

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE )  
ADMINISTRATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 02-1291  
 )  
SHADY REST CARE PAVILION, INC., )  
d/b/a SHADY REST CARE PAVILION, )  
 )  
Respondent. )  
\_\_\_\_\_)  
 )  
SHADY REST CARE PAVILION, INC., )  
d/b/a SHADY REST CARE PAVILION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 02-1965  
 )  
AGENCY FOR HEALTH CARE )  
ADMINISTRATION, )  
 )  
Respondent. )  
\_\_\_\_\_)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on June 21, 2002, by video teleconference between sites in Ft. Myers and Tallahassee, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Dennis L. Godfrey, Esquire<sup>1</sup>  
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STATEMENT OF THE ISSUE

Whether Shady Rest Care Pavilion, Inc. failed to maintain the nutritional status of one of its residents so as to justify the imposition of a conditional license rating upon the facility and an administrative fine of \$2,500.

PRELIMINARY STATEMENT

The Agency for Health Care Administration (Agency) conducted a survey of Shady Rest Care Pavilion, Inc. (Shady Rest) from July 30, 2001, to August 2, 2001. On August 22, 2001, the Agency issued a notice of intent to assign Shady Rest conditional licensure status based upon several deficiencies identified during the course of the survey. However, the only deficiency still at issue in this proceeding is the Tag F325 which was based upon Shady Rest's alleged failure to ensure that the nutritional needs of one resident, Resident 11, were met.

On September 4, 2001, Shady Rest timely requested a formal administrative hearing to contest the change in the status of its license. On May 14, 2002, Shady Rest's petition was referred to the Division of Administrative Hearings (Division) where it was assigned DOAH Case No. 02-1965.

On December 13, 2001, the Agency filed a one-count Administrative Complaint against Shady Rest. The Complaint alleged that Shady Rest violated Rule 59A-4.1288, Florida Administrative Code, and the federal regulations incorporated therein, based upon the deficiencies referenced above. On January 7, 2002, Shady Rest timely filed a petition contesting the allegations in the complaint and requesting a formal administrative hearing. The petition was referred to the Division on March 29, 2002, where it was assigned DOAH Case No. 02-1291.

By Order dated May 29, 2002, DOAH Case Nos. 02-1291 and 02-1965 were consolidated. Subsequently, the cases were transferred to the undersigned for the purpose of conducting the hearing requested by Shady Rest.

The hearing was held on June 21, 2002. At the hearing, the Agency presented the testimony of Lori Riddle, R.D., who was accepted as an expert in dietetics. The Agency's Exhibits, numbered R1, P5, P6, P12, P21-P23, and P68-P73, were received into evidence. At the hearing, Shady Rest presented the

testimony of Sonja Reece, R.N., who was accepted as an expert in geriatric nursing, and Ann Marie Shields, R.D., who was accepted as an expert in nutrition and dietetics. Shady Rest's Exhibits, numbered R2, R4, R6, R7, R9, and R10, were received into evidence.

At the conclusion of the hearing, the record was left open to allow Shady Rest to submit the deposition testimony of Robert Heiser, M.D. Dr. Heiser was unexpectedly called into surgery on the day of the hearing. The transcript of Dr. Heiser's deposition was filed with the Division on July 26, 2002. Dr. Heiser is accepted as an expert in medicine and gastroenterology.

The Transcript of the hearing was filed with the Division on August 5, 2002. At the conclusion of the hearing, the parties agreed to file their proposed recommended orders no later than 10 days after the filing of the Dr. Heiser's deposition or the Transcript of the hearing, whichever occurred later. The parties' Proposed Recommended Orders were timely filed on August 14, 2002, and were considered by the undersigned in preparing this Recommended Order.

#### FINDINGS OF FACT

Based upon the testimony and evidence received at the hearing and the parties' stipulations, the following findings are made:

1. Shady Rest is licensed by the Agency as a skilled nursing facility. Shady Rest's license number is SNF1497096.

2. The Agency conducted an on-site survey of Shady Rest from July 30, 2001, to August 2, 2001. At the time of the survey, Shady Rest's licensure status was standard.

3. The survey was conducted by a "team" that included dietitian Lori Riddle and other health care professionals.

4. The survey team identified several deficiencies at the facility. The deficiencies were detailed on the Form 2567 which was provided to Shady Rest by the Agency.

5. The only deficiency still at issue in this proceeding is the Tag F325 which was summarized on the Form 2567 as follows:

Based on observations, clinical record review and staff interviews, the facility failed to ensure that nutritional needs were met for 3 (Residents 11, 21 and 22) of 5 active sampled residents receiving tube feeding who were at high risk for malnutrition as evidenced by significant weight loss, low albumin and total protein levels and recurring pressure sores.

6. The survey team classified the Tag F325 at Level "G" (i.e., isolated actual harm) on the federal scope and severity matrix, which corresponds to an isolated Class II deficiency under the Florida classification scheme.

7. Based upon the cited Class II deficiency, the Agency issued a notice of intent to change Shady Rest's licensure

status from standard to conditional, and the Agency initiated a separate action to impose an administrative fine upon Shady Rest. This proceeding followed.

8. At the hearing, the Agency narrowed the focus of the alleged deficiency from the three residents identified on the Form 2567 to only one, Resident 11. No evidence or testimony was presented regarding any other residents.

9. Resident 11 is a female. At the time of the survey, she was 89 years old, 64 inches (five feet, four inches) tall, and weighed 145 pounds. She has been at Shady Rest since 1987.

10. A care plan for Resident 11 was developed by a "team" that included the director of nursing at Shady Rest, a nurse (Sonja Reece, R.N.), a dietitian (Ann Marie Shields, R.D.), two care plan coordinators, and social service and activity personnel. Members of the care plan team worked closely with Resident 11's physician, Dr. Lakshmi Bushan, to manage Resident 11's medical conditions.

11. Dr. Bushan was actively involved with the care of Resident 11 and was very familiar with her conditions. Dr. Bushan was at the facility on a weekly basis and sometimes several times per week.

12. Resident 11 is totally dependent on Shady Rest and its staff for the provision of nutrition. She is fed through a tube connected directly to her stomach.

13. Resident 11 is a "very complex resident" as a result of a myriad of serious medical conditions, including heart attack, seizure disorder, edema (i.e., swelling of the tissues due to fluid retention), hiatal hernia with reflux, pemphigus (i.e., an autoimmune disease resulting in blisters around the body), congestion in the lungs which caused breathing problems, kidney disease, and liver problems. She was also prone to skin breakdown.

14. The treatment of Resident 11 was complicated by the fact that management of one of her conditions would exacerbate another. For example, the Prednisone she was taking to treat her pemphigus increased her fluid retention and, hence, her edema; but, Lasix, the diuretic she was taking for the edema, caused her to have diarrhea which led to the breakdown of her skin from constant cleaning and put her at risk of dehydration and kidney failure.

15. Resident 11's edema was at a dangerous level, referred to as "3+ pitting edema." Relieving the edema was determined to be of critical importance to Resident 11 by her physician. The fluid retention in Resident 11's lungs caused her to suffer from shortness of breath which could ultimately lead to congestive heart failure.

16. Because Resident 11 did not respond well to Lasix and because it actually exacerbated her other medical problems

(i.e., skin breakdown), a fluid reduction diet was deemed necessary by her physician.

17. Resident 11 was overweight, partially due to her edema. Resident 11's weight contributed to and exacerbated her medical conditions, particularly her congestion and breathing problems, and it enhanced her risk of congestive heart failure.

18. On April 3, 2001, Dr. Bushan ordered an evaluation of Resident 11's nutritional status and the adequacy of her tube feeding. Resident 11 weighed 163 pounds on that date.

19. On April 4, 2001, Ms. Shields, performed the evaluation ordered by Dr. Bushan. Ms. Shields calculated the total calories per day (cal/day) needed by Resident 11 based upon a standard formula. She then subtracted 400 cal/day to take into account the weight loss desired by Dr. Bushan. Ms. Shields' calculation resulted in an estimated caloric need for Resident 11 of 1,100 to 1,200 cal/day.

20. Because the feeding ordered at that time provided 1,125 cal/day, which was within the range computed by Ms. Shields, no changes were made to Resident 11's diet at that time.

21. Resident 11 was, however, taken off Lasix at that time because it was not contributing significantly to her weight loss and it was putting her at risk for dehydration and kidney failure.



22. Resident 11's weight dropped only slightly after the April 4, 2001, evaluation. On May 1, 2001, she weighed 159 pounds and on June 1, 2001, she weighed 158 pounds.

23. Dr. Bushan wanted Resident 11 to lose more weight more rapidly to stabilize her serious medical conditions. Accordingly, on June 13, 2001, Dr. Bushan requested a dietary consultant to check the amount of Resident 11's tube feedings in order to implement a planned weight loss program to reduce Resident 11's weight to 145 to 150 pounds.

24. Ms. Shields conducted the assessment on June 14, 2001, and after consulting with Resident 11's care plan team, she recommended to Dr. Bushan that Resident 11's caloric intake be reduced from 1,125 cal/day to 750 cal/day to accomplish the rapid and significant weight loss desired by Dr. Bushan.

25. Dr. Bushan accepted Ms. Shield's recommendations and ordered the reduction in calories on June 14, 2001. On that date, Resident 11 weighed 158 pounds.

26. Resident 11's care plan was updated on June 14, 2001, to reflect the goal of reducing her weight by not more than five pounds per week until she reached less than or equal to 150 pounds.

27. The dietary change achieved the desired effect of rapidly reducing Resident 11's weight and stabilizing her medical conditions. Her weight records showed the following:

<u>Date</u>	<u>Weight</u>
June 20, 2001	153
June 27, 2001	153
July 4, 2001	152
July 11, 2001	153
July 18, 2001	152
July 25, 2001	n/a
August 2, 2001	145

28. The dietary notes for August 1, 2001, indicate that Resident 11's "weight goal was met" and recommended a dietary change to increase Resident 11's caloric intake to 1,000 cal/day. The record does not include the doctor's order implementing that recommendation. However, by August 8, 2001, Resident 11's weight was at 151 pounds, suggesting that the dietary change was implemented.

29. Between the June 14, 2001, dietary change and the August 2, 2001, survey, Resident 11 lost 13 pounds, which is an 8.2 percent weight loss. For the three-month period of May 1, 2001 through August 2, 2001, Resident 11 lost 14 pounds, which is an 8.8 percent weight loss.

30. Resident 11's edema improved significantly during this period; it was no longer at the "3+ pitting edema" level. In this regard, some of Resident 11's weight loss is attributable to the elimination of retained fluids (i.e., reduction in her

edema), which was a significant purpose of the weight loss program. The amount of the weight loss attributable to the fluid loss is not quantifiable.

31. The federal guidelines discussing Tag F325, which the Agency's survey team uses in its evaluation of a facility, state that "weight loss (or gain) is a guide in determining nutritional status" and identify parameters to be used in evaluating the significance or severity of weight loss. The 8.8 percent weight loss experienced by Resident 11 over a three-month period would be considered "severe" based upon the parameters.

32. The parameters in the federal guidelines specifically refer to "unplanned and undesired weight loss." By contrast, the weight loss experienced by Resident 11 was planned and desirable. It was directed by Dr. Bushan after Ms. Shield's dietary consultation in order to reduce Resident 11's fluid intake and her edema while also promoting rapid weight loss to minimize her congestion and related breathing problems.

33. The estimated protein needs for Resident 11 were 53 to 57 grams per day. The protein that she was being given, both prior to and after the June 14, 2001, dietary change was within that range. Increasing Resident 11's protein to offset the calorie reduction was not considered a viable option for Resident 11 because her history showed that the more protein she

received the more weight she gained. Moreover, too much protein could cause liver failure, which was a risk for Resident 11.

34. When the body is not receiving enough calories, it can metabolize protein as a calorie source rather than for the purposes protein is normally used, such as health of the skin. Resident 11 experienced skin breakdown (i.e., pressure sores or decubitus ulcers) after the June 14, 2001, dietary change. The sores were very small in size and, consistent with Resident 11's past history, the sores healed quickly. Therefore, they are not indicative of a protein deficiency. Indeed, subsequent to the dietary change, Resident 11's skin turgor was good.

35. The laboratory reports for Resident 11 showed her having low albumin levels after the dietary change. Low albumin is generally an indicator of insufficient protein in the body. However, as noted above, the rate at which Resident 11's skin healed suggests that she was getting sufficient protein.

36. Resident 11's low albumin level, in and of itself, is not determinative of her nutritional status. Indeed, the federal guidelines provided to the survey team state:

Because some healthy elderly people have abnormal laboratory values, and because abnormal values can be expected in some disease processes, do not expect laboratory values to be within normal ranges for all residents. Consider abnormal values in conjunction with the resident's clinical condition and baseline abnormal values.

37. Even before the June 14, 2001, dietary change, Resident 11's albumin level was not within the normal range. Her abnormal albumin levels may have been the result of her liver problems.

38. Dr. Bushan and the care plan team at Shady Rest managed Resident 11's care based upon their clinical observations of her in conjunction with their experience regarding what worked for her in the past, not simply based upon her laboratory values. They were constantly weighing standards of practice with what was actually happening with Resident 11.

#### CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes. (All references to Sections and Chapters are to the Florida Statutes. All references to Rules are to the Florida Administrative Code.)

40. The Agency has regulatory authority over skilled nursing home facilities such as Shady Rest pursuant to Part II of Chapter 400 and Rule 59A-4.

#### Burden of Proof

41. Unless there is a statute which provides otherwise, the party asserting the affirmative of an issue has the burden

of proof. See Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

42. Contrary to the Agency's argument in its Proposed Recommended Order (addressed below), the burden of proof in this proceeding is not established by statute. Accordingly, because the Agency is the party seeking to change the status quo and is asserting the affirmative on the issues in this proceeding, it has the burden of proof. See Amico v. Division of Retirement, 352 So. 2d 556 (Fla. 1st DCA 1977); Balino v. Dept. of Health and Rehabilitative Servs., 348 So. 2d 349 (Fla. 1st DCA 1977). And see Spanish Gardens Nursing & Convalescent Center v. Agency for Health Care Administration, DOAH Case No. 98-2149, Recommended Order, at 25 (September 18, 1998).

43. The standard of proof is a preponderance of the evidence with respect to the change in Shady Rest's licensure status (DOAH Case No. 02-1965), see Spanish Gardens, supra, at 25-26, and clear and convincing evidence with respect to the imposition of the civil penalty or administrative fine (DOAH Case No. 02-1291). See Dept. of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

44. In its Proposed Recommended Order, the Agency argues that the burden of proof in both cases is on Shady Rest. In support of its argument, the Agency cites Section 400.121(9) which provides:

Notwithstanding any other provision of law to the contrary, agency action in an administrative proceeding under this section may be overcome by the licensee upon a showing by a preponderance of the evidence to the contrary.

(Emphasis supplied).

45. The Agency's current position on this issue is inconsistent with the Joint Prehearing Stipulation which was signed by the Agency's counsel of record and which included the following "agreed issues of law":

The Agency has the burden of proof in this proceeding and must show by a preponderance of the evidence that there existed a basis for imposing a conditional license on [Shady Rest's] license.

The Agency has the burden of proof and must prove by clear and convincing evidence that a \$2,500 fine should be imposed against [Shady Rest] for the alleged violation.

Joint Prehearing Stipulation, at 7-8.

46. The Agency's Proposed Recommended Order was not submitted by the same attorney who signed the Joint Prehearing Stipulation and represented the Agency at the hearing. See Endnote 1. Nevertheless, the Agency is bound by its stipulations as to the burdens of proof in this proceeding.

47. In any event, the Agency's reliance on Section 400.121(9) in this proceeding is entirely misplaced.<sup>2</sup> As the language underscored above makes clear, that provision only relates to proceedings under Section 400.121. That statute sets

forth the grounds upon which the Agency may deny, suspend, or revoke a facility's license or impose a moratorium on admissions at a facility. None of those issues are involved in this proceeding. Indeed, Section 400.121 was not cited by the Agency as a basis of either its notice of intent to change Shady Rest's licensure status in DOAH Case No. 02-1965 or its Administrative Complaint in DOAH Case No. 02-1291. Moreover, there is nothing in Section 400.121 suggesting that it in anyway relates to a proceeding to change a facility's licensure status, and the only portion of the statute relating to administrative fines -- i.e., Section 400.121(2) -- confirms that proceedings under Section 400.121 and Section 400.023(8) are separate and distinct.

Change in Licensure Status (DOAH Case No. 02-1965)

48. Section 400.23(7) requires the agency to "assign a licensure status of standard or conditional to each nursing home." These statuses are explained as follows:

(a) A standard licensure status means that a facility has no class I or class II deficiencies and has corrected all class III deficiencies within the time established by the agency.

(b) A conditional licensure status means that a facility, due to the presence of one or more class I or class II deficiencies, or class III deficiencies not corrected within the time established by the agency, is not in substantial compliance at the time of the survey with criteria established under this part or with rules adopted by the agency. If the facility has no class I, class II, or



class III deficiencies at the time of the followup survey, a standard licensure status may be assigned.

Section 400.23(7)(a)-(b).

49. The change in Shady Rest's licensure status to conditional was based upon an alleged Class II deficiency, which is:

a deficiency that the agency determines 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.

Section 400.23(8).

50. The Class II deficiency identified at Shady Rest was a Tag F325 which corresponds to 42 Code of Federal Regulations Section 483.25(i)(1). That regulation, which is incorporated by reference into the Agency's Rule 59A-4.1288, provides:

(i) Nutrition. Based upon a resident's comprehensive assessment, the facility must ensure that a resident--

(1) Maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that it is not possible

(Emphasis supplied).

51. The Agency failed to meet its burden to prove the existence of a Class II deficiency. The evidence is

insufficient to show that the change in Resident 11's diet compromised her ability to maintain or reach her highest practicable physical, mental, and psychosocial well-being. To the contrary, the weight of the evidence shows that the dietary change actually improved Resident 11's medical condition by reducing her edema, and it did so without significantly compromising her nutritional health.

52. The evidence further shows that the dietary change was medically necessary, was justified based upon Resident 11's conditions and treatment history, and was the result of a risk/benefit analysis in which Resident 11's physician was actively involved. In this regard, the weight loss experienced by Resident 11 was not unplanned; it was expressly directed by her physician. Moreover, her abnormal albumin levels during this period were not inconsistent with her typical albumin levels and were explained by her history of liver problems.

Administrative Fine (DOAH Case No. 02-1291)

53. Section 400.23(8)(b) authorizes the Agency to impose a civil penalty against the facility for a Class II deficiency. The amount of the penalty depends on the scope of the deficiency, i.e., "\$2,500 for an isolated deficiency, \$5,000 for a patterned deficiency, and \$7,500 for a widespread deficiency." Section 400.23(8)(b).

54. The deficiency at issue in this proceeding, Tag F325, was alleged to be a isolated deficiency, cf. Section 400.23(8) (defining an isolated deficiency as "a deficiency affecting one or a very limited number of residents, . . ."), and the Agency is seeking to impose a \$2,500 fine.

55. In light of the foregoing determination that the Agency failed to meet its burden of proof with respect to the change in licensure status, it follows that the Agency did not meet the higher burden of proof necessary to impose an administrative fine. Indeed, having failed to prove the existence of a Class II deficiency at Shady Rest, there is no basis to impose an administrative fine under Section 400.23(8)(b).

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Agency for Health Care Administration issue a final order which:

1. Dismisses the Administrative Complaint against Shady Rest Care Pavilion in DOAH Case No. 02-1291; and

2. Rescinds the notice of intent to assign conditional licensure status to Shady Rest Care Pavilion in DOAH Case No. 02-1965 and retains the facility's standard licensure status.

DONE AND ENTERED this 26th day of August, 2002, in  
Tallahassee, Leon County, Florida.

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T. KENT WETHERELL, II  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 26th day of August, 2002.

ENDNOTES

<sup>1/</sup> Mr. Godfrey represented the Agency from the inception of these cases through at least the post-hearing deposition of Robert Heiser, M.D., which was taken on July 19, 2002. However, the Agency's Proposed Recommended Order was not filed by Mr. Godfrey; it was filed by Agency attorney Kathryn F. Fenske. The case file does not include a notice of appearance from Ms. Fenske, nor does it include a notice of substitution of counsel.

<sup>2/</sup> Application of Section 400.121(9) in a penal proceeding such as DOAH Case No. 02-1291 would also raise constitutional concerns because the statute not only relieves the Agency of its heightened burden of proof, but it relieves the Agency of any burden whatsoever. Cf. Osborne, 670 So. 2d at 935 (Due Process requires agency seeking to impose an administrative fine to meet a heightened burden of proof because such a proceeding is penal in nature and impacts constitutionally-protected property interests); Ferris v. Turlington, 501 So. 2d 292 (Fla 1987) (same in cases involving license revocation).

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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.

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