Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Evergreen Health & Rehab,
(CCN: 49-5142),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-12-33

Decision No. CR2576

Date: July 27, 2012

DECISION

Petitioner, Evergreen Health & Rehab (Petitioner or facility), is a long-term care facility located in Winchester, Virginia that participates in the Medicare program. The Centers for Medicare and Medicaid Services (CMS) determined that Evergreen was not in substantial compliance with the Medicare participation requirement at 42 C.F.R. § 483.70(a)(1), which requires that long-term facilities comply with the applicable provisions of the National Fire Protection Association's Life Safety Code (LSC). CMS found that Evergreen's noncompliance posed immediate jeopardy to resident health and safety and imposed two $1,500 per-instance civil money penalties (CMPs). Evergreen appealed, and CMS now moves for summary judgment.

For the reasons set forth below, I find that CMS is entitled to summary judgment.

I. Background

The Social Security Act (Act) sets forth requirements for a long-term care facility to participate in the Medicare program, and authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations implementing those statutory provisions.

Act § 1819.[1] Specific program requirements for long-term care facilities are at 42 C.F.R. Part 483. To participate in the Medicare program, a long-term care facility must remain in substantial compliance with the program requirements. 42 C.F.R. § 483.1(b). "Substantial compliance" means "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for minimal harm." 42 C.F.R. § 488.301.

The Act authorizes certain state officials to conduct surveys of a long-term care facility to determine the facility's compliance with Medicare participation requirements. Act § 1819(g). Specific survey procedures are at 42 C.F.R. Part 488, subpart E. The Act and implementing regulations authorize the Secretary to impose enforcement remedies if a long-term care facility is found not to be in substantial compliance with participation requirements. Act § 1819(h); 42 C.F.R. § 488.402. Among the available remedies for a facility's noncompliance are CMPs, which the Secretary may impose on a per-day or per-instance basis. Act § 1819(h)(2)(B)(ii); 42 C.F.R. § 488.408(d)-(e).

In this case, on July 8, 2011, the Virginia Fire Marshal's Office, acting on behalf of the Virginia Department of Health, surveyed the facility for compliance with the LSC. Based on the survey findings, CMS determined that Evergreen was not in substantial compliance with 42 C.F.R. § 483.70(a)(1). CMS cited two deficiencies at an immediate jeopardy level of noncompliance and imposed a $1,500 per-instance CMP for each of the two deficiencies. One of the deficiencies posing immediate jeopardy related to the operational status of the facility's automatic sprinkler system (Tag K062), and the other deficiency related to the operational status of the supervisory alarm system for the facility's sprinkler system (Tag K052).

Petitioner timely filed its request for a hearing. CMS filed a motion for summary judgment, a supporting brief (CMS Br.), and 12 exhibits (CMS Ex. 1-12). Petitioner filed a brief opposing summary judgment (P. Br.), and 8 exhibits (P. Ex. 1-8). Petitioner filed four additional exhibits subsequent to filing its brief opposing summary judgment (P. Ex. 9-12).

II. Issues

The primary issue before me is whether summary judgment is appropriate. On the merits, this case presents two issues:

[1] The Act, as amended, is available at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. On this website, each section of the Act contains a reference to the corresponding chapter and section in the United States Code.

1. whether the facility was in substantial compliance with 42 C.F.R. § 483.70(a) at the time of the July 8, 2011 survey; and

2. if the facility was not in substantial compliance, whether the penalties CMS imposed -- two $1,500 per-instance CMPs -- are reasonable.

Petitioner is not entitled to review of CMS's immediate jeopardy finding. An ALJ may review CMS's scope and severity finding, which includes an immediate jeopardy finding, only if a successful challenge by the facility would affect the range of the CMP, or if CMS has made a finding of substandard quality of care that results in the loss of approval of a facility's nurse aide training program. 42 C.F.R. § 498.3(b)(14), (d)(10).

Petitioner does not claim that a finding of substandard quality of care resulted in the loss of approval of its nurse aid training program. Thus, review of CMS's immediate jeopardy finding is not available on that ground. Petitioner claims that the immediate jeopardy finding is nevertheless reviewable because a successful challenge would affect the range of per-instance CMP imposed. P. Br. at 4. In Petitioner's view, my finding that the facility's deficiencies posed the potential for no more than minimal harm (scope and severity level "C") would affect the range of the CMP because it would "remove any authority for CMS to impose a CMP." P. Br. at 6. Of course, if the facility's deficiencies posed the potential for no more than minimal harm, it would be in substantial compliance and there would be no penalty and no applicable range of CMPs. Petitioner conflates the authority to review a noncompliance determination in 42 C.F.R. § 498.3(b)(13), with the limited authority to review scope and severity findings in 42 C.F.R. § 498.3(b)(14). The possibility that review done pursuant to 42 C.F.R. § 498.3(b)(13) may result in a noncompliance finding, does not automatically trigger review of the level of noncompliance pursuant to 42 C.F.R. § 498.3(b)(14), which limits review of scope and severity findings to cases where the outcome may affect the "range of the CMP." Procedurally, I must first consider whether the facility was in substantial compliance, and only then consider whether, based on the possible effect on the range of CMP, I am authorized to review CMS's immediate jeopardy determination.

The regulations provide for the same range of per-instance CMPs without regard to the scope and severity of noncompliance. 42 C.F.R. § 488.438(a)(2); *compare* 42 C.F.R. § 488.408(d) (permitting a per-instance CMP of $1,000 to $10,000 for a deficiency resulting in actual harm or a potential for more than minimal harm that is not immediate jeopardy) *with* subsection (e) (permitting a per-instance CMP of $1,000 to $10,000 for a deficiency that constitutes immediate jeopardy). Where, as here, CMS imposes only per-instance CMPs, "a successful challenge to the immediate jeopardy determination would not affect the range of CMP amounts that CMS could collect." *Fort Madison Health Ctr.*, DAB No. 2403, at 12-13 (2011). Accordingly, even upon a noncompliance determination, Petitioner is not entitled to review of CMS's immediate jeopardy finding.

III. Discussion

Summary Judgment. Summary judgment is appropriate if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010), and cases cited therein. The moving party may show the absence of a genuine factual dispute by presenting evidence so one-sided that it must prevail as a matter of law or by showing that the non-moving party has presented no evidence "sufficient to establish the existence of an element essential to [that party's] case, and on which [that party] will bear the burden of proof at trial." *Livingston Care Ctr. v. U.S. Dept. of Health & Human Srvcs.*, 388 F.3d 168, 173 (6th Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). If the moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial . . . .'" *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). To defeat a well-pleaded motion for summary judgment, the non-moving party cannot merely rely on denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact, *i.e.*, a fact that, if proven, would affect the outcome of the case under the governing law. *Id.* at 586, n.11; *Celotex*, 477 U.S. at 322.

In examining the evidence for purposes of determining the appropriateness of summary judgment, I must draw all reasonable inferences in the light most favorable to the non-moving party. *Brightview Care Ctr.*, DAB No. 2132, at 2, 9 (2007); *Livingston Care Ctr.*, 388 F.3d at 172; *Guardian Health Care Ctr.*, DAB No. 1943, at 8 (2004). However, drawing factual inferences in the light most favorable to the non-moving party does not require that I accept the non-moving party's legal conclusions. *Cedar Lake Nursing Home*, DAB No. 2344, at 7 (2010); *see also Guardian*, DAB No. 1943, at 11 ("A dispute over the conclusion to be drawn from applying relevant legal criteria to undisputed facts does not preclude summary judgment if the record is sufficiently developed and there is only one reasonable conclusion that can be drawn from those facts.").

A. ***CMS is entitled to summary judgment that the facility was not in substantial compliance with 42 C.F.R. § 483.70(a)(1), because the undisputed evidence establishes that, in contravention of Life Safety Code requirements, the facility's automatic sprinkler system was not continuously maintained and operational, and the alarm notifying building staff of the condition of the sprinkler system was not operating.***[2]

Program Requirements. As part of the general requirement that a long-term care facility be "designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel and the public," a facility "must meet applicable provisions of the 2000 edition of the [LSC]." 42 C.F.R. § 483.70(a)(1)(i). The LSC provides, in relevant part, that an automatic sprinkler system must be continuously maintained, and a supervisory alarm system must also be maintained and operational in order to notify building staff of a condition that would impair the satisfactory operation of the sprinkler system. *See* LSC §§ 4.6.12.1 (general maintenance and testing), 9.6.1.4 (fire alarm system maintenance and testing), 9.7.2.1 (supervisory signal for automatic sprinkler system), 9.7.6.1 (sprinkler system shutdown procedures), 19.7.6 (general maintenance and testing); CMS Ex. 4.[3] CMS interprets the LSC's maintenance requirement to require that the automatic sprinkler system be in "reliable operating condition." CMS Br. at 11. Petitioner does not dispute this interpretation, and I find that it is reasonable and consistent with the goals of the LSC to "provide an environment for the occupants that is reasonably safe from fire and similar emergencies by . . . [p]rotection of occupants not intimate with the initial fire development . . . ." LSC § 4.1.1. A maintained but non-operational automatic sprinkler system will not keep residents "reasonably safe from fire and similar emergencies."

July 8, 2011 Survey. CMS has come forward with evidence, which Evergreen does not dispute, establishing that on July 8, 2011, during the facility's Life Safety Code survey, the main water supply valve to the sprinkler system was closed, and no supervisory alarm signal indicated that the valve was closed. CMS Ex. 2, at 6-9; *see* P. Br. at 3, 5. It is unknown how long the water supply valve had been closed, in part because the building staff was completely unaware of the situation. CMS Ex. 8, at 4-5. The facility contacted

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[2] My findings of fact/conclusions of law are set forth, in italics and bold, in the discussion captions of this decision.

[3] All references to the LSC in this decision are to the 2000 edition, which is the edition incorporated by reference in 42 C.F.R. § 483.70(a). CMS Exhibit 4 provides the provisions of the LSC that are applicable in this case.

its sprinkler contractor, who arrived approximately 20 minutes later and opened the valve. CMS Ex. 2, at 7, 8. The contractor then "made adjustments to the tamper switch (main valve supervisor switch) to make it send a trouble signal to the alarm panel when in the partly closed position." CMS Ex. 2, at 7, 8. The contractor tested the alarm in the presence of the surveyor and determined it was operational while the water supply valve was closed. CMS Ex. 2, at 7, 8. The contractor said he had closed the valve on the previous day to perform work on the sprinkler system, but claimed that he reopened the valve at 5:00 p.m. the same day. CMS Ex. 2, at 7, 8. Petitioner does not dispute that the main water supply valve was closed at the time of the survey or that the supervisory alarm signal did not alert building staff about the closed valve during that time.[4] *See* P. Br. at 5.

Main Water Supply Valve. The closure of the main water supply valve left the automatic sprinkler system without any water supply, and thus not operational. CMS Ex. 8, at 3, 5. The LSC requires Evergreen to ensure its sprinkler system is *continuously* maintained and operational. LSC §§ 4.6.12.1, 9.7.1, 9.7.5; *see* LSC § 9.7.6.1 (permitting temporary shutdown of an automatic sprinkler system, but requiring evacuation or an "approved fire watch" if the system is shutdown more than four hours). Therefore, because the facility did not have a water supply for its automatic sprinkler system at the time of the July 8, 2011 survey, it did not comply with the applicable LSC provisions and 42 C.F.R. § 483.70(a)(1).

Petitioner argues that the residual water in the sprinkler pipes along with other redundant fire protection systems were sufficient for the facility to remain in substantial compliance. P. Br. at 11-14. Yet the LSC requires an automatic sprinkler system be maintained *in addition to* the redundant fire safety systems Petitioner cites. LSC §§ 4.5.1, 4.6.12.1. The Secretary, in deferring to the LSC for specific physical environment requirements, has determined as a matter of law that a facility such as Evergreen must comply with the "applicable provisions" of the LSC. 42 C.F.R. § 482.70(a)(1)(i). In this case, the "applicable provisions" of the LSC include the automatic sprinkler system requirements already discussed. Petitioner's position reworks the regulatory requirement into one where compliance with *some* of the applicable LSC provisions is sufficient for substantial compliance with Medicare participation

[4] Despite its assertion otherwise, Petitioner has not raised any genuine dispute of material fact. Petitioner challenges the conclusions of the surveyor and CMS based on certain facts, but such challenges raise questions of law, not of fact, and are not sufficient to defeat CMS's motion for summary judgment. *See* P. Br. at 3, 5. The factual errors in the informal dispute resolution decision, the redundant fire safety systems, and the specific personnel involved in determining the scope and severity of the facility's deficiencies are not in dispute nor are they material to the determination of the facility's compliance, or not, with the sprinkler-related provisions of the LSC.

requirements. But a determination that the facility substantially complied with 42 C.F.R. § 483.70(a)(1) despite failing to comply with all of the applicable provisions of the LSC deviates impermissibly from the plain language of the regulation.

Supervisory Alarm Signal. Petitioner also does not dispute that the supervisory alarm signal did not notify building staff that the main water supply valve was closed. CMS Ex. 2, at 6-7; P. Br. at 3. Failing to have an operational supervisory alarm signal violates the LSC. The LSC requires that facilities have "a distinctive supervisory signal . . . to indicate a condition that would impair the satisfactory operation of the sprinkler system." LSC § 9.7.2.1. The facility's supervisory signal was not operational at the time of the survey; indeed, the sprinkler contractor had to adjust it to make it operational. CMS Ex. 2, at 7. Failing to have a functional supervisory alarm put the facility out of substantial compliance with the LSC requirements, and thus 42 C.F.R. § 483.70(a)(1).

Petitioner argues that it complied with the LSC alarm requirement because it had a functioning *fire* alarm system. P. Br. at 11. However, the Secretary has deferred judgment of the necessary alarm systems to those the LSC requires, which includes a separate supervisory alarm system for automatic sprinkler systems. LSC § 9.7.2.1. Thus, the presence of a functional fire alarm does not supplant the requirement for a functional automatic sprinkler system supervisory alarm.

B. *The two $1,500 per-instance CMPs are reasonable.*

Evergreen does not argue that the CMPs are unreasonable and has therefore likely waived the issue. In any event, I next consider whether the CMPs imposed are reasonable by applying the factors listed in 42 C.F.R. § 488.438(f), which include: (1) the facility's history of noncompliance; (2) the facility's financial condition; (3) factors specified in 42 C.F.R. § 488.404[5]; and (4) the facility's degree of culpability, including neglect,

[5] Section 488.404 provides in relevant part:

> (b) Determining seriousness of deficiencies. To determine the seriousness of the deficiency, CMS considers and the State must consider at least the following factors:
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> (1) Whether a facility's deficiencies constitute--
>
> (i) No actual harm with a potential for minimal harm;
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> (ii) No actual harm with a potential for more than minimal harm, but not immediate jeopardy;
>
> (iii) Actual harm that is not immediate jeopardy; or
>
> (iv) Immediate jeopardy to resident health or safety.
>
> (2) Whether the deficiencies--
>
> (i) Are isolated;
>
> (ii) Constitute a pattern; or

(continued . . .)

indifference, or disregard for resident care, comfort or safety. "The absence of culpability is not a mitigating circumstance in reducing the amount of the penalty." 42 C.F.R. § 488.438(f)(4).

CMS imposed two per-instance CMPs of $1,500 each, which are both -- individually and collectively -- at the very low end of the penalty range of $1,000 to $10,000. *See* 42 C.F.R. § 488.438(a)(2). CMS has not offered evidence showing a history of noncompliance, nor has Petitioner claimed that its financial condition affects its ability to pay the penalty. Petitioner suggests that it is not culpable, because the sprinkler contractor was responsible for the closed water supply valve. P. Br. at 17-19. Even if true, the absence of culpability does not justify reducing the CMPs. 42 C.F.R. § 488.438(f)(4).

I conclude that the severity of the deficiencies here was significant enough to warrant the modest CMPs imposed. The facility was without a functioning automatic sprinkler system for an indeterminate period while none of its staff were aware of that serious situation. Even in light of the redundant fire safety systems that it had in place at the time, a functioning automatic sprinkler system is a critical life safety measure, the absence of which exposes vulnerable residents to serious injury or worse. The LSC recognizes the critical nature of a functional sprinkler system by requiring the evacuation of the building or an approved fire-watch in the event of a sprinkler system shutdown for more than four hours. LSC § 9.7.6.1. Moreover, the residents, staff, and fire department may reasonably rely on the proper functioning of the automatic sprinkler system in the event of a fire. The fact that the staff did not know about the sprinkler system being non-operational because the supervisory alarm system was not operational increases the significance of these deficiencies and amply supports the CMPs imposed. I therefore find the two $1,500 per-instance CMPs reasonable.

(iii) Are widespread.

(c) Other factors which may be considered in choosing a remedy within a remedy category. Following the initial assessment, CMS and the State may consider other factors, which may include, but are not limited to the following:

(1) The relationship of the one deficiency to other deficiencies resulting in noncompliance.

(2) The facility's prior history of noncompliance in general and specifically with reference to the cited deficiencies.

IV. Conclusion

Accepting as true all of Petitioner's factual assertions, I find that the facility was not in substantial compliance with the Medicare requirements governing physical environment at 42 C.F.R. § 483.70(a)(1). The two $1,500 per-instance CMPs imposed are reasonable. I therefore grant CMS's motion for summary judgment.

/s/
Carolyn Cozad Hughes
Administrative Law Judge