Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Highland Pines Nursing Home, Ltd.
Docket No. A-11-04
Decision No. 2361
January 14, 2011

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Highland Pines Nursing Home, Ltd. (Highland Pines) appeals the August 10, 2010 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes upholding a determination by the Centers for Medicare & Medicaid Services (CMS) to impose remedies on Highland Pines for its noncompliance with requirements for long-term care facilities participating in the Medicare program. *Highland Pines Nursing Home, Ltd.*, DAB CR2204 (2010) (ALJ Decision). CMS made its determination based on the results of a complaint investigation/extended survey done by the Texas state survey agency at Highland Pines from July 7-10, 2009. The ALJ, with the parties' agreement, made her decision based on the written record. Following a de novo review of that record, the ALJ concluded that Highland Pines was not in substantial compliance with the Medicare participation requirements at 42 C.F.R. §§ 483.10(b)(11), 483.20(k)(3)(i) and 483.25; that the facility's noncompliance posed immediate jeopardy to resident health and safety, and that the civil money penalties (CMPs) imposed by CMS -- $5,650 per day for 20 days of immediate jeopardy and $1,100 per day for 20 days of noncompliance that was not immediate jeopardy – were reasonable. Highland Pines appeals only the ALJ's conclusions that its noncompliance constituted immediate jeopardy and that the CMP amounts were reasonable. We affirm the ALJ Decision.[1]

Applicable Law

Long-term care facilities participating in the Medicare and Medicaid programs are subject to the survey and enforcement procedures set out in 42 C.F.R. Part 488, subpart

[1] In its request for review, Highland Pines requested an opportunity for oral argument but stated no purpose for the request as required by Board Guidelines. Request for Review (RR) at 7; Departmental Appeals Board, *Guidelines - Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs, http://www.hhs.gov/dab/divisions/appellate guidelines/index.html (Guidelines*). In its October 27, 2010 letter acknowledging receipt of the review request, the Board directed Highland Pines to state such reasons "no later than in its reply brief." Highland Pines did not file a reply brief or otherwise provide reasons for its oral argument request. The Board concludes that there is no purpose for oral argument and denies the request.

E, to determine if they are in substantial compliance with applicable program requirements which appear at 42 C.F.R. Part 483, subpart B. "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." 42 C.F.R. § 488.301. "Noncompliance," in turn, is defined as "any deficiency that causes a facility to not be in substantial compliance." *Id.* Survey findings are reported in a Statement of Deficiencies (SOD). The SOD identifies each "deficiency" under its regulatory requirement, citing both the regulation at issue and the corresponding "tag" number used by surveyors for organizational purposes. "Immediate jeopardy" is defined as "a situation in which the provider's noncompliance with one or more requirements of participation has caused or is likely to cause, serious injury, harm, impairment, or death to a resident." 42 C.F.R. § 488.301.

A long-term care facility found not to be in substantial compliance is subject to various enforcement remedies, including CMPs. 42 C.F.R. §§ 488.402(c), 488.406, 488.408. CMS has the option to impose a CMP whenever a facility is not in substantial compliance. 42 C.F.R. § 488.430. CMS may impose per-instance or per-day CMPs. 42 C.F.R. § 488.408(d)(1)(iii), (iv). There are two ranges of per-day CMPs, with the applicable range depending on the scope and severity of the noncompliance. 42 C.F.R. § 488.438(a)(1). The range for noncompliance that constitutes immediate jeopardy is $3,050-$10,000 per day. 42 C.F.R. §§ 488.438(a)(1)(i), 488.408(e)(1)(iii). The range for noncompliance that is not immediate jeopardy is $50-3,000 per day. 42 C.F.R. §§ 488.438(a)(1)(ii), 488.408(d)(1)(iii). When CMS imposes one or more of the alternative remedies in section 488.406 for a facility's noncompliance, those remedies continue until "[t]he facility has achieved substantial compliance, as determined by CMS or the State based upon a revisit or after an examination of credible written evidence that it can verify without an on-site visit . . . ." 42 C.F.R. § 488.454(a)(1).

Factual Background[2]

The noncompliance at issue here centers on Highland Pines's response to the development of a necrotic wound on the leg of a 104-year-old female resident, identified as Resident 1 (R. 1), who suffered from multiple ailments, including peripheral vascular disease and ischemic heart disease. ALJ Decision at 3. The material facts are not in dispute. On June 11, 2009, Judy Smith, R.N., the treatment nurse at Highland Pines, identified a wound on R. 1's right lower leg. ALJ Decision at 4, citing CMS Ex. 7, at 22-23. According to Nurse Smith's assessment, the wound was painful and measured 7 x 4.2 cm., which a surveyor testified was "slightly smaller than a standard size credit card." *Id.*; CMS Ex. 13, at 2 (Lockwood Decl.). The depth of the wound was obscured by

[2] The information in this section is drawn from undisputed findings of fact in the ALJ Decision and undisputed facts in the record before her and is presented to provide a context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact or conclusions of law.

necrosis (dead tissue). ALJ Decision at 4. Additional records confirm the presence of necrotic tissue. *Id.* (citations omitted).

Nurse Smith testified that on June 11, she instructed a licensed vocational nurse (LVN) to contact R. 1's physician "about the cellulitis assessed in the limb." *Id*., citing P. Ex. 5, at 1 (Smith Aff.).[3] At 11:00 a.m. the same day, an LVN sent a fax to the resident's physician, Dr. Tompkins, stating, "Assessed by treatment nurse, cellulitis noted to right foot. Requesting antibiotic treatment or other related suggestions" but not mentioning necrotic or dead tissue or the resident's significant pain. *Id*., citing CMS Ex. 7, at 19; CMS Ex. 13, at 3; P. Ex. 3, at 11. Nurses' notes indicate that after sending the fax, staff made calls to Dr. Tompkins' office without actually speaking to him but that sometime after 5:00 p.m., the doctor's office returned the fax with a physician order for antibiotics. *Id*. at 4-5, citing P. Ex. 3, at 11; CMS Ex. 7, at 19, 27. R. 1's care plan was amended on June 11 to add cellulitis as a problem area and the antibiotic treatment plan; the care plan does not mention necrosis. *Id.* at 5, citing P. Ex. 3, at 63-64; CMS Ex. 7, at 93, 94.

R. 1's wound deteriorated and continued to cause her significant pain. *Id*., citing *e.g*., P. Ex. 3, at 12, 14; P. Ex. 4, at 2 (Aff. of Rosalind Daniels (formerly Christian)); CMS Ex. 7, at 26. On June 14, 2009, the wound began seeping serous fluid, nursing staff administered pain medication and Nurse Smith ordered daily assessment; however, no one consulted Dr. Tompkins, and no physician looked at the wound. *Id*., citing P. Exs. 3, at 14; 5, at 1 (Smith Aff.); CMS Ex. 7 at 34. A June 15, 2009 skin assessment did not reflect R. 1's deteriorating condition but, instead, indicated that no new areas were noted, no physician was notified, no treatment was ordered and the care plan was not updated. *Id*., citing CMS Ex. 7, at 16. The LVN responsible for doing weekly skin assessments at Highland Pines told the surveyor she did not recall ever seeing an injury on or treating R. 1's right leg, although she saw a "scab" during her June 8, 2009 assessment. *Id*., citing CMS Ex. 13, at 3 (Lockwood Decl.).

On June 21, 2009, a nurse aide found R. 1 lying face-down on the floor with a hematoma on her forehead "[with a] split down [the] middle." Staff sent R. 1 to the emergency room after calling the resident's physician and family. *Id.*, citing P. Ex. 3, at 16; CMS Ex. 7, at 151-55. The emergency room physician examined R.1's leg wound and referred R. 1 to the hospital's wound clinic for evaluation and weekly treatments. *Id*. at 5-6, citing CMS Ex. 7, at 49. On June 22, 2009, R. 1 returned to Highland Pines, but nurses' notes do not mention any referral for wound care. *Id*. at 6, citing P. Ex. 3, at 16; CMS Ex. 7, at

[3] Highland Pines initially submitted the written direct testimony of its three witnesses (P. Exs. 4-6) in the form of unsworn statements that did not comply with the instructions in the ALJ's initial pre-hearing order that witness statements be in the form of affidavits made under oath or written declarations signed under penalty of perjury. The ALJ ordered Highland Pines to submit identical statements of those witnesses signed under oath or penalty of perjury, to be substituted for the unsworn statements. Highland Pines submitted affidavits of its three witnesses, which it designated as its Exhibits 4, 5 and 6. The initial unsworn statements remain in the record exhibits, and the sworn affidavits are in the administrative record under Highland Pines's transmittal letter dated April 29, 2010. Although the ALJ Decision refers to these three exhibits as declarations, they take the form of affidavits, and that is how we refer to them here.

29. On June 25, 2009, Nurse Smith wrote a nurse's note stating that there was an order "per MD" to apply a topical antiseptic compress to the leg wound and to wrap the leg, and this treatment was also added to the care plan. P. Ex. 3, at 19, 37; ALJ Decision at 6, citing P. Ex. 3, at 64. The order had not been signed by Dr. Tompkins when the surveyors arrived almost two weeks later; Dr. Tompkins signed it on July 9, 2009. ALJ Decision at 6, citing P. Ex. 3, at 12, 37. R. 1's wound continued to deteriorate and cause pain. By July 4, 2009, the wound measured 8 x 8 cm. and was described as "full thickness skin loss with extensive destruction, tissue necrosis or damage to muscle, bone, or supporting structure." *Id*., citing CMS Ex. 7, at 24. When the surveyors arrived on July 7, they saw a wound that measured 8.5 x 10.2 cm., and the wound bed was entirely obscured by necrotic tissue. *Id*., citing CMS Ex. 13, at 3 (Lockwood Decl.); CMS Ex. 6, at 8.

On July 10, Dr. Tompkins assessed the wound and diagnosed chronic stasis ulcer secondary to cellulitis and ordered debridement at the wound care clinic "if the family requests." *Id*., citing P. Ex. 3, at 32. Notes of an interdisciplinary meeting on July 10, 2010, indicate that R. 1's daughter decided that she would decline further treatment and have her mother admitted to hospice, but she first consulted with Dr. Tompkins, saying she would cancel her mother's wound clinic appointment if Dr. Tompkins agreed, which he did. *Id*., citing CMS Ex. [8] at 52.[4] After this meeting, R. 1 was admitted to hospice; she was diagnosed with gangrene in her lower right extremity on July 16 and died on July 26, 2009. *Id*., citing CMS Ex. 7, at 1; P. Ex. 3, at 29, 80, 82.

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence on the record as a whole, and a disputed conclusion of law to determine whether it is erroneous. *Guidelines*; *Batavia Nursing and Convalescent Inn*, DAB No. 1911, at 7 (2004), *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 143 F. App'x 664 (6th Cir. 2005).

Discussion

A. The ALJ did not err in concluding that Highland Pines did not show CMS's immediate jeopardy determination to be clearly erroneous.

As previously indicated, Highland Pines does not appeal the ALJ's conclusion, based on the undisputed facts cited above, that the facility was not in substantial compliance with three Medicare requirements. In fact, Highland Pines "concedes for purposes of this appeal that CMS established that it was not in substantial compliance with relevant regulations . . . ." RR at 4. Highland Pines does appeal the ALJ's conclusion that "CMS's determination that the facility's deficiencies posed immediate jeopardy to

[4] The ALJ cited CMS Ex. 7, at 52, but that was an apparently inadvertent typographical error, because the cited information actually appears in CMS Ex. 8, at 52.

resident health and safety is not clearly erroneous." RR at 2, quoting ALJ Decision at 10. However, Highland Pines cites no facts that would undercut the ALJ's conclusion and, indeed, does not discuss the evidence at all. Highland Pines makes only a legal argument, asserting that the ALJ erred in requiring it to show that CMS's immediate jeopardy determination was clearly erroneous rather than requiring CMS to bear the ultimate burden of persuasion on that issue. RR at 3-4. In making this argument, Highland Pines concedes that the ALJ relied on "familiar authority" for her position and itself cites the regulatory requirement that CMS's determination of the level of noncompliance must be upheld unless clearly erroneous. RR at 3, citing ALJ Decision at 11 and 42 C.F.R. § 498.60(c). Highland Pines also acknowledges decisions in which the Board has held that once CMS establishes noncompliance, it does not need to make a prima facie case with respect to the level of noncompliance. *Id*., citing *Daughters of Miriam Center*, DAB No. 2067 (2007); *see also Liberty Commons Nursing and Rehab Center –Johnston*, DAB No. 2031, at 18-19 (2006) (holding that extending CMS's obligation to make a prima facie case of noncompliance to the level of noncompliance or allocating the burden of proof on that issue to CMS would be inconsistent with the regulatory limitation on scope of review in § 498.60(c)), *aff'd, Liberty Commons Nursing and Rehab Center – Johnston v. Leavitt*, 241 F. App'x 76 (4th Cir. 2007); *see also Barbourville Nursing Home*, DAB No. 1962, at 11 (2005)(SOD assessment that deficiencies cited pose immediate jeopardy is evidence supporting CMS's immediate jeopardy determination, and facility must respond by showing that determination to be clearly erroneous) , *aff'd, Barbourville Nursing Home v. U.S. Dept. of Health & Human Servs*., 174 F. App'x 932 (6th Cir. 2006). In *Liberty Commons*, the Board also stated that in limiting the ALJ's scope of review on the issue of the level of noncompliance, the "clearly erroneous" standard "by extension [imposed] a corresponding burden of proof on the SNF." DAB No. 2031, at 18-19. The ALJ here correctly noted that in *Barbourville,* and other decisions, the Board has held that the facility's burden to show no immediate jeopardy is a heavy one and has sustained determinations of immediate jeopardy where CMS presented evidence from which one could reasonably draw a conclusion that immediate jeopardy exists. ALJ Decision at 11 (citations omitted).

Highland Pines asserts that the regulation and Board decisions requiring facilities to prove CMS's immediate jeopardy determination "clearly erroneous" violate the provision in section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d), that "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." RR at 3. The Board has addressed and rejected the APA argument in cases where facilities have challenged an ALJ's assigning the facilities the burden of ultimate persuasion on the issue of noncompliance. *E.g. Hillman Rehabilitation Center*, DAB No. 1611 (1997), *aff'd, Hillman Rehabilitation Ctr. v. U.S. Dep't of Health & Human Servs*., No. 98-3789 (GEB) (D. N.J. May 13, 1999); *Batavia Nursing and Convalescent Center,* DAB No. 1904, at 15 (2004), *aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 F. App'x 181 (6th Cir. 2005). As the Board noted in *Liberty Commons*, DAB No. 2031, at 18, the *Batavia* and *Hillman* decisions do not address burden of proof as to the level of noncompliance, the context in which Highland Pines raises its APA argument. However, Highland Pines's APA argument (like its burden of proof argument generally)

is irrelevant in light of Highland Pines's failure to dispute, or even discuss, in its request for review any of the findings of fact on which the ALJ based her conclusion that the facility was noncompliant at the immediate jeopardy level. Those undisputed findings show that the facility's nursing staff documented the deterioration of R. 1's leg wound for nearly a month without giving her treating physician accurate information about the wound or asking him to evaluate it, even after an emergency room physician ordered evaluation and treatment by a wound clinic. By the time the resident's physician did evaluate the wound, the resident's condition was so dire that her family, with the physician's advice, opted to put her in hospice, with comfort measures only, rather than treat the wound. Shortly thereafter, the resident's leg became gangrenous, and she died.

Regardless of which party bears the evidentiary burden, these facts, left undisputed, support the conclusion that the facility's response to R. 1's wound was noncompliance that "caused, or was likely to cause, serious injury, harm, impairment, or death" to the resident. Clearly such a serious, infected wound, absent appropriate medical attention, presented the likelihood of serious harm or death. Regardless of whether the staff's failure to provide necessary care and services actually caused the gangrene and R. 1's death, that failure, as the ALJ concluded, "was likely to cause (and probably did cause)" R. 1 serious harm in the form of "unnecessary pain." ALJ Decision at 11. Indeed, one of Highland Pines's own witnesses testified to R. 1's complaints of serious pain. P. Ex. 4, at 2. The ALJ also concluded, and Highland Pines does not dispute, that the fact that "staff were unaware of their obligations compromised the health and safety of other vulnerable residents as well." ALJ Decision at 11. Given its failure to dispute any of the ALJ's evidentiary findings, Highland Pines could not prevail regardless of which party bears the burden of ultimate burden of persuasion. Accordingly, we uphold the ALJ's conclusion sustaining CMS's immediate jeopardy determination.

B. The ALJ did not err in concluding that the amounts of the per-day CMPs imposed by CMS were reasonable.

CMS imposed CMPs of $5,650 per day for the immediate jeopardy period and $1,100 per day for the remaining period of noncompliance at less than the immediate jeopardy level. The ALJ found those amounts reasonable, applying the factors set forth in 42 C.F.R. § 488.438(f) that must be considered when determining a reasonable CMP amount: 1) the facility's history of noncompliance; 2) the facility's financial condition; 3) factors specified in 42 C.F.R. § 488.404 (relating to the seriousness of the noncompliance); and 4) the facility's degree of culpability. The ALJ found that Highland Pines had a "significant history of noncompliance" and discussed that history at some length. ALJ Decision at 12. Among other things, the ALJ noted that "[t]he facility has repeatedly been cited for failing to consult physicians about changes in resident conditions." *Id*. The ALJ also found that the deficiencies "were significant and posed a pattern of immediate jeopardy to resident health and safety" and that the facility "is particularly culpable because its staff deliberately disregarded a physician order." *Id*. at 13. The ALJ considered but rejected Highland Pines's argument that its financial condition affected its ability to pay the CMPs. She noted that while Highland Pines had submitted a list of

profits and losses, current assets and liabilities and "net equity" for the years 2004-2009, it had not submitted any underlying documentation. *Id*. The ALJ concluded that "none of this establishes that the facility lacks 'adequate assets to pay the CMP without having to go out of business or compromise resident health and safety.'" *Id*., citing *Sanctuary at Whispering Meadows,* DAB No. 1925, at 19 (2004), *aff'd*, *Sanctuary at Whispering Meadows v. Thompson*, 151 F. App'x 386 (6th Cir. 2005); *Guardian Care Nursing and Rehab Center*, DAB No. 2260, at 9 (2009).

Highland Pines asserts on appeal that substantial evidence does not support the ALJ's determination that the CMP amounts are reasonable but challenges none of the ALJ's specific findings of fact regarding the factors she was required to consider. In particular, Highland Pines does not dispute the ALJ's finding that the facility had not presented the type of evidence the Board has looked for as potentially establishing a facility's inability to pay. Instead, Highland Pines argues that CMS "made no effort in this case to present any credible evidence that it considered Highland Pines['s] ability to pay **before** it imposed the penalty at issue in this case." RR at 5 (emphasis in original). Highland Pines also reiterates its APA argument, this time arguing that the ALJ erred by requiring it to show it could not afford to pay the CMP rather than requiring CMS to show, by a preponderance of the evidence, that Highland Pines could pay. *Id*. at 6.

Highland Pines's arguments have no merit. Whether CMS showed that it considered the facility's ability to pay before imposing the CMPs is irrelevant because, as Highland Pines acknowledges, the ALJ considered the facility's financial condition de novo in her review of whether the CMP amounts were reasonable. RR at 6. By independently applying the factors in section 488.438(f) based on the evidence of record developed during ALJ proceeding rather than inquiring into or relying on CMS's internal decision-making process, the ALJ properly applied the law. *CarePlex of Silver Spring*, DAB No. 1683, at 8 (1999); *Emerald Oaks*, DAB No. 1800, at 13 (2001); *Barn Hill Care Center*, DAB No. 1848, at 21 (2002) (decisions cited in ALJ Decision at 11-12). Highland Pines also acknowledges that during the ALJ's de novo review, CMS, in fact, presented some evidence of Highland Pines's financial condition. In its request for review, Highland Pines challenges the evidentiary value of the exhibit in question but does not assert that it was not entitled to any weight.[5] Nor does Highland Pines assert that the ALJ failed to consider or inappropriately discounted the evidence Highland Pines itself submitted on this issue. In fact, the ALJ Decision indicates that the ALJ based her finding that Highland Pines had not established its inability to pay the CMPs on Highland Pines's evidence, not the CMS exhibit Highland Pines questions. *See* ALJ Decision at 13 (discussing P. Ex. 9). The ALJ cited the lack of underlying documentation for Highland Pines's exhibit but also noted that the exhibit showed that the facility actually made profits in 2008 and 2009. *Id*. and n.10. Highland Pines does not dispute on appeal that it had profits in those years. Furthermore, Highland Pines asserts, albeit for the purpose of

[5] The exhibit contains a document prepared on July 25, 2009 that is entitled "Facility Financial Condition Worksheet" and states a 3-month average Medicaid reimbursement of $357,180.78 but no other financial information. CMS Ex. 12. The ALJ Decision does not specifically address this document.

attacking the evidentiary value of CMS's exhibit, that a facility's ability to pay penalties "is based on the total costs incurred by the facility and the total revenue received by the facility." RR at 5. This statement strongly suggests that Highland Pines itself does not disagree that a facility's profits can be viewed as evidence of its ability to pay a penalty.

We find no merit to Highland Pines's APA argument here for essentially the same reasons we rejected that argument in the context of the facility's appeal on the immediate jeopardy issue. In her de novo review, the ALJ made findings of fact regarding each of the regulatory factors set forth in the regulations based on the evidence in the record before her. In its appeal to the Board, Highland Pines asserts no factual dispute about any of those findings. Most importantly, Highland Pines does not challenge the ALJ's finding that it had not established an inability to pay the penalty. Highland Pines also does not dispute that the ALJ properly applied Board precedent for assessing a facility's ability to pay a CMP. Given its failure to dispute the ALJ's factual findings on this issue or her application of the relevant legal authorities, Highland Pines has provided no basis, under any assignment of the burden of proof, for us to disturb the ALJ's conclusion that the CMP amounts are reasonable.

Conclusion

For the reasons stated above, we affirm the ALJ Decision.

_____/s/_____
Judith A. Ballard

_____/s/_____
Leslie A. Sussan

_____/s/_____
Sheila Ann Hegy
Presiding Board Member