Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Woodland View Care and Rehabilitation
(CCN: 37-5364),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-946

Decision No. CR2290

Date: December 8, 2010

DECISION GRANTING SUMMARY JUDGMENT TO CENTERS FOR MEDICARE AND MEDICAID SERVICES

I grant the motion for summary judgment that the Centers for Medicare and Medicaid Services (CMS) filed against Petitioner, Woodland View Care and Rehabilitation. I deny Petitioner's cross motion for summary judgment. I sustain the imposition of the following remedies against Petitioner:

- Termination of Petitioner's participation in Medicare effective August 24, 2010;
- Civil money penalties of $3,000 per day for each day of a period that began on August 20, 2010 and that continued through August 24, 2010; and
- Denial of payment for new Medicare admissions for each day of a period that began on August 20, 2010 and that continued through August 24, 2010.[1]

[1] CMS imposed additional remedies against Petitioner. These include: civil money penalties of $10,000 per day for each day of a period that began on June 8, 2010 and that continued through June 26, 2010; civil money penalties of $3,000 per day for each day of

Continued…

I. Background

Petitioner is a skilled nursing facility in Tulsa, Oklahoma. It has participated in the Medicare program. Its participation in Medicare is governed by sections 1819 and 1866 of the Social Security Act (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 on several occasions in 2010 for compliance with Medicare participation requirements. Surveys were completed on February 24, April 15, May 10, May 22, June 8, June 22, June 25, July 6, and August 20, 2010. The survey findings included findings that Petitioner failed to comply substantially with Medicare participation requirements. Based on these survey findings, CMS determined to impose the remedies that I describe in the opening paragraph of this decision, including termination of Petitioner's participation in Medicare effective August 24, 2010.

Petitioner requested a hearing, and the case was assigned to me for a hearing and a decision. Petitioner moved that the hearing be expedited in view of CMS's determination to terminate Petitioner's participation in Medicare, and I granted Petitioner's motion. Petitioner moved that I bifurcate the hearing of this case and that I hear and decide initially only the issue of whether CMS had authority to terminate Petitioner's participation in Medicare as of August 24, 2010. I denied that motion. It moved additionally that I issue subpoenas for certain records in the possession of the Oklahoma State survey agency. I denied that motion as well.

CMS filed its pre-hearing exchange on October 14, 2010, and, on October 20, 2010, it moved for summary judgment. CMS filed 13 proposed exhibits with its pre-hearing exchange that it identified as CMS Ex. 1 – CMS Ex. 13. On October 14, 2010, Petitioner filed its pre-hearing exchange, and, on November 3, 2010, it opposed CMS's motion for summary judgment and cross-moved for summary judgment (P. Opp. and Cross-Motion). Petitioner filed 70 proposed exhibits with its pre-hearing exchange that it identified as P. Ex. 1 – P. Ex. 70. Subsequently, it filed three additional proposed exhibits that it

---

Continued…

[1] a period that began on June 27, 2010 and that continued through August 19, 2010; and denial of payment for new Medicare admissions for each day of a period that began on May 24, 2010 and that continued through August 19, 2010. These remedies are based on noncompliance findings that were made at surveys that predated the survey that is at issue in this case, a survey of Petitioner that occurred on August 20, 2010 (August 20 Survey). Notice Letter, CMS to Petitioner, July 20, 2010. Petitioner did not offer evidence or arguments in its pre-hearing exchange concerning the findings made at the previous surveys or the remedies that CMS determined to impose based on these findings. *See* Petitioner's Pre-Hearing Brief n.1. Consequently, the findings of noncompliance that were made at these surveys and CMS's remedy determinations based on these surveys' findings are administratively final.

identified as P. Ex. 71 – P. Ex. 73. On November 23, 2010, CMS filed its opposition to Petitioner's cross motion, and, with its opposition, it filed one additional exhibit, which it identified as CMS Ex. 14. I granted Petitioner leave to file a final reply brief (P. reply brief), which it filed on December 2, 2010.

I receive into the record of this case CMS Ex. 1 – CMS Ex. 14 and P. Ex. 1 – P. Ex. 73.

II. Issues, Findings of Fact, and Conclusions of Law

A. Issues

The issues are whether:

1. As of August 20, 2010, Petitioner failed to comply with Medicare participation requirements.

2. CMS's remedy determinations, as I describe them in the opening paragraph of this decision, are authorized and reasonable.

B. Findings of Fact and Conclusions of Law

The report of the August 20 Survey alleges that Petitioner failed to comply substantially with four Medicare participation requirements. CMS Ex. 1. These requirements are stated at 42 C.F.R. §§ 483.10(b)(11); 483.25; 483.25(c); and 483.60. CMS's motion for summary judgment addresses only Petitioner's alleged noncompliance with 42 C.F.R. § 483.10(b)(11). CMS contends that proof of Petitioner's noncompliance with this section alone is sufficient basis to sustain CMS's remedy determinations. I agree with CMS for the reasons that I discuss below. For that reason, I find it unnecessary to decide the merits of Petitioner's cross-motion as to the other three alleged deficiencies. CMS would be entitled to impose the remedies that it determined to impose based on Petitioner's noncompliance with 42 C.F.R. § 483.10(b)(11), even if Petitioner were to prevail in its cross-motion as to the other noncompliance findings made at the August 20 Survey.

I do not address any of the findings of noncompliance that were made at surveys that predated the August 20 Survey, because these findings are administratively final. The findings of noncompliance that were made at the earlier surveys are not, however, irrelevant to my decision. As I shall discuss, Petitioner's compliance history is relevant to deciding the amount of the civil money penalty that is at issue here.

I make the following findings of fact and conclusions of law (Findings).

1. As of August 20, 2010, Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.10(b)(11).

In relevant part, 42 C.F.R. § 483.10(b)(11) states:

> (i) A facility must immediately inform the resident; consult with the resident's physician; and if known, notify the resident's legal representative or an interested family member when there is – . . .
>
> (B) A significant change in the resident's physical, mental, or psychosocial status (i.e., a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications);
>
> (C) A need to alter treatment significantly (i.e., a need to discontinue an existing form of treatment due to adverse consequences, or to commence a new form of treatment); . . . .

The plain meaning of the regulation is that a facility staff may not discontinue a physician-ordered treatment without consulting immediately with the resident's physician. The words "consult" and "immediately" are not ambiguous. "Consult" means more than mere notification. It means a discussion in which the physician is fully informed of the staff's assessment and is given the opportunity to direct either that treatment be continued as previously ordered or that it be suspended or modified. "Immediate" means exactly what the word says. A facility's staff do not satisfy their obligations by delaying consultations for hours after they alter a resident's treatment regime or discontinue treatment.

The premise of the regulation is that a physician has ultimate charge of a resident's care and that his or her decision-making authority is paramount. The regulation accounts for the differences in the levels of training and professional skills of physicians and nursing staffs. The regulation presumes that the staff lacks the training and judgment to overrule a physician's judgment. Thus, the staff may not countermand a physician's orders nor may they vary them significantly without immediate consultation with the physician. Implicit in the regulation is a finding of potential harm whenever a staff fails to follow a physician's order without consulting with the physician.

That is not to suggest that the staff should ignore developments that require physician involvement. To the contrary, a facility's professional staff must perform the vital functions of assessment and execution of a physician's orders. They also clearly have the obligation to advise the physician of their judgment as to what care should be provided to a resident. But, the staff may not contravene or disregard a physician's order on their own initiative.

I find the following facts to be undisputed. Resident # 17 is a profoundly impaired individual who suffers from maladies that include quadriplegia, joint contractures, and pressure ulcers. CMS Ex. 6 at 7, 11. In August 2010, the resident developed pressure ulcers on her right heel and left foot. *Id.* at 17.

The resident's treating physician, and Petitioner's medical director, is Dr. James Beymer. On August 13, 2010, Dr. Beymer issued the following order respecting the resident's right heel:

> monitor blister to right heel and leave opened to air, keep heel free from pressure . . . .

P. Ex. 24 at 1; CMS Ex. 6, at 7. Dr. Beymer issued a new order on August 17. In his new order, Dr. Beymer ordered that the resident wear foam boots on both of her feet. CMS Ex. 6 at 5; P. Ex. 25 at 1.

On August 18, 2010, Petitioner's staff observed the resident's right foot and concluded that the foam boot on that foot was exacerbating the resident's problem rather than alleviating it. P. Ex. 66 at 3; *see* P Opp. and Cross-Motion at 12. Petitioner's staff decided, on their own volition, to remove the boot from that foot. P. Ex. 66 at 3; CMS Ex. 6 at 8, 17. The staff did not consult immediately with either Dr. Beymer or with the physician's assistant who worked for him. CMS Ex. 8 at 23, 51. The physician's assistant first was made aware of the staff's action when she saw Resident # 17 later during the day on August 18, 2010, several hours after the staff had removed the boot. *Id.* at 23, 52. A new order was issued on August 19, again directing that the resident wear foam boots, although the method of attaching the boots was modified to further relieve pressure. CMS Ex. 6, at 6, 10; P. Ex. 27, at 1.

These undisputed facts unequivocally establish that Petitioner contravened the regulation's requirement that a resident's physician be consulted immediately about the need to alter significantly, or to discontinue, the treatment that had been ordered for a resident. Dr. Beymer had ordered that Resident # 17 wear foam boots as a treatment for the resident's pressure ulcers. The staff decided on their own volition that the treatment that Dr. Beymer ordered was doing more harm than good, so they discontinued it. They did so without immediately consulting Dr. Beymer or his assistant.

Petitioner disputes none of the facts that I have discussed. It argues, rather, that inferences and conclusions may be drawn from these facts that are favorable to it. Indeed, it argues that the only inferences and conclusions that may be drawn from the undisputed facts support my issuing summary judgment in its favor.

In deciding a motion for summary judgment, I am required to draw all reasonable inferences from the facts that are favorable to the party against whom the motion is filed. I must deny summary judgment if any reasonable inference would support an outcome favorable to that party. However, I am not required to draw inferences that are unsupported by, or contrary to, the facts. Nor am I required to credit arguments that are incorrect as a matter of law even if those arguments are supported by the facts.

Petitioner argues, first, that CMS's contention is that the staff improperly determined that Resident # 17's boot needed to be removed. Petitioner asserts that this asserted argument is unrealistic in that it fails to take into consideration the resident's condition on August 18, the staff's assessment of that condition, and their exercise of professional judgment when they decided that the boot was doing the resident more harm than good.[2]

The problem with this argument is that it rests on an incorrect premise. CMS is not arguing that the staff's judgment was faulty when they decided that the boot needed to be removed. Rather, it is CMS's position that the staff was required to consult with Dr. Beymer immediately upon determining that the boot should be removed. In other words, CMS does not take issue with the staff's judgment that the boot was doing the resident more harm than good, but its case is predicated on the staff's failure to communicate that judgment to Dr. Beymer and to consult with him. CMS's actual argument – as opposed to what Petitioner contends CMS is arguing – is completely consistent with the regulation's requirements.

Petitioner argues next that, in fact, there was no significant change in Resident # 17's condition that triggered the regulation's requirement for consultation with Dr. Beymer. However, CMS is not relying on 42 C.F.R. § 483.10(b)(11)(i)(B), which requires physician consultation in the event of a significant change in a resident's condition. Rather, CMS relies on 42 C.F.R. § 483.10(b)(11)(i)(C), which requires consultation in the event the staff determines a need to alter treatment significantly (including discontinuing treatment) due to adverse consequences. It is simply not a necessary element of CMS's case that there was a significant change in the resident's condition.[3]

---

[2] As a companion to this argument, Petitioner contends that CMS argues that its staff erred in not obtaining Dr. Beymer's consent prior to removing the boot. However, CMS never made this argument. Rather, CMS argues only that the staff was obligated to consult with Dr. Beymer immediately upon determining that the boot needed to be removed.

[3] However, one could argue that Petitioner's staff actually concluded that there was a significant change in Resident # 17's condition that necessitated a change in treatment.

Petitioner argues additionally that there was no significant change in the treatment that the staff gave to Resident # 17. Thus, according to Petitioner, the consultation requirements of the regulation never came into play. As support for this argument, Petitioner points to Dr. Beymer's August 13, 2010 order that required the staff to keep the resident's right heel free from pressure. P. Ex. 24 at 1. Petitioner contends that removing the boot was entirely consistent with this order, because the staff simply was keeping the resident's heel free from pressure when it did so. Thus, it argues, there was no change in treatment and no need to consult Dr. Beymer.

The problem with this argument is that it completely ignores Dr. Beymer's order of August 17, 2010, in which he directed that the resident wear foam boots. Indeed, Petitioner's reliance on the August 13 order without reference to the August 17 order makes the August 17 order meaningless.

The only reasonable inference I can draw from Dr. Beymer's August 17 order is that he meant exactly what he said when he ordered that the resident wear foam boots. Removing the boot from the resident's right foot contravened the August 17 order and changed significantly the treatment that the resident received.

Dr. Beymer – who is Petitioner's medical director and an interested witness – supplied a written declaration. P. Ex. 52. There is nothing in either this declaration, or in other testimony given by Dr. Beymer, that supports a finding that the staff's removal of the boot was consistent with Dr. Beymer's August 17 order. *See* P. Ex. 71.

At no point in his declaration does Dr. Beymer support Petitioner's contention that removing the boot constituted no change in the resident's treatment. *See* P. Ex. 52. Dr. Beymer also testified in another proceeding involving Petitioner. P. Ex. 71. And, although he asserted in that testimony that he considered the staff's removal of Resident # 17's boot to be appropriate care, his endorsement of the staff's action was qualified:

> Q: You didn't think there was anything inappropriate about what your nursing staff did, did you?
>
> A: No, not at all, *not once the nurses reported to me that – you know, what they had found and what they did.*

Id. at 45 (emphasis added). In short, Dr. Beymer accepted the staff's action, but only after they consulted with him. He did not suggest that removing the boot was consistent with the orders that he gave to the staff.

Petitioner then argues that, even if removal of the boot contravened Dr. Beymer's order, it was not a significant alteration in the treatment being given to Resident # 17. Petitioner characterizes the removal of the boot as a "temporary intervention" that would protect the

resident until the physician assistant – who saw the resident hours after the boot was removed – could evaluate the resident and decide whether and how to modify the care that was being given to her. *See* P. Ex. 62 at 6.

However, and despite Petitioner's characterization of its staff's act, the undisputed facts are that the staff discontinued the treatment that Dr. Beymer had ordered for Resident # 17. Discontinuing treatment, even temporarily, plainly triggers the consultation requirement of 42 C.F.R. § 483.10(b)(11)(i)(C). As I have stated, the regulation demands immediate consultation and not consultation some hours after the staff takes action.

Petitioner also contends that the care it gave to Resident # 17 was consistent with regulatory requirements, because it was delivered in compliance with the requirements of 42 C.F.R. § 483.25(c). Petitioner's Reply Brief at 7-9. This regulation requires a facility to ensure that a resident with pressure sores receives the necessary treatment and services to promote healing, prevent infection, and to prevent new sores from developing. Petitioner argues that removing the boot from the resident's foot was consistent with the requirements of this regulation inasmuch as the staff was concerned that the boot was exacerbating the resident's problems rather than ameliorating them.

However, there is no inconsistency between the requirements of 42 C.F.R. §§ 483.10(b)(11) and 483.25(c). A facility is obligated to comply with the requirements of both regulations. It need not choose compliance with one over compliance with the other. In this case, Petitioner could have complied with the requirements of 42 C.F.R. § 483.10(b)(11) simply by consulting immediately with Dr. Beymer or his assistant when the staff determined that the boot was putting unacceptable pressure on the resident's foot. The staff would have complied with the requirements of 42 C.F.R. § 483.25(c), if they followed whatever order he gave during consultation.

Reduced to their essence, Petitioner's arguments all essentially rest on a single premise, that being Petitioner's contention that the care that its staff gave to Resident # 17 was appropriate and consistent with nursing standards of care. Petitioner asserts that it would have been a violation of nursing standards not to remove the resident's boot when the staff determined that the boot was causing additional pressure and injury to Resident # 17. *See* P. Ex. 53 at 4. However, the question in this case is not whether removal of the boot may have been an appropriate act by the staff. The issue is whether the staff could take such an action – contravening an explicit order by the resident's physician – without immediately consulting the physician. And, the answer to that question clearly is "no."

2. CMS's remedy determinations are authorized and reasonable.

a. Termination of Petitioner's participation in Medicare is authorized by the Act and regulations.

The Secretary of this Department or her delegate, CMS, may terminate the participation in Medicare of any provider, including a skilled nursing facility, which is not complying substantially with Medicare participation requirements. Act Section 1866(b)(2); 42 C.F.R. § 488.456(b)(1)(i). The authority to terminate participation does not depend on the presence of immediate jeopardy level noncompliance. *See* 42 C.F.R. § 488.301. Nor does it require noncompliance of a specific duration. The mere presence of substantial noncompliance, in and of itself, is all that is needed to terminate participation.

Here, CMS determined to terminate Petitioner's participation, after Petitioner manifested noncompliance for several months. However, the triggering findings were those that were made at the August 20 Survey. Petitioner's noncompliance as of that survey with the requirements of 42 C.F.R. § 483.10(b)(11) is sufficient basis to authorize imposition of the remedy.

b. Civil money penalties of $3,000 per day for each day of the period that began on August 20, 2010, and that continued through August 24, 2010, are reasonable.

Petitioner has not argued in any of its briefs that the penalty amount of $3,000 per day would be unreasonable, if Petitioner were found to be noncompliant. I could find that it had abandoned its right to argue that the penalty amount is unreasonable. However, I have elected to review the merits of the penalty amount, and I find it to be reasonable.

Daily civil money penalties for noncompliance that is substantial, but which does not put residents in immediate jeopardy, must fall within a range of between $50 and $3,000 per day. 42 C.F.R. § 488.438(a)(1)(ii). There are regulatory criteria for deciding where within this range a penalty amount should fall. These are set forth at 42 C.F.R. §§ 488.438(f)(1) – (4) and 488.404 (incorporated by reference into 42 C.F.R. § 488.438(f)(3)). The criteria include: the seriousness of a facility's noncompliance; its compliance history; its culpability for noncompliance; and its financial condition.

As I have discussed, Petitioner did not offer any argument concerning the reasonableness of the $3,000 daily penalty amount that CMS determined to impose. I must therefore address the merits of the issue based only on what CMS has offered.

The $3,000 daily penalty amount is a continuation of penalties that CMS previously determined to impose. In its July 20, 2010 notice to Petitioner, CMS advised it that it was imposing penalties of $3,000 per day for noncompliance that began on June 27,

2010. That determination reflected findings of noncompliance that were made at surveys that are not being challenged by Petitioner. Consequently, the $3,000 daily penalty amount that was imposed beginning in June 2010 is administratively final. The question I must decide is: did Petitioner's noncompliance as of August 20, 2010, merit continuing these penalties at the amount of $3,000 per day for four additional days?

I conclude that the amount is reasonable based on the undisputed facts offered by CMS. Petitioner has a very lengthy history of noncompliance. The unchallenged findings of noncompliance made by CMS include numerous instances of noncompliance, several of which were at the immediate jeopardy level. Penalties of $10,000 per day for immediate jeopardy level noncompliance were insufficient inducement for Petitioner to correct all of its noncompliance. Consequently, and based in large measure on Petitioner's poor compliance history, CMS determined in July 2010 to continue penalties at the $3,000 per day amount, the maximum penalty amount that could be imposed for non-immediate jeopardy level deficiencies.

It was not unreasonable for CMS simply to continue the penalties at $3,000 per day from August 20 through August 24, 2010 given this poor compliance history and given Petitioner's evident inability to correct its noncompliance. Petitioner's compliance history and its failure to correct thus justify the penalties imposed here.

Moreover, Petitioner's noncompliance with the requirements of 42 C.F.R. § 483.10(b)(11) is, by itself, a serious deficiency. As I have discussed, this regulation implicitly rests on the fundamental differences in training and skills of a physician as opposed to nursing staff at a skilled nursing facility. There are obvious dangers when a nursing staff oversteps its authority, as Petitioner's staff did here.

c. Denial of payment for new Medicare admissions for each day of the period that began on August 20, 2010 and that continued through August 24, 2010 is authorized by law.

CMS is authorized to deny payment for new Medicare admissions as a remedy for any failure by a skilled nursing facility to comply substantially with one or more Medicare participation requirements. 42 C.F.R. § 488.417. In this case, imposition of the remedy for the period beginning on August 20, 2010 and continuing through August 24, 2010 is authorized by Petitioner's noncompliance with the requirements of 42 C.F.R. § 483.10(b)(11).

/s/
Steven T. Kessel
Administrative Law Judge