Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Elant at Fishkill
Docket No. A-12-42
Decision No. 2468
July 11, 2012

REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

Elant at Fishkill (Elant), a skilled nursing facility located in New York State, requests review of the November 17, 2011 decision of Administrative Law Judge (ALJ) Richard J. Smith granting summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS) and holding that Elant did not return to substantial compliance with two Medicare participation requirements until February 18, 2011. *Elant at Fishkill*, DAB CR2465 (2011) (ALJ Decision). The ALJ thus sustained the imposition of civil money penalties (CMPs) of $5,550 per day for the period January 4 through January 10, 2011 and $200 per day for the period January 11 through February 17, 2011, and the denial of payment for new admissions (DPNA) for the period January 13 through February 17, 2011.

Elant does not dispute CMS's determination that it was not in substantial compliance with the two requirements at a level that posed immediate jeopardy to resident health or safety from January 4 through 10, 2011 and at a level lower than immediate jeopardy through January 11, 2011, or the CMPs imposed for those periods. Elant instead argues, as it did below, that it corrected the deficiencies and achieved substantial compliance with the two requirements on January 12, 2011, the date in its approved Plan of Correction (POC). CMS argues Elant's appeal should be dismissed because CMS's determination in a letter dated April 11, 2011 that Elant returned to substantial compliance on February 18, 2011 was not subject to appeal under the regulations. CMS argues that two Board decisions holding that a facility may appeal CMS's determination of when a facility returns to substantial compliance were wrongly decided and should not be relied upon to find that the facility's hearing request was timely filed.

The ALJ declined to rule explicitly on CMS's motion to dismiss the appeal for lack of jurisdiction, though in dicta, he stated that the facility's hearing request was not timely filed because CMS's notice letter dated April 11, 2011 was not an appealable initial determination. The ALJ then granted its motion for summary judgment on the ground

that undisputed evidence showed that Elant returned to substantial compliance on February 18, 2011. He denied Elant's motion for summary judgment on the ground that Elant's motion claiming January 12, 2011 as the date of its return to substantial compliance raised disputed issues of fact.

For the reasons discussed below, we conclude that CMS's letter dated April 11, 2011 is an appealable initial determination under the plain meaning of the applicable regulations and that Elant had timely filed its request for hearing. We also decline to reverse or otherwise revisit prior Board decisions holding that CMS's finding of when a facility returns to substantial compliance that results in a remedy constitutes an appealable initial determination under the applicable regulations.

We further conclude that the ALJ erred in granting CMS's motion for summary judgment on the issue of when Elant returned to substantial compliance, and in denying Elant's motion for summary judgment, because the ALJ failed to identify or address whether evidence in the record raised a genuine dispute of material fact, including evidence supporting Elant's claim that it returned to substantial compliance on January 12, 2011. Therefore, we reverse the ALJ Decision and remand the appeal to the ALJ for further proceedings consistent with this decision.

Applicable Law

The Social Security Act (Act) and federal regulations provide for state agencies to conduct surveys of each Medicare skilled nursing facility (SNF) and Medicaid nursing facility (NF) to evaluate compliance with the Medicare and Medicaid participation requirements. Sections 1819 and 1919 of the Act; 42 C.F.R. Parts 483, 488, and 498. The participation requirements are set forth at 42 C.F.R. Part 483, subpart B. A facility's failure to meet a participation requirement is called a "deficiency." 42 C.F.R. § 488.301. "Substantial compliance" means a level of compliance such that "any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." *Id*. "Noncompliance" is defined as "any deficiency that causes a facility to not be in substantial compliance." *Id*. Survey findings are reported in a statement of deficiencies (SOD), which identifies each deficiency under its regulatory requirement and states its scope and severity. 42 C.F.R. § 488.404; CMS State Operations Manual (SOM), App. P, § IV.

In general, when a facility has been found not to be in substantial compliance with the requirements for program participation, the facility must submit a plan of correction (POC) acceptable to CMS or the state agency. 42 C.F.R. §§ 488.402(d), 488.408(f). Once a POC has been approved, CMS or the state agency must verify that corrections have been completed and substantial compliance achieved based on an onsite revisit or after an examination of credible written evidence that can be verified without an on-site visit. 42 C.F.R. § 488.454.

Sections 1866(h)(1) and 1866(b)(2) of the Act and 42 C.F.R. Part 498 provide hearing rights for specified determinations involving facility participation in the Medicare and Medicaid programs. Section 498.3 delineates the scope and applicability of the regulations, identifying the types of actions considered "initial determinations" subject to administrative review. The "initial determinations" include, "[w]ith respect to an SNF or NF, a finding of noncompliance that results in the imposition of a remedy specified in section 488.406 of this chapter, except the State monitoring remedy." 42 C.F.R. § 498.3(b)(13); *see also* 42 C.F.R. 488.408(g) ("A facility may appeal a certification of noncompliance leading to an enforcement remedy."). Among the remedies specified in section 488.406 are CMPs and a DPNA. 42 C.F.R. § 488.406(a)(2)(ii).

Background

The New York State Department of Health (DOH) surveyed Elant from January 3 through January 10, 2011. DOH surveyed Elant following an incident on the evening December 30, 2010. It is not disputed that, on that date, an elderly resident eloped undetected from the facility, and that Elant's staff did not discover her absence until police found her sitting in the snow along a highway approximately a quarter-mile from the facility at 8:45 p.m. The SOD noted that the resident had minor injuries upon her return to the facility. CMS Ex. 1.

DOH determined that Elant was not in substantial compliance with the requirements of 42 C.F.R. §§ 483.25(h)(2) and 483.75. CMS Ex. 2, at 1. Those regulations require, respectively, that "[t]he facility must ensure that . . . [e]ach resident receives adequate supervision and assistance devices to prevent accidents" and that a facility "must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident." Among the survey findings were that Elant did not have an adequate system to respond to door alarms, failed to change door key pad alarm codes and provided the code to resident's relatives and visitors, and had inadequate policies and staff awareness on preventing and responding to elopements. *Id*. at 1-3.

In a letter dated January 10, 2011, DOH informed Elant that it was not in substantial compliance with the two regulations at the immediate jeopardy level, that Elant had to submit a plan to correct the immediate jeopardy, and that DOH was recommending that CMS impose a CMP and a discretionary DPNA, effective January 13, 2011. *Id*. DOH also stated that an SOD of the survey would be provided after which Elant would have to submit a formal POC. CMS on January 11, 2011 adopted DOH's findings and imposed a CMP of $5,550 per day for each day that immediate jeopardy was present and a DPNA effective January 13, 2011, and proposed to terminate Elant's Medicare provider agreement on February 1, 2011 if the immediate jeopardy was not corrected. *Id*. at 17-19.

Based on a post-survey revisit on January 11, 2011, DOH determined that the immediate jeopardy posed had been abated, effective January 11, 2011, as Elant had alleged. *Id*. at 9-13, 20-22. DOH also informed Elant that the DPNA would continue and that it was recommending to CMS that the CMP continue at a reduced level until a revisit found that the facility had corrected the deficiencies and was in substantial compliance with Medicare requirements. *Id*. at 20-22.

CMS accepted DOH's findings in a letter of January 18, 2011. *Id*. at 23-25. CMS stated, among other things, that the DPNA "imposed . . . effective January 13, 2011 . . . will continue until your facility has achieved substantial compliance" and that the $200 per day CMP would "accrue from January 11, 2011until the facility is in substantial compliance . . . ." *Id*. CMS also stated that Elant's provider agreement would terminate on July 10, 2011 unless substantial compliance was achieved. *Id.* CMS informed Elant that it could appeal CMS's determinations by requesting a hearing before an ALJ within 60 days after receipt of CMS's letter; it is not disputed that Elant did not submit an appeal within that time.

On February 8, 2011 DOH sent Elant the SOD from the survey ending January 10, 2011, required Elant to submit a POC, and imposed a directed POC and directed inservice training. *Id*. at 29-33. On February 10, 2011 Elant submitted its POC, which alleged January 11 and 12, 2011 as the completion dates of the corrective actions therein. CMS Ex. 7, at 1-32. The corrective actions included measures such as inservice training of staff, updating policies and procedures for preventing and responding to elopements, and obtaining a consultant to chair a quality assurance committee meeting to review the deficiencies.

DOH by letter of February 16, 2011 "determined that the POC is unacceptable" and told Elant to amend it because the portion addressing the noncompliance with 45 C.F.R. § 483.25(h)(2) "does not contain these element(s): Protection of other residents in similar situations." *Id*. at 33. DOH submitted corrections by fax on February 17, 2011, comprising one revised page from the POC form and a three-page lesson plan with a one-sentence change on one page. *Id*. at 34-34. The submission did not include any new completion dates for the corrective actions. DOH "reviewed the [POC] as amended . . . and determined that the POC is acceptable" and stated that it would conduct a post-survey revisit to verify the corrections, by letter of February 18, 2011. *Id*. at 39.

On March 4, 2011, DOH conducted a revisit survey and by letter of that same date informed Elant that it had been found in substantial compliance, and that DOH "will also recommend that any remedies currently enforced will be lifted on 01/12/2011." CMS Ex. 2, at 34-35. DOH enclosed a "Post Certification Revisit Report" form with "correction completed" dates of January 12, 2011 for each of the two deficiencies. P. Ex. 10. However, DOH on April 5, 2011 sent Elant an "amended letter" that differed from the

March 4 letter only in stating that DOH "will also recommend that any remedies currently enforced will be lifted on 02/18/2011." CMS Ex. 2, at 36-37 (emphasis added). DOH enclosed a "Post Certification Revisit Report" form with "correction completed" dates of February 18, 2011. P. Ex. 11, at 5. Elant on April 7, 2011 challenged "the determination of the compliance date of February 18, 2011" and asserted that it had achieved compliance on January 12, 2011 and that the revision to its POC "was not substantive in nature and did not enhance the safety of the residents nor the security of the facility." CMS Ex. 2, at 40-41. In a letter dated April 29, 2011, DOH subsequently replied that the "date of compliance of January 12, 2011 . . . was mistakenly entered in the Department's March 4, 2011 letter" and was "not feasible." *Id*. at 44-45.

CMS adopted DOH's determination of February 18, 2011 as the date Elant returned to substantial compliance in a letter to Elant dated April 11, 2011. *Id*. at 42-43. CMS removed the DPNA effective February 18, 2011 and notified Elant of a total CMP of $46,450, comprising $5,550 per day from January 4 through 10, 2011 and $200 per day from January 11 through February 17, 2011. *Id*. In a letter dated May 27, 2011, Elant requested a hearing to challenge CMS's determination about the date that it had returned to substantial compliance. Elant challenged only CMS's determination that it had returned to substantial compliance on February 18, 2011, rather than on January 12, 2011.

The ALJ Decision

The ALJ granted CMS's motion for summary judgment, and denied Elant's motion for summary judgment on the issue of the date that Elant returned to substantial compliance. CMS contended that Elant returned to substantial compliance on February 18, 2011, whereas the facility contended that it had returned to substantial compliance on January 12, 2011. The ALJ granted CMS's motion for summary judgment on the grounds that there was "no genuine doubt that Petitioner's progress toward returning to substantial compliance was incomplete and unsuccessful until its amended POC had been accepted" on February 18, 2011, and that DOH's decisions to reject the initial POC and approve the revised POC were not subject to review. ALJ Decision at 9. He denied Elant's motion on the ground that it raised a question of fact "to be resolved only through the evaluation of evidence and the assessing of weight and credibility where that evidence conflicts," thereby rendering summary judgment inappropriate. *Id*. The ALJ addressed but declined to grant CMS's motion to dismiss the facility's appeal for lack of jurisdiction. *Id*. at 4-8.

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, at 3-5 (2004). Summary judgment is appropriate if there are no genuine disputes of fact material to the result. *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997). In reviewing

whether there is a genuine dispute of material fact, we view proffered evidence in the light most favorable to the non-moving party. *Kingsville Nursing and Rehabilitation Center*, DAB No. 2234, at 3-4 (2009); *Madison Health Care, Inc.*, DAB No. 1927, at 3-5 (2004), and cases cited therein. The standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. *Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs*, http://www.hhs.gov/dab/divisions/appellate/guidelines/prov.html; *Golden Age Skilled Nursing & Rehabilitation Center*, DAB No. 2026, at 7 (2006).

Analysis

I. We decline to revisit our decisions in *Taos* and *Mimiya*.

Before the ALJ, CMS filed a Motion to Dismiss and/or for Summary Disposition, arguing that the facility failed to file a hearing request within the 60-day deadline established by 42 C.F.R. § 498.40(a)(2) and proffered no good cause for extending the applicable appeal period. CMS contended that its letter dated January 11, 2011, constituted the only initial determination of noncompliance resulting in the imposition of a remedy for which appeal rights are provided by 42 C.F.R. § 498.3(b)(13). The facility responded that under two prior Board decisions in *Taos Living Center*, DAB No. 2293 (2009) and *Mimiya Hospital*, DAB No. 1833 (2002), *aff'd*, 331 F.3d 178 (1st Cir. 2003), CMS's letter dated April 11, 2011 is also an appealable initial determination within the scope of section 498.3(b)(13). Because the facility filed its hearing request on May 27, 2011, Elant maintained that it was timely filed within 60 days of the April 11 letter. CMS countered by arguing that these decisions were fundamentally wrong, contrary to other Board precedent, and inconsistent with the plain language of section 498.3(b)(13). CMS further asserted that the dissent in *Taos Living Center* stated the correct legal view and urged the ALJ to follow it. The ALJ avoided the jurisdictional question that was presented and instead stated that "for purposes of this immediate discussion[,] I assume *arguendo*, Petitioner's hearing request is untimely."[1] ALJ Decision at 7. Nonetheless, the ALJ commented that while CMS's argument is "not easily resisted[,] . . . the majority opinion in *Taos* is the law of this forum, and must control this question to the extent that the facts before me now are congruent with those before the divided Board in *Taos*. And to a significant extent, they are not." *Id*. at 6.

On appeal to us, Elant renews its argument that its hearing request was timely filed under the *Taos* and *Mimiya* decisions, while CMS reiterates it prior assertion that these decisions were wrongly decided and that the Board should now adopt the dissent's

[1] The ALJ also stated that "while fully recognizing that the timeliness of Petitioner's hearing request is a jurisdictional question normally to be addressed and resolved as a threshold issue, I have discussed it without explicitly ruling on CMS's Motion to Dismiss . . . ." ALJ Decision at 2.

reasoning in *Taos*. As discussed below, we decline to reconsider the Board's prior decisions. In addition, we specifically find that CMS's April 11, 2011 letter constitutes an appealable initial determination within the scope of section 498.3(b)(13) for the reasons previously stated in those decisions.

Although the ALJ expressly did not rule on the jurisdictional question, he nevertheless stated that the "majority decision in *Taos* depends on facts unique to that case. Those facts are not congruent with the facts before me, and so the reasoning and result in *Taos* are not persuasive now." *Id*. at 7. The ALJ further stated that *Taos* is distinguishable from the present case because there was "no extended delay in re-visiting" the facility, the DPNA in this case was not initiated by the April 11 letter, and "the overall nature" of the April 11 letter is different from *Taos*. *Id*. We disagree.

In *Mimiya*, the Board held that a notice of determination as to the date on which a facility returned to substantial compliance and finalizing the amount and duration of a per-day CMP was an appealable initial determination of the duration of noncompliance. *Mimiya* at 7-9. In *Taos*, the Board held CMS's decision that a facility did not return to substantial compliance at the time alleged by the facility, resulting in the continuation of an ongoing, mandatory DPNA for an additional period of time, was an appealable initial determination subject to de novo review under the plain language of section 498.3(b)(13). *Taos Living Center* at 17; *see also Foxwood Springs Living Center*, DAB No. 2294, at 14 (2009). In *Taos*, the Board specifically relied upon its analysis in *Mimiya* in stating that:

> In reaching this conclusion, we are mindful of the Board's reasoning in *Mimiya*, that if a facility that did not contest an initial survey finding of noncompliance . . . is precluded from appealing the date when it is deemed by a state survey agency to have returned to substantial compliance, [the] facility will have no recourse when the state survey agency, for whatever reason, delays its revisit to the facility and the [remedy] continues to run.

Taos at 16 (citing Ruling on Petition to Reopen DAB No. 1833, at 2 (Oct. 3, 2002)).

The gravamen of both the *Taos* and *Mimiya* decisions is that under the plain language of section 498.3(b)(13), a facility is entitled to challenge CMS's determination of the date that it returned to substantial compliance when such a determination effectively amounts to a finding of noncompliance that results in a remedy.

First, we disagree with the ALJ's conclusion that the facts in *Taos* "are not congruent here." ALJ Decision at 7. The scenario envisioned by the Board in *Mimiya* and again in *Taos* is essentially presented again here.[2] Elant made a credible allegation that it had returned to substantial compliance as of January 12, 2011. In a letter dated March 4, 2011, DOH informed the facility that it had returned to substantial compliance on January 12, 2011. In its subsequent April 11 letter, CMS found that the facility had not returned to substantial compliance until February 18, 2011, which is the date that DOH approved the facility's plan of correction. The April 11 letter was more than 60 days after CMS's initial determination of noncompliance set forth in its letter of January 18, 2011 and Elant, therefore, would not have known about this determination within 60 days of the January 18 letter. Under the plain language of section 498.3(b)(13), the April 11 letter is a finding of noncompliance for the time period from January 11 through February 18, 2011. As in *Taos*, but for CMS's finding of continued noncompliance, there would have been no legal basis for CMS to impose the discretionary DPNA effective January 13. The facility was not on notice until the April 11 letter that the DPNA would not be lifted retroactively. Thus, the April 11 letter constitutes a finding of noncompliance that resulted in a remedy, which under both *Taos* and *Mimiya* is an appealable initial determination within the ambit of section 498.3(b)(13).

Second, we also disagree with the ALJ that the result in *Taos* "depends on facts unique to that case." Nowhere in that decision (or in *Mimiya*) does the Board so limit the scope and effect of its holding. Rather than focusing on the recognized right to contest the length of period of noncompliance by challenging the date CMS found that the facility had returned to substantial compliance, the ALJ relies upon tangential factual matters in an attempt to distinguish the present case from *Taos*. These purported factual distinctions are neither substantive nor persuasive.[3] Indeed, as discussed above, the proper legal analysis is not whether the facts of this case are exactly like those presented in *Taos* (or *Mimiya*) but whether CMS's April 11 letter meets the regulatory criteria as an appealable initial determination within the scope of section 498.3(b)(13) under the reasoning set forth in those cases.

We have thoroughly considered each of the arguments raised by CMS, including its assertions that *Taos* and *Mimiya* were wrongly decided and that we should adopt the dissent's reasoning in *Taos* to find that the facility's hearing request in this case was untimely filed. However, in both of those cases, the Board carefully analyzed the

[2] We also note that the ALJ did not address whether the facts in the present case are "congruent" with those in *Mimiya*.

[3] CMS also argues that unlike the situation in *Taos*, its April 11 letter did not contain the standard language notifying the facility that it had a right to appeal CMS's determination. CMS Response to Request for Review (Response) at 16. Whether CMS includes language notifying a facility of its appeal rights is not dispositive. Just as CMS cannot expand the scope of a facility's appeal rights by inadvertently including such language in its notification letters, it cannot narrow or eliminate such a regulatory right by similarly omitting language about appeal rights. A facility may appeal under the regulation whenever CMS makes an initial determination that comes within the ambit of section 498.3(b), as it did in the April 11, 2011 letter in this case.

regulatory framework upon which a facility's hearing rights are established. The majority in *Taos* also carefully considered the arguments raised by the dissent there and rejected them for the reasons stated in that decision.[4] CMS offers no compelling reason why we should simply repeat the same analysis here, and, therefore, we decline to do so.

II. The ALJ erred by holding that undisputed evidence established that Elant did not achieve substantial compliance until February 18, 2011 and by granting CMS's motion for summary judgment and denying Elant's motion for summary judgment.

The Board "has held that 'CMS's determination of whether the evidence demonstrates that a facility returned to substantial compliance' prior to the date determined by CMS 'is subject to de novo review by an ALJ and on appeal to the Board.'" *Foxwood Springs Living Center* at 12, citing *Taos* at 20; *see also* 59 Fed. Reg. 56,116, 56,208 (Nov. 10, 1994) ("[w]hen a facility disagrees with the decision [of continued noncompliance] made at the time of the revisit, this disagreement could be resolved through the administrative hearing process."). Indeed, the Board "has never held that the issue of whether and when a facility fully implemented approved corrective actions and in fact achieved substantial compliance may not be reviewed by an ALJ under part 498 of the regulations." *Foxwood Springs Living Center* at 12 (emphasis in original). Thus, if a facility can substantiate by documentary evidence that it achieved substantial compliance prior to the date adopted by CMS, it is entitled to the reduction of the enforcement remedies applied commensurate with the earlier date. *See* 42 CFR § 488.454 (duration of remedies based on duration of noncompliance). CMS does not challenge these propositions here.

Indeed, CMS acknowledges that "the ALJ has the authority to review the evidence in the record and arrive at his own independent conclusion as to whether Appellant has met its burden of demonstrating that substantial compliance was attained on a date earlier than that set by CMS." CMS Response at 34. Elant was thus entitled to an opportunity to establish, by a preponderance of the evidence, that it corrected the undisputed deficiencies and returned to substantial compliance earlier than February 18, 2011.

[4] CMS asserts that, "as the dissent in *Taos Living Center* pointed out, a facility is free to file an appeal within 60 days of receipt of CMS's notice of noncompliance and imposition of the DPNA to protect its rights." CMS Response at 15, citing *Taos* (at 33) and *Hammonds Lane Center, et al.*, DAB No. 1853 (2002) ("there was nothing to prevent Petitioners from filing hearing requests as the 60-day deadline approached in order to preserve their rights to a hearing in the event the state survey agencies did not revisit and find substantial compliance within that time frame"), *aff'd sub nom. Meridian L.P. v. Thompson*, 305 F.Supp.2d 116 (2004). The majority in *Taos* implicitly found this point not to be persuasive, for good reasons. The earlier notice of noncompliance in *Taos*, as here, contained no finding regarding the date the facility achieved substantial compliance. Thus, neither facility had notice from the earlier letter what CMS's finding would be on that issue, whether the finding would be adverse to it, or whether the finding would result in a remedy (or continuation of a remedy) that would not have been imposed if CMS had accepted the facility's allegation regarding the date it achieved substantial compliance. Lacking such notice, the facility could not determine whether to appeal. Nor could it meet the 60-day regulatory requirements for the contents of a hearing request set forth in section 498.40(b).

Kenton Healthcare, LLC, DAB No. 2186, at 25 (2008) (facility "has the burden of proving that it achieved substantial compliance on a date earlier than that determined by CMS"); *Evergreene Nursing Care Center*, DAB No. 2069, at 7 (2007) (facility charged with "showing, by a preponderance of the evidence . . . that it was in substantial compliance during the relevant period").

We conclude the ALJ erroneously denied Elant the opportunity to show that it had achieved substantial compliance earlier than the date DOH and CMS determined, by ruling on the parties' motions for summary judgment without identifying any of the corrective actions in the revised POC or addressing whether the facility had raised a genuine factual dispute about when Elant completed those actions, by proffering evidence that Elant had done so by January 12, 2011. The ALJ instead addressed only "the fact that the first POC *was rejected* and the related fact that an amended POC *was required* before NYSDOH could conduct the re-visit survey and verify that the amended POC had actually been implemented." ALJ Decision at 9 (ALJ's emphasis). The ALJ observed:

> There is no genuine doubt that Petitioner submitted its first POC to [DOH] on February 10, 2011, and in it claimed — on the basis of the steps set out in that first POC — that it had returned to substantial compliance almost a month earlier, on January 12, 2011. Nor is there genuine doubt that this first POC was rejected by [DOH] as inadequate to assure the protection of the facility's residents.

Id. Based on those facts, the ALJ reasoned that Elant's challenge to CMS's determination of the date of return to substantial compliance was a challenge to DOH's rejection of the POC on February 16, 2011. The ALJ stated that–

> *unless the decision of [DOH] and CMS to reject the first POC is subject to Petitioner's challenge here*, there is simply no genuine doubt that Petitioner was not in substantial compliance on the basis of the measures it claimed to have taken in its first POC. And so, *unless the decision of [DOH] and CMS to accept only the amended POC of February 17, 2011 is subject to Petitioner's challenge here*, there is simply no genuine doubt that Petitioner's progress toward returning to substantial compliance was incomplete and unsuccessful until its amended POC had been accepted, thus clearing the way for [DOH] to re-visit the facility as it did two weeks later on March 4, 2011.

Id. (ALJ's emphasis). The ALJ correctly noted that "the acceptance or rejection of Petitioner's POC is not a matter subject to appeal or to my review." *Id*. at 10; *see, e.g.*, *Foxwood Springs Living Center* at 12 ("[t]he acceptance or rejection of a proposed PoC is not an appealable initial determination."). Thus, the ALJ concluded that: 1) "there are no

genuine issues of material fact as to the date Petitioner returned to substantial compliance with program requirements;" 2) "CMS is entitled as a matter of law to judgment in its favor on that issue;" and 3) Elant "returned to substantial compliance with the requirements set out at 42 C.F.R. §§ 483.25(h) and 482.75 on February 18, 2011, but not sooner." ALJ Decision at 10.

However, the ALJ did not address whether the evidence proffered by Elant created a genuine dispute of fact regarding when the facility completed the required corrective actions and returned to substantial compliance with the two regulations at issue.[5] Essentially, the ALJ reasoned that Elant could not have completed the corrective actions in its revised POC before it revised the POC to identify those corrective actions and DOH approved the revised POC. Based upon that reasoning, he concluded Elant's challenge to the determination that it returned to substantial compliance on February 18, 2011 was necessarily a challenge to the rejection of its initial POC on February 16, 2011 and the approval of the revised POC on February 18, 2011, determinations not subject to appeal. We disagree.

The ALJ erred as a matter of law in treating the date that DOH approved the revised POC as conclusively establishing the earliest date on which Elant could have achieved substantial compliance. No basis exists in the regulations for this conclusion. Indeed, CMS concedes that the determinative issue here is whether Elant demonstrated that it achieved substantial compliance on a date earlier than the date CMS found.

The ALJ also erred in treating DOH's rejection of Elant's initial POC as necessarily a rejection of Elant's allegations in that POC as to the dates it achieved substantial compliance. In doing so, the ALJ ignored CMS's own evidence regarding the revised POC that had been approved by DOH. The revisions did not include any change in the dates of correction, so the approved POC continued to allege, as the initial POC had, that corrections had been completed by January 12, 2011. CMS Ex. 7, at 3-19, 34-38. The regulations do not preclude CMS or the state agency from approving a POC with a retrospective correction date or from finding that a facility achieved substantial compliance prior to the date of the revisit, both of which happened here, and similarly do not prohibit a facility from achieving substantial compliance pursuant to a POC with a retrospective correction date. *See, e.g., Liberty Health & Rehab of Indianola, LLC*, DAB No. 2434, at 17 (2011) ("after Liberty had submitted a plan of correction, on the SOD, dated June 18, 2010" CMS "determined that Liberty had both removed the immediate jeopardy and achieved substantial compliance by May 5, [2010], the date the survey was completed.").

[5] The ALJ referred only indirectly to the corrective measures in the POC when he observed that DOH rejected the POC on February 16, 2011 "because the POC did not satisfactorily assure the safety of other facility residents in situations of potential elopement." ALJ Decision at 4. He did not identify any of the corrective actions required by the initial POC or the amendments thereto, nor any of the evidence on whether those actions were completed.

In granting summary judgment in CMS's favor on the erroneous ground that the rejection of the POC compelled upholding a later date of substantial compliance, the ALJ also failed to address evidence proffered by Elant that created a genuine dispute of material fact regarding the date Elant achieved substantial compliance. That evidence includes an affidavit by Elant's Administrator in which he attests that the POC revisions "were not changes to the then current policy and procedures of the Home, but clarification of the previously adopted procedures as part of the POC document" and that the revisions to the POC "were merely memorializations of the already-instituted corrections" that Elant had made in response to the initial survey ending January 10, 2011. P. Ex. 1, at ¶ 19. At the very least, this evidence shows a genuine dispute of material fact exists regarding the basis for CMS's motion for summary judgment (i.e., CMS's allegation that the changes to the POC involved corrections that could not have been made before the revised POC was accepted by DOH).

On the other hand, the ALJ also denied Elant's motion for summary judgment, stating there was a disputed "central question of fact," whether the POC revisions DOH required were "'neither significant nor material to the health and safety of the residents' . . . as to represent [DOH's] *de facto* acceptance of the first POC" or were '"fundamental and essential changes given the seriousness of the deficiencies cited and the risk they posed to the facility's residents,'" as CMS contended. ALJ Decision at 9. Whether the POC revisions are properly characterized as insignificant or fundamental in light of resident health and safety is not material if, as Elant alleges, it had already taken the actions described in the revisions. In resolving Elant's motion for summary judgment, the ALJ should have addressed the question of whether CMS raised a genuine dispute of material fact that Elant had returned to substantial compliance by January 12, 2011. However, in denying Elant's motion for summary judgment, the ALJ did not discuss whether evidence proffered by CMS raised a genuine dispute of material fact regarding Elant's assertion that it returned to substantial compliance on January 12, 2011.

III. Instructions for remand.

On remand, in response to the facility's motion for summary judgment, the ALJ should consider whether a genuine dispute of material fact exists regarding the date when Elant returned to substantial compliance with the two Medicare participation requirements at issue here. If a genuine dispute of material fact exists, the ALJ should conduct further proceedings to resolve that dispute.

Conclusion

For the reasons explained above, we remand the appeal to the ALJ for further proceedings consistent with this decision.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Stephen M. Godek
Presiding Board Member