Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Woodland Oaks HealthCare Facility,
(CCN: 18-5392),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-09-533

Decision No. CR2147

Date: June 9, 2010

DECISION

Petitioner, Woodland Oaks HealthCare Facility, (Petitioner or facility), is a long-term care facility, located in Ashland, Kentucky, that participates in the Medicare program. The Centers for Medicare and Medicaid Services (CMS) determined that the facility was not in substantial compliance with Medicare requirements and has imposed a civil money penalty (CMP) of $500 per day for 37 days of substantial noncompliance.

Petitioner here challenges CMS's determinations, and CMS now moves for summary judgment.

For the reasons set forth below, I find that CMS is entitled to summary judgment. The undisputed evidence establishes that the facility was not in substantial compliance with Medicare program requirements, and the penalty imposed is reasonable.

I. Background

The Social Security Act (Act) sets forth requirements for nursing facility participation 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 conduct periodic surveys to determine whether skilled nursing facilities are in substantial compliance. Act § 1864(a); 42 C.F.R. § 488.20. The regulations require that each facility be surveyed once every twelve months, and 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.

Here, following a complaint investigation survey, completed March 26, 2009, CMS determined that the facility was not in substantial compliance with Medicare participation requirements. Specifically, CMS found that the facility was not in substantial compliance with the following regulations:

- 42 C.F.R. § 483.15(h)(2) (Tag F253 – housekeeping/maintenance) at an E level of scope and severity (pattern of noncompliance that causes no actual harm with the potential for more than minimal harm);

- 42 C.F.R. §§ 483.20(d) and 483.20(k)(1) (Tag F279 -- comprehensive care plans) at a D level of scope and severity (isolated instance of noncompliance that causes no actual harm with the potential for more than minimal harm);

- 42 C.F.R. §§ 483.20(d) and 483.10(k)(2) (Tag F280 – comprehensive care plans) at a D level of scope and severity;

- 42 C.F.R. § 483.20(k)(3)(ii) (Tag F282 – comprehensive care plans) at a G level of scope and severity (isolated instance of actual harm that is not immediate jeopardy);

- 42 C.F.R. § 483.25(h) (Tag F323 – accidents and supervision) at a G level of scope and severity;

- 42 C.F.R. § 483.25(m)(1) (Tag F332 – medication errors) at an E level of scope and severity; and

- 42 C.F.R. § 483.75(j)(1) (Tag F502 – laboratory services) at a D level of scope and severity.

CMS Exs. 3, 4. CMS subsequently determined that the facility returned to substantial compliance on April 19, 2009. CMS Ex. 29.

CMS has imposed against the facility a CMP of $500 per day for 37 days of substantial noncompliance (March 13-April 18, 2009), for a total CMP of $18,500.

Petitioner timely requested a hearing. In its hearing request, Petitioner challenges two of the seven deficiencies cited -- 42 C.F.R. §§ 483.20(k)(3)(ii) and 483.25(h). Although the hearing request does not seem to raise the issue, Petitioner's initial brief adds a challenge to CMS's duration findings for all of the cited deficiencies.[1] CMS now moves for summary judgment. With its motion and brief (CMS Br.), CMS has submitted 28 exhibits (CMS Exs. 1-4 and CMS Exs. 6-29; CMS Ex. 5 was removed). With its brief (P. Br.), Petitioner submits seven exhibits (P. Exs. 1-7). CMS also submitted a reply.

II. Issues

1. Although Petitioner concedes that, at the time of the March 26, 2009 survey, it was not in substantial compliance with five of the deficiencies cited, it challenges CMS's determination as to the duration of those deficiencies. I therefore consider first whether CMS is entitled to summary judgment on the question of whether the facility's substantial noncompliance with these regulations continued until April 19, 2009;

2. I next consider whether CMS is entitled to summary judgment on the question of whether the facility was in substantial compliance with 42 C.F.R. §§ 483.20(k)(3)(ii) and 483.25(h); and, finally,

3. Was the CMP imposed reasonable?

III. Discussion

A. CMS's unchallenged determinations that, at the time of the survey, the facility was not in substantial compliance with 42 C.F.R. §§ 483.15(h)(2), 483.20(d), 483.20(k)(1), 483.10(k)(2), 483.25(m)(1), and 483.75(j)(1) are final and binding and any one of them, by itself, provides a sufficient basis for imposing a penalty. [2]

CMS's findings of noncompliance that result in the imposition of a remedy are considered initial determinations that an affected party, such as Petitioner, may appeal. The regulations governing such actions dictate that CMS send notice of the initial determination to the affected party, setting forth the basis for and the effect of the determination and the party's right to hearing. 42 C.F.R. §§ 498.20(a)(1), 498.3, 498.5.

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[1] *See* 42 C.F.R. § 498.48(c) (issues other than those set forth in hearing request may be considered if the party gives timely notice to that effect). Because Petitioner did not plainly articulate this issue until it submitted its initial brief, I allowed CMS to file a reply brief.

[2] My findings of fact/conclusions of law are set forth, in italics and bold, in the discussion captions of this decision.

The affected party may then challenge the determination by filing a hearing request within 60 days of its receiving the notice. 42 C.F.R. § 498.40. An initial determination is final and binding unless reversed or modified by a hearing decision (or under circumstances not applicable here). 42 C.F.R. § 498.20(b).

In this case, CMS sent the appropriate notice, and Petitioner requested a hearing. In both its hearing request and brief, Petitioner challenges only the deficiencies cited under Tags F282 and F383, which correspond to 42 C.F.R. §§ 483.20(k)(3)(ii) and 483.25(h). P. Br. at 2. CMS's determination that the facility was not in substantial compliance with the other regulations cited is therefore final and binding.

Because we have a final and binding determination that the facility was not in substantial compliance, CMS has the discretion to impose one or more of the enforcement remedies listed in 42 C.F.R. § 488.406, which include the per diem CMP imposed here. Act § 1819(h); 42 C.F.R. § 488.402. So long as CMS has a basis for imposing a remedy, I have no authority to review its determination to do so (42 C.F.R. § 488.438(e)), nor may I review CMS's choice of remedy. 42 C.F.R. § 488.438(a)(1)(ii).

B. CMS is entitled to summary judgment that the facility was not in substantial compliance with Medicare requirements from March 13 through April 18, 2009.

Summary Judgment. Summary judgment is appropriate if a case presents no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Ill. Knights Templar Home*, DAB No. 2274 at 3-4 (2009).

The moving party may show the absence of a genuine factual dispute by presenting evidence so one-sided that it must prevail as a matter of law, or by showing that the non-moving party has presented no evidence "sufficient to establish the existence of an element essential to [that party's] case, and on which [that party] will bear the burden of proof at trial." *Livingston Care Ctr. v. Dep't of Health & Human Servs.*, 388 F.3d 168, 173 (6th Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). To avoid summary judgment, the non-moving party must then act affirmatively by tendering evidence of specific facts showing that a dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (1986); *see also Vandalia Park*, DAB No. 1939 (2004); *Lebanon Nursing & Rehab. Ctr.*, DAB No. 1918 (2004).

> To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact . . . .

Ill. Knights Templar, DAB No. 2274, at 4; *Livingston Care Ctr.*, DAB No. 1871, at 5 (2003).

In examining the evidence to determine the appropriateness of summary judgment, I must draw all reasonable inferences in the light most favorable to the non-moving party. *Livingston Care Ctr.*, 388 F.3d at 172; *Brightview Care Ctr.*, DAB No. 2132, at 2, 9 (2007); *Guardian Health Care Ctr.*, DAB No. 1943, at 8 (2004); *but see Brightview Care Ctr.*, DAB No. 2132, at 10 (entry of summary judgment upheld where inferences and views of non-moving party are not reasonable). However, drawing factual inferences in the light most favorable to the non-moving party does not require that I accept the non-moving party's legal conclusions. *Cf. Guardian Health Care Ctr.*, DAB No. 1943, at 11 ("A dispute over the conclusion to be drawn from applying relevant legal criteria to undisputed facts does not preclude summary judgment if the record is sufficiently developed and there is only one reasonable conclusion that can be drawn from those facts.").

Here, as discussed above, Petitioner concedes that, at the time of the survey, it was not in substantial compliance but claims that it had corrected all deficiencies and returned to substantial compliance by the last day of the survey (March 26, 2009). Petitioner's argument fails for two reasons. First, with respect to at least one of the deficiencies cited (Tag F280 – comprehensive care plans), the facility's plan of correction does not even allege a completion date until April 17, 2009. CMS Ex. 3 at 7. Second, Petitioner misunderstands what it means for a deficient facility to achieve substantial compliance.

Deficiencies cited under Tag F280. A facility must periodically conduct a comprehensive, accurate, standardized and reproducible assessment of each resident's functional capacity, and it must use the results of those assessments "to develop, review, and revise the resident's comprehensive plan of care." 42 C.F.R. § 483.20(d). The care plan must be developed within seven days after the facility completes the comprehensive assessment, and must be prepared by an interdisciplinary team. A team of qualified persons must review and revise the plan after each assessment. 42 C.F.R. § 483.20(k)(2).

As Petitioner concedes, the facility was not in substantial compliance with these requirements because one of its residents, R13, was restrained in a merry-walker,[3] even though her care plan did not address the use of the merry-walker as a restraint, nor include instructions for staff to check that restraint. At the time of the survey, the facility had been restraining R13 in this fashion for at least six days, without having incorporated the restraint into her care plan. Staff were not aware that they were required to check her restraints every thirty minutes. CMS Ex. 3 at 7-9; P. Br. at 8-9.

To correct this deficiency, the facility updated R13's care plan to reflect use of the merry-walker. It promised that the Director of Nursing (DON) and Assistant Director of Nursing (ADON) would review physician orders and care plans to ensure that the care

[3] A merry-walker is an assistive device designed to enable individuals with impaired balance to ambulate. The device envelops the individual in a frame with a base wider than the area occupied by the individual's legs. A harness attaches the individual to the device.

plans reflected current orders; the DON or Clinical Coordinator would audit 25% of resident charts "in conjunction with the care plan schedule." The facility set *April 17, 2009* as the completion date. CMS Ex. 3 at 7.

Achieving substantial compliance. For summary judgment purposes, I accept as true all of Petitioner's factual allegations regarding its efforts to correct its deficiencies.

However, substantial compliance means not only that the facility corrected the specific cited instances of substantial noncompliance but also that it implemented a plan of correction *designed to assure that no additional incidents would occur* in the future. 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. *Premier Living & Rehab Ctr.*, DAB No. 2146, at 23 (2008); *Lake City Extended Care Ctr.*, DAB No. 1658, at 12-15 (1998). The burden is on the facility to prove that it has resumed complying with program requirements, not on CMS to prove that deficiencies continued to exist after they were discovered. *Asbury Ctr. at Johnson City*, DAB No. 1815, at 19-20 (2002). A facility's return to substantial compliance usually must be established through a resurvey. 42 C.F.R. § 488.454(a). 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 an earlier date. 42 C.F.R. § 488.454(e) (emphasis added); *Hermina Traeye Memorial Nursing Home*, DAB No. 1810, at 12 (2002) (citing 42 C.F.R. §488.454(a) and (e)); *Cross Creek Care Ctr.*, DAB No. 1665 (1998).

The deficiencies cited in this case indicate systemic problems, requiring a resurvey to establish that the facility implemented necessary corrections and that its actions actually resolved the deficiencies. For example, with respect to housekeeping and maintenance (Tag F253 -- 42 C.F.R. § 483.15(h)(2)), the surveyors found dust on the overhead bed lights in multiple resident rooms. Air conditioner vents were dusty. Wood in the bathrooms of the Alzheimer's unit was damaged and splintered; caulking around the toilets was discolored and stained. Wheelchairs were dirty. The facility's cleaning check-lists indicated that not all of the resident rooms were cleaned monthly, and that the housekeeping supervisor had not signed off on the sheets to indicate that she had ensured that assigned tasks were completed. CMS Ex. 3 at 2-4.

I accept as true Petitioner's claim that, by the last day of the survey, the "dust had been removed," "maintenance repairs made," and "housekeeping staff had been inserviced." P. Br. at 10. But this was only part of the correction and, at that, the easiest part. More difficult, the facility had to assure that the facility remained clean and well-maintained. To this end, its plan of correction proposed systemic changes, including weekly audits by the housekeeping supervisor, monthly checks by maintenance personnel, monthly audits by the nurse aide supervisor, and follow-up checks by the administrator or her designee. CMS Ex. 3 at 3-5. Assuring that these corrections were implemented and effective could not be and was not achieved by March 26.

With respect to the comprehensive care plan deficiencies cited under Tag F279 (42 C.F.R. §§ 483.20(d), (k)(1)), the surveyors found that the facility had not developed required care plans for two of the twenty residents in their sample. The facility had no plans in place to address R1's cognitive impairment nor R6's cognitive loss. Staff could not explain why these resident needs had not been addressed. CMS Ex. 3 at 5-6. To correct, the facility immediately developed care plans for R1 and R6. To assure that the deficiency would not recur, the facility promised to review cognitive assessments and care plans quarterly; it promised that, at the care plan meetings, the DON would review cognitive assessments to ensure a proper care plan; and it promised that the ADON would audit monthly 10% of the care plans for residents with cognitive deficits. CMS Ex. 3 at 5-6. Again, assuring that these corrections were implemented and effective could not be and was not achieved by the end of the survey on March 26, 2009.

The surveyors also observed that the facility's medication errors exceeded the maximum allowable error rate (5%). 42 C.F.R. § 483.25(m)(1) (Tag F332). On the mornings of March 25 and 26, 2009, they observed 3 errors out of 48 opportunities, a medication error rate of 6.2%. Specifically, on March 25, staff gave R21 1.5 mg. of Haldol, three times the prescribed amount. On the morning of March 26, the medication aide neglected to administer to R22 two of the medications ordered (aspirin and Demerol). CMS Ex. 3 at 19-21. In response, the facility noted that R21 did not suffer any side effects related to the overdose of Haldol, and that, after the surveyor intervened, the medication aide gave R22 the prescribed medications. To correct the deficiency, the facility claimed that, on March 25, it provided in-service training to all involved nursing staff.[4] The facility also promised that its pharmacy department would pass medications with at least two nurses or the medication tech monthly and that the DON would review the audits. The audits would also be reviewed monthly at the quality assurance meeting. CMS Ex. 3 at 20. Whether these corrections effectively reduced medication errors cannot be determined through documentation (and I note that Petitioner produces none) but requires in-person observation, and thus can only be determined following a resurvey.

Finally, the facility was not in substantial compliance with requirements for laboratory services (Tag 502 – 42 C.F.R. § 483.75(j)(1)), because the surveyors discovered that staff failed to obtain a complete blood count that R8's physician had ordered almost two months earlier in order to monitor the resident's abnormally low hemoglobin and hematocrit levels. Staff admitted that the facility's system for obtaining and reporting lab tests had been flawed but claimed that they implemented a new system in late January, which corrected its problems. They could not explain how R8's orders were missed. CMS Ex. 3 at 21-22.

To correct, the facility obtained R8's lab tests and notified his physician of the results. In addition to describing its newer system, the facility promised that the DON and/or ADON would audit 10% of resident charts monthly to ensure that lab orders were followed and

[4] One could reasonably question the effectiveness of this training in light of the March 26 medication errors.

the physician was notified of the results. They would also assure that the physician was apprised of any resident on a medication for which blood levels are recommended. Identified issues would be reviewed with the facility's medical director. CMS Ex. 3 at 22-25.

The situation with laboratory tests underscores the importance of determining corrections through subsequent surveys. Even though the documents suggested that, two months prior to the survey, the facility had corrected its ineffective system, those "corrections" did not prevent errors. So, at the time of the March 26 survey, the facility had not established that it had a reliable system in place to meet resident needs for laboratory services.

Because Petitioner has not established that an effective plan of correction was implemented any earlier than that determined by CMS, I sustain CMS's determinations as to the duration of the period of substantial noncompliance.

C. CMS is entitled to summary judgment that the facility was not in substantial compliance with 42 C.F.R. §§ 483.20(k)(3)(ii) and 483.25(h), because the undisputed evidence establishes that staff did not follow R7's care plan, and, as a result, she fell and injured herself.

Under the statute and the "quality of care" regulation, each resident must receive, and the facility must provide, the necessary care and services to allow a resident to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the resident's comprehensive assessment and plan of care. Act § 1819(b); 42 C.F.R. § 483.25. The regulation also requires that the facility "ensure" that the resident's environment remains as free of accident hazards as is possible. It must "take all reasonable steps to ensure that a resident receives supervision and assistance devices that meet his or her assessed needs and mitigate foreseeable risks of harm from accidents." *Briarwood Nursing Ctr.*, DAB No. 2115 at 5 (2007); *Guardian Health Care Ctr.*, DAB No. 1943 at 18 (2004) (citing 42 C.F.R. § 483.25(h)(2)). The facility must anticipate what accidents might befall a resident and take steps to prevent them. A facility is permitted the flexibility to choose the methods it uses to prevent accidents, but the chosen methods must constitute an "adequate" level of supervision under all the circumstances. *Briarwood*, DAB No. 2115, at 5; *Windsor Health Care Ctr.*, DAB No. 1902, at 5 (2003).

The facility must develop for each resident a comprehensive care plan that describes the services that are to be furnished, and those services *must* be provided by qualified persons "in accordance with each resident's written plan of care." 42 C.F.R. § 483.20(k)(3)(ii).

Resident 7. Resident 7 (R7) was a 98-year-old woman who suffered from dementia and a variety of other ailments. CMS Ex. 13 at 1. She was totally dependent on staff for almost all activities of daily living. CMS Ex. 13 at 24. The facility recognized that she

was at high risk for falls because of her unsteady gait, attempts to ambulate, and dementia. Among the interventions for preventing falls, her care plan required that she be fastened in a seat belt whenever she was in her wheelchair. CMS Ex. 13 at 37. But on March 13, 2009, a nurse aide neglected to fasten R7's seat belt when she returned the resident to her wheelchair after a shower. The resident leaned forward and fell out of the chair. CMS Ex. 13 at 10-12, 17-18. She suffered a closed head injury, a scalp laceration that the hospital staff were not able to suture, cervical strain, and a skin tear to her right forearm. CMS Ex. 13 at 13-17.

Petitioner concedes that R7 "did sustain injury from a fall after Nurse Aide 1 failed to fasten the seatbelt after [R7's] shower." P. Br. at 3. Nevertheless, Petitioner asserts that it "took every precaution to avoid this type of situation" by appropriately care-planning and by training its staff. P. Br. at 3. In Petitioner's view, so long as the nurse aide was qualified for the position, and adequately trained, the facility is not accountable for her failings.

> The facility cannot be held responsible for the unforeseeable action of the [nurse aide] in failing to follow a well documented plan of care, despite her education and training specifically directed at that area.

P. Br. at 6, 8.

The Board has long rejected this reasoning. A facility "cannot disown the consequences" of inadequate care by the simple expedient of pointing the finger at staff who are the agents of the facility, "empowered to make and carry out daily care decisions." *Emerald Oaks*, DAB No. 1800 at 5 n. 3 (2001); *accord Ridge Terrace*, DAB No. 1834, at 8 (2002); *Cherrywood Nursing & Living Ctr.*, DAB No. 1845 (2002). Here, the nurse aide was charged with caring for R7, and the facility is responsible for her actions.

The undisputed evidence thus establishes that a staff member failed to follow R7's care plan, which resulted in a serious accident and significant injuries to the resident. The facility was therefore not in substantial compliance with 42 C.F.R. § 483.20(k)(3)(ii) nor with 42 C.F.R. § 483.25(h).

Because this deficiency occurred on March 13, 2009, CMS reasonably determined that the facility's substantial noncompliance began on that date. As discussed above, the facility must therefore demonstrate that it implemented necessary corrections and that its corrections would prevent further incidents. Here, among other assurances, the facility told CMS that it had re-educated its staff and would provide additional in-service training on April 17, 2009. It promised that, prior to the start of each shift, the licensed nurse would ensure that the nursing assistants reviewed the care plans for their assigned residents. It promised additional audits of safety devices and alarms to assure they would be in place and working properly. The facility set *April 19, 2009* as its completion date. CMS Ex. 3 at 9-10.

Thus, the facility did not even claim correction until April 19, 2009, which was probably the minimum amount of time needed to assure correction. After all, a serious error had occurred even though the facility believed that it had adequately trained its staff – a situation that more than justifies requiring a resurvey in order to determine whether the proposed corrections (including the added training) effectively corrected the problem.

D. I sustain as reasonable the CMP imposed.

I next consider whether the CMP is reasonable.

First, I find without merit Petitioner's complaint that CMS did not accept the State Agency's recommendation of a $250 per day penalty beginning March 26. CMS Ex. 2. It is well-settled that "only the CMS remedies apply" when both entities find that the facility has not achieved substantial compliance. 42 C.F.R. § 488.452; s*ee Lake Mary Health Care*, DAB No. 2081 at 7 (2007).

To determine whether the CMP is reasonable, I apply the factors listed in 42 C.F.R. § 488.438(f): 1) the facility's history of noncompliance; 2) the facility's financial condition; 3) factors specified in 42 C.F.R. § 488.404; and 4) the facility's degree of culpability, which includes neglect, indifference, or disregard for resident care, comfort or safety. The absence of culpability is not a mitigating factor. The factors in 42 C.F.R. § 488.404 include: 1) the scope and severity of the deficiency; 2) the relationship of the deficiency to other deficiencies resulting in noncompliance; and 3) the facility's prior history of noncompliance in general and specifically with reference to the cited deficiencies.

In reaching a decision on the reasonableness of the CMP, I consider whether the evidence supports a finding that the amount of the CMP is at a level reasonably related to an effort to produce corrective action by a provider with the kind of deficiencies found, and in light of the above factors. I am neither bound to defer to CMS's factual assertions nor free to make a wholly independent choice of remedies without regard for CMS's discretion. *Barn Hill Care Ctr.*, DAB No. 1848 at 21 (2002); *Cmty. Nursing Home*, DAB No. 1807 at 22 *et seq*. (2002); *Emerald Oaks*, DAB No. 1800 at 9 (2001); *CarePlex of Silver Spring*, DAB No. 1683 at 8 (1999).

CMS has imposed a CMP of $500 per day, which is at the low end of the penalty range for per-day CMPs ($50-$3,000). 42 C.F.R. §§ 488.408(d), 488.438(a)(1)(ii).

With respect to facility history, CMS's documentation, which Petitioner does not challenge, shows that the facility has a less-than-stellar history. In January 2009, just two months prior to the complaint investigation that is the subject of this case, CMS determined that the facility was not in substantial compliance with eight program requirements, including regulations governing comprehensive care plans (cited at tags

F280 and F282). CMS Ex. 11 at 1.[5] A year earlier, in February 2008, the facility was not in substantial compliance with seven program requirements, again including regulations governing comprehensive care plans (cited at tags F280 and F282). During that survey, the facility was also out of compliance with the requirements governing accidents and supervision (cited at Tag F323). CMS Ex. 11 at 3.

Such consistent noncompliance suggests that a substantial penalty is needed to produce sustained corrective action.

Petitioner, however, trivializes its history of substantial noncompliance, pointing out that (so long as we disregard the immediate jeopardy findings) its deficiencies have mainly been cited at scope and severity levels D and E. In Petitioner's view, no penalties should be imposed unless a deficiency causes actual harm. As discussed above, the statute and regulations say otherwise. Act § 1819(h); 42 C.F.R. §§ 488.402, 488.406. Any one of the deficiencies cited had the potential for causing more than minimal harm, and CMS need not wait until someone is injured before it imposes a remedy. So long as CMS finds a single deficiency at scope and severity level D or higher, it may impose a CMP of at least $50 per day.

Petitioner does not claim that its financial condition affects its ability to pay the penalty.

With respect to the remaining factors, I note that the sheer number of deficiencies cited (7) justifies a penalty above the minimum. Moreover, R7 suffered significant harm, for which the facility is culpable.

The $500 per day CMP is therefore reasonable.

/s/
Carolyn Cozad Hughes
Administrative Law Judge

[5] Some of those deficiencies were cited at the K level of scope and severity (pattern of noncompliance that poses immediate jeopardy to resident health and safety). I am mindful that Petitioner appealed the immediate jeopardy findings, and that its appeal is pending. P. Br. at 13. However, even if I assume that the facility will succeed there (which I am not bound to do), the remaining history shows that the facility failed to maintain substantial compliance and justifies a penalty well above the minimum.