Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Sunshine Haven Lordsburg
Docket No. A-12-1
Decision No. 2456
April 23, 2012

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Sunshine Haven Lordsburg (Sunshine Haven), a skilled nursing facility (SNF) in New Mexico, appeals the August 5, 2011 decision by Administrative Law Judge (ALJ) Keith W. Sickendick, *Sunshine Haven Lordsburg*, DAB CR2408 (2011) (ALJ Decision). The ALJ concluded that Sunshine Haven was noncompliant with Medicare participation requirements from November 5, 2008 to May 6, 2009, as determined by the Centers for Medicare & Medicaid Services (CMS) based on seven surveys of Sunshine Haven by the State survey agency. The ALJ sustained enforcement remedies consisting of the termination of Sunshine Haven's Medicare participation agreement on May 6, 2009; four per-instance civil money penalties (CMPs) totaling $14,000, including CMPs of $5,000 each for two instances of noncompliance at the immediate-jeopardy level; a denial of payment for new admissions (DPNA); and the cancellation of Sunshine Haven's eligibility to conduct a nurse aide training and competency evaluation program (NATCEP) for a two-year period. We affirm the ALJ Decision.

Legal Background

The Social Security Act (Act) and federal regulations provide for state agencies to conduct surveys of SNFs that participate in Medicare to evaluate their compliance with the participation requirements in federal regulations. Act §§ 1819, 1919; 42 C.F.R. Parts 483, 488, and 498.[1] A facility's failure to meet a participation requirement constitutes a "deficiency." 42 C.F.R. § 488.301. "Substantial compliance" means a level of compliance "such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." *Id.* "Noncompliance" is defined as "any deficiency that causes a facility to not be in substantial compliance." *Id.* Survey findings are reported in a statement of deficiencies (SOD), which identifies each deficiency under its regulatory requirement and states its scope and severity. 42 C.F.R. § 488.404; CMS State Operations Manual (SOM), App. P, § IV.

[1] The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact-toc.htm.

If a survey finds that a SNF is not in substantial compliance with one or more Medicare participation requirements, CMS may impose one or more enforcement remedies, including termination of the facility's agreement to participate in the Medicare program. Act §§ 1819(h), 1866(b); 42 C.F.R. §§ 488.402(c), 488.406, 488.456(b)(i). CMS may terminate the facility's provider agreement or, if the facility submits an acceptable plan of correction (POC), allow it to continue its participation for no longer than six months, after which termination is mandatory. Act § 1819(h)(2)(C); 42 C.F.R. §§ 488.412(a), (d); 488.450(d); *see also* 42 C.F.R. § 488.450(c) (where facility submits an approved POC and there is no immediate jeopardy, CMS may continue Medicare payments "for up to 6 months from the last day of the survey"). In other words, CMS may act immediately to terminate a facility based on a survey finding that it is not in substantial compliance, without affording an opportunity to correct the noncompliance. *Id.*; 59 Fed. Reg. 56,116, 56,213 (Nov. 10, 1994) ("Neither immediate jeopardy nor a full 6 months of noncompliance have to have occurred in order for the State or [CMS] to terminate a provider agreement"). Even if a POC is approved, the facility may not be regarded as in substantial compliance until CMS determines, following an onsite revisit or other verification procedure, that the deficiencies no longer exist. 42 C.F.R. §§ 488.440(h), 488.454(a). "Immediate jeopardy" is defined as "a situation in which 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.

The remedies available to CMS also include a CMP "for either the number of days a facility is not in substantial compliance with one or more participation requirements or for each instance that a facility is not in substantial compliance[.]" 42 C.F.R. § 488.430(a). If, as here, CMS chooses to impose "per-instance" CMPs, each CMP imposed must be within the range of $1,000 to $10,000. 42 C.F.R. §§ 488.408(d)(1)(iv), 488.438(a)(2).

The Board "has made it clear that the facility bears the burden of showing that it returned to substantial compliance on a date earlier than that determined by CMS and has rejected the idea that CMS must establish a lack of substantial compliance during each day in which a remedy remains in effect." *Owensboro Place Care and Rehabilitation Center*, DAB No. 2397, at 12, (2011); *see also Kenton Healthcare, LLC*, DAB No. 2186, at 25 (2008) (facility "has the burden of proving that it achieved substantial compliance on a date earlier than that determined by CMS"); *Barn Hill Care Center*, DAB No. 1848, at 12-18 (2002) (rejecting contention that once CMS has shown that noncompliance exists, CMS must assert and prove that the facility was noncompliant each day of the noncompliance period).

The law mandates imposition of a DPNA in some circumstances. Section 1819(h)(2)(D) of the Act requires the Secretary of Health and Human Services to impose a DPNA if a SNF has not complied with Medicare participation requirements "within 3 months after the date the facility is found to be out of compliance with such requirements[.]" CMS

has implemented this statutory requirement in 42 C.F.R. § 488.417(b)(1), which provides that "CMS does or the State must deny payment for all new admissions when . . . [t]he facility is not in substantial compliance . . . 3 months after the last day of the survey identifying the noncompliance[.]"

Withdrawal of NATCEP approval is mandatory, among other reasons, where a facility has been assessed a CMP of $5,000 or more, has had its Medicare participation terminated, or has been subject to a DPNA. Act § 1819(f)(2)(B)(iii)(I); 42 C.F.R. § 483.151(b)(2), (3). Section 1819(f)(2)(B)(iii)(I) of the Act also precludes approval of a NATCEP for two years in facilities that have been subject to a finding of substandard quality of care in a standard survey. *See also* 42 C.F.R. §§ 483.151(b)(2). "Substandard quality of care" includes, but is not limited to, deficiencies under 42 C.F.R. § 483.25 found to be at the level of "immediate jeopardy." 42 C.F.R. § 488.301.

A SNF may challenge findings of noncompliance that result in the imposition of enforcement remedies by requesting a hearing before an ALJ. *See* 42 C.F.R. §§ 488.408(g)(1), 498.3(b)(13), 498.5(b). In an ALJ proceeding, CMS has the burden of coming forward with evidence related to disputed findings that is sufficient (together with any undisputed findings and relevant legal authority) to establish a prima facie case of noncompliance with a regulatory requirement. *Evergreene Nursing Care Center*, DAB No. 2069, at 7 (2007); *Batavia Nursing and Convalescent Center*, DAB No 1904 (2004), *aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 F. App'x 181 (6th Cir. 2005). "If CMS makes this prima facie showing, then the SNF must carry its ultimate burden of persuasion by showing, by a preponderance of the evidence, on the record as a whole, that it was in substantial compliance during the relevant period."[2] *Evergreene* at 7.

Case Background

The New Mexico Department of Health (State survey agency, SSA) conducted surveys of Sunshine Haven's facility that ended November 5, 2008, November 19, 2008, January 21, 2009, February 3, 2009, February 5, 2009, April 2, 2009, and April 20, 2009. Each survey alleged noncompliance with Medicare program participation requirements, with the survey ending February 3, 2009 alleging noncompliance with Medicare program participation requirements mandating compliance with "Life Safety Code" (LSC) standards relating to the nursing home's physical facility.

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[2] The ALJ incorrectly stated that "CMS bears the burden to come forward with the evidence and to establish a *prima facie* showing of the alleged regulatory violations in this case by a preponderance of the evidence." ALJ Decision at 52 (emphasis added). The preponderance of the evidence standard does not apply to CMS's prima facie case of noncompliance; rather, once CMS has made a prima facie case, the facility that must show by a preponderance of the evidence that it was in substantial compliance.

CMS notified Sunshine Haven by letter dated March 16, 2009 that its Medicare agreement would terminate effective April 5, 2009, unless Sunshine Haven was in substantial compliance by that date, but extended the termination date to May 6, 2009, in a letter dated April 21, 2009.[3] CMS Ex. 1, at 1-4, 6. CMS also notified Sunshine Haven in the March 16, 2009 letter that it was imposing per-instance CMPs of $5,000 each for two instances of noncompliance identified in the survey ending February 5, 2009 that were determined to constitute immediate jeopardy, and that a mandatory DPNA that began effective February 5, 2009 would continue until Sunshine Haven had either achieved substantial compliance with participation requirements or had its participation agreement terminated. *Id.* at 1-4. CMS also advised Sunshine Haven that it was not eligible to conduct a NATCEP for a period of two years. *Id.*

CMS notified Sunshine Haven by letter dated April 22, 2009 that the survey ending on April 2, 2009 had concluded that Sunshine Haven had not returned to substantial compliance with Medicare participation requirements and that CMS was imposing $2,000 CMPs for each of two instances of noncompliance found in that survey. CMS Ex. 1, at 9-11. CMS notified Sunshine Haven by letter dated May 28, 2009 that its Medicare agreement had been terminated on May 6, 2009, that a DPNA was in effect from February 5, 2009 to May 6, 2009 and that $2,000 CMPs had been imposed for each of two instances of noncompliance found in the survey ending April 2, 2009. CMS Ex. 1, at 12-14. In that letter CMS again notified Sunshine Haven that two $5,000 CMPs were imposed for each of two of the immediate-jeopardy deficiencies. *Id.*

Sunshine Haven filed six hearing requests appealing all of the remedies imposed. The ALJ consolidated the six cases and convened an in-person hearing in Albuquerque, New Mexico on April 12 and 13, 2010. ALJ Decision at 3. In his decision, the ALJ addressed selected instances of noncompliance from each survey and sustained all of the enforcement remedies that CMS imposed. He concluded that Sunshine Haven was continuously not in substantial compliance from November 5, 2008 to May 6, 2009 when its participation agreement was terminated, that the termination and the DPNA were required by the Act and that the four per-instance CMPs were reasonable.

[3] CMS's March 16, 2009 letter cited a survey visit on January 31, 2009, but the ALJ found that there was no separate survey of Sunshine Haven's facility on January 31, 2009, and that the survey referenced in the letter was the survey ending February 5, 2009, which commenced on January 26, 2009. ALJ Decision at 2, n.2 (noting that there was in evidence no Statement of Deficiencies (SOD) for a survey ending on January 31, 2009 and that CMS did not allege that any deficiency was identified by a survey that ended on January 31, 2009 that affected either the mandatory DPNA or termination or that was the basis for an enforcement remedy).

Standard of Review

The Board's standard of review on a disputed finding of fact is whether the 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*, available at http://www.hhs.gov/dab/divisions/appellate/guidelines/index.html. The Board's standard of review on a disputed conclusion of law is whether the ALJ's decision is erroneous. *Id.*

Analysis

We first address the ALJ's determination that CMS had a basis to terminate Sunshine Haven's Medicare provider agreement. We conclude that termination was required by the Act and regulations because Sunshine Haven was not in substantial compliance with Medicare requirements for six continuous months. We conclude that there were ongoing, overlapping periods of noncompliance with different participation requirements that lasted more than six months, as determined by the surveys ending November 5 and 19, 2008 and January 21, 2009, and the LSC survey ending February 3, 2009. We sustain the ALJ's determinations that Sunshine Haven was not in substantial compliance at the immediate-jeopardy level with two participation requirements, as identified in the survey ending February 5, 2009, and was not in substantial compliance with two participation requirements as identified in the survey ending April 2, 2009. We also sustain the imposition of two $5,000 per-instance CMPs and two $2,000 per-instance CMPs, respectively, for the noncompliance identified in those two surveys. We do not address the ALJ's determination that Sunshine Haven was not in substantial compliance with a participation requirement as identified in the survey ending April 20, 2009, as no CMPs were imposed based on those survey findings, and the other survey findings that we sustain establish six continuous months of noncompliance requiring both the termination and the DPNA.

I. We sustain the ALJ's determination that Sunshine Haven was continuously not in substantial compliance with Medicare requirements for participation for six months, requiring the termination of its Medicare participation agreement.

A. Sunshine Haven was not in substantial compliance with 42 C.F.R. § 483.25(a)(3) from November 5, 2008 through at least December 5, 2008.

Background

The ALJ determined, based on the survey ending November 5, 2008, that Sunshine Haven was not in substantial compliance with section 483.25(a)(3). The regulation requires that "[b]ased on the comprehensive assessment of a resident, the facility must

ensure that— . . . (3) A resident who is unable to carry out activities of daily living receives the necessary services to maintain good nutrition, grooming, and personal and oral hygiene." Sunshine Haven had in place a policy "that Residents will receive a shower/bath at least two times a week" and as needed. CMS Ex. 8, at 3.

This deficiency involved two residents, Residents 1 and 3, who were totally dependent on staff for dressing, toilet use and personal hygiene, and needed assistance with activities of daily living (ADLs) and to remain clean, neat, and free of body odors. ALJ Decision at 9, citing CMS Exs. 5, at 1-3; 7, at 2-3. Resident 1's care plan required that she be assisted with her bath or shower two times weekly and more often as desired, and Resident 3's care plan required that he be assisted with his bath or shower two to three times weekly and more often as desired. CMS Exs. 5, at 3; 7, at 3. Sunshine Haven's shower schedule called for each resident to be bathed on Monday, Wednesday, and Friday. CMS Ex. 8, at 7. Based on Sunshine Haven's records, the ALJ found, and Sunshine Haven does not dispute, that in October 2008, Residents 1 and 3 did not receive at least two showers or baths each week, as required by Sunshine Haven's policy and as care planned for these residents. ALJ Decision at 10. More specifically, the ALJ found that those records indicated that Resident 1 did not receive a bath or shower during the 13 days from October 15, 2008 through October 27, 2008, and that Resident 3 received a bath or shower only once during the 16 days from October 16 through October 31, 2008, on October 21, 2009. *Id.* at 9, citing CMS Exs. 5, at 4-9; 7, at 5-10, 12, 14-15; Tr. at 96-101, 105-09. The ALJ stated that the deficiencies actually arose in October 2008 but treated the noncompliance as beginning on November 5, 2008, when the survey ended, as that "is consistent with the notice provided to Petitioner by CMS and the state agency." ALJ Decision at 12.

Discussion

Sunshine Haven concedes that during the last half of October 2008 it failed to bathe the two residents as frequently as called for by their care plans, the shower schedule, and the facility policy.[4] Sunshine Haven argues, however, that these failures were not noncompliance because they did not pose of a risk of more than minimal harm to resident health and safety. Sunshine Haven particularly disputes the ALJ's reliance on the surveyor's testimony to the effect that residents who did not receive baths or showers were at increased risk for infection, for not having skin problems discovered, and for not

[4] Sunshine Haven characterizes the ALJ's findings as "providing a bath only once per week for two residents for part of the month of October 2008" and "providing a bath less than two times per week on isolated occasions during one month" but does not dispute the ALJ's findings as to the periods during which the two residents were not bathed, which are consistent with the record, and further does not dispute that the residents were not bathed as often as required by their care plans and facility policy. P. Reply at 1, 4.

having their psychosocial needs met in the form of low self-esteem or embarrassment. ALJ Decision at 9-10, citing Tr. at 63. Sunshine Haven states that the surveyor "is not a nurse and has no medical training" and "holds no licenses or certifications" beyond having passed a surveyor minimum qualifications test. P. Request for Review (RR) at 5. Sunshine Haven argues that "[i]n the absence of any evidence that [the surveyor] has *any* training, education or expertise in causes of medical conditions or possible causes of infection, the DAB must conclude that [she] was incompetent and unqualified to provide opinion testimony about the frequency of bathing creating a risk of infection." P. at 4 (emphasis in original).

The ALJ correctly rejected Sunshine Haven's criticism of the surveyor's qualifications, stating that it was "unrebutted that she is a trained surveyor with survey experience." The regulations, we note, require CMS to provide "comprehensive training" to surveyors, who "are professionals who use their judgment, in concert with Federal forms and procedures, to determine compliance." 42 C.F.R. §§ 488.26(c)(3), 488.314(b). The surveyor minimum qualifications test Sunshine Haven references "is part of the training and testing program and addresses the knowledge, skills, and abilities (KSAs) needed to conduct standard and extended surveys in LTC facilities," prior to which a surveyor "must complete the CMS Orientation Program, and the Basic Long Term Care Health Facility Surveyor Training Course." SOM § 4009.1A , B.

The surveyor moreover provided a credible rationale for her determination, noting not only the physical and psychosocial consequences potentially attendant upon failures to bathe residents as often as required, but also the fact that those failures prevented staff from observing the condition of the residents' skin during bathing, as required by Sunshine Haven's bathing policy. Sunshine Haven's policy called for staff bathing a resident to report any skin changes to a nurse, and the facility used a "bath/shower completion form" on which staff were supposed to note the locations of any skin conditions seen, such as bruises, rashes, skin tears, red areas or open areas. CMS Ex. 8, at 2, 6. The value of the opportunities that bathing affords for observing a resident's skin condition is illustrated by the case of a resident whose injuries were the basis of a finding of noncompliance in the survey ending January 21, 2009, which we address later in this decision. The first recorded observations of bruising on that resident's right arm occurred while the resident was being bathed. CMS Ex. 23, at 15. The ALJ reasonably concluded that the deprivation of this opportunity to closely observe the status of a resident's skin with at least the frequency required by facility policy posed the risk of more than minimal harm to residents. ALJ Decision at 9-10.

On appeal, the facility cites a sentence from an article published by the Centers for Disease Control and Prevention, stating that "the role of personal cleanliness in the control of infectious diseases over the past century is difficult to measure . . . ." RR at 5, citing *Hygiene of the Skin: When Is Clean Too Clean?* Emerg. Infect. Dis.. 2001 Mar.-Apr., http://wwwnc.cdc.gov/eid/article/7/2/70-0225.htm. Sunshine Haven omits the rest of the sentence from that quotation: "since other factors have changed at the same time (e.g., improved public services, waste disposal, water supply, commercial food handling, and nutrition)." The sentence, fully quoted, refers to a broad, historical context that has no bearing on the particular facts and circumstances here, involving nursing home residents with limited ability to perform ADLs. The cited sentence, moreover, does not address the ALJ's finding that failing to bathe the residents as often as required deprived the facility of the opportunity to observe and note any skin changes.

We thus conclude that the ALJ's determination that Sunshine Haven was not in substantial compliance with the Medicare participation requirement at 42 C.F.R. § 483.25(a)(3), as determined by the survey ending November 5, 2008, is supported by substantial evidence and contains no error of law.

Regarding correction of this deficiency, Sunshine Haven states that "it is undisputed that the SSA accepted Petitioner's plan of correction, which identified a December 5, 2008 completion date." RR at 31; CMS Ex. 3, at 3 (POC). The State survey agency determined, however, that the noncompliance identified in the survey ending November 5, 2008 was corrected on December 16, 2008. P. Ex. 1. The ALJ stated that "[w]hether Petitioner corrected this deficiency on December 5 or 16, 2008, the correction of the deficiency does not mean that Petitioner returned to substantial compliance on that date . . . Petitioner continued not to be in substantial compliance due to the deficiency cited by the November 19, 2008 survey."

We conclude that the ALJ's determination that Sunshine Haven was not in substantial compliance with 42 C.F.R. § 483.25(a)(3) from November 5, 2008 through at least December 5, 2008 is supported by substantial evidence and contains no error of law. Below, we sustain the deficiency determination from the survey ending November 19, 2008 and conclude that Sunshine Haven continued to remain out of substantial compliance with Medicare requirements beyond both December 5 and December 16, 2008. Accordingly, it is not germane to our decision whether Sunshine Haven corrected its noncompliance with section 483.25(a)(3) on December 5 or 16, 2008.

B. Sunshine Haven was not in substantial compliance with 42 C.F.R. § 483.13(a) and section 1819(c)(1)(A)(ii) of the Act from November 19, 2008 through January 31, 2009.

The ALJ determined, based on the survey ending November 19, 2008, that Sunshine Haven was not in substantial compliance with the statute and regulation governing the use of restraints with respect to two residents, Resident 1 and Resident 5.

The Act states that a facility may use restraints in non-emergency situations "only upon the written order of a physician that specifies the duration and circumstances under which the restraints are to be used." Act § 1819(c)(1)(A)(ii). The implementing regulation states that the resident "has the right to be free from any physical or chemical restraints imposed for purposes of discipline or convenience, and not required to treat the resident's medical symptoms." 42 C.F.R. § 483.13(a). Sunshine Haven's restraint policy, dated October 2005, requires, among other things, a signed, dated physician's order stating the type of device to be used for restraint, the reason for the device, and the timeframes the device is to be used; a care plan delineating the specific device; a signed and dated consent form completed by the resident or responsible party/guardian; and documentation every 30 days of physician authorization giving reasons for the restraint usage. CMS Ex. 18, at 3-4.

Background and Discussion – Resident 5

Regarding Resident 5, the ALJ determined that Sunshine Haven used a lap belt to restrain the resident in his wheelchair without having obtained a physician's order as required by the Act and Sunshine Haven's restraint policy. The ALJ found that there was "no order from Resident 5's physician for the use of a lap belt and no assessment for use of a lap belt in evidence."[5] ALJ Decision at 20. The ALJ also found that Sunshine Haven did "not address in its pleadings the absence of evidence of consent for a lap belt by or on behalf of Resident 5." *Id.* at 23. Sunshine Haven does not dispute any of the ALJ's findings and conclusions regarding Resident 5 under this deficiency, including the finding that there was no physician's order to use a lap belt as a restraint.

[5] As the ALJ noted, the SOM defines a restraint as including devices such as lap belts in wheelchairs that the resident "cannot remove easily." ALJ Decision at 14, citing SOM App. PP, F222. Sunshine Haven in its briefs before the ALJ and on appeal has not contended that the "self-release belt" the facility used for Resident 5 was not a restraint, and does not contest the ALJ's finding that the facility used the lap belt in Resident 5's wheelchair to restrict his movements. ALJ Decision at 19-21.

Background – Resident 1

For Resident 1, the facility employed both bed rails and a lap belt. A document from October 2008 recording physician's orders recites a physician's order dated July 12, 2006, the date of admission, for top rails to help the resident reposition, if desired, and an order dated February 18, 2008 for a seatbelt restraint or lap buddy for safety when Resident 1 was up in his wheelchair. ALJ Decision at 15, citing CMS Ex. 13, at 1, 2. The ALJ noted that the October 2008 orders sheet does "not indicate the timeframes for use of either the top rails or the wheelchair seatbelt, *i.e.*, the frequency and duration of use is not specified," and he found no evidence of physician's orders reauthorizing the restraints every thirty days, as required by Sunshine Haven's policy. *Id.*

The ALJ determined that Resident 1 experienced harm as a result of Sunshine Haven's noncompliance because he suffered bruises in October 2008 due to having been trapped in the side rails, or between the rails and an air mattress. *Id.* at 18, 20-21; CMS Ex. 13, at 35, 51, 57. In addition to those bruises, a handwritten entry dated October 6, 2008, shows that Resident 1 had a problem with red marks from lying against his bed side rails. ALJ Decision at 17, citing CMS Ex. 13, at 35.

The ALJ also noted that while there was a record of a physician's order for the lap belt, from February 18, 2008, "it does not indicate the time frames or duration for use of the lap belt in the wheelchair, a violation of both the Act and the standard of care reflected by Petitioner's policy." *Id.* at 21. The ALJ found that there was "no evidence that the use of restraints, either the lap belt or the bed side rails, was reviewed and reauthorized by a physician every thirty days as required by Petitioner's policy" and "no evidence of consent [to the use of restraints] by Resident 1 or a responsible party" as also required by Sunshine Haven's policy. *Id.* The ALJ also found no evidence that Resident 1 was reassessed to determine whether or not he had a continued need for the lap belt after he was furnished a new wheelchair with a higher back to support his head, sometime in August 2008. *Id.* at 18, 21, citing CMS Ex. 13, at 50-51, 54.

Discussion – Resident 1

Sunshine Haven principally argues that the side rails were "not properly considered a restraint" because Resident 1's physician ordered side rails for the resident's use in repositioning. RR at 7, citing CMS Ex. 13, at 2; SOM, App. PP., F222 ("The same device may have the effect of restraining one individual but not another, depending on the individual resident's condition and circumstances. For example, partial rails may assist one resident to enter and exit the bed independently while acting as a restraint for another."). The physician's order Sunshine Haven cites, however, is dated July 12, 2006, the date of admission and more than two years prior to the survey. CMS Ex. 13, at 2.

The later Side Rail Usage Assessment form cited by the ALJ, dated November 12, 2008, states that side rails were used because without them the resident would crawl out of bed, indicating that they were used to restrain the resident, not to help him reposition. ALJ Decision at 15-16; CMS Ex. 13, at 6. The SOD moreover states that the Assistant Director of Nursing agreed that the "top rail" in the resident's bed was being used as a restraint. CMS Ex. 11, at 5. This evidence suggests that while the physician may have ordered side rails initially as assistance devices, the facility over time began to use them to restrain the resident. Yet, there is no evidence of physician's orders authorizing the use of side rails as a restraint. Additionally, the ALJ pointed out that the surveyor who drafted the portion of the SOD finding this deficiency stated in the SOD that a registered nurse told her that the seat belt and alarm were both necessary because there was not enough staff to ensure a timely response to the alarm, and that the Assistant Director of Nursing agreed that the seat belt in the wheelchair was probably not necessary, and that the side rail was a restraint. ALJ Decision at 19, citing CMS Ex. 11, at 4-5. In addition to being an admission by the Assistant Director of Nursing that the side rail was used to restrain Resident 1, these statements suggest that the facility was using the seat belt and alarm for convenience (to compensate for inadequate staffing), which also is prohibited by section 483.13(a).

Sunshine Haven assails the credibility of the surveyor's statement in the SOD solely on the ground that the surveyor admitted on cross examination that some of her findings in the SOD were incorrect. The admissions of error by the surveyor that Sunshine Haven cites, however, refer only to the surveyor's admission, based on her interpretation of records in evidence that she had not reviewed during the survey, that her findings under section 483.25(a)(3) may have understated the number of times that residents were bathed in October 2008. The ALJ found that the surveyor's errors interpreting Sunshine Haven's clinical records "affected the credibility of her findings [for the section 483.25(a)(3) deficiency] in the SOD, but not the credibility of her testimony or conclusion that there was a risk for more than minimal harm to the residents." ALJ Decision at 11-12. The ALJ further found that Sunshine Haven's clinical records for the residents supported the surveyor's further findings that the two residents "did not receive all baths or showers required by their care plans and Petitioner's policy." *Id.* at 11. As we noted in the prior section, Sunshine Haven does not dispute this finding. With respect to the finding under section 483.13(a), there is no testimony or admission by the surveyor indicating that she did not correctly report in the SOD the substance of what the registered nurse or the assistant director of nursing told her during the November 19, 2008 survey regarding the use of restraints. Nor did the ALJ find any issues regarding the credibility of these findings on the SOD. Moreover, Sunshine Haven did not deny the substance of the SOD, and did not present the registered nurse or the Assistant Director of Nursing as a witness.

Sunshine Haven argues that it did assess Resident 1, pointing to assessments for the risk of falls, but, as the ALJ found, those assessments were insufficient to demonstrate compliance because they were not specifically for the use of restraints. ALJ Decision at 22. And, as CMS points out, Sunshine Haven failed to comply with the requirements of its own restraint policy because the physician's orders do not specify the duration of the use of the seatbelt and wheelchair lap belt, there was no review and reauthorization of the physician's orders for the use of the side rails or wheelchair lap belt, and Sunshine Haven failed to obtain the written consent of Resident 1's family member. CMS Resp. at 9; CMS Exs. 13, at 2; 18, at 4.

Regarding the duration of this deficiency, the ALJ upheld the State survey agency's determination in a letter to Sunshine Haven dated March 5, 2009, based on a revisit, that Sunshine Haven had corrected the noncompliance identified in the November 19, 2008 survey on January 31, 2009. ALJ Decision at 24-25, citing P. Ex. 4. Sunshine Haven disputes that it was not in substantial compliance with 42 C.F.R. § 483.13(a) and section 1819(c)(1)(A)(ii) of the Act, but does not dispute the ALJ's determination that this deficiency was not corrected any earlier than January 31, 2009. *See* RR at 34 ("[a]s the undisputed evidence demonstrates, the SSA certified that Petitioner . . . had corrected the deficiencies cited in the 11/5/08 Survey and 11/19/08 Survey no later than January 31, 2009").

Accordingly, we conclude that the ALJ's determination that Sunshine Haven was not in substantial compliance with 42 C.F.R. § 483.13(a) and section 1819(c)(1)(A)(ii) of the Act from November 19, 2008 through January 31, 2009 is supported by substantial evidence and contains no error of law.

C. Sunshine Haven was not in substantial compliance with 42 C.F.R. § 483.25(h) from January 21, 2009 through February 21, 2009.

Background

Section 483.25(h) of 42 C.F.R. requires that a nursing facility "must ensure" that "[t]he resident environment remains as free of accident hazards as is possible" and that "[e]ach resident receives adequate supervision and assistance devices to prevent accidents." This requirement is part of the overall quality of care regulation at section 483.25, which requires that each resident "must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care."

The Board has held that section 483.25(h)(2) "obligates the facility to provide supervision and assistance devices designed to meet the resident's assessed needs and to mitigate foreseeable risks of harm from accidents" and to "provide supervision and assistance devices that reduce known or foreseeable accident risks to the highest practicable degree, consistent with accepted standards of nursing practice." *Century Care of Crystal Coast,* DAB No. 2076, at 6-7 (2007) (citations omitted), *aff'd, Century Care of Crystal Coast* v. *Leavitt,* 281 F. App'x 180 (4th Cir. 2008); *see also Woodstock Care Ctr. v. Thompson*, 363 F.3d 583, 589-90 (6th Cir. 2003) (a SNF must take "all reasonable precautions against residents' accidents").

CMS determined based on the survey ending January 21, 2009 that Sunshine Haven was not in substantial compliance with the regulation in its care of Resident 5, who sustained injuries to her arms and shoulder when facility staff transferred her from her bed to a wheelchair.[6] CMS Ex. 21 (SOD). It is not disputed that the resident was 93 years old when she was admitted to the facility in March 2006 with diagnoses including osteoarthritis, contracture of the hand joint, persistent mental disorder, depression, diabetes with neuropathy, and congestive heart failure. ALJ Decision at 27; CMS Ex. 23, at 1. The resident was unable to help with positioning in bed or transferring between surfaces and needed the assistance of at least two staff members. CMS Ex. 23, at 5, 6.

The ALJ found that the resident was injured during transfers on three occasions during the period September through December 2008. ALJ Decision at 29-30. He found that the resident's left shoulder was injured during a transfer as reflected in a care plan update on September 27, 2008, that her left arm was bruised during a transfer with a "Hoyer lift" on November 25, 2008, and that she was bruised on her right arm during a transfer on or about December 29, 2008. ALJ Decision at 27-31, citing CMS Exs. 21, at 1-2; 23, at 3, 12-13, 15, 17, 18. It is not disputed that the surveyor observed bruises on the resident's arms during the survey. CMS Ex. 21, at 1.

The ALJ concluded that Sunshine Haven was not in substantial compliance with the accident regulation because it "did not take reasonable steps to eliminate or minimize the foreseeable risk for accidental injury of Resident 5 during transfers[.]" ALJ Decision at 31. He also concluded that Sunshine Haven had failed to demonstrate compliance because Sunshine Haven did "not come forward with evidence that shows it ensured that adequate supervision and assistance devices were provided to Resident 5 to mitigate or eliminate the risk of foreseeable accidental injury to her arms" during transfers, regardless of what transfer technique may have been used. *Id.*

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[6] This resident is not the same resident who was designated as Resident 5 for the November 19, 2008 survey.

Discussion

The quality of care regulation at section 483.25 imposes on facilities a "high affirmative duty" to provide services that are "designed to achieve [favorable] outcomes to the highest practicable degree." *Agape Rehabilitation of Rock Hill*, DAB No. 2411, at 9 (2011), citing *Liberty Nursing and Rehabilitation Center – Mecklenberg County*, DAB No. 2095, at 8 (2007), *aff'd*, *Liberty Nursing Rehabilitation Center Mecklenberg County v. Leavitt*, No. 07 -1667 (4th Cir. 2008); *see also Woodstock Care Center v. Thompson*, 363 F.3d at 590 ("[t]he regulations can and do set a higher standard than the common law."). Consistent with this high standard, the Board has held that if a facility implements accident prevention measures for a resident but has reason to know that those measures are substantially ineffective in reducing the risk of accidents, it must act to determine the reasons for the ineffectiveness and to consider –and, if practicable, implement – more effective measures. *Woodstock Care Center*, DAB No. 1726, at 27-28 (2000) (affirming a CMP based on evidence that a facility failed to change its practices after it became clear that those practices were ineffective), *aff'd*, *Woodstock Care Center v. Thompson*. Sunshine Haven failed to meet this standard.

Sunshine Haven claims that the resident was not "injured" during a transfer in September 2008 because, Sunshine Haven asserts, while a September 27, 2008 care plan update states that the resident complained of pain in her left shoulder related to being transferred, "[a] report of pain does not . . . equate to an injury." RR at 13, citing CMS Ex. 23, at 13. We reject that claim. The care plan entry supports the ALJ's finding, as it goes on to state the goal that the resident "will have no further injury related to transfer," indicating that Sunshine Haven staff considered the resident's shoulder to have indeed been injured in the transfer. CMS Ex. 23, at 13. Thus, as the ALJ found, it was indeed foreseeable following that injury "that Resident 5 was subject to accidental injury of her arms during transfers." ALJ Decision at 30.

Sunshine Haven argues that the "undisputed evidence establishes" that it "developed and implemented appropriate and effective policies and procedures and educated and trained staff regarding use of assistance devices and transfers." RR at 11, citing CMS Ex. 24, at 7. Sunshine Haven further asserts that it "provided in-service training to staff related to resident transfers that expressly addressed and described proper lift techniques, including two-person lifts, as well as use of mechanical lifts, such as a Hoyer lift." *Id.* Sunshine Haven also points to interventions added to Resident 5's care plan after the transfer injuries in September (transfer training with therapy, use of a gait belt, using two people or a Hoyer lift for transfers) and November ("take care" using the Hoyer lift; "pad w/c with sheepskin to prevent further trauma") as demonstrating that its interdisciplinary team "identified numerous strategies and interventions" to address the risk of accidents during transfers. RR at 13-14, citing CMS Ex. 23, at 13.

The record does not support Sunshine Haven's claims. The exhibit it cites as showing that it implemented policies and procedures and provided training on transferring residents consists of two pages from the facility's policy on lifting "different types of residents." CMS Ex. 24, at 7. The policy includes brief paragraphs on using "assistive devices" such as transfer belts, draw sheets and slide boards, and mechanical lifts, for repositioning a resident in a chair or in a beds, and for transferring a resident from a bed to a stretcher. *Id.* This exhibit does not establish that the facility provided any training or implemented any of the strategies described which, notably, do not include transferring a resident from a bed to a wheelchair. *Id.* The two-sentence paragraph on mechanical lifts does not describe how they are used, the risks they pose, or how to avoid injuries to residents while using mechanical lifts. *Id.*

Moreover, it is not clear that Sunshine Haven even followed these policies, however cursory, in transferring Resident 5. The policy advises staff to both use a mechanical lift or a transfer device "and ask one or more coworkers to assist you" to reposition a resident who is heavy, uncooperative or incapable of bearing weight. *Id.* There is no indication that the facility ever used more than one person to transfer Resident 5 with a Hoyer lift despite her being unable to help with positioning in bed or transferring between surfaces. Moreover, the care plan entries from September 27 and November 26, 2008 that Sunshine Haven cites indicate that the transfer of the resident could be done by either a two-person transfer or use of a Hoyer lift and do not show that any consideration was given to using two persons and a Hoyer lift as directed by the facility's policy. *Id.*; CMS Ex. 23, 13.

Other records, as the ALJ found, demonstrate confusion by facility staff over what transfer techniques had been ordered. ALJ Decision at 30. A nursing note from December 3, 2008 states that the use of a mechanical lift was rejected on account of dignity issues, and a nursing note from December 23, 2008 states that the resident "should be considered for use of a Hoyer lift" to prevent staff from being injured in their efforts to transfer Resident 5, notwithstanding the use of a lift having already been ordered. CMS Ex. 23, at 13, 18, 23. As the ALJ observed, the use of a Hoyer lift was ordered in the care plan prior to the injury in September 2008, so the inclusion of that intervention again on September 27, 2008 does not indicate that Sunshine Haven actually reviewed its effectiveness after the resident was injured in September 2008, or on any subsequent occasion. ALJ Decision at 30, citing CMS Ex. 23, at 12.

As further evidence of confusion over how to safeguard this resident, the intervention of padding the wheelchair was added to the care plan following the injury on November 25, 2008, yet nursing notes on December 2 and 5, 2008 state that only the left arm of the chair was padded. CMS Ex. 23, at 13, 18, 19. Sunshine Haven argues that padding the right wheelchair arm was unnecessary because the resident "suffered from left-sided weakness, not right-sided weakness, making it unlikely that her right arm would become trapped in the wheelchair side rail." RR at 14. Sunshine Haven does not cite any

evidence that its interdisciplinary team concluded it was not necessary to pad the right arm of the wheelchair, and the resident's care plan was not amended to specify that the requirement for padding applied only to the left wheelchair arm.

The record thus does not show that the facility adopted any systematic or comprehensive approach toward addressing the difficulties in transferring this resident, or that it evaluated the effectiveness of any of the measures it had adopted or even that it implemented them consistently. *See* ALJ Decision at 30, citing language of SOM, App. PP, F323 ("Petitioner's clinical records do not show that Resident 5's interdisciplinary team took action, after either the September 2008 or the November 2008 accidental injuries to Resident 5's arms, to: identify, evaluate, and analyze hazards and risks related to transfers of Resident 5; implement adequate interventions to reduce hazards and risks; or monitor the effectiveness of interventions and modify them when necessary."). The facility's failure to assess the effectiveness of the measures it adopted to protect the resident during transfers meant that it failed to ensure that "[t]he resident environment remains as free of accident hazards as is possible" and that [e]ach resident receives adequate supervision and assistance devices to prevent accidents." 42 C.F.R. § 483.25(h).

Sunshine Haven cites *Lake Park Nursing and Rehabilitation Center*, DAB No. 2035, at 8 (2006) and *Golden Living Center – Riverchase*, DAB No. 2314 (2010), *aff'd*, *Golden Living Center–Riverchase v. U.S. Dep't of Health & Human Servs.*, 429 F. App'x 895 (11th Cir. 2011), as support for its argument that it implemented interventions adequate to address the hazards of transferring this resident. We disagree. Those decisions hold that "the mere occurrence of an accident does not, by itself, prove that a facility provided inadequate supervision . . . ." *Golden Living Center – Riverchase* at 9 citing *Lake Park Nursing and Rehabilitation Center.* However, that principle is not relevant here because the ALJ did not sustain the noncompliance determination based solely on the occurrence of injuries during transfers but on his findings that the facility did not take adequate measures to prevent or respond to those accidents.

Sunshine Haven also attempts to distance itself from responsibility for the resident's injuries by blaming CNA M. for the bruising of the resident's left arm during a Hoyer lift transfer on November 25, 2008. RR at 11-12; CMS Ex. 21, at 1. Sunshine Haven states that CNA M. was counseled for her "rough bedside manner and rough transfer of residents" on December 5, 2008 and required to attend neglect and abuse in-service training. RR at 12, citing CMS Ex. 23, at 4. The ALJ found that a different CNA transferred the resident on November 25; however, which CNA was involved is irrelevant, as Sunshine Haven is fully responsible for any employee's actions. *See Life Care Center of Gwinnett*, DAB No. 2240, at 13 n.9 (2009) ("the Act and regulations make a facility responsible for the actions of its staff"); *Franklin Care Center*, DAB No. 1900, at 8 n.4 (2003) ("The Board has consistently held that a facility cannot disavow

responsibility for the actions of its employees."). The mere fact that Sunshine Haven counseled an employee after the incident would thus not insulate Sunshine Haven from a finding of noncompliance.

The record of the transfer-related injuries to Resident 5 – at least one of which Sunshine Haven concedes – amply supports CMS's determination that this deficiency posed a risk of more than minimal harm.[7] *See* RR at 12 (admitting that Resident 5 sustained an injury on November 25, 2008 during a Hoyer lift incident). Thus, we uphold the ALJ's determination that Sunshine Haven was not in substantial compliance with section 483.25(h). While Sunshine Haven disputes the ALJ's conclusion that it was not in substantial compliance, it does not challenge his determination that the noncompliance was not corrected earlier than February 21, 2009, the date it stated in its POC. CMS Ex. 21, at 2. We thus sustain the ALJ's determination that Sunshine Haven was not in substantial compliance with section 483.25(h) from January 21 through February 21, 2009.

D. Sunshine Haven was not in substantial compliance with Life Safety Code requirements imposed by 42 C.F.R. § 483.70 from February 3, 2009 to May 6, 2009, when its Medicare participation was terminated.

Background

The State survey agency conducted a survey ending February 3, 2009 to assess Sunshine Haven's compliance with section 483.70, "Physical environment," which requires that a facility "must be constructed, equipped and maintained to protect the health and safety of residents, personnel and the public." Section 483.70 goes on to require, among other things, that "[t]he facility must meet the applicable provisions of the 2000 edition of the Life Safety Code of the National Fire Protection Association." 42 C.F.R. § 483.70(a)(1)(i). CMS determined, based on the February 3, 2009 LSC survey, that Sunshine Haven was not in substantial compliance with nine separate LSC standards. CMS Ex. 27 (SOD Feb. 3, 2009, with POC). The noncompliance alleged in the SOD included failures to have sufficient smoke detectors, sprinklers, audio visual alert systems, and fire-rated walls and ceilings at different places in the facility. *See id.*; RR at 17-19. The ALJ concluded that Sunshine Haven failed to comply substantially with section 483.70 based on the eight LSC deficiency findings that Sunshine Haven did not

[7] We do not uphold the ALJ's determination that the deficiency resulted in actual harm as none of the circumstances authorizing an ALJ to review CMS's scope and severity determination were present here. *See* 42 C.F.R. § 498.3(b)(14), (d)(10)(ii) (facility may not challenge CMS's determination of the level of noncompliance except where it would affect either the range of CMPs available or a finding of substandard quality of care that results in the loss of NATCEP approval).

dispute. The ALJ did not address a disputed ninth LSC deficiency finding because he concluded, correctly, that the other eight LSC violations provided adequate bases for concluding that there was a violation of section 483.70(a). ALJ Decision at 33 n.15.

Discussion

On appeal, Sunshine Haven does not challenge the ALJ's conclusion sustaining the eight deficiencies, or that they posed a risk for more than minimal harm, but "contends that it corrected all of those deficiencies and achieved substantial compliance with the requirements of 42 C.F.R. § 483.70 prior to the termination of its provider agreement on May 6, 2009." RR at 16-17. According to the undisputed record, however, Sunshine Haven did not complete the work or repairs needed to correct the LSC deficiencies before the termination on May 6, 2009, and, indeed, was still in the process of correcting some of the deficiencies as late as November 2009, six months after termination. *See* RR at 19-20 (acknowledging that work relating to the installation of smoke detectors and audio visual devices required for compliance was still ongoing in November 2009).

Notwithstanding the undisputed evidence of ongoing corrective actions well after the termination date, Sunshine Haven argues that it should be deemed in substantial compliance before that date. Sunshine Haven relies on the testimony of its Administrator that the State LSC surveyor assured him that Sunshine Haven would be deemed to be in compliance so long as Sunshine Haven had in place contracts for the necessary work or repairs or had purchased materials needed for repairs. RR at 17-19, citing Tr. at 323-30. The ALJ found the Administrator's assertion contradicted by Sunshine Haven's November 4, 2009 letter to the State survey agency which showed that the LSC surveyor merely verbally approved the facility's POC. ALJ Decision at 33, citing P. Ex. 6, at 1-2. Approval of a POC is not a determination that a facility has either corrected its deficiencies or achieved substantial compliance. *See, e.g., Cal Turner Extended Care Pavilion,* DAB No. 2030, at 11-12 (2006) (rejecting the facility administrator's testimony that he was told by surveyors that the POC had been accepted and the deficiency had been "cleared," and holding that "[a]pproving a POC as an acceptable statement of how the facility will address the findings is not tantamount to determining that the POC has been successfully implemented and substantial compliance achieved."). Indeed, Sunshine Haven acknowledges that "a temporary waiver of initial certification requirements for a [State] relicensing survey," which is what Sunshine Haven's November 4 letter sought, "is wholly different and separate from demonstrating substantial compliance with participation requirements pursuant to an approved plan of correction." RR at 20. The November 4, 2009 letter does not support the claim that Sunshine Haven believed it was in substantial compliance with section 483.70(a), and in fact confirms that necessary repairs had not been completed more than six months after

the date for completion that Sunshine Haven proposed in its approved POC. Moreover, as the ALJ noted, the letter also shows that a relicensing survey done on November 2, 2009 found that Sunshine Haven had not yet corrected two of the deficiencies from the February 3, 2009 LSC survey. ALJ Decision at 33, citing P. Ex. 6, at 1-2; Tr. at 333-34.

The ALJ also noted, with respect to one of the other LSC deficiencies, the Administrator's testimony that fire-rated ceiling tiles that were ordered on April 27, 2009 and were needed for repairs were not received and installed until two weeks later, after the date of mandatory termination. ALJ Decision at 33-34, citing Tr. at 323-26 and P. Br. at 24. The record clearly supports the ALJ's conclusion that Sunshine Haven was not in substantial compliance with the LSC requirements and thus section 483.70(a) from February 3 to May 6, 2009, the date of the termination of Sunshine Haven's Medicare provider agreement. ALJ Decision at 34.

Sunshine Haven argues that the ALJ's findings of noncompliance with LSC standards were "erroneous and contrary to law" because the State survey agency "failed and refused to conduct any revisit to determine whether Petitioner had corrected the deficiencies . . . identified in the 2/3/09 LSC Survey," which "deprived Petitioner of the process to which it is entitled pursuant to regulation and the SOM." RR at 15-16. This argument has no merit. The absence of a revisit is irrelevant, since the undisputed record establishes that Sunshine Haven failed to correct the LSC deficiencies prior to the termination, and had still not corrected all of them as late as November 2009. Moreover, "whether and when revisit surveys are performed is in the discretion of the State and CMS, not the facility." *Cal Turner Extended Care Pavilion* at 13; *see* SOM § 7317.2 (formerly 7317) ("A facility is not entitled to any revisits"); *see also Oaks of Mid City Nursing and Rehabilitation Center*, DAB No. 2375, at 29 (2011) ("The Medicare statute and regulations permit CMS to terminate a SNF's participation based on one or more deficiencies constituting noncompliance, regardless of the noncompliance's severity or scope, and without first giving the SNF an opportunity to remove the noncompliance.").

E. CMS was required to terminate Sunshine Haven's participation in Medicare effective May 6, 2009, and to impose a DPNA effective February 5, 2009.

As discussed above, Sunshine Haven was not in substantial compliance with Medicare participation requirements beginning on November 5, 2008, based on the survey ending that date, and thereafter remained continuously noncompliant with participation requirements for at least six months, as evidenced by the findings for the surveys ending November 19, 2008, January 21, 2009, and February 3, 2009. Termination of Sunshine Haven's agreement to participate in Medicare was thus required by the Act and regulations. Act § 1819(h)(2)(C); 42 C.F.R. §§ 488.412(a), (d); 488.450(d); 488.456(b). Additionally, imposition of a DPNA was mandatory after the first three months of continuous noncompliance with program participation requirements, or by February 5, 2009. Act § 1819(h)(2)(D); 42 C.F.R. § 488.417(b)(1).

Sunshine Haven argues that the ALJ erred in concluding that the facility had six months of continuous noncompliance as of May 6, 2009 (or three months as of February 5, 2009) because, Sunshine Haven contends, the State survey agency notified it in letters dated January 8 and March 5, 2009 that Sunshine Haven was in substantial compliance with Medicare participation requirements as of December 16, 2008 and January 31, 2009, respectively, and the State survey agency did not notify it of the findings of noncompliance found on the November 19, 2008 and February 5, 2009 surveys until January 14 and March 10, 2009, respectively. RR at 31-32.

There is no merit to these arguments. The State survey agency's letter dated January 8, 2009 states-

> On November 5, 2008, a complaint survey was conducted at your facility [by the State survey agency] to determine if your facility was in compliance with the Federal and State regulations for Nursing Homes. Your facility was found to be in substantial compliance with the Standards of Participation based on the health revisit conducted on December 16, 2008.
>
> Note: **This notice of clearance is limited only to the surveys mentioned above.**

P. Ex. 1 (emphasis added). The State survey agency's March 5, 2009 letter contains the same qualifying language with respect to the November 19, 2008 complaint survey and the revisit conducted on January 31, 2009. P. Ex. 4. As the ALJ observed, the highlighted language clearly indicates that the reference to "substantial compliance" refers only to the surveys identified in the letters and not the subsequent surveys that found overlapping noncompliance. ALJ Decision at 25. Moreover, as a participant in the Medicare program, Sunshine Haven was charged with knowledge of the regulations governing its participation. *See, e.g., Heckler v. Community Health Servs. of Crawford County*, 467 U.S. 51, 63, 64 (1984) (participant in the Medicare program had "duty to familiarize itself with the legal requirements" for cost reimbursement); *Waterfront Terrace, Inc.*, DAB No. 2320, at 7 (2010) (citing *Community Health Servs. of Crawford County*). Sunshine Haven thus knew, or should have known, that it could not rely on the references to being in substantial compliance even as to the limited number of surveys identified in the State survey agency letters since under the governing statutes and regulations, CMS makes the ultimate determination of noncompliance, including whether and when a facility has returned to substantial compliance. Act § 1819(h)(l); 42 C.F.R. §§ 488.11, 488.12, 488.24, 488.452(a)(2); *see Britthaven of Chapel Hill*, DAB No. 2284, at 6-7 (2009) (State agency merely recommends findings of compliance (or noncompliance) and CMS ultimately determines whether the facility is in substantial compliance).

We also agree with the ALJ that Sunshine Haven received adequate notice of the noncompliance findings and the imposition of remedies. ALJ Decision at 51. When Sunshine Haven received the two "notice of clearance" letters from the State survey agency dated January 8 and March 5, 2009 (relating, respectively, to the surveys ending November 5 and 21, 2008), it was aware that the State survey agency had, prior to each notice, conducted additional surveys not referenced in the notices. The surveyors conducted exit conferences after each of the surveys. *See, e.g.*, CMS Exs. 10, 20, 26, 38, 50, 59 (exit conference attendance lists for surveys ending November 5 and 19, 2008, January 21, February 5, April 2 and 20, 2009); CMS Ex. 27, at 14 (SOD for LSC survey stating that the Administrator acknowledged the survey findings in an exit conference during the survey). Exit conferences are held to inform the facility of the survey team's observations and preliminary findings. SOM App. P § II.B. Absent evidence to the contrary, it is therefore reasonable to infer that Sunshine Haven was informed at those conferences of the noncompliance found by the surveys.

Sunshine Haven also was aware, from notices from the State survey agency dated November 19, 2008 and January 14, 2009, that its provider agreement would be terminated by April 5, 2009 if it had not returned to substantial compliance with the Medicare participation requirements and, as subsequently notified by the CMS letter dated April 21, 2009, that the termination date had been extended to May 6, 2009, six months after the survey ending November 5, 2008. CMS Exs. 1, at 6; 2; P. Ex. 2. The State survey agency also informed Sunshine Haven in a March 10, 2009 letter that the LSC survey had found noncompliance, and that its provider agreement would still be terminated effective April 5, 2009 if substantial compliance was not achieved by that date. P. Ex. 7, at 1.

Even if Sunshine Haven could show, notwithstanding all of this evidence, that the State survey agency notice letters erroneously led it to believe that it had returned to substantial compliance by December 16, 2008 or January 31, 2009, that would not be a basis for overturning the findings of noncompliance upheld by the ALJ based on his de novo review. As the Board has held, "the issue before the ALJ is whether 'the evidence as it is developed before the ALJ' supports the finding of noncompliance . . . ." *Sunbridge Care and Rehabilitation for Pembroke*, DAB No. 2170, at 26-27 (2008), citing *Emerald Oaks*, DAB No.1800, at 13 (2001). A state survey agency's "failure to follow survey procedures 'does not . . . [r]elieve a [facility] of its obligation to meet all requirements for program participation; or . . . [i]nvalidate adequately documented deficiencies.'" *Manor of Wayne Skilled Nursing and Rehabilitation*, DAB No. 2249, at 12 (2009) (quoting 42 C.F.R. § 488.318(b)); *see also North Carolina State Veterans Nursing Home, Salisbury*, DAB No. 2256, at 24 (2009) ("ALJ reviews de novo whether the evidence supports

CMS's (and the State's) determination of noncompliance . . . Thus, an allegation that a State surveyor failed to follow the procedures set forth in the regulations is irrelevant 'where objective evidence [such as a facility's own records] establishes noncompliance . . . .'"). As the ALJ held here, Sunshine Haven "had six months to return to substantial compliance" and "has . . . had the opportunity to show . . . on *de novo* review that it returned to substantial compliance during the six month survey cycle, and it has failed to do so." ALJ Decision at 51.

We also find no error in the ALJ's rejection of Sunshine Haven's arguments that CMS's alleged failure to notify the public of the termination or CMS's alleged failure to transfer Sunshine Haven's residents following the termination (an obligation imposed, in any event, on the State, not CMS) would be a basis to reverse the termination. *Id.* at 51-52. The ALJ correctly concluded that "nothing in 42 C.F.R. § 488.456 suggests that failure to comply strictly with the publication requirements would be a basis for invalidating the termination." *Id.*, citing *Beechwood Sanitarium*, DAB No. 1824, at 17-18 (2002). Sunshine Haven also has cited no authority for its proposition that CMS's alleged failure to transfer the residents would be a basis for avoiding the statutorily mandated termination and DPNA imposed by CMS here.

For the reasons above, we conclude that the ALJ's determinations that Sunshine Haven was not in substantial compliance with participation requirements for the entire period of November 5, 2008 to May 6, 2009, that a mandatory DPNA was triggered effective February 5, 2009 and continued to termination on May 6, 2009, and that termination of Sunshine Haven's participation in Medicare on May 6, 2009, was required by the Act, are supported by substantial evidence and are free of legal error.

II. We sustain the imposition of four per-instance CMPs totaling $14,000

A. Sunshine Haven was not in substantial compliance with 42 C.F.R. § 483.13(b), (c)(1)(i), and § 483.13(c) at a level that posed immediate jeopardy, as found in the survey ending February 5, 2009, and we sustain the imposition of per-instance CMPs of $5,000 for each of the two deficiencies.

Background

The ALJ sustained two findings from the survey ending February 5, 2009 that Sunshine Haven was not in substantial compliance at the immediate jeopardy level with section 42 C.F.R. § 483.13(b) and (c)(1)(i), and not in substantial noncompliance at the immediate jeopardy level with section 483.13(c). Section 483.13(b) states that a resident "has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and

involuntary seclusion," and section 483.13(c)(1)(i) states that a facility must "[n]ot use verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion." Section 483.13(c) states that a facility "must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property."[8] The ALJ sustained the imposition of per-instance CMPs of $5,000 for each of the two findings of noncompliance ($10,000 total).

The noncompliance findings concern assaults by male Resident 50 on female Residents 18 and 6. Resident 50 was 81 years old upon admission on June 10, 2008 and had an unspecified persistent mental disorder and COPD. ALJ Decision at 36, citing CMS Ex. 34, at 1, 2, 43. He was assessed as being moderately competent. *Id.* He was diagnosed with dementia upon his transfer to another facility on February 5, 2009. *Id.* Resident 18 had been admitted to the facility in April 2007, at the age of 92 years, and had diagnoses that included pneumonia, emphysema, peripheral neuropathy, transient cerebral ischemia, depression, arthritis and senile dementia; her competency was assessed as "moderate." ALJ Decision at 36, citing CMS Ex. 33, at 1, 3, 11. Facility records describe Resident 50 and Resident 18 as having had a "relationship," and a care plan entry from December 2008 provides for Resident 18 "and partner" to "have room privacy for sexual needs." CMS Ex. 33, at 7, 24, 27-28.

On January 2, 2009, Resident 50 physically assaulted Resident 18 in her room, bloodying her nose. ALJ Decision at 36; CMS Ex. 33, at 4-9, 14, 27. The facility updated Resident 50's care plan on January 2, 2009 to require "frequent checks" (without specifying the frequency) and monitoring of Resident 50 to keep him "away from" Resident 18. CMS Ex. 34, at 46. The facility also moved Resident 18 to a room farther away from Resident 50, after Resident 50 refused to be moved. *Id.* at 35; CMS Ex. 33, at 14. Yet, two days later on January 6, 2009, Resident 50 was observed in a hallway kissing and fondling the breasts of Resident 6, who was noted to have low competency and was considered non-verbal and incapable of asking for sexual contact. ALJ Decision at 37; CMS Exs. 32, at 2, 5-6; 34, at 6-8, 10, 12. Resident 50's care plan was then updated to "continue" 30-minute checks; the requirement for 30-minute checks also was recorded in a nursing note on January 5, 2009 and a social service progress note on January 6, 2009. CMS Ex. 34, at 24, 37, 46.

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[8] The survey ending February 5 alleged a total of 16 deficiencies amounting to noncompliance. CMS Exs. 1, at 1-2 (notice letter Mar. 16, 2009); 29 (SOD). The ALJ noted that Sunshine Haven did not dispute six of those deficiencies, and the ALJ did not address Sunshine Haven's dispute of the remaining deficiencies, on the ground that they were not cited as the basis for the CMPs imposed. ALJ Decision at 35; CMS Ex. 1, at 1-4. Neither party takes issue with the ALJ's approach. The Board has held that an ALJ need not address noncompliance findings that are not material to the outcome of the appeal. *Plott Nursing Home*, DAB No. 2426, at 23-26 (2011); *see also The Residence at Salem Woods*, DAB No. 2052, at 11 (2006) (stating that an ALJ "may . . . find the CMP amount to be reasonable based on fewer deficiencies than those upon which CMS relied to impose the penalty").

Notwithstanding those interventions, Sunshine Haven's records show that Resident 50 had further physical contact with Resident 18, on January 20, 21, 23, 28, and 29, 2009. CMS Ex. 33, at 17, 19, 21; 34, at 28-31. Additionally, the surveyor saw physical contact between Resident 50 and Resident 18, who were in the hallway unsupervised, on January 27 and 29, 2009. CMS Ex. 29, at 3 (SOD).

The ALJ determined that Sunshine Haven was not in substantial compliance with sections 483.13(b) and (c)(1)(i) because, despite its policy prohibiting abuse, Sunshine Haven failed to protect its residents from abuse by Resident 50 after his assault of Resident 18 on January 2, 2009. Most notably, the ALJ found no evidence that the facility had actually implemented the interventions of checking on Resident 50 either frequently or every 30 minutes as required by care plan updates. ALJ Decision at 40. Sunshine Haven stated in a letter to the State survey agency dated January 12, 2009 regarding the assault on Resident 6 that it was conducting 15-minute checks on Resident 50. CMS Ex. 32, at 5. Yet, the ALJ found, Sunshine Haven's records document 15-minute checks done only from 12:15 p.m. on January 29, 2009 to 12:30 p.m. on January 30, 2009. ALJ Decision at 40; CMS Ex. 34, at 41-42. The ALJ also noted some confusion as to how often Sunshine Haven was supposed to check on the resident, because another letter from Sunshine Haven to the State agency dated January 12, 2009 states that Resident 50 was on 30-minute checks. ALJ Decision at 37; CMS Ex. 34, at 10.

The evidence, the ALJ found, "shows that Petitioner's interventions were ineffective to prevent Resident 50 from abusing Resident 6 and to prevent several subsequent instances of Resident 50 having contact with Resident 18, including touching and kissing." *Id.* at 40. The ALJ rejected Sunshine Haven's argument that its interventions were effective because there were no further allegations of abuse after the incident with Resident 6. *Id.* He pointed out that the claimed interventions had not prevented the sexual assault on Resident 6, only two days after the assault on Resident 18. *Id.* He also found that Sunshine Haven had not implemented the monitoring required by Resident 50's care plan. *Id.* Similarly, he did not agree that the several observations by staff of physical contact between Residents 50 and 18 meant that Resident 50 was being monitored adequately, because "a chance observation of a contact by staff is not the same as staff supervising the contact to ensure no opportunity for abuse occurred." *Id.* at 41. He also found that that Sunshine Haven "does not address the failure of its Administrator and [Director of Nursing] to follow the procedures specified" in Sunshine Haven's abuse policy. *Id.*; *see also* CMS Ex. 29, at 3 (SOD stating that surveyor observed Residents 18 and 50 unsupervised and having physical contact on January 27 and 29, 2009). He rejected Sunshine Haven's argument that it could not prevent contacts between Resident 50 and other residents without violating resident rights, in part because he found no evidence that Sunshine Haven's interdisciplinary care planning team had ever considered that issue. ALJ Decision at 40.

Discussion

Sunshine Haven on appeal states that it "does not dispute the facts about what occurred between Resident 50, Resident 6 and Resident 18" but "does take issue with the ALJ's application of law to those facts, as well as the conclusion . . . that 'Petitioner's interventions were ineffective to prevent Resident 50 from abusing Resident 6 and to prevent several subsequent instances of Resident 50 having contact with Resident 18, including touching and kissing.'" RR at 21, quoting ALJ Decision at 40. It argues that "monitoring, supervision and redirection implemented by the Facility following the January 2, 2009 physical assault of Resident 18 were demonstrated to be effective to prevent further physical abuse of Resident 18" by Resident 50. RR at 22.

Whether Resident 50 committed further physical assaults on Resident 18 is not the issue; the issue is whether the facility responded appropriately to the physical assault that Resident 50 did commit with regard to this resident and implemented measures sufficient to protect her and other residents from abuse by Resident 50. Here, Sunshine Haven did not even implement all of the interventions it adopted following the assault on Resident 18, and Resident 50 in fact went on to abuse Resident 6 and have physical contact with Resident 18 on seven occasions (five noted by staff and two noted by the surveyor). Sunshine Haven nowhere disputes the ALJ's findings that it did not conduct the "frequent" checks of Resident 50 required by his care plan on January 2, 2009 or the 30-minute checks required on January 4, 2009, through at least January 29, 2009, when nursing and progress notes show that 15-minute checks were ordered, or that it failed to conduct the 15-minute checks except for the one 24-hour period the ALJ noted. Sunshine Haven has thus shown no error in the ALJ's conclusions that in its response to the actions of Resident 50, Sunshine Haven failed to take necessary steps to protect its residents from abuse by Resident 50 after he abused Resident 18, a violation of 42 C.F.R. § 483.13(b) and (c)(1)(i), and that Sunshine Haven failed to implement its abuse policy in violation of 42 C.F.R. § 483.13(c).

Sunshine Haven attempts to minimize the significance of Resident 50's assault on Resident 18 on January 2, 2009, on the ground that it occurred "within the context of what Resident 18 and Resident 50 treated as a boyfriend-girlfriend relationship." RR at 23. Sunshine Haven argues that "[g]iven the close relationship between Resident 18 and Resident 50 and Resident 18's description of the incident, there was no evidence that would have reasonably indicated to the Facility that Resident 50 would act out violently towards any other resident." RR at 23-24. Sunshine Haven's statement focuses on the danger posed to residents other than Resident 18 and ignores the risk that he would assault Resident 18 again. In light of the close relationship, it was clearly foreseeable that Resident 50 would seek her out and might injure her again. In this regard we note that the State incident report of the assault signed by Sunshine Haven's administrator states that Resident 18 reported that Resident 50 "was beating the . . . out of me." CMS Ex. 33, at 7.

Sunshine Haven also cites no support for the disturbing notion that a male resident who batters a female resident with whom he has had a romantic relationship need not be viewed as a potential threat to other residents, particularly women. Sunshine Haven also does not dispute the ALJ's observation that "[t]he need for fifteen-minute checks and one-on-one supervision was recognized when Resident 50 became more aggressive with staff[.]" ALJ Decision at 40.

The facility also argues that "[i]mmediate implementation of one-on-one supervision of Resident 50 was not required, nor reasonable under all of the circumstances," apparently in response to the ALJ's finding that there was "no evidence that the care planning team attempted to devise an intervention, such as one-on-one supervision, intended to balance the need to protect residents from potential abuse by Resident 50 and the right of Resident 18 to have access to him." RR at 24; ALJ Decision at 40. This argument ignores the ALJ's conclusion that Sunshine Haven was noncompliant for failing to implement even the 30- and 15-minute monitoring the facility had required earlier, and the fact that Sunshine Haven's records show that it indeed implemented one-on-one monitoring from January 29 through his discharge from the facility on February 5, 2009. CMS Ex. 34, at 31-34, 41-42.

The ALJ correctly rejected as beyond the scope of his review Sunshine Haven's argument that CMS's determination that the noncompliance posed immediate jeopardy to resident health and safety was clearly erroneous. ALJ Decision at 41. As the ALJ noted, a facility may challenge CMS's determination of the scope and severity of the level of noncompliance only if it would affect "[t]he range of" the CMP amounts CMS could impose. *Id.* citing 42 C.F.R. § 498.3(b)(14), (d)(10)(i). Here, CMS imposed *per-instance* CMPs of $5,000 for each of the two deficiencies, and the regulations authorize only one range of per-instance CMPs for both immediate-jeopardy and less-than-immediate-jeopardy-level deficiencies. 42 C.F.R. § 488.438(a)(2); *see, e.g., Heritage Park Rehabilitation and Nursing Center*, DAB No. 2231, at 15 (2009) ("an immediate jeopardy finding does not affect the range of CMP amounts in a per instance CMP").[9]

Regarding the amount of the CMP for the two deficiencies, Sunshine Haven's request for review states generally that the ALJ's determination that "[per-instance] CMPs totaling $14,000 are reasonable enforcement remedies" is "unsupported by and contrary to the record evidence, erroneous and contrary to law and applicable regulations[.]" RR at 2-3, citing ALJ Decision at 48. Sunshine Haven does not, however, allege any specific error

[9] We note that the loss of Sunshine Haven's NATCEP approval was required, as a matter of law, by the termination of Sunshine Haven's Medicare agreement and imposition of the DPNA, which remedies would not be affected by a reduction in the CMP amount or a challenge to the level of noncompliance.

in the ALJ's analysis of the regulatory factors that must be applied to determine reasonable CMP amounts. ALJ Decision at 50-51, citing 42 C.F.R. § 488.438(f). We have reviewed that analysis and find no error. As the ALJ noted, the deficiencies were "serious" and involved a pattern of noncompliance that affected multiple residents. *Id.* at 51. We therefore conclude that the ALJ's determinations that Sunshine Haven was not in substantial compliance with 42 C.F.R. § 483.13(b) and (c)(1)(i) and with § 483.13(c), that he was not authorized to review CMS's determination that the noncompliance posed immediate jeopardy, and that the imposition of a CMP of $5,000 for each of the two instances of noncompliance was reasonable, were supported by substantial evidence and were not legally erroneous.

B. Sunshine Haven was not in substantial compliance with 42 C.F.R. § 483.13(c) and with § 483.13(c)(1)(ii)-(iii) and (c)(2)-(4), as found in the survey ending April 2, 2009, and we sustain the imposition of CMPs of $2,000 for each of the two deficiencies.

Background

The ALJ sustained findings of noncompliance with 42 C.F.R. § 483.13(c) and with 42 C.F.R. § 483.13(c)(1)(ii)-(iii) and (c)(2)-(4) based on the survey ending April 2, 2009. ALJ Decision at 41-44. Section 483.13(c), as noted earlier, states that the facility "must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property." Sunshine Haven's request for review addresses only the ALJ's determination upholding the CMP based on Sunshine Haven's noncompliance with section 483.13(c). Accordingly, we discuss only that issue and affirm the ALJ's findings of noncompliance with section 483.13(c)(1)(ii)-(iii) and (c)(2)-(4) without further discussion.

The ALJ sustained the imposition of per-instance CMPs of $2,000 for each noncompliance finding ($4,000 total). *Id.* at 48-51; CMS Exs. 1, at 9-11 (CMS notice Apr. 22, 2009), 39, at 1-22 (SOD). The April 2, 2009 survey also found that Sunshine Haven was not in substantial compliance with two other regulatory requirements that the ALJ was not required to address as CMS imposed no CMPs for that noncompliance. *Id.*; ALJ Decision at 41-42.

The noncompliance cited in the SOD for the survey ending April 2, 2009 concerned Sunshine Haven's failure to respond properly to injuries to Resident 4, who was 95 years old at the time of the April 2, 2009 survey and required limited assistance of one person for locomotion, which was primarily by wheelchair. ALJ Decision at 42; CMS Ex. 45, at 52-58. An incident report dated March 18, 2009 at 7:30 a.m. states that the resident

turned her ankle that morning and developed a bruise on her heel.[10] CMS Ex. 45, at 1. That evening she complained of pain and was unable to stand on her right foot. *Id.* at 4. An incident report dated March 19, 2009 at 6:40 p.m. states that the resident's right ankle was swollen, bruised, warm to the touch, and unable to bear weight when the resident was standing. *Id.* at 2. An x-ray later that evening disclosed a fracture of her right heel. *Id.* at 7.

The ALJ concluded that Sunshine Haven was not in substantial compliance with section 483.13(c) based on uncontested evidence that, following the report of the ankle injury with resultant bruising on the morning of March 18, the facility: (1) did not assess the ankle until more than 35 hours later on March 19, 2009, after the ankle injury was again noted on a second incident report and (2) the facility conducted no investigation even after the second report, although its policy required that it investigate any "possible unexplained injury." ALJ Decision at 43; CMS Ex. 36, at 24, 32. He determined that the $2,000 per-instance CMP was reasonable under the factors in section 488.438(f). ALJ Decision at 43-44, 48-51.

The ALJ also concluded that the evidence established that Sunshine Haven was not in substantial compliance with section 483.13(c)(1)(ii)-(iii) and (c)(2)-(4) because Sunshine Haven did not present evidence "that it thoroughly investigated" either the injuries to Resident 4's right ankle and heel or "four incidents in February and March 2009" involving other residents, "including: an injury of unknown origin reported on February 16, 2009; a head injury reported on February 24, 2009; [and] an unwitnessed fall reported on March 4, 2009[.]" *Id.* at 44. Again, he determined that the $2,000 per-instance CMP was reasonable. *Id.* at 48-51. The ALJ found that Sunshine Haven "does not dispute the facts or deny the alleged deficiency in its post-hearing briefing . . . or in its prehearing brief[.]" ALJ Decision at 44.

Discussion

With respect to the ALJ's findings of noncompliance under section 483.13(c), Sunshine Haven argues only that the ALJ wrongly rejected its position that the deficiency from the April 2, 2009 survey "was not properly cited as a deficiency because it was based on findings of noncompliance which were initially found in the . . . deficiency cited [under the same regulation] in the 2/5/09 Survey SOD," which deficiency "was under an approved plan of correction not due to be completed until April 19, 2009." RR at 24. Sunshine Haven's argument has no merit.

[10] The incident report from March 19, 2009 refers to an unwitnessed injury of unknown origin, and does not indicate whether the resident sustained a second injury to her ankle on March 19, 2009, or whether the report simply describes the effects of the injury sustained on March 18, 2009.

At the outset, we find no support in the record for Sunshine Haven's argument that the deficiencies from the two surveys alleging noncompliance with section 483.13(c) "are virtually identical in nature" simply because both involved Sunshine Haven's failure to properly assess a resident who complained of pain, and in both cases the facility's POC called for it to report, assess and document pain, and to discuss and monitor the results of the assessments through the facility's quality assurance committee. RR at 25, citing

CMS Exs. 29, at 10; 39 at 1. As the ALJ noted, the deficiencies cited during the February 5 and April 2, 2009 surveys involved different residents and different circumstances and occurred on different dates. ALJ Decision at 43. Moreover, the noncompliance found in the April 2, 2009 survey involved more than just the facility's failure to address the resident's pain, since it involved the facility's failure to implement its policy to investigate any possible unexplained injury. CMS Exs. 36, at 32 (facility policy); 45, at 2 (March 19, 2009 incident report describing resident's injury as of unknown origin).

But even if the two deficiencies were "virtually identical," Sunshine Haven has cited no regulation that would support its assertion that CMS cannot impose remedies for a deficiency discovered while the facility is under a plan of correction for an earlier deficiency. Sunshine Haven cites 42 C.F.R. § 483.75(o)(4), but that regulation merely states that "[g]ood faith attempts by the [quality assurance] committee to identify and correct quality deficiencies will not be used as a basis for sanctions." The purpose of this regulation is to encourage the kind of systemic actions that can improve quality of care, not to insulate facilities that fail to properly care for residents during a period of correction from findings of noncompliance. The regulations state that CMS "may apply one or more remedies for each deficiency constituting noncompliance or for all deficiencies constituting noncompliance." 42 C.F.R. § 488.402(c); *see also* 42 C.F.R. § 488.408(d)(3) (CMS "may apply one or more of the remedies in Category 2 to any deficiency except when . . . the facility is in substantial compliance"). These regulations contain no qualifying language limiting CMS's authority to impose remedies for noncompliance simply because a facility has submitted an approved POC for previous instances of noncompliance. *See also Lakeridge Villa Health Care Center*, DAB No. 1988, at 9 (2005); *aff'd*, *Lakeridge Villa Health Care Ctr. v. Leavitt*, 202 F. App'x 903 (6th Cir. 2006) (stating that while 42 C.F.R. § 488.412 permits CMS to allow a facility with deficiencies to continue to participate in Medicare for up to six months if it has an approved POC, "[n]othing in the regulation suggests, however, that CMS may not impose a remedy such as a CMP during the period for corrective action specified in such a plan.").

Accordingly, we conclude that the ALJ's determinations that Sunshine Haven was not in substantial compliance with section 483.13(c) and with section 483.13(c)(1)(ii)-(iii) and (c)(2)-(4) for the period April 2 through 20, 2009 and imposing a CMP of $2,000 for the noncompliance with each of the two requirements, were supported by substantial evidence and were not legally erroneous.

Conclusion

For the reasons discussed, we sustain the ALJ's determinations that Sunshine Haven was continuously not in substantial compliance with Medicare requirements of participation for the period November 5, 2008 through at least May 5, 2009, based on the findings of the surveys ending November 5 and 19, 2008 and January 21, 2009 and the LSC survey ending February 3, 2009, requiring the termination of its Medicare participation agreement effective May 6, 2009 and the imposition of a DPNA effective February 5, 2009. We also sustain the ALJ's determinations upholding the imposition of two per-instance CMPs of $5,000 each for noncompliance with 42 C.F.R. § 483.13(b), (c), and 483.13(c)(1)(i) based on the February 5, 2009 survey, and the imposition of two per-instance CMPs of $2,000 each for noncompliance with 42 C.F.R. § 483.13(c), and with 483.13(c)(1)(ii)-(iii) and (c)(2)-(4) based on the April 2, 2009 survey.

/s/
Judith A. Ballard

/s/
Leslie A. Sussan

/s/
Sheila Ann Hegy
Presiding Board Member