Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Wendell Foo, M.D.
Docket No. A-16-101
Decision No. 2769
February 7, 2017

REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

Petitioner Wendell Foo, M.D. appeals the decision of an Administrative Law Judge (ALJ) dated April 8, 2016. *Wendell Foo, M.D.*, DAB CR4580 (2016) (ALJ Decision). The ALJ sustained the determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's enrollment in the Medicare program as a supplier. As we explain below, we vacate the ALJ Decision and remand this case to the ALJ pursuant to 42 C.F.R. § 498.88(a) because the ALJ admitted hearsay evidence that potentially prejudices Petitioner without offering him an opportunity to cross-examine the hearsay declarant or affirmatively ruling on the objection to the evidence.

Legal background

The Medicare program is administered by CMS, which in turn delegates certain program functions to private contractors. Social Security Act (Act) §§ 1816, 1842, 1874A; 42 C.F.R. § 421.5(b).

The Act provides for CMS to regulate the enrollment of providers and suppliers in the Medicare program. Act § 1866(j)(1)(A). The implementing regulations in 42 C.F.R. Part 424, subpart P, set out the enrollment process that CMS uses to establish eligibility for submitting claims to Medicare and to terminate such eligibility.

In order to receive payment for services furnished to Medicare beneficiaries, a "supplier," including a physician, must be "enrolled" in Medicare and maintain active enrollment status.[1] 42 C.F.R. §§ 424.500, 424.502, 424.505, 424.510, 424.516. CMS reserves the

[1] The regulations at 42 C.F.R. § 400.202 state that, unless the context indicates otherwise, the term "supplier" "means a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare." "Providers" include, *inter alia*, hospitals, nursing facilities, and comprehensive outpatient rehabilitation facilities. *Id.*

right, when deemed necessary, to perform on-site inspections to verify that the enrollment information submitted to CMS or its agents is accurate and to determine compliance with Medicare enrollment requirements. *Id.* § 424.510(d)(8).

CMS has authority to revoke a supplier's enrollment for any of the "reasons" in 42 C.F.R. § 424.535(a). Relevant here, section 424.535(a)(5) states:

> *On-site review*. Upon on-site review or other reliable evidence, CMS determines that the provider or supplier is either of the following:
> (i) No longer operational to furnish Medicare-covered items or services.
> (ii) Otherwise fails to satisfy any Medicare enrollment requirement.

See Final Rule, 79 Fed. Reg. 72,500, 72,532 (Dec. 5, 2014) (eff. Feb. 3, 2015). The term "operational" is defined in 42 C.F.R. § 424.502 to mean that "the provider or supplier has a qualified physical practice location, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked (as applicable, based on the type of facility or organization, provider or supplier specialty, or the services or items being rendered), to furnish these items or services."

Revocation effectively terminates any provider agreement and bars the provider or supplier from participating in Medicare from the effective date of the revocation until the end of the re-enrollment bar. 42 C.F.R. § 424.535(b), (c). The re-enrollment bar lasts between one year and three years, depending on the severity of the basis for revocation. *Id.* § 424.535(c). In general, revocation takes effect 30 days after CMS or its contractor mails the notice of determination to revoke, with exceptions, e.g., where the basis for revocation is that the provider or supplier was not operational, revocation takes effect on the date on which CMS determined non-operational status. *Id.* § 424.535(g). A provider or supplier whose Medicare enrollment has been revoked may request reconsideration by CMS or its contractor, and then appeal the reconsideration decision, to an ALJ and then to the Board, in accordance with the procedures at 42 C.F.R. Part 498. *Id.* §§ 424.545(a), 498.3(b)(17), 498.5(l)(1)-(3), 498.22(a).

Factual background

Petitioner is an anesthesiologist who has been practicing medicine for about 40 years. Request for Board review (RR) at 1; Request for hearing (RFH) at 2. In May 2014, he filed, through the Internet-based Provider Enrollment, Chain and Ownership System (PECOS), an application for revalidation as a supplier. CMS's response to request for Board review (CMS Response) at 4; CMS Ex. 9.

By letter dated June 24, 2015, Noridian Healthcare Solutions (Noridian), a CMS Medicare Administrative Contractor, informed Petitioner that his enrollment and billing privileges were being revoked "effective March 5, 2015" pursuant to 42 C.F.R. § 424.535(a)(5), because an "[o]nsite visit was conducted on March 5, 2015 and on May 11, 2015" at 4348 Waialae Ave., #5-311, Honolulu, Hawaii (Waialae Ave.), "and this [address] is not a practice location."[2] CMS Ex. 4, at 4. Noridian also stated, however, that revocation would remain in effect for two years[3] from "30 days from the postmark date of [the initial determination] letter [i.e., June 24, 2015]." *Id.* at 5. (We address the inconsistency in effective dates later in this decision.)

Petitioner requested reconsideration, stating that Waialae Ave., which he believed a Noridian inspector had mistaken as his practice location, is his United Parcel Service (UPS) Store mailbox address. *Id.* at 1. Petitioner explained that he provides all of his anesthesiology services at facilities where the surgeons perform the surgeries and that those facilities, not the UPS Store mailbox address, are his practice locations. *Id.* He stated that the UPS Store mailbox address was specifically identified in section 2 of his "Enrollment Record" as his correspondence address. *Id.* He identified three facilities (ambulatory surgical centers, ASCs) at which he routinely provided anesthesiology services, referring to them as his "practice locations." *Id.* at 2.

By reconsidered determination dated August 27, 2015, Noridian upheld the revocation. CMS Ex. 1, at 1, citing 42 C.F.R. § 424.535(a)(5). Noridian stated:

> On-Site Review/Other Reliable Evidence that Requirements Not Met
> An On-Site visit was conducted on March 5, 2015 and on May 11, 2015 at the address listed above [Waialae Ave.] and this is not a practice location.

Id. Noridian acknowledged the application for revalidation, received on May 14, 2014. It stated that, according to a phone log on file for this enrollment application, a Noridian enrollment representative called Petitioner on June 24, 2014, at the number identified in the reconsidered determination. *Id.* The representative reportedly spoke to a receptionist

[2] The term "practice location" is neither defined in Part 424, subpart P, nor found in section 424.535(a)(5). However, the term "operational" is mentioned in section 424.535(a)(5), and one element of "operational" status consistent with section 424.502 is to have a "qualified practice location." Section 424.502 must be read together with section 424.535(a)(5), the cited basis for revocation. We note, moreover, that while neither party has addressed the precise meaning of "practice location," the parties seem to agree that, as applied to a physician-supplier, the "practice location" is a physical location, as in a medical office, where the physician meets with patients and provides medical care and treatment. For purposes of this case, we see no reason to disagree with this interpretation, which is consistent with a commonsense understanding of a medical practice location.

[3] The imposition of a two-year re-enrollment bar comports with current CMS manual instructions to contractors to cite 42 C.F.R. § 424.535(a)(5) as the basis for revocation based on non-operational status. Medicare Program Integrity Manual (MPIM), CMS Pub. 100-08, Ch. 15, § 27.2.D.

who verified that the number was the primary office phone number for making appointments with Petitioner or to ask questions about billing, and verified that Petitioner's practice address was Waialae Ave. *Id.*

Petitioner appealed, arguing that no legally supportable basis supports revocation based on inspection of a location that he consistently identified only as a correspondence address. RFH at 3-4. He stated that he never used, and never intended to use, Waialae Ave. as anything other than a "post office box" to receive mail. *Id*. at 2. He argued that Medicare enrollment policies expressly authorize the use of a post office box for correspondence and do not require physicians like him, whose practice "focuses on delivery of services outside of the office setting," to maintain "an actual office." *Id.* He challenged Noridian's reliance on the phone log as a "separate basis" for revocation as "both substantively and procedurally improper" since the MPIM "expressly prohibits [contractors] from introducing new reasons for revocation on reconsideration review." *Id.* at 4. According to Petitioner, he is permitted to use any phone number for correspondence, *id.*, and he did precisely that by establishing a phone line at home to serve as an answering service, through which he could be contacted for appointments or to ask about billing or other matters, *id.* at 2-3.

The ALJ upheld the revocation in a decision based on the written record, finding no reason to hold a hearing or to address CMS's motion for summary judgment. The ALJ stated that neither party had requested to cross-examine the other party's sole witness (D.W. for Petitioner; C.F. for CMS) whose written direct testimony was of record. ALJ Decision at 3-4 & 4 at n.4; CMS Ex. 13 (declaration of C.F.); P. Ex. 19 (declaration of D.W.). The ALJ also admitted all of the evidence submitted by the parties, noting that neither party objected to any exhibit offered by the opposing party. ALJ Decision at 3-4. The ALJ determined that CMS lawfully revoked Petitioner's enrollment and billing privileges because, based on "site verification survey" attempted on March 5, 2015 and again on May 8, 2015, Petitioner was found "not operational at a practice location on record with CMS" (Waialae Ave.), which was a "mailbox unit" at a UPS Store. *Id.* at 1, 2 (citing CMS Exs. 9, at 1; 10, at 1; 11, at 3), 4, 5 (citing CMS Exs. 6, 7).

Before the ALJ, Petitioner represented that the surgical facilities at which he provided anesthesiology services were his practice locations, and that he had identified the specific practice location (site of the surgery) in the Medicare claim forms. He claimed that he consistently identified Waialae Ave. as his correspondence address in his enrollment applications, including the 2014 revalidation application, and listed the locations where he regularly provides anesthesiology services as his practice locations since he does not have a private office. *Id.* at 6. CMS, however, took the position that based on an earlier

(2010) revalidation application,[4] Petitioner's practice location on file was Waialae Ave, and that Waialae Ave. continued to remain in CMS's records as the practice location because Petitioner did not revise his enrollment information in 2014 to report a practice location address other than Waialae Ave. As support, CMS relied on the declaration of C.F., a Noridian project analyst, who stated that Petitioner identified Waialae Ave. as a "Physical Location" in his 2010 application and that when he later filed his 2014 application through PECOS, he could have edited, but did not edit, the existing record to enter a different practice location address. *Id.*, citing CMS Ex. 13, at 3-5.

The ALJ accepted C.F.'s explanation that the message "no current records exist" for "practice location(s)/base(s) of operations" in the PECOS report associated with the 2014 application is an indication that in 2014 Petitioner did not change the 2010 entry of Waialae Ave. as his practice location. *Id.*; CMS Exs. 9, 11, and 13, at 4-5. The ALJ also found it reasonable that the contractor would look to information from an earlier (2010) revalidation to verify the information on file if a supplier did not later provide new information, noting that 42 C.F.R. § 424.515 requires Petitioner to resubmit and recertify the accuracy of his enrollment information every five years. ALJ Decision at 10, citing CMS Ex. 13, at 4-5. The ALJ also rejected the assertion that the initial determination in this case did not arise from the 2010 application and therefore CMS's consideration of information about the 2010 revalidation was contrary to *Advance Group LLC*, DAB CR4126 (2015). The ALJ reasoned that DAB CR4126 is distinguishable from, and "not instructive" in, Petitioner's case because in DAB CR4126 CMS had acknowledged that the reconsidered determination revoking Advance Group's enrollment and billing privileges was not based on information concerning the earliest of several site visits and that the ALJ who decided DAB CR4126 did not rely on evidence concerning the earliest site visit. *Id.* at 9-10, citing *Advance Group LLC*, DAB CR4126, at 6.[5]

[4] The ALJ Decision refers to a revalidation application filed in May 2010. ALJ Decision at 6, 7, 10. The references to "May" in the ALJ Decision appear to have been in error. The record indicates that one application was filed in 2010, in February. *See* CMS Ex. 11 (February 2010 PECOS application data summary); CMS Ex. 13, at ¶ 7 (C.F.'s declaration, referring to a February 2010 PECOS record).

[5] Finding no violation of 42 C.F.R. § 424.57(c)(7), the ALJ reversed CMS's decision to revoke Advance Group's enrollment and billing privileges. *Advance Group LLC*, DAB CR4126 (2015). On CMS's appeal, by decision dated April 14, 2016, the Board reversed the ALJ's decision for reasons unrelated to the ALJ's determination not to consider evidence concerning the earliest visit. *Advance Group LLC*, DAB No. 2686 (2016).

The ALJ ultimately found that Petitioner "did not report any physical practice locations, other than the mailbox unit at the UPS Store, on the [2014] application." *Id.* at 6, citing CMS Exs. 9 and 11, at 3.[6] The ALJ also noted that, while Petitioner reported the addresses for two surgery facilities as records storage locations in 2010 and did not revise that information in 2014, he did not report that those addresses were physical practice locations. *Id.* at 6-7, citing CMS Exs. 9, at 1; 11, at 3-4; and 13, at 4-5. The ALJ therefore determined that Petitioner identified the UPS Store address as his practice location in 2010 and did not provide the address for any surgery center as his practice location in its place. *Id.* at 7. Therefore, the ALJ concluded that CMS had a basis to revoke because Petitioner's practice location on file at the time of the 2015 inspections was Waialae Ave., the UPS Store address, and it is undisputed that Petitioner was not operational (as defined in 42 C.F.R. § 424.502) in that Waialae Ave. is not a valid practice location. *Id.* at 7-8, quoting 42 C.F.R. § 424.535(a)(5)(ii).[7]

The ALJ also rejected Petitioner's argument that Noridian should have inquired further to determine whether Petitioner is operational because he was in fact fully operational. *Id.* at 8. The ALJ noted that CMS has discretionary authority to revoke, and that the question before her is limited to whether CMS had a legal basis to revoke, not whether CMS could have or should have exerted additional effort to identify a physical practice location given that Petitioner provides his services at various surgical facilities. *Id.*, citing *Letantia Bussell, M.D.*, DAB No. 2196, at 10 (2008) and *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 19 (2008), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010). Petitioner, the ALJ said, cited no authority that CMS was obligated to

[6] The ALJ recognized that D.W. (Petitioner's son, who assists his father in administrative matters related to his medical practice) stated in his written direct testimony that he "'personally typed in the Hawaii Eye Center, Surgicare of Hawaii, and Hawaii Endoscopy Center's addresses as physical location addresses'" when he completed the May 2014 revalidation application for his father, and that D.W. "'[d]id not recall having identified [Waialae Ave.] as a practice location . . . ." ALJ Decision at 5-6 n.6, quoting P. Ex. 19, at 6. The ALJ pointed, however, to the absence of a copy of the May 2014 PECOS revalidation application itself. *Id.* at 6 n.6, quoting P. Ex. 19, at 6 ("Dr. Foo's office does not have a copy of the PECOS re-enrollment application."). It therefore appears that the ALJ concluded that D.W.'s statement was not corroborated by any documentary evidence.

[7] The ALJ Decision quoted section 424.535(a)(5)(ii) in effect before February 3, 2015, to convey that the basis for revocation was non-operational status. ALJ Decision at 7. Section 424.535(a)(5)(ii) in effect before February 3, 2015, as quoted in the ALJ Decision, included the words "A Medicare Part B supplier is no longer operational to furnish Medicare covered items or services" to indicate that non-operational status was one of multiple bases for revocation following site review. However, the ALJ should have relied instead on section 424.535(a)(5)(i) that went into effect on February 3, 2015, before the first of the two inspection attempts in March 2015. The regulation effective February 3, 2015 authorizes revocation where a supplier is "[n]o longer operational to furnish Medicare-covered items or services." *See* "Legal background" section above; 79 Fed. Reg. at 72,532. In any case, the wording difference does not affect the result here.

make further attempts, inasmuch as the MPIM, chapter 15 provisions on which Petitioner relies do not "mandate the contractor to further investigate possible physical practice locations" and MPIM, § 15.5.4.3.C adds that "'the contractor shall verify that the address is a physical address'" and that "'[p]ost office boxes and drop boxes are not acceptable.'" *Id.* at 9 & 9 n.7. Nor would it be reasonable to expect contractors to "proactively search for physical locations that are not listed on an enrollment application[,]" the ALJ said, in light of the high number of suppliers who, like Petitioner, are subject to inspections. *Id.* & *id.* n.8. The ALJ went on to state that suppliers bear the burden to provide, and continue keeping CMS apprised of, accurate information about their practice location(s) in furtherance of the purpose of the site inspection process, which, as Petitioner pointed out, is to reduce fraud and maintain program integrity. *Id.* at 8-9. The ALJ noted, also, that Form 855I instructs physicians to identify the facilities at which they provide services if the facilities are hospitals or other health care facilities and explain any unique circumstances about their practice locations. *Id.* at 9; CMS Ex. 14 (blank Form 855I).

Standard of review

The standard of review for disputed issues of law is whether the ALJ's decision is erroneous. The standard of review for disputed issues of fact is whether the ALJ's decision is supported by substantial evidence on the record as a whole. *See Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program* (*Guidelines*), available at http://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/index.html?language=en.

Analysis

The issue on appeal is whether CMS lawfully revoked Petitioner's enrollment and billing privileges under section 424.535(a)(5)(i) for non-operational status based on the failed inspections at Waialae Ave. The central factual dispute between the parties related to this issue is how CMS came to have Waialae Ave. as Petitioner's practice location of record. Stated simply, CMS's position is that Petitioner's filings, including his 2010 revalidation application, reflect that Waialae Ave. is and has been his practice location and, therefore, the failed inspections in 2015 at Waialae Ave. – which cannot be a valid practice location since it is a mailbox facility – support a finding of nonoperational status at the practice location of record and revocation of Petitioner's enrollment and billing privileges under section 424.535(a)(5)(i). Petitioner, however, disputes that he ever represented Waialae

Ave. as his practice location; rather, he asserts, he does not have and has not previously had his own office and consistently represented that the surgical facilities at which he provided anesthesiology services are his practice locations.[8]

Before the ALJ, Petitioner raised evidentiary objections, especially concerning CMS's reliance on hearsay reports of contractor communications to demonstrate that Waialae Ave. was his recorded practice location. As we explain below in section A, we find ALJ error related to the admission of this hearsay evidence and remand this case for this reason. We explain in section B that we do not agree with Petitioner that the ALJ erred in admitting and relying on other evidence related to the 2010 revalidation. In section C, we identify additional evidentiary questions relevant to the central factual dispute about whether Waialae Ave. was the practice location of record for purposes of the 2015 inspection attempts. On remand, the ALJ should address in her new decision the questions we discuss in section C, explaining her rationale as to how on de novo review she weighed the evidence that raises the questions. The ALJ also may consider further developing the record as appropriate by offering the parties an opportunity to brief the ALJ on those evidentiary questions and/or submit additional relevant evidence before she readjudicates the case. Lastly, in section D, we discuss the effective date of revocation.

A. The ALJ erred by not either providing Petitioner an opportunity to cross-examine a hearsay declarant or affirmatively ruling on Petitioner's objection to hearsay evidence.

Petitioner's chief argument on ALJ error concerns the ALJ's issuance of a decision based on the written record without holding a hearing. Petitioner asserts that, absent an express waiver of his right to a hearing before the ALJ (and he has not waived that right) or circumstances otherwise rendering a hearing unnecessary, he is entitled to a hearing. RR at 2-4, citing 42 C.F.R. § 498.66(a)(1); *Marcus Singel, D.P.M.*, DAB No. 2609, at 5 (2014); *Sol Teitelbaum, M.D.*, DAB No. 1849 (2002). He denies that such circumstances were present here. *Id.* at 4.

[8] Form CMS-855I itself would indicate that CMS contemplates the possibility that not every physician filing a Form 855I would have his or her own medical office. Section 4 of Form 855I, designated for identification of practice locations, explains that a physician who provides services only at patients' homes may report a home address if the physician has no office; physicians who provide services at retirement or assisted living communities are to identify the addresses of the communities. CMS Ex. 14 (blank Form 855I), at 16. However, each practice location must be a "specific street address as recorded by the United States Postal Service" and may not be a post office box. *Id.* The MPIM, Ch. 15, § 15.5.4.3.C, is generally consistent with the language in Form 855I, and states that addresses reported by physicians who provide services at patients' homes and retirement or assisted living communities must identify physical addresses, and that post office boxes and drop boxes are not acceptable.

The Board has stated that a hearing need not be held where no testimonial evidence, however credible, could alter relevant factual findings or affect the outcome, so that convening a hearing would be "an empty formalism and a waste of administrative and litigant resources." *Big Bend Hosp. Corp., d/b/a Big Bend Hosp. Ctr.*, DAB No. 1814, at 13-16 (2002). The Board has also determined that not holding an in-person hearing does not generally pose a due process concern where neither party seeks to cross-examine any witness for whom the opposing party has submitted written direct testimony. *Igor Mitreski, M.D.*, DAB No. 2665, at 7 (2015). In the present case, the ALJ notified the parties, by an October 28, 2015 Acknowledgment and Pre-hearing Order, ¶¶ 9 and 10, that they had to affirmatively express intent to cross-examine the opposing party's witness(es), and that an in-person hearing would be held only if a party filed admissible, written direct testimony for a witness whom the opposing party asks to cross-examine. Each party here submitted written direct testimony for a single witness and neither party sought to cross-examine the other's witness. On that basis, the ALJ decided to proceed based on the written record.

In this case, however, CMS's assertion as to a central fact relies on the statement of an individual for whom it did not submit any written direct testimony. The statement is in the form of a log memorializing a June 24, 2014 telephone call by "Liza," a Noridian employee, to the number on record as belonging to Petitioner. CMS Ex. 8 (phone log). "Liza" purportedly spoke to an individual who had identified "herself" as a receptionist, and, according to CMS, confirmed that Waialae Ave. was the practice location. *Id*. Petitioner did not dispute that a call was made on June 24, 2014 or that the number "Liza" called was his number, but objected to the log itself, arguing, *inter alia*, that it is unreliable hearsay evidence, and stated that at a minimum he should be permitted to question the employee. P. Pre-hearing Brief and Opposition to CMS' Motion for Summary Judgment (P. Br.) at 4-5, 17-18; *see also* CMS Ex. 1 (reconsidered determination), at 1 (discussing the phone log and stating that by the June 24, 2014 call Noridian "verified that the practice address was [Waialae Ave.]."); CMS Motion for Summary Judgment (MSJ) at 3 (relying on the phone log as additional support for CMS's position that CMS's enrollment record continued to reflect Waialae Ave. as the practice location); CMS Ex. 13 (C.F.'s declaration), at ¶ 9 (discussing log). Moreover, Petitioner objected more broadly to CMS's exhibits to the extent CMS was relying on them as proof that Waialae Ave. was the practice location on file. P. Br. at 3-6.

The Board generally defers to ALJs' evidentiary determinations, concerning credibility and weight to be accorded to evidence, unless a particular case presents compelling reason to do otherwise. *See, e.g., Community Northview Care Ctr.*, DAB No. 2295, at 28 (2009) and cases cited therein. Here, however, the ALJ incorrectly stated that "neither party has objected to any exhibits" before admitting all of the exhibits, and denying a hearing. ALJ Decision at 3-4. Thus, this is not a situation in which the ALJ resolved evidentiary objections and ruled on the credibility or weight of the evidence, but rather

one in which evidentiary objections went unanswered. If the ALJ decided to admit the evidence, including the phone log specifically, over Petitioner's objections, the ALJ at a minimum should have explained the reasons why she found any hearsay evidence that she was admitting – which 42 C.F.R. § 498.61 does permit – reliable or unreliable and why, and the weight she was according to it. Hearsay presents inherent reliability concerns since the declarant is not subject to the safeguard of cross-examination, and accordingly the ALJ must consider those concerns in determining whether hearsay evidence should be accorded credence. As the Board said:

> The question . . . is not whether various levels of hearsay may be admitted into evidence in this administrative hearing (they may be, subject to relevance and fundamental fairness), but what weight the ALJ should accord hearsay so admitted. That weight is determined by the degree of reliability based on relevant indicia of reliability and whether the hearsay is corroborated by other evidence in the record as a whole.

Community Northview Care Ctr. at 28, quoting *Omni Manor Nursing Home*, DAB No. 1920, at 17 (2004), *aff'd*, 151 Fed. App'x 427 (6th Cir. 2005).[9] Because the ALJ did not provide Petitioner an opportunity to cross-examine the hearsay declarant or at a minimum affirmatively rule on the objection to the hearsay evidence, explaining why she found it reliable or not and the weight she was according to it, we remand for ALJ action.

B. The ALJ did not err or abuse her discretion in admitting evidence concerning the 2010 revalidation application.

Petitioner also objected to CMS's evidence related to the *2010* revalidation application, arguing that such evidence is not relevant to and beyond the scope of this appeal of a 2015 revocation predicated on information purportedly provided in or related to a *2014* application. Petitioner said that the evidence concerning the 2010 application did not inform the 2015 initial or reconsidered determinations, and thus its admission raises due process and fairness concerns. He stated that, at a minimum, he should be allowed adequate opportunity to refute such evidence (at CMS Exs. 9, 10, 11, 13, at ¶¶ 7, 8). P. Br. at 3-4, 18-19. Citing *Advance Group LLC*, DAB CR4126 (2015), he said, "This tribunal has before declined to consider evidence offered by CMS in support of a decision to revoke a provider's billing privileges that was not considered during reconsideration. .

[9] In *Florence Park Care Ctr.*, DAB No. 1931, at 10 (2004), the Board stated that a number of factors may be considered to evaluate the reliability of hearsay statements. Among them are whether: 1) the hearsay declarant is biased and has an interest in the result of the case; 2) the opposing party has the means to obtain the information contained in the statement and to verify its accuracy; 3) the opposing party can subpoena the declarant; 4) the statement is corroborated or contradicted by other evidence; 5) the statement is consistent with other statements made by the declarant; 6) the statement is signed or sworn to; and 7) the declarant is available to testify.

. . The reasoning advanced in *Advance Group LLC* applies here and supports exclusion of the 2010 evidence CMS has offered." P. Br. at 18-19. As discussed earlier, the ALJ rejected Petitioner's arguments about why evidence related to the 2010 application should not be considered. ALJ Decision at 9-10. Before the Board, Petitioner reprises the argument, disputing in particular CMS's argument in its response brief (at 12) that the ALJ's consideration of the 2010 application was not error because it was not considered as evidence of the propriety of the 2015 revocation, but as evidence of the practice location in CMS's records at the time of the inspection attempts. P. Reply at 10-13.

We agree with CMS that ALJ did not err. Petitioner takes the view that the 2015 revocation is predicated on the 2014 revalidation and only the 2014 revalidation, such that information concerning any earlier revalidation (2010) is wholly distinguishable from the 2014 revalidation or altogether irrelevant. The basis for the 2015 revocation is the failed inspection at the address CMS says was the practice location of record. Evidence in CMS records on enrollment/revalidation, whether in 2010 or 2014, reporting the practice location is relevant to how CMS came to have a particular address, Waialae Ave., as Petitioner's practice location. Indeed that is exactly the nature of the parties' factual dispute here. And, Petitioner himself maintains that he has consistently represented Waialae Ave. as his "correspondence only" address and not a practice location address, thus also referencing enrollment information reported or of record before 2014. To the extent Petitioner challenged the presence of the Waialae Ave. address in CMS's records, CMS could respond by pointing to the 2010 revalidation as the source of the information and assert that the 2014 revalidation left it unchanged. These assertions did not alter the basis for the revocation from that set out in the reconsideration decision.

We are therefore not convinced by Petitioner's arguments that evidence related to the 2010 revalidation is irrelevant here. We reject the implication that the presentation of evidence about the 2010 revalidation represents an unfair or improper attempt by CMS to pursue a different revocation basis before the ALJ. We do not agree with Petitioner that the ALJ erred in admitting and considering evidence concerning the 2010 revalidation. The evidence related to the 2010 revalidation is as relevant to the question of how CMS came to have Waialae Ave. as Petitioner's practice location of record as the evidence related to the 2014 revalidation is.

C. The PECOS records and the phone log raise concerns related to the factual dispute about how CMS came to have Waialae Ave. as Petitioner's practice location of record that the ALJ Decision does not address, and the ALJ should address them as appropriate, explaining how she weighed the evidence.

1. PECOS record

In his declaration D.W. (Petitioner's son) recalls that in May 2014, he entered into PECOS physical location addresses (ASCs) and Waialae Ave. as the correspondence and payment address. P. Ex. 19, ¶ 15.[10] He does not have a copy of the May 2014 application. *Id.* ¶ 16. In July 2015, on Noridian's instruction, D.W. purportedly resubmitted through PECOS an application, specifically adding the practice location information (ASCs) and the payment address information as he recalls he had done in May 2014. *Id*. ¶ 20. He stated that he then "manually took a PDF format screen printout of that application within hours after its completion" (screenshot) later submitted as Petitioner's Exhibit 17, which shows the information he entered, that is, ASC addresses as practice locations and Waialae Ave. as the correspondence/payment address. *Id*. Since then, he said, he accessed PECOS multiple times and found that the "'Physical Location and Special Payments Address' field" shows "No Data Provided," which indicates that PECOS does not retain the data he previously entered. *Id*. ¶¶ 22-23. Most recently in January 2016, he printed the PECOS enrollment records (Petitioner's Exhibit 18), which does not show the information he previously entered. *Id*. ¶¶ 22. *See* also P. Exs. 17, 18.

Petitioner raises a legitimate concern about how PECOS retains data that presents a challenge to the underpinning of CMS's argument and that must, therefore, be directly addressed. CMS's position, as explained through C.F.'s declaration, is that unless Petitioner edits existing PECOS enrollment records in the course of filing subsequent revalidation applications, the earlier information remains on his record and PECOS will show a "no current records exist" message when no update is made. CMS Ex. 13 ¶ 10. Based on C.F.'s explanation, it is possible that PECOS records D.W. pulled in January 2016 showed the "no data provided" message in section 4 (practice location information) (P. Ex. 18, at 1) because, as C.F. said, edits have to be made to the information previously inputted (July 2015); otherwise, such a message would appear and information entered previously remains in the system. If that is the case, then we would expect to see a similar message in the January 2016 PECOS records for the category for "medical record storage facility records" if, as D.W. says, that information was entered much earlier (and he does not specifically say he edited this category in July 2015). The 2014 PECOS

[10] Paragraph 14 of the declaration identifies the date D.W. filled out the revalidation application as May 2015 instead of May 2014. This appears to be a typographical error.

records do show a "no current records exist" message for the "medical record storage facility records" category, CMS Ex. 9, at 1, which arguably is consistent with C.F.'s explanation. But neither the July 2015 screenshot, nor the January 2016 PECOS records, shows such a message, and the field for the medical storage facilities remains populated with ASC addresses. *See* P. Ex. 17, at 4; P. Ex. 18, at 3.

Moreover, Petitioner points out in his reply brief before the Board, at 5, that the 2010 PECOS report shows Waialae Ave. as his correspondence address. CMS Ex. 11, at 2. That information, he says, was not later changed. Therefore, the "no current records exist" message should appear in the PECOS report associated with the 2014 revalidation information, but it does not. CMS Ex. 9, at 2 (address in "Contact Person Information" section). Petitioner writes, "If the practice location information was missing on the 2014 report because it did not change, the correspondence address information should have been missing for the same reason. But the correspondence address does appear in the 2014 report. As such, that portion of the 2014 PECOS . . . report is facially inconsistent with [C.F.'s] claim about why the PECOS report . . . would state that no practice location information was available." P. Reply at 5.

We are not now stating that PECOS information generated after the 2015 revocation is dispositive on the matter on appeal, nor are we now rejecting wholesale CMS's explanation, through C.F.'s declaration, about how PECOS processes and retains data as incredible or unreliable. Below, the ALJ found CMS's reasoning (as supported by C.F.'s explanation about how PECOS retains data) credible and reliable. Our point is simply that, on our examination, the PECOS reports raise concerns that CMS's explanation (through C.F.'s declaration) about how PECOS retains data does not seem to address fully, and the ALJ did not address these concerns, explaining how she weighed evidence that appears to be inconsistent with, or not adequately explained by, C.F.'s declaration. Inasmuch as CMS relies on PECOS records in support of its position, the concerns raised by the PECOS records we have set out here warrant examination. On remand, the ALJ may wish to first permit the parties an opportunity to supplement the record with additional evidence and/or briefing as appropriate to address these concerns before she readjudicates this case.

2. Phone log

The phone log also raises concerns beyond the ALJ's failure to address hearsay objections. First, while the phone log appears to indicate that the number "Liza" called was verified to have been the number associated with Petitioner or Waialae Ave., it does not actually state that "Liza" verified that Waialae Ave. was the *practice location* as the reconsidered determination (CMS Ex. 1) indicated. CMS Exs. 8 (phone log) and 1, at 1

(the call "verified that the practice address was [Waialae Ave.]"). Rather, the phone log states: "verified that the phone number listed in Section 4 of the application reaches the address listed, on [sic] that it is the primary phone number used for patients to set up appointments or ask questions on billing, [Waialae Ave.]." CMS Ex. 8.

D.W., Petitioner's son, who reportedly has assisted his father with claim filing and administrative matters related to his father's practice for over 15 years, has stated that the number called is not tied to any specific practice location, but is a phone line at Petitioner's home used as an answering service through which appointments may be scheduled and for responding to billing and other inquiries. P. Ex. 19, at ¶¶ 2, 27. D.W. stated that a miscommunication or misunderstanding may have occurred because, while Waialae Ave. is associated with Petitioner's practice in that it is his correspondence address, no one who answers the telephone number called on June 24, 2014 would be expected to represent that Waialae Ave. is an office or location where Petitioner renders services. D.W. stated that he himself has taken calls to that number and has never made any such representation. *Id.* at ¶¶ 27, 28.

While we appreciate that the assignment of weight to testimony is within an ALJ's purview and that perhaps the ALJ might have accorded less weight to D.W.'s testimony in part because Petitioner did not offer a copy of the 2014 revalidation application to help bolster D.W.'s testimony, the phone log on its face raises a concern that goes to the heart of the factual dispute. The number called by "Liza" cannot be tied to a practice location at Waialae Ave. precisely because Waialae Ave. is a UPS Store mailbox facility, not an office with a person present to take calls; rather, at bottom, the relationship between Waialae Ave. and the phone number is that both are associated with Petitioner in CMS's enrollment records and together provide CMS and its contractor two means to reach Petitioner. But because the ALJ admitted the phone log that includes hearsay statements by a declarant who was not made available in the proceedings below for questioning about the call she reportedly made to Petitioner's number and the entries she made in the phone log, the lack of clarity in the contents of the phone log remains unaddressed. The phone log, like the PECOS reports, is important since CMS evidently relied on it in support of its position that Petitioner represented Waialae Ave. as his practice location. On remand, the ALJ might further develop the record by, for instance, asking CMS to furnish a declaration of "Liza" that answers the questions raised by the phone log and make "Liza" available for cross-examination about the phone log at hearing. At a minimum, if CMS cannot make "Liza" available for cross-examination or produce her declaration, then the ALJ should discuss in her new decision the bases for any reliance or weight she gives the log specifically as evidence that Petitioner represented that Waialae Ave. was his practice location.

Second, the log (CMS Ex. 8) includes references to Petitioner's relocation not consistent on their face with anything else in the record, and CMS has not explained the relevance, if any, of the references. The log is in the form of a chart with multiple columns and boxes. It includes what appears to be pre-filled information that includes boxes for "new practice phone number" (adjacent to which "Liza" included her typed narrative of her verification effort); "deleting practice phone number" (adjacent to which are the words "verified the move"); and "provider reassigning benefits now starting a solo practice" (adjacent to which are the words "verified the intention of the [illegible] at the old practice location"). Given the importance of the factual dispute in this case about what Petitioner (or someone who answered the call on his behalf) purportedly reported as the practice location and CMS's reliance on such information to send a contractor's inspector to Waialae Ave. in 2015, the log's references to a "new practice phone number," "move" and "old practice location," which CMS has not explained, give us pause.

Based on the date of the call, June 24, 2014, the call presumably was made as part of the verification process for the May 2014 revalidation; C.F.'s declaration (CMS Ex. 13, at ¶ 9) implies as much; and the reconsidered determination expressly discusses the phone log. But nothing in the reconsidered determination itself suggests that the reason for revocation had anything to do with a reason other than non-operational status based on the failed inspection in 2015 at Waialae Ave. Nowhere in the reconsidered determination is there any indication that revocation was based on the failure to meet "any" enrollment requirement under section 424.535(a)(5)(ii), which would include a supplier's obligation to submit a complete enrollment application that includes practice location information required to be disclosed in Form 855I, as well as continued obligation to provide CMS current, accurate practice location information as part of any revalidation process. *See* 42 C.F.R. §§ 424.510(d)(2)(ii), 424.515(c)(2). During this appeal neither CMS nor Petitioner has said anything about an old address or relocation from one address to another at any time from 2010 forward, or failure to disclose new information. On remand, the ALJ should consider asking the parties to address the phone log's references to relocation and clarify what bearing they may have on the issue of whether revocation may be upheld based on section 424.535(a)(5)(i).

D. If the ALJ upholds revocation on remand, the effective date of revocation is March 5, 2015, the date of the first failed inspection at Waialae Ave.

Noridian's June 24, 2015 initial determination stated both that the effective date of revocation was March 5, 2015 (date of the first inspection attempt) and 30 days from the date of the determination. CMS Ex. 4, at 4, 5. Its reconsidered determination (CMS Ex. 1, at 1-3) said nothing about the effective date, leaving unclarified the confusing language about the effective date in its initial determination.

The effective date of revocation is determined by 42 C.F.R. § 424.535(g), which states:

> Revocation becomes effective 30 days after CMS or the CMS contractor mails notice of its determination to the provider or supplier, except if the revocation is based on Federal exclusion or debarment, felony conviction, license suspension or revocation, or the practice location is determined by CMS or its contractor not to be operational. When a revocation is based on a Federal exclusion or debarment, felony conviction, license suspension or revocation, or the practice location is determined by CMS or its contractor not to be operational, the revocation is effective with the date of exclusion or debarment, felony conviction, license suspension or revocation or the date that CMS or its contractor determined that the provider or supplier was no longer operational.

Emphasis added. Thus, the general rule is that revocation takes effect 30 days after the mailing of the notice of revocation. The exception, as pertinent here, is when the revocation is based on non-operational status, in which case revocation takes effect on the date on which non-operational status is determined.

Noridian's statement that Waialae Ave. "is not a practice location" would explain why it also stated that revocation was "effective March 5, 2015" (CMS Ex. 4, at 4) since that date is the date of the first failed inspection attempt, and section 424.535(g) permits revocation effective the date on which the supplier is determined to be no longer operational. But Noridian also said that the effective date would be 30 days after the postmark date of the determination, which would be the case if the general rule applied, i.e., if revocation were based on a reason other than non-operational status or any of the other reasons specified in section 424.535(g) as exceptions. CMS Ex. 4, at 5.

Before the ALJ, CMS stated that Noridian erred in stating that the effective date of revocation was March 5, 2015 and that the correct effective date is July 24, 2015, 30 days after the June 24, 2015 notice of revocation. MSJ at 5 n.2. CMS took a position that appears to have been inconsistent, i.e., it asserted that the effective date here should be determined by applying the general rule (30 days after mailing of the revocation notice), all the while urging the ALJ to uphold the revocation based on a finding of non-operational status at the practice location of record – the only basis for revocation cited in the reconsidered determination – which would mean that the exception would apply and the effective date would be the date on which Petitioner was found no longer operational. Before the Board, CMS continues to maintain that revocation was proper based on non-operational status at the practice location on file, except now it states that the effective date is March 5, 2015 because Petitioner's "designated practice location was not operational as of March 5, 2015." CMS Response at 2.

CMS's current position, that the effective date of revocation is March 5, 2015, is consistent with section 424.535(g). If on readjudication the ALJ upholds the revocation under section 424.535(a)(5)(i) for non-operational status, then, by operation of section 424.535(g), March 5, 2015, the date of the first failed inspection, is the effective date of revocation. In appeals of CMS revocation actions, the Board may consider the question of effective date to determine whether CMS has correctly assigned the effective date in accordance with the regulations based on the cited basis for revocation. *See, e.g.*, *Vijendra Dave, M.D.*, DAB No. 2672, at 6-8 (2016); *Keller Orthotics, Inc.*, DAB No. 2588, at 8-9 (2014); *Norpro Orthotics & Prosthetics, Inc.*, DAB No. 2577, at 7-8 (2014). We have done so here.

Conclusion

We vacate the ALJ Decision and remand this case for readjudication consistent with the discussion above. On remand, the ALJ must at minimum provide the parties an opportunity for a hearing at which Petitioner may cross-examine the hearsay declarant or affirmatively rule on the objection to the hearsay evidence, explaining why the ALJ finds it reliable or not and the weight she is according to it, before readjudicating the appeal. The ALJ has authority under section 498.88(b) to undertake further development as appropriate to the extent not inconsistent with this remand.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Susan S. Yim
Presiding Board Member