Skilled Nursing News

# Lawsuit: CMS Using Unvetted Claims in Star Rating Formula, Hurting Nursing Home Finances

By Maggie Flynn | January 29, 2020

A lawsuit filed last week accuses the Centers for Medicare & Medicaid Services (CMS) of using unreviewed deficiencies in its star rating system for nursing homes — a practice that providers claim puts them at risk for a variety of financial hardships.

The lawsuit was filed by sb2 inc. on behalf of 12 skilled nursing facilities; all are independently owned, though all are clients of the consulting firm Generations Healthcare Network, based in Lincolnwood, Ill.

It would be fair to describe the SNFs as "sister facilities," as they have some common ownership, Generations principal Bryan Barrish told Skilled Nursing News, though he stressed that each one is separate and independent.

The lawsuit was filed after roughly a year of deliberations, he said, and the issues that it raises could apply to more SNFs than the 12 plaintiffs.

"This should apply to any facility in the Medicare program," Barrish said. "As long as they're affected by the star rating system, this should be of interest to them. Every facility in the country, I would think, would want this suit to be successful."

The complaint alleges that because deficiencies recorded by state agency surveyors are posted to CMS's Nursing Home Compare website and made part of the public record, often before SNFs can contest them, they end up penalizing facilities without due process.

"Plaintiffs are entitled to a hearing regarding the alleged deficiencies under federal and state law prior to imposition of penalties in all cases," the complaint reads. "The posting of deficiencies constitutes a penalty which requires a hearing prior to posting and prior to any changes in the calculation of a Star Rating. Defendants have denied Plaintiffs the opportunity to contest citations at a fair and impartial evidentiary hearing."

The suit names Dr. Ngozi Ezike, in her capacity as director of the Illinois Department of Public Health (IDPH), and CMS administrator Seema Verma as defendants.

CMS told SNN that the agency does not comment on pending litigation as a matter of policy.

The IDPH, on the other hand, "does not have a role in hearings to contest federal deficiencies issued to Medicare certified facilities," a public information officer at the department told SNN via e-mail. That function falls to CMS, according to the officer.

**Harming business prospects**

The complaint focuses on the financial harm that a low star rating can bring to a skilled nursing facility, noting that CMS uses the information to deny properties a spot in the three-day waiver program — which allows SNFs to accept Medicare residents without a qualifying hospital stay. The Department of Housing and Urban Development (HUD) also uses star ratings when determining a property's eligibility for participation in various government-backed loan programs, the suit noted.

The star ratings are also used to determine inclusion in health care networks, by lenders in setting interest rates, and by suppliers when setting contract prices, the complaint noted.

They're also used by consumers in selecting a SNF.

Though CMS's guidelines specify that survey results shouldn't be uploaded to the Nursing Home Compare website before the resolution of an informal dispute resolution process, which CMS and the state are required to provide, the defendants are doing so anyway, the complaint alleges.

The complaint also alleges that because the formal hearing process takes so long — sometimes up to three years, according to Barrish — the contested deficiencies can have an extended effect on a facility's fortunes.

Deficiencies found in a facility during a survey can have a significant effect on the business prospects of facilities, though giving an exact number for the financial impact to the plaintiffs is difficult, Barrish said. But according to the complaint, the plaintiff facilities have all been prevented from participating in "at least one" insurance network, preferred provider network, or accountable care organization (ACO) because of low star ratings that are calculated based on unreviewed deficiencies.

"It's like saying: 'Who isn't coming to us because of this?' and I don't know who isn't coming to us because of it," Barrish pointed out. "I can tell you that most ACOs have a minimum [requirement] of three stars to be in the ACO, which is important to the financial viability of any facility, to be in its 9-1-1 ACO … the other issue is you lose the federal three-night waiver."

That could end up affecting patients, who might have to pay privately or go on Medicaid, which could then lead to differences in care coverage, he added.

All the plaintiffs have either been contacted by a lender about their low star ratings or are "in immediate danger of such contact" because of the star ratings related to those unreviewed deficiencies, according to the complaint. Their eligibility for HUD financing has also been adversely affected, the suit argues.

This is especially troublesome to facilities because the violations that are written can sometimes be reversed — years after they're written.

"You win the hearing, but the hearing's three year's down the road," Barrish said. "Where does a man go to get his good reputation back? There's nowhere to go at that point, it's over and done with, the damage has been done. We feel it's only due process and the facility's right to be able to go through the hearing process before it's dinged in the star rating system."