09Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Medinn Corp.
Docket No. A-18-107
Decision No. 2928
February 11, 2019

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Medinn Corp. (Petitioner; Medinn), a Texas ambulance services supplier, has appealed the June 13, 2018 decision by an administrative law judge (ALJ), *Medinn Corp.*, DAB CR5116 (2018) (ALJ Decision). The ALJ upheld on summary judgment the Centers for Medicare & Medicaid Services' (CMS) determination to revoke Petitioner's enrollment in the Medicare program on the ground that Petitioner "was not operational at its reported practice location." ALJ Decision at 1. For the reasons discussed below, we affirm the ALJ Decision.

Legal Background

The Medicare program is administered by CMS, which in turn delegates certain program functions to private contractors. Social Security Act (Act) §§ 1816, 1842, 1874A;[1] 42 C.F.R. § 421.5(b).

The Act provides for CMS to regulate the enrollment of providers and suppliers in the Medicare program. Act § 1866(j)(1)(A). The implementing regulations in 42 C.F.R. Part 424, subpart P[2], set out the enrollment process that CMS uses to establish eligibility for submitting claims to Medicare and to terminate such eligibility.

To participate in Medicare, a supplier must enroll in the program. 42 C.F.R. § 424.500; 42 C.F.R. § 400.202 (defining Medicare "supplier" to include "a physician or other practitioner, or an entity other than a provider, that furnishes health care services under

[1] The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section. Also, a cross-reference table for the Act and the United States Code can be found at https://www.ssa.gov/OP_Home/comp2/G-APP-H.html.

[2] We apply the regulations in effect as of the date of the notice of revocation, which in this case was December 12, 2016. The regulation at 42 C.F.R. § 424.535(a)(5), on which revocation here was based, was revised effective February 3, 2015. 79 Fed. Reg. 72,500, 72,524, 72,532 (Dec. 5, 2014).

Medicare").[3] In order to maintain enrollment in Medicare, suppliers must comply with Medicare program requirements, including the "enrollment requirements" in 42 C.F.R. Part 424, subpart P (sections 424.500-.570). *See* 42 C.F.R. § 424.516(a). The enrollment requirements obligate a supplier to submit – and keep current – a CMS-approved "enrollment application" that identifies, among other things, the supplier's "practice location." *Id.* §§ 424.502 (definition of "enroll/enrollment"), 424.510(a)(1), 424.510(d), 424.515, 424.516(b)-(e). Once enrolled, an ambulance services supplier has "billing privileges" — that is, the right to claim and receive Medicare payment for services provided to Medicare beneficiaries. 42 C.F.R. §§ 424.502, 424.505.

A Medicare supplier must be "*operational* to furnish Medicare covered items or services." *Id.* § 424.510(d)(6) (italics added). "Operational" means that the supplier "has a qualified physical practice location, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked . . . to furnish these items or services." *Id.* § 424.502.

Medicare suppliers other than physicians, non-physician practitioners and their organizations, must report to CMS a change in practice location within 90 days. 42 C.F.R. § 424.516(e)(2).

CMS may perform an "onsite review" of a supplier "to verify that the enrollment information submitted to CMS or its agents is accurate and to determine compliance with Medicare enrollment requirements." 42 C.F.R. § 424.517(a); *see also id.* §§ 424.510(d)(8), 424.515(c). In addition, CMS may revoke a supplier's Medicare enrollment for any of the "reasons" specified in paragraphs one through 14 of section 424.535(a). Relevant here are paragraphs one, five, and nine, which, in pertinent parts, provide for revocation:

> (1) *Noncompliance.* The . . . supplier is determined to not be in compliance with the enrollment requirements described in this subpart P or in the enrollment application applicable for its . . . supplier type, and has not submitted a plan of corrective action as outlined in part 488 of this chapter.

* * * *

[3] "Provider" is defined as "a hospital, a CAH [critical access hospital], a skilled nursing facility, a comprehensive outpatient rehabilitation facility, a home health agency, or a hospice that has in effect an agreement to participate in Medicare, or a clinic, a rehabilitation agency, or a public health agency that has in effect a similar agreement but only to furnish outpatient physical therapy or speech pathology services, or a community mental health center that has in effect a similar agreement but only to furnish partial hospitalization services." 42 C.F.R. § 400.202.

> (5) *On-site review*. Upon on-site review or other reliable evidence, CMS determines that the . . . supplier is . . . :
>
> (i) No longer operational to furnish Medicare-covered items or services.
>
> * * * *
>
> (9) *Failure to report.* The . . . supplier did not comply with the reporting requirements specified in § 424.516(d)(1)(ii) and (iii) of this subpart.

Id. § 424.535(a)(1), (a)(5)(i), (a)(9).

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

If CMS issues a revocation based on section 424.535(a)(5), which requires a finding by CMS that the supplier is "no longer operational," then section 424.535(g) provides that the effective date is the "date that CMS or its contractor determined that the provider or supplier was no longer operational."

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

An ALJ may, at the request of either party, or on his or her own motion, provide a hearing on new issues that impinge on the rights of the affected party, except that the ALJ will not consider any issue that arose on or after the effective date of the termination of a provider agreement. *See* 42 C.F.R. § 498.56(a)(1), (b)(1).

Case Background[4]

The uncontroverted facts establish that Petitioner was enrolled in the Medicare program as a supplier of ambulance services. CMS Ex. 1; CMS Ex. 9, at 7, 11. Petitioner reported to Medicare that its practice location was at 7331 Harwin Drive, Suite 201,

[4] The factual information in this section, except where we indicate disagreement between the parties, is drawn from the ALJ Decision and undisputed facts in the record and is presented to provide a context for the discussion of the issues raised on appeal.

Houston, Texas 77036-2050 (Harwin Drive), as of July 28, 2014. CMS Ex. 10, at 2. On August 18, 2016, and again (92 days later) on November 18, 2016, an investigator with Health Integrity, LLC, for Novitas Solutions (Novitas), a CMS Medicare Administrative Contractor, attempted to conduct a site inspection at Harwin Drive, the site location Petitioner provided when it enrolled in Medicare or revalidated its Medicare enrollment. CMS Exs. 6, 8, 10, at 2.

On August 18, 2016, at approximately 10:40 a.m., the investigator attempted to conduct a site visit at Harwin Drive. CMS Ex. 6, at 1. The Harwin Drive address appeared in the Provider Enrollment, Chain and Ownership System (PECOS) as the "practice location for Dalia Ambulance Service."[5] *Id.* The investigator found the office was vacant and locked, and noted that "[n]o customer or employee activity was observed during the site verification . . . conducted from 10:40 am to 10:57 am during regular business hours." *Id.* The investigator also took photographs of the building and the entrance area of Suite 201, including the door and window to the suite and sign on the window, and included them in his report. *Id.* at 2-4.

During the site visit, the investigator observed the name and telephone number for the property management company on a sign outside of the building. CMS Ex. 7. On August 22, 2016, the investigator called the telephone number and spoke with a representative from the management company, who reportedly told the investigator that Petitioner's company had vacated the office two months earlier. *Id.*

On November 18, 2016, at approximately 10:45 a.m., the investigator again attempted to conduct a site visit at Harwin Drive. CMS Ex. 8, at 1. As in August, the address appeared in PECOS as the practice location for Dalia Ambulance Service. *Id.* The investigator located Suite 201 by a sign bearing only the door number and nothing else. *Id.* As he stated in his report, "[t]he signage that had been secured on the window to the right of the entrance door on August 18, 2016, during the first site verification, was removed." *Id.* The investigator also observed that the office was vacant and locked, and saw no customer or employee activity while on site between 10:45 and 10:59 a.m. during regular business hours. *Id.* The investigator also took photographs as he had on the first visit. *Id.* at 2-3.

By notice dated December 12, 2016, Novitas informed Petitioner that it had revoked Petitioner's Medicare billing privileges effective August 18, 2016, the date CMS determined that Petitioner was no longer operational at its reported practice location.

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[5] "Dalia Ambulance Service" is the business name under which Medinn Corporation operated. *See* P. Ex. 2, at 7.

CMS Ex. 1. The notice letter stated that the basis for the revocation was that Petitioner was in violation of the regulations at 42 C.F.R. §§ 424.535(a)(1) and (a)(5). *Id.* at 1. The notice letter further informed Petitioner of its right to request reconsideration of the revocation determination within 60 days of the postmark date of the notice. *Id.* at 2. Petitioner filed a timely request for reconsideration in which it conceded that the site of its practice location on file with Novitas was vacant during the site visits and that it had neglected to notify Novitas of its change of address. CMS Ex. 2, at 5. In addition, Petitioner requested reinstatement as a Medicare supplier, citing the acceptance of its Corrective Action Plan (CAP). *Id.* In sum, the CAP established that Petitioner was operational at its new practice location (6201 Bonhomme Rd., 187N. Houston, Texas 77036 (Bonhomme Road)). CMS Ex. 4. However, as Novitas noted in its decision, an opportunity to submit a CAP is available only where revocation is based on section 424.535(a)(1). *Id.*

Novitas first issued a reconsideration determination on April 10, 2017, citing only section 424.535(a)(1) for revocation, and upholding the initial determination. P. Ex. 5. However, on April 19, 2017, Novitas issued a revised reconsideration determination upholding revocation based on section 424.535(a)(5), and not section 424.535(a)(1). CMS Ex. 3. Novitas found that Petitioner was no longer operational at Harwin Drive, its physical practice location of record at the time of the site visits. *Id.* at 1.

By letter dated April 26, 2017, Petitioner requested an evidentiary hearing before an ALJ. Req. for Hr'g. In its Request, Petitioner argued that revocation under section 424.535(a)(1) was improper because Novitas had accepted Petitioner's CAP and overturned the initial determination as to that basis. Req. for Hr'g at 1-2. In addition, Petitioner argued that Novitas failed to give Petitioner proper notice of revocation based on section 424.535(a)(5). *Id.* at 2. Further, Petitioner argued that Novitas violated section 424.535(g) of the regulations when it established August 18, 2016 (the date of the first site visit) as the effective date of revocation. *Id.* Finally, Petitioner argued that Novitas's actions (upholding revocation based on section 424.535(a)(1), improper notice of revocation based on section 424.535(a)(5), and establishing the effective date of revocation) violated Petitioner's right to due process. *Id.*

CMS responded to the Request for Hearing with a Motion for Summary Judgment (MSJ) and 10 exhibits. CMS stated, in sum, that the undisputed facts established that Petitioner was not operational at its physical practice location on file with Novitas on the dates of the August and November 2016 site visits, and that Petitioner did not notify Novitas of Petitioner's new practice location until Petitioner submitted its CAP (December 15, 2016; *see* CMS Ex. 9), which was after both failed inspection attempts. CMS MSJ at 1-3. In addition, CMS stated that Novitas had notified Petitioner of both bases for revocation in its initial determination letter, and that Novitas had issued a revised reconsideration redetermination on April 19, 2017, upholding the revocation based on section 424.535(a)(5). *Id.* at 2-4. CMS argued that CMS may revoke a supplier's Medicare

billing privileges for no longer being operational and that Petitioner was not operational, upon on-site inspection, at its practice location of record. *Id*. at 4-6.

Petitioner filed four pre-hearing memoranda: Petitioner's Motion for Leave to File Reply to CMS's Response to Motion for Summary Judgment (Mot. for Leave to Reply), along with three exhibits; Petitioner's Reply to CMS's Response to Motion for Summary Judgment, along with the same three exhibits; Petitioner's Objection to CMS's Evidence and Motion to Strike CMS's Motion for Summary Judgment (Pet's. Obj. and Mot. to Stk.); and Petitioner's Response and Cross Motion for Summary Judgment and Brief in Support Thereof (Pet's. Response and Cross Motion), along with seven exhibits. In its Motion for Leave to Reply and its Reply, Petitioner argued that CMS had misrepresented Petitioner's position on appeal and that CMS also had misrepresented the holding of the Board's decision in *Adora Healthcare Services, Inc.*, DAB No. 2714 (2016), *reconsideration denied*, DAB Ruling No. 2017-4 (May 18, 2017). In Petitioner's Objection to CMS's Evidence and Motion to Strike, Petitioner objected to each of CMS's exhibits as irrelevant under Federal Rules of Evidence (FRE) Rule 401, and moved to strike CMS's Motion for Summary Judgment. Petitioner argued that CMS's exhibits were irrelevant because the August 18, 2016 site visit "was conducted on the 49th day following relocation [from Harwin Drive to Bonhomme Road], and within the 90-day grace period for reporting the relocation." Pet's. Obj. and Mot. to Stk. at 1-9. Consequently, it argued, "no violation could yet have been conclusively found under 42 C.F.R. §§424.535(a)(1) or 424.535(a)(5)." *Id.* In its Response and Cross Motion for Summary Judgment and Brief in Support Thereof, Petitioner reiterated this argument. *See* Pet's. Response and Cross Motion at 2. Petitioner also argued that the revocation was "prematurely and retroactively" imposed, thus violating Petitioner's right to due process. *Id*. at 3. Petitioner further argued that it was entitled to summary judgment for the same reason: CMS failed to allow Petitioner 90 days from July 1, 2016 (the date of relocation to Bonhomme Road) to notify CMS of its move to a new practice location when it imposed revocation based on the August 18, 2016 site visit; therefore, neither section 424.535(a)(1) nor section 424.535(a)(5) provided a basis for revocation. *Id*. at 7-12. Petitioner also argued that revocation based on the August 18, 2016 site visit was cured by the CAP, and that the two-year re-enrollment bar was wrongly imposed. *Id.* at 12-14, 17.

The ALJ overruled Petitioner's Objection to CMS's exhibits and denied its Motion to Strike, concluding that Petitioner's legal arguments failed to show that CMS's exhibits were inadmissible. *Id*. at 3-4. She admitted Petitioner's seven exhibits and CMS's 10 exhibits into the administrative record. *Id*. The ALJ granted Petitioner's unopposed Motion for Leave to File a Reply and received the Reply into the record, but she excluded the attached exhibits. ALJ Decision at 3-5.

Having considered the parties' motions and evidentiary objections, the ALJ granted CMS's summary judgment motion. *Id*. at 6-8. The ALJ found that Novitas conducted site visits at Harwin Drive, Petitioner's practice location on file with CMS on August 18 and November 18, 2016, and that Novitas found that Petitioner was no longer operational at the site. *Id*. at 7. Therefore, the ALJ concluded that Petitioner was not in compliance with section 424.535(a)(5), and that such non-compliance constituted a legal basis for revocation. *See id*. at 7-8. In addition, the ALJ rejected Petitioner's procedural challenges to the revocation determination. She found meritless Petitioner's argument that the regulation at 42 C.F.R. § 498.56(b)(1) prohibited the ALJ from considering CMS's argument in support of revocation based on section 424.535(a)(5), as set forth in the revised reconsidered determination dated April 19, 2017. *Id*. at 8-9. In rejecting this argument, the ALJ wrote:

> Petitioner's argument appears to be that CMS may not cite a different regulatory basis for revocation once it has issued a reconsidered determination. Petitioner cites to no legal authority for this proposition. Moreover, to the extent Petitioner's argument relies on the plain language of 42 C.F.R. § 498.56(b)(1), its interpretation is strained at best.

Id. at 9. The ALJ also concluded that CMS did not err when it imposed revocation based on section 424.535(a)(5) because Novitas's second visit on November 18, 2016 was more than 90 days from the date Petitioner relocated its practice location. *Id*. at 10. Here, the ALJ rejected Petitioner's reading of *Adora*, stating that "the [Board's] reasoning in *Adora* is inapplicable here" because "CMS performed a second follow-up visit . . . a full 140 days after Petitioner had moved." *Id*. Finally, the ALJ concluded that Novitas's approval of Petitioner's CAP had no bearing on the revocation based on section 424.535(a)(5), because, by regulation, an opportunity to submit a CAP is available only where revocation is based on section 424.535(a)(1). *Id.* at 11-12. In a footnote, the ALJ commented on CMS's initial determination to revoke Petitioner's Medicare billing privileges under sections 424.535(a)(1) and (a)(5), accept the CAP and dismiss section 424.535(a)(1) as a basis, but not cite section 424.535(a)(9) (for failing to report its change in practice location) as a basis. *Id*. at 12, n.9.[6]

Petitioner's Request for Review (RR) of the ALJ Decision followed. Petitioner's Request for Review comprised eight paragraphs in which it specified its disagreements with the ALJ's findings of facts and conclusions of law, which we summarize as follows:

- The ALJ erred in determining that the facts establish grounds for revocation under section 424.535(a)(5), in concluding that CMS's revocation on that basis was not premature, and in sustaining CMS's revocation determination on that

[6] We will revisit this later.

basis;

- The ALJ erred in determining that 42 C.F.R. § 498.56(b) did not bar CMS from considering, in the revised (April 19, 2017) reconsideration determination, Petitioner's compliance with section 424.535(a)(5);

- The ALJ erred in determining that Novitas's approval of the CAP had no bearing on its revocation determination based on section 424.535(a)(5);

- The ALJ's decision was predicated upon Petitioner's failure to report a change in its practice location, a violation of section 424.535(a)(9), which CMS did not cite as a revocation basis;

- The ALJ's errors construing the timeframe in which CMS may impose revocation based on a site visit, and in applying section 498.56(b), violated due process; and

- The ALJ erred "in disregarding" Petitioner's objection to the 2-year re-enrollment bar CMS imposed.

RR at 1-2. Petitioner's brief in support of its request for review (P. Br.) reiterates the eight points; Petitioner seeks reversal of the ALJ Decision. P. Br. at 3-4, 18.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address de novo, construing the facts in the light most favorable to Petitioner and giving Petitioner the benefit of all reasonable inferences. *See Livingston Care Ctr*., DAB No. 1871, at 5 (2003), *aff'd*, *Livingston Care Ctr. v. U.S. Dep't of Health & Human Servs*., 388 F.3d 168, 172-73 (6th Cir. 2004). Summary judgment is appropriate when there is no genuine dispute about a fact or facts material to the outcome of the case and the moving party is entitled to judgment as a matter of law. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). The party moving for summary judgment has the initial burden to demonstrate that there is no genuine issue of material fact for trial and that it is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party carries that burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Rule 56(e) of the Federal Rules of Civil Procedure) (italics omitted). The Board's standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. *See Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html.

Discussion

We sustain the revocation in this case because: (1) in the absence of a genuine dispute of material fact, summary judgment was appropriate; and (2) the ALJ did not err in upholding CMS's revocation determination under 42 C.F.R. § 424.535(a)(5). We first address summary judgment and next discuss the question of legal error.

1. Summary judgment was appropriate.

This case presents no genuine dispute of material fact on the issue of legality of revocation under section 424.535(a)(5). Petitioner does not dispute (and itself concedes) the core facts that establish a section 424.535(a)(5) revocation basis – specifically, that Petitioner was a Medicare-enrolled ambulance service (P. Ex. 2, at 7; P. Ex. 7, at 1); and that CMS's contractor, Novitas, conducted site visits to Petitioner's practice location of record on August 18, 2016, and again on November 18, 2016, and found the premises vacant with no signs of an operating business (*e.g.*, P. Ex. 4, at 5, P. Ex. 6, and P. Ex. 7, at 2). Moreover, it is undisputed that Petitioner had moved its practice location on July 1, 2016 (P. Ex. 2, at 11, 17); Petitioner neglected to report to Novitas its change in practice location within 90 days of the change or prior to receiving notice of revocation; and Petitioner only reported the change with its CAP request on December 15, 2016 (P. Ex. 4, at 5; P. Ex. 2, at 11, 23). Since Petitioner did not report its relocation from Harwin Drive to Bonhomme Road until December 15, 2016, the practice location on file on the two inspection dates was Harwin Drive, which was where the inspector visited on those dates.

The undisputed material facts in this case also include the reports of the CMS contractor's inspector that Petitioner's practice location of record was not open for business when the inspector attempted to conduct site visits on August 18, and November 18, 2016. *See* CMS Exs. 6-8. Although Petitioner disputed the *relevance* of CMS's exhibits before the ALJ, it did not contest their authenticity or veracity, including that of the inspector's reports. Petitioner contended that Novitas had revoked Petitioner's Medicare billing privileges only 49 days after Petitioner changed its practice location, when the regulations afforded it 90 days to report the relocation. *See* 42 C.F.R. § 424.516(e)(2). However, Novitas did not impose revocation on Petitioner until 116 days after the initial site visit (August 18, 2016, to December 12, 2016). As the ALJ observed, Novitas conducted the second site visit 140 days after Petitioner moved to its new practice location (July 1, 2016, to November 18, 2016). ALJ Decision at 10. We further note that CMS did not impose revocation until 164 days following Petitioner's change of practice location (July 1, 2016, to December 12, 2016). Petitioner did not allege, much less show, that it had notified Novitas or CMS of its change of practice location within 90 days, as required under the regulations. Moreover, while Petitioner had argued that it had remained operational at its new practice location at Bonhomme Road, beginning on July 1, 2016, it nonetheless conceded that it was no longer operational at Harwin Drive at the time of the site inspections. *See* P. Ex. 4, at 5. The

Novitas inspector learned from the property manager of the Harwin Drive site that Petitioner had vacated the premises as early as two months prior to the August 18, 2016 site inspection. CMS Ex. 7.

CMS may revoke a currently enrolled supplier's Medicare billing privileges where, upon on-site review or other reliable evidence, CMS determines that the supplier is no longer operational to furnish Medicare-covered items or services. 42 C.F.R. § 424.535(a)(5). In view of the undisputed evidence, we conclude that summary judgment was appropriate.

2. The ALJ did not err when she upheld CMS's determination to revoke Petitioner's Medicare enrollment under 42 C.F.R. § 424.535(a)(5).

In reviewing a revocation determination, an ALJ or the Board is limited to deciding whether CMS had a valid "legal basis" for that action. *Care Pro Home Health, Inc.,* DAB No. 2723, at 5 (2016); *Letantia Bussell, M.D.*, DAB No. 2196, at 12-13 (2008); *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 17, 19 (2009), *aff'd, Ahmed v. Sebelius*, 710 F. Supp.2d 167 (D. Mass. 2010). The revised reconsidered determination identifies 42 C.F.R. § 424.535(a)(5) as CMS's legal basis for the challenged revocation. The ALJ concluded that CMS had lawfully revoked Petitioner's Medicare enrollment under that regulation because Petitioner was not operational at Harwin Drive on August 18 and November 18, 2016. As indicated above, the ALJ based her conclusion on the undisputed facts that on two different dates, the inspector went to Petitioner's practice location, found it vacant, telephoned the building management, and was told that Petitioner had vacated the premises. As also discussed, since Petitioner did not report its change of practice location until December 2016, Harwin Drive remained its practice location on file on the dates of the failed inspections.

Petitioner's legal arguments for reversing the ALJ's Decision center around one mistaken premise: that CMS imposed revocation without affording Petitioner a full 90 days to report the address of its new practice location before revocation. Thus, Petitioner argues that CMS's revocation determination was premature and a violation of due process; that CMS lacked a factual basis to support its revocation determination under section 424.535(a)(5); that the CAP should have applied to revocation based on section 424.535(a)(5); that the correct basis for revocation would have been section 424.535(a)(9), which CMS did not cite, and therefore CMS lacked a legal basis for revocation; and that the regulation at 42 C.F.R. § 498.56 barred the ALJ from considering revocation based on section 424.535(a)(5). Below we address each argument, in turn.

A. CMS did not prematurely revoke Petitioner's Medicare billing privileges.

As discussed above, section 424.535(a)(5) provides for revocation where CMS determines that a supplier is no longer operational at its reported practice location. Petitioner argues that, since it had merely changed practice locations and not ceased to operate, it was entitled to 90 days from the day it changed locations to report the change to CMS. Petitioner argues that CMS only afforded Petitioner 49 days because it imposed revocation on Petitioner effective August 18, 2016. *See* P. Br. at 9. In support of its position, Petitioner cites a ruling by a different ALJ in another case, *Accuread Quality Mobile X-Rays, LLC*, Docket No. C-15-3862, ALJ Ruling 2016-7 (Jan. 8, 2016). *Id*. at 8-9 ("The *Accuread* supplier's billing privilege was revoked because of an unreported changed address."). It is well established that an ALJ decision is not precedent or binding on the Board. *E.g., Willie Goffney, Jr., M.D.*, DAB No. 2763, at 8 (2017), *appeal filed,* No. 2:17-cv-08032-MRW (C.D. Cal. Nov. 3, 2017); *Alexander C. Gatzimos, MD, JD, LLC*, DAB No. 2730, at 16 (2016). In any case, Petitioner does not make a case for why *Accuread* is on point here or how the ALJ's rationale therein supports Petitioner. Moreover, CMS did not impose revocation in this case because Petitioner failed to report a change of address, as required under section 424.516(e)(2). Here, CMS imposed revocation because Petitioner was no longer operational at its practice location of record. As in *Accuread*, Petitioner here was required to report its change of practice locations within 90 days, pursuant to 42 C.F.R. § 424.516(e)(2) ("Medicare suppliers other than physicians, non-physician practitioners and their organizations, must report to CMS a change in practice locations within 90 days."). Petitioner argues that, since it relocated on July 1, 2016, a site visit before its 90-day reporting period had elapsed was premature and a denial of due process. We reject the meritless argument.

CMS has the right to perform an "onsite review" or inspection of a supplier in order "to verify that the enrollment information submitted to CMS or its agents is accurate and to determine compliance with Medicare enrollment requirements." 42 C.F.R. § 424.517(a). The regulation does not prohibit CMS from conducting a site visit of an enrolled Medicare supplier during the reporting period. In any event, Petitioner fails to explain how CMS or Novitas would know to forbear conducting a site inspection on a vacated practice location if the supplier has not reported the change in the first place. As Petitioner admitted in its CAP and reconsideration requests, Petitioner failed to report its change of practice locations (within 90 days of relocating or within 90 days of Novitas discovering that Petitioner had vacated its practice location of record) due to its own negligence. P. Ex. 2, at 23; P. Ex. 4, at 5 (Petitioner's owner himself wrote, "This was error and negligence on our side."). CMS had other credible evidence that Petitioner had relocated as long as two month prior to the first site inspection in August 2016. *See* CMS Ex. 7 ("Investigator contacted Diamond Phone Card Suite 102 Houston, TX 77036 and spoke with, [A], the Property Management Company owner. [A] verified that Dalia Ambulance Company moved out of Suite 201 two months ago."). Based on that

information, CMS could have conducted a second site visit one month later in September 2016 (under the presumption that Petitioner had been afforded 90 days to report a change of practice locations). In any event, Novitas made a second site visit on November 18, 2016, which was well after 90 days from the date of Petitioner's relocation to Bonhomme Road. There was nothing premature about the timing of the site visits or revocation based on the findings from those site visits.

Petitioner also relies on the Board's decision in *Adora* to support its meritless argument that CMS prematurely imposed revocation. In its Brief, Petitioner argued the meaning of the Board's ruling denying reconsideration of *Adora* as follows:

> The revocation [in *Adora*] was invalid because the site visit occurred *before* the 90-day period for reporting had expired, therefore the revocation determination "was premature." *Id*. at 4. Moreover, the DAB panel stated where a provider seeks reconsideration of the initial determination on the grounds that it was not at the site inspected because it moved its practice location to a new location where it continues to be "operational" within the meaning of the regulations, provides evidence establishing the move, and claims it has timely notified CMS of the move or will do so within the required time, CMS may not proceed with a revocation based solely on the fact that an on-site visit to the old address found the provider not operations [sic]. *Id*. at 5-6. CMS must then determine if the provider is operational at the new location. *Id*.

P. Br. at 10-11. Petitioner misunderstands *Adora*. As we explained in our ruling denying reconsideration:

> Our Decision [in *Adora*] addresses situations [. . .] where an initial determination that a provider or supplier is no longer operational is challenged on reconsideration on the ground that *the provider or supplier had moved to a new practice location prior to the inspection underlying the non-operational determination and either has provided notice of the move or is still within the required timeframe for providing notice to the contractor*.

DAB Ruling No. 2017-4, at 8 (italics added). Thus our rationale in *Adora could* be relevant but only under certain limited situations. However, here, first, Petitioner *had not reported* its change of practice location at the time CMS decided to revoke Petitioner's billing privileges. Second, Petitioner *did not report* its change of practice locations until December 15, 2016, which was beyond the 90-day timeframe for reporting the change to Novitas. On the facts of this case, *Adora* affords Petitioner no defense against revocation under section 424.535(a)(5).

B. CMS did not impose revocation based solely on the August 18, 2016 site visit and revocation in this case does not violate Petitioner's right to due process of law.

Petitioner contends that CMS prematurely imposed revocation based solely on the August 18, 2016 site visit. Petitioner argues that the question "whether the supplier was non-operational was 'inextricably intertwined with the issue . . . of reporting its relocation.'" P. Br. at 9 (citing *Accuread* at 6). Petitioner contends that 42 C.F.R. § 424.516 does not require authorization from CMS before a supplier relocates, and that it was operational at its new site when CMS conducted the August 18, 2016 site visit. P. Br. at 10. Petitioner then notes that "[t]he ALJ in *Adora* reversed the contractor's determination to revoke the Medicare billing privileges and found the provider had been properly notified of the change in location within the 90-day period" (the period provided for in 42 C.F.R. § 424.516). *Id*. Therefore, Petitioner argues (again misreading *Adora*), *Adora* requires CMS to wait 90 days from a supplier's relocation before CMS can perform a site visit. *Id*. (quoting *Adora* at 4) ("The revocation was invalid because the site visit occurred *before* the 90-day period for reporting had expired, therefore the revocation determination 'was premature.'"). Petitioner argues that this "premature" site visit and resulting revocation violated Petitioner's due process rights.

First, CMS did not predicate revocation here solely on the basis of the findings from the August 18, 2016 site visit. As discussed above, Novitas had information the inspector had obtained from the property manager at the Harwin Drive site and it also conducted a follow-up site visit on November 18, 2016. In addition, it is undisputed that Petitioner neglected to report its change of address within 90 days of relocating or before CMS imposed revocation. Accordingly, there is no factual basis in the administrative record to support Petitioner's assertion that CMS based revocation solely on the initial site visit.

Second, *Adora* does not support Petitioner's argument because the supplier in *Adora* had reported its relocation within 90 days and showed evidence of a timely report at the reconsideration level. By contrast, Petitioner in this case did not timely report its relocation and made no such showing at the reconsideration level.

Third, the ALJ's Decision in *Accuread* is not binding on the Board and is not helpful to our analysis. Petitioner was not revoked here because of "an unreported changed address." P. Br. at 9. Petitioner was revoked because it was found to be no longer operational under the regulations, not generally "not operational," as Petitioner suggests.

Petitioner contends that "[i]t is undisputed that Petitioner was operating at its new address and that the relocation was reported, an issue resolved by virtue of the accepted CAP." *Id*. at 11. This is irrelevant for two reasons: (1) Petitioner's belated compliance with the regulatory requirement to report its change to a new practice location may have resolved the issue of compliance with 42 C.F.R. § 424.535(a)(1), but it had no bearing on whether

Petitioner was operational at the practice location of record at the time it was inspected; and (2) Petitioner was not "operational" unless it was operational as defined by the regulations.

"Operational" has a specific meaning in this context. It means more than simply supplying services to Medicare beneficiaries from any location. "Operational" means that "the provider or supplier has a *qualified physical practice location*, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked . . . to furnish these items or services." 42 C.F.R. § 424.502 (italics added). The "qualified physical practice location" is the address "that has been provided by the provider and is currently on file with CMS." *Foot Specialists of Northridge*, DAB No. 2773, at 9 (2017), *appeal dismissed per stipulation,* No. 2:17-CV-03206 (C.D. Cal. May 1, 2018) (citing *Care Pro Home Health*, DAB No. 2723, at 5 (holding that the Medicare provider petitioner had to be operational at the location it provided on its Medicare enrollment application)). Therefore, the fact that Petitioner may have been supplying services to Medicare beneficiaries, without interruption, at its new location on Bonhomme Road was irrelevant to CMS's determination that Petitioner was no longer operational because Petitioner was not operational at its qualified physical practice location of record when CMS attempted to inspect the location.

Petitioner's due process argument similarly is without merit. As we discussed above, CMS did not impose revocation based solely on the initial inspection. Even if it had, Petitioner has failed to show that it was in compliance with regulatory requirements and was operational at the time of the initial inspection. Petitioner also has failed to show that a deficiency in the process by which CMS determined to impose revocation prejudiced him at the post-revocation stages of the appeals process. *See Dinesh Patel, M.D.*, DAB No. 2551, at 8 (2013) (finding that there was no prejudice resulting from alleged inadequate notice where Petitioner did not "claim that the alleged notice deficiency impaired his ability to defend himself before either the ALJ or the Board"). Petitioner also contends that CMS "made [revocation] effective almost 120 days prior to the issuance of notice." P. Br. at 13. This, too, Petitioner contends, violated its right to due process. This is incorrect. Section 424.535(g) of the regulations provides that if the basis for the revocation is that "the practice location is determined by CMS or its contractor not to be operational," the effective date of revocation is "the date CMS or its contractor determined that the provider or supplier was no longer operational." *Benson Ejindu, d/b/a Joy Medical Supply*, DAB No. 2572, at 8 (2014), *appeal dismissed,* No. 3:14-cv-00395 (W.D.N.C. Feb. 3, 2016). Here, the basis for revocation was that Petitioner was no longer operational under section 424.535(a)(5) as of August 18, 2016, the date specified in the initial determination. *See* CMS Ex. 1. Moreover, nothing in the regulations authorizes the ALJ to reverse a revocation in order to sanction CMS for alleged due process violations where CMS had a basis for the revocation under section 424.535(a). *See Louis J. Gaefke, D.P.M.,* DAB No. 2554, at 11 n.10 (2013), *appeal*

dismissed, No. 2:14-cv-02085 (D. Kan. Dec. 24, 2013). Accordingly, we conclude that the ALJ did not err when she upheld revocation based on section 424.535(a)(5) and find no basis to disturb the ALJ Decision on due process grounds.

C. 42 C.F.R. § 498.56(b)(1) presented no bar to the ALJ's consideration of revocation based on section 424.535(a)(5).

Petitioner contends that the regulation at 42 C.F.R. § 498.56 barred the ALJ from considering the April 19, 2017 revision by Novitas of its reconsideration decision because it cites a basis which arose after the effective date of revocation. P. Br. at 14. Section 498.56(b)(1) provides that an ALJ will not consider any issue that arose on or after the effective date of the termination of a provider agreement. Petitioner further contends that the April 10, 2017 "notice letter established August 18, 2016 as the termination date," and therefore "the ALJ was barred from hearing evidence to support revocation relying on 42 C.F.R. § 424.535(a)(5) as the reason for Petitioner's revocation." *Id*. at 14-15. Petitioner's theory, in sum, is that the *true* basis for the ALJ's decision to sustain revocation of Petitioner's billing privileges was failure to report a change of practice location under 42 C.F.R. § 424.535(a)(9), and since CMS did not cite this authority as a basis for revocation, the ALJ Decision violated Petitioner's right to due process. *See id*. at 15 (citing ALJ Decision at 12 n.9). Neither the facts nor legal authority support this argument. The original notice of revocation cites two bases: sections 424.535(a)(1) and (a)(5). CMS Ex. 1. The April 10, 2017 reconsideration determination was superseded by the revised reconsideration determination dated April 19, 2017. Here, Novitas (acting for CMS) reopened the April 10, 2017 reconsidered determination in accordance with 42 C.F.R. § 498.30. Moreover, a reconsidered determination is binding unless CMS further revises it or it is reversed or modified by a hearing decision. *See* 42 C.F.R. § 498.25(b). The ALJ found that "CMS had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(5) because it was not operational at the practice location on file with CMS," and concluded "CMS properly determined that Petitioner was not in compliance with 42 C.F.R. § 424.535(a)(5)."[7] ALJ Decision at 7. No evidence in the record supports Petitioner's theory that the ALJ's "real" basis for sustaining revocation in this case was

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[7] In her Decision, the ALJ rendered her findings of fact and conclusions of law in italicized, bold type.

section 424.535(a)(9).[8] Petitioner offers no authority to support its argument that comments in a footnote to the ALJ Decision should supersede her explicit findings of fact and conclusions of law. Moreover, it is well established by Board precedent that "an ALJ or the Board is limited to deciding whether CMS had a valid 'legal basis' for that action." *Foot Specialists of Northridge* at 18, and the cases cited therein. It is within CMS's discretion to determine the basis on which to revoke enrollment. Here, CMS chose section 424.535(a)(5), and the ALJ upheld revocation on that basis alone. Therefore, we find no basis here to disturb the ALJ Decision.

D. The ALJ did not err when she concluded that Novitas's approval of the CAP did not bear upon its determination to revoke Petitioner's Medicare billing privileges under section 424.535(a)(5).

Petitioner argues that CMS's decision to accept Petitioner's CAP eliminated the factual basis for CMS to impose revocation under section 424.535(a)(5). Petitioner argues that "the facts establish that the CAP cured Petitioner's alleged deficiency for not being operational." P. Br at 16. This is legally and factually incorrect. The initial determination to revoke Petitioner's Medicare billing privileges cited sections 424.535(a)(1) and (a)(5). CMS Ex. 1, at 1. The initial determination notified Petitioner of its right to submit a corrective action plan and informed Petitioner that a CAP would apply solely to revocation pursuant to section 424.535(a)(1), stating:

> If you believe that you are able to correct the deficiencies and establish your eligibility to participate in the Medicare program, and if this revocation is based in whole or in part on § 424.535(a)(1), you may submit a corrective action plan (CAP) within 30 calendar days after the postmark date of this letter. (Per 42 CFR § 405.809, a CAP cannot be accepted for

[8] The ALJ commented that, "in light of the limited grounds for which a CAP may be submitted," it was "puzzling" that Novitas would revoke under section 424.535(a)(1) and invite Petitioner to submit a CAP. ALJ Decision at 12 n.9. The ALJ also commented that it was "remarkable" that Novitas would rely on both sections 424.535(a)(1) and (a)(5) under the facts of this case, and "baffling" that Novitas did not rely on section 424.535(a)(9) (failure to report a change in practice location) under the facts of this case. *Id.* Although the evidence in this case demonstrates that Petitioner indeed failed to report its relocation from Harwin Drive to Bonhomme Road within 90 days in accordance with section 424.516(e)(2) (which is cited in page 11 of the ALJ Decision), it is not clear that section (a)(9) would have applied here, based on the plain language of section 424.535(a)(9). Section 424.535(a)(9) provides for revocation where "[t]he provider or supplier did not comply with the reporting requirements specified in § 424.516(d)(1)(ii) and (iii) of this subpart." Section 424.516(d) applies to "physicians, nonphysician practitioners, and physician and nonphysician practitioner organizations" and section 424.516(d)(1)(iii) requires the report of a change in practice location in 30 (not 90) days. The ALJ determined that Petitioner is an ambulance service supplier subject to the reporting requirements of section 424.516(e). *See* ALJ Decision at 5, 10 n.6, and 11 (citing sections 424.516(e) and (e)(2)). In any case, we need not and do not decide the potential applicability of section 424.535(a)(9) here. As the ALJ determined, and we agree, the undisputed facts support lawful revocation in accordance with section 424.535(a)(5).

> revocations based exclusively on reasons other than § 424.535(a)(1). If the revocation is for multiple reasons of which one is § 424.535(a)(1), the CAP will only be reviewed with respect to the § 424.535(a)(1) basis for revocation.) The CAP should provide evidence that you *are in compliance* with Medicare requirements.

Id. at 2-3 (italics added). Thus the notice directed Petitioner to demonstrate that it currently is in compliance with Medicare requirements, not that it had been in compliance at the time revocation was imposed. Section 405.809 of the regulations contemplates revoked providers and suppliers demonstrating that they have returned to compliance in accordance with section 424.535(a)(1), and not proof that the provider or supplier had been in compliance at or prior to revocation. If CMS reinstates the provider or supplier following proof of its return to compliance, the effective date of the reinstatement is based on the date the provider or supplier is in compliance with all Medicare requirements, and CMS or its contractor may pay for services furnished on or after the effective date of the reinstatement. *See* 42 C.F.R. § 405.809.[9] Here, CMS approved the CAP and dismissed section 424.535(a)(1) as a basis for revocation on January 31, 2017. CMS Ex. 4. Under section 405.809, this CAP decision restored Petitioner to good standing with the Medicare program with respect only to section 424.535(a)(1), in that Petitioner reported the change of practice locations and, after a site visit to Bonhomme Road, CMS found Petitioner to be in compliance with that provision of the regulations. *Id*. at 1 ("A site visit was conducted on January 13, 2017, at the address provided on the 855 application accompanying your CAP: 6201 Bonhomme Rd. 187N, Houston, TX 77036. The site was found to be operational.").

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[9] **§ 405.809 Reinstatement of provider or supplier billing privileges following corrective action.**

(a) *General rule.* A provider or supplier—

(1) May only submit a corrective action plan for a revocation for noncompliance under §424.535(a)(1) of this chapter; and

(2) Subject to paragraph (a)(1) of this section, has only one opportunity to correct all deficiencies that served as the basis of its revocation through a corrective action plan.

(b) *Review of a corrective action plan.* Subject to paragraph (a)(1) of this section, CMS or its contractor reviews a submitted corrective action plan and does either of the following:

(1) Reinstates the provider or supplier's billing privileges if the provider or supplier provides sufficient evidence to CMS or its contractor that it has complied fully with the Medicare requirements, in which case—

(i) The effective date of the reinstatement is based on the date the provider or supplier is in compliance with all Medicare requirements; and

(ii) CMS or its contractor may pay for services furnished on or after the effective date of the reinstatement.

. . .

However, the January 31, 2017 letter further explained the limited effect of an approved CAP:

> Since CAP rights only apply to denials and to the revocation reason § 424.535(a)(1), revocation reason § 424.535(a)(5) cannot be overturned as a result of a favorable CAP. Please be advised, if you are satisfied with this decision, you do not need to take further action. If you are not satisfied with this decision, you may request a reconsideration to review revocation reason § 424.535(a)(5), which is an independent review conducted by a person who was not involved in the initial determination.
>
> * * * *
>
> You may offer new evidence with your request for reconsideration that you believe may have a bearing on the decision.

Id. at 1-2. Thus the record reflects that Petitioner provided evidence that it had changed practice locations and that, at least as of January 13, 2017, Petitioner was operational in that it maintained a qualified physical practice location at Bonhomme Road. That evidence necessarily does not and could not prove that Petitioner was operational as a matter of fact on August 18, 2016 and therefore in compliance with section 424.535(a)(5) on that date. Further, because section 405.809 limits the applicability of a CAP to compliance with section 424.535(a)(1), and Petitioner could not prove through its CAP that it had been in compliance with section 424.535(a)(5) of the regulations at the time revocation was imposed, the ALJ did not err when she concluded that Novitas's approval of the CAP had no bearing on revocation under section 424.535(a)(5).

3. The ALJ did not err by not addressing Petitioner's argument against the 2-year re-enrollment bar.

Petitioner contends the 2-year re-enrollment bar "was improperly established in violation of 42 C.F.R. §424.535(c),"[10] and that the ALJ's failure to address this in her decision constituted legal error. P. Br. at 17; *see also* CMS Ex. 1, at 2 ("Pursuant to 42 CFR §424.535(c), Novitas Solutions is establishing a re-enrollment bar for a period of two (2) years that shall begin 30 days after the postmark date of this letter."). The ALJ did not

[10] Section 424.535(c) of the regulations states, in part:

(c) *Reapplying after revocation.* If a provider, supplier, owner, or managing employee has their billing privileges revoked, they are barred from participating in the Medicare program from the date of the revocation until the end of the re-enrollment bar.

(1) The re-enrollment bar begins 30 days after CMS or its contractor mails notice of the revocation and lasts a minimum of 1 year, but not greater than 3 years, depending on the severity of the basis for revocation.

err by not addressing Petitioner's argument against imposition of the reenrollment bar because, while a determination to revoke a supplier's enrollment under section 424.535(a) may be appealed by a supplier in accordance with Part 498's procedures, there is, however, no such right to appeal a decision by CMS concerning the duration of a post-revocation re-enrollment bar. *Vijendra Dave, M.D.*, DAB No. 2672, at 10 (2016). Therefore, Petitioner may not challenge the reenrollment bar in this case through the Part 498 appeals process.

Conclusion

For the reasons stated above, we affirm the ALJ's decision.

/s/
Constance B. Tobias

/s/
Susan S. Yim

/s/
Christopher S. Randolph
Presiding Board Member