Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Silverbrook Manor
(CCN: 23-5361),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-540

Decision No. CR2428

Date: September 14, 2011

DECISION

I sustain the determination of the Centers for Medicare and Medicaid Services (CMS) that Petitioner, Silverbrook Manor, attained compliance with Medicare participation requirements on December 22, 2009. Consequently, I sustain all of the remedies that CMS imposed against Petitioner.

I. Background

Petitioner is a skilled nursing facility in Niles, Michigan that 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.

This case originated with determinations by CMS: that Petitioner failed to comply substantially with Medicare participation requirements; and to impose remedies against Petitioner. The remedies that CMS determined to impose consisted of civil money penalties (including a civil money penalty of $4,550 for one day of immediate jeopardy level noncompliance) and a denial of payment for new Medicare admissions. Petitioner

disputed these findings, and the case was assigned to an administrative law judge for a hearing and a decision.

The case was eventually transferred to me. By the time that I received the case, the issues had been narrowed to a single issue, that being the date when Petitioner attained compliance with participation requirements. Petitioner did not contest that it had failed to comply with participation requirements, nor did it contest the reasonableness of CMS's remedy determinations. However, Petitioner argued that it came back into compliance with participation requirements by no later than November 25, 2009 rather than on December 22, 2009, the date that CMS had determined that Petitioner attained compliance.

On October 27, 2010, I issued a decision granting summary judgment in favor of CMS. Petitioner appealed my decision to the Departmental Appeals Board (Board), and, on June 17, 2011, a Board appellate panel remanded the case back to me, ordering that I hold a hearing on the issue of when Petitioner attained compliance. Shortly thereafter, the parties advised me that they were waiving an in-person hearing and that they agreed to resubmit the case for my decision based on the written record.

CMS filed 56 exhibits that I received as CMS Exhibit (Ex.) 1 – CMS Ex. 56 in connection with my original decision in this case. After the remand order, CMS filed seven additional exhibits that it identified as CMS Ex. 57 – CMS Ex. 63. Petitioner filed one exhibit that I received as P. Ex. 1 in connection with my original decision. It has now filed an additional exhibit that it identifies as P. Ex. 2. I receive into the record CMS Ex. 1 – CMS Ex. 63 and P. Ex. 1 – P. Ex. 2.

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

A. Issue

The sole issue in this case is the date when Petitioner attained compliance with Medicare participation requirements.

B. Findings of Fact and Conclusions of Law

Petitioner was found to be noncompliant with 11 Medicare participation requirements at a survey that was completed on November 5, 2009 (November 5 Survey). As I have discussed, Petitioner does not contest these findings of noncompliance. It asserts that it corrected its noncompliance by November 25, 2009. Petitioner relies on evidence that its staff attended reeducation sessions (in-service training) after November 5 and that its management instituted audits of staff performance to assure that the staff was complying with management's care directives. For several reasons, this evidence is inadequate to prove that Petitioner rectified its noncompliance earlier than December 22, 2009.

- The fact that staff members received compliance training is not, in and of itself, sufficient to prove that they completely corrected their deficient performance. Presumably, all of the staff members had been trained *prior* to the November 5 Survey, and, yet, that training was by itself inadequate to assure compliance. Consequently, retraining the staff – while a necessary element of compliance – would not alone assure that the staff was doing as of November 25 what they had previously failed to do.

- Not all of the staff members were retrained as of November 25, 2009. Several staff members did not receive retraining until weeks afterward.

- Petitioner sought to assure that its staff complied with participation requirements by instituting audits of their performance. Those audits were, for the most part, conducted after November 25, 2009, and continued well into December of that year. The audits that Petitioner conducted did not constitute detailed review of the performance by staff members. Thus, the audits conducted by Petitioner of its staff do not prove that the staff members were complying with participation requirements on dates between November 25 and December 22, 2009.

- The audits revealed several instances of continued staff noncompliance that occurred after November 25, 2009.

- At the December 22, 2009 resurvey of Petitioner's facility, a surveyor observed a member of Petitioner's staff continuing to fail to comply with a Medicare participation requirement.

The burden rests entirely on a facility to prove that it has attained compliance by a particular date. *Texan Nursing & Rehab. of Amarillo, LLC*, DAB No. 2323 (2010). What a facility must prove is that it successfully implemented all of the corrective actions that are necessary to attain compliance. Simply asserting that compliance was achieved by a particular date is insufficient to satisfy this burden. Nor is documentation that staff attended in-service training sessions, or that other forms of training were provided to staff, necessarily proof of compliance, where the noncompliance consisted of staff failures to provide nursing care to residents that is consistent with regulatory requirements. *Oceanside Nursing & Rehab. Ctr.*, DAB No. 2382 (2011).

In this case, Petitioner relies on evidence that it retrained its staff members after the November 5 Survey. As I have discussed, proof of retraining is not by itself sufficient to prove that compliance has been attained. Moreover, the evidence offered by Petitioner does not show that retraining of its staff was completed by November 25, 2009. For

example, one of the deficiencies that was identified at the November 5 Survey was a failure by Petitioner's staff, in contravention of the requirements of 42 C.F.R. § 483.10(b)(11), to consult with a treating physician concerning a significant change in a resident's condition. CMS Ex. 1 at 1-4. In its plan of correction, Petitioner contended that it would reeducate its staff by no later than November 25, 2009, regarding the need for the staff to obtain physician orders for residents with significant changes in their conditions. CMS Ex. 57 at 2. However, Petitioner's records show that staff members were receiving this reeducation as late as December 14, 2009, about three weeks after the promised reeducation completion date. P. Ex. 1 at 2-3, 19-21, 67-68, 70.

Similarly, Petitioner was found at the November 5 Survey not to be complying substantially with the requirements of 42 C.F.R. § 483.13, which prohibits abuse and neglect of facility residents. CMS Ex. 1 at 4-7. Reeducation of staff was one of the corrective actions that Petitioner promised to address this noncompliance. Petitioner's own records show that this reeducation was not completed until December 18, 2009 (a total of 22 staff members received retraining between November 25 and December 18). CMS Ex. 58.

Petitioner also relies on evidence that it instituted audits of its staff members to assure that they were implementing management's directives and good nursing practice in providing care to residents. These audits were not begun until November 25, 2009. P. Ex. 1 at 6-8. Thus, even if audits conducted *after* November 25 showed that staff members were complying with participation requirements, they could not establish compliance by November 25. Furthermore, the documentation of these audits offered by Petitioner does not provide convincing proof that Petitioner's staff members actually were complying with regulatory requirements.

For example, Petitioner compiled an audit form that it entitled "Notification of Physician Audit." P. Ex. 1 at 6-8. This form was created, apparently, to measure the compliance of Petitioner's staff with the requirements of 42 C.F.R. § 483.10(b)(11). That regulation requires a facility's staff to consult immediately with a resident's treating physician in the event of a significant change in the resident's condition. As I have discussed, Petitioner was found to have been noncompliant with this regulation at the November 5 Survey.

The regulation requires more than mere notification of a physician. It requires consultation, meaning that staff members must assess any significant change of a resident's condition, must report their observations and judgments to the physician, must engage in a dialogue with the physician about what, if any, changes to a resident's treatment regime are dictated by the resident's changed condition, and must obtain whatever new or additional treatment orders that the physician believes to be necessary. Furthermore, that consultation must be *immediate*, which is to say, contemporaneous with the discovery of a significant change in the resident's condition.

It is impossible to determine, from the "Notification of Physician Audit" offered by Petitioner, whether Petitioner's staff was complying completely with these requirements after November 25, 2009. The document consists of a series of entries that describe concerns or issues that were identified by members of Petitioner's staff that record whether a resident's physician was "notified" by the staff and that describe whatever orders were issued by the physician. What the document fails to describe is what assessments were made by the staff, what recommendations the staff made, and the content of discussions between the staff and the physician. In other words, the audit form documents "notification," but it says nothing of substance about consultation. Furthermore, the document fails altogether to describe the temporal relationship between the discovery of changes in the resident's condition and whatever consultation took place. One cannot ascertain whether notification or consultation occurred immediately, as is required by the regulation.

Furthermore, some of the audits conducted by Petitioner of its staff members show that the staff members continued to fail to comply with Medicare participation requirements after November 25, 2009. For example, at the November 5 Survey, Petitioner was found to be noncompliant with the requirements of 42 C.F.R. § 483.15(e)(1). CMS Ex. 1 at 7-9. This regulation assures a resident of a skilled nursing facility of the right to reside and to receive services with reasonable accommodation of the resident's needs and preferences. Petitioner's noncompliance with the regulation lay in its staff's inattentiveness to residents' requests for assistance. The surveyors found that residents' requests for aid – communicated via call lights situated outside of the residents' rooms – were not being answered timely.

Petitioner developed an audit form ("Call Lights Audit") to document staff's responsiveness to residents' requests for aid. P. Ex. 1 at 46-59. This form does not establish that Petitioner's staff attained compliance by November 25, 2009. To the contrary, it documents continued noncompliance by the staff.

The form, which covers dates beginning on November 23, 2009 and continuing through December 15, 2009, records numerous occasions during which staff members either failed to assure that a resident's call light button was within reach of the resident, or where staff members failed to answer a resident's call light promptly. On December 11, the staff was documented as not responding timely to a resident's call light. P. Ex. 1 at 56. And, on December 15, the staff was documented as not assuring that a resident's call light button was within reach of the resident. *Id*. at 54.

Indeed, at least one member of Petitioner's staff was continuing to fail to respond promptly to residents' call lights as of the December 22, 2009 resurvey of Petitioner's facility. One of Petitioner's certified nursing assistants (CNA "E") had been repeatedly retrained by Petitioner's management concerning the need to respond promptly to residents' call lights. P. Ex. 1 at 51, 58. But, on December 22, 2009, a surveyor watched

CNA E walk past a resident's blinking call light without responding to it. Attachment 2 to CMS Final Brief of October 13, 2010.

Petitioner offers the affidavit of Mary Stokes, RN, to support its argument that it corrected all of its deficiencies prior to December 22, 2009. P. Ex. 2 at 4-5. Ms. Stokes identifies herself as a clinical consultant who was responsible for providing monitoring and guidance to Petitioner relating to clinical compliance. She avers that she visited Petitioner's facility on December 16, 2009. According to Ms. Stokes:

> I did not observe nor was I made aware of any situations that indicated noncompliance with any federal requirements after November 25, 2009 and through my visit on December 16, 2009.

P. Ex. 2 at 5.

I do not find Ms. Stokes' testimony to be persuasive because it is belied by the evidence – contained in Petitioner's own records – which I have discussed. Nothing in Ms. Stokes' affidavit explains the failures by all members of Petitioner's staff to complete reeducation by November 25, 2009, nor does it explain the incidents of noncompliance that were documented by Petitioner between November 25 and December 22, 2009.

Petitioner argues also that it "completed" its plan of correction by November 25, 2009. I am not certain exactly what Petitioner means by its use of that word. What is clear, however, is that Petitioner did not complete all of its remedial actions prior to December 22, 2009. As I have discussed, reeducation of staff continued through the month of December, and there were still incidents of noncompliance being discovered as late as the December 22, 2009 resurvey of Petitioner.

CMS imposed remedies consisting of civil money penalties based on Petitioner's noncompliance beginning October 29 and running through December 21, 2009, and a denial of payment for new Medicare admissions from December 6 through December 21, 2009. As I have discussed, Petitioner did not challenge the civil money penalty amount, nor did it contend that CMS lacked authority to impose denial of payment as a remedy assuming that Petitioner was noncompliant with participation requirements. I find the remedies to be reasonable inasmuch as Petitioner did not prove that it attained compliance with all Medicare participation requirements prior to December 22, 2009.

/s/
Steven T. Kessel
Administrative Law Judge