

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Libertyville Manor Rehabilitation & Healthcare Center
Docket No. A-16-26
Decision No. 2849
February 7, 2018

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

Libertyville Manor Rehabilitation & Healthcare Center (Petitioner) is a skilled nursing facility (SNF) that participates in the Medicare program. Based on the results of several surveys which found Petitioner out of substantial compliance with Medicare participation requirements beginning in November 2013, the Centers for Medicare & Medicaid Services (CMS) imposed on Petitioner a “denial of payment for new admissions” (DPNA) effective from February 22 through April 2, 2014. Petitioner sought a hearing before an administrative law judge (ALJ) to challenge that enforcement action. In an October 7, 2015, decision, the ALJ granted summary judgment to CMS, sustaining the DPNA. *Libertyville Manor Rehab. & Healthcare Ctr.*, DAB CR4293 (ALJ Decision).

In this appeal, Petitioner contends that the legal condition for imposing the DPNA – a failure to achieve substantial compliance with Medicare participation requirements within three months after a survey which found it out of substantial compliance – was not met. Although our analysis differs in some respects from the ALJ’s, we determine that he correctly concluded that the condition for imposing the DPNA was met. We therefore affirm the grant of summary judgment to CMS.

Legal Background

To participate in the Medicare program, a SNF must be in “substantial compliance” with the requirements in 42 C.F.R. Part 483, subpart B (sections 483.1 through 483.75).¹ A facility is not in substantial compliance if it has a “deficiency” (that is, a failure to meet a participation requirement) that poses a “risk to resident health and safety” that is “greater” than the “potential for causing minimal harm.” 42 C.F.R. § 488.301 (defining

¹ We cite to the version of 42 C.F.R. Part 483 that was in effect during 2013 and 2014, when the relevant compliance surveys of Petitioner were performed. See *Carmel Convalescent Hosp.*, DAB No. 1584, at 2 n.2 (1996) (applying regulations in effect on the date of the survey and resurvey).

“substantial compliance” and “deficiency”). In other words, a deficiency constitutes lack of substantial compliance if it creates a potential for more than minimal harm to one or more residents. *Cf. id.* § 488.408(c)-(d) (authorizing enforcement remedies for deficiencies that pose a “potential for more than minimal harm”); *Agape Rehab. of Rock Hill*, DAB No. 2411, at 11, 13-14 (2011). The term “noncompliance,” as used in the applicable regulations (and in this decision), is synonymous with lack of substantial compliance. 42 C.F.R. § 488.301 (defining the term “noncompliance”).

State agencies conduct onsite surveys of SNFs to verify their compliance with Medicare participation requirements. *Id.* §§ 488.10(a), 488.11. Survey findings are reported in a “Statement of Deficiencies,” which describes each failure to meet a participation requirement. Each deficiency is identified in the Statement of Deficiencies by a unique “tag” number that corresponds to the regulatory requirement found to have been violated.

State survey agencies rate the level of “seriousness” of each cited deficiency using alphabetical designations: “A”-level deficiencies are the least serious, “L”-level deficiencies the most serious. Seriousness is a function of two factors: (1) “severity” – that is, whether the deficiency has created a “potential” for “minimal” or “more than minimal” harm to residents, resulted in “actual harm,” or placed residents in “immediate jeopardy” (the latter circumstance being the highest degree of severity); and (2) “scope” – whether the noncompliance is “isolated,” constitutes a “pattern,” or is “widespread.” *See* 42 C.F.R. § 488.408(a)-(b); State Operations Manual (SOM), CMS Pub. 100-07, Chapter 7 – “Survey & Enforcement Process for Skilled Nursing Facilities & Nursing Facilities,” § 7400.5.1 (matrix of scope and severity levels).² Deficiencies rated below level D are those that do not result in actual harm and create the potential for only “minimal harm” and thus do not constitute lack of substantial compliance. SOM § 7400.5.1. Deficiencies that cause actual harm or create at least the potential for more than minimal harm are rated at level D and above. *Id.*; *see also* Final Rule, *Medicare and Medicaid Programs; Survey, Certification and Enforcement of Skilled Nursing Facilities and Nursing Facilities*, 59 Fed. Reg. 56,116, 56,183 (Nov. 10, 1994) (scope-and-severity grid).

If a survey reveals that a SNF is not in substantial compliance with federal participation requirements, the SNF must promptly submit a plan of correction that is acceptable to the state survey agency or CMS. 42 C.F.R. §§ 488.402(d), 488.408(f); SOM § 7304.4; *Coquina Ctr.*, DAB No. 1860, at 3, 24-25 (2002). The plan of correction must specify the measures the SNF has taken, or intends to take, to remove the cited noncompliance as well as a timetable for completion of corrective action. 42 C.F.R. §§ 488.401; *Lake City Extended Care Ctr.*, DAB No. 1658, at 12 (1998). Even if a plan of correction is

² The State Operations Manual and its appendices are available at <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS1201984.html> (last visited Feb. 7, 2018).

accepted, the SNF is not regarded as being in substantial compliance until the survey agency determines, based on an onsite revisit survey or an “examination of credible written evidence,” that the SNF has actually achieved substantial compliance. *See* 42 C.F.R. §§ 488.440(h), 488.454(a)(1); SOM § 7317; *Lake City Extended Care Ctr.* at 12 & n.15.

CMS may, and in some cases must, impose enforcement “remedies” on a SNF that a survey finds to be out of substantial compliance. 42 C.F.R. §§ 488.402(b), 488.408-488.414. Available remedies include a DPNA. *Id.* § 488.406(a)(2), (b)(2). Section 1819(h)(2)(D) of the Social Security Act (Act) mandates the imposition of a DPNA if a SNF “has not complied” with Medicare participation requirements “within 3 months after the date the facility is found to be out of compliance with such requirements.”³ CMS implemented that statutory mandate in 42 C.F.R. § 488.417(b), which calls upon CMS to impose a DPNA if “[t]he facility is not in substantial compliance . . . 3 months after the last day of the survey identifying the noncompliance.” *See also* 42 C.F.R. 488.412(c) (“CMS does . . . deny payment for new admissions when a facility is not in substantial compliance 3 months after the last day of the survey.”).

In a May 3, 2001 program policy memorandum issued to state survey agencies, CMS explained that the “certification cycle” (sometimes referred to as the “survey cycle” or “noncompliance cycle”) during which a SNF must come back into substantial compliance in order to avoid the imposition of a DPNA or other mandatory remedies, “begins with a recertification or complaint survey and ends when substantial compliance is achieved or the facility is terminated from the Medicare . . . program.” *Meadowbrook Manor – Naperville*, DAB No. 2173, at 3-4 (2009) (*quoting* CMS Survey & Certification Memorandum No. 01-10 (May 3, 2001), available at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/downloads/SCLetter01-10.pdf>).

Survey and Enforcement Actions

In late November 2013, the Illinois Department of Public Health (IDPH) performed Life Safety Code (LSC) and standard surveys of Petitioner. CMS Ex. 1, at 1. The LSC survey was completed on November 19, 2013; the standard (or health) survey on November 22, 2013. *Id.* The standard survey found three deficiencies, each of which IDPH found to constitute lack of substantial compliance. CMS Ex. 12. The LSC survey found 11 such deficiencies, identified by K-tag numbers in that survey’s Statement of Deficiencies. CMS Ex. 4.

³ 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.

As we explain in this narrative, only one deficiency citation from the November 2013 surveys – K54 from the LSC survey – matters to the outcome of this case. K54 alleges that Petitioner was noncompliant with LSC § 9.6.1.3 because:

Based on a review of the “smoke detector” maintenance logs from the past 24 months . . . there was no bi-annual sensitivity test or annual functional test of the smoke detectors.

CMS Ex. 4, at 8-9.⁴ (The parties agree that LSC § 9.6.1.3 calls on a SNF to ensure that “[a]ll required smoke detectors, including those activity door hold open devices, are approved, maintained, inspected, and tested in accordance with the manufacturer’s specifications.” RR at 5; *see also* Response Br. at 2.)

In December 2013, Petitioner submitted a plan of correction to IDPH concerning the cited LSC deficiencies. *See* CMS Ex. 5. With respect to tag K54, the plan of correction stated:

A bi-annual smoke detector test report was issued by International Fire Equipment Corporation dated April 11, 2013 and April 12, 2013. Since April 12, 2013 all smoke detectors have been replaced throughout the entire facility. A copy of the [April 2013] smoke detector test report is attached for your review.

Id. at 3.

On January 14, 2014, IDPH determined that, with respect to tag K54 and two other LSC deficiencies, the December 2013 plan of correction could not be approved “as submitted.” CMS Ex. 24, ¶ 4.

On January 17, 2014, IDPH performed a revisit survey to determine whether Petitioner had abated the noncompliance identified by the November 2013 standard survey and found that Petitioner had done so as of January 3, 2014. CMS Ex. 13.

Also on January 17, 2014, IDPH notified Petitioner that CMS had imposed a DPNA based on the unresolved LSC deficiencies, indicating that the remedy would take effect on February 22, 2014, “if substantial compliance has not been achieved.” CMS Ex. 3, at 9.

⁴ With irrelevant exceptions, 42 C.F.R. § 483.70(a)(1)(i) requires a Medicare-participating SNF to “meet the applicable provisions of the 2000 edition of the Life Safety Code [LSC] of the National Fire Protection Association [NFPA].” The Life Safety Code, which section 483.70(a)(1)(i) expressly incorporates by reference, is also known as the NFPA 101. *BGI Retirement, LLC*, DAB No. 2620, at 1-2 (2015).

Between January 14 and February 26, 2014, Petitioner and IDPH communicated about “revisions that [Petitioner] needed to make to the plan of correction [relating to the LSC deficiencies] and the additional evidence that the facility needed to submit to show that the corrections had been made.” CMS Ex. 24, ¶ 5 (Schafer declaration); CMS Exs. 6-7.

On February 27, 2014, Petitioner submitted a revised plan of correction for the LSC deficiencies. The revised plan including the following new language concerning tag K54: “Completion date January 23, 2014 where International Fire Equipment Corp. finished installing all new addressable smoke detectors throughout the entire facility.” CMS Ex. 8, at 4; *see also* CMS Ex. 3, at 11; CMS Ex. 24, ¶ 8. IDPH accepted the revised plan of correction and notified Petitioner of that acceptance on February 28, 2014. CMS Ex. 3, at 11; CMS Ex. 24, ¶ 3.

On March 6, 2014, IDPH surveyed Petitioner again, this time in response to a complaint regarding events that had occurred on January 4, 2014. *See* CMS Exs. 14, 15, 17, 26 (¶¶ 3, 11). That survey found that, on January 4, 2014, Petitioner transferred a resident who was experiencing shortness of breath to the hospital but failed to notify the resident’s family or physician of the transfer. CMS Ex. 14. Based on these (and other) facts, IDPH cited Petitioner, under tag F157, for noncompliance with 42 C.F.R. § 483.10(b)(11) at the D-level of seriousness. *Id.* at 1.

On March 11, 2014, IDPH sent Petitioner a letter formally notifying it of the noncompliance identified by the March 6, 2014 survey⁵ and further stated:

Although no additional remedies will be recommended or imposed as a result of the [March 6, 2014 survey], all remedies proposed, recommended or imposed in the Initial Notice [IDPH’s January 17, 2014 notice letter] and any subsequent notices will continue in effect. This includes Denial of Payment for New Admissions effective February 22, 2014

CMS Ex. 3, at 12.

On March 17, 2014, IDPH performed a revisit survey – in this instance, an offsite “desk review” of submitted documentation – concerning the deficiencies identified by the November 2013 LSC survey and determined that Petitioner had returned to substantial compliance with LSC § 9.6.1.3 as of January 23, 2014, and that Petitioner had corrected its other LSC deficiencies during November and December 2013. *See* CMS Ex. 25, ¶ 6; CMS Ex. 1, at 2; CMS Ex. 11.

⁵ IDPH’s March 11, 2014 letter erroneously called the March 6, 2014 survey a “revisit.”

On April 3, 2014, IPDH performed another revisit survey (again, a desk review) which found that the alleged noncompliance identified by the March 6, 2014 survey had been corrected as of April 3, 2014. CMS Ex. 3, at 19, 21; CMS Ex. 1, at 2.

On April 15, 2014, CMS sent Petitioner a letter recounting the recent survey history (beginning in November 2013) and notified Petitioner that a DPNA “ha[d] gone into effect” from February 22 through April 2, 2014 “based on the period of time your facility was not in substantial compliance.” CMS Ex. 1, at 2. The subject line of the letter references a “cycle start date” of November 22, 2013 and states that the DPNA had been imposed “due to [Petitioner’s] failure to achieve compliance within the required three months.” *Id.* at 1-2.

The ALJ Proceeding

On May 8, 2014, Petitioner filed a request for hearing to challenge the enforcement action. The parties exchanged pre-hearing briefs, witness lists, documentary evidence, and written direct testimony. They also filed cross-motions for summary judgment.

In its submissions to the ALJ, CMS urged the ALJ to sustain the DPNA because there was “unrebutted evidence” that Petitioner was continuously out of substantial compliance with one or more participation requirements from November 19, 2013 (the date that IDPH completed the LSC survey) until April 3, 2014 (the date that IDPH found Petitioner to have abated the noncompliance identified by the March 6, 2014 survey). *See* CMS’s Oct. 20, 2014 Motion for Summary Judgment (MSJ) at 7-10. According to CMS, the approximately 19-week period that followed the November 2013 LSC and standard surveys consisted of the following overlapping periods of noncompliance:

- from November 19 through December 31, 2013 – due to deficiencies identified by the November 2013 LSC survey, other than the violation of LSC § 9.6.1.3;
- from November 19, 2013 through January 22, 2014 – due to the violation of LSC § 9.6.1.3 (tag K54); and
- from January 4 through April 2, 2014 – due to the violation of 42 C.F.R. § 483.10(b)(11) identified by the March 6, 2014 survey (tag F157).

Id. CMS asserted the “survey cycle” triggered by the November 2013 surveys did not end on January 23, 2014 (the date on which Petitioner was found to have removed its noncompliance with LSC § 9.6.1.3) because Petitioner was not in substantial compliance with 42 C.F.R. § 483.10(b)(11) as of January 4, 2014 (as determined by the March 6, 2014 survey) and because that noncompliance continued unabated from January 4 through April 2, 2014. *Id.* at 8.

Petitioner responded that it had corrected *all* deficiencies identified during the November 2013 surveys – including the noncompliance with LSC § 9.6.1.3 (tag K54) – *as of January 3, 2014*, and that because the only other deficiency identified by IDPH – namely, the section 483.10(b)(11) violation (tag F157) – arose one day later, on January 4, 2014, there was no continuous three-month period of noncompliance to justify the imposition of a DPNA. In support of that contention, Petitioner argued, in the following passage, that it had returned to substantial compliance with LSC § 9.6.1.3 no later than December 30, 2013:

The LSC Survey [Statement of Deficiencies] alleges that the facility did not have a bi-annual sensitivity test or annual functional test of the smoke detectors. This finding is factually incorrect because the International Fire Equipment Corporation conducted a Smoke Detector Test over two days on April 11-12, 2013. The Smoke Detector test was properly conducted every two years. It was last performed on April 12, 2013, as shown on the top right hand corner of the Smoke Detector Test Report In addition, Libertyville Manor installed new addressable smoke detectors throughout the facility, which was completed by January 23, 2014. The new smoke detectors were not required by K54, the only issue regarding K54 was the testing of the smoke detectors which was done before the LSC Survey was conducted. Accordingly, the date of substantial compliance for the LSC Survey should have been December 30, 2013 [not January 23, 2014, as IDPH and CMS determined].

Pet.'s Sept. 18, 2014 Pre-Hearing Br. at 4 (citations omitted). In addition, while not disputing that it was in violation of 42 C.F.R. § 483.10(b)(11) as of January 4, 2014, Petitioner contended that that violation should have been cited at the A-level of seriousness, rather than at the D-level. *Id.* at 8.

In short, Petitioner contended that that the condition for imposing a mandatory DPNA – failure to return to substantial compliance within three months after the November 2013 surveys – was not satisfied either because it was in substantial compliance with all participation requirements, including LSC § 9.6.1.3, as of January 3, 2014, or because the deficiency that arose on January 4, 2014 was not serious enough to constitute lack of substantial compliance. Pet.'s Nov. 20, 2014 Opposition to CMS MSJ at 11, 12-15. Finally, Petitioner argued that even if its violation of section 483.10(b)(11) constituted lack of substantial compliance, the violation should not have been used to “extend the survey cycle” because IDPH found Petitioner to have corrected all deficiencies from the November 2013 surveys by January 23, 2014, and had not, as of that date, discovered any other deficiencies. *Id.* at 12-13.

In response to Petitioner's argument about when it had abated the violation of LSC § 9.6.1.3, CMS asserted that Petitioner was "[i]n essence" claiming that it was in substantial compliance *during the November 2013 LSC survey* – in other words, that it was never out of substantial compliance with LSC § 9.6.1.3. CMS's Jan. 9, 2015 Opposition to Pet.'s Motion for Summary Judgment at 2. Such a claim was "barred," said CMS, because Petitioner had not filed a timely hearing request to challenge that survey's deficiency findings. *Id.* CMS also argued that its determination concerning the seriousness of Petitioner's violation of section 483.10(b)(11) was unreviewable under the applicable administrative appeal regulations in 42 C.F.R. Part 498. CMS MSJ at 3-4.

The ALJ Decision

The ALJ granted CMS's summary judgment motion and denied the Petitioner's cross-motion, holding that CMS was authorized to impose a mandatory DPNA based on "Petitioner's continued noncompliance from November 19, 2013 through April 2, 2014." ALJ Decision at 1. In reaching that conclusion, the ALJ held that Petitioner's argument about when it had corrected its violation of LSC § 9.6.1.3 was "in fact a challenge to the noncompliance finding[]" itself and could not be considered because Petitioner had not timely requested a hearing concerning that finding:

Although Petitioner frames its argument as a challenge to the date that it returned to substantial compliance with LSC section 9.6.1.3, Petitioner is in fact challenging the underlying determination that it ever violated section 9.6.1.3. Petitioner asserts that it was compliant with section 9.6.1.3 as of April 12, 2013 [the date that its smoke detectors were last tested], several months before the November 2013 LSC survey during which it was found to be in violation of section 9.6.1.3. In contending that it "achieved substantial compliance" with LSC section 9.6.1.3 on a date prior to the LSC survey, Petitioner is disputing the finding that it was in violation of section 9.6.1.3 during the survey. However, Petitioner's time to contest the finding that it violated section 9.6.1.3 has expired.

A party entitled to a hearing "must file [its] request in writing within 60 days from receipt of the notice of initial, reconsidered, or revised determination unless that period is extended [for good cause]." 42 C.F.R. § 498.40(a)(2). The date of receipt is presumed to be 5 days after the date on the notice. *Id.*; 42 C.F.R. § 498.22(b)(3). The state agency's letter dated January 17, 2014, which informed Petitioner that CMS had decided to impose a DPNA based on the results of the November 2013 surveys,

constituted an initial determination of noncompliance as to those surveys. *See* 42 C.F.R. §§ 488.406(a)(2)(ii), 498.3(b)(13). Thus, in order to contest the findings of either the November health survey or the November LSC survey, including the finding that Petitioner violated LSC section 9.6.1.3, Petitioner needed to file a request for hearing by March 24, 2014, or establish good cause for late filing. Petitioner did not file a request for hearing until May 8, 2014, and it has not established good cause for its failure to file prior to the expiration of the 60-day deadline. Accordingly, CMS's findings of noncompliance based on the November surveys are administratively final, and I cannot consider Petitioner's argument that . . . it corrected all of the deficiencies identified in the November surveys no later than January 3, 2014.

ALJ Decision at 7-8 (footnote omitted).

The ALJ also held that Petitioner's contention that its violation of section 483.10(b)(11) should have been cited as an A-level deficiency constituted a challenge to the "level of noncompliance," but that 42 C.F.R. § 498.3(b)(14) barred such a challenge because it would not affect "(1) the range of CMP amounts that CMS could collect, or (2) a finding of substandard quality of care that results in the loss of approval for the facility's NATCEP [Nurse Aide Training and Competency Evaluation Program]." ALJ Decision at 9 (citing 42 C.F.R. § 498.3(b)(14)).

Finally, the ALJ rejected Petitioner's suggestion that the deficiency identified by the March 6, 2014 survey – that is, the violation of section 483.10(b)(11) – could not be considered in deciding whether Petitioner was subject to the mandatory DPNA:

Petitioner argues that because CMS determined that the facility corrected the deficiencies identified during the November 2013 surveys by January 23, 2014, and did not identify any further deficiencies until the March 2014 complaint survey, the survey cycle should have ended on January 23, 2014

Petitioner's argument lacks merit. As the Board explained in *Meadowbrook Manor – Naperville*, DAB No. 2173, at 13 (2008), "a finding that deficiencies have been corrected is not the same as a determination that a [long-term care facility] has achieved substantial compliance with all participation requirements." CMS determined that Petitioner corrected the deficiencies identified in the November surveys on January 23, 2014, but CMS subsequently determined that Petitioner was out of substantial compliance with the requirements of section 483.10(b)(11)

from January 4, 2014 through April 2, 2014 based on the March complaint survey. For purposes of the survey cycle, it is irrelevant that the survey was conducted in March because it identified noncompliance that began in January, prior to the date that Petitioner corrected the deficiencies identified during the November surveys. Thus, Petitioner was continually out of substantial compliance with the participation requirements from November 19, 2013 to April 2, 2014. Based on the duration of Petitioner's noncompliance, a period of approximately four and a half months, CMS was authorized to impose a mandatory DPNA under section 488.417(b)(1).

ALJ Decision at 10 (record citation omitted).

Standard of Review

We review an ALJ's grant of summary judgment de novo. *Avalon Place Kirbyville*, DAB No. 2569, at 6 (2014). "Summary judgment is appropriate when the record shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

Discussion

In its request for review of the ALJ's decision, Petitioner makes the following contentions:

- It is entitled in this proceeding to contest CMS's determination concerning the duration of its noncompliance with LSC § 9.6.1.3 (RR at 4-7);
- It should be found to have returned to substantial compliance with LSC § 9.6.1.3 as of December 31, 2013 (RR at 5-7);
- The ALJ erred in refusing to address the merits of its contention that its violation of 42 C.F.R. § 483.10(b)(11) was an A-level deficiency (RR at 7-8);
- Its admitted violation of section 483.10(b)(11) did not constitute lack of substantial compliance because there "is no evidence or allegation of any harm to the resident" involved (RR at 7-8);

- Regardless of the merits of the deficiency citation resulting from the March 6, 2014 survey (that is, the citation alleging noncompliance with section 483.10(b)(11)), that citation should not have been considered by CMS in deciding whether to impose the DPNA because, under the governing statute and regulation, that remedy may be imposed only if the SNF failed to correct specific noncompliance citations from the compliance surveys that initiated the certification cycle (RR at 8-10).

Based on these contentions, Petitioner asserts that the certification cycle ended on January 3, 2014, and that there was no continuous (uninterrupted) three-month period of noncompliance, measured from November 22, 2013, to justify the imposition of a DPNA. RR at 2. Accordingly, Petitioner asks us to “reverse” the ALJ’s decision, “vacate[]” the DPNA, and enter judgment in its favor. RR at 4, 10. (Neither party contends that disputes of material fact preclude a grant of summary judgment to one party or the other.)

We address Petitioner’s contentions in the order we have just listed them.

1. *Petitioner is entitled to challenge the duration of its noncompliance with LSC § 9.6.1.3.*

The ALJ held that he could not consider Petitioner’s claim that it returned to substantial compliance with LSC § 9.6.1.3 by late December 2013, finding that the claim was, in substance, an untimely challenge to the merits of the underlying noncompliance citation. *See* ALJ Decision at 7-8. That holding is erroneous in two respects. First, it ignores the clearly stated aim of Petitioner’s presentation. Petitioner did not ask the ALJ (nor does it ask us) to overturn CMS’s determination that it was not in substantial compliance with LSC § 9.6.1.3 during the November 2013 LSC survey. Instead, Petitioner consistently indicated that it was seeking only to establish that it had returned to substantial compliance with LSC § 9.6.1.3 by late December 2013 (and no later than January 3, 2014).⁶

Second, the ALJ failed to apply correctly the holding in *Taos Living Ctr.*, DAB No. 2293 (2009). In that case, the state survey agency issued a written determination in March 2008 (all relevant dates in *Taos* are from 2008) which formally notified the SNF of noncompliance findings from two February surveys. DAB No. 2293, at 4. The March

⁶ In its brief opposing CMS’s summary judgment motion, Petitioner stated that it was contesting the “alleged duration of noncompliance with” LSC § 9.6.1.3 and was “not appealing the findings” of the November 2013 LSC survey. Pet.’s Nov. 20, 2014 Opposition to CMS MSJ at 6. In support of its own motion for summary judgment, Petitioner asserted that its appeal was “timely for the purpose of challenging the duration of the alleged noncompliance” without indicating whether it was timely for the purpose of challenging the underlying deficiency finding. Pet.’s Dec. 9, 2014 MSJ at 4.

notice advised the SNF that it needed to request an ALJ hearing within 60 days if it wished to appeal any finding of noncompliance from the February surveys. *Id.* The notice also stated that a mandatory DPNA would take effect on May 22 unless the SNF returned to substantial compliance by that date. *Id.* On August 5, CMS sent the SNF a letter stating that Medicare payment for new admissions “will be denied . . . effective May 22” and that the payment denial would continue from that date until substantial compliance was achieved. *Id.* at 6. On October 3, the SNF filed a request for hearing in which it challenged not only the determination that it was out of substantial compliance during the February surveys but CMS’s finding of “continued noncompliance” following those surveys.⁷ *Id.* at 7. In response to the October 3 hearing request, CMS argued that the SNF’s failure to timely appeal the noncompliance findings from the February survey barred it from contending that it had corrected its noncompliance sooner than the date of the pertinent revisit survey (which was performed on August 14). The Board rejected that contention, holding that CMS’s August 5 notice was an appealable determination that “preserved [the SNF’s] right to an ALJ hearing to present evidence that it returned to substantial compliance on a date earlier than that determined by CMS.” *Id.* at 14. The Board explained that:

because the DPNA could not go into effect and remain in effect unless CMS determined that [the facility] had continued to be in noncompliance after the February survey through May 22, and failed to return to substantial compliance at any subsequent date, the August 5 letter notifying TLC that the DPNA had gone into effect and remained in effect implicitly rejected [the SNF]’s allegation of compliance and constituted an initial determination of noncompliance resulting in the imposition of an administrative remedy within the meaning of section 498.3(b)(13).

Id. at 15.

Like the August 5 letter in *Taos*, which the Board found to be an appealable determination, CMS’s April 15, 2014 letter to Petitioner constituted notice that a mandatory DPNA had taken effect because substantial compliance had not been achieved within three months after a survey that initiated the certification cycle. We therefore hold, in accordance with the reasoning in *Taos*, that the April 15, 2014 notice was an appealable determination and that Petitioner’s timely appeal (request for hearing) of that determination (filed on May 8, 2014) preserved its right to present evidence that it returned to substantial compliance with LSC § 9.6.1.3 and other participation

⁷ The SNF in *Taos* also filed hearing requests on August 12 and September 26. Those hearing requests concerned noncompliance citations from surveys performed during May and July 2008. *See* DAB No. 2293, at 4-5.

requirements earlier than the dates determined by CMS. *Elant at Fishkill*, DAB No. 2468, at 7 (2012) (stating that a SNF “is entitled to challenge CMS’s determination of the date that it returned to substantial compliance when such a determination effectively amounts to a finding of noncompliance that results in a remedy”).

We address next whether Petitioner successfully made that showing.

2. *Petitioner did not abate its noncompliance with LSC § 9.6.1.3 until January 23, 2014.*

In response to the state survey agency’s finding of noncompliance with LSC § 9.6.1.3, Petitioner’s approved plan of correction indicated that Petitioner would install new, “addressable” smoke detectors throughout its facility and that this work would be completed no later than January 23, 2014. CMS Ex. 8, at 4. Petitioner now asserts that it returned to substantial compliance with LSC § 9.6.1.3 when it gave the state survey agency documentation that it had tested its smoke detectors in April 2013. RR at 1, 3, 5; Response to Surreply at 4. Petitioner further asserts that “[t]he additional work [it] performed . . . to install new smoke detectors was not required by [LSC § 9.6.1.3], nor cited as a deficiency in the Statement of Deficiencies[.]” RR at 1. For those reasons, Petitioner submits that the state survey agency “incorrectly determined the date of substantial compliance” with LSC § 9.6.1.3 to be January 23, 2014, and that the ALJ should have found it to have returned to substantial compliance with all LSC requirements – including LSC § 9.6.1.3 – as of December 31, 2013. RR at 3, 5.

These contentions must be evaluated in the context of the applicable survey-and-enforcement process. When a survey finds a Medicare-participating SNF to be out of substantial noncompliance, the SNF must promptly submit a “plan of correction” acceptable to the state survey agency. *See* 42 C.F.R. §§ 488.401, 488.402(d); SOM § 7304.4. The plan of correction must identify both the corrective actions the SNF intends to take in response to the survey findings and the date(s) when those actions will be completed. 42 C.F.R. § 488.401; SOM § 7304.4. A primary objective of the survey-and-enforcement process is to encourage SNFs to correct deficiencies promptly and to remain in substantial compliance. *See* 59 Fed. Reg. at 56,175-76, 56,178 (“Enforcement remedies are designed to motivate providers to achieve and maintain compliance with participation requirements.”) and 56,230 (stating that the statute establishing the survey-and-enforcement process is intended to encourage SNFs to “promptly correct deficiencies and maintain lasting compliance”). Accordingly, the remedial measures specified in a plan of correction should be adequate to ensure that deficient conditions and practices will not recur. SOM § 7304.4; 59 Fed. Reg. at 56,166 (stating that plans of correction “are geared toward prospective compliance to ensure [that] the underlying causes of cited deficiencies do not recur”).

Because an approved plan of correction “serves as the facility’s allegation of compliance,” its content may be regarded as evidence of the measures necessary to bring the SNF back into substantial compliance. *Cf.* SOM §§ 7304.4 (stating that without a plan of correction, a state survey agency or CMS has “no basis on which to verify compliance”) and 7000 (stating that the requirement for an acceptable plan of correction “emphasize[s] the ability to achieve and maintain compliance leading to improved quality of care”). Board decisions reflect that view: they hold that a SNF cannot be considered to have corrected a deficiency and achieved substantial compliance based on remedial measures short of those specified in its plan of correction. *See Greenbrier Nursing & Rehab. Ctr.*, DAB No. 2335, at 15 (2010) (“Having identified the in-service training of ‘all licensed nursing staff’ as a measure necessary to correct its noncompliance with section 483.25, Greenbrier cannot claim that steps short of that goal should nevertheless be accepted as adequate to require lifting the remedies imposed”), *aff’d*, *Greenbrier Nursing and Rehab. Ctr. v. U.S. Dept. of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs.*, 686 F.3d 521 (8th Cir. 2012); *Grace Living Ctr. – Northwest OKC*, DAB No. 2633, at 2 (2015) (“If CMS accepts a noncompliant facility’s PoC [plan of correction], the expectation is that the facility must timely implement all of the steps that it has itself identified in the PoC as necessary to correct the cited problems.”); *Glenoaks Nursing Ctr.*, DAB No. 2522, at 2 (2013) (“If CMS accepts a noncompliant SNF’s PoC, the facility must then timely implement all of the steps that it identified in the PoC as necessary to correct the cited problems.”); *Woodland Oaks Healthcare Facility*, DAB No. 2355, at 20 (2010) (“[A]batement of an immediate jeopardy condition (or removal of noncompliance) ordinarily requires the performance of corrective measures that the facility has included in a plan of correction,” and “[i]n this case, Woodland concedes that it did not fully implement its plan of correction until January 16, 2009, and thus it cannot now claim that partial implementation of that plan sufficed to remove the immediate jeopardy-level noncompliance.”); *Meridian Nursing Ctr.*, DAB No. 2265, at 20-21 (2009) (affirming the determination of a multi-day immediate jeopardy period because, although the SNF had taken certain corrective measures prior to the survey, the SNF failed to show that it had implemented all of the corrective actions that its own staff determined to be necessary to abate the immediate jeopardy), *aff’d*, *Fal-Meridian, Inc. v. U.S. Dept. of Health & Human Servs.*, 604 F.3d 445 (7th Cir. 2010); *Cal Turner Extended Care Pavilion*, DAB No. 2030, at 19 (2006) (rejecting the view that “steps short of those which the facility itself identified as necessary for it to correct the problems found (and to achieve substantial compliance) should nevertheless be accepted as adequate to require lifting the remedies imposed”).

In addition, the Board “has long rejected as contrary to the goals of the [Medicare] program” the notion that a SNF “can belatedly claim to have achieved substantial compliance at a date earlier than it even alleged [in its plan of correction] that it had done so” *Cal Turner Extended Care Pavilion* at 18; *Azalea Court*, DAB No. 2352, at 21

(2010) (rejecting the SNF’s “attempts to distance itself from the correction dates it chose to put in its [plan of correction]”), *aff’d*, *Azalea Court v. U.S. Dept. of Health & Human Servs.*, 482 F. App’x 460 (11th Cir. 2012); *Briarwood Nursing Ctr.*, DAB No. 2115, at 16 (2007) (“Here, the revisit survey on October 2, 2002 determined that substantial compliance was achieved on October 1, 2002[,]” which “was the date that Briarwood’s plan of correction alleged that substantial compliance would be achieved[,]” and “so Briarwood can hardly complain about having been found in substantial compliance as of the first date on which it alleged that it had made the corrections to achieve substantial compliance.”).

These holdings foreclose Petitioner’s contention that it achieved substantial compliance prior to completing the installation of new, “addressable” smoke detectors – the only remedial measure specified in its approved plan of correction. Petitioner does not allege, nor did it offer evidence, that it completed the installation prior to January 23, 2014. Nor does it contend that CMS or the state survey agency unreasonably relied upon the plan of correction’s implicit representation that new smoke detectors were necessary to achieve and maintain substantial compliance with LSC § 9.6.1.3.

We therefore sustain CMS’s determination Petitioner did not return to substantial compliance with LSC § 9.6.1.3 until January 23, 2014.

3. *Petitioner was entitled to a ruling on the merits of its contention that it was in substantial compliance with 42 C.F.R. § 483.10(b)(11) on January 4, 2014.*

Next, we consider whether the ALJ improperly refused to decide whether Petitioner’s violation of 42 C.F.R. § 483.10(b)(11) – the deficiency identified by the March 6, 2014, survey – was, as Petitioner asserts, an A-level rather than a D-level deficiency. This issue implicates provisions in 42 C.F.R. Part 498 which specify the administrative appeal rights of SNFs that receive adverse determinations by CMS affecting their participation in the Medicare program.

Under the Part 498 regulations, a SNF has the right to appeal “initial determinations” by CMS “with respect to the matters specified in paragraph (b)” of section 498.3. 42 C.F.R. §§ 498.3(a)(1), 498.5; *Vijendra Dave, M.D.*, DAB No. 2672, at 10 (2016). Those matters include:

- as specified in paragraph (b)(13), a “*finding of noncompliance leading to the imposition of enforcement actions specified in § 488.406*” (actions that include a DPNA); and

- as specified in paragraph (b)(14), the “*level of noncompliance found by CMS in a SNF . . . but only if a successful challenge on this issue would affect . . . (i) [t]he range of civil money penalty amounts that CMS could collect . . . or (ii) [a] finding of substandard quality of care that results in the loss of approval for a SNF . . . of its nurse aide training program.*”

42 C.F.R. §§ 498.3(b)(13) and (14) (italics added); *see also id.* § 488.406(a)(2)(ii) (specifying that CMS’s enforcement “remedies” include a DPNA).

The ALJ construed Petitioner’s assertion that its section 483.10(b)(11) violation was an A-level deficiency as a challenge to the “level of noncompliance found by CMS,” as that phrase is used in section 498.3(b)(14). *See* ALJ Decision at 9. The ALJ then found that neither of section 498.3(b)(14)’s preconditions for reviewing the “level of noncompliance” was met in this case because “CMS did not impose a CMP” and because CMS did not make a “finding of substandard quality of care resulting in the loss of Petitioner’s NATCEP.” *Id.* On those grounds, the ALJ concluded that he had “no basis for disturbing CMS’s determination that Petitioner was out of substantial compliance with the requirements of section 483.10(b)(11) from January 4 through April 2, 2014.” *Id.*

We do not agree that Petitioner was challenging only the “level of noncompliance.” A “deficiency” – that is, a violation of a participation requirement – constitutes “noncompliance” (lack of substantial compliance) only if it causes actual harm or the potential for more than minimal harm. *Kindred Transitional Care and Rehab – Greenfield*, DAB No. 2792, at 2, 10 (2017); *Liberty Commons Nursing and Rehab – Alamance*, DAB No. 2070, at 10 (2007), *aff’d*, *Liberty Commons Nursing & Rehab. Ctr. – Alamance v. Leavitt*, 285 F. App’x 37 (4th Cir. 2008). A deficiency that does not cause actual harm or the potential for more than minimal harm – that is, a deficiency that is not noncompliance – is cited at level A, B, or C of CMS’s deficiency categorization matrix. *Blossom South Nursing & Rehab. Ctr.*, DAB No. 2578, at 2 n.2 (2014); SOM § 7400.5.1. So when Petitioner asserted that its violation of section 483.10(b)(11) should have been cited at the A-level of seriousness, it was not merely challenging the *level of* noncompliance. Rather, it was also disputing the *existence* of noncompliance. *See, e.g.*, RR at 8 (“If reduced to a scope and severity level of ‘A,’ the Complaint Investigation cannot be used to justify a DPNA remedy because an ‘A’ level deficiency is considered to be substantial compliance.”) Moreover, because the noncompliance citation from the March 6, 2014, survey was a basis for CMS’s determination that Petitioner was subject to a mandatory DPNA, that citation was an appealable “finding of noncompliance leading to the imposition of [an] enforcement action[] specified in § 488.406.” 42 C.F.R. § 498.3(b)(13); *see also id.* § 488.408(g) (stating that a SNF “may appeal a certification

of noncompliance leading to an enforcement remedy”); Response Br. at 9 (conceding that the DPNA “was based in part on the F157 deficiency that was cited at the ‘D’ level of scope and severity”). The ALJ should therefore have decided whether Petitioner’s admitted violation of section 483.10(b)(11) constituted a lack of substantial compliance with that regulation. We address that issue in the next section.

4. *CMS is entitled to summary judgment on its claim that Petitioner was not in substantial compliance with 42 C.F.R. § 483.10(b)(11) from January 4 through April 2, 2014.*

Section 483.10(b)(11) states in relevant part that a SNF “must immediately inform the resident; consult with the resident’s physician; and if known, notify the resident’s legal representative or an interested family member when there is – (A) [a] significant change in the resident’s physical, mental, or psychosocial status (i.e., a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications) . . . ; or (D) [a] decision to transfer or discharge the resident from the facility as specified in § 483.12(a).” 42 C.F.R. § 483.10(b)(11)(i)(A), (D).

The Statement of Deficiencies for the March 2014 survey contains the following factual findings. At 1:45 a.m. on January 4, 2014, Resident 2 became short of breath. CMS Ex. 14, at 2. “Nursing interventions were implemented but [the resident’s] condition did not improve.” *Id.* Consequently, Petitioner sent Resident 2 to the hospital. *Id.* Resident 2’s daughter first learned of the transfer when the hospital called to say that her mother had been in the emergency room by herself for several hours. *Id.*; *see also* CMS Ex. 26, ¶ 11. Petitioner’s director of nursing confirmed, in a survey interview, that Petitioner’s staff had failed to notify Resident 2’s family about the hospital transfer. CMS Ex. 14, at 2; CMS Ex. 16, at 1 (identifying the director of nursing as employee E1). The director of nursing also admitted that Resident 2’s physician was not notified of the transfer. CMS Ex. 14, at 2; CMS Ex. 16, at 1, 3; CMS Ex. 19, at 5.

Petitioner does not dispute any of the facts found by the state survey agency (as narrated above), and Petitioner concedes that the facts show a violation of section 483.10(b)(11) as of January 4, 2014. In support of its contention that the violation did not constitute lack of substantial compliance, Petitioner asserts that “[t]here is no evidence or allegation of any harm to” Resident 2, and that “[t]his is conceded by CMS because a scope and severity finding of ‘D’ level is, by definition, ‘no actual harm.’” RR at 8. However, the absence of actual harm does not invalidate the noncompliance finding because, under the governing regulations, a SNF is considered to be out of substantial compliance if the deficiency *either* results in actual harm to a resident *or poses a risk of more than minimal harm* to resident health or safety. *See* 42 C.F.R. § 488.301 (defining the term “substantial

compliance”); *Harmony Court*, DAB No. 1968, at 2, 23, 28, 31 (2005), *aff’d*, *Harmony Court v. Leavitt*, 188 F. App’x 438 (6th Cir. 2006). Deficiencies that create the potential for more than minimal harm (but that do not cause actual harm) are designated as D, E, or F-level deficiencies depending on their scope. SOM § 7400.5.1.

By designating Petitioner’s section 483.10(b)(11) violation as a D-level deficiency, the state survey agency and CMS implicitly found the violation to have created at least the potential for more than minimal harm. Petitioner does not contend that the violation lacked that potential. Nor does Petitioner cite disputed facts, or posit reasonable inferences from the record, that could support a finding that the violation created a potential for only minimal harm or less. For those reasons, and because Petitioner does not contend that it corrected its violation of section 483.10(b)(11) sooner than April 3, 2014, we hold that the CMS is entitled to summary judgment on its claim that Petitioner was not in substantial compliance with that regulation from January 4 through April 2, 2014.

5. *CMS properly considered the noncompliance citation from the March 6, 2014 survey in determining whether the condition for imposing the mandatory DPNA was met.*

Section 1819(h)(2)(D) of the Act states that the Secretary of Health and Human Services “shall impose” a DPNA “[i]f a skilled nursing facility has not complied with any of the requirements of [participation] . . . within 3 months after the date the facility is found to be out of compliance with such requirements[.]” The regulation which implements the statute, 42 C.F.R. § 488.417(b)(1), states that a DPNA must be imposed if a SNF “is not in substantial compliance . . . 3 months after the last day of the survey identifying the noncompliance.”

On November 22, 2013 – the last day of the November surveys that triggered the applicable certification cycle – Petitioner was not in substantial compliance with LSC § 9.6.1.3 and other Medicare participation requirements. Petitioner therefore needed to come back into substantial compliance within three months of that date – that is, by February 22, 2014 – in order to avoid mandatory imposition of a DPNA. Petitioner did not do so. As discussed, Petitioner was not in substantial compliance with LSC § 9.6.1.3 from November 19, 2013 through January 22, 2014. In addition, Petitioner was not in substantial compliance with 42 C.F.R. § 483.10(b)(11) from January 4 through April 2, 2014. Because of these overlapping periods of noncompliance, Petitioner was continuously out of substantial compliance with at least one Medicare participation requirement for more than three months after the start of the certification cycle. CMS

therefore lawfully determined that Petitioner was subject to a mandatory DPNA that took effect on February 22, 2014, and remained in effect until April 2, 2014, the date that Petitioner was found to have returned to substantial compliance with section 483.10(b)(11).

Petitioner contends, on various grounds, that CMS unlawfully imposed the DPNA, but its points are unpersuasive. First, Petitioner interprets section 1819(h)(2)(D) of the Act and section 488.417(b)(1) as mandating a DPNA only if a specific “deficiency” remains uncorrected for three months after being first identified. *See* RR at 8-9. According to Petitioner, the statute and regulation “emphasize that the mandatory DPNA is imposed only when a facility fails to correct a *specific deficiency* for three months after the last day of the survey identifying the specific deficiency[.]” Reply Br. at 3 (emphasis in original).

The statute’s language does not support Petitioner’s reading. Section 1819(h)(2)(D) states that the DPNA must be imposed when the SNF is noncompliant with “any” participation requirement within three months after being “found to be out of compliance with such requirements” but does not state that a violation which causes the SNF to be “out of compliance” after three months must be one that has remained uncorrected throughout that period. Similarly, section 488.417(b)(1) does not require that a specific deficiency remain uncorrected for three continuous months. The regulation speaks about a SNF being “not in substantial compliance” after three months but does not say that a deficiency which causes the SNF to be “not in substantial compliance” must be one that was discovered by the survey that initiated the certification cycle.

Petitioner suggests that the preamble to the 1994 rulemaking that adopted section 488.417(b)(1) shows that the regulation was intended to apply “only if a specific instance of noncompliance persists for three months or longer” and not when “multiple instances of noncompliance [were found] during the three month period” RR at 9-10. Petitioner quotes the following preamble passage:

Comment: One commenter suggested that §488.417(a)(1)(i) be revised to state that [CMS] or the State may impose a denial of payment for new admissions if a deficiency *remains uncorrected after 90 calendar days (as opposed to within)* of the last day of [the] survey identifying the deficiency. As worded in the proposed rule, the mandatory sanction would have been imposed *if a deficiency had existed at any time during the 90 days*. [As proposed, the mandatory DPNA regulation stated that CMS “must deny

payment for new admissions if . . . [a]ny deficiency remains uncorrected *within 90 calendar days after* the last day of [the] survey identifying the deficiencies[.]” Proposed Rule, Medicare and Medicaid Programs; Survey, Certification and Enforcement of Skilled Nursing Facilities and Nursing Facilities, 57 Fed. Reg. 39,278, 39,312 (Aug. 28, 1992).⁸]

Response: We agree with the intent of the comment, and although we are no longer referring to 90 days but to 3 months as the Act does, we are making this revision. . . .

59 Fed. Reg. at 56,192-56,193 (italics added). As evident from the italicized words in the passage, the purpose of the “comment” was to notify CMS that the proposed regulation contained language suggesting that a DPNA was mandatory if noncompliance continued to exist *within the three-month* certification cycle, and to make clear that the remedy would take effect only if noncompliance continued to exist *after* three months from the start of the cycle. Consequently, CMS’s concurrence with the “intent of the comment” does not persuade us that CMS understood the regulation as mandating a DPNA only if one or more specific deficiencies identified during the initial survey remained uncorrected for three months.

Petitioner cites *Community Northview Care Center*, DAB No. 2295 (2009) to support its reading of the just-quoted preamble passage. Reply Br. at 4. However, *Community Northview* did not consider the proposition that a mandatory DPNA is lawful only when specific deficiencies remain uncorrected for three months. Although *Community Northview* discussed the just-quoted preamble language, it did so in the context of analyzing an entirely different issue – namely, CMS’s suggestion that the DPNA must be imposed if a SNF is found to have been noncompliant on two dates that are 90 days apart, even if substantial compliance was achieved in the interim. *See* DAB No. 2295, at 12-14.

Secondly, Petitioner points out that IDPH (the state survey agency) did not identify the noncompliance with 45 C.F.R. § 483.10(b)(11) until March 6, 2014 – after the date on which Petitioner was found to have abated the noncompliance with LSC § 9.6.1.3. RR at 9. Petitioner also notes that the March 6, 2014, survey was “entirely unrelated” to the November 2013 surveys. *Id.* However, the governing statute and regulation do not make these circumstances relevant in deciding whether the legal predicate for imposing the DPNA – namely, three months of continuous noncompliance following the November

⁸ As proposed, the provisions governing the imposition of mandatory and optional DPNA were contained in 42 C.F.R. § 488.217, which the final rule re-designated as section 488.417. 57 Fed. Reg. at 39,312; 59 Fed. Reg. at 56,121, 56,165.

2013 surveys – existed. Furthermore, contrary to Petitioner’s implication, IDPH’s finding that Petitioner abated the noncompliance with LSC § 9.6.1.3 as of January 23, 2014 was not a determination that Petitioner was in substantial compliance with *all* requirements as of that date. This is apparent because when IDPH performed the revisit survey concerning the LSC deficiencies (on March 17, 2014), IDPH had not yet verified that Petitioner had returned to substantial compliance with section 483.10(b)(11).

In addition, the Board has previously held that noncompliance discovered after the survey which initiated the certification cycle, and prior to a certification of substantial compliance, may be considered in deciding whether a SNF returned to substantial compliance within three months for purposes of applying sections 1819(h)(2)(D) and 488.417(b)(1). In *Meadowbrook Manor-Naperville*, a complaint survey performed on January 13, 2006 (the survey which initiated the certification cycle) and a standard survey completed on January 27, 2006 found the SNF noncompliant with multiple participation requirements. (All relevant dates in *Meadowbrook* are from 2006.) A March 7 revisit survey determined that the SNF had corrected the previously identified noncompliance by February 16. However, on March 17 and April 7, the state survey agency performed additional complaint surveys, the latter of which found previously unidentified noncompliance that arose on January 6 and which the SNF did not correct until June 12. On appeal, the SNF argued that because the state survey agency had determined in early March that the deficiencies identified by the January surveys had been corrected as of February 16, and because the state survey agency did not identify additional noncompliance until March 17 and April 7, the certification cycle that began on January 13 ended on February 16, leaving a one-month “gap period” – from February 16 through March 16, during which it was in substantial compliance. For that reason, said the SNF, CMS lacked a basis to conclude that the SNF had not achieved substantial compliance within three months after the start of the certification cycle. The SNF also contended that a second, distinct certification cycle began on March 17, when a complaint survey once again found it out of substantial compliance.

The Board rejected the SNF’s gap-period argument as “incompatible with” the state survey agency’s finding (a finding upheld by the ALJ and the Board) that the noncompliance first identified by the April 7 complaint survey had arisen on January 6 and continued unabated from that point until June 12. DAB No. 2173, at 11. In other words, said the Board, the SNF could not be regarded as in substantial compliance during the gap period because the April 7 survey (and the record developed during the ensuing appeal process) had established that the SNF was not “in fact” in substantial compliance during that period. *Id.* In addition, the Board emphasized that neither CMS nor the state survey agency had found the SNF to be in substantial compliance with all requirements during the gap period (February 16 through March 16), noting that those agencies had not

yet verified that the SNF had abated noncompliance identified during a February LSC survey. In short, the Board found that substantial compliance was not achieved on February 16, and that the certification cycle was not interrupted, because additional noncompliance was found to have begun before all previously identified noncompliance was found to have been corrected. *See Oakwood Cmty. Ctr.*, DAB No. 2214, at 19 (2008) (discussing the holding in *Meadowbrook*), *aff'd*, *Oakwood Cmty. Ctr. ICF/MR v. Sebelius*, 723 F. Supp. 2d 937 (E.D. Ky. 2010).

We see no legally significant difference between this case and the situation in *Meadowbrook*. As it did in *Meadowbrook*, CMS imposed the DPNA in this case based partly on the findings of a survey performed after initiation of the certification cycle and prior to any determination that the SNF had returned to substantial compliance with all participation requirements. And like the noncompliance discovered by the April 7 complaint survey in *Meadowbrook*, the noncompliance identified by the March 6, 2014 survey in this case arose prior to the correction of all previously identified noncompliance and was not abated until a date that was more than three months after the start of the certification cycle. Petitioner asserts that its survey cycle ended on January 23, 2014 because “no other alleged deficiencies [besides those identified during the November 2013 survey] *had been identified by* January 23, 2014.” RR at 9 (italics added). That assertion reflects the misconception that “noncompliance exists only at the point that surveyors discover it rather at the point where facts demonstrating the noncompliance occurred.” *Oakwood Cmty. Ctr.* at 19. In this case, undisputed facts establish that Petitioner was not in substantial compliance with section 483.10(b)(11) as of January 4, 2014 and that this noncompliance continued unabated until April 3, 2014. Because the record establishes that Petitioner was, in fact, not in substantial compliance with all requirements as of January 23, 2014, the certification cycle did not end on that date.

Petitioner suggests that the “long delay by IDPH surveyors in reviewing the facility’s [plan of correction] and delays in sending out the notices that the facility had achieved substantial compliance” were the reasons why the “Complaint Investigation [on March 6, 2014] was improperly used by IDPH and CMS to extend the survey cycle.” RR at 9-10. Petitioner fails to substantiate this contention. In particular, Petitioner fails to specify the nature or length of the IDPH’s so-called “delays” in issuing substantial-compliance notices or why it thinks it was unfairly prejudiced by those alleged delays. In addition, we do not find any “long delay in reviewing” Petitioner’s plan of correction. Although Petitioner claims that a month went by without the plan of correction being reviewed (RR at 8), the record shows that the initial plan was rejected. Petitioner failed to submit a corrected, approvable plan of correction relating to the LSC deficiencies until February 27, 2014. IDPH approved the plan the next day, and Petitioner does not claim

that IDPH unreasonably delayed its performance of the revisit survey regarding the LSC deficiencies.⁹ Even if Petitioner’s complaints about how the survey-and-enforcement process unfolded had been factually substantiated, they would still be legally irrelevant because they do not call into question the validity of any appealable noncompliance determination. *See* 42 C.F.R. § 488.318(b) (stating that “[i]nadequate survey performance does not . . . [r]elieve a SNF . . . of its obligation to meet all requirements for program participation” or “[i]nvalidate adequately documented deficiencies”); *Nightingale Home Healthcare, Inc.*, DAB No. 2784, at 11 (2017) (holding that the administrative appeal process under 42 C.F.R. Part 498 “do[es] not provide for a review of surveyor performance”; that “evidence about the survey process is not relevant where the provider has not shown how any alleged defects in the conduct of the survey . . . undercut or impeach the evidence of noncompliance offered by CMS”; and that the ALJ committed no error in “disregarding . . . complaints about the survey process itself that did not relate to evidence concerning the facts of [the SNF’s] compliance status”); *Ne. Ohio Alzheimer’s Research Ctr.*, DAB 1935, at 8 (2004) (noting that the goal of the survey-and-enforcement process is to ensure that “all deficient providers are appropriately sanctioned” and that this goal “is in direct conflict with the idea that a noncompliant facility may avoid a remedy based on a defense that does not negate or remove the factual basis for a finding of noncompliance” (internal quotation marks omitted)).

Based on the foregoing analysis, we conclude that CMS properly relied on the fact of Petitioner’s noncompliance with 42 C.F.R. § 483.10(b)(11) to determine whether Petitioner returned to substantial compliance within three months of the surveys that initiated the certification cycle. *Cf. Sunshine Haven Lordsburg*, DAB No. 2456, at 5 (2012) (upholding a mandatory DPNA and termination based on ongoing, overlapping periods of noncompliance with different participation requirements that lasted more than six months”), *aff’d*, *Sunshine Haven Nursing Operations, LLC, d/b/a Sunshine Haven Lordsburg v. U.S. Dept. of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs.*, 742 F.3d 1239 (10th Cir. 2014). Because Petitioner did not return to substantial compliance within that time frame, the DPNA lawfully took effect on February 22, 2014 and continued until April 3, 2014, the date that Petitioner returned to substantial compliance, as determined by CMS based on the April 3, 2014 revisit survey.

⁹ CMS’s regulations and policy “make clear that whether and when revisit surveys are performed is in the discretion of the State and CMS, not the facility.” *Cal Turner Extended Care Pavilion* at 13 (citing authorities).

6. *Certain issues raised by Petitioner in its reply brief will not be considered.*

In its response to the request for review, CMS defended the ALJ's holding that Petitioner had, in effect, presented an untimely challenge to the merits of tag K54, the citation of noncompliance with LSC § 9.6.1.3. Response Br. at 7 (stating that, "in reality, Petitioner is arguing that it was in compliance with K54 during the November 19, 2013 survey"). Petitioner replied that its May 8, 2014 request for hearing was a timely appeal of the noncompliance findings of the November 2013 LSC survey, including tag K54, and thus "there is no prohibition from finding that [Petitioner] was *always* in substantial compliance with" LSC § 9.6.1.3. Reply at 6 (italics added). In support of that contention, Petitioner asserts that IDPH's January 17, 2014 letter – which advised Petitioner of its administrative appeal rights concerning the findings of the November 2013 LSC survey and notified Petitioner that CMS had imposed a DPNA effective on February 22, 2014 unless substantial compliance was achieved – triggered no obligation to file a hearing request because "there was no enforcement remedy yet to appeal." *Id.* at 5-6. According to Petitioner, the DPNA could not be lawfully imposed until after February 22, 2014 (that is, until after three months had elapsed since the survey that initiated certification cycle), and thus the January 17, 2014 notice was "not a notice of noncompliance leading to *the imposition* of an enforcement action within the meaning of 42 C.F.R. § 498.3(b)(13)." Response to Surreply at 7-8; *see also* Reply at 5. Petitioner further asserts that IDPH's March 11, 2014 letter was the "first notice to advise [it] of an enforcement remedy"; that the March 11th letter "should have granted appeal rights for the entire survey cycle, but did not"; and that its hearing request was timely with respect to the March 11th letter. Reply at 6.

We decline to address whether Petitioner timely sought a hearing on the merits of tag K54 because Petitioner seeks no relief on that ground. While suggesting that the ALJ *could have* decided that tag K54 was an invalid deficiency citation ("there [was] no prohibition from finding" that it was "always in substantial compliance" with LSC § 9.6.1.3), Petitioner does not argue that IDPH improperly cited it for noncompliance with LSC § 9.6.1.3, nor does it ask us to remand the case to the ALJ for a ruling on the citation's merits. Petitioner made clear in the request for review that it seeks only to reverse the determination that it "*continued* [to be] out of substantial compliance" with LSC § 9.6.1.3 after December 2013. RR at 5 (italics added); *see also* Response to Surreply at 3 (stating that "[t]he specific issue in this case is the date [Petitioner] achieved substantial compliance with [LSC § 9.6.1.3] with respect to the LSC survey") and 4 (stating that "the question of whether [Petitioner] timely appealed the findings of noncompliance was not a significant issue at the administrative hearing level of this case")

because Petitioner “did not need to prove compliance with” LSC § 9.6.1.3, “merely that it had achieved compliance with [that provision] in time to avoid the DPNA”). A ruling on whether Petitioner timely appealed the November 2013 survey findings would be nothing more than an advisory opinion in these circumstances.

Conclusion

For the reasons discussed above, we affirm the grant of summary judgment to CMS and hold that Petitioner was lawfully subjected to a DPNA from February 22 through April 2, 2014.

/s/

Christopher S. Randolph

/s/

Constance B. Tobias

/s/

Leslie A. Sussan
Presiding Board Member