

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

In the Case of:)	
)	DATE: May 20, 2009
Manor of Wayne Skilled)	
Nursing and)	
Rehabilitation,)	
)	
Petitioner,)	Civil Remedies CR1841
)	App. Div. Docket No. A-09-16
)	
- v. -)	Decision No. 2249
)	
Centers for Medicare &)	
Medicaid Services.)	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Manor of Wayne Skilled Nursing and Rehabilitation (Manor of Wayne, Petitioner), appeals the September 15, 2008 decision of Administrative Law Judge (ALJ) Alfonso J. Montano. Manor of Wayne Skilled Nursing and Rehabilitation, CR1841 (2008) (ALJ Decision). In that decision the ALJ granted summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS), sustaining CMS's determination setting May 9, 2007 as the effective date of Manor of Wayne's provider agreement allowing it to participate in the Medicare program as a skilled nursing facility (SNF).

For the reasons discussed below, we uphold the ALJ Decision granting summary judgment in favor of CMS.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address *de novo*. Lebanon Nursing and Rehabilitation Center, DAB No. 1918 (2004). Summary judgment is appropriate if there are no genuine disputes of fact material to the result. Everett Rehabilitation and Medical Center, DAB No. 1628, at 3 (1997). In reviewing a disputed finding of fact, we view proffered evidence in the light most favorable to the non-moving party. Kingsville Nursing and Rehabilitation Center, DAB No. 2234 (2009); Madison Health Care, Inc., DAB No. 1927 (2004), and cases cited therein. The standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. Departmental Appeals Board, Guidelines - 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>.

Applicable Legal Authority

The applicable legal authority is set out in the ALJ Decision at page 4 and in the analysis section of our decision.

Factual background¹

The ALJ based his decision on the following undisputed facts:

- Petitioner, an SNF located in Wayne, Michigan, applied to be a provider of services under the Medicare program in May 2006.
- On June 7, 2006, the City of Wayne Fire Department conducted an inspection of the facility using the 2000 edition of the Life Safety Code of the National Fire Protection Association (LSC), the same edition used by CMS.
- On November 9, 2006, the Michigan Department of Community Health (MDCH), the State survey agency, conducted an initial state licensure survey.

¹ The information in this section is drawn from the ALJ Decision and the record and is presented to provide a context for the discussion of the issues raised on appeal.

- On December 7, 2006, MDCH conducted the initial federal health survey, which found Petitioner to be in substantial compliance with the applicable federal health requirements. P. Ex. 4.
- On December 19, 2006, as a result of the November 9 state licensure survey, MDCH issued a notice of licensure/certification action which indicated that Petitioner was licensed by the State for 99 beds, effective November 9, 2006. CMS Ex. 13, at 2. The facility was in substantial compliance with state licensure requirements and was instructed by the State licensing officer that it could admit five to six residents. CMS Ex. 8.
- By email dated January 3, 2007, MDCH issued a Notice of Licensure/Certification Action, which stated that Petitioner was in substantial compliance with federal health requirements effective December 7, 2006. CMS Ex. 14.
- On April 12, 2007, the initial federal LSC survey was conducted. The survey identified seven deficiencies for which Petitioner was cited; one of the deficiencies involved Petitioner's failure to close doors to resident rooms during fire drills.² CMS Ex. 19.
- On May 9, 2007, a revisit LSC survey was conducted, which found that the facility was in substantial compliance with the federal LSC requirements as of that date. CMS Exs. 24, 25.
- By letter dated June 5, 2007, CMS notified Petitioner that it had accepted the facility into the Medicare program with an effective date of participation of May 9, 2007. CMS Ex. 26.

ALJ Decision at 2.

² This LSC survey, which the ALJ found was the first complete LSC survey by the State survey agency, was conducted by the Bureau of Fire Services of the Michigan Department of Labor and Economic Growth. CMS Ex. 25. Neither party disputes that this survey constituted an LSC survey by the State survey agency. Manor of Wayne Request for Review (RR) at 4-5; CMS Reply at 2.

Analysis

1. The ALJ did not err in rejecting the June 7, 2006 survey as a basis for setting an earlier effective date for Manor of Wayne's Medicare provider agreement.

Under section 1866 of the Social Security Act (Act), an entity seeking to participate in Medicare as a provider of services such as an SNF must enter into an agreement with the Secretary.³ Manor of Wayne acknowledges that the Act requires that CMS or a state survey agency survey a prospective provider to assure that it is in compliance with all applicable federal requirements before it enters into a provider agreement. RR at 2, citing section 1864 of the Act, "Use of State Agencies to Determine Compliance by Providers of Services with Conditions of Participation;" ALJ Decision at 4. CMS regulations provide that "[t]he State survey agency will ascertain whether the provider meets the conditions of participation or requirements (for SNFs) and make its recommendations to CMS." 42 C.F.R. § 489.10(d). Manor of Wayne further recognizes that the earliest date a provider may be found to qualify for Medicare participation (that is, the earliest effective date of a Medicare provider agreement), is the date when the required surveys of the provider, **including the LSC survey**, are completed, if, on that date, the provider meets all federal participation requirements. 42 C.F.R. § 489.13(b); RR at 2. Except in circumstances not relevant here, an SNF must meet the provisions of the **2000 edition of the LSC** that apply to nursing homes. Act § 1819(d); 42 C.F.R. § 483.70(a). If an SNF does not meet all federal requirements on the survey date, then the effective date of the SNF's Medicare agreement is the date on which the facility is in substantial compliance with the requirements for participation. 42 C.F.R. § 489.13(c)(1).⁴

³ 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. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table, and the U.S.C.A. Popular Name Table for Acts of Congress.

⁴ The ALJ cited section 489.13(c)(2)(i) as setting the effective date as the "date on which the provider meets all requirements" for a provider that does not meet those requirements in the initial survey. ALJ Decision at 4.

(continued)

The ALJ correctly determined that Manor of Wayne could participate in the Medicare program no earlier than May 9, 2007, the date that the State survey agency certified that Manor of Wayne had corrected the deficiencies noted in the LSC survey of the facility that the State survey agency conducted on April 12, 2007. In so concluding, the ALJ appropriately rejected Manor of Wayne's argument that an LSC survey by the City of Wayne Fire Department on June 7, 2006 showed that Manor of Wayne was in substantial compliance on an earlier date.

First, the undisputed facts establish that the June 7, 2006 survey by the city fire department was not conducted by the State survey agency authorized to conduct surveys of Medicare providers. While section 1864 of the Act permits "appropriate local agencies" to enter into an agreement with CMS to conduct surveys, Manor of Wayne does not allege that either the City of Wayne or its fire department had in fact entered into such an agreement with CMS or was otherwise authorized to conduct LSC surveys to determine whether prospective providers qualify for Medicare. Manor of Wayne does not dispute the ALJ's finding that the city fire department's inspection report "was not submitted to CMS because it was not a part of the federal certification process." ALJ Decision at 6.

Second, as the ALJ concluded, the facility had no residents when the city fire department surveyed it on June 7, 2006. Manor of Wayne does not claim to have admitted any residents before it was informed on November 13, 2006 that it could admit five residents, following the November 9 State licensure survey. CMS Exs. 8, at 1; 13, at 2; RR at 9. The ALJ observed that the State agency's LSC survey on April 12, 2007 identified a deficiency relating to Manor of Wayne's failure to close doors to resident rooms during fire drills. ALJ Decision at 5-6. Manor of Wayne does not directly dispute the ALJ's conclusion that the city fire department survey could not have evaluated compliance with this requirement in June 2006 when there were no residents in the facility. This same deficiency finding from the April 2007 LSC survey also cited failure to hold fire drills at least quarterly on each shift, another requirement that presupposes at least

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Subsection (c)(1) applies to SNFs, however. That subsection provides that the effective date is the date that the SNF is in "substantial compliance" and "CMS or the State survey agency receives from the SNF, if applicable, an approvable waiver request." Below, we discuss why the waiver provision does not apply here.

staff, if not residents, present in the facility. CMS Ex. 19, at 8-9. Moreover, Manor of Wayne admits that it did not receive title to the facility from the previous owner, Tendercare of Michigan, Inc., until July 1, 2006.⁵ RR at 7. Thus, the June LSC inspection was not even a survey of the same entity.

Manor of Wayne disputes the ALJ's conclusion that section 2008A of CMS's State Operations Manual (SOM) requires that an LSC survey be conducted when a facility is "fully operational," which means "serving a sufficient number of patients so that compliance with all requirements can be determined." ALJ Decision at 5. Manor of Wayne argues that the language of section 2008A indicates that it applies to health surveys, rather than to LSC surveys, and that the more applicable provision is section 2472C, "Coordinating LSC Survey." Section 2472C says that "[m]ost States require an initial LSC survey before admitting patients prior to becoming operational."

Manor of Wayne does not explain (or proffer testimony) about how any aspects of the 2000 edition of the LSC that direct a surveyor to look at matters that would ordinarily require the facility to be operational can be applied without residents present. If substantial compliance with the LSC cannot be determined without residents, then the reference in SOM section 2472C to some states requiring an "initial" LSC survey cannot reasonably be read to exempt the entire LSC survey from the "fully operational" language in section 2008A. Section 2008A does not distinguish among different types of surveys. The two SOM provisions can be reconciled by reading section 2472C as simply recognizing that, in some states, no residents will be admitted to a facility until the state completes some critical parts of the LSC survey.

Manor of Wayne also downplays the significance of the seven deficiencies cited in the April 2007 LSC survey, characterizing them as "minor" because they were corrected in 11 days. RR at 4-5. Four of those deficiencies, however, were at the "F" level of scope and severity, and one was at the "E" level, meaning that they were, respectively, "widespread" and "pattern" deficiencies with the potential for more than minimal harm to the facility's residents and staff. CMS Ex. 19; 59 Fed. Reg. 56,116, 56,183

⁵ It is undisputed that the building's roof had collapsed in July 2005 while Tendercare owned the facility (then called Wayne Living Center), which then voluntarily terminated its Medicare provider agreement. CMS Exs. 1; 33, ¶ 3; RR at 7.

(Nov. 10, 1994) (scope and severity grid, shown with alphabetic designations at SOM § 7400E). Manor of Wayne does not proffer any evidence to dispute these survey findings, and the mere fact that the deficiencies could be remedied rather quickly is irrelevant in evaluating their seriousness.

2. Use of the May 9, 2007 date as the effective date of the provider agreement is not arbitrary and capricious under the circumstances here.

Manor of Wayne argues that rigidly applying the Medicare rules without regard to the "very unique circumstances" here is arbitrary and capricious. RR at 6. Manor of Wayne points to the January 3, 2007 "Notice of Licensure/Certification Action" it received from MDCH stating that Manor of Wayne was in substantial compliance with federal health requirements effective December 7, 2006 (the date of the initial federal health survey). CMS Ex. 14. The notice bears a check mark indicating that "State Survey agency certifies/recertifies compliance with Medicare/Medicaid program requirements," and states that "[e]ffective December 7, 2006, the facility was initially certified for 99 Medicare/Medicaid beds." Id. at 2. Manor of Wayne argues that CMS should have accepted this date as the effective date of the provider agreement (and treated the April 2007 survey as a complaint survey of a certified facility), under the totality of the circumstances. In addition to the circumstances mentioned above (which were discussed by the ALJ), Manor of Wayne cites to other facts (most of which are undisputed and shown from CMS Exhibits). We discuss these additional circumstances individually below, but we also conclude more generally that the totality of the circumstances does not require acceptance of the MDCH certification.

First, as the ALJ concluded, a state survey agency's certification of compliance does not conclusively establish the effective date. The regulations clearly provide that certifications by state survey agencies merely "represent recommendations to CMS," based on which "CMS will determine whether . . . a provider . . . is eligible to participate in or be covered under the Medicare program" 42 C.F.R. § 488.12(a)(1). Similarly, section 1864(a) of the Act provides, in pertinent part, that the Secretary-

shall make an agreement with any State . . . under which the services of the . . . appropriate State agency . . . will be utilized by him for the purpose of determining whether an institution therein is a . . . skilled nursing facility[.] To the extent that the

Secretary finds it appropriate, an institution or agency which such a State . . . agency certifies is a . . . skilled nursing facility . . . may be treated as such by the Secretary.

(Emphasis added.)

Furthermore, Manor of Wayne does not allege that it had a Medicare provider agreement, as required by section 1866 of the Act, at any time prior to May 9, 2007, or argue that the January 3, 2007 notice from MDCH should be considered such a provider agreement. Yet, Manor of Wayne had ample notice, from the regulations stating how and when CMS issues provider agreements, that it could not receive payment for Medicare services for any period for which it did not have a provider agreement in effect. The regulations explicitly provide that, if CMS determines that the provider meets participation requirements, CMS will send the provider written notice of that determination and two copies of the provider agreement. 42 C.F.R. § 489.11(a). The provider must return to CMS both copies of the agreement, signed by an authorized official, together with a written statement indicating whether it has been adjudged insolvent or bankrupt in any state or federal court, or whether any insolvency or bankruptcy actions are pending. Section 489.11(b). If CMS accepts the agreement, it will return one copy to the provider with a written notice that indicates the dates on which it was signed by the provider's representative and accepted by CMS, and specifies the effective date of the agreement. Section 489.11(c). These provisions make clear that "[a]cceptance of a provider as a participant" requires an independent action by CMS. Section 489.11. Manor of Wayne does not allege that any of these steps had been taken at the time that it admitted Medicare patients.

Manor of Wayne points out that CMS sometimes relies on MDCH to notify facilities of CMS enforcement actions, and says that MDCH sent such a letter to Manor of Wayne on September 18, 2008, stating that the CMS regional office had concurred in MDCH's recommendation of an enforcement remedy and had authorized MDCH to notify Manor of Wayne of the imposition of this remedy. RR at 10. Manor of Wayne does not point to any such evidence that CMS in fact authorized MDCH to establish an effective date for Manor of Wayne's Medicare provider agreement.

Arguably, CMS could assert discretion under the regulations to accept a state survey agency's certification of compliance as establishing the date an SNF is in substantial compliance with Medicare requirements even if the state survey agency did not perform an LSC survey specifically for Medicare purposes. CMS's

determination not to accept the MDCH January 2007 certification under the circumstances here was reasonable, however.

Manor of Wayne relies primarily on the fact that, in addition to the June 2006 LSC survey, another one had been done in May 2006. According to Manor of Wayne, on May 24, 2006, "approximately two weeks after Manor of Wayne filed its application for initial enrollment [in Medicare]," the State survey agency conducted an LSC survey, found the facility to be deficiency-free, and approved a "Fire Safety Certification." RR at 7, citing CMS Exs. 33, at 2, ¶ 5; and 2. Manor of Wayne acknowledges that CMS submitted an affidavit from the State Fire Marshal who conducted this survey indicating that this was just a partial survey, but Manor of Wayne asserts that it was not informed at the time that he did not inspect the entire facility or informed after this survey that there was any deficiency. RR at 7-8. Manor of Wayne also points out that, while the June 7, 2006 survey was conducted by the city, the city performed this survey using the 2000 edition of the LSC (the edition incorporated by reference into the federal regulations at 42 C.F.R. § 483.70(a)).

Manor of Wayne does not deny, however, that the May 24, 2006 LSC survey by the State survey agency used the **1997** code edition. Manor of Wayne also concedes that the June 7, 2006 survey (which used the 2000 edition, as required) was not performed by MDCH or other authorized agent of CMS. More important, Manor of Wayne not only concedes, in effect, that it was not fully operational at the point either of these surveys were conducted, but also concedes that the facility was still at that time owned by another entity, which had voluntarily terminated its Medicare provider agreement because the roof had collapsed. RR at 5-6; Manor of Wayne Reply at 4, and n.4; CMS Ex. 33, ¶ 3. Especially in light of this history, CMS could reasonably determine that these LSC surveys (conducted many months before) did not give adequate assurance that Manor of Wayne was substantially complying with LSC requirements as of December 7, despite the MDCH certification of compliance.

As Manor of Wayne asserts, the MDCH Licensing Officer did acknowledge that the LSC survey on May 24, 2006 (which the State Fire Marshal indicated was only a partial survey) would have been sufficient for a change of ownership application. CMS Ex. 33, ¶ 5; RR at 6. Manor of Wayne does not assert, however, that the change of ownership provision at 42 C.F.R. § 489.18 in fact applies. That section permits assignment of a provider agreement to a new owner, but here the prior owner had voluntarily terminated the agreement and could not assign it to the new owner.

Moreover, regardless of whether the earlier LSC surveys were partial surveys or were full surveys that showed that Manor of Wayne was in substantial compliance with the applicable LSC in June 2006, CMS could reasonably reject them as insufficient to show that Manor of Wayne was substantially complying with the LSC requirements on December 7, 2006. As discussed above, the deficiencies found in April 2007 (and undisputed) were not just minor deficiencies as Manor of Wayne argues. Also, several noncompliance findings in the April 2007 LSC survey, such as failure to document periodic fire drills and tests of the sprinkler system, relate back to the period during which Manor of Wayne argues it was in substantial compliance. CMS Ex. 19.

The other circumstances cited by Manor of Wayne also do not make any material difference here, even considered collectively. For example, the fact that Manor of Wayne submitted an enrollment application to Medicare prior to the May 24 LSC inspection by the State survey agency is irrelevant. The regulations governing enrollment require that an enrollment application include "all documentation . . . required by CMS . . . to establish the provider or supplier's eligibility to furnish Medicare covered items or services to beneficiaries in the Medicare program." 42 C.F.R. § 424.510(d)(2)(iii); see also 42 C.F.R. § 424.520(a). Providers who are required "to be surveyed or certified by the State survey and certification agency, and to also enter into and sign a provider agreement as outlined in part 489 . . . must also meet those requirements as part of the process to obtain Medicare billing privileges." 42 C.F.R. § 424.510(d)(5). Not only had Manor of Wayne not met these requirements in May 2006, but the facility had a different owner and name at the time.

Manor of Wayne also points to various actions or inactions of the State survey agency. Manor of Wayne says that MDCH inspected the roof and related improvements on August 9, 2006, and reported on October 31, 2006 that the facility had repaired roof damage and other identified problems. RR at 8-9, citing CMS Ex. 10; see also CMS Ex. 9. Manor of Wayne also says it was told by an MDCH official on December 7, 2006 that it was permitted to admit additional patients. Manor of Wayne suggests that, in light of MDCH's actions, it is significant that MDCH's notice of licensure/certification did not inform Manor of Wayne that the notice was merely a recommendation to CMS with respect to Medicare participation.

The lack of actual notice from MDCH that the certification was only a recommendation to CMS is irrelevant, however, since Manor of Wayne had constructive notice from the regulations. MDCH also

should have understood the difference between MDCH's role as the State licensing body and its role in the Medicare program. As the ALJ noted, applicants are held to a standard of responsibility for understanding what is required of them to be program participants. ALJ Decision at 6, citing Cary Health and Rehabilitation Center, DAB No. 1771 (2001).

Manor of Wayne contrasts MDCH's certification notice with another state agency notice that a court cited in rejecting a provider's claim of detrimental reliance on that state agency's certification. RR at 9-10, citing Central Suffolk Hospital v. Shalala, 841 F. Supp. 492 (E.D.N.Y. 1994). In that case, the state agency notice warned that if the provider chose to admit Medicare patients prior to official notification by the Health Care Financing Administration (CMS's predecessor), the provider did so at its own risk. The content of the notice was only one factor in the court's decision, however. The court also found "no authority [to] support an entitlement to certification as a Medicare provider on the basis of the state survey agency's 'recommendation' of certification." Id. at 498. If anything, Central Suffolk Hospital supports the result here.

Finally, Manor of Wayne asserts that rejection of the MDCH certification was arbitrary and capricious because, from the time MDCH "unequivocally informed Petitioner both **verbally and in writing** of its Medicare certification, until the time when both MDCH and CMS determined that an internal error had occurred and that Manor of Wayne was allegedly not yet officially certified," Manor of Wayne provided services to Medicare patients for which it is owed reimbursement of \$600,000. RR at 7 (emphasis in original).

The mere fact that Manor of Wayne may have suffered a loss does not make CMS's action in rejecting the MCDH certification arbitrary, however. The purpose of the requirements at issue is to protect facility residents, not facilities.

In sum, we conclude that CMS reasonably decided not to accept MDCH's certification of compliance as establishing the effective date for Manor of Wayne's Medicare provider agreement, even if Manor of Wayne's allegations about the circumstances are true.

3. Manor of Wayne's argument that it was disadvantaged by the interval between the health survey and the LSC survey does not demonstrate error in the effective date determination.

Manor of Wayne also argues that it was disadvantaged by the over four-month interval that passed between the federal health survey on December 7, 2006 and the LSC survey on April 12, 2007. (CMS acknowledges that MDCH normally schedules the LSC survey to take place within 30 to 60 days of the initial health survey. CMS Response at 7.) Manor of Wayne bases this argument on its alleged \$600,000 loss of reimbursement for Medicare services.

Even if the State survey agency had been required to schedule the LSC survey earlier (which Manor of Wayne has not shown), the regulations provide that a state survey agency's failure to follow survey procedures "does not . . . [r]elieve a [facility] of its obligation to meet all requirements for program participation; or . . . [i]nvalidate adequately documented deficiencies." 42 C.F.R. § 488.318(b). As the ALJ noted, regulations governing these appeals state that "[a] decision by the State survey agency as to when to conduct an initial survey of a prospective provider or supplier" is not subject to appeal. 42 C.F.R. § 498.3(d)(15); ALJ Decision at 6. The Board has noted that this approach "is consistent with other statutory and regulatory provisions which the Board has held place the health and safety of the residents above any alleged facility right to have survey procedures or protocols followed." Forest Glen Skilled Nursing & Rehabilitation Center, DAB No. 1887, at 15 (2003).

The interval between the health survey and the LSC survey, while unfortunate, does not provide any basis to alter the effective date of Manor of Wayne's provider agreement.

4. Provisions of the Act and regulations providing for waiver of LSC requirements do not apply.

Manor of Wayne also argues that CMS or the Secretary should use their authority under the Act and regulations to waive LSC requirements to grant Manor of Wayne the relief it seeks. Section 1819(d)(2)(B) of the Act, which requires that SNFs meet applicable LSC provisions, provides:

(i) the Secretary may waive, for such periods as he deems appropriate, specific provisions of such Code which if rigidly applied would result in unreasonable hardship upon a facility, but only if such waiver would

not adversely affect the health and safety of residents or personnel . . .

The regulations provide for waiver of specific provisions of the LSC by CMS "[a]fter consideration of State survey agency findings" where the statutory waiver requirements are met. 42 C.F.R. § 483.70(a)(2). Manor of Wayne asserts that the Board should interpret this section to authorize the Secretary "to waive any provisions that would preclude" the LSC and health surveys in 2006 "from being sufficient to certify the facility as of December 7, 2006." RR at 16.

The statute on its face authorizes waiver only of specific LSC requirements and not of the overarching requirement for an LSC survey meeting federal standards, which is essentially what Manor of Wayne requests here. See Forest Glen Skilled Nursing & Rehabilitation Center at 11 ("the waiver contemplated by the statute and regulations is not waiver of the requirement for an LSC survey, nor is it waiver of all of the LSC provisions that otherwise would apply"). Manor of Wayne did not and has not requested waiver of "specific provisions of such Code" nor identified any LSC requirements that it maintains should be waived.

In any event, while CMS has discretion to waive LSC provisions which, if rigidly applied, would result in unreasonable hardship on the facility, CMS may do so only if the waiver "does not adversely affect the health and safety" of a facility's residents. 42 C.F.R. § 483.70(a)(2). CMS found that Manor of Wayne's deficiencies in April 2007 posed a greater risk to its residents than the potential for minimal harm. Thus, even if Manor of Wayne had requested waiver of any specific LSC requirements that were not addressed by the May or June 2006 surveys or that were cited in the April 12, 2007 survey, CMS could reasonably deny the request. Moreover, the hardship of which Manor of Wayne complains springs not from rigidly applying any specific LSC provision, but from the fact that Manor of Wayne treated the MDCH certification as if it were sufficient to establish a right to Medicare payment, when it was not.

5. Summary judgment was appropriate.

The ALJ determined that there was no genuine dispute as to any material fact because the parties "agree on the essential facts of when Petitioner was surveyed, by whom, and for what purpose" and that their dispute was over "what legal significance, in light of the applicable law and regulations, should be attributed to those facts." ALJ Decision at 4.

While Manor of Wayne asserts the existence of factual disputes, none of them involve material facts. In opposing CMS's motion for summary judgment, Manor of Wayne argued that the various surveys of the facility raised genuine issues of material fact regarding "whether it was in substantial compliance with all federal regulations effective on some date before May 9, 2007." Response to Motion for Summary Judgment at 12. Manor of Wayne does not actually proffer any evidence of substantial compliance, however. For example, Manor of Wayne does not seek to show that the doors found defective during the April 2007 survey were operating in compliance with the LSC in December 2006. Instead, Manor of Wayne relies on its beliefs about what the May and June 2006 LSC surveys found. As discussed above, there are reasons for rejecting these surveys as establishing an effective date earlier than May 9, 2007, even had they been more than partial surveys.

Before the Board, the section of Manor of Wayne's request for review in which it argues that there are genuine issues of material fact is devoted to its theory that MDCH was confused over the nature of Manor of Wayne's application and whether a complete LSC survey was required. RR at 5-6. Manor of Wayne cites evidence it says shows that MDCH did not schedule the LSC survey sooner because of its "confusion" about whether a survey was required. RR at 6, and n.7.⁶ The Medicare fiscal intermediary, to whom Manor of Wayne applied for Medicare certification, incorrectly informed MDCH in June 2006 that Manor of Wayne had submitted a "change of ownership" application, rather than a new application for initial enrollment; the intermediary issued a corrected notice one week later. CMS Exs. 4, 6, 7. Also, the MDCH Licensing Officer stated that the partial LSC survey on May 24, 2006 would have been sufficient for a change of ownership application. CMS Ex. 33, ¶ 5. Manor of Wayne also speculates that "the confusion may also have been created because one of MDCH's supervisors went on extended sick

⁶ Manor of Wayne's proffer of evidence before the ALJ was more general, and CMS argues that Manor of Wayne waived its "confusion" argument by not presenting it to the ALJ. Manor of Wayne did generally proffer testimony on its communications with MDCH, however. While this proffer was not detailed, we note that the ALJ did not adopt Rule 56 of the Federal Rules of Civil Procedure, under which affidavits may be required in response to a properly supported motion for summary judgment. We need not reach the waiver issue since none of Manor of Wayne's allegations or proffers raises genuine issues of material fact.

leave" around the time of the December 2006 health survey. RR at 6, n.7. Elsewhere, Manor of Wayne states that the Senior Regional Administrator of its parent company would testify that she believed that the May 24, 2006 survey evidenced LSC compliance, and that after she began contacting MDCH in March 2007 to inquire why Manor of Wayne had not received Medicare payments, CMS discovered that MDCH had incorrectly represented that the required LSC survey had been conducted and MDCH then scheduled the survey for April 12, 2007. RR at 8-9, 11-12. Manor of Wayne also proposes to establish through testimony that it was never informed that the LSC survey on May 24, 2006 was a partial survey. RR at 7-8.

Factual findings about MDCH's beliefs or the reason for any delay in scheduling the LSC survey are not material, because they would provide no basis for reversing the effective date determination. None of the alleged facts would establish that Manor of Wayne was in substantial compliance with all applicable requirements, including LSC requirements, earlier than May 9, 2007.

Conclusion

For the reasons discussed above, we affirm the ALJ Decision granting summary judgment to CMS and sustaining CMS's determination setting May 9, 2007 as the effective date of Manor of Wayne's Medicare provider agreement.

_____/s/_____

 Leslie A. Sussan

_____/s/_____

 Constance B. Tobias

_____/s/_____

 Judith A. Ballard
 Presiding Board Member