Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Adams County Manor (CCN: 36-6143),	)	Date: January 30, 2008
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-07-331
	)	Decision No. CR1730
Centers for Medicare & Medicaid Services.	)	
	)	

DECISION

Petitioner, Adams County Manor (Petitioner or facility), is a long-term care facility in West Union, Ohio, certified to participate in the Medicare program as a provider of services. Petitioner challenges the Centers for Medicare & Medicaid Services' (CMS's) determination that, from August 23, 2006 through January 3, 2006, it was not in substantial compliance with program participation requirements because its fire alarm system did not work reliably. Petitioner also challenges the penalty CMS imposed – a Denial of Payment for New Admissions (DPNA), effective November 25, 2006 through January 3, 2007.

CMS asks for summary affirmance. For the reasons discussed below, I grant CMS's motion. I conclude that the facility's admissions as to its deficiencies provide a sufficient basis for imposing a DPNA.

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). If a facility is not in substantial compliance with program requirements, CMS may impose a remedy, including a DPNA. 42 C.F.R. § 488.406. The facility may not then appeal CMS's choice of remedy. 42 C.F.R. § 488.408(g)(2).

When a facility is found to be out of substantial compliance for three months or longer, CMS must impose a DPNA. 42 C.F.R. § 488.417. If a facility is subject to a DPNA, its Nurse Aide Training and/or Competency Evaluation Program (NATCEP) may not be approved. Act, § 1819(f)(2)(B).

In this case, the Ohio Department of Health (state agency) conducted a Life Safety Code (LSC) survey of the Petitioner on August 23, 2006, and an annual health survey on August 25, 2006, to determine whether Petitioner was in substantial compliance with Medicare participation requirements. Both surveys found that the facility was not in substantial compliance with program requirements. On October 12, 2006 and November 14, 2006, LSC revisit surveys found that the facility remained out of substantial compliance with federal requirements.[1] An LSC revisit survey on January 4, 2007, found that the facility achieved substantial compliance as of January 4, 2007.

As a result of these findings, CMS imposed a DPNA from November 25, 2006 through January 3, 2007, which also precluded Petitioner from conducting NATCEP for two years beginning on November 25, 2006. CMS Ex. 6, at 2; *see* Act, § 1819(f)(2)(B); 42 C.F.R. § 488.417.

Petitioner requested a hearing (P. Hearing Request) and the case was assigned to me. I issued an initial pre-hearing order which directed the parties to file pre-hearing exchanges including briefs and proposed exhibits that included the written direct testimony of all proposed witnesses. The parties complied with the exchange requirements. With its pre-hearing brief (CMS Op. Br.) CMS moved for summary judgment. Petitioner opposed CMS's motion in its pre-hearing brief (P. Br.). In its opposition Petitioner raised new issues (the building's classification by the Ohio Department of Commerce), so, by order dated October 12, 2007, I gave CMS the opportunity to reply. Responding to my order, Petitioner asked to file a sur-reply, but, inasmuch as CMS had not yet filed a reply, I denied the request as premature. CMS then filed its reply in support of its motion for summary affirmance (CMS Reply). Petitioner did not renew its request for a sur-reply after CMS's reply was filed.

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[1] In order to sustain the penalty imposed here, I need not consider the deficiencies cited during the August 25, 2006 health survey. On October 12, 2006, a revisit health survey found that the facility had no health deficiencies that would cause it to be out of substantial compliance.

With its pre-hearing exchange CMS filed 59 proposed exhibits which it identified as CMS Ex. 1 – CMS Ex. 59. With its exchange Petitioner filed two proposed exhibits which it identified as P. Ex. 1 – P. Ex. 2.

II. Issues

I consider first whether summary judgment is appropriate. On the merits, the sole issue before me is whether, at the time of the August 23, October 12, and November 14, 2006 surveys, the facility was in substantial compliance with the requirements of the LSC.

III. Discussion

A. Summary judgment is appropriate because Petitioner has not brought forth evidence sufficient to establish a genuine factual dispute.

"To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact . . . ." *Livingston Care Center*, DAB No. 1871 (2003). The moving party may show the absence of a genuine factual dispute 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 Center v. Dep't of Health and Human Services*, 388 F.3d 168, 173 (6th Cir. 2004) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). To avoid summary judgment, the non-moving party must then act affirmatively by tendering evidence of specific facts showing that a dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (1986); *see also Vandalia Park*, DAB No. 1939 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No 1918 (2004).

Here, CMS has come forward with evidence that, at the time of the surveys, the facility did not comply with LSC requirements with respect to its fire warning system and its sprinkler system. In response, Petitioner argues that the facility building in question is not subject to the LSC requirements, which is a legal argument. Petitioner also argues that the state agency should have accepted an earlier date of correction. However, as the following discussion establishes, Petitioner presents no evidence sufficient to establish that 1) at the time of the surveys, it maintained an effective fire warning system, and 2) at the time of the August survey, its automatic sprinkler system was maintained in reliable operating condition, with periodic inspections and tests.

Because the undisputed facts establish deficiencies that are sufficient to sustain the penalties imposed, CMS is entitled to summary judgment.

B. The facility was not in substantial compliance with LSC sections 19.3.4 and 9.6 (K051) because its fire alarm system did not work properly.

The facility here consists of two buildings. Building 1 was built in 1859 and is located between two new wings termed Building 2. CMS Ex. 10, at 1; CMS Ex. 54, at 2 (Borell Decl.); CMS Ex. 56, at 2 (Washburn Decl.).[2] Building 1 is currently used for physical and occupational therapy, activities, dining, and the kitchen is located there. P. Ex. 2, at 4 (Houser Decl.); CMS Ex. 54, at 2 (Borell Decl.); CMS Ex. 56, at 2 (Washburn Decl.). Building 2 was built from 2005 to 2006 and is used primarily for resident rooms. P. Ex. 2, at 2 (Houser Decl.); CMS Ex. 54, at 2 (Borell Decl.).

A facility must be designed, constructed, equipped, and maintained to protect the health and safety of its residents, personnel, and the public. 42 C.F.R. § 483.70. With respect to fire safety, facilities "must meet the applicable provisions of the 2000 edition of the [LSC] of the National Fire Protection Association [(NFPA)]." 42 C.F.R. § 483.70(a)(1).

The LSC requires that facilities install and maintain adequate fire detection and communications systems. The purpose of these systems is to

> provide the indication and warning of abnormal conditions, the summoning of appropriate aid, and the control of occupancy facilities to enhance protection of life.

LSC § 9.6.1.3.

> Initiation of the required fire alarm systems shall be by manual means in accordance with 9.6.2 and by means of any required sprinkler system waterflow alarms, detection devices, or detection systems.

LSC § 19.3.4.2. *See also* LSC § 19.3.4.1 ("[h]ealth care occupancies shall be provided with a fire alarm system in accordance with Section 9.6").

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[2] Petitioner points out that the facility actually consists of five buildings: Building 1 (1859), the two new wings, and two stair towers. P. Ex. 2, at 2 (Houser Decl.). The surveyors explain that Building 2 is comprised of the two new wings. CMS Ex. 54, at 2 (Borell Decl.); CMS Ex. 56, at 2 (Washburn Decl.). It makes no difference whether the two new wings and stair towers are considered together or separately, so, to avoid confusion, I will refer to all of the new constructions as Building 2.

> Fire detection, alarm, and communications systems installed to make use of an alternative allowed by this *Code* shall be considered required systems and shall meet the provisions of this *Code* applicable to required systems.

LSC § 9.6.1.2.

The LSC also requires an approved maintenance and testing program for the fire alarm system, with the facility maintaining records of that maintenance and testing, as well as maintaining a copy of the certificate of compliance. LSC § 9.6.1.7; LSC § A.9.6.1.7.

The fire alert system in Building 1 did not work properly during any of the LSC surveys. P. Ex. 2, at 4 (Houser Decl.); CMS Ex. 10, at 11-13; CMS Ex. 49, at 3-4; CMS Ex. 51, at 2-3; CMS Ex. 56, at 5 (Washburn Decl.). On August 23, 2006, two pull stations of the fire alarm system in that building did not activate the fire alarm system. CMS Ex. 10, at 11-13; CMS Ex. 11, at 16; CMS Ex. 14, at 6; CMS Ex. 54, at 11-12. The facility's maintenance director admitted that the alarm did not sound after either pull station was activated and even told the surveyor that the pull stations on the second floor were not working either. CMS Ex. 10, at 11-13; CMS Ex. 54, at 11-12. In its hearing request, Petitioner acknowledges that the pull stations were in need of repair, but claims that they were repaired that day. P. Hearing Request at 4.

But when the surveyors returned to the facility on October 12, 2006, the fire alarm pull station on the second floor still did not work properly. The alarm sounded on the first floor, but it did not sound on the second floor. CMS Ex. 49, at 4; CMS Ex. 50, at 1; CMS Ex 56, at 5 (Washburn Decl.). A staff member asked to retest the alarm using a different pull station. Again, the alarm did not sound on the second floor, and the strobe light associated with the alarm did not illuminate. CMS Ex. 49, at 4; CMS Ex. 50, at 1; CMS Ex 56, at 5 (Washburn Decl.).

Petitioner subsequently claimed that the fire alarm on the second floor "was operational by November 10, 2006." P. Hearing Request at 2. However, at the time of the November 14, 2006 LSC revisit survey, the fire alarm pull station on the first floor did not work properly. The alarm did not sound and the strobe light did not flash. When the alarm was pulled on the second floor, only a faint sound could be heard on the first floor. The facility maintenance director indicated in an interview with the surveyor that the facility had used a light without a horn at one time, but that the light had been disconnected during recent construction and no longer worked. The maintenance director did not mention any alternative means of fire alert either during or after completion of the construction. CMS Ex. 51, at 2-3; CMS Ex. 52, at 1; CMS Ex. 54, at 18-19.

In his declaration, John B. Houser, one of the facility's owners (who was not at the facility during any of the surveys) admits that the fire system did not function properly. According to Mr. Houser, "one part would be working one time and another part would be working another." P. Ex. 2, at 1, 3-4 (Houser Decl.).

The LSC specifically requires that facilities maintain records of maintenance and testing and a copy of the certificate of compliance. LSC § 9.6.1.7; LSC § A.9.6.1.7. During the August survey, the facility could not provide documentation as to the date and time of the last fire alarm inspection for Building 1. P. Hearing Request at 4 ("[m]aintenance personnel will also keep a record of fire alarm inspections."). The facility's maintenance director admitted that the facility had no records of the last fire alarm inspection for Building 1. P. Hearing Request at 4. Petitioner's hearing request also states that it had to instruct personnel to keep records of fire alarm inspections. CMS Ex. 7, at 4. To be in compliance with testing requirements, a facility must *document* that it inspected and tested a system as required. *Crestview Parke Care Center v. Thompson*, 373 F.3d 743, 751 (6th Cir. 2004);[3] *Price Hill Nursing Home*, DAB No. 1781, at 18-19 (2001).

Thus, there is no dispute that the facility's fire alarm system did not function reliably. During each of the surveys, the alarm system failed. Nor has Petitioner demonstrated that it maintained and tested the system as required. CMS is therefore entitled to summary judgment on these issue. *See Crestview Parke Care Center v. Thompson*, 373 F.3d 743, 751 (6th Cir. 2004) (court affirmed agency finding of LSC violation where no dispute that at the time of the survey staff were unable to start the emergency generator, and where facility produced no evidence that the generator had been tested as required).

C. At the time of the August 23, 2006 survey, the facility was not in substantial compliance with LSC sections 19.7.6, 4.6.12, and 9.7.5 (K062).

Obviously, a sprinkler system that does not operate properly is useless. LSC sections 19.7.6, 4.6.12, and 9.7.5 provide that automatic sprinkler systems must be continuously maintained in reliable operating condition and must be inspected and tested periodically. There is no dispute that the LSC (NFPA 13 section 4.9.12) requires that sprinkler heads used for kitchen hood suppression be replaced annually.

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[3] For a more comprehensive discussion of the documentation requirement, see the full text of the DAB decision in *Crestview*. *Crestview Parke Care Center*, DAB No. 1836 (2002).

Here, as staff admitted, Petitioner's kitchen sprinkler heads were dirty and greasy. Moreover, Petitioner could not produce documentation that the kitchen hood sprinkler had been replaced as required. CMS Ex. 10, at 15-16; CMS Ex. 11, at 19; CMS Ex. 14, at 6; CMS Ex 54, at 14-15; s*ee* discussion *supra* p. 6**,** Part III.B.

Petitioner has not denied these allegations, but asserts in its hearing request that the sprinkler heads were scheduled to be cleaned. P. Hearing Request at 5. A scheduled cleaning is not sufficient to satisfy the LSC requirements. Had the sprinkler heads been maintained as required, they would not have been in the sorry state the surveyors found. *See* LSC §19.7.6 (referring to LSC § 4.6.12, which requires the maintenance of "any device, equipment, system, condition, arrangement, level of protection, or any other feature" required for compliance with the LSC); LSC § 9.7.5 ("All automatic sprinkler and standpipe systems required by this Code shall be inspected, tested, and maintained in accordance with NFPA 25, *Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems*.")

I therefore find that Petitioner was not in substantial compliance with LSC sections 19.7.6, 4.6.12, and 9.7.5.

D. Building 1 is subject to the requirements of the LSC.

Petitioner does not argue that Building 1 was in compliance with the LSC provisions that apply to nursing facilities. Instead, Petitioner asserts that the Ohio Department of Commerce classified Building 1 as a Group B (business) building,[4] and argues that, as such, it is not subject to the LSC provisions upon which CMS relies. P. Br. at 1. In support of this claim, Petitioner offers the declaration of an engineer, Mr. J.D. Stine, and a copy of the Ohio Department of Commerce Plan Approval. P. Ex. 1.

Neither the Ohio Building Code nor the state classification system exempts Petitioner from compliance with federal requirements for Medicare participation. Facilities "must meet the applicable provisions of the 2000 edition of the [LSC] of the [NFPA]." 42 C.F.R. § 483.70(a)(1). Moreover, for the initiation of required fire alarm systems, both the LSC provisions for business (LSC section 39) and health care (LSC section 19) incorporate LSC section 9.6.2. Therefore, whether termed a business or a healthcare occupancy, the LSC requires Petitioner to have an operating fire detection, alarm, and communications system with activation by manual means throughout the facility.

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[4] "Business Group B occupancy includes, among others, the use of a building or structure, or a portion thereof, for office, professional or service-type transactions, including storage of records and accounts." Ohio Admin. Code Chapter 4 § 304.1.

In any event, Mr. Houser's declaration confirms that Building 1 was regularly used for resident services, including physical therapy, dining, and activities. P. Ex. 2, at 4 (Houser Decl.). Because residents routinely access the building, Building 1 must be subject to those provisions of the LSC that apply to nursing facilities.[5]

E. The duration of the penalty is consistent with statutory and regulatory requirements.

Petitioner complains that it corrected its deficiencies earlier than January 4, 2007. Substantial compliance means not only that the specific cited instances of substandard care were corrected, and that no other instances have occurred, but also that the facility has implemented a plan of correction designed to assure that no such incidents occur in the future. The burden is on the facility to prove that it has resumed complying with program requirements, not on CMS to prove that deficiencies continued to exist after they were discovered. *Asbury Center at Johnson City*, DAB No. 1815, at 19-20 (2002). A facility's return to substantial compliance usually must be established through a resurvey. *Cross Creek Care Center*, DAB No. 1665 (1998); *Hermina Traeye Memorial Nursing Home*, DAB No. 1810, at 12 (2002) (citing 42 C.F.R. § 488.454(a) and (e)).

Requiring a showing of correction through a resurvey makes eminently good sense in this case, where the facility's fire alarm system was unreliable without being wholly dysfunctional. This is not a situation in which the system was broken, and then repaired and worked reliably thereafter. This is a situation in which repeated efforts did not resolve the system's underlying problems, so it could not be relied upon. It appears that repairing the pull station on one floor disrupted the system on the other floor. A temporary repair endangers residents and staff, and is not sufficient to establish that the facility achieved substantial compliance. The mere existence of an alarm "creates a reasonable expectation by the public that these safety features are functional. When systems are inoperable or taken out of service but the devices remain, they present a false sense of safety." LSC § A.4.6.12.2. CMS therefore reasonably required the facility to establish through resurvey that the problem had been corrected.

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[5] At best, the building might fall into the category of "mixed occupancies." *See* LSC § 6.1.14. A mixed occupancy building is one "in which two or more classes of occupancy exist in the same building or structure and where such classes are intermingled so that separate safeguards are impracticable." LSC § 3.3.134.10. As such, it would still be subject to the nursing facility provisions.

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 August 23, 2006 through January 3, 2007. CMS therefore had a basis for imposing a remedy. I have no authority to review CMS's choice of remedy, and must uphold the imposition of a DPNA.

/s/
Carolyn Cozad Hughes
Administrative Law Judge