Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Golden Living Center - North Little Rock (CCN: 05-5337),	)	Date: June 26, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-676
	)	Decision No. CR1810
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION GRANTING MOTION FOR SUMMARY JUDGMENT

I grant the motion by the Centers for Medicare & Medicaid Services (CMS) to enter summary judgment against Petitioner, Golden Living Center - North Little Rock a/k/a Beverly Healthcare North Little Rock. I sustain remedies against Petitioner consisting of civil money penalties of: $3,050 per day for each day of a period beginning on June 7, 2007 and ending June 8, 2007; and $300 per day for each day of a period beginning on June 9, 2007 and ending July 3, 2007. The total amount of the civil money penalties that I sustain is $13,600.

I. Background

Petitioner is a skilled nursing center located near Little Rock, Arkansas. It participates in the Medicare program. Its participation in Medicare is governed by sections 1819 and 1866 of the Social Security Act (Act) and by implementing 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.

Petitioner was surveyed for compliance with Medicare participation requirements in a survey that was completed on June 8, 2007 (June 8 survey) and was found not to be complying in several respects. These included findings of noncompliance so egregious as to pose immediate jeopardy for Petitioner's residents. "Immediate jeopardy" is defined to mean noncompliance that has caused or is likely to cause serious injury, harm, impairment, or death to a resident. 42 C.F.R. § 488.301.

Petitioner filed a hearing request to challenge CMS's determination to impose the remedies that I describe in the opening paragraph of this decision. The case was assigned to me for a hearing and a decision and I scheduled an in-person hearing. Prior to the hearing CMS moved for summary judgment and Petitioner opposed the motion.

CMS filed a pre-hearing exchange which included 23 proposed exhibits. These are designated as CMS Exhibit (Ex.) 1 - CMS Ex. 23. Petitioner filed 89 proposed exhibits which are designated as Petitioner (P.) Ex. 1 - P. Ex. 89. I receive all of the proposed exhibits into the record of this case and I cite to some of them from time to time in this decision as may be appropriate. However, none of the material facts that I rely on in deciding this case are disputed.

II. Issues, findings of fact and conclusions of law

A. Issues

The issues in this case are whether the undisputed material facts establish that:

1. Petitioner failed to comply substantially with a Medicare participation requirement during the period beginning on June 7, 2007 and ending on July 3, 2007;

2. CMS's determination that Petitioner's noncompliance during the part of this period that included June 7 and 8, 2007 comprised immediate jeopardy for Petitioner's residents was clearly erroneous; and

3. CMS's determination to impose civil money penalties against Petitioner 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. The undisputed material facts establish that Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.25(h)(2) between June 7, 2007 and July 3, 2007.

The regulation that is at issue here mandates that a skilled nursing facility provide each of its residents with adequate supervision and assistance devices to prevent accidents. 42 C.F.R. § 483.25(h)(2). A facility's duty to its residents requires it to take all reasonable measures to protect each of them.

The following facts are undisputed:

- Petitioner established a policy governing the use of mechanical lifts (lift policy) for the physical transfer of residents who needed such devices for assistance. CMS Ex. 16. The overall objective of this policy is to provide appropriate, high-quality care for each of Petitioner's residents and to maintain a safe and enjoyable work environment for Petitioner's employees. CMS Ex. 16, at 4; P. Ex. 69, at 4.

- The lift policy provides explicitly that residents of Petitioner's facility who are identified as totally dependent on the staff for care or requiring extensive assistance for care will be transferred by means of lift equipment and/or other resident assistance devices instead of by manual lift. CMS Ex. 16, at 4; P. Ex. 69, at 4.

- The lift policy provides additionally that a resident's transfers, mobility assistance and other resident handling and movement tasks are to be carried out in accord with that resident's minimum data set (MDS) and care plan. CMS Ex. 16, at 4; P. Ex. 69, at 5. Staff are enjoined not to deviate from the resident's MDS and care plan without contacting supervisory personnel. CMS Ex. 16, at 4; P. Ex. 69, at 5. The lift policy reinforces this requirement by instructing individual employees that:

  > Once the staff has been inserviced, **the use of the lifts on assessed residents becomes mandatory.** The staff should assist you in reporting changes of conditions, which may necessitate a reevaluation of the resident and the lift. However, **the staff should clearly understand that prior to changing a transfer procedure on a resident, the supervisor must be consulted.**

CMS Ex. 16, at 4; P. Ex. 69, at 11 (emphasis added).

- The lift policy also requires that supervisors will be responsible for ensuring that resident handling tasks are assessed and completed safely, using mechanical lifting devices and other appropriate resident handling aids and appropriate techniques. CMS Ex. 16, at 4; P. Ex. 69, at 6.

Resident # 6

- A resident of Petitioner's facility who is identified as Resident # 6 was, as of June 2007, an 85-year old individual suffering from debilitating physical and cognitive problems, including bilateral foot drop. CMS Ex. 10, at 1, 9, 28, 40. I take notice that a "foot drop" is an inability of an individual, for neurological reasons, to control the position of his or her foot. The bilateral foot drop affected both of the resident's feet.

- Petitioner's staff assessed Resident # 6 as requiring extensive assistance and as requiring a mechanical transfer with a device called a Marisa Lift when Petitioner's staff transferred her from her bed to a wheelchair. *Id.* at 10, 13, 23. "Safety" was given as the reason for this assessment. *Id.* at 10. The resident's care plans dated January and March 2007 also provided that the resident be mechanically transferred. *Id.* at 28, 30, 34.

- The care plan noted that the resident was afraid of the mechanical lift device, preferring that the staff transfer her manually, and the planned intervention was for staff to encourage the resident to use the mechanical lift. *Id.* at 34.

- On May 18, 2007, Petitioner's staff attempted to transfer Resident # 6 from her bed to a wheelchair manually, without the assistance of a lift. *Id.* at 54, 63-68; P. Ex. 57. Petitioner's staff did not first consult with a supervisor prior to attempting the manual transfer.

- The resident sustained a broken right leg; Petitioner determined that during the transfer the resident's foot struck a bed rail. CMS Ex. 10, at 63.

Resident # 7

- As of June 2007, a resident who is identified as Resident # 7 was an 87 year-old female who suffered from right side hemiplegia (paralysis on the right side of her body) as the consequence of a stroke and blindness. CMS Ex. 11, at 1.

- The resident's May 14, 2007 care plan required that the resident be mechanically transferred from her bed with the assistance of two staff members. *Id.* at 1, 4.

- However, and as is corroborated by admissions by members of Petitioner's staff and the observations of a State agency surveyor, Petitioner's staff usually transferred Resident # 7 with a mechanical device but with the assistance of only one member of Petitioner's staff. CMS Ex. 6, at 63.

The regulations governing hearings in cases involving CMS at 42 C.F.R. Part 498 do not provide explicitly for the imposition of summary judgment. Administrative law judges have applied the principles of Rule 56 of the Federal Rules of Civil Procedure to enter summary judgment in those cases where there are no disputed issues of material fact and where the only disputes between the parties are about legal issues.

The Departmental Appeals Board (Board) has found summary judgment to be appropriate in cases involving a facility's compliance with the requirements of 42 C.F.R. § 483.25(h)(2). Such cases include those where undisputed facts establish that the facility has identified and planned for a risk, but not followed its own plan in attempting to prevent accidents. *Windsor Health Care Center,* DAB No. 1902 (2003), *aff'd*, *Windsor Health Center v. Leavitt*, 127 Fed. Appx. 843, 2005 WL 858069 (6th Cir. Apr. 13, 2005); *St. Catherine's Care Center at Findlay*, DAB No. 1964, at 13 (2005).

The undisputed facts of this case place it on all fours with those in which the Board and federal appeals courts have found summary judgment to be appropriate. They establish that Petitioner was not providing its residents with adequate supervision and assistance devices to prevent accidents because its staff contravened facility policy *and* requirements established for individual residents which directed the staff to use mechanical lifts in order to protect the residents. Petitioner's staff assessed both Residents #s 6 and 7 as requiring transfers with the use of a mechanical lift. The residents' debilitated states required that they be transferred mechanically for their own protection and safety. Care plans were developed for each resident that incorporated these conclusions. In the case of Resident # 6, Petitioner's staff failed to use the mechanical lift that it had been directed to use. The failure of Petitioner's staff to provide care to Resident # 6 consistent with the

resident's assessment and care plan and Petitioner's lift policy is in and of itself sufficient to justify my conclusion that Petitioner failed to comply with the requirements of 42 C.F.R. § 483.25(h)(2).

In the case of Resident #7, Petitioner's staff failed to transfer the resident in compliance with a determination that the resident needed a two-person assist when transferred. Petitioner's staff violated Petitioner's protocol in providing care to Resident # 6 and to Resident # 7 by failing to consult with supervisors before contravening the residents' care plans and Petitioner's lift policy.

Petitioner offers a series of arguments to counter CMS's motion. I do not find them to be persuasive. Petitioner contends that it would be unfair to issue summary judgment against it premised on its noncompliance with a single Medicare participation requirement when CMS alleged originally that there were four additional instances in which Petitioner failed to comply with participation requirements. Petitioner's response to CMS's motion for summary judgment (Petitioner's response) at 2. But, there is nothing in either the Act or implementing regulations that requires CMS to sustain each of its allegations of noncompliance as a condition for it to impose a remedy against a participating facility. CMS is authorized to impose a remedy against a facility so long as there are sufficient findings of noncompliance to justify imposition of that remedy. As I discuss below, at Finding 3, the findings of noncompliance that I sustain in this decision are sufficient to support the civil money penalties that CMS determined to impose.

Next, Petitioner contends that the material facts of this case definitely are disputed. Petitioner's response at 5-18. But, in fact, Petitioner has not disputed the facts that I recite above and which I find to be material to this decision. It has raised other fact allegations which it contends are material and which it asserts create fact disputes. For purpose of this decision, I accept each of Petitioner's fact allegations as true. But, that does not change the outcome inasmuch as none of them are material.

Petitioner argues that CMS omits to state in its motion that its lift policy has a dual purpose: (1) to protect residents; *and* (2) to protect members of Petitioner's staff from injuring themselves when they transfer residents. Petitioner's response at 7-8. That may be so. But, as Petitioner concedes, protection of residents is certainly a principal purpose of the lift policy.

Moreover, Petitioner does not deny that protection of these residents from harm was a reason for ordering that they be transferred mechanically or with a two-person assist. And, Petitioner has offered nothing to show that protection of Residents #s 6 and 7 was not a major consideration in the staff's determination to require that these residents be transferred with mechanical lifts (and, in the case of Resident # 7, with a two-person

assist). Thus, even if protection of staff from injuries was a reason for the staff's decision to require that Residents #s 6 and 7 be transferred with mechanical lifts, Petitioner has identified absolutely nothing to support a conclusion that protection of these residents was not a major consideration as well.

According to Petitioner, its witnesses describe in their written direct testimony:

> various circumstances where it may be clinically appropriate – or even preferred – and perfectly safe, to transfer a particular resident from one surface to another via a "physical assist" . . . even where an assessment or care plan generally provides for use of a mechanical lift.

Petitioner's response at 9. For purposes of this decision, I accept that this contention is true. But, it is irrelevant here because, in the cases of Residents #s 6 and 7, Petitioner's staff *specifically ordered* that the residents be transferred mechanically (or, mechanically with a two-person assist). Petitioner has not identified anything which would show that Petitioner's staff made a reasoned judgment prior to the June 8 survey to modify those orders.

Petitioner argues that CMS's allegations must be evaluated against the context that it is impossible to eliminate entirely the risk of accident and injury inherent with a resident's transfer. Petitioner's response at 10-11. I disagree. I accept as a premise that it may be impossible for a nursing facility to eliminate every risk to a resident. But, that is not the compliance standard that 42 C.F.R. § 483.25(h)(2) mandates, nor is elimination of every risk the criterion I use to decide that Petitioner was noncompliant. The regulation requires a facility to take all reasonable measures to address known or knowable risks that a resident encounters. Here, the undisputed facts establish that Petitioner identified risks to its residents related to the way in which they were transferred and it established policies and care plans to address those risks. Petitioner is deficient not because it failed to address risks that were impossible to eliminate but because it failed to carry out its own plans to address risks which it knew it could minimize.

Petitioner also asserts that CMS has confused Petitioner's annual "Lift/Mobility Assessment" of each resident with sections of the comprehensive assessment and MDS which Petitioner prepares for each resident. Petitioner's response at 13. I see no such confusion in CMS's case against Petitioner. CMS is not relying on anything other than the assessments that Petitioner's staff made of each of the two residents whose care is at issue. What is evident from the undisputed facts of this case is that Petitioner's staff concluded that these two residents needed mechanical transfers (and a two person assist in the case of Resident # 7) for their own safety. Nothing that Petitioner asserts contradicts those facts.

As an additional contention, Petitioner asserts that its staff members are trained to provide safe transfers of residents, including what to do in the event that a resident slips, loses his or her balance, becomes ill or agitated, or simply will not or cannot complete a transfer safely. Petitioner's response at 14. For purposes of this decision I assume this assertion to be true. But, it begs the question of whether Petitioner's staff followed prescribed procedures and care plans in providing care to Residents #s 6 and 7.

In addressing the care given to Resident # 7, Petitioner seems to be arguing that, notwithstanding the requirements in the resident's plan of care, it was perfectly safe for Petitioner's staff to transfer the resident with the assistance of only one person. Petitioner's response at 16. However, the facts on which Petitioner relies all post-date the point during the June 8 survey at which noncompliance was identified. *See* P. Ex. 64; P. Ex. 68; P. Ex. 86. For example, Petitioner amended the resident's care plan to provide for one-person assistance during transfers only after the surveyors discovered that the staff was violating the resident's care plan requiring two-person transfers.

Prior to the survey, Petitioner's staff were operating under the assumption that two-person transfers of this resident were necessary to protect her. Failure by the staff to comply with the directives in the resident's care plan and with Petitioner's policies is unrebutted evidence that the staff was not carrying out facility directives designed to protect residents. So, even if it may be determined from the vantage point of hindsight that *this resident* could have been transferred safely with the assistance of only one staff member, that conclusion says nothing about the Petitioner's staff's disregard of instructions that were designed to protect all of Petitioner's residents. For that reason Petitioner's argument that the resident could have been transferred safely with the assistance of only one staff member does not address the issue of its compliance.

Petitioner also alleges that Resident # 7's care plan prior to the survey – which mandated two-person assisted transfers – was unclear. Petitioner's response at 16. I see no lack of clarity in the care plan and no fact dispute as to what the care plan said. The precise language of the plan read:

> Use: two staff to assist getting OOB [out of bed].

CMS Ex. 11, at 1. That language is unequivocal and Petitioner has pointed to nothing which suggests it to be unclear or subject to interpretation.

Petitioner suggests that there is a fact dispute as to whether Resident # 6 actually broke her leg while being transferred. Petitioner's response at 17. I am not persuaded that there are facts which credibly support any explanation for the injury sustained by the resident other than the facility's conclusion that she struck her foot against her bed rail during the

transfer. But, for purposes of this decision I will assume that there is a genuine dispute as to how the resident was injured. I find that it is unnecessary that I decide the cause of the resident's injury.

Certainly, concluding that an improper transfer of Resident # 6 caused her to sustain a broken leg would be relevant to a finding that Petitioner was noncompliant. But, that conclusion is *not necessary* to finding lack of compliance. Noncompliance is based on Petitioner's failure to carry out instructions in the resident's care plan and to comply with its own policy in a way that put the resident at risk for harm. The risk to the resident is evident from Petitioner's own assessment that the use of a mechanical lift was necessary to protect her.

Petitioner asserts that Resident # 6's care plan did not require the use of a mechanical lift for transfer but merely recommended the use of that device. Petitioner's response at 18. But, Petitioner's assertion notwithstanding, Petitioner's staff had concluded about Resident # 6 that:

> She has bilateral foot drop and needs to be transferred to her w/c [wheel chair] via mechanical lift.

CMS Ex. 10, at 21. There is nothing equivocal about that assessment. The statement "needs to be transferred" is not a suggestion nor is it a recommendation. It is an unadorned finding that transfer via a mechanical lift was necessary to protect the resident. Petitioner's lift policy mandates that a mechanical lift be used to transfer every resident who is assessed as needing mechanical transfer. CMS Ex. 16, at 4; P. Ex. 69, at 4. So, even if there were ambiguity in the resident's care plan (and I do not find it to be ambiguous) the staff's assessment of the resident coupled with the facility's lift policy would have mandated mechanical transfers.

Petitioner also argues that establishing noncompliance requires CMS to prove, prima facie, that Petitioner not only failed to comply with facility policy and its residents' care plans but that the alternative means used by the staff to transfer Residents #s 6 and 7 (manual transfer in the case of Resident # 6, mechanical transfer but aided by only one staff person in the case of Resident # 7) were, in and of themselves, dangerous to the residents. But, that argument is answered by Petitioner's own assessments of these residents' needs. Petitioner's staff concluded that mechanical transfer (assisted by two staff persons in the case of Resident # 7) was *necessary* to protect these residents. CMS is not obligated to prove anything more than that.

CMS concluded that Petitioner's noncompliance persisted through July 3, 2007. Petitioner offered no facts or arguments in opposing CMS's motion to establish that it corrected its noncompliance prior to that date. Where noncompliance is established – as is established here by undisputed material facts – it is presumed to continue until CMS either determines that it has been abated or until the facility proves that it corrected the noncompliance. Consequently, I sustain CMS's determination as to duration.

2. CMS's determination that Petitioner's noncompliance on June 7 and 8, 2007 was at the immediate jeopardy level is sustained by the undisputed material facts and is not clearly erroneous.

The undisputed material facts strongly support CMS's determination of immediate jeopardy level noncompliance on June 7 and 8, 2007. Petitioner's staff determined that mechanical transfer of Resident # 6 was necessary in order to protect her. The staff concluded, in effect, that transferring the resident by another means would create unacceptable risks of injury or harm to the resident. The staff's failure to implement this assessment, therefore, put the resident at an unacceptable risk of harm based on the staff's own judgment of the resident's needs.

I do not premise my conclusion that Resident # 6 was placed in jeopardy by the staff's failure to transfer her mechanically on the injury she sustained when the staff transferred her manually on May 18, 2007. The likelihood of harm resulting to the resident from a manual transfer is established, in this case, by Petitioner's staff's assessment that mechanical transfer was necessary in order to protect her. Petitioner has offered no facts to challenge this assessment. I am not concluding that finding that the staff injured the resident by transferring her improperly is irrelevant. Rather, I conclude that it is unnecessary for me to make such a finding in order to sustain CMS's determination of an immediate jeopardy level deficiency.

The staff's failure to comply with the care plan that it established for Resident # 7 provides added support for my conclusion that immediate jeopardy is established by the undisputed material facts. For purposes of my decision I accept as true Petitioner's contention that the resident was, in fact, capable of being transferred with the assistance of only one person. But, prior to June 8, 2007 the staff didn't know that to be correct. The staff planned its care of the resident based on an assessment that two-person transfers were mandatory. The failure of the staff to implement that assessment, coupled with the failure to carry out instructions to transfer Resident # 6 mechanically, shows that the staff was indifferent to the assessments and plans that were developed to protect Petitioner's residents. That is certainly a contributing factor to the immediate jeopardy level noncompliance that I find was present at Petitioner's facility.

3. The undisputed material facts sustain CMS's determination to impose civil money penalties against Petitioner of $3,050 and $300 per day.

This case involves two civil money penalty determinations by CMS. The first, to impose civil money penalties of $3,050 per day for the period of June 7 and 8, 2007, is intended to remedy Petitioner's immediate jeopardy level noncompliance. The second, to impose civil money penalties of $300 per day for each day of a period that ran from June 9 through July 3, 2007, is intended to remedy Petitioner's noncompliance during this period at a level of scope and severity that is less than immediate jeopardy. I sustain both determinations.

a. Penalties of $3,050 per day for June 7 and 8, 2007 are reasonable as a matter of law.

Regulations governing civil money penalty amounts provide for two ranges of penalties. Penalties for deficiencies that are at the immediate jeopardy level fall within a range of between $3,050 and $10,000 per day. 42 C.F.R. § 488.438(a)(1)(i). The minimum daily immediate jeopardy level penalty amount is $3,050 and that is what CMS imposed against Petitioner for its two days of immediate jeopardy level noncompliance. Consequently, that penalty amount is reasonable as a matter of law.

b. The undisputed material facts establish that penalties of $300 per day for each day of the period beginning on June 9, 2007 and running through July 3, 2007 are reasonable.

The range of permissible civil money penalties for non-immediate jeopardy level deficiencies is from $50 to $3,000 per day. 42 C.F.R. § 488.438(a)(1)(ii). There are regulatory criteria for deciding what is reasonable within this range. The criteria 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)).

Neither CMS nor Petitioner provided me with meaningful arguments as to whether a $300 daily civil money penalty is reasonable. CMS asserts merely that it considered the regulatory criteria governing penalty amount in determining to impose penalties of $300 per day. But, my authority is not limited to an appellate review of CMS's penalty determinations. I am charged with deciding de novo whether a civil money penalty amount is reasonable. Petitioner failed to address the issue of reasonableness in its response to CMS's motion.

However, the undisputed material facts of this case provide ample support for a penalty amount of $300 per day. I find that the seriousness of Petitioner's noncompliance is, in and of itself, sufficient to justify the penalty amount. In fact, the penalty amount of $300 per day that CMS determined to impose is quite modest, comprising only ten percent of the maximum allowable non-immediate jeopardy daily penalty amount.

Even after Petitioner abated immediate jeopardy on June 8, 2007 there still remained a significant possibility that residents of Petitioner's facility might experience harm as a consequence of the staff's evident inability to implement Petitioner's lift policy and findings in assessments and resident care plans. What is apparent from the way in which the staff dealt with both Residents #s 6 and 7 is that the staff simply failed to comprehend the importance of following established policies and care plans. Thus, the *potential* for significant harm continued to exist at Petitioner's facility until the staff became fully proficient in carrying out facility policies and in implementing care plans.

/s/
Steven T. Kessel
Administrative Law Judge