Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Resurrection Nursing and Rehabilitation Center
Docket No. A-11-44
Decision No. 2392
June 27, 2011

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Resurrection Nursing and Rehabilitation Center (Resurrection) appealed a decision by Administrative Law Judge (ALJ) Steven T. Kessel. *Rehabilitation Nursing and Rehabilitation Center*, CR2292 (2010) (ALJ Decision). The ALJ sustained the determination by the Centers for Medicare & Medicaid Services (CMS) to impose on Resurrection a civil money penalty (CMP) of $300 per day for the period March 31, 2009 through April 21, 2009. For the reasons stated below, we uphold the ALJ Decision.

Background

This case involves a relatively narrow dispute. Resurrection challenges the ALJ's conclusion that it failed to comply substantially with 42 C.F.R. § 483.25(h)(2), one of the requirements for participation by long-term care facilities such as Resurrection in the Medicare program. Under section 483.25(h)(2), a facility is required to "ensure" that each resident receives "adequate supervision and assistance devices to prevent accidents." The following facts are undisputed. An 81-year old resident (referred to as Resident # 1 or R1), whom Resurrection had evaluated as presenting a high risk for falls, was attempting to get out of bed and go to the bathroom by himself on February 14, 2009, and fell, injuring himself. Resident #1 had had surgery for a fractured hip, was on oxygen, and was taking Coumadin (which increases the risk of bleeding from a fall). Resident #1 was transferred to Resurrection from a hospital rehabilitation center on February 13, 2009, the day before he fell, and Resurrection received from the center two forms with information about the resident and recommendations for his care.

The ALJ found that Resurrection failed to take all reasonable measures to protect Resident # 1 from falling. Specifically, the ALJ found that, after Resident # 1 was admitted to Resurrection, its staff "failed to assess the resident to determine whether or not he needed the assistance devices that had been recommended by the hospital's rehabilitation center and failed to make a definitive determination about whether the resident might have memory problems that required special assistance." ALJ Decision at 4. The ALJ rejected the arguments by Resurrection that it could not have reasonably

foreseen that Resident # 1 would attempt to get out of bed without assistance from staff and that Resurrection had adequately addressed the fall risk by keeping a call light within reach of the resident while he was in bed. *Id.* at 5.

On appeal, Resurrection does not challenge the legal standard applied by the ALJ, but asserts that "[t]aking the record and the evidence as a whole, the ALJ's findings are not supported by substantial evidence." Request for Review (RR) at 9. According to Resurrection, it introduced "extensive, uncontroverted evidence that R1 suffered no cognitive impairment and that staff had comprehensively assessed R1 and his needs, including the need for supervision," determining that Resident #1 was "alert and oriented and not confused." *Id.* "Given R1's lack of cognitive impairment and his demonstrated ability to use a call light," Resurrection contends, "it was reasonable for Resurrection to rely on providing R1 with a call light to address his risk for falls." *Id.* Resurrection asserts that the ALJ improperly dismissed or otherwise ignored the evidence it presented, instead placing a disproportionate amount of weight on an "ambiguous statement on a hospital Transfer Form and non-binding recommendations made by hospital staff in the Discharge Form" – forms that were completed "before R1 was even admitted" to Resurrection. *Id.* at 9-11.

We conclude that substantial evidence in the record supports the ALJ's conclusion that Resurrection was not in substantial compliance with section 483.25(h)(2), for the reasons stated below.

Analysis

As the ALJ noted, the preprinted Interim Care Plan that Resurrection put in place for Resident # 1 identified risk of falls as a problem, but had a blank on the line for "Use of assistive device" to address that fall risk. P. Ex. 22, at 2. There is no marking to indicate that staff made any determination regarding whether assistance devices were needed to protect the resident against falls.

The Discharge Form from the rehabilitation center, signed by both a physical therapist (PT) and an occupational therapist (OT), stated that "the following levels of assistance are required," identifying the level for "Transfers" as "[minimal assistance] to get in and out of bed, and transfer to chair with Rolling Walker" and the level for "Walking" as "[minimal assistance] to walk with R.W. for household/community distances." P. Ex. 20. After "Recommended Equipment" for "Toilet Transfer," the form has a circle around the phrase "commode chair." *Id.* We also note that the Nursing Admission Assessment form for Resident # 1 has a check in the box for "Yes" after "Ambulates with Assistance," and the word "Walker" is entered after "Device" in the same section of the form. P. Ex. 6.

Resurrection argues that it was not required to adopt recommendations from the rehabilitation center. Tr. at 53. Section 483.25(h)(2), however, required Resurrection to ensure it provided Resident # 1 with supervision and assistance devices adequate to address his high risk of falls. Thus, Resurrection could not reasonably just ignore the PT/OT recommendations, especially in the period before it had completed its own independent assessment of the resident's functional capacity. Yet, Resurrection presented no evidence that shows that it even considered those recommendations when implementing the Interim Care Plan. Resurrection suggests that it determined to provide a wheelchair instead of a rolling walker to assist Resident # 1, and facility staff were using a wheelchair for him, but the care plan also fails to mention a wheelchair or plan for its use. P. Ex. 22; P. Ex. 29 ¶ 5.

While the registered nurse (RN) who admitted Resident #1 to the facility averred that the Interim Care Plan adequately addressed his needs, she also attested that the "Care Plan allowed for use of an assistive device if needed" which suggests that she recognized that he might have such a need. P. Ex. 25 ¶ 14. The fact that he had a wheelchair for ambulating also suggests that the facility had not determined that staff assistance alone would be sufficient for that purpose. The plan did not, however, inform staff about what assistive devices might be needed or for what purpose. Moreover, while the RN's declaration expresses her opinion that the "call light was an adequate safeguard to address R1's risk for falls," she does not claim to have considered the PT/OT recommendations before putting the Interim Care Plan in place. Finally, even assuming the resident could use the call light to summon staff to assist him, he would still be at risk for falls if he needed assistive devices as well as assistance from staff when transferring out of bed, ambulating, or on the toilet, as the Discharge Form indicated. Yet, the RN does not claim that she considered at the time she developed the care plan whether staff assistance alone would be sufficient to prevent accidents in all foreseeable circumstances. Thus, the ALJ could reasonably characterize her testimony as a "post hoc rationalization," as he did. ALJ Decision at 5.

Resurrection also points to evidence from the rehabilitation center's OT that, in recommending a commode chair for Resident #1, she did not mean that the commode chair should be placed by his bedside, as CMS alleged, but that she wanted the chair to be used in the resident's bathroom to assist him in positioning himself on the toilet. P. Ex. 32 ¶ 7. As the ALJ pointed out, however, Resurrection's staff did not know this at the time Resident # 1 was admitted to the facility, did not consult with the rehabilitation center staff at that time, and, in any event, the Interim Care Plan did not provide for use of a commode chair at all. ALJ Decision at 7.

Perhaps understanding the weakness of its arguments regarding the assistance devices, Resurrection focuses on appeal on the question of Resident 1's mental/cognitive status. Resurrection asserts that the Patient Information and Transfer Form (CMS Exhibit 26) from the rehabilitation center was ambiguous on this issue because the form noted that

the resident was "Alert. Forgetful." – which Resurrection describes as a "vague, contradictory statement." RR at 11. Resurrection also relies on the fact that the form indicated that the resident had no "Major Diagnosis" of a cognitive impairment and that he had full communication abilities and appropriate behavior. *Id.* CMS presented evidence, however, that an elderly resident who is alert can also be forgetful. CMS Ex. 34 ¶ 19; Tr. at 16, 44. Resurrection presented no evidence that the terms are mutually exclusive, and the form not only noted both terms in a space for "Additional Pertinent Information" but also showed checks in boxes for both "Alert" and "Forgetful" under "Mental Status." CMS Ex. 26.

Resurrection suggests that the statement that the resident was forgetful is unreliable because the ALJ was provided no evidence of how that statement came to be. RR at 11. The Transfer Form was signed by an RN, however. CMS Ex. 26, at 2. In light of the form's purpose to provide pertinent information to the transferee facility, the ALJ reasonably concluded that it was based on the rehabilitation center's observations of the resident during the over two-week period he was receiving rehabilitation there – more time than Resurrection had had to observe the resident. Resurrection did not present any testimony from the RN or other rehabilitation center staff that undercuts the reliability of the statement, even though the rehabilitation center, like Resurrection, was part of the Resurrection Health Care system. CMS Ex. 26, at 1.

Resurrection also asserts that there is no evidence that the resident was noted to be "confused" while at the facility. RR at 11. The Transfer Form, however, distinguishes the status of being "Forgetful" from the status of being "Confused," and, again, Resurrection presented no evidence the terms are mutually exclusive. CMS Ex. 26, at 1. CMS presented evidence, moreover, that a certified nurse assistant (CNA) who attended Resident # 1 at the facility told the surveyor that the resident was forgetful. CMS Ex. 29, at 16. In her declaration of August 24, 2010, this CNA averred that the resident never demonstrated "any cognitive or behavioral deficits such as confusion, agitation, or forgetfulness." P. Ex. 30 ¶ 12. She did not, however, deny telling the surveyor she found him to be forgetful. *Id.* The ALJ could reasonably give greater weight to her earlier statement.

In any event, the ALJ did not definitively find that Resident # 1 was, in fact, forgetful, but only that Resurrection could not reasonably rely on the call light as sufficient **alone** to address the resident's high risk of falls when he was in bed, without greater assurance than it had that he did not have memory problems. Resurrection asserts that the ALJ ignored the evidence it presented providing such assurance, "which included 11 separate assessments of R1 showing that he was alert and oriented and/or had no cognitive impairment (Petitioner's Ex. 1,2,3,4,5,6,7,11,18,19 and 23) and the uncontroverted testimony of 5 staff and R1's attending physician, who all observed R1 during the time in question and found that he exhibited no signs of confusion (Petitioner's Ex. 25, 26, 27, 29, 30, 31)." RR at 11. The ALJ analyzed the key testimony regarding the resident's

cognitive status and found it unpersuasive, concluding that, given Resurrection's choice to rely on a call light in lieu of any other assistance device—

> it was incumbent on the staff to rule out any possibility that the resident might not remember how or whether to use the call light if he needed assistance. In view of the resident's history of forgetfulness at the rehabilitation center, that meant that the staff needed to test the resident carefully and systematically to assure that he could understand how to use the call light. It meant also that the staff should have resolved any doubts that might exist about the resident's memory, even if that meant consulting with the staff at the rehabilitation center. They failed to take these measures.

ALJ Decision at 5-6.

On appeal, Resurrection cites evidence that two staff members did instruct Resident # 1 on the call light, that he had demonstrated to each staff member that he understood how to use it, and that he had, in fact, used it during the less than two days he was in the facility. RR at 5. The ALJ perhaps too readily dismissed this evidence and evidence regarding assessments of Resident # 1's cognitive status by facility staff and his physician. Under the regulations, Resurrection was not required to complete an initial "comprehensive assessment" of Resident # 1 until 14 days after his admission to the facility. 42 C.F.R. § 483.20. Thus, we do not suggest here that Resurrection should have done a "systematic assessment" of the resident's memory within the first two days of his admission to rule out any possibility of forgetfulness.

On the other hand, Resurrection clearly overstates the probative value and weight of the assessments on which it relies. First, they affirm that Resident # 1 needed moderate to minimal assistance for activities such as transfers, ambulating, or toileting and was at a high risk for falls. Second, some of the assessments do not address mental/cognitive status or were not completed prior to Resident # 1's fall on February 14. *See*, *e.g.*, P. Ex. 4 (Pressure Sore Risk Assessment); P. Ex. 18, at 1, 3 (Minimum Data Set form signed February 18 and later); P. Ex. 23 (Physical Therapy Evaluation dated February 14, indicating areas not tested and noting that resident "unable to ambulate today [because of] fatigue and nausea"). Thus, Resurrection could not have based its complete reliance on the call light alone as adequate to meet the resident's high risk of falls on 11 assessments, as it suggests. Nor were the assessments separate from each other. Many of the forms were completed by the same RN. P. Exs. 3, 4, 5, 7. The RN's August 19, 2009 statement that she "noted no cognitive deficits including confusion, agitation, and forgetfulness" was limited to her observations of Resident # 1 "during admission." P. Ex. 8; *see also,* P. Ex. 25 ¶ 12.

Further, as CMS points out, the facility's PT who evaluated Resident # 1 the morning of February 14 noted "impaired safety" awareness on the evaluation form under "Functional

Limitations." P. Ex. 23. Although the PT's declaration states that she noted this because of Resident # 1's persistence regarding returning home (rather than because he had impaired memory), she does not deny that she told the surveyor that she marked "impaired safety" on the form because Resident # 1 had "poor insight into his physical deficits" resulting from the hip fracture and surgery. P. Ex. 15, at 1; CMS Ex. 34 ¶ 13. While this evaluation does not establish that the resident was forgetful, it does undercut Resurrection's evidence that the call light alone was adequate to address the resident's needs.

Even assuming, however, that Resurrection reasonably determined that Resident # 1 would remember to use his call light to summon staff assistance, substantial evidence supports the ALJ's conclusion that Resurrection was not in substantial compliance with section 483.25(h)(2). As discussed above, substantial evidence supports the ALJ's finding that Resurrection failed to take all reasonable measures to protect Resident # 1 from falls because its staff implemented a care plan providing for no assistance devices other than the call light, without considering the recommendations by the hospital's rehabilitation center to provide him with such devices.

Conclusion

Resurrection does not on appeal challenge the amount or duration of the CMP imposed based on noncompliance with section 483.25(h). Accordingly, we affirm the ALJ Decision for the reasons stated above.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member