Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Claiborne and Hughes Health Care Center (CCN: 44-5157),	)	Date: July 10, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-08-525
	)	Decision No. CR1815
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION ON REMAND

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS) to impose civil money penalties against Petitioner, Claiborne and Hughes Health Center, in amounts of $100 per day, for each day of a period that began on September 5, 2006 and which continued through September 17, 2006. I also sustain CMS's determination to deny Petitioner payment for new Medicare admissions for each day of this period.

I. Background

This was originally before me as two consolidated cases.[1] On November 9, 2007 I issued a decision in these cases in which I sustained CMS's determinations to impose remedies against Petitioner. Petitioner appealed my decision and, on June 16, 2008, an appellate panel of the Departmental Appeals Board issued a decision in which it affirmed in part and reversed in part my findings of noncompliance and my decision to impose remedies. *Claiborne-Hughes Health Center*, DAB No. 2179 (2008). It affirmed my decision that, from July 18 through September 4, 2006, Petitioner manifested an immediate jeopardy

[1] The cases bore the Civil Remedies Division docket numbers C-07-31 and C-07-111.

level deficiency justifying the imposition against it of civil money penalties of $3,050 per day for each day of the period. Additionally, it affirmed my decision that CMS was authorized to deny Petitioner payment for new admissions for each day of a period that began on August 20, 2006 and which continued through September 4, 2006.

The appellate panel reversed that part of my decision in which I found that Petitioner manifested non-immediate jeopardy level noncompliance from September 5 through September 17, 2006 with a Medicare participation requirement that is stated at 42 C.F.R. § 483.10(b)(11). It remanded the case to me so that I might decide whether Petitioner failed to comply with one or more other Medicare participation requirements during the September 5 - 17, 2006 period and to decide whether, assuming that Petitioner was noncompliant, CMS's remedy determinations covering the September 5 - 17, 2006 period were reasonable.

The noncompliance findings that are at issue for the September 5 - 17, 2006 period were made at a survey of Petitioner's facility that was completed on September 6, 2006 (September survey). 07-111, CMS Ex. 1.[2] The September survey noncompliance findings included allegations that Petitioner failed to comply substantially with Medicare participation requirements stated at 42 C.F.R. §§ 483.10(b)(11) (as I discuss above, the appellate panel reversed my finding that Petitioner failed to comply with this requirement); 483.15(g)(1); and 483.25(j). In this decision on remand, I address CMS's allegations that Petitioner failed to comply with the requirements of 42 C.F.R. § 483.15(g)(1). I find it unnecessary to address additional findings of noncompliance made either at the September survey or at an earlier survey that occurred in August 2006 (August survey).

I base this decision on remand on the evidence that I received previously and on the parties' previously filed briefs. I have not afforded the parties the opportunity to submit additional evidence inasmuch as I closed the record of this case prior to my issuing my November 9, 2007 decision. Nor have I requested additional briefing from the parties inasmuch as all of the issues were briefed previously.

---

[2] All of the exhibits that I received into evidence previously remain in evidence. I cite to them here using the same nomenclature that I used in my November 9, 2007 decision.

II. Issues, findings of fact and conclusions of law

A. Issues

On remand, the issues are whether, during the period beginning September 5, 2006 and running through September 17, 2006:

1. Petitioner failed to comply substantially with a Medicare participation requirement.

2. CMS's remedy determinations are reasonable.

B. Findings of fact and conclusions of law

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

1. During the September 5 - 17, 2006 period Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.15(g)(1).

The regulation in question requires a skilled nursing facility to provide medically related social services to its residents so that each of them may attain or maintain his or her highest practicable physical, mental, and psychosocial well-being. 42 C.F.R. § 483.15(g)(1).

CMS alleges that Petitioner failed to comply substantially with the requirements of this regulation in that it failed to inform a resident's family (the resident is identified as Resident # 5 in the report of the September survey) that it had ordered and conducted a medical consultation in order to evaluate the resident for suitability for hospice care. CMS's final brief (dated October 2, 2007) at 40; 07-111, CMS Ex. 1, at 3 - 4; 07-111, CMS Ex. 7, at 1 -3, 6 - 7. The evidence offered by CMS, which includes an interview with a member of the resident's family, supports CMS's allegations.

Hospice care is a special way of caring for people who are terminally ill and who are at the end stages of their lives. 07-111, CMS Ex. 26, at 1. Its goal is management of symptoms rather than attaining a cure. Thus, although hospice care may benefit its recipients it represents a definite and significant change in the course of care and treatment that its recipients receive. I take notice that the Medicare program pays for hospice care separate and apart from other items or services for which it may compensate.

Petitioner argues, first, that it was under no obligation to consult with the resident's family before having the resident evaluated for hospice care. I find this argument to be without merit. It is true that 42 C.F.R. § 483.15(g)(1) does not spell out the steps that a facility must take as a prerequisite to ordering hospice care or even a hospice suitability consultation for a resident. But, implicit in the regulations is that every resident of a facility – or that resident's guardian or representative – must be kept informed of every significant care decision by facility staff. The resident or her representative had a right in this situation to refuse the consultation or to have it conducted by a different medical professional than that selected by Petitioner. Given that, it was essential that the resident's family be given the opportunity to weigh in before a hospice suitability consultation was performed on Resident # 5.

Petitioner then argues that Resident # 5's family "was aware of the situation." Petitioner's final brief (dated October 2, 2007) at 82. As support for this contention, it cites to the declarations of two of its witnesses, its director of rehabilitation (07-111, P. Ex. 6), and a health care consultant (07-111, P. Ex. 8). However, the evidence cited by Petitioner does not show that it discussed in advance with the resident's family its decision to order a hospice suitability consultation for Resident # 5. The director of rehabilitation avers only that, during a discussion with the resident's daughter on August 21, 2006 concerning possible placement of a feeding tube in the resident:

> we introduced the topic of Hospice care for Resident # 5 with . . . [the daughter]. . . [She] stated she didn't really know how she felt about Hospice care for her mother, and that the family would have to think about it. . . .

07-111, P. Ex. 6, at 2 - 3.

The affidavit not only fails to prove that Petitioner informed the resident's family that it was ordering a hospice suitability consult for Resident # 5 but it shows that Petitioner knew that the resident's family was uncertain about agreeing to hospice care. Thus, it establishes that Petitioner ordered a hospice consult without the family's consent and in the face of knowledge that the family might not want hospice care for Resident # 5.

The affidavit of the health care consultant does not support Petitioner's argument. The health care consultant was not present during any of the conversations between Petitioner's staff and the resident's family and has no first-hand knowledge of what occurred. 07-111, P. Ex. 8.

Petitioner argues also that the resident's daughter acknowledged being aware of a hospice suitability consultation. It refers to a surveyor's note which quotes the daughter as saying:

> I had a call from Hospice asking for a consultation.

07-111, CMS Ex. 7, at 3.

But, Petitioner's arguments notwithstanding, this statement doesn't show that Petitioner's staff consulted with the daughter before ordering a hospice suitability consultation. The call that the daughter refers to is from *the hospice* and not from Petitioner's staff. The "consultation" that the hospice was seeking, evidently, was a consultation between the hospice and the resident's family. I infer, therefore, that the statement shows that the hospice consulted the daughter about hospice care only after the suitability consultation had been performed. The hospice's call to the daughter does not excuse Petitioner from its obligation to discuss the situation with the resident's family *before* it ordered the suitability consultation.

Petitioner also cites as support for its contention that the resident's family was aware of the hospice suitability consultation a nurses note dated August 22, 2006. The note states:

> Dr. Parker notified, family here, signed paper-work for No Tube Feeding, Hospice Consult. Awaiting orders.

07-111, CMS Ex. 7, at 9. I do not read this note as suggesting that the resident's family discussed a hospice suitability consultation with Petitioner's staff or with the resident's physician. All that the note says is that the nurse signed paperwork for a hospice suitability consultation. *Id.* It neither says nor suggests that the nurse did that after discussing the matter with the resident's family.

Petitioner also cites to a social progress note made on August 22, 2006 as evidence that the resident's family was aware that a hospice suitability consultation had been ordered for Resident # 5. However, the note does not suggest that the consultation had been discussed with the family prior to it being ordered. It says:

> Hospice consult has been order[ed]. Daughters are currently discussing whether or not to elect hospice and will make decision soon . . . .

07-111, CMS Ex. 7, at 13. When the note is read in context with the other documentation I have discussed, it suggests only that the staff had broached the subject of hospice care with the resident's family. It does not state or suggest that the staff had discussed with the family a hospice suitability consultation prior to ordering it.

I am not suggesting that Petitioner's failure to consult with Resident # 5's family before ordering a hospice suitability consultation for the resident was motivated by bad intentions. Petitioner's staff may well have had the resident's best interests in mind when they ordered the consultation. However, ordering the consultation was simply not a decision that the facility had the authority to make without first discussing the matter with the resident's family.

Nor is the noncompliance here insubstantial. The failure by Petitioner's staff to discuss a hospice suitability consultation with Resident # 5's family prior to ordering it is evidence of a broader problem, a lack of understanding on the part of the staff of its responsibilities to keep residents and their families informed of care decisions. Although the intent may have been benign in this situation, the ramifications of the staff's lack of understanding of their responsibilities might not be so benign in other circumstances where consultation and discussions prior to making care determinations are mandatory.

Petitioner has not offered evidence showing that it corrected its noncompliance with 42 C.F.R. § 483.15(g)(1) on any date prior to September 18, 2006, the date when CMS determined it had attained compliance with participation requirements. Consequently, I find that Petitioner's noncompliance with the regulation continued from September 5 through September 17, 2006.

2. CMS's remedy determinations are reasonable.

The noncompliance that I discuss above falls within the lower range of noncompliance consisting of a deficiency or deficiencies that are substantial but which do not put residents in immediate jeopardy. Thus, any civil money penalty that CMS may impose must fall within the penalty range of from $50 - $3,000 per day that is reserved for non-immediate jeopardy level deficiencies. 42 C.F.R. § 488.438(a)(1)(i).

The penalty amount that CMS determined to impose – $100 per day – is a minimal penalty comprising only three percent of the maximum permissible non-immediate jeopardy penalty amount. I find it to be commensurate with the potential for harm caused by Petitioner's noncompliance. 42 C.F.R. § 488.438(f)(3) (incorporating by reference 42 C.F.R. § 488.404). As I discuss above, the potential for harm relates not so much to the failure of Petitioner's staff to consult with Resident # 5's family as it does to the failure of Petitioner's staff to recognize and understand the need to consult with family and care givers before initiating significant treatment initiatives. This lack of understanding in some respects mirrors the deficiency that I discussed in my original decision in this case and which was identified at the August 2006 survey of Petitioner's facility.

I also sustain CMS's determination to impose denial of payment for new admissions during the September 5 through September 17, 2006 period. As I discussed in my original decision, CMS's authority to impose this remedy is discretionary and it may exercise that authority whenever a facility is out of compliance with participation requirements. I have no authority to question CMS's exercise of discretion to impose this remedy.

/s/
Steven T. Kessel
Administrative Law Judge