STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
Petitioner,	)	
vs.	)	Case No. 02-0596
BEVERLY HEALTHCARE EVANS,	)	
Respondent.	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on May 2, 2002, in Fort Myers, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Dennis Godfrey, Esquire
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For Respondent: R. Davis Thomas, Jr.
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STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner should change the rating of Respondent's license from standard to conditional.

PRELIMINARY STATEMENT

By letter dated August 27, 2001, Petitioner notified Respondent that Petitioner had changed Respondent's license rating from standard to conditional. Respondent timely requested an administrative hearing.

At the hearing, Petitioner presented the testimony of two witnesses and submitted 33 exhibits for admission into evidence. Respondent presented the testimony of one witness and submitted no exhibits for admission into evidence. The identity of the witnesses and exhibits and any attendant rulings are set forth in the Transcript of hearing filed on June 5, 2002.

The style of the documents in the case denoted Beverly Healthcare Evans (Beverly) as the Petitioner and the Agency for Health Care Administration (AHCA) as Respondent. That style, however, misrepresented the burden of proof in this case. AHCA has the burden of proof to substantiate the proposed agency action and properly should appear as the petitioner in the style of the case. The ALJ amended the style of the case, nunc pro tunc, to show AHCA as the Petitioner and to denote Beverly as Respondent.

The ALJ ordered the parties to file their respective Proposed Recommended Orders (PROs) within ten days of the date that the Transcript is filed with DOAH. On June 10, 2002,

Petitioner filed an unopposed Motion to extend the time for filing the PROs until July 15, 2002. The ALJ granted the motion for extension of time. Thereafter, Beverly filed an unopposed Motion to extend the time to file PROs until July 26, 2002. Respondent timely filed its PRO on July 26, 2002. Petitioner filed its PRO on July 29, 2002.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for evaluating nursing homes in Florida pursuant to Section 400.23(7), Florida Statutes (2001). Respondent operates a licensed nursing home located in Ft. Myers, Florida (the facility). (All chapter and section references are to Florida Statutes (2001) unless otherwise noted.)

2. Petitioner conducted a survey of the facility on August 16, 2001. Petitioner determined that Respondent violated the standards of 42 Code of Federal Regulations (CFR) Section 483.25(i)(1) with respect to the dietary care of residents 20, 6, and 8. Florida Administrative Code Rule 58A-4.1288 makes the federal standards applicable to nursing homes in the state. Petitioner prepared a survey report that sets forth the basis for the alleged violations under "Tag F325." F325 is a shorthand reference to the regulatory standard of the CFR.

3. Petitioner assigned the deficiency in F325 a severity rating of class "II." Section 400.23(8)(b) defines a class II deficiency as one that has:

> compromised the resident's ability to maintain or reach his or her highest practicable physical, mental and psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services.

The surveyors for Petitioner testified that a Class II rating was appropriate because each of the cited residents experienced a significant weight loss that the facility could have prevented with better dietary care.

4. Petitioner changed the license rating for the facility from Standard to Conditional within the meaning of Section 400.23(7). The change in license rating was effective August 16, 2001. The Conditional license rating continued until September 18, 2001, when Petitioner changed Respondent's license rating to Standard.

5. The regulatory standard of Tag F325 requires a nursing home to:

> ensure that a resident maintains acceptable parameters of nutritional status such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible.

42 CFR Section 483.25(i)(1).

6. The State Operations Manual (SOM) sets forth agency policy with respect to how surveyors are to interpret and apply the regulatory standard of Tag F325. In determining if a facility has maintained a resident's body weight at an acceptable level, the SOM guidelines direct surveyors to evaluate the significance of unplanned weight loss. A significant weight loss occurs when a resident loses five percent or more of his or her body weight in one month, 7.5 percent or more in three months, or 10 percent or more in six months. However, the guidelines caution surveyors that ideal body weight charts have not been validated for the elderly and that weight loss is only a guide in determining nutritional status.

7. If a resident has experienced a significant weight loss, the facility may nonetheless comply with the regulatory standard of Tag F325, if the Resident has clinical conditions that demonstrate that the maintenance of the Resident's weight at an acceptable level is not possible. The SOM indicates that clinical conditions that demonstrate that the maintenance of acceptable nutritional status may not be possible include advanced diseases such as cancer and a Resident's refusal to eat. Even in the absence of an identified disease process, the weight loss is considered unavoidable if the facility has properly assessed the resident, developed a care plan for the resident,

consistently implemented that care plan and periodically re-evaluated the care plan.

8. Resident 20 suffered from end-stage Alzheimer's disease and cancer. Like many persons afflicted with end stage Alzheimer's disease, Resident 20 began to refuse to eat food in November 2000. Residents with end-stage Alzheimer's disease refuse to eat because they no longer are aware of the need to eat and do not recognize any hunger pangs. As a result, they typically experience weight loss in their final months of life.

9. As early as October 2000, facility staff determined that Resident 20 was refusing to eat and developed a care plan for her. In November 2000, the facility dietician placed Resident 20 on a high calorie diet that offered her almost 4000 calories a day. The dietician also changed the consistency of Resident 20's diet from pureed to liquid in an effort to get her to consume more calories. However, Resident 20 continued to eat poorly.

10. Resident 20's weight dropped from 151.6 pounds to 147.2 pounds between November 15, 2000, and December 20, 2000. Between December 20, 2000, and January 24, 2001, Resident 20 lost only six tenths of a pound to 146.6 pounds. Resident 20's weight loss during two months between November 2000 and January 2001 was only three percent of her actual body weight. A three percent loss of body weight is not a significant weight loss under the SOM guidelines.

11. The facility dietician did not recommend any changes to Resident 20's dietary care plan for several reasons. Resident 20's weight had stabilized. The dietician believed that Resident 20's refusal to eat was a product of Alzheimer's disease and could not be reversed. Resident 20 had not experienced any significant weight loss. The dietician's decision not to make any revisions to the care plan was consistent with good dietary practice and relevant regulatory standards.

12. Between January 24 and February 28, 2001, Resident 20's weight dropped to 134.2 pounds. The weight loss was 8.5 percent of the resident's body weight. The parties stipulated that this weight loss was significant within the meaning of the SOM.

13. The facility dietician reassessed Resident 20 and concluded that the weight loss was attributable to a refusal to eat caused by Alzheimer's disease. The dietician placed Resident 20 on weekly weight monitoring.

14. The facility dietician correctly determined that there was no dietary intervention that would make Resident 20 consume more food. Both parties acknowledged that an end-stage Alzheimer's patient will progressively decline and that the patient's consumption gets worse, not better, over time. The dietician did not make any recommended changes to Resident 20's dietary orders. Instead, the dietician recommended that staff

discuss with the physician and family members the possibility of placing a feeding tube in Resident 20.

15. The facility arranged a meeting with the physician for Resident 20 and family members in March 2001, to discuss the possibility of a feeding tube for Resident 20. The family refused to consent to the placement of the feeding tube in Resident 20. Resident 20 had issued an Advance Directive which prohibited that intervention. Resident 20 passed away on May 7, 2001.

16. The facility did not violate the requirements of Tag F325 by failing to try or even consider new care plan interventions to prevent Resident 20's weight loss between March 1 and May 7, 2001. The facility could have offered Resident 20 smaller portions more frequently, instead of larger portions three times a day, or could have changed the temperature of the liquids offered to Resident 20. The facility could have offered Resident 20 supplements between meals. However, there is no evidence that the available interventions would have been effective.

17. Resident 20's cognitive decline was so severe that it is unlikely the available interventions would have had any positive effect on Resident 20. No regulatory standard required the facility to change the dietary care plan interventions for

Resident 20 prior to the significant weight loss in February 2001.

18. The facility provided Resident 20 with every reasonable intervention for the resident's dietary care. Resident 20's diet provided her with more than enough calories. Changing the amount or frequency of food offerings would have had no positive impact on Resident 20's consumption because of the resident's diminished cognitive capacity.

19. The absence of physician's orders for supplements for Resident 20 had no adverse effect. The facility's policy is to offer supplements throughout the day to all residents on the unit in which Resident 20 resided. The facility offered these supplements to Resident 20, but they did not improve her consumption or otherwise stem her weight loss.

20. The facility provided adequate dietary care to Resident 20. The facility offered Resident 20 fluids at three different meal times in addition to supplements throughout the day. Resident 20's appetite and consumption did not improve. The refusal to eat was not related to her distaste for the food offered to her, the quantity of the food offered to her, or the frequency of feeding. Rather, the refusal to eat was a product of her inability to understand what food was and the need to eat. It was thus appropriate for the surveyor to conclude that

additional interventions would not have been effective and should not have been employed.

21. The significant weight loss experienced by Resident 20 was unavoidable due to clinical conditions. The SOM guidelines acknowledge that weight loss should be expected in a resident who has a terminal illness or whose diminished cognitive capacity results in a refusal to eat. Resident 20 possessed both of these clinical conditions.

22. The facility admitted Resident 8 in July 2001, for rehabilitative care after surgery for a fractured femur. Upon admission, Resident 8 weighed 106.8 pounds. Her ideal body weight was approximately 98 pounds, and her usual body weight was between 100 and 105 pounds. The admitting body weight may have been high due to swelling in Resident 8's leg. The facility measured and monitored Resident 8's weight weekly for four weeks pursuant to the facility's protocol for all new admissions.

23. The facility dietician assessed Resident 8's food preferences and nutritional needs at the time of admission. The dietician designed a diet to meet Resident 8's needs and preferences. Resident 8 was cognitively alert and physically capable of feeding herself. Resident 8 did not require any special assistance to consume her food other than for staff to set up her feeding tray.

24. Resident 8 was at risk for weight loss due to poor intake upon admission. Facility staff decided not to develop a dietary care plan for Resident 8 because the resident was above both her ideal and usual body weights. The decision not to develop a dietary care plan was within the sound discretion of facility staff. The failure to develop a dietary care plan for Resident 8 did not violate the standard of Tag F325.

25. The dietary plan for Resident 8 maintained the Resident's body weight at acceptable levels for the first three weeks of her stay at the facility. Resident 8's weight on July 25, 2001, was 104.2 pounds. On August 1, 2001, Resident 8's weight was 106.2 pounds. On August 8, 2001, however, Resident 8's weight dropped to 100.2 pounds. On August 9, 2001, the resident's weight was 99.8 pounds. Resident 8's ideal body weight was approximately 98 pounds. The facility discharged Resident 8 on or about August 9, 2001, upon successful completion of her rehabilitation before another weight could be measured.

26. A threshold issue that must be determined is whether Resident 8 experienced a significant weight loss. Respondent stipulated at the administrative hearing that Residents 20 and 6 experienced significant weight losses during their stays at the facility, but refused to concede that point with regard to Resident 8.

27. As noted earlier herein, SOM guidelines indicate that a significant weight loss occurs if a resident loses 5 percent of his or her body weight in the "interval" of one month. The SOM guidelines prescribe a formula for determining the percentage of weight loss. The formula requires usual weight to be reduced by actual weight. The result is divided by usual weight, and that result is multiplied by 100.

28. Resident 8's usual body weight ranged between 100 and 105 pounds when she was admitted to the facility. Use of the high-end of that range in the SOM formula would produce the highest percentage of weight loss for Resident 8. The formula for calculating the significance of the Resident's weight loss produces a number that is less than the 5 percent weigh loss that must be present to satisfy the test of significant weight loss, e.g.: usual weight loss (105) less actual weight (99.9) equals 5.2. The result (5.2) is divided by usual weight (105). The result (.0495) is multiplied by 100 to determine the percentage of weight loss (4.95 percent).

29. The parties stipulated at hearing that Resident 8 lost 6.5 percent of her body weight between July 18 and August 9, 2001. However, that percentage is based upon a comparison of her actual body weights rather than the usual-body-weight formula prescribed in the SOM. Petitioner provided no evidence to

justify a deviation from the SOM formula generally used for determining significant weight loss in this case.

30. Even if such a deviation were justified, Resident 8 did not experience a significant weight loss within the meaning of the SOM guidelines. The guidelines indicate that the minimum interval for evaluating a resident's weight loss is one month. Resident 8's actual weight loss occurred in the eight-day period between August 1 and 9, 2001. That is less than the one-month interval established in the SOM guidelines.

31. Even if July 18, 2001, were used as the beginning point for evaluating Resident 8's weight loss, the one-month interval for determining if a significant weight loss had occurred did not expire and would not expire until August 18, 2001. The facility discharged Resident 8 on or about August 9, 2001.

32. Petitioner's surveyor testified that if Resident 8 were to have stayed in the facility for 30 days and if her weight had returned to that present before she began her weight loss, there would have been no significant weight loss. Petitioner provided no evidence that indicated that a resident's weight loss should be evaluated over some time period shorter than the one month period established in the SOM guidelines.

33. Resident 8's case illustrates at least one reason why the SOM guidelines caution surveyors against strict reliance on the amount of a resident's weight loss to determine the

resident's nutritional status. Resident 8's body weight never dropped below her ideal body weight while she was admitted to the facility. A weight loss which occurs over a one-week period, and which only results in the Resident dropping to her ideal body weight, does not indicate that the Resident is malnourished.

34. Assuming arguendo that Resident 8 experienced a significant weight loss at the facility, the weight loss was not caused by the failure of facility staff to develop a dietary care plan. It is undisputed that facility staff assessed Resident 8 for her nutritional needs and provided her with an adequate diet to meet those needs. It is also undisputed that, prior to the Resident's weight being taken on August 8, 2001, the facility had no reason to believe or know that the diet that it had prescribed for Resident 8 or the Resident's consumption of that diet might be inadequate. Resident 8's weight remained at or near its admission level under the dietary regimen that the facility prescribed for her for those three weeks.

35. Petitioner was unable to identify one intervention that should have appeared in a dietary care plan that the facility did not actually provide to Resident 8 or that would have prevented the weight loss experienced by Resident 8. The surveyor who developed the allegations regarding Resident 8 is a nurse and not a dietician. The surveyor alleged that Resident 8 was anxious, had been ill when she was admitted, and that the facility had not

appropriately assessed whether those factors would affect Resident 8's appetite. Resident 8 did not express such problems to the facility dietician. If it were determined that those problems existed at the time of admission, they were not significant because Resident 8 maintained her usual body weight during the first three weeks of her stay at the facility.

36. When the Resident's weight loss was identified on August 9th, the facility added fortified foods to her diet. Fortified foods are the appropriate dietary response to Resident 8's identified weight loss. The facility provided Resident 8 with all appropriate dietary care.

37. Resident 6 had been a resident at the facility since November 29, 1999. Between May 9 and June 13, 2001, Resident 6 experienced a weight loss of 6.5 percent. The parties stipulated that this loss was significant. However, Resident 6's weight of 152 pounds on June 13th remained above his ideal body weight of 144 pounds. During the period of weight loss, Resident 6 experienced a urinary tract infection for which he was receiving anti-biotic therapy. It is not uncommon for a resident to lose his or her appetite and to have a corresponding weight loss during such treatment.

38. The surveyor for Petitioner who prepared the case involving Resident 6 is not a dietician. The surveyor charged that Resident 6's weight loss was avoidable because the facility

failed to assess Resident 6's protein needs after he developed the urinary tract infection and because the facility did not closely monitor Resident 6's food intake. Petitioner offered no evidence to show what additional calorie or protein requirements the facility did not provide to Resident 6. The facility monitored the resident's low consumption levels and attributed them to his antibiotic therapy.

39. The facility dietician is a dietary expert. There is no dietary standard that requires dieticians to reassess a resident's nutritional needs when the resident has an infection. Instead, good dietary practice allows the infection and antibiotic treatments to run their course. Thereafter, the dietician should monitor the resident's consumption and weight to see if he or she returns to normal.

40. The facility dietician assessed Resident 6 after the infection cleared and after the antibiotic treatment had been completed. The dietician determined that Resident 6's consumption was good. The weight loss Resident 6 experienced was attributable to his decreased appetite while on antibiotic therapy. Resident 6's weight remained stable after his infection cleared, and his treatment was completed. Resident 6's ideal body weight is 144 pounds. The facility determined to maintain Resident 6's weight at 150 pounds.

41. The significant weight loss experienced by Resident 6 was the unavoidable consequence of clinical conditions in the form of the illness he experienced and the treatments he received for that illness. The weight loss was not caused by inadequate dietary care by the facility. Moreover, Resident 6 remained above his ideal body weight and, therefore, did not experience any harm.

42. On or about July 12, 2001, the facility obtained an albumin level for Resident 6 of 2.9, which was below the suggested normal laboratory range of 3.5 to 5.0. The surveyor for Petitioner charged that the facility did nothing to address this low lab value but conceded that Resident 6 did not experience any harm as a result of that failure.

43. The SOM guidelines indicate that surveyors should not expect normal lab values for all residents they review because abnormal values are to be expected with certain disease processes. Resident 6 was severely compromised by cardiac problems, dementia, a prior stroke, diabetes, prostate cancer, and Alzheimer's disease. He died shortly after the survey in this case. His albumin level of 2.9 was indicative of his diseased condition rather than his nutritional status. Accordingly, the facility did not violate any standard of good dietary practice when it did not consider or implement dietary interventions for the low albumin level.

CONCLUSIONS OF LAW

44. DOAH has jurisdiction over the parties and subject matter of this cause. Section 120.57(1). The parties received adequate notice of the administrative hearing.

45. Petitioner alleges that there was a deficiency at facility under Tag F325. Tag F325 encompasses the regulatory standard contained in 42 CFR Section 483.25(i)(1). 42 CFR Section 483.25(i)(1) provides, in relevant part:

> Based on a resident's comprehensive assessment, the facility must ensure that a resident maintains (1) acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible . . . .

46. Petitioner failed to show by a preponderance of evidence that Resident 8 experienced any significant weight loss. Petitioner also failed to show that the weight loss experienced by Residents 20, 6, and 8 was caused by inadequate dietary care by facility staff. Thus, the preponderance of evidence failed to establish any violation of Tag F325.

47. A standard rating is defined in Section 400.23(7)(a), in relevant part, to mean:

> . . . a facility has no class I or II deficiencies and has corrected all class III deficiencies within the time established by the Agency.

48. Petitioner failed to prove that there was a class I or II deficiency or an uncorrected class III deficiency at the facility on August 16, 2001. It was inappropriate for Petitioner to issue a conditional rating to the facility on that date.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that Petitioner enter a Final Order finding no basis to issue a Conditional rating to the facility on August 16, 2001; deleting the deficiency described under Tag F325; and issuing a Standard rating to the facility to replace the previously issued Conditional rating.

DONE AND ENTERED this 6th day of September, 2002, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.