Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Belmont Nursing & Rehabilitation Center,	)	Date: November 25, 1997
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-96-407
	)	Decision No. CR507
Health Care Financing Administration.	)	
	)	

DECISION

Below, I explain my reasons for granting the Health Care Financing Administration's (HCFA) motion for summary affirmance against Petitioner, thereby sustaining HCFA's findings that Petitioner was not in substantial compliance with Medicare participation requirements and its imposition of the remedies of denial of payment for new admissions and a civil money penalty (CMP) in the amount of $300 per day.

I. Procedural history and background facts

The procedural history and background facts which I recite in this portion of my decision are not disputed by the parties.

Petitioner is a 100-plus-bed skilled nursing facility located in Madison, Wisconsin. Petitioner participates in the Medicare program.

The State of Wisconsin Department of Health and Social Services (State agency) conducted a survey of Petitioner's long-term care facility on April 25, 1996. The surveyors concluded that the facility was out of compliance with a number of Medicare participation requirements (HCFA Ex. 2)[1]. By letter dated May 3,

[1] Throughout this decision I will refer to the various written submissions by the parties as follows:

(continued...)

1996, the State agency advised Petitioner that in order to avoid the imposition of remedies, the facility was required to correct its deficiencies by May 25, 1996. HCFA Ex. 6 at 1. A revisit survey conducted by the State agency on June 10, 1996 found that Petitioner remained out of compliance with Medicare participation requirements. HCFA Ex. 3. By letter dated June 17, 1996, the State agency advised Petitioner that the surveyors had cited the facility for 10 deficiencies, 5 of which had been noted on the previous survey and had not been corrected. Petitioner was advised that one of the new deficiencies, that dealing with the care and treatment of pressure sores (F-Tag 314), constituted substandard quality of care as defined at 42 C.F.R. § 488.301. Moreover, section 1819(g)(5)(C) of the Social Security Act (Act) required that the attending physician of each resident who was found to have received substandard quality of care, as well as the Wisconsin Department of Regulation and Licensing, be notified of the substandard quality of care. Finally, the letter notified Petitioner that because of the change in the seriousness of Petitioner's noncompliance, the State agency would recommend the remedy of denial of payment for new admissions effective July 8, 1996. HCFA Ex. 6 at 5 - 6.[2]

Upon receipt of the findings and recommendations from the State agency, HCFA adopted the findings but **not** the recommendations of that agency as to the remedy. By letter dated July 22, 1996, HCFA advised Petitioner that it was imposing a CMP in the amount of $300 per day effective April 25, 1996 and mandatory denial of payment for new admissions effective August 12, 1996. HCFA

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[1](...continued)

a. Exhibits offered by HCFA will be identified as HCFA Ex. (number).

b. Exhibits offered by Petitioner will be identified as P. Ex. (number).

c. Documents offered by HCFA in support of its motion for summary affirmance will be identified as HCFA Attach. (number).

d. HCFA's brief in support of motion for summary affirmation will be identified as HCFA Br. at (page).

e. Petitioner's brief in opposition to the motion for summary affirmation will be identified as P. Br. at (page).

[2] It is noted that the remedy of denial of payment for new admissions is mandatory, pursuant to 42 C.F.R. § 488.417(b)(1), when a facility is not in substantial compliance three months after the last day of the survey identifying the noncompliance. In this case, mandatory denial of payment for new admissions would have been effective on or about July 26, 1996 (three months after the survey was completed on April 25, 1996). In deciding to impose the remedy effective July 8, 1996, the State was in effect recommending a more severe penalty.

Attach. 4. Further, Petitioner was prohibited from offering or conducting a Nurse Aide Training and/or Competency Evaluation Program for two years from June 10, 1996 and was notified that the contingent remedy of termination of Petitioner's Medicare participation would be imposed in the event that the facility had not attained compliance by October 25, 1996. The letter advised Petitioner that the remedy was being imposed in response to Petitioner's continued noncompliance with Medicare participation requirements. This letter constituted HCFA's initial determination. Accordingly, Petitioner was notified of its right to request a hearing before an administrative law judge (ALJ).

Petitioner filed its request for hearing on August 15, 1996, stating in pertinent part "[b]ased on the DHHS letter of June 17, 1996, Belmont respectfully requests a hearing under 42 C.F.R. Part 498. Specifically, Belmont challenges the basis for the findings of substandard quality of care as evidenced by the information presented at the Informal Dispute Resolution Conference of July 2, 1996." HCFA Attach. 5.

The State agency conducted a second survey revisit to Petitioner's facility on September 11, 1996. The survey team found continuing noncompliance with Medicare participation requirements. HCFA Ex. 4. By letter dated November 6, 1996, Petitioner requested that the findings from the September 11, 1996 survey be incorporated into its appeal. HCFA Attach. 6.

On October 23, 1996, the State agency conducted a third revisit, at which time the facility was found to be in substantial compliance effective October 18, 1996. By letter dated October 29, 1996, the State agency advised that it would recommend to HCFA that the remedy of denial of payment for new admissions be discontinued effective October 18, 1996 and that the facility's certification as a skilled nursing facility be continued. HCFA Ex. 6 at 9, 10.

By letter dated November 27, 1996, HCFA advised Petitioner that based on the findings of the State agency, the mandatory denial of payment for new admissions imposed effective August 12, 1996 would be discontinued effective October 18, 1996, that termination would not be imposed, and that the CMP of $300 per day effective April 25, 1996 was discontinued effective October 18, 1996. The letter advised Petitioner that the total amount of the CMP due was $52,800, representing a CMP of $300 per day for 176 days (April 25, 1996 through November 17, 1996[3]). HCFA Ex. 6 at 12, 13.

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[3] This date appears to be incorrect. I have assumed that the controlling date here is October 18, 1996 because that is when the facility was found to be in compliance. HCFA Ex. 6. I will use the October 18th date throughout this Decision.

Pursuant to Petitioner's request for hearing, this matter was originally assigned to ALJ Mimi Hwang Leahy. Judge Leahy held a prehearing conference by telephone with the parties on November 26, 1996 and at that time established time frames for the exchange of proposed exhibits and identification of witnesses. This matter was subsequently reassigned to me and ultimately set for trial in Madison, Wisconsin on October 30 and 31, 1997. Prior to trial, HCFA submitted nine proposed exhibits, marked as HCFA Ex. 1 - 9. It later moved to submit three additional exhibits, marked as HCFA Ex. 10 - 12, and still later amended exhibit 11 and withdrew exhibit 12, all without objection from Petitioner. Petitioner has submitted 47 exhibits, marked P. Ex. 1 - 47, with no objection from HCFA. At this time, I am hereby receiving all of the proposed exhibits into the record in this case.

In a joint stipulation dated April 7, 1997, Petitioner withdrew its challenge to the findings from the April 25, 1996 survey. HCFA Attach. 1.

In a letter dated June 16, 1997, Petitioner withdrew its challenge to the findings from the June 10, 1996 survey except for certain deficiency examples cited by the surveyors under F-Tag 314, Pressure sores, 42 C.F.R. § 483.25(c), namely with respect to residents 13, 16, 17, 21, 23, 25, and 29. HCFA Attach. 2.

In a letter dated August 8, 1997, Petitioner withdrew its challenge to the September 11, 1997 survey findings. HCFA Attach. 3.

In response to Petitioner's withdrawal of challenges to the surveys in question, HCFA filed two motions, first asking the undersigned to rule on the question of whether Petitioner had a right to hearing on the finding of Substandard Quality of Care, and secondly, assuming Petitioner had no right to hearing on this issue, requesting in effect summary judgment, arguing that there were no material issues of fact requiring a hearing.

Both parties filed briefs with respect to the issues raised in the two HCFA motions. Subsequently, I issued a ruling with respect to HCFA's first motion, finding that as a matter of law, Petitioner did not have a right to hearing on the State agency's finding of Substandard Quality of Care in this case. Rather than reiterate my rationale for that ruling herein, I am hereby incorporating that ruling by reference and making it a part hereof as if it were set forth in its entirety as a part of this Decision. Petitioner's objections to that ruling are noted for the record.

On October 15, 1997, a telephone prehearing conference was held with the parties at which time they gave oral argument in support of their respective positions with regard to HCFA's motion for summary affirmance. I decided at that time that it would be helpful to hear the testimony of Mr. Mark Dykstra, a HCFA program representative, with respect to a possible unresolved issue of fact, that being the reasonableness of the amount of the CMP imposed against Petitioner, HCFA having advanced the argument that even if the matter went to trial, and even if Petitioner would prevail in showing that the seven examples in dispute should not have been cited, the CMP would remain unchanged.

The sworn testimony of Mr. Dykstra was taken by telephone in the presence of the parties on October 20, 1997. A transcript of that testimony will be made available to the parties herein. Following the conclusion of Mr. Dykstra's testimony, I ruled orally that HCFA's motion for summary affirmance was granted, and I accordingly canceled the trial scheduled for October 30 - 31, 1997. I advised the parties that I would follow my oral ruling with this written decision.

II. Findings of Fact and Conclusions of Law

In support of my decision to grant HCFA's motion for summary affirmance in this case, I hereby make the following findings of fact and conclusions of law (FFCL):

1. A motion for summary disposition is appropriate, and no evidentiary hearing is required, where there is no genuine issue of material fact.

2. 42 C.F.R. § 498.3(b) defines those determinations made by HCFA which are deemed "initial determinations" from which affected parties have a right of appeal. The following subsections of that regulation are controlling in the case before me:

> (12) with respect to a SNF [skilled nursing facility] or NF [nursing facility], a finding of noncompliance that results in the imposition of a remedy specified in 488.406 of this chapter, except the State monitoring remedy, and the loss of the approval for a nurse-aide training program.
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> (13) the level of noncompliance found by HCFA in a SNF or NF but only if a successful challenge on this issue would affect the range of civil money penalty amounts that HCFA could collect.

3. In this case, HCFA imposed only two remedies specified in 42 C.F.R. § 488.406, namely denial of payment for new admissions, extending from August 12, 1996 through October 17, 1996 and a CMP

in the amount of $300 per day extending from April 25, 1996 through October 18, 1996. HCFA Attach. 4; HCFA Ex. 6 at 12.

4. The findings of noncompliance which resulted in the imposition of the aforesaid remedies were those findings made by the State agency, and adopted by HCFA, in the surveys concluded on April 25, 1996 and June 10, 1996. HCFA Ex. 2, 3; HCFA Attach. 4. Findings of noncompliance resulting from a third survey ending September 11, 1996 (HCFA Ex. 4) resulted in the continuation of the previously imposed remedies. Those findings of deficiency and noncompliance from the three surveys are as follows[4]:

April 25, survey--

F-Tag 221--Physical restraints. Failure to comply substantially with the requirements of 42 C.F.R. § 483.13(a). HCFA Ex. 2 at 1 - 4;

F-Tag 241--Quality of life. Failure to comply substantially with the requirements of 42 C.F.R. § 483.15(a). HCFA Ex. 2 at 4 - 7.

F-Tag 272--Resident assessment. Failure to comply substantially with the requirements of 42 C.F.R. § 483.20(b). HCFA Ex. 2 at 15 - 20.

F-Tag 279--Resident assessment. Failure to comply substantially with the requirements of 42 C.F.R. § 483.20(d). HCFA Ex. 2 at 20 - 24.

F-Tag 318--Quality of care. Failure to comply substantially with the requirements of 42 C.F.R. § 483.25(e)(2). HCFA Ex. 2 at 25 - 26.

F-Tag 364--Dietary services. Failure to comply substantially with the requirements of 42 C.F.R. § 483.35(d)(1), (2). HCFA Ex. 2 at 26 - 28.

F-Tag 441--Infection Control. Failure to comply substantially with the requirements of 42 C.F.R. § 483.65(a)(1) - (3). HCFA Ex. 2 at 28 - 33.

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[4] I have included in this list of deficiencies only those which the State surveyors classified as having a scope and severity of "D" and higher. The surveyors found some deficiencies with lower scope and severity levels, but pursuant to the regulations, levels "A," "B," and "C," constitute substantial compliance. 42 C.F.R. §§ 488.301, 488.404(b); HCFA Br. at 6.

F-Tag 444--Infection control. Failure to comply substantially with the requirements of 42 C.F.R. § 483.65(b)(3). HCFA Ex. 2 at 33 - 35.

June 10, 1996 survey--

F-Tag 241--Quality of life. Failure to comply substantially with the requirements of 42 C.F.R. § 483.15(a). HCFA Ex. 3 at 1 - 5.

F-Tag 272--Resident assessment. Failure to comply substantially with the requirements of 42 C.F.R. § 483.20(b). HCFA Ex. 3 at 5 - 11.

F-Tag 279--Resident assessment. Failure to comply substantially with the requirements of 42 C.F.R. § 483.20(d). HCFA Ex. 3 at 11 - 19.

F-Tag 312--Quality of care. Failure to comply substantially with the requirements of 42 C.F.R. § 483.25(a)(3). HCFA Ex. 3 at 19 - 23.

F-Tag 314--Quality of care. Failure to comply substantially with the requirements of 42 C.F.R. § 483.25(c). HCFA Ex. 3 at 23 - 66.

F-Tag 318--Quality of care. Failure to comply substantially with the requirements of 42 C.F.R. § 483.25(e)(2). HCFA Ex. 3 at 66 - 68.

September 11, 1996 survey--

F-Tag 272--Resident assessment. Failure to comply substantially with the requirements of 42 C.F.R. § 483.20(b). HCFA Ex. 4 at 1 - 5.

F-Tag 312--Quality of care. Failure to comply substantially with the requirements of 42 C.F.R. § 483.25(a)(3). HCFA Ex. 4 at 5 - 11.

F-Tag 314--Quality of care. Failure to comply substantially with the requirements of 42 C.F.R. § 483.25(c). HCFA Ex. 4 at 11 - 31.

F-Tag 324--Quality of care. Failure to comply substantially with the requirements of 42 C.F.R. § 483.25(b)(2). HCFA Ex. 4 at 31 - 36.

5. Petitioner withdrew its challenge to the findings of the April 25, 1996 survey by stipulation dated April 7, 1997. HCFA Attach. 1.

6. Petitioner withdrew its challenge to the findings of the June 10, 1996 survey by letter dated June 16, 1997. HCFA Attach. 2. However, Petitioner did not withdraw its challenge to the scope and severity of one of the findings, F-Tag 314, noting its disagreement with 7 of 14 resident examples cited by the surveyors in support of this one finding.

7. Petitioner withdrew its challenge to the findings of the September 11, 1196 survey by letter dated August 8, 1997. HCFA Attach. 3.

8. Based upon the findings of the three surveys noted above, which are now unchallenged by Petitioner, I find that the Petitioner was not in substantial compliance with the Medicare participation requirements set forth in FFCL number 4 herein, including the requirements of 42 C.F.R. § 483.25(c), during the period from April 26, 1996 through October 18, 1996.

9. As a result of the Petitioner's noncompliance with Medicare participation requirements, HCFA has established a basis for the imposition of the remedies of denial of payment for new admissions and a CMP against Petitioner.

10. 42 C.F.R. § 488.417(b) makes denial of payment for new admissions mandatory where a facility is not in substantial compliance three months after the last day of the survey identifying the noncompliance. April 25, 1996, was the last day of the survey originally identifying the noncompliance. By virtue of the fact that Petitioner does not challenge the findings that it was out of compliance through October 17, 1996, a period of more than three months, HCFA's imposition of the remedy was mandated under the regulations.

11. In cases where HCFA has imposed a CMP, review by the ALJ is limited to determining whether or not a basis for imposition of the penalty exists, that is, whether or not the facility was in substantial compliance with Medicare participation requirements, and whether or not the amount of that penalty is reasonable. 42 C.F.R. § 488.438(e), (f).

12. Petitioner has no right to a hearing, under the regulations, to challenge examples used to support a finding of substantial noncompliance where the finding itself is not contested. 42 C.F.R. § 488.438(e), (f).

13. Petitioner did not specifically raise the issue as to the reasonableness of the amount of the CMP in its request for hearing filed on August 15, 1996, (HCFA Attach. 5), nor in its amended request for hearing filed November 6, 1996. HCFA Attach. 6.

14. 42 C.F.R. § 498.40(b)(1), (2) require that a request for hearing **"must"** (emphasis added):

> (1) identify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees; and
>
> (2) specify the basis for contending that the findings and conclusions are incorrect.

15. Petitioner's request for hearing challenges only the basis for the State agency's finding of substandard quality of care, however, as I have previously ruled, Petitioner has no right to hearing on this issue.

16. Inasmuch as my scope of review is limited to determining whether there is a basis for imposition of remedies, that is whether or not the facility was out of compliance with Medicare requirements, and inasmuch as a basis has been established and is not in dispute, the only remaining issue over which I have jurisdiction is the question as to whether the amount of the CMP is reasonable. By not raising that issue in its request for hearing, Petitioner has waived its right to hearing on that issue. Accordingly, I find that there are no material facts at issue which would require an evidentiary hearing, and HCFA's motion for summary affirmance should be granted.

17. Even if I were to take jurisdiction of the issue of the amount of the CMP, and even if Petitioner should prevail in showing, at trial, that 7 of the 14 resident examples cited by HCFA in support of its finding that Petitioner was out of compliance with 42 C.F.R. § 483.25(c) were incorrect, the amount of the CMP assessed by HCFA would be reasonable.

III. Governing law

Under both the Act and applicable regulations, Petitioner is classified as a long-term care facility. In order to participate in Medicare, a long-term care facility must comply with federal participation requirements. The statutory requirements for participation by a long-term care facility are contained in the Act, at sections 1819 and 1919. Regulations which govern the participation of a long-term care facility are published at 42 C.F.R. Part 483.

Part 488 of the regulations provide that facilities which participate in Medicare may be surveyed on behalf of HCFA by State survey agencies to determine whether the facilities are complying with participation requirements. 42 C.F.R. § 488.10 - 488.28. The regulations contain special survey provisions for long-term care facilities. 42 C.F.R. § 488.300 - 488.325.

If as a result of the survey findings a facility is found not to be in substantial compliance with participation requirements, a State or HCFA may impose a variety of remedies designed to ensure prompt compliance with program requirements. 42 C.F.R. § 488.402(a). Available remedies, and the factors to be considered in selecting those remedies are set forth at 42 C.F.R. § 488.406 and 42 C.F.R. § 488.404 respectively. Those remedies include the denial of payment for new admissions and CMPs, remedies imposed in this case, among others.

The term "substantial compliance" is defined 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.

A long-term care facility which wishes to contest HCFA's determination to impose one or more of the enforcement remedies specified at 42 C.F.R. § 488.406 (except the State monitoring remedy and the loss of the approval for a nurse-aide training program) is entitled to a hearing before an ALJ. The facility may contest the finding(s) of noncompliance that resulted in the imposition of the remedy but may not appeal the choice of remedy. 42 C.F.R. § 498.3(b)(12), (13); 42 C.F.R. § 488.408(g)(1), (2).

The right to a hearing, and the authority of an ALJ to conduct a hearing, is based on a determination by HCFA to impose one of the enforcement remedies specified at 42 C.F.R. § 488.406. 42 C.F.R. §§ 488.408(g), 498.3(b). Where HCFA has determined not to impose one of the aforementioned remedies, the facility has no right to a hearing and the administrative law judge is not authorized to conduct a hearing. Rafael Convalescent Hospital, DAB CR444 (1996), aff'd, DAB 1616 (1997).

IV. Discussion

Stipulated facts and findings

In this case, the Petitioner does not contend that it was in compliance with Medicare conditions of participation or that there was no basis for HCFA's imposition of a CMP or mandatory denial of payment for new admissions. As pointed out by counsel for HCFA, Petitioner's withdrawal of all but limited challenges to the three surveys in question is in essence an admission that it was out of compliance, and that it was out of compliance for the entire period from April 25 - October 17, 1996. HCFA Br. at 6, 7. Likewise, Petitioner states unequivocally that it "seeks to overturn seven examples cited in F-314 - Pressure Sores, leaving only three examples at an actual harm level." Petitioner concedes that it was out of compliance with F-Tag 314 and all of the other findings contained in HCFA Ex. 2 - 4 and it concedes

that its lack of compliance with the requirements of 42 C.F.R. § 483.25(c) resulted in actual harm to three of the residents cited by the State surveyors in the June 1996 survey, as examples of Petitioner's deficiency. P. Br. at 4.

Petitioner's challenge is to the scope and severity assigned by the surveyors to F-Tag 314 in the June survey

HCFA's procedures require surveyors, upon making a finding of deficiency, to assess the scope and severity of that deficiency. With respect to F-Tag 314, the surveyors concluded that there was a "pattern" of noncompliance that resulted in actual harm. Petitioner contends that the proper scope of the deficiency is "isolated". Petitioner argues that it is a 132-bed facility and if it is successful in challenging seven of the resident examples cited by the surveyors, there would only be three remaining examples of residents who suffered actual harm. It contends further, that if HCFA is able to establish only three residents harmed in a 132-bed facility, these examples should be considered "isolated" whereas a larger number of examples might constitute a "pattern." P. Br. at 5.

In effect, Petitioner wishes to lower the scope of the deficiency. Petitioner freely admits that its primary reason for wishing to do so is that the finding by the surveyors of a "pattern" of behavior leading to patient harm was the finding which triggered the finding of substandard quality of care. Petitioner states "[f]rom the beginning, Belmont has contested and continues to contest HCFA's determination that it delivered SQC [substandard quality of care]."

I have previously ruled that Petitioner has no right to hearing on the finding of substandard quality of care. Even so, Petitioner contends it has a right to hearing to contest the seven resident examples in question because: (1) those findings were a part of the basis for the CMP and (2) because the scope of a deficiency is a factor which HCFA must consider in determining the amount of the penalty, and which an ALJ must consider in reviewing the amount of the penalty. P. Br. at 6, 7. I will attempt to address each argument separately hereafter.

The Basis Argument

42 C.F.R. § 498.3(b)(12) grants an affected party the right to appeal a finding of noncompliance that results in the imposition of a remedy. Similarly 42 C.F.R. § 488.438(e) provides that, prior to reviewing the amount of CMP imposed, the ALJ must first determine whether there is a basis for imposition of that penalty, and basis is defined at 42 C.F.R. § 488.430 as the determination that the facility is not in substantial compliance.

When read together, it would appear that it is the finding of substantial noncompliance which gives rise to the right to hearing and which Petitioner has the right to contest, not any particular factor which might have gone into making that finding, unless a challenge to an element of the finding would change the finding itself.

In this case, Petitioner concedes it was not in substantial compliance, and having made that concession it is obvious that a challenge to any of the facts leading to the finding would not change the finding itself.

One of the exhibits offered by HCFA, HCFA Ex. 5 at 7, is a document prepared by a HCFA surveyor who, after reviewing the findings by the State survey agency, makes recommendations to the official authorized to impose a penalty. The HCFA surveyor makes the comment "F314 was the deficiency that drove the remedy--Pressure sores." Petitioner interprets this sentence to mean, apparently, that this is the finding which lead to the imposition of the remedy, and accordingly, it argues, it has the right to challenge the facts upon which that finding was based. I do not agree with either Petitioner's assumption as to what the sentence in question means, nor to the conclusion Petitioner reaches as a result. The surveyor's statement is not the statement of HCFA. HCFA states its official position through the notice of imposition of civil money penalty, in this case dated July 22, 1996. HCFA Attach. 4. That is the document from which Petitioner derives the right of appeal. That document refers to the deficiencies found in the first survey, April 25, 1996, lists the deficiencies found in the second survey, June 10, 1996, and states in pertinent part, "[i]n response to your facility's continued noncompliance, the Health Care Financing Administration is imposing the following remedy against your facility . . . ." HCFA has made it clear that the basis for imposition of the CMP was all of the deficiencies found in the course of the two surveys, not just F-Tag 314.

Even if it were true, however, that the surveyor's findings that Petitioner was not in substantial compliance with F-Tag 314 were the findings that lead to the imposition of the remedy, the fact is that Petitioner has conceded that it was not in substantial compliance with F-Tag 314. I do not read the regulations as granting Petitioner the right to a hearing to challenge examples used to support a finding of noncompliance where the finding itself is not contested.

The undersigned would further note that at the time that the HCFA surveyor made her comment that F-Tag 314 drove the remedy, the remedy which had been recommended by the State agency was denial of payment for new admissions effective July 8, 1996. HCFA Ex. 6. It is clear that the decision to impose a CMP was HCFA's and

that HCFA's decision was based on the facilities continued noncompliance with a number of participation requirements. Id.

Amount of Penalty Argument

Petitioner argues that the seven resident examples which it challenges under F-Tag 314 have relevance to the amount of penalty imposed. In support of its position, Petitioner cites 42 C.F.R. § 488.438(b) which requires HCFA, in assessing the amount of the CMP, to take into consideration the factors specified in section 488.404 of that chapter. 42 C.F.R. § 488.404(b)(2) requires HCFA to consider whether the deficiencies are isolated, constitute a pattern, or are widespread. In this case, the State agency found that the deficiencies under F-Tag 314 constituted a pattern. Petitioner intends to prove, by challenging the seven examples in question, that the deficiencies were isolated. If successful, Petitioner contends, HCFA would be forced to reconsider its chosen remedy and/or the amount of the CMP assessed. P. Br. at 6, 7.

With respect to Petitioner's contention that if it is successful HCFA would be forced to reconsider its chosen remedy, I find its position has no merit. First, as noted above, HCFA decided to impose a remedy because the facility was in substantial noncompliance with a number of participation requirements. 42 C.F.R. § 488.408(g)(2) provides clearly that "[a] facility may not appeal the choice of remedy. . . ." It is the intent of the regulations to leave the choice of remedy in the discretion of HCFA. HCFA cannot be "forced to reconsider its chosen remedy," and Petitioner's challenge to the seven resident examples in question would have no bearing on the choice of remedy, even if the challenge were successful.

With respect to Petitioner's contention that HCFA would be forced to reassess the amount of the CMP, I likewise find that Petitioner's argument is not supported by the facts or governing law.

Unlike Petitioner's challenge to the selection of the remedy itself, however, a facility does have the right to challenge the amount of CMP assessed. 42 C.F.R. § 488.438 (e) provides essentially that an ALJ may review the amount of a CMP to determine if that amount is reasonable and subparagraph (f) of that regulation authorizes the judge to take into consideration the factors set forth in 42 C.F.R. § 488.404 with respect to the scope of the deficiency as one of a number of factors in determining the amount of the CMP.

Petitioner in this particular instance, however, has waived its right to challenge the reasonableness of the amount of the CMP because it did not raise the issue timely. 42 C.F.R. § 498.40(b)

states, in pertinent part, that the request for hearing **must** (emphasis added):

> (1) identify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees; and
>
> (2) specify the basis for contending that the findings and conclusions are incorrect.

In filing its request for hearing on August 15, 1996, Petitioner specifically identified only one issue--"the basis for the findings of substandard quality of care." HCFA Attach. 5.[5] Further, Petitioner amended its request for hearing on November 6, 1996, incorporating its objections to the findings of the September 11, 1996 revisit survey, but did not raise any challenges to the reasonableness of the amount of the CMP. HCFA Attach. 6.

Petitioner contends that I should construe its request for hearing as incorporating a challenge to the amount of the CMP. Petitioner states "[l]ogically, a challenge to the basis of the penalty presumes a challenge to the penalty itself." P. Br. at 5. Even if one were to accept that argument as correct, Petitioner never challenged the basis for imposition of the CMP and therefore one cannot presume a challenge to the amount of that penalty. I do not accept the argument as being valid even if Petitioner had challenged the basis for imposition of the CMP. The regulation cited above clearly requires a Petitioner to identify with specificity those findings with which it disagrees. Petitioner did not identify the amount of the CMP as being in issue in this case in its request for hearing and I will not permit it to do so at this late date.

I would note for the record, however, that even were I to permit this matter to go forward to trial on the issue of the amount of the CMP, and even if Petitioner would prevail in its attempt to show that the scope of the deficiency under F-Tag 314 was "isolated" rather than constituting "a pattern" as determined by HCFA, I would still find that the amount of the penalty assessed, $300 per day, was reasonable.

I note again that Petitioner has withdrawn its challenge to all of the State agency's findings that Petitioner was not in substantial compliance with participation requirements. (It's challenge is only to the scope of one of the findings.) Of particular importance in reviewing those findings is that the Petitioner was found to be out of compliance on the April 25,

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[5] I have previously ruled that Petitioner does not have a right to hearing on this issue. See Attached Ruling.

1996 survey with F-Tag 241, a Quality of life requirement, in violation of 42 C.F.R. § 483.15(a) and that the surveyors had assessed this deficiency at "harm level 3/isolated." HCFA Ex. 2 at 1, 4 - 6. With respect to the F-Tag 314 deficiency noted in the June 10, 1996 survey, Petitioner challenges the finding that there was a pattern of noncompliance, but admits that the harm level was three and that there was isolated harm to at least three residents. HCFA Ex. 3; P. Br. at 5. With respect to the September 11, 1996 survey, Petitioner admits that it was out of compliance with F-Tag 312, a Quality of care requirement in violation of 42 C.F.R. § 483.25(a)(3) and F-Tag 314 also a Quality of care requirement, in violation of 42 C.F.R. § 483.25(c). The surveyors found both of those deficiencies to be at harm level 3/isolated. HCFA Ex. 4 at 1, 5 - 31. These are serious deficiencies involving violations of multiple participation requirements and which the facility admits resulted in actual harm to its residents.

42 C.F.R. § 488.408 gives guidance to HCFA by grouping deficiencies into one of three categories according to how serious the noncompliance is, and sets forth appropriate remedies for each category from which HCFA can select. The major deficiencies in this case fall into category two as the evidence establishes that there were one or more deficiencies that constituted actual harm but not immediate jeopardy. 42 C.F.R. § 488.408(d)(2)(ii). Among the remedies HCFA may impose in this category are CMPs of $50 - 3,000 per day. 42 C.F.R. § 488.408(d)(1)(iii).

In reviewing the amount of the penalty, the ALJ is limited to reviewing only whether HCFA or the State took into account those factors set forth in 42 C.F.R. § 488.438(f). These include:

> (1) the facility's history of noncompliance, including repeated deficiencies;
>
> (2) the facility's financial condition;
>
> (3) the factors specified in 42 C.F.R. § 488.404; and
>
> (4) the facility's degree of culpability.

Because HCFA had asserted that, even if Petitioner should prevail in showing that the scope of the F-Tag 314 deficiency was somewhat less than the scope relied upon by HCFA as a factor in determining the amount of the CMP, the amount of the CMP would not change, and that therefore a trial on the facts alleged by Petitioner was immaterial, I elected to take the sworn testimony of Mr. Mark Dykstra, a program representative for HCFA, by telephone on October 20, 1997, without objection from either party.

Mr. Dykstra testified that on July 22, 1996, he was the main recommending official who recommended the imposition and amount of the CMP in this case. Tr. at 7. He testified that in making his recommendation he reviewed the State's certificate of Petitioner's noncompliance and the State's recommendation. He considered the Petitioner's financial condition as set forth in HCFA Ex. 5 at 7 - 9, the facility's history of noncompliance as set forth at HCFA Ex. 5 at 6, the seriousness/scope of the deficiencies, the relationship of one deficiency to another and the facility's degree of culpability as well as other remedies being imposed, all as set forth in HCFA Ex. 5 at 7. Tr. at 39. He recommended a CMP in the amount of $300 per day. When asked if his recommendation would remain the same if the scope of F-Tag 314 were changed from "pattern of deficiencies" to "isolated deficiencies" he stated that while he could not be 100 percent certain what he would have done at that time, it was "quite likely" his recommendation would have been the same. Tr. at 39. He explained that in his view there was an entire situation or pattern of activities that lead to health care problems in the facility, and that it was not likely that a change in the scope and severity of one deficiency would have changed his recommendation.

In retrospect, the testimony of Mr. Dykstra was not necessary in reaching a decision in this case. The fact is that the Petitioner did not raise the issue of the amount of the CMP and it is not properly before me. Even if it were, however, and were I to exercise my authority to set a CMP in this case, should Petitioner prevail in persuading me that the scope and severity of F-Tag 314 was less than that found by HCFA, I would find that the uncontroverted evidence in this case justified a CMP higher than that imposed by HCFA. Because of the documented harm to a number of residents, caused by at least three deficient practices, considering the facility's good financial condition, a strong financial remedy would be warranted to ensure Petitioner's compliance with participation requirements.

A finding that the scope of Petitioner's F-Tag 314 deficiency was isolated harm as opposed to a pattern of harm would not change the fact that Petitioner caused harm to other patients by other deficiencies which themselves warranted CMPs in the range of $50 - $3000 per day, nor would it change the fact that this Petitioner has admitted it was not in substantial compliance with any of the requirements of participation cited as being deficient in an initial survey and two revisits. The amount of the CMP in this case was more than reasonable and nothing Petitioner could prove at trial on the limited issue it raises would change that fact. I find then, that the facts challenged by Petitioner would have no material bearing on the reasonableness of the CMP imposed in this case.

V. Conclusion

For the reasons set forth above, I find that there are no material facts in dispute in this case requiring a hearing. I find further that HCFA has established, and Petitioner has conceded, that Petitioner was not in substantial compliance with Medicare participation requirements, that accordingly a basis exists for the imposition of the remedies of denial of payment for new admissions and a CMP in the amount of $300 per day. I decide further that Petitioner has no right to hearing to challenge the amount of the CMP imposed as it did not timely raise that issue in its request for hearing, and that, even if I were to take jurisdiction of the issue, the amount of that penalty was reasonable. The facts disputed by Petitioner would not materially affect the amount of the penalty imposed. Finally, I conclude that the only issue raised by Petitioner, the finding that the Petitioner provided substandard quality of care, is not an issue to which Petitioner has a right to hearing. A motion for summary disposition is appropriate before the Departmental Appeals Board where there is no genuine issue of material fact. Campesinos Unidos, Inc., DAB 1518 (1995). HCFA Br. at 9. Accordingly, HCFA's motion for summary affirmation is granted. Petitioner has raised several constitutional challenges to the regulations governing this proceeding. Those challenges are preserved herein for purposes of appeal of my decision.

/s/

Stephen J. Ahlgren

Administrative Law Judge