

Department of Health and Human Services  
DEPARTMENTAL APPEALS BOARD  
Appellate Division

In the Case of:	)	DATE: November 17, 2009
Britthaven of Chapel Hill,	)	
Petitioner,	)	Civil Remedies CR1942
	)	App. Div. Docket No. A-09-98
	)	
- v. -	)	Decision No. 2284
	)	
Centers for Medicare and	)	
Medicaid Services	)	
	)	

FINAL DECISION ON REVIEW OF  
ADMINISTRATIVE LAW JUDGE DECISION

Petitioner Britthaven of Chapel Hill (Petitioner) requests review of the April 24, 2009 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes finding that Petitioner was not in substantial compliance with Medicare participation requirements for long-term care facilities from September 30, 2007 through January 1, 2008, that Petitioner's noncompliance posed immediate jeopardy to resident health and safety from September 30 through November 28, 2007 and that the civil money penalties imposed by the Centers for Medicare and Medicaid Services (CMS) for that noncompliance, \$3,550 per day for the jeopardy period and \$100 per day thereafter, are reasonable. Britthaven of Chapel Hill, DAB CR1942 (2009) (ALJ Decision). CMS's determinations of noncompliance, and immediate jeopardy, involved the quality of care requirement for long-term care facilities at 42 C.F.R. § 483.25 and the accident prevention requirement at 42 C.F.R. § 483.25(h).

Petitioner requests review "solely of the narrow legal issue as to whether CMS has the authority to disregard the findings and conclusion of an IDR [informal dispute resolution] panel without having any other independent findings on which to rely for its decision." Request for Review (RR) at 5. Petitioner does not appeal the ALJ's findings of fact or her conclusions that Petitioner had not shown CMS's determination of immediate jeopardy to be "clearly erroneous" and that the CMPs imposed by CMS were reasonable.<sup>1</sup> ALJ Decision at 10-13. Accordingly, we provide below a brief summary of key undisputed facts only to provide background for the single legal issue on appeal, and summarily uphold the ALJ's findings of fact (FFs) and unappealed conclusions of law (CLs).<sup>2</sup> We conclude that while the ALJ did not need to reach the legal issue appealed here, there is no error in her conclusion that CMS had the authority to reject the IDR results.

#### Factual Background

CMS made its determinations of noncompliance (and immediate jeopardy) with sections 483.25 and 483.25(h) following surveys completed by the North Carolina Department of Health and Human Services (State Agency) at Petitioner's facility on October 19, 2007 (the October survey) and November 29, 2007 (the November survey). ALJ Decision at 2, citing CMS Exhibits (Exs.) 1, 2. The State Agency reported its survey findings to CMS (and to Petitioner) on a statement of deficiencies (SOD) for each survey. CMS Ex. 1 (SOD for the November survey); P. Ex. 4 (SOD for the October survey). CMS based its determinations of

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<sup>1</sup> The regulations provide that CMS's determination of immediate jeopardy must be upheld unless it is "clearly erroneous." 42 C.F.R. § 498.60(c)(2). As the ALJ stated, the Board has held that this rule presumes that CMS's determination is correct and gives the facility the burden to demonstrate that it is clearly erroneous. ALJ Decision at 10-11. See e.g. Liberty Commons Nursing and Rehab Center - Johnston, DAB No. 2031 (2006), aff'd, Liberty Commons Nursing and Rehab Center - Johnston v. Leavitt, 241 F. App'x 76 (4<sup>th</sup> Cir. 2007). A determination as to whether a CMP is reasonable is made by applying the factors listed in 42 C.F.R. § 488.438(f).

<sup>2</sup> Our decision to uphold the ALJ's FFs and CLs includes all of the FFs and CLs stated throughout the ALJ Decision, not just those set forth in the headings.

noncompliance and immediate jeopardy, as well as its decision as to which remedies to impose, on the findings of noncompliance cited on the SOD for the November survey, which CMS determined - and so notified Petitioner - superseded the findings on the SOD for the October survey. CMS Ex. 1, CMS Ex. 14.<sup>3</sup> Only the findings of noncompliance on the November survey are at issue in this appeal.

The findings of noncompliance on both surveys involved the same incident affecting one resident, a 95-year-old woman who suffered from Alzheimer's dementia, osteoarthritis, osteoporosis of the spine and scoliosis and had a history of compression fractures of her thoracic spine and fractures of her right hip and upper left arm.<sup>4</sup> ALJ Decision at 4. The resident's care plan and care guide provided that R12 was to be transferred by means of a Viking mechanical lift. *Id.* Notwithstanding these instructions, on September 30, 2007, a certified nursing assistant (CNA) transferred the resident from a chair to her bed by manually lifting her, picking her up under her arms and legs. *Id.* at 5. During the transfer, the resident screamed and scratched the CNA. The CNA later reported the scratches, but apparently not the inappropriate transfer, to an unidentified nurse. *Id.* R12 suffered bilateral knee fractures that a facility manager concluded upon investigation resulted from the inappropriate transfer and that went undetected and untreated for two weeks. *Id.* at 4, 5. The ALJ concluded that Petitioner had failed to comply with the quality of care and accident prevention requirements "because staff did not follow the resident care plan instructions for transfers, did not timely report an inappropriate transfer, did not adequately address [R12's] increased pain, bruising, and abnormal blood test

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<sup>3</sup> The October survey was a complaint survey; the November survey was an extended survey. On the complaint survey, the State Agency cited noncompliance only under 42 C.F.R. § 483.25(h) and cited that noncompliance at a scope and severity level of "G". On the extended survey, the State Agency cited noncompliance under 42 C.F.R. §§ 483.25 and 483.25(h) and cited the noncompliance with both requirements at a scope and severity level of immediate jeopardy. Compare P. Ex. 4 with CMS Ex. 1.

<sup>4</sup> The resident was identified as Resident No. 15 on the October survey and Resident No. 12 on the November survey. Hereafter we refer to the resident as R.12 since the November survey is the only relevant survey for purposes of this appeal.

results, and delayed investigation of those changes in R12's condition." Id. at 4.

In addition to requesting a hearing before an ALJ, Petitioner disputed the findings of noncompliance on the November survey in an informal dispute resolution (IDR) proceeding before the state agency.<sup>5</sup> Id. at 13. Based on the IDR proceeding, the State Agency eliminated the determination of noncompliance with section 483.25, reduced the scope and severity of the noncompliance with section 483.25(h) from immediate jeopardy to level D (an isolated deficiency posing the risk of more than minimal harm but not actual harm) and prepared a revised SOD reflecting those changes. However, in two letters, dated July 2 and July 11, 2008, respectively, CMS informed Petitioner that it rejected the IDR decision and the revised SOD and reiterated its determination that Petitioner was noncompliant with sections 483.25 and 483.25(h) and that its noncompliance with both requirements constituted immediate jeopardy. Id., citing CMS Exs. 11, 14. With the July 11, 2008 letter, CMS enclosed "for the sake of clarity" an additional copy of the unrevised SOD upon which CMS based its determination. Id., citing CMS Exs. 1, 11, 14.

#### Standard of Review

The applicable standard of review on a disputed issue of law is whether the ALJ decision is erroneous. *Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs*, <http://www.hhs.gov/dab/guidelines/prov.html> (Board Guidelines).

#### Discussion

##### I. The ALJ did not need to reach the issue of CMS's authority.

Below we explain why we find no error in the ALJ's conclusion that CMS had the authority to reject the IDR results. However,

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<sup>5</sup> Although the ALJ Decision does not expressly state that the November survey findings were at issue in the IDR proceeding, it is clear from the ALJ's reference to findings of noncompliance with two federal requirements, and the CMS letters in CMS exhibits 11 and 14, that those were the findings at issue.

as a threshold matter, we note that Petitioner conceded during a pre-hearing conference "that, since [the ALJ's] review is de novo, the [IDR] panel conclusions would be irrelevant." Pre-hearing Conference Order (Order) (October 1, 2008) at 2; see also ALJ Decision at 2 (citing Order and 42 C.F.R. § 498.50(b) - giving parties 10 days to object to a pre-hearing order - and noting that Petitioner did not object).<sup>6</sup> Notwithstanding this concession, the ALJ went on to address the issue of CMS's authority, explaining that she was doing so because "in its subsequent submissions, Petitioner appears to have changed its position. Without citing to any portion of the excluded documents [the IDR materials], Petitioner argues that the IDR determination 'is the final decision in this case.'" ALJ Decision at 3 (citations omitted).<sup>7</sup> The ALJ then concluded that CMS had the authority to reject the IDR findings.

The ALJ was not required to reach the issue of CMS's authority to reject the IDR results given Petitioner's pre-hearing concession that the IDR results were irrelevant in light of the ALJ's de novo review authority.<sup>8</sup> Implicit in Petitioner's

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<sup>6</sup> Petitioner made its concession in response to CMS's objection to Petitioner's proposed exhibit 13, the conclusions of the IDR panel, and the IDR materials in Petitioner's proposed exhibit 12. Id. Following this concession, the ALJ declined to admit Petitioner Exhibit 13 and admitted only the pages (64-71) of Petitioner Exhibit 12 to which the parties had agreed. Id.

<sup>7</sup> On appeal, Petitioner continues to discuss, and even quote, the IDR documents (without citation) even though they are not in the record and Petitioner does not allege that the ALJ erred in excluding the exhibits containing these documents. CMS's letters acknowledging, and rejecting, the IDR panel results are in the record. CMS Exs. 11, 14. However, the absence of the IDR materials themselves leaves us without any direct evidence of the substance of the IDR panel's actions, the reasons for those actions or the panel's actual revisions to the SOD. Thus, even if the IDR results could be relevant, Petitioner has not established an adequate record for the ALJ or the Board to consider those results.

<sup>8</sup> Petitioner does not dispute here that it made the concession; neither does Petitioner argue that it wrongly conceded the ALJ's authority to make a fresh determination, based on the facts presented at the hearing, as to whether

concession is a conclusion that CMS's authority to reject those findings was also irrelevant. The ALJ was not reviewing CMS's conclusions about the IDR findings but, rather, was reviewing the facts before her on the record to determine de novo whether Petitioner was in substantial compliance. As the Board has stated, an ALJ hearing is not a "review of how or why CMS decided to impose remedies," nor is it "restricted to the facts or evidence that were available to CMS when it made its decision." Beechwood Sanitarium, DAB No. 1906, at 28-29 (2004), motions granted in part and denied in part, Beechwood v. Thompson, 494 F. Supp.2d 181 (W.D.N.Y. 2007). Rather, the ALJ hearing provides a fresh look by a neutral decision-maker at the legal and factual basis for the deficiency findings underlying the remedies. Id. Accord Sunbridge Care and Rehabilitation for Pembroke, DAB No. 2170, at 26-27 (2008) (holding that ALJ review is de novo), aff'd, Sunbridge Care and Rehabilitation for Pembroke v. Leavitt, 2009 WL 2189776 (4<sup>th</sup> Cir. 2009). Since Petitioner does not dispute the ALJ's findings of noncompliance with the two regulatory requirements at issue in the hearing, or the ALJ's authority to make those findings regardless of what CMS found, the ALJ did not need to reach Petitioner's challenge to CMS's authority to reject IDR determinations. Nonetheless, because the ALJ went on to address that legal issue, we have fully considered Petitioner's arguments before us on it and, as discussed below, find no error in the ALJ's conclusion that CMS was authorized to reject the IDR findings.

II. The ALJ did not err in concluding that CMS was authorized to reject the IDR panel's findings.

A. CMS's findings of noncompliance and immediate jeopardy prevail over contrary findings by the State.

The ALJ based her determination that CMS was authorized to reject the IDR results largely on her conclusion that the statutes and regulations do not permit the State's finding of compliance to override CMS's finding of noncompliance. ALJ Decision at 14. The ALJ is correct. Where, as here, a state surveys skilled nursing facilities for compliance with Medicare

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Petitioner was in substantial compliance. In any event, as discussed below, our decisions establish that ALJ review in Part 498 cases is de novo.

requirements, the State merely recommends findings of compliance (or noncompliance); CMS ultimately determines whether the facility is in substantial compliance and whether immediate jeopardy exists. Act, §§ 1819(h)(1),(2); see also Act, § 1919(h)(3)(B) (authorizing Secretary to find a (non-state-operated) nursing facility participating in Medicaid program noncompliant, to determine immediate jeopardy and impose remedies), § 1919(g)(3)(A) (stating that Secretary's noncompliance findings in validation surveys of Medicaid nursing facilities supersede state's findings of compliance) and 42 C.F.R. § 488.452(a)(2) (findings of noncompliance - whether made by the state or CMS - take precedence over findings of compliance when a facility participates in both the Medicare and Medicaid programs or is a non-state operated nursing facility).<sup>9</sup> Cf. Lake Mary Health Care, DAB No. 2081, at 7 (2007) (relying upon these statutes and regulations in rejecting the facility's arguments that the state agency's findings on noncompliance or scope and severity should control).

Petitioner does not directly dispute the authorities relied on by the ALJ and this Board. Indeed, Petitioner concedes that "it is generally true as a matter of law that CMS's findings and decisions take preceden[ce] over the findings of the state survey agency . . . ." RR at 9. However, Petitioner asserts that "neither this statement of law nor the *Lake Mary* case is applicable to the unique facts of the current case." Id. Petitioner notes that CMS's rejection of the state agency's scope and severity determination in Lake Mary did not occur in the context of IDR and, thus, did not directly implicate the IDR regulation at 42 C.F.R. § 488.331(c). Petitioner points to language in section 488.331(c) that states in relevant part, "[i]f a provider is subsequently successful, during the informal dispute resolution process, at demonstrating that deficiencies should not have been cited, the deficiencies are removed from the statement of deficiencies and any enforcement actions imposed solely as a result of those cited deficiencies are rescinded." Petitioner asserts that this regulatory language is "clear and mandatory" and requires removal of the deficiency and any associated remedy.<sup>10</sup> P. Br. at 7, 10.

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<sup>9</sup> "Nursing facility" means a Medicaid facility. "Skilled nursing facility" means a Medicare facility. 42 C.F.R. § 488.301.

<sup>10</sup> We note that Petitioner's brief cites this regulation as  
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While Petitioner is correct that Lake Mary did not involve rejection of IDR results, Petitioner has not explained why the Board's analysis there that the statutes and regulations (the same ones on which we rely here) require a conclusion that CMS's determination of noncompliance prevails over the state agency's determination of compliance would not apply in an IDR context as well. A state agency determination of compliance is a determination of compliance by the state agency regardless of whether it is based on state IDR results or on survey findings not challenged or changed in a state IDR process. Thus, either with or without state IDR involvement, CMS's determination of noncompliance would prevail under the statute and regulations.

Furthermore, nothing in section 488.331 provides any basis for concluding that CMS is bound by state agency revision of survey results or the SOD based on IDR. Section 488.331(a), which establishes the opportunity to refute survey findings, provides as follows:

*Opportunity to refute survey findings.* (1) For non-Federal surveys, the State must offer a facility an informal opportunity, at the facility's request, to dispute survey findings upon the facility's receipt of the official statement of deficiencies. (2) For Federal surveys, CMS offers a facility an informal opportunity, at the facility's request, to dispute survey findings upon the facility's receipt of the official statement of deficiencies.

This language clearly divides state and federal survey opportunities so that the regulation, by its own terms, applies to CMS only when CMS conducts a federal survey, which it did not do here. In light of the divided opportunities in subsection (a), we read subsection (c) as meaning to describe the effects of state IDR on state agencies and state remedies and the effects of federal IDR on CMS, not as implying that CMS is bound by the results of state IDR proceedings.

Moreover, the language of 42 C.F.R. § 488.331 must be read in the context of, and in harmony with, the statutes and

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section 488.311(c) rather than section 488.331(c), but the language quoted appears in the latter section, not the former.



regulations, discussed above, under which CMS's determination of noncompliance prevails over a state agency's finding of compliance. Cf. St. Anthony Hospital, DAB No. 1728 at 10 (2000), aff'd, St. Anthony Hospital v. Dep't of Health & Human Servs., 309 F.3d 680 (10<sup>th</sup> Cir. 2002) (under the "whole statute" rule of interpretation, sections of a statute should not be read in isolation but should be construed in connection with each other, so as to provide a harmonious whole). So read, we find no basis for concluding that 42 C.F.R. § 488.331(c) can be found to override those authorities.

Moreover, the Board has already held that that "[t]he revised Statement of Deficiencies issued following completion of the State IDR process does not constitute a 'reconsideration or revised determination' within the meaning of 42 C.F.R. § 498.5 and creates no new appeal rights." Concourse Nursing Home, DAB No. 1856, at 5 (2002); cf. Cary Health & Rehabilitation Center, DAB No. 1771, at 28 (2001) (being separate from and in addition to the appeal rights provided to facilities under federal regulations, the state IDR process could not toll the federal appeals process). Since a revised SOD issued by a state agency based on a state IDR proceeding is not a reconsidered or revised determination that would trigger appeal rights under Part 498, Petitioner's suggestion that the IDR determination and revised SOD here somehow became the final decision for appeal in this case, notwithstanding CMS's rejection of both, lacks merit. See ALJ Decision at 3. CMS had authority to reject the state IDR results and rely on the unrevised SOD for the November survey (CMS Ex. 1) in its Part 498 "initial determination" that is at issue in this case. See 42 C.F.R. § 498.3(b)(13) (providing for review of CMS's initial determination regarding a "finding of noncompliance that results in the imposition of a remedy specified in § 488.406 . . . .").

B. The Ridgely case relied upon by Petitioner is neither binding nor apposite.

Petitioner asserts that CMS "simply ignored the finding of the IDR panel and reimposed a J level deficiency, without any indication of an independent review, investigation or explanation as to why the finding of the IDR panel was erroneous." RR at 12. Petitioner cites Ridgely Care & Rehabilitation Center, DAB CR1258, at 5 (2004), as authority for the proposition that CMS cannot do this. The ALJ rejected Petitioner's reliance on Ridgely, and so do we. ALJ Decision at 14. We note at the outset that neither the Board nor other ALJs

are bound by an ALJ decision. Moreover, the ALJ in Ridgely decided that case based on revisions made following the IDR only because CMS offered no evidence that it had reviewed and rejected those results, or even considered them, not because he concluded that CMS did not have authority to reject those results. DAB CR1258, at 6. Indeed, the ALJ expressly recognized "that CMS's findings of noncompliance take precedence where it and the State disagree" and stated that "CMS could have, but did not, overrule the IDR findings." Id. at 2, 5. Petitioner's citation to Ridgely as authority for the proposition that CMS cannot reject IDR results is further undercut by Petitioner's own concession in the same section of its request for review that "[i]t is a fairly settled matter of law that CMS has the authority to reject the recommendation of the state survey agency and impose a remedy of its own choosing." RR at 11, citing 42 C.F.R. § 488.452(a)(2).

Ridgely also is inapposite because in that case, CMS ignored the IDR results. Here, CMS did not ignore the IDR results but affirmatively rejected them, as well as the associated revised SOD. See ALJ Decision at 14; CMS Exs. 11, 14. Indeed, CMS in this case twice notified Petitioner that it was rejecting the IDR results and the revised SOD, and that CMS continued to base its finding of noncompliance and imposition of remedies on the unrevised SOD for the November survey (CMS Ex. 1), an additional copy of which CMS sent to Petitioner. Id. In addition, here, unlike in Ridgely, CMS explained that it had reviewed the documents which Petitioner submitted to the state during IDR but was rejecting the IDR results because of CMS's determination that "the deficiencies at Tags F309 and F323 are properly cited at the level of immediate jeopardy as reflected in the enclosed statement of deficiencies . . . ." <sup>11</sup> CMS Ex. 11; CMS Ex. 14, at 1. Given CMS's explicit rejection of the IDR results and its explanation that it was continuing to rely on the findings in the unrevised SOD for the November survey, Petitioner's assertion that CMS "without comment, analysis, independent findings or investigation simply overturned this decision and re-imposed the immediate jeopardy finding" is simply not correct, and Petitioner's reliance on Ridgely is misplaced.

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<sup>11</sup> CMS's reference to "Tags F309 and F323" is a reference to the deficiencies cited on the SOD under regulatory sections 483.25 and 483.25(h), respectively. "F-tags" are survey form designations that correlate to the regulatory requirements listed on the SOD.

We find no merit to Petitioner's argument that CMS could not reject the IDR results without making different or additional findings to justify its conclusion. See RR at 9. Petitioner asserted that CMS had no basis for rejecting the IDR decision to reduce the immediate jeopardy determination to a level D deficiency since CMS "did not conduct a validation survey or any other independent investigation . . . ." Id.

CMS could evaluate the proper application of federal standards to the facts, which were undisputed in any material respect, differently from the State's evaluation during IDR. This is precisely what CMS did when it rejected the IDR results and explained why it was doing so. In this regard, we note, as did the ALJ, that in reaching its conclusion to reduce the immediate jeopardy determination to a level D deficiency, the state IDR panel apparently did not apply the proper federal standard. ALJ Decision at 15, n.12. Petitioner asserts that the IDR panel based its conclusion on its finding that "there was not concrete proof that the resident's bilateral femur fractures of 10/14/07 were the direct result of the deficit [sic] practice of 09/30/07." RR at 8. However, as the ALJ properly held, whether the noncompliance (the transfer in disregard of the resident's care plan) actually caused the fractures was not material since a determination of immediate jeopardy required only a finding that the noncompliance be likely to cause serious harm. ALJ Decision at 10-12. The ALJ found that the improper transfer was likely to cause serious harm, and Petitioner did not appeal that finding.

Conclusion

For the reasons stated above, we conclude that the ALJ Decision is free of legal error, and we affirm the decision.

\_\_\_\_\_/s/\_\_\_\_\_  
Stephen M. Godek

\_\_\_\_\_/s/\_\_\_\_\_  
Leslie A. Sussan

\_\_\_\_\_/s/\_\_\_\_\_  
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