Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of: Embassy Health Care Center, Petitioner, - v. - Centers for Medicare & Medicaid Services.	DATE: January 28, 2010 Civil Remedies CR1980 App. Div. Docket No. A-09-128 Decision No. 2299

FINAL DECISION AND PARTIAL REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

Embassy Health Care Center (Embassy, Petitioner), a long-term care facility that participates in the Medicare and Medicaid programs, appeals the July 24, 2009 decision of Administrative Law Judge (ALJ) Richard J. Smith. Embassy Health Care Center, DAB CR1980 (ALJ Decision). The ALJ concluded that Embassy was not in substantial compliance with the participation requirements and sustained CMS's imposition of a $200 per-day civil money penalty (CMP) for the period March 17 through June 8, 2008--for a total CMP of $16,800, as well as a mandatory three-month denial of payment for new admissions (DPNA) effective June 17, 2008. Before the ALJ, Embassy disputed one noncompliance finding from a March 17, 2008 survey (tag F314-pressure ulcers) and one noncompliance finding from an April 1, 2008 survey (tag F323-accidents and supervision). CMS cited each of these noncompliance findings at a level of seriousness of "G," that is, an isolated instance of noncompliance that caused actual harm that is not immediate jeopardy. See State

Operations Manual § 7400E (scope and severity grid). Embassy also argued that the $16,800 CMP was unreasonable. The ALJ concluded that Embassy failed to comply substantially with the requirement in 42 C.F.R. § 483.25(c)(2) (tag F314). The ALJ stated that he "made no findings or conclusions regarding[] the alleged violation" of 42 C.F.R. § 483.25(h) (tag F323) from the April 1, 2008 survey because the violation of section 483.25(c)(2) "provides a sufficient basis for the enforcement remedies proposed by CMS that I approve." ALJ Decision at 2. The ALJ further concluded that the $16,800 CMP for the period March 17 through June 8, 2008 was reasonable.

On appeal, Embassy argues that the ALJ erred in concluding that Embassy failed to comply substantially with section 483.25(c)(2). Embassy argues further that a $200 per-day CMP based on one noncompliance finding at the G level is excessive, pointing both to CMS's reliance on two G-level findings and to the particular circumstances of the facility's care of the resident who had the pressure sores.

As discussed below, we conclude that substantial evidence supports the ALJ's conclusion that Embassy failed to comply substantially with section 483.25(c)(2) and that a $200 per-day CMP is reasonable for the period March 17 to April 1, 2008. We further conclude, however, that the ALJ erred in considering that the finding of noncompliance with section 483.25(h) from the April 1 survey was not material to his determination. As the Board has pointed out, a dispute of fact may be material to resolving issues regarding not only the reasonableness of a per-day CMP amount but also the duration of the CMP. See, e.g., Guardian Healthcare Center, DAB No. 1943 (2004); Lebanon Nursing and Rehabilitation Center, DAB No. 1918 (2004). Here, it is undisputed that Embassy corrected the noncompliance with section 483.25(c)(2) by April 1, so that noncompliance does not provide a basis for a CMP for the period after that date. In addition, absent the finding of noncompliance from the April 1 survey, imposition of a DPNA effective June 17, 2008 would not have been mandatory. Accordingly, we remand the case to the ALJ for further proceedings consistent with this decision.

Analysis

I. The ALJ's conclusion that Embassy failed to comply substantially with section 483.25(c)(2) (F314) is supported by substantial evidence.[1]

Section 483.25(c) states:

> *Pressure sores*. Based on the comprehensive assessment of a resident, the facility must ensure that –
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> (1) A resident who enters the facility without pressure sores does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable; and
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> (2) A resident having pressure sores receives necessary treatment and services to promote healing, prevent infection and prevent new sores from developing.

The Board has explained that this regulation requires that a facility must do more than just maintain the status quo for a resident who suffers from pressure sores and obligates the facility, among other things, to promote healing. See, e.g., Stone County Nursing & Rehabilitation Center, DAB No. 2276, at 13 (2009). A pressure sore that persists without improvement for a long period is not healing. Woodland Village Nursing Center, DAB No. 2172, at 13 (2008). "In order to avoid a deficiency finding in that circumstance, the facility [must] show that the failure to achieve healing was clinically unavoidable, despite implementing measures to address the persistent sore . . . ." Id. at 13-14.

In the instant case, CMS's allegation of noncompliance with section 483.25(c)(2) centers on Embassy's treatment of one resident, identified as Resident 3. The following facts found by the ALJ are undisputed on appeal. Resident 3, a 95-year-old woman with multiple ailments including a history of

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[1] We review a disputed finding of fact to determine whether the finding is supported by substantial evidence on the record as a whole, and a disputed conclusion of law to determine whether it is erroneous. Departmental Appeals Board, *Guidelines-Appellate Review of Decisions of Administrative Law Judges Affecting* a *Provider's Participation in the Medicare and Medicaid Programs*, http://www.hhs.gov/dab/divisions/appellate/guidelines/prov.html.

cerebrovascular accident, osteoporosis, anemia, renal insufficiency, and urinary tract infection, was originally admitted to the facility in 2003. Upon readmittance from a local hospital in November 2007, she had a "decubitus ulcer" (also known as a pressure sore) on her coccyx and had another on her heel. Resident 3's physician ordered treatment for these pressure sores. The orders required a daily dry dressing on the resident's heel.[2] In addition, the orders required cleansing the pressure sore on the resident's coccyx with normal saline solution and an application of DuoDerm every three days and as needed until healed.[3] Embassy's staff failed to follow these orders, however. In particular, "on at least three occasions in November (November 15, 17, and 18) Petitioner failed to change Resident 3's dry dressing on her heel as required by her physician's orders[.]" In addition, Embassy allowed four days to elapse (from November 13 to 17, and six days to elapse (from November 17 to 23) before cleansing the pressure sore on the resident's coccyx with normal saline solution and applying DuoDerm as directed. ALJ Decision at 6 (citations omitted).[4] The ALJ observed that, since Resident 3 arrived at Embassy with pressure sores, section 483.25(c)(2) required the facility "to

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[2] The ALJ initially stated that the pressure sore in question was on Resident 3's left heel, but cited to treatment records that refer to the resident's right heel, and subsequently stated that the pressure sore in question was on Resident 3's right heel. ALJ Decision at 6 (citing CMS Ex. 6, at 168), 7. The Statement of Deficiencies for the March 17 survey notes that the facility administrator told surveyors that "the documentation regarding the treatments to the heel should be on the left heel, as R3 had a cast on her right le[g] that covered her heel." CMS Ex. 1, at 6. It is immaterial which heel was involved since Embassy does not dispute that it failed to change the dry dressing for a pressure sore on one of Resident 3's heels, as ordered by her physician, on the days in question.

[3] The ALJ Decision variously describes the schedule for care of the pressure sore on the resident's coccyx as "every three days as needed" and "every three days." ALJ Decision at 6, 7. The physician's orders are for care every three days and "PRN" (as needed). CMS Ex. 6, at 95, 160.

[4] The ALJ Decision incorrectly cites page 158 of CMS Exhibit 6 instead of page 160 of that exhibit as establishing Embassy's failings with respect to the treatment of the pressure sore on Resident 3's coccyx.

provide the necessary treatment and services to promote healing, prevent infection, and prevent new sores from developing." ALJ Decision at 7. The ALJ concluded that "Petitioner's failure to follow her doctor's explicit orders to provide the necessary dressing changes and cleansing of Resident 3's pressure sores on several occasions, as scheduled and required by those orders, falls below the quality of care that the regulations require." Id. at 8.

On appeal, Embassy argues that the ALJ erred in concluding that CMS established a prima facie case of noncompliance with section 483.25(c)(2). According to Embassy, CMS was required to show that Resident 3's pressure sores could have been healed if Embassy had followed her physician's orders for treatment of the pressure sores. Embassy also argues that the ALJ erred in concluding that Embassy failed to rebut CMS's alleged prima facie case. Embassy contends that the deposition testimony of Dr. Jurak, Resident 3's physician, established that, "*considering the Resident's condition*," "no harm occurred or could occur" as a result of the "lapses in care of short duration[.]" Request for Review (RR) at 12 (italics in original); see also RR at 6 (claiming that Dr. Jurak made an "assessment that Embassy took all appropriate measures to alleviate a health concern that could not be healed and was a result of the dying process."). (Resident 3 died on February 25, 2008. ALJ Decision at 6.)

Embassy's arguments reflect a misunderstanding of the requirements of section 483.25(c)(2). CMS's burden in relation to establishing a prima facie case is to come forward with evidence that, if undisputed, would establish a legally sufficient basis for its determination of noncompliance, i.e., that Embassy failed to "ensure" that Resident 3 received "necessary treatment and services" to promote healing and prevent infection of her existing pressure sores. CMS met that burden by coming forward with evidence that Embassy failed to follow Dr. Jurak's orders for treatment of the resident's pressure sores, a fact Embassy does not dispute. RR at 11.[5]

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[5] Embassy's request for review expressly acknowledges that facility staff waited four days, instead of the three days ordered by Resident 3's physician, to cleanse the pressure sore on Resident 3's coccyx and to apply DuoDerm, but does not mention that facility staff then waited another six days to provide this treatment again. However, Embassy does not dispute the ALJ's finding regarding the six-day gap, which is clearly shown by Embassy's own records cited above.

Moreover, as discussed below, we conclude that Embassy has not rebutted that prima facie case since Dr. Jurak's testimony does not establish that the treatment he ordered was not necessary to promote healing and prevent infection.

We note preliminarily that Embassy characterizes its failure to follow Dr. Jurak's orders as involving only "lapses in care of short duration[.]"[6] According to Embassy, in finding a failure to comply substantially with the requirements of section 483.25(c), the ALJ improperly held it to a "strict liability standard[.]" RR at 7, 11. The ALJ rejected this argument, as do we. The physician's orders were very explicit about the timing of the care to be provided for the pressure sores. The ALJ reasonably rejected Embassy's position that the timing did not matter. It is undisputed that "[i]n a sickly, immobile, 95 year-old woman such as Resident 3, pressure sores may develop very quickly." ALJ Decision at 8. Yet, Embassy repeatedly failed to provide the ordered care on the schedules specified in the orders. As the ALJ Decision notes, a dry dressing change was ordered daily for the pressure sore on Resident 3's heel but was not provided three times in a four-day period in November 2007. In addition, the saline solution cleansing and DuoDerm application was ordered every three days and as needed (which could be more frequently than every three days) for the pressure sore on Resident 3's coccyx but was provided instead at intervals of four days and six days on two consecutive occasions in November 2007. Moreover, although it is not mentioned in the ALJ Decision, the surveyors found, and Embassy's treatment records show, that new orders were given for care of both Resident 3's heel and coccyx every day and as needed beginning February 6, 2008, but that no care was provided for the pressure sore at either site on February 9, 10, or 17.[7] CMS Ex. 1, at 6-7; CMS Ex. 6, at 162, 164. Thus, there were multiple failures to follow treatment orders for pressure sores at two separate sites. The ALJ was therefore correct in stating that, in

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[6] Embassy also makes a vague suggestion that facility staff provided the ordered care on the days on which no care was documented in its treatment records. See, e.g., RR at 10. However, Embassy proffered no evidence to support this suggestion.

[7] The surveyors also found, and the record shows, that neither treatment was given on February 21, 22, 23 or 24. However, a February 20 order signed by Dr. Jurak to "[change] dressing only when saturated for comfort measures" (P. Ex. 8, at 30) could be read as superseding the prior orders.

finding a violation of section 483.25(c)(2) on these facts, he did not interpret the regulations to "require a facility to be perfect in its execution when providing care to its residents." ALJ Decision at 8.

We also disagree with Embassy as to what Dr. Jurak's testimony shows. On appeal, Embassy quotes his testimony that having the DuoDerm "on for an extra day, provided it was secure and it was not overly saturated and it was not leaking in any way, would really not make a whole lot of difference between the three days and four days." RR at 12, quoting P. Ex. 34, at 14. This statement pertains only to one of the many missed treatments for one of the two pressure sore sites, however. In any event, Dr. Jurak did not affirmatively state that the missed treatment would not have made a difference, but only that, under certain conditions, it would not have made a difference. Dr. Jurak did not say these conditions had been met; indeed, he prefaced his statement by saying "I would have to see the wound[.]" P. Ex. 34, at 13.

Moreover, contrary to what Embassy argues, Dr. Jurak did not clearly testify that facility staff actually provided appropriate treatment for Resident 3's pressure sores. Instead, he stated only that "everyone did the best of their ability to try and take care of Resident [3] and do the appropriate things to try to keep her wounds from getting any worse and her infections from getting any worse . . . ." P. Ex. 34, at 25. Dr. Jurak did not explain how he knew what kind of treatment facility staff actually provided given his admission that he did not recall if he ever reviewed the treatment sheets. Id. at 35-36, 43. Moreover, he testified on cross-examination that the goal of the treatment he ordered was to promote healing and prevent infection (as opposed to merely preventing the pressure sores and any infection from "getting any worse") and that it was important that his orders be followed. Id. at 32, 34.

Furthermore, Embassy's reliance on Dr. Jurak's testimony that Resident 3's pressure sores worsened "as a result of the dying process" and that there was no "good chance that she was going to get healed" (P. Ex. 34, at 24-25) is misplaced. There is no evidence that either Dr. Jurak or Embassy staff thought Resident 3 was dying in November 2007 or even in the early part of February 2008 when Embassy failed to provide care as ordered. It was not until February 20, 2008 that Dr. Jurak signed the order for "comfort measures" and not until February 22, 2008 that he gave a telephone order permitting her evaluation for hospice care. P. Ex. 8, at 30; CMS Ex. 6, at 102.

Even if Resident 3 had been identified as terminally ill before those dates, the Board has held that simply because a resident is terminally ill "does not mean that the facility is thus absolved from complying with Medicare participation requirements (including the prevention and treatment of pressure sores)." Clermont Nursing and Convalescent Center, DAB No. 1923, at 18 (2004); see also Batavia Nursing and Convalescent Inn, DAB No. 1911 (2004), aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson, 143 F. App'x 664 (6th Cir. 2005). Dr. Jurak testified that he gave the February 20 "comfort measures" order at the point where he felt "the treatments seemed to be causing [Resident 3] more discomfort with trying to turn her and give her dressing changes and those kinds of things" than the pressure sores themselves. P. Ex. 34, at 20, 44, 46. Until that point, any improvement in the condition of the pressure sores might have enhanced the quality of Resident 3's life during her remaining months or weeks by lessening the pain associated with the pressure sores. Cf. Beechwood Sanitarium, DAB No. 1906, at 94 (2004)(in upholding finding that facility violated requirement for physician notification in section 483.10, Board stated that "it is obvious that a resident's condition may change significantly during the dying process, and that medical and nursing care may affect the quality of death as much as, and as part of, the quality of life" (emphasis in original)). Indeed, Embassy's own treatment records document occasional improvement in the condition of one or both of Resident 3's pressure sores. See CMS Ex. 6, at 26, 29, 30, 33 (Weekly Pressure Ulcer Surveillance Reports). While Embassy presented evidence that Resident 3 was at high risk for pressure sores, that development of such sores may have been unavoidable, and that the sores might never have healed completely, Embassy has not shown that the condition of the pressure sores could not have been further improved or their deterioration delayed if Embassy had provided all the care ordered by Dr. Jurak.

Moreover, as noted, section 483.25(c)(2) requires a facility to provide care to "prevent infection" as well as to "promote healing." Thus, even if Embassy had established that it could not promote healing by providing all the care ordered by Dr. Jurak, Embassy had an obligation to continue to treat the pressure sores to prevent infection. Dr. Jurak testified that one of the purposes of DuoDerm—which he ordered for the pressure sore on Resident 3's coccyx—"is to keep material out of the wound, i.e., feces and urine and any other general debris that would get into the wound." P. Ex. 34, at 13. Thus, by not

applying the DuoDerm as ordered, Embassy was not providing the care necessary to prevent infection.[8]

Accordingly, we conclude that the ALJ did not err in determining that Embassy failed to comply substantially with section 483.25(c)(2).

II. The ALJ's determination that the per-day amount of the CMP is reasonable is supported by substantial evidence with respect to the period March 17 to April 1, 2008.

The ALJ upheld as reasonable in amount the $200 per-day CMP imposed by CMS based on Embassy's failure to comply substantially with section 483.25(c)(2). As discussed in the next section, this noncompliance supports a CMP only for the period March 17 to April 1, 2008 since it is undisputed that the noncompliance was corrected by April 1. We thus discuss in this section only whether a $200 per-day CMP for this period is reasonable.

In cases not involving immediate jeopardy, a per-day CMP may be imposed in a range from $50 to $3,000. 42 C.F.R. § 488.438(a)(1)(ii). In determining the amount of a CMP, CMS and the ALJ must use the factors listed at section 488.438(f). Those factors are: (1) the facility's history of noncompliance; (2) the facility's financial condition; (3) factors specified in section 488.404; and (4) the facility's degree of culpability, which includes neglect, indifference, or disregard for resident care, comfort or safety. 42 C.F.R. § 488.438(f). This section also states: "The absence of culpability is not a mitigating circumstance in reducing the amount of the penalty." Section 488.404 includes as factors the seriousness of and relationship among the deficiencies and the facility's history of noncompliance in general and specifically as to the cited deficiencies. The Board has held that in assessing whether CMP amounts are within a reasonable range, the ALJ should not look into CMS's internal decision-making process but, rather, should make a de novo determination as to the whether the amounts are reasonable applying the regulatory criteria based on the record developed before the ALJ. See, e.g., Kingsville Nursing and

[8] The surveyors found that there was a MRSA (methicillin-resistant Staph aureus) infection at the site of the pressure sore on Resident 3's heel. CMS Ex. 6, at 4, 6; see also P. Ex. 34, at 14. However, the record does not definitively establish when that infection developed.

Rehabilitation Center, DAB No. 2234, at 13 (2009) and cases cited therein.

The ALJ addressed the regulatory factors as follows:

> . . . Petitioner argues with respect to the deficiency at F314, that its failure to follow Resident 3's physician orders was an isolated incident; that its failure did not amount to actual harm; and that the $200 per day CMP was excessive.
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> I disagree. The deficiency determination at F314 easily supports a $200 per day CMP imposition. The record shows that Petitioner failed to follow treatment orders as required and that Resident 3 developed stage III and stage IV pressure sores while at Petitioner's facility, thus a determination that she suffered actual harm is warranted.[9] There was no compelling evidence presented that persuaded me that Petitioner was not culpable, nor were there facts that indicated that its culpability is in any way diminished which would warrant the reduction of the CMP amount in this case. The $200 per day CMP is reasonable since it is in the lower range of penalties for deficiencies that do not constitute immediate jeopardy but involved actual harm or caused no harm but have the potential for more than minimal harm.
>
> Neither party has contended that the penalty amount should be affected by Petitioner's compliance history or financial condition. . . .

ALJ Decision at 10-11.

On appeal, Embassy asserts that its "purported failure to follow the doctor's orders [was] minimal and the harm, if any, was marginal." RR at 14. As discussed above, however, Embassy failed to follow the orders for care of pressure sores at two

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[9] In context, the ALJ clearly meant that the pressure sores that existed when Resident 3 was readmitted to the facility in November 2007 increased in severity to a stage III and a stage IV pressure sore. (Embassy does not dispute CMS's contention, noted in the ALJ Decision, that, although Embassy's records at the time of the resident's readmission merely noted areas of blistering and reddening, the blistered areas should have been assessed as stage II pressure sores. See ALJ Decision at 6.)

separate sites on a number of occasions. In addition, the surveyors and CMS found that the stage III and IV pressure sores caused actual harm to Resident 3, and the surveyor testified that there was actual harm (Tr. at 70). Embassy's characterization of the harm as "marginal" does not deny that there was actual harm. In any event, a $200 per-day CMP was within the range of CMP amounts that may be imposed for deficiencies that caused no actual harm, but have the potential for more than minimal harm. 42 C.F.R. § 488.438(a)(1)(ii). At the very least, failing to follow a physician's orders for the treatment of pressure sores has a potential for more than minimal harm to any residents with treatment orders for pressure sores that might go unheeded.

Embassy argues in addition that it "did not neglect this resident; rather it gave excellent care to [her] for more than four years[.]" RR at 14. The quality of the care provided to Resident 3 at other times or in other respects does not obviate the fact that Embassy demonstrated some degree of culpability (which can include indifference) when it repeatedly failed to follow Dr. Jurak's orders for treatment of her pressure sores. Moreover, the ALJ could reasonably determine that Embassy's provision of other interventions to address Resident 3's pressure sores did not demonstrate that there was an absence of culpability.[10]

Embassy also reiterates its argument that the pressure sores "were inevitable" given Resident 3's medical condition. RR at 14. As indicated above, Embassy was required to provide treatment that would promote healing and prevent infection even if it was not possible to prevent new sores from developing or to completely heal the pressure sores that had developed.

Embassy argues further that "the CMP imposed here is far more punitive than the circumstances warrant." RR at 14. This argument has no merit. As the Board has previously stated, the purpose of nursing home enforcement CMPs is to ensure compliance with program requirements, making them not punitive but remedial in nature. See, e.g., Alexandria Place, DAB No. 2245, at 31, n.12, citing 42 C.F.R. § 488.402(a) and Board decisions including Regency Gardens Nursing Center, DAB No. 1858 (2002). While a penalty amount substantially exceeding the amount

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[10] Embassy's administrator testified that its other interventions included providing Resident 3 with a pressure-relieving mattress, placing a cushion in her wheelchair, and keeping her heels floating above the bed. Tr. at 139.

necessary to achieve this remedial purpose might arguably be considered "punitive," Embassy has not shown here that the $200 per-day CMP is excessive.

Finally, Embassy did not dispute a different noncompliance finding from the March 17 survey (tag F225). As CMS points out, this tag was cited at a level of seriousness of "D" (isolated, with no actual harm but a potential for more than minimal harm that is not immediate jeopardy) and provides an additional basis for the $200 per-day CMP for the period March 17 to April 1, 2008. See CMS Response to RR, at 30.

Accordingly, we conclude that the ALJ did not err in upholding a $200 per-day CMP for the period March 17 to April 1, 2008.

III. The ALJ erred in upholding the CMP for the period April 1 though June 8, 2008 without reaching the issue of whether Embassy complied substantially with the requirements in section 483.25(h) (F323).

CMS initially notified Embassy of the imposition of the $200 per-day CMP in an April 14, 2008 letter. The letter stated that March 17 and April 1, 2008 surveys found that Embassy "was not in substantial compliance," and identified "the most serious deficiencies" as tag F314 (from the March survey) and tag F323 (from the April survey), which were cited at a scope and severity level of "G." The letter further stated that the CMP was imposed beginning March 17, 2008 and would continue to accrue until "you have made the necessary corrections to achieve substantial compliance with the participation requirements, or your provider agreement is terminated." In a letter dated July 24, 2008, CMS referred to its earlier letter and noted additional deficiencies found in subsequent surveys: two "E" level deficiencies in a May 16, 2008 revisit survey (tag F253-housekeeping and maintenance services and tag F406-specialized rehabilitative services) and one "F" level deficiency in a May 28, 2008 Life Safety Code survey (K29). CMS stated that it was therefore imposing a $200 per-day CMP for 84 days beginning March 17 and continuing through June 8, 2008.

Before the ALJ, Embassy disputed the noncompliance cited under tags F314 and F323--the two tags identified in CMS's April 14, 2008 letter as the most serious deficiencies, but admitted to the noncompliance cited under the remaining tags (which involved a lower level of scope and severity): a second "D" level tag cited in the March 17 survey but not mentioned in the April 14 letter (tag F225 – staff treatment of residents); the two tags cited in the May 16 survey; and the one tag cited in the May 28 survey. See ALJ Decision at 1-2, and Joint Motion to

Consolidate and Stipulation of the Parties, enclosed with letter dated 10/23/08. However, the ALJ did not consider the noncompliance cited under the second disputed tag (tag F323), nor did he rely on any of the undisputed tags. Instead, the ALJ determined that Embassy's violation of section 483.25(c)(2) (tag F314) by itself provided a sufficient basis for a $200 per-day CMP for the entire period for which CMS imposed the CMP. See ALJ Decision at 2-3.

The ALJ's failure to consider the noncompliance cited under tag F323 was error. CMS stated in its prehearing brief, and Embassy stated without contradiction at the hearing, that Embassy came back into compliance with tags F314 and F225 by April 1, 2008. Respondent's Prehearing Br. at 1; Tr. at 22-23.[11] Moreover, CMS in effect conceded before the ALJ and the Board that the undisputed noncompliance findings from the May 16 and May 28 surveys would not support remedies for periods prior to those survey dates. CMS's Post-Hearing Reply Br. at 14-15; CMS Response to RR at 30-31. Thus, from April 1 to May 16, 2008, the only basis for a CMP could have been the noncompliance finding under tag F323, which was the sole remaining finding from the March 17 and April 1 surveys. Since Embassy disputed this finding, the ALJ could not properly uphold the $200 per-day CMP for this period without determining whether Embassy failed to comply substantially with the requirements of section 483.25(h) to which this tag refers and, if so, whether the amount of the CMP was reasonable based on this noncompliance. Any such noncompliance, together with Embassy's undisputed noncompliance cited in the May 16 and May 28 surveys, would also provide a basis for a CMP for the period May 16 through June 8, 2008 since Embassy did not assert that, prior to June 9, it corrected any noncompliance other than that found in the March 17 survey under tags F314 and F225. If the ALJ were to determine that Embassy complied substantially with section 483.25(h), the ALJ could still uphold a CMP for the period May 16 through June 8, 2008 based solely on the undisputed findings from the May 16 and May 28 surveys. In either case, however, he would need to determine whether a $200 per-day CMP for this period is reasonable in amount. If the ALJ were to determine

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[11] CMS's July 24, 2008 letter to Embassy regarding the imposition of remedies states that revisits by the State agency on June 16 and June 27, 2008 "found your facility to be in substantial compliance with the participation requirements effective June 9, 2008." CMS letter at 1. This finding was not inconsistent with a finding by CMS that Embassy corrected its noncompliance with some of the tags prior to June 9.

that Embassy complied substantially with section 483.25(h) (and therefore had achieved substantial compliance by April 1, 2008), the DPNA that CMS imposed effective June 17, 2008 would not have been mandatory. See 42 C.F.R. § 488.417(b)(1) (providing for a mandatory DPNA if a facility is not in substantial compliance three months after the last day of the survey identifying the noncompliance).

Accordingly, contrary to what the ALJ decided, whether Embassy failed to comply substantially with section 483.25(h) is material to both the duration of the CMP and the reasonableness of the CMP amount for any periods of noncompliance beginning April 1, 2008. We therefore vacate the ALJ's decision to uphold the $200 per-day CMP for the period April 1 through June 8, 2008 and the mandatory DPNA and remand the case to the ALJ for further proceedings consistent with this decision.

Conclusion

For the foregoing reasons, we uphold the ALJ Decision with respect to the CMP for the period March 17 to April 1, 2008, vacate the ALJ's decision to uphold the $200 per-day CMP for the period April 1 through June 8, 2008 and the mandatory DPNA, and remand the case to the ALJ for further proceedings.

/s/
Stephen M. Godek

/s/
Leslie A. Sussan

/s/
Judith A. Ballard
Presiding Board Member