Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Meadowlark Hills,
(CCN: 175174),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-2437

Decision No. CR4885

Date: July 7, 2017

DECISION

Petitioner, Meadowlark Hills, is a skilled nursing facility located in Manhattan, Kansas, that participates in the Medicare program as a provider of services. On March 6, 2015, it underwent its annual state survey, followed a few weeks later by a federal survey. After each survey, the Centers for Medicare & Medicaid Services (CMS) determined that the facility was not in substantial compliance with Medicare program requirements and imposed remedies, including a civil money penalty (CMP) and denial of payment for new admissions. Petitioner has not challenged the survey findings and has paid the CMP.

The sole issue before me is whether the CMS may impose remedies for deficiencies cited during a federal "comparative" survey. I conclude that it may and grant summary judgment in favor of CMS.

Background

This case rests on a purely legal question, yet neither party moved for summary judgment. In an order dated April 21, 2017, I invoked Rule 56 of the Federal Rules of Civil Procedure and advised the parties that I had the authority to enter summary

judgment on my own motion. I identified the material facts that I deemed were not in dispute and gave the parties an opportunity to respond. Order (April 21, 2017); *see Livingston Care Ctr. v. U.S. Dep't of Health and Human Services*, 388 F. 3d 168, 172 (6th Cir. 2004).

Petitioner responded that it did "not object" to filing a motion for summary judgment and would do so if given permission. I found this unresponsive and confusing, particularly since my initial order in this case plainly states that a "party may file a motion for summary judgment without requesting leave." Acknowledgment and Prehearing Order at 4 ¶ 8 (June 9, 2015); *see* Civil Remedies Procedures at 18 ¶ 19(a)(i) (advising that "any party may file a motion for summary judgment at any time prior to the scheduling of a hearing").

CMS responded that (due to an apparent glitch in the electronic filing system) it did not receive notice of my order until after the deadline for responding had passed. Nevertheless, CMS understood that I intended to consider the case on summary judgment after giving the parties an opportunity to comment. CMS agreed that the case could be decided in this fashion.

Having satisfied the requirements of Rule 56, I decide this matter on my own motion.

Discussion

> ***CMS may impose remedies based on state or federal survey findings. Because the facility was not in substantial compliance with Medicare program requirements from March 6 through May 2, 2015, CMS may impose remedies for that period, including a denial of payment for new admissions from April 5 through May 2, 2015.***[1]

The surveys. In this case, on March 6, 2015, surveyors from the Kansas Department for Aging and Disability Services (state agency) completed the facility's annual health survey. Based on the survey findings, CMS determined that the facility was not in substantial compliance with multiple program requirements, specifically:

- 42 C.F.R. § 483.10(b)(11) (Tag F157) (resident rights – notification of changes) at scope and severity level D (isolated instance of substantial noncompliance that causes no actual harm with the potential for more than minimal harm);

- 42 C.F.R. § 483.15(f)(1) (Tag F248) (quality of life: activities) at scope and severity level D;

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

- 42 C.F.R. § 483.20(k)(3)(ii) (Tag F279) (resident assessment: comprehensive care plans) at scope and severity level D;

- 42 C.F.R. §§ 483.20(d)(3) and 483.10(k)(2) (Tag F280) (resident assessment: coordination and comprehensive care plans) at scope and severity level E (pattern of noncompliance that causes no actual harm with the potential for more than minimal harm);

- 42 C.F.R. § 483.25(c) (Tag F314) (quality of care: pressure sores) at scope and severity level G (isolated instance of substantial noncompliance that causes actual harm that is not immediate jeopardy);

- 42 C.F.R. § 483.25(h) (Tag F323) (quality of care – accident prevention) at scope and severity level D;

- 42 C.F.R. § 483.35(i) (Tag F371) (dietary services: sanitary conditions) at scope and severity level F (widespread substantial noncompliance that causes no actual harm with the potential for more than minimal harm); and

- 42 C.F.R. § 483.65 (Tag F441) (infection control) at scope and severity level F.

CMS Exhibit (Ex.) 29; *see* Petitioner's Brief (P. Br.) at 1-2.

Petitioner did not appeal the deficiency findings but submitted a plan of correction and asked for a revisit survey. P. Ex. D; P. Br. at 2.

Thereafter, CMS sent a team of federal surveyors to the facility to perform what the surveyors characterize as a "federal comparative survey." Its purposes were: 1) to assess the state survey team's March 6 survey performance; and 2) to establish whether the facility was then in substantial compliance with program requirements. CMS Ex. 54 at 1-2 (Johnson Decl. ¶¶ 3, 4); *see also* CMS Exs. 51, 52, 53. The federal team completed its survey on March 27, 2015, and, based on those survey findings, CMS determined that the facility was not in substantial compliance with the following program requirements:

- 42 C.F.R. § 483.10(b)(11) (Tag F157) (resident rights: notification of changes) at scope and severity level D (**repeat deficiency**);

- 42 C.F.R. § 483.10(f)(2) (Tag F166) (resident rights: grievances) at scope and severity level D (**new deficiency**);

- 42 C.F.R. §§ 483.13(c)(1)(ii)-(iii) and 483.13(c)(2)-(4) (Tag F225) (staff treatment of residents: investigate and report allegations of abuse) at scope and severity level E (**new deficiency**);

- 42 C.F.R. § 483.15(h)(2) (Tag F253) (quality of life: environment) at scope and severity level E (**new deficiency**);

- 42 C.F.R. §§ 483.20(d) and 483.20(k)(1) (Tag F279) (resident assessment: comprehensive care plans) at scope and severity level D (**repeat deficiency**);

- 42 C.F.R. §§ 483.20(d)(3) and 483.10(k)(2) (Tag F280) (resident assessment: coordination and comprehensive care plans) at scope and severity level D (**repeat deficiency**);

- 42 C.F.R. § 483.20(k)(3)(i) (Tag F281) (resident assessment: professional standards of quality) at scope and severity level D (**new deficiency**);

- 42 C.F.R. § 483.25(a)(2) (Tag F311) (quality of care: activities of daily living – appropriate services) at scope and severity level D (**new deficiency**);

- 42 C.F.R. § 483.25(a)(3) (Tag F312) (quality of care: activities of daily living – necessary services) at scope and severity level D (**new deficiency**);

- 42 C.F.R. § 483.25(i) (Tag F325) (quality of care: nutrition) at scope and severity level D (**new deficiency**);

- 42 C.F.R. § 483.25(*l*) (Tag F329) (quality of care: unnecessary drugs) at scope and severity level D (**new deficiency**);

- 42 C.F.R. § 483.35(i) (Tag F371) (dietary services: sanitary conditions) at scope and severity level E (**repeat deficiency**);

- 42 C.F.R. § 483.60(c) (Tag F428) (pharmacy services: drug regimen review) at scope and severity level D (**new deficiency**);

- 42 C.F.R. § 483.60(b), (d), and (e) (Tag F431) (pharmacy services: consultation, labeling, and storage) at scope and severity level E (**new deficiency**); and

- 42 C.F.R. § 483.70(c)(2) (Tag F456) (physical environment: space and equipment) at scope and severity level E (**new deficiency**).

CMS Ex. 1; P. Br. at 3. Petitioner does not challenge any of these deficiency findings and, in fact, explicitly concedes that the facility was not in substantial compliance. P. Br. at 4 ("There was no reason to expect the facility to be back in compliance. . ."). It submitted another plan of correction, indicating that it would correct its deficiencies and return to substantial compliance as of May 3, 2015. CMS Ex. 40; P. Br. at 4.

A state survey team revisited the facility on May 5, 2015. Based on their findings, CMS determined that the facility returned to substantial compliance on May 3, 2015. CMS Ex. 3.

Remedies. CMS imposed against the facility a CMP of $250 per day from March 6 through May 2, 2015, and denial of payment for new admissions effective March 27, ending May 3, 2015. CMS Exs. 2, 3, 5.

Petitioner's argument. Although it concedes that it was not in substantial compliance with program requirements and did not achieve substantial compliance until May 3, 2015, Petitioner argues that CMS may not impose remedies based on a federal "comparative" survey and challenges the denial of payment for new admissions for the period of April 5 through May 2, 2015 (a total of 28 additional days).

In support of its argument, Petitioner points to provisions from the Medicare State Operations Manual that discuss "federal monitoring surveys," which include "comparative surveys." According to Petitioner, a "comparative survey" is an assessment tool for measuring state survey performance (which is true) but does not permit CMS to impose remedies against a facility for being out of substantial compliance (which is not true).

Petitioner misunderstands the nature and purpose of the State Operations Manual and misinterprets the sections addressing federal surveys.

Manual provisions. With respect to the specific sections upon which Petitioner relies, section 4157 of the Medicare State Operations Manual defines "federal monitoring survey" and explains its purpose. The definition is broad: a survey performed by the CMS regional office or a designated contractor of any participating provider or supplier. SOM § 4157A. The manual lists four survey purposes: 1) to monitor the state agency's performance; 2) to identify surveyor training and technical assistance needs; 3) to identify problems that surveyors and/or providers encounter in implementing federal regulations; and 4) to require correction of problems existing in individual facilities or in individual surveys. The manual further defines a "comparative survey" as a federal survey conducted within 60 days (and preferably within 30 days) of the state survey to assess the state agency's performance in interpreting, applying, and enforcing federal requirements. SOM § 4157D.

It is well-settled that manual provisions provide useful guidance to the state survey agencies and may even include CMS's interpretations of applicable law, but they do not constitute enforceable, substantive rules. *Beverly Health & Rehabilitation Services v. Thompson*, 223 F. Supp. 2d at 99-106 (D.D.C. 2002); *Oakwood Community Ctr.*, DAB No. 2214 at 16 (2008); *Aase Haugen Homes, Inc.*, DAB No. 2013 at 15 (2006). I see nothing in section 4157's short definitions to suggest that they were intended to limit CMS's authority to impose remedies whenever any federal survey discloses substantial noncompliance with program requirements. If I did, I would disregard the manual provision as inconsistent with the statute and regulations, which explicitly authorize CMS to impose remedies based on federal survey findings. I am, after all, bound by the statute and regulations.

Statute and regulations. 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. The state agency must also investigate all complaints. Act § 1819(g)(4).

The Secretary also conducts his own surveys. By statute, he surveys a representative sample of skilled nursing facilities within two months of the date of the state surveys. Act § 1819(g)(3)(A). Such a survey is referred to as a "validation survey" and its purpose is to monitor the state survey agency's performance. 42 C.F.R. § 488.301. In the case of a validation survey, *the Secretary's determination as to the facility's noncompliance is binding* and takes precedence over a state agency's certification of compliance. Act § 1819 (g)(3)(A); 42 C.F.R. § 488.330(a)(1)(ii); *see* 42 C.F.R. § 488.452.

Whenever the Secretary has reason to question a particular skilled nursing facility's compliance with program requirements, he may conduct his own survey, and, based on that survey, "make independent and binding determinations" concerning the extent to which the facility meets program requirements. Act § 1819(3)(D).

The statute also gives the Secretary broad authority to impose remedies *based on his own findings* or, pursuant to the state agency's recommendation. Act § 1819(g)(5)(h)(2)(A); 42 C.F.R. § 488.402(b); *see* 42 C.F.R. § 488.402(c) (giving CMS the authority to impose remedies if a facility is not in substantial compliance) 42 C.F.R. § 488.402(a) (explaining that CMS imposes remedies "to ensure prompt compliance with program requirements.").

A facility may not appeal the choice of remedy or the factors CMS considered in selecting the remedy. 42 C.F.R. § 488.408(g)(2).

Thus, without distinguishing among the categories of federal surveys, the statute and regulations give CMS broad authority to impose remedies based on federal survey findings. Nothing in the State Operations Manual diminishes this authority. As the Departmental Appeals Board has noted in a similar context, "[f]or CMS to act independently to confirm or overturn the findings underlying a state survey recommendation . . . protects beneficiaries. . . . [the Board] would be loath to read into the law some prohibition against CMS taking that course *absent a clear provision unambiguously imposing it*." *Big Bend Hospital Corp.*, DAB No. 1814 at 6 (2002) (emphasis added). In *Big Bend*, the Board upheld CMS's authority to determine a hospital's effective date of Medicare enrollment based on a type of federal survey that was not even mentioned in the State Operations Manual.

Conclusion

Because the facility was not in substantial compliance with Medicare program requirements, CMS appropriately imposed remedies for its period of substantial noncompliance. I therefore grant summary judgment in favor of CMS and sustain its denial of payment for new admissions through May 2, 2015.

/s/
Carolyn Cozad Hughes
Administrative Law Judge