Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Viora Home Health, Inc.
Docket No. A-16-16
Decision No. 2690
April 28, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Viora Home Health, Inc. (Viora), a home health agency, appeals the October 27, 2015 decision by an administrative law judge (ALJ). *Viora Home Health, Inc.*, DAB CR4369 (2015) (ALJ Decision). The ALJ affirmed the determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Viora's enrollment in Medicare effective July 8, 2014. The ALJ determined that CMS lawfully revoked Viora's enrollment because Viora was not "operational" to furnish Medicare items or services within the meaning of the applicable regulations.

The Board concurs with the ALJ's ultimate conclusion that Viora's enrollment was properly revoked effective July 8, 2014 because its practice location was not operational upon onsite inspection on July 8, 2014. Accordingly, we uphold the ALJ Decision. We do so, however, based on rationale that is somewhat different from that of the ALJ, as we explain below.

Legal Background

To participate in Medicare, a home health agency must enroll in the program. 42 C.F.R. §§ 424.500, 400.202 (defining Medicare "provider" to include a home health agency). 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. 42 C.F.R. § 424.505.

The regulations in 42 C.F.R. Part 424, subpart P set out the requirements for establishing and maintaining Medicare billing privileges. Section 424.510(d)(6) states that a provider "must be operational to furnish Medicare covered items or services . . . ." 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). CMS may use the results of an onsite review to support a decision to revoke a provider's enrollment. *Id.*

Section 424.535(a) sets out the bases on which CMS may revoke a provider's Medicare billing privileges and provider agreement. Section 424.535(a)(5) provides that "CMS may revoke" a provider's Medicare billing privileges and provider agreement when CMS determines "[u]pon on-site review" that the provider is "[n]o longer operational to furnish Medicare covered items or services . . . ." Section 424.502 defines the term "operational" to mean that—

> the provider or supplier has a qualified physical practice location, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked (as applicable, based on the type of facility or organization, provider or supplier specialty, or the services or items being rendered), to furnish these items or services.

Revocation 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 provider may appeal a determination by CMS to revoke its Medicare enrollment under the procedures in 42 C.F.R. Part 498. A provider must first ask CMS for "reconsideration" of the initial revocation determination. 42 C.F.R. §§ 498.5(1), 498.22. A 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[1]

On July 8, 2014, at 9:45 AM, an inspector from Palmetto GBA (Palmetto), a CMS contractor, arrived at 12808 W. Airport Blvd., Suite 285, Sugar Land, Texas, the practice location of record for Viora, to conduct an onsite visit. CMS Ex. 4, at 2; CMS Ex. 6, at 1. The inspector completed a report, headed "Site Verification Survey Form," in which he noted, "This company is no longer at this address." CMS Ex. 4, at 2. The report also indicates that the provider was not open for business and did not appear to have employees or staff present; there did not appear to be signs of customer activity present; and the facility did not appear to be operational – that is, it did not appear to be open to the public for the purpose of providing health care related services, did not appear to be prepared to submit valid Medicare claims, and did not appear to be properly staffed,

[1] 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.

equipped, and stocked to furnish health care services. *Id.* The inspector's report includes a photograph of the framed sign on the door to the suite. The sign included the suite number, 285, and identified the business entity at the suite as "Applied Optoelectronics, Inc[.]" *Id.* at 3.

On October 23, 2014, CMS, through Palmetto, issued an initial determination to revoke Viora's Medicare billing privileges and terminate its provider agreement pursuant to section 424.535(a)(5), effective July 8, 2014, on the ground that Viora was "no longer operational." CMS Ex. 3, at 1. The determination stated, "On July 8, 2014, a site visit was conducted at 12808 W Airport Blvd. Suite 285 Dallas, TX . . . It was found that Viora Home Health Inc. is no longer operating from this location." *Id.*[2] Viora requested reconsideration of the initial determination, stating that it "sent a letter to Medicare via mail notifying change of address dated 08/06/2013." CMS Ex. 2.

On March 31, 2015, CMS's Center for Program Integrity, Provider Enrollment Operations Group, issued its reconsidered determination sustaining the revocation, stating, in part:

> Viora . . . revalidated their enrollment on March 16, 2012 and listed 12808 W. Airport Blvd Ste. 285 Sugarland, TX as the current practice location. On July 8, 2014 this practice location was found to be non-operational. On December 22, 2014 Viora . . . submitted a change of information form to Palmetto which was ultimately rejected due to the current revocation. Viora . . . alleges they submitted a change of practice location to CMS on August 6, 2013. However, there has been no compelling evidence submitted that supports this allegation or corrects the revocation deficiency. For this reason, the proposed reconsideration is hereby denied.

CMS Ex. 1, at 2; *see also id.* at 1, quoting, in part, 42 C.F.R. § 424.535(a)(5)(i).[3]

Viora appealed. Before the ALJ, Viora stated that, by letter dated August 6, 2013, it notified the CMS contractor of its intent to relocate from W. Airport Boulevard to 3711 Pennington Court, Missouri City, Texas. ALJ Decision at 3; P. Ex. 1 (August 6, 2013 letter to Palmetto notifying Palmetto of change of location to Pennington Court); P. Ex. 2

[2] The initial determination apparently misstated the city as Dallas. The reference to Dallas appears to have been minor error of no consequence. Neither party disputes that the office at 12808 W. Airport Blvd., Suite 285, is located in Sugar Land, Texas.

[3] Under 42 C.F.R. § 424.516(e)(2), a home health agency is required to report changes in its enrollment information (other than changes concerning ownership or control of the agency addressed in section 424.516(e)(1)) within 90 days. The failure to comply with the reporting requirement in section 424.516(e)(2) could be a basis for revoking a home health agency's billing privileges. *See Health Connect at Home*, DAB No. 2419 (2011). Here, however, CMS revoked Viora's billing privileges on non-operational status on the date of the inspector's visit to the W. Airport Boulevard location, not on any alleged failure to comply with a reporting requirement.

(similar letter, also dated August 6, 2013, addressed to the Texas Department of Aging & Disability Services (TDADS), the state survey agency, but adding, "These changes will take effect on August 9, 2013."). Viora also stated that it "updated" the change of its location "online in August of 2013" (Request for hearing (RFH) (one page)) by filing "the correct Form 855 to inform and update its business address" (Petitioner's brief to the ALJ (P. Br.), headed "Prehearing Exchange," at 1 (not paginated)).[4] According to Viora, Palmetto's decision to revoke its billing privileges was "unsubstantiated" and "unfair," and "a way to cover up [Palmetto's] error." RFH.

CMS moved for summary judgment, asserting that there is no dispute that Viora was not operational at the W. Airport Boulevard location, "the practice location on file," on July 8, 2014 and failed to notify CMS of the change of location either via "a paper 855 form" or electronically through CMS's Provider Enrollment, Chain and Ownership System (PECOS). CMS's motion at 4-6. CMS asserted, moreover, that Viora "cannot prove that it ever submitted [the August 6, 2013] letter since it was not sent via electronic means, certified mail, or any mailing method with a corresponding tracking mechanism." *Id.* at 3. CMS also stated that it "does not believe an in-person hearing is necessary in this case" (*id.* at 1), and asserted that it "is entitled to judgment as a matter of law" (*id.* at 6). Viora filed its brief in opposition.

The ALJ upheld the revocation on the ground that Viora's W. Airport Boulevard location was found not operational upon on-site review on July 8, 2014. ALJ Decision at 1, 2, 4, citing 42 C.F.R. § 424.535(a)(5).[5] The ALJ noted that "[t]he contractor and CMS predicated their revocation determination on the fact that [Viora] was no longer doing business at the location it had listed as its business location [at W. Airport Boulevard] in its revalidation application." *Id.* at 2. The ALJ further noted that Viora had changed its business location sometime after it revalidated its Medicare enrollment in 2012 so that "[a]s of July 2014 it was no longer doing business" at the W. Airport Boulevard location,

---

[4] We assume that the references in the record to 855 is to Form CMS-855A, which is the CMS-designated form institutional providers (such as home health agencies) use to apply for enrollment in Medicare and to report changes to their enrollment information. *See* https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/CMS-Forms-Items/CMS019475.html.

[5] CMS asked that the ALJ consider its motion for summary judgment in the alternative as a pre-hearing brief, and stated that it "does not believe an in-person hearing is necessary." CMS's motion at 1. The ALJ did not expressly state that he was deciding this case on summary judgment or based on the written record without holding a hearing. However, we understand the ALJ Decision to mean that the ALJ effectively denied the motion inasmuch as he made findings of fact and conclusions of law (rather than deciding that there was or was not a genuine dispute of material fact), and decided the case based on the written record, finding no reason to convene a hearing to take oral testimony. We note that the ALJ's June 8, 2015 Acknowledgment and Pre-hearing Order, pages 4-5, notified the parties that each must first submit the testimony of any proposed witness in writing in the form of an affidavit or declaration, and affirmatively indicate whether it objects to any witness proposed by the opposing party or wants to cross-examine any witness of the opposing party. Only CMS submitted written witness testimony. CMS Ex. 5 (declaration of T.N., a Palmetto employee). Viora did not identify any proposed witness, or indicate that it wanted to cross-examine T.N., or otherwise raise any specific objection to any exhibit offered by CMS.

but had moved to the Pennington Court location. *Id.*, citing P. Exs. 1 and 2; *see also* CMS Ex. 6 (PECOS data on Viora's 2012 revalidation, identifying the W. Airport Boulevard address as its "practice location" and signed certification statement that accompanied the application for revalidation).

The ALJ said:

> A provider or supplier participating in Medicare is required to comply with that program's participation criteria. Its duties include complying with the program's prerequisites for providing notice and information regarding its business location and change of address. Medicare publishes a Program Integrity Manual (Manual) that instructs providers and suppliers as to what information they must provide but just as importantly, how they are to provide that information. The Manual specifically instructs providers and suppliers that they must adhere to all relevant instructions. Manual § 15.1.3. The Manual allows for two ways in which a provider or supplier may provide the Medicare program with notice. It may do so by either filing an 855 Form or via PECOS. Manual § 15.1.2.
>
> The two forms of notice provided for by the Manual are exclusive. The Manual allows for no alternate form of notice. [Viora] was required, when it changed its business location, either to provide the Medicare program with an 855 Form announcing the change, or to notify the program online via PECOS. Sending a letter to the contractor by regular mail is not an acceptable alternative.

ALJ Decision at 3.[6]

The ALJ also stated that Viora "did not deny that it failed to use either of these official mechanisms for notifying the contractor of its change of business location but asserted that on August 6, 2013, it sent a letter to the contractor announcing its intent to move from the [W.] Airport Boulevard location to the Pennington Court location." *Id.*, citing P. Ex. 1. The ALJ also wrote, "I find it unnecessary to decide whether the [August 6, 2013] letter was actually delivered to the contractor. The letter was an ineffective form of notice and consequently, [Viora] did not comply with its duty as a Medicare participant to notify the contractor of its change of business location." *Id.*

[6] The Medicare Program Integrity Manual (MPIM), CMS Pub. 100-08, Ch. 15, § 15.1.2, states, in part, that "[p]roviders and suppliers . . . may enroll or update their Medicare enrollment using" either the "[i]nternet-based . . . PECOS" or the "[p]aper enrollment application process (e.g., Form CMS-855I)." The MPIM and other CMS manuals are available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html.

Moreover, the ALJ indicated, holding Viora to showing that it used one of the two "official mechanisms" for notifying the contractor of its change in location – filing a Form 855A or notice through PECOS – would not be "exalting form over substance" because, given the large number of providers and suppliers participating in Medicare and "immense amounts of information" the contractors are responsible for processing and organizing, "[i]t is essential that [the contractors] receive relevant information in a routinized way." *Id.* The ALJ stated that, "[c]onsequently, it is entirely rational that the Medicare program and CMS, its administrator, insist that information be provided to the program only in a standardized format" that all providers and suppliers must follow. *Id.* The ALJ found that Viora, as a program participant, was required to be aware of and adhere to the requirements. *Id.* at 4.

The ALJ also wrote:

> The regulatory requirement that a participating provider or supplier be operational subsumes the duty to be accessible for on-site compliance inspections. 42 C.F.R. § 424.535(a)(5). A provider or supplier can fulfill its duty to be accessible only by keeping the contractor informed as to its current business location. It is impossible to inspect a provider or supplier when that participant's current business location is unknown. Here, [Viora] failed to provide the contractor with acceptable notice of its current business location and, consequently, the contractor's inspector – relying on the information that [Viora] had supplied on an 855 Form as to its business location – went to a location that no longer housed [Viora's] business. [Viora's] new business location was inaccessible to the contractor because the contractor had never been informed of the new address through acceptable channels. [Viora's] failure to keep the contractor informed of its business location meant that it was not operational within the meaning of the regulation.

Id.

The ALJ noted that the failure "properly to notify the Medicare program of its change of business location" would be an additional basis for revoking Viora's participation in Medicare. *Id.* at 4 n.3, citing 42 C.F.R. §§ 424.516(e)(2) and 424.535(a)(1). Nevertheless, the ALJ said, he was not "sustain[ing] CMS's determination [to revoke] on this ground inasmuch as this basis was not cited by CMS either in its initial determination or in its reconsidered determination." *Id.* The ALJ stated that he was sustaining the revocation based on the sole ground cited on initial and reconsidered determinations, that is, the failure to be operational under section 424.535(a)(5). *Id.* at 2-4.

Standard of Review

We review a disputed finding of fact to determine whether the finding is supported by substantial evidence in the record as a whole and a disputed conclusion of law to determine whether it 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*). The *Guidelines* are available at http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html.

Analysis

1. Issues before the Board

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 such as the instant case is whether CMS has a legal basis for revocation. *See, e.g.*, *Stanley Beekman, D.P.M.*, DAB No. 2650, at 10 (2015); *John Hartman, D.O.*, DAB No. 2564, at 5-6 (2014); *Letantia Bussell, M.D.*, DAB No. 2196, at 12-13 (2008). Specifically, the question presented here is whether Viora's practice location was "operational" (as defined in 42 C.F.R. § 424.502) upon onsite review on July 8, 2014. If it was not, then CMS is authorized to revoke Viora's billing privileges under 42 C.F.R. § 424.535(a)(5)(i). *See also* 42 C.F.R. § 424.535(g) (stating, as relevant here, that the effective date of revocation based on a determination that the "practice location" was no longer operational is the date that CMS or its contractor determined that the provider was no longer operational). To be "operational" in accordance with the definition in section 424.502, a provider, among other things, must have a "qualified physical practice location" that is "open to the public for the purpose of providing health care related services."[7]

The ALJ concluded, ultimately, that CMS lawfully revoked Viora's billing privileges because its practice location of record (W. Airport Boulevard) was non-operational upon onsite review on July 8, 2014. We agree with that conclusion and uphold the ALJ Decision.

---

[7] We also note that, in an analogous context involving the revocation of billing privileges of a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) for non-operational status under section 424.535(a)(5)(ii), the Board stated that the proper inquiry is to assess the supplier's operational status *at the time of the onsite review* because the intent of the applicable regulations "is that a supplier must maintain, and be able to demonstrate, continued compliance with the requirements for receiving Medicare billing privileges." *A TO Z DME, LLC*, DAB No. 2303, at 7 (2010).

We note, however, that underpinning the ALJ's conclusion was that the W. Airport Boulevard location, not the Pennington Court location, was Viora's practice location of record on July 8, 2014. The ALJ determined as much because he found that Viora did not use one of the two "official mechanisms" permitted in the MPIM, Ch. 15, § 15.1.2 (i.e., filing a Form 855A or notice online through PECOS) to notify CMS or Palmetto of its relocation from W. Airport Boulevard to Pennington Court and, therefore, the W. Airport Boulevard location remained the practice location on July 8, 2014. The ALJ stopped short of making specific factual findings on whether Viora effectuated notice of a change of its practice location by letter dated August 6, 2013 – which was Viora's chief assertion – inasmuch as the ALJ determined that such notice would not have been valid because a letter is not one of the two forms of notice sanctioned by the MPIM. As explained below, we reach the same ultimate conclusion but base it on the facts of record showing that Viora did not effectively inform the contractor of a change of practice location rather than on a legal conclusion that notice made by any means other than an 855 or PECOS is always invalid and ineffective.

2. *The record before the ALJ, and before the Board, is not developed sufficiently to support the broad legal conclusion made by the ALJ on means of notice.*

While we appreciate the ALJ's observation that the use of standardized means of communicating changes of address to CMS and its contractors may help facilitate orderly administration of the Medicare program, it is not clear to us that CMS has definitively decided that only two methods of notice – filing Form 855A and notice online through PECOS – are acceptable or valid forms of reporting changes in enrollment information. The language in the MPIM at section 15.1.2 of chapter 15, on which the ALJ relied, states that "[p]roviders and suppliers . . . may enroll or update their Medicare enrollment record using . . . PECOS . . . or [the] [p]aper enrollment application process (e.g., Form CMS-855I)." (Emphasis added.) The MPIM's use of the word "may" suggests that the two methods of notice are not necessarily exclusive or mandatory means of notice.[8] Moreover, the MPIM provision on which the ALJ relied is sub-regulatory guidance, and, as the introduction to chapter 15 of MPIM (*see* § 15.1) suggests, chapter 15 provisions are primarily intended as guidance or instructions for CMS fee-for-service contractors. In contrast, the regulation in 42 C.F.R. § 424.516(e)(2), binding authority relevant to the notice issue presented here, states only that changes in enrollment, other than changes concerning ownership or control of a provider or supplier addressed in section 424.516(e)(1), must be reported within 90 days. Section 424.516(e)(2) prescribes nothing specific about the method(s) by which required notice may or must be given.

[8] We note that other provisions in the MPIM may also bear on what effect change of address notice to a contractor through means other than an 855 or PECOS may have and what action a contractor should take upon receipt of information by other means. *See, i.e.*, MPIM, chapter 15, sections 15.1.3D, 15.10.1. Given the lack of development in the record about how these provisions interact with each other, with the regulation, and with other legal authorities, we express no opinion on the issue in this decision.

Moreover, CMS did not base the reconsideration decision under review on the claim that Viora was required to, but failed to, use one of the two specified means and that therefore notice was legally ineffective. CMS supports the revocation on the ground that Viora never notified the contractor of a different address, so the W. Airport Boulevard site remained its qualified practice location and was undisputedly not operational at the time of the site visit. CMS Br. at 5.

Indeed, while we share the ALJ's view that CMS could have pursued revocation of Viora's billing privileges based on the failure to comply with notice of change in practice location under section 424.516(e)(2), it is clear that CMS elected to revoke Viora's billing privileges based only on non-operational status of Viora's practice location on July 8, 2014. In short, in the absence of any briefing below on the issue of whether the failure to use an MPIM-sanctioned method of notice means that there was no valid notice such that the old location remains the practice location of record for the purposes of an inspection, we decline to uphold the ALJ Decision on the ALJ's underlying rationale, i.e., any notice of change in practice location as claimed by Viora, regardless of whether the notice in fact reached Palmetto, is invalid so long as the method used was not MPIM-sanctioned.

We therefore turn next to the question of what the record shows as to Viora's qualified practice location of record as of the date of the site visit. Normally, we review questions of fact under a substantial evidence standard. In this case, however, the ALJ expressly declined to resolve the issue of fact as to whether Viora provided notice to Palmetto relying instead on the conclusion that no notice could be valid unless sent by Form 855 or PECOS. Since we have declined to rely on that conclusion, we must resolve the factual question of whether the change of address was effectuated. We see no reason to further delay the matter by remand, since the evidence on this question has been fully developed in the record already. We therefore proceed to evaluate the evidence and make the relevant factual findings ourselves.

3. *The W. Airport Boulevard location was Viora's practice location on July 8, 2014.*

According to Viora, Palmetto knew or at least should have known about its relocation, because Viora sent a letter dated August 6, 2013 notifying Palmetto about the relocation. *See* P. Ex. 1 (Viora's August 6, 2013 letter to Palmetto); RFH; Petitioner's brief to the Board (P. Br. to Board) at 1 (not paginated); Petitioner's reply brief (P. Reply) at 2. Viora disagrees with the ALJ Decision to the extent the ALJ determined Viora did not effectuate proper notice of relocation. It asserts that the ALJ "failed to examine the record as a whole," "ignored several key pieces of evidence," and "based [his] decision on clearly erroneous facts." P. Reply at 4.

Viora disputes the ALJ's statement that it "did not deny that it failed to use either of [the two] official mechanisms for notifying the contractor of its change of business location" (ALJ Decision at 3), asserting that its "very argument before the ALJ was that it did submit an online Form 855 via PECOS." P. Reply at 4, citing RFH at 1 and P. Br. at 1. Viora appears to construe the ALJ's "did not deny" language to mean the ALJ determined that Viora specifically conceded it failed to send notice through one of two methods the ALJ said were acceptable. *Id.* ("ALJ erroneously stated that [Viora] admitted that it failed to file a change of address using either paper Form 855 or the online version . . . ."). This "faulty assumption," Viora says, "precluded" the ALJ from considering evidence of Palmetto's mishandling of Viora's notice of relocation, evidence of which Viora claims was submitted in multiple forms. *Id.* at 4-5; *see also id.* at 2.

It is true that, before the ALJ, Viora took the position that it sent notice of relocation using Form 855A via PECOS. *See* RFH; P. Br. at 1. Despite making this allegation in its briefing below, however, Viora did not offer the ALJ documentary evidence of notice via PECOS or explain why it did not or could not produce such evidence. Before the Board, Viora states that it could not produce such evidence, but asserts that it has nevertheless proven notice by other means. P. Reply at 2 ("While [Viora] could not produce direct evidence of its online address change, it tendered circumstantial evidence by way of exhibits.")

The evidence to which Viora points us consists of three exhibits which Viora says show that the failure to record Viora's change of address was the result of contractor errors. *Id.* at 4. First, Viora points to its August 6, 2013 letter to Palmetto, which Viora claims was sent at the same time as it "filed the electronic change of address." *Id*. at 4-5, citing P. Ex. 1. Nothing in the letter mentions a simultaneous filing via PECOS, which might be expected if Viora were sending notice by two means at once. In any case, the letter at most establishes only that Viora prepared, and perhaps mailed, a notice to Palmetto on the date typed on the letter. We see no evidence that Palmetto received that letter nor that it was sent by any method calculated to trace delivery or receipt. CMS has offered affirmative evidence indicating the contrary (CMS Ex. 5), which remains unrebutted. (We note that Viora's submission of a similar letter addressed to TDADS on the same date offers little support to the claim that both letters were actually mailed and no evidence on the question of whether the letter to Palmetto was ever received.[9] P. Ex. 2.)

---

[9] We note that, unlike the letter to TDADS, which states that the change of address "will take effect on 8/9/2013" (P. Ex. 2), the letter to Palmetto (P. Ex. 1) says nothing about the effective date of the new address.

Viora also points to an envelope (submitted as Petitioner's Exhibit 4). Palmetto is the sender and the addressee is "El Paso Prime Home Health LLC" at the Pennington Court address with a notation, "Returned mail." P. Ex. 4. Viora describes the exhibit as a "letter" meant for "El Paso Prime Home Health LLC" but sent to Viora's Pennington Court address. P. Reply at 2, 5. Viora explains the relevance by pointing to a March 9, 2015 email from an individual at Palmetto to Viora, explaining that Palmetto mistakenly sent to Viora's Pennington Court address a letter containing sensitive information about patients intended for El Paso. *Id.* at 5, citing P. Ex. 5. The email requested that Viora not open the letter and destroy it. P. Ex. 5.[10] Viora's theory is that Palmetto's admitted error in mailing this letter to its address suggests that Palmetto may have "inadvertently documented Petitioner's Form 855 under El Paso's name." P. Reply at 5.

Even if we accept that the mailing of a letter to El Paso at Viora's new address and the follow-up email indicate that Palmetto had received the address information from Viora and mis-associated it with El Paso, the communications involved a date from March 2015. Viora reported that it "updated" Palmetto on the new address on December 22, 2014 as an "agent" at Palmetto "suggested." RFH. In the reconsidered determination, Palmetto confirmed that Viora reported the relocation by December 22, 2014 notice. CMS Ex. 1, at 2. Thus, Palmetto was certainly aware of Viora's location at Pennington Court before March 2015.[11] We find nothing in the misdirected mail to El Paso at Pennington Court to bolster Viora's claim that it notified Palmetto of its change of address prior to the site visit (or at any time before December 2014, well after its apparent move date of August 9, 2013 based on its letter to TDADS (P. Ex. 2)).

In its brief before the ALJ, Viora sought to support its claim that it filed an 855 to update its business address by stating that it was submitting "[a] copy of the cancel[l]ed check for payment of the change of address (P. Ex. 3) showing that payment was for the change of address." P. Br. at 1. Petitioner's Exhibit 3 is a copy of Viora's check (the upper left portion of which bears the Pennington Court address) for $30, but it is payable to TDADS. On the margin of the exhibit is a handwritten notation that the check, which was cashed, was sent to TDADS for "update (change of address notification)." P. Ex. 3.

[10] We presume that Viora provided only the empty envelope as its exhibit because it complied with this request and destroyed the contents, although nothing in the record establishes that this occurred.

[11] We do note that, if anything, the fact that Viora needed to provide notice of its new location to Palmetto as late as December 2014 at the suggestion of a Palmetto employee reinforces that months after the attempted inspection Palmetto had no record of Viora's relocation.

Viora does not explain how a check to TDADS proves that Palmetto also received notice, and we decline to draw any inference based on the letter and check directed to TDADS about whether Palmetto was actually notified given the lack of affirmative proof that Palmetto received notice from Viora whether by PECOS or by letter.[12]

We conclude based on the record before us that Viora's qualified practice location of record as of the date of the site visit remained W. Airport Boulevard.

4. *The ALJ did not err in concluding that Viora's practice location was not operational to furnish Medicare covered items or services.*

Substantial evidence in the record supports the ALJ's conclusion that Viora was not operating out of the office at 12808 W. Airport Boulevard, Suite 285, in Sugar Land, Texas on July 8, 2014, the date of the inspector's visit. The inspector's report and accompanying photograph of the sign on the door to Suite 285 (CMS Ex. 4) on their face show that a different business occupied Suite 285 on July 8, 2014. Under the circumstances it was reasonable for the inspector to have determined that Viora was not occupying Suite 285 on July 8, 2014 and therefore Viora was "not open to the public for the purpose of providing health care related services" at Suite 285.

Viora has not specifically disputed any part of the inspection report, including the photograph of the sign on the door to Suite 285. Nor has Viora raised any specific dispute concerning CMS's Exhibit 6 showing a PECOS application record for Viora with W. Airport Boulevard as the location effective September 24, 2007. Viora has not asserted or shown that, despite what the inspection report and the sign on Suite 285 indicate, it was in fact operating as a home health agency at the W. Airport Boulevard location on July 8, 2014.

In our view, by arguing only that it had already notified Palmetto of its changed location, Viora effectively concedes that it had stopped operating, or being operational, at the W. Airport Boulevard location before July 8, 2014. Since we have found that Viora has not established that it changed its location of record at any point prior to December 2014, Viora's arguments do nothing to establish operational status at the only practice location CMS had "on file" for Viora, i.e., W. Airport Boulevard, on July 8, 2014.

[12] Moreover, without more information or explanation we are unable to satisfactorily reconcile the contents of Petitioner's Exhibit 2 (August 6, 2013 letter to TDADS) and Exhibit 3 (check to TDADS). The date on the check appears to be "09/2/13," but Viora's position is that it notified Palmetto and TDADS simultaneously by letter dated August 6, 2013 (P. Exs. 1 and 2).

In sum, the Board concludes that substantial evidence of record establishes that Viora's practice location of record was correctly found not operational upon onsite review on July 8, 2014. Accordingly, CMS has a basis to revoke Viora's billing privileges.

5. *The ALJ did not determine that the MPIM notice provisions on which he relied define the term "operational" or dictate when a provider's or supplier's practice location is non-operational.*

Viora also asserts that the ALJ erred in his understanding of the term "operational." Specifically, Viora takes issue with the following sentence: "[Viora's] failure to keep the contractor informed of its business location meant that it was not operational within the meaning of the regulation." P. Reply at 5, quoting ALJ Decision at 4. According to Viora, this sentence implies that "the ALJ defined *operational* as failure to file an address change using the two exclusive means identified in the Manual. This interpretation of 42 CFR § 424.535(a)(5) is erroneous." P. Reply at 5-6 (emphasis in original). Viora points out that the plain language of the definition of the term "operational" in section 424.502 does not require the "filing [of] a change of address as a precondition for being operational" (*id.* at 6) or state that a change of address must be reported using one of two exclusive means (*id.* at 7). According to Viora, its "Pennington Court location" was or is fully operational in accordance with the section 424.502 definition of "operational." *Id.* at 6, 7.

Viora argues that change-of-address reporting is mandated by other regulations, not the one under which Viora was revoked, so the ALJ should not have "assist[ed]" CMS by "reading the address change provision into the meaning of *operational*" since CMS did not revoke Viora's billing privileges for failure to report a change of address. *Id.* at 7, citing 42 C.F.R. §§ 424.535(a)(9) and 424.516(d)(1)(iii).

The ALJ's statement that Viora's "failure to keep the contractor informed of its business location meant that it was not operational within the meaning of the regulation" should be read within the full context of the remainder of the ALJ's discussion of the notice issue. The ALJ was not, in our view, relying on the manual provision at section 15.1.2 to define the term "operational." We read the ALJ's statement merely as an observation that one consequence of the failure to effectuate notice of the change of address was that the practice location of record was not in operation when it was subjected to an unannounced site visit. As we have noted, the facts that establish that Viora was not operational at the W. Airport Boulevard location within the meaning of the regulatory definition of the term are essentially undisputed. Therefore, we do not find that the ALJ erred on this point.

Conclusion

For the reasons discussed above, the Board affirms the ALJ Decision. CMS lawfully revoked Viora's enrollment in Medicare effective July 8, 2014.

/s/
Christopher S. Randolph

/s/
Leslie A. Sussan

/s/
Susan S. Yim
Presiding Board Member