Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: December 8, 2009
Desert Lane Care Center,	
Petitioner,	Civil Remedies CR1914 App. Div. Docket No. A-09-89
	Decision No. 2287
- v. -	
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Desert Lane Care Center (Desert Lane), a Nevada nursing facility, appeals the March 9, 2009 decision of Administrative Law Judge (ALJ) José A. Anglada that Desert Lane was not in substantial compliance with requirements for participation in the Medicare program during surveys in January, April and June 2007. Desert Lane Care Center, DAB CR1914 (2009) (ALJ Decision). The ALJ sustained the imposition of a per-instance civil money penalty (CMP) of $10,000 and a denial of payment for new Medicare admissions (DPNA) for the period April 20, 2007 through June 15, 2007.[1]

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[1] CMS also informed Desert Lane following the January 12, 2007 survey that a statutory prohibition on conducting a nurse aid training and competency evaluation program (NATCEP) applied to it, based on the imposition of a DPNA and a CMP greater than

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For the reasons discussed below, we sustain the ALJ Decision in full.

Applicable law

Federal law and regulations provide for imposing remedies on nursing facilities that do not comply substantially with requirements for participation in the Medicare and Medicaid programs. Sections 1819 and 1919 of the Act (42 U.S.C. §§ 1395i-3, 1396r); 42 C.F.R. Parts 483, 488, and 498.[2] "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 and safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Noncompliance means any deficiency that causes a facility to not be in substantial compliance." Id.

Among the remedies CMS may impose is a CMP ranging from $1,000 to $10,000 for each instance that a facility is not in substantial compliance with one or more program requirements. 42 C.F.R. §§ 488.408(d)(1)(iv), (e)(iv), 488.430(a), 488.438(a)(2). The factors that CMS considers in determining the amount of a CMP are: (1) the facility's history of noncompliance, including repeated deficiencies; (2) the facility's financial condition; (3) the factors specified in 42 C.F.R. § 488.404 (the scope and severity of the deficiencies, the relationship of one deficiency to other deficiencies resulting in noncompliance, a facility's prior history of noncompliance in general and specifically with reference to the

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$5,000. CMS Ex. 6, at 3, citing sections 1819(f)(2)(B), 1919(f)(2)(B) of the Social Security Act (Act). The ALJ did not address this remedy, and Desert Lane does not raise it on appeal. In any event, since we uphold the DPNA and the $10,000 CMP, the NATCEP prohibition applies as a matter of law. Id.

[2] The current version of the 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, and the U.S.C.A. Popular Name Table for Acts of Congress.

deficiency at issue); and (4) the facility's degree of culpability. 42 C.F.R. § 488.438(f).

CMS must impose a DPNA when a facility remains out of substantial compliance three months after the last day of the survey identifying the noncompliance. 42 C.F.R. § 488.417(a); Act, § 1819(h)(2)(D). A DPNA continues until the date the facility achieves substantial compliance. 42 C.F.R. §§ 488.454(a), 488.417(d); Act, § 1819(h)(3).

Standard of review

Our standard of review on a disputed finding of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. Our standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs, www.hhs.gov/dab/guidelines/prov.html (Guidelines).

Case Background[3]

The Nevada Department of Health and Human Services (state agency) completed a recertification survey of Desert Lane on January 12, 2007, and revisit surveys on April 20, 2007, and June 6, 2007. The January 12 survey identified 13 deficiencies representing noncompliance with specific regulatory requirements. ALJ Decision at 1-2. CMS notified Desert Lane that it was imposing the remedy of a per-instance CMP of $10,000 based on a deficiency alleging noncompliance with the requirement to ensure that residents maintain acceptable parameters of nutritional status. Id. at 2, citing 42 C.F.R. § 483.25(i)(1). CMS also notified Desert Lane that it had determined to impose a DPNA effective April 12, 2007.[4] Id.; CMS

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[3] The information in this section is drawn from the ALJ Decision and the record and is presented to provide a context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace or modify the ALJ's findings of fact or conclusions of law.

[4] It appears that the ALJ Decision addressed the DPNA only as it relates to the April 20 through June 15, 2007 period because the ALJ understood that Desert Lane had appealed only

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Ex. 6. Desert Lane contested only the noncompliance finding under section 483.25(i)(1), not the other findings from the January 12, 2007 survey. ALJ Decision at 2.

A revisit survey conducted on April 20, 2007 found two deficiencies, and CMS informed Desert Lane that the DPNA would remain in effect. Another revisit survey on June 6, 2007 found two deficiencies. CMS subsequently determined that Desert Lane had attained substantial compliance effective June 15, 2007, and notified Desert Lane that the DPNA was discontinued on that date. Desert Lane timely requested hearings to challenge the four deficiencies found in the two revisit surveys, which were the basis for the DPNA for the period April 20 through June 15, 2007. Id.; see 42 C.F.R. § 498.3(b)(13) (providing a right to appeal findings of noncompliance that result in the imposition of a remedy specified in section 488.406); 42 C.F.R. § 488.406 (available remedies include a DPNA).

The ALJ granted the parties' request to waive an in-person hearing and have him decide the case based on their written submissions, which comprised each party's initial brief and reply brief, and their proposed exhibits (including written declarations of CMS and State surveyors), which the ALJ admitted in the absence of any objection. The ALJ sustained the five deficiency determinations that Desert Lane had appealed, the

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the basis for CMS' decision to continue the DPNA from April 20 through June 15, 2007 based on the findings from the April 20 revisit survey. See ALJ Decision at 2 ("Petitioner has appealed . . . the basis for CMS's decision to continue the DPNA from April 20 through June 15, 2007."); see also CMS Br. at 4 (noting that Desert Lane had not appealed "the DPNA imposed from April 12, 2007 through April 19, 2007.") It is clear from CMS's notice letters to Desert Lane that the DPNA was to take effect April 12, 2007, the 90th day after the final day of the January 12, 2007 survey that first identified noncompliance. CMS Exs. 6 at 2; 7 at 1, 2, 3. In its requests for hearing, Desert Lane acknowledged this. Letter to Oliver Potts, at 1 (Aug. 2, 2007); Letter to Steven D. Chickering, at 1 (Apr. 12, 2007). We also note that in its reply brief Desert Lane did not challenge CMS's statement to us that Desert Lane had not appealed the DPNA for the earlier period. Thus, the mandatory DPNA was in effect from April 12, 2007 through June 15, 2007.

imposition of the $10,000 CMP that CMS imposed for the deficiency from the January 12, 2007 survey, and the DPNA.

We discuss the ALJ's findings and conclusions in our analysis of Desert Lane's appeal of each deficiency.

Analysis

I. The ALJ's conclusion that Desert Lane failed to comply substantially with the requirements of 42 C.F.R. § 483.25(i)(1) (January 12, 2007 survey) is supported by substantial evidence and free of legal error.

The regulation, as applicable here, provides as follows:

> (i) *Nutrition*. Based on a resident's comprehensive assessment, the facility must ensure that a resident—
> (1) Maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible; . . .

42 C.F.R. § 483.25(i)(1). In decisions addressing this regulation, the Board has held that unplanned weight loss may raise an inference of inadequate nutrition and support a prima facie case of a deficiency. The Windsor House, DAB No. 1942 (2004); Carehouse Convalescent Hospital, DAB No. 1799 (2001). If CMS makes a prima facie showing of noncompliance based on unplanned weight loss, the facility must prove that it provided adequate nutrition or that the weight loss was attributable to non-nutritive factors which establish that the weight loss was unavoidable. Carehouse Convalescent Hospital at 22; The Windsor House at 17-18. The finding of noncompliance concerns Desert Lane's care of two residents who received all of their nutrition through gastric tubes.

Resident 23

Resident 23 was a 24-year-old male who was in a persistent vegetative state and had additional diagnoses, including anoxic brain damage, pneumonia, hypertension, and retention of urine. ALJ Decision at 6, citing CMS Ex. 10, at 18-20. He was readmitted to the facility on June 16, 2006 and weighed 143.2 pounds on June 17, 2006. It is not disputed that the resident weighed 131.7 pounds on July 13, 2006, 126.9 pounds on October 6, 2006, and 122 pounds on January 8, 2007. Desert Lane also

does not dispute the ALJ's conclusion that this represents an "unplanned weight loss of almost 15% of his total body weight from the time he was admitted" that was classified as "severe" under the guidance in CMS's State Operations Manual (SOM) for evaluating the significance of unplanned, undesired weight loss.[5] ALJ Decision at 6-7, citing CMS Ex. 10, at 5 (SOM, App. PP, F325).

The ALJ found that Resident 23's undisputed weight loss established a prima facie case that Desert Lane failed to ensure that Resident 23 maintained acceptable parameters of nutritional status as required by section 483.25(i)(1). He concluded that Desert Lane did not rebut that showing because the evidence showed that Desert Lane's response to the resident's weight loss was "tardy and insufficient." Id. at 7. The ALJ found that the facility did not modify or increase the resident's feeding tube formula - "the most effective and expedient way of responding to his weight loss" - from the time he was readmitted on June 16, 2006 until October 6, 2006, which caused the resident actual harm. Id. at 8. The ALJ also found that the facility did not address the resident's weight loss in his care plan until October 17, 2006 and did not notify his physician of the weight loss between June 16 and January 10, 2007. The ALJ noted that on July 13, 2006, the registered dietician recommended no changes to Resident 23's tube feeding plan and "indicated that the current plan would continue to be followed unless further weight loss was noted," despite the resident having already manifested a "severe" weight loss under the SOM guidelines. Id. The facility's failure to have acted sooner to address the resident's weight loss, the ALJ found, violated the facility's own policies on nutritional services and weight management. Id.

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[5] The suggested parameters for evaluating significance of unplanned and undesired weight loss are:

Interval	Significant Loss	Severe Loss
1 month	5.0%	Greater than 5%
3 months	7.5%	Greater than 7.5%
6 months	10.0%	Greater than 10%

SOM, App. PP, F325. The facility's own weight management policy is similar to the SOM, providing that "unplanned and undesired weight loss will be evaluated for significance utilizing the following guidelines:" 3% in one week; 5% in 30 days; 7.5% in 90 days; 10% in 180 days. CMS Ex. 27, at 12.

The ALJ rejected Desert Lane's contention that Resident 23's weight loss was clinically unavoidable, finding that the facility had not shown that the weight loss was the result of non-nutritive factors, such as the resident's multiple serious infections, fever, antibiotics treatment, or other clinical conditions. Id. at 8-9. He concluded that the facility's "very slow" response to Resident 23's unplanned weight loss, and its failure to establish that the weight loss was due to the resident's clinical condition, meant that the facility had not demonstrated that the weight loss was unavoidable or that it could not have provided him with adequate nutrition. Id.

Desert Lane's assertions on appeal that it furnished adequate nutrition to Resident 23 and appropriately addressed his weight loss are without merit. None of the measures Desert Lane says it took contradict the ALJ's findings, which show that despite the resident's displaying a "severe" weight loss less than a month after readmission (7.6% of total body weight by July 13, 2006), the facility took no measures to address his weight loss until October 2006, some three months later.

In particular, Desert Lane ignores the critical issue of the timeliness of the measures it asserts it took to address the resident's weight loss. The record shows they were not timely. Desert Lane asserts, for example, that it provided Resident 23 with "adequate nutrition" because it administered "Isosource formula 1.5 cal @ 80 ml/hr for 16 hours per day." RR at 3; P. Reply at 5. Desert Lane does not mention evidence in the record that it only began administering that formula to the resident on or after October 6, 2006, as confirmed by a dietary progress note of that date recommending a change to the resident's feeding tube formula. CMS Ex. 10, at 6-7. By that time, the resident weighed 126.9 pounds, which was also a "severe" weight loss under the SOM since admission. The evidence thus supports the ALJ's observation that this was the first increase in the resident's feeding tube formula since he was admitted to the facility on June 16, 2009. ALJ Decision at 8. The dietary progress note was the first since July 13, 2006, when the registered dietician had recommended no changes to Resident 23's tube feeding plan.

Desert Lane also asserts that the resident "was Care Planned for weight loss" as part of Desert Lane's efforts "to address his unique risk factors for malnutrition." P. Reply at 6, citing P. Ex. 11. The care plan Desert Lane cites is dated October 17, 2006, which supports the ALJ's finding that Desert Lane did not

address the resident's weight loss in his care plan before that time. ALJ Decision at 8, citing P. Ex. 11, at 2. Desert Lane asserts that it "monitored the resident's progress and reviewed the circumstances contributing" to the resident's weight loss. P. Reply at 7, citing P. Exs. 11, 18. The exhibits it cites are the care plan entry from October 17, 2006, care plan entries for other problems beginning October 16, 2006, and medication administration records from December 2006 and January 2007. Nothing that Desert Lane cites shows any error in the ALJ's determination that Desert Lane failed to mount a timely response to the resident's weight loss.

Other measures cited by Desert Lane are irrelevant because they address aspects of the resident's care other than his weight loss, such as Desert Lane's assertions that the resident "received scheduled medications" and that "staff turned and repositioned Resident #23 every two hours according to standard practice." P. Reply at 7. An exhibit Desert Lane cites as showing that the resident "received assessments by the dietary staff" is a "physical restraint assessment" dated June 16, 2006, which, in addition to occurring before the resident displayed a severe weight loss, contains no indication of any dietary assessment. P. Reply at 7, citing P. Ex. 5. Desert Lane also cites "Nursing Assessments" dated June 16, July 18, and October 16, 2006 that do not concern the resident's weight loss. P. Ex. 4. Desert Lane's assertion that its staff "administered tube feedings as ordered" is irrelevant in light of the facility's failure to have changed the tube feeding formula until October 6, 2006. P. Reply at 7. Desert Lane does not explain how any of these measures constituted the provision of nutrition sufficient to maintain acceptable parameters of nutritional status. They show no error in the ALJ's determination that Desert Lane failed to conduct any dietary evaluations of Resident 23 between July 13 and October 17, 2006.

Desert Lane also fails to provide citations to the record to support some of its claims. Desert Lane for example provides no citation for its assertion that the resident's physician "was aware" of the weight loss and "had been working with the facility" to assure that he received adequate nutrition.[6] P.

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[6] Desert Lane's failure to provide record citations is contrary to the Board's Guidelines, which state that a petitioner's arguments should be supported by precise citations to the record. The cover letter to Desert Lane transmitting the

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Reply at 6. In addition, Desert Lane does not assert that this "awareness" was a result of facility staff having notified the physician or that any such notification occurred soon enough after the resident manifested a severe weight loss as to have constituted an appropriate and timely response to the weight loss.

Desert Lane also does not dispute the ALJ's determination that the response to the resident's weight loss failed to meet the requirements of its own policies. The ALJ found, and Desert Lane does not dispute, that its policies required that once the facility became aware of a resident's weight loss, it would, at a minimum, provide: (1) monthly dietary reevaluations of the resident's nutritional status, (2) monthly documentation in the plan of care demonstrating that his unplanned weight loss was addressed by the registered dietician or dietary technician, (3) timely interventions and recommendations by the registered dietician or dietary technician in response to his unplanned weight loss, and, (4) notification of the resident's physician when his weight declined five percent or more in one month. ALJ Decision at 7-8, citing CMS Exs. 1, at 52-54 (survey Statement of Deficiencies (SOD)); 25, at 10-13 (facility Nutrition Services Standards of Practice); 27, at 11-12 (facility Weight Management Practice Guidelines). The measures a facility adopts in its policies to care for its residents are evidence of the facility's evaluation of what must be done to attain or maintain a resident's "highest practicable physical, mental, and psychosocial well-being," as required by the introductory language of section 483.25.[7] Kenton Healthcare, LLC, DAB No.

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ALJ Decision similarly instructed Desert Lane to "cite each part of the record that you want the Board to consider, identifying the document and page number."

[7] This introductory language, which requires that "[e]ach resident must receive and the facility must provide" the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care, "encompasses (and prefaces) [the] other, more specific quality of care requirements," set forth in the subsections of the regulation. Sheridan Health Care Center, DAB No. 2178, at 16 (2008), citing Lake Park Nursing and Rehabilitation Center, DAB

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2186, at 21 (2008); Spring Meadows Health Care Center, DAB No. 1966, at 16-20 (2005). A facility's failure to fully employ those measures as intended in its policies may thus be evidence that the facility failed to provide residents with the services required by specific subsections of section 483.25. Kenton Healthcare, LLC. Desert Lane's failure to have met the requirements of its nutritional and weight management policies in its care of this resident supports the ALJ's determination that Desert Lane failed to comply substantially with section 483.25(i).

Desert Lane also has shown no error in the ALJ's rejection of its argument that the resident's "clinical conditions demonstrate that his weight loss was unavoidable." P. Reply at 6; see ALJ Decision at 7-8. As the ALJ observed, the mere presence of a significant clinical condition, without additional evidence, does not prove that maintaining acceptable nutritional status is not possible. ALJ Decision at 9; Windsor House at 15-20 (2004). The "clinical condition exception is a narrow one and applies only when the facility can demonstrate that it cannot provide nutrition adequate for the resident's overall needs, so the weight loss is unavoidable." Windsor House at 18 (footnote omitted), citing Carehouse Convalescent Hospital at 21-22. Desert Lane has not made that showing here. Desert Lane merely enumerates the resident's various conditions but does not explain (and proffered no expert testimony explaining) how those conditions caused the resident's weight loss or made it impossible for the facility to have provided the resident with nutrition adequate to maintain his weight at an acceptable level. See Carehouse at 22 (if a facility cannot establish that it provided adequate nutrition then it must demonstrate that the resident's clinical condition made such a goal impossible). Desert Lane also cites no contemporaneous evidence showing that the resident's physician or the facility's dietary staff made those determinations.

Substantial evidence supports the ALJ's findings here that Desert Lane, like the facility in Windsor House, was very slow in responding to the resident's unplanned weight loss, and failed to demonstrate that the weight loss was the unavoidable result of the resident's overall clinical condition. Windsor

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No. 2035, at 6, n.1 (2006).

House at 23-26. Desert Lane's argument that it addressed the resident's weight loss by treating his overall clinical condition has no merit where the evidence shows that Desert Lane failed to respond to his nutritional needs in a timely, adequate manner and failed to demonstrate that his weight loss was because of nonnutritive factors. We thus sustain the ALJ's determination for Resident 23.

Resident 3

Resident 3 was a 74-year-old male who received all nutrition through a gastrostomy feeding tube. He had been readmitted to the facility on May 19, 2006, and had diagnoses including Alzheimer's disease, dementia with behavioral disturbance, hypertension, renal/urethral disorder, dysphagia due to cerebrovascular accident, esophageal reflux, and urinary tract infection. ALJ Decision at 9, citing CMS Exs. 1, at 64; 8, at 7-14. It is not disputed that Resident 3 lost 32.1 pounds from May 19, 2006 to August 15, 2006, an almost 20% decrease in his body weight (195.4 - 163.3 pounds), and then gained 29 pounds between November 7, 2006 and December 2, 2006 (161.6 - 190.6 pounds). Id., citing CMS Ex. 8, at 42. These "severe weight fluctuations," the ALJ concluded, were sufficient to establish a prima facie case, which Desert Lane did not rebut, that Desert Lane failed to ensure that Resident 3 maintained acceptable parameters of nutritional status. Id. at 9, 10.

The ALJ rejected Desert Lane's contention that Resident 3's unplanned weight loss was due to his overall clinical condition, and determined that Desert Lane "failed to take all reasonable steps to ensure that Resident 3 received nutrition adequate to his needs." Id. at 10, 11. Desert Lane does not dispute findings the ALJ made in reaching this determination. Specifically, Desert Lane does not dispute that the facility knew as early as during June 2006 that the resident was losing weight but did not modify his tube feeding plan until July 24, 2006, and suggested no further nutritional changes when the resident continued to lose weight. Id. at 9, citing CMS Ex. 8, at 46, 49-52. Desert Lane does not dispute that its dietary technician and registered dietician did not monitor the resident's weight loss until September 11, 2006 and made no nutritional status review notes or dietary progress notes for October and November 2006. Id. at 10. As to the resident's weight gain after November 7, 2006, Desert Lane does not dispute that "apparently the dietician technician was completely unaware of the recorded change in weight, and did not have this weight

change information when she conducted her nutritional status review of Resident 3 for the month of December 2006." Id., citing CMS Ex. 8, at 4. Desert Lane also does not dispute that it failed to notify Resident 3's physician of his severe weight fluctuations, as the ALJ found. Id.

The ALJ viewed Desert Lane's assessment and care of Resident 3 as "strikingly similar to Resident 23." Id. at 9. And Desert Lane, as with its appeal of the ALJ's determination for Resident 23, simply recites measures it says it took to address Resident 3's various medical conditions, but does not demonstrate that those measures addressed, or were intended to address, either the severe weight loss that the resident experienced from May 19 to August 15, 2006, or his rapid weight gain from November 7 to December 2, 2006.

The ALJ rejected Desert Lane's argument that one of the measures it cites on appeal, a "Braden Scale assessment" of the resident's risk of developing pressure sores, showed that Desert Lane conducted necessary nutritional assessments of Resident 3. The ALJ did not disagree that nutritional interventions may play a role in the healing of pressure ulcers, as Desert Lane asserts. See, e.g., The Windsor Place, DAB No. 2209, at 9, n.6 (2008) ("awareness of the connection between pressure sores and nutrition" consistent with SOM discussions about the need for interdisciplinary development of nutritional goals for residents with pressure sores). Rather, the ALJ found that the Braden Scale assessment (and an order for a speech therapy evaluation that Desert Lane does not cite on appeal) "are not evidence of the monthly nutritional assessments that should have been performed by the dietary technician or registered dietician in accordance with the regulatory requirements, facility policies, or the acceptable standard of care in the nursing home industry."[8] ALJ Decision at 10-11. Desert Lane does not directly dispute this actual finding by the ALJ. Furthermore, this finding is supported by substantial evidence in the record since whoever did the Braden Scale assessments for Desert Lane left blank those sections of the assessments that deal with "nutrition." P. Ex. 34, cited in P. Reply at 10. Braden Scale

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[8] Although the ALJ did not discuss specific standards of care in the nursing home industry, Desert Lane's failure to follow its own requirement for monthly nutritional assessments is, as discussed for Resident 23, evidence that Desert Lane did not provide services necessary to comply with section 483.25(i).

assessments that Desert Lane did not cite simply note the resident's "usual food intake pattern" and do not mention his severe weight loss or gain and discuss no nutritional interventions.[9] P. Ex. 28, at 3, 6, 9, 12, 15, 18.

As with Resident 23, some of the measures Desert Lane cites as addressing Resident 3's nutritional status are interim care plans for other conditions (e.g., a urinary tract infection and diarrhea). Desert Lane merely asserts those other conditions "could contribute" or "may contribute" to weight loss but does not explain how. P. Reply at 9. Even assuming these other conditions might affect nutritional status, Desert Lane has not established that the measures it took to address those other conditions constituted either appropriate assessments of the resident's nutritional status or effective interventions for maintaining acceptable parameters of nutrition.

Finally, for the same reasons we discussed with respect to Resident 23, Desert Lane's contention that Resident 3's clinical conditions rendered his weight loss unavoidable is conclusory, speculative, and unsupported.

Accordingly, we sustain the ALJ's determination that Desert Lane failed to comply substantially with the requirements of the regulation in caring for Resident 3.

II. The ALJ's determination that Desert Lane failed to comply substantially with the requirements of 42 C.F.R. § 483.25(k) (April 20, 2007 survey) is supported by substantial evidence and free of legal error.

Nursing facilities must ensure that residents "receive treatment and care for certain special services" including, as applicable here, enteral fluids (i.e., tube feeding). 42 C.F.R. § 483.25(k)(2). The ALJ determined that Desert Lane was not in substantial compliance because of its uncontested failure to provide two residents with the correct amount of enteral nutrition ordered by each resident's physician. For eight consecutive shifts, Desert Lane erroneously fed one resident (Resident 11) 15 ml more than the enteral feeding amount ordered per hour (65 ml vs. 50 ml). ALJ Decision at 11, citing CMS Exs.

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[9] Two other exhibits that Desert Lane cites as Braden Scale assessments are actually fall risk assessments and bowel and bladder assessments. See P. Reply at 10, citing P. Exs. 35, 36.

2, at 7; 12, at 6, 19. Desert Lane failed to provide the other resident (Resident 14) "a number of tube feedings and water flushes . . . on shifts from April 11, 2007 through April 20, 2007." Id. at 12, citing P. Ex. 66, and CMS Ex. 13, at 73-75. The ALJ cited declarations of two CMS surveyors, both registered dieticians, as showing that Desert Lane's failures to deliver tube feeding as prescribed posed the risk of more than minimal harm to each resident. Id. at 12-13, citing CMS Ex. 36, at 16; 38, at 4-5.

Desert Lane concedes that it provided the incorrect feeding amounts to the two residents, but argues that its deviations from their feeding orders were not so significant as to constitute noncompliance. RR at 5-6; P. Reply at 13-14. Desert Lane argues that Resident 11 suffered no adverse effects from the extra formula, and asserts that Resident 14 received "at least" 85 percent "of the treatments" ordered. Id. The absence of a showing of actual harm to either resident does not show substantial compliance or demonstrate error in the ALJ's determination, as a showing of actual harm is not required to find a deficiency. 42 C.F.R. § 488.301 (definition of "substantial compliance"). The state agency rated this deficiency at the "D" level of scope and severity, meaning that it caused no actual harm but had the potential for more than minimal harm. CMS Ex. 2, at 1 (SOD); SOM § 7400E (scope and severity grid, shown without alphabetic designations at 59 Fed. Reg. 56,116, 56,183 (Nov. 10, 1994)). The ALJ found that the surveyors' declarations established that the noncompliance posed the potential for more than minimal harm. One surveyor opined that Resident 11's blood sugar and fluid levels could have been adversely affected by the facility's administration of excess feeding. ALJ Decision at 12, citing CMS Ex. 36, at 16. Both attested that Desert Lane's failure to provide nutrition and water to Resident 14 as prescribed could have adversely affected the resident's renal failure and other conditions. Id., citing CMS Exs. 36, at 16; 38, at 4-5. Desert Lane did not specifically dispute the surveyors' opinions or proffer any evidence contradicting them.

We have in prior cases observed the fundamental importance of ensuring that the orders of a resident's physician are implemented faithfully. Carehouse Convalescent Hospital at 19 (deficiency under section 483.25 based on failure to deliver tube feeding and water as ordered that was not alleged to have caused actual harm). A facility's failure to comply with physician's orders can constitute a deficiency under section

483.25. Woodland Village Nursing Center, DAB No. 2053, at 8-9, (2006), aff'd, Woodland Village Nursing Ctr. v. U.S. Dep't of Health & Human Servs., 239 F. App'x 80 (5th Cir. 2007). Desert Lane did not demonstrate that it fulfilled its responsibility to provide residents with adequate nutrition to maintain acceptable parameters of nutritional status. The ALJ's finding that Desert Lane's failure to deliver nutrition as prescribed posed the risk of more than minimal harm to residents is supported by substantial evidence.

III. The ALJ's determination that Desert Lane failed to comply substantially with the requirements of 42 C.F.R. § 483.65(b) (April 20, 2007 survey) is supported by substantial evidence and free of legal error.

A facility must isolate a resident "[w]hen the infection control program determines" that the resident needs isolation to prevent the spread of infection. 42 C.F.R. § 483.65(b)(1). CMS determined, and the ALJ agreed, that Desert Lane failed to properly assess a resident who had methicillin resistant staphylococcus aureus (MRSA) to determine what infection control measures were appropriate. ALJ Decision at 13-14. Specifically, the ALJ agreed with CMS's determination that Desert Lane should have assessed the resident's cough to determine if "contact/isolation procedures" were necessary; informed staff that Resident 10 tested positive for MSRA; and ensured that staff used precautions such as goggles and masks. ALJ Decision at 13, citing CMS Ex. 2, at 7-12 (SOD). The ALJ relied on the declaration of a State surveyor, a registered nurse, supporting CMS's determinations. The ALJ found that Desert Lane offered no evidence refuting the surveyor's declaration. Id. at 14. The ALJ dismissed Desert Lane's theory that the resident's persistent vegetative state precluded his having a productive cough, citing the surveyor's opinion that the suctioning of the resident's air passage by facility staff indicated the possibility of coughing and the expulsion of infectious secretions. Id., citing CMS Ex. 39 at 6, 10.

On appeal, Desert Lane asserts that it "properly assessed" Resident 10 and "properly communicated Resident 10's infection status to its staff," but cites nothing in the record that supports those assertions. P. Reply at 14. Desert Lane does not dispute the ALJ's finding that Desert Lane offered no evidence to refute the surveyor's statements, including that Desert Lane failed to determine whether the resident had an active cough or indicate in the resident's comprehensive care

plan that he tested positive for MRSA, and did not inform staff as to what precautions were required in light of the infection. Before the ALJ, Desert Lane asserted only that information about the resident's MRSA infection "was readily available" to staff, citing an exhibit consisting of 31 pages of nurses notes covering the period March 1 through April 20, 2007. P. Br. at 43. Nowhere do the nurses notes clearly indicate the fact that the resident was infected with MRSA. They do, however, record the presence of "blood tinged sputum" on one occasion, which supports the surveyor's opinion that the resident's vegetative state did not preclude the possibility of MRSA transmission. P. Ex. 71, at 17. In any event, in light of the fact that the resident's care plan did not mention the positive MRSA test or any related interventions, the presence of one or more notations of MRSA status among chronological, handwritten nurses notes would not establish that Desert Lane "properly communicated Resident 10's infection status to its staff," as it asserts here.

Desert Lane's argument that it was sufficient to take "standard universal precautions" in caring for the resident is not supported by its own infection control policies.[10] Those policies indicate that universal precautions are used for all residents, regardless of diagnosis or presumed infection status, but impose additional precautions when MRSA is confirmed. The additional precautions include, among other things, fluid-resistant gowns and "masks/goggles" whenever soiling of clothes with infectious material is likely and whenever there is a risk of splash to the eyes or mucous membranes of staff during care such as suctioning or mouth care. CMS Ex. 25, at 1-2; P. Ex. 73, at 1. Desert Lane has not demonstrated that it took any of those measures in treating this resident, and has not refuted the ALJ's finding that it failed to take appropriate measures in light of the MRSA infection.[11] Accordingly, Desert Lane has

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[10] CMS's SOM states that "universal precautions," now called standard precautions, "refers to infection prevention practices that apply to all residents, regardless of suspected or confirmed diagnosis or presumed infection status." SOM, App. PP, F441.

[11] The ALJ did not specifically address Desert Lane's argument that the universal precautions it says it took for this resident were sufficient, but his rejection of that argument is implicit in his determination that Desert Lane should have taken

(Continued. . .)

shown no error in the ALJ's determination that Desert Lane was not in compliance with section 483.65(b)(1) in its care of this resident.

IV. The ALJ's determination that Desert Lane failed to comply substantially with the requirements of 42 C.F.R. § 483.25(k) (June 6, 2007 survey) is supported by substantial evidence and free of legal error.

Facilities must ensure that residents "receive treatment and care for certain special services" listed in the regulation, including, as applicable here, respiratory care. 42 C.F.R. § 483.25(k)(6). CMS alleged that Desert Lane failed to complete respiratory assessments as ordered for nine residents requiring ventilator support and respiratory treatments. The ALJ addressed the allegations concerning two residents only, Residents 17 and 7, and found "sufficient evidence to establish the violation" of the regulation. ALJ Decision at 15.

The ALJ found that Desert Lane staff noticed signs that Resident 17 was in respiratory distress at 9:45 a.m. on May 17, 2007 and indicated that she should be monitored, but did not conduct any follow-up assessment until some five shifts later, on May 19. The facility then responded with new orders for supplemental oxygen and treatments for Resident 17, but her respiratory status continued to decline and later that day she was taken to the hospital emergency room. Id. at 15-16, citing CMS Exs. 23, at 79; 41, at 15. The ALJ found no evidence that Desert Lane staff had listened to Resident 17's breathing sounds each shift as required by physician's orders, citing the surveyor's opinion that the absence of nurses notes recording breathing difficulties after May 17, 2007 was "reason to doubt" that the ordered examinations had occurred. Id. at 16, citing CMS Ex. 41, at 16 (surveyor's declaration). He found that the nurses notes do not indicate that staff intervened in the care of Resident 17 prior to May 19, 2007, or that the nurse practitioner actively assessed and intervened in the care of this Resident prior to May 19, 2007. The ALJ found persuasive the surveyor's opinion that the resident's condition worsened as a result of Desert Lane's failure to assess the resident on each shift and more often if necessary, which would have enabled

(Continued. . .)

additional measures.

staff to identify the respiratory difficulties and distress and intervene earlier than they did. Id., citing CMS Ex. 41, at 20-21.

On appeal, Desert Lane argues that Resident 17 "received appropriate respiratory assessments." P. Reply at 16. Concerning the lack of documentation in the nurses notes of assessments or interventions prior to May 19, 2007, Desert Lane asserts that a nurses note "dated May 19, 2007 actually began on May 18, 2007" and that this note "documents the notification of the Nurse Practitioner who performed in the capacity of physician extender for the attending physician." Id. Desert Lane, however, cites no evidence showing that the Nurse Practitioner or other staff assessed the resident on May 18, 2007. Before the ALJ, Desert Lane cited nurses notes which, consistent with the ALJ's finding, contain no entry dated May 18, 2009, and do not document that staff assessed (or intervened to treat) the resident's respiratory condition earlier than May 19, 2007. P. Br. at 47, 51-52, citing P. Ex. 84, at 6. Desert Lane does not dispute the ALJ's findings that staff should have assessed the resident's breathing sooner and that their failure to do so was harmful to the resident. We thus sustain the ALJ's determination that Desert Lane was noncompliant in its treatment of Resident 17.

For Resident 7, the ALJ determined that Desert Lane failed to substantially comply with 42 C.F.R. § 483.25(k) because it did not demonstrate that it administered respiratory care treatments every four hours, as ordered by the resident's physician on March 23, 2007. ALJ Decision at 16, citing CMS Exs. 16, at 24; 3, at 12. The ALJ found that the three instances of treatments that Desert Lane reported (on March 25, 26, and 31, 2007) were the only instances in the record and were not evidence that Desert Lane had administered treatment every four hours as ordered. Desert Lane does not dispute the ALJ's findings. It alleges only that it performed respiratory assessments and provided respiratory care, without specifying when such treatments and assessment occurred and without citing evidence in the record. In the absence of any showing by Desert Lane that it complied with the regulation in its care of this resident and that the ALJ's determination was wrong, we sustain that determination.

V. The ALJ did not err in concluding that CMS's imposition of the $10,000 per-instance CMP was reasonable.

CMS imposed the $10,000 per-instance CMP for Desert Lane's noncompliance with 42 C.F.R. § 483.25(i)(1) as found in the survey on January 12, 2007, based on Desert Lane's failure to assure that two residents maintained acceptable parameters of nutritional status. The ALJ cited the facility's prior history of noncompliance, including citations during surveys in February 2005 and 2006 for deficiencies relating to pressure sores, inadequate nursing staff, and failure to provide necessary care and services to residents. ALJ Decision at 18, citing CMS Ex. 5. He pointed out that Desert Lane did not claim that its financial condition affected its ability to pay the penalty. The ALJ opined that the imposition of the maximum per-instance penalty "should generally be reserved for particularly egregious situations," but concluded that, based on the circumstances of this case and the regulatory factors for setting a CMP, he was "not able to find $10,000 an unreasonable amount."[12] Id.

Desert Lane argues that it does not have a history of repeat deficiencies, but the relevant factor does not limit consideration of the history of noncompliance to only repeat deficiencies. 42 C.F.R. § 488.438(f)(1). Desert Lane does not dispute the ALJ's recitation of its prior history of noncompliance in February 2005 and 2006. Desert Lane argues that CMS has not established a "high culpability" on Desert Lane's part. P. Reply at 13. The regulations provide, however, that the absence of culpability is not a mitigating factor for reducing a CMP. 42 C.F.R. § 488.438(f)(4). Additionally, culpability "includes, but is not limited to, neglect,

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[12] The ALJ also stated that "the deficiency was widespread and the potential for more than minimum harm was evident." Id. To the extent that the ALJ was describing the deficiency under 42 C.F.R. § 483.25(i)(1), and not any of the deficiencies from 2005 and 2006, which he discussed in the paragraph immediately preceding this statement, he did not accurately characterize CMS's findings. CMS rated this deficiency at the "G" level of scope and severity, meaning that the deficiency was isolated, not widespread, and caused actual harm, rather than simply posing the potential for more than minimal harm. CMS Exs. 1, at 52; 6; SOM § 7400E. We nonetheless find no error in his overall assessment of the reasonableness of the CMP, for the reasons discussed.

indifference, or disregard for resident care, comfort or safety." Id. The ALJ's finding that the facility's response to the steady weight loss observed in a resident who was completely dependent on the facility for all his nutritional needs (Resident 23) was "tardy and insufficient" raises at least an inference of neglect, indifference, or disregard for that resident's care, comfort or safety. ALJ Decision at 7.

Desert Lane also reasons that because the regulations authorize *per-day* CMPs of $3,050 to $10,000 per day for deficiencies that pose immediate jeopardy to a facility's residents, and $50 to $3,000 per day for deficiencies that do not, a reasonable per-instance CMP here, where the deficiency was not found by CMS to be at the immediate jeopardy level, would be less than $3,000. We reject this reasoning. The range of per-day CMPs is not relevant, since CMS chose to impose a per-instance CMP and the ALJ is not permitted to review CMS's choice of remedy. 42 C.F.R. § 488.408(g)(2). The ALJ was obliged to consider what is a reasonable CMP within the range for the remedy chosen by CMS. Desert Lane does not question that the regulations authorize per-instance CMPs of up to $10,000, without regard to whether there was immediate jeopardy.

Desert Lane has thus shown no error in the ALJ's conclusion that Desert Lane failed to establish that a $10,000 CMP was unreasonable.

Conclusion

For the reasons explained above, we sustain the ALJ Decision in full.

/s/
Judith A. Ballard

/s/
Stephen H. Godek

/s/
Sheila Ann Hegy
Presiding Board Member