Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Foot Specialists of Northridge
Docket No. A-16-61
Decision No. 2773
February 27, 2017

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

We affirm the Administrative Law Judge's decision granting summary judgment and affirming the Center for Medicare & Medicaid Services' (CMS) revocation of Petitioner Foot Specialists of Northridge's (Northridge, Petitioner) Medicare billing privileges for not being operational at the location of its address on file with CMS. *Foot Specialists of Northridge*, DAB CR4529 (2016) (ALJ Decision). The ALJ accepted for the purpose of summary judgment that CMS contractor staff incorrectly told Northridge that it could not change its address on file while the reenrollment application it had filed for its practice was pending, but found that he had no authority to grant equitable relief. We conclude that the ALJ Decision affirming the revocation is not legally erroneous.

Legal background

Petitioner was enrolled in the Medicare program as a supplier of "durable medical equipment, prosthetics, orthotics and supplies" (DMEPOS). To maintain Medicare enrollment and associated "billing privileges," all suppliers and providers must comply with the "[r]equirements for reporting changes and updates to, and the periodic revalidation of Medicare enrollment information" in 42 C.F.R. § 424.515 and with "[a]dditional provider and supplier requirements for enrolling and maintaining active enrollment status in the Medicare program" in section 424.516. DMEPOS suppliers must also comply with the reporting requirements and the "[s]pecial payment rules for items furnished by DMEPOS suppliers and issuance of DMEPOS supplier billing privileges" in section 424.57. All suppliers must submit and keep current a CMS-approved "enrollment application" that identifies, among other things, the supplier's "practice location."[1] *Id.*

[1] The regulations define "enrollment application" as the "CMS-approved paper enrollment application" (the CMS-855) or "an electronic Medicare enrollment process approved by OMB [the Office of Management and Budget]." 42 C.F.R. § 424.502.

§§ 424.502 (definition of "enroll/enrollment"), 424.510(a)(1), 424.510(d), 424.515, 424.516(b)-(e). DMEPOS suppliers like Northridge "must report to CMS any changes in the information supplied on the [enrollment] application within 30 days of the change." 42 C.F.R. § 424.57(c)(2).

CMS (through its contractors) performs on-site reviews and inspections to verify compliance with program requirements. *See* 42 C.F.R. §§ 424.57(c)(8), 424.517. One such requirement is that a provider be "operational to furnish" Medicare covered items or services. *Id.* §§ 424.510(d)(6). "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 . . . to furnish these items or services." *Id.* § 424.502. CMS may revoke a provider's Medicare enrollment for any of the reasons specified in section 424.535(a)(1) through (a)(14). Relevant here is section 424.535(a)(5), which permits revocation if, "[u]pon on-site review or other reliable evidence, CMS determines that the provider or supplier is . . . [n]o longer operational to furnish Medicare-covered items or services" (§ 424.535(a)(5)(i)) or "[o]therwise fails to satisfy any Medicare enrollment requirement" (§ 424.535(a)(5)(ii)).[2]

Revocation results in the termination of the Medicare provider agreement as well as a bar on re-enrollment for a minimum of one year, but no more than three years. 42 C.F.R. § 424.535(b), (c).

A supplier or provider may appeal a determination by CMS to revoke its Medicare enrollment under the procedures in 42 C.F.R. Part 498. 42 C.F.R. §§ 424.545(a), 498.3(b)(17). A supplier or provider must first ask CMS for "reconsideration" of the initial revocation determination. 42 C.F.R. §§ 498.5(1), 498.22. A supplier or provider dissatisfied with the reconsidered determination may request a hearing before an ALJ, and then seek Board review of an unfavorable ALJ decision. 42 C.F.R. §§ 498.40, 498.80

Case background

The following facts are either undisputed or accepted as true by the ALJ for the purpose of summary judgment. Northridge was a Medicare DMEPOS supplier whose address on file with CMS as of December 2014 was 9335 Reseda Blvd., Suite 500, Northridge, California 91324. In December 2014, the owner of that property notified Northridge that it had to vacate the premises within 30 days, which it later extended. ALJ Decision at 2, citing P. Ex. 1 at ¶ 3; P. Ex. 2 at ¶ 3; P. Ex. 3.

[2] We note that the ALJ cites an older version of the regulation in his decision. There is no substantive difference between the older version of the regulation cited by the ALJ and the current version. We discuss this in further detail in the analysis section of this decision.

The Medicare contractor, Palmetto GBA National Supplier Clearinghouse (NSC), told Northridge by notice of January 7, 2015 to submit a revalidation Medicare enrollment application within 60 days. *Id*. at 2, citing P. Exs. 4; 1 at ¶ 4. Northridge filed its revalidation enrollment application on January 23, 2015 through CMS's "Provider Enrollment, Chain and Ownership System" (PECOS).[3] Northridge had not yet found a new location and provided its 9335 Reseda Boulevard address in Northridge as its location on the revalidation enrollment application. *Id*. citing CMS Ex. 1 ¶ 4; P. Ex. 1 ¶¶ 5-6; P. Ex. 5.

"Shortly after" filing the revalidation enrollment application, Northridge found a new location, at 10515 Balboa Blvd., Suite 140, Granada Hills, California 91344. ALJ Decision at 2, citing P. Exs. 1 at ¶ 7; 7. On February 3, 2015 Northridge's office manager filed through PECOS an enrollment application, form CMS-855I, which CMS approved, to change the practice address of one its owners to the Balboa Boulevard address in Granada Hills.[4] *Id*. citing P. Exs. 1 at ¶ 7; 7, at 3; 9. Also on or about February 3, 2015, Northridge attempted to file through PECOS a form CMS-855S to change its own address on file with CMS to the new Balboa Boulevard address in Granada Hills but the PECOS system would not permit the change to be made while Northridge's revalidation enrollment application, which listed the previous Reseda Boulevard address in Northridge, was pending. *Id*.; P. Ex. 1 at ¶ 8. Northridge's office manager spoke with an NSC employee who stated that a change of address (form CMS-855S) could not be processed while the revalidation enrollment application was pending. ALJ Decision at 2; P. Ex. 7, at 1.

On February 19, 2015, the same NSC employee with whom Northridge's office manager spoke emailed a letter to Northridge requesting information about "missing or incomplete" items in Northridge's revalidation enrollment application, including "Physical address as listed in business section of the CMS 855S." P. Exs. 11; 12, at 1. The letter gave Northridge 30 days to provide the missing information. ALJ Decision at 2, citing P. Exs. 1 at ¶ 11; 11; 12. Northridge responded that its business location was 9335 Reseda Boulevard in Northridge. P. Ex. 1 at ¶ 11. The office manager testified that she provided that address, instead of the new Balboa Boulevard address in Granada Hills,

[3] PECOS, https://pecos.cms.hhs.gov, is "an internet-based Medicare enrollment system through which providers and suppliers can submit enrollment applications, view, print, and update enrollment information, and track the status of submitted enrollment applications." *UpturnCare Co., d/b/a Accessible Home Health Care*, DAB No. 2632, at 3 n.4 (2015).

[4] The CMS 855 applications are "used to gather information on providers and suppliers for the purpose of authorizing billing numbers and establishing eligibility to furnish services to Medicare beneficiaries." 71 Fed. Reg. 20,754, 20,756 (Apr. 21, 2006). The 855S is for DMEPOS suppliers and the 855I is for individual health care practitioners. *Id*.

because it was the address "still listed on Northridge's CMS 855S" and because she believed, based on the PECOS rejection of the attempted change to the office address earlier in February, that no address changes could be made during the revalidation application process. *Id*.

Northridge moved to its new offices at the Balboa Boulevard address in Granada Hills on March 1, 2015. It posted notices on the front and rear doors of its former office on Reseda Boulevard in Northridge stating that it had moved to the Balboa Boulevard location. ALJ Decision at 2-3.

On April 14, 2015, an NSC inspector attempted to visit Northridge's former location at 9335 Reseda Boulevard in Northridge, having been informed by NSC that this was Northridge's address on file with CMS. The inspector determined that Northridge was not operational at that address because the building, which had a Northridge sign, was "under demolition/construction." *Id*. at 3, citing CMS Ex. 1, at ¶ 5; Ex. 4, at 1.

On May 20, 2015, NSC revoked Northridge's Medicare enrollment and billing privileges for two years effective April 14, 2015 because Northridge was "not operational to furnish Medicare covered items and services . . . in violation of 42 CFR §§ 424.535(a)(5) and all supplier standards as defined in 42 CFR 424.57(c)." ALJ Decision at 3, quoting CMS Ex. 5, at 1-2. NSC stated in the revocation determination that the inspector's visit on April 14 was "unsuccessful because the facility was found to be in the process of demolition/construction" and NSC "could not complete an inspection of your facility" and "could not verify your compliance with the supplier standards." *Id*.

Northridge asked NSC to reconsider the revocation on May 20, 2015, stating that after receiving the revocation notice it inquired with NSC and was told that the information it received earlier from NSC – that it could change the address only after the revalidation enrollment application was approved – was incorrect. CMS Ex. 6. Northridge enclosed with its reconsideration request a form CMS 855S enrollment application reporting as its practice location the Balboa Boulevard address in Granada Hills. CMS Ex. 7.

An NSC hearing officer upheld the revocation on the ground that the inspector "could not access Foot Specialists of Northridge facility to verify compliance with the supplier standards because the facility location on file with the NSC was not operational or accessible to the site inspector." ALJ Decision at 4, quoting CMS Ex. 8, at 3.

Northridge requested an ALJ hearing. CMS filed a brief and motion for summary judgment and nine exhibits including the declaration testimony of the NSC inspector. *Id*.; CMS Ex. 1. Northridge file a brief and opposition to CMS's motion for summary judgment and 12 exhibits including declaration testimony of its office manager and one

of its owners, and sought to compel CMS to produce documents related to Northridge's efforts to notify NSC of its change of location. ALJ Decision at 4; P. Exs. 1; 2. The ALJ granted CMS's motion for summary judgment and thus did not address the subpoena requests or objections each party made to some of the exhibits.[5] ALJ Decision at 4.

The ALJ Decision

The ALJ held that CMS had a basis to revoke Northridge's Medicare billing privileges because Northridge was "not operational at its qualified practice location" on file with CMS – the former Reseda Boulevard address – when the NSC inspector "attempted to visit that practice location" on April 14, 2015. ALJ Decision at 7. The location was not operational, the ALJ concluded, because it was undisputed that at that time Northridge was no longer operating from the vacant Reseda Boulevard address that Northridge reported as its practice location on its revalidation enrollment application and again in response to NSC's February 19, 2015 letter. *Id*. at 6, 10.

The ALJ rejected Northridge's argument that it was operational at its new location at the time of the attempted visit. The ALJ held that the applicable regulations in 42 C.F.R. Part 424 "mean[] that CMS will inspect the 'qualified physical practice location' that has been provided by the supplier and is currently on file with CMS" and there was "no dispute" that "Northridge did not provide notice to CMS on a CMS-855S form of the change in Northridge's address to 10515 Balboa Boulevard [in Granada Hills], either electronically through PECOS or with a paper form sent through the mail" until May 2015 when Northridge requested reconsideration of the revocation. *Id*. at 7, 8. The ALJ concluded that the regulations define "operational" to "refer[] to the 'qualified physical practice location' of a supplier" (42 C.F.R. § 424.502); equate "qualified physical practice location" with "the address provided by a supplier on an enrollment application" (§ 424.510(d)(2)(ii)); and authorize CMS to "perform on-site inspections to verify that the enrollment information submitted by a supplier is accurate and to determine compliance with Medicare requirements" (§ 424.517(a)). *Id*., also citing *JIB Enterprises, LLC*, DAB CR3010, at 9 (2013) ("Although Petitioner may have been 'operational' at its new location . . . an on-site inspection takes place at the location on-file with CMS to ensure the accuracy of the supplier's information and status.").

[5] CMS objected to Petitioner's Exs. 5, and 8 through 12 because Northridge "failed to submit these documents with its reconsideration request." ALJ Decision at 4. Northridge objected to copies of photographs in CMS Ex. 4 "because they [we]re allegedly blurry." *Id*. The ALJ did not rule on these objections and cited Petitioner's Exs. 5 (*id*. at 7), 11 and 12 (*id.* at 10), as well as CMS Ex. 4 (*id*. at 7) in his decision. Accordingly, CMS Exhibits 1-9 as well as Petitioner's Exhibits 1-12 are part of the administrative record before the Board.

The ALJ also cited the preamble to regulations affecting the effective date of revocations, where CMS stated that "when . . . a provider or supplier, including a DMEPOS supplier, is no longer operating *at the practice location provided to Medicare on a paper or electronic Medicare enrollment application*" then "the revocation should be effective with the date that CMS or our contractor determines that the provider or supplier is no longer operating *at the practice location*." 73 Fed. Reg. 69,725, 69,865 (Nov. 19, 2008) (italics added), cited at ALJ Decision at 8. The ALJ cited this preamble language as further confirming that a supplier like Northridge is "not operational at its 'qualified practice location'" if at the time of the inspection it is "no longer present at that location." ALJ Decision at 8.

The ALJ rejected Northridge's argument that the revocation should be reversed because, according to Northridge, an NSC employee told Northridge, after it was unable to change the address through PECOS, that the address could not be changed while the revalidation application was still being processed. The ALJ accepted Northridge's account for the purposes of summary judgment but concluded that the "allegedly inaccurate information that an NSC employee provided to Northridge is not legally sufficient to require reversal of the revocation in this case" because Northridge did not provide CMS its new location address within 30 days after moving as required of DMEPOS suppliers, and because the alleged misstatements by the NSC employee did not rise to the level of "affirmative misconduct" that would be required for equitable estoppel to apply against the government. *Id*. at 8-9, citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 419, 421 (1990); *US Ultrasound*, DAB No. 2302, at 8 (2010); and *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009).

The ALJ also rejected Northridge's argument that NSC's February 19, 2015 letter, requesting information about Northridge's practice location that NSC said was missing from the revalidation enrollment application, "taken in conjunction with the previous telephone conversation earlier in February, required Northridge to provide" the Reseda Boulevard address, rather than the Balboa Boulevard address to which Northridge would move on March 1, 2015. *Id*. at 10. The ALJ concluded that Northridge's reading of the letter was not reasonable and that the letter "was an opportunity for Petitioner to timely provide its new address, which Petitioner failed to do." *Id*.

Northridge appealed the ALJ Decision.[6]

[6] With its appeal Northridge filed duplicates of the exhibits it had filed with the ALJ, but with different exhibit numbers. These duplicates are superfluous. Also, in provider or supplier enrollment appeals, the Board may not admit evidence into the record in addition to the evidence introduced at the ALJ level of review. *See* 42 C.F.R. § 498.86(a); *Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program, Development Of The Record On Appeal, Section (f)*. Therefore, these duplicates are not made part of the record at this stage of the proceedings, and we refer to the exhibit numbers used before the ALJ and in the ALJ Decision.

Standard of review

The ALJ decided this case by granting summary judgment to CMS. The Board has explained its role in reviewing an ALJ grant of summary judgment in numerous prior decisions. Most recently, the Board articulated in detail the standard of review as follows:

> We review an ALJ's grant of summary judgment de novo, construing the facts in the light most favorable to the petitioner and giving the petitioner the benefit of all reasonable inferences. *See Livingston Care Ctr.*, DAB No. 1871, at 5 (2003), *aff'd*, *Livingston Care Ctr. v. U.S. Dept. of Health & Human Servs.*, 388 F.3d 168, 172-73 (6th Cir. 2004). Summary judgment is appropriate when there is no genuine dispute about a fact or facts material to the outcome of the case and the moving party is entitled to judgment as a matter of law. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). The party moving for summary judgment (here, CMS) has the initial burden of demonstrating that there is no genuine issue of material fact for trial and that it is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party carries that burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial."' *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Rule 56(e) of the Federal Rules of Civil Procedure).[7]
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> "To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact - a fact that, if proven, would affect the outcome of the case under governing law." *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010), *aff'd*, *Senior Rehab. & Skilled Nursing Ctr. v. Health & Human Servs.*, 405 F. App'x 820 (5th Cir. 2010). A party "must do more than show that there is 'some metaphysical doubt as to the material facts . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial."' *Mission Hosp. Regional Med. Ctr.*,

[7] Effective December 10, 2010, Rule 56 of the Federal Rules of Civil Procedure was "revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts." Committee Notes on Rules - 2010 Amendment, available at http://www.law.cornell.edu/rules/frcp/rule_56. The revisions alter the language of the rule, but the "standard for granting summary judgment remains unchanged." *Id.* Although the Federal Rules do not directly apply, the Board may use them as guidance.

> DAB No. 2459, at 5 (2012) (quoting *Matsushita*, 475 U.S. at 587), *aff'd*, *Mission Hosp. Regional Med. Ctr. v. Sebelius*, No. SACV 12-01171 AG (MLGx), 2013 WL 7219511 (C.D. Cal. 2013)[*aff`d sub nom. Mission Hosp. Regional Med. Ctr. v. Burwell*, 819 F.3d 1112 (9th Cir. 2016)]. In examining the evidence to determine the appropriateness of summary judgment, an ALJ must draw all reasonable inferences in the light most favorable to the non-moving party. *See Brightview Care Ctr.*, DAB No. 2132, at 2, 9 (2007); *but see Cedar Lake Nursing Home*, DAB No. 2344, at 7 (2010); *Brightview* at 10 (entry of summary judgment upheld where inferences and views of non-moving party are not reasonable). Drawing factual inferences in the light most favorable to the non-moving party does not require that an ALJ accept the non-moving party's legal conclusions. *Cedar Lake Nursing Home* at 7.

Pearsall Nursing & Rehab. Ctr. – North, DAB No. 2692, at 5 (2016).

Our 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* (*Guidelines*) at http://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment.

Analysis

I. CMS had a basis to revoke Northridge's Medicare enrollment because Northridge was not operational at its practice location on file with CMS.

Northridge does not dispute that it was not operational at its former Reseda Boulevard address in Northridge, California on April 14, 2015 when the NSC inspector attempted to visit that location, but asserts that on that date it "'was operational' at the location of its new address" on Balboa Boulevard in Granada Hills. P. Reply at 6. The ALJ rejected this argument because it was undisputed that Northridge "was not operational *at its qualified practice location* (9335 Reseda Boulevard) [in Northridge] on file with CMS on April 14, 2015, when an NSC inspector attempted to visit that practice location." ALJ Decision at 7 (emphasis added); *see id*. at 8 (Northridge "was not operational at its 'qualified practice location'" because on April 14, 2015 "Northridge was no longer present" at its "practice location that was on file with CMS").

The ALJ did not err in concluding that Northridge did not satisfy the requirement to be operational when it was not operating at the location it had identified as its practice location in its enrollment application with CMS (the Reseda Boulevard address in Northridge). In the recent case of *Care Pro Home Health, Inc.*, DAB No. 2723 (2016),

the Board held that the Medicare provider petitioner had to be operational at the location it provided on its Medicare enrollment application. *Care Pro Home Health* at 5-6. The Board approved and adopted the analysis of the ALJ in that case which, like the ALJ Decision here, points out that the regulatory definition of "operational" at 42 C.F.R. § 424.502 requires the provider to have a "qualified physical practice location;" that section 424.510(d)(2) requires the applicant to provide "[c]omplete, accurate and truthful responses to all information requested within each section [of the enrollment application] as applicable to the provider or supplier type" (which may include the "practice location"); and that section 424.517(a) states that CMS may perform on-site inspections to verify that the enrollment information is accurate and to determine compliance with Medicare requirements, meaning that "CMS will inspect the 'qualified physical practice location' that has been provided by the provider and is currently on file with CMS." *Id*. at 5, citing *Care Pro Home Health, Inc*., DAB CR4321, at 9-10 (2015).

The Board in *Care Pro Home Health* found "no legal error" in the ALJ's reasoning and "agree[d] with the ALJ that CMS lawfully revoked Petitioner's Medicare enrollment based on its non-operational status" at the location of its address on file with CMS. *Care Pro Home Health* at 6 (also citing *Viora Home Health, Inc.*, DAB No. 2690, at 13 (2016), as holding that "CMS had a basis to revoke a home health agency's Medicare enrollment 'because its *practice location of record* was . . . not operational *upon onsite review*' (italics added)."). The ALJ Decision here relied on the same regulations, and reached the same conclusion that the Board reached in *Care Pro Home Health*. ALJ Decision at 8, citing 42 C.F.R. §§ 424.502, 424.510(d)(2)(ii), 424.517(a); *see supra* p. 5. The regulations cited in *Care Pro Home Health* apply equally to Medicare suppliers like Northridge. Accordingly, we find no error in the ALJ's analysis in this case.

The preamble language the ALJ Decision cited also supports its conclusion. As the ALJ pointed out, CMS stated that "when . . . a provider or supplier, including a DMEPOS supplier, is no longer operating *at the practice location provided to Medicare on a paper or electronic Medicare enrollment application*" then "the revocation should be effective with the date that CMS or our contractor determines that the provider or supplier is no longer operating *at the practice location*." 73 Fed. Reg. at 69,865 (italics added), cited at ALJ Decision at 8. This language is further notice that Medicare enrollment and billing privileges may be revoked if a supplier is not operational at its practice location address on file with CMS that the supplier provided on its enrollment application.

The Board's and the ALJ's analysis in *Care Pro Home Health* also noted that the Medicare enrollment application in that case (form CMS-855A) directed the applicant to provide the address of its practice location it intended to use to bill for Medicare services. *Care Pro Home Health* at 5-6; *Care Pro Home Health, Inc*., DAB CR4321, at 9-10. Here, the form CMS-855S similarly asks for the "Business Location" and states that DMEPOS suppliers "must maintain a physical facility on an appropriate site and must maintain a visible sign with posted hours of operation"; "must complete and submit a

separate CMS-855S enrollment application to enroll each physical location (i.e., store or other retail establishment) used to furnish Medicare covered DMEPOS[,]" which "must be a specific street address as recorded by the United States Postal Service[,]" and warns "[a] supplier must permit CMS or its agents to conduct on-site inspections to ascertain the supplier's compliance" with the supplier standards listed at 42 C.F.R. § 424.57(c). CMS Ex. 7, at 7; *see* ALJ Decision at 2, 6, 7 (noting use of form CMS-855S to report change in business location).[8]

The Board in *Care Pro Home Health* concluded that CMS "lawfully revoked Petitioner's Medicare enrollment based on its non-operational status" because on the date of the on-site review the provider was no longer operational at the address it gave on its enrollment application. DAB No. 2723, at 6, citing *Viora Home Health, Inc.* at 13 (CMS had a basis to revoke a home health agency's Medicare enrollment "because its *practice location of record* was . . . not operational upon onsite review") (italics added). Northridge here does not dispute that as of April 14, 2015, the date of NSC's attempted on-site inspection, it was no longer in operation at the Reseda Boulevard address. CMS thus had a valid legal basis for the revocation, and the ALJ's conclusions that summary judgment was appropriate and that CMS "had a legitimate basis to revoke Petitioner's Medicare billing privileges" because it "was not operational at its qualified practice location . . . on file with CMS on April 14, 2015, when an NSC inspector attempted to visit" were not legally erroneous. ALJ Decision at 7.

In its reply brief, Northridge complains that the ALJ erred in relying on an older version of the regulation at section 424.535(a)(5). P. Reply at 5-6. Northridge argues that it was denied due process because it is not clear which version of the regulation provides the basis for the ALJ's decision. *Id*. In his decision, the ALJ cites an older version of section 424.535(a)(5)(ii); however, when CMS revised the regulation it made no substantive changes to the language that provides the grounds for this revocation. Prior to February 3, 2015, section 424.535(a)(5) authorized revocation if "CMS determines, upon on-site review," (but not also upon "other reliable evidence"), "that the provider or supplier is no longer operational to furnish Medicare covered items or services, or is not meeting Medicare enrollment requirements under statute or regulation to supervise treatment of, or to provide Medicare covered items or services for, Medicare patients." Subparagraphs (a)(i) and (a)(ii) then repeated part of those grounds for revocation (no longer operational and not meeting Medicare enrollment requirements) for "Medicare Part A provider[s]" and "Medicare Part B supplier[s]," respectively, with the additional ground that a Part B supplier "has failed to furnish Medicare covered items or services as required by the statute or regulations." CMS revised section (a)(5) because "the language in these two subsections is redundant" and "effectively duplicate[s] the language in the first sentence

[8] CMS Exhibit 7 is the form CMS-855S that Northridge filed on May 20, 2015.

of § 424.535(a)(5)," and added the "other reliable evidence" language to make this section consistent with section 424.530(a)(5), which authorizes denial of an enrollment application based on the findings of an on-site review "or other reliable evidence." 79 Fed. Reg. 72,500, 72,524 (Dec. 5, 2014).

We reject Northridge's claim that it was denied due process by this error, which we find harmless. The Board has noted that "even assuming inadequate notice, it will not find a due process violation absent a showing of resulting prejudice." *Med-Care Diabetic & Med. Supplies, Inc.*, DAB No. 2764, at 19 (2017); *Green Hills Enters. LLC*, DAB No. 2199, at 8 (2008), citing *Livingston Care Ctr.* at 20; *see also Dinesh Patel, M.D.*, DAB No. 2551, at 8 (2013). Even if it was unclear to Northridge which version of the regulation the ALJ applied in reaching his decision, Northridge could have made the same arguments on appeal, because the two versions of the regulation are substantively the same. Northridge has demonstrated no prejudice because of a lack of clarity over which version of the regulation the ALJ applied. In the absence of prejudice, we find no denial of due process.

Northridge also requested subpoenas for A) the testimony of the NSC employee who told Northridge via telephone that Northridge could not submit a Form 855 via PECOS to change its address while its revalidation was pending; B) the testimony of the site inspector concerning the April 14, 2015 site visit; C) the "person most knowledgeable" about PECOS at CMS; and D) CMS documents on Northridge's attempt to notify NSC of its change of address. P. Opposition at 12-14. The ALJ did not issue the subpoenas Northridge requested and instead ruled on summary judgment. ALJ Decision at 4. On appeal, Northridge contends that it "requested subpoenas to secure documents and testimony of witnesses who possess relevant and material facts [. . . and] requested a hearing and opportunity to cross-examine [CMS's] witnesses . . . [which were] critical for the A.L.J. to properly evaluate whether [Northridge] reported its address change to CMS or its agents." P. Reply at 7.

An ALJ may issue subpoenas if they are "reasonably necessary for the full presentation of a case." 42 C.F.R. § 498.58(a). The regulation also requires the party requesting the subpoena to "[i]dentify the . . . documents to be produced;" *id.* § 498.58(c)(1), and to "[s]pecify the pertinent facts the party expects to establish by the . . . documents" sought and to "indicate why those facts could not be established without use of a subpoena[,]" *id.* § 498.58(c)(3). *Wills Eye Hosp.*, DAB No. 2743, at 7 n.3 (2016); *see also Horace Bledsoe, M.D. & Bledsoe Family Med.*, DAB No. 2753, at 6 (2016).

The record here does not support the request for subpoenas. The ALJ found that pertinent facts were already established by evidence in the record about the Northridge/NSC telephone call concerning the submission of the Form 855S through PECOS; about the site visit and inspector's report; and about Northridge's attempts to submit its change of address. In explaining his decision to proceed to summary judgment, the ALJ wrote:

> There is no genuine dispute of any material fact in this case. It is undisputed that Northridge no longer occupied its former offices at 9335 Reseda Boulevard by March 1, 2015. P. Ex. 1 ¶ 12; P. Ex. 2 ¶ 4. It is undisputed that an NSC inspector attempted to visit the 9335 Reseda Boulevard location on April 14, 2015, but that the location was vacant. CMS Ex. 4; P. Br. at 3. It is also undisputed that in January 2015 Northridge indicated that its business address was 9335 Reseda Boulevard in its Medicare revalidation enrollment application and again in February 2015 in response to a request for additional information related to the revalidation enrollment application. P. Ex. 1 ¶¶ 5, 11. In addition, there is no dispute that Northridge attempted to file a CMS-855S through PECOS to change its address, but was unsuccessful, and that the first time Northridge successfully filed with NSC a CMS-855S to change its address with CMS was on May 20, 2015. P. Br. at 3-4, 6; CMS Ex. 6; CMS Ex. 7; P. Ex. 1 ¶¶ 8, 13; P. Ex. 2 ¶ 5; *see also* CMS Ex. 1 ¶ 6. Therefore, there is no material fact in dispute that, on April 14, 2015, the NSC site inspector went to Northridge's address that was on file with CMS. *See* P. Br. at 3.
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> I accept as true for purposes of summary judgment that Northridge attempted to submit a CMS-855S on or about February 3, 2015, through PECOS in order to notify CMS of its impending change of address. I also accept as true that PECOS would not accept the change of address because Northridge's revalidation enrollment application was still pending with NSC and that an NSC employee told a Northridge employee that a CMS-855S could not be submitted to change an address while a revalidation application was still being processed. P. Ex. 1 ¶ 8; P. Ex. 7 at 1.

ALJ Decision at 6. The fact that Northridge had made unsuccessful attempts to submit its change of address through PECOS was not material to the ultimate issue and, in any event, was undisputed. *See id*. Therefore, subpoenas were unnecessary for the information Northridge was seeking. Ultimately, how PECOS worked (and whether it was working as intended) at the time was irrelevant to whether Northridge informed NSC of the change in its qualified physical practice location because PECOS was not the *only* way Northridge could have submitted its change of address. Thus, expert testimony on the operation of the PECOS system would have been immaterial. Accordingly, we find that the ALJ did not err by not granting Northridge's subpoena request.

II. The ALJ did not err in finding it undisputed that Northridge did not timely report the change of its practice location address as required by 42 C.F.R. § 424.57(c)(2).

Northridge says it has "a complete defense to revocation" because it "established that it notified CMS of its address change on or about February 3, 2015" during "the February 3, 2015 conversation between Northridge and [the] NSC employee" in which "the Northridge change of address was discussed." P. Reply at 4, citing P. Ex. 1 at ¶¶ 8-9 (Northridge office manager's decl.). Northridge argues that "it [thus] complied with 42 C.F.R. § 424.57(c)(2)" (DMEPOS supplier must "report to CMS any changes in the information supplied on the [enrollment] application within 30 days of the change") and that the ALJ erred in granting summary judgment because a "material fact in dispute is whether Northridge timely reported a change of address to CMS or its agents." *Id.* at 2, 4.

Northridge did not make these arguments before the ALJ and raises them for the first time in its reply brief on appeal. Before the ALJ, Northridge conceded that "CMS did not have the new Granada Hills address" at the time of the attempted on-site visit on April 14, 2015 and "admit[ed] that it did not submit a change of address form between January 23, 2015 and May 20, 2015" for its practice location. P. Br. at 3, 6. The ALJ Decision accordingly does not discuss whether Northridge reported its intended new address to NSC during the February phone call. As noted above, the ALJ found that Northridge "had 30 days from March 1, 2015, to report its change of address to CMS, but did not do so until May 20, 2015" and that there was "no dispute that until May 2015, Northridge did not provide notice to CMS on a CMS-855S form of the change in Northridge's address to 10515 Balboa Boulevard, either electronically through PECOS or with a paper form sent through the mail[.]" ALJ Decision at 7, 9.

Having failed to assert before the ALJ either that it reported the new address to NSC during the office manager's February phone call with the NSC employee or that it complied with the reporting requirement of section 424.57(c)(2), Northridge may not now raise these issues for the first time on appeal. The Board *Guidelines*, which were provided to Northridge with the ALJ Decision, state that the Board "will not consider issues not raised in the request for review, *nor issues which could have been presented to the ALJ but were not*." *Guidelines* at "Completion Of The Review Process," ¶ (a) (emphasis added); *see Complete Home Care, Inc.*, DAB No. 2525, at 5 (2013) (Board "will not consider issues which could have been presented to the ALJ but were not"); *ACT for Health, Inc.*, DAB No. 1972, at 5 (2005) (*Guidelines* prohibition on raising issues not presented to ALJ "mirrors the rule applied in federal appellate courts, which generally refuse to consider issues or arguments raised for the first time on appeal").

Northridge's new arguments "could have been presented to the ALJ." *Guidelines*. CMS, in moving for summary judgment, asserted that Northridge "admitted that it failed to report its change of address within 30 days and that it was an error on its part" and stated, as undisputed material facts, that "NSC records show that Petitioner never submitted a change of address form between January 23, 2015 and May 20, 2015[,]" when Northridge submitted a "CMS Form 855S [stating the address of] its new location . . . ." CMS Br. & Motion for Summary Judgment at 5-6, 10. CMS cited Northridge's reconsideration request stating that "[w]e apologize that you were not notified that we moved locations which was a huge mistake on our part," and the NSC analyst's declaration that "I have thoroughly searched the files of NSC, and can state that NSC did not receive any forms from Foot Specialists of Northridge reporting a change of address between January 23, 2015 and May 20, 2015." *Id*., citing CMS Exs. 6; 1 at ¶ 6. Northridge, in response to the CMS motion, only "dispute[d] it made 'a huge mistake'" in failing to report its new address, as conceded in the reconsideration request, "as it had relied upon false information provided by CMS." P. Br. at 4. If Northridge indeed maintained that it timely reported the address of its new practice location in compliance with section 424.57(c)(2), then it was obliged to so argue before the ALJ in response to CMS's argument and evidence and to proffer supporting evidence. *See Hiva Vakil, M.D.*, DAB No. 2460, at 5 (2012) (Medicare suppliers waived argument "because they did not raise it before the ALJ despite having the opportunity to do so").

Additionally, Northridge's office manager did not state that she provided the address of Northridge's future location (to which it had not yet moved) to NSC during the phone conversation in early February 2015. The office manager's entire testimony about the phone call is as follows:

> On or about February 3, 2015, I attempted to complete and file Northridge's Form 855S changing the address on file to the new location in Granada Hills through the PECOS system. When trying to change Northridge's address via PECOS, however, PECOS would not allow me to make any changes as Northridge's revalidation was "pending." In an abundance of caution, I subsequently contacted [the NSC employee] to inquire as to changing the address of Northridge. [The NSC employee] told me that while the revalidation was pending, changes to Northridge's address and filing of Form 855S could not be processed. Based upon [the NSC employee]'s affirmative misconduct as well as the PECOS system denying me the ability to change Northridge's address, I did not change Northridge's address. Had [the NSC employee] not provided this information to me in error in addition to the PECOS system denying me the ability to change Northridge's address, I would have prepared and filed a paper Form 855S.

P. Ex. 1 at ¶ 8.

This testimony alleges only that the office manager contacted the NSC employee "to inquire as to changing the address of Northridge" and does not represent that she provided Northridge's future address to NSC during the phone call. Had the office manager done so it is reasonable to expect that she would have so stated in her declaration. The absence of such a statement from the declaration is consistent with the office manager's testimony that she believed Northridge could *not* update its location at the time of the phone call and with Northridge's concession in its request for reconsideration, noted above, that NSC was not notified that Northridge had moved locations. CMS Ex. 6, at 1. The declaration accordingly does not support an inference that Northridge reported its new location by telephone prior its move, even viewed in the light most favorable to Northridge.

To the extent Northridge now argues that simply informing the NSC employee of *the fact* of the intended move without providing the new address fulfilled the reporting requirement in section 424.57(c)(2), we reject that argument. Northridge did not make that argument to the ALJ and, as we observed above, each DMEPOS supplier must identify a specific physical address as its practice location that is then subject to on-site visits to verify compliance with supplier standards. This requirement cannot be met absent provision of an actual address at which the supplier is currently operational.

Northridge also requests that the ALJ Decision "be vacated or remanded for further evidentiary proceedings" because CMS "failed to establish that Appellant did not change its address and that CMS, and its agents, were not notified" of the change. P. Reply at 4. Northridge cites *Daniel H. Kinzie, IV, M.D.*, DAB No. 2341 (2010), which remanded an ALJ decision upholding the revocation of a physician's billing privileges for failure to report a state's revocation of his license to practice medicine, where CMS "did not proffer any evidence . . . such as a declaration from a CMS or [contractor] official stating that [its] telephone or mail logs had been reviewed and there was no record of Dr. Kinzie reporting his license revocation." *Kinzie* at 9. Northridge argues that the NSC analyst's declaration "fails to provide any details regarding which 'files' were searched; whether the search included hard-copies and electronic documents; or whether the 'files' searched at NSC reflect information within the files of CMS and its other agents" and that "[s]imilar to *Kinzie*, in this matter CMS has proffered no evidence that its telephone or mail logs had been reviewed or that it possessed no record of [Northridge's] notifying CMS or its agents of its address change." P. Reply at 3-4. Before the ALJ, however, Northridge did not even dispute, let alone proffer evidence to dispute, CMS's argument and evidence that it did not receive a timely change of address.[9]

[9] In *Kinzie*, moreover, the Board found that CMS "failed to establish that the license revocation constituted a change to information furnished on his enrollment form that he was obligated to report." *Kinzie* at 7. Here, by contrast, it is not disputed that Northridge had provided its former Reseda Boulevard address in Northridge on its enrollment application and was thus required to report any change of address location to CMS within 30 days.

Finally, Northridge disputes the ALJ's conclusion that NSC's February 19, 2015 letter requesting information about "missing or incomplete" items in Northridge's revalidation enrollment application, including "Physical address as listed in business section of the CMS 855S," was "an opportunity for Petitioner to timely provide its new address, which Petitioner failed to do." P. Exs. 11; 12, at 1; ALJ Decision at 10. Northridge argues it would have been "unreasonable to conclude that [it] should have given CMS/NSC the same address that CMS/NSC had just rejected" and that the letter "clearly sought information about the Reseda Office necessary to complete the PECOS revalidation and Appellant properly interpreted it as such." Request for Review of ALJ Decision (RR) at 6. Northridge cites the timing of the letter (prior to the move and "just two weeks after CMS/NSC had rejected Appellant's February 3, 2015, attempt to submit its upcoming change of address to CMS/NSC"); the fact that it was from the NSC employee who told Northridge it could not update its address while that application was pending; and the fact that it sought information about the physical practice location (including business address and proof of liability insurance) when Northridge had provided only the Reseda Boulevard location. RR at 6-8. Northridge argues that the ALJ "misapplied the summary judgment standard because the ALJ clearly did not make all reasonable inferences" regarding the letter in its favor. RR at 11.

We need not decide whether it was reasonable to infer that NSC was seeking information about the Reseda Boulevard location in its February 19 letter. Even if we agreed with Northridge that the ALJ erred by not adopting Northridge's reading of the letter, that error would be harmless. Northridge still was on notice from the regulation (§ 424.57(c)(2)) that it had to provide its new location address within 30 days after it moved there on March 1, 2015, and Northridge cites nothing in the letter that may be reasonably read as exempting it from that requirement. As CMS points out, Northridge was also aware from the regulations that its premises were subject to on-site inspection at any time to verify that it was operational. CMS Resp. at 13-14, citing 42 C.F.R. § 424.535(a)(5)(i) (authorizing revocation if supplier found no longer operational "[u]pon on-site review").

We note that NSC afforded Northridge sufficient time to provide notice that it had moved to a new practice location before conducting the site visit. In a recent decision, the Board concluded that there was no legal basis for revocation where the CMS contractor conducted a site review before allowing sufficient time under the regulations for the provider to notify the contractor of its new address. In *Adora Healthcare Services, Inc.*, DAB No. 2714 (2016), the Board affirmed (on different grounds) the ALJ's decision reversing CMS's revocation of a home healthcare provider's Medicare enrollment. CMS had revoked the provider's enrollment following a site visit because (the provider having relocated to a new address) the contractor found the provider to be not operational at its practice location as required under 42 C.F.R. § 424.535(a)(5). *Adora* at 2. The ALJ found that the provider had reported to the CMS contractor the change of its practice

location, and that, therefore (having conducted the site visit at the wrong location), the CMS contractor had no valid basis for revocation. *See id*. at 4. The Board, however, concluded that the CMS contractor had not afforded the provider 90 days, pursuant to the regulation at 42 C.F.R. 424.516(e)(2), to report a change of address and that, therefore, the revocation was "premature." *Id*. at 4.

Here, as noted above, Northridge acknowledged that "it did not submit a change of address form between January 23, 2015 and May 20, 2015" (80 days after it moved to the new location), and thus concedes it did not report the change within 30 days as required by the regulations. P. Br. at 3, 6; 42 C.F.R. §§ 424.57(c)(2), 424.516(c); *see* ALJ Decision at 3-4, *citing* CMS Exs. 1, 6, 7. NSC attempted to conduct the site visit on April 14, 2015, 44 days after Northridge moved to its Balboa Boulevard location. *Id*.

We thus conclude that the ALJ did not err in finding it undisputed that Northridge did not timely report the change of its practice location address as required by 42 C.F.R. § 424.57(c)(2).

III. The ALJ did not err in concluding that Northridge could not be granted equitable relief.

Northridge argues for reversal of the revocation despite not being operational at its address on file with CMS because it "took all reasonable steps to communicate its impending address change to CMS," which "rejected" Northridge's "timely attempt to submit its address change" and then "erroneously instructed" Northridge that its address change "could not be effectuated until its revalidation process was completed." RR at 2. We agree with the ALJ that Northridge seeks equitable relief that ALJs and the Board are not empowered to grant.

The ALJ accepted for the purpose of summary judgment that on or about February 3, 2015 Northridge unsuccessfully attempted to file a form CMS-855S through PECOS to change its address on file to its future practice location on Balboa Boulevard in Granada Hills, that PECOS would not accept the change of address form because the revalidation enrollment application that Northridge filed on January 23, 2015 was still pending, and that "an NSC employee told a Northridge employee that a CMS-855S could not be submitted to change an address while a revalidation application was still being processed." ALJ Decision at 6, citing P. Exs. 1 at ¶ 8; 7, at 1; *see also id*. at 9 ("For purposes of summary judgment, I accept as true that the NSC employee told Northridge that it could not file a CMS-855S form while a reenrollment application was pending."). The ALJ, however, rejected Northridge's argument "that CMS should be estopped on equitable grounds from revoking Northridge" and concluded that the NSC employee's provision of "allegedly inaccurate information [was] not legally sufficient to require reversal of the revocation in this case." *Id*. at 8, 9.

The ALJ's conclusion was legally correct. The Board has repeatedly confirmed that neither it nor the ALJs have authority to overturn a legally valid agency action on equitable grounds or otherwise grant equitable relief. *See*, *e.g.*, *Orthopaedic Surgery Assocs.*, DAB No. 2594, at 7 (2014) (Board "lacks the authority to restore OSA's billing privileges on equitable grounds"); *Neb Grp. of Ariz. LLC*, DAB No. 2573, at 6 (2014) (Board "has consistently held that it (and the ALJs) lack the authority to restore a supplier's billing privileges on equitable grounds").

The Board also held in *Care Pro Home Health* that "[i]n reviewing a revocation determination, an ALJ or the Board *is limited to deciding whether CMS had a valid 'legal basis' for that action*." DAB No. 2723, at 5 (italics added), citing *Letantia Bussell, M.D.*, DAB No. 2196, at 12-13 (2008) (ALJ's review of revocation is "limited to whether CMS had established a legal basis for its actions"; once the ALJ found the "elements required for revocation were present" the ALJ "was obliged to uphold the revocation, as are we"); and *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 17, 19 (2009) ("the scope of administrative review before the ALJ and the Board is limited to determining whether CMS had a sufficient legal predicate . . . for its revocation determination [and] we may not substitute our discretion for that of CMS in determining whether revocation is appropriate under all the circumstances"), *aff'd, Ahmed v. Sebelius*, 710 F. Supp. 2d 167 (D. Mass. 2010); *see also Viora Home Health, Inc.* at 7 (the "central question before the ALJ, and then before the Board, in a 42 C.F.R. Part 498 appeal that arises from a revocation determination . . . is whether CMS has a legal basis for revocation"). CMS here had a valid legal basis to revoke Northridge's billing privileges as there is no dispute that Northridge was not operational at its address of record with CMS.

Additionally, as the ALJ stated, the U.S. Supreme Court in *Office of Personnel Management v. Richmond*, 496 U.S. 414, 419 (1990) held that "'equitable estoppel will not lie against the Government as it lies against private litigants[]'" and "has indicated 'that some type of 'affirmative misconduct'" would be required for estoppel to apply against the federal government. ALJ Decision at 9, quoting 496 U.S. at 419, 421. The ALJ concluded that, "[a]t worst, [he could] only reasonably infer that the NSC employee provided incorrect information," but that he could not conclude that the NSC employee who allegedly gave Northridge incorrect information "engaged in 'affirmative misconduct.'" *Id*. Therefore, consistent with the Supreme Court's decision in *Richmond*, the ALJ found no basis for estoppel to apply in this case.

The ALJ again did not err. The Board has repeatedly cited *Richmond* in rejecting claims of equitable estoppel based on the alleged actions or representations of the federal agency. *E.g.*, *US Ultrasound* at 8 ("estoppel against the federal government, if available at all, is presumably unavailable absent 'affirmative misconduct,' such as fraud, by the federal government"); *Oaks of Mid City Nursing & Rehab. Ctr.*, DAB No. 2375, at 31 (2011) (government cannot be estopped absent showing that "the government's

employees or agents engaged in 'affirmative misconduct.'"). Based on those decisions, we conclude that the ALJ did not err in concluding that the possibly mistaken representations of the NSC employee did not rise to the level of "affirmative misconduct."

Northridge disputes the ALJ's reliance on *Richmond*, citing older appeals court decisions from various circuits in support of its argument that "a showing of fraud or affirmative misconduct is not required where the government agent is acting within the scope of their authority." P. Reply at 10, citing *Penny v. Giuffrida*, 897 F.2d 1543, 1546 (10th Cir. 1990); *U.S. v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); and *U.S. v. Ga.-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970). However, the Supreme Court's decision in *Richmond* supersedes those lower court decisions.

The Board has, moreover, rejected the argument that "estoppel should be available . . . because the employee who gave the advice was 'acting within the scope of [her] authority.'" *Southlake Emergency Care Ctr.*, DAB No. 2402, at 8 (2011). The Board again recognized as "well-established that 'the government cannot be estopped absent, at a minimum, a showing that the traditional requirements for estoppel are present . . . and that the government's employees or agents engaged in 'affirmative misconduct.'" *Id.* (emphasis in original), citing *Oaks of Mid City Nursing & Rehab. Ctr.* at 31. Northridge points to nothing in *Richmond* supporting its argument and provides no reason for the Board to reject its longstanding reliance on that decision.

We also decline Northridge's request that the appeal "be remanded to permit the parties to secure the testimony" of the NSC employee with whom its office manager spoke "and facts relating to the misleading statements made," in order for the ALJ to determine "whether the conduct of CMS's agent was 'affirmative misconduct.'" P. Reply at 4. Northridge has not shown that such proceedings would be likely to result in evidence of affirmative misconduct. Moreover, even possible affirmative misconduct in misinforming a supplier during a phone conversation in early February about whether it could update its location while a revalidation enrollment application was pending would not negate the clear requirement of section 424.57(c)(2) to notify CMS within 30 days after it moved to a new location on March 1. And, in any case, neither the Board nor the ALJ, as we have explained, has authority to alter a legally valid revocation, even were the basis for equity present. The ALJ thus did not err in concluding that Northridge could not be granted equitable relief from the revocation.

Conclusion

We affirm the ALJ Decision.

/s/
Leslie A. Sussan

/s/
Susan S. Yim

/s/
Christopher S. Randolph
Presiding Board Member