand, and without explanation, the declaration states that staff and the resident "communicate together non-verbally, and well enough to provide her needs." *Id*. The declaration offers no explanation how this non-verbal communication works given that the resident apparently does no more than look at the staff and smile when approached. How, for example, does the resident describe or explain her symptoms, her feelings of pain, or anything beyond her most simple needs and desires? In that respect Petitioner offered nothing to derogate from its own assessment that the resident needed more assistance than Petitioner's staff was giving to her.

Second, Petitioner contends that it was offering appropriate and effective communication with Resident # 28 consistent with guidelines in the State Operations Manual. Petitioner's brief on remaining issues at 4. But, Petitioner offers no explanation as to exactly what it did to provide this allegedly appropriate and effective communication.[2] And, it does not directly respond to CMS's evidence that its staff recognized a need to do more to assist the resident but failed to do so.

Finally, Petitioner argues that, if it was deficient, its deficiency posed no possibility of more than minimal harm to the resident. It contends, without offering supporting evidence, that the resident lived at its facility for more than two years without experiencing harm. I find that assertion not only to be unsupported but to be contradicted by the evidence offered by CMS. Resident # 28 was in plain need of assistance by Petitioner's staff and the staff, in fact, recognized that need. For example, the staff saw a

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[2] Petitioner argues that it was not required by law to provide Resident # 28 with a translator and that CMS may not measure its compliance in terms of whether Petitioner provided or failed to provide one to the resident. However, CMS did not mandate that Petitioner provide the resident with a translator. The decision to do that was made independently by Petitioner to address the resident's communication needs. Petitioner's failure to implement this decision, along with several others concerning the resident's needs, by the completion of the January 27 survey is evidence that it had not implemented its own corrective actions by the end of the survey. But, the choice of precisely what corrective actions to take lay with Petitioner, not CMS.

need to enable the resident to communicate her complaints of pain so that the staff could treat her. The failure to address the resident's communication problem left this resident in a walled-in state, unable adequately to express her concerns, her complaints, or her symptoms. The potential for harm to the resident is obvious given Petitioner's failure to address her communication needs.

b. Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.25(b).

CMS premises its case for Petitioner's failure to comply with the requirements of 42 C.F.R. § 483.25(b) on evidence relating to the care Petitioner's staff gave to a resident who is identified as Resident # 16 in the report of the January 27 survey. This evidence provides strong support for CMS's allegations and establishes Petitioner's noncompliance with the regulatory requirement – that residents receive proper treatment and assistive devices to maintain vision including assistance in making necessary appointments and arranging transportation to and from appointments – if not rebutted.

Resident # 16 is an individual with numerous physical and mental impairments. Her problems include dementia, an unsteady gait and a history of falls. CMS Ex. 16, at 1, 3, 6. Petitioner's staff observed that she tended to wander as a consequence of her dementia.

The resident wore eyeglasses and her vision was assessed by Petitioner's staff in October 2005 as adequate so long as she wore them. CMS Ex. 10, at 3; CMS Ex. 16, at 4. However, in September 2005, the resident's eyeglasses were broken and they were neither repaired nor replaced. P. Ex. 8, at 1. On repeated occasions Petitioner's staff documented that the resident's vision was impaired and that she needed new eyeglasses. CMS Ex. 10, at 3; CMS Ex. 16, at 4. On several occasions prior to January 2006, Petitioner's staff documented that the resident was on an ophthalmology consult list to assist her in getting new eyeglasses. *Id.*

But, during the months prior to the survey, Resident # 16 did not receive a consultation with an ophthalmologist nor did she receive new eyeglasses. And, the evidence offered by CMS is devoid of anything to show that Petitioner's staff provided the resident with assistance in getting her vision checked or in getting new eyeglasses. As CMS asserts, the record shows that, in fact, it was Petitioner's policy *not* to make appointments on a resident's behalf or to provide transportation so that the resident might obtain eyeglasses off-premises. One of Petitioner's nurses states:

> When residents have broken glasses or need to see an eye doctor, nursing staff puts the resident's name and need in a book for service appointments. There is this "consult book" on each floor. Nurses write in residents' needs for optometry, podiatry, and dentistry in the consult books. Nurses also have the ability to write in minor concerns for follow-up in the consult book, even without a physician's order.
>
> For eye doctor visits, residents may go out to the eye doctor's office or we have eye doctors who come to the facility to see residents. Whether a resident goes out of the facility or stays in to see the eye doctor is up to the resident and family and is their choice.

P. Ex. 8, at 1.

As I discuss above, Resident # 16 was known to wander. During the January 27 survey she was observed by a surveyor wandering in Petitioner's facility and bumping into objects. CMS Ex. 55, at 2.

The regulation at issue imposes the explicit duty on a facility to assist a resident in making an appointment with a vision specialist and, where necessary, with transporting the resident to and from the specialist. The evidence supplied by CMS shows clearly that Petitioner failed to comply with this obligation in providing care for Resident # 16. For a period of nearly six months, in advance of the January 27 survey, Resident # 16 wandered Petitioner's facility without eyeglasses. She was prone to, and in fact did, bump into objects as she wandered. Petitioner's staff knew that the resident's vision was impaired, knew that her eyeglasses were broken, and yet, did not assist the resident in making an appointment with a vision specialist or in transporting the resident to a specialist. Indeed, it was Petitioner's policy, contrary to regulatory requirements, that it not do so. The resident's history and behavior supports the conclusion that, at a minimum, Petitioner's staff should have alerted the resident's family concerning her vision problems and need for immediate attention. Yet, Petitioner's records do not show such communication prior to the January 27 survey.

Petitioner's response to CMS's evidence is to argue that Resident # 16 had cataracts that the resident's family decided not to address with corrective surgery. Petitioner's brief on remaining issues at 5; *see* P. Ex. 8, at 1-2. It asserts that the resident's eye doctor concluded that corrective eyeglasses would not help the resident in view of her uncorrected cataracts. *Id*. Therefore, according to Petitioner, there is nothing that Petitioner could have done to assist the resident.

I find this argument to be unpersuasive. Whether Resident # 16 had cataracts that would have made corrective eyeglasses useless begs the question of whether Petitioner complied with its obligations under 42 C.F.R. § 483.25(b). Because the issue is irrelevant to my decision I make no finding that the resident would benefit or would not have benefitted from corrective eyeglasses. The issue here is, as I have stated, whether Petitioner provided the resident with required assistance and not whether that assistance would have produced good results had it been provided.

The whole point of the regulation is that a facility owes a duty to provide assistance to its vision-impaired residents to assure that these individuals receive appropriate clinical attention and whatever care their condition merits. Here, the evidence is that Petitioner failed to do anything to assist the resident prior to the January 27 survey, despite knowing that the resident had broken her eyeglasses and that she could not see adequately without them. Petitioner's staff did not know at the time when it was not providing necessary assistance that the resident had cataracts or that her cataracts would interfere with the benefits provided by corrective eyeglasses. Petitioner's vision was not assessed until *after* the completion of the January 27 survey. P. Ex. 4, at 3, 6-7.

Petitioner's argument is essentially an effort by it to shrug off its obligations by saying that its assistance would have been of no benefit to the resident had it been given. But, the regulation does not give a pass to a facility that fails to comply with its duties based on a retrospective finding that its assistance would not have helped. The "no harm no foul" logic used by Petitioner is no excuse for its failure to comply with regulatory requirements. The regulation imposes on a facility the affirmative duty to provide assistance *regardless* of the outcome of that assistance. The regulation's requirements are based on residents' needs and not on outcomes.

Petitioner could not have known that the resident would not benefit from new eyeglasses without the resident being assessed by an optometrist or ophthalmologist. And, during the entire five-month period that the resident was without glasses she wandered Petitioner's facility, bumping into objects as a consequence of her impaired vision. The potential for harm to this resident from Petitioner's failure to provide mandated assistance is evident.

Petitioner argues also that it complied with the requirements of 42 C.F.R. § 483.25(b) by putting Resident # 16's name on its ophthalmology consult list in September, October, November, and December 2005. Petitioner's pre-hearing brief at 9; CMS Ex. 10, at 3; CMS Ex. 16, at 4. According to Petitioner it assisted the resident, not only by recommending her to see an eye doctor but by giving her the choice to see an eye doctor in the facility. *Id*.

But, Petitioner did nothing to assist Resident # 16 to see an eye doctor aside from putting her on a list of names of individuals who would benefit from such a visit. It did not assist her in scheduling a visit outside of the facility. In fact, and without explanation, Petitioner's staff dropped the resident's name from the ophthalmology consult list in January 2006. CMS Ex. 10, at 3; CMS Ex. 16, at 4. It did not specifically discuss with the resident's family prior to the January 27 survey the need for the resident to see an eye doctor. And, it made no effort to arrange for a visit between an eye specialist and the resident at the facility. Simply putting the resident's name on a list of people who would benefit from consultation plainly wasn't enough in this case and Petitioner's staff knew or should have known that by virtue of the resident's continued wandering without corrective glasses.

Finally, Petitioner argues that the resident's family was reluctant to pursue vision treatment. Petitioner's pre-hearing brief at 9. However, the evidence relied on by Petitioner to support this contention relates to a visit that Resident # 16 made to an optometrist *after* completion of the January 27 survey. P. Ex. 4, at 3. Petitioner points to nothing prior to the survey showing discussions between Petitioner's staff and the resident's family concerning her vision and her need for treatment.

3. Petitioner did not prove that it corrected the deficiencies that were established as of January 27, 2006 prior to February 16, 2006.

CMS determined that Petitioner did not correct the deficiencies that were identified at the January 27 survey prior to February 16, 2006. Petitioner offered no affirmative proof to establish that it corrected these two deficiencies prior to that date. Therefore, I find that the deficiencies that were identified on January 27 persisted until February 16, 2006.

4. It is unnecessary that I decide whether Life Safety Code deficiencies existed as of February 2, 2006 because, as of that date, Petitioner remained noncompliant with other participation requirements.

As I discuss in the Issues section of this decision, the parties stipulated that on February 3, 2006 Petitioner corrected the Life Safety Code deficiencies that were identified at the February 2 survey. It is unnecessary that I decide whether there were Life Safety Code deficiencies extant on February 2 because, on that date, Petitioner had not corrected deficiencies that were identified at the January 13 and 27 surveys. Consequently, Petitioner was continuously noncompliant at least from January 13 until February 16, 2006.

5. Noncompliance identified at the April 7 survey and not challenged by Petitioner predates February 16, 2006.

The noncompliance finding made at the April 7 survey, which Petitioner does not contest, is that Petitioner failed to comply substantially with requirements stated at 42 C.F.R. § 483.13(c). The regulation, among other things, requires that a facility thoroughly investigate all allegations of resident neglect or abuse. 42 C.F.R. § 483.13(c)(2), (3). Petitioner's noncompliance with this requirement consisted of its persistent failure to investigate reported incidents of missing money and credit cards belonging to residents. These incidents originated with a reported loss on January 6, 2006, and continued through at least March 2006. CMS Ex. 33, at 2.

The dates of these reported incidents and Petitioner's acknowledged failure to investigate them establish noncompliance with the regulatory requirement beginning in January 2006. Petitioner's noncompliance with 42 C.F.R. § 483.13(c) predated the January 13 survey and continued through the period after February 12 and 16, 2006, the dates when Petitioner corrected the deficiencies that were identified at the January 13 and 27 surveys, until June 12, 2006, the date when CMS determined that Petitioner had corrected the deficiency identified at that survey. CMS Ex. 46, at 3.

Petitioner argues that CMS may not rely on the January 6, 2006 onset of noncompliance that was identified at the April 7 survey as a basis for imposing remedies because CMS: "never alleged 'past noncompliance' for any survey at issue in this case." Petitioner's reply brief at 5. However, the onset of noncompliance resulting from the deficiency identified at the April 7 survey – and not challenged by Petitioner – is stated in the report of that survey. CMS Ex. 33, at 2. Petitioner was put on notice by that report that CMS was asserting a deficiency as of April 7, 2006 that had its onset on January 6, 2006.

6. It is undisputed that Petitioner did not correct the deficiency that was identified at the April 24 survey until June 12, 2006.

As I discuss in the Issues section of this decision, Petitioner did not challenge the deficiencies that were identified at the April 7 and April 24 surveys. CMS found that Petitioner corrected these deficiencies effective June 12, 2006, and Petitioner did not challenge this determination.[3]

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[3] The noncompliance finding that was made at the April 24 survey was that Petitioner manifested an immediate jeopardy level deficiency as of that date. CMS determined that Petitioner corrected the immediate jeopardy on April 25, 2006, but found that noncompliance at a non-immediate jeopardy level continued until June 12, 2006.

7. Petitioner was noncompliant with at least one Medicare participation requirement throughout the period beginning January 13 and running through June 11, 2006. CMS was therefore justified in imposing all of the remedies that it determined to impose.

My Findings in this decision demonstrate that, at no time during the period that ran from January 13 through June 11, 2006 was Petitioner in compliance with all Medicare participation requirements. The overlapping periods of noncompliance establish a continuous period of noncompliance extending throughout the entire period for which CMS determined to impose remedies. In summary, my Findings establish that:

- Petitioner's noncompliance established at the January 13 survey continued until February 12, 2006.

- Additional deficiencies were established as of the January 27 survey and these were not corrected prior to February 16, 2006.

- The noncompliance that was identified at the April 7 survey began on January 6, 2006 and continued until June 12, 2006.

- The deficiency that was identified at the April 24 survey continued until June 12, 2006.[4]

CMS determined to impose civil money penalties of $300 for each day of Petitioner's noncompliance beginning with January 13 and running through June 11, 2006, with the exception of a single day – April 25, 2006 – for which CMS imposed an immediate jeopardy level penalty of $3,050. Petitioner has not challenged the reasonableness of the daily penalty amounts nor has it challenged CMS's finding of immediate jeopardy on April 25. Consequently, I sustain all of the civil money penalties that CMS determined to impose.

Additionally, I sustain CMS's determination to impose the remedy of denial of payment for new admissions for the April 13–June 11, 2006 period. Petitioner was noncompliant with participation requirements throughout this period and CMS may impose the remedy for denial of payment for new admissions for each day that a facility is out of compliance. 42 C.F.R. § 488.417(a).

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[4] In addition Petitioner does not challenge CMS's determination that, as of the March 17 survey, Petitioner was noncompliant with an additional participation requirement. The record is unclear as to the date when CMS determined that Petitioner corrected the deficiency that was identified on March 17.

Petitioner argues that CMS determined to impose denial of payment for new admissions pursuant to the requirements of 42 C.F.R. § 488.417(b). This section *mandates* imposition of the remedy for, among other reasons, the circumstance in which a facility is noncompliant for three or more continuous months. Petitioner argues that there was no point during the January 13 - June 11 period when it was out of compliance for three continuous months and, therefore, CMS has no authority to impose mandatory denial of payment for new admissions against it. Additionally, according to Petitioner, CMS may not now rely on the discretionary authority to impose a denial of payment for new admissions stated in 42 C.F.R. § 488.417(a) because CMS elected to impose a mandatory denial of payment and cannot now change the basis for its remedy determination. Petitioner's reply brief at 5.

I find Petitioner's argument without merit for the following reasons. First, Petitioner did not timely challenge CMS's determination to impose the remedy and has offered no good cause for its failure to do so. 42 C.F.R. § 498.70(c). As a consequence I dismiss its hearing request insofar as it challenges CMS's imposition of the remedy of denial of payment for new admissions. CMS imposed the remedy of denial of payment on January 23, 2006 and sent notice on that date to Petitioner of its determination. In order to be entitled to challenge this determination Petitioner should have filed a hearing request by no later than March 28, 2006, 65 days after the mailing date of the notice. In fact, it did not file its hearing request until August 7, 2006, more than four months after its deadline for challenging the denial of payments remedy.[5]

Petitioner has not shown good cause for filing its hearing request untimely. It argues that CMS should, in effect, be estopped from moving to dismiss Petitioner's request insofar as it addresses the denial of payments remedy because, according to Petitioner, CMS waited too long to move to dismiss. Petitioner's argument notwithstanding, there is nothing in the regulations governing hearings that places a time limit on CMS's right to move to dismiss an untimely hearing request.

Second, even if I were to grant Petitioner a hearing on its challenge to imposition of denial of payment, Petitioner has shown no basis in fact or law to defeat CMS's imposition of the remedy. Petitioner's assertions to the contrary, it was deficient for more than three continuous months. Its period of unbroken noncompliance extends over a period of more than five months. Moreover, the regulations permit CMS to impose denial of payment as a remedy even where the conditions for mandatory imposition of the

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[5] Arguably, CMS gave Petitioner an additional right to challenge the denial of payments remedy by sending it an additional notice regarding the imposition of that remedy on May 9, 2006. But, Petitioner's August 17 hearing request is untimely with respect to the May 9 notice, as well.

remedy have not been met.[6] I would sustain CMS's imposition of the remedy, therefore, even if there had been a "gap" in the period of Petitioner's noncompliance, as it alleges, because it was unquestionably noncompliant on each of the days for which CMS imposed the remedy.

/s/
Steven T. Kessel
Administrative Law Judge

[6] I am unpersuaded by Petitioner's argument that CMS may not rely on the discretionary denial of payment authority conferred by 42 C.F.R. § 488.417(a) because it "elected" to impose a mandatory denial of payment. The authority to impose a discretionary denial of payment is available to CMS at any time. Moreover, I have no authority to challenge CMS's election of remedies. Consequently, I may not preclude CMS from relying on its inherent discretionary authority to impose a denial of payment for new admissions so long as a basis exists for imposing the remedy – as is the case here – even if CMS chooses to rely on that authority at a date after making its initial determination.