Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

San Fernando Post Acute Hospital
Docket No. A-12-123
Decision No. 2492
December 21, 2012

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

San Fernando Post Acute Hospital (San Fernando), a long-term care facility in Sylmar, California that participates in Medicare and Medicaid, appeals the July 27, 2012 decision of Administrative Law Judge (ALJ) Richard J. Smith dismissing San Fernando's March 16, 2012 and May 1, 2012 requests for an ALJ hearing. *San Fernando Post Acute Hospital*, DAB CR2577 (2012) (ALJ Decision). San Fernando filed its hearing requests to contest December 2011 survey findings that it was not in substantial compliance with Medicare and Medicaid participation requirements. The ALJ concluded that under the applicable regulations and Board precedent there is no right to an ALJ hearing to contest noncompliance citations if, as in this case, CMS revises its initial determination and rescinds all enforcement remedies.

For the reasons discussed below, we sustain the ALJ's action.

Legal Background

To participate in Medicare or Medicaid, long-term care facilities must be certified as meeting program participation requirements. The Act and regulations provide for State agencies to conduct on-site surveys of any Medicare skilled nursing facility (SNF) or Medicaid nursing facility (NF) to evaluate its compliance with the participation requirements. Sections 1819, 1864(a), 1902(a)(33)(B) and 1919 of the Act; 42 C.F.R. Parts 483, 488, and 498.

Survey findings are reported in a Statement of Deficiencies (SOD). A "deficiency" is defined as a "failure to meet a participation requirement specified in the Act or [42 C.F.R. Part 483]." 42 C.F.R. § 488.301. Section 488.301 defines "substantial compliance" as "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." "Noncompliance" means "any deficiency that causes a facility to not be in substantial compliance." *Id.*

CMS and State agencies use survey results as the basis for decisions to enter into or deny provider agreements, recertify facility participation in one or both programs, terminate provider agreements, or impose alternative enforcement remedies based on findings of noncompliance. Act §§ 1819 and 1919; 42 C.F.R. Parts 483, 488, and 498. The Act requires the Secretary to terminate the Medicare participation agreement of any SNF that does not return to substantial compliance within six months of being found to be not in substantial compliance. Act § 1819(h)(2)(C). The Act also requires the Secretary to deny Medicare payments for new admissions (DPNA) if a facility fails to return to substantial compliance within three months of being found not to be in substantial compliance. Act § 1819(h)(2)(D). This remedy is referred to as a statutory or mandatory DPNA. The additional enforcement remedies include temporary management, per-instance and per-day civil money penalties (CMPs), discretionary DPNAs (which may be imposed prior to a statutory DPNA), State monitoring and directed in-service training. Act §§ 1819, 1919; 42 C.F.R. § 488.406.

CMS determines the seriousness of each deficiency found during a survey in order to select the appropriate remedies, if any, to impose on the facility. *See* 42 C.F.R. § 488.404. The level of seriousness is based on an assessment of the scope of the problem within the facility (whether the deficiency is isolated, a pattern, or widespread) and severity (the degree of actual, or potential, harm to resident health and safety posed by the deficiency). *Id.* Under section 488.402(f)(1), CMS or a State survey agency (as authorized by CMS) gives the provider notice of a determination of noncompliance and the remedies imposed.

Sections 1866(h)(1), 1866(b)(2), and 205(b)(2) of the Act provide formal hearing rights for certain types of determinations involving provider participation in Medicare, and sections 1819, 1919 and 1128A provide hearing rights where a CMP has been imposed on an SNF or NF. These provisions are implemented by the regulations in 42 C.F.R. Parts 488 and 498. Section 498.3 sets forth a list of administrative actions that are "initial determinations by CMS" that are subject to review, as well as a list of other types of "administrative actions that are not initial determinations (and therefore not subject to appeal under [Part 498])." 42 C.F.R. §§ 498.3(b), 498.3(d). The "initial determinations" include, "[w]ith respect to an SNF or NF, a finding of noncompliance that results in the imposition of a remedy specified in § 488.406 . . . , except the State monitoring remedy." 42 C.F.R. § 498.3(b)(13). An ALJ may dismiss a hearing request where the party requesting the hearing "does not . . . have a right to a hearing." 42 C.F.R. § 498.70(b).

In addition to the formal hearing rights provided under the Act and regulations, a facility may request to participate in an informal dispute resolution (IDR) process to dispute any survey findings. 42 C.F.R. § 488.331(a). If a provider successfully demonstrates during

the IDR process that deficiencies should not have been cited, "the deficiencies are removed from the [SOD] and any enforcement actions imposed solely as a result of those cited deficiencies are rescinded." 42 C.F.R. § 488.331(c).[1]

Case Background

On December 21, 2011, the Los Angeles County Department of Public Health (State agency) completed a standard and complaint survey of San Fernando. By letter dated January 18, 2012, the State agency notified San Fernando that it was not in substantial compliance with the Medicare and Medicaid participation requirements, as reflected in the SOD enclosed with the letter. CMS Ex. 1. The SOD identified 22 deficiencies. CMS Exs. 4, 5. The most serious deficiency, involving the requirements at section 483.25(c) relating to the treatment and prevention of pressure sores, was cited at scope and severity level G (isolated, constituting actual harm that is not immediate jeopardy). CMS Exs. 1, 4. The State agency advised San Fernando that "as authorized by CMS . . . we are giving formal notice of imposition of statutory [DPNA] effective March 21, 2012," but stated that the DPNA would not be effectuated if San Fernando "demonstrate[d] substantial compliance with an acceptable plan of correction and subsequent revisit." CMS Ex. 1, at 2. The State agency further explained that San Fernando's provider agreement would be terminated on June 21, 2012 if it did not achieve substantial compliance by that time. *Id.* at 3.

The State agency also advised San Fernando that if it "disagree[d] with the determination of noncompliance . . . [it could] request a hearing before an administrative law judge of the . . . Departmental Appeals Board." *Id.* at 3. The notice stated that "[p]rocedures governing this process are set out in 42 CFR 498.40, et. seq." and that "San Fernando "may appeal the finding of noncompliance that led to an enforcement action, but not the enforcement action or remedy itself." *Id.* The State agency further advised San Fernando that it had an "opportunity to question cited deficiencies through an [IDR] process" under section 488.331. *Id.* at 4.

On January 27, 2012, San Fernando submitted a request for IDR to contest multiple survey deficiency findings. CMS Ex. 2. An IDR conference was held on February 21, 2012, at which time San Fernando presented evidence to refute nine of the deficiencies cited in the SOD. CMS Ex. 4.

[1] Sections 6111(a) and (b) of the Patient Protection and Affordable Care Act (Affordable Care Act) added a new section (IV)(aa) to sections 1819(h)(2)(B)(ii) and 1919(h)(3)(C)(ii) of the Act, which provide a facility with the opportunity to participate in an independent informal dispute resolution process if a CMP has been imposed. Pub. L. No. 111-148, 124 Stat. 713-716 (2010). The Secretary promulgated a new regulation at section 488.431, effective January 1, 2012, to implement the statute. 76 Fed. Reg. 15,126 (Mar. 18, 2011).

By a determination dated March 2, 2012, CMS notified San Fernando that CMS concurred with the State agency's December 2011 survey findings and that CMS had determined to impose a per-instance CMP of $1,500 for the facility's noncompliance.[2] CMS Ex. 3. CMS also advised San Fernando that CMS would terminate the facility's Medicare provider agreement no later than June 20, 2012 (six months from the last day of the survey) if San Fernando did not "promptly" achieve and maintain substantial compliance. *Id.* at 2. The notice further advised San Fernando of the appeal rights available at 42 C.F.R. Part 498. *Id.* at 3.

By letter dated March 16, 2012, San Fernando requested an ALJ hearing to contest the alleged deficiencies, certification of noncompliance and remedies imposed as a result of the December 2011 survey.

In a letter dated March 22, 2012, the State agency notified San Fernando that as a result of the State agency's review of materials presented at the IDR conference, it was upholding three of the contested deficiencies; dismissing three of the contested deficiencies; modifying one of the deficiencies; and modifying and reducing the scope/severity levels of two of the deficiencies. CMS Ex. 4. Significantly, the scope and severity of the most serious deficiency, involving the pressure sore requirements at section 483.25(c), was reduced from level G (isolated, constituting actual harm that is not immediate jeopardy) to level D (isolated, constituting no actual harm with potential for more than minimal harm that is not immediate jeopardy). The State agency explained that it initially cited San Fernando "for failing to prevent the development of a pressure ulcer in [a resident's] right hand" resulting in an infection and other results. *Id.* at 2. "The information and materials submitted" at the IDR conference were "sufficient to mitigate the severity and scope of the deficiency," the State agency explained, and "there was no evidence" of an infection of the right hand wound or the other results. *Id.* The State agency advised San Fernando that the survey records would be revised accordingly and that San Fernando could request a "clean, new copy of the" SOD. *Id.* at 3.

The SOD and CMS's Nursing Home Compare website were thereafter revised to reflect the results of the IDR proceedings. CMS Ex. 5; CMS Br. at 3.

[2] The March 2, 2012 notice erroneously cited SOD F-tag 371 as the deficiency for which the CMP was imposed. CMS Ex. 3, at 2. (F-tag 371 involved the requirements at section 483.35(i) governing food procurement, storage, preparation and serving. CMS Ex. 5, at 37-38. The survey found that San Fernando's noncompliance with section 483.35(i) was at scope and severity level F (widespread, no actual harm with potential for more than minimal harm that is not immediate jeopardy). *Id.*) CMS's subsequent, April 16, 2012 notice of reopening and revision, discussed below, clarified that the CMP was based on F-tag 314, involving the requirements at section 483.25(c), initially cited at scope and severity level "G." CMS Ex. 6, at 1.

By letter dated April 16, 2012, CMS notified San Fernando that CMS was reopening and revising its March 2, 2012 determination. CMS Ex. 6. CMS stated that it concurred with the State agency's revision of the survey findings based on the IDR process and, consequently, the $1,500 CMP "has been rescinded." *Id.* at 2. CMS further stated that "in view of the fact that no remedies were ultimately imposed as a result of the referenced certification/finding of noncompliance, and that there does not continue to exist a remedy determination that [San Fernando] may challenge, we hereby notify you that the applicable regulations specify that there is no right to an administrative hearing under 42 C.F.R. Part 498 . . . ." *Id.*

By letter dated May 1, 2012, San Fernando requested an ALJ hearing "of the certification of noncompliance and related sanctions" set forth in CMS's March 2, 2012 notice. The ALJ thereafter consolidated San Fernando's hearing requests.

The ALJ Decision

The ALJ dismissed San Fernando's hearing requests. The ALJ explained that the regulations at 42 C.F.R. Part 498 specify which administrative actions constitute "initial determinations" subject to ALJ review (as well as actions that are not initial determinations and, thus, not subject to ALJ review). The ALJ noted that initial determinations include "[w]ith respect to an SNF or NF, a finding of noncompliance that results in the imposition of a remedy specified in 42 C.F.R. § 488.406 . . . ." 42 C.F.R. § 498.3(b)(13) (*cited in* ALJ Decision at 3). The ALJ stated that where, as in this case, "CMS rescinds all proposed remedies," a facility has no hearing right. ALJ Decision at 3. "It is the final imposition of an enforcement remedy or sanction and not the citation of a deficiency that triggers a facility's right to a hearing pursuant to 42 C.F.R. Part 498," the ALJ explained. *Id.*

The ALJ further discussed the "long and unvarying line" of Board decisions finding providers not entitled to an ALJ hearing under similar circumstances. *Id.* at 1, 3 (citations omitted). The ALJ noted that the United States District Court for the District of Nebraska recently issued a decision he viewed as "casting doubt on the validity" of those Board decisions. *Id.* at 3, *citing Golden Living Ctr.-Grand Island Lakeview v. Sebelius,* No. 8:11CV119, 2011 WL 6303243 (D. Neb. Dec. 16, 2011), *reconsideration denied.*, 2012 WL 2685001 (D. Neb. July 6, 2012). The ALJ concluded, however, that the district court's decision was not controlling in this appeal.

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence in the record as a whole, and a disputed conclusion of law to determine whether it is erroneous. *See Departmental Appeals Board, Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's*

Participation in the Medicare and Medicaid Programs (Board Guidelines), http://www.hhs.gov/dab/ divisions/appellate/guidelines/prov.html. We review an ALJ's exercise of discretion to dismiss a hearing request, where such dismissal is authorized by law, for abuse of discretion. *See, e.g.*, *High Tech Home Health, Inc.*, DAB No. 2105, at 7-8 (2007) (and cases cited therein), *aff'd, High Tech Home Health, Inc. v. Leavitt*, Civ. No. 07-80940 (S.D. Fla. Aug. 15, 2008).

Analysis

The ALJ properly dismissed San Fernando's Hearing Requests.

San Fernando argues that the Board has adopted a "longstanding position that an ALJ may reach the merits of an appeal only where there is both a finding of noncompliance *and* a *continuing* final remedy." Request for Review (RR) at 8 (emphasis in original). According to San Fernando, this position is "inconsistent with the plain language of [section 498.3(b)(13)], as well as its purpose to effectuate the *statutory* right to appeal findings of noncompliance." *Id.* Section 498.3(b)(13) provides that "a finding of noncompliance that results in the imposition of a remedy specified in § 488.406 . . . , except the State monitoring remedy" is an initial determination that may be appealed to an ALJ. 42 C.F.R. § 498.3(b)(13). San Fernando argues that "the verb 'results in' plainly refers to the specific action by CMS imposing a sanction, and cannot reasonably be interpreted to incorporate the future tense, or . . . the future existence of the sanction itself and not CMS's action." RR at 9. San Fernando asserts that the Board's interpretation of section 498.3(b)(13) violates the Act because it allows CMS to vitiate an otherwise proper appeal "simply by withdrawing the remedy, even if it does not withdraw the underlying finding of noncompliance." *Id*. at 8. "In essence," San Fernando argues, "the regulation gives CMS one shot, and once CMS imposes a remedy, it cannot unscramble the eggs." P. Reply at 2.

Contrary to what San Fernando argues, there is no statutory right to appeal all findings of noncompliance. The Act provides for appeals of specific types of administrative actions taken to ensure provider compliance with program participation requirements to protect program beneficiaries. Under section 1866(h)(1) of the Act, "an institution or agency dissatisfied with a determination by the Secretary that it is not a provider of services or with a determination described in subsection (b)(2) shall be entitled to a hearing thereon by the Secretary . . . to the same extent as is provided in section 205(b) . . . . "[3] Section 205(b) describes the nature of the administrative hearing. Section 1866(b)(2) states in relevant part that the Secretary "*may refuse to renew or may terminate [a provider]*

[3] The Secretary's longstanding interpretation of "a determination that an institution or agency is not a provider of services" is that this refers to a determination that a "prospective provider does not qualify as a provider," in other words, a denial of an initial certification permitting the institution or agency to enter into a provider agreement. 42 C.F.R. §§ 498.5(a), 498.3(b)(1), 489.

agreement after the Secretary . . . has determined that the provider fails to comply substantially with the provisions of the agreement, with the provisions of this title and regulations thereunder . . . ." Act § 1866(b)(2)(A) (emphasis added). Sections 1819(h)(2)(B)(ii) and 1919(h)(2)(B)(ii) authorize the Secretary to impose a CMP and state that "the provisions of section 1128A (other than subsections (a) and (b)) *shall apply to a civil money penalty* . . . in the same manner as such provisions apply to a penalty or proceeding under section 1128A(a)." (Emphasis added.) Section 1128A(c)(1) describes the proceeding with respect to a CMP as one to "determine whether to impose" a CMP. Nothing in the Act provides a general right to appeal any noncompliance finding.

After the Act was amended in 1987 to permit the Secretary to impose CMPs and other, less severe remedies as alternatives to termination, the Secretary construed the language of sections 1866(b)(2) and section 1866(h) to provide hearing rights beyond those specifically required by the Act, but those extended hearing rights are defined in and circumscribed by the regulations. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, §§ 4201-4218, 101 Stat. 1330-160 to 1330-221; 59 Fed. Reg. 56,116 (1994). Under 42 C.F.R. § 498.3(a)(1), an ALJ has the authority to review a CMS "initial determination" of a kind specified in 42 C.F.R. § 498.3(b). As relevant here, the Secretary added the provision now at subsection 498.3(b)(13) defining "initial determination" to include, "[w]ith respect to an SNF or NF, a finding of noncompliance that results in the imposition of a remedy specified in § 488.406 of this chapter, except the State monitoring remedy." Section 488.408(g), addressing enforcement of the participation requirements for SNFs and NFs, in turn, states that a "facility may appeal a certification of noncompliance leading to an enforcement remedy." Thus, the regulations do not provide a hearing right for a noncompliance finding alone.

We are not persuaded by San Fernando's argument that the use of the present tense ("results in") in subsection 498.3(b)(13) means that once CMS has issued an initial determination to impose a remedy hearing rights attach regardless of subsequent events. Part 498, subpart C specifically permits CMS to reopen and revise an initial determination within 12 months after the date of notice of the initial determination. Once CMS has done this and issued a revised determination rescinding the remedy, the initial determination is void and no longer is a determination that "results in" or is "leading to" one of the specified enforcement remedies.

When the Secretary promulgated the nursing home regulations in 1994, she expressly rejected comments seeking to provide hearings to facilities found not to be in substantial compliance where no remedy (or only a minor remedy such as State monitoring) was imposed. 59 Fed. Reg. 56,116, at 56,158 (1994). The Secretary concluded that absent the imposition of a remedy identified in the regulations, the deficiency findings alone do not result in such a degree of harm as to create hearing rights. *Id.* Amending the regulations in 1999 to provide for an ALJ hearing where a provider lost its nurse aide training program based on a substandard quality of care finding, the Secretary explained

that a full evidentiary hearing is provided only where the consequence of a remedy "ris[es] to the level of deprivation marked by sanctions described elsewhere in the statute such as facility agreement terminations or civil money penalties." 64 Fed. Reg. 39,934, at 39,935 (1999).

The Board has long held that ALJs have authority to dismiss a request for hearing under section 498.70(b) if CMS did not issue a determination to impose any of the remedies specified at section 488.406 or where, as in this case, CMS imposed but subsequently rescinded such a remedy. *See, e.g., Fountain Lake Health & Rehab., Inc*., DAB No. 1985 (2005); *Lakewood Plaza Nursing Ctr.*, DAB No. 1767 (2001); *The Lutheran Home – Caledonia*, DAB No. 1753 (2000); *Schowalter Villa*, DAB No. 1688 (1999); *Arcadia Acres, Inc*., DAB No. 1607 (1997). The Board has concluded that "no right to a hearing survives merely to 'correct [a] compliance record' upon rescission of all remedies listed in 42 C.F.R. § 488.406." *Fountain Lake* at 6, *citing Schowalter Villa* at 2.[4] As the Board explained in *Lakewood*, "rescission of all alternative remedies ab initio creates a situation where no determination resulting in a remedy exists any longer, and no appeal lies under section 498.3(b)(12)." *Lakewood* at 7. In other words, the legal effect of a reopening and revision rescinding all previously noticed remedies is to void the imposition of the remedies and the provider's associated hearing rights. *Id.* at 8 (where all remedies have been voided by retroactive rescission, a provider is in the same position as that of a facility found to be out of compliance but not subjected to a remedy).

Despite this longstanding implementation of the statute and regulations, Congress has not acted to expand formal hearing rights for SNFs and NFs although it has provided new hearing rights for other types of determinations and has addressed the informal dispute resolution process for SNFs and NFs. *See, e.g.,* Act §§ 1866(j)(8) and 1819(h)(2)(B)(ii)(IV)(aa).

Applying the language of the Act and regulations in this case, we conclude that the ALJ did not abuse his discretion in dismissing San Fernando's hearing requests. CMS's April 16, 2012 notice of reopening and revision of its March 2, 2012 initial determination expressly rescinded the CMP noticed in the initial determination and explained that "no remedies were ultimately imposed." CMS Ex. 6, at 2. Consequently, there was no CMP to which proceedings under section 1128A would apply nor was there a determination that could or did result in a DPNA. We therefore conclude that the ALJ was authorized to dismiss San Fernando's hearing requests under section 498.70(b) because San Fernando did not have a right to a hearing.

[4] It is not clear how San Fernando derived its description of Board jurisprudence as permitting an appeal to proceed only if a "*continuing* final remedy" exists. RR at 8 (emphasis in original). To the extent that San Fernando implies that no right exists to appeal a remedy that has taken effect and been completed, the Board has not so held.

The Board's interpretation and application of section 498.3(b)(13) is consistent with the Supreme Court's decision in Illinois Council.

San Fernando asserts that the Board's interpretation and application of the regulations is inconsistent with the Supreme Court's decision in *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000). RR at 12-15. In *Illinois Council*, the Court held that section 205(h) of the Act, as applied to Medicare by section 1872, barred federal question jurisdiction of a trade association's challenge to the nursing home enforcement regulations.[5] The Court determined that the association or its members must proceed through the "special review channel" provided under sections 1866(h)(1), 1866(b)(2)(A), 1872, and 205(b), (g) and (h) of the Act. 529 U.S. at 5. The Court also noted that sections 1819(h)(2)(b)(ii) and 1128A provide a different channel for administrative and judicial review of a decision to impose a CMP. 529 U.S. at 8, 20-21.

According to San Fernando, the Court in *Illinois Council* found that section 1866(h)(1) "provides the basis for judicial review of 'termination' decisions" and read section 205(b) "to provide for *administrative* review of, among other things, most remaining enforcement decisions." RR at 12 (emphasis in original), *citing* 529 U.S. at 8-9. San Fernando contends that "the Court specifically held in *Illinois Council* that unless the Secretary affirmatively waives administrative review of a specific decision or category of actions, these *statutory* provisions, taken together, *require* 'channeling' of *any and all* challenges to *any and all* Secretarial enforcement decisions and actions through the administrative appeal process." *Id.* at 13 (emphasis in original). San Fernando also contends that the Supreme Court "relied heavily on the Secretary's representation that administrative review *always* is available, one way or another, *to challenge deficiencies*. . . ." *Id.* at 14 (emphasis in original), *citing* 521 U.S. at 21-22.

San Fernando mischaracterizes the *Illinois Council* decision. The Court in *Illinois Council* did not conclude that the statutory provisions, taken together, provide a general right to administrative review for "any and all" determinations involving a long-term care provider's compliance with the program participation requirements, as San Fernando asserts. Rather, the Court explained that section 1866(h)(1) "authorizes" a section 205(b) hearing "whenever a home is 'dissatisfied … with a determination described in subsection (b)(2)," and subsection (b)(2) "authorizes the Secretary to terminate an

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[5] Section 205(h) states:

> The findings and decision of the [Secretary] after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision . . . shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the [Secretary], or any officer or employee thereof shall be brought under section 1331 [federal question jurisdiction]. . . of title 28 . . . to recover on any claim arising under this subchapter.

Section 1872 makes section 205(h) applicable to the Medicare Act "to the same extent as" it applies to the Social Security Act.

agreement," if she has determined that the provider has failed to comply substantially with the statutes, provider agreement, or regulations. 521 U.S. at 21. The Court then explained that the "Secretary state[d] in her brief that the relevant 'determination' that entitles a 'dissatisfied' home to review is any determination that a provider has failed to comply substantially with the statute, agreements, or regulations whether termination or '*some other remedy* is imposed." *Id.* (emphasis in decision). The Court went on to say:

> The Secretary's regulations make clear that she so interprets the statute. *See* 42 CFR §§ 498.3(b)(12), 498.1(a)-(b) (1998). The statute's language, though not free of ambiguity, bears that interpretation. And we are aware of no convincing countervailing argument. We conclude that the Secretary's interpretation is legally permissible.

Id. (citations omitted). Thus, the Court found that the regulations clearly authorize a hearing *on a termination* for failure to comply substantially with the applicable requirements *or when other specified remedies are imposed*. This interpretation of the statute, the Court concluded, was reasonable and entitled to deference. Nothing in the Court's decision suggests that a hearing is required absent the imposition of a remedy. Moreover, San Fernando does not point to any specific wording in the statutory provisions discussed in *Illinois Council* to support its position here.

> *The district court decision in Golden Living Center—Grand Island Lakeview is distinguishable from this case.*

San Fernando also cites the decision of the United States District Court for the District of Nebraska in *Golden Living Center—Grand Island Lakeview (Grand Island)* to support its request for review. San Fernando argues that the district court decision addressed the same, narrow question here: "whether CMS may vitiate an appeal that *was* properly initiated under section 498.3(b)(13), because CMS *did* both make a finding of noncompliance and *did* impose a sanction." P. Reply at 1-2 (emphasis in original). San Fernando states that the district court held that the Board's interpretation of section 498.3 of the regulations was inconsistent with the plain language of the Act and that the Board "can and should interpret and apply its regulations, including section 498.3, to be *consistent with*" the Act. RR at 2 (emphasis in original). In addition, San Fernando contends, the *Grand Island* court found the Board's longstanding interpretation and application of the regulations inconsistent with constitutional requirements and that the Secretary was obligated to substitute "an equally plausible interpretation that *is* consistent with due process requirements." P. Reply at 3 (emphasis in original). CMS chose not to appeal *Grand Island*, San Fernando argues, and the decision "remains the only controlling judicial authority," even though it is located in the Eighth Circuit. *Id.*

The district court's decision in *Grand Island* is distinguishable from this matter, however. In *Grand Island*, the court determined that a facility was entitled to an ALJ hearing to contest noncompliance findings where the Secretary had withdrawn all remedies *after* the Secretary had imposed *a DPNA that went into effect* "for three days and affected the Medicare/Medicaid admissions and reimbursements." *Grand Island* at 4; *see also Grand Island Memorandum and Order Denying Motion to Reconsider*, 8:11CV119 (July 6, 2012), at 2. In addition, the facility was listed on the Nursing Home Compare website with a citation for "failure to '[p]rotect each resident from all abuse, . . . resulting in 'actual harm'" to its residents. *Grand Island Memorandum and Order Denying Motion to Reconsider* at 3. The court also described the case as "unique" in that CMS's revision of its Special Focus Facility program after the ALJ's dismissal would permit CMS to use the charge that the facility allowed sexual abuse "in other regulatory actions and proceedings. . . without a decision on the merits having been reached." *Grand Island* at 3-4.

Here, in contrast, neither the statutory DPNA identified in the January 18, 2012 State agency notice nor the $1,500 per-instance CMP identified in CMS's March 2, 2012 notice went into effect, and San Fernando has not shown that CMS's action impacted its Medicare and Medicaid admissions or reimbursements.[6] Furthermore, there is no actual harm finding on the December 21, 2011 survey records. The Nursing Home Compare website (described in the next section of our analysis) does not list any finding of actual harm in the survey results from the December 21, 2011 survey, and the revised SOD (which reflects the deletions and modifications made as a result of the IDR process) "serves as the public copy of the document." CMS Br. at 7.[7] San Fernando has not been placed on the Special Focus Facility List. *Id.* Thus, unlike the outcome in *Grand Island,* the outcome of CMS's actions here was the same as it would have been had CMS never imposed any remedy based on the noncompliance findings. Further, while the *Grand Island* court found that the dismissal would permit CMS to use the charge of allowing sexual abuse "in other regulatory actions and proceedings. . . without a decision on the merits having been reached," *Grand Island* at 3-4, in this case, CMS states that if the

[6] San Fernando's opposition to CMS's motion to dismiss (at 5) states that, since the revisit survey found substantial compliance as of March 7, 2012, "Petitioner . . . presumes that the DPNA that the [State agency] imposed in its January 18, 2012 Notice *did not take effect*, although it has received no such confirmation . . . ." (Emphasis added.) This indicates that San Fernando understood that the DPNA would take effect only if it did not timely correct the noncompliance.

[7] The public copy of the revised SOD is available at: http://www.medicare.gov/nursinghomecompare/SurveyReportDetail.aspx?ID=555814&SURVEYDATE=12/21/2011&profTab=1&loc=Los%20Angeles%2C%20CA&lat=34.0522342&lng=118.2436849&dist=50&name=san%20fernando%20post%20acute&bhcp=1. Last accessed December 5, 2012. A copy of the revised SOD is included in the record and was made available to San Fernando. CMS Ex. 4-5.

December 2011 deficiency findings were to be used in future proceedings they "can be addressed in those proceedings should they ever occur." CMS Br. at 16, *citing Taos Living Center*, DAB No. 2293 (2009). Moreover, while the *Grand Island* court emphasized that the findings of "sexual abuse" and "actual harm" could be particularly problematic for the petitioner if it were to be designated a Special Focus Facility, in this case neither sexual abuse nor any actual harm was ultimately cited. Accordingly, we conclude that even if *Grand Island* were controlling outside of the Eighth Circuit (which it is not), the court's decision is factually distinguishable from this case.

San Fernando's contention that it was denied due process does not provide a basis for reversing the ALJ Decision.

San Fernando further argues that "the Board has failed to give appropriate consideration to the collateral effects of the findings of noncompliance it allows CMS to relegate to enforcement limbo by vitiating properly filed appeals." RR at 15. "CMS has implemented a variety of quasi-official enforcement 'initiatives' in recent years that are *not* set forth in any duly-promulgated regulations," San Fernando contends. *Id.* at 15-16 (emphasis in original). "Most notable," San Fernando states, "are the so-called 'Nursing Home Compare,' 'Five-Star Quality Rating System' and 'Special Focus Facility' programs," the latter of which is "not described in any regulation or even any manual . . . . .". *Id.* at 16-17. The programs make survey findings publicly available, rate facilities based on staffing, inspections, complaints and quality measures, and subject facilities with histories of performance issues to more intense monitoring. *See http://www.medicare.gov/NursingHomeCompare/ search.aspx.* San Fernando argues that CMS "asserts that the purpose of these efforts is to dissuade referral sources and the public from patronizing nursing facilities that are *cited* for deficiencies, regardless of the accuracy of such citations, or even whether such citations are disputed." RR at 16 (emphasis in original).

San Fernando argues that as a result of CMS's initiatives, third parties initiate civil suits and leverage settlements and jury awards based on "unreviewed" deficiencies; facilities are disqualified from commercial insurance contracts and commercial mortgages; and third-party contracts with the facilities are threatened. *Id.* at 18-19. San Fernando contends that the CMS initiatives "raise significant due process issues -- *and* that this Board has the responsibility in the first instance to assure that its regulations are interpreted and applied to accommodate such concerns." *Id.* at 19. Moreover, San Fernando argues, CMS may in the future rely on "unreviewed" deficiencies for other regulatory uses, such as to determine penalty levels for future findings of noncompliance. *Id.* at 14-15, 18-19.

As the Board has explained previously, it is bound by all applicable sections of the Act and regulations and does not have the authority to ignore unambiguous regulations on the ground that they are unconstitutional. *See, e.g., Columbus Park Nursing & Rehab. Ctr.*, DAB No. 2316, at 10 (2010)(citations omitted). The statute and regulations read as a whole unambiguously support the ALJ's determination that San Fernando has no right to an ALJ hearing. The Board previously has made clear that potential harm to a facility's reputation or financial status that may flow from the publication of deficiency findings does not trigger appeal rights under the Act or regulations. *Florida Health Sciences Ctr., Inc., d/b/a Tampa General Hosp.*, DAB No. 2263 (2009).

Furthermore, San Fernando's due process claims are grounded in inaccurate allegations and mischaracterizations. For example, San Fernando mischaracterizes the Nursing Home Compare, Five-Star Quality Rating System, and Special Focus Facility programs as "quasi-official enforcement 'initiatives'" through which CMS independently chose to publish SODs and use deficiency citations without regard to accuracy or facilities' responses to deficiency findings. Sections 1819(i) and 1919(i) of the Act explicitly authorize the Secretary's use of the Nursing Home Compare website to promote transparency and program integrity. Affordable Care Act, Pub. L. No. 111-148, § 6103, 124 Stat. 704-711 (March 23, 2010). The statute requires the Secretary to ensure that the information provided on the Nursing Home Compare website includes "[l]inks to State Internet websites with information regarding State survey and certification programs, links to [SODs] on such websites, information to guide consumers in how to interpret and understand such reports, and the facility plan of correction or other response to such report." *Id*. The legislation further requires the Secretary to "establish a process . . . to review the accuracy, clarity of presentation, timeliness, and comprehensiveness of information reported" on the website. *Id.* In addition, the Affordable Care Act codified the Special Focus Facility Program at sections 1819(f) and 1919(f) of the Act "for enforcement of requirements for skilled nursing facilities that the Secretary has identified as having substantially failed to meet applicable requirements of [the] Act." *Id.* Moreover, section 6107 of the Affordable Care Act recognizes the Five Star Quality Rating System and ordered the Government Accountability Office to study its implementation and identify ways to improve the system. Pub. L. No. 111-148, § 6107, 124 Stat. 713. Notably, the legislation codifying the program initiatives and requiring the publication of deficiency information did not provide new or separate appeal rights for facilities in connection with these initiatives.

San Fernando also mischaracterizes deficiency citations that have not been contested at an ALJ hearing as "unreviewed" and incorrectly asserts that CMS uses such citations without regard to their accuracy. The survey protocols provided by regulation and detailed in the CMS State Operations Manual (SOM) establish "safeguards and protections available to facilities to challenge the accuracy of survey findings at various points during the survey, including interviews during the survey and the exit conference." 76 Fed. Reg. 15,106, 15,108 (March 18, 2011); 42 C.F.R. § 488.110; SOM Chapter 7,

Appendices P and PP, available at http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS1201984.html. The regulations also require surveys to be conducted by an interdisciplinary team of professionals, including a registered nurse, and CMS provides comprehensive training to surveyors on the application and interpretation of the SNF and NF requirements, techniques and survey procedures. 42 C.F.R. § 488.314; SOM Chapter 7; *see also CMS 2012 Nursing Home Action Plan for Further Improvement of Nursing Home Quality* (describing ongoing initiatives to strengthen survey processes, standards and enforcement, including surveyor and regional office training and surveyor testing) available at http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/2012-Nursing-Home-Action-Plan.pdf.

Moreover, section 488.331(a) of the regulations requires each State agency to offer a facility an informal opportunity to dispute survey noncompliance findings through the IDR process regardless of whether a remedy is imposed. As the Secretary has stated, the IDR process "is expeditious and it addresses all noncompliance issues that would affect the imposition of other enforcement remedies." 76 Fed. Reg. at 15,108. If a provider is successful in showing that deficiencies should not have been cited, the deficiencies are removed from the SOD, and any enforcement actions imposed solely as a result of those deficiency citations are rescinded. 42 C.F.R. § 488.331(c). Thus, while CMS is not required to accept IDR results, the IDR process does provide an opportunity for the provider to challenge, and for the State agency to further review, deficiency citations. *See, e.g.*, *Rafael Convalescent Hosp. v. Shalala*, No. C-97-1967 FMS, 1998 WL 196469 (N.D. Cal. Apr. 15, 1998); *Britthaven of Chapel Hill*, DAB No. 2284 (2009); *Capitol House Nursing & Rehab. Ctr.*, DAB No. 2252, at 5-8 (2009). That the IDR process provides a meaningful opportunity to dispute survey factual assertions and findings is exemplified in this case, where San Fernando provided evidence through the IDR process to refute nine deficiencies, and on review of that information, the State agency dismissed three deficiencies; modified one deficiency; and modified and reduced the scope/severity levels of two of the deficiencies. CMS Ex. 4, at 3.

Moreover, while San Fernando argues that there are a multitude of "collateral effects" from noncompliance findings that are not subject to ALJ review, it has not provided any evidence to show that it suffered any tangible loss as a result of the publication of the December 2011 survey findings on CMS's Nursing Home Compare website or its rating under the Five-Star Quality Rating Program. San Fernando has not provided any evidence that it lost placement referrals, experienced declining enrollments, lost any third-party contracts, or was disqualified from commercial insurance contracts or commercial mortgages as a result of the survey findings. Nor does San Fernando allege that it has been placed on the Special Focus Facility list or been subject to increased penalties in subsequent enforcement actions based on the December 2011 noncompliance findings. As noted above, in response to San Fernando's contention that CMS may in the future rely on the deficiency findings for "collateral regulatory uses," such as to

determine penalty levels for future findings of noncompliance, CMS makes clear that if the deficiency findings were to be used in future proceedings they "can be addressed in those proceedings should they ever occur." CMS Br. at 16, *citing Taos.*

We also note that the federal district court for the Northern District of Illinois recently addressed a suit brought by a Medicaid-only facility that made arguments similar to San Fernando's due process claim. *Bryn Mawr Care v. Sebelius,* --- F.Supp.2d----, 2012 WL 4481924 (N.D. Ill. Sept. 26, 2012). In *Bryn Mawr*, the State agency conducted a survey that found the facility noncompliant, but did not impose remedies. The results of the survey were published, and as a result of a mistaken calculation, the facility's Five-Star rating was decreased to two stars when it should have been four stars. The facility filed suit in federal court claiming, among other things, that the Secretary violated its Fifth Amendment procedural due process rights in denying it an administrative hearing to contest the deficiencies.

The *Bryn Mawr* court rejected the facility's argument, explaining that "[p]rocedural due process claims require a two-step analysis," the first of which is to determine whether the aggrieved party was deprived of a protected liberty or property interest. *Bryn Mawr* at 3. If such an interest exists, the court determines what process is due. Bryn Mawr claimed that it had "a constitutionally protected property interest . . . in maintaining its reputation" and that it lost potential patients as a result of the incorrect Five-Star rating. *Id.* The district court concluded that "[w]hile it [was] true that this mistaken rating could have caused some potential patients to look elsewhere for their care, this does not amount to a property interest in which Plaintiff can claim it is legally entitled." *Id.* Furthermore, the court concluded, CMS's mistake in lowering the facility's rating and delay in correcting the mistake, while "unfortunate," did not "consist of remedies pursuant to the federal regulation which entitles [the facility] to a hearing . . . ." *Id.* at 8. The district court therefore declined to address the Secretary's alternative argument that the facility received adequate due process through IDR. The *Bryn Mawr* decision thus indicates that the claimed "collateral consequences" of the December 2011 survey noncompliance findings do not rise to the level of a constitutionally protected interest.

Accordingly, we conclude that San Fernando's due process argument does not establish a basis for the Board to reverse the ALJ's dismissal.

> *San Fernando's argument that Board precedent disregards "additional principles of federal law" does not provide grounds for reversing the ALJ Decision.*

San Fernando additionally contends that the Board's interpretation of section 498.3 disregards the "standard rule" that "a federal tribunal's 'jurisdiction depends on the facts as they existed when the complaint was brought' and 'cannot be ousted by subsequent events.'" RR at 21, *citing Smith v. Sperling*, 354 U.S. 91, 93 n.1, 97 (1957). San Fernando states that the Board previously "suggested that it is not bound by this rule

because it was developed and applied in the context of federal court, and not administrative agency, jurisdiction." RR at 22. San Fernando argues that this rationale is circular because the Board's jurisdiction is derived from a statute that provides for administrative appeals of adverse decisions, and the Board may not limit such challenges on the basis of "some novel jurisdictional principle." *Id.* San Fernando adds that "the only general exception to the rule that jurisdiction is fixed at the time of the filing of an appeal is mootness," but that doctrine would not apply where there remains a live controversy based on the collateral effects of the agency's decision. *Id.* at 23.

None of the cases cited by counsel involved administrative adjudication, which is governed by controlling statutes and regulations rather than federal court procedures. Contrary to San Fernando's contention that the governing statute provides a general right to an administrative appeal of any adverse decision, the applicable sections of the Act limit administrative appeals based on the imposition of specific types of remedies not imposed here, as we explained at length above. Finally, we need not parse the federal case law on mootness and its exceptions. The justiciability doctrine and its exceptions stem from the Article III requirement that federal courts hear only "cases and controversies." While such principles may provide useful guidance, they are not directly applicable to disputes raised in the administrative process, which must be decided on the basis of the controlling statutes and regulations.

Conclusion

For the reasons stated above, we sustain the ALJ Decision dismissing San Fernando's March 16, 2012 and May 1, 2012 hearing requests.

/s/
Stephen M. Godek

/s/
Leslie A. Sussan

/s/
Judith A. Ballard
Presiding Board Member