

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Meadowwood Nursing Center
Ruling No. 2014-1
Petition for Reopening of Decision No. 2541
March 12, 2014

RULING ON PETITION FOR REOPENING OF BOARD DECISION

On January 9, 2014, Meadowwood Nursing Center (Meadowwood) petitioned the Board to “reopen the record, for consideration of additional evidence and argument, and for revision of Decision No. 2541, which was issued by the Board on November 18, 2013 (‘the Board Decision’).” Petitioner’s Petition to Reopen the Record and for Rehearing (Petition) at 1. The Board Decision modified the Administrative Law Judge (ALJ) decision in *Meadowwood Nursing Center*, DAB CR2829 (2013) (ALJ Decision). The ALJ had upheld a determination by the Centers for Medicare & Medicaid Services (CMS) to impose a per-day civil money penalty (CMP) on Meadowwood for failure to comply substantially with Medicare participation requirements at 42 C.F.R. Part 483 during the period March 7 to July 7, 2011. The Board reversed the CMP for the period March 7 through March 31, 2011, which effectively reduced the total amount of the CMP by \$88,750. The Board upheld the \$3,550 per-day CMP for the period April 1 through July 7, 2011, rejecting Meadowwood’s argument that the ALJ erred by not taking its financial condition into account in evaluating the reasonableness of the CMP amount.

The Board may reopen a decision, within 60 days of the date of notice of the decision, upon its own motion or the petition of either party. 42 C.F.R. § 498.100. The regulations do not specify a standard for granting a petition to reopen. Procedures applicable to other types of disputes provide that the Board may reconsider a decision when a party promptly alleges a clear error of fact or law. 45 C.F.R. § 16.13. This standard is reasonably applied to reopening under the regulations in 42 C.F.R. Part 498 as well. *Mimiya Hosp.*, DAB No. 1833, at 2 (2002). Reopening a Board decision is not a routine step. Rather, it is the means for the parties and the Board to point out and correct any errors that make the decision clearly wrong. *Experts Are Us, Inc.*, DAB No. 2342, at 2 (2010); *BioniCare Medical Technologies, Inc.*, Ruling 2011-3 (Dec. 2, 2010).

Meadowwood argues generally that the Board made what Meadowwood describes as “two material factual errors” in the decision. Petition at 2. First, Meadowwood argues that the Board’s discussion of the evidence regarding Meadowwood’s financial condition

is “entirely speculative, and disregards factual evidence that has been readily available to CMS at all times to review, critique or refute.” Petition at 2. In support of this argument, Meadowwood submitted for the first time an affidavit by in-house counsel for Cardinal Resources, LLC, the management company for Meadowwood Nursing Center, Inc., and documentation including tax returns and income summary reports. Second, Meadowwood asserts that the Board improperly “substituted a new evidentiary and legal basis for a new CMP” after setting aside “the evidentiary and legal theory CMS actually relied upon to impose a sanction; that CMS advanced at and after the Part 498 hearing; and that, not incidentally, the ALJ blessed and adopted.” *Id.* at 3. According to Meadowwood, “the plain language of the controlling regulations – and due process – require that, at a minimum, the Board should have remanded the matter either to CMS to decide whether it would adopt the Board’s suggestion as the new basis for a sanction, or to the ALJ to allow both parties to offer and cross-examine evidence regarding the Board’s suggested new basis for the sanction.” *Id.*

We address each of these allegations of error below.

The Board did not err in its analysis of Meadowwood’s financial condition.

The Board Decision addressed financial condition, as follows:

Since we reverse the ALJ Decision to the extent that the ALJ concluded that Meadowwood was not in substantial compliance for the period March 7 through March 31, 2011, the total amount of the CMP is now \$88,750 less than the total amount imposed by CMS. We presume that Meadowwood would maintain that its financial condition precluded it from paying even the lower amount. However, we conclude that the ALJ did not err in determining that Meadowwood did not meet its burden of proving that its financial condition should have been taken into account in determining the reasonableness of the CMP amount.

Contrary to what Meadowwood suggests, the fact that CMS did not dispute the interim administrator’s testimony that the CMP amount equaled Meadowwood’s annual operating costs does not relieve Meadowwood of the burden to prove its financial condition. The ALJ assigned the testimony “little weight” because Meadowwood failed to provide “any sort of easily accessible financial information . . . such as tax returns, balance sheets, income statements, or cash flow statements” to support the testimony. ALJ Decision at 16. Even if Meadowwood had provided documentation to support the interim administrator’s testimony, the testimony would not establish that the CMP amount should be reduced because the testimony is not probative of the relevant issue: that is, whether Meadowwood lacked the ability to

pay the CMP without going out of business or jeopardizing resident health and safety. The Board has explained repeatedly that partial information, such as information about a facility's "annual profits or losses, may not be an accurate reflection of a facility's financial health or ability to pay, and must be considered in the light of such other indicators as the facility's financial reserves, assets, credit-worthiness, and 'other longterm indicia of its survivability.'" *Guardian Care Nursing & Rehab. Ctr.*, DAB No. 2260, at 8 (2009), citing *Kenton Healthcare, LLC*, DAB No. 2186 (2008) (all indicia of financial situation, as well as financing options, not merely cash flow, considered for this factor) and *Windsor Health Care*, DAB No. 1902 (2003) (adequacy of assets, not profits, the relevant inquiry). The interim administrator did not represent that Meadowwood did not have sufficient assets to pay the CMP. The only information he provided was that the total CMP amount was equal to Meadowwood's annual operating costs. This information on its face is insufficient to establish that payment of the CMP would put Meadowwood out of business or compromise resident health and safety.

Moreover, Meadowwood's long term care facility application for Medicare and Medicaid for the fiscal year ending October 31, 2011 shows that Meadowwood was owned or leased by a multi-facility organization (Sterling Health Care). CMS Ex. 1, at 1. Thus, even if Meadowwood itself did not have sufficient assets to pay the CMP, it does not necessarily follow that Meadowwood would have had to go out of business or compromise its residents' health and safety in order to pay the CMP. *Cf. Oceanside Nursing & Rehab. Ctr.* at 23 (Oceanside's "common ownership with other facilities" with large gross revenues cannot be ignored in determining Oceanside's financial condition).

DAB No. 2541, at 17-18.

Meadowwood argues in its petition for reopening that, because "CMS has said nothing whatsoever in this case about [Meadowwood's] financial status, or the impact of this CMP on the facility's financial liability or resident care," the result is that the Board's decision is "inaccurate" and "also is based on a materially incomplete record." Petition at 4. Meadowwood argues that the Board merely "speculated that Meadowwood might have resources other than its ordinary revenue to pay the penalty," and should reopen the case because the Board did not address the evidence regarding its financial condition which Meadowwood has now submitted and which, Meadowwood suggests, was available to CMS. *Id.* at 5. According to Meadowwood, its newly submitted documents show that "the Board's speculation about [Meadowwood's] corporate structure and financial status is not accurate." *Id.*

With respect to corporate structure, Meadowwood concedes that CMS Exhibit 1 “appears to be a page from a Medicare reenrollment form completed by” Meadowwood’s Administrator “that refers to ‘Sterling Health Care’ as a ‘multi-facility organization’ that owns or leases the facility” *Id.* at 6. Meadowwood asserts, however, that the Administrator “was mistaken” and that the form was for “data collection purposes, and is not material to the Provider Agreement itself, which is a separate contract.” *Id.* According to Meadowwood, its newly submitted affidavit shows that the reenrollment form was not reviewed or approved by any of the owners of Meadowwood and that, in fact, Sterling Healthcare, Inc. was merely an entity that provided services such as payroll management, purchasing group insurance, and the like for Meadowwood and other healthcare facilities and that did not ever own any interest in the Meadowwood corporation. Meadowwood further argues that the “bottom line” is that it lacks the resources to pay the CMP, that, therefore, the CMP amounts to a de facto termination of the facility, and that public policy demands that CMS and the Board ensure that the record supports the CMP because it is well-known that moving residents to another facility could cause them “transfer trauma.” *Id.* at 7. Meadowwood proffers affidavits regarding transfer trauma in support of this assertion.

We conclude that Meadowwood has not shown any reason for us to reopen our decision with respect to Meadowwood’s financial condition. We note at the outset that the Board’s analysis went to the inadequacy of the evidence Meadowwood submitted regarding financial condition – evidence that consisted solely of the interim administrator’s testimony regarding how the amount of the CMP CMS imposed compared to Meadowwood’s annual operating costs. The Board was not “speculating” about the facts regarding Meadowwood’s financial condition, but merely explaining why that testimony was insufficient to show that paying the CMP would put Meadowwood out of business or compromise resident health and safety. Because Meadowwood had provided information only on its operating costs, the Board’s analysis necessarily treated the issue of whether Meadowwood could pay the fine from its assets or other sources only in terms of possibilities. The point was that Meadowwood had not submitted any evidence to rule out those possibilities.

Moreover, the alleged factual error that Meadowwood says the Board made with respect to Meadowwood’s corporate structure was not material to the Board’s analysis. The Board cited to the information about corporate structure in CMS Exhibit 1 only to illustrate one of the myriad ways in which Meadowwood’s evidence was insufficient.¹

¹ We note, however, that Meadowwood’s description of the purpose of the enrollment form as simply “data collection” is inaccurate. The purpose of the enrollment process is to ensure the integrity of the Medicare program and the qualifications of Medicare providers and suppliers. 42 C.F.R. Part 424, subpart P. Disclosure of ownership is required to protect the program from untrustworthy owners. 42 C.F.R §§ 420.1, 420.200, 489.12(a)(2). To the extent the form was inaccurately filled out by the facility Administrator, moreover, Meadowwood had ample opportunity to present the correct information to the ALJ, but did not do so.

Meadowwood's complaint that the Board based its decision on materially incomplete information is specious given that Meadowwood provides no explanation of why it did not submit during the prior proceedings the tax returns, income statements, and other documentation of its financial condition that it now says we should consider. Under the regulations, the Board "may" reopen its decision and revise it on the basis of new evidence. 42 C.F.R. §§ 498.100, 498.102. The Board generally will not exercise the discretion to reopen based on evidence that a party could have submitted before, but did not. Here, past Board decisions clearly laid out the types of evidence relevant to determining whether a CMP would cause a facility to go out of business or jeopardize resident health or safety. While Meadowwood suggests that the relevant information was available to CMS (a questionable proposition at best), Meadowwood should have known from past Board decisions that the Board had previously rejected the argument that CMS had to establish a facility's ability to pay. *See Oceanside Nursing & Rehab. Ctr.*, DAB No. 2382, at 22-23 (2011), citing *Gilman Care Ctr.*, DAB No. 2357, at 7 (2010). Moreover, even after the ALJ Decision set out the burden Meadowwood had regarding financial condition, Meadowwood still continued during the appeal before us to rely only on the interim administrator's testimony.

Meadowwood mentions that it had previously pointed out that "one need not be a financial expert or CPA to recognize that effectively doubling any business' annual costs of operation overnight would adversely affect, if not immediately kill, the business." Petition at 4. According to Meadowwood, "[f]ew businesses – and certainly no nursing facility that depends largely on Medicaid reimbursement – have a 50% profit margin" and "no lender will loan any business an amount equal to its annual operating costs to pay a fine" *Id.* This argument was premised on the interim administrator's testimony about the amount of Meadowwood's annual operating costs compared to the unreduced CMP amount, and the ALJ and Board adequately addressed it by pointing out that the testimony was unsupported by any documentation. Even accepting that testimony as true, moreover, the testimony by itself would not compel a conclusion that the CMP (even as reduced by the Board) would either put the facility out of business or compromise resident health and safety.

We note, moreover, that any CMP will have some financial effect on a nursing facility. Otherwise, the CMP would not provide an incentive to a facility to achieve and maintain substantial compliance with the requirements intended to protect residents. Meadowwood had ample opportunity to provide evidence that would establish the extent of the adverse effect on it from the CMP and failed to do so in a timely manner.

In sum, any errors were the result of Meadowwood's failure to timely make its case regarding its financial condition, not in the Board's analysis of the evidence in the record that was before it.

The Board did not err in considering the April audit in determining whether Meadowwood was in substantial compliance with section 483.25(h).

Section 483.25(h) requires that a long-term care facility “ensure” that the “resident environment remains as free of accident hazards as is possible” and that “[e]ach resident receives adequate supervision and assistance devices to prevent accidents.” In its decision, the Board concluded that the ALJ had erred in determining that Meadowwood was not in substantial compliance with section 483.25(h) as of March 7, 2011, when Meadowwood found a resident (referred to as R2 or Resident #2) with her head entrapped under a side rail. The Board further concluded, however, that Meadowwood failed to substantially comply with section 483.25(h) beginning April 1, 2011, when a nurse performed a side rail audit and found that some facility beds had gaps between the mattress and side rails that posed a risk of entrapment. “At that point,” the Board found, “Meadowwood was on notice that its existing system for identifying and fixing side rail problems was ineffective in preventing dangerous gaps,” yet “Meadowwood took no further steps to investigate how the gaps were being created or why its system was not working to prevent dangerous gaps.” DAB No. 2541, at 7.

Meadowwood argues that there is no support in the law “for the notion that the Board may step in for the agency duly charged by the Secretary with making initial survey findings and enforcement determinations, or that the Board may grant itself the authority to make independent compliance findings or to impose sanctions *in the first instance*.” Petition at 9-10 (italics in original). “More to the point,” Meadowwood asserts, “there certainly is no authority for the Board to do so in a manner that vitiates the notice, appeal, and other due process protections that Congress and the Secretary created to circumscribe the enforcement agency’s authority, and to prevent the agency from exercising unfettered discretion.” *Id.* at 10.

Meadowwood concedes that the Board “certainly has the authority to review the findings of fact and conclusions of law set forth in ALJ Decisions,” but argues that the Board did not do that here. *Id.* According to Meadowwood, the Board “*set aside* the allegation that CMS actually made – that Resident #2’s accident in March, 2011 in and of itself represented noncompliance and triggered a period of continuing ‘immediate jeopardy’ – and *substituted a different* factual allegation of noncompliance that CMS never made, that is, that *following* Resident #2’s accident, *any* act or omission involving side rails could both represent noncompliance *and* could trigger a period of continuing ‘immediate jeopardy’ noncompliance.” *Id.* (italics in original). Meadowwood cites Board decisions its says “make clear that *an ALJ* does not have the authority to sustain a sanction on grounds not originally stated by CMS as the basis for its action.” *Id.* (italics in original), citing *Columbia Care and Rehab. Ctr.*, DAB No. 2348 (2010); *Venetian Gardens*, DAB No. 2286 (2009); *Illinois Knights Templar*, DAB No. 2274 (2009).

Meadowwood says that there is “no way any reasonable nursing facility (or lawyer) could have derived the Board’s theory of the case from the Statement of Deficiencies, or from CMS’ evidence and argument below.” *Id.* at 11. Meadowwood points out that CMS must give prior notice to a facility regarding the nature of its noncompliance and that a facility must set forth what parts of the factual and legal bases for the CMS determination it wishes to challenge. *Id.* at 11-12. In addition, Meadowwood argues, “the Board has held many times that CMS may not make new allegations, or raise new issues at or after hearings, without affording the petitioner appropriate notice.” *Id.* at 12, citing *Life Care Ctr. of Tullahoma*, DAB No. 2304 (2010), *aff’d*, *Life Care Ctr. Tullahoma v. Secretary of U.S. Dep’t of Health & Human Servs.*, 453 F. App’x 610 (6th Cir. 2011).

With respect to CMS’s theory of the case, Meadowwood quotes the following from the Statement of Deficiencies (SOD) prepared by the state surveyors: “42 CFR 483.25(h) . . . is not met as evidenced by: based on observation, record review and staff interviews the facility failed to position mattresses and side rails in such a manner to maintain the safety of two (2) of ten (10) sampled residents who utilized side rails. (Resident #2 and Resident #8).” *Id.*, citing CMS Ex. 4. According to Meadowwood, the surveyors relied on the accident suffered by R2 to represent noncompliance in and of itself and “chose to rely only on the ‘presumption’ of continuing noncompliance that the Board permits,” rather than identifying incidents, policies, procedures, systemic issues, etc. during the period between the incident with R2 and the survey to support a finding of continuing noncompliance. *Id.* at 13. Meadowwood asserts that the Board “disregarded CMS’s description of Resident #2’s accident as the trigger for the noncompliance” and interpreted the ALJ Decision “to say that the accident itself was not a deficiency, but rather that some act or omission *thereafter* triggered the period of noncompliance.” *Id.* (italics in original).

These arguments have no merit. The Board has authority not only to reverse or remand an initial decision by an ALJ, but also to modify it. 42 C.F.R. § 498.88(f)(1)(iii). Here, the Board modified the ALJ Decision in Meadowwood’s favor. Meadowwood does not accurately describe the Board’s decision, however. The Board did not disregard R2’s entrapment or interpret the ALJ Decision to mean that some act or omission thereafter triggered the period of noncompliance. Instead, the Board agreed with Meadowwood that R2’s entrapment did not by itself put Meadowwood on notice that its system for preventing dangerous side rail gaps was ineffective. The Board concluded, however, that, once the April audit identified large gaps that posed a risk for entrapment, Meadowwood could no longer reasonably treat R2’s entrapment as an isolated event and needed to take further steps adequate to ensure that the facility was as free of accident hazards as possible, as required by section 483.25(h). Contrary to what Meadowwood suggests, there does not have to be some particular incident or event that “triggers” a finding of noncompliance. The Board here reasonably considered both R2’s entrapment and the April audit in evaluating Meadowwood’s compliance with section 483.25(h).

Meadowwood's arguments are premised on the view that the only "theory of the case" the Board may adopt is the one set out in the SOD. It is true that the statute and regulations require that a nursing facility have notice of the basis for the imposition of a CMP. 42 C.F.R. §§ 488.330(d), 488.434(a). The Board has held though that this does not preclude CMS from relying on evidence not discussed in the SOD to support its determination, or from raising new issues, so long as the facility has adequate notice and an opportunity to respond.² 42 C.F.R. § 498.56; *see, e.g., Kingsville Nursing & Rehab. Ctr.*, DAB No. 2234, at 12-13 (2009), and cases cited therein. The decisions which Meadowwood says make clear that an ALJ may not "sustain a sanction on grounds not originally stated by CMS as the basis for its action" do not, in fact, stand for that proposition, but instead addressed whether an ALJ may grant summary judgment based on facts CMS did not allege were undisputed. *See, e.g., Columbia*, DAB No. 2348, at 2 (ALJ may not "grant summary judgment on a ground not alleged by the moving party without providing adequate notice and an opportunity to show that a genuine dispute of material fact exists."). In *Tullahoma*, the Board held that the ALJ improperly relied on "incidents upon which CMS disclaimed any reliance prior to the hearing." DAB No. 2304, at 26-28.

In any event, as Meadowwood acknowledges, the SOD here did make findings about the April 1 audit and the lack of subsequent corrective action in support of the surveyors' finding of noncompliance with section 483.25(h). Petition at 14. CMS also presented evidence, including surveyor notes, regarding the April 1 audit and the lack of any response to that audit and discussed that evidence in its prehearing brief in connection with the dangers of entrapment in bed side rails, so Meadowwood did have notice that CMS considered it relevant. CMS Prehearing Br. at 6-7, citing CMS Ex. 24. Since the April 1 audit identifying gaps (and the absence of any follow-up to that audit) had been mentioned in the SOD and in the exhibits on which CMS relied, Meadowwood had reasonable notice that what Meadowwood did or did not do in response to the findings of the April 1 audit would be considered relevant to whether it was in substantial compliance with section 483.25(h) during the period from April 1 through July 7.

Meadowwood's arguments to the ALJ also show that Meadowwood clearly knew that its compliance during the entire CMP period was at issue. Meadowwood argued in its prehearing brief that "[i]n essence, CMS alleges that [Meadowwood] improperly used 'side rails' on residents' beds in a manner that posed the 'likelihood' of serious harm or

² We note that the ALJ's March 5, 2012 Order stated that the parties had agreed to the following, very broad statement of the relevant issue for hearing: "Whether Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.25(h)(Tag F323, relating to accident prevention and adequate supervision with regard to side rails)."

death to one or more residents for the period March 7, 2011 through July 7, 2011.” P. Prehearing Br. at 1. Meadowood acknowledged that use of side rails inherently poses some risk of harm. *Id.* Meadowood argued, however, that the immediate jeopardy “spans a period during which literally nothing unusual happened, and during which CMS alleges not a single act or omission that constitutes noncompliance of any kind.” *Id.* at 2. Meadowood said that it would show that “its staff immediately responded to Resident #2’s accident by removing the Resident’s side rails and implementing additional safety interventions for her,” by “promptly reevaluating side rail use throughout its facility,” and by implementing “various policy and procedure improvements that its managers considered appropriate in the circumstances.” *Id.* Given that one of the steps Meadowood took – the April 1 audit – found large gaps and that the nurse who did the audit indicated that she was not aware of any follow-up to that audit (as CMS had pointed out in its brief), Meadowood should have known that, in evaluating whether the steps Meadowood took were sufficient to show substantial compliance, the ALJ and/or the Board might take into account whether Meadowood adequately responded to the April 1 audit findings.

Meadowood suggests now that the gaps found in that audit may not have posed a risk at all. Petition at 15. As the Board Decision indicates, however, Meadowood presented no evidence that it investigated at the time whether the “large gaps” posed a risk of entrapment or why they had occurred, and it is reasonable to infer from the undisputed fact that the nurse who did the audit stated that the gaps were “too large” that the nurse thought the gaps posed such a risk. DAB No. 2541, at 11. Without any evidence to contradict that inference, the Board reasonably determined that the existence of the gaps in April, together with R2’s entrapment, put Meadowood on notice that its system to prevent dangerous gaps was not working, and therefore it did not substantially comply with section 483.25(h).

CMS presented other evidence relevant to whether Meadowood was in substantial compliance during this period as well. CMS pointed out that, whatever steps Meadowood took, they were inadequate to prevent a large gap between the mattress and side rail in R8’s bed in July 2011. Thus, CMS was not relying solely on a presumption that the noncompliance continued, as Meadowood now contends. Meadowood clearly had notice that it needed to show that the problem with R8’s bed was not because of any failure on its part to take steps it could have reasonably foreseen were needed to prevent gaps that pose a risk of entrapment.

Thus, we reject Meadowood’s arguments that the Board erred by modifying the ALJ Decision without further procedures.

Conclusion

For the reasons stated above, we decline to reopen the Board Decision.

_____/s/
Stephen M. Godek

_____/s/
Leslie A. Sussan

_____/s/
Judith A. Ballard
Presiding Board Member