

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:)	DATE: December 16, 2008
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)	
Oakwood Community Center,)	Civil Remedies CR1670
Petitioner,)	App. Div. Docket No. A-08-105
)	
)	Decision No. 2214
- v. -)	
)	
Centers for Medicare &)	
Medicaid Services.)	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Oakwood Community Center (Oakwood) timely appealed the April 15, 2008 decision of Administrative Law Judge (ALJ) Richard J. Smith which upheld the termination of Oakwood' provider agreement as an intermediate care facility for the mentally retarded (ICF/MR) participating in the Medicaid program. Oakwood Request for Review, dated June 13, 2008, appealing Oakwood Community Center ICF/MR, DAB CR1670 (April 15, 2008) (ALJ Decision). The Centers for Medicare & Medicaid Services (CMS) determined to terminate Oakwood based on the results of surveys conducted in August and September 2005 which concluded that Oakwood was out of compliance with multiple conditions of participation, some of which posed immediate jeopardy to the health and safety of Oakwood's clients. The ALJ upheld CMS's authority to terminate approval for Oakwood to participate in Medicaid.

The central dispute in this case centers on the regulatory enforcement scheme for ICFs/MR. Oakwood does not dispute the existence of the condition-level deficiencies at the immediate jeopardy level found during the August 2005 survey. Surveyors in September 2005 found that the specific immediate jeopardy cited in August had abated, but did not find that the condition-level

deficiencies had been corrected and, in fact, also found, based on investigation of a new complaint, that new condition-level deficiencies were present that rose to the level of immediate jeopardy. Oakwood relies on the fact that the revisit survey in September found that immediate jeopardy had abated and views the September complaint investigation as separate and not properly considered. Oakwood contests the immediate jeopardy determination made in September. Oakwood contends that the ALJ erred as a matter of law because the regulations permit termination of ICFs/MR only when immediate jeopardy is found and continues uncorrected for more than 23 days. CMS responds that all that is required to authorize Oakwood's termination is the existence of one or more condition-level deficiencies, and that Oakwood's own admissions suffice to establish this predicate.

For the reasons explained below, we agree with the ALJ that the regulations permit CMS to terminate approval of an ICF/MR when it fails to comply with a condition of participation, even if the noncompliance does not reach the level of immediate jeopardy. While it was not necessary to his decision, we also uphold the ALJ's conclusion that the September 2005 determination of immediate jeopardy was not clearly erroneous. We therefore uphold the ALJ Decision in full.

Case background¹

The Kentucky Division of Health Care Facilities and Services (state agency) completed a survey of Oakwood on August 22, 2005. Oakwood does not dispute the findings of that survey arose from the drowning death of Client 1.² Client 1 had a history of multiple seizures, and the facility plans for his care called for moderate to total assistance for him while bathing. Nevertheless, although the plan identified specific levels of supervision for Client 1 under various conditions, it did not specify the level of supervision required for his safety while bathing. On August 13, 2005, facility staff left Client 1 in the

¹ The following background is drawn from the ALJ Decision, the record before the ALJ, and the undisputed facts. We summarize the information here for the convenience of the reader, but make no new findings in this section.

² We follow the ALJ's practice in referring to this client as Client 1 and referring to the client referenced as Client 1 in the September survey report as Client 1-S. ALJ Decision at 5, n.5.

bathtub unsupervised for more than 1½ hours until he was found unresponsive and submerged. After finding bite marks on his tongue, the autopsy concluded that a seizure contributed to his drowning. One of the three staff responsible for Client 1 was unaware of his history and the others did not know he needed supervision while bathing. The supervisor on duty knew that one-on-one supervision in the bath was necessary for a client with a seizure history but did not realize her staff was not providing it to Client 1. Five other clients in the same cottage also had seizure histories but were not being provided with continuous supervision while bathing.

Oakwood did not contest, and the ALJ upheld, CMS's determination that it was out of compliance at the time of the August survey with three conditions of participation relating to client protection, facility staff, and governing body and management. See ALJ Decision at 2, 5-7 (regulatory and record citations for August survey findings). Furthermore, Oakwood did not contest, and the ALJ upheld, CMS's determination that the noncompliance rose to the level of immediate jeopardy. Finally, Oakwood did not dispute the findings in the August Statement of Deficiencies (SOD) that immediate jeopardy and/or condition-level deficiencies in these same areas had been identified at three prior surveys in March and April 2005 and that the facility had a history of recurring problems with inadequate staffing, failure to train to meet client needs, and failure to follow plans to protect clients. CMS Ex. 1, at 7.

As a result of the August survey, CMS sent Oakwood a notice informing it that its approval for Medicaid participation would be terminated as of September 14, 2005 unless Oakwood submitted an acceptable credible allegation of compliance prior to that date. CMS Ex. 1. If an allegation was submitted and found acceptable, the letter explained, a revisit would be conducted. Termination would take effect on September 14, if the "reasons for termination continue." Id. at 2. CMS then laid out the other possibilities as follows:

If corrections have been made to remove the Immediate Jeopardy **and if total compliance has been achieved**, the termination procedures will be halted, and you will be notified in writing. If the threat has been removed but compliance with all the conditions of participation has not been achieved, additional time **may** be granted for correction.

Id. (emphasis added).

On September 2, 2005, Oakwood submitted its acceptable plan of correction (POC) and credible allegation setting out the actions it would take to ensure compliance, the last of which was to be completed on September 11, 2005. CMS Ex. 2, at 12, 21. A revisit occurred on September 14 which sought to determine whether the immediate jeopardy relating to inadequate supervision of clients with seizure disorders had been removed. The revisit did not result in any determination that the condition-level deficiencies found in August were corrected. In addition, surveyors investigated a new complaint from September 12-17, 2005.³

A single SOD issued with the September survey results again found condition-level deficiencies relating to client protection, facility staff, and governing body and management. CMS Ex. 35, at 1, 20-52; see also ALJ Decision at 2-3, 7-10 (regulatory and record citations for September survey findings). In addition, the SOD cited Oakwood for failure to comply with the condition of participation for the provision of active treatment services to clients. CMS Ex. 35, at 45. CMS informed Oakwood that the surveyors found "on-going immediate jeopardy" which related to "the facility's failure to provide supervision in a community setting; failure to report and investigate allegations of suspected sexual abuse; and failure to protect clients from further potential abuse.

The September findings involved two clients (Client 1-S and Client 2) who were placed in a grocery store as part of an outside employment program. Oakwood does not dispute, and the ALJ found, that Oakwood failed to obtain required vocational assessments or set relevant goals and objectives for either client relating to this work; that neither received appropriate training, treatment and services from trained staff to meet client needs; and that both showed signs of maladaptation after being placed at the job site. ALJ Decision at 8-10, and record citations therein. Furthermore, Oakwood did not dispute, and the ALJ found, that, on August 31, 2005, Client 1-S's job coach improperly allowed Client 1-S to leave the work premises alone

³ The parties dispute whether the September revisit and complaint surveys should be viewed as part of a continuous process of assessing whether Oakwood had come into compliance with all conditions of participation, as CMS contends, or as distinct in a way that should have permitted another opportunity to correct, as Oakwood contends. We discuss this issue later in our analysis.

with the manager of the business to get ice cream, even though Client 1-S's level of supervision in that setting required the job coach to keep him in sight at all times. *Id.* Oakwood does dispute factual allegations regarding whether Oakwood staff failed to properly investigate, report, and respond to suspected sexual abuse of Client 1-S, and denies that surveyors properly found condition-level deficiencies or immediate jeopardy at the complaint survey.

Legal authority

Section 1905 of the Social Security Act (Act)⁴ defines an ICF/MR as an institution for the mentally retarded with the "primary purpose" of providing "health and rehabilitation services" to such individuals under active treatment programs and authorizes the Secretary to prescribe standards for their operation.

The Secretary has set the conditions for participation by ICFs/MR in the Medicaid program by regulation codified as 42 C.F.R. Part 483, Subpart I. The conditions are laid out as broad criteria under each of which are grouped various subsidiary standards. Where deficiencies in meeting the standards under a condition are sufficiently serious or numerous to demonstrate that the facility does not meet the condition of participation, surveyors may find condition-level deficiencies.

Section 1910(b)(1) of the Act provides that the Secretary may "cancel approval" of an ICF/MR "at any time" if he finds that it fails to meet certain statutory requirements or "if he finds grounds for termination of his agreement with the facility" under 1866(b)(2) of the Act. CMS interprets the last phrase as adopting, for purposes of termination of Medicaid ICFs/MR, the statutory provision under the Medicare program (section 1866(b)(2)) providing CMS with authority to terminate whenever a provider "fails to comply substantially" with its provider agreement provisions, applicable conditions of participation or similar requirements. CMS Br. at 14. Oakwood did not dispute this interpretation and no other interpretation that gives meaning to all the words of section 1910(b)(1) has been

⁴ The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp. Table.

suggested. We therefore defer to CMS's interpretation for purposes of this decision.⁵

Medicaid regulations provide that the "failure to meet one or more of the applicable conditions of participation is cause for termination or non-renewal of the ICF/MR provider agreement. 42 C.F.R. § 442.101(e). Indeed, the regulations permit a state agency to certify an ICF/MR with deficiencies only under very limited circumstances. Specifically, deficiencies may only be at the standard, not condition, level and other requirements must be met. 42 C.F.R. § 442.101(e).

Section 1910(b)(2) entitles any ICF/MR dissatisfied with a determination that it is no longer qualified to participate to seek a hearing before an ALJ, as Oakwood has done. The same section provides that the cancellation of approval will not take effect until the appeal is resolved unless the Secretary makes certain specific written determinations. CMS has not sought to terminate Oakwood prior to the outcome of the appeal process here. The applicable hearing regulations appear at Part 498. 42 C.F.R. § 498.3(a)(2)(ii) and 498.3(b)(9).

Standard of review

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. Departmental Appeals Board, *Guidelines for Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs* (DAB *Guidelines*), <http://www.hhs.gov/dab/guidelines/prov.html>; Golden Age Nursing & Rehabilitation Center, DAB No. 2026 (2006).

⁵ CMS interprets this provision as in effect adopting Section 1866(b)(2) (a Medicare provider termination provision) as applicable to terminations of ICFs/MR under Medicaid. CMS Br. at 14. Oakwood did not dispute this interpretation in its reply brief. Well-established canons of construction instruct courts to give meaning to all language in a statute, and it is difficult to conceive of (and Oakwood does not propose) any other meaningful interpretation of this language in Section 1910(b)(1).

Analysis

The crux of this appeal lies in the parties' very different conceptions of the principles governing the cancellation of approval or termination of ICFs/MR found out of compliance with conditions of participation. We clarify the applicable principles and then discuss why Oakwood's arguments for its alternative legal framework are all without merit.

The legal framework for termination of ICFs/MR

Based on the legal provisions quoted above, the statute empowers CMS, as the Secretary's delegate, to terminate an ICF/MR when it fails to comply substantially with applicable conditions of participation. Section 1910(b)(1) of the Act. Any condition-level deficiency demonstrates a lack of substantial compliance under the applicable regulations and is a sufficient cause for termination. 42 C.F.R. § 442.101(e). No legal provision requires an opportunity to correct prior to termination.

Further, in the case of a facility which, like Oakwood, has acknowledged the presence of condition-level deficiencies and the existence of resulting immediate jeopardy and has been given an opportunity to correct, CMS, and the ALJ, contend that the facility must demonstrate at the revisit that it has achieved total compliance, including correcting all previously-cited condition-level deficiencies as well as avoiding any new deficiencies, in order to stop a pending termination. CMS argues that it has discretion to permit further time for correction if the immediate jeopardy has been abated (whereas, if the immediate jeopardy is not abated, termination is mandatory), but denies that a facility is entitled to another correction period where condition-level deficiencies continue to exist.

By contrast, Oakwood's view of the applicable procedures once a facility has been found to have a condition-level deficiency that presents an immediate jeopardy to client health and safety can be summarized as follows. The facility submits a POC and a revisit is conducted within 23 days. Unless the revisit finds that the immediate jeopardy in question is still unabated, according to Oakwood, the facility's termination must be withdrawn. If any condition-level deficiencies remain, the facility must be given 90 days in which to correct them. The only survey results to be considered in determining whether to proceed with termination, in Oakwood's view, are those of the revisit, not those of any other survey (even if conducted during the same time frame). Oakwood Request for Review (RR) at 10.

Oakwood's arguments are difficult to disentangle since the logic of each argument often depends on assumptions that are themselves based on erroneous arguments. In attempting to support its erroneous view of the prerequisites necessary for CMS to terminate it, Oakwood misreads multiple authorities. Since relatively little jurisprudence addresses termination of ICFs/MR, we nevertheless discuss each of Oakwood's misunderstandings below.

We emphasize, however, our ultimate conclusions (which we explain in more detail in discussing Oakwood's arguments) that --

(1) it is undisputed that Oakwood was noncompliant with multiple conditions of participation in August 2005 to the point of presenting immediate jeopardy to the health and safety of its clients;

(2) Oakwood was notified that CMS might proceed with termination if a revisit did not find full compliance;

(3) the revisit survey found that Oakwood abated the immediate jeopardy but did not find that Oakwood eliminated the condition-level deficiencies cited in August - on this basis alone, CMS could have proceeded to termination;

(4) CMS could properly consider the results of both the revisit survey and the complaint survey conducted concurrently in September 2005 to determine whether Oakwood had demonstrated compliance by September 14, 2005;

(5) Oakwood had condition-level deficiencies as of September 2005 based on the undisputed facts found in the complaint survey; and

(5) these condition-level deficiencies suffice to authorize CMS's decision to terminate Oakwood on September 14, 2005, and no finding of immediate jeopardy was necessary to justify termination.

Section 442.117 does not require a finding of immediate jeopardy in order to terminate an ICF/MR.

Oakwood premises much of its discussion on its contention that CMS had to show immediate jeopardy in September 2005 in order to terminate. It bases that false premise on misreading several legal authorities. The first of these mistakes involves its reading of section 442.117 of the regulations.

Oakwood argues that regulations at 42 C.F.R. § 442.117 permit termination of an ICF/MR only upon a certification of immediate jeopardy. Oakwood RR at 13. On that premise, Oakwood argues that the ALJ erred in treating the issue before him as whether Oakwood had one or more condition-level deficiencies in September, rather than limiting his review to whether the immediate jeopardy was abated. Id. Oakwood contends that the September revisit survey found that the immediate jeopardy relating to supervising clients with seizures was abated and that the revisit was not intended to assess whether total compliance was achieved.⁶ Oakwood RR at 5; Oakwood Reply Br. at 2. Oakwood reads the limited scope of the revisit survey as somehow supporting the idea that determining whether the same immediate jeopardy persisted in September was the only relevant issue.

Section 442.117(a) reads as follows:

A survey agency must terminate a facility's certification if it determines that -

- (1) The facility no longer meets conditions of participation for ICFs/MR as specified in subpart I of part 483 of this chapter.
- (2) The facility's deficiencies pose immediate jeopardy to residents' health and safety.

The plain language specifies that a state survey agency is mandated to terminate an ICF/MR when it determines that condition-level deficiencies exist and pose immediate jeopardy. This regulation does not limit the state survey agency to terminating only when immediate jeopardy is present, nor does it on its face preclude the state survey agency from terminating an ICF/MR when it has a condition-level deficiency. Moreover, this regulation says nothing about CMS's authority to terminate based on survey findings. Contrary to Oakwood's suggestions, we conclude that CMS did not, by mandating that states terminate

⁶ CMS acknowledged before the ALJ that the revisit surveyors found that Oakwood had successfully implemented its plan to remove the immediate jeopardy relating to supervision of clients with seizure disorders while bathing. ALJ Decision at 7; CMS Ex. 8, at 2. The revisit survey made no finding, however, that Oakwood had corrected the outstanding condition-level deficiencies. Id. The revisit survey indeed did not purport to ascertain whether all condition-level deficiencies had been removed but rather focused on whether the facility had abated the immediate jeopardy found in the August survey. CMS Ex. 8, at 2.

ICFs/MR for immediate jeopardy, somehow constrain its own statutory authority to terminate ICFs/MR without requiring an immediate jeopardy determination.

Moreover, in its misreading of section 442.117(a)(2) as requiring that the condition-level deficiency referenced in section 442.117(a)(1) be cited at the immediate jeopardy level before termination can occur, Oakwood ignores other regulatory language which clearly supports the ALJ's view of the appropriate issue. Section 442.101(e) expressly states that the "failure to meet one or more of the applicable conditions of participation is cause for termination or non-renewal of the ICF/MR provider agreement." Oakwood's theory that it should have been allowed to continue in operation despite deficiencies in order to provide it further opportunities to reach compliance also contradicts the regulation providing that an ICF/MR may be certified despite deficiencies only where "[a]ll conditions of participation are found met" (i.e., with standard-level deficiencies only) and an acceptable POC for correcting any remaining deficiencies is in place. 42 C.F.R. § 442.101(d)(3); see also 42 C.F.R. § 442.105.

Moreover, the preamble to the final regulations adopting the approach of setting conditions of participation for ICFs/MR with subsidiary standards explained the effect of this scheme on termination of such facilities as follows:

Under such an approach, State agencies would survey for compliance with the conditions of participation. We note that a condition is often made up of several "standards". In order for the condition to be met, all or a majority of the standards must be met. Thus, if a facility is found to meet all the conditions of participation, it would be eligible for Medicaid certification. If a facility meets all the conditions of participation, but has deficiencies in one or more of the standards comprising a condition of participation, it has up to 12 months to achieve compliance in conformity with a corrective plan of action (provided that the deficiencies do not immediately jeopardize the health and safety of the facility's clients, in which case the facility's certification must be terminated as set forth under § 442.117).

53 Fed. Reg. 20,448, at 20,449 (June 3, 1988). This explanation supports the ALJ's conclusion that an ICF/MR is subject to termination if it has condition-level deficiencies, and must be terminated if those deficiencies present immediate jeopardy. An ICF/MR may be provided a period of up to 12 months to achieve

compliance based on a POC only where standard-level deficiencies alone are present but no condition-level deficiencies.

Medicare regulations are not necessary or relevant to the ALJ's finding that Oakwood was subject to termination.

Oakwood also argues that the ALJ erred by applying "the general survey and certification provisions of 42 C.F.R. Part 488 . . . rather than the specific standards governing ICFs/MR at 42 C.F.R. Part 442, Subpart C" Oakwood RR at 1. Part 442 sets out requirements for payment to ICFs/MR based on requirements for valid provider agreements and for certification that the applicable standards described in Part 483 are met with a few exceptions for waivers (not applicable here) or certification with standard-level deficiencies, as discussed above. Part 488 lays out guidance and forms for state agencies to conduct surveys of providers and suppliers as those terms are defined in section 488.1. ICFs/MR are not included in those definitions.

Oakwood argues that the ALJ erred by citing 42 C.F.R. § 488.24 as direct authority for the state agency to certify noncompliance where deficiencies substantially limit care or adversely affect patient health or safety and for a facility to request review of a CMS termination for condition-level deficiencies. See ALJ Decision at 4. As noted in our discussion of legal authority, section 1910 of the Act incorporates the section 1866(b)(2) grounds for termination for failure to comply substantially with applicable conditions of participation. We have found that CMS may reasonably rely on this statutory authority but that does not require a conclusion that 42 C.F.R. § 488.24 or other Medicare certification regulations also apply, especially since ICFs/MR have their own certification regulations in part 442. Nothing from the part 488 regulations is necessary to support the ALJ's conclusions, and, therefore, whether the ALJ properly cited part 488 is immaterial. We therefore do not rely on part 488 here.

In sum, nothing in the applicable statutory or regulatory authority cited by Oakwood constrains CMS to terminate only if immediate jeopardy is still present on a revisit or to provide repeated opportunities for an ICF/MR to correct condition-level deficiencies.

The limited scope of the revisit survey does not imply that Oakwood would not be terminated if immediate jeopardy was abated but condition-level deficiencies were not corrected.

Oakwood's misguided idea that only immediate jeopardy could justify termination is further based in part on its

misunderstanding of the instructions in CMS's pre-revisit letter. Oakwood suggests that the ALJ erred in relying on that August 29, 2005 letter as requiring Oakwood to achieve "total compliance" to avoid termination. Oakwood RR at 12, referencing ALJ Decision at 13 and P. Ex. 4, at 2 (which is the same letter as CMS Ex. 1).

The letter advised Oakwood what action to expect depending on the results of a revisit based on a credible allegation of compliance. If the survey found that the immediate jeopardy persisted, Oakwood's termination would proceed as scheduled. If Oakwood was found to have achieved "total compliance," the termination would be halted. If immediate jeopardy was removed, but compliance with other conditions had not been achieved, Petitioner "may be granted [additional time] for correction." P. Ex. 4, at 1-2.

According to Oakwood, because that letter indicated that the facility might receive more time for correction if CMS found the immediate jeopardy abated in a revisit even though condition-level deficiencies remained, the only proper issue should be whether the original immediate jeopardy was abated. The ALJ erred, in Oakwood's view, in three ways. First, since the revisit found the immediate jeopardy issue had been corrected, Oakwood argues that the termination should have been halted and it should have been granted additional time to make corrections to any remaining deficiencies. Second, since the revisit made no new factual findings about the prior condition-level deficiencies, the ALJ should, according to Oakwood, have considered them to have been corrected. Third, Oakwood argued that the ALJ erred in treating new concerns raised in the complaint survey as relevant, instead of viewing the complaint survey as entirely irrelevant. Oakwood RR at 12.

We agree with the ALJ that the August 29, 2005 letter clearly informs Oakwood that termination would be halted only if the immediate jeopardy had been removed and total compliance achieved. The language about the possible consequences of removing immediate jeopardy but failing to achieve total compliance with conditions of participation is entirely permissive. CMS says that it "may" decide to grant more time to correct, but in no way assures the facility that any additional time will necessarily be granted. The revisit survey did not find that condition-level deficiencies were corrected. CMS reasonably did not elect to grant more time for further corrective efforts. This outcome is consistent with the authorities we have cited above that refute Oakwood's theory that CMS could not termination absent immediate jeopardy.

Further, the revisit did not find that Oakwood had corrected the condition-level deficiency. The revisit survey report indicated that the surveyors only reviewed whether the immediate jeopardy had been abated and that they did not undertake to evaluate whether compliance had been achieved. Oakwood has not shown any entitlement to have a revisit prior to termination at all, and certainly no entitlement to have all outstanding deficiencies reviewed at any revisit. Under the legal scheme we have explained above, Oakwood had to show that it came into substantial compliance, meaning at a minimum that it eliminated condition-level deficiencies, in order to halt the termination. 42 C.F.R. § 442.101(e). The revisit survey made no such determination. A mere finding that the particular situation that created the threat of immediate jeopardy was corrected does not suffice.

CMS was entitled to consider the condition-level deficiencies found in the complaint in its determination to terminate

The concurrent complaint investigation found condition-level deficiencies still present in the same areas cited on the August survey based on problems exposed by the August 31, 2005 incident. Oakwood seeks to treat those findings as somehow inadmissible in evaluating whether Oakwood achieved compliance or still had condition-level deficiencies as of September 14, 2005 because they were not made in the revisit survey itself. CMS's letter, however, does not state that only those findings made during a discrete revisit survey (as opposed to any type of survey) may be considered in assessing compliance. Oakwood cites no authority suggesting that the results of investigating new complaints must be ignored in determining whether to proceed with a pending termination action. Furthermore, the Board has explained that a survey finding of noncompliance beginning at a date earlier than a prior revisit survey would supersede the revisit survey results even if the revisit had found substantial compliance. Meadowbrook Manor - Naperville, DAB No. 2173, at 13 (2008). In fact, in Meadowbrook, as in the present case, the revisit survey had not actually made a finding of substantial compliance.

Oakwood emphasizes its idea that the September revisit and complaint surveys, although admittedly conducted concurrently, were "wholly **unrelated**," because they involved different "concerns," different surveyors, and different findings. Oakwood Br. at 11. Oakwood apparently feels that this point would somehow oblige CMS to disregard the findings of the complaint survey in determining whether Oakwood was in substantial compliance on September 14, 2005. Oakwood fails, however, to establish that these differences, even if they were true, have

any legal significance. In any case, the same survey agency conducted both survey visits at the same time and the concerns involved the same conditions of participation regarding staffing, client protection, and management of the facility.

Oakwood had no entitlement to additional time for correction.

Again in pursuing its theory that CMS could not proceed immediately to termination unless immediate jeopardy were found in the revisit survey, Oakwood argues that any findings of immediate jeopardy or of condition-level deficiencies in the complaint survey, even if correct, should have resulted in additional time for correction. Specifically, Oakwood asserts it was entitled to be switched to a 90-day correction track to correct any condition-level deficiencies once the revisit survey showed that it had corrected the original immediate jeopardy finding.⁷ Oakwood also contends that, even if immediate jeopardy was properly cited at the time of the complaint survey, a new 23-day correction period should have been allowed.

Oakwood cites in support of this claim an excerpt from surveyor notes, as follows:

IJ prompted 23 d term. The results of the f/u determined 0 longer on this track. CMS will be

⁷ In its reply, Oakwood also suggests that CMS failed to "make a *prima facie* case" that noncompliance existed "as of September 14, 2005" on the theory that the SOD section dealing with the revisit "merely restates" the condition-level deficiency findings from August without finding any additional facts to establish that noncompliance continued. Oakwood Reply Br. at 2-3. However, the burden was on the facility to demonstrate that the existing noncompliance was corrected, and the surveyors report that "noncompliance continued" as to three conditions of participation. CMS Ex. 35, at 3. The same SOD contains the results of the complaint survey in which noncompliance with the same three conditions was determined to present immediate jeopardy and an additional condition-level deficiency was cited. Oakwood's argument in this regard depends on accepting the idea that none of the findings made in the complaint survey should have been considered at all in evaluating Oakwood's compliance status for purposes of whether the termination action should proceed. Since we reject this premise, we find no merit in the claim that "no facts . . . demonstrate non-compliance as of September 14, 2005." Oakwood Reply Br. at 2.

notifying fac re current termination track.

We have ID IJ as a result of the on-going complaint investigation r/t client protection. Visit is continuing.

CMS Ex. 49, at 32. Oakwood infers from this somewhat cryptic note that the surveyor's impression of the "consequences of the two **separate** immediate jeopardy findings - one of which had been abated and the other of which had just been discovered" was that the 23-day track for termination was lifted. Oakwood RR at 20 (emphasis in original). Although the note merely says that CMS will inform the facility of the "current termination track," Oakwood apparently also infers that the facility would get a new 23-day correction period for the "new" immediate jeopardy.⁸

Clearly, even if the surveyor had been under the mistaken impression which Oakwood attributes, CMS's legal authority to terminate does not depend on a surveyor's impressions. Oakwood goes on to say that this interpretation is "consistent with federal regulations and guidelines." Id. Oakwood does not explain before us the federal guidelines to which it is referring, but below it premised these time frames on its reading of section 3040A2 of the State Operations Manual (SOM). See ALJ Decision at 12, n.8; P. Post-Hearing Br. at 10-16.

The ALJ dismissed the SOM section as directed at the performance of state agencies and without the force of law to alter the "plain meaning of applicable regulations." ALJ Decision at 12, n.8. He further found that the claim that immediate jeopardy

⁸ Notably, the same surveyor's notes elsewhere describe the September surveys as having a "2-fold" purpose in which the follow-up revisit assessed the correction efforts as successful in removing the immediate jeopardy identified after Client 1's death but the "2nd part of our visit has been to conduct an alleg. investigation" which determined that the "allegation is SUBSTANTIATED." CMS Ex. 49, at 5. The note goes on to state that the facility was informed that the "revisit was not to verify compliance" and that, given the finding of immediate jeopardy level deficiencies in the second part of the survey, "CMS has instructed that we advise the facility that termination of the provider agreement is effective on 9-14-05." Id. Clearly, the surveyor was not actually under the impression that the effect of finding immediate jeopardy based on the complaint investigation was to trigger a new 23-day correction period.

findings made in a separate survey (though one conducted concurrently with a revisit survey) must trigger a new 23-day period was irrelevant because he did not consider the two September survey processes "separate" in any relevant sense. Id.

The SOM provisions do not constitute substantive rules enforceable against a facility, as the ALJ noted. Beverly Health & Rehabilitation Services, DAB No. 1696, at 19 (1999), aff'd, Beverly Health & Rehabilitation Services v. Thompson, 223 F. Supp.2d 73, at 99-106 (D.D.C. 2002). They may, nevertheless, "provide useful guidance as to CMS' interpretations of applicable law." Cal Turner Extended Care Pavilion, DAB No. 2030, at 13 (2006); see also Aase Haugen Homes, Inc., DAB No. 2013, at 15 (2006). The section cited by Oakwood here, read closely, does not support its position, however, and other provisions of the SOM, like the governing regulations, make clear that CMS has interpreted governing law to permit termination of an ICF/MR whenever condition-level deficiencies are present.

Section 3040A of the SOM instructs the state agency on the steps to be taken to initiate termination procedures after an ICF/MR is found noncompliant in a survey, with much shorter time periods allowed where immediate jeopardy is identified and a termination date set for 23 days after the survey ends. If no immediate jeopardy is identified, or if the identified threat is removed within less than five days, but condition-level deficiencies are present, the SOM instructs the state agency to set the termination date at 90 days after the survey ends. The section nowhere indicates what time frames apply to the results of a revisit survey which does not find compliance. Nothing in its language supports the theory that a new finding of immediate jeopardy during a concurrent complaint survey somehow restarts the "clock" if the immediate jeopardy determination at the initial survey was abated. Moreover, the SOM elsewhere makes clear that processing times for termination are "the maximum allowed" and that once termination for immediate jeopardy has been scheduled, the state agency is not to "postpone or stop the procedure unless **compliance** is achieved and documented through onsite verification." SOM., § 3010B (emphasis added). Thus, the SOM does not contemplate that termination will be stopped whenever immediate jeopardy is abated while condition-level deficiencies persist. On the contrary, it reiterates that a determination that the facility has achieved substantial compliance is needed to avert a previously scheduled termination.

This conclusion is underscored by reference to another section of the SOM which expressly states:

Failure to substantially meet one or more Conditions is a cause for termination of participation.

"Substantially," for purposes of this section, is defined as meeting the applicable CoPs Any provider/supplier that does not substantially meet the Conditions is considered to be limited in its capacity to furnish services at an adequate level or quality. Compliance with Conditions; i.e., condition level deficiencies, can never be certified based upon a PoC or acceptable progress since the law specifically requires that all CoPs . . . must be met.

SOM § 3012. The SOM plainly offers no support for Oakwood's contention that termination may only be based on continuous immediate jeopardy. Neither does it require that a facility failing to comply substantially with conditions of participation (while having abated the original immediate jeopardy finding) be placed on a different 90-day "track" and given additional time to correct its condition-level deficiencies.

CMS may identify condition-level deficiencies based on newly-discovered circumstances even where those circumstances occurred during the period allowed for correction of previously-cited deficiencies.

Oakwood also argues that the period from August 26-September 11, 2007 was a "correction period" during which no "instances of noncompliance" should be considered. Oakwood RR at 10. According to Oakwood, events occurring during the period from the end of the survey which found noncompliance up to the date as to which the facility alleges it completed corrections should be ignored to avoid repeat investigations of "the same circumstances that led to the initial determination." Id., citing Batavia Nursing and Convalescent Center, DAB No. 1904 (2004). Oakwood also asserts that Batavia relies for that proposition on a provision of the SOM at section 7317A.1.

The referenced SOM language (no longer in effect) dealt with the survey agency's response to a POC submitted by a long-term care facility for correction of noncompliance and read as follows: "Surveyors should focus on what has occurred since correction dates [contained in the POC]; a determination of noncompliance is not based on problems which took place during the correction period." Even if this provision was in effect during the survey period at issue (which is not clear), its thrust was that previously-cited noncompliance should not be cited again in a revisit survey simply because it continued to exist during the correction period, so long as the noncompliance has been

eliminated by the time set for correction in the POC. The noncompliance identified in the complaint survey was not previously cited and involved areas not being addressed by the August 2005 POC, such as resident abuse, job coach training, and community placement suitability and supervision. Hence, the issue of repeatedly investigating "the same circumstances" does not arise.

In any event, the case cited by Oakwood does not support the broad proposition Oakwood relies on. In Batavia, the Board held that the nursing facility could not show substantial compliance merely based on submission of an acceptable POC or even completion of the steps set out in the POC. Batavia at 58. The Board found that incidents showing the failure of corrective efforts by Batavia continued to occur after the date for which the POC alleged substantial compliance. Batavia at 58-59. The Board concluded that those incidents alone demonstrated continuing noncompliance, "even if the determination of noncompliance must rest on Batavia's continuing failure after that date to meet the regulatory requirements." Id. at 59 (also finding no error in the ALJ noting the events during the correction period as part of the facility's notice of residents' fall risks). Batavia did not address the situation here where new noncompliance occurred unrelated to that found in the original survey and not addressed in the POC for that survey.

Finally, both the cited section of the SOM and the discussion of it in Batavia specifically relate only to survey and certification of long-term care facilities, not ICFs/MR. Oakwood itself stresses in its brief that ICFs/MR are subject to specific certification requirements different from those applicable to nursing facilities and other providers and attributes error to the ALJ for referencing the more general survey and certification regulatory provisions at part 488. Oakwood RR at 1. Oakwood cannot reasonably pick out individual provisions of the general survey and certification scheme which it would like to apply and deny the applicability of all other provisions.⁹

In its reply brief, Oakwood seems to frame this argument

⁹ Oakwood makes this attempt not only in relation to the claim that events occurring during a correction period should be disregarded but also in relying on 42 C.F.R. § 488.410 as authority for its claim that the immediate jeopardy finding from the September complaint survey entitled it to another 23-day correction period. Oakwood RR at 12.

differently by setting out a time line in which it highlights the idea that immediate jeopardy cited on the August survey was resolved on September 11, 2005, as found in the revisit survey of September 14, 2005. Oakwood Reply Br. at 2. Meanwhile, the allegation that led to the complaint survey ending September 17, 2005, which found immediate jeopardy, was received by the state agency on September 12, 2005. Oakwood mistakenly views the finding that immediate jeopardy was abated as equivalent to a finding that the condition-level deficiencies cited at the immediate jeopardy level had been removed entirely. Oakwood derives this view from the absence of express new findings showing continuing violations. Oakwood thus suggests that, as of September 14, 2005, noncompliance was not present.

This construct is based not only on Oakwood's legal misunderstandings discussed above, but also on the false concept that noncompliance exists only at the point that surveyors discover it rather than at the point where facts demonstrating the noncompliance occurred. In a case discussed earlier, the Board has previously rejected this idea that a substantial compliance "gap" occurs that necessarily interrupts the survey cycle in any situation where "new" noncompliance is not identified until after an earlier noncompliance is resolved. Meadowbrook at 10. Instead, the Board found that when the "new" noncompliance is found to have begun before all earlier noncompliance is found to have been corrected, then substantial compliance was never achieved and the survey cycle and remedies are not interrupted. Id. Oakwood's situation here is exactly analogous to that of the long-term care facility in Meadowbrook Manor.

We therefore uphold the ALJ's position that CMS could properly consider findings from both September 2005 surveys in determining whether Oakwood was subject to termination on September 14, 2005.

The ALJ's findings on abuse and immediate jeopardy relating to the August 31, 2005 incident are supported by substantial evidence and free of legal error.

Oakwood does not dispute that the August 31, 2005 incident occurred as recited in the SOM from the complaint survey. Specifically, Oakwood does not deny that it failed to assess the appropriateness of two clients for a community placement and failed to ensure that job coaches were trained about their responsibilities to supervise the clients in the community. The ALJ found that these admitted facts sufficed to demonstrate that Oakwood still had condition-level deficiencies as of September 14, 2005. ALJ Decision at 14. The ALJ described Oakwood's

failure to supervise as a "systemic and regrettably pervasive problem" and noted "long-term systemic problems" with placing and supervising clients in the community, which showed failures at the management level as well. *Id.*, citing CMS Ex. 35, at 22-28. Oakwood does not make any serious effort to dispute that these findings are supported by substantial evidence or to demonstrate any legal error in the ALJ's conclusion that they supported the determination of condition-level deficiencies. For this and the reasons discussed above, we uphold CMS's authority to proceed to terminate Oakwood.

Oakwood, however, also challenges the ALJ's conclusions that it violated conditions relating to abuse and that its deficiencies as of September 14, 2005 also presented immediate jeopardy to the health and safety of clients. As the ALJ pointed out, neither issue was essential for his ultimate conclusion that CMS had ample basis to terminate Oakwood. We have explained in detail above that applicable law permits termination whenever an ICF/MR has a condition-level deficiency. We find no merit, in any case, to Oakwood's arguments that no failure to report and investigate abuse occurred and that the situation did not present an immediate jeopardy to clients.

Oakwood mistakenly treats the immediate jeopardy finding in the September complaint survey as founded only on abuse-related allegations. The ALJ, however, concluded that CMS's determination that immediate jeopardy was present was not clearly erroneous, even accepting Oakwood's version of the facts relating to the sexual abuse incident. The ALJ found it sufficient that the failure to train job coaches led directly to allowing the coach's client to leave unsupervised which "left him prey to abuse." ALJ Decision at 14; see also CMS Br. at 18 (reiterating that immediate jeopardy determination was not based only on the allegations of failure to investigate and report abuse). Finding immediate jeopardy depends on the likelihood of serious harm and does not require a showing that actual harm did occur. The likelihood was high that so dependent a client might be taken advantage of if not provided with the continuous supervision that the facility itself assessed as necessary for a community job placement, especially if he was taken off site. We agree with the ALJ that CMS's determination of immediate jeopardy is not clearly erroneous regardless of the resolution of the abuse-related deficiencies.

On the abuse allegation, Oakwood argues that no reporting or investigation obligation arose because the facility did not suspect abuse once physicians examined Client 1-S at the facility and found no basis to believe that anal penetration had occurred.

The duty to report is triggered at the point that an allegation or reasonable suspicion of possible abuse comes to the attention of facility staff. The nurse who first examined him on his return to the facility referred him to a physician to check for abuse. That undisputed fact suffices to demonstrate that facility staff reasonably suspected abuse, which is enough to trigger the reporting and investigation obligations. Examination by the physician might well be a reasonable step in an investigation, but not a basis to decide not to report or investigate. The facility's responsibility to report suspected abuse cannot be avoided by undertaking itself to rule out the suspicion instead of permitting proper authorities to decide whether or how to proceed.

We therefore reject Oakwood's arguments relating to its failure to report and investigate abuse and the presence of immediate jeopardy as of September 14, 2005. We emphasize, however, that neither issue is necessary to support CMS's authority to terminate, since all that is required is the presence of condition-level deficiencies.

Conclusion

For the reasons explained above, we uphold the ALJ Decision in its entirety.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member