

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:)	
)	
Meadowbrook Manor - Naperville)	DATE: April 25, 2008
)	
Petitioner,)	App. Div. Docket No. A-08-25
)	
- v. -)	Decision No. 2173
)	
Centers for Medicare &)	
Medicaid Services.)	
)	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Meadowbrook Manor – Naperville (Meadowbrook), an Illinois skilled nursing facility (SNF), appealed the September 14, 2007 decision of Administrative Law Steven T. Kessel. Meadowbrook Manor – Naperville, DAB CR1648 (2007) (ALJ Decision). That decision upheld enforcement remedies imposed by the Centers for Medicare & Medicaid Services (CMS) on Meadowbrook for its noncompliance with Medicare participation requirements.

This case arose from a series of compliance surveys of Meadowbrook by the Illinois Department of Public Health (IDPH) between January 13 and June 12, 2006. During surveys on January 13, January 27, February 2, March 17, April 7, and April 28, IDPH determined that Meadowbrook had one or more deficiencies constituting noncompliance with Medicare participation requirements. Based on IDPH's survey findings, CMS imposed the following remedies: (1) a \$300 per day civil money (CMP) that ran from January 13 through April 24, 2006; (2) a \$3,050 CMP for April 25, 2006; (3) a \$300 per day CMP that ran from April 26 through June 11, 2006; and (4) a denial of payment for new Medicare admissions (DPNA) from April 13 through June 11, 2006. During the ensuing ALJ proceeding, Meadowbrook contested only the deficiency findings from the January 27 and February 2 surveys.

The ALJ concluded that Meadowbrook was not in substantial compliance with two Medicare requirements during the January 27 survey. The ALJ also found it unnecessary to address the February 2 survey findings, taking note of a pre-hearing stipulation by the parties that deficiencies found during that survey had been corrected on February 3, 2006. In addition, the ALJ found that: (1) the noncompliance identified by the January 27 survey was not corrected until February 16; (2) the noncompliance identified by the April 7 survey arose on January 6, 2006 and continued from that date through June 11, 2006; and (3) Meadowbrook was in a state of noncompliance throughout the period for which CMS imposed the CMPs and DPNA (January 13 through June 11, 2006). Based on these key findings and conclusions, the ALJ sustained all the remedies imposed by CMS.

In this appeal, Meadowbrook leaves unchallenged the ALJ's conclusions regarding the merits of the January 27 survey findings. Meadowbrook also raises no issues regarding the merits of deficiency findings from the other five surveys (on January 13, February 2, March 17, April 7, and April 28). Nonetheless, Meadowbrook contends that the ALJ erroneously concluded that it was in a state of continuous noncompliance from January 13 through June 11, 2006. Meadowbrook maintains that it achieved substantial compliance with all Medicare requirements on February 16, 2006, and that it should be regarded as having been in substantial compliance from that date until March 16, 2006. Meadowbrook further contends that, because it came back into substantial compliance on February 16, 2006, all remedies that accrued or took effect after that date must be rescinded, and the case must be remanded to CMS so that CMS can select remedies for the period of noncompliance from March 17 through June 11, 2006.

For the reasons discussed below, we conclude that the ALJ Decision is supported by substantial evidence and free of legal error. We thus affirm the ALJ Decision.

Legal Background

To participate in the Medicare program, a SNF must comply with the requirements for participation found in 42 C.F.R. Part 483, subpart B. 42 C.F.R. §§ 483.1, 488.3. A SNF's compliance with these requirements is verified by surveys conducted by state health agencies. *Id.* Part 488, subpart E. Based on its survey, the state agency will certify, subject to CMS approval, that the SNF is either in or out of "substantial compliance" with Medicare participation requirements. *Id.* § 488.330(a)(1)(i)(C), (a)(2). CMS's regulations (and we) use the term "noncompliance" to refer to any "deficiency" that causes a facility to be out of

substantial compliance. Id. § 488.301 (definition of "noncompliance").

To encourage prompt corrective action, CMS may impose enforcement remedies on a SNF that is out of substantial compliance. 42 C.F.R. § 488.402(a), (c). These remedies include CMPs and DPNAs. Id. § 488.406.

CMS may impose a CMP starting "as early as the date that the facility was first out of compliance" and continuing until CMS determines that the facility has achieved substantial compliance. 42 C.F.R. §§ 488.440(a)(1), 488.454(a)(1) (providing that CMPs and other alternative remedies, including a DPNA, continue in effect, absent termination, until "the facility has achieved substantial compliance as determined by CMS or the State based upon a revisit survey or after an examination of credible written evidence that it can verify without an on-site visit").

The law mandates imposition of a DPNA in some circumstances. Section 1819(h)(2)(D) of the Social Security Act¹ (Act) requires the Secretary of Health and Human Services to impose 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[.]" CMS has implemented this statutory requirement in 42 C.F.R. § 488.417(b)(1), which provides: "CMS does or the State must deny payment for all new admissions when . . . [t]he facility is not in substantial compliance . . . 3 months after the last day of the survey identifying the noncompliance[.]"

In a May 3, 2001 "Survey and Certification" memorandum addressed to CMS regional offices and state survey agencies, CMS set forth guidelines for determining the boundaries of the three-month "certification cycle" – herein referred to as a "survey cycle" – during which a noncompliant SNF must come back into substantial compliance in order to avoid imposition of the mandatory DPNA. P. Ex. 2. This memorandum states that a survey cycle "begins with a recertification or complaint survey and ends when substantial compliance is achieved or the facility is terminated

¹ The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

from the Medicare or Medicaid program."² Id. at 2 (emphasis added).

Case Background³

The case has a complicated history. On January 13, 2006, IDPH, the state survey agency, performed a complaint survey of Meadowbrook. CMS Ex. 1, at 1; CMS Ex. 3. As a result of the survey, IDPH found that Meadowbrook had two deficiencies constituting noncompliance. CMS Ex. 33. One of those deficiencies was a violation of the requirement in 42 C.F.R. § 483.13(c) that a SNF investigate the source or circumstances of a resident's injury. Id. at 1-2.

In a letter dated January 23, 2006, IDPH: (1) notified Meadowbrook of the results of the January 13 complaint survey; (2) informed Meadowbrook that CMS had imposed a mandatory DPNA with an effective date of April 13, 2006; and (3) stated that IDPH would recommend that CMS impose a \$300 per day CMP on Meadowbrook.⁴ CMS Ex. 1, at 1-3. IDPH also notified Meadowbrook

² Chapter 7 of CMS's State Operations Manual (SOM), which provides guidance to state survey agencies and CMS employees on the implementation of nursing home survey and enforcement regulations, uses the term "noncompliance cycle" in lieu of "certification cycle" or "survey cycle" but defines the cycle's boundaries similarly. See SOM (CMS Pub. 100-07), Chapter 7 – *Survey and Enforcement Process for Skilled Nursing Facilities and Nursing Facilities* (Rev. 1, 05-21-04) (available on CMS's public website at <http://www.cms.hhs.gov/Manuals/IOM/list.asp>). Section 7317C of the manual states that a noncompliance cycle "begins with a recertification or complaint survey that finds noncompliance and ends when substantial compliance is achieved or the facility is terminated from the Medicare or Medicaid program." Section 7317A states that "substantial compliance cannot be certified and any remedies imposed cannot be lifted until facility compliance has been verified."

³ The information in this section is drawn from the ALJ Decision and the record before the ALJ, and is presented to provide a context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact or conclusions of law.

⁴ The January 23, 2006 letter also indicated that IDPH had imposed the remedy of "directed in-service" training. That

(continued...)

in the January 23 letter that it had 60 days from receipt of the letter to contest the findings of noncompliance that resulted in imposition of the DPNA, and that the remedies imposed would be "effective until the facility achieves 'Substantial Compliance' with all federal certification regulations or is terminated from participation in the Medicare/Medicaid programs." Id. at 3.

On January 27, 2006, IDPH completed a standard survey of Meadowbrook. CMS Ex. 1, at 9; CMS Ex. 10. As a result of this survey, IDPH found two additional deficiencies that it believed constituted noncompliance with Medicare requirements. CMS Ex. 10. No additional remedies were imposed as a result of the January 27 standard survey.

On February 2, 2006, IDPH completed a Life Safety Code survey. CMS Ex. 20. As a result of that survey, IDPH cited Meadowbrook for several additional deficiencies involving Life Safety Code requirements. CMS Ex. 1, at 22; CMS Ex. 20.

On February 17, 2006, Meadowbrook submitted a plan of correction regarding the deficiencies identified by the February 2 Life Safety Code survey. CMS Ex. 20, at 1, 17-30. In this plan, Meadowbrook alleged that it had corrected some Life Safety Code deficiencies but that others would not be corrected until May 2, 2006. Id. at 17-30.

On March 7, 2006, IDPH performed a revisit survey which found that Meadowbrook had corrected the deficiencies identified during the January 13 survey by February 12, and had corrected the deficiencies identified during the January 27 survey by February 16. CMS Ex. 24, at 4-5.

On March 17, 2006, IDPH performed a complaint survey which found a new deficiency constituting noncompliance. CMS Ex. 1, at 22; CMS Ex. 27.

On April 7, 2006, IDPH performed a complaint survey and found another new deficiency constituting noncompliance. CMS Ex. 1, at 22; CMS Ex. 33. The deficiency involved a failure to comply with the requirement in 42 C.F.R. § 483.13(c) that a SNF investigate allegations of misappropriation of resident property.

On April 24, 2006, IDPH performed a revisit survey which found that Meadowbrook had corrected the deficiency found during the

⁴(...continued)
remedy is not at issue in this case. See infra fn. 6.

March 17 complaint survey. CMS Ex. 1, at 13; CMS Ex. 38, at 1, 5.

On April 28, 2006, IDPH performed a "partial extended" survey that found additional deficiencies constituting noncompliance. CMS Ex. 1, at 15, 22; CMS Ex. 40. IDPH determined that this additional noncompliance had created a situation of "immediate jeopardy" on April 25, 2006. CMS Ex. 1, at 22; CMS Ex. 40, at 1.

In a letter dated May 9, 2006, IDPH notified Meadowbrook of the results of the April 28 complaint survey. CMS Ex. 1, at 15. The letter informed Meadowbrook (as IDPH had once before) that CMS had imposed a DPNA effective April 13, 2006, and that this remedy had been imposed for the survey cycle beginning on January 13, 2006. Id. at 15-16. The May 9 letter also stated that IDPH would recommend a \$300 per day CMP effective January 13, 2006, that the CMP would be increased to \$3,050 for one day on April 25, 2006, and that the CMP would continue at \$300 per day from April 26, 2006 until Meadowbrook achieved substantial compliance. Id. at 16.

On May 12, 2006, IDPH performed a revisit survey regarding the deficiencies found during the February 2 Life Safety Code survey. CMS Ex. 1, at 30; CMS Ex. 45. As a result of this revisit survey, IDPH determined that Meadowbrook had corrected (or resolved through Fire Safety Evaluation System analysis) all of its Life Safety Code deficiencies by May 12, 2006. CMS Ex. 45.

In a letter dated June 7, 2006, CMS notified Meadowbrook of its decision to impose the CMPs recommended by IDPH. CMS Ex. 1, at 21-25. The June 7 notice letter also advised Meadowbrook that its Medicare participation would be terminated effective July 13, 2006.

On June 12, 2006, IDPH conducted a revisit survey and determined that Meadowbrook had, as of that date, corrected the deficiencies found during the April 7 and April 28 complaint surveys. CMS Ex. 1, at 32; CMS Ex. 46, at 8-9.

On July 17, 2006, CMS informed Meadowbrook that it had come back into substantial compliance as of June 12, 2006. Accordingly, CMS discontinued the previously imposed CMPs and DPNA effective June 12, 2006 and rescinded the termination remedy scheduled to take effect on July 13, 2006. CMS Ex. 1, at 32.

To summarize, based on the surveys of Meadowbrook between January 13 and June 12, 2006, CMS imposed the following remedies:

- \$300 per day CMP from January 13 through April 24, 2006
- \$3,050 CMP for April 25, 2006
- \$300 per day CMP from April 26 through June 11, 2006
- DPNA effective April 13 through June 11, 2006.

The ALJ Proceeding

On August 7, 2006, Meadowbrook filed a request for hearing, stating that its request was in response to CMS's June 7, 2006 notice letter. CMS Ex. 1, at 36.

An in-person hearing was scheduled for July 10, 2007. On July 2, 2007, the ALJ held a pre-hearing conference. One day after the conference, the ALJ issued an order which stated in relevant part:

The parties stipulated that all Life Safety Code deficiencies found on February 2, 2006 had been corrected by February 3, 2006. Therefore, there were no Life Safety Code deficiencies at any point after February 3, 2006. On the basis of that stipulation, the parties have agreed that there is no need for an in person hearing

Order of July 3, 2007, at 1.

On July 11, 2007, CMS filed a motion to dismiss Meadowbrook's challenge to the DPNA, contending that Meadowbrook had not timely appealed the imposition of that remedy.

The ALJ Decision

The parties having waived the opportunity for an in-person hearing, the ALJ decided the matters before him based on the documentary evidence and written legal arguments. The ALJ made the following factual findings and legal conclusions:

- The merits of deficiency findings from the January 13, March 17, April 7, and April 28 complaint surveys, as well as the merits of the immediate jeopardy finding from the April 28 partial extended survey, "were not at issue" because

Meadowbrook had not contested those findings during the proceeding. ALJ Decision at 4.

- Meadowbrook failed to prove that deficiencies identified by the January 13 complaint survey had been corrected as of January 27, 2006 (instead of February 12, 2006, as the survey agency and CMS found). ALJ Decision at 4-7.
- Deficiencies identified by the January 27 standard survey constituted noncompliance with sections 483.15 and 483.25(b). ALJ Decision at 7-14.
- Meadowbrook did not correct the deficiencies identified by the January 27 survey until February 16, 2006. ALJ Decision at 14.
- It was unnecessary to consider the merits of deficiencies identified by the February 2 Life Safety Code survey because, as of February 2, 2006, Meadowbrook remained in a state of noncompliance due to uncorrected deficiencies from the January 13 and January 27 surveys. ALJ Decision at 14.
- Noncompliance identified by the April 7 complaint survey arose on January 6, 2006 and continued from that date through June 11, 2006. ALJ Decision at 15.
- Noncompliance identified by the April 28 partial extended survey continued (at either the immediate jeopardy or non-immediate-jeopardy level) from April 25 through June 11, 2006.⁵ ALJ Decision at 15.
- "The overlapping periods of noncompliance establish[ed] a continuous period of noncompliance

⁵ In certain part of his decision, the ALJ misidentified the April 28th extended survey, which found an immediate jeopardy-level deficiency, as the April 24th survey. ALJ Decision at 15-16 & n.3. It is clear from the context of his discussion that the ALJ was, in fact, referring to the April 28 partial extended survey. (A survey was performed on April 24, 2006, but that survey was a revisit survey that found no new or additional deficiencies. CMS Exs. 38, 54.)

extending throughout the entire period for which CMS determined to impose remedies." ALJ Decision at 16.

- Meadowbrook was not entitled to challenge the DPNA because it failed to appeal the imposition of that remedy within the 60-day period prescribed by 42 C.F.R. § 498.40(a)(2) and failed to show good cause for not appealing within that timeframe. ALJ Decision at 17.
- Regardless of the timeliness of Meadowbrook's hearing request, the DPNA had been lawfully imposed because: (1) Meadowbrook had a five-month "period of unbroken noncompliance" from January to June 2006; (2) CMS had discretion to impose a non-mandatory DPNA even if the conditions for a mandatory DPNA had not been met; and (3) Meadowbrook was in a state of noncompliance on each of the days for which it imposed the DPNA (April 13 through June 11, 2006). ALJ Decision at 18.

Based on these findings and conclusions, the ALJ sustained all the remedies imposed by CMS."⁶ ALJ Decision at 16.

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence, and a disputed conclusion of law to determine whether it is erroneous. Departmental Appeals Board, *Guidelines for Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs* (DAB *Guidelines*), <http://www.hhs.gov/dab/guidelines/prov.html>; Golden Age Nursing & Rehabilitation Center, DAB No. 2026 (2006).

Discussion

As noted in the introduction, Meadowbrook raises no issues in this appeal regarding the merits of any deficiency finding. Nor

⁶ The ALJ also determined that Meadowbrook had not challenged the imposition of certain other remedies, including directed in-service training and loss of its nurse aide training program. ALJ Decision at 3. n.1. Meadowbrook's appeal raises no issues regarding those remedies.

does Meadowbrook contend that IDPH, CMS, or the ALJ erred in their findings about when individual deficiencies were corrected. In addition, Meadowbrook does not object to the April 28 survey finding that its residents were in immediate jeopardy on April 25, 2006. Meadowbrook also does not dispute the reasonableness of any CMP amount. Meadowbrook nevertheless contends that the remedies imposed for its noncompliance are unlawful in whole or part.

Underpinning that contention is an objection to the ALJ's finding that there was an "unbroken period of noncompliance" at Meadowbrook between January 13 and June 11, 2006. App. Br. at 2. In support of this objection, Meadowbrook makes the following points: First, CMS or the ALJ have determined that deficiencies identified by the January 13 and January 27 surveys were corrected by February 16, 2006. Second, CMS stipulated in the ALJ proceeding that deficiencies identified by the February 2 Life Safety Code survey no longer existed as of February 3, 2006. Third, apart from the January 13, January 27, and February 2 survey findings, IDPH and CMS made no other deficiency findings during January and February 2006. Relying on these points, Meadowbrook contends that it should be regarded as having attained substantial compliance with all Medicare participation requirements by February 16, 2006, and as having terminated the survey cycle that began on January 13, 2006. Id. at 2, 8. Meadowbrook also contends that a second, distinct survey cycle began when IDPH found it out of substantial compliance on March 17, 2006. App. Br. at 2. Meadowbrook contends that because the survey cycle was, in its view, broken on February 16, 2006, and because a new cycle did not, in its view begin until March 17, 2006, the Board must:

- discontinue the \$300 per CMP on February 16, 2006;
- find the facility in substantial compliance with all participation requirements from February 16 through March 16, 2006;
- rescind the mandatory DPNA on the ground that there was not a three-month period of continuous noncompliance between January 13, 2006 (the date of the initial complaint survey) and April 13, 2006 (the date that the mandatory DPNA took effect); and
- remand this case to CMS for an "initial determination of remedies" for the survey cycle that began on March 17, 2006.

Id. at 2, 8, 9, 15-21.

To summarize, Meadowbrook contends that, between January and June 2006, there was a one-month period (February 16 to March 16, 2006) when the facility was in substantial compliance with all participation requirements, and that this "gap period" of substantial compliance serves to extinguish any remedy that accrued or that became effective after February 16, 2006.

The necessary premise of Meadowbrook's gap-period argument – that Meadowbrook was in substantial compliance with all Medicare requirements between February 16 and March 16, 2006 – is incompatible with the ALJ's conclusion that noncompliance identified by the April 7 survey arose on January 6, 2006 and continued from that point – and throughout the gap period – until June 11, 2006. In other words, Meadowbrook cannot be regarded as having been in substantial compliance during the gap period if, in fact, the noncompliance identified by the April 7 survey existed during the gap period. We must, therefore, reject Meadowbrook's gap-period argument unless the ALJ's conclusion regarding the origin and duration of the noncompliance identified by the April 7 survey is legally erroneous or not supported by substantial evidence. We see no reason to disturb that conclusion.

The participation requirement at issue during the April 7 survey was 42 C.F.R. § 483.13(c), which provides in relevant part:

(c) *Staff treatment of residents.* The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property.

* * *

(2) The facility must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with State law

(3) The facility must have evidence that all alleged violations are thoroughly investigated

(Emphasis added). IDPH's Statement of Deficiencies for the April 7 survey, whose findings Meadowbrook did not (and does not) contest, states that Meadowbrook violated section 483.13(c) by failing to investigate or properly investigate incidents involving alleged theft of resident money or credit cards. CMS Ex. 33. The earliest incident that Meadowbrook failed to investigate or properly investigate occurred on January 6, 2006, according to the Statement of Deficiencies. Id. at 2. Additional incidents of this kind occurred on January 24, February 18, and March 9, 2006. Id. IDPH found, and Meadowbrook does not dispute, that these investigative failures evidenced a lack of substantial compliance with section 483.13(c).⁷ IDPH also determined, and Meadowbrook does not dispute, that this noncompliance was not corrected until June 12, 2006.⁸ CMS Ex. 46, at 1, 9. These undisputed facts and findings adequately support the ALJ's conclusion that the noncompliance identified by the April 7 survey arose on January 6, 2006 and continued throughout the gap period.

Meadowbrook attempts to minimize the relevance or impact of this conclusion in several ways. First, it asserts that "CMS's own determinations" establish that it was in substantial compliance

⁷ In its Statement of Deficiencies for the April 7 survey, IDPH placed the noncompliance with section 483.13(c) at level E on the scale of seriousness. Level E designates a pattern of violations that create the potential for more than minimal harm to residents. See Western Care Management, DAB No. 1921, at 4 (2004). A SNF is not in "substantial compliance" when it has a deficiency that creates the potential for more than minimal harm to one or more residents. 42 C.F.R. § 488.301 (defining "substantial compliance" to mean the "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").

⁸ Alternative remedies such as CMPs generally continue until "[t]he facility has achieved substantial compliance, as determined by CMS or the State based upon a revisit or after an examination of credible written evidence that it can verify without an on-site visit." 42 C.F.R. § 488.454(a). Here, IDPH and CMS determined, based on a June 12, 2006 revisit, that Meadowbrook did not correct the noncompliance with section 483.13(c) involving alleged misappropriation of resident property until June 12, 2006. Meadowbrook has not alleged that it achieved substantial compliance with that requirement on an earlier date.

"with all requirements" during the gap period. App. Br. at 8. This assertion is factually incorrect. It is true that, during the March 7 revisit survey, IDPH found that deficiencies identified by the January 13 and January 27 surveys had been corrected by February 16, 2006. It is also true that CMS stipulated during the ALJ proceeding that Life Safety Code deficiencies identified by the February 2 survey no longer existed after February 3, 2006. However, a finding that deficiencies have been corrected is not the same as a determination that a SNF has achieved substantial compliance with all participation requirements. Neither CMS nor IDPH has ever found that Meadowbrook was in substantial compliance with all participation requirements during the gap period.

No such finding was made by IDPH as a result of the March 7 revisit survey, the only survey to occur during the gap period. The March 7 revisit merely found that deficiencies identified by the January 13 and January 27 surveys had been corrected. CMS Ex. 24. Indeed, IDPH could not have found Meadowbrook in substantial compliance with all requirements on March 7 because IDPH had not yet found that Meadowbrook's Life Safety Code deficiencies had been corrected.⁹ Furthermore, CMS's subsequent stipulation regarding the Life Safety Code deficiencies (as memorialized in the ALJ's July 3, 2007 pre-hearing order) contained no concession that Meadowbrook was in substantial compliance with all Medicare requirements during the gap period, only the parties' agreement that, as a matter of fact, all Life Safety Code deficiencies had been corrected by February 3, 2006.

According to Meadowbrook, the ALJ's conclusion that noncompliance with section 483.13(c) spanned the gap period is erroneous because the March 7 revisit survey found that the facility had corrected a violation of section 483.13(c). App. Br. at 11. To understand this contention, one must recall that both the January 13 and April 7 surveys found violations of section 483.13(c), though surveyors found that a different part of the regulation had been violated on each occasion. In particular, the January 13 survey found a violation of section 483.13(c)'s requirement to

⁹ Meadowbrook submitted its plan of correction for the Life Safety Code deficiencies on February 17, 2006. CMS Ex. 20, at 17-20. That plan indicated that some deficiencies would not be corrected until May 2006. *Id.* As CMS notes, this representation "kept the survey cycle open through at least May 2, 2006 because revisits to verify correction of deficiencies do not occur until after the latest correction date stated in the facility's plan of correction." Response Br. at 24; see also SOM § 7317(B).

investigate "injuries of unknown source." The April 7 survey, on the other hand, found a violation of section 483.13(c)'s requirement to investigate "misappropriation" of resident property. During the March 7 revisit, IDPH found that Meadowbrook had, as of February 12 or 16, 2006, corrected deficiencies identified by the January surveys, including the violation of section 483.13(c)'s requirement to investigate resident injuries of unknown source. CMS Ex. 24, at 3, 4. Meadowbrook suggests that this revisit finding establishes that the facility was in substantial compliance with all of section 483.13(c)'s requirements – including the requirement to investigate alleged misappropriation – as of February 16, 2006. App. Br. at 11.

We reject this proposition for several reasons. First, there is no evidence that IDPH found or certified Meadowbrook to be in substantial compliance with section 483.13(c) as a result of the March 7 revisit survey. IDPH's "Post-Certification Revisit Report" for the March 7 revisit contains no statement that Meadowbrook was in substantial compliance; the report merely indicates that previously reported "deficiencies" had been corrected by February 16, 2006. CMS Ex. 24, at 4. Furthermore, there is no evidence that, during the March 7 revisit, IDPH actually sought to verify Meadowbrook's compliance with requirements of section 483.13(c) not implicated in prior deficiency citations, such as the regulation's requirement to investigate alleged misappropriation of resident property.

Second, assuming for argument's sake that IDPH had certified Meadowbrook to be in substantial compliance with section 483.13(c) during the March 7 revisit, that certification was superseded by IDPH's April 7 certification of noncompliance, which alleged a pattern of noncompliance predating and spanning the gap period. CMS Ex. 33; 42 C.F.R. § 488.20(c) (stating that "[a] State survey agency certification . . . that a provider or supplier is no longer in compliance with the conditions of participation . . . will supersede the State survey agency's previous certification.").

Third, any IDPH certification of compliance regarding the gap period was not binding on CMS. When a surveyed facility is a non-state operated SNF, a state survey agency's certification of compliance is subject to CMS approval, and when the facility is a "dually participating facility" (a facility that participates in both Medicare and Medicaid), the state survey agency's finding of compliance must give way to a contrary finding by CMS. 42 C.F.R. § 488.330(a)(1)(i)(C), (D). CMS has made it clear in this proceeding that it does not regard the March 7 survey as

establishing that Meadowbrook, which participates in both Medicare and Medicaid, was in substantial compliance with section 483.13(c) as of March 7, 2006, and the record contains no determination by CMS that would undercut this position.

Any IDPH certification of compliance was also not binding on the ALJ. The ALJ had the authority to make an independent, de novo determination about whether Meadowbrook was in substantial compliance during the gap period as long as Meadowbrook had notice that its compliance status during that period was at issue. Western Care Management at 4 (stating that the the ALJ hearing is a "'de novo proceeding to be resolved on the evidence in the record developed before the ALJ, and is not a quasi-appellate review of the correctness of [CMS's] determination based on the evidence [CMS] had at the time it acted'"). Meadowbrook clearly had such notice and does not assert otherwise.¹⁰

For the foregoing reasons, the ALJ's conclusion that the noncompliance found during the April 7 survey arose on January 6, 2006 and ended on June 12, 2006 is supported by substantial evidence and not legally erroneous.¹¹ In addition, Meadowbrook

¹⁰ IDPH's May 9, 2006 letter and CMS's June 7, 2006 letter advised Meadowbrook that the DPNA and CMPs were being imposed for continuous noncompliance from January 13, 2006 through the effective date of the DPNA, and from that point until the facility achieved substantial compliance. CMS Ex. 1, at 16, 21-24. In addition, CMS's pre-hearing brief advised Meadowbrook that CMS would seek to prove that the noncompliance identified by the April 7 survey arose from Meadowbrook's failure to investigate incidents of alleged misappropriation in January, February, and March 2006. CMS Pre-Hearing Br. at 64-72. And in its post-hearing brief, to which Meadowbrook had an opportunity to respond, CMS argued that the remedies should be sustained in part because the noncompliance identified by the April 7 survey arose before and continued throughout the gap period. CMS Post-Hearing Br. at 43.

¹¹ Because Meadowbrook did not establish that it was in substantial compliance prior to June 12, 2006, there is no basis to find that the survey cycle that began on January 13, 2006 ended on February 16, 2006, as Meadowbrook contends. A survey cycle does not end until the facility has in fact achieved substantial compliance. See P. Ex. 2 (May 3, 2001 Survey and Certification memorandum). Here, the record supports the ALJ's

(continued...)

does not dispute the ALJ's conclusion that it was out of substantial compliance from January 13 until February 16, 2006, and from March 17 through June 11, 2006, based on deficiencies identified by the January 13, January 27, February 2, March 17, and April 28 surveys. We thus uphold the ALJ's conclusion that there was "a continuous period of noncompliance extending throughout the entire period for which CMS determined to impose remedies" (January 13 through June 11, 2006). Furthermore, we conclude that the mandatory DPNA lawfully took effect on April 13, 2006 because Meadowbrook was in continuous noncompliance with one or more Medicare participation requirements for three months following the initial survey on January 13, 2006.¹² See 42 C.F.R. § 488.417(b)(1) (requiring the imposition of a DPNA if the facility is not in substantial compliance "3 months after the last day of the survey identifying the noncompliance"). The CMPs imposed were also lawful (as the ALJ found) because they were in effect only on days when Meadowbrook was not in substantial compliance. See 42 C.F.R. § 488.402(b) (stating that remedies are applied "on the basis of noncompliance found during surveys"). Meadowbrook does not contend that the amount of the CMP – \$300 per day – was unreasonable at any time during its period of noncompliance.

Meadowbrook asserts that "the federal regulatory framework for survey and certification has established that noncompliance cycles and remedies begin on the survey dates, not on the dates of the subject matter of the cited deficiencies (except in limited situations of 'past noncompliance' and immediate jeopardy neither applicable here)." App. Br. at 12. The subtext of this assertion is an apparent belief that, in the event CMS had imposed a CMP solely for the noncompliance identified by the April 7 survey, that CMP could not have taken effect any earlier than April 7 (and thus could not have accrued during the gap period). That belief is erroneous. Section 488.440(a)(1) of CMS's regulations provides that a CMP may start accruing "as early as the date that the facility was first out of compliance." In Century Care of Crystal

¹¹(...continued)

conclusion that there was a single survey cycle that began on January 13, 2006 and ended on June 12, 2006. All of the challenged remedies relate to that cycle.

¹² Because we uphold, on the merits, the ALJ's conclusion that CMS lawfully imposed the mandatory DPNA, we do not discuss our reasons for concluding that the ALJ also had adequate procedural grounds for granting CMS's motion to dismiss Meadowbrook's challenge to that remedy.

Coast, DAB No. 2076, at 1-2, 26 (2007), the Board cited this regulation in upholding a CMP that started accruing before the date of the survey that identified the noncompliance.

Meadowbrook also suggests, in the following passage, that the noncompliance identified by the April 7 survey could not, in fact, be a basis for imposing the DPNA:

. . . CMS's actions with respect to this case's surveys belie the argument that Meadowbrook was noncompliant back to January 6, 2006. According to CMS's argument and the ALJ's FFCL #5, the subject matter of the April 7's deficiency shows that Meadowbrook was not in substantial compliance since January 6 – a time predating the end of the January 13, January 27, and February 2 surveys and connecting them continuously to the March 17, April 7, and April 28 survey group. However, CMS did not revise and reform the survey remedies to reflect a January 6 noncompliance date. CMS is **required** to impose [a] DPNA 90 days into a noncompliance cycle and terminate a facility if substantial compliance has not been achieved in 6 months. Based on the January noncompliance date, [the] DPNA went into effect on April 13 and Meadowbrook faced termination on July 13, 2006. Yet when it alleged noncompliance going back to January 6, CMS did not recalculate the mandatory remedies – it did not impose [the] DPNA on April 6 nor threaten termination on July 6.

App. Br. at 13-14 (underscoring added; bolding in original). This argument is unavailing because the schedule for implementing the mandatory DPNA and the mandatory termination remedy is tied, by regulation, to the last day of the initial survey that found noncompliance, not to the date on which the noncompliance arose. 42 C.F.R. §§ 488.417(b)(1) (requiring the imposition of a DPNA "3 months after the last day of the survey identifying the noncompliance"), 488.412(d) (requiring termination if the facility is not in substantial compliance "within 6 months after the last day of the survey" that first found noncompliance).

In short, because Meadowbrook was (as the ALJ found) out of substantial compliance as early as January 6, 2006, and because that noncompliance continued until June 12, 2006, CMS lawfully imposed a CMP on every day from January 13 through June 11, 2006. In addition, the mandatory DPNA from April 13 through June 11, 2006 was lawful because Meadowbrook did not, in fact, achieve substantial compliance within three months after the January 13

complaint survey, and because Meadowbrook remained in a continuous state of noncompliance from April 13 through June 11, 2006.

Conclusion

For the reasons discussed above, we affirm the ALJ Decision.

_____/s/
Judith A. Ballard

_____/s/
Leslie A. Sussan

_____/s/
Sheila Ann Hegy
Presiding Board Member