Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: April 10, 2007
Century Care of Crystal Coast, Petitioner,	Civil Remedies CR1488 App. Div. Docket No. A-06-128
- v. -	Decision No. 2076
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Century Care of Crystal Coast (Century Care, facility) appealed the August 9, 2006 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes upholding civil money penalties (CMPs) of $3,050 per day for 52 days from April 26 through June 16, 2004 and $150 per day from June 17 through July 20, 2004. Century Care of Crystal Coast, DAB CR1488 (2006) (ALJ Decision). The Centers for Medicare & Medicaid Services (CMS) imposed the CMPs based on the findings of a complaint survey which ended on June 18, 2004. The surveyors found noncompliance posing an immediate jeopardy to residents related to two regulatory requirements: 42 C.F.R. § 483.25(h)(2) (cited as Tag F324) and 42 C.F.R. § 483.75 (Tag F490). The surveyors also found two deficiencies involving dietary services which they cited at lower levels of scope and severity: 42 C.F.R. § 483.35(d)(3) (Tag F365) and 42 C.F.R. § 483.35(e) (Tag F367). The surveyors determined that the immediate jeopardy arose before the survey began and was not abated until June 17, 2004. Century Care submitted a plan of correction and was found to have achieved substantial compliance by July 21, 2004. Century Care requested and received a hearing

before the ALJ. The ALJ concluded that the facility was not in substantial compliance from April 26 through June 20, 2004, and that until June 16, 2004, the facility's noncompliance constituted immediate jeopardy. ALJ Decision at 1, 23. The ALJ sustained the CMP amounts.

Century Care challenged on appeal only the immediate jeopardy findings; hence, we sustain the unchallenged noncompliance determinations without discussion. We consider below Century Care's contentions that the ALJ Decision rested only on unsupported inferences, that Century Care had a reasonable policy for handling residents' smoking behaviors, that the episodes cited by CMS involving two particular residents did not result from Century Care's inadequate supervision of their smoking, that in any case the episodes were too trivial and unrelated to justify an immediate jeopardy determination continuing from the date of the first episode until June 17, 2004, that the CMP amount imposed was excessive, and that the ALJ generally treated Century Care unfairly. We find no merit in any of these arguments.

For the reasons fully explained below, we therefore uphold the ALJ Decision and sustain the imposition of the CMPs on Century Care.

Factual Background[1]

Century Care is a North Carolina nursing facility. The State survey agency conducted a complaint investigation at the facility from June 16 through June 18, 2004 which resulted in a finding of immediate jeopardy. Many of the key facts relating to the two incidents that triggered the immediate jeopardy determination are undisputed, although the implications of the facts are at issue.

It is undisputed that, on April 26, 2004, Resident 10 (R10) wandered away from the facility's smoking patio unobserved. Staff from an adjacent doctor's office saw her sitting at a picnic table and contacted the facility after noticing R10's wristband identifying her as a facility resident. R10 wore an electronic wristband which was also designed to sound a loud alarm whenever she approached the facility's exits. Facility

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[1] The facts included in this general background are drawn from the ALJ Decision, which contains relevant citations and are presented here merely to provide a general framework for understanding the rest of our decision. They are not intended to substitute for the ALJ's findings.

staff did not document or report the elopement, and facility administration first learned of the episode only from the surveyors, when they surveyed the facility in response to a complaint relating to the incident discussed below. Century Care conceded that the supervision provided to R10 at the time of the incident was inadequate and that the staff's failure to document or report the episode was poor judgment. ALJ Decision at 5 and citations therein; Century Care Request for Review (RR) at 30-31. In addition to the elopement, facility documents recorded repeated problems with R10's violations of the facility's smoking policy before and after the elopement. Century Care argued that the significance of the elopement was overblown in that the episode was "isolated in nature" and resulted in no injury, and that any potential for harm was eliminated by the fact that R10 had become incapacitated by the time of survey and "no other residents at risk of wandering smoked." RR at 32.

It is also undisputed that, on May 5, 2004, Resident 2 (R2) suffered flash burns to his face and hands after igniting a lighter in his room while using oxygen. R2 had previously been discovered, on February 9, 2004, to have smoked in his room, contrary to the facility policy, and had promised not to do so again. Facility policy stated that all matches and lighters were to be kept at the nurses' station, but testimony by facility staff and the resident's wife conflicted as to whether staff ever in practice permitted him to keep his lighter with him. ALJ Decision at 9. It was also undisputed that, at the time R2 admitted smoking in his room, facility staff did not question him as to whether he had a lighter or matches, nor did the facility conduct any search, although the parties did dispute whether such steps would have been appropriate.

ALJ Decision and Issues on Appeal

The ALJ made the following Findings of Fact and Conclusions of Law (FFCLs)[2]:

> ***I. From April 26, through July 20, 2004, the facility was not in substantial compliance with the program participation requirements.***
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> > ***A. The facility did not provide an adequate level of supervision to prevent accidents, as required by 42 C.F.R. § 483.25(h)(2).***

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[2] We omit the interspersed discussions of her reasoning and its basis in the record.

> ***1. The facility had in place an ambiguous smoking policy, inconsistently applied.***
> ***2. The facility had in place no systematic procedure for assessing the degree of supervision required for its smokers.***
> ***3. The facility's response to R2's February 9, 2004 smoking incident was not adequate for preventing accidents.***
> ***4. The evidence establishes that even a seriously demented resident could obtain cigarettes, lighters, and matches, yet the facility took virtually no action to prevent this.***
> ***5. As the facility concedes, it failed to provide R10 an adequate level of supervision to prevent accidents.***
> ***6. Facility staff failed to document, report, or investigate R10's elopement.***
>
> ***B. The facility was not administered in a manner that enabled it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as required by 42 C.F.R. § 483.75.***
>
> ***C. The facility did not meet each resident's special dietary needs, as required by 42 C.F.R. § 483.35.***
>
> ***II. CMS's determination that, from April 26 through June 16, 2004, the facility's deficiencies posed immediate jeopardy to resident health and safety was not clearly erroneous.***
>
> ***III. The reasonableness of the amount of the CMP is not before me.***

ALJ Decision at 4, 12-16, 18-20, 24 (bold and italics in original; footnote omitted).

Century Care does not specify to which FFCLs it excepts. Based on the brief Century Care submitted, it appears that Century Care seeks review of all the FFCLs except I.C., which relates to the non-immediate jeopardy noncompliance findings, and III to the

extent it refers to the CMP for the period that did not involve immediate jeopardy. See RR at 6.[3]

Century Care argues that the ALJ overall relied on mere hearsay, inference and speculation in reaching her decision, resulting in material errors of fact and law. See, e.g., RR at 1-2, 21. According to Century Care, its staff's judgments about how to handle its residents' smoking were reasonable and should not be second-guessed. RR at 16-17, 39-41. Further, Century Care asserts, the accident that occurred to R2 was not foreseeable and could not have been prevented without infringing on the resident's rights. Century Care characterizes R2's burn as resulting from the resident's "own willful choice" to violate the policy which facility staff could not have foreseen or prevented. RR at 2-3. Century Care conceded below that it failed to adequately supervise R10, and could be found out of compliance for that reason. Nevertheless, Century Care asserts on appeal that R10's elopement was merely "a short and uneventful unsupervised walk across" facility grounds presenting no actual or likely serious harm, and certainly not justifying the immediate jeopardy CMP here. RR at 44-47.

Further, Century Care contends that these two incidents were unrelated and cannot together establish a systemic violation of 42 C.F.R. § 485.25(h)(2) or the presence of immediate jeopardy. RR at 48. Since Century Care contends no systemic violation was shown, it argues that it should also be found to be in substantial compliance with the requirements for effective administration. Finally, Century Care argues that the amount of the CMP is unreasonable.

CMS chose not to file a brief on appeal, submitting only a letter from counsel dated October 27, 2006 asserting that "the findings of the ALJ are supported by substantial evidence and there are no errors of law." We consider the above challenges to the ALJ Decision raised by Century Care based on our careful review of the full record and the applicable law.

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[3] Although the noncompliance findings under 42 C.F.R. § 483.75 remain at issue since they formed part of the immediate jeopardy determination, CMS based them on the facts relating to section 483.25. Century Care makes no substantive arguments specifically relating to the facility administration requirements, relying on the same general arguments which we discuss below. Therefore, we do not discuss this FFCL separately but simply affirm it based on the same reasons for which we affirm the other challenged FFCLs.

Applicable legal authority

The federal statute and regulations provide for surveys to evaluate the compliance of skilled nursing facilities such as Century Care with the requirements for participation in the Medicare and Medicaid programs and to impose remedies when a facility is found not to be in substantial compliance. Sections 1819 and 1919 of the Social Security Act; 42 C.F.R. Parts 483, 488, and 498.[4] "Substantial compliance" is defined as "a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health and safety than the potential for causing minimal harm." 42 C.F.R. § 488.301. "Noncompliance" means "any deficiency that causes a facility to not be in substantial compliance." Id. "Immediate jeopardy" is defined 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." Id.

Quality of care requirements reflect the overarching regulatory objective that "[e]ach resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care." 42 C.F.R. § 483.25. Among the required measures to that end, a facility must ensure that "[e]ach resident receives adequate supervision and assistance devices to prevent accidents." 42 C.F.R. § 483.25(h)(2) (tag F324).

The Board has articulated the requirements of 42 C.F.R. § 483.25(h)(2), the regulation governing this dispute, in numerous decisions. Northeastern Ohio Alzheimer's Research Center, DAB No. 1935 (2004). The Board has held that section 483.25(h)(2) cannot properly be read to impose strict liability on facilities for accidents that occur. Instead, the Board has found that the regulatory requirement of "adequate supervision and assistance devices to prevent accidents" obligates the facility to provide supervision and assistance devices designed to meet the resident's assessed needs and to mitigate foreseeable

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[4] The current version of the Social Security Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross reference table for the Act and the United States Code can be found at 42 U.S.C.A. Ch. 7, Disp Table.

risks of harm from accidents. Id.; see also Tri-County Extended Care Center, DAB No. 1936 (2004); Odd Fellow and Rebekah Health Care Facility, DAB No. 1839 (2002). In addition, the Board has indicated that a facility must provide supervision and assistance devices that reduce known or foreseeable accident risks to the highest practicable degree, consistent with accepted standards of nursing practice. Woodstock Care Center, DAB No. 1726, at 21, 25, 40 (2000), aff'd, Woodstock Care Ctr. v. Thompson, 363 F.3d 583 (6th Cir. 2003); Florence Park Care Center, DAB No. 1931 (2004).

A facility must also be "administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psycho-social well-being of each resident." 42 C.F.R. § 483.75.

Where CMS determines that noncompliance is at the immediate jeopardy level, a per-day CMP may be imposed within a range from $3,050 to $10,000. 42 C.F.R. § 488.438(a)(1)(ii). For noncompliance findings below the immediate jeopardy level, a per-day CMP may be imposed within a range from $50 to $3,000 covering the time a facility is not in substantial compliance. Id.

A facility must prove by the preponderance of the evidence that it is in substantial compliance, once CMS has established a prima facie case that the facility was not in substantial compliance with relevant statutory or regulatory provisions. Batavia Nursing and Convalescent Center, DAB No. 1904 (2004), aff'd Batavia Nursing & Convalescent Center v. Thompson, No. 04-3325, 129 Fed. App. 181, 2005 WL 873514 (6th Cir. April 15, 2005); see also Cross Creek Health Care Center, DAB No. 1665 (1998), applying Hillman Rehabilitation Center, DAB No. 1611 (1997), *aff'd*, Hillman Rehabilitation Center v. HHS, No. 98-3789(GEB), slip op. at 25 (D.N.J. May 13, 1999).

Standard of Review

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. Our standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. 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.

Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971), quoting Consolidated Edison Co. v. NLRB,

305 U.S. 197, 229 (1938). 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. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). Under this standard, we defer to inferences which the ALJ draws from the evidence so long as those inferences are reasonable, even if other inferences might also be reasonable. Park Manor Nursing Home, DAB No. 2005 (2005).

Analysis

1. Century Care did not show, as it asserts, that the ALJ relied only on unreasonable inferences from subjective speculation rather than evidence of facts.

Century Care makes an overarching argument that the ALJ's finding of systemic violation of the quality of care requirements was merely an inference "based upon nothing more than the 'inferred' underlying facts" which are themselves "subjective judgments that are directly contrary to the facts illustrated by the evidence." RR at 1-2. Further, Century Care suggests that imposing sanctions based on such inferences upon inferences is part of a trend to broaden enforcement actions arising from isolated incidents, contrary to congressional intent that surveys "detect facilities where residents are not receiving quality care." Id. at 2, quoting from H.R. Rep. No. 391(I), at 468, reprinted in 1987 U.S.C.C.A.N. 2313-1. Because Century Care highlighted this broad argument as framing its objections to the ALJ Decision, we discuss it independently here, before turning to the more specific exceptions raised.

The ALJ's analysis began with undisputed facts. R2 had possession of a lighter in his room contrary to the smoking policy then in place and despite an earlier episode in which he admitted smoking in his room. ALJ Decision at 8-12. No investigation of how he obtained the smoking materials was done at that time, and no additional care planning was done to control his access to smoking materials although he promised not to do it again. ALJ Decision at 13-14, and record citations therein. R2 was mentally alert while using oxygen but confused and disoriented without it, yet he could not safely use oxygen while smoking. Id.; see also P. Ex. 6, at 7; P. Ex. 9, at 2. R10 was admittedly known to be mentally-impaired, an "incessant" smoker and a wanderer who went through the doors to an outside patio to smoke many times a day, setting off the alarm (when she remembered not to smoke in the dining room which happened repeatedly too). RR at 25-26; see also P. Exs. 26, 42, at 4, 43, 45. R10's care plan stated that she was to be "accompanied when

going to smoke." P. Ex. 25, at 1. After a gate was apparently left open by maintenance staff, R10 was able to leave the patio and walk 30-40 feet to a picnic table area behind an adjacent medical building. P. Ex. 1, at 16. Her absence went unnoticed until a doctor's office called the facility. Id. Given these uncontested facts alone, Century Care cannot persuasively argue that the foundation of the ALJ's conclusion that the facility was not in substantial compliance rested on unreasonable "double" inference or "mere" speculation. See ALJ Decision at 4 (ALJ noted that "[f]ew facts are in dispute here.").

To the extent that Century Care may intend its characterization of double inferences to refer to the finding that systemic failures were implicated in these instances of noncompliance, we still disagree. See, e.g., RR at 1, 35. The ALJ laid out in some detail the evidence that supported her finding connections between the incidents and Century Care's ongoing failure to implement effectively a smoking policy and failure to investigate adequately when lapses occurred in that policy's enforcement. ALJ Decision, passim. Century Care may, and does, dispute the reasonableness of the connections drawn by the ALJ but cannot fairly claim that they are based themselves on pure inference without reference to the facts as established by evidence in the record.

Moreover, although Century Care refers to "CMS' current effort to cite every ostensible caregiver mistake or omission as a deficiency" and opines that this effort is inconsistent with the legislative purpose of detecting facilities that are not providing quality care to residents, Century Care does not provide a single example other than its characterization of its own case. RR at 2, n.1. Given that Century Care itself expressly concedes that R10's unsupervised elopement "even brief and uneventful, could have supported an appropriate deficiency and sanction," if not an immediate jeopardy determination, it is hard to see how Century Care could describe even its own case as an example of any such trend. See RR at 4.[5]

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[5] Century Care also asserts that the Board's approval of "even the most flimsy rationales in favor of CMS actions" exacerbates the "increasingly ephemeral nature of the regulatory requirements governing assessments, resident accidents and the like." RR at 3. For this proposition, Century Care cites only a Board decision which states that the Board does not sit as a federal court, but rather serves as an "internal agency appeals process for formulating final agency action." RR at 3, quoting

(continued...)

We turn next to the evidence which led the ALJ to find noncompliance and, further, to view that noncompliance as systemic rather than merely episodic.[6] The events at issue both related to Century Care's management of potentially unsafe smoking behavior by its residents. We begin, therefore, with a review of the evidence regarding the facility's smoking policies and their implementation in practice. We then discuss how the ALJ reasonably found that ineffective implementation and inadequate supervision led to R2's flash burns and R10's elopement. We later address Century Care's challenge to the ALJ conclusions regarding the immediate jeopardy determination and the amount of the resulting CMP. Finally, we consider Century Care's general complaints that the ALJ did not treat it fairly.

2. Century Care failed to implement effectively its facility smoking policies.

The two incidents discussed at length in the surveyors' Statement of Deficiencies (SOD), and addressed in detail later in this decision, are not the only bases for the noncompliance finding, but rather constitute the most vivid demonstrations of the potential for dangerous consequences from a laxly and inconsistently enforced smoking policy. The SOD and the evidence in the record provide many illustrations of confusion and inconsistency in the way the facility handled residents who continued to smoke.

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[5](...continued)
Cal Turner Extended Care Pavilion, DAB No. 2030 (2006). The discussion in Cal Turner related to the ALJ's de novo role in considering the regulatory factors relevant to setting a CMP amount, an issue not relevant here. In any case, the Board's conclusion that Board review of a CMS determination is not limited to the "arbitrary and capricious" standard applied in federal courts, but extends to the regulatory authority provided to the Board as part of the agency review process in no way constitutes "lax oversight" or encourages CMS to "stretch the logic" of its enforcement rules, as Century Care suggests.

[6] Much of Century Care's position rests on the claim that any noncompliance consisted of two isolated events weeks apart. Century Care contends that, since the events were unrelated and did not arise from any systemic breakdown, the finding of continuing noncompliance (and hence the imposition of a CMP for the intervening weeks) is inappropriate.

The facility had two smoking policies which were produced for the record. The first, dated February 20, 2002, states in the introduction that smoking issues have been "an ongoing concern for residents and the facility," especially during inclement weather, and that staff report that residents "are maintaining lighters and matches" in violation of the existing policy. P. Ex. 29, at 1. The introduction further reports that the facility had revised smoking policies over recent months as a result of these reports, "in view of the safety regulations mandated for the facility," and had communicated with residents and families about the issues. Id. Nevertheless, "residents have continued to smoke episodically at inappropriate times" and staff continue "to find lighters on residents . . . ." Id. Before adopting the February 2002 policy, the facility had met with residents who smoked and experimented with the following steps: holding cartons of cigarettes at the nurses' station to be dispensed to residents one pack at a time (rather than single cigarettes); posting a reminder that residents may not smoke in dining area during mealtimes; and providing that staff will "maintain lighters at the nurses station and in the front office" but residents "will not keep lighters and matches for themselves." Id.

The February 2002 smoking policy adopted after this trial run permitted residents to smoke only in two locations: the back patio at any time and the dining room except 30 minutes before and after any meal or event. The required procedures were set out, in relevant part, as follows:

- Each resident who smokes shall be provided the degree of independence appropriate to his/her demonstrated ability to do so safely and within facility guidelines. Each resident who smokes will not be permitted at any time to keep lighters/matches and cigarettes in his/her room or on his/her person. Lighters/matches will be stored at the nurses station, the front office, the activity office, and in the Social Services office.

* * *

- Violations of the smoking policy are to be reported to the Social Service Director or the Director of Nursing. Cases involving repeated violations and safety issues will be referred to the Administrator.

P. Ex. 29, at 2.

On February 14, 2003, the facility notified residents and their families of its intention to become smoke-free by prohibiting all smoking by residents "within in the facility walls." P. Ex. 30. Under the February 2003 policy, residents who smoked were restricted to using the back patio or offered the options of a smoking cessation program or a move to a facility permitting indoor smoking. Id.; see also Tr. at 34. The requirements that staff, rather than residents, retain cigarettes, lighters and matches remained in effect under this policy.

The surveyors interviewed two nurses about the facility smoking policy as part of their investigation. Nurse #1 said that residents are "not allowed to keep matches or lighters in their possession," and that most were not allowed to keep cigarettes, "especially if they were to be supervised while smoking." P. Ex. 1, at 15. Nurse #2 said that residents are "not to have lighters or matches of any kind and must be supervised while smoking at all times." Id.

The ALJ found that, in practice, these restrictions were not actually implemented consistently in the facility. ALJ Decision at 6. The ALJ pointed to conflicting statements by the facility administrator, Beverly Jorgensen. Id. Ms. Jorgensen said in her declaration that lighters and matches were kept at the nurses' station, but on cross-examination she stated that "safe residents" were permitted to carry lighters on their person in the daytime (for "[m]aybe 12 hours") and turn them back in at night. P. Ex. 42, at 2; Tr. at 127. When questioned about how that practice was consistent with the written policy, Ms. Jorgensen opined that it would be "very degrading" to have to ask someone to go outside to light their cigarette. Id. Her justification in no way explains the inconsistency with the policy but rather suggests that her attitude was in conflict with the policy. The administrator's testimony does tend to corroborate the surveyor's reports of staff statements about permitting some residents to possess smoking materials. See, e.g., Tr. at 59-60, 71; P. Ex. 1, at 6, 15, 17. As the ALJ noted, however, even without those statements, the record clearly establishes that the facility staff was aware that residents were able to obtain lighters and matches and yet failed to investigate

how that was occurring.[7] ALJ Decision at 14-15, and record citations therein.

On appeal, Century Care argues that the ALJ was "unduly rigid" and did not accord facility staff flexibility to "address resident preferences," given that regulations do not mandate "any particular content to a smoking policy." RR at 10. The ALJ did not, however, hold that Century Care was bound to adopt a specific smoking policy or deny that the facility had the flexibility to select its means of dealing with the health and safety issues presented by residents smoking. On the contrary, the ALJ accepted the policy that Century Care itself had adopted and later revised as its own plan about how to best address those issues. As the ALJ noted, the Board has held that a facility "is permitted the flexibility to choose the methods it uses to prevent accidents, but the chosen methods must constitute an 'adequate" level of supervision under all the circumstances." ALJ Decision at 5, quoting Windsor Health Care Center, DAB No. 1902, at 5 (2003).

Furthermore, what Ms. Jorgensen reported was not an instance of staff flexibly dealing with a resident but rather a practice (of permitting "safe" smokers to retain possession of lighters and matches) that conflicts with the written policy. Moreover, in regard to that practice, Century Care did not identify any documentation of assessments made prior to the survey of which

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[7] Century Care spends considerable effort in its appeal brief challenging the reliability of surveyor reports of staff awareness of residents' possession of smoking materials. RR at 21-24. Century Care contends that the surveyors described statements by R2's wife and by Century Care staff that the surveyors later admitted they no longer specifically remembered and could not find survey notes memorializing all of the reported statements. Id. Century Care's characterization of the surveyor testimony is not entirely fair, since, for example, one surveyor did locate the notes relating to R2's wife's statement that her husband had a lighter two weeks before he ignited his oxygen. See, e.g., Tr. at 80-88. More importantly, however, contrary to Century Care's claims, the ALJ explicitly reached her conclusions without relying on the surveyors' findings but rather on uncontroverted evidence that "facility staff knew or should have know that the facility's smokers - even a high risk smoker like R10 - were able to obtain lighters and matches." ALJ Decision at 14-15. Therefore, the reliability of the surveyors is not central to the ALJ's analysis, and she declined to reach that issue. Id.

smokers the staff were to treat as "safe." In addition, the ALJ cited, and we find that the record contains, considerable evidence of confusion among the staff about what was expected of them under the smoking policy and of documentation in nursing notes and other facility records of frequent violations of policy by residents without obvious consequences or effective responses by staff to stop the violations. See, e.g., ALJ Decision at 13-14, and record citations therein.

The context in which we review the ALJ's findings as to the specific episodes involving two residents who continued to smoke is, thus, of strict written policies on smoking combined with inconsistent and permissive practices in conflict with those policies. We turn next to the specific events involving R2 and R10 that made evident the risks of this situation.

3. Century Care did not provide supervision for R2's smoking activities adequate to prevent foreseeable accidents.

R2 was admitted in January 2004 with diagnoses that included mild dementia, delirium, chronic obstructive disease, and acute pneumonia. ALJ Decision at 8. R2 required oxygen almost continuously but also continued to be a heavy smoker. Id. When he went outside to smoke, he removed his oxygen, but, without oxygen, he often became confused and disoriented. Id., and record citations therein.

The ALJ noted that, despite the policy allowing residents to smoke only on the back patio, the facility staff, including the administrator, more than once permitted R2 to smoke on the front porch. ALJ Decision at 11, and record citations therein; P. Ex. 19, at 8-9, 12. The ALJ also noted conflicting evidence about whether R2 was permitted to keep a lighter, in violation of the smoking policy. Id. at 9, n.7., and record citations therein.

On February 9, 2004, staff reported to the facility's social services department that R2 had been smoking in his bathroom. P. Ex. 12, at 1. R2 was told that "to continue breaking the policy will result in" discharge. Id. R2 apologized and promised not to break the rules again. Id. On February 13, 2004, staff again informed social services of concerns that R2 was still smoking in his bathroom based on the smell of cigarettes there. Social services again interviewed the resident, but this time he denied smoking indoors. Social services concluded that R2 might be telling the truth and the smell of smoke, which also lingered in the social services office, may have come from his clothes. Id. Social services notes conclude that staff would "follow" the matter. Id. In addition, although the smoking policy permitted

smoking only on the back patio, the ALJ found that the resident frequently smoked on the front porch without staff intervention, even though the administrator herself admitted having seen R2 smoking there twice. ALJ Decision at 11, and record citations therein.[8]

On May 5, 2004, R2 lit a lighter in his room while using oxygen and suffered flash burns on his face and hands, which were assessed as first degree burns by the emergency room doctor. P. Ex. 15, at 1-2. R2 complained of the pain and was provided with Percocet and antibiotic ointment. Id. at 3.

Century Care acknowledges that it is "now obvious" that "at the time of his accident" R2 "had a cigarette lighter in his room in violation of Petitioner's policies." RR at 40. Century Care further admits that "it is obvious that any resident having a lighter in his or her room – especially a resident who uses oxygen -- poses a serious hazard."[9] Id. Century Care insists, however, that it could not have done anything to prevent the accident, which it regards as unforeseeable and entirely the result of the resident's "*own willful choice*." Id. at 2 (italics in original).

According to Century Care, the resident had been "warned twice not to [violate the smoking policy] shortly after his admission" and had agreed to its terms. Century Care argues that, after the February 9th incident when R2 admitted smoking in his room, no additional steps could have been taken to enforce that policy, because intrusive involuntary searches, visitor restrictions or discharge would have impinged on the resident's dignity and violated his rights. See, e.g., RR at 42-43. Yet, as the ALJ found, the facility failed to take, or even to document consideration of, much less intrusive measures, such as investigating how the resident obtained the matches or lighter, placing signs to warn visitors not to provide such items,

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[8] Housekeepers also found cigarette butts in R2's bathroom and drawers but this fact was not reported to administration until after the accident occurred. ALJ Decision at 12, at n.9.

[9] Century Care's admission is particularly significant in light of its argument, discussed later, that R2's burns did not constitute a serious injury and were exaggerated by the ALJ to "qualify the deficiency for the 'immediate jeopardy' level of severity." RR at 20, n.9. Immediate jeopardy exists when serious harm is likely even in the absence of any actual harm.

increasing supervision of the resident's smoking, or installing smoke detectors in his room and bathroom. ALJ Decision at 14. Director Wolf testified that he did not even ask R2 how he lit his cigarette on that occasion even though he agreed that such a question would not violate the resident's rights. ALJ Decision at 9-10; Tr. at 25. He also agreed that it would not have violated R2's rights to inform visitors not to provide lighters or matches, but that this step was not taken. Tr. at 25. Instead, the facility simply left R2 in possession of any smoking materials he had. Even assuming that R2 had a right to take a risk with his own safety, there is no evidence that the facility considered, in reaching its decision not to intervene with R2, the health and safety risks posed to other residents for whose care the facility was responsible.

Furthermore, the resident's possession of a lighter at the time of the accident is not, as Century Care suggests, completely unrelated to the prior episode of smoking in his room. Clearly, R2 used something (or obtained someone's help) to light his cigarette on the earlier occasion, and yet Century Care took no steps at that time to determine whether R2 had a lighter or matches in his room or had access to them. Cf. RR at 39. It was not unreasonable for the ALJ to consider that, had appropriate inquiries been made at that time to identify how R2 accessed smoking materials, reasonable steps could have been taken to prevent R2's access to a lighter in his room on the day of the accident.

We agree with the ALJ's conclusion that, while the facility had flexibility in determining how to respond to a situation which was obviously potentially dangerous, its response can hardly be considered adequate when no reasonable measures were taken. See ALJ Decision at 14. According to the facility's own account, R2 had already been counseled about the policy and warned of the seriousness of violations. It should have been clear to the facility after February 9 (when R2 was first discovered smoking in his room), if not before[10], that R2 was at serious risk from

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[10] The ALJ pointed out that the facility in fact was placed on specific notice about R2's propensity to engage in unsafe smoking behavior even before he admitted smoking in his room. ALJ Decision at 13. His wife reported that he had been dropping cigarette butts at home and that she feared he would "burn the house down." Id., citing CMS Ex. 8, at 57. Indeed, once the facility finally performed a "safe smoking assessment" for R2 on June 17, 2004, well after he burned himself and long

(continued...)

his combination of smoking in violation of facility policy and his dependence on oxygen. The ALJ reasonably characterized the accident which then ensued when R2 lit a lighter while the oxygen was on as foreseeable. Cf. RR at 37-38.

Century Care contends on appeal that the ALJ's linkage of R2's accidental fire to the "lax enforcement of [the facility's] *smoking* policy" is "really from thin air." RR at 38 (italics in original). In this regard, Century Care argues that no evidence supports the assertion that R2 violated the smoking policy since R2 denied that he was trying to light a cigarette at the time. Id. at 37. Further, according to Century Care, the lighter which R2 used should not be considered "contraband," as the ALJ characterized it. Id. at 38; see ALJ Decision at 4.

These arguments are without merit. The possession and use of a lighter by a resident is covered by the written smoking policy then in effect at Century Care (which, as is clear from our prior quotations from it, covers smoking materials as well as the smoking of cigarettes). The fact that R2 reported that, at the time he ignited the oxygen, he wanted to use the lighter to see a business card rather than to light a cigarette does not contradict the ALJ's conclusion that R2's repeated possession of smoking materials in his room violated the smoking policy. As to the lighter itself, Century Care makes the self-contradictory claim that it was not clearly contraband "since the Resident had the right to have one, subject to Petitioner's time and place restrictions, which he obviously violated." RR at 38. Essentially, the written policy required lighters to be kept by staff, and the Administrator's claim that some "safe" smokers were allowed to keep lighters during the day to avoid the humiliation of asking for lights for their cigarettes still cannot justify R2's possession of a lighter overnight in his room. Contraband seems a reasonable term for something possessed in violation of applicable policy, even if not illegal in itself. Century Care also argues that no additional interventions or supervision were called for because R2 "was an alert and oriented adult who at least in general was capable of making his own decisions." RR at 40. Century Care asserts that this was "undisputed (until Judge Hughes found otherwise)." RR at 40. The ALJ found that "R2's history was significant for confusion, delirium, and unsafe behaviors, including unsafe smoking

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[10](...continued)
after the survey, Century Case found him to be an "unsafe smoker" who required constant supervision while smoking, given his mental status and his vision impairments. CMS Ex. 25, at 23-27.

behaviors" and that he was "suffering from progressive dementia." ALJ Decision at 13. The ALJ cited medical records from his treatment at the hospital about a week prior to his admission to Century Care. CMS Ex. 8, at 54-59. Those records establish that R2 was at that time indeed alert and oriented as to person and place but also confused as to the time and situation, and that he was cooperative generally but had poor insight and judgment, symptoms of delirium, and psychiatric and chemical dependency issues. Id.; see also CMS Ex. 8. Century Care's assessment of his "psychosocial well-being" dated February 2, 2004 reported that he was diagnosed from the hospital with delirium and had a possible cognitive decline secondary to senile dementia, as well as depression, although he was "usually" alert and oriented. CMS Ex. 8, at 15. The facility planned to monitor for changes in mood and mental status, and for uncontrolled anger or aggression (he had one incident of hitting another resident). Id. at 20, 23, 25. He was assessed as demonstrating confusion and reduced "decision-making skills" when not using his oxygen. Id. at 28. In sum, we find substantial evidence in the record supporting the ALJ's characterization of R2's mental status problems. None of the ALJ's findings is inconsistent with R2 being alert and oriented as to who and where he was most of the time, but the evidence casts significant doubt on Century Care's present claim that R2 could be relied on to make "his own decisions" without supervision in areas relating to safety and smoking. R2 was supposed to leave his oxygen behind when smoking, but on room air he was known to have worse judgment and more confusion. The facility was aware that R2 had violated smoking policies both by smoking in his room, and by smoking on the front porch. The facility should also have considered the risk to other residents in the event of an oxygen explosion or fire in determining how much reliance to place on R2's judgment.

We conclude that Century Care has not shown any error in the ALJ's conclusions that the facility did not take adequate steps to prevent R2 from encountering foreseeable accidents as a result of his smoking activities, and that that conclusion is based on substantial evidence in the record as a whole.

4. Century Care did not provide adequate supervision to R10 to prevent foreseeable accidents.

R10 was a long-time resident in her seventies who was a heavy smoker. P. Ex. 21. R10's serious mental incapacity is not disputed. As the ALJ recited, she suffered from organic brain syndrome, depression, and deteriorating memory. ALJ Decision at 5, and record citations therein. She had a history of wandering and elopement, and she wore an electronic bracelet which sounded

an alarm when she approached an exterior door. Id. The facility assessed her as having impaired safety awareness and judgment and even before the survey, her care plans identified her as requiring supervision whenever she smoked for her safety. Id.; see also P. Ex. 26. Her care plan also recorded her frequent noncompliance with smoking policy and planned interventions to remind her of the policy whenever she attempted to go out to smoke without staff. P. Ex. 1, at 10; P. Ex. 25, at 1, 8.

Nursing records relied on by the ALJ document numerous occasions when R2 was found with matches or a lighter in her possession contrary to the smoking policy. ALJ Decision at 6 and record citations therein; P. Ex. 1, at 9-12. She was also repeatedly found smoking in the dining room, long after that had been prohibited by facility policy. ALJ Decision at 6; see, e.g., P. Ex. 27, at 1-3. Both violations continued to occur even after her April 26, 2004 elopement. ALJ Decision at 7-8, and record citations therein. Facility records document that R10 was incessantly heading to the patio to smoke, frequently doing so without supervision. Id.

The surveyor testified that her interviews with staff indicated that the alarm on the back door to the patio would sound regularly and "people would say, 'Oh, that's Resident Number Ten. She's going out to the patio.'" Tr. at 37. The surveyor also testified that the staff told her "they were supposed to go out and be with her when she would go out on the patio, but there were times when she would get out there by herself and be alone." Tr. at 42-43.

Century Care argues that the records of R10 incessantly trying to exit to the smoking patio are evidence that the staff was actually implementing her care plan and trying to monitor and redirect her. RR at 26-27. According to Century Care, the ALJ failed to acknowledge the numerous assessments and care plans that addressed R10's smoking safety. RR at 12. While admitting that R10's noncompliance with facility policy and her family's insistence on her right to smoke presented obstacles, Century Care asserts that "staff was alert to that issue, and responded accordingly." Id. Century Care points to statements by staff members describing occasions when R10 was retrieved only to turn around and head back out immediately. Id. and record citations therein. Century Care concludes the alarm system was actually serving its intended function by alerting staff whenever R10 went out alone. Id. at 27.

This argument ignores the core point made by the ALJ, i.e., that not only were smoking policies unenforced but the care plan that

required supervision of R10 whenever she smoked was also not fully implemented in practice. The care plan demanded that staff accompany the resident whenever she went outside to smoke, not merely be aware when she exited unaccompanied. The ALJ drew an inference from the evidence that Century Care's staff became so "inured" to the constant alarms that they did not always respond by accompanying her so that she would not be outside smoking by herself. ALJ Decision at 6-7. Century Care strongly objects to this inference, but we find that the evidence reasonably bears the construction which the ALJ gave to it. The points made by Century Care about the staff's attempts at redirection or response and the resident's persistence in exiting are not necessarily inconsistent with the ALJ's conclusion that at times the staff failed to respond to alarms triggered by R10.

Overall, the ALJ saw the evidence relating to R10's smoking behaviors over time as further demonstrating the facility's failure to consistently implement a policy that controlled possession of smoking materials and limited smoking to the back patio. ALJ Decision at 14-15. The ALJ particularly stressed that even a resident who was documented as an unsafe smoker and who was "seriously demented" was able to repeatedly obtain lighters and matches. Id. Furthermore, the ALJ considered the numerous records of R10 being "found" smoking or going on to the patio alone to show that this resident's individual care plan, like the facility smoking policy, was not being carried out consistently in practice. Id. at 15-16. Century Care characterizes these conclusions as "straight out of left field" and complains that the ALJ incorrectly focused on R10's smoking instead of her brief elopement. RR at 30. We find, however, that the ALJ's views are supported by substantial evidence in the entire record. The discussion of the longstanding problems with inadequate supervision of R10's smoking behavior is critical, moreover, to understanding why Century Care's efforts to cast the circumstances of the elopement as isolated are unavailing.

Another case presented the situation of a resident with an alarm bracelet who regularly exited the facility to sit outside, despite being assessed as at risk of elopement and falls. Golden Age Skilled Nursing & Rehabilitation Center, DAB No. 2026 (2006). The staff would turn off the alarm and asserted that they checked on the resident outside "off and on." Id. at 15. The Board there upheld the immediate jeopardy determination because the facility failed to show that it developed or implemented a protocol to assure her supervision while outside. Id. at 19. While Century Care did have a protocol for R10 to be accompanied by staff whenever she was on the smoking patio, the ALJ's finding

that this protocol was not implemented in practice is supported by substantial evidence.

As discussed earlier in this decision, Century Care conceded from the beginning that R10 was not adequately supervised on the day she eloped from the back smoking patio. Counsel for Century Care expressly stated at the hearing that "we are not contesting that it will be appropriate to find that there was a deficiency relating with the supervision" of R10, as R10 "obviously was not supervised." Tr. at 46. Century Care wishes to treat the failure of supervision as a single lapse, but the ALJ's determination that this failure was of a piece with the ongoing lack of effective supervision of R10's smoking behaviors is well-supported on the record.

First, prior to the survey, Century Care clearly failed to implement any "systematic procedure for assessing the degree of supervision required for its smokers," as the ALJ found. ALJ Decision at 13. The fact that an individual resident may have smoking supervision included in her care plan does not establish that the staff had any consistent criteria for distinguishing "safe" and "unsafe" smokers or for assigning degrees of supervision based on those criteria. The ALJ could reasonably consider the lack of an assessment process as increasing the risk that an unsafe smoker would not be supervised.

Second, Century Care points to no reason that we should assume that its level of supervision provided to R10 increased after her elopement. On the contrary, the continuing issues with the staff's management of R10's smoking behaviors reported after the elopement suggest that little had changed. Furthermore, staff who knew of the elopement admittedly never reported it to those who might have investigated appropriate additional measures to take, and Century Care has not identified any such measures that were in fact adopted. In fact, it is undisputed that no one among Century Care's administrative staff was even aware of the elopement until the surveyors discovered the event by interviewing staff and reported the past elopement to the facility's administration. Clearly, the facility lost an opportunity to analyze and correct the problems that led to the elopement by failing to have an effective system for staff to report and investigate such episodes.

Century Care argues that the ALJ's logic that the failure to investigate prevented the facility from taking steps to prevent recurrence is "sophistic," in that "by the time the surveyors cited the deficiency, they knew that the problem had not recurred, and would not recur" because R10 was no longer

ambulatory. In fact, Century Care insists that R10 never previously or afterward eloped from the facility, so that the events of April 26, 2004 should be seen as isolated. RR at 27-29, 32.

By the time the surveyors cited the deficiency, R10 and any other smokers who might be at risk without supervision had been exposed to the dangers for months. The risks that unsafe smokers might wander, or burn themselves, or start a fire, or otherwise suffer from inadequate supervision remained serious whether or not R10 actually eloped again during that time. As the ALJ pointed out, furthermore, the complete failure to document, report, or investigate the elopement about which the surveyors happened to learn months after the fact undercuts Century Care's reliance on the absence of other documented incidents as proof that no other elopements occurred. ALJ Decision at 17, n.14.

5. We affirm the ALJ's conclusions on immediate jeopardy.

Century Care characterizes both incidents discussed above as essentially trivial with little or no consequence for either resident. See RR at 2,4, 19, 20 n.9, 48 Century Care argues that, while some deficiency might appropriately be cited as to R10, no immediate jeopardy determination at all should be upheld on this record. As to R2, Century Care argues that, not only was the resident's decision to light a lighter in the middle of the night while smoking unforeseeable, the consequences were minor. As to R10, Century Care suggests that CMS has created an illogical concept of "past immediate jeopardy in which liability is created for a period of time starting with some past event and ending only after the completion of a plan of correction that could only be created after a later survey." RR at 53. Century Care denies any evidence of systemic breakdowns as opposed to simply the occurrence of "undesirable event[s]." RR at 55. Century Care points to the absence of proof that other residents both wandered and smoked or had smoked in their rooms as undercutting any basis for showing a likelihood that any other residents would suffer harm during the period for which immediate jeopardy was cited. RR at 56.

Century Care also contends that, even if both incidents constituted noncompliance, they cannot be joined to find continuing noncompliance absent a showing of a "factual connection" and a need for "common corrective action." RR at 49, 54. Century Care thus contests both the existence of any immediate jeopardy and the extension of the immediate jeopardy determination over the cited period of April 26, 2004 through June 16, 2004.

The standard by which we are guided in reviewing an ALJ's decision to uphold CMS's immediate jeopardy determination is highly deferential. See, e.g., Barbourville Nursing Home, DAB No. 1962, at 11 (2005), aff'd, Barbourville Nursing Home v. Leavitt, 2006 W.L. 908631 (6th Cir., Apr. 6, 2006). Regulations require an ALJ to uphold CMS's determination that the applicable level of noncompliance is immediate jeopardy unless the facility proves that it is "clearly erroneous." 42 C.F.R. § 498.60(c). Century Care is thus mistaken in framing the "ultimate issue" as whether the events here "compel an 'inference' that Petitioner supervised these residents so inadequately during the Spring of 2004 as to make it 'likely' that those residents, and all of Petitioner's others, were at 'immediate jeopardy' of serious harm or death for a period of some eight weeks." RR at 4.[11]

Under the clearly erroneous standard, Century Care bears a high burden on the issue of whether immediate jeopardy was present. The ALJ must uphold CMS's determination, even if not "compelled" by the evidence, so long as it is not clearly erroneous.

The ALJ here rejected Century Care's claims that R2 was only "slightly singed" and that R10 merely took an uneventful "short walk." ALJ Decision at 16, n.15, 21. Century Care reiterates these claims on appeal. RR at 20, 48. Century Care asks the Board to take notice that "first degree burns" merely redden the skin as in sunburn, and plainly are not a serious injury. RR at 20, n.9. While sunburn is indeed characterized by the American Medical Association (AMA) Encyclopedia of Medicine as a typical first-degree burn, the same source notes that extensive first-degree burns cause "pain, restlessness, headache and fever," even though not "life-threatening." AMA Encyclopedia of Medicine at 220 (1989). R2 required emergency room treatment for burns on his face and hands. The ALJ could reasonably determine, as she did, that this injury was serious. ALJ Decision at 21. In any case, the ALJ correctly noted that actual serious injury need not be shown where the likelihood of serious harm exists. Id.; 42 C.F.R. § 483.301. In finding that such a likelihood existed here, the ALJ relied, inter alia, on the testimony of Century Care's own director that the use of fire around oxygen is "always a concern" and may result in a "flame up or an explosion." Id., citing Tr. at 20.

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[11] Century Care pointed to no authority for a requirement that "all" residents of the facility have been at risk in order to justify immediate jeopardy, and we find none.

As to R10, Century Care acknowledges that any "unsupervised excursion" posed the "potential for injury," if, for example, R10 had walked toward a street. RR at 47. Nevertheless, Century Care argues that the evidence does not establish that serious harm was likely since in fact the resident merely walked to a picnic table on a sunny day and was promptly retrieved. RR at 48. Further, Century Care argues that "while we cannot know what - if anything - was in the Resident's mind as she walked toward the picnic table, it is fair to infer that she was not fixated on getting away, going home to cook dinner, going out for a drink or any of the other common motivations of residents who elope." Id. Century Care argues that, for that reason, any conclusion that R10 was likely to be "exposed to the usual hazards of wandering away - getting cold, lost, confused, scared, hit by a car" would be "entirely speculative." Id.

What seems entirely speculative is Century Care's "inference" as to what was not in R10's mind or motivation. In any case, we do not see how that inference leads to a conclusion that R10 was unlikely to be "exposed to the usual hazards of wandering away." No one on Century Care's staff claimed to have been aware of the resident's absence or to have been looking for her before the doctor's office luckily spotted her and called the facility. Her recovery, if prompt (which, as the ALJ noted, is hard to prove because no one knows the point at which she left the patio), was merely fortuitous and lends no confidence that eloping residents would generally be promptly rescued. The likelihood of serious harm is weighed not merely by the fortuitous sequence of events that actually resulted from lack of supervision in the instance discovered by the surveyor, but by considering what the episode reveals about dangers to which residents in the facility were exposed by the identified problems and how likely such dangers were to result in serious harm. Whatever R10 was thinking, the fact that someone who was severely mentally impaired and unable to care for her own safety could wander off entirely unnoticed and not be sought until strangers rescued her presents significant likelihood that vulnerable residents might encounter the very dangers which Century Care calls the "usual hazards of wandering away," such as falls, traffic, etc. Century Care does not deny that it housed other similarly impaired residents. Whether or not other residents both wandered and smoked is not material. If staff had become inured to the alarm sounding as R10 went in and out from the patio, as the ALJ found, they would not necessarily be aware whether a particular alarm was actually set off by her or by some other resident exiting to the back patio.

Furthermore, as Century Care acknowledges, the Board routinely upholds the presumption that noncompliance remains until the facility demonstrates that it has achieved substantial compliance. RR at 49; see, e.g., Lake City Extended Care, DAB No. 1658, at 12-15 (1998). Century Care argues, however, that this general rule is inapplicable where CMS has not demonstrated that some "common corrective action" was required to achieve substantial compliance. RR at 54. Century Care argues that no corrective action was actually called for by either of the incidents discussed above and that the ALJ did not specify what correction was required for either, much less determine that they needed some "common" correction. RR at 51. Century Care provides no legal authority for the idea of "common corrective action." Even were there such a requirement, we would find that it was met here based on Century Care's plan of correction, which contained measures, including full implementation by staff of the smoking policy, which were accepted by CMS as alleviating the immediate jeopardy demonstrated by both episodes.

Century Care's core complaint about the immediate jeopardy finding is that finding immediate jeopardy to have been present at some time prior to the survey is illogical and unfair since the facility could not correct the situation until the survey exposed it. RR at 50-56. This premise is faulty. The facility did not have to wait for surveyors to discover from facility staff that an elopement had occurred which was not reported or investigated. Had the facility monitored its own staff more closely, R10's elopement could have been promptly discovered and its causes addressed long before the survey. Moreover, the immediate jeopardy discovered at the survey was not "past" immediate jeopardy that had been eliminated but was continuing immediate jeopardy. Since the elopement went unreported and uninvestigated, the facility had not even identified, much less corrected, the flaws in its supervision and staff reporting that permitted it to occur. The second incident which gave rise to the complaint survey, R2's accident, was not merely an unrelated event the investigation of which unearthed the prior elopement. Instead, both episodes expose different dangers that residents confronted because of the facility's ongoing failure to implement its own policies for regulating and supervising resident smoking.

Accordingly, we affirm the ALJ's conclusion that the immediate jeopardy determination was not clearly erroneous.

6. The amount of the CMP is reasonable as a matter of law.

We note that Century Care also contests the amount of the CMP imposed for the immediate jeopardy findings, citing other ALJ

decisions in which either the CMP imposed was lower or the facts were, according to Century Care, more egregious. RR at 59-64. Century Care asserts that a reasonable CMP under the circumstances would be no more than a total of $5,000. Id.

Given our resolution of the substantive issue above, we have no authority to reduce the amount of the CMP below that imposed by CMS. The amount of the CMP is established based on the applicable range and the number of days of noncompliance. 42 C.F.R. §§ 488.438(a), 488.440(a),(b). In deciding whether the amount of a CMP is reasonable, we look at the per day amount, not at the total amount of the CMP. Thus, Century Care's argument that "a reasonable CMP under the circumstances would be no more than a total of $5,000" is irrelevant. RR at 64-65.

As to the applicable range, where immediate jeopardy is present, as we have found here, the regulations set $3,050 per day as the lowest per-day CMP applicable. 42 C.F.R. § 488.438(a)(1)(i). CMS thus imposed the lowest per day amount possible. Therefore, we cannot reduce the amount of the per-day CMP absent a finding that the immediate jeopardy determination was clearly erroneous, which we reject.

As to the number of days, the regulations set the period for which CMS may impose a CMP as beginning as early as the date that the facility was first out of substantial compliance (as determined by CMS or the survey agency) and continuing until the facility is determined to have abated the immediate jeopardy (for the immediate jeopardy range amount) and (at a lower level) until substantial compliance is achieved. 42 C.F.R. § 488.440(a),(b). CMS imposed the immediate jeopardy CMP here beginning with the date of the first episode which it cited as revealing the existence of immediate jeopardy until surveyors determined the immediate jeopardy was abated (during the survey itself). Above, we upheld the ALJ's conclusion that the incidents cited revealed continuing systemic problems, rather than merely isolated events, at the level of immediate jeopardy. Given our conclusions in that regard, we find nothing in Century Care's arguments that could justify altering the number of days of noncompliance at the immediate jeopardy level.

We thus could not reduce the amount of the per-day CMP or the number of days, and therefore have no authority to reduce the total CMP to $5,000 as Century Care requests. Hence, we need not consider further Century Care's arguments as to the reasonableness of the CMP amount in light of various other fact scenarios in the other cases.

7. Century Care did not show any unfairness in the ALJ's treatment of the evidence.

Finally, we must address Century Care's pervasive assertions of unfairness on the part of the ALJ. See, e.g., RR at 7-8 (ALJ conclusions on lack of systematic assessments or effective actions to control smoking "completely unfair and inappropriate"), 10 (ALJ finding of inconsistency in Administrator Jorgensen's testimony on smoking policies "gratuitous"); 11 (ALJ took "gratuitous potshots . . . entirely inappropriate"); 17 (ALJ had a "sort of impressionistic reaction to the occurrence of an accident"); 21 (ALJ's treatment of "very troubling evidence" from surveyors "completely unreasonable"); and 30 ("almost entirely subjective, impressionistic nature of Judge Hughes' analysis"). Century Care complains of the ALJ's "sarcasm" in describing the evidence about what R2 was told about smoking policies at admission and in disposing of its claims about the possibility that a visiting relative might have left R10 unattended on the back patio. RR at 11, n.6, and 32, n.12. Century Care also accuses the ALJ of ignoring record evidence and drawing inferences "really from thin air." See, e.g., RR at 38.

Century Care has not identified any specific example of the ALJ's demeanor at the hearing or during the case that could support its allegations of unfairness, other than its own dispute with how the ALJ analyzed the evidence. The Board has articulated in many prior cases the limited bases on which an ALJ can be found to have been biased in deciding a case. Thus, the Board explained:

> In Edward J. Petrus, Jr., M.D., and The Eye Center of Austin, DAB No. 1264 at 23-26 (1991)[aff'd sub nom., Petrus v. I.G., 966 F.2d 675 (5th Cir. 1992), cert. denied, 506 U.S. 1048 (1993)], the Board described the standard for disqualifying a judge on a charge of bias. The Supreme Court, the Board noted, has held that "[t]he alleged bias and prejudice, to be disqualifying, must stem from an extrajudicial source and result in an opinion on the merits on some other basis than what the judge learned from his participation in the case . . . ." United States v. Grinnell Corp., 384 U.S. 563, 583 (1966); see also Tynan v. United States, 376 F.2d 761 (D.C. Cir. 1967), cert. denied, 389 U.S. 845 (1967); Duffield v. Charleston Area Medical Center, 503 F.2d 512, 517 (4th Cir. 1974).

St. Anthony Hospital, DAB No. 1728, at 84 (2000), aff'd, 309 F.3d 680 (10th Cir. 2002); see also Madison Health Care, Inc., DAB No.

2049 (2006); Britthaven of Goldsboro, DAB No. 1960 (2005); Meadow Wood [Nursing Home], DAB No. 1841, at 10 (2002), aff'd, Meadow Wood Nursing Home v. HHS, 364 F. 3d 786 (6th Cir. 2004)("[W]eighing of testimony and evidence in the record is the essential task of an ALJ and can hardly be viewed as a demonstration of bias toward the party that does not prevail on the merits, however disappointed.").

Thus, it is not enough for Century Care to show that the ALJ was unimpressed by Century Care's witnesses or arguments or that the ALJ may have used strong language in expressing her views of the evidence. Nothing to which Century Care has pointed shows any reason for the ALJ's resolution of the case before her other than her assessment of the evidence and arguments presented within the four corners of the legal proceeding before her. Century Care may disagree with that assessment but such disagreement does not substantiate a claim of unfairness.

Conclusion

For the reasons explained in detail above, we affirm the ALJ Decision.

Judith A. Ballard

Sheila Ann Hegy

Leslie A. Sussan
Presiding Board Member