

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

The Claremont Rehab & Living Center d/b/a Claremont of Buffalo Grove,
(CCN: 14-5819),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-12-482

Decision No. CR3307

Date: July 23, 2014

DECISION

Petitioner, The Claremont Rehab & Living Center d/b/a Claremont of Buffalo Grove, was not in substantial compliance with program participation requirements from January 5, 2012 to February 17, 2012, due to violations of 42 C.F.R. §§ 483.13(c), 483.25(h), 483.30(a), 483.70(a), and 483.75(f).¹ There is a basis for the imposition of enforcement remedies. The declaration of immediate jeopardy was not clearly erroneous. The following enforcement remedy is reasonable: a civil money penalty (CMP) of \$3,050 per day for January 5 and 6, 2012 and \$300 per day for January 7 through February 17, 2012, for a total CMP of \$18,700.

I. Background

Petitioner is located in Buffalo Grove, Illinois, and participates in Medicare as a skilled nursing facility (SNF) and the state Medicaid program as a nursing facility (NF). On January 11, 2012, the Illinois Department of Public Health (state agency) completed a

¹ References are to the 2011 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

complaint investigation and partial extended survey at Petitioner's facility. The state agency concluded that Petitioner was not in substantial compliance with program participation requirements due to violations of 42 C.F.R. §§ 483.13(c), 483.25(h), and 483.75(f).² Centers for Medicare & Medicaid Services (CMS) Exhibit (Ex.) 5. The state agency completed an annual life safety code survey on February 15, 2012, and concluded that Petitioner was not in substantial compliance due to a violation of 42 C.F.R. § 483.70(a) based on eight life safety code violations. CMS Ex. 53. On February 17, 2012, the state agency completed an annual licensure and certification survey and concluded that Petitioner was not in substantial compliance due to a violation of 42 C.F.R. § 483.30(a). CMS Ex. 21. CMS notified Petitioner by letter dated May 16, 2012, that the state agency determined that Petitioner returned to substantial compliance effective February 18, 2012, and that CMS was imposing the following enforcement remedy based on the deficiencies cited in the three surveys: a CMP of \$3,050 per day for January 5 and 6, 2012 and \$300 per day for January 7 through February 17, 2012, a total CMP of \$18,700.

Petitioner requested a hearing before an administrative law judge (ALJ) by letter dated March 19, 2012. Petitioner challenged the findings and conclusions of all three surveys and the proposed enforcement remedy. The case was assigned to me for hearing and decision on March 30, 2012, and an Acknowledgement and Prehearing Order was issued at my direction. On January 29, 2013, a hearing was convened by video teleconference. A transcript (Tr.) of the proceedings was prepared. CMS offered CMS exhibits (CMS Exs.) 1 through 56 that were admitted as evidence. Tr. 34. Petitioner offered Petitioner exhibits (P. Exs.) 1 through 3 that were admitted as evidence. Tr. 37. CMS called Surveyor Patricia Campbell, RN, as a witness. Petitioner called the following witnesses: Concepcion Paloma, RN, Petitioner's Director of Nursing (DON); Merle Punzalan, RN; and Jackelin Yang, RN. The parties filed post-hearing briefs (CMS Br. and P. Br., respectively) and post-hearing reply briefs (CMS Reply and P. Reply, respectively).

II. Discussion

A. Issues

Whether there is a basis for the imposition of an enforcement remedy; and,

Whether the remedy imposed is reasonable.

² Originally cited as a violation of 42 C.F.R. § 483.75(e)(4) (Tag F495), but amended to a violation of 42 C.F.R. § 483.75(f) by informal dispute resolution. CMS Ex. 5 at 34-38.

B. Applicable Law

The statutory and regulatory requirements for participation of a SNF in Medicare are at section 1819 of the Social Security Act (Act) and 42 C.F.R. pt. 483. Section 1819(h)(2) of the Act authorizes the Secretary of Health and Human Services (Secretary) to impose enforcement remedies against a SNF for failure to comply substantially with the federal participation requirements established by sections 1819(b), (c), and (d) of the Act.³ The Act requires that the Secretary terminate the Medicare participation of any SNF that does not return to substantial compliance with participation requirements within six months of being found not to be in substantial compliance. Act § 1819(h)(2)(C). The Act also requires that the Secretary deny payment of Medicare benefits for any beneficiary admitted to a SNF, if the SNF fails to return to substantial compliance with program participation requirements within three months of being found not to be in substantial compliance – commonly referred to as the mandatory or statutory DPNA. Act § 1819(h)(2)(D). The Act grants the Secretary discretionary authority to terminate a noncompliant SNF’s participation in Medicare, even if there has been less than 180 days of noncompliance. The Act also grants the Secretary authority to impose other enforcement remedies, including a discretionary DPNA, CMPs, appointment of temporary management, and other remedies such as a directed plan of correction. Act § 1819(h)(2)(B).

The Secretary has delegated to CMS and the states the authority to impose remedies against a long-term care facility that is not complying substantially with federal participation requirements. “*Substantial compliance* means a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm.” 42 C.F.R. § 488.301 (emphasis in original). A deficiency is a violation of a participation requirement established by sections 1819(b), (c), and (d) of the Act or the Secretary’s regulations at 42 C.F.R. pt. 483, subpt. B. Noncompliance refers to any deficiency that causes a facility not to be in substantial compliance; that is, a deficiency that poses a risk for more than minimal harm. 42 C.F.R. § 488.301. State survey agencies survey facilities that participate in Medicare on behalf of CMS to determine whether the

³ Participation of a NF in Medicaid is governed by section 1919 of the Act. Section 1919(h)(2) of the Act gives enforcement authority to the states to ensure that NFs comply with the participation requirements established by sections 1919(b), (c), and (d) of the Act.

facilities are complying with federal participation requirements. 42 C.F.R. §§ 488.10-.28, 488.300-.335. The regulations specify the enforcement remedies that CMS may impose if a facility is not in substantial compliance with Medicare requirements. 42 C.F.R. § 488.406.

CMS is authorized to impose a CMP for the number of days of noncompliance – a per-day CMP – or for each instance of noncompliance – a per-instance CMP (PICMP). 42 C.F.R. § 488.430. The regulations specify that a CMP that is imposed against a facility on a per-day basis will fall into one of two ranges of penalties. 42 C.F.R. §§ 488.408, 488.438. The upper range of CMPs, \$3,050 per day to \$10,000 per day, is reserved for deficiencies that pose immediate jeopardy to a facility’s residents, and, in some circumstances, for repeated deficiencies. 42 C.F.R. § 488.438(a)(1)(i), (d)(2). “*Immediate jeopardy* means 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 (emphasis in original). The lower range of CMPs, \$50 per day to \$3,000 per day, is reserved for deficiencies that do not pose immediate jeopardy, but either cause actual harm to residents, or cause no actual harm but have the potential for causing more than minimal harm. 42 C.F.R. § 488.438(a)(1)(ii). The only range for a PICMP is \$1,000 to \$10,000. 42 C.F.R. §§ 488.408, 488(a)(2).

Petitioner was notified in this case that it was ineligible to conduct a nurse aide training and competency evaluation program (NATCEP) for two years. CMS Ex. 6 at 4. Pursuant to sections 1819(b)(5) and 1919(b)(5) of the Act, SNFs and NFs may only use nurse aides who have completed a training and competency evaluation program. Pursuant to sections 1819(f)(2) and 1919(f)(2) of the Act, the Secretary was tasked to develop requirements for approval of NATCEPs and the process for review of those programs. Sections 1819(e) and 1919(e) of the Act impose upon the states the requirement to specify what NATCEPs they will approve that meet the requirements that the Secretary established and a process for reviewing and reapproving those programs using criteria the Secretary set. The Secretary promulgated regulations at 42 C.F.R. pt. 483, subpt. D. Pursuant to 42 C.F.R. § 483.151(b)(2) and (f), a state may not approve and must withdraw any prior approval of a NATCEP offered by a SNF or NF that has been: (1) subject to an extended or partial extended survey under sections 1819(g)(2)(B)(i) or 1919(g)(2)(B)(i) of the Act; (2) assessed a CMP of not less than \$5,000; or (3) subject to termination of its participation agreement, a DPNA, or the appointment of temporary management. Extended and partial extended surveys are triggered by a finding of “substandard quality of care” during a standard or abbreviated standard survey and involve evaluating additional participation requirements. “Substandard quality of care” is identified by the situation where surveyors identify one or more deficiencies related to participation requirements established by 42 C.F.R. § 483.13 (Resident Behavior and Facility Practices), § 483.15 (Quality of Life), or § 483.25 (Quality of Care) that are found to constitute either immediate jeopardy, a

pattern of or widespread actual harm that does not amount to immediate jeopardy, or a widespread potential for more than minimal harm that does not amount to immediate jeopardy and there is no actual harm. 42 C.F.R. § 488.301.

The Act and regulations make a hearing before an ALJ available to a long-term care facility against which CMS has determined to impose an enforcement remedy. Act §§ 1128A(c)(2), 1866(h); 42 C.F.R. §§ 488.408(g), 498.3(b)(13). A facility has a right to seek review of a “certification of noncompliance leading to an enforcement remedy.” 42 C.F.R. §§ 488.408(g)(1), 488.330(e), 498.3. However, the choice of remedies, or the factors CMS considered when choosing remedies, are not subject to review. 42 C.F.R. § 488.408(g)(2). A facility may only challenge the scope and severity level of noncompliance determined by CMS if a successful challenge would affect the range of the CMP that may be imposed or impact the facility’s authority to conduct a NATCEP. 42 C.F.R. § 498.3(b)(14), (d)(10)(i). The CMS determination as to the level of noncompliance, including the finding of immediate jeopardy, “must be upheld unless it is clearly erroneous.” 42 C.F.R. § 498.60(c)(2); *Woodstock Care Ctr.*, DAB No. 1726 at 9, 38 (2000), *aff’d*, 363 F.3d 583 (6th Cir. 2003). The Departmental Appeals Board (the Board) has long held that the net effect of the regulations is that a long-term care facility has no right to challenge the scope and severity level assigned to a noncompliance finding, except in the situation where that finding was the basis for an immediate jeopardy determination. *See, e.g., Ridge Terrace*, DAB No. 1834 (2002); *Koester Pavilion*, DAB No. 1750 (2000). ALJ review of a CMP is subject to 42 C.F.R. § 488.438(e).

The hearing before an ALJ is a de novo proceeding, i.e., “a fresh look by a neutral decision-maker at the legal and factual basis for the deficiency findings underlying the remedies.” *Life Care Ctr. of Bardstown*, DAB No. 2479 at 32 (2012) (citation omitted); *The Residence at Salem Woods*, DAB No. 2052 (2006); *Cal Turner Extended Care*, DAB No. 2030 (2006); *Beechwood Sanitarium*, DAB No. 1906 (2004); *Emerald Oaks*, DAB No. 1800 at 11 (2001); *Anesthesiologists Affiliated*, DAB No. CR65 (1990), *aff’d*, 941 F.2d 678 (8th Cir. 1991). The standard of proof is a preponderance of the evidence. CMS has the burden of coming forward with the evidence and making a prima facie showing of a basis for the imposition of an enforcement remedy. Petitioner bears the burden of persuasion to show by a preponderance of the evidence that it was in substantial compliance with participation requirements or any affirmative defense. *Batavia Nursing & Convalescent Inn*, DAB No. 1911 (2004); *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff’d*, 129 F. App’x 181 (6th Cir. 2005); *Emerald Oaks*, DAB No. 1800; *Cross Creek Health Care Ctr.*, DAB No. 1665 (1998); *Hillman Rehab. Ctr.*, DAB No. 1611 (1997) (*remand*), DAB No. 1663 (1998) (*aff. remand*), *aff’d*, *Hillman Rehab. Ctr. v. United States*, No. 98-3789 (GEB), 1999 WL 34813783 (D.N.J. May 13, 1999).

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold text followed by my findings of fact and analysis. I have carefully considered all the evidence and the arguments of both parties, though not all may be specifically discussed in this decision. I discuss in this decision the credible evidence given the greatest weight in my decision-making.⁴ I also discuss any evidence that I find is not credible or worthy of weight. The fact that evidence is not specifically discussed should not be considered sufficient to rebut the presumption that I considered all the evidence and assigned such weight or probative value to the credible evidence that I determined appropriate within my discretion as an ALJ. There is no requirement for me to discuss the weight given every piece of evidence considered in this case, nor would it be consistent with notions of judicial economy to do so. Charles H. Koch, Jr., *Admin. L. and Prac.* § 5:64 (3d ed. 2013).

Petitioner was cited by the survey completed on January 11, 2012, for noncompliance with 42 C.F.R. §§ 483.13(c), 483.25(h), and 483.75(f). The alleged noncompliance with 42 C.F.R. § 483.25(h) was cited as an isolated incident of immediate jeopardy. CMS Ex. 5. The life safety survey completed on February 15, 2012, cited Petitioner for noncompliance with 42 C.F.R. § 483.70(a). CMS Ex. 53. The February 17, 2012, survey cited Petitioner for noncompliance with 42 C.F.R. § 483.30(a). CMS Ex. 21. Petitioner requested a hearing as to all deficiency citations and enforcement remedies. However, prior to hearing, the parties stipulated that Petitioner now challenges only the declaration of immediate jeopardy related to 42 C.F.R. § 483.25(h) (Tag F323) and the reasonableness of the CMP proposed by CMS. Joint Stipulation of Issues. The parties agreed at hearing that Petitioner contests only the declaration of immediate jeopardy related to Tag F323 and the reasonableness of the CMP. Tr. 16-17. In post-hearing briefing Petitioner concedes that it was not in substantial compliance with 42 C.F.R. § 483.25(h) (Tag F323). P. Br. at 2; P. Reply at 2. Petitioner also affirms that it challenges only the declaration of immediate jeopardy related to Tag F323 (P. Br. at 2; P. Reply at 2) and the reasonableness of the CMP, if I conclude that the declaration of immediate jeopardy was clearly erroneous. P. Br. at 17; P. Reply at 7. Accordingly, I conclude:

⁴ “Credible evidence” is evidence that is worthy of belief. *Black’s Law Dictionary* 596 (8th ed. 2004). The “weight of evidence” is the persuasiveness of some evidence compared to other evidence. *Id.* at 1625.

1. Petitioner violated 42 C.F.R. §§ 483.13(c) (Tag F226), 483.25(h) (Tag F323), 483.30(a) (Tag F353), 483.70(a) (Tag F454), and 483.75(f) (Tag F498).

2. Petitioner's violations of 42 C.F.R. §§ 483.13(c) (Tag F226), 483.25(h) (Tag F323), and 483.75(f) (Tag F498) caused actual harm to Resident 3.

3. Petitioner's violations of 42 C.F.R. §§ 483.30(a) (Tag F353) and 483.70(a) (Tag F454) posed a risk for more than minimal harm for Petitioner's residents with no actual harm.

4. The violations of 42 C.F.R. §§ 483.13(c) (Tag F226), 483.25(h) (Tag F323), 483.30(a) (Tag F353), 483.70(a) (Tag F454), and 483.75(f) (Tag F498) are an adequate basis for the imposition of an enforcement remedy.

The issues remaining for decision are whether the violation of 42 C.F.R. § 483.25(h) (Tag F323) posed immediate jeopardy; and whether, if there was immediate jeopardy, a CMP of \$3,050 per day for two days is a reasonable enforcement remedy.

5. The declaration of immediate jeopardy for two days based upon the violation of 42 C.F.R. § 483.25(h) (Tag F323) was not clearly erroneous.

a. Facts

The parties stipulated to the following facts in their Joint Stipulation of Facts dated August 24, 2012 (Jt. Stip.):

- Resident 3 was a 75-year-old woman readmitted to Petitioner's facility on December 5, 2011, following a hospitalization for the fracture of her right upper leg due to a fall. CMS Ex. 14 at 1, 7, 11, 129; Jt. Stip. ¶ 5.
- Resident 3 also suffered from coronary artery disease, diabetes, and renal disease that required hemodialysis, among other conditions. CMS Ex. 4 at 10-11; CMS Ex. 14 at 1, 61, 63; Jt. Stip. ¶ 5.
- Resident 3 wore an immobilizer on her right leg due to the fracture, and her physician ordered that she not bear weight on her leg. Resident 3's December 8, 2011 therapy assessment showed that Resident 3 could not bear weight on her lower extremities, and required the use of a mechanical lift for transfers. CMS Ex. 5 at 10-11; CMS Ex. 14 at 73, 86, 113, 126-29; Jt. Stip. ¶ 6.

- On December 10, 2011, at 10 a.m., Employee 16, a certified nurse aide (CNA), transferred Resident 3 by himself using a Hoyer lift. During the course of the transfer, Resident 3's right cheek hit the Hoyer lift resulting in pain, but no bruises or skin tears. CMS Ex. 5 at 8-9; CMS Ex. 14 at 9, 14; Jt. Stip. ¶ 7.
- Nurses notified Resident 3's physician about the accident at 1:21 p.m. on December 10, 2011. The physician ordered Petitioner to hold Resident 3's second dose of heparin, an anticoagulant or blood thinner, that evening and told Petitioner's staff to ice Resident 3's cheek if swelling occurred. CMS Ex. 14 at 9, 14; Jt. Stip. ¶ 8.
- Four days later, on December 14, 2011, Employee 15, a CNA, also transferred Resident 3 by himself using a Hoyer lift. Resident 3 fell out of the Hoyer lift sling onto the floor, hitting her head and right shoulder. CMS Ex. 5 at 9-13; CMS Ex. 14 at 3-4, 13-14; Jt. Stip. ¶ 9.
- The hospital report on December 14, 2011, shows that Resident 3 sustained a comminuted right-side scapular fracture and multiple right-sided rib fractures as a result of the fall from the lift sling. CMS Ex. 5 at 9-10; CMS Ex. 14 at 44; Jt. Stip. ¶ 10.

Surveyor Patricia Campbell, RN, testified that she cited immediate jeopardy in this case for the following reasons: on December 14, 2011, Resident 3 experienced serious injuries due to the fall from the Hoyer lift; Resident 3 was 72 years old; Resident 3 suffered multiple fractured ribs and a fractured scapula; Resident 3 was on heparin and had an increased risk for bleeding due to trauma. Surveyor Campbell testified that heparin prevents the formation of blood clots and any kind of trauma can cause internal bleeding. Resident 3 hit her head when she fell on December 14, and the fact she was taking heparin made her more susceptible to a subdural hematoma (bleeding in the skull) which could cause brain damage, coma, or death. Resident 3's fractured right scapula and rib fractures also posed a risk for uncontrolled bleeding of organs or tissue. Surveyor Campbell testified that she also considered that Resident 3 suffered pain due to the injury resulting from the incorrect Hoyer lift procedure on December 10, 2011. Tr. 48-51, 59-61. Surveyor Campbell also testified that while Petitioner's staff trained on correct procedures, she found no evidence that the facility monitored staff to ensure that Hoyer lift transfers were properly performed using a two-person assist and that sufficient assistance was provided in the day-to-day care of Resident 3 and other residents. Tr. 58, 60.

Concepcion Paloma, RN, Petitioner's DON, testified in response to my questions that Resident 3 suffered serious injuries on December 14, 2011. Tr. 137-38.

Petitioner elicited testimony from Merle Punzalan, RN, one of Petitioner's nursing supervisors. Tr. 146-47. On cross-examination she agreed that because Resident 3 was on heparin, the physician was called and he ordered that Resident 3 be sent to the hospital. Tr. 153.

Petitioner also called Jackelin Yang, RN, an employee of Petitioner, to testify. Tr. 162-63. RN Yang testified that because Resident 3 was on an anticoagulant and claimed to have hit her head, she called the physician for an order to send Resident 3 to the hospital for further evaluation. Tr. 166, 176-77.

b. Analysis

Petitioner concedes that on December 10 and 14, 2011, there were violations of 42 C.F.R. § 483.25(h) (Tag F323), for which Petitioner is responsible. Petitioner's Prehearing Brief at 1, 9; P. Br. at 2; P. Reply at 2. The regulation requires:

The facility must ensure that—

- (1) The resident environment remains as free from accidents hazards as is possible; and
- (2) Each resident receives adequate supervision and assistance devices to prevent accidents.

42 C.F.R. § 483.25(h). The surveyors cited this deficiency at a scope and severity of J (CMS Ex. 5 at 7), which means an isolated incident that posed immediate jeopardy to resident health and safety. 42 C.F.R. § 488.404; *State Operations Manual*, pub. 100-07 (SOM), ch. 7, § 7400.5. CMS's position before me is that there was immediate jeopardy due to the admitted violation of 42 C.F.R. § 483.25(h). As discussed in more detail in the following analysis, the issue before me is whether the determination that there was an isolated incident of immediate jeopardy was clearly erroneous.

The parties stipulated that on December 10, 2011, Resident 3 was hit on the right cheek with a part of the Hoyer lift, resulting in a complaint of pain by Resident 3. Resident 3's physician ordered that staff hold her second prescribed dose of anticoagulant for that evening. Jt. Stip. ¶¶ 7, 8. The parties stipulated that on December 14, 2011, Resident 3 fell from the Hoyer lift sling, striking her head and right shoulder on the floor, resulting in a fracture of her right scapula and fractured ribs. Jt. Stip. ¶¶ 9, 10. RN Yang testified that because Resident 3 was on an anticoagulant and claimed to have hit her head, RN Yang called the physician for an order to send Resident 3 to the hospital for further evaluation. Tr. 166, 176-77. RN Punzalan agreed that because Resident 3 was on heparin, the physician was called and he ordered that Resident 3 be sent to the hospital. Tr. 153. Surveyor Campbell testified that she cited immediate jeopardy because Resident 3 experienced serious injuries due to her fall on December 14, 2011, and because she was

on an anticoagulant, she was at increased risk for internal bleeding, including the risk of bleeding in the skull that could cause coma or death. Tr. 48-51, 59-61. Surveyor Campbell's testimony is un rebutted and is consistent with the fact that Petitioner's nurses recognized the increased risk for bleeding associated with anticoagulant use and contacted the physician who ordered holding one dose of heparin on December 10, 2011, and ordered Resident 3 to the hospital on December 14, 2011.

The evidence supports a conclusion that there was immediate jeopardy⁵ because Petitioner's admitted noncompliance with 42 C.F.R. § 483.25(h) "caused, or was likely to cause, serious injury, harm, impairment, or death to a resident." 42 C.F.R. §§ 488.301, 489.3. The CMS determination as to the level of noncompliance, including the finding of immediate jeopardy, "must be upheld unless Petitioner can meet the burden of showing that the declaration of immediate jeopardy was clearly erroneous." 42 C.F.R. § 498.60(c)(2); *Woodstock Care Ctr.*, DAB No. 1726 at 9, 38. I conclude that Petitioner has not met its burden in this case.

Before addressing Petitioner's specific arguments, it is necessary to consider first the meaning of immediate jeopardy, what the Act and regulations provide, and the principles adopted by various appellate panels of the Board.

The Act requires that if the state survey agency finds that a facility's deficiencies "immediately jeopardize the health or safety" of the facility's residents, the state is to recommend that the Secretary take action to remove jeopardy and correct the deficiencies through the appointment of temporary management, or terminate the facility's participation. Act § 1819(h)(1)(A). Congress granted the Secretary authority and required that, if a facility is found to no longer meet the conditions for participation and the facility's deficiencies "immediately jeopardized the health or safety of its residents," the Secretary is to remove the jeopardy and correct the deficiencies through the appointment of temporary management or terminate the facility's participation. Act § 1819(h)(2)(A)(i) and (4); *see also* Act § 1919(h)(3)(B)(i) and (5) (enforcement procedures for NFs are similar to those for SNFs). The phrase "immediately jeopardize" is not defined in the statutes. However, the context suggests that Congress intended that the phrase be given its plain meaning and to be applied if there was any potential of instantaneous or proximate, hazard or risk for harm to the health or safety of a long-term care facility resident.

⁵ The evidence also supports a conclusion that Resident 3 suffered actual harm on December 10 and 14, 2011. However, whether or not there was immediate jeopardy is not dependent upon a determination that there was actual harm.

The phrase “immediate jeopardy,” which seems to have derived from the statutory “immediately jeopardize,” is given a specific and different effect or meaning by the Secretary through regulation. “*Immediate jeopardy*” under the regulations refers to 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, 489.3 (emphasis in original). Thus, “immediate jeopardy” under the regulation refers only to serious injury, serious harm, serious impairment, or death; whereas the statutory “immediately jeopardize” refers to any imminent risk to a resident no matter how severe. In the context of survey, certification, and enforcement related to SNFs and NFs under the regulations, a conclusion by the state agency and CMS that noncompliance with program participation requirements poses immediate jeopardy to the facility residents triggers specific regulatory provisions that require enhanced enforcement remedies, including authority for CMS to impose a larger CMP than may be imposed when there is no declaration of immediate jeopardy. 42 C.F.R. §§ 488.408(e), 488.438(a)(1)(i), (c), and (d). The regulations also require termination of the facility’s provider agreement on an expedited basis or the removal of the immediate jeopardy through appointment of temporary management. 42 C.F.R. §§ 488.410, 488.440(g), 488.456, 489.53(d)(2)(B)(ii).

Pursuant to 42 C.F.R. § 498.3(d)(10), a finding by CMS that deficiencies pose immediate jeopardy to the health or safety of a facility’s residents is not an initial determination that triggers a right to request a hearing by an ALJ or that is subject to review. A finding of noncompliance that results in the imposition of an enforcement remedy, except the remedy of monitoring by the state, does trigger a right to request a hearing and is subject to review. 42 C.F.R. §§ 488.408(g); 498.3(b)(8) and (13). Furthermore, the level of noncompliance, i.e. scope and severity, is subject to review only if a successful challenge would affect: (1) the amount of CMP that may be imposed, i.e. the higher range of CMP authorized for immediate jeopardy; or (2) a finding of substandard quality of care that rendered the facility ineligible to conduct a NATCEP. 42 C.F.R. § 498.3(b)(14) and (16). Pursuant to 42 C.F.R. § 498.60(c)(2), in reviewing a CMP, the ALJ must uphold the CMS determination of the level of noncompliance (i.e. scope and severity), unless it is clearly erroneous.⁶

⁶ Petitioner argues that burdening Petitioner to show that the declaration of immediate jeopardy was clearly erroneous without requiring that CMS first establish a prima facie showing of the existence of immediate jeopardy violates the Administrative Procedure Act, 5 U.S.C. § 556(d). P. Br. at 15-17. Although I must construe and apply the regulations consistent with the Constitution, Act, and other statutory requirements, I may not upset the Secretary’s regulations on grounds that they do not comply with the Constitution and statutes. *Buena Vista Care Ctr.*, DAB No. 2498, at 20-22 (2013). (Footnote continued next page.)

Petitioner correctly notes that the phrase “clearly erroneous” is not defined by the Secretary in the regulations. P. Br. at 12; P. Reply at 2. Many appellate panels of the Board have discussed “immediate jeopardy” and “clearly erroneous.”⁷ In *Mississippi Care Center of Greenville*, DAB No. 2450, at 15 (2012), the Board commented:

CMS’s determination that a deficiency constitutes immediate jeopardy must be upheld unless the facility is able to prove that the determination is clearly erroneous. 42 C.F.R. § 498.60(c)(2); *Woodstock Care Center*. The “clearly erroneous” standard means that CMS’s immediate jeopardy determination is presumed to be correct, and the burden of proving the determination clearly erroneous is a heavy one. *See, e.g., Maysville Nursing & Rehabilitation Facility*, DAB No. 2317, at 11 (2010); *Liberty Commons Nursing and Rehab Center — Johnston*, DAB No. 2031, at 18 (2006), *aff’d*, *Liberty Commons Nursing and Rehab Ctr. — Johnston v. Leavitt*, 241 F. App’x 76 (4th Cir. 2007). When CMS issued the nursing facility survey, certification, and enforcement regulations, it acknowledged that “distinctions between different levels of noncompliance . . . do not represent mathematical judgments for which there are clear or objectively measured boundaries.” 59 Fed. Reg. 56,116, 56,179 (Nov. 10, 1994). “This inherent imprecision is precisely why CMS’s immediate jeopardy determination, a matter of professional judgment and expertise, is entitled to deference.” *Daughters of Miriam Center*, DAB No. 2067, at 15 (2007).

(Footnote continued.)

However, I also note that in this case CMS did present some evidence of the basis for the existence of immediate jeopardy.

⁷ Some of the often cited: *Lakeport Skilled Nursing Ctr.*, DAB No. 2435, at 6 (2012); *Liberty Health & Rehab. of Indianola, LLC*, DAB No. 2434, at 12, 19 (2011); *Yakima Valley School*, DAB No. 2422, at 7 (2011); *Lutheran Home at Trinity Oaks*, DAB No. 2111 (2007); *Daughters of Miriam Center*, DAB No. 2067 (2007); *Britthaven of Havelock*, DAB No. 2078 (2007); *Koester Pavilion*, DAB No. 1750 (2000); *Woodstock Care Ctr.*, DAB No. 1726 (2000).

The Board's statement that the CMS immediate jeopardy determination is entitled to deference is subject to being misunderstood to limit ALJ and Board review of immediate jeopardy beyond what was intended by the drafters of the regulations. In the notice of final rulemaking on November 10, 1994, the drafters of 42 C.F.R. § 498.60(c)(2), discussing the merits of the reviewability of deficiency citations, selection of remedy, and scope and severity, commented:

We believe that a provider's burden of upsetting survey findings relating to the level of noncompliance should be high, however. As we indicated in the proposed rule, distinctions between different levels of noncompliance, whether measured in terms of their frequency or seriousness, do not represent mathematical judgments for which there are clear or objectively measured boundaries. Identifying failures in a facility's obligation to provide the kind of high quality care required by the Act and the implementing regulations most often reflect judgments that will reflect a range of noncompliant behavior. Thus, in civil money penalty cases, whether deficiencies pose immediate jeopardy, or are widespread and cause actual harm that is not immediate jeopardy, or are widespread and have a potential for more than minimal harm that is not immediate jeopardy does not reflect that a precise point of noncompliance has occurred, but rather that a range of noncompliance has occurred which may vary from facility to facility. While we understand the desire of those who seek the greatest possible consistency in survey findings, an objective that we share, the answer does not lie in designing yardsticks of compliance that can be reduced to rigid and objectively calculated numbers. Survey team members and their supervisors ought to have some degree of flexibility, and deference, in applying their expertise in working with these less than perfectly precise concepts. **For these reasons, we have revised the regulations to require an administrative law judge or appellate administrative review authority to uphold State or HCFA findings on the seriousness of facility deficiencies in civil money penalty cases unless they are clearly erroneous.**

59 Fed. Reg. 56,116, 56,179 (Nov. 10, 1994) (emphasis added). It is clear from this regulatory history, that the drafters of 42 C.F.R. § 498.60(c)(2) ensured that the state agency or CMS determination that there was immediate jeopardy would receive deferential consideration, by adopting the clearly erroneous standard of review. Thus,

caution must be exercised to ensure that the Board's decision in *Miss. Care Ctr. of Greenville* at 15, and other decisions that have mentioned deference relative to immediate jeopardy not be read to require deference for the determination that there was immediate jeopardy beyond that imposed by adoption of the clearly erroneous standard. Giving or requiring that the immediate jeopardy determination be given deference in addition to applying the "clearly erroneous standard" would be contrary to the intent of the drafters of the regulation; would significantly limit the review of the determination by an ALJ and the Board; and would impermissibly deny an affected party the due process right to review intended by the drafters of the regulation.

In the foregoing quotation from *Mississippi Care Center of Greenville*, that panel of the Board states that the clearly erroneous standard means that "the immediate jeopardy determination is presumed to be correct, and the burden of proving the determination clearly erroneous is a heavy one." *Mississippi Care Center of Greenville* at 15. Similar formulations have been used in other Board decisions when referring to the "clearly erroneous standard." However, the Board's characterization of the "clearly erroneous standard" in *Mississippi Care Center of Greenville* and other cases does not actually define the standard.

The "clearly erroneous standard" is described in *Black's Law Dictionary* as a standard of appellate review applied in judging the trial court's treatment of factual issues, under which a factual determination is upheld unless the appellate court has the firm conviction that an error was committed. *Black's Law Dictionary* 269 (8th ed. 2004). The Supreme Court has addressed the "clearly erroneous standard" in the context of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-59. The Court described the preponderance of the evidence standard, the most common standard, as requiring that the trier-of-fact believe that the existence of a fact is more probable than not before finding in favor of the party that had the burden to persuade the judge of the fact's existence. *In re Winship*, 397 U.S. 358, 371-72 (1970); *Concrete Pipe and Prods.s of Cal., Inc. v. Constr. Laborers*, 508 U.S. 602, 622 (1993). The "substantial evidence" is an appellate standard of review that considers whether a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion. *Consol. Edison*, 305 U.S. 197, 229 (1938); *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999). Under the "clearly erroneous" standard, a finding is clearly erroneous even though there may be some evidence to support it if, based on all the evidence, the reviewing judge or authority has a definite and firm conviction that an error has been committed. *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Dickinson*, 527 U.S. at 162; *Concrete Pipe*, 508 U.S. at 622. The clearly erroneous standard has been characterized by the Court as being stricter than the substantial

evidence test and significantly deferential.⁸ The Court stressed in discussing the clearly erroneous standard the importance of not simply rubber-stamping agency fact-finding. The Court also commented that the APA requires meaningful review. *Dickinson*, 527 U.S. at 162 (citations omitted); *Concrete Pipe*, 508 U.S. at 622-23.

Although the definition in *Black's* and the Supreme Court decisions treats the “clearly erroneous standard” as a standard applied on appeal to judge factual conclusions similar to the substantial evidence test, the drafters of 42 C.F.R. § 498.60 adopted the “clearly erroneous” standard and made it applicable to both the ALJ level for application in the trial de novo and to review by the Board. At the ALJ level for cases subject to 42 C.F.R. § 498.60(c), the “clearly erroneous” standard must be applied as an evidentiary standard establishing the quantum of evidence required to support a conclusion that CMS and the state agency erred in declaring immediate jeopardy. Based on the foregoing authorities, the quantum of evidence required by the “clearly erroneous” standard to overcome the declaration of immediate jeopardy is sufficient evidence to cause a definite and firm conviction that the declaration of immediate jeopardy was in error.

Various panels of the Board have recognized principles applicable to the review of the immediate jeopardy issue. A finding of immediate jeopardy does not require a finding of actual harm, only a likelihood of serious harm. *Dumas Nursing and Rehab., L.P.*, DAB No. 2347, at 19 (2010), *citing Life Care Ctr. of Tullahoma*, DAB No. 2304, at 58 (2010), *aff'd, Life Care Ctr. of Tullahoma v. Sebelius*, No. 10-3465 (6th Cir., Dec. 16, 2011). The definition of immediate jeopardy at 42 C.F.R. § 488.301 does not define “likelihood” or establish any temporal parameters for potential harm. *Agape Rehab. of Rock Hill*, DAB No. 2411, at 18-19 (2011). The duration of the period of immediate jeopardy is also subject to the clearly erroneous standard. *Brian Ctr. Health and Rehab./Goldsboro*, DAB No. 2336, at 7-8 (2010). There is a difference between “likelihood” as required by the definition of immediate jeopardy and a mere potential. A synonym for “likely” is “probable,” which suggests a greater degree of probability that an event will occur than suggested by such terms as “possible” or “potential.” *Daughters of Miriam Ctr.*, at 10. “Jeopardy” generally means danger, hazard, or peril. The focus of the immediate jeopardy determination is how imminent the danger appears and how serious the potential

⁸ The Board’s characterization of the clearly erroneous standard as being highly deferential to the fact-finding by the state agency surveyor and CMS, and even triggering a rebuttal presumption, is entirely consistent with the Supreme Court’s characterization of the standard. However, the Court’s cautions about ensuring meaningful review rather than rubber-stamping agency decisions show it is important for the ALJ and the Board not to be tempted to simply defer to the surveyor, the state agency, or CMS on the immediate jeopardy issue.

consequences would be. *Woodstock Care Ctr.*, DAB No. 1726 (2000). The SOM, app. Q, is guidance issued by CMS that is instructive but is not a controlling substantive rule like the regulations. *Green Oaks Health and Rehab. Ctr.r*, DAB No. 2567 at 10 (2014), *citing Agape Rehab. of Rock Hill*, DAB No. 2411, at 19 and *Foxwood Springs Living Ctr.*, DAB No 2294, at 9.

What is the meaning of “serious injury, harm, or impairment” as used in the definition of “immediate jeopardy” found in 42 C.F.R. § 488.301? How does serious injury, harm, or impairment compare with “actual harm?” On the first question, the Board recognized in *Yakima Valley School*, DAB No. 2422, at 8 (2011), that the regulations do not define or explain the meaning of the term “serious” as used in the definition of immediate jeopardy.⁹ The Board suggested that the definitions may be unimportant as the Board has held that, under the “clearly erroneous” standard, once the state agency or CMS declares immediate jeopardy, there is a presumption that the actual or threatened harm was serious and the facility can only rebut the presumption of immediate jeopardy by showing that the harm or threatened harm meets no reasonable definition of the term “serious.” *Yakima Valley Sch.*, DAB No. 2422, at 8, *citing Daughters of Miriam Ctr.* DAB No. 2067 at 9. In *Daughters of Miriam Ctr*, the Board discussed that the ALJ attempted to define “serious,” finding meanings such as dangerous, grave, grievous, or life-threatening. The Board notes that the ALJ stated that serious harm is outside the ordinary, requiring extraordinary care, or having lasting consequences. The Board further noted that the ALJ stated that a serious injury may require hospitalization, or result in long-term impairment, or cause severe pain as opposed to harm, injury, or impairment that is temporary, easily reversible with ordinary care, does not cause a period of incapacitation, heals without special medical intervention, or does not cause severe pain. The Board did not endorse or adopt the ALJ’s definitional exercise but concluded that it was simply unnecessary in the context of that case. The Board reasoned, as already noted, that the facility bore the burden to rebut the presumption by showing that the actual or threatened harm met no reasonable definition of serious. *Daughters of Miriam Ctr.*, DAB No. 2067 at 9.

⁹ Appendix Q of the SOM also fails to provide surveyors a working definition of the term “serious” that they can use to determine whether harm, injury, or impairment is serious when deciding whether or not to declare immediate jeopardy. The Act does not define the phrase immediately jeopardize as previously discussed in this decision and does not introduce the concept of serious harm, injury, or impairment as the basis for finding immediate jeopardy. Thus, one is not in error concluding that absent a definition of the term “serious” in the Act, the regulations, the SOM, or decisions of the Board, it is essentially up to individual surveyors and whatever unpublished guidance they receive from their superiors or CMS officials, to exercise their individual discretion and judgment to decide that there was immediate jeopardy, which subjects a facility to the maximum imposable CMPs.

My review of the evidence in this case causes no definite or firm conviction that the declaration of immediate jeopardy was in error. The evidence shows that there was an imminent risk for and a high probability of serious injury, harm, impairment, or death of Resident 3. Resident 3 suffered fractures, which I consider to be serious injuries, particularly given her age and her complaints of pain. Furthermore, because Resident 3 was on heparin, there was a high risk or probability that she would suffer internal bleeding, which is serious and could lead to death if not promptly and appropriately treated. The degree of the risk associated with anticoagulant use and possible internal bleeding and the immediacy of the risk are established not only by the surveyor's testimony, but also by the testimony of Petitioner's nurses that they recognized the risk as well as by the speed with which Petitioner's nurses and the physician effected Resident 3's transfer to the hospital. Petitioner has not presented evidence that tends to show that there was no risk for serious injury, harm, impairment, or death, or that such risk was not probable or imminent.

Petitioner argues that the declaration of immediate jeopardy in this case is inconsistent with the policy guidance of CMS in the SOM. P. Br. at 3-7; P. Reply at 3-4. The SOM is CMS's guidance to surveyors. The SOM does not have the force and effect of law. *Green Oaks Health and Rehab. Ctr.*, DAB No. 2567 at 10. The SOM reflects the CMS interpretation and understanding of how the Act and regulations should be applied, and reference to the SOM for that purpose may be helpful. However, my review of whether there is a basis for imposition of an enforcement remedy is de novo. I do not review whether or not the state agency or CMS acted in accordance or consistent with interpretive rules of CMS found in the SOM. Rather, I am bound to follow the provisions of the Act and regulations related to immediate jeopardy as discussed earlier in this analysis.

Petitioner argues that the determination of immediate jeopardy requires a finding that residents other than Resident 3 faced the likelihood of serious injury, harm, impairment, or death. P. Br. at 7-9, 13. Petitioner asserts that there is not substantial evidence in this case that there was a likelihood of harm, serious injury, or death for other residents. P. Br. at 15. Petitioner incorrectly quotes 42 C.F.R. § 488.301 as stating “. . . **likely** to cause serious injury, harm, impairment or death to other residents in the facility [emphasis added].” P. Br. at 7. In fact, the definition of “immediate jeopardy” set forth in 42 C.F.R. § 488.301 provides that immediate jeopardy “is a situation in which . . . noncompliance . . . has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident.” Resident 3 was “a resident” and the conclusion that there was immediate jeopardy for her alone is sufficient. Petitioner cites no other authority to support the argument that there must be a showing that other residents were also at risk.

Petitioner argues that immediate jeopardy is not supported by substantial evidence in this case. P. Br. at 13, 15. The standard of proof and quantum of evidence required to

establish a fact in this proceeding is generally a preponderance of the evidence. The substantial evidence test is not one applied at the ALJ level. *Magnolia Estates Skilled Care*, DAB No. 2228 at 12 (2009). As already discussed in detail, immediate jeopardy involves the application of a different evidentiary standard before me. The applicable standard is that required by 42 C.F.R. § 498.60(c)(2), which specifies that the CMS determination of the level of noncompliance, immediate jeopardy in this case, must be upheld unless it is clearly erroneous. The regulation does not specify that Petitioner bears the burden of coming forward with the evidence and the burden of persuasion on that issue, but that has consistently been the approach followed by the Board in the cases discussed above.

Petitioner argues that it is unlikely that its staff would disregard the facility policy for a two-person assist with Hoyer lifts. P. Br. at 8, 14; P. Reply at 5. It is not clear to me whether Petitioner's argument refers to the future or to the accidents involving Resident 3. Petitioner conceded a violation of 42 C.F.R. § 483.25(h) (Tag F323) on the facts stipulated, including the fact that its staff did violate the alleged policy. Jt. Stip. ¶¶ 7, 9. Whether or not staff will in the future comply with Petitioner's policy requiring a two-person assist with the Hoyer lift, does not impact my determination that there was immediate jeopardy for Resident 3 in the past. The issue is whether Petitioner's noncompliance posed immediate jeopardy. Petitioner argues that there is overwhelming evidence that Petitioner trained its staff in safety and fall prevention related to transfers. Petitioner also argues that the surveyor reviewed Petitioner's accident and incident reports and found no accidents similar to those involving Resident 3. P. Br. at 14; P. Reply at 5-6. Petitioner conceded that it violated 42 C.F.R. § 483.25(h), and Petitioner's arguments do not tend to show that the declaration of immediate jeopardy was clearly erroneous. The surveyor clearly recognized the isolated nature of the deficiency and related jeopardy, given that the deficiency was cited at scope and severity of "J" in the Statement of Deficiencies. CMS Ex. 5 at 7. Petitioner's training of staff and its policy may have been considered by the surveyor in determining that Petitioner abated immediate jeopardy and returned to substantial compliance. The surveyor was clearly convinced that the last day of immediate jeopardy was January 7, 2011, and I do not review whether or not the determination that immediate jeopardy was abated was correct.

Petitioner argues that the manufacturer's instructions for use of the Hoyer lift indicate that one person can do a transfer. P. Br. at 9; CMS Ex. 19. Petitioner reasons that it would be unlikely that the manufacturer would suggest a one-person transfer with the lift if there was a risk for serious injury, impairment, harm, or death associated with a one-person transfer. P. Br. at 8. The manufacturer actually recommends the use of two people to effect a transfer. The manufacturer clearly states that a one-person transfer is possible with the equipment. However, the manufacturer also states that the decision to do a one-person transfer should be based on the evaluation of a health care professional in each case. CMS Ex. 19 at 8. Petitioner also argues that there is no evidence that Resident 3 actually required two people to perform her transfers with a Hoyer lift for

safety or other reasons. P. Br. at 10. Petitioner's argument overlooks that Petitioner conceded that it was not in substantial compliance with 42 C.F.R. § 483.25(h), based on the stipulated facts related to the December 10 and 14, 2011 accidents involving Resident 3. Therefore, Petitioner's factual arguments related to whether or not two people were required to transfer Resident 3, either based on manufacturer recommendations or some medical evaluation of Resident 3, are without merit.

Petitioner argues that CMS provides no support for the determination that Petitioner's noncompliance posed immediate jeopardy "[a]part from merely stating that petitioner's noncompliance was at the severity level of immediate jeopardy." P. Br. at 12. Petitioner's assertion is inaccurate. CMS offered the Statement of Deficiencies, the testimony of the surveyor that declared immediate jeopardy, and various records obtained from Petitioner during the survey that record the accidents on December 10 and 14, 2011, and the nature and seriousness of Resident 3's injuries. Petitioner also stipulated to the facts. Jt. Stip. CMS does not bear the burden of coming forward with the evidence and making a prima facie showing; however, the CMS evidence is clearly sufficient to show that it was more likely than not that Resident 3 suffered and was likely to suffer, serious injury, harm, impairment or death as a result of Petitioner's noncompliance.

I conclude that Petitioner has failed to meet its burden to show that the declaration of immediate jeopardy was clearly erroneous.

6. Petitioner does not dispute that a CMP of \$300 per day from January 7 through February 17, 2012 is a reasonable enforcement remedy.

7. A CMP of \$3,050 per day for the two-day period of immediate jeopardy is reasonable.

I have concluded that from January 5, 2012 to February 17, 2012, Petitioner was not in substantial compliance with program participation requirements due to violations of 42 C.F.R. §§ 483.13(c), 483.25(h), 483.30(a), 483.70(a), and 483.75(f). I have also concluded that Petitioner has not met its burden to show that the declaration of immediate jeopardy related to the violation of 42 C.F.R. § 483.25(h) was clearly erroneous. If a facility is not in substantial compliance with program requirements, CMS has the authority to impose one or more of the enforcement remedies listed in 42 C.F.R. § 488.406, including a CMP. CMS may impose a per-day CMP for the number of days that the facility is not in compliance or a per instance CMP for each instance that a facility is not in substantial compliance, whether or not the deficiencies pose immediate jeopardy. 42 C.F.R. § 488.430(a). The upper range of a per-day CMP, \$3,050 per day to \$10,000 per day, is reserved for deficiencies that pose immediate jeopardy to a facility's residents, and, in some circumstances, for repeated deficiencies. 42 C.F.R. § 488.438(a)(1)(i), (d)(2). The lower range of per-day CMPs, \$50 per day to \$3,000 per

day, is reserved for deficiencies that do not pose immediate jeopardy, but either cause actual harm to residents, or cause no actual harm but have the potential for causing more than minimal harm. 42 C.F.R. § 488.438(a)(1)(ii). I conclude that there is a basis for the imposition of a per-day CMP in the upper range of CMPs reserved for immediate jeopardy for two days during which immediate jeopardy existed based on the violation of 42 C.F.R. § 483.25(h). I also conclude that there is a basis for the imposition of a per-day CMP at the lower range for the deficiencies that posed a risk for more than minimal harm but not immediate jeopardy.

If I conclude, as I have in this case, that there is a basis for the imposition of an enforcement remedy and the remedy proposed is a CMP, my authority to review the reasonableness of the CMP is limited by 42 C.F.R. § 488.438(e). The limitations are: (1) I may not set the CMP at zero or reduce it to zero; (2) I may not review the exercise of discretion by CMS in selecting to impose a CMP; and (3) I may only consider the factors specified by 42 C.F.R. § 488.438(f) when determining the reasonableness of the CMP amount. In determining whether the amount of a CMP is reasonable, the following factors specified at 42 C.F.R. § 488.438(f) must be considered: (1) the facility's history of non-compliance, including repeated deficiencies; (2) the facility's financial condition; (3) the seriousness of the deficiencies as set forth at 42 C.F.R. § 488.404(b), the same factors CMS and/or the state were to consider when setting the CMP amount; and (4) the facility's degree of culpability, including but not limited to, the facility's neglect, indifference, or disregard for resident care, comfort, and safety, and the absence of culpability is not a mitigating factor. The factors that CMS and the state were required to consider when setting the CMP amount and that I am required to consider when assessing the reasonableness of the amount are set forth in 42 C.F.R. § 488.404(b): (1) whether the deficiencies caused no actual harm but had the potential for minimal harm; no actual harm with the potential for more than minimal harm, but not immediate jeopardy; actual harm that is not immediate jeopardy; or immediate jeopardy to resident health and safety; and (2) whether the deficiencies are isolated, constitute a pattern, or are widespread. My review of the reasonableness of the CMP is de novo and based upon the evidence in the record before me. I am not bound to defer to the CMS determination of the reasonable amount of the CMP to impose but my authority is limited by regulation as already explained. The Board has explained that my task is to determine whether the amount of any CMP proposed is within reasonable bounds considering the purpose of the Act and regulations. *Emerald Oaks*, DAB No. 1800, at 10; *CarePlex of Silver Spring*, DAB No. 1683, at 14–16 (1999); *Capitol Hill Cmty. Rehab. and Specialty Care Ctr.*, DAB No. 1629 (1997).

A CMP in the upper range is authorized for a period of immediate jeopardy. The upper range is \$3,050 to \$10,000. CMS proposes a CMP of \$3,050, which is the lowest permissible daily CMP for immediate jeopardy. Accordingly, I conclude that the CMP of \$3,050 per day for two days of immediate jeopardy on January 5 and 6, 2012, is reasonable.

CMS proposes a CMP of \$300 per day based on all the deficiencies for the period January 7 through February 17, 2012, after immediate jeopardy was abated. Petitioner does not dispute the reasonableness of the \$300 per-day CMP. P. Br. at 17, P. Reply at 7. My review of the required factors leads me to conclude that the \$300 per-day CMP is reasonable. Petitioner does not argue that it cannot afford to pay the total CMP of \$18,700, and Petitioner offered no testimony or documents related to its financial condition. Petitioner has a history of noncompliance from 2008, 2009, and 2010, including a prior violation of 42 C.F.R. § 483.25(h) that caused actual harm. CMS Ex. 56 at 1-2. Resident 3's injuries were serious. The life safety code violations were also serious. I also conclude that Petitioner was culpable in the injuries of Resident 3, particularly with respect to the December 14, 2011 injuries, given that a Hoyer lift had also caused her injury just four days prior on December 10, 2011. The most serious deficiencies were isolated, but the \$300 per-day CMP is at the low--end of the authorized range. I conclude that a CMP of \$300 per day from January 7 through February 17, 2012 is a reasonable enforcement remedy.

III. Conclusion

For the foregoing reasons, I conclude that Petitioner was not in substantial compliance with program participation requirements from January 5, 2012 to February 17, 2012. I further conclude that a CMP of \$3,050 per day for January 5 and 6, 2012 and \$300 per day for the period January 7 through February 17, 2012, a total CMP of \$18,700, is reasonable.

/s/

Keith W. Sickendick
Administrative Law Judge