

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Cascade-Nueces Health Services, LTD
D/B/A Cimarron Place Health & Rehabilitation Center,
(CCN: 67-6087),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-17-155

Decision No. CR5026

Date: February 14, 2018

DECISION

I grant the motion for summary judgment filed by the Centers for Medicare & Medicaid Services (CMS) against Petitioner, Cascade-Nueces Health Services, Ltd d/b/a Cimarron Place Health & Rehabilitation, a skilled nursing facility. I impose civil money penalties against Petitioner in the following amounts:

- \$4,550 per day for each day of a period that began on July 6, 2015 and that ran through July 28, 2016; and
- \$150 per day for each day of a period that began on July 29, 2015 and that continued through September 16, 2015.

I. Background

This case originally was assigned to another administrative law judge and was transferred to me in early February of this year. CMS moved for summary judgment while the case was assigned to the other judge and Petitioner opposed the motion.

In support of its motion CMS relies on 29 exhibits identified as CMS Ex. 1-CMS Ex. 29. Petitioner, in opposition, relies on two exhibits identified as P. Ex. 1-P. Ex. 2. I do not receive these exhibits into evidence inasmuch as I find the material facts of this case to be undisputed. I cite to some of the exhibits only to identify the source of undisputed facts.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether undisputed material facts establish that Petitioner failed to comply substantially with Medicare participation requirements, whether CMS's determination of immediate jeopardy level noncompliance is clearly erroneous, and whether the penalty amounts and durations determined by CMS are reasonable.

B. Findings of Fact and Conclusions of Law

CMS determined that Petitioner failed to comply substantially with six conditions of participation, at the immediate jeopardy level of noncompliance. CMS Ex. 2. It determined also that Petitioner failed to comply substantially with two additional conditions of participation albeit at a scope and severity of noncompliance that did not constitute immediate jeopardy. *Id.* Petitioner opted to challenge only the immediate jeopardy level noncompliance findings. P. Request for Hearing. The findings as to non-immediate jeopardy level noncompliance therefore are administratively final.¹

The allegations of immediate jeopardy level noncompliance all pertain to the care that Petitioner provided to a Resident who is identified as Resident 1.² It is undisputed that Resident 1 is an individual who, on the relevant dates, was suffering from a variety of medical problems that included, among others, atrial fibrillation, hypothyroid disease, congestive heart failure, and coronary artery disease. CMS Ex. 8 at 1; CMS Ex. 18; CMS Ex. 19. Her physician prescribed a variety of medications to treat these conditions. One of those medications was Coumadin. CMS Ex. 29 at 3-7.

¹ The non-immediate jeopardy level noncompliance findings are that Petitioner failed to comply substantially with the requirements of 42 C.F.R. §§ 483.25(a)(3) and 483.75(1)(1). CMS Ex. 2 at 36-42, 77-84.

² CMS's original allegations of noncompliance also addressed care that Petitioner's staff gave to a second Resident, Resident 5. However, CMS bases its motion for summary judgment entirely on the care that Petitioner's staff gave to Resident 1. As I discuss below, the undisputed facts addressing Petitioner's noncompliance as respects the care that it gave to Resident 1 amply support CMS's noncompliance allegations and a finding that this noncompliance was at the immediate jeopardy level.

Coumadin is an anticoagulant that is used to prevent heart attacks, strokes, and blood clots in susceptible individuals. CMS Ex. 29 at 3-7. Coumadin's benefits must be balanced against the risks that it poses for those individuals taking the drug. *Id.* While the drug effectively slows blood clotting time it may slow clotting time in some individuals so much as to be dangerous. *Id.* Coumadin has the potential of causing fatal bleeding in some individuals. *Id.* The blood clotting time of individuals taking Coumadin – measured in tests that assess how long it takes for blood to clot – must be carefully monitored. *Id.*

On June 20, 2015, Resident 1's physician issued a telephone order that the physician and one of Petitioner's nurses subsequently signed, directing Petitioner's staff to monitor the resident's blood clotting time weekly. CMS Ex. 8 at 169. Petitioner's staff noted the order on the resident's medication administration record (MAR). *Id.* at 152. However, the staff never conducted the prescribed tests even though they were administering Coumadin to the resident. Tests were supposed to have been done on July 6, 13, and 20, 2015, pursuant to the resident's physician's orders. They were not performed. *Id.* at 152.

On July 24, 2015, Petitioner's staff discovered a "clot and blood" coming from Resident 1's rectum. CMS Ex. 28 at 4. Petitioner sent the resident to the emergency room at a local hospital. There, the hospital staff determined that the resident's blood clotting time was far above normal. On one test for clotting time, the resident scored at a level that is 8-10 times the normal range. On another test her score was more than twice normal. CMS Ex. 8 at 212, 232. The resident suffered from Coumadin toxicity and the hospital treated her for a Coumadin overdose. *Id.* at 212.

Petitioner disputes none of the foregoing facts. P. Br. The undisputed failure by Petitioner's staff to follow Resident 1's physician's order to monitor the resident's blood clotting time while she was receiving Coumadin violated several conditions of participation. Petitioner clearly contravened 42 C.F.R. § 483.20(k)(3)(ii).³ This regulation requires that a facility arrange or provide services to a resident in accordance with the resident's plan of care. Petitioner failed to comply with this regulation in that its staff had planned to monitor Resident 1's blood clotting times in accordance with a physician's order but failed to do it.

Petitioner also contravened 42 C.F.R. § 483.25(l). The regulation requires that a resident's drug regime be free from unnecessary drugs. That requirement applies to any drug that is administered in an excessive dose or without adequate monitoring. Failure to provide ordered blood clotting time tests for a resident who is receiving Coumadin is a clear violation of the regulation's requirements. *Universal Health Care – King*, DAB No.

³ Some of the regulations that I cite were recodified. I cite to the versions of these regulations that were in effect in 2015 as of the dates of Petitioner's noncompliance.

2383, at 4, 7 (2011). The undisputed material facts establish additionally that Petitioner contravened the requirements of a related regulation, 42 C.F.R. § 483.75(j)(1). This regulation requires a skilled nursing facility to provide or obtain laboratory services to meet the needs of its residents. Here, laboratory services included obtaining the results of blood clotting tests that Resident 1's physician prescribed. Petitioner's failure to administer the tests precluded any possibility of performing the requisite laboratory services. CMS Ex. 28 at 4.

In addition, the undisputed material facts establish that Petitioner failed to comply substantially with the requirement set forth at 42 C.F.R. § 483.13(c). This regulation requires a facility to develop and to implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents. The term "neglect" is defined at 42 C.F.R. § 488.301 to mean a failure to provide goods and services to a resident that are necessary to avoid physical harm, mental anguish, or mental illness. Petitioner neglected to provide necessary care to Resident 1. That failure constituted a failure by Petitioner to implement its own policies governing resident treatment and care. CMS Ex. 23. The staff's failure to monitor the resident's blood clotting time – against the resident's physician's orders – was an evident failure to provide Resident 1 with necessary services.

Finally, the undisputed material facts establish that Petitioner failed to comply with the requirements of 42 C.F.R. § 483.75. This regulation requires a skilled nursing facility to be administered in a manner that enables it to use its resources effectively and efficiently so that each of its residents may obtain the highest practicable level of physical, mental, and psychosocial well-being. The undisputed facts establish an obvious supervisory failure at Petitioner's facility. Someone should have reviewed Resident 1's records to assure compliance with her physician's order. The absence of supervision compounded the staff's failure to comply with the order in that the failure went undetected or corrected for a full month.

The undisputed facts establish that Petitioner's noncompliance with these regulatory requirements posed immediate jeopardy for residents of Petitioner's facility. A Coumadin overdose may be lethal. In the case of Resident 1, the overdose endangered her to the extent that she exhibited bleeding of such severity that she needed hospital treatment. At the time of her visit to the emergency room the resident displayed blood clotting times that were several times the average, a highly dangerous situation.

Petitioner defends against summary judgment by asserting that the undisputed facts establish that Petitioner's noncompliance in providing care to Resident 1 was at most an isolated mistake by Petitioner's staff, one that Petitioner self-corrected prior to it being discovered by Texas state agency surveyors, and one that needed no further remediation after Petitioner corrected the problem. P. Br. at 3-4. Accepting Petitioner's representations as true for purposes of deciding the motion for summary judgment, I find that they provide no defense against the imposition of remedies. 42 C.F.R. § 483.430(b)

authorizes CMS to impose civil money penalties for noncompliance that predate a survey. Indeed, such remedies are routine. Moreover, the fact that Petitioner self-corrected its noncompliance does nothing to mitigate the findings of immediate jeopardy. Put simply, Resident 1 was at likelihood for serious harm or worse throughout the month-long period when Petitioner's staff failed to perform the physician-ordered tests of her blood clotting time. I do not find anything in the facts offered by Petitioner to suggest that the immediate jeopardy determination was clearly erroneous.

Petitioner also makes a disparate treatment argument, asserting that CMS has not imposed similar remedies in other instances where facts similar to those of this case existed. P. Br. at 4. That argument fails as a matter of law. Regulations governing remedies against skilled nursing facilities neither state nor do they imply that remedies should be imposed based on a comparative standard. What is reasonable in each case depends on the unique facts of that case and not what CMS may have determined to impose in other cases. *Beverly Health and Rehabilitation Serv. – Spring Hill*, DAB No. 1696 (1999), *aff'd*, *Beverly Health and Rehabilitation Serv. v. Thompson*, 223 F. Supp. 2d 73 (D.D.C. 2002).

Petitioner asserts that there are disputed issues of fact in this case that preclude issuance of summary judgment. P. Br. at 3. I disagree. The facts that I have stated in this decision aren't disputed and, indeed, Petitioner admits them. What Petitioner claims are disputed facts are, rather, *opinions* offered by two witnesses whose testimony CMS provides. *See* CMS Ex. 28; CMS Ex. 29. Those witnesses offer their opinions as to ultimate conclusions such as whether Petitioner failed to comply substantially with regulatory requirements, the scope and severity of Petitioner's noncompliance, and the reasonableness of the penalty amounts. These are all legal conclusions and I do not rely on them because they would not be admissible were I to conduct a hearing, and because they add nothing to the undisputed facts. By contrast, facts the declarants cite in CMS Ex. 28 and CMS Ex. 29 are not disputed by Petitioner.

The per diem civil money penalties that CMS imposed to remediate Petitioner's immediate jeopardy level noncompliance are reasonable both in amount and in duration. CMS imposed these penalties for each day that Petitioner's staff failed to carry out Resident 1's physician's order to monitor the resident's blood clotting times. In other words, the remedy applies only during the period of Petitioner's immediate jeopardy level noncompliance, and that is reasonable.

As for penalty amount, a penalty of \$4,450 per day is modest considering the flagrant failure of Petitioner's staff to do what they were ordered to do and the likelihood of serious harm or worse that Resident 1 experienced as a consequence. Civil money penalties may be determined based on regulatory factors that include a facility's compliance history, the severity of its noncompliance, its culpability, and its financial condition. 42 C.F.R. §§ 488.438(f)(1)-(4), 438.404 (incorporated by reference into 42

C.F.R. § 488.438(f)(3)). Here, the undisputed facts establish that Petitioner committed very serious regulatory violations. Its staff completely ignored a physician's order to monitor a resident's blood clotting time under conditions where grave harm to the resident was a likely consequence of the staff's neglect. The undisputed facts establish also that Petitioner has an extensive history of noncompliance beginning in 2006. CMS Ex. 7 at 1-5.

The penalties that CMS imposed in this case are modest in light of the severity of Petitioner's noncompliance and its poor compliance history. Under regulations that were in effect as of the time of Petitioner's noncompliance, CMS could have imposed civil money penalties of as much as \$10,000 per day. 42 C.F.R. § 488.438(a)(1)(i). The penalties that CMS determined to impose here are in fact quite modest, comprising less than one-half the maximum allowable daily penalty amount.

I find that the penalties that CMS imposed for non-immediate jeopardy level noncompliance of \$150 per day for each day of the period from July 29 through September 16, 2015 are administratively final and not subject to review inasmuch as Petitioner did not challenge the deficiency findings that form the basis for these penalties.

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