

Long-Term Care Survey Alert

Survey Appeals: ALJ RULINGS PROVIDE INSIGHT INTO WINNABLE APPEALS

To appeal or not to appeal: That's the big decision when your facility disagrees with survey citations. Looking at published appeals decisions can provide clues to which issues are - and are not - likely to win sympathy from administrative law judges.

Facilities can also use an ALJ ruling as an argument for challenging a deficiency in an informal dispute resolution, says **Howard Sollins**, a health care attorney with **Ober/Kaler** in Baltimore.

Below are some highlights of ALJ decisions presented by **Anne Hall**, assistant regional counsel, for Region IX with the **Department of Health and Human Services**. Hall spoke at the recent **American Health Lawyers Association's** annual Long-Term Care and the Law conference:

1. **Failure to follow the facility's own internal policies and procedures.** In this case, a facility was found out of substantial compliance and had its provider agreement terminated for several deficiencies. While the ALJ upheld the **Centers for Medicare & Medicaid Services'** determinations and termination action, the ALJ did find that a facility's failure to follow its own policies and procedures under F325 (adequate nutrition) does not establish a basis for a deficiency unless the protocol includes a regulatory requirement. This ruling is important, as surveyors often cite facilities for failing to follow internal protocols that exceed what the government actually requires.

However, the ALJ upheld a deficiency cited under F309 where documentation showed the facility's nursing staff failed to question a physician's order for the resumption of Lasix, a diuretic, to a resident who had signs of dehydration. (DAB CR746, Feb. 23, 2001)

2. **Overreliance on alarms to prevent resident elopements.** In this case, the ALJ sustained CMS' determination of immediate jeopardy and a civil monetary penalty of \$10,000 per day. The ALJ found that a facility had failed to monitor a resident known to be at high risk of elopement who wandered from the facility and died of exposure.

The judge said the staff's reliance on an alarm device, Wanderguard, was inappropriate, considering the facility knew that residents wearing alarm bracelets could leave the facility without triggering the alarm. (DAB CR775, March 21, 2001)

3. **Alleged resident sexual abuse committed by a family member.** Here's one where the ALJ ruled in a facility's favor. The ALJ concluded CMS had no basis for imposing remedies in a case where the roommate of the resident reported seeing a resident's son sexually abuse her at the facility. The administrator directed that the son be prohibited from visiting the resident without supervision.

CMS argued that under federal regulations, even a single incident of abuse requires a facility be found out of compliance. The ALJ countered, however, that facilities are only required to take all necessary steps to support a resident's right to be free from abuse.

As to the facts of the case, the ALJ found no credible evidence that the resident's son sexually abused the resident, other than hearsay. (DAB CR818, Sept. 14, 2001)

4. **Resident injured during one-person assist transfer.** In this appeal, the ALJ concluded the facility had failed to comply with F324 (accident prevention) when on at least two occasions the nursing staff used one person to transfer a resident the facility had determined required a two- or three-person assist.

On both occasions, the resident was injured during the transfer. The judge sustained CMS' determination of noncompliance and a per instance civil monetary penalty of \$1,500. (DAB CR845, Dec. 13, 2001)