Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Rae-Ann Geneva Nursing Home
Docket No. A-12-36
Decision No. 2461
May 30, 2012

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Rae-Ann Geneva Nursing Home (Rae-Ann) appeals the November 4, 2011 decision of Administrative Law Judge (ALJ) Keith W. Sickendick upholding a determination by the Centers for Medicare & Medicaid Services (CMS) that Rae-Ann was not in substantial compliance with 42 C.F.R. § 483.25(c), a requirement for long-term care facilities participating in the Medicare program, and CMS's imposition of a $3,200 per-instance civil money penalty (CMP) for that noncompliance. *Rae-Ann Geneva Nursing Home*, DAB CR2461 (2011)(ALJ Decision). CMS based its determination on results of a survey at Rae-Ann completed by the state survey agency, the Ohio Department of Health (ODH), on July 9, 2009.[1] Following an in-person hearing, the ALJ concluded that Rae-Ann was not in substantial compliance with 42 C.F.R. § 483.25(c) and that the per-instance CMP imposed for that noncompliance was reasonable.[2] After considering all of Rae-Ann's arguments, we affirm the ALJ Decision.

Applicable Law

Long-term care facilities participating in the Medicare and Medicaid programs are subject to the survey and enforcement procedures set out in 42 C.F.R. Part 488, subpart E, to determine if they are in substantial compliance with the program requirements in 42 C.F.R. Part 483, subpart B. "Substantial compliance" means a level of compliance such that "any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Noncompliance," in turn, is defined as "any deficiency that causes a facility to not be in substantial compliance." *Id.* Surveyors report survey findings in a Statement of Deficiencies (SOD). The SOD

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[1] ODH found Rae-Ann out of compliance with five participation requirements, but only the requirement in section 483.25(c) is at issue in this appeal.

[2] The ALJ cited Rae-Ann's statements that the reasonableness of the CMP was not at issue but nevertheless reviewed the CMP amount and concluded it was reasonable. In its request for review (RR), Rae-Ann states that while it disputes whether CMS had a basis for imposing the CMP, it "does not dispute the civil monetary penalty of $3,200.00." RR at 1-2. Thus, we uphold the ALJ's conclusion that the CMP amount is reasonable without further discussion.

identifies each "deficiency" under its regulatory requirement, citing both the regulation at issue and the corresponding "tag" number used by surveyors for organizational purposes.

A long-term care facility found not to be in substantial compliance is subject to various enforcement remedies, including CMPs. 42 C.F.R. §§ 488.402(b),(c), 488.406, 488.408. CMS has the option to impose a CMP whenever a facility is not in substantial compliance. 42 C.F.R. §§ 488.402(b), 488.430. CMS may impose per-day or, as it did here, per-instance CMPs. 42 C.F.R. § 488.408(d)(1)(iii), (iv), (e)(1)(iii),(iv). There is only a single range – $1,000 to $10,000 – for per-instance CMPs. 42 C.F.R. § 488.438(a)(2). When CMS imposes one or more of the alternative remedies in section 488.406 for a facility's noncompliance, those remedies continue until "[t]he facility has achieved substantial compliance, as determined by CMS or the State based upon a revisit or after an examination of credible written evidence that it can verify without an on-site visit . . . ." 42 C.F.R. § 488.454(a)(1).

Factual Background

The survey and ALJ Proceeding

Rae-Ann participates in the Medicare program as a skilled nursing facility (SNF) and in the Medicaid program as a nursing facility (NF). ALJ Decision at 1. ODH conducted an annual survey at Rae-Ann that ended on July 9, 2009 and found that the facility was not in substantial compliance with requirements for participation in the Medicare/Medicaid programs. *Id.*; CMS Exhibit (Ex.) 1. The surveyors recorded their survey findings on an SOD. CMS Ex. 2. ODH reported the survey findings to CMS and recommended imposition of certain remedies, including a per-instance CMP of $3,200, effective July 9, 2009, for the noncompliance with section 483.25(c). CMS Ex. 1. Based on the survey findings, CMS determined that Rae-Ann was not in substantial compliance with Medicare/Medicaid participation requirements and on September 30, 2009, sent Rae-Ann a letter notifying it of that determination as well as CMS's determination, based on revisit surveys by ODH, that Rae-Ann had returned to substantial compliance on August 24, 2009. ALJ Decision at 2, citing CMS Exs. 1, 5; Joint Stipulation of Undisputed Fact. CMS's letter also notified Rae-Ann of CMS's decision to impose a $3,200 per-instance CMP for the noncompliance with section 483.25(c) cited at level G scope and severity

(isolated actual harm). *Id*.; CMS Ex. 1, at 2; *see also* 42 C.F.R. § 488.404 (defining scope and severity); 59 Fed. Reg. 56,116, 56,183 (Nov. 10, 1994)(grid of scope and severity levels). On November 23, 2009, Rae-Ann filed a hearing request, and the ALJ held an in-person hearing September 23-24, 2010. Following submission of post-hearing briefs, the ALJ issued his decision, and Rae-Ann timely filed this appeal.

<u>Summary of ALJ Findings of Facts</u>

The determination of noncompliance at issue involves development of two pressure sores on Resident 45 (R45) who had no pressure sores when admitted to Rae-Ann on April 10, 2009 or when he returned to Rae-Ann from the hospital on June 4, 2009. On admission and again on June 5, Rae-Ann assessed R45 as at mild risk for skin breakdown and bruising because of his skin fragility, limited mobility and anticoagulant therapy. ALJ Decision at 6, citing CMS Ex. 6, at 11; P. Ex. 2, at 1, 3. On July 6, 2009, Rae-Ann assessed R45 as at high risk for pressure sores due to being chairfast and having very limited mobility, probably inadequate nutrition and a potential problem with friction and sheer due to skin sliding against his sheets or chair during moves. *Id.*, citing P. Ex. 2, at 3 (Braden Scale assessment on July 6, 2000). R45's care plan dated April 10, 2009 included the following interventions for preventing pressure sore development: reporting bruising, rash, redness, irritation or open areas to the nurse; using a pressure relieving mattress; repositioning every two hours and as necessary; providing treatment as physician orders and recording treatment on skin grid; providing good perineal care; use of pressure relieving products as ordered; monitoring skin condition; and providing a nutritional supplement as ordered. On July 7, 2009, two interventions were added: providing a protein supplement and multi-vitamin. *Id*., citing CMS Ex. 6, at 11; P. Ex. 2, at 1.

On April 14, 2009, R45's physician, Dr. Mikhail, ordered a gel cushion in the resident's wheelchair; the physician had ordered a pressure relieving mattress on April 10, 2009. *Id*., citing P. Ex. 2 at 4, 28. Dr. Mikhail ordered use of a Merry Walker for independent ambulation on April 17, 2009. *Id*., citing P. Ex. 2, at 6. On May 27, 2009, Dr. Mikhail ordered ambulation for fifteen minutes, six days each week with assistance of one to two staff. *Id*., citing P. Ex. 2, at 8. On June 10, 2009, the physician ordered a nutritional supplement. *Id*., citing P. Ex. 2, at 28. Dr. Mikhail wrote a progress note on June 6, 2009, which stated that R45 had advanced Alzheimer's dementia, was unable to use his Merry Walker due to fall risk and had multiple medical problems including renal failure and congestive heart failure; the physician opined that "skin breakdown is unavoidable due to expected decline in mental and physical condition." *Id*. at 7, citing P. Ex. 2, at 16; Tr. at 130-31. A June 20, 2009 nursing assessment found R45's skin intact with no red or open areas. *Id*., citing CMS Ex. 6, at 17.

A July 6, 2009 Wound Management Progress/Procedure Note recorded discovery of pressure sores on R45's right and left trochanters; the right pressure sore was assessed as Stage II. *Id*., citing P. Ex. 2, at 20. Although the staging of the left pressure sore is unclear on this note, weekly skin reports for July 6, 2009 show both pressure sores as Stage II. *Id*.; P. Ex. 2, at 22; P. Ex. 4. Based on authority submitted by the parties following the hearing, the ALJ described the "trochanter" as "the bony protuberance of the upper thigh bone and generally the widest point of the hips." *Id*., citing CMS Br. att. A; P. Reply, app. D.[3] The ALJ stated, "Diagrams on the weekly skin reports indicate that the ulcers were just to the left and right of the gluteal folds, the folds where the buttock and thigh meet, and the reports describe the sores as being on the left and right posterior trochanter."[4] *Id*., citing P. Ex. 2, at 22; P. Ex. 4; Tr. at 185. A July 20, 2009 weekly skin report indicates resolution of the right trochanter pressure sore. *Id*., citing P. Ex. 2, at 22.

On July 8, 2009, an occupational therapist (OT) evaluated R45's then current wheelchair – which had a drop seat and measured 16 x 16 inches – and concluded that it was "not accommodating." *Id*., citing P. Ex. 2, at 26, 27. The OT report shows a decision to switch the resident to a 16 x 18 inch wheelchair with a sling seat and gel cushion and further indicates that a used wheelchair meeting those requirements was "located and issued on 7-9-09." *Id*. The therapist's note, which appears in an addendum to the OT report, does not state whether the 18 inches refers to the width or depth of the seat in the new wheelchair. *Id.*, citing P. Ex. 2 at 25; CMS Ex. 6, at 12. However, the note indicates that R45's hips measured 16 inches wide. *Id*. The OT evaluation report notes that the resident had bilateral excoriated areas over his lesser trochanters but does not state whether the therapist attributed these wounds to the ill-fitting old wheelchair.[5] *Id.* at 7-8, citing CMS Ex. 6, at 15.

[3] The language "generally the widest point of the hips" does not appear on the documents cited by the ALJ, but neither party disputes this description.

[4] The ALJ correctly stated what the diagrams indicate as the location of the pressure sores but not how the reports describe the location of the pressure sores on July 6, 2009, the date they were first reported. The July 6 report describes the "[l]ocation" as the "trochanter" only. The modifier "posterior" does not appear until July 13, 2009. P. Ex. 2 at 22; P. Ex. 4. The pressure sore assessment completed by the wound consultant also does not use the word "posterior" but only "bilat[eral] trochanters" in its narrative description and "trochanter" in the description of "Wound Location". P. Ex. 2 at 19, 20. Rae-Ann's witnesses relied on the word "posterior" in the later skin reports for their testimony that the pressure sores were on the buttocks, not the hips, and could not have been caused by rubbing against the sides of the wheelchair. The ALJ's inaccurate reading of the skin reports and his failure to discuss the wound consultant's report might have been significant had his decision depended on a finding that the wheelchair caused the pressure sores. However, his decision did not depend on such a finding.

[5] The lesser (minor) trochanter is a short conical process projecting medially from the lower part of the posterior border of the base of the neck of the femur. CMS Post-hearing Brief, Attachment A, at 2; P. Reply Brief, Appendix D.

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence on the record as a whole, and a disputed conclusion of law to determine whether it is erroneous. *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs*, http://www.hhs.gov/dab/divisions/appellate guidelines/index.html (Guidelines); *Batavia Nursing and Convalescent Inn*, DAB No. 1911, at 7 (2004), *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 143 F. App'x 664 (6th Cir. 2005).

Discussion

The ALJ's conclusion that Rae-Ann was not in substantial compliance with 42 C.F.R. § 483.25(c) because it failed to ensure that R45 did not develop pressure sores is supported by substantial evidence and legally correct.

A. There is no dispute that R45 developed pressure sores at Rae-Ann, and this fact establishes a prima facie case of noncompliance.

The noncompliance at issue here involves the pressure sore prevention requirement at 42 C.F.R. § 483.25(c), one of the quality of care requirements set forth in 42 C.F.R. § 483.25. The overall quality of care requirement provides --

> Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.

42 C.F.R. § 483.25. The quality of care requirement specific to pressure sore prevention and treatment provides as follows:

> Pressure sores. Based on the comprehensive assessment of a resident, the facility must ensure that - (1) A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable; and (2) A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.

42 C.F.R. § 483.25(c).[6] As the ALJ stated, "[t]he application of [the pressure sores] regulation is well-established by decisions of various appellate panels of the Board." ALJ Decision at 9. Citing the Secretary's refusal to replace the word "ensure" with less demanding language, the Board has held that a facility "should go beyond merely what seems reasonable to, instead, always furnish what is necessary to prevent new sores unless clinically unavoidable, and to treat existing ones as needed." *Koester Pavilion,* DAB No. 1750, at 32 (2000)(citing 56 Fed. Reg. 48,826, at 48,850 (Sept. 26, 1991)); *see also Clermont Nursing and Convalescent Ctr*., DAB No. 1923, at 9-10 (2004)(citing *Koester* and rejecting provider's argument that a "standard of necessity appears nowhere in the regulation"), *aff'd*, *Clermont Nursing and Convalescent Ctr. v. Leavitt*, 142 F. App'x 900 (6th Cir. 2005). In *Koester Pavilion* and *Clermont*, the Board also held that a prima facie case of noncompliance exists when the evidence establishes that a nursing home resident having no pressure sores on admission develops a pressure sore in the facility, and the burden then shifts to the facility to establish that the pressure sore was clinically unavoidable. DAB No. 1750, at 34; DAB No. 1923, at 9; *see also Woodland Village Nursing Center*, DAB No. 2172, at 13 (2008)(evidence that resident developed a pressure sore while under a facility's care is enough to show a deficiency in the absence of clinical evidence from the facility proving such negative outcomes to have been clinically unavoidable), *aff'd*, *Woodland Village Nursing Ctr. v. U.S. Dep't of Health & Human Servs*., 239 F. App'x 80 (5th Cir. 2007).

There is no dispute that R45 had no pressure sores when he was admitted to Rae-Ann and that the facility assessed him as at mild risk for pressure sores. CMS Ex. 2, at 15; P. Ex. 2, at 3. There also is no dispute that R45 developed two pressure sores on July 5, 2009 while residing at Rae-Ann. P. Ex. 2 at 20; CMS Ex. 6 at 20. Although the ALJ cited additional evidence for his conclusion that CMS had established a prima facie case of noncompliance with section 483.25(c), ALJ Decision at 10-11, under the Board decisions cited above, the development of R45's pressure sores was enough to support the ALJ's conclusion. The other evidence discussed by the ALJ, however, supports the ALJ's further conclusion that Rae-Ann did not carry its burden to rebut the finding of noncompliance by establishing that the pressure sores were unavoidable. We discuss and uphold that further ALJ conclusion below.

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[6] The ALJ concluded that "in the interest of judicial economy . . . it is not necessary . . . to analyze the alternative ground [subsection (c)(2)] that Petitioner failed to ensure appropriate interventions were implemented to promote healing," although he noted the absence of any dispute that the pressure sores did heal within 15 days. ALJ Decision at 8, n.6. Rae-Ann does not challenge this conclusion.

B. Rae-Ann did not establish that it provided all the care and services necessary to prevent R45's pressure sores but that they were clinically unavoidable.

As stated, a nursing home can overcome a prima facie case of noncompliance with section 483.25(c) that is based on development of pressure sores only by showing that it provided all the care and services needed to prevent pressure sores but that they developed anyway because they were clinically unavoidable. *E.g., Koester Pavilion,* DAB No. 1750, at 34; *Clermont,* DAB No. 1923, at 9. "Clinically unavoidable" in this context "means not just unsurprising given the clinical condition of the resident, but incapable of prevention despite appropriate measures taken in light of the clinical risks." *Harmony Court*, DAB No. 1968, at 11 (2005), *aff'd*, *Harmony Court v. Leavitt*, 188 F. App'x 438 (6th Cir. 2006). A facility "cannot meet its burden of proof on the issue of whether a pressure sore is unavoidable merely by establishing that the resident's clinical condition heightens the risk that pressure sores will develop." *Id*., quoting *Ivy Woods Health Care and Rehab. Ctr.*, DAB No. 1933, at 9 (2004), *aff'd, Ivy Woods Health Care and Rehab. Ctr. v. Thompson*, 156 F. App'x 775 (6th Cir. 2005). Rae-Ann argues here, as it did below, that "all steps necessary to ensure the Resident's care and treatment from the time he reentered the facility were taken to prevent development of pressure sores, however the pressure sores . . . developed because they were unavoidable." RR at 6. The ALJ rejected this argument. ALJ Decision at 11, 15. As discussed below, we conclude that the record supports this rejection.

1. Substantial evidence supports the ALJ's finding that Rae-Ann did not provide all the care and services necessary to prevent R45's pressure sores.

On June 6, 2009, R45's attending physician wrote in a progress note for R45 that "skin breakdown is unavoidable due to expected decline in mental and physical condition." P. Ex. 2, at 16. The ALJ found that this note "clearly advised Petitioner that the resident's risk for pressure sores had increased." ALJ Decision at 14. Although Rae-Ann argues (as we discuss later) that the ALJ should have accepted the physician note as opinion evidence that the pressure sores were unavoidable, it does not attempt to refute the ALJ's finding that the note served as a warning of the increased risk of pressure sores.[7] The ALJ found that despite the physician's warning of a heightened risk for skin breakdown, Rae-Ann did not reassess R45's risk for pressure sores or evaluate whether its existing interventions, or the wheelchair R45 was using, met R45's needs with respect to preventive care. *Id*. This failure, the ALJ concluded, was sufficient to show that Rae-Ann had not provided all necessary care and services to prevent the pressure sores.

[7] Nor does Rae-Ann argue that viewing the note as an opinion that the pressure sores were unavoidable would be inconsistent with viewing it as a warning that the resident was at heightened risk of pressure sores, and we find no such inconsistency.

> [B]ecause Petitioner failed to reassess [R45's] needs following the June 6, 2009 physician's note and . . . failed to present any evidence that the fit of the old wheelchair was properly evaluated prior to July 8, 2009, Petitioner simply cannot show it delivered all necessary care and services to prevent the development of Resident 45's pressure sores.

ALJ Decision at 15. The record supports the ALJ's findings. The physician's progress note specifically warned that R45's declining physical and mental condition put him at greater risk for skin breakdown. Surveyor Kelly Sites, RN, described a pressure sore as skin breakdown that results from unrelieved pressure and a Stage II pressure sore (what R45 developed) as "an actual open area, an open wound." Tr. at 38-39. Rae-Ann does not dispute this description. In addition, the physician's note advised that R45 could no longer use his Merrywalker, "which confirms that Petitioner knew then that the resident would be spending more time in his bed or his wheelchair, also increasing his risk for pressure sores . . . ." ALJ Decision at 14, citing P. Ex. 2, at 16. The ALJ cited other evidence that Rae-Ann was aware that R45 had suffered a physical decline – nursing assessments in June and July, 2009 showing that he was on intravenous antibiotics and was having problems with edema due to fluid retention and an assessment dated July 6, 2009 that confirmed that he had been suffering a physical decline over the last few weeks. ALJ Decision at 10-11; *see also* CMS Ex. 6, at 16-18. Yet, as the ALJ said,

> Petitioner presented no evidence that it reassessed the resident's risk for skin breakdown following the June 6, 2009 physician's progress note. In fact, Petitioner's evidence shows that there was no assessment using the "Braden Scale" tool that had previously been used for assessing Resident 45, until July 6, 2009, after the two ulcers on his buttocks or hips were discovered.

ALJ Decision at 14. In addition, Rae-Ann presented no evidence that it reassessed the wheelchair R45 was then using or the pressure relieving mattress prescribed in his care plan. *Id*. "In fact," the ALJ noted, "the occupational therapy assessment completed on July 8, 2009 (P. Ex. 2, at 25-27) establishes that the resident was in a wheelchair of incorrect size and seat type for a month after the physician alerted Petitioner of the increased risk for pressure ulcers." *Id.*

Although Rae-Ann argues generally that the facility did all that was necessary to prevent pressure sores from developing, it disputes only one of the ALJ's specific findings, stating that there is no evidentiary support for his statement that R45 remained in a wheelchair of the wrong size for a month after his physician's warning. RR at 7.

Contrary to Rae-Ann's assertion, the occupational therapy evaluation cited by the ALJ provides clear evidentiary support for the ALJ's finding. That evaluation states that the wheelchair was "not accommodating" and recommends a new wheelchair with larger seat dimensions. P. Ex. 2, at 27; CMS Ex. 6, at 14; *see also* ALJ Decision at 7 (discussing the evaluation).

Rae-Ann's general argument that it provided all necessary care and treatment also is not supported by the record. Rae-Ann states --

> [A]ll steps necessary to ensure the Resident's care and treatment from the time he reentered the facility [after hospitalization in early June 2009] were taken to prevent development of pressure sores, however the pressure sores that developed on July 5th or 6th, 2009 developed because they were unavoidable. A plan was immediately implemented by the facility and subsequent treatment was given to ensure that the pressure sores were properly treated. The pressure sores were resolved on a quick basis.

RR at 6.

R45 returned from the hospital on June 4, 2009, Tr. at 63, but Rae-Ann points to no pressure sore interventions developed between that date and July 5, 2009, the date his pressure sores were identified.[8] Most of the interventions in R45's care plan were adopted in April 2009, well before R45's hospitalization or subsequent return to the facility. CMS Ex. 6, at 11. The only pressure sore prevention interventions subsequently added to the care plan were not added until July 7, 2009, a month after the physician wrote the progress note warning of increased risk and after staff identified the pressure sores. *Id*. If Rae-Ann is suggesting that it was doing all that was necessary to prevent R45's pressure sores by merely continuing to follow R45's existing care plan, there is no evidence to support that suggestion. The existing care plan interventions were developed to address R45's originally assessed mild risk for pressure sores. There is no evidence that Rae-Ann reassessed the care plan interventions or made any determination that they were sufficient to address R45's known heightened risk of pressure sores after June 6, 2009. As the ALJ found, Rae-Ann did not even do another Braden Scale assessment after the physician note and nursing assessments warning of his declining condition. In this regard, we note that the last Braden Scale assessment Rae-Ann did for R45 before

[8] Although Rae-Ann says the pressure sores developed on July 5 <u>or</u> July 6, 2009 the wound consultant's report, which the ALJ relied on, lists the onset date as July 5, 2009. ALJ Decision at 7, citing P. Ex. 2, at 20. We use the July 5, 2009, date except when referring to Rae-Ann's Weekly Skin Reports which indicate that the first day Rae-Ann <u>evaluated</u> the pressure sores was July 6, 2009. See P. Ex. 2, at 22; P. Ex. 4.

identifying his pressure sores was done on June 5, 2009, the day before the physician wrote his note. This Braden Scale, like the one on admission, assessed R45 as at mild risk for pressure sores. But the very next day, the physician wrote that pressure sores were unavoidable. This patent inconsistency should have prompted Rae-Ann to repeat the Braden Scale or use some other tool to reassess R45's risk for pressure sores and evaluate the adequacy of the existing care plan to address that risk.[9] It did not do so. The evidence relied on by the ALJ and the record as a whole support the ALJ's conclusion that Rae-Ann cannot be found to have done all that was necessary to prevent the development of R45's pressure sores.

In reaching our conclusion, we have considered Rae-Ann's reliance on the written report and testimony of Rae-Ann's expert witness, Tina Baum, a registered nurse consultant (RN), that Rae-Ann initiated a nutritional supplement (Medpass) and a non-skid pad in R45's wheelchair in June and that administration of these and other preventive measures were "documented consistently from April 2009 . . . through July 2009. "[10] RR at 11, citing P. Ex. 3; *see also* Tr. at 304-05. Ms. Baum's report and testimony were based on R45's care plan and the restorative and documentation charting records for April through July 2009 in Petitioner Exhibit 5. Tr. at 303-04. CMS argues that these records (which CMS calls "restorative flow sheets") "are an unreliable reflection of the services provided to Resident 45" because, *inter alia*, some of the services were shown as having been rendered on dates R45 was in the hospital, not in the facility. CMS Response at 12-13. Rae-Ann does not address CMS's argument that the documentation is unreliable, an argument CMS also made in its Post-hearing Reply Brief below. *See* Centers for Medicare & Medicaid Services's Post-Hearing Reply Brief at 2-3.

In any event, we need not decide whether the charts are reliable documentation of actual care rendered to R45 for the time period at issue because even if they were, they do not undercut the ALJ's findings.[11] The charts support Ms. Baum's assertions that a nutritional supplement (Medpass) and a non-skid pad were added after the physician's

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[9] Rae-Ann has not argued that the physician's note obviated the need to use an assessment tool, but even if that were true, Rae-Ann, as we have discussed, would still have needed to evaluate the existing care plan interventions based on the physician's note.

[10] Ms. Baum's curriculum vita indicates that she has bachelor and master of science degrees in nursing and a certificate in the care of patients with wounds, ostomies and incontinence; she has worked as a clinical nurse specialist/wound ostomy continence nurse. P. Ex. 3, at 1-3. The ALJ found Ms. Baum qualified to give expert testimony on pressure sores. Tr. at 301-02.

[11] Rae-Ann had an opportunity to file a reply brief in which it could have stated any dispute with CMS's assertion that these records are unreliable documentation but did not do so. *See* "Closing of Record" (Board Order), issued April 18, 2012.

warning and before the pressure sores were identified (June 11 and 16, 2009, respectively), and that these additional interventions continued through July. P. Ex. 5, at unnumbered pages 30, 36. However, the Medpass and non-skid pad were not added to R45's care plan as interventions addressing the resident's pressure sore risk. Nor does Rae-Ann cite any evidence that it initiated the Medpass and non-skid pad as part of any comprehensive reassessment of R45's pressure sore risk or any reevaluation of the effectiveness of the existing care plan interventions for that risk. The other care and services related to pressure sore prevention that are documented in the charts relate to care plan measures adopted in April 2009, before the warning of R45's increased risk for pressure sores. *See*, *e.g.*, P. Ex. 5 at unnumbered page 4 (directing nursing staff to observe skin during care and report any redness, rash, irritation or open areas); unnumbered page 5 (directing staff to use pressure relieving cushion in chair); unnumbered page 6 (note to remind and encourage staff to turn and reposition resident every one to two hours). Thus, these interventions do not undercut the ALJ's finding that Rae-Ann did not reassess R45's needs or amend his care plan between the time staff became aware of his increased risk for pressure sores and the development of his two pressure sores.

In summary, Rae-Ann has not shown that it provided R45 with all the care and services necessary to prevent development of the pressure sores.

2. *We find no reason to disturb the ALJ's rejection of the physician's opinion or the testimony of Rae-Ann's witnesses that the pressure sores were unavoidable.*

Absent compelling reasons, the Board defers to ALJ findings on the weight and credibility of testimony. *Gateway Nursing Ctr.*, DAB No. 2283, at 7 (2009), citing *Koester Pavilion*, DAB No. 1750, at 15, 21. Rae-Ann offers no compelling reason to reject any of the ALJ's findings with regard to the testimony of Rae-Ann's witnesses or the opinion in the physician note.

Rae-Ann relies on the June 6, 2009 progress note written by R45's physician opining that skin breakdown would be unavoidable due to a decline in R45's physical and mental condition. RR at 10. Rae-Ann also relies on opinion testimony by Ms. Baum that the pressure sores were unavoidable. *Id.* at 8. The ALJ discussed these opinions (and similar opinions by the facility's Director of Nursing and Assistant Director of Nursing) but found them "not . . . weighty" because they were "admittedly developed without

knowledge of the actual cause of the sores."[12] ALJ Decision at 15. Before the ALJ, Rae-Ann disagreed with CMS's theory that the pressure sores were caused by R45 using a wheelchair with a seat that was not wide enough, and Ms. Baum opined (Tr. at 325-27) that the pressure sores may have been caused by an incontinence pad bunched under R45's buttocks and hips, rather than the ill-fitting wheelchair.[13] The ALJ concluded it was not necessary to determine the cause since "[e]ach of the potential causes of the ulcers was clearly avoidable by ensuring a proper fit of the wheelchair or by ensuring the incontinence pad was not bunched in the bed." *Id.* The ALJ also noted that Ms. Baum's opinion was based on inference from her record review, and she admitted on cross-examination that she never saw either R45 or his wheelchair. *See id.* at 13, 15; Tr. at 328. Although Rae-Ann argues that the ALJ should have accepted the opinions of its witnesses on the issue of unavoidability, it does not specifically challenge any of the reasons he gave for finding those opinions "not weighty".

The ALJ also found the opinions of R45's physician and Rae-Ann's witnesses that the pressure sores were unavoidable inconsistent with the fact that the pressure sores healed.

> The fact that the ulcers healed is inconsistent with the ulcers being unavoidable. If, when the cause of the ulcers is removed the body has sufficient resources to heal, then it is not credible that the ulcers were unavoidable.

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[12] The ALJ also found "not weighty" Ms. Baum's unexplained opinion that R45's stage II pressure sores did not amount to "real harm." Ms. Baum had earlier conceded that pressure sores at this stage amount to harm. ALJ Decision at 13, citing Tr. at 316-18. The ALJ found that R45's "open wounds and associated pain amounts to actual harm." ALJ Decision at 11. It was not necessary for the ALJ to find actual harm in order to uphold CMS's determination of noncompliance since section 488.301 defines noncompliance to include the potential for more than minimal harm. CMS's determination of actual harm in this case also was not subject to ALJ review because, as the ALJ noted earlier in his decision, review of CMS's scope and severity determination is permitted only where a successful challenge to that determination would affect the range of a CMP or reverse a finding of substandard quality of care that led to loss of a facility's authority to conduct nurse aide training for two years. *See* ALJ Decision at 4 (citations omitted). A successful challenge to scope and severity here could not change the CMP range since per-instance CMPs have a single range, and level G noncompliance (what CMS cited here) is not substandard quality of care under the regulations. 42 C.F.R. §§ 488.438(a)(2), 488.301. Although the ALJ should not have reviewed scope and severity, his doing so was harmless error since whether R45 sustained harm is irrelevant to the determination of noncompliance. It was appropriate for the ALJ to consider CMS's finding of harm when he reviewed the reasonableness of the per-instance CMP amount.

[13] Rae-Ann objects to the ALJ's finding regarding Ms. Baum's testimony on this issue, but the basis for the objection is not clear. If Rae-Ann is saying that Ms. Baum did not opine definitively that the incontinence pad caused the pressure sores, there is no basis for the objection since the ALJ's finding clearly characterizes her testimony as stating only a possible cause.

ALJ Decision at 14. The Board has held that an ALJ is entitled to consider the fact that pressure sores healed as undercutting opinions that clinical conditions made them unavoidable. *Plott Nursing Home*, DAB No. 2426, at 7 (2011). While Rae-Ann continues to dispute that the wheelchair caused the pressure sores, Rae-Ann does not challenge the ALJ's finding that the pressure sores healed after an occupational therapist assessed the fit of the wheelchair and gave R45 one with a larger seat. This strongly suggests that the initial wheelchair, which the occupational therapist found "not accommodating," was a factor in development of the pressure sores. Moreover, the ALJ concluded he need not resolve the parties' dispute as to whether the change in seat dimensions in the replacement chair related to depth, as Rae-Ann's witnesses asserted, or width, as CMS asserted, because even if he accepted Rae-Ann's contention, "the evidence that the seat was not deep enough suggests that the sores could have been caused by friction and shearing or impairment of circulation dues to the movement of [R45's] hips and buttocks on the drop seat of the wheelchair, while [R45] was self-propelling his wheelchair with his feet." ALJ Decision at 14. Rae-Ann does not dispute this conclusion.

The ALJ gave other, detailed reasons, not specifically disputed by Rae-Ann, why he found the testimony of Rae-Ann's witnesses "not weighty" on unavoidability and other issues. *See* ALJ Decision at 12-15. We also note that although the physician's note refers in conclusory fashion to R45's medical diagnoses and expected deterioration in his physical and mental condition, it does not explain why these factors would make pressure sores clinically unavoidable no matter what preventive tools the facility might employ. The physician also did not provide any testimony elaborating on his note. In *Sanctuary at Whispering Meadows*, DAB No. 1925, at 29 (2004), the Board upheld an ALJ's discounting of a treating physician's chart notes on the issue of unavoidability where, as here, the physician did not provide any explanation for his opinion. The ALJ's treatment of the physician's note also is consistent with the surveyor's testimony that the statement "simply reflected risk factors" that should have put the facility on heightened alert to R45's risk for pressure sores and prompted facility staff to take additional preventive actions. Tr. at 69-70. This is a reasonable view of the physician's note in this case, especially since he gave no testimony to the contrary.

Rae-Ann suggests that the ALJ was required to accept the progress note opinion of R45's physician and the expert opinion of Ms. Baum because CMS put on no expert witness on the issue of unavoidability.[14] RR at 12. There is no merit to this argument.

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[14] Rae-Ann also asserts that the surveyor "consciously slanted the [SOD] to advocate her position" and points out that the surveyor did not state on the SOD that the pressure sores were unavoidable. RR at 12. Rae-Ann's insinuation of bias is undercut by its own statement that "it is not the intention of counsel to question the veracity and capability of the surveyor." *Id.* Moreover, nothing in the record supports the insinuation, and the surveyor's findings on the SOD are well-supported by Rae-Ann's own documents. The surveyor did not need to expressly state on the SOD that the pressure sores were avoidable. The finding of noncompliance with the regulatory requirements cited and summarized on the SOD assumes the pressure sores were avoidable and Rae-Ann had the burden to show otherwise, which it has not done on this record.

"Unavoidability" is an affirmative defense. As the ALJ noted, "[Rae-Ann] bears the burden of persuasion to show by a preponderance of the evidence that it was in substantial compliance with participation requirement or any affirmative defense." ALJ Decision at 4, citing *e.g. Batavia Nursing & Convalescent Ctr*., DAB No. 1904 (2004), *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 F. App'x 181 (6th Cir. 2005); RR at 3. Rae-Ann argues that it showed the pressure sores were unavoidable by "clear and convincing evidence." RR at 13. However, as discussed, the ALJ found that the principal opinion evidence on which Rae-Ann relies for that issue was not weighty, and the documentary evidence also does not support Rae-Ann's assertion.

Conclusion

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

/s/
Constance B. Tobias

/s/
Leslie A. Sussan

/s/
Sheila Ann Hegy
Presiding Board Member