Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

BGI Retirement, LLC, d/b/a
Crossbreeze Care Center
Docket No. A-14-117
Decision No. 2620
February 23, 2015

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

BGI Retirement, LLC, d/b/a Crossbreeze Care Center (Petitioner), a skilled nursing facility that participates in the Medicare program, has appealed the March 18, 2014 decision issued by an administrative law judge (ALJ), *BGI Retirement, LLC, d/b/a Crossbreeze Care Ctr.*, DAB CR3295 (2014) (ALJ Decision). The ALJ concluded, after an evidentiary hearing, that Petitioner was not in substantial compliance with 42 C.F.R. § 483.70(a)(1)(i) from June 25 through August 28, 2012 because some of its automatic sprinklers did not meet a fire prevention standard issued by the National Fire Protection Association (NFPA). The ALJ also concluded that the Centers for Medicare & Medicaid Services (CMS) had imposed a "reasonable" civil money penalty (CMP) for Petitioner's noncompliance – namely, $200 per day for the period June 25 through August 28, 2012.

In this appeal Petitioner contends that: (1) CMS failed to identify the controlling legal standards prior to or during the evidentiary hearing and thus failed to meet its burden of proof; (2) the ALJ erroneously assigned evidentiary weight to CMS's photographic evidence; and (3) the $200 per-day CMP imposed by CMS should accrue for only one day (in the event the Board affirms the ALJ's noncompliance holding).

We find no merit in these contentions and therefore affirm the ALJ Decision in its entirety.

LEGAL BACKGROUND

With irrelevant exceptions, 42 C.F.R. § 483.70(a)(1)(i) requires a Medicare-participating nursing facility to "meet the applicable provisions of the *2000 edition of the Life Safety Code [LSC]* of the National Fire Protection Association [NFPA]" (italics added). The LSC, which section 483.70(a)(1)(i) expressly incorporates by reference, is also known as

the NFPA 101. The NFPA 101, in turn, incorporates by reference certain provisions of the 1999 edition of another NFPA publication titled "Installation of Sprinkler Systems," also known as the NFPA 13. *See* NFPA 101 (2000 ed.) § 2.1 (providing that other NFPA publications, or portions of them, "are referenced within this *Code* [*i.e.*, the LSC] as mandatory requirements and shall be considered part of the requirements of this *Code*").[1]

At issue in this case is a NFPA standard intended to ensure that water discharged from an automatic (heat-activated) sprinkler is not obstructed and can reach the area of a fire. *See* CMS Ex. 10 ¶¶ 8, 10. Table 5-6.5.1.2 in the 1999 edition of the NFPA 13 provides that if the horizontal distance between a sprinkler and the side of an "obstruction" – such as ductwork, piping, or, as in this case, a ceiling-mounted light fixture – is less than one foot, then the "maximum allowable distance" that a sprinkler's "deflector" (the component of the sprinkler that creates its spray pattern) may be "above [the] bottom of [the] obstruction" is zero inches. In other words, if the horizontal distance between the sprinkler and obstruction is less than one foot, the sprinkler's deflector must be *even with or below* the bottom of the obstruction.[2] For simplicity, we refer to this standard as the Maximum Distance standard – the maximum "distance" being the vertical distance that a sprinkler's deflector may be above the bottom of a nearby obstruction. The ALJ held, and Petitioner does not dispute, that the 2000 edition of the NFPA 101, and thus section 483.70(a)(1)(i), requires Petitioner's automatic sprinklers to meet the Maximum Distance standard, as specified in the 1999 edition of the NFPA 13.

CASE BACKGROUND[3]

From June 25 to June 29, 2012, the Florida Agency for Health Care Administration (AHCA) conducted a survey of Petitioner to assess its compliance with the LSC. CMS Ex. 3, at 1. That survey (which we call the "June survey") found ten separate violations of the LSC, which AHCA identified in a Statement of Deficiencies (SOD). CMS Ex. 1. The SOD identified each "deficiency" with a unique "tag" number and further indicated that each deficiency constituted a lack of substantial compliance with the LSC. *Id.*

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[1] Relevant excerpts of the 2000 edition of the NFPA 101 and the 1999 edition of the NFPA 13 are contained, quoted in, or attached to CMS Exhibit 8 and CMS's January 6, 2014 post-hearing reply brief.

[2] Table 5-6.5.1.2 in the 1999 edition of the NFPA 13 is titled "Positioning of Sprinklers to Avoid Obstructions to Discharge."

[3] Factual information in this background is drawn from the ALJ Decision and the record before the ALJ and is not intended to substitute for the ALJ's findings of fact.

Under tag K062, the SOD for the June survey states that some of Petitioner's automatic sprinklers were "approximately 4 inches away" from ceiling-mounted light fixtures (the SOD and other records refer to the light fixtures as "surface-mounted"). CMS Ex. 1, at 5.

The SOD does not mention the Maximum Distance standard or state that Petitioner's sprinklers failed to meet that standard. However, the AHCA employee who conducted the June survey later testified (in written direct testimony submitted before the hearing) that he was concerned during the survey that four sprinklers were "obstructed" by light fixtures, a condition that "significantly reduced the effectiveness" of the sprinklers."[4] CMS Ex. 9 ¶ 4. Petitioner's owner admitted that he was aware of that concern during the June survey. *See* Transcript of Sept. 11, 2013 Hearing (Tr.) at 141. (We note in connection with this admission that Petitioner's administrator and director of maintenance accompanied the surveyor when he made his observations and findings about the sprinklers. CMS Ex. 5, at 1.)

On or about July 12, 2012, Petitioner submitted a "plan of correction" in response to the K062 citation. *See* P. Ex. 3. The plan stated that Petitioner objected to the deficiency citation because the positioning of the sprinklers and light fixtures was reflected in building plans that AHCA had approved in 1960 and again in 1995. *Id.*; P. Ex. 4, at 3. The plan of correction further stated that "[s]hould it become necessary to remove the surface mounted lights," plans would be submitted to install "appropriate lighting." P. Ex. 3.

On August 13, 2012, the AHCA surveyor who performed the June survey conducted a revisit survey (the "August survey") of Petitioner. CMS Ex. 2. Afterward, AHCA issued another SOD, which restated the K062 deficiency citation as follows:

> . . . . [I]t was observed that the sprinkler heads are located next to surface mounted light fixtures. The bottom of the sprinkler head is above the bottom of the light fixture. This condition was observed at four different light fixtures. . . .

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[4] The following is the surveyor's written direct testimony about the June survey finding:

> I found a problem related to the building's automatic sprinkler system. I observed that four sprinkler heads were being obstructed by surface mounted lights. These sprinkler heads were located near the nurses' station, close to the unit where residents with impaired memory resided. Because of their location relative to the sprinkler heads, the surface mounted lights significantly reduced the sprinkling effectiveness of the sprinkler heads. The sprinklers would not have properly protected the area of the building in the event of the fire, thus endangering staff and residents of the building. The water which was generated by those four sprinkler heads would not have been as effective in controlling or putting out the fire because of the obstruction of the surface mounted lights.

CMS Ex. 9 ¶ 4.

Id. at 2. This finding was based on the surveyor's visual assessment of the sprinklers and light fixtures, rather than on actual measurements. Tr. at 20-21, 27-28.

Between the June and August surveys, Petitioner contacted AHCA's Office of Planning and Construction (OPC), seeking another opinion about the merits of the K062 deficiency citation. *See* P. Ex. 2 ¶ 6; P. Ex. 4, at 2 (Aug. 3, 2012 email); Tr. at 142-43. (We assume, absent contrary evidence or argument, that the OPC and the office within AHCA that regularly conducts LSC surveys are different entities.)

On August 24, 2012, two OPC employees performed an inspection of Petitioner, in the presence of at least one of its employees, to determine whether the four sprinklers identified in the August survey's SOD were "obstructed." CMS Ex. 5, at 1; CMS Ex. 10 ¶ 7; Tr. at 116, 117.

On August 28, 2012, the OPC inspectors issued a written report of their findings. CMS Ex. 5; CMS Ex. 10 ¶ 9. That report ("OPC report") consists of: (1) a two-page memorandum; (2) a hand-drawn map; and (3) four photographs, which we discuss later in greater detail.[5] CMS Ex. 5.

The OPC report's memorandum states that the inspectors examined four sprinklers located near a nurse's station (and "adjacent to the dining room's corridor") and that the hand-drawn map showed the location of each sprinkler. CMS Ex. 5, at 2; *see also* CMS Ex. 10 ¶ 11. The memorandum then states the following "findings":

> At all four locations, the sprinkler heads were found to be within one foot of the light fixture. At all four locations the sprinkler head deflectors are above the bottom of the fixture. At all four locations, the sprinkler head[ ] deflectors are obstructed by the light fixture.

CMS Ex. 5, at 2. A similar statement appears on the face of the hand-drawn map: "Fire sprinklers 1, 2, 3 and 4 [as labeled and shown on the map] are within 1 foot of the adjacent surface-mounted light fixtures and all 4 deflectors are above the bottom of the fixture. . . ." *Id.* at 3.

During September 2012, Petitioner informed AHCA that it had taken corrective action on August 29, 2012, the day after the OPC report was issued. P. Ex. 9, at 2. In particular, Petitioner reported that it had "replaced" four light fixtures "with smaller and shallower fixtures," with the apparent aim of bringing them above the level of nearby sprinkler deflectors. *Id.*

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[5] The record contains only photocopies of the four photographs.

On October 9, 2012, and before AHCA returned to the facility to verify that Petitioner was back in substantial compliance with the Maximum Distance standard, CMS notified Petitioner that it was imposing a $200 per day CMP effective from June 25, 2012 until Petitioner achieved substantial compliance. CMS Ex. 3, at 3.

On October 17, 2012, AHCA re-surveyed Petitioner and determined that it was back in substantial compliance as of August 29, 2012. CMS Ex. 6. Accordingly CMS rescinded the CMP as of August 29, 2012 and withdrew other enforcement remedies scheduled to take effect in the event of continuing noncompliance. *Id.*

Petitioner requested a hearing to challenge CMS's enforcement action. The parties submitted pre-hearing briefs and evidence. CMS's evidence included the OPC report (which, as noted, includes four photographs) and written direct testimony from two individuals: the AHCA surveyor who conducted the June and August surveys; and one of the OPC employees who performed the August 24, 2012 inspection. Petitioner's evidence included written direct testimony by its owner as well as its own photographs of the sprinklers in question. P. Exs. 2, 11-12. In September 2013, the ALJ conducted a videoconference hearing during which the parties cross-examined each other's witnesses.

Among the topics raised during the September 2013 hearing were the OPC report's four photographs, all of which were taken by the testifying OPC inspector. Each photograph is a roughly eye-level view of a sprinkler head that is located, respectively, above and next to intersecting (horizontal and vertical) measurement scales. CMS Ex. 5, at 4-7. The OPC inspector testified that each photograph shows: (1) the distance between a sprinkler and a nearby light fixture, as shown on the horizontal scale (the distance, in each instance, being less than one foot); and (2) the extent to which the sprinkler's deflector (a round, notched disk) was higher than the bottom of the light fixture, as shown on the vertical scale. CMS Ex. 10 ¶ 12; Tr. at 71-72, 75, 113-14. The inspector further testified that he and his colleague determined those distances by using a yardstick to project a horizontal plane from the bottom of a light fixture to the sprinkler, then using a tape measure to determine whether, and to what extent, the deflector was higher than the projected plane. *See* Tr. at 112-15. The inspector testified that the first photograph (CMS Ex. 5, at 4) in the OPC report shows a sprinkler head whose deflector was approximately 1¼ inches "above the bottom edge" of a light fixture; that the second photograph (*id.* at 5) "shows a different" sprinkler whose deflector was approximately ⅜ of an inch above the bottom edge of a light fixture; that the third photograph (*id.* at 6) shows "another different" sprinkler whose deflector was approximately ¼ of an inch above the bottom edge of a light fixture; and that the fourth photograph (*id.* at 7) shows "another different" sprinkler whose deflector was approximately ⅛ inch above the bottom edge of the light fixture. CMS Ex. 10 ¶ 12.

In its post-hearing brief, Petitioner argued, on various grounds, that CMS had not made a prima facie showing of noncompliance with the Maximum Distance standard. *See* Pet.'s Dec. 6, 2013 Post-Hearing Br. at 1. Petitioner also argued that the OPC report's photographs were unreliable evidence of noncompliance because they were taken at deceptive angles and because the OPC inspector was unable to match each photograph to a location marked on the report's map. *Id.* at 12-13. Petitioner further contended that those photographs were entitled to "no weight" because the OPC inspectors did not comply with a CMS guidance document concerning photographic evidence. *Id.* at 5-12. On the other hand, said Petitioner, its own photographs (Petitioner's Exhibits 11 and 12) demonstrated that the four sprinklers at issue were not, in fact, obstructed. *Id.* at 13. In addition to touting its photographic evidence, Petitioner urged the ALJ to credit the testimony of its owner, who testified that its employees took measurements and determined that "the sprinkler heads were level to or below the surface-mounted lights . . . ." *Id.*; Tr. at 128, 141-42; P. Ex. 2 ¶ 16.

Applying the Maximum Distance standard, as specified in the 1999 edition of the NFPA 13, the ALJ concluded that from June 25 through August 28, 2012, Petitioner was not in substantial compliance with the LSC and with section 483.70(a)(1)(i) because four sprinkler heads "were within one foot of light fixtures and that the bottoms of the sprinkler heads were above the bottoms of the light fixtures." ALJ Decision at 8. The ALJ based that conclusion largely on the "credible and reliable" testimony of CMS's witnesses and on the OPC's report's two-page memorandum and map. *Id.* at 8, 12. The ALJ also assigned varying amounts of weight to the OPC report's photographs. He accorded "some, although not a significant amount of weight" to three photographs that he thought were "blurry" and which did not, in his view, clearly depict "[t]he spatial relationship between the sprinkler head depicted and the nearest light fixture," although he later commented that the OPC inspector's testimony had "clarifie[d]" the "more troublesome aspects" of those photographs. *Id.* at 8-9 (referring to CMS Ex. 5, at 5-7). As for the fourth photograph, the ALJ stated:

> The remaining picture, CMS Ex. 5, at 4, clearly shows what the [OPC inspector] asserts it does, i.e., the yardstick establishing a horizontal plane from the bottom of a light fixture, the distance from the light fixture to the sprinkler head, and the height of one in relation to the other. That photograph is worthy of substantial weight in this decision, and corroborates the investigator's testimony as well as the findings in the investigators' memorandum.

Id. at 8.

On the other hand, the ALJ found that Petitioner's photographs were "less reliable" than CMS's – and worthy of no weight – because they did not show the method used to determine relative positions of the sprinklers and light fixtures. ALJ Decision at 10, 11.

The ALJ also accorded no weight to the testimony of Petitioner's owner on the issue of whether it was in compliance with the Maximum Distance standard. *Id.* at 11. In addition, the ALJ rejected Petitioner's argument that CMS had failed to make a prima facie showing of noncompliance. He held that "once both parties have presented evidence and argument about the cited deficiencies, the analysis of whether CMS has established a prima facie case is not applicable." *Id.* at 11-12 (*citing Hanover Hill Health Care Ctr.*, DAB No. 2507, at 2-3 (2013)). The ALJ then stated that "[e]ven if I considered whether CMS established a prima facie case, I would find that it has done so," noting that Petitioner had "presented credible and reliable testimony from the surveyor and OSC inspector who have first-hand knowledge of the sprinkler heads and light fixtures in Petitioner's facility, a memorandum completed shortly after the OSC inspection, and photographs of the sprinkler heads, all of which confirm that the sprinkler heads and light fixtures were within one foot of each other and the bottom of the sprinkler heads were above the bottom of the light fixtures, even if only slightly so." *Id.* at 12. Finally, the ALJ held that the "duration" and amount of the CMP imposed by CMS were "reasonable." *Id.* at 17-18.

STANDARD OF REVIEW

The Board reviews a disputed finding of fact to determine whether it is supported by substantial evidence on the record as a whole. *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/divisions/appellate/guidelines/prov.html. The Board's standard of review concerning a disputed conclusion of law is whether the conclusion is erroneous. *Id.*

Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Under the substantial evidence standard, the Board does not re-weigh the evidence or overturn an ALJ's "choice between two fairly conflicting views" of the evidence; instead, the Board determines whether the contested finding could have been made by a reasonable fact-finder "tak[ing] into account whatever in the record fairly detracts from [the] weight" of the evidence that the ALJ relied upon. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *see also Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 377 (1998); *Golden Living Ctr. — Frankfort*, DAB No. 2296, at 9-10 (2009), *aff'd*, *Golden Living Ctr. – Frankfort v. Sec'y of Health & Human Servs.*, 656 F.3d 421 (6th Cir. 2011).

DISCUSSION

A. *The ALJ properly characterized, as immaterial, CMS's failure to cite or produce copies of relevant provisions from applicable editions of the NFPA 101 and NFPA 13.*

Petitioner contends that the ALJ Decision must be reversed because CMS did not meet its "burden of proof."[6] RR at 10-12. CMS did not meet its burden, Petitioner says, because it failed to cite or submit, either before or during the September 2013 hearing, relevant sections in the applicable NFPA codes. *See* RR at 12.

Although the applicable fire safety codes are the 2000 edition of the NFPA 101 and the 1999 edition of the NFPA 13, CMS's pre-hearing submissions (including the written direct testimony of the OPC inspector) cited to *post-2000* editions of those publications. For example, in its March 7, 2013 pre-hearing brief, CMS cited Table 8.6.5.1.2 of the *2007 edition* of the NFPA 13, which, like Table 5-6.5.1.2 from the 1999 edition, requires that a sprinkler's deflector be even with or below the level of an "obstruction" that is less than one foot away. *See* CMS Ex. 7 (containing Table 8.6.5.1.2); CMS Ex. 10 ¶ 10 (citing post-2000 editions of the NFPA 13). In addition, CMS did not submit copies of some pertinent code provisions – most notably Table 5-6.5.1.2 from the 1999 edition of the NFPA 13 – until after the hearing. *See* CMS's Jan. 6, 2014 Reply Br. at 2-3 (and attachments thereto). Petitioner asserts that the "[t]he *time to present controlling law* and supporting testimony was at the time of trial, when the information presented could be subjected to cross-examination (and the Court's inquisition if necessary)," and that "any subsequent attempt to cure [that is, any post-hearing attempt to cite the correct editions of the NFPA codes] must fail." RR at 12.

Petitioner raised the same argument before the ALJ, who rejected it for the following reasons:

> . . . It is certainly important that CMS and the state agency carefully cite to the correct editions of the Life Safety Code [NFPA 101] and NFPA 13 as the carelessness in citing to the wrong editions may mislead a petitioner into defending an entirely different standard than what actually applies. The improper citations here, however, are not a basis to reverse the noncompliance finding because *review of the language and tables in the later editions of the Life Safety Code and NFPA 13 that CMS cited are substantively the same as the earlier editions that apply in this case. . . .*

[6] The ALJ appears to have viewed this argument as a "notice" argument, rather than a burden-of-proof argument, and we concur. Based on the admission of Petitioner's owner that he was aware of why the deficiency was cited and the ALJ's finding (discussed below) that there was no substantive difference in the Maximum Distance standard between code editions, we find no colorable basis for finding inadequate notice.

> Therefore, Petitioner was *on notice of* the relevant facts and the *correct legal standard* that CMS applied when making its noncompliance determination. . . . Petitioner has had *ample opportunity to defend itself using the correct legal standards* and, as a result, *incurred no prejudice* from CMS's citation to later, but substantively same editions of the Life Safety Code and NFPA 13. Regardless of the Life Safety Code and NFPA 13 editions that CMS cited, Petitioner should have known the correct edition that applied because long-term care facilities participating in the Medicare program are "presumed to be on notice of program requirements through the applicable regulations." . . .

ALJ Decision at 14 (italics added, citations omitted).

We find the ALJ's analysis thorough and persuasive and note that Petitioner does not mention – much less challenge – it on appeal. In particular, Petitioner does not dispute the ALJ's finding that both the applicable and later editions of the NFPA 101 and NFPA 13 required it to comply with the same Maximum Distance standard. Nor does Petitioner dispute the ALJ's findings (1) that it was actually on notice of the "correct legal standard that CMS applied when making its noncompliance determination,"[7] (2) that it "had ample opportunity to defend itself using the correct legal standards," and (3) that it "incurred no prejudice from CMS's citation to later, but substantively same editions of the Life Safety Code and NFPA 13." Furthermore, although CMS's pre-hearing submissions did not cite to the applicable editions of the NFPA 101 and NFPA 13, those submissions accurately communicated the *substance* of the controlling fire prevention standard. *See, e.g.*, CMS Ex. 10 ¶¶ 10-12 (testimony that four sprinklers were "deficient" because their deflectors were above the bottom of light fixtures that were less than one foot away). Petitioner emphasizes that the ALJ "expressed confusion" at the hearing about which editions of the NFPA 101 and NFPA 13 were applicable. *See* RR at 10-11. However, the ALJ's careful analysis shows that any confusion he may have expressed during the hearing no longer existed at the time of his decision. For these reasons, we reject Petitioner's contention that CMS failed to meet its burden of identifying the "controlling law" prior to the September 2013 hearing.

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[7] Petitioner's pre-hearing awareness of the substance of the applicable fire prevention standard is evidenced by statements in its pre-hearing brief. *See* Crossbreeze Care Center's April 2, 2013 Pre-Hearing Br. ¶¶ 25-28.

B. *Petitioner has identified no compelling reason to overturn the ALJ's findings concerning CMS's photographic evidence.*

Petitioner contends that the ALJ erred in according weight to the four photographs included in the OPC report. RR at 5-6, 10. Petitioner asserts that the photographs deserved *no* weight because they were not taken, handled, or used in a manner that complied with CMS Survey & Certification Letter 06-33 (Sept. 29, 2006), titled "Some Basic Principles of Using Photography During the Survey" (S&C Letter).[8] RR at 5-6. Petitioner further contends that the S&C Letter's procedures and instructions are legally binding on CMS and state survey agencies and that because "CMS failed in every regard to comply with its own guidance document" (referring to the S&C Letter), the ALJ "erred when it disregarded" that document and accorded weight to CMS's photographic evidence. RR at 5-6, 10.

This argument's premise – that the S&C Letter imposes legally binding rules – is erroneous. The Board has held consistently that CMS manuals, instructions, or policy "guidance" do not have the force of law. *See, e.g., Agape Rehab. of Rock Hill*, DAB No. 2411, at 19 (2011) (holding that Appendix Q to CMS's State Operations Manual, while "instructive" on the issue of immediate jeopardy, "is not controlling authority"); *Foxwood Springs Living Ctr.*, DAB No. 2294, at 9 (2009) ("While the [State Operations Manual (SOM)] may reflect CMS's interpretations of the applicable statutes and regulations, the SOM provisions are not substantive rules themselves."); *Cedar Lake Nursing Home*, DAB No. 2344, at 6 (2010) ("The Board has repeatedly explained that while [CMS's State Operations Manual] may provide useful guidance as to CMS's interpretations of applicable law, the SOM itself does not have the force of law."). We see no reason why the S&C Letter should be treated differently. The letter states that "CMS wish[es] to share[s] some basic *principles* that [state survey agencies] can use to incorporate photographic evidence into their survey process" (italics added). Nothing in that sentence indicates that CMS intended those "principles" to be anything more than recommendations or non-binding guidance. The next sentence is similarly devoid of prescriptive language, stating that the principles discussed in the letter are a "tool" that "may be used at a State's discretion" because photographs are "optional."

Regardless of whether the S&C Letter announces legally binding rules, Petitioner's argument is unconvincing. To begin, it is misleading to say, as Petitioner does, that the ALJ "disregarded" the S&C Letter. In fact, the ALJ considered that document but found that it did not limit his authority to assign appropriate weight to CMS's photographic evidence. *See* ALJ Decision at 10. The ALJ was correct. Assigning weight to evidence

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[8] The S&C Letter is available on CMS's website at http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/SCLetter06-33.pdf.

is an "essential function of the ALJ as factfinder" and is a matter largely within the ALJ's sound discretion. *Golden Living Ctr. – Frankfort* at 7; *see also Beechwood Sanitarium*, DAB No. 1906 (2004) (holding that it was "within [the ALJ's] discretion to give greater weight or credence" to a witness's version of events); *Royal Manor*, DAB No. 1990 (2005) (stating that an administrative law judge's "role as the finder of fact [is] to determine which testimony he believe[s], what weight to give the various items of evidence, and which permissible inferences to draw"). Nothing in the S&C Letter purports to limit or guide an administrative law judge's fact-finding discretion. The S&C Letter simply provides guidance to surveyors concerning the acquisition and use of photographic evidence during the "survey process." S&C Letter at 1 (stating that it "shares some basic principles that [state survey agencies] can use to incorporate photographic evidence into their survey process").

The ALJ's disposition of this issue is correct for at least one other reason: alleged shortcomings or improprieties in the survey and enforcement process are generally irrelevant in this type of proceeding. *See Del Rosa Villa*, DAB No. 2458, at 20 (2012), *aff'd, Del Rosa Villa v. Sebelius*, 546 Fed. App'x 666 (2013); *Northlake Nursing & Rehab. Ctr.*, DAB No. 2376, at 10-11 (2011); *Yakima Valley School*, DAB No. 2422, at 15 n. 9 (2011). The chief issue before the ALJ was whether Petitioner was in substantial compliance during the period for which CMS imposed an enforcement remedy. *See* 42 C.F.R. § 498.3(b)(13) (identifying, as an appealable "initial determination," the "finding of noncompliance leading to the imposition" of a remedy specified in 42 C.F.R. § 488.406). The resolution of that issue, we have often said, "hangs on the ALJ's de novo review of the evidence" submitted by the parties concerning that determination, and "not on the conduct (by CMS or the state) of the survey and enforcement process." *Del Rosa Villa,* DAB No. 2458, at 20 (internal quotation omitted); *see also Beechwood Sanitarium* (declining to address a facility's complaint concerning the conduct of a survey, stating that the "appeals process is not intended to review the conduct of the survey but rather to evaluate the evidence of compliance regardless of the procedures by which the evidence was collected"). Given the ALJ's authority as fact-finder and obligation to make a de novo determination concerning Petitioner's compliance status, the appropriate question concerning the photographs is not whether the S&C Letter's protocols were followed, but whether the ALJ sufficiently articulated his reasons for assigning weight to the photographs. *Cf. Michael D. Dinkel*, DAB No. 2445, at 12 (2012) ("We will not disturb the ALJ's assignment of weight to conflicting evidence where it is reasonably explained."); *Woodland Oaks Healthcare Facility*, DAB No. 2355, at 12 (2010) (holding that the administrative law judge "properly exercised" her fact-finding authority by "giving several valid reasons for assigning no weight" to certain evidence).

In deciding what, if any, weight to give the photographs, the ALJ evaluated them, not in isolation, but in light of CMS's other evidence, especially the OPC inspector's testimony. As noted in the background, the OPC inspector testified that he took the photographs during the August 24, 2012 inspection; that each photograph depicts a sprinkler that was less than one foot from a surface-mounted light fixture and whose deflector was above the bottom edge of the fixture; and that this spatial relationship is evidenced in each photograph by the intersecting measurement scales that are arrayed against the sprinkler. *See* CMS Ex. 10 ¶ 12; Tr. at 82, 113-14, 115. The OPC inspector also testified that he and his colleague created the intersecting scales shown in the photographs by projecting a horizontal plane from the bottom of the light fixture to the sprinkler and then using a tape measure to measure the distance between that plane and the bottom of the sprinkler's deflector. Tr. at 113-14. While admitting that he did not make written notes of his measurements, the inspector testified that he did his best to document the measurements with photographs, stating that the "four photographs [in the OPC report] show the actual dimensions." Tr. at 82-84, 113.

The ALJ expressly credited this testimony concerning the "spatial relationship of the sprinkler head and light fixtures," emphasizing that the OPC inspector, a licensed architect, had "substantial experience in reviewing and identifying problems with sprinkler systems." ALJ Decision at 8. The ALJ also found that the inspector's testimony was sufficient to authenticate the photographs and invested them with some probative value, noting that one photograph "clearly corroborated" the inspector's testimony and that "troublesome aspects" of three other photographs were "clarifie[d]" by the inspector's testimony. *See id.* at 8-9, 12. In addition, the ALJ observed that Petitioner had not argued, "let alone demonstrated," that the photographs were "tampered with or depicted something other than what the OPC inspector (the photographer) said." *Id.* at 10.

Nowhere in its request for review does Petitioner mention this analysis, much less dispute its validity. For example, Petitioner does not challenge the ALJ's finding that the OPC inspector's testimony was adequate to authenticate the photographs. Nor does Petitioner argue that it was unreasonable to accord the photographs weight based on (1) testimony by the OPC inspector about how he and his colleague obtained the measurements depicted in the photographs, (2) the ALJ's positive assessment of the OPC inspector's credibility, and (3) the absence of any allegation that the photographs were not what they purported to be – namely, a depiction and visual record of the measurements taken on August 24, 2012 to verify that Petitioner's sprinklers were obstructed (as defined in the

NFPA 13).[9] In addition, Petitioner does not point to evidence that the measurements depicted in the photographs were the product of unsound techniques or that the photographs materially misrepresented the spatial relationships of the sprinklers and light fixtures; indeed, it appears that Petitioner has abandoned its claim (raised in its post-hearing brief) that the photographs were taken at deceptive angles. We note one other telling circumstance not mentioned by the ALJ: the fact that a *facility employee with a camera* was present during the August 24, 2012 inspection. *See* Tr. at 116-17. Had the OPC inspectors used deceptive or unreliable methods to measure and photograph the relevant spatial relationships, then that employee was presumably in a position to have observed and documented those methods. However, Petitioner did not produce that employee as a witness, a circumstance that, in our view, lends additional credibility to the photographs.

It is true, as Petitioner alleges, that the testifying OPC inspector was unable to match each photograph to a location marked on the OPC report's hand-drawn map. Tr. at 74-75. But the inspector testified (contrary to Petitioner's assertion) that each photograph shows a *different* sprinkler whose spatial relationship to a light fixture was assessed on August 24, 2014. CMS Ex. 10 ¶ 12. The inspector also confirmed that each photograph corresponded to *only one* of the sprinkler locations marked on the map. Tr. at 74-75. A fact-finder could reasonably infer from that testimony that the photographs depict all four of the sprinklers whose positioning was found to violate the Maximum Distance Standard during the August 24, 2012 inspection. Moreover, Petitioner has not explained why the OPC inspector's inability to match each photograph with a specific location on the map materially detracts from the ALJ's ultimate finding that "[s]urface-mounted light fixtures illegally obstructed *four sprinkler heads*" in Petitioner's facility. ALJ Decision at 7 (italics added).

Absent a compelling reason to do otherwise, the Board defers to an administrative law judge's finding about the proper weight to assign evidence. *See, e.g., Woodland Oaks Healthcare Facility* at 7 (stating that "[i]n general, the Board defers to an administrative law judge's findings on weight and credibility of witness testimony unless there are compelling reasons not to do so" (internal quotation marks omitted)). As we have explained, Petitioner has offered no compelling reason to reject the ALJ's rationale for assigning weight to CMS's photographic evidence. We therefore affirm the ALJ's findings regarding that evidence.

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[9] Consistent with the S&C letter's advice, see S&C Letter at 2, CMS did not rely solely on the photographs to support its noncompliance determination. The photographs did not replace but merely supplemented the OPC inspectors' written finding and were used as a tool to provide an accurate record of the inspectors' observations and measurements, a use of photographic evidence that is permissible under the S&C Letter. *See* CMS Ex. 5; Tr. at 72, 84, 113; S&C Letter at 1 (stating that a surveyor "may use photography as a tool, supplementing written documentation, to assure accurate and effective records of observations made during surveys with the intent to produce photographs that are relevant to possible deficiencies").

C. *The ALJ committed no error in sustaining the CMP imposed by CMS.*

Petitioner's final argument concerns the duration of the CMP imposed for its noncompliance with 42 C.F.R. § 483.70(a)(1)(i). (We summarily affirm the ALJ's conclusion that the CMP amount was reasonable because Petitioner does not challenge it.)

The CMP accrued from June 25, 2012 (the first day of the June survey) through August 28, 2012 (the day before Petitioner replaced the obstructing light fixtures). The ALJ found the duration of the CMP to be "reasonable." ALJ Decision at 18. Petitioner now contends that the CMP should have accrued for only one day. *See* RR at 13-16. In support of that contention, Petitioner asserts that, during the June and August surveys, AHCA's surveyor did not take measurements to verify that its sprinklers were obstructed. RR at 13, 14. Petitioner contends that without actual measurements of the relative positions of the sprinklers and nearby light fixtures, AHCA could not have made a valid "determination" of noncompliance based on those two surveys. RR at 14. Petitioner submits that a determination of noncompliance did not occur until the OPC inspectors took measurements on August 24, 2012, and that it did not receive notice of that noncompliance determination until it received the OPC report on August 28, 2012. RR at 15. In light of these circumstances, says Petitioner, August 28, 2012 is the only day for which the CMP may be imposed. *Id.*

In the course of its argument, Petitioner cites a pertinent regulation – 42 C.F.R. § 488.440(a)(1), which states that "[t]he per day civil money penalty may start accruing as early as the date that the facility was first out of compliance, as determined by CMS or the State." Another pertinent regulation is 42 C.F.R. § 488.454, which governs the duration of CMPs and other "alternative remedies." That regulation states that a remedy imposed on a noncompliant facility "continue[s] until . . . [t]he facility has achieved substantial compliance, as determined by CMS or the State based upon a revisit or after an examination of credible written evidence that it can verify without an on-site visit" or until the facility is terminated. 42 C.F.R. § 488.454(a); *see also id.* § 488.430(a) (authorizing CMS to impose a CMP for "the number of days a facility is not in substantial compliance with one or more participation requirements. . . .").

Petitioner's apparent view is that a per-day CMP may start accruing no earlier than either (1) the date on which CMS or the state survey agency makes a determination of noncompliance or (2) the date the nursing facility receives a notice of noncompliance from either of those agencies. However, the regulations we just quoted impose no such limitations. Instead, they clearly authorize a per-day CMP that starts accruing on the date that CMS or the state survey agency determines the facility "<u>was first out of compliance</u>." 42 C.F.R. § 488.440(a)(1). Here, AHCA (the state survey agency) and CMS determined that Petitioner was first out of compliance with 42 C.F.R. § 483.70(a)(1)(i) on June 25, 2012, the day that the June survey commenced. *See* CMS Ex. 1, at 5 (containing the

Statement of Deficiencies which reports that Petitioner was noncompliant with the 2000 edition of the LSC during the June survey); CMS Ex. 3, at 3 (CMS's concurrence that Petitioner was not in substantial compliance with Medicare participation requirements based on the results of the June and August surveys). Substantial evidence, including the OPC report and associated testimony, demonstrates that Petitioner *in fact* was not in substantial compliance with 42 C.F.R. § 483.70(a)(1)(i) on June 25, 2012. Furthermore, Petitioner did not take sufficient – or, for that matter, any – action to remove the noncompliance until August 29, 2012. The ALJ therefore committed no error in concluding that CMS had properly imposed a per-day CMP from June 25 through August 28, 2012. *See Life Care Ctr. of Tullahoma*, DAB No. 2304, at 59-60 (2010) (rejecting the argument that a CMP may be imposed only for dates after CMS or the state survey agency notifies the facility of noncompliance), *aff'd, Life Care Ctr. of Tullahoma v. Sec'y of U.S. Dep't of Health & Human Servs.*, 453 F. App'x 610 (6th Cir. 2011); *Bergen Regional Med. Ctr.*, DAB No. 1832 (2002) (holding that CMS was authorized to impose a per-day CMP that started accruing prior to the survey and "regardless of the date [the facility] received notice of the imposition of the CMP"); *The Residence at Salem Woods,* DAB No. 2052, at 13 (2006) (holding that CMS had the "discretion and authority" to start a CMP accruing on the date the facility was first out of substantial compliance).

Petitioner suggests that it was unfair to make the CMP start accruing on June 25, 2012 because it could not reasonably have been expected to know on that date how to come back into substantial compliance given the state survey agency's failure to take measurements. *See* RR at 13. This alleged unfairness is not a ground upon which the Board is permitted to shorten the CMP's duration. Having validly determined that Petitioner was not in substantial compliance as early as June 25, 2012, CMS had legal authority – and discretion – under section 488.454(a) to impose a per-day CMP that took effect on that date. *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 22 (2010) (holding that "it was within CMS's discretion to elect the date on which the survey began as the starting date of the CMP period"), *aff'd, Senior Rehab. & Skilled Nursing Ctr. v. HHS*, 405 F. App'x 820 (5th Cir. 2010).

In any event, we see no unfairness in CMS's decision to make the CMP take effect on June 25, 2012 in part because skilled nursing facilities are expected to be in substantial compliance with Medicare participation requirements at all times. *See Life Care Ctr. at Tullahoma*, DAB No. 2304, at 60 (*citing* 42 C.F.R. §§ 488.3(a)(i) and 488.20, which require periodic surveys to verify a nursing facility's continued compliance); *Mountain View Manor*, DAB No. 1913 (2004) (discussing the legislative purpose in authorizing civil money penalties). Furthermore, Petitioner had a reasonable opportunity to forestall enforcement action or minimize the accrual of any financial penalty by *promptly* seeking clarification of the applicable LSC rules, performing its own measurements, then taking necessary corrective action. Petitioner did not fully seize that opportunity. After the initial (June) survey, Petitioner assumed a defensive posture rather than attempting to take the steps needed to return to substantial compliance.

CONCLUSION

For the reasons discussed above, we affirm the ALJ's conclusions that Petitioner was not in substantial compliance with 42 C.F.R. § 483.70(a)(1)(i) from June 25 through August 28, 2012 and that CMS's remedy for that noncompliance was lawful.

/s/
Constance B. Tobias

/s/
Stephen M. Godek

/s/
Sheila Ann Hegy
Presiding Board Member