

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Seabreeze Nursing and Rehabilitation, LP,  
(CCN: 67-5222),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-144

Decision No. CR2210

Date: August 12, 2010

**DECISION**

I sustain the determination of the Centers for Medicare and Medicaid Services (CMS) to impose a denial of payment for new admissions against Petitioner, Seabreeze Nursing and Rehabilitation, LP, for the period beginning on October 1, 2009 and running through October 13, 2009. I find that there is no basis to impose this remedy against Petitioner on dates after October 13, 2009.

**I. Background**

Petitioner is a skilled nursing facility in the State of Texas. It participates in the Medicare program. Its participation in Medicare is governed by sections 1819 and 1866 of the Social Security Act and by implementing regulations at 42 C.F.R. Parts 483 and 488. Its hearing rights in this case are governed by regulations at 42 C.F.R. Part 498.

Petitioner was surveyed for compliance with Medicare participation requirements on August 25, 2009 (August 25 Survey), October 1, 2009 (October 1 Survey) and October 16, 2009 (October 16 Survey). The noncompliance findings made at the August 25 Survey included findings that Petitioner failed to comply with 42 C.F.R. §§ 483.35(i), a regulation governing food storage, handling and preparation; and 483.70(a), a regulation

incorporating facility structural safety requirements in a document known as the Life Safety Code. The October 1 Survey findings identified continued alleged noncompliance with the requirements of 42 C.F.R. § 483.35(i). The October 16 Survey findings addressed continued alleged Life Safety Code noncompliance.

CMS determined to impose a denial of payment for new Medicare admissions to remedy Petitioner's alleged noncompliance. The remedy extended over a period that began on October 1, 2009 and that continued through November 5, 2009. Petitioner requested a hearing and the case was assigned to me for a hearing and a decision.

CMS moved for summary disposition and Petitioner opposed the motion. With its motion CMS filed 23 proposed exhibits that it identified as CMS Ex. 1 – CMS Ex. 23. In opposing the motion Petitioner filed five proposed exhibits that it identified as P. Ex. 1 – P. Ex. 5.

On May 13, 2010 I issued a ruling that granted partial summary disposition to CMS. I received into the record CMS Ex. 1 – CMS Ex. 23 and P. Ex. 1 – P. Ex. 5. I found that the undisputed material facts showed that Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.35(i) during the period that began on October 1, 2009 and that continued through October 13, 2009 and I sustained CMS's determination to impose a denial of payment for new Medicare admissions for each day of that period. I found that there were disputed issues of material fact concerning Petitioner's alleged noncompliance with the Life Safety Code. For that reason I denied summary disposition as to that issue and withheld deciding whether denial of payment for new admissions could be imposed for the period beginning on October 14, 2009 and continuing through November 5, 2009. I scheduled an in-person hearing to be held in Houston, Texas on September 13, 2010.

The parties subsequently advised me that they were submitting their respective cases based on the exhibits and briefs that they had filed. I therefore cancelled the in-person hearing and advised the parties that I would decide the case based on the written record. Each party filed a final brief.

## **II. Issue, Findings of Fact and Conclusions of Law**

### **A. Issue**

There is no longer any issue before me of Petitioner's compliance with the requirements of 42 C.F.R. § 483.35(i). I decided that issue in my May 13, 2010 ruling and I incorporate that ruling into this decision.

My May 13, 2010 ruling did not address the issue of whether Petitioner complied with Life Safety Code requirements prior to October 14, 2009. That issue, technically, remains open. However, it is unnecessary that I decide it because Petitioner's

noncompliance with the requirements of 42 C.F.R. § 483.35(i) during the October 1 through October 13, 2009 period is sufficient to justify the imposition of a denial of payment for new Medicare admissions for each day of that period.

What remains undecided in this case is whether Petitioner failed to comply substantially with Life Safety Code requirements during the period that ran from October 14, 2009 through November 5, 2009. I address that remaining issue here.

## **B. Findings of Fact and Conclusions of Law**

I make the following findings of fact and conclusions of law.

***1. Petitioner proved by the preponderance of the evidence that it complied with Life Safety Code requirements during the period that ran from October 14, 2009 through November 5, 2009.***

CMS alleges that Petitioner failed to comply with provisions of the Life Safety Code of the National Fire Protection Association (NFPA) that is incorporated by reference into 42 C.F.R. § 483.70(a)(1). The Life Safety Code requires that a facility's sprinkler systems be continuously maintained in reliable operating condition and that they be inspected and tested periodically. CMS's Motion for Summary Judgment and Pre-hearing Brief at 9, 17. More specifically, the Life Safety Code requires that sprinkler heads shall be free of corrosion, foreign materials, paint, and physical damage. CMS Ex. 19 at 2; CMS Ex. 23 at 6.

CMS alleges that, as of the October 16 Survey, Petitioner remained noncompliant with the Life Safety Code because it failed to maintain 21 of its 122 sprinkler heads free of corrosion and paint. It asserts that there were corroded sprinkler heads in Petitioner's medical records office, and that paint was observed on sprinkler heads in 14 residents' rooms as well as in Petitioner's medical records office, copy room, restroom, and the west and east bathing rooms in Petitioner's 200 corridor. CMS asserts that the alleged lack of sprinkler system maintenance potentially could endanger all of Petitioner's residents.

CMS relies on two exhibits as support for these assertions. These are the report of the October 16 Survey and notes made by Gerhard Zacharias, a surveyor who participated in the October 16 Survey. CMS Ex. 16; CMS Ex. 17. Neither of these documents is sworn to and CMS did not offer an affidavit or a declaration made under oath by Mr. Zacharias. Neither of the exhibits contains a detailed description of Mr. Zacharias' findings. There is no detailed description of the sprinkler heads that purportedly were corroded or covered with paint, no analysis of how the condition of the sprinkler heads might affect their function, and no description of the methodology used by Mr. Zacharias to reach his conclusions.

Petitioner rebuts CMS's evidence with the sworn declarations of Kevin Roberts, a technician who is responsible for servicing Petitioner's sprinkler system, and Robert Damesworth, Jr., a licensed professional responsible for supervising the servicing of the sprinkler system. P. Ex. 1; P. Ex. 2. Both individuals are employed by Total Fire and Safety, Inc., an independent contractor. P. Ex. 1; P. Ex. 2. These two witnesses aver that the sprinkler heads that they removed and personally examined after the October 16 Survey were functional. They state that the heads had no corrosion or paint marks on their functional parts that would have impeded their operation. P.Ex. 1 at 2; P. Ex. 2 at 4. They found a patina or a discoloration of the heads that resembled corrosion. P.Ex. 1 at 2; P. Ex. 2 at 4. They found that this patina is a common aspect of older sprinkler heads and does not impair their function. P. Ex. 1 at 2; P. Ex. 2 at 4.

I find the testimony of Petitioner's witnesses to be the more persuasive analysis of the condition of the sprinkler heads in Petitioner's facility. As I have stated, the evidence given by CMS is not made under oath nor does it provide me with a detailed description of the condition of Petitioner's sprinkler heads. Importantly, the evidence contains no discussion of whether the sprinkler heads actually functioned. By contrast, the two declarations given by Petitioner's witnesses are made under penalty of perjury, they are detailed, and they address the specific issue that I must resolve, whether Petitioner's sprinkler heads were functional as opposed to having cosmetic blemishes.

The preponderance of the evidence establishes that the sprinkler heads in Petitioner's facility were functional as of the October 16 Survey. Consequently, Petitioner was not deficient in complying with the Life Safety Code. CMS has offered no additional proof showing that Petitioner manifested deficiencies at any time after the October 16 Survey.

***2. There is no basis for CMS to deny Petitioner payment for new Medicare admissions after October 13, 2009.***

A facility must be out of compliance with Medicare participation requirements in order for CMS to have the authority to impose a remedy against it. The preponderance of the evidence in this case proves that Petitioner complied with participation requirements, including the Life Safety Code, after October 13, 2009. Consequently, no basis exists for CMS to impose denial of payment for new Medicare admissions against Petitioner for dates after October 13, 2009 up until and including November 5, 2009.

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/s/  
Steven T. Kessel  
Administrative Law Judge