Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Omni Manor Nursing Home
Docket No. A-11-8
Decision No. 2374
March 31, 2011

REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

Omni Manor Nursing Home (Omni Manor) appeals the August 12, 2010 decision of Administrative Law Judge (ALJ) Steven T. Kessel granting summary judgment to the Centers for Medicare & Medicaid Services (CMS). *Omni Manor Nursing Home*, DAB CR2213 (2010) (ALJ Decision). The ALJ upheld CMS's determination to impose a $550 per day civil money penalty (CMP) on Omni Manor for the period April 24 through May 21, 2008 based on the facility's noncompliance with requirements for long-term care facilities participating in the Medicare program. The ALJ concluded that as a matter of law, Omni Manor, given the nature of its noncompliance, could not establish that it achieved substantial compliance earlier than May 22, 2008, the compliance date determined by CMS based on a revisit survey that concluded on that date.[1] Omni Manor appeals only this conclusion of law.[2]

We conclude that the ALJ erred in deciding that Omni Manor could not, as a matter of law, establish a compliance date earlier than May 22, 2008, the date of the revisit. The ALJ's conclusion is not supported by the regulations or Board decisions addressing those regulations. The ALJ's conclusion of law was the sole basis he gave for granting summary judgment to CMS. Accordingly, we vacate the ALJ's ruling, reinstate the previously vacated order denying summary judgment and remand for a hearing limited to the issue of whether Omni Manor, as a matter of fact, returned to substantial compliance on a date earlier than the date of the revisit survey.

Applicable Law

Long-term care facilities participating in the Medicare and Medicaid programs are subject to the survey and enforcement procedures set out in 42 C.F.R. Part 488, subpart E, to determine if they are in substantial compliance with applicable program requirements which appear at 42 C.F.R. Part 483, subpart B. "Substantial compliance" means a level of compliance such that "any identified deficiencies pose no greater risk to

[1] CMS erroneously states in its brief that the revisit survey concluded on May 21, 2008. CMS Response at 4. The revisit concluded on May 22, 2008. CMS Exs. 1, 6.

[2] As discussed below, the duration of Omni Manor's noncompliance was the only issue that remained before the ALJ.

resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Noncompliance," in turn, is defined as "any deficiency that causes a facility to not be in substantial compliance." *Id.*

A long-term care facility found not to be in substantial compliance is subject to various enforcement remedies, including CMPs. 42 C.F.R. §§ 488.402(b),(c), 488.406. CMS has the option to impose one or more of the other remedies in section 488.406 whenever a facility is not in substantial compliance. *Id.* CMS may impose a per-day CMP for the number of days a facility is not in substantial compliance with one or more requirements or a per-instance CMP for each instance of noncompliance. 42 C.F.R. § 488.430(a). When CMS imposes one or more of the alternative remedies in section 488.406 for a facility's noncompliance, those remedies continue until "[t]he facility has achieved substantial compliance, as determined by CMS or the State based upon a revisit or after an examination of credible written evidence that it can verify without an on-site visit . . . ." 42 C.F.R. § 488.454(a)(1).

Procedural Background

This case was originally assigned to Administrative Law Judge Alfonso Montano. During the prehearing process, the parties stipulated that the only issue to be resolved was the duration of Omni Manor's noncompliance. ALJ Decision at 2; Agreed Scheduling Order and Joint Stipulation Governing Further Proceedings (Joint Stipulation), ¶ 2. Omni Manor specifically agreed that it did not dispute the findings of noncompliance or the amount of the CMP.[3] *Id.* CMS moved for summary judgment that Omni Manor's noncompliance – and consequently the CMP – continued through May 21, 2008. Omni Manor filed a brief opposing the motion and also filed evidence that allegedly supports its assertion that it returned to substantial compliance on April 29, 2008. After a second round of briefing, ALJ Montano denied CMS's motion for summary judgment, ruling that there was a material dispute of fact on the issue of the duration of Omni Manor's noncompliance. Following that ruling, ALJ Montano left the Department of Health and Human Services, and the case was reassigned to ALJ Kessel. ALJ Kessel vacated Judge Montano's ruling, advised the parties that he would reconsider CMS's motion for summary judgment and received into the record CMS Exhibits 1-24 and Petitioner Exhibits 1-49. The ALJ then granted CMS's motion for summary judgment based on the legal conclusion that is the subject of this appeal.

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence on the record as a whole, and a disputed conclusion of law to determine whether it is erroneous. *Guidelines-Appellate Review of Decisions of*

[3] The findings of noncompliance involved five quality of care requirements, 42 C.F.R. §§ 483.25, 483.25(d), 483.25(g)(2), 483.25(h), 483.25(m)(1), and the infection control requirement, 42 C.F.R. § 483.65(a). ALJ Decision at 1-2.

Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs (Guidelines), http://www.hhs.gov/dab/divisions/appellate/guidelines/index.html; *Batavia Nursing and Convalescent Inn*, DAB No. 1911, at 7 (2004), *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 143 F. App'x 664 (6th Cir. 2005).

Discussion

A. The ALJ erred in concluding that as a matter of law, CMS, or the State, was required to determine whether Omni Manor had returned to substantial compliance by conducting a revisit survey.

1. S*ection 488.454(a)(1) on its face plainly makes a revisit survey discretionary; accordingly, resort to the preamble was not necessary or appropriate.*

The regulations, in relevant part, provide that once CMS finds noncompliance and imposes a remedy, the remedy continues in effect until--

> [t]he facility has achieved substantial compliance, as determined by CMS or the State based upon a revisit or after an examination of credible written evidence that it can verify without an on-site visit . . . .

42 C.F.R. § 488.454(a)(1)(emphasis added). The ALJ found the regulation ambiguous because it does not specify the circumstances under which a revisit survey is required to verify compliance and looked to the November 10, 1994 preamble for "clarification". ALJ Decision at 4-5. The ALJ read the following language in the preamble as "defining the circumstances in which documentation alone will not serve to establish compliance."

> There are other cases in which documentation cannot confirm the correction of noncompliance, and in these cases an on-site revisit is necessary. For example, one of the requirements for Infection Control is that personnel must handle, store, process and transport linens so as to prevent the spread of infection as specified in § 483.65. If a deficiency is cited for a violation of this requirement and a civil monetary penalty is imposed, submitting written documentation would not confirm the correction of the violation. An on-site revisit to observe personnel behavior is necessary in this case to confirm that the facility is, in fact, back in substantial compliance with this regulatory provision.

Id. at 5, quoting 59 Fed. Reg. 56207 (November 10, 1994). Based on this language, the ALJ concluded:

> Deficiencies that involve staff members' providing care to residents are not deficiencies that normally can be certified as corrected based solely on a

> review of documents because documents alone cannot prove that staff is actually providing care according to professionally recognized standards of care. For such deficiencies, observation of performance is a critical element of certifying compliance.

Id. Omni Manor's noncompliance, the ALJ then found, fell into the category of deficiencies that "cannot be certified as having been corrected based solely on documents" because each was, "at bottom, a failure by Petitioner's staff to provide care to residents in accord with professionally recognized standards of care." *Id*. Having found that Omni Manor's deficiencies fell within the category described in the preamble, the ALJ concluded:

> [t]hus, and as a matter of law, Petitioner could not establish compliance with the deficiencies that I describe . . . based solely on documents representing that its staff had been retrained or even that they were performing according to professionally recognized standards of care. What was minimally necessary to establishing compliance was that the staff be observed actually providing the care implicated in the deficiencies and providing it according to professionally recognized standards of care. Certification of that required a revisit to the facility. In this case the revisit occurred on May 22, 2008 and that date is as a matter of law the earliest date on which CMS could have certified Petitioner as compliant.

Id. at 5-6.

We disagree with the ALJ's analysis and conclusion. We find no ambiguity in section 488.454(a)(1). The fact that the regulation does not specify circumstances where a revisit would be required does not make it ambiguous since the regulation, by its plain language, does not state that a revisit would ever be required to determine whether a facility has returned to substantial compliance. Instead, the regulation states, without qualification, that CMS or a state may verify a return to substantial compliance either by conducting a revisit or by reviewing credible written evidence. The regulation makes it clear that a revisit is a discretionary, not mandatory, method of doing this verification.

Since the regulation on its face is unambiguous, there is neither a need to nor basis for looking to the preamble for clarification. *See, e.g.*, *Napoleon S. Maminta, M.D.*, DAB No. 1135, at 8 (1990)(and cited cases)(explaining and applying the general rule of statutory construction that the plain meaning of the statute should control, and that resort to legislative history is appropriate only where a statute is ambiguous); s*ee generally* 2A N. Singer, Sutherland Statutes and Statutory Construction § 46:01 (2000 Revision). Consistent with this rule, the Board has declined to read into a statute or regulation limitations not present on the face of the statute or regulation itself. *Singing River Rehabilitation & Nursing Center*, DAB No. 2232 (2009)(rejecting nursing facility's argument that regulatory language stating the "results of all investigations" of alleged abuse "must be reported . . . to the administrator or his designated representative and to

other officials in accordance with State law" meant that alleged abuse by non-staff perpetrators was reportable only to the extent that state law defined the conduct involved as "abuse"); *Napoleon S. Maminta* (appeal of exclusion from Medicare program for conviction of program-related crime in which the Board declined to read into the phrase "related to the delivery of an item or service under title XVIII . . ." a limitation that the delivery must have been effected by the convicted individual himself). In sum, we conclude that the plain language of section 488.454(a)(1) does not, as a matter of law, require CMS or a state to verify a facility's achievement of substantial compliance by means of a revisit survey but, rather, gives CMS or a state discretion to make that determination either through a revisit survey or through a review of credible written evidence.

We also note that although the Board may not have addressed the precise issue of law raised in this appeal, the plain language reading we apply here is consistent with our prior treatment of section 488.454(a)(1). The Board has noted that CMS or a state usually determines whether a facility has returned to substantial compliance by means of a revisit survey. *See, e.g., Briarwood Nursing Center*, DAB No. 2115 (2007)(stating that "[t]he accrual of per diem penalties ends when the facility is found to have indeed achieved substantial compliance, usually through a revisit unless the deficiency is of a nature that correction can be verified through written evidence alone"); *Cross Creek Health Care Center*, DAB No. 1665, at 3 (1998)(stating that even when a plan of correction is accepted, a facility "is not regarded as in substantial compliance until [CMS] determines, usually through a revisit survey, that the deficiency no longer exists"). However, the Board has not held that CMS or a state must make this determination by means of a revisit but, instead, has recognized that this is a matter of discretion. *See, e.g., Foxwood Springs Living Center*, DAB No. 2294, at 9-10 (2009)("CMS has the discretion to determine that a facility's written evidence is not credible and that a revisit may be necessary to verify that a facility has returned to substantial compliance."); *Cal Turner Extended Care Pavilion*, DAB No. 2030, at 13 ("whether and when revisit surveys are performed is in the discretion of the State & CMS, not the facility"). The ALJ Decision does not discuss any of these decisions and is not consistent with them.

Our conclusion that the law does not mandate an on-site revisit does not preclude CMS's determining administratively that an on-site survey is necessary to verify correction of certain types of deficiencies. The regulation clearly affords administrative discretion to make such determinations. The CMS State Operations Manual (SOM), in fact, indicates just such an administrative determination by instructing the state survey agencies that "[a]n onsite revisit is required when a facility's beginning survey finds deficiencies that constitute substandard quality of care, harm, or immediate jeopardy." SOM § 7317.2, http://www.cms.gov/Manuals/IOM/list.asp. However, the fact that CMS has this administrative discretion does not mean that it is required to conduct revisit surveys to determine a return to substantial compliance.

2. *The preamble, in any event, does not evidence an intent to require CMS to verify compliance in this case (or any other) based on a revisit survey.*

We concluded above that the ALJ erred in finding section 488.454(a)(1) ambiguous and resorting to the preamble for "clarification." However, even if we had concluded that resort to the preamble was necessary and proper, we would not agree that the preamble "clarifies" that the Secretary intended by this regulation to require CMS or a state to conduct revisit surveys to verify a facility's return to substantial compliance for certain types of deficiencies. The ALJ concluded that the preamble "define[s] the circumstances in which documentation alone will not serve to establish compliance" as deficiencies that involve "staff members' providing care to residents." ALJ Decision at 5. He extrapolated that categorical "definition" from a single paragraph (fully quoted above) that gives only one example, involving one regulatory requirement, for which the drafters indicated that observation of care would be necessary to verify compliance. *Id.*, citing 59 Fed. Reg. 56,207 (November 10, 1994). We do not find this limited discussion sufficient to evidence the Secretary's intent to define a whole category of deficiencies for which CMS or a state would not have the option of verifying compliance based on credible written evidence if CMS thought that was a sufficient means of verification in a given case. The quoted language, in our view, is more reasonably read as (1) explaining why the Secretary chose, in section 488.454(a)(1), to give CMS or a state the discretion to choose between a revisit survey and written submissions as the vehicle for verifying compliance in any given case and (2) explaining why CMS or a state might choose a revisit survey over written submissions for deficiencies when, in CMS or a state's view, observation of staff providing (or failing to provide) particular types of care to residents is needed. Since many deficiencies are quality of care deficiencies that might need such observation, the preamble language may also explain why, in practice, as the Board has noted, CMS usually does use a revisit survey to determine whether a facility has returned to substantial compliance. However, that does not mean it is required to do so.

Furthermore, although the preamble language relied on by the ALJ explains why "an on-site revisit is necessary" in some circumstances, including the infection control example given, that explanation is not followed by a statement that CMS or a state must do revisit surveys in specific types of cases; nor does the preamble contain a list of the long-term care requirements affected. In our view, it is simply not reasonable to extrapolate from the preamble's brief discussion of this issue the mandatory requirement found there by the ALJ. We also note that the ALJ Decision itself contains a statement undercutting the ALJ's reading of the preamble as mandating revisit surveys for certain types of deficiencies. After quoting the passage the ALJ relied on, the ALJ Decision goes on to say, "Deficiencies that involve staff members' providing care to residents are not deficiencies that normally can be certified as corrected based solely on a review of documents . . . ." ALJ Decision at 5 (emphasis added). Use of the qualifying term "normally" leaves open the possibility that some certifications involving staff care can be based solely on document review. Indeed, although CMS argues in support of the ALJ's legal conclusion in this case, in practice, CMS apparently has not always used a revisit survey to determine whether a facility has returned to substantial compliance with requirements involving staff rendering care. *See Cedar Lake Nursing Home*, DAB CR2252, n.10 (2010)(ALJ footnote questioning why CMS accepted facility's allegations that it had corrected noncompliance involving failure to follow physician orders, resident

care plan and facility policies with respect to oxygen administration without a revisit survey).[4]

B. The ALJ erred in holding that as a matter of law Omni Manor could not have achieved substantial compliance earlier than the date of the revisit survey because the duration of its noncompliance is an issue of fact that Omni Manor was entitled to litigate during its appeal.

Although Omni Manor presented some evidence in an attempt to establish a compliance date earlier than the date of the revisit, the ALJ provided no opportunity for a hearing on that evidence because of his legal conclusion that Omni Manor could not establish an earlier date of compliance based on written evidence since an on-site revisit was required to determine compliance. That conclusion, as discussed above, was erroneous because section 488.454(a)(1) unambiguously gives CMS or a state discretion to verify a facility's return to substantial compliance through written credible evidence, regardless of the type of deficiency. The ALJ's conclusion was also erroneous because it is inconsistent with section 488.454(e), a regulation the ALJ Decision does not even discuss. That regulation provides as follows:

> If the facility can supply documentation acceptable to CMS or the State survey agency that it was in substantial compliance and was capable of remaining in substantial compliance, if necessary, on a date preceding that of the revisit, the remedies terminate on the date that CMS or the State can verify as the date that substantial compliance was achieved and the facility demonstrated that it could maintain substantial compliance, if necessary.

This language unambiguously states that even when CMS or a state determines a return to substantial compliance by means of a revisit survey, as happened here, CMS or the state can determine that the facility achieved substantial compliance on a date earlier than that of the revisit. If the ALJ were correct that as a matter of law Omni Manor could not establish compliance earlier than the date of the revisit survey, then CMS or the State would not have been able to exercise the discretion this regulation clearly provided them to find that Omni Manor had established compliance on a date earlier than that of the revisit. The fact that CMS or the state did not make such a finding here does not obviate their discretion to have done so under the plain language of this regulation.

In addition to being inconsistent with the plain language of section 488.454(e), the ALJ's conclusion is not consistent with Board decisions construing that regulation. The Board has consistently recognized that section 488.454(e) allows a provider appealing noncompliance findings that resulted in the imposition of a remedy the opportunity to

[4] Omni Manor concedes that observation was necessary to determine its compliance with respect to one of the deficiencies in this case. RR at 8; Reply at 4. However, this concession does not undercut Omni Manor's argument that the ALJ erred when he read the preamble as requiring a revisit survey as a matter of law when the regulations themselves contain no such requirement. RR at 4-7. Nor does it undercut Omni Manor's objection to the ALJ's conclusion that when CMS does determine compliance via a revisit survey, the date compliance is achieved cannot, as a matter of law, be earlier than the date of the revisit. RR at 9-10.

also attempt to establish before the ALJ and the Board a compliance date earlier than that determined by CMS or the state. *See, e.g., Texan Nursing & Rehabilitation of Amarillo,* DAB No. 2323, at 23-24 (2010)(remanding for further proceedings and revised decision because ALJ did not adequately explain why he found facility had not shown that it returned to substantial compliance on an earlier date); *Chicago Ridge Nursing Center,* DAB No. 2151, at 25-27 (2008)(rejecting facility's contention that CMS letter revising its determination of the date the facility returned to substantial compliance was evidence supporting facility's assertion that it returned to compliance on the date first propounded by CMS). The Board also has made it clear that the facility bears the burden of showing that it returned to substantial compliance on a date earlier than that determined by CMS. *Id*; s*ee also Lake Mary Health Care,* DAB No. 2081, at 28 (2007)("The burden is on the facility to show that it timely completed the implementation of [a plan of correction] and in fact . . . achieved substantial compliance (to end the application of remedies)"); *Barn Hill Care Center*, DAB No. 1848 (2002)(rejecting contention that once CMS has shown that noncompliance exists, CMS must assert and prove that the facility was noncompliant each day of the noncompliance period). The Board decisions assigning the evidentiary burden on the duration issue to the facility again recognize, relying on section 488.454(e), that during its hearing a facility is entitled to try to show an earlier date of compliance. The ALJ's denial of a hearing to consider the evidence presented by Omni Manor on the duration issue, together with any evidence on that issue presented by CMS, is inconsistent with this precedent.

Conclusion

For the reasons stated, we conclude that the ALJ erred in concluding that Omni Manor could not, as a matter of law, establish compliance on a date earlier than that of the revisit survey. Since the ALJ provided no other reason for vacating ALJ Montano's ruling denying CMS's motion for summary judgment, we reinstate that ruling and remand for a hearing consistent with this decision on the issue of the duration of Omni Manor's noncompliance.

_____/s/_____
Stephen M. Godek

_____/s/_____
Leslie A. Sussan

_____/s/_____
Sheila Ann Hegy
Presiding Board Member