Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

NMS Healthcare of Hagerstown,
(CCN: 215256),

Petitioner,

v.

Centers for Medicare & Medicaid Services,

Respondent.

Docket No. C-14-447

Decision No. CR3232

Date: May 15, 2014

DECISION

I grant summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS) and against Petitioner, NMS Healthcare of Hagerstown, sustaining the imposition of an $8000 per-instance civil money penalty against Petitioner.

I. Background

Petitioner is a skilled nursing facility doing business in Hagerstown, Maryland and participating in the Medicare program. It requested a hearing to challenge the imposition against it by CMS of the civil money penalty that I cite in the opening paragraph of this decision. CMS moved for summary judgment and Petitioner opposed the motion. CMS filed 22 exhibits in support of its motion and these are identified as CMS Ex. 1 – CMS Ex. 22. Petitioner filed seven exhibits in opposition to the motion and these are identified as P. Ex. 1 – P. Ex. 7. I receive all of these exhibits into the record.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue that I decide is whether it is appropriate to enter summary judgment against Petitioner based on the law and the undisputed material facts.

B. Findings of Fact and Conclusions of Law

CMS asserts that Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.25(h)(1). This subsection directs a skilled nursing facility to maintain a resident environment that is as free of accident hazards as is possible. CMS contends that Petitioner violated this requirement by allowing the water temperature in residents' rooms to become excessively hot, thereby putting residents at risk for harm from scalding.

Petitioner does not deny its noncompliance. But, it contends that CMS was clearly erroneous in assigning a scope and severity level of immediate jeopardy to Petitioner's noncompliance. It asserts that there are disputed issues of fact as to the scope and severity of its noncompliance that mandate an in-person hearing.

As I discuss below, the scope and severity of Petitioner's noncompliance is irrelevant to the question of whether a per-instance civil money penalty is authorized. Furthermore, the undisputed facts showing the potential harm that Petitioner's noncompliance might have caused to its residents are more than ample justification for a per-instance civil money penalty of $8000.

CMS has the option of imposing two types of civil money penalties when it has determined that a skilled nursing facility failed to comply substantially with Medicare participation requirements. The first type of penalty is a *per-diem* civil money penalty, one that is imposed for each day of a facility's noncompliance. Per-diem civil money penalties may range in amount from $50 to $10,000 per day. The regulations prescribe two categories of scope and severity for per-diem penalties. Noncompliance that is substantial, but that does not rise to a scope and severity of immediate jeopardy to facility residents, merits per-diem penalty amounts of between $50 and $3000 per day. 42 C.F.R. § 488.408(d)(1)(iii), (2). Noncompliance that falls within the immediate jeopardy level of scope and severity merits per-diem penalty amounts of between $3050 and $10,000 per day. 42 C.F.R. § 488.408(e)(1)(iii), (2).

The second type of penalty is a *per-instance* civil money penalty, one that is imposed for each instance of noncompliance. Per-instance civil money penalties of between $1000 and $10,000 may be imposed for any noncompliance that is substantial whether or not immediate jeopardy exists. 42 C.F.R. §§ 488.408(d)(1)(iv), (e)(1)(iv). A finding of immediate jeopardy is irrelevant to establishing the authority to impose a per-instance civil money penalty. *Id.*

Here, CMS determined to impose a per-instance civil money penalty against Petitioner. It is true that the surveyors who made the initial findings of noncompliance against Petitioner determined that the scope and severity of Petitioner's noncompliance was at the immediate jeopardy level.[1] But that finding is irrelevant to the issue of remedy because CMS ultimately determined to impose a per-instance penalty. The authority to impose the penalty of between $1000 and $10,000 per instance is based on Petitioner's noncompliance and not on the presence of immediate jeopardy.

Consequently, there is no issue of immediate jeopardy in this case that I may hear and decide. The surveyors' finding of immediate jeopardy is simply irrelevant to the case.

Petitioner has conceded its noncompliance and the question of immediate jeopardy is irrelevant and beyond my authority to hear and decide. That leaves only one question that I may resolve and that is whether the $8000 per-instance penalty amount is reasonable. I conclude that the undisputed material facts establish that the penalty amount is reasonable.

There exists a regulatory framework for deciding whether a penalty amount is reasonable. The reasonableness of a penalty amount is measured by factors set forth at 42 C.F.R. §§ 488.438(f) and 488.404 (incorporated by reference into 42 C.F.R. § 488.438(f)(3)). These factors include the seriousness of a facility's noncompliance (measured without regard to the presence or absence of immediate jeopardy where a per-instance civil money penalty is at issue), its compliance history, and its financial condition.

The undisputed material facts establish that Petitioner's noncompliance was very serious. On July 8, 2013 (July survey) surveyors went to Petitioner's facility and discovered that the water taps in multiple residents' rooms emitted water that approached or reached 130 degrees Fahrenheit (F). CMS Ex. 5 at 11-13; CMS Ex. 14 at 1, 3; CMS Ex. 15 ¶¶ 8-25.

[1] The regulations define "immediate jeopardy" to mean a situation of noncompliance that causes or is likely to cause serious injury, harm, impairment, or death to one or more residents of a facility. 42 C.F.R. § 488.301.

The rooms where these temperatures were recorded included rooms in a unit that housed residents with mental impairments including dementia, schizophrenia, paranoia, bipolar disorder, poor judgment, mood swings, anxiety, psychosis and behavioral problems. CMS Exs. 13, 15-16.

Water that is heated to temperatures exceeding 120 degrees F can produce severe scalding and burns. CMS Ex. 11 at 15. Water heated to 127 degrees F can cause a third-degree burn in a minute. Water that is heated as high as 130 degrees F can cause a third-degree burn in considerably less time. CMS Ex. 11 at 15. Third-degree burns are extremely serious injuries:

> Third-degree burns penetrate the entire thickness of the skin and permanently destroy tissue. These present as loss of skin layers, often painless (pain may be caused by patches of first- and second-degree burns surrounding third-degree burns), and dry, leathery skin. Skin may appear charred or have patches that appear white, brown, or black.

Id. at 16. Thus, Petitioner put mentally impaired residents, including demented individuals who would have lacked the cognitive ability to determine whether they were exposing themselves to dangerously high temperatures, in a situation where the residents could experience severe burns as a result of exposure to dangerously hot water. That level of noncompliance plainly merits a per-instance penalty of $8000.

Petitioner does not establish any ground for me to deny CMS's motion. Much of Petitioner's argument is devoted to its contention that the immediate jeopardy citation in the July survey report is arbitrary and capricious.[2] As I explain above, the surveyors' finding of immediate jeopardy is irrelevant and I have no authority to address it.

Petitioner argues also that the water temperatures at its facility did not pose a serious risk to its residents. First, it contends that there were no findings of actual harm to residents, averring that there is no evidence that any resident was scalded. While that is true, it doesn't derogate from the fact that the potential for serious harm was certainly present, given the high water temperatures and exposure of residents with significant mental impairments to those temperatures. Second, Petitioner asserts that it is unlikely that a

[2] Petitioner grounds its argument that the immediate jeopardy finding is arbitrary and capricious on its contention that other facilities did not receive immediate jeopardy-level noncompliance citations for water temperatures that were as high or higher than those at Petitioner's facility. That argument would not prevail even if a finding of immediate jeopardy was relevant because CMS's findings in each case are adjudicated based on the unique facts and circumstances of that case and not by comparison to findings in other cases.

resident would expose himself or herself to water as hot as 130 degrees F long enough to sustain a burn "given human reflexes." Petitioner's brief in opposition to CMS's motion at 5. But, Petitioner cites nothing to support this assertion. It offers no evidence that would raise a disputed issue of material fact as to the potential danger of being exposed to water that is heated to 130 degrees F. Third, Petitioner asserts that it had a supervised bathing program that kept residents from being exposed to superheated water long enough to be burned. Again, Petitioner cites no facts or evidence to support this assertion. But, even if it is true, the presence of a supervised bathing program does not derogate from the possibility that residents could be burned by water coming from the taps in their rooms while they were unsupervised.

Petitioner also argues that it has a protocol for testing water temperatures. That may be so, but it obviously was ineffective to prevent water from reaching dangerously high temperatures on July 8, 2013. Finally, Petitioner contends that it immediately reacted to the information it received about water temperatures on July 8 and took corrective action promptly. That also may be so, but that does not serve as any impediment to imposing a per-instance civil money penalty. Indeed, had Petitioner *not* corrected its noncompliance immediately, then a per-diem as opposed to a per-instance penalty would have been appropriate.

/s/
Steven T. Kessel
Administrative Law Judge