Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Fireside Lodge Retirement Center, Inc.,
(CCN: 67-5147),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-16-61

Decision No. CR4924

Date: August 15, 2017

DECISION

Fireside Lodge Retirement Center, Inc. (Petitioner), asks me to remove a denial of payments for new admissions (DPNA) and reduce the duration of a civil money penalty (CMP) that the Centers for Medicare & Medicaid Services (CMS) imposed on Petitioner after CMS found that Petitioner was not in substantial compliance with multiple Medicare program participation requirements from August 11, 2015 through September 29, 2015. Petitioner concedes it was not in substantial compliance with many of those requirements beginning August 11, 2015. However, Petitioner contends that it returned to substantial compliance on September 1, 2015, before the DPNA was to take effect, therefore depriving CMS of authority to impose the DPNA or to continue imposing a CMP on or after that date.

CMS has moved for summary judgment, arguing that Petitioner's submissions and Departmental Appeals Board (DAB) cases undermine Petitioner's contentions as a matter of law. Specifically, CMS argues that Petitioner's submissions establish that it was not in substantial compliance with the Medicare program participation requirement at

42 C.F.R. § 483.70(a)(1), which requires that skilled nursing facilities (SNF) comply with the applicable provisions of the National Fire Protection Association's Life Safety Code (LSC) from August 11, 2015 through September 29, 2015.

I agree with CMS and conclude that Petitioner has failed as a matter of law to establish that it returned to substantial compliance with all Medicare program participation requirements prior to September 30, 2015. I also conclude that the enforcement remedies CMS imposed on Petitioner are reasonable. Therefore, I grant CMS's motion for summary judgment.

I. Background and Procedural History

The Social Security Act (Act) sets forth requirements for the participation of a 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. part 483, subpart 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 CMP for the number of days a SNF is not in substantial compliance or a per-instance CMP for each instance of the SNF's noncompliance. 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

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

noncompliance, or $3,050 to $10,000 per day for more serious noncompliance that poses immediate jeopardy to the health and safety of residents. 42 C.F.R. § 488.438(a)(1).[2] "Immediate jeopardy" exists when "the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident." 42 C.F.R. § 488.301.

If CMS, or a state agency acting on CMS's behalf, imposes a DPNA or a CMP 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. 42 U.S.C. §§ 1320a-7a(c)(2); 1395i(h)(2)(B)(ii); 1395cc(h)(1); 42 C.F.R. §§ 488.408(g), 488.434(a)(2)(viii), 498.3(b)(13). 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."). A facility has a right to appeal a "certification of noncompliance leading to an enforcement remedy." 42 C.F.R. § 488.408(g)(1); *see also* 42 C.F.R. §§ 488.330(e), 498.3. However, 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)(2).

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 Fort Worth, Texas, that participates in the Medicare program. In August 2015, The Texas Department of Aging and Disability Services (state agency) conducted two surveys of Petitioner's facility: an LSC survey on August 5, 2015, and a health survey on August 11, 2015. CMS Exhibits (Exs.) 3, 4. Following the state agency's surveys, the state agency sent Petitioner a notice dated August 25, 2015,

[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.

informing Petitioner of the state agency's finding that Petitioner was not in substantial compliance with Medicare program participation requirements.[3] The letter also informed Petitioner that the state agency, with CMS's authorization, was imposing a DPNA on Petitioner effective September 9, 2015, for Petitioner's noncompliance. Further, it informed Petitioner of its right to request a hearing by an ALJ with the DAB to dispute the imposition of the DPNA.

Thereafter, CMS sent Petitioner a separate notice, dated September 10, 2015, containing CMS's initial determination that Petitioner was not in substantial compliance with the following Medicare program participation requirements:

> F0164 -- S/S: E – [42 C.F.R. §§] 483.10(e), 483.75(l)(4) -- Personal Privacy/Confidentiality Of Records
> F0281 -- S/S: E -- [42 C.F.R. §] 483.20(k)(3)(i) -- Services Provided Meet Professional Standards
> F0322 -- S/S: E -- [42 C.F.R. §] 483.25(g)(2) -- Ng Treatment/Services - Restore Eating Skills
> F0332 -- S/S: F -- [42 C.F.R. §] 483.25(m)(1) -- Free Of Medication Error Rates Of 5% Or More
> F0441 -- S/S: F -- [42 C.F.R. §] 483.65 -- Infection Control, Prevent Spread, Linens
>
> [42 C.F.R. §] 483.70(a) – Life Safety from Fire
> K0018[4] -- S/S: E -- NFPA 101 -- Life Safety Code Standard

[3] Neither party submitted this document into evidence as part of its prehearing exchange even though it forms the basis for and was attached to Petitioner's request for hearing.

[4] "F164" and "K018" are both examples of "Tags." The F "Tag" designation is used in CMS Publication 100-07, State Operations Manual (SOM), app. PP - Guidance to Surveyors for Long Term Care Facilities, http://www.cms.hhs.gov/Manuals/IOM/list.asp, which sets forth CMS policy related to health surveys. The "Tag" designation relates to the specific part of the SOM app. PP that sets forth the specific regulatory provision allegedly violated and CMS's guidance to surveyors related to the regulation. The K "Tag" designation is used for LSC surveys under SOM app. I, § II, Task 5, and the K Tag refers to the specific data tag on the Fire Safety Survey Report used by the surveyor. CMS submitted into evidence the relevant portions of the LSC applicable in this case. CMS Exs. 34-37, 47-49. Although the SOM does not have the force and effect of law, the provisions of the Act and regulations interpreted clearly do have such force and effect. *State of Indiana by the Indiana Dep't of Pub. Welfare v. Sullivan*, 934 F.2d 853 (7th Cir. 1991); *Northwest Tissue Ctr. v. Shalala*, 1 F.3d 522 (7th Cir. 1993). Thus,

K0022 -- S/S: E -- NFPA 101 -- Life Safety Code Standard
K0038 -- S/S: E -- NFPA 101 -- Life Safety Code Standard
K0046 -- S/S: D -- NFPA 101 -- Life Safety Code Standard
K0054 -- S/S: D -- NFPA 101 -- Life Safety Code Standard
K0069 -- S/S: F -- NFPA 101 -- Life Safety Code Standard
K0076 -- S/S: E -- NFPA 101 -- Life Safety Code Standard
K0147 -- S/S: E -- NFPA 101 -- Life Safety Code Standard

CMS Ex. 1 at 1. In a subsequent October 22, 2015 notice, CMS informed Petitioner of its finding that Petitioner "achieved substantial compliance with the requirements for Medicare participation on September 30, 2015." CMS Ex. 2 at 1. Based on these findings, CMS imposed a $400.00 per day CMP for 50 days from August 11, 2015 through September 29, 2015, and the previously imposed DPNA remained in effect from September 9, 2015 through September 29, 2015. CMS Ex. 2 at 1.

On October 26, 2015, Petitioner requested a hearing in which it challenged the state agency's findings and the remedies proposed or imposed by the state agency. Following receipt of Petitioner's hearing request, I issued an Acknowledgment and Prehearing Order (Pre-Hearing Order) that established a prehearing exchange schedule for the parties. In that order, I directed the parties to file briefs, proposed exhibits, and written direct testimony for all witnesses they wanted to present in this case. I also set forth guidelines for the parties to file a motion for summary disposition. Pre-Hearing Order ¶ 5.a.

In compliance with my prehearing order, CMS filed a prehearing brief (CMS Br.), a witness and exhibit list, and 47 proposed exhibits (labeled CMS Exs. 1-37, 40-49). Petitioner then filed a prehearing brief (P. Br.), a witness list, an exhibit list, and three proposed exhibits (P. Exs. 1-3). Shortly thereafter, CMS moved for summary judgment, which Petitioner opposed. The motion is fully briefed and ripe for ruling.

Neither party objected to the exhibits proposed by the other; Therefore, I admit them all into evidence.

II. Issues

1. Whether summary judgment is appropriate;

2. Whether Petitioner returned to substantial compliance with the participation requirements at 42 C.F.R. § 483.70(a) prior to September 30, 2015; and

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while the Secretary may not seek to enforce the provisions of the SOM, he may seek to enforce the provisions of the Act or regulations as the SOM consistently interprets them.

3. Whether CMS legitimately imposed a DPNA and CMP, and whether the CMP amount was reasonable.

III. Facts, Conclusions of Law, and Analysis

My conclusions of law are set forth in italics and bold font followed by detailed factual and legal analyses. Any facts I reference are either not disputed by the parties or, where there is a dispute, I accept Petitioner's version of the facts to the extent it is supported by evidence in the record.

1. Summary judgment is appropriate.

Summary judgment is appropriate in cases where 42 C.F.R. Part 498 applies if there is no genuine dispute of any material fact and the moving party is entitled to judgment as a matter of law. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 750 (6th Cir. 2004); CRDP § 19(a). A "genuine" dispute exists if "the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and a "material" fact is one "that, if proven, would affect the outcome of the case under governing law." *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300 at 3 (2010).

To obtain summary judgment, the moving party must show that there is no genuine dispute of material fact requiring an evidentiary hearing and that it is entitled to judgment as a matter of law. *Mission Hosp. Reg'l Med. Ctr.*, DAB No. 2459 at 5 (2012). If the moving party meets this initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial . . . .'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact — a fact that, if proven, would affect the outcome of the case under governing law." *Senior Rehab.*, DAB No. 2300 at 3.

In evaluating a motion for summary judgment, an ALJ does not address credibility or evaluate the weight of conflicting evidence. *Holy Cross*, DAB No. 2291 at 5 (200). Rather, in examining the evidence to determine the appropriateness of summary judgment, an ALJ must draw all reasonable inferences in the light most favorable to the non-moving party. *See Brightview Care Ctr.*, DAB No. 2132 at 10 (2007) (upholding summary judgment where inferences and views of non-moving party are not reasonable). "[A]t the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986). However, drawing

factual inferences in the light most favorable to the non-moving party does not require that I accept the non-moving party's legal conclusions. *Cedar Lake Nursing Home*, DAB No. 2344 at 7 (2010).

As to the first issue presented in this case—whether Petitioner resumed substantial compliance before September 30, 2015—summary judgment is appropriate for two reasons. First, the September 11, 2015 plan of correction (POC) that Petitioner submitted to CMS indicated Petitioner would not complete corrections of the LSC violations cited by CMS until September 30, 2015, yet Petitioner now claims it actually corrected those violations and achieved substantial compliance by September 1, 2015. The DAB has rejected this argument, and I find the DAB's reasoning persuasive in rejecting Petitioner's argument in this case. *See Cal Turner Extended Care Pavilion*, DAB No. 2030 at 18 (2006). Second, and perhaps more important, even when viewing Petitioner's evidence of correction—the declaration of its maintenance director, Frankie Long, at P. Ex. 3—in the light most favorable to Petitioner and accepting Petitioner's argument that the dates of corrective actions taken with respect to various LSC violations provided in that declaration are the dates Petitioner corrected those violations, Petitioner has provided no evidence that it corrected at least one of those violations before September 30, 2015. *Compare* CMS Ex. 5 at 9 *with* P. Ex. 3 at 2 ¶ 9. Petitioner's evidence is thus insufficient as a matter of law to carry its burden to prove that it resumed substantial compliance before September 30, 2015, entitling CMS to summary judgment on this issue.

Summary judgment is also appropriate as to the reasonableness of the remedies imposed by CMS in this case. CMS may impose a DPNA and a CMP for each day of Petitioner's noncompliance, even for a single instance of noncompliance. 42 U.S.C. § 1395i-3(h)(2)(B)(i), (h)(2)(B)(ii), (h)(3); 42 C.F.R. §§ 488.417, 488.430. Furthermore, Petitioner does not challenge the reasonableness of the amount of the CMP imposed by CMS, and, in any event, that CMP is modest in amount and commensurate with Petitioner's noncompliance. Thus, I conclude that summary judgment is appropriate in this case.

2. Petitioner did not return to substantial compliance with 42 C.F.R. § 483.70(a) until September 30, 2015.

Petitioner concedes that it did not substantially comply with multiple Medicare program participation requirements, including 42 C.F.R. §§ 483.10(e), 483.75(*l*)(4) (F164); 483.20(k)(3)(i) (F281); 483.25(g)(2) (F322); 483.25(m)(1) (F332); 483.65 (F441); and 483.70(a) (at K018, K022, K038, K046, K054, K069, K076, and K147), beginning August 11, 2015. P. Br. at 7-8; *see also* CMS Exs. 4-5 (detailing CMS's findings of Petitioner's noncompliance with these requirements). Petitioner alleges, and CMS does not dispute, that it corrected the first five instances of noncompliance (F164, F281, F322, F332, and F441) on or before September 1, 2015. P. Br. at 7-8; P. Exs. 1-2. Therefore,

the only instance of noncompliance at issue is Petitioner's noncompliance with § 483.70(a). Petitioner contends that it corrected this noncompliance by September 1, 2015, whereas CMS argues that Petitioner did not correct it until September 30, 2015.

a. Facts

CMS's September 10, 2015 notice to Petitioner lists CMS's findings of Petitioner's noncompliance with the above-cited regulations beginning August 11, 2015. CMS Ex. 1 at 1. CMS's follow-up October 22, 2015 notice to Petitioner states that Petitioner "achieved substantial compliance with the requirements for Medicare participation on September 30, 2015." CMS Ex. 2 at 1. This notice of compliance is consistent with Petitioner's POC, which details the actions Petitioner was taking to correct its noncompliance with various LSC requirements and lists "9/30/2015" as the completion date for those corrective actions for each separate K-tag citation. CMS Ex. 5 at 2-3, 5-11. Among other things, Petitioner's POC lists as corrective actions for K018, K022, K046, K069, and K147 the following:

- K018: "Frequent rounding will be conducted by the maintenance supervisor to ensure this deficient practice does not recur[]." CMS Ex. 5 at 2
- K022: "The maintenance supervisor will perform frequent rounding to ensur[e] this deficient practice does not recur." CMS Ex. 5 at 3.
- K046: "The maintenance supervisor will continue to perform require[d] checks of the generator to ensure that this issue does not recur." CMS Ex. 5 at 6.
- K069: "The maintenance supervisor will perform frequent rounding will follow-up [sic] by the facility administrator to ensure that this problem does not recur[]." CMS Ex. 5 at 9.
- K147: "The maintenance staff will be more observant and thorough during frequent rounding to address[] the problems as they occur." CMS Ex. 5 at 11.

Mr. Long, Petitioner's maintenance director, states that during the LSC survey, he corrected many of the identified citations "beginning on the day they were identified by the surveyor (August 5, 2015) and over the next five days." P. Ex. 3 at 1 ¶ 3. Mr. Long explains the actions he took as to each cited K-tag to correct the deficiency, along with the dates on which he performed many of the actions. P. Ex. 3 at 1-3 ¶¶ 4-11. He does not say when or if he performed the "frequent rounding" listed in the POC for tags K018, K022, K069, and K147 or the "require[d] checks of the generator" listed in the POC for K046. Furthermore, in describing the actions he took to correct K069, he states simply that "[a] new cleaning contractor was obtained and corrections were made" without explaining when the new contractor was obtained or when the corrections were made. P. Ex. 3 at 2 ¶ 9.

b. Analysis

As part of the general requirement that a SNF be "designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel and the public," a facility "must meet applicable provisions of the 2000 edition of the [LSC]." 42 C.F.R. § 483.70(a)(1)(i). Once CMS demonstrates that a facility is out of substantial compliance with a Medicare program participation requirement, the burden shifts to the facility to demonstrate its return to substantial compliance. *Premier Living & Rehab. Ctr.*, DAB No. 2146 at 23 (2008). "The Board has long rejected as contrary to the goals of the program the notion[] . . . that a facility can belatedly claim to have achieved substantial compliance at a date earlier than it even alleged that it had done so . . . ." *Cal Turner*, DAB No. 2030 at 18.

As already noted, Petitioner concedes that it was not in substantial compliance with various LSC requirements and, by extension, 42 C.F.R. § 483.70(a) beginning August 11, 2015. Thus, Petitioner bears the burden of demonstrating when it returned to substantial compliance. *Premier Living*, DAB No. 2146 at 23. Petitioner admits in its September 11, 2015 POC that it would not correct the LSC violations cited by CMS until September 30, 2015. Nevertheless, Petitioner now argues that it was actually able to correct all of its LSC violations by September 1, 2015, relying solely on Mr. Long's declaration. For the reasons that follow, I conclude that as a matter of law, Petitioner has failed to demonstrate that it returned to substantial compliance with all of the above-cited requirements until September 30, 2015, making summary judgment in CMS's favor on this issue appropriate.

For purposes of summary judgment, I take Mr. Long's statements in his declaration to be true and view them in the light most favorable to Petitioner. However, Mr. Long's declaration, and by extension Petitioner's argument, suffers from two major shortcomings that render it insufficient as a matter of law to establish that Petitioner corrected before September 30, 2015, all of the LSC violations cited by CMS. First, with regard to the citations to K018, K022, K046, K069, and K147, Mr. Long's declaration does not establish that Petitioner completed *all* the corrective actions it listed in its POC. As already observed, Mr. Long does not say when or if he performed the "frequent rounding" listed in the POC for tags K018, K022, K069, and K147 or the "require[d] checks of the generator" listed in the POC for K046. Petitioner's attempt to nonetheless argue that Mr. Long's declaration establishes it corrected all of these LSC violations mirrors the argument made by the facility and rejected by the DAB in *Cal Turner*, DAB No. 2030 at 17-19 (quoting *Regency Gardens*, DAB No. 1858 at 11 (2002)). As the DAB did in that case, I reject as a matter of law Petitioner's attempt to claim belatedly in this case that, notwithstanding the POC it submitted to CMS, it corrected its violations of K018, K022, K046, K069, and K147 prior to September 30, 2015.

Notwithstanding the previous paragraph, Mr. Long's declaration suffers from a second, more basic shortcoming that undermines reliance on it to establish correction of all Petitioner's LSC violations by September 1, 2015. Although Mr. Long provides a timeline for most of the corrective actions he took, P. Ex. 3 at 2 ¶¶ 4-6, 10-11,[5] he does not say when he completed the actions he took to correct the violation of K069. P. Ex. 3 at 2 ¶ 9. Thus, it is impossible to determine, based solely on Mr. Long's declaration, when exactly Petitioner corrected its violation of K069 if not September 30, 2015.

Petitioner submitted no other evidence aside from Mr. Long's declaration that sheds light on when it may have corrected its violation of K069. In essence, it appears that Petitioner wishes me to infer from Mr. Long's declaration that the "new cleaning contractor was obtained and corrections were made" on or before September 1, 2015. As there is no independent basis for this inference beyond pure speculation, I find it to be an unreasonable inference to draw and decline to draw it.[6] *See Brightview Care Ctr.*, DAB No. 2132 at 10 (upholding summary judgment where inferences and views of non-moving party are not reasonable).

In sum, Petitioner submitted no evidence beyond Mr. Long's declaration to carry its burden of proving that it returned to substantial compliance with all Medicare program participation requirements before September 30, 2015. As a matter of law, Mr. Long's declaration, even when viewed in Petitioner's favor, falls short of carrying that burden as to Petitioner's violation of K069 as well as its violations of K018, K022, K046, and K147. Therefore, I conclude that Petitioner has failed to establish that it returned to substantial compliance with all Medicare program participation requirements before September 30, 2015. Based on this conclusion, I further conclude that CMS is entitled to summary judgment on this issue.

3. The remedies imposed in this case are reasonable.

Congress authorized the Secretary to impose a DPNA or a CMP (or both) on a SNF for each day the Secretary finds that the SNF is not in compliance with at least one Medicare

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[5] Mr. Long claims that two of the cited LSC violations (K046 and K054) were not in fact violations at all because the problems alleged by the surveyor as to those violations were not actually problems. P. Ex. 3 at 2 ¶¶ 7-8. I accept these claims for summary judgment purposes.

[6] This is not to say that I draw the inverse inference against Petitioner and conclude that Mr. Long did not complete these actions until September 30, 2015. However, even when viewing Mr. Long's declaration in the light most favorable to Petitioner, I have no basis to say that it supports Petitioner's claim that it returned to substantial compliance before September 30, 2015.

program participation requirement. 42 U.S.C. § 1395i-3(h)(2)(B)(i), (h)(2)(B)(ii), (h)(3). The Secretary delegated this remedial authority to CMS. 42 C.F.R. §§ 488.417, 488.430. CMS may impose a DPNA on a SNF, such as Petitioner, when it "is not in substantial compliance with the [Medicare program participation] requirements," and payments do not resume until "the date that the [SNF] achieves substantial compliance . . . ." *Id.* § 488.417(a), (d). In this case, CMS was within its authority under § 488.417 to impose a DPNA on Petitioner from September 9, 2015 through September 29, 2015, because, as I concluded in the previous section, Petitioner was not in substantial compliance with at least one Medicare program participation requirement (specifically, 42 C.F.R. § 483.70(a)) during that period.

CMS also may impose a CMP on a SNF for "the number of days [the SNF] is not in substantial compliance with one or more participation requirements . . . ." 42 C.F.R. § 488.430(a). When CMS finds that a SNF is not in substantial compliance and imposes a CMP based on that finding, the SNF has the right to request an ALJ hearing to seek reversal or modification of CMS's findings of noncompliance leading to an enforcement remedy. *See id.* §§ 488.408(g), 488.330(e). However, to exercise its hearing rights, the SNF must file a written request for hearing within 60 days of receiving notice of CMS's initial determination, unless the 60-day period is extended for good cause shown. *Id.* § 498.40(a)(2), (c). If the SNF fails to request a hearing in the above-prescribed manner, CMS's findings and imposition of remedies become administratively final and binding. *See id.* §§ 498.3(b)(13) ("CMS makes initial determinations with respect to . . . the finding of noncompliance leading to the imposition of enforcement actions specified in [42 C.F.R.] § 488.406 . . . ."), 498.20(b)(2) (An initial determination is binding unless it is . . . [r]eversed or modified by a hearing decision . . . ."); *see also Regency Manor Rehab & Subacute Ctr.*, DAB CR4920 at 10 (2017).

In determining whether the per-day CMP amounts imposed against Petitioner are reasonable, I apply the factors listed in 42 C.F.R. § 488.438(f). 42 C.F.R. § 488.438(e)(3). These factors include: (1) the facility's history of compliance; (2) the facility's financial condition; (3) the factors specified at 42 C.F.R. § 488.404; and (4) the facility's degree of culpability, which includes neglect, indifference, or disregard for resident care, comfort, or safety. The absence of culpability is not a mitigating factor. The factors at 42 C.F.R. § 488.404 include: (1) the scope and severity of the deficiency; (2) the relationship of the deficiency to other deficiencies resulting in noncompliance; and (3) the facility's prior history of noncompliance in general and specifically with reference to the cited deficiencies. Unless a facility contends that a particular regulatory factor does not support the CMP amount, the ALJ must sustain it. *Coquina Ctr.*, DAB No. 1860 at 32 (2002). My review of the reasonableness of a CMP amount is *de novo* and based upon the evidence in the record before me. I am not bound to defer to the CMS determination of the reasonable amount of a CMP to impose, but my authority is limited by regulation as already explained. I am to determine whether the amount of any CMP imposed is within reasonable bounds considering the purpose of the Act and

regulations. *Emerald Oaks*, DAB No. 1800 at 10 (2001); *CarePlex of Silver Spring*, DAB No. 1683 at 14-16 (1999); *Capitol Hill Cmty. Rehab. & Specialty Care Ctr.*, DAB No. 1629 (1997).

At first blush, it does not appear that Petitioner appealed CMS's imposition of a CMP in this case, which as noted would render the CMP final and binding. Petitioner's request for hearing (P. RFH) does not include any specific assertion that Petitioner is challenging CMS's findings or imposition of remedies. Petitioner makes some general assertions challenging the findings contained in the statements of deficiencies, P. RFH at 2-6, which the state agency initially generated, but goes on to state the following:

> Finally, [Petitioner] disagrees that the revised remedies imposed or proposed for imposition *by DADS* in its August 25, 2015 Notice of Adverse Action, are reasonable or appropriate to the level of non-compliance, if any. Specifically, the facility contends that:
>
> > (a) the proposed/imposed denial of payment for new Medicare and/or Medicaid admissions is not reasonable or proper;
> > (b) the proposed termination of the facilitys provider agreement is not reasonable or proper;
> > (c) the proposed or civil money penalties are not reasonable or proper; and
> > (d) the imposed Directed Inservice Training is not reasonable or proper.
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> The basis for the facility's contentions is that the findings-of-fact are inaccurate, and that there are additional facts, which would negate the conclusions that deficiencies existed. Furthermore, the basis for contending that DADS' (*and if adopted, CMS'*) determinations are incorrect will include: observations of employees and/or consultants for Fireside Lodge Retirement Center, Inc., including but not limited to administrator, physician(s), director of nurses, assistant director of nurses, licensed nurses, social services, maintenance personnel, and documentation maintained by Fireside Lodge Retirement Center, Inc., Fireside Lodge Retirement Center, Inc.'s policies and procedures, applicable in-services, the opinions of expert witnesses, and any other relevant information, which may be obtained in the future.

P. RFH at 6-7 (emphasis added). Notable about the language I emphasized in the last quoted paragraph above is that it came *after* CMS had already sent Petitioner not one, but two notices communicating CMS's findings and imposition of remedies, as Petitioner's hearing request is dated October 26, 2015, and CMS's two notices are dated September 10, 2015, and October 22, 2015, respectively. Thus, it appears that Petitioner did not even appeal CMS's findings or imposition of the CMP, which would render the CMP final and binding. 42 C.F.R. § 498.20(b); *see also Regency Manor*, DAB CR4920 at 11 (2017).

Assuming, however, that Petitioner's hearing request could be construed as appealing CMS's findings and imposition of the CMP,[7] Petitioner has shown no basis for reducing or eliminating any part of the CMP that CMS imposed on it. Petitioner has not argued that any of the applicable regulatory factors do not support the CMP amount; I could sustain the CMP on this ground alone. *Coquina Ctr.*, DAB No. 1860 at 32. In any event, as discussed in the previous section and consistent with the DAB's decision in *Cal Turner*, DAB No. 2030 (2006), Petitioner has effectively conceded that it did not correct at least one and as many as five of the LSC violations cited by CMS until September 30, 2015. *Compare* P. Ex. 3 at 1-3 ¶¶ 4, 5, 9, 11 *with* CMS Ex. 5 at 2, 3, 9, 11. The one LSC violation Petitioner completely failed to prove it corrected before September 30, 2015, (K069) is also the most serious violation, as it constituted widespread noncompliance that posed the potential for more than minimal harm. CMS Ex. 5 at 9. Three of the remaining violations (K018, K022, and K147) constituted patterns of noncompliance that posed the potential for more than minimal harm, while the other violation (K046) constituted an isolated instance of noncompliance that posed the potential for more than minimal harm. CMS Ex. 5 at 2-4, 6-7, 11-12. Petitioner's noncompliance reflects its culpability at least for neglecting its residents' safety. Further, Petitioner has a long history of noncompliance. P. Exs. 1, 2. In addition, CMS imposed a very modest CMP, only $400.00 per day, which is near the bottom of the lower range of CMPs that CMS is authorized to impose for non-immediate jeopardy noncompliance. *See* 42 C.F.R. § 488.438(a)(1)(ii). Whether Petitioner failed to comply substantially with only one LSC requirement (K069) or five (K018, K022, K046, K069, and K147), I conclude that the very modest CMP imposed by CMS in this case was reasonable in amount. Similarly, because Petitioner was not in substantial compliance with the above-cited requirements from August 11, 2015 through September 29, 2015, and CMS imposed a CMP during that same period, I also conclude that the CMP is reasonable in duration.

[7] An assumption CMS appears to have operated under in any event. *See* CMS Br. at 1 ("Fireside appealed CMS' findings."), 3 ("On October 26, 2015, Fireside requested a hearing on CMS' determination of substantial noncompliance based on the August surveys conducted by [the state agency]" (citing P. RFH).).

IV. Conclusion

I grant CMS's motion for summary judgment, affirm CMS's initial determinations as explained herein, and order Petitioner to pay the per-day CMP, totaling $20,000.00, to CMS.

/s/
Scott Anderson
Administrative Law Judge