Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: August 29, 2001
VITAS Healthcare Corporation of California,	
Petitioner,	Civil Remedies CR738 App. Div. Docket No. A-01-61
- v. -	Decision No. 1782
Health Care Financing Administration.	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

The Health Care Financing Administration (HCFA)[1] appealed the February 16, 2001 decision of Administrative Law Judge (ALJ) Jill Clifton, overturning the termination from the Medicare program of VITAS Healthcare Corporation of California (VITAS), a hospice care provider. The ALJ held that HCFA had failed to establish a prima facie case that HCFA had a basis to terminate VITAS. VITAS Healthcare Corporation of California, DAB CR738 (2001)(ALJ Decision). HCFA alleged that the ALJ had committed a prejudicial procedural error of law by ruling that HCFA failed to present a prima facie case that it had a basis to terminate VITAS when the ALJ had already permitted VITAS to begin presenting its case. HCFA also argued that the ALJ erred by excluding evidence that HCFA argued would prove that VITAS had repeat deficiencies which,

[1]Although HCFA has been renamed the Centers for Medicare & Medicaid Services (CMS), we continue to use "HCFA" below since that acronym was used to refer to the agency at the time that the actions at issue here were taken and that the testimony discussed was given. See 66 Fed. Reg. 35437 (July 5, 2001).

according to HCFA, would be a sufficient basis to terminate, and erred in formulating the standard by which she assessed certain deficiency findings.

HCFA's core position was that, because several VITAS witnesses had already testified, federal law barred the ALJ from deciding whether HCFA had provided evidence sufficient to establish even a prima facie case. Instead, HCFA argued, the ALJ, having deferred ruling on the motion when HCFA rested (and having permitted a few witnesses to testify for VITAS "out of order"), was compelled to wait until the entire hearing had been completed. We have concluded, however, that this was not required legally, logically or administratively.

Legally, the federal court procedural rules, and a few decisions interpreting those rules containing language on which HCFA relied, do not apply to these administrative proceedings. Logically, HCFA does not have a right to rely on its opponent to present the evidence lacking in HCFA's own case. The ALJ found, considering HCFA's evidence and witnesses alone, that HCFA did not establish a single deficiency and did not demonstrate any basis on which it would be authorized to terminate VITAS. A remand would be pointless in this situation. Even if VITAS chose to put on no further evidence, the decision must necessarily go against HCFA. Furthermore, HCFA sought only a remand, not a review of the substance of the ALJ Decision, and presented no arguments or exceptions to any of the factual findings or legal conclusions of the ALJ on the merits of the case. In addition, HCFA failed to show any harm from the ALJ's process, since no lay factfinder was present who might have been misled by a partial presentation by one party. Numerous factual representations which HCFA counsel made in support of a claim of prejudice to HCFA proved unfounded on review of the actual record. Finally, administratively, adopting HCFA's position here would wreak havoc with many common practices, such as allowing presentation of witnesses out of order and admitting exhibits prior to the in-person hearing. HCFA, as well as other parties to administrative adjudications, routinely benefits from such flexibility.

For these reasons and as explained further below, we find no merit in HCFA's contentions. Thus, we sustain the ALJ Decision.

Legal Background

1. Relevant provisions governing hospice care services under Medicare

Section 1861(dd) of the Social Security Act (Act) provides Medicare coverage for hospice care for terminally ill patients. Hospice services may be rendered directly by the hospice's own staff or by others (such as family members or staff in a nursing home) under the hospice's written plan of care approved by an

interdisciplinary group. Section 1861(dd)(1) of the Act. Hospice services may include nursing care, physical therapy, medical social services, home health aides and homemakers, physician services, medications, short-term in-patient care, counseling, and any otherwise covered Medicare services specified in the patient's plan. Id.[2] A hospice program may provide care to the patient in the individual's home or on an outpatient basis, must be available 24 hours a day, and must provide bereavement counseling to the immediate family. Section 1861(dd)(2)(A) of the Act. In addition to the statutory requirements, hospice programs must meet "such other conditions of participation as the Secretary may find necessary in the interest of the health and safety of individuals who are provided care and services." Section 1861(dd)(2)(G) of the Act.

The Secretary has promulgated regulations governing conditions of participation for hospice programs. 42 C.F.R. Part 418, Subparts C, D, and E. The regulations are organized into 24 conditions which must be met for a hospice program to maintain certification as a Medicare provider. Id. Each of these conditions are comprised of a number of related standards. In assessing provider compliance with the applicable conditions, surveyors are given the following guidance:

> The decision as to whether there is compliance with a particular . . . condition of participation . . . depends upon the manner and degree to which the provider . . . satisfies the various standards within each condition.

42 C.F.R. § 488.26(b). When a hospice (or any provider other than a long-term care facility) is found deficient in relation to one or more standards in the conditions of participation, it may continue to participate in Medicare only if it has "submitted an acceptable plan of correction" and if –

> [t]he existing deficiencies noted either individually or in combination neither jeopardize the health and safety of patients nor are of such character as to seriously limit the provider's capacity to render adequate care.

42 C.F.R. § 488.28(a) and (b). HCFA may terminate a provider agreement if it finds, inter alia, that the provider is "not

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[2]The statutory provision sets out more details about the nature of and limitations on the services involved which are not pertinent to this decision. Additional provisions on payments for and limitations on coverage of hospice care under Medicare may be found at sections 1814(a)(7), 1814(i), and 1862(a) of the Act.

complying with the provisions [of the Act] and the applicable regulations of this chapter or with the provisions of the agreement" or that the provider "no longer meets the appropriate conditions of participation . . . ." 42 C.F.R. § 489.53(a)(1) and (3).

2. Right to a de novo hearing before an ALJ and burden of proof

Under the Act and implementing regulations, "[a]ny provider dissatisfied with an initial determination [by HCFA] to terminate its provider agreement is entitled to a hearing before an ALJ." 42 C.F.R. § 498.5(b); 42 C.F.R. § 498.3(b)(7); see sections 205(b) and 1866(h)(1) of the Act. The Board has long held that the ALJ hearing is a de novo proceeding to be resolved on the evidence in the record developed before the ALJ, and is not a quasi-appellate review of the correctness of HCFA's determination based on the evidence HCFA had at the time it acted. See, e.g., CarePlex of Silver Spring, DAB No. 1683, at 16-17 (1999). Such a "de novo hearing does not presume the validity of HCFA's determination, but rather requires HCFA to present a prima facie case establishing a basis for its action." Id.

At the hearing before the ALJ, HCFA bears the burden of producing evidence sufficient to establish a prima facie case. Thus, in a termination case, HCFA must set forth the basis for its determination with sufficient specificity for the provider to respond and come forward with evidence related to any disputed findings sufficient to establish a prima facie case that HCFA had a legally sufficient basis for termination. In order to prevail, the provider must then prove by a preponderance of the evidence on the record as a whole that it was in substantial compliance with the relevant statutory and regulatory provisions. See Hillman Rehabilitation Center, DAB No. 1611 (1997), aff'd, Hillman Rehabilitation Center v. U.S. Dept. of Health and Human Services, No. 98-3789 (D.N.J. May 13, 1999).

3. Regulations and standards governing appeals from ALJ decisions

A party dissatisfied with an ALJ decision, including HCFA, may file a written request for review by the Departmental Appeals Board. 42 C.F.R. § 498.82(a). The request must "specify the issues, the findings of fact or conclusions of law with which the party disagrees, and the basis for contending that the findings and conclusions are incorrect." 42 C.F.R. § 498.82(b). On review, the Board may remand to the ALJ, or may modify, affirm, or reverse the ALJ's decision. 42 C.F.R. § 498.88.

The Appellate Division Guidelines for review of ALJ decisions on provider participation set out the following standards for review:

> The standard of review on a disputed factual issue is whether the ALJ decision is supported by substantial evidence in the record. The standard of review on a disputed issue of law is whether the ALJ decision is erroneous. The bases for modifying, reversing or remanding an ALJ decision include the following: a finding of material fact necessary to the outcome of the decision is not supported by substantial evidence; a legal conclusion necessary to the outcome of the decision is erroneous; the decision is contrary to law or applicable regulations; a prejudicial error of procedure (including an abuse of discretion under the law or applicable regulations) was committed.

Factual Background

The following facts are not contested for purposes of this appeal. VITAS is a hospice program located in Torrance, California and serving terminally ill patients in their homes and in long-term care placements. ALJ Decision at 1. HCFA terminated VITAS's Medicare provider agreement in 1999 after a series of three survey visits conducted by the state survey agency, and ultimately including federal surveyors.

The first visit on January 7, 1999 was triggered by a complaint and resulted in findings by the surveyors that VITAS was out of compliance with 12 applicable conditions of participation. VITAS submitted a plan of correction. When VITAS alleged it had completed corrective actions, a revisit was scheduled on March 4, 1999 ("March survey") in which the surveyors reported finding VITAS out of compliance with six conditions of participation and further found that eight standard-level deficiencies seen in January had not been corrected. HCFA sent VITAS a termination notice at that point, effective April 15, 1999, but later decided not to terminate VITAS and instead to conduct another survey. This survey included both state and federal surveyors and was completed on June 23, 1999 ("June survey"). HCFA Ex. 1.

After the June survey, the surveyors reported on a statement of deficiencies that they found VITAS out of compliance with two conditions of participation, specifically those relating to hospice governing bodies and to hospice plans of care. HCFA Ex. 1; 42 C.F.R. §§ 418.52 and 418.58.

Based on the results of this survey, HCFA notified VITAS that its provider agreement would be terminated effective August 10, 1999. HCFA notice letter (July 22, 1999); ALJ Decision at 1. The letter referenced an attached statement of deficiencies from the June survey to support the conclusion that VITAS was out of compliance with the two conditions cited. HCFA further recited that the documented deficiencies met the criteria of substantially limiting VITAS's capacity to render adequate care or adversely affecting patient health and safety, "thus establishing a basis under 42 C.F.R. § 488.24(b) for concluding that" the two cited conditions were not met. In addition, HCFA stated that the existence of deficiencies uncorrected from the March survey (some also having been cited in January) "establishes a separate and distinct basis for termination" under 42 C.F.R. § 488.28 and 489.53(a)(1).

VITAS appealed and sought an expedited hearing before an ALJ. Letter from VITAS counsel to Chief, Civil Remedies Division, Aug. 9, 1999. VITAS disputed all of the factual findings, disputed that the facts alleged would constitute standard or condition-level deficiencies, contested HCFA's authority to terminate it, contended that repeat deficiencies were not an independent basis for termination and were not, in any case, present, and complained of procedures used in the surveys. Id.

Procedural History of the Case and Summary of ALJ Decision

The ALJ held an in-person hearing in this matter in Los Angeles, California from December 13-17, 1999, and December 20-22, 1999. HCFA completed its case-in-chief after six days. During HCFA's presentation and over HCFA's objections, the ALJ permitted VITAS to present three witnesses out of order to accommodate the witnesses's schedules. When HCFA rested, VITAS moved for dismissal on the grounds that HCFA failed to prove a prima facie case that it had the authority to terminate VITAS. Tr. at 1803. The ALJ, after consulting with the parties, took the hospice's motion under advisement. Tr. at 1805.

The ALJ then resumed the hearing and permitted VITAS to present one more witness and the direct and part of the cross-examination of another. At that point, with two days left before Christmas, she determined to recess the hearing, again after objection from HCFA, for purpose of ruling on the dismissal motion as well as considering pending evidentiary disputes. See Tr. at 2384-2385, 2387-2391, 2395-2396.

The ALJ explained, both at the hearing and in her final decision, that her evaluation of the existence of a prima facie case

depended solely on the evidence adduced on behalf of HCFA, and not on whether VITAS's evidence rebutted it.

> I informed the parties that, in ruling on whether HCFA had established a prima facie case to support its termination, I would consider only the evidence presented in HCFA's case-in-chief; that is, the evidence that was elicited through HCFA's witnesses, including the cross-examination of them. I would not consider the testimony elicited through witnesses called by the hospice. Tr. 2386, 2396 -2398, 2470. Thus, throughout this Decision, when I refer to the evidence, I am referring to only the evidence presented in HCFA's case-in-chief.

ALJ Decision at **2**.

At the outset of the hearing, the ALJ reiterated her pre-hearing ruling to postpone deciding whether to permit HCFA to present evidence regarding deficiencies cited during the March survey and to take only evidence on the deficiencies alleged from the June survey. Tr. at 14. She explained that two eventualities might obviate the need to do so: (1) if she did find condition-level deficiencies in June that supported the termination, then taking evidence about any deficiencies in March might be redundant; and (2) if, on the other hand, she found no deficiencies proven in June, it might be improper to then consider alleged deficiencies from March since none of them could have been repeated in June (and the termination notice relied solely on the June survey). Tr. at 14-15. In either case, she indicated she might also need briefing before ruling on the admissibility of the March evidence. HCFA argued throughout that the ALJ should hear the whole case. Id. In addition, HCFA wanted to present its case in the full perspective of the three surveys, including the January survey. Tr. at 17-20, 31. After hearing additional argument from both parties, the ALJ ruled that she would reserve a decision on whether to take evidence on the March survey until after the hearing on the June survey. Tr. at 34-36; see also ALJ Decision at 73-74. Ultimately, she excluded evidence relating to the March survey as irrelevant based on the second eventuality that she had foreseen. She determined to proceed to decision on the merits agreeing with VITAS that HCFA's evidence did not establish any basis for termination.

The ALJ made 13 Findings of Fact and Conclusions of Law (FFCLs) in support of her conclusion that HCFA had not demonstrated a prima facie case for the existence of any of the alleged condition or standard-level deficiencies on which the termination was based. ALJ Decision at 7-9. She then discussed the evidence

and rationale in relation to each allegation of non-compliance. Finally, the ALJ summarized her analysis as follows:

> The foregoing discussion . . . demonstrates that at the time covered by the June 1999 survey, the hospice had no deficiencies that would justify termination. After careful consideration of the evidence, **I found no support in the evidence for any of HCFA's alleged deficiencies**. **I found three insignificant documentation omissions, none of which constituted even a standard-level deficiency**. Those three insignificant documentation omissions are discussed under Tag L133, involving Patient 7, Patient 8, and Patient 9. In each case, there was no evidence that the hospice failed to establish and maintain a written plan of care for the patient, and there was no evidence that the hospice failed to provide care in accordance with the plan, as required by 42 C.F.R. § 418.58. The circumstances of Patient 9 were alleged again under Tag L136. Here again, there was no evidence that the hospice failed to assess the patient's needs or to identify and provide services to meet those needs, as required by 42 C.F.R. § 418.58. I found none of the three insignificant documentation omissions was proven to have affected or even to have had the potential to have affected the care and services provided to the patient.
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> I find that HCFA did not establish a prima facie case that, at the time covered by the June 1999 survey, the hospice failed to establish compliance with either of the two Medicare conditions of participation (Plan of Care, Governing Body) that HCFA alleged to be deficient. I find further that HCFA did not establish a prima facie case that, at the time covered by the June 1999 survey, the hospice had any deficiencies which, noted either individually or in combination, were of such character as to substantially limit the hospice's capacity to furnish adequate care or adversely affected the health and safety of patients. 42 C.F.R. §§ 488.24(b) and 488.26. Clearly, the evidence from the June 1999 survey fails to justify termination.

ALJ Decision at 73-74 (emphasis added).

HCFA's Appeal

HCFA's brief set out the two issues which it raised on appeal, as follows:

> 1. Whether the ALJ erred by ruling on petitioner's motion to dismiss, after having permitted petitioner to

> begin the presentation of its rebuttal case but before HCFA was able to cross-examine petitioner's witnesses or otherwise test the veracity and credibility of these witnesses.
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> 2. Whether the ALJ evaluated the evidence using improper legal standards.

HCFA Br. at 12.

HCFA's appeal thus rested entirely on procedural and legal objections. HCFA did not except to any FFCL, contest the facts set out by the ALJ as to any particular deficiency, or offer any argument or analysis of the record to demonstrate the purported existence of a prima facie case, or even to support the factual basis of a single deficiency finding. HCFA asserted generally that a prima facie case existed even on the record before the ALJ but insisted that the evidence should not be reviewed on appeal. Id. at 12-13. Further, HCFA expressly limited the relief that it sought to a remand to the ALJ to reopen and continue the hearing. Id.

We therefore consider below whether HCFA demonstrated prejudicial error by the ALJ necessitating remand of the case for further proceedings.

Analysis

1. HCFA's appeal as to the first issue is without merit.

> A. It was within the discretion of the ALJ to take the motion to dismiss under advisement and rule on it even after VITAS presented some of its witnesses.
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> i. HCFA offered no compelling logical reason to permit an ALJ to decide a motion based on failure to prove a prima facie case only immediately after HCFA rests or at the close of the entire hearing.

The core argument raised by HCFA posited that the ALJ committed prejudicial legal error by assessing whether HCFA had established its prima facie case at the wrong point in the hearing process. The problem as HCFA posed it relates only to the situation where some but not all of the provider's evidence has been introduced before the ALJ issues a ruling on a motion to dismiss. Thus, HCFA explained that it was --

> not arguing that an ALJ may never evaluate HCFA's presentation to determine whether or not a prima facie case has been made but clearly this determination must either be immediately after HCFA has rested and before the petitioner has begun its case or after all the evidence is in -- not, as here, half way into petitioner's case.

HCFA Br. at 15, n.5.

We find that HCFA's objection to the middle case, where the ALJ had heard some but not all of VITAS's witnesses, exalts formalism and litigation tactics over substance and fairness. HCFA argued that VITAS had "waived any right it might otherwise have had to challenge the adequacy of HCFA's case-in-chief" by making the "strategic choice" to examine any of its witnesses before the dismissal motion was resolved. HCFA Br. at 15. HCFA's position is not only that a provider could not begin its case-in-chief without forfeiting any ruling on the existence of a prima facie case but also that no witness for the provider could appear earlier in the hearing without the same effect. See id. We would be loath to attribute such preclusive effect to presenting witnesses out of order with the permission of the ALJ, absent some compelling reason to do.

HCFA argued that the "simple and logical" reason that the existence of a prima facie case must not be considered after the presentation of any evidence by the opposing party is the "prima facie concept" that "a lower burden of proof [is required] . . . to sustain a prima facie case than to win a judgment on the ultimate issue of noncompliance." HCFA Br. at 14. According to HCFA, the ALJ's "mishandling" of the hearing process failed to respect that distinction. Id. We find HCFA's logic confused.

HCFA confuses here the purpose of requiring it to come forward with some evidence to support the allegations on which its action is based with the effect of defining the "burden of proof" to be applied by the decision-maker. A prima facie case consists merely of the presentation of enough evidence to allow a trier of fact "to infer the fact at issue and rule in the party's favor," absent any opposing evidence. Black's Law Dictionary (7th ed. 1999); see Hillman Rehabilitation Center, DAB No. 1663 (1998) (Hillman II). Once the party with the burden of putting forward a prima facie case has done so, then the question of a prima facie case does not recur, and the question is to be decided on the merits based on all the evidence. Where the evidence in the record as a whole is in equipoise, the assignment of the ultimate

burden of proof determines which party prevails. Thus, as we instructed in Hillman II, an ALJ –

> should be able to determine the existence of a prima facie case at the close of HCFA's presentation. Hence, as we pointed out in our first decision, HCFA would lose even if the provider offered no evidence at all, if HCFA did not come forward with evidence sufficient to support a conclusion in its favor in presenting its prima facie case. [Hillman I] at 23. Thus, we held that HCFA must make its case "at the outset." Id. at 24.
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> Once HCFA has established a prima facie case, the provider may then offer evidence in rebuttal, both by attacking the factual underpinnings on which HCFA relied and by offering evidence in support of its own affirmative arguments. An effective rebuttal of HCFA's prima facie case would mean that at the close of the evidence the provider had shown that the facts on which its case depended (that is, for which it had the burden of proof) were supported by a preponderance of the evidence.

Hillman II at 9. Hence, the burden of proof required to "win a judgment on the ultimate issue of noncompliance" lies with the provider and consists of proving substantial compliance by a preponderance of the evidence as to those deficiencies put forward in HCFA's prima facie case.

The situation presented, however, here is precisely the reverse. The ALJ determined that HCFA failed to present a prima facie case; that is, no decision in its favor could be sustained even had VITAS failed to offer any evidence at all. The ALJ clearly understood that HCFA was not required to prove its case by the preponderance of the evidence, because ultimately the provider had the burden of proving compliance once HCFA put forward a case strong enough to at least require response. ALJ Decision at 7, 73-74. Here, however, the provider was never put to either rebuttal or affirmative defense because the ALJ determined that HCFA did not even present evidence sufficient to make out a case to put VITAS to its proof. Yet, HCFA argued that the provider nevertheless made a strategic error, by putting on testimony out of order, that somehow cured HCFA's failure to make its own prima facie case. We find that position illogical and unpersuasive.

HCFA further contended, however, that this result was nevertheless compelled by a "well-settled principle of federal civil procedure" that where a party moves for dismissal for failure to prove a prima facie case, and where the court reserves

ruling on the motion, and where the moving party proceeds to introduce any evidence on its own behalf, "the motion is considered waived." HCFA Br. at 14. HCFA characterized the ALJ's decision to recess the hearing at the point she did as "[p]lainly . . . an abuse of discretion that must be corrected." HCFA Br. at 16. We next address therefore whether applicable law indeed requires the outcome propounded by HCFA.

> ii. Federal civil procedure authorities do not preclude ALJ discretion to recess the hearing after a portion of VITAS's case and thereafter to rule on HCFA's prima facie case.

The authorities on which HCFA relied to bolster its procedural attack consisted of four court cases interpreting Federal Rules of Civil Procedure (FRCP) Rule 41(b). HCFA Br. at 14. HCFA suggested that this rule was directly on point. HCFA Reply Br. at 5-6. As HCFA admitted, the FRCP is not applicable in these administrative hearings, although it may offer helpful guidance in some areas. We consider in the next section whether any such guidance is relevant to the present situation, and conclude that special considerations in these hearings argue against a close adherence to the FRCP in this area. In the present section, however, we consider whether HCFA is correct that a broad and well-settled line of authority underpins its attack on the timing of the ALJ's ruling and decision.

We are not persuaded that case law imposes a restriction on a judge's discretion such that the action taken here would have been error even in a proceeding governed by the FRCP. We conclude that even if we applied FRCP Rule 41(b),[3] we would not

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[3]It is not entirely clear that our consideration of the circumstances here should be informed only by FRCP Rule 41(b). FRCP Rule 52(c) may also be a useful touchstone for evaluating the propriety of the analysis that the ALJ undertook of the record as it stood after HCFA put on its case-in-chief. That Rule provides as follows:

> Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may

(continued...)

find HCFA's interpretation of how to apply it to the circumstances here persuasive. First, HCFA failed to recognize federal appellate decisions in direct conflict with the authorities which it cited. Second, a close look at the circumstances of the cases cited by HCFA indicates that these authorities involve quite different contexts than we are dealing with here.

The most instructive case which we have identified is Sanders v. GSA, 707 F.2d 969 (7th Cir. 1983). In that case, the court confronted a dilemma virtually identical to the one before us. The plaintiff had completed its case in chief, the defendant had moved to dismiss, and lost that motion. (The judge had actually denied the motion initially rather than simply taking it under advisement as did the ALJ). The defendant began presenting witnesses, but the hearing was recessed before the defendant's case was concluded, and, in fact, as with the present case, in the middle of the cross-examination of one of the defense witnesses. During the recess, the judge reconsidered and determined that, based solely on the plaintiff's own evidence, without considering any conflicting evidence presented by the defendant, no prima facie case had been established. The plaintiff appealed the consequent adverse judgment on the grounds that the motion should have been treated as waived once the defense case began, and that "defendant's proper course if he objected to the initial denial was to refuse to present witnesses and then appeal the judgment in favor of plaintiff." 707 F.2d at 971. We quote at some length the appellate court's response to the defendant's position, since it is the same one taken by HCFA

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[3](...continued)
decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

It is thus within the discretion of a court to decide whether to proceed to make findings against a party who has been fully heard on an issue and failed to establish its necessary burden or whether to hear all the evidence before making any judgment. See International Union of Operating Engineers, Local Union 103 v. Indiana Const. Corp., 13 F.3d 253,257 (7th Cir. 1994). This scenario better fits in some ways what the ALJ actually did here than a FRCP Rule 41(b) order, since she did not merely dismiss the case but rather took evidence and made detailed analyses and findings on the record as to why she concluded that HCFA had failed to establish a prima facie case and thus VITAS was not put to its proof.

here. The appellate court reasons ultimately that the procedure adopted was within the trial judge's discretion.

> [Plaintiff's] is a correct statement of the procedure for contesting the denial of a 41(b) motion since such denial is not appealable at the close of a case. See Wealden Corp. v. Schwey, 482 F.2d 550 (5th Cir. 1973). All the Rule 41(b) cases cited by appellant deal with this issue. That, however, is not the issue in this case. This appeal does not involve defendant appealing the denial of a 41(b) motion, but rather plaintiff appealing the granting of one. . . .
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> The relevant question is whether the court may grant the motion upon reconsideration. Rule 41(b) states in pertinent part that:
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> > After the plaintiff ... has completed the presentation of his evidence, the defendant ... may move for dismissal .... The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.
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> This language is on its face ambiguous, and the Advisory Committee's Notes are not helpful. While the Rule seems to contemplate an either-or situation in which the case is either dismissed after plaintiff's case in chief or goes to completion, the Rule does not say that the trial judge must press on to the bitter end even if he has second thoughts about his original ruling. The "may decline to render any judgment until the close of all the evidence" language is permissive and is at least not inconsistent with a 41(b) ruling sometime prior to completion of the trial.
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> Neither party has cited a case involving this timing problem, and our research has disclosed none. It is clear from the cases that a Rule 41(b) denial is tentative and does not constrain the court's ultimate disposition of the case. "As we view it, the denial of defendant's motion amounts to nothing more than a refusal to enter judgment at that time. At most it constitute[s] a tentative and inconclusive ruling on the quantum of plaintiff's proof." Armour Research Foundation of Illinois Institute of Technology v. Chicago, Rock Island & Pacific Railroad, 311 F.2d 493, 494 (7th Cir.), *cert. denied,* 372 U.S. 966, 83 S.Ct. 1090, 10 L.Ed.2d 129 (1963). . . . Given that a 41(b) motion can be granted at the close of trial, we see no logical reason why it cannot be granted sometime between the end of plaintiff's case and the end of the trial.

> The Ninth Circuit in Pearson v. Dennison, 353 F.2d 24, 28 (9th Cir.1965) (dictum) has suggested that the "denial of the motion would be interlocutory, and it could be renewed and reconsidered at any time before final judgment." Our language in Armour Research is consistent with this point of view. We thus find no basis for precluding reconsideration in the present case on the grounds of timing *per se.*

707 F.2d at 971-72. Furthermore, the trial judge had undertaken precisely the task which the ALJ set herself. The appellate court expressly approved the judge avoiding the potential pitfall of deciding the motion midway through the presentation of defense witnesses by reaching his conclusion "on the basis of plaintiff's case alone." 707 F.2d at 973. The appellate court concluded:

> In the absence of any contention that the judge's 41(b) ruling was improper for any reason other than timing *per se* --and that only due to the unusual circumstances of this case--we cannot say that the granting of the motion to reconsider was improper. If plaintiff has not set forth evidence of discrimination and there is nothing aside from general assertions of discrimination for defendant to rebut, no purpose is served by requiring defendant to go through the motions -- at no small cost in time and expense to the parties and the court. Plaintiff has no entitlement to a full dress trial regardless of the plausibility of her claim.

Id. In the present case, an additional factor was that the hearing was adjourned for the holiday and the parties would have been required to travel at considerable cost to continue a hearing where the ALJ had already determined that HCFA had presented no prima facie case for the provider to answer.

We conclude that the approach which the ALJ articulated of focusing solely on HCFA's evidence and ignoring any conflicting material in VITAS's partial presentation was a proper route to deciding on the existence of a prima facie case despite any questions of timing.

HCFA, in its brief, quoted a resounding statement to the contrary, however, from Duval v. Midwest Auto City, Inc., 578 F.2d 721, 724 (8th Cir. 1978) to the effect that if "a defendant, after moving for involuntary dismissal at the close of plaintiff's case, introduces evidence on his own behalf, his right to a judgment of dismissal is thereby waived," and that "[t]his conclusion is not altered by the fact that the trial judge reserved ruling on the motion when made." HCFA Br. at 15, also citing E.E.O.C. v. Avery Dennison Corp, 578 F.3d 858(6th Cir. 1997) and two lower court cases. We look at these cases next to determine whether they control here.

Duval was a civil case in which the defendant had sought dismissal, but then proceeded with its presentation, only to itself introduce evidence of the missing element in plaintiff's case. The defendant then appealed the final decision against it on the grounds that it was error for the court to have "forced the defendants to proceed with their case without ruling on the motion to dismiss and then allowed the plaintiffs to bootstrap their faulty case with evidence adduced by the defendants." 578 F.2d at 724.

> **Under the circumstances here presented**, defendants are foreclosed from raising any issue concerning the sufficiency of the evidence as it stood at the close of plaintiffs' case.

578 F.2d at 725 (emphasis added). Thus, the core of the holding is the reasonable point that defendant could not essentially rewrite the record to expunge events after its motion was made in order to escape the effect of its own evidence. We conclude that the expansive language relied on by HCFA is not relevant to circumstances like those present here.

Avery Dennison was an employment discrimination case in which the appellate court held that it was error to rule on the absence of a prima facie case after the trial on the merits had been held. In such cases, the Supreme Court has laid out a complex analytical formula which lower courts have tried to implement for applying a shifting burden of proof. Briefly, the claimant must come forward with evidence of discriminatory treatment. Only if that prima facie case is established need the defendant come forward with evidence of nondiscriminatory reasons. If the defendant satisfies that burden, then the plaintiff has the ultimate burden of proof that discrimination was the real reason for the employment action. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This change in the nature of the issue as the case proceeds makes it difficult to analogize from such cases to the appropriate procedure in other settings. In any case, the Sixth Circuit in Avery Dennison rejected the proposition that the court could assess the existence of a prima facie case of discriminatory treatment after a full trial on the merits and required the court instead to resolve the ultimate issue of the real reason for the action. HCFA here took the position that the ALJ could appropriately have evaluated the question at the close of all the evidence. HCFA Br. at 15, n.5. The case thus does not support HCFA's proposition. Furthermore, Judge Ryan authored a persuasive dissent:

> In addition to concluding that it is not a rule compelled, or even supported, by existing precedent, I find no jurisprudential justification for inventing the rule posited by the majority . . . In sum, I fail to see the wisdom in the new rule created by the majority, in which the district courts are now forbidden, once a trial has occurred, from entering judgment on the ground that the *prima facie* burden has not been proved by a preponderance of the evidence. I recognize the case law from this circuit that "when a case has been tried on the merits, a reviewing appellate court *need not* address the sufficiency of a plaintiff's *prima facie* case, and *may* instead proceed directly to the ultimate question whether plaintiff has established discrimination," Brownlow v. Edgecomb Metals Co., 867 F.2d 960, 963 (6th Cir. 1989) (emphasis added), *quoted in* maj. op. at 862-863, and I have no quarrel with that proposition. I nonetheless can see no rationale for hamstringing the district court in its decisional process. If a case is most easily resolvable on the ground that a *prima facie* case has not been met, why should the district court be prohibited from doing so? Questions of judicial economy strongly counsel that it should not be. I, accordingly, dissent.

578 F.3d at 866. Avery Dennison thus involved a line of authority relating to a complex shifting burden of proof, reached a holding that does not accord with HCFA's position, and did not offer any persuasive reason why we should adopt the rule suggested by HCFA in the circumstances before us.

As for the lower court cases cited by HCFA, Int'l Union of Operating Engineers, Local No., 571 v. Hawkins Const. Co., 727 F.Supp. 537(D. Neb. 1990) followed Duval in a similar situation and was reversed and remanded to the district court on other grounds. 929 F.2d 1346 (8th Cir. 1991). In E.F. Hutton Group, Inc. v. U.S. Postal Service, 723 F.Supp. 951 (S.D.N.Y. 1989), the court reserved ruling on a motion to dismiss for failure to prove a prima facie case, which it treated as a FRCP Rule 41(b) motion. The court observed that enough evidence had been presented at the close of plaintiff's case to establish a prima facie case, but that in any case the defendant subsequently elicited evidence in its case that tended to show its own liability. The court concluded that "[b]y doing so [defendant] waived its right to have the court consider the sufficiency of plaintiffs' evidence standing alone." Id.; citing duPont v. Southern National Bank, 771 F.2d 874, 881 (5th Cir. 1985), cert. denied, 475 U.S. 1085 (1986); Duval; and Moore's ¶ 41.13[1] at 41-167 & n. 16. Again,

the proposition that a party cannot undo the effect of self-inflicted wounds by turning back the clock does not translate into a weapon for HCFA to avoid scrutiny of whether it made a prima facie case simply because a provider has already submitted any evidence in its own favor.

Furthermore, in order to prevail on a remand, all VITAS would be required to do would be to rest its case since by definition the ALJ's decision established that HCFA did not present evidence sufficient to support a finding in its favor even without any conflicting evidence. The posture of this case underscores the futility of resuming the hearing.

> iii. Even if in federal court the FRCP had required the result HCFA proposed, we would decline to follow that practice in these hearings because of the high potential for unfair and inefficient effects.

HCFA acknowledged that the cases on which it relied do not directly apply to administrative proceedings, which are not governed by the FRCP rule that the courts were interpreting. HCFA Reply Br. at 5-6; FRCP Rule 1; see also Sloan v. SEC, 547 F.2d 152, 155 (2d Cir.1976). Nevertheless, HCFA argued that the Board has looked to the FRCP except where specific regulations conflict, for example, where a regulation requires more detailed content in hearing requests than the federal rules mandate in pleadings. HCFA Reply Br. at 6, n.4., citing Birchwood Manor Nursing Center, DAB No. 1669 (1998). Hence, according to HCFA, the Board should be guided in evaluating the ALJ Decision by FRCP 41(b) and the cases which it cited. HCFA Reply Br. at 6.

The Administrative Procedure Act (APA) provides that agencies may establish their own rules for hearings and that, subject to published agency rules, ALJs presiding at hearings have the general authority, among other powers, to "regulate the course of the hearing" and to "dispose of procedural requests or similar matters." 5 U.S.C. § 556(c)(6) and (9). The agency rules applicable to the hearing here are set out at 42 C.F.R. Part 498. Nowhere do they oblige an ALJ to rule on the existence of a prima facie case only at the close of HCFA's case or after all evidence has been taken. The provision on the conduct of hearings emphasizes the discretion of the ALJ by providing that "[t]he ALJ decides the order in which the evidence and the arguments of the parties are presented and the conduct of the hearing." 42 C.F.R. § 498.61(b)(3).

This broad latitude does not preclude the ALJ from considering authorities relating to FRCP rules corresponding to a situation

presented in an administrative hearing. Looking to the FRCP for useful guidance, however, does not equate to applying its provisions mechanistically in a context for which they were not drafted. See Section 1013 on Administrative Proceedings in Wright & Miller, Federal Practice and Procedure, Federal Rules of Civil Procedure (1987). Administrative proceedings differ in many ways from federal court trials and present different considerations.

The ALJ's initial decision to permit the hearing to proceed briefly while she considered the motion served the interest of using scarce hearing time efficiently rather than adjourning to take the motion under advisement with the potential costs and difficulties of trying to reconvene and reschedule witnesses should the motion be found baseless. In any case, that decision made little difference in terms of HCFA's complaint that the ALJ should not thereafter have reconsidered and decided to adjourn and address the merits of the motion. As is common in agency hearings, both parties' exhibits had already been admitted before the start of the hearing. Furthermore, as is also common, several VITAS witnesses had been accommodated by permitting them to testify before HCFA concluded its case-in-chief.[4] Hence, permitting VITAS to present some additional testimony after HCFA rested its case was not the decisive action. We must consider instead the costs that adopting HCFA's position would impose in this case and in reducing the flexibility available to parties in future cases.

Agency adjudicators seek to provide the fair, prompt and efficient process due to parties who assert an appealable adverse effect from government action. Such tribunals are, as we have noted, not subject to the strict rules of evidence or procedure that govern federal court proceedings. Among other reasons for this, administrative adjudicators need flexibility to accommodate scheduling and logistical concerns of parties and witnesses and minimize unnecessary burdens and costs of travel and litigation. Were we to impose the result HCFA advocated here, a strong disincentive would be created to parties cooperating with the ALJ in arranging such accommodations. In order to assure that any attack on HCFA's prima facie case was heard, providers would be

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[4]The taking of testimony "out of order" is a frequent occurrence at HHS administrative hearings. Often, accommodation is made for doctors, whose testimony is commonly scheduled around patient visits and surgery. Here, accommodation was made for VITAS's out-of-town witnesses, in large part because HCFA's case-in-chief went considerably beyond the time originally allocated.

forced to press for hearings to be halted in mid-stream and rescheduled after the issuance of rulings. The likely result would be unnecessary inefficiencies in numerous cases without any countervailing benefit.

These cases do not involve juries or lay fact-finders whose capacity to disregard partial testimony might be doubtful. By contrast, we perceive little potential for confusion with a professional adjudicator considering only one party's case where appropriate, as here. We hence decline to impose such a profitless restriction on the discretion of ALJs in conducting hearings arising from appeals of adverse actions taken by HCFA against providers.

iv. Even had we found error, HCFA did not demonstrate any prejudice as a result of the timing of the ALJ's ruling.

We would reverse the ALJ Decision on procedural grounds, such as those advanced here, only if we found not only legal error (which we do not) but also that such error actually caused prejudice to the appellant. We find HCFA's assertions of prejudice unfounded.

Although HCFA stated that it doubted neither "the ALJ's integrity, nor her commitment to 'consider only the evidence presented in HCFA's case-in-chief,'" HCFA called the task she undertook "impossible" because she "distorted the record" by her "refusal to permit cross-examination of Vitas' principal witness." HCFA Br. at 17. HCFA argued that it was thus prejudiced in that the record was skewed in VITAS's favor since "HCFA had no chance to probe Vitas' witnesses, to test their memories and credibility." Id. Also, HCFA complained that it had been denied an opportunity to put on a rebuttal case which was crucial because the ALJ had assertedly permitted VITAS to cross-examine HCFA's witnesses "well beyond the scope of their direct testimony." HCFA Br. at 17, n.7.

In support of its claim that the hearing was thereby so poorly run as to deny HCFA due process, HCFA cited the APA for the proposition that "a party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full disclosure of the facts." HCFA Br. at 16-17; 5 U.S.C. § 556(d). We note initially that this language does not state an absolute requirement to permit all requested cross-examination but only such as will result in full disclosure of the relevant facts. Further, the APA also provides that the ALJ has discretion "to regulate the course of the hearing." 5 U.S.C.

§ 556(c)(5). Nothing on the face of the APA precludes an ALJ from exercising discretion to suspend a hearing where it appears likely that a pending motion may be dispositive and further examination of witnesses superfluous. The case law supports our conclusion.

The only case relied on by HCFA is not greatly analogous to the present dispute and, if anything, supports a conclusion opposite to what HCFA suggested. HCFA cited the case for the proposition that a party is entitled to a "reasonable opportunity" to know what the opposing claims are and to meet them. HCFA Br. at 16-17; Morgan v. U.S., 304 U.S. 1 (1938). Even in isolation the common sense idea that a party should not have to litigate in a blind vacuum hardly leads to the conclusion HCFA asserted, i.e., that it was entitled "[a]ccordingly, at a minimum" to have been able to "cross-examine every witness that Vitas was allowed to put on the stand" before the ALJ could recess the hearing and rule on the existence of HCFA's prima facie case. HCFA Br. at 17. The underlying facts in Morgan cut even more strongly against such an extrapolation. The Court there addressed a rate-setting case in which the private party and the agency representatives presented massive amounts of testimonial and documentary evidence to an agency examiner. 301 U.S. at 14. The examiner issued no report; the component of the agency that appeared at the hearing wrote detailed findings; the Secretary of Agriculture essentially accepted those findings without an opportunity for input from the private party. 301 U.S. at 14-18. The Court concluded that --

> The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasijudicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. No such reasonable opportunity was accorded appellants.

301 U.S. at 18-19. The virtual absence of notice and participation by the non-federal party that so concerned the court can hardly compare to HCFA not completing its cross-examination of one witness before the ALJ decided to recess and rule on whether HCFA's own case sufficed to meet its initial burden. Rather, the case supports the ALJ's focus and concern about the importance of the problems caused in this case by HCFA

having provided inadequate or erroneous notice of the underpinnings of many of the allegations underlying the deficiencies at issue.

Other case law that is more apposite directly establishes that an ALJ has discretion to limit the scope of cross-examination where the result does not substantively impair the ability to decide the issue presented on a full, fair record. For example, the Fifth Circuit stated as follows:

> Appellants' argument assumes that due process requires cross-examination of all witnesses whose testimony was taken in the hearing. Due process, however, "is not a technical conception with a fixed content unrelated to time, place and circumstances." Mathews v. Eldridge, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). Instead, it only "calls for such procedural protections as the particular situation demands." Id. The Administrative Procedure Act similarly mandates only "such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. 556(d) (1977). Cross-examination is thus not an absolute right in administrative cases.

Central Freight Lines, Inc. v. U. S., 669 F.2d 1063, 1068 (5th Cir. 1982); see also Solis v. Schweiker, 719 F.2d 301 (9th Cir. 1983)(holding cross-examination should have been permitted in circumstances of the case but affirming that ALJs “have discretion to decide when cross-examination is warranted”). In particular, limitation of cross-examination is less problematic where the testimony was not necessary or relevant to the ALJ’s decision. See 669 F.2d at 1068. Here, the testimony of VITAS’s last witness was wholly irrelevant to the ALJ Decision, which considered only HCFA’s evidence and witnesses. We conclude that the interruption of that testimony did not deny due process or violate the APA and was well within the ALJ’s discretion.

Furthermore, many of the factual premises on which HCFA based its claims of prejudice were squarely contradicted by the record. For example, HCFA asserted that it “had not been permitted to cross-examine any of Vitas’s witnesses.” HCFA Br. at 13. Yet, in fact, HCFA fully cross-examined each of VITAS witnesses except the final one who was undergoing cross-examination (and had been for the entire day) when the hearing adjourned on December 22, 1999. Tr. at 571-80, 596-612, 830, 851-857, 1240-48, 1277-92 and 2242-2465. As we have noted, in her ruling and decision, the ALJ made explicit that she was judging the prima facie case based on

the evidence and witnesses proffered by HCFA alone. HCFA has shown no basis to conclude that the ALJ here did not do exactly as she said. In particular, HCFA failed to cite even a single instance in the lengthy and detailed ALJ Decision in which the ALJ relied on or even referenced any testimony or evidence not introduced by HCFA itself.

HCFA also mounted a more general, if rather vague, attack on the ALJ's conduct. For example, HCFA asserted that, the ALJ "offered no rationale for [her] extraordinary (not to say bizarre) manner of proceeding" in determining to recess the hearing and in then permitting the parties an opportunity to brief whether HCFA presented a prima facie case and whether VITAS was provided adequate notice of certain deficiencies. The ALJ did offer reasons, however, for her decision to adjourn and seek briefing, and the documents cited by HCFA reflect them. Tr. at 2386-2470; ALJ Orders of January 6 and 18, 2000. While HCFA clearly objected to the reasons the ALJ gave, that does not justify HCFA's erroneous assertion that the ALJ gave no reasons.

HCFA also questioned the "ALJ's judgment in managing these proceedings," apparently inferring some reflection on her capacity to consider fairly the evidence presented by HCFA alone based on her conduct of the hearing itself. HCFA Br. at 13, n.4. To that end, HCFA asserted that the ALJ was responsible for "many flaws," of which the most egregious example offered was that the ALJ announced one day that "she was determined to continue the hearing as late as 11 p.m. without a break for dinner and, 'until the lights go out,' Tr. 1806." Id. The transcript reflects instead that the ALJ responded to VITAS's counsel's request to put on a witness on the evening of December 20, 1999 by pointing out that the courthouse would probably be locked up from the outside, preventing anyone leaving for dinner and returning, and that the building's lights would go out at 11 p.m. Tr. at 1805-06. Nevertheless, she stated that she was "willing to go as long as everybody can stand it" and that she would be "guided by what the rest of you want to do as to how late" to go. Tr. at 1806. Since counsel for HCFA responded to the ALJ's offer by stating "That's fine," the suggestion in HCFA's brief that such flexibility amounted to improper conduct of the hearing is unwarranted and, in fact, reflects a distortion of the record. Compare Tr. at 1806 with HCFA Br. at 13, n.4.

HCFA further asserted that the prolongation of the hearing beyond the scheduled time was the direct result of the ALJ permitting VITAS to cross-examine HCFA's witnesses too extensively and to interrupt HCFA's case to present witnesses out of order. HCFA Reply Br. at 3-4. Again, the transcript does not lend credence

to HCFA's assertions. VITAS calculated in its brief, and HCFA did not dispute the accuracy of the calculation in its reply, that only 8% of the hearing time (based on transcript pages) during HCFA's case was diverted to the examination (both direct and cross) of VITAS's three witnesses. VITAS Br. at 6. Those witnesses had timed their appearances based on HCFA's declaration that it intended to use only the first 2 - 3 hearing days to complete its full presentation. Tr. at 53; VITAS Br. at 6. HCFA's case, however, extended over 6 days.

While one VITAS witness was re-scheduled for earlier in the week because of a corporate meeting, he was limited to a one-hour appearance beginning at 5:01 p.m. on December 13, 1999. Tr. at 48-52, 565. HCFA described the ALJ as having "allowed petitioner 'to shift from our planned order' and present the testimony of" a VITAS witness the next day, forcing one of the HCFA surveyor witnesses to return the next day to complete her testimony. Tr. at 4. HCFA omitted, but the transcript revealed, the circumstances surrounding this schedule alteration. At about 4 p.m. on December 14, 1999, the ALJ reported that during a break lead counsel for VITAS was notified of a family emergency and had to leave immediately. Tr. at 825. The ALJ indicated that she felt it inappropriate to continue with the testimony of a witness in regard to a topic as to which lead counsel had prepared the examination. Id. In order to use the remaining time, the ALJ noted that co-counsel for VITAS was prepared to examine a VITAS witness who was to have been taken after the surveyor's testimony was completed. Tr. at 626-28, 825-26. His testimony lasted about an hour, concluding before 5 p.m. Tr. at 858-59.

We conclude that HCFA has not shown any prejudice to it from the ALJ's conduct of the hearing.

B. The ALJ's treatment of HCFA's proffer of evidence concerning the March survey was within her discretion.

As noted above, the ALJ's stated reason for postponing ruling on the relevance and hence admissibility of the March survey evidence proferred by HCFA was that a determination depended on what was proven about the June survey. Thus, if the June survey found condition-level deficiencies justifying termination in themselves, she reasoned, then it would not be necessary to consider whether HCFA proved its alleged independent basis that some March deficiencies were uncorrected in June. Conversely, if HCFA failed to establish any deficiencies in June, it would be irrelevant which deficiencies existed in March, since they could not then form the basis of a repeat deficiency finding.

The ALJ concluded that HCFA failed to present a prima facie case adequate to support finding any deficiency in June at all. Logic compels her further conclusion that HCFA could not possibly prove that deficiencies found in June had gone uncorrected since March if no deficiencies existed in June. The correctness of her ultimate treatment of the proffered evidence on March deficiencies derives from her ruling that HCFA failed to establish a prima facie case that any deficiencies existed in June. We have held that the ALJ committed no prejudicial error in ruling on that question when she did. We must therefore consider next whether HCFA has raised a challenge to the substance of that ruling.

> C. HCFA failed to challenge any factual findings or present any reasons to overturn the ALJ's conclusion that HCFA did not establish a prima facie case.

As discussed above, HCFA's appeal of the ALJ Decision presented a very narrow set of issues, and raised no exceptions to any FFCLs in the ALJ Decision. Indeed, HCFA expressly asserted that it was "not asking the Board to examine the evidence," calling any attempt to do so "premature." HCFA Br. at 13.

The Board's guidelines for appeal in these cases clearly instruct parties to identify specific disputed FFCLs and to explain the basis for each such challenge, including citations to evidence in the record. Thus, parties are informed as follows:

> Your request for review must include a written brief specifying findings of fact and conclusions of law with which you disagree, and your basis for contending that each such finding or conclusion is unsupported or incorrect. Do not merely incorporate by reference a brief previously submitted to the ALJ. The basis for challenging each element of the ALJ decision should be set forth in a separate numbered paragraph or section, and the accompanying arguments concisely stated. Where appropriate, each should be supported by precise citations to the record before the ALJ or by precise citations to statutes, regulations or other authorities relied upon.

DAB Guidelines for Appellate Review of Decisions of ALJs Affecting a Provider's Participation in the Medicare and Medicaid Program, at 1. Further, the dispute on appeal to the Board is limited to those issues articulated in the exceptions taken by the appealing party (and responsive arguments). Id.; see also

Beverly Health and Rehabilitation Center – Williamsburg, DAB No. 1748 (2000).

In its reply brief, HCFA elaborated on the scope of its appeal:

> [A]lthough HCFA is not at this time appealing the ALJ's factual findings because the hearing was not permitted to proceed to completion and a full record, even the existing record will show that HCFA presented a prima facie case. . . .

HCFA Reply Br. at 1-2. HCFA contended that the ALJ Decision could not be upheld absent "a review of the entire testimony of HCFA's witnesses, as well as HCFA's arguments in its post-hearing briefs regarding the existence of deficiencies, for which HCFA is not seeking review at this time." HCFA Br. at 2. Thus, HCFA expressly declined to request appellate review of the evidentiary basis of any of the ALJ's factual findings.

In effect, HCFA here attempted to misuse the requirement that any issues raised on appeal be fully briefed in the appellate record as a device by which it sought to constrain the Board from reaching any final conclusion about the ALJ Decision by declining to brief any issues on the merits of its prima facie case "at this time." Apparently, HCFA intended to address these issues, if at all, only on an appeal from another ALJ decision which it hoped would result from a remand for further hearing.

The requirement that arguments be developed on appeal and not merely incorporated by reference from briefing below assures that the parties address the case as it stands after the ALJ Decision. The rule does not mean that issues developed before the ALJ are not to be fully briefed on appeal if the appellant seeks to press them before us. Thus, a party is not permitted to reserve an issue for later dispute simply by its silence in its appeal submissions. Instead, what is not excepted to and not argued on appeal is deemed accepted.

Since no challenge was timely and properly raised by HCFA to any of the ALJ's FFCLs, we sustain them in their entirety.

> D. Given HCFA's failure to prove even a prima facie case as to any condition- or standard-level deficiency during the June survey, evidence about the March survey was irrelevant as a matter of law.

HCFA argued that its termination action was supported by three independent bases: (1) that VITAS was out of compliance with one

or more conditions of participation at the time of the June survey; (2) that the deficiencies found at the June survey (even if not condition-level per se), either individually or in combination, adversely affected the health and safety of patients or substantially limited VITAS's capacity to render adequate care; and/or (3) that VITAS failed to correct standard-level deficiencies identified during a prior survey, that is, repeated the same deficiencies in the June survey. On the grounds that the third basis could suffice by itself, HCFA insisted that no decision should have been reached without presentation of all the evidence relating to the March survey. Hence, HCFA contended that it should be permitted at a reconvened hearing to present evidence that numerous deficiencies found at the March survey were uncorrected at the June survey. HCFA Br. at 7-9. HCFA Br. at 7, quoting ALJ Decision at 9. We find that the quoted statement to which HCFA excepted was mere dicta. Hence, we decline to address the legal issue HCFA raised about it, because it was ultimately unnecessary to the ALJ Decision not to hear evidence about the March survey.

The ALJ's exclusion of the evidence proffered by HCFA concerning the March survey does not rest on a legal conclusion that repeat standard-level deficiencies may not be the basis of a termination. Rather, the ALJ found no evidence establishing any standard-level deficiencies at all from the June survey. ALJ Decision at 73-74. Her reasoning is set out in the following excerpt from her decision:

> There is no need for me to consider any evidence from the March 1999 survey because it is irrelevant. The March 1999 survey evidence is irrelevant because HCFA, in its discretion, permitted the hospice the opportunity to establish compliance with the Medicare conditions of participation by the time of the second resurvey (3rd survey) which was completed on June 23, 1999. HCFA Ex. 2. The June 1999 survey evidence does not show that the hospice failed to establish compliance. Not only does that evidence fail to show non-compliance with any condition of participation, that evidence fails also to show non-compliance with any standard.

ALJ Decision at 73-74. We agree with the ALJ that, logically, HCFA could not prove that there were repeat deficiencies from March if HCFA had not made out at least a prima facie case that the deficiencies even existed in June. HCFA never asserted that the termination could be justified based solely on the results of the March survey, and could not have done so because the

termination letter gave no notice of any such basis for the termination.

We conclude that, as a matter of law, evidence about the March survey was properly treated as irrelevant based on HCFA's failure to prove the predicate for its admission, i.e., that at least one standard-level deficiency was present in June that had also been cited in March.

2. **HCFA's appeal as to the second issue is without merit**.

HCFA alleged that the ALJ required a showing of actual harm to patients as a prerequisite to terminating VITAS's provider agreement. HCFA Br. at 19. HCFA argued that a provider may be terminated without such a showing under the regulations. Id., citing 42 C.F.R. §§ 488.24(b) and 489.53(a)(1) and (3). HCFA also relied on Board precedent holding that no showing of actual harm is required to terminate a provider agreement. Carmel Convalescent Hosp., DAB No. 1584 (1996). Hence, HCFA argued that the ALJ misunderstood the legal standard. As evidence for that argument, HCFA pointed to the ALJ's rejection of two deficiency findings "based, at least in part, on her conclusion that the patients described in the findings were not harmed." Id., citing ALJ Decision at 14-15 as relating to Findings 3 and 5 under Tag L133.

As discussed in the legal background, 42 C.F.R. §§ 489.53(a)(1) and (3) authorize HCFA to terminate a provider that is out of compliance with applicable provisions of the Act, regulations, or provider agreement or no longer meets the applicable conditions of participation. Section 488.24(b) provides that state survey agencies will certify that a provider is not in compliance with the conditions of participation "where the deficiencies are of such character as to substantially limit the provider's . . . capacity to furnish adequate care or which adversely affect the health and safety of patients." See also 42 C.F.R. § 488.28(a) and (b). Before the ALJ, the parties disputed whether HCFA was authorized to terminate a provider only where deficiencies were found that, individually or in combination, met the criteria of substantially limiting the capacity to furnish adequate care or adversely affecting the health and safety of patients. HCFA contended that it also had authority to terminate where standard-level deficiencies were uncorrected from an earlier survey even absent a showing that the repeat deficiencies individually or collectively meet that criteria. HCFA Reply Br. at 7-8. The ALJ disagreed. ALJ Decision at 8-9, FFCL 10. HCFA charged that this interpretation was legal error in defining the standard to evaluate repeat deficiencies and procedural error in that the

exclusion of evidence from the March survey handicapped HCFA in showing that the persistence of uncorrected deficiencies did compromise care and jeopardize health and safety. HCFA Reply Br. at 8, and n.5.

We decline to resolve here the dispute about whether repeat deficiencies in themselves establish grounds for termination regardless of whether they meet the criteria set out for condition-level failures. We do so because the issue is irrelevant to this case given the ALJ's conclusion that no standard-level deficiencies existed in June. The question of whether repeat deficiencies existed that fell short of substantially limiting the capacity to furnish adequate care or adversely affecting the health and safety of patients is not presented.

HCFA appeared to confuse this dispute over permissible grounds for termination with the concept of actual harm, although they are not identical. See, e.g., HCFA Reply Br. at 9. The Board has addressed whether a showing meeting the criteria for a condition-level deficiency must include evidence of actual harm to a patient, as follows:

> We agree with the ALJ that the use of the terms "capacity" and "safety" clearly indicates that a condition-level deficiency may arise from a potential for harm to patients, as well as from circumstances which result in actual harm. This result is also consistent with the decision in Beverly California Corporation v. Shalala, 78 F.3d 403 (8th Cir. 1996). The Eighth Circuit in Beverly agreed with the Appeals Council that "the relevant inquiry is not whether Medicaid patients suffered actual harm" since a "standard requiring harm to Medicaid patients before the Secretary could take action would improperly subvert the Secretary's oversight of the program." 78 F.3d at 409; see, also, Carmel Convalescent Hospital, DAB 1584 (1996).

National Hospital for Kids in Crisis, DAB No. 1600, at 8 (1996). It is clear that it would be error to require a showing of actual harm as a prerequisite for terminating a non-compliant provider. We therefore consider next whether the ALJ did in fact impose such a requirement.

At the hearing, counsel for HCFA objected to any questions about whether or not a challenged practice harmed a patient because no such showing was required to terminate. The ALJ replied that

"[w]e all know that there doesn't have to be harm . . ." Tr. at 727. Although this comment suggests that the ALJ indeed understood that actual harm was not a prerequisite, we must determine whether she nevertheless applied an actual harm requirement in reaching her conclusions.

The specific Findings mentioned by HCFA are not discussed on the cited pages of the ALJ Decision, which instead address Findings 1(b) and 2 under Tag L133 in the statement of deficiencies.[5] See ALJ Decision at 14-15. We look both at the cited pages and at the cited Findings to determine if the ALJ relied on a requirement that actual harm be proven in weighing these Findings.

As to Finding 1(b), the ALJ reported that HCFA admitted at the hearing and in post-hearing briefing that the statement of deficiencies mistakenly identified the patient involved (citing Patient 3 instead of Patient 7). ALJ Decision at 14. The ALJ concluded that HCFA failed to give VITAS adequate notice of the basis for the alleged deficiency, since HCFA never provided a written correction and the error was not obvious on the face of the statement of deficiencies. Id. In any case, the ALJ noted that the facts underlying the allegations about the intended patient were addressed on the merits in relation to a finding under another tag number. Id.; see HCFA Ex. 1, at 10, 30-31. At the latter tag number, the statement of deficiencies also erroneously identified the patient at issue (as Patient 6 this time) but the ALJ found that sufficient detail was included in that section to overcome the error and alert VITAS to the identity of the intended patient. ALJ Decision at 15.[6]

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[5]HCFA did not offer any clarification in its reply brief despite VITAS having pointed out the discrepancy in its response brief. See VITAS Br. at 18.

[6]The allegations related to a hospice participation requirement that "[m]edical supplies and appliances, including drugs and biologicals, must be provided as needed for the palliation and management of the terminal illness and related conditions." 42 C.F.R. § 418.96. HCFA interpreted this language to require the hospice to pay for any medication that appears on a hospice patient's plan of care or medication list, regardless of whether it treats the terminal illness or a related condition. VITAS argued, and the ALJ agreed, that its duty was to provide only medications for the terminal illness or a related condition, and that noting other medications that the patient was taking on

(continued...)

As to Finding 2, the statement of deficiencies alleged that the problem lists that appeared as part of the plan of care in nine patients' records were not consistent with "standardized problems on the Interdisciplinary Care Plan Problem forms" resulting in some interventions being identified with problems to which the interventions were not directed. Id. at 15-16. The ALJ found that HCFA failed to name any of the nine patients, offered no evidence in support of these allegations at the hearing, and presented no argument concerning the allegations in its post-hearing briefing. Id. at 16. Consequently, she concluded that the deficiency finding had to be dismissed. Id. In neither case did the ALJ dismiss these findings for failure to prove actual harm; rather, she dismissed them for inadequate notice and/or on the merits of the evidence proffered by HCFA to show noncompliance.

Turning to the survey Findings 3 and 5, under Tag L133, we reach the same conclusion. Finding 3 alleged that no evidence demonstrated how the intervention of discontinuing regular laboratory tests and providing a blood pressure medication related to the care goal of comfort management or how the interventions of checking blood sugar and insulin and medicating for nausea and vomiting related to the care goal of maintaining a source of nutrition. HCFA Ex. 1, at 11-12. The ALJ found that one surveyor, a registered dietician, acknowledged that discontinuation of laboratory testing involving needles could contribute to comfort and that controlling blood pressure would be important to a patient's comfort. ALJ Decision at 17. Further, the surveyor testified on cross-examination that managing blood sugar in a diabetes patient and controlling for

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[6](...continued)
the hospice records was good practice that did not convert those medications to the kind covered under 42 C.F.R. § 418.96. See discussion in ALJ Decision at 69. The patient at issue had a terminal diagnosis of ALS, but the hospice had noted over-the-counter hemorrhoids medications on the patient's medication list. The ALJ found that the hospice had not violated the regulatory requirement by failing to pay for those items. The statement of deficiencies also alleged that several medications were not available in the home when the survey team visited. A surveyor testified at the hearing that the patient informed her that she no longer needed those items. The ALJ overturned the deficiency, finding that the medications at issue were not currently needed to manage the terminal illness or related conditions. Id. at 73. The ALJ made no observation relating to the absence of actual harm in relation to Patient 7.

nausea and vomiting in a patient on tube feeding would affect nutritional status. Id. at 17-18. The ALJ concluded that the evidence would not support a deficiency finding under the cited regulations. Id. at 19.

The statement of deficiencies alleged in Finding 5 that the hospice did not document that the nurse monitored a patient's breath sounds each visit, as required by the plan of care. HCFA Ex. 1, at 12-13. As to two of the three visits cited as deficient, the ALJ found that the nurse's notes, submitted as part of HCFA Exhibit 12, contain notations as to whether the patient had a cough or complained of shortness of breath, and contained a mark noting the patient had rales or wheezes and describing where these were heard in the patient's lungs. ALJ Decision at 21-22. Consequently, the ALJ was not persuaded that the hospice had not documented monitoring of breath sounds on those visits. Id. at 22. The nurse's notes from third visit were less complete. The notes indicated that the patient denied dyspnea and had no cough, recorded the rate of oxygen use, and included the nurse's assessment that no new or further interventions were required under respiratory goals. Id. at 23-24. However, the box for rales and wheezes was left unchecked. The hospice argued that this meant that the nurse found no rales or wheezes; HCFA argued that the omission meant that the nurse did not document monitoring. The ALJ stated that the nurse should have affirmatively noted if the patient no longer had rales or wheezes, but concluded that this "insignificant documentation omission in the June 15, 1999 nursing notes certainly does not rise to even a standard-level deficiency." Id. at 24.

The ALJ observed as to both Findings 3 and 5 that the evidence did not show that the hospice failed to meet the patient's needs adequately under the plan of care. Id. at 19, 24. Again, the ALJ found the evidence proffered by HCFA to show noncompliance inadequate to support the findings and did not dismiss them for failure to prove actual harm.

We conclude that the ALJ imposed no requirement that HCFA show actual harm to a patient in order to demonstrate noncompliance. In each situation to which HCFA may have referred, the ALJ rejected HCFA's contention that VITAS was not in compliance with a standard or condition because she did not find that a violation was proven based on HCFA's witnesses' testimony and documentary evidence. In no case did she suggest that the facts she found would have constituted a deficiency but for the absence of actual harm occurring to the patient involved. Where she found documentation errors that did not suffice to establish even a

standard-level deficiency, she based her analysis on the trivial nature of the omissions of particular notations which were not specifically required by law or regulation and which had no significance in the context of the full records of the patients' care. See ALJ Decision at 24, 73. Thus, as to three other insignificant documentation omissions, she found that none "was proven to have affected or even to have had the potential to have affected the care and services provided to the patient." ALJ Decision at 73. We find no error in the ALJ's conclusion that HCFA thus failed to present evidence of a legally sufficient basis for termination.

3. No relief is warranted based on HCFA's appeal.

It follows from our analysis so far that, since the ALJ committed no error, we have no basis to remand this matter. Given that the regulations governing appeals quoted above plainly require the appellant to set out its exceptions and the reasons therefor, HCFA could not reasonably reserve for some other occasion any challenge it could make to the FFCLs. Our guidelines for these appeals clearly state that the "Board will not consider issues not raised in the request for review." Yet, HCFA failed to raise any issue as to the evidentiary basis for the ALJ's substantive conclusion that HCFA failed to present a prima facie case in support of its authority to terminate VITAS. In fact, HCFA explicitly asked us not to review the evidence. Therefore, we conclude that no relief is warranted.

HCFA's appeal amounts to a demand to reconvene the hearing for VITAS to put on its case in the hope that HCFA may elicit something from VITAS's witnesses to rehabilitate a case that HCFA had failed to make at the close of its own presentation. We decline to grant that demand.

Conclusion

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

/s/
Judith A. Ballard

/s/

Donald F. Garrett

_____/s/_____
Marc R. Hillson
Presiding Board Member