

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

Miracle Deeds Medical Supplies, LLC  
Docket No. A-17-8  
Decision No. 2785  
April 14, 2017

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

Miracle Deeds Medical Supplies, LLC (Petitioner) appeals the September 2, 2016 decision of an Administrative Law Judge. *Miracle Deeds Medical Supplies, LLC*, DAB CR4697 (ALJ Decision). The ALJ sustained the determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's Medicare enrollment and billing privileges. Petitioner argues on appeal that the ALJ denied it the opportunity to present the testimony of its witnesses because the ALJ did not conduct an in-person hearing. Consequently, Petitioner contends, the ALJ Decision was not correct. As discussed below, we sustain the ALJ Decision.

We conclude that the ALJ provided Petitioner a full and fair opportunity to present its case, including the opportunity to submit the direct written testimony of any proposed witness and the opportunity to cross-examine the witness whose written testimony CMS submitted. Petitioner did not file any witness testimony or ask to cross-examine the CMS witness. Moreover, the ALJ Decision addressed Petitioner's evidence and arguments, and Petitioner does not indicate how the requirement to submit written direct testimony in this case prejudiced its ability to raise any issue or prove any fact bearing on its enrollment status.

**Legal Background**

The Social Security Act (Act) provides for CMS to regulate the enrollment of providers and suppliers in Medicare. Act § 1866(j)(1)(A). The implementing regulations in 42 C.F.R. Part 424, subpart P set out the requirements for providers and suppliers to establish and maintain Medicare billing privileges.

Petitioner is a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). DMEPOS suppliers that enroll in Medicare and receive associated billing privileges from CMS must comply with the conditions for Medicare payment in 42 C.F.R. Part 424 and with the "[s]pecial payment rules for items furnished by DMEPOS

suppliers and issuance of DMEPOS supplier billing privileges” in section 424.57. CMS may revoke a DMEPOS supplier’s Medicare enrollment for any of the “reasons” in 42 C.F.R. § 424.535(a) or if the supplier fails to meet and maintain the standards in paragraphs (b) and (c) of section 424.57. 42 C.F.R. §§ 424.57(e)(1), 424.535(a).

The regulations that govern a supplier’s right to appeal a revocation of its enrollment are set forth in 42 C.F.R. Part 498, subpart A. *Id.* § 424.545(a). A supplier may request reconsideration of a revocation determination by CMS, may request a hearing before an ALJ to challenge CMS’s reconsidered determination, and may then seek Board review of an unfavorable ALJ decision. *Id.* §§ 424.545, 498.5(1), 498.22, 498.40, 498.80, 498.82.

### **ALJ Decision**

As noted above, the ALJ sustained CMS’s determination to revoke Petitioner’s Medicare enrollment and billing privileges. In reaching this determination, the ALJ first explained that CMS had filed a motion for summary judgment and proposed exhibits (including the direct testimony of one witness) in response to Petitioner’s request for an ALJ hearing, and that Petitioner had filed eight proposed exhibits and a brief opposing CMS’s motion. The ALJ stated that it was not necessary to decide whether the criteria for summary judgment were met, however, because Petitioner had not asked to cross-examine CMS’s witness or provided direct testimony on its own behalf. Though Petitioner listed two witnesses in its prehearing exchange, the ALJ noted, it “failed to provide written direct testimony as per [the ALJ’s] Acknowledgment and Pre-hearing Order.” ALJ Decision at 1. Therefore, the ALJ decided the case based on the parties’ written exchanges.

On review of the record, the ALJ then determined that CMS was authorized to revoke Petitioner’s enrollment and billing privileges because Petitioner was not accessible to the public and staffed during posted hours of operation, as required under 42 C.F.R. § 424.57(c)(7)(C), and was not operational within the meaning of 42 C.F.R. § 424.502, as required under 42 C.F.R. § 424.535(a)(5). The ALJ found that the record established that on two occasions in December 2015, a Medicare site investigator attempted to visit Petitioner’s place of business in order to conduct a site inspection, but Petitioner’s facility was closed on both occasions. ALJ Decision at 2.

The ALJ noted that Petitioner did not explicitly argue that it was open when the inspector attempted to conduct on-site inspections. Rather, Petitioner indicated that it had posted an emergency phone number and notice of the owner’s estimated time of return on the exterior of the premises. *Id.* citing P. Br. at 1. Although photographs taken by the inspector showed a phone number painted on the building’s front door, the ALJ found that there was no sign indicating that this was an emergency phone number. *Id.* citing

CMS Ex. 2, at 2. On the first site visit attempt, “there was a ‘closed’ sign, stating that Petitioner’s owner would return by 12:00 p.m.” *Id.* On the second visit, however, “there was nothing posted ... to explain why it was closed or when it would reopen.” *Id.* In any event, the ALJ explained, posting “a phone number for potential customers to call does not make a facility open and accessible during posted hours.” *Id.* at 3. “Having represented that it would be open at specific hours,” the ALJ stated, “Petitioner was obligated to have someone on the premises during those hours,” and posting “a phone number is not an acceptable substitute for being open and accessible.” *Id.*

Responding to Petitioner’s additional arguments, the ALJ stated that Petitioner suggested that the inspector may not have visited the correct address for its business. The ALJ found, however, that nothing in the record supported this contention and that he was “satisfied from the evidence offered by CMS that the inspector attempted to conduct on-site inspections at Petitioner’s actual business address.” *Id.* citing CMS Ex. 2. The ALJ further described Petitioner’s remaining arguments, which focused on the hardships that Petitioner’s owners faced while trying to operate their business in December 2015. The ALJ explained that he did not have the authority to address these equitable arguments. Accordingly, the ALJ sustained the revocation.

### **Scope and Standard of Board Review**

In an appeal challenging an ALJ decision to revoke a supplier’s enrollment in Medicare, the Board will not consider issues not raised in a request for review or issues that could have been presented to the ALJ, but were not. *Guidelines - Appellate Review of Decisions of Administrative Law Judges Affecting a Provider’s or Supplier’s Enrollment in the Medicare Program (Guidelines)*, available at <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment/index.html>.

The Board’s standard of review for a disputed issue of law is whether the ALJ decision is erroneous. *Id.* The standard of review for a disputed factual issue is whether the ALJ decision is supported by substantial evidence in the record as a whole. *Id.*

### **Exclusion of New Evidence**

The Board’s acknowledgment of Petitioner’s request for review of the ALJ Decision instructed the parties not to submit any new evidence. Acknowledgment of Notice of Appeal at 2. Petitioner nevertheless filed sworn, written statements by its owners several months after CMS submitted its Response to Petitioner’s request for review of the ALJ Decision.

The regulations governing the Board's review of an ALJ decision involving a supplier's Medicare enrollment and billing privileges provide that the Board may not admit evidence into the record in addition to the evidence introduced before the ALJ. 42 C.F.R. § 498.86(a); *MedStar Health, Inc.*, DAB No. 2684, at 6 (2016) (stating that section 498.86(a) "expressly except[s] provider and supplier enrollment appeals from the general rule authorizing the Board to admit additional evidence that the Board finds is relevant and material"). See also *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 3-4 (2009) (discussing CMS's rationale for excepting provider or supplier enrollment appeals from the general rule authorizing the Board to exercise discretion to admit additional evidence, a revision made to section 498.86(a) in 2008); *Guidelines*, section entitled "Development Of The Record On Appeal," ¶ (f) ("The Board may not admit evidence into the record in addition to the evidence introduced at the ALJ hearing or in addition to the documents considered by the ALJ if the hearing was waived. See 42 C.F.R. § 498.86(a)."). Pursuant to the regulations, we exclude this evidence from our consideration.

### **Discussion**

Petitioner raised a single, procedural issue in its request for review of the ALJ Decision.<sup>1</sup> Petitioner states that it "expected a hearing with an opportunity to speak [its] case regarding the grounds for CMS to revoke [its] Medicare enrollment and billing privileges." ALJ Appeal Request Update. Because the ALJ did not conduct an in-person hearing, Petitioner argues, it was not allowed to present the testimony of its witnesses. Consequently, Petitioner asserts, "the ALJ decision was [not] correct because it did not factor in Miracle Deeds Medical Supplies, LLC witness testimonies." *Id.*

The record shows that the ALJ provided Petitioner with the opportunity to present the testimony of its witnesses. Specifically, the ALJ's Pre-Hearing Order plainly directed the parties to exchange as a proposed exhibit the complete, written direct testimony of any proposed witness. Dkt. No. C-16-614, Ack. & Pre-Hr. Order at 5. The Order also stated that the ALJ would convene an in-person hearing only if a party asked to cross-examine an opposing party's witness. *Id.* at 6. Petitioner did not file any written direct testimony or ask to cross-examine the sole witness whose declaration CMS offered. Furthermore,

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<sup>1</sup> Petitioner's initial request for review of the ALJ Decision did not specify the issues, findings of fact or conclusion of law with which Petitioner disagreed, or the basis for contending that the ALJ's findings and conclusions were incorrect, as required under 42 C.F.R. § 498.82(b). The Board's acknowledgment of the request for review told Petitioner that it could supplement its request with the specified content no later than the 60-day deadline for submitting its request for review. Petitioner timely submitted an "ALJ Appeal Request Update," which raised the sole issue now before the Board.

Petitioner did not object to the procedures established in the ALJ's Pre-Hearing Order. Consistent with his Pre-Hearing Order, the ALJ determined that an in-person hearing was not necessary and proceeded to issue a decision on review of the written record, including the parties' briefs and exhibits. ALJ Decision at 1.

The Board has previously determined in proceedings conducted under the regulations at 42 C.F.R. Part 498 that an ALJ has discretion to require direct testimony in written form, so long as the right to effective cross-examination is protected and no prejudice is shown. *HeartFlow, Inc.*, DAB No. 2781 at 17-18 (2017); *See, e.g., Vandalia Park*, DAB No. 1940, at 19-20, 28-29 (2004), *aff'd, Vandalia Park v. Leavitt*, 157 F. App'x 858 (6th Cir. 2005); *Marcus Singel, D.P.M.*, DAB No. 2609, at 5-6 (2014). As the Board has previously stated, the federal courts "have allowed, and even strongly encouraged, written direct testimony in a variety of proceedings. Since it is offered under oath, [written direct testimony] is generally no less credible in most instances than oral testimony in the hearing room, as long as the witness is subject to cross-examination." *Pacific Regency Arvin*, DAB No. 1823, at 7- 8 (2002), citing *Kuntz v. Sea Eagle*, 199 F.R.D. 665 (D. Haw. 2001). Moreover, use of written direct testimony shortens trials, permits the parties to present direct testimony in a measured and complete manner, and reduces the possibility that material testimony will not be presented. *Id.*

The ALJ in this matter provided Petitioner a full and fair opportunity to present its case, including the opportunity to submit the testimony of its witnesses and to cross-examine CMS's witness. Petitioner does not contend that its right to effective cross-examination was impaired, nor does it argue that the requirement that it submit written direct testimony prejudiced its ability to raise any issue or prove any fact bearing on its enrollment status. Furthermore, while Petitioner summarily asserts in its request for review that the ALJ Decision was incorrect because it did not take into account its witnesses' testimony, Petitioner does not specify how such testimony would demonstrate that any of the ALJ's factual findings are not supported by substantial evidence or that any of the ALJ's conclusions are legally erroneous. As summarized above, the ALJ Decision fully addressed Petitioner's evidence and arguments, and Petitioner has not specified any particular issue, finding of fact or conclusion of law in the ALJ Decision with which it expressly disagrees. Accordingly, we find no basis for reversing or remanding the ALJ Decision.

**Conclusion**

For the reasons discussed above, we affirm the ALJ decision.

\_\_\_\_\_/s/  
Leslie A. Sussan

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

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