Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Cypresswood Health and Rehabilitation Center, (CCN: 45-5815)	)	Date: September 17, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-556
	)	Decision No. CR1843
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

In this appeal, Petitioner, Cypresswood Health and Rehabilitation Center contests a determination by the Centers for Medicare & Medicaid Services (CMS) that it was not in substantial compliance with a requirement for participation in the Medicare and Medicaid programs between December 5, 2006 and January 18, 2007, and challenges the remedy imposed on it by CMS as a result. For the reasons set out below, I sustain CMS's determination and affirm the remedy.

I. Procedural Background

Petitioner is a long-term care facility located in Houston, Texas. It participates in the Medicare and Medicaid programs. The Texas Department of Aging and Disability Services (TDADS) conducted a survey of Petitioner's facility on December 28, 2006; although earlier surveys of the facility had been conducted and certain deficiencies cited based on those surveys, those surveys and the validity of certain citations based on them are not directly at issue in this appeal. It is to be observed, however, that the finality of the citations issued as a result of the earlier surveys does have an important bearing on the period of non-compliance I address in this Decision.

The December 28, 2006 survey findings were based on observations made on that date at Petitioner's facility by a member of the survey team, who watched as facility staff conducted certain basic care-giving operations. That survey found Petitioner not to be in substantial compliance with one of the requirements for participation in those programs, specifically, the requirement set out at 42 C.F.R. § 483.65(b)(3) obliging such facilities to establish an infection control program that, among other things, requires members of its staff to wash their hands after each direct resident contact for which hand washing is indicated by accepted professional practice. It may be worth noting that the citation was directed toward the facility's administration and enforcement of the infection control program, and not at the observed predicate acts themselves. A subsequent survey conducted at Petitioner's facility by TDADS on February 1, 2007 led CMS to determine that the facility had achieved substantial compliance on January 19, 2007.

On April 30, 2007, CMS notified Petitioner that it had imposed a Denial of Payment for New Admissions (DPNA) beginning December 5, 2006 and continuing through January 18, 2007, based on a period of substantial non-compliance with the requirement, cited as Tag F-444. CMS proposed additional sanctions, but they are not before me.

Petitioner perfected its appeal of CMS's action in its June 27, 2007 Request for Hearing. An interval of motion practice followed, and the substantive issues raised in that motion practice were resolved by the parties' replies to my letter of April 22, 2008, and my rulings in response to their replies as set out in my Order of May 20, 2008. On the basis of the parties' replies and that Order, the case came on for a full evidentiary hearing on the merits of the limited issues noted immediately below on June 30, 2008, in Houston, Texas.

II. Issues

The issues before me in this appeal are:

> 1. Whether, between December 5, 2006 and January 18, 2007, Petitioner was in substantial compliance with requirements for participation in the Medicare and Medicaid programs; and if Petitioner was not,
>
> 2. Whether the DPNA imposed on Petitioner by CMS as a result of Petitioner's alleged substantial non-compliance is reasonable.

III. Controlling Statutes and Regulations

Petitioner is a long-term care facility. Its participation in Medicare and Medicaid is governed by sections 1819 and 1919 of the Social Security Act (Act), 42 U.S.C. § 301 *et*

seq., and the regulations at 42 C.F.R. Part 483. Sections 1819 and 1919 of the Act invest the Secretary with authority to impose a range of remedies, including DPNAs, against long-term care facilities for failure to comply substantially with participation requirements.

The 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 of Health and Human Services (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 facilities participating in Medicare and Medicaid may be surveyed on behalf of CMS by state survey agencies in order 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. The DPNA remedy at issue here is authorized by sections 1819(h)(2)(B) and 1919(h)(2)(A) of the Act 42 U.S.C. §§ 1395i-3(h)(2)(B) and 1396r(h)(2)(A), respectively.

The requirement of participation directly at issue in this litigation is set out at 42 C.F.R. § 483.65(b)(3), and is part of a broad regulatory scheme meant to ensure that facilities establish and maintain infection control programs designed to provide safe, sanitary, and comfortable environments, and help to prevent the development and transmission of disease and infection. The specific regulatory provision in issue requires:

> The facility must require staff to wash their hands after each direct resident contact for which hand washing is indicated by accepted professional practice.

42 C.F.R. § 483.65(b)(3).

The Departmental Appeals Board (Board) has held that a facility has no right to challenge the scope and severity assigned to a non-compliance finding, except where that finding was the basis for an immediate jeopardy determination. *See, e.g.*, *Ridge Terrace*, DAB No. 1834 (2002); *Koester Pavilion*, DAB No. 1750 (2000). Thus, the scope and severity

of Petitioner's non-compliance between December 5, 2006 and January 18, 2007, cited at a scope-and-severity level below that of immediate jeopardy, is not properly before me in this appeal.

IV. Findings and Conclusions

I find and conclude:

1. Because it failed to require that members of its staff wash their hands after each direct resident contact for which hand washing is indicated by accepted professional practice, Petitioner was not in substantial compliance with 42 C.F.R. § 482.65(b)(3) on December 28, 2006.

2. Petitioner had been substantially non-compliant with Medicare participation requirements since at least December 5, 2006, and remained substantially non-compliant with Medicare program requirements until January 18, 2007.

3. CMS's assessment of the scope and severity of Petitioner's substantial non-compliance between December 5, 2006 and January 18, 2007 is not properly before me in this appeal.

4. The DPNA imposed by CMS for the period of Petitioner's substantial non-compliance between December 5, 2006 and January 18, 2007 is not unreasonable.

V. Discussion

As far as the events of December 28, 2006 are concerned, the persuasive evidence in this case is focused, concise, and clear. It is not based on a *post hoc* "record review" or on hearsay, but rather on direct observations on that date by the witness Arlita Jefferson, R.N., who made contemporaneous notes of her observations and repeated those observations in open court (Tr. 18-67). There is other evidence in the record, including the testimony of a CMS official called to testify by Petitioner, presumably as an adverse witness (Tr. 70-95; 97-99). I have studied all of it, documentary and testimonial. But the kernel of this part of the case lies in the testimony of R.N. Jefferson and the notes she made at Petitioner's facility. Those notes appear in this record as CMS Exs. 4 and 4a, and they are incorporated in CMS Ex. 3, the CMS Form 2567 that records the survey on December 28, 2006.

I have characterized this evidence as "persuasive." It may be helpful to remind the reader of the criteria usually applied by a trial judge in reaching such a characterization, and to assure the reader that I have applied them here. First, I found R.N. Jefferson to be well-

informed in matters of "hands-on" care giving, and well-trained in observing the practical details of such activity. Her academic credentials and her professional history are more than respectable and entirely apposite to the topics of her testimony. I found that on December 28, 2006 she was quite literally in a physical position to observe and record the activity she recounted. Her testimony and her contemporaneously-written notes of her observations were reciprocally consistent and were consonant with other documents in the record. Her testimony was candid and complete: I detected no hesitation, hedging, or shading in it whatsoever. It was also given very carefully, indulging in no unsupported assumptions and adopting no tenuous conclusions. I have been shown no departures from normal survey protocols that would in any way impeach R.N. Jefferson's testimony, and I have been shown no reason to treat her testimony as other than objective and disinterested. It is precisely the sort of evidence a reasonable person would accept as persuasive on any serious, even grave, factual question, and it remains fundamentally uncontradicted by other evidence of equal weight and reliability. On that evidence I base my findings of fact, and for those findings I claim the deference usually given to such findings when announced by the primary trier of fact.

Put in its briefest form, the evidence shows that on December 28, 2006, while R. N. Jefferson was watching, two substantial lapses of accepted professional practice regarding hand washing were committed by Petitioner's staff.

The first incident took place at approximately 10:00 a.m., when one of Petitioner's CNA staff undertook to provide incontinent care to Resident 11, whose need for such care had been called to the CNA's attention by R. N. Jefferson. Without pulling on rubber gloves or washing her hands, the CNA removed the Resident's incontinent pad undergarment and provided care.

The second incident occurred approximately an hour later, around 11:00 a.m. when another CNA attended Resident 34 to provide incontinent care. This CNA pulled on rubber gloves but did not wash his hands first. With the gloves on, he first touched the room's trash container and adjusted the trash-bag in it, wet a towel in the Resident's sink, then removed a bottle of peri-wash from the drawer of the Resident's roommate and provided the needed care, beginning by removing Resident 34's undergarment. During the process, however, the CNA repeatedly handled items in the room, such as both dressers' drawers, items in those drawers, the room's dividing curtain, and the bottle of peri-wash.

R.N. Jefferson credibly testified that the CNAs' failures to wash their hands at the beginning of their activities, and their repeated touching of items and places in the two rooms with unwashed hands or unchanged gloves, was contrary to accepted professional practice. The documents support her testimony, and I so find. CMS Exs. 7, 11, 12.

Petitioner's cross-examination of Ms. Jefferson proposed alternative ways of looking at — or of understanding — Ms. Jefferson's objective observations, but none of those alternatives was based on an objectively established foundation in fact, and none was anything more than hypothetical. In short, the facts observed, noted, reported, and testified to by R.N. Jefferson fully establish Petitioner's non-compliance with the terms of 42 C.F.R. § 483.65(b)(3) on December 28, 2006.

Thus, it is established that Petitioner was out of substantial compliance on December 28, 2006, and other parts of this record show that the period of its non-compliance extended through January 18, 2007. CMS Ex. 1. The imposition of the DPNA between those two dates is manifestly warranted. But what of the period between December 5, 2006 and December 28, 2006, the first part of the DPNA's imposition? Both sides agree that Petitioner's non-compliance on December 28, 2006 is only part of the whole controversy, and apparently agree that I must decide whether the DPNA was warranted for that earlier period.

Deciding that question requires that I review the facility's survey history over the two months prior to December 28, 2006. The facility had been surveyed by TDADS on October 26, 2006 and November 3, 2006. Those two surveys resulted in Petitioner's being found substantially non-compliant with federal standards cited as Tags F-225, F-282, F-312, F-327, and certain "N-Tag" citations based on Texas law, but related to the F-312 and F-327 citations. CMS Ex.16. Petitioner received notice of the citations based on the two surveys and the remedies CMS proposed on November 20, 2006. CMS Ex. 9.

Before Petitioner responded to CMS's notice of November 20, 2006 by perfecting its appeal pursuant to 42 C.F.R. § 498.40 or by waiving its appeal and compromising the remedies pursuant to 42 C.F.R. § 488.436, TDADS returned to the facility on December 5, 2006. The survey conducted on that date resulted in citations based on Tags F-372 and F-441. The F-441 citation asserted that the facility had failed, since at least October 25, 2006, to establish and maintain an adequate infection control program as required by 42 C.F.R. § 483.65(a); the allegation was based on direct observation of a specific resident during the survey, and a review of that resident's records as far back as October 25, 2006. CMS Ex.10. Petitioner received notice of the citations and the remedies CMS proposed on December 27, 2006.[1]

[1] The CMS notice letter of December 27, 2006 is not among the hearing exhibits proper, but may be found as "CMS Exhibit # 3" attached to CMS's October 17, 2007 Memorandum in Support of the Respondent's Request to Limit the Scope of Petitioner's Appeal.

So, on December 28, 2006, Petitioner was faced with the imposition of remedies based on the first three surveys — the October 26, 2006 survey, the November 3, 2006 survey, and the December 5, 2006 survey — and had formal notice of those penalties and the bases for them as set out in the CMS notice letters of November 20, 2006 and December 27, 2006.[2]

Petitioner's responses to the first three surveys were the determining factors in shaping the posture of this case as it came to hearing. First, on January 19, 2007, Petitioner waived its appeal of the October and November survey findings and the remedies proposed in the CMS notice letter of November 20, 2006. Petitioner availed itself of the waiver and compromise provisions of 42 C.F.R. § 488.436. CMS Ex.11. By that action the citations derived from the October and November surveys became conclusive and final. Next, the third survey's citations, those based on the December 5, 2006 survey, had the potential of becoming conclusive and final if Petitioner failed to perfect an appeal of them within 60 days of its receipt of the CMS notice letter of December 27, 2006. When TDADS detected evidence of what I have found above to be Petitioner's non-compliant status on December 28, 2006, the period of that non-compliance had the potential of beginning at least as of December 5, 2006 based on the survey findings of that date. That potential became actual when Petitioner did not appeal the results of the December 5, 2006 survey. By that non-action the citations based on the December 5, 2006 survey became conclusive and final. *Chicago Ridge Nursing Center*, DAB No. 2151 (2008). Those citations now provide support for my finding that the period of Petitioner's non-compliance before me in this case began on December 5, 2005, continued through December 28, 2006, and extended through January 18, 2007.

Petitioner asserts that it had achieved substantial compliance with program requirements as of November 22, 2006 by correcting all of the deficiencies discovered in the October 26 and November 3 surveys, the deficiencies that had been cited in CMS's November 20, 2006 letter. Relying on that assertion, Petitioner goes on to argue that whatever justification CMS claimed for the DPNA's effective date of December 5, 2006 was eliminated when the facility returned to what it claimed to be substantial compliance on November 22, 2006.

This argument, which for present purposes I shall describe as Petitioner's "gap-period" theory, seems to depend on the assumption that because TDADS certified on November 22, 2006 that the deficiencies it had observed in the October 26 and November 3 surveys appeared to have been corrected, the facility was as of that date in substantial compliance as a matter of law. As a matter of law, that assumption is patently incorrect: a state

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[2] Both CMS letters were sent to Petitioner by facsimile transmission.

survey agency's finding that a facility's deficiencies have been corrected is simply not the equivalent of a CMS determination that the facility has returned to substantial compliance. *Meadowbrook Manor-Napier*, DAB No. 2173 (2008). The underlying — and the determinative — factual matrix in *Meadowbrook* is remarkably similar to that in the instant case: the alleged "gap-period" in both cases began during, and ended during, the extended period of the facility's non-compliance with another requirement. In *Meadowbrook*, the "gap-period" lasted from February 16, 2006 to March 16, 2006, while the extended period of non-compliance with another requirement began on January 6, 2006 and continued until June 11, 2006. Here, the "gap-period" described by Petitioner is said to have lasted from November 22, 2006 to December 4, 2006, but the extended period of the facility's non-compliance with F-441 began on October 25, 2006 and continued at least through December 5, 2006.

But even assuming *arguendo* the facility's return to substantial compliance on November 22, 2006, Petitioner's argument falls short of success, for it does not come to grips with the fact that the December 5, 2006 survey found the facility not in substantial compliance with at least two program requirements *on that date*. In essence, the larger flaw in Petitioner's argument is this: whether it was in substantial compliance on November 22, 2006 is irrelevant to the question of whether it was in substantial compliance on December 5, 2006, when TDADS surveyors inspected the facility for the third time.

Finally, it is apparent from the discussion thus far that the DPNA imposed by CMS for the period of Petitioner's substantial non-compliance between December 5, 2006 and January 18, 2007 is not unreasonable. That period of substantial non-compliance has been fully established. The DPNA remedy is authorized by 42 C.F.R. §§ 488.406, 488.408(d)(3), and 498.417, and CMS's choice of that remedy from among those others authorized by law and regulation is not subject to review here. *Elm Heights Care Center*, DAB CR1774 (2008); *Broadlawn Manor Nursing Center*, DAB CR944 (2002).

VI. Conclusion

For the foregoing reasons, I find and conclude that Petitioner, failed to comply substantially with the requirements for participation in Medicare and Medicaid from December 5, 2006 though January 18, 2007, and that the DPNA imposed against it is reasonable.

/s/
Richard J. Smith
Administrative Law Judge