Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: December 31, 2009
Taos Living Center,	
Petitioner,	Civil Remedies CR1915 App. Div. Docket No. A-09-85
	Decision No. 2293
- v. -	
Centers for Medicare & Medicaid Services.	

FINAL DECISION AND PARTIAL REMAND
ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION[1]

Taos Living Center (TLC) appeals the decision of Administrative Law Judge (ALJ) Richard J. Smith in Taos Living Center, DAB CR1915 (2009) (ALJ Decision). The ALJ granted summary disposition in the nature of summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS), sustaining the denial of payment for new admissions (DPNA) imposed on TLC from May 22, 2008 through August 13, 2008. The ALJ found that TLC failed to timely request a hearing to challenge February 2008 survey findings cited in a March 19, 2008 notice and that no good cause existed to extend the deadline for filing a hearing request. The ALJ also determined that TLC had no right to a hearing to contest the date on which it returned to substantial compliance and that the DPNA was required by law. TLC contended

[1] This decision is by a majority of the three-member panel that heard the above-captioned appeal. An opinion concurring in part and dissenting in part follows the majority opinion.

that it was entitled to a hearing to contest CMS's determinations, based on survey findings made in February, May and July 2008, that the facility was not in substantial compliance and that it did not return to substantial compliance until August 14, 2008 and that, consequently, the DPNA should not have taken effect or remained in effect until that date.

For the reasons discussed below, we affirm the ALJ's determination that TLC is not entitled to a hearing to contest the February 2008 survey findings. We further determine, however, that TLC is entitled to a hearing to submit evidence showing that it returned to substantial compliance earlier than the date of an August 2008 revisit survey and that summary judgment is not appropriate. Accordingly, we remand this matter for further proceedings consistent with this decision.

Applicable Legal Authority

The Social Security Act (Act) and federal regulations provide for state agencies to conduct surveys of Medicare skilled nursing facilities (SNF) and Medicaid nursing facilities (NF) to evaluate their compliance with the Medicare and Medicaid participation requirements. Sections 1819 and 1919 of the Social Security Act; 42 C.F.R. Parts 483, 488, and 498.[2] The Act and regulations also provide for the imposition of various remedies on a facility found not to comply substantially with the participation requirements. Id. A "deficiency" is defined as a "failure to meet a participation requirement specified in the Act or [42 C.F.R. Part 483]." 42 C.F.R. § 488.301. "Substantial compliance" is defined as "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." Id. "Noncompliance means any deficiency that causes a facility to not be in substantial compliance." Id.

Generally, when a facility has been found not to be in substantial compliance with the requirements for program participation, the facility must submit a plan of correction (PoC) acceptable to CMS or the state survey agency. 42 C.F.R.

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[2] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

§§ 488.402(d), 488.408(f). Once a PoC has been accepted by CMS or the State, CMS or the state agency must verify that corrections have been completed and substantial compliance achieved based on an on-site revisit or after an examination of credible written evidence that can be verified without an on-site visit. 42 C.F.R. § 488.454.

Under sections 1819(h)(2)(D) and 1919(h)(2)(C) of the Act and 42 C.F.R. § 488.417(b), CMS must deny payment for all new admissions to a facility when the facility is not in substantial compliance within three months after the date it is found to be out of substantial compliance. Section 488.417(d) of the regulations states that in cases where facilities do not have repeated instances of substandard quality of care, payments "resume prospectively on the date that the facility achieves substantial compliance, as indicated by a revisit or [acceptable] written credible evidence . . . ."

Sections 1866(h)(1) and 1866(b)(2) of the Act and 42 C.F.R. Part 498 provide hearing rights for specified determinations involving facility participation in the Medicare and Medicaid programs. Section 498.3 of the regulations delineates the scope and applicability of the regulations, identifying the types of actions considered "initial determinations" subject to administrative review. The "initial determinations" include, "[w]ith respect to an SNF or NF, a finding of noncompliance that results in the imposition of a remedy specified in section 488.406 of this chapter, except the State monitoring remedy." 42 C.F.R. § 498.3(b)(13); see also 42 C.F.R. 488.408(g) ("A facility may appeal a certification of noncompliance leading to an enforcement remedy."). Among the remedies specified in section 488.406 is a DPNA. 42 C.F.R. § 488.406(a)(2)(ii).

Under 42 C.F.R. § 488.402(f)(1), CMS or a state survey agency (as authorized by CMS) may send a notice of survey findings and imposition of remedies, including a DPNA. See also 64 Fed. Reg. 13,354, 13,357-58 (1999). Section 498.40(a)(2) of the regulations states that a provider entitled to a hearing "must file [its] request in writing within 60 days from receipt of the notice of initial, reconsidered, or revised determination unless that period is extended [for good cause]."

Factual Background

The following information is drawn from the ALJ Decision and the record before him. Documents included in the record but not designated as exhibits are referenced as attachments to the pleadings with which they were submitted.

TLC is a skilled nursing facility located in Taos, New Mexico that participates in Medicare and Medicaid. The New Mexico Department of Health (State agency) conducted health and life safety code surveys of TLC on February 20 and 22, 2008 (February survey). The February survey identified multiple deficiencies, the most serious of which was identified as isolated, posing actual harm that was not immediate jeopardy. CMS Exs. 1, 6.

In a letter to TLC dated March 19, 2008 and enclosing the February survey statement of deficiencies (SOD), the State agency stated that TLC was not in substantial compliance based on the February survey findings. CMS Ex. 1. The State agency directed TLC to submit a PoC by the tenth day from its receipt of the letter. The PoC, the letter stated, would "serve as the facility's allegation of compliance." Id. at 2. Further, "[u]nless otherwise stated on the PoC," the State agency advised TLC, "the last completion date will be the date of alleged compliance." Id.

The March letter also stated that "as authorized by CMS Dallas Regional Office," the State agency was providing "formal notice of imposition of statutory Denial of Payment for New Admissions (DPNA) effective May 22, 2008 . . . unless TLC demonstrate[s] substantial compliance with an acceptable PoC and subsequent revisit." Id. The letter further stated that if TLC "disagree[s] with the determination of noncompliance," it should file a request for an ALJ hearing "to appeal the finding of noncompliance" no more than 60 days from its receipt of the notice. Id. at 3.

TLC timely submitted to the State agency a PoC identifying March 28, 2008 as the last completion date of its corrections. CMS Exs. 6-7. The State agency accepted the PoC but did not conduct a revisit survey until more than four months later, as discussed below. TLC did not file a request for hearing to challenge the findings of noncompliance from the February survey within 60 days of its receipt of the March 19, 2008 letter.

On May 29, 2008, the State agency conducted a complaint survey of TLC during which the State agency identified one isolated deficiency constituting actual harm that was not immediate jeopardy. See May 29, 2008 Survey SOD attached to TLC August 12, 2008 Notice of Appeal.

By letter to TLC dated June 13, 2008 and forwarding the May survey SOD, the State agency advised TLC that it was not in substantial compliance based on the May survey findings. The

June 13 letter also stated that "[b]ased on deficiencies cited during the Recertification and Complaint surveys, and as authorized by CMS Dallas Regional Office, imposition of statutory [DPNA] effective May 22, 2008 remains in effect . . . ." June 13, 2008 letter attached to TLC August 12, 2008 Notice of Appeal. The June 13 letter further provided that "***the remedies for this Complaint survey are a continuation of an enforcement action that began with the Recertification survey conducted on February 20 and 22, 2008. Refer to the State Agency letter dated March 19, 2008.***" Id. (emphases in original). In addition, the June 13 letter advised TLC that if TLC disagreed with the noncompliance finding it could file a request for an ALJ hearing. Id.[3]

By letter dated August 12, 2008, TLC requested an ALJ hearing to contest "the finding of noncompliance" in the State agency's June 13 letter. August 12, 2008 Notice of Appeal at 1. TLC also requested a hearing to challenge, among other things, the "finding of continued noncompliance" cited in the State agency's June 13 letter. Id. at 5. According to TLC, the finding of continued noncompliance was "contrary to the evidence, [was] solely the result of the failure of [the State agency] to timely meet its survey agency obligations, and [was] otherwise improper under the facts and circumstances." Id.

On July 10, 2008, the State agency conducted a second complaint survey of TLC during which it found multiple deficiencies, the most serious of which it identified as isolated, constituting actual harm that was not immediate jeopardy. See July 10, 2008 Survey SOD attached to TLC September 26, 2008 Notice of Appeal.

In a letter to TLC dated July 28, 2008 and forwarding the July survey SOD, the State agency stated that TLC was not in substantial compliance based on the July 10 survey findings. The July 28 letter further stated that the DPNA which "became effective on May 22, 2008 . . . will remain in effect until compliance has been attained or Termination of Provider Agreement has occurred." July 28, 2008 letter attached to TLC September 26, 2008 Notice of Appeal at 2. The July letter also stated that the remedies for the July survey were "***a continuation of an enforcement action that***

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[3] The June 13 letter further stated that the DPNA "will also result in the inability of [TLC] to become eligible to participate in the Nurse Aide Training and Competency Evaluation Program . . . effective for a two (2) year period beginning May 22, 2008 through May 21, 2010."

began with [the February and May surveys]" and that TLC should "***[r]efer to the State Agency letters dated March 19, 2008 and June 13, 2008***." Id. (emphases in original). The July 28 letter also advised TLC that it could request an ALJ hearing to appeal the noncompliance determination. Id.

TLC appealed the July 28, 2008 State agency notice of noncompliance by letter dated September 26, 2008. TLC requested a hearing to contest, among other things, the July survey findings and the "erroneous finding of continued noncompliance." September 26, 2008 Notice of Appeal at 2.

In a notice from CMS to TLC dated August 5, 2008, CMS stated that the February, May and July surveys had "found that [TLC] was not in substantial compliance [with the participation requirements]." August 5, 2008 notice attached to TLC's October 3, 2008 Notice of Appeal. The August 5 notice stated that CMS "concur[ed] with the [State agency] findings" and that based on TLC's noncompliance, CMS would terminate TLC's provider agreement on August 22, 2008 unless TLC achieved substantial compliance before that date. CMS also notified TLC that it was imposing CMPs against TLC. With respect to the DPNA, the August 22 notice stated:

> **DENIAL OF PAYMENT FOR NEW ADMISSIONS: Payment will be denied for all new Medicare and Medicaid admissions, effective May 22, 2008.** *Under CMS's authority, the State Agency had sent you notice of this imposition in their March 19, 2008 notice letter. . . .* **This denial of payment will continue until your facility achieves substantial compliance or your provider agreement is terminated, whichever comes first.**

Id. at 2 (emphases in original).

On August 14, 2008, the State agency conducted a revisit survey of TLC related to the February survey findings. By letter dated September 9, 2008, the State agency advised TLC that "based on [the] health revisit conducted on August 14," TLC "was found to be in substantial compliance with the Standards of Participation." CMS Ex. 3. The State's agency's post-certification revisit report, showing the "deficiencies previously reported . . . that [were] corrected and the date such corrective action was accomplished," shows that the corrections of the deficiencies identified during the February survey were accomplished on or prior to March 28, 2008. CMS Ex. 5.

On October 3, 2008, TLC submitted a request for hearing to contest the findings of noncompliance set forth in CMS's August 5 notice. In its notice of appeal, TLC argued that it was in substantial compliance at the time of the February survey, the May survey, and the July survey. TLC further argued that CMS's "finding of continued noncompliance" was unsupported by the evidence and "solely the result of [the State agency's] failure to timely meet its obligations as a CMS survey agency . . . ." October 3, 2008 TLC notice of appeal at 19. Accordingly, TLC argued, the remedies imposed by CMS "based on the finding of continued noncompliance should not be adopted or implemented." Id.

By notice to TLC dated October 23, 2008, CMS stated that the proposed termination of TLC's provider agreement and per-instance CMP had been rescinded. CMS further stated, that the DPNA had "already [been] imposed and [was] in effect from May 22, 2008 through August 13, 2008." CMS Ex. 4.

On October 10, 2008, the ALJ consolidated TLC's August 12, September 26, and October 3, 2008 hearing requests, and in March 2009 the ALJ granted CMS's motion for summary judgment on the consolidated appeal.

The ALJ Decision

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

A. Summary disposition is appropriate.

B. Petitioner is not entitled to a hearing with regard to the February survey.

C. The DPNA imposed is required by law and Petitioner is not entitled to a hearing with regard to the date on which it achieved substantial compliance.

See ALJ Decision at 7-11.

The ALJ determined that TLC was not entitled to a hearing to contest the February survey findings because it failed to timely appeal the March 19, 2008 initial determination of noncompliance based on those findings. Id. at 1, 7-9. In reaching this conclusion, the ALJ rejected TLC's contentions that: 1) the March 19, 2008 letter was not a legally sufficient initial determination notice; 2) the March determination was revised by

CMS's August 5 notice; 3) the terms of the August 5 notice expressly extended TLC's deadline for requesting a hearing on the February survey findings; and 4) the August 5 notice constituted good cause to extend the filing deadline. Id. at 7-9.

In determining that the DPNA imposed was required by law and that TLC was not entitled to a hearing with regard to the date on which it achieved substantial compliance, the ALJ rejected TLC's argument that the PoC and post-certification revisit report showed that the facility had returned to substantial compliance as of March 28. Id. at 9-11. Further, the ALJ found, the nature of the deficiencies identified during the February survey was such that an on-site visit was required to verify the facility's return to substantial compliance, the on-site visit was not completed until August 14, 2008, and TLC therefore could not establish that it achieved substantial compliance prior to that date. Id. at 10-11. Finally, the ALJ rejected TLC's assertion that the State agency was required to have made its revisit prior to May 22, 2008. Id. at 11. Thus, the ALJ determined, summary disposition was appropriate. Id.

Standard of Review

Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-25 (1986); Everett Rehabilitation and Medical Center, DAB No. 1628, at 3 (1997). Whether summary judgment is appropriate is a legal issue that we address de novo. Lebanon Nursing and Rehabilitation Center, DAB No. 1918 (2004). In reviewing whether there is a genuine dispute of material fact, we view proffered evidence in the light most favorable to the non-moving party. Kingsville Nursing and Rehabilitation Center, DAB No. 2234 (2009); Madison Health Care, Inc., DAB No. 1927 (2004), and cases cited therein. The standard of review on a disputed conclusion of law is whether the ALJ decision 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, http://www.hhs.gov/dab/guidelines/prov.html.

Analysis

I. TLC is not entitled to a hearing to contest the February 2008 survey findings.

A. *The March 19, 2008 letter was an initial determination.*

TLC argues that the ALJ's finding that TLC is not entitled to a hearing as to the February 2008 survey findings is not supported by the evidence and is legally erroneous. TLC Br. at 7-13. TLC does not deny that it failed to file a hearing request within 60 days of receiving the March 19, 2008 notice. Rather, TLC contends that the March letter did not meet the requirements of 42 C.F.R. §§ 488.402(f) and 498.20(a) and thus "cannot, as a matter of law, constitute an initial determination by CMS." TLC Br. at 8; TLC Reply at 5. Under the regulations, TLC argues, an initial determination must be made by CMS and must "set forth all remedies imposed by CMS related to that determination of noncompliance." TLC Br. at 8. TLC argues that the March 19 letter notified TLC that the State agency, not CMS, had made the determination of noncompliance and that the letter gave "no indication . . . that CMS concurred with or otherwise approved the finding of noncompliance." TLC Reply at 3. Further, TLC contends, the letter failed to state all of the remedies imposed; provided only that the State agency was "recommending" to CMS that certain remedies be imposed; and used ambiguous, conditional language. TLC Reply at 5-6.

TLC's arguments are without merit. Section 498.20 of the administrative appeals regulations states the "general rule" that "CMS . . . mails notice of an initial determination to the affected party, setting forth the basis or reasons for the determination, the effect of the determination, and the party's right to . . . a hearing." In the context of long-term care facility survey, certification and enforcement, however, the regulations explicitly provide that a state survey agency may give notice of the noncompliance, the remedy, the effective date of the remedy and the right to appeal the determination leading to the remedy. See 42 C.F.R. §§ 488.402(f) and 488.330(c); see also 64 Fed. Reg. 13,354 (1999). In addition, the CMS State Operations Manual (SOM), which provides detailed guidance based on the regulations, explains that in addition to certifying facility compliance or noncompliance, "the State recommends appropriate enforcement actions to [CMS]." SOM § 7300A.[4]

[4] Chapter Seven of the SOM, Survey and Enforcement Process (Continued. . .)

Further, the SOM provides, "when authorized by the [CMS] regional office or the State Medicaid agency, the State may also provide notice of imposition of the denial of payment for new admissions remedy." Id.

Applying the regulatory provisions in this case, we agree with the ALJ that the March 19 letter constituted an initial determination of noncompliance as to the February survey. As described above, the March 19 letter stated that TLC was not in substantial compliance based on the February survey findings (set forth with specificity in the enclosed SOD) and that the CMS Dallas Regional Office had authorized the State agency to give TLC "formal notice of imposition of statutory [DPNA]." CMS Ex. 1, at 2. Further, we find no basis for concluding that a statement in the notice that the State agency also was recommending other remedies to CMS invalidated the initial determination. Moreover, the March 2008 notice provided explicit instructions to TLC to "appeal the finding of noncompliance" within 60 days if it disagreed with the determination. Id. at 3. Thus, we reject TLC's arguments that the March 2008 notice lacked clarity, gave no indication that CMS concurred with the noncompliance finding, or was otherwise legally insufficient.

B. The June 13, 2008 and July 28, 2008 letters did not revise the March 19, 2008 determination.

TLC alternatively argues that the ALJ's finding that the March 19 determination was not "reconsidered or revised by CMS pursuant to subsequent notices" was in error. TLC Br. at 8-12. TLC contends that the State agency's June 13 and July 28 letters, which TLC timely appealed, contained findings "different from, and thus a modification of, the findings set forth in the March [letter] and thus constitute revised determination[s] related to the February survey pursuant to 42 C.F.R. § 498.30." TLC Br. at 9-10. TLC also argues that CMS and the State agency recognized that the June 13 and July 28 letters were revised determinations relating to the February survey because the letters "provided [TLC] with the right to appeal the determinations identified in the letter[s]." Id.

(Continued. . .)

for Skilled Nursing Facilities and Nursing Facilities, is available at http://www.cms.hhs.gov/manuals/downloads/som107c07.pdf.

We disagree. Under 42 C.F.R. §§ 498.30 and 498.32, CMS may reopen and revise an initial determination within a specified time period and must state the basis or reason for its action in the revised determination notice. In this case, the June 13 and July 28 letters did not specifically state or otherwise indicate that CMS was revising the prior initial determination of noncompliance based on the February survey findings. Rather, the June 13 and July 28 letters advised TLC of, respectively, the May 29 and July 10 complaint survey findings of noncompliance and of TLC's right to appeal those survey findings. While both notices referenced the February survey and the March 19 notice, neither the June 13 nor the July 28 letters can reasonably be construed as a reopening or revision of the February survey findings or the March 19 noncompliance determination based on those findings.

C. The August 5, 2008 notice did not revise the March 19, 2008 determination or extend the deadline for appealing the February survey findings.

TLC further contends that CMS's August 5 notice, which it timely appealed, was a revised determination as to the February survey findings in that it notified TLC "[f]or the first time" that CMS concurred in the State agency's findings and advised TLC of all of the remedies CMS was imposing for all three surveys. TLC Br. at 10. TLC also argues that "CMS implicitly recognized the August CMS Notice as a revised determination related to the February Survey" because the notice expressly stated that TLC had a right to appeal "the determinations identified in the letter," including "the determination of noncompliance related to the February Survey." TLC Br. at 11; see also TLC Reply at 7-8. TLC alternatively argues that even if the August 5 notice was not a revised determination regarding the February survey, it "should be deemed an express extension by CMS" of the deadline for TLC to appeal the February survey findings or a "misleading document constituting good cause for the Board to extend" the deadline. TLC Br. at 12.

We reject these arguments. As discussed above, the State agency had the authority under the regulations to issue the initial determination of noncompliance based on the February survey and to notify TLC, pursuant to CMS's authorization, of the DPNA. Thus, the March 19 notice itself informed TLC that CMS concurred in the State agency's February survey findings. Further, while the August 5 notice listed the participation requirements with which TLC had been found noncompliant in each survey, CMS noted that the State agency had previously provided to TLC notices of those findings. Moreover, the August notice stated that

"*[u]nder CMS's authority, the State Agency had sent you notice of [the DPNA] imposition in their March 19, 2008, notice letter.*" August 5 notice at 2 (emphasis in original). Thus, the August 5 letter made reference to, and confirmed, the March 19 initial determination of noncompliance based on the February survey. It cannot reasonably be construed as "revising" the initial determination as to the February survey findings.

In addition, the August 5 notice did not provide TLC with a new opportunity to appeal the February survey findings, nor did it extend the 60-day filing period set forth in the March notice. The August 5 notice did advise TLC of the additional remedies CMS was imposing for the facility's noncompliance based on the February, May and July surveys. The August 5 notice also included general language that if TLC "disagree[d] with the determination of noncompliance . . . that led to an enforcement action" it could request an ALJ hearing. Id. The August 5 letter further provided, however, that the "[p]rocedures governing this process are set out in 42 CFR § 498.40 et. seq." Id. Under those regulations, as explained above and set forth in the March 19 notice, TLC was required to request a hearing to challenge the February survey findings no later than 60 days after its receipt of the March 19 notice. Thus, we concur in the ALJ's finding that while not "a model of clarity," CMS's August 5, 2008 notice did not extend the deadline for TLC to challenge the February survey findings. ALJ Decision at 8.

D. TLC did not show good cause for its failure to timely appeal the February survey findings.

Finally, we reject TLC's argument that purportedly misleading language in the August 5 notice (as well as the June 13 and July 28 State agency letters) "constitut[ed] good cause for the Board to extend the time for [TLC] to file a hearing request." TLC Br. at 12-13. Section 498.40(c) of the regulations provides that an ALJ has discretion to extend the period for a facility to file a request for hearing if the facility files a "written request for extension of time stating the reasons why the request was not filed timely" and the ALJ finds "good cause" for the late filing. TLC's argument does not state the reasons why it did not timely request a hearing on the February survey findings within 60 days of its receipt of the March 19 notice. Moreover, the notices that TLC claims misled it to believe that it could file its appeal of the February survey findings after the 60-day period expired were issued well after the deadline. Thus, they cannot account for TLC's failure to timely file a hearing request to challenge the February survey findings, and

they provide no basis to find that there was good cause for the late filing. Thus, TLC's "good cause" argument has no merit.

Based on the foregoing discussion, we conclude that the ALJ correctly determined that TLC is not entitled to a hearing with regard to the February survey.

II. TLC is entitled to a hearing to demonstrate that it returned to substantial compliance as of March 28, 2008 or thereafter.

TLC argues that, regardless of whether we conclude that it is entitled to a hearing as to the February survey findings, it is entitled to a hearing as to the date on which it achieved substantial compliance. Specifically, TLC contends, it timely appealed the June 13 and July 28 notices of "continued noncompliance," which imposed "continued DPNA[s]" on the facility. TLC Br. at 14. Further, TLC contends, the State agency's post-certification revisit report establishes that TLC "achieved substantial compliance related to the February Survey as of March 28, 2008." Id. at 15. Alternatively, TLC argues, "the documentation prepared by the State Survey Agency, including the post-certification revisit report . . . creat[es] a factual dispute that is properly resolved at hearing, not on summary disposition by the ALJ." Id. at 16.

In response, CMS argues that "[c]ontinued noncompliance, is merely a status, not an appealable determination." CMS Br. at 9. CMS also avers that the June 13 and July 28 letters were not initial determinations subject to appeal because they imposed no new remedies, i.e., they only imposed the continuation of the DPNA. Id. at 9-10. CMS further states that while the August 5 letter did give TLC "appeal rights to challenge the per instance CMPs and termination remedies set forth in [the letter]," these appeal rights were extinguished by CMS' October 23, 2008 letter rescinding those two remedies. Id. at 9-10, citing Lakewood Plaza Nursing Center, DAB No. 1767 (2001); Schowalter Villa, DAB No. 1688 (1999) (A facility loses its right to a hearing pursuant to 42 C.F.R. §§ 498.3 and 498.3(b)(13) (formerly section 498.3(b)(12)) if CMS rescinds the remedies listed in section 488.406 that CMS had imposed in its notice of determination.).

CMS additionally argues that TLC's failure to timely appeal the February survey findings "procedurally precluded it from challenging the duration of the DPNA at a hearing." CMS Br. at 10. To support its argument, CMS relies on the ALJ decision in United Presbyterian Residence which involved a "factual scenario

and legal issues [that were] virtually the same as those presented in this case." CMS Br. at 11, citing United Presbyterian Residence, DAB CR1305 (2005), which in turn cited Mimiya Hospital, DAB No. 1833 (2002)(concluding that a notice of determination as to the date on which a facility returned to substantial compliance and finalizing the amount and duration of a per-day CMP was an initial determination of the duration of noncompliance; the facility's timely appeal of the notice preserved its right to a hearing as to the date it achieved substantial compliance). Relying on the Board's decision in Mimiya Hospital, CMS observes, the ALJ in United Presbyterian found that the facility had "preserved the right to prove that compliance was earlier than the onsite revisit date . . . ." Id.

While the United Presbyterian matter went to hearing, CMS notes, the ALJ in that matter concluded that the facility failed to establish that it achieved substantial compliance earlier than the revisit date because some of the deficiencies "required on-site observation to verify compliance." CMS Br. at 11-12. CMS argues that in TLC's case, an on-site visit likewise was necessary to evaluate the facility's compliance given the types of deficiencies at issue (which included the use of restraints, pressure sore care, and range of motion). Id. Thus, CMS contends, "[b]ecause the uncontested February findings were now established, the ALJ was procedurally required to find that TLC was out of substantial compliance from the date of completion of the survey (February 22, 2008) until the date of the resurvey in which substantial compliance was established (August 14, 2008)." Id. at 13.

> *A. TLC timely requested a hearing to demonstrate that it returned to substantial compliance as of March 28, 2008 or thereafter.*

We conclude that, as in United Presbyterian and Mimiya Hospital, the facility in this matter preserved its right to an ALJ hearing to present evidence that it returned to substantial compliance at a date earlier than that determined by CMS. See also Ruling on Petition to Reopen DAB No. 1833 (Mimiya Hospital)(October 3, 2002). That is, TLC, like United Presbyterian and Mimiya Hospital, did not timely request a hearing to challenge the initial determination of noncompliance based on the first survey findings, thus rendering the first (February) survey findings of noncompliance final. As in United Presbyterian and Mimiya Hospital, however, TLC did timely request a hearing to dispute a subsequent, appealable determination as to the duration of its noncompliance.

Specifically, CMS's August 5 notice to TLC, advising the facility of all of the remedies that CMS was imposing based on the February, May and July survey noncompliance findings, stated that TLC's provider agreement would be terminated "on August 22, 2008 unless [TLC] achieve[d] substantial compliance before that date." August 5, 2008 notice. CMS further advised TLC that CMS was imposing multiple per-instance CMPs based on the deficiency findings. With respect to the DPNA, the August 5 notice provided that payment "will be denied for all new Medicare and Medicaid admissions, effective May 22, 2008," and noted that the State agency had previously provided TLC notice of the DPNA in the March 19, 2008 letter. Id. Further, CMS stated, the DPNA, "will continue until [TLC] achieves substantial compliance or [TLC's] provider agreement is terminated, whichever comes first." Id.

Based on the foregoing statements, we conclude that at the very least, the August 5 notice constituted an initial determination by CMS that TLC had failed to achieve substantial compliance as of March 28, 2008 (the date of compliance cited in TLC's PoC) and that TLC had failed to return to substantial compliance at any time after that date. That is, because the DPNA could not go into effect and remain in effect unless CMS determined that TLC had continued to be in noncompliance after the February survey through May 22, and failed to return to substantial compliance at any subsequent date, the August 5 letter notifying TLC that the DPNA had gone into effect and remained in effect implicitly rejected TLC's allegation of compliance and constituted an initial determination of noncompliance resulting in the imposition of an administrative remedy within the meaning of section 498.3(b)(13).

Accordingly, we conclude that TLC's timely appeal of the August 5 notice preserved TLC's right to contest CMS's determination as to the duration of the facility's noncompliance.

In reaching this conclusion, we reject CMS's contention that TLC's appeal rights arising from the August 5 notice were extinguished by CMS's October 23, 2008 letter rescinding the CMP and termination remedies. According to CMS, while the August 5 determination imposed several per-instance CMPs and threatened termination on August 22, 2008, it did not impose a "new" DPNA remedy. CMS Br. at 8. The DPNA, CMS contends, had already been imposed under the March 19 determination. Id. Consequently, CMS argues, the October 23, 2008 rescission of the only remedies imposed by the August 5 determination extinguished TLC's right to a hearing to challenge that determination because the

determination no longer resulted in the imposition of a remedy, and thus no longer constituted an appealable initial determination under the regulations. CMS Br. at 9-10, citing 42 C.F.R. § 498.3(b)(13).

We disagree. The March 19 determination did provide TLC notice of the imposition of a DPNA, to be effective May 22, 2008, if the facility did not return to substantial compliance by that date. CMS's August 5 initial determination that TLC had failed to return to substantial compliance at any time before the date of that notice, however, not only imposed per-instance CMPs and threatened termination, but also resulted in the imposition of additional remedies against TLC in the form of losses of program payments relating to the alleged period of ongoing noncompliance. In other words, but for the August 5 determination that TLC did not achieve substantial compliance as of March 28 or any time thereafter, the DPNA might not have gone into effect or have remained in effect after May 22. Accordingly, we conclude that CMS's October 23 notice did not rescind all of the remedies imposed by the August 5 initial determination, and that, consequently, TLC's right to challenge the August 5 notice was not extinguished by CMS's October 23 action.

In reaching this conclusion, we are mindful of the Board's reasoning in Mimiya, that if a facility that did not contest an initial survey finding of noncompliance --

> is precluded from appealing the date when it is deemed by a state survey agency to have returned to substantial compliance, [the] facility will have no recourse when the state survey agency, for whatever reason, delays its revisit to the facility and the [remedy] continues to run.

Ruling on Petition to Reopen DAB No. 1833, at 2 (October 3, 2002). The scenario envisioned by the Board in the Mimiya ruling is essentially presented here. A determination that TLC has no right to a hearing to show that it returned to substantial compliance as of March 28, 2008 or thereafter would deny the facility recourse where the State agency in fact delayed its revisit until months after the DPNA went into effect, even though the facility timely submitted an acceptable PoC and made a credible allegation of compliance following the February survey.[5]

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[5] Under the regulations and the SOM, however, "whether and (Continued. . .)

We believe that such a determination would undermine a fundamental goal of the survey, certification and enforcement procedures, as described in the 1994 preamble to the long-term care facility regulations, to motivate facilities to promptly correct acknowledged deficiencies. 59 Fed. Reg. 56,116, 56,175-76 (1994); see also 42 C.F.R. 488.402(a) ("The purpose of remedies is to ensure prompt compliance with program requirements."). The result CMS advocates here would create uncertainty as to whether a facility that follows the correction procedures and timely returns to substantial compliance might nevertheless be unable to avoid remedies intended for noncompliant facilities that do not make such timely corrections. Furthermore, the preamble indicates that a facility has the right to a hearing to challenge the date it returned to substantial compliance. 59 Fed. Reg. at 56,208 ("When a facility disagrees with the decision [of continued noncompliance] made at the time of the revisit, the disagreement could be resolved through the administrative hearing process."). Nothing in the preamble suggests that a hearing is available only if a facility timely appeals an initial notice of imposition of a DPNA. Moreover, the preamble states, the reason the regulations limit appeals of noncompliance findings to determinations resulting in remedies is that not all findings have adverse affects on providers warranting hearing rights. Id. at 56,158 (". . . if no remedy is imposed, the provider has suffered no injury calling for an appeal."). We conclude here that the finding of continued noncompliance resulting in the continuation of an ongoing DPNA is an appealable initial determination under the regulations. 42 C.F.R. § 498.3(b)(13).

Response to Dissent

We disagree with the dissent that the regulations compel a conclusion that a facility that does not challenge a finding of noncompliance leading to the initial notice of imposition of a DPNA may not challenge a subsequent determination that noncompliance continued and on which the continued imposition of a DPNA is based. The imposition of a DPNA is not necessarily limited to the single point in time in which CMS first notifies

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(Continued. . .)

when revisit surveys are performed is in the discretion of the State and CMS, not the facility." Cal Turner Extended Care Pavilion, DAB No. 2030, at 13 (2006), citing 42 C.F.R. § 488.308(c); SOM § 7207B, 7317.

the facility that it is in noncompliance and that the DPNA will go into effect if the facility does not return to substantial compliance by a specified date. Rather, in our view, when, but for a finding of continued noncompliance, a DPNA would not go into effect, the finding of continued noncompliance results in the "imposition" of a remedy and is an appealable determination under section 498.3(b)(13).

Furthermore, the dissent mischaracterizes the majority's statement that the August 5 initial determination resulting in "losses of program payment relating to the alleged period of ongoing noncompliance" describes a type of remedy not available under section 488.406. Instead, the reference to "losses of program payments" simply describes the potential impact of the continuation of a DPNA. Nothing in the language of section 488.406 compels the conclusion that a continuation of a DPNA is not an "available remedy" within the meaning of the regulation.

We also disagree with the dissent's understanding of the holding in Cary Health and Rehabilitation Center, DAB No. 1771, at 23-24 (2001), and the other cited cases. In Cary, the Board held that the 60-day time limit to file an appeal contesting findings of noncompliance is not extended merely because a facility is not yet notified of the extent of the remedy (i.e., the total amount of a CMP or length of a DPNA). Cary and the other cases did not address the right of a facility to appeal a later finding of noncompliance (or continued noncompliance) that results in an enforcement remedy.

Further, we note, CMS's position has not been consistent on this point. For example, while CMS contends that a finding of continued compliance resulting in an ongoing DPNA is not an appealable determination, CMS simultaneously acknowledges but does not question the ALJ's conclusion that the facility in the factually analogous United Presbyterian case was entitled to a hearing as to the duration of its noncompliance. See also Meadowbrook Manor-Naperville, DAB No. 2173 (2008), aff'd sub nom. Butterfield Health Care v. Charles E. Johnson, Case No. 08-CV-3604 (N.D. Ill. Apr. 16, 2009) (CMS gave facility a second opportunity to appeal the imposition of a statutory DPNA within 60 days of a letter dated May 9, 2006 advising the facility that the DPNA went into effect on April 13, 2006, even though CMS had previously provided that same notice in a letter dated January 23, 2006.); Palm Garden DAB No. 1922 (2004) (CMS does not challenge facility's right to appeal duration of remedies when facility seeks to demonstrate a return to substantial compliance earlier than the date found by CMS). Nor does CMS argue that our unanimous decision in Mimiya should be reversed.

B. There is a genuine dispute of material fact as to the date on which TLC achieved substantial compliance.

As summarized above, the ALJ determined that summary judgment was appropriate because the types of deficiencies identified during the February survey were such that TLC "could not have demonstrated compliance until [the August 14] revisit date." ALJ Decision at 11. In reaching this conclusion, the ALJ noted that the February survey deficiencies involved restraints, pressure sore care, and range of motion, which were cited "as a direct result of surveyors' observations of care and interviews with staff." ALJ Decision at 10-11, citing CMS Ex. 7. The ALJ further stated that, due to the nature of the deficiencies, he "accept[ed] CMS's representation" that "the surveyors needed to *go back to the facility* and *observe the care provided*" to verify the corrections and the facility's return to substantial compliance. Id. at 11 (emphasis in original). While the ALJ went on to acknowledge that the post-certification revisit report "found . . . that the deficiencies cited were corrected as of March 28, 2008," he nevertheless concluded that TLC was foreclosed from establishing that it returned to substantial compliance prior to the revisit date because "a finding that deficiencies have been corrected is not the same as a determination that a facility has achieved substantial compliance with all participation requirements." ALJ Decision at 11, citing Meadowbrook Manor-Naperville, DAB No. 2173, at 13-14.

Under the survey, certification and enforcement regulations, an on-site revisit survey may, as the ALJ concluded here, be necessary in order to verify that a facility has implemented its accepted PoC and returned to substantial compliance. 42 C.F.R. §§ 488.454(a)(1), 488.454(e); 59 Fed. Reg. 56,218-19; see also 42 C.F.R. § 488.440(h). It does not necessarily follow, however, that a facility's corrections and achievement of substantial compliance may not be established as of a date prior to such a revisit. As stated in the 1994 preamble to the long-term care facility regulations, "[s]ometimes substantial compliance can be achieved before an on-site revisit and the retroactive substantial compliance date can be verified with an on-site revisit." 59 Fed. Reg. 56,207. For example, surveyor interviews, observations, and reviews of facility records or policies may provide surveyors sufficient information to verify that a facility returned to substantial compliance prior to the revisit date. Thus, section 488.417(d) states that in the case of a DPNA that is not imposed on the basis of repeated instances of substandard quality of care, payments resume prospectively *on*

the date the facility achieves substantial compliance, as found on revisit or based on acceptable written credible evidence. (Emphasis added.) Further, section 488.454(e) provides that if a facility can supply acceptable documentation "that it was in substantial compliance and was capable of remaining in substantial compliance, if necessary, *on a date preceding that of the revisit*," the remedy terminates on the date verified "as *the date that substantial compliance was achieved* and the facility demonstrated that it could maintain substantial compliance, if necessary."[6] (Emphasis added.)

The Board has held that once a facility is found to be out of substantial compliance, noncompliance is presumed to continue until the facility demonstrates that it has achieved substantial compliance. See, e.g., Cary Health and Rehabilitation Center, DAB No. 1771, at 23-24 (2001) (citing section 488.417(b)(i) and stating that a DPNA remedy would take effect "unless the facility affirmatively acts to avert it.") The Board has never held, however, that the presumption of continued noncompliance is unrebuttable or that findings of continuing noncompliance are an exception to the regulatory provision of hearing rights on findings of noncompliance resulting in enforcement actions. Instead, the Board has previously recognized that, under the regulations, CMS's determination of whether the evidence demonstrates that a facility returned to substantial compliance is subject to de novo review by an ALJ and on appeal to the Board. See, e.g., Palm Garden of Gainseville, DAB No. 1922 (2004). Here TLC did act affirmatively to avert the DPNA, by submitting a PoC asserting correction of all of the deficiencies and a return to substantial compliance by March 28, well before the date the DPNA would go into effect if TLC did not timely achieve substantial compliance.

A finding that deficiencies have been corrected is not tantamount to a determination that a facility has achieved substantial compliance. Meadowbrook Manor-Naperville, DAB No. 2173, at 13-14. Under the procedures and policies governing revisits and certifications, however, state agencies are directed (on first revisits) to certify substantial compliance "as of the latest correction date on the approved PoC," unless: 1) the correction actually occurred between the latest

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[6] Where a DPNA is imposed based on repeated instances of substandard quality of care, payments do not resume until the facility has achieved substantial compliance and CMS or the state has determined that the facility is capable of remaining in substantial compliance. 42 C.F.R. §§ 488.417(c), 488.454(b).

correction date on the PoC and the date of the first revisit; 2) the correction occurred sooner than the latest correction date on the PoC; or 3) the surveyors determine that there is continuing noncompliance. SOM §§ 7317-7317B. Thus, under the survey and certification scheme, once a facility has submitted an acceptable PoC and made a credible allegation of compliance, and the state agency has, on revisit, determined that the PoC has been implemented, it is incumbent on the state agency either to certify the date the facility returned to substantial compliance or to make a finding of ongoing noncompliance.

In this case, an on-site revisit survey may indeed have been necessary to verify that TLC had implemented its PoC and returned to substantial compliance. Nevertheless, viewing the proffered evidence in the light most favorable to TLC, we reject CMS's "representation," accepted by the ALJ, that the nature of the February survey deficiencies was such that TLC could not have demonstrated that the deficiencies were corrected, and that substantial compliance was achieved, prior to the August revisit. Specifically, the State agency's post-certification revisit report appears to show that the State agency determined on the revisit that the deficiencies identified during the February survey were corrected as of March 28, 2008 and that the PoC had been fully implemented. In addition, while CMS contends that TLC did not return to substantial compliance as of March 28, it is unclear from the record and CMS's arguments whether this determination was based on a finding that the deficiencies identified during the February survey had not in fact been corrected or whether the State agency (or CMS) found that noncompliance continued as of and after March 28 on some other basis.

Accordingly, construing the record evidence in the light most favorable to TLC, we conclude that there are genuine issues of material fact as to the date on which the deficiencies identified during the February survey were corrected and TLC returned to substantial compliance. Thus, we conclude, summary judgment is not appropriate, and TLC is entitled to a hearing as to the date on which it returned to substantial compliance.

Based on the foregoing discussion, on remand the ALJ should direct CMS to clarify and provide evidence as to: Whether the State agency certified, on its August revisit, the date of TLC's return to substantial compliance; CMS's determination of the date on which TLC completed the corrections of the deficiencies identified in the February survey; and the specific bases for CMS's determination that TLC's noncompliance continued as of and after March 28, 2008. TLC should be provided an opportunity to

develop the record and to respond to CMS's evidence and contentions and to establish that it returned to substantial compliance as of March 28, 2008 or thereafter.

Conclusion

For the reasons discussed above, we conclude that TLC is not entitled to a hearing to contest the findings of noncompliance in the February survey. We further conclude that TLC timely requested a hearing to demonstrate that it returned to substantial compliance as of March 28, 2008 or thereafter. Accordingly, we remand this matter to the ALJ for hearing consistent with our decision. In so doing, we affirm FFCL B. and revise FFCLs A. and C. to read as follows:

A. Summary disposition is not appropriate.

C. TLC is entitled to a hearing with regard to the date on which it achieved substantial compliance.

/s/
Leslie A. Sussan

/s/
Stephen M. Godek
Presiding Board Member

PARTIAL CONCURRENCE IN AND DISSENT TO DECISION NO. 2293

I concur in the majority's decision to uphold the ALJ's finding that Taos Living Center (TLC) is not entitled to appeal the findings of noncompliance on the February 2008 surveys because it did not appeal within 60 days of receiving the state's March 19, 2008 letter notifying TLC of those findings and the imposition of a mandatory DPNA effective May 22, 2008, as required by 42 C.F.R. § 498.40(a)(2), and did not show good cause for the late filing. However, I disagree with and dissent from the majority's conclusion that TLC has a right to a hearing on the issue of whether it returned to compliance before August 14, 2008 and, thus, a right to challenge the DPNA even though TLC did not file a timely appeal from the March 19, 2008 notice imposing the DPNA. The ALJ correctly found that TLC had no right to a hearing with regard to the date it achieved substantial compliance and that summary judgment, therefore, was appropriate, and I would affirm those findings.

The ALJ finding that the majority affirmed (no right to a hearing with respect to the February survey findings), together with the fact that CMS rescinded all of the additional remedies it imposed based on the findings of noncompliance on the post-February revisit surveys that TLC did timely appeal, compels the conclusion reached by the ALJ that no hearing rights exist, and summary judgment is appropriate. Under the plain language of the regulations governing hearing rights, findings of noncompliance are subject to appeal only if they result in the imposition of a remedy specified in the regulations. 42 C.F.R. § 498.3(b)(13)(defining as an "initial determination" conveying appeal rights "a finding of noncompliance that results in the imposition of a remedy specified in § 488.406 of this chapter.") The Board has long upheld this reading of the regulation. E.g., Lakewood Plaza Nursing Center, DAB No. 1767 (2001); Schowalter Villa, DAB No. 1688 (1999).

The majority does not question this law. Neither does it dispute that in its October 23, 2008 letter, CMS rescinded the termination and per-instance CMP remedies, the only new remedies CMS stated it was imposing based on the findings of noncompliance on the revisit surveys. Nonetheless, the majority finds that appeal rights exist based on CMS's August 5, 2008 letter because, in the majority's view, that letter imposed "additional remedies against TLC in the form of losses of program payments relating to the alleged period of ongoing noncompliance." Majority Decision at 31. Presumably the majority's reference to "losses of program payments . . ."

refers to any loss of payments that TLC may have incurred if it admitted new Medicare-eligible residents between May 22, 2008, the date the DPNA took effect, and August 14, 2008, the date CMS found that the facility had achieved substantial compliance.

The majority cites no authority for its conclusion that "losses of program payments relating to the alleged period of ongoing noncompliance" constitute a "remedy" within the meaning of section 498.3(b)(13). The remedies that CMS can or must impose (and that would, thus, be remedies associated with appeal rights under section 498.3(b)(13)), are specified in the list of remedies in 42 C.F.R. § 488.406. That list does not include "losses of program payments relating to the alleged period of ongoing noncompliance." While imposition of one of the remedies specified in the regulation may cause a loss of program payments, for example, if a facility admits new Medicare-eligible residents while a DPNA is in effect, the fact of that potential consequence does not make the losses themselves an enforcement remedy. Although such losses, from the provider's viewpoint, may be an adverse consequence of enforcement, the Secretary, in promulgating the regulations, did not designate as "remedies" all enforcement measures that can have an adverse effect. Thus, it seems clear from the plain language of the regulation that the Secretary intended to convey appeal rights not with regard to all CMS actions that could adversely impact providers, but only with regard to imposition of the specific remedies listed in section 488.406. I note in this regard that in Fountain Lake Health & Rehabilitation, Inc., DAB No. 1985, at 6 (2005), the Board rejected the provider's argument that it should be afforded a hearing, even though CMS had rescinded all remedies, since the provider would suffer adverse consequences ancillary to the immediate jeopardy determination on its record. Upholding the ALJ's dismissal, the Board stated, "Even if we assume that Fountain Lake suffered specific adverse consequences ancillary to CMS's imposition of a deficiency citation . . . Fountain Lake has not shown how such a consequence constitutes 'the imposition of a remedy specified in section 488.406.'" Similarly, the majority here has not shown how "losses of program payments relating to the alleged period of ongoing noncompliance" constitutes "the imposition of a remedy specified in section 488.406."

Furthermore, where, as here, a facility has received notice that a DPNA is being imposed on a specific date and that date arrives without any notice that CMS found the facility in substantial compliance before that date, the facility can avert, or at least ameliorate, any adverse effect, by simply not admitting new Medicare-eligible residents while the remedy remains in effect.

In this regard, I note that the majority does not state that TLC in fact lost payments or even that it admitted new Medicare-eligible residents during the period in question. Neither does the majority cite any evidence that TLC could not have avoided or alleviated any adverse effects through admission of non-Medicare residents. If TLC did admit new Medicare-eligible residents after May 22, 2009, even though it knew that that the DPNA was scheduled to take effect on that date, TLC is itself responsible for any losses it incurred due to those admissions.

As discussed above, the majority decision rests, in part, on its assertion of a remedy not included in the existing regulations.[7] The majority decision also rests on its conclusion that CMS's notice of the date a facility achieved compliance is an "initial determination." The majority finds that CMS's August 5 letter "constituted an initial determination by CMS that TLC had failed to achieve substantial compliance as of March 28, 2008 (the date of compliance cited in TLC's POC) and that TLC had failed to return to substantial compliance at any time after that date." Majority Decision at 29. The majority also finds that the August 5, 2008 letter "constituted an initial determination of noncompliance resulting in the imposition of an administrative remedy within the meaning of section 498.3(b)(13)." Id. The majority reasons that but for the continuing noncompliance, the DPNA remedy would not have taken effect, thus conflating a remedy's taking effect with its having been "imposed". I disagree with and dissent from these findings and this analysis, which, in effect, create an "initial determination" that does not exist in the regulations.

The authorities the majority cites for its analysis are Mimiya Hospital, DAB No. 1833 (2002) and Mimiya Hospital Ruling on Petition to Reopen (October 3, 2002), which found that CMS's notice of the date the facility achieved substantial compliance was an "initial determination" conveying appeal rights, and an ALJ decision, United Presbyterian Residence, DAB CR1305 (2005), that relied on Mimiya. I regard Mimiya (and thus Presbyterian as well) as flawed by incomplete analysis that precludes viewing Mimiya or the Board ruling in that case as reliable or persuasive precedent on the issue presented.[8] In Mimiya the

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[7] The breadth of this putative new remedy, "losses of program payments relating to the alleged period of ongoing noncompliance," is such that it could significantly expand claimed appeal rights.

[8] ALJ decisions do not bind the Board or other ALJs. Furthermore, since United Presbyterian relied on the Board

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Board found that CMS's notice of the date the facility achieved substantial compliance was an "initial determination" conveying appeal rights without discussing section 498.3(b), the regulation that governs appeal rights, or attempting to bring its finding within that provision.[9] I regard this deficit as a fatal analytical flaw, making the decision unreliable and unpersuasive precedent on the issue of what constitutes an "initial determination" conveying appeal rights.

It is well-settled (and the majority here does not dispute this) that Part 498.3(b) sets forth the actions or decisions by CMS that constitute "initial determinations" and, thus, convey appeal rights. 42 C.F.R. §§ 498.2, 498.3; Fountain Lake Health & Rehabilitation, Inc. at 4 and Lakewood Plaza Nursing Center at 4 (stating that under section 498.3, providers are entitled to request a hearing where CMS has made an adverse initial determination of a kind specified in section 498.3(b)); cf. Cary Health and Rehabilitation Center, DAB No. 1771, at 7 (2001)(citing section 498.3(b)(13)(formerly section 498.3(b)(12) as the authority providing hearing rights for "initial determinations" to impose alternative remedies). As indicated above, the "initial determination" provision at issue here is

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decision and ruling in Mimiya, the reasons I discuss below for why Mimiya is not reliable or persuasive precedent apply equally to United Presbyterian.

[9] Rather than addressing the appeal limits in section 498.3(b), the Board reasoned that finding CMS's letter notifying the facility of the date it had achieved substantial compliance an "initial determination" was "consistent with the appeals procedures at part 42 C.F.R. § 498, read as a whole," because, the Board said, "[t]hose procedures recognize that enforcement is a dynamic process, providing for revision by CMS of its determinations and for the addition of new issues prior to a hearing." Ruling at 3 (emphasis added). That rationale is not responsive to the legal issue involved, which is how the Secretary has specifically defined appeal rights, not what part 498 as a whole may reflect with regard to the enforcement process. Furthermore, there is no need to resort to a rule of construction (which is what reading Part 498 "as a whole" is), nor was it appropriate to do so in Mimiya, since section 498.3(b) specifically and plainly sets out which CMS decisions or actions are "initial determinations" conveying appeal rights.

section 498.3(b)(13) which applies to "a finding of noncompliance that results in the imposition of a remedy specified in § 488.406 of this chapter." Importantly, this language does not define an initial determination based on the status of continuing noncompliance or the date a remedy takes effect. Rather it defines "initial determination" based on findings of noncompliance resulting in "imposition" of the remedy. Id. (emphasis added). The listing of "initial determinations" contained in section 498.3(b) is very precise. Had the Secretary wanted to include such CMS actions as determining that noncompliance continued (without imposing a new remedy) or providing notice that a remedy has taken effect presumably the Secretary would have done so with commensurate precision. The majority's analysis fails to give meaning to the plain language of the regulation.

In addition, the majority's analysis overlooks the substantive distinction between findings of continuing noncompliance that result in a DPNA's taking effect and the findings of noncompliance that caused CMS to impose that remedy in the first place. CMS's notification of TLC in its August 5, 2008 notice that the DPNA had taken effect as scheduled assumes, correctly, that the facility had previously been notified that CMS was imposing the DPNA.[10] A remedy cannot take effect or continue unless it has first been imposed. Thus, CMS's August 5, 2008 letter could not have "imposed" the DPNA and, therefore, could not have triggered appeal rights. Moreover, the majority does not, nor could it, claim that CMS's August 5, 2008 letter, in fact, imposed the DPNA. Clearly that letter merely refers to the fact that the DPNA took effect on May 22, 2008, as imposed by the state on CMS's authority. "Under CMS's authority, the State Agency had sent you notice of this imposition [of the DPNA] in their March 19, 2008 notice letter." CRD Docket No. C-09-9, enclosure to TLC 10/3/08 Hearing request at 2 (italics omitted). The state's March 19, 2008 letter, in turn, notified

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[10] There is no dispute that the state's letter of March 19, 2008, as authorized by CMS, notified TLC that the DPNA was being imposed and would take effect on May 22, 2009 if the facility did not achieve substantial compliance by that date. Indeed, the majority quotes the letter as providing "formal notice of imposition of statutory Denial of Payment for New Admissions (DPNA) effective May 22, 2008 . . . ." Majority Decision at 7 (emphasis added). There also is no dispute that the same letter notified TLC that it must appeal the findings of noncompliance that resulted in the imposition of that remedy within 60 days after receiving the notice.

TLC of its right to appeal the findings of noncompliance that resulted in the imposition of the DPNA. CRD Docket No. C-08-667, CMS's Motion for Summary Disposition, CMS Ex. 1, at 3. It is clear that as a matter of fact, as well as law, the state's March 19, 2008 letter imposing the DPNA was the "initial determination" triggering appeal rights for that remedy, not the later notices stating that noncompliance continued and that the DPNA had taken effect.

I find the Majority Decision here and the Board decision in Mimiya inconsistent with the Board decision in Cary Health and Rehabilitation Center. In Cary (which Mimiya dismissed as factually distinguishable without discussion), the Board recognized that appeal rights for findings of noncompliance resulting in imposition of a DPNA run from the notice imposing the remedy.[11] Relying on section 498.3(b), the Board expressly held that "an appeal from a HCFA determination imposing a DPNA must be filed within 60 days of receipt of the determination." Cary at 8. The Board also held that "the timing of a hearing is unrelated to the effective date of the DPNA, but depends only on the date of receipt of notice of HCFA's determination imposing the remedy." Id. at 13. The Board expressly rejected the provider's claim "that no valid notice imposing a DPNA could be sent before [the date the mandatory DPNA was scheduled to take effect] had passed or without conducting another revisit on or after [that date] to establish continued noncompliance." Id. at 11. The Board explained that "proof of continued noncompliance on the 90th day after noncompliance was first certified is not, as Cary contemplated, a condition precedent to the imposition of a DPNA . . . . Proof of the achievement of substantial compliance before the 90th day, instead, was a condition subsequent which would avert the action that would otherwise go into effect." Id. at 25.

In addition to being inconsistent with the Board's unanimous decision in Cary, I find the majority's analysis inconsistent with the Board's decision in North Ridge Care Center, DAB No. 1857 (2002), a decision issued shortly after Cary. In North Ridge, an ALJ had held that CMS's certification that a facility

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[11] The absence of any discussion of the factual distinctions in Mimiya further undercuts the authority of Mimiya since the mere fact that a case may have different facts does not necessarily mean that those facts have any material effect on the applicability of the legal holdings to another case. The Board did not explain why all of the legal holdings I cite from Cary would not apply regardless of differing factual contexts.

was in substantial compliance was an initial determination. The Board disagreed.

> The October 28, 1996 certification of compliance is not among the actions listed in section 498.3(b) as being an initial determination. By its very terms, Part 498 provides appeal rights only for these listed actions. 42 C.F.R. § 498.3(a)("This part sets forth procedures for reviewing initial determinations that [CMS] makes with respect to matters specified in paragraph (b)"). Because a certification of compliance is not specified in section 498.3(b), and because we can find no other regulation that makes the procedures in Part 498 applicable to such a certification, we conclude that it is not an initial determination under Part 498.

DAB No. 1857 at 8 (emphasis added and footnote omitted).[12] As discussed above, CMS's determinations that noncompliance continued for a particular period (but did not result in imposition of additional remedies) are not listed "initial determinations" in section 498.3. Furthermore, a determination that a facility achieved compliance on a certain date, which the majority here characterizes as a finding that TLC was out of compliance before that date, is, in my view, more appropriately characterized as a determination of compliance which, as the Board held in North Ridge, is not an "initial determination" and, thus, conveys no appeal rights.

In addition, I find no support in the record or the law for the majority's finding that CMS's August 5 notice constituted an "initial determination" because it "implicitly rejected TLC's allegation of compliance." Majority Decision at 29. The letter does not even mention TLC's allegation of compliance, and the regulations do not provide for "implicit rejections of allegations of compliance." The regulations require facilities to submit plans of correction (POCs) containing timetables for corrective action for approval by CMS or the state survey agency.[13] 42 C.F.R. §§ 488.402(d)(1), 488.450. CMS or the state

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[12] Although the factual context in which the Board made this holding was different from the factual context here, those differences are not material to the Board's construction of section 498.3(b) as circumscribing appeal rights.

[13] The POC must specify the date the facility alleges the deficiencies found on the survey for which the POC is submitted will be corrected. See 42 C.F.R. § 488.401.

must then make a determination not only that the facility has corrected the deficiencies addressed in the POC but has achieved substantial compliance with all requirements. 42 C.F.R. §§ 488.440(h)(1), 488.454(a)(1); Meadowbrook Manor-Naperville, DAB No. 2173, at 13-14 (2008)(holding that a finding that deficiencies have been corrected is not the same as a determination that a facility has achieved substantial compliance with all requirements), aff'd sub nom., Butterfield Health Care v. Charles E. Johnson, Case No. 08-CV-3604 (N.D. Ill. April 16, 2009). CMS or the state makes its determination that a facility has achieved substantial compliance "based upon a revisit or after an examination of credible written evidence that it can verify without an on-site visit . . . ." 42 C.F.R. § 488.454(a)(1). See also 42 C.F.R. § 488.440(h)(1)(where it is necessary to do an on-site visit to confirm a return to substantial compliance, if the provider can supply "documentation acceptable to CMS or the State agency that substantial compliance was achieved on a date preceding the revisit," a per-day CMP accrues "until that date of correction for which there is written credible evidence") and 42 C.F.R. § 488.440(h)(2)(stating that if an on-site visit is not necessary to confirm a return to substantial compliance, a per-day CMP accrues "until the date of correction for which CMS or the State receives and accepts written credible evidence.")

As is evident from the regulations cited above, the mere submission of a POC alleging a date when deficiencies will be corrected does not establish either correction of the deficiencies addressed in the POC or substantial compliance with all requirements; neither does CMS's acceptance of the POC. E.g., Cal Turner Extended Care Pavilion, DAB No. 2030, at 8 (2006)("Approving 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."). These regulations clearly require CMS or the state to make an affirmative determination that the facility has, in fact, corrected the cited deficiencies and achieved substantial compliance with all requirements, based either on findings made during an on-site revisit or, where CMS or the state determines that an on-site revisit is not necessary, based on the facility's submission of written evidence that is credible and sufficient for CMS or the state to verify compliance without an on-site visit. In other words, the language of these regulations anticipates affirmative, overt conduct on the part of the state or CMS to determine whether to accept or reject a facility's allegations of compliance.

Moreover, excerpts from notice letters sent by the state in this case, cited by the majority in its decision, make it plain that a determination as to whether TLC had achieved compliance would occur by way of an actual (not implicit) determination by CMS following an on-site revisit to the facility, not by mere submission of a POC and credible allegation of compliance or any "implicit" conduct on the part of CMS or the state. See Majority Decision at 7, 11-12.

The Majority Decision here, like the decision in Mimiya, rests principally on a policy rationale.

> A determination that TLC has no right to a hearing to show that it returned to substantial compliance as of March 28, 2008 or thereafter would deny the facility recourse where the State agency in fact delayed its revisit until months after the DPNA went into effect, even though the facility timely submitted an acceptable POC and made a credible allegation of compliance following the February surveys. We believe that such a determination would undermine a fundamental goal of the survey, certification and enforcement procedures, as described in the 1994 preamble to the long term care facility regulations, to motivate facilities to promptly correct acknowledged deficiencies.

Majority Decision at 32 (citing its reasoning in Mimiya, Ruling on Petition to Reopen DAB No. 1833, at 2). The majority further opines that if a revisit survey had taken place before May 22, 2008, the facility might have been found to have achieved substantial compliance prior to that date. The majority finds that this is reason enough to afford TLC a hearing on the imposition of the DPNA even though TLC did not file any hearing request until August 12, 2008, nearly five months after CMS notified TLC (through the state agency) that the DPNA was being imposed. Id. at 31. The Secretary determines policy and promulgates that policy in regulations that bind ALJs and the Board. Here the regulations, by their plain language and the preamble, indicate that the Secretary did not choose to incorporate in the regulations governing hearing rights the policy considerations advanced by the majority here. As discussed above, there is no language in the Part 498 regulations that delineates a CMS decision as to when a facility achieved substantial compliance as an "initial determination". The majority states that "the preamble indicates that a facility has the right to a hearing to challenge the date it returned to substantial compliance." Majority Decision at 33 (citing 59

Fed. Reg. 56,116, 56,208 (Nov. 10, 1994)). The preamble cannot create appeal rights that do not exist in the plain language of Part 498. Furthermore, the preamble excerpt cited by the majority as supporting this proposition does not even relate to section 498.3(b), the only section that creates appeal rights. Neither does it relate to DPNAs, the remedy at issue here; rather, the language cited relates to 42 C.F.R. § 488.440, which deals with the effective date and duration of CMPs.

Furthermore, the preamble section containing the cited excerpt totally undercuts the majority's rationale for its decision. That section of the preamble shows that the Secretary rejected a public comment that the regulation "incorporate a provision assuring prompt revisits by CMS or the States to evaluate compliance based upon a facility's allegation of compliance." 59 Fed. Reg. 56116, 56206 (Nov. 10, 1994). In rejecting this comment, the Secretary stated:

> While [CMS] and the States will try to revisit the facility in as timely a fashion as possible, when a revisit is necessary to verify substantial compliance, neither [CMS] nor the States will be constrained by a specified time frame in which to conduct these revisits. Nor will [CMS] or the States suspend a penalty until a revisit can be conducted. The revisit would not be necessary if the SNF or NF had met its commitment to remain in substantial compliance with the participation requirements. Therefore, it is the provider's poor performance that has generated the need for a revisit.

Id. at 56,207. Board decisions have recognized this discretion, holding that "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; cf. Beechwood Sanitarium, DAB No. 1824, at 14 (2002) (upholding ALJ's conclusions that alleged defects in survey procedures are not grounds for dismissal of remedies and specifically upholding the ALJ's conclusion that "CMS is not required by law to use 'reasonable time frames' to evaluate a facility's performance before terminating that facility's [participation] in Medicare . . . ."). The majority itself cites Cal Turner for this rule but does not address the inconsistency between that rule and its finding here that for CMS to not conduct a revisit before the date a DPNA is scheduled to take effect somehow undermines the survey and certification enforcement procedures. Majority Decision at 32, n.4. As the preamble language shows, the

rationale used by the majority here, which is really a policy decision, has already been rejected by the Secretary. The Secretary chose to put the onus squarely on the facility to remain in substantial compliance at all times, not on CMS to conduct revisits on the facility's timetable or to prove that the facility continues to be in noncompliance. As the ALJ here noted, the Board has recognized that this is the intent of the regulations by holding that the regulations do not require CMS to provide affirmative evidence of continuing noncompliance. ALJ Decision at 10, citing Barn Hill Care Center, DAB No. 1848 (2002).

Finally, I see no factual basis for saying that TLC would be denied recourse if not permitted a hearing based on its belated appeal. TLC's recourse with respect to the DPNA (which was the only remedy remaining since CMS rescinded all other remedies) was to appeal within 60 days of receiving the state's letter imposing the DPNA. TLC did not do so. The Board has held that a facility cannot complain of a lack of recourse when it sits on its appeal rights. E.g., Hammonds Lane Center et al., DAB No. 1853 (2002)("Clearly, there was nothing to prevent Petitioners from filing hearing requests as the 60-day deadline approached in order to preserve their rights to a hearing in the event the state survey agencies did not revisit and find substantial compliance within that time frame. Petitioners chose, however, not to undertake that protective course of action."); Quality Total Care, L.L.C. dba The Crossings, DAB No. 2242 (2009)("[N]either the law nor the regulations excuse [The Crossings] from timely seeking an appellate remedy because the final CMP amount is yet to be determined due to the facility's continued status of noncompliance."). The majority decision here is inconsistent with those decisions and allows long term care facilities like TLC to ignore notices that DPNAs are being imposed (and perhaps notices that other remedies are being imposed) and still obtain a hearing well after expiration of the 60-day time limit the regulations provide for filing a hearing request.

In its "Response to Dissent", the majority cites Palm Garden of Gainsville, DAB No. 1922 (2004) and several other cases as evidence that CMS's position has not been consistent on the issue presented here, whether there is a right to appeal a finding of continuing noncompliance or the duration of noncompliance that does not result in imposition of an additional remedy. In my view, it is irrelevant to our decision here whether CMS has always been consistent with respect to administrative enforcement of appeal rights or whether it has chosen to raise an issue regarding appeal rights in any

particular case. The Board has been presented here with what is essentially a jurisdictional issue, and our task is to decide that issue, taking into consideration the parties' positions in this case, but being bound, ultimately, by the regulations and, in particular, the limitation of appeal rights in Part 498.

Furthermore, I find nothing in the Palm Garden decision that indicates that there was any issue there involving the provider's appeal rights. Palm Garden involved an appeal of findings of noncompliance with 42 C.F.R. § 483.25(m)(1). There is no suggestion in the decision that Palm Garden did not timely appeal those findings or that its right to appeal was otherwise at issue. Instead, based on the regulations cited in that decision, Palm Garden appears to be an example of cases in which ALJs and the Board have concluded in the context of a timely and otherwise valid appeal that the provider can argue as part of that appeal not only that it was not out of compliance in the first place but, also, that it returned to compliance on a date earlier than the date determined by CMS. See e.g., Sunbridge Care and Rehabilitation for Pembroke, DAB No. 2170 (April 7, 2008), aff'd, Sunbridge Care and Rehab. V. Leavitt, No. 08-1603, 2009 WL 2189776 (4th Cir. July 22, 2009). Those decisions are based on several Part 488 regulations, including the provisions of section 488.454(e) that "[i]f the facility can supply documentation acceptable to CMS or the State survey agency that it was in substantial compliance . . . on a date preceding that of the revisit, the remedies terminate on the date that CMS or the State can verify as the date that substantial compliance was achieved . . . ." See also 488.454(a), 488.417(d). Indeed, the Board in Palm Garden cited these regulations and found no reason to disturb the ALJ's conclusion that the evidence submitted by Palm Garden did not establish an earlier date of compliance. DAB No. 1922, at 7-8. However, the fact that section 488.454 has been construed as permitting a facility which has an otherwise valid Part 498 appeal before an ALJ to attempt to show an earlier compliance date does not mean that section 488.454 makes CMS's decision as to the duration of noncompliance an "initial determination" triggering appeal rights. In other words, section 488.454, in contrast to section 498.3(b), does not create appeal rights but merely affects the scope of an otherwise valid appeal. I know of no Board case holding the contrary, and the majority here does not allege that section 488.454 creates appeal rights.

In conclusion, for the reasons stated above, I would affirm the ALJ Decision in its entirety and specifically would affirm the ALJ's Findings of Fact and Conclusions of Law (FFCLs) A. B. and C., as those FFCLs are stated in the ALJ Decision. I

specifically dissent from and do not join in the majority's revisions to FFCLs A. and C.

/s/
Sheila Ann Hegy