Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	
Illinois Knights Templar Home,	DATE: September 30, 2009
Petitioner,	Civil Remedies CR1879 App. Div. Docket No. A-09-71
- v. -	Decision No. 2274
Centers for Medicare & Medicaid Services.	

REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

Illinois Knights Templar Home (Illinois Knights, Petitioner) appealed the January 6, 2009 decision of Administrative Law Judge (ALJ) Steven T. Kessel granting summary judgment for the Centers for Medicare & Medicaid Services (CMS). Illinois Knights Templar Home, DAB CR1879 (2009) (ALJ Decision). The ALJ sustained the imposition of civil money penalties (CMPs) of $3,050 per day from March 28, 2008 through April 3, 2008, and $300 per day from April 4, 2008 through April 30, 2008, based on a conclusion that Illinois Knights failed to comply substantially with regulatory requirements at 42 C.F.R. § 483.13(a) and (b).

For the reasons explained below, we conclude that the ALJ erred both procedurally and substantively in reaching his conclusion that this matter could be appropriately resolved through summary judgment. We therefore vacate the ALJ Decision and remand the case for further development.

Background[1]

Illinois Knights is located in Paxton, Illinois and participates as a nursing facility in the Medicare and Medicaid programs. Illinois Knights Br. at 2. As such, it is subject to surveys by the State survey agency to ensure that it is in compliance with applicable participation requirements. Social Security Act (Act) §§ 1819 and 1866; 42 C.F.R. Parts 483 and 488. On April 14, 2008, surveyors found that the facility was not in substantial compliance with 14 participation requirements, including three at the immediate jeopardy level, set out in a statement of deficiencies (SOD). On April 25, 2008, CMS issued a notice of imposition of the remedies set out above from which Illinois Knights filed a timely appeal. A revisit survey on June 17, 2008 resulted in a determination that the facility returned to substantial compliance by May 1, 2008.

Illinois Knights timely appealed the findings of noncompliance. CMS moved for summary judgment on a subset of noncompliance findings all relating to protection of residents from abuse. CMS filed 70 proposed exhibits. Illinois Knights opposed the motion and filed 18 proposed exhibits. The ALJ granted summary judgment to CMS based on some of those findings, and Illinois Knights timely sought review by the Board.

Applicable law

In granting summary judgment, the ALJ addressed only noncompliance findings arising under 42 C.F.R. § 483.13(b), which reads as follows:

> *Abuse*. The resident has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion.

ALJ Decision at 1, and n.1. The definition of "abuse" in the Medicare regulations, the applicability of which the parties do not dispute, is "the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish." 42 C.F.R. § 488.301.

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[1] The following background information is drawn from the ALJ Decision and the record before him.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address de novo. Lebanon Nursing and Rehabilitation Center, DAB No. 1918 (2004). Summary judgment is appropriate only if there are no genuine disputes of fact material to the result. Everett Rehabilitation and Medical Center, DAB No. 1628, at 3 (1997). We review disputed conclusions of law for error. Departmental Appeals Board Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs, http://www.hhs.gov/dab/guidelines/prov.html; Golden Age Nursing & Rehabilitation Center, DAB No. 2026, at 7 (2006).

Analysis

1. The ALJ erred in granting summary judgment.

Illinois Knights alleges two problems with the ALJ's use of summary judgment to resolve this case, one procedural and one substantive. First, Illinois Knights objects to the ALJ's statement that all the "fact findings" in his decision were "based solely on the undisputed material facts as averred by the parties in CMS's motion and Petitioner's opposition to it," contending that the ALJ ignored the evidence which both parties had submitted. Illinois Knights Br. at 7-8, quoting ALJ Decision at 2, n.2. Second, Illinois Knights contends that the ALJ failed to view the evidence in the light most favorable to it (as the nonmovant). We agree that the ALJ erred in both respects, although we base our decision to remand on the reasons explained below without adopting Illinois Knights' broader assertions as to what the record shows.

A. The ALJ's treatment of the record in his decision was flawed.

The Board recently laid out the process and standards for resolving a summary judgment motion by CMS in a nursing facility case, in which, as here, the ALJ has informed the parties that he will be guided by Rule 56 of the Federal Rules of Civil Procedure (FRCP). We quote that explanation at length as it informs our decision here:

> Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-25 (1986).

> . . . The party moving for summary judgment bears the initial burden of demonstrating that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. If a moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) (quoting FRCP 56(e)). 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. Id. at 586, n.ll; Celotex, 477 U.S. at 322. In order to demonstrate a genuine issue, the opposing party must do more than show that there is "some metaphysical doubt as to the material facts. Where **the record taken as a whole** could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587. In making this determination, the reviewer must view the **evidence** in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. See, e.g., U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962). . . .
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> [I]f CMS in its summary judgment motion has asserted facts that would establish a prima facie case that the facility was not in substantial compliance, the first question is whether the facility has in effect conceded those facts. If not, the next question is whether CMS has come forward with evidence to support its case on any disputed fact. **If so, the facility must aver facts and proffer evidence sufficient to show that there is a genuine dispute of material fact. Ultimately, if the proffered evidence as a whole, viewed in the light most favorable to the facility**, might permit a rational trier of fact to reach an outcome in favor of the facility, summary judgment on the issue of substantial compliance is not appropriate.

Kingsville Nursing and Rehabilitation Center, DAB No. 2234, at 3-4 (2009) (emphasis added; citations omitted); see also Crestview Parke Care Center, DAB No. 1836 (2002), aff'd in part, Crestview Parke Care Ctr. v. Thompson, 373 F.3d 743 (6th Cir. 2004).

In his initial prehearing order, the ALJ instructed the parties on the content of any motions for summary disposition:

> I will hear and decide each motion for summary disposition according to the principles of Rule 56 of the [FRCP] and applicable case law. A party moving for summary disposition **need not** offer supporting affidavits or exhibits but it must state concisely in its motion those material facts which it contends are not in dispute. A party opposing a motion for summary disposition must state in its opposition those material facts that it asserts to be in dispute. It is never sufficient for a party opposing a motion to aver only that it "disputes" alleged facts or that it demands an in-person hearing.

Order, dated June 20, 2008, at 4-5 (emphasis added). FRCP Rule 56 permits parties to move for summary judgment "with or without supporting affidavits."

As noted, both parties chose to offer supporting declarations and other exhibits. In his decision, however, the ALJ made the following statement about his handling of the exhibits:

> I am receiving all of these proposed exhibits into the record of this case and I cite to some of them in this decision for purposes of illustration. However, I make no evidentiary findings based on the exhibits. My fact findings in this decision are based solely on the undisputed material facts as averred by the parties in CMS's motion and Petitioner's opposition to it.

ALJ Decision at 2, n.2. This statement is less than clear on its face. First, it is not clear if the ALJ admitted the exhibits into the record for decision, received them as support for the parties' positions on summary judgment, or merely included them in the administrative record. Second, it is not clear what is meant by citing exhibits for "purposes of illustration" but not for fact-finding.

The apparent meaning is that the ALJ is relying only on factual assertions contained in the briefing and not reviewing the proffered evidence, even where cited by the parties, to discern whether any genuine dispute of material fact exists. If this was the intention, it is inconsistent with the instruction given in the prehearing order. The ALJ order would lead the parties to assume that, while not required to support their averments of material facts with affidavits or evidence, they were permitted

to provide such support. The reasonable expectation implicit in this process is that, if evidence is proffered to support a claim that a material fact is genuinely in dispute, the ALJ would consider it. Indeed, as discussed below, an ALJ's ruling on a summary judgment motion for which evidence was proffered in support or in opposition without considering all the evidence in determining whether a genuine dispute of material facts exists would in itself constitute grounds for reversal.

To do otherwise is not consistent with either Board practice or the case law around summary judgment under Rule 56. The Board has pointed out that, even where proposed exhibits are yet not formally admitted into the record for decision, they are "properly treated as an offer of proof, that may be evaluated if necessary to determine whether a genuine issue of material fact exists" in considering a motion for summary judgment. Lackawanna Medical Group Laboratory, DAB No. 1870, at 14 (2003) (finding harmless error where neither party specifically identified on appeal anything in the exhibits that would have made a difference to the ALJ's determination).

While permitting a party to seek or oppose summary judgment without submitting affidavits, Rule 56(c) states that the "judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute of material fact . . . ."[2] The rule thus does not support the ALJ's approach of ruling on a summary judgment motion based solely on the averments in the parties' briefs without considering the declarations and proposed exhibits. One Court of Appeals has recently concluded that a district court abused its discretion by refusing to consider all evidence presented at the summary judgment stage without individually considering whether the proffered documents would be admissible if the matter went to trial. Law Co., Inc. v. Mohawk Const. and Supply Co., Inc., 577 F.3d 1164 (10th Cir. 2009).[3]

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[2] An amendment to Rule 56(c), adopted March 26, 2009 and effective December 1, 2009 absent contrary congressional action, alters only procedural timing issues about summary judgment motions in federal courts. Advisory Committee Notes to Rule 56, 2009 Amendments. The language quoted here does not change.

[3] We do not imply that the ALJ was obliged to scrutinize the entire record looking for a potential dispute of material fact

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The lack of clarity in the ALJ's statement is even more problematic in light of his actual treatment of the exhibits in a manner that appears inconsistent with his statement. In discussing the "undisputed material facts," the ALJ sets out "CMS noncompliance allegations" in detail and extensively cites to CMS exhibits. He then concludes that the "facts offered by CMS, if not rebutted, provide a strong basis to conclude that Petitioner failed to prevent residents from being abused." ALJ Decision at 4. As discussed in more detail below, this presentation and language may appropriately belong in a discussion of a prima facie case made by CMS followed by an evaluation of the evidence in the record as a whole to determine whether the preponderance of the evidence shows that the facility rebutted that prima facie case. It is inappropriate to a summary judgment analysis in which the ALJ should be asking not whether a petitioner rebutted CMS's case, but whether any genuine dispute of material fact exists after construing all the evidence in the light most favorable to the petitioner.[4]

In discussing Illinois Knights' opposition to summary judgment, the ALJ referred to only a single exhibit (a declaration of Illinois Knights' administrator) and then discussed only a few of the points made in that declaration, as explained below. ALJ Decision at 5. Both the tone of the discussion and the unbalanced use of the record exhibits do not conform to the ALJ's statement that he will rely only on undisputed material

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to which neither party has alluded in its argument. We have held that an ALJ may reasonably insist that "a party state its position on an issue or explain the intended relevance of its exhibits." Guardian Care Nursing & Rehabilitation Center, DAB No. 2260, at 17-18 (2009). In summary judgment, the parties must identify those portions of the record relevant to whether material issues of fact are in dispute. Celotex Corp. v. Cartrett, 477 U.S. 317, 323 (1986). Nevertheless, when the parties have proffered evidence for the record and relied on it in their briefing to show the presence or absence of disputes of material fact, the ALJ may not decline to review that evidence.

[4] Moreover, a nursing facility may rebut a prima facie case made by CMS without necessarily rebutting all of the facts averred by CMS, if, for example, the facility proves facts that undercut the conclusion CMS draws from the facts it avers or rebuts an essential element of CMS's case.

facts averred in the briefs and will use exhibits only "for purposes of illustration." They are also inconsistent with the requirement discussed above that an ALJ must review and consider all of the proffered evidence to determine whether a genuine dispute of material fact exists.

B. The ALJ failed to view the record in the light most favorable to the nonmovant.

The ALJ concluded that "[t]he undisputed material facts establish that Petitioner failed to protect its residents against abuse." ALJ Decision at 3. The Board has explained in prior decisions how an ALJ's role in deciding a summary judgment motion differs from the role of an ALJ resolving a case after a hearing (whether an in-person hearing or on the written record). For example, in Madison Health Care, Inc., DAB No. 1927, at 6 (2004), the Board stated that "the ALJ deciding a summary judgment motion does not 'make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts,' as would be proper when sitting as a fact-finder after a hearing, but instead should 'constru[e] the record in the light most favorable to the nonmovant and avoid [] the temptation to decide which party's version of the facts is more likely true.' Payne v. Pauley, 337 F.3d 767, 770 (7th Cir. 2003)." In that process, the ALJ should not be assessing credibility or evaluating the weight to be given conflicting evidence. As explained below, his discussion of the two incidents at issue here indicates that the ALJ did give differing weight to the parties' evidence and averments.

i. September 9, 2007 incident

The ALJ asserted that the certified nurse aide (CNA) to whom the ALJ referred as "H" should have been immediately terminated after he "engaged in conduct that jeopardized the physical and emotional well-being of at least two" extremely vulnerable residents in that H "repeatedly struck" the bed of one "90-year old blind resident," and refused to stop despite requests. ALJ Decision at 4. The ALJ further opined that H demonstrated an "explosive temper" by conducting "a loud altercation with other staff in which he uttered threats, in the intimate presence" of the two helpless residents. Id.

The account of events proffered by Illinois Knights overlaps in that it includes H touching a resident's bed and becoming upset with another CNA for trying to touch him, but differs fairly dramatically in the details from the inflammatory portrayal

drawn from CMS's allegations. Illinois Knights Br. at 10-12. According to Illinois Knights and the evidence which it says shows a genuine dispute of fact, H was shaking his knee against the foot board of the bed of a sleeping resident in a sort of twitch or "nervous tic," and was asked by the roommate and another CNA to stop. P. Ex. 7, at 3, cited at Illinois Knights Response to Motion for Summary Judgment at 2-3. Two other CNAs were also in the room providing care at the time. Id. Illinois Knights also points to a CMS proposed exhibit that contains contemporaneous signed statements from those two CNAs saying that they thought that H was joking around.[5] CMS Ex. 41, at 1, 2. It is undisputed that CNA York raised her hand and either touched H or made to touch him in order to move him away from the bed and that H stepped back saying not to touch him. CNA York's statement indicates that H said, "If you ever touch me[,] I will hurt you," but that she "didn't take it seriously so I just joked to him saying that if he would do so I would just slap his butt." CMS Ex. 41, at 1. It is not disputed that H then got upset, left the room and went to the charge nurse and told her that he did not like to be touched. The signed contemporaneous statements of both the CNAs in the room along with H do not mention any "loud altercation" or "yelling."[6] CMS Ex. 41. CMS has not contested Illinois Knights' assertions that the incident lasted less than a minute, that the sleeping resident never awoke during it,[7] and that the roommate who was

[5] In its opposition to summary judgment, Illinois Knights relied on the administrator's account of the results of her investigation and interviews which was submitted as Petitioner Exhibit 7. The record also includes the written statements of the two CNAs recording their reports to the administrator as CMS Exhibit 41 which Illinois Knights points to on appeal to flesh out the basis of its assertion that a dispute of material fact exists as to whether the episode was, as it alleged before the ALJ, "a disagreement between employees rather than alleged abuse, because there was none." Illinois Knights Response to Motion for Summary Judgment at 2.

[6] CMS based its claims about a loud altercation on an interview conducted later by a surveyor with one of the CNAs. CMS Motion for Summary Judgment and Pre-hearing Br. at 5; CMS Ex. 16, at 21.

[7] The ALJ says that Illinois Knights' assertion that the "only undisputed fact . . . is that the resident allegedly

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awake did not report any concerns or remember the event when later asked. Illinois Knights Response to Motion for Summary Judgment at 2-3; P. Ex. 7, at 2-4.

The only distinction between these factual accounts that the ALJ acknowledges is the facility administrator's characterization of H striking the bed board as "unintentional tapping" and a "nervous tic." ALJ Decision at 5. The ALJ states that he accepts Illinois Knights' characterization as accurate for purposes of his decision on summary judgment, but nonetheless says: "There is nothing in the record to contradict" CMS's contention that H "struck" the bed. Id. This statement is clearly not supported by the record to the extent that "striking" characterizes the nature of his contact with the bed board differently (and as more intentional and forceful) than the descriptions by the administrator and the contemporary statements of the CNAs on which she relied. P. Ex. 7, at 3; CMS Ex. 41, at 1, 2. Moreover, the ALJ points out that the administrator, Ms. Swan, based her declaration on interviews during her investigation rather than first-person knowledge, which suggests that the ALJ was improperly weighing the evidence.[8]

The ALJ improperly discounted the significance of the difference between this description and CMS's portrayal of H "repeatedly striking" the bed, on the basis that, "even if H did not strike the resident's bed board as a demonstration of his anger or in order to intimidate the residents, failure to stop doing it when asked and his subsequent outburst when confronted by the other CNAs about his conduct was utterly unacceptable . . . [and]

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abused . . . slept through the entire event" is "simply incorrect," but does not point to anything in the record even alleging that the resident woke up. ALJ Decision at 5. The ALJ apparently meant only that other undisputed facts about the episode existed.

[8] This comment on Ms. Swan's lack of first-person knowledge overlooks the contemporary written statements of the two CNA eyewitnesses. The first calls it "bouncing" the bed and says that she believed he was "just joking" because he "didn't look mad or aggressive;" the second characterizes the behavior as "jokingly tapping" the end of the bed. CMS Ex. 41, at 1, 2.

culminated in an angry confrontation between H and the two other CNAs in the presence of the two residents." ALJ Decision at 5. The ALJ did not identify any evidentiary basis claimed by CMS to show that H was acting "in anger" or with "intent to intimidate" residents in tapping the bed. CMS's contention that H had a volatile temper appears to have been based largely on his alleged reaction to CNA York's touching or moving as if to touch him. See, e.g, CMS Motion for Summary Judgment at 4-5.

Illinois Knights' position is not that H's response was acceptable. It is not in dispute that H became agitated and upset at CNA York and ultimately left his post as a result. The administrator says in her declaration that she found H's conduct immature, inappropriate and uncooperative, and disciplined him for leaving the facility without permission.[9] P. Ex. 7, at 7. Drawing all reasonable inferences in favor of the facility, however, a reasonable trier of fact could find that H left the residents' presence immediately upon getting upset with CNA York's touching or trying to touch him, that his temper was therefore not "explosive," and that he could control his anger in the interest of safeguarding residents. It is also reasonable to infer that no dramatic shouting or frightening threats took place since no witness contemporaneously reported either, and it is undisputed that the sleeping resident was not disturbed. If these inferences are drawn, the ALJ's conclusion that the only appropriate response from the facility to protect residents from abuse was immediate termination does not make sense.[10]

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[9] The ALJ also expressed disapproval that "H received no discipline from Petitioner other than a written warning." ALJ Decision at 4. For the reasons discussed below, it was inappropriate for the ALJ to opine on what discipline should have been imposed where salient facts are in dispute.

[10] The ALJ made repeated statements indicating that H should have been immediately terminated for his conduct on September 9, 2007. ALJ Decision at 4, 7. At this point in the proceedings, it was improper for the ALJ reach this conclusion. The ALJ identified no authority suggesting that a nursing facility is always in violation of section 483.13(b) whenever it fails to immediately terminate an employee who expresses an angry emotion, without regard to the nature of the expression or whether it evidences anger that impacts or has the potential to impact residents causing more than minimal harm. The nature of

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ii. October 2007 incident

The ALJ also recited CMS's allegations regarding another incident in which H allegedly told a resident being prepared for a mechanical lift that H would roll the resident onto the floor if the resident kept complaining. ALJ Decision at 4. According to Illinois Knights, on October 18, 2007, its activity director overheard CNA Ebert saying that H made this statement about 10 days earlier. Illinois Knights Br. at 14. Illinois Knights further asserts that the activity director reported the allegation and the administrator conducted an investigation. Id. Illinois Knights denies that the incident ever in fact occurred, however, relying on the evidence that its administrator concluded, after interviews with both H and the (cognitively competent) resident involved, that CNA Ebert fabricated the charges. Id. at 14-15; P. Ex. 7, at 8. In a footnote, the ALJ commented that even "assuming for purposes of this decision" that the finding that CNA Ebert fabricated the charges was accurate, that would nevertheless "not justify the CNA who reported the allegations delaying for more than one week communicating to management what she claimed to have observed." ALJ Decision at 5, n.3. The ALJ concluded that this delay constituted a failure in the facility's abuse prevention policies. Id.

Essentially, the ALJ concluded that it was not material to his decision whether the CNA lied about the alleged incident ever occurring because the CNA should have known that policy required reporting any abuse immediately and yet took more than a week to report it. It is difficult to see how the ALJ could conclude that reporting of a fabricated charge that abuse had occurred more than a week before the report somehow implicates a failure of timeliness under the facility's abuse prevention policies. The problem with a report of an event that never occurred is that it is false, not that it is late. Indeed, the ALJ could have drawn an inference in favor of Illinois Knights that the CNA's allegation was more apt to be false, as Illinois Knights found, since it was not reported to management at all, but merely made to other staff well after the event allegedly occurred. CMS made no allegation that the facility failed to

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H's conduct and the actual or potential effect of H's words and behavior on residents are disputes of material fact in this case.

act promptly and properly in investigating and reporting the allegation once the CNA made it. We conclude that Illinois Knights raised a dispute of material fact as to whether a reportable incident occurred in October for which a CNA failed to make a timely report in violation of facility policy.

In sum, we conclude that summary judgment was inappropriate in this case and that, on remand, the ALJ should conduct further proceedings, including a hearing, unless waived.

2. The other legal challenges Illinois Knights raises have no merit.

We next address certain legal challenges by Illinois Knights to the ALJ's framing of the law governing the alleged noncompliance at issue in order to clarify the legal standards for the ALJ to employ in reviewing the full record on remand.

Illinois Knights argues that the ALJ impermissibly expanded the issues by looking at H's general temperament rather than the findings in the SOD about two specific events on which CMS relied in its summary judgment motion and by making a finding that all the residents in the facility were at risk of potential abuse when the SOD and CMS motion contained only allegations as to the specific residents involved. According to Illinois Knights, the ALJ should have limited his evaluation of the deficiency to whether those individual residents lacked adequate protection from abuse. Illinois Knights Br. at 3-4. We disagree. The ALJ on remand may also consider whether the facts relating to the specific incidents demonstrate the existence of a more general problem with H's potential treatment of residents. He may further consider whether any risk went beyond the residents directly involved and affected other residents who might encounter or be cared for by H. The resolution of those questions, however, may only come after development of a full record and assessment of the weight of the credible evidence and, in any case, is likely to make little difference since the risk to other residents is mostly related to the scope or severity of the deficiency and hence the reasonableness of the CMP amount. 42 C.F.R. §§ 488.438(f) and 488.404. Here, the CMP imposed during the period of immediate jeopardy is the minimum amount set for that range, so the only amount for which the reasonableness may be contested is the later $300 per-day penalty.

Conclusion

For the reasons explained above, we remand this case to the ALJ for further proceedings consistent with this decision. On remand, the ALJ may address all the noncompliance findings, and is not limited to those which were raised in summary judgment or discussed here.

_____/s/_____
Judith A. Ballard

_____/s/_____
Stephen M. Godek

_____/s/_____
Leslie A. Sussan
Presiding Board Member