Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: July 2, 2010
Texan Nursing & Rehabilitation of Amarillo, LLC,	
Petitioner,	Civil Remedies CR2024 App. Div. Docket No. A-10-35
- v. -	Decision No. 2323
Centers for Medicare & Medicaid Services.	

FINAL DECISION AND PARTIAL REMAND ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Petitioner Texan Nursing & Rehab of Amarillo, LLC (Texan) appeals the November 10, 2009 decision of Administrative Law Judge (ALJ) Keith Sickendick, Texan Nursing & Rehabilitation of Amarillo, LLC, DAB CR2024 (2009) (ALJ Decision). The ALJ concluded that Texan was not in substantial compliance with a requirement for participation in the Medicare program, 42 C.F.R. § 483.25(i)(1), on January 5, 2007, as found by the Texas Department of Aging and Disability Services (DADS) during an on-site survey. The ALJ based his conclusion on findings of fact regarding one resident, identified by the surveyors as Resident 1 (R. 1). ALJ Decision at 12-13. The ALJ concluded that although Texan was aware R. 1 had sustained a severe weight loss, Texan did not take reasonable steps to address the weight loss and to ensure that R. 1 maintained acceptable parameters of nutrition. Id. at 15. The ALJ also concluded that Texan did not show that the weight loss was unavoidable. Id. The ALJ further concluded that Texan did not return to substantial

compliance prior to July 16, 2007 and that CMS, therefore, was required to impose a denial of payment for new admissions (DPNA) from April 5, 2007 through July 16, 2007. Id. at 16.

In its Request for Review (RR) Texan disagrees with the ALJ's conclusion that it was not in substantial compliance on January 5, 2007, arguing that it identified and addressed R. 1's weight loss but that it was unavoidable. RR at 9-14. Texan also argues that even if it was not in substantial compliance on January 5, 2007, it returned to substantial compliance on February 16, 2007, the date stated on its plan of correction (POC) for the section 483.25(i)(1) deficiency, not on July 16, 2007 as found by the ALJ. Id. at 16. Texan argues, therefore, that it returned to substantial compliance within 90 days after its noncompliance was first identified and no basis existed for the DPNA. RR at 15-20. Texan alleges that the ALJ reached his conclusions by applying an erroneous burden of proof and that certain facts found by the ALJ are "irrelevant and immaterial." RR at 1-6, 6-9. CMS did not appeal the ALJ Decision or any of the ALJ's procedural rulings, including his denial of CMS's motion to dismiss.[1]

We uphold the ALJ's conclusion that Texan was not in substantial compliance with 42 C.F.R. § 483.25(i)(1) at the time of the January 5, 2007 survey, which is supported by substantial evidence and free of legal error. We also conclude that the ALJ properly required Texan to carry the burden of proving it achieved substantial compliance prior to July 16, 2007 in order to avoid the DPNA that took effect on April 5, 2007 and continued in effect through July 16, 2007. However, we vacate the ALJ's findings of fact (FFs) and conclusions of law (CLs) in which he concluded that Texan did not meet its burden of proving a compliance date prior to July 16, 2007 and remand the decision to the ALJ with instructions to issue a revised decision that adequately explains the basis for his conclusion that Texan did not establish a compliance date prior to July 16, 2007. We also instruct the ALJ on remand to decide whether Texan was in substantial compliance with section 483.20(k)(3)(i) on the February 6, 2007 survey and, if not, whether it returned to substantial compliance with that requirement before July 16, 2007. Finally, we instruct the ALJ on remand to clarify the ambiguity in his decision and the record as to whether the DPNA,

[1] Since those rulings are not before us, we express no opinion about the correctness of the ALJ's conclusions or the validity of the analyses on which he based them.

assuming it took effect at all, was in effect from April 5, 2007 through July 16, 2007 or April 5, 2007 through July 15, 2007.

Applicable Law

Long-term care facilities participating in the Medicare and Medicaid programs are subject to the survey and enforcement procedures set out in 42 C.F.R. Part 488, subpart E, to determine if they are in substantial compliance with applicable program requirements which appear at 42 C.F.R. Part 483, subpart B. "Substantial compliance" means a level of compliance such that "any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Noncompliance," in turn, is defined as "any deficiency that causes a facility to not be in substantial compliance." Id. Survey findings are reported in a Statement of Deficiencies (SOD). The SOD identifies each "deficiency" under its regulatory requirement, citing both the regulation at issue and the corresponding "tag" number used by surveyors for organizational purposes.

A long-term care facility found not to be in substantial compliance is subject to various enforcement remedies, including a DPNA. 42 C.F.R. §§ 488.402(c), 488.406, 488.408. CMS has the option to impose a DPNA whenever a facility is not in substantial compliance. 42 C.F.R. § 488.417(a). CMS must impose a DPNA "[i]f a facility has not complied with any of the requirements . . . within 3 months after the date the facility is found to be out of compliance with such requirements . . . ." Section 1819(h)(2)(D) of the Social Security Act (Act); 42 C.F.R. § 488.417(b). The implementing regulation provides for a mandatory DPNA if a "facility is not in substantial compliance . . . 3 months after the last day of the survey identifying the noncompliance." 42 C.F.R. § 488.417(b)(1).

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 (Guidelines), http://www.hhs.gov/dab/divisions/appellate/guidelines/prov.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).

Case Background

A. Survey and Procedural History

The Texas Department of Aging and Disability Services (DADS) conducted surveys at Texan on January 5, February 6, April 19 and June 22, 2007. ALJ Decision at 1, citing Joint Stipulation filed November 21, 2007 (Jt. Stip.). On each survey, DADS found Texan not in substantial compliance with multiple federal requirements for long-term care facilities that participate in the Medicare and Medicaid programs. ALJ Decision at 1-4 (citing, *inter alia*, CMS Ex. 1); P. Exs. 1-4.

On January 22, 2007, DADS notified Texan of the noncompliance found on the January 5, 2007 survey and, as authorized by CMS, advised that a mandatory DPNA was being imposed for that noncompliance and would take effect April 5, 2007, unless Texan returned to substantial compliance before that date. ALJ Decision at 1-2; CMS Ex. 1. DADS enclosed with its January 22, 2007 letter an SOD for the January 5, 2007 survey and informed Texan it must submit a plan of correction (POC). CMS Ex. 1, at 1. Texan submitted a POC on January 1, 2007. P. Ex. 1. The alleged noncompliance cited on the SOD for the January 5, 2007 survey included noncompliance with section 483.25(i)(1).[2] CMS Ex. 1, at 1; P. Ex. 1, at 3-8.

On August 2, 2007, CMS sent Texan a letter setting out the findings of noncompliance on all of the above-mentioned surveys and advising Texan that, based on a July 22, 2007 survey, CMS had determined that Texan returned to substantial compliance effective July 22, 2007. ALJ Decision at 3-4, citing CMS Ex. 1, at 1. The CMS letter stated that the mandatory DPNA, therefore, took effect April 5, 2007 and continued through July 21, 2007. Id. The CMS letter also advised Texan that it was imposing multiple per-instance CMPs. Id. On August 15, 2007, Texan requested a hearing. ALJ Decision at 4.

In subsequent letters, CMS revised and ultimately rescinded all of the remedies except for the DPNA. ALJ Decision at 4-6, citing CMS Ex. 1, at 4-5; CMS Ex. 44 (letter of March 3, 2008); CMS Ex. 43 (letter of March 4, 2008 and CMS's motions to dismiss). A March 3, 2008, letter from CMS notified Texan that CMS was revising the effective date of the DPNA so that the

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[2] DADS sent additional notice letters to Texan after each of the succeeding surveys. See ALJ Decision at 2-3.

remedy was in effect from April 5 through July 16, 2007. ALJ Decision at 6, citing CMS Ex. 44.

The ALJ held a hearing March 4-6, 2008. In a ruling on November 13, 2007 and again at the hearing, before the presentation of evidence, the ALJ indicated that the issues were whether Texan was out of compliance with section 483.25(i)(1) as found on the January 5, 2007 survey and whether Texan returned to substantial compliance earlier than the date determined by CMS. ALJ Decision at 5-8.

Following the hearing and post-hearing briefing, the ALJ concluded that Texan was not in substantial compliance with section 483.25(i)(1) on January 5, 2007 and remained out of compliance through July 16, 2007. The ALJ further concluded that CMS was required to impose the DPNA on April 5, 2007 and to continue it through July 16, 2007 because Texan did not return to substantial compliance within 90 days after its noncompliance was first identified and, therefore, he "need not consider the other surveys and their alleged deficiencies." ALJ Decision at 10.

B. ALJ's Findings of Fact Regarding R. 1

R. 1, an 87-year-old man, was admitted to Texan on September 20, 2006 with diagnoses that included a past medical history of bladder cancer, hypothyroidism and Alzheimer's dementia, deafness and inability to communicate. ALJ Decision at 12. On admission, R. 1 was 71 inches tall, weighed 150 pounds, had no nutritional problems and was independent for eating with setup help only. Id., citing CMS Ex. 6, at 13, 15. A certified nursing assistant (CNA) flow sheet shows that from September 21-28, 2006, R. 1's meal consumption was poor (25%-50%), except for two meals on September 26 rated, respectively, as good (75-100%) and fair (50-75%). Id., citing P. Ex. 15, at 1.

An October 3, 2006 minimum data set (MDS) indicated no change in weight since R. 1's admission or any nutritional problems. Id., citing CMS Ex. 6, at 25, 28. However, a care planning conference summary sheet dated October 4, 2006 identified as a dietary concern that R. 1's weight had dropped by 5% since admission on September 20, 2006 (from 150 pounds to 142 pounds). Id., citing CMS Ex. 6, at 50. Texan planned for Dietary to give the resident finger foods and sweets. Id. R.1's family, who also expressed concern about the weight loss, indicated that they would bring R. 1 his favorite foods. Id.

A nutritional assessment by Texan's dietician on October 17, 2006 also indicates that Resident 1's weight had dropped to 142 pounds. Id., citing CMS Ex. 6, at 44-45. The assessment listed his ideal weight as 155 to 189 pounds, and stated that he required 1704 calories per day. Id. The dietician noted that R. 1 self-fed, ate approximately 50 percent of meals and had adequate albumin and protein levels; she also recommended a house supplement three times per day and referral to his physician. Id.

An October 2006 ADL (activities of daily living) work sheet records R. 1's meal consumption as good to poor, with most meals recorded as good and fair, but no recording on October 27, 2006. Id., citing P. Ex. 15, at 2-4. November 2006 records show meal consumption ranging from refused (four breakfasts) to good, no records for November 3 and 30 and poor consumption for all meals from November 20 through 25 and 27 through 29. Id. December recordings range from poor to good, with all meals on December 1 through 3 and 30 listed as poor. Id.

A height and weight form listed weights of 142 pounds on admission, 142 pounds on October 1, 2006, 142 pounds on November 5, 2006 and 134 pounds on December 2, 2006. P. Ex. 25, at 5. The ALJ found the admission weight stated on this form not credible based upon other clinical record evidence that R. 1's weight was 150 pounds on admission. ALJ Decision at 13 and n. 10.

R. 1's physician examined him on November 29, 2006 and speculated that R. 1 had a recurrence of transitional cell carcinoma that was multifocal, but further testing was delayed. Id., citing CMS Ex. 6, at 3-4; P. Ex. 15, at 7. A CT scan of R. 1's pelvis on December 5, 2006 revealed an abnormality in the urinary bladder wall characterized as "worrisome for malignancy." Id., citing CMS Ex. 6, at 54-55. However, the ALJ noted that the record contains no definite diagnosis of a cancer recurrence. Id.

A physician's progress note dated December 14, 2006 shows the physician's awareness that R. 1's weight had decreased by 8 pounds to 134 pounds but does not include any specific plan addressing the weight loss. P. Ex. 14. A physician's progress note of November 27, 2006 does not list R. 1's weight. Id., citing CMS Ex. 6, at 2.

In December 2006, R. 1's recorded weights were 134, 129, 137 and 137 pounds. Id., citing CMS Ex. 6, at 47. Laboratory results from December 8, 2006 reflect low albumin and low total protein.

Id., citing CMS Ex. 6, at 42. Low albumin and low protein levels are indicative of possible malnutrition. Id., citing Tr. at 176-77 (testimony of Barbara Courson, DADS surveyor).

On January 1, 2007, R. 1 was found unresponsive and taken to the emergency room where he was assessed as suffering septic shock with low blood pressure, tachycardia, and hypoxia (low blood oxygen). Id., citing CMS Ex. 6, at 70. The family understood that R. 1 was dying, and hospice care - no aggressive treatment or diagnostics - was planned. Id., citing CMS Ex. 6, at 72. R. 1 died on January 1, 2007 at 8:05 p.m. Id., citing CMS Ex. 6, at 56, 61, 73-74. Emergency room records characterize him as thin and cachetic (physical wasting with loss of weight and muscle mass due to disease). Id., citing CMS Ex. 6, at 59.

Analysis

A. The ALJ's conclusion that Texan was not in substantial compliance with section 483.25(i)(1) at the time of the January 5, 2007 survey is supported by substantial evidence and free of legal error.

Section 483.25(i)(1) states:

> Based on a resident's comprehensive assessment, the facility must ensure that a resident –
>
> (1) Maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible[.]

CMS's interpretive guidelines explain that the intent of this regulation is to "assure that the resident maintains acceptable parameters of nutritional status, taking into account the resident's clinical condition or other appropriate intervention, when there is a nutritional problem." State Operations Manual (SOM) App. PP (Rev. 22, 12-15-06) (accessible at http://www.cms.hhs.gov/Manuals/IOM/list.asp). The "unacceptable" parameters of nutritional status listed in the interpretive guidelines include "unplanned weight losses as well as other indices such as peripheral edema, cachexia and laboratory tests indicating malnourishment (e.g., serum albumin levels)." Id. The guidelines contain the following commentary about "weight" as a parameter of nutritional status:

> Since ideal body weight charts have not yet been validated for the institutionalized elderly, weight loss (or gain) is a guide in determining nutritional

status. An analysis of weight loss or gain should be examined in light of the individual's former life style as well as the current diagnosis. Suggested parameters for evaluating significance of unplanned and undesired weight loss are:

Interval	**Significant Loss**	**Severe Loss**
1 month	5.0%	Greater than 5%
3 months	7.5%	Greater than 7.5%
6 months	10%	Greater than 10%

SOM App. PP. The interpretive guidelines further state, "Clinical conditions demonstrating that the maintenance of acceptable nutritional status may not be possible include, but are not limited to, "[r]efusal to eat and refusal of other methods of nourishment"; "[a]dvanced disease (i.e., cancer, malabsorption syndrome)"; "[i]ncreased nutritional/caloric needs associated with pressure sores and wound healing"; "[r]adiation or chemotherapy"; "[k]idney disease, alcohol/drug abuse, chronic blood loss, hyperthyroidism"; "[g]astrointestinal surgery"; and "[p]rolonged nausea, vomiting, diarrhea not relieved by treatment given according to accepted standards of practice." Id.

Unplanned weight loss "may raise an inference of inadequate nutrition and support a prima facie case of a deficiency" under section 483.25(i)(1). Bradford County Manor, DAB No. 2181, at 22 (2008), quoting Carehouse Convalescent Hospital, DAB No. 1799, at 22 (2001); accord The Windsor House, DAB No. 1942, at 17 (2004). The Board held in these cases that if CMS makes a prima facie showing of noncompliance with section 483.25(i)(1) based on unplanned weight loss, the nursing facility must prove, by a preponderance of evidence, that it provided adequate nutrition and that the weight loss was "attributable to non-nutritive factors" which establish that the weight loss was unavoidable. Bradford County Manor at 22; Windsor House at 17; Carehouse at 22. "[T]he facility is responsible for taking all reasonable steps to ensure that the resident receives nutrition adequate to his or her needs." Windsor House at 18. As discussed below, the ALJ correctly applied the law.

1. R. 1's undisputed unplanned weight loss establishes CMS's prima facie case.

As the ALJ found, Texan's clinical records establish that R. 1 experienced a 5.3 percent weight loss (eight pounds) between admission on September 20 and October 1, 2006, a 10.6 percent

weight loss (16 pounds) between admission and December 2, 2006, a 14 percent weight loss (21 pounds) between admission and the second week of December 2006. ALJ Decision at 14. The ALJ also found that while these records indicate that R. 1 gained eight pounds between the second and third week of December, his recorded weight of 137 pounds in the third and fourth weeks of December still represented a loss after admission of 13 pounds or 8.7 percent. The same clinical records show that R. 1 experienced a 5.3 percent weight loss (eight pounds) during his first month at Texan and that Texan staff identified this loss as a dietary concern. CMS Ex. 6, at 50. Texan does not dispute these facts or that the weight loss sustained by R. 1 in the three months after admission represents a severe weight loss under CMS's guidelines and Texan's own weight loss policy. See CMS Ex. 10, at 5 (weight loss policy). Furthermore, as the ALJ found and Texan does not dispute, the October 17, 2006 nutritional assessment clearly supports a conclusion that the weight loss was unplanned and undesired.[3] ALJ Decision at 14. Accordingly, the ALJ correctly determined that CMS made its prima facie case of noncompliance with section 483.25(i)(1), which Texan was required to rebut by a preponderance of the evidence.

2. Substantial evidence in the record supports the ALJ's finding of noncompliance.

At issue here is the ALJ's conclusion that Texan failed to show that it took all reasonable steps to ensure that R. 1 received nutrition adequate to his needs. The problem, the ALJ concluded, was not that R. 1 failed to identify the weight loss or to take some steps to address it. Rather, it was that the steps Texan took were not adequate. In particular, the ALJ cited the absence of any evidence that Texan developed a specific plan, with his physician's input, to address R. 1's weight loss and nutritional status or that Texan followed through on the dietician's recommendation to refer her concerns about those issues to R. 1's physician. The ALJ also found no documentary evidence that Texan assessed the effectiveness of the limited interventions it developed in October: house

[3] The ALJ also concluded that the December 14, 2006 physician progress note supported this conclusion. Id. On its face at least, this note does not indicate whether the eight pound weight loss noted by the doctor was planned or unplanned; however, there is ample evidence, in addition to that cited by the ALJ, that the loss was unplanned. See, e.g., CMS Ex. 6, at 50 (care plan conference summary).

supplements three times per day as recommended by the dietician, giving R. 1 finger foods and sweets, and having R. 1's family bring in R. 1's favorite foods. In addition, the ALJ concluded that R. 1's further weight loss in December permitted an inference that these interventions were either not effective or not consistently implemented and noted instances in which a surveyor observed that Texan failed to implement these interventions. ALJ Decision at 14-15.

Texan argues that the ALJ's conclusion that it did not take all reasonable steps is erroneous. According to Texan, "the condition . . . responsible for [R. 1's] poor appetite and resulting weight loss from late November into early December, 2006 was a severe urinary tract infection ("UTI") which did not respond to antibiotic treatment and ultimately caused the resident's death."[4] RR at 7. Thus, in Texan's view, R. 1's continued weight loss and nutritional decline were unavoidable notwithstanding Texan's interventions.

We note, at the outset, that Texan did not argue before the ALJ that R. 1's UTI caused his weight loss. The Board generally does not entertain arguments that could have been but were not presented to the ALJ. Guidelines; see also Ross Healthcare Center, DAB No. 1896, at 11 (2003). Texan does not assert that it could not have presented the UTI argument to the ALJ. The record shows that rather than being prevented from making that argument below, Texan chose, instead, to attribute R. 1's weight loss to a different medical condition, a recurrence of bladder cancer.[5] Petitioner's [Post-hearing] Response Brief at 4-5. In any event, we find no evidence to support Texan's assertion that the UTI made R. 1's weight loss unavoidable. The evidence Texan cites merely supports a fact not in dispute, that R. 1 had and was treated for a UTI in late November and early December. RR at 8, citing CMS Ex. 6, at 5, 6, 40-43. That evidence establishes no connection at all between R. 1's UTI, or the treatment for that condition, and his weight loss (which was

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[4] Texan also asserts that R. 1's condition prevented conducting the tests necessary to make a specific diagnosis of recurrent bladder cancer. The urology report Texan cites does not support that assertion since it discusses proceeding initially with certain tests and considering additional tests in the future. CMS Ex. 6, at 4.

[5] Texan also asserted before the ALJ that the weight loss could have been associated with R. 1's diagnosis of Alzheimer's but did not develop that argument. Id. at 5.

first noted in October). Thus, we reject Texan's argument that the weight loss was unavoidable because of the UTI just as the ALJ rejected Texan's argument that it was unavoidable because of a suspected, but not definitely diagnosed, recurrence of bladder cancer. See Windsor, DAB No. 1942, at 34 (finding the clinical condition exception inapplicable where record established no causal connection between the clinical condition and the weight loss).

As we stated in The Windsor House, "the clinical condition exception is a narrow one and applies only when the facility can demonstrate that it cannot provide nutrition adequate for the resident's overall needs, so the weight loss was unavoidable." DAB No. 1942, at 18 (citing Carehouse and commentary to the regulation at 54 Fed. Reg. 5316, 5335 (Feb. 2, 1989)). Texan did not show that it could not provide nutrition adequate to meet R. 1's nutritional needs. Indeed, the ALJ concluded, and we agree, that Texan did not even show that it took reasonable steps toward meeting those needs. ALJ Decision at 15. Accordingly, the clinical condition "exception" could not apply here even if Texan had established a causal relationship between a significant clinical condition and R. 1's weight loss, which it did not.

Texan cites the planning meeting held on October 4, 2006, and the approaches that came out of that meeting (finger foods, sweets and "favorite foods" from R. 1's family), as evidence that it had an adequate plan to address R. 1's weight loss and nutritional needs. Texan asserts that "whether the physician participated in the care plan meeting is simply immaterial to the issue of whether or not the resident's weight loss was identified and addressed." RR at 11. However, the summary from the care planning meeting reflects only a one-time meeting that did not involve R. 1's physician, who, as the ALJ correctly found, was a critical member of his care planning team. CMS Ex. 6, at 50; 42 C.F.R. § 483.20(k)(2)(ii). There is no evidence that the meeting, although presumably called to address the need for a care plan addressing R. 1's severe weight loss and any nutritional deficit reflected by that loss, actually resulted in Texan's creating a specific plan to address those issues. See CMS Ex. 6, at 50. Although the meeting resulted in a few interventions, they were not part of an overall plan of care. See Carrington Place of Muscatine, DAB No. 2321, at 14, 15, 17 (2010)(finding noncompliance with section 483.25(i)(1) based, in part, on lack of comprehensive, coordinated approach to addressing weight loss and nutritional decline). In fact, the only written care plan for R. 1 in the record does not mention his nutritional status or weight loss. See CMS Ex. 6, at 51-53.

Texan also argues that the nutritional assessment performed by the dietician on October 17, 2006 is evidence that it took all reasonable steps to address the weight loss and R. 1's nutritional needs. On the contrary, that assessment simply underscores Texan's failure to take reasonable steps. The assessment listed R. 1's ideal weight as 155 to 189 pounds, and stated that he required 1704 calories per day but noted that he had lost eight pounds since admission approximately a month prior to the assessment. The dietician also noted that R. 1 ate only about 50 percent of meals. While noting that his albumin and protein levels were adequate at that time, the dietician recommended a house supplement three times per day and referral to his physician. CMS Ex. 6, at 44-45. Texan asserts that it provided the recommended supplement but provides no evidence that it followed through on the dietician's recommendation that the matter be referred to R. 1's physician. Furthermore, there is evidence that a surveyor saw a staff member serve R. 1 a supplement without opening it or giving him a straw to drink it, even though his MDS states that he needed setup help for his meals and had visual limitations. CMS Ex. 6, at 13. Texan attacks the weight of the surveyor's observation since she observed only a single meal. RR at 13-14. However, Texan bears the burden of proof and cited no evidence that what the surveyor observed during this meal did not happen on other occasions.

The ALJ also cited the surveyor's observation of R. 1 being given cottage cheese and pudding, which are not finger foods, and her further observation that R. 1 dropped a canned peach when he tried to eat it with his fingers. ALJ Decision at 14. Texan does not dispute these observations but notes, as did the surveyors, that the tray observed also contained sausage and pancakes, food that R. 1 could eat with his fingers. RR at 13. Texan then asserts, "neither the care plan summary nor the dietician's evaluation required that [R. 1] be fed only finger foods. Rather, the dietician recommended a regular diet." Id. Texan's assertion implies that a regular diet and finger foods are mutually exclusive, that a regular diet cannot be given in the form of finger foods. Diet manual excerpts put into evidence by CMS, and not rebutted by Texan, show that this is not the case. The manual indicates that the term "finger food" merely refers to the form in which food is given, and "regular diet" refers to the consistency. CMS Ex. 11, at 2-3. The manual specifically provides that "a finger food diet can meet the nutritional needs of clients on regular or mechanical soft consistencies." Id. at 3. Indeed, the fact that R. 1 was observed eating pancakes and sausages, which are items in a regular diet and also finger foods, illustrates this point. Neither the care planning summary nor nutritional assessment

provides any indication that the dietician intended R. 1, to receive any portion of the foods in his "regular diet" in a form other than finger foods.

Texan also "objects" to certain of the ALJ's findings of fact on the grounds that they are "irrelevant and immaterial" and, in one case, contradicted by other evidence of record. RR at 6-9. None of Texan's objections undercut the ALJ's conclusion that Texas failed to show that it took all reasonable steps to ensure that R. 1 received nutrition adequate to his needs, however. Texan asserts that its failure to mention R. 1's weight loss and nutritional concerns in the October 3, 2006 MDS (noted on page 12 of the ALJ Decision) is irrelevant and immaterial since the summary of the care planning conference held the following day "clearly reflects that the weight loss issue was recognized and that approaches were developed to address the weight loss." RR at 7. As indicated above, however, substantial evidence supports the ALJ's conclusion that the interventions developed at the care planning conference were inadequate. Moreover, the MDS is an important assessment tool for nursing home residents. See generally 42 C.F.R. § 483.20. Since Texan admits it was aware of the weight loss and was concerned enough to hold a care planning conference to address the issue on October 4, 2006, this information should have been on the MDS completed the previous day, and Texan offers no explanation of why it was not. Without this important information, the MDS is inaccurate and unreliable with respect to R. 1's nutritional status. This further demonstrates that Texan did not take all reasonable steps to maintain acceptable nutritional parameters for R. 1.

Texan also objects that the ALJ's findings that a November 27, 2006 physician progress note does not mention R. 1's weight and that a December 14, 2006 progress note shows the physician's awareness of an 8% weight loss but contains no specific plan to address it (ALJ Decision at 13) are irrelevant and immaterial. We disagree. The ALJ found, and Texan does not dispute, that by October 1, 2006, approximately ten days after his admission, R. 1 had lost eight pounds. ALJ Decision at 14 (citing clinical records). Texan's weight loss policy required staff to notify R. 1's attending physician if he lost five pounds in a week. CMS Ex. 10, at 5. A nutritional assessment on October 17, 2006 again noted the eight-pound weight loss, and the dietician recommended referral to R. 1's physician. CMS Ex. 6, at 44-45. Yet there is no evidence that staff notified R. 1's physician until some time after November 27, 2006.

To the contrary, the fact that the physician's November 27, 2006 note contains no reference to R. 1's weight loss suggests that the physician was not aware of R. 1's weight loss at that time. Furthermore, although the physician's December 14, 2006 note reflects his awareness of R. 1's weight loss as of this later date, the note proposes no plan to address that serious issue. Texan's weight loss policy and the dietician's recommendation indicate that R. 1's attending physician was a necessary participant in any plan to address R. 1's weight loss. This is consistent with a CMS regulation that requires physician participation in development of comprehensive care plans. 42 C.F.R. § 483.20(k)(2)(ii). Clearly, Texan's failure to show that it notified R. 1's physician of R. 1's serious weight loss or tried to involve the physician in plans to address that medical issue is relevant and material to whether Texan took all reasonable steps to assure that R. 1 maintained acceptable parameters of nutrition.

Texan suggests that it was unnecessary to involve R. 1's physician in care planning for R. 1's weight loss, arguing that the physician was treating R. 1 for a UTI and made a judgment that this treatment was sufficient to address the weight loss. RR at 7-8. While the record shows that R. 1 was being treated for a UTI, it contains no evidence that the physician considered this a treatment for R. 1's weight loss, much less that he made a judgment that this would be a sufficient treatment for that purpose. Indeed, as discussed above, the record contains no evidence establishing any connection between the UTI and the weight loss.

The ALJ made a finding regarding the recorded weights for R. 1 during December 2006 and laboratory test results reflecting low albumin and protein, which, he noted, are indicative of possible malnutrition. ALJ Decision at 8. Texan acknowledges that "the weights and test results are correctly stated in the finding." RR at 7. However, Texan argues that the finding is irrelevant and immaterial because the December 14, 2006 progress note by R. 1's physician shows that he was aware of the weight loss and low albumin and protein levels, and because R. 1's weight increased somewhat in the third and fourth weeks of December. The facts found by the ALJ are relevant because they evidence R. 1's deteriorating nutritional parameters and the need for effective interventions by Texan. As the ALJ concluded, although there is some evidence that R. 1's weight increased somewhat during the last two weeks of December, "the recorded weight of 137 pounds [during those weeks] reflects a loss after admission of 13 pounds or 8.7 percent[,]" which is a severe weight loss under CMS's guidelines and Texan's weight loss policy. ALJ Decision

at 14. Furthermore, although the December 14, 2006 progress note shows that the physician had become aware of the issues by that date, the note, as discussed above, shows no plans to deal with them.

Texan's final objection is to the ALJ's finding that "emergency room records characterize [R. 1] as thin and cachetic (physical wasting with loss of weight and muscle mass due to disease)." ALJ Decision at 8-9, citing CMS Ex. 6, at 59. Texan objects that this evidence is "contradicted by the consulting physician's evaluation of [R. 1] in the emergency room on January 1, 2007 wherein the resident was described as a well-developed, well-nourished, very elderly white male." CMS Ex. 6, at 62. The Board has held that while an ALJ does not have to address every fact in the record, the ALJ should address evidence that conflicts with evidence supporting his or her findings of fact. Estes Nursing Facility Civic Center, DAB No. 2000, at 5 (2005). It is not clear why the ALJ here did not discuss the conflicting assessment cited by Texan. The ALJ could, however, reasonably have discounted that assessment or given more weight to the assessment of R. 1 as thin and cachetic since the latter is supported by other evidence of record whereas the assessment of R. 1 as well-nourished is not. Texan's own records show that by the time R. 1 went to the hospital, he had sustained a weight loss that put him 13 pounds under the floor of his ideal weight and is classified as "severe" under CMS's guidelines and Texan's policy. Moreover, as the ALJ noted, there is evidence that a surveyor observed R. 1 being weighed on December 29, 2006, and that his weight was actually 122 pounds rather than the 137 pounds listed in Texan's records. ALJ Decision at 14, citing CMS Ex. 3, at 4 (SOD). R. 1 also had laboratory test results consistent with possible malnutrition. Records showed that his meal consumption was variable, ranging from refused to good, with poor consumption for all meals during the periods November 20-25 and 27-29 and December 1-3 and 30, 2006. Texan points to no evidence of record, other than the inconsistent emergency room assessment, that would even arguably support a finding that R. 1 was well-nourished when he went to the emergency room.

3. Texan had ample opportunity to present evidence and make its case.

Texan asserts by way of a "[n]ote" that it was "prevented from making a complete record as to [R. 1]" because, Texan says, CMS did not submit R. 1's complete medical record and Texan assumed, based on the ALJ's November 13, 2007 partial granting of CMS's motion to dismiss, that it would not be allowed to present

evidence regarding the January 5, 2006 survey findings. RR at 14-15. Responding to the ALJ's rejection of essentially the same argument, ALJ Decision at 7-8, Texan states on appeal:

> It is correct that the ALJ's November 13, 2007 ruling on CMS's motion for partial dismissal stated that he would consider the facts regarding the alleged violation of 42 C.F.R. § 483.25(i)(1) from the January 5, 2007 survey but it was *only* because that violation was the basis of a proposed CMP. Because CMS subsequently dismissed all of the proposed CMPs against Texan, it was far from clear that the ALJ would consider evidence as to the alleged violation of 42 C.F.R. § 483.25(i)(1) as it related to whether or not Texan was out of compliance for the purpose of triggering the beginning of the mandatory [DPNA] period since the ALJ had previously dismissed that issue. It was not until the ALJ modified his ruling on CMS's motion to dismiss during the hearing that it was clear that evidence would be considered as to the January 5, 2007 survey for the purpose of determining whether the facility was out of compliance for the purpose of triggering the mandatory [DPNA].

RR at 14-15. Texan had no basis to assume that its opportunity to present evidence on the alleged findings of noncompliance with section 483.25(i)(1) would depend on which remedy was imposed based on those findings. Where a remedy listed in 42 C.F.R. § 488.406 is imposed, the right to a hearing is on the findings of noncompliance that led to imposition of the remedy, not CMS's choice of remedy, which is not subject to review. 42 C.F.R. § 498.3(b)(13); 42 C.F.R. § 488.408(g). Furthermore, at the beginning of the hearing, the ALJ engaged in a lengthy colloquy with both parties regarding their positions on CMS's new motion to dismiss based on its withdrawal of all CMPs. Tr. at 17-71. The ALJ then denied CMS's motion to dismiss, modifying his November ruling in the process. Tr. at 66-71, 483-85. If Texan believed at the time of that discussion that it had not had adequate notice of the issues to be addressed, it had ample opportunity to object to going forward or to request additional time to prepare its case.[6] Texan did not do either. Neither did Texan raise a notice issue in its

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[6] The regulations provide that the ALJ "gives the parties written notice at least 10 days before the scheduled [hearing] date . . . [that] informs the parties of the general and specific issues to be resolved at the hearing." 42 C.F.R. § 498.52.

post-hearing brief. Moreover, in that brief, Texan discussed the evidence related to R. 1 and the alleged noncompliance with section 483.25(i)(1) and asserted that it was in substantial compliance with that requirement, making essentially the same arguments it does here. Texan also submitted proposed findings of fact and conclusions of law consistent with its position.

Not until its post-hearing response brief did Texan raise a notice issue, in the context of objecting to certain of CMS's proposed findings of fact, arguing, in effect, that it had not anticipated all of the arguments CMS might advance. Texan asserted that if the ALJ considered the CMS proposed findings to which Texan objected, the ALJ should permit Texan to augment the clinical records of R. 1 with a new 9-page exhibit. Although the ALJ concluded that Texan's objections were baseless, he nonetheless admitted the newly proposed evidence as Petitioner Exhibit 15, over CMS's objection.[7] We conclude that the ALJ did not err in that rejection. Even if we had concluded the rejection was error, moreover, we would also conclude that any lack of adequate notice was harmless because Texan did not object to going forward with the hearing, Texan's post-hearing submissions reflect an understanding of the evidentiary issues and the ALJ granted Texan's post-hearing motion to admit new evidence, which was the only "relief" sought by Texan for the alleged inadequate notice.

4. Texan's burden of proof argument lacks merit.

The ALJ required CMS to make a prima facie case of noncompliance with section 483.25(i)(1) and, after finding CMS had made that case, required Texan to rebut CMS's case by a preponderance of the evidence, by showing that it took all reasonable steps to identify and address R. 1's weight loss and nutritional needs. On appeal, Texan asserts that the burden of proof applied by the ALJ is inconsistent with section 556(d) of the Administrative Procedure Act (APA), which provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof . . . ."[8] RR. at 1-6.

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[7] The ALJ excluded an article on cardiovascular disease attached to Texan's response because it was not "properly marked and offered as an exhibit at hearing" and was not relevant to his decision. ALJ Decision at 7-8. Texan does not appeal that ruling.

[8] The ALJ informed the parties that he would apply the burden of proof to which Texan now objects. Prehearing Notice

(Continued. . .)

Texan acknowledges that the burden of proof applied by the ALJ is consistent with the Board's decisions on the burden of proof in long-term care facility cases, none of which has been reversed on appeal on that issue. See ALJ Decision at 9-10, citing, e.g., Batavia Nursing and Convalescent Center, DAB No. 1904 (2004), aff'd, Batavia Nursing & Convalescent Ctr. v. Thompson, 129 F. App'x 181 (6th Cir. 2005).[9] In Batavia, the Board rejected a similar argument based on the APA, concluding that under the statutes and regulations governing nursing home participation in the Medicare program, a facility is the proponent of an order finding it in substantial compliance. Accordingly, we find no merit to Texan's burden of proof argument.

B. The ALJ did not adequately explain the basis for his conclusion that Texan did not show it returned to substantial compliance before July 16, 2007 and did not reach issues potentially material to that decision; accordingly, we remand for further proceedings and a revised decision.

CMS is required to impose a DPNA if a facility is found out of compliance does not correct its deficiencies and return to substantial compliance within 90 days after CMS first identified

(Continued. . .)

at 13. The ALJ also noted when the hearing began that Texan had not preserved an issue regarding this burden of proof in its prehearing brief, and Texan agreed that it had not done so. Tr. at 3. Texan also did not raise the issue in its post-hearing brief even though the ALJ opined that doing so might be sufficient to preserve the issue. Id.

[9] Texan characterizes the Eighth Circuit decision in Grace Healthcare of Benton v. U.S. Dep't of Health & Human Servs., 589 F.3d 926 (8th Cir. 2009), amended at 603 F.3d 412 (2009), as "strongly suggesting" that the burden of proof applied by the Board "goes against the clear wording of the APA." RR at 6. We disagree. The court decision clearly shows that the burden of proof issue was not even raised, much less decided, and the court's decision, as amended, merely vacated the portion of Grace Healthcare of Benton, DAB No. 2189 (2008) that upheld CMS's immediate jeopardy determination and the $3,500 per day CMP imposed for that determination. The court's discussion of Board decisions addressing the burden of proof was confined to a footnote and constitutes dicta.

the noncompliance. Section 1819(h)(2)(D) of the Social Security Act (Act); 42 C.F.R. § 488.417(b)(1). After the July 22, 2007 revisit survey, the DADS surveyors prepared a CMS 2567B on which they identified July 16, 2007 as the date Texan completed correcting its deficiencies under section 483.25(i)(l).[10] Pet. Ex. 5, at 2. The ALJ held that it was Texan's burden to "affirmatively establish . . . that it came into compliance with 42 C.F.R. § 483.25(i)(l) . . . earlier than the July 16, 2007 date found by the state agency and adopted by CMS." ALJ Decision at 16. The ALJ then concluded that the evidence cited by Texan was insufficient to meet that burden and, therefore, that "CMS was required to impose a statutory DPNA effective April 5, 2007 through July 16, 2007 . . . ." Id.

Texan argues on appeal that the DPNA should not have taken effect because Texan corrected its deficiency under section 483.25(i)(l) and returned to substantial compliance by February 16, 2007, less than 90 days after its noncompliance was first identified on January 5, 2007. RR at 15-21. As evidence, Texan cites its POC for the January 5, 2007 survey, which lists February 16, 2007 as the date Texan would complete correcting the deficiency under section 483.25(i)(l), and testimony by its former Director of Nursing (DON). Id. The DON responded "[y]es" when Texan's counsel asked her whether the corrective actions listed in the POC "would have been completed" by the date on the POC. Tr. at 427-428. Texan also cites the fact that none of the surveys after the January 5, 2007 survey found a repeat of the section 483.25(i)(l) deficiency or any of the other deficiencies cited on that survey. RR at 16-17. An overarching theme for all of its arguments is Texan's contention that the ALJ erroneously required Texan to affirmatively establish that it returned to substantial compliance before the DPNA took effect on April 5, 2007, rather than requiring CMS to prove that Texan failed to return to substantial compliance by that date. Id. at 15-16.

We conclude that the ALJ correctly assigned Texan the burden of proving it corrected its deficiencies and achieved substantial compliance on a date earlier than determined by CMS. We also reject Texan's argument that the fact that no new deficiencies were found on the complaint surveys conducted after the January 5, 2007 survey is evidence that it corrected its noncompliance with section 483.325(i)(l) by February 16, 2007. However, for

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[10] The title of the form is "Post-certification Revisit Report". CMS refers to the forms as the "CMS Form 2567B", and we do likewise for brevity's sake.

the reasons stated below, we find it necessary to remand the decision to the ALJ with instructions to issue a revised decision that: 1) adequately explains the basis for his conclusion that Texan did not establish a compliance date prior to July 16, 2007; 2) decides whether Texan was in substantial compliance with section 483.20(k)(3)(i) on the February 6, 2007 survey and, if not, whether it returned to substantial compliance with that requirement before July 16, 2007; and 3) clarifies whether the DPNA, assuming it took effect at all, was in effect from April 5, 2007 through July 16, 2007 or April 5, 2007 through July 15, 2007, the alternative dates stated in the ALJ decision.

1. *The ALJ correctly held that a facility has the burden to prove it returned to substantial compliance prior to the date CMS found and Texan did not meet that burden merely by stating an earlier correction date in its POC.*

The ALJ correctly held that once CMS finds noncompliance and imposes a remedy, the remedy continues until the facility establishes that it has achieved substantial compliance or is terminated from the program. 42 C.F.R. §§ 488.440(a), 488.454(a); Chicago Ridge Nursing Center, DAB No. 2151 (2008)(and cases cited). The Board has "consistently rejected the contention . . . that CMS must affirmatively prove that noncompliance exists on each day that a remedy is in effect after the first day of noncompliance." Chicago Ridge at 27, citing, e.g., Cal Turner Extended Care Pavilion, DAB No. 2030 (2006).

The ALJ also correctly held that Texan's mere representation in its POC that it would complete correction of the deficiency under section 483.25(i)(1) by February 16, 2007 does not demonstrate that Texan, in fact, completed those corrections or returned to substantial compliance by that date. A POC is "a plan developed by the facility and approved by CMS or the survey agency that describes the actions the facility will take to correct deficiencies and specifies the date by which those deficiencies will be corrected." 42 C.F.R. § 488.401. However, completion of a POC "does not per se imply correction of prior deficiencies." Warren N. Barr Pavilion of Illinois Masonic Medical Center, DAB No. 1705, at 5 (1999). A facility's correction of deficiencies and return to substantial compliance must be verified by CMS or the State "based upon a revisit or after an examination of credible written evidence that [CMS or the State] can verify without an on-site visit or . . . CMS or the State terminates the provider agreement . . . ." 42 C.F.R. § 488.454(a); Sunbridge Care and Rehabilitation for Pembroke,

DAB No. 2170 (2008), aff'd, Sunbridge Care & Rehabilitation for Pembroke v. Leavitt, 340 F. App'x 929 (4th Cir. 2009); accord Cross Creek Health Care Center, DAB No. 1665, at 3 (1998)(stating that even when a POC is accepted, a facility "is not regarded as in substantial compliance until [CMS] determines, usually through a revisit survey, that the deficiency no longer exists."); see also Warren N. Barr Pavilion at 6 n. 3 ("Substantial compliance depends on a factual assessment that the preexisting deficiency has been eliminated, not merely on determining that the POC has been complied with and no new deficiencies discovered."). However, that does not necessarily mean that the date of the revisit survey is the date that the facility returned to substantial compliance. Foxwood Springs Living Center, DAB No. 2294, at 7 (2009)(stating that a facility should be determined to have returned to substantial compliance and remedies should end on the date the facility actually achieved substantial compliance).

The record contains no evidence that CMS or DADS verified that Texan completed the corrective actions for section 483.25(i)(1) listed on its POC or returned to substantial compliance by February 16, 2007, or any date before the DPNA took effect on April 5, 2007. Texan points to the fact that none of the complaint surveys after the January 5, 2007 survey found a repeat of the section 483.25(i)(1) deficiency or any of the other deficiencies cited on that survey. RR at 16-17. However, that point is irrelevant because, as Texan concedes, DADS conducted the February 6, April 19 and June 22, 2007 surveys to investigate complaints, not to determine whether Texan had corrected the deficiencies on the January survey or to determine whether it had achieved compliance. RR at 16-17.

Texan also does not dispute that CMS and DADS made no affirmative determination that Texan had corrected the deficiency under section 483.25(i)(1) and returned to substantial compliance until the July 22, 2007 survey. In Meadowbrook Manor, DAB No. 2173 (2008), aff'd sub nom. on other grounds, Butterfield Health Care II, Ind. v. Johnson, No. 1:08-cv-03604, (N.D. Ill. June 16, 2009), the Board rejected the facility's argument that a Post-certification Revisit Report found the facility in substantial compliance where the Report contained no statement to that effect, even though the report indicated that a deficiency from the prior survey had been corrected. Here, there was no report even stating that the deficiency under section 483.25(i)(1) had been corrected, until after the July 22, 2007 revisit survey. As CMS points out, "[o]nly after [that] survey did [DADS] complete and send Texan a CMS Form 2567B 'to show those deficiencies previously reported

on the CMS 2567, [SOD and POC] that have been corrected and the date such corrective action was accomplished.'" CMS Response at 21, citing Pet. Ex. 5, at 2, 4, 6, 8. The CMS Form 2567B indicates that the deficiencies under section 483.25(i)(1) were corrected on July 16, 2007. CMS asserts that had the surveyors made a determination that Texan corrected its deficiency under section 483.25(i)(1) before that date, DADS or CMS would have communicated that determination to Texan via a CMS Form 2567B. CMS Response at 21. Texan does not dispute that assertion.

In addition to the CMS Form 2567B, the record contains Report of Contact forms put into evidence by Texan. The forms completed after the February 6, April 19, and June 22 surveys all state "deficiencies cited (health)" and "continue previous action," indicating that the surveyors did not find Texan in substantial compliance on those surveys. Pet. Ex. 2, at 1; Pet. Ex. 3, at 1; Pet. Ex. 4, at 1. Only the Report of Contact form completed after the July 22, 2007 survey states "no deficiencies cited (health)" and "substantial compliance (health)." Pet. Ex. 5, at 1. CMS asserts that these forms constitute additional evidence that DADS found continuing noncompliance until July 16, 2007, and Texan does not address this assertion.

2. The ALJ did not sufficiently explain his conclusion that Texan failed to rebut the July 16, 2007 correction date.

Texan argues on appeal that the July 16, 2007 correction date on the CMS Form 2567B is not credible evidence absent supporting evidence, at least in the face of the testimony by its former DON regarding the correction date on its POC. Texan argues:

> In light of the total absence of any evidence or testimony that would bolster or support what appears to be a totally arbitrary differentiation in the dates of correction of the three deficiencies [from the January 5 survey], the mere insertion of July 16, 2007, on the CMS 2567B is simply not credible evidence on which to base a conclusion that Texan remained out of compliance with 42 C.F.R. § 483.25(i)(1) until that date, particularly when such evidence has been rebutted by the live testimony of [Texan's] former DON.

RR at 19. We note that Texan did not argue before the ALJ that the CMS Form 2567B was not credible evidence of the date its corrections were completed absent "bolstering" evidence. Instead, Texan argued that CMS put on no evidence at all to support a July 16, 2007 correction date:

> CMS put on no evidence whatsoever that supports a finding that F-325 was not corrected as of the date listed in its [POC], e.g., 2/16/07. Therefore, [CMS] failed to carry its burden of putting on a prima facie case that F-325 was not "substantially corrected" by 2/16/07, the date of completion of corrective action on the 2567 from the January 5, 2007 visit.

Pet. Brief at 7 (cited in ALJ Decision at 15-16). The ALJ responded to that argument by stating that Texan misunderstood the burden of proof and that Texan had the burden of establishing that it corrected its deficiencies and returned to substantial compliance on a date earlier than that determined by CMS. Id. The ALJ cannot be faulted for not addressing an argument (that CMS must submit evidence to "bolster" the date on the CMS Form 2567B) that was not specifically raised below. Nonetheless, the ALJ should have discussed more completely the argument Texan did make below, that CMS put on no evidence whatsoever that supports finding July 16, 2007 the correction date. The ALJ should have discussed the evidence supporting CMS's choice of the July 16, 2007 date and weighed that evidence against the evidence Texan relied on for the February 16, 2007 date. If his decision on that issue rested on a determination regarding the credibility of the DON's testimony, the ALJ should have so stated and explained the basis for that determination. In our view, it was not sufficient for the ALJ to merely cite the case law giving Texan the burden of proof where Texan was effectively arguing, as it does more precisely on appeal, that even assuming such a burden, CMS was required to make an evidentiary response once Texan put on evidence (the testimony of its DON) that Texan claims supports an earlier correction date.[11]

The ALJ Decision does contain some discussion of the DON's testimony. However, we find that discussion inadequate to either affirm or reverse the ALJ's conclusion on the issue of whether Texan had met its burden to show it returned to substantial compliance on February 16, 2007. The ALJ found Texan's reliance on the DON's testimony "misplaced". ALJ Decision at 16 (citing Tr. at 427-28). He described the DON's testimony as "conclusory," and found "her mere assertion that

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[11] We note that the CMS Form 2567B does not indicate any reason why the DADS surveyors determined that July 16, 2007 was the correction date. Nor does the ALJ Decision discuss any testimonial or other documentary evidence from CMS explaining that determination.

Petitioner's [POC] was fully implemented by February 16, 2007 (Tr. 427-28) to be insufficient evidence to rebut the presumption in favor of the July 16, 2007 date." ALJ Decision at 16. It is unclear whether the ALJ intended his comments on the DON's testimony to be a credibility determination, a finding about the weight of her testimony, or both. If the ALJ was weighing the evidence, it is not clear from his decision what he meant by the term "conclusory"; nor is it clear precisely what evidence he weighed the DON's testimony against and why he gave the other evidence controlling weight. For example, the ALJ Decision does not specifically discuss the issue of what weight, if any, he afforded the CMS Form 2567B or the Notice of Contact forms or how any weight he afforded those documents compares to the weight, if any, he afforded the DON's testimony and why.

In addition, the ALJ stated, "Petitioner offered me no evidence that shows the specific steps that were taken at its facility to complete its plan of correction (P. Ex. 1 at 4-6) in order to cure this deficiency." ALJ Decision at 16. However, the exhibit cited by the ALJ (the SOD/POC for the January 5, 2007 survey) sets forth both the deficiency and the corrective actions Texan proposed to cure it, and the DON's testimony refers to those corrective actions. Tr. at 427. Yet, the ALJ does not discuss this aspect of her testimony.

For the reasons stated, we find the ALJ's discussion of the evidence on the correction date issue insufficient to determine whether to uphold or reverse his conclusion that Texan did not prove it returned to substantial compliance earlier than July 16, 2007.

3. *The ALJ should decide whether Texan was out of compliance with section 483.20(k)(3) on the February 6, 2007 survey and, if so, whether Texan proved that it returned to substantial compliance earlier than the July 16, 2007 date found by CMS for that deficiency.*

As the ALJ Decision notes, CMS found Texan out of substantial compliance with multiple requirements on the February 6, 2007 survey, including section 483.20(k)(3)(i). ALJ Decision at 4. The parties put on evidence regarding the alleged noncompliance with section 483.20(k)(3)(i). The ALJ concluded that he need not reach CMS's findings of alleged noncompliance on the February 6, 2007 complaint survey, or any of the subsequent complaint surveys, because of his conclusion that Texan failed to show it was in substantial compliance with section 483.25(i)(1) at the time of the January 5, 2007 survey and that

it achieved substantial compliance with that requirement before July 16, 2007.

The Board has upheld ALJ discretion not to reach deficiencies that the ALJ concludes are not material to his or decision. See Alexandria Place, DAB No. 2245, at 27 n. 9 (2009)(citing decisions). Here, however, Texan's alleged noncompliance with section 483.20(k)(3)(i) on the February survey is potentially material to when Texan returned to substantial compliance. DADS conducted the July 22, 2007 revisit to determine whether Texan had corrected the deficiencies cited on all of the complaint surveys and had returned to substantial compliance. Pet. Ex. 5 at 1. In addition to recording July 16, 2007 as the date Texan completed correcting its alleged noncompliance with section 483.25(i)(1), the surveyors recorded July 16, 2007 as the date Texan completed correcting its alleged noncompliance with section 483.20(k)(3)(i). Id. at 2, 4. If the ALJ (or the Board on review) were to determine that Texan completed correction of its noncompliance with section 483.25(i)(1), before the DPNA took effect, the ALJ or the Board would still be required to uphold imposition of the mandatory DPNA if either concluded that Texan was not in substantial compliance with section 483.20(k)(3)(i) at the time of the February 6, 2007 survey, and did not correct that noncompliance before the July 16, 2007 date found by DADS and CMS. Under these circumstances, we conclude that the ALJ must reach the issue and should do so on remand.

4. *If the ALJ's revised decision still concludes that Texan did not return to substantial compliance in time to avoid the DPNA, the ALJ should clarify the ambiguity in his decision as to whether the DPNA continued in effect through July 15 or July 16, 2007.*

In his decision, the ALJ states that Texan "did not show a return to substantial compliance earlier than July 16, 2007" and further concludes that CMS, therefore, "was required to impose a statutory DPNA effective April 5, 2007 through July 16, 2007 . . . ." ALJ Decision at 16. However, when a DPNA is imposed (in the absence of repeated instances of substandard quality of care) the regulations provide that "payments . . . resume prospectively on the date that the facility achieves substantial compliance, as indicated by a revisit or written credible evidence acceptable to CMS . . . ." 42 C.F.R. § 488.417(d). See also 42 C.F.R. § 488.454 (stating that remedies continue until "[t]he facility has achieved substantial compliance . . . .") Thus, the ALJ's statement that the DPNA was in effect from April 5 through July 16, 2007, implies that Texan was found in substantial compliance the day after July 16, 2007 or July 17,

2007, not July 16, 2007. Adding further confusion is the ALJ's statement earlier in his decision that "CMS was required to impose a statutory [DPNA] effective from April 5, 2007 through July 15, 2007." ALJ Decision at 1. Applying the regulations cited above, this statement assumes a finding that Texan achieved substantial compliance on July 16, 2007.

The record, as well, is not entirely clear on this issue. CMS originally found, based on the July 22, 2007 revisit, that Texan returned to substantial compliance on July 22, 2007, and that the DPNA, therefore, was in effect from April 5 through July 21, 2007. ALJ Decision at 4, citing CMS Ex. 1 (August 2, 2007 notice letter). However, CMS subsequently revised the final effective date of the DPNA to July 16, 2007 based on DADS's finding, which CMS adopted, that Texan completed the correction of its noncompliance with section 483.25(i)(1) on July 16, 2007. CMS Ex. 44 (CMS letter of March 3, 2008); accord, CMS Ex. 43 (CMS letter of March 4, 2008); Pet. Ex. 5, at 2. Although CMS did not state a new substantial compliance date in these letters (a date other than the July 22, 2007 date cited before the remedies were revised), the statement that the DPNA was in effect through July 16, 2007 assumes a compliance date of July 17, 2007.[12] The ALJ should resolve this issue on remand, unless he concludes that Texan achieved substantial compliance on February 16, 2007 as alleged by Texan and that the DPNA, therefore, did not take effect at all.

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[12] In its response, CMS incorrectly states that the ALJ concluded that Texan did not prove "that it [c]orrected the [v]iolation of 42 C.F.R. § 483.25(i)(1) [p]rior to July 17, 2007 . . . ." CMS Response at 20. The ALJ never stated that July 17, 2007 was the compliance date although, as discussed above, his conclusion that the DPNA continued through July 16, 2007 implies that it was.

Conclusion

For the reasons stated above, we affirm FFCL 1 in the ALJ Decision. We vacate FFCLs 2, 3, and 4 and remand for further proceedings and a revised decision that addresses the issues we have raised in this decision about those FFCLs. The ALJ is not required to take additional evidence below but may do so as he deems necessary to make an informed decision on any of the outstanding issues.

/s/
Judith A. Ballard

/s/
Stephen M. Godek

/s/
Sheila Ann Hegy
Presiding Board Member