

Department of Health and Human Services  
DEPARTMENTAL APPEALS BOARD

Appellate Division

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In the Case of:	)	DATE: November 17, 2009
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Gateway Nursing Center,	)	
Petitioner,	)	Civil Remedies CR1963
	)	App. Div. Docket No. A-09-116
	)	
- v. -	)	Decision No. 2283
	)	
Centers for Medicare &	)	
Medicaid Services.	)	

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FINAL DECISION ON REVIEW OF  
ADMINISTRATIVE LAW JUDGE DECISION

The Centers for Medicare & Medicaid Services (CMS) appealed the June 24, 2009 decision of Administrative Law Judge (ALJ) Keith W. Sickendick which upheld as reasonable civil money penalties (CMPs) of \$3,050 per day for February 5, 2007 and \$50 per day from February 6, 2007 through March 7, 2007, but rejected as unreasonable a CMP of \$3,050 per day from January 21, 2007 through February 4, 2007. Gateway Nursing Center, DAB CR1963 (2009) (ALJ Decision). The ALJ found that Gateway Nursing Center (Gateway) was in substantial compliance with participation requirements at 42 C.F.R. § 483.13(b) but was not in substantial compliance with 42 C.F.R. § 483.13(c). He further concluded that CMS's determination of immediate jeopardy was not clearly erroneous as to February 5, 2007 but was clearly erroneous as to the earlier period of time. (At the hearing, Gateway withdrew its appeal as to the imposition of the \$50 per-day CMP for noncompliance with 42 C.F.R. § 483.25.) CMS argued

that the ALJ erred in finding no noncompliance as to section 483.13(b) and in finding the determination of immediate jeopardy to be clearly erroneous prior to February 5, 2007.

For the reasons explained before, we uphold the ALJ Decision.

### **Background**<sup>1</sup>

Gateway is a dually-certified facility in North Carolina. The State survey agency conducted a complaint survey on February 16, 2007 and a revisit survey on March 19, 2007. The dispute in this case centers on the facility's handling of a 91-year-old female (Resident 1), who was severely demented and psychotic, confined to a wheelchair and suffering from numerous physical and mental ailments. She frequently screamed at night and was doing so in her bed during the early morning hours of February 5, 2007, demanding to go home. A licensed practical nurse (LPN), John Tellefsen, had her transferred to her wheelchair and moved to the front desk. When she again began screaming, LPN Tellefsen wheeled her outdoors wearing only her hospital gown and a diaper, in an effort, he said, to show her that the weather was too cold for her to go home. These events are not disputed, nor is the fact that the temperature at the time was in the 20's.

The ALJ found, and Gateway does not contest before us, that the incident was not reported to the director of nursing or the facility administrator until February 7, 2007, although it was observed by or known to multiple staff members. LPN Tellefsen was suspended and ultimately terminated.

Additional allegations were made by CMS about two episodes involving the same resident, one on December 17, 2006 and one on January 21, 2007. The ALJ found that the first incident did not involve abuse and that the evidence did not show that the second incident actually took place. CMS disputes those findings.

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<sup>1</sup> The following background information is drawn from the ALJ Decision and the record before the ALJ and summarized here for the convenience of the reader, but should not be treated as new findings.

### Applicable legal authorities

Federal law and regulations provide for surveys by state survey agencies to evaluate the compliance of long-term care facilities with the requirements for participation in the Medicare and Medicaid programs and for CMS to impose remedies when a facility is found not to comply substantially. Sections 1819 and 1919 of the Social Security Act;<sup>2</sup> 42 C.F.R. Parts 483, 488, and 498.

"Substantial compliance" is defined as "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health and safety than the potential for causing minimal harm." 42 C.F.R.

§ 488.301. "Noncompliance" means "any deficiency that causes a facility to not be in substantial compliance." *Id.* "Immediate jeopardy" means a "situation in which the provider's noncompliance ... has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident." *Id.*

CMS may impose a CMP whenever a facility is not in substantial compliance. 42 C.F.R. §§ 488.404, 488.406, and 488.408. In cases not involving immediate jeopardy, a per-day CMP may be imposed in a range from \$50 to \$3,000; in immediate jeopardy cases, a per-day CMP in a range from \$3,050 to \$10,000. 42 C.F.R. § 488.408(d).

The regulatory requirements with which Gateway was allegedly out of substantial compliance read, in relevant part, as follows:

(b) *Abuse.* The resident has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion.

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<sup>2</sup> The current version of the Social Security Act can be found at [www.ssa.gov/OP\\_Home/ssact/comp-ssa.htm](http://www.ssa.gov/OP_Home/ssact/comp-ssa.htm). Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

(c) *Staff treatment of residents.* The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property. . . .

42 C.F.R. § 483.13.<sup>3</sup>

### Issues

Although CMS states that a legal issue for this appeal is whether substantial evidence supports "each of the ALJ's factual findings" and whether "the ALJ's conclusion of law are erroneous," in its briefing CMS only takes exception to conclusions 1, 3, and 5. CMS Request for Review (RR) at 2-3.<sup>4</sup> The challenged findings of fact and conclusions of law are as follows:

1. Petitioner did not violate 42 C.F.R. § 483.13(b).
3. Immediate jeopardy was clearly erroneous from January 21, 2007 to February 4, 2007 but not clearly erroneous as to February 5, 2007.
5. A civil money penalty (CMP) of \$3050 per day from January 21 to February 4, 2007 is not reasonable.

CMS argues that the ALJ erred in finding Gateway in substantial compliance with section 483.13(b) because he improperly required a showing that the abuse that occurred had to have been foreseeable. CMS also argues that the ALJ failed to recognize that the incident was, in fact, foreseeable in light of the earlier episodes showing a pattern of abuse. CMS Br. at 7-10. Furthermore, CMS argued that the ALJ should have recognized that

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<sup>3</sup> Section 483.13(c) contains further requirements about investigating and reporting allegations of abuse which were relevant to the ALJ's finding of noncompliance but which are not at issue on appeal.

<sup>4</sup> Since neither party appealed them, we summarily affirm conclusions 2, 4, 6, and 7. Further, we summarily affirm the conclusion that the determination of immediate jeopardy on February 5, 2007 was not clearly erroneous, since CMS makes arguments only as to that part of conclusion 3 which stated that immediate jeopardy "was clearly erroneous from January 21, 2007 to February 4, 2007." ALJ Decision at 5.

noncompliance with section 483.13(b) existed at least as early as January 21, 2007, at which time another incident involving Resident 1 and the same LPN allegedly occurred, and should therefore have upheld the immediate jeopardy CMP as proposed prior to February 5, 2007.

### 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. Departmental Appeals Board, *Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs*, <http://www.hhs.gov/dab/guidelines/prov.html>; Golden Age Nursing & Rehabilitation Center, DAB No. 2026 (2006).

### Analysis

1. **CMS has shown no compelling reason to reject the ALJ's finding that the evidence did not show that any incident of abuse occurred on January 21, 2007 or December 17, 2006.**

CMS based its allegation that LPN Tellefsen abused Resident 1 on or about January 21, 2007 in large part on handwritten statements purporting to be made by three CNAs and provided to the surveyors by LPN Corley. CMS Ex. 14, at 10. The statements were undated and unsigned, but LPN Corley told the surveyors that she overheard the CNAs discussing the subject on the morning of February 6, 2007, and had them write the statements. ALJ Decision at 9, and record citations therein. The surveyors testified at the hearing before the ALJ about their interviews of the CNAs, which indicated that two of the CNAs denied witnessing any January 21 incident but asserted they had heard about it from others. Tr. at 104, 164; ALJ Decision at 10. A third CNA told the surveyors that she did witness LPN Tellefsen pushing Resident 1 back indoors during the January 21 night shift, but facility records document that that CNA did not work at all on the weekend in question, and the CNA later admitted to the surveyors that she did not in fact witness two incidents as she had claimed. Tr. at 146-47, 152-54, 164-67; ALJ Decision at 10. It is not disputed that the three CNAs were all terminated by the facility for providing false statements to surveyors.

The ALJ reviewed the evidence regarding the CNAs' claims of a prior incident about two weeks before the overnight episode on February 4/5, including the written statements and the surveyors' testimony about their interviews. ALJ Decision at 10. He concluded that none of the hearsay statements demonstrated sufficient indicia of reliability to be entitled to much weight. In so doing, he considered the inconsistencies in the statements about whether the declarants had any first-hand knowledge of such an incident, the evidence that the declarants' work schedules precluded their presence on the date of the purported evidence, and the totality of the evidence bearing on the credibility and weight of the statements.

The Board has recognized that, while admissible in administrative hearings, hearsay presents inherent questions of reliability since the declarant is not subject to the usual safeguard of cross-examination, and that the ALJ must weigh that concern against other reasons to accord credence to hearsay evidence. The Board explained the ALJ's role as follows:

The question then is not whether various levels of hearsay may be admitted into evidence in this administrative hearing (they may be, subject to relevance and fundamental fairness), but what weight the ALJ should accord hearsay so admitted. That weight is determined by the degree of reliability, based on relevant indicia of reliability and whether the hearsay is corroborated by other evidence in the record as a whole. A survey of our prior decisions reflects this principle.

In Carehouse [Convalescent Hospital, DAB No. 1799 (2001)], we affirmed "the ALJ's decision rejecting [CMS] deficiency findings based solely on hearsay . . . ." Carehouse at 32 (emphasis supplied). The ALJ had deemed the hearsay evidence "highly unreliable and of no probative value, principally because there was no way to test either the accuracy or the credibility of statements attributed to residents or their family members . . . ." Id. We found no error in the "ALJ's determination to disregard proffered hearsay because he found that it lacked reliability [or his] rejecting unsubstantiated hearsay as the sole basis for sustaining the deficiency finding." Id. at 33 (emphasis supplied). These conclusions reflect questions of weight, not admissibility.

Omni Manor Nursing Home, DAB No. 1920, at 17 (2004).

The determination of the relative weight to be accorded to competing evidence is one quintessentially appropriate for the ALJ to address. Absent compelling reasons, we defer to the findings of the ALJ on weight and credibility of testimony. Koester Pavilion, DAB No. 1750, at 15, 21 (2000). Here, as in Koester Pavilion, "[w]e find no compelling reason to reject the ALJ's determination about the relative credibility and persuasiveness of the testimony of these witnesses." Id. at 24. CMS has given us no reason to disturb the ALJ's conclusion that the evidence proffered by CMS to attempt to show that a similar instance of abuse of Resident 1 by LPN Tellefsen occurred prior to February 5, 2007 was less credible or outweighed by contrary evidence. Accordingly, we find no basis to disturb the ALJ's conclusion that no such incident was shown to have occurred. ALJ Decision at 10.

CMS's assertions about an even earlier incident of abuse did not appear in the statement of deficiencies. Instead, CMS raised them during the proceedings below based on an entry in facility records. Specifically, a December 17, 2006 progress note at 7 P.M. in Resident 1's file records that, after "much yelling" and "much agitation @ 1300," the resident was redirected "many times, even took outside [with] no effectiveness." CMS Ex. 11, at 44. The resident was, however, noted to be resting quietly in bed at the time of the note. Id. The ALJ declined CMS's suggestion to view this report as evidence of a pattern of abusive treatment. ALJ Decision at 8. The brief note, as the ALJ recognized, provides none of the indications of abuse associated with the events of February 5, 2007. Id. For example, the time was prior to 7 P.M., rather than late at night; the weather was unremarked; and the purpose of taking the resident outside as part of redirection efforts was not improper on its face under the facts presented in the record here. Id. By contrast to the record developed about the February 5 incident, no evidence was presented of intimidating demeanor by the staff involved, of inappropriate clothing for the ambient temperature, or of distress on the part of the resident. Id.

We conclude that substantial evidence in the record as a whole supports the ALJ's findings that neither alleged incident prior to February 5, 2007 demonstrates noncompliance that could form the basis to impose remedies earlier than February 5, 2007. CMS based its finding of noncompliance for the period January 21

through February 4, 2007 on the alleged incident of January 21 (which CMS regarded as similar to the abuse that occurred on February 5 and cited at the scope and severity level of immediate jeopardy). The ALJ concluded that the record did not support the occurrence of the alleged earlier incident of abuse and that no noncompliance existed prior to February 5, 2007. A determination of immediate jeopardy prior to February 5, 2007 necessarily assumes a finding of noncompliance prior to February 5, 2007. Since he found no noncompliance prior to February 5, 2007, the ALJ did not err in concluding that there was no basis for finding immediate jeopardy during the earlier period.

**2. We need not resolve CMS's arguments concerning 42 C.F.R. § 483.13(b).**

Section 483.13(b) states that a resident "has the right to be free from" abuse. CMS argued that, having found that LPN Tellefsen abused Resident 1 on February 5, 2007, the ALJ was compelled to find noncompliance with section 483.13(b). CMS Br. at 7-8. The ALJ did not do so based on his assessment that the facility did not have "any reason to foresee that LPN Tellefsen would abuse Resident 1 in the manner that he did." ALJ Decision at 11.

CMS argues that the facility acts through its staff and cannot disown the consequences of the actions of its employee, citing several Board decisions. CMS Br. at 7-8, citing Emerald Oaks, DAB No. 1800, at 7, n.3 (2001), North Carolina State Veterans Nursing Home, Salisbury, DAB No. 2256 (2009), and others. We agree with CMS that considerations of foreseeability are inapposite when staff abuse has occurred. Board precedent establishes that "[p]rotecting and promoting a resident's right to be free from abuse necessarily obligates the facility to take reasonable steps to prevent abusive acts, regardless of their source." Western Care Management Corp., DAB No. 1921, at 12 (2004). Since the Board has indeed held that a facility is responsible for its staff's actions, the facility cannot have taken adequate measures to prevent its staff from acting abusively when a staff member caring for a resident commits abuse on her, as was found to have occurred here. CMS seeks to go further and suggests that foreseeability is never relevant in abuse situations and at the same time argues that it proved that the abuse here was indeed foreseeable. CMS Br. at 7-8.



In the present posture of the case, however, resolution of this broader question is unnecessary and hence we decline to reach it. Furthermore, revisiting the resolution of noncompliance allegations under section 483.13(b) could not have any effect on the remedies imposed. The ALJ upheld the \$3,050 CMP for February 5, 2007 based on his finding that Gateway's noncompliance with section 483.13(c) presented an immediate jeopardy on that date. Gateway has not appealed that conclusion. The amount imposed is the minimum set by regulation for an immediate jeopardy determination, so no question of the reasonableness of the amount arises here. Therefore, the remedy would not be affected if we concluded that Gateway was also out of substantial compliance with section 483.13(b) on that date. We therefore do not address the question further.

### Conclusion

For the reasons explained above, we uphold the ALJ Decision imposing a total CMP of \$4,550 on Gateway.

/s/

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Sheila Ann Hegy

/s/

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Constance B. Tobias

/s/

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Leslie A. Sussan  
Presiding Board Member