

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Hearthside Rehabilitation & Nursing Center,
(CCN: 395868),

Petitioner,

v.

Centers for Medicare & Medicaid Services,

Respondent.

Docket No. C-15-957

Decision No. CR4533

Date: February 18, 2016

DECISION

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS) to impose a per-instance civil money penalty of \$3000 against Petitioner, Hearthside Rehabilitation & Nursing Center, a skilled nursing facility.¹

I. Background

Petitioner requested a hearing to challenge the remedy determination that I describe above. I held a hearing by video teleconference on November 3, 2015. I received into evidence exhibits offered by CMS that are identified as CMS Ex. 1 – CMS Ex. 14. Petitioner offered no exhibits at the hearing.

II. Issues, Findings of Fact and Conclusions of Law

¹ In its post-hearing brief Petitioner incorrectly describes the remedy imposed by CMS as being a penalty of \$2500. Post-Hearing Brief of Hearthside Rehabilitation & Nursing Center at 2.

A. Issues

The issues are whether:

1. Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.25(h); and
2. CMS's remedy determination is reasonable.

B. Findings of Fact and Conclusions of Law

CMS alleges that Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.25(h). In relevant part, this regulation requires that a skilled nursing facility, such as Petitioner, keep its premises as free from accident hazards as is possible. The regulation is not a strict liability requirement. It has been determined universally to require a facility to take all reasonable measures to protect its residents from accident hazards.

Essentially, CMS alleges that Petitioner's staff allowed a resident, identified as Resident # 122, to consume proscribed food, causing the resident to choke and requiring her hospitalization. CMS alleges that Petitioner violated 42 C.F.R. § 483.25(h) because the proscribed food – a medium size chunk of ham – constituted an accident hazard for Resident # 122, a hazard that was foreseen by Petitioner's staff and preventable.

The facts that CMS relies on in support of its assertion are uncomplicated. Resident # 122 was, at the time of the event at issue, an elderly individual who suffered from dysphagia (difficulty swallowing) and had difficulty chewing because she had dental decay and was missing numerous teeth. CMS Ex. 5 at 1; CMS Ex. 4 at 15, 35. The resident also suffered from cognitive impairments, including dementia. CMS Ex. 4 at 14-15, 28. Petitioner's staff recognized these problems and prescribed a "mechanical soft diet" for the resident. CMS Ex. 6; CMS Ex. 4 at 18.

Petitioner has a diet manual that describes a mechanical soft diet as follows:

The Mechanical Soft Diet consists of foods that are in an easy to chew form. Foods from the Regular Diet menu are mechanically altered, chopped or ground, so [that they] can be consumed by a resident with chewing difficulty.

CMS Ex. 10 at 2. The manual contains a list of foods that are allowed or are to be avoided on a mechanical soft diet. Allowable meats consist of the following:

Ground meats and poultry with gravy, ground lunch meats and hot dogs, chipped lunch meat, ground sausage, soft boneless fish (when baked), soft casserole (with no larger than bite size pieces of fork-tender meat), meatloaf with gravy, soft fork-tender meatballs, soft cheese, eggs and eggs substitute.

Id. at 3. Proscribed meats include: “Whole meats and poultry, whole hamburger patties, hard cheese or any difficult to chew meats.” *Id.*

The policy does not prescribe the size of pieces of meat that may be served to a resident who is receiving a mechanical soft diet. However, what is evident is that whatever is served must be chopped so finely or ground so that it will not be a choking hazard or must be of so soft a texture as to not cause a resident to choke when it is consumed.

On August 9, 2014, Resident # 122 had an incident of choking while she was eating. The resident began coughing and could not breathe. CMS Ex. 7 at 1. Petitioner’s staff performed the Heimlich maneuver on the resident several times and suctioned her, retrieving a medium size chunk of meat from the resident’s throat. *Id.* The resident was sent to a hospital after this incident where she received a chest x-ray.

The uncontroverted evidence establishes that Resident # 122, despite being on a mechanical soft diet, ingested a piece of meat that was large enough to cause the resident to choke. There is no objective description of this meat except that Petitioner’s staff described it as a “medium size chunk [sic]” (CMS Ex. 7 at 1) and that it was a piece of ham salad, the meal that was being served to the resident at the time of the choking incident.

The conclusion that I draw from this evidence is that Petitioner’s staff fed Resident # 122 a piece of meat (ham) that was too large for the resident to consume safely. That plainly was inconsistent with the requirements of the resident’s mechanical soft diet. As I have discussed, Petitioner’s diet manual requires that meat fed to any resident on a mechanical soft diet must be either so soft (as with baked fish), or chopped or ground so finely, so as not to cause a potential problem for a resident with swallowing difficulties, such as Resident # 122.

I find that this failure by Petitioner’s staff contravened the requirements of 42 C.F.R. § 483.25(h). The fact that Resident # 122 was supposed to be receiving a mechanical soft diet meant that Petitioner’s staff recognized that the resident was at risk from choking. The staff had a duty to ensure that anything that was fed to Resident # 122 not contain pieces of meat that were too large for the resident to consume safely. They plainly failed to discharge this duty when they allowed the resident to consume a chunk of meat that was large enough to cause the resident to choke.

Petitioner offers several arguments in its defense. I find these to be without merit.² First, Petitioner argues that the food served to Resident # 122 at the time of the incident – commercially manufactured ham salad – was safe, because it consisted of small pieces of chopped ham that were lubricated with mayonnaise. Moreover, according to Petitioner, the ham salad was in complete accord with the resident’s dietary restrictions because Petitioner’s diet manual called for chopped meats and the ham was chopped.

CMS asserts in response that the manual actually called for meat to be ground and CMS argues that the ham salad did not conform to the resident’s dietary restrictions. I don’t need to resolve the question of whether the commercial ham salad that was fed to the resident was a permissible item pursuant to Petitioner’s mechanical soft diet manual. The fact is that the ham salad served to Resident # 122 on August 9, 2014, *did not* conform to Petitioner’s mechanical soft diet manual, because it contained a chunk of meat that was large enough to cause Resident # 122 to choke. That violated the resident’s mechanical soft diet even if the remainder of the commercial ham salad that contained the chunk of meat would otherwise comply with the resident’s dietary restrictions.

Petitioner’s staff had a duty to check the food that was fed to the resident in order to assure that it was of a consistency that complied with the mechanical soft diet restrictions. Petitioner cannot hide behind the fact that the ham salad that its staff fed to the resident was prepared commercially. Whether the staff served commercially prepared food or whether the staff prepared the food on premises, Petitioner had a duty to examine everything that was fed to Resident # 122 to assure that it was of a safe consistency.

Petitioner asserts that its staff checked the ham salad that came from the kitchen generally at that time and the resident’s ham salad after the choking incident and found no additional chunks of meat in the salad. Post-Hearing Brief of Hearthside Rehabilitation & Nursing Center at 9. But, even if that is so, that doesn’t lead to an inference that the salad, when served to the resident, contained no chunks of meat that were large enough to cause the resident to choke. That is made evident by the fact that the Resident *did* choke on what the staff described as a medium size chunk of meat. That is proof that ham salad served to the resident contained at least one chunk of meat that was larger than what the resident should have been served.

Nor does the fact that the staff checked the ham salad after the resident choked and found nothing out of the ordinary fulfill the staff’s obligation to assure that the resident was not

² Petitioner contends that a State review of the initial findings that led to CMS’s remedy determination resulted in a conclusion that State surveyors had erred and it recommended that no penalty be imposed against Petitioner. That review is irrelevant because it is not binding on CMS. 42 C.F.R. § 488.452(a)(2). I have made findings based on an independent and de novo review of the record.

served food that could cause her to choke. Checking the food after the fact is too late. The food should have been checked before it was served to the resident.

Petitioner argues also that there is no evidence in the record that establishes the actual size of the piece of meat that caused Resident # 122 to choke. It suggests that, in fact, the piece may have been quite small, matching the overall consistency of the ham salad that was served to the resident. It is true that there is no objective measurement of the piece of ham that was retrieved from the resident's airway. But, it is obvious that the piece – whatever its specific dimensions – was large enough to cause the resident to choke. Moreover, Petitioner's own staff described the piece as being medium size. That suggests three equally reasonable inferences. First, that the piece was bigger than the other bits of food that the resident had been given to consume, with the term "medium size" being used by Petitioner's staff to explain that it was not of typical size. Second, if the piece was not larger than the other bits that were fed to the resident, then *all* of the pieces of ham were at least "medium size." Lastly, that there were both smaller pieces *and* larger pieces, and the piece upon which Resident #122 ultimately choked fell between the two. Under each of these circumstances Petitioner's staff contravened its duty to the resident. Either it allowed the resident to consume food containing an abnormally large piece of meat or it allowed the resident to consume a meal that was, in and of itself, inconsistent with the resident's prescribed diet.

Petitioner asserts that, whatever happened to Resident # 122, she suffered no actual harm. Therefore, according to Petitioner, the State survey agency finding of a "G" level deficiency is incorrect.

As a matter of law Petitioner has no right to make this argument.

I take notice that State survey agencies assign letter grades to findings of deficiencies at skilled nursing facilities. Under the States' protocols, a grade of anything higher than "C" signifies a failure to comply substantially with Medicare participation requirements. Those letter grades are of relevance in hearings at the departmental level *only* if there is an issue of immediate jeopardy or if the case involves the imposition of certain remedies that have not been implemented here. A facility otherwise has no right to challenge the letter grade of its deficiencies. 42 C.F.R. § 498.3(b)(14), (d)(10)(ii).³

³ There is, in fact, ample evidence to support a finding that Resident # 122 actually sustained harm even if that harm did not necessarily cause her to suffer long-term injuries. The resident choked and was unable to breathe. She turned blue as a consequence. She sustained whatever physical trauma comes with administration of the Heimlich maneuver and whatever psychological trauma that comes with the inability to breathe. She complained of pain in the right side of her chest. She had to be sent to a hospital for evaluation and to undergo examination procedures and x-rays at the hospital.

