

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:)	DATE: June 17, 2009
Jewish Home of Eastern)	
Pennsylvania,)	
Petitioner,)	Civil Remedies CR1863
)	App. Div. Docket No. A-09-42
)	
- v. -)	Decision No. 2254
Centers for Medicare &)	
Medicaid Services.)	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Jewish Home of Eastern Pennsylvania (Jewish Home) appeals the November 17, 2008 decision of Administrative Law Judge (ALJ) José A. Anglada in Jewish Home of Eastern Pennsylvania, DAB No. CR1827 (2008) (ALJ Decision). At issue before the ALJ were determinations by the Centers for Medicare & Medicaid Services (CMS) in two unrelated surveys that Jewish Home was not in substantial compliance with the participation requirement at 42 C.F.R. § 483.25(h)(2). This requirement concerns supervision and assistance devices to prevent accidents. It is not disputed that multiple residents experienced multiple falls that resulted in actual harm.

The ALJ determined that Jewish Home failed to substantially comply with section 483.25(h)(2) and upheld CMS's imposition of the following per-day civil money penalties (CMPs) against Jewish Home: \$350 per day for December 9, 2005 through January 26, 2006; \$400 per day for October 16, 2006 through November 16, 2006.

On appeal, Jewish Home argues that the ALJ erred by: (1) failing to exclude documents that Jewish Home alleges were records of its Quality Assurance (QA) Committee subject to disclosure and use restrictions under section 1919(b)(1)(B) of the Social Security Act (the Act) and implementing regulations; (2) failing to hold a hearing on whether CMS exhibits should be excluded under equal protection principles because of surveyor bias and selective enforcement; and (3) upholding the CMP from the second survey for a period of time when Jewish Home alleged that it was in substantial compliance.

We uphold the ALJ's decision. We conclude that the ALJ's findings of fact and conclusions of law (FFCLs) as to noncompliance are fully supported by: (1) Jewish Home's stipulation that its care was not in substantial compliance for three residents; and (2) evidence that Jewish Home failed to allege or show constituted records of its QA Committee. We reject Jewish Home's equal protection arguments for reasons that include lack of relevance and being outside the limited scope of review under 42 C.F.R. Part 498. Finally, we reject Jewish Home's challenge to the second CMP because the record does not support its assertion that it was in substantial compliance during the period of the CMP.

Applicable legal authority

Federal law and regulations provide for surveys by state survey agencies to evaluate the compliance of long-term care facilities with the requirements for participation in the Medicare and Medicaid programs and for CMS or the State to impose remedies on skilled nursing facilities (SNF) or nursing facilities, respectively, found not to comply substantially. Sections 1819 and 1919 of the Social Security Act; 42 C.F.R. Parts 483, 488, and 498.¹

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. 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.

"Substantial compliance" is defined as "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health and safety than the potential for causing minimal harm." 42 C.F.R.

§ 488.301. "Noncompliance" means "any deficiency that causes a facility to not be in substantial compliance." *Id.* CMS may impose a CMP when a facility is not in substantial compliance. 42 C.F.R. §§ 488.404, 488.406, and 488.408.

Section 483.25(h)(2) requires that "the facility must ensure that . . . [e]ach resident receives adequate supervision and assistance devices to prevent accidents." Surveyors use a system of "tag numbers" to identify deficiencies under particular regulatory requirements in preparing the Statement of Deficiencies (SOD). Section 483.25(h)(2) deficiencies are cited under Tag F324.

A SNF may request an ALJ hearing to contest a finding of noncompliance that has resulted in the imposition of a CMP or other enforcement remedy. 42 C.F.R. §§ 488.408(g)(1), 498.3(b)(13). In an ALJ proceeding, "CMS has the burden of coming forward with evidence related to disputed findings that is sufficient (together with any undisputed findings and relevant legal authority) to establish a prima facie case of noncompliance with a regulatory requirement." Evergreene Nursing Care Center, DAB No. 2069, at 4 (2007); Batavia Nursing and Convalescent Center, DAB No 1904 (2004), aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson, 129 F. App'x 181 (6th Cir. 2005). "If CMS makes this prima facie showing, then the SNF must carry its ultimate burden of persuasion by showing, by a preponderance of the evidence, on the record as a whole, that it was in substantial compliance during the relevant period." Evergreene Nursing Care Center at 4.

Standard of Review

Our standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. Our standard of review on a disputed finding of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. Guidelines - Appellate Review of Decisions of Administrative Law Judges Affecting A Provider's Participation In the Medicare and Medicaid Programs, <http://www.hhs.gov/dab/guidelines/prov.html>, (Guidelines).

Background

This case involves appeals of deficiencies cited in two unrelated surveys conducted by the State survey agency, the Pennsylvania Department of Health (PDH), in December 2005 and October 2006. The PDH cited eight deficiencies in the first survey and 12 deficiencies in the second survey. In both surveys, the PDH cited the Tag F324 deficiencies at a scope and severity level of "G" (isolated actual harm that is not immediate jeopardy).² CMS Ex. 2, at 19, CMS Ex. 20, at 20. The PDH cited the remainder of the deficiencies at lower levels. ALJ Decision at 5-6.

Jewish Home requested an ALJ hearing on the Tag F324 citations in each survey. The ALJ consolidated the two hearing requests under the original docket number, C-06-613. ALJ Ruling dated April 17, 2007.

The ALJ held an in-person hearing. At the beginning of the hearing, Jewish Home stipulated that its care of R157 and R56 from the first survey, and R133, from the second survey, was not in substantial compliance with section 483.25(h)(2). Tr. at 1. After the hearing, the ALJ issued a decision holding that Jewish Home's care of R98 (first survey) and CR2 (second survey), as well as its care of the three residents identified in the stipulation, was not in substantial compliance with that regulation. The ALJ made the following three numbered FFCLs:

1. Petitioner was not in substantial compliance with participation requirements for the periods from December 9 2005 through January 26, 2006 [for the first survey] and from October 16, 2006 through November 16, 2006 [for the second survey].

² The SOD for the first survey alleged that Jewish Home had failed to provide adequate supervision or assistance devices to 10 residents. CMS Ex. 2, at 19-29. The SOD for the second survey alleged that Jewish Home had failed to provide adequate supervision or assistance devices to two residents, Resident 133 (R133) and Closed Record [resident] 2 (CR2). CMS Ex. 20, at 21-23.

2. Petitioner was not in substantial compliance with the quality of care requirement of 42 C.F.R. § 483.25(h)(2) (Tag F324) which requires that the facility ensure that each resident receives adequate supervision and assistance devices to prevent accidents.

3. CMS's remedy determinations are reasonable.

Issues on Appeal

In its request for review, Jewish Home states that it --

challenges [FFCLs] 1, 2 and 3 because each is the result of one or more of the following errors:

1. The ALJ erred by failing to exclude facility [QA Committee] Records, and testimony derived from those Records, and by relying on [QA Committee] Records and derivative testimony to sustain the CMP.

2. The CMP violates Equal Protection Principles because it is the result of selective enforcement based on race and/or religion, and the ALJ erred by failing to hold an exclusionary hearing.

3. The ALJ erred in sustaining the CMP [from the second survey] for periods during which the facility was in substantial compliance.

RR at 4. Jewish Home did not appeal the reasonableness of the amount of either CMP and did not appeal the duration of the CMP from the first survey.

Analysis

- A. In FFCLs 1 and 2, the ALJ did not err in holding that Jewish Home was not in substantial compliance with 42 C.F.R. § 483.25(h)(2) at the time of the first and second surveys.

Jewish Home challenges FFCLs 1 and 2 on the ground that they are dependent on inadmissible documents, what Jewish Home asserts are records of its QA Committee. RR at 5-23. Jewish Home argues that these documents are subject to disclosure and use restrictions under section 1919(b)(1)(B) of the Act and

implementing regulations and that the ALJ materially erred by admitting and relying on them.

Section 1919(b)(1)(B) requires nursing facilities to "maintain a quality assessment and assurance committee" that "develops and implements appropriate plans of action to correct identified quality deficiencies." That section restricts the disclosure of the records of a QA committees as follows:

A state or the Secretary may not require disclosure of the records of such committee except insofar as such disclosure is related to the compliance of such committee with the requirements of this subparagraph.

Id. Section 483.75(o) of 42 C.F.R. implements the statute. Section 483.75(o)(3) simply repeats the preceding statutory language, and subsection (4) provides:

(4) Good faith attempts by the [QA] committee to identify and correct quality deficiencies will not be used as a basis for sanctions.

In Appendix 1 to its post-hearing brief, Jewish Home identified specific pages of CMS exhibits that it argued the ALJ should have excluded on the ground that they were records of its QA Committee and therefore "privileged" under the Act and regulations.³ See also Motion in Limine to Suppress Evidence dated November 15, 2006 (seeking to "exclude certain evidence . . . on the grounds that introduction of the evidence would violate Petitioner's quality assurance privilege set forth at 42 C.F.R. § 483.75(o) . . .").

³ While we conclude that we need not resolve the full scope of the QA provisions of the Act or regulation in deciding this case, we note that Jewish Home mistakenly refers to the Act and the regulation as creating an evidentiary privilege. Neither the Act nor the regulation employs the term "privilege" or refers to rules of evidence relating to privilege. Rather than a privilege, the Act and regulation establish disclosure and use restrictions applicable to records of a QA Committee.

The ALJ rejected Jewish Home's arguments (Ruling dated December 29, 2006; ALJ Decision at 2-3, n.2) and, in FFCLs 1 and 2, held that Jewish Home was not in substantial compliance with section 483.25(h)(2). For the following reasons, we conclude that these FFCLs are supported by Jewish Home's stipulation and by evidence that was properly admitted by the ALJ.

1. Jewish Home's stipulation that its care of two residents from the first survey and one resident from the second survey did not substantially comply with 42 C.F.R. § 483.25(h)(2) fully supports FFCLs 1 and 2.

A facility 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"). Noncompliance as to any one resident cited under a tag is sufficient to support a finding of noncompliance under the tag even if the surveyors cited other examples of noncompliance under the same tag. See ALJ Decision at 6.

At the beginning of the hearing, as noted, Jewish Home stipulated that its care of R157 and R56, from the first survey, and R133, from the second survey, did not substantially comply with section 483.25(h)(2). Tr. at 1-2; see also P. Posthearing Br. at 5 (confirming this stipulation). In its posthearing brief, however, Jewish Home argued as to other residents cited under Tag F324 that the ALJ could not rely on documents that it claimed were records of its QA Committee. P. Post-Hearing Br. at 8-57. Because Jewish Home made no such argument with regard to the three residents included in its stipulation, it failed to preserve any evidentiary objections as to these residents. Additionally, Jewish Home attached to its post-hearing brief as Appendix 1 a list of "CMS documents . . . that violate Petitioner's QA privilege." Id. at 57. None of the CMS exhibits that Jewish Home identified in Appendix 1 pertains to the residents as to which Jewish Home stipulated to noncompliance.

CMS argues that the Board should dismiss this appeal because Jewish Home conceded the Tag F324 citation in both surveys "immediately before the hearing" by way of the stipulation. CMS

Response at 3. In its reply, Jewish Home failed to address CMS's argument, or even assert that it had preserved any basis for disputing the noncompliance citations as to R157 and R56 (first survey) or R33 (second survey).

Therefore, we conclude that Jewish Home's stipulation that it failed to provide necessary supervision and/or assistance devices to R157, R56, and R133 fully supports the ALJ's FFCLs that Jewish Home was not in substantial compliance, in each survey, with section 483.25(h)(2).

- 2. FFCLs 1 and 2 are supported by substantial evidence in the record as a whole based on documents that Jewish Home does not allege or has not shown were records of the QA Committee under section 483.75(o).**

After the hearing, the ALJ found that Jewish Home was noncompliant in its care of two additional residents, one from the first survey (R98) and one from the second (CR2). ALJ Decision at 6-8. The ALJ did not need to make this finding to support his conclusion of noncompliance because Jewish Home's stipulation with regard to the other residents was sufficient to support that conclusion. Nevertheless, the ALJ's findings as to R98 and CR2 are fully supported by documents and expert testimony that Jewish Home did not allege were protected by section 483.75(o).⁴ The documents consist of patient records (such as care plans) and reports titled "Event Details" that Jewish Home submitted to the PDH (herein after referred to as "state reports") as required under 42 C.F.R. §§ 483.13(c)(2)-(4). See, e.g., CMS Exs. 6, at 4 (state report on R98), 7-9 (excerpts from R98's plan of care); see also Tr. at 338-340 (testimony of Jewish Home Assistant Administrator about the facility's obligation to make state reports on "instances with injuries").

The following evidence supports the ALJ's findings as to R98 and CR2.

⁴ See RR at 10-15 (Jewish Home's chart of alleged QA records and derivative testimony that Jewish Home asserts should have been excluded).

- For R98, the state report described the "EVENT TYPE" as "Patient/Resident Neglect" and stated that R98 fell out of bed on June 17, 2005 when "[o]ne nurse aide turned resident in bed," that the "plan of care and resident care card states this resident is a two staff member assist," and that the resident suffered an abrasion and bruising. CMS Ex. 6, at 4. The ALJ also relied on CMS's expert who testified that the "real culprit" in the fall was the fact that care was being provided by one person rather than two as called for by the resident's care plan and that the care was deficient. ALJ Decision at 7-8, citing Tr. at 12-13.
- For CR2, the state report described the "EVENT TYPE" as "Transfer/Admission to Hospital Because of Injury/Accident" and stated that CR2 was attending mass in the auditorium on June 15, 2006 and that, after it was over, a family member of another resident found her on the floor. CMS Ex. 23, at 3. CR2 broke her hip in this unwitnessed fall from her wheelchair. Id. The ALJ also relied on the testimony of the CMS expert who opined that, given CR2's pre-existing behaviors and diagnosis (which are documented in the state report, her care plan (CMS Ex. 23, at 7) and the surveyor's notes on the resident's Minimum Data Set (CMS Ex. 23, at 16)), CR2 was not adequately supervised. ALJ Decision at 8, citing Tr. at 15; see also Tr. at 16-21 (expert further testified that CR2 should have had a wheelchair alarm because of her poor safety awareness).

Jewish Home does not argue that this evidence is not sufficient to support the ALJ's findings of noncompliance or contest that the description of events in these documents is accurate. We conclude that this evidence, which Jewish Home did not assert was subject to disclosure or use restrictions under section 483.75(o), fully supports the ALJ's determination that Jewish Home failed to provide adequate supervision and/or assistance devices to R98 and CR2.

Furthermore, the event report forms and interview reports that Jewish Home did assert were subject to disclosure and use restrictions under section 483.75(o) do not appear to be in the nature of records of a QA Committee.⁵ The two-page forms are

⁵ Jewish Home asserts that other documents, which it
(Continued. . .)

entitled "Event Report - Fall" (Event Report) and accompanied by documentation of staff interviews about the particular event, often on a form titled "Addendum Investigation of Events." RR at 10-15 (Jewish Home's list of documents subject to QA restrictions).

The Event Report forms seek to elicit the kind of information about the facts and circumstances surrounding a particular incident that the facility would have to collect in order to meet its obligations under section 483.13(c)(2), (3) and (4).⁶ That section requires:

(2) The facility must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source . . . are reported immediately to the administrator of the facility and to other officials in accordance with State law through established procedures (including to the State survey and certification agency).

(3) The facility must have evidence that all alleged violations are thoroughly investigated, and must prevent further abuse while the investigation is in progress.

(Continued. . .)

characterizes as "minutes," constitute records of its QA Committee. RR at 10-15. Neither the ALJ nor the Board relies on those "minutes" to resolve any relevant issue. Therefore, we need not determine whether they would constitute "records" of the QA Committee. We also make no findings as to what type of documents would qualify as such.

⁶ For example, the form asks, inter alia, for the name of the resident, the time and location of the fall, what the resident was doing when the fall occurred, injuries, and resident characteristics that may have contributed to the event. It instructs, "Attach Statement(s) From Staff Who Witnessed/Found Event." CMS Ex. 6, at 10; see, e.g., CMS Ex. 6, at 10-16 (Event Report for R98's June 17, 2005 fall with attached staff interviews, identified by Jewish Home as QA Committee records at RR 11).

(4) The results of all investigations must be reported to the administrator . . . and to other officials in accordance with State law (including to the State survey and certification agency) within 5 working days of the incident, and if the alleged violation is verified appropriate corrective must be taken.

Similarly, the records of staff interviews reflect the necessary gathering of facts required to demonstrate a thorough investigation. The results of this investigatory process (not merely the occurrence of the event) are required by law to be reported to the regulators under section 483.13(c)(3). As the Board has recently reiterated, this is so because the state agency has oversight obligations in addressing potential abuse or neglect, including injuries of unknown origins. Columbus Nursing & Rehabilitation Center, DAB No. 2247 (2009); Singing River Rehabilitation & Nursing Center, DAB No. 2232 (2009). It would be strange indeed if the very documentation which a facility is required to generate for that purpose were also shielded from those very regulators whenever it has been reviewed by a QA Committee or whenever an individual whose responsibilities include conducting or documenting such investigations also serves on a QA Committee.⁷

⁷ Jewish Home incorrectly represents that the record establishes that the Event Reports were "authored by a QA Committee Member." RR at 16. However, Jewish Home's "Falls Review Process" provides that "the Unit Manager or Supervisor on duty at the time of the event is responsible to do an immediate investigation . . . documented on the Event Report Fall Form" P. Ex. 10, at 4 (in Appendix D in the record consisting of Jewish Home's attachments to its Motion in Limine). Unit Managers and Supervisors are not listed as members of the QA Committee. Id. at 1 (Jewish Home's QA Committee policy identifying members). Instead, Unit Managers participate in a "Falls Process Improvement Team" (id. at 3), but Jewish Home has not established that such participation somehow converts all the actions of the Unit Managers in carrying out their functions (including immediate investigation of a fall on their unit) into functions of the QA Committee.

The Event Report and interview statements here appear on the face of the documents to be of the kind regularly generated in a normal facility incident investigation. Jewish Home has failed to show any basis for us to conclude otherwise. Such documents may well also become the basis for review, consideration, analysis and action by a QA Committee, which could result in the creation of QA Committee records, but we see no basis to treat such raw factual material as itself the product of the QA Committee process. Such material is more analogous to actual patient care records, such as nursing notes or progress reports, which may well be important for the QA Committee to evaluate in determining the underlying causes of or best approaches to address a facility issue identified by the QA Committee. But this material clearly does not thereby become QA Committee records, unavailable for the purposes for which it was actually created (i.e., medical care of the patient or management of an incident).

The only support Jewish Home cited on appeal for its position consists of two affidavits and a quote from material purportedly used by CMS in training surveyors. RR at 17-18, citing P. Ex. 2 (affidavit of Jewish Home's Assistant Administrator); P. Ex. 5 (affidavit of Dr. Barry Fogel); P. Ex. 7, at 20 (training materials). While these affiants assert that the event reports play an important role in Jewish Home's QA process, they do not testify that incident reports and witness interview statements are actually records of the QA Committee itself. For example, Dr. Fogel describes the Event Reports here as "a critical part of [Jewish Home's] quality assurance activities, providing the raw material for analysis and discussion" by the QA Committee. CMS Ex. 2, at 2 (emphasis added). This characterization is consistent with our view that the Event Reports are not themselves QA Committee records; rather, they are created for another purpose. The QA Committee may use them, along with patient care records (such as nursing notes and care plans) and other facility documentation, in conducting its own assessments and developing its own recommendations. That use does not convert them into records of the QA Committee.

Both affiants also assert that use of the information in Event Reports to support deficiency findings will have a chilling and negative impact on facilities' willingness to conduct investigations of quality issues and on staff's willingness to report honestly when participating in such investigations. P. Ex. 2, at 3-4; P. Ex. 5, at 2. Given our conclusion that the

information in these reports is the kind of incident information that facilities are required to gather and record under section 483.13(c)(3), this argument is irrelevant.

Finally, we see no evidence that the training material to which Jewish Home refers (P. Ex. 7, at 20) constitutes an authoritative interpretation by CMS of the scope of section 483.75(o) for any purpose, much less for purposes of this case. Thus, this material is irrelevant. In any event, nothing in the language of the cited document states that reports created and maintained to meet a facility's obligations under section 483.13(c) are records of a QA Committee within the meaning of section 483.75(o).

For the preceding reasons, we conclude that Jewish Home failed to establish that even those Event Reports (and associated interviews) whose admission it did challenge were actually subject to the use and disclosure restrictions of section 483.75(o).

B. The ALJ did not err in rejecting Jewish Home's equal protection arguments.

Before the ALJ, Jewish Home also sought to exclude CMS's evidence on the ground that it "is tainted by racial and/or religious bias" and therefore would be "unfair to use." Petitioner's Narrative Summary at 15; see also Petitioner's Motion in Limine to Suppress Evidence at 21-25; Petitioner's Objections to Order Dated June 13, 2008, at 1-2. Jewish Home also argued that the PDH "issued the G level citations for alleged violations of 42 C.F.R. § 483.25(h)(2) based on prohibited racial and/or religion factors" Petitioner's Motion in Limine to Suppress Evidence at 12; see also P. Posthearing Br. at 60.

The ALJ declined to exclude the CMS exhibits or to consider Jewish Home's proffered documentary evidence or to hear testimony in support of Jewish Home's bias assertions. Order Denying Petitioner's Motion in Limine to Suppress Evidence dated December 29, 2006; Order Denying Petitioner's Request for Issuance of Subpoenas dated June 11, 2008. In his decision, the ALJ stated that, because his review of whether Jewish Home was in substantial compliance was de novo, Jewish Home's religious bias argument was "wholly irrelevant to my decision making here." ALJ Decision at 3, n.2.

On appeal, Jewish Home argues that "[t]he CMP violates Equal Protection Principles because it is the result of selective enforcement based on race and/or religion, and the ALJ erred by failing to hold an exclusionary hearing." RR at 4. It alleges that the PDH's citation of the noncompliance at the G scope and severity level is evidence of religious bias (RR at 26-30, 33), and it points to submissions proffered by Jewish Home in an attempt to show that it was treated more harshly than other similarly situated nursing facilities in selection of the scope and severity levels. See P. Exs. 3, 4, 9; Narrative Summary at 17-19.

In effect, Jewish Home is asking us to review and compare either the level of noncompliance or the choice of remedies in this case with those which Jewish Home considers similarly-situated and to determine that CMS's treatment of Jewish Home in these respects is somehow inequitable. Neither the level of noncompliance assigned nor the choice of remedies imposed by CMS is subject to review in this proceeding.⁸ 42 C.F.R. §§ 498.3(c)(10)(ii) and (b)(14), 488.408(g), 488.438(e)(2). We therefore have no basis to consider Jewish Home's claims that CMS's determinations as to the level of noncompliance or choice of remedies here were in some way inappropriate in relation to such determinations in regard to other facilities.

Furthermore, as the ALJ pointed out, in an appeal of CMS's imposition of administrative remedies, the ALJ reviews de novo whether the evidence supports CMS's (and the PDH's) determination of noncompliance. ALJ Decision at 3, n.2; Sunbridge Care and Rehabilitation for Pembroke, DAB No. 2170, at 26-27 (2008). Thus, allegations of surveyor bias in an ALJ de novo review are immaterial "where objective evidence [such as a facilities' own records] establishes noncompliance"

⁸ In any case, Jewish Home cannot credibly claim that a "G" level citation, which relates to an isolated deficiency that cause actual harm, is somehow evidence of unfair treatment where the undisputed facts here include noncompliance resulting in broken bones and additional injuries to multiple residents. See 42 C.F.R. § 488.404(b); State Operations Manual § 7400 (scope and severity grid) (grid also published at 59 Fed. Reg. 56,116, 56,183 (Nov. 10, 1994)).

Canal Medical Laboratory, DAB No. 2041, at 6 (2006); accord, Vijay Sakhuja, M.D., DAB No. 1958, (2005), Vandalia Park, DAB No. 1940 (2004). In such cases, an ALJ's de novo evaluation of the objective evidence would correct any alleged bias in a surveyor's evaluation of that evidence.⁹

Jewish Home's argument based on disparate treatment is also without merit. CMS's treatment of other facilities cannot undercut Jewish Home's responsibility to show that it was in compliance with the applicable legal requirements or remove CMS's authority to take actions which it is authorized by statute and regulation to take in response to Jewish Home's noncompliance. Thus, the Board has held in numerous cases that allegations by a party against which an action has been taken that the treatment accorded to it is harsher than that accorded to others similarly situated "do not prohibit an agency of this Department from exercising its responsibility to enforce statutory requirements[.]" Municipality of Santa Rosa, DAB No. 2230, at 126 (2009) (ACF termination of Head Start grant); Mountain View Manor, DAB No. 1913, at 14 (2004) (CMS imposition of a CMP on a nursing facility); National Behavioral Center, Inc., DAB No. 1760, at 4 (2001) (CMS decision not to certify appellant as a community mental health center); Edison Medical Laboratories, Inc., DAB No. 1713, at 5 (1999) (CMS imposition of remedies under the Clinical Laboratory Improvement Amendments of 1988); and Rural Day Care Association of Northeastern North Carolina, DAB No. 1489 (ACF termination of Head Start grant). As we have found, objective evidence in the record amply supports the ALJ's finding that Jewish Home was not in substantial compliance.

We therefore reject Jewish Home's disparate treatment claims.

⁹ While allegations of bias might be relevant to an ALJ's credibility determinations, Jewish Home does not raise the bias issue in that context or dispute any of the ALJ's credibility determinations as to the surveyors' factual testimony. Rather, Jewish Home seeks only to exclude documents prepared by its own staff without any explanation of how the surveyors' alleged bias could have "tainted" such facility documents so that they would be "unfair to use."

C. The ALJ did not err in sustaining the CMP imposed by CMS as a result of the second survey.

The ALJ upheld CMS's imposition of a per-day CMP from October 16, 2006 through November 16, 2006 for the second survey. ALJ Decision at 8.

Section 488.440 provides that a per-day CMP "may start accruing as early as the date that the facility was first out of compliance, as determined by CMS or the State" and accrues "until the date the facility achieves substantial compliance, or, if applicable, the date of termination" Section 488.440(h)(1) provides that "[i]f an on-site revisit is necessary to confirm substantial compliance and the provider can supply documentation acceptable to CMS or the State agency that substantial compliance was achieved on a date preceding the revisit, penalties imposed on a per day basis only accrue until that date of correction for which there is written credible evidence."

Jewish Home argues that the ALJ erred by upholding CMS's imposition of this CMP through November 16, 2006. It asserts that it returned to substantial compliance with section 483.25(h)(2) (Tag F324) as of October 20, 2008 (RR at 35-36) and that "CMS introduced no evidence on [the] less serious deficiencies" cited in the second survey (*id.* at 37). Jewish Home argues that, therefore, there was no basis in the record for the ALJ to uphold any CMP imposed after October 20. *Id.* at 38.

Jewish Home's position is without merit. CMS did submit the SOD from the second survey (CMS Ex. 20), which is evidence that may be considered in this case. Guardian Health Care Center, DAB No. 1943 (2004). Accordingly, Jewish Home's assertion that CMS submitted no evidence on the less serious deficiencies is factually incorrect. Further, as a matter of law, CMS was not required to submit evidence as to these "less serious deficiencies" because Jewish Home did not appeal them before the ALJ. In his ruling in response to CMS's partial motion for summary disposition, the ALJ concluded that Jewish Home had failed to satisfy the requirements of 42 C.F.R. § 498.40(b) for requesting a hearing on the non-Tag F324 citations in the second survey and, therefore, that the only deficiency on appeal from that survey involved Tag F324. Ruling for Partial Summary Judgment dated November 21, 2007. While elsewhere in its

request for review, Jewish Home asserts that the ALJ was incorrect in stating that Jewish Home disputed "only deficiencies cited with respect to Tag F324" (RR at 22-23), Jewish Home did not appeal (or even mention) the ALJ's Ruling for Partial Summary Judgment, much less provide any argument challenging the ALJ's application of section 498.40(b). Thus, contrary to Jewish Home's argument here, these uncontested noncompliance findings provide a basis for the imposition of a CMP after October 20 whether or not Jewish Home came into compliance with section 483.25(h)(2) by that date.

But even if Jewish Home's date of achieving compliance with section 483.25(h)(2) were relevant, Jewish Home failed to show that it actually was in substantial compliance with section 483.25(h)(2) as of October 20, 2006. Although Jewish Home cites to CMS's letter of January 3, 2007 (CMS Ex. 19) and its Plan of Correction (CMS Ex. 20), neither of these documents show that the PDH determined on revisit that Jewish Home was in substantial compliance with section 483.25(h)(2) as of October 20 or that Jewish Home supplied written credible evidence to the PDH showing that it was in compliance with section 483.25(h)(2) as of October 20. 42 C.F.R. § 488.440(h).

Conclusion

For the reasons stated above, we affirm the ALJ's FFCLs and uphold his decision.

/s/

 Sheila Ann Hegy

/s/

 Leslie A. Sussan

/s/

 Stephen M. Godek
 Presiding Board Member