Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Garden View Care Center of Dougherty Ferry
(CCN: 26-5808),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-374

Decision No. CR2423

Date: September 7, 2011

DECISION

Petitioner Garden View Care Center of Dougherty Ferry challenges the decision of the Centers for Medicare & Medicaid Services (CMS) that it was not in substantial compliance with program participation requirements from December 18, 2009 through January 3, 2010. Petitioner also challenges CMS's imposition of a denial of payment for new admissions (DPNA) for that period, as well as a two-year prohibition, commencing December 18, 2009, on its conducting a nurse aide training and/or competency evaluation program (NATCEP). CMS found Petitioner back in substantial compliance as of January 4, 2010. I find Petitioner remained out of substantial compliance from December 18, 2009 through January 3, 2010, and that the remedies imposed are required by law.

I. Background

Petitioner is a nursing home located in Valley Park, Missouri. Petitioner was surveyed by the Missouri Department of Health and Senior Services (state agency) on September 18, 2009, and found out of substantial compliance with participation requirements, including

the participation requirement at 42 C.F.R. § 483.25(h) (Tag F323[1]). CMS Exhibit (CMS Ex.) 4. The state agency conducted a revisit survey on November 25, 2009, and found Petitioner still out of substantial compliance with participation requirements, again including the participation requirement at Tag F323. CMS Exs. 1, 2. The most serious deficiency at either survey constituted no actual harm but had the potential for more than minimal harm not amounting to immediate jeopardy. April 1, 2010 Joint Stipulations of Facts (April Jt. Stips. at 1-2). By letter dated November 25, 2009, CMS notified Petitioner that in accordance with 42 C.F.R. § 488.417(b) (which requires CMS or a state to impose a DPNA when a facility is not in substantial compliance three months after the last date of a survey identifying noncompliance) a DPNA would be imposed on December 18, 2009, if Petitioner was still out of substantial compliance with participation requirements on that date. CMS also noted that federal law prohibits approval of a NATCEP where a facility has been subject to a DPNA. Petitioner's Exhibit (P. Ex.) 6. By letter dated January 6, 2010, CMS removed the DPNA, following a second revisit survey concluding January 4, 2010, which found Petitioner in substantial compliance as of January 4, 2010.[2] P. Ex. 9.

Petitioner requested a hearing by letter dated January 22, 2010. The case was assigned to me for hearing and decision on January 29, 2010. I held a hearing in the case in St. Louis, Missouri, on December 14, 2010. A 135-page transcript of the hearing (Tr.) was prepared. Testifying were: Emma Jeanne Harper, a licensed clinical social worker and a surveyor with the state agency (Surveyor Harper); Julie Louise Boyd, Petitioner's Director of Nursing (DON Boyd); and Genelle Lynn Gutmann, Petitioner's Administrator (Administrator Gutmann). At hearing, I admitted CMS Exs. 1-4 and P. Exs. 1-23. The parties submitted post-hearing briefs (CMS and P. Br.) and replies (CMS and P. Reply).

II. Stipulations

The April Jt. Stips. state, in pertinent part, that:

1. Petitioner submitted a plan of correction (PoC) to the November 25, 2009 survey on December 18, 2009, with a completion date of all measures to address the alleged deficiencies of December 17, 2009.

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[1] The "Tag" designation is used in the State Operations Manual (SOM), Appendix PP – Guidance to Surveyors for Long Term Care Facilities, and in a statement of deficiencies (SOD or CMS 2567), to denote a regulatory provision.

[2] There were only two days the surveyors were at the facility on the second revisit, December 31, 2009, and January 4, 2010. No surveyors were at the facility on January 1 through 3, 2010, or during the period December 17 through 30, 2009.

2. The state agency notified Petitioner on December 23, 2009, that the PoC was not acceptable and required modification.

3. The modification was to copy a paragraph from page one of the PoC and to place the identical paragraph on page two.[3]

4. A modified PoC was received by the state agency on December 23, 2009, and it was approved as modified.

5. Both Petitioner's December 18 and 23, 2009 PoCs indicated that Petitioner was in substantial compliance with participation requirements by December 17, 2009.

Petitioner stipulated also that it does not dispute the underlying findings and conclusions contained within the September18 and November 25, 2009 SODs.

III. Issues

The general issues are:

1. Whether Petitioner was out of substantial compliance with participation requirements; and

2. Whether the remedies imposed are reasonable.

A second joint stipulation dated July 1, 2010, states that the parties agree that the sole factual issue in dispute:

> is the date on which [Petitioner] achieved substantial compliance with Tag F323. [Petitioner] contends that it achieved substantial compliance with Tag F323 on or before December 17, 2009. CMS contends that substantial compliance with Tag F323 was not achieved until January 4, 2010. The parties stipulate that [Petitioner] was in substantial compliance with all additional program requirements on or before December 17, 2009.

[3] The paragraph states: "All residents that require assistive devices have been evaluated to determine the least restrictive device to assist the resident to achieve or maintain his/her highest level of physical, mental, or psychosocial functioning. In addition, the DON or nurse designee will assess all wheelchairs in use for the presence of belts or other devices. If a belt or device is found on a wheelchair, the DON or nurse designee will check the resident's medical record for assessment related to the device/belt/restraint. If none is found, the DON or nurse will contact physical therapy for an assessment."

At hearing, the parties agreed that the sole basis for the finding that Petitioner remained out of substantial compliance with participation requirements through January 3, 2010, was CMS's allegation that incident tracking logs were unavailable on the first day of the second revisit (December 31, 2009). [4] Tr. at 12-13; CMS Br. at 2; P. Br. at 4-5.

IV. Applicable Law

Sections 1819 and 1919 of the Social Security Act (Act) and the regulations at 42 C.F.R. Part 483 govern Petitioner's participation in Medicare and Medicaid. Sections 1819 and 1919 of the Act provide the Secretary of Health and Human Services (Secretary) with authority to impose remedies, including a DPNA, against long-term care facilities for failure to comply with participation requirements.

Regulations define the term "substantial compliance" to mean:

> [A] level of compliance with the requirements of participation 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.

The Secretary has delegated to CMS and the states the authority to impose remedies against long-term care facilities not complying substantially with federal participation requirements. The applicable regulations at 42 C.F.R. Part 488 provide that state survey agencies, on behalf of CMS, may survey facilities participating in Medicare and Medicaid to ascertain whether the facilities are complying with participation requirements. 42 C.F.R. §§ 488.10-488.28. The regulations contain special survey conditions for long-term care facilities. 42 C.F.R. §§ 488.300-488.335. Under Part 488, CMS is authorized to impose a DPNA for a facility's noncompliance. 42 C.F.R. §§ 488.406(a)(2), 488.408, 488.417, and 488.418.

Sections 1819(f)(2)(B) and 1919(f)(2)(B) of the Act prohibit approval of a NATCEP if within the last two years the facility has been subject to, among other things, an extended or partial extended survey; imposition of a CMP of not less than $5000; or imposition of a DPNA.

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[4] Petitioner asserts that it did not waive a determination with respect to other issues raised in its hearing request and pre-hearing brief (set forth at pages 9 through 14 of its hearing request and pages 24 through 29 of its pre-hearing brief). The issues raised were incorporated but not discussed in Petitioner's brief. P. Br. at 20. With regard to any of the issues not addressed below, the issues raised are generally beyond the scope of this hearing process and the authority of an Administrative Law Judge to resolve in the hearing process.

A facility may challenge the scope and severity that CMS cites only if a successful challenge would affect the range of civil money penalty amounts that CMS imposed or would affect the facility's NATCEP. 42 C.F.R. § 498.3(b)(14), (d)(10)(i). CMS's determination as to the scope and severity of noncompliance "must be upheld unless it is clearly erroneous." 42 C.F.R. § 498.60(c)(2). This includes CMS's finding of immediate jeopardy. *Woodstock Care Center*, DAB No. 1726, at 9 (2000), *aff'd, Woodstock Care Center v. U.S. Department of Health and Human Services,* 363 F.3d 583 (6th Cir. 2003).

The Departmental Appeals Board (Board) has long held that the net effect of these regulations is that a provider has no right to challenge the scope and severity assigned to a noncompliance finding except in the situation where that finding is the basis for an immediate jeopardy determination. *See, e.g., Ridge Terrace,* DAB No. 1834 (2002); *Koester Pavilion,* DAB No. 1750 (2000).

V. Analysis

My findings of fact and conclusions of law are set forth in bold and italics and are followed by my analysis.[5]

1. Petitioner was out of substantial compliance with the participation requirement at 42 C.F.R. § 483.25(h) (Tag F323) from December 18, 2009 through January 3, 2010.

The participation requirement at 42 C.F.R. § 483.25 requires that:

> Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.

The subsection at 483.25(h) requires that:

> (h) *Accidents*. The facility must ensure that –

[5] I have reviewed the entire record, including all the exhibits and testimony. Because the Federal Rules of Evidence do not control the admission of evidence in proceedings of this kind (*see* 42 C.F.R. § 498.61), I may admit evidence and determine later, upon a review of the record as a whole, what weight, if any, I should accord that evidence or testimony. To the extent that any contention, evidence, or testimony is not explicitly addressed or mentioned, it is not because I have not considered the contentions. Rather, it is because I find that the contentions are not supported by the weight of the evidence or by credible evidence or testimony.

(1) The resident environment remains as free of accident hazards as is possible; and

(2) Each resident receives adequate supervision and assistance devices to prevent accidents.

The regulation at 42 C.F.R. § 488.454(a)(1) provides that alternate remedies, such as a DPNA, continue until the facility has achieved substantial compliance. The achievement of substantial compliance is determined by CMS or a state agency based upon a revisit or after an examination of credible written evidence that it can verify without an on-site visit. Section 488.454(e) states that if a facility can supply documentation acceptable to CMS or a state that it was in substantial compliance and was capable of remaining in substantial compliance on a date preceding that of a revisit, the remedies terminate on the date CMS or a state can verify as the date that substantial compliance was achieved and the facility demonstrated it could achieve substantial compliance, if necessary. Section 488.417(d) states that where a facility does not have repeated instances of substandard quality of care, payments to a facility resume prospectively on the date that the facility achieves substantial compliance, as indicated by a revisit or written credible evidence acceptable to CMS (under Medicare) or a state (under Medicaid).

In the case of *Foxwood Springs Living Center*, DAB No. 2294 (2009), the Board held that CMS has the discretion to determine that a facility's written evidence is not credible and that a revisit may be necessary to verify that a facility has returned to substantial compliance. The Board noted, however, that the regulations tie the cessation of payments to the actual date the facility achieves substantial compliance, not necessarily to the date of the revisit, and that a facility is entitled to submit evidence to establish that it was in compliance prior to the date of a revisit survey. *Foxwood Springs Living Center*, DAB No. 2294, at 9-10.

In this case, the SOD dated September 18, 2009 alleges at Tag F323 that Petitioner failed to assess and provide interventions to reduce resident falls for three sampled residents and one resident selected for a closed record review, and also failed to transfer one expanded-sample resident in a safe manner. CMS Ex. 4, at 1. Following the first revisit survey, the SOD dated November 25, 2009 alleges at Tag F323 that Petitioner failed to thoroughly investigate the circumstances for one of six sampled residents' falls in a manner which would allow Petitioner to implement adequate interventions to prevent accidental injury. CMS Ex. 1, at 5. Petitioner has stipulated that it does not dispute the September 18 and November 25, 2009 SOD findings that it was out of substantial compliance with Tag F323 through December 17, 2009. April Jt. Stips. In sum, the September and November SODS assert, and Petitioner agrees, that Petitioner failed to investigate, assess, and intervene to reduce resident falls.

In support of its argument that Petitioner remained out of substantial compliance with Tag F323 through January 4, 2010, CMS asserts, relying on the testimony of Surveyor

Harper,[6] that Petitioner had ongoing problems with the way it investigated incidents of potential and actual harm as part of its process to predict and prevent other possible accidents. Tr. at 28. The surveyors came to this conclusion after entering the facility for a second revisit survey on December 31, 2009. Surveyor Harper testified that when the survey team entered the facility she was apprised that as part of Petitioner's implementation of its PoC for incident tracking, Petitioner utilized an incident tracking log. Petitioner did not dispute that Surveyor Harper was told this. Tr. at 38, 52, 55, 68; *see* Tr. at 83. The surveyors asked for the incident tracking log because it was used by the facility as a form of "shorthand" for how the facility kept track of incidents involving issues raised in the SODs and as a way to communicate to the surveyors which residents they might review.[7] Tr. at 29, 38, 55. However, CMS asserts that it was not provided a complete version of the incident tracking log until mid-afternoon on December 31, 2009, shortly before the surveyors left the facility.

CMS notes that Petitioner's initial PoC for Tag F323 from the September survey indicated that an inservice on incident tracking was to be completed by November 11, 2009, and that incident tracking was to be "totally effective" by December 1, 2009. CMS Ex. 4, at 1-2. Petitioner's PoC from the November revisit survey alleged that corrections would be accomplished no later than December 17, 2009. CMS Ex. 2, at 4-8. Part of this PoC was that the Director of Nursing (DON) or nursing supervisor was to contact each shift's charge nurse to review incident reports, among other things, and for them then to make certain charge nurses reported incidents and followed up on incident and investigative forms. CMS Ex. 2, at 6. CMS argues, however, that as of the second revisit on December 31, 2009, Petitioner was unprepared to show its compliance. Despite Petitioner's adoption, as part of its PoC, of a policy to implement an annual incident inservice on tracking to make certain incidents were being reported and followed up on incident and investigative forms, during the second revisit survey Petitioner was unable

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[6] Petitioner argues that Surveyor Harper provided evasive and contradictory testimony with respect to the reasons CMS determined Petitioner was not in substantial compliance as of December 17, 2009. I find, as discussed below, that Surveyor Harper's testimony was neither evasive nor contradictory.

[7] Petitioner notes that Surveyor Harper testified that although there were other ways to obtain a list of residents to review she requested the incident tracking log to "avoid" spending time going through the records to find residents who had incidents. She also noted that the list could have been "hand scribbled." Petitioner argues from this that the surveyors only wanted the list to save themselves time and implies that the surveyors did not need the incident tracking log. P. Br. at 6. As noted above, although there were other ways Petitioner might have provided a list of incidents to the surveyors, Petitioner informed the surveyors that the way Petitioner was implementing its PoC was via the incident tracking log. It was thus reasonable and necessary for the surveyors to ask for that log.

to provide an up-to-date list of incidents. CMS argues that it took most of a day to complete a list and that Petitioner was adding incidents over 30 days old during the process. Tr. at 70-71.

CMS asserts specifically that Petitioner provided three one-page versions of its incident report tracking log at various times on December 31, 2009. CMS Ex. 3, at 32-34. Each page of the log lists the date, resident name, wing, room number, incident time and type of accident or injury, and notes whether the doctor and family were notified, whether the resident needed first aid, whether the resident's vital signs were assessed, and whether the resident went to the hospital. The first page was provided at approximately 9:30 to 10:00 a.m., the second around noon, and the third at approximately 2:00 or 2:30 p.m. on December 31, 2009. Tr. at 32-34; 106; P. Br. at 8. The first page (CMS Ex. 3, at 33) provided to the surveyors documented incidents from November 25 through December 12, 2009; the second page, CMS Ex. 3, at 32, documented incidents from November 25, 2009 through December 10, 2009, and the third page, CMS Ex. 3, at 34, documented incidents from December 11 through 29, 2009. Surveyor Harper testified that she considered the list inaccurate because she did not receive a complete list until 2:30 in the afternoon. She also testified that she was able to determine substantial compliance on January 4, 2010, because she had enough information from which to pick a useful sample. Tr. at 66. My review of the three pages supports CMS's assertions, and shows that the second page provided contains at least eight names that were not on the first page provided to the surveyors for dates between December 1 through 10, 2009, and the third page provided contains two names on December 11, 2009, that were not contained on the first or second page provided to the surveyors. CMS Ex. 3, at 32-34.

CMS argues that until the surveyors received the third page about 2:30 p.m. on December 31, 2009, the surveyors were unable to ascertain that it was Petitioner's complete and up-to-date incident tracking log. CMS Ex. 3, at 34; Tr. at 31-33. That this up-to-date tracking log was not available, according to Surveyor Harper, showed that Petitioner's system of incident tracking was "not fully realized" and "fragmented" and left her without confidence that Petitioner's incident tracking system "was in good shape." Tr. at 38, 42, 55. In sum, CMS argues that this evidence shows that staff was not making certain that reported incidents were being followed up on via incident and investigative forms and strongly suggests that the annual inservice on incident reporting and tracking was ineffective. CMS Ex. 2, at 6; CMS Ex. 4, at 2.

CMS argues that while Petitioner seeks to frame the issue narrowly as to whether an incident tracking log must be updated contemporaneous to an incident and immediately provided to the surveyor upon request, the relevant issue is whether Petitioner's inability to provide the incident tracking log, or any other evidence of incident tracking, shows that Petitioner was out of compliance with the participation requirement. During the December 31, 2009 revisit, the surveyors were looking for a system of tracking resident incidents and injuries that provided the facility the ability to analyze information

concerning incidents and to use that information to inform plans of care and other actions. This focus was not unreasonable or unwarranted and should have been anticipated given the regulatory requirement that a facility must take all reasonable steps to mitigate foreseeable risks of harm, here in conformance with Petitioner's PoC. CMS stresses that it was Petitioner's own representation to the surveyors that Petitioner complied via use of the incident tracking log. But on December 31, 2009, Petitioner was unprepared to show its compliance because the log was incomplete, at a certain level inaccurate, and thus unreliable for the purpose it was intended to serve.

Based on DON Boyd's testimony, Petitioner asserts that its incident tracking logs are only used at its quality assurance (QA) meetings, which occur every three months. Tr. at 75-76, 95. Administrator Gutmann testified that the incident tracking logs are updated only three to four days prior to a QA meeting. And she testified that the next scheduled QA meeting after December 31, 2009 was not until January 12, 2010. Tr. at 112. Based on this, Petitioner's argument appears to be that Petitioner thus did not expect the incident tracking log would be updated as of December 31, 2009.

Petitioner asserts further that its incident tracking log is generated from information contained in individual incident reports completed by charge nurses following an incident or accident. The process for completing an incident report involves conducting an investigation and 72-hour follow-up of the incident or accident, a similar follow-up with the resident, and having the DON review the ensuing incident report. The incident report is then sent to a resident's physician for review, input, signature, and return to the facility, typically by U.S. mail. Upon receipt, Petitioner's office manager enters the report in the computer and makes it part of the incident tracking log. There is thus a lag time between the occurrence of the incident and information from the incident report being input into the incident tracking log. Tr. at 77-78, 81. The incident report also contains information not included in the incident tracking log, but there is no information contained in the incident tracking log that is not contained within the incident report itself. Tr. at 79; P. Br. at 8.

Petitioner disputes that it failed to provide the surveyors with the incident tracking log timely. Petitioner acknowledges that it provided the surveyors with the incident tracking log in three separate installments, but asserts that this was because Petitioner's office manager was not in the facility when the surveyors arrived on December 31, 2009, and the office manager's computer password was needed to gain access to the incident tracking log system. Once the office manager arrived, Petitioner was able to provide the surveyors with the first of the three installments. The office manager then entered data during the rest of the day with respect to the additional incidents, which resulted in the creation of two additional pages of the incident tracking log. P. Br. at 8.

Petitioner argues that CMS provided inconsistent and contradictory reasons for finding it noncompliant with regard to the incident tracking log until January 4, 2010. First,

Surveyor Harper testified that Petitioner was not in substantial compliance because Petitioner could not provide the complete log until the afternoon of December 31. Later, however, Surveyor Harper testified that "It was because it (the log) was different each time. It contained different information. It wasn't because it wasn't updated it was because it was inaccurate. And that inaccuracy is what made me concerned that the system was not in place." Tr. at 61. Petitioner disputes that the three lists were inaccurate. Other than the fact the respective lists contained different names, Surveyor Harper could provide no example of an inaccuracy.

Petitioner notes that the PoC for the September survey makes no reference to incident tracking or to an incident tracking log, other than stating that incident tracking is being implemented. And the December 23, 2009 PoC for the November survey does not mention the facility's obligation to keep or immediately update an incident tracking log. Petitioner notes that the surveyors' review of the care afforded residents included in the completed incident tracking log did not identify a single provision from the PoCs that was not corrected as of December 17, 2010. Tr. at 67. Petitioner argues that the real issue in the case, which CMS rebutted above, is whether an incident tracking log must be updated contemporaneous to an incident and provided immediately to the surveyor upon request. Petitioner argues that these requirements are not practical or supported by law.[8] Petitioner argues that even if Petitioner was required to maintain such a log and provide it to the surveyors, requiring it to be updated contemporaneous to a particular incident is not practical. There is, claims Petitioner, a necessary lag time between the occurrence of the incident and information about the incident being put into the log.

Despite this, Petitioner argues that it did provide the surveyors with an updated copy of the incident tracking log in an expedited manner. Although there was some delay in generating the initial incident tracking log, the surveyors had a completed incident

[8] In this regard, Petitioner argues that facilities are not legally mandated to keep and maintain incident tracking logs, even for QA programs. Petitioner notes that CMS and the states are legally prohibited from requesting QA documents. Act, section 1819(b)(1)(B) (42 U.S.C. § 1395i-3(b)(1)(B); 42 C.F.R. § 483.75(o)(3). Thus, the failure of the facility to provide an up-to-date incident log maintained solely for QA purposes cannot be used as the basis to cite a deficiency or determine a compliance date. Petitioner argues from this that the surveyors should not have requested documents from its QA process or sanctioned Petitioner as a result of it. The QA process, however, is not relevant to the issue here. The evidence does not show that the surveyors requested a QA document. Instead, it was Petitioner who stated that the incident tracking log was part of its PoC compliance.

tracking log by 2:30 on December 31, 2009. And it is true that the surveyors were able to conduct some investigations that morning even without the incident tracking log.[9]

Petitioner also argues that DON Boyd was able to monitor accident trends based on the information she received from staff nurses, her review of incident reports, her stand-up management meetings, and her weekly risk assessment meetings. DON Boyd termed herself a "workaholic" and on call "24/7" and indicated that just because an incident wasn't on a tracking form that did not mean the facility was not aware of it. Tr. at 84-88.

Petitioner stresses that CMS based its noncompliance finding upon the alleged unavailability of a list that it asked for only to save itself time. Petitioner argues that if the surveyors did not need the list to conduct a review, basing compliance on the immediate unavailability of the list "defies common sense and is inconsistent with the law." P. Br. at 17.

I accept Petitioner's representations that it completed and reviewed incident reports. And I accept Petitioner's representations with regard to the process by which it completed and used the incident tracking logs for its QA process. I accept Petitioner's representation that DON Boyd monitored accident trends via the review of incident reports, and stand-up and weekly meetings. However, I also accept Surveyor Harper's testimony that when the surveyors entered the facility on December 31, 2009, to revisit compliance with Tag F323, the surveyors were told that Petitioner utilized the incident tracking log as part of its PoC for incident tracking.

Once a facility has been found out of substantial compliance it is the facility's responsibility to demonstrate that it has returned to substantial compliance, either by documentation or during a revisit survey. Part of Petitioner's obligation in this situation was to show the surveyors, as those surveyors entered the facility to determine compliance with a regulatory citation with which Petitioner had twice been found noncompliant, that Petitioner had an actual program in place to report and keep track of accidents and incidents. The surveyors' purpose and obligation was to ascertain that Petitioner had the ability to analyze information concerning incidents and to use that analysis to inform their plans of care. This focus should have been anticipated by Petitioner given its representations in the PoC, considering that the regulation requires it to take all reasonable steps to mitigate foreseeable risks of harm. Petitioner, however, was unable to demonstrate to the surveyors that it had an adequate tracking system in place on December 31, 2009.

[9] Petitioner argues also that it is contrary to CMS policy to target only those residents who had an incident, citing the SOM. P. Br. at 17. Petitioner did not explain, however, how the citation it cited supported the proposition it alleged.

With regard to the adequacy of Petitioner's incident tracking system, contrary to Petitioner's accusation that Surveyor Harper's testimony was both evasive and inconsistent, I found her testimony with regard to the system to be generally frank, consistent, and persuasive. Surveyor Harper testified that when Petitioner needed most of a day to provide the surveyors with a complete incident tracking form, she concluded that they were not complying with their PoC as their tracking system was not "fully realized." That suggested to her that Petitioner was not looking at repeated incidents during a short period of time or analyzing information that an incident tracking log would allow a reviewer to see readily. She did not enter the facility assuming that Petitioner tracked incidents via the incident tracking log; instead, as noted, that is how she was told Petitioner was tracking incidents. Tr. at 38. Surveyor Harper testified that use of such a master log has an advantage over individual incident reports because it allows the reviewer to spot trends. Tr. at 39. Without a master log it is difficult (although not impossible) to do so, and Surveyor Harper was not led to believe Petitioner had another system in place to do this. Although DON Boyd testified that it was sufficient for Petitioner to determine a trend via incident reports and weekly meetings, I find persuasive Surveyor Harper's testimony with regard to the need for a master log, given that Petitioner's prior method of tracking led to two surveys of noncompliance with Tag F323.[10] And, according to Surveyor Harper, using the master log allows a facility to see if care to a resident can be tailored specifically to that resident on the basis of a particular trend. Tr. at 40.

Petitioner admits that it was out of compliance with Tag F323 with regard to resident falls in the previous two surveys. Failure to comply with this regulation with regard to falls obviously could lead to serious harm to Petitioner's residents. It was thus reasonable for CMS to request a PoC regarding those falls in order to ensure Petitioner's compliance with the participation requirement. Petitioner informed the surveyors that it used incident tracking logs to demonstrate that compliance. My review of the incident tracking logs found them inaccurate, in that they were incomplete and unavailable to the surveyors entering the facility on December 31. In fact, Petitioner had to try three times before it was able to provide an accurate accounting to the surveyors.

[10] Petitioner asserts that CMS did not indicate any concern with respect to the incidents not recorded in the incident tracking log, or any lag time with respect to the occurrence of an incident and its inclusion in the log, during either the September or November surveys. It asserts it has used the same incident log tracking system for years, and the first time CMS relayed it had any issue with it was during the January 4, 2010 revisit. P. Br. at 18. Petitioner's criticism misses the point. Petitioner had been found noncompliant over two surveys with Tag F323. CMS was in the facility on December 31 to survey its compliance with that Tag because Petitioner's systems had failed and CMS was in the facility to determine how Petitioner was correcting that failure.

Petitioner's argument that CMS violated its own policy and federal law when it found Petitioner out of substantial compliance on December 17, 2009 is also unavailing. Petitioner asserts that CMS's policy provides that compliance is to be certified as of the date of a revisit or the date confirmed by acceptable evidence, whichever is sooner. Here, according to Petitioner, that would be December 17, 2009. As I find Petitioner out of substantial compliance as of that date, Petitioner's argument is moot.

Petitioner also argues that finding Petitioner did not achieve substantial compliance until January 4, 2010 violates federal law, which mandates that providers be afforded an opportunity to present evidence establishing substantial compliance prior to the date of the applicable revisit, citing *Foxwood Springs Living Center,* DAB No. 2294, at 6-9 and 42 C.F.R. §§ 488.417 and 488.454. Petitioner asserts that Surveyor Harper conceded that Petitioner complied with its PoC, agreeing that she could not point to a single provision of the PoC from the November 25, 2009 survey with which Petitioner had not complied as of December 17, 2009. Tr. at 67. Therefore, asserts Petitioner, the evidence establishes compliance on December 17, 2009. I disagree. When noncompliance is found a remedy remains in effect until the date of a revisit, although a facility is entitled to submit evidence to establish it was in compliance prior to the date of the revisit survey. While Surveyor Harper conceded that after she received the sample she found Petitioner in compliance with its PoC on January 4, 2010, she did not have a complete incident tracking log on December 31, 2009, and Petitioner did not provide a completed log upon entry in order for the surveyors to ascertain Petitioner's compliance. Thus, since Petitioner did not have the necessary documentation on December 31, 2009, in an area of noncompliance demonstrated during two prior surveys, Petitioner's argument is not persuasive with regard to its compliance prior to that date.

2. The DPNA and two-year prohibition on Petitioner conducting a NATCEP are mandatory remedies, and CMS does not have the discretion to not impose them.

The regulation at 42 C.F.R. § 488.417(b)(1) provides that CMS or a state must impose a DPNA when a facility is not in substantial compliance three months after the last day of a survey identifying noncompliance. Petitioner was first found out of substantial compliance following a survey concluding on September 18, 2009, and Petitioner does not contest that noncompliance. Thus, if Petitioner was still out of substantial compliance with participation requirements on December 18, 2009, CMS had to impose a DPNA. I have sustained CMS's determination that Petitioner did not return to substantial compliance until January 4, 2010. Thus, CMS was required by regulation to impose the DPNA on December 18, 2009.

Although Petitioner was not conducting a NATCEP as of December 18, 2009, Petitioner asserts that the ability to conduct a NATCEP is still important to Petitioner because it allows Petitioner options to train staff under its philosophy, reduces staff turnover, and provides continuity of care to Petitioner's residents. P. Br. at 19. Petitioner's argument

is unavailing. The Act prohibits approval of a NATCEP for two years where a facility has been subject to a DPNA. Act, section 1819(f)(2)(B).

VI. Conclusion

For the reasons discussed above, I find that Petitioner was out of substantial compliance with Medicare participation requirements through January 4, 2010. Further, I find the remedies imposed, a DPNA from December 18, 2009 through January 3, 2010, and a two-year prohibition on Petitioner's conducting a NATCEP commencing December 18, 2009, are required by law.

/s/
Richard J. Smith
Administrative Law Judge