Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: July 30, 2008
Grace Healthcare of Benton,	
Petitioner,	Civil Remedies CR1676 App. Div. Docket No. A-08-40
	Decision No. 2189
- v. -	
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Grace Healthcare of Benton (Grace, Petitioner) requested review of the decision of Administrative Law Judge (ALJ) Steven T. Kessel in Grace Healthcare of Benton, DAB CR1676 (2007) (ALJ Decision). The ALJ Decision upheld the determination by the Centers for Medicare & Medicaid Services (CMS) to impose on Grace a civil money penalty (CMP) of $3,500 per day for the period May 17 and 18, 2006 and a CMP of $350 per day beginning on May 19, 2006. Before the ALJ, Grace challenged the $3,500 per-day CMP, which CMS imposed based on the findings of the State survey agency that Grace was not in substantial compliance with six Medicare and Medicaid participation requirements and that Grace's noncompliance posed immediate jeopardy. The ALJ addressed only the finding that Grace failed to investigate alleged violations involving abuse, as required by 42 C.F.R. § 483.13(c)(2)-(4), concluding that Grace failed to substantially comply with this requirement, that CMS's determination that this noncompliance posed immediate jeopardy was not clearly erroneous, and that this single immediate jeopardy-level deficiency amply justified a CMP of $3,500 per day. The ALJ also found Grace disqualified from

participating in a Nurse Aide Training Competency and Evaluation Program (NATCEP) for two years as a consequence of its noncompliance.

On appeal, Grace argues that it was in substantial compliance with all six of the participation requirements and that the ALJ erred in addressing only one of these requirements. In addition, Grace argues that even if it was not in substantial compliance with section 483.13(c)(2)-(4), its noncompliance did not rise to the level of immediate jeopardy. Grace also argues there was no basis for the NATCEP prohibition in the absence of immediate jeopardy. Grace requests that the Board reverse the ALJ Decision upholding the CMP or remand the case to the ALJ for further proceedings.

As explained below, we conclude that the ALJ Decision is free of legal and procedural error and is supported by substantial evidence in the record as a whole. Accordingly, we affirm the ALJ Decision.

The record for decision includes the record before the ALJ, the parties' briefs on appeal, and the transcript of a July 7, 2008 oral argument held by the Board at Grace's request.

Background

The deficiency finding addressed by the ALJ was cited by the State survey agency under 42 C.F.R. § 483.13(c), which provides in pertinent part as follows:

> (2) The facility must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with State law through established procedures (including to the State survey and certification agency).
>
> (3) The facility must have evidence that all alleged violations are thoroughly investigated, and must prevent further potential abuse while the investigation is in progress.
>
> (4) The results of all investigations must be reported to the administrator or his designated representative and to other officials in accordance with State law (including to the State survey and

> certification agency) within 5 working days of the incident, and if the alleged violation is verified appropriate corrective action must be taken.

The term "abuse" is defined as "the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish." 42 C.F.R. § 488.301.

The following facts are undisputed.[1] Resident #1 "was an elderly individual with numerous medical problems," [h]er medications included anti-coagulant drugs (Plavix and aspirin)," and "[s]he had been assessed by Petitioner's staff to have moderately impaired cognitive skills and to require assistance in daily activities including eating and use of the toilet." ALJ Decision at 4-5. She was first admitted to Grace on April 4, 2006. P. Ex. 5, at 7. She was transferred to Saline Memorial Hospital on April 7 for a change in condition (inability to verbalize) and then discharged to Grace on April 11, 2006. Id. at 7 and 238. On May 7, 2006, she was transferred to Saline Memorial Hospital after she was found with blood in her mouth, a low-grade fever and a golf ball-sized lymph node on her neck. A complete body check performed by Grace at that time also disclosed multiple bruises. ALJ Decision at 5, citing CMS Ex. 4, at 4-6, CMS Ex. 32, at 2-4. Upon the resident's arrival at the hospital, "[t]he emergency room physician noted that the resident manifested multiple bruises in a purplish state . . . ." ALJ Decision at 5, citing CMS Ex. 4, at 27. The following day, the admitting physician at the hospital, Dr. Quade, said to an LPN from Grace that the resident had not been bruised at the time of her April 11, 2006 discharge from the hospital to Grace. The LPN promptly reported Dr. Quade's statement to both Grace's DON and Administrator. ALJ Decision at 5; CMS Ex. 4, at 15-16.

The surveyors found a deficiency under section 483.13(c) on the ground that--

> the facility failed to ensure an immediate and thorough investigation of [a resident] (Resident #1) . . . with multiple bruises of unknown origin and subsequent allegations by a physician of abuse relating to the bruising.

CMS Ex. 4, at 12.

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[1] We set out other undisputed facts where appropriate below.

The ALJ made the following findings of fact and conclusions of law (FFCLs):

> FFCL 1: Petitioner failed to comply substantially with the requirements of 42 C.F.R. § 483.13(c)(2)-(4).
>
> FFCL 2: Petitioner did not prove to be clearly erroneous CMS's determination that petitioner's noncompliance put residents at immediate jeopardy.
>
> FFCL 3. Civil money penalties of $3,500 per day are reasonable.
>
> FFCL 4. Petitioner loses the authority to conduct NATCEP because it manifested an immediate jeopardy level deficiency.

ALJ Decision at 8-9. In support of FFCL 1, the ALJ found that Grace's staff observed multiple bruises on Resident #1 from May 4 through May 7, 2006, when she was re-admitted to Saline Memorial Hospital. ALJ Decision at 6. The ALJ further found that, despite the fact that "Resident #1 manifested obvious - and extreme - external injuries over a three day period," Grace's staff "did not investigate the sources of these injuries during the period." Id. The ALJ noted in particular that Grace "identified no evidence to show that its staff assessed the nature of the resident's injuries during the May 4-7 period" or that its staff consulted with the resident's attending physician at Grace, Dr. Stewart, about the resident's bruises prior to her transfer to Saline Memorial Hospital on May 7, 2006. Id. at 6-7. The ALJ quoted a June 30, 2006 letter from Dr. Stewart that the bruising "was caused by the administration of Plavix and aspirin . . . not . . . by injury or accident," but stated that Dr. Stewart "does not aver that he made this assessment prior to the May 7 hospital admission." Id. at 7. Thus, the ALJ found, "[t]he precise cause of the injuries sustained by Resident #1 during the May 4-7, 2006 period was, in fact, not established by Petitioner's staff prior to the resident being sent to the hospital on May 7."

Discussion[2]

In its request for review, Grace takes exception to all of the ALJ's FFCLs. Below, we first address Grace's argument that the ALJ should have addressed all six immediate jeopardy-level deficiency findings on which CMS relied in imposing the CMP. We then address Grace's arguments relating to the single deficiency finding based on which the ALJ upheld the $3,500 per-day CMP. We review a disputed finding of fact to determine whether the finding is supported by substantial evidence, and a disputed conclusion of law to determine whether it is erroneous. *Guidelines for 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.

The ALJ did not err in addressing only one of the six deficiency findings on which CMS relied in imposing the CMP.

Grace argues that all of the immediate jeopardy citations "should be addressed in that they all involve R1." P. Reply Br. at 17. The ALJ stated that it was "unnecessary . . . to address all of [the six] alleged deficiencies in order to issue a decision that sustains CMS's remedy determination" since the $3,500 per-day CMP "is amply justified by the presence of" the immediate jeopardy-level deficiency under section 483.13(c). ALJ Decision at 3. "[A]n ALJ has discretion, as an exercise of judicial economy, in determining whether to address findings that are not material to the outcome of a case[.]" Western Care Management Corp. D/B/A Rehab Specialties, DAB No. 1921, at 19 (2004) (emphasis in original). In this case, the other alleged deficiencies would be material only if we did not agree with the ALJ that Grace failed to substantially comply with the requirements of section 483.13(c), that Grace's noncompliance with these requirements posed immediate jeopardy, or that the amount of the CMP was reasonable based on this noncompliance. Since we uphold the ALJ Decision in all these respects, we conclude that the ALJ did not err in deciding not to address the other alleged deficiencies.

Grace also appears to object to the ALJ's consideration of "additional medical facts" that it says "were included" only in the "allegations" relating to the alleged deficiencies that the ALJ declined to address. P. Br. at 7; P. Reply Br. at 8. Grace

[2] We have fully considered all of Grace's arguments on appeal, regardless of whether we have specifically addressed particular assertions or documents.

nowhere identifies the facts to which it is referring, however. In any event, the ALJ was not precluded from relying on any relevant evidence in the record for this case in concluding that Grace failed to substantially comply with section 483.13(c).

The ALJ's finding that there was an alleged violation involving abuse is supported by substantial evidence.

As indicated above, the surveyors found that there were "allegations of abuse by a physician relating to the bruising," triggering the requirement to investigate. CMS Ex. 4, at 12. Grace argues on appeal that Dr. Quade's statement that Resident #1 had not been bruised at the time of her April 11, 2006 discharge from the hospital to Grace was not an allegation of abuse. See, e.g., P. Br. at 3, 9, 15; P. Reply Br. at 9, 12. Although the ALJ Decision takes note of this statement (ALJ Decision at 5), the ALJ did not make an express finding that the physician's statement constituted an allegation of abuse. We conclude, however, that such a finding is implicit in the ALJ Decision and is supported by substantial evidence in the record.

We note preliminarily that section 483.13(c) does not use the term "allegation of abuse," but instead requires reporting and investigation of "alleged violations involving neglect, mistreatment, or abuse, including injuries of unknown source." This broad language encompasses not only a direct allegation that the resident has been abused, but also an allegation of facts from which one could reasonably conclude that the resident has been abused. Cf. Cedar View Good Samaritan, DAB No. 1897, at 11 (2003) (duty to report under section 483.13(c)(2) arose where Cedar View staff "alleged facts that pointed to the possibility of abuse of a resident by another staff member" and Cedar View "conceded that" these facts "on their face 'might raise a suspicion of possible misconduct'."). Moreover, the regulation specifically includes "injuries of unknown source" as alleged violations of neglect, mistreatment or abuse that must be reported and investigated. Thus, the ALJ correctly stated that "[a] facility has an absolute duty to treat every resident injury from an unknown source as evidence of possible abuse, neglect, or mistreatment, until it establishes the injury's cause." ALJ Decision at 6.

According to Grace's incident report, Dr. Quade "confronted" LPN Frederick, Grace's nurse liaison, the day after the May 7 transfer and told LPN Frederick that she wanted to talk to someone about the care that Resident #1 had received. P. Ex. 23, at 2. According to the surveyor's interview notes, LPN Frederick said that Dr. Quade asked her what she knew about the resident

and that Dr. Quade then said that the resident was in "good condition" when she was discharged to Grace on April 11 - without bruises and well-hydrated. CMS Ex. 21, at 16. Dr. Quade did not specifically allege that the resident's bruises resulted from abuse; however, viewed in the context of her entire interaction with LPN Frederick, Dr. Quade's statement that Resident #1's multiple bruises were not present when the resident was discharged from the hospital to Grace was an allegation of facts that could indicate abuse. In addition, Dr. Quade appeared to consider the bruises an injury of unknown source since she asked LPN Frederick for information about what had happened to Resident #1 in the month that she was at Grace.[3]

Grace argues that there is no basis for finding that Dr. Quade made an allegation of abuse because the hospital records contain no indication that any physician suggested that Resident #1's bruises were the result of abuse and the hospital did not make a report of abuse to the authorities. P. Br. at 3, 7, 21-22; P. Reply Br. at 5, 8-9. This argument has no merit. Grace does not dispute that Dr. Quade made the statement described in Grace's incident report and in the surveyor's interview notes. As discussed above, that statement constituted an alleged violation involving abuse within the meaning of section 483.13(c). Thus, even if the hospital were required to document or report Dr. Quade's allegation, its failure to do so would not undercut the substantial evidence in the record supporting the ALJ's finding that there was an alleged violation involving abuse.

Grace was required to investigate the source of Resident #1's bruises even if its staff did not see the bruises until May 7, 2006 just prior to her transfer to the hospital.

The ALJ found that on May 7, 2006, prior to Resident #1's transfer to the hospital later that day, Grace's staff saw bruises on the resident's arms, legs, bottom, coccyx, right side of chest, and left side of upper arm. ALJ Decision at 5. The ALJ further found that Grace's staff saw some bruises beginning on May 4, 2006. Id. Grace does not dispute that its staff saw the extensive bruises described in the ALJ Decision on May 7, but

[3] Grace's staff may well have had an obligation under section 483.13(c)(2) to report their earlier observation of Resident #1's bruises to Grace's Administrator. We need not decide that issue here since we conclude that Dr. Quade made an allegation of abuse that Grace failed to investigate as required by section 483.13(c)(3).

asserts that the only bruises identified by its staff before that date were bruises on the resident's arms from IV infusions and blood draws from her prior stay at the hospital. P. Br. at 8; P. Reply Br. at 9-10. Grace documented bruises at the latter sites on a Nursing Admission Assessment dated April 11, 2006 (P. Ex. 5, at 252).

Grace does not explain the relevance of its assertion that its staff first identified new bruises on Resident #1 on May 7. Grace may be implying that an investigation of bruises that were not identified until just before Resident #1's transfer to the hospital would have served no purpose, and thus was not required, because there was no possibility of any future abuse of Resident #1 at Grace once she was transferred. We reject any such argument, however. Where abuse of one resident has been alleged, other residents may be or could already have been abused by the same perpetrator. Since section 483.13(b) provides that each resident has a right to be free from abuse, the regulations clearly require an investigation of an allegation of abuse not only to protect a resident who may already have been abused from further abuse but also to prevent other residents from being abused. Here, an investigation in response to Dr. Quade's statement could have protected other residents who might otherwise have been subjected to abuse even if Resident #1 was no longer a possible target of abuse at Grace. Accordingly, even if Grace's staff did not see the bruises until just prior to Resident #1's transfer to the hospital, Grace was still obligated to investigate the bruises after receiving Dr. Quade's allegation of abuse.

In any event, we see no basis for concluding that the ALJ erred in finding that Grace's staff was aware prior to May 7 that Resident #1 had bruises in multiple locations. In making this finding, the ALJ relied on the surveyor's interviews with Grace's staff as reported in the Statement of Deficiencies (SOD) and on the surveyor's affidavit stating that the SOD accurately reflects her interviews. According to the SOD, CNA #2 stated that he saw bruises on the resident's arms on May 4 and CNA #1 stated that she saw a bruise on the resident's right hip on May 5. CMS Ex. 4, at 4-5. Grace claims that the ALJ failed to consider written statements by a nurse and two other CNAs. P. Br. at 2 and P. Reply Br. at 4, citing P. Exs. 33-35. The nurse stated that she "[d]id not note any new bruises after return from Hosp. No new areas were reported to me." P. Ex. 33. One of the CNAs stated that "[w]hile working with [Resident #1] to the best of my memory I was not aware of any unusual bruising or spots." P. Ex. 34. The other CNA stated "I did not see any bruises on [Resident #1]." P. Ex. 35. None of these statements indicates that the

author had done a body check of Resident #1 or had other close contact with her that would have revealed bruises. In addition, the CNA's statement that she was not aware of any "unusual bruising" neither explains what the CNA considered unusual bruising nor denies that she was aware of any bruising. Thus, the ALJ could reasonably decide to credit the specific statements made to the surveyor about the location of bruises observed on May 4 and 5, 2006 rather than the general statements offered by Grace. Moreover, Grace provided no basis for concluding that the bruises CNA #2 reported seeing on Resident #1's arms on May 4 were the bruises documented in the April 11 Nursing Admission Assessment. Counsel's assertion that "bruises can last . . . two or three weeks in an elderly patient who's taking Plavix and Coumadin" (Tr. at 21) is not based on any evidence in the record and does not account for all of the time between April 11 and May 4.

We note that the ALJ Decision also states that "[o]n May 6, the staff observed blood on the resident's cheek and multiple bruises on her coccyx, the right side of her chest, her legs, and on the left side of her upper arm." ALJ Decision at 5, citing CMS Ex. 4 (SOD), at 5-6. The SOD indicates, instead, that staff made these observations "on 5/7/06 during the 6:00 a.m. rounds." CMS Ex. 4, at 5. The ALJ's mistake as to the date is harmless error since there is substantial evidence to support the ALJ's finding that staff observed bruises on Resident #1 on both May 4 and 5 and, in any event, Grace had a duty to investigate the bruises observed by its staff on May 7.

The ALJ did not err in finding that Grace failed to timely establish the cause of Resident #1's bruises.

As indicated above, the ALJ found that Grace failed to establish the precise cause of the bruises observed on Resident #1 during the period May 4 through May 7, 2006 prior to her admission to Saline Memorial Hospital on the latter date. ALJ Decision at 7. On appeal, Grace argues, as it did before the ALJ, that the bruises were caused by the medication that Resident #1 was receiving. See, e.g., P. Br. at 16. Grace relies on two physicians' opinions to this effect--a letter from Dr. Stewart and the affidavit of Carroll Holsted, M.D., a medical expert for Grace.[4] See, e.g., P. Br. at 13.

[4] Grace also argues that the ALJ instead erroneously credited the opinion of the surveyor, who Grace argues was not qualified to give medical testimony

(continued...)

Dr. Stewart's letter, dated June 30, 2006, states in part:

> This patient had developed a lot of ecchymosis, as documented on her readmission to the hospital, which was on the basis of her Plavix and aspirin. The [illegible word] changes were not due to bruising but due to ecchymosis probably on the basis of her Plavix which is a very potent anti-platelet medication as well as the aspirin.[5]

P. Ex. 17, at 1. Dr. Holsted's affidavit, dated February 23, 2007, states in part:

> The Resident was again admitted to Saline Memorial Hospital on May 7, 2006. Prior to this admission, the Resident developed ecchymosis which was caused by the administration of Plavix and aspirin. Plavix is a potent anti-platelet medication. The ecchymosis was not caused by injury or accident.

P. Ex. 24, at 2.

Neither of these opinions provides a basis for disturbing the ALJ's finding that, as of the time that Resident #1 was transferred to the hospital on May 7, Grace had failed to establish the cause of her bruises. As the ALJ correctly noted, the June 30, 2006 letter from Dr. Stewart "does not aver" that he made his determination that Resident #1's bruises were caused by medication prior to Resident #1's hospitalization on May 7. ALJ Decision at 7. Indeed, there is no indication that Dr. Stewart ever examined the bruises or that he made this determination about the cause of the bruises before the date of his letter. Dr. Holsted's affidavit (which is not mentioned in the ALJ Decision) states that his opinion is based on his "review of the

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[4](...continued)
because she is a registered nurse, not a physician. P. Br. at 3, 11; P. Reply Br. at 6, 11-12. However, the surveyor was not purporting to give medical testimony, but rather alleging that Grace had not investigated the cause of the bruises.

[5] "Ecchymosis" is defined as a "small haemorrhagic spot . . . in the skin or mucous membrane forming a nonelevated, rounded or irregular, blue or purplish patch." Dorland's Illustrated Medical Dictionary 524, W.B. Saunders Co. (28th ed. 1994).

records" but does not state when that review took place. Since the affidavit describes his opinion as "testimony" (P. Ex. 24, at 1), it is likely that he reviewed Resident #1's records and made his determination regarding the cause of Resident #1's bruises only in the course of this litigation.

These belated determinations, even if they are sufficient to establish that Resident #1's bruises were caused by her medications and not by abuse, do not excuse Grace's failure to investigate Dr. Quade's allegation of abuse. As the Board has previously held, "even an allegation of abuse that turns out to be unsubstantiated . . . must be reported and investigated." Beverly Health Care Lumberton, DAB No. 2156, at 13 (2008). Noting that the regulation requires that any allegation of abuse must be immediately reported and thoroughly investigated, the Board reasoned that "[i]f the system does not function properly in response to an allegation that is subsequently found not to constitute abuse . . . , residents who may experience serious abuse cannot rely on that system to protect them." Id. at 15. Thus, Dr. Quade's allegation of abuse obligated Grace to investigate the cause of Resident #1's bruises, regardless of what Grace later learned about the cause of the bruises.[6]

Grace also argues that "it would be reasonable for [Grace's] staff to conclude that R1's 'bruising' was related to her current medication regime." P. Br. at 2. According to Grace, Plavix "would pre-dispose R1 to bruising" and its staff was aware that, prior to being placed on Plavix, Resident #1 had taken Coumadin, which Grace says "led to a gastrointestinal bleed." P. Br. at 3-4, 11; P. Reply Br. at 6, 12. We have emphasized in previous cases that "the duty to investigate under 42 C.F.R. § 483.13 applies even in cases where facility administrators have some

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[6] We note that, pursuant to section 483.13(c)(4), Grace should have reported the results of an investigation of the allegation of abuse "within 5 working days of the incident," even though the allegation of abuse was not made until after the incident. See 56 Fed. Reg. 48,826, 48,844 (rejecting comment that language should be changed from "within 5 working days of the incident" to "within 5 working days of knowledge of the incident"). If "the incident" is considered to be Grace's staff's observation of Resident #1's bruises on May 7, 2006 (a Sunday), Grace should have reported the results of an investigation by May 12, 2006. This was well before either Dr. Stewart or Dr. Holsted opined as to the cause of the bruises.

reason to suspect what the cause of an injury may be." Rosewood Care Center of Inverness, DAB No. 2120, at 8 (2007), citing Tri-County Extended Care Center, DAB No. 1936 (2004), aff'd, Tri-County Extended Care Ctr. v. Leavitt, 157 F. App'x 885 (6th Cir. 2005); see also Britthaven, Inc., DAB No. 2018, at 13 (2006) ("[M]ere conclusory assumptions about the cause of an injury do not evidence a thorough investigation"); Cedar View Good Samaritan at 11 ("the salient question is not whether any abuse in fact occurred or whether [a facility] had reasonable cause to believe that any abuse occurred, but whether there was an allegation that facility staff had abused a resident"). Grace does not argue that bruises such as Resident #1's could not be caused by abuse, or claim that where medications predispose a person to bruising, abuse could not be the proximate cause of bruises. Thus, regardless of whether Grace's staff believed the cause of the bruises to be something else, Grace was obligated to conduct an investigation following Dr. Quade's allegation of abuse in order to rule out the possibility that the bruises were caused by abuse.

The ALJ did not err in concluding that CMS's determination of immediate jeopardy was not clearly erroneous.

The ALJ upheld CMS's determination that Grace's noncompliance with section 483.13(c) posed immediate jeopardy. The ALJ found that although Grace had the burden of proving that this determination was clearly erroneous, Grace failed to offer any evidence challenging this determination. ALJ Decision at 8, citing 42 C.F.R. § 498.60(c)(2) (which states that "CMS's determination as to the level of noncompliance of an SNF or NF must be upheld unless it is clearly erroneous"). The ALJ also concluded that immediate jeopardy existed because "there is an obvious likelihood of serious injury, harm, or death to facility residents resulting from a failure by a facility to investigate injuries of unknown origin such as those displayed by Resident #1." ALJ Decision at 8. Immediate jeopardy is defined in 42 C.F.R. § 488.301 as a situation in which a provider's noncompliance "has caused, or is likely to cause, serious injury, harm, impairment or death to a resident." The ALJ stated specifically that given Resident #1's "frailty and dependence on Petitioner's staff . . . any physical abuse might have been lethal and yet, the facility did nothing to rule out the possibility of abuse." Id.

Grace argues that the ALJ erred in upholding CMS's determination of immediate jeopardy because CMS failed to offer evidence to support its determination of immediate jeopardy. P. Br. at 16, 22; P. Reply Br. at 14, 16. This argument has no merit. The

Board has held that once CMS has presented evidence supporting a finding of noncompliance, CMS does not need to offer evidence to support its immediate jeopardy determination and that the burden is on the facility to show that that determination is clearly erroneous. See Liberty Commons Nursing & Rehab Center - Johnston, DAB No. 2031, at 17-18, aff'd, Liberty Commons Nursing & Rehab Ctr.-Johnston v. Leavitt, 241 F. App'x 76 (4th Cir. 2007) ("To require CMS to make a *prima facie* case on the level of noncompliance would effectively and impermissibly convert what is clearly a limitation on the ALJ's scope of review under the regulations (and by extension a corresponding burden of proof on the SNF) into a burden of proof, or at least a burden of going forward, on CMS.); accord, Daughters of Miriam Center, DAB No. 2067, at 7 [ck] (2007). Since we have concluded that substantial evidence in the record supports the ALJ's conclusion that Grace failed to substantially comply with section 483.13(c), no additional evidence was required to place the burden on Grace to show that CMS's determination of immediate jeopardy was clearly erroneous.

Grace also argues that its noncompliance with section 483.13(c), if any, did not rise to the level of immediate jeopardy because there was no "causal connection" between its noncompliance and the existence of serious injury or a threat of injury. P. Br. at 26, citing Spring Meadows Health Care Center, DAB No. 1966, at 36 (2005) (stating that "[b]ecause the definition of 'immediate jeopardy' requires that there be some causal connection between the facility's noncompliance and the existence of serious injury or a threat of injury, the nature and circumstances of the facility's noncompliance are of obvious importance to the evaluation."). Grace argues specifically that there was no indication in Resident #1's medical records that the bruises "in any way related to R1's subsequent medical condition which led to her death and/or caused jeopardy to her health and safety or to the health and safety of other residents in the facility." P. Br. at 4; P. Reply Br. at 6, 12.

As indicated above, however, the burden was on Grace to show that CMS's determination of immediate jeopardy was clearly erroneous. Grace did not meet this burden. Grace's argument reflects too narrow a view of what constitutes immediate jeopardy in this instance. There was a sufficient causal connection between the noncompliance - failure to investigate alleged violations involving abuse - and the likelihood of serious harm because, as the ALJ Decision notes, any abuse of a frail nursing home resident can be lethal. Moreover, immediate jeopardy existed even if Resident #1's bruises were caused by her medication since, at the time the allegation of abuse was made, Grace had

not ruled out the possibility of abuse by conducting the requisite investigation. The Board's holding in Spring Meadows that CMS's determination of immediate jeopardy was clearly erroneous was based on the particular circumstances of that facility's noncompliance with section 483.13(c) (see DAB No. 1966, at 37-38) and does not provide any basis for concluding that CMS's determination was clearly erroneous here.

In support of its argument that any noncompliance did not pose immediate jeopardy, Grace also cites to Life Care Center of Paradise Valley, DAB CR1673 (2007), and Rosewood Care Center of Inverness. P. Br. at 4, 12-13; P. Reply Br. at 12-14; Tr. at 11-12, 19. Both decisions upheld CMS's imposition of a non-immediate jeopardy-level CMP for noncompliance that included noncompliance with section 483.13(c). Grace argues that an immediate jeopardy determination was not warranted in its case because its noncompliance with section 483.13(c) was no more egregious than the noncompliance in either of these cases. We find no merit to this argument. The presence (or absence) of immediate jeopardy is determined on the basis of a complete view of facts in a particular case, and comparisons from one case to another are of limited, if any, utility. Grace had the burden of showing that CMS's immediate jeopardy determination was clearly erroneous under the facts of this case, and it has not done so. But even assuming such comparisons could be useful under some circumstances, neither of the cases Grace cites provides a basis for comparison since neither presented any issue as to whether the noncompliance could constitute immediate jeopardy.[7]

Since we uphold the ALJ's determination that Grace's noncompliance with section 483.13(c) was properly cited at the immediate jeopardy level, we also uphold FFCL 4, in which the ALJ concluded that Grace loses the authority to conduct NATCEP. A facility is subject to a two-year prohibition on approval of its NATCEP if it has an immediate jeopardy-level deficiency under section 483.13(c). See 42 C.F.R. § 488.301, 488.310, and 483.151(b)(2)(iii).

The $3,500 per-day CMP imposed by CMS is reasonable in amount.

Grace asserts that "the reasonableness in regard to CMS's determination that a civil money penalty in the amount of

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[7] We also note that Life Care Center of Paradise Valley is an ALJ decision, and the Board is not bound to follow ALJ decisions. Florence Park Care Center at 30, n.13.

$3,500.00 per day should not be permissible." P. Br. at 23. This statement appears to take exception to the ALJ's FFCL 3, that the $3,500 per day CMP is reasonable in amount. ALJ Decision at 8. The ALJ specifically found this CMP amount reasonable in light of the seriousness of Grace's noncompliance with section 483.13(c), which he stated was "in and of itself, sufficient to justify" a CMP at the lower end of the range of immediate jeopardy-level CMPs. Id. at 8-9. The seriousness of the noncompliance is one of the factors that CMS may consider in setting the amount of a CMP, which ranges from $3,050 to $10,000 for an immediate jeopardy-level deficiency. 42 C.F.R. § 488.438(a)(1) and (f), 488.404. We see no reason, and Grace offers none, why a single immediate jeopardy-level deficiency is not sufficient to support a per-day CMP amount at the bottom of the applicable range.

We note that at the oral argument, Grace's counsel stated that CMS imposed a CMP of $3,500 for only a single day of noncompliance. Tr. at 4-6. CMS's counsel concurred, stating that CMS imposed a $3,500 CMP for a 24-hour period of noncompliance, from May 17-18. Tr. at 6-7. The ALJ Decision notes that CMS counsel created confusion as to the CMP imposed. ALJ Decision at 3, n.3. However, based on CMS's notice letter, the ALJ found that "Petitioner's noncompliance at the immediate jeopardy level was for a two day period consisting of May 17-18, 2006" and sustained "the imposition of daily civil money penalties for both of those days." Id. The ALJ further stated:

> If CMS has, in fact, determined to modify its remedy to a one-day civil money penalty or even to a per-instance penalty then, of course, it may impose such a remedy on the strength of my decision. If, on the other hand, Petitioner believes that CMS has waived imposing a remedy for one of the two days, it may move to clarify my decision.

Id. Grace did not move to clarify the ALJ Decision or state in its notice of appeal to the Board that it was appealing the ALJ's conclusion sustaining a $3,500 CMP for each day. Accordingly, we uphold the ALJ's decision sustaining the imposition of a $3,500 CMP for the two-day period of May 17 through May 18, 2006. As the ALJ indicated, however, CMS is not precluded from modifying its remedy to impose a lesser penalty.

Conclusion

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

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Constance B. Tobias
Presiding Board Member