Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	
	DATE: December 7, 2009
Venetian Gardens,	
Petitioner,	Civil Remedies CR1956
	App. Div. Docket No. A-09-108
	Decision No. 2286
- v. -	
Centers for Medicare & Medicaid Services.	

REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

Venetian Gardens appealed the June 1, 2009 decision of Administrative Law Judge (ALJ) Steven T. Kessel granting summary judgment for the Centers for Medicare & Medicaid Services (CMS). Venetian Gardens, DAB CR1956 (2009) (ALJ Decision). The ALJ sustained the imposition of civil money penalties (CMPs) of $4,150 for May 17, 2008, and $100 per day from May 18 through July 17, 2008, based on his conclusion that Venetian Gardens failed to comply substantially with regulatory requirements at 42 C.F.R. §§ 483.25(h)(2) (prevention of accidents) and 483.10(n) (self-medication).

This case involves a competent resident who repeatedly chose to leave the facility in his motorized wheelchair and was killed when his wheelchair was hit by a car.

Venetian Gardens appealed the ALJ's conclusions that Venetian Gardens was not in substantial compliance with section 483.25(h)(2), that CMS's determination this noncompliance posed immediate jeopardy was not clearly erroneous, and that the

amounts of the CMPs were reasonable. Venetian Gardens did not appeal the ALJ's conclusion that Venetian Gardens was not in substantial compliance with section 483.10(n), so we uphold that conclusion.

For the following reasons, we conclude that the ALJ erred in determining that this matter could be fully resolved through summary judgment. Venetian Gardens placed in dispute the limited facts on which CMS relied in its motion for summary judgment as material and undisputed. Instead of denying CMS's motion, the ALJ ruled for CMS on grounds independent of those on which CMS relied in its motion, and, in doing so, failed to follow applicable summary judgment standards. Moreover, the ALJ did not identify any authority or provide any analysis for the broad view he apparently took of Venetian Gardens' responsibilities under section 483.25(h)(2). We therefore vacate the ALJ Decision and remand the case for further proceedings consistent with this decision.

Background

Venetian Gardens is located in Ohio and participates as a skilled nursing facility in the Medicare program. ALJ Decision at 1. As such, it is subject to surveys by the State survey agency to ensure that it complies with applicable participation requirements. Social Security Act (Act) §§ 1819 and 1866; 42 C.F.R. Parts 483 and 488. On May 28, 2008, state surveyors found that the facility was not in substantial compliance with five participation requirements, including one (under section 483.25(h)(2)) at the immediate jeopardy level. CMS Ex. 3 (Statement of Deficiencies (SOD)). Adopting the state survey findings, CMS imposed CMPs of $4,150 per day beginning May 17, 2008 and $100 per day beginning May 18, 2008 through July 17, 2008, for a total of $10,250. CMS Ex. 1, at 2.

Venetian Gardens timely appealed the findings of noncompliance. CMS moved for summary judgment on two of the five deficiency citations. Venetian Gardens opposed the motion. CMS filed 24 proposed exhibits, and Venetian Gardens filed 16 proposed exhibits. The ALJ granted summary judgment to CMS on both citations, and upheld CMS's immediate jeopardy finding and the CMPs. Venetian Gardens timely sought review by the Board of the ALJ Decision as to the section 483.25(h)(2) citation and the amounts of the CMPs.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address de novo. Lebanon Nursing and Rehabilitation Center, DAB No. 1918 (2004). Summary judgment is appropriate if there are no genuine disputes of fact material to the result. Everett Rehabilitation and Medical Center, DAB No. 1628, at 3 (1997). In reviewing a disputed finding of fact, we view proffered evidence in the light most favorable to the non-moving party. Kingsville Nursing and Rehabilitation Center, DAB No. 2234 (2009); Madison Health Care, Inc., DAB No. 1927 (2004), and cases cited therein. The standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. Guidelines - Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs, http://www.hhs.gov/dab/guidelines/prov.html.

Applicable law

Section 483.25(h)(2) of 42 C.F.R. falls under 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(h) provides:

> *Accidents.* The facility must ensure that –
> (1) The resident environment remains as free of accident hazards as is possible; and
> (2) Each resident receives adequate supervision and assistance devices to prevent accidents.

Analysis

The deficiency citation at issue involves a legally competent Venetian Gardens resident, identified as Resident # 79 (R79), who was a 56-year old man with advanced Parkinson's disease. R79 owned a motorized wheelchair that he purchased himself and regularly used to travel, by himself and sometimes at night, on Ohio State Route (SR) 28. According to the SOD, SR 28 was a "rural highway" (CMS Ex. 3, at 14) with a speed limit of "45 miles per hour" (id. at 17).

Venetian Gardens was located on SR 28, as were other commercial establishments including stores and bars that R79 would visit.[1] CMS Ex. CMS 5, at 1; CMS Ex. 21. SR 28 did not have sidewalks, but Venetian Gardens presented evidence that it did have a "6-foot wide asphalt berm to the right of the farthest edge of the lane of travel in each direction." P. Ex. 3, at ¶ B.2; CMS Ex. 5, at 5. The evidence indicates that it was illegal for R79 to operate the wheelchair in the part of the roadway in which cars traveled, which police referred to as his being "in" the road (CMS Ex. 5, at 4), but lawful for him to operate the wheelchair on the paved berm, which the police referred to as his being "on" the road (CMS Ex. 21, at ¶¶ 3, 4, 6, 7). The evidence also indicates that R79's usual practice was to operate the wheelchair on the paved berm of SR 28. CMS Ex. 21, ¶¶ 2-4, 6, and 7; P. Ex. 10, at 3. Shortly after midnight on May 18, 2008, however, R79 was struck and killed by an automobile, and the report of the accident indicates that he was operating his wheelchair "in" SR 28, i.e., the lanes in which cars traveled. CMS Ex. 5, at 1-4.

The ALJ, citing a set of facts that he characterized as undisputed, concluded that those facts showed that Venetian Gardens "failed to provide R79 with adequate supervision and assistance devices to prevent accidents as required by section 483.25(h)(2)" and granted CMS's Motion for Summary Judgment (MSJ). ALJ Decision at 5, citing facts set forth at ALJ Decision 3-4. The ALJ rejected evidence on which Venetian Gardens relied in opposing summary judgment as insufficient to establish a dispute of material fact as to whether it had provided adequate supervision. ALJ Decision at 6-12.

The ALJ erred in granting summary judgment for the following reasons, each of which we discuss below. CMS moved for summary judgment on the basis of three primary facts that it alleged were undisputed. Venetian Gardens presented evidence disputing those facts, which should have been sufficient to defeat the motion. Instead of denying the MSJ, the ALJ ruled for CMS on grounds independent of those on which CMS relied in its motion. Moreover, in independently formulating his bases for summary judgment, the ALJ failed to follow applicable summary judgment

[1] We note that evidence in the record indicates that R79 went to bars for companionship and did not drink. See CMS Ex. 8, at 2. The accident report stated that his system was free of drugs and alcohol the night he was killed. CMS Ex. 5, at 2, 6.

standards. Finally, the ALJ did not support the broad view he apparently took of Venetian Gardens' responsibilities under section 483.25(h)(2) with any analysis of or citation to the wording of that section, its history, CMS guidance on the requirement, or professionally recognized standards of care.

A. Venetian Gardens' evidence created disputes of fact about the allegedly undisputed material facts on which CMS based its MSJ. The ALJ therefore erred in granting the motion.

The Board has repeatedly stated that a facility's failure to follow its care plan or a doctor's order may be grounds for concluding that the facility is not in substantial compliance with section 483.25 quality of care standards. See Alexandria Place, DAB No. 2245 (2009) (failure to provide care in accordance with the doctor's order); Kenton Healthcare, LLC, DAB No. 2186 (2008) (failure to follow standards in the care plan for supervision); Spring Meadows Healthcare Center, DAB No. 1966, at 17 (2005) ("the clearest case of failure to meet [section 483.25] is failure to provide one of the specific services outlined in the subsections or failure otherwise to follow the plan of care based on the comprehensive resident assessment"); and St. Catherine's of Findley, DAB No. 1964, at 13 n.9 (2005) (facility admission that it failed to follow its own supervision care plan may make summary judgment appropriate).

Here, CMS framed a narrow basis for summary judgment based on Venetian Gardens' alleged failure to comply with the resident's care plan and a doctor's order. As stated in heading C.1 of its MSJ, CMS relied on the following allegedly undisputed material facts:

> There is No Genuine Issue of Material Fact: That R79's Care Plan Required 24-Hour Care and Supervision; That A March 21, 2008 Physician Order Allowed R79 To Go Out On Pass With Family; and That Venetian Gardens Repeatedly Allowed R79 to Go Outside the Facility Alone, Without Supervision.

CMS MSJ at 6.[2] CMS alleged that the care plan and a doctor's order required that the resident "receive 24-hour supervision and care and leave the facility in the company of his family, not alone." CMS MSJ at 2. Based on its interpretation of these documents, CMS then argued that Venetian Gardens should not have allowed R79 to leave the facility alone and, by doing so, violated section 483.25(h)(2). CMS MSJ at 6-10.

Venetian Gardens disputed CMS's interpretation of the care plan and R79's doctor's order. Citing evidence in the record, Venetian Gardens argued that these documents did not, as CMS said, preclude R79's temporarily leaving the facility alone. P. Response to CMS MSJ at 5-7; 10-11. Venetian Gardens also disputed CMS's characterization of its actions as "allowing" the resident to leave the facility since the resident was competent and had a right to leave the facility and his departures were not inconsistent with the care plan or doctor's orders. Id.

As to the doctor's March order, Venetian Gardens proffered earlier standing orders and the doctor's declaration stating that her orders authorized R79 to leave the facility and did not condition his right to leave on the presence of family. P. Ex. A. The doctor's declaration is supported by a nurse's note stating that, on February 29, 2008, the day after R79 acquired his power wheelchair, the facility notified the doctor that R79 left the facility on February 28 for several hours in his new wheelchair. P. Ex. 4, at 32. (The nurse's note reflects that, on the 28th, R79 left the facility at 5:20 p.m., at 8:30 p.m. and at 11:35 p.m. Id.) Moreover, a nurse's note states that on March 10, 2008 at 9:15 p.m., when R79 said he was going out to a bar and asked for his Percocet pill, the facility called the doctor and spoke with a nurse practitioner who stated that "ord is on chart ref taking narcotics and leaving facility to go to bar – ord is no alcohol with narcotics." P. Ex. 4, at 28. Indeed, for purposes of summary judgment, the ALJ accepted as true Venetian Gardens' allegations that the resident was competent and that, under the doctor's orders, "the resident could leave the facility unaccompanied and with his medications." ALJ Decision at 9. The ALJ erred, however, in

[2] While CMS discussed other facts and circumstances concerning R79's condition and the facility's actions, it did not characterize them as undisputed material facts or rely on them as the basis for summary judgment.

treating this fact as immaterial, even though it clearly was a basis for CMS's motion. Moreover, absent a failure to follow physician's orders, facts about the resident's condition and rights that might be irrelevant if such a failure were present become relevant in evaluating compliance with section 485.25(h).

As to the care plan, CMS contended that it required "that someone who can provide health care, either staff or family member, at all times, 24 hours a day, must be within observation, hearing or contact of R79." CMS MSJ at 7. As support for this assertion, CMS relied on this sentence in the care plan: "Resident's discharge status is: Long term care, requires 24 hour care and supervision r/t dx of DM, Parkinsons, Anxiety, Anemia, and Renal failure." CMS MSJ 6-7, citing CMS Ex. 9, at 13. Venetian Gardens disputed CMS's interpretation of the care plan, citing the doctor's orders allowing R79's unsupervised departure (P. Response to MSJ at 10) and evidence in the record about R79's capabilities and desire for independence and autonomy (id. at 7-8, n.7). An alternative favorable inference that could be drawn from the discharge plan is that it means merely that the resident was expected to continue to need a long term care placement with access to round-the-clock care. Venetian Gardens cited the doctor's orders allowing R79's unsupervised departure (P. Response to MSJ at 10) and evidence in the record about R79's capabilities and desire for independence and autonomy (id. at 7-8, n.7) for the proposition that needing access to 24-hour care and supervision did not preclude the resident from electing to go out of the facility on his own. Viewing the evidence in the light most favorable to Venetian Gardens, we agree that the evidence created a dispute of material fact as to whether the cited sentence in the care plan regarding 79's "discharge potential" reflected a determination that R79 required the type of 24-hour supervision described by CMS and, therefore, should not be permitted to leave the facility alone, even temporarily.

Thus, as Venetian Gardens argues on appeal, it raised genuine disputes of material fact about CMS's interpretation of the doctor's orders and the care plan, i.e., the facts that CMS identified as material and undisputed in moving for summary judgment. RR at 5-6, 11. These disputes of fact should have been sufficient to defeat CMS's motion. Instead, as discussed below, the ALJ erroneously granted CMS's motion by formulating his own bases for summary judgment.

B. The ALJ erred in formulating independent bases for granting summary judgment.

(1) The ALJ erred in granting summary judgment on bases on which CMS did not rely in moving for summary judgment.

The ALJ granted summary judgment on the basis of his conclusion that section 483.25(h)(2) required Venetian Gardens to comprehensively assess R79 for risks he may encounter if he left the facility unsupervised in the wheelchair, to plan his care to address those risks, and to implement that care plan by at least offering R79 "all reasonable protective measures" based on its assessment and planning. ALJ Decision at 6. The ALJ then treated as material to his conclusion only some alleged facts related to Venetian Gardens' performance or nonperformance of these steps.[3] Finding that these were undisputed facts that showed that Venetian Gardens had failed to perform any of these steps, the ALJ concluded that Venetian Gardens had not complied substantially with section 483.25(h)(2). Id. at 5.

The ALJ's action here is contrary to fundamental fairness. Without notice of the bases on which summary judgment is being sought, a nonmoving party cannot effectively respond. Since Venetian Gardens did not have prior notice that summary judgment

[3] As to the evidence submitted by the parties, the ALJ stated:

> I am receiving all of these exhibits into the record of this case and I cite to some of them in this decision. However, I make no evidentiary findings from these exhibits. I base my fact findings solely on the undisputed material facts as averred by the parties.

ALJ Decision at 2. As discussed at length in Illinois Knights Templar Home, DAB No. 2274, at 3-8 (2009), this approach is not consistent with Rule 56 of the Federal Rules of Civil Procedure (by which the ALJ informed the parties he would be guided) and is contrary to Board practice and summary judgment case law. Moreover, it is inconsistent with what the ALJ ultimately did. Citing and weighing the exhibits, he rejected Venetian Gardens' averments of fact about staff's efforts to provide for R79's safety.

might be granted based on the legal theory on which the ALJ relied, Venetian Gardens did not have an adequate opportunity to identify disputes regarding facts material under that theory, nor to address legal issues related to that theory. Under the circumstances here, this procedural error by the ALJ was prejudicial to Venetian Gardens.

(2) The ALJ failed to follow standards for evaluating whether summary judgment is appropriate because he failed to view the record in the light most favorable to the nonmovant, to draw all favorable reasonable inferences in support of the nonmovant, and to refrain from weighing and evaluating the credibility of the evidence.

Section 483.25(h)(2) requires that a facility take "all reasonable steps to ensure that a resident receives supervision and assistance devices that meet his or her assessed needs and mitigate foreseeable risks of harm from accidents." Briarwood Nursing Center, DAB No. 2115, at 11 (2007), citing Woodstock Care Center, DAB No. 1726, at 28 (2000) (facility must take "all reasonable precautions against residents' accidents"), aff'd, Woodstock Care Ctr. v. Thompson, 363 F.3d 583 (6th Cir. 2003). The combination of the fact-based nature of section 483.25(h) citations and summary judgment review standards make summary judgment "particularly unsuited in most cases for resolving issues arising under section 483.25." St. Catherine's of Findlay, DAB No. 1964, at 13.

The Board recently laid out the process and standards for resolving a summary judgment motion by CMS in a nursing facility case, in which, as here, the ALJ has informed the parties that he will be guided by Rule 56 of the Federal Rules of Civil Procedure (FRCP). We quote that explanation at length since we rely on summary judgment principles articulated therein:

> 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). . . . 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.ll; 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). . . .
>
> [I]f 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.

Kingsville, DAB No. 2234, at 3-4 (citations omitted); see also Crestview Parke Care Center, DAB No. 1836 (2002), aff'd in part, Crestview Parke Care Ctr. v. Thompson, 373 F.3d 743 (6th Cir. 2004).

Moreover, as the Board has explained in prior decisions, an ALJ's role in deciding a summary judgment motion differs from the role of an ALJ resolving a case after a hearing (whether an in-person hearing or on the written record). For example, in Madison Health Care, Inc., DAB No. 1927, at 6 (2004), the Board stated that "the ALJ deciding a summary judgment motion 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)." In that process, the ALJ should not be assessing credibility or evaluating the weight to be given conflicting evidence.

As discussed below, the ALJ failed to properly apply the standards for evaluating whether summary judgment was appropriate. He weighed conflicting evidence, did not view evidence in the light most favorable to Venetian Gardens, and did not draw all reasonable inferences in its favor.

The ALJ's and Venetian Gardens' depictions of R79, which are both based on evidence in the record, differ dramatically. While it is undisputed that R79 had significant physical limitations as a result of Parkinson's disease, the ALJ described the resident almost exclusively in terms of his impairments. ALJ Decision at 3. Venetian Gardens did not dispute all of the findings made by the ALJ but cited other evidence that, it asserted, showed a more complete picture of the resident as a legally competent 56-year old man whose decision-making ability had been assessed as "consistent and reasonable" (P. Ex. 4, at 12) and whose doctor had assessed him as competent to leave the facility unaccompanied (P. Ex. A). For example, Venetian Gardens cites evidence that R79 was a retired art teacher and former head wrestling coach, a photographer who ran his own website from the nursing facility, a former licensed driver and avid cyclist who was aware of traffic laws and familiar with SR 28, and, though he did not drink, someone who liked to socialize with younger people by visiting local bars at night. CMS Ex. 8, at 2; CMS Ex. 11, at 28; P. Ex. 3, at ¶ 7; P. Ex. 4, at 9. Viewed favorably, the evidence showed that, despite his physical limitations, R79 was resolutely determined to maintain all possible measures of adult independence and was, at the time of the accident, arranging to move from the nursing home to an assisted living facility based on his improved physical capacities. Venetian Gardens' Response to CMS MSJ at 7.

The ALJ's limited portrayal of R79 resulted, in part, from the ALJ's failure to consider evidence relied on by Venetian Gardens and in part from his declining to draw reasonable inferences in favor of Venetian Gardens from the evidence he did consider. The ALJ's treatment of R79's seated balance and its impact on his ability to operate the wheelchair unsupervised illustrates this failure. The ALJ stated that R79 was "a gravely impaired

individual with serious balance and positioning issues" (ALJ Decision at 5), an individual whose "balance was unsteady even when he sat" (id. at 3); an individual for whom the risks of his unsupervised operation of the wheelchair were "exacerbated by . . . his loss of balance" (id. at 6). However, the Minimum Data Set (MDS) (on which the ALJ relied) showed that, while the resident's balance while sitting was described as "unsteady," he was "able to rebalance self without physical support." January 2007 Minimum Data Set at CMS Ex. 9, at 51. Moreover, there was evidence that the motorized wheelchair was ordered by his neurologist to increase R79's mobility (P. Ex. 3, at ¶ 4); that his balance had been taken into account when ordering the wheelchair (see, e.g., occupational therapist's notes pre-dating the acquisition of the wheelchair stating that the resident "is in need of a custom seating system" for his "power w/c" (P. Ex. 4, at 53); that the "wheelchair was always fitted with a custom-made, built-in pressure relief chair" (P. Ex. 2, at ¶ 5); that the wheelchair had a "front release seat belt" which "was to be worn at all times while in wheelchair" (P. Ex. 7, at 3, 4); and that the wheelchair "contained a built-in, customized pressure relief seat that made it unlikely to create the need for Resident 79 to reposition himself, as that device would prevent Resident 79's tremors (if any) from affecting his basic posture in the wheelchair" (P. Ex. 3, at ¶ E.3). The ALJ focused on R79's poor balance and its impact on his safety in the wheelchair, while improperly ignoring evidence that mitigated or eliminated the potential negative impact his balance would have on his ability to operate the wheelchair away from the facility.

Another example of the ALJ's failure to consider relevant evidence and draw favorable inferences is illustrated by his treatment of the doctor's orders. While finding for purposes of summary judgment that the doctor had "ordered that the resident could leave the facility unaccompanied and with his medications," the ALJ concluded this fact was immaterial because staff was obligated to provide for the resident's safety with or without a doctor's order. ALJ Decision at 9. The doctor's orders are material, however, because they arguably indicate that R79's doctor had determined that he was physically and mentally capable of temporarily leaving the facility alone and of safely operating his motorized wheelchair on a roadway setting. The ALJ erroneously stated that "there are no facts in this case to show that Resident # 79's physician was aware that the resident was using his motorized wheelchair to travel alone and at night on a public highway." ALJ Decision at 13. However, as discussed in the prior section, nurses' notes indicate staff informed the physician about R79's use of the

wheelchair outside the facility. Moreover, the surveyors' interview notes indicate that the physician told the surveyors that she was aware of R79's use of the wheelchair on the road and that R79 was adequately counseled and aware of the risks. CMS Exs. 11, at 39; 12, at 7. Also, since Venetian Gardens was located on the road on which R79 was killed (SR 28) and the doctor was its "geriatric medical supervisor," one could reasonably infer that the doctor understood exactly the type of road on which R79 would travel in the wheelchair.

One of the grounds on which the ALJ concluded that Venetian Garden's supervision was inadequate was his finding that the staff had never comprehensively assessed and reviewed with R79 safety considerations about his use of the wheelchair on the road.[4] Id. at 5. In making this finding, the ALJ discussed some of the evidence on which Venetian Gardens relied to show that it had in fact addressed safety with R79.[5] However, the ALJ failed to consider all of this evidence and failed to view the evidence he did consider in the light most favorable to Venetian Gardens

[4] The ALJ's repeated reliance on Venetian Gardens' alleged failure to "comprehensively assess" or perform a "comprehensive assessment" (ALJ Decision at 8, 9, 12) of R79 for his use of the wheelchair off-site raises a question of whether the ALJ was improperly relying on requirements set forth in 42 C.F.R. § 483.20 (comprehensive assessments). Venetian Gardens was cited under this regulation (at a less that immediate jeopardy level) (CMS Ex. 3, at 3, 6), but CMS did not rely on these citations in its MSJ.

[5] While the ALJ concentrated on Venetian Garden's alleged failure to protect R79 from the hazards posed by his travel on a road in a wheelchair, CMS focused in its MSJ on the issue of the impact of his temporary absences on his physical and medical care needs. CMS MSJ at 5-7. We note that there is evidence in the record indicating that Venetian Gardens discussed such questions with R79. For example, when R79 moved to Venetian Gardens, he signed a form about temporary absence from the facility stating that he "had a right to leave the Facility's premises at any time," that he "had been informed of [his] medication/treatment regime" and that he assumed "all risks involved and is fully responsible for [his] actions while away." CMS Ex. 9, at 72; see also P. Ex. 4, at 28 (nurse's note stating she told R79 she needed to observe him for his response to Percocet.)

or draw all reasonable favorable inferences, as indicated by the following:

- Venetian Gardens' nursing notes, physical therapy notes, and social services notes repeatedly refer to conversations with R79 about road safety. The ALJ cited only the nursing and social service notes but then discounted this evidence by saying that the safety discussions evidenced therein were "superficial and sporadic." ALJ Decision at 5, citing P. Ex. 4, at 26, 28, 30, 31, 39; P. Ex. 10, at 3. However, viewed favorably, the notes might permit a rational trier of fact to find that warnings and safety training about use of the wheelchair on the road were repeatedly provided to R79 by a variety of types of staff.

- The social worker's contemporaneous social service note stated that she spoke with the resident about the safety of being on the road and the resident "stated he followed all traffic rules." ALJ Decision at 5, citing P. Ex. 10, at 3. Viewed favorably, this statement indicates that R79 understood the laws governing operation of the wheelchair along a road and asserted that he was capable of conforming his operation of the wheelchair to those standards.

- The day after R79 received the wheelchair, the physical therapist's notes report that she had a safety discussion with him about use of the wheelchair. The therapist's notes reflect that she discussed the need to go slowly in the halls so as to not injure other residents and considerations, such as reflective tape and a bike flag, for using the wheelchair outside the facility. P. Ex. 4, at 54. Subsequently, the facility did apply the reflective tape and flag. P. Ex. 6. Again, this evidence supports an inference that staff was counseling and assisting R79 with road safety, not only safety in the facility.

- The ALJ did not address the social worker's statement in her declaration that R79 had "expressed keen knowledge and awareness of staff's requests/reminders to remain safe when he would sign out for these trips, and exclaimed that they bothered him because they were essentially treating him like a child." P. Ex. 1, at ¶ 4. This statement supports an inference that staff's counseling of R79 had not been, as the ALJ concluded "superficial and sporadic" but so sustained and sufficient as to make him feel like staff believed he could not understand what he had been repeatedly told. This inference is supported by nurses'

notes reporting that, upon being given safety advice, R79 said that "I understand everything" (P. Ex. 4, at 28); that he "stat[ed] understanding" (Id. at 30) and that "he understands everything explained to him" (P. Ex. 4, at 31).

- Finally, the ALJ did not discuss this statement by one of R79's licensed practical nurses:

> On several occasions, I educated [R79] on safety and this being a busy road. Pt was upset that I cont to educate him. Stated he knew "I use to ride my bike [up arrow] and [down arrow] this road." Pt also stated that we treat him like he was dumb because we continuously was reminding him to be careful and safety.

P. Ex. 7, at 1. Read favorably, this statement indicates that the staff did counsel the resident about the dangers of the road and that he was very familiar with using the road for non-vehicular travel. Additionally, it also indicates that R79 believed he had been excessively counseled about the safety issues posed by his decision to use the wheelchair on the road. Indeed, viewed favorably, this evidence and other evidence raise a question as to whether more frequent counseling would have been productive and consistent with R79's right to dignity under section 483.10.

The ALJ also discounted Venetian Gardens' assertions about safety training and R79's "awareness and an understanding of [safety] training" on the ground that Venetian Gardens "cites to nothing in the treatment records to support these assertions." ALJ Decision at 9 (emphasis added). There are two problems with this statement. First, as discussed above, Venetian Gardens did cite evidence as to safety advice in nursing, social service, and physical therapy notes, which are all part of the resident's treatment records, but the ALJ did not draw favorable inferences from this evidence. Second, on summary judgment, an ALJ must not weigh the evidence. Therefore, evidence other than treatment records, such as the declarations of the social worker, nurse, and the Clinical Support Team Member (which we discuss below), was relevant even if the ALJ would, outside the context of summary judgment, conclude that these statements deserved less weight than contemporaneous treatment records. Thus, while the ALJ stated that he accepted "everything Petitioner asserts to be true," his decision and the record show that the ALJ did reject assertions made by Venetian Gardens,

and, in doing so, he either did not view the evidence favorably to the facility or he did not consider it at all.

Moreover, the ALJ improperly disregarded the declaration of the Clinical Support Team Member (Ms. Collins). In doing so, the ALJ incorrectly stated that it was "the sole support offered by Petitioner for its assertion that its staff gave safety training to the resident." ALJ Decision at 9. The ALJ's treatment of this witness was error for several reasons.

- The ALJ asserted that, as required by summary judgment, he was not making any "credibility findings" about Ms. Collins and was "assuming [her] statements to be true even if they find no support in the record of the resident's care." ALJ Decision at 10 and 10, n.3. However, contrary to this statement, when reviewing her testimony about R79's safety training, the ALJ stated that he accepted it only "to the extent that it is supported by the exhibits which the consultant cites." Id. at 10.

- The ALJ then went on to discount Ms. Collins' testimony about the adequacy of the facility's safety training on the grounds that the evidence (i.e., the treatment records discussed above) that Ms. Collins cited did not support a finding that staff "*comprehensively* discussed" the relevant hazards with the resident. ALJ Decision at 10 (emphasis in original). As discussed above, however, these documents, viewed in the light most favorable to the facility, might permit a rational trier of fact to conclude that Venetian Gardens staff had adequately discussed safety with R79 and therefore did support Ms. Collins' assertions.

- Further, Ms. Collins stated that her testimony was based not only on facility records but also on "my discussions with facility staff" and "my own knowledge and observations about the resident at issue." P. Ex. 3, at ¶ 5. Therefore, in the context of summary judgment in which an ALJ must draw all reasonable favorable inferences on behalf of the nonmoving party, the ALJ erred by treating Ms. Collins' testimony as credible only to the extent that it was supported by cited facility records.

- Moreover, the ALJ described her as a "consultant" "who was not involved in providing direct care to the resident." ALJ Decision at 9. This characterization incorrectly gave the impression that Ms. Collins was hired to give testimony and had no personal knowledge of the operation of Venetian

> Gardens or of R79. Ms. Collins, however, stated that she is employed by Venetian Gardens as a Clinical Support Team Member (P. Ex. 3, at ¶ 1) and that she was "generally familiar with the delivery of care to Resident 79 at issue [here]" (id. at ¶ 3) and had "known him even before his admission to Venetian Gardens because he was residing in a sister facility, Salem Woods, before coming to Venetian Gardens" (id. at ¶ 4).

Finally, the ALJ Decision contains repeated, overbroad statements. For example, at the end of his discussion of this deficiency, the ALJ stated that "what is singularly lacking in this case are facts showing that Petitioner's staff conceived of or offered any assistance to Resident # 79." ALJ Decision at 12. Similarly, the ALJ stated elsewhere that "undisputed facts establish a wholesale disregard by Petitioner's staff of the resident's safety and welfare" (id. at 5); and that staff "planned no interventions to protect the resident while he was outside the facility" (id.). As discussed above, however, the evidence, viewed favorably to Venetian Gardens, indicates that staff modified the wheelchair to make it more visible on the road, consulted with R79's doctor, and talked with R79 about the dangers of the roadway and the safe operation of the wheelchair to such an extent that the resident became frustrated with staff's repeated counseling.

C. While Venetian Gardens clearly has some responsibilities when a resident chooses to leave the facility, the ALJ did not provide adequate support for his broad view of a facility's duties under section 483.25 nor adequately consider resident rights. On remand, the ALJ should apply the relevant legal standards, including relevant CMS guidance, in light of our discussion below and of the record developed on remand.

Venetian Gardens contends that CMS and the ALJ did not adequately take into account that R79 was exercising his right to leave, i.e., to temporarily refuse Venetian Gardens' care and supervision, and his right to choose to engage in behavior that exposed him to risks. RR at 11-12. Venetian Gardens raises issues regarding what its supervision responsibilities were once it was clear that R79 was making these choices, taking into account R79's alleged capacities, rights, and need for independence.

We note, as a threshold matter, that CMS and the ALJ apparently rejected documentation in the record that tends to show R79 was exercising his right to refuse treatment under section 483.10.

See, e.g., CMS Ex. 8, at 1; CMS Ex. 21, at ¶ 4; P. Ex. 13, at 2. This rejection appears to have been based in part on a misreading of Board decisions. Specifically, in discussing R79's right to refuse constant supervision and care, CMS and the ALJ both cited 42 C.F.R. § 483.20(k)(1)(ii). ALJ Decision at 8; CMS Reply at 10. That regulation provides that a care plan must describe "any services that would otherwise be required under § 483.25 but are not provided due to the resident's exercise of rights" to refuse treatment under section 483.10(b)(4). The Board has previously cited this provision when rejecting, as after-the-fact rationalizations, facilities' assertions that demented or combative residents' resistance to care were exercises of rights under section 483.10 where there was no evidence to suggest such an exercise. See, e.g., Woodland Village Nursing Center, DAB No. 2172 (2008); Tri-County Extended Care Center, DAB No. 2060 (2007); Burton Health Care Center, DAB No. 2051 (2006); Sanctuary at Whispering Meadows, DAB No. 1925 (2004). The Board, however, has not held that the absence of documentation in a care plan would be a complete bar to a facility's proving, under section 483.25(h), that a competent resident had elected to refuse care and services on occasion, by leaving the facility. Thus, on remand, the ALJ may consider documentation and evidence relevant to the resident's exercise of his rights other than the care plan.

A related problem is that the ALJ faulted Venetian Gardens for not documenting in the care plan "a possible refusal by the resident to accept supervision and/or assistance while away from the facility." ALJ Decision at 8 (emphasis added). This statement, and the ALJ Decision as a whole, adopts the view that a facility must provide supervision and/or assistance outside facility premises to a competent resident who chooses to leave temporarily and independently. See, e.g., ALJ Decision at 6, 12. The ALJ did not, however, support this broad view with any citation to or analysis of the wording of section 483.25(h), its history, CMS guidance on the requirement, or professionally recognized standards of care.

Based on our preliminary analysis below, we conclude that the ALJ Decision reflects a view of the facility's duties that is unsupported in some respects and does not adequately consider a facility's need to balance its responsibilities with resident rights. On the other hand, we reject Venetian Gardens' position to the extent it suggests that a facility has no responsibility in the face of a resident's decision to exit the facility or otherwise exercise his rights. Given the complicated and fact-specific nature of these issues, however, we also conclude that

the record would benefit from further argument and evidence from the parties about the legal bases for each party's position on the issues raised by this case, any applicable professional standards, and relevant CMS guidance in the State Operations Manual Appendix PP (SOM). http://cms.hhs.gov/manuals/Downloads/som107ap_pp_guidelines_ltcf.pdf.

We first note that the ALJ refers to road hazards as though these are hazards from which the facility had an obligation to protect the resident. ALJ Decision at 4, 6, 5, 7, 11. This raises the question of what duty a facility has under section 483.25(h) with respect to hazards beyond its control that a competent resident chooses to encounter while independent and away from the facility.

Section 483.25(h) contains two paragraphs: the first imposes a duty to ensure the "resident environment" is as free of "accident hazards" as possible, and the second imposes a duty to ensure the resident receives "adequate supervision and assistance devices to prevent accidents." The SOM discusses hazards as those in the "resident environment," stating that it "includes the physical surroundings to which the resident has access (e.g., room, unit, common use areas, and facility grounds, etc.)." SOM at F323. The overall context can reasonably be read as referring only to areas over which the facility has control, such as the facility building and grounds, or, as Board decisions have recognized, an environment in which the facility is responsible for caring for the resident, such as in a van the facility uses to transport residents to other locations where services are provided. Sunbridge Care and Rehabilitation for Pembroke, DAB No. 2170 (2008), aff'd, Sunbridge Care & Rehab v. Leavitt, No. 08-1603, 2009 WL 2189776 (4th Cir. July 22, 2009). We thus find no support for applying the "accident hazard" provision to hazards outside the facility's control.

We also note that the surveyors indicated that the facility was responsible for services to R79 such as "evaluat[ing] him for how he maneuvered on the highway" or "observ[ing] his skills in acting like a pedestrian and steering his wheelchair on the shoulder of the road." CMS Ex. 18, at ¶ 19. CMS provided no analysis to support this position, nor did the surveyors state that professional standards of care impose such a duty. While a facility's assessment responsibilities are not necessarily limited to items identified in the MDS, neither the MDS form nor the SOM indicate that a facility is expected to comprehensively assess all needs and hazards faced by a competent resident while

outside the resident environment. Thus, while the surveyors may be able to show on remand that they were applying a professionally recognized standard of care in imposing a duty on a facility to actually go off facility premises to observe and evaluate a resident's interactions with potential accident hazards in that environment, we see no basis in the current record, the SOM, or the MDS materials for finding a facility in noncompliance with the regulations for failing to do such an assessment.

The ALJ did also refer to the facility's responsibility under section 483.25(h)(2) to take "all reasonable protective measures" to prevent accidents. Venetian Gardens proffered evidence that it did take some measures to reduce R79's risks. The ALJ, however, faulted Venetian Gardens for not offering to transport the resident or to accompany him, without explaining why such measures should be considered "reasonable" under the circumstances.[6] ALJ Decision at 6; CMS brief before ALJ at 4-5. The regulations in part 483 mention several situations where a facility must assist a resident in making transportation arrangements. See, e.g., 42 C.F.R. § 483.75(j). CMS points to nothing in the applicable authorities directly addressing when, if at all, a facility is required either to provide transportation services or to accompany competent residents if they choose to leave a facility temporarily. Moreover, the preamble of the quality of care regulation explains that the use of term "ensure" in section 483.25 is related to care and services for which the facility is paid. 54 Fed. Reg. 5316, at 5332 (1989).[7] In considering what, if any, responsibility a

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[6] Venetian Gardens objects that staffing levels made this proposal "impractical." RR at 12. A facility may not, however, fail to provide needed services for which it is responsible on such a ground. Staff level is supposed to be adequate to meet resident needs for covered services. Milpitas Care Center, DAB No. 1864 (2003). At issue here, however, is the nature of the services for which Venetian Gardens was responsible.

[7] In that preamble, CMS wrote:

> We recognize that a facility cannot ensure that the treatment and services will result in a positive outcome since outcomes can depend on many factors, including a resident's cooperation (i.e., the right to refuse treatment), and disease processes. However, we believe

(Continued . . .)

facility has for transporting or accompanying residents when they leave the facility, it is therefore potentially relevant whether payment to the facility includes such a service. On remand, the ALJ should also consider whether a determination that a facility must provide transportation or someone to accompany a competent resident who encounters risks when exercising his/her right to leave the facility is consistent with the corrective policy approved by the State survey agency in determining that Venetian Gardens was once again in substantial compliance. CMS Ex. 10, at 8. That policy does not require Venetian Gardens to do either of these things.

Moreover, the SOM recognizes that, in formulating supervision interventions necessitated by a resident's condition and potential accident hazards, even when they are in the resident environment, a facility is required to balance the resident's needs and rights. SOM at F323. Those rights include the right to refuse treatment under 42 C.F.R. § 483.10(b)(2)(ii)(4), as well as the rights to a "dignified existence" and "self-determination" under section 483.10. We agree with Venetian Gardens that the ALJ Decision did not adequately take into account R79's rights, including his rights to dignity and self-determination, in evaluating the nature of safety and other instructions Venetian Gardens was required to give and the frequency with which Venetian Gardens was required to reiterate its advice.

On the other hand, we reject any suggestion by Venetian Gardens that, if a competent resident exercises his right to leave the facility and place himself in danger, the facility has no responsibilities. The SOM, in discussing section 483.25(h), focuses mainly on the scope of facilities' responsibilities in situations where a mentally incompetent resident elopes, rather than on the welfare of competent residents who voluntarily and temporarily leave the facility and who choose to engage in

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(Continued . . .)

> that it is reasonable to require the facility to ensure that 'treatment and services' are provided, since the basic purpose for residents being in the facility is for the 'treatment and services' and that is why the Medicare or Medicaid program makes payment on the residents' behalf.

54 Fed. Reg. at 5332.

unsafe activity outside the facility. However, the Board has previously stated, as to known departures by competent residents, that a facility has some obligation "to take steps to protect residents from harm when they temporarily [leave] the facility," by being aware of the circumstances of a resident's departure. Heritage Park Rehabilitation and Nursing Center, DAB No. 2231 (2009). The Board has also concluded that a facility should be aware of when a resident is expected to be returned to the facility and consider factors that would impact the resident's health and safety when away, such as the resident's need for medication. Eastwood Convalescent Center, DAB No. 2088 (2007). These conclusions were consistent with the goal of the quality of care provisions and with the facilities' own policies.

Moreover, a resident's choice to leave the facility may, in a sense, be considered a refusal of the care and supervision the facility would otherwise provide. As the SOM states, when a resident refuses care, the facility has an obligation to make sure that the refusal is informed, to attempt to address the cause of the resident's refusal, and to look for alternatives. Specifically, the SOM provides:

> [T]he facility should determine exactly what the resident is refusing and why. To the extent the facility is able, it should address the resident's concern. For example, a resident requires physical therapy to learn to walk again after sustaining a fracture hip. The resident refuses therapy. The facility is expected to assess the reasons for this resident's refusal, clarify and educate the resident as to the consequences of refusal, offer alternative treatment, and continue to provide all other services.

SOM at F115. This implies assessing what the potential consequences of refusal are and what alternatives could reasonably be offered that would not violate the resident's rights.[8]

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[8] One surveyor suggested that a facility could threaten to transfer or discharge a resident who exercised his right to leave. See CMS Ex. 19, at ¶ 16. The SOM states, however, that "a facility may not transfer or discharge a resident for refusing treatment unless criteria for transfer or discharge are met." SOM at F155.

In sum, the ALJ should on remand analyze, in light of our discussion above and a more fully developed record, what responsibilities Venetian Gardens had under the applicable authorities and whether Venetian Gardens appropriately balanced those responsibilities with R79's rights.

Conclusion

For the reasons explained above, we remand this case to the ALJ for further proceedings consistent with this decision.

_____/s/_____
Stephen M. Godek

_____/s/_____
Leslie A. Sussan

_____/s/_____
Judith A. Ballard
Presiding Board Member