

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:)	DATE: March 31, 2010
)	
Beatrice State Developmental)	
Center,)	
)	
Petitioner,)	
)	Civil Remedies CR2009
)	App. Div. Docket No. A-10-15
)	
- v. -)	Decision No. 2311
)	
)	
Centers for Medicare &)	
Medicaid Services.)	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Beatrice State Developmental Center (BSDC or facility), a state-owned and operated Intermediate Care Facility for the Mentally Retarded (ICF/MR) located in Beatrice, Nebraska, appealed the September 23, 2009 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes, DAB CR2009 (2009) (ALJ Decision). The ALJ Decision upheld the determination by the Centers for Medicare & Medicaid Services (CMS) that BSDC was not in substantial compliance with multiple conditions of participation for an ICF/MR for more than a year, and its conditions frequently posed immediate jeopardy to client health and safety. Based upon these findings, the ALJ concluded that there was a basis to terminate BSDC's participation in the Medicaid program. For the reasons discussed below, we affirm the ALJ Decision.

Applicable Law

Section 1905 of the Social Security Act (Act) defines an ICF/MR as an institution for the mentally retarded with the "primary purpose" of providing "health or rehabilitative services" to such individuals (clients) under active treatment programs and authorizes the Secretary to prescribe standards for their operation.¹ Act § 1905(d); 42 C.F.R. § 483.400. The Secretary has set the conditions for participation by ICFs/MR in the Medicaid program by regulation codified as 42 C.F.R. Part 483, subpart I. See also 42 C.F.R. §§ 440.150, 442.101(d)(1). The conditions are laid out as broad criteria under each of which are grouped various subsidiary standards. "Where deficiencies in meeting the standards under a condition are sufficiently serious or numerous to demonstrate that the facility does not meet the condition of participation, surveyors may find condition-level deficiencies." Oakwood Community Center, DAB No. 2214, at 5 (2008). Compliance with a condition of participation is determined by the manner and degree to which the provider satisfies the standards within the condition. 42 C.F.R. §§ 442.101, 442.105; see also 42 C.F.R. § 488.36(b).

CMS, acting on behalf of the Secretary, may make independent and binding determinations, based on its own surveys, as to whether ICFs/MR meet the regulation's certification requirements. See Act § 1902(a)(33)(B). CMS may cancel a facility's Medicaid provider agreement if the ICF/MR does not meet program requirements. Act § 1910(b)(1); Oakwood Community Center at 7. The regulations specify that "the failure to meet one or more of the applicable conditions of participation is cause for termination or non-renewal of the ICF/MR provider agreement." 42 C.F.R. § 442.101(e).

Section 1910(b)(2) of the Act entitles any ICF/MR dissatisfied with a determination that it is no longer qualified to participate in the Medicaid program to seek a hearing before an ALJ, as BSDC has done here. See Oakwood Community Center at 7. The same section of the Act provides that CMS's cancellation of approval will not take effect until the appeal is resolved unless the Secretary makes certain specific written

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

determinations that did not occur in this case. The applicable hearing regulations appear at Part 498. 42 C.F.R. §§ 498.3(a)(2)(ii) and 498.3(b)(9).

Factual Background

The following undisputed facts are drawn from the ALJ Decision and the record below.

BSDC has a significant history of noncompliance with program requirements, and CMS has provided it with multiple opportunities to correct those problems. For example, in September 2006, CMS surveyors determined that BSDC failed to meet seven conditions of participation and that three of those deficiencies posed immediate jeopardy to client health and safety. CMS Ex. 8, at 3. After a follow-up survey in October 2006, CMS found that the immediate jeopardy had been abated but that BSDC's non-compliance continued at the condition level "due to existing systemic problems." Id. CMS conducted yet another follow-up survey in April 2007 and found that BSDC continued to remain non-compliant with two conditions of participation and found one new deficiency posing immediate jeopardy to client health and safety. In May 2007, CMS completed another follow-up survey of BSDC. Although CMS determined that the immediate jeopardy had been removed, BSDC remained non-compliant with conditions of participation. Despite these serious repeated instances of noncompliance, the facility was permitted to continue participating in the Medicaid program. CMS Exs. 8 at 3; 9.

On November 7, 2007, CMS completed another survey of the facility and determined that BSDC was still not in substantial compliance and that the deficiencies again posed immediate jeopardy to client health and safety. CMS Ex. 1, at 1. Specifically, CMS found that the facility was not in substantial compliance with multiple conditions of participation, including the conditions at:

- 42 C.F.R. § 483.410 (governing body and management)
- 42 C.F.R. § 483.420 (client protections)
- 42 C.F.R. § 483.430 (facility staffing)
- 42 C.F.R. § 483.440 (active treatment services)

CMS Exs. 1, 2. Based upon these deficiencies, CMS imposed the only remedy available against an ICF/MR that is not in substantial compliance with conditions of participation – termination from participation in the Medicaid program. See CMS Exs. 2, 14.

BSDC filed a request for hearing on February 1, 2008. On April 7, 2008, CMS filed a Motion to Dismiss, or In the Alternative, Motion for More Definite Statement, on the grounds that BSDC failed to identify the findings that it was challenging on appeal. Although the ALJ found that BSDC's "hearing request [did] not satisfy the regulatory requirements for a valid hearing request," the ALJ denied CMS's motion because "[i]t is well-settled that ALJ[']s must 'choose remedies short of outright dismissal to effectuate regulatory purposes' of requiring specificity in hearing requests." Ruling and Order, at 1 (April 23, 2008) (citations omitted). In order to achieve this regulatory purpose, the ALJ amended her February 11, 2008 Acknowledgment and Initial Pre-Hearing Order and switched the order of the parties' pre-hearing submissions, which included exhibits, written direct testimony by their witnesses, and a pre-hearing brief. Id. at 2. BSDC subsequently filed a request for a 30-day extension to file its pre-hearing submission, which the ALJ denied. See Ruling (June 3, 2008). A two-day hearing was scheduled in Omaha, Nebraska for November 19 and 20, 2008. However, the hearing concluded at the beginning of the second day after CMS decided not to cross-examine BSDC's remaining six witnesses. Hearing Transcript (Tr.) at 87. BSDC submitted 389 exhibits, including multiple written witness statements, and 550 pages of argument (including pre-hearing and closing briefs).

ALJ Decision

The ALJ issued a written decision in which she concluded that BSDC failed to meet at least three conditions of participation for an ICF/MR and, therefore, CMS was authorized to terminate the facility's program participation. Specifically, the ALJ discussed in detail the evidence relating to several incidents occurring at BSDC between August 31 and October 4, 2007, determining that BSDC was not in compliance with the conditions governing client protections at 42 C.F.R. § 483.420; facility staffing at 42 C.F.R. § 483.430; and governing body and management at 42 C.F.R. § 483.410. See ALJ Decision at 5-16.

The ALJ next noted that BSDC had "challenged few of the factual findings described [by the ALJ], but instead base[d] its case on purported surveyor errors." Id. at 16. The ALJ pointed out that the regulations on which BSDC relied to support this argument were inapplicable because they address the performance of state survey agencies, not federal/CMS survey teams, such as the team that conducted the surveys of BSDC. Id. at 17. The ALJ also informed BSDC that she conducts a de novo review of the evidence in deciding whether to sustain CMS's findings of noncompliance and that the relevant issue on appeal is the

conduct of the facility at the time of the survey, not that of the surveyors. Id. at 20. The ALJ concluded that, even if applicable, the regulations would not compel a different outcome here because they provide that “[i]nadequate survey performance does not . . . invalidate adequately documented deficiencies,” and in this case, the deficiencies were adequately documented. Id. at 17, citing 42 C.F.R. §§ 488.18(a), 488.318(b)(2).

Finally, the ALJ concluded that BSDC’s “objections to the procedures followed [were] without merit.” Id. 17-20. With respect to BSDC’s objection to the ALJ’s order that it “file the first round of submissions,” the ALJ first noted that BSDC had admittedly failed to file a timely, valid hearing request even though more than four months had passed since the facility had received CMS’s notice of termination with appeal rights. Id. at 17-18. Nevertheless, the ALJ stated that she denied CMS’s Motion To Dismiss, instead directing BSDC to file its pre-hearing submission exchange first “in order to achieve the regulatory purposes of requiring [BSDC] to specify what it was appealing . . . and to avoid any additional delay of the administrative process.” Id. at 18. The ALJ did not address why she denied BSDC’s motion for a 30-day extension.

BSDC filed a timely appeal of the ALJ Decision, and oral argument was held by the Board on February 10, 2010.

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence in the record as a whole, and a disputed conclusion of law to determine whether it is erroneous. See Departmental Appeals Board, 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/divisions/appellate/guidelines/prov.html>. The Board reviews alleged procedural errors (including an abuse of discretion under the law or applicable regulations) to determine if they existed and, if so, whether they were prejudicial. Id.; see also Royal Manor, DAB No. 1990 (2005); Spring Meadows Health Care Center, DAB No. 1966 (2005).

Analysis²

On appeal, BSDC does not contend that any of the findings of fact by the ALJ were unsupported by substantial evidence in the record. Nor does BSDC allege that any of the ALJ's legal conclusions were inconsistent with the applicable statute or regulations. Instead, BSDC makes a number of related arguments under the overarching rubric of due process that are essentially based upon the same set of erroneous premises.

Specifically, BSDC first contends that, as a result of two pre-hearing procedural rulings, the ALJ denied BSDC an "opportunity to be heard at a meaningful time and in a meaningful manner" in violation of basic due process. BSDC's Request for Review (RR) at 2, 8; Oral Argument Transcript (OA Tr.) at 8. Second, BSDC contends that the "ALJ denied BSDC basic due process by restricting the questioning of witnesses and showing her bias toward a particular outcome during the hearing." RR at 3; BSDC's Reply Brief (Reply Br.) at 7-9. Finally, BSDC essentially reiterates its prior arguments in contending that the ALJ erred in terminating BSDC's participation in Medicaid "because BSDC was prohibited from bringing forth its best case[] due to procedural anomalies, ALJ bias, and a denial of due process." RR at 8. BSDC requests the Board to reverse the ALJ Decision terminating its participation in the Medicaid program.³ Id.

For the reasons discussed below, none of these arguments are persuasive or demonstrate that the ALJ Decision either was not supported by substantial evidence in the record or was based upon an erroneous conclusion of law. Nor do they persuade us that there was any procedural error.

A. The ALJ did not deny BSDC due process as a result of two pre-hearing procedural rulings.

² We have fully considered all arguments raised by BSDC on appeal and reviewed the full record, regardless of whether we have specifically addressed particular assertions or documents in this decision.

³ In the alternative, BSDC requests the Board "to stay [the] program termination and order an immediate resurvey of the facility." RR at 2. Because the Board does not have the authority to order CMS to conduct an immediate resurvey of the facility, we do not address this part of BSDC's appeal.

BSDC claims the ALJ acted capriciously by switching the order for the parties' pre-hearing submissions, thereby requiring BSDC to submit its materials on June 17, 2008, which was 30 days earlier than previously scheduled. RR at 3; Reply Br. at 10. However, BSDC provides no basis to support its allegation. For example, BSDC does not claim that the ALJ acted outside the scope of her authority.⁴ BSDC does not challenge the ALJ's conclusion that the regulations provide her with discretion to develop a sound record, to fully inquire into all relevant matters, and to schedule pre-hearing proceedings in a manner that is efficient and fair to both parties. ALJ Decision at 19. BSDC cites to no evidence in the record, and we cannot find any, that demonstrates that the ALJ acted capriciously or violated due process in switching the order of the pre-hearing submissions.

Indeed, the ALJ acted fairly and reasonably to resolve a problem created by BSDC in the first place when it submitted a hearing request that was not in conformity with the requirements of 42 C.F.R. § 498.40(b) because it did not specify the basis of its appeal. BSDC even admitted that its hearing request was not valid. ALJ Decision at 17-18. Under these circumstances, the ALJ had the authority under the regulations to dismiss BSDC's noncompliant hearing request outright. See e.g., Capitol House Nursing and Rehab Center, DAB No. 2252, at 2-3 (2009). However, the ALJ did not do so. Instead, the ALJ relied on prior Board cases she read as instructing ALJs to find an alternative method to ensure that the regulatory purpose of providing CMS with notice of the basis of a facility's appeal was served while preserving a facility's right to appeal findings of noncompliance. See ALJ Decision at 18 (citations omitted). The ALJ fashioned a remedy that was fundamentally fair to both parties by switching the order of the pre-hearing submissions. Under the ALJ's resolution of the problem, CMS would learn the basis of BSDC's appeal, while BSDC would still have an opportunity to present its case on appeal. Under these circumstances, the ALJ's April 23 Order could reasonably be

⁴ The Board has previously held that the regulations give the ALJ the discretion to determine the order in which the evidence and the arguments of the parties are presented. See Beechwood Sanitarium, DAB No. 1824, at 17 (2002), aff'd, Beechwood v. Thompson, 494 F.Supp.2d 181 (W.D.N.Y. 2007), citing 42 C.F.R. § 498.60 ("the regulation clearly provides that the ALJ has the discretion to set the process for presentation of the parties' arguments."); see also VITAS HealthCare Corporation of California, DAB No. 1782, at 2 (2001).

viewed as a victory for BSDC and does not support a conclusion that the ALJ acted capriciously against BSDC.

Nevertheless, BSDC maintains that the ALJ's April 23 Order violated basic due process under the 14th Amendment of the United States Constitution because she denied BSDC "an opportunity to be heard at a meaningful time and in a meaningful manner." RR at 2. The fundamental problem with this argument is that BSDC does not allege, much less demonstrate, how it was prejudiced by the April 23 Order, especially given that the alternative would have been for the ALJ to dismiss its request for hearing. For example, BSDC complied with the ALJ's order and timely submitted 389 exhibits, written statements from witnesses, and a pre-hearing brief. However, BSDC does not identify with any specificity what documents it would have presented with its submission but did not as a result of the April 23 Order. Nor does BSDC identify any individuals it would have called as witnesses if it had the additional 30 days available under the original scheduling order. When it filed its pre-hearing submission on June 17, 2008, BSDC had known of CMS's findings from the November 2007 survey for over seven months. BSDC does not allege that it did not understand the nature of CMS's findings; nor does it contest the ALJ's finding that the statement of deficiencies was adequately documented. ALJ Decision at 17. The hearing did not take place for another five months after BSDC submitted its pre-hearing materials and four months after CMS did so on July 17, 2008. Although the ALJ's February 11, 2008 Acknowledgment and Initial Pre-Hearing Order provided a process for a party to seek leave to supplement the record with additional exhibits after filing its pre-hearing submission, BSDC did not seek such leave.⁵ ALJ Decision at 19. BSDC's arguments are mere puffery, providing no basis to conclude that the ALJ's April 23 Order denied BSDC an opportunity to be heard at a meaningful time and in a meaningful manner.

Finally, BSDC claims that the ALJ's denial of its unopposed request for a 30-day extension of time to file its pre-hearing submission was arbitrary. For the same reasons discussed above, we find this argument has no merit. There is no right under the regulations to an extension of time, even if unopposed, and the ALJ has discretion under the regulations to establish the

⁵ BSDC did submit 24 additional exhibits with its post-hearing brief but did not formally move to admit them into the record. ALJ Decision at 4-5. Because BSDC did not offer any good cause for the 10-month delay in submitting the additional documents, ALJ did not admit the documents. Id. at 5.

hearing schedule. 42 C.F.R. §§ 498.52, 498.53. Thus, we find that the ALJ's denial of the motion for a 30-day extension was reasonable.

B. The ALJ was not biased and did not deny BSDC due process by restricting cross-examination during the hearing.

BSDC contends that the "ALJ restricted questioning of witnesses and made frequent remarks reflecting profound bias toward a particular predetermined outcome without regard to evidence that had yet to be presented at the hearing and in the post-hearing brief." RR at 3. This argument is without merit.

1. The ALJ did not rely on extrajudicial information.

In Edward J. Petrus, Jr., M.D., and The Eye Center of Austin, DAB No. 1264 at 23-26 (1991), aff'd, Petrus v. Inspector General, 966 F.2d 675 (5th Cir. 1992), the Board described the standard for disqualifying a judge on a charge of bias. There, the Board noted that the Supreme Court has held that the "alleged bias and prejudice, to be disqualifying, must stem from an extrajudicial source and result in an opinion on the merits on some other basis than what the judge learned from his participation in the case" Id. at 23 (citations omitted); see also St. Anthony Hospital, DAB No. 1728, at 84 (2000), aff'd, 309 F.3d 680 (10th Cir. 2002); Laurelwood Care Center, DAB No. 2229, at 22-23 (2009). The Board has also held that it is not evidence of bias that the ALJ's view of the record was not in accordance with a petitioner's views. See Meadow Wood Nursing Home, DAB No. 1841, at 10 (2002), aff'd, Meadow Wood Nursing Home v. HHS, 364 F. 3d 786 (6th Cir. 2004)("[W]eighing of testimony and evidence in the record is the essential task of an ALJ and can hardly be viewed as a demonstration of bias toward the party that does not prevail on the merits, however disappointed.").

In its Reply Brief, BSDC clarified its allegation of ALJ bias by contending that it "is not asserting bias based on the *intrusion* of extrajudicial information." Reply Br. at 12 (emphasis in original); see also OA Tr. at 28. Because BSDC failed to properly allege any basis under the case law for us to conclude that the ALJ was biased, our analysis could end here.

2. The ALJ was not biased against BSDC.

BSDC also contends that the ALJ violated BSDC's basic due process right to confront and cross-examine adverse witnesses by restricting BSDC from questioning witnesses during the hearing.

RR at 3-4, citing Goldberg v. Kelly, 397 U.S. 254, 269-71 (1970). BSDC asserts that the ALJ was biased as evidenced by her "improper exclusion of relevant evidence [that was] caused by the ALJ raising objections for CMS, curtailing cross-examination of [CMS] surveyors, and restricting the opportunity to view adverse evidence." Reply Br. at 12; see also RR at 3, 7; OA Tr. at 28. We find that there is no factual basis to support BSDC's contention. We also find that BSDC's additional arguments do not provide any basis to conclude that the ALJ violated BSDC's due process right to an impartial decisionmaker or otherwise denied BSDC the opportunity to confront and cross-examine adverse witnesses.

The gravamen of BSDC's contention is that the ALJ restricted cross-examination by "prohibit[ing] BSDC from asking the [CMS] surveyor about what standards were used for evaluating compliance during the survey, even though the ALJ acknowledged [that] surveyors made many mistakes." RR at 7; see also Reply Br. at 6. In support of its contention, BSDC argues that many statements by the ALJ during the hearing demonstrate "fundamental unfairness, if not flagrant bias, from the ALJ during the hearing." RR at 4. For example, BSDC cites to the following statements by the ALJ:

- "I mean, [surveyors] make a lot of mistakes. I have no doubt that surveyors make a lot of mistakes." Tr. at 20.
- "Then why don't you limit yourself to asking about specific incidents and not these more global questions that really [sic] the answers I'm just going to ignore. They're not helpful to me at all. I mean, if the point is that surveyors make mistakes, yes, I know that." Tr. at 20-21.
- "I don't care if [the surveyors] followed survey procedures. I really don't care." Tr. at 22.

RR at 5. Contrary to BSDC's contention, these statements by the ALJ recognizing that surveyors in general are capable of making mistakes do not demonstrate that the ALJ was biased against BSDC or had a predetermined conclusion about the outcome of this case. Instead, these statements indicate that the ALJ would not rely solely upon the testimony from surveyors in reaching her decision. Moreover, the ALJ concluded that any surveyors' failure to follow proper survey procedures here are irrelevant.

As the ALJ correctly ruled before the hearing, the relevant issue for her to decide was "[w]hether at the time of the November 7, 2007 survey, [BSDC] was in substantial compliance

with conditions of participation for [an ICF/MR]." Pre-Hearing Conference Order, at 1-2 (August 29, 2008). The ALJ further correctly ruled that "[w]e are not reviewing the process by which CMS reached its determination to terminate [BSDC's] program participation." Id. at 20. Instead, the ALJ conducts a de novo review of the evidence to determine whether the evidence supports CMS's determination that the facility failed to meet the conditions of participation at the time of the survey. See Sunbridge Care and Rehabilitation for Pembroke, DAB No. 2170, at 26-27 (2008).

Indeed, the hearing transcript in this case further indicates that, rather than exhibiting bias, the ALJ attempted to focus BSDC counsel on the relevant issues by correctly explaining that the purpose of the appeal is for the ALJ "to fix" any substantive mistakes resulting in an improper finding of noncompliance:

I mean, if the surveyors messed up, and I have no doubt that surveyors mess up all the time, I'm -- and it resulted in them finding substantial noncompliance when, in fact, you were in compliance, that's what I'm here for. I'm here to fix that. But I'm not reviewing the surveyor conduct. I'm reviewing what was going on in your facility.

Tr. at 19-20 (emphasis added).

Moreover, BSDC takes the ALJ's statement about not caring whether surveyors followed the correct procedures out of context. The ALJ's full statement was:

I don't care if they followed survey procedures. I really don't care. I'm not bound by the survey procedures. If they didn't follow surveys procedures and it resulted in a bad finding, it's the bad finding that I care about. But, hey, the survey procedure says you're supposed to come in and look at every tenth resident and they decide to look at every twelfth. What am I supposed to do with that information? Nothing. I'm not going to do anything with that information. It doesn't change the quality of services that were provided at the facility. I mean, it's not about the way CMS reached its decision. It's about what was going on in the facility. Convince me that the facility was doing what it was supposed

to do. You know, if you want to succeed that's what you have to do is convince me that the facility was doing what it was required to do

Tr. at 22-23. At the end of the hearing, the ALJ further elaborated on what information she felt was relevant to her decision in this case by telling the parties:

What I'm really interested in is your arguing facts and the application of law to those facts, but I'm not terribly interested in whatever errors the surveyors might have made. Certainly I'm not interested in legal errors the surveyors might have made since I'm making a de novo finding of what the law is going to be. If they made errors that affected their actual factual findings, I'm obviously interested in that.

Tr. at 89. Thus, when viewed in their entirety, the ALJ's statements demonstrate that she was not biased against BSDC but was reasonably exercising her discretion under the regulations to "inquire[] fully into all of the matters at issue[] and receive[] into evidence the testimony of witnesses . . . that are relevant and material." 42 C.F.R. § 498.60(b)(1).

3. The ALJ did not restrict cross-examination by BSDC counsel.

BSDC next contends that the ALJ "inappropriately narrowed the scope of BSDC's questions . . . [by] den[ying] BSDC the right to examine the [CMS] surveyor about her knowledge and application of substantial compliance as defined in [the] federal regulation." RR at 5-6; see also Reply Br. at 2-3, 5-6. In making this argument, BSDC specifically refers to the definition of substantial compliance at 42 C.F.R. § 488.301. RR at 4; Reply Br. at 2-3. BSDC cites to the following statements made by the ALJ during the hearing after BSDC asked the CMS surveyor "how do you define substantial compliance?" (Tr. at 14):

- "I don't care how she defines substantial compliance. I'm letting you ask these questions, but this is a good example of the kinds of questions that are not helpful to me. I define substantial compliance. I determine whether the facility was in or out of compliance." Tr. at 14.
- "I'm going to ignore it. I mean, you know, we can sit here all day and listen to her definitions of what's substantial

compliance, what -- it doesn't matter. I'm going to ignore it. I mean, nobody objected, but I can just see the way this is going, and, you know, we're only about 10 or 15 minutes into this hearing, and if this is the tenor of the hearing, you're wasting your time." Tr. at 15.

RR at 5-6. When the ALJ's statements are viewed in context, however, it is clear that the ALJ is again attempting to focus BSDC counsel on the relevant issue of the facility's conduct at the time of the survey rather than on the survey itself. For example, the second statement quoted above was followed by:

I mean, the focus should be what was going on at the facility. Anyway, I'm just telling you how I'm going -- what I'm going to base my decision on.

Tr. at 15.

Our review of the transcript reveals that the ALJ did not restrict or narrow the scope of BSDC's cross-examination of the CMS surveyor. For example, BSDC does not point to any specific question that it was not allowed to ask. Instead, as discussed above, the ALJ simply attempted to focus BSDC counsel on eliciting testimony that was "relevant and material" to the issues before her as required under section 498.60(b)(1). Given the ALJ's repeated efforts to guide BSDC as to the relevant issues during the hearing, the record supports the ALJ's conclusion that she "afforded counsel wide latitude in questioning the surveyor." ALJ Decision at 20, citing Tr. at 14 ("I'm letting you ask these questions, but this is a good example of the kinds of questions that are not helpful to me."); Tr. at 21 ("I'm going to let you do this any way you want. I've told you . . . what I think I'm reviewing here. I'll let you do it any way you want.").

In any event, BSDC's attempted inquiry into the surveyor's understanding of the definition of "substantial compliance" under section 488.301 would have been doomed to fail as irrelevant because that definition applies to long-term care facilities and not to an ICF/MR such as BSDC. The correct standard relating to an evaluation of "substantial compliance" for an ICF/MR is reflected in the regulation at 42 C.F.R. § 442.105 (permitting certification with deficiencies only if the "agency finds that the facility's deficiencies, individually or in combination, do not jeopardize the patient's health and safety, nor seriously limit the facility's capacity to give adequate care."). See also 42 C.F.R. § 488.24(b) (requiring

certification of noncompliance with a condition of participation if "deficiencies are of such a character as to substantially limit the [facility's] capacity to furnish adequate care or which adversely affect the health and safety of patients"). Thus, BSDC was not prejudiced by the ALJ's decision to ignore any testimony on this issue.

4. The ALJ did not improperly act as CMS counsel.

BSDC further contends that the "the ALJ improperly functioned as CMS counsel, raising objections for CMS, restricting questions by BSDC, barring exploration of CMS surveyor understandings and practices, but quizzing the BSDC expert on his definition of substantial compliance." RR at 7. In support of its argument, BSDC relies upon the same statements made by the ALJ regarding surveyor "mistakes" that BSDC previously claimed amounted to a violation of basic due process. See RR at 4-5, citing Tr. at 15, 18, 19, 20, 22. However, our review of the transcript reveals that the ALJ did not actually "raise objections." Rather, she merely observed that BSDC's questions sought a legal conclusion by the CMS surveyor, and she remarked that she was "surprised [she] didn't get an objection" to those questions (Tr. at 18). For the reasons already discussed, the ALJ's statement simply reflects her repeated attempts to focus BSDC on issues that are relevant and material.

Nor did the ALJ "quiz" BSDC's expert on the definition of substantial compliance. See Tr. at 64-67. Rather, the transcript indicates that the ALJ sought to clarify the witness's testimony "that puts [his written] declaration in context." Tr. at 66. The mere fact that the ALJ asked questions of a witness does not demonstrate bias. In Laurelwood Care Center, the Board rejected an allegation that the ALJ was biased because she asked leading questions. In so doing, the Board noted:

The administrative proceeding is informal in nature and the federal rules of evidence do not apply. ALJs customarily ask questions of witnesses in order to ensure that the record has been fully developed.

DAB No. 2229, at 29. Here, the ALJ's questions do not demonstrate that the ALJ attempted to act as counsel for CMS, but rather reflect an effort to develop a sound record, which clearly lies within the scope of the ALJ's authority under section 498.60(b)(1). In any event, we find nothing in our

review of the record that indicates the ALJ unfairly denied BSDC an opportunity to cross-examine the CMS surveyor.

5. The ALJ did not prematurely terminate the hearing or "cut corners" by restricting BSDC's cross-examination to catch her flight.

Finally, BSDC argues that the ALJ violated BSDC's fundamental right to due process because "the ALJ wished to conduct a hearing with 'amazing speed' in order to catch her flight, and in so doing, denied BSDC due process through restrictions that were fundamentally unfair."⁶ RR at 7; see also Reply Br. at 6. BSDC argues that it "is unrefuted that the ALJ was more concerned about speed than BSDC['s] due process [rights, and] . . . [t]he ALJ cut corners and restricted BSDC['s] cross-examination, so that she could catch her flight." Reply Br. at 2, 11; OA Tr. at 27. BSDC further claims that the ALJ infringed upon BSDC's due process rights because "she may have been annoyed impatient, or disgusted, when BSDC Counsel York examined CMS Surveyor Priyanath." Reply Br. at 4-5. In support of this argument, BSDC cites to Eilers v. Eilers, 873 A.2d 185, 190 (Conn. Ap. Ct. 2005), for the proposition that "a court's annoyance or impatience with the pace and range of questioning or the court's disgust . . . will not justify the termination of a proceeding before a party has been given a reasonable opportunity to examine and to cross-examine witnesses on facts pertinent to the issues at hand."

Contrary to BSDC's contention, the ALJ did not prematurely terminate the hearing or "cut corners" by improperly restricting BSDC's cross-examination in order to "catch her flight." Instead, the record clearly demonstrates that the ALJ terminated the hearing at the beginning of the second day only after CMS's

⁶ The ALJ actually stated:

And then on Friday, Mr. Detherage -- and I have to leave here no later than 1:00. I say no later than 1:00 because it will get me out by 1:30 in order to catch a plane. There are very few direct flights from Omaha to Washington, D.C., but don't worry, we will finish. You will be amazed at the speed with which we operate. And one of the reasons we're going to get this finished is because most of the case is already in

Tr. at 2.

counsel elected not to cross-examine BSDC's six remaining witnesses and BSDC counsel stated, "Well, your honor, there's no basis for redirect if there is no cross[-examination]." Tr. at 87. Moreover, the record provides ample evidence for us to conclude that BSDC counsel had a reasonable opportunity to cross-examine CMS's witnesses on issues that were relevant and material for the reasons previously discussed. As the court in Eilers observed, "nothing . . . suggests that a party's right to present evidence is unlimited. To the contrary, . . . the [trial] court reasonably may limit the time allowed for an evidentiary hearing . . . [and] had the power to control the plaintiff's cross-examination by confining the questions to relevant matters." 873 A.2d at 191 (emphasis added). Thus, the ALJ's action did not deprive BSDC of either an impartial decisionmaker or a meaningful opportunity to present evidence and to cross-examine CMS's witnesses.

6. The ALJ was developing a sound record containing relevant and material evidence.

In sum, based upon a review of the entire transcript, we see absolutely no evidence demonstrating that the ALJ was biased. Instead, we conclude that the very statements relied upon by BSDC, taken in full context, demonstrate that the ALJ was attempting to focus the parties on developing a sound record containing evidence that was relevant and material to the issue of whether BSDC met the conditions of participation at the time of the November 2007 survey. None of the ALJ statements cited by BSDC establish that the ALJ was unwilling to provide a fair hearing or to weigh the resulting record fairly.

C. The ALJ did not prohibit BSDC from bringing forth its best case.

BSDC contends that the "ALJ's decision to terminate BSDC program participation in Medicaid was arbitrary, capricious, and unreasonable because of procedural anomalies and ALJ bias that resulted in denial of due process." RR at 8. BSDC further contends that it was "prohibited from bringing forth its best case" apparently based upon that same set of circumstances. Id.; see also Reply Br. at 9. Although not a model of clarity, these contentions appear to merely reiterate BSDC's prior arguments that the ALJ treated it with "fundamental unfairness," in an attempt to show a nexus between the ALJ's conduct and her ultimate decision in this case. For the reasons previously addressed, these arguments are without merit.

However, BSDC also argues that "CMS was permitted to offer its survey report into evidence with its many undocumented opinions based on hearsay conversations and observations unsupported by any records." RR at 8; Reply Br. at 7. BSDC argues that the "ALJ refused to consider the opinion testimony of experts and/or BSDC staff members, which would have refuted and rebutted the CMS surveyor's opinions." Id. at 8-9. BSDC further argues that "[u]ncorroborated hearsay tested by cross-examination does not by itself constitute substantial evidence" (Reply Br. at 7, quoting Richardson v. Perales, 402 U.S. 389, 413 (1971)), and that the "capricious ALJ conduct prevented BSDC from mounting an adequate defense" (RR at 9). Thus, BSDC argues the "ALJ authorization to terminate [BSDC's] program termination was arbitrary, capricious, and unreasonable." RR at 9. These arguments are also without merit.

First, the standard of review at the Board level is whether the ALJ's findings of fact are supported by substantial evidence in the record as a whole and whether a conclusion of law is erroneous. The standard is not whether the ALJ Decision is arbitrary, capricious, or unreasonable, as BSDC alleges. Second, BSDC has not argued that any of the ALJ's findings of fact are unsupported by substantial evidence in the record. Nor does BSDC point to any evidence that even slightly suggests that the facility was in substantial compliance at the time of the survey on November 7, 2007. Third, BSDC neither argues nor otherwise has shown that the ALJ incorrectly interpreted the relevant law or that the ALJ's conclusions of law are inconsistent with the applicable statutes and regulations.

In any event, BSDC mischaracterizes the holding in Perales. Based on the analysis in Perales concerning when hearsay may constitute substantial evidence, the Board has previously held hearsay is admissible in proceedings under Part 498 and may constitute substantial evidence if it has appropriate indicia of reliability. Florence Park Care Center, DAB No. 1931, at 10 (2004), citing Perales, 402 U.S. at 402; see also Pacific Regency Arvin, DAB No. 1823 (2002) (survey report may function both as a notice document and as evidence of the facts asserted therein). The Board has also consistently held that statements of facility employees to the surveyor may be admitted in an administrative proceeding and may constitute substantial evidence for purposes of review. See e.g., Omni Manor Nursing Home, DAB No. 1920, at 11 (2004), citing Perales, 402 U.S. at 410. The issue is whether there are indicia that the statements contained in the survey report are reliable.

Here, there are several indicia of reliability. First, BSDC did not challenge the ALJ's conclusion that "the survey report form sets forth in considerable detail 'a description of the specific deficiencies' that led to CMS's determination, and I consider it more than adequate documentation." ALJ Decision at 17. Second, BSDC also did not challenge the ALJ's conclusion that "[BSDC] concedes that the survey report accurately reflects the contents of its investigative report." Id. at 12. Third, it is clear from our review of the record that the ALJ relied upon the contemporaneous documents from BSDC itself or the statements contained in the survey report, which had been corroborated by BSDC's own witnesses. For example, the ALJ cited the testimony of BSDC's expert witness, Craig Blum, Ph.D., who agreed that the staff conduct at issue described in the survey and facility investigation reports was not appropriate (Tr. at 79) and was abusive (Tr. at 81). Id. at 8, 12.

Finally, our record review also found no indicia that would require giving greater weight to the after-the-fact testimony of BSDC's witnesses, and BSDC fails to identify any testimony that would fairly detract from the ALJ's findings. Although the ALJ stated during the hearing that if BSDC's employees "did not say what the survey team says they said, bring them forward and let them explain what they said . . ." (Tr. at 15), BSDC did not do so. Thus, BSDC has failed to show how, if greater weight had been given to the testimony of its witnesses, it would have resulted in a finding that the facility had met the conditions of participation at the time of the survey.

Conclusion

For the reasons explained above, we uphold the ALJ Decision and affirm and adopt each of the ALJ's findings of fact and conclusions of law.

_____/s/_____
Judith A. Ballard

_____/s/_____
Constance B. Tobias

_____/s/_____
Stephen M. Godek
Presiding Board Member