



## Ninth Circuit Delivers Blow to CMS, Victory for Skilled Nursing Facilities

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The U.S. Court of Appeals for the Ninth Circuit delivered a major victory for skilled nursing facilities (SNF) on March 3, 2015. In the case of *Plott Nursing Home v. Sylvia Matthews Burwell, Secretary of the Department of Health & Human Services*, the court reversed in part and remanded a decision by the Department of Health and Human Services (HHS) Departmental Appeals Board (Board).<sup>1</sup> The court's decision mandates Administration Law Judge (ALJ) and Board review of each survey deficiency, and has significant implications for all SNFs that seek to challenge alleged deficiencies.

On September 24, 2008, a team of ten surveyors from the California Department of Public Health conducted a survey at Plott Nursing Home ("Plott"). The surveyors cited 33 separate deficiencies. (A "deficiency" is a violation of a specific federal regulation at 42 C.F.R. Part 483.) A revisit survey was conducted in December 2008, at which time an additional deficiency was cited. Based on the 34 deficiencies, the Centers for Medicare & Medicaid Services ("CMS") imposed a \$500 per day civil money penalty (CMP) from September 24, 2008 through December 3, 2008, and a \$100 per day civil money penalty from December 4 through December 15, 2008. Plott timely filed an appeal with a ALJ of the Board, challenging the results of both surveys.

Following a four-day evidentiary hearing, the ALJ upheld the entire CMP based on three deficiencies involving three residents. Two residents were related to the September survey and the deficiencies were based on the standards of care for 1) pressure ulcers and 2) care of urinary tract infections ("UTI"). The third deficiency from the December survey was also related to the standard of care for a resident with a UTI.

CMS deleted one deficiency and failed to establish a *prima facie* case for five others regarding the September survey findings. Thus, 27 challenged deficiencies from the September survey remained. However, the ALJ did not review 25 of the remaining 27 deficiencies, holding that the pressure ulcer and UTI deficiencies "provide a sufficient basis for the enforcement remedies that CMS proposes." On appeal, the Board affirmed the ALJ's decision upholding the \$500 per day CMP based on the two deficiencies noted above. In keeping with prior decisions and Board reasoning, the Board held that the ALJ was not required to review the other 25 deficiencies, even though they were challenged.

On appeal to the U.S. Court of Appeals for the Ninth Circuit, the court affirmed the Board's decision regarding the pressure ulcers deficiencies. However, it reversed the Board's decision regarding the UTI deficiency. More importantly, the Court held that "Plott is entitled to administrative review of all deficiencies that CMS cited and remand with directions to review or dismiss the 25 violations that the ALJ and Board did not review." Decision at 12.

The Board had reasoned, incorrectly, that because two deficiencies from the September survey were sufficient to support the \$500 per day CMP, the unreviewed 25 deficiencies were "immaterial." The Ninth Circuit disagreed with the ALJ's and the Board's attempted justification for refusing to review 25 deficiencies. Rejecting the Board's holding, the court instead agreed with Plott that "unreviewed deficiency allegations do affect the penalty" and are indeed material. Decision at 27.

<sup>1</sup> *Plott Nursing Home v. Sylvia Matthews Burwell, Secretary of the Department of Health & Human Services*, No. 12-70174 (9th Cir. March 3, 2005).

The court noted that the statute and regulations require increasing the amount of a CMP for repeat deficiencies. Therefore, the argument that a deficiency is not reviewable although it may later be used in calculating a CMP “verges on the ridiculous,” according to the court. Decision at 28. Consequently, all deficiencies that were challenged but not reviewed by an ALJ or the Board must either be reviewed or dismissed.

This case breathes new life into the battles providers have fought for fair hearings of challenged deficiencies. One can only imagine how many alleged deficiencies that ALJs routinely refuse to consider that will now be reviewed or dismissed. The practical implications of this decision cannot be overstated. By allowing providers to have a meaningful review of challenged deficiencies or forcing their dismissal, SNFs may effect a positive change in their Five-Star rating; correct unsupported survey allegations, thereby preserving their reputation; as well as preventing alleged deficiencies from being used in collateral litigation.

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