Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Bibb Medical Center Nursing Home
Docket No. A-12-32
Decision No. 2457
May 7, 2012

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Bibb Medical Center Nursing Home (Bibb), a skilled nursing facility (SNF) located in Centreville, Alabama, appeals the October 11, 2011 decision of Administrative Law Judge (ALJ) Steven T. Kessel upholding the determination by the Centers for Medicare & Medicaid Services (CMS) that Bibb was deficient in its care of residents at an "immediate jeopardy" level of noncompliance. *Bibb Medical Center Nursing Home*, DAB CR2448 (2011) (ALJ Decision). The ALJ also upheld the civil money penalties (CMPs) imposed by CMS against Bibb based on that noncompliance. *Id.* at 6. On appeal, Bibb does not challenge CMS's finding that Bibb was deficient in its care of certain residents. Rather, Bibb argues that substantial evidence does not support the ALJ's conclusion that CMS was not clearly erroneous in its determination of immediate jeopardy. For the reasons explained below, we affirm the ALJ Decision.

Statutory and Regulatory Background

Long-term care facilities participating in the Medicare and Medicaid programs are subject to the survey and enforcement procedures set out in 42 C.F.R. Part 488, subparts E and F, to determine if they are in substantial compliance with the program requirements in 42 C.F.R. Part 483, subpart B. "Substantial compliance" means a level of compliance such that "any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Noncompliance," in turn, is defined as "any deficiency that causes a facility to not be in substantial compliance." *Id.* "Immediate jeopardy" is defined as "a situation in which the provider's noncompliance with one or more requirements of participation has caused or is likely to cause, serious injury, harm, impairment, or death to a resident." *Id.*

A long-term care facility found not to be in substantial compliance is subject to various enforcement remedies, including CMPs. 42 C.F.R. §§ 488.402(b), (c), 488.406, 488.408. CMS has the option to impose a CMP whenever a facility is not in substantial compliance. 42 C.F.R. §§ 488.402(b), 488.430. CMS may impose per-instance or, as it did here, per-day CMPs. 42 C.F.R. § 488.408(d)(l)(iii)-(iv), (e)(I)(iii)-(iv). There are

two ranges of per-day CMPs, with the applicable range depending on the severity of the noncompliance. 42 C.F.R. § 488.438(a)(l). The range for noncompliance that constitutes immediate jeopardy is $3,050-$10,000 per day. 42 C.F.R. §§ 488.408(e)(l)(iii), 488.438(a)(1)(i). The range for noncompliance that is not immediate jeopardy is $50-$3,000 per day. 42 C.F.R. §§ 488.408(d)(l)(iii), 488.438(a)(l)(ii). When CMS imposes one or more of the alternative remedies in section 488.406, those remedies continue until the facility "has achieved substantial compliance, as determined by CMS or the State based upon a revisit or after an examination of credible written evidence that it can verify without an on-site visit . . . ." 42 C.F.R. § 488.454(a)(l).

Discussion

Bibb does not dispute that it was deficient in its care of a resident, referred to by her "Resident Identifier" (RI) number as RI #1. Based on a survey of Bibb's facility conducted from November 9 to November 14, 2010 by the Alabama Department of Public Health, CMS determined that Bibb's noncompliance with four federal requirements related to the care of RI #1 posed immediate jeopardy from October 7 to November 13, 2010. CMS Ex. 1, at 2, 11, 23, 52, 61. The ALJ provided a description of RI #1, which Bibb does not dispute, as an individual who "has severely impaired cognitive abilities; requires extensive assistance from the staff for bed mobility; and is totally dependent on [Bibb's] staff for all activities of daily living." ALJ Decision at 2-3 (citing CMS Ex. 1, at 4). The ALJ summarized the undisputed deficiencies related to RI #1's care as follows:

- The staff failed to comply with their duty under 42 C.F.R. § 483.10(b)(11) to consult immediately with [RI #1's] treating physician about the significant change in [RI #1's] condition brought on by the development of pressure sores. CMS Ex. 1 at 2-7. The staff waited 12 days, until October 19, 2010, before advising [RI #1's] physician about [RI #1's] pressure sores.

- [Bibb's] staff failed to comply with professional standards of quality in providing care to RI #1, as 42 C.F.R. § 483.20(k)(3)(i) requires. The staff allowed a nonprofessional employee of [Bibb] to apply wound treatments to [RI #1]. They failed in several respects to provide wound treatment to [RI #1] as [her] physician had ordered. These deficiencies included failures to apply wound dressings as ordered by [RI #1's] physician, failures to administer a medication that the physician had ordered, and failure to float [RI #1's] heels pursuant to the physician's order. CMS Ex. 1 at 11-23.

- The staff failed to provide RI #1 with the necessary treatment and services to promote healing of her pressure sores and to protect against the development of additional sores as 42 C.F.R. § 483.25(c) requires. These deficiencies include the failures to consult with [RI #1's] treating physician and to follow the

physician's orders that I have discussed. They also include failures to ensure that professional staff knew how to measure accurately the size of a resident's pressure ulcers, and a failure to determine why RI #1's sponsor refused to allow the resident to be sent to a local hospital for evaluation of her pressure sores. CMS Ex. 1 at 23-52.

- [Bibb's] management failed, in contravention of the requirements of 42 C.F.R. § 483.75, to ensure that the facility was administered in a manner that enabled it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as is evidenced by the deficient care that [Bibb's] staff gave to RI #1. CMS Ex. 1 at 61-66.

ALJ Decision at 3-4.

CMS imposed a $3,550 per-day CMP from October 7 to November 13, 2010 and a $100 per-day CMP from November 14 to December 10, 2010. CMS Ex. 2, at 2; CMS Ex. 3. Bibb did not challenge the $100 per-day CMP. Rather, Bibb argued on appeal to the ALJ that CMS's determination that Bibb's deficiencies posed immediate jeopardy to RI #1 and other residents between October 7 and November 13, 2010 was clearly erroneous. The ALJ concluded that CMS was not clearly erroneous in its determination, and that the $3,550 per-day CMP was "justified." ALJ Decision at 2, 6.

The sole issue Bibb raises on appeal to the Board is whether its noncompliance with federal requirements was at an immediate jeopardy level. [1] Federal regulations require that CMS's determination of the level of noncompliance must be upheld unless it is clearly erroneous. 42 C.F.R. § 498.60(c)(2). Because the "clearly erroneous" standard is highly deferential to CMS's determination, the facility has a "heavy burden to demonstrate error in that determination." *Liberty Health & Rehab. of Indianola, LLC*, DAB No. 2434, at 13 (2011) (citing cases).

Bibb first argues that neither CMS nor the ALJ analyzed the probability of serious injury or harm to RI #1 or any other resident from Bibb's noncompliance. *See* Bibb Br. at 7; Bibb Reply Br. at 2. Bibb claims that the ALJ and CMS merely assessed the *possibility* of serious injury or harm, and that the ALJ concluded that the presence of any pressure sore is automatically likely to cause serious harm or injury because pressure sores can be fatal in some cases. *Id.*

Bibb's argument on this issue has no merit. While the ALJ briefly addressed the possible complications of pressure sores, he premised a significant part of his decision on the systemic problems evidenced by Bibb's noncompliance. *Id.* at 4-5. The ALJ cited many

[1] On appeal, Bibb does not challenge the amount of the $3,550 per-day CMP.

factors that showed "fundamental" failures in the care of RI #1's pressure sores. *Id.* at 4. The ALJ addressed the likelihood of serious injury or harm from Bibb's noncompliance, if not corrected, by highlighting, among other things, RI #1's "vulnerable condition," the "serious" pressure sores on her heels, the prolonged period of Bibb's failure to follow RI #1's physician's orders (two months), and the extended length of time it took to consult with RI #1's physician about the pressure sores (12 days). *Id.* at 3-4. The ALJ determined that based on RI #1's compromised medical condition and the severe nature of pressure sores generally, "[e]ven a few omissions to provide care would have caused a likelihood of serious injury or worse . . . ." *Id.* The ALJ found that the instant case was "not a case of one or two missed administrations of medication or one or two missed treatments," but a series of failures that constituted a pattern of noncompliance and that were "egregious." *Id.* at 4-5. Accordingly, we conclude that the ALJ sufficiently addressed the probability of serious injury or harm to RI #1 as well as other residents.

The remainder of Bibb's arguments before us challenge the ALJ's characterization of and reliance on specific evidence, and whether that evidence supports the determination that RI #1 was likely to suffer serious harm or injury. We note that Bibb appears to take the position that each of the stated deficiencies must have caused or been likely to cause serious injury or harm to RI #1. *See, e.g.*, P. Br. at 10 (arguing that the staff's failure to consult immediately with RI #1's physician was not likely to cause serious harm or injury because the nursing staff administered a topical medication during the time the physician was not consulted); *id.* at 12 (arguing that the failure to follow a physician's order "was not a matter which could have led to serious injury or death"). However, CMS's determination of immediate jeopardy was based on noncompliance with four different requirements, involving numerous failures by more than one staff member to provide care consistent with professionally recognized standards of quality, not on any one failure in isolation. CMS Ex. 1, at 2, 11, 23, 52; CMS Ex. 2, at 1. Also, the ALJ discussed the risks from Bibb's noncompliance in light of the systemic and fundamental failures of Bibb's nursing staff and administration, and did not rely on one particular failure to conclude CMS's determination was not clearly erroneous. The term "immediate jeopardy" includes a situation in which the provider's *noncompliance* with *one or more* requirements is likely to cause serious injury or harm to *a resident*. 42 C.F.R. § 488.301. Thus, the focus is not on just an instance of failing to provide care to an individual resident consistent with the regulations, but on whether the noncompliance evidenced by one or more failures to comply with one or more requirements is likely to cause serious injury or harm to a resident if not corrected. To meet its high burden and to overturn a determination of immediate jeopardy that is based on more than one failure, therefore, the facility must demonstrate that all the failures relied upon, *i.e.*, the "totality" of its noncompliance, did not create the likelihood of serious injury or harm to any resident. *See, e.g., Universal Health Care – King*, DAB No. 2383, at 18-19 (2011) (upholding CMS's immediate jeopardy determination based on the "totality" of the facility's

noncompliance that resulted in the likelihood of serious harm to residents). Here, Bibb's arguments are flawed in that Bibb addresses its failures individually and only with respect to the risk to one resident. These arguments fail to consider the "totality" of Bibb's noncompliance and do not demonstrate adequate grounds to disturb the ALJ's conclusions.

In any event, Bibb's arguments about specific evidence are without merit. Bibb first argues that there was no likelihood RI #1 would suffer serious harm because Bibb's staff treated RI #1's pressure sores with granulex, a topical prescription medication, from the time the pressure sores were first observed on October 7, 2010 to the time the staff consulted with RI #1's physician on October 19, 2010.[2] Bibb Br. at 9-10. Bibb also points out that the physician ordered the treatment of RI #1's pressure sores with granulex to continue after his October 19th evaluation, which Bibb argues is evidence the treatment provided from October 7 to October 19, 2010 was "appropriate" and eliminated the likelihood that RI #1 would suffer serious injury or harm. Bibb Reply Br. at 4.

While the application of granulex may show that Bibb was not indifferent to RI #1's care, that is not the issue for purposes of immediate jeopardy. Application of the granulex without a physician's order over a period of time (and sometimes by unqualified staff) constituted failure to meet professionally recognized standards of care involving at least several staff members. It is undisputed that the staff's application of granulex from October 7 to October 19, 2010 was not consistent with physician's orders and was inconsistently done. On August 2, 2010, the physician ordered that granulex treatment to RI #1's right heel be discontinued, and a hydrocolloid dressing be applied every third day. CMS Ex. 4, at 28. That order remained in place until October 16, 2010. *Id.* at 33. Thus, between October 7 and October 16, 2010, the nursing staff applied treatment to RI #1's heel inconsistent with physician's orders and without having timely consulted with the physician about appropriate treatment, as required. In addition, from October 7 to October 19, 2010, the nursing staff failed eight times (out of a possible 30 times) to apply granulex to RI #1's heels, and used unqualified staff to administer the treatment on two occasions. CMS Ex. 4, at 54. Thus, the nursing staff's treatment of RI #1's pressure sores was inaccurate, inconsistent, and unsupervised by her physician, which significantly undercuts Bibb's argument that the nursing staff provided "appropriate" care. Moreover, the fact that RI #1's physician later ordered that granulex be applied to RI #1's heels does nothing to lessen the severity of the overall systemic problems revealed by Bibb's failures to provide quality care to RI #1. Bibb's staff did not carry out the physician's prior orders, did not transcribe the physician's orders to ensure they

[2] RI #1 had a history of bilateral pressure sores on her heels, but her medical record shows that the most recent pressure sore on her heel had healed by early September 2010. *See* CMS Ex. 4, at 18-25. Bibb does not dispute that the pressure sores observed on October 7, 2010 were a "significant change in the resident's physical . . . status" that required immediate consultation with RI #1's physician and notification of her sponsor pursuant to 42 C.F.R. § 483.10(b)(11).

would be followed, and did not effectively treat or immediately alert the resident's physician about the pressure sores on RI #1, a resident with significant medical complications. *See* CMS Ex. 6, at 65-66 (statement of licensed practical nurse to investigators that she did not transcribe the order of RI #1's physician for hydrocolloid to RI #1's medication administration sheet). CMS and the ALJ reasonably concluded that such systemic failures, along with other failures to provide quality care, meant that the noncompliance, if uncorrected, was likely to cause serious injury or harm to a resident.[3]

Bibb also argues that the ALJ mischaracterized as "egregious" the nursing staff's failure to administer granulex consistently, apply hydrocolloid dressings to RI #1's right heel, and to float RI #1's heels as ordered. *Id.* at 11-12. Bibb claims the missed applications of granulex to RI #1's heels were "infrequent and not in sequence" and that the failure to apply the hydrocolloid dressing was not a "significant medication error" under CMS's State Operations Manual (SOM). Bibb asserts that the nursing staff mistakenly applied granulex – "less effective than [hydrocolloid], but it was not inappropriate as a means of treatment" – during the time it should have applied the hydrocolloid dressing, making the mistake "not a matter which could have led to serious injury or death." *Id.*

Bibb's argument on this issue is also unpersuasive. Irrespective of how "significant" these "medication errors" were in themselves, they occurred because of and in the context of systemic deficiencies in Bibb's facility, including the failure to transcribe the physician's orders, the failure to consult immediately with the physician upon noticing RI #1's pressure sores, and the failure to follow through on the physician's orders to apply hydrocolloid and discontinue granulex. It was this "pattern of noncompliance," taken together with the vulnerability of RI #1 and other residents based on their medical conditions and the serious nature of pressure sores, that posed immediate jeopardy to Bibb's residents.

Bibb further argues that the ALJ improperly concluded that the nursing staff failed to float RI #1's heels for four consecutive days. Bibb Br. at 19. We agree that the record does not support the ALJ's statement that the staff "failed for *four consecutive days* to float the resident's heels, even though the resident's physician had ordered that care." ALJ Decision at 5 (emphasis added). However, the record shows that the staff did, at some point on four consecutive days between November 9 and November 12, 2010, fail to float RI #1's heels, albeit not for an entire day as the ALJ's statement implies. *See* CMS Ex. 15, at 1 (asserting that a surveyor observed RI #1's heels directly on her bed or footrest on three separate occasions); CMS Ex. 8, at 10 (noting that RI #1's heels were in

[3] Bibb's argument is also undercut by evidence in the record showing that the pressure sores worsened in the time the nursing staff failed to consult with RI #1's physician. *See* CMS Ex. 14, at 6-7; *see also Stone County Nursing & Rehab. Ctr.*, DAB No. 2276, at 19 (2009) (upholding a determination of immediate jeopardy based on serious harm when resident's pressure sores deteriorated from Stage II to Stage IV in the time it took the nursing staff to consult with the resident's physician).

"bootie protectors" but were resting directly on her bed). Nevertheless, the failures to float RI #1's heels for even short periods were contrary to the physician's order to float heels at all times. *See* CMS Ex. 4, at 58. In addition, a CNA who worked on the shift from 7:00 a.m. to 3:00 p.m., stated to surveyors that when she arrived in the morning for the start of her shift, she observed RI #1's heels flat on her bed and the bed sheets on top of her feet were tucked under the corners of the mattress. CMS Ex. 6, at 32. Also, the Activities of Daily Living sheets show that RI #1's heels were not floating at all times, as ordered by RI #1's physician. CMS Ex. 4, at 63. Moreover, RI #1's physician told surveyors that floating RI #1's heels was the most important treatment to prevent further breakdown. CMS Ex. 6, at 47. While we recognize that RI #1 had a history of "push[ing] her heels into [the] bed," *see* P. Ex. 1, at 1, this was merely another reason to monitor the floating of RI #1's heels more closely and does not detract from the evidence showing RI #1's heels were not floated at all times, as her physician ordered. Therefore, the ALJ's erroneous statement was not material to his conclusion regarding immediate jeopardy. In addition, based on RI #1's physician's assertion that floating the heels was the most important treatment for pressure sores, one could reasonably conclude that continued failure to follow the order consistently would likely cause serious harm or injury to RI #1.

Bibb also argues that the inability of the nursing staff to measure pressure sores was not likely to lead to serious injury or harm, asserting that CMS and the ALJ "leap without logic or explanation to conclude that inaccurate measurement could have led to a crisis or fatality." Bibb Br. at 13. The nursing staff's ability to measure pressure sores may assist in determining whether pressure sores are healing and whether any changes in care are needed. The measuring error here consisted of a nurse measuring only one part of the pressure sore (necrotic tissue), when she should have measured the entire sore (redness around the necrotic tissue), then writing her measurement in RI #1's medical chart in centimeters despite measuring the wound in inches. CMS Ex. 6, at 79-81. Medical personnel may have concluded from a measurement on November 9, 2010 of 2.5 x 2.5 centimeters that the wound was healing faster than it actually was.[4] The ALJ and CMS could have reasonably inferred that the nursing staff's inability to measure a resident's wound accurately increased the risk of serious harm to RI #1 and other residents.

Finally, Bibb's reliance on other decisions is misplaced. One of the cited cases, *Tara at Thunderbolt*, DAB CR1445 (2006) is an ALJ decision that is not binding upon the Board. In addition, Bibb misreads the significance of "triggers" for immediate jeopardy discussed in *Barbourville Nursing Home v. Dept. of Health and Human Services*, 174 Fed. App'x. 932 (6th Cir. 2006). Nothing in *Barbourville* mandates that certain

[4] One member of Bibb's nursing staff stated that the wound on RI #1's right heel on November 9, 2010 was actually 8 x 5.5 centimeters of redness and 5 x 4 centimeters of necrotic tissue. CMS Ex. 6, at 69.

"triggers" stated in the SOM be met before CMS may determine immediate jeopardy exists. Moreover, Bibb overlooks one of the triggers cited in *Barbourville*, which is the "[f]ailure to carry out doctor's orders." 174 Fed. App'x. at 937. Here, CMS determined Bibb failed to carry out RI #1's physician's orders in numerous ways, which may have reasonably served as a "trigger" for CMS's determination of immediate jeopardy. In *Josephine Sunset Home*, DAB No. 1908 (2004), no immediate jeopardy was found despite deficiencies related to the care of residents' pressure sores, but unlike this case, *Josephine Sunset* did not involve the failure to follow physician orders and other failures to meet professionally recognized standards of care. DAB No. 1908, at 2.

Conclusion

For all of the foregoing reasons, we affirm the ALJ Decision.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member