Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Avon Nursing Home
Docket No. A-17-2
Decision No. 2830
November 6, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

This appeal, filed by the Centers for Medicare & Medicaid Services (CMS), concerns a determination by CMS that Avon Nursing Home (Avon), a skilled nursing facility (SNF), was not in substantial compliance with Medicare participation requirements in 42 C.F.R. §§ 483.13(c) and 483.25(h).[1] CMS's determination was based on findings of a September 2013 compliance survey performed by the New York State Department of Health (NYDOH). Avon requested, and received, an evidentiary hearing before an administrative law judge (ALJ) to challenge the noncompliance determination and associated civil money penalty (CMP) levied by CMS. After the hearing, the ALJ issued a decision holding that the "findings and conclusions of the [September 2013] survey team" were "invalid" because the survey team did not include a registered nurse in violation of section 1819(g)(2)(E)(i) of the Social Security Act (Act).[2] *Avon Nursing Home*, DAB CR4670 (2016) (ALJ Decision). Based on that holding, the ALJ further concluded that there was no "lawful basis" for CMS's determination of noncompliance or the imposition of a CMP. *Id.* at 1, 16-17.

[1] On October 4, 2016, CMS issued a final rule that re-designates and revises the provisions of 42 C.F.R. Part 483. *See* Final Rule, Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688, 68,726, 68,825 (Oct. 4, 2016). This decision cites to the version of 42 C.F.R. Part 483 that was in effect in September 2013, when the survey that provided the bases for CMS's noncompliance determination was performed. *See Carmel Convalescent Hospital*, DAB No. 1584, at 2 n.2 (1996) (applying regulations in effect on the date of the survey and resurvey).

[2] The current version of the Act can be found at https://www.ssa.gov/OP_Home/ssact/ssact-toc.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, cross-reference tables for the Act and the United States Code can be found at http://uscode.house.gov/table3/1935_531.htm and https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

CMS contends that the ALJ's holding violates an applicable regulation and exceeds the scope of his review authority. According to CMS, the ALJ should have decided whether the evidence before him substantiated the challenged noncompliance determination rather than focus on whether NYDOH complied with survey performance requirements. CMS also objects to the ALJ's holding that, notwithstanding certain prehearing stipulations by the parties, the issue of "[w]hether or not the facts proved" a violation 42 C.F.R. § 483.13(c) was "properly before [him] for decision." ALJ Decision at 7.

As discussed below, we conclude that NYDOH's purported failure to comply with section 1819(g)(2)(E)(i) of the Act in performing the September 2013 survey did not invalidate CMS's noncompliance determination or enforcement remedy. In addition, we conclude that the ALJ did not commit a prejudicial error or abuse his discretion in deciding that the section 483.13(c) issue was properly before him. Finally, we hold that the section 483.13(c) issue encompassed claims by CMS that Avon had violated paragraphs (2), (3), and (4) of that section, and not just paragraph (3), as the ALJ found.

Accordingly, we vacate the ALJ Decision and remand the case for additional proceedings, including the issuance of a decision on the merits of CMS's noncompliance determination.

Legal Background

In order to participate in the Medicare program, a SNF must meet that program's requirements for participation. Act § 1819(a)(3), (b)-(d); 42 C.F.R. § 483.1. The chief purpose of those requirements, and of the laws adopted to enforce them, is to promote and protect the health, safety, and rights of a SNF's Medicare residents. *See* Act § 1819(f)(1) ("It is the duty and responsibility of the Secretary [of Health and Human Services] to assure that requirements which govern the provision of care in skilled nursing facilities under this title, and the enforcement of such requirements, are adequate to protect the health, safety, welfare, and rights of residents and to promote the effective and efficient use of public moneys."); *Northeastern Ohio Alzheimer's Research Ctr.*, DAB No. 1935, at 8 (2004) (discussing the "regulatory goal" of the enforcement scheme for Medicare-participating SNFs); *Sanctuary at Whispering Meadows*, DAB No. 1925, at 9 (2004) (stating that the purpose of the participation requirements is to "protect the health and safety of the patients who are the intended beneficiaries of the [Medicare] program"), *aff'd*, *Sanctuary at Whispering Meadows v. Thompson*, 151 F. App'x 386 (6th Cir. Oct. 7, 2005).

Section 1819(g) of the Act, and regulations implementing that section, establish a scheme in which state health agencies, under agreements with the Secretary of Health and Human Services (Secretary), are responsible for conducting "surveys" (inspections) of non-state-owned or operated SNFs in order to verify those facilities' compliance with Medicare participation requirements. *See* Act §§ 1819(g)(1)(A), 1864(a); 42 C.F.R. §§ 488.10(a), 488.11, 488.20. (The Secretary has delegated his authority under section 1819 to CMS.)

Section 1819(g)(2) specifies the types of surveys (e.g., "standard," "extended") to which a SNF may be subjected. That section also specifies requirements concerning a survey's content, frequency, scope, and manner of performance. Of relevance here is the requirement in section 1819(g)(2)(E)(i), which states that "[s]urveys under this subsection [1819(g)] shall be conducted by a multidisciplinary team of professionals (including a registered professional nurse)." Consistent with section 1819(g)(2)(E)(i), Medicare regulations in 42 C.F.R. Part 488 state that "[s]urveys must be conducted by an interdisciplinary team of professionals, which must include a registered nurse." 42 C.F.R. § 488.314(a)(1).

In addition to establishing a compliance survey regimen, the Act and regulations authorize, and in some instances require, CMS to take enforcement action against a SNF – including imposing CMPs and other "remedies" – if it determines, on the basis of a state agency's "recommendation," that the SNF does not meet one or more Medicare participation requirements. Act § 1819(h)(2)(A); 42 C.F.R. Part 488, subpart F; *see also North Ridge Care Ctr.*, DAB No. 1857, at 11 (2002) (explaining that "CMS's authority to impose CMPs, as well as other enforcement remedies, is based on section 1819(h) of the Act").

In order to avoid the imposition of federal enforcement remedies, a SNF must be in "substantial compliance" with Medicare participation requirements. 42 C.F.R. §§ 488.400, 488.402(b), (c). A SNF is not in substantial compliance when it has a "deficiency" – that is, a failure to meet a participation requirement – that creates the potential for more than minimal harm to one or more residents. *See id.* § 488.301 (defining "substantial compliance"). The term "noncompliance," as used in the applicable regulations, is synonymous with lack of substantial compliance. *Id.* (defining "noncompliance").

A SNF may appeal a CMS "finding of noncompliance" that has resulted in the imposition of a CMP or other enforcement remedy. 42 C.F.R. §§ 498.3(b)(13), 498.5(b), 488.408(g)(1). During a hearing in such an appeal, a SNF may challenge the reasonableness of the amount of any CMP imposed. *Lutheran Home at Trinity Oaks*, DAB No. 2111, at 21 (2007).

Case History

1. *The compliance surveys*

NYDOH performed a "complaint survey"[3] of Avon on September 5, 2013, followed by another survey on September 6, 2013. *See* Revised Joint Stipulation of Facts dated Dec. 18, 2013 (Rev. Jt. Stip.) ¶¶ 9-10. (We refer to these surveys collectively as the "September 2013 survey.") The survey team consisted of two registered dieticians; a registered nurse did not participate in the survey. *See id.*; CMS Exs. 2-4; Transcript of Jan. 2015 Hearing (Tr.). Vol. 2, at 85-87. NYDOH performed the September 2013 survey in connection with its investigation of an incident that Avon self-reported to state authorities in August 2013. *See* Tr. Vol. 1, at 93-95; Rev. Jt. Stip. ¶¶ 7, 9; CMS Ex. 9.

As a result of the September 2013 survey, NYDOH issued a Statement of Deficiencies containing two noncompliance citations. CMS Ex. 1; Rev. Jt. Stip. ¶ 13. The citations are identified in the Statement of Deficiencies by "tag" numbers F225 and F323.[4] CMS Ex. 1, at 1, 5. Tag F225 alleges noncompliance with various requirements in 42 C.F.R. § 483.13(c); tag F323 alleges noncompliance with 42 C.F.R. § 483.25(h). *Id.* In addition, tag F323 indicates that Avon's noncompliance with section 483.25(h) was at scope-and-severity level "L" (widespread immediate jeopardy).[5] *Id.* at 5; Rev. Jt. Stip. ¶ 12.

---

[3] A "complaint survey" is a survey "conducted on the basis of a *substantial allegation of noncompliance*," as the italicized term is defined in 42 C.F.R. § 488.1. 42 C.F.R. § 488.430(a). A "substantial allegation of noncompliance" is defined to "mean[ ] a complaint from any of a variety of sources (such as patient, relative, or third party), including complaints submitted in person, by telephone, through written correspondence, or in newspaper or magazine articles, that would, if found to be present, adversely affect the health and safety of patients or residents and raises doubts as to a provider's or supplier's compliance with any Medicare condition of participation, condition for coverage, condition for certification, or requirements." *Id.* § 488.1.

[4] Each tag number corresponds to a particular Medicare participation requirement and to CMS's "interpretive guidance" regarding that requirement, as published in Appendix PP to CMS's State Operations Manual. The State Operations Manual and its appendices (CMS Pub. 100-07) are available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS1201984.html.

[5] State survey agencies rate the level of "seriousness" of each cited deficiency using alphabetical designations (with "A"-level deficiencies being the least serious, and "L"-level deficiencies being the most serious). Seriousness is a function of two factors: (1) "severity" – that is, whether the deficiency has created a "potential" for "minimal" or "more than minimal" harm to residents, resulted in "actual harm," or placed residents in "immediate jeopardy" (the latter circumstance being the highest degree of severity); and (2) "scope" – whether the noncompliance is "isolated," constitutes a "pattern," or is "widespread." *See* SOM, Appendix P – "Survey Protocol for Long Term Care Facilities," Part 1, sec. IV (deficiency categorization); SOM, Chapter 7 – "Survey & Enforcement Process for Skilled Nursing Facilities & Nursing Facilities," § 7400.5.1 (matrix of scope and severity levels).

Tags F225 and F323 describe the same food-related incidents involving two residents with dementia. In one incident, on May 11, 2013, Resident 2's left pinky finger came into contact with hot soup (causing skin "redness") when she tried to move the soup bowl. CMS Ex. 1, at 4, 11. In a later incident, on August 16, 2013, Resident 1 spilled a bowl of hot soup in her lap while eating supper at a dining room table. *Id.* at 2, 6. The spill caused second-degree burns on her thighs. *Id.*

Tag F225 states that Avon violated 42 C.F.R. § 483.13(c) because it "did not thoroughly investigate incidents involving Residents 1 and 2 to determine the root cause of burns and did not investigate in a timely manner an incident of a burn affecting Resident # 2."[6] *Id.* at 2.

Tag F323 indicates that NYDOH's investigation of the two incidents, coupled with its direct observation of staff's food-and-beverage service practices, revealed that Avon did not have "systems in place to ensure [that] hot foods and beverages were served to residents at safe temperatures to limit the potential for burns." CMS Ex. 1, at 5. The absence of such safety systems allegedly violated 42 C.F.R. § 483.25(h), which requires a SNF to "ensure that . . . [t]he resident environment remains as free of accident hazards as is possible" and that "[e]ach resident receives adequate supervision and assistance devices to prevent accidents." *Id.*

On October 17, 2013, a revisit survey found that Avon had returned to substantial compliance with the cited participation requirements. CMS Ex. 2, at 1.

On November 15, 2013, CMS notified Avon that it was imposing a per-instance CMP of $9,500 based on the two noncompliance citations (F225 and F323) from the September 2013 survey. CMS Ex. 2, at 2.

2. *The ALJ proceeding*

By letter dated January 6, 2014, Avon requested an ALJ hearing to contest the findings under tag F323. Rev. Jt. Stip. ¶ 23. The hearing request did not mention, or otherwise indicate that Avon wished to contest, the F225 citation.[7]

---

[6] Tag F225 cites requirements in paragraphs (1)(ii)-(iii), (2), (3), and (4) of section 483.13(c), CMS Ex. 1, at 1, although it is clear that NYDOH did not find violations of some of the cited requirements. In particular, tag F225 alleges no facts suggesting that Avon violated paragraph (1)(ii)'s provisions regarding employment of persons "[f]ound guilty of abusing, neglecting, or mistreating residents" or (1)(iii)'s requirement to report certain employee information to a state nurse aide registry or licensing authority.

[7] The January 6, 2014 letter states in its initial paragraph that Avon's hearing request was being "submitted in accordance with 42 C.F.R. 498.40 with respect to the following deficiency identified in the Facility's September 6, 2013 Statement of Deficiencies . . ., with which the Facility disagrees: F323 . . . Survey Allegations of Finding for Deficiency F323[.]"

During May and June 2014, in accordance with a January 2014 pre-hearing order issued by the ALJ, the parties exchanged documentary evidence, written direct testimony, and pre-hearing briefs. Along with those materials, the parties submitted a Joint Statement of Facts and Issues (Jt. Stip.), which states, among other things, that:

> [Avon] is not appealing the deficiency at 42 C.F.R. § 483.13(c)(1)(ii-iii), (c)(2)-(4) [F225], which was cited at a scope and severity of "D" in the Statement of Deficiencies for the September 6 Survey. However, to the extent that CMS is relying on findings related to the deficiency at 42 C.F.R § 483.13(c)(1)(ii-iii), (c)(2)-(4) [F225] to support its determination of noncompliance with respect to 42 C.F.R. § 483.25(h) [F323], [Avon] reserves the right to contest the findings related to the F225 deficiency as part of this appeal.

Jt. Stip. at 4; *see also* Avon's June 16, 2014 Pre-Hearing Br. at 7-8. CMS indicated in its pre-hearing brief and summary of proposed testimony that "it would be relying on [survey] findings associated with the F225 deficiency to support the F323 deficiency." CMS's June 13, 2014 Pre-Hearing Br. at 7. More specifically, CMS stated that it would try to show that Avon's alleged "failure to investigate the root causes" of the accidental injuries sustained by Residents 1 and 2 (as described in tag F225) "contributed to its failure [to comply with its obligation under section 483.25(h)] to ensure that the resident environment remained as free of accident hazards as is possible, and that each resident received adequate supervision and assistance devices to prevent accidents[.]" *Id.* Shortly after the pre-hearing exchange, the ALJ scheduled an evidentiary hearing to begin in January 2015.[8]

On December 5, 2014, CMS reduced the scope-and-severity level assigned to the F323 citation (though not by enough to rescind the immediate-jeopardy finding) and reissued the Statement of Deficiencies to reflect that reduction. CMS Ex. 64, at 2, 7 (specifying a reduction in the level of seriousness from "widespread" immediate jeopardy to a "pattern" of immediate jeopardy). No other changes were made to the Statement of Deficiencies or to the enforcement action taken by CMS. *Id.* at 2 (stating that all remedies, including the $9,500 CMP, remained in place).

On December 18, 2014, the parties submitted a Revised Joint Stipulation of Facts which acknowledged that Avon's "hearing request only sought to appeal the deficiency at F323." Rev. Jt. Stip. ¶ 22.

[8] The ALJ later denied a motion for summary judgment filed by CMS. Nov. 4, 2014 Ruling Denying Respondent's Motion for Summary Judgment.

From January 6 through January 8, 2015, the ALJ conducted an evidentiary hearing (via videoconference). On the hearing's first day, Avon reiterated that it was "not seeking to reverse or overturn" tag F225 but that it was also "not conceding the facts stated" under that citation. Tr. Vol. 1, at 59. In addition, Avon disclosed that its position regarding F225 was based on the assumption that "the civil monetary penalty . . . arose from the entry of the F323 tag rather than the F225 tag." *Id.* Responding to these assertions, the ALJ stated that it was "incumbent upon me as a matter of law to rule upon both deficiencies [F225 and F323] to the extent that they would affect the amount of the [per-instance civil money penalty]"; that tag F225 was "potentially still in play" for that reason; and that the parties should address that possibility in its post-hearing briefs. *Id.* at 66-69.

On day two of the hearing, January 7, 2015, after CMS had finished the direct examination of its first witness (surveyor Linda Werth), Avon advised the ALJ that it "intend[ed] to move to amend the hearing request to conform to the evidence in this proceeding, to include a challenge to the 225 tag," stating that both deficiencies were "based on a common set of evidence." Tr. Vol. 2, at 5-6. In support of that request, Avon noted that the ALJ had "welcomed evidence as to both deficiencies and then post hearing briefing on the issues." *Id.* at 6. Avon also asserted that CMS would have "a fair opportunity to defend against the F225 issue and introduce evidence on that issue in light of the fact [that] there's a common nexus of evidence underlying both deficiencies." *Id.* That same day (January 7, 2015), Avon filed an "Amended Request for Hearing" that included challenges to both deficiency citations (F225 and F323) from the September 2013 survey. The parties addressed the propriety of Avon's amended hearing request in their post-hearing briefs, and both presented arguments on the merits of the F225 citation.

3. *The ALJ's decision*

As a preliminary matter, the ALJ found that tag F225's factual statements, as set out in the Statement of Deficiencies, "are consistent with an alleged violation of 42 C.F.R. § 483.13(c)(3) only," and that there "are no factual allegations by the surveyors that would support a conclusion" that Avon violated any other provision of section 483.13(c). ALJ Decision at 8 n.9. In other words, the ALJ concluded that any future adjudication of the merits of tag F225 would be limited to deciding whether Avon had violated paragraph (3) of section 483.13(c).

Turning to Avon's amended hearing request, the ALJ found "no regulation or statute that prevents an aggrieved party from amending its request for hearing at any time after filing and before [an ALJ] makes a decision." ALJ Decision at 11. While acknowledging that Avon's initial hearing request did not "specifically challenge" the legal conclusion stated by tag F225, the ALJ found that the amended request was, under the circumstances, a permissible "clarification" and that Avon "[did] not concede the legal issue of whether or

not, if proven, the facts alleged under Tag F225 support a legal conclusion that [it had] violated 42 C.F.R. § 483.13(c)." *Id.* at 12. The ALJ stated that "[a]mending the request for hearing [was] unnecessary" given that "the parties had stipulated that the factual bases for both deficiencies cited by the survey of [Avon]'s facility completed on September 6, 2013, were at issue before me." *Id.* at 7, 12. In addition, the ALJ rejected CMS's contention that Avon needed to show "good cause" to amend its hearing request or to withdraw any "implicit waiver" in that request. *Id.* at 12. Finally, the ALJ held that CMS could not "credibly argue" that it was unprepared to respond to, or was unfairly "prejudiced" by, Avon's amendment because: (1) the noncompliance findings under tags F323 and F225 were based in "substantial part" on common facts – "mostly related to the incidents involving Residents 1 and 2 save for a few observations of the surveyors in the [Statement of Deficiencies] under Tag F323"; (2) Avon's initial hearing request "did not concede the findings of fact that the surveyors allege[d] amounted to a violation of 42 C.F.R. § 483.13(c)"; (3) the parties' pre-hearing joint statement of issues expressly reserved Avon's right to dispute any facts alleged by CMS in support of tag F225 if CMS sought to rely upon those facts to justify the noncompliance finding stated in F323; (4) CMS acknowledged in its pre-hearing brief that it planned to rely upon facts or evidence relevant to F225 in order to defend F323 and support the CMP imposed on Avon; and (5) there was "no dispute that [Avon]'s request for hearing was timely" or that an ALJ "ha[s] jurisdiction to decide all legal issues, including whether or not the facts constitute the regulatory violations that CMS cites as a basis for" imposing a CMP. *Id.* at 10-12. Based on these various findings and circumstances, the ALJ concluded that the "legal question" of "[w]hether or not the facts proved" that Avon had violated 42 C.F.R. § 483.13(c) was "properly before [him] for decision." *Id.* at 7.

The ALJ did *not* go on to decide whether the "facts proved" a violation of either section 483.13(c) or section 483.25(h). Instead, he held that NYDOH, the state survey agency, had violated section 1819(g)(2)(E)(i) of the Act and 42 C.F.R. § 488.314(a)(1) by "permitting a survey team with no registered nurse participating to conduct the survey of [Avon] that was completed on September 6, 2013."[9] ALJ Decision at 1, 13. The ALJ further held that "[b]ecause the survey team . . . was constituted in violation of" the Act and regulations, "the findings and conclusions of the survey team were reached in violation of the Act and regulations, and are therefore, void and may not be the bases for the imposition of enforcement remedies." *Id.* at 13. Based on these holdings, the ALJ concluded "that there is no basis for the imposition of an enforcement remedy and [that] no enforcement remedy is reasonable in this case." *Id.* at 22.

[9] In some parts of his decision, the ALJ states that the absence of a registered nurse on the September 2013 survey team violated section 1819(g)(2)(C). *See, e.g.,* ALJ Decision at 13. The requirement that a survey team include a registered nurse is found in section 1819(g)(2)(E)(i), not section 1819(g)(2)(C).

CMS then filed this appeal, taking issue with the conclusions just outlined. *See* CMS's Request for Review and Brief in Support of Request for Review (RR) at 7-31.

Standard of Review

The standard of review on a disputed factual issue is whether the ALJ decision is supported by substantial evidence in the record as a whole. The standard of review on a disputed issue of law is whether the ALJ decision is erroneous. *See Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program* (Guidelines), http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html. In addition, the Board reviews an allegation of procedural error to determine whether the ALJ committed a "prejudicial error . . . (including an abuse of discretion under the law or applicable regulations)." *Id.*; *Norman Johnson, M.D.*, DAB No. 2779, at 11 (2017).

Discussion

A. *The absence of a registered nurse on the September 2013 survey team does not render CMS's noncompliance determination and remedy invalid.*

The ALJ held that CMS's noncompliance determination and remedy were rendered invalid solely because the survey whose findings triggered CMS's enforcement action did not include a registered nurse in violation of section 1819(g)(2)(E)(i) of the Act. According to CMS, that holding:

- violated 42 C.F.R. § 488.318(b), which states that "[i]nadequate survey performance does not . . . [i]nvalidate adequately documented deficiencies";
- exceeded "limits on [the ALJ's] jurisdiction contained at 42 C.F.R. § 498.3(b)";
- ignored contrary Board case law; and
- "abdicated [the ALJ's] duty to conduct a *de novo* hearing" about whether Avon was in substantial compliance during the September 2013 survey.

RR at 1, 7-16. CMS further contends that, because the September 2013 survey was partly a "complaint survey," or related to the investigation of a complaint, NYDOH had "discretion" to conduct the survey without a registered nurse and thus did not violate section 1819(g)(2)(E)(i). *Id.* at 8-9, 17-24. In addition, CMS contends that the survey team's composition was a "new issue" injected by the ALJ during the January 2015 hearing in violation of 42 C.F.R. §§ 498.56(c) and 498.52. *Id.* at 9 n.4.

Avon defends the ALJ's holding, asserting that "[t]he participation of a registered nurse is a basic and critical element of the survey process, required by the Act and the Secretary's regulations." Response Br. at 21. Avon also argues that section 1819(g)(2)(E)(i) of the Act and 42 C.F.R § 488.314(a)(1) "unambiguously require[ ] registered nurses on all survey teams," regardless of the type of survey. June 5, 2017 Letter from Avon to Presiding Board Member at 2, 4-5.

It is unnecessary for us to decide – and we do not decide – whether section 1819(g)(2)(E)(i) or the regulations in 42 C.F.R. Part 488 required NYDOH to include a registered nurse on the September 2013 survey team, or whether a state survey agency has lawful "discretion" to perform a survey without a registered nurse when the survey has been triggered by a "complaint." Even if NYDOH violated a statutory or regulatory directive concerning the composition of its survey team, the ALJ erred in overturning CMS's noncompliance determination and remedy on that basis.

In the ALJ's (apparent) view, any enforcement action by CMS based on the results of a state agency survey is legally "void" at its inception if the survey was performed in violation of section 1819(g)(2)(E)(i). *See* ALJ Decision at 13 (conclusion 6). The ALJ indicates that his view is rooted in section 1819 of the Act, but we see nothing there to support the proposition that CMS's enforcement authority is conditioned on a state agency's compliance with survey-performance requirements. Subparagraph (A) of section 1819(h)(2) authorizes enforcement action by CMS, including the imposition of CMPs, "if [it] finds, or *pursuant to a recommendation* of the State finds, that a [SNF] no longer meets" a participation requirement. Under that provision, which does not refer or allude to the requirements of subsection (g)(2), CMS makes an independent determination about whether a SNF "no longer meets" the participation requirements based on either its own survey or other investigative findings, or, as in this case, on its review of the facts gathered, and findings made, by the state survey agency. *Cf. Brookshire Health Care Ctr.*, DAB No. 2190, at 18 n.10 (2008) (stating a state agency's determinations do not bind CMS "as the law clearly provides CMS with authority to determine the existence of noncompliance and its scope and severity"). Although section 1819(h)(1) says that, in general, a state agency will make a "recommendation" based on a "survey under subsection (g)(2)," that language does not support, much less compel, a conclusion that subsection (g)(2)'s provisions constrain the enforcement authority granted to the Secretary (and CMS) under subsection (h)(2). And nothing in subsection (h)(2) itself even implies that an enforcement action "pursuant to" a state agency's "recommendation" is unlawful (and therefore invalid) if the recommendation was the product of a survey that failed to meet subsection (g)(2)'s survey performance requirements. Furthermore, section 1819(g)(3)(C) strongly suggests that Congress did not intend to limit CMS's authority in that way. That provision authorizes the Secretary

to "provide for an appropriate remedy" if a state has "failed to perform surveys as required under" subsection (g)(2). That Congress left it to the Secretary to craft "remedies" for survey performance violations implies that section 1819 itself does not recognize such violations as limits on, or as a defense to, an enforcement action brought under subsection (h)(2).

In addition to finding no support in statutory text, the proposition that the validity of CMS's noncompliance determination depends on a state's compliance with survey performance requirements conflicts with regulations in subparts E and F of 42 C.F.R. Part 488 that implement the survey-and-enforcement scheme envisioned by section 1819. As noted, section 488.318(b), found in subpart E of Part 488, states that "inadequate survey performance" does not "[r]elieve a SNF . . . of its obligation to meet all requirements for program participation" or "[i]nvalidate adequately documented deficiencies." Section 488.318(a)(1)(iii) describes inadequate survey performance as including a failure to "[c]onduct surveys in accordance with the requirements of this subpart [E]" – requirements that include the provisions in section 488.314(a) concerning the composition of survey teams.

Also relevant is 42 C.F.R. § 488.320(b). That section authorizes "sanctions" for inadequate survey performance, but those measures do not include "allowing facilities to escape responsibility for supported deficiencies." *Rosewood Care Ctr. of Swansea v. Price*, 868 F.3d 605, at 621 (7th Cir. 2017), *affirming Rosewood Care Ctr. of Swansea*, DAB No. 2721 (2016).

In light of these regulations, the Board has consistently held that allegations of inadequate survey performance are irrelevant to ALJ or Board review of CMS's noncompliance and remedy determinations. *See, e.g., Rosewood,* DAB No. 2721, at 7; *Perry County Nursing Ctr.*, DAB No. 2555, at 6-7 (2014), *aff'd, Perry County Nursing Ctr. v. U.S. Dept. of Health & Human Servs.*, 603 F. App'x 265 (5th Cir. 2015); *Sunshine Haven Lordsburg*, DAB No. 2456, at 21-22 (2012), *aff'd in part and transferred, Sunshine Haven Lordsburg v. U.S. Dept. of Health & Human Servs.*, 742 F.3d 1239 (10th Cir. 2014); *Miss. Care Ctr. of Greenville*, DAB No. 2450, at 18 (2012), *aff'd, Miss. Care Ctr. of Greenville v. U.S. Dept. of Health & Human Servs.*, 517 F. App'x 209 (5th Cir. 2009); *Beechwood Sanitarium*, DAB No. 1824, at 14 (2002). The Board's holdings in this area emphasize that, under the governing administrative appeal regulations, the ultimate issue before an ALJ is not how the state agency performed the survey or what process it followed to reach its conclusions, but "whether the *evidence* as it is *developed before the ALJ* supports" CMS's independent "finding of noncompliance" under the relevant participation requirements. *Sunshine Haven Lordsburg* at 21 (italics added, internal quotation marks omitted); *see also Lifehouse of Riverside Healthcare Ctr.*, DAB No. 2774, at 13 (2017) (noting that the "ultimate question is not whether the survey was

performed correctly but whether the evidence collected at the survey, along with all other evidence presented on appeal, establishes noncompliance"); *Beechwood Sanitarium*, DAB No. 1906, at 44 (2004) (stating that the "appeals process is not intended to review the conduct of the survey but rather to evaluate the evidence of compliance regardless of the procedures by which the evidence was collected"), *modified on other grounds, Beechwood v. Thompson*, 494 F. Supp.2d 181 (W.D.N.Y. 2007); *Perry County Nursing Ctr.* at 6 (rejecting the suggestion that section 1819 of the Act (and the regulations which implement that statue) "require[ ] CMS to establish the legality of a compliance survey as a condition for imposing an enforcement remedy for noncompliance found by that survey"); *Northlake Nursing & Rehab. Ctr.*, DAB No. 2376, at 10 (2011) (stating that the provider "must look outside the federal administrative appeals process to prosecute any complaint it may have about" alleged misconduct by the state survey agency). An ALJ decides the noncompliance issue de novo – that is, without deference to CMS's or the state survey agency's factual findings or legal conclusions and based on her own evaluation of the credibility of the submitted evidence. *N.C. State Veterans Nursing Home, Salisbury*, DAB No. 2256, at 24 (2009). Because the ALJ reviews CMS's noncompliance determination de novo, an allegation that the state survey agency used improper methods or personnel to make its findings and conclusions is irrelevant, except to the extent that the state agency's survey practices undermine the credibility of evidence that CMS identifies as supporting the noncompliance determination. *Cf. Del Rosa Villa*, DAB No. 2458, at 20 (2012) ("Allegations of errors or irregularities in the survey and enforcement process will not upset a determination of noncompliance when reliable evidence submitted during the ALJ proceeding (such as the SNF's own records) supports that determination."), *aff'd*, *Del Rosa Villa v. Sebelius*, 456 F. App'x 666 (9th Cir. 2013); *id.* at 20 n.10 (stating that allegation of survey impropriety "might be relevant if it implicated a SNF's due process rights or called into question the authenticity of documentary evidence in the record"); *Aspen Grove Home Health*, DAB No. 2275, at 24 (2009) (holding, in an appeal by a home health agency challenging the termination of its Medicare participation, that allegations of "surveyor bias" are immaterial when "objective evidence," such as a provider's own records, "would correct any alleged bias in a surveyor's evaluation of that evidence").

The Board case law is consistent with CMS's stated intent in promulgating the nursing home survey-and-enforcement regulations and with Congress's overriding goal of safeguarding resident health and safety. In the 1994 rulemaking preamble to the Part 488 regulations, CMS (then known as the Health Care Financing Administration) made it clear, in a discussion of section 488.318(b), that a "flawed" survey does not invalidate remedies for noncompliance whose existence has been established by competent evidence. In response to commenters who suggested that "any findings or remedies resulting from inadequate survey performance should be rescinded," CMS stated that "a

flawed survey can still validly document one or many deficiencies[,]" and a facility "is still liable for sanctions where deficiencies, in fact, exist." Final Rule, *Medicare and Medicaid Programs; Survey, Certification, and Enforcement of Skilled Nursing Facilities and Nursing Facilities*, 59 Fed. Reg. 56,116, 46,147-46,148 (Nov. 10, 1994).

CMS expressed a similar view in the 1994 preamble's discussion of section 488.305(b), which states that a survey agency's "failure to follow the procedures" set out in section 488.305(a) for a standard survey "will not invalidate otherwise legitimate determinations that a facility's deficiencies exist." Public comments questioned whether section 488.305(b) was consistent with congressional intent and proposed that the Part 488 regulations allow SNFs to appeal survey agencies' failures to follow established protocols for standard surveys. In response, CMS took the position that section 1819(g)(2)(C) – in particular, that provision's statement that CMS's "failure . . . to develop, test or validate such a protocol [for standard surveys] will not relieve any State or the Secretary of the responsibility to conduct surveys – showed that Congress "intended for survey results to be binding even when surveys were conducted in the absence of a formal protocol" and that Congress "view[ed] the substance of survey findings to be of greater importance than the process used to identify them." 59 Fed. Reg. at 56,134. CMS further explained:

> An appeal of a deficiency based on surveyor noncompliance with the established protocol would be inconsistent with this position [on congressional intent], and as a result, we [CMS] will not offer facilities an appeal on these grounds. *In particular, we wish to avoid situations where otherwise well documented deficiencies are subject to challenge, and potentially invalidated, simply because a surveyor did not follow every last detail of the survey protocol*. We believe this would be surrendering all substance to form and would clearly thwart Congressional will. Moreover, since the source of binding requirements on facilities is not in the survey protocol, but in the Act and regulations, the ultimate, and proper, test of facility noncompliance will not rest on whether the survey protocol was rigorously followed, but on whether a requirement of the Act or the regulations has been violated.
>
> * * *
>
> We recognize that protocols and guidelines are necessary to promote consistent survey practice. However, whether or not a surveyor follows protocols must be subordinate in importance to whether or not a facility meets Federal participation requirements. Violations must be recognized and remedied appropriately if resident interests are to be protected and integrity is to remain in the enforcement system.

Id. (italics added). The Board has found this rulemaking commentary to be a "reasonable interpretation" of section 1819 (*Golden State Manor & Rehab. Ctr.*, DAB No. 1597, at 18-19 (1996)), and we see nothing in the ALJ's reasoning that persuades us otherwise.

While he acknowledged section 488.318(b), the ALJ noted that the regulation "does not authorize CMS to impose an enforcement remedy based on an unlawful survey." ALJ Decision at 20. That observation ignores the substance of the laws establishing CMS's enforcement authority. As discussed, section 1819(h)(2) of the Act authorizes CMS to enforce compliance with Medicare based on a state's "recommendation" of enforcement action, without regard to whether the survey that formed the basis for recommendation complied with survey-performance requirements in section 1819(g)(2). Similarly, 42 C.F.R. Part 488, subpart F, which implements section 1819(h), authorizes CMS to impose remedies based on "*noncompliance found* during surveys" (italics added) – that is to say, based on a review of the survey's substantive results, not on an assessment of how the state agency carried out the survey. 42 C.F.R. § 488.402(b).

For its part, Avon concedes that "'[i]nadequate survey performance does not . . . invalidate adequately documented deficiencies.'" Response Br. at 18 (quoting 42 C.F.R. § 488.318(b)). However, Avon argues that "a survey team lacking a registered nurse cannot adequately document deficiencies, as illustrated by the record below, which is replete with speculation by dietician surveyors tasked well beyond their expertise," and that "[w]ithout the participation of a registered nurse, *the [September 2013] survey team lacked the crucial foundation* for finding compliance or noncompliance, in contravention of the mandate for such expertise set out by Congress and the Secretary." *Id.* at 18-19 (italics added).

These points do not change the legal equation. It is important to reemphasize that a state agency's survey findings constitute *recommendations* to CMS. 42 C.F.R. §§ 488.11, 488.12. CMS makes its own determination of noncompliance, and decides what enforcement action to take, based on the survey's findings. *Lifehouse of Riverside Healthcare Ctr.* at 12; *Beechwood Sanitarium*, DAB No. 1906, at 28-31. Consequently, the issue here is not whether *the state survey agency*'s findings are documented and supportable but whether *CMS* has substantiated *its* determination of noncompliance based on the evidence submitted during the administrative appeal. *Beechwood Sanitarium*, DAB No. 1906, at 30 (stating that the "question before [an] ALJ [is] what the admitted facts and the evidence presented by CMS and [the SNF] as to challenged facts proved about the noncompliance findings leading to the remedies proposed," and that the content or quality of any pre-hearing decision making process is "irrelevant"). Objections about proper "foundation" and surveyor competence or expertise may, of course, be raised in arguing about the proper weight to give the evidence that CMS relies upon during an administrative appeal, but apart from that analytical context, such objections are legally insufficient grounds for overturning a noncompliance determination.

Avon suggests that section 488.318(b) is inapplicable because the participation of a registered nurse is a "critical element" for any survey and not merely "inadequate survey performance." Response Br. at 20. As we noted earlier, however, section 488.318(a) describes inadequate survey performance as encompassing a failure to perform a survey in accordance with survey-team-composition requirements.

Finally, Avon asserts that the "Board has recognized a distinction between missteps by surveyors and more fundamental failings undermining the basic building blocks of a survey." Response Br. at 20. Board decisions recognize no such distinction for purposes of section 488.318(b). Avon cites *Hillman Rehabilitation Center*, DAB No. 1663 (1998), but the dispute in *Hillman* was not whether the survey team was properly constituted but whether a survey of the SNF's compliance status had actually occurred. The Board rejected the claim that the visit at issue in Hillman did not constitute a survey and held that, in any case, the deficiency findings would not be invalid ab initio but the provider would simply have the opportunity to provide contrary evidence in the de novo hearing process. *Hillman*, DAB No. 1663, at 6-7. Furthermore, *Hillman* does not cite, construe, or apply section 488.318(b).

In sum, the ALJ erroneously concluded that a violation of statutory and regulatory requirements concerning the composition of its September 2013 survey team rendered CMS's noncompliance determination invalid. Instead of focusing on how the survey was performed, the ALJ should have decided whether the evidence presented by the parties at the hearing substantiated CMS's noncompliance determination and, if necessary, rule on any claim by Avon that the CMP amount was unreasonable.

B. *The ALJ committed no prejudicial error or abuse of discretion by holding that the section 483.13(c) issue was properly before him.*

As noted in the background, on the second day of the evidentiary hearing, Avon amended its request for hearing to include a challenge to deficiency tag F225, the citation of noncompliance with 42 C.F.R. § 483.13(c). The ALJ did not disallow the amendment, but characterized it as "unnecessary" and held that the merits of F225 were, for a variety of reasons, properly before him for decision (the latter being a point the ALJ already raised on the first day of the hearing). *See* ALJ Decision at 7-13.

CMS contends that 42 C.F.R. §§ 498.40(c)(2) and 498.70(c) barred the amendment because Avon did not file a written request to extend the 60-day filing deadline for hearing requests (as specified in 42 C.F.R. § 498.40(a)(2)) or show "good cause" for such an extension. RR at 24-28. CMS further contends that given the absence of a good-cause showing, Avon should be found to have "waived" its right to challenge the legal conclusion that it was not in substantial compliance with section 483.13(c). *Id.* at 28.

Sections 498.40(c) or 498.70(c) are not controlling in these circumstances. Those provisions authorize an ALJ, for "good cause" shown, to extend the time for filing a hearing request beyond the 60 days allowed under section 498.40(a)(2), and to dismiss an untimely hearing request for which the 60-day filing period specified in section 498.40(a)(2) has not been extended. Here, there is no question about the timeliness of Avon's hearing request, as it was filed, as section 498.40(a)(2) requires, "within 60 days from receipt of the notice" of CMS's "initial . . . . determination[.]" Given that the parties' pre-hearing stipulations indicate that Avon did not concede the truth of any facts supporting the claimed violation of section 483.13(c), we agree with the ALJ that Avon's amendment did not amount to an appeal of a new or distinct initial determination but merely attempted to "clarify" the scope of Avon's challenge to the initial determination already under appeal. *See* ALJ Decision at 12 (stating that the amendment "simply clarifies" that Avon did not concede that facts established at the hearing "support a legal conclusion that [it] violated 42 C.F.R. § 483.13(c)"). Hence, the more relevant, but not necessarily dispositive, regulation is section 498.40(b), which spells out content requirements for a hearing request – requirements whose "central purpose" is to "focus[ ] the scope of the dispute." *Alden Nursing Ctr. – Morrow*, DAB No. 1825, at 11 (2002). The Board has held that a proper resolution of issues concerning a hearing request's content is not "bounded" by any good-cause requirement but is a matter of discretion which "must be exercised with a view to achieving the ends of the content requirements." *Id.* at 8-9.

We find no abuse of discretion, or any legal error, by the ALJ in his handling of Avon's amended hearing request. Although Avon stipulated before the hearing that it would not contest the legal conclusion expressed by tag F225, Avon's comments at the outset of the hearing indicated that this narrow concession reflected a misunderstanding that the CMP amount was based only on the deficiency described under tag F323. *See* Tr. Vol. 1, at 59. In light of those comments, and the possibility that contested facts supporting tag F225 might be relevant in judging the reasonableness of the CMP amount, the ALJ thought it "incumbent upon [him] to as a matter of law to rule upon both deficiencies [tags F225 and F323] to the extent that they would affect the amount of the PICMP . . . ." *Id.* at 66. In effect, the ALJ signaled that he intended to treat the legal issue presented by tag F225 as contested, despite the parties' contrary pre-hearing stipulation.

That was not a legal error: an ALJ is not bound by a party's stipulation or concession. Furthermore, the ALJ's stated reason for disregarding the stipulation – the perceived need to ensure that any dispute about the reasonableness of the CMP was fairly adjudicated – was not unreasonable. We have said that while the administrative review process under 42 C.F.R. Part 498 is "adversarial," its ultimate objective is to produce factually and legally accurate decisions in disputes affecting facilities that serve vulnerable residents. *Alden Nursing Ctr.* at 12.

The timing of the ALJ's announcement that he considered tag F225 to be "in play" created the potential for unfair prejudice to CMS. To minimize that potential, the better practice would have been for the ALJ to raise his questions or concerns about the scope and potential effect of the parties' stipulations at a prehearing conference. Although no prehearing conference was held in this case, the ALJ reasonably determined that allowing Avon to contest the legal conclusion expressed under tag F225 did not, in fact, unfairly prejudice CMS given that: (1) tags F225 and F323 were based in substantial part on common facts; (2) CMS had indicated in pre-hearing submissions that it intended to rely on facts supporting tag F225 to support the conclusion under tag F323[10]; (3) CMS knew before it questioned its first witness that the ALJ considered F225 to be "in play" and actually questioned its witnesses, and Avon's as well, about facts relevant to that deficiency citation[11]; and (4) CMS had a full opportunity to argue the merits of F225 in its post-hearing briefs, one of which asserts that "uncontested facts in the record establish a *prima facie* case" that Avon had violated section 483.13(c). Post-Hearing Reply Br. of CMS, dated May 4, 2015, at 24.

CMS contends that the belated amendment to Avon's hearing request "prevent[ed] [it] from identifying and presenting a full case in support of [Avon]'s noncompliance under F225." RR at 29. "Had [it] been aware, prior to the hearing, that F225 was 'in play,'" says CMS, it "would have identified additional evidence in support of [Avon's] noncompliance that was not necessarily identified in the Statement of Deficiencies, as it would have had the right to do so under DAB caselaw." *Id.* However, CMS does not specify what additional documents or witness testimony it might have offered, and it did not ask the ALJ to extend or reconvene the hearing for that purpose or tell us that it would make such a request in the event the case is remanded to the ALJ.[12]

[10] CMS's Witness List and Summaries of Proposed Testimony," dated April 6, 2014 (CRD Docket No. C-14-549).

[11] *See,e.g.*, Tr. Vol. 1, at 95-96 (asking for surveyor's opinion about whether the investigation of an incident was "thorough"); Tr. Vol. 2, at 68-75, 110-11, 137-38, 211-12, 228-31 (eliciting testimony regarding: the nature of the incidents triggering Avon's purported obligations under section 483.13(c); the adequacy of Avon's investigation of accidents involving Residents 1 and 2; and the timing of any reporting of the accidents and investigation results to Avon's administrator).

[12] In footnote 15 on page 31 of its request for review, CMS asks the Board, should it decide that the ALJ did not abuse his discretion, to direct the ALJ to "consider the additional bases for noncompliance" under paragraphs (2) and (4) of section 483.13(c) but does not ask the Board to direct the ALJ to permit the submission of additional evidence relevant to tag F225.

CMS emphasizes that Avon did not give notice of its intent to amend the hearing request until after it completed its direct examination of its first witness, Surveyor Werth. Reply Br. at 13. But the ALJ indicated that he would grant CMS leeway in questioning Werth about F225 on redirect examination (*see* Tr. Vol. 2, at 13), and CMS does not identify any specific instances in which the ALJ cut off questions seeking relevant information from Werth or from any other witness.

C. *The ALJ incompletely defined the legal issues presented by tag F225.*

Regarding tag F225's merits, CMS contends that the ALJ "improperly limited the legal question before him to whether there was a violation of 42 C.F.R. § 483.13(c)(3), even though CMS provided notice that it was also asserting [Avon]'s noncompliance with 42 C.F.R. §§ 483.13(c)(2) and (c)(4)." RR at 2, 24-25, 30 (internal quotation marks omitted).

Paragraph (2) of section 483.13(c) requires a SNF to "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)." Paragraph (3) of that section states in relevant part that a SNF "must have evidence that ***all alleged violations are thoroughly investigated*** . . . ." And paragraph (4) requires the SNF to ***report the "results of all investigations*** . . . 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 . . . ." 42 C.F.R. § 483.13(c)(2)-(4) (italics and emphasis added).

The ALJ found that CMS's "allegations" implicated only paragraph (3) of section 483.13(c). That statement is inaccurate. In its post hearing brief, CMS asserted that:

- "[Avon] did not conduct a thorough investigation of the root cause of Resident #1 and #2's incidents, including failing to conduct interviews of the kitchen staff or to investigate the temperatures of the soup served to residents";

- "[Avon] did not immediately notify the administrator of either incidents [sic] involving Residents #1 and #2"; and

- "[Avon] did not complete or report the results of the investigation into Resident #2's incident within five working days to the administrator."

April 2, 2015 Post-Hearing Br. of CMS at 26. In the ensuing paragraphs, CMS argued that these allegations are substantiated by the record and establish that Avon was not in substantial compliance with paragraphs (2), (3), and (4) of section 483.13(c). *Id.* (asserting, in the section heading, that Avon "Was Not in Substantial Compliance With 42 C.F.R. § 483.13(c)(2)-(4)"). We conclude that CMS's case before the ALJ alleged violations of paragraphs (2) and (4) – as well as paragraph (3) – of section 483.13(c). The ALJ should therefore decide on remand whether or not the evidence proves those allegations.

The ALJ suggested that CMS was not allowed to pursue claims that Avon violated paragraphs (2) and (4) because the Statement of Deficiencies did not cite facts to support them. ALJ Decision at 8 n.9. But the Board has long held that CMS's presentation before an ALJ is not limited to facts asserted in the Statement of Deficiencies. "CMS may defend a noncompliance determination based on facts, evidence, or reasoning not specified in the Statement of Deficiencies, provided . . . that due process requirements – adequate notice and a meaningful opportunity to be heard – are satisfied." *Golden Living Ctr. – Superior*, DAB No. 2768, at 8 n.4 (2017).

Conclusion

For the reasons discussed, we vacate the ALJ's holding that a violation of section 1819(g)(2)(E)(i) by the state survey agency invalidated CMS's enforcement action against Avon and remand the case to the ALJ. On remand, the ALJ should issue a decision addressing, at minimum, whether Avon was in substantial compliance with 42 C.F.R. §§ 483.13(c)(2)-(4) and 483.25(h) during the relevant period. The ALJ may take any other action not inconsistent with this decision.

/s/
Christopher S. Randolph

/s/
Constance B. Tobias

/s/
Leslie A. Sussan
Presiding Board Member