Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Brian Center Health and Rehabilitation/Goldsboro
Docket No. A-10-47
Decision No. 2336
September 29, 2010

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Brian Center Health and Rehabilitation/Goldsboro (Brian), a skilled nursing facility (SNF), and the Centers for Medicare & Medicaid Services (CMS) appeal the February 5, 2010 decision of Administrative Law Judge (ALJ) Keith W. Sickendick, *Brian Center Health and Rehabilitation/Goldsboro*, DAB CR2063 (2010) (ALJ Decision). We affirm in part and reverse in part the ALJ Decision.

The issues in this appeal arise from a December 6, 2007 incident in which Brian's nursing staff allegedly failed to perform cardiopulmonary resuscitation (CPR) on a resident. CMS determined that the incident showed that Brian was noncompliant with two Medicare participation requirements: 42 C.F.R. § 483.13(c), which obligates a SNF to implement policies prohibiting mistreatment, neglect, and abuse of residents; and 42 C.F.R. § 483.25, which establishes a general quality standard for SNF care and services. CMS also determined that the noncompliance involving Resident 23 created a situation of "immediate jeopardy" at the facility that began on December 6, 2007 and ended on February 5, 2008, and that Brian did not come back into substantial compliance with all requirements until March 25, 2008.

Based on evidence concerning the December 6, 2007 incident, the ALJ agreed with CMS that Brian was noncompliant with section 483.25. He also upheld CMS's determination that Brian's residents were in immediate jeopardy from December 6, 2007 through February 4, 2008. However, the ALJ did not uphold CMS's determination that Brian was noncompliant with section 483.13(c). Largely for that reason, the ALJ reduced the per-day civil money penalty (CMP) that CMS had imposed for the period from December 6, 2007 through February 4, 2008 from $4,550 to $3,050 per day. The ALJ also sustained the imposition of a smaller CMP for a later period, but, as we discuss later, Brian did not appeal that remedy or the findings of noncompliance that support it.

CMS now contends that it made a prima facie – and unrebutted – showing of noncompliance with section 483.13(c) and that the ALJ erred in reaching a contrary conclusion. CMS further contends that this error warrants a reinstatement of the original CMP ($4,550 per day) for the period of immediate jeopardy. Brian, on the other hand, challenges the ALJ's conclusion concerning the duration of the immediate jeopardy period. For the following reasons, we: (1) decline to reach the issue of whether Brian was noncompliant with section 483.13(c); (2) affirm the ALJ's conclusion that Brian was not in substantial compliance with section 483.25; (3) affirm the ALJ's conclusion that CMS's determinations concerning the existence and duration of immediate jeopardy were not clearly erroneous; (4) reinstate the $4,550 per-day CMP for the period from December 6, 2007 through February 4, 2008; and (5) affirm the $200 per-day CMP imposed by CMS for the period of noncompliance from February 5, 2008 through March 24, 2008.

Legal Background

In order to participate in Medicare, a SNF must comply with the participation requirements in 42 C.F.R. §§ 483.1-483.75. A SNF's compliance with these requirements is verified by surveys conducted by state health agencies. *See* 42 C.F.R. Part 488, subpart E.

CMS may impose enforcement remedies on a SNF if it determines, on the basis of survey findings, that the SNF is not in "substantial compliance" with one or more participation requirements. 42 C.F.R. § 488.402. "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." 42 C.F.R. § 488.301. Under CMS's regulations, the term "noncompliance" means "any deficiency that causes a facility to not be in substantial compliance." *Id.*

The remedies that CMS may impose for a SNF's noncompliance include per-day CMPs. 42 C.F.R. § 488.438(a). When CMS elects to impose a CMP, it sets the CMP amount based on, among other factors, the "seriousness" of the SNF's noncompliance. 42 C.F.R. §§ 488.404(b), 488.438(f). "Seriousness" is a function of the deficiency's "severity" (whether it has created a "potential for harm," resulted in "actual harm," or placed residents in "immediate jeopardy") and "scope" (whether it is "isolated," constitutes a "pattern," or is "widespread"). 42 C.F.R. § 488.404(b); State Operations Manual (SOM), App. P, sec. IV.[1]

The most serious noncompliance is that which puts one or more residents in "immediate jeopardy." *See* 42 C.F.R. §§ 488.404 (setting out the levels of scope and severity that

[1] The SOM (CMS Pub. 100-07) is available on CMS's website at http://www.cms.hhs.gov/Manuals/IOM/list.asp.

CMS considers when selecting remedies), 488.438 (authorizing the highest CMPs for immediate jeopardy); SOM § 7400.5.1. Immediate jeopardy is 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. 42 C.F.R. § 488.301. If a per-day CMP is imposed for immediate-jeopardy-level noncompliance, the CMP must be set within the range of $3,050 to $10,000 per-day. 42 C.F.R. §§ 488.404(d)(3)(ii), 488.438(a)(1)(i).

Case Background[2]

From January 13 to 16, 2008, the North Carolina Department of Health and Human Services (state survey agency) surveyed Brian to determine whether it was compliant with Medicare requirements. CMS Ex. 1, at 1; Tr. at 37. During that survey ("January survey"),[3] the state survey agency inquired about whether Brian's nursing staff had improperly failed to perform CPR on a "full code" male resident – known here as Resident 23 – during the early morning on December 6, 2007.[4] Tr. at 37-39; *see also* CMS Ex. 34, at 8-24.

At least five Brian employees – four nurses and one certified nursing assistant (CNA) – witnessed or were involved in the December 6, 2007 incident. Their recollections of the incident, as documented in interviews conducted by Brian and by the state survey agency (*see* CMS Ex. 34, at 12-18 and P. Exs. 12-13*)*, vary somewhat in factual detail and were, in a few instances, internally inconsistent. But certain facts appear undisputed. Sometime between 3:50 around 4:00 a.m., a CNA called a nurse – whom the surveyors referred to as Nurse 1 – to check on Resident 23, who was unresponsive. P. Ex. 13, at 1, 5, 7. During post-incident interviews, Nurse 1 reported that she checked Resident 23's vital signs but found no pulse or respiration. *Id*. at 7; CMS Ex. 34, at 14. She also reported thinking that Resident 23 was already dead when she examined him and that performing CPR would have been futile. CMS Ex. 34, at 14. Shortly after Nurse 1 examined Resident 23, three other nurses entered Resident 23's room at various times. *Id.* at 15, 16, 18; P. Exs. 12-13. One of those nurses, whom the surveyors referred to as Nurse 2, took steps to insert an IV (intravenous) line to boost Resident 23's blood sugar, evidently suspecting that his unresponsiveness was the result of diabetic coma. CMS Ex. 34, at 15; P. Ex. 13, at 3, 15. Nurse 2 also called Resident 23's physician as well as 911.

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[2] The information in this section is drawn from undisputed findings in the ALJ Decision as well as from the record before the ALJ, and is presented to provide a context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact or conclusions of law.

[3] The state survey actually performed two distinct surveys during January 2008: an annual recertification survey that addressed all participation requirements and a complaint survey focused on the December 6, 2007 incident involving Resident 23.

[4] A "full code" resident is one for whom the nursing staff is instructed to attempt life-saving measures, including CPR, in the event of cardiac or respiratory arrest. *See* Tr. at 152-53; CMS Ex. 34, at 84.

P. Ex. 13, at 3. According to Nurse 2's treatment notes, Resident 23 still had a carotid pulse and shallow respiration when she entered the room at around 4:15 a.m. (CMS Ex. 34, at 61), although a third nurse was unable to find a pulse (P. Ex. 13, at 2) and a fourth reported that others had found no blood pressure (*id.* at 12). Emergency Medical Technicians (EMTs) arrived at 4:38 a.m., according to their records. CMS Ex. 34, at 6. When the EMTs arrived, Resident 23 had no pulse, respiration, or cardiac sounds, and he was declared dead. *Id.;* P. Ex. 13, at 3-4.

Between December 6 and December 10, 2007, Brian investigated this incident and implemented certain corrective measures, including retraining its staff in emergency medical procedures. *See* ALJ Decision at 12-13. Brian also fired Nurse 1 for failing to initiate CPR based on her assessment of Resident 23. Tr. at 173. In view of Brian's post-incident corrective actions, the January survey team concluded that Brian's deficient response to Resident 23's cardiopulmonary crisis constituted "past noncompliance." Tr. at 39, 64-65, 102-03, 125-26, 146-47, 151. The January survey team also concluded that the noncompliance had caused "actual harm" to Resident 23 but that it did not place one or more residents in immediate jeopardy. Tr. at 61-62, 64. The team advised Brian during an exit conference on January 16, 2008 that their work and findings would be reviewed by the team's managers and by CMS. Tr. at 39.

After reviewing the information gathered during the January survey, the state survey agency and CMS disagreed with the survey team's assessment and determined that the circumstances of the December 6, 2007 incident reflected uncorrected – i.e., ongoing – immediate-jeopardy-level noncompliance. Tr. at 40, 65-67, 88-89. For that reason, the survey team returned to Brian on February 4, 2008 to notify it of the immediate jeopardy determination and perform an extended survey (the "February survey").[5] Tr. at 40-44, 67-68, 89-92; CMS Ex. 38.

During the February survey, Brian formulated a plan to abate the immediate jeopardy. Tr. at 45-46. The abatement plan, as approved by the state survey agency, specified several corrective actions (including staff training or "in-servicing") and the dates that those actions were completed or scheduled to be completed. CMS Ex. 4; Tr. at 45-46.

On February 18, 2008, the state survey agency issued a Statement of Deficiencies (form CMS-2567) that set forth its findings from the January and February surveys. CMS Ex. 1. Based on the circumstances of the December 6, 2007 incident, the Statement of Deficiencies cited Brian for noncompliance with 42 C.F.R. §§ 483.13(c) and 483.25 and further indicated that this noncompliance had placed one or more residents in immediate jeopardy beginning on December 6, 2007. CMS Ex. 2, at 1-18, 48-65. The Statement of

[5] The regulations require that an extended survey be performed within 14 days after completion of a standard survey that finds "substandard quality of care," which is defined to include noncompliance with a quality of care requirement that constitutes immediate jeopardy to resident health and safety. 42 C.F.R. §§ 488.310(c), 488.301 (defining "substandard quality of care").

Deficiencies also stated that Brian did not abate the alleged immediate jeopardy until February 5, 2008. *Id.* at 1, 48. In addition, the Statement of Deficiencies alleged that Brian was noncompliant with sections 483.13(c) and 483.25 at a level below immediate jeopardy because it allegedly failed to provide physician-ordered wound care to four residents. *Id.* at 1, 18- 48, 65-74. Finally, the Statement of Deficiencies alleged that Brian was noncompliant (at a level below immediate jeopardy) with eight other participation requirements. *Id.* at 39, 44, 48, 74, 78, 91, 97, 113, 123.

On March 24 and 25, 2008, the state survey agency completed a revisit survey which found that Brian had come back into substantial compliance with all Medicare requirements as of March 25, 2008. CMS Ex. 6.

Based on all the survey findings, CMS imposed two CMPs on Brian: a $4,550 per day CMP for the period from December 6, 2007 through February 4, 2008; and a $200 per-day CMP for the period from February 5 through March 24, 2008. CMS Ex. 7, at 2. Brian requested a hearing to challenge CMS's enforcement action, contending that all of the citations of noncompliance were factually or legally unfounded. The ALJ subsequently held an evidentiary hearing during which CMS presented the testimony of two surveyors: Ann Modlin and Teresa Radcliffe. Brian presented the testimony of Karla Minyard, L.P.N., an employee who participated in the investigation of the December 6, 2007 incident; and Bindy Powell, R.N., an employee of Brian's corporate owner (Sava Senior Care). The hearing testimony focused on the noncompliance involving Resident 23 (the source of CMS's immediate jeopardy determination), and the parties agreed at the hearing's outset that the other allegations of noncompliance could be addressed by the ALJ based on their documentary evidence and written submissions. *See* Tr. at 23, 28, 30.

The ALJ Decision

The ALJ concluded that Brian was noncompliant with section 483.25 when it failed to perform CPR on Resident 23. ALJ Decision at 12. However, the ALJ overturned CMS's determination that Brian's actions (or inaction) with respect to Resident 23 demonstrated noncompliance with section 483.13(c). *Id.* at 10-12. The ALJ also upheld CMS's determination that Brian's noncompliance with section 483.25 had placed residents in immediate jeopardy beginning on December 6, 2007, and that Brian did not abate the immediate jeopardy until February 5, 2008. *Id.* at 12-17. In addition, the ALJ:

- concluded, on grounds unrelated to Resident 23, that Brian was noncompliant with sections 483.25(c), 483.20(k)(3)(i), and 483.60(c)). ALJ Decision at 17-22.
- reduced the per-day CMP that CMS had imposed for the period of immediate jeopardy (December 6, 2007 through February 4, 2008) from $4,550 to $3,050. *Id.* at 25.

- concluded that $200 per day was a reasonable per-day CMP for the period of noncompliance from February 5 through March 24, 2008. *Id.* at 26.

The parties then filed timely requests for review, raising issues that implicate only the per-day CMP for the period of immediate jeopardy.

Discussion

Before discussing the issues raised in this appeal, we note that Brian does not challenge the ALJ's conclusion that its response to Resident 23's medical emergency on December 6, 2007 constituted noncompliance with the quality of care requirement in section 483.25. Nor does Brian dispute that this noncompliance put Resident 23 (and others) in immediate jeopardy beginning on December 6, 2007. We therefore summarily affirm the ALJ's conclusion that Brian was noncompliant with section 483.25 at the level of immediate jeopardy beginning on December 6, 2007.[6]

We now turn to the issues raised by the parties in this appeal. We address CMS's issues in sections one and three; we discuss the issues raised by Brian in section two.

1. *It is unnecessary for the Board to reach the issue of whether Brian was noncompliant with 42 C.F.R. § 483.13(c).*

As noted, based on the nursing staff's response to Resident 23's medical emergency on December 6, 2007, CMS cited Brian for noncompliance with section 483.13(c). CMS Ex. 2, at 1, 48. The ALJ overturned that deficiency citation, and CMS contends that that was error. CMS Request for Review (RR) at 7.

In explaining his decision to overturn the deficiency citation, the ALJ stated, in part, that it was "not necessary" for CMS to cite Brian for noncompliance with section 483.13(c) based on the incident involving Resident 23 because the same incident supported a finding of noncompliance with section 483.25. *See* ALJ Decision at 12. The fact that the same incident was cited under section 483.25 was not a basis for overturning the deficiency citation under section 483.13(c). If a given set of facts demonstrates that a SNF has violated more than one participation requirement, CMS may, in its discretion, charge the SNF with violating any, or all, of the applicable requirements. *See generally* 42 C.F.R. § 488.330. The role of the ALJ and the Board is not to review that exercise of discretion or to assess the "necessity" of issuing any particular deficiency citation but to determine whether deficiency citations appealed by the SNF are supported by the evidence and law. *Cf. North Carolina State Veterans Nursing Home, Salisbury*, DAB

[6] Brian also does not contest the ALJ's conclusion that it was noncompliant with sections 483.20(k)(3)(i), 483.25(c), and 483.60(c), nor does it contend that this noncompliance continued from February 5 through March 24, 2008, as the ALJ found. In addition, Brian does not challenge the ALJ's conclusion that the $200 per-day CMP for that period was reasonable. Accordingly, we summarily affirm those uncontested findings and conclusions.

No. 2256, at 15 n.13 (2009) (holding that a deficiency citation was not "redundant" merely because it was based on survey findings that supported another citation).

Nonetheless, we decline to address whether the ALJ erred in rejecting CMS's allegation of noncompliance with section 483.13(c) because any conclusion that we reach concerning Brian's noncompliance with section 483.13(c) is immaterial to the conclusions we make below concerning the reasonableness of the CMP and the duration of the immediate jeopardy. For similar reasons and as a matter of judicial economy, we also decline to address the merits of CMS's contention that it made a prima facie showing of noncompliance with section 483.13(c), at a level lower than immediate jeopardy, based on survey findings that Brian failed to provide physician-ordered wound care to Residents 7, 8, 19, and 25.

2. *We affirm the ALJ's conclusion that CMS's determination that Brian did not abate the immediate jeopardy until February 5, 2008 is not clearly erroneous.*

As indicated, Brian does not dispute that as of December 6, 2007, it was in a state of noncompliance with section 483.25 at the immediate jeopardy level. However, Brian contends that the ALJ erred in upholding CMS's determination that it did not abate the immediate jeopardy until February 5, 2008. Brian asserts two arguments for this challenge: first, it claims that the ALJ mistakenly reviewed CMS's determination for "clear error"; and second, Brian claims that it completed all of the corrective measures necessary to abate the immediate jeopardy by December 10, 2007. We find no merit in either argument.

Regarding the first argument, Brian points to the following statement in the ALJ Decision: "[Brian] has not shown that the determination that immediate jeopardy was posed to [Brian's] residents from December 6, 2007 through February 4, 2008, was clearly erroneous." ALJ Decision at 7. According to Brian, "when reviewing the continued existence of a deficiency the correct standard of review requires a provider to prove by a preponderance of the evidence that it is in substantial compliance with program requirements." *Id.* at 8.

We do not agree that the ALJ erred in applying a clearly erroneous standard of review. The pertinent regulation is 42 C.F.R. 498.60(c). It provides that in an appeal that challenges the imposition of a CMP, "CMS's determination as to the *level* of noncompliance of an SNF or NF must be upheld unless it is clearly erroneous." CMS's judgment that Brian's corrective measures were insufficient to abate the immediate jeopardy prior to February 5, 2008 is, in essence, a determination that the *level* of noncompliance continued to present immediate jeopardy to Brian Center's residents until the measures specified in its abatement plan were completed on February 5, 2008. A determination by CMS that a SNF's ongoing compliance remains at the level of immediate jeopardy during a given period constitutes a determination about the "level of

noncompliance" and, therefore, is subject to the clearly erroneous standard of review under section 498.60(c)(2).

Brian points to Board decisions holding that a provider bears the ultimate burden of proving substantial compliance by a preponderance of the evidence. Brian RR at 9 (citing *Hillman Rehabilitation Center*, DAB No. 1611 (1997), *aff'd, Hillman Rehabilitation Ctr. v. U.S. Dep't of Health and Human Servs.*, No. 98-3789 (GEB) (D.N.J. May 13, 1999)). Brian also points to regulations which provide that a CMP may continue to accrue until a facility has "achieved substantial compliance." *Id.* at 10 (citing 42 C.F.R. §§ 488.454 and 488.440). These authorities are irrelevant because the issue here is not how long Brian remained in a state of noncompliance but how long Brian's noncompliance remained at the immediate jeopardy level.

Brian further contends that the Board's decision in *Pinehurst Healthcare & Rehabilitation Center*, DAB No. 2246 (2009) supports its view that the ALJ should have applied a preponderance of the evidence standard to resolve the abatement issue, instead of reviewing CMS's determination concerning that issue under the clearly erroneous standard.[7] In discussing *Pinehurst*, Brian attributes to the Board a statement that the SNF "ha[d] not met its burden to prove by a preponderance of the evidence that it abated the immediate jeopardy" (Brian RR at 11), but this statement is a quotation from the underlying administrative law judge decision, not from the Board's decision on review. *Pinehurst Healthcare & Rehabilitation Center*, DAB CR1854, at 15 (2008). In *Pinehurst*, the Board upheld the administrative law judge's affirmance of CMS's determination of immediate jeopardy and its duration without explicitly addressing the administrative law judge's statement concerning the SNF's "burden to prove" abatement. Furthermore, the Board made it clear in *Pinehurst* that a SNF has the burden to show that an immediate jeopardy determination by CMS – which logically includes a finding that immediate jeopardy has not been abated – is clearly erroneous. DAB No. 2246, at 13 n.3. In addition, other Board decisions directly support the ALJ's application of the clearly erroneous standard in these circumstances. *See Fairfax Nursing Home, Inc.*, DAB No. 1794, at 17 (2001) (finding that CMS "was *not clearly erroneous* in concluding that steps taken prior to April 4 were insufficient to abate the immediate jeopardy" (italics added)), *aff'd, Fairfax Nursing Home v. Dep't of Health & Human Servs.*, 300 F.3d 835 (7th Cir. 2002), *cert. denied*, 537 U.S. 1111 (2003); *Rolling Hills Rehab Center*, DAB No. 2119, at 7 (2009) (stating that "we could not find that CMS committed *clear error* by determining that an immediate jeopardy condition was not abated as long as such retraining was not done, even if a single staff person had actually acted in violation of the policy" (italics added)); *Harlan Nursing Home*, DAB No. 2174, at 9-13 (2008) (sustaining, as not

[7] Brian also cites the Board decision in *SunBridge Care and Rehabilitation for Pembroke*, DAB No. 2170 (2008) in support of its contention that an ALJ must apply a preponderance-of-the-evidence standard when reviewing CMS's determination as to the duration of immediate jeopardy. However, *SunBridge* contains no holding to that effect.

clearly erroneous, a finding that immediate jeopardy remained uncorrected for approximately one week).

We therefore hold that CMS's determination that the immediate jeopardy was not abated until February 5, 2008 is reviewable under a clearly erroneous standard. Under that standard, CMS's determination is presumed to be correct, and Brian has a heavy burden to demonstrate clear error. *Barbourville Nursing Home*, DAB No. 1962, at 11 (2005), *aff'd, Barbourville Nursing Home v. U.S. Dept. of Health & Human Servs.*, No. 05-3241 (6th Cir. April 6, 2006); *see also Liberty Commons Nursing and Rehab Center – Johnston*, DAB No. 2031 (2006), *aff'd, Liberty Commons Nursing & Rehab. Ctr. – Johnston v. Leavitt*, 241 F. App'x 76 (4th Cir. 2007); *Maysville Nursing and Rehabilitation Facility*, DAB No. 2317, at 11 (2010).

We agree with the ALJ that CMS did not commit clear error in determining that immediate jeopardy was not abated at the facility until February 5, 2008. This is evident from a review of Brian's plan to abate the immediate jeopardy. The Board has held that abatement of an immediate jeopardy condition (or removal of noncompliance) ordinarily requires the performance of corrective measures that the facility has included in a plan of correction. *See Cal Turner Extended Care Pavilion*, DAB No. 2030, at 19 (2006) (rejecting facility's "claim that steps short of those which the facility itself identified as necessary for it to correct the problems found (and to achieve substantial compliance) should nevertheless be accepted as adequate to require lifting the remedies imposed"); *Meridian Nursing Center*, DAB No. 2265, at 20-21 (2009) (affirming the determination of a multi-day immediate jeopardy period because, although the SNF had taken certain corrective measures prior to the survey, the SNF failed to show that it had implemented all of the corrective actions that its own staff determined to be necessary to abate the immediate jeopardy); *Lake Mary Health Care*, DAB No. 2081, at 29 (2007) (holding that the burden was on the SNF to show that it timely completed the implementation of its plan of correction).

Here, Brian's abatement plan specified corrective measures with stated completion dates of February 5, 2008. CMS Ex. 4. Most notably, the plan called on Brian's Staff Development Coordinator or the Director of Nursing to "validate" or "check" the competency of Brian's nurses to clear an airway, assess carotid pulse and perform CPR. *Id.* at 1. Referring to that measure, the ALJ expressly found that immediate jeopardy continued to exist until Brian validated (or, in the words of the ALJ, "verified") – through actual "demonstration" – the competency of its nursing staff to assess carotid pulse and perform other emergency procedures (including CPR). ALJ Decision at 16. Brian does not challenge this finding or contend that such validation was unnecessary to abate the immediate jeopardy. The necessity of that measure is apparent from our summary of the December 6, 2007 incident, which cited evidence that nurses on the scene made seemingly conflicting assessments of Resident 23's vital signs and clinical status. In addition, Surveyor Modlin expressed concern at the hearing about the nursing staff's ability to accurately assess Resident 23's clinical condition:

> Some of the nurses thought one thing and – the medical emergency existed. Some of nurses thought the man was not breathing. Some of them thought he was having a low blood sugar. There was some conflict about whether he had a pulse or not. So it appeared that he had some assessment issues.

Tr. at 71.

Since Brian does not dispute that it was obligated to validate pertinent nursing competencies in order to abate the immediate jeopardy, the dispositive issue here is *when* Brian satisfactorily implemented that corrective measure. The abatement plan indicates that the required validations were "completed" on February 5, 2008, and Brian has not furnished evidence of earlier completion. In particular, Brian presented no declarations or in-person testimony from the two employees – the Staff Development Coordinator and the Director of Nursing – who were responsible for performing the validations. Nor did Brian submit documentation of their completion of that work. *See* Petitioner's List of Exhibits (June 23, 2008).

Brian complains that the ALJ overlooked Nurse Minyard's testimony that a few days after the December 6, 2007 incident, each of Brian's nurses was asked if he or she knew how to respond to a "code blue" resident (one without pulse or respiration). Brian RR at 12 (citing Tr. at 217). This testimony does not establish that Brian implemented the required validations prior to February 5, 2008. First, Nurse Minyard admitted that it was not her responsibility to perform the validations. Tr. at 217. Second, Nurse Minyard admitted that *she* was not asked to *demonstrate* her knowledge of the relevant nursing competencies, as the abatement plan required. Tr. at 218. She was also vague about how Brian performed the validations – indicating only that each nurse was "asked questions." Tr. at 217. Finally, Nurse Minyard was unable to specify the date on which that alleged questioning was completed. Tr. at 217-18.

Brian points to evidence that during December 2007, it: (1) updated or verified the "code status" of all residents and identified the code status for each resident with a white label on the resident's chart; (2) verified that each nurse had a valid CPR certification; (3) checked the facility's "crash carts" to ensure that they were adequately stocked and in working order; (4) implemented a system to ensure that all nurses have current CPR certifications; and (5) instituted a new policy that obligated the Director of Nursing to ensure that CPR certifications were current for all nurses. Brian RR at 14. However, the fact that Brian completed these actions during December 2007 is immaterial because Brian has failed to demonstrate that it completed the validations of nursing competencies prior to February 5, 2008.

Brian contends that the firing of Nurse 1 "clearly evidences the seriousness in which the facility judged, and responded to, the CPR incident." Brian RR at 17. Brian further asserts that "[t]he deficiency cited regarding the CPR incident stemmed from the isolated conduct of one nurse, and the removal of that nurse from the Facility significantly

reduces any concerning regarding continuing jeopardy." *Id.* We find no merit in this contention. Even if we were to find that Brian's noncompliance stemmed entirely from the acts or omissions of a single nurse (and we make no such finding), that would be immaterial because, having specified certain systemic corrective measures in its abatement plan, measures that go beyond the disciplining of any single employee, Brian cannot be regarded as having abated the immediate jeopardy until the date those measures were implemented. *Cf. Cal Turner Extended Care Pavilion*, DAB No. 2030, at 18-19 (stating that the "[t]he Board has long rejected as contrary to the goals of the program" the proposition "that a facility can belatedly claim to have achieved substantial compliance at a date earlier than it even alleged that it had done so" in a corrective action plan).

Finally, Brian contends that in deciding when it abated the immediate jeopardy, the ALJ improperly relied on the fact that in-service training of certified nursing assistants (CNAs) concerning emergency procedures was not completed until February 5, 2008. Brian RR at 1, 3, 23-27. Brian contends that it was improper for the ALJ to rely on the timing of that training because surveyors did not find that any CNA had acted improperly in responding to Resident 23's emergency and because the ALJ himself determined that the actions of the CNA involved in the December 6, 2007 incident were not deficient. *Id.* In other words, Brian contends that no corrective action with respect to its CNAs was necessary to bring it back into substantial compliance because its noncompliance did not stem from the acts or omissions of its CNAs. Brian also contends (as it did before the ALJ) that the training measures aimed at the CNAs were either excessive or unnecessary because they concerned duties – specifically, the performance of CPR – that are allegedly beyond a CNA's scope of practice. Brian RR at 25.

In rejecting the same argument below, the ALJ said:

> Whether or not the CNA acted appropriately on December 6, 2007, is not the issue. It is clearly reasonable to ensure that all CNAs are trained to address a situation such as that which occurred on December 6, 2007, and to verify that all CNAs understand the actions they are authorized and required to take. [Brian]'s concern that the surveyors were suggesting a corrective action that would be outside the scope of duties of a CNA was proved unfounded by the survey team's acceptance of corrective action that involved creation of a decision-tree that instructed and clearly authorized CNAs to alert the entire nursing chain-of-command if they believed appropriate emergency actions were not taken.

ALJ Decision at 16. We concur with this analysis. We further note that although the CNA's actions on December 6, 2007 were not found to be deficient, the record shows that during a post-incident interview, the CNA stated that she was unsure of her proper responsibilities during the medical emergency that day. Tr. at 71. Brian has not pointed to any testimony that a CNA's ignorance of those responsibilities – which were clarified

in the decision-tree on which all CNAs were trained – did not present a likelihood of serious harm or death.

For all of these reasons, we conclude (as the ALJ did) that CMS's determination that Brian did not abate the immediate jeopardy condition until February 5, 2010 was not clearly erroneous.

3. *The ALJ erred in reducing the per-day CMP amount chosen by CMS for the period of immediate jeopardy; a per-day CMP of $4,550 is reasonable for that period.*

In an appeal where the amount of a CMP is challenged, the ALJ and the Board determine whether the amount is reasonable. *See Cal Turner Extended Care Pavilion* at 6-7 (finding that the CMP amounts were not unreasonable); *Lutheran Home at Trinity Oaks*, DAB No. 2111, at 21 (2007). In deciding whether the per-day CMP amount is reasonable, an administrative law judge (or the Board) may consider only those factors specified in section 488.438 of CMS's regulations. *See* 42 C.F.R. § 488.438(e), (f); *Senior Rehabilitation and Skilled Nursing Center*, DAB No. 2300, at 19-20 (2010). Those factors are: (1) the SNF's history of noncompliance; (2) the SNF's financial condition; (3) factors specified in 42 C.F.R. § 488.404 (i.e., the severity and scope of the noncompliance, and "the relationship of the one deficiency to other deficiencies resulting in noncompliance"); and (4) the SNF's degree of culpability, which includes neglect, indifference, or disregard for resident care, comfort or safety. 42 C.F.R. §§ 488.438(f), 488.404. An administrative law judge (or the Board) reviews the reasonableness of the CMP de novo, based on the facts established in the appeal record. *Emerald Oaks*, DAB No. 1800 (2001); *CarePlex of Silver Spring*, DAB No. 1683 (1999). "[W]hether the CMP amount is reasonable is a legal conclusion to be drawn from the application of regulatory criteria to the facts of the case." *Cedar Lake Nursing Home*, DAB No. 2288, at 14 (2009). The Board has held that "there is a presumption that CMS has considered the regulatory factors [in section 488.438(f)] in setting the amount of the CMP and that those factors support the CMP amount imposed by CMS." *Coquina Center*, DAB No. 1860, at 32 (2002). Accordingly, the burden is on the SNF to demonstrate, through argument and the submission of evidence addressing the regulatory factors, that a reduction is necessary to make the CMP amount reasonable. *The Windsor House*, DAB No. 1942, at 62 (2004).

The ALJ considered whether $4,550 was a reasonable per-day CMP for the period of immediate jeopardy arising from the December 6, 2007 incident. After stating that CMS had "presumably considered" the fact that surveyors had found the incident to be proof of noncompliance with both sections 483.13(c) and 483.25, the ALJ found that reducing the CMP was "appropriate" in light of his decision to overturn the deficiency citation that alleged noncompliance with section 483.13(c). On its face this finding was inadequate to support a reduction in the CMP for two reasons. First, the finding indicates that the ALJ assessed the reasonableness of the CMP by discounting a factor that he believed CMS

actually considered in setting the CMP amount (namely, the issuance of two deficiency citations stemming from the December 6, 2007 incident). In other words, the ALJ implied that he was merely reviewing or assessing the sufficiency of CMS's rationale for choosing the CMP amount. However, the Board has held that "in evaluating whether a CMP amount is reasonable, the ALJ *should not look into CMS's internal decision-making process*. Rather, the ALJ must make a de novo determination as to whether the amount is reasonable applying the regulatory criteria to the record developed before the ALJ." *Senior Rehabilitation and Skilled Nursing Center*, DAB No. 2300, at 21 (italics added). Second, the ALJ did not indicate which of the regulatory factors in section 488.438 were implicated by his decision to overturn the finding of noncompliance with section 483.13(c). We could speculate that the ALJ may have believed that removing one of the two deficiency citations stemming from the December 6, 2007 incident reduced the seriousness of Brian's noncompliance (thereby warranting a reduction in the CMP amount), but we find no factual foundation for such a belief. Both citations indicated that Brian's noncompliance was at scope-and-severity level J, which refers to isolated, immediate jeopardy. CMS Ex. 2, at 1, 48 (findings under deficiency "tags" F224 and F309); SOM § 7400.5.1. Moreover, the facts supporting both citations were the same; both citations were based on findings that Brian's nursing staff failed to initiate CPR for Resident 23. Whether these facts constitute violations of one or both regulations does not alter the seriousness of the conduct at issue. Consequently, the ALJ had no basis to conclude that overturning one of the citations required a reduction in the severity or scope of Brian's noncompliance.

In justifying his reduction of the per-day CMP amount, the ALJ also stated that "there is no dispute that [Brian] took significant remedial action immediately from December 6 through 10, 2007, in a good faith effort to ensure that no similar incidents would occur." ALJ Decision at 25. Although a facility's prompt institution of corrective measures is certainly desirable, the Secretary of Health and Human Services has not made doing so a basis for reducing a CMP amount. *See* 42 C.F.R. § 488.438(f).

For the reasons stated, we vacate the section of the ALJ Decision that discusses the reasonableness of the $4,550 per-day CMP. We conclude, instead, that the CMP imposed by CMS for the period of immediate jeopardy was reasonable given the totality of the relevant circumstances. The authorized penalty range for the period of immediate jeopardy is $3,050 to $10,000 per day. The per-day amount imposed by CMS is $1,500 higher than the minimum but still close to the lowest amount within the authorized range. We cannot find such a penalty amount to be unreasonable when it is imposed for immediate-jeopardy-level noncompliance involving a failure to perform a basic life-saving procedure. In addition, we find that Brian was culpable for the noncompliance in some degree because its own investigation found an employee – Nurse 1 – guilty of "neglect." P. Exs. 6-7. Equally troubling, the record does not satisfactorily explain why none of the *three other* nurses who entered Resident 23's room during the critical hour on December 6, 2007 initiated CPR prior to his death.

We further note that the ALJ made other, uncontested findings of noncompliance that existed concurrently with the noncompliance involving Resident 23. *See* ALJ Decision at 17 (finding a failure to follow physician orders for vital sign monitoring during December 2007 and January 2008 in violation of section 483.20(k)(3)(i)); *id.* at 18-20 (finding noncompliance with section 483.25(c)'s requirement to prevent and treat pressure sores on multiple days from October 2007 through January 2008). Some of that other noncompliance resulted in actual harm to residents. CMS Ex. 2, at 78 (indicating that Brian's noncompliance with section 483.25(c) was at scope-and-severity level G, which denotes noncompliance resulting in actual harm). The regulations permit us to consider the severity and scope of *all* deficiencies constituting noncompliance in determining whether a CMP amount is reasonable. *Cf.* 42 C.F.R. § 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*").

In its post-hearing brief to the ALJ, Brian contended that the $4,550 per-day CMP should be reduced because its pre-December 2007 survey history going back "several years" showed no immediate jeopardy deficiencies or findings of "substandard quality of care," and because the January and February surveys produced "no findings . . . that would demonstrate an *enhanced* degree of facility culpability for the [December 6, 2007] incident." Pet.'s Posthearing Br. at 24 (Feb. 9, 2009) (italics added). We note that Brian's assertion there were no findings of "enhanced" culpability implies a concession by Brian that it was culpable *in some degree* for the noncompliance. In any event, although we give Brian credit for both of the factors it relies upon,[8] we conclude that those factors are not weighty enough to render the per-day CMP unreasonable in view of the seriousness of the noncompliance involving Resident 23, the facility's culpability for that noncompliance, the existence of other (non-immediate jeopardy) noncompliance that resulted in actual harm to residents, and the fact that $4,550 per-day is an amount that is already at the lower end of the authorized penalty range.

Conclusion

For the reasons discussed, we: (1) decline to reach the merits of the ALJ's conclusion that CMS failed to prove that Brian was noncompliant with 42 C.F.R. § 483.13(c); (2) affirm the ALJ's conclusion Brian was noncompliant with 42 C.F.R. § 483.25 at the level of immediate jeopardy beginning on December 6, 2007; (3) affirm the ALJ's conclusion that CMS's determination that Brian did not abate the immediate jeopardy until February 5, 2008 was not clearly erroneous; (4) reverse the ALJ's reduction of the per-day CMP applicable to the period of immediate jeopardy; (5) conclude that a $4,550 per-day CMP

[8] CMS did not dispute Brian's characterization of its pre-December 2007 compliance history. *See* Respondent's Reply Br. (March 11, 2009).

was reasonable for the period of immediate jeopardy; and (6) summarily affirm the ALJ's findings and fact and conclusions of law that were not challenged by Brian in this appeal.

_____/s/_____
Stephen M. Godek

_____/s/_____
Leslie A. Sussan

_____/s/_____
Sheila Ann Hegy
Presiding Board Member