Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Regency Manor Rehab & Subacute Center
(CCN: 365484),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-203

Decision No. CR4920

Date: August 15, 2017

DECISION

Based on a series of surveys conducted by its surveyors, the Ohio Department of Health (state agency) found that from June 20, 2014 through October 15, 2014, Regency Manor Rehab & Subacute Center (Regency or Petitioner) was not in substantial compliance with various Medicare program participation requirements with which a skilled nursing facility (SNF), such as Regency, must comply. The state agency also found that Regency's noncompliance posed immediate jeopardy to its residents' health and safety from June 20, 2014 through July 14, 2014. Regency requested a hearing before an administrative law judge (ALJ) to challenge the state agency's findings related to three of the five deficiencies and the imposition of an enforcement remedy, i.e., the denial of payment for new admissions (DPNA), which the Centers for Medicare & Medicaid Services (CMS) authorized the state agency to impose. During this proceeding, Regency has sought to challenge the enforcement remedies imposed on it by CMS based on CMS's separate findings of Regency's noncompliance. Both Regency and CMS have moved for summary judgment, and the time for each party to respond to the other's motion has passed. Therefore, the motions are ripe for ruling.

Although Regency requested a hearing to challenge some of the state agency's findings related to the state agency's initial determination, as authorized by CMS, to impose a denial of payment for new admissions (DPNA), it did not request a hearing to challenge CMS's subsequent findings of continued noncompliance. Petitioner's failure to request a hearing to challenge CMS's subsequent initial determinations to impose civil money penalties (CMPs) and related noncompliance findings renders those initial determinations and findings binding and administratively final. 42 C.F.R. § 498.20(b). Further, because CMS subsequently rescinded the DPNA, Petitioner has already received all of the relief that I would be able to provide based on its hearing request. Therefore, I conclude that CMS is entitled to judgment as a matter of law as to Petitioner's challenge to its findings and enforcement remedies. Consequently, I deny Petitioner's motion for summary judgment and grant CMS's cross-motion for summary judgment.

I. Background and Procedural History

The Social Security Act (Act) sets forth requirements for the participation of a SNF in the Medicare program and authorizes the Secretary of Health and Human Services (the Secretary) to promulgate regulations implementing those statutory provisions. 42 U.S.C. § 1395i-3. The Secretary's regulations are found at 42 C.F.R. Parts 483 and 488. To participate in the Medicare program, a SNF must maintain substantial compliance with program participation requirements. To be in substantial compliance, a SNF's deficiencies may "pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301.[1] A deficiency is a violation of a participation requirement established by 42 U.S.C. § 1395i-3(b), (c), and (d), or the Secretary's regulations at 42 C.F.R. pt. 483, subpt. B. "Noncompliance" means "any deficiency that causes a facility to not be in substantial compliance." 42 C.F.R. § 488.301. A facility may violate a statutory or regulatory requirement, but it is not subject to enforcement remedies if the violation does not pose a risk for more than minimal harm. 42 C.F.R. §§ 488.402(b), 488.301.

The Secretary contracts with state agencies to conduct periodic surveys to determine whether SNFs are in substantial compliance. 42 U.S.C. § 1395aa(a); 42 C.F.R. § 488.10. The Act also authorizes the Secretary to impose enforcement remedies against SNFs that are not in substantial compliance with the program participation requirements. 42 U.S.C. § 1395i-3(h)(2). The regulations specify the enforcement remedies that CMS may impose. 42 C.F.R. § 488.406. Among other remedies, CMS may impose a DPNA when a SNF is not in substantial compliance. 42 U.S.C. § 1395i-3(h)(2)(B)(i); 42 C.F.R. §§ 488.406(a)(2)(ii), 488.417(a). CMS may also impose a per-day CMP for the number

[1] All citations to the Code of Federal Regulations are to the version in effect at the time of the incident at the heart of this decision unless otherwise indicated.

of days a SNF is not in substantial compliance or a per-instance CMP for each instance of the SNF's noncompliance. 42 U.S.C. § 1395i-3(h)(2)(B)(ii); 42 C.F.R. § 488.430(a). A per-day CMP may range from either $50 to $3,000 per day for less serious noncompliance, or $3,050 to $10,000 per day for more serious noncompliance that poses immediate jeopardy to the health and safety of residents. 42 C.F.R. § 488.438(a)(1).[2] "Immediate jeopardy" exists when "the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident." 42 C.F.R. § 488.301.

If CMS imposes a DPNA or a CMP based on a noncompliance determination, then the facility may request a hearing before an ALJ to challenge the noncompliance finding and enforcement remedy. 42 U.S.C. §§ 1320a-7a(c)(2); 1395i(h)(2)(B)(ii); 1395cc(h)(1); 42 C.F.R. §§ 488.408(g), 488.434(a)(2)(viii), 498.3(b)(13). The hearing before an ALJ is a *de novo* proceeding. *CarePlex of Silver Spring*, DAB No. 1683 (1999) (holding that ALJs hold *de novo* hearings based on issues permitted under the regulations and ALJ review is not a quasi-appellate review); *see also Claiborne-Hughes Health Ctr. v. Sebelius*, 609 F.3d 839, 843 (6th Cir. 2010) (The Departmental Appeals Board (DAB) "reviewed the finding under the *de novo* standard that the ALJ would have applied."). A facility has a right to appeal a "certification of noncompliance leading to an enforcement remedy." 42 C.F.R. § 488.408(g)(1); *see also* 42 C.F.R. §§ 488.330(e), 498.3. However, CMS's choice of remedies and the factors CMS considered when choosing remedies are not subject to review. 42 C.F.R. § 488.408(g)(2).

In regard to the burden of proof, CMS must make a *prima facie* case that the SNF failed to comply substantially with federal participation requirements and, if this occurs, the SNF must, in order to prevail, prove substantial compliance by a preponderance of the evidence. *Hillman Rehab. Ctr.*, DAB No. 1611 at 8 (1997); *see Batavia Nursing & Convalescent Inn*, DAB No. 1911 (2004); *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004); *Emerald Oaks*, DAB No. 1800 (2001); *Cross Creek Health Care Ctr.*, DAB No. 1665 (1998).

Petitioner is a SNF located in Columbus, Ohio, that participates in the Medicare program. On July 17, 2014, the state agency completed a partial extended survey of Petitioner's facility to determine whether Petitioner was in compliance with Medicare program

[2] CMS recently increased the CMP amounts to account for inflation in compliance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 104 Pub. L. No. 114-74, 129 Stat. 584, 599. The new adjusted amounts apply to CMPs assessed after August 1, 2016, for deficiencies occurring on or after November 2, 2015. *See* 81 Fed. Reg. 61,538 (Sept. 6, 2016). As the deficiencies alleged in this case occurred prior to November 2, 2015, the increased CMP amounts do not apply in this case.

participation requirements. CMS Exhibit (Ex.) 5 at 1. On August 13, 2014, the state agency completed a complaint survey of Petitioner's facility for the same purpose. CMS Ex. 7 at 1. Based on these surveys, the state agency sent Petitioner a notice dated August 15, 2014, informing Petitioner that it was not in substantial compliance with several Medicare program participation requirements, including one that posed immediate jeopardy to Petitioner's residents. CMS Ex. 1 at 1. In the August 15, 2014 notice letter, the state agency informed Petitioner that, with CMS's authorization, it was imposing a DPNA on Petitioner effective October 17, 2014, "if compliance is not achieved." CMS Ex. 1 at 2. The state agency later completed additional surveys of Petitioner's facility on August 28, 2014, September 11, 2014, September 22, 2014, and October 14, 2014, and, on each occasion, found instances of Petitioner's continued noncompliance with the participation requirements. CMS Ex. 37 at 1-2; CMS Exs. 8-11. On November 4, 2014, the state agency completed one final survey during which it found that Petitioner had returned to substantial compliance with federal requirements as of October 16, 2014. CMS Ex. 37 at 2.

Based on the state agency's surveys, CMS sent several notice letters to Petitioner notifying Petitioner of CMS's findings of Petitioner's noncompliance. In the first of these letters, dated August 20, 2014, CMS cited Petitioner for the same noncompliance cited by the state agency in the August 15, 2014 notice letter. CMS Exs. 2, 5, 7. In the second letter, dated November 17, 2014, CMS cited Petitioner for noncompliance revealed by the state agency's surveys completed on August 28, 2014, September 11, 2014, September 22, 2014, and October 14, 2014, and found that Petitioner resumed substantial compliance with federal requirements effective November 4, 2014. CMS Exs. 3, 8-11. In the November 17, 2014 notice letter, CMS also informed Petitioner that it was imposing enforcement remedies as a result of Petitioner's noncompliance, including CMPs from June 20, 2014 through November 3, 2014, and a DPNA effective October 17, 2014 through November 3, 2014. CMS Ex. 3 at 2. CMS sent its third and final letter on January 20, 2015, to "correct[] an error in [its] November 17, 2014 notice regarding the date the facility returned to substantial compliance and the final status of remedies imposed." CMS Ex. 37 at 1 (emphasis deleted). In the January 20, 2015 notice letter, CMS informed Petitioner of its revised finding that Petitioner resumed substantial compliance with federal requirements effective October 16, 2014. CMS Ex. 37 at 2. CMS also informed Petitioner in the January 20, 2015 notice letter that it was rescinding the DPNA and reducing the duration of the CMPs (to last from June 20, 2014 through October 15, 2014, rather than through November 3, 2014). CMS Ex. 37 at 2.

Petitioner timely requested a hearing to challenge the state agency's findings as set forth in the August 15, 2014 notice letter. Following receipt of Petitioner's hearing request, I issued an Acknowledgment and Pre-Hearing Order (Pre-Hearing Order) that established a prehearing exchange schedule for the parties. In that order, I directed the parties to file briefs, proposed exhibits, and written direct testimony for all witnesses they wanted to

present in this case. I also set forth guidelines for the parties to file a motion for summary disposition. Pre-Hearing Order ¶ 5.a.

Prior to filing its prehearing exchange, CMS notified me that it sought to introduce documents into the record that were subject to confidentiality rules imposed by an Ohio court and requested that those documents be filed under seal. Petitioner did not object to CMS's request, which I granted in my Order to Seal Documents Marked as CMS Exhibit 32. Shortly thereafter, CMS filed its prehearing exchange, including its combined prehearing brief and partial motion for summary judgment (CMS Br.), a witness list, an exhibit list, three proposed witnesses, and 41 proposed exhibits (CMS Exs. 1-41). After I granted Petitioner a four-week extension of its exchange deadline, Petitioner filed its own prehearing exchange, including a prehearing brief (P. Br.) in which Petitioner requested to cross-examine CMS's proposed witnesses in conformity with ¶ 7 of the Pre-Hearing Order, a separate motion for summary judgment (P. MSJ), a witness list, an exhibit list, 13 proposed witnesses, and 39 proposed exhibits (P. Exs. 1-39).[3] Pursuant to ¶ 9 of the Pre-Hearing Order, CMS filed a request to cross-examine 12 of Petitioner's proposed witnesses. CMS subsequently filed its combined response to Petitioner's summary judgment motion and cross-motion for summary judgment. Petitioner did not respond to CMS's cross-motion, and the time for Petitioner to respond has expired. *See* Pre-Hearing Order ¶ 5.a.

Petitioner did not object to any of CMS's proposed exhibits. I therefore admit CMS Exs. 1-41 into the record. However, CMS objected to page 29 of P. Ex. 1 and to all of P. Exs. 27, 28, 33, 34, and 35, arguing that they are irrelevant in this proceeding and that P. Exs. 28, 33, 34, and 35 are prejudicial to CMS. CMS did not object to the remainder of P. Ex. 1 or to P. Exs. 2-26, 29-32, or 36-39. Petitioner concedes CMS's objection to P. Ex. 1 at 29 but opposes the remainder of CMS's objections. As Petitioner concedes the irrelevance of P. Ex. 1 at 29, I do not admit that page into the record. I overrule the remainder of CMS's objections and admit P. Ex. 1 pages 1-28 and 30-61 along with P. Exs. 2-39 into the record.

II. Issues

1. Whether summary judgment is appropriate; and

[3] In its exhibit list, Petitioner proposed as an additional exhibit, to be marked as P. Ex. 40. However, Petitioner had not yet obtained that document. Shortly before filing its prehearing exchange, Petitioner had filed a motion to compel CMS to produce the document it sought to introduce as P. Ex. 40. CMS opposed the motion, and I denied it in an order dated April 15, 2015.

2. If summary judgment is appropriate, which party is entitled to summary judgment.

III. Facts, Conclusions of Law, and Analysis

My conclusions of law are set forth in italics and bold font followed by detailed factual and legal analyses. Any facts I reference are either not disputed by the parties or, where there is a dispute, I accept Petitioner's version of the facts to the extent it is supported by evidence in the record.

1. Summary judgment is appropriate.

Summary judgment is appropriate in cases where 42 C.F.R. Part 498 applies if there is no genuine dispute of any material fact and the moving party is entitled to judgment as a matter of law. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 750 (6th Cir. 2004); CRDP § 19(a). A "genuine" dispute exists if "the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and a "material" fact is one "that, if proven, would affect the outcome of the case under governing law." *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010).

To obtain summary judgment, the moving party must show that there is no genuine dispute of material fact requiring an evidentiary hearing and that it is entitled to judgment as a matter of law. *Mission Hosp. Reg'l Med. Ctr.*, DAB No. 2459 at 5 (2012). If the moving party meets this initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial . . . .'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact — a fact that, if proven, would affect the outcome of the case under governing law." *Senior Rehab.*, DAB No. 2300 at 3.

In evaluating a motion for summary judgment, an ALJ does not address credibility or evaluate the weight of conflicting evidence. *Holy Cross*, DAB No. 2291 at 5. Rather, in examining the evidence to determine the appropriateness of summary judgment, an ALJ must draw all reasonable inferences in the light most favorable to the non-moving party. *See Brightview Care Ctr.*, DAB No. 2132 at 10 (2007) (upholding summary judgment where inferences and views of non-moving party are not reasonable). "[A]t the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, drawing factual inferences in the light most favorable to the non-moving party does not require that I accept the non-

moving party's legal conclusions. *Cedar Lake Nursing Home*, DAB No. 2344 at 7 (2010).

Summary judgment is appropriate in this case because the critical facts necessary to resolving this case are undisputed and clearly establish that CMS is entitled to summary judgment. As explored in greater detail below, it is undisputed that Petitioner failed to request a hearing to challenge CMS's initial determinations and findings of Petitioner's noncompliance related to those initial determinations. Petitioner's failure to request such a hearing renders CMS's findings and initial determinations final and binding, including the immediate jeopardy findings and the CMPs that CMS imposed as part of those initial determinations. Further, the hearing request that Petitioner filed to initiate this case only properly disputed the imposition of a DPNA. However, when CMS rescinded the DPNA, Petitioner's hearing request was moot because Petitioner obtained all the relief that it could request based on an appeal of the state agency's notice of the DPNA. Consequently, I must grant CMS summary judgment.

2. Undisputed Material Facts

On August 15, 2014, the state agency sent Petitioner a notice letter with the subject: "**NOTICE OF IMPOSITION OF REMEDY**." CMS Ex. 1 at 1. Among other things, the notice letter informed Petitioner of the state agency's findings that Petitioner was not in substantial compliance with Medicare program participation requirements beginning June 20, 2014, and that Petitioner's noncompliance posed immediate jeopardy to Petitioner's residents from June 20, 2014 through July 14, 2014. CMS Ex. 1 at 1. The notice letter further informed Petitioner that the state agency, "as authorized by CMS," was providing notice of the imposition of a mandatory DPNA effective October 17, 2014, and that if Petitioner "disagree[d] with the finding of noncompliance which resulted in the imposition of [DPNA]," it had the right to request a hearing before a DAB ALJ by filing a written request for hearing with the DAB within 60 days of receiving the notice letter. CMS Ex. 1 at 2.

Five days later, on August 20, 2014, CMS sent Petitioner a notice letter with the subject: "**NOTICE OF IMMEDIATE IMPOSITION OF REMEDIES**." CMS Ex. 2 at 1. CMS's notice letter informed Petitioner of CMS's findings, which mirrored the state agency's findings and were based on the state agency's July 17, 2014 and August 13, 2014 surveys of Petitioner's facility, that Petitioner was not in substantial compliance with Medicare program participation requirements beginning June 20, 2014, and that Petitioner's noncompliance posed immediate jeopardy to Petitioner's residents from June 20, 2014 through July 14, 2014. CMS Ex. 2 at 1. More specifically, according to the letter, Petitioner was not in substantial compliance with 42 C.F.R. §§ 483.13(a) and 483.60(b), (d), (e), and Petitioner's noncompliance with § 483.13(a) posed immediate

jeopardy to resident health and safety from June 20, 2014, until immediate jeopardy was removed on July 15, 2014. CMS Ex. 2 at 1.[4] CMS's notice letter further informed Petitioner that CMS was imposing enforcement remedies including, as relevant here, a $4,050.00 per-day CMP for the duration of Petitioner's immediate jeopardy noncompliance (i.e., June 20, 2014 through July 14, 2014) and a $100 per-day CMP beginning July 15, 2014, and continuing either until Petitioner resumed substantial compliance with all Medicare program participation requirements or until CMS terminated Petitioner's provider agreement. CMS Ex. 2 at 2-3. CMS's notice letter also informed Petitioner that if it "disagree[d] with the finding of noncompliance which resulted in th[e] imposition" of enforcement remedies, it had the right to request a hearing before a DAB ALJ by filing a written request for hearing with the DAB within 60 days of receiving the notice letter. CMS Ex. 2 at 4-5. CMS also noted in the notice that it had not received a hearing request from Petitioner disputing the DPNA. CMS Ex. 2 at 4.

Thereafter, on November 17, 2014, CMS sent Petitioner a second notice letter based on surveys conducted by the state agency after it sent the first letter. CMS Ex. 3. CMS later sent a third notice letter on January 20, 2015, that serves to "correct[] an error in [CMS's] November 17, 2014 notice regarding the date [Petitioner] returned to substantial compliance and the final status of remedies imposed." CMS Ex. 37 at 1 (emphasis deleted). Read together, these two notice letters informed Petitioner of CMS's finding that it was out of substantial compliance with various Medicare program participation requirements continuously until it returned to substantial compliance with all requirements as of October 16, 2014. CMS Ex. 3 at 1-2; CMS Ex. 37 at 1-2. The two notice letters specifically note CMS's findings that Petitioner was out of compliance with 42 C.F.R. §§ 483.15(h)(6) (found during the state agency's August 28, 2014 complaint survey), 483.20(g) - (j) and 483.25(h) (found during the state agency's September 11, 2014 and September 22, 2014 complaint surveys), and 483.60(b), (d), (e) (found during the state agency's October 14, 2014 revisit survey). CMS Ex. 37 at 1-2. The January 20, 2015 notice letter goes on to summarize the remedies CMS was imposing on Petitioner as a result of these findings, including CMPs of $4,050.00 per day effective June 20, 2014 through July 14, 2014, and $100.00 per day effective July 15, 2014 through October 15, 2014, for a total CMP of $110,550.00. CMS Ex. 37 at 2. It also states that the DPNA that was to go into effect October 17, 2014, "is rescinded." CMS Ex. 37 at 2. Petitioner's appeal rights are explained in the November 17, 2014 notice letter, which provides that if Petitioner "disagree[d] with [CMS's] finding of noncompliance which resulted in the continuation of previously imposed remedies based on surveys conducted

[4] The August 20, 2014 notice letter also references survey reports from the state agency, included in the record at CMS Exs. 5 and 7, that provide additional citations and more detailed findings of Petitioner's noncompliance made during the surveys referenced in the letter.

after [CMS's] August 20, 2014 notice," it must file a written request for a DAB ALJ hearing "no later than 60 days from the date of receipt of this notice." CMS Ex. 37 at 4 (emphasis deleted).

While the survey process was ongoing, Petitioner filed a written request for a DAB ALJ hearing (P. RFH) on October 13, 2014, which the DAB's Civil Remedies Division received on October 15, 2014. In it, Petitioner, through counsel, "request[ed] a hearing before an Administrative Law Judge ('ALJ') for data tags F155, F221 and F242, which were cited by the Ohio Department of Health ('ODH') during an inspection that commenced on July 17, 2014." P. RFH at 1. Petitioner attached to its hearing request a copy of the August 15, 2014 state notice letter. P. RFH Ex. 1. Petitioner did not, however, attach to its hearing request a copy of CMS's August 20, 2014 notice letter. Petitioner makes no reference to the August 20, 2014 notice letter in its hearing request. In discussing its requested relief, Petitioner does not directly challenge CMS's August 20, 2014 imposition of CMPs. Rather, Petitioner requests that "[t]he *recommendation* for a civil money penalty, as indicated in an ODH enforcement letter dated July 29, 2014 . . . should be removed" for violating due process or, "[i]f the recommendation for a civil money penalty . . . is found to comport with due process of law, the recommendation should be withdrawn" to the extent that it "violates the federalism and separation of powers doctrines . . . ." P. RFH at 2 (emphasis added). In fact, Petitioner's first reference to CMS in its hearing request does not come until page 11, and then only in the context of Petitioner's discussion of the authority CMS granted to the state agency. The next reference comes when Petitioner notes that the state agency "act[s] as an agent for CMS." P. RFH at 11. And while Petitioner's last two references to CMS briefly mention CMS's "authority to interpret the law" and the fact that CMS is "bound by certain statutory and regulatory requirements to ensure that nursing homes receive due process of law in matters concerning the survey process," the references to CMS are essentially made in passing. P. RFH at 12. In both instances, Petitioner refers to *both* the state agency and CMS, and the rest of Petitioner's discussion of "authority to interpret the law" and "due process" refers to *the state agency*, not CMS. P. RFH at 12.

Petitioner filed no further hearing requests following its October 13, 2014 hearing request.

3. CMS is entitled to summary judgment because Petitioner did not request a hearing to challenge CMS's initial determinations and findings of Petitioner's noncompliance reflected in the notice letters dated August 20, 2014, November 17, 2014, and January 20, 2015, rendering those findings administratively final and binding, and the hearing request that Petitioner did file to challenge the imposition of a DPNA was rendered moot because CMS ultimately rescinded the DPNA.

As relevant in this case, "[a]n initial determination is binding unless it is . . . [r]eversed or modified by a hearing decision . . . ." 42 C.F.R. § 498.20(b)(2). "CMS makes initial determinations with respect to . . . the finding of noncompliance leading to the imposition of enforcement actions specified in [42 C.F.R.] § 488.406 . . . ." *Id.* § 498.3(b)(13). Section 488.406 specifies the enforcement remedies that may be imposed on a SNF. A SNF, like Petitioner, has the right to request an ALJ hearing to seek reversal or modification of CMS's findings of noncompliance leading to an enforcement remedy. *See id.* §§ 488.408(g), 488.330(e). However, to exercise its hearing rights, the SNF must file a written request for hearing within 60 days of receiving notice of CMS's initial determination, unless the 60-day period is extended for good cause shown. *Id.* § 498.40(a)(2), (c). Thus, for Petitioner to challenge CMS's noncompliance findings and initial determinations in this case (as it attempts to do in its motion for summary judgment and prehearing brief), it must have requested a hearing in the above-prescribed manner; otherwise, I must conclude, pursuant to § 498.20(b), that CMS's findings and initial determinations are binding, rendering summary judgment in CMS's favor appropriate.

At the outset, it is apparent that CMS's August 20, 2014 and November 17, 2014 notice letters (the latter as revised by the January 20, 2015 notice letter) communicate CMS's initial determinations to Petitioner. In the notice letters, CMS states its findings that Petitioner was not in substantial compliance with various Medicare program participation requirements and imposes enforcement remedies on Petitioner for its noncompliance. CMS Exs. 2, 3, 37. Therefore, in addition to the initial determination to impose a DPNA, as conveyed in the state agency's August 15, 2014 notice, CMS made two initial determinations in this case. *See* 42 C.F.R. § 498.3(b)(13). Therefore, as stated in the August 20, 2014 and November 17, 2014 notice letters, Petitioner had the right to request a hearing to challenge those initial determinations and underlying findings of noncompliance within 60 days of receiving CMS's notice letters (unless it could show good cause for extending the 60-day deadline).[5] *Id.* §§ 488.408(g), 488.330(e), 498.40(a)(2), (c). However, Petitioner's failure to request such a hearing would render final and binding any of CMS's finding(s) of noncompliance and initial determination(s) that Petitioner did not request a hearing to challenge. *Id.* § 498.20(b).

Close examination of Petitioner's hearing request shows that Petitioner did not challenge any of CMS's initial determinations or findings of Petitioner's noncompliance. Petitioner's hearing request pre-dates the November 17, 2014 and January 20, 2015 notice letters from CMS, and Petitioner filed no additional hearing requests after

[5] To be precise, Petitioner would have needed to request a hearing to challenge each separate initial determination made by CMS, subject to the same 60-day time limit as it related to Petitioner's receipt of each separate notice letter from CMS.

receiving those notice letters. Petitioner's hearing request regarding the DPNA also does not challenge, or even mention, the August 20, 2014 notice letter from CMS. Petitioner's hearing request instead refers exclusively to the August 15, 2014 notice letter from the state agency, challenges certain instances of noncompliance "cited by the Ohio Department of Health" (not cited by CMS), and asks for removal of the state agency's recommendation for CMPs. P. RFH at 1-2. Indeed, Petitioner only attached the August 15, 2014 notice letter to its hearing request, P. RFH Ex. 1; it did not attach the August 20, 2014 notice letter. In addition, Petitioner's only references to CMS in its hearing request contain no substantive discussion of CMS's actions or authority in this case, instead at most appearing in passing before discussion of the state agency's actions or authority. P. RFH at 11-12. The only inkling that Petitioner gives in its hearing request that it might be challenging CMS's August 20, 2014 initial determination is in the conclusion of its hearing request, where it more broadly asks for removal or revocation of any or all CMPs. P. RFH at 13. But this request must be read in the context of the hearing request as a whole, which as discussed continuously emphasizes the state agency's role and actions, not CMS's. Furthermore, while CMS states in its prehearing brief that Petitioner's "hearing request referred only to the August 15, 2014 [state agency] notice, not to CMS's August 20, 2014 letter imposing the CMP," CMS Br. at 3, Petitioner does not contest or even discuss this issue in its own briefing. Thus, Petitioner's seemingly broad request for removal or revocation of any or all CMPs in this case does not constitute a challenge to CMS's August 20, 2014 initial determination or findings of Petitioner's noncompliance.[6]

Based on the foregoing, it is apparent on the face of Petitioner's hearing request that Petitioner did not challenge CMS's August 20, 2014 initial determination and findings of Petitioner's noncompliance. Petitioner also did not challenge CMS's later November 17, 2014 initial determination and findings of Petitioner's noncompliance, as modified by the January 20, 2015 notice letter. Consequently, I conclude that CMS's initial determinations, as reflected in the August 20, 2014 and November 17, 2014 notice letters (the latter as modified by the January 20, 2015 notice letter), are final and binding. *See* 42 C.F.R. § 498.20(b).

[6] Although Petitioner requested a hearing to dispute the DPNA and certain deficiencies on which the DPNA was based, that request no longer serves as a basis to dispute the findings of substantial noncompliance because CMS rescinded the DPNA. *Columbus Park Nursing & Rehab. Ctr.*, DAB No. 2316 at 7 (2010) (An SNF cannot "contest survey deficiency findings where CMS has not imposed any of the remedies specified in section 488.406 based on those findings, or where CMS imposed, but subsequently rescinded, any such remedies.").

As already described in detail above, CMS's three notice letters included findings of multiple instances of Petitioner's noncompliance and imposed CMPs for the period of Petitioner's noncompliance. In sum:

- Petitioner was not in substantial compliance with various Medicare program participation requirements from June 20, 2014 through October 15, 2014, including, at various times during that period, with 42 C.F.R. §§ 483.13(a) (July 17, 2014 survey); 483.60(b), (d), (e) (August 13, 2014 survey); 42 C.F.R. §§ 483.15(h)(6) (August 28, 2014 survey), 483.20(g) - (j) and 483.25(h) (September 11, 2014 and September 22, 2014 surveys), and 483.60(b), (d), (e) (October 14, 2014 survey);
- Petitioner's noncompliance with 42 C.F.R. § 483.13(a) posed immediate jeopardy to resident health and safety from June 20, 2014 through July 14, 2014;
- CMS imposed CMPs of $4,050.00 per day effective June 20, 2014 through July 14, 2014, and $100.00 per day effective July 15, 2014 through October 15, 2014.

CMS Ex. 2 at 1-3; CMS Ex. 3 at 1-2; CMS Ex. 37 at 1-2.

Despite its failure to request a hearing to challenge the above-mentioned findings and enforcement remedies, Petitioner nonetheless attempts to challenge (1) the merits of the findings made in connection with the July 17, 2014 survey that it was not in substantial compliance with several Medicare program participation requirements and (2) the immediate jeopardy-level CMP imposed by CMS. *See generally* P. MSJ; P. Br. Petitioner argues that it is entitled to summary judgment either on its claim that it was actually in substantial compliance with the requirements it discusses, contrary to CMS's findings, or at least on its claim that there is no basis for the finding that Petitioner's noncompliance with 42 C.F.R. § 483.13(a) posed immediate jeopardy to resident health and safety. P. MSJ at 1, 23. In its prehearing brief, Petitioner also raises the issue of whether the CMP imposed for its noncompliance with 42 C.F.R. § 483.13(a) was reasonable, although it does not contend it should receive summary judgment on that issue. P. Br. at 5.

Because CMS's initial determinations and related findings of multiple instances of Petitioner's noncompliance are binding, I have no basis to look behind those determinations and findings as Petitioner asks me to do. Consequently, I am constrained to reject as a matter of law Petitioner's arguments concerning the merits of the instances of noncompliance it attempts to challenge in its prehearing brief and motion for summary judgment. Instead, I must grant CMS judgment as a matter of law because its initial determinations, including its findings of Petitioner's noncompliance and its imposition of enforcement remedies on Petitioner, are final and binding.

IV. Conclusion

I deny Petitioner's motion for summary judgment and grant CMS's cross-motion for summary judgment. As CMS imposed in its now binding initial determinations, Petitioner must pay to CMS the per-day CMPs totaling $110,550.00.

/s/
Scott Anderson
Administrative Law Judge