

Skin Care: Court Says CMS Must Consider Skilled Facility's Explanations For Non-Compliance With Federal Regulations.

A skilled nursing facility was cited by state department of health inspectors for deficiencies in violation of Medicare and Medicaid regulations. The US Centers for Medicare and Medicaid (CMS) services imposed a civil monetary penalty on the facility to enforce compliance.

The facility requested a hearing before an administrative law judge to contest the citations and the civil monetary penalty. The administrative law judge ruled in favor of CMS and upheld the citations and the penalty. The facility filed an appeal with the US Circuit Court of Appeals for the Sixth Circuit.

The Sixth Circuit Court upheld some of the citations. The Court also ruled in favor of the facility that the facility should have been allowed to present its explanations which the administrative law judge should have considered before ruling.

Aide In-Service Training

Federal regulations (42 CFR 483.75(e)(8)(i)) require at least twelve hours of annual in-service training for nurses aides. Failure to supply and document such training for all aides every year is a violation of CMS regulations.

Housekeeping / Facilities

The inspectors took issue with the cleanliness of the facility and with sanitary conditions in the kitchen.

The inspectors also found that the facility staff on duty were unable to start the facility's emergency electric power generator. It was no defense to a violation that required annual inspection records were available for the generator.

Patient Care

Skin Protection Not Being Used

The inspectors found that two specific residents were without their elbow and heel protectors at multiple times during the days of inspection, even though the residents' physicians had ordered the protectors to be worn at all times because of the high danger of pressure-sore development.

The Federal regulation (42 CFR 483.25(h)) dealing with pressure-sore care in nursing homes is not a strict-liability law. The legal standard is reasonableness, not absolute strict liability.

That is, a nursing home is allowed to offer reasons for ostensible failures to adhere to a resident's comprehensive plan of care.

Federal regulations for quality of care in nursing homes are meant to promote the highest practicable physical, mental and psychosocial well-being.

The nursing home is not necessarily guilty of a violation just because certain residents were observed without their skin protectors that had been ordered by their physicians.

Some justifications are acceptable; others are not.

If a nursing home is cited for ostensibly violating a resident's comprehensive plan of care, and wants to claim justification based upon practicability, the nursing home has to have the nursing and/or medical documentation to back it up.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
June 28, 2004

Physician's Orders Disregarded Violations Upheld

The Court soundly rejected the facility's argument that these two residents did not need their skin protectors because the protectors would not prevent the development of unavoidable pressure sores and because other treatments such as the use of pressure-relief mattresses were being used to prevent development of pressure sores.

The Court ruled that a skilled nursing facility cannot defend against charges it failed to adhere to a physician's orders by arguing that the orders are incorrect or misguided.

If the staff of a facility believes that a resident does not need elbow or heel protectors or some other treatment ordered by a physician, the proper course of action is to rework the patient's comprehensive plan of care though the channels outlined in the Federal regulations.

Patient Interference With Care Facility's Arguments

Should Have Been Considered

The facility wanted to argue before the administrative law judge that the patients themselves interfered with the implementation of their physicians' orders.

The facility offered an affidavit from the facility's administrator that some residents moved or shifted their skin protectors or were uncooperative with care or the staff had to remove the protectors to provide necessary treatment and personal care.

The Court validated the legal principle that the Federal regulations for nursing facilities are not strict-liability laws. That is, the focus is on the highest *practicable* level of well-being for residents. CMS is not supposed to impose a violation and/or a civil monetary penalty without hearing the facility's arguments as to the practicability of carrying out the care plan with the regulations' overall goals in mind.

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Treatment Records Lacking

That being said, however, although the facility should have been allowed to present its evidence on the issue of practicability of care, that evidence was not strong in this case.

The facility did not point to any patient-care records or written statements from treatment staff to back up the administrator's affidavit that patients were interfering with their own care. The administrative law judge would have to look carefully at the evidence when the case came back before her.

Focus on Avoidable Pressure Sores

With respect to other residents who did suffer from pressure sores the Court felt that the pressure sores were unavoidable, that is, that all appropriate treatment measures were taken with respect to avoidable pressure sores.

The Court ruled the administrative law judge would have to focus on the overall quality of care given the residents, rather than making a knee-jerk judgment that the facility was in violation just because certain aspects of the care plans were not being followed.

The facility would be able to point out that one or more pressure sores did improve or fully resolve for a resident who nevertheless had other sores which appeared and/or progressed other places on his body, evidence that he was receiving the best care practicable under the circumstances.

Prior Owner's Problems Irrelevant

In general, a nursing facility's past history of non-compliance can be a factor in computing how large a civil monetary penalty to impose for a particular violation. The Court ruled, however, that if the facility could show it "cleaned house" when new management took over, it would get a fresh start in this regard. Crestview Parke Care Center v. Thompson, ___ F. 3d ___, 2004 WL 1432719 (6th Cir., June 28, 2004).

Code of Federal Regulations 42 CFR Part 483 – Requirements for States and Long Term Care Facilities.

Sec. 483.20 Resident assessment.

(k) Comprehensive care plans.

(1) The facility must develop a comprehensive care plan for each resident that includes measurable objectives and timetables to meet a resident's medical, nursing, and mental and psychosocial needs that are identified in the comprehensive assessment. The care plan must describe the following--

(i) The services that are to be furnished to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being as required under Sec. 483.25; and

(ii) Any services that would otherwise be required under Sec. 483.25 but are not provided due to the resident's exercise of rights under Sec. 483.10, including the right to refuse treatment under Sec. 483.10 (b)(4).

(2) A comprehensive care plan must be--

(i) Developed within 7 days after completion of the comprehensive assessment;

(ii) Prepared by an interdisciplinary team, that includes the attending physician, a registered nurse with responsibility for the resident, and other appropriate staff in disciplines as determined by the resident's needs, and, to the extent practicable, the participation of the resident, the resident's family or the resident's legal representative; and

(iii) Periodically reviewed and revised by a team of qualified persons after each assessment.

Sec. 483.25 Quality of care.

Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being in accordance with the comprehensive assessment and plan of care.

(c) Pressure sores. Based on the comprehensive assessment of a resident, the facility must ensure that--

(1) A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable; and

(2) A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.

Sec. 483.75 Administration.

(e) Required training of nursing aides.

(8) Regular in-service education. The facility must complete a performance review of every nurse aide at least once every 12 months, and must provide regular in-service education based on the outcome of these reviews. The in-service training must--

(i) Be sufficient to ensure the continuing competence of nurse aides, but must be no less than 12 hours per year.