Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Manorcare Nursing and Rehabilitation Center
(CCN: 10-5421),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-16-384

Decision No. CR4917

Date: August 14, 2017

DECISION

Petitioner disputes that a denial of payment for new admissions (DPNA), imposed on it by the Centers for Medicare & Medicaid Services (CMS), should have gone into effect because CMS ultimately concluded that Petitioner had corrected the deficiencies, on which the DPNA was originally based, before the date the DPNA was to go into effect. CMS asserts in response that, during the revisit survey at which Petitioner was found to have corrected the previously identified deficiencies, additional deficiencies were found. As a result, CMS permitted the DPNA to go into effect because Petitioner was not in substantial compliance with Medicare program participation requirements. For the reasons that follow, I affirm CMS's imposition of a DPNA on Petitioner for the period of December 29, 2015 through January 16, 2016.

I. Background and Procedural History

The Social Security Act (Act) sets forth requirements for the participation of a skilled nursing facility (SNF) in the Medicare program and authorizes the Secretary of Health and Human Services (the Secretary) to promulgate regulations implementing those statutory provisions. 42 U.S.C. § 1395i-3. The Secretary's regulations are found at

42 C.F.R. Parts 483 and 488. To participate in the Medicare program, a SNF must maintain substantial compliance with program participation requirements. To be in substantial compliance, a SNF's deficiencies may "pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301.[1] A deficiency is a violation of a participation requirement established by 42 U.S.C. § 1395i-3(b), (c), and (d), or the Secretary's regulations at 42 C.F.R. pt. 483, subpt. B. "Noncompliance" means "any deficiency that causes a facility to not be in substantial compliance." 42 C.F.R. § 488.301. A facility may violate a statutory or regulatory requirement, but it is not subject to enforcement remedies if the violation does not pose a risk for more than minimal harm. 42 C.F.R. §§ 488.402(b), 488.301.

The Secretary contracts with state agencies to conduct periodic surveys to determine whether SNFs are in substantial compliance. 42 U.S.C. § 1395aa(a); 42 C.F.R. § 488.10. The Act also authorizes the Secretary to impose enforcement remedies against SNFs that are not in substantial compliance with the program participation requirements. 42 U.S.C. § 1395i-3(h)(2). The regulations specify the enforcement remedies that CMS may impose. 42 C.F.R. § 488.406. Among other remedies, CMS may impose a DPNA when a SNF is not in substantial compliance. 42 U.S.C. § 1395i-3(h)(2)(B)(i); 42 C.F.R. §§ 488.406(a)(2)(ii), 488.417(a). CMS may also impose a per-day civil money penalty (CMP) for the number of days a SNF is not in substantial compliance. 42 U.S.C. § 1395i-3(h)(2)(B)(ii); 42 C.F.R. § 488.430(a). A per-day CMP may range from either $50 to $3,000 per day for less serious noncompliance, or $3,050 to $10,000 per day for more serious noncompliance. 42 C.F.R. § 488.438(a)(1).[2]

If CMS imposes a DPNA based on a noncompliance determination, then the facility may request a hearing before an administrative law judge (ALJ) to challenge the noncompliance finding and enforcement remedy. *See* 42 C.F.R. §§ 488.330(e), 488.408(g), 498.3(b)(13), 498.40(a). The hearing before an ALJ is a *de novo* proceeding. *CarePlex of Silver Spring*, DAB No. 1683 (1999) (holding that ALJs hold *de novo* hearings based on issues permitted under the regulations and ALJ review is not a quasi-appellate review); *see also Claiborne-Hughes Health Ctr. v. Sebelius*, 609 F.3d 839, 843 (6th Cir. 2010) (The Departmental Appeals Board (DAB) "reviewed the finding under the *de novo* standard that the ALJ would have applied."). Although the facility has a

[1] All citations to the Code of Federal Regulations are to the version in effect at the time of the incident at the heart of this decision unless otherwise indicated.

[2] CMS recently increased the CMP amounts to account for inflation in compliance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 104 Pub. L. No. 114-74, 129 Stat. 584, 599. The new adjusted amounts apply to CMPs assessed after August 1, 2016, for deficiencies occurring on or after November 2, 2015. *See* 81 Fed. Reg. 61,538 (Sept. 6, 2016). As the deficiencies alleged in this case occurred prior to November 2, 2015, the increased CMP amounts do not apply in this case.

right to appeal a "certification of noncompliance leading to an enforcement remedy," CMS's choice of remedies and the factors CMS considered when choosing remedies are not subject to review. 42 C.F.R. § 488.408(g).

In regard to the burden of proof, CMS must make a *prima facie* case that the SNF failed to comply substantially with federal participation requirements and, if this occurs, the SNF must, in order to prevail, prove substantial compliance by a preponderance of the evidence. *Hillman Rehab. Ctr.*, DAB No. 1611 at 8 (1997); *see Batavia Nursing & Convalescent Inn*, DAB No. 1911 (2004); *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004); *Emerald Oaks*, DAB No. 1800 (2001); *Cross Creek Health Care Ctr.*, DAB No. 1665 (1998).

Petitioner is a SNF located in Naples, Florida, that participates in the Medicare program. On November 5, 2015, the Florida Agency for Health Care Administration (state agency) simultaneously completed a recertification survey and a complaint investigation survey. Petitioner's Exhibit (P. Ex.) 4 at 1. The state agency sent Petitioner two separate notice letters dated November 20, 2015, one based on the recertification survey and the other based on the complaint investigation survey, along with two separate statements of deficiencies, one related to each notice and survey. P. Exs. 1 and 2. Those notice letters and statements of deficiencies informed Petitioner of the state agency's findings that it was not in substantial compliance with multiple federal regulations for long-term care facilities. *Id.*

Based on the surveys, CMS issued an imposition notice on December 14, 2015, in which it found Petitioner "was not in substantial compliance with the [Medicare] participation requirements." P. Ex. 4 at 1. Based on its findings, CMS informed Petitioner that it was "imposing remedies immediately based upon the findings of a Scope/Severity at 'G' for F314 [42 C.F.R. § 483.25(c)] and F323 [42 C.F.R. § 483.25(h)]."[3] *Id.* As relevant here, CMS notified Petitioner that a DPNA "is effective December 29, 2015, if [Petitioner's] facility is still out of compliance on that date." P. Ex. 4 at 2 (emphasis omitted).

Shortly thereafter, from December 16 through 21, 2015, the state agency conducted a revisit survey and a new complaint survey. P. Exs. 6, 7. The revisit survey, completed

[3] Scope and severity levels are used by CMS and state agencies when selecting remedies. The scope and severity level is designated by letters A through L, selected by CMS or the state agency from the scope and severity matrix published in the State Operations Manual, chap. 7, § 7400.5 (Sep. 10, 2010). A scope and severity level of G indicates a deficiency that involves actual harm that does not amount to immediate jeopardy. The reference to "F314" and "F323" is based on "F tags" used in the State Operations Manual, app. PP, that refer to specific regulatory violations. F314 is a reference to 42 C.F.R. § 483.25(c); F323 is a reference to 42 C.F.R. § 483.25(h).

December 21, 2015, revealed that Petitioner corrected all of the deficiencies from the November 5, 2015 surveys. P. Ex. 7.[4] However, based on the new complaint survey, completed December 17, 2015, the state agency concluded that Petitioner was not in substantial compliance with two additional Medicare program participation requirements for SNFs. P. Ex. 6 at 1-15. Based on the complaint survey, CMS issued a change in remedies notice dated January 28, 2016, in which it informed Petitioner that Petitioner still was not in substantial compliance with Medicare participation requirements. CMS further notified Petitioner that the DPNA "remains in effect as of December 29, 2015, as stated in our imposition notice of December 14, 2015." P. Ex. 10 at 3 (emphasis omitted).

On January 20, 2016, the state conducted another revisit survey and concluded that Petitioner had returned to substantial compliance. P. Exs. 8, 9. In a compliance notice dated January 28, 2016, CMS advised Petitioner that Petitioner returned to substantial compliance on January 17, 2016, and that the DPNA "remains in effect from December 29, 2015, through January 16, 2016 . . . ." CMS Exhibit (Ex.) 3 at 1 (emphasis omitted).

Petitioner waived its right to appeal CMS's December 14, 2015 imposition notice, P. Ex. 5, but timely requested a hearing to challenge CMS's January 28, 2016 change in remedies notice and the imposition of the DPNA. Following receipt of Petitioner's hearing request, I issued an Acknowledgment and Pre-Hearing Order (Pre-Hearing Order) that established a prehearing exchange schedule for the parties. In that order, I directed the parties to file briefs and proposed exhibits. I also ordered the parties to submit the written direct testimony for all witnesses they wanted to present in this case. Pre-Hearing Order ¶ 8; Civil Remedies Division Procedures (CRDP) §§ 16(b), 19(b). I also set forth guidelines for the parties to file a motion for summary disposition.

In compliance with my Pre-Hearing Order, Petitioner filed a motion for summary judgment (P. MSJ) along with thirteen proposed exhibits (P. Exs. 1-13), which included the prefiled direct testimony of one witness. Shortly thereafter, CMS filed its prehearing exchange, including a prehearing brief, witness and exhibit list, one proposed witness, and four proposed exhibits (CMS Exs. 1-4), followed two weeks later by its combined opposition to Petitioner's motion and cross-motion for summary judgment (CMS MSJ). Petitioner then filed a reply to CMS's motion (P. Reply) along with a witness and exhibit

[4] Due to an apparent oversight by the state agency, Petitioner did not receive documentation following the December 21, 2015 revisit survey indicating that it had corrected the deficiencies identified by the November 5, 2015 complaint survey. P. Ex. 13 at 3. Petitioner's staff questioned the surveyors about this oversight during a revisit survey that concluded on January 20, 2016, P. Ex. 13 at 3, and on January 26, 2016, the state agency sent a letter notifying Petitioner that it had corrected the deficiencies identified by November 5, 2015 complaint survey as of December 5, 2015. P. Ex. 9.

list and cover letter. In the cover letter, Petitioner indicated that it would rely on its own summary judgment motion along with its proposed exhibits, the newly filed witness and exhibit list, and the newly filed reply to CMS's summary judgment motion collectively as its prehearing brief and exchange.[5] After requesting permission, which I granted, CMS filed a sur-reply to Petitioner's reply (CMS Sur-Reply). Finally, Petitioner filed a response to CMS's sur-reply (P. Response).

II. Decision on the Record

Neither party has objected to the exhibits offered by the other; I therefore admit them all into the record. *See* Pre-Hearing Order ¶ 7; CRDP § 14(e). In addition, neither party requested to cross-examine the other's witness. Pre-Hearing Order ¶ 9; CRDP § 16(b). Therefore, although both parties have moved for summary judgment, I decide this case based on the written record. Pre-Hearing Order ¶¶ 10, 13; CRDP § 19(b), (d).

III. Issue

Whether CMS had the authority to impose a DPNA on Petitioner.

IV. Findings of Facts, Conclusions of Law, and Analysis

"The Secretary may . . . with respect to a finding that a facility has not met an applicable [Medicare program participation] requirement . . . deny any further payments under [the Medicare program] . . . with respect to such individuals admitted to the facility after the effective date of the finding." 42 U.S.C. § 1395i-3(h)(2)(B)(i); *see also* 42 C.F.R. § 488.417(a). Before denying payments, "notice must be given at least 15 calendar days before the effective date of the enforcement action in situations where there is no immediate jeopardy." 42 C.F.R. § 488.402(f)(4). The notice given includes the "[n]ature of the noncompliance," "[w]hich remedy is imposed," the "[e]ffective date of the remedy," and the "[r]ight to appeal the determination leading to the remedy." *Id.* § 488.402(f)(1)(i)-(iv).

Under the Secretary's regulations, determining whether CMS had legal authority to impose a DPNA on Petitioner from December 29, 2015 through January 16, 2016, requires examining two antecedent issues: First, whether Petitioner was in substantial compliance with Medicare program participation requirements, and second, whether CMS gave adequate notice of the DPNA to Petitioner under 42 C.F.R. § 488.402(f).

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[5] To be precise, the cover letter requests that Petitioner's summary judgment motion and reply to CMS's cross-motion be treated as its prehearing brief and that the exhibits submitted with Petitioner's summary judgment motion be treated as its prehearing exchange. I grant Petitioner's request.

Only if CMS shows that Petitioner was not in substantial compliance and that it gave Petitioner adequate notice of the DPNA can I conclude that CMS had the authority to impose a DPNA on Petitioner in this case. I address each of these issues in turn. My findings of fact and conclusions of law are set forth in italics and bold font followed by detailed factual and legal analyses.

A. CMS's noncompliance findings, which Petitioner does not contest, establish that Petitioner was not in substantial compliance with Medicare program participation requirements from August 20, 2015 through January 16, 2016.

Whether Petitioner substantially complied with federal participation requirements turns on a careful examination of the facts related to the notice letters sent to Petitioner by CMS, the statements of deficiencies sent to Petitioner by the state agency, and Petitioner's reaction to those documents. CMS's December 14, 2015 imposition notice informed Petitioner of CMS's determination that Petitioner was not in substantial compliance with those requirements beginning August 20, 2015. P. Ex. 4 at 1-2.[6] Petitioner waived its right to appeal that determination, P. Ex. 5, rendering the determination administratively final. 42 C.F.R. §§ 498.3(b)(13), 498.20(b).

CMS's January 28, 2016 change in remedies and compliance notices, read together, informed Petitioner of CMS's determination that Petitioner remained out of substantial compliance and did not return to substantial compliance until January 17, 2016. P. Ex. 10 at 1-2; CMS Ex. 3 at 1. CMS based the latter findings on the state agency's December 17, 2015 complaint survey, during which the state agency found that Petitioner was not in substantial compliance with 42 C.F.R. §§ 483.25(m)(2) and 483.75(*l*)(1) dating back to October 2015. P. Ex. 6 at 4-17. Petitioner admits that it "has not contested the merits of any of the underlying deficiencies" forming the basis for CMS's enforcement actions, which includes the deficiencies on which the January 28, 2016 notices were based. P. Reply at 2 n.2. Thus, it appears, based on Petitioner's admission, that CMS's January 28, 2016 findings (in particular, that Petitioner's noncompliance, which began August 20, 2015, continued through January 16, 2016) are also administratively final. *See* 42 C.F.R. §§ 498.3(b)(13), 498.20(b).

Despite Petitioner's failure to contest the merits of the deficiencies cited by CMS in its December 14, 2015 and January 28, 2016 notice letters, Petitioner argues that it has

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[6] Although the imposition notice does not specifically state that Petitioner's noncompliance began on August 20, 2015, it does state that CMS was imposing a "CMP effective August 20, 2015." P. Ex. 4 at 2. Moreover, the statement of deficiencies related to the November 5, 2015 complaint survey includes findings that Petitioner that violated 42 C.F.R. § 483.25 and 483.25(c) beginning at least as early as August 20, 2015. P. Ex. 2 at 11-19.

demonstrated through its evidence that "it resumed compliance, as the [state agency] found, on December 5, 2015," citing P. Exs. 11 and 12. P. Reply at 10. In support of this argument, Petitioner asserts that the noncompliance identified by the state agency in the statement of deficiencies arising from the December 17, 2015 survey was "past noncompliance," rather than "'systemic' or ongoing noncompliance." P. Reply at 8. Petitioner asserts that "[c]lose reading of that [s]tatement of [d]eficiencies" reveals that the state agency only cited deficiencies "that had occurred in October, 2015, and that posed 'potential for harm' to a single resident who had been discharged home in November, 2015." *Id.* (emphasis omitted).

Petitioner's argument fails for two reasons. First, it finds no support in the record. At the outset, I note that, contrary to Petitioner's repeated assertions, the state agency never found that Petitioner resumed substantial compliance on December 5, 2015. Although the state agency did find that Petitioner corrected all instances of noncompliance identified during the November 5, 2015 surveys, P. Ex. 7 at 3; P. Ex. 9 at 3—a fact CMS concedes,[7] CMS MSJ at 5 n.3—the state agency explicitly stated in a January 5, 2016 notice letter that it found that Petitioner was "not in substantial compliance with the [Medicare] participation requirements" as a result of the December 17, 2015 survey, P. Ex. 6 at 1. As Petitioner points out, P. Reply at 8, the December 17, 2015 survey revealed noncompliance that occurred in October 2015; however, the fact that the noncompliance *began* in October 2015 does not mean it *ended* in October 2015. To the contrary, the state agency found that Petitioner did not correct the two instances of noncompliance the agency found during the December 17, 2015 survey *until January 17, 2016*. P. Ex. 8. Based on the state agency's findings alone, the substance of which Petitioner does not challenge, it is clear that Petitioner did not resume substantial compliance on December 5, 2015.

The notice letters CMS sent to Petitioner are consistent with the state agency's findings. In the January 28, 2016 change in remedies notice CMS sent to Petitioner, CMS informed Petitioner that it was imposing a CMP of $100 per day effective December 17, 2015, which would continue until Petitioner achieved substantial compliance, in addition to the previously imposed $500 per day CMP that was effective August 20, 2015 through December 16, 2015. P. Ex. 10 at 2. In the January 28, 2016 compliance notice, CMS informed Petitioner that it achieved substantial compliance on January 17, 2016, which, read together with the change in remedies notice, gave Petitioner notice that the $100 per

[7] CMS's concession on this point renders P. Exs. 11 and 12 cumulative and essentially irrelevant. Those exhibits establish only that Petitioner corrected by December 5, 2015, two instances of noncompliance identified during the November 5, 2015 surveys—not, as Petitioner asserts, that Petitioner "resumed compliance" by December 5, 2015. P. Reply at 10.

day CMP would continue until January 16, 2016.[8] CMS is permitted to impose remedies, including CMPs, on SNFs only when they are not in substantial compliance with participation requirements. 42 C.F.R. §§ 488.402(b), 488.301; *see also* 42 U.S.C. 1395i-3(h)(2)(B)(ii)(I) ("[T]he Secretary may impose a civil money penalty . . . for each day of noncompliance."). CMS's imposition of CMPs that lasted from August 20, 2015 through January 16, 2016, strongly implies (although CMS does not explicitly state) that Petitioner was not in substantial compliance throughout that period. Thus, the record as a whole does not support Petitioner's argument that it has demonstrated through its evidence that "it resumed compliance . . . on December 5, 2015." P. Reply at 10.

The second reason Petitioner's argument fails is that Petitioner did not offer any evidence to prove that it resumed substantial compliance on December 5, 2015. Petitioner has not contested the two instances of noncompliance cited by the state agency and CMS as a result of the December 17, 2015 survey and even admits that those instances of noncompliance occurred in October 2015. Petitioner failed to submit any evidence that it corrected that noncompliance on or before December 5, 2015. As already observed in note 6, above, the evidence Petitioner cites in support of this claim only proves the uncontested fact that Petitioner corrected two instances of noncompliance identified by the state agency during the November 5, 2015 surveys. At most, Petitioner seems to argue implicitly that because those two instances of noncompliance related to "a single resident who had been discharged home in November, 2015," the discharge of that resident corrected the noncompliance and returned Petitioner to substantial compliance. P. Reply at 8. However, my analysis in the previous two paragraphs shows that the state agency, apparently with CMS's concurrence, found that those two instances of noncompliance were not corrected until January 17, 2016. None of the evidence Petitioner submitted touches on those instances of noncompliance, much less demonstrates that Petitioner corrected them before January 17, 2016. Petitioner has thus failed to carry its burden to demonstrate that it returned to substantial compliance before the date CMS alleges. *See Premier Living & Rehab. Ctr.*, DAB No. 2146 at 23 (2008).

In light of the foregoing, I conclude that Petitioner was not in substantial compliance with Medicare program participation requirements from August 20, 2015 through January 16, 2017.

[8] The compliance notice does not state outright when the CMP would terminate, only that Petitioner would receive a separate notice regarding the CMP. CMS Ex. 3 at 1. However, the compliance notice says that the DPNA "remains in effect from December 29, 2015, through January 16, 2016," *id.*, which is consistent with the reading that the CMP would also terminate on that date.

B. CMS gave adequate notice of the DPNA to Petitioner under 42 C.F.R. § 488.402(f) because, on December 14, 2015, CMS notified Petitioner of the following: (1) based on noncompliance revealed by the November 5, 2015 surveys, CMS was imposing a DPNA effective December 29, 2015, if Petitioner was still out of compliance with Medicare program participation requirements as of that date, and (2) Petitioner could appeal this determination.

The issue of whether CMS gave adequate notice of the DPNA to Petitioner in this case turns on whether the December 14, 2015 imposition notice CMS sent to Petitioner contained the requisite information listed in 42 C.F.R. § 488.402(f)(1)(i)-(iv). As already observed above, in cases like this, where there is no immediate jeopardy, the "notice must be given at least 15 calendar days before the effective date of the enforcement action," 42 C.F.R. § 402(f)(4), and it must state the "[n]ature of the noncompliance," "[w]hich remedy is imposed," the "[e]ffective date of the remedy," and the "[r]ight to appeal the determination leading to the remedy," *id.* § 488.402(f)(1)(i)-(iv).

CMS's December 14, 2015 imposition notice informed Petitioner that CMS was "imposing remedies immediately" based on two actual harm deficiencies revealed by the state agency's November 5, 2015 complaint survey. P. Ex. 4 at 1. The letter goes on to state that a DPNA "is effective December 29, 2015, if [Petitioner] is still out of compliance on that date." P. Ex. 4 at 2. The letter concludes by explaining Petitioner's appeal rights. P. Ex. 4 at 3-5. This notice provides all the information required by 42 C.F.R. § 488.402(f)(1)(i)-(iv), including the nature of Petitioner's noncompliance (the two actual harm deficiencies), the remedies CMS was imposing (including the DPNA) and the effective dates of those remedies (December 29, 2015), and Petitioner's appeal rights. At first blush, therefore, it appears that CMS gave Petitioner notice of the DPNA that satisfied 42 C.F.R. § 488.402(f).

Notwithstanding the foregoing, Petitioner argues that "CMS not only did not, but *could not*, meet its own regulatory notice requirements for the DPNA in this case." P. MSJ at 8. Petitioner points out that the December 14, 2015 imposition notice premised the imposition of the DPNA on specific instances of noncompliance revealed by the November 5, 2015 surveys, but Petitioner corrected those instances of noncompliance before the DPNA went into effect on December 29, 2015. Although other instances of noncompliance still existed throughout the period of December 14, 2015 through December 29, 2015—and beyond[9]—Petitioner notes that those instances of

[9] Petitioner repeatedly attempts to deny this fact in its briefing, but as already discussed in the previous section, CMS has conclusively established, in part due to Petitioner's own concession, that Petitioner was not in substantial compliance from August 20, 2015 through January 16, 2016.

noncompliance were not discovered until the December 17, 2015 survey. Given that those instances of noncompliance were newly discovered after CMS issued the December 14, 2015 imposition notice and thus were not cited in the notice as a basis for imposing a DPNA, Petitioner reasons that CMS was required under 42 C.F.R. § 488.402(f)(1) to issue a new imposition notice if it wished to base a DPNA on those instances of noncompliance.[10] As CMS never sent a new imposition notice to this effect, Petitioner argues that CMS had no authority to impose a DPNA in this case due to lack of adequate notice. P. MSJ at 7-10.

Although Petitioner's argument has some surface appeal, it is ultimately unpersuasive in view of the facts and circumstances of this case. Careful review of the December 14, 2015 imposition notice is necessary to understand where Petitioner goes astray. The first page of the notice states, in relevant part, that CMS or the state agency is "imposing remedies immediately based upon the findings of a Scope/Severity at 'G' for F314 [42 C.F.R. § 483.25(c)] and F323 [42 C.F.R. § 483.25]." P. Ex. 4 at 1. However, the second page of the notice provides, in pertinent part:

> **Remedies Imposed**
>
> We have reviewed the November 5, 2015 survey findings, and we are imposing the following mandatory and discretionary remedies on the dates indicated:
>
> ***
>
> **II. DISCRETIONARY REMEDIES**
>
> - **Discretionary Denial of Payment for New Admissions (DPNA)**
>
> **Denial of Payment for New Admissions is effective December 29, 2015, if your facility is still out of compliance on that date.**

P. Ex. 4 at 2 (emphasis in original).

[10] Such notice, Petitioner points out, would trigger a new 15-day delay of the effective date of the DPNA under 42 C.F.R. § 488.402(f)(4). P. MSJ at 10.

As the quoted language reveals, and as the parties agree, CMS premised the imposition of remedies on noncompliance revealed by the November 5, 2015 surveys.[11] The language is less clear concerning whether CMS was imposing the DPNA immediately (i.e., on December 14, 2015) or only on December 29, 2015.[12] The problem for Petitioner is that, even assuming CMS was not imposing the DPNA until December 29, 2015, the notice makes clear that at most, CMS was offering Petitioner an opportunity to avoid imposition of the DPNA by *returning to substantial compliance* on or before December 29, 2015. Simply correcting the specific instances of noncompliance cited in the notice would not be sufficient, contrary to Petitioner's assertions. In other words, although CMS notified Petitioner that CMS was seeking to impose the DPNA on Petitioner because of the instances of noncompliance cited in the December 14, 2015 imposition notice, CMS also notified Petitioner that Petitioner could only avoid imposition of the DPNA by returning to substantial compliance with all program requirements before December 29, 2015. Petitioner did not return to substantial compliance before December 29, 2015, and thus failed to avoid imposition of the DPNA. Consequently, in light of the content of the December 14, 2015 imposition notice, CMS was not required to issue a new notice prior to imposing the DPNA, contrary to Petitioner's contentions.

This analysis is consistent with the Act, the regulations, and DAB decisions. The Act states that "[a] finding to deny payment . . . shall terminate when the Secretary finds that the facility is in substantial compliance with **all** the [Medicare program participation] requirements." 42 U.S.C. § 1395i-3(h)(3) (emphasis added). Similarly, the regulation governing DPNAs provides that once a DPNA is imposed on a facility, the facility cannot receive payments for new admissions until "the date that the facility achieves *substantial*

[11] It makes no difference to the analysis whether remedies were imposed based on only some or all of the noncompliance found during the November 5, 2015 surveys because, as already observed, the parties agree that Petitioner corrected all instances of noncompliance revealed by the November 5, 2015 surveys before December 29, 2015.

[12] On the former view, which CMS advances in its own briefing, CMS MSJ at 3-4; CMS Reply at 1, Petitioner's whole chain of reasoning falls apart because it would make no difference whether Petitioner corrected the instances of noncompliance cited in the December 14, 2015 notice before the effective date of the DPNA. Under the regulations, once a DPNA is imposed on a facility, payments to the facility do not resume until "the facility achieves substantial compliance." 42 C.F.R. § 488.417(d). Thus, if the DPNA was imposed on December 14, 2015, the only way Petitioner could have avoided the effect of the DPNA would have been to resume substantial compliance during the 15-day notice period before the DPNA's December 29, 2015 effective date. As already explored in the previous section, Petitioner was continuously out of substantial compliance beginning August 20, 2015, until it resumed substantial compliance on January 17, 2016. Consequently, accepting this view would militate in favor of concluding that CMS gave Petitioner adequate notice of the DPNA.

compliance," not, as Petitioner would have it, the date it corrects particular instances of noncompliance. 42 C.F.R. § 488.417(d) (emphasis added). As for prior DAB decisions, of particular relevance is *West Texas LTC Partners, Inc., d/b/a Cedar Manor*, DAB No. 2652 (2015). In *West Texas*, CMS imposed remedies on West Texas, including a DPNA from January 24 through 31, 2014, based on multiple instances of noncompliance found in two consecutive surveys, the first concluding on December 20, 2013, and the other on January 28, 2014. DAB No. 2652 at 1. The instances of noncompliance cited after the first survey were completely different from the instances cited after the second survey; there was no overlap. *Id.* West Texas claimed that "it was found in substantial compliance as of January 16, 2014," citing a Post-Certification Revisit Report form filled out by the surveyors that stated that each deficiency cited following the December survey was corrected on "1/16/14." *Id.* at 17; *see also id.* at 12 n.11 ("CMS does not dispute that West Texas completed correction of the deficiencies found on the December survey by January 16, 2014 . . . ."). West Texas further asserted that "no new deficiencies were cited between January 16 and January 24 . . . ." *Id.* at 17. Based on these assertions, West Texas argued that CMS lacked authority to impose a DPNA from January 24 through 31, 2014. *Id.*

The DAB rejected West Texas's argument. Although the DAB noted that Petitioner failed to submit any evidence to establish that it achieved substantial compliance by January 16, 2014, it went on to conclude that, "[e]ven assuming the State agency determination is correct as to correction of the previously cited deficiencies[,] . . . 'a finding that deficiencies have been corrected is not the same as a determination that a SNF has achieved substantial compliance with **all** participation requirements.'" *Id.* at 18 (quoting *Meadowbrook Manor – Naperville*, DAB No. 2173 at 13 (2008)) (emphasis added). The DAB noted that this holding was "consistent with the regulations," opining that "[o]nce it finds a SNF out of compliance, CMS is authorized to impose one or more of the alternative remedies listed in section 488.406 – including CMPs and a DPNA – beginning as early as the date that the facility was first out of substantial compliance and continuing in effect until the facility establishes that it has achieved substantial compliance or is terminated from the program." *Id.* Based on this analysis, the DAB upheld the imposition of the DPNA in the case. *Id.* at 1, 20.

Although Petitioner argues otherwise, the facts of *West Texas* are indistinguishable from this case. Here, the state agency conducted surveys in November 2015 and December 2015 and found completely different instances of noncompliance in each survey. The state agency found, and CMS concedes, that Petitioner corrected the November 2015 instances of noncompliance before the December 2015 survey. Yet, CMS still imposed a DPNA beginning December 29, 2015. As did West Texas, Petitioner in this case is claiming that its correction of the earlier finding of noncompliance deprives CMS of authority to impose a DPNA. Petitioner attempts to distinguish this case from *West Texas* by claiming that it offered evidence that it resumed compliance on December 5, 2015, but, as already explored above, Petitioner has not offered such evidence. To the

contrary, CMS has conclusively established that Petitioner, like West Texas, never resumed compliance between surveys or between the initial notice date of the DPNA and the DPNA's effective date. Thus, the DAB's analysis upholding the DPNA in *West Texas* applies with equal force in this case.

In sum, the December 14, 2015 imposition notice contained all the information required under 42 C.F.R. § 488.402(f); Petitioner does not successfully challenge the adequacy of the imposition notice, either factually or legally; and legal authority, as well as a DAB decision, support the adequacy of the notice in this case. Therefore, I conclude that CMS gave adequate notice of the DPNA to Petitioner under 42 C.F.R. § 488.402(f).

C. CMS had the authority in this case to impose a DPNA on Petitioner from December 29, 2015 through January 16, 2016.

In light of my conclusions above that Petitioner was not in substantial compliance with Medicare program participation requirements from August 20, 2015 through January 16, 2016, and that on December 14, 2015, CMS gave adequate notice of the DPNA to Petitioner under 42 C.F.R. § 488.402(f), it follows that in this case, CMS had the authority to impose a DPNA on Petitioner from December 29, 2015 through January 16, 2016. *See* 42 U.S.C. § 1395i-3(h)(2)(B)(i), (3); 42 C.F.R. §§ 488.402(f), 488.417(a).

V. Conclusion

I affirm CMS's imposition of a DPNA on Petitioner for the period of December 29, 2015 through January 16, 2016.

/s/
Scott Anderson
Administrative Law Judge