Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

NMS Healthcare of Hagerstown
Docket No. A-14-95
Decision No. 2603
November 24, 2014

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Petitioner NMS Healthcare of Hagerstown (NMS), a skilled nursing facility (SNF) in Maryland, requested review of an Administrative Law Judge's decision sustaining the imposition of an $8,000 per-instance civil money penalty (CMP) by the Centers for Medicare & Medicaid Services (CMS) as a remedy for NMS's failure to be in substantial compliance with Medicare participation requirements for long-term care facilities in the federal regulations. *NMS Healthcare of Hagerstown (CCN: 215256)*, DAB CR3232 (2014) (ALJ Decision). CMS determined that NMS was not in substantial compliance with the requirement in 42 C.F.R. § 483.25(h)(1) that long-term care facilities, including SNFs, maintain a resident environment that is as free of accident hazards as is possible and that NMS's noncompliance posed immediate jeopardy to the health and safety of its residents. The ALJ granted CMS's motion for summary judgment, which NMS opposed, sustaining CMS's determination of noncompliance and holding that he had no authority to hear or decide NMS's challenge to the immediate jeopardy determination. NMS asserts on appeal that "CMS did not meet the burden entitling it to Summary Judgment, a full hearing on whether CMS's actions were arbitrary and capricious should have been given, and NMS would have prevailed in showing that the actions of CMS were, in fact, arbitrary and capricious." Request for Review of Summary Judgment Decision (RR) at 1. NMS does not challenge the ALJ's determination that the amount of the per-instance CMP ($8,000) is reasonable, applying the factors set forth at 42 C.F.R. §§ 488.438(f) and 488.404, and we affirm that amount summarily.[1]

[1] We note, however, that the following statement by the ALJ about the factors an ALJ considers when determining whether the amount of a CMP is reasonable is not accurate: "These factors include the seriousness of a facility's noncompliance (measured without regard to the presence or absence of immediate jeopardy where a per-instance civil money penalty is at issue . . . ." ALJ Decision at 3. Section 488.404, as the ALJ correctly noted, is incorporated by reference into section 488.438(f)(3). Section 488.404 states that in determining the "seriousness of deficiencies," CMS considers the severity of those deficiencies, including, expressly, "[w]hether [they] constitute . . . [i]mmediate jeopardy to resident health or safety," as well as the scope of the deficiencies. 42 C.F.R. § 488.404(b)(1)(iv), (b)(2). Thus, an immediate jeopardy citation is relevant to the seriousness of deficiencies and is a factor to be considered by an ALJ when determining whether the amount of a CMP is reasonable even where, as here, the immediate jeopardy determination itself is not subject to review because CMS imposed a per-instance CMP.

For the reasons discussed below, we reject NMS's arguments and affirm the ALJ Decision.

Legal Background

To participate in the Medicare program, a long-term care facility, including a SNF, must be in "substantial compliance" with the requirements in 42 C.F.R. Part 483. 42 C.F.R. §§ 483.1, 488.400. Under agreements with the Secretary of Health and Human Services, state survey agencies conduct onsite surveys of facilities to verify compliance with the Medicare participation requirements. *Id.* §§ 488.10(a), 488.11; *see also* Social Security Act (Act) §§ 1819(g)(1)(A), 1864(a). State survey agencies conduct periodic surveys as well as surveys to investigate complaints that facilities are violating one or more participation requirements. 42 C.F.R. § 488.308.

A state survey agency reports any "deficiencies" it finds in a Statement of Deficiencies (SOD), which identifies each deficiency under its regulatory requirement. A "deficiency" is any failure to comply with a Medicare participation requirement, and "substantial compliance" means "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301 (also defining "noncompliance" as "any deficiency that causes a facility to not be in substantial compliance").

CMS may impose one or more remedies on noncompliant facilities, including per-day and/or per-instance CMPs. 42 C.F.R. §§ 488.402(b)-(c), 488.406, 488.408(d)(1)(iii)-(iv), (e)(1)(iii)-(iv), 488.430(a). When CMS imposes a per-instance CMP, it chooses an amount within the $1,000-$10,000 range designated for per-instance CMPs. *Id.* §§ 488.408(d)(1)(iv), (e)(1)(iv). This range applies to a per-instance CMP regardless of the level of noncompliance found by CMS. *Id.*; *compare* 42 C.F.R. §§ 488.408(d)(1)(iii) and 488.408(e)(1)(iii) (providing two ranges for per-day CMPs, depending on the level of noncompliance).

Case Background[2]

This case involves a finding of noncompliance with section 488.25(h)(1) based on findings from a survey that ended on July 8, 2013. The surveyors found water temperatures in residents' rooms that were excessively high and put residents at risk of harm from scalding. NMS does not dispute here, and did not dispute below, the

[2] The information in this section is drawn from the ALJ Decision and the record before the ALJ and is recited for background purposes only, not to replace the ALJ's statement of the undisputed facts.

following facts alleged by CMS in support of summary judgment. Water temperatures in taps in multiple resident rooms reached or approached 130 degrees Fahrenheit (130ºF). ALJ Decision at 3, *citing* CMS Ex. 5, at 11-13; CMS Ex. 14, at 1, 3; and CMS Ex. 15, ¶¶ 8-25. Residents with mental impairments such as dementia, schizophrenia, paranoia, bipolar disorder, poor judgment, mood swings, anxiety, psychosis and behavioral problems inhabited these rooms. *Id.* at 4, *citing* CMS Exs. 13, 15-16. Water heated to temperatures in excess of 120ºF can produce severe scalding and burns. *Id.*, *citing* CMS Ex. 11, at 15. Water heated to 127ºF can cause a third-degree burn in a minute, and water heated to 130ºF can cause a third-degree burn in considerably less time. *Id.* A third degree burn is an extremely serious injury that "penetrate[s] the entire thickness of the skin and permanently destroy[s] tissue." *Id.*, *citing and quoting* CMS Ex. 11, at 16. Third-degree burns "present as loss of skin layers, often painless ([although] pain may be caused by patches of first- and second-degree burns surrounding third-degree burns), and [as] dry, leathery skin." *Id.* "Skin may appear charred or have patches that appear white, brown or black." *Id.*

Based on these undisputed facts, the ALJ upheld CMS's determination that NMS was not in substantial compliance with section 483.25(h)(1) because the excessive water temperatures presented a hazard to the residents. The ALJ also determined that because CMS imposed only a per-instance CMP, NMS's challenge to CMS's conclusion that the noncompliance caused immediate jeopardy was irrelevant and beyond his authority to hear and decide.

Standard of review

The Board reviews an ALJ's grant of summary judgment de novo, construing the facts in the light most favorable to the appellant and giving it the benefit of all reasonable inferences. *See Livingston Care Ctr.*, DAB No. 1871, at 5 (2003), *aff'd, Livingston Care Ctr. v. U.S. Dep't of Health & Human Servs.*, 388 F.3d 168, 172-73 (6th Cir. 2004). Summary judgment is appropriate where there is no genuine dispute about a fact or facts material to the outcome of the case and the moving party is entitled to judgment as a matter of law. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). The party moving for summary judgment has the initial burden of demonstrating that there is no genuine issue of material fact for trial and that it is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party carries that burden, the non-moving

party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (*quoting* Rule 56(e) of the Federal Rules of Civil Procedure).[3]

The Board reviews a disputed conclusion of law to determine whether it is erroneous. *Departmental Appeals Board, Guidelines for 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/prov.html; *Golden Living Ctr. – Frankfort v. Sec'y of Health & Human Servs.*, 656 F.3d 421, 426-27 (6th Cir. 2011).

Analysis

A. *Summary judgment for CMS was appropriate since NMS disputed no fact material to the ALJ's conclusion that NMS was not in substantial compliance and conceded its noncompliance with section 483.25(h)(1).*

Section 483.25(h) addresses a SNF's (or other nursing facility's) responsibility for accident prevention. Accident prevention is one of the quality-of-care requirements listed in section 483.25, and a facility must maintain substantial compliance with all of these requirements in order to participate in the Medicare program. Each listed quality of care requirement must be read in the context of section 483.25's introductory statement that providers "must provide" to "[e]ach resident . . . 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." Section 483.25(h)(1), the specific requirement found unmet here, provides as follows:

> *Accidents*: The facility must ensure that –
>
> (1) The resident environment remains as free of accident hazards as is possible . . . .

42 C.F.R. § 483.25(h)(1). The ALJ entered summary judgment for CMS after concluding that NMS was not in substantial compliance with section 483.25(h)(1) based on the excessively hot water temperatures in the taps in multiple rooms housing mentally impaired residents found during the July 8, 2013 survey at NMS. The ALJ cited

[3] Effective December 10, 2010, Rule 56 was "revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts." Committee Notes on Rules – 2010 Amendment, available at http://www.law.cornell.edu/rules/frcp/rule_56. The revisions alter the language of the rule, but the "standard for granting summary judgment remains unchanged." *Id*.

"undisputed material facts" of record showing that the water temperatures in the residents' rooms exceeded 120°F by as much as 10°F and that any temperature above 120°F posed a risk of scalding and third degree burns to the residents of those rooms. ALJ Decision at 3-4. The ALJ also noted, "Petitioner has conceded its noncompliance . . . ." ALJ Decision at 3.

As stated above, under the standard of review that applies to this case, the Board is required to make a de novo review of the record before the ALJ and determine whether summary judgment for CMS on the issue of NMS's noncompliance was appropriate. In its Request for Review, NMS purports to disagree with the ALJ's conclusion that there was no material fact in dispute and that summary judgment for CMS was appropriate. NMS asserts, "There are issues of genuine fact that entitle NMS to a hearing." RR at 1. However, NMS does not identify any dispute about any fact supporting the ALJ's conclusion that NMS was not in substantial compliance with section 483.25(h)(1), much less any fact material to that conclusion. Instead, NMS asserts that CMS did not address its contention that CMS "has acted in an arbitrary and capricious manner in assessing these penalties" and that the ALJ "erred in granting CMS summary judgment against NMS," giving "only a cursory mention of th[is] key argument in NMS's appeal . . . ." *Id*. at 1-2, 5. NMS further asserts that it was entitled to a "full hearing on whether CMS's actions were arbitrary and capricious." RR at 1.

These assertions state a legal issue, not a factual dispute, and, as such, do not preclude summary judgment. The ALJ properly decided this case on summary judgment because the record before the ALJ shows no genuine dispute about any material fact. Indeed, as CMS correctly points out, NMS's hearing request stated that it "d[id] not challenge the facts cited"; conceded "that the water exceeded the temperature recommended in the State Regulations"; and "recognize[d] that this citation is properly cited under the Federal regulation tagged F-323."[4] CMS's Response to Petitioner's Request for Review at 6 (CMS Response); *see also* ALJ Decision at 3 (noting NSM's concession of noncompliance); NMS's Response to CMS's Motion for Summary Judgment and Supporting Brief (Prehearing Exchange) (Response to CMS Motion) at 3 ("NMS concurs that the facts supporting the deficiency are undisputed."). NMS's failure to identify in its Request for Review any fact that it disputes, material or otherwise, reinforces the correctness of the ALJ's use of the summary judgment procedure to decide this case.

NMS's argument that the ALJ should have considered whether CMS's actions were arbitrary and capricious also reflects a misunderstanding about the roles of the ALJ and the Board in the administrative appeal process governed by 42 C.F.R. Part 498 in this case and how those roles differ from that of a federal court reviewing final agency

[4] "F-323" is a survey "tag number" used by the surveyors on the SOD that correlates to the regulatory requirement at section 483.25(h)(1). *See* CMS Ex. 5, at 11.

actions. The arbitrary and capricious standard, as NMS recognizes, RR at 2-3, is an Administrative Procedure Act (APA) standard for court review of final agency actions set forth at 5 U.S.C. § 706. The ALJs and the Board are adjudicators in an administrative appeal process, not courts, and neither CMS's determination nor the ALJ Decision is a final agency action in matters subject to appeal under Part 498. *See* 42 C.F.R. § 498.90 (providing that the Board decision is the final agency action that may be appealed to federal court). As the Board held in *Hanover Hill Health Care Ctr.*, DAB No. 2507, at 7 (2013), "[n]othing in the APA . . . applies the 'arbitrary and capricious standard' to Board review of an ALJ decision on behalf of the Secretary . . . ." *See also Cal Turner Extended Care Pavilion*, DAB No. 2030, at 7 (2006) (discussing "the distinction between the oversight role of a federal court reviewing agency decisions to determine if an adequate basis is articulated and the internal agency appeals process for formulating final agency action"). Thus, there is no merit to NMS's argument that the ALJ was required to consider whether CMS's actions were arbitrary and capricious.

B. *The ALJ correctly concluded that he had no authority to review CMS's immediate jeopardy determination in this case.*

As indicated above, the ALJ held that he was not authorized to review the scope and severity level – widespread immediate jeopardy – determined by CMS. NMS makes several arguments challenging that holding. For the reasons stated below, we conclude that none of those arguments has merit.

1. CMS's immediate jeopardy determination is not subject to review where, as here, CMS imposes a per-instance CMP for the noncompliance associated with that determination.

At the outset, we note that NMS misstates the basis for the ALJ's holding that he had no authority to review CMS's immediate jeopardy determination. NMS states, "At least part of the reasoning for granting summary judgment was that the facility does not have the right to challenge and the ALJ (and the DAB) does not have the ability to review scope and severity of deficiencies where facts are unchallenged." RR at 6. The ALJ's holding that he had no authority to hear and decide a challenge to CMS's immediate jeopardy determination was not based on the absence of any factual challenge. Instead, the ALJ's holding that he had no authority to review the immediate jeopardy determination was based on the fact that CMS had imposed a per-instance CMP. ALJ Decision at 3.

The ALJ's holding that he had no authority to review the immediate jeopardy determination was correct. The level of noncompliance may be appealed, and reviewed, only if a successful challenge would affect the range of the CMP amounts that CMS could collect or affect a finding of substandard quality of care that resulted in the loss of a

nurse aide training program. 42 C.F.R. § 498.3(b)(14), (d)(10)(i)-(ii). There is only one range for a per-instance CMP: $1,000 to 10,000. *Id.* § 488.438(a)(2). Thus, a successful challenge on the immediate jeopardy issue could not have affected the range of the CMP amounts that CMS could collect. *See, e.g.*, *Oaks of Mid City Nursing & Rehab. Ctr.*, DAB No. 2375 at 24 (2011), *citing Aase Haugen Homes, Inc.*, DAB No. 2013, at 3 (2006). Moreover, NMS has not asserted that it lost approval of a nurse aide training program based on a finding of substandard quality of care. For these reasons, NMS had no right to appeal the immediate jeopardy determination, and the ALJ correctly determined that he had no authority to review it.

NMS argues that CMS's determination of immediate jeopardy should be subject to appeal and ALJ review because "CMS has layered so much meaning on a determination of Immediate Jeopardy that at this point, the finding of Immediate Jeopardy could be considered to be more of a penalty than the civil money penalty associated with it. A finding of Immediate Jeopardy is punitive in and of itself and must carry appeal rights." RR at 6. NMS cites as "punitive realities of Immediate Jeopardy" CMS's Five-Star Quality Rating System on the CMS Compare website and the Special Focus Facility designation assigned to certain nursing facilities based on their noncompliance history.[5] RR at 6-7. In a similar vein, NMS asserts that it should have a right to appeal the immediate jeopardy determination because, it says, the law permits judicial review of any action causing a person to suffer a legal wrong, and "[r]ead with the CMS creation of the Five Star Quality Rating system and the Special Focus Facility program, immediate jeopardy citations create a real and lasting legal wrong that heretofore is allowed to go on unchecked." RR at 9.

These arguments provide no basis for concluding that the ALJ erred when he held that he had no authority to review the immediate jeopardy determination in this case. Essentially NMS is asking the Board to find the regulations or the policy choices they reflect invalid, but ALJs and the Board are "bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground." *Jewish Home of Eastern Pa.*, DAB No. 2380, at 9 (2011) (*citing 1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009)); *see also Sentinel Medical Lab., Inc.*, DAB No. 1762, at 9 (2001), *aff'd, Teitelbaum v. Health Care Fin. Admin.*, 32 F. App'x 865 (9th Cir. 2002).

[5] "The Five-Star Quality Rating System was developed to help consumers compare nursing homes and identify areas about which they might have questions. Ratings are based on facility surveys, staffing information, and quality measures. Consumers may access the facility ratings on the 'Nursing Home Compare' web site at http://www.medicare.gov/NHCompare/." *Columbus Park Nursing & Rehab. Ctr.*, DAB No. 2316, at 6 n.2 (2010). A facility that is designated as a "special focus facility" based on its compliance history is subject to enhanced survey activities. Act § 1819(f)(8); *see also Blossom South Nursing & Rehab. Ctr.*, DAB No. 2578, at 3 (2014).

In any event, the Board has rejected the notion that the regulations provide or should provide appeal rights for any determinations that may carry adverse consequences for nursing homes, regardless of whether those determinations are among those listed as initial determinations subject to appeal in the regulations. In *Columbus Park Nursing and Rehabilitation Center*, the Board specifically rejected Columbus Park's arguments that it was entitled to a hearing based on the alleged adverse consequences of CMS's Five-Star Rating System, even though CMS imposed no remedy. DAB No. 2316, at 6 (2010). The Board stated, "These arguments fail to take into account the plain language of the regulations governing provider appeals. As the ALJ observed, there is no general right to appeal CMS administrative actions." *Id.*; *see also North Ridge Care Ctr.*, DAB No. 1857, at 8 (2002) ("By its very terms, Part 498 provides appeal rights only for these listed actions"); *Capitol House Nursing & Rehab Ctr.*, DAB No. 2252, at 2 (2009) ("[A]dministrative actions that are not CMS initial determinations are not subject to appeal.").[6]

2. The ALJ did not err by declining to compare CMS's immediate jeopardy determination here to determinations of scope and severity in other cases involving excessively hot water temperatures.

NMS's principal ground for its arbitrary-and-capricious argument before the ALJ (and here) was (and is) that the immediate jeopardy citation for its noncompliance based on the excessive water temperatures is arbitrary or capricious when compared with allegedly lower level citations for facilities "with substantially similar (or worse) facts . . . ." Response to CMS Motion at 3-4; RR at 3-4. NMS argues that the ALJ erred by "fail[ing] to look at the previous decisions made by CMS," by not "evaluat[ing] the unexplained inconsistency," and "not requir[ing] CMS to offer any evidence as to why [the] inconsistency is appropriate . . . ." RR at 3. There is no merit to this argument since, as we have already concluded, the APA's arbitrary and capricious standard of

[6] We also note that NMS cites no authority to support its characterization of immediate jeopardy determinations as penalties or punitive measures creating "a real and lasting legal wrong" simply because they may affect the facility's standing in other programs administered by CMS. Although the regulations use the term "civil money penalty," they also make it clear that a CMP is not a punitive mechanism but, rather, one of the "remedies" whose "purpose . . . is to ensure prompt compliance with program requirements." 42 C.F.R. § 488.402(a); *see also id.* §§ 488.404, 488.406, and 488.408 (describing, respectively, factors to be considered in selecting remedies, available remedies, and selection of remedies).

review does not apply in this proceeding, and the issue of the proper standard of review for CMS's immediate jeopardy determination is irrelevant given the ALJ's correct holding that he had no authority to review that determination.[7]

Nonetheless, we note that although the ALJ correctly concluded that he had no authority to review the immediate jeopardy determination, he also stated that NMS's comparative analysis argument "would not prevail . . . because CMS's findings in each case are adjudicated based on the unique facts and circumstances of that case and not by comparison to findings in other cases." ALJ Decision at 4 n.2. That conclusion is consistent with the Board's holding in *Jewish Home*, that:

> CMS's treatment of other facilities cannot undercut Jewish Home's responsibility to show that it was in compliance with the applicable legal requirements or remove CMS's authority to take actions which it is authorized by statute and regulation to take in response to Jewish Home's noncompliance. Thus, the Board has held in numerous cases that allegations by a party against which an action has been taken that the treatment accorded to it is harsher than that accorded to others similarly situated "do not prohibit an agency of this Department from exercising its responsibility to enforce statutory requirements[.]"

DAB No. 2380 at 7-8, *quoting Jewish Home of Eastern Pa.*, DAB No. 2254, at 15 (2009) (citations omitted), *aff'd*, *Jewish Home of Eastern Pa. v. Centers for Medicare & Medicaid Servs.*, 413 F. App'x 532, 535-36 (3rd Cir. 2011).[8] Thus, we conclude that the ALJ was not required to address NMS's argument about disparate treatment.

[7] It is worth noting, however, that in cases where an ALJ **is** authorized to review CMS's immediate jeopardy determination (such as cases involving per-day CMPs), the standard of review is whether the determination is "clearly erroneous." 42 C.F.R. § 498.60(c)(2). In such cases, the provider bears the burden of showing clear error, and it is a heavy one. *See, e.g.*, *Oaks of Mid City Nursing & Rehab. Ctr.*, DAB No. 2375, at 24 (*citing Maysville Nursing & Rehab. Facility*, DAB No. 2317, at 11 (2010)). We note that while NMS asserted below that the water temperatures did not pose a serious risk to its residents, it did not take exception to the ALJ's conclusion that NMS "offers no evidence that would raise a disputed issue of material fact as to the potential danger of being exposed to water that is heated to 130 degrees F." ALJ Decision at 5. Moreover, CMS determined based on the facts found by the surveyors – including that the excessively high water temperatures were found in multiple rooms housing impaired residents – that the noncompliance cited as immediate jeopardy was widespread, and NMS did not challenge those facts.

[8] The regulations provide that CMS's choice of remedy is not subject to appeal (and, thus, not subject to review). 42 C.F.R. § 498.3(d)(11). They also provide that an ALJ "may not . . . [r]eview the exercise of discretion by CMS or the State to impose a [CMP.]" *Id.* § 488.438(e)(2).

3. The Board has no authority to decide whether the regulations violate NMS's alleged protected property interests.

NMS's final argument on appeal is that it "is entitled to appeal the finding of immediate jeopardy because the sanctions imposed for regulatory noncompliance against nursing homes implicate protected property interests." RR at 10. At the outset, we note that this argument is predicated on the erroneous characterization, addressed above, that a determination of immediate jeopardy constitutes a penalty or sanction when it is actually a determination of the level of the noncompliance that results in imposition of one of the specified remedies. Moreover, as stated above, the Board is bound by the applicable regulations, and those regulations do not permit long-term care facilities to seek an ALJ hearing, or Board review, of an immediate jeopardy determination where, as here, CMS has imposed a per-instance CMP. Thus, the Board may not decide the constitutional issue raised by NMS.

In any event, neither the unreported district court decision cited by NMS, *Golden Living Center – Grand Island Lakeview v. Sebelius*, No. 8:11CV119, 2011 WL 6303243 (D. Neb. Dec. 16, 2011), nor the Eighth Circuit decision cited in that decision, *Grace Healthcare of Benton v. U.S. Dep't of Health & Human Servs.*, 589 F.3d 926 (2009), *amended and superceded by Grace Healthcare of Benton v. U.S. Dep't of Health & Human Servs.*, 603 F.3d 412 (2010), supports NMS's argument. Neither case addresses the regulation prohibiting review of an immediate jeopardy determination where, as here, CMS imposes a per-instance CMP, much less holds that application of this regulation implicates a provider's property interests in such a way as to violate the United States Constitution.[9] Finally, we do not find in *Grace Healthcare* the following holding imputed to that decision by the district court in *Golden Living Center* and relied on by NMS: "The Eighth Circuit has held that sanctions imposed for regulatory noncompliance against nursing home implicate protected property interests." 2011 WL 6303243, at *2. The Eighth Circuit merely referred to the statement by Grace Healthcare "that unreviewed CMS findings of immediate jeopardy remain accessible to the public and can

[9] In *Golden Living Center – Grand Island Lakeview*, CMS withdrew findings of noncompliance after an appeal had been filed, leading to ALJ dismissal of the appeal while leaving the findings of noncompliance intact. The court decided that the plaintiff was entitled to appeal the merits of the findings under the circumstances of that case and remanded to allow an ALJ "to develop the record on the merits of this case, so as to permit judicial review at a later date if necessary." 2011 WL 6303243, at *2-3. *Grace Healthcare* involved a challenge to the Board's affirmance of an ALJ decision to uphold CMS's finding of noncompliance, cited at the immediate jeopardy level, based on review of only one of six findings of noncompliance cited at that level. The Board applied its general rule that an ALJ need not address noncompliance findings that are not material to the ALJ decision. The court reversed the immediate jeopardy determination upon finding that it was not supported by substantial evidence but declined to rule on the provider's challenge to the general rule, concluding only that the rule "was misapplied in this case." 603 F.3d at 422. The court also remanded with directions to expunge references to the immediate jeopardy determinations from all records accessible by the public, *id*., but, importantly (although NMS does not mention it), on petition for rehearing, rescinded that part of its order, *id.* at 423.

be used to support damage claims against the provider in private litigation" and to CMS counsel's not having denied that statement at oral argument. *Grace Healthcare,* 589 F.3d at 926. The court then stated, "If true, that is a material adverse impact, in which case all findings of immediate jeopardy that are appealed should either be upheld or reversed by the ALJ or the DAB or be expunged from the agency's public records." [10] *Id*. (emphasis added). Given the qualifier "If true," the reference cannot reasonably be read as the property rights holding NMS imputes to it. Furthermore, as discussed in note 9 above, the court subsequently rescinded its order to expunge the findings of immediate jeopardy level noncompliance from records accessible to the public.

Conclusion

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

/s/
Judith A. Ballard

/s/
Stephen M. Godek

/s/
Sheila Ann Hegy
Presiding Board Member

[10] In the amended, superceding decision, this language was replaced with the following: "If true, that is a material adverse impact, in which case all findings of immediate jeopardy that are appealed should either be upheld or reversed by the ALJ or the DAB. Otherwise, the agency's inaction on appeal arguably would deprive an aggrieved party of its statutory right to judicial review." *Grace Healthcare*, 603 F.3d at 423. That case, unlike the present one, involved a circumstance where section 498.3(b)(14) provided a right to appeal CMS's immediate jeopardy determination and, as indicated above, the issue was whether the ALJ in that circumstance could decline to address some of the findings of noncompliance on which that determination was based, an issue not presented here.