Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Valley View Health Center,
(CCN: 31-5368),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-907

Decision No. CR2395

Date: July 12, 2011

DECISION

I grant the motion of the Centers for Medicare and Medicaid Services (CMS) for summary judgment against Petitioner, Valley View Health Center. I sustain the per instance civil money penalty (CMP) of $5,000 and the per day CMP of $50 per day for the period of May 1 through May 9, 2010, for a total CMP amount of $5,450.

I. Background

Petitioner is a skilled nursing facility located in New Jersey. It participates in the Medicare program. Petitioner's participation in Medicare is governed by sections 1819 and 1866 of the Social Security Act (Act), as well as by implementing regulations at 42 C.F.R. Parts 483 and 488. Petitioner's hearing rights are governed by regulations at 42 C.F.R. Part 498.

On April 29, 2010, the New Jersey State Department of Health and Senior Services conducted a complaint survey of Petitioner to determine whether it was in compliance with Medicare participation requirements. The surveyors determined that, among other things, Petitioner was not complying substantially with certain Medicare requirements in

the area of nurse aide training, competency and registry verification and that Petitioner's noncompliance with these requirements constituted immediate jeopardy to resident health and safety.[1] Specifically, CMS determined that Petitioner was out of compliance with the Medicare requirements in the area of nurse aide training, competency and registry verification pursuant to 42 C.F.R. §§ 483.75(b), (e)(4) and (e)(5)-(7).

The surveyors determined that Petitioner failed to operate and provide services in compliance with all applicable federal, State and local laws, regulations and codes and with professional standards and principles that apply to professionals providing services in a long term care facility such as Petitioner's. At the time of the survey, Petitioner employed non-certified nurse aides. Petitioner also failed to ensure that seven out of eight non-certified nurse aides hired since January 14, 2010, were enrolled in a state-approved Nurse Aide Training and Competency Evaluation Program (NATCEP). The surveyors further determined that Petitioner failed to obtain Multi-State registry verification prior to employment for any of the 35 nurse aides hired from August 2009 through April 2010.

Petitioner timely requested a hearing challenging some of the deficiencies cited during the April 29, 2010 survey: Tag F 492 (Compliance with federal, State and local laws); and Tag F 495 (Nurse Aide Working less than four months-Training/Competency).[2] The parties filed pre-hearing briefs (P. Br.; CMS Br.) Petitioner submitted two exhibits

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[1] I will not review the immediate jeopardy finding. An Administrative Law Judge may review CMS's scope and severity findings (which include a finding of immediate jeopardy) only if: (1) a successful challenge would affect the range of the CMP; or (2) CMS has made a finding of substandard quality of care that results in the loss of approval of a facility's nurse aide training program. Here the penalty imposed is a per instance CMP, for which the regulations provide only one range ($1,000 to $10,000) so the level of noncompliance does not affect the range of the CMP. 42 C.F.R. § 488.438(a)(2). Nor does CMS's scope and severity finding affect approval of a nurse aide training program since the facility has been assessed a CMP of $5,000 or more which precludes state agency approval of a nurse aide training program. Act § 1819(f)(2)(B); 42 C.F.R. §483.151(b)(2)(iv).

[2] Petitioner did not specifically address the deficiency cited for Tag F 496 (Nurse Aide Registry Verification). The Statement of Deficiencies also cites five other deficiencies with scope and severity levels of D and F (Tags F 157, 164, 309, 493 and 494), but Petitioner did not contest them in its hearing request or discuss them in any of its later submissions. Nor did Petitioner contest CMS's determination to impose a CMP of $50 per day for the period of May 1, 2010 through May 9, 2010. Therefore, these unappealed deficiencies establish a basis for imposing a $ 50 per day CMP, the lowest CMP that may be imposed for that nine day period and I sustain CMS's imposition of that remedy without further discussion.

(P. Exs. 1-2); CMS submitted 21 exhibits (CMS Exs. 1-21). CMS included with its brief a Motion for Summary Judgment.

I initially set this matter for hearing but the parties requested a postponement. I granted the parties' request but I also reviewed CMS's motion for summary judgment and Petitioner's response to that motion (P. Response). CMS contended that the present matter turns on the interpretation of relevant federal and state law regarding the required use and training of nurse aides. While Petitioner's response argued that there were material factual disputes, it did not clearly articulate which, if any, facts are disputed, how they are material, and why in-person testimony would be necessary to resolve them. I agreed with CMS that this matter involves legal issues for which an in-person hearing is unnecessary. I concluded that this matter could be decided on the basis of the parties' written briefs and submissions and cancelled the hearing. I allowed Petitioner the opportunity to submit a supplemental brief which it did (P. Supp.).

II. Issues

I consider whether summary judgment is appropriate.

On the merits, I consider:

(1) Whether, at the time of the survey on April 29, 2010, the facility was in substantial compliance with Medicare requirements; and
(2) If the facility was not in substantial compliance, is the penalty imposed, a $5,000 per instance CMP reasonable?

III. Discussion

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. *Illinois Knights Templar Home*, DAB No. 2274 at 3-4 (2009), and cases cited therein.

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 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 ([E]ntry 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.").

A. CMS is entitled to summary judgment. The conclusion drawn from applying the applicable law to the undisputed evidence establishes that the facility was not in substantial compliance with 42 C.F.R. §§ 483.75(b), (e)(4) and (e)(5)-(7) .[3]

While Petitioner contends that there are disputes of fact present, there simply are no material facts in dispute here. Rather, this matter involves the parties' differing interpretations of the applicable law. In fact, Petitioner states in all of its submissions that it does not and cannot dispute that seven out of eight nurse aides hired since January 14, 2010 and working at Petitioner facility at the time of the survey were not "certified," and were not enrolled in a Nurse Aide Training and Competency Evaluation Program (NATCEP). Petitioner contends that the requirements are at best ambiguous and do not require that nurse aides be enrolled in a NATCEP on "day one" of employment. Petitioner agrees that enrollment in such a course by a non-certified nurse aide is a requirement within the first 120 days of employment. But Petitioner's position is that because there is such turnover of nurse aides and since it contends that a NATCEP takes only a few weeks at most to complete, its nurse aides were not always enrolled in a NATCEP program until such time as it appeared that they were going to last as regular employees. It claims that it still properly trained and supervised these employees, although it did not have at its facility an approved NATCEP. And, finally, Petitioner's

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

interpretation of the applicable law is that an uncertified nurse aide does not have to be enrolled in a NATCEP as of the date of employment as long as the nurse aide enrolls in and completes a NATCEP program before the completion of his or her 120th day of employment.[4] Petitioner further contends that no residents were harmed or injured as a result of its practice.

I find that the applicable law is unambiguous. As a result I conclude that Petitioner was not in compliance with Medicare requirements at 42 C.F.R. § 483.75(b) and 42 C.F.R. § 483.75(e)(4).

New Jersey statutes and regulations regulate the use of nurse aides in long-term care facilities. The relevant section of the New Jersey Administrative Code provides, at N. J. ADMIN. CODE § 8-39-43.1:

> **§ 8-39-43.1 Nurse aide competency**
>
> (a) An individual who meets any of the following criteria shall be considered by the Department to be competent to work as a nurse aide in a licensed long-term care facility in New Jersey:
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> 1. Has a currently valid nurse aide in long-term care facilities certificate and is registered in good standing on the New Jersey Nurse Aide Registry; or
> 2. Has been employed for less than 120 days and is currently enrolled in an approved nurse aide in long term care facilities training course and scheduled to complete the competency evaluation program (skills and written/oral examination) within 120 days of employment; or
> 3. Has been employed for no more than 120 days, has completed the required training specified in (a) 2, above, and has been granted a conditional certificate by the Department while awaiting clearance from the criminal background investigation conducted in accordance with N.J. ADMIN. CODE 8:43I.

[4] Petitioner contends that a non-certified aide in its employ on April 29, 2010 for less than 100 days could complete an NATCEP before his or her 120th day of employment as these courses take only several hours to complete and are typically started and completed over one to three weeks. The State requirements for a nurse aide training program require 90 hours of training: 50 hours of classroom instruction and 40 hours of clinical experience. N.J. ADMIN. CODE § 8-39-43.10(b). At the very least, even assuming that someone enrolled in such a program attended full-time, it would require at least two and one-half weeks to complete the course.

Moreover, 42 C.F.R. § 483.75(e)(4) provides that the facility must not use any individual who has worked less than four months as a nurse aide unless the individual is a fulltime employee in a State-approved training and competency evaluation program, has demonstrated competence through satisfactory participation in a State-approved nurse aide training and competency evaluation program, or because the individual met certain deeming requirements not relevant here for a Certified Nurse Aide. 42 C.F.R. § 483.75(e)(5)-(7) further requires that, before allowing an individual to serve as a nurse aide, a facility must receive registry verification that the individual has met competency evaluation requirements unless the individual is a full-time employee in a NATCEP approved by the State or the individual can prove that he or she has recently successfully completed a NATCEP or competency evaluation program approved by the State and has not yet been included in the registry.

I do not find any of these regulations to be ambiguous. They clearly require that any non-certified nurse aide employed by a facility must be currently enrolled in a NATCEP and must complete that program within 120 days of employment. This means enrolled as of the date of hire. Interpreting the regulations as Petitioner would have me do ignores the clear goal and purpose for the requirements in the first instance: to ensure that nursing and nursing related services provided to vulnerable, elderly and frail nursing home residents are provided by competent employees. This is not just a State requirement but a federal requirement. In fact, section 1819(b)(5) of the Social Security Act imposes as a requirement for any long term care facility participating in the Medicare program that any nurse aide employed by that facility must have certain required training. The interpretation set forth by Petitioner turns these requirements upside down, and having done so, would invite dangerous situations. It would mean that nurse aides who have not been certified and who are not yet currently enrolled in an approved NATCEP program could provide services to residents as long as they somehow enroll and complete a NATCEP before her or his 120th day of employment. Petitioner's interpretation frankly would lead to illogical and potentially perilous results.

Petitioner may argue that it provided training and supervision but even if it did, its training and supervision was not the same as or equal to the kind of training provided by an approved NATCEP in New Jersey. And Petitioner has not shown that there was anything preventing Petitioner from setting up and seeking approval of a NATCEP from the State if it wished to pursue its own training. But, in order to receive approval for a New Jersey NATCEP, each student is required to be under the supervision of the registered professional nurse instructor **at all times** when providing resident care as part

of the student's clinical experience in the facility. N.J. ADMIN. CODE 8.39-43.10(p).[5] Here, Petitioner admits that the non-certified nurse aides work under the supervision of others, including RNs, several LPNs and their CNA supervisor but it does not contend that supervision of non-certified nurse aides was limited to the kind of supervision required under the state law for a state approved NATCEP and that the non certified aides were supervised by a registered professional nurse instructor at all times when providing resident care.

Petitioner disputes that the non-nurse aides were properly supervised by registered nurses. Even accepting that fact as true, Petitioner failed to ensure that nurse aides hired and who had worked less than 120 days were currently enrolled in a state approved NATCEP prior to rendering resident care.[6]

Furthermore, CMS's interpretation that a nurse aide must be currently enrolled in a NATCEP and complete that program within 120 days of employment is further supported by the regulations at 42 C.F.R. § 483.75(e)(5)-(7). That regulation provides as follows:

> *(e) Required training of nurse aides.*
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> * * * *
>
> *(5) Registry verification.* Before allowing an individual to serve as a nurse aide, a facility must receive registry verification that the individual has met competency evaluation requirements unless—
>
> *(i)* The individual is a full-time employee in a training and competency evaluation program approved by the State; or
> *(ii)* The individual can prove that he or she has recently successfully completed a training and competency evaluation program or competency evaluation program approved by the State and has not yet been included in the registry. Facilities must follow up to ensure that such an individual actually becomes registered.

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[5] N.J. ADMIN. CODE 8.39-43.10(m) requires a nurse aide training program instructor/evaluator among other things to be currently licensed as a registered professional nurse in New Jersey, possess at least three years of full-time or full-time equivalent experience in a licensed health care facility and one year as a registered professional nurse in a licensed long term care facility and have completed a training workshop offered by New Jersey for instructors/evaluators. Petitioner does not contend that its training of non-certified nurse aides was provided only by individuals with such qualifications.

[6] On the date of the survey, April 29, 2010, one of the nurse aides providing care, nurse aide 3, informed the surveyor that she had been working at the facility since January 2010 (specifically, January 14, 2010) yet she still was not currently enrolled in a NATCEP. CMS Ex. 6 at 5.

> *(6) Multi-State registry verification.* Before allowing an individual to serve as a nurse aide, a facility must seek information from every State registry established under sections 1819(e)(2)(A) of the Act . . .the facility believes will include information on the individual.
>
> *(7) Required retraining.* If, since an individual's most recent completion of a training and competency evaluation program, there has been a continuous period of 24 consecutive months during none of which the individual provided nursing or nursing-related services for monetary compensation, the individual must complete a new training and competency evaluation program or a new competency evaluation program.

The regulation here makes it abundantly clear that **before** an individual can serve as a nurse aide, the facility must verify through nurse registries that the nurse aide has met all competency evaluation requirements unless that individual is currently enrolled and employed full time training and competency program approved by the State or has successfully completed such a program and has not yet been included in the registry. The facility, in the latter case, still must continue to follow up to ensure that such an individual actually becomes registered. Therefore, if I were to accept Petitioner's interpretation, I would have to ignore the rest of the applicable regulatory requirements. I am bound by all applicable regulations and appropriate regulatory construction requires that all parts of a regulation be read together. Doing so here, the only rational interpretation is that a non-certified nurse aide must be enrolled in a NATCEP on her or his date of hire and must complete that program within 120 days of employment.

I also find that Petitioner did not meet the requirements under 42 C.F.R. § 483.75(e)(5)-(7). The surveyors reviewed Petitioner's records and found that it failed to obtain Multi-State registry verification prior to employment for 35 of 35 nurse aides hired from August 2009 through April 2010. CMS Ex. 1 at 18. Petitioner fails even to address this deficiency or to attempt a rebuttal of it. Therefore, I conclude that Petitioner was not in substantial compliance with this requirement.

B. The penalty imposed is reasonable.

I next consider whether the $5,000 per instance CMP is reasonable by applying 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); *Community Nursing Home*, DAB No. 1807 at 22 *et seq*. (2002); *Emerald Oaks*, DAB No. 1800 at 9 (2001); *CarePlex of Silver Spring*, DAB No. 1638 at 8 (1999).

CMS has imposed just one $5,000 per instance CMP, which is in the middle of the penalty range ($1,000-$10,000). 42 C.F.R. §§ 488.408(d)(iv), 488.438(a)(2). On the other hand, the penalty is modest considering what CMS might have imposed. *See Plum City Care Ctr.*, DAB No. 2272 at 18-19 (2009) (Even a $10,000 per instance CMP can be "a modest penalty when compared to what CMS might have imposed.").

CMS does not cite facility history as a factor that justifies a higher CMP.

With respect to its financial condition, Petitioner has submitted no financial documents, such as tax returns, financial statements, or audits to establish its financial condition. It merely states that the CMP imposed is "extremely high for a rural 45 bed facility in which no patients were harmed and the facility acted promptly to remedy the deficiencies." P. Supp. at 11.

However, that a CMP imposes "financial burden" or as Petitioner contends, is "extremely high" does not make it unreasonable. In fact, a CMP is supposed to impose a financial burden significant enough to compel corrective action. In any event, the standard for determining whether a CMP is reasonable based on the facility's financial condition requires the facility to show that it lacks "adequate assets to pay the CMP without having to go out of business or compromise resident health and safety." *Sanctuary at Whispering Meadows*, DAB No. 1925 at 19 (2004); *Guardian Care Nursing and Rehab. Ctr.*, DAB No. 2260 at 9-10 (2009). Petitioner does not claim this degree of financial insolvency. Therefore, its financial condition does not render the CMP unreasonable.

With respect to the remaining factors, I consider the severity of the deficiencies significant enough to warrant at least this relatively modest penalty. Here, there is no dispute that Petitioner used non-certified nurse aides without training, without enrollment in a certified nurse aide training and competency program and without proper supervision, and, by its own admission, had done so for years. Moreover, Petitioner did not dispute that it did not failed to obtain Multi-State registry verification prior to

employing 35 nurse aides hired from August 2009 through April 2010. These failures evidence significant disregard for the residents' safety, for which the facility is culpable.

I therefore find reasonable the $5,000 per instance CMP.

/s/
Richard J. Smith
Administrative Law Judge