

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:)	DATE: March 19, 2009
)	
Kingsville Nursing and)	
Rehabilitation Center,)	
)	
Petitioner,)	Civil Remedies CR1832
)	App. Div. Docket No. A-09-05
)	
- v. -)	Decision No. 2234
)	
Centers for Medicare &)	
Medicaid Services.)	

REMAND OF
ADMINISTRATIVE LAW JUDGE DECISION

Kingsville Nursing and Rehabilitation Center (Kingsville or Petitioner) appealed the August 14, 2008 decision of Administrative Law Judge (ALJ) Stephen T. Kessel. On summary judgment, the ALJ upheld the imposition of two per instance civil money penalties (CMPs) by the Centers for Medicare & Medicaid (CMS). Kingsville Nursing and Rehabilitation Center, DAB CR1832 (2008) (ALJ Decision). The ALJ concluded that undisputed facts established that Kingsville was not in substantial compliance with 42 C.F.R. § 483.25(c), which addresses prevention and treatment of pressure sores, and 42 C.F.R. § 483.75, which addresses efficient and effective management of facilities, and that the amounts of the CMPs were reasonable.

We remand this case for further proceedings consistent with our decision. The ALJ made his conclusions of law based on findings of fact involving six residents - four who allegedly were not repositioned in accordance with their care plans and two who allegedly developed avoidable pressure sores while at the facility. The ALJ erred in granting summary judgment in favor of

CMS to the extent that his doing so was based on the alleged repositioning failure because Kingsville raised a genuine dispute of material fact with respect to these allegations. Since Kingsville alleged no genuine dispute of material fact with respect to the other two residents' development of pressure sores, the ALJ still had a basis to grant summary judgment for CMS with respect to Kingsville's noncompliance with the requirements of section 483.25(c). However, the Board cannot determine whether the ALJ erred in determining that Kingsville was noncompliant with section 483.75 or that the amounts of the CMPs were reasonable based on the current record, given the disputes of material fact regarding four of the six residents. Accordingly, we vacate all the ALJ's Findings of Fact and Conclusions of Law (FFCLs) and remand the case in order to preserve the ALJ's ability to consider whether Kingsville was in substantial compliance with section 483.75 and the reasonableness of the amounts of the CMPs in light of a fully developed record regarding the cited deficiencies at issue, including the alleged noncompliance under section 483.25(c) involving the four residents. On remand, the ALJ, at his discretion, is free to take additional evidence as to all six residents at issue on summary judgment (and other residents who were not at issue on summary judgment) to the extent necessary to assess whether Kingsville was in substantial compliance with sections 483.25(c) and 483.75 and to determine whether the amounts of the CMPs are reasonable.

Applicable law

The federal statute and regulations provide for surveys to evaluate the compliance of skilled nursing facilities with the requirements for participation in the Medicare and Medicaid programs and to impose remedies when a facility is found not to comply substantially. Sections 1819 and 1919 of the Social Security Act; 42 C.F.R. Parts 483, 488, and 498.¹

A "deficiency" is defined as a nursing facility's "failure to meet a participation requirement specified in the Act or [42 C.F.R. Part 483]." "Substantial compliance" is defined as "a level of compliance with the requirements of participation such

¹ The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

that any identified deficiencies pose no greater risk to resident health and safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Noncompliance" means "any deficiency that causes a facility to not be in substantial compliance." Id. "Immediate jeopardy" is defined a situation in which a provider's noncompliance "has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident." 42 C.F.R. § 488.301.

CMS may impose per day or per instance CMPs if a facility is not in substantial compliance. A determination of immediate jeopardy is a prerequisite to imposing a per day civil money penalty in excess of \$3,000 but not a prerequisite to imposing a per instance CMP of up to \$10,000. 42 C.F.R. § 488.438(a)(1) and (2).

Standards for summary judgment

Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-25 (1986). Although the Federal Rules of Civil Procedure (FRCP) are inapplicable in this administrative proceeding, we are guided by those rules and by judicial decisions on summary judgment in determining whether the ALJ properly granted summary judgment. See Thelma Walley v. Inspector General, DAB No. 1367 (1992). The ALJ told the parties that he would decide motions for summary judgment "according to the principles of Rule 56 of the Federal Rules of Civil Procedure and applicable case law." Initial Pre-Hearing Order dated January 2, 2008.

The party moving for summary judgment bears the initial burden of demonstrating that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. If a moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) (quoting FRCP 56(e)). To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact -- a fact that, if proven, would affect the outcome of the case under governing law. Id. at 586, n.11; Celotex, 477 U.S. at 322. In order to demonstrate a genuine issue, the opposing party must do more than show that there is "some metaphysical doubt as to the material facts Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587. In

making this determination, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. See, e.g., U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Under the applicable substantive law, CMS has the initial burden of coming forward with evidence on any disputed facts showing that the provider was not in substantial compliance with Medicare participation requirements. However, the provider bears the ultimate burden of persuasion that it was in substantial compliance with those requirements. See South Valley Health Care Center, DAB No. 1691 (1999), aff'd, South Valley Health Care Center v. HCFA, 223 F.3d 1221 (10th Cir. 2000); see also, Batavia Nursing and Convalescent Center, DAB No 1904 (2004); aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson, 129 Fed.Appx. 181 (6th Cir. 2005).

Consequently, if CMS in its summary judgment motion has asserted facts that would establish a prima facie case that the facility was not in substantial compliance, the first question is whether the facility has in effect conceded those facts. If not, the next question is whether CMS has come forward with evidence to support its case on any disputed fact. If so, the facility must aver facts and proffer evidence sufficient to show that there is a genuine dispute of material fact. Ultimately, if the proffered evidence as a whole, viewed in the light most favorable to the facility, might permit a rational trier of fact to reach an outcome in favor of the facility, summary judgment on the issue of substantial compliance is not appropriate. Madison Health Care, Inc., DAB No. 1927 (2004); Lebanon Nursing and Rehabilitation Center, DAB No. 1918 (2004).

Standard of Board review

Whether summary judgment is appropriate is a legal issue that we address de novo. Lebanon, DAB No. 1918. In reviewing a disputed finding of fact, we view proffered evidence in the light most favorable to the non-moving party. See Crestview Parke Care Center, DAB No. 1836 (2002), Crestview Parke Care Center v. Thompson, 373 F.3d 743 (6th Cir. 2004). The standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. Departmental Appeals Board, *Guidelines for Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs* (DAB Guidelines), <http://www.hhs.gov/dab/guidelines/prov.html>.

Relevant background

Kingsville is skilled nursing facility located in Kingsville, Tennessee that participates in the Medicare program. Based on a survey conducted by the Texas Department of Aging and Disability (state agency) in September 2007, the state agency determined that Kingsville was not in substantial compliance with federal requirements. On October 17, 2007, CMS issued an initial determination based on the state agency's Statement of Deficiencies (SOD), concluding that Kingsville was not in substantial compliance with 42 C.F.R. §§ 483.25(c) (pressure sores) and 483.75 (administration) and imposing per instance CMPs of \$4,000 and \$6,000 for these violations respectively. CMS Ex. 1.

Kingsville filed a request for a hearing before an ALJ. After the parties had submitted their prehearing briefs, proposed exhibits, and the written direct testimony of all of their witnesses, CMS filed a motion for summary judgment (MSJ). The ALJ granted the motion, holding that there were no disputes of material fact as to whether Kingsville failed to substantially comply with sections 483.25(c) and 483.75 and whether the amounts of the CMPs were reasonable.

Analysis

- 1. The ALJ erred in determining that there were no disputes of material fact as to whether Kingsville was in substantial compliance with 42 C.F.R. § 483.25(c) in regard to its care of Residents 24, 25, 26, and 11.**

Section 483.25(c) is included within the "quality of care" requirements, which share the same regulatory objective that "[e]ach 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." 42 C.F.R. § 483.25. Section 483.25(c) provides in relevant part:

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

CMS moved for summary judgment as to six residents identified in the SOD: (1) R24, R25, R26, and R11 because Kingsville allegedly failed to reposition them as required by their care plans to prevent pressure sores, and (2) R33 and R39 because Kingsville failed to prevent them from developing avoidable pressure sores.

In granting the portion of the MSJ related to Kingsville's care of R24, R25, R26, and R11, the ALJ relied on the following factual findings:

- each of the residents were "essentially helpless" and therefore dependent on staff for assistance in repositioning themselves in bed;
- Kingsville had assessed each of these residents as being at risk for developing pressure sores;
- care plans for each of the residents required that they be "repositioned once every two hours as a pressure sore prevention intervention";
- the surveyors "observed each of these residents on multiple occasions over an approximately eight-hour period on September 13";
- R24 and R25 "were observed to be lying only on their backs throughout the period";
- R26 and R11 "were observed to be lying only on their backs during the first six hours of the same eight hour period."

ALJ Decision at 3. The ALJ concluded that Kingsville had failed to present any evidence that raised a material dispute as to these facts and that these facts demonstrated that Kingsville staff was not repositioning these residents at two hour intervals. The ALJ concluded that Kingsville was not in substantial compliance with section 483.25(c) based, in part, on this finding. Id. at 4-7.

Kingsville argues that the ALJ erred in concluding that its evidence with respect to the repositioning issue failed to raise a material dispute of fact. It cites entries on the activities of daily living (ADL) flow sheets for each of the residents at issue. These monthly ADL flow sheets set out a grid. The vertical axis lists boxes with printed activity categories such as "BATH," "URINARY OUTPUT," and "TRANSFERS"; the horizontal axis lists the days of the month with spaces for the initials of staff on the "Night," "Day," and "Evening" shifts. The activity

category at issue is "BED/CHAIR MOBILITY." In the category box for BED/CHAIR MOBILITY, the form says "Turn & Reposition q2h." For September 13, all of the spaces for BED/CHAIR MOBILITY are initialed for each of these residents.² CMS Exs. 12, at 20 (R24); 14, at 17 (R26); and 8, at 26 (R11); P. Ex. 79.

Kingsville asserts that the ADL flow sheets support the favorable inference that these residents "were repositioned every 2 hours on a daily basis, including the day of the surveyor's [sic] visit." RR at 11. Kingsville argues that the ALJ erred in treating the surveyors' observations as undisputed because the observations conflict with the entries on the ADL flow sheets. RR at 5.

In discussing the ADL flow sheets, the ALJ wrote:

[The ADL flow sheets] contain markings from which I might infer that members of Petitioner's staff reported having repositioned the residents whose care is at issue during the work shifts on September 13, 2007 and on other dates. But the most I can infer from the markings is that the residents were repositioned *at some time* during a given shift. I cannot infer anything beyond that because the flow sheets contain no charting showing when during a shift the residents were being repositioned or even how frequently they were repositioned during a shift.

ALJ Decision at 6 (*italics in original; underlining added*). The ALJ went on to conclude that --

there is nothing inconsistent between the [ADL] exhibits and the surveyors' observations because . . . the residents could have been . . . repositioned during *each shift* but not

² In its summary judgment motion, CMS pointed out that there were no initials for R25's evening shift. CMS MSJ at 5, citing CMS Ex. 13, at 18. Kingsville responded that "the ADL Flowsheet is a working document that was used through the entire month of September 2007. According to Kingsville, the ADL document referenced by CMS in its exhibits was compiled . . . sometime during the afternoon of September 13, 2007, after the surveyors made their observations of resident care, but before the evening shift occurred." P. Response to CMS MSJ at 4, citing P. Ex. 79 (R25's ADL flow sheet on which evening shift for September 13 is initialed); see also RR at 10, n.9.

at two hour intervals or during the period when the surveyors saw them lying continuously on their backs."

Id. (italics in original).

While the ALJ is correct that the ADL flow sheets do not document "the times the residents were repositioned," he is incorrect in finding that they do not support a favorable inference as to "how frequently they were repositioned." ALJ Decision at 6. The ALJ's analysis of the ADL flow sheets fails to mention that the sheets describe the action required as repositioning "q2h," i.e., every two hours. Therefore, contrary to the ALJ's conclusion here, a reasonable inference could be drawn from the ADL flow sheets that, by initialing the BED/CHAIR MOBILITY category, the staff member was representing that the residents had, in fact, been repositioned no less frequently than every two hours during the shift for which a staff person entered his/her initials, as required by the residents' care plans. Indeed, in its MSJ, CMS expressly recognized that the ADL flow sheets represented that staff were repositioning these residents at least every two hours. CMS stated that each resident's care plan required repositioning at least every two hours and that for each of these residents the "[f]acility staff initialed [the Resident's] ADL Flowsheet to indicate that [the Resident] was being repositioned as required" CMS MSJ at 3 (R24), 5 (R25), 7 (R26), and 9 (R11). These ADL flow sheets thus create a material dispute of fact because, viewed in a light most favorable to Kingsville, they support the inference that the residents at issue were repositioned at least every two hours on September 13.

Unlike the ALJ, CMS does not deny that the ADL flow sheets purport to show that these residents were repositioned no less frequently than every two hours. CMS Response at 3-4. It asserts, however, that the surveyors' observations show that "care was not provided as documented" and, therefore, that the sheets are "ultimately unresponsive to CMS' allegation, immaterial, and consequently, insufficient to defeat summary judgment." Id. at 4. In other words, CMS effectively argues that we should find the surveyors' observations more credible than the ADL flow sheets.

We reject CMS's argument. On summary judgment, the reviewer does not "make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts," as would be proper when sitting as a fact-finder after a hearing, but instead should "constru[e] the record in the light most favorable to the nonmovant and avoid [] the temptation to decide which party's version of the facts is more likely true." Payne v. Pauley, 337

F.3d 767, 770 (7th Cir., 2003); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); Madison, DAB No. 1927, at 6. The ADL flow sheets, on their face, reasonably support the inference that these residents were repositioned at least every two hours as required by their care plans. Kingsville has proffered evidence that, viewed in the most favorable light, could lead a rational trier of fact to find that it did properly reposition its residents. At this stage, Kingsville is not required to convince the decisionmaker that its evidence is more persuasive or credible than CMS's evidence. St. Catherine's Care Center of Findley, Inc., DAB No. 1964, at 24 (2005).

While the ALJ is correct that Kingsville offered no testimony of a particular employee stating that he/she repositioned these residents during the period of surveyor observation (ALJ Decision at 6), the ADL flow sheets are sufficient on their face to raise a dispute as to this material fact. Under these circumstances, drawing negative inferences based on a party's failure to offer testimonial evidence is not proper on summary judgment if the party has offered other evidence (e.g., records) that could cause a reasonable person to conclude that there is a material dispute of fact. As the Board said in Madison:

The ALJ may well find Madison's arguments, evidence and witnesses less credible or persuasive than those presented by CMS, but where such evaluation of credibility or comparison of competing evidence is called for, summary judgment is inappropriate. . . . [W]here the record evidence is susceptible of a rational interpretation which would preclude summary judgment against the non-movant party, the case must go forward for a thorough evaluation of what the most reasonable inferences and the preferable interpretations are based on all credible evidence in the record after a full hearing

Madison, DAB No. 1927, at 14.

Kingsville also argues that the written direct testimony of the Kingsville nurses and the CMS surveyor nurse "create[s] a material issue of disputed fact on the core issue of whether Kingsville failed to substantially comply with Medicare participating requirements." Request for Review (RR) at 9. It points out that the four nurses "reviewed the same survey findings but reach[] opposite opinions. Namely, the CMS nurse states the survey findings were deficient practices (R Ex. 35, p.4) while the Kingsville nurses state the Kingsville facility was 'in substantial compliance' with the applicable regulations (P Ex. 95, p. 2, P Ex. 96, p. 2, P Ex. 97, p.2)." Id. at 9.

Kingsville's argument is incorrect. The question of whether Kingsville was in substantial compliance is ultimately one of law, not of fact. The ALJ makes this determination, not the witnesses. Conflicting witness conclusions as to substantial compliance do not create a dispute of material fact.

In summary, the ALJ's conclusion that there are no disputes of material fact with respect to the alleged failures to reposition R24, R25, R26, and R11 is erroneous because he failed to draw inferences in favor of the non-moving party that a reasonable factfinder could draw. The ADL flow sheets support a reasonable inference that these residents were being repositioned every two hours in accordance with their care plans. Therefore, we conclude that the ALJ erred in concluding there were no disputed material facts as to Kingsville's alleged failure to reposition R24, R25, R26, and R11 and in granting summary judgment as to these residents. Accordingly, we reverse the ALJ's findings as to these residents and remand for him to conduct further proceedings as necessary to determine the merits of CMS's allegations of noncompliance with section 483.25(c) with respect to these residents.

2. While the ALJ could have found noncompliance with section 483.25(c) based on Kingsville's care of R33 and R39, we remand this portion of the case to the ALJ as well to preserve his ability to further address these residents as needed to assess the alleged noncompliance with section 483.75 and the reasonableness of the CMP amounts.

As additional grounds for summary judgment for the deficiency cited under section 483.25(c), CMS alleged that R33 and R39 had been assessed by Kingsville as being at low or moderate risk for pressure sores, that they developed pressure sores after they entered the facility, and that there was "no documentation that [the] development of pressure sores was unavoidable." CMS MSJ at 11, 12. The ALJ found CMS's allegations of fact to be undisputed and concluded that Kingsville was not in substantial compliance with section 483.25(c) because it had failed to prevent R33 and R39 from developing avoidable pressure sores. ALJ Decision at 7-8.

Kingsville argues that the ALJ improperly allowed CMS to "create[] a new survey finding" by alleging for the first time in its MSJ that Kingsville was deficient because it had failed to prevent R33 and R39 from developing avoidable new pressure sores. RR at 11. Kingsville relies on the following factors in support of its argument.

- Kingsville argues that the surveyors framed the deficiency in the SOD as a failure to "identify" the pressure sores.³ Id. at 11. The SOD states that, on September 20, 2007, Kingsville "did a "100% audit of head to toe assessments and provided the surveyors with a copy of the sweep results." P. Ex. 3, at 32. On September 21, surveyors "accompanied facility nurses and conducted a sweep of all residents." This sweep "revealed extended sample residents (SR#33, 34, 39, 40) had pressure areas that the facility had not identified the day before on 09/20/07." Id. at 33. Moreover, the SOD reported that some staff seemed to be uninformed about how to stage pressure sores or whether a skin blister was even a "stageable wound." Id. at 34-35. Thus, as to these residents, the surveyors focused on Kingsville's performance in identifying and staging pressure sores, not preventing the development of new pressure sores.
- Kingsville participated in an Informal Dispute Resolution (IDR) proceeding before the state agency after which the state agency recommended that the SOD findings as to R33 and R39 (as well as to R34, R40) be "deleted" because the SOD "provided insufficient evidence that the facility failed to identify four new Stage II [pressure sores] for Residents 33, 34, 39, and 40." P. Ex. 94, at 18.⁴ Kingsville relies on the fact that the focus at the IDR proceeding continued to be an alleged failure to identify pressure sores. RR at 12.

³ The SOD stated:

This REQUIREMENT [section 483.25(c)] is not met as evidenced by:
Based on the observation, interview and record review, the facility failed to:

* * *

4. Identify 4 new Stage II pressure ulcers for four sample residents (SR#33, 34, 39, 40) from an audit of 106 residents present in the facility on 09/20/07, 09/21/07 and 09/22/07.

P. Ex. 3, at 1-2; see also id. at 32-34.

⁴ Kingsville points to no evidence in the record (and we see none) indicating that the state agency or CMS actually deleted the SOD allegations on Residents 33 and 39 in response to the IDR recommendation or for any other reason.

- Both in its Pre-Hearing Brief and its Revised Pre-Hearing Brief, CMS argued only that Kingsville "failed to identify four new Stage II pressure ulcers for [R33, R34, R39, and R40]," and did not argue that Kingsville failed to prevent these sores. CMS Pre-Hearing Br. at 16; CMS Revised Pre-Hearing Br. at 16. Kingsville points out that, subsequently, in its MSJ CMS framed the issue as a failure to prevent pressure sores. The MSJ was filed after Kingsville had filed its exhibits, written direct of its witnesses, and pre-hearing brief.⁵ Id.

Kingsville argues that these considerations "disadvantaged [it] in the ability to address these subsequently raised concerns when it submitted its Pre-Hearing Brief." RR at 7, n.6. It argues that CMS therefore should not be allowed to rely on Kingsville's alleged failure to prevent new pressure sores on R33 and R39 and that the ALJ erred in entering summary judgment as to these residents.

In response to Kingsville's arguments below, the ALJ correctly observed that the SOD expressly set forth the facts on which CMS now relies, i.e., that R33 and R39 were admitted to Kingsville without pressure sores, that they were assessed by Kingsville as being at low or moderate risk for pressure sores, and that, on September 21, 2007, they were found to have Stage II pressure sores. ALJ Decision at 7, citing P. Ex. 3, at 33. The ALJ correctly stated that there is nothing in the regulations "barring CMS from clarifying or even amending its determination of noncompliance pending an appeal of its remedy determination." Id. Rather, as the ALJ correctly wrote, the "limitations placed on CMS's ability to clarify or amend are those which are posed by considerations of due process. CMS is precluded from amending or making new allegations where to do so would be fundamentally unfair to a facility." Id.; see, e.g., Livingston Care Center, DAB No. 1871 (2003), aff'd 388 F.3d 168 (6th Cir. 2004) (facility received adequate notice that CMS was relying on a surveyor's observation that had not been included in SOD when CMS proffered these facts as part of its motion for summary judgment); Cedar View Good Samaritan, DAB No. 1897, at 7-9 (2003) (stating that

⁵ The ALJ's Pre-Hearing Order required CMS to file a "pre-hearing exchange" consisting of, inter alia, all proposed exhibits, a list of all proposed witnesses, and a pre-hearing brief. CMS did so on May 6, 2007. On June 5, as required by the order, Kingsville filed its pre-hearing exchange. Thereafter, on June 17, CMS moved for summary judgment and, on July 17, Kingsville filed a responsive brief.

Cedar View had adequate notice even though the SOD did not cite the subsection under which it was found deficient); Pacific Regency Arvin, DAB No. 1823, at 9-10 (2002) (stating that the ALJ erred in treating the SOD "as rigidly framing the scope of evidence to be admitted concerning any allegation relating to a cited deficiency, and requiring formal amendment of the 2567 to allow any additional supporting evidence." As an example of such unfairness, the ALJ posed a situation "where a facility does not have sufficient notice of the new allegations and an opportunity to develop its defense to them." Id.; see also Spring Meadows Health Care Center, DAB No. 1966, at 14-15 (2005) (holding that the ALJ improperly relied on a factual basis for which Spring Meadows did not have adequate notice; the deficiency finding was sustained on other factual bases). The ALJ stated that he "discern[ed] no prejudice" to Kingsville, finding that Kingsville "had long been aware of the operative facts" and "had ample notice" of CMS's "amended allegations of noncompliance." ALJ Decision at 7. Finally, the ALJ correctly found that Kingsville "offered no facts to dispute the allegations on which CMS based its motion." Id. at 8. Specifically Kingsville did not deny that the two residents developed pressure sores at the facility or that the pressure sores were unavoidable. Id. Moreover, Kingsville did not request an opportunity in response to the MSJ to supplement its evidence as to these residents.

We agree with the ALJ's conclusion that Kingsville had sufficient notice since the SOD contained the operative facts and CMS set forth its theory of noncompliance based on those facts in its MSJ. Kingsville knew from the time it received the SOD what facts it would need to refute and could have proffered additional evidence or made arguments as to development of these pressure sores in response to CMS's MSJ but failed to do so.

Based on the foregoing, we conclude that the ALJ did not err in concluding that Kingsville had adequate notice of CMS's amended allegations of noncompliance or that Kingsville failed to raise a dispute of material fact as to whether R33 and R39 had developed avoidable pressures sores at the facility. Accordingly, we could sustain the finding of noncompliance with section 483.25(c) based on these two residents. However, because we have found a material dispute of fact with regard to the repositioning, we cannot determine on the current record whether the ALJ properly found noncompliance with section 483.75 (to the extent it is derivative of the entire 483.25(c) deficiency) or whether the CMP amounts are reasonable. We are remanding for further proceedings to resolve these issues. Since the factual record regarding R33 and R39, as well as R24, R25, R26, and R11, could affect the

ALJ's decision on these issues, we are vacating his FFCLS with respect to all of the residents to give the ALJ maximum flexibility in developing the record.

3. We vacate the ALJ's conclusion that Kingsville was not in substantial compliance with 42 C.F.R. § 483.75 and that the amounts of per instance CMPs were reasonable.

The ALJ entered summary judgment on the issues of whether Kingsville was in substantial compliance with 42 C.F.R. § 483.75 and whether the amounts of per instance CMPs were reasonable.

- Section 483.75 requires that a facility must be administered "in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident." The ALJ concluded that his factual findings about Kingsville's failure to reposition residents and prevent pressure sores showed such "a pervasive lack of compliance by Petitioner's staff" that it was "only reasonable that I infer that such a wholesale failure by staff to discharge their responsibilities was caused by a failure of Petitioner's management to assure that the staff was sufficiently trained and appropriately managed to carry out their responsibilities." ALJ Decision at 9.
- As to the reasonableness of the amounts of the CMPs, the ALJ concluded that the CMPs were reasonable because of the seriousness of Kingsville's noncompliance in failing to reposition four residents in accordance with their care plans and in failing to prevent pressure sores on two residents. ALJ Decision at 11-12.

Both of these holdings are dependent on FFCLS that have been reversed or vacated in this decision. Therefore, the issues of Kingsville's compliance with section 483.75 and the reasonableness of the amounts of the CMPs are remanded to the ALJ for further proceedings consistent with this decision.

On appeal, Kingsville argues that, because there is no evidence that CMS considered the factors in 42 C.F.R. §§ 488.438 and 488.404 in setting the CMP amounts, the ALJ erred in finding those amounts reasonable. RR at 13-15. This legal argument is without merit. As the ALJ correctly stated, CMS does not have to "present[] facts or arguments [before the ALJ] addressing all of the regulatory factors described in 42 C.F.R. §§ 488.438 and 488.404." ALJ Decision at 12. The Board has held that in assessing whether the CMP amounts are reasonable, the ALJ should

not look into CMS's internal decision-making process but, rather, should make a de novo determination as to the whether the amounts are reasonable applying the regulatory criteria based on the record developed before the ALJ. Community Nursing Home, DAB No. 1807, at 21-26 (2002); Emerald Oaks, DAB No. 1800, at 5-13 (2001).

Conclusion

Based on our analysis of the law and discussion of the evidence of record, we vacate all of the FFCLs and remand the case to the ALJ to conduct further proceedings consistent with this decision.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Stephen M. Godek
Presiding Board Member