

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Heritage Plaza Nursing Center
Docket No. A-17-61
Decision No. 2829
October 31, 2017

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Heritage Plaza Nursing Center (Heritage), a long-term care facility, appeals the administrative law judge (ALJ) decision in the case of *Heritage Plaza Nursing Ctr.*, DAB CR4771 (2017) (ALJ Decision). The ALJ sustained a determination by the Centers for Medicare & Medicaid Services (CMS) to impose a civil money penalty (CMP) against Heritage of \$1,650 per day for the period from April 23, 2016 through May 21, 2016 based on findings that Heritage was not in substantial compliance with Medicare and Medicaid participation requirements at 42 C.F.R. §§ 483.13(c) and 483.25(h). The ALJ determined that the record established a pattern of neglectful behavior by Heritage’s staff and a consistent failure to protect residents against evident accident hazards or to provide those residents with necessary assistance devices, which resulted in actual harm to multiple residents. The ALJ also concluded that the penalty amount was reasonable.

For the reasons discussed below, we sustain the ALJ Decision.

I. Legal Background

To participate in Medicare or Medicaid, a long-term care facility must be in “substantial compliance” with the participation requirements in 42 C.F.R. Part 483, subpart B. 42 C.F.R. §§ 483.1, 488.400. The term “noncompliance,” as used in the regulations, is synonymous with lack of substantial compliance. *Id.* § 488.301 (defining “noncompliance”).¹

¹ In October 2016, CMS issued a final rule that amended the Medicare requirements for long-term care facilities and re-designated some sections. *See* Final Rule, *Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities*, 81 Fed. Reg. 68,688, 68,847 (Oct. 4, 2016); 82 Fed. Reg. 32,256 (July 13, 2017) (technical corrections). We rely on the regulations in effect in April 2016, when the survey providing the bases for CMS’s determination took place. *Carmel Convalescent Hosp.*, DAB No. 1584, at 2 n.2 (1996) (applying regulations in effect on the date of the survey and resurvey).

CMS evaluates whether a facility is in compliance with the Part 483 requirements based on onsite surveys that are usually performed by state agencies. *Id.* §§ 488.10(a), 488.11. A “deficiency” is any failure to comply with a participation requirement, and “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.” *Id.* § 488.301. A state agency reports deficiencies in a Statement of Deficiencies (SOD), which identifies each deficiency with the associated regulatory requirement(s) and a corresponding “Tag” number.

CMS may impose enforcement “remedies,” including a per-day CMP, on a facility found not to be in substantial compliance. *Id.* §§ 488.400, 488.402(b), (c), 488.406, 488.408. When CMS elects to impose a CMP, it sets the CMP amount based on the “seriousness” of the facility’s noncompliance, among other factors. *Id.* §§ 488.404(b), 488.438(f). “Seriousness” is a function of scope (whether the deficiency is “isolated,” constitutes a “pattern,” or is “widespread”) and severity (whether it has created a “potential for harm,” resulted in “actual harm,” or placed residents in “immediate jeopardy”). *Id.* § 488.404(b). A per-day CMP may accrue from the date the facility was first out of substantial compliance until the date it is determined to have achieved substantial compliance. *Id.* § 488.440(a)(1), (b).

A skilled nursing facility or nursing facility such as Heritage may appeal a finding of noncompliance that results in the imposition of a CMP by requesting an ALJ hearing. *Id.* §§ 488.406(a), 498.3(b)(13), 498.40. A party may request Departmental Appeals Board review of an ALJ decision. *Id.* § 498.80.

II. The Survey and CMS Determination

On April 27, 2016, the Texas Department of Aging and Disability Services (state agency) completed a recertification survey at Heritage. CMS Ex. 1, at 1. In a letter dated May 17, 2016, CMS notified Heritage that it concurred in the survey findings that Heritage was not in substantial compliance with multiple participation requirements, including:

- 42 C.F.R. § 483.13(c), Staff treatment of residents
Tag F224 Prohibit Mistreatment/Neglect/Misappropriation
Tag F226 Develop/Implement Abuse/Neglect, etc. Policies
Scope and Severity (S/S) Level H, Pattern of actual harm that is not immediate jeopardy
- 42 C.F.R. § 483.25(h), Accidents
Tag F323 Free of Accident Hazards/Supervision/Devices
S/S Level H, Pattern of actual harm that is not immediate jeopardy

Id. The letter also notified Heritage that CMS was imposing the following enforcement remedies: termination of Heritage's Medicare and Medicaid provider agreement unless Heritage achieved substantial compliance before October 27, 2016; a CMP of \$1,650 per day beginning April 23, 2016 until further notice; and denial of payment for all new Medicare and Medicaid admissions (DPNA) beginning May 26, 2016. *Id.* at 2-3. By letter dated August 1, 2016, CMS notified Heritage that it had achieved substantial compliance on May 22, 2016. CMS Ex. 2. The notice stated that CMS had rescinded the proposed termination of Heritage's provider agreement and DPNA and was imposing the per-day CMP of \$1,650 per day for 29 days (April 23, 2016 through May 21, 2016) for a total of \$47,850. *Id.* at 1. Heritage appealed CMS's determination.

III. The ALJ Proceedings and Decision

CMS filed a pre-hearing brief and 52 proposed exhibits. ALJ Decision at 1. Heritage filed a pre-hearing brief without proposed exhibits, stating that it would rely on CMS Exhibits 5-38 and 46-47, and that it did not intend to present any witnesses or cross-examine any CMS witness. *Id.*; Pet.'s Witness and Exhibit List at 1.

Petitioner objected to CMS Exhibits 3 (SOD for Recertification Survey ending April 27, 2016) and 39 (SOD for Life Safety Code survey ending April 27, 2016) on the ground that they contain inadmissible hearsay. ALJ Decision at 1; Pet.'s Prehearing Br. at 16. The ALJ overruled this objection, explaining that the proceeding was not governed by the Federal Rules of Evidence and that he generally admits hearsay with the caveat that he may choose not to rely on it if he finds it unreliable. ALJ Decision at 1-2. The ALJ stated that while he overruled Petitioner's objections to CMS Exhibits 3 and 39, he did not rely on them in deciding this case. *Id.* at 2.²

Petitioner also objected to CMS Exhibits 48-52 (Surveyors' Declarations) on the ground that CMS submitted them after the deadline for pre-hearing submissions. *Id.*; Pet.'s Prehearing Br. at 16. The ALJ acknowledged that the late submission violated his pre-hearing order but determined that the late submission was harmless because Heritage still had ample time to reply to the exhibits and, in any case, he did not rely on CMS Exhibits 48-52 in deciding this case. ALJ Decision at 2. The ALJ received CMS Exhibits 1-52 into the record. *Id.*

² The ALJ's ruling was consistent with prior Board decisions. See, e.g., *Omni Manor Nursing Home*, DAB No. 1920, at 16-18 (2004), *aff'd*, *Omni Manor Nursing Home v. Thompson*, 151 F. App'x 427 (6th Cir. 2005) (hearsay may be admitted into evidence in an administrative hearing, subject to relevance and fundamental fairness; the weight the ALJ should accord hearsay is determined by the degree of reliability, based on relevant indicia of reliability and whether the hearsay is corroborated by other evidence in the record as a whole). Heritage's appeal does not contest the ALJ's evidentiary rulings.

The ALJ decided the case based on the parties' written submissions. The ALJ concluded that the evidence "amply support[ed]" CMS's determination that Heritage failed to comply substantially with 42 C.F.R. §§ 483.13(c) and 483.25(h). *Id.* Those regulations, the ALJ explained, require a facility "to assure that its resident environment remain free from accident hazards and to ensure that each resident receives adequate supervision and assistance devices to prevent accidents." *Id.* The ALJ concluded, based on records relating to four residents and documenting a multitude of falls, that Heritage's noncompliance was serious and its failure to adequately protect the residents against falls by developing and implementing protective measures resulted in actual harm. Therefore, he found it unnecessary to address CMS's additional findings of noncompliance. *Id.*³

IV. Standard of Review

The Board's standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. The Board's standard of review on a disputed finding of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs*, accessible at <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/participation/index.html>; *Batavia Nursing and Convalescent Inn*, DAB No. 1911, at 7 (2004), *aff'd*, *Batavia Nursing & Convalescent Ctr. v. Thompson*, 143 F. App'x 664 (6th Cir. 2005).

V. Analysis

Heritage argues that the ALJ "erroneously determined that CMS established a 'prima facie' case that Petitioner was not in substantial compliance with participation requirements." Request for Review (RR) at 3. In Heritage's view, CMS did not "identify the legal criteria to which it sought to hold" the facility or "produce evidence of the basis for its determination." *Id.* In particular, Heritage asserts that CMS did not provide evidence of, and the ALJ did not discuss, how Heritage failed to implement, or violated, its policy on neglect. *Id.* Heritage also alleges that the ALJ did not consider all of the evidence demonstrating that it "implemented its policies and procedures, assessed the needs of" the four residents whose care was at issue "and fully implemented reasonable measures to mitigate foreseeable risks for harm to themselves and other facility

³ An ALJ need not make findings on all alleged survey deficiencies to sustain a CMS determination and the imposition of enforcement remedies. *See, e.g., Beechwood Sanitarium*, DAB No. 1824, at 20-22 (2002) (ALJ not required to make findings on all deficiencies in CMS statement of deficiencies), *aff'd after remand, Beechwood Sanitarium*, DAB No. 1906 (2004). Heritage does not assert that the ALJ would have had to uphold any or all of the deficiencies he did not address to also uphold the imposed sanctions, including the CMP amounts, or otherwise allege any prejudice to it as a result of the ALJ's determination to address only certain deficiencies.

residents.” *Id.* at 4. Heritage additionally argues that, in instances when it did not abide by one of its own policies, “violation of a facility policy is not a violation of a regulatory requirement unless the policy is identical to the regulation.” *Id.* at 8. Lastly, Heritage argues, the ALJ failed to address all of the elements that must be considered in evaluating a CMP and, consequently, he incorrectly determined that the CMP was reasonable. *Id.* at 8-9.

We explain below why Heritage’s contentions are unfounded and the ALJ Decision is supported by substantial evidence and free from legal error. We first discuss the applicable legal criteria cited by CMS and addressed by the ALJ in support of the determination of Heritage’s noncompliance. We next evaluate the evidence on which the ALJ relied relating to the care and services that Heritage provided to each of the four residents whose care is at issue. We describe how substantial evidence supports the ALJ’s finding of a pattern of neglect and an underlying breakdown in the implementation of Heritage’s own policies and procedures, which led to multiple residents falling and sustaining harm. Finally, we explain why we uphold the ALJ’s conclusion that the CMP amount imposed against Heritage is reasonable.

A. The ALJ’s determination that Heritage was not in substantial compliance with 42 C.F.R. §§ 483.13(c) and 483.25(h) is supported by substantial evidence and free from legal error.

1. The applicable legal criteria

a. *42 C.F.R. § 483.13(c), Staff treatment of residents*

Under section 483.13(c), a “facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents” The regulations define “neglect” to mean the “failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.” 42 C.F.R. § 488.301. Accordingly, a facility may be noncompliant with section 483.13(c) if it “fail[s] to develop policies or procedures adequate to prevent neglect” or fails to implement its anti-neglect policy and procedures. *Glenoaks Nursing Ctr.*, DAB No. 2522, at 14 (2013).

A facility’s failure to implement other policies or procedures also may support a finding of noncompliance with section 483.13(c) insofar as those other policies or procedures establish what “goods and services [are] necessary to avoid physical harm” to residents. *Avalon Place Kirbyville*, DAB No. 2569, at 9 (2014) (facility failure to follow its emergency response policy and procedures constituted a deficiency under section 483.13(c)); *Azalea Court*, DAB No. 2352, at 13-15 (2010) (facility failure to follow its elopement protocol and smoking policy constituted noncompliance with section 483.13(c)), *aff’d*, *Azalea Court v. United States Dep’t of Health & Human Servs.*, 482 F. App’x 460 (11th Cir. 2012).

b. 42 C.F.R. § 483.25(h), *Accidents*

The lead-in language of 42 C.F.R. § 483.25, “Quality of care,” sets out the overarching requirement that a long-term care facility must provide each resident “the necessary care and services to attain or maintain the [resident’s] highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.” See Social Security Act (Act) §§ 1819(b)(2) (Medicare) and 1919(b)(2) (Medicaid).⁴ This language is “based on the premise that the facility has (or can contract for) the expertise to first assess what each resident’s needs are (in order to attain or maintain the resident’s highest practicable functional level) and then to plan for and provide care and services to meet the goal.” *Spring Meadows Health Care Ctr.*, DAB No. 1966, at 16 (2005).

Under section 483.25(h), a long-term care facility must “ensure that ... [t]he resident environment remains as free of accident hazards as is possible,” and that “[e]ach resident receives adequate supervision and assistance devices to prevent accidents.” 42 C.F.R. § 483.25(h)(1), (2). The Board has repeatedly held that section 483.25(h) obligates a facility to take “all reasonable steps to ensure that a resident receives supervision and assistance devices that meet his or her assessed needs and mitigate foreseeable risks of harm from accidents.” *Briarwood Nursing Ctr.*, DAB No. 2115, at 5 (2007), *citing Woodstock Care Ctr. v. Thompson*, 363 F.3d 583, at 590 (6th Cir. 2003), *affirming Woodstock Care Ctr.*, DAB No. 1726 (2000). Though a facility has flexibility to choose the methods of supervision and assistance used to prevent accidents, it must also “provide supervision and assistance devices that reduce known or foreseeable accident risks to the highest practicable degree, consistent with accepted standards of nursing practice.” *Century Care of Crystal Coast*, DAB No. 2076, at 6-7 (2007), *aff’d*, *Century Care of Crystal Coast v. Leavitt*, 281 F. App’x 180 (4th Cir. 2008).

Where a facility policy or a resident’s care plan requires staff to take specific measures in caring for a resident, the Board has repeatedly held that those measures reflect the facility’s own determination of what it must do to attain or maintain the resident’s “highest practicable physical, mental, and psychosocial well-being” as required by the overarching quality-of-care requirement. *Azalea Court*, DAB No. 2352, at 9 (citations omitted).

⁴ The current version of the Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

2. The ALJ's evaluation of the care and services that Heritage provided to four residents is supported by substantial evidence and free from legal error.

- a. *Resident # 18 (R18)*

R18, a woman who was 67 years old during the period at issue, was admitted to Heritage on April 20, 2016 for skilled care following a total right knee replacement. CMS Ex. 24, at 3, 9, 24, 161. R18 was diagnosed with osteoarthritis in the right knee, generalized muscle weakness, ataxic gait, lack of coordination, acute kidney failure, lupus erythematosus, anemia, hypertension, low back pain, and obesity. *Id.* at 43-44, 46. Heritage's admission records for R18 documented that she had "[p]roblems with balance requir[ing] assistance" and decreased range of motion in the knees, used a wheelchair, and required limited assistance for transfers and extensive assistance for ambulation. *Id.* at 19. On the day of her admission, Heritage developed a care plan for R18 that identified "Impaired Physical Mobility" as a "Care Area/Problem," which necessitated an "appropriate level of assistance to promote safety of resident" and an occupational and physical therapy evaluation. *Id.* at 36.

On the following day, April 21, 2016, therapy staff assessed R18 to be a "high risk" for falls, unable to maintain her balance while standing and turning, and "severely impaired" for fall recovery. *Id.* at 24. Therapy staff also determined that she required "moderate assistance (26-75% assist)" for transfers to and from the shower, among other things. *Id.* Upon completion of the April 21 evaluation, staff developed occupational and physical therapy plans and recommended skilled treatment for R18's activities of daily living (ADLs), gait, balance, transfers, bed mobility, and strengthening. *Id.* at 24-28.

On April 23, 2016, the third day of her stay at Heritage, R18 fell directly on her right knee while trying to exit a shower. *Id.* at 31, 161. A nursing assistant was present at the time of the fall but, Heritage acknowledged, she did not provide any physical assistance to R18.⁵ Pet.'s Prehearing Br. at 7 ("Based upon information obtained at admission, [R18] only required supervision while taking and exiting the shower and that was the supervision she was provided."). The fall resulted in what R18 described as "excruciating pain" and significant physical harm – a rupture along the surgical incision, uncontrolled bleeding, and patellar tendon rupture – which required emergency surgery to the same knee and another postoperative hospitalization. CMS Ex. 24, at 33, 159, 161, 181.

⁵ The ALJ noted that Heritage's nursing notes state that the resident fell while "a nursing assistant was assisting her exit from a shower chair," but that those notes do not explain what type of help the assistant provided. ALJ Decision at 3, n.1, citing CMS Ex. 24, at 5, 33. Given Heritage's admission that the assistant only supervised the transfer, the ALJ did not infer that the assistant was attempting to provide physical assistance or support. *Id.*

The ALJ determined that the “evidence presented by CMS as to [R18] plainly support[ed] a finding of noncompliance with the requirements of 42 C.F.R. §§ 483.13(c) and 483.25(h).” ALJ Decision at 3. The ALJ found that Heritage staff assessed R18 to be at risk for falls and concluded that she “at the least required close supervision and physical assistance.” *Id.* Nevertheless, the ALJ said, “staff stood by without offering assistance as the resident fell while exiting a shower, sustaining a severe physical injury.” *Id.*; *see also* CMS Ex. 34, at 12 (surveyor notes of interview with R18, who reportedly said that “the aide was propped up on the doorway and didn’t help”).

Heritage argues that the ALJ did not acknowledge or consider the evidence that, at the time R18 was admitted, her preliminary assessment found her to be full weight bearing on both legs and able to transfer herself with supervision only. RR at 4, citing CMS Ex. 24, at 8 and 19. Heritage also contends that while its therapy department assessed R18 on April 21, 2016, the day after her admission, as needing moderate assistance with transfers, she fell less than 24 hours after that assessment. According to Heritage, 24 hours “is an insufficient amount of time for a nursing facility to gather the required attendees of the interdisciplinary team ... for a care plan meeting and for them to evaluate ... what type of additional assistance she may have needed.” *Id.* at 5. Because this evidence and the regulations were not adequately considered by the ALJ, Heritage asserts, “the legal conclusion reached by the ALJ that the Petitioner was not in compliance with §§ 483.13(c) and 483.25 was erroneous.” *Id.*

Heritage’s contentions are baseless. The ALJ explicitly discussed these arguments and described why they were unpersuasive. While Heritage preliminarily assessed R18 as full weight bearing, the ALJ explained, R18 had documented physical impairments that required interventions and assistance to ensure her physical safety. ALJ Decision at 3, citing CMS Ex. 24, at 3, 10, 19. Heritage’s own therapy staff assessed her on April 21, 2016 to be at high risk for falls and having problems with balance requiring assistance. CMS Ex. 24, at 24. “Yet,” the ALJ found, “the staff stood by and allowed the resident to attempt to exit a shower – a clearly hazardous activity – without providing necessary assistance to the resident.” ALJ Decision at 4. In addition, the ALJ noted, Heritage provided no evidence to support its claim that its therapy staff did not have adequate time to communicate to the rest of the staff that R18 was at high risk for falls and needed assistance with transfers. *Id.*

We agree with the ALJ that “a finding such as the one made by ... therapy staff should have been communicated *immediately* to [Heritage’s] general staff given the resident’s obvious vulnerability.” *Id.* (emphasis in ALJ Decision). Indeed, Heritage’s own “Fall Prevention Program” policy supports this conclusion. The policy provides that a fall assessment will be “completed within 24 hours following admission” and an “*Interim* Care Plan will be initiated for residents determined to be at risk.” CMS Ex. 46, at 27

(emphasis added). Thus, it was incumbent on Heritage to promptly establish an interim care plan for R18 to alert staff to her high risk for falls and transfer assistance needs before the interdisciplinary team care plan meeting. Moreover, the policy instructed staff how to instantaneously communicate R18's need for assistance with transfers to her caregivers: "Implement a communication system whereby all caregivers are alerted to the fact that certain residents are at high risk for falls, i.e., flag medical record on the Resident Care Needs Sheets or Flow Sheets." *Id.*⁶ In light of Heritage's April 21 assessment of R18 to be at high risk for falls and requiring assistance with transfers, and the facility's own policy, we reject Heritage's claim that it did not have sufficient time prior to April 23 to ensure that direct care staff provided the services necessary to meet R18's assessed needs, as required by section 483.25(h).

Moreover, Heritage's "Patient Safe Handling and Movement" and "Transfer Skills" policies, a surveyor sworn declaration, and surveyor notes further support the conclusion that Heritage failed to provide R18 the assistance devices necessary to meet her assessed needs and to reduce known accident risks to the highest practicable degree. The "Patient Safe Handling and Movement" policy directs staff to "assess residents in advance to determine the safest way to accomplish lifting, transferring, and movement needs" and use "[m]echanical lifting devices and other approved handling devices," such as gait belts (a device placed around the waist to help maintain balance during transfer), to "assist in the lift or transfer process." CMS Ex. 46, at 29. Heritage's "Transfer Skills" policy instructs caregivers to use a gait belt for "one person (stand/pivot) transfers" and "two person transfers." CMS Ex. 47, at 40. Consistent with these policies, Surveyor Hicks stated that Heritage's Director of Nursing (DON) told the surveyor that she expected a gait belt to be used with *all* transfers. CMS Ex. 48, at 3 ¶ 9; CMS Ex. 34, at 14. Yet, Surveyor Hicks found no evidence that a gait belt was used at the time of R18's fall. CMS Ex. 48, at 3 ¶ 9. According to survey interview notes, R18 and a nursing assistant who helped R18 after the fall reported that no gait belt was offered or used for the transfer. CMS Ex. 34, at 12, 13. Moreover, Surveyor Hicks stated, "Conditions in the resident's shower were made more dangerous by a lack of slip resistant strips on the shower floor," which the nursing assistant reported, the surveyor observed and the DON confirmed. CMS Ex. 48, at 3 ¶ 10; CMS Ex. 34, at 16; CMS Ex. 3, at 15-16.

⁶ In her declaration, Surveyor Hicks testified that the assistant who was present at the time of R18's fall stated that she was not aware of R18's assistance needs. CMS Ex. 48, ¶ 8. Heritage does not challenge this testimony, or point to any evidence indicating that the assistant was alerted to R18's need for active, physical assistance, rather than mere supervision, for transfers.

As explained above, when a facility policy or a resident's care plan requires staff to take specific measures in caring for a resident, those measures reflect the facility's own determination of what it must do to attain or maintain the resident's "highest practicable physical, mental, and psychosocial well-being." *Azalea Court*, DAB No. 2352, at 9. The evidence of Heritage's failure to provide the staff assistance prescribed in R18's care plan and facility policies amply demonstrates that Heritage did not provide the supervision and assistance devices that R18 needed to reduce known or foreseeable accident risks to the highest practicable degree, as required under section 483.25(h). This evidence also supports the conclusion that Heritage failed to comply substantially with section 483.13(c) because its staff recognized that R18 was at risk for serious injury from falls but did not provide the care and services required under its fall prevention and resident transfer policies to avoid the harm from that risk. That is plainly "neglect" within the meaning of the applicable regulations. 42 C.F.R. §§ 488.301, 483.13(c).⁷ This instance of neglect, with the others discussed below, demonstrates that the facility's policy to prevent neglect was not effectively implemented.

b. *Resident # 12 (R12)*

R12, an 89 year-old woman during the period at issue, was diagnosed with dementia with behavioral disturbance, anxiety, atrial fibrillation, congestive heart failure, hyperlipidemia, osteoarthritis of the knee, and peripheral vascular diseases. CMS Ex. 18, at 19. Her cognitive status varied throughout the day, her judgment was impaired, and she was unable to understand directions. *Id.* at 25. In February 2016, staff assessed R12 to be at high risk for falls and to need extensive assistance for mobility and transfers. *Id.* at 67, 113-114. February 2016 entries on R12's care plan identified impaired physical mobility as a problem area, evidenced by difficulty with balance, decreased range of motion in her hips and knees, and use of a wheelchair. *Id.* at 66-67. The care plan also identified anxiety as a "Care Area/Problem," evidenced by "episodes of anxiety[-]driven impulsivity" and an elopement. *Id.* at 63. To address these problems, R12's February 2016 care plan included the following interventions: "Assist as needed with Wheel Chair mobility," "OT/PT screen and/or evaluation as needed," "Provide appropriate level of

⁷ The SOD states that Heritage had an "Abuse Prohibition Management Program policy," which provided that all residents "have the right to be free from . . . neglect" and that Heritage would "[d]eploy[] staff on each shift in sufficient numbers to meet the need of the residents and assure that the staff assigned have knowledge of the individual residents' care needs . . ." CMS Ex. 3, at 23, 26, 104. The ALJ did not discuss this policy. We would find that the failure to assure that staff assigned to R18 was aware of her care needs directly violates the facility's anti-neglect policy. Heritage's violation of that policy further supports CMS's determination that the facility was not in substantial compliance with the anti-neglect requirement at section 483.13(c). It was not necessary for the ALJ to rely on that policy, however, to support the finding of noncompliance with section 483.13(c) because Heritage's failure to implement its "Patient Safe Handling and Movement" and "Transfer Skills" policies demonstrated repeated instances of neglect showing failure to implement anti-neglect policies as discussed above.

assistance to promote safety of resident,” “Anticipate resident[']s needs check frequently,” “assess contributing factors related to fall history,” “Assess medications for contributing factors,” “Assist resident with ADLs as needed,” and “Keep call light and most frequently used personal items within reach.” *Id.* at 66-68.

R12 fell no fewer than 10 times over a 26-day period, from March 19, 2016 through April 13, 2016. *Id.* at 25-62.

- On March 19, R12 fell twice. At approximately 1:40 p.m., a resident alerted staff that R12 was on the floor of her room. *Id.* at 28, 30. According to the facility incident report, R12 reported that “she was attempting to get into bed by herself and lost her balance and fell.” *Id.* at 30. R12 fell later the same day in the “lobby area.” *Id.* at 25, 27. The incident report indicates that “it appear[ed]” that R12 tried “to stand from the chair and begin using her walker but lost [her] balance.” *Id.* at 27.
- On March 20, R12 fell from her wheelchair while leaning forward and reaching; she hit her head as she fell on “the metal door to [the] side of the dining room,” which resulted in a laceration with a hematoma to the left side of her head. *Id.* at 31-34. R12 was transferred to a hospital emergency room for evaluation. *Id.* at 34.
- On March 23 at approximately 11:30 p.m., R12 fell while attempting to transfer to or from her bed unassisted. *Id.* at 35. A CNA found R12 on the floor of her bathroom. *Id.* at 37. R12 stated that she fell trying to go to the bathroom. *Id.*
- On March 24, R12 fell twice.
 - At approximately 3:45 p.m., in a hallway, R12 “fell ... trying to transfer [her]self from wheelchair to wheelchair” and “[I]anded between [the wheelchairs]” on her buttocks. *Id.* at 43, 45. “Assisted X 2 to [wheelchair] and placed at nurses station. No injuries noted.” *Id.* at 45.
 - At approximately 6:20 p.m., while sitting in her wheelchair near the nurses’ station, R12 attempted to reach for something on the floor, and fell out of her wheelchair and hit her head on the wall and floor. *Id.* at 39-42. She was again transported to the hospital for evaluation. *Id.* at 42.⁸

⁸ The Incident/Accident report for the March 24, 3:45 p.m. fall includes a summary which states that R12’s physician later ordered Heritage “to send [R12] to ER . . . for evaluation due to fall X 3 today.” CMS Ex. 18, at 45, 46. We note that CMS and the ALJ cited that summary to support the assertion that R12 fell three times on March 24. CMS Prehearing Br. at 5; ALJ Decision at 4. However, the facility-wide “Incident Report” chart for the November 2015 through April 2016 period lists only two R12 falls that occurred on March 24 (CMS Ex. 47, at 8-9), and the facility completed only two Incident/Accident reports for R12 for falls that occurred on March 24. CMS Ex. 18, at 39-46.

- On March 26, R12 fell while attempting to stand up from her wheelchair in the dining room. She “hit [her] head on another resident’s [wheelchair]. No injury [was] noted” *Id.* at 47-49.
- On March 28, R12 fell to the floor while attempting to transfer from her wheelchair to a straight chair without any assistance. *Id.* at 51-53.
- On April 1, staff found R12 sitting upright against the bed on the floor of her bedroom with her wheelchair at her side. The incident report notes, “Unwitnessed fall.” *Id.* at 57.
- On April 13, staff found R12 on the floor of her bedroom; she reported she fell while walking to the door unassisted. *Id.* at 62.

Based on the facility records, surveyor observations and survey interviews, the state agency found that Heritage “did not re-evaluate the effectiveness of interventions and implement new interventions to prevent/reduce [R12’s] falls.” CMS Ex. 3, at 9, 25.

The ALJ determined that the “new or enhanced interventions” Heritage stated that it had provided to address R12’s risk of serious injury from falls, which included putting needed items within reach of R12 as she sat in her wheelchair, were inadequate. ALJ Decision at 4-5. Heritage “could have and should have done more to protect this resident,” the ALJ concluded, and the measures it “took do not justify its failure to take additional reasonable and necessary measures.” *Id.* at 5. The ALJ noted that Heritage identified one additional intervention that it could have undertaken but did not implement: continuous supervision of R12, at least during the hours when R12 was awake. Heritage claimed that such supervision would have been an impermissible restraint, however, and that “nursing facilities are not equipped to provide constant one-on-one supervision.” Pet.’s Prehearing Br. at 8-9. The ALJ rejected those contentions, explaining that continuous supervision is not “something that physically restricts a resident’s freedom of movement or ... ability to make choices and decisions.” ALJ Decision at 5. Furthermore, the ALJ said, Heritage offered no evidence or argument to support its assertion that close supervision of R12 was unfeasible. Given R12’s “grave risk for injury every moment that she was not supervised,” the ALJ concluded, Heritage should have provided R12 with “close supervision” “at least until Petitioner’s staff devised alternative means of protecting” R12. *Id.*

On appeal, Heritage argues that the ALJ did not consider the facility records that show it “developed, implemented and assessed the effectiveness” of the following interventions: 1) March 19, 2016 - non-skid shoes, well-fitting shoes, and new medications were still being monitored for effectiveness; 2) March 20, 2016 - placing needed and desired items within reach and notifying physician that R12’s medication was having an increased

drowsiness effect; 3) March 24, 2016 - Resident taken to nurses' station for increased supervision, screened by physical therapy, continued monitoring recent decrease in her psychoactive medications and consultation with the pharmacy consultant to make additional adjustments, and chair alarm; and 4) March 26, 2016 - re-review of medications, anti-roll back device on wheelchair. RR at 5-6, citing CMS Exs. 10, at 22; 18, at 25-29, 37, 41, 45, 50; 19, at 34.

Heritage's claim that the ALJ did not consider the evidence of the interventions that it implemented for R12 is groundless. The ALJ explicitly acknowledged that Heritage put needed items within reach of the resident, placed R12 near the nursing station so that she could receive increased supervision, put an anti-roll back device on her wheelchair, supplied the resident with a chair alarm pursuant to a physician's order, and raised with R12's physician and the pharmacist the possibility that her medications might be making her drowsy and contributing to the falls. ALJ Decision at 4-5. The ALJ then stated that he "*agree[d]* with Petitioner that it provided [R12] with new or enhanced interventions during the period" at issue. *Id.* at 5 (emphasis added). The ALJ went on to explain, however, that the interventions Heritage implemented were inadequate. *Id.*

On appeal of the ALJ's determination that it should have provided R12 continuous supervision, Heritage argues that direct supervision did not prevent R12 from falling on March 28, 2016 because personnel were unable to reach her "before she fell while attempting to rise from her wheelchair despite all interventions." RR at 6, citing CMS Ex. 18, at 54. Heritage further contends that providing one-on-one supervision by an employee "within reach" of the resident was not a "reasonable step" because Heritage had 81 residents, who all needed the assistance of one or two employees or were totally dependent on staff for ADLs. *Id.*, citing CMS Exs. 4, 42.

Heritage's arguments are unpersuasive and evade the central question whether it met its responsibilities under the applicable regulations. The fact that a single fall occurred while R12 was under staff supervision does not prove that continuous supervision would not have significantly reduced R12's risk of serious harm from foreseeable accidents. To the contrary, the number of falls that occurred while R12 was unsupervised suggests that continuous supervision would have been an effective measure. With respect to Heritage's contention that it did not have sufficient staff to provide continuous supervision to R12, we further note that the facility's own abuse prohibition management program required "[d]eployment of staff on each shift in sufficient numbers to meet the need of the residents and assure that the staff assigned have knowledge of the individual residents' care needs" CMS Ex. 3, at 23.

But even if continuous or close supervision of R12 would not have been effective or practicable, as Heritage argues, this would not excuse the facility from meeting its responsibility to "take reasonable steps to ensure that" R12 "receive[d] supervision and assistance devices designed to meet . . . her assessed needs and to mitigate foreseeable

risks of harm from accidents.” *Alden-Princeton Rehab. and Health Care Ctr.*, DAB No. 1978, at 2 (2005). The Board has explained in numerous cases that each facility has flexibility to choose the methods and devices it uses to prevent accidents, but the chosen interventions (and the consistent implementation of those interventions) must provide an “adequate” level of supervision and assistance devices under the circumstances. *Woodstock Care Ctr.*, DAB No. 1726, at 28-35. What is “adequate” depends in each case on the resident’s condition, the facility environment, and the viable and preferred methods available to the facility. *Id.* Hence, as the ALJ recognized, it was ultimately Heritage’s responsibility to devise the appropriate and effective means of protecting R12.

Here, Heritage failed to take the reasonable steps that its own fall prevention policy requires to ensure that R12 timely and consistently received an adequate level of supervision and assistive devices to meet her assessed needs and prevent foreseeable accidents. As discussed above, Heritage’s policy directs staff to implement a communication system whereby all of a resident’s caregivers are alerted to the resident’s risk for falls. CMS Ex. 46, at 27. The policy also sets out protocols for staff to follow after each resident fall, ensuring that the facility timely updates the resident’s assessment and promptly considers available interventions to mitigate newly-identified risks. Specifically, when a fall occurs, staff must: immediately assess and treat any injury; identify the cause of the fall; “Initiate the Comprehensive Assessment Following a Fall form;” and “Initiate [the] Interdisciplinary Assessment/ Intervention Checklist.” *Id.* The policy also directs staff to “Document on the Checklist the interventions and the date implemented.” *Id.* In addition, “Negative Outcome Review” protocols in the policy require staff to review falls daily, convene “[s]tand-up meetings [that] include interdisciplinary discussion of all falls occurring within the past 24 hours,” review documentation, “[a]ssure that immediate interventions are in place,” and “[a]ssure that [the resident’s] care plan has been updated.” *Id.* at 28.

In the case of R12, Heritage personnel seemingly ignored many of these critical protocols between March 19, 2016 and April 13, 2016. Heritage staff filled out “Incident/Accident Reports” for R12’s 10 falls, documenting that staff assessed R12 for injuries after each fall and, in some instances, identified particular interventions to mitigate the risk of further falls. CMS Ex. 18, at 25-62. Yet, there is no evidence that Heritage conducted daily stand-up meetings to evaluate the causes of the falls, discuss fall-prevention strategies, review the effectiveness of existing interventions or systematically consider additional appropriate interventions for R12. Consequently, R12’s records show, staff apparently did not identify the need for an anti-rollback device on R12’s wheelchair until March 26, even though several of the previous accidents involved falls from her wheelchair. In addition, not until after R12’s multiple falls on March 24 did staff explicitly identify “1:1 care” on the “Incident/Accident Reports” as an appropriate intervention to mitigate the risk for harm from falls, even though multiple prior falls apparently had not been witnessed and the supervision and assistive devices that had been implemented prior to the March 24 falls were plainly inadequate. *Id.* at 37.

Heritage personnel also disregarded protocols in the policy to ensure that the interventions staff had prescribed for R12 were consistently in place. Specifically, the record contains no “Interdisciplinary Assessment/Intervention Checklist” or any other comprehensive list of interventions prescribed for R12 to which staff could routinely refer to confirm that all of the fall precautions were in place. Consequently, the record reveals, the interventions prescribed for R12 were not consistently implemented. For example, a March 19 Incident/Accident Report lists “Non-skid shoes, well-fitting shoes” as a new intervention identified after R12’s first fall that day. *Id.* at 29. Yet, the Incident/Accident Report for R12’s March 23 fall shows that “Inappropriate foot wear” contributed to that fall. *Id.* at 35. Similarly, the March 26 Incident/Accident Report indicates that staff determined after the fall that day that R12 required an anti-rollback device on her wheelchair. *Id.* at 50. Yet, the facility records show that an anti-rollback device was not on the wheelchair that R12 was using when she fell on April 13 (“p[atien]t transferred from current w[heel]c[hair] to one with anti-rollback system set up”). *Id.* at 61.

Heritage also did not timely update or consistently implement R12’s plan of care, as its policy required. For example, while the March 20 Incident/Accident Report identifies “chair alarm,” among the interventions to be provided to R12, *id.* at 33-34, her plan of care lists “Bed/Chair alarm (clip alarm)” with an “onset” date more than one week later, March 29. *Id.* at 67-68. Similarly, the March 26 Incident/Accident Report includes the new intervention, “anti-rollback device on wheelchair,” *id.* at 50; yet R12’s plan of care shows “Anti-rollback to wheelchair” with an onset date of April 23. *Id.* at 67. We also note that, although R12 was assessed to be at high risk for falls in February 2016, the plan of care intervention “Make sure that staff members are aware that resident is at high risk for falls” listed an “onset” date of April 1, more than a month after the fall risk assessment. *Id.* at 68. Even after the new interventions were care-planned, surveyor Parker stated in her sworn declaration, the facility did not consistently use them. In particular, the surveyor stated, on April 27, 2016 she observed that R12’s bed alarm and chair alarm were not properly attached and not in use. CMS Ex. 49, at 2-3 ¶ 7; CMS Ex. 3, at 18.⁹

⁹ The record also includes numerous references dated before R12 sustained the falls to R12’s tendency to wander and attempts to ambulate on her own, and the difficulty staff experienced in attempting to redirect R12. *E.g.*, CMS Ex. 18, at 97 (February 15, 2016 nurse note, discussing R12’s “compulsive elopement seeking behavior”; that she “continuously tries to walk but has an unsteady gait”; and her need for “constan[t] redirection”), and 93, 94, 96 (similar notations in other February nurse notes). Given these factors, coupled with high fall risk, significant mobility deficit, and impaired judgment – all known to the staff before the falls – the facility should have been particularly vigilant in ensuring that any intervention, like an alarm, it chose to employ for R12 was *consistently* used.

In sum, substantial evidence in the record supports the ALJ's determination that Heritage did not provide adequate supervision and assistive devices to R12 to prevent accidents. In light of R12's multiple falls and the facility's failure to follow its own fall prevention protocols, we conclude that Heritage did not take all reasonable steps to ensure that R12 received supervision and assistance devices to mitigate foreseeable risks of harm from accidents to the highest practicable degree, as required under section 483.25(h). As in the case of R18, this evidence also supports the conclusion that Heritage failed to comply substantially with section 483.13(c) because staff seemingly recognized that R12 was at risk for serious injury from falls but did not implement its fall prevention policy to avoid harm to R12 from that risk.

c. *Resident # 11 (R11)*

R11, a woman who was 93 years old during the period at issue, was diagnosed with osteoporosis, congestive heart failure, Alzheimer's disease, hypertension, muscle weakness, and impaired vision and hearing, among other diagnoses. CMS Ex. 17, at 5, 44, 98-99. On January 19, 2016, Heritage assessed R11 to be at high risk for falls and requiring extensive assistance for ADLs; she was unable to balance herself when moving from a seated to a standing position or when transferring between a bed and chair or wheelchair. *Id.* at 50, 51, 74. She used a wheelchair. *Id.* at 3, 51.

R11 fell eight times over a 28-day period, from January 19, 2016, through February 15, 2016:

- On January 19, staff found R11 on the floor of her room. She reported that she had stood up to fix her shirt, lost her balance and fell forward, hitting her forehead on a night stand drawer handle. She complained of pain in her head and was taken to the hospital emergency room for evaluation. *Id.* at 36-39.
- On January 24, staff found R11 on her knees on the floor of her room and holding a side rail. She reported that she fell from her wheelchair after falling asleep while watching television; she "nodded forward awakening as she slid forward out of the chair...." *Id.* at 32-35, 107.
- On January 29, staff found R11 on the floor of her bathroom. She reported that she was brushing her teeth while standing at the sink when her legs gave out. *Id.* at 28-31.
- On February 8, R11 fell twice. *Id.* at 21, 106. In the first instance, she reported that she fell to the floor beside her bed while attempting to get something out of a drawer. Staff assisted R11 to her wheelchair. *Id.* at 22-26. Less than 10 minutes later, a nurse and aide heard the resident yelling. They found her on the floor,

positioned on her back with her feet in the bathroom and upper torso in the bedroom. She sustained a large contusion to the back of her head and elevated blood pressure. She was taken to the hospital for evaluation. *Id.* at 17-21, 105-106.

- On February 9, R11 fell in her bathroom when, she later reported, she attempted to stand up without assistance and lost her balance. *Id.* at 13-16.
- On February 12, R11 fell in the bathroom when, she again later reported, “she was trying to pick her toothbrush up off the floor that she had dropped.” *Id.* at 9-12.
- On February 15, R11 fell and hit her head when she stood up and attempted to walk in the therapy room. She was taken to the hospital for evaluation. *Id.* at 4-8, 102.

On February 16, 2016, the day after the eighth fall, R11 was discharged from Heritage to a different facility. *Id.* at 102, 115.

The ALJ found that Heritage implemented “various interventions” for R11, such as installing non-slip strips on the floor of R11’s room and bathroom, re-educating R11 to request assistance, and increasing supervision. ALJ Decision at 6; *see* CMS Ex. 17, at 7, 12, 16, 31, 39, 74-76. However, the ALJ explained, Heritage did “not address CMS’s central argument: Petitioner’s failure to assess the efficacy of its interventions notwithstanding the plain evidence that the resident continued to fall despite the actions taken by Petitioner and its staff.” ALJ Decision at 6. As in the case of R12, the ALJ noted, Heritage contended that it could not have provided R11 close supervision but did not explain “*why* this measure could not have been implemented.” *Id.* (ALJ’s emphasis).

Heritage asserts that the ALJ did not consider the evidence that it implemented multiple interventions to prevent R11 from falling. RR at 6-7, citing CMS Ex. 17, at 7, 12, 16, 31, 39. As summarized above, however, the ALJ explicitly recognized the interventions that Heritage put in place for R11 but explained that they were inadequate.

Heritage also suggests that there was nothing more it could have done to mitigate the risk of harm to R11 from foreseeable accidents. For example, Heritage says that it did not provide a chair alarm to R11 because “[c]hair alarms are ineffective in preventing falls.” RR at 7. Yet, Heritage’s “Fall Prevention Program” states that “Personal alarms attached to chair or bed” should be used for “residents found to be at high risk for falls.” CMS Ex. 46, at 27. This policy statement indicates that Heritage determined that a personal alarm is one of numerous devices (such as side rails) that play an important part in comprehensive, individualized care-planning to prevent facility residents, particularly

those at high risk, from falling. *Id.* Similarly, the record document, “Accident & Fall Prevention Strategies and Utilization of Fall Alarms for Residents at Fall Risk,” further explains that fall alarms “can help monitor residents at fall risk” and are “best used as a ‘safety mechanism’ to support supervision needs....” CMS Ex. 47, at 10, 14.

Heritage additionally repeats its earlier contention that continuous “one-on-one within reach supervision” of a single resident was not a “reasonable step” because the facility must provide care to “81 residents that are dependent on staff for ADL assistance.” RR at 7, citing CMS Exs. 4 and 42. As previously discussed, Heritage had the flexibility to choose the methods and devices it used to meet R11’s assessed needs and mitigate foreseeable risks of harm from accidents, so long as those interventions provided an adequate level of supervision and assistance under the circumstances. *Woodstock Care Ctr.*, DAB No. 1726, at 28-35. In the case of R11, who fell numerous times over a short period of time, in many instances while unsupervised and on three occasions sustaining actual harm, the monitoring that Heritage provided was plainly not adequate under any reasonable definition of the term.

In response to the ALJ’s finding that it did not assess the efficacy of the interventions that were in place for R11, Heritage says that the “interventions were reviewed and evaluated by the interdisciplinary team for effectiveness on February 16, 2016.” RR at 7, citing CMS Ex. 17, at 74-76. But February 16, 2016 was *after* the 28-day period in which R11 fell eight times; in fact, R11 was discharged from Heritage early in the afternoon that day. *Id.* at 102. Heritage’s tacit acknowledgment that an interdisciplinary team did not review and evaluate the interventions that had been prescribed for R11 *during* the 28-day period confirms that Heritage personnel disregarded the facility’s fall prevention protocols for ensuring that interventions are continuously implemented and, where ineffective, addressed without delay. As discussed above, the facility policy called for staff to convene daily stand-up meetings that included interdisciplinary discussions of all falls occurring within the past 24 hours, to review documentation, to assure that immediate interventions were in place, and to assure that R11’s care plan had been updated. There is no evidence in the record of any such meetings.

We therefore conclude that substantial evidence supports the ALJ’s determination that Heritage did not provide R11 with adequate supervision and assistance devices to meet her assessed needs and prevent reasonably foreseeable accidents, as required under section 483.25(h). Heritage’s care for R11, together with the findings about the other residents, support a failure to comply with the requirements in section 483.13(c) to implement an effective anti-neglect policy, because staff observed that she was at risk for serious injury from falls but did not implement its fall prevention protocols to avoid harm to R11 from that risk.

d. *Resident # 20 (R20)*

R20, a woman who was 40 years old at the time of the survey, was diagnosed with cerebral infarction, blindness, generalized anxiety disorder, hypertension, diabetes, hemiplegia affecting left side, anemia and transient paralysis. CMS Ex. 26, at 7. Heritage assessed R20 to be at high risk for falls. *Id.* at 11-13. R20's balance during transitions and walking was not steady and she was unable to stabilize without staff assistance. *Id.* at 42. She required one person to assist her with most transitions and two persons to assist her to use the toilet and to dress. *Id.* at 41.

Before the ALJ, CMS alleged that staff never used a gait belt to transfer R20. CMS's Prehearing Br. at 6-7. The ALJ noted that Heritage "offer[ed] nothing to refute the resident's report that the staff never used the belt." ALJ Decision at 6. The ALJ explained that Heritage's resident transfer policy made the use of the gait belt mandatory where the assistance of two or more individuals was necessary to transfer a resident. *Id.*, citing CMS Ex. 47, at 40. "The fact that use of a gait belt was mandatory policy," the ALJ continued, "meant that Petitioner's staff had determined that employment of such a device was absolutely necessary in order to safely transfer gravely impaired residents such as [R20]." *Id.* Consequently, the ALJ concluded, Heritage's failure to use a gait belt in transferring R20 violated sections 483.25(h) and 483.13(c). *Id.* at 7.

On appeal, Heritage argues that "there is insufficient evidence in the record . . . that staff did not regularly use a gait belt when transferring [R20] as she allegedly told the surveyor."¹⁰ RR at 7. Heritage also attempts to cast doubt on the reliability of R20's statement to the surveyor that staff never used a gait belt when assisting her with transfers, noting that R20 "has moderate cognitive impairment and has moderately impaired memory recall." *Id.*, citing CMS Ex. 26, at 33. Heritage further contends that the purpose of a gait belt is not to prevent falls but to "put less strain on the back of a care giver and to provide support to a patient who is able to bear weight." *Id.* Moreover, Heritage points out, R20's interdisciplinary team did not identify a gait belt as an appropriate intervention for her. *Id.*, citing CMS Ex. 26, at 13-15. Heritage additionally contends that a violation of a facility policy is not a violation of a regulatory requirement unless the policy is identical to the regulation. Because gait belts are not required by any regulation, Heritage contends, the ALJ erred in concluding that Heritage violated any participation requirement. *Id.* at 8.

¹⁰ Heritage also argued that there was insufficient evidence that R20 fell in the bathroom, as CMS also alleged. Pet.'s Prehearing Br. at 9; RR at 7. The ALJ did not find that R20 fell, however, nor was such a finding necessary to conclude that Heritage was not in substantial compliance with sections 483.25(h) or 483.13(c). *See, e.g., Western Care Management Corp.* DAB No. 1921, at 15 (2004) ("to show noncompliance with section 483.25(h)(2), CMS need not show that an 'accident' occurred, only that the facility failed to take reasonable steps to protect a resident from foreseeable risks of harm . . ." (internal citations omitted)).

In finding that staff did not regularly use a gait belt when transferring R20, the ALJ did not simply rely on R20's report to the surveyors that staff did not use a gait belt when assisting her with transfers. *See* CMS Ex. 26, at 94 (surveyor notes documenting R20's statement); CMS Ex. 3 at 21 (SOD reporting R20's statement). Rather, the ALJ explained that when presented with this allegation, Heritage did not provide any evidence that staff *did* use a gait belt when transferring R20. We note that additional evidence in the record corroborates R20's statement and the ALJ's finding. For example, surveyors recorded in the SOD that during a survey interview on April 27, 2016, R20's "mother said she visited [R20] weekly and has never seen a gait belt in her room until that week," and "staff had never used a gait belt to transfer the resident before." CMS Ex. 3, at 22. The SOD additionally shows that during a survey interview on April 27, 2016, a Heritage registered nurse "said when she was transferring [R20] from the wheelchair to the toilet," R20's "leg started sliding out from under her" and the nurse "lowered [R12] to the ground." *Id.* The nurse "said she did not use a gait belt." *Id.* A January 4, 2016 form, "Community's C.A.R.E. Response to the Concern," filled out by the DON, also records that an individual identified in the record as R20's father was "concerned that Resident fell and had no assistance. . . ." CMS Ex. 26, at 5, 7. In light of R20's statement to the surveyors that staff did not use a gait belt when assisting her with transfers, the evidence corroborating R20's statement, and the lack of evidence provided by Heritage to the contrary, we conclude that substantial evidence on the record as a whole supports the ALJ's finding that Heritage staff did not regularly use a gait belt when transferring R20.

Furthermore, the ALJ correctly read and applied section 483.25(h), explaining that the fact that use of a gait belt for a two-person-assisted transfer was mandatory under Heritage's policy meant that Petitioner's staff had determined that the use of a gait belt was necessary in order to safely transfer gravely impaired residents such as R20. Section 483.25(h) "does not prescribe any specific accident-prevention method." *Lifeshouse of Riverside Healthcare Ctr.*, DAB No. 2774, at 15 (2017). Rather, "facilities have flexibility to choose the specific methods as appropriate to their circumstances and to employ reasonably necessary measures to comply with the regulation." *Id.* (citations omitted). Once a facility adopts a policy that incorporates the measures that are appropriate to assure that residents receive adequate supervision and assistance devices to prevent accidents, however, the facility is held to follow through on them. *Id.* Moreover, the Board has stated, "The fact that the regulations do not specify that a particular type of care is necessary to meet a requirement does not prevent a finding of noncompliance when the facility itself has determined that type of care is necessary." *Id.*, citing *Azalea Court*, DAB No. 2352, at 9.

Based on the discussion above, we conclude that the ALJ's findings and conclusions of Heritage's noncompliance are supported by substantial evidence on the record and free from legal error. We thus sustain the ALJ's determination that Heritage was not in substantial compliance with section 483.25(h) because it failed to provide adequate supervision and assistive devices to R18, R12, R11 and R20 to meet their assessed needs and mitigate foreseeable risks of harm from accidents. We likewise sustain the ALJ's determination that Heritage was not in substantial compliance with section 483.13(c) for the reasons discussed above.

B. The CMP imposed is reasonable.

A facility may challenge the reasonableness of the amount of any CMP imposed for noncompliance. *Golden Living Ctr. – Superior*, DAB No. 2768, at 26 (2017), citing *Lutheran Home at Trinity Oaks*, DAB No. 2111, at 21 (2007). For deficiencies cited at less than the immediate-jeopardy level, the permissible range of per-diem penalties is from \$50 to \$3000 per day. 42 C.F.R. § 488.438(a)(1)(ii). Here, CMS imposed a CMP of \$1,650 per day for 29 days, for a total of \$47,850. On appeal, Heritage challenged only the per-day amount of the CMP and did not contest the duration of the penalty.

An ALJ (or the Board) reviews de novo whether a CMP is reasonable based on facts and evidence in the administrative record concerning the factors specified in section 488.438. See 42 C.F.R. § 488.438(e), (f); *Senior Rehab. and Skilled Nursing Ctr.*, DAB No. 2300, at 19-20 (2010); *Lakeridge Villa Healthcare Ctr.*, DAB No. 2396, at 14 (2011). Those factors are: (1) the facility's history of noncompliance; (2) the facility's financial condition (indicating its ability to pay a CMP); (3) the factors specified in section 488.404, which include the seriousness (severity and scope) of the noncompliance, and "the relationship of the one deficiency to other deficiencies resulting in noncompliance"; 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), 488.404(b), (c)(1).

The ALJ observed that the "penalty amount of \$1650 is only slightly more than one-half the maximum amount for non-immediate jeopardy level deficiencies." ALJ Decision at 7. He concluded that "the seriousness of Petitioner's noncompliance justifies the penalty amount." *Id.* The ALJ further stated that the amount is "eminently reasonable given the nature of Petitioner's noncompliance and the fact that residents suffered harm as a consequence." *Id.*

On appeal, Heritage argues that CMS failed to submit any evidence and the ALJ failed to consider three of the factors set forth in 42 C.F.R. § 488.438(f) in determining the amount of the CMP. RR at 8. Specifically, Heritage asserts that "CMS did not evaluate Petitioner's history of compliance and the erroneous citation of deficiencies results in an

inaccurate statement of the facility's compliance history.” *Id.* Heritage also argues that “redundant citation of allegations under two (2) separate deficiencies resulted in an inaccurate perception of the relationship of cited deficiencies.” *Id.* at 9. Lastly, Heritage asserts, there “is no evidence [that CMS] considered [Heritage's] financial condition.” *Id.*

These arguments reflect a misunderstanding of the burden of proof relating to the applicable CMP factors. In a proceeding to challenge a CMS determination of noncompliance and imposition of a CMP, an ALJ or the Board “properly presumes that CMS considered the regulatory factors and that those factors support the amount imposed.” *Elgin Nursing and Rehab. Ctr.*, DAB No. 2425, at 12 (2011); *Coquina Center*, DAB No. 1860, at 32 (2002). Consequently, “the burden is not on CMS to present evidence bearing on each regulatory factor but on the [facility] to demonstrate, through argument and the submission of evidence addressing the regulatory factors, that a reduction is necessary to make the CMP amount reasonable. *Oaks of Mid City Nursing and Rehab. Ctr.*, DAB No. 2375, at 26-27 (2011).

Heritage proffered no evidence relating to its history of noncompliance or financial condition. Consequently, there is no basis to conclude that either of these regulatory factors warranted a reduction in the CMP chosen by CMS. Furthermore, there is no merit to Heritage's statement that “CMS' redundant citation of allegations under two (2) separate deficiencies resulted in an inaccurate perception of the relationship of cited Deficiencies.” RR at 9. Each citation charged Heritage with a failure to comply with a different Medicare and Medicaid participation requirement. CMS may, in its discretion, charge a facility with violating any number of applicable requirements based on the same or similar set of underlying facts and circumstances, so long those facts make out a violation of each requirement. *See Brian Ctr. Health and Rehab./Goldsboro*, DAB No. 2336, at 6 (2010).

Here, we agree with CMS and the ALJ that the seriousness of Heritage's deficiencies warranted the penalty amount imposed. As discussed at length above, the evidence establishes a pattern of deficiencies involving multiple residents over a significant period of time. These deficiencies resulted in actual harm to several residents. Accordingly, we conclude that the CMP of \$1,650 per day for 29 days, for a total of \$47,850 was reasonable.

VI. Conclusion

For the reasons stated above, we sustain the ALJ Decision.

_____/s/
Leslie A. Sussan

_____/s/
Constance B. Tobias

_____/s/
Susan S. Yim
Presiding Board Member