Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Better Living/Better Health, LLC
(Supplier No. 6652830001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-1119

Decision No. CR3388

Date: October 8, 2014

REVISED DECISION

Palmetto GBA National Supplier Clearinghouse (NSC), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), determined that Petitioner, Better Living/Better Health, LLC, failed to be accessible and staffed during posted hours of operation. Based on this finding, NSC revoked Petitioner's Medicare billing privileges. Petitioner requested a hearing before an administrative law judge to dispute the revocation. Based on the evidence of record, I issued a decision on September 26, 2014, in which I upheld CMS's determination to revoke Petitioner's Medicare billing privileges; however, I modified the effective date of revocation to May 25, 2013. I issue this revised decision to change the regulatory citation that serves as the basis for modifying the effective date of the revocation. The May 25, 2013 effective date of revocation remains unchanged.

I. Background

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). *See* CMS Exhibit (Ex.) 1, at 3. On April 9 and 10, 2013, an NSC inspector attempted to conduct a site inspection at

Petitioner's location on file with CMS. CMS Ex. 3, at 20-31. The NSC inspector could not complete an inspection on either date and, on April 25, 2013, NSC issued an initial determination revoking Petitioner's Medicare supplier number because Petitioner: was not operational (42 C.F.R. § 424.535(a)(5)(ii)); was not accessible or staffed during posted hours of operation (42 C.F.R. § 424.57(c)(7)); did not have comprehensive liability insurance in an amount equal to at least $300,000 (42 C.F.R. § 424.57(c)(10)); and was not accredited by a CMS-approved accrediting organization (42 C.F.R. § 424.57(c)(22)). CMS Ex. 3, at 17-18. NSC stated that the revocation was effective April 10, 2013, the date CMS determined that Petitioner's practice location was not operational. CMS Ex. 3, at 17. NSC barred Petitioner from re-enrolling in the Medicare program for two years from the effective date. CMS Ex. 3, at 17.

On May 16, 2013, Petitioner filed a timely request for reconsideration with NSC. CMS Ex. 3, at 7-19. On June 24, 2013, an NSC hearing officer issued an unfavorable reconsidered determination upholding the revocation of Petitioner's Medicare billing privileges. CMS Ex. 2. The reconsidered determination upheld revocation because Petitioner "has not shown compliance with supplier standard 7 and 22" (i.e., 42 C.F.R. §§ 424.57(c)(7), (22)). CMS Ex. 2, at 5. The reconsidered determination also found Petitioner compliant with the requirement that it have liability insurance (42 C.F.R. § 424.57(c)(10)). CMS Ex. 2, at 4. Although the reconsidered determination defined the term "*Operational*," it did not expressly base revocation on a violation of 42 C.F.R. § 424.535(a)(5)(ii)). CMS Ex. 2, at 3.

On August 2, 2013, Petitioner timely filed a request for hearing (RFH) before an administrative law judge. On August 9, 2013, I issued an Acknowledgement and Pre-hearing Order (Order). In response to the Order, CMS filed a motion for summary judgment (CMS Motion) with four exhibits (CMS Exs. 1-4). Petitioner submitted a brief in opposition to the CMS Motion (P. Opposition) with nine exhibits (P. Exs. 1-9).

My Order advised the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Order ¶¶ 8-11; *see Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823, at 7-8 (2002) (holding that the use of written direct testimony for witnesses is permissible so long as the opposing party has the opportunity to cross-examine those witnesses).[1] Here, CMS listed one witness, the NSC inspector, and relied on his site investigation report as his written direct testimony. *See* CMS Ex. 3, at 20-31. Petitioner requested to cross-examine the NSC inspector and listed as witnesses its owner and operator, Marlene Thomas, and

[1] Administrative decisions and rulings cited in this decision are accessible on the Department of Health and Human Services' website at: http://www.hhs.gov/dab/decisions/index.html.

two other individuals whose businesses are on the same street as Petitioner. Petitioner submitted their affidavits as P. Exs. 1, 8, and 9.

CMS filed objections to P. Exs. 1-9 and Petitioner's witnesses. CMS argued that the case should be decided on the written submissions without an in-person hearing, but expressed its intention to cross-examine Petitioner's witnesses if they were permitted to testify.

On November 20, 2013, I issued an Order, in which I denied the CMS Motion and stated that I would schedule a hearing for the purpose of allowing the parties to cross-examine their party-opponent's witnesses. Further, I admitted CMS Exs. 1-4, except that I did not admit the NSC inspector's report (CMS Ex. 3, at 20-31) pending cross-examination of the inspector. I also overruled CMS's objections to P. Exs. 1, 8, and 9, but I reserved admitting those exhibits into the record until CMS had an opportunity to cross-examine those witnesses. Finally, I sustained CMS's objection to P. Ex. 7 and I excluded that exhibit from the record as irrelevant. I reserved ruling on CMS's objections to P. Exs. 2-6 until the hearing. Order dated November 20, 2013.

I convened a hearing by video teleconference on January 28, 2014. The NSC site inspector testified, as did Ms. Thomas, and one of Petitioner's other witnesses (Petitioner's witness). At the hearing, I admitted pages 20-31 of CMS Ex. 3 (Hearing Transcript (Tr.) 80-81) and P. Exs. 1-4 (Tr. 135), 6 (Tr. 135), and 9 (Tr. 29). I did not admit P. Ex. 8 because Petitioner did not call the affiant to testify. Tr. 7-8. Petitioner withdrew P. Ex. 5. Tr. 117.

I gave the parties the opportunity to file post-hearing briefs. Petitioner filed a brief (P. Br.), and CMS subsequently filed a reply (CMS Br.). With its post-hearing brief, Petitioner requested that I admit a new exhibit, P. Ex. 10, consisting of Petitioner's Corrective Action Plan (CAP) and cover letter that it submitted to NSC on May 6, 2013. Petitioner requested that I admit P. Ex. 10 on the grounds that it is relevant and also that it should have been included in CMS Ex. 1 as part of the correspondence between Petitioner and CMS/NSC. P. Br. at 6 n.3. In the absence of objection from CMS, I admitted P. Ex. 10 into the record.

On July 11, 2014, I remanded this case to CMS to consider Petitioner's previously submitted CAP. *Better Living/Better Health, LLC*, ALJ Ruling 2014-36 (HHS CRD July 11, 2014). In that Order of Remand, I made numbered findings of fact and conclusions of law related to the issue as to whether Petitioner was accessible and staffed during posted hours of operation as required by the supplier standards, i.e., 42 C.F.R. § 424.57(c)(7). *Id*. at 4-13. However, I explained in the remand order that I could not adjudicate the issue as to whether Petitioner had not been operational (42 C.F.R. § 424.535(a)(5)(ii)) because Departmental Appeals Board (DAB) decisions (*Neb Group of Arizona LLC*, DAB No. 2573, at 7 (2014) and *Benson Ejindu, d/b/a Joy Medical Supply*, DAB No. 2572, at 8-9 (2014)) issued subsequent to the hearing in this case

interpreted the regulations to preclude administrative law judges from upholding a denial or revocation of Medicare billing privileges on any basis not expressly relied upon by CMS in the reconsidered determination. *Id*., at 3-4. I further pointed out that because I could no longer conclude that Petitioner had not been operational, the April 10, 2013 retroactive effective date of revocation assigned to Petitioner in the initial determination could not stand because that date would only apply if CMS had made a finding that Petitioner was not operational. *Id*. at 13-14.

Based on the record before me, I concluded that Petitioner failed to be accessible and staffed in violation of the supplier standards, 42 C.F.R. § 424.57(c)(7), and that CMS had a legitimate basis to revoke Petitioner's Medicare billing privileges. *Id*. at 11-13. However, when attempting to determine under what authority CMS could revoke Petitioner's Medicare billing privileges based on a violation of the supplier standards, I concluded that the regulatory history of the supplier standards, i.e., 42 C.F.R. § 424.57, showed that there has not been a specific provision in that regulation authorizing revocation since March 25, 2011. *Id*. at 14-17. Ultimately, I determined that 42 C.F.R. § 424.535(a)(1) provided CMS with authority to revoke Petitioner's Medicare billing privileges based on a violation of the supplier standards. *Id*. at 17-18. However, because 42 C.F.R. § 424.535(a)(1) requires that CMS afford a supplier an opportunity to correct deficiencies before a final revocation determination is issued and CMS had not previously afforded such an opportunity to Petitioner, I concluded that CMS needed to consider Petitioner's previously filed CAP before I could render a decision upholding revocation based on a violation of the supplier standards. *Id*. at 18. Therefore, I remanded this case to CMS to consider Petitioner's CAP and any supplemental information Petitioner wanted to submit, and render a decision on the CAP. *Id*. at 18-19. I furthered ordered CMS to submit the CAP decision to me and to either request that I issue a decision in this case if CMS denied the CAP, or request that I dismiss the RFH if CMS accepted the CAP. *Id*. at 19. I also provided CMS and Petitioner with an opportunity to submit any argument "concerning CMS's authority to revoke Petitioner and the effective date of the revocation." *Id*. Finally, I informed the parties that I had no authority to review CMS's decision regarding the CAP. *Id*. at 19 n.14.

On July 18, 2014, CMS requested that I reconsider my remand of the case, asserting that I had erroneously concluded that I could no longer uphold CMS's revocation based on its original finding that Petitioner was non-operational. Petitioner argued that I had properly applied the holdings from the DAB's cases cited in my Order of Remand, and that CMS's revocation could no longer be based on the finding that Petitioner was not operational, in violation of 42 C.F.R. § 424.535(a)(5)(ii). On July 25, 2014, I denied CMS's request.

On August 25, 2014, CMS filed its decision denying Petitioner's CAP and its Request for Issuance of a Final Decision (CMS Request). Petitioner filed an opposition to CMS's Request. On September 26, 2014, I issued a decision upholding Petitioner's revocation

based on a violation of 42 C.F.R. § 424.57(c)(7) and modified the effective date of the revocation to May 25, 2013, based on 42 C.F.R. § 424.535(g).

Following the subsequent issuance of the DAB's seventh decision (*Orthopaedic Surgery Associates*, DAB No. 2594 (2014)), since May 2014, in which the DAB applied 42 C.F.R. § 424.57(e) (2010),[2] to determine the effective date of a revocation based on a supplier standards violation, I issued an order indicating that I would reopen the decision in this case to change the legal basis for modifying the effective date of the revocation. I indicated that I thought it was in the best interests of the parties for me to revise the decision in this case to base the effective date of Petitioner's revocation on 42 C.F.R. § 424.57(e) (2010) because appeals from both parties on the merits seem likely and the parties requested that I set the date based on two of the DAB's decisions that cited 42 C.F.R. § 424.57(e) (2010). CMS's Request for Issuance of a Final Decision, at 11-12; Petitioner's Omnibus Opposition to CMS's Request for Issuance of a Final Decision, at 3. I stated that, although I continued to be concerned with applying a regulation that no longer appeared to be in effect, i.e., 42 C.F.R. § 424.57(e) (2010), I did not wish to unnecessarily delay or complicate their possible appeals with an issue on which they did not seem concerned. I gave the parties an opportunity to comment or object to my order. The parties did not object to a revised decision.

I issue this revised decision that substitutes 42 C.F.R. § 424.57(e) (2010) for 42 C.F.R. § 424.535(g) as the basis for modifying the effective date of the revocation in this case. *See* 42 C.F.R. §§ 498.100-103.

II. Issues

1) Whether CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges for failing to be accessible and staffed during posted hours of operation (42 C.F.R. § 424.57(c)(7)).[3]

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[2] The DAB decisions do not appear to expressly cite the year of the Code of Federal Regulations that the DAB references when citing 42 C.F.R. § 424.57(e) as the authority to set the effective date of a revocation. Based on my research, as explained in my Order of Remand in this case, the 2010 volume of the Code of Federal Regulations is the only one in which 42 C.F.R. § 424.57(e) provides text related to the effective date for revocations based on supplier standards violations. *Better Living/Better Health, LLC*, ALJ Ruling 2014-36, at 16-17. Therefore, I reference the year when citing this regulation because from 2011 to the present, 42 C.F.R. § 424.57(e) only discusses revalidation of DMEPOS suppliers.

[3] Although the reconsidered determination upheld the initial determination's finding that Petitioner failed to be accredited by a CMS-approved accrediting organization (42 C.F.R. § 424.57(c)(22)), CMS has, in this proceeding, conceded that this is no longer a basis to

2) Whether CMS's finding in its initial determination that Petitioner was not operational (42 C.F.R. § 424.535(a)(5)(ii)) can serve as a basis, in this proceeding, to uphold the revocation of Petitioner's Medicare billing privileges.

3) If CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges under 42 C.F.R. § 424.57(c)(7), but CMS cannot rely on its previous finding of a violation under 42 C.F.R. § 424.535(a)(5)(ii) as a basis for revocation, does the effective date of Petitioner's revocation need to be adjusted.

III. Jurisdiction

I have jurisdiction to decide the issues in this case. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

IV. Findings of Fact, Conclusions of Law, and Analysis[4]

In order for a DMEPOS supplier to receive Medicare payments for items furnished to a Medicare-eligible beneficiary, the Secretary of Health and Human Services (Secretary) must first issue a supplier number to that supplier. 42 U.S.C. § 1395m(j)(1)(A). The Social Security Act establishes as a basic requirement that a DMEPOS supplier must maintain a physical facility on an appropriate site, but further authorizes the Secretary to create other DMEPOS supplier requirements. *Id.* § 1395m(j)(1)(B)(ii). The Secretary promulgated regulations establishing DMEPOS supplier enrollment standards, which a DMEPOS supplier must meet and maintain. 42 C.F.R. § 424.57(c).

In addition to maintaining a physical facility on an appropriate site, the supplier standards require that the facility must be "open to the public a minimum of 30 hours per week" and the supplier must "post[] hours of operation." *Id.* §§ 424.57(c)(7)(i)(D), (c)(30). Most important for this case, the facility must be "accessible and staffed during posted hours of operation." *Id*. § 424.57(c)(7)(i)(C).

CMS may conduct on-site reviews and inspections to ascertain supplier compliance with enrollment requirements and supplier standards, and to determine if a supplier is operational. *Id.* §§ 424.57(c)(8), 424.510(d)(8), 424.515(c), 424.517(a). Further, as stated by the DAB:

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revoke Petitioner's Medicare billing privileges. CMS Motion at 9 n.3; *see also* CMS Ex. 4. Therefore, this is not an issue in this case.

[4] My numbered findings of fact and conclusions of law are set forth in italics and bold in the discussion captions of this decision.

> CMS is authorized to revoke a DMEPOS supplier's billing privileges for noncompliance with any of the supplier standards. [42 C.F.R.] § 424.57(e). Section 424.57(e) provides that the effective date of revocation for noncompliance with any of the supplier standards under section 424.57(c) is 30 days after the supplier is sent notice of the revocation. *See* 75 Fed. Reg. 52,629, 52,648-52,649 (Aug. 27, 2010)."

Orthopaedic Surgery Associates, DAB No. 2594, at 2.

1. The NSC inspector could not gain entry to Petitioner's facility at 2901 W. Girard Avenue in Philadelphia, Pennsylvania, when he attempted site inspections on April 9 and 10, 2013.

On Tuesday, April 9, 2013, at approximately 11:45 a.m., the NSC inspector attempted to conduct an unannounced site inspection at Petitioner's facility located at 2901 W. Girard Avenue in Philadelphia, Pennsylvania. CMS Ex. 3, at 22, 27. Petitioner's posted hours of operation, as indicated by the door sign, were listed as Monday through Friday from 9:00 a.m. to 5:00 p.m. CMS Ex. 3, at 29; *see also* CMS Ex. 3, at 23. In his site investigation report, the NSC inspector stated that "[n]o one answered the door during the posted hours of operation" and the "[s]upplier was not open." CMS Ex. 3, at 20, 27. On Wednesday, April 10, 2013, at approximately 9:45 a.m., the inspector attempted another site inspection. However, he reported that "[a]gain, no one responded to the bell and the doors were locked." CMS Ex. 3, at 27. The inspector documented his attempted site inspections with date and time-stamped photographs. CMS Ex. 3, at 28-31.

At the hearing, the NSC inspector testified, consistent with his inspection report, that when he arrived at approximately 11:45 a.m. on April 9, 2013, for the first site inspection, he took photos and "attempt[ed] to open the door and the door was locked." Tr. 38. The NSC inspector testified that there were two doorbells – a doorbell on the entrance door and a doorbell next to the handicapped sign on the entrance – and he rang both bells several times. Tr. 38, 43, 71, 75-76, 84. He stated that there was no response, and he waited several minutes and then left. Tr. 38, 44, 76. The NSC inspector testified that when he returned at 9:45 a.m. on April 10 for the second site visit, he took photos and attempted to open the door, but it was locked. Tr. 45; *see also* CMS Ex. 3, at 31. He stated that he rang both doorbells several times, and again, no one responded. Tr. 45, 72; *see also* CMS Ex. 3, at 27. The NSC inspector testified that "no Medicare beneficiary would have been able to access the supplier" on either April 9 or 10, 2013. Tr. 38-39. He stated that he had not encountered a situation before where, on two consecutive days, a supplier who was operational was unavailable on both site visits. Tr. 48-49.

CMS offered the NSC inspector's site investigation report and his date and time-stamped photos (CMS Ex. 3, at 20-31) as contemporaneous evidence of his site visits. As noted above, Petitioner objected to these documents, and I deferred admitting them into the record pending cross-examination of the inspector. Order dated November 20, 2013. On direct examination, the inspector confirmed that he had completed the report on April 10, 2013, and verified his signature on it. Tr. 39-41. He testified further that he took photos during the course of both of his site visits on April 9 and 10, 2013, and that he took the photos found at pages 28-31 of CMS Ex. 3. Tr. 42-45. On cross-examination, the inspector testified that he used an NSC-issued digital camera that automatically stamped the date and time on each picture he took. Tr. 72. When asked about three photos which all had the time stamp of "11:43," the inspector stated that he had no reason to question the time stamp's accuracy. Tr. 73-75. Petitioner withdrew its objection to the investigation report, but questioned whether the photos were "true and accurate depictions," and claimed that the fact that three photos all had the time stamp of "11:43" shows that the inspector's camera may not have been calibrated. Tr. 79-80. Petitioner offered no evidence to suggest the camera had a calibration problem. Noting that the inspector had thoroughly testified regarding his photos, I admitted pages 20-31 of CMS Ex. 3. Tr. 80-81.

I find that the inspector testified credibly. His testimony regarding the site visits on April 9 and 10 was consistent with his contemporaneous documentation of the attempted inspections. His investigation report indicates the dates and times of when the site visits occurred, and states that, on both visits, no one answered the door during the posted hours of operation and the facility was locked. Moreover, the dates and times in the report are corroborated by the date and time stamps on the photos the inspector took on the two visits. There are no internal discrepancies with the inspector's report. I find that his photos accurately represent what he observed on his site visits of April 9 and 10 and find no evidence that he fabricated or manipulated the taking of the photos. The fact that the NSC inspector took several photos from different locations, all bearing the same time stamp, is not, in and of itself, sufficient grounds to question the reliability of the photos and when they were taken.

Petitioner offered the testimony of two witnesses – a witness who owns a business across the street from Petitioner's office, and its owner/operator, Marlene Thomas. Petitioner's witness testified that he cannot see into Petitioner's office from his location, but he sees Ms. Thomas in the morning taking out the trash, sweeping, and watering her plants. Tr. 16, 18. When asked whether he saw Ms. Thomas on April 9, he replied that he "usually see[s] her every morning." Tr. 17. When asked whether he saw Ms. Thomas on April 10, he replied, "yes," and stated that his basis for remembering seeing her at any time during the month of April was due to the fact that he usually sees her car parked outside her shop. Tr. 17. On cross-examination, the witness confirmed that he is unable to see inside Petitioner's office. Tr. 18-19. He testified that he was unable to confirm

that Ms. Thomas was physically present in her office on April 9 and 10, but believed she was there on those dates because he saw her car parked outside. Tr. 19-20.

I do not find the testimony of Petitioner's witness to be credible. His testimony at hearing is not consistent with his written direct testimony, provided in an affidavit dated October 4, 2013. At the hearing, Petitioner's witness testified that he is unable to see into Ms. Thomas' office from his business, an important detail he omitted from his affidavit. Thus, he could not definitively state that he could see Ms. Thomas in the facility. He testified that he believed Ms. Thomas was in her office on April 9 and 10 because he had seen her car parked outside. However, in his affidavit, Petitioner's witness stated only that he observed Ms. Thomas "during the course of [his] work day" "doing the following: entering the office, cleaning up the block . . . (during the morning hours), or leaving the office at the end of the day." P. Ex. 9. Nowhere in his affidavit does the witness mention Ms. Thomas' car or claim that he was able to see Ms. Thomas' car on April 9 and 10 or even on a daily basis. Further, nowhere in the affidavit did the witness state that he believed Ms. Thomas was physically present in her office on April 9 at 11:45 a.m. and April 10 at 9:45 a.m. P. Ex. 9. In fact, the witness conceded on recross-examination that this information was not in his affidavit. Tr. 25. Given that the witness' assertions that Ms. Thomas was present on the dates of the inspections are completely unsupported by any evidence, his testimony is suspect and not definitive.

Petitioner's owner and operator, Ms. Thomas, testified on direct examination that she was present in the facility on April 9 and 10, 2013, at the times of the attempted inspections. Tr. 93-94, 104, 116; P. Ex. 1, at 4-5. She testified that she did not hear the doorbell on either date. Tr. 103-04, 112; P. Ex. 1, at 4, 5. According to Ms. Thomas, she did not conduct any "due diligence" before she submitted her request for reconsideration because she relied on the representations of an NSC employee who told her "everything should be fine" if she submitted a CAP. Tr. 114-15. Ms. Thomas testified that she only learned of the specific times of the site visits when she received the reconsidered determination from NSC. Tr. 115-16. Ms. Thomas stated that she determined she was at the facility on the inspection dates by reviewing her phone records, client files, and delivery records. *See* Tr. 93-94, 104, 109-10; *see also* P. Exs. 2-6.

On cross-examination, Ms. Thomas testified that she is the sole person working in the facility. Tr. 121. She conceded that in her May 2013 request for reconsideration, she had admitted that she had been out of the office servicing patients with setting up medical supplies at the time of the two site visits. Tr. 126, 129-30. Ms. Thomas admitted that she later retracted this admission and that her original admission was made more contemporaneously with the site inspections than was her affidavit. Tr. 126, 130. Ms. Thomas testified that the reason she had stated she was not present for the inspections was due to her not knowing the times of the inspections. Tr. 126. Ms. Thomas testified that once she learned of the precise times of the site visits upon receiving the unfavorable

reconsidered determination, "[she] immediately knew, a light like hit, I was in the office at this time." Tr. 126, 133; P. Ex. 1, at 3-4.

I do not find credible Ms. Thomas' testimony that she was present in her office at the times of the two inspections because her statements directly contradict her prior assertions contained in her request for reconsideration and her request for hearing. When Ms. Thomas submitted Petitioner's request for reconsideration in May 2013, she plainly admitted that she had not been in the office at the times of the site visits. Ms. Thomas stated, "[a]t the time of the two stated site visits above, owner/operator, Marlene Thomas, was servicing clients with set ups and/or deliveries." P. Ex. 10, at 2; CMS Ex. 3, at 11. Nowhere in the request for reconsideration did she dispute NSC's findings that Petitioner's facility was closed and no one was present on the dates of the site visits.[5]

During her testimony, Ms. Thomas claimed that she was not able to conduct her due diligence until she became aware of the precise times of the two site inspections in the June 24, 2013 reconsidered determination. Tr. 114-16, 126, 133, 141-42. However, if, as Ms. Thomas claims, seeing the times of the site visits in the reconsidered determination led to a sort of epiphany in which she realized that she had indeed been present on those dates, I would have expected Petitioner's August 2, 2013 request for hearing to reflect this. However, it does not. Petitioner's hearing request does not challenge NSC's finding that the facility was closed for the attempted inspections on April 9 and 10, 2013. It does not suggest that the facility was open or that Ms. Thomas was present and available at the relevant times. Rather, the hearing request references Petitioner's CAP and notes that the CAP had set forth new operational hours "to maintain compliance with Supplier Standards and to assure staffing." The hearing request also indicates that additional staff had been hired to ensure that someone would be present at all times during the posted hours of operation. Thus, Petitioner's statements in the hearing request are actually consistent with those expressed in her request for reconsideration and reinforce the conclusion that she was <u>not</u> present and available at the time of the attempted inspections.

It is noteworthy that, despite Ms. Thomas' claim that once she learned of the times of the site inspections from the reconsidered determination and conducted her "due diligence" review of records, she chose to offer her new recollection of events in her October 13, 2013 affidavit, six months after the site inspections occurred. P. Ex. 1. In this affidavit, Ms. Thomas stated for the first time that she "was present" at Petitioner's facility on the

[5] In Petitioner's May 16, 2013 request for reconsideration, Petitioner further stated that, "[t]o avoid this absence in the future and to adhere to supplier standards," it had implemented certain changes in its policies and procedures, including posting new hours of operation and leaving a sign on the door when the office was left unattended to inform the public when someone would return. CMS Ex. 3, at 11.

dates of the site visits, April 9 and 10, 2013, but did not hear the doorbell ring. P. Ex. 1, at 4-5.

In light of Ms. Thomas' change in position based on learning the exact times of the site inspections on April 9 and 10 from the reconsidered determination, I posed the following question to her at the hearing: "[W]hat times were you in fact not present at your location on the dates . . . or are you withdrawing that assertion in its entirety that you were out of the office at all on the two dates, April 9th and April 10, 2013?" Tr. 136.

Ms. Thomas responded:

> To the extent that I was out of the office at any time on those dates between the posted hours of 9:00 and 5:00, no, I was not. I did on April the 10th I had a patient that I did service. And I had submitted that documentation but it was after close of business hours on April the 10th. But for April 9th and 10th the reason why I said I was servicing deliveries is I could have ran to the store.

Tr. 136-37. I find Ms. Thomas' response further highlights problems with her credibility, as I find it to be less than candid and not believable. Given her original assertion in her request for reconsideration that she had been out of the facility on April 9 and 10 servicing clients, and then her new version in which she claims that she realized she had actually been in the facility on April 9 and 10 at the times of the inspections, I would have expected an admission that she had been out of the office at *other times* on those dates. I do not find credible Ms. Thomas's statement that she was never gone from Petitioner's facility and was actually there all day on April 9 and 10.[6]

[6] I note that Ms. Thomas sent additional documentation to the Hearing Officer on June 21, 2013, in support of her request for reconsideration. As explained by Ms. Thomas, the documents include a "Client/Patient Service Agreement," which was executed by her client and herself on April 10, 2013, as well as an "Equipment Management Admission Assessment and Plan of Service" form, "which was completed at the time of the set up, service and training for the beneficiary's medical equipment which took place on April 10, 2013." CMS Ex. 3, at 33-34, 44, 45-46. Although at the hearing Ms. Thomas indicated that she serviced a client after business hours, these documents could also suggest that Ms. Thomas was out of the office for at least a portion of the day on April 10, servicing clients, as she admitted in her reconsideration request. I note further that Ms. Thomas admitted on cross-examination that, "prior to May 16th," there had been times when she left the facility unattended to go out and service clients and sometimes she "would leave a sign on the door and sometimes [she] wouldn't." Tr. 123-24. Therefore, Ms. Thomas admitted that, at times other than the two site visits, she left the

In support of her claim that she was present at Petitioner's facility on April 9 and 10, 2013, Ms. Thomas produced cellular telephone records from the dates at issue. P. Ex. 2; *see* Tr. 133. According to Ms. Thomas, when she compared her cellular telephone records to her patient files, she realized that she had been present on the inspection dates. *See* Tr. 93-94, 104, 109-10;133-34. However, cellular phone records cannot be used to prove that a DMEPOS supplier was staffed because unlike landlines, cellular phones are mobile and can be used outside of the DMEPOS supplier's offices. *See Benson Ejindu*, DAB No. 2572, at 7 n.4; *see also* 42 C.F.R. § 424.57(c)(9) (requiring DMEPOS suppliers to have a business phone, but prohibiting them from using cellular phones as their primary business telephone).

I find that Petitioner offered no evidence to corroborate the "new story" that Ms. Thomas provided in her affidavit and hearing testimony. While she may not have known the precise times of the site inspections on April 9 and 10, she knew from CMS's April 25, 2013 letter that the inspections took place during her posted business hours. Ms. Thomas thus knew that the inspector was at the facility sometime between 9:00 a.m. and 5:00 p.m. on April 9 and 10. Her testimony that she was only able to conduct her "due diligence" as to her whereabouts once she learned of the specific times of the inspections is improbable because nothing would have prevented her from immediately reviewing her records and logs after she received CMS's April 25, 2013 letter. One would expect a business owner to review her own records when confronted with a notice such as the initial determination in this case. Ms. Thomas' testimony and affidavit clearly contradict her earlier admissions that she was away from the office and appear to constitute an after the fact attempt to rebut CMS's case and avoid revocation of Petitioner's Medicare billing privileges.

Based on the evidence of record, I find that the NSC inspector attempted to conduct site inspections of Petitioner's facility at 2901 W. Girard Avenue in Philadelphia, Pennsylvania, on April 9 and 10, 2013, during Petitioner's posted hours of operation. However, the NSC inspector was unable to gain entry to the facility and complete the inspections because Petitioner's sole employee, Ms. Thomas, was not present on those dates.

2. CMS had a legitimate basis to revoke Petitioner's Medicare billing privileges because Petitioner's location was not accessible and staffed during posted hours of operation as required by 42 C.F.R. § 424.57(c)(7)(i)(C).

The facts in this case establish that Petitioner's facility was not open and available for the NSC inspector to conduct site inspections on April 9 and 10, 2013. Therefore,

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facility unstaffed and unattended during posted hours of operation to service clients. CMS Br. at 12-13.

CMS had a legitimate basis to conclude that Petitioner was not in compliance with the supplier standards found at 42 C.F.R. § 424.57(c)(7)(i)(C).

Petitioner argues that Ms. Thomas was in the facility at the time of the site visits and posits that the NSC inspector waited unreasonably short amounts of time for Ms. Thomas to respond to the door, or that Ms. Thomas did not hear the doorbell because she was on the telephone, or even that the doorbell might have malfunctioned. Assuming Ms. Thomas was in her office on April 9 and 10 when the site inspections occurred, the fact that she did not hear the inspector ring the doorbells on either date in order to give him access to the facility means that the facility was not accessible under 42 C.F.R. § 424.57(c)(7)(i)(C). A supplier's place of business must remain publicly accessible during posted hours of operation and may not close, even temporarily, during its posted hours. *Complete Home Care, Inc.*, DAB No. 2525, at 5-6 (2013). A DMEPOS supplier's facility "does not 'provid[e] access' to a Medicare beneficiary," nor can it "be 'used' or physically 'reached' by the beneficiary, if its entry door is locked during posted hours, no one responds to a knock on the door, and there is no alternative means of gaining entry for a customer seeking to purchase or at least consider purchasing Medicare-covered supplies." *Norpro Orthotics & Prosthetics*, DAB No. 2577, at 6, *citing Benson Ejindu*, DAB No. 2572, at 6. Here, when the NSC inspector went to Petitioner's facility on April 9 and 10, 2013, he found it locked on both dates. At each visit, he rang two doorbells several times and waited for someone to open the door, but no one responded. The inspector encountered no staff. There were no instructions posted on the entrance for how to obtain access and assistance from staff in the event the facility was locked. On both of the NSC inspector's visits, Petitioner's facility was, for all practical purposes, closed. Petitioner's facility was, therefore, not "accessible" within the meaning of 42 C.F.R. § 424.57(c)(7)(i)(C).

Further, as I found, the record supports a finding that Ms. Thomas was not present at Petitioner's facility on the days and times the NSC inspector attempted inspections. Since there was no one present, Petitioner's facility was also not "staffed" during its posted hours of operation as required by 42 C.F.R. § 424.57(c)(7)(i)(C). A supplier's place of business must be continually staffed during its posted hours of operation. *Complete Home Care, Inc.*, DAB No. 2525, at 6. The preamble to the proposed rule that added section 424.57(c)(7)(i)(C) to the regulations explained that a "supplier is not in compliance with this standard if no one is *available* during the posted hours of operation." 73 Fed. Reg. 4503, 4506 (Jan. 25, 2008) (emphasis added). Similarly, the preamble to the final rule stated that exceptions to the staffing requirement have always been made for emergencies, disasters, and federal and state holidays, but emphasized that a DMEPOS supplier "should be available during posted business hours" and "should do its best to plan and staff for temporary absences." 75 Fed. Reg. 52,629, 52,636 (Aug. 27, 2010). When the NSC inspector was on site on April 9 and 10, 2013, no one answered the door on two consecutive days, nor did the NSC inspector see anyone on the premises on either visit. There was no signage to indicate how a customer could reach an

employee of Petitioner for assistance if the door was locked. Therefore, I conclude that Petitioner's office was not "staffed" in accordance with 42 C.F.R. § 424.57(c)(7)(i)(C).

In its posthearing brief, Petitioner claims for the first time that the evidence suggests that "[i]t is likely that either the doorbell malfunctioned or the Palmetto inspector did not press it hard enough."[7] P. Br. at 7-8. Petitioner points out that the NSC inspector testified that he did not hear the doorbell ring through the door on either of his visits on April 9 and 10, and this confirms Ms. Thomas' testimony that she did not hear the doorbell ring on those dates. P. Br. at 7-8; *see* Tr. 84, 103-04, 112.

I find Petitioner's attempt to undermine the validity of the NSC inspector's site visits unconvincing and unreasonable. As discussed above, I found the NSC inspector to be a credible witness. His testimony regarding the attempted inspections on April 9 and 10, 2013, was consistent with his contemporaneous documentation of the inspections. In testifying about his attempts to gain access to Petitioner's office on April 9 and 10, the NSC inspector stated that the facility was locked and the doorbells went unanswered on both visits. The fact that the NSC inspector did not hear the doorbells ringing does not, in and of itself, mean that the doorbells were not working or that he may not have "press[ed] hard enough." In suggesting that both of the doorbells may have been broken over the course of two days, Petitioner describes nothing more than a speculative scenario. Petitioner offered no evidence whatsoever, such as an invoice from a repairman, in support of its assertion that either or both of the doorbells at its facility malfunctioned when the inspector rang them on April 9 and 10. Petitioner also offered no evidence to prove that the inspector may not have properly engaged either of the doorbells.

Moreover, even accepting that both of Petitioner's doorbells were not working on the dates of the inspections, then this would further support the finding that Petitioner was not accessible to the public during its posted hours of operation. Having malfunctioning doorbells would clearly impede customer access to Petitioner's office, and, under those circumstances, it would be incumbent upon Petitioner to institute an alternative means of gaining entry in order to satisfy the requirements of 42 C.F.R. § 424.57(c)(7). Given that Petitioner had not posted any notice for its customers specifying an alternate means of gaining entry in the event its doors were locked, its argument that its doorbells likely malfunctioned does not inure to its benefit.

[7] As testified by the inspector, there were two doorbells at Petitioner's facility – one on the entrance door and another next to the handicapped sign on the entrance. Tr. 38. I will assume that Petitioner is making the argument that both doorbells were malfunctioning on April 9 and 10 even though it only refers to "doorbell" in the singular in its brief.

With respect to Petitioner's claim that the inspections were flawed because the inspector "failed to exhaust every effort to determine if [Petitioner] was operational" on his visits, I find this argument to be without merit. P. Br. at 9. The inspector credibly testified, consistent with his investigation report, that he went to Petitioner's facility on two consecutive days, April 9 and 10, 2013, to conduct inspections. The record shows that the inspector used reasonable efforts to attempt to gain entry to Petitioner's facility on both dates, but was unable to gain access. Although Petitioner argued that the inspector should have called Petitioner's phone number when he was at the facility, an inspector is not required to telephone a supplier to find out why its location is closed. *See Complete Home Care*, DAB No. 2525, at 5-6. It is not the inspector's responsibility to chase down a supplier in order to gain access to its facility. Furthermore, I note that site inspections are supposed to be unannounced. 75 Fed. Reg. 52,629, 52,637-52,638 ("We have found unannounced on-site visits to be a very effective tool in combating fraud and abuse and to protect the Medicare Trust Fund from unscrupulous suppliers. Moreover, CMS and our designated contractor, the NSC, have conducted unannounced on-site visits since 2000 to ensure compliance with those standards which only can be verified by visual inspection."), 52,644 ("maintain[ing] a minimum number of hours open to the public . . . will ensure that the DMEPOS supplier is operational and allows CMS, the NSC or agents of CMS or the NSC to conduct unannounced site visits to ensure compliance with the standards set forth at § 424.57.") (Aug. 27, 2010). The NSC inspector acted properly in this case.

I conclude that CMS has a legitimate basis for its determination that Petitioner's facility was not accessible and staffed during posted business hours and CMS properly revoked Petitioner's Medicare billing privileges. 42 C.F.R. § 424.57(c)(7)(i)(C).

3. *Because CMS did not expressly state in its reconsidered determination that CMS based its revocation on a finding that Petitioner was not operational under 42 C.F.R. § 424.535(a)(5)(ii), CMS failed to affirm this aspect of the initial determination and I cannot consider this as a basis to uphold CMS's revocation.*

The initial determination in this matter indicated that Petitioner was found not to be operational under 42 C.F.R. § 424.535(a)(5)(ii). Although the reconsidered determination defined the term "operational" and found that Petitioner was not open, the reconsidered determination did not expressly uphold the initial determination's finding that Petitioner was not operational under 42 C.F.R. § 424.535(a)(5)(ii).

Between the hearing in this case and the completion of post-hearing briefing, the DAB issued decisions indicating that a revocation can only be upheld at the administrative law judge level of review based on the grounds stated in the reconsidered determination. *Neb Group of Arizona LLC*, DAB No. 2573, at 7 (2014); *see also Benson Ejindu, d/b/a Joy Medical Supply*, DAB No. 2572, at 8-9 (2014). The material facts in these cases are very

similar to those in the present case. Although the holdings in these cases constituted a significant departure from prior practice where CMS could notice new issues in its briefs submitted to an administrative law judge, *see Fady Fayad, M.D.*, DAB No. 2266, at 9-11 (2009), I applied the principal in the recent decisions to this case.

In its request that I issue a decision in this case, CMS essentially argues that I ought to disregard the DAB's recent decisions as erroneously decided and uphold revocation based on the finding in the initial determination that Petitioner was not operational under 42 C.F.R. § 424.535(a)(5)(ii). CMS further argues that I should do this because Petitioner failed to dispute the non-operational finding in its reconsideration request. CMS reasons that, because Petitioner failed to raise the issue, it was unnecessary for CMS to address whether Petitioner was not operational in the reconsidered determination. CMS Request at 3-5. CMS asserts that CMS's mere failure to mention 42 C.F.R. § 424.535(a)(5)(ii) in the reconsidered determination does not mean that CMS abandoned it as a basis for revocation. CMS Request at 5-6.

Although CMS is correct that a supplier is required to "state the issues, or the findings of fact with which the [supplier] disagrees, and the reasons for disagreement" in a reconsideration request, there is no reason to believe that the supplier's reconsideration request limits the issues that CMS will consider on reconsideration. 42 C.F.R. § 498.22(c). To the contrary, a reconsidered determination must "give[] the reasons for the determination" and, when the reconsidered determination is adverse to a supplier, CMS is obligated to "specif[y] the conditions or requirements of law or regulations that the [supplier] fails to meet, and informs the [supplier] of its right to a hearing." 42 C.F.R. § 498.25(a)(2)-(3); *see also* 42 C.F.R. § 498.24(c) (the reconsidered determination "affirm[s] or modif[ies] the initial determination and the findings on which it was based."). The need for CMS to state all reasons for its adverse reconsidered determination is clear when one considers that the reconsidered determination (not the initial determination) becomes the binding determination in the case unless there is further review, in which case the supplier will need to know exactly what issues it may appeal. 42 C.F.R. § 498.25(b); *see also* 42 C.F.R. §§ 498.20(b)(1) (CMS's initial determination is binding unless reconsidered), 498.40(b) (hearing requests must state the basis for appeal). In the present case, if CMS intended to base revocation on 42 C.F.R. § 424.535(a)(5)(ii), it needed to cite that regulation in the reconsidered determination, especially since the reconsidered determination was adverse to Petitioner.[8]

[8] CMS counsel argues, misleadingly, that 42 C.F.R. § 498.24 does not specify requirements for the content of reconsidered determinations. CMS Request at 7. However, as seen above, the next regulatory section, 42 C.F.R. § 424.25(a), provides very specific requirements when CMS issues an adverse reconsidered determination. Obviously, this case involves an adverse reconsidered determination.

CMS further argues that I (and presumably the DAB) must defer to CMS's interpretation of the regulations concerning reconsideration requests. CMS Request at 6-9. CMS states that I "overstep[] [my] authority by substituting [my] own interpretation of the regulation at 42 C.F.R. § 498.24 concerning the requirements CMS must follow when issuing a Reconsidered Determination." CMS Request at 6. Shockingly, CMS concluded its argument as follows: "Because the interpretation of 42 C.F.R. § 498.24(c) CMS presents in its brief is consistent with the regulatory text, this Tribunal need look no further in deciding this issue." CMS Request at 8-9. CMS's argument was based on a variety of United States Supreme Court opinions, the best known of which is *Auer v. Robbins*, 519 U.S. 452 (1997), which directs federal courts to defer to an agency's interpretations of the regulations it administers.

Although an administrative law judge is functionally comparable to a trial judge, he is not part of the judicial branch, but rather part of the executive branch and the same department or agency that has initiated the case before the administrative law judge. *Butz v. Economou*, 438 U.S. 478, 511-14 (1978). Therefore, CMS's argument that an administrative law judge must adopt the same standards of deference applied by the federal courts to an agency's interpretation of the regulations is fundamentally contrary to federal administrative law.

Further, CMS's suggestion that an administrative law judge is committing error when he does not defer to CMS's interpretation of a regulation, as expressed in CMS's brief, has no basis in law and would subvert the decisional independence of an administrative law judge. Congress ensured, through statute, that each administrative law judge "exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." *Butz*, 438 U.S. at 513. The agency or department that employs the administrative law judge has the responsibility to ensure that the administrative law judge is independent. 5 C.F.R. § 930.201(f)(3).

In regard to cases under 42 C.F.R. pt. 498, administrative law judges have the authority and obligation to make "conclusions of law" in their decisions. 42 C.F.R. § 498.74(a). The regulation does not indicate that administrative law judges will adopt any legal interpretation of the regulations that CMS provides in a brief. *Cf. Foxwood Springs Living Ctr.*, DAB No. 2294 at 9 (2009) (unpublished CMS interpretations of the regulations in its manuals are not binding on administrative law judges or the DAB). This is not to say that CMS has no authority to render binding interpretations. On the contrary, the Secretary has authorized the CMS Administrator to publish CMS Rulings in the Federal Register that constitute "[p]recedent[ial] final opinions and orders and statements of policy and interpretation," which "are binding . . . on all [Department of Health and Human Services] components that adjudicate matters under the jurisdiction of CMS . . . ." 42 C.F.R. § 401.108. In its brief, CMS did not cite a CMS Ruling to support its argument. Therefore, I am free to reject CMS's legal argument concerning the regulations related to reconsidered determinations.

The DAB has now issued seven decisions in the last few months that either directly or indirectly relate to the question as to whether an administrative law judge ought to uphold a revocation based on a finding in the initial determination that does not appear in the reconsidered determination (i.e., whether the supplier was not operational). *Orthopaedic Surgery Associates*, DAB No. 2594, at 7; *Ortho Rehab Designs Prosthetics & Orthotics, Inc.*, DAB No. 2591, at 8 (2014); *Keller Orthotics, Inc*., DAB No. 2588, at 7 (2014); *Cornerstone Medical Inc*., DAB No. 2585 (2014); *Norpro Orthotics & Prosthetics, Inc.*, DAB No. 2577 (2014); *Neb Group of Arizona LLC*, DAB No. 2573, at 7; *see also Benson Ejindu, d/b/a Joy Medical Supply*, DAB No. 2572, at 8-9. Applying the holding in these decisions, I will not consider a violation of 42 C.F.R. § 424.535(a)(5)(ii) to be a basis for upholding Petitioner's revocation.

4. *Because revocation is premised only on a violation of a supplier standard and not a finding that Petitioner was not operational, the retroactive effective date of the revocation imposed by CMS in the initial determination is no longer appropriate, and, under 42 C.F.R. § 424.535(g), the effective date must be changed from April 10, 2013, to May 25, 2013, which is 30 days after the date CMS mailed its initial determination to revoke Petitioner's billing privileges in this case.*

CMS's April 25, 2013 initial determination imposed an effective date of revocation that was retroactive to the date that Petitioner was found not to be operational. This is appropriate under 42 C.F.R. § 424.535(g) when CMS has made a finding that a supplier is not operational pursuant to 42 C.F.R. § 424.535(a)(5)(ii). However, because the reconsidered determination in this case failed to make a finding that Petitioner was not operational, there is no longer a valid reason to impose a retroactive effective date of revocation. As stated in the most recent DAB decision on this issue:

> Because the sole basis for revocation properly decided by the ALJ and affirmed by the Board in this appeal is [Petitioner's] noncompliance with Supplier Standard 7, the effective date of revocation should be determined in accordance with section 424.57(e)'s effective-date provision . . . . Applying that rule here, we conclude that the proper effective date of the revocation is . . . 30 days from the date of NSC's letter notifying [Petitioner] of the revocation.

Orthopaedic Surgery Associates, DAB No. 2594, at 8.

Both parties agree that, in the event I uphold CMS's revocation of Petitioner's Medicare billing privileges, the new effective date should be May 25, 2013. This is 30 days from the date of the initial determination in this case. Therefore, I agree with their calculation and May 25, 2013, is the effective date of Petitioner's revocation.

Petitioner asserts that CMS rejected claims that Petitioner filed for items or services it provided to Medicare beneficiaries after CMS imposed the April 10, 2013 retroactive revocation effective date. Petitioner requests that I order CMS to reprocess the rejected claims as part of any final decision I issue setting a new effective date of revocation.

Although payment of claims is not made during the appeal process, if a supplier is successful in overturning a revocation, "unpaid claims for services furnished during the overturned period may be resubmitted." 42 C.F.R. § 424.545(a)(2); *see also* 42 C.F.R. § 405.806. In the present case, Petitioner was successful in overturning the effective date of the revocation. Therefore, Petitioner had billing privileges through May 24, 2013, and may bill for items or services provided from April 10, 2013 through May 24, 2013.

V. Conclusion

For the reasons stated above, I affirm CMS's revocation of Petitioner's Medicare billing privileges, but modify the effective date of the revocation to May 25, 2013.

/s/
Scott Anderson
Administrative Law Judge