Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Littlefield Hospitality
Docket No. A-16-106
Decision No. 2756
December 27, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

We affirm the Administrative Law Judge's decision sustaining the imposition of $44,250 in civil money penalties (CMPs) and a denial of payment for new Medicare admissions on Petitioner Littlefield Hospitality (Littlefield), a Texas nursing facility, for noncompliance with Medicare regulations. *Littlefield Hospitality*, DAB CR4598 (2016) (ALJ Decision). The Centers for Medicare & Medicaid Services (CMS) imposed those remedies in response to incidents in which mentally and physically compromised residents repeatedly left the facility unsupervised and were exposed to danger and injury. The ALJ sustained CMPs of $6,050 per day for the period of immediate-jeopardy level noncompliance from July 30 through August 4, 2015, and of $150 per day for the period of noncompliance that did not pose immediate jeopardy from August 5 through September 26, 2015, for a total of $44,250.

Littlefield does not appeal the ALJ's determinations that Littlefield was noncompliant with the regulations in its care of the residents and that the noncompliance posed immediate jeopardy for part of the noncompliance period. Nor does Littlefield dispute the duration of its noncompliance – July 30, 2015 through September 26, 2015.[1] In its Request for Review, Littlefield argues only that the total amount of the CMPs is not reasonable, asserting that it "simply does not have any resources to cover this additional expense, without a palpable impact on resident care." Request for Review (RR) at 6; *see also* RR at 8 ("Littlefield Hospitality is faced with an impossible choice: do the best it can under the financial circumstances, or close the facility and displace dozens of residents . . . .").[2]

[1] Noncompliance was at the immediate jeopardy level from July 30 through August 4, 2015, and at a level that was less than immediate jeopardy from August 5 through September 26, 2015.

[2] After CMS responded to the Request for Review, Littlefield attempted to interject an issue it had not raised in its Request for Review or before the ALJ – whether the on-site survey was invalid because the surveyor who conducted it was not a registered nurse. It did so by filing a Request for Admission of Additional Evidence. Later in our decision we address this attempt and our reasons for rejecting it.

For the reasons explained below, we affirm the ALJ Decision and deny Littlefield's request to submit additional evidence.

Legal background

CMS may impose remedies on a nursing facility for noncompliance with Medicare participation requirements in 42 C.F.R. Part 483, including "per day" CMPs for each day of noncompliance and a denial of payment for new Medicare admissions (DPNA) during the period of noncompliance. 42 C.F.R. §§ 488.406, 488.417, 488.430(a). A per-day CMP may accrue from the date the facility was first out of substantial compliance until the date it is determined to have achieved substantial compliance. *Id.* § 488.440(a)(1), (b). For deficiencies determined to pose immediate jeopardy, defined as "a situation in which the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident," CMS may impose per-day CMPs ranging from $3,050-$10,000 per day. *Id.* §§ 488.301, 488.408(e)(2)(iii). For noncompliance at less than the immediate jeopardy level, CMS may impose per-day CMPs ranging from $50-$3,000 per day. *Id.* § 488.408(d)(1)(iii). CMS in determining the amount of any CMP "must take into account" factors the regulations specify. These include the "facility's financial condition," the "seriousness of the deficiencies," the "facility's degree of culpability," and the "facility's history of noncompliance." 42 C.F.R. §§ 488.438(f), 488.404(b), (c).

Case background and ALJ Decision[3]

1. General background and the ALJ Decision findings on noncompliance

This case involves Littlefield's undisputed failure to take appropriate measures to protect three residents (identified as Residents 1, 2, and 4) who had "serious mental and physical problems" including "dementia, schizophrenia, and substance abuse problems" from being "allowed to wander off-premises, unaccounted for and sometimes for days, exposing them to a myriad of risks and hazards" including actual injury. ALJ Decision at 3, 5.

As a result of a complaint survey of Littlefield's facility by the state survey agency on August 4, 2015, CMS found Littlefield not in substantial compliance with requirements that Medicare nursing facilities "develop and implement written policies and procedures that prohibit mistreatment [and] neglect" of residents (42 C.F.R. § 483.13(c)); "ensure that . . . [e]ach resident receives adequate supervision and assistance devices to prevent

[3] This background is based on facts from the ALJ Decision and the record that are undisputed. We make no new findings of fact.

accidents" and "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 (§ 483.75).[4, 5]

The ALJ found, and Littlefield does not dispute, that the record was "replete with evidence of instances in which these three residents left the facility unsupervised and were exposed to great risk of harm." ALJ Decision at 5. Residents "were found wandering miles from Petitioner's premises days after they'd disappeared from the facility"; one resident "suffered an injury during the course of his wandering that required hospital care" and "[r]esidents with substance abuse problems were allowed to go into an environment where unlawful drugs were available and to obtain them . . . and were using their trips away from the facility to obtain drugs and alcohol." *Id*. Indeed, "[re]sidents returned to Petitioner's facility under the influence of alcohol and illegal controlled substances and, on at least one occasion, a resident returned to Petitioner's facility with an illegal controlled substance and offered to share it with other residents." *Id*.

The ALJ rejected Littlefield's "sole defense" that it could not lawfully interfere with the residents' "right to leave the facility as they pleased" because he found that Littlefield made no showing that it ever assessed or planned for the risks that its compromised residents might encounter when leaving the facility unescorted; i.e., that Littlefield "made no showing that it actually attempted to protect its residents from the likely effects of their wandering off premises." *Id*. at 5. Littlefield does not dispute these findings.

The ALJ sustained CMS's determination that Littlefield was not in substantial compliance with the three regulations and that the noncompliance "was certainly so egregious as to comprise immediate jeopardy for its residents," as the "likelihood of serious injury, harm, or death to these residents was overwhelming" with one resident sustaining physical injury. ALJ Decision at 2. The ALJ also found that Littlefield did not dispute the duration of its noncompliance, either at the immediate jeopardy level or at

[4] In October 2016 the requirements for long term care facilities in subpart B of Part 483 were revised and redesignated effective November 28, 2016. 81 Fed. Reg. 68,688, 68,848 (Oct. 4, 2016). We cite to the prior provisions, which are the provisions applicable in this case.

[5] CMS also determined based on a second survey on September 2, 2015 that Littlefield was not in substantial compliance, at a level that did not pose immediate jeopardy, with the requirement at section 453.25(m)(2) that nursing facilities "must ensure that . . . "[r]esidents are free of any significant medication errors." CMS Ex. 1, at 6; CMS Ex. 45, at 3. The ALJ found that Littlefield "did not challenge these findings [of the September 2 survey] and they are administratively final." ALJ Decision at 1 n.1. Littlefield does not challenge that finding. CMS states on appeal that based on the deficiency findings from that survey, CMS "continued its imposition of a relatively low $150 per-day CMP from September 2 through September 26, 2015." CMS Resp. at 7.

the non-immediate jeopardy level, and "that Petitioner's immediate jeopardy level noncompliance extended from July 30 through August 4, 2015 and that its non-immediate jeopardy level noncompliance extended from August 5 through September 26, 2015." *Id*. at 5, 7.

Littlefield has not appealed these findings by the ALJ.

2. The ALJ Decision findings sustaining the CMPs

In addition to upholding CMS's findings of noncompliance, the ALJ sustained the remedies CMS imposed, concluding that the "egregious" nature of Littlefield's noncompliance "strongly supports" the CMP amounts and rejecting Littlefield's contention that its financial condition was so precarious as to render the CMPs unreasonable. On appeal, Littlefield challenges only the ALJ's rejection of the latter argument.

Before the ALJ, Littlefield relied on the declaration of one of the three "members" of the company that operates Littlefield, and documents described as a three-page balance sheet as of December 31, 2015, a three-page profit/loss statement for 2015, and a "summary balance sheet" as of February 29, 2016. P. Br. at 11-13; P. Ex. 1, at 1. Littlefield described the declarant as "a part owner of Petitioner's facility," and we refer to her as an owner, as did the ALJ and CMS. P. Pre-Hearing Br. at 12. The owner stated that the "key numbers" from those documents are:

(a) Total Cash in Bank on December 31, 2015 (-631,071.54) – Balance Sheet;
(b) Total Assets -1,810,598.78 on December 31, 2015 – Balance Sheet;
(c) Gross Profit through December 31, 2015 of $l,589.77 and Net Income of -$1,802,129.55 – Profit/Loss Sheet;
(d) Total assets of -$2,308,161.21 as of February 29, 2016 – Summary Balance.

P. Ex. 1, at 1-2; P. Br. at 12. The owner stated that "[t]hese numbers mean that while Littlefield Hospitality continues to meet financial obligations to staff and vendors, there are no assets available beyond what is needed to meet the needs of residents" and that as of the date of her testimony in March 2016, Littlefield "cannot pay the civil money penalty as imposed and continue to meet its obligations to residents, staff and vendors." P. Ex. 1, at 2. The owner also cited "factors [that] affected us in 2015 and now," including the facility having "required a new water heater and a replacement parking lot," and reduced income due to "very slow Medicaid reimbursements" by "the new Texas Medicaid managed care program," a low resident census, and "several residents who had applied for Medicaid but were non-paying pending approval." *Id*.

The ALJ found Littlefield's evidence regarding its ability to pay the CMPs not "persuasive proof that it would be an unreasonable hardship on Petitioner if it were compelled to pay the penalties imposed by CMS." ALJ Decision at 7. The ALJ described the balance sheet as showing that as of December 31, 2015, Littlefield "had net income of just over $1.8 million" and "expenses of roughly the same amount as its income." *Id.* at 8, citing P. Ex. 1, at 4-5. The ALJ rejected Littlefield's argument that its "operating margin is so thin that it could not be expected to pay the [CMPs] without jeopardizing its ability to continue to function," concluding that "while the facility's income and expenses may be in almost perfect balance, that does not mean that Petitioner lacks the wherewithal to pay" the CMPs. *Id*. The ALJ found that Littlefield's evidence "shows that, in fact, Petitioner has substantial reserves and assets from which it could pay the penalties" including "cash in its checking and savings accounts in excess of $900,000" at the end of 2015 and "other, unspecified assets of more than $2.3 million." *Id*. The ALJ thus concluded that Littlefield "has reserves that are more than sufficient for it to pay the penalties" and also found that "Petitioner has not offered any evidence concerning its creditworthiness." *Id*.

Analysis

1. *The ALJ did not err in concluding that the seriousness of Littlefield's noncompliance "strongly supports both the $6050 daily immediate jeopardy level penalties and the $150 daily non-immediate jeopardy level penalties." ALJ Decision at 7.*

The regulations direct CMS, in setting CMP amounts, to take into account the "seriousness" of deficiencies and in doing so to consider what the Board has called their "scope and severity . . . i.e., whether a deficiency has created a 'potential for' harm, resulted in '[a]ctual harm, or placed residents in 'immediate jeopardy,' and whether a deficiency is 'isolated,' constitutes a 'pattern,' or is 'widespread.'" *Rutland Nursing Home*, DAB No. 2582, at 1 (2014), citing 42 C.F.R. § 488.404.

The ALJ found that the seriousness of the deficiencies was "egregious" and "strongly supports both the $6,050 daily immediate jeopardy level penalties and the $150 daily non-immediate jeopardy level penalties." ALJ Decision at 7. The undisputed details of the noncompliance that the ALJ discussed amply support those conclusions.

Resident 1 "could not walk safely unsupervised" and "had been adjudicated as mentally incapacitated" with diagnoses including dementia with behavior disturbances, alcohol-induced amnestic disorder, psychosis, antisocial personality disorder, and signs and symptoms of delirium. ALJ Decision at 6, 3, citing CMS Ex. 2, at 3; CMS Ex. 7, at 1; CMS Ex. 8, at 21, 31; CMS Ex. 12, at 12-13; CMS Ex. 14, at 16; and CMS Ex. 16, at 1. In 2014, he wandered away from Littlefield's facility and was found two weeks later

almost 80 miles away. *Id*. at 4, citing CMS Ex. 6 at 8; and CMS Ex. 13, at 2. On July 30, 2015, he left the facility without signing out; sometime later someone phoned the facility and told staff that the resident was at a store and appeared confused. *Id*. at 3. A nursing assistant went to the store to retrieve the resident but the resident refused to return and the nursing assistant returned to the facility without the resident. *Id*.; CMS Ex. 6, at 1. The facility then called the police but by the time they arrived at the store the resident had left. ALJ Decision at 3-4, citing CMS Ex. 6, at 1; and CMS Ex. 9, at 1. He spent that night away from the facility, his whereabouts unknown, and was found the next day in a store located in a town 23 miles away the facility. *Id*. at 4, citing CMS Ex. 9, at 20.

Resident 2 needed 24-hour supervision and his diagnoses included schizophrenia and drug and alcohol abuse. *Id*. at 3, citing CMS Ex. 2, at 2, 11, 48; and CMS Ex. 24, at 1. Littlefield asked police to look for him "[o]n multiple occasions," and his absences from the facility often involved alcohol and drugs, which staff often found in his possession upon his return. He was once found "passed out in the community" and, on one occasion, another resident reported being offered methamphetamine by Resident 2. *Id*. at 4, citing CMS Ex. 2 at 34; CMS Ex. 9, at 14-15; CMS Ex. 17, at 1; CMS Ex. 18, at 11-15; and CMS Ex. 25, at 1. On one occasion, July 30, 2015, Resident 2 was discovered away from the facility by the same police who were unsuccessfully searching for Resident 1. *Id*. citing CMS Ex. 6, at 1.

Resident 4's traumatic brain injury caused him to be forgetful, have short-term memory problems and make bad decisions; he was at high risk for falls and fell multiple times at Littlefield. *Id*. at 3, 4, citing CMS Ex. 2, at 18; CMS Ex. 27, at 1, 3, 5, 6, 8; and CMS Ex. 30, at 1. He "frequently left the facility unescorted" and "Petitioner's staff would search for the resident in town or ask the police to search for him." *Id*. at 4, citing CMS Ex. 27, at 19, 20; and CMS Ex. 31, at 19, 25. On one such occasion, July 6, 2015, the employee of a store found the resident injured, bleeding and yelling, in the rain, in an alley behind the store. *Id.*, citing CMS Ex. 2, at 20-21; and CMS Ex. 35, at 2. Store employees told a state agency surveyor they had often seen Resident 4 asking customers for money, alcohol, or a ride to another town and that Littlefield more than once had not responded to calls to assist the resident. *Id*.

The ALJ found this record "replete with evidence of instances in which these three residents left the facility unsupervised and were exposed to great risk of harm." *Id*. at 3. "Residents with serious mental and physical problems," he found, "were allowed to wander off-premises, unaccounted for and sometimes for days, exposing them to a myriad of risks and hazards," and residents with substance abuse problems "were allowed to go into an environment where unlawful drugs were available and to obtain them." *Id*. at 5.

As noted above, the ALJ rejected Littlefield's "sole defense" that it could not lawfully interfere with the residents' "right to leave the facility as they pleased" because he found that Littlefield "made no showing that it actually attempted to protect its residents from the likely effects of their wandering off premises." *Id*. at 5. Specifically, the ALJ found that Littlefield–

- did not deny that it "failed to assess the risks and possible harm that the residents might experience if away unsupervised" and "failed to assess or plan for the residents' protection in spite of the obvious risks to these residents of being alone off-premises,"

- "made no plans to deal with the possibility that these residents might leave the facility" and "failed to develop interventions to protect its residents when they were not on the facility's premises," and never "developed interventions to protect [Residents 1, 2 and 4] when they were away" from the facility,"

- "made no meaningful efforts to trace these residents or retrieve them," and,

- "simply ignored its own assessments of the residents' conditions and problems," permitting Resident 2 to "wander away from the facility at will" despite his need for 24-hour supervision, and "ma[king] no attempt to protect Resident 1 when he was away from the facility" despite having determined that the resident "could not walk safely unsupervised."

Id. at 3, 5, 6. The ALJ also pointed out, in rejecting Littlefield's argument that it could not legally prevent the residents from leaving, that Resident 1's impairments "were so severe that he was adjudicated mentally incapacitated and a guardian was appointed to make decisions on his behalf" meaning he "no longer had the legal right to decide on his own that he could wander from the facility." *Id*. at 6, 3, citing CMS Ex. 16, at 1.

Littlefield on appeal does not dispute the ALJ's findings that it neither assessed the risks its residents faced when leaving the facility alone and nor developed *any* interventions to prevent them from coming to harm on their many forays away the facility. Littlefield also does not take issue with any of the ALJ's descriptions of the nature and extent of its noncompliance, or with his conclusions that the noncompliance was at the immediate-jeopardy level for the time period CMS alleged. Nor does Littlefield deny culpability for this serious noncompliance, a factor that while not separately addressed by the ALJ was implicit in his findings regarding the egregiousness of the noncompliance.

This record of profound disregard for the well-being of mentally and physically compromised residents amply justifies the $6,050 per-day CMP for the period of immediate jeopardy, which is only in the middle of the permissible range, as well as the

$150 per-day CMP, which is near the bottom of the permissible range and which, as noted above, CMS imposed at least in part for a deficiency found in the September 2, 2015 survey that Littlefield did not challenge.

2. Littlefield did not meet its burden of showing that its financial condition rendered the CMPs unreasonable.

Littlefield "bears the burden of proving its financial condition by the preponderance of the evidence." *Columbus Nursing & Rehab. Ctr*., DAB No. 2398, at 17 (2011), citing *Western Care Mgt. Corp.*, DAB No. 1921, at 91, *citing* 59 Fed. Reg. 56,116, 56,204 (1994). The Board has accordingly "rejected the argument that CMS had to establish a facility's ability to pay. *See Oceanside Nursing & Rehab. Ctr.*, DAB No. 2382, at 22-23 (2011), citing *Gilman Care Ctr.*, DAB No. 2357, at 7 (2010)." The question before us, moreover, is not whether Littlefield "has serious financial problems but whether it is unable to pay" a $44,250 CMP "without closing or providing inadequate care to its residents." *Gilman Care Ctr.* at 8 n.4.

As the ALJ found Littlefield noncompliant with the regulations, he "was precluded by regulation from reducing the per-day CMPs below $50 for noncompliance less than immediate jeopardy and $3,050 for immediate jeopardy," the minimum per-day amounts the regulations set. *Gilman Care Ctr.* at 6, citing 42 C.F.R. § 488.438(a), (e); and 59 Fed. Reg. at 56,206 (when ALJ "finds noncompliance supporting the imposition of [a CMP], he or she must remedy it with some amount of penalty consistent with the ranges of penalty"). The ALJ found Littlefield noncompliant at the immediate jeopardy level for six days (July 30 through August 4, 2015) and at the less-than-immediate jeopardy level for 53 days (August 5 through September 26, 2015). Littlefield did not appeal those determinations. Therefore, the total CMP amount CMS imposed, $44,250, could not be reduced below $20,950 ($18,300 ($3,050/day x 6 days) + $2,650 ($50/day x 53 days)), even if we were to find (as we do not) that Littlefield had met its burden of proving its claims about its ability to pay the CMPs.

Applying these considerations, we conclude for the reasons discussed below that Littlefield has not shown that the $20,250 difference between the minimum applicable CMP and the total amounts the ALJ sustained would drive it out of business or compromise resident care and thus did not meet its burden of proof on the issue of its financial condition. *See, e.g., Oceanside Nursing & Rehab. Ctr.* at 23 ("Oceanside offered no showing that the difference between the minimum and actual total" CMP amounts "would drive it out of business or compromise resident care."). Additionally, a facility's financial condition "is only one of the factors that must be considered in evaluating the reasonableness of the amount of a CMP." *Gilman Care Ctr*. at 6.

The ALJ would have been justified in giving more weight to the seriousness of the noncompliance, a critical factor here, than to Littlefield's financial condition even if he had agreed with Littlefield's argument about its financial condition. Littlefield has also not alleged any error in the ALJ's evaluation of the seriousness of the noncompliance, and we agree with the ALJ that the noncompliance was "egregious" and "strongly supports both the $6,050 daily immediate jeopardy level penalties and the $150 daily non-immediate jeopardy level penalties." ALJ Decision at 7.

On appeal, Littlefield argues that the ALJ Decision fails to properly consider and draw reasonable inferences from the financial evidence and "references bank balances which are not evident from the evidence presented." RR at 4. Based on the figures Littlefield cites from the financial sheets filed with its owner's declaration, Littlefield apparently alleges that the ALJ Decision mistakes liabilities and negative balances shown on the sheets for assets and positive balances. Specifically, Littlefield cites the sheets as showing net income for 2015 of "$ -1,802,129.55" (versus the ALJ finding of "net income of just over $1.8 million"), total assets of "$ -2,308,161.21" as of February 29, 2016 (versus the ALJ finding of "other, unspecified assets of more than $2.3 million"), and a "Checking/Savings Balance" of "$ -906,638.93" as of February 29, 2016 (versus the ALJ finding of cash in checking and savings accounts "in excess of $900,000" at the end of 2015). RR at 4-5, citing P. Ex. 1, at 3, 8, 9; ALJ Decision at 7-8. Littlefield also asserts that it "owed its venders $0.42 million" as of the end of 2015 and "$0.55 million" as of the end of February 2016, citing its "Summary Balance Sheet" as showing "Accounts Payable" amounts of $421,624.60 as of the end of 2015 and $554,829.83 as of the end of February 2017. RR at 5; P. Ex. 1, 3, at 9.

For the following reasons, we find that Littlefield's financial sheets do not meet its burden to show that it could not pay the CMPs without closing or providing inadequate care to its residents.

- The sheets do not establish Littlefield's claim that the ALJ misstated Littlefield's income for 2015. Instead, the ALJ's finding that Littlefield had "expenses of roughly the same amount as its income" is consistent with the profit/loss sheet for 2015 showing "Gross Profit" of $1,589.77 and "Total Expense" of $1,803,719.32. P. Ex. 1, at 6, 7. Littlefield's assertion apparently rests on the sheets seeming to show a "Net Income" of *negative* $1,802,129.55 for 2015. *Id*. at 4, 5, 8. Littlefield did not address how it could register a *positive* gross profit for 2015 in the face of both that negative net income *and* the "Total Expense" of $1,803,719.32 listed for 2015. *Id*. at 7-8. Additionally, while the profit/loss sheet shows the $1,589.77 in "Gross Profit" as the excess of $2,530.36 in "Total Income" over $940.59 in "Cost of Goods Sold" (*Id*. at 6), it is also the difference between the "Total Expense" for 2015 of $1,803,719.32 (*Id*. at 6) and $1,802,129.55, the purported net income when shown as a positive figure (*Id*. at 4, 5, 8). Thus, the financial sheets are, at best, ambiguous, and Littlefield did not remove that ambiguity.

- Littlefield did not fully explain its report of having substantial *negative* "Checking/Savings" balances, of over $631,000 at the end of 2015, consisting almost entirely of "Cash in Banks – Other," and over $906,000 as of the end of February 2016. P. Ex. 1, at 3; RR at 5. Littlefield states that these figures show that it "over-extended its cash-base by $0.9 million, up from $0.63 million just two months prior." RR at 5. Littlefield does not explain how it could maintain bank checking and savings accounts with substantial deficits and whether, for example, it has actually overdrawn those accounts by the stated amounts or whether these amounts represent loans from those banks.

- Littlefield's claim that it owed vendors $554,829.83 as of the end of February 2016 (with that amount shown as a positive "Accounts Payable" balance on the summary balance sheet) fails to note that, according to that balance sheet, this amount was more than offset by "Other Current Liabilities" of *negative* $568,931.97, yielding "Total Current Liabilities" of *negative* $14,102.14, meaning, it appears, that Littlefield was owed that amount in excess of its claimed obligations to vendors.[6] RR at 5; P. Ex. 1, at 9. Even if the "-14,102.14" figure shown on the balance sheet as "Total Current Liabilities" was meant to represent an amount that Littlefield owed, it is still substantially less than the $554,829.83 in accounts payable that Littlefield selectively cited in its Request for Review.

- As CMS points out, one of Littlefield's financial sheets "indicates that Littlefield paid $100,000 in member draws" for 2015. CMS Resp. at 4, citing P. Ex. 1, at 4 (balance sheet showing, under "Equity," $ -100,388.96 in "Member Draws" as of December 31, 2015). The sheet CMS cited shows this amount offset against $91,891.73 in "Retained Earnings," which indicates that the $ -100,388.96 represents amounts paid out. Littlefield did not file a reply as permitted by the Board's procedures and thus did not dispute CMS's assertion that Littlefield paid over $100,000 to the members in 2015. *See* July 6, 2016 Board letter, *supra*. As CMS also notes, the Board in *Gilman Care Center* held that the facility there, facing CMPs for noncompliance, "may be expected to satisfy its obligations to the federal government before making payments to its owners." *Gilman Care Ctr*. at 8. The Board there observed that "eliminating the liabilities to owners from the balance sheet would appear to mean a sufficient

[6] CMS cites these figures as showing that "Littlefield's accounting uses the negative symbol for things that are actually positive numbers . . . or Littlefield's accounting uses negative and positive indicators inconsistently, rendering its financial statements unable to provide useful information to determine its financial condition" CMS Resp. at 5. Littlefield did not reply to CMS's questions about the figures shown on the financial sheets, even though the Board's scheduling order gave Littlefield the opportunity to file a reply brief. Board letter acknowledging receipt of Request for Review and setting procedures (July 6, 2016).

positive capital balance to more than cover the CMPs without shutting the facility or compromising resident care." *Id.* That principle applies here, where it appears that Littlefield distributed more than enough funds to cover the CMP to the members of the company that owns Littlefield. P. Ex. 1, at 1.

- Although Littlefield's owner, a nurse, submitted a declaration stating that Littlefield's financial sheets are "true and accurate" to her knowledge, the financial sheets are not represented as the product of audits conducted by certified public accountants, or by otherwise qualified auditors, pursuant to generally accepted accounting principles. P. Ex. 1, at 1. The lack of such a standard imprimatur of reliability for financial statements lends weight to our concerns over the ambiguous and questionable aspects of Littlefield's financial sheets that we discuss above.

Additionally, the owner's declaration states that Littlefield's facility is "operated" by a parent company, GFG Management Services, LLC, of which she is one of the three "members." P. Ex. 1, at 1. Citing this statement, CMS describes GFG as an owner of Littlefield, and Littlefield does not dispute this. CMS Resp. at 4. The Board has held that absent evidence of "legal separation between" a facility and its corporate owner, it is the owner's "ability to pay the CMP that is relevant here."[7] *Wisteria Care Ctr.*, DAB No. 1892, at 12 (2003). In *Oceanside Nursing and Rehabilitation Center*, for example, the Board agreed that the facility's "net income loss . . . of more than $282,000" over five months and "an operating loss for the prior two years 'does not tell the entire story'" of the facility's financial condition "because Oceanside 'is one of several interrelated entities with common ownership' and 'gross revenue of . . . about $75 million per year.'" DAB No. 2382, at 23, citing *Oceanside Nursing & Rehab. Ctr.*, DAB CR2269, at 17. The Board further agreed that "ignoring such shared resources could 'be an open invitation for skilled nursing facilities to avoid paying' CMPs by encouraging them 'to contend that they must be treated as isolated facilities regardless of the financial wherewithal of the entity or individual that owns them along with other similar facilities.'" *Id.*

Citing *Oceanside*, the Board has also held that even if a facility "owned or leased by a multi-facility organization . . . did not have sufficient assets to pay the CMP," it did "not necessarily follow that [the facility] would have had to go out of business or compromise its residents' health and safety in order to pay the CMP." *Meadowwood Nursing Ctr.*, DAB No. 2541, at 18 (2013); *see also Burton Health Care Ctr.*, DAB No. 2051, at 20

[7] As previously stated, Littlefield itself describes the declarant as "a part owner" of Littlefield. *See supra* at 4. Although Littlefield does not fully explain the relationship between GFC Management Services, LLC and the declarant, it appears from Littlefield's admissions and non-denials that GFC, as an LLC, is the corporate entity that owns Littlefield, and the declarant is one of three owners of the corporation.

(2006) ("the fact that Burton's owners owned eight other facilities is affirmative evidence of Burton's ability to pay a CMP in this amount"). Littlefield's failure to offer evidence about the resources of what it did not deny is the company that owns it is thus a further failure to meet its burden of establishing its financial condition.

Finally, Littlefield has not refuted the ALJ's finding that it "has not offered any evidence concerning its creditworthiness." ALJ Decision at 8. Littlefield relies on the information in its financial sheets to argue that "the only reasonable inference . . . is additional debt is not an option." RR at 5-6. Littlefield's financial sheets, however, are not reliable for the reasons we discussed above and do not constitute probative evidence of Littlefield's creditworthiness and demonstrate no error in the ALJ's finding.

Littlefield thus did not meet its burden to establish that the payment of the CMP amount would drive it out of business or compromise resident care.

3. We deny Littlefield's request to file untimely argument and evidence.

After the parties had completed briefing this appeal, Littlefield asked to admit additional evidence it said shows "that the survey that gave rise to the remedies under appeal was conducted in violation of section 1819(g)(2)(E)(i) of the Social Security Act (Act) (42 USC §1395i-3(g)(2)(E)(i)) and 42 CFR §488.314(a)(l)" because "no registered nurse was present during the survey ending August 4, 2015."[8] P. Request at 5. The additional evidence comprises three documents Littlefield says show that a nurse did not participate in the survey: a second declaration of its owner (P. Ex. 3); a state survey agency "Report of Contact" (P. Ex. 4); and "an extract of [the surveyor]'s personnel file" (P. Ex. 5). P. Request at 3-4. Littlefield also submitted the August 2, 2016 decision of an Administrative Law Judge, *Avon Nursing Home*, DAB CR4670 (2016) (P. Ex. 2) which, Littlefield says, holds that if the survey team "was constituted in violation of" those provisions, "the findings and conclusions of the survey team . . . are therefore void and may not be the bases for the imposition of enforcement remedies." *Id*. at 4, citing DAB CR4670, at 1, 13.

The Board's Guidelines for this case, given to Littlefield with the ALJ Decision, state that the Board "will not consider issues not raised in the request for review, nor issues which could have been presented to the ALJ but were not" and will admit additional evidence "only if it considers the additional evidence to be relevant and material to an issue before it" and "will also consider whether the party that proffers the evidence has demonstrated good cause for not producing the evidence during proceedings before the ALJ."

[8] Section 1819(g)(2)(E)(i) of the Act states: "In general.—Surveys under this subsection shall be conducted by a multidisciplinary team of professionals (including a registered professional nurse)." Section 488.314(a)(l) of 42 C.F.R. states: "*Team composition*. (1) Surveys must be conducted by an interdisciplinary team of professionals, which must include a registered nurse."

Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs.[9] Littlefield, in response to a Board order, stated that it did not file the additional evidence earlier because the *Avon* ALJ decision on which it relies was not issued until after the parties had completed its briefing. Littlefield further stated that the *Avon* ALJ decision represents a change to "'well settled law' . . . that a survey's finding may not be invalidated by the argument that the surveyors did not follow survey protocol or that they did a poor job." P. Resp. to Board Order at 3-4.

Littlefield did not demonstrate good cause for not raising this issue or proffering evidence about the survey team during the ALJ proceeding. The Act and regulatory provisions on which Littlefield relies have been in effect since 1987 and 1995, respectively. Pub. L. No. 100-203, § 4202(a)(2) (Dec. 22, 1987); 59 Fed. Reg. 56,116, 56,238, 56,240 (Nov. 10, 1994). Thus, there is no reason why Littlefield could not have sought information about the surveyor's qualifications and made this argument to the ALJ. Moreover, the ALJ decision in *Avon*, which is currently on appeal to the Board,[10] is not "evidence" of any change to "settled law" or "a change in the interpretation of the rules governing appeals," as Littlefield asserts (P. Resp. to Board Order at 3). The Board has long held that ALJ decisions "are not precedential and are not binding authority on the Board or other ALJs." *Zahid Imran, M.D.*, DAB No. 2680, at 12 (2016), citing *Green Oaks Health & Rehab. Ctr.*, DAB No. 2567, at 9 (2014); and *Lopatcong Ctr.*, DAB No. 2443, at 12 (2012).

Finally, the regulations barred Littlefield's untimely argument and evidence because Littlefield, in its Request for Review, did not appeal the portion of the ALJ Decision that sustained the noncompliance findings. 42 C.F.R. § 498.82(b) (request for review of an ALJ decision "must specify the issues, the findings of fact or conclusions of law with which the party disagrees, and the basis for contending that the findings and conclusions are incorrect"). The ALJ's determination that Littlefield was not in substantial compliance with the regulations was a de novo determination and became final when Littlefield failed to appeal that determination. Thus, even assuming the survey process employed by the state agency on behalf of CMS would be relevant, it is now a moot issue.

[9] www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/participation/index.html

[10] Avon Nursing Home, Board Docket No. A-17-2.

Accordingly, we deny Littlefield's request to admit the additional evidence.

Conclusion

For the reasons discussed above, the Board affirms the ALJ Decision.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member