Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Jewish Home of Eastern Pennsylvania
Docket No. A-12-19
Decision No. 2451
March 30, 2012

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Jewish Home of Eastern Pennsylvania (Jewish Home or Petitioner) appeals the August 30, 2011 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes in *Jewish Home of Eastern Pennsylvania*, DAB No. CR2421 (2011) (ALJ Decision) granting summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS). The ALJ sustained CMS's findings that Jewish Home was not in substantial compliance with five Medicare participation requirements and upheld a $600 per-day civil money penalty (CMP) for 29 days of noncompliance ($17,400 total).

For the reasons set forth below, we affirm the ALJ Decision granting summary judgment in favor of CMS. We further conclude that the ALJ's conclusions of law are free of legal error. Based upon our affirmance of the ALJ's conclusions regarding Jewish Home's legal arguments and the fact that Jewish Home does not otherwise contest the ALJ's conclusion that the CMP was "remarkably modest" at $600 per-day given the facility's past history of noncompliance, we summarily affirm the reasonableness of the CMP. ALJ Decision at 8.

Legal Background

Federal law and regulations provide for surveys by state survey agencies to evaluate the compliance of long-term care facilities with the requirements for participation in the Medicare and Medicaid programs and for CMS or the State to impose remedies on skilled nursing facilities (SNF) or nursing facilities, respectively, found not to comply substantially with any of those program requirements. Sections 1819 and 1919 of the Social Security Act (Act)[1]; 42 C.F.R. Parts 483, 488, and 498.

[1] The current version of the Act is available at http://www.socialsecurity.gov/OP_Home/ssact/ ssact.htm. On this website, each section of the Act contains a reference to the corresponding chapter and section in the United States Code.

"Substantial compliance" is defined as "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health and safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Noncompliance" means "any deficiency that causes a facility to not be in substantial compliance." *Id.* CMS may impose a CMP when a facility is not in substantial compliance. 42 C.F.R. §§ 488.404, 488.406, and 488.408. Where the noncompliance does not constitute immediate jeopardy, but either caused actual harm or caused no actual harm but has the potential for more than minimal harm, CMS may impose a penalty in the range of $50 to $3,000 per day. 42 C.F.R. § 488.438(a)(1)(ii).

Case Background

The following facts are not disputed and are drawn from the record before the ALJ and the ALJ Decision.

Jewish Home is located in Scranton, Pennsylvania and participates in Medicare as a SNF and in the state Medicaid program as a nursing facility. Based on a survey of Jewish Home completed on January 14, 2010 by the Pennsylvania Department of Health (state agency), CMS determined that the facility was not in substantial compliance with the following Medicare participation requirements:

- 42 C.F.R. § 483.10(b)(11) (Tag F157 — notification of changes);
- 42 C.F.R. § 483.15(f)(1) (Tag F248 — activities);
- 42 C.F.R. § 483.25(c) (Tag F314 — pressure sores);
- 42 C.F.R.§ 483.25(f)(1) and (f)(2) (Tags F319 and F320 — mental and psychosocial functioning);
- 42 C.F.R. § 483.35(i) (Tag F371 — sanitary conditions);
- 42 C.F.R. § 483.60(c) (Tag F428 — drug regimen review);
- 42 C.F.R. § 483.60(b), (d), and (e) (Tag F 431 — pharmacy services);
- 42 C.F.R. § 483.65(a) (Tag F441 — infection control); and
- 42 C.F.R. § 483.75(l)(1) (Tag F514 — clinical records).

CMS Exhibit (Ex.) 1. CMS subsequently determined that the facility returned to substantial compliance on February 12, 2010. CMS imposed a CMP of $600 per day for 29 days of noncompliance from January 14 through February 11, 2010 ($17,400 total). CMS Ex. 2. Jewish Home filed a Notice of Appeal before an ALJ on May 17, 2010.

CMS moved for summary judgment on five of these noncompliance findings.[2] Jewish Home did not furnish any evidence or argument in response that attempted to

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[2] The five Medicare participation requirements at issue are set forth at 42 C.F.R. §§ 483.10(b)(11), 483.25(c), 483.35(i)(2), 483.60(b), (d), and (e), and 483.65.

demonstrate the existence of a material factual dispute in response to CMS's motion for summary judgment. Instead, Jewish Home raised several legal arguments regarding the survey and appeal process.

The ALJ concluded that "CMS is entitled to summary judgment because Petitioner has not challenged its determinations that the facility was not in substantial compliance with specific Medicare program requirements. Those determinations are therefore final and binding and provide a sufficient basis for imposing a penalty." ALJ Decision at 3. The ALJ rejected Jewish Home's argument that CMS imposed the CMP as the result of selective enforcement in violation of equal protection principles because Jewish Home "did not appeal any of the deficiencies cited" and because "Petitioner made the same argument — even relying on the same evidence — in two prior appeals" that were rejected by the Board and the Court of Appeals for the Third Circuit. *Id.* at 5-6 (citing *Jewish Home of Eastern Pennsylvania*, DAB No. 2254, at 13-15 (2009) *aff'd*, *Jewish Home of Eastern Pennsylvania. v. CMS*, 413 F. App'x 532 (3rd Cir. 2011) (*JHEP I*) and *Jewish Home of Eastern Pennsylvania*, DAB No. 2380 (2011) (*JHEP II*)). The ALJ also rejected Jewish Home's argument that she could not consider the facility's prior history of noncompliance until all avenues of appeal had been exhausted as "wholly impracticable" and inconsistent with the purpose of the CMP, which is to provide an incentive for a facility to return to substantial compliance with program requirements as soon as possible and to remain in substantial compliance. *Id.* at 7. The ALJ also concluded that she had no authority to review how CMS calculated the CMP amount and rejected Jewish Home's challenge to how CMS calculated the CMP amount and that Jewish Home was not entitled to review of the scope and severity finding involving pressure sores. *Id.* at 6-7.

Jewish Home filed a timely appeal of the ALJ Decision to the Board. Jewish Home's Request for Review (RR).

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address de novo. *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918, at 3-5 (2004). Summary judgment is appropriate only if there are no genuine disputes of fact material to the result. *Everett Rehabilitation and Medical Center,* DAB No. 1628, at 3 (1997). We review disputed conclusions of law for error. *Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs,* available at http://www.hhs.gov/dab/divisions/appellate/guidelines/index.html; *Golden Age Nursing & Rehabilitation Center,* DAB No. 2026, at 7 (2006).

Analysis

On appeal before us, Jewish Home makes the following legal arguments: 1) there is no legal authority under either the Administrative Procedure Act (APA) or the regulations for an ALJ to grant summary judgment, and the ALJ erred in granting summary judgment; 2) the ALJ may not consider the facility's past history of noncompliance until appeals of two prior Board decisions have been decided by the United State Supreme Court and the United States Third Circuit Court of Appeals; 3) the Jewish Home is entitled to an in-person hearing on its equal protection and selective prosecution defense; 4) the Secretary's regulation precluding consideration of evidence tending to decrease culpability violates the Act; and 5) the Secretary's discretion to impose CMPs absent judicial review of how the amount of the CMP is calculated violates due process. For the reasons discussed below, we conclude that Jewish Home's arguments are without merit.

1. The ALJ did not err in granting summary judgment in favor of CMS.

A. Neither the APA nor the applicable regulations preclude an ALJ from granting summary judgment.

Jewish Home argues that summary judgment is not authorized by either the APA, 5 U.S.C. §§ 556(c) and 556(d), or 42 C.F.R. § 498.5(k). RR at 2. In furtherance of this argument, Jewish Home contends that 5 U.S.C. § 556(d) requires that "[a]ny oral . . . evidence may be received" during a hearing governed by the APA. *Id.* Jewish Home also contends that "the regulations strongly imply a right to an in-person hearing 'before an ALJ.'" *Id.* citing 42 C.F.R. § 498.5(k) (a nursing facility "has a right to a hearing before an ALJ . . . ."). Jewish Home further contends that when the APA and section 498.5 are "read together[,] . . . [they] create a strong inference that an-person hearing where oral testimony can be received is required." *Id.* These arguments are without merit.

Jewish Home does not cite any case law in support of its contention. On the other hand, the Board has previously addressed and rejected similar arguments. *See, e.g.*, *Madison Health Care, Inc.*, DAB No. 1927, at 2-5 (2004); *Lebanon Nursing and Rehabilitation Center* at 3-5; *Crestview Parke Care Center*, DAB No. 1836, at 5-8 (2002), *rev'd on other grounds*, *Crestview Parke Care Center v. Thompson*, 373 F.3d 743 (6th Cir. 2004). Although there is a statutory and regulatory right to a hearing in these matters, the Board and courts have long recognized that such hearing rights may be satisfied without an oral hearing under certain circumstances. *See Vandalia Park*, DAB No. 1939, at 5-6 (2004) (citing *Crestview Parke Care Center*, 373 F.3d at 750). Indeed, the Board has repeatedly found that a "requirement affording the opportunity for an oral hearing is not contravened by summary judgment if there are no genuine issues of material fact." *Vandalia Park* at 5-6 (citing *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997)).

Federal Circuit Courts of Appeal have also consistently held that "HHS's interpretive rule allowing ALJs to grant summary judgment without an in-person hearing is valid." *Crestview,* at 373 F.3d at 750 (upholding validity of summary judgment procedures in DAB Civil Remedies Division Procedures Manual); *see also Senior Rehabilitation and Skilled Nursing Center v. Health and Human Services,* 405 F. App'x 820, (5th Cir. 2010); *Windsor Health Center v. Leavitt* 127 F. App'x 843, at 846 (6th Cir. 2005) (CMS is entitled to summary judgment if it has: 1) made a prima facie showing that petitioner was not in substantial compliance with one or more program requirements, and 2) demonstrated that there is no dispute about any material fact supporting its prima facie case and that it is otherwise entitled to summary judgment as a matter of law.); *Travers v. Shalala*, 20 F.3d 993, 998 (9th Cir. 1994). Jewish Home has neither acknowledged these prior Board or Circuit court cases rejecting the very same argument it raises here, nor explained why we should not rely on them.

We also see nothing in either the language of the APA or the regulations that precludes an ALJ from using summary judgment or that specifically requires an ALJ to afford an in-person hearing to a nursing facility that is appealing a finding of noncompliance where no issue of material fact has been placed in dispute.

Accordingly, we reject Jewish Home's argument that granting summary judgment would be inconsistent with the APA and the applicable regulations.

B. The ALJ did not err in granting summary judgment in favor of CMS.

The Board has also previously laid out the process and standards for resolving a summary judgment motion by CMS in a nursing facility case, in which, as here, the ALJ has informed the parties that he or she will be guided by Rule 56 of the Federal Rules of Civil Procedure (FRCP). We quote that explanation at length as it informs our decision here:

> Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). . . . The party moving for summary judgment bears the initial burden of demonstrating that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. If a moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986) (quoting FRCP 56(e)). To defeat an adequately supported summary judgment motion, the non-moving party **may not rely on the denials in its pleadings or briefs, but must furnish evidence** of a dispute concerning a material fact -- a fact that, if proven, would affect the outcome of the case under governing law. *Id.* at 586, n.11; *Celotex*, 477

> U.S. at 322. In order to demonstrate a genuine issue, the opposing party must do more than show that there is "some metaphysical doubt as to the material facts. Where **the record taken as a whole** could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587. In making this determination, the reviewer must view the **evidence** in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *See, e.g., U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Kingsville Nursing and Rehabilitation Center, DAB No. 2234, at 3-4 (2009) (emphasis added). The Board has also previously explained how this analysis proceeds in a Part 498 proceeding as follows:

> Under the applicable substantive law, CMS has the initial burden of coming forward with evidence on any disputed facts showing that the provider was not in substantial compliance with Medicare participation requirements. However, the provider bears the ultimate burden of persuasion that it was in substantial compliance with those requirements. . . .
>
> Consequently, if CMS in its summary judgment motion has asserted facts that would establish a prima facie case that the facility was not in substantial compliance, the first question is whether the facility has in effect conceded those facts. If not, the next question is whether CMS has come forward with evidence to support its case on any disputed fact. If so, the facility must aver facts and proffer evidence sufficient to show that there is a genuine dispute of material fact.

Lebanon Nursing and Rehabilitation Center at 5 (citations omitted). The Board also has held that in order to defeat a motion for summary judgment, "the facility must proffer evidence of facts which, if taken as true with all favorable inferences which could be reasonably drawn from that evidence, would be sufficient as a legal basis for determining that the facility was in substantial compliance." *Vandalia Park* at 8.

The ALJ followed these principles in explaining the analysis that she used in determining whether summary judgment in favor of CMS was appropriate in this case. Here, the ALJ issued an order dated May 24, 2010 in which she directed the parties to file pre-hearing exchanges, which were to include proposed exhibits, declarations of proposed witnesses, and pre-hearing briefs. ALJ Decision at 4 (citing Acknowledgment and Initial Pre-Hearing Order at 4, ¶ 7 (May 24, 2010)). The record shows that CMS's pre-hearing exchange included a legal brief that contained detailed factual allegations and legal arguments that addressed five of the deficiencies cited (42 C.F.R. §§ 483.10(b)(11), 483.25(c), 483.35(i)(2), 483.60(b), (d), and (e), and 483.65). The record further shows

that CMS's submission was supported by 34 proposed exhibits, including the written and sworn statements of three surveyors, a sworn written statement from a CMS witness regarding the reasonableness of the CMP imposed, the written testimony of two expert witnesses, and publications setting forth generally accepted standards of care. The ALJ effectively concluded that CMS had submitted sufficient evidence to establish a prima facie case that Jewish Home was not in substantial compliance with the five program requirements addressed in its submission when she stated that Jewish Home "would have to furnish evidence of specific facts showing that a dispute exists." ALJ Decision at 5 (citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 586 n.11; *Vandalia Park*; *Lebanon Nursing and Rehabilitation Center*).

Jewish Home responded by submitting a pre-hearing brief and nine exhibits in which Jewish Home did not address the factual or legal basis for any of the deficiencies and instead made some of the same arguments Jewish Home makes on appeal (i.e., that the CMP resulted from bias and selective enforcement, that the regulation precluding consideration of evidence tending to decrease culpability violates the Act, and that the ALJ could not consider the facility's history of noncompliance pending resolution of its appeals of DAB Nos. 2254 and 2280 in federal court).

After the parties submitted their pre-hearing briefs, the Third Circuit issued its decision upholding *JHEP I*, DAB No. 2254, 413 F. App'x 532. On June 3, 2011 the ALJ ordered the parties to address the effect on the appeal of the Third Circuit's decision. CMS responded by submitting its motion for summary judgment in which it argued that Jewish Home "failed to challenge a single deficiency based on the underlying facts" and "never even suggests, let alone argues that it was in substantial compliance" with any of the regulations with which it was found to be out of substantial compliance. CMS Motion for Summary Judgment, at 2. Jewish Home in response submitted its brief in opposition to CMS's motion for summary judgment with only two attachments that did not address any of the deficiencies identified in CMS's motion for summary judgment or the factual or legal basis for those cited deficiencies.[3] Indeed, Jewish Home did not even mention any of the deficiencies at issue, let alone challenge the underlying factual basis for those deficiencies. Indeed, Jewish Home's opposition contained only the vague and general statement that "CMS is not otherwise entitled to summary judgment as a matter of law because it has not yet introduced 'substantial evidence [of non-compliance] on the record considered as a whole' as required by the Social Security Act. 42 U.S.C. §1320a-7a(e)." Pet. Br. in Opposition to CMS's Motion for Summary Judgment, at 1-2. However, this response is insufficient to defeat summary judgment as a matter of law because Jewish Home's statement goes to the appellate standard of review used by the Board reviewing an ALJ finding of fact (and by courts reviewing findings of fact in a Board decision), rather than to the evidentiary standard applied by the finder of fact in making findings of

[3] Attachment #1 was entitled "History of the CMPs Assessed on the Jewish Home." Attachment #2 was entitled "CMPs Issued to the Facilities in the Scranton Field Office since 2005."

noncompliance in the first instance. The appropriate standard for an ALJ evaluating a CMS motion for summary judgment is set out above. S*ee Vandalia Park* at 6; *Lebanon Nursing and Rehabilitation Center* at 5. Moreover, even if Jewish Home had articulated the appropriate regulatory standard, a mere blanket denial of the evidence supporting CMS's findings of noncompliance is not sufficient to defeat a properly supported motion for summary judgment, as is the case here.

Nonetheless, Jewish Home contends that the ALJ erred because its "Notice of Appeal [to the ALJ] specifically challenges the factual basis of each citation issued during the survey, and does so in a manner that raises issues of fact that can only be resolved by a hearing." RR at 3. This statement is without merit because, as the ALJ noted "[w]ith respect to the specific citations of noncompliance, [Jewish Home] did not 'identify the specific issues, and the findings of fact and conclusions of law' with which it disagreed, nor did it 'specify the basis for contending that those findings and conclusions [were] incorrect,' as required by . . . 42 C.F.R. § 498.40(b)." ALJ Decision at 4. Jewish Home also does not contest the ALJ's finding that "for each of the deficiencies cited, except one, it argued, generally, that the survey report form 'does not contain substantial evidence of a violation of the regulation,' promises to introduce evidence to establish its compliance and 'decrease its culpability,' and/or claims that it satisfied the cited requirement." *Id.* citing Pet. Notice of Appeal, at 5-9. On review of the notice of appeal, we agree with the ALJ's description.

More importantly, however, even if Jewish Home's Notice of Appeal had challenged CMS's factual and legal findings of noncompliance, Jewish Home was required to do more than state general challenges in the face of CMS's motion for summary judgment and submission of evidence in the support of its determination. Specifically, Jewish Home had to "furnish evidence of a dispute concerning a material fact." Instead, the only factual challenge that Jewish Home made in its opposition to the motion for summary judgment was the bald statement that a "fact hearing is necessary to establish culpability . . . [and] *[a]t a fact finding hearing* with respect to culpability, Petitioner *will introduce evidence* tending to decrease culpability . . . ." Pet. Br. in Opposition to CMS's Motion for Summary Judgment, at 5 (italics added). Jewish Home submitted no documents or witness testimony, with either its pre-hearing brief or its opposition to the motion for summary judgment, to demonstrate that there was a genuine dispute of material fact about whether it was in substantial compliance with the program requirements at issue during the survey. Thus, the ALJ accurately stated that Jewish Home "did not respond to CMS's specific arguments or evidence relating to the facility's noncompliance." ALJ Decision at 5.

Instead, Jewish Home raised the following legal arguments: 1) the CMP should be stricken and CMS's exhibits and testimony should be excluded because they were the result of selective enforcement in violation of equal protection principles; 2) CMS cited one of the deficiencies (42 C.F.R. § 483.25(c) — Tag F314) at a higher scope and

severity level than the state agency recommended; 3) CMS erred in how it calculated the CMP; and 4) the ALJ may not consider a facility's prior history of noncompliance until the facility has exhausted all court appeals of past allegations of noncompliance. ALJ Decision at 5. The ALJ correctly concluded that summary judgment was appropriate in this case because the only issues for her consideration were legal in nature. *Id.*

Accordingly, we agree with the ALJ that CMS was entitled to summary judgment because Jewish Home did not submit any evidence demonstrating a genuine dispute of material fact existed and did not otherwise challenge CMS's evidence demonstrating that the facility was not in substantial compliance with five program requirements.

2. The ALJ's consideration of Jewish Home's history of past-noncompliance was not erroneous.

In assessing the reasonableness of the amount of the CMP in this case, the ALJ considered Jewish Home's prior history of noncompliance, as required by 42 C.F.R. § 488.438(f). ALJ Decision at 8-9. Specifically, CMS had previously determined that Jewish Home was not in substantial compliance with program requirements based on surveys by the state agency in 2005, 2006, and 2007. *Id.* Jewish Home appealed the CMPs imposed based upon those findings of noncompliance to an ALJ and later to the Board.[4] In both cases, the Board affirmed the ALJ decisions that sustained the CMPs. *See JHEP I*, DAB No. 2254; *JHEP II*, DAB No. 2380.

On appeal before us, Jewish Home contends that "CMS impermissibly took account of an alleged history of non-compliance in setting the CMP" in this case because the appeals of those non-compliance findings are pending before the Third Circuit and the United States Supreme Court. RR at 10. Jewish Home further contends that in order to impose a CMP based upon a prior history of noncompliance, the "appeals related to that noncompliance would have to be resolved." *Id.* We disagree.

First, although it is really not material to our decision, it appears that the court challenges to the prior noncompliance have, in fact, been resolved at this point. During the pendency of this appeal before us, the United States Supreme Court denied Jewish Home's Petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit regarding its appeal of the Board decision in *JHEP I*, DAB No. 2254. *JHEP I*, 132 S.Ct. 837 (Mem) (Dec. 5, 2011). In addition, the Third Circuit recently affirmed the Board's decision in *JHEP II*, DAB No. 2380, in which Jewish Home had raised essentially the same legal arguments as *JHEP I*. *JHEP II*, 2012 WL 834129 (3rd

[4] The appeals of the survey results from 2005 and 2006 were consolidated in one proceeding.

Cir. Mar. 14, 2012). Thus, Jewish Home's appeals in these two cases have now effectively been exhausted.[5]

Second, Jewish Home actually stipulated to the findings of noncompliance imposed by CMS and instead grounded its appeal in both of these prior cases on the allegation that it had been the target of selective enforcement, in that the facility allegedly has been singled out for harsher penalties than other comparable nursing facilities solely because the facility, while non-denominational, is associated with Jewish culture and values. *JHEP I*, DAB No, 2254, at 2, 5, 7; *JHEP II*, DAB No. 2380, at 1, 2. By stipulating to the noncompliance findings in those two cases, Jewish Home, in effect, was stipulating to the same history of noncompliance it now says CMS and the ALJ should not consider. Thus, we fail to see any basis for the contention that the ALJ erred as part of her de novo review of CMS's determination about the CMP amount by considering the facility's prior history of noncompliance.

Third, Jewish Home cited to no relevant legal authority supporting its claim that CMS, the ALJ, and the Board may not consider prior history as required by the regulation until all possible avenues of appeal have been exhausted. In any event, we agree with the ALJ that staying the proceeding and not considering the prior findings of noncompliance against Jewish Home until all outstanding appeals have been exhausted is "wholly impracticable and would defeat the underlying purposes of imposing CMPs." ALJ Decision at 7. We further agree with the ALJ that Jewish Home's argument, if accepted, would be "unworkable" and inconsistent with the underlying purpose of a CMP to provide facilities with an incentive to return to substantial compliance as soon as possible and to remain in substantial compliance. *Id.* (citing *Careplex of Silver Spring*, DAB No. 1683, at 8 (1999)). It would also be incompatible and interfere with CMS's ability to manage nursing home enforcement cases because CMS might have to wait years before it could consider a facility's prior history of noncompliance in determining the appropriate amount of a CMP.[6]

Thus, we conclude that the ALJ properly considered Jewish Home's history of noncompliance in her de novo review of the reasonableness of the amount of the CMP.

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[5] Jewish Home has not informed the Board that it intends to appeal the recent Third Circuit decision in *JHEP II* to the U.S. Supreme Court. However, even if Jewish Home ultimately decides to do so, it would not alter our decision on this issue.

[6] We also note that the regulations explicitly state that a per-day CMP is due within 15 days after a final administrative decision has been made, not after any court appeals have been exhausted. 42 C.F.R. § 488.442(a).

3. The Board and the Third Circuit have previously rejected Jewish Home's equal protection arguments as meritless.

Before the ALJ, Jewish Home argued that CMS imposed a CMP that is "the result of selective enforcement in violation of Equal Protection Principles," and that the ALJ must exercise the discretion afforded to her by 42 C.F.R. § 498.61 to "exclude or suppress such evidence." ALJ Decision at 5. The ALJ rejected this argument, finding it irrelevant because Jewish Home "did not appeal any of the deficiencies cited, CMS's determination that it was not in substantial compliance with Medicare program requirements is final and binding, without regard to any of CMS's proffered evidence." *Id.* (citing 42 C.F.R. § 498.20(b)). The ALJ also rejected Jewish Home's argument on the ground that it had made the same argument based on the same evidence in two prior appeals and that argument had been rejected by the Board in *JHEP I*, DAB No. 2254, and again in *JHEP II*, DAB No. 2380, as well as the Third Circuit (in an appeal of the Board's decision in *JHEP I*), 413 F. App'x at 535-36. *Id.* at 6. Before us, Jewish Home raises essentially the same argument but couches it as a request "that it be granted a full Due Process hearing on its Equal Protection defense[,] which it has raised and preserved at each stage of this administrative process." RR at 11-12. We find this request to be without merit for the reasons the Board and the Third Circuit have previously stated.

In this regard, we note that the Third Circuit recently affirmed the Board's decision in *JHEP II*, DAB No. 2380, where we rejected the same argument currently before us for a second time. *JHEP II*, 2012 WL 834129 (3rd Cir. March 14, 2012). Specifically, the Third Circuit held that:

> . . . the issue of whether CMS has been engaged in selective enforcement with respect to petitioner JHEP has been decided adversely to the petitioner in litigation that has gone to final judgment between the same parties as the parties in the case at bar. Under these circumstances, the petitioner is precluded from relitigating the selective enforcement issue. *See* Restatement (Second) of Judgments § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.")[.]

Id. at 2012 WL 834129, at *4 (citations omitted). The Third Circuit also rejected Jewish Home's argument that due process had been violated because the ALJ did not afford the facility an evidentiary hearing on its selective enforcement claim. *Id.* The Third Circuit concluded that Jewish Home "is not entitled to an evidentiary hearing to explore an issue that has already been fully litigated to final judgment in prior litigation." *Id.*

Jewish Home submitted the same evidence in support of its argument in the present case that it had previously submitted in regard to our decisions in *JHEP I*, DAB No. 2254, and *JHEP II*, DAB No. 2380.[7] For example, Jewish Home here proffered identical affidavit testimony from the same three witnesses (Samuel P. Wilcox, Sara Raposo, and Mark White) to support its equal protection and selective enforcement claims. Jewish Home has not alleged any new facts in the present case that would even arguably warrant a different outcome. Thus, for the reasons previously stated in *Jewish Home*, DAB No. 2254, at 13-15, DAB No. 2380, at 6-8, as well as those stated by the Third Circuit, *JHEP I*, 413 F. App'x at 535-36; *JHEP II*, 2012 WL 834129, at *4, we conclude that the ALJ did not err in rejecting Jewish Home's equal protection and selective prosecution arguments.

4. The ALJ did not err in rejecting Jewish Home's argument that 42 C.F.R. § 438(f)(4) is invalid and contrary to section 1128A(d)(2) of the Act.

The regulation at section 488.438(f)(1)-(4) sets forth the factors that CMS must consider when determining the amount of a CMP. One of those factors is the facility's degree of culpability. Section 488.438(f)(4). This regulation further provides that the "absence of culpability is not a mitigating circumstance in reducing the amount of the penalty." *Id.* Jewish Home contends that the ALJ erred in rejecting its argument that section 488.438(f)(4) "is contrary to federal law because it precludes consideration of factors tending to decrease culpability and the Social Security Act requires a consideration of culpability." RR at 9 (citing Act § 1128A(d)(2)). We disagree.

Jewish Home raised the same legal argument in *JHEP II*, where the Board held that: "The ALJ did not err in rejecting Jewish Home's argument that 42 C.F.R. § 488.438(f)(4) is invalid and contrary to section 1128A(d)(2) of the Act." *JHEP II*, DAB No. 2380, at 8; *see also CarePlex of Silver Spring*, DAB No. 1627, at 17-21 (1997) (Board rejected the argument that the regulation stating that the absence of culpability is not a mitigating factor that can reduce a CMP violates the Act). Moreover, as we stated in *JHEP II*, "Jewish Home's argument that the regulation is invalid does not provide any legal basis for us to conclude that the ALJ erred because the ALJ and the Board are bound by the cited regulations." *JHEP II*, DAB No. 2380, at 9 (citing *1866ICPayday*, DAB No. 2289, at 14 (2009) (stating "an ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground"); *see also Sentinel Medical*

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[7] Before the ALJ, Jewish Home also relied on allegations that a state surveyor made biased remarks during an October 2004 survey. ALJ Decision at 6, citing P. Ex. 2; P. Br. at 9-10. The ALJ correctly observed that Jewish Home made the same claims in its earlier appeals to the Board in *JHEP I*, DAB No. 2254, and in its appeal to the Third Circuit of that Board decision. In affirming the Board's decision in *JHEP I*, the Third Circuit characterized Jewish Home's reliance on the surveyor's remarks as "misplaced." *JHEP I*, 413 F. App'x at 536. It found the remarks "clearly taken out-of-context," as well as "not relevant or facially discriminatory." *Id.* The ALJ concluded that the Third Circuit's decision resolves the issue. ALJ Decision at 6. For the reasons previously set forth in *JHEP I*, DAB No. 2254, at 13-15, and *JHEP II*, DAB No. 2380, at 6-8, as well as those stated by the Third Circuit, 413 F. App'x at 536 and 2012 WL at 834129, at *4, we agree that the ALJ's conclusion was not erroneous.

Laboratories, Inc., DAB No. 1762, at 9 (2001), *aff'd, Teitelbaum v. Health Care Financing Admin.*, 32 F. App'x 865 (9th Cir. 2002).

5. The ALJ did not err in declining to review how CMS calculated the amount of the CMP.

Jewish Home contends that the ALJ erred by concluding that she has "no authority to review CMS's internal decision-making process[es]" regarding how CMS determined the amount of the CMP in this case. RR at 12 (quoting ALJ Decision at 7). Jewish Home further contends that "a hearing procedure that precludes examination of the Secretary's compliance with her own regulatory standards for imposing a discretionary fine is *per se* arbitrary and a violation of substantive and procedural Due Process."[8] RR at 14. These arguments are without merit.

How CMS calculated the amount of the CMP is not relevant because the ALJ conducts a de novo review of the reasonableness of the amount of the CMP based on the facts and evidence contained in the appeal record. *See Cal Turner Extended Care Pavilion*, DAB No. 2030, at 7-8 (2006) (citing *CarePlex of Silver Spring*, DAB No. 1683, at 17-18). Moreover, as discussed above, the ALJ, and the Board on appellate review, are bound by the regulations. Section 488.438(f) sets forth the factors that an ALJ may consider in her de novo review of the CMP amount. The regulation at 42 C.F.R. § 488.438(e)(3) specifically provides that the ALJ "may not . . . consider any factors in reviewing the amount of the penalty other than those specified in paragraph (f) of this section." *See Merrimack County Nursing Home*, DAB No. 2424, at 11 (2011) ("an ALJ may not . . . consider any factors other than those specified in section 488.438(f) of CMS's regulations.") Indeed, the Board has long recognized that an ALJ is not permitted to review CMS's method or motive used in calculating the amount of the *CMP. See Capitol Hill Community Rehabilitation and Specialty Care Center*, DAB No. 1629, at 5 (1997) (sections 488.438(e) and (f) "do not authorize an ALJ to review the particular process which HCFA [now CMS] utilized to establish the amount of the CMP"). Moreover, the only relevant evidence that the ALJ can consider is that which falls within the scope of the regulatory factors, which does not include statistical evidence comparing the amount of CMPs based on noncompliance findings by the Scranton Field Office with noncompliance findings by other state survey agencies or field offices. Here, Jewish Home did not proffer any relevant evidence that fell within the scope of the regulatory

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[8] Jewish Home further suggests that the ALJ erred in not permitting it to present expert testimony that purportedly would show "a gross statistical disparity in CMS'[s] assignment of CMPs to the Petitioner's facility in comparison [with] all other facilities surveyed from the Scranton Field Office." RR at 12. For the reasons previously discussed in section 3, we reject this argument without any further discussion.

factors, and the ALJ properly declined to consider the proffered statistical evidence.[9] Jewish Home also does not challenge before us the ALJ's conclusion that the $600 per-day CMP is "relatively modest" or contend that the ALJ otherwise did not follow the regulations in upholding it.

Conclusion

For all of the foregoing reasons, we affirm the ALJ Decision.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Stephen M. Godek
Presiding Board Member

[9] To the extent that Jewish Home suggests that the ALJ erred in not considering the expert statistical testimony because the case was dismissed on summary judgment, we note that the Board rejected this argument in *JEHP I* and in *JHEP II* as without merit. *JHEP I*, DAB No. 2254, at 13-15; *JHEP II*, DAB No. 2380, at 6-8. We see nothing in the record that compels a different result here.