Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of: Meridian Nursing Center, Petitioner, - v. - Centers for Medicare & Medicaid Services.	DATE: August 12, 2009 Civil Remedies CR1903 App. Div. Docket No. A-09-82 Decision No. 2265

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Meridian Nursing Center (Meridian, Petitioner) appeals the February 19, 2009 decision of Administrative Law Judge (ALJ) Steven T. Kessel in Meridian Nursing Center, DAB CR1903 (2009) (ALJ Decision). On summary judgment, the ALJ upheld the imposition by the Centers for Medicare & Medicaid Services (CMS) of two per—day civil money penalties (CMPs) and the loss of authority to conduct a nurse aide training and competency program for two years. The ALJ determined that the undisputed facts established that Meridian was not in substantial compliance with 42 C.F.R. § 483.25(h)(1) and (2) and that CMS's determination that this noncompliance posed immediate jeopardy was not clearly erroneous. The ALJ further determined that the CMPs, which were also based on another finding of noncompliance that Meridian did not challenge, were reasonable in both amount and duration.

For the reasons discussed below, we uphold the ALJ Decision granting summary judgment in favor of CMS.

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 U.S.C. §§ 1395i-2 and 1396r); 42 C.F.R. Parts 483, 488, and 498. A "deficiency" is defined as a nursing facility's "failure to meet a participation requirement specified in the Act or [42 C.F.R. Part 483]." "Substantial compliance" is defined as "a level of compliance with the 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.

CMS determines the amount of a CMP based in part on the "seriousness" of the noncompliance, i.e., its scope and severity. See 42 C.F.R. §§ 488.438(f)(3), 488.404. The most severe deficiencies are those that pose "immediate jeopardy" to resident health or safety. 42 C.F.R. § 488.404(b). "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. For noncompliance at the immediate jeopardy level, CMS may impose a per-day CMP in the range of $3,050 to $10,000 per day. 42 C.F.R. § 488.438(a)(1). For noncompliance that does not pose immediate jeopardy, CMS may impose a per-day CMP of between $50 and $3,000 for each day the facility is not in substantial compliance. Id. In determining the amount of a CMP, CMS takes into account factors specified at 42 C.F.R. §§ 488.438(f) and 488.404. CMS's determination concerning the seriousness of a facility's noncompliance must be upheld unless it is "clearly erroneous." 42 C.F.R. § 498.60(c)(2).

The specific requirements at issue here are at 42 C.F.R. § 483.25(h), which provides:

> *Accidents*. The facility must ensure that—
> (1) The resident environment remains as free of accident hazards as is possible; and

(2) Each resident receives adequate supervision and assistance devices to prevent accidents.

Section 483.25(h)(1) requires that a facility address foreseeable risks of harm from accidents "by identifying and removing hazards, where possible, or where the hazard is unavoidable because of other resident needs, managing the hazard by reducing the risk of accident to the extent possible." Maine Veterans' Home – Scarborough, DAB No. 1975, at 10 (2005). Section 483.25(h)(2) requires that a facility take "all reasonable steps to ensure that a resident receives supervision and assistance devices that meet his or her assessed needs and mitigate foreseeable risks of harm from accidents." Briarwood Nursing Center, DAB No. 2115, at 11 (2007), citing Woodstock Care Ctr. v. Thompson, DAB No. 1726 (2000) (facility must take "all reasonable precautions against residents' accidents"), aff'd, Woodstock Care Ctr. v. Thompson, 363 F.3d 583 (6th Cir. 2003).

Standards for Summary Judgment

Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-25 (1986). Although the Federal Rules of Civil Procedure (FRCP) are inapplicable in this administrative proceeding, we are guided by those rules and by judicial decisions on summary judgment in determining whether the ALJ properly granted summary judgment. See Thelma Walley v. Inspector General, DAB No. 1367 (1992). In the case before us, the ALJ told the parties that he would decide motions for summary judgment "according to the principles of Rule 56 of the Federal Rules of Civil Procedure and applicable case law." Acknowledgment and Initial Pre-Hearing Order dated June 20, 2008, at 4.

The party moving for summary judgment bears the initial burden of demonstrating that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. If a moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) (quoting FRCP 56(e)). To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material

fact -- a fact that, if proven, would affect the outcome of the case under governing law. Id. at 586, n.11; Celotex, 477 U.S. at 322. In order to demonstrate a genuine issue, the opposing party must do more than show that there is "some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587. In making this determination, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. See, e.g., U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962).

Standard of Board Review

Whether summary judgment is appropriate is a legal issue that we address de novo. Lebanon Nursing and Rehabilitation Center, DAB No. 1918 (2004). In reviewing a disputed finding of fact, we view proffered evidence in the light most favorable to the non-moving party. Madison Health Care, Inc., DAB No. 1927 (2004). The standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. 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/guidelines/prov.html.

Case Background

Meridian is a skilled nursing facility located in Indianapolis, Indiana that participates in the Medicare and Medicaid programs. The Indiana State Department of Health (State survey agency) conducted a complaint survey of Meridian's facility on March 28 and 31, 2008, followed by an extended survey on April 1-2, 2008. Based on the Statement of Deficiencies (SOD) issued by the State survey agency, CMS determined that Meridian was not in substantial compliance with 42 C.F.R. §§ 483.25(h)(1) and (2) and 483.20(k)(3)(i) and imposed a $3,550 per-day CMP for March 31-April 1, 2008 and a $100 per-day CMP for April 2-3, 2008.[1]

[1] On page 13 of his decision, the ALJ incorrectly identifies the amount of the per-day CMP for March 31 -April 1 as $3,350 and $3,050; however, the amount is correctly identified on page 1 as $3,550.

Meridian filed a request for a hearing before an ALJ. With its pre-hearing brief and proposed exhibits, CMS filed a motion for summary affirmance. Meridian filed a pre-hearing brief and proposed exhibits in opposition to CMS's motion.[2] The ALJ then scheduled a hearing, but, after receiving CMS's reply in support of its motion for summary affirmance, issued a decision granting CMS's motion.

The ALJ upheld the finding of noncompliance under section 483.20(k)(3)(i) and the $100 per-day CMP that was imposed based on this finding. See ALJ Decision at 3 (Finding of Fact and Conclusion of law (FFCL) 1), 13 (FFCL 4). As the ALJ Decision notes, Meridian did not dispute that finding or CMP in its pre-hearing brief.

The ALJ also upheld the finding of noncompliance under section 483.25(h). CMS's allegations of noncompliance with this regulation centered around the care that Meridian provided to Resident B. The ALJ stated that he "rel[ied] on the undisputed material facts as averred by the parties" and that "the only reasonable conclusion that one can draw from the undisputed material facts" is that Meridian "failed to discharge its obligations to protect Resident B from accident hazards and to provide this resident with adequate supervision." ALJ Decision at 2, 6. The ALJ Decision identifies the following as undisputed facts:[3]

- Resident B suffered from dysphagia (difficulty in swallowing).
- A swallowing assessment of Resident B at a hospital on February 11, 2008 found that aspiration (inhaling food or liquid into the lungs) was "certain to occur" even if the resident was given a special diet including pureed foods and thickened liquids.[4]

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[2] The parties' proposed exhibits included testimony in the form of declarations or affidavits to which we refer later. The ALJ stated that he was receiving the proposed exhibits into the record of this case. See ALJ Decision at 2.

[3] As we discuss later, Meridian actually disputes some of these facts in certain respects.

[4] We supply the date of the swallowing assessment, as well as other dates not specified in the ALJ Decision, from the

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- Aspiration in the case of an individual such as Resident B could cause choking, pneumonia, or even death.
- On February 15, 2008, Resident B had surgery to implant a PEG tube, a device which enabled her to be nourished and hydrated without orally consuming food or liquid.[5]
- Resident B was discharged from the hospital on February 22, 2008 with a physician's order that she not consume anything by mouth (NPO order).
- Upon Resident B's readmission to Meridian's facility on February 22, 2008, facility staff assessed Resident B's decisionmaking ability as being "severely impaired" and noted that she was NPO.
- The care plans prepared by facility staff on February 22 and 25, 2008 focused on attempting to give verbal cues to Resident B and to redirect her when she was observed attempting to consume food and drink.[6]
- On February 22, 2008, the facility placed Resident B with a roommate who had no dietary restrictions and received all her meals and snacks while in bed.
- Beginning on February 22, 2008 until March 10, 2008, Resident B was observed on many occasions to be seeking or consuming food and drink, including food and drink which had been supplied to her roommate.
- The facility revised Resident B's care plan on March 8, 2008 to require that there be safety checks of the resident at 15-minute intervals.
- Resident B's roommate advised facility staff on March 10, 2008 that she was providing Resident B with food and drink.
- On March 11, 2008, facility staff found Resident B lying non-responsive on the floor of her bathroom, and she was later pronounced dead.

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record in order to clarify the sequence of events.

[5] "PEG" stands for percutaneous endoscopic gastrostomy. CMS Ex. 19, at 2.

[6] The ALJ Decision gives the date of the care plan only as February 22, but cites to care plans dated February 22 and 25. ALJ Decision at 5. The February 22 care plan (CMS Exhibit 7, at 58) was for aspiration risk. The February 25 care plan (CMS Exhibit 7, at 55) was for resident non-compliance.

ALJ Decision at 4-5.

The ALJ determined that "the undisputed material facts of this case do not support an inference that Petitioner did everything reasonable to protect Resident B." ALJ Decision at 9. Instead, according to the ALJ, these facts--

> show that Petitioner's staff was aware that the resident was at grave risk for causing severe injury to herself, or even death, due to her persistent and determined consumption of food and fluids by mouth. Yet in spite of its recognition of the problem, Petitioner's staff allowed the resident to engage in behaviors that jeopardized the resident's health and life. Interventions that the staff adopted were ineffective and their ineffectiveness became apparent immediately to Petitioner's staff upon their adoption. But, the obvious failure of those interventions failed to provoke the staff to implement additional, more aggressive interventions that might have protected the resident better, and even spared her life.

Id.; see also id. at 9-10 (stating that even if the measures that Meridian implemented to protect Resident B initially seemed to be reasonable, facility staff "very quickly learned that they were ineffective" and should have modified the resident's care plan "to attempt to protect the resident more aggressively"). The ALJ concluded that "[t]he facts adduced by CMS are ample support for a finding that Petitioner's noncompliance with the requirements of 42 C.F.R. § 483.25(h)(1) and (2) placed residents at immediate jeopardy." Id. at 11. The ALJ further concluded that the facts alleged by Meridian were insufficient to show that the immediate jeopardy was abated prior to April 1, 2008. Finally, the ALJ concluded that the $3,550 per-day CMP imposed by CMS was reasonable in amount.

On appeal, Meridian takes exception to the following numbered FFCLs in the ALJ Decision:

2. Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.25(h)(1) and (2).

3. The undisputed material facts establish that CMS's determination of immediate jeopardy was not clearly erroneous.

Meridian Br. at 1-2. As previously noted, Meridian does not take exception to FFCL 1. Nor does Meridian take exception to FFCL 4, in which the ALJ found that CMS's remedy determinations, including the two per-day CMPs and the loss of authority to conduct a nurse aide training and competency program for two years, are reasonable.[7]

Analysis

Meridian argues generally that the ALJ failed to follow the standards for summary judgment and erred in determining that summary judgment was appropriate. According to Meridian, this case is similar to St. Catherine's Care Center of Findlay, Inc., DAB No. 1964 (2005), which the Board remanded for a hearing, stating in part that "summary judgment is particularly unsuited in most cases for resolving issues arising under section 483.25" because "[t]he evidence relevant to resolving these issues about the adequacy of the supervision is seldom clear and consistent enough to make a hearing unnecessary." Meridian Br. at 23-24, quoting St. Catherine's at 13. This case is distinguishable from St. Catherine's, however. As we explain below, Meridian has identified no dispute of material fact regarding its supervision of Resident B or any other matter. Below, we first explain how Meridian's appeal mischaracterizes the ALJ's holdings. We then discuss Meridian's arguments with respect to whether there was a foreseeable risk of harm to Resident B; whether the interventions Meridian had in place to address the risk of harm were adequate; and whether Meridian's noncompliance posed immediate jeopardy.

I. The ALJ did not conclude that Meridian was required to implement particular interventions in order to comply with section 483.25(h)(1) and (2).

Meridian's view of what facts are material is based in part on a mischaracterization of the ALJ's holdings. According to Meridian, the ALJ concluded, erroneously, that in order to satisfy the requirements of section 483.25(h)(1) or section 483.25(h)(2), Meridian was required to provide "continuous one-on-one

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[7] The ALJ Decision states that Meridian "has not specifically challenged the imposition" of the remedy of the loss of authority to conduct a nurse aide training and competency program for two years, "which is required given Petitioner's immediate jeopardy level noncompliance." ALJ Decision at 14.

supervision" of Resident B or to change her assigned roommate. See, e.g., Meridian Br. at 2, 16. Meridian argues that, in reaching this conclusion, the ALJ disregarded Board and court cases holding that the regulation gives facilities "the 'flexibility to choose the methods of supervision' to prevent accidents as long as the methods chosen are consistent with the resident's needs and ability to protect himself/herself from harm." Id. at 16, citing Golden Age Skilled Nursing & Rehabilitation Center, DAB No. 2026, at 11 (2006)), quoting Woodstock Care Ctr. v. Thompson, 363 F.3d at 590. Contrary to Meridian's argument, however, nothing in the ALJ Decision indicates that the ALJ concluded that a particular level of supervision was required. The ALJ stated that "if housing Resident B with a roommate who consumed her food in her bed was the *only* housing arrangement available to Petitioner's staff, then Petitioner has offered no explanation why staff didn't police the room vigilantly to ensure that Resident B was never left alone with her roommate while there was food and beverages available for consumption." Id. at 7 (italics in original). Similarly, the ALJ stated that—

> there clearly were things that Petitioner could have done to protect Resident B which did not constitute restraint or isolation, but which might have given the resident greater protection. For example, Petitioner might have considered changing the resident's roommate to an individual who did not consume meals in her room. Or, the staff could have kept Resident B out of her room while her roommate ate, and could have ensured that all leftovers were removed before Resident B returned. The staff could have stepped up its observation of Resident B.

Id. at 11; see also id. at 10. Thus, consistent with the language quoted by Meridian, the ALJ simply found that, even accepting Meridian's assertion that it was not possible to eliminate the accident hazard posed by the presence of Resident B's roommate's meals and snacks by changing her room, there were several different actions Meridian could have taken, but did not, to protect Resident B from this accident hazard, as well as from the accident hazard posed by the availability of food and drink from other sources.

II. The ALJ did not err in concluding that there was a foreseeable risk of harm to Resident B from aspirating food or drink.

Meridian acknowledges that sections 483.25(h)(1) and (2) come into play when there are conditions in a facility that pose a known or foreseeable risk of accidental harm. Meridian takes the position, however, that it was not required to take any action to protect Resident B from consuming food or drink because it was "not foreseeable at the time of her death that even if Resident B obtained food from [her roommate] or any other source . . . [,] Resident B would be in danger of aspirating." Meridian Br. at 18. Meridian relies primarily on the undisputed fact that Resident B did not experience an episode of aspiration or choking on food or drink after she was readmitted to Meridian following surgery to implant the PEG tube, although there were several occasions on which she consumed the food or drink she managed to obtain.

Meridian's view that the foreseeability of Resident B's accidentally aspirating food or drink could be determined by the fact that Resident B never experienced such an accident stands the concept of foreseeability on its head. As the ALJ correctly found, Meridian was required to protect Resident B from the risks that were identified when she was readmitted to the facility. It was clear when Resident B was readmitted to Meridian on February 22 that she was at risk of aspirating food or drink consumed by mouth. At that point, Resident B had just had a PEG tube implanted and an NPO order had been given. Meridian does not dispute that "[t]he whole purpose of inserting a PEG tube into Resident B, and precluding any nutrition or hydration by mouth, was the risk of aspiration posed by consuming food and liquids by mouth." ALJ Decision at 8. Thus, as the ALJ Decision states, "the *risk of aspiration*" was medically established[.]" Id. (italics in original). As the ALJ Decision also indicates, Meridian itself recognized that risk when it noted in its assessment of Resident B and in the care plans it created for her that she had a doctor's NPO order. Id. at 8.

According to Meridian, however, in determining that the risk of aspiration was foreseeable, the ALJ relied on the statement in the swallowing assessment, performed by the hospital speech therapist before the PEG tube was implanted, that aspiration was "certain to occur" even if the resident was fed a pureed diet and thickened liquids. Meridian Br. at 10-11, quoting CMS Ex. 7, at 8 (February 11, 2008 speech pathology progress note for Resident B). Meridian argues that the ALJ improperly weighed the swallowing assessment against evidence that the resident safely consumed food and drink, instead of viewing the conflicting evidence in the light most

favorable to the facility. Meridian also asserts that the swallowing assessment is not entitled to any weight because, as Meridian reads the assessment, it was based on the resident's reported inability to follow verbal cues, as to which Meridian claims there is a genuine dispute.[8] There is no indication in the ALJ Decision that the ALJ relied on the swallowing assessment; instead, as just discussed, the ALJ properly found that the risk of aspiration was established by the NPO order. It is immaterial whether the PEG tube was implanted, and the NPO order given, based on a flawed swallowing assessment. Even if facility staff were aware of the swallowing assessment and believed that it was flawed (and Meridian points to no evidence of that), it would not have been proper for them to ignore the NPO order without consulting a physician.

Meridian also appears to argue that there was no foreseeable risk of aspiration because, "[e]ven though the hospital had recommended prior to Resident B's readmission to the facility in February that she receive all of her nutrition by tube to avoid the risk of aspiration, the hospital staff questioned whether that recommendation was still applicable the day before Resident B died after she was fed two meals while at the hospital to be evaluated for a delusion that she had recently been raped." Meridian Br. at 10. This argument has no merit. Meridian's argument misrepresents that, after the PEG tube was implanted, Resident B's physicians merely recommended that she receive all of her nutrition via the tube. As Meridian acknowledges elsewhere, however, when Resident B was readmitted to the facility on February 22, she had an NPO order, not merely a recommendation for NPO status. See Meridian Br. at 22 (referring to the "attending physician's order that [Resident B] have nothing by mouth and that she receive all nutrition through a feeding tube").[9] Given that there was an NPO order, it is immaterial that the hospital subsequently raised a question about whether the order was necessary. As the ALJ correctly noted in response to a similar argument by Meridian below, not only did the hospital merely make

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[8] We discuss this dispute later in the decision.

[9] The hospital "Patient Visit/Discharge Summary" for Resident B dated February 22, 2008 contains an entry under "Discharge Diet" that "Pt is NPO . . . Pt with aspiration" and a line at the bottom identifying the "ordering Physician." CMS Ex. 7, at 13. Meridian does not argue that this was not an NPO order.

"[a] suggestion that the resident should be reassessed," but no such reassessment was subsequently performed. ALJ Decision at 8-9. We note, moreover, that the hospital's suggestion was not made until March 10, the day before Resident B died. Thus, this suggestion could have no bearing on whether aspiration was foreseeable prior to that date.

III. The ALJ did not err in concluding that Meridian did not adequately protect Resident B from the foreseeable risk of harm from aspiration.

Meridian also takes the position that, even if the risk of aspiration was foreseeable, the interventions it put in place were adequate to protect Resident B. According to Meridian, the ALJ based his conclusion that its interventions were inadequate on improper inferences or otherwise erroneous findings of fact. We discuss Meridian's specific arguments in turn below.

A. Meridian's arguments predicated on the lack of an accident or actual harm have no merit.

Meridian argues that the fact that Resident B never aspirated any of the food or drink she managed to consume after being readmitted to the facility "support[s] an inference that staff intervened successfully[.]" Meridian Reply Br. at 2; see also Meridian Br. at 16. Meridian's argument has no merit. The absence of any accident, i.e., aspiration of food or drink, much less any accident that resulted in actual harm, i.e., aspiration that resulted in choking, pneumonia, or even death, no more proves that Meridian adequately supervised Resident B than it proves that there was no foreseeable risk of harm. Under the definitions of "substantial compliance" and "noncompliance" in section 488.301, a facility may fail to comply substantially when its acts or omissions cause only a potential for more than minimal harm. Moreover, as the Board stated in Woodstock Care Center, the emphasis in section 483.25(h)(2) "is on ensuring the adequacy of supervision to meet the specified goal (preventing accidents)."[10] Thus, "[o]ccurrences that do not themselves constitute accidents may well be evidence that the supervision provided was not adequate to prevent accidents." DAB No. 1726, at 35. Accordingly, the ALJ correctly concluded that the fact that

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[10] The same is true of section 483.25(h)(1) where it is not possible to remove an accident hazard.

Resident B managed to consume some food and drink that she could foreseeably have aspirated, which in turn could have resulted in serious harm, was itself evidence that facility staff was not providing adequate supervision to prevent such an accident.

Meridian also argues that the affidavit of Resident B's attending physician, together with the evidence regarding Meridian's interventions, "presents a genuine factual dispute" about the adequacy of Meridian's supervision of Resident B. Meridian Br. at 25. Meridian points to the physician's statement that "[i]t is my opinion, to a reasonable degree of medical certainty, that the nursing staff of Meridian Nursing and Rehabilitation Center implemented appropriate interventions to address the foreseeable risk of [Resident B's] noncompliance with her dietary restrictions."[11] P. Ex. 41, at 1, ¶ 6 (cited in Meridian Br. at 25). The affidavit goes on to indicate, however, that this opinion was based on clinical records indicating that Resident B "did not have any episodes of aspiration or choking during any of the times when she was non-compliant with her dietary restrictions while she resided at Meridian." P. Ex. 41, at 1, ¶ 8. As just discussed, a showing of actual harm is not required to support a finding of noncompliance. Accordingly, we conclude that the physician's opinion does not create a dispute of material fact.

For the same reason, we reject Meridian's argument that it was prejudiced because the ALJ stated only that Resident B's death certificate listed the cause of death as aspiration pneumonia and ignored the fact that the death certificate was subsequently revised to identify schizophrenia and chronic obstructive lung disease as the causes of death. <u>See</u> Meridian Br. at 29-30, citing P. Exs. 29 and 30. Since there was no requirement for a showing of actual harm, the ALJ correctly stated that it was unnecessary that he determine that "failure to supervise and protect Resident B adequately contributed to her death from choking or aspiration." ALJ Decision at 11, n.4. Meridian nevertheless argues that "[t]he ALJ's statement that determining the cause of death was

[11] The attending physician also opined that Resident B "did not require supervision by a sitter[.]" P. Ex. 41 at 1. Meridian argues that the ALJ improperly weighed this opinion and a contrary opinion in the surveyor's declaration, and "impermissibly drew an inference favorable to CMS that one-on-one supervision was medically necessary." Meridian Br. at 16. As discussed earlier, however, the ALJ did not conclude that one-on-one supervision was required.

'unnecessary' to his ruling should be disregarded because CMS makes it an essential element of its allegations, and therefore material[.]" Meridian Br. at 31, citing Lebanon Nursing and Rehabilitation Center. Lebanon does not provide any support for Meridian's argument, however. In that case, CMS's motion for summary judgment treated as material certain facts disputed by the facility that the ALJ determined were not relevant or material. In its decision remanding the case for a hearing, the Board concluded that the disputed facts were material since the opinions of CMS's experts that the facility was not in substantial compliance with section 483.25(h)(2) were based on those facts. Nothing in that decision states that a fact is material simply because CMS alleges that this is so.

B. The precise number of times facility staff observed Resident B consuming food or drink is immaterial.

Meridian argues that the ALJ's conclusion that its interventions were inadequate is based in part on erroneous inferences about the number of occasions on which Resident B obtained food and drink from her roommate as well as from other sources. The ALJ Decision states that there were "many occasions" following Resident B's readmission to Meridian after having the PEG tube implanted "on which the resident was observed to be seeking, and in some instances consuming, food and fluids." ALJ Decision at 5. The decision further states that "[o]n several occasions Petitioner's staff observed Resident B consuming fluids and food which had been supplied to her roommate." Id. Meridian asserts that the evidence it presented showed that Resident B was observed eating food obtained from her roommate on only one occasion and drinking water obtained from her roommate on only three occasions. Meridian Reply Br. at 3. Meridian suggests that the ALJ improperly inferred that Resident B was consuming her roommate's food and drink more frequently based on a nurses note dated March 10, which reported that Resident B was observed consuming her roommate's food and drink and that her roommate admitted to providing Resident B with food and drink.[12] See Meridian Br. at

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[12] Meridian elsewhere does not include the eating and drinking documented in the March 10 nurses notes in its count of the number of times Meridian consumed her roommate's food or drink. See Meridian Br. at 13, 15. Meridian subsequently argues that these notes are unreliable because both Resident B's roommate and the CNA to whom the roommate made the purported admission (who was not the same person who wrote the nurses

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22; Meridian Reply Br. at 3. Meridian also asserts that "[t]here were only five documented instances of Resident B actually obtaining food while at the facility," and that the nurses notes for only two of those instances state that Resident B was observed eating the food she obtained.[13] Meridian Br. at 13. Thus, according to Meridian, it "is entitled to an inference that staff intervened on these three occasions before Resident B was able to consume the food she obtained." Id. at 14. Meridian also asserts that both of the occasions on which Resident B consumed food were within the first four days Resident B was at the facility, showing that "the care plan interventions and 15 minute checks that were instituted thereafter prevented Resident B from consuming any of the food she . . . obtained . . . during the remainder of her stay at the facility." Meridian Br. at 17-18. Meridian's count of the number of times Resident B consumed food omits, without any explanation, a March 9 incident described in the ALJ Decision and documented in the nurses notes for Resident B. See ALJ Decision at 5, citing CMS Ex. 7, at 38 (stating "In Dining room during meals eating off Res trays of food thats left.").[14]

Even assuming Resident B consumed food and drink only on the occasions to which Meridian refers, it makes no difference here.

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notes) "both demonstrated at the time of the survey that they are poor historians of recent events." Id. at 19. However, for the reasons discussed in the text below, it is immaterial whether Resident B was, in fact, observed eating her roommate's food on this (or any other) occasion.

[13] One of these two instances, occurring on February 23, is described in Meridian's Exhibit 46 only as "[t]aking food from another resident's tray." Consistent with Meridian's brief, however, the nurses notes indicate that Resident B actually consumed the food she took. See CMS Ex. 7, at 26.

[14] Notwithstanding Meridian's attempt to downplay the number of times Resident B consumed food or drink, Meridian asserts that "[t]he fact that each of these instances was documented by Petitioner's staff shows that they were paying attention to her whereabouts and activities at all times." Meridian Br. at 15. However, Meridian does not explain why, if facility staff were providing this level of supervision, there were occasions on which they were unable to stop Resident B from consuming food or drink, nor does it point to any other evidence of this level of supervision.

As the Board has previously stated, "[e]ven one isolated instance of non-compliance having a potential for more than minimal harm may be the basis for finding that a facility is not substantially complying with the applicable participation requirement." Ridge Terrace, DAB No. 1834, at 7 (2002); see also Lake City Extended Care Center, DAB No. 1658, at 14 (1998) (ALJ's conclusion that facility was in substantial compliance because there was only an isolated episode of failure to provide care in accordance with professionally recognized standards was "contrary to the regulatory scheme, which assumes that any deficiency that has a potential for more than minimal harm is necessarily indicative of problems in the facility which need to be corrected."). Moreover, there is no dispute that the number of occasions on which Resident B was observed consuming food or drink was far from isolated. Meridian admits that, during the 18 days that Resident B was at the facility after having the PEG tube implanted, Resident B was observed consuming drinks intended for her roommate on two occasions and drinks intended for others on 11 occasions, as well as eating food intended for others on two occasions. See Meridian Br. at 13-15. It is not significant that most of these occasions involved drinks rather than food since Meridian does not assert that there is any reason to distinguish between Resident B's consumption of the two (such as a greater likelihood of aspirating food than drink or more dire consequences of aspirating food than drink). For the same reason, it is irrelevant that the two occasions on which Meridian admits Resident B consumed food were within four days of her readmission, as there is no dispute that Resident B consumed drinks on multiple occasions after that period, including the day she died.

C. The precise date on which Meridian implemented 15-minute safety checks is immaterial.

Meridian also argues that the ALJ's finding that 15-minute safety checks were implemented (and Resident B's care plan modified) on March 8 was not warranted since there is conflicting evidence in the record identifying February 28 as the relevant date. See Meridian Br. at 26-29. The ALJ relied on the March 8 date in finding that Meridian knew "[f]or a period of more than two weeks after it implemented the February 22 care plan . . . that efforts to cue and redirect the resident" were unsuccessful in preventing her "from seeking and obtaining food and fluid which she consumed orally," yet failed to modify the care plan. ALJ Decision at 10. The precise date when Meridian began its more frequent checks is not material here, however. Assuming Meridian instituted 15-minute safety checks on the earlier date, five days rather than two weeks elapsed before Meridian modified its care plan for

Resident B to include 15-minute safety checks. However, it still follows that Meridian waited too long to modify its February 22 care plan since Meridian not only admits that Resident B was observed drinking from a water fountain and the bathroom sink on February 22 but also that she was observed eating sandwiches from another resident's tray on February 23. Further, Meridian admits that, on March 2, subsequent to the date it claims it instituted the 15-minute safety checks and six days before the ALJ found it instituted these checks, Resident B was observed drinking from a water fountain, drinking water in bathrooms, and taking food off tables in the dining room (see Meridian Exhibit 46). Thus, Meridian had even more notice than the ALJ found that 15-minute safety checks were not working, yet still failed to modify its care plan prior to her death.[15]

D. Meridian's assessment of Resident B's cognitive impairment is consistent with the ALJ's conclusion that Meridian's initial care plans for Resident B were inadequate.

Meridian argues further that the ALJ concluded that the interventions in Meridian's initial care plans for Resident B were inadequate based on an erroneous finding that the resident's cognitive impairment rendered verbal cues and redirection ineffective. Meridian Reply Br. at 1. The ALJ Decision notes that facility "staff had assessed the resident's decision making ability as being 'severely impaired,'" and observes that "[d]espite the resident's severe cognitive and psychiatric problems the plan initially focused on attempting to give verbal cues to the resident and to redirect her when she was observed attempting to consume food and fluids." ALJ Decision at 5.

[15] According to Meridian, the surveyor omitted from the SOD information regarding the earlier implementation of 15-minute safety checks. Meridian argues that her omission of "this and other facts" "raises a genuine issue regarding the accuracy and reliability of the SOD itself" and therefore the ALJ should have permitted Meridian to cross-examine the surveyor. Meridian Br. at 28. As the ALJ correctly stated, however, "the possibility that the surveyor may have misinterpreted some information or erred in some respect is irrelevant unless that undercuts a material fact necessary to finding Petitioner to be noncompliant." ALJ Decision at 9. Meridian has not pointed to any omission or error by the surveyor that undercuts a material fact.

According to Meridian, the ALJ disregarded the fact that in the section on "decision-making ability" in Meridian's nurse's assessment of Resident B, the handwritten notation "diet compliance" appears next to the box checked "severely impaired." Meridian Reply Br. at 2, citing CMS Ex. 7, at 23. Meridian argues that this notation "indicates that for all other purposes her decision-making ability was not severely impaired."[16] Id. Thus, according to Meridian, there was no basis for the ALJ to infer that Resident B "did not have the mental capacity to understand verbal cues and redirection." Id. The notation "diet compliance" does not necessarily support the inference that Resident B's decision-making ability was not impaired for other purposes. However, even assuming for summary judgment purposes that it does, the ALJ's point is that, based on its assessment of Resident B as having severely impaired decision-making with respect to diet compliance, Meridian should have known better than to adopt a care plan that relied on the resident's acting in a rational manner when reminded not to consume food or drink by mouth. That Resident B's decision-making may not have been impaired with respect to matters other than her compliance with the NPO order is thus immaterial. In any event, regardless of the reason Resident B was noncompliant with the NPO order, Meridian had a responsibility to change its care plan once it became apparent that the planned interventions were not working.

IV. The ALJ did not err in concluding that CMS's determination that Meridian's noncompliance posed immediate jeopardy was not clearly erroneous.

The ALJ concluded that the undisputed facts supported a finding that Meridian's noncompliance with section 483.25(h)(1) and (2)

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[16] Meridian notes elsewhere that on February 22, its nursing staff found that Resident B "was not confused, was alert and was 'not disoriented'." Meridian Br. at 7, citing CMS Ex. 7, at 17-18. However, Meridian does not argue that this finding conflicts with its assessment of Resident B's decisionmaking as severely impaired with respect to the NPO order. Meridian notes further that a March 6 MDS (Minimum Data Set) assessment stated that Resident B "[u]nderstands what is said when she wants to," and "[i]s able to verbalize understanding of the need for the PEG tube." Id., citing CMS Ex. 7, at 3 (surveyor worksheet quoting MDS). These statements are irrelevant, however, since they were made after the date Meridian says it changed its care plan for the last time to provide for 15-minute safety checks.

placed residents at immediate jeopardy. The ALJ found specifically that immediate jeopardy was established because, by not preventing a resident who had been diagnosed by her physicians as "at a high likelihood for life threatening consequences if she consumed food and liquids by mouth . . . from doing so," Meridian "put the resident in the precise jeopardy that her physicians feared and warned against." ALJ Decision at 11. The ALJ also found that immediate jeopardy was "established by the systemic failure of Petitioner's staff to recognize that the measures that they had adopted to protect Resident B were utterly ineffective." Id.

Meridian challenges the ALJ's conclusion upholding CMS's determination of immediate jeopardy on several grounds. According to Meridian, the ALJ made the finding of "systemic failure" based on the surveyor's opinion that "Meridian should have placed Resident B in a room where there was no tray service . . . [or instituted] continuous one-on-one staff supervision. . . ." Meridian Br. at 33, quoting CMS pre-hearing brief at 19, citing CMS Ex. 19, ¶ 22 (declaration of surveyor). Meridian argues that since it had offered evidence disputing the facts underlying the surveyor's opinion, the ALJ could not properly rely on that opinion. See Meridian Br. at 33 (citing Innsbruck Healthcare Center, DAB No. 1948, at 7 (2004) ("[o]n a motion for summary judgment, the ALJ may not rely on the testimonial opinion evidence of the surveyor as a basis to support an immediate jeopardy conclusion and yet ignore proffered evidence disputing the facts on which that opinion is based."). Meridian's argument is based on a mistaken premise. As discussed above, the ALJ did not find that Meridian should have taken any particular actions in order to comply with section 483.25(h). Thus, it is irrelevant whether Meridian offered evidence disputing the surveyor's opinion.

Meridian also claims that the determination of immediate jeopardy is contrary to the guidance for surveyors in Appendix Q of CMS's State Operations Manual. Meridian quotes the following language from the Appendix Q Guidelines for Determining Immediate Jeopardy:

> After determining that the harm meets the definition of Immediate Jeopardy, consider the following points regarding entity compliance:
>
> - The entity either created a situation or allowed a situation to continue which resulted in serious harm or a potential for serious harm, injury, impairment or death to individuals.

Meridian Br. at 34, quoting SOM, App. Q (available at http://cms.hhs.gov/manuals/Downloads/som107ap_q_immedjeopardy.pdf). Meridian argues that, unlike the situation described in Appendix Q, "Petitioner's staff did not create or exacerbate Resident B's noncompliance with dietary restrictions nor did they passively allow Resident B to remain noncompliant." Meridian Br. at 34. Instead, Meridian argues, "each episode of noncompliance was followed by a measured response, usually involving contact with the resident's physician." Id.

Although the Appendix Q language on which Meridian relies appears in the guidelines on immediate jeopardy, its focus is on whether the actual or potential serious harm that is necessary to find immediate jeopardy resulted from noncompliance with a participation requirement. Thus, Meridian's argument is essentially that it complied with section 483.25(h)(1) and (2) by taking some action each time Resident B consumed food or drink. As discussed above, however, under section 483.25(h)(2), Meridian was required to take all reasonable steps to prevent Resident B from consuming food and drink. Accordingly, even if, as Meridian argues, it was not passive in the face of Resident B's failure to follow the NPO order, that is not sufficient to establish either its compliance with this regulation or an absence of immediate jeopardy. Moreover, contrary to what Meridian argues, it was responsible for exacerbating, if not creating, an accident hazard by placing Resident B in a room with a resident who was served her meals and snacks in bed and allowing Resident B to remain there without adequate supervision, in violation of section 483.25(h)(1).

Finally, Meridian argues that even if immediate jeopardy existed when Resident B died on March 11, there was no immediate jeopardy on March 31 - April 1, the dates for which the immediate jeopardy level CMP was imposed. According to Meridian, "well before the survey" began on March 31, its staff had already taken corrective action "to ensure that other residents with dietary restrictions continued to receive adequate supervision." Meridian Br. at 34 (listing corrective action taken). In response to the same argument below, the ALJ stated that, even assuming that Meridian took the corrective action to which it referred, the facts offered by Meridian fail to show that Meridian implemented "*all* of the corrective actions that its own staff determined to be necessary. Indeed, Petitioner admitted that it did not complete all necessary corrective actions prior to April 1. CMS Ex. 16, at 2, 5." ALJ Decision at 12-13 (italics in original). The exhibit cited by the ALJ is identified in CMS's list of proposed exhibits as Meridian's

plan of correction for abating immediate jeopardy noncompliance with section 483.25(h) and shows the latest "[d]ate of compliance" as April 1. Meridian does not deny that it did not complete all of the actions in its plan of correction until April 1. We therefore find no error in the ALJ's determination upholding the immediate jeopardy level CMP imposed for March 31 – April 1. As the Board has previously stated, even when a plan of correction has been accepted by CMS, the burden is on the facility to show that it timely completed the implementation of that plan, and "[i]t is not enough that some steps have been taken, but rather the facility must prove that the goal has been accomplished." Lake Mary Health Care, DAB No. 2081, at 29 (2007); see also Cal Turner Extended Care Pavilion, DAB No. 2030, at 19 (2006) (rejecting facility's "claim that steps short of those which the facility itself identified as necessary for it to correct the problems found (and to achieve substantial compliance) should nevertheless be accepted as adequate to require lifting the remedies imposed.").

Conclusion

For the reasons discussed above, we affirm the ALJ Decision granting summary judgment in favor of CMS and sustaining CMS's imposition of CMPs on Meridian based on its failure to substantially comply with the requirements of section 483.25(h)(1) and (2). We also affirm the ALJ's finding that the CMP amounts were reasonable.

/s/
Stephen M. Godek

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan
Presiding Board Member