Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: August 21, 2008
Jennifer Matthew Nursing & Rehabilitation Center,	
Petitioner,	Civil Remedies CR1717 App. Div. Docket No. A-08-60
	Decision No. 2192
- v. -	
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Jennifer Matthew Nursing & Rehabilitation Center (Jennifer Matthew) appealed the December 27, 2007 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes, which incorporated an attached Ruling and Order dated February 15, 2007 (February Ruling). The ALJ concluded Jennifer Matthew was not in substantial compliance with Medicare participation requirements and upheld the imposition by the Centers for Medicare & Medicaid Services (CMS) of a civil money penalty (CMP) of $10,000 from July 13 through 20, 2005. Jennifer Matthew Nursing and Rehab Center, DAB CR1717 (2007) (ALJ Decision). The case involves Jennifer Matthew's care of a resident who died after allegedly choking on his dinner and its care of residents during a heat wave in which the temperatures inside the facility reached into the 90's.

For the reasons explained below, we affirm the ALJ Decision.

Applicable law

The federal statute and regulations provide for surveys to evaluate the compliance of skilled nursing facilities with the requirements for participation in the Medicare and Medicaid programs and to impose remedies when a facility is found not to comply substantially. Sections 1819 and 1919 of the Social Security Act; 42 C.F.R. Parts 483, 488, and 498.[1]

A "deficiency" is defined as a nursing facility's "failure to meet a participation requirement specified in the Act or [42 C.F.R. Part 483]." "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. "Immediate jeopardy" is defined as a situation in which a provider's noncompliance "has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident." 42 C.F.R. § 488.301.

CMS may impose a CMP for the days on which the facility is not in substantial of noncompliance. 42 C.F.R. §§ 488.404, 488.406 and 488.408. Where the noncompliance poses immediate jeopardy, CMS may impose a penalty in the range of $3,050 to $10,000 per day. 42 C.F.R. § 488.438(a)(1)(i).

Under the statute and regulations, CMS has the initial burden of going forward, but the facility has the ultimate burden to prove by the preponderance of the evidence that it is in substantial compliance. Batavia Nursing and Convalescent Center, DAB No. 1904 (2004), aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson, 129 Fed.Appx. 181 (6th Cir. 2005).

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

[1] 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.

conclusion of law is whether the ALJ decision is erroneous. Guidelines for 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.

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Under the substantial evidence standard, the reviewer must examine the record as a whole and take into account whatever in the record fairly detracts from the weight of the decision below. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

Relevant background

Jennifer Matthew was a skilled nursing facility located in Rochester, New York that participated in the Medicare program. Based on a survey completed by the New York State Department of Health (state agency) on July 18, 2005, the state agency determined that Jennifer Matthew was not in substantial compliance with federal requirements. On July 21, 2005, CMS issued its initial determination based on the state agency's Statement of Deficiencies (SOD), concluding that, from July 13 through July 20, 2005, Jennifer Matthew was not in substantial compliance with multiple program requirements and imposing a $10,000 per-day CMP.

Jennifer Matthew filed a hearing request as to the following two requirements involving its care of a resident who died and its care of residents during a heat wave.

- 42 C.F.R. § 483.13(c)(failure to implement policies and procedures that prohibit mistreatment, neglect, and abuse of residents); and

- 42 C.F.R. § 483.75 (failure to administer the facility in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.)

Jennifer Matthew's appeal was docketed before the ALJ as C-05-

583.[2] CMS filed a motion for summary judgment, which the ALJ denied in an order dated June 1, 2006. After consulting with the parties, the ALJ then remanded the case to CMS.

On July 18, 2006, CMS issued a revised determination adopting the state agency's recommendation that two additional citations be added based on the previously cited facts:

- 42 C.F.R. § 483.15(h)(6) (quality of life - failure to provide comfortable and safe temperature levels) at scope and severity level L (widespread immediate jeopardy); and

- 42 C.F.R. § 483. 25 (quality of care) at scope and severity level J (isolated immediate jeopardy).

CMS determined that the remedies imposed in the July 21, 2005 initial determination remained "appropriate." CMS Ex. 64, at 2.

Jennifer Matthew appealed the revised determination and the case was docketed before the ALJ as Docket No. C-06-671. The ALJ incorporated the record of Docket No. C-05-583 and invited the parties to supplement those materials following the procedural rules set out in the pre-hearing order in Docket No. C-05-583.

CMS renewed its motion for summary judgment as to comfortable and safe temperature levels required by section 483.15(h)(6). It argued that the undisputed facts established that Jennifer Matthew was not in substantial compliance with this section and that this deficiency posed immediate jeopardy. In the February Ruling, the ALJ partially granted CMS's motion, ruling that Jennifer Matthew was not in substantial compliance with section 483.15(h)(6) from July 13 through 20, 2005 because it failed to provide <u>comfortable</u> temperature levels during hot weather. The ALJ also ruled that Jennifer Matthew had raised genuine disputes of material fact as to whether this noncompliance posed immediate

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[2] Jennifer Matthew did not appeal CMS's determination that, from July 13 through September 15, 2005, it was not in substantial compliance at less than an immediate jeopardy level with the following requirements: 42 C.F.R. §§ 483.13(c)(1)(ii) (staff treatment of residents); 483.15(a) (quality of life - dignity); 483.20(k)(3)(i) (resident assessment); 483.25(a)(3) (quality of care - nutrition, hygiene, grooming); 483.25(j) (quality of care – hydration); 483.35(h)(2) (dietary services); 483.75(b) (administration - compliance with standards).

jeopardy and that CMS was not entitled to summary judgment as to the penalty amount. After the February Ruling, the following issues remained:

- Whether, from July 13 through 20, 2005, Jennifer Matthew was in substantial compliance with 42 C.F.R. § 483.13(c) (staff treatment of residents); 42 C.F.R. § 483.25 (quality of care); and 42 C.F.R. § 483.75 (administration);

- If Jennifer Matthew was not in substantial compliance, did its deficiencies (including the deficiency cited under section 483.15(h)(6)) pose immediate jeopardy to resident health and safety and for what period; and

- If the facility was not in substantial compliance, whether the $10,000 per-day penalty reasonable.

After conducting a hearing on June 13-14, 2007, the ALJ held in favor of CMS on each of these issues. At the hearing, she admitted into evidence CMS Exhibits 1-64 and Petitioner Exhibits (P. Ex.) 1-93. Transcript (Tr.) at 3.

Analysis

Below we make some introductory remarks about Jennifer Matthew's briefs on appeal before discussing the key issues related to the resident's death and heat-related problems. We then consider whether the deficiencies presented immediate jeopardy, the duration of any such jeopardy, and the reasonableness of the CMP amount. Finally, we discuss Jennifer Matthew's allegations of improper actions by and bias of the ALJ.

I. Introduction

Jennifer Matthew's briefs present two problems that cut across the issues in the case.

First, Jennifer Matthew misapplies the standard for determining whether a facility is in substantial compliance and, if so, whether that noncompliance constitutes immediate jeopardy. "Substantial compliance" turns on whether a deficiency "pose[s] no greater risk to resident health and safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. Where a facility's noncompliance "has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident," the noncompliance poses immediate jeopardy. 42 C.F.R. § 488.301 (emphasis added). Jennifer Matthew's arguments continually focus

on whether CMS showed that there was actual harm to residents. See e.g., P. Br. at 28, 32-33, 40, 44, 69, 90, 101. This misdirected focus makes much of its argument irrelevant to the standards that the ALJ and we must apply and provides no basis for concluding that the ALJ erred.

Second, Jennifer Matthew's 106-page initial brief contains many dramatic and indignant passages that are frequently misleading or unsupported by any evidence in the record. Jennifer Matthew misstates the law (as discussed above), the issues, the proceedings below, the record, and the ALJ Decision. Jennifer Matthew regularly fails to support its representations with any record cite, or cites documents that do not support the representation made. Here are some examples of the lack of accuracy:

- In discussing the allocation of burden of proof in the choking incident, Jennifer Matthew alleges that --

  > by the time of the hearing, the ALJ already had ruled the only purpose of the hearing was to determine whether an 'immediate jeopardy' penalty was appropriate – i.e., under a 'clearly erroneous' standard of proof that plainly is not the standard for resolving factual disputes, much less determining whether CMS has established a prima facie case of a violation.

  P. Br. at 94. This is simply false. The ALJ's prehearing order stated that the "outstanding issues" included whether Jennifer Matthew was in substantial compliance with 42 C.F.R. §§ 483.13(c), 483.25, and 483.75. Order dated June 5, 2008. Further, the ALJ applied the clearly erroneous standard only to the issue of immediate jeopardy. Compare ALJ Decision at 5-27 (discussion of substantial compliance) with 27-29 (discussion of immediate jeopardy).

- Jennifer Matthew represents that CMS argued that--

  > the $10,000 per day "immediate jeopardy" CMP must be upheld if there was even the "*possibility* that the high temperatures could have caused more than minimal harm, not a likelihood or actuality of more than minimal harm." CMS Brief, p. 51 (emphasis in original). .

  P. Reply at 20 (emphasis in original). Jennifer Matthew

then concludes, "This assertion is breathtaking in its scope . . . ." Id. On page 51 of its brief, however, CMS is discussing the standard for substantial compliance (which it correctly described), not immediate jeopardy.

- In addition to misrepresenting aspects of the record, Jennifer Matthew's descriptions of events appear calculated to suggest unwarranted negative inferences. For example, Jennifer Matthew writes that the SOD "alleged . . . that on June 9, 2005 – six weeks before the survey – " the resident choked and the facility did not respond properly. P. Br. at 44. The inclusion of the irrelevant fact "six weeks before the survey" conjures a picture of an untimely investigation based on stale recollections that reaches unfairly back into the facility's past operations. The record shows, however, that the state agency initially began its review of Jennifer Matthew eight days after the resident died, in response to a complaint about his death. CMS Ex. 52, at ¶ 5. This complaint survey was then combined with an annual survey that was completed six weeks after the resident died. Id. at ¶ 8.

Since the ALJ Decision is clear and thorough, we do not here identify every respect in which Jennifer Matthew's statements are simply incorrect. Instead, we address below Jennifer Mathew's main legal arguments on appeal, explaining how they are based on erroneous premises, or a misreading of the law, the record, or past Board decisions. We explain why we reject Jennifer Matthew's assertions about the lack of an evidentiary basis for the ALJ's findings, as well as its complaints about the fairness of the hearing process. We conclude that the ALJ Decision is free of harmful legal and procedural error and based on substantial evidence in the record as a whole.

II. Alleged choking deficiencies

The ALJ found that Jennifer Matthew was not in substantial compliance with 42 C.F.R. §§ 483.13(c), 483.25, and 483.75 based events surrounding its care of Resident 17 (R17). R17 died on June 9, 2005 after allegedly choking while eating supper.

A. Summary of critical facts

R17 was an 81-year-old resident. He suffered many health problems, including heart problems and end-stage dementia. He had lost his ability to talk. He also had, in the words of his

Care Plan, "forgotten" how to get food to his mouth. CMS Ex. 22, at 79. While eating, R17 would sometimes fail to swallow and then retain, or "pocket," food in his cheeks. His care plan called for staff "to feed meals" and "encourage participation as able." Id.

On June 9, 2005, R17 was eating dinner in the dining room. Contrary to his care plan, he was feeding himself. CNA Pat Brooks (who was supposed to be feeding R17 but was not) noticed that something appeared wrong with him. CNA Brooks asked LPN Sara Jacobs to check R17. According to LPN Jacob's June 9 nursing notes, she found that R17's lips were blue, and he was pocketing food, was not swallowing, and was sweating; she encouraged him to spit out the food but he "was unable to do so." CMS Ex. 22, at 73. In her June 9 nursing notes, Registered Nurse (RN) Shift Supervisor Mary Charles (who was not in the dining room) wrote that, upon checking R17, the LPN "noted that [R17] looked like he was choking, color appeared blueish." Id. at 74. CNA Brooks and LPN Jacob then moved R17 in a wheelchair from the dining room to his room.

Jennifer Matthew does not dispute that a choking resident requires immediate intervention. The CMS expert, Gregory E. Young, M.D., testified that a person who cannot breath requires immediate intervention because "after four minutes of oxygen deprivation, the chances of survival are 'next to nil.'" Tr. 219; see also CMS Ex. 58, at ¶ 38. Moreover, Dr. Young testified that here, if R17's lips were blue because he was choking, staff no longer had even four minutes in which to act. Instead, they should have fully assessed his condition and intervened as required in the dining room rather than losing critical time transferring him to his room. Tr. 225, 232.

Once R17 had been moved to his room, more nurses arrived to help. According to the LPN's notes, he was placed on the floor, and staff tried giving him oxygen, suctioning him, and performing the Heimlich maneuver (also referred to as abdominal thrusts). CMS Ex. 22, at 73. LPN Jacobs' notes stated that "Heimlich maneuver started by in-service coordinator (Judy). Some undigested food removed from mouth." Id. The notes of RN Shift Supervisor Charles (who had been called to R17's room) reported that the staff tried giving him oxygen, performing the Heimlich maneuver, and removing food from his mouth, but "[R17] was still not breathing." Id. at 74. According to RN Shift Supervisor Charles' notes, somewhere in this process 911 was called for a "choking resident." Id. The Emergency Medical Technicians (EMTs) arrived and provided aid but, at 6:45 p.m., pronounced R17 dead. The EMT report states that "RN reports that [R17] was

eating dinner when he began to choke and lost consciousness." CMS Ex. 22, at 13.

After the incident, staff reported other facts about the circumstances of R17's death, some of which were inconsistent with the facts reported in the contemporaneous nursing notes and EMT report. The most critical subsequent allegation, for purposes of Jennifer Matthew's argument, is that R17 was breathing in the dining room and not choking. See P. Br. at 8, 48-53, 56-59, 96-98. Another material change asserted by the Director of Nursing (DON), who was not there, was that staff did not perform the Heimlich maneuver on R17. See P. Br. at 53 n.22. The ALJ did not find these subsequent contradictory reports to be credible. Rather, the ALJ found more credible the nurses notes describing the incident because they were contemporaneous, "reasonably consistent" (ALJ Decision at 6), made by people with first-hand knowledge of events, and supported by other evidence in the record. The ALJ also noted that no staff with first-hand knowledge testified, and were subject to cross-examination.

B. Contrary to what Jennifer Matthew argues, the actual cause of R17's death is not the key fact for purposes of evaluating compliance.

Jennifer Matthew characterizes the surveyors' opinion that R17 was choking (and choked to death) as "almost entirely speculative, describing – at best - one *possible* explanation for the event." P. Br. at 48 (emphasis in original). Since R17 had heart problems, as well as eating problems, Jennifer Matthew argues that it was just as possible that the cause of his illness and death was a heart attack or stroke. Id. at 47. Since no autopsy was done to establish the cause, Jennifer Matthew asserts that it is being held to an unreasonable burden to prove that the cause was not choking. P. Br. at 54, 91.

This argument entirely misses the point. Contrary to what Jennifer Matthew argues, the actual cause of R17's death is not the key fact for purposes of evaluating compliance. While, as we discuss below, substantial evidence in the record as a whole supports the ALJ's finding that the resident was choking in the dining room, the key facts are undisputed on appeal – that R17's plan of care called for R17 to receive assistance eating because Jennifer Matthew had assessed him as needing such assistance; that he was not receiving such assistance (as he did not on "most days" (CMS Exhibit 22, at 2)); that he had food in his mouth when showing symptoms consistent with having a blocked airway which the staff contemporaneously described as "choking"; and that, rather than immediately checking for any blockage or taking steps

to clear his airway even though his coloring indicated he was already suffering oxygen deprivation, staff took the time to transfer him to his wheelchair and move him to his room to check his airway and render assistance – a delay that was significant and was inconsistent with professionally recognized standards of care, as well as the facility's own policy. These facts, which are largely undisputed, are sufficient by themselves to support a finding of noncompliance because facility policy and standards of care required staff to first determine whether he needed immediate emergency intervention before taking the time to move him to his bedroom.

C. Substantial evidence in the record a whole supports the ALJ's finding that staff delayed in providing critical assistance to a choking resident.

The ALJ concluded, based on her factual findings, that Jennifer Matthew's staff delayed in providing critical assistance to R17, who was choking. ALJ Decision at 6. Jennifer Matthew disputes a number of the ALJ's factual findings, principally the finding that R17 was choking. Below we explain why substantial evidence in the record as a whole supports the ALJ's factual findings.

1. Whether R17 was choking

The ALJ and Jennifer Matthew used the term "choking" to mean a situation in which a person has a blockage of his/her airway that prevents them from breathing. This is consistent with the medical definition of the term "choking," cited with approval by Jennifer Matthew, in the Webster's New World Medical Dictionary (2d ed. 2003), which is "a blocked or occluded airway, which prevents a person from breathing." P. Br. at 96. Jennifer Matthew argues that the evidence shows that R17 was breathing, i.e., not choking, in the dining room therefore its staff did not improperly delay addressing his condition by moving him to his room. P. Br. at 8, 46-60, 95-98. Jennifer Matthew also argues that there is "absolutely nothing" in the contemporaneous notes that contradicts the eyewitnesses' "consistent" later statements that R17 remained breathing *in the dining room* and was not choking there and that the ALJ "completely ignored" this evidence. P. Br. at 50.

In the absence of sworn testimony from any staff who had witnessed the event, the ALJ relied on the contemporaneous notes of staff with personal knowledge describing the events and the EMT report. She regarded the statements in these documents as more reliable than evidence about what staff said later or what others (who were not present) thought. According more weight to

eyewitness contemporaneous statements is perfectly reasonable, especially since other evidence (such as CMS's expert testimony and subsequent statements by staff) corroborated critical aspects of these accounts and since no eyewitnesses testified.[3]

As noted above, the contemporaneous nurses notes state --

- that R17 "looked like he was choking" and "appeared bluish" when CNA Brooks called out to LPN Jacobs in the dining room and the LPN went to assess him;
- that 911 was called for "a choking resident" (id.);
- that after interventions such at the Heimlich maneuver in his room, "Res was still not breathing."

CMS Ex. 22, at 74 (emphasis added). The EMT report states that an RN told them that R17 "was eating dinner when he began to choke and lost consciousness. RN relates staff performed Heimlich Maneuver but Pt lost pulses." CMS Ex. 22, at 13.

The ALJ did not simply ignore the evidence on which Jennifer Matthew relies, but reasonably rejected it:

- As the ALJ pointed out, the contemporaneous nurses note by LPN Jacobs, who was in the dining room, does not say that the resident was breathing or that she checked his airway. ALJ Decision at 7. The note describes the incident as follows: "chewing food, pocketing food, lips blue, resident not swallowing, encouraged resident to spit it out, unable to do." CMS Ex. 22, at 73. This statement in no way suggests that, at that time, the LPN thought that he was breathing.
- The ALJ gave sound reasons why she did not rely on the subsequent statements by LPN Jacobs saying that R17 was

[3] Jennifer Matthew calls "bizarre" the ALJ's rejection of the later statements by the eyewitnesses on the basis that the eyewitnesses did not "appear personally at the hearing," alleging that the ALJ "did not permit most of [Jennifer Matthew's] witnesses who did appear to speak." P. Br. at 49. The ALJ's point, however, was that Jennifer Matthew proffered no sworn testimony whatsoever from these eyewitnesses and, therefore, they were not subject to cross-examination. Moreover, this was only one of several reasons why she determined that the later statements were not as reliable.

breathing in the dining, including that they were materially inconsistent with the contemporaneously created record. ALJ Decision at 7-9.

- It is misleading for Jennifer Matthew to represent that CNA Brooks and LPN Jacobs subsequently "consistently stated that the Resident was breathing" in the dining room. P. Br. at 97 (emphasis added) (no supporting authority cited); see also 8, 48, 52. For example, in a statement typed by the DON that purports to report what CNA Brooks told the DON on June 10, CNA Brooks says only that she observed R17 to be "in distress." CMS Ex. 22, at 66. She does not make any representation about what she thought was wrong with him or describe his symptoms. She certainly does not say that R17 was not choking or that he was breathing.[4] As for LPN Jacobs, a surveyor testified that in her first interview of LPN Jacobs on June 17, LPN Jacobs said nothing about whether R17 was breathing (and nothing about thinking R17 was having a cardiac event). CMS Ex. 48, at ¶ 18. Only at the later June 21 interview did LPN Jacobs state to the surveyor that "because his lips were blue, she was thinking of his cardiac history" and that he "looked like he was breathing."[5] Id. at ¶ 24.

Therefore, the ALJ reasonably gave no weight to the after-the-fact statements that R17 was breathing in the dining room.

Jennifer Matthew faults the ALJ for rejecting the testimony by its DON about the results of her inquiry into R17's death. P. Br. at 50-54. Jennifer Matthew argues:

> [T]he ALJ disregards the obvious point[] . . . that

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[4] When shown this statement by a surveyor, CNA Brooks denied ever seeing it, denied saying that she was actually feeding R17, and denied that the Heimlich maneuver was performed in the dining room, as the statement says. CMS Ex. 22, at 4-5.

[5] A surveyor testified that in this interview LPN Jacobs also stated that "[h]is lips were closed and slightly blue. He made no noise. . . . . [T]he resident was transferred to a wheelchair and into his room. He had red blotches on his face and his lips were cyanotic [blue]." CMS Ex. 48, at ¶ 24. Dr. Young testified that the fact that R17's lips were blue and his face was red was a sign that he was suffering from a choking problem and not a cardiac problem. CMS Ex. 58, ¶ 36g.

> [Jennifer Matthew's] Administrator and Director of Nursing – who were charged with determining what happened – actually concluded almost immediately following the incident that the Resident had died from natural causes.

P. Br. at 46.[6] In the face of this record, it is, to borrow one of Jennifer Matthew's adjectives, "breathtaking" that Jennifer Matthew would make this argument. The ALJ clearly explained her bases for not relying on the DON's opinions and for finding that they were not based on any timely or adequate investigation and that they ignored key points made by the witnesses in their initial, contemporaneous notes or in statements to the EMT. ALJ Decision at 14-17. The ALJ's reasons included, but were not limited to, the following consideration of the evidence.

In her written testimony, the DON stated that she reached her conclusion based on the information that she gathered after R17's death.[7] P. Ex. 92, at 12-13. She testified as follows. She was not at the facility when R17 died, but his death was reported to her that night and she spoke with RN Shift Supervisor Nurse Charles and RN Judy Buckalew, the staff development coordinator.

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[6] Jennifer Matthew mentions the Administrator but does not develop any argument here as to his "investigation." The Administrator, after the complaint survey was initiated, interviewed LPN Jacobs on July 5 and CNA Brooks July 27. P. Exs. 81, 82. Elsewhere, Jennifer Matthew states that the Administrator's notes of those interviews "clearly recite that each nurse told him that the Resident did not stop breathing in the dining room, did not appear to be choking, got into the wheelchair on his own, etc." P. Br. at 49, citing P. Exs. 82 (CNA interview) and 83 (LPN interview). Jennifer Matthew misdecribes the content of these statements, however. For example, CNA Brooks says nothing about whether R17 appeared to be breathing or choking. P. Ex. 83.

[7] The DON (and the Administrator) stated to the surveyors on June 17 that they had done no incident and accident report or investigation of the incident "because the resident had died." ALJ Decision at 13, citing CMS Ex. 48, at ¶ 19. As the ALJ noted, the facility's choking policy requires that an "Accident/Incident Report will be completed" after a choking incident. Id. citing CMS Ex. 15, at 1, 2. The DON did, however, apparently document some inquiry. On June 21, the DON gave the surveyors typed statements of LPN Jacobs and RN Buckalew dated June 10 and June 12 respectively. CMS Ex. 48, at ¶ 21.

They opined that R17 had apparently suffered a heart attack or stroke. Both of them said "nothing about the Resident appearing to choke." Id. The next day she spoke with CNA Brooks, who "repeated the same story that I had heard the evening before." Id. at 13. "At no time during any of these conversations did anyone say that he or she thought that the Resident had choked." Id. Based on this inquiry, she concluded R17 had died of natural causes. She stated that "[i]t was only several weeks later . . . that anyone even mentioned choking, or the Heimlich maneuver." Id.

The ALJ (who observed the DON at the hearing) reasonably determined that the DON's testimony at the hearing and other evidence makes her written testimony completely incredible. We agree for the following reasons:

- At the hearing, the DON testified that on June 10, the day after the incident, she read LPN Jacob's notes and Nurse Charles' notes, the latter of which said R17 appeared to be choking and the Heimlich maneuver was performed. ALJ Decision at 13, citing Tr. at 389, 423.

- The DON gave the surveyors her typed statement of her June 10 conversation with CNA Brooks (CMS Exhibit 22, at 66) in which she reported that the CNA told her that the Heimlich maneuver was performed on R17. ALJ Decision at 14, citing CMS Ex. 48, at 5-6; Tr. 33, 103-104.

- The DON also gave the surveyors a typed (and signed) June 12 statement by RN Buckalew. Id. citing CMS Ex. 22, at 67. In the statement, RN Buckalew says that she met the EMTs at the door and told them that "the resident had apparently choked while eating supper but that following intervention resulting in removal of food from oral cavity there was no breathing and he had no pulse." CMS Ex. 22, at 67.

Thus, by June 12, 2005 the DON had information from at least three people indicating that R17 had choked. This is completely contrary to her subsequent sworn testimony stating that neither choking nor the Heimlich maneuver were mentioned until "several weeks later." After the DON acknowledged this testimony was not consistent with her other testimony, the ALJ asked the DON if she could explain the discrepancies and she said, "No." Tr. at 389-

390.[8] The ALJ's finding that the DON's testimony was incredible and unreliable was justified.

2. Whether Jennifer Matthew's staff performed the Heimlich maneuver

Jennifer Matthew also argues that the ALJ erred in finding that staff performed the Heimlich maneuver in R17's room and mistakenly relied on this finding in concluding that R17 was choking and that staff believed he was choking. P. Br. at 50, 53. Jennifer Matthew relied on the DON's written testimony, representing that the DON "concluded that the reference in the cited nursing note was a clumsy way of describing the chest compressions involved in CPR [cardiopulmonary resuscitation], since one would not do the Heimlich maneuver on a resident who was supine on the floor." P. Br. at 53 n.22, citing P. Ex. 92, at 13.

Substantial evidence in the record as whole supports the ALJ's finding that staff performed the Heimlich maneuver on R17. This evidence has been discussed above. See CMS Ex. 22, at 13, 19, 67, 73, 74. Moreover, it is undisputed that RN Buckalew and RN Shift Supervisor Charles told a surveyor that they had performed the Heimlich maneuver on R17. Tr. at 50. Finally, contrary to what Jennifer Matthew asserts, the DON did not testify that one would not do the Heimlich maneuver on a supine person. P. Ex. 92, at 13. The CMS expert testified that once a person is unconscious (which R17 was in his room), the Heimlich maneuver must be done lying down and is less likely to be effective than if the person is standing. CMS Ex. 58, at ¶ 34, Tr. at 229.

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[8] Jennifer Matthew argues that the ALJ's statement at the hearing that the DON had "lied" (Tr. at 413) shows that the ALJ was biased. P. Br. at 8, 21. The ALJ, however, made this statement only after the exchange in which the DON admitted she could not explain her inconsistent testimony (Tr. at 389-390). An opinion formed by an ALJ based on evidence during a proceeding does not, however, demonstrate that the ALJ was biased. Central Care of Crystal Coast, DAB No. 2076 (2007), citing Edward J. Petrus, Jr., M.D., and The Eye Center of Austin, DAB No. 1264 (1991), aff'd sub nom., 966 F.2d 675 (5th Cir. 1992), cert. denied, 506 U.S. 1048 (1993); United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

3. Other disputes of fact

Most of Jennifer Matthew's other objections involve factual findings of the ALJ that support the result, but are not necessary to it, or complaints that the ALJ failed to consider specific evidence. Here are some examples:

- The ALJ found that R17 was eating a hot dog and that the texture and shape created a danger of choking. ALJ Decision at 6, citing CMS Ex. 22, at 2, 3, 28. Jennifer Matthew relies on the DON's testimony in asserting that R17 was in fact eating "Italian sausage, onions and peppers, which has a different texture and seems less inherently dangerous." P. Br. at 45 n.17, citing Tr. at 420. As the ALJ pointed out, the staff present at the meal told the surveyors he was eating a hot dog, and, in any event, Jennifer Matthew presented no testimony to support its assertion that eating Italian sausage would be less inherently dangerous for R17, with his swallowing difficulties. ALJ Decision at 6 n.4.

- Jennifer Matthew questions whether the undisputed fact that R17 was turning blue in the dining room meant he was choking. Jennifer Matthew says that the surveyor's opinion that he was choking was based on an assumption that "is not necessarily correct (he could have turned blue from a stroke or heart attack, for example)." P. Br. at 47. The surveyor (and the ALJ) did not simply "assume" that his color alone meant he was choking. Blue color was consistent choking and it was not only possible that he was choking, but was suggested by the circumstance of his eating and was what the staff thought at the time. Staff should have more quickly taken steps to address the possibility, but did not.

- Jennifer Matthew says the ALJ's faulting its staff for not performing the Heimlich maneuver in the dining room is contrary to evidence that, particularly in elderly people, this should not be done unless staff is sure that there is <u>complete</u> blockage of the airways because of the risk of injury. P. Br. at 56-57, 96. The ALJ reasonably, however, rejected the DON's testimony that use of the Heimlich maneuver is justified only when staff is sure there is complete blockage of the airway on the basis that this testimony was based on a misunderstanding of the standard of care. ALJ Decision at 12. In doing so, the ALJ relied on the standards published by the American Heart Association (CMS Ex. 46,

at 10), the testimony of the CMS expert (Tr. 225, 232), and the facility's own policy (CMS Ex. 15).[9] ALJ Decision at 12. Based on this evidence, the ALJ concluded that the "rescuer *should* intervene if the choking victim has signs of 'severe' - note, 'severe' does not mean 'complete' - airway obstruction [including] 'signs of poor air exchange and increased breathing difficulty, such as silent cough, cyanosis (which R17 unquestionably demonstrated), or inability to speak or breathe." Id.[10]

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[9] Jennifer Matthew's in-service training materials for its staff instruct them on how to distinguish between a "partial airway block" and a "complete airway block". Signs of a "partial airway block" are "coughing," "wheezing," and "able to talk, make sound." CMS Ex. 15, at 10. For a partial airway block, the materials instruct "stay w/person" and "encourage to continue coughing." Id. Signs of a "complete airway block" are "can not speak, cough forcefully or breath," or "may be able to cough weakly or make high-pitched sounds (not enough O2 to sustain life)." Id. For these symptoms, staff is instructed to perform the Heimlich maneuver. Id. at 11. R17 displayed symptoms consistent with a complete blockage; thus the ALJ correctly described Jennifer Matthew's choking policy and how it should have been applied to R17. ALJ Decision at 12.

[10] Jennifer Matthew also cites Atlantic Rehabilitation & Nursing Center, DAB No. CR1230 (2004). P. Br. at 56, 96. This case does not support Jennifer Matthew. In Atlantic, the issue was whether the facility had failed to provide services to a resident with swallowing problems to prevent him from choking. Over the course of several meals, the surveyors observed the resident feeding himself rapidly while repeatedly coughing strongly and spitting out significant quantities of food. While one surveyor wrote in her notes "Heimlich-almost needed!", no surveyor testified the maneuver was ever needed and the ALJ made no holding about the standards for when to perform one. Citing the medical definition of choking (a blocked or occluded airway, which prevents a person from breathing), the ALJ found that the resident there was never choking. He relied on expert testimony stating that a person who is choking cannot cough and that "even a partial blockage [would result in] 'strider,' which is a noticeable, high-pitched noise as the patient is trying to move air." Atlantic at 15. This testimony is consistent with the ALJ's reliance here on the undisputed fact that R17 was silent and not coughing as support for her conclusion that R17 was choking.

- Jennifer Matthew cites the testimony of its expert, Richard Hodder, M.D., who said he did not believe R17 was choking and that the staff's failure to perform the Heimlich maneuver did not violate any standard of care. P. Br. at 56-57; P. Ex. 7-12. Again, the ALJ addressed this testimony and explained why she did not rely Dr. Hodder's conclusions. ALJ Decision at 10-11. For example, she cited his testimony that the Heimlich maneuver should not be performed on a person who is "breathing and coughing" and "the proper procedure is to encourage the person to continue to cough to dislodge the partial blockage." P. Ex. 91, at 11. The ALJ "found no fault with this opinion as a general proposition" but pointed out it was undisputed that R17 "*was not coughing* so he could not have dislodged the blockage through coughing." ALJ Decision at 10-11 (emphasis in original).

- Jennifer Matthew points out that the EMT record indicated that the EMTs inserted a breathing tube into R17's airway, and that, according to Dr. Hodder, "if a person's airway is blocked by food, intubation is difficult or impossible." P. Br. at 59-60, citing P. Ex. 91. Dr. Young, however, explained that intubation did not prove that R17 had not previously had an airway obstruction. By the time the EMTs acted, he stated "the nurses had been performing the Heimlich maneuver for several minutes, while continuing to remove food from the resident's mouth. It is probable that the obstruction had been removed prior to EMT's arrival." CMS Ex. 58, at ¶ 44; see also Tr. at 47-48.

Thus, we conclude that Jennifer Matthew's allegations of error related to these and other factual findings do not provide a basis for reversing the ALJ Decision.

D. The ALJ's findings support her conclusion that Jennifer Matthew was not in substantial compliance with 42 C.F.R. §§ 483.13(c), 483.25, and 483.75

Based on the discussion above, we conclude that substantial evidence in the record as a whole supports the ALJ's findings of noncompliance under the following regulations.

- Section 483.25 (and section 1819(b) of the Act) requires that each resident must receive, and the facility must provide, the necessary care and services to allow a

resident to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the resident's comprehensive assessment and plan of care. Because staff did not provide R17 the emergency care he needed when he needed it, the facility did not provide necessary care to allow him to maintain the highest practicable physical well-being.

- Section 483.13(c) requires facilities to develop and implement written policies and procedures that prohibit resident neglect; "neglect" means failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness (42 C.F.R. § 488.301). Jennifer Matthew failed to provide R17 with care and services he needed during this incident to avoid physical harm.

- Section 483.75 requires that a facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.[11] Here not only did Jennifer Matthew fail to provide R17 with the care and services he needed, but the DON and the Administrator failed to adequately investigate the circumstances of R17's death, and the DON provided false and misleading information to the state agency about the investigation she did make.

E. The burden of proof is irrelevant here.

Jennifer Matthew argues that because it is possible (or even, in its view, equally or more possible) that R17 did not choke, "this case may squarely pose perhaps the first real application of the Board's rule that the 'burden of proof' is on a petitioner where the evidence is in 'equipoise' . . . ." P. Br. at 9. It argues that, in ruling for CMS, the ALJ "improperly required [it] to prove that Resident #17 did not choke." P. Br. at 91.

We disagree. First, the fact that an ALJ cannot "know" with absolute certainty whether the disputed facts were one way or

[11] CMS cited Jennifer Matthew for noncompliance with sections 483.75 and 483.75(d)(1)-(2). CMS Ex. 63, at 28, 31. The ALJ adjudicated only the citation under section 483.75. ALJ Decision at 5. Therefore, we do not consider Jennifer Matthew's arguments at page 99 of its brief as to section 483.75(d).

another does not mean the evidence is in equipoise. The standard of proof for these cases is the preponderance of the evidence, not certainty. Second, in applying a preponderance of the evidence standard, the test is not the amount of evidence (as Jennifer Matthew appears to believe). Evidence is given weight only if it is reliable, probative, and credible. Here, the ALJ gave reasonable explanations for concluding that the critical evidence on which Jennifer Matthew relies was not credible, not reliable, or not probative.

Third, Jennifer Matthew's argument is based on the erroneous premise that no violation would exist if R17 was not choking. P. Br. at 93. That is not correct. Findings may support a result, without being material to it. Even if R17 was not in fact choking, noncompliance could be found here because the staff did not act appropriately under the circumstances as they perceived them. The contemporaneous evidence shows that the staff thought he was choking, had reason to believe he was, and, ultimately, acted as if he was, but delayed rendering aid while they moved him to his room. Moreover, part of the inadequacy of their response was that, even though the circumstances suggested blockage of his airway, the staff took no timely steps to check or to clear his airway. There is no credible evidence that staff took such steps before moving R17 to his room.

Fourth, Jennifer Matthew misstates the Board's holdings on burden of proof, in a number of respects. For example, Jennifer Matthew asserts that Hillman Rehabilitation Center, DAB No. 1611 (1997), aff'd, Hillman Rehabilitation Ctr. v. U.S. Dep't of Health and Human Servs., No. 98-3789 (GEB) (D.N.J. May 13, 1999), holds that "if the evidence is in equipoise, then Petitioner has the burden of demonstrating by the appropriate standard - presumably the preponderance of the evidence - that its staff satisfied the intent of the regulations at issue." P. Br. at 95. This is not accurate. What the Board said is that, only if the evidence is in equipoise does allocation of the ultimate burden of persuasion become important because it means the party who has the burden has not met that burden under a preponderance of the evidence test. Here the evidence is in not in equipoise so the burden of proof is irrelevant.[12]

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[12] Citing Batavia, DAB No. 1904, Jennifer Matthew also complains that the Board "never has clearly defined either the content or *timing* of the determination whether CMS has established a 'prima facie case'" that shifts the burden to Jennifer Matthew. P. Br. at 92 (emphasis in original). The content of what CMS has to do to establish a prima facie case

Finally, Jennifer Matthew does not explain how a finding that R17 was experiencing a heart attack rather than choking in the dining room would meet its burden to show substantial compliance with the cited sections. Jennifer Matthew presented nothing to show that taking the time to move a resident experiencing a heart attack from the dining room to his room (rather than immediately doing CPR and calling an ambulance) is consistent with professionally recognized standards of care. See CMS Ex. 58, at ¶ 48 (testimony of CMS expert as to what staff should have done if they thought he was having a cardiac event).

Contrary to what Jennifer Matthew argues, therefore, the evidence regarding Jennifer Matthew's noncompliance with the cited requirements is not in equipoise here and the allocation of the burden of proof is irrelevant.

III. Deficiencies related to heat

A. Jennifer Matthew's arguments about how the ALJ analyzed and applied 42 C.F.R. § 483.15.(h)(6) have no merit.

Section 483.15(h)(6) of 42 C.F.R. provides:

> 483.15 *Quality of life*. A facility must care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life.
>
> * * *
>
> (h) Environment. The facility must provide --
>
> * * *

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cannot be defined since there are numerous participation requirements and numerous factual findings that would be legally sufficient to show noncompliance with each of those requirements. The timing of a determination about whether CMS has made a prima facie case – in those rare instances where it is an issue - depends on the proceedings. A petitioner could challenge the legal sufficiency of CMS's case in a summary judgment motion or simply choose not to present any evidence and seek an ALJ decision that CMS's case is not legally sufficient to show noncompliance. The Board has held, however, that once a petitioner has presented evidence, the record as a whole is to be considered in determining whether the petitioner met its burden of persuasion to show substantial compliance. Oxford Manor, DAB No. 2167 (2008); Hillman Rehabilitation Center, DAB No. 1663, at 9-10 (1998).

> (6) Comfortable and safe temperature levels. Facilities initially certified after October 1, 1990, must maintain a temperature range of 71-81°F.

Under section 483.15(h)(6) as a facility certified before October 1, 1990, Jennifer Matthew "must provide . . . comfortable and safe temperature levels." While office areas and nurses stations had air conditioning, Jennifer Matthew was not centrally air conditioned, and residents' rooms were not air conditioned. P. Ex. 89, at 2. It is undisputed that on July 10, 2005, the day-time high temperature in Rochester was 87° Fahrenheit (all temperatures herein are Fahrenheit); on July 11 it was 91°; on July 12 it was 93°; on July 13 it was 93°, and on July 14 it was 90°. CMS Ex. 14, at 4. In this weather, the inside temperatures at Jennifer Matthew became, in the words of Jennifer Matthew's administrator, "hot." P. Ex. 89, at 5. Throughout the days of July 11 through 13, the surveyors measured the temperatures of residents' rooms on the third floor (which housed about 35 of the 81 residents), found high temperatures such as 87° to 96° over several days, and witnessed repeated instances of residents sweating in their beds in the heat and elevated body temperatures. February Ruling at 7-8. Jennifer Matthew concedes that "certain areas inside the facility were uncomfortably hot during the survey." P. Br. at 72-73.

In granting summary judgment, the ALJ correctly noted that the harm addressed by the quality of life standards, such as the temperature requirement, is not limited to physical harm. February Ruling at 12. Thus, in evaluating whether this standard is violated, she was required to consider not only the potential for physical harm, but also the potential for mental and emotional harm caused by high temperatures. Harm or the potential for more than minimal harm to a resident's mental well-being constitutes noncompliance. See, e.g., Beechwood Sanatarium, DAB No. 1906, at 41 (2004); Kenton Healthcare, LLC, DAB No. 2186, at 23 n.15 (2008). In the summary judgment ruling, the ALJ found that residents "experienced serious discomfort," and that "the significant discomfort of individuals subjected to excessively hot rooms, by itself, creat[ed] more than minimal harm." February Ruling at 12. This was all she needed to conclude for purposes of summary judgment on the issue of substantial compliance with section 483.15(h)(6). After the in-person hearing, the ALJ made further findings as to the care provided by Jennifer Matthew staff and its failure to fully implement its heat safety policies. She concluded that Jennifer Matthew failed to show that CMS's determination that the conditions posed immediate jeopardy to residents was clearly erroneous. ALJ Decision at 28-30.

Jennifer Matthew argues that the ALJ's analysis of section 483.15(h)(6) is "not correct." P. Br. at 72; see also 72-87. Below we consider Jennifer Matthew's allegations of error as to the ALJ's analysis of section 483.15(h)(6). (Some of Jennifer Matthew's arguments are discussed under the heading dealing with its attack on the ALJ's use of summary judgment, since they relate to that topic.)

First, Jennifer Matthew asserts that the ALJ concluded that "hot weather alone can result in "per se 'immediate jeopardy' liability" (P. Br. at 74) and that the combination of hot weather and frail, elderly residents "supports the highest possible CMP that CMS is authorized to impose" (id. at 73). This assertion is inaccurate. In her summary judgment, the ALJ concluded Jennifer Matthew was not in substantial compliance with section 483.15(h)(6) because residents suffered more that minimal harm as a result of the undisputed conditions at Jennifer Matthew. February Ruling at 12. She specifically refrained from ruling on the level of the noncompliance (and the CMP) until after the in-person hearing on the level of harm posed by the care and conditions at Jennifer Matthew. Id. Her resulting decision thoroughly discusses why she concluded the CMP imposed by CMS was reasonable in light of the multiple requirements at issue.

Second, Jennifer Matthew objects to the ALJ's reliance on Care Inn of Abilene, DAB No. CR1034 (2003), a case involving a New Mexico facility that experienced high interior temperatures after its air conditioner broke. P. Br. at 74, see also 18, 63. Jennifer Matthew criticizes various findings and conclusions in Care Inn and points out how the circumstances there differed from this case. It alleges that the ALJ "in effect drew inferences *against* [Jennifer Matthew] that were based on the record in another case to which [Jennifer Matthew] was not a party." P. Br. at 20. We reject Jennifer Matthew's argument. The ALJ cited Care Inn as consistent prior authority. She did not cite it as controlling and did not rely on evidence exclusive to the Care Inn record to support her findings here. Rather, she fully explained her application of section 483.15(h)(6) to the facts in this case. February Ruling at 5-12. Jennifer Matthew does not give any basis for alleging that the ALJ drew inferences based on the Care Inn record, other than alleging that the ALJ "adopted," from Care Inn, a finding that Jennifer Matthew staff should have been monitoring room temperatures. P. Reply at 17. This is not correct. The ALJ explained that she based this finding on Jennifer Matthew's policies. See ALJ Decision at 20.

Third, Jennifer Matthew argues that the ALJ erred in concluding that "temperatures in excess of 85 degrees F are neither safe nor

comfortable" under section 483.15(h)(6). P. Br. at 75, citing February Ruling at 6. Jennifer Matthew asserts that the standards promulgated by the American Society for Heating, Refrigerating and Air Conditioning Engineers (ASHRAE), on which the ALJ relied in reaching this conclusion, address comfort but not safety.[13] Jennifer Matthew does not dispute that the ASHRAE standard supports the ALJ's finding that interior temperatures above 85° are not comfortable, but asserts that CMS, in promulgating section 483.15(h)(6), did not regard the ASHRAE standard to be relevant to pre-1990 facilities and the ALJ should not have relied on it. P. Br. at 77. Jennifer Matthew argues:

> CMS went on to state in the [regulatory preamble] that "currently certified" facilities (such as [Jennifer Matthew]) . . . "would not be required to modify their heating and cooling systems to maintain the specified temperature ranges." In other words, CMS specifically recognized that the inability of an older facility's heating and cooling systems to maintain the specified indoor temperatures would be immaterial to the application of the regulation.

Id.

These arguments have no merit. Section 483.15(h)(6) requires all facilities to maintain comfortable and safe temperature levels. The fact that CMS did not adopt a specific temperature range for pre-1990 facilities does not make temperature measurements or the ASHRAE standard "immaterial" in evaluating whether a pre-1990 facility failed to provide comfortable temperatures. Temperatures provide an objective measure to be used in conjunction with the otherwise subjective impressions of individuals in assessing comfort. The ASHRAE standard was established by a recognized professional association as a measure of comfort. Indeed, Jennifer Matthew does not dispute that the ASHRAE standard is used by the heating and air conditioning industry and does not dispute that the temperatures in the

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[13] The stated purpose of the ASHRAE Standard for Thermal Environmental Conditions for Human Occupancy ANSI/ASHRAE 55-1981 (ASHRAE Standard) (on which the ALJ relied) is to "specif[y] the combination of factors necessary for thermal comfort in the built environment." CMS Ex. 47, at 4. While CMS relied on this standard in setting the temperature range for post-1990 facilities (71° to 81°), the relevant regulatory preamble indicates that CMS relied on ANSI/ASHRAE 55-1981 as a measure for comfort. 56 Fed. Reg. 48,826 (Sept. 26, 1991).

facility (which exceeded the ASHRAE standard) were uncomfortably hot. This objective standard was appropriately relied on by the ALJ in addition to subjective impressions of the surveyors.

Moreover, we do not need to address here the ALJ's conclusion that a temperature above 85° is not safe. The ALJ's summary judgment ruling was based the undisputed facts that specifically identified residents at Jennifer Matthew whom the surveyors observed in rooms with high temperatures (from 89° to 96°) and with high body temperatures, sweating, thirst, and other characteristics from which the ALJ reasonably inferred that they were experiencing "significant discomfort." February Ruling at 12. Jennifer Matthew cites to no evidence it proffered to show that the residents were not, in fact, experiencing significant discomfort.

Fourth, Jennifer Matthew asserts that CMS's prior "interpretation and application" of section 483.15(h)(6) "make clear that [the ALJ's] broad reading of the regulation to impose 'strict liability' for hot indoor temperatures is misplaced." P. Br. at 80; see also P. Br. at 6 (the ALJ erred determining that section 483.15(h) "in effect incorporated a technical air conditioning *comfort* standard into the regulation, and thereby intended to impose strict liability on nursing operators for the effects of hot weather conditions."), 74, 85, 89-90, 105.

The ALJ did not, as Jennifer Matthew asserts, "impos[e] strict liability on nursing operators for the effects of hot weather conditions." P. Br. at 6. Strict liability is a tort term - the issue here is whether the facility was substantially complying with a requirement for participation in Medicare and Medicaid. In the summary judgment ruling, the ALJ found Jennifer Matthew was deficient because its interior temperatures were not comfortable, and therefore it had "fail[ed] to meet a participation requirement specified" in Part 483. 42 C.F.R. § 488.301. Notwithstanding this finding, Jennifer Matthew would have been in substantial compliance with section 483.15(h)(6) (and not subject to a CMP) if its failure to maintain comfortable temperatures and care of the residents in context of those temperatures had "pos[ed] no greater risk to resident health and safety than the potential for causing minimal harm." Id. Thus, Jennifer Matthew is being held responsible for what it did not do (keep the residents sufficiently comfortable to avoid the risk of more than minimal harm) during the hot weather, not for unavoidable consequences of the weather.

Jennifer Matthew continually portrays itself as a hapless victim of the hot weather and tries to obfuscate the fact that its

choices about how to address the heat resulted in the uncomfortable, and ultimately unsafe, conditions. For example, its Standard Policy called for it to "[c]lose draperies on sunny side of building". CMS Ex. 18, at 1. Jennifer Matthew's windows at issue, however, did not have draperies and its window blinds did not prevent heat gain from direct sunlight. Tr. 87, 283-285; CMS Ex. 48, ¶ 74; CMS Ex. 49, at ¶ 89. Jennifer Matthew does not dispute that surveyors found a dependent resident lying in 96° direct sunlight coming through "thin, faded mini blinds that were pulled down." P. Ex. 2, at 4-5. Instead, Jennifer Matthew argues that "it was the hot weather that heated the rooms, not the 'too thin' blinds. (And how [Jennifer Matthew] was supposed to control the ability of the window blinds to control heat is unclear.)" P. Reply at 17. Obviously, Jennifer Matthew could control the ability of drapes (or blinds) to mitigate heat gain in rooms by having installed drapes or blinds that were capable of doing so. The ALJ ultimately found that Jennifer Matthew did not sufficiently implement the means it chose to comply with section 483.15(h)(6). The decision does not, as Jennifer Matthew alleges, make it strictly liable for the fact that the weather was hot.

Fifth, Jennifer Matthew argues that CMS's interpretive guidelines in the State Operations Manual (SOM) create an exception the requirements of section 483.15(h)(6) for uncomfortable (as opposed to unsafe) temperatures. According to Jennifer Matthew, the SOM provisions "make clear that the Secretary did *not* intend strictly to bind nursing facilities located in northern regions where very hot weather is unusual to any specific temperature standard, but rather imposed the obligation to keep residents *safe*, if not necessarily comfortable, in such conditions." Id. at 7. Section PP-66 of the SOM which states in relevant part:

> "Comfortable and safe temperature levels" means that the ambient temperature should be a relatively narrow range that minimizes residents' susceptibility to loss of body heat and risk of hypothermia or susceptibility to respiratory ailments and colds. Although there are no explicit temperatures standards for facilities certified on or before October 1, 1990, these facilities still must maintain safe and comfortable temperature levels.
>
> For facilities certified after October 1, 1990, temperatures may exceed the upper range of 81° Fahrenheit for facilities in geographic areas of the country (primarily at the northernmost latitudes) where that temperature is exceeded only during rare, brief, unseasonably hot weather. This interpretation would

> apply in cases where it does not adversely affect resident health and safety, and would enable facilities in areas of the country with relatively cold climates to avoid the expense of installing air conditioning equipment that would be needed infrequently.

P. Ex. 16. Jennifer Matthew argues that this SOM provision establishes that "maximum temperature limits described in the regulation are not intended to be absolute – even for post 1990 facilities – during unusually hot weather in geographic areas (like Rochester) where air conditioning is not required." P. Br. at 81. It concludes that any nursing facility in an area where the upper range of 81° is exceeded "only during rare, brief, unseasonably hot weather" may provide uncomfortable interior temperatures and still be in substantial compliance "so long as the facility could show that the conditions [created by those temperatures] were not *unsafe*." P. Br. at 86.

This argument does not provide a basis for finding the ALJ erred. The SOM does not excuse a facility from exposing its residents (as Jennifer Matthew did here) to the risk of more than minimal harm - it merely recognizes some limited flexibility in applying a standard (based on what temperature range is considered acceptable) to facilities that will only rarely experience extreme temperatures, so long as resident safety is not at issue. Here the temperatures in some residents' rooms were well over any reasonable, acceptable range that might be applied to pre-1990 facilities, even in an area where the temperature would rarely exceed the high end of the range. We also note that --

- The measure of substantial compliance is not simply whether a condition is "unsafe," as Jennifer Matthew posits. The measure is whether "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. While the SOM allows for some deviation from a comfortable temperature range in specific limited circumstances, such a deviation would still constitute noncompliance if it posed a risk of more than minimal harm.[14]

- The exception in the SOM must be read in conjunction the

[14] Indeed, after an in-person hearing, the ALJ found that it was not clearly erroneous to conclude that the high temperatures and Jennifer Matthew's care of residents in the face of the temperatures were so unsafe as to create immediate jeopardy.

fact that the regulation addresses "quality of life" standards and the discussion in the regulatory preamble. There CMS stated:

> We . . . plan to specify within guidelines exceptional circumstances under which a facility may be briefly outside the specified ranges. Thus, we believe this would accommodate concerns about situations in which the temperature may deviate a degree or two in either direction.

56 Fed. Reg. 48,826.

Therefore, while the SOM provides some latitude to deviate beyond the defined comfort range for post-1990 facilities for quality of life standards, the SOM cannot reasonably be read as sanctioning temperatures that diverged dramatically from recognized comfort standards. Jennifer Matthew does not dispute the ALJ findings that its residents experienced temperatures 89° to 96°. The ALJ could reasonably conclude that this magnitude of divergence was adverse to residents' quality of life, resulted in more than minimal harm, and did not fall within the SOM exception.[15]

- Jennifer Matthew did not establish that Rochester is a geographic area of the country where interior temperatures of 81° would be exceeded only during rare, brief, unseasonably hot weather. The Administrator testified that "it does occasionally get hot in the summer in this area . . . so all facilities do have policies and procedures for dealing with unusual heat."

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[15] Jennifer Matthew points to the fact that the SOM does not specifically address the dangers posed by hot weather, as opposed to cold weather. P. Br. at 82-83. Pointing out that the heat made many people in Rochester uncomfortable during this time, it argues that "there is no regulatory requirement that nursing facilities must insulate residents from even the common or ordinary *discomforts* they might experience as a matter of course." Id. at 83 (emphasis in original); see also P. Reply at 19. We reject this argument. Nursing facilities that claim federal reimbursement must meet federal standards; federal standards require comfortable temperatures. The fact that there were Rochester residents outside Jennifer Matthew who were also hot in July 2005 does not excuse Jennifer Matthew from meeting those standards.

> P. Ex. 89, at 4. The DON testified: "It does reach 90 degrees for at least a few days at a time most summers in R." P. Ex. 92, at 3. Neither of these statements (assuming they are credible) suggests that temperatures in the 90's are "rare." A NOAA issuance which Jennifer Matthew says shows that the temperatures at issue were 3 to 9 degrees above average for those dates (P. Br. at 23, citing P. Ex. 11) does not actually show that, much less establish that the temperatures were "rare." Indeed, Jennifer Mathews' brief on appeal concedes that "the heat – several days in the mid-90's - was not particularly remarkable for most areas of the country, and even Northern New York regularly experiences such hot weather." P. Br. at 4.

Sixth, Jennifer Matthew argues that "there was an obvious unresolved material issue in this case: did *weather conditions* at [Jennifer Matthew's] facility during the heat wave *adversely affect resident health and safety*?" P. Br. at 83-84 (emphasis in original). This argument misstates both requirements of section 483.15(h)(6) (which requires comfortable and safe temperatures) and the cited provisions of the SOM (which do not sanction temperatures that diverge dramatically from recognized comfort standards). Further, it misstates the test for determining noncompliance, which may be found based on the <u>potential</u> for causing more than minimal harm. Here, the ALJ concluded, based on the undisputed facts, that the significant discomfort of the residents caused more than minimal harm. Thus, no material issue was unaddressed.[16]

B. The factual findings on which the ALJ based her conclusion that Jennifer Matthew was not in substantial compliance with 42 C.F.R. §§ 483.13(c), 483.25, and 483.75 because of its care of residents during hot weather is supported by substantial evidence in the record a whole.

Section 483.13(c)(1)(i) provides that a nursing facility "must

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[16] Before reaching this conclusion, the ALJ incorrectly stated that the Secretary has determined that "subjecting elderly and infirm residents to high temperatures creates the potential for more than minimal harm." February Ruling at 11. This error was harmless, however, since the ALJ ultimately treated the question of whether there was a potential for more than minimal harm as a matter of fact, not of law.

develop and implement written policies and procedures that prohibit mistreatment, neglect and abuse of resident . . . .” Neglect is defined as the “failure to provide goods and services necessary to avoid physical harm, mental anguish or mental illness.” 42 C.F.R. § 488.301. Jennifer Matthew argues that it was in substantial compliance with this regulation because, contrary to the what the ALJ concluded, it “effectively implemented” its heat policy during the heat wave. P. Br. at 88. Jennifer Matthew relies on the same argument in contending that it was in compliance with section 483.25 (quality of care) and section 483.75 (administration).

The ALJ thoroughly discussed the facts and evidence on which she relied in concluding that Jennifer Matthew was not in substantial compliance with these regulations. ALJ Decision at 18-28. We conclude that the ALJ’s factual findings necessary to her conclusions are supported by substantial evidence in the record as whole.

The ALJ found that Jennifer Matthew’s heat policy consisted of two documents; she referred to one as the Standard Policy and the other as the Emergency Policy.[17] ALJ Decision at 19. Those policies required, among other things, that Jennifer Matthew close window coverings on the sunny side of the building; increase fluids offered to residents; transfer to cooler areas residents with temperature elevations; observe residents for signs of possible heat-related problems such as high body temperature, hot and dry skin, or rapid respirations; encourage residents to stay out of direct sunlight; and monitor temperature and other vital signs once each shift on all residents. CMS Ex. 18, at 1, 6.

Jennifer Matthew attacks the ALJ’s findings that Jennifer Matthew had failed to fully implement its heat policies and neglected vulnerable residents in face of the high temperatures; Jennifer Matthew describes evidence it says shows that the heat policies were fully implemented. P. Br. at 89. For example, it cites the Administrator’s and the DON’s testimony about covered windows, increased hydration efforts, and moving residents to cooler

[17] The ALJ addressed Jennifer Matthew’s argument that the Emergency Policy did not represent its policy and that Jennifer Matthew was not required to comply with the additional standards in that policy. She explained why she rejected this position. ALJ Decision at 20-21. On appeal, Jennifer Matthew makes the same argument (P. Br. at 24 n.10) but offers nothing that causes us to conclude the ALJ erred in her treatment of these documents.

areas. Id. The ALJ, however, reasonably gave less weight to this testimony than to the surveyors' observations and other evidence or undisputed facts, fully discussed in her decision, that the staff had not fully implemented the measures called for in Jennifer Matthew's Standard Policy or in its Emergency Policy. ALJ Decision 20-27. The ALJ explained why she concluded that Jennifer Matthew's staff failed to provide its most vulnerable residents with sufficient hydration, that staff were not monitoring temperatures and vital signs as called for by the Emergency Policy, that Jennifer Matthew did not have effective drapes or blinds for blocking the sun from shining in rooms on the sunny side of the building and failed to encourage residents to stay out of direct sunlight, and that staff failed to move residents with high temperatures and other potentially heat-related symptoms from hot rooms. She also noted that, until the surveyors questioned it, the facility did not even have a thermometer to measure room temperatures in order to determine whether the Emergency Policy should be implemented or help them determine which residents should be moved from their rooms – a fact that Jennifer Matthew does not contest.[18]

Jennifer Matthew also asks us to infer that it did effectively implement its policy since the ALJ did not find that any resident suffered "adverse clinical consequences" or "required treatment for any heat-related conditions." P. Br. at 89-90, see also 28; 87. We reject this argument. First, as discussed below, the ALJ found that R5 suffered an increased temperature (up to 103.3) because she was left in a hot room while suffering from an urinary tract infection. ALJ Decision at 28. Second, this is not a reasonable inference in the face of evidence to the contrary, based on surveyors' observations that staff failed to do things (such as move particular residents from hot rooms) that were required by the policy.

In attacking the ALJ's findings of fact that Jennifer Matthew had failed to fully implement its heat emergency policies and neglected vulnerable residents in face of the high temperatures, Jennifer Matthew attacks findings that are supportive but not necessary to the ALJ's conclusions and makes many unsupported and incorrect representations about the evidence. See P. Br. at 22-44. While we have reviewed Jennifer Matthew's allegations, it is impractical to address all of them so we provide the following

[18] Jennifer Matthew objects that its Standard Policy does not require it to measure indoor temperatures and CMS cited no regulation requiring this. P. Br. at 72, 84. The ALJ relied on the Emergency Policy for this requirement. ALJ Decision at 21.

examples unsupported or misdirected assertions involving R5 and R24.

Jennifer Matthew attacks the ALJ's findings as to R5. P. Br. at 33-37. R5 was an 82-year old woman who suffered from, among other things, diabetes, decreased cognition and communication deficits related to aphasia, stroke and blindness. ALJ Decision at 27. She was tube-fed and completely dependent on staff for hydration. Id. at 22. Her care plan called for staff to assess changes in her fluid needs during period of fever, diarrhea, emesis, and hot weather. Id. at 27, citing CMS Ex. 22; CMS Ex. 24, at 1, 63. Jennifer Matthew does not dispute that on July 12, at 1:50 p.m., the temperature in R5's room (the window blinds in which admitted bright sunlight) was 89°F and her hair and shoulders were wet; that at approximately 9:00 a.m. on July 13, the surveyors observed R5 in bed in her very warm room, sweating; that at 12:45 p.m. on July 13, her room temperature was 92°F and that R5 was no longer sweating; that at a surveyor's request the nurse took R5's body temperature, which registered 101.1°F (axillary) and 103.3° (rectal); that at 5:00 p.m. on July 13 the temperature in R5's room was still 92°F; that notwithstanding two doses of Tylenol, her temperature was still elevated (103.3°); that she was breathing heavily, with respirations of 36 a minute, which is not normal (normal is up to 12 to 20 breaths per minute); that its heat policy identified rapid respiration as a heat-related symptom; and that later that evening staff moved her to the nurses station and applied ice to vital areas and her temperature dropped. ALJ Decision at 27-28. The ALJ relied on Dr. Young's opinion, as stated in his written testimony, that the high room temperature contributed to R5's high body temperature and that the facility failed to properly assess R5's fluid needs in light of her fever and the hot room. CMS Ex. 58, at ¶¶ 79-87.

Jennifer Matthew asserts that Dr. Young's conclusion that R5 was suffering from the effects of the high room temperature was "completely wrong." P. Br. at 34. It argues that R5's fever was the result of the fact that she was developing a urinary tract infection (UTI) and asserts that Dr. Young "actually conceded in his *oral* testimony that the Resident's illness *was* a [UTI] and *not* a heat related ailment." P. Br. at 35. This completely distorts the written and oral testimony. In his written testimony, Dr. Young discussed R5's UTI and explained why he believed R5 was also suffering from heat exhaustion and why there was "clearly a heat-related component to her elevated temperature" in addition to the effect of the infection. CMS Ex. 58, at ¶ 81-84. Contrary to Jennifer Matthew's representations, Dr. Young's subsequent oral testimony was consistent with his written testimony; he stated that, in his opinion, "the low-grade

temp, a hundred and one, was due to the infection and the additional couple of degrees was due to the heat exposure." Tr. at 184. Thus, Jennifer Matthew's allegations of inconsistencies in Dr. Young's testimony are unsupported by the record. Moreover, Jennifer Matthew does not dispute that, prior to the surveyor's request to take R5's temperature, the staff had not been monitoring her temperature or calibrating her fluid needs in light of fever and her hot room as required by her care plan.[19]

R24 was an 83-year old man, suffering from dementia, cerebral vascular accident, hypertension, history of hypernatremia (elevated sodium) and acute renal failure. CMS Ex. 27, at 10. On July 13, at approximately 5:15 p.m., a surveyor observed him in lying in bed with "the sun pouring in directly on him" (Tr. at 306); she put the thermometer beside him and it measured 96° (CMS Ex. 49, at ¶ 89). Because of his dementia and history of stroke, R24 was dependent on staff for his care and was not able to move himself out of the sun. CMS Ex. 49, at ¶ 90. He indicated to the surveyor that he was hot and thirsty; his lips were dry and cracked. CMS Ex. 49,at ¶ 89. He had no water in his room, and, when the surveyor asked him if he wanted water, he whispered yes. Tr. 306-307. This was shortly after the surveyors had told the Administrator that the conditions in the facility posed immediate jeopardy. Tr. at 306. While the surveyor was there, two CNAs arrived and told her they would move him to a cooler area of the

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[19] Jennifer Matthew also alleges that the surveyor "conceded that [Jennifer Matthew's] staff *was* closely monitoring R5 at the time of the survey because of [the doctor's orders to give her additional fluid for her UTI]." P. Br. at 35, citing Tr. 300 (emphasis in original). This is another distortion of the testimony. The surveyor testified that as of 5:00 p.m. when she last saw R5 on July 13 (Tr. at 300; CMS Ex. 49, at ¶ 52), R5 was being monitored (Tr. at 300). The surveyor does not describe the quality of or the reason for the monitoring. Indeed, it is reasonable to infer that the reason R5 was being monitored by 5:00 P.M. was that at 12:45 P.M. the surveyor had asked a nurse to take R5's temperature and it was then discovered that R5 had a high temperature and the doctor was notified. CMS Ex. 49, at ¶¶ 49, 55; Tr. at 296-297. The surveyor testified that the nurse told the surveyor that she would not have taken R5's temperature if the surveyor has not asked her to. CMS Ex. 49, at ¶ 51; Tr. at 297. Moreover, the surveyor also testified that it was only after she asked staff about R5's urinary culture performed the week before that staff called the hospital about the culture and determined that the doctor needed to be notified about the culture. Tr. at 297-298.

building and did so. CMS Ex. 49,at ¶ 89; Tr. at 306.

On appeal, Jennifer Matthew argues that the evidence does not show that R24 suffered any actual harm such as fever, pain, or signs or symptoms of dehydration. P. Br. at 40. This argument is inconsistent with both the evidence and the standards for determining noncompliance. First, R24 did suffer some actual harm. His communication with the surveyor indicated that he was both hot and thirsty when the surveyor found him and his lips were dry and cracked. As the ALJ noted, the DON's testimony that R24 "was a native of Georgia and enjoyed hot weather" (P. Ex. 92, at 9) did not justify leaving a helpless, sick person in the sun. ALJ Decision at 22. Second, the issue is whether the situation posed a risk of more than minimal harm or likely serious harm - the tests for substantial compliance and immediate jeopardy respectively – not whether he suffered actual harm. Third, Jennifer Matthew offers no explanation for why R24 was left in the sun in the first place. Thus, one cannot assume that Jennifer Matthew staff would have moved him when they did or given him timely fluids but for the surveyors' intervention in calling immediate jeopardy or going into his room.

Finally, Jennifer Matthew argues that "it is significant that CMS never alleged that [Jennifer Matthew's] heat/humidity policy itself was inadequate, or could not protect residents." P. Br. at 86. Since CMS (and the ALJ) determined that Jennifer Matthew had failed to implement its heat policy, we do not need to address whether full implementation of the policy would have protected residents' safety.

As the ALJ concluded, Jennifer Matthew was not providing necessary care to allow all residents to maintain the highest practicable physical, mental, and psychosocial well-being and was not in substantial compliance with 42 C.F.R. § 483.25; Jennifer Matthew did not fully implement its heat policies, which exposed its most vulnerable residents to physical harm and mental anguish, and was not in substantial compliance with 42 C.F.R. §483.13(c); Jennifer Matthew's administrators were responsible for the facility's failure to use its resources effectively to maintain the highest practicable physical, mental and psychosocial well-being of each resident, and the facility was not in substantial compliance with 42 C.F.R. § 483.75.

IV. The ALJ did not err in concluding that Jennifer Matthew failed to show that CMS's determination that its deficiencies posed immediate jeopardy was clearly erroneous.

"Immediate jeopardy" is defined by 42 C.F.R. § 488.301 as a situation in which a provider's noncompliance "has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident." CMS's determination that a deficiency constitutes immediate jeopardy must be upheld unless it is clearly erroneous. 42 C.F.R. § 498.60(c); see also Beverly Health Care Lumberton, DAB No. 2156, at 4 (2008), citing Woodstock Care Center, DAB No. 1726, at 39 (2000), aff'd, Woodstock Care Ctr. v. Thompson. The Board has held that section 498.60(c) "places the burden on the SNF [skilled nursing facility] – a heavy burden, in fact – to upset CMS's finding regarding the level of noncompliance." Liberty Commons Nursing & Rehab Center v. Johnston, DAB No. 2031, at 18 (2006), aff'd, Liberty Commons Nursing and Rehab Center – Johnston v. Leavitt, 241 Fed.Appx. 76 (4th Cir. 2007), quoting (with emphasis in original) Barbourville Nursing Home, DAB No. 1962 (2005), aff'd, Barbourville Nursing Home v. U.S. Dep't of Health & Human Servs., No. 05-3241 (6th Cir. April 6, 2006).

Relying on her findings as to Jennifer Matthew's care of R17 and its care of residents during the hot weather, the ALJ concluded that Jennifer Matthew had not met this burden and upheld CMS's finding that immediate jeopardy existed from July 13 through 20, 2005, and that CMS's imposition of a per-day CMP of $10,000 (the maximum allowed for a per-day immediate jeopardy CMP). ALJ Decision at 27, 29.

Jennifer Matthew argues that there was no immediate jeopardy. P. Br. at 100-105. Jennifer Matthew's argument as to R17 is based first on its view that the ALJ erred in finding that R17 was choking, a view we have rejected. P. Br. at 102. Jennifer Matthew also argues that, even if R17 did choke to death, it is "hard to see how the nurses' judgments reflected in the record were so flawed as to be the *causative* factor" in his death. Id. (emphasis in original). The ALJ addressed this argument, writing:

> No one knows with certainty whether staff could have saved R17's life by immediately administering the Heimlich maneuver, instead of expending precious time taking him back to his room. However, delay in initiating a potentially life-saving procedure is unquestionably likely to cause serious injury or death, and justifies the immediate jeopardy determination.

ALJ Decision at 28.

As to the heat-related deficiencies, Jennifer Matthew asserts that "CMS never argued or offered evidence that the weather

conditions actually at issue in this case were dangerous to anyone." P. Br. at 101. Jennifer Matthew reasons that the absence of actual harm establishes either that the staff's care was sufficient to protect residents from dangerous conditions or that the conditions were not actually dangerous. Id. This statement and reasoning ignores the testimony of Dr. Young, who testified a length as to why he believed the conditions at Jennifer Matthew posed immediate jeopardy to specific residents based on their individual circumstances (CMS Exhibit 58, at 19-35) and stated generally the conditions "created a situation of immediate jeopardy to all residents, in which there was a likelihood of serious injury or harm" (CMS Exhibit 58, at ¶ 57).

Jennifer Matthew argues that the ALJ disregarded the testimony of Dr. Richard Hodder, whom Jennifer Matthew describes as one of the nation's leading experts on heat-related medical problems, and that the ALJ's failure to address that testimony in itself ought to be reversible error. P. Br. at 7, 25-27, 79; P. Reply at 22. Both the allegation that the ALJ failed to address the testimony and Jennifer Matthew's description of the testimony are simply inaccurate. Jennifer Matthew relies on the following excerpt from Dr. Hodder's testimony:

> What immediately struck me about the circumstances at Jennifer Matthew was that the ambient temperatures the State seemed concerned about only were in the 85 to 95 degree range. While such temperatures are uncomfortable for some people, they are not really "severe," in the sense that I would be concerned about significant immediate medical problems. While elderly or sick persons generally are less able than younger or well persons to regulate their body temperatures, air temperatures in the mid-90's, by themselves, ordinarily would not create medical concerns, or cause heat-related illness, even to elderly or sick residents.
>
> Likewise, I am aware of no study or empirical evidence that temperatures in the mid-90's, in themselves, cause significant fevers. The normal body temperature is in the 97 to 99 degrees Fahrenheit range (98.6 is an average determined from observation many years ago, but many people have slightly higher or lower "normal" temperatures). Most people's body temperature fluctuates by several degrees during the day, with the lowest temperature in the early morning, and the highest in late afternoon. "Normal" body temperature is affected by many variables, including ambient temperature, whether the person recently ate, the

> person's body size and build, underlying illness, and even ethnicity. Most clinicians do not consider an elevated temperature to be an abnormal "fever" until about 100 degrees, but even that level may not be a sign of illness in hot weather. Serious injury to the brain and other organs ordinarily does not occur until internal temperature reaches 105 degrees or higher for a prolonged period of time, and that degree of fever would not be caused by ambient temperatures in the mid-90's.
>
> As noted above, the fact that initially struck me when reviewing the allegations in the Statement of Deficiencies relating to the July, 2005 heat wave is that air temperatures into the mid-90's, such as those experienced in the Rochester area (and, apparently, inside the facility) probably were uncomfortable, but were not, by themselves, medically dangerous even to frail, sick persons. It is true that elderly persons are more susceptible to heat-related ailments than younger, healthy persons. But most heat ailments result from overexertion and/or dehydration in hot conditions. Most nursing facility residents, on the other hand, are relatively sedentary, and the staff ordinarily is able to keep them well hydrated in such conditions.

P. Br. at 25-26, citing P. Ex. 91.

Contrary to what Jennifer Matthew asserts, the ALJ did discuss this testimony. For example, in the course of addressing Jennifer Matthew's "misapprehension that the immediate jeopardy standard requires findings of actual harm that rises to the level of a medical emergency" (ALJ Decision at 28), the ALJ stated:

> Dr. Hodder, for example, discusses temperature levels that lead to "serious injury to the brain and organs" (about 105º in an otherwise healthy person - or less than 2 degrees higher than R5's temperature). But this is not the level of harm necessary to establish immediate jeopardy.
>
> People live in nursing facilities because of illness or other debilitating condition, and excessive heat and humidity necessarily present the potential for negative outcomes, which is why the facility must increase its vigilance during periods of excessive heat and humidity. Tr. 211. Exacerbation of those existing conditions can constitute serious harm. In testimony that was not inconsistent with anything Dr. Hodder said, Dr. Young

> explained that, by the time temperatures reach about 90°F, the body is no longer able to offload heat by means of radiation. The only chance it has to dissipate excessive heat is by evaporation, but if an individual has problems sweating, which can be caused by a myriad of drugs (e.g. antipsychotics, anticholinergics, antihistimines, some antihypertensives, diuretics), the risk of heat-related injury increases. Tr. 148. When body temperature reaches 105° or so, there is an immediate chance of end organ damage. But temperatures of 101ºF can also present the risk of serious injury depending on its duration and the individual's co-morbidities, such as COPD and cardiac disease. Tr. 150.

ALJ Decision at 28-29.

Jennifer Matthew points to nothing in Dr. Hodder's testimony that contradicts the testimony of Dr. Young on which the ALJ relied. Indeed, a careful reading of Dr. Hodder's testimony shows that it is replete with qualifiers, such as "by themselves" or "ordinarily," and that he is talking about "severe" or "significant immediate medical problems" rather than the regulatory standard of "serious harm" to the residents.

Moreover, as a matter of law, the ALJ was correct that actual harm is not required to establish immediate jeopardy. 42 C.F.R. § 488.301. The ALJ was also correct that there can be a likelihood of "serious harm" even if that harm is not the type of harm that Dr. Hodder said would not occur unless a resident's body temperature reached 105°. That "serious injury to the brain and organs" might not have occurred until residents' body temperatures reached 105° does not mean that they were not at risk of the type of serious harm about which Dr. Young testified because of Jennifer Matthew's failures to fully implement its own policies meant to protect them.

Indeed, the ALJ also noted that one of Jennifer Matthew's failures was a failure circulate the hydration carts, its strategy for maintaining adequate hydration, and both Drs. Hodder and Young cited it as absolutely necessary that the residents be well-hydrated. ALJ Decision at 29. In his declaration, Dr. Hodder's opinion that there was no likelihood of "significant immediate medical problems" is based on the assumption that the residents would be well-hydrated, since he recognizes dehydration as one of the causes of "most heat ailments." P. Ex. 91, at 6. Dr. Hodder's opinion also assumed that CMS was relying on the temperatures "by themselves." Id. Dr. Young's testimony, however, addressed the risks associated with residents who were

exposed to high temperatures and had particular ailments or were taking particular medication. CMS Ex. 24, at ¶¶ 52, 66, 79, 91-93, 100, 106, 118.

In sum, the ALJ did not disregard Dr. Hodder's testimony, as Jennifer Matthew argues on appeal, but explained why part of the testimony simply is not relevant under the immediate jeopardy standard and why part of the testimony that is relevant under the applicable standard supports her conclusion that CMS's judgment that immediate jeopardy existed is not clearly erroneous.

Jennifer Matthew also suggests that "the notion that any ALJ can make findings regarding medical facts, or the weight to be accorded a specific expert's testimony, without even hearing the witness testify, is far-fetched" and that "it is a basic premise of administrative law that ALJs may not disregard unrebutted medical evidence." P. Br. at 26 n.11. To the contrary, however, written direct testimony is often used in administrative proceedings for testimony by experts whose credibility is not at issue. Evaluating that evidence on the basis of whether it is probative of the issue being decided is perfectly proper (whether it is presented orally or in writing). Moreover, the ALJ properly relied on the more probative statements made by Dr. Young (that were not inconsistent with what Dr. Hodder said) and other evidence (such as the facility's own policies). She was not merely making her own medical judgments.

For the preceding reasons, we conclude that the ALJ did not err in holding that CMS's determination that Jennifer Matthew's deficiencies posed immediate jeopardy was not clearly erroneous.

V. The ALJ did not err in concluding that a $10,000 CMP for eight days is warranted.

Jennifer Matthew asserts that, other than unwarranted "rhetoric," CMS "offered absolutely no reason why this set of facts can be classified as the most serious violation conceivable under the regulations – i.e., to justify the highest CMP the law allows – even though no one suffered any injury." P. Br. at 103.

Our review looks at whether the ALJ Decision is correct under the law and supported by substantial evidence, not at what CMS said or did. The ALJ Decision applied the regulatory factors at 42 C.F.R. §§ 488.404 and 488.438(f) in evaluating whether the $10,000 CMP amount was within a reasonable range for the period of immediate jeopardy. The ALJ concluded that the amount was supported based on the following factors:

- *the nature and scope of the deficiencies*: two factual situations leading to noncompliance findings at the immediate jeopardy level, one of which was widespread and seven other undisputed noncompliances, including at the E level (pattern with potential for more than minimal harm), the F level (widespread with potential for more than minimal harm), and the G level (actual harm);

- *history of noncompliance*: Jennifer Matthew's designation as a special focus facility, previous findings of immediate jeopardy and substandard quality of care, and the fact that "approximately eight facility employees (CNAs and LPNs) were criminally convicted of falsifying medical records and patient neglect" because they "claimed to have provided care that they had not provided";

- *degree of culpability*: facility staff were "guilty of widespread neglect, disregarding resident care, comfort and safety"; staff's "conduct and arguments demonstrate disregard for resident comfort"; Jennifer Matthew "continues to trivialize the residents' real suffering as 'ordinary discomforts of life'"; and the facility is also culpable for failing to investigate the circumstances of R17's death.

ALJ Decision at 30-31 (citations omitted). The ALJ also noted that Jennifer Matthew had not argued that its financial condition affects its ability to pay the CMP. Id. at 30.

The minimum CMP amount for one immediate jeopardy finding is $3,050. Here, there were two situations that caused immediate jeopardy, one of which was widespread. This would, by itself, justify an amount well over twice the minimum. The other seven findings of noncompliance (which Jennifer Matthew did not dispute) justify increasing the amount by at least an additional $350 (since the minimum for one noncompliance finding is $50 and some of these findings were at higher levels of scope and severity). Concluding that the history of noncompliance and the high degree of culpability justified the increase to $10,000 was therefore reasonable, and consistent with the regulations. Contrary to what Jennifer Matthew suggests, no finding of "actual injury" is required to set a penalty at the highest level.

Jennifer Matthew does not here raise any additional challenge to any of the findings on which the ALJ relied in determining that the amount of the penalty is reasonable, other than to assert

that she erred by her "understanding of [Jennifer Matthew's] history, including its (still-unresolved) investigation by the New York Attorney General regarding an unrelated matter." P. Br. at 103. According to Jennifer Matthew, an ALJ is limited to the regulatory factors and, in any event, "even the most basic notion of due process provides that a pending *investigation* is not the same as a finding of guilt or liability, and cannot be the basis for imposition of a sanction (in an unrelated case, at that)." In finding that Jennifer Matthew employees had been convicted, however, the ALJ relied on evidence in the record before her. ALJ Decision at 30, citing Tr. 237; CMS Exs. 12, 13; P. Ex. 89, at 2-4. Contrary to what Jennifer Matthew asserts, the exhibits discuss more than a mere investigation of Jennifer Matthew and its employees. One refers to eight employees who pled guilty to one count of second-degree falsifying of business records and one count of willful violation of public health law (which the attorney for one of the employees described as "neglect"), after a camera observed them failing to provide needed services over a period of time. CMS Ex. 12, at 2. Another CMS Exhibit refers to a ninth employee later pleading guilty, and to a statement by Jennifer Matthew's management that "the neglect was the result of the actions of a select group of staff members . . . ." CMS Ex. 59, at 2. The declaration of the facility's Administrator confirms that, as a result of videotapes of the care provided to a resident, "approximately fourteen caregivers, mostly certified nursing assistants on the night shift, were charged with (and several pleaded guilty to) falsifying facility records, primarily for signing daily 'accountability statements' to the effect that they had provided all of the services the Resident required (for example, turning and positioning) when, the Attorney General alleged, the camera showed that they had not." P. Ex. 89, at 3. While this declaration refers only to "several" convictions, it does not directly contradict the ALJ's finding that there were "approximately eight."

While Jennifer Matthew did not explicitly argue that the guilty pleas did not establish noncompliance, the ALJ cites the Administrator's declaration, which asserts that "the Resident in question did not suffer any adverse outcomes during his entire stay at the Center" and that the "Department of Health never cited any deficiencies related to the Attorney General's charges." P. Ex. 89, at 3. The ALJ could nonetheless reasonably conclude that the nature of the convictions - for patient neglect and falsification of records – and their scope shows noncompliance with federal requirements. See, e.g., 42 C.F.R. §§ 483.13(c); 483.25; 483.75(b), (l). Actual harm is not required, and a systemic failure to provide required services such as turning and positioning has the potential for more than

minimal harm, particularly if staff is falsely certifying that the services are being provided.

Even if the ALJ could not properly use this evidence to demonstrate a history of noncompliance, moreover, the amount of the CMP is amply supported by presence of the other regulatory factors.

As to the finding that the immediate jeopardy lasted eight days, Jennifer Matthew argues that "even if every other argument [Jennifer Matthew] makes is unavailing, CMS offered no evidence that any noncompliance persisted after July 13 (unless hot weather alone is enough to impose liability)." P. Br. at 103. Jennifer Matthew points to interventions it implemented to address the heat-related problems and relies on testimony by one of the surveyors who testified that they were an acceptable response. According to Jennifer Matthew, neither the State agency nor CMS "considered the conditions so gruesome as to require any additional interventions, up to and relocating residents" and this concession should have been binding on CMS, but was not even mentioned by the ALJ. Id. at 104. Jennifer Matthew acknowledges that one of the surveyors testified that the duration of the penalty was related to both the choking and heat-related noncompliances, but argues that "it was the *event* of the alleged choking and *not* any defect in staff training that supported that finding." Id.

These arguments have no merit, for the following reasons. First, the duration of a per-day CMP is controlled by the regulations, which provide that the penalty is computed for the number of days of noncompliance (or until the facility is terminated) and accrues until the date of correction determined by an on-site revisit or by "written credible evidence" which CMS or the State agency receives and accepts. 42 C.F.R. §§ 488.440, 488.454; Cross Creek Health Care Center, DAB No. 1665, at 3 (1998). Thus, contrary to what Jennifer Matthew argues, the burden is not on CMS to show "noncompliance persisted." Similarly, it is the facility that has the burden to show that it has made sufficient corrections to remove the immediate jeopardy so that the amount of the CMP should be reduced, even if noncompliance persists. Hermina Traeye Memorial Nursing Home, DAB No. 1810 (2002). The facility failed to meet its burden in this case.

Second, there is no requirement that a State agency *immediately* transfer patients if an immediate jeopardy situation exists. Transfer may be appropriate in an emergency situation, and, if immediate jeopardy is not corrected within 23 days, the facility must be terminated or a temporary manager appointed to remove the

immediate jeopardy. 42 C.F.R. §§ 488.410; 488.426. Thus, the surveyors' testimony that the additional interventions to address the heat-related problems were an acceptable response and that the surveyors did not invoke the State agency's authority to relocate residents because of the steps the facility took late in the day on July 13 does not amount to a concession that the immediate jeopardy did not persist. See Tr. at 337, 259, 285. Nor does it conflict with CMS's rationale for determining that the immediate jeopardy was not removed until July 21 – which was based on Jennifer Matthew's own plan of correction regarding when it would do in-service training of staff, related to both the choking incident and the heat-related problems.

Finally, contrary to what Jennifer Matthew suggests, the surveyors did not find that there was no defect in the training on the Heimlich Maneuver that Jennifer Matthew had provided *prior* to the choking incident with R17. While one surveyor found that staff could verbalize what to do, another pointed out that there is a difference between being able to verbalize it and really knowing what to do when in the situation. Tr. at 260-262. As the ALJ found, the training alone did not ensure that the immediate jeopardy was removed since the facility needed to follow up with staff to verify that they understand and have implemented the practices taught, particularly in light of the facility's history of staff neglect and its failure to investigate the choking incident. ALJ Decision at 31.

In sum, the ALJ's conclusions regarding the amount and duration of the immediate jeopardy CMP are legally correct and supported by substantial evidence in the record.

VI. The ALJ did not commit procedural error.

A. The ALJ did not err in granting summary judgment on the issue of whether Jennifer Matthew was in substantial compliance with section 483.15(h)(6).

On summary judgment, the ALJ found that the section 483.15(h)(6) deficiency caused more than minimal harm to residents. After an in-person hearing, she concluded that Jennifer Matthew had failed to show that CMS's determination that this deficiency posed immediate jeopardy was clearly erroneous. Despite the fact that the ALJ found a higher level of noncompliance after the hearing, Jennifer Matthew argues that the entry of a summary judgment as to the section 483.15(h)(6) deficiency citation constitutes harmful error. P. Br. at 63-72. It asserts that the entry of summary judgment –

> precluded [Jennifer Matthew] from examining any of CMS' witnesses regarding the underlying deficiency itself and thereby converted the entire hearing – including what was left of the "choking" citation – into no more than an exercise to determine the amount of the penalty.

P. Br. at 71-72 (emphasis added).

This description (which is the only description) of the "harm" resulting from entry of a summary judgment mischaracterizes the procedures below.

- The ALJ's summary judgment ruling was based on undisputed facts and was issued after Jennifer Matthew had proffered its written direct testimony and exhibits. Jennifer Matthew does not argue it proffered any affirmative evidence that residents did not experience significant discomfort and, as discussed above, that is a reasonable conclusion from the undisputed facts.

- At issue in the oral hearing were other deficiency citations related to Jennifer Matthew's care of residents in response to the high temperatures (and its care of R17). Jennifer Matthew, therefore, had an opportunity to cross-examine any of CMS's witnesses about facts relevant to these deficiencies such as its implementation of its heat policies, its staff's care of residents throughout the heat wave, and the conditions of the affected residents. Thus, at the hearing, Jennifer Matthew had an opportunity to fully adjudicate facts that the ALJ had treated as disputed and not necessary to her summary judgment ruling.

- Moreover, at the hearing the ALJ heard evidence as to the level of harm posed by all the deficiencies, including the citation under section 418.15(h)(6). Therefore, Jennifer Matthew was able to cross-examine CMS witnesses, including the CMS expert, as to their bases for concluding that conditions associated with the high temperatures were likely to cause serious harm. The evidence about likelihood of serious harm would also support a conclusion that there was a potential for more than minimal harm. Jennifer Matthew does not assert that its evidence would have been any different if it were merely trying to show that it was in substantial compliance with the requirement, and, in fact, Jennifer Matthew submitted its written direct testimony before the summary judgment ruling.

- Finally, Jennifer Matthew identifies nothing in the transcript that would tend to show that the ALJ improperly prevented it, at the hearing, from presenting evidence related to staff implementation of its heat policies or the risk of serious harm posed by the high temperatures. Jennifer Matthew asserts that the ALJ "repeatedly cut off questioning related to the merits of the 'heat' deficiencies," but provided no cites to the transcript to support its assertion. P. Br. at 19.

In other words, the outcome of this appeal would have been the same even if the ALJ had not granted partial summary judgment for CMS on the basis she did. Therefore, we only briefly explain below why Jennifer Matthew's additional arguments regarding the summary judgment ruling have no merit.

Jennifer Matthew argues that the ALJ, after denying CMS's motion under section 483.13(c), misapplied the standards for summary judgment by relying on the same facts but by "skipp[ing] over" whether there were material disputed facts under section 483.15(h)(6).[20] P. Br. at 66. This is not correct. While the ALJ was presented with the same facts for both determinations, the two regulations required her to apply different standards to those facts. Thus, as the ALJ pointed out, summary judgment was inappropriate under section 483.13(c) because there were "disputed material facts surrounding the facility's implementation of its policies and procedures." February Ruling at 5-6. These facts were not necessary to her conclusion under section 483.15(h)(6).

Jennifer Matthew asserts that the summary judgment ruling "confuses the sort of 'evidence' that may support a summary disposition *in favor of* CMS." P. Br. at 67 (emphasis in original). Specifically, Jennifer Matthew argues that the ALJ erred in relying on written testimony from CMS witnesses and findings in the SOD. P. Br. at 67-69; see also at 12 n.4. As to written testimony, Jennifer Matthew characterizes as a "glaring flaw" the ALJ's reliance on CMS's written testimony prior to Jennifer Matthew's opportunity to cross-examine CMS witnesses.

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[20] Jennifer Matthew also argues that, as the moving party, CMS had the burden of showing that there were no material facts in dispute, and that, "as a practical matter, that burden is obviously even higher than usual in a "renewed" motion . . . ." P. Br. at 66. Jennifer Matthew cites no authority for such a proposition.

Id. at 67.[21]

This argument is baseless. Rule 56 of the Federal Rules of Civil Procedure (adopted in the ALJ's prehearing order) provides for the use of affidavits and for a response of the party opposing the motion "by affidavits" that "set out facts showing a genuine issue for trial." Here Jennifer Matthew did file opposing affidavits but failed to controvert CMS's factual allegations that provided a basis for the summary judgment as to the quality of life standard: the residents were frail elderly people who suffered significant debilitating conditions and who were therefore susceptible to heat related health complications; the temperatures inside the facility were uncomfortably hot; multiple residents were left in hot rooms, including one that was 96°; residents, several with elevated temperatures, were sweating and thirsty as they lay in their beds. February Ruling at 7-9.

As for the SOD, Jennifer Matthew asserts that an ALJ "may *not* take into account the unsworn allegations in a charging document . . . since that charging document is not 'evidence,' at least not for purposes of considering summary disposition." Id. at 68. For this proposition, Jennifer Matthew cites U.S. v. Menendez, 48 F.3d 1401 (5th Cir. 1995), which involved the imposition of penalties for fishing practices that violated the Endangered

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[21] Jennifer Matthew also objects that the CMS witness affidavits were drafted by CMS counsel after conversations with the witnesses. P. Br. at 68-69. Jennifer Matthew acknowledges that the surveyor affidavits largely just repeat the SOD, but says there were some significant differences between what a witness said in written testimony and on cross-examination. Id. at 69. As the only example of such a disparity, Jennifer Matthew asserts (without citation) that "CMS' expert Dr. Young testified that he was concerned about the potential harm that could occur from hot weather conditions, but his written statement had him stating that the hot weather *actually* caused harm to certain residents (an opinion he disclaimed at the hearing.)" Id. These objections have no merit. First, witnesses must attest to their statements. Even if a statement is drafted by counsel after consulting with the witness, it is fair to assume the witness reads statement before attesting and can correct any material drafting errors. Second, we do not see where Dr. Young disclaimed his opinion there was actual harm. Compare CMS Ex. 58, at ¶¶ 67-87 to Tr. at 182-192. And on its face, it is not inconsistent to opine, as he did, that there was actual harm to R5, yet still be concerned about the potential for even greater harm.

Species Act. In Menendez, the court found that the ALJ improperly rejected the petitioners' request for hearing. The court then reversed the ALJ's entry of summary judgment because it was based on an evidentiary record containing only a Notice of Violation and Assessment (NOVA), which the court described as "an *unsworn* document signed by a [government] staff attorney not claiming to have personal knowledge of the matters alleged [which] contains only fact allegations of the charge violation." Id. at 1414 (emphasis in original). The record before the ALJ here was materially different from the one before the ALJ in Menendez (which is distinguishable in multiple ways). The SOD is a detailed recitation of the findings of the surveyors, based on their personal observations, in a survey conducted and documented according to federal regulations; the surveyors attested to those findings in their written testimony.[22] Both the SOD and the witness affidavits are competent evidence for purposes of summary judgment. In any event, the ALJ was not relying on the SOD or affidavits, but on Jennifer Matthew's failure to dispute the material facts asserted there. Where Jennifer Matthew submitted evidence disputing allegations in the SOD or CMS testimony, the ALJ did not rely on the disputed allegations. For example, Jennifer Matthew's expert witness testified about whether the heat conditions caused actual injury or posed the risk of serious injury to residents. Noting this dispute of fact, the ALJ declined to grant summary judgment as to the level of noncompliance. February Ruling at 12-13.

Jennifer Matthew argues that the ALJ's focus on the hot conditions in the facility did not take into account the actions of its staff and that if the "staff properly implemented its heat emergency procedures (and protected residents against heat injury), the fact that parts of the building stayed hot may have no regulatory consequence." P. Br. at 71. It concludes that, since there were disputes of fact as to the actions of its staff, summary judgment was improper. We reject this argument. Section 483.15(h)(6) requires temperatures to be comfortable and safe. As discussed above, Jennifer Matthew did not dispute facts that

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[22] The Board has previously concluded that a "SOD may function both as a notice document and as evidence of the facts asserted therein." Oxford Manor, DAB No. 2167, at 2 (2008), citing Pacific Regency Arvin, DAB No. 1823 (2002). Further, the Board has determined that if a finding in a SOD is not disputed, CMS need not present evidence in support of the finding. Batavia Nursing and Convalescent Center, DAB No. 1904, *supra*; see also 42 C.F.R. § 498.40(b)(request for hearing must identify specific findings of fact with which a party disagrees).

established that the residents experienced significant discomfort with the potential for more than minimal harm to their quality of life.

Jennifer Matthew argues that, for purposes of summary judgment, the ALJ "should have taken [Jennifer Matthew's] evidence as correct." P. Br. at 78; 78-80. In granting summary judgment, the ALJ did treat Jennifer Matthew's evidence, specifically Dr. Hodder's testimony, as correct. The summary judgment ruling was based on the limited conclusion that residents had suffered at least more than minimal harm from admittedly being left in rooms with temperatures well in excess of 85°. In reaching this conclusion (and the conclusion that CMS was not entitled to summary judgment on the issue of whether this noncompliance caused immediate jeopardy), the ALJ stated that Dr. Hodder's testimony created a dispute of material fact as to whether there was "actual harm or the additional likelihood of serious harm." February Ruling at 12. This is correct; Dr. Hodder's testimony (as discussed more fully above) went to whether the conditions at Jennifer Matthew had caused actual physical harm or were likely to cause serious physical harm, factors that were not necessary to the ALJ's finding that the conditions, and the significant discomfort endured by residents, caused suffering that was at least minimal harm. P. Ex. 91. Jennifer Matthew cites no expert evidence going to whether the conditions posed a risk of more than minimal mental or emotional harm.[23]

B. The ALJ's summary judgment ruling did not result from an improper process for developing the case.

As part of her ruling of June 1, 2006 denying CMS's motion for summary judgment (June Ruling), the ALJ issued an "Order pursuant to 42 C.F.R. § 498.56."[24] June Ruling at 3. She stated that, if

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[23] While some isolated statements in Dr. Hodder's written direct testimony could, if read in the light most favorable to Jennifer Matthew, arguably go to this issue, the testimony read as a whole did, as the ALJ found, focus on the issue of serious, heat-related illnesses, and does not mention potential mental or emotional effects of the discomfort.

[24] Section 498.56, which is titled "Hearing on new issues," provides in pertinent part:

> (a) *Basic rules*. (1) Within the time limits specified in paragraph (b) of this section, the ALJ may, at the request of either party, or on his or her own motion, provide a

CMS's factual findings were correct, it appeared that Jennifer Matthew had failed to comply with section 483.15(h)(6) (comfortable and safe temperatures) and section 483.25 (quality of care). Id. She directed the parties to address whether she should add these two issues to the case pursuant to section 483.56(a) and noted they could also consider whether the matter should be remanded to CMS pursuant to section 498.56(d) to consider these issues. Id. The parties filed a joint response to the June Ruling. The parties agreed that CMS would issue a revised determination that included the two additional deficiency citations and that provided Jennifer Matthew with appeal rights. Joint Response at 2. The ALJ then remanded the case to CMS and Jennifer Matthew appealed CMS's revised determination.

On appeal to the Board, Jennifer Matthew argues that the ALJ "crossed the line between judge and advocate" because, after having denied CMS's summary judgment motion based on section 483.13(c), she questioned whether the facts set forth in the original SOD indicated that Jennifer Matthew was in noncompliance with two additional performance requirements. P. Br. at 61; see also P. Br. 6, 19.

This argument has no merit for the following reasons.

- Section 498.56 specifically authorizes an ALJ to add new issues, on her own motion, so long as he/she gives notice in accordance with sections 498.56(c) and 498.52.

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hearing on new issues that impinge on the rights of the affected party.

(2) The ALJ may consider new issues even if CMS or the OIG has not made initial or reconsidered determinations on them, and even if they arose after the request for hearing was filed or after a prehearing conference.

(3) The ALJ may give notice of hearing on new issues at any time after the hearing request is filed and before the hearing record is closed.

(d) *Remand to CMS or the OIG.* At the request of either party, or on his or her own motion, in lieu of a hearing under paragraph (c) of this section, the ALJ may remand the case to CMS or the OIG for consideration of the new issue and, if appropriate, a determination. If necessary, the ALJ may direct CMS or the OIG to return the case to the ALJ for further proceedings.

Thus, the hearing regulations establish a procedure that is sufficiently flexible to ensure that all relevant issues are litigated while providing adequate notice and opportunity to contest new issues that are added. What the ALJ did was well within her authority under Part 498 and did not transform her into a "prosecutor" (P. Br. at 63).

- The case on which Jennifer Matthew relies as authority for the proposition that the ALJ's action was improper is inapposite. In National Labor Relations Board v. Tamper, Inc., 522 F.2d 781 (4th Cir. 1975), the court reversed an ALJ decision because the ALJ had, in his final decision and without any prior notice to the parties, ruled that certain conduct violated a section of the National Labor Relations Act that the employer was not charged with violating. Here, unlike the appellant in Tamper, Jennifer Matthew was given notice that these deficiencies would be added to the case and an opportunity to dispute them.

- The fact that the ALJ raised this question after denying CMS's first motion for summary judgment is immaterial. Plainly, after her initial review of the record, she found that the facts at issue appeared to violate additional performance requirements.

- Having agreed to the procedure ultimately used to add the new issues, Jennifer Matthew should not be heard to complain about it now. Indeed, despite Jennifer Matthew's acknowledgment that it had agreed that the parties' approach to "avoid litigating" the issue of whether the ALJ had the authority to add new issues sua sponte was preferable (Joint Response at 3 n.2), Jennifer Matthew is now trying to do exactly what it agreed to avoid - to litigate the issue of the ALJ's authority. In light of Jennifer Matthew's agreement, the ALJ reasonably determined that Jennifer Matthew had waived any objection to the procedure followed. February Ruling at 3 n.3.

- Jennifer Matthew can demonstrate no prejudice since the ALJ determined after an hearing (and we agree) that, based on its care of R17 and of other residents during the heat wave, Jennifer Matthew was not in substantial compliance with sections 483.13(c), 483.25, and 483.75. These allegations of noncompliance were set forth by CMS in its initial determination and provide a sufficient

basis for the CMP imposed in this case.

VII. The ALJ did not base her evaluations of witness credibility on an impermissible ground.

The Board defers to an ALJ's evaluation of witnesses whose demeanor the ALJ has observed at hearing. Perhaps mindful of this, Jennifer Matthew argues that the ALJ's evaluations of credibility were colored by her reliance on certain newspaper reports of civil charges against Jennifer Matthew management and that this created material prejudice to Jennifer Matthew's case before the ALJ. P. Br. at 2-4, 7, 20-21.

This argument misdescribes the ALJ Decision. First, in discussing witness credibility, the ALJ never relied on information in the record about civil charges against Jennifer Matthew. She did refer to the criminal investigation about care at Jennifer Matthew and the result that at least eight of Jennifer Matthew's nurse aides and nurses for, during April and May 2005, pled guilty (see discussion at pages -40-41 above) to falsifying medical records and neglecting patients. Under 42 C.F.R. § 498.61, an ALJ has broad discretion to admit evidence.[25] Jennifer Matthew identifies no authority for its assertion the ALJ erred by admitting evidence of patient neglect in the months immediately preceding the neglect incidents at issue.

Second, the ALJ referred to the criminal proceeding twice in relation to witness testimony. Once she relied on it as <u>confirming</u> the DON's testimony about the untrustworthiness of Jennifer Matthew staff. Thus, in explaining why she believed the statement of a mentally competent resident about trying to get out of bed instead of a nursing note, the ALJ wrote:

> [Jennifer Matthew] has convinced me that its staff was capable of putting false information into the patient records. *See*, *e.g.* Tr. 428, 431. *See also* Tr. 237-238; CMS Exs. 12, 13 (At least eight facility employees criminally convicted of falsifying medical records and patient neglect during April and May 2005).

ALJ Decision at 23 n.18. The ALJ's other reference involved the

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[25] Section 498.61 provides:

> Evidence may be received at the hearing even though inadmissible under the rules of evidence applicable to court procedure. The ALJ rules on the admissibility of evidence.

DON's failure to report the circumstances of R17's death to the state agency. ALJ Decision at 16 n.13. Jennifer Matthew argued to the ALJ that "it is hard to imagine why [the DON] would want to cover up this particular event, especially after she came to the conclusion that [R17] actually had died a natural death." P. Reply before ALJ at 15. In response, the ALJ wrote:

> First, I find not credible her claim that she thought that R17 died a natural death. Second, it is not so hard to imagine that she wanted to cover up this particular incident of neglect. During this time, the facility was under investigation for criminal neglect. Fourteen of its staff were ultimately indicted, and at least eight or more of those were convicted.

ALJ Decision at 16 (citation omitted). This response does not display "material prejudice" as Jennifer Matthew alleges. P. Br. at 20-21. It is a reasonable inference provoked by Jennifer Matthew's assertion that the DON had no motive to conceal the incident.

Finally, throughout the decision, the ALJ set forth other convincing reasons for determining witness credibility and for giving more weight to CMS's evidence than to Jennifer Matthew's. The main determination of credibility at issue was the credibility of the DON, and we have discussed above the inconsistencies in her testimony. Moreover, even if the ALJ had found the DON to be credible, the ALJ still reasonably gave more weight to contemporaneous notes and statements of staff than to what the DON testified or recorded that staff told her at a later time, particularly since Jennifer Matthew did not offer testimony from any of these staff members to contradict their contemporaneous statements and the DON herself raised questions as to the staff trustworthiness. Indeed, the DON's lack of credibility is demonstrated by her inability to explain her own inconsistent statements. Tr. at 389-390.

Thus, there is no reason to believe that the ALJ's evaluation of credibility was inappropriately "colored by" admission of the news reports into the record or that the result would have been any different even if those reports had been omitted from the record.

Conclusion

For the reasons explained above, we uphold the ALJ Decision. We affirm and adopt each of her numbered findings of fact and conclusions of law.

/s/
Stephen M. Godek

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member