

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Bayou Shores, SNF, LLC, d/b/a Rehabilitation Center of St. Petersburg,
(CCN: 10-5772),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-1643

Decision No.: CR4701

Date: September 8, 2016

DECISION

Petitioner, Bayou Shores, SNF, LLC, d/b/a Rehabilitation Center of St. Petersburg, was a long-term-care facility, located in St. Petersburg, Florida, that participated in the Medicare program. Following a series of surveys, ending in July 2014, the Centers for Medicare & Medicaid Services (CMS) determined that the facility was not in substantial compliance with program requirements and that its deficiencies posed immediate jeopardy to resident health and safety. Based on those determinations, CMS terminated the facility's program participation and imposed other remedies, including a civil money penalty (CMP).

Petitioner filed a hearing request challenging the termination and CMS's refusal to allow it an additional opportunity to correct its deficiencies, but did not challenge the deficiencies themselves nor the immediate jeopardy finding.

CMS moved for partial summary judgment. In a ruling dated December 16, 2014¹, I found that the facility had a significant number of serious deficiencies, any one of which

¹ A typographical error indicates the wrong year: the published Ruling is dated December 16, 2015, rather than December 16, 2014, when it was issued.

put it out of substantial compliance with program requirements. CMS was therefore authorized to impose a penalty – including termination – and federal regulations preclude me from reviewing the penalty imposed or CMS’s determination to reject the facility’s plan of correction. I therefore granted CMS’s motion. *Bayou Shores, SNF, LLC*, ALJ Ruling 2015-6 (December 16, 2014).

I affirm my December 16, 2014 ruling and incorporate it into this final decision.

Although given ample opportunity, Petitioner has not challenged CMS’s immediate jeopardy determination nor the amount of the CMP. Instead, Petitioner challenges the duration of the CMP, arguing that it brought itself into substantial compliance prior to the date of its termination.

For the reasons discussed below, I affirm CMS’s determinations as to the duration of the facility’s substantial noncompliance and the duration of the immediate jeopardy. The amount of the CMP – \$3,050 per day – is reasonable as a matter of law.

Background

The Social Security Act (Act) sets forth requirements for nursing facilities to participate in the Medicare program and authorizes the Secretary of Health and Human Services to promulgate regulations implementing those statutory provisions. Act § 1819. The Secretary’s regulations are found at 42 C.F.R. Part 483. To participate in the Medicare program, a nursing facility must maintain substantial compliance with program requirements. To be in substantial compliance, a facility’s deficiencies may pose no greater risk to resident health and safety than “the potential for causing minimal harm.” 42 C.F.R. § 488.301.

The Secretary contracts with state survey agencies to survey skilled nursing facilities in order to determine whether they are in substantial compliance. Act § 1864(a); 42 C.F.R. § 488.20. Each facility must be surveyed annually, with no more than fifteen months elapsing between surveys, and must be surveyed more often, if necessary, to ensure that identified deficiencies are corrected. Act § 1819(g)(2)(A); 42 C.F.R. §§ 488.20(a), 488.308. The state agency must also investigate all complaints. Act § 1819(g)(4).

Here, the Florida Agency for Healthcare Administration (state agency) completed a series of surveys: on February 10, 2014, March 20, 2014, and July 11, 2014. For each of these surveys, CMS determined that the facility was not in substantial compliance with multiple program requirements and that its deficiencies posed immediate jeopardy to resident health and safety. CMS Exhibits (Exs.) 4, 5, 6.

The February 10, 2014 survey findings reflect a seriously deficient facility whose deficiencies posed immediate jeopardy to resident health and safety:

- 42 C.F.R. § 483.10(b)(4) (Tag F155) (resident rights – notice of rights and services) at scope and severity level K (pattern of noncompliance that posed immediate jeopardy to resident health and safety);
- 42 C.F.R. §§ 483.10(b)(5)-(10), 483.10(b)(1) (Tag F156) (resident rights – notice of rights and services) at scope and severity level K;
- 42 C.F.R. § 483.10(c)(2)-(5) (Tag F159) (resident rights – protection of resident funds) at scope and severity level D (isolated instance of substantial noncompliance that caused no actual harm with the potential for more than minimal harm);
- 42 C.F.R. § 483.15(g)(1) (Tag F250) (quality of life – social services) at scope and severity level K;
- 42 C.F.R. § 483.15(h)(2) (Tag F253) (quality of life – environment) at scope and severity level D;
- 42 C.F.R. § 483.20(b)(1) (Tag F272) (resident assessment – comprehensive assessments) at scope and severity level D;
- 42 C.F.R. §§ 483.20(d), 483.20(k)(1) (Tag F279) (resident assessment – use and comprehensive care plans) at scope and severity level D;
- 42 C.F.R. § 483.25(a)(3) (Tag F312) (quality of care – activities of daily living) at scope and severity level D;
- 42 C.F.R. § 483.25(b) (Tag F313) (quality of care – vision and hearing) at scope and severity level D;
- 42 C.F.R. § 483.25(d) (Tag F315) (quality of care – urinary incontinence) at scope and severity level D;
- 42 C.F.R. § 483.60(b),(d),(e) (Tag F431) (pharmacy services – service consultation, drug labeling and storage) at scope and severity level E (pattern of noncompliance that caused no actual harm with the potential for more than minimal harm);
- 42 C.F.R. § 483.65 (Tag F441) (infection control) at scope and severity level D);
- 42 C.F.R. § 483.75 (Tag F490) (administration) at scope and severity level K; and

- 42 C.F.R. § 483.75(l)(1) (Tag F514) (administration – clinical records) at scope and severity level K;

CMS Ex. 4.

CMS gave the facility an opportunity to correct its deficiencies but, in the meantime, the state agency received abuse complaints. The state surveyors returned to the facility, conducting a complaint investigation (CMS Ex. 5) and completing the follow-up survey on March 20, 2014 (CMS Ex. 6). They again found multiple deficiencies, including some that posed immediate jeopardy to resident health and safety.

Complaint investigation:

- 42 C.F.R. § 483.13(b), (c)(1)(i) (Tag F223) (resident behavior and facility practices – abuse and staff treatment of residents) at scope and severity level J (isolated instance of noncompliance that poses immediate jeopardy to resident health and safety) (**new deficiency**);²
- 42 C.F.R. § 483.13(c)(1)(ii)-(iii), (c)(2)-(4) (Tag F225) (resident behavior and facility practices – staff treatment of residents) at scope and severity level J (**new deficiency**);
- 42 C.F.R. § 483.13(c) (Tag F226) (resident behavior and facility practices – staff treatment of residents) at scope and severity level J (**new deficiency**);
- 42 C.F.R. § 483.20(k)(3)(ii) (Tag F282) (resident assessment – comprehensive care plans) at scope and severity level D (**new deficiency**);
- 42 C.F.R. § 483.25(f)(1) (Tag F319) (quality of care – mental and psychosocial functioning) at scope and severity level J (**new deficiency**);
- 42 C.F.R. § 483.25(h) (Tag F323) (quality of care – accident prevention) at scope and severity level D (**new deficiency**); and

² I view repeat deficiencies narrowly, considering a deficiency repeated if cited under the same F-tag. I am not bound by F-tags, however. I am bound by the regulations. Arguably, repeated noncompliance with the same regulation should be considered a repeat deficiency. Indeed, many of the deficiencies cited under new tag numbers are at least related to deficiencies cited previously. But that issue is not material in this case, so I need not decide it.

- 42 C.F.R. § 483.35(i) (Tag F371) (dietary services – sanitary conditions) at scope and severity level E (**new deficiency**).

CMS Ex. 5.

Follow-up survey:

- 42 C.F.R. § 483.20(g) –(j) (Tag F278) (resident assessment – accuracy, coordination, certification, penalty for falsification) at scope and severity level D (**new deficiency**);
- 42 C.F.R. § 483.60(b),(d),(e) (Tag F431) (pharmacy services – service consultation, drug labeling and storage) at scope and severity level E (**repeat deficiency**);
- 42 C.F.R. § 483.65 (Tag F441) (infection control) at scope and severity level D (**repeat deficiency**);
- 42 C.F.R. § 483.75 (Tag F490) (administration) at scope and severity level J (**repeat deficiency**); and
- 42 C.F.R. § 483.75(o)(1) (Tag 520) (administration – quality assessment and assurance) at scope and severity level J (**new deficiency**).

CMS Ex. 6.

Notwithstanding these survey findings, CMS gave the facility an additional opportunity to correct. Responding to another complaint, the surveyors returned to the facility in July to investigate. While there, they also completed the recertification survey on July 11, 2014. Again, they cited multiple deficiencies that posed immediate jeopardy to resident health and safety:

- 42 C.F.R. § 483.13(c) (Tag F224) (resident behavior and facility practices– staff treatment of residents) at scope and severity level J (**new deficiency**);
- 42 C.F.R. § 483.13(c)(1)(ii)-(iii), (c)(2)-(4) (Tag F225) (resident behavior and facility practices – staff treatment of residents: employee histories of abuse/neglect/mistreatment; reporting and investigating violations) at scope and severity level J (**repeat deficiency**);

- 42 C.F.R. § 483.13(c) (Tag F226) (resident behavior and facility practices – staff treatment of residents: anti-abuse and neglect policies and procedures) at scope and severity level J (**repeat deficiency**);
- 42 C.F.R. § 483.20(k)(3)(ii) (Tag F282) (resident assessment – comprehensive care plans/qualified persons) at scope and severity level D (**repeat deficiency**);
- 42 C.F.R. § 483.25(h) (Tag F323) (quality of care – accident prevention) at scope and severity level J (**repeat deficiency**);
- 42 C.F.R. § 483.35(i) (Tag F371) (dietary services – sanitary conditions) at scope and severity level E (**repeat deficiency**);
- 42 C.F.R. § 483.65 (Tag F441)(infection control) at scope and severity level D (**repeat deficiency**);
- 42 C.F.R. § 483.75 (Tag F490) (administration) at scope and severity level J (**repeat deficiency**);
- 42 C.F.R. § 483.75(d)(1)-(2) (Tag F493) (administration - governing body) at scope and severity level K (**new deficiency**); and
- 42 C.F.R. § 483.75(o)(1) (Tag F520) (administration - quality assessment and assurance) at scope and severity level J (**repeat deficiency**).

CMS Exs. 1, 2.

In conjunction with the recertification survey, state surveyors completed the facility's annual life safety code (LSC) survey on July 9, 2014, and found LSC deficiencies:

- K038 (LSC §§ 7.1 and 19.2.1) – which includes means of egress requirements – at scope and severity level D;
- K051 (LSC §19.3.4 and 9.6) – which governs fire alarm systems – at scope and severity level D;
- K062 (LSC §§ 19.7.6; 9.7.5; and 4.6.12) – which governs sprinkler systems – at scope and severity level D; and

- K076 (LSC §§ 4.3.1.1.2 and 19.3.2.4) – which governs medical gas storage and administration – at scope and severity level D.

CMS Ex. 3.

By letter dated July 22, 2014, CMS advised the facility that it was not in substantial compliance with program requirements, that conditions in the facility posed immediate jeopardy to resident health and safety, and that “the substandard quality of care” existing on June 21, 2014, was ongoing. CMS Ex. 7 at 1; *see* P. Ex. 22 at 1-2 (state agency letter advising the facility of its immediate jeopardy findings and its recommendation that CMS terminate). Based on the July 22 survey findings, CMS terminated the facility’s program participation as of August 3, 2014, denied payment for new admissions as of July 24, 2014, and imposed a \$3,050 per day CMP, effective June 21, 2014. CMS Ex. 7 at 2.

Petitioner appealed.³ It conceded that it was not in substantial compliance at the time of the July survey but challenged the termination, arguing that the facility subsequently corrected its deficiencies. Petitioner’s Hearing Request (July 31, 2014). CMS moved for partial summary judgment.

In a ruling dated December 16, 2014, I found that, because the facility was not in substantial compliance with program requirements, CMS was authorized to impose a remedy and that its choice of remedies is not reviewable. *Bayou Shores, SNF, LLC*, ALJ Ruling 2015-6 (December 16, 2014). For the same reason, I am not authorized to review CMS’s decision to impose a DPNA. As explained in my ruling, so long as CMS has a basis for imposing a remedy, I have no authority to review its determination to do so nor

³ To avoid termination, Petitioner also sought emergency injunctive relief from the U.S. District Court for the Middle District of Florida. When that court dismissed the case on jurisdictional grounds (*Bayou Shores SNF, LLC v. Burwell*, No. 8:14-CV-1849-T-33MAP, 2014 WL 4059900, 6-8 (M.D. Fla. Aug. 15, 2014), Petitioner went to the bankruptcy court. The bankruptcy court “assumed authority over the Medicare and Medicaid provider agreements”; it enjoined CMS from terminating the facility’s Medicare agreement, determined for itself that Bayou Shores was qualified to participate in the program, and required the Secretary of Health and Human Services to continue paying benefits to the facility. *Florida Agency for Health Care Admin. v. Bayou Shores SNF, LLC*, Case No. 15-13731, 2016 WL 3675462, at *5 (11th Cir. July 11, 2016). Thereafter, the United States District Court for the Middle District of Florida reversed, finding that the bankruptcy court had no jurisdiction over Medicare claims. *In re Bayou Shores SNF, LLC*, 533 B.R. 337, 343 (M.D. Fla. 2015). The Eleventh Circuit Court of Appeals affirmed the District Court. *Florida Agency for Health Care Admin. v. Bayou Shores SNF, LLC*, 2016 WL 3675462 at *6 (11th Cir. July 11, 2016).

may I review CMS's choice of remedy. Act § 1819(h); 42 C.F.R. §§ 488.402, 488.406, 488.408(g)(2), 488.438(e); 498.3(d)(14); *Beverly Health & Rehab. Servs., Inc. v. Thompson*, 223 F. Supp. 73, 111 (D.D.C. 2002) (holding that the "determination of what remedy to seek is beyond challenge.").

I also found that CMS need not afford a deficient facility the opportunity to correct its substantial noncompliance and that I have no authority to review its rejection of the facility's plan of correction. *Bayou Shores, SNF, LLC*, ALJ Ruling 2015-6 at 5-6 (December 16, 2014), citing *Blossom South*, 987 F. Supp. at 302; *Oaks of Mid City*, DAB 2375 at 29-30 (2011); *Hermina Traeye Mem'l Nursing Home*, DAB No. 1810 at 13 (2002).⁴

My ruling offered Petitioner a final opportunity to challenge the immediate jeopardy determination, as well as the amount of the CMP. Petitioner does not challenge CMS's finding of immediate jeopardy as of the July 11 survey. Instead, it doubles down on its earlier arguments, pointing out that it submitted an "Allegation of Compliance," and claiming that it was in substantial compliance "no later than July 28, 2014." P. Br. at 3, 5; P. Ex. 4 at 2 (Martin Decl. ¶¶ 7, 8). From this, Petitioner argues that, because it achieved substantial compliance no later than July 28, the CMP – which lasted until the date of its termination – is unreasonable.⁵ But, as the following discussion shows, Petitioner has not established that it ever achieved substantial compliance or that its deficiencies no longer posed immediate jeopardy to resident health and safety.

⁴ As the Eleventh Circuit observed, terminating repeat offenders, like Petitioner, "was a key part of Congress's overhaul of nursing home regulations and was intended to stop 'instances in which substandard providers had avoided termination from Medicare by claiming that they had cured serious violations of safety standards, only to lapse back into noncompliance after the threat of administrative sanction was removed.'" *Bayou* at *19; See H.R. Rep. No. 100-391(I), 100th Cong., 1st Sess. (1987) (expressing the goal of eliminating the "yo-yo" or "roller coaster" phenomenon); *Heartland Manor at Carriage Town*, DAB No. 1664 (1998).

⁵ In federal court, the parties argued over the effective date of termination. CMS maintained that the provider agreement terminated on August 3, before Petitioner petitioned the bankruptcy court; Petitioner contested that position, arguing for a later effective date (which, ironically, could result in a substantially higher CMP). The Eleventh Circuit declined to resolve the issue. *Bayou* at *6, n.9, *22. Petitioner has not raised that issue here, so CMS's position prevails; the parties are squabbling over when the CMP ends, i.e., whether the CMP should be imposed up to July 28th or through August 2.

Discussion

***CMS's determinations as to the duration of the facility's substantial noncompliance and the duration of the immediate jeopardy are consistent with statutory and regulatory requirements and must be affirmed.*⁶**

Once a facility has been found to be out of substantial compliance (as Petitioner was here), it remains so until it affirmatively demonstrates that it has achieved substantial compliance once again. *Ridgecrest Healthcare Ctr.*, DAB No. 2493 at 2-3 (2013); *Taos Living Ctr.*, DAB No. 2293 at 20 (2009); *Premier Living & Rehab Ctr.*, DAB No. 2146 at 23 (2008); *Lake City Extended Care*, DAB No. 1658 at 12-15 (1998). The burden is on the facility to prove that it is back in compliance, not on CMS to prove that deficiencies continued to exist. *Asbury Ctr. at Johnson City*, DAB No. 1815 at 19-20 (2002).

The facility must show that the incidents of noncompliance have ceased *and* that it has implemented appropriate measures to insure that similar incidents will not recur. *Libertywood Nursing Ctr.*, DAB No. 2433 at 15, *citing Life Care Ctr. of Elizabethton*, DAB No. 2356 at 16 (2011); *accord*, 42 C.F.R. § 488.454(a) and (e); *Hermina Traeye Mem'l Nursing Home*, DAB No. 1810 at 12 (holding that, to be found in substantial compliance earlier than the date of the resurvey, the facility must supply documentation "acceptable to CMS" showing that it was in substantial compliance and *was capable of remaining in substantial compliance* on the earlier date); *Cross Creek Care Ctr.*, DAB No. 1665 (1998). A facility's return to substantial compliance usually must be established through a resurvey. 42 C.F.R. § 488.454(a); *Ridgecrest* at 2-3.

Petitioner has conceded that, as of July 11, its deficiencies were many, and they were serious. The facility neglected its residents, failed to provide them with the quality of care they needed, and was not administered effectively, among other problems. *See CMS Exs. 4, 6.*

The most dangerous situation cited by the July survey team involved Resident 210's (R210's) elopement from the facility and the facility's response – or lack of response – to his departure. R210 transferred into the facility on June 20, 2014. He was alert but confused and had a history of injury (hematoma) from falls. He "frequently" walked the corridors and was known for "exit-seeking" behavior. As part of his transfer order, his physician stated that he "needs secure unit." CMS Ex. 1 at 11, 15, 16; CMS Ex. 9 at 3, 7 (Bartlett Decl. ¶¶ 4, 7); CMS Ex. 10 at 3, 7 (Benjamin Decl. ¶¶ 4, 7). The facility placed him in its "secure unit" on the second floor, but took no steps to assess his risk for elopement, and – aside from his placement – adopted no procedures for keeping him safe. No one told staff that he was an elopement risk. *Id.* As it turned out, the "secure unit"

⁶ I make this one finding of fact/conclusion of law.

was not so secure and, without anyone noticing, R210 made his way out of the unit, down to the first floor, and out the exit. No one can say how long he was gone, but he was found “down the road,” having attempted to “walk home.” CMS Ex. 1 at 7, 9, 14; CMS Ex. 9 at 4-5 (Bartlett Decl. ¶¶ 4, 5).

While the facility was undeniably deficient for its lack of effort in preventing R210’s elopement, its response to his disappearance was simply appalling. Staff did not ask the police to help find him. No one notified R210’s physician that he had eloped. Staff did not report the elopement to the appropriate state agency. They did not even document the elopement in a nurse’s note or elsewhere, which might have alerted others of the need for vigilance to prevent another elopement. CMS Ex. 1 at 9, 10; CMS Ex. 9 at 3, 5 (Bartlett Decl. ¶¶ 4, 5).

No one investigated the elopement. Indeed, although the “secure unit” was equipped with video surveillance equipment, no one bothered to review it. CMS Ex. 9 at 5 (Bartlett Decl. ¶ 5). The facility’s director of nursing (DON) told the surveyors that management hadn’t reported or investigated because they didn’t consider R210’s departure an elopement. CMS Ex. 9 at 5 (Bartlett Decl. ¶ 5).

Of course, R210’s departure was an elopement, and it put R210 in grave danger. As CMS points out, any elderly and confused resident who wanders outdoors unsupervised is at risk of serious injury. Given the circumstances, R210’s risk was even more significant. He was wandering outside on a summer day in Florida, risking dehydration and heat stroke. CMS Ex. 1 at 9 (stating “it was hot out there”); *see* CMS Ex. 1 at 12 (indicating a heat index between 109 and 113 degrees that day). The facility was located near a body of water (the bayou), putting him at risk of drowning. A busy street connected the facility to the bus stop where he was eventually found; he could have been hit by a car or truck. CMS Ex. 1 at 11, 13; CMS Ex. 9 at 7 (Bartlett Decl. ¶ 7); CMS Ex. 10 at 7 (Benjamin Decl. ¶ 7).

Without an investigation to determine how and why the elopement happened, the facility is not in a position to take steps to prevent it from recurring. That a mentally impaired resident, who is unable to care for his own safety, could wander off unnoticed “presents a significant likelihood” that other vulnerable residents could leave and encounter the hazards of wandering away, such as falls and traffic. *Century Care of Crystal Coast*, DAB No. 2076 at 24 (2007).

This and other deficiencies put the facility out of substantial compliance with program requirements:

- The facility failed to provide R210 (and others) the goods and services they needed to avoid physical harm, mental anguish, or mental illness and was guilty of neglect. 42 C.F.R. § 488.301. It was out of substantial compliance with 42 C.F.R.

§ 483.13(c), which mandates that it develop and implement written policies and procedures to prohibit resident neglect. It must assure that all alleged violations involving neglect are reported immediately to the facility administrator and the appropriate state officials. It must have evidence that all alleged violations are thoroughly investigated and, if verified, that the facility has taken appropriate corrective action.

- The facility also failed to provide R210 with the quality of care he needed in order to maintain the highest practicable physical, mental, and psychosocial well-being. It did not ensure that he was adequately supervised to prevent accidents and was thus not in substantial compliance with 42 C.F.R. § 483.25(h). *See* Act § 1819(b).
- Finally, the facility was not governed 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. Neither its governing body nor its quality assessment and assurance committee were performing their duties as required, which put the facility out of substantial compliance with 42 C.F.R. §§ 483.75, 483.75(d), and 483.75(o).

Given the dangers faced by R210 and other confused and vulnerable residents who elope from facilities, the deficiencies cited posed immediate jeopardy to resident health and safety. 42 C.F.R. § 488.301 (defining immediate jeopardy as noncompliance that has caused or is likely to cause “serious injury, harm, impairment, or death to a resident”).

What happened to R210, while serious, does not, in itself, constitute the underlying deficiency. The facility’s failure to meet a participation requirement “is what constitutes the deficiency, not any particular event that was used as evidence of the deficiency.” *Oceanside Nursing & Rehab. Ctr.*, DAB No. 2382 at 18 (2011) (quoting *Regency Gardens Nursing Ctr.*, DAB No. 1858 at 21 (2002)). These are precisely the types of deficiencies that the regulators contemplated when they specified that a facility’s return to substantial compliance would usually be established through a resurvey. 42 C.F.R. § 488.454(a). Unlike a leaky roof or broken dishwasher, they reflect deep-rooted problems that do not lend themselves to a quick fix.

To show that it corrected, Petitioner presents evidence that it: 1) hired consultants;⁷ 2) reviewed the facility’s policies and procedures regarding elopement;⁸ 3) interviewed

⁷ These consultants have opined that the facility is in substantial compliance. The opinion of a facility’s paid consultant does not substitute for a survey.

⁸ In fact, the facility had policies and procedures in place to address resident wandering, elopement, abuse, neglect, reporting and response, and investigations. However, neither management nor staff followed those policies. CMS Ex. 1 at 3-6, 30-32, 49-51.

some staff members; 4) provided in-service training; 5) held a quality assurance meeting; and 6) “developed tools” for monitoring compliance.

These interventions might help a facility achieve substantial compliance if properly implemented, but introducing them does not establish substantial compliance. Until the facility can demonstrate that its training and other interventions were effective, i.e., that staff capably followed the training, that management put the monitoring tools in place, and that those interventions resolved the problem, the facility has not met its significant burden of demonstrating that it has alleviated the level of threat to resident health and safety. *Oceanside*, DAB No. 2382 at 19; *Premier Living & Rehab. Ctr.*, DAB CR1602 (2007), *aff'd*, DAB No. 2146 (2008). This can only be established over time. Moreover, CMS may justifiably view Petitioner’s promises of correction with a critical eye, considering that it afforded the facility two previous opportunities to correct; the facility promised correction; but follow-up surveys established on-going noncompliance that was immediate jeopardy.

CMS imposed a penalty of \$3,050 per day, which is the minimum per day penalty for deficiencies constituting immediate jeopardy. 42 C.F.R. §§ 488.408(e)(iii), 488.438(a)(1)(i). The amount of the CMP is therefore reasonable as a matter of law.

Conclusion

Petitioner acknowledges that the facility had multiple deficiencies and was not in substantial compliance with program requirements and that its deficiencies posed immediate jeopardy. It has not met its “significant burden” of establishing that it removed the immediate jeopardy and achieved substantial compliance prior to the date of its termination. The facility was therefore not in substantial compliance with program requirements from February 2014 through the date of its termination. The penalty imposed – \$3,050 per day from June 21, 2014, through the date of the termination – is reasonable as a matter of law.

/s/
Carolyn Cozad Hughes
Administrative Law Judge