Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: October 11, 2006
Madison Health Care, Inc.	
Petitioner,	Civil Remedies CR1325 App. Div. Docket No. A-05-118
- v. -	Decision No. 2049
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Madison Health Care, Inc. (Madison) appeals the July 14, 2005 decision of Administrative Law Judge (ALJ) Steven T. Kessel which sustained the imposition of a civil money penalty (CMP) of $450 per day from August 1, 2002 through August 22, 2002. Madison Health Care, Inc., DAB CR1325 (2005)(ALJ Decision). The ALJ upheld the CMP based on his determination that Madison was not in substantial compliance with a Medicare participation requirement relating to falls. He concluded that the amount of the CMP was reasonable for the deficiency which he sustained. Madison argues that the ALJ applied an incorrect standard in evaluating the deficiency, failed to properly evaluate evidence in the record relating to the deficiency, and was biased against Madison due to frustration at the Board's earlier reversal and remand of the ALJ's prior summary disposition in this matter. We conclude below that the ALJ applied the correct standard, properly considered the full record as it stood after the hearing on the merits had been held, and, regardless of any confusion or

frustration he may have expressed about the remand, did not exhibit bias against Madison in reaching his decision. We also conclude that the ALJ's findings are supported by substantial evidence. We therefore uphold the ALJ Decision.

Case background[1]

Madison is a skilled nursing facility in Ohio that was surveyed on August 1, 2002, to determine whether it was complying with Medicare participation requirements. The surveyors cited nine deficiency findings as the basis for their recommendation of the CMP, which the Centers for Medicare & Medicaid Services (CMS) then imposed, in the amount of $450 per day, for a total of $9,900. The ALJ initially granted summary disposition to CMS sustaining a single deficiency and finding the facts relating to the deficiency sufficient to sustain the full CMP amount. Madison Health Care, Inc., DAB CR1094 (2003). Madison appealed that decision, arguing that material facts remained in dispute. The Board reversed the summary disposition and remanded the matter to the ALJ for a full hearing on the merits. Madison Health Care, Inc., DAB No. 1927 (2004).

The hearing was held on April 5, 2005. The ALJ made three numbered Findings of Fact and Conclusions of Law (FFCLs) set out here:

> 1. Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.25(h)(2).
>
> 2. Petitioner did not challenge CMS's determination as to the duration of Petitioner's noncompliance.
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> 3. Civil money penalties of $450 per day are a reasonable remedy for Petitioner's failure to comply substantially with the requirements of 42 C.F.R. § 483.25(h)(2).

ALJ Decision at 3, 10, 11. The ALJ followed each FFCL with a discussion of his basis for reaching it. He again did not address the other deficiency findings, but concluded that the full amount of the CMP was sustainable based on the single deficiency finding in the first FFCL.

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[1] The background information is drawn from the ALJ Decision and the record before the ALJ and summarized here for the convenience of the reader, but should not be treated as new findings.

Madison again appeals in the present case. Madison challenges those FFCLs "regarding the substantive basis for affirmance of the CMP, including but not limited to those FFCLs set forth in Section(s) at pages 3-14 of the [ALJ Decision] and the finding that Petitioner was lacking substantial compliance with program participation requirements set forth in 42 C.F.R. § 483.25(h)(2) (Quality of Care) and data tag F-324 relating to 'accidents.'" Madison Request for Review at 1-2. Given this statement and the absence of any argument in Madison's briefing about the duration of the CMP or the reasonableness of the amount of the CMP (as opposed to the basis for its imposition), we conclude that Madison's exceptions go only to the first FFCL and its supporting discussion.[2]

Madison asks that "the CMP and the finding under Tag F-324 as to Res. 85 should be abated in its entirety." Madison Br. at 11. CMS asks that the Board affirm the ALJ Decision, or, in the alternative, remand the case for further proceedings if the Board does not determine that substantial evidence supports the ALJ's conclusions as to Tag F-324. CMS Br. at 14.

Since we find below that the first FFCL is supported by substantial evidence in the record and that the supporting discussion sets out a legally sufficient basis for imposition of a CMP, we affirm without further discussion the second and third FFCLs. Given our result in regard to Tag F-325, we need not address CMS's alternative request for remand.

Applicable legal authority

The federal statute and regulations provide for surveys to evaluate the compliance of skilled nursing facilities with the requirements for participation in the Medicare and Medicaid programs and to impose remedies when a facility is found not to comply substantially. Sections 1819 and 1919 of the Social Security Act; 42 C.F.R. Parts 483, 488, and 498. "Substantial compliance" is defined as "a level of compliance with the

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[2] Madison acknowledges that the ALJ explicitly advised the parties to brief the "propriety of the amount of the CMP under Tag F-324 alone (i.e., if no other deficiencies are sustained)." Madison Br. at 3, citing Tr. at 137-39. While Madison referred to the ALJ Decision as reimposing the "whole CMP" based again on the single deficiency on which the summary disposition had been based, Madison offers no relevant argument about what other amount of CMP would be reasonable if this deficiency alone is upheld.

requirements of participation such that any identified deficiencies pose no greater risk to resident health and safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Noncompliance" means "any deficiency that causes a facility to not be in substantial compliance." Id.

"Quality of care" requirements reflect the overarching regulatory objective that "[e]ach resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care." 42 C.F.R. § 463.25. Among the required measures to that end, a facility must ensure that "[e]ach resident receives adequate supervision and assistance devices to prevent accidents." 42 C.F.R. § 483.25(h)(2).

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; see also Batavia Nursing and Convalescent Center, DAB No. 1911, at 7 (2004); Hillman Rehabilitation Center, DAB No. 1611, at 6 (1997), *aff'd*, Hillman Rehabilitation Center v. U.S. Dept. of Health and Human Services, No. 98-3789 at 21-38 (D.N.J. May 13, 1999).

Analysis

1. Substantial evidence in the record as a whole supports the ALJ's conclusion that Madison was not in substantial compliance with 42 C.F.R. § 483.25(h)(2).

The deficiency finding upheld by the ALJ under section 483.25(h)(2) was based on incidents involving two

residents.[3] Resident 85 fell twice while ambulating in a merri walker and was injured on both occasions. Resident 60 had a history of falls and was provided with a bed alarm to reduce the risk. After another fall occurred, Madison planned to check the functioning of the alarm daily but failed to do so, as confirmed by the director of nursing who told surveyors that the facility policy was to check alarms randomly. ALJ Decision at 5. We discuss later (and reject) Madison's claims that the ALJ was predisposed against the facility as a result of the Board's reversal of his prior summary disposition of the case. Here, we address Madison's substantive arguments relating to this deficiency.[4]

A. The ALJ did not err in his legal analysis of the deficiency at issue.

Madison complains that the ALJ misread the Board's decision as affirming his "analysis of the law." Madison Br. at 5, quoting ALJ Decision at 3. Madison emphasized that the Board overturned the ALJ's prior decision, implying that it must therefore have disagreed with the ALJ's legal analysis of the deficiency at issue. Id. Madison does not state clearly how the ALJ's present

[3] Madison asserts that the ALJ relied only on the example of Resident 85 in finding that Madison was not in substantial compliance with this regulatory requirement. Madison Br. at 4. A review of the ALJ Decision makes plain that Madison is mistaken. The ALJ made findings about Resident 60 and provided his rationale for rejecting Madison's arguments about that resident. ALJ Decision at 4-5, 7-10. Madison's claim is based solely on part of the ALJ's discussion of the reasonableness of the amount of the CMP which reads as follows: "The fact that Resident #85 was injured as a consequence of Petitioner's failure to supervise her, in my judgment, justifies the penalties I am imposing without regard to what happened to Resident #60." ALJ Decision at 14. Madison ignores the preceding three sentences which clearly show that, while the ALJ considered that the CMP amount would be reasonable even for the actual harm to Resident #85, he also concluded that Resident #60 escaped another fall not because of, but "in spite of" the quality of care received. Id. He concluded that the "potential for very serious harm existed in the case of Resident # 60." Id.

[4] None of those arguments refer in any way to Resident #60, evidently because of Madison's mistaken belief that the ALJ relied only on his findings about Resident #85 in upholding the amount of the CMP.

analysis of this deficiency is in error, other than the assertion that the ALJ simply repeated the errors committed in his earlier summary disposition.

The Board reversed the summary disposition essentially because the ALJ failed to draw all reasonable inferences in favor of the non-moving party when evaluating a contested summary disposition request. Instead, the ALJ stated that it was "appropriate to grant summary disposition where conclusions favorable to the moving party may be drawn from the undisputed material facts and applicable law." Madison Health Care, Inc., DAB CR1094, at 3. As a result of this error, the ALJ resolved in ways adverse to Madison (the non-moving party) inferences that could well be reasonable to draw after a full review of the evidence, tested by cross-examination, but that were not compelled. This error is now irrelevant because a full hearing on the merits has been held, giving Madison an opportunity to test CMS's evidence and present its own. It is now the proper role of the ALJ to determine what inferences to draw from the evidence, rather than to draw all possible inferences in Madison's favor as is required at the summary disposition stage.

The Board did not overturn the ALJ's discussion of the substantive standards to be applied to the deficiency finding. In fact, the Board expressly found that the ALJ applied the correct legal standard in evaluating compliance with section 483.25(h)(2). DAB No. 1927, at 8-9. The ALJ encapsulated his understanding in one sentence, stating as follows: "While not imposing a strict liability standard on a facility, the regulation requires a facility to take all measures that are within its power to prevent accidents that are reasonably foreseeable." ALJ Decision at 3.

This brief summary is consistent with prior case law. In Woodstock Care Center, DAB No. 1726, at 25-30 (2000)(citing 54 Fed. Reg. 5316, 5332 (February 2, 1989)), aff'd, Woodstock Care Ctr. v. Thompson, 363 F.3d 583 (6th Cir. 2003), the Board analyzed the wording, context, and history of section 483.25(h)(2) and, based on that analysis, set out a framework for evaluating allegations of noncompliance with that requirement. The Board elaborated on this framework in a more recent case, as follows:

> The Board has held that section 483.25(h)(2) cannot properly be read to impose strict liability on facilities for accidents that occur. Instead, the Board has found that the regulatory requirement of "adequate supervision and assistance devices to prevent accidents"

> obligates the facility to provide supervision and assistance devices designed to meet the resident's assessed needs and to mitigate foreseeable risks of harm from accidents. Id.; see also Tri-County Extended Care Center, DAB No. 1936 (2004); Odd Fellow and Rebekah Health Care Facility, DAB No. 1839 (2002). In addition, the Board has indicated that a facility must provide supervision and assistance devices that reduce known or foreseeable accident risks to the highest practicable degree, consistent with accepted standards of nursing practice. Woodstock Care Center, DAB No. 1726, at 21, 25, 40 (2000), aff'd, Woodstock Care Ctr. v. Thompson, 363 F.3d 583 (6th Cir. 2003); Florence Park Care Center, DAB No. 1931 (2004). Thus, if a facility implements accident prevention measures for a resident but has reason to know that those measures are substantially ineffective in reducing the risk of accidents, it must act to determine the reasons for the ineffectiveness and to consider -- and, if practicable, implement -- more effective measures. Woodstock at 28 (affirming a CMP based on evidence that a facility failed to change its practices after it became clear that those practices were ineffective).

Residence at Kensington Place, DAB No. 1963, at 9 (2005); see also Lake Cook Terrace Nursing Center, DAB No. 1745 (2000).

We see no basis for Madison's claims that the ALJ somehow applied an erroneous standard. Madison does not point to any specific statement in the ALJ Decision that would support those claims, and we conclude that they have no merit.

B. The ALJ made adequate credibility assessments where necessary to resolve disputed factual issues.

Madison asserts that the ALJ "made no credibility findings as to the witnesses appearing at hearing. None." Madison Br. at 5. According to Madison, the ALJ Decision contains no indication of credibility assessment and only one reference to the transcript relating to Resident #85, allegedly erroneous. Madison then recites its own assessment that the evidence it presented was "more credible" generally. Madison Br. at 6. In particular, Madison repeatedly asserts that the Madison physical therapist who testified about Resident #85's use of the merri walker was "compelling and believable." Id. at 7.

Among the tasks normally undertaken by the ALJ is evaluating the credibility and persuasiveness of witness testimony. Absent

clear error, we defer to the findings of the ALJ on weight and credibility of testimony. Koester Pavilion, DAB No. 1750, at 15 (2000). In making credibility evaluations of testimony, the ALJ may reasonably consider many factors, including "witness qualifications and experience, as well as self-interest." Community Skilled Nursing Centre, DAB No. 1987 (2005), aff'd sub nom., Community Skilled Nursing Ctr. v. Leavitt, No. 05-4193 (6th Cir. Feb. 23, 2006).

Credibility matters, however, only where resolving a material issue of fact depends on the accuracy, weight and believability of particular testimony. In this case, the role of credibility assessment in the final decision on the single deficiency was rather limited. Most of the ALJ's rationale for determining that Madison was not in substantial compliance in relation to Resident #85 turned on his conclusion that the resident's first fall while using a merri walker put Madison on notice that "something in the facility had caused the resident to fall" and that all of Madison's proffered explanations, including the resident's instability, environmental factors, and actions of other residents "were items that were within Petitioner's staff's ability to control."[5] ALJ Decision at 7.

Madison denied that it was on notice that the resident might be unsafe while in the merri walker. Madison's witness in relation to Resident #85, Ms. Weaver, was a therapy manager at two facilities and had evaluated Resident #85 for use of a merri walker. Tr. at 86. The direct treatment to Resident #85 was provided by licensed physical therapy assistants (LPTAs). Tr. at 87. One of those LPTAs, Jeff Lindberg, wrote a therapy note recording his observations. Tr. at 88-89; see also CMS Ex. 28, at 13-14. Ms. Weaver co-signed the statement and testified that her signature meant that she agreed with the information on the page. Tr. at 91.

The progress notes are written in the short form notation common in patient care records and appear in a narrative report and on a pre-printed form, each with weekly entries for the month of June. The relevant narrative notes state as follows:

> 6/21/02 'R' progressing well toward goals but has shown some inconsistencies in balance. Some days she ~~she~~

[5] It was undisputed that neither of the resident's falls were observed or reported by any staff member and that the precise causes or sequences of events were never established.

> [error JL] is (I) + safe in merriwalker © harness + others she has occasional L.O.B. Cont. per P.O.C.

CMS Ex. 28, at 13. The note is signed by the LPTA and countersigned by Ms. Weaver.

The parties do not appear to dispute that the second sentence of the notes should be read as: "Some days she is independent and safe in merriwalker with harness and others she has occasional loss of balance." What they dispute is how to interpret the sentence in context. CMS understands the notes to mean that some days the resident is safe using the merri walker and other days she is unsafe using it because of loss of balance. Madison contends that the meaning is that she has loss of balance some days but not that she is ever unsafe while in the merri walker.[6] Madison Br. at 7. Rather, Madison views her balance problems as the very reason for using the merri walker. Id. Madison relies for this view on the testimony of Ms. Weaver that she interpreted the progress notes to mean that the resident was inconsistent in her balance but not that she was inconsistently safe while in the merri walker. Tr. at 92. The ALJ clearly and reasonably found CMS's interpretation inherently more persuasive.

In addition, on the question of whether the LPTA's notes demonstrated notice to the facility that Resident #85 could not be relied upon to safely navigate independently while using the merri walker, the ALJ did make an express credibility determination. The ALJ stated "credible evidence" demonstrated that "the resident was intermittently unstable while using the merri walker," citing to the cross-examination of Ms. Weaver. ALJ Decision at 6, citing Tr. at 91-93. Madison dismisses this reference to the testimony as "a misinterpretation and misassessment of the evidence." Madison Br. at 6. According to Madison, this is so because Ms. Weaver "repeatedly testified that the resident was safe in the merri walker and ambulating

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[6] The corresponding form entry for June 21, 2002 states the following: "Ambu. (I) + safe inconsistently in merriwalker © harness on unit." CMS Ex. 28, at 14. Again, there is no disagreement that this entry should be read as: "Ambulation independent and safe inconsistently in merriwalker with harness on unit." Again, the ambiguity arises between CMS's interpretation of this as meaning that the resident is only inconsistently safe in the merri walker and Madison's interpretation that, because the resident is not consistently safe and independent in ambulating, she is using a merri walker with harness to ambulate.

independently and safe on a consistent basis in the merri walker" during the cited part of the transcript. Id. at n.2. In context, however, it is evident that the ALJ's point is that he did not accept her repeated claims that the progress notes should be so interpreted. At the hearing, the ALJ pointed out that her testimony was based on her understanding of what someone else wrote about observations for which she was not present. Tr. at 94. Further, the ALJ could reasonably consider in reaching his assessment of the testimony, the failure of Madison to produce the LPTA who actually performed the observations and made the notes, even though it was established at the hearing that the LPTA was still employed by Madison.[7] Tr. at 87-88.

Drawing an inference from or determining the interpretation of these notations is precisely the kind of thing that the ALJ was not permitted to do on summary disposition so long as alternative inferences or interpretations existed that were more favorable to Madison. After a full hearing, however, the ALJ appropriately may, and indeed must, determine which inferences and interpretations are best supported on the record. At this stage, we will disturb the ALJ's conclusions about the correct inferences and interpretations only if they cannot reasonably be supported based on the evidence in the record as a whole. Thus, the burden on Madison on appeal now is much greater than on appeal from summary disposition. Rather than merely showing that the ALJ was not compelled to reach a particular inference or interpretation, Madison would now have to show that the ALJ could not reasonably do so. Madison has not come close to carrying this burden.

Although Madison argues that there is "NO evidence that Res[ident] 85 was unstable at all while **using** the merri walker," the written notes of the LPTAS were indeed part of the record. Madison Br. at 6, n.2. (emphasis in original). The ALJ could, and did, consider the notes as he interpreted them to be evidence on this point. Furthermore, the undisputed fact that the resident fell over twice while using the merri walker was evidence that the ALJ could, and did, consider in this regard.

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[7] In addition, the direct testimony of another witness, Christine Lister, on whom Madison relied in part to show disputes of fact relating to Resident #85 in its earlier appeal, was not admitted into the record because Ms. Lister was not made available for cross-examination. Tr. at 79. Madison did not challenge this ruling on appeal.

Ultimately, however, the ALJ did not center his decision on whether the LPTA's notes created a duty in Madison to take additional measures to protect Resident #85 if she was to use the merri walker. Rather, the ALJ considered the notes only in relation to the first fall which the resident experienced. He concluded that, once the fact of the resident's vulnerability in the merri walker was illustrated so concretely, Madison surely had a duty thereafter to take measures likely to be effective to protect her from further foreseeable falls. ALJ Decision at 6. The ALJ also determined that Madison did not show that it had adopted any measures after the first fall that were designed to monitor the resident closely enough to discover the source of the problem and, in any event, to protect the resident from a recurrence. Id. at 6-7.

Madison seems to have misconstrued the Board's reversal of summary disposition as directing that Madison "should prevail" if the ALJ "could reasonably" make specific findings and draw particular inferences favorably to Madison. Madison Br. at 10. On the contrary, the Board merely laid out the conclusions that the ALJ might be able to reach when later weighing the evidence after a full hearing. The Board did not suggest that Madison should prevail or that the ALJ must reach any of these conclusions. A chain of possible reasonable inferences, depending on what the record as a whole after a hearing might support, existed that could have permitted the ALJ to decide in favor of Madison. That was enough to require reversal of summary disposition and remand for hearing. That reversal in no way prejudged what conclusions the ALJ should reach after the hearing. DAB No. 1927, at 7, n.2. Thus, the Board found the ALJ erred in determining that no dispute existed about whether Madison took any additional steps after the first fall, and in fact noted that even CMS's surveyor reported that two new interventions were care-planned. Id. at 11. The Board also found that it was not undisputed that the resident was without supervision at the time of her falls, because Madison asserted that general supervision was appropriately provided despite the fact that no staff member observed the falls. Id. The Board did not conclude that the planned interventions were implemented or that, if they were, they sufficed to address the resident's needs. The Board did not conclude that general supervision was provided or, if it was, that it sufficed either. In fact, the Board explicitly stated that the "ALJ might ultimately find Madison's evidence too vague or unreliable without further explanation[.]" Id. The remand merely provided Madison with the opportunity to present evidence to prove its assertions.

Nor did Board require that the ALJ believe Madison's evidence or draw inferences from it in Madison's favor. Thus, the Board held that --

> The ALJ may well find Madison's arguments, evidence and witnesses less credible or persuasive than those presented by CMS, but where such evaluation of credibility or comparison of competing evidence is called for, summary judgment is inappropriate. It is true that, even accepting all the evidence and factual assertions proffered by Madison as accurate, the inferences Madison would have us draw are certainly not the only ones that could reasonably be drawn. Yet, where the record evidence is susceptible of a rational interpretation which would preclude summary judgment against the non-movant party, the case must go forward for a thorough evaluation of what the most reasonable inferences and the preferable interpretations are based on all credible evidence in the record after a full hearing. . . .
>
> The effect of our conclusion is that Madison must be provided with a hearing in which to present evidence (unless Madison waives its right to an oral hearing) and that Madison must be provided with an opportunity to argue for those inferences which it contends should be drawn from the evidence. Only after that process is complete may the ALJ proceed to weigh the evidence in the record and determine which inferences to draw. **Nothing in our discussion here should be taken as suggesting or limiting what conclusions the ALJ may appropriately reach based on the record as a whole at that point.**

DAB No. 1927, at 14 (emphasis added). The Board further pointed out that, "[f]or purposes of summary judgment, the non-moving party does not have to prove its case, but merely must show that there is a genuine dispute." Id. at 11. By contrast, after having received a full opportunity to present its case, Madison does have to prove by the preponderance of the evidence that it was in substantial compliance. The ALJ was therefore correct in making findings and reaching conclusions on remand based on weighing the evidence in the full record.

Madison points to nothing in the record before the ALJ that substantiated that Madison had implemented any additional monitoring or interventions for which the facility planned after

the resident's first fall.[8] On the contrary, Madison asserts in its appeal brief that, although the facility "planned interventions in response to falls for this resident, it was impractical for the facility to consider the first fall a predictor requiring the type of direct one-on-one supervision suggested by CMS." Madison Br. at 8. According to Madison, it could not provide such supervision because it "would require constant staffing of one resident every time she was in an inherently stable device just to see if events would fortuitously repeat themselves." Id. Instead, Madison averred that it provided "adequate general supervision" in that the resident was, "geographically, not free to roam the entire facility but instead was in a locked unit along with at least 3-4 staff members among its 28 or so residents." Id., citing Tr. at 98-99. Since this was the same level of supervision provided before the first fall, Madison's claim amounts to an admission that no change in supervision was implemented after the fall. Further, this admission acknowledges that Madison did not implement even its own planned interventions. The ALJ was, thus, not confronted with the question of whether some level of increased supervision short of one-on-one staffing could have been adequate for times the resident used the merri walker. Rather, the ALJ had to decide whether the facility took reasonable measures to forestall further falls when it made no change in its manner of supervision of the resident, contrary to its own care-planning.

We find the ALJ's conclusion that Madison did not provide adequate supervision to Resident #85 after her first fall to be supported by substantial evidence in the record as a whole.

Since Madison made no argument that the ALJ erred in his findings and conclusions relating to Resident #60, we need not address them further. Therefore, we conclude that the ALJ's conclusion that Madison failed to comply substantially with the requirements of 42 C.F.R. § 483.25(h)2) is itself supported by substantial evidence in the record as a whole.

2. Madison has not shown bias on the part of the ALJ.

Much of Madison's appeal centers on the theme that the ALJ was biased against Madison out of frustration with the Board's

[8] The surveyor reported that the facility had documented plans for new interventions to "check for proper positioning and to supervise traffic in the hallway." P. Ex. 1, at 29.

decision granting Madison a hearing. For example, Madison states that the "event that occurred on April 5, 2005, which Madison will assume was the hearing demanded by this tribunal's remand notice, made a mockery of this Board's decision and direction to the ALJ. . . ." Madison Br. at 10. We have addressed above Madison's allegations, repeated in this context, that the ALJ persisted in an erroneous legal analysis of the regulatory requirement and failed to consider credibility as instructed.

In addition, Madison points to two other factors it says evidence ALJ bias. First, Madison complains that --

> [b]eginning with several comments that ominously marked the foregone conclusions the tribunal would later reach, the ALJ concluded the hearing with a demand that the parties brief not only proposed findings on Tag F-324, but also the following (Tr. 137-139):
>
> 1) The sufficiency of evidence on tags other than Tag F-324;
> 2) The propriety of the amount of the CMP under Tag F-324 alone (i.e., if no other deficiencies are sustained);
> 3) The propriety of the amount of the CMP if the alleged deficiency under Tag F-324 is not sustained but (some or all) other deficiencies are sustained[.]

Madison Br. at 3. This complaint has no merit.

On their face, the ALJ's requests reflect an effort to be sure the parties had a full opportunity to present argument on issues which the Board had found were disputed. A review of the transcript shows that the ALJ stated that he would hear argument on whether the parties believed that issues of credibility or the weight to be accorded to particular evidence were important to his review of the record on Tag F-324. Tr. at 138. He also stated that, in regard to the additional deficiency findings, he had "not decided them so you may advise me if there's anything . . . that came up at the hearing that hasn't come up previously that you want to tell me about." Id. As to the penalty amount, the ALJ explained that he was complying with the Board's directive to permit the parties to address whether the amount would be reasonable under various possible scenarios in which less than the full set of deficiency findings might be sustained. Id. at 139. At that time, counsel for Madison made no objections to the ALJ's requests and suggestions about subjects for briefing, and, in fact, remarked that the time provided in which to submit briefs was "more than" sufficient. Id. at 139-40. We

therefore find no basis for Madison's claim that these requests constituted an effort by the ALJ to "force the parties to undertake the wasteful task by requiring presentation on numerous citations (Tr. 138) he seemingly purposefully failed to consider for a second time." Madison Br. at 4. The fact that the ALJ ultimately resolved the same deficiency against Madison does not imply that the ALJ had already reached that conclusion in advance.

Furthermore, it is not evidence of bias for the ALJ to have formed a view of the case by the close of the hearing. The Board has discussed, in several prior cases, the law governing challenges to ALJ decisions based on claims of bias and prejudice as follows:

> In Edward J. Petrus, Jr., M.D., and The Eye Center of Austin, DAB No. 1264 at 23-26 (1991)[aff'd sub nom., Petrus v. I.G., 966 F.2d 675 (5th Cir. 1992), cert. denied, 506 U.S. 1048 (1993)], the Board described the standard for disqualifying a judge on a charge of bias. The Supreme Court, the Board noted, has held that "[t]he 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 . . . ." United States v. Grinnell Corp., 384 U.S. 563, 583 (1966); see also Tynan v. United States, 376 F.2d 761 (D.C. Cir. 1967), cert. denied, 389 U.S. 845 (1967); Duffield v. Charleston Area Medical Center, 503 F.2d 512, 517 (4th Cir. 1974). Here, St. Anthony did not point to any extrajudicial source of bias. Rather, St. Anthony referred to the ALJ's rulings on the parties' motions, his alleged predisposition not to consider certain evidence, and allegations that the ALJ had taken positions on important issues prior to the presentation of all of the evidence.

St. Anthony Hospital, DAB No. 1728 (2000), aff'd, 309 F.3d 680 (10th Cir. 2002); see also Britthaven of Goldsboro, DAB No. 1960 (2005); Tri-County Extended Care Center, DAB No. 1936 (2004). Nor is it evidence of bias that the ALJ's view of the record was not in accordance with Madison's views. See Meadow Wood, DAB No. 1841, at 10 (2002), aff'd, Civ. No. 02-4115 (6th Cir. March 2, 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.").

Finally, Madison points to what it calls the "markedly negative" attitude expressed by the ALJ regarding the Board's decision remanding the case to him for hearing. Madison Br. at 4-6, 10. The ALJ did make comments at the hearing and in the ALJ Decision that demonstrated confusion or frustration about why a hearing was required or whether he was expected to give credence to inferences that the Board had merely found would be permissible. See, e.g., Tr. at 5; ALJ Decision at 7, 13. Nevertheless, none of those comments suggest that the ALJ was unwilling to provide a fair hearing or to weigh the resulting record fairly.

We conclude that Madison has failed to prove that the ALJ was biased against it.

Conclusion

For the reasons explained above, we uphold the ALJ Decision.

_____/s/_____
Judith A. Ballard

_____/s/_____
Donald F. Garrett

_____/s/_____
Leslie A. Sussan
Presiding Board Member