Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

AR Testing Corp.
Docket No. A-15-69
Decision No. 2679
March 10, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

AR Testing Corp. (Petitioner), an independent diagnostic testing facility (IDTF), appeals the March 30, 2015 decision of an Administrative Law Judge (ALJ). *AR Testing Corp.*, DAB CR3741 (2015) (ALJ Decision). The ALJ upheld a determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's Medicare supplier number. The ALJ granted summary judgment for CMS, determining that CMS properly revoked Petitioner's supplier number because the undisputed evidence established that Petitioner was not operational and, therefore, revocation was proper.

Petitioner asks the Board to review the ALJ Decision. For the reasons stated below, we conclude that the ALJ did not err in upholding the revocation on summary judgment.

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 requirements for establishing and maintaining Medicare billing privileges are in 42 C.F.R. Part 424, subpart P. In order to receive payment for services furnished to Medicare beneficiaries, a provider or supplier – "supplier" includes an IDTF – must be "enrolled" in Medicare and maintain active enrollment status.[2] 42 C.F.R. §§ 424.500,

[1] The current version of the Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/ssact-toc.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 42 U.S.C.A. Ch. 7, Disp. Table.

[2] The regulations at 42 C.F.R. § 400.202 state that, unless the context indicates otherwise, "[s]upplier means a physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare." "Providers" include, *inter alia*, hospitals, nursing facilities, and comprehensive outpatient rehabilitation facilities. *Id.*

424.502, 424.505, 424.510, 424.516. CMS reserves the right, when deemed necessary, to perform on-site inspections of a provider or supplier to verify that the enrollment information submitted to CMS or its agents is accurate and to determine compliance with Medicare enrollment requirements. *Id.* § 424.510(d)(8).

CMS has authority to revoke a provider's or supplier's enrollment for any of the "reasons" in 42 C.F.R. § 424.535(a). One such "reason" is when a provider or supplier is found to be no longer operational upon on-site inspection. Section 424.535(a)(5) states:

> (5) *On-site review*. CMS determines, upon on-site review, that the provider or supplier is no longer operational to furnish Medicare covered items or services, or is not meeting Medicare enrollment requirements under statute or regulation to supervise treatment of, or to provide Medicare covered items or services for, Medicare patients. Upon on-site review, CMS determines that–
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> * * *
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> (ii) A Medicare Part B supplier [such as an IDTF] 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.

The term "operational" is defined in 42 C.F.R. § 424.502 to mean that --

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

In accordance with 42 C.F.R. § 498.5(l)(2), a prospective or existing supplier dissatisfied with a reconsidered determination issued under section 498.5(l)(1) is entitled to a hearing before an ALJ. If dissatisfied with the ALJ's decision, the prospective or existing supplier may seek Board review and judicial review of the Board's decision. 42 C.F.R. § 498.5(l)(3); 42 C.F.R. § 498.1(g) (stating that section 1866(j) of the Act provides for a hearing and judicial review for any provider or supplier whose application for enrollment or reenrollment in Medicare is denied or whose billing privileges are revoked).

Case Background[3]

Petitioner is a mobile IDTF.[4] ALJ Decision at 3. On February 12, 2014, 9:35 a.m., an inspector employed by a contractor for National Government Services, Inc. (NGS), a CMS Medicare Administrative Contractor, attempted to perform an unannounced inspection at 1640 Deer Park Avenue, Deer Park, New York (Deer Park Avenue), the address for its practice location that Petitioner provided on its application for revalidation of enrollment.[5] *Id.* at 3, citing P. Ex. 12, at 1 and CMS Ex. 1, at 2; CMS Ex. 3, at 16. The inspector reported that not only was he unable to locate a sign identifying Petitioner's facility, but he could not locate the facility in the building at all. The inspector reportedly informed an individual from another office in the building that he was attempting to inspect an IDTF, and that individual gave the inspector the telephone number for the IDTF. *Id.*, citing CMS Ex. 1, at 2-3. The inspector states that he left a voicemail message at that number, explaining that he had attempted to perform an inspection. CMS Ex. 1, at 3.

Later that day the inspector reports receiving a call from an individual who identified himself as Petitioner's owner. *Id.* According to the inspector, the owner informed him that Petitioner had moved from Deer Park Avenue to 84 Wood Hollow Road, Great River, New York (Wood Hollow Road), and offered to meet the inspector that day, but the inspector was en route to a different part of the state and was not available to meet the owner. *Id.* According to the owner, he was at Deer Park Avenue at 7:30 a.m. on February 12, 2014 to pick up equipment but later was, like the technicians working for Petitioner, off-site working in the field. Request for hearing (RFH) at 1, 3. The owner reports receiving the inspector's voicemail message left on the owner's cell phone. The owner disputes that he told the inspector that Petitioner had moved from one location to

[3] 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.

[4] The regulations in 42 C.F.R. § 410.33, which set out the basic Medicare enrollment requirements for IDTFs, do not define the term "independent diagnostic testing facility," but, as the term itself would indicate, an independent diagnostic testing facility provides diagnostic testing services, e.g., x-rays. *See generally* 42 C.F.R. § 410.33; Medicare Claims Processing Manual (MCPM), CMS Pub. 100-04, Ch. 35. An IDTF is "independent of a physician's office or hospital" and "may be a fixed location, a mobile entity, or an individual nonphysician practitioner." 42 C.F.R. § 410.33(a)(1). The preamble language in the 2007 final rule with comment period, effective January 1, 2008, helps explain the basic distinction between a fixed IDTF and a mobile IDTF. CMS said, "A fixed base IDTF performs all of its diagnostic testing at the practice location found on the Medicare enrollment application (CMS-855), whereas a mobile IDTF travels and performs its diagnostic tests at locations other than a single practice location." 72 Fed. Reg. 66,222, 66,287 (Nov. 27, 2007).

[5] Petitioner did not dispute before the ALJ, and does not now dispute, that Deer Park Avenue was its "practice location" on February 12, 2014. ALJ Decision at 3, citing P. Ex. 12, at 1; Petitioner's brief (P. Br.) at 3.

another. Rather, according to the owner, Petitioner operated two locations, at Deer Park Avenue and at Wood Hollow Road.[6] The owner also states that when he returned the inspector's call, he offered to meet the inspector later at Deer Park Avenue or Wood Hollow Road, but the inspector declined, stating that he had finished his inspections for the day and had to drive to another part of the state hours away. *Id.* at 3; P. Ex. 12, at 1-3.

The inspector states that, on or around February 12, 2014, he prepared his report on the attempted inspection. *See* CMS Ex. 1, at 3-4, 5-8. Among other findings, the inspector determined that Petitioner was not "accessible during regular business hours" and did not "maintain posted hours of operation." *Id.* at 7 (the boxes for the answer "NO" to the questions "Is the IDTF accessible during regular business hours?" and "Does the facility maintain posted hours of operation?" are marked with "X"). The inspector also marked "X" in the box for "NO" in answer to the question "Were you able to complete the site visit?" and noted that Petitioner's owner had informed him that Petitioner had moved to Wood Hollow Road. *Id.*

By initial determination dated March 19, 2014, NGS informed Petitioner that its Medicare billing privileges were revoked and its provider agreement was terminated, effective February 12, 2014, on the ground that Petitioner was "no longer operational." CMS Ex. 2, at 1, citing 42 C.F.R. § 424.535(a)(5). On appeal, by reconsidered determination dated August 8, 2014, NGS upheld its decision, again citing 42 C.F.R. § 424.535(a)(5) as grounds for revocation and stating that upon "a site visit . . . conducted at [the] practice location identified for [Petitioner] [at Deer Park Avenue] . . . [Petitioner's] business was [found] no longer operational."[7] CMS Ex. 5, at 1.

Petitioner requested a hearing before an ALJ. CMS moved for summary judgment, asserting, chiefly, that there was no dispute of material fact that, on February 12, 2014, Deer Park Avenue was unattended and not open to the public during normal business hours, with no signage posted, and therefore was not operational - a proper basis for revoking Petitioner's billing privileges. CMS's motion at 10-12. Petitioner opposed the motion, asserting that a mobile IDTF is not required to have personnel at its practice location at the moment of any site visit. Petitioner's response at 8-9. Petitioner asserted that it was operational at the Deer Park Avenue location on February 12, 2014. *Id.*

[6] Petitioner's application for revalidation of enrollment reflects both addresses, at Deer Park Avenue and at Wood Hollow Road. The former is identified as the practice location (CMS Ex. 3, at 16); the latter is identified as the correspondence address and the address to which "remittance notices or special payments" should be sent (*id.* at 10, 17).

[7] Both determinations cited a second ground for revocation, failure to report a change in location, but the ALJ decision addressed only the non-operational ground. Neither party challenges the ALJ's not addressing the second ground, and, as the ALJ noted, a revocation need only be upheld on one regulatory ground in order to be sustained. *See* ALJ Decision at 4, citing *Centro Radiologico Rolon, Inc.*, DAB No. 2579, at 7 (2014). Accordingly, our decision addresses only the non-operational ground.

Moreover, Petitioner raised questions about the authenticity, reliability, and sufficiency of CMS's evidence on the attempted inspection (e.g., contending that inspector took only one photograph of the façade of the facility; the photograph was not dated; the inspector's report was not signed or dated at the time it was allegedly prepared). *Id.* at 3-4, 7-8; P. Ex. 12, at 8-11.

The ALJ admitted all twelve of Petitioner's exhibits over CMS's objections. CMS objections (Jan. 16, 2015); ALJ March 19, 2015 Order. The ALJ then granted summary judgment, finding that Petitioner was not operational at Deer Park Avenue and concluding that CMS properly revoked Petitioner's billing privileges. ALJ Decision at 2, 4-5. The ALJ first noted that Petitioner conceded no one was at Deer Park Avenue at 9:35 a.m. on February 12, 2014. *Id.* at 3. The ALJ rejected Petitioner's arguments to the effect that Petitioner was nonetheless accessible during regular business hours because Petitioner's owner and technicians could be reached by telephone and the telephone numbers were allegedly posted on a sign at the facility as "not compatible with the regulations." *Id.* at 3-4. The ALJ said that "[a]n IDTF must be accessible to CMS and beneficiaries during regular business hours" under 42 C.F.R. § 410.33(g)(14)[8] and "[i]t is not operational [as defined in 42 C.F.R. § 424.502] if it is not open to the public and properly staffed." *Id.* at 4. And, the ALJ said, "Posting a telephone number does not satisfy the requirements that a supplier be open and accessible." *Id.*, citing *Complete Home Care, Inc.*, DAB No. 2525, at 5-6 (2013). The ALJ noted, moreover, that CMS must be but would not be able to perform an *unannounced* on-site inspection – important to protect the Medicare program against fraud and to ensure that the enrolled supplier remains viable – if an inspector has to call someone at the facility to arrange for access to it. *Id.*, citing 76 Fed. Reg. 5862, 5869 (Feb. 2, 2011).

On whether Petitioner had failed to have a visible sign posted as required under 42 C.F.R. § 410.33(g)(14)(ii), the ALJ noted that early in the proceedings "Petitioner conceded that 'at the time of the visit' construction workers 'had very recently taken down [Petitioner's] sign, and it had not yet been replaced.'" *Id.*, quoting RFH at 4 ¶17. The ALJ also observed, however, that later Petitioner was "less definitive." *Id.* The ALJ wrote:

[8] This regulation, cited by the ALJ, is specific to IDTFs (although similar rules apply to other kinds of suppliers and providers). Section 410.33(g)(14) provides that an IDTF must "[p]ermit CMS, including its agents, or its designated fee-for-service contractors, to conduct unannounced, on-site inspections to confirm the IDTF's compliance with these standards [i.e., those in section 410.33(g)]. The IDTF must – (i) Be accessible during regular business hours to CMS and beneficiaries; and (ii) Maintain a visible sign posting its normal business hours."

> Without declaring outright that a visible sign was posted, [Petitioner] maintains that "[Petitioner] had signage on site." . . . It submits undated photographs showing what appear to be temporary signs. One sign, on an exterior door, has the facility name on it. A second sign, next to the door, says that the office hours are Monday through Friday, 9 a.m. to 5 p.m. and "By Appointment." [Petitioner's] Owner . . . alludes to the signage, without specifically saying that any sign was posted on February 12: "As indicated on [Petitioner's] signage, [Petitioner] was available by appointment and could be contacted during regular business hours. Copies of photographs showing a fair and accurate likeness of [Petitioner's] entrance . . . are annexed as [Petitioner's] Exhibit 11." . . . .

Id. (citations to exhibits and footnote omitted).

The ALJ noted the differences between the photograph of the building taken by the inspector, which showed "a significant amount of snow on the ground, the shrubbery, and the building's roof," and Petitioner's photographs, which did not show any snow. *Id.* at n.5, citing CMS Ex. 1, at 8 and P. Ex. 11, at 1, 2, 3. Nevertheless, the ALJ said, because she must draw all reasonable inferences in the light most favorable to Petitioner, she would accept, for summary judgment purposes, that the signs as depicted in Petitioner's photographs had been posted consistently at the entrance of Deer Park Avenue, including on February 12, 2014. *Id.* at 4. Even so, the ALJ also stated, it was ultimately immaterial whether the signs were posted on February 12, 2014 because "[t]he undisputed evidence establish[ed] that the facility was not accessible for inspection during regular business hours and was not operational." *Id.* The ALJ concluded that these findings supported revocation of Petitioner's Medicare supplier number. *Id.* at 4-5, citing *Centro Radiologico Rolon, Inc.*, DAB No. 2579, at 7 (2014).

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address *de novo*. *1866ICPayday.com*, DAB No. 2289, at 2 (2009), citing *Lebanon Nursing & Rehab. Ctr.*, DAB No. 1918 (2004). Summary judgment is appropriate when the record shows that there is no genuine dispute of fact material to the result. *See 1866ICPayday.com* at 2, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). 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*, which are available at http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html.

Analysis

In general Petitioner raises two arguments. Its chief argument is that, contrary to the ALJ's finding that it was not operational, it was operational and otherwise compliant with Medicare participation requirements on February 12, 2014 and CMS therefore failed to make even a *prima facie* showing of a basis for revocation. The gravamen of Petitioner's chief argument is that CMS, and the ALJ, failed to consider Petitioner's status as a mobile IDTF in determining that Petitioner was not operational. According to Petitioner, a determination of whether a mobile IDTF is in compliance with Medicare participation requirements should be made based on whether its mobile unit(s) or off-site location(s), not whether its practice location (i.e., Deer Park Avenue), is in compliance. Because its mobile unit(s) or off-site location(s) was (were) in compliance, Petitioner says, there is no basis for revocation. *See* P. Br. at 1, 3-4, 8-9. Petitioner also raises an alternative argument to the effect that the existence of disputed issues of material fact made the ALJ's ruling against Petitioner on summary judgment erroneous. *See id.* at 2, 4-8.

The ALJ upheld the revocation on summary judgment on undisputed evidence that Petitioner was not operational within the meaning of 42 C.F.R. § 424.502 on February 12, 2014, the date of the attempted inspection. We recognize that the ALJ Decision at times cited or referred to the "accessibility" requirement for IDTFs in section 410.33(g)(14) – not cited or discussed as a basis for revocation by NGS. The Board has long held that, in cases of revocation of providers' and suppliers' billing privileges, the issues on appeal to an ALJ are limited to the bases for revocation stated in the reconsidered determinations. *Neb Group of Arizona LLC*, DAB No. 2573, at 7 (2014). We find no error here, however, because the ALJ ultimately upheld the revocation because she found undisputed evidence that Petitioner was not operational (within the meaning of section 424.502). We, like the ALJ, conclude that CMS properly revoked Petitioner's supplier number pursuant to section 424.535(a)(5) because the undisputed evidence establishes that Petitioner was not operational.

1. *The undisputed evidence demonstrates that Petitioner was not operational on the date of the attempted inspection and, accordingly, the ALJ appropriately ruled on summary judgment that CMS had a basis for revoking Petitioner's supplier number under 42 C.F.R. § 424.535(a)(5).*

As explained above, CMS revoked Petitioner for being "no longer operational" under section 424.535(a)(5) after a failed unannounced inspection attempt of Deer Park Avenue on February 12, 2014. To be "operational" in accordance with 42 C.F.R. § 424.502 means that a 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."

It is undisputed that Petitioner's practice location at Deer Park Avenue (the only practice location identified in Petitioner's enrollment revalidation application) was unattended on February 12, 2014. Therefore, Petitioner's practice location was not "staffed" or "open to the public for the purposes of providing health care related services" that day. And, because it was not open, it also was not available for an unannounced inspection CMS or a contractor is authorized to conduct. Indeed, Petitioner's owner acknowledged that Deer Park Avenue was closed and unstaffed while he and Petitioner's technicians were off-site at mobile unit(s). P. Ex. 7, at 1 ("On February 12, 2014 . . . our staff was in the field working . . . [and] no employees were available to meet and speak to the inspector . . . ."); P. Ex. 12, at 2 ¶5 (owner's declaration, stating that he was "out in the field at the remote location and conducting [Petitioner's] business at a medical office in Flushing, Queens . . ."); RFH at 4, ¶19 ("no person was available to see walk-in patients at the time that the unannounced site visit occurred"). Petitioner also does not argue that the absence of staffing was an aberration or that the practice location was regularly open to the public to provide services. Thus, Deer Park Avenue was not "operational" on February 12, 2014, and CMS had a basis for revoking Petitioner's billing privileges under section 424.535(a)(5).

Petitioner points out that its owner and the inspector spoke over the telephone later on the day of the attempted inspection and that the owner was willing to meet the inspector the same day so the inspection could go forward. P. Ex. 12, at 2-3 ¶7. It is undisputed, however, that the telephone number the inspector had called was the owner's cell phone number, and the owner was not at the premises. *See* P. Ex. 12, at 2, ¶5.

In his declaration, Petitioner's owner states that Deer Park Avenue was properly equipped with two telephones (P. Ex. 12, at 8 ¶33, 9 ¶35), referring to its photographic evidence (P. Ex. 11, at 6, 7 (copies of photographs purportedly showing the interior of Deer Park Avenue, which appear to show telephones). He avers that the inspector could have contacted Petitioner's "regular office number, where his call would have been answered" (P. Ex. 12, at 3 ¶10) or its "listed telephone number, from which the business can be easily contacted" (*id.* at 9 ¶37). He further contends that Petitioner "was available by appointment and could be contacted during regular business hours" through the "main office number" (*id.* at 11 ¶44).[9] The declaration does not clearly explain what is meant by its references to "regular," "listed," and "main" office number(s). But, even assuming that at least one telephone was located in Deer Park Avenue with an active number on

[9] We note that IDTFs are required to keep a "[p]rimary business phone located at the designated site of the business." 42 C.F.R. § 410.33(g)(5)(i). For mobile IDTFs, the primary business phone must be located "within the home office of the mobile IDTF units." *Id.*

February 12, 2014, the undisputed fact is that no one was at Deer Park Avenue that day to answer the telephone. In short, even if Deer Park Avenue was "equipped" to the extent of having at least one telephone, it was not appropriately "staffed" in that no one was present to operate that equipment or receive visitors.[10]

According to Petitioner, however, a mobile IDTF, unlike a fixed-location IDTF, "must be recognized as operational based on its availability to see patients at the mobile unit during regular business hours, a criterion which was assuredly satisfied in this case" (P. Br. at 3) because Petitioner's owner was providing services at a mobile site when the inspector arrived at Deer Park Avenue (*id.* at 1). It asserts that "[t]he mobile IDTF was available for inspection by [the inspector] if he had gone to visit it" (*id.* at 3), and "[m]embers of the general public easily could have visited and obtained services [at the mobile site]," and members of the public did indeed visit the mobile site to receive services (*id.* at 4). There is no requirement, Petitioner says, that the office location of a mobile IDTF (e.g., Deer Park Avenue) have someone physically at the office at all regular office hours. *Id.* at 4. Petitioner states: "The statute and regulations absolutely do not require that an IDTF be available for inspection at all times in one place. A mobile IDTF could not operate if it were required to be stationary." *Id.* at 7. Thus, Petitioner argues, it should have been found operational on February 12, 2014 even though its practice location was unattended, so long as Petitioner was available to provide or was providing IDTF services somewhere off-site where beneficiaries or inspectors could have visited.[11]

[10] We also note that in sub-regulatory guidance CMS wrote that "IDTFs may not use 'call forwarding' or an answering service as their primary method of receiving calls from beneficiaries during posted operating hours." Medicare Program Integrity Manual (MPIM), CMS Pub. 100-08, Ch. 15, § 15.5.19.1. This language tends to reinforce the importance of an IDTF's accessibility to beneficiaries. Being available primarily or only by voicemail or answering service would impede access to the IDTF.

[11] The regulations identify some differences in treatment between fixed-location IDTFs and mobile IDTFs. For example, under section 410.33(g)(15), fixed-base IDTFs are subject to certain restrictions, like prohibition against leasing or subleasing their operations or practice locations to other Medicare-enrolled individuals or organizations, from which mobile IDTFs are exempt. However, most of section 410.33(g), which enumerates the basic performance standards for IDTFs, does not expressly distinguish fixed-location IDTFs from mobile IDTFs, and we find nothing in the regulations indicating that a mobile IDTF can establish operational status based only on the status of its mobile unit at the time of inspection or that the practice location of a mobile IDTF need not be operational.

The argument that mobile IDTFs are somehow exempt from the requirement to meet the definition of being operational at their practice location is not sustainable based on the content and regulatory history of the IDTF requirements. In revising IDTF regulations, CMS explained in relation to section 410.33(g)(3)[12]:

> [W]e are adopting a position that IDTF performance standards apply to the home location of the mobile IDTF, not the mobile vehicle. Accordingly, the home location of the mobile IDTF, not the mobile IDTF vehicle, is required to maintain patient records, a primary business phone, and meet all other performance standards met by fix[ed] location IDTFs.

Final rule with comment period, 71 Fed. Reg. 69,624, 69,699 (Dec. 1, 2006). Also, CMS explained its position on section 410.33(g)(14)'s "accessibility" requirement, stressing that, for a mobile IDTF, its "home location" or "fixed location," as opposed to its mobile unit, will be looked to in order to determine whether the IDTF is accessible. CMS said:

> We are clarifying supplier standard number 14 [i.e., section 410.33(g)(14)] that fixed and mobile IDTFs are required to grant CMS, or our designated fee-for-service contractors, access to the IDTF physical location, all equipment, and beneficiary medical records during normal business hours . . . . If the IDTF denies CMS or our designated fee-for-service contractor access to its fixed located [sic] or the home location for a mobile vehicle, the IDTF's Medicare enrollment will be denied if initially enrolling or revoked if currently enrolled in the Medicare program.

Id.

The quoted passages from the preamble, considered together, mean that where, as here, an IDTF operates as a mobile IDTF, CMS will look to the compliance or noncompliance of the practice location of the IDTF, not merely its mobile unit(s) or off-site location(s). CMS thus clarified how it would evaluate the compliance of mobile IDTFs. Accordingly, Deer Park Avenue, not any off-site location or mobile unit at which Petitioner's owner (or anyone else working for Petitioner) happened to be on February 12, 2014, had to be found operational under section 424.535(a)(5) upon a site visit. It is

[12] Section 410.33(g)(3) concerns the maintenance of a physical facility on an appropriate site, which may not be a post office box, commercial mailbox, hotel or motel. It provides that practice locations for all IDTFs, including mobile units, must contain space for appropriate equipment, although those that only provide services remotely and do not see beneficiaries at their practice locations need not provide hand washing and patient privacy accommodations. Also, all IDTFs must store business records and current medical records at the practice location of the IDTF or IDTF home office, not within a mobile unit.

undisputed that Deer Park Avenue was not properly staffed and open to beneficiaries or the inspector on February 12, 2014, and therefore not operational. Therefore, Petitioner's argument that it sufficed to show it was operational if its owner and/or its technicians were at mobile site(s) serving clients and could have met an inspector there is meritless.

Petitioner's factual allegations to the effect that its owner and/or technicians were available to the public and providing services off-site at the time the inspector visited Deer Park Avenue, therefore, do not raise material disputes of fact. *See* P. Br. at 3 ("[Petitioner's owner] stated in his Declaration [P. Ex. 12] that he was providing services in the mobile IDTF in another location at the time of the unannounced site visit at the office address."); RFH at 3, ¶13 (alleging that on February 12, 2014 the owner told the inspector over the telephone that he was "in the field, as were [Petitioner's] other technicians"). We note that even if we accepted Petitioner's position that its compliance should have been judged at its mobile site(s), which we do not, Petitioner has offered no evidence that a beneficiary (much less an inspector) could have determined how to access Petitioner's services from its practice location. While the signs shown in Petitioner's photographs, assuming they were posted on Wednesday, February 12, 2014, show IDTF's office hours as "Monday-Friday 9 am-5 pm By Appointment," they do not include a telephone number or information about the location(s) of Petitioner's mobile unit(s). *See, e.g.*, P. Ex. 11, at 8. Thus, Petitioner's signage does not provide clear guidance as to when and how Petitioner's services could be accessed. *See Ita Udeobong, d/b/a Midland Care Medical Supply and Equipment*, DAB No. 2324, at 7 (2010)("The purpose of requiring suppliers to post their hours of operation is . . . to facilitate both on-site inspections and transactions with beneficiaries in need of items or services."). We also agree with the ALJ that merely being available by telephone does not mean that a supplier is accessible and staffed. ALJ Decision at 4, citing *Complete Home Care, Inc*., DAB No. 2525, at 5-6 (2013)(involving a different type of supplier, but one also required to maintain a primary business telephone on site).

2. Petitioner's remaining arguments, chiefly alleging defects concerning the attempted inspection and CMS's evidence concerning the attempted inspection, do not raise any dispute of material fact that would affect the outcome of this appeal.

Petitioner makes additional attempts to identify disputes of material fact that made decision by summary judgment error. *See* P. Br. at 2, 4-8. First, Petitioner attacks the inspector's testimony and report as lacking reliability. Petitioner characterizes the inspector's work as "very sloppy, hurried, inaccurate and misleading." *Id.* at 5. Petitioner denies that the inspector made efforts to "locate and enter the place of business of this mobile IDTF" (*id.*) and implies that the inspector's work was wanting because the inspector made no additional attempt to personally inspect Petitioner's premises before preparing his report (*id.* at 5, 6). Moreover, Petitioner says, the inspection report and inspector's supporting affidavit (together admitted as CMS Exhibit 1) are factually

inaccurate and incomplete and, therefore, unreliable. As one example, Petitioner notes that the inspector did not provide any explanation for why he checked the boxes for "NO" to indicate negative inspection findings (e.g., "no sink; no bathroom") when he had not even gained entry into the facility. *Id.* at 6.

None of these arguments raises a genuine dispute of material fact because Petitioner's factual concessions alone establish the material facts that support summary judgment upholding the revocation. In any case, Petitioner points to no evidence inconsistent with the inspector's statement that he did attempt to locate Petitioner's facility at the building, "check[ing] every office in the building," but was unable to do so. CMS Ex. 1, at 2. Petitioner does not dispute that Deer Park Avenue was unattended, however, so it is immaterial what efforts the inspector made to locate the correct office. RFH at 4 ¶19. It was not unreasonable (*see* P. Br. at 5, 6) for the inspector to check the boxes in the negative since he could not gain the entry necessary to potentially make the opposite determination. In any case, it is, again, immaterial because the basis for Petitioner's revocation is not that it lacked particular required equipment, but that the practice location was not operational on February 12, 2014. Since it is undisputed that the practice location was not open or staffed, and we have found that sufficient under the circumstances here to demonstrate that it was not operational, the credibility of the inspector's report is immaterial.

Also, citing ALJ and Board decisions involving the revocation of billing privileges of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) suppliers where at least two inspection attempts were made before revocation, Petitioner complains that a single inspection attempt here should not have been the basis for revocation. P. Br. at 5-6. We find no merit in this argument. ALJ decisions do not bind the Board or other ALJs, *Lopatcong Ctr.*, DAB No. 2443, at 12 (2012), and Petitioner points to no Board decision holding (or regulation providing) that a given number of inspections must occur in order for CMS to lawfully revoke a supplier's Medicare participation or billing privileges. The mere fact that certain revocation decisions upheld by the Board involved factual contexts where more than one inspection occurred does not constitute a holding that more than one inspection must occur before a supplier can be found non-operational. We need not and do not decide in this case whether a single episode in which a provider or supplier is closed, unattended, and inaccessible during the hours it purports are its regular business hours would always suffice, on its own, to establish non-operational status. It is sufficient that Petitioner, based on its own admissions, was not operational at its practice location upon the inspection attempt.

Conclusion

Based on the foregoing reasons, we conclude that Petitioner's billing privileges were lawfully revoked and uphold the ALJ Decision.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Susan S. Yim
Presiding Board Member