Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Silverbrook Manor
Docket No. A-11-37
Decision No. 2388
June 17, 2011

REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

Silverbrook Manor (Silverbrook), a Michigan skilled nursing facility (SNF), appeals the October 27, 2010 decision of Administrative Law Judge (ALJ) Steven T. Kessel, *Silverbrook Manor*, DAB CR2275 (2010) (ALJ Decision). A compliance survey performed by the Michigan Department of Community Health (MDCH) found that Silverbrook was not in substantial compliance with Medicare participation requirements as of October 29, 2009. The sole issue before the ALJ was how long it took Silverbrook to return to substantial compliance after that date. The ALJ concluded that, as a matter of law, Silverbrook could not prove that it attained substantial compliance sooner than December 22, 2009, the date of MDCH's "revisit" (follow-up) survey. Based on that conclusion, the ALJ granted summary judgment for the Centers for Medicare & Medicaid Services (CMS) and affirmed the enforcement remedies that CMS had imposed on Silverbrook for the period from October 29 through December 21, 2009.

For the reasons discussed below, we reverse the ALJ Decision and remand the case for further proceedings.

Legal Background

In order to participate in Medicare, a SNF must comply with the participation requirements in 42 C.F.R. §§ 483.1-483.75. Compliance with these requirements is verified by nursing home surveys conducted by state health agencies. 42 C.F.R. Part 488, subpart E. Survey findings are reported in a document called a Statement of Deficiencies (SOD), which identifies each alleged failure to meet a participation requirement with a unique survey "tag" number. *See* CMS Ex. 1.

If CMS determines, on the basis of survey findings, that a SNF is not in "substantial compliance" with one or more participation requirements, CMS may, in lieu of termination, impose on the SNF one or more of the "alternative" enforcement "remedies" specified in 42 C.F.R. § 488.406. 42 C.F.R. § 488.402(b), (c). Those

remedies include per-day civil money penalties (CMPs) for the number of days the SNF is not in substantial compliance, and a denial of payment for new Medicare admissions (DPNA) during the period of noncompliance. *Id.* §§ 488.406, 488.417, 488.430(a).

In choosing an appropriate remedy, CMS considers factors including the "seriousness" of the SNF's noncompliance and the SNF's history of noncompliance. 42 C.F.R. § 488.404(a), (c). Seriousness is a function of the noncompliance's "severity" (whether it has created a "potential" for "more than minimal" harm, resulted in "actual harm," or placed residents in "immediate jeopardy") and "scope" (whether it is "isolated," constitutes a "pattern," or is "widespread"). 42 C.F.R. § 488.404(b); State Operations Manual (CMS Pub. 100-07), Appendix P – *Survey Protocol for Long-Term Care Facilities*, sec. IV (available on CMS's website at http://www.cms.gov/Manuals).

With certain irrelevant exceptions, an alternative remedy remains in effect until either (1) "[t]he facility has achieved substantial compliance, as determined by CMS or the State based upon a revisit or after an examination of credible written evidence that it can verify without an on-site visit," or (2) CMS or the state terminates the SNF's provider agreement. 42 C.F.R. § 488.454(a)(1).

Case Background

On November 5, 2009, MDCH completed an on-site complaint investigation survey of Silverbrook ("November survey"). CMS Ex. 2, at 1. As a result of that survey, MDCH cited Silverbrook for noncompliance with 11 Medicare participation requirements.[1] CMS Ex. 5, at 1-2. Three of the 12 deficiency citations were:

- ***Tag F323, noncompliance with 42 C.F.R. § 483.25(h)(2)***

  Failure of staff to provide supervision and assistance devices to prevent elopement by Resident 100; failure to have functioning door alarms, which placed at risk other elopement-prone residents.

- ***Tag F309, noncompliance with 42 C.F.R. § 483.25***

  Failure to implement a physician's wound care orders for Resident 104 on August 22 and 23, 2009.

[1] MDCH initially cited Silverbrook for noncompliance with 12 requirements but later rescinded one of the citations as a result of informal dispute resolution. *See* CMS Ex. 3.

- ***Tag F281, noncompliance with 42 C.F.R. § 483.20(k)(3)(i)***

  Failure to provide services that meet professional standards of quality in connection with the nursing staff's failure, described under F309, to implement a physician's wound care orders for Resident 104 on August 22 and 23, 2009.

Id.; *see also* CMS Ex. 1, at 10-17, 23-27. The deficiency cited under tag F323 was found to be at the immediate jeopardy-level of severity. CMS Ex. 5, at 1.

On November 20, 2009, MDCH notified Silverbrook that it had recommended (to CMS) the imposition of CMPs for the noncompliance found during the November survey. CMS Ex. 2, at 1. MDCH also informed Silverbrook that CMS had authorized the imposition of a DPNA effective December 6, 2009. *Id.* at 2.

On December 22, 2009, MDCH performed an on-site revisit survey ("December revisit") and concluded that Silverbrook had achieved substantial compliance as of that date. *See* CMS Ex. 5, at 2.

Based on the findings of the November survey and December revisit, CMS imposed the following remedies on Silverbrook:

- $4,550 per-day CMP for October 29, 2009
- $600 per-day CMP from October 30, 2009 through December 21, 2009
- DPNA from December 6, 2009 through December 21, 2009

CMS Ex. 5, at 1-2.

Silverbrook requested an administrative law judge hearing to challenge CMS's enforcement action. CMS responded with a motion for summary judgment,[2] asking the ALJ to affirm all of the remedies based on the three above-mentioned deficiency citations and contending that there were no genuine disputes of material fact concerning: (1) the survey findings that Silverbrook was not in substantial compliance with sections 483.25(h)(2), 483.25, or 483.20(k)(3)(ii) as of October 29, 2009; (2) the finding that Silverbrook's noncompliance with section 483.25(h)(2) was at the level of immediate jeopardy; or (3) the reasonableness of the per-day CMP amounts.

[2] Memorandum of Law in Support of CMS's Motion for Summary Judgment (Aug. 6, 2010).

In response to CMS's motion,[3] Silverbrook did not (1) dispute that it was noncompliant with sections 483.25(h)(2), 483.25, and 483.20(k)(3)(ii) as of October 29, 2009, (2) challenge the finding that the noncompliance with section 483.25(h)(2) had placed one or more residents in immediate jeopardy; or (3) contend that the per-day CMP amounts were unreasonable based on the three deficiency citations that CMS relied upon in its motion. Instead, Silverbrook contended that the duration of the remedies should be reduced. Claiming that it had implemented a CMS-approved "plan of correction" and returned to substantial compliance by November 25, 2009, Silverbrook asserted that CMS should have rescinded the $600 per-day CMP and withdrawn the DPNA as of that date, not as of December 22, 2009, the date of the revisit. Silverbrook claimed that the evidence that it had implemented its plan of correction could be found in Petitioner's Exhibit 1 and that this evidence, at a minimum, created genuine disputes of material fact concerning the duration of its noncompliance. *Id.* at 7, 16-17.

After reviewing Silverbrook's response to the motion, the ALJ issued an order directing the parties to brief the duration issue fully. Order Directing Parties to Address New Issue (Sept. 17, 2010). The ALJ indicated in the order that Silverbrook's response had raised the issue of "whether, as a matter of law, a follow up survey is necessary in order to establish whether and when Petitioner corrected its noncompliance given the types of deficiencies that are at issue here." *Id.* at 2. The ALJ also noted that he had recently issued his decision in *Omni Manor Nursing Home*, DAB CR2213 (2010), which, he said, "addresses the identical issue that has surfaced here." *Id.*

After receiving responses to his order, the ALJ granted summary judgment in favor of CMS, sustaining all of the remedies imposed and holding that, "as a matter of law, the earliest date when any of [Silverbrook's] deficiencies could have been certified to have been corrected was the date of the revisit survey . . . ." ALJ Decision at 1, 3, 5. In rejecting the facility's claim of an earlier return to substantial compliance, the ALJ held that the deficiency citations placed in issue by CMS (tags F323, F309, and F281) all involved failures of "human performance," and that "[d]eficiencies that involve the actual provision of care by facility staff may not be certified as having been corrected without observation of personnel providing care." *Id.* at 5-6. Thus, said the ALJ, the documents submitted by Silverbrook which purport to show that its staff had been retrained and that "systems had been put in place . . . to monitor and check on staff performance" are, "as a matter of law," inadequate to establish a compliance date earlier than the date of the December revisit. *Id.* at 5. The ALJ stated that his

[3] Petitioner's Response to Respondent's Motion for Summary Judgment (Sept. 3, 2010).

holding was compelled by 42 C.F.R. 488.454(a)(1), "as interpreted by" the preamble to the November 10, 1994 final rule (59 Fed. Reg. 56,116) which promulgated that regulation. *Id.* at 3-4.

In this appeal, Silverbrook contends that it is "entitled to an opportunity to show that compliance was achieved pursuant to the plan of correction" on a date earlier than the date of the revisit, "even if a deficiency involves [a] quality of care deficiency." Reply Br. at 8. The facility further contends that because the ALJ Decision "was based upon an erroneous regulatory conclusion that the revisit was the date of compliance as a matter of law, the record was not developed and is necessarily incomplete and requires remand for development." *Id.* CMS, on the other hand, urges us to affirm the grant of summary judgment based on the ALJ's reasoning, asserting that "deficiencies that involve facility staff members providing care to residents, including those at tags F323, F309, and F281 require an on-site revisit survey because observation of personnel behavior to confirm the correction of the noncompliance is essential." Response Br. at 7 (citing *Asbury Center at Johnson City,* DAB No. 1815, at 20 (2002)).

Discussion

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. *Kingsville Nursing and Rehabilitation Center*, DAB No. 2234, at 3 (2009) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986)). Whether summary judgment is appropriate is a legal issue that we address de novo. *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918, at 7 (2004).

In *Omni Manor Nursing Home*, DAB No. 2374 (2011), the Board reviewed a grant of summary judgment concerning the duration of the facility's noncompliance. In that case, when the facility, Omni Manor, declined to challenge CMS's findings of noncompliance or the amount of a per-day CMP, CMS moved for summary judgment concerning the duration of that remedy, contending that the facility's noncompliance (and, consequently, the CMP) continued until the date of a revisit survey. *Id.* Omni Manor responded that it returned to substantial compliance approximately three weeks earlier than the revisit and proffered documentary evidence allegedly supporting that assertion. *Id.*

In granting summary judgment for CMS in *Omni Manor*, the ALJ held that the regulation governing the duration of remedies – section 488.454 – did not specify the circumstances under which a revisit survey was required to verify that a SNF had returned to substantial compliance. DAB CR2213, at 4-5. He thus looked to the preamble of the November 10, 1994 final rule for "clarification" and found that it "defin[ed] the circumstances in which documentation alone will not serve to

establish compliance." *Id.* According to the ALJ, the preamble explained that deficiencies that "involve staff members' providing care to residents are not deficiencies that normally can be certified as corrected based solely on a review of documents because documents alone cannot prove that staff is actually providing care according to professionally recognized standards of care." *Id.* at 5. For deficiencies concerning the provision of nursing care, said the ALJ, "observation of performance is a critical element of certifying compliance." *Id.*

Finding that Omni Manor's deficiencies related to the adequacy of the nursing care provided to residents, the ALJ held that "as a matter of law, Omni Manor could not establish compliance . . . based solely on documents representing that its staff had been retrained or even that they were performing according to professionally recognized standards of care." DAB CR2213, at 5. The ALJ further held that certification of substantial compliance required that staff "be observed actually providing the care implicated by the deficiencies," and thus the date of the revisit was "*as a matter of law the earliest date on which CMS could have certified [Omni Manor] as compliant.*" *Id.* (italics added).

On review, the Board disagreed with the ALJ's holding that section 488.454(a)(1) required CMS to certify Omni Manor's compliance by means of a revisit survey. DAB No. 2374, at 4-5. The Board held that the "plain language of section 488.454(a)(1) does not, as a matter of law, require CMS or a state to verify a facility's achievement of substantial compliance by means of a revisit survey but, rather, gives CMS discretion to make that determination either through a revisit survey or through a review of credible written evidence," regardless of the type of deficiency. *Id.* at 5, 7 (emphasis in original). The Board also held that there was "neither a need to nor basis for looking to" the November 10, 1994 preamble because the regulation on its face was unambiguous. *Id.* at 4. In any event, said the Board, the preamble's "limited discussion" was insufficient evidence that the Secretary of Health and Human Services (Secretary) intended "to define a whole category of deficiencies for which CMS or a state would not have the option of verifying compliance based on credible written evidence if CMS thought that was a sufficient means of verification in a given case." *Id.* at 6. In addition, the Board held that the ALJ's conclusion that Omni Manor could not prove a return to substantial compliance earlier than the date of the revisit survey was inconsistent with Board decisions that recognize that section 488.454(e) "allows a provider appealing noncompliance findings that resulted in the imposition of a remedy the opportunity to also attempt to establish before the ALJ and the Board a compliance date earlier than that determined by CMS or the state." *Id.* at 7-8.

Based on the foregoing analysis, the Board held that the ALJ "erred in concluding that Omni Manor could not, as a matter of law, establish compliance on a date earlier than that of the revisit survey." DAB No. 2374, at 8. Because the ALJ's

erroneous legal conclusion was the sole basis for the grant of summary judgment to CMS, and because Omni Manor received no hearing on its evidence of a pre-revisit compliance date as a result of that conclusion, the Board vacated the ALJ's decision and remanded the case for a hearing "limited to the issue of whether Omni Manor, as a matter of fact, returned to substantial compliance on a date earlier than the date of the revisit survey." *Id.* at 1.

We see no material distinction between the circumstances here and those in *Omni Manor.* Here, as in the prior case, the only issue for decision is the duration of the facility's noncompliance and a claim by the facility that it returned to substantial compliance earlier than the date of a revisit survey. In both cases, the facility introduced written evidence allegedly supporting the claim of an earlier compliance date. And in both cases the ALJ held that, given the nature of the facility's deficiencies, its return to substantial compliance could not, *as a matter of law,* be certified without a revisit survey.

In addition, the ALJ here, as he did in *Omni Manor,* made it clear that his legal conclusion was based on what he perceived to be the Secretary's "interpretation" of section 488.454(a)(1) in the preamble to the November 10, 1994 final rule. As the Board discussed in *Omni Manor,* however, there was no need or basis to look to the preamble for clarification of the regulation's meaning or effect, and the interpretation that the ALJ ascribed to the Secretary is, in any event, unsupported by the preamble and inconsistent with section 488.454(e).

Finally, in both cases, the sole reason given by the ALJ for granting CMS's summary judgment motion was an erroneous conclusion that, given the nature of the relevant deficiencies, CMS could not, as a matter of law, find the facility to be in substantial compliance prior to the date of a revisit.[4] While the Board has recognized in cases like *Asbury Center*, cited by CMS, that revisits are the usual means of establishing a return to substantial compliance, the Board has never held that revisits are mandated in any particular type of case. *Omni Manor*, DAB No. 2374, at 5 (citing decisions). Even when substantial compliance is verified by means of a revisit, CMS may, and often does, determine that substantial

[4] CMS asserts that "even if the Board finds that a revisit survey could verify retroactive compliance or concludes that a revisit survey was not necessary to determine substantial compliance in the first instance, . . . the ALJ's Decision is supported by *substantial evidence in the record as a whole* because the *written evidence provided by Silverbrook Manor* does not show that the facility was in substantial compliance, including with tags F323, F309, and F281, prior to December 22, 2009." Response Br. at 14-15 (italics showed). We reject this assertion because the "substantial evidence" standard of review is inapplicable in summary judgment cases, *St. Catherine's Care Center of Findlay, Inc.*, DAB No. 1964, at 6 n.5 (2005), and because the ALJ made no findings about what Silverbrook's written evidence showed concerning the timing of its corrective measures.

compliance was achieved on a date earlier than that on which the revisit occurs. *Oceanside Nursing and Rehabilitation Center*, DAB No. 2382, at 21 (2011) (noting that CMS in that case determined that the facility had remedied all deficiencies as of a date earlier than the date of a revisit survey).

Because the erroneous legal conclusion that substantial compliance could be verified only by a revisit was the sole basis for the ALJ's decision and effectively denied Silverbrook a hearing on its evidence that it achieved substantial compliance prior to the December revisit, we reverse the grant of summary judgment to CMS and remand the case for a hearing consistent with this decision on the issue of the duration of Silverbrook's noncompliance.

/s/
Stephen M. Godek

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan
Presiding Board Member