

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

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In the Case of:)	DATE: December 8, 2008
St. Joseph Villa Nursing)	
Center,)	
Petitioner,)	Civil Remedies CR1800
- v. -)	App. Div. Docket No. A-08-116
Centers for Medicare &)	Decision No. 2210
Medicaid Services.)	
_____)	

REMAND ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

The Centers for Medicare & Medicaid Services (CMS) requested review of the decision of Administrative Law Judge (ALJ) Keith W. Sickendick in St. Joseph Villa Nursing Center, DAB CR1800 (2008) (ALJ Decision). The ALJ concluded that CMS had failed to make a prima facie showing that St. Joseph Villa Nursing Center (St. Joseph) was not in substantial compliance with requirements for participation in the Medicare and Medicaid programs and that there was no basis for CMS to impose a per-instance civil money penalty (CMP). The ALJ based his conclusion on his findings that CMS failed to appear at the hearing except by telephone for the limited purpose of presenting CMS's exhibits, and that CMS had not presented any evidence to establish a prima facie case.

For the reasons explained below, we conclude that the ALJ made a prejudicial procedure error in granting judgment in St. Joseph's favor at the hearing, under the particular factual circumstances. We further conclude that the ALJ erred by ruling in St. Joseph's favor without considering the stipulated facts and the evidence in the record, including the Statement of Deficiencies (SOD) containing the findings of the State survey agency on which CMS based the CMP. Accordingly, we remand the appeal to the ALJ for further proceedings consistent with this decision.

Applicable Legal Authority

The applicable legal authority is set out at pages 3-5 of the ALJ Decision and in our decision where appropriate. With respect to burden of proof, the ALJ Decision quoted the following from the Board's decision in Evergreene Nursing Care Center, DAB No. 2069, at 7-8 (2007):

CMS has the burden of coming forward with evidence related to disputed findings that is sufficient (together with any undisputed findings and relevant legal authority) to establish a prima facie case of noncompliance with a regulatory requirement. If CMS makes this prima facie showing, then the SNF must carry its ultimate burden of persuasion by showing, by a preponderance of the evidence, on the record as a whole, that it was in substantial compliance during the relevant period.

ALJ Decision at 6. This statement from Evergreene is a summary of specific and detailed conclusions regarding parties' relative burdens that the Board first set out in Hillman Rehabilitation Center, DAB No. 1611 (1997), aff'd Hillman Rehabilitation Ctr. v. U.S. Dep't of Health & Human Servs., No. 98-3789 (GEB) at 21-38 (D.N.J. May 13, 1999) (Hillman I), and applied to cases involving compliance with long-term care Medicare participation requirements in Batavia Nursing and Convalescent Inn, DAB No. 1911 (2004), aff'd Batavia Nursing & Convalescent Ctr. v. Thompson, 143 F. App'x 664 (6th Cir. 2005), after a thorough analysis of the relevant statutory and regulatory provisions.

These decisions make clear that CMS is not required to present any evidence with respect to facts that are undisputed. In some cases, the undisputed facts may be legally sufficient to show noncompliance. Jennifer Matthew Nursing & Rehabilitation Center, DAB No. 2192 (2008); Guardian Health Care Center, DAB No. 1943, at 9 (2004).

Also relevant to the burden analysis here are the following conclusions the Board reached in Hillman Rehabilitation Center, DAB No. 1663 (1998), aff'd Hillman Rehabilitation Ctr. v. U.S. Dep't of Health & Human Servs., No. 98-3789 (GEB) (D. N.J. May 13, 1999) (Hillman II), a case where a provider challenged whether CMS (then the Health Care Financing Administration) had made a prima facie case after the provider had itself presented evidence:

It is correct that if a party fails to establish a prima facie case, the opposing party may prevail without producing any evidence. However, it does not

follow that, once the opponent has presented evidence, the decision-maker can ignore probative evidence properly in the record before him in weighing whether each party has proven an issue by the preponderance of the evidence. The patient records proffered by Hillman in response to the deficiency findings in themselves effectively show (as the ALJ found) that Hillman was unable to prove that its clinical records were in substantial compliance as of April 5, 1995. The result of disregarding them was that the ALJ expressly declined to consider significant evidence of noncompliance in the record in determining whether even a prima facie case of noncompliance had been made.

Hillman II, at 10-11. In other words, the legal sufficiency of CMS's case does not depend solely upon the evidence submitted by CMS itself.

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 - 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>; Batavia Nursing and Convalescent Inn at 7; Hillman I at 6. The Board's Guidelines also state that "[t]he bases for modifying, reversing, or remanding an ALJ decision include the following: . . . a prejudicial error of procedure . . . was committed."

Case Background

St. Joseph, a nursing facility in Omaha, Nebraska authorized to participate in the Medicare and Medicaid programs, requested a hearing on CMS's decision to impose a per-instance CMP of \$8,000 for four deficiencies, two at the immediate jeopardy level, that the State agency found during a survey completed on May 3, 2007. A notice from the ALJ dated November 2, 2007 set the hearing for Tuesday, April 1 through Friday, April 4, 2008, in Omaha. On Monday morning, March 31, 2008, first by e-mail and then during a telephone pre-hearing conference held later that day, the Chief Counsel of the HHS Regional Office in Kansas City, Missouri informed the ALJ that the Assistant Regional Counsel assigned to represent CMS was not available to attend the hearing due to a death in her family over the prior weekend. He further represented that no other counsel were familiar with the case or

could attend the hearing to represent CMS and that no clerical staff were available to prepare necessary travel orders. Decl. of Harry Mallin (June 20, 2008), Ex. C (ALJ Ruling Denying CMS Request for Postponement); ALJ Decision at 2, 7. The ALJ treated the Regional Chief Counsel's statements as a request to postpone the hearing, which the ALJ then denied in a written decision dated March 31, 2008. *Id.* Later that day, Harry Mallin, an attorney from the CMS Regional Office, contacted counsel for St. Joseph, who agreed that Mr. Mallin could participate in the hearing by telephone for the limited purpose of presenting CMS's exhibits and offering them into evidence, but that Mr. Mallin would not present or cross-examine any witnesses. *Id.* at 2-3, 7; Hearing Transcript (Tr.) at 9-10, 21-22; Mallin Decl. at ¶ 7. During the April 1 hearing, the ALJ found this arrangement acceptable. Tr. at 22. On the afternoon of March 31, Mr. Mallin delivered the proposed exhibits to Federal Express (FedEx) for overnight delivery to an individual in Omaha, apparently a non-attorney representative of the State survey agency, who would deliver them to the hearing. Tr. at 9-10, 36-37; Mallin Decl. at ¶ 8; CMS Request for Review at 2.

The ALJ convened the hearing at 9:09 a.m. on Tuesday, April 1, 2008. At approximately 9:40 a.m., the ALJ contacted Mr. Mallin by telephone to participate in the hearing at which time he informed the ALJ and St. Joseph's counsel that the proposed CMS exhibits had arrived in Memphis, Tennessee (i.e., the main FedEx hub) at 2:56 a.m. but had not yet been delivered to Omaha. Tr. at 21-23; Mallin Decl. at ¶¶ 11, 12, and Ex. B. St. Joseph then moved for judgment in its favor on the ground that CMS had not presented any evidence and, therefore, had not made a prima facie case. The ALJ denied the motion and ruled that he would "accept the Government's exhibits any time they arrive and consider them for admissibility." Tr. at 23-26. The ALJ then ordered Mr. Mallin to contact FedEx and inquire about the delivery status of the exhibits. The ALJ and both counsel agreed that Mr. Mallin would report what he learned to St. Joseph's counsel by e-mail, after which the ALJ and St. Joseph's counsel would telephone Mr. Mallin from the hearing location. Tr. at 27-29; Mallin Decl. at ¶¶ 14-15. At that point, the ALJ admitted St. Joseph's Exhibits 1-39 into evidence, and the hearing went off the record at 9:53 a.m. Tr. at 27-28; ALJ Decision at 2.

The hearing resumed at 10:24 a.m. without Mr. Mallin participating by telephone. At that time, St. Joseph renewed its prior motion for judgment in its favor. Tr. at 32-37. St. Joseph also requested that its "presumptively admitted" exhibits "not be actually admitted" until CMS made its prima facie case, or that its Exhibit 1 (i.e., the SOD) be withdrawn or not

admitted as not authenticated so as not to support a prima facie case, but the ALJ did not rule on St. Joseph's request. Tr. at 33. Before ruling on St. Joseph's renewed motion for judgment, the ALJ asked if St. Joseph's counsel had heard from Mr. Mallin, and St. Joseph's counsel replied that she had not. Then, at approximately 10:28 a.m., St. Joseph's counsel e-mailed Mr. Mallin asking if he had any additional information about the delivery status of the exhibits.¹ Tr. at 36; Mallin Decl., Ex. C. Shortly before adjourning the hearing 13 minutes later at 10:41 a.m., the ALJ orally granted judgment for St. Joseph on the ground "that CMS has failed to appear, although given multiple opportunities to do so." Tr. at 41. The ALJ also concluded that CMS had not presented any evidence that would establish a prima facie case of a violation. Tr. at 41-43.

With its request for review of the ALJ Decision, CMS submitted what the parties do not dispute is FedEx Internet tracking information showing that the CMS exhibits arrived at the Omaha FedEx facility on April 1, 2008 at 9:41 a.m., and were delivered and signed for at 12:15 p.m. the same day by "M.SMORRISY," whom the parties have not identified. Mallin Decl., Ex. B (FedEx tracking sheet).

In his subsequent written decision, the ALJ recounted the procedural history of the case, including his ruling above, and concluded that CMS "failed to make a prima facie showing of any regulatory or statutory violation that provides a basis for the imposition of an enforcement remedy and no such remedy is reasonable in this case." ALJ Decision at 8.

Before the Board, CMS argues that the sole issue is whether the ALJ erred in failing to allow CMS the opportunity to present its exhibits, leading to his decision that CMS failed to make a prima facie case showing a statutory or regulatory violation. CMS Request for Review at 1. Because CMS did not challenge the ALJ's denial of CMS's request to postpone the hearing, that issue is not before us on appeal.

¹ Mr. Mallin did not respond to the e-mail during the hearing. Mr. Mallin later reported in a declaration filed with CMS's request for review that he did not receive the e-mail until later that morning because his office computer had lost access to the e-mail server. Mallin Decl. at ¶ 17.

Analysis

- A. The ALJ's determination to end the hearing and enter judgment without receiving CMS's exhibits constitutes a prejudicial error.

For the reasons discussed below, we conclude that the ALJ's decision at the hearing not to await the arrival of CMS's exhibits and to end the hearing and enter judgment against CMS, made in the absence of CMS counsel who had been participating in the hearing by telephone, was a prejudicial error of procedure. Although we recognize that an ALJ has the authority to reconsider an earlier ruling made in a case, an ALJ may not do so in an arbitrary or capricious manner that is prejudicial to a party, as the particular facts indicate occurred here.

The ALJ's decision to end the hearing was contrary to his prior statements to both counsel that he would not grant St. Joseph's motion for judgment in its favor and would instead "accept the Government's exhibits any time they arrive and consider them for admissibility." Tr. at 23-26. The ALJ was aware that the exhibits had been sent by FedEx, and prior to ruling that he would await their arrival, he indicated an understanding that a FedEx delivery "usually doesn't happen until after 10:00 in the morning." Tr. at 17-18. The ALJ also told both counsel that he anticipated that the exhibits would arrive "sometime during the next two days" during which St. Joseph estimated that it could complete the examination of its witnesses in the absence of cross examination. Tr. at 24; see also Tr. at 14-15. When the ALJ subsequently ordered Mr. Mallin, shortly before 10:00 a.m., to leave the hearing telephone call to check on the status of the exhibits, the ALJ did not give Mr. Mallin any deadline by which to report back and/or produce the exhibits. The ALJ also did not provide any notice to the parties that CMS's failure to respond by a certain time would result in a reconsideration of the ALJ's previous ruling and the entry of judgment for St. Joseph. Tr. at 28-29, 32; Mallin Decl. at ¶¶ 14-16. Moreover, in response to a request by Mr. Mallin for CMS "to reserve any right to litigate the case in post-hearing briefs," the ALJ stated that "[e]verybody gets a chance to do post-hearing briefing." Tr. at 31. Because this exchange occurred before Mr. Mallin left the telephone call to check on the status of the exhibits (Tr. at 31), Mr. Mallin could reasonably rely upon these statements as meaning that the ALJ would not enter judgment against CMS from the bench, ex parte and without further notice.² Approximately

² After the ALJ later granted judgment - without CMS counsel present by telephone - he stated that there would be no
(continued...)

45 minutes after Mr. Mallin left the hearing as ordered to check on the status of the exhibits, the ALJ reconsidered his previous ruling and granted St. Joseph's motion without giving CMS a chance to respond. It should also be noted that St. Joseph did not allege that it would be prejudiced by the late arrival of the exhibits, and St. Joseph had previously received copies of the exhibits, pursuant to the ALJ's prehearing order.

We conclude that under the particular facts presented here, the ALJ's decision to end the hearing as he did was an error of procedure that was prejudicial to CMS. Given the ALJ's assurance to both counsel that the exhibits would be accepted when they arrived, the ALJ should at the very least have permitted CMS counsel Mallin an opportunity to respond by telephone to St. Joseph's renewed motion for judgment in its favor, instead of ruling on that motion in his absence. The ALJ also should have explained why he reconsidered his earlier ruling that he would accept the CMS exhibits when they arrived and permit post-hearing briefing. Based upon our review of the record, there does not appear to have been any change in the factual circumstances that would warrant the ALJ's reconsideration of his prior ruling.³ Although the ALJ found that "no counsel or other representative appeared on behalf of CMS" except "by telephone for the limited purpose of offering CMS exhibits" (ALJ Decision at 3), it is reasonable for CMS to expect to have had an opportunity to respond to St. Joseph's motion because it related to the proffer of exhibits, which was part of the "limited purpose" of CMS counsel's appearance. The ALJ gave no reason why CMS counsel should have been precluded from responding to St. Joseph's motion in a telephone appearance.

Contrary to what St. Joseph argues, CMS did not seek an indefinite time period to present its exhibits. Instead, CMS was

²(...continued)

need for post-hearing briefing. Tr. at 43. The ALJ did not explain the rationale for this finding.

³ In discussing the basis for his ruling, the ALJ observed that someone from the Regional Office in Kansas City could have brought the exhibits to the hearing in Omaha by car that morning in about two to three hours; however, he did not order that CMS do so at any point during those proceedings. Tr. at 25-26, 38-39. The ALJ also did not rule that the exhibits would be excluded if they were not delivered to the hearing by 9:00 a.m. Under these circumstances, it would not have been reasonable for the ALJ to rely upon CMS's failure to drive from Kansas City, Missouri to Omaha, Nebraska to deliver its exhibits before 9:00 a.m. as a basis to enter judgment against CMS.

simply seeking, at the ALJ's behest, to locate the exhibits after having taken reasonable steps to ensure their delivery on the first day of the hearing. St. Joseph, having agreed to CMS's proposal to send its exhibits by FedEx (and appear for the purpose of moving to admit them) assumed the risk that FedEx might cause some delay in delivering the exhibits. Indeed, it seems unfair that after having agreed to bear this risk, St. Joseph should then benefit from the actualization of that risk by moving for reconsideration of the ALJ's ruling and obtaining the entry of judgment against CMS. There is no indication in the record that the ALJ considered this factor in reaching his decision.

Additionally, to the extent the ALJ's decision to end the hearing and enter judgment for St. Joseph was based on his finding that CMS failed to appear at the hearing, we conclude that this was inconsistent with the applicable regulations. The regulations address non-appearance at a hearing only by the party requesting the hearing, or the "affected party," which includes a facility challenging a CMS determination, but not CMS.⁴ They permit the ALJ to dismiss a request for hearing if the party abandons the request by failing to appear at the hearing or the prehearing conference without having previously shown good cause for not appearing. 42 C.F.R. § 498.69. Even then, the ALJ must first send a "show cause" notice to the party that gives the party 10 days to respond. *Id.*; see also 42 C.F.R. § 498.66(c) (authorizing dismissal pursuant to section 498.69 if the "affected party" fails to appear for the hearing or show good cause for failing to appear).

St. Joseph contends that CMS waived any claim of procedural error by the ALJ because it was given multiple opportunities to present evidence and intentionally failed to do so. This argument is without merit. As an initial matter, St. Joseph cites to no legal authority in support of its contention. In addition, as indicated above, there is no evidence in the record that CMS abandoned its prosecution of this case. Although CMS did not participate in the hearing in-person, CMS did attend the hearing via telephone in order to put evidence in the record in an attempt to meet its burden in this case. Most importantly, both St. Joseph and the ALJ agreed to this process. Having thus agreed to this process, it is disingenuous for St. Joseph to assert that CMS had somehow "waived" its right to claim on appeal

⁴ "Affected party means a provider, prospective provider, supplier, prospective supplier, or practitioner that is affected by an initial determination or by any subsequent determination or decision issued under this part, and 'party' means the affected party or CMS (or the OIG), as appropriate." 42 C.F.R. § 498.2.

that the ALJ had committed procedural error, especially in light of the fact that the motion for reconsideration and entry of judgment was made and granted while CMS's counsel was absent from the proceeding to inquire about the status of the exhibits.

St. Joseph also notes that CMS could have, but failed to, move that the ALJ reopen the case for presentation of additional evidence, the CMS exhibits. The regulations at 42 C.F.R. § 498.100 permit the ALJ to reopen "[a] decision of an ALJ." It is not clear that this regulation would have applied prior to the ALJ's issuance of his written decision. In any event, the regulations do not require CMS to seek reconsideration of an ALJ's decision prior to appealing it to the Board. Indeed, the regulations specifically authorize any party to appeal an adverse decision to the Board. See 42 C.F.R. § 498.82(a).

In sum, we conclude that under the particular facts of this case, the ALJ committed a prejudicial error of procedure by reconsidering his ruling about whether to wait for the arrival of CMS's exhibits and deciding instead to enter judgment against CMS, in the absence of CMS counsel and without providing any rationale for reconsidering his ruling.

- B. The ALJ's determination to rule in St. Joseph's favor without considering the undisputed facts and the record, including the SOD, was legally erroneous.

Regulations governing ALJ hearings in this type of case mandate that the ALJ "inquires fully into all of the matters at issue, and receives in evidence the testimony of witnesses and any documents that are relevant and material," and that when as here there is no oral testimony, the ALJ will "[m]ake a record of the relevant written evidence that was considered in making the determination being appealed, and of any additional evidence submitted by the parties." 42 C.F.R. §§ 498.60(b), 498.66(d). Additionally, the ALJ's decision must be "based on the evidence of record." 42 C.F.R. § 498.74(a).

It is evident, however, that the ALJ did not base his decision on the evidence of record as required. Prior to ruling at the hearing that CMS had not made a prima facie case, the ALJ stated that he had not reviewed St. Joseph's exhibits in any detail. Tr. at 20. Moreover, the ALJ Decision contains no discussion of any evidence, notwithstanding the admission to the record of St. Joseph's exhibits, and does not address the undisputed facts at all, much less why they are not sufficient to establish a prima facie case. ALJ Decision at 2. The decision does not even identify the regulatory requirements that St. Joseph was alleged to have violated or CMS's deficiency findings. As we discussed

in Hillman II, the ALJ cannot ignore probative evidence properly in the record before him. Hillman II at 10-11.

The ALJ's failure to consider and address the evidence is significant, as the evidence included St. Joseph's Exhibit 1, the SOD prepared by the State agency following the survey completed on May 3, 2007. The SOD was likely relevant to the issue of whether CMS had established a prima facie case. The Board has held that a prima facie showing of noncompliance may be based on the SOD, if the factual findings and allegations it contains are specific, undisputed, and not inherently unreliable. Guardian Health Care Center, at 14. Indeed, the ALJ recognized during the hearing that a facility's own exhibits may establish that it was not in substantial compliance. Tr. at 10, 41. The ALJ conducted no analysis of the SOD in either his oral ruling or his written decision to determine whether the SOD's findings and allegations satisfied those criteria or provided a basis on which to determine whether CMS had established a prima facie case, and did not state why the evidence therein was not considered as required by the regulations. The SOD was part of the record, as the ALJ admitted St. Joseph's exhibits and never ruled on St. Joseph's subsequent request at the hearing that its exhibits not be "actually admitted" or that its Exhibit 1 be withdrawn or not admitted as not authenticated. Tr. at 27, 32-33; see also ALJ Decision at 2.

St. Joseph's argument on appeal that its Exhibit 1 had not been authenticated does not justify the ALJ's failure to address that exhibit in reaching his decision, for two reasons. First, the parties filed a joint stipulation in which they agreed that the State agency issued an SOD dated May 3, 2007, that CMS relied on the State agency findings in imposing the remedies for the deficiencies cited in the SOD, and that St. Joseph contested the findings in the SOD. Joint Stipulation of Undisputed Facts, Nos. 5-8 (Jan. 17, 2008). The ALJ noted the stipulation of undisputed facts at the hearing and said, without any objection from St. Joseph, that he would consider it binding on the parties. Tr. at 8. Counsel for St. Joseph even acknowledged that its Exhibit 1 was a copy of the SOD and that it could potentially provide an evidentiary basis to support a prima facie case. Tr. at 33, 40. Thus, St. Joseph in effect conceded that the SOD is genuine. St. Joseph also cannot now credibly challenge the authenticity or reliability of the SOD given that it proffered the exhibit. Second, the SOD could be considered a record of a regularly conducted activity exempt from the requirement of authentication under Rule 902(11) of the Federal Rules of Evidence; the Board has previously held that SODs are both records and reports of public offices or agencies as well as factual findings resulting from an investigation made pursuant to authority granted by law

that qualify as admissible hearsay under Rule 803. Britthaven, Inc., d/b/a/ Britthaven of Smithfield, DAB No. 2018, at 4 (2006).

In sum, we conclude that the ALJ erred by ruling in St. Joseph's favor without considering the whole record, including the SOD and the undisputed facts.

C. We remand the appeal to the ALJ for further proceedings.

CMS argues that the sole issue is whether the ALJ erred in failing to allow CMS the opportunity to present its exhibits, and does not appeal the ALJ's prehearing ruling denying postponement of the hearing. Thus, based on our analysis above, we remand the appeal to the ALJ to receive CMS's exhibits and determine whether any should be admitted. The ALJ should conduct further proceedings as appropriate, consistent with our decision. In the event that the ALJ decides to hear testimony from St. Joseph's witnesses, he should afford the parties an opportunity for post-hearing briefing, as he originally stated he would. See Tr. at 31.

St. Joseph argues it will be prejudiced by a remand, through the expense entailed in presenting its eight witnesses, including two experts and one witness who is not located in Omaha. This argument has no merit for several reasons. First, when St. Joseph at the hearing renewed its motion for judgment in its favor, the ALJ warned of the possibility that the Board could remand the case back to the ALJ. Tr. at 37-40. In deciding to pursue its motion for an entry of judgment despite the ALJ's cautionary admonition, St. Joseph assumed the risk that the case could be remanded back to the ALJ for a possible hearing, including the possibility that witnesses may not be available or that memories may fade. Under these circumstances, St. Joseph cannot reasonably contend that it will be prejudiced by any remand. Second, St. Joseph does not address why, in the event that this appeal resumes its prior posture in which there was to have been no cross-examination of St. Joseph's witnesses, it could not proffer their testimony in writing. Finally, St. Joseph also did not demonstrate that it bore all of these costs with respect to the hearing that the ALJ convened, given that only one of its witnesses was in attendance at the hearing location. Tr. at 1-2, 11-12, 19.

Conclusion

We reverse the ALJ Decision and remand the appeal to the ALJ to receive CMS's exhibits and take any other appropriate action consistent with this decision.

_____/s/
Judith A. Ballard

_____/s/
Constance B. Tobias

_____/s/
Stephen M. Godek
Presiding Board Member