Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Madison County Nursing Home
(CCN: 25-5329),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-14-641

Decision No. CR4851

Date: May 18, 2017

DECISION

Over a period of almost one year, the Director of Social Services at Madison County Nursing Home (Petitioner) mismanaged and misappropriated as much as $3,117 from a trust account that Petitioner set up to safeguard funds entrusted to Petitioner by its residents. Following a complaint survey by the Mississippi State Department of Health (state agency) that uncovered the misfeasance of the Director of Social Services, the Centers for Medicare & Medicaid Services (CMS) determined that Petitioner was not in substantial compliance with several Medicare program participation requirements related to management and safeguarding of resident funds and that Petitioner's alleged noncompliance posed immediate jeopardy to resident health and safety. CMS imposed a series of remedies for Petitioner's alleged noncompliance, including a $10,000 per-instance civil money penalty (CMP) and a two-year loss of approval for conducting a Nurse Aide Training and Competency Evaluation Program (NATCEP) at Petitioner's facility. In response, Petitioner requested a hearing before an administrative law judge (ALJ) to challenge the noncompliance findings, the finding that the noncompliance posed immediate jeopardy to resident health and safety, and the enforcement remedies imposed due to those findings. The parties each moved for summary judgment.

The parties do not dispute the core facts material to the outcome of this case. Rather, their dispute centers on the legal significance of those facts. As a result, I agree with the parties that summary judgment is appropriate in this case.

As explained in detail below, I make the following conclusions based on the undisputed facts in this case: there is a basis for CMS's noncompliance findings and imposition of enforcement remedies because Petitioner is legally responsible for its social worker's actions, which violated several Medicare program participation requirements and had at least the potential to cause more than minimal harm to Petitioner's residents; I have no authority to address CMS's finding that Petitioner's noncompliance posed immediate jeopardy to the health and safety of Petitioner's residents; and the CMP imposed by CMS is reasonable. Therefore, I grant CMS's motion for summary judgment, deny Petitioner's cross-motion, and affirm CMS's initial determination.

I. Background and Procedural History

The Social Security Act (Act) sets forth requirements for the participation of a skilled nursing facility (SNF) in the Medicare program and authorizes the Secretary of Health and Human Services (the Secretary) to promulgate regulations implementing those statutory provisions. 42 U.S.C. § 1395i-3. The Secretary's regulations are found at 42 C.F.R. Parts 483 and 488. To participate in the Medicare program, a SNF must maintain substantial compliance with program participation requirements. To be in substantial compliance, a SNF's deficiencies may "pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. A deficiency is a violation of a participation requirement established by sections 1819(b), (c), and (d) of the Act, 42 U.S.C. § 1395i-3(b), (c), and (d), or the Secretary's regulations at 42 C.F.R. pt. 483, subpt. B. "Noncompliance" means "any deficiency that causes a facility to not be in substantial compliance." 42 C.F.R. § 488.301. A facility may violate a statutory or regulatory requirement, but it is not subject to enforcement remedies if the violation does not pose a risk for more than minimal harm. 42 C.F.R. §§ 488.402(b), 488.301.

The Secretary contracts with state agencies to conduct periodic surveys to determine whether SNFs are in substantial compliance. 42 U.S.C. § 1395aa(a); 42 C.F.R. § 488.10. The Act also authorizes the Secretary to impose enforcement remedies against SNFs that are not in substantial compliance with the program participation requirements. 42 U.S.C. § 1395i-3(h)(2). The regulations specify the enforcement remedies that CMS may impose. 42 C.F.R. § 488.406. Among other enforcement remedies, CMS may impose a per-day CMP for the number of days a SNF is not in substantial compliance or a per-instance CMP for each instance of the SNF's noncompliance. 42 C.F.R. § 488.430(a). A per-day CMP may range from either $50 to $3,000 per day for less serious noncompliance, or $3,050 to $10,000 per day for more serious noncompliance that poses

immediate jeopardy to the health and safety of residents. 42 C.F.R. § 488.438(a)(1). The authorized range for a per-instance CMP is $1,000 to $10,000. 42 C.F.R. § 488.438(a)(2).[1] "Immediate jeopardy" exists when "the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident." 42 C.F.R. § 488.301. "Substandard quality of care" is identified by the situation where there are one or more deficiencies related to participation requirements under 42 C.F.R. §§ 483.13 (Resident Behavior and Facility Practices), 483.15 (Quality of Life), or 483.25 (Quality of Care), which constitute either immediate jeopardy to resident health or safety; a pattern of or widespread actual harm that is not immediate jeopardy; or a widespread potential for more than minimal harm, but less than immediate jeopardy, with no actual harm. 42 C.F.R. § 488.301.

If CMS imposes a CMP based on a noncompliance determination, then the facility may request a hearing before an ALJ to challenge the noncompliance finding and enforcement remedy. Act § 1128A(c)(2), 42 U.S.C. § 1320a-7a(c)(2); Act § 1819(h)(2)(B)(ii), 42 U.S.C. § 1395i(h)(2)(B)(ii); Act § 1866(h)(1), 42 U.S.C. § 1395cc(h)(1); 42 C.F.R. §§ 488.408(g), 488.434(a)(2)(viii), 498.3(b)(13). The hearing before an ALJ is a *de novo* proceeding. *CarePlex of Silver Spring*, DAB No. 1683 (1999) (holding that ALJs hold *de novo* hearings based on issues permitted under the regulations and ALJ review is not a quasi-appellate review); *see also Claiborne-Hughes Health Ctr. v. Sebelius*, 609 F.3d 839, 843 (6th Cir. 2010) (The Departmental Appeals Board (DAB) "reviewed the finding under the *de novo* standard that the ALJ would have applied."). A facility has a right to appeal a "certification of noncompliance leading to an enforcement remedy." 42 C.F.R. § 488.408(g)(1); *see also* 42 C.F.R. §§ 488.330(e), 498.3. However, CMS's choice of remedies and the factors CMS considered when choosing remedies are not subject to review. 42 C.F.R. § 488.408(g)(2).

In regard to the burden of proof, CMS must make a *prima facie* case that the SNF failed to comply substantially with federal participation requirements and, if this occurs, the SNF must, in order to prevail, prove substantial compliance by a preponderance of the evidence. *Hillman Rehab. Ctr.*, DAB No. 1611 at 8 (1997); *see Batavia Nursing & Convalescent Inn*, DAB No. 1911 (2004); *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004); *Emerald Oaks*, DAB No. 1800 (2001); *Cross Creek Health Care Ctr.*, DAB No. 1665 (1998).

[1] CMS recently increased the CMP amounts to account for inflation in compliance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 104 Pub. L. No. 114-74, 129 Stat. 584, 599. The new adjusted amounts apply to CMPs assessed after August 1, 2016, for deficiencies occurring on or after November 2, 2015. *See* 81 Fed. Reg. 61,538 (Sept. 6, 2016). As the deficiencies alleged in this case occurred prior to November 2, 2015, the increased CMP amounts do not apply in this case.

Petitioner is a SNF located in Mississippi that participates in the Medicare program. From October 14 through 24, 2013, the state agency conducted a complaint survey and a partial extended survey at Petitioner's facility. CMS Exhibit (Ex.) 3 at 1. As a result of those surveys, the state agency found that Petitioner was not in substantial compliance with federal regulations for long-term care facilities and that Petitioner's noncompliance posed immediate jeopardy to resident health and safety and constituted substandard quality of care beginning on November 2, 2012, and concluding October 23, 2013, when Petitioner removed the immediate jeopardy conditions. CMS Ex. 5 at 1-3.

Based on the survey, CMS issued an initial determination on December 6, 2013, in which it found that Petitioner was not in substantial compliance with three Medicare participation requirements, all at the immediate jeopardy level (42 C.F.R. §§ 483.10(c)(2)-(5), 483.13(c), 483.75), and that Petitioner's noncompliance with one of those requirements (42 C.F.R. § 483.13(c)) constituted substandard quality of care. Based on these findings, CMS imposed several remedies, including, as relevant here, a per-instance CMP of $10,000 and prohibition on approval of a NATCEP. CMS Ex. 6.

Petitioner timely requested a hearing to challenge CMS's noncompliance findings and the imposition of a $10,000 per-instance CMP. Following receipt of Petitioner's hearing request, I issued an Acknowledgment and Prehearing Order (prehearing order) that established a prehearing exchange schedule for the parties. In that order, I directed the parties to file briefs, proposed exhibits, and written direct testimony for all witnesses they wanted to present in this case. I also set forth guidelines for the parties to file a motion for summary disposition.

In compliance with my prehearing order, CMS filed an exchange, including a motion for summary disposition/prehearing brief (CMS Br.), a list of proposed exhibits and witnesses, and 38 proposed exhibits (CMS Exs. 1-38). Petitioner then filed its own exchange, including a prehearing brief and response in opposition to CMS's motion (P. Br.), in which Petitioner also requested summary disposition in its favor; a proposed exhibit list; a proposed witness list; and 27 proposed exhibits (P. Exs. 1-27). In its witness list, Petitioner noted that four of its exhibits, P. Exs. 8-11, were unsworn statements and requested that those statements be given the same weight as if they were declarations or affidavits (i.e., statements under oath).

Simultaneously with its exchange, Petitioner filed a request for subpoena *duces tecum* upon CMS. CMS objected to the request, and Petitioner responded to CMS's objection. While Petitioner's requests were pending, Petitioner filed a motion to supplement its prehearing exchange (P. First Motion to Supp.) along with two additional proposed exhibits (P. Exs. 28-29). In my Ruling and Order dated November 14, 2014 (Nov. 14 Order), I denied both Petitioner's subpoena request and Petitioner's further request that I give the statements contained in P. Exs. 8-11 the same weight as if they were declarations or affidavits. I did not address Petitioner's motion to supplement in my order, but I

directed each party to, among other things, file in writing: (1) any objections they had to the other party's exhibits within 30 days of the date on my order and (2) responses to any objections within 65 days of the date on my order.

Thereafter, on December 15, 2014, CMS filed a response to my order (CMS Response), which included, in relevant part, objections to all or a portion of P. Exs. 8-11, 21-23, and 28-29. Petitioner filed its own reply to my order on December 19, 2014, along with a reply to CMS's response, a response to CMS's objections, and a second motion to further supplement its prehearing exchange (collectively, P. Reply). In its reply, Petitioner stated that it filed its reply late, but claimed that CMS's response to my order was also untimely because it was filed 31 days after the date on my order. Petitioner also included with its reply three additional proposed exhibits (P. Exs. 28A, 29A, and 30). CMS filed a response to Petitioner's reply (CMS Second Response) on January 20, 2015, in which CMS (1) objected to Petitioner's reply as untimely filed and requested I exclude it for that reason and (2) objected to Petitioner's second motion to supplement and to P. Exs. 28A, 29A, and 30 on relevance grounds. CMS Second Response at 1-2, 5-6. Petitioner later filed yet another motion to supplement its prehearing exchange (P. Third Motion to Supp.) along with an additional proposed exhibit (P. Ex. 31) on June 10, 2015, to which CMS again objected in writing on relevance grounds on June 30, 2015 (CMS Objection).

II. Preliminary Matters

Before addressing the merits of this case, I rule first on CMS's objections to P. Exs. 8-11, 21-23, 28-29, 28A, 29A, 30, and 31 and to Petitioner's reply to my November 14, 2014 order and then rule on Petitioner's three motions to supplement its prehearing exchange. As Petitioner did not object to any of CMS's proposed exhibits, I admit them all into the record. I also admit P. Exs. 1-7, 12-20, and 24-27, as CMS did not object to them.

A. CMS's Objections

At the outset, I deny CMS's request that I reject Petitioner's reply to my November 14, 2014 order for failure to timely file. Despite Petitioner's apparent concession that it filed untimely by filing on December 19, 2014, I note that a different subsection of the same rule in the Civil Remedies Division Procedures (CRDP) governing computation of time cited by CMS in its response to Petitioner's reply (CMS Second Response at 2) provides for an additional five days to respond to documents issued by mail. CRDP § 11(c). Thus, it does not appear that Petitioner's reply was actually late, as the due date of Petitioner's reply, taking that five days into account, would have been December 19, 2014 — the day Petitioner filed. Even were Petitioner's reply late, its lateness was minimal and caused no prejudice to CMS, which was able to respond within the 65-day deadline that I set in my November 14, 2014 order for the parties to reply to each other's initial responses to my order. Therefore, I accept Petitioner's reply, timely or not.

CMS argues that portions of P. Exs. 8-11 and all of P. Exs. 21-23, 28, 29, 28A, 29A, 30, and 31 should be excluded because they are irrelevant. Specifically, CMS argues that portions of P. Exs. 8-11, which are unsworn statements by individuals who act as the legal responsible parties for four of the residents whose money was misappropriated by Petitioner's employee, "relate to the irrelevant issue of immediate jeopardy [or] call for a legal opinion or are otherwise outside of these individuals' qualifications." CMS Response at 3. With regard to P. Exs. 21-23, CMS argues that they are irrelevant because they "pertain to deficiencies at other nursing homes" and do not relate to whether Petitioner substantially complied with Medicare participation requirements in this case. *Id.* at 4. CMS argues that P. Exs. 28, 29, 28A, 29A, and 30 are similarly irrelevant because they relate to noncompliance of other facilities and thus do not bear on my inquiry into Petitioner's alleged noncompliance. *Id.*; CMS Second Response at 5-6. Finally, CMS argues that P. Ex. 31 is irrelevant because it relates to the independent informal dispute resolution (IIDR) process utilized by CMS in this case (CMS Objection at 1-2), which I have already ruled is not relevant to this proceeding. Nov. 14 Order at 2.

Although I may admit evidence into the record that is inadmissible under the rules of evidence (42 C.F.R. § 498.61), I am not precluded from considering the Federal Rules of Evidence to assist me in ruling on evidentiary matters. Federal Rule of Evidence 401 contains a helpful standard against which to judge the relevance of particular items of evidence:

> Evidence is relevant if:
>
> > (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
> >
> > (b) the fact is of consequence in determining the action.

With this standard in mind, I turn to CMS's objections.

First, I overrule CMS's objection to P. Exs. 8-11 and conclude that they are admissible. CMS is partially correct in arguing that the issue of immediate jeopardy is irrelevant. As my analysis in section VI.C, *infra*, shows, CMS's finding that Petitioner's noncompliance posed immediate jeopardy to the health and safety of its residents is not reviewable in this forum. However, still at issue in this case is whether the CMP imposed by CMS is reasonable in amount. One of the factors I must consider in determining whether the CMP is reasonable is the seriousness of Petitioner's deficiencies. *See* 42 C.F.R. §§ 488.438(f)(3), 488.404(b). Although P. Exs. 8-11 are unsworn statements that amount to hearsay, I may consider hearsay in my decision, *see Omni Manor Nursing Home*, DAB No. 1920 (2004), and the statements have a tendency to make it less likely that

Petitioner's deficiencies harmed four of the residents they directly affected. Whether Petitioner's deficiencies harmed its residents is a fact of consequence to determining how serious Petitioner's deficiencies are and, by extension, whether the CMP imposed by CMS is reasonable. The statements in P. Exs. 8-11 are thus relevant to the issues of the seriousness of Petitioner's deficiencies and whether the CMP imposed by CMS is reasonable. Those exhibits are, therefore, relevant under the test set forth in Fed. R. Evid. 401 and are admissible for that reason.

Although CMS does not explicitly object to P. Exs. 8-11 for lack of foundation, its objection to portions of those exhibits because they either "call for a legal opinion or are otherwise outside of these individuals' qualifications" (CMS Response at 3), is more like an objection based on lack of foundation than an objection based on relevance. Such a concern goes to the weight to be accorded to the evidence, rather than its admissibility in this forum. Moreover, CMS does not specify which portions of the exhibits it objects to on these grounds. I note that in any event, to the extent that any of the exhibits contains statements opining on a legal issue rather than reporting factual information, those opinions do not control my independent legal analysis of the issues in this case.

Second, I overrule CMS's objections to P. Exs. 21-23, 28, 28A, 29, 29A, and 30 and conclude that those exhibits are admissible. In its proposed exhibit list, Petitioner indicates that P. Exs. 21-23 are statements of deficiencies for three other SNFs who were cited for noncompliance with 42 C.F.R. § 483.10(c)(2)-(5); P. Ex. 30 is a fourth statement of deficiencies from another SNF that similarly was cited for noncompliance with the same regulation. P. Reply at 8. In essence, P. Exs. 28, 29, 28A, and 29A are charts of data drawn from https://data.medicare.gov/data/nursing-home-compare, that include "provider name, provider city and state, survey type, deficiency . . . , and the scope/severity code for the deficiency citation," and show all citations for violations of 42 C.F.R. § 483.10(c)(2)-(5) against all SNFs across the country from February 5, 2009 through May 14, 2014. In P. Exs. 28 and 28A, the data is organized in reverse chronological order by survey date; in P. Exs. 29 and 29A, the data is organized by the scope and severity code, with more severe citations appearing first followed by progressively less severe citations.

In arguing that these exhibits are not relevant, CMS correctly identifies several ways that they are not relevant to my inquiry. CMS Response at 4; CMS Second Response at 2-6. However, CMS fails to address Petitioner's contention that these exhibits "are relevant and necessary to the full presentation of this case to show the impropriety of . . . the amount of CMP imposed" in this case. P. Reply at 6. As I have already observed, my inquiry in this case includes whether the imposed CMP is reasonable, and one of the factors I must consider in determining the reasonableness of the CMP is the seriousness of Petitioner's deficiencies. *See* 42 C.F.R. §§ 488.438(f)(3), 488.404(b). Comparative data about deficiency citations from other facilities, and particularly the facts alleged in the statements of deficiencies contained in P. Exs. 21-23 and 30, can provide context for

determining how serious Petitioner's own comparable alleged deficiencies are. The exhibits thus have a tendency to make it either more or less probable that Petitioner's alleged noncompliance was serious, a fact of consequence in determining the reasonableness of the CMP. Therefore, although these exhibits may be of marginal relevance, they are not irrelevant and are thus admissible.

Finally, I overrule CMS's objection to P. Ex. 31. The exhibit consists of documents related to the IIDR process conducted on behalf of CMS by the Michigan Review Peer Organization. Petitioner initially sought to obtain these documents through a subpoena (P. Third Motion to Supp. ¶ 4), but I denied Petitioner's subpoena request. Nov. 14 Order at 1-2. In denying Petitioner's subpoena request, I reasoned that the IIDR documents were not relevant for several reasons and thus concluded that Petitioner "fail[ed] to meet the standard for the issuance of a subpoena." *Id.* at 2 (citing 42 C.F.R. § 498.58(a) (establishing the basis for an ALJ to issue a subpoena)).

In objecting to P. Ex. 31, CMS correctly notes that I already ruled that the IIDR-related documents are not relevant to these proceedings. CMS urges me to decline to revisit my ruling and argues further that "the IIDR outcome is not relevant as evidence regarding the IIDR reviewer's possible disagreement with CMS' determination of immediate jeopardy, because immediate jeopardy is not subject to appeal in this . . . case." CMS Objection at 1-2. Although in denying Petitioner's subpoena request I originally ruled that the IIDR documents were not relevant, that ruling was guided by my consideration of the standard for issuing subpoenas found in 42 C.F.R. § 498.58(a). That standard requires me to find that a subpoena is "reasonably necessary for the full presentation of a case" before issuing the subpoena. That standard is higher than the standard of relevance necessary to admit documentary evidence into the administrative record. As indicated above, I am looking to Rule 401 of the Federal Rules of Evidence to determine the relevance of proposed exhibits, and my earlier refusal to issue a subpoena does not operate as a bar to accepting P. Ex. 31.

As for CMS's second argument that P. Ex. 31 is irrelevant, I agree that to the extent the exhibit relates to the immediate jeopardy issue, it is not relevant because I cannot review CMS's determination that immediate jeopardy existed in this case. However, as with CMS's other objections, its objection to P. Ex. 31 does not account for the exhibit's relevance to the issue of whether the CMP imposed is reasonable. Although not binding on my decision, the independent analysis of the seriousness of Petitioner's alleged noncompliance contained in P. Ex. 31 has at least a mild tendency to make it less likely that Petitioner's alleged noncompliance was serious enough to justify the CMP imposed by CMS, which is a factual issue of consequence in this case. I therefore conclude that P. Ex. 31 is also not irrelevant and thus admissible.

B. Petitioner's Motions to Supplement

In the previous section, I concluded that P. Exs. 28, 28A, 29, 29A, 30, and 31 were admissible notwithstanding CMS's objections. I find good cause to grant Petitioner's motions to supplement dated July 21, 2014, December 19, 2014, and June 10, 2015, and admit those documents into the record.

III. Issues

1. Whether summary judgment is appropriate;

2. Whether Petitioner substantially complied with Medicare participation requirements at 42 C.F.R. §§ 483.10(c)(2)-(5); 483.13(c); and 483.75; and

3. Whether CMS's finding of immediate jeopardy is reviewable in this forum; and

4. Whether the imposed per-instance CMP amount is reasonable.

IV. Jurisdiction

I have jurisdiction to hear and decide this case. 42 U.S.C. §§ 1320a-7a(c)(2), 1395i-3(h)(2)(B)(ii); 42 C.F.R. §§ 488.408(g), 488.434(a)(2)(viii), 498.3(b)(13).

V. Facts[2]

1. Petitioner is a SNF located in Mississippi that participates in the Medicare program. CMS Ex. 1 at 1.

2. Petitioner had an anti-abuse policy entitled "Abuse Policy and Procedure." CMS Ex. 13 at 1-4.

3. Petitioner's anti-abuse policy provided that Petitioner's residents "ha[ve] the right to be free from . . . misappropriation of resident property," which is defined as "the deliberate misplacement, exploitation, or wrongful, temporary or permanent use of a resident's belongings or money without the resident's consent." CMS Ex. 13 at 2.

[2] The following facts are either not disputed by the parties or, where there is a dispute, I accept Petitioner's version of the facts to the extent it is supported by evidence in the record.

4. Petitioner also had a policy entitled "Resident Trust Fund Policies" that provided a mechanism for Petitioner to accept personal funds from its residents to hold in trust. CMS Ex. 13 at 12-14.

5. Petitioner's "Resident Trust Fund Policies" provided, among other things, that Petitioner "will, upon written authorization by the resident or responsible party, accept responsibility for holding, safeguarding and accounting for the resident's personal funds . . . The responsibility for the accuracy of the records remains with [Petitioner]." CMS Ex. 13 at 12.

6. Petitioner accepted personal funds from multiple residents who gave written authorization (or whose legal representative gave written authorization) and placed funds in excess of $50 in trust in an account separate from Petitioner's own accounts. CMS Ex. 10 at 1, 4, 6, 9, 15, 22, 27, 29, 32, 33; CMS Ex. 11; P. Ex. 6 at 2 ¶ 4.

7. Petitioner purchased a surety bond covering the total amount held in the trust account on behalf of Petitioner's residents. P. Ex. 1 at 2; P. Ex. 6 at 2 ¶ 4.

8. Prior to the state agency's survey, Petitioner's usual practice was to place its Director of Social Services in charge of the resident trust account as the account manager. P. Ex. 6 at 4 ¶ 11.

9. Although Petitioner had another employee conduct a monthly balancing and reconciliation of the bank statements related to the trust account, the trust account manager (ordinarily the Director of Social Services) was responsible for carrying out Petitioner's "Resident Trust Fund Policies." P. Ex. 6 at 4, 5-6 ¶¶ 11, 17.

10. On October 7, 2011, a social worker with the initials ANR applied to become Petitioner's new Director of Social Services. P. Ex. 6 at 4 ¶ 12.

11. Petitioner offered ANR the position on November 2, 2011, which she accepted. P. Ex. 6 at 4 ¶ 12.

12. Consistent with its usual practice, Petitioner provided training to ANR to take over management of the trust account in January 2012, and she assumed that responsibility in February 2012. P. Ex. 6 at 5 ¶ 16.

13. On September 1, 2013, ANR was replaced as the trust account manager by Petitioner's bookkeeper, and ANR did not have access to resident trust funds from that date forward. P. Ex. 6 at 5 ¶ 16.

14. From October 14 through 24, 2013, the state agency conducted a complaint survey and a partial extended survey at Petitioner's facility. CMS Ex. 3 at 1; P. Ex. 2 at 1, 6; P. Ex. 3 at 1, 6; P. Ex. 6 at 1 ¶ 2.

15. On October 14, 2013, while the survey was ongoing, one of the surveyors requested documentation for a resident trust account transaction related to one of Petitioner's residents that was dated July 25, 2013. P. Ex. 6 at 6 ¶ 18.

16. Petitioner's general practice was to document such transactions by keeping "a copy of the check [drawn from the resident trust account] and the form indicating where the resident or legal representative would have signed for the authorization with two witnesses." P. Ex. 6 at 6 ¶ 18.

17. Petitioner's administrator sought the documentation supporting the July 25, 2013 transaction from ANR, who was unable to produce it. P. Ex. 6 at 6 ¶ 18.

18. When ANR was unable to produce the documentation, Petitioner's administrator asked her to obtain verification of the transaction from the affected resident, if possible — more than two and a half months after the transaction occurred. P. Ex. 6 at 6 ¶ 18.

19. Ultimately, this transaction raised the suspicions of the resident involved, her son, and Petitioner's staff and led to Petitioner's administrator conducting an internal audit and investigation. P. Ex. 6 at 6-8 ¶¶ 20-25.

20. Petitioner's administrator thereafter "called in an independent, outside accounting firm not related to the facility to review all resident trust fund account transactions for the past 12 months . . . ." P. Ex. 6 at 8 ¶ 25.

21. The independent auditor's investigation revealed that while ANR acted as the trust account manager, during a period beginning in November 2012 and continuing until Petitioner replaced her as account manager and removed her ability to access the account on September 1, 2013, there were numerous instances of suspicious activity related to the account that affected multiple residents. P. Ex. 6 at 5, 7-8 ¶¶ 16, 23-28.

22. The independent auditor's investigation further revealed that, due to suspicious activity and/or clerical errors, an amount totaling $3,117 for multiple residents was "in question." P. Ex. 6 at 8-9 ¶¶ 25-28.

23. Although it is "unclear" how much of the amount "in question" was in question due to suspicious activity as opposed to clerical error, Petitioner admits that

ANR "concocted and executed a devious, long-running fraud against [Petitioner] and its residents," intentionally "misappropriat[ed] larger and larger amounts" over time until she was removed as trust account manager, and "stole approximately $1,110 from one resident between July 25 and August 26, 2013." P. Ex. 6 at 9-10 ¶¶ 31-32; P. Br. at 6, 9-11, 17; *see also* CMS Br. at 4.[3]

24. To cover up her fraudulent scheme, ANR "forg[ed] signatures and creat[ed] documents to give the appearance of appropriate transactions . . . ." P. Ex. 6 at 10 ¶ 31; *see also* CMS Br. at 8; P. Br. at 9.

VI. Conclusions of Law and Analysis

My conclusions of law are set forth in italics and bold font followed by detailed factual and legal analyses.

A. Summary judgment is appropriate because there are no disputed issues of material fact.

Summary judgment is appropriate if there is "no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Mission Hosp. Reg'l Med. Ctr.*, DAB No. 2459 at 5 (2012) (citations omitted). In order to prevail on a motion for summary judgment, the moving party must show that there is no genuine dispute of material fact requiring an evidentiary hearing and that it is entitled to judgment as a matter of law. *Id.* If the moving party meets this initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial . . . .'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact — a fact that, if proven, would affect the outcome of the case under governing law." *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010).

In evaluating a motion for summary judgment, an ALJ does not address credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291 at 5 (2009). Rather, in examining the evidence to determine the appropriateness of summary judgment, an ALJ must draw all reasonable inferences in the light most favorable to the non-moving party. *See Brightview Care Ctr.*, DAB No. 2132 at 10 (2007) (upholding summary judgment where inferences and views of non-moving party are not reasonable). "[A]t the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether

[3] Petitioner characterizes ANR's actions as theft. P. Br. at 9.

there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). However, drawing factual inferences in the light most favorable to the non-moving party does not require that I accept the non-moving party's legal conclusions. *Cedar Lake Nursing Home*, DAB No. 2344 at 7 (2010).

The parties do not dispute the basic underlying facts that I laid out in the previous section. They both agree that ANR's actions were highly improper if not outright illegal and constituted misappropriation of resident property. CMS Br. at 4; P. Br. at 6, 9-11. What they do dispute is whether Petitioner can be held responsible for those actions, which is a legal question appropriate for resolution on summary judgment. CMS Br. at 4; P. Br. at 11. There do also appear to be other factual disputes between the parties, but as my analysis in the forthcoming section makes clear, those factual disputes do not relate to any facts material to the outcome of this case and are thus irrelevant to my inquiry into whether summary judgment is appropriate. Consequently, I conclude that summary judgment is appropriate in this case.

B. The undisputed facts that ANR (1) forged signatures and created fraudulent documents to disguise illegitimate resident trust account transactions and (2) intentionally misappropriated money from several of Petitioner's residents over a period lasting close to a year support a conclusion that Petitioner was not in substantial compliance with 42 C.F.R. §§ 483.10(c)(2), 483.13(c), and 483.75.[4]

1. Petitioner is responsible for ANR's misconduct because she was Petitioner's employee, and ANR was able to commit the misconduct due to the duties and responsibilities assigned to her by Petitioner.

The DAB has made clear that, "for the purpose of evaluating a facility's compliance with the Medicare and Medicaid participation requirements, the facility acts through its staff and cannot dissociate itself from the consequences of its employees' actions." *Springhill Senior Residence*, DAB No. 2513 at 14 (2013); *see also, e.g.*, *Gateway Nursing Ctr.*, DAB No. 2283 at 8 (2009) (holding that a facility "acts through its staff and cannot disown the consequences of the actions of its employee"). Employees are the agents of their employers, "empowered to make and carry out daily care decisions." *Emerald Oaks*, DAB No. 1800 at 7 n.3 (2001). "Electing to meet its commitments to provide care and protect residents' rights through these employees, [a facility] cannot . . . reasonably

[4] CMS also alleges that Petitioner failed to comply substantially with 42 C.F.R. § 483.10(c)(3) because it did not place resident funds in an interest-bearing account. I need not address this allegation of noncompliance because the noncompliance allegations I do address support both the imposition of enforcement remedies, including a CMP, and the reasonableness of the CMP imposed by CMS. *See Claiborne-Hughes Health Ctr.*, 609 F.3d at 847; *Carrington Place of Muscatine*, DAB No. 2321 at 20-21 (2010).

claim that their misconduct [i]s in effect irrelevant for the purpose of evaluating the facility's compliance." *Springhill*, DAB No. 2513 at 14; *see also Emerald Oaks*, DAB No. 1800 at 7 n.3 ("[Emerald Oaks] cannot disown the consequences of the inadequacy of the care provided by the simple expedient of pointing the finger at [its employee's] fault, since [the employee] was the agent of [Emerald Oaks] empowered to make and carry out daily care decisions."). The DAB has further explained that this "rationale for holding a facility accountable for the actions of its staff applies equally to all staff members who, in the course of carrying out their assigned duties, fail to act in a manner consistent with the regulations and the facility's policies pertaining to resident abuse." *North Carolina State Veterans Nursing Home, Salisbury*, DAB No. 2256 at 12 (2009).

Despite misconduct by Petitioner's employee, ANR, that appears to violate 42 C.F.R. §§ 483.10(c)(2), 483.13(c), and 483.75, Petitioner argues that it substantially complied with those regulations because it cannot be held responsible for ANR's misconduct. P. Br. at 11, 15-16. Petitioner asserts that it "had fraud controls" and "multiple policies and procedures in place which prohibit theft, exploitation and/or misappropriation of resident property" and contends that these anti-fraud and anti-misappropriation measures free it from responsibility for ANR's fraud and misappropriation. P. Br. at 11-13. Petitioner also argues that the circumstances in *Emerald Oaks* are "easily distinguishable" from the circumstances in this case. P. Br. at 13. As Petitioner explains, in *Emerald Oaks*, the nurse who provided poor care to Emerald Oaks residents "was acting within the scope of her employment" and was "providing care to residents," whereas Petitioner asserts that ANR's actions were neither care-related nor within the scope of her employment. P. Br. at 13 (quoting *Emerald Oaks*, DAB No. 1800 at 7 n.3). Petitioner further argues that unlike in *Emerald Oaks*, where the DAB noted that "responsibility for neglect of the resident . . . does not stem solely from the actions of a single nurse" DAB No. 1800 at 7 n.3, ANR acted alone and "deliberately concealed" her actions from her employer. *Id.* at 14. Based on these distinctions, Petitioner argues that it "cannot be held responsible for [ANR's] acts." *Id.*

I accept for summary judgment purposes that Petitioner had fraud controls and multiple policies and procedures in place that prohibit misappropriation of resident property. Nevertheless, those policies and procedures are insufficient to free Petitioner from responsibility for ANR's fraud and misappropriation. The DAB rejected nearly identical arguments in *Springhill* by a facility that similarly was seeking to escape responsibility for regulatory violations committed by two of its employees. DAB No. 2513 at 13-14. As a legal matter, therefore, Petitioner's safeguards against fraud and misappropriation do not preclude me from relying on ANR's fraud and misappropriation to conclude that Petitioner was not in substantial compliance with Medicare program participation requirements.

Furthermore, the distinctions Petitioner attempts to draw between this case and *Emerald Oaks* do not persuade me to deviate from the DAB's well-established rule that SNFs are

responsible for regulatory violations committed by their employees. First, the fact that ANR's misdeeds did not occur while she was providing care to residents offers no basis to refuse to impute her wrongdoing to Petitioner. Although *Emerald Oaks*, *Salisbury*, *Gateway Nursing*, and *Springhill* involved allegations of care-related abuse or neglect rather than misappropriation of resident funds, facilities are under a regulatory duty to develop and implement policies and procedures that protect their residents equally from the latter as from the former. 42 C.F.R. § 483.13(c). On this point, Petitioner essentially appears to be arguing that facilities should be held to a lower regulatory standard in misappropriation cases because misappropriation only involves money, not resident care. As I explain below, however, *see infra* note 6, misappropriation cases involve not just money, but also potentially serious psychological harm; thus, I see no reason to hold Petitioner to a lower standard in this case simply because its staff is accused of misappropriation rather than abuse or neglect.

Second, Petitioner's attempt to distinguish this case from *Emerald Oaks* on the ground that ANR acted outside the scope of her employment misses the overall thrust of the DAB's cases discussing the principle that SNFs are liable for their staff members' regulatory violations. Although the DAB in *Emerald Oaks* did rely in part on the fact that an Emerald Oaks nurse "was acting within the scope of her employment responsibilities" to impute to Emerald Oaks the nurse's regulatory violation (DAB No. 1800 at 7 n.3), that is not a general limiting principle on imputing to a facility regulatory violations committed by its staff. For example, in *Springhill*, the DAB affirmed a decision by another ALJ that imputed to Springhill the intentional mistreatment of residents perpetrated by two CNAs employed by Springhill when assessing Springhill's compliance with Medicare participation requirements. DAB No. 2513 at 4-8, 12-13. The behavior—which included making audio-visual recordings of residents without their knowledge or consent and "making demeaning comments" to the residents — was clearly not within the scope of their employment, yet the DAB observed that "[t]he ALJ correctly concluded that Springhill 'cannot disavow responsibility for the actions of its employees.'" *Id.* at 4-8, 13. The DAB went on to state, "[a] facility whose staff has been found not in substantial compliance with federal requirements . . . 'is itself subject to administrative enforcement remedies' and cannot avoid remedies by disowning the acts and omissions of its employees 'since the facility elected to rely on them to carry out its commitments.'" *Id.* at 13 (quoting *Beverly Health Care Lumberton*, DAB Ruling No. 2008-5 at 6-7 (2008)).

Finally, Petitioner's attempt to distinguish this case from *Emerald Oaks* on the ground that ANR acted alone and deliberately concealed her actions from Petitioner is unavailing. If anything, the fact that ANR was even able to act alone in misappropriating funds speaks to the inadequacy of Petitioner's safeguards for the resident trust account. In any event, *Springhill* is again instructive on this point. The facility in *Springhill* empowered the two CNAs caught intentionally mistreating residents to provide care for those residents and had no knowledge of the mistreatment until videos of the

mistreatment were downloaded from one of the CNAs' cell phones and sent to local police. DAB No. 2513 at 3, 5-9. Those CNAs acted alone and in effect hid their misdeeds from Springhill, yet the DAB still imputed their regulatory violations to Springhill and upheld the enforcement remedies imposed on Springhill by CMS. *Id.* at 9-22. Similarly here, Petitioner empowered ANR to access the resident trust account unilaterally and charged her with managing the account. Petitioner in essence acted through ANR to ensure compliance with its regulatory duties related to the account. Having so empowered ANR, Petitioner "cannot . . . reasonably claim that [her] misconduct [i]s in effect irrelevant for the purpose of evaluating [its] compliance." *Id*. at 14.

Based on the foregoing, I conclude that Petitioner is responsible for ANR's misconduct for the purpose of determining whether Petitioner was noncompliant with Medicare program participation requirements.

2. Petitioner, through ANR, violated 42 C.F.R. § 483.10(c)(2).

The regulation dealing with the rights of SNF residents provides, in relevant part, that, "[u]pon written authorization of a resident, the facility must hold, safeguard, manage, and account for the personal funds of the resident deposited with the facility . . . ." 42 C.F.R. § 483.10(c)(2). To comply with this and other regulations, Petitioner's "Resident Trust Fund Policies" provided, among other things, that Petitioner "will, upon written authorization by the resident or responsible party, accept responsibility for holding, safeguarding and accounting for the resident's personal funds." CMS Ex. 13 at 12. That same policy also provided, "[t]he responsibility for the accuracy of the records remains with [Petitioner]." *Id.* Petitioner was bound to follow this policy. *See Illinois Knights Templar Home*, DAB No. 2369 at 9-10 (2011).

Petitioner submitted testimony from its administrator establishing that ANR "forg[ed] signatures and creat[ed] documents to give the appearance of appropriate transactions . . . ." P. Ex. 6 at 10 ¶ 31. Petitioner further admits in its brief that "[s]he created fraudulent documents to give the appearance that the transactions were for credible resident needs . . . ." P. Br. at 9; *see also* P. Br. at 6 ("[ANR's] scheme was expressly designed to forge signatures, fabricate documents, and cover up her misappropriation . . . ."). In addition, ANR failed to contemporaneously document a resident trust fund transaction involving one of Petitioner's residents in accordance with Petitioner's general practice of documenting similar transactions. P. Ex. 6 at 6 ¶ 18. These undisputed facts demonstrate that ANR, through forgery and neglect, repeatedly failed to maintain accurate records related to the resident trust account , which violated Petitioner's self-imposed duty to maintain accurate records for the resident trust account. I, therefore, conclude that, in violating its own "Resident Trust Fund Policies" — which Petitioner created in part to comply with its regulatory duty under 42 C.F.R. § 483.10(c)(2) — Petitioner also violated 42 C.F.R. § 483.10(c)(2).

3. Petitioner, through ANR, violated 42 C.F.R. § 483.13(c).

The regulation dealing with staff treatment of residents provides, in pertinent part, that a "facility must develop and implement written policies and procedures that prohibit . . . misappropriation of resident property." 42 C.F.R. § 483.13(c). The DAB has explained: "A facility may be noncompliant with section 483.13(c) when it either 'fail[s] to develop policies or procedures adequate to prevent neglect' or 'fail[s] to implement such policies.'" *Southpark Meadows Nursing & Rehab. Ctr.*, DAB No. 2703 at 6 (2016) (quoting *Glenoaks Nursing Ctr.*, DAB No. 2522 at 14 (2013)) (alterations in original). Although specific instances of neglect do not in themselves violate § 483.13(c), the circumstances of such instances may "'demonstrate a systemic problem in implementing policies and procedures' intended to prevent neglect" that violates § 483.13(c). *Id.* (quoting *Columbus Nursing & Rehab. Ctr.*, DAB No. 2247 at 27 (2009)). Circumstances relevant to the inquiry include the number of staff members "involved in instances of neglect" and whether their "actions or inactions were directly contrary to directions in care policies adopted by the facility." *Id.* (quoting *Hanover Hill Health Care Ctr.*, DAB No. 2507 at 9-10 (2013)). As § 483.13(c) addresses developing and implementing policies to prohibit both neglect *and* misappropriation of property, it follows that the principles found in *Southpark* apply equally in cases, like this one, that involve allegations of a SNF's failure to develop or implement policies related to misappropriation of resident property.

CMS does not dispute that Petitioner developed written policies and procedures adequate to prevent misappropriation of resident property; rather, CMS's allegations amount to a claim that Petitioner failed to implement those policies and procedures. CMS Br. at 7-8. Petitioner argues that because § 483.13(c) "only contemplates policies and procedures," not specific instances of misappropriation, CMS's citation to this regulation is not appropriate in this case. P. Br. at 16. However, as *Southpark* and the cases it cites show, Petitioner can violate § 483.13(c) not only by failing to develop anti-misappropriation policies and procedures but also by failing to implement those policies and procedures. DAB No. 2703 at 6. Furthermore, failure to implement anti-misappropriation policies and procedures can be revealed by specific instances of misappropriation. *Id.*

The undisputed facts show that ANR misappropriated resident property between November 2012 and September 1, 2013. This directly contravened Petitioner's anti-abuse policy, which explicitly provided Petitioner's residents with "the right to be free from . . . misappropriation of resident property." CMS Ex. 13 at 2. ANR, Petitioner's Director of Social Services, acted in direct contravention of Petitioner's policy prohibiting misappropriation of resident property. In addition, ANR's misappropriation was not a one-time event, but rather occurred many times over a period of months. These

facts show that Petitioner's implementation of its anti-misappropriation policy broke down at a fundamental level.[5] Consequently, I conclude based on the undisputed facts that Petitioner, through ANR, also violated 42 C.F.R. § 483.13(c).

4. Petitioner, through ANR, violated 42 C.F.R. § 483.75.

The regulation dealing with administration of SNFs provides that "[a] facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident." 42 C.F.R. § 483.75. The regulation also includes specific requirements to comply with federal, state, and local laws and professional standards and requirements in other areas as well, including: licenses; training; registry verification; in-service education; staff qualifications; and provisions for laboratory, radiology, and other diagnostic services; and clinical records. 42 C.F.R. § 483.75(a)-(p). The language of § 483.75 is such that any failure of management that adversely affects a resident constitutes a violation. *See, e.g.*, *Stone Cty. Nursing & Rehab. Ctr.*, DAB No. 2276 at 15 (2009) ("[A] determination that a SNF failed to comply substantially with section 483.75 may be derived from findings that the SNF was not in substantial compliance with other participation requirements." (citing *Life Care Ctr. at Bardstown*, DAB No. 2233 at 28 (2009) and *Britthaven, Inc., d/b/a Britthaven of Smithfield*, DAB No. 2018 at 22 (2006))).

As stated in one case:

> The administrative deficiency [at 42 C.F.R. § 483.75] is a derivative deficiency based on findings of other deficiencies . . . where a facility has been shown to be so out of compliance with program requirements that its residents have been placed in immediate jeopardy, the facility was not administered in a manner that used its resources effectively to attain the highest practicable physical, mental, and psychosocial well-being of each resident.

Asbury Ctr. at Johnson City, DAB No. 1815 at 11 (2002); *see also Odd Fellow & Rebekah Health Care Facility*, DAB No. 1839 (2002).

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[5] Because CMS does not dispute the adequacy of Petitioner's policy prohibiting misappropriation of resident funds, I accept that it is adequate for summary judgment purposes. However, the fact that one person was able to get away with misappropriating resident funds for as long as ten months strongly suggests that Petitioner's anti-misappropriation policy was inadequate.

CMS argues that Petitioner did not substantially comply with § 483.75 based on administrative failures related to ANR's misconduct and that this noncompliance posed immediate jeopardy to its residents' health and safety. CMS Br. at 9. Any failure of management that adversely affects a resident constitutes a violation of § 483.75. I have already found that Petitioner violated Medicare participation requirements at §§ 483.10(c)(2) and 483.13(c), and, as I conclude later in the decision, I cannot review CMS's finding that these violations posed immediate jeopardy. The same undisputed facts that support those deficiency findings also support my conclusion that Petitioner violated the administration requirement at 42 C.F.R. § 483.75.

5. Because Petitioner's violations of 42 C.F.R. §§ 483.10(c)(2), 483.13(c), and 483.75 had the potential to cause more than minimal harm to Petitioner's residents, Petitioner was not in substantial compliance with those regulatory requirements.

As already noted, a SNF's regulatory violations must pose a risk for more than minimal harm to justify the imposition of enforcement remedies. *See* 42 U.S.C. § 1395i-3(h)(2); 42 C.F.R. §§ 488.301, 488.402(b). Substantial noncompliance, and thus harm, can result from deficiencies related to misappropriation of property. *Rosewood Care Ctr. of Swansea*, DAB No. 2721 at 11 (2016).

Petitioner contends that CMS's "allegations represent a potential for no more than minimal harm, if that." P. Br. at 7. Although I must view the undisputed facts in the light most favorable to Petitioner before granting summary judgment to CMS, I am only required to draw *reasonable* inferences in Petitioner's favor. *See Brightview*, DAB No. 2132 at 10. Petitioner characterizes ANR's conduct as theft (P. Br. at 9), which makes Petitioner's residents victims of theft. Even accepting as true Petitioner's assertions that it maintained a surety bond guaranteeing the residents' funds against such loss and that the specific residents whose money was stolen did not suffer harm in this case (P. Br. at 6-7), it is unreasonable to infer that ANR's misconduct did not even create a *potential* for more than minimal harm. To the contrary, the only reasonable inference that I could draw from the undisputed facts of this case is that ANR's misconduct carried *at least* the potential to cause more than minimal harm to Petitioner's residents. ANR stood in a position of trust vis-à-vis Petitioner's residents and she abused that trust. By its very nature, ANR's clearly improper and potentially criminal conduct carried a risk of harming Petitioner's residents.

I have already concluded that ANR's conduct violated 42 C.F.R. §§ 483.10(c)(2), 483.13(c), and 483.75, and that Petitioner by extension violated those same regulations. Because those regulatory violations also had the potential to cause more than minimal harm to Petitioner's residents, I further conclude that Petitioner was not in substantial compliance with 42 C.F.R. §§ 483.10(c)(2), 483.13(c), and 483.75.

C. CMS's finding that Petitioner's noncompliance posed immediate jeopardy to resident health and safety is not reviewable in this forum.

Petitioner has challenged CMS's finding that the deficiencies cited under 42 C.F.R. §§ 483.10(c)(2)-(5), 483.13(c), and 483.75 placed its residents in immediate jeopardy. However, because CMS has imposed only a per-instance CMP in this case, I have no authority to review CMS's finding of immediate jeopardy.

An ALJ may review CMS's scope and severity findings (which includes a finding of immediate jeopardy) only if a successful challenge would affect: (1) the range of the CMP amounts that CMS could collect; or (2) a finding of substandard quality of care that results in the loss of approval of a facility's NATCEP. 42 C.F.R. § 498.3(b)(14), (d)(10)(i)-(ii). Petitioner argues that its challenge to CMS's finding of immediate jeopardy falls into the former category and is thus reviewable in this forum because the finding affects the range of the CMP in this case. P. Reply at 3-4.

In this case, CMS imposed a per-instance CMP. Unlike for per-day CMPs, under the regulations, there is only a single range for a per-instance CMP, which is $1,000 to $10,000, and this range applies to both immediate jeopardy and non-immediate jeopardy level noncompliance. *Compare* 42 C.F.R. § 488.438(a)(1) *with* 42 C.F.R. § 488.438(a)(2). Thus, although the severity of noncompliance affects review of the *amount* of a CMP, it does not, in the case of a per-instance CMP, affect the *range* of the CMP. 42 C.F.R. §§ 488.438(e) and (f); 488.404. Consequently, because CMS only imposed a per-instance CMP against Petitioner, a successful challenge to the immediate jeopardy finding would not affect the range of the CMP amount that CMS could collect. *NMS Healthcare of Hagerstown*, DAB No. 2603 at 6-7 (2014). Thus, Petitioner's argument as to why its challenge to CMS's finding of immediate jeopardy is reviewable is incorrect. For these reasons, I conclude that I have no authority to review CMS's finding of immediate jeopardy.

Notwithstanding the foregoing, Petitioner argues that it should be allowed to challenge CMS's finding of immediate jeopardy because it "will be unfairly prejudiced if [it is] not allowed to dispute" that finding. P. Br. at 24. Even if that is true, it does not alter my limited jurisdiction to review such a finding. I am bound by the Secretary's regulations and do not have the discretion to ignore them. *See California Dep't of Soc. Servs.*, DAB No. 1959 (2005) ("Generally, an agency is legally bound to follow its own regulations as long as they are in force."), and cases cited therein. Further, to the extent Petitioner's argument is a request for equitable relief, I have no authority to grant such a request. *Oaks of Mid City Nursing & Rehab. Ctr.*, DAB No. 2375 at 31 (2011) ("In general, neither the Board nor an administrative law judge is authorized to provide equitable relief."). I have already concluded that the Secretary's regulations give me no authority

to review CMS's finding of immediate jeopardy in this case; therefore, I cannot ignore those regulations and review that finding no matter the balance of the equities in this case.[6]

D. The imposed CMP is reasonable.

My authority to review the reasonableness of a CMP imposed by CMS is limited by 42 C.F.R. § 488.438(e). The limitations are: (1) I may not set the CMP at zero or reduce it to zero; (2) I may not review the exercise of discretion by CMS in selecting to impose a CMP; and (3) I may only consider the factors specified by 42 C.F.R. § 488.438(f) when determining the reasonableness of the CMP amount. These factors include: (1) the facility's history of compliance; (2) the facility's financial condition; (3) the factors specified at 42 C.F.R. § 488.404; and (4) the facility's degree of culpability, which includes neglect, indifference, or disregard for resident care, comfort, or safety. The absence of culpability is not a mitigating factor. 42 C.F.R. § 488.438(f)(4). The factors at 42 C.F.R. § 488.404 include: (1) the seriousness of the deficiency, including its severity and scope; (2) the relationship of the deficiency to other deficiencies resulting in noncompliance; and (3) the facility's prior history of noncompliance in general and specifically with reference to the cited deficiencies. Unless a facility contends that a particular regulatory factor does not support the CMP amount, the ALJ must sustain it. *Coquina Ctr.*, DAB No. 1860 at 32 (2002). My review of the reasonableness of the CMP is *de novo* and based upon the evidence in the record before me. I am not bound to defer to CMS's determination of the reasonable amount of the CMP to impose, but my

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[6] Even were I able to review CMS's finding of immediate jeopardy, I would uphold it. Petitioner's employee operated a scheme to intentionally misappropriate money from residents over an almost year-long period. Even though the sums stolen were relatively small, the real issue is that Petitioner's residents entrusted Petitioner with that money, and Petitioner's employee misappropriation of that money represents a serious breach of that trust. Therefore, Petitioner, acting as the residents' fiduciary, had significant obligations to ensure the residents' money was not misappropriated. I take notice of the fact that attorneys often face serious consequences, including losing their license to practice law, for similar offenses, and the Mississippi Supreme Court has said that "the ultimate wrong of a lawyer to his profession is to divert clients' and third parties' funds entrusted to him to an unauthorized use." *Reid v. Mississippi State Bar*, 586 So. 2d 786, 788 (Miss. 1991); *see also, e.g.*, *In re Addams*, 579 A.2d 190, 191 (D.C. 1990) ("[I]n virtually all cases of misappropriation [of client funds], disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence."). The rationale for protecting clients from predatory lawyers applies with at least as much force to protecting potentially vulnerable residents of SNFs from predatory facility employees. Such residents may feel a profound loss of confidence in a facility that did not keep their property safe.

authority is limited by regulation as already explained. I am to determine whether the amount of any CMP imposed is within reasonable bounds considering the purpose of the Act and regulations. *Emerald Oaks*, DAB No. 1800 at 10 (2001); *CarePlex of Silver Spring*, DAB No. 1683 at 14-16 (1999); *Capitol Hill Cmty. Rehab. & Specialty Care Ctr.*, DAB No. 1629 (1997). In this case, CMS imposed a $10,000 per-instance CMP, which is the maximum per-instance CMP that CMS may impose. 42 C.F.R. § 488.438(a)(2).

Petitioner's noncompliance in this case was very serious. Petitioner's employee intentionally misappropriated money entrusted to Petitioner by Petitioner's residents numerous times, negatively affecting multiple residents. Petitioner's employee also forged signatures and created fraudulent documents to cover up her misappropriation. CMS found that this noncompliance constituted a pattern of immediate jeopardy to the health and safety of Petitioner's residents, citing the second most serious scope and severity level. *See* 42 C.F.R. § 488.404(b)(1)-(2). It is a finding I cannot review and would affirm in any event, *see supra* Part VI.C. Therefore, I conclude as an initial matter, based on the undisputed facts, that a maximum per-instance CMP is reasonable in this case due to Petitioner's serious noncompliance.

Petitioner's legal arguments do not undermine the foregoing conclusion. Petitioner argues that the CMP is unreasonable "in light of [its] past history," because the incident at issue in this case "does not rise to the level of" immediate jeopardy, and because it was "not culpable for the alleged deficiencies here." P. Br. at 24. Petitioner notes that it does not have a history of misappropriating resident property, that it has not been cited for deficiencies under 42 C.F.R. §§ 483.10(c)(2)-(5), 483.13(c), and 483.75 "for at least the 2 years prior to the survey at issue here," and that it "has been cited for no [immediate jeopardy]-level [deficiencies] in at least the last 12 years." P. Br. at 24-25; P. Ex. 6 at 1-2 ¶ 3; P. Ex. 25. For summary judgment purposes, I accept that Petitioner had no recent history (as of the survey date) of: (1) misappropriating resident property, (2) violating 42 C.F.R. §§ 483.10(c)(2)-(5), 483.13(c), and 483.75, or (3) violating any Medicare program participation requirements at the immediate jeopardy level. Nevertheless, Petitioner's noncompliance in this case was so severe that despite this clean recent history, imposing the maximum per-instance CMP for Petitioner's noncompliance is reasonable. With respect to Petitioner's second point, I reiterate that I cannot review CMS's immediate jeopardy finding and would affirm it in any event. Finally, Petitioner's argument that it was not culpable for the deficiencies at issue here is irrelevant because "[t]he absence of culpability is not a mitigating circumstance in reducing the amount of the penalty." 42 C.F.R. § 488.438(f)(4).

VII. Conclusion

For the foregoing reasons, I grant CMS's motion for summary judgment, deny Petitioner's motion for summary judgment, affirm CMS's initial determination as explained herein, and order Petitioner to pay the $10,000 per-instance CMP to CMS.

/s/
Scott Anderson
Administrative Law Judge