

**Department of Health and Human Services  
DEPARTMENTAL APPEALS BOARD  
Appellate Division**

Vamet Consulting & Medical Services  
Docket No. A-16-145  
Decision No. 2778  
March 30, 2017

**FINAL DECISION ON REVIEW OF  
ADMINISTRATIVE LAW JUDGE DECISION**

Vamet Consulting & Medical Services (Petitioner; Vamet), a Texas home health agency, has appealed the August 10, 2016 decision by an administrative law judge (ALJ), *Vamet Consulting & Medical Services*, DAB CR4677 (2016) (ALJ Decision). The ALJ upheld on summary judgment the Centers for Medicare & Medicaid Services (CMS) determination to revoke Petitioner’s enrollment in the Medicare program on the ground that Petitioner “was not operational at the practice location on file with CMS and its administrative contractor[.]” ALJ Decision at 1. For the reasons discussed below, we affirm the ALJ Decision.

**Legal Background**

To participate in Medicare, a home health agency must enroll in the program. 42 C.F.R. § 424.500; 42 C.F.R. § 400.202 (defining Medicare “provider” to include a home health agency). In order to maintain enrollment in Medicare, suppliers and providers (such as Petitioner, a home health agency) must comply with Medicare program requirements, including the “enrollment requirements” in 42 C.F.R. Part 424, subpart P (sections 424.500-.570). *See* 42 C.F.R. § 424.516(a). The enrollment requirements obligate a provider to submit – and keep current – a CMS-approved “enrollment application” that identifies, among other things, the provider’s “practice location.” *Id.* §§ 424.502 (definition of “enroll/enrollment”), 424.510(a), 424.510(d), 424.515, 424.516 (e). Once enrolled, a home health agency has “billing privileges” — that is, the right to claim and receive Medicare payment for services provided to Medicare beneficiaries. *Id.* §§ 424.502, 424.505.

A Medicare provider must be “*operational* to furnish Medicare covered items or services.” *Id.* § 424.510(d)(6) (italics added). “Operational” means 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.” *Id.* § 424.502.

CMS may perform an “onsite review” of a provider “to verify that the enrollment information submitted to CMS or its agents is accurate and to determine compliance with Medicare enrollment requirements.” 42 C.F.R. § 424.517(a). In addition, CMS may revoke a provider’s Medicare enrollment for any of the “reasons” specified in paragraphs one through 14 of section 424.535(a). *Id.* Relevant here is paragraph five, which permits revocation if “CMS determines, upon onsite review, that the provider or supplier is no longer operational to furnish Medicare-covered items or services.” *Id.* § 424.535(a)(5)(i).

### **Case Background**<sup>1</sup>

The uncontroverted facts establish that Vamet was enrolled in the Medicare program as a provider of home health services. CMS Ex. 7, at 11; CMS Ex. 8. Vamet’s site location was at 8600 West Airport Blvd. # B, Houston, Texas 77071, effective April 21, 2012. CMS Ex. 9, at 19; CMS Ex. 10. On July 14, 2014 and again on July 15, 2014, an investigator with MSM Security Services, LLC (MSM) attempted to conduct a site inspection at 8600 West Airport Blvd. # B, Houston, Texas 77071, the site location Vamet provided in its Form 855A, an enrollment application Vamet used to notify CMS of the change of its address to 8600 West Airport Boulevard in Houston.<sup>2</sup> CMS Ex. 9, at 7, 19; CMS Ex. 5; CMS Ex. 3.

On July 14, 2014 at approximately 1:40 p.m., the inspector attempted to conduct a site visit at Vamet’s listed address. CMS Ex. 3, at 2. The inspector found the provider was not open for business, did not appear to have employees, did not appear to have signs of customer activity, and did not appear operational. *Id.* The site location had a paper sign taped to the window stating the name of the business, the address, and the hours of operation (Monday through Friday, 9:00 a.m. to 5:00 p.m.). *Id.* at 3. Despite noticing no employees inside Vamet’s site location, the inspector knocked on Vamet’s doors and no one answered. CMS Ex. 3 at 2.

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<sup>1</sup> The factual information in this section, except where we indicate disagreement between the parties, is drawn from the ALJ Decision and undisputed facts in the record and is presented to provide a context for the discussion of the issues raised on appeal.

<sup>2</sup> The ALJ referred to the investigator as an “inspector,” and we use the ALJ’s terminology.

The following day, Tuesday, July 15, 2014, at approximately 11:45 a.m., the inspector again attempted to conduct a site visit. *Id.* On this second attempt, the inspector found the same sign and posted hours as on the first attempted site visit. *Id.* The site location was closed and no one answered when the inspector knocked on the door. *Id.* The inspector took photographs of the location to document his observations. CMS Ex. 3, at 6.

On October 21, 2014, Palmetto notified Vamet that it was revoking Vamet's provider number effective July 14, 2014, the date CMS determined that Vamet was not operational at the site location. CMS Ex. 1. The notice letter stated that the basis for the revocation was that Vamet was in violation of the regulations at 42 C.F.R. § 424.535(a)(5). *Id.* The notice letter further informed Vamet of its right to request reconsideration of the revocation determination within 60 days of the postmark date of the notice. *Id.* Vamet filed a timely request for reconsideration alleging that it had never closed or moved and that it continued to operate at 8600 West Airport Blvd. #B, Houston, TX 77071. Request for ALJ Review (Req. for Hr'g), Exhibit "C" (request for reconsideration). On January 15, 2015, the appointed Hearing Officer issued an unfavorable decision and upheld the revocation of Vamet's provider number for its noncompliance with 42 C.F.R. § 424.535(a)(5). CMS Ex. 2.

Vamet timely requested an evidentiary hearing before an ALJ. Req. for Hr'g. In its hearing request, Vamet alleged that it was "open, staffed, and operational" and "performing duties in the back room of the company's Medicare approved location" on the dates of both site visits. *Id.* at 3. Vamet argued that it was operational at the time of the attempted site visits because the ALJ should apply to home health agencies the reasoning in *Keyz EMS, Inc.*, DAB CR4090, at 13 (2015), that a "supplier of ambulance services is arguably open to the public if it can be contacted to dispatch an ambulance even when the business office may be closed and inaccessible to the public." *See id.* at 4.

In its Motion for Summary Judgment or in the Alternative, Pre-hearing Brief, CMS argued that the ALJ should uphold the revocation. CMS cited ALJ decisions applying the Board's analysis in *I & S Healthcare Servs., LLC*, DAB No. 2519, at 5-6 (2013) ("[W]e read the regulation [at section 424.535(a)(5)(i)] [ . . . ] to authorize CMS to revoke billing privileges if a provider is not operational when an inspector visits its address during normal business hours..."). *See* CMS Pr. H'g Br. at 6-7. CMS also argued that the ALJ should reject Vamet's theory (which relied on *Keyz EMS, Inc.*) that a home health agency should be treated the same way as ambulance services suppliers when site visits are attempted. *See id.*

The ALJ rejected Vamet's contention that a dispute of material fact existed because Vamet personnel had been in the file room during the attempted site visits, and rejected Vamet's argument that it was operational because it was providing services despite its facility being locked and inaccessible to the public. In explaining his conclusion, the ALJ wrote:

[M]y conclusion that Petitioner was not operational does not rest on petitioner's failure to provide evidence that Petitioner was providing services. Rather, Petitioner's qualified physical practice location needed to be open to the public and open for a site inspector to conduct a site visit.

ALJ Decision at 8. The ALJ found that although Vamet had posted business hours, it was not accessible to the public during those hours on the two occasions when an inspector attempted to conduct a site visit. He concluded:

If, as Petitioner asserts, its owner and staff were present at its office on the days and at the times of the attempted site visits, but the owner and staff were in a filing room with the front door to the office locked [ ], this still provides no defense to revocation because Petitioner's owner or staff needed to answer the door when the inspector knocked.

ALJ Decision at 8 (citing Petitioner's Brief at 7; case citation omitted).

Petitioner's timely request for review of the ALJ Decision followed. Petitioner contends that the ALJ erred in "finding Vamet not open to the public" on the dates of the attempted site inspections because

the ALJ accepted as true that the Petitioner's owner and staff member were working in the filing room of Petitioner's office on both dates during the times of the attempted visits and because the ALJ accepted as true that Petitioner was prepared to submit claims, and was properly stocked and equipped.

Request for Review (RR) at 1. Consequently, Vamet contends that the ALJ erred in entering summary judgment in favor of CMS because "the ALJ accepted as true facts that dispute CMS's alleged uncontroverted facts, thereby precluding the entry of summary judgment." *Id.* at 3. Before the Board, Petitioner reiterates its argument that the reasoning in *Keyz* applies here, and thus should result in reversal of the ALJ's decision in this case.

## **Standard of Review**

Whether summary judgment is appropriate is a legal issue that we address *de novo*. *1866ICPayday.com*, DAB No. 2289, at 2 (2009), citing *Lebanon Nursing & Rehab. Ctr.*, DAB No. 1918 (2004). Summary judgment is appropriate when the record shows that there is no genuine dispute of fact material to the result. See *1866ICPayday.com* at 2, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). The Board’s standard of review on a disputed conclusion of law is whether the ALJ Decision is erroneous. See *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider’s or Supplier’s Enrollment in the Medicare Program*, which are available at <http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html>.

## **Discussion**

We affirm the ALJ’s decision in this case because, 1) in the absence of a genuine dispute of material fact, summary judgment was appropriate, and 2) the ALJ did not err in rejecting the reasoning another ALJ applied to an ambulance services supplier. We first address summary judgment and next discuss the question of legal error.

### 1. *Summary judgment was appropriate.*

In its request for review, Vamet contends that summary judgment was not appropriate because “the ALJ accepted as true the fact that Petitioner was prepared to submit claims, and was properly stocked and equipped[,]” which it characterized as “true facts that dispute CMS’s alleged uncontroverted facts.” RR at 3. Vamet is correct that those facts were not in dispute before the ALJ.<sup>3</sup> ALJ Decision at 7. However, the ALJ made clear that his decision to grant summary judgment turned on the uncontroverted *material* facts supporting CMS’s determination to revoke Vamet’s Medicare billing privileges and enrollment. These uncontroverted facts showed that Petitioner’s “physical practice location,” was not “*open to the public for the purpose of providing health care related services . . .*” and therefore was not “operational” as defined in 42 C.F.R. § 424.502. ALJ Decision at 7 (italics added.)

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<sup>3</sup> The ALJ accepted as true the fact that Vamet was “prepared to submit claims” and “properly stocked and equipped” based upon the admission into the record of Petitioners Exhibits 4-6, the declarations of three witnesses. However, the ALJ concluded, in essence, that while those facts would have been material to the issue of whether Vamet was “operational” had the inspector been able to gain entry to the premises to complete the site survey, he was not able to gain entry. See ALJ Decision at 7 n.3. As the ALJ Decision went on to explain, the inspector’s inability to gain entry during Vamet’s stated business hours was the material fact because it showed that Vamet did not meet the “open to the public” requirement for being found “operational.”

Those undisputed material facts included the reports of the CMS contractor's inspector that Vamet's practice location of record was not open for business when the inspector attempted to conduct site visits on July 14 and July 15, 2014. *See* CMS Exs. 5, 6. Vamet does not dispute that the door to the premises was locked during its posted business hours, that no one responded to knocks on the door, and that this was a barrier to entry by the site inspector and public at the times indicated in the inspector's report. *See* ALJ Decision at 6; RR at 5. The fact that Vamet's owner and staff were in a back room on the dates when the inspector attempted to conduct site visits does not conflict with the fact that, as the ALJ observed, someone "needed to answer the door when the inspector knocked" and no one did. *See* ALJ Decision at 8. The ALJ found that Vamet was not *open to the public* for the purpose of providing health care related services. It was upon this basis, and not because Vamet was not "prepared to submit claims" or was not "properly stocked and equipped," that the ALJ upheld CMS's determination that Vamet was not operational on the dates of the attempted site visits. *See id.* Therefore, the facts Vamet asserts are not, in and of themselves, material to the outcome and do not contradict the facts which are material to the outcome of the appeal. Consequently, summary judgment was appropriate.

2. *The ALJ did not err when he upheld CMS's determination to revoke Petitioner's Medicare enrollment under 42 C.F.R. § 424.535(a)(5)(i).*

In reviewing a revocation determination, an ALJ or the Board is limited to deciding whether CMS had a valid "legal basis" for that action. *Care Pro Home Health, Inc.*, DAB No. 2723, at 5 (2016); *Letantia Bussell, M.D.*, DAB No. 2196, at 13 (2008); *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 17, 19 (2009), *aff'd*, *Ahmed v. Sebelius*, 710 F. Supp.2d 167 (D. Mass. 2010). The reconsidered determination identifies 42 C.F.R. § 424.535(a)(5) as CMS's legal basis for the challenged revocation. The ALJ concluded that CMS had lawfully revoked Petitioner's Medicare enrollment under that regulation because Petitioner was not operational at 8600 West Airport Blvd. #B, Houston, TX 77071 on July 14 and July 15, 2014. As indicated above, the ALJ based his conclusion on the undisputed facts that on two different dates, the inspector went to Vamet's practice location during the business hours posted by Vamet but was unable to gain access despite knocking on the door on both occasions.

In its argument before the Board, Vamet does not dispute that to be found "operational" within the meaning of the regulations, it needed to show that, in addition to being "prepared to submit valid Medicare claims" and being "properly staffed, equipped, and stocked," it needed to show that it was "open to the public for the purpose of providing health care related services." 42 C.F.R. § 424.502. Nor does Vamet challenge the ALJ's finding that it was undisputed that the inspector failed to gain access to Vamet's practice location of record (as provided to the contractor by Vamet), even after knocking on the

door. Vamet contends, however, that the failure of employees on the premises to respond to the inspector's knocking on the door was insufficient to find it non-operational. RR at 5. Noting that a phone number was posted in a note on the door, Vamet contends that in the face of a locked door and unanswered knocks on that door, the site inspector "could have easily called to contact the agency and verify its operational status but he did not." *Id.* Its posted sign, Vamet argues, "provided the site inspector with a telephone number to call if anyone needed to contact the agency." *Id.*

Vamet seeks to put the onus on the site inspector to exhaust all possible means of contacting the provider when faced with a locked facility. By posting its telephone number, Vamet argues:

[The] Petitioner provided the site inspector with a reliable and effective mean[s] to communicate with Petitioner and overcome any barrier that could be preventing prompt entry to the qualified location. The inspector's decision to not use available methods for verification of Petitioner's operational status does not automatically render Petitioner non-operational under 42 C.F.R. § 424.535(a)(5).

*Id.* at 5-6.

We reject this argument. Vamet has offered no authority to support the notion that posting a telephone number is a substitute for a provider making its qualified physical practice location open and accessible during business hours. As we indicated above, the site visits provided for in the regulations are intended to be unannounced. *See Care Pro* at 6 n.4, citing 76 Fed. Reg. 5862, 5870 (Feb. 2, 2011). Were providers permitted to evade this requirement for Medicare enrollment and participation by imposing upon site inspectors the burden to announce themselves prior to conducting site visits, the purpose of CMS's rulemaking would be completely frustrated. Therefore, the posting of Vamet's telephone number does not constitute compliance with the requirement that the provider be "open to the public for the purpose of providing health care related services."

We also note that the sign posted by Vamet did not instruct customers (or inspectors) to call the listed phone number in order to gain access.<sup>4</sup> Nor did Vamet explain how even with instructions, the listing of a phone number would help either customers or inspectors not carrying a phone to gain access. Thus, we conclude that merely listing a phone number was not sufficient to assure either customers or inspectors would be able to gain access during Vamet's listed business hours. *See Benson Ejindu, d/b/a/ Joy Medical Supply*, DAB No. 2572, at 7 (2014) (assuming that the DMEPOS supplier was inside his

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<sup>4</sup> The sign instructed that if there was an emergency, the reader of the sign should call 911 but gave no instructions for phoning to gain access.

practice suite when the inspector unsuccessfully attempted to gain access but nonetheless finding the mere listing of a phone number on a door sign insufficient to establish a dispute of material fact regarding whether the practice location was “accessible” within the meaning of 42 C.F.R. § 424.57(c)).

Petitioner devotes most of its appeal brief to arguing that its home health agency is analogous to an ambulance services supplier, and that the ALJ here should have applied the reasoning from another ALJ’s decision that it may be possible for an ambulance services supplier to be operational at the time of attempted site inspections, while not open to the public, because it nonetheless is able to furnish services to Medicare beneficiaries. *See* RR at 5; *see also* Req. for H’rg at 4 (citing *Keyz* at 13). In *Keyz*, the ALJ concluded that partial summary judgment for CMS was appropriate in upholding the determination that the petitioner had failed to notify the Medicare Administrative Contractor of its change of practice location as required under 42 C.F.R. § 424.516(e)(2). However, the ALJ also found that there was a dispute of material fact as to whether *Keyz* had been operational at the time of several attempted site visits. *Keyz* at 11-12. The ALJ in *Keyz* reasoned:

[S]uppliers of ambulance services [ ] are not required by regulation to have an office open to the public during posted or at any other specific times and, therefore, a closed office alone is insufficient to prove that Petitioner was non-operational (footnote omitted).

*Id.* at 12 (citing 42 C.F.R. § 410.40 (“Coverage of ambulance services”) and § 410.41 (“Requirements for ambulance suppliers”)). The ALJ decision in *Keyz* provides no authority for overturning the ALJ Decision here.

*Keyz* is an ALJ decision and, therefore, not binding precedent on another ALJ or on the Board. Furthermore, the ALJ in *Keyz* did not decide whether *Keyz*, a supplier of ambulance services, was operational. The ALJ simply found that he could not enter summary judgment for CMS on that ground because he read the regulations relating to coverage of ambulance suppliers as raising “a genuine dispute of material fact as to whether Petitioner was ‘open to the public for the purpose of providing health care related services’ at the time of the various site inspections.” *Keyz* at 13. Even if the ALJ was correct about the ambulance supplier regulations (and we do not find the authority cited by the ALJ dispositive of that question),<sup>5</sup> *Vamet* does not direct us to, and the

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<sup>5</sup> The regulations for ambulance suppliers cited by the ALJ, 42 C.F.R. §§ 410.40-41, establish requirements for Medicare Part B coverage and reimbursement for ambulance services but do not address (or purport to limit in any way) the requirements for ambulance services suppliers to establish and maintain Medicare enrollment. *See* 62 Fed. Reg. 32,717 (June 17, 1997); 64 Fed. Reg. 3,638 (January 25, 1999).



regulations do not contain, any exemption for home health agencies from demonstrating ongoing compliance with Medicare enrollment requirements, including submitting to site visits at their practice locations of record from CMS or its agents. As discussed above, these requirements include informing CMS of its practice location (424 C.F.R. § 424.510(d)(2)(ii)); remaining operational (§ 424.510(d)(6)), by being open to the public for the purpose of providing health care related services (§ 424.502); and being accessible for onsite review (§ 424.517(a)).

Moreover, we do not find any basis for the analogy Vamet tries to establish between a home health agency like itself and an ambulance service like *Keyz*. In support of its ambulance services analogy, Vamet contends that, not unlike the services of an ambulance supplier, its work is performed in the field:

Every home health care agency provides health care related services at the patients' homes. [Doing so] is a condition of participation as well as a condition for payment of services. Provision of health care related services by the home health agency to Medicare beneficiaries is not interrupted even though its administrative offices may not be [ ] open to the general public at any given time.

RR at 5. Vamet has not provided any evidence to support its statement that “[p]rovision of health care related services by the home health agency to Medicare beneficiaries is not interrupted even though its administrative offices may not be [ ] open to the general public at any given time,” *id.*, and we do not find it persuasive on its face. We note here the ALJ’s rejection in this case of the notion that a home health agency’s “qualified physical practice location does not need to be open to the public” simply because it provides health care services in patients’ homes. ALJ Decision at 9. The ALJ expressed his agreement with the analysis in another ALJ decision that “there are reasons why members of the public would want to visit [the home health agency’s] office directly,” including, for example, the need of “either beneficiaries or members of their families . . . to talk to [the agency’s] staff in person” or “to ask questions about what home health care consists of and their eligibility” or “to seek instructions about care to be given to relatives . . .” *Id.*, citing *Guardian Care Servs., Inc.*, DAB CR4195 at 4 (2015). Although we are not bound by the ALJ decision in *Guardian*, like the ALJ here, we find it persuasive on this point. See *Singing River Rehab. & Nursing Ctr.*, DAB No. 2232, at 11 n.7 (2009) (stating that although the Board is not bound by other ALJ decisions, it may rely on ALJ analysis it finds persuasive). We would add to the reasons stated in that decision, and quoted by the ALJ here, that members of the public might want to visit multiple home health agencies to decide which one to select for home health services. Given the various reasons why a customer might need or want to visit a home health agency’s offices, we are unable to conclude that there is no possibility that services to beneficiaries might be interrupted if the office is not open to the public.

**Conclusion**

For the reasons stated above, we affirm the ALJ's decision.

\_\_\_\_\_/s/  
Sheila Ann Hegy

\_\_\_\_\_/s/  
Constance B. Tobias

\_\_\_\_\_/s/  
Christopher S. Randolph  
Presiding Board Member