Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Saginaw Geriatrics Home
(CCN: 23-5442),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-15

Decision No. CR2262

Date: October 5, 2010

DECISION

Petitioner, Saginaw Geriatrics Home, is a long-term care facility located in Saginaw, Michigan, that participates in the Medicare program. In this case, the parties agree that the facility was not in substantial compliance with Medicare program requirements based on surveys completed May 14, 2009 and July 10, 2009. Because of the facility's substantial noncompliance, the Centers for Medicare and Medicaid Services (CMS) denied payment for new admissions from August 14 through September 2, 2009. The issue before me is whether the facility corrected its deficiencies prior to September 3, 2009, the date CMS determined it returned to substantial compliance.

CMS moves for summary judgment, which Petitioner opposes.

For the reasons discussed below, I find that CMS is entitled to summary judgment. The undisputed facts establish that the facility was not in substantial compliance prior to September 3, 2009, and that CMS properly denied payment for new admissions prior to that date.

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 survey completed May 14, 2009 and revisit completed July 10, 2009, CMS determined that the facility was not in substantial compliance with Medicare participation requirements, specifically 42 C.F.R. §§ 483.10(a) (Tag F152 – exercise of rights); 483.15(h)(2) (Tag F253 – housekeeping/maintenance); 483.35(c) (Tag F363 – menus and nutritional adequacy); 483.35(i) (Tag F371 – sanitary conditions); and 483.70(d)(1) (Tag F460 – resident rooms). CMS Ex. 5.[1]

Both the state survey agency and CMS advised Petitioner that CMS would impose a mandatory denial of payment for new admissions (DPNA), effective August 14, 2009, unless the facility achieved substantial compliance prior to that date. CMS Ex. 1 at 3, 9; *see* 42 C.F.R. § 488.417(b) (requiring imposition of a DPNA when the facility is not in substantial compliance 3 months after the last day of the survey identifying the noncompliance).

Petitioner did not challenge these survey findings but submitted plans of correction. CMS Ex. 1 at 10-13; CMS Exs. 2, 5.[2] In the plan it submitted following the July survey, Petitioner promised to correct its deficiencies by August 14, 2009. CMS Ex. 5.

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[1] Additional deficiencies cited during the May 14 survey were apparently corrected by the time of the July resurvey. *Compare* CMS Ex. 2 *with* CMS Ex. 5.

[2] CMS imposed a $1,500 per instance civil money penalty for the most serious of the deficiencies cited during the May survey. Because Petitioner waived its appeal, the penalty was reduced by 35%. CMS Ex. 1 at 10; 42 C.F.R. § 488.436(b).

CMS accepted the facility's plan of correction, and, on September 1, 2009, State Surveyor Cinda Romanow revisited the facility. At the outset, she determined that the facility remained out of substantial compliance with section 483.35(i) (sanitary conditions), because the facility's dishwasher did not consistently reach temperatures adequate to sanitize dishes. On the final day of the survey (September 3, 2009), however, the facility installed a chemical sanitization system. CMS Ex. 8; CMS Ex. 11 at 6-7 (Romanow Decl. ¶¶ 52-69). Based on this, CMS determined that the facility achieved substantial compliance with program requirements on September 3, 2009. However, because the facility was not in substantial compliance "3 months after the last day of the survey identifying noncompliance," CMS imposed the DPNA, effective August 14, as 42 C.F.R. § 488.417(b) required. CMS Ex. 8.[3]

Here, Petitioner appeals the imposition of a mandatory DPNA, contending that it corrected its deficiencies before ninety days had expired from the date of the initial citation of noncompliance (May 14, 2009). Hearing Request at 1.

The parties have filed their pre-hearing briefs (CMS Br.; P. Br.). With its brief, CMS submitted eleven exhibits (CMS Exhibits (Exs.) 1-11). Petitioner submitted 22 exhibits (P. Exs. 1-22). CMS subsequently filed a motion for summary judgment (MSJ), and Petitioner responded in a letter.

II. Issues

I consider whether summary judgment is appropriate. On the merits, the issue before me is whether the facility achieved substantial compliance prior to September 3, 2009.

III. Discussion

Summary judgment. Summary judgment is appropriate when a case presents no issue of material fact, and its resolution turns on questions of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Livingston Care Ctr. v. U. S. Dep't. of Health and Human Servs.*, 388 F.3d 168, 173 (6th Cir. 2004). *See Illinois Knights Templar Home*, DAB No. 2274 at 3-4 (2009) (*citing Kingsville Nursing Ctr.*, DAB No. 2234 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

[3] CMS has the authority to deny payment for new admissions whenever a facility is not in substantial compliance, and its determination to impose that remedy would not be reviewable. 42 C.F.R. §§ 488.417(a); 488.406(a); 488.408(g)(2). However, the DPNA would end if the facility achieves substantial compliance. 42 C.F.R. § 488.454(a).

burden of proof at trial." *Livingston Care Ctr.*, 388 F.3d at 173 (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. *See 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 and 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 . . . .

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

In examining the evidence for purposes of determining the appropriateness of summary judgment, I must draw all reasonable inferences in the light most favorable to the non-moving party. *Brightview Care Ctr.*, DAB No. 2132, at 2, 9 (2007); *Livingston Care Ctr.*, 388 F.3d at 172; *Guardian Health Care Ctr.*, DAB No. 1943, at 8 (2004); *but see Brightview*, DAB No. 2132 at 10 (noting 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.").

> ***CMS's is entitled to summary judgment, because the undisputed evidence establishes that the facility did not achieve substantial compliance prior to September 3, 2009.*** [4]

The facility must store, prepare, distribute, and serve food under sanitary conditions. 42 C.F.R. § 483.35(i).

The parties agree that, during the May and July surveys, the facility was not in substantial compliance with 42 C.F.R. § 483.35(i), because, among other deficiencies, its automatic dishwasher did not reach temperatures (160°F) that were high enough to sanitize the dishes. The facility did not adequately monitor dishwashing temperatures, testing only once daily instead of at every meal. CMS Ex. 5 at 6-8; *see* CMS Ex. 4 at 4.

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[4] I make this one finding of fact/conclusion of law.

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 and Rehab Ctr.*, DAB No. 2146 at 23 (2008); *Lake City Extended Care*, 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. § 488.456(e); *Hermina Traeye Mem'l Nursing Home*, DAB No. 1810 at 12 (*citing* 42 C.F.R. § 488.456(a) and (e)); *Cross Creek Care Ctr.*, DAB No. 1665 (1998).

CMS presents compelling evidence to establish that, prior to September 3, 2009, the facility's automatic dishwasher still failed to reach sanitizing temperatures. In her written declaration, Surveyor Romanow explains that, on September 2 at 9:50 a.m., she ran a temperature sensitive tape through the dishwasher. CMS Ex. 11 at 6 (Romanow Decl. ¶58). The tape turns black when the dishes' surface temperature reaches 160 degrees. To pass the test, the tape must turn completely black. CMS Ex. 11 at 3 (Romanow Decl ¶ 27). But when Surveyor Romanow ran the tape through the dishwasher, it did not change color at all; it came back clear. CMS Ex. 11 at 6 (Romanow Decl. ¶ 58). At 9:55 a.m., she ran two tapes through the machine, placing one on a plate at the front of the dish rack and one at the back. The machine failed both tests. The tape at the front emerged with a "slight black rim," and the tape at the back "was only slightly better." CMS Ex. 11 at 6 (Romanow Decl. ¶ 59). At 10:05 a.m., she ran a fourth tape, which also failed to turn completely black. CMS Ex. 11 at 6 (Romanow Decl. ¶ 60).[5]

CMS produces a September 2, 2009 memo from facility administrator Donald M. Mass, stating that, after routine testing, they found "a water temperature problem in the facility, and a booster heater for the dish machine is necessary." He told his staff not to operate the machine between 9:30 and 10:30 a.m. and to use a temperature tape on the first and final load cycles of the run. He emphasized that the strips must turn completely black to ensure that the proper temperature has been reached. CMS Ex. 10 at 3.

When Surveyor Romanow returned to the facility on September 3, she learned that the facility had converted the dishwasher into a low temperature machine that uses a chemical sanitization process. That day, the facility trained its staff, and they

[5] Although the cause of the low temperatures is not material to my decision, Surveyor Romanow suggests the facility's hot water heater was not adequate to meet dishwashing and bathing needs simultaneously. Resident's were showered between 9:30 and 10:30 a.m. CMS Ex. 11 at 6, 7 (Romanow Decl. ¶¶ 49, 50, 51, 61).

successfully demonstrated the new system. CMS Ex. 11 at 7 (Romanow Decl. ¶¶ 63, 64, 66, 67, 68); CMS Ex. 10 at 2; P. Ex. 20 at 1. Based on these undisputed facts, the facility did not return to substantial compliance until September 3. *See Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 751 (6th Cir. 2004) (affirming agency finding of substantial noncompliance where no dispute that, at the time of the survey, staff were unable to start the emergency generator).

Petitioner gratuitously claims to have achieved substantial compliance at an earlier date. As noted above, such a denial is insufficient to defeat an adequately supported summary judgment motion. *Illinois Knights Templar*, DAB No. 2274, at 4.

Petitioner comes forward with no evidence suggesting any dispute over the facts set forth by CMS. Instead, it produces two service reports, dated May 15, 2009 and June 1, 2009 – well before the July survey – showing that a serviceman twice checked and adjusted the water pressure for the dishwasher's rinse cycle. With respect to water temperature, he reported on June 1 that the "machine is running at 190 degrees." P. Exs. 17, 18; *see* P. Br. at 4. Drawing all inferences in the light most favorable to Petitioner, I accept, for purposes of summary judgment, that, on June 1, the machine's water temperature was sufficient, and the dishwasher functioned properly when the serviceman tested it. However, that finding is not material to the question of the facility's compliance as of August 14, particularly since (as Petitioner concedes) the machine consistently failed to reach the necessary sanitizing temperature (160°F) on July 10. On that date, the surveyor ran three tapes through the machine at 9:45 a.m. None reached 160°F. At 10:05, in the presence the facility administrator, she ran a fourth tape, which also failed to reach the necessary temperature. CMS Ex. 5 at 7.

Moreover, Petitioner submits additional documents that confirm the September 3 compliance date. A service order, dated September 3, 2009, shows that the facility added a sanitizer to the dishwasher on that day. P. Ex. 19. And, as noted above, a sign-in sheet shows that staff were trained to operate the machine on September 3, 2009. P. Ex. 20.

Finally, Petitioner complains that it would have solved its dishwasher problem prior to August 14, if the surveyor had earlier returned to the facility and expressed her dissatisfaction with its effectiveness. I note first that Petitioner signed and submitted its plan of correction on August 13, and the state agency received it on August 18, so surveyors could not possibly have revisited the facility before August 14. CMS Ex. 15 at 1. The surveyor arrived two weeks after receiving the plan, which is, by any standard, an expeditious response. In any event, the timing of a revisit survey is wholly within the discretion of the state and CMS and not reviewable in this forum. 42 C.F.R. § 488.308(c); *Cal Turner Extended Care Pavilion*, DAB No. 2030, at 13 (2006).

IV. Conclusion

The undisputed facts establish that the facility was not in substantial compliance prior to September 3, 2009, and CMS properly denied payment for new admissions from August 14 through September 2, 2009.

/s/
Carolyn Cozad Hughes
Administrative Law Judge