Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: February 22, 2010
Golden Living Center - Frankfort,	
Petitioner,	App. Div. Docket No. A-10-33 Request to Reopen Decision No. 2296
- v. -	Ruling No. 2010-2
Centers for Medicare & Medicaid Services.	

RULING ON REQUEST FOR REOPENING AND RECONSIDERATION OF DAB NO. 2296 AND FOR EXTENSION OF TIME FOR SEEKING JUDICIAL REVIEW

On December 31, 2009, the Board issued its final decision in the appeal of Golden Living Center - Frankfort (Golden) from the June 29, 2009 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes. Golden Living Center - Frankfort, DAB No. 2296 (2009). The Board upheld the ALJ in concluding that the Centers for Medicare & Medicaid Services (CMS) had authority to impose remedies on Golden based on finding the facility not in substantial compliance. Id., upholding Golden Living Center - Frankfort, DAB CR1981 (2009) (ALJ Decision). The remedies sustained by the ALJ included a civil money penalty (CMP) of $3,750 per day from December 15, 2007 through January 28, 2008, during which period Golden's deficiencies posed immediate jeopardy to resident health and safety, and a CMP of $100 per day from January 29, 2008 through March 2, 2008 during which period noncompliance continued at a lower level. On January 11, 2010, Golden filed a motion to reopen decision and to extend

time for seeking judicial review (Reopening Motion). For the reasons explained below, we deny the motion to reopen but grant an extension of time to seek judicial review.

1. The motion to reopen the Board's decision is denied.

The Board has authority under the regulations to reopen its decisions upon the petition of either party filed within 60 days from the date of the notice of the Board's decision. 42 C.F.R. § 498.100. Golden timely filed its petition and presented two bases for its reopening request. The first basis rested on the presumption that the Board did not have time to consider prior to issuing its decision certain supplemental materials submitted by Golden with a December 22, 2009 motion to supplement. Reopening Motion at 1. The second basis relied on a recent Eighth Circuit Court of Appeals decision as additional authority for Golden's argument that the Board must either "address and resolve all of the allegations of noncompliance upon which CMS based its findings and remedies . . . or else delete such allegations from the public record." Id. at 2. We address each basis in turn.

A. The Board addressed the supplemental material in its final decision and found it not material.

On December 22, 2009, Golden filed a motion to supplement the record with a second declaration by Dr. Michael Yao, its corporate medical director, accompanying an article from the Journal of American Medical Directors Association addressing dehydration in elderly people. Golden now argues that it "presumes that the Board did not receive and consider this Motion prior to issuing its Decision." Reopening Motion at 1. Golden contends now, as it did in its motion to supplement, that Dr. Yao's discussion of the article clarifies clinical issues which Golden views as material. Id. at 1-2.

Golden apparently failed to read the Board's decision closely, since the Board expressly indicated that Golden's supplemental material was received on December 30, prior to issuance of the Board's decision. DAB No. 2296, at 17 n.11. The Board noted there that Golden did not establish a basis to admit the material out of order since it did not show why the article (which was already several months old) had not been produced timely. The Board further concluded that, even were the documents admitted, they would not be material to the outcome. Id., citing 42 C.F.R. § 498.86. The same points made in Dr. Yao's declaration accompanying the article were already made in earlier declarations. Those points, which the Board summarized

as asserting that dehydration is more complex than simple volume depletion and that dehydration is particularly difficult to define and manage in the elderly, especially those with many medical complications, ultimately offered no support for Golden's position. Id. An understanding of this clinical background actually reinforces the significance of Golden's failure to be diligent in monitoring R1's intake issues, her diarrhea, and her various signs of possible dehydration or other fluid imbalances. As we noted in our decision, the ALJ clearly recognized this:

> The ALJ explained that, while Golden made "much of R1's fragility and complicated health issues," in fact, "for this very reason, she required especially careful assessment and monitoring, and the facility had a heightened duty to provide her the care she needed." ALJ Decision at 15. Yet, "the problem here was not that the facility fell short of providing a complicated level of care; rather, the facility failed to provide even an ordinary level of care." Id. at 16.

DAB No. 2296, at 16. We conclude that Golden has not presented any new evidence or identified any clear error of fact that could justify reopening and reconsidering our decision.[1]

B. The recent court decision does not alter our analysis.

Golden's second basis relies on dicta from an Eighth Circuit decision in Grace Healthcare of Benton v. DHHS, ___ F.3d ___, Civ. No. 08-3218, slip op. at 14-15 (8th Cir., Dec. 21, 2009). In our decision, we rejected Golden's argument that we or the ALJ must either address all noncompliance findings or order them "removed from the administrative record for all purposes." We noted that Golden identified no authority that would empower either the ALJ or the Board to order noncompliance findings "removed from the administrative record for all purposes" when the ALJ had not addressed them. DAB No. 2296, at 3 n.2.

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[1] The regulations provide that, if a decision is to be reopened and revised on the basis of new evidence not previously in the record, then the Board would provide notice to the opposing party and an opportunity to appear, unless waived. 42 C.F.R. § 498.102(a). We do not provide such notice and opportunity to appear because we conclude that the evidence is not new and because we do not reopen or revise our decision.

The Grace decision held that the Court was not bound by the limitations on administrative review of CMS's determination of the level of noncompliance, which require the ALJ and Board to uphold immediate jeopardy determinations unless clearly erroneous. Grace, slip op. at 9.[2] The Court then overturned the determination that the facility's failure to investigate possible abuse constituted immediate jeopardy, concluding that the likelihood of serious harm was too speculative in the circumstances involved. Grace, slip op. at 14. The Court declined to review the principle that an ALJ need not "address CMS noncompliance findings that are not material to the ALJ's decision," while concluding that this principle was "misapplied" in Grace. Id., citing Western Care Mgmt. Corp., DAB No. 1921 (2004). Nevertheless, the Court commented that, if Grace's assertion that "unreviewed CMS findings of immediate jeopardy remain accessible to the public and can be used to support damage claims against the provider in private litigation" are true, then "that is a material adverse impact, in which case all findings of immediate jeopardy that are appealed should either be upheld or reversed by the ALJ or the DAB or be expunged from the agency's public records." Id. at 14-15 (emphasis added).

The situation in Golden is not on all fours with that in Grace. The noncompliance findings that demonstrated immediate jeopardy in the present case arose out of a single factual scenario involving care provided to one resident. In contrast, CMS based its immediate jeopardy determination in Grace on noncompliance with "six regulations in caring for three residents." Grace, slip op. at 9. In Golden, the ALJ resolved any disputes regarding the relevant facts and established the likelihood of serious harm from the facts she found, even though she did not address the application of every cited regulation to the facts that she found.

In any case, the Grace dicta, even if it applied here, does not mandate that the ALJ or the Board must resolve noncompliance findings that are not material to the outcome of an appeal before it. Nor does it opine that either the ALJ or the Board,

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[2] The Court referred to this limitation as "self-imposed," citing Liberty Commons Nursing & Rehab. Ctr.-Johnston, DAB No. 2031 (2006), aff'd, Liberty Commons Nursing & Rehab. Ctr.-Johnston v. Leavitt, 241 Fed. App'x 76, 79-81 (4th Cir. 2007), but in fact the regulations expressly bar the ALJ and the Board from overturning a CMS determination of immediate jeopardy unless clearly erroneous. 42 C.F.R. §§ 498.3(b)(14); 498.3(d)(10); 498.60(c).

as opposed to CMS or the Secretary, is empowered to order expungement of CMS's public records or to do as Golden asks and order removal of such findings "from the administrative record for all purposes." DAB No. 2296, at 3 n.2, citing P. Request for Review at 12 n.6.

We conclude that Golden's citation to the Grace case does not justify reopening and reconsidering our decision.

2. Golden's deadline for seeking judicial review is extended to 60 days from receipt of this ruling.

Section 498.95 of 42 C.F.R. provides that an affected party that is dissatisfied with a Board decision and is entitled to judicial review must commence civil action within 60 days from receipt of the notice of the Board's decision, unless the party files a request for extension with the Board in writing before the 60-day period ends and the Board extends the time for good cause shown. When a Board decision is reopened and revised, section 498.103 provides that the revised decision may be appealed 60 days from receipt of notice of the revision.

In the present case, we have not reopened or revised the Board decision previously issued. We nevertheless grant an extension of time for seeking judicial review of the Board decision. Golden timely requested the extension and could not know whether its motion would result in a revised decision prior to its receipt of this ruling. Therefore, for good cause shown, we extend the period in which Golden may seek judicial review to 60 days from Golden's receipt of this ruling. If Golden fails to seek judicial review within this period, the Board's decision will be final and binding.

/s/

Judith A. Ballard

/s/

Constance B. Tobias

/s/

Leslie A. Sussan
Presiding Board Member