Long-Term Care Survey Alert

Case Study: Position Your Facility To Win An Appeal Long Before You Need To Battle F Tags

Find out what constitutes your best defense if you get hit with unfair F tags.

Nursing facilities are having more luck these days winning survey appeals when their evidence-based clinical practices - and attending physicians' and medical directors' opinions - weigh in their favor.

Administrative law judges are, in some cases, making the **Centers for Medicare & Medicaid Services** articulate how a citation violates a regulation, says Joseph Bianculli, an attorney in Arlington, VA.

Case in point: One facility found itself saddled with a deficiency and major civil monetary penalty for allegedly failing to assess a resident for psychoactive medication. CMS imposed a $131,000 CMP for immediate jeopardy at a clip of $3,050 a day for 43 days, which included the entire time the resident in question was receiving the psychoactive medications, including 10 days she wasn't taking them, reports Bianculli.

"The original CMS 2567 (statement of deficiencies) alleged the resident died due to inappropriate use of a series of psychoactive medications," Bianculli explains. "The 90-something-year-old resident did, in fact, die in the hospital from what the facility believes was sepsis due to osteomyelitis," he adds.

"The resident had received a series of psychoactive medications, including Zyprexa, Resperidol and one other drug, to treat agitation interfering with her ability to sleep. The different drugs weren't administered at the same time, however," says Bianculli.

Documentation, Physician Testimony Turn the Corner

The facility had solid documentation of their assessments and care related to the psychoactive medication. "The head clinical nurse for the corporation testified at the ALJ hearing (and CMS did not disagree) that assessment for a psychoactive medication should include observation, communication of those observations to the physician, and monitoring the resident" for side effects and outcomes, says Bianculli.

"The documentation showed facility caregivers spoke to the doctor and the content of the communication, such as 'Dr. advises med doesn't seem to be working. Increase dosage for three days and reevaluate for effectiveness,'" Bianculli reports.

The documentation also showed that the facility and physician reached a decision on the medical necessity of the drugs and their effectiveness on the targeted problem, says Bianculli. Not only that, but the resident was admitted to the hospital where a third physician decided to continue the psychoactive medication.

"The ALJ said he had to accept the facility's evidence since CMS couldn't explain why the facility's assessment used by the physicians to make their prescribing decisions didn't suffice under the regulations," says Bianculli.

OBRA Butts Heads With Nontraditional Facility

A second appeal shows how the right documentation and behavioral programs can win the day when surveyors write up a facility for resident-to-resident altercations.

Facts of the case: A special care facility in New York provides services for people with traumatic brain injuries, including ventilator care and locked behavioral units. "If New York had a more appropriate licensure category, the facility would probably be a long-term acute care (LTAC) or rehabilitation facility, but it's categorized as a nursing home," Bianculli explains.

CMS performed a federal lookback survey using Boston/Philadelphia surveyors who didn't know about the nursing facility's unique purpose and population, as state surveyors did, reports Bianculli. As a result, "the facility received numerous deficiencies and, after six months, still had some D's and one G-level deficiency for resident-to-resident altercations. So CMS terminated the facility from participation in federal programs."

At that point, the facility sought an expedited hearing with an ALJ. "The judge ultimately set aside every deficiency, saying that CMS can't squeeze the facts into the regulations based on the unique population served by the facility," says Bianculli.

Check out this helpful ruling: As for the G-level deficiency involving resident-to-resident altercation, the facility had excellent documentation of its behavioral program and follow-up after an altercation, says Bianculli. "And the ALJ judge ruled that the mere fact that a resident altercation has occurred is not in itself a deficiency," he adds.

The facility showed how the interdisciplinary team had used various interventions and how residents responded in each situation where CMS had identified residents involved in repeated acts of aggression or victimization.

"In some cases, the facility could trace minute by minute what happened with a resident following an aggressive incident - for example, he went to the emergency room for a psychiatric consult and came back on different medications," says Bianculli.