Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: March 28, 2007
Emerald Shores Health & Rehabilitation Center,	
Petitioner,	Civil Remedies CR1385 App. Div. Docket No. A-06-50
- v. -	Decision No. 2072
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

The Centers for Medicare & Medicaid Services (CMS) appeals the December 22, 2005 decision of Administrative Law Judge (ALJ) Steven T. Kessel overturning CMS's imposition of a $10,000 per day civil money penalty (CMP) and the denial of payment for new admissions on Emerald Shores Health & Rehabilitation Center (Emerald Shores). Emerald Shores Health & Rehabilitation Center, DAB CR1385 (2005) (ALJ Decision). CMS imposed those remedies based on findings by the state survey agency that Emerald Shores failed to provide adequate pest control and to protect residents, after a resident had been stung 40 times by fire ants. The surveyors also concluded that Emerald Shores failed to administer medication prescribed for the resident who was stung, failed to provide the resident's family with adequate information about the resident's condition, and prevented a family member from speaking with state surveyors. CMS determined that Emerald Shores was not in substantial compliance with Medicare participation requirements regarding pest control, neglect of residents, and resident rights, and that the noncompliance with two of those requirements posed immediate jeopardy to resident health and safety. The ALJ concluded that Emerald Shores was complying substantially with the first two requirements and that CMS had

not made a prima facie case that Emerald Shores failed to comply substantially with the third requirement.

For the reasons explained below, we reverse the ALJ's conclusion that Emerald Shores was in substantial compliance with the participation requirement pertaining to pest control because it was not supported by substantial evidence on the record as a whole. We uphold his conclusions regarding the other deficiencies. We also conclude that a $10,000 per day CMP that CMS imposed is not reasonable, but that a CMP of $8,500 per day is reasonable, and we sustain CMS's determination to impose a DPNA.

Applicable Legal Provisions

Long-term care facilities participating in the Medicare and Medicaid programs are subject to 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. "Deficiency" means a facility's failure to meet a participation requirement specified in the Act or in subpart B of 42 C.F.R. Part 483. Id.

A long-term care facility found not to be in substantial compliance is subject to various enforcement remedies, including CMPs. 42 C.F.R. §§ 488.402(c), 488.408. CMS may impose CMPs ranging from $50-$3,000 per day for one or more deficiencies that do not constitute "immediate jeopardy" but that either cause actual harm or create the potential for more than minimal harm, and from $3,050-$10,000 per day for deficiencies constituting immediate jeopardy. 42 C.F.R. § 488.438(a). A per-day CMP may start to accrue as of the date that the facility was first out of compliance, as determined by CMS or the state, and continues until the date the facility achieves substantial compliance. 42 C.F.R. § 488.440(a),(b).

Additionally, CMS may impose a denial of payment for new admissions (DPNA) for any deficiency, except when a facility is in substantial compliance. 42 C.F.R. §§ 488.408(d)(3), 488.417; Desert Hospital, DAB No. 1623, at 5-6, n.4 (1997). A DPNA continues until the date the facility achieves substantial

compliance. 42 C.F.R. §§ 488.454(a), 488.417(d); section 1819(h)(3) of the Act.

Standard of Review

Our standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. Our 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 for Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs, www.hhs.gov/dab/guidelines/prov.html (DAB Appellate Review Guidelines); Golden Age Nursing & Rehabilitation Center, DAB No. 2026 (2006).

Before the ALJ, a facility must prove substantial compliance by the preponderance of the evidence once CMS has established a prima facie case that the facility was not in substantial compliance with one or more of the participation requirements. Batavia Nursing and Convalescent Center, DAB No. 1904 (2004), aff'd, 129 Fed.Appx. 181 (6th Cir. 2005); Cross Creek Health Care Center, DAB No. 1665 (1998).

Case Background[1]

Emerald Shores is a skilled nursing facility located in Florida. On July 7, 2004, Emerald Shores' staff discovered that a resident who was dependent on facility staff for activities of daily living had been stung approximately 40 times by fire ants while in bed. Facility staff removed the resident from bed, showered the resident to remove ants, and provided medical treatment.

The following day, members of a state survey team who were conducting an annual survey of Emerald Shores were informed of the stinging incident by their home office, which had learned about it through an anonymous complaint. The surveyors examined the resident, who is identified in the ALJ Decision as Resident # 1, and spoke to facility staff and to members of the resident's family. On July 16, 2004, the state survey agency returned to conduct a complaint survey relating to the stinging incident. The surveyors inspected Emerald Shores' facility and grounds and interviewed facility staff as well as an employee of a pest

[1] The following background information is drawn from the ALJ Decision and the record before him and summarized here for the convenience of the reader, but should not be treated as new findings.

control company with which Emerald Shores then contracted for pest control services. ALJ Decision at 3; CMS Exhibits (Exs.) 2, 23. The surveyors conduced a revisit survey of the facility on July 28, 2004.

The surveyors found that, as of July 16, Emerald Shores did not have an adequate pest control program, despite the warnings that should have been taken from the July 7 incident, as well as prior ant-related incidents. The surveyors also found that Emerald Shores staff engaged in problematic conduct in the days following the stinging incident. Specifically, the surveyors found that the facility failed to administer to the resident all of the doses of medication that had been prescribed in response to the stinging incident. They also found that facility staff failed to provide complete information about the resident's condition to a member of the resident's family. The staff had reported the resident's stings and condition to her daughter, who then asked to be kept informed about the resident's condition, but surveyors concluded that the staff did not document whether specific details of the resident's treatment and condition were conveyed to the daughter. Finally, the surveyors further determined that on July 8, the day after the stinging incident, the daughter had called the facility seeking to speak to the state surveyors who were at the facility, but facility staff declined to connect the family member with the surveyors because they were in a meeting, and instead took a message. CMS Ex. 2.

Based on the state survey agency findings, CMS determined that Emerald Shores was not in substantial compliance with regulations requiring nursing facilities to (1) maintain an effective pest control program, (2) develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents, and (3) post information about how to contact client advocacy groups such as state survey agencies and provide residents with information on how to file complaints with the state survey agency concerning, among other things, resident abuse and neglect. CMS determined that Emerald Shores was not in substantial compliance for the period July 16 through July 27, 2004, and that Emerald Shores' noncompliance with the first and second requirements posed immediate jeopardy to residents of the facility. CMS imposed a CMP of $10,000 per day for the period July 16 through July 27, 2004, and DPNA for the period July 22 through July 27, 2004. Emerald Shores requested a hearing before an ALJ pursuant to 42 C.F.R. § 488.408(g).

The ALJ made three numbered findings of fact and conclusions of law (FFCLs), one for each of the three regulatory requirements with which CMS determined that Emerald Shores had failed to

comply substantially.[2] CMS took exception to each of these FFCLs. We address each individually below.

Analysis

I. The ALJ's determination that Emerald Shores was in substantial compliance with the pest control regulation, 42 C.F.R. § 483.70(h)(4), is not supported by substantial evidence.

A. The ALJ Decision

In FFCL No. 1, the ALJ held that "[t]he preponderance of the evidence establishes that Petitioner was complying substantially with the requirements of 42 C.F.R. § 483.70(h)(4) on and after July 16, 2004." ALJ Decision at 3. The cited regulation states:

> Sec. 483.70 Physical environment.
>
> The facility must be designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel and the public.
>
> * * *
>
> (h) Other environmental conditions. The facility must provide a safe, functional, sanitary, and comfortable environment for the residents, staff and the public. The facility must—
>
> * * *
>
> (4) Maintain an effective pest control program so that the facility is free of pests and rodents.

The ALJ stated that the sole issue before him was whether Emerald Shores was complying with the regulation as of July 16, 2004, the beginning date for the CMP that CMS imposed. He determined that Emerald Shores was in compliance as of July 16, 2004, because, as of that date, Emerald Shores was doing all that a facility

---

[2] The ALJ found that CMS was no longer relying on the survey findings that the facility had failed to inform a family member of the resident's condition.

reasonably could be expected to do to protect its residents against fire ants.

The ALJ found, and CMS does not dispute, that fire ants are ubiquitous in the Southern United States, that no pest control program will ensure that an environment is completely ant free, and that no nursing facility can guarantee to its residents that they will never be stung by fire ants. The ALJ thus inquired whether Emerald Shores "did all that it reasonably could be expected to do to prevent ant infestation and to protect its residents against ant stings." ALJ Decision at 5.

As a guide to the measures that a facility can take to combat fire ants, the ALJ relied on the testimony of CMS's expert witness, Michael E. Merchant, Ph.D., a professor of entomology and an expert in the study of fire ants and their eradication and control. Dr. Merchant described a method of fire ant eradication and control which he called integrated pest management (IPM). CMS Ex. 19, at 1-2. IPM, as Dr. Merchant used the term, is a progressive approach to pest control using the least hazardous chemicals and techniques possible with a multi-level approach that uses cultural, biological and chemical methods, and which advocates preventing the problems caused by unacceptably large numbers of fire ants, rather than eliminating all ants from the ecosystem. CMS Exs. 8, 19. Dr. Merchant identified the following measures that the facility should have taken as part of a fully-implemented IPM program:

- requiring regular pest management inspection reports from a pest control service;
- aggressive caulking and sealing actions after ant sightings, and documented correction of all conditions conducive to ant entry;
- broadcast application of facility premises with ant bait;
- regular inspections and regular mound treatment of visible mounds within 50 feet of the facility;
- additional use of a barrier treatment around the facility's perimeter;
- a verifiable staff training program to ensure that new staff are aware of their role in a facility's pest management program.

ALJ Decision at 5, citing CMS Ex. 19.

The ALJ characterized Dr. Merchant's testimony as identifying "three critical elements of an integrated fire ant control program." They are: (1) extensive surveillance of facility

premises and grounds in order to identify the presence of ants; (2) effective documentation of problems accompanied by coordination of ant control efforts; and (3) an effective eradication program which consists of more than sporadic spraying of visible infestation, such eradication to include a barrier insecticide application in order to deny ants access to a facility. Id. at 5-6.[3] The ALJ then found that the weight of the evidence established that as of July 16, 2004, Emerald Shores had implemented all three "critical elements" (regardless of whether Emerald Shores had an effective IPM program when the resident was stung by fire ants on July 7, 2004, an issue that the ALJ declined to address).

The ALJ found that Emerald Shores had implemented the first of the three "critical elements" - extensive surveillance of facility premises and grounds in order to identify the presence of ants - through frequent inspections of the exterior and interior of its facility, communication among staff concerning possible ant infestation, and education of residents and staff in steps necessary to prevent ant infestation. Id. at 7. The ALJ found that beginning with the opening of the facility in 2000, Emerald Shores had contracted for monthly inspection and treatment of the exterior and interior of the facility and spot treatment when ants were observed on the premises. The pest control service, in its service agreement, characterized this as integrated pest management. Id. at 6; P. (Petitioner) Ex. 11.[4] The ALJ noted that between July 7 and July 12, 2004, Emerald Shores drafted and implemented an "action plan" that included inspections of the outside perimeter of the facility, daily "guardian angel" rounds of residents' rooms to inspect for ant infestations, guidance to residents in keeping food in sealed

---

[3] The ALJ accepted all of Dr. Merchant's testimony about what would constitute an effective pest control program, but summarized Dr. Merchant's specific recommendations into these three "critical elements." The ALJ's summary can be accepted as an accurate reflection of the testimony only if it is read to include all of the specifics discussed by Dr. Merchant within these three categories. As we discuss below, the ALJ failed to consider all of the requisite IPM aspects when he considered the three so-called "critical elements."

[4] We find, however, that the evidence on the record as a whole does not support a conclusion that the characterization meant that the services actually provided met the definition of IPM put forward by Dr. Merchant.

containers, and education of staff in pest control protocol. Id. at 7.

The ALJ found that Emerald Shores had implemented the second critical element of an IPM program – effective documentation of problems accompanied by coordination of ant control efforts – by beginning comprehensive documentation of its insect control efforts after the July 7, 2004 stinging incident, inspecting rooms three times per shift, and providing "in-service" training to staff in insect prevention. Id.

The ALJ found that Emerald Shores had implemented the third critical element of an IPM program – an effective eradication program – through "aggressive treatment activities" including treating "[t]he entire grounds" of the facility for fire ants twice between July 7 and 16, 2004, and obtaining a "barrier treatment" of the entire facility on July 16, 2004. Id. The ALJ also noted that the facility's action plan included daily spreading of bait, "calling the extermination service to come to the facility as soon as possible," and continuing the monthly treatment that Emerald Shores had originally contracted for in 2000. Id. at 6-7.

On appeal, CMS agrees that a facility can demonstrate compliance with the regulation by demonstrating that it has successfully implemented the IPM program Dr. Merchant described, but disputes that the facility had in fact fully implemented such an IPM program prior to July 16, 2004. CMS Br. at 8-10, 12, 15. CMS also argues that the ALJ failed to address evidence of the continued presence of significant numbers of ants and other pests in and around the facility after July 16, 2004, which demonstrated that Emerald Shores did not have an effective pest control program. CMS relies on testimony it presented before the ALJ that the presence of significant numbers of ants is inconsistent with an effective, properly-implemented IPM system. CMS also points to measures that Emerald Shores adopted after July 16 and before July 28, 2004 as evidence that, although some corrective steps may have begun soon after the July 7 stinging incident, some important improvements were not completed until the date CMS determined that Emerald Shores was in substantial compliance. Emerald Shores argues that it implemented an effective pest control program by July 16 by completing all of the critical elements of an IPM program as described by Dr. Merchant. P. Br. at 10-11.

B. Discussion

1. Evidence which the ALJ failed to consider shows the presence of ants and other pests in significant numbers between July 16 and July 28, 2004.

The regulation's requirement to maintain an effective pest control program "so that the facility is free of pests and rodents" suggests a strict standard that approaches holding a facility absolutely liable for the presence of pests. We do not adopt that standard here, as CMS does not dispute the ALJ's findings that no pest control program will ensure that an environment in the Southern United States is completely ant free, and that no nursing facility can guarantee that its residents will never be stung by fire ants. Instead, we accept for the purposes of this decision, as did both parties, the ALJ's determination that a facility may show substantial compliance with the requirement to maintain an effective pest control program by implementing all of the elements of the type of IPM program described by Dr. Merchant, as Emerald Shores claimed it did.

A successful IPM program, as described by Dr. Merchant, includes measures designed to reduce the presence of ants and the likelihood of encountering them in and around a facility. ALJ Decision at 5-6, citing CMS Ex. 19, at 5. Dr. Merchant testified that, if Emerald Shores had an effective IPM program in place for fire ants, he would expect to see "rare, but occasional fire ants outside of the facility," and would not expect to see "major problems indoors with fire ants or feral ants, or German cockroaches, or other pests . . . ." Transcript of ALJ hearing (Tr.) at 35. Thus, the presence of ants in significant numbers can demonstrate that a facility does not have an effective IPM program.[5]

The ALJ, however, disregarded evidence of numerous sightings of ants and ant activity throughout the period of July 16 - 27, 2004, both inside Emerald Shores' facility and around its immediate exterior, which establish that Emerald Shores' pest control program was not effective, and that this deficiency had a

---

[5] We note that the ALJ Decision did not rule out the possibility that a pest control program other than an IPM program might be effective, as required. Evidence of significant numbers of ants and other pests, however, shows lack of <u>any</u> effective program, even assuming there are reasonable alternatives to an IPM program.

potential for more than minimal harm to residents. CMS presented testimony and records showing significant presence of ants throughout the relevant period. Emerald Shores, far from rebutting this evidence, submitted records of its own staff and its pest control service that corroborate the scope of the problem. This evidence includes the following:

- Emerald Shores' pest control logs, maintenance round notes and other notes by Emerald Shores' maintenance supervisor and other staff show that the staff observed active ant "beds" and "mounds" outside of room 507, near patio tables, in a courtyard, near the rail of a canopy, near the building foundation, near a sidewalk, near air conditioning units, at the edge of flower bed outside facility courtyard door, near a bush on the "500 side" of the building, and near parking lots, as well as ants on the window ledge of room 806. Emerald Shore staff treated these beds and mounds, observed them for signs of continued ant activity, and re-treated those that were still active. The records also show that staff reported seeing ant beds and mounds, without stating whether they were active or new, outside of the dining room, outside of rooms 406 and 502, and outside of the "600 hall;" these beds were treated as well. Emerald Shores staff reported these sightings on various dates from July 18 through July 27, 2004. CMS Ex. 29, at 9-14, 16, 20-24; P. Ex. 21, at 10-13.

- Those records, and Emerald Shores' reports of daily "guardian angel" rounds of resident rooms, also record sightings of ants and spiders inside the building during the relevant period. These include sightings of spiders in hallways and rooms and sightings of ants in rooms including rooms 200, 201, 202, 203, 204, 210, 511, 513, 515, 804, 806 and 810, in the activity room, and in a store maintained in the facility, on various dates during the relevant period.[6] CMS Ex. 29, at 1, 2, 6, 11, 15; P. Ex. 22, at 4, 39, 40, 58.

---

[6] The sighting reports refer to both fire ants and other kinds of ants. Even when not specifically identified as fire ants, the presence of ants of any kind, as well as other pests, inside the facility in significant numbers would, as Dr. Merchant testified, undercut the claim that an effective IPM program was in place. Tr. at 35.

- Facility pest control service tickets show sightings of "little black ants" in rooms 202, 204 and 810 on July 23 and describe the floor underneath the radiator of room 509 and the "country store by window" as issues or areas that required additional treatment. CMS Ex. 29, at 3-5. Correspondence dated July 20 from Panama Pest Services, which became Emerald Shores' pest control shortly after the July 7 stinging incident, states that Panama's inspection of the premises revealed "little black ants" in a few resident rooms and German roaches in the kitchen facility, as well as fire ant populations in the lawn areas of the facility and in the foundation perimeter. CMS Ex. 27, at 2-4. Panama cautioned that the fire ant populations seen outside the facility "could result in future problems should they enter the main structure, posing a threat to your residents." Id.

- One of the surveyors, Cynthia Pettis, testified that she saw evidence of ants at different spots around the exterior of entire building during an inspection of the building perimeter with the facility's then-administrator on July 16, but that she recorded only two areas of ant activity in the Statement of Deficiencies (SOD) (the survey report that state agencies complete using a CMS form) because she felt they were the most egregious. Tr. at 67. Her testimony is consistent with her notes and with her testimony at a state agency hearing that there were ants around air conditioning units and "hundreds of ants" where laundry vents discharged lint into the yard, as well as reports of ants found in rooms 202 and 804 and in the dining room during the period of July 24-26. P. Ex. 28, at 32-33; CMS Ex. 22, at 2-4.

These numerous ant sightings throughout the period of July 16 - 27 paint a far less positive picture of the facility's eradication efforts than the ALJ Decision, which implies that only a few ants were seen in or around the facility after July 16. The ALJ referred to only two sightings of ants during that time, both made during the July 16 survey: "two areas of ant activity" on the facility's grounds (which the ALJ dismissed in light of the size of the facility's grounds - five acres - and the ubiquitousness of fire ants), and "some dead ants in Resident # 1's room," which the ALJ viewed as possible evidence of the success of Emerald Shores' eradication efforts. ALJ Decision at 8. However, the facility's records describe the locations of many of the observed ant beds and mounds by reference to specific rooms, corridors and other facility features such as sidewalks,

patios and courtyards, indicating that they were in close proximity to the building and not at remote locations from which fire ants would be unlikely to enter the facility or pose risks to residents outside the facility, as the ALJ suggested. Similarly, the number of sightings of ants inside the facility is too great to permit the conclusion that Emerald Shores had an effective IPM program.

The ALJ Decision does not reference any evidence of continued ant infestation during the period of July 16 - 27 other than the two ant sightings that were made by one of the surveyors during the July 16 survey and reported in the SOD. At the hearing, the ALJ expressed hesitancy to rely on hearsay statements of nursing home residents and family members (who also reported experiences with ants in the facility) because they may be infirm and are not available for cross-examination. Tr. at 97-99. That logic, even assuming it is sound, provides no reason to discount portions of the record reflecting the direct observations of facility staff and pest control contractors. The ALJ, moreover, made no adverse findings about the credibility of the surveyor who testified that she saw multiple areas of ant activity in addition to those she referenced in the SOD, testimony consistent with the observations of Emerald Shores' staff and the pest control service. The ALJ did point out that the surveyors were not experts in ant control and eradication but did not explain why such expertise would be necessary to note the presence of ants and active ant beds and mounds, or why it would justify failing to credit the reports of Emerald Shores' staff recorded in Emerald Shores' records. ALJ Decision at 8. Even if the surveyors and Emerald Shores' staff were arguably not qualified to distinguish between fire ants and other species, such distinctions are of questionable relevance, as the presence of ants and active ant beds and mounds in the numbers shown in the record, regardless of the species, indicates the lack of an adequate pest control program based on Dr. Merchant's testimony.

Absent any basis to discount evidence of ant sightings during the period of noncompliance, we are bound to consider that evidence in determining whether the ALJ's finding that Emerald Shores had an effective IPM program is supported by substantial evidence. "Under the substantial evidence standard, the reviewer must examine the record as a whole and take into account whatever in the record fairly detracts from the weight of the decision below." Britthaven, Inc., DAB No. 2018, at 2 (2006), citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). We thus review the ALJ's findings "to determine, among other things, whether conflicting evidence in the record has been addressed by the ALJ and whether the inferences drawn by the ALJ are

reasonable;" in so doing, we have explained that "a decision may not be upheld based solely on the evidence 'which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.'" Id.; Barry D. Garfinkel, M.D., DAB No. 1572, at 5-6 (1996), aff'd, Garfinkel v. Shalala, No. 3-96-604 (D. Minn. June 25, 1997), citing Universal Camera, 340 U.S. at 487. The Board has vacated an ALJ decision that overturned CMS's imposition of a CMP "because the ALJ did not address evidence in the record that conflicts with his finding . . ." Estes Nursing Facility Civic Center, DAB No. 2000, at 1-2 (2005). Here, the overwhelming evidence of ant sightings during the period of July 16 - 27, 2004 prevents us from concluding that the ALJ Decision's finding that Emerald Shores had an effective pest control program was supported by substantial evidence.

2. The ALJ also failed to consider additional evidence that Emerald Shores had not completed implementing specific critical elements of an IPM program until July 28, 2004.

Substantial evidence in the record does not support the ALJ's finding that a barrier treatment, one of the elements of an IPM program listed by Dr. Merchant, was applied by July 16. ALJ Decision at 7. The ALJ based his finding on testimony by the former administrator of Emerald Shores, at a hearing before the state survey agency, that a barrier was applied on or before July 16. ALJ Decision at 7. The former administrator's testimony is neither clear nor consistent on this point. See P. Ex. 28, at 64, 73, 76. Some of his statements and some documents do suggest that some outdoor treatment was applied by A to Z Pest Control, Emerald Shores' pest control contractor at the time of the July 7, 2004 stinging incident, possibly on July 8, 9, and/or 16. See P. Exs. 15, 27. The administrator's testimony, which was not observed by the ALJ, is unclear as to exactly what was applied by each pest control company on each visit, although he does at times refer to the July outdoor treatments by A to Z as "barrier treatment." A sales order of July 16 from A to Z states that "fire ant treatment" was performed on the "entire outside of building" at a cost of $225.00. P. Ex. 10; CMS Ex. 27, at 1.

Record evidence suggests, however, that a full barrier treatment involved treatment of walls, as well as surrounding areas. See, e.g., CMS Ex. 8, at 13. Such treatments are costly. A to Z reported to the surveyors that a "barrier" treatment would have cost $600 (in addition to the $160 per month that the facility was already paying for a monthly "spot and control" service). The $600 price quote is consistent with the actual $624 cost of

the exterior treatment performed on July 21 by Panama Pest Services. P. Ex. 11; CMS Ex. 16, at 4-5; CMS Ex. 22, at 1; CMS Ex. 27, at 5, 6; P. Ex. 26. It is undisputed that on July 21, Panama Pest Services applied a full barrier treatment to the outside perimeter of the facility. The evidence that an effective barrier treatment was available only at a price so much higher than the amount on the July 16 sales order makes it unreasonable to infer that the July 16th outside work by A to Z met the standards for a barrier treatment as part of an effective IPM program as described by Dr. Merchant.

This conclusion is also consistent with other evidence that Emerald Shores had been delaying a decision about applying a barrier treatment because of concerns over the cost. Surveyor Pettis recalled Wayne Roberts of A to Z telling her that he had recommended applying a full barrier treatment shortly after the July 7, 2004 stinging incident, but that Emerald Shores' then-administrator had been unwilling to pay the extra cost of a barrier treatment, and that the then-administrator told her that the problem was a cost issue as the facility was trying to find a different contractor at a lower cost. Tr. at 63-64, 71-72. Emerald Shores concedes that the former administrator did not direct application of a barrier treatment when A to Z recommended one because he was receiving and evaluating proposals from other exterminators. P. Br. at 5. Based on this evidence, one cannot reasonably infer from the sales order or the administrator's testimony that A to Z performed a "barrier" treatment of the type referred to by Dr. Merchant on July 16.

Given this strong focus on cost, the absence of specific evidence that A to Z agreed to provide the barrier treatment at a substantial discount, and the fact that Emerald Shores paid the full price of a barrier treatment to Panama Pest Services on July 21, we do not find the ALJ's finding that the outdoor treatment on July 16 was the type of barrier application that is an element of an IPM program was supported by substantial evidence on the record as a whole. The ALJ failed to consider the evidence that the facility delayed application of the correct kind of barrier treatment and did not apply that treatment when recommended by the pest control service shortly after the July 7, 2004.

In addition, evidence in the record which the ALJ failed to consider shows that Emerald Shores failed to implement some of the other elements of an IPM program. One of the critical elements of an IPM program, according to Dr. Merchant, is "aggressive caulking and sealing actions after ant sightings, as well as documented correction of all conditions conducive to ant entry." ALJ Decision at 5, citing CMS Ex. 19. The state survey

agency reported that on July 17, 2004 an area of the building contained "a small hole in the stucco exposing insulation;" and that "[t]he Week-end Supervisor notified the Maintenance Director and Administrator about the hole." P. Ex. 25, at 2. CMS's expert identified contact between the building and surrounding trees or shrubbery as potential points of entry for ants, and indicated that such trees or shrubbery should be trimmed. CMS Ex. 19, at 3-4; Tr. at 30-31. Notes of the maintenance supervisor from July 23, 2004 state that "bushing" was removed from the North side of the building by a day room window and that a bush in front of the Director of Nursing's office was trimmed. CMS Ex. 29, at 20. Additionally, plants near a window in the "country store" appear to have been associated with the sightings of ants in the store as late as July 26, and were removed for that reason. CMS Ex. 22, at 6; CMS Ex. 29, at 4, 12. Thus, Emerald Shores was still in the process of correcting conditions conducive to ant entry well after July 16.

Another element of an IPM program is "a verifiable staff training program to ensure that new staff are aware of their role in a facility's pest management program." ALJ Decision at 5, citing CMS Ex. 19. Although Emerald Shores began "in-service" training of its staff in a pest control protocol in response to the July 7, 2004 stinging incident, class attendance records and agendas for the training show that training was not completed before July 22, 2004. CMS Ex. 28. Additionally, the facility's immediate jeopardy abatement plan dated July 16 states that the facility "will immediately start inservicing all staff in the facility on monitoring for ants and what to do when ants are found," indicating that training had not been completed. P. Ex. 15. A revised plan dated July 20, 2004 still refers to in-service training in the future tense. P. Ex. 19. The ALJ relied on testimony and records which establish that educational activities for staff and residents were underway, but which nowhere demonstrate that they were completed. Thus, the ALJ's finding that education of Emerald Shores' staff had been completed by July 12, 2004 is not supported by substantial evidence. ALJ Decision at 7, and record cites therein.

The ALJ's finding that, prior to July 16, Emerald Shores had contracted for services that "were characterized by the pest control service as being integrated services" (ALJ Decision at 6) appears to have been based on an agreement Emerald Shores had with A to Z Pest Control for "once a month pest control services and integrated pest management" at a cost of $160 per year. P. Ex. 11. As the evidence described above shows, the services that A to Z provided at that price did not include all components of an IPM program, such as barrier treatment, and would not have

included those IPM elements that must be provided by facility staff through inspections, record keeping and training. While Dr. Merchant agreed with the statement of Emerald Shores' counsel at the hearing that the facility had "contracted for integrated pest management," the totality of Dr. Merchant's testimony shows that he did not agree that Emerald Shores was in fact receiving IPM services or had put in place an IPM program as of July 16, 2004. Tr. at 26 (emphasis added); CMS Ex. 19.

Thus, substantial evidence does not support the ALJ's finding that as of July 16, 2004, Emerald Shores was doing all that a facility reasonably could be expected to do to protect its residents against fire ants. ALJ Decision at 5. Although Emerald Shores had undoubtedly taken some significant measures to improve its pest control program after the July 7 stinging incident, the record as a whole shows that, as of July 16, the facility still had not attained substantial compliance with the requirement to maintain a pest control program that effectively protected its residents from the likelihood of serious harm from fire ant stings. We conclude that the ALJ's conclusion that Emerald Shores was in substantial compliance with 42 C.F.R. § 483.70(h)(4) is not supported by substantial evidence on the record as a whole. We therefore reverse the ALJ's conclusion.

3. There was no error in CMS's determination of the period of noncompliance.

Emerald Shores does not argue that, assuming it failed to substantially comply by July 16 with the requirement to maintain an effective pest control program, it attained substantial compliance any earlier than July 28, as CMS determined following a revisit survey. Moreover, once CMS determined that Emerald Shores was not in substantial compliance with the requirement to maintain an effective pest control program, it was not required to produce evidence of Emerald Shores' continuing noncompliance for each succeeding day during that interval. See Coquina Center, DAB No. 1860, at 23-26 (2002), and cases cited therein; CarePlex of Silver Spring, DAB No. 1683, at 6 (1999) (it would be "impracticable to expect surveyors to return daily to monitor corrections before the facility even offers a credible allegation that it has achieved substantial compliance").

In any event, there is ample evidence in the record to support CMS's determination that Emerald Shores did not attain substantial compliance until July 28. Notes from the July 28 revisit indicate a variety of factors supporting CMS's determination. These factors include reports of insects in the facility up to July 27, the hiring of a new pest control service

that treated the facility on July 21 and returned on July 26 and 27, and other measures that were ongoing from July 16 - 27, such as in-service training of staff, the institution of documentation such as pest control logs at each nursing station, having the pest control service complete a service ticket each visit, the removal of plants from the country store and the removal of bird feeders from near the facility. CMS Ex. 22, at 5.

Accordingly, we conclude that CMS properly imposed remedies through July 27, 2004.

4. CMS's determination that the deficiency caused immediate jeopardy was not clearly erroneous.[7]

Finally, we uphold CMS's determination that this deficiency was properly cited at the immediate jeopardy level of severity. The regulations define "immediate jeopardy" as a "situation in which the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident." 42 C.F.R. § 488.301. CMS's determination that noncompliance is at the immediate jeopardy level must be upheld unless it is clearly erroneous. 42 C.F.R. § 498.60(c)(2); Liberty Commons Nursing and Rehab. Center - Johnston, DAB No. 2031, at 18-19 (2006).

Evidence in the record amply supports CMS's conclusion that Emerald Shores' continued failure to control fire ants presented a likelihood that serious harm to residents could be expected. According to Dr. Merchant, numerous incidents of fire ant attacks on nursing home patients have been reported, including "deaths in at least 7 nursing home cases in the past 15 years." CMS Ex. 19, at 3 (Merchant Decl.). Emerald Shores did not dispute his testimony. Thus, fire ants were, undisputably, a well-known and worrisome threat to nursing home residents in Emerald Shores' geographic area.

---

[7] Under its authority at 42 C.F.R. § 498.88, the Board may modify, rather than remand, an ALJ's decision. We find it appropriate here to consider the arguments on immediate jeopardy in light of our reversal of the ALJ's findings as to noncompliance. The ALJ did not reach Emerald Shores' challenge to CMS's immediate jeopardy determination, since he overturned all of the noncompliance findings. Our reversal on one of the findings compels a resolution of Emerald Shores' challenge to immediate jeopardy. We can more efficiently resolve that issue as well, given that the record before us is fully developed. rather than remand for further proceedings on this issue.

The surveyors' greatest concern was the risk that fire ants posed to the population of Emerald Shores residents who "were especially vulnerable because they were bedfast and/or cognitively impaired." CMS Ex. 16, at 2 (Pettis Decl.); CMS Ex. 17, at 4 (Cowart Decl.). Such residents might be unable to see and avoid fire ants or even to brush them away if attacked. Id. These concerns are supported by a medical literature review paper from the Annals of Internal Medicine from 1999, submitted for the record by CMS, which indicates that immediate eradication efforts are critical when immobile persons are involved and that such persons "should be considered at risk for fire ant attacks as long as the ants are present." CMS Ex. 7, at 1. The article describes four cases of attacks on "poorly mobile, neurologically compromised" residents, of which three "were associated with worsening of preexisting cardiopulmonary disease and early or late death." Id. at 3. Fire ants are able to sting repeatedly if not removed and reactions to the stings vary widely, from those who have no untoward response to numerous stings (beyond the obvious pain and localized reactions such as the pustules observed on Resident # 1) to others who experience "cardiac dysfunction, pneumonia, cerebrovascular accidents, and other complications" even without obvious signs of anaphylaxis, to anaphylactic shock. Id. at 4. The article estimates that between 17-56% of patients experience allergic reactions and 0.6-6% suffer anaphylaxis. Id. at 1-2.

The July 7, 2004 stinging incident, in which a helpless, bedfast nursing home resident sustained serious harm when she was stung multiple times by fire ants while in bed, illustrates precisely the nature of the threat posed to the vulnerable residents who were the focus of the surveyors' concerns. Although that attack occurred prior to the beginning of the period of immediate jeopardy as determined by CMS, it still demonstrates the reality of the harm to vulnerable residents that was likely to recur so long as the facility failed to have an effective pest control program. Even residents who were not bedfast or impaired were at risk for being stung by fire ants that invaded their beds while they slept. Those other residents were also at risk for being stung while in outdoor areas of the facility intended for resident use where ant mounds and beds were observed, such as patios, patio tables, sidewalks and courtyards. CMS Ex. 27, at 2-4; CMS Ex. 29, at 9-14, 16, 20-24; P. Ex. 21, at 10-13.

Given all these circumstances and the evidence of the continued presence of a significant number of ants in and around the facility, we conclude that Emerald Shores has not presented any basis to conclude that CMS's immediate jeopardy finding is clearly erroneous.

II. The ALJ's determination that Emerald Shores was in substantial compliance with the requirement to develop and implement written policies and procedures that prohibit neglect, at 42 C.F.R. § 483.13(c), is supported by substantial evidence and is not erroneous.

In FFCL No. 2, The ALJ held that "[t]he preponderance of the evidence establishes that Petitioner was complying substantially with the requirements of 42 C.F.R. § 483.13(c) on and after July 16, 2004." The cited regulation states:

> Sec. 483.13 Resident behavior and facility practices.
>
> (c) Staff treatment of residents. The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property.

CMS found that Emerald Shores was not in substantial compliance with this regulation based on three alleged deficiencies, all related to the stinging incident on July 7. However, only two of these alleged deficiencies remain at issue on appeal:

- Emerald Shores deprived Resident # 1 of needed medication that had been prescribed by the resident's physician after the resident was stung by fire ants, and failed to document the administration of the medication to the resident.

- Emerald Shores' failure to have an effective program to control fire ants constituted failure to implement policies to prohibit neglect.

ALJ Decision at 9.[8]

---

[8] Emerald Shores' alleged failure to adequately communicate with Resident # 1's family regarding the resident's condition and the medication prescribed for her after the ants stung her was the third alleged deficiency on which CMS based its determination of noncompliance with the neglect requirement. However, the ALJ found that CMS had failed to pursue this allegation before him. ALJ Decision at 9. Before the Board, CMS states only that it "discussed that aspect of the case" as part of its discussion of the deficiency alleged for failure to substantially comply with

(continued...)

The ALJ found that Resident # 1 received all of the prescribed medication. As previously discussed, the ALJ also found that Emerald Shores had an effective program in place to control fire ants. Based on these findings, the ALJ concluded that Emerald Shores was in substantial compliance with the neglect requirement at 42 C.F.R. § 483.13(c). As discussed below, we agree with the ALJ's determination that Emerald Shores was in substantial compliance with section 483.13(c), even though we have reversed the ALJ's finding that the facility had an effective pest control program in place.

A. The ALJ did not err in finding that Emerald Shores did not fail to administer Resident # 1's medication.

CMS's conclusion that Emerald Shores failed to "develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents" was based, in part, on the surveyors' determination that Emerald Shores failed to administer to Resident # 1 all of the medications that had been prescribed in response to her being stung by fire ants on July 7, 2004. Before the ALJ, CMS argued that "due to the lack of documentation, the resident could not have received all of the doses" of each of two medications in the manner that the resident's physician prescribed, and that "[t]here were several inconsistencies in the Medication Administration Record . . . relating either to the time or the manner in which a medication was allegedly given." CMS Pre-hearing Br. at 6; CMS Post-hearing Br. at 12-13. CMS cited differences between the nursing notes and the medication administration record (MAR) kept for the resident, as well as a seeming discrepancy indicating that medication was administered to the resident prior to the time that the physician ordered it.

The ALJ found that the records establish that Emerald Shores gave the resident all of the prescribed medications as ordered. ALJ Decision at 9. The ALJ acknowledged that the nursing notes

---

[8](...continued)
the requirement to post information about how to report neglect, which we address in the next section of this decision. CMS Br. at 21. However, a review of CMS's briefing on that deficiency, both before the ALJ and the Board, does not reveal any discussion of this allegation. CMS did not offer any substantive case on this allegation on appeal to counter the ALJ's finding. Thus, we find no error in the ALJ's determination that CMS did not pursue its allegation that Emerald Shores failed to communicate with the resident's family regarding the resident's medical condition.

contain no reference to administration of an injection that the physician had ordered by telephone at 6:00 a.m on July 8, 2004, but then noted that the MAR states that this injection was administered to the resident at 5:30 a.m. on July 8. Id. at 9-10. The ALJ found no basis to infer from the 30-minute discrepancy between the 5:30 a.m. MAR entry and the 6:00 a.m. physician's order that the medication had not been administered. The ALJ found instead that a more reasonable inference was that the nurse - who had herself signed the physician's telephone order, the nursing notes and the MAR - administered the medication as ordered but made a mistake in recording either the time of the physician's telephone medication order or the entry on the MAR. Id. CMS on appeal does not point to any other alleged discrepancy. Moreover, CMS neither argues that the ALJ's inference that the nurse likely had administered the medication but recorded the time incorrectly on either the MAR or the physician's order was unreasonable nor provides any analysis that would support reversal of the ALJ's conclusion. CMS Br. at 21-23.

Based on our review of the record, we conclude that the ALJ's inference was reasonable. We therefore adopt it and find that Emerald Shores has successfully rebutted CMS's allegation that it failed to administer medications ordered by Resident # 1's physician.[9]

B. CMS has not shown that Emerald Shores' failure to have an effective program to control fire ants also constituted failure to implement policies to prohibit neglect.

CMS argues that even if the Board agrees with the ALJ on the medication issue, as we do, it should still find that Emerald Shores' noncompliance with the pest control regulation was substantial enough to sustain a deficiency for failure to develop and implement written policies and procedures that prohibit neglect of residents. CMS Br. at 23. However, focusing on the seriousness of the noncompliance under the pest control

---

[9] The ALJ also found that a second physician's order for an additional injection was issued on July 8 at 4:00 p.m, and that a nursing note recorded at 4:30 p.m. on July 8 states that the resident received the injection medication pursuant to the physician's order. ALJ Decision at 9-10. Again, CMS provides no basis to reverse the ALJ's finding that this medication was administered as ordered.

regulation misses the point.[10] We do not disagree that noncompliance with section 483.70(h)(4) could also constitute noncompliance with section 483.13(c), depending on the facts of a particular case. The regulations define "neglect" as "failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness," 42 C.F.R. § 488.301, and a failure to provide pest control services can meet that definition under appropriate circumstances.[11] However, as CMS agrees, CMS Br. at 20, the neglect regulation, section 483.13(c), focuses on 1) whether the facility has policies and procedures that prohibit abuse, mistreatment or neglect, and 2) whether those policies and procedures have been implemented. CMS Br. at 20. Thus, to establish that noncompliance with section 483.70(h)(4) also constitutes noncompliance with section 483.13(c), CMS must establish some relationship between the failure to provide pest control services and a failure to have or to implement policies

---

[10] We have found that Emerald Shores' failure to maintain an effective pest control program posed a likelihood of serious harm during the period of noncompliance to bedfast residents who would be unable to escape an attack by fire ants, along with the potential for harm to any other residents unfortunate enough to encounter fire ants unexpectedly. CMS accounted for that risk by finding noncompliance with the pest control deficiency at 42 C.F.R. § 483.70(h)(4) at the scope and severity level of "L", meaning a widespread deficiency that poses immediate jeopardy to resident health or safety, 42 C.F.R. § 488.404(b)(1); CMS State Operations Manual § 7400E, and the ALJ and this Board have upheld that finding. However, that alone does not establish a violation of section 483.13(c) as well.

[11] The Board has held that it is not error for an ALJ to infer from multiple or sufficient examples of neglect that a facility has failed to adequately implement its anti-neglect policy. See, e.g., Liberty Commons Nursing & Rehab - Johnston (upholding inference of neglect from failure of shift nurse to notify CNA about resident's allergy to latex before she provided care, failure of staff to maintain latex warning signs and failure of CNA to review resident's medical record when caring for resident for the first time); Emerald Oaks, DAB No. 1800 (2001) (upholding inference of neglect where facility delayed contacting resident's physician about sudden changes in resident's condition and abnormal vital signs until a second episode occurred); Barn Hill Care Center, DAB No. 1848 (2002)(upholding inference of neglect based on substantial evidence showing medication errors and untimely medication passes by one nurse on a single day).

or procedures designed to prevent neglect. CMS has tried to make that argument in this case, but, for the reasons discussed below, it is not persuasive.

CMS states, "Emerald Shores had no policies and procedures regarding fire ants or pests in general." CMS Br. at 20. CMS also asserts that prior to July of 2004, Emerald Shores did not require documentation of any pests. Id. CMS further states that the facility "had a pest control operator who would spray mostly on [an] as-needed basis." Id. CMS then argues that based on these alleged facts, the neglect inquiry should end, that "the facility could not implement policies and procedures it did not have." Id. The record does not support CMS's assertions about the absence of policies or procedures.[12] The record includes Emerald Shores' fire ant policy dated March 2002, and that policy contains a pest control assessment checklist. P. Ex. 2; see also P. Ex. 28, at 53. In addition, Emerald Shores adopted a pest control "action plan" with additional specific policies on July 7, 2004, prior to the date when CMS alleges that this deficiency began. P. Ex. 7. By July 16, 2004, the administrator had also spelled out pest inspection, documentation, reporting, and response policies for the maintenance director and obtained that individual's signature on the new policies. P. Ex. 14; see also P. Ex. 17 (action plan and further steps incorporated into revised pest control policy in July 2004). CMS's case for noncompliance under 483.13(c) might have been more persuasive had CMS admitted that policies and procedures existed but argued shown that they were not sufficient or adequately implemented.[13]

---

[12] CMS does not specifically state that Emerald Shores did not have a general policy prohibiting abuse and neglect as well as a policy addressing pest control. However, the record would not support that allegation either, since Emerald Shores introduced into the record an anti-neglect policy that it developed and adopted well before the July 7, 2004 stinging incident. P. Ex. 1.

[13] Merely having a paper policy or being able to show some implementation of that policy will not necessarily insulate a facility from a finding of noncompliance with section 483.13(c), without regard to the adequacy of that policy or its implementation. However, where, as here, CMS is trying to establish noncompliance with section 483.13(c) based primarily on facts supporting noncompliance under another regulation, it cannot simply reiterate those facts but must show how those facts, together with any other facts of record that may be

(continued...)

Here, however, CMS did not make that argument. Instead it asserts that the facility did not have any pest control policies or procedures, and the record simply does not support that assertion.

Furthermore, evidence in the record which CMS fails to contest or even address establishes that the administrator adopted a documentation system for all pests just after the July 7, 2004 incident. See, e.g., Tr. at 89 (testimony of former administrator that as of July 7 or 8 "we started doing documenting rooms then for specific pests"). CMS's carefully worded reference to the absence of such a system "prior to July 2004" appears designed to finesse the timing and obscure the fact that the documentation policy was put in place prior to the survey. The contract with Emerald Shores' original contractor (renewed January 24, 2004) was not only for "as-needed" spraying, but rather for monthly treatment with interim spot treatment as needed. P. Ex. 11. Uncontradicted testimony confirmed that the contractor did monthly treatments as called for in the contract, as well as up to four additional visits in a month. P. Ex. 28, at 91. While we have detailed above the ways in which these treatments fell short of the full IPM program which the parties agreed was required to establish an effective pest control system, we cannot accept CMS's characterization of the services for purposes of this deficiency as merely consisting of as-needed spraying.

Thus, although we disagree with some of the ALJ's reasoning, in particular his reliance on the now-reversed finding that Emerald Shores was in substantial compliance with section 483.70(h)(4), we uphold the ALJ's finding that the preponderance of the evidence shows that Emerald Shores was in substantial compliance with the requirements of 42 C.F.R. § 483.13(c) on and after July 16, 2004.

---

[13](...continued)
uniquely relevant to the neglect issue, relate to the legal requirements of the neglect regulation. CMS's statement of the facts on which it relies also must accurately reflect the record as a whole, which is not the case here.

III. The ALJ's determination that CMS failed to establish a prima facie case that Emerald Shores did not comply with the requirements of 42 C.F.R. 483.10(b)(7)(iii) - (iv) was not erroneous.

In FFCL No. 3, the ALJ held that "[t]he preponderance of the evidence establishes that Petitioner was complying substantially with the requirements of 42 C.F.R. 483.10(b)(7)(iii) - (iv) on and after July 16, 2004." The cited regulation states:

> Sec. 483.10 Resident rights.
>
> The resident has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility. A facility must protect and promote the rights of each resident, including each of the following rights:
>
> * * *
>
> (b) Notice of rights and services.
> (7) The facility must furnish a written description of legal rights which includes-
>
> * * *
>
> (iii) A posting of names, addresses, and telephone numbers of all pertinent State client advocacy groups such as the State survey and certification agency, the State licensure office, the State ombudsman program, the protection and advocacy network, and the Medicaid fraud control unit; and
> (iv) A statement that the resident may file a complaint with the State survey and certification agency concerning resident abuse, neglect, misappropriation of resident property in the facility, and non-compliance with the advance directives requirements.

CMS determined that Emerald Shores failed to comply with the regulation by denying Resident # 1's daughter the opportunity to speak by telephone with one of the state surveyors who were in the facility on July 8, 2004. The SOD states that the daughter told the surveyors on July 9 that she telephoned the facility on the afternoon of July 8, asking to speak to the state agency

survey team, and was told that the survey team was in a meeting but would be given a message. Further, according to the SOD, a few minutes later the Director of Nursing called the daughter and told her that the survey team was aware of the issue but was exiting the facility. CMS Ex. 2, at 4. CMS determined that this deficiency was at a scope and severity level of D, meaning that it did not constitute immediate jeopardy but had the potential for more than minimal harm. CMS Br. at 24; 42 C.F.R. §§ 488.408, 488.438(a).

The ALJ found that CMS's allegations did not establish a prima facie case of noncompliance with the regulation for the following reasons:

- Even if true, the allegations do not establish that Emerald Shores failed to provide residents with any of the information required at 42 C.F.R. § 483.10(b)(7)(iii) - (iv), failed to give any resident a statement informing that resident of his or her right to file a complaint with appropriate authorities as required by subsection (b)(7)(iv) of the regulation, or failed to post the information required by subsection (b)(7)(iii).

- There is no way to determine from the allegations that the daughter was prevented from making a complaint to the surveyors, as the allegations do not state that the family member wanted to make a complaint to the surveyors and do not describe what the family member wanted to discuss with them.

- CMS does not allege that the Director of Nursing refused to permit Resident # 1's daughter to speak with a surveyor, but only that the Director of Nursing told the daughter that the surveyors were aware of the daughter's call but were exiting the facility.[14] A reasonable interpretation of that statement, the ALJ noted, is that Emerald Shores' staff relayed the daughter's request to the surveyors

[14] The ALJ apparently interpreted "the issue" of which the surveyors were aware as being the daughter's phone call. A more reasonable interpretation may be that it referred to the stinging incident. In any event, the ALJ could reasonably infer that the surveyors were told of the daughter's call because they called her the next day.

and that it was the surveyors who decided whether to return the daughter's call at that time.

- The reported allegations are hearsay, and it is impossible to verify their truth in the absence of direct testimony.

ALJ Decision at 11-12.

Before the Board, CMS argues that the ALJ should have accorded greater weight to the hearsay evidence supporting this deficiency, because hearsay evidence is admissible in administrative proceedings if accompanied by sufficient indicia of reliability. CMS Br. at 25, citing Guardian Health Care Center, DAB No. 1943, at 15-16, n.13 (2004); Omni Manor Nursing Home, DAB No. 1920, at 16 (2004), aff'd, 151 Fed.Appx. 427 (6th Cir. 2005). Specifically, CMS contends that hearsay evidence in a SOD has been found to be inherently reliable where it consisted of unrebutted statements by facility employees that were akin to admissions or statements against interest. Id. CMS also argues that independent evidence corroborates any hearsay evidence that is significant to the outcome of the case, and that Emerald Shores has "essentially admitted that it prevented Resident # 1's daughter from speaking with State Agency surveyors about the resident's fire ant stings." Id. at 26, citing CMS Ex. 23, at 6.

We agree with CMS that hearsay evidence is admissible in ALJ proceedings under the circumstances discussed in our decisions. However, CMS has not shown that the ALJ erred in excluding the statements at issue here or, if he did, that such error was harmful. CMS's arguments that Resident # 1's rights were violated are simply not persuasive. CMS does not allege that Emerald Shores failed to post or make available the information on resident rights that the regulation requires. Nevertheless, we agree with CMS that an active effort by a facility to obstruct or prevent residents or their families from filing complaints or otherwise contacting appropriate state authorities could arguably be egregious enough to render the required notices meaningless and to deny residents the ability to exercise the rights stated therein. Here, however, we agree with the ALJ that the circumstances reported in the SOD, even if unrebutted, would not show such a denial or violation of resident rights.

The ALJ reasonably declined to draw the inference for which CMS argues, that the facility's failure to immediately connect the resident's daughter with the surveyors onsite was an effort to

prevent her from filing a complaint or report.[15] The record shows, among other things, that the state survey agency had already learned of the stinging incident less than 24 hours after it happened and that a state survey team that was already at the facility knew about the event. Moreover, the surveyors did talk to the daughter on July 9, the day after she called the facility. See CMS Ex. 2, at 2-7. Surveyor notes relate that the daughter reported to the surveyors the substance of the previous phone calls to the facility but record no claim by the daughter that she felt she had been denied access to the surveyors or prevented from filing a complaint with the state survey agency. CMS Ex. 23, at 6. Instead, the surveyor notes state that the daughter told the surveyor that she had wanted to speak to the surveyors just to ensure that a similar event "doesn't happen to anyone else" and that she was pleased overall with the care that the resident had received during two and a half years at the facility. Id.

The ALJ could reasonably conclude that the facility would have no reason to prevent Resident # 1's daughter from reporting an incident that was already reported and known to the surveyors, and that the Director of Nursing could reasonably have believed (even if incorrectly) that the daughter was satisfied with the information that the surveyors were aware of the incident. The evidence CMS cites as showing that Emerald Shores "essentially admitted" that it prevented the resident's daughter from speaking with the surveyors consists of surveyor's notes reporting the statements of an Emerald Shores employee who remembered taking the call from the daughter requesting to speak with the surveyors. CMS Br. at 26. The employee stated that the door was closed as the surveyors were meeting and that the employee did not know if the surveyors were taking messages and therefore gave the message to Emerald Shores' Director of Nursing. CMS Ex. 23, at 6. These statements do not support CMS's assertions regarding what Emerald Shores admitted.

The ALJ also concluded that the allegations that the facility prevented the resident's daughter from speaking with surveyors, even if true, did not establish that Emerald Shores failed to fulfill the requirements of the regulation. The regulation requires that a facility "furnish a written description of legal rights" which includes "[a] statement that the resident may file a complaint with the State survey and certification agency

---

[15] We will defer to the inferences drawn by the ALJ where reasonable on the record. Park Manor Nursing Home, DAB No. 2005, at 12 (2005); Barry D. Garfinkel, M.D.

concerning resident abuse, neglect," among other subjects, and make "[a] posting of names, addresses, and telephone numbers of all pertinent State client advocacy groups such as the State survey and certification agency . . . ." CMS on appeal does not explain how the facility's actions in taking a message, rather than connecting the daughter with the surveyors when she called, constituted failure to take the actions required by the regulation. Accordingly, we find that the ALJ's FFCL No. 3 is not legally erroneous.

IV. The amount of the CMP is not reasonable, but a CMP of $8,500 per day is reasonable.

Because the ALJ determined that the evidence did not support CMS's determination to impose remedies on Emerald Shores, he did not address whether $10,000 per day was a reasonable amount for a CMP. ALJ Decision at 2.

Having determined above that Emerald Shores was not in substantial compliance with the requirement to maintain an effective pest control program and that this deficiency posed immediate jeopardy to resident health and safety, We must next consider whether the amount of CMP that CMS imposed is reasonable, given our findings above. That determination is made by applying the factors specified in 42 C.F.R. § 488.438(f). These factors include the scope, severity and interrelationship of the deficiencies, the facility's compliance history, its financial condition, and the degree of the facility's culpability for the deficiencies. We have considered the regulatory factors in determining what is a reasonable CMP amount.[16] CMPs imposed for deficiencies constituting immediate jeopardy may range from $3,050-$10,000 per day. 42 C.F.R. § 488.438(a). The CMP of $10,000 per day here was thus the maximum possible CMP.

The Board generally presumes that CMS has considered the regulatory factors in setting the amount of the CMP and that those factors support the CMP amount imposed by CMS. Coquina Center at 32. A facility contesting the amount of a CMP must thus articulate which regulatory factors justify a reduction. Id. (ALJ did not err in upholding a $10,000 per day CMP where the facility "did not contend before the ALJ (or even on appeal) that any particular regulatory factor did not support the CMP

[16] Emerald Shores does not address how these factors should be considered in determining a reasonable amount when one but not all of the noncompliance findings are reinstated, as we have done here.

amount"). Had the deficiency findings that we reinstate here tracked precisely the findings made by CMS, we might have declined to address the reasonableness of the amount of the CMP, since Emerald Shores did not articulate any specific factor undercutting its reasonableness for the circumstances as alleged by CMS.

We have not, however, upheld all of CMS's determinations. In such circumstances, among others, we are imposing a CMP based on factual findings and legal conclusions different from those on which CMS relied in assessing the regulatory factors. The Board has held that an ALJ must make an independent determination of the reasonableness of the amount of a CMP based on applying the regulatory factors to the facts as found.[17] The Residence at Salem Woods, DAB No. 2052, at 11 (2006), citing CarePlex of Silver Spring. Where the ALJ overturns some of the allegations relied on by CMS, the ALJ must consider the reasonableness of the amount based on the altered factual findings even if the facility did not argue that the amount was unreasonable had all the original allegations been upheld. Madison Health Care, DAB No. 1927, at 23 (2004)("It is not enough to say that the facility did not argue that the amount was unreasonable, where the facility did dispute the underlying facts of the findings of noncompliance. An amount accepted as reasonable if CMS were to succeed in all its allegations may not be accepted as reasonable if only some subset is upheld, yet the facility would not have had an opportunity to raise such a contention without knowing what subset the ALJ would select to address.") The same rationale applies when the Board, as here, has reinstated some but not all of CMS's findings.

All of the deficiencies that CMS alleged relate to Emerald Shores' failure to implement an effective pest control program, a deficiency that CMS did not cite as noncompliance until July 16,

---

[17] Further, as we have explained:

> [T]he ALJ decision is not a quasi-appellate review of the regularity of [CMS]'s determination but rather a determination of the reasonableness of the amount based on the evidence in the record as a whole as developed before the ALJ. Thus, if evidence is developed at the hearing as to a relevant factor, the ALJ must take that evidence into account even if it was not available to or considered by [CMS].

CarePlex of Silver Spring, at 17.

2004 but which dated from a stinging incident that occurred on July 7, 2004.[18] We have found that the ongoing inadequacy of Emerald Shores' pest control program during the period of noncompliance constituted immediate jeopardy and increased the risk that other residents of the facility could suffer stings from fire ants. The resident in question indeed suffered actual and serious harm as a result of the inadequacy of Emerald Shores' pest control program. These findings alone justify a large per-day CMP in the upper half of the applicable range.

In addition, Emerald Shores clearly is culpable for the noncompliance under 42 C.F.R. § 483.70(h)(4), since its failure to have an effective pest control program showed "disregard for resident care, comfort or safety" with respect to all of its residents, including the resident stung by fire ants. 42 C.F.R. § 488.438(f)(4). This is especially true since even knowing that a resident had already suffered serious harm from ant stings, Emerald Shores failed to fully implement an effective pest control program until some eleven days after surveyors made an immediate jeopardy finding. Finally, we see no evidence that Emerald Shores cannot afford to pay any CMP within the appropriate range.

We have upheld, however, the ALJ's reversal of CMS's additional allegations findings of noncompliance with regulations aimed at preventing the neglect of residents and at protecting resident rights. 42 C.F.R. §§ 483.10, 483.13(c). Those findings presented the even more disturbing picture of a facility that,

---

[18] CMS's argument about the reasonableness of the total CMP focuses mostly on whether the duration of the CMP was appropriate, even though it began a week after the triggering incident. CMS Br. at 26-31. We have held that noncompliance indeed continued throughout the period cited by CMS, and we agree with CMS that it was not required to impose a CMP for all possible days on which noncompliance could have been found. Id. at 28, and citations therein. However, CMS does not indicate what it would consider to be a reasonable CMP amount if not all of the findings of noncompliance were upheld. CMS does suggest, however, that it recognizes that a reduction of the CMP might be appropriate if all of the findings of noncompliance were not upheld. See CMS Br. at 26 ("[h]ad the ALJ not discounted the substantial weight of the evidence of Emerald Shores' noncompliance, the ALJ would have likely also found substantial evidence to support CMS's immediate jeopardy determination and the reasonableness of at least one portion of the CMP" (emphasis added)).

after failing to protect the resident from being stung by fire ants, further failed to provide medical treatment prescribed to the resident in response to the fire ant stings and tried to prevent a member of the resident's family from filing a complaint with state authorities. We have found those allegations not supported by substantial evidence in the record as a whole together with inferences reasonably drawn from the record by the ALJ.

Given the significantly altered basis for the CMP here, we conclude that continued imposition of the maximum possible CMP is not reasonable for the single immediate jeopardy deficiency sustained here. We further conclude that a CMP of $8,500 per day reasonably reflects the factors to be considered in light of our findings here, and accounts for the very serious nature of the deficiency that we sustain.

Conclusion

For the reasons discussed above, we modify the ALJ's FFCL No. 1 to read as follow:

> 1. The preponderance of the evidence establishes that Petitioner was not complying substantially with the requirements of 42 C.F.R. § 483.70(h)(4) from July 16 through July 27, 2004, and that this deficiency constituted immediate jeopardy to resident health and safety.

We add the following FFCLs No. 4 and 5:

> 4. A CMP of $10,000 per day for the period July 16 through July 27, 2004 is not reasonable. A CMP of $8,500 per day for that period is reasonable.
>
> 5. As applicable law authorizes imposition of a DPNA if a provider is found to be out of substantial compliance with a single program requirement, we sustain CMS's determination to impose a DPNA for the period July 22 through July 27, 2004.

Judith A. Ballard

Sheila Ann Hegy

Leslie A. Sussan
Presiding Board Member