

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

Neb Group of Arizona LLC  
Docket No. A-14-16  
Decision No. 2573  
May 14, 2014

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

Neb Group of Arizona LLC (Neb Group or Petitioner), a company in Scottsdale, Arizona, that was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS), requests review of an Administrative Law Judge (ALJ) decision dated October 25, 2013. *Neb Group of Arizona LLC*, DAB CR2970 (2013) (ALJ Decision). The ALJ granted summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS), sustaining its revocation of Neb Group's Medicare billing privileges and related supplier number, effective December 4, 2012. The ALJ determined that CMS was authorized to revoke Neb Group's Medicare enrollment under 42 C.F.R. § 424.57(d) because the undisputed facts established that on two dates the facility was not "accessible and staffed" during its posted hours of operation in violation of 42 C.F.R. § 424.57(c)(7) (Supplier Standard 7).<sup>1</sup> Based on the same facts, the ALJ further concluded that there also was a basis for CMS to revoke Neb Group's billing privileges under 42 C.F.R. § 424.535(a)(5)(ii) based on his determination that it was not "operational" as defined in 42 C.F.R. § 424.502.

As discussed below, we first conclude that the ALJ properly granted summary judgment in favor of CMS under section 424.57(e) because Neb Group admittedly was not in compliance with DMEPOS Supplier Standard 7 in section 424.57(c)(7)(i)(C). Second we conclude that the ALJ erred in granting summary judgment under section 424.535(a)(5)(ii). *See* 42 C.F.R. § 498.5(l)(2). Accordingly, we uphold the revocation of Neb Group's Medicare billing privileges under section 424.57(c)(7) but modify the effective date of the revocation to February 3, 2013 pursuant to section 424.57(e).

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<sup>1</sup> Effective January 2, 2009, section 424.57 was amended, in pertinent part, by redesignating section 424.57(d) as section 424.57(e). *See* 74 Fed. Reg. 198 (Jan. 2, 2009). Accordingly, all future references to this regulatory provision herein will be to section 424.57(e).

## **Applicable Law**

Pursuant to section 1834(j)(1)(A) of the Social Security Act (Act),<sup>2</sup> a DMEPOS supplier may not be reimbursed for items provided to an eligible Medicare beneficiary unless the supplier has a supplier number issued by the Secretary of the U.S. Department of Health & Human Services. To receive a supplier number, a DMEPOS supplier must meet each of the supplier enrollment standards set forth in 42 C.F.R. § 424.57(c)(1) - (30). Among other things, a DMEPOS supplier must maintain a physical facility on an appropriate site which is in a location that is accessible to the public, staffed during posted hours of operation, and maintained with a visible sign and posted hours of operation. Section 424.57(c)(7). Also, a DMEPOS supplier must permit CMS or its agent to conduct on-site inspections to determine supplier compliance with each of the enrollment standards. 42 C.F.R. § 424.57(c)(8). CMS will revoke a currently-enrolled Medicare supplier's billing privileges if CMS or its agent determines that the supplier fails to meet any supplier enrollment standard. Section 424.57(e); *see also* section 424.535(a)(5)(ii) (reasons for revocation include a “supplier has failed to satisfy any or all of the Medicare enrollment requirements”); *1866ICPayday.com*, DAB No. 2289, at 13 (2009)(“[F]ailure to comply with even one supplier standard is a sufficient basis for revoking a supplier's billing privileges.”).

In addition, if an on-site review reveals that a supplier is “no longer operational[,]” CMS may revoke the supplier’s Medicare billing privileges. Section 424.535(a)(5)(ii). A provider or supplier is operational if it “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 [the] items or services [being rendered].” 42 C.F.R. § 424.502. The effective date of revocation is the date CMS determines the supplier was no longer operational. 42 C.F.R. § 424.535(g).

## **Case Background**

The facts in this case are undisputed. On Monday, December 3, 2012, at approximately 9:10 a.m., an inspector of the Supplier Audit and Compliance Unit (SACU) of the National Supplier Clearinghouse (NSC) operated by Palmetto GBA, a Medicare Administrative Contractor on behalf of CMS, attempted to conduct an unannounced site inspection at Petitioner’s facility to determine whether Neb Group was currently in compliance with Medicare enrollment standards. CMS Exhibit (CMS Ex.) 2, at 2. The attempt occurred during Neb Group’s posted hours of operation, which were Monday through Wednesday, 9:00 a.m. to 5:00 p.m., Thursday, 9:00 a.m. to 3:00 p.m. and closed Fridays and Saturdays. *Id.*; CMS Ex. 1, at 16. The inspector found that the door was

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<sup>2</sup> The current version of the Act can be found at [www.ssa.gov/OPHome/ssact/comp-ssa.htm](http://www.ssa.gov/OPHome/ssact/comp-ssa.htm). Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

locked and no one responded to her knock on the door. CMS Ex. 2, at 2. A note posted on the door stated “Just Stepped Out, Be Back Soon!” *Id.*; CMS Ex. 1, at 20, 25. The inspector thus concluded that the facility was closed. CMS Ex. 1, at 2. The next day, December 4, 2012, at approximately 1:44 p.m., the SACU inspector made a second attempt to inspect Neb Group’s facility but once again she found that the door was locked, and she received no answer to her knock on the door and was not able to enter the premises to complete her on-site review. CMS Ex. 2, at 3. The same note was posted on the facility’s door. *Id.*; CMS Ex. 1, at 20, 25.

In a letter dated January 4, 2013, CMS informed Neb Group that its Medicare supplier number was revoked with a retroactive effective date of December 4, 2012. CMS Ex. 1, at 30. The letter advised Neb Group that pursuant to 42 C.F.R. § 424.535(g), it was barred from re-enrollment in the Medicare program for a period of two years. *Id.* The letter stated that on both December 3 and again on December 4, 2012, a NSC representative visited Neb Group’s facility during its posted hours of operation to conduct an inspection. *Id.* at 31. The letter further stated that those two visits were unsuccessful because the facility was closed on both occasions and that “[b]ecause we could not complete an inspection of your facility, we could not verify your compliance” with Medicare enrollment standards for DMEPOS suppliers. *Id.* Based on these facts, the letter further stated that Neb Group was not in compliance with section 424.57(c)(7), and was “not operational to furnish Medicare covered items and services . . . in violation of section 424.535(a)(5)(ii) . . . and all supplier standards as defined in 42 C.F.R. § 424.57(c).” CMS Ex. 1, at 31.

In a letter dated February 15, 2013, Neb Group requested reconsideration. CMS Ex. 1, at 37. Neb Group’s reconsideration request enclosed a Corrective Action Plan (CAP) and supporting documentation, including the facility’s policy on “Tardiness and Absenteeism.” *Id.* at 37-44. In a letter dated March 22, 2013, a Medicare hearing officer issued a reconsideration decision that upheld the revocation of Neb Group’s Medicare billing privileges under section 424.57(c)(7). CMS Ex. 1, at 1-4. The hearing officer’s “Summary of Submitted Documentation” stated: “The site inspector was unable to complete a site investigation . . . because the facility location on record with the NSC was not open at the times of the site visit attempts, and the site inspector was unable to verify compliance with supplier standards.” *Id.* at 3. The Medicare hearing officer issued an “Unfavorable Decision,” concluding that Neb Group “has not shown compliance with supplier standard 7.” *Id.* at 2-4.

Neb Group timely filed a request for a hearing before an ALJ on April 29, 2013, and included evidence related to its CAP previously submitted with its reconsideration request. ALJ Decision at 2.

CMS moved for summary judgment on June 6, 2013. In support of its motion, CMS contended that the undisputed facts demonstrate that Neb Group's enrollment was properly revoked under sections 424.57(e) and 424.535(a)(5)(ii) because the facility was not in compliance with the enrollment standards in sections 424.57(c)(7)(i)(C) and 424.57(c)(8). CMS Motion for Summary Judgment (MSJ) at 2, 5-6.

In response to CMS's motion, Neb Group stated: "Neb Group of Arizona does admit that we were not in compliance [with] supplier standard 7 on 12-3-12 and 12-4-12." Letter dated 7/13/12, at 1. The letter further stated that there is "no excuse for our employee being late for work on 12-3-12." *Id.* The letter further indicated that on December 4, that same employee became ill and that another employee who was covering the office had to leave the facility to respond to an emergency with the appropriate medical equipment. *Id.* The letter went on to explain that Neb Group had implemented a number of measures, including unannounced phone calls and on-site visits and the installation of a camera which allows the owner to view the office at all times "in order to ensure that it is properly manned." *Id.* Finally, Neb Group stated: "All we [are] asking is for probation with more frequent site visits if that is required." *Id.*

### **ALJ Decision**

On October 25, 2013, the ALJ granted CMS's motion for summary judgment. The ALJ found that summary judgment was appropriate because there were no material issues of fact in dispute and because the only issues to be decided were issues of law. ALJ Decision at 6-7. The ALJ concluded that CMS had a basis to revoke Neb Group's Medicare billing privileges pursuant to section 424.57(e) for failure to meet Supplier Standard 7 because undisputed facts showed that the facility's practice location was not accessible and staffed when visited by the SACU inspector on December 3 and 4 during its posted hours of operation and because Neb Group admitted that it was not in compliance with Supplier Standard 7 on those dates.<sup>3</sup> *Id.* at 11-12. Based on the same facts, the ALJ further concluded that there was a basis for CMS to revoke the Medicare billing privileges of Neb Group pursuant to section 424.535(a)(5)(ii) because the facility was not operational within the meaning of section 424.502. *Id.* The ALJ explained that it was necessary to reach this issue because CMS determined the effective date of the revocation based on 42 C.F.R. § 424.535(g), which governs where the facility was found to be no longer operational. *Id.* at 11.

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<sup>3</sup> As previously noted, CMS also moved for summary judgment on the ground that Neb Group was not in compliance with section 424.57(c)(8). However, the ALJ did not address this alleged basis for revocation in his decision. In addition, the reconsideration decision, which defines the legal issues underlying Neb Group's appeal to the ALJ, did not cite noncompliance with Supplier Standard 8 as a basis for the revocation.

The ALJ also concluded that there is no regulatory requirement that a supplier be granted an opportunity to submit a CAP or correct deficient compliance prior to revocation under section 424.57(e) and that Neb Group had no right to an ALJ review of CMS's rejection of its CAP. ALJ Decision at 12. Finally, the ALJ concluded that that he had no authority to grant equitable relief to Neb Group. *Id.*

Neb Group timely appealed the ALJ Decision to the Board on November 15, 2013.

### **Standard of Review**

Whether summary judgment is appropriate is a legal issue that we address de novo. *Elant at Fishkill*, DAB No. 2468, at 5-6 (2012), citing *Lebanon Nursing and Rehab. Ctr.*, DAB No. 1918, at 3-5 (2004). Summary judgment is appropriate if there are no genuine disputes of fact material to the result. *Everett Rehab. and Medical Ctr.*, DAB No. 1628, at 3 (1997). In reviewing whether there is a genuine dispute of material fact, we view proffered evidence in the light most favorable to the non-moving party. *Kingsville Nursing Rehab. Ctr.*, DAB No. 2234, at 3-4 (2009); *Madison Health Care, Inc.*, DAB No. 1927, at 3-5 (2004), and cases cited therein. The standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. *Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare and Medicaid Programs*, <http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html>; *Golden Age Skilled Nursing & Rehab. Ctr.*, DAB No. 2026, at 7 (2006).

### **Analysis**

- 1. The ALJ properly granted summary judgment in favor of CMS under section 424.57(e) because there was a valid legal basis for revocation of Neb Group's Medicare billing privileges for its failure to meet the requirements of Supplier Standard 7.**

Based on the undisputed facts in this case, the ALJ correctly concluded that Neb Group's practice location was not accessible and staffed on either December 3 or 4, 2012 during its posted office hours. ALJ Decision at 11. The ALJ concluded that section 424.57(e) empowers CMS to revoke the Medicare billing privileges of a supplier that is found not to meet the Medicare enrollment standards established by section 424.57(c). *Id.* Thus, the ALJ upheld the revocation based on "an admitted violation of [section] 424.57(c)(7)(i)(C)." *Id.*

Upon appeal to us, Neb Group does not challenge the ALJ's finding that Neb Group conceded its noncompliance with Supplier Standard 7 or any of the ALJ's conclusions of law. Because Neb Group admittedly was not accessible and staffed when the NSC inspector attempted to conduct an on-site review during its posted hours of operation, the

ALJ correctly concluded that Neb Group did not meet the requirements of section 424.57(c)(7)(i)(C). ALJ Decision at 11. *See Complete Home Care, Inc.* DAB No. 2525, at 5-6 (2013) (upholding revocation under former section 424.57(d) when supplier's office was temporarily closed during its posted hours of operation in violation of section 424.57(c)(7)(i)(C)). Failure to meet even one supplier standard is a sufficient basis for CMS to revoke a supplier's Medicare billing privileges under section 424.57(e). *1866ICPayday*, DAB No. 2289, at 13. Indeed, as the ALJ correctly observed, section 424.57(e) provides that "CMS will revoke" a DMEPOS supplier's billing privileges for any noncompliance with the supplier enrollment standards established by sections 424.57(b) or (c). ALJ Decision at 11. Thus, we conclude that the ALJ properly granted summary judgment in favor of CMS, concluding that there was a valid legal basis for revocation of Neb Group's Medicare billing privileges under section 424.57(e) due to its failure to meet the requirements of Supplier Standard 7.

As it did before the ALJ and Medicare hearing officer, Neb Group focuses primarily on its compliance efforts undertaken since the revocation and asks the Board to be placed on probation in lieu of having its billing privileges revoked. Neb Group also repeats the arguments it raised before the ALJ. Neb Group states that it "was inexcusable that [the employee] was not at his posting on the first site visit[;] that is why we implemented the [corrective] policies along with the camera." Petitioner's Request for Review at 2. Neb Group further states that "second [there] was a true emergency at a clinic while [a different employee] was covering in the afternoon since [the first employee] had gone home sick." *Id.* Neb Group requests that the Board take these extenuating circumstances into account, and states that it has "tried to implement corrective actions that this will never happen again." *Id.* Neb Group goes on to state: "Allow us a chance to prove our corrective actions by reinstating [our] Medicare supplier number. Put us on probation with more frequent unannounced site visits if necessary." *Id.*

The ALJ concluded that the arguments raised by Neb Group essentially seek equitable relief and that he lacked the authority to grant equitable relief. ALJ Decision at 12. We agree. The Board has consistently held that it (and the ALJs) lack the authority to restore a supplier's billing privileges on equitable grounds. *See Complete Home Care, Inc.* at 7. The Board (and the ALJs) are authorized to review only whether CMS has a legal basis to revoke a provider or supplier's billing privileges. *Letantia Bussell, M.D.*, DAB No. 2196, at 12-13 (2008). Thus, neither the actions allegedly taken by Neb Group to ensure future compliance with Supplier Standard 7, nor the alleged extenuating circumstances surrounding the noncompliance provide a basis for reversing the ALJ Decision upholding the revocation.<sup>4</sup>

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<sup>4</sup> To the extent that Neb Group's arguments imply that it should have been permitted to submit a CAP prior to the revocation, we also agree with the ALJ that section 424.57(e) does not contain any requirement to provide a supplier an opportunity to submit a CAP or correct any deficiencies before the revocation decision is made. ALJ Decision at 12.

**2. Because the reconsideration decision made no finding that Neb Group was not operational, the ALJ erred in granting summary judgment on the alternative ground in section 424.535(a)(5)(ii).**

Based upon the same set of facts discussed above, the ALJ also concluded that CMS had a legitimate basis to determine that Neb Group was not operational within the meaning of section 424.502 as of December 4, 2012, the date of the second attempted inspection, and therefore, there was a basis for revocation under section 424.535(a)(5)(ii). ALJ Decision at 11. Although CMS's initial determination (January 4, 2013) contained a finding that Neb Group was not operational and therefore subject to revocation under section 424.535(a)(5)(ii), the contractor's reconsidered determination did not. CMS Ex. 1, at 3. Neb Group's right of appeal was from the reconsidered determination, not the initial determination. 42 C.F.R. § 498.5(1)(2); *see also Benson Ejindu, d/b/a/ Joy Medical Supply*, DAB No. 2572, at 5 (2014). The reconsidered determination stated only that "Neb Group of Arizona has not shown compliance with supplier standard 7" as the legal basis for Petitioner's revocation. CMS Ex. 1, at 3. Thus, the only issue properly before the ALJ was whether there was a legal basis for revocation of Neb Group's billing privileges pursuant to section 424.57(e), not whether Neb Group was operational.

**3. The correct effective date for Neb Group's revocation based under section 424.57(e) for its failure to meet the requirements of Supplier Standard 7 is February 3, 2013.**

In light of our decision to sustain Neb Group's revocation solely based on section 424.57(e), we find it necessary to modify the effective date of that revocation.<sup>5</sup> In its January 4, 2013 notice of revocation, CMS advised Neb Group that its revocation date was made retroactive to December 4, 2012 because it was "not operational" on that date. CMS Ex. 1, at 30. In choosing the effective date, CMS was apparently applying section 424.535(g). That regulation states a general rule that the effective date of a revocation is 30 days from the date CMS mails the supplier notice of its revocation determination. However, if CMS issues a revocation based on section 424.535(a)(5)(ii), 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." As discussed, that exception cannot properly be applied in this case.

Because the sole basis for revocation in this case is Neb Group's admitted failure to meet Supplier Standard 7, the effective date of revocation should be determined in accordance with section 424.57(e)'s effective-date provision. As it currently appears in the Code of Federal Regulations, paragraph (d) of section 424.57 states that a revocation based on a

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<sup>5</sup> Because neither party raised the effective-date issue on appeal, the Board notified the parties of its proposed resolution of the issue in an April 10, 2014 letter and gave them an opportunity to comment. Neither CMS nor Neb Group submitted any comments.

violation of section 424.57(c) “is effective *15 days* after the [supplier] is sent notice of the revocation” (italics added). The regulation’s editorial note states that a January 2, 2009 final rule (74 Fed. Reg. 198) re-designated paragraph (d) of section 424.57 as paragraph (e) but that this and other changes to section 424.57 were not incorporated into the codified text of the regulation because of an “inaccurate amendatory instruction.” Also, on August 27, 2010, CMS published a final rule in the Federal Register which revised paragraph (e) (that is, the re-designated paragraph (d)) to extend the effective date of a revocation based on section 424.57(c) *from 15 to 30 days* after the supplier is notified of the revocation. Final Rule, *Medicare Program; Establishing Additional Medicare Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Supplier Enrollment Safeguards*, 75 Fed. Reg. 52,629, 52,648-52,649 (Aug. 27, 2010). CMS indicated that it was making this change “[i]n order to be consistent with [its] regulations at [42 C.F.R.] § 424.535(g).” *Id.* at 52,645. As re-designated and amended by the January 2, 2009 and August 27, 2010 final rules, the effective date provision in section 424.57 now provides in relevant part:

(e) Failure to meet standards — (1) Revocation. CMS revokes a supplier's billing privileges if it is found not to meet the standards in paragraphs (b) and (c) of this section. Except as otherwise provided in this section, the revocation is effective 30 days after the entity is sent notice of the revocation, as specified in § 405.874 of this subchapter. . . .

*Id.* at 52,648.<sup>6</sup> Applying that rule,<sup>7</sup> we conclude that the effective date of Neb Group’s revocation is February 3, 2013.

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<sup>6</sup> The reference to section 405.874 in section 424.57(e) is outdated. The relevant portions of that regulation have been moved to 42 C.F.R. § 405.800(b). *See* 77 Fed. Reg. 29,002, 29,016-29,017 (May 12, 2012). Section 405.800(b)(2) presently states that “[t]he revocation of a provider’s or supplier’s billing privileges is effective 30 days after CMS or the CMS contractor mails notice of its determination to the provider or supplier, except if the revocation is based on a Federal exclusion or debarment, felony conviction, license suspension or revocation, or the practice location is determined by CMS or its contractor not to be operational.”

<sup>7</sup> In its April 10, 2014 letter to the parties, the Board advised the parties of its preliminary analysis that it should apply section 424.57’s effective-date provision as amended by the final rule published in the August 27, 2010 Federal Register, even though the revision has not been incorporated into the Code of Federal Regulations. The Board cited statutes and case law indicating that lack of codification in the Code of Federal Regulations does not necessarily render a revision finally published in the Federal Register ineffective or legally invalid. *See, e.g.*, 44 U.S.C. § 1507 (stating that “[t]he contents of the Federal Register shall be judicially noticed”) and § 1510(a), (b) (providing that the Code of Federal Regulations is a codification of agency documents “having general applicability and legal effect” that are “promulgated by the agency by publication in the Federal Register”); 5 U.S.C. § 552(a)(1)(D) (requiring publication of “substantive rules of general applicability” in the “Federal Register”); *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384–85 (1947) (“Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents.”). Neither party objected to the Board’s analysis.



**Conclusion**

For the reasons explained above, we affirm the ALJ Decision to uphold the revocation of Neb Group's Medicare billing privileges under section 424.57(c)(7), but we modify the effective date to February 3, 2013.

\_\_\_\_\_/s/  
Sheila Ann Hegy

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

\_\_\_\_\_/s/  
Stephen M. Godek  
Presiding Board Member