Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: December 31, 2009
Foxwood Springs Living Center,	
Petitioner,	Civil Remedies CR1966 App. Div. Docket No. A-09-111
	Decision No. 2294
- v. -	
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

The Centers for Medicare & Medicaid Services (CMS) appeals the decision of Administrative Law Judge (ALJ) Keith W. Sickendick in Foxwood Springs Living Center, DAB CR1966 (2009) (ALJ Decision). The ALJ determined that Foxwood Springs Living Center (Foxwood) returned to substantial compliance with Medicare and Medicaid program participation requirements on March 9, 2007. Consequently, the ALJ concluded, a denial of payment for new admissions (DPNA) imposed by CMS on Foxwood effective March 13, 2007 through April 10, 2007 was not reasonable.

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

Applicable Legal Authority

The Social Security Act (Act) and federal regulations provide for state agencies to conduct surveys of Medicare skilled nursing facilities (SNF) and Medicaid nursing facilities (NF) to evaluate their compliance with the Medicare and Medicaid participation requirements. Sections 1819 and 1919 of the Act; 42 C.F.R. Parts 483, 488, and 498.[1] The Act and regulations also provide for the imposition of various remedies on a facility found not to comply substantially with the participation requirements. Id. 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. "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 or safety than the potential for causing minimal harm." Id. "Noncompliance means any deficiency that causes a facility to not be in substantial compliance." Id.

In general, when a facility has been found not to be in substantial compliance with the requirements for program participation, the facility must submit a plan of correction (PoC) acceptable to CMS or the state agency. 42 C.F.R. §§ 488.402(d), 488.408(f). Once a PoC has been approved, CMS or the state agency must verify that corrections have been completed and substantial compliance achieved based on an on-site revisit or after an examination of credible written evidence that can be verified without an on-site visit. 42 C.F.R. § 488.454.

Under sections 1819(h)(2)(D) and 1919(h)(2)(C) of the Act and 42 C.F.R. § 488.417(b)(1), CMS must deny payment for all new Medicare and Medicaid admissions to a facility when the facility is not in substantial compliance within three months after the last day of the survey identifying the noncompliance. When a DPNA has been imposed and the facility does not have repeated instances of substandard quality of care, payments "resume prospectively on the date that the facility achieves substantial compliance, as indicated by a revisit or written credible

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[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.

evidence acceptable to CMS (under Medicare) or the State (under Medicaid)." 42 C.F.R. § 488.417(d).

Sections 1866(h)(1) and 1866(b)(2) of the Act and 42 C.F.R. Part 498 provide hearing rights for specified determinations generally involving participation in the Medicare and Medicaid programs. Section 498.3 of the regulations identifies the types of CMS actions considered "initial determinations" subject to appeal under Part 498. 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 section 488.406 of this chapter, except the State monitoring remedy." 42 C.F.R. § 498.3(b)(13); see also 42 C.F.R. § 488.408(g) ("A facility may appeal a certification of noncompliance leading to an enforcement remedy."). Among the remedies specified in section 488.406 is a DPNA. 42 C.F.R. § 488.406(a)(2)(ii).

Factual Background

The following background information is drawn from the ALJ Decision and the record, including the parties' Joint Stipulation of Undisputed Facts (Joint Stipulation). It is not intended to substitute or modify any of the ALJ's findings.

Foxwood is a Missouri SNF that participates in Medicare and Medicaid. On December 1, 2006, the Missouri Department of Health and Senior Services (State agency) completed a survey of Foxwood. ALJ Decision at 1-2; CMS Exs. 1, 23. The State agency found Foxwood to be out of substantial compliance with multiple participation requirements. Id.

By letter dated December 11, 2006, the State agency notified Foxwood that, based on the December survey findings, the facility was out of substantial compliance. ALJ Decision at 2; CMS Ex. 23. The letter also advised Foxwood that if it did not achieve substantial compliance within three months of the last day of the survey, CMS "must deny payments for new admissions." CMS Ex. 23, at 2.

The State agency conducted a revisit survey of Foxwood on January 24, 2007. ALJ Decision at 2; Joint Stipulation at 2. The State agency determined that Foxwood had corrected all of the deficiencies found in the December survey but that Foxwood continued to be out of compliance based on new deficiency findings. Id. The State agency notified Foxwood in a letter dated February 7, 2007 that it had recommended to CMS to impose a DPNA against the facility. Id.

In a letter to Foxwood dated February 26, 2007, CMS stated that it had been advised by the State agency that, based on the January 24, 2007 revisit, the "facility was still not in substantial compliance." CMS Ex. 28, at 1. The letter further stated: "Consequently, in accordance with 42 CFR 488.417(b), payment for new Medicare and Medicaid admissions will be denied March 13, 2007." Id.

On February 28, 2007, the State agency conducted a second revisit survey of Foxwood. ALJ Decision at 2; Joint Stipulation at 2-3; CMS Ex. 31. The State agency identified one new deficiency during that survey. Id.

Foxwood submitted a PoC to the State agency "in response to the February 28, 2007 revisit survey, which indicated a completion date of March 9, 2007 for the plan of correction." Joint Stipulation at 3.

On March 13, 2007, the DPNA went into effect. Id.

On April 11, 2007, the State agency conducted a third revisit of Foxwood, during which the State agency identified no new deficiencies. Further, "all outstanding deficiencies were deemed corrected." Joint Stipulation at 3.

By letter dated April 12, 2007, the State agency notified Foxwood that the facility had achieved substantial compliance effective April 11, 2007. "The DPNA was terminated effective April 11, 2007." ALJ Decision at 2; CMS Exs. 34, 35; P. Ex. 16.

On April 24, 2007, Foxwood "requested a hearing challenging the allegation that the facility was out of compliance with any certification requirement during the period of March 9, 2007 through April 11, 2007 and appealing [the DPNA]." Joint Stipulation at 4.

On August 23, 2007, CMS moved for summary judgment arguing that there was no justiciable issue. CMS argued that: 1) the frequency and timing of revisit surveys is within the discretion of CMS and the states and is not subject to review; 2) if a facility's compliance cannot be certified until a third revisit survey is conducted, compliance may only be certified as of the date of the third revisit; and 3) CMS is not required to prove ongoing noncompliance for each day in which a DPNA is in effect. CMS Motion for Summary Judgment at 3-4. Foxwood opposed CMS's motion.

On August 27, 2007 the parties submitted a Joint Stipulation of Undisputed Facts and Joint Statement of Issues Presented for Hearing, in which they represented that the only question in dispute was, whether Foxwood "was in substantial compliance with all certification requirements during the period of March 9, 2007 through April 11, 2007." Joint Statement of Issues at 1.

By order dated October 16, 2007, the ALJ denied CMS's summary judgment motion, concluding that there "is a justiciable controversy and [Foxwood] will be accorded the opportunity to attempt to establish that it returned to substantial compliance prior to April 11, 2007. Ruling Denying Respondent's Motion for Summary Judgment at 4-5.

A hearing was held on January 15, 2008. The ALJ issued the Decision on June 24, 2009. CMS requested review of the ALJ Decision by notice dated August 3, 2009.

The ALJ Decision

The ALJ made the following findings of fact and conclusions of law:

> 1. Petitioner filed a timely request for hearing and I have jurisdiction over this matter.
>
> 2. Petitioner has a right to review of whether or not it was in substantial compliance or had returned to substantial compliance with program participation requirements because the alleged noncompliance is the basis for imposing or continuing an enforcement remedy.
>
> 3. Petitioner is not deprived of its right to review and I am not deprived of jurisdiction by the CMS policy statement in this case.
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> 4. Petitioner returned to substantial compliance with program requirements on March 9, 2007.
>
> 5. Because Petitioner returned to substantial compliance on March 9, 2007, the imposition of a DPNA effective March 13, 2007 was unreasonable.

ALJ Decision at 5, 9, 11.

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 (Board Guidelines).

Analysis

The ALJ Decision thoroughly and accurately explains why the relevant sections of the Act, regulations, and prior Board decisions, as applied to the undisputed facts and uncontested evidence, support the ALJ's findings and conclusions. The ALJ also fully and fairly addressed the parties' arguments before him. Accordingly, our analysis does not discuss in detail each of the ALJ's points but primarily responds to CMS's arguments on appeal. We discuss below why we reject CMS's contentions and conclude that the ALJ Decision is based on substantial evidence on the record as a whole and is free from legal error.

I. The ALJ Decision is free from legal error.

A. The ALJ correctly determined that a CMS policy statement did not preclude Foxwood from challenging, nor bar the ALJ from reviewing, CMS's determination that Foxwood was not in substantial compliance prior to April 11, 2007.

CMS argues that "two legal conclusions necessary to the outcome of the [ALJ] Decision were erroneous." CMS Br. at 3. First, CMS contends, in determining that Foxwood returned to substantial compliance prior to the date the DPNA went into effect, the ALJ erroneously concluded that a policy statement CMS said was controlling "was inconsistent with the regulations regarding the end of enforcement remedies." CMS Br. at 3-4, citing ALJ Decision at 8.

The policy statement on which CMS relies is set forth in a chart titled "Revisit/Date of Compliance Policy," which appears under section 7317B of the State Operations Manual (SOM).[2] The same

[2] The SOM is available on CMS's public website at http://www.cms.hhs.gov/Manuals/IOM.

chart was referenced in, and attached to, a May 3, 2001 CMS Survey and Certification Group Memorandum addressed to CMS associate regional administrators and state survey agency directors (S&C-01-10). Explaining the chart, the May 3 memorandum states that a "facility's ability to be certified in compliance as of a date sooner than the date of the revisit is diminished with each revisit." Court Ex. 1, at 1. The chart indicates that when a third revisit is conducted at a facility and the facility is found to be in substantial compliance, then "[c]ompliance is certified as of the date of the 3rd revisit." SOM § 7317B, Table; Court Ex. 1, at 4. CMS contends that the ALJ "disregarded" this provision and that, "[a]s applied" to Foxwood, "the SOM provision directed a finding of compliance on the date of the third revisit, April 11, 2007." CMS Br. at 3-4.

CMS further contends that the ALJ erred in concluding that the regulations at 42 C.F.R. §§ 488.417 and 488.454 permit a facility to "attempt to prove by acceptable evidence that it has returned to substantial compliance with program participation requirements prior to the date of a revisit survey." Id. at 5, citing ALJ Decision at 8. CMS argues instead that the regulations "give CMS the discretion to rely on acceptable written evidence OR a revisit" and to "set the earliest possible date for compliance for facilities requiring a third revisit as the date of that third revisit." CMS Br. at 5. Moreover, CMS argues, the Board has held that "what actions are required for a facility to correct deficiencies is a matter committed to CMS's discretion." Id., citing Barn Hill Care Center, DAB No. 1848, at 11 (2002).

CMS's contentions are without merit. As a threshold matter, we note that additional statements in the May 3, 2001 memorandum on which CMS relies undercut CMS's argument as to the meaning and effect of the language in the "Revisit/Date of Compliance Policy" chart. Specifically, the May 3, 2001 memorandum states that a "certification cycle . . . ends *when substantial compliance is achieved* or the facility is terminated from the Medicare or Medicaid program." Court Ex. 1, at 2 (emphasis added). In addition, the memorandum states, "Once a remedy is imposed, it continues *until the facility is in substantial compliance* or is terminated from our programs." Id. (emphasis added).

Together, these statements indicate that a facility should be determined to have returned to substantial compliance and that remedies should end on the date the facility actually achieved substantial compliance. In other words, the date on which a facility returns to substantial compliance under the regulations

is not dependent upon the number of revisits that a facility has had, nor is it necessarily tied to the date of a revisit. Furthermore, the memorandum does not reconcile these statements with the inconsistent provision in the "Revisit/Date of Compliance Policy" chart indicating that when third revisits are conducted, compliance should be certified as of the date of the third revisit, regardless of when the facility in fact returned to substantial compliance. Accordingly, we conclude that CMS's policy issuances do not unambiguously require "a finding of compliance on the date of the third revisit," as CMS argues in this case. CMS Br. at 4.

Furthermore, the ALJ did not "disregard" the policy issuance cited by CMS, but squarely addressed CMS's arguments as to the meaning, force and applicability of the provision in this appeal. The ALJ explained that the SOM provisions are not substantive regulations promulgated under the Administrative Procedure Act (5 U.S.C. § 500 *et. seq.*). ALJ Decision at 6 (and cases cited therein). Rather, the ALJ stated, the SOM provisions reflect CMS's interpretations of the Act and regulations and are designed as "policy guidance." Id. Thus, the ALJ observed, the SOM provisions "may only be construed and applied consistently and in harmony with" the controlling sections of the Secretary's regulations and the Act. ALJ Decision at 6-7.

Here, as the ALJ determined, CMS's reading of the SOM as compelling a determination that Foxwood returned to substantial compliance on the date of the third revisit is contrary to the regulations at 42 C.F.R. §§ 488.417(c) and (d) and 488.454(e). ALJ Decision at 8. According to the ALJ, the regulations "establish that a facility may attempt to prove by acceptable evidence that it returned to substantial compliance with program participation requirements prior to the date of a revisit survey to confirm substantial compliance." Id. Moreover, the ALJ explained, the policy in the SOM was "intended to direct CMS and state agency actions" but in no way "limit[ed] a provider's rights to have ALJ or Board review of the surveyor or CMS determination of when the noncompliant provider returned to substantial compliance with program participation requirements." Id. at 7-8.

We agree with the ALJ. The SOM, in general, is a compilation of interpretive guidelines, standards of practice, and internal policies directed to the state survey agencies that conduct long-term care facility surveys and that certify facility compliance. See, e.g., Columbus Nursing & Rehabilitation Center, DAB No. 2247, at 23 (2009); Claiborne-Hughes Health

Center, DAB No. 2223, at 8 (2008); Aase Haugen Homes, Inc., DAB No. 2013, at 15 (2006). While the SOM may reflect CMS's interpretations of the applicable statutes and regulations, the SOM provisions are not substantive rules themselves. Beverly Health & Rehabilitation Services v. Thompson, 223 F.Supp.2d 73, at 99-106 (D.D.C.), aff'g Beverly Health & Rehabilitation - Spring Hill, DAB No. 1696 (1999). In this case, CMS does not explain what regulatory language is being "interpreted" in the chart. In any event, we have previously upheld an ALJ's conclusion that "unpublished internal guidance to surveyors in the SOM . . . was not a reliable basis to alter the plain meaning of [a] published regulation." Beverly Health and Rehabilitation Center - Williamsburg, DAB No. 1748, at 8 (2000). In this case, the manual section on which CMS relies states that the "Revisit/Date of Compliance Policy" chart in the SOM "provides the course of action for certifying substantial compliance and for conducting revisits." ALJ Decision at 7, quoting SOM § 7317B. As the ALJ noted, "Only the state agency or CMS" -- not ALJs or the Board -- "conduct revisits and certify substantial compliance." Id. Thus, the manual provision might reasonably be construed as directing surveyors to certify that a facility achieved substantial compliance on the date of the third revisit when, on such a third revisit, the surveyors find a facility to be in substantial compliance.

However, the manual section at issue is not binding upon an ALJ or the Board on appeal. Moreover, to read the manual as requiring the ALJ (or the Board) to conclude that Foxwood achieved substantial compliance on the date of the third revisit and as precluding the facility from demonstrating that it achieved substantial compliance prior to that date would be inconsistent with the regulations governing the imposition and duration of remedies.

Specifically, section 488.417(d) provides that when a facility does not have repeated instances of substandard quality of care, a DPNA ends and program payments "resume prospectively *on the date that the facility achieves substantial compliance*, as indicated by a revisit or written credible evidence acceptable to CMS (under Medicare) or the state agency (under Medicaid)." 42 C.F.R. § 488.417(d) (emphasis added). Similarly, 42 C.F.R. § 488.454(a) provides that alternative remedies (including DPNAs) continue only until a "facility *has achieved substantial compliance*," which may be determined based on a revisit or "credible written evidence" that can be verified without an on-site visit. (Emphasis added.) CMS has the discretion to determine that a facility's written evidence is not credible and that a revisit may be necessary to verify that a facility has

returned to substantial compliance. However, the regulations tie the cessation of remedies and the resumption of payments to the actual date the facility achieves substantial compliance - not necessarily the date of the revisit itself.

In addition, section 488.454(e) states that if a facility can supply acceptable documentation "that it was in substantial compliance and was capable of remaining in substantial compliance, if necessary, *on a date preceding that of the revisit*," the remedies terminate on the date verified as the date substantial compliance was achieved. (Emphasis added.) Moreover, the 1994 preamble to the regulations stated that "if a facility can show that substantial compliance was achieved on a date earlier than a revisit by a survey team or before the State or [CMS] receives or examines acceptable credible evidence, the remedies cease to apply as of that date." 59 Fed. Reg. 56,116, at 56,219 (1994). The language of the regulation, supported by the agency's preamble statement, thus plainly establishes that a facility is "entitled to submit evidence to CMS to establish that it was in compliance prior to the date of the [revisit] survey" - regardless whether the survey was a first, second or third revisit. Palm Garden of Gainesville, DAB No. 1922 (2004), citing 42 C.F.R. §§ 488.417(d), 488.454(a), and 488.454(e). If the facility's allegation of compliance can be verified, the remedy should be suspended or rescinded retroactively, on the date on which substantial compliance was achieved, not arbitrarily on the date of the third revisit.

Accordingly, the ALJ correctly concluded that CMS's position that the SOM compelled a determination that Foxwood returned to substantial compliance on the date of the third revisit is inconsistent with the governing regulations.

> B. The ALJ correctly determined that Foxwood was entitled to an ALJ hearing with respect to the date on which it achieved substantial compliance.

CMS further contends that the ALJ erred in concluding that CMS "was impermissibly seeking to limit [Foxwood's] right to review." CMS Br. at 4, 7; ALJ Decision at 7-8. CMS notes that the ALJ stated "that the Board has consistently recognized challenges to the duration of remedies" by facilities that "seek[] to prove a return to substantial compliance earlier than the date found by CMS." CMS Br. at 7, citing ALJ Decision at 8-9. Nevertheless, CMS argues, more weight should be given to the cases wherein the Board has "recognize[d] that the actions necessary for a facility to correct deficiencies is a matter committed to CMS's discretion and beyond the Board's authority

to review under 42 C.F.R. § 498.3." CMS Br. at 8, citing Barn Hill Care Center, DAB No. 1848, at 11 (2002).

In sum, CMS contends that: 1) the "regulations grant to CMS the authority to set standards for determining the duration of remedies;" 2) the SOM properly "set[s] the [substantial compliance] date for facilities requiring third revisits as the date of that third revisit;" and 3) "[a]bsent any showing of inconsistency with the regulations . . . there is no basis for the ALJ to have found an impermissible attempt to limit appeal rights." CMS Br. at 8-9.

As reflected in the ALJ Decision, it was precisely because CMS's interpretation of the SOM is inconsistent with the regulations governing appeal rights that the ALJ concluded CMS was "impermissibly seek[ing] to limit [Foxwood's] right to review . . . ." ALJ Decision at 8. Specifically, the ALJ stated, sections 1819(h)(2)(B) and 1866(h) of the Act and 42 C.F.R. §§ 488.408(g) and 498.3(b)(13) "make a hearing before an ALJ available to a long-term care facility against which CMS has determined to impose an enforcement remedy." ALJ Decision at 8. Further, the ALJ noted, while the Board has stated that CMS need not provide affirmative evidence of continuing noncompliance for each day a remedy is in effect, the "Board has consistently recognized that challenges to the duration of remedies such as a CMP or DPNA are permissible even when the facility seeks to prove a return to substantial compliance earlier than the date found by CMS." ALJ Decision at 9, citing Cal Turner Extended Care Pavilion, DAB No. 2030, at 18-20; Palm Garden, DAB No. 1922. Moreover, CMS could point to no provisions in the Act or regulations "that preclude ALJ or Board review of the issue of when a facility returned to substantial compliance [as it would affect] the duration of an enforcement remedy such as a DPNA . . . ." Id. at 8-9. Similarly, the ALJ found that SOM section 7303 "includes no limitation on a provider's right of review [by ALJs and the Board] such as that advocated by CMS in this case." ALJ Decision at 8. Thus, the ALJ rejected CMS's argument that the determination of when Foxwood returned to substantial compliance was wholly within CMS's discretion and not subject to review. CMS Br. at 9.

The ALJ's conclusion is legally correct. First, we note, CMS's attempt to limit Foxwood's right to a hearing in this matter squarely contravenes a statement in the preamble to the 1994 final regulations that "when a facility disagrees with the decision [as to a facility's compliance] made at the time of the revisit, this disagreement could be resolved through the administrative hearing process." 59 Fed. Reg. at 56,208.

Furthermore, CMS takes out of context and misconstrues the meaning of the Board's statement in Barn Hill Care Center that "CMS's determination regarding what actions are required for a facility to correct deficiencies is a matter committed to [CMS's] discretion." DAB No. 1848, at 11. There, the Board was discussing a determination that the facility's proposed PoC was inadequate and that additional actions were necessary to correct identified deficiencies. The acceptance or rejection of a proposed PoC is not an appealable initial determination. The Board has never held that the issue of whether and when a facility fully implemented approved corrective actions and in fact achieved substantial compliance may not be reviewed by an ALJ under part 498 of the regulations. Thus, Barn Hill is perfectly consistent with the other line of Board decisions recognizing that facilities may seek to prove a return to substantial compliance earlier than a date found by CMS. Indeed, the Board has recognized that a determination by CMS as to the duration of a facility's noncompliance, including a determination by CMS of the date on which the facility returned to substantial compliance, may be reviewed under Part 498 of the regulations. See e.g., Regency Gardens Nursing Center, DAB No. 1858, at 16 (2002) (stating that on remand to the ALJ, "If the facility can demonstrate that it achieved substantial compliance with all participation requirements at a date earlier than that found by CMS, that is relevant to the date on which remedies must end."); see also Mimiya Hospital, DAB No. 1833 (2002) (concluding that a timely appeal of a notice of determination as to the date on which a facility returned to substantial compliance and the amount and duration of a per-day CMP preserved the facility's hearing right as to the date noncompliance ended); Palm Garden, DAB No. 1922.

Moreover, the Board has held that "CMS's determination of whether the evidence demonstrates that a facility returned to substantial compliance" prior to the date determined by CMS "is subject to de novo review by an ALJ and on appeal to the Board." Taos Living Center, DAB No. 2293, at 20 (2009); cf. Meadowbrook Manor-Naperville, DAB No. 2173 (2008) (stating that the ALJ has "the authority to make an independent, de novo determination about whether [a facility] was in substantial compliance during [a period between two dates when the facility was not in substantial compliance] as long as [the facility] had notice that its compliance status during that period was at issue."), aff'd sub nom., Butterfield Health Care v. Charles E. Johnson, Case No. 08-CV-3604 (N.D. Ill. April 16, 2009). Thus, the regulations do not preclude an ALJ or the Board from reviewing evidence submitted by a facility on the issue of whether a

facility returned to substantial compliance prior to the date of a revisit survey.

Accordingly, we reject CMS's contention that the ALJ erred in concluding that CMS was "impermissibly seek[ing] to limit [Foxwood's] right to review" in this matter. CMS Br. at 4, 7.

II. We reject CMS's alternative argument that its determination regarding Foxwood's return to substantial compliance was not an initial determination subject to review.

In the alternative, CMS argues before the Board that its determination as to the date Foxwood returned to substantial compliance was not an "initial determination" subject to review under sections 488.408(g) and 498.3 of the regulations.[3] Section 488.408(g) states that a "facility may appeal a certification of noncompliance leading to an enforcement remedy." Section 498.3 of the regulations lists the "initial determinations" subject to administrative review under Part 498. Relevant in this matter, the list includes "[w]ith respect to a SNF or NF, a finding of noncompliance that results in the imposition of a remedy . . . ." 42 C.F.R. § 498.3(b)(13). CMS contends that because Foxwood stipulated to the validity of the December 1, 2006, January 24, 2007 and February 28, 2007 survey findings, Foxwood's "noncompliance was answered by stipulation" and the facility "is left with nothing to appeal." CMS Br. at 9-10.

The Board's Guidelines provide that the "Board need not consider issues not raised in the request for review, nor issues which could have been presented to the ALJ but were not." Board Guidelines, Completion of the Review Process. CMS does not dispute that it did not present this argument to the ALJ. Nevertheless, CMS contends that the Board should consider this argument because it involves a "jurisdictional prerequisite . . . not subject to waiver." CMS Reply at 3.
We find no merit in CMS's contentions. CMS provided no reason why it could not have presented this issue to the ALJ. Moreover, CMS does not attempt to reconcile its new jurisdictional argument with its contradictory, pre-hearing stipulation that the "only" issue "presented for hearing" was whether Foxwood "was in substantial compliance with all

[3] Before the ALJ, CMS did not dispute that the April 11 finding that Foxwood was not in substantial compliance from December 1, 2006 until April 11, 2007 constituted an appealable initial determination under section 498.3(b)(13).

certification requirements during the period of March 9, 2007 through April 11, 2007." Joint Statement of Issues Presented for Hearing.

Indeed, while Foxwood did not challenge the deficiency findings of the December 2006, January 2007 and February 2007 surveys, both parties made clear in the stipulation that Foxwood was contesting CMS's determination that the facility remained noncompliant between March 9, 2007 and April 11, 2007. Joint Stipulation at 4. But for the findings of continued noncompliance on which this determination was based, the mandatory DPNA would not have gone into effect. As the Board has recently held, a decision by CMS that a facility did not return to substantial compliance at the time alleged by the facility, resulting in the continuation of an ongoing, mandatory DPNA for an additional period of time, is an appealable initial determination subject to de novo review under 42 C.F.R. § 498.3(b)(13). Taos Living Center, DAB No. 2293, at 17 ("finding of continued noncompliance resulting in the continuation of an ongoing DPNA is an appealable initial determination under the regulations"). Accordingly, we reject CMS's contention on appeal to the Board that its determination regarding the date on which Foxwood returned to substantial compliance was not an initial determination subject to review under the applicable regulations.

III. The ALJ's findings that Foxwood returned to substantial compliance on March 9, 2007 and that the DPNA imposed by CMS was unreasonable are supported by substantial evidence and free from legal error.

As noted above, CMS's appeal of the ALJ Decision presented a narrow set of arguments. On appeal to the Board, CMS does not directly challenge the ALJ's factual finding that Foxwood returned to substantial compliance on March 9, 2007, nor does CMS directly contest the evidence and testimony on which the ALJ based his factual finding. To the extent that CMS's brief can be read as indirectly taking exception to the ALJ's finding, we conclude based upon our review of the record that the ALJ's finding is supported by substantial evidence. For example, the ALJ specifically found that "CMS proffered no evidence to rebut [Foxwood's] showing that it implemented all parts of its POC to correct" the noncompliance findings. ALJ Decision at 11; see also id. at 5 ("CMS does not address Petitioner's evidence that Petitioner returned to substantial compliance on March 9, 2007."). Thus, we affirm the ALJ's finding that Foxwood returned to substantial compliance on March 9, 2007 without further discussion.

CMS also does not dispute on appeal the ALJ's conclusion that because Foxwood returned to substantial compliance prior to the effectuation of the mandatory DPNA on March 13, the DPNA "should not have been triggered and was not a reasonable enforcement remedy." ALJ Decision at 11-12, citing 42 C.F.R. §§ 488.417(b), 488.414(a)(1) and (2); Act § 1819(h)(2)(D). We find no error in that conclusion, and therefore affirm it without further discussion.

Conclusion

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

/s/
Judith A. Ballard

/s/
Leslie A. Sussan

/s/
Stephen M. Godek
Presiding Board Member