Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

E & I Medical Supply Services, Inc.
(PTAN: 5216250001)

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-393

Decision No. CR2189

Date: July 20, 2010

DECISION

E & I Medical Supply Services, Inc. (E & I, Petitioner) timely appealed the December 15, 2009 reconsideration decision of the National Supplier Clearinghouse (NSC), a Medicare contractor of the Centers for Medicare & Medicaid Services (CMS), upholding the revocation of E & I's Medicare supplier number. The revocation was effective August 13, 2009, based on a determination that E & I was not operational as of that date. I reverse the revocation, because I find that the preponderance of the evidence supports E & I's assertion that the business was fully operational.

I. Background

It is not disputed that E & I has been a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) since approximately 2005 with its primary place of business at 9898 Bissonnet Street, Suite 290, in Houston, Texas. The directors of the business are Ms. Evangeline Ibeziako and Ms. Theresa Anakor.

By letter dated September 8, 2009, NSC notified E & I that its supplier number would be "revoked 30 days from the postmark" of the letter, but that the "effective date of this revocation has been made retroactive to August 13, 2009, which is the

date that CMS determined [E & I's] practice location is not operational." CMS Ex. 8, at 1. The notice explained that an NSC representative attempted to conduct site visits to the facility on April 27 and 28 and August 4 and 13, 2009, but found it "closed during posted hours of operation" and therefore concluded that the "facility is not operational to furnish Medicare covered items and services" in violation of 42 C.F.R. § 424.535(a)(5)(ii). *Id*. at 1-2.

E & I timely sought reconsideration of the revocation asserting that the business is fully operational. E & I denied that any inspector came to its place of business on the dates in question, because "someone is always in the office" during the posted hours. Petitioner (P.) Ex. 1, at 1. An NSC hearing officer issued an unfavorable decision on December 15, 2009. CMS Ex. 1, at 2-4. She concluded that the "fact remains that the site inspector could not access" Petitioner's office on October 12 or 13, 2009 to "verify that E & I Medical Supply Services was open and operational and compliant with state and Medicare requirements." *Id*.

By letter dated January 5, 2010, E & I sought review of the reconsideration decision asserting that it was and had been fully operational. P. Ex. 1, at 4. On March 18, 2010, CMS submitted a combined motion for summary judgment and pre-hearing brief (CMS Br.). Petitioner responded to the motion for summary judgment and supporting brief on April 9, 2010 (P. Br.).

The appeal was initially assigned to Administrative Law Judge Richard J. Smith and subsequently transferred to me pursuant to 42 C.F.R. § 498.44, which permits a Member of the Departmental Appeals Board (Board) to be designated to hear appeals taken under Part 498. I conducted a telephone conference with the parties on May 7, 2010. At that time, CMS indicated that, while it believed the evidence supported its position, it did not disagree that material issues of fact were in dispute. I therefore scheduled an in-person hearing, which was held on June 10, 2010.

CMS presented Mr. Mark Porter, the site investigator who reported on all the unsuccessful visits to E & I's premises, as its only witness at the hearing. Petitioner presented both of E & I's directors as witnesses. Petitioner also presented testimony from two other individuals, Mr. Stanley U. Akujor and Ms. Iris E. Linden, who both work in offices on the same floor as E & I.

Prior to the hearing, Petitioner submitted 11 exhibits, and CMS submitted 12 exhibits. Petitioner objected to the authenticity of the date and time stamps shown on photographs in CMS Exhibit 11. Transcript of June 10, 2010 Hearing (Tr.) at 11. I admitted all of CMS's exhibits, noting that I would receive testimony concerning the credibility of the date and time stamps and consider it in deciding how much weight to give to that exhibit. *Id.* at 11-12. CMS initially questioned the identity of signatories shown in Petitioner's Exhibit 9 but later withdrew any

objection to the admission of the exhibit. *Id.* at 12, 99. CMS did not object to any of Petitioner's other exhibits. I admitted all of Petitioner's exhibits.

Although I did not anticipate a need for further briefing after the hearing, and neither party requested further briefing, I determined to reopen the record on June 11, 2010 to permit both parties to comment on issues, which I discuss later in this decision. Petitioner responded on June 17, 2010, and CMS responded on June 24, 2010.[1] By letter dated July 2, 2010, Petitioner replied to CMS's response.

II. Applicable Legal Authority

Regulations provide that CMS may revoke a currently enrolled Medicare supplier for noncompliance when "CMS determines, upon on-site review, that the . . . supplier is no longer operational to furnish Medicare covered items or services . . . ." 42 C.F.R. § 424.535(a)(5). CMS has adopted a list of 26 supplier standards, including operational requirements that DMEPOS suppliers must meet on a continuing basis. Among these, the regulation provides that a supplier –

> (7) Maintains a physical facility on an appropriate site. . . . ;
> (8) Permits CMS, or its agents to conduct on-site inspections to ascertain supplier compliance with the requirements of this section. The supplier location must be accessible during reasonable business hours to beneficiaries and to CMS, and must maintain a visible sign and posted hours of operation . . . .

42 C.F.R. § 424.57(c). The term "operational" is defined in the regulations to mean that a 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.

42 C.F.R. § 424.502.

III. Issues

[1] CMS also emailed a response on June 21, 2010. The copy of the CMS response attached to the email is similar, but not identical, to the copy filed by mail. The email was not addressed, or copied, to Petitioner. I therefore strike the email copy and rely on the formal mail copy for my decision.

The issues before me are:

1. Whether CMS is entitled to summary disposition;

2. Whether E & I was "operational" within the meaning of 42 C.F.R. § 424.57(c) at the relevant times; and

3. Whether CMS had a basis to revoke E & I's Medicare supplier number.

IV. Findings of Fact, Conclusions of Law, and Analysis

I set out my findings of fact and conclusions of law in the headings below, followed by my supporting analysis.

A. CMS is not entitled to summary disposition.

The core issue in this case, the operational status of E & I as a Medicare DMEPOS supplier, devolved into a question of credibility. CMS relied entirely on the reports of Mr. Porter to the effect that E & I's place of business was closed and empty during posted business hours on six separate occasions. CMS Br. at 6-7; CMS Exs. 9-12; Tr. at 24-55. I have no doubt that this evidence establishes a prima facie case that CMS had a legal basis to revoke E & I's supplier number. That is to say, unchallenged by any contrary evidence, the site investigator's reports would suffice to show that E & I was not operational.

That evidence did not remain unchallenged, however. Petitioner presented affirmative evidence that the business was operational at all relevant times. A dispute of material fact thus lies at the heart of the dispute, as CMS conceded during the telephone conference in this matter.

For that reason, I denied summary disposition and proceeded to hearing. I confirm here that CMS was not entitled to summary disposition.

B. E & I was operational at the relevant time within the meaning of the regulations.

1. The relevant date for determining whether E & I was operational is August 13, 2009.

CMS's contention that E & I was not operational rests on its claim that a site inspector made multiple visits to E & I's office during posted business hours on six dates in April, August, and October 2009 and found it empty on each occasion. Petitioner denies that a site inspector could have visited its location on the days and times claimed and have found no one on the premises. P. Br. at 3-4

(unnumbered). As a preliminary matter, I consider whether, to uphold the revocation, I need only find that the office was closed at any time when the site inspector visited.

CMS argues in its motion for summary judgment that, if a facility is "found closed" during an on-site review, "this becomes grounds for revocation because the facility was found nonoperational." CMS Br. at 7. It is not clear, however, if CMS meant to assert that a single visit finding a facility closed creates an irrebuttable presumption that the facility is not operational, since, in the next sentence, CMS states that NSC was thus authorized to do "onsite inspections at Petitioner's place of business and deem it nonoperational upon finding the doors locked (and no one present) **on multiple occasions**." *Id.* (emphasis added).

CMS relies on language in section 424.515, which provides as follows:

> (c) *On-site inspections*. CMS reserves the right to perform on-site inspections of a provider or supplier to verify that the information submitted to CMS or its agents is accurate and to determine compliance with Medicare enrollment requirements. . . .
>
> * * * *
>
> (2) *Medicare Part B suppliers.* CMS determines, upon review that the supplier is no longer operational to furnish Medicare covered items or services, or the supplier has failed to satisfy any or all of the Medicare enrollment requirements, or has failed to furnish Medicare covered items or services as required by the statute or regulations.

See also 42 C.F.R. § 424.535(a)(5). Nothing in these regulations provides any details about whether a single site visit finding a facility not open is per se grounds for revocation or simply evidence as to whether the facility is actually operational. Certainly, a contractor may reasonably conclude, absent evidence to the contrary, that a closed facility is not operational. Where conflicting evidence suggests that the facility is in fact in regular operation, however, it is less clear that a brief or explicable absence cannot be overcome by such evidence. This appears to be the interpretation that CMS adopted in guidance, which instructs its contractors that, unless "obvious indications" are found on a first attempt "that the facility is non-operational, a second attempt on a different day during posted hours of operation should be made." Medicare Program Integrity Manual (MPIM), ch. 10, § 22.1.[2]

---

[2] This interpretation is consistent with the Board's recent decision in *Ita Udeobong, d/b/a Midland Care Med. Supply & Equip.*, DAB No. 2324 (2010). In that case, a facility was found on an initial visit not only closed but, with a letter showing, that entry was denied to due to nonpayment of rent. *Id*. at 3. After the supplier submitted a corrective action plan, the contractor conducted two more site

(continued…)

The testimony in this case also suggests that CMS's contractor here similarly did not take the view that a single absence during a site visit is insurmountable evidence of non-operational status. Thus, the site inspector, Mr. Porter, testified that it was mandatory to conduct a second visit on a different day before determining that a facility is not operational, if the inspector did not gain entry on a first visit but the supplier had a business sign and posted hours. Tr. at 75-77. As explained below, NSC did not actually determine that E & I was not operational until Mr. Porter's fourth reported visit. I need not finally resolve the legal question of whether a single unsuccessful site visit is sufficient to revoke in the face of other evidence that a business is fully operational at a particular location, however, because, as I explain below, I am not able to determine as a matter of fact that the site inspector tried but failed to gain entry to E & I on any one of the specific occasions alleged.

A second related legal question that arises in this matter is determining which alleged visits are properly at issue before me. NSC initially notified Petitioner in a letter dated September 8, 2009 that E & I's Medicare supplier number would be revoked, because, on "April 27, 2009, April 28, 2009, August 4, 2009 and August 13, 2009, a representative of the NSC attempted to conduct a visit of your facility; however, the visit was unsuccessful because your facility was closed during posted hours of operation." CMS Ex. 8, at 1. The revocation was made retroactive only to August 13, 2009, the date of the last reported visit. Regulations provide that a revocation generally becomes effective 30 days after notice is sent to the supplier, but that, where revocation is based on a determination that a supplier is not operational, the revocation is effective on "the date that CMS or its contractor determined that the provider or supplier was no longer operational." 42 C.F.R. § 424.535 (g); MPIM, ch. 10, § 22.1 ("The Medicare contractor shall use either 42 CFR § 424.535(a)(5)(i) or 42 CFR § 424.535(a)(5)(ii) as the legal basis for revocation. Consistent with 42 CFR § 424.535(g), the date of revocation is the

---

[2] (…continued)

visits. Both found the facility closed and locked at around 11 AM, with posted business hours of 10 AM - 5 PM. *Id*. The supplier admitted it was closed at those times, but argued that it closed for lunch from 12-1 and claimed that a note was posted stating that it was closed for lunch. *Id*. at 4-5. Both the ALJ and the Board upheld the revocation concluding that a facility is not permitted to post hours from which it knows it will "deviate from on a regular basis." *Id*. at 7. The situation of a supplier locked out of its own facility for non-payment of rent, and then admittedly closed during three site visits, and further admittedly deviating on a daily basis from its posted hours, is entirely different from the scenario before me in the present case.

date that CMS or the Medicare contractor determines that the provider or supplier is no longer operational."). It thus appears that NSC determined that the earliest date as of which NSC found E & I to be non-operational was August 13, 2009. NSC apparently treated the site visits on prior dates as contributing to its conclusion that finding the office closed on August 13, 2009 demonstrated that the facility was not in operation.

During a telephone conference, I asked CMS counsel to clarify the selection of the August 13, 2009 effective date in light of the usual 30-day notice provisions and the indications that site visits occurred as early as April 27, 2009 and as late as October 13, 2009. Order Following Telephone Conference at 2-3 (May 11, 2010). CMS responded as follows:

> NSC advised that after the unsuccessful ad hoc site inspections of April 27, 2009 and April 28, 2009 it wanted to affirm that the supplier was truly non-operational. A random call to the business was made and personnel answered the phone with the business name leading SACU [Supplier Audit and Compliance Unit] to believe that the business was indeed operational. Because analyst believed that the business was operational with activity confirmed at the business with the follow-up call, another site inspection was ordered and it was eventually confirmed that the business was non-operational on August 13, 2009.

CMS Response Letter, Dated June 4, 2010, at 1-2. I would conclude from this evidence that the crucial date for determining whether E & I was operational within the meaning of 424.57(c) was August 13, 2010. That conclusion is, however, undercut by a review of the reconsideration decision.

The December 15, 2009 reconsideration decision first lays out the following information as "facts:"

> 1. On August 13, 2009, the Supplier Audit and Compliance Unit (SACU) retroactively revoked the DMEPOS PTAN [provider transaction access number] due to non-compliance with al [sic] Medicare Supplier Standards because a site inspection could not be completed. The effective date of revocation was made retroactive due to the date CMS determined the business to be non-operational.
>
> 2. On November 4, 2009 the NSC received the reconsideration request from the supplier.

CMS Ex. 1, at 2. This statement appears to confirm that the site visit of August 13, 2009 was indeed the basis for the revocation action. The rationale that the hearing officer gave for affirming the revocation, however, does not mention

the August 13, 2009 site visit, or any of the preceding site visits cited in the revocation notice. The factual discussion in the rationale is as follows:

> The attempted site visits occurred on October 12, 2009 at 10:10 am, and October 13, 2009 at 9:15 am; however, the business was found closed by the site inspector on both attempts. According to the time and date stamped photographs taken by the site inspector, posted hours of operation are Monday through Friday from 9:00 am to 5:00 pm. Photographs taken by the site inspector confirm that E & I Medical Supply Services was listed on the business door. The site inspector stated in his site investigation report that he knocked on both attempted visits but there was no answer. According to the photographs taken by the site investigator there was no after-hours contact phone number on the office door, or [sic] was there a note posted to explain why the office was not open.
>
> Ms. Evangeline Ibeziako, director of E & I Medical Supply Services, sent for review telephone records for the business phone to verify that the office was open and operational. This information indicates that a call was made on October 13, 2009 at 9:32 am. However, no information was available to inform the site investigator why the business was not open.
>
> . . . The fact remains that the site inspector could not access the office to verify that E & I Medical Supply Services was open and operational and compliant with state and Medicare requirements. In review of the case file to establish that E & I Medical Supply Services was *Operational*, available for a site inspection, and compliant with state and Medicare requirements, does not verify compliance at the time of revocation.

CMS Ex. 1, at 3 (italics in original). Although the hearing officer speaks of verifying compliance "at the time of revocation," the rationale is based solely on site visits that allegedly occurred two months after the effective date of the revocation. The October site visits were, in fact, not even conducted at the time that the notice of revocation was issued or at the time that Petitioner first requested reconsideration.

Petitioner first requested reconsideration of the revocation decision (and offered a corrective action plan) by letter dated September 11, 2009. P. Ex. 1, at 1-2. By letter dated November 2, 2009, Petitioner again requested a reconsideration hearing. P. Ex. 1, at 3. In that request, Petitioner references receiving a letter

from NSC on the same day, which apparently asserted that a site inspector came out "twice again." *Id*. Petitioner responded with the following statement:

> Honestly speaking I do not know where the inspector is visiting. The facility was open and operational on the claimed two dates (10/12 & 10/13) and there was no site inspector seen. I and another employee were in the facility to assist our clients, any inspector that may show up and the public but there was no inspector. Since the last letter I wrote you regarding a corrective action plan, I have always made sure that someone is in the facility as always from 9:00 am to 5:00 pm Monday – Friday. After hours and weekends we work by appointments. Would you please reconsider your decision as we are open during our operative hours and someone is always in the facility.

Id. The record does not include the letter, which NSC wrote to Petitioner in November 2009. The reconsideration decision, as quoted above, clearly reviews the initial revocation notice imposing revocation retroactive to August 13, 2009, but also refers only to the November 2009 reconsideration request rather than the September 2009 reconsideration request.

The reconsideration thus rests on a completely different factual basis than the initial revocation decision, i.e., on Petitioner's operational status during the alleged October 2009 site visits rather than on August 13, 2009.

The Board has generally permitted CMS to change the legal basis for an adverse administrative action during the appeal process, where the party affected was provided with sufficient notice of the revised basis to permit them to respond. *See, e.g., Fady Fayad, M.D.*, DAB No. 2266, at 10-11 (2009); *Green Hills Enters., LLC*, DAB No. 2199, at 8 (2008). The reasoning underlying these decisions is that due process rights are adequately preserved, absent a showing of prejudice, so long as the individual had a full opportunity to address the different basis during the administrative appeals proceedings. The situation in the case before me is distinguishable, however, in that the reconsideration decision does not simply rely on different reasons for the revocation but relies on facts that were not in existence at the time of the revocation action (i.e., site visits undertaken more than a month after the revocation action).

In revocation cases, CMS has expressly chosen to restrict the reasons for revocation on reconsideration to that set out in the initial revocation notice. Thus, the MPIM provides the following guidance:

> In reviewing an initial enrollment decision or a revocation, the HO [hearing officer] should limit the scope of its review to the Medicare contractor's reason for imposing a denial or revocation at the time it

> issued the action and whether the Medicare contractor made the correct decision (i.e., denial/revocation). **Medicare contractors cannot introduce new denial or revocation reasons or change a denial or revocation reason listed in the initial determination during the reconsideration process.** If a provider or supplier provides evidence that demonstrates or proves that they met or maintained compliance after the date of denial or revocation, the HO shall exclude this information from the scope of its review.

MPIM, ch. 10, § 19 (emphasis added). This language is not directly binding on me or the Board, but the underlying approach is entwined with regulatory restrictions on the evidence which a provider or supplier may present on appeal from a revocation.

In the preamble to the final rule at 42 C.F.R. § 405.874(e), CMS explained that the only evidence admissible at reconsideration is that which shows compliance at the time of the revocation notice.

> When a Medicare contractor makes an adverse enrollment determination (for example, enrollment denial or revocation of billing privileges) . . . appeal rights are limited to provider or supplier eligibility at the time the Medicare contractor made the adverse determination. . . . Accordingly, a provider or supplier is required to furnish the evidence that demonstrates that the Medicare contractor made an error at the time an adverse determination was made, not that the provider or supplier is now in compliance.

See 73 Fed. Reg. 36,448, 36,452 (June 27, 2008); *see also DMS Imaging, Inc.*, DAB No. 2313 (2010); *1866ICPayday.com, L.L.C.*, DAB No. 2289 (2009). If the contractor were permitted during the appeal process to rely on later events as a new basis for a revocation, it would clearly not be reasonable to restrict the appellant to furnishing evidence of error at the time of the initial revocation determination with no opportunity to respond to the new allegations.

Further, the regulations provide that new issues may be considered on appeal to an ALJ, even if not part of an initial or reconsidered determination, "[e]xcept for provider or supplier enrollment appeals which are addressed in § 498.56(e)." 42 C.F.R. § 498.56(a). Section 498.56(e) requires a showing of good cause, before an ALJ may consider any new documentary evidence not presented at the reconsideration level in provider or supplier enrollment appeals. I question whether the regulations contemplate the kind of shifting factual basis for a revocation action that appears to have occurred here.

On June 11, 2010, I reopened the record after the hearing to allow the parties to comment on the significance of the inconsistency of the revocation notice and the reconsideration decision. CMS's formal response asserts that I should read into the reconsideration decision a reliance on the earlier site visits. CMS Response to the Court's Reopening the Record, Dated June 24, 2010. CMS points to the hearing officer's references to having reviewed the case file and suggests that, to have known that the effective date was August 13, 2009, the hearing officer would have to have relied on information from the case file. *Id*. at 1-2. The effective date of revocation was apparent on the face of the revocation notice, so no particular search of a case file was needed.[3]

CMS also argues that the revocation notice and the reconsideration request refer to the dates of the prior inspections, and that, by mentioning these documents, the hearing officer should be understood to have incorporated "by reference the prior site inspections." *Id*. at 2. This argument is equally unavailing. The point is not that the hearing officer was unaware of the dates of the earlier site visits. The point is that the hearing officer did not make any of those site visits the basis for her decision. The choice not to rely on, or even refer to, them in evaluating whether NSC has a basis to find the Petitioner not operational is even more telling, given that I agree with CMS that she must have been aware of the claims made about them in the revocation notice.

CMS finally contends that Petitioner "did not present any evidence that NSC made an error," so it would "not be necessary for the HO to comment on the April and August site inspections in the 'Rationale' section of her decision." *Id.* at 2. CMS's contention ignores the fact that Petitioner's September 11, 2009 request for reconsideration squarely challenges the claim that a site inspector came to the correct location on the dates alleged in April and August 2009. P. Ex. 1, at 1. The hearing officer nowhere responded to that challenge or suggested that she made any finding that the earlier visits actually occurred.

I conclude that, under the circumstances of this case, permitting CMS to rely on site visits that occurred after the revocation notice as the basis for determining whether the revocation was justified would be prejudicial to Petitioner. Thus, while Petitioner undoubtedly had notice that CMS alleged that the site inspector made unsuccessful visits on six occasions in April, August, and October 2009, I

[3] The reconsideration decision does not identify any documents from the case file other than the reconsideration request and telephone records submitted with a letter from Petitioner in response to the hearing officer's November 25, 2009 acknowledgment letter. CMS Ex. 1, at 2-3. Presumably, the file also included reports and photographs from the October site visits, since these are mentioned in the discussion. No indication exists that the hearing officer reviewed any documentation relating to the earlier visits.

conclude that the actual basis for the revocation, if any, must rest on CMS's evidence that Petitioner was not operational as of August 13, 2009, as alleged in the revocation notice.

I treat evidence relating to site visits on earlier and later dates as admissible in that repeated findings that the office was closed would be probative in making it more likely that E & I was non-operational on August 13, 2009, than it would be if no other visits took place, but do not treat those visits as an independent basis for the revocation.

2. CMS's evidence relating to the alleged site visits is not credible or persuasive.

All of the site visits in 2009 were conducted and reported by a single site investigator, Mr. Porter, who testified that no one else accompanied him on any of the visits. Tr. at 23, 25. For each alleged visit, Mr. Porter took photographs that included the door to E & I's office and prepared site visit report forms. CMS Exs. 9-12. The photographs show dates and times corresponding to those contained in the site visit reports, although those affixed for the April and August site visits are significantly different in appearance from those appearing on the October site visit photographs, as I discuss below. It is not possible from the photographs to ascertain whether the business is operational at the times identified. All that is visible is the signage, the office door, and a side window. In some cases, the blinds on the side window appear closed, while, in other cases, the blinds appear open, and it is apparent that the lights are on in the office. *Compare* CMS Ex. 11, at 9 and 11, and CMS Ex. 12, at 11, *with* CMS Ex. 10, at 1 and 4. Given that the photographs cannot establish whether the office was open or whether the investigator tried to enter or knock, the claim that Petitioner was not open for business at the times and dates cited depends wholly on the personal credibility of Mr. Porter. I therefore closely observed Mr. Porter during his testimony.

After observing Mr. Porter testify and respond to questions from the parties, I did not find him believable. Mr. Porter testified that, while working at NSC as a site investigator, he conducted 500 inspections a year.[4] Tr. at 23. In response to

[4] Mr. Porter testified that he began work as a health insurance specialist at CMS just four days before the hearing. Counsel for CMS informed the staff attorney in this case on May 25, 2010 that Mr. Porter might not be available to testify at the hearing, because he had just advised counsel that he would no longer be employed by NSC as of May 28, 2010. E-mail Correspondence from CMS Counsel, Dated May 25, 2010. Counsel advised the staff attorney by telephone on the same date that he had spoken with Petitioner's representative. On June 3, 2010, counsel advised that Mr. Porter would not be available and asked me to allow him to testify at another time by telephone, a request that I denied, because "the witness's

(continued…)

questions from CMS counsel about the October site visit report contained in CMS Ex. 9, Mr. Porter testified that he –

> noted that after two attempts were made during the posted hours of operation, that I found the office door locked and the office closed on two attempts. I indicate that on the first attempt when I went that the lights were on, but no one answered the door when I knocked. And on the second attempt, the lights were out and the facility was not operational, and there was no one around to question regarding the occupant and that no further attempts were necessary.

Tr. at 31-32. I then asked Mr. Porter, given that he appeared to be essentially reading the exhibit, whether he had a present memory of the visits or whether he was relying on his recorded notes. Tr. at 32. This colloquy followed:

> THE WITNESS: No. Well, I remember going to conduct the inspections. I remember being at the facility. So I do remember the site inspection, but I am just referring to the site inspection to validate that, what I wrote for the inspection.
> ADMIN. LAW JUDGE SUSSAN: Okay, so you, at this time you do remember the visits? I wonder --
> THE WITNESS: Yes.

---

[4](…continued)

testimony is central to CMS's establishment of a prima facie case in support of the revocation, and the witness' credibility has been questioned." Staff Attorney Email to CMS Counsel, Dated June 3, 2010. After the hearing, I requested that CMS clarify why CMS had sought accommodations to present Mr. Porter by telephone only, or to substitute another witness, since it appeared he was only changing employers from NSC to work directly for CMS. Order Reopening the Record, Dated June 11, 2010. CMS responded that, out of "an abundance of caution," counsel "notified the Judge and Ms. Ibeziako that there might be difficulties" with Mr. Porter's appearance but that "NSC and CMS were able to resolve their administrative concerns" so that he could appear as scheduled. CMS Response to the Court's Reopening the Record at 2. Ms. Ibeziako denied that she was notified of any issues around Mr. Porter's appearance. Letter from Ms. Ibeziako, Dated July 2, 2010, at 1. I am concerned that the communications from counsel prior to the hearing may have been less than clear and candid, but I do not attribute any responsibility for that to the witness or consider his change of employment in evaluating his credibility.

> ADMIN. LAW JUDGE SUSSAN: -- because you said you did 500 in a year, whether you actually could remember this particular visit at this point.
>
> THE WITNESS: Yes, I'm, I'm, I remember addresses very well. So, yeah, I remember pretty much all of my site visits.

Yet on cross-examination, Mr. Porter denied that he remembered a site visit on June 25, 2008, when he found E & I compliant, because he had "made several trips to E & I" and would need to "review his records." Tr. at 63-64. He insisted that he could remember a visit in April 2009, but not the one in June 2008 or any other of the "numerous times throughout the years" when he visited the facility while E & I was a Medicare applicant or provider. Tr. at 64.

I do not find credible Mr. Porter's convenient claim to have a clear present memory of each of the six visits in 2009, on which CMS relied (and "pretty much all of [his] site visits"), while having no memory of any other "numerous," evidently successful, site visits to the same facility. He appeared to me to be willing to overstate or exaggerate where his claims might serve to make him appear more successful to his employers.

Mr. Porter acknowledged that he did not: (1) leave a business card on any of his alleged attempts to enter E & I; (2) check with any of the neighboring offices; and (3) carry a telephone or try to call to see if anyone was actually in the office. Tr. at 69-71, 77. He pointed out that none of these measures was required of him in conducting a site visit. *Id*. I make no finding that he was required to do any of these steps. Under most circumstances, the fact of an unsuccessful site visit is either not questioned, or the documentation and statements of the site investigator are sufficient to establish the fact. I note, however, that had he undertaken any of them, the credibility of Mr. Porter's claims to have sought access on the reported dates might have been enhanced in the face of the questions raised in this case. A neighbor might have corroborated that Mr. Porter could not find anyone in the E & I office or at least corroborated seeing his cards posted on one or more occasions. A telephone call from outside the door might have been corroborated on a telephone log. As the record stands, no corroboration exists that the door was locked or that Mr. Porter knocked on the door on any of the alleged occasions.

As mentioned, CMS offered photographs as contemporaneous evidence of Mr. Porter's site visits, but the testimony at the hearing about those photographs raised further concerns in my mind. On direct examination, Mr. Porter testified that the photographs in CMS Exhibit 10 accurately represented what he observed on his site visits of October 12 and 13, 2009. Tr. at 35-36. The copies in the record appear to be photocopies; however, Mr. Porter explained that no "original" photographs existed, because they were taken by a digital camera and "downloaded and printed onto photocopying paper." Tr. at 38. He further

asserted that the dates and times that appear on those photographs were not added by hand, through "any manual manipulation or labeling," but, rather, "the way it prints is exactly the way the software system prints it for me." Tr. at 38-39. He similarly testified that CMS Exhibits 11 and 12 accurately represented what he observed on his April and August 2009 site visits. Tr. at 43-48.

Only on cross-examination did Mr. Porter acknowledge what is obvious to anyone who compares the October photographs with those dated in April and August – the earlier dates are not embedded in the photographs but rather appear in boxes overlaid on the photographs. Tr. at 56-58. No direct testimony was offered on this difference, even though the issue was identified as early as Petitioner's Pre-hearing brief dated April 9, 2010, which pointed to the April and August photographs and stated that, "looking at the said picture dates, it appears that the dates were pasted and were not imprinted by the camera." P. Br. at 4. When confronted, Mr. Porter offered the following explanation:

> I used two different digital cameras. On the April 22 date, I had an old digital camera, and . . . whenever I got to print, the photos, it was a camera that would imprint a date directly onto the photo. So whenever I printed from a software that I use, I would have to select that the date to be implanted on top of the photo. So it was a different [camera] that I use for April 27th. And I received a new camera by . . . the October visits, where I could imprint the photo directly onto the photo. But the April 27th and 28th photos, the dates and times that you see there, those are generations from the computer software due to the camera that I was using at the time.

Tr. at 57-58. I found this statement difficult to make sense of and not convincing evidence that the dates and times shown on the earlier photographs were reliable proof of when the camera shots were made. Mr. Porter later emphasized that he "did not physically cut and paste anything to any photo on record." Tr. at 60. This statement, even assuming its veracity, leaves open in my mind several possibilities – the boxes containing the typed dates and times may have been inserted using word processing, or other software, rather than "physically" cut and pasted. Alternatively, the dates may have been manipulated using the camera's software rather than retained as part of the photographs when they were taken.

Any effort to verify the source of the date and time inputs would be futile since Mr. Porter further testified that the digital files were destroyed, "because we take so many photos that what we have to do is print out the photos, and we're not required to maintain that digital copy of the photo." Tr. at 78. When I inquired about the existence of digital files, Mr. Porter went on to volunteer the following

further explanation of the peculiar typewritten appearance of the dates and times in white boxes overlaid on the earlier photographs:

> And like with the older camera that I used, because it was an older camera and because it was hard for the software system itself to emplace the date and time on the photo itself, that's why I was issued, in mid-2009, the new camera that imprinted the photo directly onto the picture, what went, is, immediately when I took the photo. The photos taken in April would have been -- during the software program, I would have to elect to put the date on the photo, and so the software system itself laid the date on top of the photo.

Id. This testimony appeared to me be defensive, as if Mr. Porter recognized that his prior statement was less than persuasive. It also raises further questions. The date and hour entries on the August photographs have the same appearance as the April photographs, yet Mr. Porter claims that he had the newer camera, provided specifically to solve this problem, by mid-2009, but does not explain why he did not use the new camera until late October. Mr. Porter acknowledged that he personally set the date and time parameters in the digital cameras, which indicates that he knew how to alter them. Tr. at 81. He denied, however, that he "changed any dates and times on []any cameras for any photos of record." Tr. at 90.

I do not make a finding that Mr. Porter in fact altered or manipulated the dates or times on any particular photographs. I believe that Mr. Porter was at the correct location on at least some occasions and took photographs of E & I's office door and surroundings. I do not, however, find Mr. Porter's testimony sufficiently credible that I can be sure that he was there on any specific date or time or that he actually tried the doors and knocked but found no one present on any specific date or time.[5]

---

[5] It appears to me that NSC may have had doubts about Mr. Porter's reports as well, perhaps similar to mine. As mentioned earlier, after Mr. Porter submitted his "paperwork" on the April 2009 site visits, the contractor decided to call to verify the conclusion that E & I was not operational. Tr. at 50-51. The results of that call led the contractor to conclude that "the business was indeed operational." CMS Response Letter, Dated June 4, 2010, at 1. Although NSC proceeded to revocation after Mr. Porter reported negative results on his August return visits, Mr. Porter was sent out again because of Petitioner's September 11, 2009 reconsideration request. Tr. at 54. The fact that the reconsideration decision upholding the revocation relied only on the October visits supports an inference that the contractor's hearing officer was not convinced that the facility was closed on the earlier dates.

Petitioner presented a variety of documents to demonstrate that E & I was an ongoing operational business and that it was open on the dates in question. This evidence included a lease to occupy the premises beginning April 1, 2003 and continuing through amendments until December 31, 2010, as well as current state licenses, evidence of payment of state business taxes, and current business liability insurance. P. Exs. 3, 4, 6, 8. Petitioner submitted invoices for equipment purchased and tickets showing delivery to clients in 2009. P. Exs. 7, 9. Petitioner also provided telephone records from April through December of 2009. P. Ex. 5. These records show calls either incoming or outgoing from the office number.[6] Petitioner points to calls recorded on each of the site visit dates. *See, e.g.*, P. Ex. 5, at 22, 45, 48, 59, 61-62, 87, 89, 93; Tr. at 17, 130-32. It is true that none of the calls for which a time is shown occurred at the precise moments at which Mr. Porter claimed to have performed his site visits, the closest being an outgoing call at 9:32 on October 13, 2009 from the location that Mr. Porter claims to have visited at 9:23 the same day. CMS argues that Petitioner "[n]evertheless . . . failed to explain why the business was closed." CMS Br. at 2.

Evidence that calls were made and received at E & I's place of business on the dates in question cannot in itself prove that someone was present in the office at the specific times that the site investigator arrived. Evidence that E & I was current in paying rent, taxes, and insurance and that it was ordering suppliers and delivering them to clients during the time frame in question cannot in itself prove that the company was open for business at the specific times that the site investigator arrived.

All of this evidence collectively, however, increases the likelihood that the business was operational at the location during the relevant time period. Such evidence could nevertheless be overcome by credible proof that the location was closed during business hours on repeated visits. I have difficulty in finding the evidence of such repeated visits credible and persuasive in light of the concerns I have already expressed about Mr. Porter's testimony and photographs.

In addition to its documentary evidence, Petitioner presented the testimony of four witnesses – its two directors and two witnesses who work in neighboring office suites. Both directors testified under oath that the office was open with one, or both, of them present at all times during posted hours and specifically at the times

---

[6] The records do not purport to show all calls made to or from the business. Instead, they include reports showing calls over 30 minutes in length or listing long distance calls or the ten longest outgoing and incoming local calls during a given period. *See* P. Ex. 5 passim. (It seems likely that the telephone company offers reports likely to be of use to a business monitoring its employees' telephone use). A review of these records certainly suggests active business being conducted throughout the period from April through October of 2009.

that Mr. Porter allegedly visited and found it vacant. Tr. at 124-26, 131-32, 139-41, 150-52. Ms. Anakor, who appears to have been the one largely responsible for daily staffing of the office, testified that she wrote a note and stuck it on the door any time that she went down the hall to the restroom. Tr. at 125, 139, 152. Ms. Ibeziako testified that she had a particularly vivid recollection of August 4, 2009. Tr. at 150. She recalled Ms. Anakor teasing her for arriving at 8:30 am, when Ms. Anakor had come into the office even earlier. *Id*. She reported that they came in early to respond to a request for help with photocopying materials for another business, which was having a problem. Tr. at 150-51. She testified that she took the copies to the other business, rejoined Ms. Anakor, and remained in the office that entire day. Tr. at 151. The particularity of the detail with which Ms. Ibeziako described that day made it particularly credible.

Since both directors testified that they have no other jobs and that their livelihood depends on the continuation of this business, they are obviously motivated to save the business. Tr. at 138, 149-50, 152-53. For that reason, although I found them personally believable, I do not rely entirely on their testimony to prove that their business was open on the days and times at which Mr. Porter claimed he found no one present.

The testimony that I found most credible and persuasive was that of the two disinterested witnesses who voluntarily took time from their own business responsibilities to testify at the hearing in this matter. Stanley U. Akujor, a practicing attorney, testified that he: worked on the same floor; passed the E & I office every weekday; spoke with the directors every day; and could "tell you categorically that they are open every day Monday through Friday." Tr. at 93-95. He stated that he was shocked at the allegations, because he knew "for a fact" that, regardless of which dates the investigator claimed to have found the business closed, the office was open every day. *See* Tr. at 96-97; *see also* P. Ex. 10, at 1.

Iris E. Linden testified that she was an administrative assistant for Treasure Health Care with offices across the hall from E & I. Tr. at 103. She testified that she can observe lights and motion through E & I's office window from her own office. Tr. at 104. She testified that E & I was open and operational from 9 AM to 5 PM, Monday through Friday. *Id*. In a letter from Ms. Linden that Petitioner submitted prior to the hearing, Ms. Linden stated that, from her knowledge, E & I was "always open during business hours," that she noticed Ms. Anakor "from time to time . . . [passing] each other going to the bathroom or just passing through a stairwell," that they saw each other many times "when leaving at the end of the day," and that they sometimes borrowed copy paper from each other. P. Ex. 10, at 2. According to her testimony, Ms. Linden missed at most two or three days of work during the time period at issue, was present on the days that the site visits took place, and saw the lights on and activity in E & I's office on all the days she was herself at work. Tr. at 109-15. When asked if she could explain more

precisely what she meant by seeing Ms. Anakor "from time to time," Ms. Linden testified as follows:

> THE WITNESS: Yes, I can. Bathroom breaks, three or four times a day, we bump into each other going to the bathroom. Coming in, we pass each other, coming into the office building. When I go out to get something to eat, there's a, three or four times a day where I could leave out of my office, and I'll pass over by, knock on the door, say hello. So that it happened regularly, Your Honor, three or four times a day, as far as the bathroom goes, and then, just going in and out to get a snack or something from up, downstairs and come back up, I could see her. When I walk past my desk, which is many times in the course of the day, I could see her probably leaving out, coming to the bathroom. There's times that she has even come over and asked me for, to borrow the copier or makes some copies or something of that nature.
>
> ADMIN. LAW JUDGE SUSSAN: Okay, let me, let me be sure I understand because you also testified that Mr. Goines' question that you will place your determination that the office is open and operational simply on whether the lights are on or off. But now you seem to also be saying that you, you actually physically observe or interact with someone from that office multiple times every day. So are both those statements correct? Have I understood your testimony?
>
> THE WITNESS: They are. And as well, in my letter that I stated from time to time, those would be my time-to-times. I could see her in the stairwell coming into the office building. I could be coming from getting a snack. I could pass and she might be crossing by the bathroom, but I'm actually heading back to my office.

Tr. at 116-17. I find no reason to disbelieve the testimony of these two witnesses that they interacted with the directors of E & I multiple times every day and observed activity and lights in the office during business hours, including on the days when Mr. Porter allegedly found the lights off and no one present. While it is not physically impossible that Mr. Porter arrived six times at intervals when neither director was present at moments when Mr. Anakor and Ms. Linden did not observe their absences, I find it more probable that Mr. Porter took photographs of the site but did not actually verify that no one was present.

I conclude that CMS has not presented credible or persuasive evidence that E & I was not operational on August 13, 2009.

Based on the evidence discussed above, I conclude that E & I was operational at the relevant time within the meaning of the regulations.

C. CMS is not authorized to revoke E & I's Medicare supplier number.

The sole basis on which NSC revoked E & I's Medicare supplier number was its alleged failure to be "operational to furnish Medicare covered items or services," as required under section 424.535(a)(5). The evidence does not support a finding that E & I was not operational as defined in section 424.502. It follows that CMS lacks legal authority to revoke E & I's Medicare supplier number.

V. Conclusion

For the reasons explained above, I reverse the revocation of E & I's Medicare supplier number.

/s/
Leslie A. Sussan
Board Member