Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Grace Living Center - Northwest OKC,
(CCN: 37-5209),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-748

Decision No. CR3347

Date: August 27, 2014

DECISION

I grant summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS) and against Petitioner, Grace Living Center - Northwest OKC. I sustain CMS's determination to impose the following remedies against Petitioner.

- A per day civil money penalty of $4550 for one day, October 31, 2013.
- Per day civil money penalties of $50 for each day of a period beginning on November 1, 2013 and running through January 6, 2014.
- Denial of payment for all new Medicare admissions for each day of a period beginning December 4, 2013 and running through January 6, 2014.

I. Background

Petitioner is a skilled nursing facility doing business in the State of Oklahoma. It filed a hearing request in order to challenge the remedies that I cite in the opening paragraph of this decision. CMS moved for summary judgment, filing a brief and exhibits that it

identified as CMS Ex. 1 – CMS Ex. 7. Petitioner opposed the motion and filed exhibits that it identified as P. Ex. 1 – P. Ex. 8. I receive the parties' exhibits into the record for purposes of deciding CMS's motion.

II. Issues, Findings of Fact, and Conclusions of Law

A. Issues

The sole issue that I must decide is whether Petitioner was substantially noncompliant with Medicare participation requirements between November 12, 2013 and November 25, 2013.

This case arises from compliance surveys that were conducted at Petitioner's facility on November 1, 2013 (November 1 survey) and November 25, 2013 (November 25 survey).[1] The surveyors found Petitioner to be noncompliant with Medicare participation requirements at each survey. Petitioner does not dispute that it was noncompliant nor does it dispute the level of its noncompliance at the November 1 survey (immediate jeopardy). Furthermore, Petitioner does not deny that it was noncompliant with Medicare participation requirements between November 25, 2013 and January 6, 2014. Petitioner's argument is that it attained compliance with Medicare participation requirements effective November 12, 2013 and remained compliant until the November 25 survey. Finally, Petitioner does not dispute that the remedies that CMS imposed against it, including civil money penalties and a denial of payment for new admissions, are reasonable or within CMS's authority to impose assuming that it was noncompliant.

B. Findings of Fact and Conclusions of Law

The undisputed facts are as follows. On November 25, 2013, Petitioner filed a plan of correction with the Oklahoma State Department of Health (OSDH) addressing the immediate jeopardy level noncompliance that was identified at the November 1 survey. CMS Ex. 3. That plan included several steps that Petitioner pledged to take in order to assure that the deficiency would be abated. These steps included the following:

> Random daily audits will be conducted by the [Director of Nursing], administrator and/or designee for 30 days and findings will be reported to the Quality Assurance

[1] The immediate jeopardy-level noncompliance that was identified at the November 1 survey relates to an incident in which a resident of Petitioner's facility drank cleaning fluid. The surveyors found that Petitioner's staff left dangerous chemicals such as cleaning fluid and hand sanitizer unattended in unlocked carts to which residents of the facility had access. CMS Ex. 1 at 5-9.

> Committee. The Quality Assurance Committee will then determine further interventions if needed to ensure compliance.

CMS Ex. 3 at 3. The quoted part of the plan contained two critical elements for attaining compliance. There would be daily audits to assure that corrections were being implemented. And, just as critical, those audits would be reviewed and assessed by Petitioner's Quality Assurance Committee. In other words, the audits would be conducted for purposes of obtaining evidence of compliance and the committee would evaluate the findings made at the audits in order to assure that corrections were being implemented.

Petitioner envisioned that this process would take 30 days to complete. That is why it represented specifically that the audits and assessments would last for a 30-day period.

It is obvious that Petitioner did not complete by November 12, 2013 the essential corrective actions that it had represented it would implement over a period of 30 days. It could not possibly have done so, because assuming that Petitioner began its corrective actions as of the determination of immediate jeopardy on November 1, its *own plan* envisioned a 30-day period of audits and assessments. Petitioner has not offered any explanation of how it could have completed or did complete its plan in 12, rather than 30, days.

Petitioner now argues that there is a fact dispute as to whether it attained compliance on November 12, as it contends, or remained noncompliant through November 25, when a re-survey found additional instances of noncompliance. Petitioner predicates its arguments on an OSDH certification of November 12 as the compliance date plus evidence that it contends contains facts that support a finding of a November 12 compliance date. I find that Petitioner's assertions do not raise a dispute of material fact.

Petitioner hangs its argument primarily on a re-survey of its facility that OSDH completed on January 31, 2014. P. Ex. 1. In the re-survey report the surveyor notes – without any explanation whatsoever – that on November 12, 2013, Petitioner corrected the deficiency identified at the November 1 survey. *Id.* The surveyor makes no reference to Petitioner's plan of correction nor does the surveyor offer any explanation at all as to how Petitioner completed 30 days of audits and assessments in 12 days.[2] *Id.*

[2] The plan of correction shows a completion date for the audits and committee meetings of November 12, 2013. CMS Ex. 3 at 3 and 12. However, the plan itself specifies that the audits and meetings would continue for 30 days. I find that the schedule of audits and meetings set forth in the plan is determinative of the plan's intent because it obviously would have been impossible for Petitioner to complete 30 days of audits and committee meetings by November 12, 2013.

It is irrelevant that OSDH might have said that Petitioner attained compliance by November 12 if there is no evidence to back up that conclusion. CMS is not bound by OSDH's findings. It has the ultimate authority to decide issues of compliance and noncompliance and its determination of failure to attain compliance takes precedence over any findings that OSDH makes. 42 C.F.R. § 488.452(a)(2).

It might be a different story if OSDH, at its January 31 survey, had obtained evidence that Petitioner actually attained compliance on November 12, 2013 and Petitioner were now to offer that evidence as proof that there is a legitimate dispute as to whether, by November 12, Petitioner did all that it represented it would do. There, I would not accept OSDH's conclusion as binding CMS, but I would nevertheless look closely at the underlying proof. However, Petitioner did not offer such evidence. Petitioner provided nothing to show how OSDH could have concluded that Petitioner attained compliance without completing the audits and assessments that Petitioner represented as a necessary prerequisite for compliance.

Petitioner says that its exhibits, P. Ex. 1 – P. Ex. 8, contain evidence that it attained compliance as of November 12. However, Petitioner cites to nothing in those exhibits that raises a genuinely disputed issue of material fact. Indeed, Petitioner refers to these exhibits only in passing and it says merely that the exhibits raise disputed issues of fact without explaining exactly what those fact disputes might be.

Nevertheless, I have examined P. Ex. 1 – P. Ex. 8 and I find nothing in these exhibits that addresses CMS's central contention that Petitioner could not have completed the necessary audits and assessments by November 12 after representing explicitly that it would take 30 days to do that. P. Ex. 1 and P. Ex. 2 are reports of surveys completed after November 12 that do not address the issue of audits at all. I have already explained that P. Ex. 1, while it certifies Petitioner as having attained compliance on November 12, 2013, contains no findings that would substantiate that certification.

P. Ex. 3 and P. Ex. 4 are records of in-service training that Petitioner gave to its staff. In-service training may have been a necessary element of Petitioner's corrective action but Petitioner offers no evidence to show that such training *substitutes* for the audits and assessments that Petitioner averred it would perform. Indeed, Petitioner doesn't even assert that contention.

P. Ex. 5 is the minutes of Petitioner's Quality Assurance Committee for a single day, November 12, 2013. The exhibit establishes that, on that date, the committee discussed issues related to the immediate jeopardy level noncompliance that was found at the November 1 survey. The exhibit says nothing at all about why subsequent audits and committee meetings would be unnecessary and so, does not evidence or even suggest that Petitioner completed its promised corrections ahead of schedule.

P. Ex. 6 is a 235-page exhibit that Petitioner does not discuss at all in its brief. It consists of a series of documents that are headed with the term "compliance rounds" and the documents appear to be reports of checks that staff made to assure that the facility safely stored potentially hazardous chemicals. It appears to consist of the audits that were promised in Petitioner's plan of correction. The documentation establishes that Petitioner's staff was conducting compliance audits for weeks after November 12, 2013. The exhibit contains "compliance rounds" reports that are for dates in January 2014.

The "compliance rounds" reports do not allow for an inference that Petitioner attained compliance by November 12, 2013. To the contrary, the reports allow only for the inference that Petitioner found it necessary to continue compliance audits *well after* November 12, precisely what it represented would be necessary in its plan of correction.

P. Ex. 7 is a copy of the November 1 survey report. It identifies Petitioner's noncompliance but says nothing at all about correction of noncompliance.

P. Ex. 8 is an affidavit signed by Amber Nowling, R.N., Petitioner's director of clinical services. In her affidavit Ms. Nowling avers that she attended Petitioner's November 12, 2013 Quality Assurance Committee meeting. She discusses the meeting. However, she does not aver that a determination was made then – or ever – that this meeting would obviate the need for the subsequent meetings that Petitioner promised in its plan of correction. Nor does Ms. Nowling explain why subsequent meetings would be unnecessary, particularly in that Petitioner obviously had determined that additional "compliance rounds" would be needed after November 12.

Ms. Nowling also asserts that an employee of OSDH told her that OSDH had found that Petitioner attained compliance by November 12. This adds nothing to the evidence because her assertion merely reiterates what is stated in P. Ex. 1. As I have found, the fact that OSDH may have found compliance as of November 12 is not meaningful absent evidence that Petitioner actually attained compliance by that date. Nothing supplied by Petitioner explains how it could have avoided completing the promised audits and committee meetings and still attained compliance.

The $4550 civil money penalty imposed by CMS for immediate jeopardy level noncompliance on November 1, 2013 is not at issue. The $50 daily penalty amount for non-immediate jeopardy level noncompliance is not at issue either, because $50 is the minimum daily penalty amount that CMS may impose for noncompliance that is substantial but not at the immediate jeopardy level. 42 C.F.R. § 488.438(a)(1)(ii). Petitioner asserts that $50 daily penalties may not be imposed for the period of November 12 – 25, 2013 because it alleges that it was in substantial compliance on those dates.

However, I find that there is no genuinely disputed material fact as to Petitioner's noncompliance on the dates in question and, therefore, imposition of $50 penalties on each of those dates is lawful.

Finally, CMS is authorized to impose denial of payment for new admissions for each day of the December 4, 2013 – January 6, 2014 period. That remedy is lawful even if I were to find a dispute as to Petitioner's compliance during the November 12 – 25, 2013 period. There is no dispute that Petitioner failed to comply substantially with Medicare participation requirements during the period between December 4, 2013 and January 6, 2014. Petitioner has not challenged CMS's noncompliance findings for that period. CMS is authorized to impose the remedy of denial of payment for new admissions for each day that a facility is noncompliant. 42 C.F.R. § 488.417(a). That authority is based on the noncompliance that is present on the days when the remedy is imposed. The authority to impose the remedy does not hinge on findings of previous noncompliance. So, the admitted fact that Petitioner was noncompliant from December 4, 2013 through January 6, 2014 is all that is needed to sustain CMS's determination to impose the remedy. Petitioner's compliance or noncompliance on dates prior to December 4 is irrelevant.

/s/
Steven T. Kessel
Administrative Law Judge