Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: November 29, 2006
Crestview Parke Care Center, Petitioner,	Civil Remedies CR1347 App. Div. Docket No. A-06-25
- v. -	Decision No. 2055
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Crestview Parke Care Center (Crestview) appeals the September 8, 2005 decision (on remand from the Sixth Circuit Court of Appeals) of Administrative Law Judge (ALJ) Carolyn Cozad Hughes, which sustained the imposition of a civil money penalty (CMP) of $400 per day covering a 69-day period from August 13, 1999 through October 20, 1999. Crestview Parke Care Center, DAB CR1347 (2005) (ALJ Decision on Remand). The procedural history of the remand proceedings is described in detail in the Case Background of this decision. For the reasons discussed below, we uphold the ALJ Decision on Remand.

Applicable Legal Authority

The federal statute and regulations provide for surveys to evaluate the compliance of skilled nursing facilities with the requirements for participation in the Medicare and Medicaid programs and for the imposition of remedies when a facility is found not to comply substantially. Sections 1819 and 1919 of the Social Security Act; 42 C.F.R. Parts 483, 488, and 489.

"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.

Case Background[1]

During three surveys of Crestview Parke Care Center, which were completed on August 12, 1999 (Life Safety Code survey), August 13, 1999 (health survey), and October 5, 1999 (revisit survey), the Ohio Department of Health (ODH) found that the facility was not in substantial compliance with the applicable federal requirements for long-term care facilities participating in the Medicare and Medicaid programs. CMS Exhibits (Exs.) 1-4, 6. During the Life Safety Code survey ending August 12, 1999, the surveyors found that Crestview's emergency generator was inoperative and that this created the potential for more than minimal harm because emergency lighting would be unavailable in the event of a power outage. CMS Ex. 2. During the survey ending August 13, 1999, the ODH surveyors found a number of participation deficiencies including a deficiency under Tag F-314 that they found resulted in actual harm from the development of a pressure sore.[2] CMS Ex. 3. On the revisit survey ending on October 5, 1999, the ODH surveyors found a pattern of violations concerning the failure to maintain a sanitary, orderly, and comfortable facility which they found created the potential for more than minimal harm. CMS Ex. 4. Upon completing a fourth survey on October 21, 1999, ODH's surveyors found that Crestview had achieved substantial compliance as of that date with the requirements for participation in the Medicare and Medicaid programs. CMS Ex. 8.

In letters dated November 1, 1999, and November 19, 1999, CMS

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[1] The information in this section is presented to provide a context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the findings of fact or conclusions of law in the ALJ's Decision on Remand.

[2] "Deficiencies" found during a survey are designated in a Statement of Deficiencies using alpha-numeric "tags" that correspond to the requirements in Part 483.

informed the facility that it had found a number of deficiencies and that it was imposing a CMP against the facility. CMS Exs. 7, 10. The $400 per day CMP covered a 69-day period from August 13, 1999 through October 20, 1999 for a total of $27,600. CMS Ex. 10.

On December 20, 1999, Crestview requested a hearing. A September 19, 2001 pre-hearing conference was held after the final exchanges of the parties' exhibits and lists of witnesses had been filed and after all exhibits had been admitted into evidence at an earlier pre-hearing conference. See the ALJ's September 21, 2001 Summary of Results of Prehearing Conference and Order to Submit Briefing. At that conference, the ALJ established a new date for the in-person hearing, to commence on January 8, 2002, and ordered the parties to submit pre-hearing briefs for the purpose of "delineating clearly what is in dispute." Id. at 2.

After reviewing the briefs, declarations, and exhibits, the ALJ found that an in-person hearing was unnecessary. On February 4, 2002, the ALJ issued her original decision (DAB CR867), which upheld the survey deficiencies and the $400 per day CMP. The basis for the ALJ's decision not to hold an in-person hearing was that after deciding all legitimate factual disputes in favor of Crestview, she had determined that no disputes of material fact remained and that CMS still was entitled to summary judgment. DAB CR867 at 6, 8-9.

Crestview appealed the 2002 ALJ Decision to the Departmental Appeals Board (Board) and a three-member panel affirmed the ALJ's summary judgment decision. Decision No. 1836. Following Crestview's appeal of the Board's decision, the Sixth Circuit Court of Appeals in Crestview Parke Care Ctr. v. Thompson, 373 F.3d 743 (6th Cir. 2004), affirmed the summary judgment concerning the following deficiencies: (1) 42 C.F.R. 483.70(b)(1) (Tag K-46) involving a failure to provide adequate emergency power; (2) 42 C.F.R. § 483.15(h)(2) (Tag F253) encompassing multiple housekeeping failures during several surveys to provide proper maintenance and sanitation in the facility; (3) 42 C.F.R. § 483.25(c)(2) (Tag F314, example 2) concerning the failure to provide Resident 93, who already had pressure sores, with the necessary treatment and services to promote healing, prevent infections and prevent new sores from developing; (4) 42 C.F.R. § 483.35(h)(2) (Tag F371) involving multiple food service sanitation and health deficiencies;[3] and

[3] This requirement was amended in 1993 and now appears at

(continued...)

(5) 42 C.F.R. § 483.75(e)(8)(i) (Tag F497) concerning a failure to provide the required nurse-aide in-service training.

However, the Sixth Circuit reversed and remanded for an evidentiary hearing the following F Tags:

(1) Noncompliance with 42 C.F.R. § 483.25 (Tag F309) for the alleged failure to provide necessary care and services to attain or maintain the highest practicable well-being for Residents 44 and 90. The Sixth Circuit concluded that there was a material question of fact concerning whether the reason surveyors did not observe the ordered skin protectors on these residents was because either the residents "removed or shifted" these devices themselves or because these devices were removed by staff to provide treatment, and that this might affect whether noncompliance existed. 373 F.3d at 753-754.

(2) The conclusion that example one under Tag F314 on the Statement of Deficiencies established noncompliance with 42 C.F.R. § 483.25(c)(2) for the failure to prevent or promote the healing of pressure sores. The Sixth Circuit concluded that there was a material question of fact concerning whether Resident 68's newly developed pressure sore was "unavoidable" and whether Crestview provided the necessary treatment and services to prevent this or other possible pressure sores from developing, to prevent infections, and to promote the healing of any pressure sores. 373 F.3d at 754-755.

On remand, the ALJ scheduled a hearing for May 25, 2005, and held a telephone prehearing conference on May 9, 2005. Responding to the ALJ's query, Crestview indicated its plan to call just two witnesses, the facility administrator, Julie Hrybiniak, and Tom Schindler, an employee in the facility's corporate office, Strategic Nursing Systems, Inc. ALJ Decision on Remand at 5. In a ruling dated May 17, the ALJ denied Crestview's motion to add Mr. Schindler to its witness list for reasons that were summarized in her decision on remand. Id. At the May 25, 2005 in-person hearing before the ALJ during the remand proceedings, CMS indicated that its two witnesses, Laura McClure and Sylvia Grimes, were present and ready to testify. Tr. at 4. Crestview indicated that it would make an offer of proof of Mr. Schlinder's testimony in writing at the time its post-hearing brief was

[3](...continued)
section 483.35(i)(2).

filed, but Crestview never made such an offer. Tr. at 9, 19.[4] Crestview's counsel also reported that its witness Julie Hrybiniak was not available to testify at the hearing because she was admitted to the hospital at midnight the night before the hearing. Tr. at 9. Crestview did not request that the hearing be rescheduled to allow Ms. Hrybiniak to testify. CMS waived its right to cross-examine Ms. Hrybiniak to permit Ms. Hrybiniak's already filed declarations to be considered by the ALJ. Tr. at 12. Crestview then waived its right to cross-examine CMS's witnesses and stated: "We'll do it on the brief . . . and in the record that's already present." Tr. at 13. Although CMS indicated that it desired to present live testimony of its witnesses in addition to the declarations already admitted, the ALJ ordered that the record was closed and the case would be determined based upon the already submitted exhibits and declarations. Tr. at 13, 16.

Standard of Review

Our standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. Our standard of review on a disputed finding of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. Guidelines for Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs; see also Batavia Nursing and Convalescent Center, DAB No. 1911, at 7 (2004), aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson, No. 04-3687 (6th Cir. Aug. 3, 2005); Hillman Rehabilitation Center, DAB No. 1611, at 6 (1997); aff'd, Hillman Rehabilitation Ctr. v. U.S. Dep't of Health and Human Servs., No. 98-3789(GEB) at 21-38 (D.N.J. May 13, 1999).

Analysis

1. Crestview's procedural challenges lack merit.

A. Crestview received its full opportunity for an in-person hearing on remand.

Crestview claims in its appeal of the ALJ Decision on Remand that it was denied an in-person hearing on the remaining F-Tag deficiencies during the remand proceedings. Crestview Br. at 7-10. It blames the ALJ for the absence of oral testimony from its

[4] Crestview did not argue on appeal that the ALJ had erred in her ruling.

only proposed hearing witness, Julie Hrybiniak. However, as discussed below, the responsibility for the absence of oral testimony from Ms. Hrybiniak rests entirely with Crestview, not the ALJ. Crestview was provided the full opportunity for a hearing contemplated by statute under the circumstances--

including the opportunity to present oral testimony from Ms. Hrybiniak.

The ALJ convened the remand hearing on May 25, 2005, with counsel for both Crestview and CMS present. The full transcript of that hearing establishes that after advising the ALJ that Ms. Hrybiniak had entered the hospital at midnight the evening before and that she would be unable to testify that day, Crestview never asked the ALJ to re-schedule or continue the hearing to afford Ms. Hrybiniak an opportunity to provide oral testimony or to be cross-examined. Clearly, it was the obligation of Crestview under the circumstances to make that request of the ALJ if Crestview had wanted its witness to have an opportunity at a later time to provide oral, direct testimony and be subject to cross-examination. Crestview claims its counsel "attempted to reason with the court in offering to have Ms Hiberniak (sic) testify at a later date. . . ." Crestview Br. at 7. Crestview cites its counsel's statement at page 12 of the transcript, "I'm more than willing to produce her when she is released by her physician for testimony . . ." as proof he requested a continuance. This statement is not on its face a request for a continuance, however. Nor can it reasonably be interpreted to be a request for a continuance in the context of the colloquy between the ALJ and counsel for both parties that preceded and followed it. Leading up to that statement, Crestview's counsel had indicated that Ms. Hrybiniak had been admitted to the hospital and was not available for testimony at the May 25th hearing (Tr. at 9) and the ALJ noted her concern in response that without Ms. Hrybiniak, whose two declarations were already in the record, CMS's counsel would be unable to cross-examine Ms. Hrybiniak (Tr. at 10, 12). It was in response to that concern that Crestview's counsel had made his statement that he would be willing to produce Ms. Hrybiniak for testimony when she was released by her physician. In context, this clearly was not a request for a continuance of the hearing, but rather an effort to solve the problem that CMS would have no opportunity to cross-examine a witness whose declarations were already in the record. Shortly after that exchange, rather than asking for a continuance, Crestview waived its opportunity to cross-examine CMS's witnesses. Crestview's counsel then voluntarily stated: "We'll do it on the brief, Your Honor, and in the record that's already present." Tr. at 13. Moreover, counsel for Crestview

subsequently stated that if CMS had the opportunity to put on new evidence, "then I would like to be able to put on Ms. Hrybiniak to respond to whatever that new evidence is." Tr. at 16. This indicates that he was no longer requesting an opportunity to have her testify unless CMS put on new evidence, which the ALJ did not permit.

Moreover, although Crestview misleadingly suggests that "the ALJ took the extraordinary step of requiring an offer of proof before the ALJ would even consider allowing her testimony" (Crestview Br. at 7), there is absolutely no evidence in the hearing transcript that the ALJ would have barred Ms. Hrybiniak's testimony if she had been present at the May 25, 2005 hearing or if the hearing had been continued upon request of counsel. At no point did Crestview ask the ALJ to continue the hearing at a future date or to make any other type of arrangement to afford Ms. Hrybiniak another opportunity to appear in person. After being informed that Ms. Hrybiniak could not testify that day, the ALJ on her own initiative asked what additional testimony, that was not already in Ms. Hrybiniak's declarations, she had been expected to give. Tr. at 10. In response, Crestview indicated her testimony would present the same facts that were already in her declarations. Tr. at 11. The ALJ further stated that her inquiry was to decide "whether we're going to proceed today," a statement indicating she was open to the possibility of continuing the hearing to another day to permit Ms. Hrybiniak's testimony. Id. Since Crestview at no time moved to continue the hearing, the ALJ never even had to rule on a continuance request. Having failed even to take the initiative of making a motion for continuance before the hearing judge, Crestview failed altogether to preserve any right to appeal how the ALJ might have ruled if a procedural motion had been made.

Crestview implies that it could waive its opportunity for an in-person hearing only by executing a written waiver in accordance with 42 C.F.R. § 498.66(a). Crestview Br. at 8-9. Crestview misconstrues the purpose and requirements of section 498.66(a), as well as the effect of its own actions as evidenced by the transcript of the remand proceedings before the ALJ during which Crestview clearly received the opportunity to appear in person before the ALJ after the ALJ had convened a "hearing." Section 498.66(a) applies to the situation where an affected party has decided to "waive its right to appear" at an in-person hearing and "present evidence." Section 498.66(a) specifically recognizes that the affected party will be waiving even the opportunity to "appear" in person before the ALJ and therefore contemplates the affected party would execute the waiver before the ALJ has actually convened the in-person hearing. Under the

circumstances contemplated by section 498.66(a), the regulation employs a "written" waiver because the waiver serves as confirming evidence of the party's decision to waive even its right to appear in person before the ALJ and thus explains the ALJ's failure to convene a hearing. Crestview, however, did not waive its opportunity to appear in person before the ALJ. In

fact, both parties were present at the scheduled in-person hearing as evidenced by the transcript of the proceedings. Accordingly, the written waiver requirements of section 498.66(a) simply do not apply. Under the circumstances present here, where a hearing had actually been convened, a waiver by a party of any aspect of the hearing opportunity would be evidenced by the transcript of the hearing itself, not by a separately executed waiver document. The statements made by Crestview's counsel during the in-person remand proceedings, as evidenced by the transcript, amply demonstrate Crestview's decision to waive its opportunity to have Ms. Hrybiniak testify in person. Crestview waived the opportunity to have Ms. Hrybiniak testify by being unable to produce her on the day of the hearing, by failing to request a continuance to allow her to testify at a later time, and by agreeing to proceed to a decision on the record as it then existed.

The hearing transcript here demonstrates that Crestview ultimately agreed to have the remand issues decided on the record as it then stood, which included a number of declarations and exhibits. This procedure is fully consistent with 42 C.F.R. 498.66(d), which concerns the holding of "hearings" without oral testimony. We also conclude that the Board's decision that Crestview relies upon here, Glenburn Home, DAB No. 1806 (2002), is totally inapplicable and unavailing. Unlike Glenburn Home, Crestview in fact received an in-person hearing even though Crestview waived its opportunity to have Ms. Hrybiniak testify in person.

B. The ALJ did not employ an erroneous burden of proof.

Crestview argues that the ALJ erred in determining on remand that its "collateral attack on the . . . Board's decisions on burden of proof is irrelevant where, as here, a preponderance of evidence supports CMS's findings." See ALJ Decision at 16. The ALJ's determination was consistent with the decision of the Sixth Circuit in Fairfax Nursing Home v. U.S. Dep't of Health and Human Servs., 300 F.3d 835 (7th Cir. 2002), cert. denied, 537 U.S. 1111 (2003) (affirming Fairfax Nursing Home, DAB No. 1794 (2001)). The court there declined to address whether the ALJ and the Board correctly allocated the burden of proof because the evidence in

the case was not in equipoise and the allocation of the burden of proof had no bearing on the outcome of the case. Crestview argues on appeal, however, that because the Sixth Circuit had identified genuine disputes of material fact concerning a few of the deficiencies relied upon by CMS in its motion for summary judgment, the evidence in the record concerning these remanded deficiencies should be viewed as being in equipoise. For the reasons discussed subsequently in this decision, the evidence in the record regarding the remanded deficiencies was clearly not in equipoise. Crestview also argues that "burden of proof" refers to "the *manner* in which evidence is presented," whereas "equipoise" refers to "the weight of the evidence," and that to assert that the burden of proof "is only relevant when the evidence presented is in a state of equilibrium is tantamount to putting the cart before the horse." Crestview Reply Br. at 2nd page (unnumbered). To the contrary, however, the evidence is weighed in the same manner regardless of who has the burden of proof. As indicated above, unless the weight of all the competing evidence is in equipoise, i.e., the evidence on each side is of equal weight, the decision-maker need not resort to the concept of burden of proof to determine which party prevails. See Hillman Rehabilitation Center at 10, n.7. Thus, the ALJ correctly concluded on remand that Crestview's collateral attack on the Board's decisions on burden of proof is irrelevant where, as here, a preponderance of the evidence supports CMS's findings.

Further, Crestview argues that placing the ultimate burden of persuasion on the facility is legally incorrect because it violates the Administrative Procedure Act as interpreted by the Supreme Court and federal circuit courts. We have evaluated and rejected these same arguments in several prior decisions, and nothing in Crestview's arguments makes it necessary for us to reconsider them here. See Lakeridge Villa Health Care Center, DAB No. 1988 (2005), aff'd, Lakeridge Villa Health Care Ctr. v. Leavitt, No. 05-4194, 2006 WL 3147250 (6th Cir. Nov. 3, 2006); Vandalia Park, DAB No. 1940 (2004), aff'd, Vandalia Park v. Leavitt, No. 04-4283 (6th Cir. Dec. 8, 2005); Tri-County Extended Care Center, DAB No. 1936 (2004), aff'd, Tri-County Extended Care Ctr. v. Leavitt, No. 04-4199 (6th Cir. Dec. 14, 2005); Omni Manor Nursing Home, DAB No. 1920 (2004), aff'd, Omni Manor Nursing Home v. Thompson, No. 04-3836 (6th Cir. Oct. 11, 2005); Batavia Nursing and Convalescent Inn, supra.

2. The ALJ's findings regarding the two deficiencies considered on remand are supported by substantial evidence and are free of legal error.

A. The deficiency under 42 C.F.R. § 483.25.

CMS concluded that the facility was not in substantial compliance with the quality of care requirements under 42 C.F.R. § 483.25 based on surveyor observations as to the care provided to four residents: Residents 44, 90, 68, and 93. The Sixth Circuit upheld the findings concerning Residents 68 and 93. With respect to Residents 44 and 90, the ALJ was solely charged with determining whether the residents themselves were responsible for removing their heel and/or elbow protectors or whether those devices were removed by staff to provide treatment and, if so in either case, with weighing those findings in determining whether noncompliance existed.

The regulation at 42 C.F.R. § 483.25 provides: "Each resident must receive and the facility must provide the necessary care and services to attain or maintain their highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care." For the two residents at issue on remand, we conclude that there is substantial evidence in the record as a whole that Crestview did not provide the necessary care and services to attain and maintain the highest practicable well-being, and that Crestview did not even provide the care and services ordered by the two residents' physicians.

i. Example 1 under deficiency Tag F309 involving Resident 44.

The ALJ made the following findings concerning Resident 44:

> R44 was bedfast; she had severe muscle contractures, including in her arms, and the parties agree that she was at high risk for skin breakdown. Indeed, according to Crestview, her diagnoses - CVA, hypertension, osteoarthritis, dysphasia, congestive heart failure and diabetes - made skin breakdown unavoidable. R44's physician therefore ordered "heel protectors on at all times (w/ ankle rings) [and] bilat[eral] elbow protectors on at all times." R44's care plan, responding to her risk for skin break-down, called for "heel protectors and elbow protectors as ordered." The Court of Appeals "emphatically" rejected Crestview's suggestion, which Crestview repeats on remand, that R44 did not require heel and elbow protectors. *Crestview*, 373 F.3d at 753.

* * * *

> Yet on three days of the survey, the surveyors observed R44 without elbow protectors. Specifically, at 2:00 P.M. on August 10, 1999, she was lying on her elbow on her right side without protectors. Throughout the day on August 11, 1999, she was observed without the protectors. On August 12 at 8:15 A.M. she had no protectors; and at 8:55 A.M. she was observed lying on her elbow on her left side without the elbow protectors.
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> The Court of Appeals affirmed the surveyor observations. *Crestview*, 373 F.3d at 754. With respect to Crestview's defense - that the residents themselves removed or shifted the protectors or that staff members removed the protectors to provide other treatment - the Court recognized:
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> > Crestview's evidence in this vein is not strong, chiefly because Crestview has failed to preserve staff observations of such behavior ... Upon remand, the ALJ may conclude in fact that Crestview has not proved it acted reasonably in failing to adhere to these residents' plans of care.
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> *Id*.

ALJ Decision on Remand at 10-12 (citations to the record omitted).

Both the surveyor, Laura McClure, and Crestview's records (including its own exhibits) agree that Resident 44 had physician's orders in force during the survey for the use of elbow protectors at all times. McClure Decl. ¶ 18; CMS Ex. 3, at 5; CMS Ex. 23, at 3; Crestview Ex. 1, at 1. The surveyor observed the resident without elbow protectors on all three days of the August 1999 survey, during a total of six observations, some while Resident 44 was lying on her elbows. McClure Decl. ¶ 18, CMS Ex. 3, at 5-6; CMS Ex. 23, at 4. It was the opinion of the surveyor and her survey team leader, a registered nurse, that this deficiency created the potential for more than minimal harm to Resident 44 because failing to apply the elbow protectors as ordered by the physician increased Resident 44's risk of developing pressure sores on her elbows. McClure Decl. ¶ 19. Grimes Decl. ¶ 10. The sole question of material fact the Sixth Circuit identified on appeal regarding this deficiency example was Crestview's contention that "the residents removed or shifted the protectors or the staff members removed the protectors to provide other treatment." 373 F.3d at 754.

The only witness or declarant of Crestview to address this issue was Julie Hrybiniak. While Ms. Hrybiniak's November 27, 2001 declaration does suggest that residents generally can and do remove protectors (Hrybiniak Decl. ¶ 4a.), there is absolutely nothing in her declaration that specifically addresses the circumstances surrounding the protectors for this resident or that supports the contention that staff members had removed protectors to provide other treatment for this resident. Ms. Hrybiniak did not declare she had observed this resident removing protectors at the time of the survey or any other time. Crestview, moreover, failed to provide any evidence from the caretakers actually caring for Resident 44 at the time of the survey to establish that they had removed protectors to provide other treatment or that they had observed this resident removing protectors. The absence of such testimony is particularly noteworthy given the number of times that this resident was observed without elbow protectors contrary to doctors's orders during the three-day survey. Moreover, as CMS noted, Resident 44 was bedfast and had severe muscle contractures in her arms (McClure Decl. ¶ 18; CMS Ex. 3, at 5), which are factors that could reduce the likelihood that Resident 44 had been removing the elbow protectors on her own. Moreover, Crestview failed to cite any evidence in the record that would establish that Resident 44 was being examined and treated at the very times that the surveyors made their observations that the resident lacked protectors.

The only argument Crestview presents on appeal in an attempt to refute this deficiency example is that Resident 44 did not need to wear elbow protectors because she was on a pressure relief mattress. The Sixth Circuit has already "emphatically" rejected this argument, so it is not within the scope of the Sixth Circuit's remand. Crestview, 373 F.3d at 753. Furthermore, the Sixth Circuit rejected Crestview's argument suggesting that it could disregard a physician's order by contending that those orders were incorrect or misguided. Id.

Accordingly, we conclude that substantial evidence in the record supports the ALJ's findings with respect to Resident 44.

ii. Example 2 under deficiency Tag F309 involving Resident 90

The ALJ made the following findings concerning Resident 90:

> . . . R90 had a history of skin breakdown, and also had orders in place for bilateral heel protectors "at all times," bilateral elbow protectors "at all times for preventive measure," and for a cone splint for his hand

> to be worn from 7 A.M. to 7 P.M., then taken off at bedtime. R90 had paralysis on his right side as the result of a stroke, and his right hand was severely contractured. The cone splint was designed to hold his hand partially open to avoid worsening the contractures. R90's care plan acknowledged these problems, and, among other measures, called for "heel protectors as ordered," "elbow protectors as ordered, and "cone splint as ordered." Again, the Court of Appeals rejected Crestview's suggestion that R90 did not require these protective devices. *Crestview*, 373 F.3d at 753.
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> The surveyors observed R90 on August 12 at 8:30 A.M. (awake and in bed), 9:15 A.M. (sleeping), and 11:30 A.M. (Up in a chair with his arms on the arm rest) without elbow protectors. They observed him in a geri chair in the dining room at 1:50 P.M. without elbow protectors, heel protectors, or hand splint.

ALJ Decision on Remand at 11 (citations to the record omitted).

Crestview did not dispute that Resident 90 had a history of pressure sores and was identified as at risk for pressure sores. See Cobb Decl. ¶ 8, CMS Ex. 3, at 6, CMS Ex. 22, at 3. The survey report, surveyor's notes, and Crestview's own exhibit establish that there were physician's orders in effect at the time of the August survey directing that Resident 90 was to have elbow protectors on both elbows at all times and heel protectors on both feet at all times and a cone splint for his hand from 7:00 a.m. to 7:00 p.m. every day. Id. and Crestview Ex. 2, at 2, 6. As the result of a stroke, Resident 90 suffered from paralysis of his right side. Cobb Decl. ¶ 8. The cone shaped hand splint was designed to be placed in Resident 90's hand, which was severely contracted, to hold his hand partially open to avoid the worsening of his hand contractures (contracted muscles). Id.

Despite this history and the orders, the surveyor observed Resident 90 four times on August 12, 1999 without any elbow protectors and on one of those occasions, observed Resident 90 without any elbow protectors, without any heel protectors, and without any hand cone splint. Cobb Decl. ¶ 8, CMS Ex. 3, at 6, CMS Ex. 22, at 4.

This deficiency also created the potential for more than minimal harm to Resident 90 because failing to apply these devices as ordered by the physician increased Resident 90's risk of developing new pressure sores on his elbows and heels, and

increased the resident's risk of worsened contractures of his hand. Cobb Decl. ¶ 9.

Crestview does not dispute that Resident 90 was not wearing heel or elbow protectors or the cone splint for the resident's hand. Again, the sole question of material fact that the Sixth Circuit identified on appeal regarding this deficiency example was Crestview's contention that "the residents removed or shifted the protectors or the staff members removed the protectors to provide other treatment." 373 F.3d at 754; see also, Hrybiniak Decl. ¶ 4a.

Again, the only witness or declarant of Crestview to address this issue was Julie Hrybiniak, who had not actually observed the resident removing protectors at the time of the survey or any other time. Crestview, moreover, failed to provide any evidence from the caretakers actually caring for Resident 90 at the time of the survey to establish that they had removed protectors to provide other treatment or that they had observed this resident removing protectors. The absence of such testimony is particularly noteworthy given the number of times that this resident was observed without elbow protectors contrary to doctors's orders on a single day and on one of those occasions (at 1:50 P.M. while R90 was sleeping), without any elbow protectors, heel protectors, or any hand cone splint. Moreover, Crestview failed to cite any evidence in the record that would establish that Resident 90 was being examined and treated at the very times that the surveyors made their observations that the resident lacked protectors.

Crestview argues that because a CMS surveyor note at 8:30 a.m. on August 12, 1999 indicated that Resident 90 "moves around, scratches, [and was] verbally abusive," that "at that single observation" the absence of elbow protectors "cannot be inferred to be [a] facility staff failure[.]" Crestview Br. at 15. This evidence does not establish that the resident removed his protectors in this one instance nor does it justify the facility's failure to ensure that they were in place. Nor does it explain the absence of elbow protectors on three other occasions on the same day or the absence on one of those occasions of heel protectors and the hand cone splint as well as the heel protectors while the resident was sleeping. Moreover, as CMS noted, Resident 90 suffered from paralysis of his right side due to a stroke, and it consequently would have been difficult for the resident to have removed any of the protective devices. CMS Br. at 24, citing Cobb Decl. ¶ 8. Finally, as the ALJ concluded, if for any reason the facility is unable to keep the protectors in place, as required by the physician order and

care plan, that fact should be documented, and then considered by the interdisciplinary team in developing the plan of care. ALJ Decision at 13. The medical records for Resident 90 suggest no such problem, much less consideration of such a problem by the interdisciplinary team. Id.

Accordingly, we conclude that substantial evidence in the record supports the ALJ's findings for Resident 90. We therefore uphold the conclusion that Crestview was not in substantial compliance with 42 C.F.R. § 483.25 based on the findings with respect to the two uncontested residents (Residents 68 and 93) as well as the two contested residents (Residents 44 and 90).

B. The deficiency at 42 C.F.R. § 483.25(c)(2).

The regulation at 42 C.F.R. 483.25(c)(2) provides:

> *Pressure sores.* Based on the comprehensive assessment of a resident, the facility must ensure that--
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> * * * *
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> (2) A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.

The facts concerning this resident as stated by the ALJ on remand are as follows:

> Resident 68 was diagnosed with multiple sclerosis, dysphagia (difficulty swallowing), iron deficient anemia, and dermatitis. She had a gastrostomy tube for feeding, was bed ridden, and had multiple contractures, such that she was unable to reposition herself. The parties agree that she was at high risk for developing pressure sores, and, in August 1999, she had a stage II open sore on her left buttock, and a stage II open sore on her left hip. According to treatment records, a pressure sore on her left elbow had healed, so the facility stopped treatment for that on July 23, 1999. Resident 68's physician ordered pressure relieving devices on both feet and both elbows at all times. . . . [T]he physician repeatedly reordered them.[5]
>
> Notwithstanding the physician orders, at 1:00 P.M. and again at 2:00 P.M. on August 10, 1999, the surveyor

[5] The ALJ cited 11 instances where the physician had reordered feet and elbow protectors.

> observed R68 in bed with pressure relieving devices on her right elbow and both feet, but none on her left elbow, which was resting directly on the mattress. Although Crestview questions whether the surveyor accurately recorded R68's positions at all of these times, the more pertinent question is whether she had in place all of the ordered heel and elbow protectors. The
>
> overwhelming and uncontradicted evidence establishes that she did not.
>
> On August 11, 1999, at 10:30 A.M., 3:00 P.M., and 5:30 P.M., the surveyor, with the nurse, observed the resident's left hip had a 6 cm by 4 cm pressure sore with thick yellow slough. The left buttock area had an 8 cm by 4 cm stage II red and bloody pressure sore. The surveyor observed dried, yellow drainage on the resident's gown directly under her left elbow, and the left elbow had a 2 cm by 3 cm stage II pressure sore with yellow slough.

ALJ Decision on Remand at 14-15 (citations to the record omitted).

The Sixth Circuit remanded this deficiency for a hearing to resolve only two issues: (1) whether the newly developed pressure sore on Resident 68's left elbow was "unavoidable," and (2) whether Crestview was providing the necessary treatment and services to promote healing of the already existing pressure sores on the buttocks and left hip and prevent new sores from developing. 373 F.3d at 755. On appeal, Crestview fails to cite any evidence in the record that could possibly explain how Crestview could be viewed as providing the necessary treatment and services to prevent new sores from developing when Resident 68 had been observed on two separate instances without an elbow protector on her left elbow the day before the surveyor observed that a new stage II pressure sore with "yellow slough" existed on that same elbow.

Crestview does not dispute the existence of the new pressure sore that the surveyor observed on the left elbow of Resident 68 on August 11, 1999. Indeed, Ms. Hrybiniak in her declaration states that "[t]he pressure sore on the resident's left elbow came and went in approximately 30 days which indicates appropriate care and treatment was timely provided." Hrybiniak Decl. ¶ 6a. As the ALJ concluded, the fact that this new pressure sore healed within 30 days of the survey because of proper care is further evidence that it could have been avoided altogether if Crestview

had provided the proper care prior to the survey. Thus, the record fully supports the ALJ's finding that the pressure sore was not "unavoidable" and that Crestview had not provided the necessary treatment and services to prevent new pressure sores from developing.

Accordingly, we conclude that substantial evidence in the record supports the ALJ's conclusion that Crestview was out of compliance with section 483.25(c) with respect to Resident 68.[6]

3. A $400 per day CMP is reasonable based solely on the deficiencies for which the Sixth Circuit found the facility "undeniably responsible."

Crestview first argues that "the ALJ ignores the mandate of the Sixth Circuit," claiming that the Sixth Circuit required that the ALJ first decide the remanded deficiencies before determining if the CMP was reasonable. Crestview Br. at 10. The court, however, did not provide the ALJ a clear direction in that regard. Rather, the court stated that there were genuine issues of material fact concerning two of the deficiencies that "may" have impacted the determination of whether the penalty amount was reasonable. 373 F.3d at 751. Thus, while concluding that the unresolved deficiencies being remanded may have impacted the amount of the CMP, the court suggested that there was also a possibility that the CMP amount was reasonable based upon the deficiencies already upheld by the Sixth Circuit's decision. Thus, the ALJ was apparently acting on the discretion left her by the Sixth Circuit when she concluded that the deficiencies already upheld by the Sixth Circuit's decision were sufficient to uphold the full $400 a day CMP. ALJ Decision on Remand at 8-10. The Sixth Circuit's decision had affirmed that for five of the six deficiency tags at issue Crestview was out of substantial compliance. 373 F.3d at 751-754. What was left for the remanded hearing was only a small number of the deficiencies at issue. Moreover, the argument raised became moot when the ALJ also determined that a preponderance of the evidence supported CMS's case on the remanded deficiencies. Thus, even if the ALJ had

[6] Example 2 under Tag F314 that involved Resident 93 was upheld by the Sixth Circuit on appeal (because facility staff had applied a dirty heel protector over the resident's open pressure sore) and is not an issue on remand. 373 F.3d at 755.

erred in determining whether the CMP amount was reasonable based solely on the deficiencies upheld by the Sixth Circuit, that error clearly was not prejudicial since the ALJ on remand upheld the remaining disputed deficiencies after convening a hearing, and as a result would certainly have reached the same conclusion on the reasonableness of the CMP with this additional set of deficiencies added to the deficiencies already upheld.

4. The ALJ correctly considered the factors set forth in 42 C.F.R. § 488.438(f) in upholding the CMP amount imposed by CMS.

Crestview also raises arguments about whether the per day amount was reasonable based on the four factors that may be considered as set forth in 42 C.F.R. § 488.438(f). The ALJ is limited to these factors in considering whether the CMP amount imposed is reasonable. These factors are:

> (1) The facility's history of non-compliance, including repeated deficiencies.
> (2) The facility's financial condition.
> (3) The factors specified in § 488.404.
> (4) *The facility's degree of culpability*. . . .

(Italics in original.)

CMS, in concurrence with the ODH's recommendation, originally imposed a CMP of $400 per day based on the totality of the deficiencies cited. This is near the low end of the range permitted by the regulations, which allow CMS to impose a CMP from $50 per day up to $3,000 per day for deficiencies that cause either actual harm or create the potential for more than minimal harm but do not pose immediate jeopardy. 42 C.F.R. § 488.438(a)(ii).

Crestview first raises the issue of its financial condition and ability to pay the CMP. Crestview Br. at 11-14. The ALJ properly did not consider this issue on remand, because the Sixth Circuit upheld the conclusion in the original Board decision (and the ALJ Decision) that Crestview had waived any reliance on this issue. 373 F.3d at 756. Accordingly, the issue of Crestview's financial condition as a factor in imposing the amount of the CMP was not before the ALJ on remand and correctly not considered by her.

Regarding Crestview's history of noncompliance, the ALJ first

notes that the Sixth Circuit invited Crestview, upon remand, to rebut the presumption that past noncompliance accurately predicts future problems. ALJ Decision on Remand at 9. The ALJ goes on to conclude that Crestview had not in fact rebutted that presumption on remand and that the record shows "a facility history of deficiencies" in the very areas cited here. Id. Crestview does not even argue on appeal, much less cite any evidence, that the ALJ should not have considered this history in upholding the CMP imposed, and we conclude that she correctly did so.

We also conclude that the ALJ correctly considered the factors specified in 42 C.F.R. § 488.404 in upholding the CMP. See ALJ Decision at 10. The primary focus of section 488.404 is the seriousness, or scope and severity, of the deficiencies. Again, Crestview provides no argument on appeal why the ALJ did not correctly consider this factor in upholding the CMP imposed, and we conclude she correctly did so.

Finally, the ALJ considered on remand the facility's culpability. Among other things, she considered the facility "particularly culpable for its housekeeping and maintenance deficiencies" and "its application of dirty heel protectors over an open pressure sore a blatant disregard for R93's health and safety." ALJ Decision on Remand at 10. Again, Crestview takes no exception to the ALJ's consideration of this factor, and we therefore uphold it.

Accordingly, we conclude that the ALJ correctly analyzed the factors as supporting the CMP imposed.

Conclusion

For the reasons explained above, we uphold the ALJ Decision on Remand.

/s/
Judith A. Ballard

/s/
Leslie A. Sussan

/s/
Donald F. Garrett
Presiding Board Member