Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Lake Charles Care Center (CCN: 19-5413),	)	Date: April 13, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-693
	)	Decision No. CR1940
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

I impose a per-instance civil money penalty of $9,000 against Petitioner Lake Charles Care Center.

I. Background

Petitioner is a skilled nursing center doing business in the State of Louisiana. It participates in the Medicare program. Its participation in Medicare is governed by sections 1819 and 1866 of the Social Security Act and by federal regulations at 42 C.F.R. Parts 483 and 488. Its hearing rights in this case are governed by regulations at 42 C.F.R. Part 498.

This case is before me as a result of findings of noncompliance with Medicare participation requirements that were made at a survey of Petitioner's facility on June 20, 2008. The surveyors found that Petitioner was not complying with three Medicare participation requirements stated at 42 C.F.R. §§ 483.20, 483.20(d) and (k)(1), and 483.25(h)(2). The Centers for Medicare & Medicaid Services (CMS) concurred with the surveyors' findings and determined to impose civil money penalties against Petitioner consisting of three per-instance penalties of $3000. Petitioner requested a hearing.

CMS moved for summary judgment. Petitioner opposed the motion and filed a cross motion for summary judgment. On February 23, 2009 I issued rulings in which I granted CMS's motion to the extent that I found that Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.25(h)(2). Rulings on Parties' Motions for Summary Judgment, February 23, 2009. However, I also found that, as a matter of law, CMS failed to establish that Petitioner contravened the requirements of 42 C.F.R. §§ 483.20 and 483.20(d) and (k)(1). Consequently I granted Petitioner's cross motion as to these two allegations of noncompliance.

I withheld a finding as to the reasonableness of the $3000 per instance civil money penalty that CMS determined to impose for Petitioner's noncompliance with 42 C.F.R. § 483.25(h)(2). I concluded that I could easily sustain a penalty of $3000 based on the undisputed material facts of the case which showed that Petitioner failed adequately to assess and supervise a resident who was at a high risk for falling. But, I concluded that the per instance civil money penalty that CMS determined to impose was arguably too low in view of the seriousness of Petitioner's noncompliance. I directed the parties to brief the issue of whether a per instance civil money penalty of as much as $9000 would be reasonable given the undisputed facts. The parties briefed that issue.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether:

1. Petitioner failed to comply substantially with Medicare participation requirements; and

2. A per instance civil money penalty of up to $9000 is reasonable.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading.

1. I incorporate into this decision each of my February 23, 2009 rulings.

I incorporate in their entirety the rulings that I made on February 23, 2009. Rulings on Parties' Motion for Summary Judgment, February 23, 2009.

2. A per-instance civil money penalty of $9000 is reasonable.

The undisputed material facts of this case prove that Petitioner egregiously violated its obligation to supervise and assist a resident who Petitioner knew was at a great risk for falling. Resident # 78 was admitted to Petitioner's facility from the hospital after having sustained a serious fall while at home. He was a demented, elderly individual who was clearly incapable of caring for his needs. The resident was taking Coumadin, a medication that greatly increased the risk of serious bleeding from any fall that he might sustain. The resident was exposed to patently obvious risks of falling and related hazards. Yet, the staff failed to perform even a minimal assessment of these risks and hazards. Nor did the staff assess the added risks to the resident posed by his use of Coumadin or by his physician's order that the resident's bed be equipped with side rails. Less than a day after his admission to the facility the resident fell while unsupervised and sustained serious injuries.

In deciding what would be an appropriate per-instance civil money penalty it is unnecessary that I find that the level of Petitioner's noncompliance posed immediate jeopardy to Resident # 78. *See* 42 C.F.R. § 488.438(a)(2). However, it is apparent from the undisputed facts that Petitioner's noncompliance is so egregious that it satisfies all of the elements of immediate jeopardy level noncompliance. An immediate jeopardy level deficiency is one that creates the likelihood of serious injury, impairment, harm or death to a resident. 42 C.F.R. § 488.301. Here, Petitioner's noncompliance certainly created a high likelihood of serious injury, impairment, harm, or death. A principal reason for admitting Resident # 78 to Petitioner's facility was that he was at grave risk for injury from falling. Yet, Petitioner's staff managed to ignore that risk, failing to assess him for the hazards he would certainly encounter, failing to plan care to address those hazards, and failing to supervise the resident adequately.

The risk to Resident #78 caused by the staff's failure to discharge its obligations to the resident is one facet of the harm caused by Petitioner's noncompliance but it is not the only facet. I infer from the staff's disregard of the needs of this resident that the staff lacked comprehension of its responsibilities and obligations to all of its residents. It is reasonable – in the absence of any facts to the contrary – to generalize from the derelictions present in the care of Resident # 78 and to conclude that Petitioner's staff fundamentally lacked an understanding of its responsibilities. Indeed, that misunderstanding is reflected in Petitioner's argument that it was under no obligation to assess Resident # 78 for falls hazards until the end of the first 14 days of his stay at the facility.

I conclude that a per-instance penalty of $9000 is a reasonable remedy for Petitioner's noncompliance with the requirements of 42 C.F.R. § 483.25(h)(2). The seriousness of the noncompliance in and of itself justifies the remedy. Indeed, I find it to be quite modest given the nature of Petitioner's noncompliance.

In now arguing in favor of a per-instance penalty of $9000 CMS relies on the declaration of Susan R. LeBlanc, R.N. CMS Ex. A, attached to CMS's brief on the reasonableness of the civil money penalty. Ms. LeBlanc, who is a Health Quality Review Specialist for the CMS Dallas Regional Office, asserts in her declaration that a penalty of $3000 – as originally determined by CMS to remedy Petitioner's noncompliance with 42 C.F.R. § 483.25(h)(2) – is unreasonably small. That, according to her, is because CMS intended all along to impose a penalty of $9000 against Petitioner and simply apportioned it among the three deficiencies that CMS originally alleged (two of which I have concluded are not sustainable as a matter of law). Thus, according to her, it was always CMS's intent to require Petitioner to pay a total penalty amount of $9000. Moreover, according to Ms. LeBlanc, the three deficiencies alleged by CMS all are based on identical facts. Therefore, she avers, a total penalty of $9000 is reasonable even if one or two of those three deficiencies cannot be sustained as a matter of law.

I do not rely on Ms. LeBlanc's analysis in deciding that a penalty of $9000 is reasonable. First, and as I discuss in detail below, my decision is de novo and not an appellate review of CMS's determination. For that reason the thought processes of the CMS employee or employees who were responsible for CMS's penalty determination may not be a basis for my decision. More importantly, a penalty of $9000 stands on its own merits in this case. I stress that I would find $9000 to be a reasonable penalty amount to remedy Petitioner's noncompliance with the requirements of 42 C.F.R. § 483.25(h)(2) even if CMS had never alleged other deficiencies based on identical facts.

Petitioner makes several arguments to support its contention that the penalty in this case should not exceed $3000, the amount originally determined by CMS. First, it asserts that I lack the authority to increase the penalty beyond the $3000 that CMS originally determined to impose. In effect, Petitioner contends that my authority is limited simply to reviewing the propriety of CMS's penalty determination. I disagree with that argument.

There is nothing in either the Act or the regulations which so limits my authority. The regulations grant CMS the authority to make an initial determination as to penalty amount. 42 C.F.R. §§ 488.438(a),(f); 488.404. However, a hearing of a challenge to CMS's determination is not merely an appellate review of that determination. Both the Act and regulations provide that the administrative law judge's authority in deciding the penalty amount is de novo although there are

some limitations on his or her exercise of discretion. The Secretary's statutory authority to impose a civil money penalty against a participating nursing facility, stated at section 1819(h)(1)(B)(ii) of the Act, is made expressly subject to the requirements of section 1128A of the Act. Section 1128A contemplates a de novo hearing in every case where the proposal to impose a civil money penalty is challenged by the affected party.

Regulations governing imposition of civil money penalties against participating nursing facilities specify that final authority to decide penalty amounts rests with the administrative law judge when a party that is dissatisfied with CMS's determination requests a hearing. 42 C.F.R. § 488.438(e). The regulations impose limits on the administrative law judge's exercise of discretion but he or she is not prohibited from increasing a penalty amount. The administrative law judge is prohibited only from: reducing a penalty to zero where CMS has determined to impose a penalty and where noncompliance authorizing imposition of a penalty is present; reviewing CMS's exercise of discretion in deciding whether to impose a remedy; and considering factors in deciding on the amount of the penalty other than those set forth at 42 C.F.R. § 488.438(f). 42 C.F.R. § 488.438(e)(1) – (3). Moreover, the regulations permit an administrative law judge to raise new issues arising during the course of a case – so long as he or she gives the parties notice and opportunity to be heard on those issues – and there is nothing in the regulations suggesting that the new issues that an administrative law judge might hear would not include the possibility that CMS's penalty determination is too low. 42 C.F.R. § 498.56.

Petitioner argues that determination of a penalty amount by CMS is an act of discretion which is non-reviewable by an administrative law judge. This argument is based on a misreading of 42 C.F.R. § 483.438(e)(2). The section expressly prohibits an administrative law judge from reviewing CMS's act of discretion "to impose" a civil money penalty. The regulation thus makes CMS's determination whether or not to impose a penalty non-reviewable. But, it does not suggest that the *amount* of a civil money penalty determination is off-limits to administrative law judge decision making.

Petitioner argues also that a penalty amount of $9000 is unreasonable because it is not so culpable for its noncompliance as CMS contends it to be. Culpability is one of the regulatory factors which may be considered in deciding on a reasonable civil money penalty amount. 42 C.F.R. § 488.438(f)(4). I have not relied on Petitioner's culpability (or relative non-culpability) as a factor to be used in

deciding the amount of the civil money penalty in this case because, as I have stated, the seriousness of Petitioner's noncompliance in and of itself supports a penalty of $9000. Consequently, disputes as to the extent to which Petitioner's staff should be found culpable for Petitioner's noncompliance are simply not relevant to my decision.

Having said that, Petitioner's contentions about its relative lack of culpability raise no facts which derogate from my conclusion that Petitioner's noncompliance was extremely serious. Petitioner asserts that – allegedly contrary to CMS's contentions – it checked on Resident # 78 at two hour intervals during the night when the resident sustained his fall. For purposes of this decision I am assuming it to be true that the staff checked on the resident every two hours. But, that level of supervision was woefully inadequate in view of the resident's risk for falling, his demented state, his use of Coumadin, and the fact that there were raised side rails on his bed. Indeed, Petitioner has offered no facts to show that the decision to check on the resident at two hour intervals was based on an assessment of the resident's condition and his actual needs.

Petitioner contends additionally that it should not be penalized for failing to assess Resident # 78's risk for falling because, even if its staff did not assess those risks, the staff demonstrated good faith by assessing the resident for other potential problems such as his risk for pressure sores. Again, I will assume for purposes of this decision that Petitioner's contentions concerning the other assessments that the staff may have performed are correct. But, the fact that the staff knew to perform other assessments of Resident # 78 simply underscores the glaring error committed by the staff in not assessing the resident for falls risks. I stress that a *principal reason* for housing this resident at Petitioner's facility was that he could no longer live independently due to his risk for falling. In light of that it is shocking that the staff did not immediately acknowledge that risk, assess the resident, and provide him with appropriate supervision.

Finally, Petitioner asserts that CMS wrongly seeks to penalize it for putting the resident in a bed with side rails without first determining the necessity for this device when, in fact, the side rails were supplied to the resident pursuant to a physician's order. I dealt with this argument in my February rulings and I will not address it again at length here. However, my decision takes into account the fact that there was a physician's order to put the resident in a side rail equipped bed. The issue in this case is not whether the resident should have been supplied with side rails but whether Petitioner's staff assessed the resident and planned for the risks that might have been created as a result of the use of side rails. Petitioner

had the duty to assess, plan, and to implement supervision regardless whether the physician ordered the use of side rails. The failure to do so was an element of Petitioner's serious noncompliance with regulatory requirements because it was plainly a failure to take into account a potentially very serious risk to Resident # 78.

/s/
Steven T. Kessel
Administrative Law Judge