Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: July 1, 2009
Guardian Care Nursing & Rehabilitation Center Petitioner,	Civil Remedies CR1858 App. Div. Docket No. A-09-34
	Decision No. 2260
- v. -	
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

By a request for review (RR) dated December 30, 2009, the Centers for Medicare & Medicaid Services (CMS) appealed two aspects of the decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes in this matter. Guardian Care Nursing & Rehabilitation Center, DAB CR1858 (2009) (ALJ Decision). First, CMS objects to the ALJ's reduction of the amount of the civil money penalty (CMP) imposed on Guardian Care Nursing & Rehabilitation Center (Guardian) from $700 to $450 per day. Second, CMS appeals the ALJ's imposition of sanctions in the form of an award of attorneys' fees on CMS based on the conduct of CMS's attorney during the proceeding below.

As to the amount of the CMP, for the reasons explained below, we conclude that, contrary to the ALJ's rationale, Guardian did not show that its financial condition made the amount of the CMP

imposed by CMS unreasonable. We therefore reinstate a $700 per-day CMP.

As to the sanctions imposed on CMS, for the reasons explained below, we conclude that the ALJ had authority under the statute to impose sanctions. We also conclude, however, that the financial sanction imposed on the agency here does not "reasonably relate to the severity and nature of the failure or misconduct," as required by statute. We find that the conduct at issue was attributable primarily to CMS's first counsel, rather than to the agency itself, and therefore substitute a sanction narrowly tailored to ensure an understanding by counsel that disregard of the ALJ's instructions is not without consequence.

Case Background

Guardian is a skilled nursing facility (SNF), located in Orlando, Florida, that participates in the Medicare program. SNFs are required to comply with participation requirements set forth at 42 C.F.R. Part 483, subpart B, and their compliance is assessed through surveys performed by state agencies. 42 C.F.R. Parts 483, 488, and 498.

Under the regulations, the term "noncompliance" means "any deficiency that causes a facility to not be in substantial compliance." 42 C.F.R. § 488.301. "Substantial compliance" means a level of compliance "such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." Id. CMS determines the amount of a CMP based in part on the "seriousness" of the noncompliance, i.e., its scope and severity. See 42 C.F.R. §§ 488.438(f)(3), 488.404.

Guardian was subject to a survey ending May 17, 2007 (May survey) which found that Guardian was not in substantial compliance with multiple participation requirements. CMS Ex. 19. Of the 21 noncompliance findings, the most serious involved allegations cited under 42 C.F.R. § 483.25 (Tag F309 - quality of care) at a "G" level of scope and severity (which is assigned to an isolated instance of noncompliance that causes actual harm but that is not immediate jeopardy). CMS Ex. 19, at 1. A subsequent survey determined that Guardian returned to substantial compliance on June 26, 2007. CMS Ex. 3, at 1.

The state agency recommended several remedies, including a CMP of $150 per day during the period in which Guardian was not in substantial compliance.[1] CMS Ex. 3, at 3. CMS determined to impose a CMP of $700 per day instead. P. Ex. 1. Guardian timely appealed CMS's determination. ALJ Decision at 4. The parties agreed for the case to be decided based on their written submissions. Id. at 5.

Standard of Review

Our standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. Our standard of review on a disputed finding of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. *Guidelines for 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. We review the ALJ's imposition of a sanction for abuse of discretion. Osceola Nursing and Rehabilitation Center, DAB No. 1708 (1999).

Analysis

The issues, facts, and applicable law relevant to each of CMS's challenges to the ALJ Decision are fairly distinct.[2] For readability, we therefore provide below, as part of our analysis, separate background and discussion sections on the reasonableness of the amount of the CMP and on the ALJ's imposition of litigation sanctions on CMS.

1. Background on Reasonableness of the Amount of the CMP

The ALJ determined that the merits of only the following deficiencies were at issue before her: 42 C.F.R. §§ 483.10(n) (self-administration of drugs); 483.15(a) (dignity); 483.15(f)(1) (activities); 483.15(h)(2)

---

[1] The ALJ addressed confusion about the end date of this period and concluded that the CMP applied from May 17 through June 25, 2007, for a total of 40 days. ALJ Decision at 1, 4. The duration of the CMP is not challenged on appeal to us.

[2] Guardian notified the Board that it continued to oppose CMS's positions on both of its challenges to the ALJ Decision but that, for financial reasons, it was unable to file any further briefing.

(housekeeping/maintenance); 483.20(g) (resident assessment); 483.25 (quality of care); 483.25(c) (pressure sores); 483.25(h)(2) (failure to prevent accidents); and 483.65(a) (infection control). ALJ Decision at 6. She concluded that the other deficiencies cited during the survey were waived because CMS failed to address them in its briefing or its motion for summary judgment (MSJ). Id. CMS does not challenge this conclusion on appeal.

The ALJ rejected Guardian's view, implied in its hearing request and expressed in its pre-hearing brief, that CMS is precluded from imposing any remedy without first providing an opportunity to correct unless a noncompliance finding at level "G" or above is sustained. ALJ Decision at 6, citing P. Cl. Br. at 4-5. Guardian apparently based this understanding on its reading of a State agency notice letter dated May 24, 2007 which provided the results of the May survey. CMS Ex. 3, at 2.[3] The ALJ correctly concluded that the statute and regulations plainly provide CMS with authority to impose a remedy whenever a facility is not in substantial compliance, which is any noncompliance at level "D" or above. ALJ Decision at 6-7, citing Social Security Act (Act) § 1819(h)[4] and 42 C.F.R. §§ 488.301, 488.402, 488.406.

---

[3] The State notice stated that remedies will be imposed on a facility without an opportunity to correct if it "has a deficiency of actual harm or above (S/S [scope/severity level] G, H, I, J, K, L) on the current survey and the facility had a deficiency at the level of actual harm or high[er] at the previous standard survey or any intervening survey." Id. at 3. Further, the State notice advised Guardian that the agency was recommending the imposition of remedies upon the facility "as a result of your facility's non-compliance as evidenced by the findings of F309 at S/S of G during [the May survey] and F 223, F 225 and F226 at S/S of G on the previous complaint investigation survey ending March 19, 2007" (March survey). Id. (emphases omitted).

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

Turning to the deficiencies before her, the ALJ first considered the allegations of noncompliance with section 483.25 at the G level, on which both parties focused in their briefing. A surveyor observed wound care provided to a 90-year old completely-dependent resident (R3) with numerous ailments who suffered from "multiple, chronic, non-healing pressure sores (stages III and IV) on both her heels and her coccyx." ALJ Decision at 7-8 (footnote omitted). The ALJ found that the facility failed to appropriately assess and address R3's pain. Id. at 11. The ALJ correctly ruled that the level of noncompliance was not reviewable because a successful challenge would not affect the applicable range of CMP. Id. The ALJ then considered the remaining deficiencies at issue and upheld all but two.[5] Id. at 11-18.

The ALJ next explained why she concluded that the per-day amount of the CMP should be lowered from $700 to $450. She undertook a de novo review of the factors set out by regulation for determining whether a CMP amount is reasonable. ALJ Decision at 18-20. Those factors are: (1) the facility's history of noncompliance; (2) the facility's financial condition; (3) factors specified in 42 C.F.R. § 488.404; and (4) the facility's degree of culpability, which includes neglect, indifference, or disregard for resident care, comfort or safety. 42 C.F.R. § 488.438(f). Section 488.404 includes as factors the seriousness of and relationship among the deficiencies and prior noncompliance in general and specifically as to the cited deficiencies. The absence of culpability is not a mitigating factor. 42 C.F.R. § 488.438(f)(4).

The ALJ noted that the $700 amount, while higher than the original recommendation of $150, "is still at the lower end of the penalty range ($50-$3000)." ALJ Decision at 19. As to culpability, she found particularly troubling "the facility staff's apparent disregard for the pain R3 suffered, which they took no steps to alleviate, even when that pain was recognized and documented." Id.

---

[5] The ALJ found that a single nurse's failure to put socks on a resident's feet did not present a potential for more than minimal harm to the resident's dignity under section 483.15(a) and that possible discrepancies in resident assessment forms were neither obvious nor presented the potential for more than minimal harm to any resident under section 483.20(g)-(j). ALJ Decision at 17-18.

In considering the facility's prior history of noncompliance, the ALJ stated that CMS had pointed to the March survey finding of two "G" level deficiencies, but that she was concerned that Guardian never had an opportunity to contest the findings on which noncompliance was based in that survey because no remedies had been imposed.[6] ALJ Decision at 19. In this proceeding, both parties had submitted evidence on the merits of the noncompliance findings from the March survey. The ALJ found Guardian's evidence "compelling" and declined to include the March survey findings as part of the prior history for her consideration. ALJ Decision at 19. The ALJ nonetheless concluded that the prior history was "sufficiently problematic to justify a CMP above the minimum levels." Id. at 19-20.

The ALJ relied mainly on Guardian's financial condition in concluding that $700 per day was not reasonable. Id. At 20. She described the facility as dependent upon charity and its condition as "sufficiently precarious to justify its serious consideration in assessing a penalty." Id. On this basis, she reduced the penalty to $450 per day, for a total of $17,000 instead of $28,000.

2. Discussion on Reasonableness of the Amount of the CMP

On appeal to us, CMS argues that the ALJ did not properly apply the relevant factors in determining that the amount of the CMP imposed by CMS was not reasonable. Specifically, CMS contends that the ALJ should not have addressed the merits of the March survey findings and disputes her assessment of the facility's financial condition.

The ALJ found, and Guardian does not dispute, that the facility was not in substantial compliance from May 17 through June 25, 2007. The most serious noncompliance upheld by the ALJ involved a deficiency assigned a scope and severity of "G." In addition to upholding the noncompliance, the ALJ found that the facility's conduct demonstrated an egregious disregard for resident suffering. The ALJ also upheld multiple other noncompliance findings which implicated numerous aspects of the facility's care. In light of these findings, the imposition of a CMP less than 25% of the top of the applicable range does not seem unreasonable on its face. The ALJ nevertheless reduced the

[6] Only a finding of noncompliance which leads to the imposition of a remedy constitutes an appealable initial determination. 42 C.F.R. § 498.3(b)(13).

daily amount of the CMP, as noted. We therefore consider whether any of the regulatory factors support her reduction.

The ALJ did not suggest that the reduction resulted from a change in the number or seriousness of or relationship among the cited deficiencies. Indeed, the noncompliance findings she upheld included the most serious allegations and suffice to support the original CMP amount.

We agree with CMS that it was error for the ALJ to evaluate the merits of the March survey noncompliance findings in the context of her discussion of the reasonableness of the amount of the CMP. Cf. CMS Br. at 7-9. First, she herself had ruled, as discussed in the next section, that the merits were not before her. ALJ March 31, 2008 Order at 2-3. Guardian did not appeal the March survey results at the time it received notice of them. The CMS notice letter which Guardian appealed here shows that the remedies imposed were based on the May survey findings not on the March survey. Second, as CMS asserts, it did not rely on the merits of the March survey findings to "justify a higher CMP." CMS Br. at 9-10. Instead, CMS explained on appeal that the March statement of deficiencies was relevant only as part of the documentation of the facility's history of noncompliance because the March survey results were not yet included in the online survey certification and reporting system. The ALJ concluded that the March survey results likely would not have been sustained had they been appealed, and the ALJ declined to include those findings in her consideration of the facility's history. ALJ Decision at 20. The ALJ nevertheless determined that Guardian's history of noncompliance, including multiple examples of other adverse findings against Guardian in multiple surveys, was sufficiently problematic to justify a CMP above the minimal amounts." ALJ Decision at 20. The ALJ did not expressly base any change in the amount of the CMP on her views about the G-level deficiency found in the March survey, relying instead on her findings about Guardian's financial condition (which we address below). Therefore, we need not decide in this case whether the ALJ erred in discussing the merits of the March survey, because any such error was harmless here. For the same reason, we need not decide whether it was error for the ALJ to decline to consider the noncompliance findings from the March survey as part of Guardian's history, since in any event she took into account Guardian's problematic compliance history. As explained below, we reinstate the CMP amount imposed by CMS.

CMS argues that two of Guardian's exhibits which the ALJ failed to consider undercut the conclusion that its financial condition was too precarious to sustain the CMP as imposed by CMS. CMS Br. at 11. The first exhibit is Guardian's 2003-2004 annual report which contains a message from the President of its Board of Directors in which he asserts that Guardian is "now fiscally sound." P. Ex. 46, at 4. The second is its 2005-2006 annual report which indicates that Guardian received funds as a nonprofit entity from the United Way, from various foundations, and from the local city and county governments, and states that Guardian has "completed yet another successful fiscal year." P. Ex. 47, at 2, 6. The annual message from the Board chair states that Guardian was in a strong state and had, during the preceding three years, operated "at its highest level of solvency since its existence." Id. at 8.

The evidence on which the ALJ relied in evaluating Guardian's financial condition came from an undated partial copy of a market analysis of Guardian, identified as prepared by a MIA Consulting Group. P. Ex. 48. The market analysis states as follows:

> Guardian Care maintains an almost 90% Medicaid census. Medicare and Medicaid payments leave a $250,000 shortfall each year. Guardian Care funds that shortfall through gifts by individuals, contributions by corporations and grants by local government.

Id. at 2, 11.

The Board has generally articulated the inquiry for determining whether a CMP amount is unreasonable in light of a facility's financial condition as whether the facility can show that it lacks "adequate assets to pay the CMP without having to go out of business or compromise resident health and safety." Sanctuary at Whispering Meadows, DAB No. 1925, at 19 (2004) and cases cited therein. The ALJ did not conclude that paying the $700 per day CMP would either force Guardian out of business or compromise its residents' health or safety, but merely that its financial condition was "precarious." ALJ Decision at 20. Moreover, the ALJ made that characterization based solely on three sentences in a consultant's marketing report for Guardian which claims an annual shortfall without providing specific information for any particular year. The record is devoid of any actual financial documentation such as tax returns, financial statements or audits. Guardian proffered no

affidavits from management, financial officers or independent sources to establish its lack of resources to meet a CMP.

The ALJ recognized that 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 long-term indicia of its survivability." ALJ Decision at 20; see 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). Despite recognizing this legal precedent, the ALJ ignored the lack of information on any such indicators here, finding them "scarcely relevant" for a facility that "experiences consistent losses, and survives only through substantial charitable contributions." ALJ Decision at 20.

We do not see that these indicators are irrelevant merely because Guardian asserts that it runs a shortfall in its care for Medicaid and Medicare patients and that the shortfall is made up through contributions (as well as government grants). Surely, it would make a significant difference to the viability of the facility in the face of a CMP if, for example, it has a large endowment, substantial lines of credit, or major sources of income flow and capital reserves related to activities other than resident care (and the excerpts of its marketing report refer to other activities including housing rentals). We see no foundation for the ALJ's assumption, without supporting evidence, that no such resources could possibly be available to Guardian and that even inquiry about them was irrelevant.

We conclude that the ALJ's finding that Guardian's financial condition is too precarious to enable it to pay a $700 per day CMP is not supported by substantial evidence in the record as whole. We further find that the record on the other regulatory factors discussed above, including the number of, relationship among, and scope and severity of the noncompliance findings upheld by the ALJ, the facility's prior history, and the degree of culpability, suffices to justify as reasonable the $700 per day CMP.

We therefore reinstate the $700 per-day CMP.

3. Background on Imposition of Litigation Sanctions on CMS

Section 1128A(c)(4) of the Act provides as follows:

> The official conducting a hearing under this section may sanction a person, including **any party or attorney, for failing to comply with an order or procedure**, failing to defend an action, or other misconduct as would interfere with the speedy, orderly, or fair conduct of the hearing. Such sanction shall reasonably relate to the severity and nature of the failure or misconduct. Such sanctions may include -
>
> (A) . . . drawing negative factual inferences . . .,
> (B) prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense,
> (C) striking pleadings, in whole or in part,
> (D) staying the proceedings,
> (E) dismissal of the action,
> (F) entering a default judgment,
> (G) ordering the party or attorney to pay attorneys' fees and other costs caused by the failure or misconduct, and
> (H) refusing to consider any motion or other action which is not filed in a timely manner.

Act § 1128A(c)(4) (emphases added). CMS does not dispute that this provision applies to these proceedings.

The ALJ issued a pre-hearing order directing the parties to submit a pre-hearing exchange including a witness list, all exhibits (including "the complete written direct testimony of any proposed witness" to be treated as a "statement in lieu of in-person testimony"), and a pre-hearing brief. Initial Pre-hearing Order ¶¶ 4, 7 (August 3, 2007). The order instructed each party to set forth in their pre-hearing briefs: (a) a statement of each of the facts the party intends to prove; (b) a discussion of the relevant law and how it relates to the facts; and (c) an explanation of how the proposed evidence proves the facts alleged. Id. The order warned that the pre-hearing brief "must contain any argument that a party intends to make" and that the ALJ "may exclude an argument" if the party fails to address it in its pre-hearing brief. Id. The ALJ further stated that "[n]either party is entitled to supplement its pre-hearing exchange," and that any motion to amend would be decided based on "considerations of good cause and absence of prejudice to the opposing party." Id. ¶ 3. The ALJ expressly asserted that "I may impose sanctions pursuant to 1128A(c)(4) of the Social

Security Act (Act) **for a party's failure to comply with any order including this order.**" Id. ¶ 11 (emphasis added).

CMS's pre-hearing exchange submission identified five witnesses but presented declarations for only three (all surveyors). CMS stated that its witnesses "will" or "may" provide other testimony going to their methodology in performing the survey and "expert opinions concerning the significance of particular findings." CMS Witness List at 1-2.

CMS's use of the future tense in this and other references appears inconsistent on its face with the ALJ's order specifically requiring that all exhibits, including all direct testimony, have been submitted as part of the pre-hearing exchange. The pre-hearing exchange was not merely a step to provide "notice" of the issues. The pre-hearing exchange was the beginning of the actual hearing process, including essentially the presentation of CMS's direct case and all its affirmative arguments. CMS counsel's repeated references to an intended future presentation of additional direct testimony and exhibits thus seems out of synch with the proceedings as explained in the ALJ's pre-hearing orders. See, e.g., CMS Response to MSJ at 10. It is possible that CMS merely meant to reserve the possibility of seeking leave to amend its witness declarations. However, when considered in the context of failing to submit any testimony as to some of the witnesses on its list, CMS's language reasonably could have been construed by the ALJ as suggesting a failure to timely present part of CMS's direct case.

Despite being accompanied by voluminous exhibits,[7] CMS's pre-hearing brief had less than two pages of text, with barely one of argument. Contrary to the order to **explain how** the proposed evidence proved the alleged facts, the brief did not contain a single citation or reference to a single exhibit or any indication as to what relevance the exhibits had to the arguments. For example, CMS refers to observations to which a surveyor "will testify," but does not point to any such testimony in that witness's declaration. CMS Pre-hearing Br. at 2-3; CMS Ex. 46.

---

[7] CMS's total prehearing submission is described in the record without objection as consisting of "approximately 1,200 pages of documents." Petitioner's Agreed Motion for an Extension of Time at 2.

As to all other noncompliance findings, CMS's argument in its entirety read as follows:

> Documentary evidence and oral testimony related to remaining tags cited in the subject 2567 will be presented to substantiate the findings of noncompliance which form the basis of this action.

CMS Pre-Hearing Br. at 3. We note that Guardian's request for hearing failed to identify any dispute as to many noncompliance findings, so that CMS might have argued for the ALJ to summarily affirm those noncompliance findings not identified in Guardian's hearing request. CMS might also have argued that the 2567 (the form number of the Statement of Deficiencies (SOD)) alone sufficed as evidence to support those findings in the absence of any factual challenge. While CMS raises those arguments on appeal to us, however, CMS did not make any such arguments to the ALJ.[8] The ALJ recognized that she had sufficient authority to reach issues that the parties failed to develop (given adequate notice) but she also pointed out that an ALJ "has broad authority to require that a party set forth the issues, evidence, witnesses, and arguments it relies upon to make its case." ALJ Decision at 5, citing 42 C.F.R. §§ 498.47, 498.49, 498.50, 498.56, 498.60. In any case, CMS does not argue on appeal that we should revisit the ALJ's decision about the other noncompliance findings.

After receiving both pre-hearing exchanges and Guardian's MSJ, the ALJ held a pre-hearing telephone conference on March 27, 2008, and issued a second order dated March 31, 2008. In the

---

[8] In this regard, both below and on appeal, CMS argues that the ALJ failed to recognize that the SOD has long been accepted as "the notice document" to set out the basis for imposing remedies. CMS Response to MSJ at 10, citing Pacific Regency Arvin, DAB No. 1823 (2002) and other Board cases; CMS Br. at 16. We find no evidence that the ALJ misunderstood the role of the SOD in providing notice or failed to consider the SOD as relevant evidence. The problem the ALJ had with CMS's submissions was not that CMS had failed to provide adequate notice of the bases for its noncompliance findings nor that CMS could not properly rely on the SOD as evidence. The problem to which the ALJ appears to have reacted was that CMS did not rely on the SOD alone, but rather relied on hundreds of pages of additional documents, and then failed to comply with orders to explain the relevance of any of those documents to CMS's case.

order, the ALJ ruled that she would exclude testimony from the two named witnesses for whom CMS failed to submit declarations. The ALJ further determined that the issues before her could not be discerned because of several failings with CMS's first submission. She noted that CMS discussed only one deficiency but continued to assert that it was pursuing the other deficiency findings which were contained in its "witness declarations and proposed exhibits," without indicating which documents support the allegations and in what way. ALJ March 31, 2008 Order at 2. Second, the ALJ noted that many of CMS's exhibits appeared to relate only to the merits of the deficiency found during the March survey, yet CMS did not refer to that survey or its findings or explain how it was relevant to any issues before the ALJ. Id., citing CMS Exs. 2, 7, 9, 10, 11, 12, 15. Further, the ALJ pointed out that CMS had failed to respond at all to Guardian's explicit challenge to the reasonableness of the amount of the CMP. Id.

The ALJ stated that she was not "responsible for parsing through hundreds of pages of documents in order to determine CMS's position" in the absence of an explanation of their relevance from CMS in response to her orders. ALJ March 31, 2008 Order at 2. Therefore, she ordered CMS to submit the following documents along with its response to Guardian's MSJ --

> (1) a written statement setting forth any argument it intends to make, including a discussion of each deficiency it relies on to justify the penalty imposed, and its arguments as to why the penalty imposed is reasonable; and (2) a new exhibit list that eliminates exhibits that are not relevant and material to this case.

Id. at 3. The ALJ reiterated her authority to impose sanctions for failure to comply with her orders. Id.

Disturbingly, the ALJ also reports that, contrary to her direct orders, CMS counsel "walked out in the middle of the call" during the conference. ALJ Decision at 22, n.11. The attorney eventually returned with her supervisor but, after having departed without permission, proceeded to complain "that her work had been unfairly criticized." Id.[9] CMS does not dispute the accuracy of the ALJ's summary of what occurred at the March

[9] The record does not reflect what comment, if any, the supervising attorney offered.

27, 2008 pre-hearing conference or provide any explanation for the behavior of its counsel.

CMS responded by letter to the ALJ's March 31, 2008 Order on April 18, 2008 as follows:

> After a careful review of its Exhibit and Witness Lists, to include submitted exhibits, Respondent maintains that each exhibit as listed bears some relevance to a material fact or argument in this case. Accordingly, we will not voluntarily withdraw any of the exhibits listed as part of the earlier exchange. Additionally, we will also leave our witness list as filed.

Thus, CMS did not withdraw any of the exhibits related to the merits of the noncompliance findings from the March survey, but still provided no explanation of whether or why CMS felt those findings were relevant to the issues before the ALJ.[10] CMS's accompanying response to the MSJ, however, does attempt to correct the shortcomings identified by the ALJ with its first submission by providing an expanded discussion of some deficiency findings and including some citations to surveyors' notes and declarations among the exhibits.

After holding another pre-hearing conference, the ALJ issued an order dated June 18, 2008 in which she ruled that the March survey was not relevant to the issues before her and struck ten of Guardian's thirteen witness declarations that related only to the March survey. The ALJ denied Guardian's MSJ and reserved ruling on Guardian's sanctions motion.[11] She accepted the

---

[10] In declining to revise its witness list, CMS failed to acknowledge that the ALJ had already excluded testimony from two witnesses. CMS did later submit an amended witness list omitting the name of one (but not both) of the witnesses whose testimony the ALJ had already excluded. Letter from CMS counsel dated April 23, 2008. The letter says: "Please forgive our oversight." Id. at 1. No explanation was offered for the continued inclusion of the CMS official for whom no written direct testimony was proffered even at that point.

[11] Along with its reply to CMS's response to the MSJ, Guardian had filed a motion seeking sanctions against CMS asking the ALJ alternatively to prohibit CMS from introducing evidence or supporting its claims, to enter default judgment against CMS, or to order attorneys' fees.

parties' agreement that no in-person hearing was necessary and "that that the case may be decided based on written submissions." ALJ June 18, 2008 Order at 2. The ALJ set out the issues before her as whether the facility was in substantial compliance with the eight tags as to which CMS provided some argument and, if not, whether the CMP amount is reasonable. Id. She scheduled simultaneous briefing by the parties. Id.

New counsel for CMS filed a notice of appearance on July 10, 2008 and signed the subsequent brief before the ALJ. The ALJ identified no further problematic conduct.

The record closed on August 19, 2008.

4. Discussion on Imposition of Litigation Sanctions on CMS

On appeal, CMS acknowledges that ALJs have imposed sanctions against CMS under some circumstances, and does not dispute their authority to do so, but asserts that "one inadequate submission does not give rise to the level of conduct that supports the imposition of sanctions." CMS Br. at 20, citing Alpine Living Center, DAB CR897 (2002). CMS, therefore, asks us to reverse the sanctions order and find that its conduct before the ALJ did not in fact interfere with the speedy, orderly or fair conduct of the hearing or cause Guardian to expend unnecessary resources. CMS Br. at 15-19. Further, CMS questions whether section 1128A(c)(4) of the Act constitutes an express waiver of sovereign immunity sufficient to permit imposition of attorneys' fees against the government. Id. at 13-15. Finally, CMS contends that the sanction imposed does not reasonably relate to the severity or nature of the failure or misconduct "alleged" by the ALJ. Id. at 19-20.

The Board has not previously considered the imposition of attorneys' fees as a sanction for failure to comply with ALJ orders, but has reviewed the imposition of other types of sanctions. The Board upheld in a prior decision the authority of an ALJ "to sanction noncompliance with his orders" where the record made clear that the ALJ involved considered a party "to have repeatedly and intentionally failed to comply with requirements set out in his prehearing order." Royal Manor, DAB No. 1990, at 14 (2005), citing section 1128(c)(A)(4) and 42 C.F.R. § 498.60(b)(3); see also Hi-Tech Home Health, DAB No. 2105 (2007) (upholding dismissal where lesser sanctions failed to elicit compliance with ALJ rulings and case procedures); but see Osceola Nursing and Rehabilitation Center, DAB No. 1708 (1999)(while an ALJ does have authority to dismiss under section

1128A(c)(4), dismissal was an abuse of discretion based on the facts of the case). We first consider whether the ALJ had authority to sanction CMS under the statute and then consider whether, if so, the sanction imposed was reasonably related to the misconduct.

We have conducted a careful review of the record below. Before explaining why we cannot say that the ALJ lacked authority to impose some sanction on CMS, we note that not all the confusion and delay in the proceedings below can be laid at the doorstep of CMS or its counsel. From its original request for a hearing through its various submissions below, Guardian contributed to framing improperly the issues for review. Furthermore, the ALJ's own handling of the question of the role of the March survey findings, as we explain below, was inconsistent with her own rulings and legally incorrect. Finally, the ALJ cites, and we find, no basis to conclude that CMS or its counsel acted with intent to mislead or motive to delay or disrupt the proceedings. Nevertheless, we find nothing in the statute requiring that the ALJ find that a party or counsel bear sole responsibility for creating problems in a proceeding or have acted with improper intent before the ALJ may impose a sanction.

The ALJ expressly found that CMS's disregard of her prehearing order "interfered with the speedy, orderly and fair conduct" of the proceedings. ALJ Decision at 21. We disagree with CMS's characterization of the ALJ's sanction as based solely on the slender contents of CMS's pre-hearing brief.[12] CMS Br. at 4, 17, 20. While the ALJ Decision does not lay out the course of the

---

[12] CMS bases this assertion on the ALJ's reference to CMS's "initial submissions" as "wholly inadequate" from which it concludes that the ALJ "found that CMS's initial submission was wholly inadequate" but did not address "CMS's second submission" as part of the basis for sanctions. CMS Br. at 17, citing ALJ Decision at 22. The ALJ's reference to "initial submissions" is ambiguous and may be read either to refer only to CMS's first pre-hearing submission or (given the use of the plural) to both of CMS's pre-hearing submissions (as opposed to its post-hearing submission). The ALJ does not, in any case, explain in her decision in what regard the supplemental pre-hearing submission by CMS was inadequate. Based on our reading, while it does not entirely comply with the ALJ's orders, it is difficult to characterize that supplemental submission as "wholly" inadequate.

proceedings in detail, the section discussing sanctions refers to more than the inadequacy of one brief, and should be read in the context of the record as a whole (including the ALJ's several orders). For example, the ALJ also discusses the conduct of CMS's attorney at the March 27, 2008 pre-hearing conference and the inclusion of (and refusal either to remove or explain the relevance of) numerous exhibits, including those relating to the merits of the March survey. ALJ Decision at 22 and nn. 11, 12. Furthermore, the record reflects other discussion by the ALJ of the conduct which concerned her, particularly in her orders as described above.

Without resolving whether failure to comply with a legitimate order must always interfere with "speedy, orderly or fair conduct" of a proceeding in order to be sanctionable, we cannot conclude that the ALJ abused her discretion in concluding that CMS's actions and omissions here did have such an effect. We do not, in that regard, attribute to CMS all of the difficulties referenced by the ALJ. In particular, we are not persuaded that CMS was entirely responsible for the misdirected efforts of both parties and the ALJ toward the merits of the March survey finding.

Nevertheless, CMS bears some responsibility for triggering the need for a second round of pre-hearing submissions.[13] CMS acknowledges that its original brief "contained mistakes and should have included more information, including a discussion of the justification for the amount of the CMP imposed." CMS Br. at 16. As noted, CMS's first submission did not present written declarations for all its purported witnesses, did not explain the relevance of its voluminous exhibits, and did not present any clear statement of CMS's position as to the additional deficiency findings from the May survey, the relevance of the merits of the March survey finding, or the reasonableness of the amount of the CMP. While an ALJ may not instruct a party to argue or present its case according to the ALJ's view of the merits, an ALJ does not exceed her discretion in insisting that a party state its position on an issue or explain the intended

---

[13] CMS calls Guardian's reply to CMS's second pre-hearing submission the "only extra pleading" required (CMS Br. at 18), but the extra pre-hearing conference and second submission by CMS would also have been unnecessary had its first pre-hearing submission complied with the ALJ's order. The ALJ could reasonably consider all of these steps as resulting in delays in the proceedings.

relevance of its exhibits. In addition, counsel's conduct in walking out of a telephone conference, against the ALJ's instructions, was certainly less than orderly participation. We conclude that the record demonstrates sufficient delay and disruption to support the ALJ's finding that she had statutory authority to impose a sanction.

Our inquiry does not end, however, with finding that the ALJ had the authority to impose some sanction because the statute requires that the sanction chosen must "reasonably relate to the severity and nature of the failure or misconduct." We find that the sanction imposed here does not meet that standard for a number of reasons.

While the plain language of the statute provides authority for imposition of sanctions on any party or attorney, including federal parties and attorneys,[14] it does not unambiguously specify that every listed sanction may be applied to every party or attorney. As CMS points out, the imposition of a financial sanction on a federal government party raises special concerns.

Courts have applied a stringent standard to evaluating whether the federal government has waived sovereign immunity with sufficiently explicit language to consent to the imposition of financial sanctions. For example, in Ruckelhaus v. Sierra Club, 463 U.S. 680 (1983), the Supreme Court considered the meaning of a statutory provision permitting a court to award costs, including attorneys' fees, "whenever it determines that such an award is appropriate." Id. at 682-85. The Court read "appropriate" narrowly to limit fee awards against the government, stating that, absent clear waiver, "the Government is immune from claims for attorney's fees." Id. at 685, citing Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, at 267-268 (1975). Further, the Court noted that "[w]aivers of

---

[14] At one point in its brief, CMS suggests that, because section 1128A(a) does not define a "party," as opposed to a "person" subject to civil money penalties, CMS might not be viewed as a party subject to attorneys' fees as a sanction. CMS Br. at 14. CMS acknowledges that the appeals regulations specifically identify CMS as a "party" in appeals of its imposition of CMPs. Id. at 14, n.9., citing 42 C.F.R. § 498.42. In context, CMS appears to be arguing only that sovereign immunity acts to bar attorneys' fees against CMS and that the regulatory language cannot be read to "provide the basis for a waiver of sovereign immunity." CMS Br. at 14, n.9.

immunity must be 'construed strictly in favor of the sovereign,' *McMahon v. United States*, 342 U.S. 25, 27 . . . (1951), and not 'enlarge[d] . . . beyond what the language requires,' *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 . . . (1927)." 463 U.S. 680, at 685-86; see also Alexander v. FBI, 541 F. Supp. 274 (D.D.C. 2008) (even where statute "authorized awards against parties generally, it still could not be a basis to assess monetary sanctions against . . . the federal government," and to be effective, waiver "must be unequivocally expressed in statutory text." Id. at 300, quoting Lane v. Pena, 518 U.S. 187, 192 (1996)).[15]

Given this high standard, it is not obvious that the language of section 1128A(c)(4) is sufficiently explicit to authorize imposition of attorneys' fees against the government.[16] It could be argued that, in referring to any party or counsel in the statute, Congress must be assumed to have realized that CMP cases always involve a governmental party, and yet failed to exclude imposition of attorneys' fees against federal parties. On the other hand, Congress did not include explicit language treating the federal government as a party for attorneys' fees purposes. Even assuming, however, that attorneys' fees can be imposed against a federal party under that provision, such an action would surely require the strongest of justifications which we do not find present here.

---

[15] It could also be argued that the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(b), demonstrates that Congress knows how to make clear when it intends to waive sovereign immunity to permit imposition of attorneys' fees on a government party. Courts nevertheless have read EAJA's waiver narrowly and construed it strictly in favor of the government. See, e.g., Aronov v. Napolitano, 562 F.3d 84 (1st Cir. 2009); Graham v. United States, 981 F.2d 1135, 1140 (10th Cir. 1992). Guardian does not claim that it could qualify for attorneys' fees under EAJA.

[16] CMS also asserts that it is "not certain that it can expend funds not appropriated for that purpose." CMS Br. at 15. CMS's argument fails to acknowledge that the costs of litigating appeals of its initial determinations are authorized uses of its operating funds or to address why payment of a litigation sanction would not be considered a cost of such appeals. We find more troubling the issue discussed in the text of whether a more explicit waiver of sovereign immunity was required to authorize imposing attorneys' fees on a government party.

Furthermore, we do not find that a sanction of attorneys' fees reasonably relates to the CMS attorney's failure to comply with ALJ orders. Compensating the other party's costs implies that those costs would not have been incurred but for the disobedience or misconduct of the offending party. Here, the general confusion that persisted over what significance to attribute to evidence going to the merits of the March survey (which was the basis for the ALJ's conclusion that Guardian incurred unnecessary costs) was equally attributable to Guardian's own actions and submissions. For example, while CMS might have saved some time in the hearing process by responding directly and quickly to Guardian's evident misunderstanding that the remedies could be imposed only if two consecutive surveys identified G-level deficiencies, Guardian could equally have disabused itself of that notion by undertaking its own research on the applicable legal standards of which it should have been aware.

We therefore conclude that the sanction imposed does not reasonably relate to the severity and nature of the misconduct and vacate it. Another sanction provided for in the statute, such as drawing negative inferences, excluding specific evidence or pleadings, or even default resolution of arguments against CMS, could have been appropriately applied here. We recognize the ALJ's expressed concern that the sanction not fall heavily in the direction of weakening protections for facility residents by undercutting CMS's ability to prove its case about deficiencies which were ultimately substantiated. ALJ Decision at 22. Nevertheless, we cannot find that the ALJ properly addressed this concern by seeking to shift costs from the petitioner to the government.

At the same time, we recognize the importance of ensuring speedy, orderly, and fair proceedings and do not take lightly conduct that disregards judges' orders and unnecessarily delays or complicates adjudicative processes. We must, therefore, consider what action is appropriate given the present posture of this case. Neither party has requested that we remand to the ALJ if, as we find here, the sanction imposed was not reasonably so related. Given the time already expended on this matter and the apparent exhaustion of Guardian's resources to pursue further litigation, we do not believe that remand in this instance would be consistent with judicial economy. Furthermore, since the merits of the case have already been resolved, evidentiary sanctions which go to limitations of proof or default judgment cannot now be meaningfully imposed. We

therefore do not attempt to impose a substitute statutory sanction in retrospect.

Nevertheless, the Board has an overarching responsibility to ensure the efficiency and integrity of proceedings before the Departmental Appeals Board as a whole, which encompasses a concern that the orders of ALJs not be disregarded by counsel without consequence. The primary problems identified by the ALJ lay with CMS's first counsel rather than with any misconduct by the party itself. Whether or not counsel intended to be disrespectful or obstructionist, her failure to appreciate and abide by the instructions in the ALJ's orders here made more difficult and time-consuming the ALJ's appropriate efforts to clarify the issues and discern what evidence CMS relied on for specific purposes. CMS, not the ALJ, is responsible for choosing its litigation strategy, including whether to limit the number of deficiencies on which it relies, but CMS is not free to withhold an explanation for its litigation choices when an ALJ has indicated that he/she is confused about CMS's case.

CMS counsel's conduct here reflects, at best, incomplete attempts to comply with the prehearing order, and that only after being given a chance to amend CMS's initial submission. Neither counsel nor CMS should have been surprised by the ALJ's displeasure with that conduct. We are particularly concerned about the errors in CMS's initial prehearing brief and the sparse, poorly articulated discussion of CMS's position. We are also concerned about counsel's failure to provide clear explanations for CMS's litigation choices when asked to do so by the ALJ, especially with respect to its reasons for declining to delete exhibits. CMS's first counsel could (and should) have at least given the ALJ the explanation that CMS counsel on appeal has given. As we have discussed above, counsel's failure to provide that explanation, especially with regard to the March survey exhibits, appears to have been a major factor in the ALJ's decision to impose sanctions. Moreover, we find very troubling counsel's conduct in walking out of a telephone conference contrary to the ALJ's instructions. While the call was not recorded, so that no transcript is in the record, CMS has not disputed, even on appeal to us, the ALJ's characterization of the events nor offered any explanation of the behavior. At the least, such conduct is disruptive and does not reflect the type of respect for the forum that all judges are entitled to expect, that clients should expect from counsel, and that counsel should expect from themselves as professionals.

Based on our review of the record as a whole, we therefore recommend that the attorney who first represented CMS before the ALJ be appropriately supervised to ensure compliance with ALJ orders in future cases. We further instruct her not to appear (in writing or in person) before the ALJ in front of whom the misconduct occurred for the six-month period following issuance of this decision unless that ALJ gives permission for her to appear earlier.

Conclusion

For the reasons explained above, we increase the per-day CMP amount from $450 to $700 for the period from May 17 through June 25, 2007. We uphold the ALJ's authority to impose sanctions under section 1128A(c)(4), but reverse the award of attorneys' fees here as not reasonably related to the misconduct. We substitute a recommendation for appropriate supervision and an order precluding the CMS attorney originally involved in this matter from appearing before the ALJ without her prior permission for six months from the date of this decision.

/s/
Stephen M. Godek

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan
Presiding Board Member