Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Covington Manor Nursing Home
Docket No. A-17-18
Decision No. 2789
May 15, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Covington Manor Nursing Home (Covington, Petitioner), a skilled nursing facility in Georgia, requested review of an Administrative Law Judge (ALJ) decision imposing civil money penalties (CMPs) based on state survey findings that Covington was not in substantial compliance with the Medicare participation requirement at 42 C.F.R. § 483.25(h). *Covington Manor Nursing Home*, DAB CR4706 (2016). The ALJ imposed a $3,550 per-day CMP for the period September 20 through October 10, 2012 and a $100 per-day CMP for the period October 11, 2012 through April 26, 2013, reversing CMS's determination that the immediate jeopardy continued through April 4, 2013 as well as certain deficiency findings on which CMS relied. Covington concedes that it failed to comply with section 483.25(h) on September 20, 2012, and that this noncompliance posed immediate jeopardy on that date. However, Covington contends that there is no legal or factual basis for determining that the immediate jeopardy continued beyond that date.

For the reasons discussed below, we conclude that the ALJ did not err in upholding the immediate jeopardy-level CMP for the period September 20 through October 10, 2012. Accordingly, we uphold the CMPs imposed by the ALJ and affirm his decision.

Legal Background

To participate in the Medicare program, a long-term care facility, including a skilled nursing facility, must be in "substantial compliance" with the requirements in 42 C.F.R. Part 483. 42 C.F.R. § 483.1. Under agreements with the Secretary of Health and Human Services, state survey agencies conduct onsite surveys of facilities to verify compliance with the Medicare participation requirements. *Id*. §§ 488.10(a), 488.11; *see also* Social Security Act (Act) §§ 1819(g)(1)(A), 1864(a). A state survey agency reports any "deficiencies" it finds in a Statement of Deficiencies (SOD), which identifies each deficiency under its regulatory requirement and the corresponding "tag" number. A "deficiency" is any failure to comply with a Medicare participation requirement, and

"substantial compliance" means "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301 (also defining "noncompliance" as "any deficiency that causes a facility to not be in substantial compliance"). CMS may impose one or more remedies on noncompliant facilities, including per-day CMPs. 42 C.F.R. §§ 488.402(b), (c), 488.406, 488.408(d)(1)(iii), (iv), (e)(1)(iii), (iv); 488.430(a). When CMS imposes a per-day CMP for noncompliance at a level less than immediate jeopardy, it chooses an amount within the $50-$3,000 "[l]ower range" for per-day CMPs. 42 C.F.R. §§ 488.438(a)(1)(ii), 488.408(d)(1)(iii). When CMS imposes a per-day CMP for noncompliance that it has determined poses immediate jeopardy, CMS must impose a CMP within the "[u]pper range" of $3,050-$10,000 per day. 42 C.F.R. §§ 488.438(a)(1)(i), 488.408(e)(1)(iii).

Immediate jeopardy exists when a facility's noncompliance "has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident." 42 C.F.R. § 488.301. An ALJ must affirm an immediate jeopardy determination unless the petitioner shows that it is clearly erroneous. 42 C.F.R. § 498.60(c)(2). "A determination by CMS that a [skilled nursing facility]'s ongoing [non]compliance remains at the level of immediate jeopardy during a given period constitutes a determination about the 'level of noncompliance' and, therefore, is subject to the clearly erroneous standard of review under section 498.60(c)(2)." *Brian Ctr. Health & Rehab./Goldsboro*, DAB No. 2336 , at 8-9 (2010); *see also Universal Health Care – King*, DAB No. 2383, at 16 (2011), *aff'd, Universal Healthcare/King v. Sebelius*, 49 F. App'x 299 (4th Cir. 2012).

The Medicare participation requirement at issue in this case is part of the quality of care requirements at 42 C.F.R. § 483.25 and states:

> (h) *Accidents*. The facility must ensure that—
> (1) The resident environment remains as free of accident hazards as is possible; and
> (2) Each resident receives adequate supervision and assistance devices to prevent accidents.

Case Background[1]

Resident B, who had a diagnosis of Alzheimer's disease, was assessed for smoking on July 18, 2012 by a social worker at Covington, who determined that the resident was an "independent smoker" who was able to light, smoke, and extinguish a cigarette in a safe

[1] The factual information in this section is drawn from the ALJ Decision and undisputed facts in the record and is presented to provide a context for the discussion of the issues raised on appeal. Covington's request for review states that "Covington does not dispute any of the ALJ's Findings of Fact, all of which are supported by sworn testimony and/or documentary evidence in the record." Request for review (RR) at 5.

manner. ALJ Decision at 5; CMS Ex. 18, at 4. On September 20, 2012, while on the facility's front porch, Resident B ignited her blouse while trying to light a cigarette and sustained second degree burns. ALJ Decision at 6. No Covington staff members were present when the incident occurred. *Id*. Resident B was sent to a hospital and then to a burn center after the incident and did not return to the facility until September 25. *Id*. at 6-7.

On September 20, 2012, following the incident involving Resident B, Covington issued a new smoking policy.[2] *Id*. at 6; Tr. at 44; P. Ex. 41, at 3; P. Ex. 10, at 1 (same document as CMS Ex. 12, at 1). The new policy provided that all residents requesting to smoke will be assessed for the ability to smoke safely and will be reassessed quarterly, designated the front porch as the smoking area, listed permitted smoking times, and stated that smoking materials and smoking aprons (to be worn by all patients while smoking) will be kept at a nurse's desk to be provided to residents at permitted smoking times and that a staff member will be assigned to the front porch to monitor and assist patients with their smoking. *Id*. Covington completed a new Safe Smoking Assessment for its other five smokers on September 20 and, on September 25, conducted a new assessment for Resident B that determined she was not able to smoke independently. ALJ Decision at 6-7; P. Ex. 14; P. Ex. 17, at 9. In addition, on September 21, Covington initiated in-service training for staff on the new smoking policy, which it completed on September 24. ALJ Decision at 7. On October 10, 2012, Covington's Quality Assurance Committee (QA Committee) "considered all of the steps Covington had taken with regard to smoking safety following Resident B's incident on September 20, 2012" and approved the policy without additional recommendations. *Id*.; P. Ex. 23, at 1. The QA Committee minutes state that "[a]s a result of" the September 20, 2012 incident "we have revised our smoking policy" and that "Smoking Policy was reviewed and approved by Quality Committee." P. Ex. 23, at 1. The minutes also describe the requirements of the new policy, refer to in-service training for staff on the new policy, and note that it was reported that the facility had had "no complaints or grievances" related to the changed smoking situation. *Id*.

[2] Covington's prior policy is at Petitioner's Exhibit 10, at 2. *See* Tr. at 49 (surveyor's testimony identifying this document as "old policy that was in existence up until September 20, 2012"). That policy permits smoking only "out of doors"; provides that residents who smoke will be assessed "for safety" and be subject to "ongoing observation by staff and administration"; provides that residents who are "deemed capable may be allowed to keep smoking supplies on their person"; and provides that residents "deemed incapable of smoking safely may have interventions placed upon them" including requiring that the resident receive smoking supplies directly from staff, requiring that the resident smoke under direct supervision of staff, and the use of a smoker's apron.

In a standard survey of Covington conducted from April 1-5, 2013, the state survey agency found Covington noncompliant with section 483.25(h) at the immediate jeopardy level from September 20, 2012 through April 4, 2013. The surveyors found that the requirement in section 483.25(h) was not met because "the facility failed to provide a safe smoking environment for" six residents (not including Resident B) in a sample of 44 residents, "as evidenced by the use of unsafe ashtrays; lack of a fire extinguisher in close proximity of the smoking area; and unsecured storage of smoking materials." P. Ex. 4 (SOD), at 16. The SOD further stated: "This failure resulted in the likelihood of an immediate and serious threat to resident health and safety for those six (6) residents. Therefore, it was determined that the likelihood of an immediate and serious threat to resident health and safety existed as of September 20, 2012 until April 5, 2013, at which time a plan was implemented by the facility to remove the immediate jeopardy situation." *Id*. at 16-17. The SOD also contained survey findings, based on surveyor interviews and document review, concerning the September 20, 2012 incident involving Resident B and described the new smoking policy issued by Covington on that date (after the incident). *Id*. at 17-18, 21.

Based on the survey findings, CMS imposed a $3,550 per-day CMP from September 20, 2012, through April 4, 2013, and a $100 per-day CMP effective April 5, 2013, until Covington achieved substantial compliance on April 26, 2013, as determined in a revisit survey. ALJ Decision at 4, citing P. Ex. 6. Covington requested a hearing before an ALJ, "challenging the immediate jeopardy level noncompliance finding and the enforcement remedy based on that finding, but did not challenge the CMP imposed from April 5, 2013, through April 26, 2013." ALJ Decision at 1-2.

The ALJ concluded that Covington was not in substantial compliance with section 483.25(h) because it "failed to provide an environment as free as possible from accident hazards, and failed to provide an adequate smoking assessment and supervision to Resident B while she was lighting a cigarette, resulting in accidental burns." ALJ Decision at 8. The ALJ also concluded, based on the September 20, 2012 incident involving Resident B, that CMS's determination that Covington's noncompliance was at the immediate jeopardy level is not clearly erroneous. *Id*. at 10, citing 42 C.F.R. § 498.60(c)(2). However, the ALJ found that the immediate jeopardy ended on October 10, 2012, not April 4, 2013, as CMS found, because he concluded that none of the other deficiencies the surveyors found existed at the time of the survey posed immediate jeopardy. In particular, the ALJ concluded that, while Covington was not in compliance with section 483.25(h) for the additional reason that "it failed to have a fire extinguisher located no more than 75 feet from Covington's designated smoking area . . . , it was clearly erroneous for CMS to conclude that this deficiency was at the immediate jeopardy level." *Id*. at 10. In addition, the ALJ concluded that neither "Covington's ashtrays" nor "Covington's placement of smoking materials in an unlocked box at the nurse's station" supported a determination that Covington was not in substantial compliance with section 483.25(h). *Id*. at 12, 14.

The ALJ concluded that although Covington was not in substantial compliance from September 20, 2012 through April 26, 2013, its "noncompliance was at the immediate jeopardy level only from September 20, 2012, through October 10, 2012, the date on which Covington had implemented all of its changes to its smoking safety policy and Covington's Quality [Assurance] Committee had time to assess their effectiveness." *Id.* at 16. The ALJ therefore "modif[ied]CMS' s determination and conclude[d] that Petitioner placed residents in immediate jeopardy from September 20, 2012, until October 10, 2012, the date by which Petitioner had implemented all of its changes to its smoking procedures and Petitioner's Quality Assurance Committee reviewed and approved the effectiveness of those changes." *Id.* at 17; *see also id.* at 7 (Finding of Fact 15, addressing the October 10, 2012 meeting of the QA Committee). The ALJ further stated with respect to why he was shortening the immediate jeopardy period determined by CMS:

> My choice of October 10, 2012, as the final day of immediate jeopardy is based on the significant actions Petitioner took in response to Resident B's incident (see Findings of Fact 11 through15 above). Further, Mr. Kampmeyer, the fire safety expert, assessed the changes Petitioner made after September 20, 2012, and he called them "significant steps ... to tighten up procedures to prevent further accidents." He also concluded:
>
> > Because of the appropriate measures instituted by the facility as of September 20, 2012, I do not believe that there was a risk of any resident suffering serious harm in the very near future as a result of the smoking environment. To the contrary, it is my expert opinion that when considering all of the measures and interventions undertaken by the staff, it was unlikely any resident would be harmed....
>
> P. Ex. 40 at 7. Petitioner's other fire safety expert also stated that the changes Petitioner instituted would make another incident like the one Resident B suffered very unlikely. Tr. 224-25.

ALJ Decision at 17. The ALJ concluded that Covington was therefore liable for a CMP of $3,550 per day (an amount which he found reasonable) beginning September 20 through October 10, 2012 and a CMP of $100 per day from October 11, 2012 through April 26, 2013. *Id.* at 19.

On appeal to the Board, Covington "concedes that immediate jeopardy existed on September 20, 2012" but takes the position that the ALJ erred in concluding that the immediate jeopardy continued after September 20 and through October 10, 2012, the date Covington's QA Committee approved the new smoking policy Covington issued on

September 20. RR at 2. Covington does not challenge the ALJ's conclusion that its noncompliance continued at the non-immediate jeopardy level through April 26, 2013 or the reasonableness of either CMP amount. CMS did not appeal the ALJ Decision. *See* CMS Br. at 3 n.2.

Analysis

Below, we explain why we sustain the ALJ's conclusion that the immediate jeopardy continued through October 10, 2012.

We note preliminarily that we apply here the general standard the Board has adopted for review of administrative law judge decisions in cases of this type. *See Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs* ("The standard of review on a disputed factual issue is whether the ALJ decision is supported by substantial evidence on the record as a whole. The standard of review on a disputed issue of law is whether the ALJ decision is erroneous.").[3]

As noted, Covington concedes that it was not in substantial compliance and that its noncompliance was at the immediate jeopardy level on September 20, 2012, the beginning date for the immediate jeopardy that the ALJ upheld under the clearly erroneous standard governing his review on the immediate jeopardy issue. Covington, as noted, bears the burden of showing, by a clearly erroneous standard, that the immediate jeopardy it concedes existed on September 20, 2012 was abated before October 10, 2012, the last date of the immediate jeopardy period as modified by the ALJ. Covington argues that the measures it implemented immediately after Resident B set her blouse on fire while trying to light a cigarette on September 20, 2012 were sufficient to abate the immediate jeopardy that same day. This argument has no merit and, indeed, is undercut by the fact that corrective measures Covington relies on for the abatement were taken after September 20, 2012. Although there is no dispute that Covington issued a new smoking safety policy on September 20 after the incident with Resident B, the ALJ found, and Covington does not dispute, that on September 21, Covington began to provide in-service training to its staff on the new policy and did not complete the in-servicing until September 24. In addition, the ALJ found, and Covington does not dispute, that Covington's reassessment of each of its smokers was not completed until it reassessed Resident B on September 25 after she returned from the hospital.[4]

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[3] The Guidelines are available at https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/participation/index.html#development.

[4] The only evidence Covington cites in support of its position is the testimony of its two fire safety experts. RR at 15 (also claiming that other "unchallenged testimony," which it did not identify, supports its position). As discussed below, however, this testimony in context does not support Covington's position that the immediate jeopardy ended on September 20, 2012.

Given these undisputed facts, Covington has effectively conceded that the immediate jeopardy continued at least through September 25, 2012, notwithstanding its arguments to the contrary. The Board has previously stated that "immediate jeopardy is deemed to have been removed only when the facility has implemented necessary corrective measures." *Florence Park Care Ctr.*, DAB No. 1931, at 30 (2004). In other cases, the Board has concluded that immediate jeopardy was not abated prior to the date planned in-service training on procedures adopted by a facility to address a deficiency was completed. *See, e.g., Owensboro Place & Rehab. Ctr.*, DAB No. 2397, at 13 (2011). Covington acknowledges that its planned in-service training was not completed until September 24, 2012. The measures Covington determined were necessary to correct its fire safety immediate jeopardy situation also included reassessing residents to identify any limitations on their ability to smoke safely.[5] Since the reassessments were not completed until September 25, 2012, residents remained at risk even after the in-servicing was completed. Given the facts about Covington's corrective steps on which Covington itself relies, we must at minimum uphold the ALJ's conclusion that the immediate jeopardy continued after September 20, 2012 at least through September 25, 2012 .

That leaves only the question of whether the ALJ erred in concluding that Covington had not shown CMS's immediate jeopardy determination to be clearly erroneous for the period September 26, 2012 through October 10, 2012, when Covington's QA Committee met and approved Covington's new smoking policy. *See* ALJ Decision at 16. We conclude the ALJ did not err. Covington itself entered the minutes of the October 10, 2012 QA Committee into evidence (as Petitioner Exhibit 23) and presented the testimony of several members of Covington's QA Committee stating that the committee reviewed and approved the September 20, 2012 smoking policy. *See* P. Ex. 41, at 5 (testimony of Covington's administrator); P. Ex. 45, at 5 (testimony of Covington's social worker); P. Ex. 46, at 5-6 (testimony of Covington's MDS director); P. Ex. 49, at 3 (testimony of a Covington LPN);[6] and P. Ex. 50, at 2 (testimony of Covington's medical director). Covington's entry of the minutes and the testimony it presented regarding the QA Committee's meeting strongly suggest that Covington itself thought the QA Committee's review and approval of the new smoking policy was necessary to ensure that Covington's revised policy was adequate **and was being effectively implemented** even though the policy was issued on September 20, 2012. The ALJ referred to these exhibits as support for his finding of fact that "on October 10, 2012, Covington's Quality Assurance Committee considered all of the steps Covington had taken with regard to smoking safety

[5] For example, Resident B's reassessment indicated that "[i]f she smokes . . . , cigarettes will be lit by staff[.]" ALJ Decision at 7, citing P. Ex. 17, at 9.

[6] The LPN stated in part: "I am a member of the Quality Assurance Committee which revised the smoking policies and procedures immediate after the incident on September 20, 2012." She may have meant "reviewed" rather than "revised."

following Resident B's incident on September 20, 2012, and determined that it was in agreement with the new policy and that it did not have any additional recommendations to make." ALJ Decision at 7 (Finding of Fact 15). It is reasonable to infer from the ALJ's citation to these exhibits as support for that finding that his selection of the date of the QA Committee meeting as the date the immediate jeopardy was abated was influenced, at least in part, by the importance Covington put on that meeting in its testimony.

Moreover, Covington's reliance on other testimony in support of its position that September 20, 2012 was the only day of immediate jeopardy is unwarranted. Contrary to what Covington argues (at RR at 15), the testimony of its two fire safety experts does not undercut the ALJ's conclusion that the immediate jeopardy continued until October 10, 2012. One of the experts, Mr. Kampmeyer, testified, in essence, that the measures in Covington's September 20, 2012 smoking policy were sufficient to make it unlikely that any resident would be harmed as a result of the smoking environment and that CMS's later findings about the ashtrays, location of the fire extinguisher, and storage of smoking materials were not grounds for finding immediate jeopardy. *See* P. Ex. 40, at 7. Mr. Kampmeyer referred to the "measures instituted by the facility as of September 20, 2012" (*id.*, emphasis added) but stated elsewhere that "[s]taff were trained in the new policy on 9/21/2012 and 9/24/2012" and that Covington's QA Committee later met and "ratified the new policy" (*id*. at 3).[7] The other expert, Mr. Peters, testified that "[i]t is my opinion that the substantial measures implemented immediately after the September 2012 incident eliminated the risk of any resident suffering from a smoking related or fire injury." P. Ex. 56, at 2. He further testified that "[a]mong the measures undertaken by Covington Manor that I considered" in reaching this conclusion were that "[a]ll staff were advised of the new smoking policy" and "trained in fire safety" and that "[o]n October 10, 2012, a review of the interventions was done at the QA meeting." *Id.* at 2-3. These experts' testimony as a whole supports an inference that the QA Committee's approval of the new smoking policy was necessary to ensure its successful implementation and further supports the ALJ's determination that the immediate jeopardy continued through October 10.

Covington also relies on the testimony of a surveyor that Covington exceeded the standard of care by requiring in its September 20, 2012 smoking policy that 1) smoking materials be removed from even those residents who were assessed as safe smokers, 2) even smokers who had been assessed as able to smoke independently be supervised while smoking, and 3) all smokers including safe smokers wear a smoker's apron. RR at 3, citing Tr. at 108-110. In Covington's view, it "could not have exceeded the standards of

[7] Mr. Kampmeyer incorrectly stated that the meeting occurred on October 4, 2012 rather than October 10, 2012.

care regarding a safe smoking environment while simultaneously being in immediate jeopardy for the same environment." RR at 4. "The two possibilities," Covington claims, "are mutually exclusive." *Id*. We disagree with the "mutually exclusive" premise of Covington's argument. As our discussion above indicates, we must look beyond the content of the policy Covington developed to address the immediate jeopardy situation to whether the policy was implemented effectively. The ALJ determined that the immediate jeopardy was not abated until the QA Committee reviewed and approved the new smoking policy after having been advised that "no complaints or grievances" had been received in the weeks since the policy was adopted. We find no error in that determination.

Covington also argues that the ALJ erred in concluding that the immediate jeopardy could not be abated until the QA Committee approved the policy issued on September 20, 2012 because neither the state survey agency nor CMS found a deficiency related to the QA Committee. RR at 15. The regulations at 42 C.F.R. § 483.75(o) require that a facility "maintain a quality assessment and assurance committee" that includes the director of nursing services, a physician designated by the facility, and at least three other members of the facility's staff, and that the committee meet "at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary; and "[d]evelop[] and implement[] appropriate plans of action to correct identified quality deficiencies." However, the salient question here is not whether Covington failed to comply with this requirement (and Covington is correct that there was no finding of noncompliance with it) but whether the meeting of Covington's QA Committee to review and approve the new smoking policy Covington issued on September 20, 2012 was a final step in Covington's process for abating the immediate jeopardy. Accordingly, Covington's argument does not identify any error of law in the ALJ's conclusion that the immediate jeopardy continued through October 10, 2012. Indeed, as we have discussed, the record facts, and reasonable inferences that can be drawn from them, support our conclusion that the ALJ did not err.

Covington argues further that the ALJ's conclusion that the immediate jeopardy was not abated until October 10, 2012 is inconsistent with his conclusion that three survey findings on which CMS relied did not pose immediate jeopardy (and that two of the findings are not even grounds for finding noncompliance). According to Covington, CMS based its immediate jeopardy determination solely on three survey findings, i.e., that Covington used unsafe ashtrays, that there was no fire extinguisher in close proximity to the smoking area, and that smoking materials were not securely stored. Covington points to the ALJ's conclusion that the use of unsafe ashtrays did not pose immediate jeopardy and that the two other findings are not grounds for finding noncompliance. Covington argues that it follows from this conclusion that there was no longer any basis for determining that the immediate jeopardy continued after September 20. *See* RR at 5-11. This argument is not persuasive.

First, Covington's argument is inconsistent with the admission in its request for review that immediate jeopardy existed on September 20, 2012. That was the date that Resident B set her blouse on fire while smoking without staff supervision and suffered serious burns requiring her hospitalization. The ALJ based his determination that the immediate jeopardy began that day on the full fire safety circumstances surrounding that incident, in particular, that Covington had not adequately assessed Resident B as well as two other smokers. ALJ Decision at 9-10. There is no indication the ALJ based his determination solely on the survey findings Covington cites. We note that in discussing the circumstances surrounding Resident B's setting her blouse on fire, the ALJ rejected Covington's suggestion that this event was an "aberration" and that it had correctly assessed Resident B as a safe smoker before the incident. *Id*. at 9. The ALJ noted that the resident's BIMS (Brief Interview for Mental Status) score of 9 meant "that Resident B was at the low end of being 'moderately impaired' (i.e., a score of 7 is 'severe impairment')." *Id.*, citing CMS Ex. 22, at 2, 5. The ALJ also stated, "Had Covington truly believed that it had correctly assessed Resident B initially as a smoker who could independently smoke and that the September 20, 2012 incident was purely an accident, Covington would not have radically reassessed Resident B's smoking abilities [after she returned from the hospital]." ALJ Decision at 9. On appeal, Covington does not dispute any of the ALJ's findings of fact regarding the incident in which Resident B burned herself while smoking. As noted, the failure to adequately assess residents' smoking ability was not corrected until at least September 25, 2012.

Second, the statement in the SOD that these three findings "resulted in the likelihood of an immediate and serious threat to resident health and safety" for six residents in the facility at the time of the April 2013 survey (not including Resident B) (P. Ex. 4, at 16), read in context, does not **limit** the grounds for continuing immediate jeopardy to these three findings. The SOD also sets out findings about the September 20, 2012 incident, based on which the surveyors concluded that the immediate jeopardy began on that date. These findings include that Resident B was burned "while smoking without a staff member present" when she attempted to light a cigarette and that she had been assessed as able to light, smoke and extinguish a cigarette safely and as "a safe smoker, not requiring supervision to smoke." *Id.* at 17-18, 21. In addition, in their testimony addressing the determination of immediate-jeopardy level noncompliance with section 483.25(h), two surveyors referred not only to the three findings that the ALJ concluded did not pose immediate jeopardy but also to the facts surrounding the incident involving Resident B. *See* CMS Exs. 29, at 2 (nurse surveyor C.L.'s declaration stating that the survey team "also gathered information regarding Resident 'B', who was burned while smoking in September of 2012"); 30, at 2 (state agency regional director A.T.'s declaration stating that the survey team "also gathered information and made findings regarding Resident 'B', who was burned while smoking in September 2012").[8]

[8] The ALJ excluded the written direct testimony of the third surveyor, at CMS Exhibit 28, because she died before the hearing at which Covington could have cross-examined her. Tr. at 9, 11-12, 21.

Third, whether CMS based its immediate jeopardy determination exclusively on the three findings the ALJ concluded did not support that determination is irrelevant at this point. While the regulatory standard for an ALJ's review of CMS's immediate jeopardy determination is whether the facility has shown that determination to be clearly erroneous, the ALJ applies that standard after reviewing the record as a whole de novo. *See Sunbridge Care & Rehab. for Pembroke*, DAB No. 2170, at 26 (2008) ("ALJ review is de novo"), *aff'd*, *Sunbridge Care & Rehab. for Pembroke v. Leavitt*, 340 F. App'x 929 (4th Cir. 2009); *Beechwood Sanitarium*, DAB No. 1906, at 28-29 (2004) (ALJ hearing is not a "review of how or why CMS decided to impose remedies"), *modified on other grounds*, *Beechwood v. Thompson*, 494 F.Supp.2d 181 (W.D.N.Y. 2007). Thus, it was not necessary for the ALJ to rely on the same evidence on which CMS relied in order to determine that CMS's immediate jeopardy determination was not clearly erroneous. The ALJ could reasonably infer based on other evidence that it was not clear error to determine that immediate jeopardy had not been abated so long as the provisions of the new policy had not been fully implemented and found to be effective in protecting smoking residents from the likelihood of further serious harm. The ALJ concluded that the QA Committee's review and approval of the policy changes provided the assurance that they had been fully implemented and were effective.

Conclusion

For the foregoing reasons, we sustain the ALJ Decision imposing a $3,550 CMP for the period September 20 through October 10, 2012 and a $100 per-day CMP for the period October 11, 2012 through April 26, 2013.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member