Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Jewish Home of Eastern Pennsylvania
Docket No. A-11-19
Decision No. 2380
May 18, 2011

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Jewish Home of Eastern Pennsylvania (Jewish Home or Petitioner) and the Centers for Medicare & Medicaid Services (CMS) each appeal the September 17, 2010 decision of Administrative Law Judge (ALJ) Keith W. Sickendick in *Jewish Home of Eastern Pennsylvania*, DAB CR2242 (2010) (ALJ Decision). At issue before the ALJ were determinations by the CMS in a survey on November 2, 2007 and a revisit survey on January 4, 2008 that Jewish Home was not in substantial compliance with a number of Medicare program participation requirements. Jewish Home stipulated during the hearing that CMS had established a *prima facie* showing of noncompliance for the deficiencies found on the November 2 survey but challenged the findings of noncompliance from the January 4 survey, which involved violations of 42 C.F.R. § 483.25(h) [Tag F323] concerning supervision and assistance devices to prevent accidents, and 42 C.F.R. § 483.75(o) [Tag F520] concerning the failure of the facility's Quality Assurance (QA) Committee to develop and implement an effective quality assurance plan to prevent the recurrence of resident falls. The ALJ determined that Jewish Home failed to substantially comply with section 483.25(h) and upheld CMS's imposition of a $600 per day civil money penalty (CMP) against Jewish Home from November 2, 2007 through January 17, 2008, for a total of $46,200. However, the ALJ concluded that the facility did not violate section 483.75(o). Both Jewish Home and CMS appealed the ALJ Decision.

On appeal, Jewish Home does not contest the ALJ's findings of noncompliance but argues that: (1) the ALJ failed to hold a hearing on whether CMS's exhibits should be excluded under equal protection principles because of selective enforcement and surveyor bias; and (2) the CMP imposed pursuant to 42 C.F.R. § 488.438(f)(4) is invalid and contrary to section 1128A(d)(2) of the Social Security Act (Act),[1] 42 U.S.C.

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[1] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp. Table.

§ 1320a-7a(d)(2). CMS argues on appeal that the ALJ erred in concluding that the facility did not violate section 483.75(o) and that his conclusion on that issue is not supported by substantial evidence in the record.

We uphold the ALJ's decision in part and reverse in part. Because Jewish Home does not appeal the ALJ's findings of fact and conclusions of law (FFCLs) as to noncompliance (and, in fact, stipulated to the findings of noncompliance from the November 2 survey), we uphold those FFCLs without further discussion. We reject Jewish Home's argument that the CMP regulation is invalid and contrary to section 1128A(d)(2) of the Act. We also reject Jewish Home's equal protection and selective enforcement arguments for reasons previously set forth in *Jewish Home of Eastern Pennsylvania*, DAB No. 2254, at 13-15 (2009), *aff'd*, 2011 WL 477818 (3rd Cir. Feb. 11, 2011), including the lack of relevance and being outside the limited scope of review under 42 C.F.R. Part 498. Finally, we reverse the ALJ's conclusion that the facility was in substantial compliance with section 483.75(o) because it is not supported by substantial evidence and conclude that the only reasonable inference from the evidence adduced before the ALJ is that Jewish Home failed to develop and implement an effective quality assurance plan.

Applicable legal authority

Federal law and regulations provide for surveys by state survey agencies to evaluate the compliance of long-term care facilities with the requirements for participation in the Medicare and Medicaid programs and for CMS or the State to impose remedies on skilled nursing facilities (SNF) or nursing facilities, respectively, found not to comply substantially with any of those program requirements. Sections 1819 and 1919 of the Social Security Act; 42 C.F.R. Parts 483, 488, and 498.

"Substantial compliance" is defined as "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health and safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Noncompliance" means "any deficiency that causes a facility to not be in substantial compliance." *Id*. CMS may impose a CMP when a facility is not in substantial compliance. 42 C.F.R. §§ 488.404, 488.406, and 488.408.

Section 483.25(h)(2) requires that "the facility must ensure that . . . [e]ach resident receives adequate supervision and assistance devices to prevent accidents." Surveyors use a system of "tag numbers" to identify deficiencies under particular regulatory requirements in preparing the Statement of Deficiencies (SOD). Section 483.25(h) deficiencies are cited under Tags F322 or F323.

Section 483.75 of the regulations sets forth the administration requirements for long term care facilities. The regulation provides that –

> A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.

Section 483.75(o) also requires long-term care facilities to establish and maintain a QA Committee and provides in pertinent part that –

> (1) A facility must maintain a quality assessment and assurance committee consisting of –
> (i) The director of nursing services;
> (ii) A physician designated by the facility; and
> (iii) At least 3 other members of the facility's staff.
> (2) The quality assessment and assurance committee--
> (i) Meets at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary; and
> (ii) Develops and implements appropriate plans of action to correct *identified quality deficiencies*.

Section 483.75(o) (emphasis added). Deficiencies under section 483.75(o) are cited under Tag F520.

In the State Operations Manual (SOM), CMS defines "quality assessment" to mean "an evaluation of a process and/or outcomes of a process to determine if a defined standard of quality is being achieved." SOM App. PP, F520. "Quality assurance" is defined as "the organizational structure, processes, and procedures designed to ensure that care practices are consistently applied and the facility meets or exceeds an expected standard of quality." *Id*. The term "quality deficiency" in section 483.75(o) "is meant to describe a deficit or an area for improvement," and it "is not synonymous with a deficiency cited by surveyors." *Id*. The SOM states that the purpose of QA "is continuous evaluation of facility systems." *Id*. Each facility's QA committee is to discern "issues and concerns . . . with facility systems," to correct "inappropriate care processes," and to develop a plan of action to correct problems and monitor the corrections' effectiveness. *Id*.

A SNF may request an ALJ hearing to contest a finding of noncompliance that has resulted in the imposition of a CMP or other enforcement remedy. 42 C.F.R. ' ' 488.408(g)(1), 498.3(b)(13). In an ALJ proceeding, CMS has the burden of coming forward with evidence related to disputed findings that is sufficient (together with any undisputed findings and relevant legal authority) to establish a prima facie case of noncompliance with a regulatory requirement.@ *Evergreene Nursing Care Center*, DAB No. 2069, at 4 (2007); *Batavia Nursing and Convalescent Center*, DAB No 1904 (2004), *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 F. App=x 181 (6th Cir.

2005). "If CMS makes this prima facie showing, then the SNF must carry its ultimate burden of persuasion by showing, by a preponderance of the evidence, on the record as a whole, that it was in substantial compliance during the relevant period." *Evergreene Nursing Care Center* at 4.

Standard of Review

Our standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. Our standard of review on a disputed finding of fact is whether the ALJ decision 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/guidelines/divisions/appellate/prov.html (Guidelines). Substantial evidence is "more than a mere scintilla. It 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 reviewer must examine the record as a whole and take into account whatever in the record fairly detracts from the weight of the evidence relied on in the decision below. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Case Background

Jewish Home is located in Scranton, Pennsylvania and participates in Medicare as a SNF and in the state Medicaid program as a nursing facility. On November 2, 2007, the Pennsylvania Department of Health (state agency) conducted a survey of Jewish Home and found that the facility was not in substantial compliance with several Medicare program participation requirements. CMS Ex. 2. In particular, the state agency determined that Jewish Home was not in substantial compliance with section 483.25(h) because "the facility failed to consistently implement facility identified safety interventions or to provide adequate supervision to prevent falls with significant injury for three of 26 sampled residents (Residents 152, 54, and 9)." *Id.*

In order to return to substantial compliance regarding the noncompliance findings from the November 2, 2007 survey, Jewish Home proposed in its plan of correction that its QA falls committee "will continue to evaluate all falls incidents within twenty-four to seventy hours post fall to ensure that investigations and interventions had been implemented." CMS Ex. 2, at 24. The plan of correction "included a quality assurance component to ensure that solutions were sustained." CMS Ex. 25, at 5.

On January 4, 2008, the state agency conducted a revisit survey and determined that Jewish Home had not returned to substantial compliance with program requirements found under the first survey. CMS Ex. 25. In addition, the state agency determined that Jewish Home was not in substantial compliance with section 483.25(h) based on evidence relating to Resident 164, who fell four times during a six-week period, all after

the November 2 survey, including one fall which resulted in significant injury to the resident. *Id*. at 1-3. Resident 164 fell on November 5, 2007, November 27, 2007, December 2, 2007, and December 22, 2007. *Id*. The state agency also determined during the revisit survey that Jewish Home was not in substantial compliance with section 483.75(o). The SOD states that, based on the clinical record review of Resident 164, "the facility was unable to provide evidence that adequate monitoring/supervision was timely implemented to prevent recurrence of falls." CMS Ex. 25, at 5. Accordingly, CMS determined that Jewish Home's "quality assurance plan was ineffective in identifying this continuing concern[,]" and the facility "failed to implement a corrective plan to prevent recurrence." *Id*.

In both surveys, the state agency cited the Tag F323 deficiencies at a scope and severity level of "G" (isolated actual harm that is not immediate jeopardy). CMS Ex. 2, at 23; CMS Ex. 25, at 1. The state agency cited the Tag F520 deficiency at a scope and severity level of "D" (no actual harm with potential for more than minimal harm that is not immediate jeopardy). CMS Ex. 25, at 4.

Based on another revisit survey conducted on February 22, 2008, CMS determined that Jewish Home returned to substantial compliance with Medicare program participation requirements on January 18, 2008. A per-day CMP of $600 was imposed for the period from November 2, 2007 through January 17, 2008, totaling $46,200. Jewish Home requested a hearing before an ALJ, which was held on August 25, 2009, in Scranton, Pennsylvania. ALJ Decision at 2. CMS offered exhibits (CMS Exs.) 1 through 37 that were admitted as evidence, and Jewish Home offered exhibits (P. Exs.) 6 through 10 that were admitted as evidence. ALJ Decision at 2. CMS called the following witnesses: Surveyor Darin Ambosie; Daniel Haimowitz, MD; and Beryl Goldman, PhD. Jewish Home called as a witness Mary Rose Applegate, who is Jewish Home's Assistant Administrator and a member of its QA committee. *Id*.; Tr. at 226-27. During the hearing Jewish Home stipulated that the exhibits offered by CMS were sufficient to make a *prima facie* showing of the deficiencies alleged in the SOD from the November 2, 2008 survey. ALJ Decision at 5. Jewish Home further stated that it would not introduce any rebuttal evidence. However, Jewish Home sought to preserve its right to proceed on certain alleged "equal protection issues" related to the surveys. *Id*.

The ALJ issued a decision sustaining CMS's determination that Jewish Home was not in substantial compliance with several Medicare program participation requirements related to the November 2, 2007 survey and was not in substantial compliance with section 483.25(h) involving Resident 164 during the January 4, 2008 revisit survey. ALJ Decision at 11-13. The ALJ concluded that Jewish Home was in violation of section 483.25(h) as of November 9, 2007 because Jewish Home failed "to implement adequate interventions to minimize the risk for harm to the resident due to accidental injury related to the falls." *Id*. at 11. However, the ALJ concluded that Jewish Home did not violate section 483.75(o). *Id*. at 14. The ALJ further concluded that Jewish Home returned to substantial compliance on January 18, 2008, as CMS found, rather than on the date Jewish Home asserted – November 30, 2007. *Id*. at 14-15. The ALJ also rejected Jewish

Home's argument that CMS's evidence was gathered in violation of equal protection principles and that the case involved selective enforcement based on surveyor bias because it is a Jewish facility. *Id.* at 17. Finally, the ALJ concluded that the amount and duration of the CMP was reasonable. *Id.* at 18-19. Both Jewish Home and CMS appealed the ALJ Decision.

Analysis

Notably, Jewish Home does not appeal the ALJ's conclusion that it was not in substantial compliance with several Medicare program requirements as a result of the November 2, 2007 and January 4, 2008 surveys. Furthermore, Jewish Home does not contest the reasonableness of the CMP imposed or the duration of the period of noncompliance. Instead, Jewish Home argues that the ALJ's FFCLs and the $600 per-day CMP are invalid because they are based: 1) on selective prosecution arising from religious discrimination in violation of equal protection principles; and 2) on a regulation, section 488.438(f)(4), that is contrary to section 1128A(d)(2) of the Act. We conclude that both of these arguments are without merit.

CMS argues on appeal that the ALJ erred in concluding that the facility did not violate section 483.75(o) and that his conclusion is not supported by substantial evidence in the record.[2] CMS's Request for Review (RR) at 4-8, 11-15. We agree and conclude the record is sufficiently developed for us to find that, applying the proper legal standard, substantial evidence demonstrates that Jewish Home failed to develop and implement an effective quality assurance plan to prevent the recurrence of falls to its residents in violation of section 483.75(o).

A. The ALJ did not err in rejecting Jewish Home's Equal Protection arguments.

During the hearing before the ALJ, Jewish Home argued that the CMP violates the Equal Protection Clause because it is the result of selective enforcement due to race and/or religious bias. Tr. at 67-71. It alleged that the state agency "issued citations to the Jewish Home for no other reason than the fact it is a Jewish facility." Tr. at 67-68. Jewish Home thus objected to the admission at the hearing of any evidence supporting the noncompliance on grounds that the ALJ could not consider evidence gathered by CMS in violation of Equal Protection principles. Tr. at 66-67. The ALJ declined to

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[2] Jewish Home contends that CMS does not have standing to appeal the ALJ Decision because it did not suffer any "injury in fact." Petitioner's (P.) RR at 3-4. We reject this argument. The regulation at 42 C.F.R. § 498.80 permits either party to request the Board to review an ALJ Decision and 42 C.F.R. § 498.83 authorizes the Board to "dismiss, deny, or grant a request made by CMS." The regulations do not require CMS to have suffered any harm from an adverse ALJ Decision in order to seek a review.

exclude the CMS exhibits or to consider Jewish Home's proffered documentary evidence or to hear testimony in support of Jewish Home's bias assertions. [3] Tr. at 72-76.

On appeal, Jewish Home reiterates its allegation made before the ALJ that the citation of the noncompliance at the G scope and severity level is evidence of religious bias. P. RR at 5-6. In support of this allegation, it points to proffered "expert statistical evidence" and testimony regarding surveyor bias in an attempt to show that it was treated more harshly than other similarly situated nursing facilities in selection of the scope and severity levels. P. RR at 7-15. Jewish Home argues that: 1) the "ALJ may not exercise his discretion to admit [CMS's] evidence if that evidence violates Equal Protection principles" and; 2) the ALJ "erred in failing to hold an exclusionary hearing." *Id*. at 7, 17.

Jewish Home has raised these arguments in a prior case in which we rejected them as being without merit. *Jewish Home,* DAB No. 2254, at 13-15. In that case, we rejected Jewish Home's equal protection argument, stating –

> In effect, Jewish Home is asking us to review and compare either the level of noncompliance or the choice of remedies in this case with those which Jewish Home considers similarly-situated and to determine that CMS's treatment of Jewish Home in these respects is somehow inequitable. Neither the level of noncompliance assigned nor the choice of remedies imposed by CMS is subject to review in this proceeding. 42 C.F.R. §§ 498.3(c)(10)(ii) and (b)(14), 488.408(g), 488.438(e)(2) [footnote omitted]. We therefore have no basis to consider Jewish Home's claims that CMS's determinations as to the level of noncompliance or choice of remedies here were in some way inappropriate in relation to such determinations in regard to other facilities.

Id. at 14. We also rejected Jewish Home's argument based on disparate treatment, stating as follows:

> CMS's treatment of other facilities cannot undercut Jewish Home's responsibility to show that it was in compliance with the applicable legal requirements or remove CMS's authority to take actions which it is authorized by statute and regulation to take in response to Jewish Home's noncompliance. Thus, the Board has held in numerous cases that allegations by a party against which an action has been taken that the treatment accorded to it is harsher than that accorded to others similarly

[3] In response to a question from the ALJ during the hearing, counsel for Jewish Home conceded that there was no "specific evidence of surveyor bias that might impact the credibility of the surveyor that's going to testify, that's been noticed to testify." Tr. at 69-70. The ALJ correctly noted in his decision that his de novo evaluation of the evidence "insulates a facility from the effect of any perceived disparate treatment or bias on the part of the state survey agency or CMS." ALJ Decision at 17. Jewish Home does not contest this conclusion on appeal.

> situated "do not prohibit an agency of this Department from exercising its responsibility to enforce statutory requirements[.]"

Id. at 15 (citations omitted). On appeal, the Third Circuit affirmed, rejecting Jewish Home's argument on the grounds that: 1) it did not demonstrate that CMS imposed the CMP at issue with an intentionally discriminatory purpose; 2) its reliance on alleged surveyor bias was misplaced; and 3) it failed to show that it was treated differently from other similarly situated facilities. *Jewish Home*, 2011 WL 477818, slip op. at 8-9.

Jewish Home submitted the same evidence in support of its arguments in the present case that was previously submitted in regard to our 2009 Decision. Jewish Home has not alleged any new facts here that would even arguably warrant a different outcome. Thus, for the reasons previously stated in *Jewish Home*, DAB No. 2254, at 13-15, as well as those stated by the Third Circuit, *Jewish Home*, 2011 WL 477818, slip op. at 8-9, we conclude that the ALJ did not err in rejecting Jewish Home's equal protection arguments.

B. The ALJ did not err in rejecting Jewish Home's argument that 42 C.F.R. § 488.438(f)(4) is invalid and contrary to section 1128A(d)(2) of the Act.

The regulation at section 488.438(f)(1)-(4) sets forth the factors that CMS must consider when determining the amount of a CMP. One of those factors is the facility's degree of culpability. Section 488.438(f)(4). This regulation also provides that the "absence of culpability is not a mitigating circumstance in reducing the amount of the penalty." *Id*. Jewish Home contends that the ALJ erred in rejecting its argument that section 488.438(f)(4) "is contrary to federal law because it precludes consideration of factors tending to decrease culpability and the Social Security Act requires a consideration of culpability." P. RR at 20 *citing* Act, § 1128A(d)(2). We disagree.

The issue of whether the absence of culpability can be a mitigating factor does not apply in this case because, as the ALJ correctly found, Jewish Home "was clearly culpable in its failure to develop and implement appropriate interventions to fulfill its regulatory obligation to ensure that Resident 164 had adequate supervision to prevent falls." ALJ Decision at 19. Moreover, the ALJ noted that in assessing the reasonableness of the $600 per-day CMP, he "specifically considered the degree or amount of [Jewish Home's] culpability given [Jewish Home's] failing or neglect of its regulatory obligation vis-à-vis the efforts made toward care planning actually undertaken and implemented, i.e. there was not a complete failure to care plan for falls as evidenced by the placement of mats, the use of a low bed, and the other interventions listed on Resident 164's care plan." *Id*. Finally, the ALJ correctly noted that his review of the reasonableness of the amount of the CMP is de novo and does not involve a review of how or whether CMS considered the regulatory factors in determining the amount of the CMP. *Id*. Jewish Home does not explain how the ALJ erred in reaching these conclusions.

In any event, Jewish Home's argument that the regulation is invalid does not provide any legal basis for us to conclude that the ALJ erred because the ALJ and the Board are bound by the cited regulations. *See 1866ICPayday*, DAB No. 2298, at 14 (2009) (stating "an ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground"); *see also Sentinel Medical Laboratories, Inc.*, DAB No. 1762, at 9 (2001), *aff'd*, *Teitelbaum v. Health Care Financing Admin.*, No. 01-70236 (9th Cir. Mar. 15, 2002), *reh'g denied*, No. 01-70236 (9th Cir. May 22, 2002).

C. The ALJ erred in concluding that Jewish Home did not violate 42 C.F.R. § 483.75(o).

CMS argues on appeal that the ALJ erred in concluding that the facility did not violate section 483.75(o) and that his conclusion is not supported by substantial evidence in the record. CMS further contends that substantial evidence in the record demonstrates that Jewish Home failed to develop and implement an effective quality assurance plan to prevent the recurrence of falls to its residents. CMS RR at 5. We agree.

Sections 483.75(o)(1) and (2) require a facility to establish and maintain a QA committee composed of certain key members that meets quarterly and develops and implements appropriate plans of action. The Board has previously affirmed an ALJ decision sustaining CMS's determination that a facility was in not in substantial compliance with this regulation when its "quality assurance committee was not doing what was required of it under section 483.75(o), *e.g.*, to review facility records and information, identify potential and actual quality deficiencies, and develop corrective action plans." *Alexandria Place,* DAB No. 2245, at 22 (2009).

As in *Alexandria Place*, substantial evidence exists that Jewish Home was aware of a continuing pattern of accidents and resident falls that "should have alerted the facility QA[] committee to a more widespread problem needing its attention." *Id*. Indeed, Jewish Home was aware of a continuing pattern of accidents and falls by its residents well before the November 2 survey and that falls continued to occur even after that survey. *See* ALJ Decision at 18. For example, the ALJ observed from the public record that Jewish Home "was previously found to have violated 42 C.F.R. § 483.25(h) from December 9, 2005 through January 26, 2006 and a CMP of $350 per day was imposed and affirmed on review through the Board." *Id*., *citing Jewish Home*, DAB No. 2254,

at 1. The ALJ also noted that Jewish Home "was also found in violation of 42 C.F.R. § 483.25(h) from October 16, 2006 through November 16, 2006 and a CMP of $400 per day was imposed and approved on review through the Board."[4] *Id.*

In light of the repeated deficiencies under section 483.25(h), including deficiencies relating to resident injuries due to falls, the November state agency survey team directed Jewish Home to develop a plan of correction "to change the conditions" that were found to be deficient in order to return to substantial compliance. CMS Ex. 2, at 23. The facility agreed with this directive as evidenced by its plan of correction in which it proposed to undertake a number of actions to protect its residents by preventing the reoccurrence of accidents and falls resulting in injury to its residents. *Id.* at 23-25. As part of its proposed plan of correction, the facility agreed that its "QA falls committee will continue to evaluate all falls incidents within twenty four to seventy hours post fall to ensure that investigations *and interventions have been implemented*." *Id.* at 24 (emphasis added). During the January revisit survey, the state agency conducted a clinical record review and discovered that Resident 164 had fallen four times between November 5, 2007 and December 22, 2007. All of these falls occurred after the November survey, and three of the falls occurred after the facility had proposed its plan of correction on November 19, 2007. The state agency determined that the facility's quality assurance plan was ineffective "in identifying this continuing concern" of resident falls and that the facility "failed to implement a corrective plan to prevent recurrence." CMS Ex. 25, at 5. The SOD specifically stated that "the facility was unable to provide evidence that adequate supervison/monitoring was timely implemented to prevent [the] recurrence of falls." *Id.*

In concluding that the facility was not in violation of section 483.75(o), the ALJ's analysis consisted solely of the following statement:

> I find that [Jewish Home] had the required [QA] committee and that the committee met as required for the required purpose. I will not infer that the QA committee was not effective in fulfilling its regulatory purpose based upon the facts related to the deficiency I have found under Tag F323. I further note that the allegations relate to Resident 164 and Tag F323 to the

[4] Jewish Home acknowledges that CMS suggests on appeal that four consecutive years of G-level deficiencies involving the Tag F323 are sufficient to establish a failure of the facility's QA committee. P. Response to CMS RR at 6. Although recognizing this as a "viable theory[,]" Jewish Home claims that CMS failed to put evidence in the record to establish that there are, in fact, four consecutive years of G-level deficiencies involving this Tag. *Id.* It is true that CMS did not submit documentation of the findings of noncompliance in 2005 and 2006. However, Jewish Home identified no error in the ALJ's reliance upon the public record to establish that the facility was cited for noncompliance with section 483.25(h) at the G level of scope and severity in 2005 and 2006. ALJ Decision at 18. The record in this case shows that the facility was also cited in 2007 and again in January 2008 for noncompliance with this regulation at the G level. The facility was also on notice from CMS's pre-hearing and post-hearing briefs that it would rely on the facility's history of prior noncompliance. This prior history is relevant to both the reasonableness of the CMP and the facility's awareness of "identified quality deficiencies" that should have been the subject of QA committee action, even though none of the deficiencies in this case are based directly on the *findings* of noncompliance in 2005 and 2006.

> plan of care for the resident and not to the development and implementation of a plan of action to correct identified quality deficiencies as required by the regulation.

ALJ Decison at 14. The ALJ's legal conclusion is erroneous because he failed to address whether Jewish Home's QA committee developed and implemented an effective plan of assurance to prevent resident falls, as alleged in the SOD. In this light, the ALJ applied the incorrect legal standard as stated in *Alexandria Place* because he did not address whether the facility's QA committee was doing what is required under section 483.75(o).[5] ALJ Decison at 14.

The ALJ erred by incorrectly focusing solely on allegations about Resident 164's plan of care rather than on whether the QA committee developed and implemented a plan to correct the falls problem at the facility. In other words, the ALJ should have considered the repeated falls of Resident 164 in the context of the ongoing problem existing at the facility to identify and correct the causes of these kinds of incidents. Given the facility's prior history of noncompliance involving resident falls and the QA committee's responsibility under section 483.75(o), the QA committee had an obligation to review facility records and information, identify potential and actual quality deficiencies that were systemic in nature, and develop a corrective action plan to prevent the recurrence of resident falls. Resident care planning and a QA committee's development and implementation of an effective plan of action to correct identified deficiencies that potentially affect the quality of care in the whole facility – in this case falls – are not mutually exclusive. Indeed, it is reasonable to conclude that, under the circumstances of this case, an appropriate plan of care for Resident 164 would necessarily overlap with recommendations of the QA committee to prevent the recurrence of falls for all residents. The fact that three of the four falls sustained by Resident 164 occurred within six weeks of the November survey further underscores the failure of the QA committee to implement an effective quality assurance plan as required in order to return to substantial compliance. Furthermore, Jewish Home specifically undertook to have its QA committee falls assessment process to be part of its plan of correction for the November deficiencies. Yet, the QA committee identified no record of falls assessments performed after *any* of Resident 164's falls. Tr at 296. The ALJ thus erred by declining to draw an inference from Resident 164's inadequate care planning without explaining why the full record on the facility's failure to correct repeated and identified falls deficiencies did not compel an inference of noncompliance with section 483.75(o).

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[5] The ALJ also erred by incorrectly focusing on whether the facility had established and maintained a properly composed QA committee that met quarterly as required under the regulations. CMS had not alleged a failure by the QA committee to meet as required. CMS did allege that the QA committee should have included Resident 164's personal physician and that the ALJ erred as a matter of law by ignoring "the fact that [Resident 164's personal] physician was not participating with the QA committee." CMS RR at 12 n. 8; *see also id.* at 4 n.2. We disagree. Although section 483.75(o)(1)(ii) requires that a QA committee must consist of, among other things, a "physician designated by the facility[,]" the regulation does not require the personal physician of any particular resident to be a member of a facility's QA committee. Our conclusion here should be not read as indicating that a QA committee has no responsibility to consult with the personal physician of a resident whose care was the subject of an identified quality of care deficiency.

In addition, as discussed below, the ALJ's conclusion is not supported by substantial evidence in the record. Indeed, the ALJ's conclusion is completely devoid of any meaningful analysis of the underlying facts and law. Moreover, the ALJ ignored or otherwise failed to address unrebutted testimony and other evidence in the record (as discussed below) that supports a conclusion that the facility violated section 483.75(o). *See Life Care Center of Bardstown*, DAB No. 2233, at 10 (2009) (we have previously concluded that "a decision may not be upheld based solely on the evidence 'which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.'" (citations omitted)).

When the Board reviews an ALJ decision, it may either issue a decision or remand the case. 42 C.F.R. § 498.88(a). Because the record has been adequately developed regarding the deficiency cited under section 483.75(o), instead of remanding the case, we will next address the question of whether substantial evidence in the record demonstrates that Jewish Home was in violation of this regulation.

CMS contends that it "presented overwhelming and credible evidence that the quality assurance deficiency was properly cited." CMS RR at 8. We agree for several reasons. First, the SOD specifically stated that "the facility was unable to provide evidence that adequate supervision/monitoring was implemented to prevent recurrence of falls." CMS Ex. 25, at 5. Similarly, Surveyor Ambrose testified without rebuttal that he asked both the Director of Nursing and the Assistant Nursing Home Administrator, Mary Rose Applegate, for any evidence that would indicate that the facility had conducted "appropriate investigations and interventions that were implemented." Tr. at 111. He further testified that they provided him with "[n]othing that would negate a citation." *Id*. When asked during cross-examination if the facility had any documentation that would show that the facility might have done some quality assurance with respect to this resident [*i.e.*, Resident 164]," Surveyor Ambrose further testified that: "They didn't have any." Tr. at 127. Nor did Jewish Home offer any documentation or testimony at the hearing indicating that the facility had implemented a quality assurance plan or taken corrective action to prevent the recurrence of resident falls. Finally, Surveyor Ambrose's testimony that "their plan was ineffective . . . it was not effectively implemented," was not rebutted. Tr. at 109; *see also* Tr. at 111 (Surveyor Ambrose testified "effective interventions [were not] put in place."). The record indicates that the facility failed to rebut CMS's evidence demonstrating noncompliance.

Second, on appeal before us, Jewish Home points to no evidence in the record indicating that the facility's QA committee was doing what was required of it under section 483.75(o). P. Response to CMS RR at 7. In other words, Jewish Home has not identified what facility records or information were reviewed by the QA committee, whether any potential or actual quality deficiencies had been identified, or whether any corrective action plan had been developed. Instead, Jewish Home argued that *Alexandria Place* is not "relevant" because "There is no evidence to show that the facility failed to 'review

records and information, identify potential and actual quality deficiencies, and develop corrective action plans."[6] *Id*. Although Jewish Home claims that the facility "took steps to identify Resident 164's safety needs," it points to no evidence on appeal that the QA committee took steps to identify systemic causes of falls or took action to prevent falls from recurring facility wide.

Third, there is also no evidence in the record to support a conclusion that the facility's QA committee had implemented an appropriate plan of corrective action. For example, the SOD stated that the facility's QA falls committee would evaluate all incidents of resident falls within 24 to 70 hours after the fall "to ensure that investigations and interventions had been implemented." CMS Ex. 2, at 24. Ms. Applegate testified that the facility did not conduct a fall assessment of Resident 164 until *after her fourth fall*, even though she conceded that the facility was obligated to conduct such an assessment after every fall. Tr. at 296; *see also* Tr. at 204, 149. The QA committee also should have at least undertaken a fall assessment of Resident 164 after each fall in an effort to determine the root causes of her repeated falls but failed to do so. Similarly, the facility did not institute a bed and chair alarm, 30-minute checks, or consider a winged mattress for Resident 164 until after her fourth fall. Tr. at 296, 265, 278-279. Once these measures were taken, the record indicates that Resident 164 did not experience any additional falls. Thus, substantial evidence in the record demonstrates that the facility's QA committee did not take appropriate corrective action to correct identified deficiencies in an effort to prevent Resident 164 from suffering repeated falls or protect other residents susceptible to falls.

Jewish Home claims that "CMS argues that because the Jewish Home was not in compliance with regard to care planning for a single resident, its quality assurance program is not in substantial compliance with the requirements of [section] 483.75(o)." P. RR at 5. Jewish Home goes on to argue that "[i]f the Board accepts the reasoning offered in the CMS argument, then it stands to reason that *any* substantive non-compliance in the care planning of an individual resident would *automatically* result in a failure to comply with [section] 483.75(o)." *Id*. (emphasis in original). We disagree. Jewish Home mischaracterizes CMS's position in this case. CMS based the section 483.75(o) deficiency on the facility's inability to provide evidence that its QA committee had developed and implemented an effective plan of correction to prevent the recurrence of a pattern of resident falls, as demonstrated by its failure to take any steps to prevent the repeated falls experienced by Resident 164. CMS Ex. 25, at 5. The evidence relating to

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[6] Jewish Home also contends that "CMS did not introduce any evidence showing that had the quality assurance committee reviewed different records, identified different quality issues or developed [a] different corrective action plan, Resident 164 would not fallen." P. Response to CMS RR. at 7. This contention is not relevant to whether the deficiency cited under section 483.75(o) is supported by the evidence. CMS does not bear the burden of demonstrating that *if* the facility's QA committee had done what it was supposed to, then the resident would not have fallen. The appropriate role for the QA committee was to attempt to identify any systemic causes of resident falls, including those of Resident 164, and recommend any changes in policy or practice that might help prevent falls and ensure the recommendations are implemented. The point is that there is no evidence indicating that the QA committee carried out this role as required by section 483.75(o).

the facility's prior history of noncompliance is relevant to the issue of whether the QA committee should have taken appropriate corrective action in light of "identified quality deficiencies[.]" Our construction of section 483.75(o) does not compel a derivative finding of noncompliance with section 483.75(o) whenever a deficiency exists under section 483.25(h).

In summary, we conclude that substantial evidence on the record supports CMS's determination that Jewish Home's QA committee was aware of the history of resident falls, including those of Resident 164, and nevertheless was not doing what was required of it under section 483.75(o). Thus, we conclude that that Jewish Home failed to substantially comply with the requirements of section 483.75(o)

Conclusion

For the reasons stated above, we uphold the ALJ's decision in part and reverse in part. We uphold the ALJ's FFCLs as to noncompliance under section 483.25(h) regarding the November 2, 2007 and January 4, 2008 surveys. We reverse the ALJ's conclusion of law that Jewish Home did not violate section 483.75(o) and find that substantial evidence in the record demonstrates that Jewish Home failed to develop and implement an effective quality assurance plan.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Stephen M. Godek
Presiding Board Member