Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

North Las Vegas Care Center
Docket No. A-18-36
Decision No. 2946
May 23, 2019

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

North Las Vegas Care Center (Petitioner), a skilled nursing facility (SNF) that participates in the Medicare program, has appealed the December 21, 2017 decision of the administrative law judge (ALJ) rejecting its challenge to a $750 per day civil money penalty (CMP) imposed by the Centers for Medicare & Medicaid Services (CMS) for alleged noncompliance with a Medicare participation requirement. Granting summary judgment to CMS, the ALJ held that Petitioner was not in substantial compliance with 42 C.F.R. § 483.25 because a member of its nursing staff failed to check the vital signs of, and administer cardiopulmonary resuscitation (CPR) to, a resident who was found "unresponsive." *North Las Vegas Care Ctr.*, DAB CR4997 (ALJ Decision). The ALJ further held that Petitioner's noncompliance with section 483.25 continued from August 12, 2015 (when first identified by a compliance survey) through October 1, 2015. Petitioner challenges both holdings, but we find no error by the ALJ. For that reason, and because Petitioner does not contend that the daily CMP amount chosen by CMS was unreasonable, we affirm the grant of summary judgment to CMS.

Legal Background

To participate in Medicare, a SNF must be in "substantial compliance" with the program's participation requirements in 42 C.F.R. Part 483, subpart B (sections 483.1-.75).[1] 42 C.F.R. §§ 483.1, 488.400. A SNF is not in substantial compliance when it has a "deficiency" – that is, a failure to meet a participation requirement – that creates at least the potential for more than minimal harm to one or more residents. 42 C.F.R. § 488.301

[1] On October 4, 2016, CMS issued a final rule that amended the Medicare participation requirements for long-term care facilities published in 42 C.F.R. Part 483. Final Rule, *Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities*, 81 Fed. Reg. 68,688 (Oct. 4, 2016). Our analysis and decision are based on the version of the participation requirements in effect during August 2015, when the compliance survey supporting CMS's enforcement action was performed. *Carmel Convalescent Hosp.*, DAB No. 1584, at 2 n.2 (1996) (applying the regulations in effect on the date of the survey and resurvey).

(defining "substantial compliance"). The term "noncompliance," as used in the applicable regulations (and in this decision), is synonymous with lack of substantial compliance. *Id.* (defining the term "noncompliance"). Compliance with Medicare participation requirements is verified through onsite surveys performed by state health agencies, which report their findings in a Statement of Deficiencies (form CMS-2567). *Id.* §§ 488.10(a), 488.11.

If a survey reveals that a SNF is not in substantial compliance with Medicare participation requirements, the SNF must promptly submit a plan of correction acceptable to the state survey agency or CMS. *Id.* §§ 488.402(d), 488.408(f); *Coquina Ctr.*, DAB No. 1860, at 3, 24-25 (2002). A plan of correction specifies remedial measures the SNF has taken, or intends to take, to correct the cited deficiencies as well as a timetable for completion of corrective action. 42 C.F.R. §§ 488.401; *Lake City Extended Care Ctr.*, DAB No. 1658, at 12 (1998).

CMS may impose enforcement "remedies" on a SNF found to be not in substantial compliance. 42 C.F.R. §§ 488.400, 488.402(b)-(c), 488.406. Such remedies may include a per-day CMP, which may start accruing "as early as the date that the facility was first out of compliance, as determined by CMS or the State," and continue until the date the SNF comes back into substantial compliance, "as determined by CMS or the State based upon a revisit or after an examination of credible written evidence that it can verify without an on-site visit." *Id.* §§ 488.438(a), 488.440(a)(1), 488.454(a)(1).

A SNF may challenge a determination of noncompliance that has resulted in the imposition of a CMP (or other enforcement remedy) by requesting an ALJ hearing and appealing any unfavorable decision by the ALJ to the Board. *Id.* §§ 488.408(g)(1), 498.3(b)(13), 498.5(a)-(c). In appealing a determination of noncompliance and related remedy, the SNF may contest CMS's finding concerning the duration of any noncompliance. *See Taos Living Ctr.*, DAB No. 2293, at 2, 13-14 (2009).

Case Background

On August 12, 2015, the Nevada Bureau of Health Care Quality and Compliance (state survey agency) performed a Medicare compliance survey of Petitioner. CMS Ex. 1. The survey's findings are memorialized in a Statement of Deficiencies. *Id.* The state survey agency found that, on July 23, 2015, one of Petitioner's registered nurses failed to "timely" assess and perform CPR on an "unresponsive" male resident who is referred to here and in the Statement of Deficiencies as Resident 1. *Id.* at 2-3. The state survey agency further found that Resident 1 had "full code" status on July 23, 2015, meaning

that he was a person for whom Petitioner was obligated to perform basic life-saving measures, including CPR, in the event his heart or breathing stopped. *Id.* at 3-4; CMS Ex. 12 (declaration of state survey agency inspector M.G., R.N.), ¶ 13. In addition, the state survey agency found that Petitioner had itself investigated the July 23, 2015 incident and ultimately discharged the registered nurse in question for not complying with its resident care policies and the Nevada Nurse Practice Act. CMS Ex. 1, at 3; *see also* CMS Ex. 6. Based on these and other findings, the state survey agency cited Petitioner for noncompliance with 42 C.F.R. § 483.25, which directs a SNF to provide each resident with "necessary care and services" to enable the resident to "attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care."

On September 8, 2015, CMS notified Petitioner that it concurred with the state survey agency's noncompliance finding. CMS Ex. 3, at 1-2. CMS further advised Petitioner that it had imposed a $750 per day CMP for the noncompliance, and that the CMP had begun to accrue on August 12, 2015, and would remain in effect until Petitioner achieved substantial compliance or its Medicare participation was terminated. *Id.* at 2.

In mid-September 2015, Petitioner submitted a plan of correction to the state survey agency. CMS Ex. 1, at 1. That plan alleged that Petitioner had returned to substantial compliance on August 15, 2015. *Id.* at 1-4. The state survey agency "accepted" the plan of correction on September 21, 2015. *Id.* at 1 (handwritten notation on top of page).

On October 2, 2015, the state survey agency performed a revisit survey and determined that Petitioner had returned to substantial compliance on October 2, 2015, not August 15, 2015, as Petitioner had alleged. CMS Ex. 4, at 2. Two weeks later CMS notified Petitioner that it concurred with the revisit survey's finding and rescinded the CMP effective October 2, 2015. *Id.*

On November 6, 2015, Petitioner requested an ALJ hearing to challenge the noncompliance finding and associated CMP. CMS responded with a motion for summary judgment. In support of the motion, CMS submitted, among other material, the declaration of M.G., R.N., a state agency surveyor who participated in the August 2015 survey and authored the resulting Statement of Deficiencies. CMS Ex. 12. Among other things, M.G. stated in his declaration that guidelines published by the American Heart Association (AHA) "set forth the standard of care for when and how CPR should be provided to persons who have suffered a cardiac or respiratory arrest." *Id.* ¶ 10.

In addition to the M.G. declaration, CMS submitted a copy of CMS Survey & Certification Letter 14-01-NH (last revised January 23, 2015), which provides guidance to state survey agencies concerning a Medicare-participating SNF's obligation to provide CPR to a resident in "cardiac arrest (cessation of respirations and/or pulse)." CMS Ex. 11. According to Survey & Certification Letter 14-01-NH, AHA decision-making guidelines regarding CPR "provide the standard" for "healthcare providers" (and others) and indicate that CPR should be initiated when cardiac arrest occurs unless (1) "a valid DNR order is in place"; (2) "obvious signs of clinical death (e.g., rigor mortis, dependent lividity, decapitation, transection, or decomposition) are present"; or (3) "initiating CPR could cause injury or peril to the rescuer." *Id.* at 2.

Petitioner responded to CMS's summary judgment motion with a legal brief and a single exhibit – the declaration of its administrator. The administrator did not dispute any of the state survey agency's findings regarding the nursing staff's response to Resident 1's July 23, 2015 medical emergency. P. Ex. 1, ¶¶ 3-5. He did, however, testify about Petitioner's efforts to return to substantial compliance after the incident. *Id.*, ¶¶ 6-7.

The ALJ granted CMS's motion, concluding that Petitioner was not in substantial compliance with 42 C.F.R. § 483.25 because its registered nurse did not check Resident 1's vital signs or initiate CPR after discovering him "unresponsive" on the floor, contrary to applicable "standards of nursing practice" and an internal resident care policy. ALJ Decision at 4, 6. In addition, the ALJ considered but rejected Petitioner's contention that it returned to substantial compliance with section 483.25 by August 15, 2015, earlier than the substantial-compliance date determined by CMS.[2] *Id.* at 7-8.

Petitioner then filed its request for Board review.

Analysis

We review the ALJ's grant of summary judgment de novo. *Southpark Meadows Nursing & Rehab. Ctr.*, DAB No. 2703, at 5 (2016). "Summary judgment is appropriate when the record shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.* In evaluating whether summary judgment is proper, we view the record in the light most favorable to the non-moving party (Petitioner in this case). *Id.*

[2] The ALJ also held, based on a consideration of certain regulatory factors, that the CMP amount imposed by CMS was "reasonable." ALJ Decision at 8-9. Petitioner does not contest that holding in this appeal.

1. *Petitioner was not in substantial compliance with 42 C.F.R. § 483.25 when its registered nurse failed to assess and perform CPR on Resident 1.*

The ALJ determined, and our review of the record confirms, that the following undisputed facts establish Petitioner's lack of substantial compliance with 42 C.F.R. § 483.25 stemming from the July 23, 2015 incident:

> Resident 1 . . . was a 61-year-old man, admitted to the facility on September 11, 2014, for physical therapy, occupational therapy, and medical management. He suffered from chronic bilateral lower extremity edema (i.e., his legs swelled), cellulitis, and peripheral vascular disease. He had a history of congestive heart failure, lymphedema, hypertension, and bipolar disorder. *He was full code*. . . . At about 8:30 p.m. [on July 23, 2015], [Resident 1] was taking a shower, apparently unsupervised. Sometime thereafter, a registered nurse (RN) entered the shower room and found him lying on the floor. She did not check his vital signs; she did not begin CPR. Instead, she found a nurse aide and told him that the resident was on the shower room floor. She offered no assistance but left the nurse aide to address the problem. . . . The nurse aide went to the shower room, found the resident unresponsive, and reported that to a licensed practical nurse (LPN). The LPN went to the nurses station and told the RN, who said that she knew about the resident but that he "was already gone"; the RN said that she had "pronounced" him dead because "he seemed to be dead." The LPN checked the resident's medical record and saw that he was "full code." Only then did staff initiate CPR and call "911." The paramedics arrived and continued resuscitation efforts for another 25 minutes, but their efforts were unsuccessful.

ALJ Decision at 5 (footnote, paragraph breaks, and citations omitted; ALJ's emphasis); *see also* P. Ex. 1, ¶¶ 3-4 (admitting certain facts concerning the nursing staff's response to Resident 1's medical emergency).

Also undisputed is that, on July 23, 2015, Petitioner had in place a written "Do Not Resuscitate" (DNR) policy. *See* CMS Ex. 1, at 4. That policy required that each resident's medical record be flagged to identify the resident's status as "DNR" or "Full Code," and further required staff to "respond to medical emergencies with CPR measures" unless the affected resident had an "appropriate DNR Order/Identifier." CMS Ex. 7, at 1-2. Petitioner admits that it discharged the registered nurse who discovered Resident 1 unresponsive on the shower room floor on July 23, 2015 because she failed to perform CPR on that full-code resident in accordance with its DNR policy. Pet.'s

Request for Review (RR) at 6-7 (stating that Petitioner "did terminate and report the registered nurse who failed to start CPR pursuant to [its] policy"); *see also* CMS Ex. 1, at 3; P. Ex. 1 ¶ 5. In addition, Petitioner has not contested CMS's evidence that AHA practice guidelines regarding CPR establish an applicable standard of care, one that obligates a nurse to initiate CPR for a full-code resident unless the resident has "obvious signs of clinical death," such as rigor mortis, or performing CPR could physically imperil the rescuer.

Title 42 C.F.R. § 483.25 requires a SNF to provide each resident with "necessary care and services" to enable the resident to "attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care." The Board has held that section 483.25 "implicitly imposes on [a SNF] a duty to provide care and services that, at a minimum, meet accepted professional standards of quality," *Golden Living Ctr. – Foley*, DAB No. 2510, at 23 (2013), and that such standards include CPR decision-making guidelines published by the AHA, *John J. Kane Regional Ctr. – Glen Hazel*, DAB No. 2068, at 11-12 (2007). The Board has also held that the "necessary care and services" required by section 483.25 may include care and services called for by an established resident care policy. *Life Care Ctr. of Tullahoma*, DAB No. 2304, at 34 (2010), *aff'd, Life Care Ctr. Tullahoma v. Sec'y of U.S. Dept. of Health & Human Servs.*, 453 F. App'x 610 (6th Cir. 2011); *see also Good Shepherd Home for the Aged, Inc.*, DAB No. 2858, at 12 (2018) (stating that section 483.25 obligates a SNF to follow its own resident care policies); *The Laurels at Forest Glenn*, DAB No. 2182, at 6, 12, 18 (2008) (finding a SNF's failure to follow facility protocol for notification of low blood sugar levels was a failure to provide necessary care and services). CMS "may reasonably rely on a facility's policy relating to the care and treatment of its residents as evidencing the facility's understanding of what must be done to attain or maintain residents' highest practicable physical, mental, and psychosocial well-being, as required by section 483.25." *The Laurels at Forest Glenn* at 18; *see also Hanover Hill Health Care Ctr.*, DAB No. 2507, at 6 (2013) (observing that "the Board has long held that a facility's own policy may be sufficient evidence . . . of what the facility has determined is needed to meet the quality of care requirements in section 483.25").

Petitioner's failure to provide CPR to a full-code resident in cardiac arrest violated both an established resident care policy (the DNR policy) and an accepted professional standard of quality (reflected in AHA's CPR guidelines). In defense of the registered nurse's inaction, Petitioner asserts that the registered nurse who found Resident 1 unresponsive on July 23, 2015 "believed [Resident 1] to be dead." RR at 9. However, Petitioner does not say what objective findings led her to that belief or otherwise contend that the nurse's response to Resident 1's medical emergency was consistent with the

applicable standard of nursing care. Petitioner's silence about the nurse's thinking is unsurprising because there is no evidence that she performed any hands-on assessment of Resident 1 during the incident. Because Petitioner failed to provide a resident with CPR in accordance with an established resident care policy and professional standards of quality, it did not meet the basic quality-of-care obligation in section 483.25. *Avalon Place Kirbyville*, DAB No. 2569, at 13 (2014) (holding that the "necessary care and services" required by section 483.25 included the "emergency care services set forth in its emergency response policy adopted for full code residents").

Petitioner submits that the available facts do not amount to a "prima facie case" of noncompliance with section 483.25. RR at 7. That contention is founded on a statement in Survey & Certification Letter 14-01-NH that "[r]esearch generally shows that CPR is ineffective in the elderly nursing home population." CMS Ex. 11, at 2. Given this acknowledgment of CPR's ineffectiveness, says Petitioner, CMS needed to proffer "credible evidence" that but for the registered nurse's failure to perform CPR, Resident 1 would have been revived and restored to a "practicable level of functioning." RR at 7-9; Reply at 4. Petitioner submits that "[t]here [is] no more than a scintilla of evidence" in the record concerning the possibility of Resident 1's survival, and thus there is no basis to find either: (1) that it failed to meet the requirement in section 483.25 to provide services "necessary" to enable Resident 1 to achieve his highest practicable well-being; or (2) that a violation of section 483.25, assuming it occurred, posed a risk of more than minimal harm to that resident. RR at 7, 9-10, 15.

We are unpersuaded by this argument for several reasons. First, for any resident who has not elected in a DNR order or other instrument to forego emergency resuscitation, CPR is an inherently "necessary" service because when it is started promptly after cardiac arrest and performed correctly, a possibility exists, however small, that the resident will survive to attain a desired level of well-being. CMS Ex. 11, at 2 (noting that survival rates for long-term residents are between two and 11 percent, according to a 2006 study). It follows that an unwarranted failure to perform CPR has the potential for more than minimal harm – that being the evisceration of any chance of survival and recovery. *Ross Healthcare Ctr.*, DAB No. 1896, at 9 (2003) (holding that there was a potential for more than minimal harm "because a potentially lifesaving procedure was denied [to the resident] without any determination being made that she would not benefit from it").

Second, the statement from CMS's guidance letter upon which Petitioner so heavily relies relates to the population of "elderly" nursing home residents. At 61 years old, Resident 1 was not a member of that population on July 23, 2015.[3] That circumstance alone indicates that Petitioner's failure to administer CPR had at least the potential for more than minimal harm to Resident 1. CMS's guidance letter recognizes that a SNF's residents may include "potentially more viable and younger patients" (such as persons admitted for short-term rehabilitation stays) for whom the effectiveness of CPR may be greater than for elderly residents. CMS Ex. 11, at 2.

Third, requiring CMS to present evidence that a resident would have survived, or had a chance to survive, the administration of CPR is incompatible with its mandate to enforce compliance with section 483.25. As noted, that regulation "implicitly imposes on [SNFs] a duty to provide care and services that, at a minimum, meet accepted professional standards of quality" – standards that include AHA's CPR guidelines. *Sheridan Health Care Ctr.*, DAB No. 2178, at 15 (2008). Under those standards, a SNF may not, absent obvious signs of clinical death or physical peril to the rescuer, withhold CPR from a full-code resident based on its estimate of the medical probability that the resident will survive the procedure. *See Woodland Oaks Healthcare Facility*, DAB No. 2355, at 16 (2010) (rejecting a SNF's suggestion that a nursing staff could "choose to disregard an advance directive if they determined, on-the-spot, that CPR would not likely save the resident"). Consequently, when a SNF has failed to perform CPR in accordance with those standards (or with a resident care policy modeled on those standards), the SNF cannot defend that failure by claiming, in hindsight, that the procedure was ineffective or would not have produced a positive outcome (had it been performed) given the resident's preexisting clinical circumstances. *Id.* at 16 (refusing to consider the "potential futility of CPR" in deciding whether a SNF that failed to provide CPR in accordance with the AHA's CPR guidelines was noncompliant with section 483.25); *Ross Healthcare* at 8 (holding – in a case in which the SNF was cited for noncompliance with section 483.13 for failing to carry out its CPR policy – that it was "immaterial whether it could be determined with hindsight that [the resident] would have benefitted from CPR" and that retrospective evidence of futility did not "transform [the SNF's] withholding of CPR into

[3] "Traditionally, the 'elderly' are considered to be those persons age 65 and older." Institute of Medicine (National Academies Press), "Medicare: A Strategy for Quality Assurance" (Lohr K.N., ed.), vol. 1, chap. 3 (available at https://www.ncbi.nlm.nih.gov/books/ NBK235450); *see also* 38 C.F.R. § 61.1 (defining the "frail elderly," for purposes of a federal veterans assistance program, as persons "65 years of age or older with one or more chronic health problems and limitations in performing one or more activities of daily living") and 38 Nev. Rev. Stat. §§ 427A.010(1), 427A.029 (similarly defining a "frail elderly person" for purposes of state and local governmental assistance to the "older people of [Nevada]"); U.S Census Bureau Statistical Brief, "Sixty-Five Plus in the United States" (available at https://www.census.gov/population/socdemo/statbriefs/agebrief.html) (discussing attributes of "America's elderly population").

appropriate care"); *Avalon Place Kirbyville* at 12-14 (upholding on summary judgment a determination that the SNF was noncompliant with section 483.25 based on the undisputed fact that the SNF did not provide a full-code resident with CPR in accordance with the SNF's emergency response policy, despite the impossibility of determining whether CPR would have revived the resident). It follows that CMS need not provide evidence of CPR's potential efficacy when the record shows, as it does here, that the SNF failed to perform CPR in accordance with professional standards of quality. *Woodland Oaks* at 16 (affirming a finding of noncompliance with section 483.25 based on the AHA guidelines' "bright-line rule" that a patient without a DNR order must receive CPR unless one of the stated exceptions applies).

Fourth, accepting Petitioner's "survivability" argument would necessarily require CMS to offer more proof than necessary to warrant a noncompliance finding. That argument presumes that Resident 1 would have died even if the registered nurse had started CPR immediately after discovering him on July 23, 2015. *See* RR at 9 (emphasizing the absence of evidence that Resident 1 "was discovered within the survivable four to six minute range following the cardiac arrest"). Overcoming that presumption would, as Petitioner implicitly acknowledges, require proof that the resident would have survived and recovered but for the nursing staff's failure to provide CPR in accordance with an established resident care policy and professional standards of quality. *See* Reply at 4-5 (asserting that "noncompliance with section 483.25 requires proving the failure to start CPR prevented the resident from attaining/maintaining his highest practicable function"). Hence, under Petitioner's conception of the parties' evidentiary burdens, CMS would have to prove that the cited regulatory violation caused, or contributed to causing, actual harm to Resident 1 – that being his death. However, proof that a deficiency caused actual harm is not a prerequisite to finding a lack of substantial compliance. Under the nursing home enforcement regulations (in 42 C.F.R. Part 488, subpart F), a SNF may be found out of substantial compliance (and thus subject to CMPs and other remedies) if the deficiency has the "potential" to cause more than minimal harm to resident health or safety. *Libertyville Manor Rehab. & Healthcare Ctr.*, DAB No. 2849, at 17-18 (2018); *Oaks of Mid City Nursing and Rehab. Ctr.*, DAB No. 2375, 16-17 (2011) (rejecting a contention that CMS could not find the SNF noncompliant with section 483.25 absent proof of a "causal link" between the regulatory violation and a "negative resident outcome").

It was also unnecessary for CMS to show that Petitioner's deficiency posed a risk of harm to a specific resident (such as Resident 1). A deficiency is severe enough to warrant a noncompliance finding if it involves acts or omissions that, if repeated, have the potential to cause more than minimal harm to *any* of the SNF's residents, "even if surveyors did not observe or identify a particular resident who was actually threatened with harm during the survey." *Liberty Commons Nursing and Rehab Ctr. – Johnston,*

DAB No. 2031, at 19-20 (2006) (applying the principle in reviewing an immediate-jeopardy finding), *aff'd*, *Liberty Commons Nursing & Rehab. Ctr. – Johnston v. Leavitt*, 241 F. App'x 76 (4th Cir. 2007); *Daughters of Miriam Ctr.*, DAB No. 2067, at 12 (2007) (stating, in an appeal challenging CMS's immediate-jeopardy finding, that "a reviewer should consider the nature of the noncompliance and decide whether it was likely to result in serious harm, not only to the resident or residents whose circumstances triggered the immediate jeopardy determination, but to the facility's population at large"). That condition is met here: because CPR is a potentially life-saving procedure, Petitioner's deficiency – its failure to perform CPR in accordance with facility policy and accepted standards of care – "posed a risk of more than minimal harm [the loss of a chance for survival and recovery] to any full-code resident . . . needing resuscitation." *Southpark Meadows* at 8; *see also Ross Healthcare Ctr.* at 9 (holding that the SNF's failure to carry out its CPR policy, in violation of 42 C.F.R. § 483.13, "posed a potential for more than minimal harm to all of the residents in the facility who had no DNR request since there was no assurance that any residents among them who might benefit from CPR would receive it in the event of a cardiopulmonary arrest"); *Royal Manor*, DAB No. 1990, at 8 (2005) (finding the SNF's noncompliance to be at the immediate-jeopardy level because its incompetent response to a life-threatening emergency could have harmed other residents facing a similar emergency).

For the reasons just outlined, we reject Petitioner's argument disputing the existence and severity of the cited deficiency. Undisputed facts demonstrate that Petitioner's response to Resident 1's medical emergency failed to meet section 483.25's basic quality-of-care requirement and that this deficiency had the potential to cause more than minimal harm to any full-code resident of Petitioner's facility. The record reveals no factual dispute that could lead a reasonable factfinder to conclude differently. Accordingly, CMS is entitled to summary judgment on its claim that Petitioner was not in substantial compliance with section 483.25 during the August 2015 survey.

2. *The state survey agency's finding regarding the severity of Petitioner's noncompliance is not reviewable.*

Petitioner appears to contest the state survey agency's finding that its noncompliance with section 483.25 caused "actual harm" to Resident 1. RR at 11. However, that severity finding is not appealable. To reiterate, a finding of noncompliance requires that a deficiency create at least the potential for more than minimal harm to one or more residents (as Petitioner's deficiency did, for reasons discussed in the previous section). Under the administrative appeal regulations in 42 C.F.R. Part 498, a finding that a SNF's deficiency exceeded the "potential-for-more-than-minimal-harm" threshold – by causing "actual harm" or placing residents in "immediate jeopardy" – is not appealable unless a successful challenge to the finding would affect "(i) [t]he range of civil money penalty

amounts that CMS could collect" or "(ii) [a] finding of substandard quality of care [as defined in 42 C.F.R. § 488.301] that results in the loss of approval for a SNF or NF of its nurse aide training program." 42 C.F.R. § 498.3(b)(14); *NHC Healthcare Athens*, DAB No. 2258, at 15-17 (2009) (construing section 498.3(b)(14) and other provisions of the Part 498 regulations).

Neither of these conditions is satisfied. The state survey agency's actual-harm finding did not affect the range of civil money penalty amounts that CMS could collect because the daily penalty range for deficiencies that cause actual harm – $50 to $3,000 per day – is the same as the range for deficiencies that have the potential for more than minimal harm. 42 C.F.R. § 488.438(a)(1)(ii). In addition, there is no indication in the record that CMS or the state survey agency made a "substandard quality of care" finding that might be affected by our review of the actual-harm finding. Consequently, we have no authority to review the state survey agency's finding that Petitioner's violation of section 483.25 caused actual harm to Resident 1.

3. *Petitioner has not created a genuine dispute about the date it returned to substantial compliance.*

We turn next to the issue of when Petitioner returned to substantial compliance with section 483.25 following the August 2015 survey. Resolving that issue requires close inspection of Petitioner's plan of correction, which was submitted to the state survey agency in mid-September 2015. CMS Ex. 1, at 1.

In response to the state survey agency's question about the "systemic changes" Petitioner intended to make, or had made, "to ensure that the deficient practice will not recur," the plan of correction stated that Petitioner's staff development coordinator had "re-educated" the nursing staff between July 27 and August 14, 2015 on the following subjects: "appropriate response during emergent situations"; "performance of CPR"; "initiating CPR immediately in accordance with guidelines"; and "code status identification." *Id.* at 2. The plan also indicated that Petitioner's director of nursing and staff development coordinator intended to "conduct routine rapid response drills with nursing staff to validate understanding of education." *Id.* at 3. In response to a question about how the nursing staff's practices would be "monitor[ed] . . . to ensure that the deficient practice will not recur," the plan of correction stated that "[c]ode status audits [would] be conducted at least once a week for two months and then randomly thereafter," and that "[a]udit results [would] be reported to [the] Quality Assurance Performance Improvement committee monthly for the first three months and quarterly thereafter until deemed no longer necessary." *Id.*

In light of the measures specified in its plan of correction, Petitioner alleged that its date of substantial compliance was August 15, 2015. *Id.* at 2, 4. However, the state survey agency and CMS determined that Petitioner did not return to substantial compliance until October 2, 2015, the date that the state survey agency performed a revisit survey to verify that Petitioner had taken measures sufficient to prevent further incidents like the one involving Resident 1. CMS Ex. 4, at 2.

Petitioner asked the ALJ to find that it had returned to substantial compliance as of August 15, 2015, emphasizing that "corrective training" of staff was "complete" as of that date. Pet.'s Prehearing Br. and Response to Motion for Summary Judgment at 13, 15, 16. To support that request, Petitioner relied on the declaration of its administrator. *Id.* The administrator asserted that between July 27 and August 14, 2015, Petitioner re-educated the nursing staff about "appropriate response during emergency situations, performance of CPR, . . . code status identification," and "initiating CPR immediately in accordance with guidelines." P. Ex. 1, at 2 ¶ 6. Attached to the administrator's declaration are copies of employee sign-in sheets for five staff training sessions held between July 27 and August 14, 2015. *Id.*, Attachment 2. According to these sheets, the topics covered during the training sessions included CPR and "code status" (among other topics). *Id.* Four of the five sessions also purportedly involved a CPR-related "drill." *Id.* The administrator did not claim to have attended any training session or observed any "drill."

The ALJ rejected the claim of an earlier return to substantial compliance based on the following reasoning:

> The facility's deficiency is not the type of deficiency (like a leaky roof or a broken dishwasher) that lends itself to a quick fix. An in-service training and a practice drill or two (whatever that entails) are not sufficient to ensure that a quality-of-care deficiency has been corrected and will not recur. If properly implemented, these interventions might help a facility achieve substantial compliance, but introducing them does not, by itself, establish substantial compliance. Until the facility can demonstrate that its training and other interventions were effective, i.e., that staff capably followed the training, that management put effective monitoring tools in place, and that those interventions resolved the problem, the facility has not met its significant burden of demonstrating that it has alleviated the level of threat to resident health and safety. *Oceanside [Nursing and Rehab. Ctr.*], DAB No. 2382 at 19 [(2011)]; *Premier Living and Rehab. Ctr.*, DAB CR 1602 (2007), *aff'd* DAB No. 2146 (2008).

ALJ Decision at 8.

Because an approved plan of correction "serves as the facility's allegation of compliance, its content may be regarded as evidence of the measures necessary to bring the SNF back into substantial compliance." *Libertyville Manor Rehab. & Healthcare Ctr.* at 14 (internal quotation marks omitted). In other words, a "SNF cannot be considered to have corrected a deficiency and achieved substantial compliance based on remedial measures short of those specified in its plan of correction." *Id.* A SNF's evidence should permit a finding that its post-survey remedial measures were effective, or likely to be effective, in preventing a recurrence of a deficient nursing practice. *Oceanside Nursing and Rehab. Ctr.*, DAB No. 2382 at 20 (2011) (holding that the SNF's evidence of in-service training "could not alone establish that the facility had successfully implemented the practices and procedure required in the [plan of correction] and training materials"); *Rosewood Care Ctr. of Rockford*, DAB No. 2466, at 11-12 (2012) (rejecting a claim of an earlier return to substantial compliance because the SNF failed to produce evidence that it had "satisfactorily implemented" all of the measures, including chart "monitoring," that its plan of correction indicated would be performed to ensure that deficient practices would not recur); *Omni Manor Nursing Home*, DAB No. 2431, at 9 (2011) (holding that auditing or monitoring measures to verify the efficacy of staff education and training were reasonably considered "necessary elements of [the SNF's] return to substantial compliance"), *aff'd, Omni Manor Nursing Home v. U.S. Dept. of Health & Human Servs.*, 512 F. App'x 543 (6th Cir. 2013).

Viewing the record in the light most favorable to Petitioner, a reasonable factfinder could not find that Petitioner fully or effectively implemented the remedial measures specified in its plan of correction by August 15, 2015. Although the training session sign-in sheets are some evidence that Petitioner conducted staff training between late July and mid-August 2015, they do not show that all of the training topics specified in the plan of correction were covered during each session. The sign-in sheets contain only cursory (one- or two-word) descriptions of the substance of the training. Four of the five sheets indicate that "CPR" and "code status" were covered topics but do not indicate whether the participants were instructed on the broader subject of "appropriate response during emergent situations." The documents attached to the administrator's declaration include a two-page typewritten training agenda with slightly more information about the subjects covered, but the document does not identify its author, when it was prepared, or the training sessions during which the listed topics were covered, making it difficult to determine if all of the nursing staff received the planned instruction. The administrator states that all the topics were covered during each session, but he did not claim to have personally attended any of the training sessions, and Petitioner did not proffer declarations from the employee (staff development coordinator) who was supposed to have conducted them.

The evidence submitted by Petitioner also fails to show that staff training was effective in imparting the necessary information. The plan of correction called for "rapid response drills" to "validate understanding of education," but Petitioner provided no evidence of what the drills entailed and whether they had reliably verified the staff's "understanding" of its responsibilities. Also unclear is whether Petitioner had, by August 15, 2015, begun to perform "code status audits," a measure that the plan of correction called to be performed at least once a week for two months. In his declaration, the administrator appears to equate the code status audits with the previously mentioned "rapid response drills," P. Ex. 1 ¶ 6, but the plan of correction indicates that the drills and audits are different remedial measures, CMS Ex. 1, at 3, and the administrator did not explain the apparent inconsistency. In addition, Petitioner proffered no evidence that its staff had, by August 15, 2015, instituted internal procedures for reporting audit findings to its Quality Assurance Performance Improvement (QAPI) committee, as the plan of correction called for. The administrator admitted in his declaration that the QAPI did not start reviewing the "CPR implementing issue" until September 2015. P. Ex. 1, at 2 ¶ 7.

In *Oceanside*, the SNF's plan of correction called for supervisors to "monitor" the nursing staff's performance of certain required practices about which the nursing staff had recently received "in-service training," and also to periodically report the findings of that monitoring to the SNF's quality assurance committee. DAB No. 2382, at 20. The Board found that the "nature of these corrective actions," including the fact that they were intended to "operate prospectively," meant that in-service training of staff (which the plan of correction had also called for) "could not alone establish that the facility had successfully implemented the practices and procedure required in the [plan of correction] and training materials." *Id.* The Board further held that, because the monitoring and reporting measures operated prospectively, "CMS could reasonably require evidence that the new practices and requirements were actually put into effect in order to verify that the facility had attained substantial compliance" with Medicare participation requirements. *Id.* Similarly, in *Omni Manor*, the Board held that a plan of correction that called for post-training "monitoring" obligated the SNF to produce some evidence of the training's effectiveness. DAB No. 2431, at 12 (holding that "in light of [the SNF's] own recognition of the need to monitor staff on a regular basis for a one-month period after the training, CMS could reasonably require evidence that the protocols addressed in the training were actually put into effect in order to verify that the facility had attained substantial compliance" (internal quotation marks omitted)).

Like the plans of correction in *Oceanside* and *Omni Manor*, Petitioner's plan of correction included monitoring and reporting measures (code status audits and periodic reporting of audit results to a quality assurance committee) to ensure that certain practices or procedures about which the nursing staff had received training would be followed in

appropriate circumstances. That these measures were included in the approved plan of correction obligated Petitioner to produce some evidence, beyond the training sessions' attendance records, verifying that its nursing staff understood its responsibilities and obligations regarding emergency resuscitation and would reliably act in accordance with that understanding. Petitioner submitted no such evidence.

Petitioner asserts that post-incident monitoring revealed no further "incidents of substantial noncompliance between completion of training drills and the revisit," and that "a day of monitoring that reveals no act meeting the definition of substantial noncompliance is still a day in compliance." RR at 14. However, the Board has repeatedly held that cessation, during the survey-and-certification process, of the "incidents" reflecting a SNF's noncompliance is insufficient proof that a SNF has returned to substantial compliance. There must also be evidence that the SNF has implemented appropriate education, care-monitoring, and other operational measures "to ensure that similar incidents will not recur." *Florence Park Care Ctr.*, DAB No. 1931, at 30 (2004); *see also Omni Manor* at 6.

Petitioner also contends that the state survey agency's decision about when to perform a revisit after "completion" of the plan of correction "is arbitrary and subject to treating similar providers to dissimilar outcomes." RR at 14. However, under the governing survey-and-enforcement regulations, "whether and when revisit surveys are performed is in the discretion of the State and CMS, not the facility." *Cal Turner Extended Care Pavilion*, DAB No. 2030, at 13 (2006). Furthermore, there is nothing in the record suggesting that the state survey agency unreasonably delayed the performance of the revisit survey. It appears that the October 2, 2015 revisit occurred only fifteen days after Petitioner submitted (on or about September 17, 2015), and only eleven days after the state survey agency approved (on September 21, 2015), the plan of correction. CMS Ex. 1, at 1.

Given its failure to proffer evidence verifying the effectiveness of staff training and implementation of planned monitoring and reporting measures, we conclude that Petitioner did not raise a genuine dispute of material fact regarding the date it returned to substantial compliance. We therefore affirm the ALJ's conclusion that Petitioner did not return to substantial compliance earlier than October 2, 2015.

4. *Petitioner does not challenge the ALJ's conclusion that the per-day CMP amount imposed by CMS was reasonable.*

In appealing a determination of noncompliance, a SNF may challenge the reasonableness of the amount of any CMP imposed. *Crawford Healthcare & Rehab.*, DAB No. 2738, at 2 (2016). In deciding whether a CMP amount is reasonable, ALJs and the Board may consider only the factors specified in 42 C.F.R. § 488.438(f). 42 C.F.R.

§ 488.438(e)(3); *Crawford* at 19. The daily or per-instance penalty amount selected by CMS is presumptively reasonable based on those regulatory factors, and the burden is on the SNF "to demonstrate, through argument and the submission of evidence addressing the regulatory factors, that a reduction is necessary to make the CMP amount reasonable." *Crawford* at 19 (internal quotation marks omitted).

Petitioner takes no issue with the ALJ's conclusion that the CMP imposed by CMS for the noncompliance – $750 per day – was reasonable based on the regulatory factors. We therefore summarily affirm that conclusion. *Bivins Memorial Nursing Home*, DAB No. 2771, at 13 (2017) (affirming a CMP against a SNF that failed to present an argument based on the regulatory factors).

5. *Petitioner's new evidence does not meet the conditions for admissibility in this proceeding.*

Petitioner asks that we admit to the record a document that it did not present to the ALJ. RR at 4. The document (P. Ex. 2) is a factsheet, authored by the National Heart, Lung, and Blood Institute, about heart failure. Petitioner asserts that the factsheet "highlight[s] the significance" of Resident 1's congestive heart failure and lower extremity edema (or swelling), the latter being a sign or symptom of the former. RR at 4.

Title 42 C.F.R., § 498.86(a) provides that the Board "may" admit additional evidence (that is, evidence that was not presented to the ALJ) if it is "relevant and material to an issue before it." Section 498.86(a) does not impose a mandatory obligation on the Board; it may refuse to admit additional evidence even if it is relevant and material. *Cmty. Nursing Home*, DAB No. 1807, at 28 (2002). In deciding whether to admit additional evidence, the Board considers whether its proponent has shown "good cause" for not producing it during the ALJ proceeding. *Id.* (citing and quoting the Board's appellate review guidelines[4]); *The Windsor Place*, DAB No. 2209, at 24 (2008), *aff'd, Windsor Place v. U.S. Dept. of Health & Human Servs.*, 649 F.3d 293 (5th Cir. 2011).

Petitioner asserts that the factsheet is "relevant" but does not say that it is evidence of any material fact. The document is not such evidence because the existence or severity of Resident 1's congestive heart failure did not diminish the nursing staff's obligation to perform CPR on July 23, 2015. Petitioner suggests that the factsheet "is relevant to whether . . . the proper inferences were drawn for purposes of the Motion for Summary Judgment" but does not specify what those inferences are. RR at 4. Finally, Petitioner does not say why it failed to submit the factsheet when its case was before the ALJ. For all these reasons, we exclude that document from the record of this case.

[4] Departmental Appeals Board, *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs*, "Development of the Record on Appeal," ¶ g (available at https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/participation/index.html).

Conclusion

We conclude that: (1) CMS demonstrated that Petitioner was not in substantial compliance with 42 C.F.R. § 483.25 from August 12 through October 1, 2015; (2) there are no genuine disputes of material fact concerning Petitioner's lack of substantial compliance with section 483.25 during that period; (3) the reasonableness of the CMP amount is not at issue in this appeal; and (4) Petitioner's new evidence is inadmissible in this proceeding. Based on these conclusions, we affirm the ALJ's grant of summary judgment to CMS.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Christopher S. Randolph
Presiding Board Member