Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Sunview Care & Rehab Center, L.L.C. (CCN: 67-5530),	)	Date: July 12, 2007
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-06-597
	)	Decision No. CR1620
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

Until July 2006, Petitioner, Sunview Care & Rehab Center, L.L.C. (Petitioner or facility), was a long-term care facility located in Corsicana, Texas, that participated in the Medicare program as a provider of services. Following a change of ownership, critical staff members (administrator, director of nursing, and the bulk of the nursing staff) either quit, were fired, or simply stopped coming to work. Based on these and other problems, the Centers for Medicare & Medicaid Services (CMS) determined that, from June 5 through July 5, 2006, the facility was not in substantial compliance with Medicare requirements, and that, from June 5 through 9, 2006, its deficiencies posed immediate jeopardy to resident health and safety. Petitioner has not challenged those determinations, but characterizes as "unconscionable" the penalty imposed, $39,250.

CMS now asks for summary affirmance. For the reasons discussed below, I grant CMS's motion. I conclude that the uncontested deficiencies provide a sufficient basis for imposing a civil money penalty (CMP), and I affirm the imposition of a $6,550 per day CMP for the period of immediate jeopardy, and a $250 per day CMP for the period of substantial noncompliance that was not immediate jeopardy.[1]

[1] Petitioner asserts, without support, that the penalty is $38,000. CMS's brief is (continued...)

I. Background

To participate in the Medicare program, facilities periodically undergo surveys to determine whether they comply with applicable statutory and regulatory requirements. The Secretary of Health and Human Services contracts with state survey agencies to conduct those surveys. Social Security Act (Act) § 1864(a); 42 C.F.R. § 488.20. The regulations require that each facility be surveyed at least once every 12 months, and more often, if necessary, to ensure that identified deficiencies are corrected. 42 C.F.R. § 488.20(a). Where deficiencies are found, the state survey agency and CMS assess their seriousness on a scale that considers the scope (how isolated or widespread the deficiency is) and severity (how great the harm or potential for harm the deficiency causes). 42 C.F.R. § 488.404.

In this case, the facility (which had apparently been teetering on the verge of bankruptcy) changed ownership on June 1, 2006. P. Exhibit (Ex.) 3. At about that time, the Texas Department of Aging and Disability Services (State Agency) began receiving complaints of serious staffing shortages and the facility's failure to meet its residents' basic needs. CMS Ex. 8. On June 9, 2006, the State Agency completed a combined complaint investigation, standard survey, life safety code (LSC) survey, and state licensure inspection. CMS Exs. 2, 4. Among many serious deficiencies, the surveyors found:

- The facility had no administrator and no director of nurses (DON); the facility's new owner (who resided out of state) had designated a licensed vocational nurse (LVN) and an office assistant to run the facility. The former administrator had resigned effective June 1, 2006. The facility's former DON resigned on May 5, 2006. Another registered nurse (RN) was hired to replace her but left after four days (May 12-15), refusing the DON position. CMS Ex. 4, at 23-33, 49-50; CMS Ex. 41, at 5 (Robinson Decl.); CMS Ex. 42, at 3-4 (Lasseter Decl.); CMS Ex. 45, at 3 (Whiteley Decl.).

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[1](...continued)
inexplicably silent as to the amount of the CMP. The evidence, however, establishes a penalty of $6,550 per day for five days of immediate jeopardy ($32,750), plus $250 a day for 26 days of substantial noncompliance that was not immediate jeopardy ($6,500). CMS Ex. 1. In the absence of some subsequent determination, not mentioned by either party, the total CMP is $39,250 ($32,750 + $6,500 = $39,250).

- When surveyors arrived at the facility on June 5, 2006, no certified nurse aides (CNAs) were on duty; only one LVN and one Certified Medication Aide (CMA) were there to provide care for the facility's 38 residents (many with complicated care needs).[2] The surveyors learned that this level of staffing was not unusual for the facility. CMS Ex. 4, at 5; CMS Ex. 8, at 8-9; CMS Ex. 42, at 3-4 (Lasseter Decl.); CMS Ex. 45, at 2 (Whiteley Decl.) (No CNAs on duty at 7:10 a.m. on June 7, 2006).

- Multiple current and former staff members told the surveyors that the facility's owner had cut staff positions, working hours, and salaries; he instructed that no more than two staff members be on the floor at one time. CMS Ex. 4, at 50; CMS Ex. 41, at 4 (Robinson Decl.); CMS Ex. 42, at 4-5 (Lasseter Decl.); CMS Ex. 44, at 4 (Carr Decl.).

- The facility failed to provide dependent residents with appropriate, timely incontinent care, and assistance with bathing, dressing, and other activities of daily living. CMS Ex. 4, at 1 *et seq.*; CMS Ex. 41, at 2-4 (Robinson Decl.). The surveyors recorded numerous specific examples, including: 1) surveyors observed Resident (R) 12 (a totally dependent resident with contractures) lying on a linen sheet, stained brown with urine, smelling strongly of ammonia; 2) at 2:20 p.m., R17's brief was urine-soaked, smelling strongly of ammonia. Her skin was deep red and creased from the brief. A CNA admitted that R17 had not received incontinent care all day due to insufficient staff; 3) R20 was wearing a urine-soaked brief with strong ammonia odor. The resident's skin had deep red creases and indentations from the brief, and the surveyor observed a stage II pressure ulcer on the resident's buttock; 4) R16's pants and brief were urine-soaked with a strong ammonia odor. Surveyors observed two stage II pressure ulcers on the resident's buttocks; 5) surveyors observed R3, whose leg had been amputated, lying in urine-soaked sheets, blood-tinged drainage on the dressing covering the amputation site. CMS Ex. 4, at 3-4; CMS Ex. 41, at 3 (Robinson Decl.); CMS Ex. 43, at 3 (Webster Decl.): CMS Ex. 44, at 2-3 (Carr Decl.).

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[2] Eight residents had identified behavior problems; 17 required nine or more medications; 12 were incontinent; 2 were tube-fed; 19 required psychoactive medications; 2 had catheters; 2 were bedfast; and 6 had pressure ulcers. CMS Ex. 42, at 4; *see also* CMS Ex. 7.

- Diabetic residents were not administered insulin as ordered. Surveyors observed a registered nurse inject R2 with units of air rather than Humulin NPH insulin (apparently unaware that the syringe she picked up was empty). R2's blood sugar level measured 236 mg/dl (normal 60-100). CMS Ex. 44, at 3-4 (Carr Decl.).

- No resident assessments or care plans had been completed in more than a month because the facility lacked sufficient qualified staff to perform them. CMS Ex. 4, at 36; CMS Ex. 44, at 4 (Carr Decl.).

- The facility no longer provided physical therapy, although its population included residents who required physical therapy. CMS Ex. 4, at 49; CMS Ex. 41, at 5 (Robinson Decl.).

- Garbage had not been collected, and the dumpster was overflowing. Surveyors counted 25 bags on the ground surrounding the dumpster, some broken with contents (which included rotten food, feces and urine-soaked incontinent briefs) spilling out. "A large swarm of flies" hovered over the garbage pile and dumpster. "A pungent stench surrounded the area around the dumpster and permeated to the back door of the kitchen." The facility no longer had a contractual agreement for trash pick-up. CMS Ex. 4, at 37; CMS Ex. 43, at 4 (Webster Decl.).

- During the survey a representative from the gas company appeared, complaining to staff that the bill had not been paid, and requesting some money to prevent services being disconnected. CMS Ex. 4, at 51; CMS Ex. 44, at 4 (Carr Decl.).

Although advised that the facility conditions posed immediate jeopardy to resident health and safety, the facility's new owner offered no plan to correct the facility's most pressing problems. He designated no qualified persons to assume the duties of administrator or DON. CMS Ex. 4, at 41; CMS Ex. 42, at 5 (Lasseter Decl.).[3]

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[3] Petitioner claims that the office assistant, Bettie Miles, was in charge of the facility. P. Ex. 4. He does not suggest that she was licensed or otherwise qualified for the position. The administrator must be licensed by the state. 42 C.F.R. § 483.75; CMS Ex. 51, at 4.

Deeply concerned about the absence of any administrative or nursing supervision, and citing numerous instances of deficient quality of care, on June 7, 2006, the State Agency issued an order for licensure suspension and emergency closure, and, over the next several days, the facility's residents were relocated. CMS Exs. 3, 5; CMS Ex. 16, at 1; CMS Ex. 17, at 10-14.

Based on the surveyor findings, the State Agency found that Petitioner was not in substantial compliance with federal requirements for nursing home participation in the Medicare program. Specifically, the State Agency found that the facility was not in substantial compliance with the following regulations: 42 C.F.R. § 483.25 (quality of care); 42 C.F.R. § 483.30 (nursing services); 42 C.F.R. § 483.70 (physical environment); and 42 C.F.R. § 483.75 (administration). CMS Exs. 1, 4.

CMS agreed with the State Agency assessment, and, in a letter dated June 20, 2006, advised the facility that it was not in substantial compliance with program requirements, that its noncompliance constituted substandard quality of care, and that its deficiencies posed immediate jeopardy to resident health and safety. CMS imposed a CMP of $39,250 ($6,550 per day for the period of immediate jeopardy and $250 per day for the remaining period of substantial noncompliance), as well as other remedies. CMS Ex. 1. The letter set forth Petitioner's appeal rights:

> If you disagree with the determination of noncompliance (and/or substandard quality of care, if applicable), you or your legal representative may request a hearing before an administrative law judge of the Department of Health and Human Services, Departmental Appeals Board. Procedures governing this process are set out in 42 C.F.R. § 498.40, et seq. You may appeal the finding of noncompliance that led to an enforcement action, but not the enforcement action or remedy itself. A written request for a hearing must be filed no later than August 19, 2006.
>
> ****
>
> A request for hearing should identify the specific issues, and the findings of fact and conclusions of law with which you disagree. It should also specify the basis for contending that the findings and conclusions are incorrect.

CMS Ex. 1.

In a letter dated July 27, 2006, Petitioner requested a hearing "regarding the temporary closure" of the facility. In that letter, Petitioner does not contest any single deficiency finding. In fact, it appears to concede the facility's multiple problems, but lists actions taken to remedy those problems, and suggests that, because of its efforts to correct, the facility should not be penalized:

> I'd like to know how the state can make redress to a person who has every good intention to turn around the facility and the only transgression that he had was that he miscalculated that in rural America, the pool for nursing aids (sic) where five facilities exist in a three mile radius, governs and sometimes dictates the lot and future of a facility, and where your competition tries to intervene and underhandedly undermine our ability to operate.

Hearing Request at 3.

Petitioner's appeal was assigned to me for resolution. In an initial order dated August 9, 2006, I directed the parties to file pre-hearing exchanges, including briefs and exhibits, setting forth their respective positions. As part of its submission, CMS moved for summary judgment, pointing out that Petitioner did not specifically challenge any of the cited deficiencies.[4] CMS also submitted 54 exhibits, including surveyor affidavits. CMS Exhibits (Exs.) 1-54. Petitioner, whose pre-hearing submissions were due on January 10, 2007, did not respond. In an order dated February 12, 2007, I directed Petitioner to show cause why his appeal should not be dismissed for abandonment pursuant to 42 C.F.R. § 498.69. Petitioner eventually submitted its response accompanied by seven exhibits.[5]

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[4] CMS also stressed that, since Petitioner did not mention the cited LSC deficiencies, summary judgment could be based on those deficiencies alone. However, I have no idea whether the LSC deficiencies would sustain the penalties imposed because CMS has not provided the statement of deficiencies nor any other evidence suggesting the scope and severity of the LSC problems. However, as discussed below, the health survey findings more than justify a $39,250 CMP.

[5] Petitioner marked its exhibits as "Exhibits A through G." To conform to Civil Remedies procedures, we have re-marked them P. Exs. 1 through 7.

II. Issues

- Petitioner has not challenged CMS's determinations as to the facility's substantial noncompliance nor the scope and severity of its deficiencies, so those issues are not before me.

- The sole issue before me is whether the CMP imposed is reasonable.

III. Discussion

A. CMS's determinations on the unchallenged deficiencies are final and binding.[6]

As a threshold matter, my review is limited to those issues that Petitioner has appealed and over which I have jurisdiction. My jurisdiction is limited to review of "initial determinations," i.e., CMS's findings of noncompliance that result in the imposition of a remedy. 42 C.F.R. § 498.3(b) and (d). Here, CMS made an initial determination that, from June 5, 2006 through July 5, 2006, the facility was not in substantial compliance with 42 C.F.R. § 483.25 (quality of care); 42 C.F.R. § 483.30 (nursing services); 42 C.F.R. § 483.70 (physical environment); and 42 C.F.R. § 483.75 (administration), and that, from June 5 through June 9, 2006, its deficiencies posed immediate jeopardy to resident health and safety.

The regulations dictate that CMS mail notice of its initial determination to the affected party, setting forth the basis for and effect of the determination, and the party's right to hearing. 42 C.F.R. §§ 498.20(a)(1); 498.3; 498.5. The affected party may then challenge the determination by filing a hearing request within sixty days of its receiving the notice. 42 C.F.R. § 498.40. The hearing request "must" identify the specific issues and findings of fact and conclusions of law with which the affected party disagrees, and must specify the basis for contending that the findings and conclusions are incorrect. 42 C.F.R. § 498.40. Here, CMS sent the required notice with a statement of the facility's appeal rights, including the specificity requirements of section 498.40. CMS Ex. 1.

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[6] I make Findings of Fact and Conclusions of Law (Findings) to support my decision in this case. I set forth each Finding, in italics and bold, as a separate heading.

In its appeal, Petitioner did not challenge any specific deficiency findings, but instead listed the actions it had taken to correct some of its cited problems, suggesting that it should have been afforded an opportunity to correct before penalties were imposed.[7] But Petitioner is not entitled to review of CMS's (or the State Agency's) purported failure to afford it an opportunity to correct. If I sustain CMS's deficiency findings at the scope and severity levels cited – which I must since Petitioner has not challenged them – CMS has a basis for imposing remedies. Act § 1819(h); 42 C.F.R. § 488.301; 42 C.F.R. § 488.402. So long as CMS has a basis for imposing a remedy, I have no authority to review its determination to do so. 42 C.F.R. § 488.438(e). Thus, whenever it finds substantial noncompliance, CMS may impose a remedy without affording the facility an opportunity to correct. *See* 59 Fed. Reg. 56,171 (Nov. 10, 1994) ("[N]either the Act nor the Constitution require that providers have the opportunity to correct deficiencies before sanctions are imposed.") *See also Beechwood Sanitarium*, DAB No. 1824, at 15 (2002).

I might have dismissed Petitioner's appeal based on its failure to raise any issue that I have the authority to review. 42 C.F.R. § 498.70(b). However, my initial order gave Petitioner a second opportunity to raise a reviewable issue. In its March 5, 2007 submission, Petitioner still did not challenge any individual deficiency findings (reiterating its attempts to correct), but it added an additional issue – which I have the authority to review – the reasonableness of the CMP.

Because Petitioner has not challenged CMS's determinations that the facility was not in substantial compliance and that its deficiencies posed immediate jeopardy to resident health and safety, those determinations are final and binding. 42 C.F.R. § 498.20(b).[8]

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[7] In its later submission, Petitioner more explicitly complained that it "tried everything humanly possible to deal with the work stoppage," but required more time to bring itself into compliance, and should have been given an additional 30 days so that it could replace key personnel. P. Brief at 1, 2; P. Ex. 5.

[8] I note also that summary judgment is appropriate because CMS has come forward with evidence establishing that the facility lacked critical staff, that its residents were not receiving basic care and needed services, that the facility's physical environment was not adequately maintained, and that the facility was effectively devoid of any functioning administration. For its part, Petitioner has presented no evidence or argument to suggest dispute on any of CMS's assertions. *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (1986); *see also, Livingston Care Center v. Dep't of Health and Human Services,* 388 F.3d 168, 173 (6th Cir. 2004); *Vandalia Park,* DAB No. 1939 (2004); *Lebanon Nursing and Rehabilitation Center,* DAB No. 1918 (2004).

B. I find reasonable the imposition of a $6,550 per day CMP for the period of immediate jeopardy, and $250 per day CMP for the period of substantial noncompliance that was not immediate jeopardy.

The sole issue before me is whether the penalty imposed is reasonable.

If a facility is not in substantial compliance with program requirements, CMS may impose a CMP for each day of substantial noncompliance. Act § 1819(h); 42 C.F.R. § 488.402; 42 C.F.R. § 488.408. Where the deficiencies do not pose immediate jeopardy to resident health and safety, but have either caused actual harm or have the potential for more than minimal harm, the penalty will be in the range of $50 to $3,000 per day. 42 C.F.R. §§ 488.408(d). 488.438(a). Penalties in the range of $3,050 to $10,000 per day are imposed for deficiencies constituting immediate jeopardy. 42 C.F.R. § 488.438.

I determine whether the amount of a 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. 42 C.F.R. § 488.438(f). 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.

Here, the record offers no reliable evidence as to the facility's history, so I am assuming that its history is satisfactory.

Petitioner complains bitterly about the financial impact of the State Agency's actions, which led to the facility's closure and allegedly caused it more than $500,000 in damages. Even severe financial losses may not be sufficient to establish a provider's inability to pay, and I find it questionable whether Petitioner has presented sufficient evidence to justify lowering the CMP based on its financial condition. *See Mercy Health Care & Rehabilitation Center*, DAB CR955 (2002); *Wellington Specialty Care & Rehabilitation Center*, DAB CR548 (1998). Nevertheless, I have no doubt that the financial impact of the license revocation and resident transfers has been dramatic, and is arguably justification for imposing penalties below the maximum allowable by the regulations.

Otherwise, the scope (widespread) and severity (immediate jeopardy) of the facility's deficiencies, as well as the owner's culpability, justify the most severe sanctions. This facility housed more than 38 aged and infirm residents. Yet, virtually every system that should have been in place to protect and treat them had broken down. The facility had no administrator; it had no DON; it had no governing body. I reject any suggestion that a clerical employee and LVN could adequately perform these functions, even for a very short time.

Residents were not assessed; care plans were not developed. Necessary therapies were not provided.

The facility did not have enough registered nurses to administer injections and perform other duties requiring that level of training. Moreover, one of the facility's few RNs seemed incapable of injecting insulin, using an empty syringe and administering air instead. The facility did not have an adequate number of CNAs, and, facility-wide, the residents' most basic needs were not met. Even the garbage was not collected and the utility bills were not paid.

Under these circumstances, I find reasonable the imposition of a $6,550 per day CMP for the period of immediate jeopardy. I also sustain CMS's determination that the period of immediate jeopardy continued so long as even a single resident remained in the facility. Fortunately, the State Agency was able to find (presumably) appropriate placements for these residents on short notice, but the final residents were not discharged until June 9, 2006, and so long as they remained in this shell of an institution, they were in immediate jeopardy. CMS Ex. 4, at 52; CMS Ex. 17, at 10-14; CMS Ex. 31, at 23.

I also sustain the $250 per day CMP for the remaining period of noncompliance. This is at the low end of the range, and was certainly justified by the deficiencies, since, at that point, the facility had no residents, no staff and was capable of providing no services. While Petitioner may eventually have abandoned its Medicare provider agreement, CMS is justified in imposing a per day penalty until such time as the facility actually withdrew from the program.

IV. Conclusion

For all of the reasons discussed above, I uphold CMS's determination that Petitioner was not in substantial compliance with program participation requirements from June 5 through July 5, 2006, and that its deficiencies posed immediate jeopardy to resident health and safety from June 5 through 9, 2006. I find reasonable the imposition of a $6,550 per day CMP for the period of immediate jeopardy, and $250 per day CMP for the period of substantial noncompliance that was not immediate jeopardy.

/s/

Carolyn Cozad Hughes
Administrative Law Judge