Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

St. Anthony's Nursing and Rehabilitation Center,
(CCN: 145387/0047126),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-5

Decision No. CR4797

Date: February 22, 2017

DECISION

I enter summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS) sustaining its determination to impose a civil money penalty of $603 against Petitioner, St. Anthony's Nursing and Rehabilitation Center, a skilled nursing facility, for each day of a period that began on May 13, 2016, and that continued through July 13, 2016.

I. Background

CMS moved for summary judgment asking that I sustain the remedies that I cite in this decision's opening paragraph. Petitioner opposed the motion. CMS filed 31 proposed exhibits, identified as CMS Ex. 1-CMS Ex. 31, in support of its motion. Petitioner filed eight proposed exhibits, identified as P. Ex. 1-P. Ex. 8, in opposition. I have reviewed these exhibits in connection with the motion and opposition and they are part of the record of this case for purposes of deciding the motion.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether Petitioner was not in substantial compliance with Medicare participation requirements during the May 13, 2016-July 13, 2016 period and whether CMS's remedy determination is reasonable.

B. Findings of Fact and Conclusions of Law

CMS made three noncompliance findings based on surveys of Petitioner's facility that were completed on May 13 and June 29, 2016. The alleged noncompliance identified at the May survey consists of alleged failures by Petitioner to comply with the requirements of 42 C.F.R. § 483.35(i)(2), which requires a skilled nursing facility to prepare, distribute, and serve food under sanitary conditions, and 42 C.F.R. § 483.75(*l*)(1) which requires a skilled nursing facility to maintain clinical records on each of its residents in accord with accepted professional standards and practices that are, among other things, accurately documented. The alleged noncompliance identified at the June survey consists of alleged failure to comply with the requirements of 42 C.F.R. § 483.13(c), which in relevant part directs a facility to develop and implement written policies and procedures to prevent misappropriation of resident property.

The undisputed material facts unequivocally support CMS's allegations of noncompliance. As concerns Petitioner's noncompliance with the food handling regulation, Petitioner failed to comply with the regulation in in three respects: (1) Petitioner left out on a flat surface wet cups, glasses, and bowls to dry; (2) it failed to label containers for the storage of sugar, flour, and oatmeal; and (3) it stored thawed health shakes (nutritional items that were prescribed to certain residents of Petitioner) for longer than the 14-day period recommended by the manufacturer of this product. CMS Ex. 1 at 3-4; CMS Ex. 5 at 2.

Petitioner doesn't deny that its staff left out dishes to dry or that it failed to properly label bins for storage of dry foodstuffs. It contends that CMS failed to demonstrate harm resulting from these transgressions and that; furthermore, the failure to label food storage bins properly was excusable given that Petitioner had just repaired its kitchen facilities after a fire.

I find these arguments to be unpersuasive. It is unnecessary that CMS establish actual harm from Petitioner's noncompliance. There is an obvious potential for harm resulting from both instances of noncompliance. I take notice that failure to properly dry dishes may lead to the accumulation of potentially harmful bacteria on these items. Failure to store food properly labeled raises the risks that substances may be misidentified or that they may be mixed.

Petitioner asserts that there is a disputed issue of material fact as to its storage of thawed health shakes beyond the manufacturer's recommended maximum period of 14 days. The surveyors found that the health shakes had been thawed beginning on April 14, 2016. Petitioner now asserts that this finding is erroneous and that the shakes were thawed beginning on April 24, 2016.

For purposes of this decision I accept as true Petitioner's representation that the shakes were thawed beginning on April 24. But, that is still outside of the two-week period that the shakes' manufacturer states is the maximum allowable period that thawed health shakes may be stored. Petitioner argues, however, that it takes from 5-7 days for the shakes to thaw. Therefore, according to Petitioner, the shakes really weren't "thawed" until after about a week past the April 24th date. Petitioner's brief at 4.

However, Petitioner offered no facts to support this naked assertion. In deciding a motion for summary judgment I must draw all inferences favorable to the party opposing a motion from the facts that are before me. That requirement, however, does not extend to unsupported assertions of fact. Baldly asserting that something is so doesn't create a material fact in dispute.

Petitioner argues additionally, that if I sustain its noncompliance with the requirements of 42 C.F.R. § 483.35(i)(2), I should at least reduce the scope and severity of CMS's noncompliance findings. I have no authority to address the issue of scope and severity. I may only review scope and severity of a finding of noncompliance where the range of noncompliance (immediate jeopardy vs. non-immediate jeopardy) is at issue or where there is a finding of substandard quality of care that results in the loss of a skilled nursing facility's approval to conduct nurse aide training. 42 C.F.R. § 498.3(b)(14).

Petitioner acknowledges this limitation on my authority but complains that this limitation is unfair given that CMS designated Petitioner as a special focus facility due to its noncompliance history. That designation, according to Petitioner, puts it under more intense scrutiny for compliance than other facilities might experience. It argues that it will remain under such scrutiny for the foreseeable future unless I find a way to reduce the scope and severity of its noncompliance. This assertion is irrelevant whether or not it may be true. My authority is limited by what the regulations allow me to hear and decide. It is clear that I may not address the scope and severity of Petitioner's noncompliance given that there is neither a finding of immediate jeopardy nor the loss of nurse aide training in this case.

CMS's assertion that, as of May 13, 2016, Petitioner was not complying with the documentation requirements of 42 C.F.R. § 483.75(*l*)(1) center on the fact that Petitioner's staff failed to document the change of a resident's status from "full code" to "do not resuscitate (DNR)." CMS Ex. 8 at 1-2, 6. Petitioner has not challenged the facts asserted by CMS nor has it argued that these facts fail to establish noncompliance on its part.

The allegations of noncompliance with 42 C.F.R. § 483.13(c) as of the June survey center on the systematic theft of a resident's personal funds by one of Petitioner's employees. The undisputed facts prove that, between February 2015, and June 2016, on about 20 occasions, the employee wrote checks payable to herself from a resident's checking account in amounts from $250 to $600. CMS Ex. 15. The resident, a 92-year old demented individual, gave the employee blank checks that were intended to pay for the purchase of personal items, enabling the employee to extract and convert funds from the resident's account. *Id.*

The term "misappropriation of resident property" is defined at 42 C.F.R. § 488.301 to include the deliberate misplacement, exploitation, or wrongful use of a resident's money without the resident's consent. The protracted and systematic theft comprises failure by Petitioner to implement its policy to protect resident property against misappropriation.

Petitioner argues the theft of the resident's money was a willful act by a single employee and that it should not bear responsibility for that act. That argument is unpersuasive. A facility is liable for the acts of its employees. *Royal Manor*, DAB No. 1990 at 12 (2005). Indeed, it would make no sense if a facility could immunize itself from noncompliance findings on the ground that noncompliance was due to some employee's act or omission. The facility's employees provide virtually all of the services provided by a skilled nursing facility; immunizing the facility from its employees' acts would render meaningless the regulations governing compliance.

Petitioner argues also that the theft of the resident's funds should be viewed as an isolated incident that has no significance to the question of whether Petitioner implemented its policy against misappropriation. That assertion is incorrect. The undisputed facts establish that the resident was robbed of her funds about 20 times over a period of almost one and one-half years. That is systematic theft and it is something that the facility should have been able to prevent. This demented resident had no immediate family and Petitioner was charged with the responsibility of managing her funds. CMS Ex. 15 at 10. Its staff should have known that something was amiss simply by keeping track of the resident's expenditures.

The daily civil money penalty of $603 imposed by CMS falls within a permissible range of $103 to $6188 for non-immediate jeopardy level noncompliance. 42 C.F.R. § 488.438(a)(1)(ii); 81 Fed. Reg. 61,538, 61,563 (Sept. 16, 2016). Several factors may be considered in deciding whether this penalty amount is reasonable. These include: the seriousness of a facility's noncompliance; its compliance history; its culpability; and its financial condition. 42 C.F.R. §§ 488.438(f)(1)-(4), 488.404 (incorporated by reference into 42 C.F.R. § 488.438(f)(3).

I find the penalty imposed by CMS to be reasonable. First, it is extremely modest in that the daily penalty amount is less than 10 percent of the maximum allowable penalty for non-immediate jeopardy noncompliance. The modesty of the penalty becomes apparent when it is considered in the context of the harm that might have resulted or did result from Petitioner's noncompliance and the resulting severity of that noncompliance. Petitioner's violation of food sanitation requirements, for example, placed residents at risk for illness from food borne contaminants.[1] Its failure to chart a change in a resident's status from "full code" to "DNR" potentially put that resident at risk for painful and unwanted interventions and, moreover, showed a misunderstanding by Petitioner's staff of the need to document accurately the care that it might provide. Finally, the theft of funds from a resident caused that resident to experience actual harm.

Furthermore, Petitioner's noncompliance is not isolated when considered in the context of Petitioner's history. This is a facility with a poor compliance history. CMS Ex. 23. Petitioner has conceded as much by acknowledging that CMS designated it as a special focus facility. Finally, Petitioner has not established that paying the penalty at issue would cause it to suffer financial harm.

Petitioner argues that, even if the penalty amount might be reasonable, the determination of duration of noncompliance – more than two months – is not reasonable. Petitioner contends that, to the extent that it was noncompliant, it "immediately rectified" the noncompliance. Petitioner's brief at 12. It also contends that it attained substantial compliance with participation requirements "sooner than CMS claims." *Id.* at 3. However, Petitioner offered no analysis whatsoever to support these assertions. It did not discuss any of the measures that it might have taken to rectify the deficiencies that CMS identified. For that reason I do not find that there is any support for Petitioner's contention that the duration of its noncompliance is less than that determined by CMS.

[1] Petitioner asserts that the risk to residents from health shakes kept beyond their maximum shelf life was minimal because only 11 residents received this product. That number is, in fact, substantial. Moreover, the lack of recognition of the potential danger caused by feeding residents with an expired product potentially extends to other products beyond health shakes.

Petitioner asserts that CMS imposed an additional penalty consisting of a denial of payment for new Medicare admissions and it challenges the imposition of this remedy. Neither Petitioner nor CMS advised me of the commencement date or the end date of this additional remedy. For purposes of this decision I am assuming that it may be commensurate with the 62-day period for which CMS imposed civil money penalties or for some period of time within that 62-day period. I sustain the denial of payment to the extent that CMS imposed it. CMS is authorized to impose the remedy of denial of payment for any period of time within which a facility is substantially noncompliant with participation requirements. 42 C.F.R.§ 488.417(a). Here, Petitioner failed to explain how it corrected its deficiencies in less than the noncompliance period determined by CMS. Consequently, denial of payment would be authorized for any dates within that period.

____/s/_____
Steven T. Kessel
Administrative Law Judge