

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Rockcastle Health and Rehabilitation Center
Docket No. A-18-3
Decision No. 2891
September 6, 2018

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Rockcastle Health and Rehabilitation Center (Rockcastle or Petitioner), a skilled nursing facility located in Kentucky, appeals an August 17, 2017 decision of an Administrative Law Judge (ALJ) upholding the determination of the Centers for Medicare & Medicaid Services (CMS) that Rockcastle was not in substantial compliance with Medicare program participation requirements in 42 C.F.R. §§ 483.10, 483.13, and 483.75, and also upholding the civil money penalty (CMP) totaling \$162,600 that CMS imposed for Rockcastle's noncompliance. *Rockcastle Health and Rehabilitation Ctr.*, DAB CR4926 (2017) (ALJ Decision). The \$162,600 reflects the accrual of a per-day CMP of \$5,300 for immediate-jeopardy-level noncompliance from May 26 through June 24, 2014, and a per-day CMP of \$100 for noncompliance below the immediate jeopardy level for the period from June 25 through July 30, 2014.

For the reasons explained below, the Board concludes that the ALJ's factual findings are supported by substantial evidence and her legal conclusions are free of legal error. We therefore uphold the ALJ Decision and sustain the CMP as imposed.

Legal authorities

To participate in the Medicare program, a long-term care facility must be in "substantial compliance" with Medicare participation requirements in 42 C.F.R. Part 483, subpart B. 42 C.F.R. §§ 483.1, 488.400.¹ Under agreements with the Secretary of Health and Human Services, state survey agencies conduct onsite surveys of facilities to verify

¹ In October 2016, the requirements for long-term care facilities in subpart B of Part 483, including those at issue here, were revised. Final Rule, *Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities*, 81 Fed. Reg. 68,688 (Oct. 4, 2016); 82 Fed. Reg. 32,256 (July 13, 2017) (technical corrections). The revisions took effect on November 28, 2016, with implementation of the revised regulations in phases, with the earliest implementation date beginning on November 28, 2016, after the surveys that formed the bases for CMS's determination of noncompliance in this case. See 81 Fed. Reg. at 68,688, 68,696-698. We rely on the regulations in effect when the state agency performed the survey(s) in this case. See *Carmel Convalescent Hosp.*, DAB No. 1584, at 2 n.2 (1996) (The Board applies the regulations in effect on the date of the survey and resurvey.).

compliance with the requirements. *Id.* §§ 488.10(a), 488.11; *see also* Social Security Act (Act) §§ 1819(g)(1)(A), 1864(a).²

A state survey agency reports any “deficiencies” it finds in a Statement of Deficiencies (SOD), which identifies each deficiency under its regulatory requirement and the corresponding “Tag” number. A “deficiency” is any failure to comply with a Medicare participation requirement, and “substantial compliance” means “a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm.” 42 C.F.R. § 488.301 (also defining “noncompliance” as “any deficiency that causes a facility to not be in substantial compliance”). “Immediate jeopardy” is “a situation in which the [facility’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.” *Id.*

Under authority of 42 C.F.R. Part 488, subpart F, CMS enforces compliance with Part 483, subpart B requirements. Enforcement “remedies” for facilities found to be not in substantial compliance with those requirements include per-day CMP(s) in amounts that vary depending on factors specified in the regulations, which include the “seriousness” of the facility’s noncompliance. 42 C.F.R. §§ 488.404(b), 488.438(f). “Seriousness” is a function of the noncompliance’s scope (whether it is “isolated,” constitutes a “pattern,” or is “widespread”) and severity (whether it has created a “potential for” harm, resulted in “actual harm,” or placed residents in “immediate jeopardy”). *Id.* § 488.404(b). The most serious noncompliance is that which puts one or more residents in “immediate jeopardy.” *See id.* § 488.438(a) (highest CMPs are imposed for immediate-jeopardy-level noncompliance); *Woodland Oaks Healthcare Facility*, DAB No. 2355, at 2 (2010) (citing authorities). A per-day CMP may accrue from the date the facility was first out of substantial compliance until the date it is determined to have achieved substantial compliance. 42 C.F.R. § 488.440(a)(1), (b). CMS’s determination on the level of noncompliance must be upheld unless it is clearly erroneous. *Id.* § 498.60(c)(2).

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

² The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

Case background

On June 27, 2014, the state survey agency completed a complaint survey of Rockcastle, finding multiple violations of Medicare participation requirements. CMS Ex. 1. Following a revisit survey on August 10, 2014, CMS determined that Rockcastle had returned to substantial compliance effective July 31, 2014. CMS Ex. 3. Based on the survey findings, CMS determined that Rockcastle was not in substantial compliance with certain participation requirements, including those at issue on appeal, all at scope and severity level “J” (isolated instance of substantial noncompliance that poses immediate jeopardy to resident health and safety). Those requirements are:

- 42 C.F.R. § 483.10(b)(4) (Tag F155, Right to refuse treatment)
- 42 C.F.R. § 483.13(b), (c)(1)(i) (Tag F223, Abuse and staff treatment of residents)
- 42 C.F.R. § 483.13(c)(2)-(c)(4) (Tag F225, Investigate and report abuse)
- 42 C.F.R. § 483.13(c) (Tag F226, Abuse and neglect policies and procedures)
- 42 C.F.R. § 483.75 (Tag F490, Administration)

CMS Ex. 1.

CMS imposed a per-day CMP of \$5,300 for the period from May 26 through June 24, 2014, during which Rockcastle was out of substantial compliance with the participation requirements at the immediate-jeopardy level, and a per-day CMP of \$100 for the period from June 25 through July 30, 2014, during which it was out of substantial compliance below the immediate-jeopardy level, having returned to substantial compliance on July 31, 2014. CMS Exs. 2; 3; 5, at 3. The total CMP was thus \$162,600 (\$159,000, immediate jeopardy; \$3,600, below immediate-jeopardy level). CMS Ex. 5, at 3.

Rockcastle requested a hearing before an ALJ, challenging the above-identified immediate jeopardy deficiencies.³ Rockcastle offered 64 exhibits; CMS offered 33 exhibits. Each party objected to certain exhibits offered by the opposing party. By her August 1, 2016 ruling, the ALJ excluded Petitioner’s exhibits 1, 2, 3, and 7A, admitting all of the other Petitioner’s exhibits; and admitted all of CMS’s exhibits, though she conditionally admitted CMS exhibit 33 (declaration of CMS’s witness K.B., a state agency surveyor, offered as written direct testimony of K.B.) subject to K.B.’s availability for cross-examination. On August 18, 2016, the ALJ convened a video-teleconference hearing during which Rockcastle cross-examined K.B. CMS elected not to cross-examine Petitioner’s witnesses, R.B., R.M., A.B., S.C., L.S., and B.L., all of

³ Rockcastle was also cited for, but did not challenge, two non-immediate jeopardy deficiencies (Tags F151 and F514 for alleged violations of 42 C.F.R. §§ 483.10(a)(1)-(2) and 483.75(l)(1), respectively) or the \$100 per-day CMP associated with the period of time during which it was out of substantial compliance at below the immediate-jeopardy level. ALJ Decision at 4 n.4; Request for Hearing at 2.

whose written direct testimony was submitted before the hearing. Both parties submitted pre-hearing and post-hearing briefs. ALJ Decision at 3-4.

On August 17, 2017, the ALJ issued her decision,⁴ finding that Petitioner was not in substantial compliance with the above requirements at the immediate-jeopardy level for the period from May 26 through June 24, 2014, and at below the immediate-jeopardy level for the period from June 25 through July 30, 2014. The ALJ concluded that CMS's determination that the violations posed immediate jeopardy to resident health and safety was "not clearly erroneous" and that the total amount of the CMP imposed, \$162,600, was reasonable. ALJ Decision at 1, 18-21.

Standard of review

The standard of review on a disputed factual issue is whether the ALJ's 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's decision is erroneous. *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs*, available at <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/participation/index.html>.

Discussion

A. The ALJ's determination that Rockcastle was not in substantial compliance with 42 C.F.R. § 483.13 is supported by substantial evidence and free of legal error.

1. Abuse – Regulatory requirements and Rockcastle's abuse policy

A resident "has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion." 42 C.F.R. § 483.13(b). The term "abuse" is defined as the "willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish." *Id.*

⁴ The appeal was initially assigned to a different ALJ who, on March 30, 2016, denied Petitioner's motion for summary judgment. That ALJ later departed from the Civil Remedies Division of the Departmental Appeals Board. The appeal was then assigned to the ALJ who issued the August 1, 2016 evidentiary ruling, convened a hearing on August 18, 2016, and issued the August 17, 2017 decision appealed to the Board.

§ 488.301.⁵ A facility must “develop and implement written policies and procedures” prohibiting mistreatment, neglect, and abuse of residents. *Id.* § 483.13(c). A facility is also prohibited from using verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion. *Id.* § 483.13(c)(1)(i). A facility also must ensure that all alleged violations involving mistreatment, neglect, or abuse are “reported immediately” to the facility administrator and to other officials in accordance with state law through established procedures (including to the state survey agency) (section 483.13(c)(2)); must have evidence that all alleged violations are thoroughly investigated and prevent further potential abuse while the investigation is in progress (section 483.13(c)(3)); and must report the investigation results to the facility administrator or designated representative, as well as to appropriate state officials (including the state survey agency), within five working days of the incident and, if the alleged violation is verified, must take appropriate corrective action (section 483.13(c)(4)).

Rockcastle’s policy on abuse (CMS Ex. 32, at 6-9) states, “All allegations of abuse involving abuse along with injuries of unknown origin are reported immediately to the charge nurse and/or administrator of the facility along with other officials in accordance with State law through established guidelines.” *Id.* at 6. The policy also requires that “[a]ll allegations of abuse will be investigated and reported to the appropriate agencies”; that “[t]he Administrator/designee will make all reasonable efforts to investigate and address alleged reports, concerns, and grievances”⁶; and that “[a]ll allegations are to be reported within the timeframe allotted by state agency.” *Id.* at 8-9.

2. ALJ’s findings - R2 (May 15, 2013; June 3 and 11, 2014 incidents); R1 (May 26, 2014 incident)

On May 16, 2013, Resident 2 (R2) reported that the prior day, May 15, Medication Aide 1 (MA1) was “rough” with her when MA1 put her into bed. R2 did not allege that MA1 injured or intended to injure her. ALJ Decision at 7-8 (citing CMS Ex. 16, at 1 and 13); *id.* at 7 n.8. Rockcastle performed a routine “Weekly Skin Rounds” examination of R2 on May 17, 2013. *Id.* at 8 (citing CMS Ex. 16, at 13). Rockcastle counseled MA1 on

⁵ The definition of “abuse” in section 488.301 quoted in the ALJ Decision, page 5, footnote 5, is the revised definition in the final rule published in October 2016, after the surveys in this case. *See* 81 Fed. Reg. at 68,871. Rockcastle raises no argument concerning the ALJ’s quotation of the longer definition of “abuse” from the revised regulation, and there is nothing in the expanded definition that is inconsistent with the regulatory treatment of abuse in sections 488.301 and 483.13 that applied during the time period in question.

⁶ Unlike Rockcastle, which addresses its process for handling “grievances” in its abuse policy, federal regulations address grievances in a section other than 42 C.F.R. § 483.13, the regulation that addresses abuse. *See* 42 C.F.R. § 483.10(f) (stating, “A resident has the right to—(1) Voice grievances without discrimination or reprisal. Such grievances include those with respect to treatment which has been furnished as well as that which has not been furnished; and (2) Prompt efforts by the facility to resolve grievances the resident may have, including those with respect to the behavior of other residents.”).

May 18, 2013, directing MA1 to approach R2 “in a slow manner” when transferring R2 using a lift and not to “rush” when putting a sling underneath R2 and to “explain what [MA1 is] doing” while transferring. *Id.* (citing CMS Ex. 16, at 2). The facility’s grievance report indicates that a nurse asked all alert and oriented residents with BIMS⁷ scores higher than 7 if they had any issues about MA1 or anyone else at the facility and that “no one interviewed had any issues or felt afraid.” *Id.* (citing CMS Ex. 16, at 1). The ALJ noted that the record did not show whether any resident who had been questioned required a lift for transfers or whether MA1 had assisted any of those residents for transfers. *Id.* (citing CMS Ex. 16, at 1 and CMS Ex. 28, at 1-2).

The ALJ also noted that Rockcastle first reported the May 15, 2013 incident involving R2 to the State OIG⁸ as an allegation of abuse in June 2014, in conjunction with the June 2014 complaint survey – more than a year after the fact. *Id.* (citing CMS Ex. 16, at 3-5). On June 19, 2014, two facility nurse consultants interviewed R2, who reportedly said that MA1 “threw her legs into the bed like [they were] a sack of dog food,” and R1 (R2’s roommate), who had a consistent recollection of the incident. *Id.* (citing CMS Ex. 16, at 7). An interview conducted by the Ombudsman, also on June 19, elicited that MA1 had not injured R2, but that R2 was not pleased about how MA1 had treated her. *Id.* (citing CMS Ex. 16, at 8). In a June 20, 2014 amended report to the State OIG, S.C., Rockcastle’s administrator, stated that Rockcastle had substantiated abuse: “Please consider this an amended reported [sic] substantiating this allegation which has been filed to the [State] OIG, APS [Adult Protective Services], and Ombudsman.” *Id.* at 8-9 (citing CMS Ex. 16, at 6-9).

On June 3, 2014, R2 told Certified Nursing Assistant 1 (CNA1)⁹ that she needed to use the restroom. CNA1 reportedly told R2 that she could urinate in the bed, and that staff would later clean it up. *Id.* at 11 (citing CMS Ex. 17, at 6). Rockcastle initially handled the complaint as a grievance rather than an allegation of abuse or neglect. CMS Ex. 17, at 5. On interview, CNA1 stated that R2 told CNA1 that she could not wait any longer to use the restroom and that CNA1 told R2 that she was busy assisting other residents but would return and clean up R2 if she were to have an incontinence episode. ALJ Decision

⁷ “BIMS” stands for Brief Interview for Mental Status, which is a structured evaluation or assessment of cognitive functioning. BIMS scores range from 00-15 (00-07 means severe impairment; 08-12 means moderate impairment; 13-15 means intact cognitive response). *See* CMS’s Long-Term Care Facility Resident Assessment Instrument 3.0 User’s Manual (<https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/NursingHomeQualityInits/Downloads/MDS-30-RAI-Manual-V113.pdf>).

⁸ Rockcastle’s Director of Nursing (DON) testified that, in Kentucky, allegations of abuse must be reported on a specific form to the state survey agency, known in Kentucky as the Office of Inspector General, as well as to Adult Protective Services and the local Ombudsman. ALJ Decision at 6-7 n.6. The ALJ referred to the survey agency as “State OIG” throughout her decision and indicated that those references to the “State OIG” encompassed Rockcastle’s reports to Adult Protective Services and the Ombudsman as well. *Id.* at 7 n.7.

⁹ We refer to the staff person in question as CNA, since the parties refer to that person as a CNA. Parts of the record refer to the staff person in question as “SRNA.” *E.g.*, CMS Ex. 17, at 7.

at 11 (citing CMS Ex. 17, at 1, 5). The ALJ noted that Rockcastle eventually substantiated this incident as abuse, as stated in a June 20, 2014 report. *Id.* (citing CMS Ex. 17, at 7-10); *id.* at 15.

In a June 12, 2014 initial report to the State OIG, Rockcastle reported that, on June 11, 2014, CNA1 reportedly told R2 not to call her guardian and that it had determined that it could not substantiate the June 3 incident as one of abuse or neglect. *Id.* at 12, 15 (citing CMS Ex. 18, at 1, 3). The ALJ noted that nothing in the report explicitly indicated that CNA1 had threatened R2, yet Rockcastle suspended CNA1 a day later, on June 12, 2014, and terminated her employment on June 16, 2014. *Id.* at 12 (citing CMS Ex. 29, at 3-4). On June 20, 2014, Rockcastle amended its report to the State OIG to address both the June 3 and June 11 allegations. That report indicated that CNA1's telling R2 not to call her guardian stemmed from complaints R2 had made that she was not given assistance with toileting, and explained that when CNA1 informed R2 that she could not take her to the toilet, R2 immediately called her guardian. The ALJ noted, however, that the evidence "suggest[ed]" that CNA1 was the staff member who had answered the telephone call from the family member complaining about R2's care; when CNA1 returned to the room, CNA1 told R2 not to call whomever she had called again and that R2's complaints would get CNA1 fired. ALJ Decision at 12-13 (citing CMS Ex. 17, at 7, 8, 9). The ALJ also noted that, after re-investigation, Rockcastle amended its prior finding, and determined that the allegation of abuse had been substantiated. *Id.* at 13 (citing CMS Ex. 17, at 10); *id.* at 15.

Resident 1 (R1) reported that, on May 26, 2014, MA1 administered a rectal suppository even though R1 communicated her refusal to accept the suppository by attempting to block its insertion with her hand. *Id.* at 10 (citing CMS Ex. 8, at 2 and CMS Ex. 14, at 2, 3). At Rockcastle's request, MA1 provided a statement about the incident, reporting that R1 had consented to receiving the medication. *Id.* (citing CMS Ex. 14, at 3-5). In a May 30, 2014 report to the State OIG, Rockcastle stated that it could not substantiate this incident as abuse, but that it had decided to terminate MA1 "due to the residents['] perception of the incident." *Id.*; CMS Ex. 14, at 7. However, later, in a June 25, 2014 amended report to the State OIG, Rockcastle stated that it had substantiated abuse upon re-investigation and reiterated that MA1 was terminated effective May 26, 2014. ALJ Decision at 10-11 (citing CMS Ex. 14, at 9).

The ALJ found that the three incidents involving R2, as well as the medication administration incident involving R1, were incidents that the facility itself had substantiated as abuse. *Id.* at 15. Indeed, she stated that she did "not need to independently evaluate whether Petitioner's residents were abused on at least four occasions, because Petitioner substantiated four separate allegations of abuse in its reports to the State OIG." *Id.* (citing CMS Exs. 14, at 9; 16, at 12; and 17, at 10). The ALJ found that the record contradicted Rockcastle's argument that "after the surveyors cited a deficiency regarding [the May 15, 2013 incident involving R2] . . . [its] managers

reexamined [the incident], repeated resident and staff interviews, and did report it to the appropriate State agencies as an *unsubstantiated* allegation of abuse.” *Id.* at 15 (quoting P. Br. at 16, italics in original) (internal quotation marks omitted). The ALJ noted that Rockcastle had in fact *substantiated* the allegation of abuse after re-investigation. *Id.* (citing CMS Ex. 16, at 12).

Petitioner admitted that the allegations of abuse were substantiated, and I see no basis to disturb Petitioner’s own findings. While Petitioner, for purposes of its appeal, seems to be mired in a suspension of reality in which it refuses to acknowledge that it already substantiated these allegations of abuse, it has presented no reason why its own investigative findings were in error or should be disregarded. Therefore, based on the four substantiated allegations of abuse, Petitioner did not meet the condition requiring it to ensure that [R1] and [R2] were “free of verbal, sexual, physical, and mental abuse” as required by 42 C.F.R. §§ 483.13(b) and (c)(1).

Id.

The ALJ also determined that Rockcastle failed to report and investigate the May 15, 2013 and June 3, 2014 incidents involving R2 as required by 42 C.F.R. § 483.13(c)(2)-(4) – a requirement the ALJ said was “triggered by any *allegation* of abuse, whether or not it is recognized as such by the facility” – since the facility initially handled the later-substantiated May 15, 2013 and June 3, 2014 incidents as grievances and did not report them to the State OIG until June 14, 2014 and June 16, 2014, respectively, after the five-day reporting period under 42 C.F.R. § 483.13(c)(4). ALJ Decision at 16 (citing *Illinois Knights Templar Home*, DAB No. 2369, at 11, 12 (2011)). In so doing, the ALJ expressly rejected Rockcastle’s argument that not every complaint about staff is an allegation of abuse for which a facility must launch a full investigation, and that Rockcastle properly handled certain complaints as grievances rather than as allegations of abuse. *Id.*¹⁰

¹⁰ The ALJ also discussed a May 19, 2014 request by R4’s daughter that CNA1 no longer provide care to her mother because CNA1 was rude, disrespectful and hateful to her mother – a complaint Rockcastle accepted as a grievance. ALJ Decision at 9. The ALJ noted that Rockcastle reported the complaint to the State OIG on June 14, 2014, and, on June 17, 2014, almost a month after the incident, Rockcastle investigated the complaint by interviewing other residents, after which it acknowledged that it reported late because the report “stemmed from the most recent complaint survey” and the facility “reviewed all grievances back to February of 2013.” *Id.* (citing or quoting CMS Ex. 21, at 4, 5) (internal quotation marks omitted). The ALJ noted, however, that Rockcastle did not substantiate abuse based on its interview with R4. *Id.* The ALJ did not specifically conclude that this incident was one of abuse, but did determine that Rockcastle did not timely report the incident. We note that, although the ALJ’s findings concerning R1 and R2 alone fully support her conclusions that Rockcastle violated various section 483.13 requirements, the ALJ’s finding concerning the late reporting of the May 19, 2014 event concerning R4, which is supported by substantial evidence, is one more indication of noncompliance with 42 C.F.R. § 483.13(c)(2).

The ALJ found that, on her “review [of] the cited deficiencies under the applicable federal regulations,” which would include section 488.301 that defines “abuse,” Petitioner’s own investigations “ultimately substantiated that abuse had actually occurred” in two instances (May 15, 2013 and June 3, 2014), and that “it is inexcusable that Petitioner did not treat these incidents, at the time it learned of them, as allegations of abuse that must be reported within the five days as required by 42 C.F.R. § 483.13(c)(4).” *Id.* at 16-17. Rockcastle, the ALJ noted, was also required under Kentucky law to report the suspected abuse to the State OIG, Adult Protective Services, and the Ombudsman, but failed to do so. *Id.* at 17 (citing P. Ex. 59, at 5 and P. Ex. 64, at 3); *id.* at 16-17 n.19 (noting that Kentucky’s definition of “abuse” is “nearly identical” to that in section 488.301 and that since Rockcastle’s policy, CMS Ex. 32, does not include a definition of abuse, Rockcastle presumably applied the state and federal definitions of “abuse”).

Moreover, the ALJ found that, since Rockcastle substantiated two incidents involving R2 as abuse, but, in treating them as grievance complaints, did not follow its own abuse policy requiring it to report the “mere *allegations* of abuse to the State OIG in a timely manner,” it did not comply with section 483.13(c). *Id.* at 17 (*italics in original*). The ALJ stated that a consequence of that failure was that Rockcastle also violated section 483.13(b), which requires the facility to keep its residents free from abuse. *Id.*

3. Analysis

The ALJ’s core factual findings are that: (1) MA1 gave R1 medication over R1’s refusal, for which Rockcastle later terminated MA1 and which Rockcastle determined was abuse; (2) Rockcastle failed to treat certain complaints as abuse allegations, which led to its failure to timely investigate them as abuse; (3) Rockcastle’s own investigation substantiated multiple incidents of abuse; and (4) Rockcastle twice failed to timely report abuse allegations to the State OIG. The ALJ’s findings are supported by substantial evidence of record, and we concur with those findings.

Rockcastle does *not* directly and specifically challenge the core facts as found by the ALJ, pointing to evidence that is contrary to or inconsistent with the ALJ’s findings. Rockcastle instead makes arguments, which we will address below, that essentially raise two questions: (1) whether the incidents in question fit within the regulatory definition of “abuse” or, instead, whether they were grievances that Rockcastle alleges it appropriately handled as grievances; and (2) whether the ALJ erred in relying on Rockcastle’s own reports to the State OIG that it had substantiated abuse. We reject the arguments as meritless. We conclude that Rockcastle was properly cited for noncompliance with section 483.13 based on its failure to properly handle allegations of staff abuse of two residents and that the ALJ did not err in relying on evidence of the facility’s own determination that its staff had abused the residents.

- a. *Rockcastle was properly cited for abuse of residents in accordance with 42 C.F.R. §§ 483.13 and 488.301, and it may not circumvent its 42 C.F.R. § 483.13 abuse reporting and investigation obligations by treating abuse allegations as grievances.*

As discussed in the ALJ Decision and above in our decision, the record reveals that Rockcastle itself concluded that its staff had abused two residents. This is evidence the ALJ found highly probative and which was unquestionably central to the ALJ's determination to uphold the abuse deficiencies – a determination we now affirm as legally and factually sound. Rockcastle attempts to avoid the adverse impact of that evidence on appeal by asserting, chiefly, that it appropriately handled certain complaints as grievances rather than as allegations of abuse. The attempt fails.

Rockcastle states that CMS's and the ALJ's approach in this case is based on fundamentally erroneous assumptions that “every resident complaint ipso facto is an ‘allegation of abuse’” such “that a facility administrator has *no* discretion to treat *any* resident complaint as a ‘grievance,’” and moreover that “every resident complaint ipso facto is valid.” Petitioner's Request for Review (RR) at 3, 5 (Rockcastle's emphases). The threshold question, says Rockcastle, is whether a complaint even rises to a level of abuse – a question that calls for judgment and discretion on the part of a facility's administrator to determine whether a complaint is only that, such as an expression of concern or preference, or merely a “customer service issue,” as opposed to an allegation of abuse. *Id.* at 2-5, 9. It asserts that, where a facility in its reasonable judgment determines that a complaint may appropriately be handled as a grievance as opposed to an allegation of abuse, the facility need not have reported it to the state under state and federal law that govern grievances. *Id.* at 1-2. Rockcastle urges the Board to define the “line between ‘allegations of abuse’ and ‘grievances.’”¹¹ *Id.* at 3.

¹¹ In support of this invitation, Rockcastle asserts that “several ALJs have recognized that Section 483.13 requires administrators to make *some* initial determination whether a complaint, report, or incident *could be* an ‘allegation of abuse,’ as opposed to a ‘grievance,’ *in order to trigger the investigation and reporting requirements.*” RR at 32 (citing *Golden Living Ctr. – Riverchase*, DAB CR2012, at 19-20 (2009) and *Royal Park Care Ctr.*, DAB CR1493 (2006)) (Rockcastle's emphases). ALJ decisions are not precedential or binding on the Board. *Green Oaks Health & Rehab. Ctr.*, DAB No. 2567, at 9 (2014) (and cases cited therein). Moreover, although Rockcastle is correct that the Board reviewed the ALJ's decision in *Golden Living Center*, Rockcastle's statement that the Board “did not disturb [the ALJ's] finding that the facility Administrator had not violated Section 483.13 by treating certain complaints as ‘grievances’ rather than ‘allegations of abuse’” (RR at 32 n.12) is a mischaracterization of what the Board did in *Golden Living Ctr. – Riverchase*, DAB No. 2314 (2010), *aff'd*, *Golden Living Center – Riverchase v. U.S. Dep't of Health & Human Servs.*, 429 F. App'x 895 (11th Cir. 2011). In DAB No. 2314, the Board concluded that it did not need to reach the issue of whether the ALJ erred in concluding that Golden was in substantial compliance with section 483.13(c) since that conclusion did not affect the Board's decision. *See* DAB No. 2314, at 3. Since the Board did not even reach the issue of Golden's compliance with section 483.13(c), the Board could not, as Rockcastle suggests, have tacitly accepted the findings or reasoning underlying the ALJ's conclusion on that issue.

We decline Rockcastle’s invitation to insert a non-issue into this case. Rockcastle’s insistence that there is a meaningful, consequential distinction between a grievance and an allegation of abuse for purposes of determining whether the cited abuse deficiencies should stand needlessly confuses the issue and diverts the focus away from where it should be – whether Rockcastle complied with section 483.13 requirements for reporting and investigating “abuse.” That term, unlike the term “grievance,” is defined in the applicable regulations as the “willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.” 42 C.F.R. § 488.301. The regulations further provide that “abuse” includes verbal and mental abuse. *Id.* § 483.13(c)(1)(i).

There can be no reasonable dispute that the allegations by Rockcastle’s residents that are at issue here – forced, opposed insertion of a suppository and “rough” handling (that the resident experienced as “thr[owing] her legs into the bed like . . . a sack of dog food”) by MA1 and CNA1’s telling a resident to “pee in her bed” rather than assisting her with toileting and then telling the resident not to tell her guardian about the incident – meet section 488.301’s definition of abuse. Accordingly, section 483.13 required Rockcastle to report those allegations to the State OIG “immediately,”¹² before conducting its own investigation or forming its own opinion as to whether abuse might have occurred. 42 C.F.R. § 483.13(c)(2); *Beverly Healthcare Lumberton v. Leavitt*, 338 F. App’x 307, 313 (4th Cir. 2009)¹³ (“[I]t is the *allegation* that triggers the responsibility to report.”) (court’s emphasis; citing *Cedar View Good Samaritan*, DAB No. 1897, at 11 (2003)); *Rosewood Care Ctr. of Swansea*, DAB No. 2721, at 10 (2016) (“[T]he regulation does not permit a facility to decline to report or delay reporting based on its own evaluation that an allegation is not credible.”), *aff’d*, *Rosewood Care Ctr. of Swansea v. Price*, 868 F.3d 605 (7th Cir. 2017); *Illinois Knights Templar Home*, DAB No. 2369, at 11 (2011) (“[T]he [facility’s] reporting requirements are triggered by an allegation of abuse whether or not it is recognized as such by the facility.”) (cited in the ALJ Decision at 16). Yet, Rockcastle did not immediately report the allegations.

¹² The Part 483, subpart B regulations do not provide a specific time frame for reporting an abuse allegation “immediately” in accordance with section 483.13(c)(2). We note, however, that the Board has stated, within the context of section 483.10(b)(11)(i) (addressing a facility’s notice and consultation obligations concerning, e.g., changes in a resident’s condition), that the word “immediately” is accorded its ordinary dictionary meaning, i.e., “at once” or “without delay.” *See, e.g., River City Care Ctr.*, DAB No. 2627, at 7-8 (2015), *aff’d*, *River City Care Ctr. v. U.S. Dep’t of Health & Human Servs.*, 647 F. App’x, 349 (5th Cir. 2016); *Magnolia Estates Skilled Care*, DAB No. 2228, at 8-9 (2009).

¹³ The U.S. Court of Appeals for the Fourth Circuit in *Beverly* upheld the Board’s March 4, 2008 decision in *Beverly Health Care Lumberton*, DAB No. 2156 (2008). By Ruling 2008-5 (May 2, 2008), the Board denied Beverly’s petition to reopen and reconsider DAB No. 2156.

In light of the requirement to report all allegations of abuse, as defined in section 483.13(c), immediately, we reject the Administrator's attempt to justify his failure to report the allegations immediately to the State OIG by testifying that, after talking with the residents or staff (or learning of staff investigatory steps), he considered these allegations grievances rather than allegations of abuse.¹⁴ See P. Ex. 62, at 5-12. The Administrator was required to report the allegations immediately, before he investigated them. Furthermore, Rockcastle's suggestion that these allegations were grievances rather than allegations of abuse is wholly undercut by its ultimate admission in subsequent reports to the State OIG that it had substantiated abuse.

But even assuming the Administrator was justified in first investigating the allegations, he was required to report the results of that investigation to the State OIG, which he did not do in every instance. The Board has made it clear that a facility's reporting and investigation obligations are not dependent on whether or not the facility later determines there was abuse. *Singing River Rehab. & Nursing Ctr.*, DAB No. 2232, at 8 (2009) (“[T]he regulation explicitly requires reporting of the results of all investigations of abuse, not merely those that substantiate abuse. Thus, facilities are not free to view their internal investigations as an opportunity to ‘pre-screen’ whether an alleged or suspected instance of abuse is substantiated or involves specific bad actors, i.e., staff. Indeed, the regulation states that all investigations are to be reported and ‘if the alleged violation is verified appropriate corrective action must be taken.’ 42 C.F.R. § 483.13(c)(4) (emphasis added). It follows that the regulation contemplates reporting of the results of investigations even when the alleged violation is not verified.”); *Illinois Knights Templar Home* at 12 (“[E]ven an allegation of abuse not ultimately substantiated must be fully investigated.”).

Just as we reject Rockcastle's “grievance” argument, we also reject Rockcastle's argument that the first ALJ assigned to this case erred in denying Rockcastle's motion for summary judgment, a motion based on essentially the same argument. Rockcastle moved for summary judgment below, invoking collateral estoppel and res judicata, in reliance on a January 13, 2015 decision of an ALJ of the Commonwealth of Kentucky, Cabinet for Health and Family Services, which found in part that Rockcastle appropriately treated the May 2013 and June 2014 incidents as grievances. Rockcastle asserted that CMS's enforcement action for violation of section 483.13 requires reference to Kentucky law under which the state cited Rockcastle for allegedly the same deficiencies and that the state ALJ properly determined that Rockcastle exercised discretion to determine whether to investigate and report the complaints as allegations of abuse, precluding the ALJ of the

¹⁴ With respect to the suppository incident involving R1, the Administrator testified that he “did determine that the Resident's complaint was an ‘allegation of abuse,’ and we treated it as such, and the allegation was reported to the State immediately.” P. Ex. 62, at 8. However, Rockcastle actually reported the incident four days after the resident alleged abuse and in the report stated that it had investigated and that “[r]esident allegation of abuse can not be substantiated.” CMS Ex. 14, at 7.

Civil Remedies Division from reviewing that issue. On March 30, 2016, the ALJ who initially presided over the Civil Remedies Division appeal denied the motion.

Rockcastle asserts that the denial of summary judgment was “plainly erroneous as a matter of law” and “materially prejudicial.” RR at 12; *id.* at 5, 10 (similar argument). This assertion, like Rockcastle’s summary judgment motion, is based on the argument that Rockcastle acted appropriately in treating abuse allegations as grievances. Since we have already upheld the ALJ’s rejection of that argument, we also reject Rockcastle’s assertion of error and prejudice in connection with denying its motion for summary judgment. Moreover, Rockcastle’s assertion disregards settled Board precedent recognizing that federal law, not state law, governs these proceedings. See *Britthaven, Inc., d/b/a Britthaven of Smithfield*, DAB No. 2018, at 15 (2006) (“[F]ederal reporting requirements take precedence over state law.”); *Illinois Knights Templar Home* at 11 n.10 (“[T]he federal regulation . . . governs the facility’s responsibility to report an allegation of abuse to the State survey agency.”); *Fairfax Nursing Home, Inc.*, DAB No. 1794, at 14 (2001) (“Fairfax’s reliance on a decision by a state ALJ reaching a somewhat different result is misplaced. The state ALJ did not have the same evidence before her, nor was she applying the same standards.”), *aff’d*, *Fairfax Nursing Home, Inc. v. U.S. Dep’t of Health & Human Servs.*, 300 F.3d 835 (7th Cir. 2002), *cert. denied*, 537 U.S. 1111 (2003).

- b. *Rockcastle’s amended reports to the State OIG that the facility had substantiated abuse is evidence the ALJ properly considered as part of her de novo review to determine whether Rockcastle violated section 483.13.*

Central to the ALJ’s determination upholding the abuse deficiencies is evidence of Rockcastle’s substantiation of abuse as reported to the State OIG. Rockcastle asserts that the surveyors, not Rockcastle, “substantiated” abuse. RR at 6-7, 38. According to Rockcastle, its reports to the State OIG that the ALJ found were evidence of Rockcastle’s own determination that abuse had occurred are not actually evidence of the facility’s substantiation of abuse. Rather, Rockcastle argues, they are, or are akin to, compulsory post-survey¹⁵ submissions like plans of corrective action that a facility had no choice but to submit, and thus are not evidence of “concessions” or “admissions” of abuse that may be used against a nursing home facility in a CMS enforcement proceeding. *Id.* at 7. According to Rockcastle, a determination, as in this case, that a facility’s staff abused its

¹⁵ Rockcastle attempts to show that its amended reports to the State OIG were in fact compulsory *post-survey* submissions by asserting that it filed them “only after the State had cited the deficiencies.” RR at 7, 36. We reject Rockcastle’s arguments concerning its amended reports for the reasons given in the text. We do note, however, that Rockcastle is mistaken in terms of timing of the submittal of the amended or final reports. Strictly speaking, they were not *post-survey* filings because Rockcastle submitted them *before* the completion of the survey on June 27, 2014. Moreover, CMS sent Rockcastle the notice of deficiencies and imposition of CMPs based on the survey findings on July 25, 2014, a full month after June 27, 2014. See CMS Ex. 2.

residents based on such evidence of “concessions” or “admissions” is not legally supportable as it “poses obvious due process problems.” *Id.* at 8. Moreover, Rockcastle says, since “such ‘concessions’ are not *evidence* of the underlying events,” the ALJ’s determination based “only upon [Rockcastle’s] supposed concession” of abuse in its amended reports is “inconsistent” with the requirement that the ALJ evaluate whether CMS has established its prima facie case of noncompliance. *Id.* (italics in original). If CMS does not establish its prima facie case, Rockcastle says, then “the case ends right there, and the [facility] need offer no evidence or make any argument at all.” *Id.*

Rockcastle’s argument disregards a basic point, that is, its amended reports to the State OIG indicating that it had substantiated abuse are a part of the evidence that CMS submitted and the ALJ admitted, *without objection by Rockcastle*, as relevant and material evidence on the issue of Rockcastle’s noncompliance with the regulation prohibiting abuse. Thus, the ALJ properly considered those reports as part of her de novo review. *See* 42 C.F.R. §§ 498.60, 498.61.¹⁶ If Rockcastle believed that the reports were not relevant or material to the issues of noncompliance before the ALJ, it should have objected during the ALJ proceeding. We find no error with the ALJ’s having considered that relevant and material evidence. Moreover, we agree with the ALJ’s assessment of that evidence and her conclusion that the reports were evidence that “[Rockcastle] admitted that the allegations of abuse were substantiated.” ALJ Decision at 15. Rockcastle’s bald assertion on appeal that it did not actually substantiate abuse despite such evidence, as the ALJ aptly observed, “blatantly misrepresents” that evidence for which Rockcastle has offered “no reason why its own investigative findings were in error or should be disregarded.” *Id.* at 10 n.12 and 15. We also note the ALJ’s statement – which Rockcastle does not dispute – that “Petitioner has not argued, either in its briefing or its witness testimony, that it erroneously substantiated abuse in those four instances.” *Id.* at 15. The ALJ was not required to make an independent evaluation of whether these residents were abused when Rockcastle admitted to the abuse in reports to the State OIG that were admitted without Rockcastle’s objection and without any argument by Rockcastle before the ALJ disputing the findings and conclusions of abuse it made in those reports. Moreover, we have reviewed the record and find no basis for any reasonable argument that the staff conduct at issue was anything other than physical and mental abuse within the meaning of the federal regulation and Rockcastle’s own policy.

Nor does Rockcastle cite any authority on point supporting what we understand is its core argument – that any facility investigation report concerning allegations of abuse required to be filed with a state agency may not later be used against the facility as “admissions”

¹⁶ We also observe that included within the exhibits Rockcastle itself submitted is a final, amended report to the State OIG that duplicates CMS’s exhibit. *Compare* CMS Ex. 14, at 9 and P. Ex. 26, at 1 (both are the June 25, 2014 amended report to the State OIG stating that the facility had substantiated the medication administration incident involving R1 as abuse and had terminated MA1).

or “concessions” to the extent the contents of the report are adverse to the facility. Rockcastle attempts to liken its amended reports to the State OIG to plans of correction (POCs) evidencing remedial measures that it says are desirable and should be encouraged as a matter of policy as the Federal Rules of Evidence (FRE) Rule 407¹⁷ recognizes. In essence, Rockcastle is attempting to avoid the adverse impact on its appeal of its reports to the State OIG that Rockcastle substantiated abuse by asserting that those reports constitute evidence of remedial measures that may not or should not be used against Rockcastle as proof of noncompliance. RR at 37 (stating that a POC is “logically and legally comparable to the sort of post-accident evidence of correction that [FRE Rule] 407 prohibits plaintiffs from introducing to support an allegation of underlying noncompliance” and that “the reason for applying a parallel or comparable rule here is exactly the same; that is, the law may encourage, or, in this case, require subsequent remedial measures as a matter of policy, regardless of whether the absence of such measures caused an accident, or, in this case, a deficiency”); Reply Br. to the Board at 10-11 (similar argument).

We reject the attempt. The ALJ and the Board are not bound to follow the FRE and the “subsequent remedial measures” rule in FRE Rule 407 has no place in these administrative proceedings, which are governed by specific federal statutes and regulations, not tort law. *Lakeport Skilled Nursing Ctr.*, DAB No. 2435, at 6 (2012) (the FRE do not apply to Part 498 proceedings); *Omni Manor Nursing Home*, DAB No. 1920, at 44 (2004) (observing that FRE Rule 407 “arises in tort, not in the context of statutory and regulatory obligations of skilled nursing facilities to maintain substantial compliance with Medicare participation requirements” and “[t]hus, FRE [Rule] 407 provides no clear guidance in the context of an administrative hearing conducted pursuant to 42 C.F.R. Part 498”), *aff’d*, *Omni Manor Nursing Home v. Thompson*, 151 F. App’x 427 (6th Cir. 2005).¹⁸ Rockcastle has not identified any authority applicable to these proceedings, and which binds the ALJ and the Board, that requires treatment of the contents of its amended State OIG reports (even assuming only for purposes of argument that those reports are

¹⁷ FRE Rule 407, “Subsequent Remedial Measures,” provides that when measures are taken that would have made an earlier injury or harm less likely to occur, evidence of such measures is not admissible to prove negligence, culpable conduct, defect in a product or its design, or need for a warning or instruction. Evidence of subsequent remedial measures may be admitted for other purposes, such as impeachment, proof of ownership or control, or the feasibility of precautionary measures.

¹⁸ Rockcastle’s own language indicates its awareness that the ALJ and the Board are not so bound. RR at 37 (stating that FRE Rule 407 “does not directly apply here”).

akin to POCs as Rockcastle argues)¹⁹ as evidence of subsequent remedial measures that may not be used against the facility as evidence of noncompliance.

Moreover, the Board rejected a similar argument in *Avalon Place Trinity*, where the nursing facility invoked FRE Rule 407 to assert that its POC (in the Statement of Deficiencies) is evidence of subsequent remedial measures that may not be used against a facility to prove culpability or to establish deficient facility practice. DAB No. 2819, at 36-37 (2017). The Board has also observed that the public policy concern underlying the FRE’s “subsequent remedial measures” rule – the “notion that [the] use of corrective actions as evidence of negligence or culpable conduct could act as a disincentive to such measures and therefore jeopardize public health and safety” – is not a concern in nursing home enforcement proceedings because admitting and considering evidence of facilities’ corrective actions “would not have the unintended consequence of discouraging them from taking such actions.” *Fairfax Nursing Home, Inc.*, DAB No. 1794, at 8-9.

B. The ALJ’s determination that Rockcastle was not in substantial compliance with 42 C.F.R. § 483.10(b)(4) is supported by substantial evidence and free of legal error.

The ALJ determined that Rockcastle also was not in substantial compliance with 42 C.F.R. § 483.10(b)(4) – which states, in relevant part, that a resident “has the right to refuse treatment” – because MA1 did not allow R1 to refuse treatment and “forcibly administered” the suppository to R1 despite her refusal. ALJ Decision at 17-18.

Again, Rockcastle itself determined that MA1 abused R1 when MA1 administered the suppository after R1 refused it. CMS Ex. 14, at 9. Evidence that Rockcastle substantiated MA1’s abuse of R1 not only supports the section 483.13 citation discussed above, it also establishes the fact central to the section 483.10(b)(4) citation – that MA1 in fact administered the suppository over R1’s refusal. Despite such evidence, Rockcastle maintains that its staff did not abuse R1, and acted appropriately in giving R1 the suppository because she needed it to manage her bowel movements and needed assistance for every episode of toileting. RR at 15, 17. But whether R1 needed the suppository or assistance with toileting is not the issue here. The issue is whether R1 in fact refused treatment (medication), but nevertheless was given it against her will.

On that issue, Rockcastle attempts to cast doubt on whether MA1 actually administered the suppository to R1 against her will. Rockcastle first implies that R1 misperceived her

¹⁹ Rockcastle does not even address exactly why the ALJ should have treated its amended reports to the State OIG as equivalent to post-survey POCs; it merely asserts that they are, in a futile attempt to invoke the “subsequent remedial measures” rule that we are not bound to apply. In addition, in *Avalon Place Trinity*, the Board noted that “42 C.F.R. § 488.408(f) requires facilities to have [a POC] for virtually all deficiencies.” DAB No. 2819, at 39. Thus, Rockcastle’s POC (CMS Ex. 1), which was required by section 488.408(f), is distinguishable from the abuse investigation reports (CMS Exs. 14, at 9; 16, at 6-9; and 17, at 7-10), which Rockcastle was required to submit under 42 C.F.R. § 483.13(c).

own medical condition and might have given an inaccurate accounting of what happened on May 26, 2014. RR at 15-16, 17. Rockcastle then asserts that the “scenario” – that despite R1’s refusal, MA1 rolled R1 over, moved her hand away, and inserted the suppository – is “implausible” because R1 had enough control over her body to prevent the insertion. *Id.* at 17. Relying on MA1’s accounting of the incident, Rockcastle also asserts that R1 eventually consented to receiving the suppository once MA1 reminded R1 that the doctor had ordered it administered regularly. *Id.* at 18-19.

Credible evidence amply supports the ALJ’s finding that MA1 administered the medication over R1’s refusal. Of note, the ALJ relied on the signed statements of two Rockcastle employees – a student registered nurse anesthetist (SRNA) and a licensed practical nurse (LPN) – signed May 26, 2014, the day of the incident, as evidence that R1 refused the medication. The SRNA memorialized R1’s statement to her that she did not want the suppository and that, by placing her hand behind her physically signaled her refusal, but that MA1 nevertheless administered it. The SRNA reported R1’s complaint to the LPN, who then went to R1. R1 gave the LPN a similar statement about MA1 giving her the suppository despite her refusal. ALJ Decision at 10 (quoting employee statements at CMS Ex. 14, at 2, 3); *see also* P. Ex. 13, at 2 (May 27, 2014 nurse’s note, stating that R1 reported receiving medication that she did not want) and P. Ex. 14, at 1 (similar notation in May 27, 2014 social services progress notes). Rockcastle offers no reasoned and persuasive explanation, bolstered by evidence in the record, as to why the ALJ could not rely on the SRNA’s and LPN’s statements that *contemporaneously* memorialized R1’s report that MA1 administered the suppository despite her refusal.

Nor does Rockcastle point to any specific evidence indicating that R1’s cognitive status was such that R1 actually misperceived what had occurred on May 26, or was unable to communicate her wishes on May 26, or was unable to or did not give an accurate accounting of what happened.²⁰ In fact, Rockcastle’s initial (May 27, 2014) report of the incident to the State OIG indicated that R1 was “alert and oriented x3” and had a BIMS score of “13/15.” CMS Ex. 14, at 1; *see also id.* at 7 (May 30, 2014 report to the State OIG, stating that R1 “is alert and oriented x3, understands communication, and speaks clearly”). Moreover, neither the statements of the SRNA and the LPN, nor the nurse’s or social services progress notes, are equivocal or inconsistent about what happened based on R1’s report of the incident. They consistently indicate that R1 reported refusing the suppository but was given it anyway.

²⁰ Rockcastle asserts that the day after the incident R1 retracted her accounting of MA1 forcibly administering the medication. RR at 19 (citing P. Ex. 20), 20. Petitioner’s exhibit 20 does not support Rockcastle’s argument that R1 “change[d] her story the following day” (RR at 20). Moreover, the argument is wholly undercut by evidence that about a month after the incident Rockcastle reported to the State OIG that it had substantiated the incident as abuse. Surely, if R1 actually had withdrawn the complaint or denied that she was forcibly medicated, Rockcastle would not have reported to the State OIG that it had substantiated abuse.

We therefore reject Rockcastle's assertion that the "scenario" is somehow "implausible, as [R1] had enough body control to prevent a nurse from inserting the suppository," suggesting that R1 actually was able to prevent and perhaps did prevent the administration of the suppository. RR at 17. Whether or not R1 had "enough body control" is not the issue; the question is whether Rockcastle's staff did something prohibited by federal regulations, that is, whether MA1 administered medication over R1's refusal. The evidence shows not only that R1 refused but that MA1 still administered the medication. Moreover, despite Rockcastle's arguments that there is no evidence corroborating R1's accounting, *e.g.*, RR at 16, 20, there is highly probative corroborating evidence in the form of the written statements of facility employees and the facility's own contemporaneous determination substantiating the incident as abuse, which indicates to us, as it indicated to the ALJ, that the facility had determined that MA1 had administered the suppository despite R1's refusal.

Rockcastle also relies on MA1's written statement (unsigned and undated) that, although R1 initially indicated to MA1 that she did not believe she needed the suppository on May 26, R1 later consented to receiving it. RR at 18-19; CMS Ex. 14, at 4-5.²¹ But Rockcastle does not address why the accounting of the incident given by MA1 – who was terminated over this incident and who presumably had an interest in avoiding that fate when giving her employer her accounting – is more probative, credible, and reliable as compared to R1's accounting, despite ample evidence indicating that the incident occurred as R1 reported it and that the facility substantiated the incident as abuse. Moreover, on this argument, what Rockcastle carefully avoids addressing – its decision to terminate MA1 – is quite telling. If, as Rockcastle now says, it had determined that MA1's "denial was plausible and consistent with the evidence" and that MA1 did nothing wrong (RR at 20, 21), then there should have been no reason to terminate MA1, at least based on the May 26 incident. But the evidence plainly shows that Rockcastle terminated MA1 over this incident. CMS Ex. 14, at 9; CMS Ex. 16, at 5; CMS Ex. 30, at 2; P. Exs. 19, 26.

Lastly on this citation, Rockcastle asserts that "residents may refuse medications, but that when a resident does so, the standard of care is for the nurse to try to persuade the resident to change her mind, and if the resident does so, it is perfectly appropriate to administer it then." RR at 18-19. Elsewhere in its brief Rockcastle says, similarly, that "the evidence is undisputed that if a resident refuses medication, the standard of care is for a nurse first to explain why the medication is needed, and to try to persuade the resident to accept it, and only if the resident persists in her refusal, then to notify the physician." *Id.* at 19 n.7.

²¹ Rockcastle cites its own exhibit, Petitioner's exhibit 15, RR at 18-19, which includes only the first of two pages of MA1's statement. CMS exhibit 14 (pages 4 and 5) provides the full two-page statement.

Rockcastle's written medication policy, which was in effect at the time of the incident involving R1 and MA1, CMS Ex. 32, at 1-5, states, in part:

Important: If the resident refuses medication, indicate failure to administer medication on administration record and nurse's clinical notes. Counsel the resident on the potential dangers to him/herself if medication is refused. In nurse's clinical notes, document refusal, reason and counseling. Notify the physician timely of refusal as medication indicates.

Id. at 2; ALJ Decision at 5 (quoting CMS Ex. 32, at 2). The policy also states:

Additional Charging Procedures

1. If appropriate, chart on back of medication administration record reasons for medication not taken or given.

CMS Ex. 32, at 4.

The Board has stated that, absent contrary evidence (which Rockcastle has not presented here), it is "reasonable to presume" that a facility's own resident care policies reflect professional standards of quality. *See Perry Cnty. Nursing Ctr.*, DAB No. 2555, at 9 (2014) (citing *Sheridan Nursing Care Ctr.*, DAB No. 2178, at 32 (2008) (quoting *Spring Meadows Health Care Ctr.*, DAB No. 1966, at 18 (2005))), *aff'd*, *Perry Cnty. Nursing Ctr. v. U.S. Dep't of Health & Human Servs.*, 603 F. App'x 265 (5th Cir. 2015) (internal quotation marks omitted). Rockcastle has not attempted to rebut that presumption here, and we find that its argument does not comport with its policy. Rockcastle's policy does not contemplate that the facility is to try to "persuade" or press a resident into taking the medication. Nor does the policy state that if the resident "persists" in refusing it despite an attempt to "persuade," only then the facility must notify the physician. Rather, it states that if a resident refuses medication, the facility is to counsel the resident on the potential consequences of refusal, document the refusal, the reason why the medication was not administered and counseling, and notify the physician of the refusal. Thus, if Rockcastle's staff administered medication over a resident's refusal, that action would be in violation of facility policy (as well as section 483.10(b)(4)). Since the record establishes that MA1 administered the suppository to R1 despite her refusal, that action was in violation of facility policy.

C. The ALJ's determination that Rockcastle was not in substantial compliance with 42 C.F.R. § 483.75 is supported by substantial evidence and free of legal error.

Section 483.75 requires a facility to govern itself in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident. The ALJ found that multiple

violations of 42 C.F.R. §§ 483.10 and 483.13, which posed immediate jeopardy to Rockcastle's residents, also put Rockcastle in violation of 42 C.F.R. § 483.75. ALJ Decision at 18. The ALJ found that the deficiencies based on violations of sections 483.10 and 483.13 were "directly attributable to administrative failures," that is, Rockcastle's "administration disregarded facility policies when it failed to investigate and report timely allegations of resident abuse by its employees" and, accordingly, Rockcastle was not administered consistent with section 483.75. *Id.*

Rockcastle does not specifically disagree with the ALJ's findings and conclusions on noncompliance with section 483.75 and we therefore summarily affirm those findings and conclusions. In any event, it is well established that noncompliance with section 483.75 may be based on violations of other participation requirements. *See, e.g., Brenham Nursing and Rehab. Ctr.*, DAB No. 2619, at 15-16 (2015) (summarily upholding a finding that Brenham violated section 483.75 because Brenham's argument for reversing that finding was founded on its objection to other noncompliance findings that the Board had affirmed), *aff'd, Brenham Nursing & Rehab Ctr. v. U.S. Dep't of Health & Human Servs.*, 637 F. App'x 820 (5th Cir. 2016); *Pinehurst Healthcare Rehab. Ctr.*, DAB No. 2246, at 19-20 (2009) (upholding the ALJ's determination that CMS had made its prima facie showing of Pinehurst's noncompliance with section 483.75 based on its failure to implement anti-abuse policies and that the facility did not then meet its burden to prove substantial compliance with section 483.75 by a preponderance of the evidence); *Life Care Ctr. of Bardstown*, DAB No. 2233, at 28 (2009) (The existence of other deficiencies may establish a prima facie case that a facility has not been administered consistent with section 483.75.) (and cases cited therein); *Asbury Ctr. at Johnson City*, DAB No. 1815, at 11 (2002) ("[W]here a facility has been shown to be so out of compliance with program requirements that its residents have been placed in immediate jeopardy, the facility was not administered in a manner that used its resources effectively to attain the highest practicable physical, mental, and psychosocial well-being of each resident.") (cited in ALJ Decision at 18), *aff'd, Asbury Ctr. at Johnson City v. Dep't of Health & Human Servs.*, 77 F. App'x 853 (6th Cir. 2003).

D. The ALJ did not err in concluding that CMS's determination of immediate jeopardy was not clearly erroneous; the CMPs are reasonable.

In reviewing an immediate jeopardy determination, the ALJ and the Board must defer to CMS's determination absent a showing of clear error. 42 C.F.R. § 498.60(c)(2). This regulatory standard means that a facility bears a heavy burden in challenging the assessment of immediate jeopardy, which, of necessity, includes an element of judgment. *Meadowwood Nursing Ctr.*, DAB No. 2541, at 14 (2013); *Britthaven of Havelock*, DAB No. 2078, at 29 (2007) (and cases cited therein). Immediate jeopardy need not be based on the occurrence of actual harm but, rather, requires only the "likelihood" that serious harm may result from the noncompliance. *Crawford Healthcare and Rehab.*, DAB No.

2738, at 17 (2016); *Woodstock Care Ctr.*, DAB No. 1726, at 39 (2000), *aff'd*, *Woodstock Care Ctr. v. Thompson*, 363 F.3d 583 (6th Cir. 2003).

The ALJ rejected Rockcastle's challenge to the immediate jeopardy determination, noting that Rockcastle offered "little elaboration and no factual support." The ALJ concluded that CMS's immediate jeopardy determination was not clearly erroneous, stating:

The facility failed to timely investigate and report abuse. In fact, the facility's refusal to report the alleged abuse, but instead to handle the reported abuse through its internal grievance process, undoubtedly contributed to its failure to terminate an employee [MA1] for *more than a year* after an employee abused [R2 in May 2013]. . . . As a result, this abusive employee continued to care for the facility's residents for a lengthy period of time following her abuse of [R2]. In fact, [MA1] committed abuse in an incident on May 26, 2014, when she forcibly administered a suppository to [R1]. . . . If [MA1] had been terminated at the time she abused [R2] in May 2013, she would not have been able to again commit abuse in May 2014. . . . While I need not find that the facility's noncompliance caused actual harm or injury to a resident, it is apparent that residents suffered actual harm in that one resident was forcibly given a suppository against her wishes, another resident was physically handled in a rough manner, and a resident was mistreated when she was told to go to the bathroom in her bed and abused yet again by the same employee because she had reported the abuse. So long as the deficiencies are *likely* to cause serious injury or harm, they pose immediate jeopardy. Petitioner had a pattern of not timely reporting and investigating abuse, and effectively allowed an abusive employee to continue to care for its residents for a year, thereby exposing its residents to potential abuse by this employee. CMS's determination that the deficiencies posed immediate jeopardy to resident health and safety is therefore not clearly erroneous.

ALJ Decision at 19 (ALJ's emphases; internal citations and footnote omitted). The ALJ also concluded that "[a] 30-day period of immediate jeopardy is lenient" given that the first substantiated abuse allegation occurred in May 2013 but Rockcastle did not report the incident until June 2014, and the offending staff person remained in Rockcastle's employ until June 2014. *Id.* at 19-20 n.20.

Before the Board, Rockcastle merely restates its arguments, which we have already rejected, to the effect that the noncompliance findings were erroneous (and thus not a basis for finding immediate jeopardy) because they allegedly were based on "subjective disagreements" with how the facility handled certain complaints as grievances rather than as allegations of abuse. P. Reply at 19. Rockcastle also alleges, without explanation, that CMS merely "bootstrapped" its immediate jeopardy determination relying "solely" on

“inferences” the surveyors allegedly drew concerning resident complaints. *Id.* Rockcastle makes no argument specifically challenging the ALJ’s conclusion (or the ALJ’s reasoning for that conclusion) that Rockcastle did not show CMS’s immediate jeopardy determination to be clearly erroneous, and we find no basis for disturbing that conclusion.

Lastly, the ALJ determined that the per-day CMP amount of \$5,300 was at the “low end” of the range of per-day CMPs for violations at the immediate-jeopardy level (\$3,050-\$10,000). ALJ Decision at 20 (citing and applying 42 C.F.R. §§ 488.404, 488.408, 488.438). The ALJ stated that “these penalties are reasonable” and, “[i]f anything, [they] are too low considering that there are five immediate jeopardy level deficiencies” involving four substantiated incidents of employee abuse of residents, and Rockcastle’s failure to adhere to its abuse policies, and investigate and report the abuse.²² *Id.* Rockcastle remains silent about this part of the ALJ’s analysis. We do not disturb it.

E. Rockcastle’s remaining arguments have no merit.

1. ALJ’s August 1, 2016 evidentiary ruling

By her ruling issued August 1, 2016, the ALJ excluded Rockcastle’s exhibits 1, 2, 3 and 7A, which, respectively, are the State OIG’s statement of deficiencies based on the survey findings, the State OIG’s notice of citation based on the survey findings, a printout of certain Kentucky Administrative Regulations obtained from the Kentucky legislature’s website, and a copy of the “Kentucky Resident Handbook & Admissions Information.” The ALJ determined that these exhibits were not relevant to her review of whether Rockcastle was in substantial compliance with federal nursing home participation requirements. August 1, 2016 Ruling at 2 (citing 42 C.F.R. § 498.61).²³ In her decision, she restated her ruling excluding the evidence. ALJ Decision at 4.

Rockcastle asserts that the ALJ’s ruling was “legally incorrect.” RR at 10 n.1. Also, referring to the March 30, 2016 denial of its motion for summary judgment, Rockcastle asserts that the ALJ who denied summary judgment “misstated and misapplied governing

²² As noted earlier, Petitioner did not challenge before the ALJ the two non-immediate-jeopardy level deficiencies (Tags F151 and F514) or the CMPs imposed for those deficiencies. ALJ Decision at 4 n.4. Accordingly, those CMPs are final, and we need not address them.

²³ However, the ALJ admitted Rockcastle’s exhibits 59 and 62, which contain the written direct testimony of R.B. and S.C. In her ruling, the ALJ made clear that, while she was not striking portions of Petitioner’s exhibits 59 and 62 that refer to the state ALJ proceeding, any state administrative proceeding referred to by the witnesses was not relevant to her review and that she would not be persuaded or bound by any findings made in that proceeding. Moreover, in admitting Rockcastle’s exhibits 4, 5, and 6 (transcripts of the deposition of one individual and of testimony given by various individuals in the state proceeding), the ALJ stated that, “[w]hile the matters that were the subject of the witness testimony at P. Exs. 4, 5, and 6 involved a different adjudicative body, the underlying facts involved allegations of abuse, as is involved in this case. Therefore, the sworn witness testimony appears to be relevant and will be admitted into evidence.” August 1, 2016 Ruling at 2.

law regarding issue preclusion” and that the exhibits were “offered to address that issue, and plainly are relevant to it.” *Id.*

It is the ALJ who determines whether to admit or exclude evidence. She has wide latitude within the context of Part 498 proceedings to decide whether any particular piece of evidence is relevant and material, and may exclude evidence that she determines is not relevant and material. *See* 42 C.F.R. § 498.60(b)(1) (The ALJ admits “relevant and material” evidence.); *Jennifer Matthew Nursing & Rehab. Ctr.*, DAB No. 2192, at 51 (2008) (“Under 42 C.F.R. § 498.61, an ALJ has broad discretion to admit evidence.”).

Rockcastle attempts to frame the question as relevance of the excluded exhibits to its argument about alleged preclusion of these federal proceedings based on the state ALJ’s decision, an argument we have already rejected on the ground that the state ALJ’s decision based on Kentucky law is irrelevant to the ALJ proceeding here. Since the state ALJ decision was irrelevant to the ALJ proceeding, the exhibits also were irrelevant, and the ALJ did not abuse her discretion in not admitting them.

2. Alleged violation of 42 C.F.R. § 483.15(a), Tag F241

In its pre-hearing brief, CMS asserted that the SOD’s deficiency findings also support a finding that Rockcastle violated 42 C.F.R. § 483.15(a) (Tag F241). CMS’s Pre-Hearing Brief at 3, 12-13. In subsequent briefing and during the hearing, CMS asserted that it was authorized to raise new deficiencies in its briefing provided that Rockcastle is given notice and opportunity to be heard, and that Tag F241 was an immediate-jeopardy-level deficiency. CMS’s Post-Hearing Brief at 2 n.2; Hearing Transcript at 9-10. Petitioner challenged CMS’s “adding” a new deficiency citation, not cited in the SOD, through briefing and without having issued a prior written notice of the citation. Petitioner’s Post-Hearing Brief at 7 n.3. The ALJ stated that she need not address Tag F241 in her decision since the other cited immediate jeopardy deficiencies that she was upholding sufficiently supported the remedies imposed. ALJ Decision at 14 n.18 (citing *Claiborne-Hughes Health Ctr. v. Sebelius*, 609 F.3d 839 (6th Cir. 2010)).

Rockcastle does not specifically reassert its earlier argument that CMS may not “add” a new deficiency citation through briefing. It states instead that the ALJ “did not make clear whether or not [Tag F241] would remain on [Rockcastle’s] record” and asserts that “where CMS does not make clear that a citation has no regulatory effect, the reviewing ALJ must either address or dismiss every citation.” RR at 13 n.4 (citing “Plott Nursing Home v. Burwell, 779 F.3d 975 (2015)”).

We confine our discussion to those arguments Rockcastle specifically raises. *Guidelines*. The sole authority Rockcastle invokes is *Plott Nursing Home v. Burwell*, 779 F.3d 975 (9th Cir. 2015), in which the U.S. Court of Appeals for the Ninth Circuit reversed that part of the Board’s decision, *Plott Nursing Home*, DAB No. 2426 (2011), in which the Board

held that the ALJ was not required to uphold or set aside every deficiency finding that Plott, a California facility, had appealed. The court in *Plott* held that if a facility appeals a deficiency, the deficiency must either be dismissed or reviewed. *Plott*, 779 F.3d at 985-989. The Board is not bound to follow *Plott* in this case, which involves a facility in Kentucky, located within the Sixth Circuit. See *Ind. Dep't of Public Welfare*, DAB No. 970, at 5-6 (1988) (“[T]he Board is not bound to apply a decision from a different circuit as controlling precedent.”), *aff'd*, *Indiana v. Sullivan*, 934 F.2d 853 (7th Cir. 1991); *Tenn. Dep't of Health and Env't.*, DAB No. 921, at 12 (1987) (“[T]he Board is not bound here by the First Circuit decision.”); see also *Wash. State Dep't of Social & Health Servs.*, DAB No. 940, at 7 (1988) (stating that “[t]he Board is not bound to apply the cited District Court decision as controlling precedent because the instant appeal is from a different district than the court in Delaware”).

We note, moreover, that Rockcastle’s argument – that where CMS does not specifically state whether a citation would remain on the facility’s record the ALJ must address or “dismiss” that citation – is one that the Board has previously considered and rejected, and the Sixth Circuit has upheld the Board on that issue. See *Golden Living Ctr. - Frankfort*, DAB No. 2296 (2009), reconsideration of DAB No. 2296 denied by DAB Ruling 2010-2 (Feb. 22, 2010), *aff'd*, *Golden Living Ctr. – Frankfort v. Sec’y of Health & Human Servs.*, 656 F.3d 421 (6th Cir. 2011); *Claiborne-Hughes Health Ctr.*, DAB No. 2223, at 3 n.2 (2008) (declining to review certain noncompliance findings that the ALJ did not review below), *aff'd*, *Claiborne-Hughes Health Ctr. v. Sebelius*, 609 F.3d 839, 847 (6th Cir. 2010), *reh’g denied*, Aug. 20, 2010 (rejecting the facility’s argument that because unreviewed deficiencies will “remain on the public record,” the court should “either direct the ALJ or the [Board] to review these remaining deficiencies, or dismiss [them] outright” and stating that “[i]t is neither arbitrary nor capricious for the agency to conclude that, in the interests of judicial economy, it will review only those deficiencies that have a material impact on the outcome of the dispute”).

Rockcastle does not assert or show that the ALJ would have had to uphold Tag F241 to also uphold the deficiencies she did address or the imposed sanctions, including the CMP amounts. An ALJ is not required to make findings on every alleged deficiency in order to sustain CMS’s enforcement action. See, e.g., *Heritage Plaza Nursing Ctr.*, DAB No. 2829, at 4 n.3 (2017); *Alexandria Place*, DAB No. 2245, at 27 n.9 (2009); *Community Skilled Nursing Centre*, DAB No. 1987, at 5 (2005); *Western Care Management Corp., d/b/a Rehab Specialties Inn*, DAB No. 1921, at 19 (2004). Accordingly, we find no error in the ALJ’s determination not to separately address Tag F241. See *Carrington Place of Muscatine*, DAB No. 2321, at 20-21 (2010) (ALJ committed no prejudicial error in not adjudicating certain cited deficiencies where the ALJ determined that those deficiencies the ALJ did address were on their own sufficient to support the remedies imposed).

Conclusion

The Board upholds the ALJ Decision.

_____/s/
Sheila Ann Hegy

_____/s/
Constance B. Tobias

_____/s/
Susan S. Yim
Presiding Board Member