Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Perry County Nursing Center
Docket No. A-13-86
Decision No. 2555
January 3, 2014

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Perry County Nursing Center (PCNC), a Mississippi skilled nursing facility (SNF), appeals an April 13, 2013 decision by an administrative law judge (ALJ) following a hearing in which PCNC challenged the imposition of civil money penalties (CMPs) by the Centers for Medicare & Medicaid Services (CMS). *Perry County Nursing Ctr.*, DAB CR2757 (2013) (ALJ Decision). The ALJ concluded that from April 30 through October 16, 2011, PCNC was not in substantial compliance with Medicare participation requirements in 42 C.F.R. §§ 483.20(k)(3)(i) and 498.60. The ALJ also sustained, as not clearly erroneous, CMS's finding that PCNC's noncompliance with those requirements placed residents in "immediate jeopardy" from April 30 through September 6, 2011. The ALJ further concluded that the amounts of the per-day CMPs imposed by CMS for the period of PCNC's noncompliance were reasonable.

For the reasons explained below, we affirm the ALJ's conclusion that PCNC was not in substantial compliance with sections 483.20(k)(3)(i) and 498.60 from April 30 through October 16, 2011. We also affirm her conclusion concerning CMS's immediate jeopardy finding. In addition, like the ALJ, we reject PCNC's argument that the state of Mississippi lacked the legal authority to conduct the August 2011 compliance survey which led to those remedies and, therefore, conclude that CMS's enforcement remedies based on that survey were lawfully imposed. We deny PCNC's request to stay our adjudication of the noncompliance issues pending judicial review of its argument concerning the legality of the August 2011 survey. Finally, we affirm the ALJ's conclusion that the per-day CMP amounts were reasonable.

Legal Background

To participate in Medicare, a SNF must at all times be in "substantial compliance" with the requirements in 42 C.F.R. Part 483. 42 C.F.R. § 483.1. Under agreements with the Secretary of Health & Human Services (Secretary), state health agencies conduct onsite surveys to verify compliance with those participation requirements. *Id.* §§ 488.410(a), 488.11; *see also* Social Security Act (Act) §§ 1819(g)(1)(A), 1864(a).

A state survey agency reports any "deficiencies" it finds in a document called a Statement of Deficiencies. *See* 42 C.F.R. § 488.331(a). A "deficiency" is any failure to comply with a Medicare participation requirement, and a SNF is not in substantial compliance when it has one or more deficiencies that have the potential for causing "more than minimal" harm to residents. 42 C.F.R. § 488.301 (defining the term "substantial" compliance"). The regulatory term "noncompliance" is synonymous with lack of substantial compliance. *Id.* (defining "noncompliance").

Surveyors categorize each instance of noncompliance found by its level of "seriousness, which is a function of: (1) "severity" – that is, whether the deficiency has created a "potential" for "more than minimal" harm, resulted in "actual harm," or placed residents in "immediate jeopardy" (the latter circumstance is the highest degree of severity); and (2) "scope" – that is, whether the noncompliance is "isolated," constitutes a "pattern," or is "widespread." 42 C.F.R. § 488.404(b); State Operations Manual, CMS Pub. 100-07, Appendix P – *Survey Protocol for Long Term Care Facilities*, Part I, Chapter IV ("Deficiency Categorization").[1]

Based on a survey's findings, CMS may impose enforcement "remedies" – including CMPs – for any days on which the SNF is not in substantial compliance with one or more Medicare participation requirements. 42 C.F.R. § 488.402(b), (c). In choosing an appropriate remedy, CMS considers the seriousness of the SNF's noncompliance and other factors specified in the regulations. *Id.* § 488.404(a), (c).

When CMS imposes a per-day CMP for noncompliance at the immediate jeopardy-level of severity, it must set the CMP amount within the "upper range" of $3,050 to $10,000 per day. 42 C.F.R. §§ 488.408(d)(3)(ii), 488.438(a)(1)(i). A per-day CMP for noncompliance below the immediate jeopardy level must be set within the "lower range" of $50 to $3,000 per day. *Id.* §§ 488.408(d)(1)(iii), 488.438(a)(1)(ii).

A SNF may appeal a determination of noncompliance that has resulted in the imposition of an enforcement remedy by requesting a hearing before an ALJ. *See* 42 C.F.R. §§ 488.408(g)(1), 498.3(b)(13), 498.5(b). In its appeal, the SNF may also contend that the amount of the CMP imposed for the noncompliance is unreasonable. *See Lutheran Home at Trinity Oaks*, DAB No. 2111, at 21 (2007); *Capitol Hill Community Rehabilitation and Specialty Care Ctr.*, DAB No. 1629, at 5 (1997).

[1] Appendix P to the State Operations Manual is available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_p_ltcf.pdf.

Case Background

From August 3 through August 17, 2011, the Mississippi Department of Health (state survey agency) performed a compliance survey of PCNC. *See* CMS Ex. 4. The survey focused on administration and management of residents' medications. *Id.*

In its Statement of Deficiencies for the August 2011 survey (CMS Ex. 4), the state survey agency reported the following five deficiencies (each identified by a survey "tag" number):

- Tag F281: failure to ensure that five residents had received medication in accordance with their physicians' orders, in violation of 42 C.F.R. § 483.20(k)(3)(i);

- Tag F425: failure to follow procedures for "acquiring, receiving, storing, controlling and reconciling" of medication, in violation of 42 C.F.R. § 483.60(a) and (b);

- Tag F520: failure of PCNC's Quality Assurance Committee to address "medication related issues related to the prevention and reporting of medication inconsistencies," in violation of 42 C.F.R. § 483.75(o)(1);

- Tag F225: failure to timely notify the police department about the December 2009 discovery of missing tablets of Lortab (a narcotic pain medication), in violation of 42 C.F.R. § 483.13(c)(1) and (2); and

- Tag F514: failure to maintain clinical records of a resident in accordance with professional standards of practice, in violation of 42 C.F.R. § 483.75(l)(1).

The state survey agency found that the deficiencies described under tags F281, F425, and F520 constituted noncompliance with the three corresponding regulatory requirements at the "immediate jeopardy" level, while the deficiencies under tags F225 and F514 constituted noncompliance with the other two regulatory requirements at a lower level of severity. CMS Ex. 4, at 1-2, 34. The state survey agency further found that PCNC's immediate-jeopardy-level noncompliance began on April 30, 2011 and was still ongoing when the survey ended on August 17, 2011. *Id.* at 1-2.

During a revisit survey in September 2011, the state survey agency determined that PCNC had abated the immediate jeopardy as of September 7, 2011 but that PCNC remained out of substantial compliance with all five regulatory requirements cited in the August 2011 survey's Statement of Deficiencies. CMS Ex. 5, at 1-3, 8-9, 22-24, 41-43, 52-54. A second revisit survey found PCNC to be back in substantial compliance with all regulatory requirements as of October 17, 2011. CMS Ex. 7.

Concurring with the state survey agency's noncompliance findings, CMS imposed the following enforcement remedies on PCNC: a $3,550 per-day CMP from April 30 through September 6, 2011 (the period during which the state survey agency had found immediate-jeopardy-level noncompliance); a $150 per-day CMP from September 7 through October 16, 2011; and a denial of payment for new admissions from August 26 through October 16, 2011. CMS Ex. 7; CMS Ex. 8, at 2.

PCNC then requested and received an evidentiary hearing before the ALJ, challenging each of the deficiency citations resulting from the August 2011 survey.[2] Prior to the hearing, the ALJ denied a motion for summary judgment filed by PCNC. In that motion PCNC contended that CMS lacked the legal authority to impose enforcement remedies based on the August 2011 survey because that survey (along with related revisit surveys) constituted an improper "reopening" of a January 2010 survey.[3] In denying the motion, the ALJ stated that "CMS and/or the state survey agency have the authority to survey a facility at any time and for virtually any reason," further stating that she had "no authority to review an agency decision to conduct a survey."[4]

The ALJ elaborated on her reasons for denying the motion in the decision that PCNC is now appealing. *See* ALJ Decision at 4-6. She then addressed the deficiency citations under tags F281 and F425, concluding that PCNC was not in substantial compliance with sections 483.20(k)(3)(i) and 483.60. *Id.* at 6-13, 15-20. She further concluded that CMS's finding that this noncompliance was at the level of immediate jeopardy from April 30 through September 6, 2011 was not clearly erroneous. *Id.* at 20-22. Finally, she found that the per-day CMP amounts were "reasonable." *Id.* at 1, 22. The ALJ did not address the merits of the immediate-jeopardy-level noncompliance citation under tag F520 (i.e., the alleged violation of section 483.75(o)) because she found that the deficiencies she did address "more than justify the penalties imposed." *Id.* at 20 n.17.

PCNC filed its request for review, the contentions of which we identify and address below.

Standard of Review

The Board's standard of review concerning a disputed finding of fact is whether the finding is supported by substantial evidence on the record as a whole. *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's*

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[2] *See* PCNC's November 23, 2011 *Notice of Appeal*, CRD Docket No. C-12-152.

[3] *Motion for Judgment as a Matter of Law* (Jan. 16, 2012), CRD Docket No. C-12-152.

[4] *Summary of Prehearing Conference and Order Establishing Procedures for Hearing* (April 6, 2012), CRD Docket No. C-12-152, at 2.

Participation in the Medicare and Medicaid Programs, http://www.hhs.gov/dab/divisions/appellate/guidelines/prov.html. The Board's standard of review concerning a disputed conclusion of law is whether the conclusion is erroneous. *Id.*

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

Discussion

A. *PCNC's argument concerning the legality of the August 2011 survey has no merit, and we reject PCNC's request that the Board stay its review of the ALJ Decision.*

PCNC restates its argument that the August 2011 survey was an illegal "reopening" of a January 2010 survey, asserts that neither the ALJ nor the Board is empowered to rule on the merits of that issue, and asks the Board to "stay any further hearing on the merits of the deficiencies and the imposition of any enforcement remedies . . . until such time as this issue [concerning the legality of the August 2011 survey] may be ruled upon in the appropriate federal court by the body with proper jurisdiction." Request for Review (RR) at 8.

The ALJ held that she had no authority to review any decision by CMS or the state survey agency (under its agreement with the Secretary) to conduct the August 2011 survey. ALJ Decision at 4. She discussed CMS's broad statutory authority and Mississippi's corresponding responsibility (under its agreement with the Secretary) to survey PCNC in order to verify its compliance with Medicare participation requirements, and she concluded that the August 2011 survey had been performed within the scope of that authority. *Id.* at 5-6.

We agree with the ALJ that the August 2011 survey – which was officially designated a "complaint investigation" or an extension of a complaint investigation (*see* CMS Ex. 4, at 1 and P. Ex. 9, at 1) – was lawful. As the ALJ correctly noted, CMS and states (pursuant to their agreements with the Secretary) have broad legal authority to conduct surveys to ensure compliance with Medicare participation requirements. That authority is found in

section 1819(g) of the Social Security Act (Act). That section authorizes a state to conduct a standard survey and to extend the survey at its discretion and also authorizes a survey "[w]here the Secretary has reason to question the compliance of a skilled nursing facility." Act §§ 1819(g)(2)(A)-(B), 1819(g)(3)(D). That section further requires states to have procedures and staff to conduct surveys to investigate "complaints." Act § 1819(g)(4).

The regulations that implement section 1819(g) also define the survey authority broadly. They provide that a state survey agency "may conduct a survey as frequently as necessary to . . . [d]etermine whether a facility complies with the [Medicare] participation requirements." 42 C.F.R. § 488.308(c)(1). They also require a state to conduct a survey when there is a "complaint," as CMS states there was in this case (*see* CMS Ex. 4, at 1), that the facility is violating one or more participation requirements and a survey is needed to determine whether a deficiency exists.[5] *Id.* § 488.308(e)(2)(ii).

PCNC asserts that in order to impose enforcement remedies based on a survey,

> CMS must show that the survey was lawful [and] conducted in accordance with the Certification and Survey Process and the Enforcement Process provisions of Section 1819 of the Social Security Act . . . and the Survey, Certification and Enforcement Process provisions of the federal regulations (42 C.F.R. § 488 *et seq.*).

RR at 7 (emphasis in original). However, PCNC does not point to any Medicare statute or regulation which requires CMS to establish the legality of a compliance survey as a condition for imposing an enforcement remedy for noncompliance found by that survey. Furthermore, such a showing is neither required nor reviewable in this administrative appeal proceeding, which is governed by the regulations in 42 C.F.R. Part 498. Under those regulations, an ALJ and the Board review "initial determinations" specified in 42 C.F.R. § 498.3(b). The only initial determinations properly before us in this appeal are determinations of noncompliance that led the imposition of certain enforcement remedies

[5] The preamble to the November 11, 1994 Final Rule which promulgated the regulations in question also makes clear that, to safeguard resident health and safety, state survey agencies possess considerable discretion to schedule and conduct surveys when they have reason to believe that a SNF may be out of substantial compliance. *See* 59 Fed. Reg. 56,116, 56,126 (clarifying that a "survey agency will review complaint allegations and conduct a standard or abbreviated standard survey if the survey agency concludes that a deficiency in one or more requirements may have occurred and only a survey can confirm the existence of the deficiency or deficiencies"); 56,137 (stating that "[t]he survey agency may conduct surveys as frequently as necessary to determine compliance with participation requirements, to confirm that previously cited deficiencies have been corrected, to investigate complaints and to ensure that certain changes do not cause a decline in the quality of care furnished to the resident"); and 56,138 (stating that "[w]e are retaining the provision in which the decision to conduct other surveys under the circumstances specified at § 488.308(c) be *at the State survey agency's discretion* [italics added].)

as well as CMS's determination regarding the level of PCNC's noncompliance.[6] In addition, the validity of these determinations depends not on the scope of a state agency's legal authority to conduct a survey, but on the evidence submitted by the parties concerning the nature, severity, and scope of the alleged noncompliance with one or more of the participation requirements in 42 C.F.R. Part 483. The Board has, in fact, repeatedly emphasized the irrelevance of issues relating to the conduct of the survey. "Allegations of errors or irregularities in the survey and enforcement process will not upset a determination of noncompliance when reliable evidence submitted during the ALJ proceeding (such as the SNF's own records) supports that determination." *Del Rosa Villa*, DAB No. 2548, at 20 (2012) (holding that "[t]he issue before the ALJ (and the Board) is the validity of CMS's determination of noncompliance, and a resolution of that issue hangs on the ALJ's de novo review of the evidence relating to that determination, and not on the conduct (by CMS or the state) of the survey and enforcement process" (internal quotation omitted)), *aff'd*, *Del Rosa Villa v. Sebelius*, ___ Fed. App'x ___, 2013 WL 6172067 (9th Cir. Nov. 26, 2013); *see also Beechwood Sanitarium*, DAB No. 1906, at 44 (2004) (declining to address a facility's complaint concerning the conduct of a survey, stating that the "appeals process is not intended to review the conduct of the survey but rather to evaluate the evidence of compliance [or noncompliance] regardless of the procedures by which the evidence was collected").

In any event, PCNC's argument that the August 2011 survey was an unauthorized "reopening" is meritless. The argument is based explicitly on 42 C.F.R. § 498.30, which provides that, with one irrelevant exception, CMS may "reopen" an "initial determination" within 12 months after notice of that determination. According to PCNC, the August 2011 survey constituted an untimely – and therefore illegal – reopening of a January 2010 *survey* performed by the Mississippi Department of Health. *See* RR at 10. However, section 498.30 does not address the reopening of "surveys"; rather, it limits the time for the reopening of "initial determinations." *See* 42 C.F.R. § 498.3(a) (stating, in relevant part, that Part 498 sets forth procedures "for reviewing initial determinations that CMS makes with respect to the matters in" section 498.3(b)). PCNC does not allege that CMS made an initial determination based on, or in any way related to, the January 2010 survey. Consequently, section 498.30's one-year limitation on reopening is simply irrelevant.

As indicated, PCNC asks us to stay our review of the ALJ Decision while it pursues court litigation on the issue of the August 2011 survey's legality. We see no basis for delaying our review of the initial determination before us, especially since we have concluded

[6] During the period relevant to this decision, initial determinations concerning SNFs were defined to include a finding of noncompliance that resulted in the imposition of a remedy specified in section 488.406, such as a CMP, and a finding regarding the level of noncompliance if that finding, as here, affects the range of CMPs that CMS may collect. 42 C.F.R. § 498.3(b)(13)-(14) (Oct. 1, 2011).

there is no merit to PCNC's argument that there was no legal authority for the survey. PCNC is free to make this argument in a federal court if and when it decides to appeal our decision, which is the final decision of the Secretary.

B. *The ALJ's conclusion that PCNC was noncompliant with 42 C.F.R. § 483.20(k)(3)(i) from April 30 through October 16, 2011 is supported by substantial evidence and free of legal error.*

Citing the circumstances of five residents (Residents 1, 3, 5, 7, and 17), the ALJ concluded that PCNC was noncompliant with 42 C.F.R. § 483.20(k)(3)(i), which requires a SNF to ensure that its nursing care meets "professional standards of quality." In support of that conclusion, the ALJ found that PCNC's nursing staff: (1) did not administer medication – including narcotic drugs – "as ordered by physicians"; (2) did not document the reasons why medication was not administered as ordered; (3) did not document instances in which residents refused their prescribed medications or report those refusals to the residents' physicians; and (4) failed to transcribe physician orders accurately or check medication labels to ensure that a resident was receiving the dose actually prescribed.[7] ALJ Decision at 6-13. The ALJ found that professional standards of quality: (1) required staff to document when medication was given or refused and to indicate "in nurses' notes the reason a medication was not given as ordered"; (2) required staff to notify a resident's physician and representative when the resident refused medication; (3) required nurses to "transcribe physician orders carefully and accurately," check medication labels for accuracy (including medication name and strength), and "add all medication orders, including temporary changes in orders, to [a] resident's medication administration record (MAR)"; and (4) required nurses to "compare the physician order, the MAR, and the medication label" and to "contact the physician for clarification" if "inconsistencies or ambiguities" were found. *See id.* at 6, 7, 9, 11, 12 (*citing* CMS Ex. 10, at 2, 8, 9, 12; CMS Ex. 11; CMS Ex. 13, at 2; CMS Ex. 35, at 1, 3; CMS Ex. 36, at 3; and CMS Ex. 38).

[7] In support of her conclusion that PCNC was noncompliant with section 483.20(k)(3)(i), the ALJ also found that its staff violated "[s]tandards of nursing practice by failing to track adequately its supplies of narcotics and other controlled substances." ALJ Decision at 6 (heading), 13. However, the ALJ reviewed the evidence of PCNC's medication tracking failures in the section of her decision that discussed PCNC's noncompliance with section 483.60, concluding that those failures violated that regulation as well. *Id.* at 15-20. The ALJ found, for example, that PCNC was noncompliant with section 483.60 when it violated a facility policy which "comport[ed] with standards of nursing practice" and which required the staff to sign out narcotic medication at the time it was to be administered. ALJ Decision at 17. As we discuss in the following section, PCNC does not raise a meritorious objection to the ALJ's conclusion that it was noncompliant with section 483.60, nor does PCNC dispute the ALJ's finding that its medication tracking failures violated section 483.20(k)(3)(i). *See* RR at 18-29.

PCNC raises various objections to the ALJ's noncompliance finding. First, PCNC suggests that there was no independent legal or other source for the "professional standards of quality" described by the ALJ. RR at 18-19. However, the standards in question are found in PCNC's resident care policies. *See* CMS Exs. 11, 34-38. The Board has held that, absent contrary evidence, it is "'reasonable to presume'" that such policies reflect professional standards of quality. *Sheridan Nursing Care Ctr.*, DAB No. 2178, at 32 (2008) (*quoting Spring Meadows Health Care Ctr.*, DAB No. 1966, at 18 (2005)). PCNC does not allege or point to evidence indicating that its resident care policies did not reflect the professional nursing standards found by the ALJ. Furthermore, PCNC did not rebut Surveyor Baker's testimony that the nursing failures found by the ALJ violated professional standards of nursing care. *See* CMS Ex. 10 (Baker Decl. ¶¶ 9, 24, 30, 36, 39, 41-42, 44-45, 47). In ascertaining an applicable professional standard, an ALJ may reasonably rely on surveyor testimony (as the ALJ did here) "where the evidence shows that the surveyor has training, experience and knowledge in the subject field." *Universal Health Care – King*, DAB No. 2383, at 8 (2011), *aff'd*, *Universal Health Care/King v. Sebelius*, 499 F. App'x 299 (4th Cir 2012). Surveyor Baker – who had been a registered nurse for 20 years at the time of the hearing and professed to be "knowledgeable regarding appropriate standards of care in nursing homes" – had ample training, experience, and knowledge, including a total of seven years "overseeing" nursing services in a hospital's skilled nursing unit and her participation in "hundreds" of compliance surveys during her seven-and-one-half year career with the state survey agency. CMS Ex. 10 (Baker Decl. ¶¶ 2-4).

Second, PCNC takes issue with some of the ALJ's resident-specific factual findings. However, none of the assertions it makes concerning those findings is sufficient to undercut the ALJ's conclusion that PCNC's nursing staff violated professional standards of quality for the following reasons:

- Resident 1: The ALJ found that a PCNC nurse failed to administer a prescribed dose of Lortab to Resident 1 in eleven instances and in six of those instances failed to document that she had failed to administer that drug. ALJ Decision at 7-8. When the state surveyors brought these circumstances to PCNC's attention, the nurse in question wrote an unsworn, handwritten statement claiming that Resident 1 had refused to take the scheduled medications at those times. *Id.* at 8; *see also* RR at 24. The ALJ found "such after-the-fact and potentially self-serving statements inherently unreliable, particularly where the person making the statement does not testify." ALJ Decision at 8. PCNC now questions that credibility finding. RR at 24. However the Board defers to an ALJ's credibility findings absent a compelling reason to do otherwise, *Woodland Oaks Healthcare Facility*, DAB No. 2355, at 7 (2010), and PCNC provided no such reason here. In any event, the nurse's statement, even if true, is irrelevant given the ALJ's finding

that she violated professional standards of quality by failing to record the alleged refusals in the resident's nursing records and to notify the resident's physician about them. *See* CMS Ex. 10 (Baker Decl. ¶ 14, 30); CMS Ex. 36, at 3 (facility policy instructing nursing staff on proper response to a resident's medication refusal).

PCNC also questions the ALJ's finding concerning Lortab doses that Resident 1 was supposed to receive on July 15, 2011. RR at 24-25. It is undisputed that because PCNC ran out of 7.5 mg Lortab tablets, Resident 1's physician issued an order that Resident 1 receive one and one-half 5 mg Lortab tablets at 1:00 a.m. and 5:00 a.m. on July 15 and then receive 5 mg tablets every four hours afterward until the facility obtained 7.5 mg tablets. *See* ALJ Decision at 8; RR at 24. The ALJ found that PCNC did not enter the order for the 5 mg doses on Resident 1's MAR and did not administer those doses as ordered. ALJ Decision at 8. PCNC now contends that it followed the physician's order to administer only 5 mg tablets after 5:00 a.m. on July 15. RR at 24. However, the ALJ's contrary finding is supported by substantial evidence – specifically, Resident 1's MAR, which shows that *all* doses of Lortab administered to Resident 1 during July 2011, including those administered after 5:00 a.m. on July 15, were 7.5 mg. *See* CMS Ex. 13, at 1-2. PCNC contends that its Emergency Box Requisitions form is proof that it administered only 5 mg dosages, but that form shows only what medications the nursing staff *withdrew* from the Emergency Box on a particular date, not the medications that were actually administered. To the extent that there is any conflict between the MAR (the best evidence of what the nursing staff actually administered) and the Emergency Box Requisitions form, it was PCNC's burden to reconcile the conflict before the ALJ.[8] It failed to do so.

- Resident 3: As of April 2011, Resident 3 had a standing physician order to receive Ambien (a sedative) every night. CMS Ex. 16, at 1; CMS Ex. 17, at 1; CMS Ex. 10 (Baker Decl. ¶ 17). The ALJ found that PCNC's nursing staff withheld the drug on nine Sundays during June and July 2011. ALJ Decision at 9. She also found that staff failed, without explanation, to administer Ambien to Resident 3 on June 30 (a Thursday), July 4 (a Monday), and July 30 (a Saturday). *Id.* PCNC does not dispute that its staff failed to administer the drug on these 12 occasions but asserts that the physician order was "coded [in nursing records] for a drug holiday on Sundays." RR at 25. However, the ALJ found – and PCNC does not

[8] *See Evergreene Nursing Care Ctr.*, DAB No. 2069, at 7 (2007) (holding that a SNF has the ultimate burden of demonstrating substantial compliance with Medicare requirements once CMS makes a prima facie case of noncompliance); *Batavia Nursing and Convalescent Ctr.*, DAB No. 1904 (2004) (discussing the parties' evidentiary burdens before the ALJ), *aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson*, 129 F. App'x 181 (6th Cir. 2005).

dispute – that the operative physician order did not provide for any drug holiday and that "[s]taff made a mistake when they entered the Ambien order into the facility's computerized physician orders, erroneously indicating that the drug should be withheld on Sundays."[9] ALJ Decision at 9.

- Resident 5: The ALJ found that PCNC's nursing staff failed to administer ordered doses of Restoril and Trazadone to Resident 5 on July 25, 2011. ALJ Decision at 9. PCNC contends that Resident 5's Individual Resident's Narcotics Record (IRNR), a control sheet the facility used to track narcotics, shows that Restoril was administered on that date. RR at 26. However, PCNC does not dispute the ALJ's finding (*see* ALJ Decision at 9) that the IRNR shows only that a nurse removed the drug from locked storage on July 25, not that the drug was actually administered to Resident 5. Nor does PCNC dispute the ALJ's finding (*id.* at 9-10) that it would be inappropriate to presume that Restoril was actually administered in the absence of proper documentation. Moreover, PCNC concedes that Resident 5's MAR, the document used to record daily and hourly administration of medication, indicates that neither drug was administered on July 25. PCNC acknowledges that the entry box for documenting administration of these drugs was "left blank" on the MAR. RR at 26 (*citing* CMS Ex. 24, at 1).

- Resident 7: The ALJ found that PCNC's nursing staff failed to administer an ordered 12:00 a.m. dose of Lortab to Resident 7 on August 5, 2011 and failed to document the reason that the dose was not administered. ALJ Decision at 26. PCNC does not challenge these findings. RR at 26-27. Instead, it argues that these (and other) errors were not "significant" within the meaning of section 483.25(m), the quality of care regulation that specifically addresses medication errors. RR at 27-28. As we discuss below, however, the ALJ was not obligated to make findings about whether the errors were significant in order to conclude that PCNC was noncompliant with section 483.20(k)(3)(i).

- Resident 17: The ALJ found that PCNC's nursing staff failed to obtain and administer Percocet (a narcotic pain medication) to Resident 17 at the dosage prescribed by her physician. ALJ Decision at 11. The ALJ further found that these errors revealed two deviations from "standard nursing practices" and PCNC's own resident care policies: first, a failure to follow a physician's orders; and second, a failure to "check the medication label for accuracy, including the medication name and strength." *Id.* PCNC asserts that the ALJ "ignored the fact that [Percocet] was a PRN med [that is, a drug to be taken as needed], not a regular daily med" and "ignored that [Resident 17] . . . had the ability to ask for a second dose (as evidenced by the alternate prescriptions for one or two tablets

[9] PCNC asserts that Resident 3's MARs reflect an order for an Ambien drug holiday, RR at 25, but the record shows that they did not. *See* CMS Ex. 10 (Baker Decl. ¶ 17); CMS Ex. 17, at 1; CMS Ex. 16, at 1.

> based on [the resident's] degree of pain)." RR at 29. PCNC also asserts that there "was no danger to [Resident 17] from receiving a smaller dosage of a PRN pain med," and that "[t]he dosage given was sufficient to ease [Resident 17's] complained-of pain." *Id.* Even if true, these assertions do not undercut the ALJ's finding that members of the nursing staff failed to implement the physician's medication order correctly because they did not obtain and administer tablets of the prescribed dosage. Furthermore, we disagree that there "was no danger" to Resident 17 from receiving less than the prescribed dose. The danger to her was that the wrong dose might have been inadequate to alleviate the pain she was experiencing.

PCNC's key argument is that the ALJ should have assessed its compliance with section 483.20(k)(3)(i) in light of the requirements in section 483.25(m), which calls on a SNF to ensure that it is "free of medication error rates of 5 percent or greater" and that its residents are "free of significant medication errors." RR at 18-23, 30. Asserting that the facts alleged by CMS or found by the ALJ revealed various types of "medication errors," PCNC contends that section 483.25(m) provides the relevant "professional standard of quality" for judging whether those errors constitute noncompliance with Medicare participation requirements. *Id.*; *see also* Reply Br. at 9 (asserting that "no matter what Tag(s) CMS chooses to cite, it must do in light of the proper standard for the particular conduct at issue"). PCNC asserts that CMS did not allege or establish that any of the medication errors involving Residents 1, 3, 5, 7, and 17 breached the standards in section 483.25(m). RR at 23.

The ALJ considered but rejected this argument for legally sound and sufficient reasons. She first correctly noted that section 483.20(k)(3)(i) "makes no exception for breaches of professional standards that involve medication errors." ALJ Decision at 14. In addition, she accurately noted that "nothing in the language of [CMS's] interpretive guidelines [Appendix PP to the State Operations Manual[10]] precludes CMS from citing a medication error" under section 483.20(k)(3)(i). RR at 13-14. The ALJ also aptly cited *Premier Living and Rehab Center*, where the Board held that "the language of [section 483.20(k)(3)(i)] itself makes no exception for breaches of professional standards that involve medication errors" and that CMS's interpretative guidelines, read as a whole, do not preclude CMS from citing medication errors as the basis for finding noncompliance with that regulation when the errors reflect breaches of professional standards, as the record shows they did in this case. DAB No. 2146, at 16, 18-19. We further note that

[10] State Operations Manual, CMS Pub. 100-07, Appendix PP – *Guidance to Surveyors for Long Term Care Facilities*, available at https://www.cms.gov/Regulations-and-Guidance/Guidance/ Manuals/ downloads/ som107ap_pp_guidelines_ltcf.pdf.

although PCNC asserts that there is a "nexus" between sections 483.20(k)(3)(i) and section 483.25(m) "in situations which involve medication administration" (RR at 18), it does not point to anything in the text of those regulations which creates a legally binding connection or requires citation of deficiencies under one regulation rather than the other.

PCNC also faults the ALJ for "ignoring" an alleged "admission" by CMS that all but one of the medication errors were not "significant" within the meaning of that regulation. RR at 23, 25, 26 29 (citing Tr. at 33-34). Since we have concluded that the "medication errors" here were properly cited as failures to meet professional standards of quality constituting noncompliance with section 483.20(k)(3)(i), it is irrelevant whether those errors were significant for purposes of section 483.25(m). However, we note the regulations expressly provide that residents must be free of "any significant medication errors." 42 C.F.R. § 483.25(m)(2). Thus, even if Resident 7 were the only resident who did not receive medication as prescribed, that would constitute a "significant" medication error. PCNC also has mischaracterized the surveyor testimony it cites. In response to a question on cross-examination, the surveyor identified failure to give Resident 7 pain medication as ordered by her physician as a significant medication error having an adverse consequence – the pain the resident suffered during the night in question. Tr. at 34. However, she did not state that the other medication errors were not significant. Indeed, with respect to the five residents (including Resident 7) who did not receive medications as ordered by their physicians, the surveyor testified, "Any of these [residents] were likely to have a significant medication error based on the practice of the facility." Tr. at 33-34.

Finally, PCNC complains that CMS has imposed an immediate jeopardy-level penalty when such a penalty would not have been justified had CMS attempted to cite the facility for noncompliance with section 483.25(m). Reply Br. at 12-13. PCNC contends that because that regulation distinguishes between significant and non-significant medication errors and allows some tolerance for non-significant errors (up to the five percent level), the failure to apply the medication error standards in section 483.25(m) "creates a dangerous precedent whereby any missed medication could be considered an immediate jeopardy event." *Id.* at 13.

These assertions are unpersuasive. Contrary to PCNC's suggestion, CMS's enforcement action, including its determination of immediate jeopardy, is not based on a single or handful of isolated medication errors but on ample evidence of repeated or chronic failures to comply with nursing care standards and policies, compliance with which was critical to ensuring the health and safety of PCNC's residents. We are unaware of any statute, regulation, or legal principle which precludes CMS in these circumstances from enforcing section 483.20(k)(3)(i) – which requires a facility to meet professional standards of quality – according to its terms. "CMS may exercise its discretion to

determine which participation requirement best accords with factual circumstances." *The Windsor House*, DAB No. 1942, at 48 (2004). In any case, the circumstances here clearly went well beyond the hypothetical situation PCNC poses of a single missed dose of a non-critical medication.

C. *The ALJ's conclusion that PCNC was noncompliant with 42 C.F.R. § 483.60(a) and (b) from April 30 through October 16, 2011 is supported by substantial evidence and free of legal error.*

Section 483.60(a) requires a SNF to "provide pharmaceutical services (including procedures that assure the accurate acquiring, receiving, dispensing, and administering of all drugs and biologicals) to meet the needs of each resident." Section 483.60(b) requires a facility to --

> employ or obtain the services of a licensed pharmacist who – (1) [p]rovides consultation on all aspects of the provision of pharmacy services in the facility; (2) [e]stablishes a system of records of receipt and disposition of all controlled drugs in sufficient detail to enable an accurate reconciliation; and (3) [d]etermines that drug records are in order and that an account of all controlled drugs is maintained and periodically reconciled.

In concluding that PCNC was noncompliant with these requirements, the ALJ made three key findings: first, she found that PCNC failed to have on hand adequate supplies of certain medications needed by its residents. ALJ Decision at 15, 16. Second, she found that PCNC "misused its emergency drug supplies." *Id.* at 15, 16-17. And third, she found that PCNC failed to track or otherwise account adequately for "narcotics and other controlled substances." *Id.* at 15, 17-20. The ALJ also found that PCNC had "written policies designed to assure compliance with" section 483.60 but that staff "repeatedly failed to follow those policies." *Id.* at 15.

With one minor exception discussed in the next paragraph, PCNC does not dispute the substance of these three findings or contend that the findings fail to demonstrate noncompliance with section 483.60(a) and (b). *See* RR at 30-31. Instead, PCNC makes assertions that are unsupported or irrelevant or immaterial to the ALJ's conclusion. For example, PCNC asserts that "[n]either resident referenced [by the ALJ in these findings] missed any medication administrations unless they refused them." RR at 30. However, the basis for the ALJ's conclusion that PCNC was noncompliant with section 483.60 was not the failure to administer medication to particular residents on specific occasions but its larger administrative failure to acquire, manage, and account for its medications in a manner that ensured their availability to meet residents' needs. PCNC also suggests that the problems described by the ALJ were merely "isolated documentation issues." RR at 31. However, it provides no analysis and cites no evidence to support that assertion. *Id.*

Finally, PCNC asserts that "[n]one of the residents cited" under the relevant deficiency tag (F425) suffered any harm as a result of the noncompliance."[11] RR at 30. However, under CMS's regulations, the occurrence of actual harm to a resident is not a prerequisite for finding a SNF noncompliant with a Medicare participation requirement, even at the immediate jeopardy level. *Oaks of Mid City Nursing and Rehabilitation Ctr.*, DAB No. 2375, at 17 (2011).

PCNC takes issue with one of the ALJ's findings that its staff failed to account adequately for its controlled substances. *See* RR at 31; ALJ Decision at 17-18. The finding concerns the withdrawal of Lortab from PCNC's Emergency Drug Kit for Resident 1. In relevant part, the ALJ found that "nurses signed out twice as much [Lortab] as needed at any given time" from that emergency supply in violation of a facility policy – one that the ALJ found to "comport[ ] with standards of nursing practice" – which required staff to sign out controlled medications "in the narcotic book *at the time they are to be administered*." ALJ Decision at 17 (quoting CMS Ex. 15 (italics added)).

That finding is supported by substantial evidence. During July 2011, Resident 1 had a standing physician order to receive a 7.5 mg tablet of Lortab every four hours. *See* CMS Ex. 12, at 1. However, when PCNC ran out of 7.5 mg tablets on or about July 15 (which prompted the facility's decision to tap its emergency supply), Resident 1's physician modified Resident 1's order, instructing the staff to administer one and one-half 5 mg Lortab tablets at 1:00 a.m. and 5:00 a.m. on that day and to administer a single 5 mg tablet every four hours thereafter until 7.5 mg tablets were obtained. ALJ Decision at 17; RR at 31. For each Lortab dose administered under the modified order, it was necessary to withdraw *no more than two 5 mg tablets* from the emergency supply (one tablet for a 5 mg dose, or two 5 mg tablets in case one had to be split in half to compile a 7.5 mg dose). However, an Emergency Box Requisitions form for July 2011 shows that, in carrying out the order, a nursing staff member withdrew *three 5 mg tablets at once* on July 16 at an unspecified time. *See* CMS Ex. 15, at 1. This means either that some Lortab was withdrawn four hours before it was administered in violation of PCNC's own policy and standard nursing practice or that the nurse did not document the withdrawal of some of the tablets at the time they were to be administered. CMS Ex. 37, at 1; CMS Ex. 10, at 15 (Baker Decl. ¶ 47).

PCNC asserts it pulled each ordered dose of Lortab from the emergency box on separate occasions, and that multiple doses "were simply documented at one time at one line each" on the Emergency Box Requisitions form. RR at 31. As the ALJ noted, however, PCNC produced no evidence to support this claim that it pulled all of Resident 1's Lortab

[11] PCNC also asserts that the noncompliance with section 483.60 did not create the "likelihood of serious harm" (RR at 30), a contention that we address in the section concerning CMS's immediate jeopardy finding.

at the appropriate time on July 16. There is, in fact, nothing on the requisition form confirming that Lortab was pulled on multiple occasions that day. Moreover, we agree with the ALJ that even if staff withdrew only the amount of Lortab needed at any one four-hour interval and simply documented multiple withdrawals at one time on a single line, the staff was still in violation of PCNC's policy because some Lortab was not signed out at the time it was removed. *See* ALJ Decision at 18.

D. *CMS's finding that PCNC's noncompliance was at the immediate jeopardy level from April 30 through September 6, 2011 is not clearly erroneous.*

CMS found that PCNC's noncompliance with sections 483.20(k)(3)(i) and 483.60(a) and (b) was at the immediate jeopardy level from April 30 through September 6, 2011. We agree with the ALJ that PCNC did not carry its heavy burden to overturn that finding.

"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. Actual harm is not a prerequisite for an immediate jeopardy finding; immediate jeopardy may exist when the noncompliance is "likely to cause" death or serious injury, harm, or impairment. 42 C.F.R. § 488.301; *Glenoaks Nursing Ctr.*, DAB No. 2522, at 17 (2013).

CMS's immediate jeopardy finding "must be upheld unless it is clearly erroneous." 42 C.F.R. § 498.60(c)(2); *Maysville Nursing & Rehab. Facility*, DAB No. 2317, at 11 (2010). "The 'clearly erroneous' standard . . . is highly deferential and places a heavy burden on the facility to upset CMS's finding regarding the level of noncompliance." *Yakima Valley School*, DAB No. 2422, at 8 (2011) (citing cases).

In reviewing CMS's immediate jeopardy finding, the ALJ found that PCNC's multiple errors in administering and tracking medication and repeated failure to comply with "standard" nursing practices revealed a "systemic" inability to meet residents' medication needs. ALJ Decision at 21. "If the facility cannot assure that the correct medications – particularly powerful narcotic medications – are administered according to physician order," said the ALJ, "its deficiencies are likely to cause serious harm." *Id.*

PCNC contends that any problems identified by the surveyors, including failure to administer prescribed medication, were not "systemic," as the ALJ found, but instead were "isolated incidents occurring over the span of several months . . . ." RR at 39. PCNC notes that although the state survey agency characterized each of the deficiencies at issue as being at the "immediate jeopardy" level of severity, it characterized them as "isolated" in scope. Reply Br. at 19. PCNC further suggests that the ALJ's characterization of the noncompliance as "systemic" was an unwarranted attempt to link

the disputed deficiency citations to an alleged history of "drug diversion." RR at 39. PCNC asserts that the August 2011 survey did not find that staff had diverted medication, and that no such problem had been identified by CMS or the state survey agency since the January 2010 survey. *Id*.

This argument is unpersuasive. The fact that a state or CMS cites a deficiency at a scope of "isolated" (as opposed to a "pattern" or "widespread") does not necessarily mean the deficiencies considered together do not reflect a systemic problem. A deficiency can manifest itself in terms of care given to even one resident and yet reflect systemic flaws in the facility's delivery of long term care. *Cf. Franklin Care Ctr.*, DAB No. 1900 (2003) ("[T]the regulatory scheme presumes that there are systemic problems in a facility that give rise to a deficiency."). Putting it another way, "pattern" or "widespread" is not necessarily synonymous with "systemic." Moreover, the ALJ adjudicated the noncompliance issues and the reasonableness of the CMP *de novo* based on the evidence presented during the hearing. PCNC's multiple lapses in medication administration and management – which spanned at least four months, violated multiple resident care polices, and were undetected by the facility – amply support the ALJ's finding that PCNC had a systemic inability to meet residents' medication needs. *See SunBridge Care and Rehabilitation for Pembroke,* DAB No. 2170, at 26-27 (2008); *Lake City Extended Care Ctr.*, DAB No. 1658, at 13-14 n. 16 (1998) ("We see nothing in the regulations that precludes the ALJ from making a new finding as to the scope of a deficiency where the ALJ findings are different from the survey findings."). Contrary to PCNC's suggestion, the ALJ did not cite or rely on a history or allegations of drug diversion to support her conclusion on the immediate jeopardy issue. *See* ALJ Decision at 20-22.

Petitioner contends that the immediate jeopardy finding was erroneous because its noncompliance did not create a "likelihood" of serious harm, merely the "possibility" of harm. Reply Br. at 17. At the outset, this argument ignores the following ALJ finding:

> If the facility cannot assure that the correct medication – particularly powerful narcotic medications – are administered according to physician orders, its deficiencies are likely to cause serious harm. Indeed, the record contains at least one documented instance of actual harm – the pain suffered by [Resident 7] on the night of August 5.

ALJ Decision at 21. This statement suggests the ALJ considered Resident 7's pain to constitute serious harm, and the record shows that Resident 7, who was cognizant, told the surveyor that "she hurt awfully bad" when staff, as PCNC admits, failed to give her the prescribed pain medication the night of August 5. CMS Ex. 27. Resident 7's complaint that she "hurt awfully bad" is arguably sufficient to support a finding of immediate jeopardy based on serious pain. *Cf. Highland Pines Nursing Home, Ltd.*, DAB No. 2361, at 6 (2011) (indicating that unnecessary pain may constitute serious

harm); *Barbourville Nursing Home*, DAB No. 1962 (2005) (sustaining an immediate jeopardy finding based on evidence of pain experienced by the resident as a result of inadequately treated pressure sore), *aff'd, Barbourville Nursing Home v. U.S. Dep't of Health & Human Servs.*, 174 F. App'x 932 (6th Cir. 2006).

In any event, the record contains ample evidence to support the ALJ's finding of a likelihood of serious harm. Most notably, PCNC did not rebut the testimony of Surveyor Baker that PCNC's repeated failures to administer medications in accordance with physician orders, its failure to document and report residents' refusals to take medication, and its demonstrated inability to track and account accurately for controlled substances were the types of lapses likely to cause serious harm, including unrelieved pain and other serious adverse consequences of under- and over-dosing of medication. *See* CMS Ex. 10 (Baker Decl. ¶¶ 28, 29, 31-35, 48-50).

PCNC complains that CMS failed to identify a single resident who was likely to experience serious harm as a result of the noncompliance. RR at 22. Once again, this ignores the pain suffered by Resident 7. Immediate jeopardy can exist if the noncompliance with one or more requirements is likely to cause serious harm to "a resident." 42 C.F.R. § 488.301. In addition, the Board has held that "the validity of an immediate jeopardy determination does not depend on whether any specific resident was harmed or was at risk of being harmed" but on the nature of the underlying regulatory failure. *Dumas Nursing and Rehabilitation, L.P.*, DAB No. 2347, at 19 (2010). In this case, the underlying regulatory failures reflected systemic inability to adhere to accepted or required standards of nursing care and medication administration and management. *Cf. Dumas Nursing and Rehabilitation, L.P.* at 20 (upholding an immediate jeopardy finding when the evidence revealed a systemic failure to follow facility polices regarding emergency care). It was this systemic failure, which compromised PCNC's ability to meet residents' needs for prescribed medication, that posed immediate jeopardy to residents. *See Bibb Medical Ctr. Nursing Home*, DAB No. 2457, at 6 (2012)(holding that "[i]rrespective of how 'significant'" the facility's "medication errors" were, they "occurred because of and in the context of systemic deficiencies in Bibb's facility," and that it was the "'pattern of noncompliance,' taken together with the vulnerability" and the clinical condition of the residents, that posed immediate jeopardy), *aff'd, Bibb Medical Ctr. Nursing Home v. Dep't of Health & Human Servs.*, 510 F. App'x 861 (11th Cir. 2013).

Finally, PCNC contends that immediate jeopardy, if it existed at all, did not occur until August 5, 2011. The ALJ rejected that contention. She found that "significant problems with administering and accounting for medications" began as early as April 2011 and were "ongoing" from that date, pointing to, among other things, the nursing staff's acceptance on April 25, 2011 of the wrong Percocet dosage for Resident 17, evidence of errors in the tracking of narcotic medication during April 2011, and failures to administer prescribed medication during the ensuing months. ALJ Decision at 21 (citing CMS Exs.

32-33). PCNC does not challenge that finding. Instead, it contends that if immediate jeopardy did occur, it occurred only when the nursing staff failed to administer a prescribed 12:00 a.m. dose of Lortab to Resident 7 on August 5, 2011. *See* RR at 38; Reply Br. at 17; ALJ Decision at 10. PCNC asserts that this incident is the only one identified by CMS as involving what PCNC characterizes as a "significant" medication error. RR at 21-22. But as we have emphasized, the validity of the immediate jeopardy finding does not hinge on whether some particular resident was likely to suffer serious harm but on the risk to all residents created by PCNC's multiple regulatory failures. We therefore agree with the ALJ that CMS did not clearly err in determining that the period of immediate jeopardy began before the incident involving Resident 7.

For the reasons outlined above, we affirm the ALJ's conclusion that CMS's determination that immediate jeopardy existed and began at least as of April 30, 2011 was not clearly erroneous.

E. *The ALJ committed no error by not addressing three of the deficiency citations from the August 2011 survey.*

The ALJ held that PCNC's noncompliance with sections 483.20(k)(3)(i) and 483.60 "more than justif[ies] the penalties imposed." ALJ Decision at 20 n.17. For that reason, she declined to address the survey finding that PCNC was not in substantial compliance (at the immediate jeopardy level) with section 483.75(o), while noting that "the facility's long-standing and serious deficiencies regarding its pharmaceutical services raises questions about the effectiveness of its quality assurance committee." *Id.* The ALJ also did not address the survey findings that PCNC was noncompliant with sections 483.13(c) and 483.75(l)(1) at a non-immediate-jeopardy level.

PCNC now asks the Board to make *de novo* rulings on the merits of the three unaddressed deficiency citations, arguing that they are "clearly against the weight of the substantial evidence." RR at 31-37. However, PCNC does not contend that the ALJ committed a prejudicial legal error by failing to address those citations, nor does it challenge the ALJ's conclusion that the noncompliance found by the ALJ is sufficient to justify the remedies imposed. "The Board has held that an ALJ has discretion, as an exercise of judicial economy, not to address findings that are immaterial to the outcome of an appeal." *Alexandria Place*, DAB No. 2245, at 27 n.9 (2009); *see also Magnolia Estates Skilled Care*, DAB No. 2228, at 30 (2009). PCNC does not contend, and we do not find, that a review of remaining three deficiency citations would be material to the outcome of this appeal. Consequently, we affirm the ALJ's decision not to address them and deny PCNC's request to adjudicate their merits in this appeal.

F. *PCNC provided no basis for disturbing the ALJ's conclusion regarding the CMP amounts or the duration of its noncompliance.*

PCNC does not dispute the ALJ's findings with respect to the duration of its noncompliance except, as discussed above, her finding that upheld CMS's determination that the immediate-jeopardy-level noncompliance began on April 30, 2011. We have already affirmed the ALJ's finding concerning the beginning date of the immediate jeopardy. PCNC does not allege it removed the immediate jeopardy any sooner than the abatement date found by the state survey agency (September 7, 2011). In addition, PCNC does not dispute that its noncompliance continued at a lower level of severity through October 17, 2011. We therefore affirm the ALJ's conclusion that PCNC's period of noncompliance was April 30 through October 16, 2011.

The ALJ concluded that the per-day CMP amounts imposed for that period are reasonable. PCNC does not challenge that conclusion. We therefore summarily affirm her conclusion that the $3,550 per day CMP for the period April 30 through September 6, 2011, and the $150 per day CMP for the period September 7 through October 16, 2011, are reasonable.

Conclusion

For the reasons outlined above, the Board affirms the ALJ Decision in its entirety.

/s/
Judith A. Ballard

/s/
Leslie A. Sussan

/s/
Sheila Ann Hegy
Presiding Board Member