Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Columbia Care and Rehabilitation Center
(CCN: 44-5465),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-176

Decision No. CR2212

Date: August 12, 2010

DECISION

Petitioner, Columbia Care and Rehabilitation Center (Petitioner or facility), is a long term care facility located in Columbia, Tennessee, that participates in the Medicare program. During a fire drill, conducted September 14, 2009, four of its six exits doors would not unlock, and its smoke barrier doors failed to close. Based on these failings and other cited deficiencies, the Centers for Medicare and Medicaid Services (CMS) determined that the facility was not in substantial compliance with Medicare requirements. CMS also determined that the facility's fire safety deficiencies posed immediate jeopardy to resident health and safety. CMS imposed civil money penalties (CMPs) of $6,800 for one day of immediate jeopardy, and $200 per day for 44 days of noncompliance that was not immediate jeopardy.

Petitioner here challenges only the deficiencies cited at the immediate jeopardy level. CMS moves for summary judgment, which Petitioner opposes.

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 requirements and that its deficiencies pose immediate jeopardy to resident health and safety.

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 an annual re-certification survey, conducted from September 14-16, 2009, CMS determined, among other findings, that the facility was not in substantial compliance with 42 C.F.R. §§ 483.25(h) (tag F323 – accident prevention and supervision) and 483.75 (tag F490 – administration), as well as provisions of the Life Safety Code of the National Fire Protection Association (LSC). CMS also determined that these deficiencies posed immediate jeopardy to resident health and safety. CMS Exs. 1, 2; P. Ex. 3. Based on these deficiencies, CMS imposed a $6,800 per instance CMP. P. Ex. 3.[1]

Petitioner timely requested a hearing. CMS has filed a motion for summary judgment with a brief in support (CMS Br.). Petitioner filed its opposition brief (P. Br.). CMS has submitted 4 exhibits (CMS Exs. 1-4). Petitioner has submitted 5 exhibits (P. Exs. 1-5).

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[1] Based on both the health and LSC survey findings, CMS cited additional deficiencies at lower scope and severity levels. CMS Exs. 1, 2. CMS also determined that the facility returned to substantial compliance on October 29, 2009. CMS Br. at 2. Petitioner does not challenge these deficiencies, so they are final and binding and establish that the facility was not in substantial compliance with program requirements. 42 C.F.R. § 498.20(b). They provide a sufficient basis for imposing a penalty. Act § 1819(h); 42 C.F.R. § 488.402.

II. Issues

I consider whether summary judgment is appropriate.

On the merits, I consider: 1) whether the facility was in substantial compliance with 42 C.F.R. §§ 483.25(h), 483.75, and the LSC; and 2) if the facility was not in substantial compliance with these requirements, whether its deficiencies pose immediate jeopardy to resident health and safety.

Except to challenge the immediate jeopardy finding (which led to CMS's imposing a higher-range penalty), Petitioner does not claim that the amount of the CMP is unreasonable, so that issue is not before me.

III. Discussion

A. CMS is entitled to summary judgment, because the undisputed evidence establishes that the facility failed to monitor and maintain the proper operation of its fire alarm system. As a result: 1) the resident environment was not as free of accident hazards as possible, as 42 C.F.R. § 483.25(h) required; 2) the facility was not administered in a manner that would effectively ensure that its residents maintain their highest practicable well-being and safety, as 42 C.F.R. § 483.75 required; and 3) the facility did not meet applicable provisions of the LSC.

Summary judgment. Summary judgment is appropriate here, because this case presents no issue of material fact, and its resolution turns on questions of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Livingston Care Ctr. v. United States Dep't of Health and Human Servs.*, 388 F.3d 168, 173 (6th Cir. 2004). *See also Illinois Knights Templar Home*, DAB No. 2274 at 3-4 (2009) (*citing Kingsville Nursing Ctr.*, DAB No. 2234 at 3-4 (2009)). Although Petitioner opposes summary judgment, it has not challenged a single material fact. Instead, it makes the wholly legal argument that the immediate jeopardy determination, like the noncompliance finding, "must be supported by substantial evidence on the administrative record as a whole." P. Br. at 6. Not only does this fail to raise a material fact, nothing in CMS's submissions even suggests that CMS disagrees with Petitioner's statement of that legal standard.

Regulatory requirements. 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. To achieve this goal, the facility must "ensure" that the resident's environment remains as free of accident hazards as possible. *Briarwood Nursing Ctr.*, DAB No. 2115, at 5 (2007); *Guardian Health Care Center*, DAB No. 1943, at 18 (2004) (*citing* 42 C.F.R. § 483.25(h)(2)).

The facility must also be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident. 42 C.F.R. § 483.75.

Finally, the facility must be designed, constructed, equipped, and maintained to protect the health and safety of its residents, personnel, and the public. In this regard, it must meet provisions of the LSC. Act § 1819(d)(2)(B); 42 C.F.R. § 483.70(a). The LSC is a set of fire protection requirements designed to provide a reasonable degree of safety from fires. Among other requirements, the LSC mandates that smoke barrier doors close automatically when the facility's alarm system is activated. CMS Ex. 2 at 2-3. Locked exit doors must unlock during the activation of the alarm system. CMS Ex. 2 at 345-46.[2]

Application of law to the undisputed facts. The parties agree that part of the LSC survey included a fire drill, which was conducted on September 14, 2009. During the drill, the facility's two smoke barrier doors did not close, and four of six exit doors on the facility's main residential level did not unlock. CMS Ex. 1 at 10; CMS Br. at 2; P. Br. at 1. The facility thereafter called in the fire alarm company, and service workers came out that same day to repair the equipment failure. P. Ex. 1 at 5.

Petitioner argues that it should not be held accountable for the system's failure, because, prior to the September 14 drill, it did not know, or have reason to know, that its system was not working properly. In fact, the undisputed evidence establishes otherwise. As Petitioner acknowledges, its system had been malfunctioning since at least July 3. A fire alarm service order, dated July 3, 2009, describes problems with door locks not releasing during a fire alarm. According to the order, the relay controlling the doors' magnetic locks did not work, or worked intermittently. CMS Ex. 1 at 13; *see* P. Ex. 1 at 5 (highlighting that the system required repairs on May 21, July 3, August 25, August 26, and August 31, 2009).

[2] Neither party cited the relevant provisions of the LSC, but they agree that these are LSC requirements.

The facility installed a new alarm panel on August 25-26, 2009. CMS Ex. 1 at 12-14; CMS Ex. 3.[3] However, that system soon required repair. On August 31, 2009, the alarm company workers found "several wires connected incorrectly." The system then required additional repairs on September 15. CMS Ex. 1 at 14 (asserting that workers "made corrections in panel and [junction] box cabinets to wiring and replaced relays to get system operational again."). Notwithstanding the problems it had with the alarm system after installing the new alarm panel, the facility did not test it by conducting a single fire drill. CMS Ex. 1 at 12; P. Ex. 1 at 5; P. Ex. 4 at 4 (noting prior to survey, the last fire drill was conducted on August 21, 2009).

Petitioner points to its having conducted an abundance of fire drills, but all were prior to its (apparently incorrectly) installing the new alarm panel. Petitioner admits that the new system did not function properly, requiring additional repairs on August 31. The facility thus had ample reason to suspect that its alarm system might malfunction. After all, repairs had been made before, with the system pronounced functional when it was not. Yet, the facility conducted no drills to test it. In this regard, the facility fell short of its regulatory obligations. As the Departmental Appeals Board (Board) explained in *Sunset Manor*:

> [The facility's] responsibility was not merely to have an alarm system installed and operational. That requirement is just one element of a facility's overarching obligation under section 483.70 to equip and maintain its facility in a manner that *actually* does "protect the health and safety of residents," as well as staff and the public. Hence, the facility must do more than merely hook up its fire alarm system . . . and hope for the best. It must take reasonable steps to ensure that its alarm system and associated protocols operated to achieve their intended purpose in the circumstances for which they were designed.

Sunset Manor, DAB No. 2155, at 11 (2008).

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[3] The facility failed to submit the new alarm panel for State Agency approval. Petitioner concedes that the system must be approved; however, Petitioner questions whether that approval must precede installation. Petitioner points out that it needed to make immediate repairs, so it did not have time for advance approval. P. Br. at 4. This may be, but weeks passed without the facility's notifying the state. Following the survey, the facility sent to the state agency the specifications for the replacement fire alarm panel, which were subsequently approved. P. Ex. 1 at 1 (Miller Affidavit ¶ 6). Of course, by the time they submitted the information, the new system had failed and been repaired.

Because the facility did not take the "reasonable step" of conducting at least one fire drill to ensure that its new alarm system operated properly, the facility did not ensure that the resident environment was as free of accident hazards as possible (42 C.F.R. § 483.25(h)), nor that all requirements of the LSC were met (*see* 42 C.F.R. § 483.70(a)). Further, these deficiencies establish that the facility was not administered in a manner that enabled it to use its resources effectively and efficiently to maintain the highest practicable well-being of its residents (42 C.F.R. § 483.75). The facility was therefore not in substantial compliance with Medicare requirements.

B. CMS's immediate jeopardy finding is not clearly erroneous.

Petitioner challenges the immediate jeopardy determination. It again argues that it could not have foreseen the alarm system's malfunction and points out that, after the alarm system malfunctioned, it quickly corrected the problems. In Petitioner's view, these factors preclude my finding immediate jeopardy.

Immediate jeopardy exists if a facility's noncompliance has caused or is likely to cause "serious injury, harm, impairment, or death to a resident." 42 C.F.R. § 488.301. CMS's determination as to the level of a facility's noncompliance (which would include an immediate jeopardy finding) must be upheld, unless it is "clearly erroneous." 42 C.F.R. § 498.60(c). The Board has observed repeatedly that the "clearly erroneous" standard imposes on facilities a "heavy burden" to show no immediate jeopardy, and has sustained determinations of immediate jeopardy where CMS presented evidence "from which '[o]ne could reasonably conclude' that immediate jeopardy exists." *Daughters of Miriam Ctr.*, DAB No. 2067 at 7, 9 (2007); *Barbourville Nursing Home*, DAB No. 1931 at 27-28 (2004) (*citing Koester Pavilion*, DAB No. 1750 (2000)).

Petitioner has not come close to meeting this standard. First, as the above discussion shows, Petitioner had ample notice that its alarm system might not function properly when needed, but did not once test its new system by conducting a fire drill. Second, that it promptly brought in workers to correct the system's problem may have justifiably limited the period of immediate jeopardy to one day; however, it neither eliminated the deficiency, nor decreased its scope and severity.

Indeed, Petitioner's failure to ensure that its new alarm system worked properly created a situation likely to cause serious injury, harm, impairment, or death to a resident. Because the smoke barrier doors would remain open during a fire, the fire and its accompanying smoke would have spread, unchecked, through the residences. And, because the exit doors remained locked and could not be opened, facility residents and staff could have been locked in a burning building. Because of this, I do not find clearly erroneous CMS's determination that the facility's failure to ensure that its alarm system worked properly posed immediate jeopardy to resident health and safety.

IV. Conclusion

For the reasons discussed above, I find that the facility was not in substantial compliance with the Medicare requirements. Its deficiencies posed immediate jeopardy to resident health and safety, and I affirm as reasonable the penalty imposed.

/s/
Carolyn Cozad Hughes
Administrative Law Judge