

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Rosewood Care Center of)	Date: June 18, 2009
St. Charles, (CCN: 14-5980),)	
)	
Petitioner,)	
)	
- v. -)	Docket No. C-08-487
)	Decision No. CR1962
Centers for Medicare &)	
Medicaid Services.)	

DECISION

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS) to impose civil money penalties of \$500 per day against Petitioner, Rosewood Care Center of St. Charles, for a period that began on March 13, 2008 and which ran through April 7, 2008.

I. Background

Petitioner is a skilled nursing facility located in the State of Illinois. It participates in the Medicare program. Its participation 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. Its hearing rights in this case are governed by regulations at 42 C.F.R. Part 498.

CMS determined that Petitioner was not complying with Medicare participation requirements based on deficiency findings that were made at a survey of Petitioner's facility that was completed on March 13, 2008 (March survey). It imposed the civil money penalties that I describe in the opening paragraph of this decision. Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I scheduled an in-person hearing. However, the parties agreed that the case could be heard based on their written submissions.

Each party submitted a pre-hearing brief and a closing brief. CMS filed 26 proposed exhibits which it identified as CMS Ex. 1 - CMS Ex. 26. Petitioner filed 36 proposed exhibits which it identified as P. Ex. 1 - P. Ex. 36. I receive all of the parties' proposed exhibits into evidence.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. Petitioner failed to comply substantially with Medicare participation requirements; and
2. CMS's remedy determination is reasonable.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision. Each Finding is set forth below under a separate heading.

1. Petitioner failed to comply substantially with Medicare participation requirements.

CMS alleges that Petitioner failed to comply substantially with the following Medicare participation requirements:

- 42 C.F.R. § 483.20(b)(2)(ii), which requires that a skilled nursing facility perform a comprehensive assessment of a resident within 14 days after the facility determines, or should have determined, that there has been a significant change in the resident's physical or mental condition.
- 42 C.F.R. § 483.25(a), which directs a facility to ensure that, based on its comprehensive assessment of a resident, the resident's abilities in activities of daily living do not diminish unless the resident's clinical condition demonstrates that diminution was unavoidable. The activities of daily living enumerated by the regulation include the ability to: (i) bathe, dress, and groom; (ii) transfer and ambulate; (iii) utilize a toilet; (iv) eat; and (v) use speech, language, or other functional communications systems. 42 C.F.R. § 483.25(a)(1). The regulation also directs a facility to ensure that a resident is given the appropriate treatment and services to improve his or her abilities in the specified functional areas. 42 C.F.R. § 483.25(a)(2).

- 42 C.F.R. § 483.25(e)(2), which specifies that a facility must ensure that, based on a resident's comprehensive assessment, any resident with a limited range of motion receives appropriate treatment and services to increase range of motion and/or to prevent further decrease in range of motion.
- 42 C.F.R. § 483.75(e)(8), which requires that a facility complete a performance review of each of its nurse aides at least once every 12 months and provide them with regular in-service training based on the outcome of these reviews.

a. Petitioner did not offer evidence or arguments to challenge CMS's determinations of noncompliance with 42 C.F.R. §§ 483.20(b)(2)(ii), 483.25(e)(2), and 483.75(e)(8). These findings of noncompliance are, therefore, administratively final.

CMS offered evidence and argument concerning each of the above-enumerated noncompliance allegations. Petitioner, however, offered evidence and argument pertaining to only one of them, its alleged noncompliance with the requirements of 42 C.F.R. § 483.25(a). Consequently, I conclude that CMS's allegations with respect to the other alleged deficiencies are unopposed and CMS's findings of noncompliance as to these alleged deficiencies are administratively final. I do not discuss the evidence pertaining to these deficiencies except in Finding 2 where I address the seriousness of Petitioner's noncompliance and the reasonableness of the civil money penalties.

b. Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.25(a).

CMS alleges that Petitioner failed to give requisite maintenance and restorative care to a resident who is identified as Resident # 5 in the report of the March survey. The resident was aged 96 as of the date of the survey and had resided at Petitioner's facility since August 2000. CMS Ex. 1, at 1; CMS Ex. 15, at 1. The resident's ailments included arthritis, degenerative joint disease, hypertension, hyperlipidemia, and esophageal reflux. *Id.*

The evidence establishes that Resident # 5 was profoundly limited in her ability to care for herself. On September 4, 2007 Petitioner's staff concluded that the resident needed extensive assistance for dressing, personal hygiene, and bathing, and limited assistance for eating. CMS Ex. 1, at 3; CMS Ex. 15, at 9. Petitioner assessed her in December 2007 as being totally dependent on Petitioner's staff for dressing, personal hygiene, and bathing. CMS Ex. 1, at 3. The staff concluded

that the resident needed extensive assistance for eating. *Id.* On February 29, 2008 Petitioner's staff reiterated that the resident was totally dependent on the staff for all activities of daily living other than eating. CMS Ex. 1, at 5; CMS Ex. 15, at 19. The staff concluded that the resident could eat only with extensive assistance from the staff. *Id.*

There is a dispute as to whether the staff's findings as to the resident's limitations document a decline in her condition between September 2007 and February 2008. CMS asserts that the descriptions of her condition which I describe above document a decline. Petitioner, on the other hand, argues that the resident's condition was essentially stable during the period between September 2007 and February 2008, albeit extremely impaired.

However, it is not necessary that I decide whether the resident's condition actually deteriorated during this period in order to find that Petitioner was not complying with the requirements of 42 C.F.R. § 483.25(a) in providing care to Resident # 5. The record of the care that Petitioner provided to the resident is devoid of evidence showing that Petitioner provided her with restorative care that was designed to address the specific activities of daily living enumerated in the regulation with the exception of physical therapy in order to improve the resident's wheelchair positioning. 42 C.F.R. § 483.25(a)(1); *see* P. Ex. 33, at 7. There is, for example, nothing in the resident's record of care showing that the resident received restorative care designed to help her eat despite the fact that Petitioner's staff concluded in December 2007 that the resident needed extensive assistance from staff to eat. Nor is there anything in the resident's care record showing that the resident received restorative care targeted at her ability to bathe, dress, and groom herself even though as of December 2007 the staff had concluded that she was totally dependent on them for performance of these activities of daily living.

Petitioner has not offered persuasive evidence establishing that it satisfied the regulation's specific requirements in providing care to Resident # 5. Petitioner asserts that it had a program in place to provide restorative care to all of its residents. Petitioner's closing brief at 6; P. Ex. 33, at 7. But, assuming the truth of this contention, it begs the question of whether Resident # 5 was receiving restorative services that were specifically designed to address her unique problems and limitations. Evidence showing that Petitioner had a restorative care program does not answer that question. It is reasonable to conclude that the Resident did not receive restorative care tailored to her unique needs given that her treatment record is devoid of any documentation showing that she received such care.

2. Civil money penalties of \$500 per day are reasonable.

The deficiencies manifested by Petitioner all fall into a level of scope and severity for which remedial civil money penalties ranging from \$50 to \$3,000 per day are prescribed. 42 C.F.R. § 488.438(a)(1)(i). Regulations establish criteria for what is reasonable within this range. 42 C.F.R. §§ 488.438(f)(1) - (4); 488.404 (incorporated by reference into 42 C.F.R. § 488.438(f)(3)). The criteria include: the seriousness of the noncompliance; a facility's compliance history; its culpability; and its financial condition. *Id.*

CMS determined to impose penalties against Petitioner for each day of a period that began on March 13, 2008 and which ran through April 7 of that year. Petitioner has not challenged the duration of noncompliance. It has not argued that, if it was noncompliant, the noncompliance began at a date that was later than was determined by CMS or ended on an earlier date than that which CMS determined to be the date when Petitioner attained compliance. Consequently, I find that Petitioner is liable for civil money penalties for each day of the period in question.

I find that the seriousness of Petitioner's noncompliance certainly justifies the civil money penalties that CMS determined to impose. Petitioner manifested four deficiencies, one of which, Petitioner's noncompliance with the requirements of 42 C.F.R. § 483.25(a)(2), was determined by CMS to be so egregious as to cause actual harm to residents of Petitioner's facility. Each of the deficiencies posed at least the potential for harming Petitioner's residents. Petitioner has not even challenged evidence which establishes that:

- It failed to assess comprehensively significant changes in the condition of two of its residents, thus violating the requirements of 42 C.F.R. § 483.20(b)(2)(ii). One of these residents, identified as Resident # 8, showed progressive deterioration between November 2007 and February 2008. CMS Ex. 14, at 25. Similarly, the staff documented another resident, Resident # 5, as declining between September and December 2007 (I have discussed this resident's care in more detail above, at Finding 1.b.). CMS Ex. 1, at 3; CMS Ex. 15, at 9. Yet neither of these residents were assessed comprehensively by Petitioner's staff in order to determine what, if any, additional care interventions might be merited.

- It failed to provide appropriate range of motion therapy to four of its residents, thereby contravening the requirements of 42 C.F.R. § 483.25(e)(2). For example, one of the residents, identified as Resident # 10, suffered from quadriplegia and full loss of voluntary range of motion. CMS Ex. 1, at 6; CMS Ex. 16, at 1, 4. The resident's hands and legs were notably contracted. CMS Ex. 1, at 6-7; CMS Ex. 16, at 4. Yet, Petitioner had not developed a restorative plan for ameliorating these contractures. *See* CMS Ex. 1, at 7.
- It failed to ensure that all of its nursing assistants completed required continuing education, thus violating the requirements of 42 C.F.R. § 483.75(e)(8). Several of Petitioner's nursing assistants had received fewer than minimum required hours of continuing education. CMS Ex. 19. Two of the nursing assistants had been hired by Petitioner in 2001, but still had not received requisite continuing education after about seven years of employment. *Id.* CMS Ex. 20.

The three unchallenged deficiencies are, in and of themselves, sufficiently severe to justify the penalties that CMS determined to impose. The penalties that CMS determined to impose – \$500 per day – are quite modest, comprising only one sixth of the maximum penalty amount that CMS could have determined to impose for noncompliance such as that which Petitioner manifested. Additional, and in my opinion, overwhelming evidence justifying the \$500 per day penalties consists of the evidence which I have discussed at Finding 1.b. of this decision addressing Petitioner's failure to provide restorative care to one of its residents.

The seriousness of Petitioner's noncompliance is, moreover, enhanced by evidence showing a pattern of Petitioner's failures to accommodate the needs of its residents. In numerous instances, the evidence shows that Petitioner failed to comprehend that its obligation to its residents was to make every reasonable effort to improve their conditions and the quality of their lives. Thus, Petitioner failed to provide some of its residents with needed restorative care and it failed to assess residents for changes that signaled deterioration in their medical conditions and in the quality of their lives.

Petitioner asserts that penalties of \$500 per day are unreasonable in the absence of evidence establishing actual harm to residents. I disagree. Penalties may be imposed where noncompliance creates a potential of harm. Here, there is ample – and undisputed evidence – showing that Petitioner manifested three deficiencies that posed a potential for resident harm. And, as I have stated, the seriousness of

