Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Advance Group LLC
Docket No. A-16-10
Decision No. 2686
April 14, 2016

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

The Centers for Medicare & Medicaid Services (CMS) appeals the August 17, 2015 decision of an Administrative Law Judge (ALJ). *Advance Group LLC*, DAB CR4126 (2015) (ALJ Decision). The ALJ reversed CMS's determination to revoke the Medicare enrollment and billing privileges of Advance Group LLC (Advance Group, Petitioner), a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) located in Pikesville, Maryland. The ALJ concluded that there was no basis for revocation because, contrary to what CMS found, Advance Group met the requirement at 42 C.F.R. § 424.57(c)(7) that it be accessible and staffed during posted hours of operation.

For the reasons below, we reverse the ALJ's decision that Advance Group complied with section 424.57(c)(7), and we uphold CMS's revocation of Advance Group's enrollment and billing privileges based on that section. We hold, however, that Advance Group's revocation became effective on July 30, 2014, instead of the effective date imposed by CMS, May 5, 2014.

Legal Background

The Medicare program is administered by CMS, which in turn delegates certain program functions to private contractors. Social Security Act §§ 1816, 1842, 1874A (42 U.S.C. §§ 1395h, 1395u, 1395kk-1); 42 C.F.R. § 421.5(b).

In order to maintain Medicare enrollment and associated billing privileges, a DMEPOS supplier must be in compliance with the standards in paragraphs (1) through (30) of 42 C.F.R. § 424.57(c). CMS, through its contractors, performs on-site inspections to verify compliance with these and other Medicare requirements. *See* 42 C.F.R. §§ 424.57(c)(8), 424.517.

CMS is authorized to revoke a DMEPOS supplier's Medicare enrollment for noncompliance with any of the standards in section 424.57(c). 42 C.F.R. § 424.57(d).[1] As relevant here, section 424.57(c), titled "*Application certification standards*," states:

> The supplier must meet and must certify in its application for billing privileges that it meets and will continue to meet the following standards:
>
> *****
>
> (7) Maintains a physical facility on an appropriate site. An appropriate site must meet all of the following:
> (i) Must meet the following criteria:
>
> *****
>
> (B) Is in a location that is accessible to the public, Medicare beneficiaries, CMS, NSC [National Supplier Clearinghouse, a Medicare contractor], and its agents.
> (C) Is accessible and staffed during posted hours of operation.

In addition, CMS is authorized to revoke a supplier's enrollment for any of the "reasons" listed in section 424.535(a), including the following reason in paragraph (5):

> *On-site review*. . . . .Upon on-site review, CMS determines that—
>
> *****
>
> (ii) A Medicare Part B supplier is no longer operational to furnish Medicare covered items or services . . . .

The term "operational" is defined in section 424.502 to mean—

> 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.

Factual Background[2]

On May 2, 2014 and again on May 5, 2014, a site visit inspector working for an NSC contractor attempted to inspect Advance Group's office. CMS Ex. 1, at 8. The inspector's report states:

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[1] The editorial note following section 424.57 in the 2009-2014 Code of Federal Regulations (C.F.R.) states that a January 2, 2009 final rule (74 Fed. Reg. 198) re-designated paragraph (d) of section 424.57 as paragraph (e).

[2] The factual information in this section 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. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact.

> 1st attempt made on 5/2/14 @ 11:45 am. Sign on door said open, door was locked, I knocked and no one answered.
> 2nd attempt was made on 5/5/14 @ 10:45 am, Sign on door said open, door was locked, I knocked and no one answered.

CMS Ex. 1, at 13. The report also notes that Advance Group's posted hours of operation were Monday through Friday, 9:00 a.m. – 5:00 p.m., and Saturday, 9:00 a.m. – 1:00 p.m. *Id*. at 9. The report includes photographs of the glass front door of Advance Group's office, including two photographs (one from each visit) that show "a doorbell on the left side of Petitioner's front door." ALJ Decision at 8, citing CMS Ex. 1, at 14 (black and white photographs); *see also* CMS Ex. 2, at 11 (identical photographs in color). A close-up photograph from the second visit shows three telephone phone numbers (including one toll-free number) on Advance Group's front door. CMS Ex. 1, at 14; CMS Ex. 2, at 11.

In a letter dated June 30, 2014, NSC notified Advance Group that, based on the inspector's report that "the doors were locked and no one answered" when she attempted to visit Advance Group's office on May 2, 2014 and May 5, 2014, Advance Group's Medicare supplier number (i.e., its enrollment and billing privileges) was revoked retroactive to May 5, 2014. CMS Ex. 1, at 18. NSC also stated that pursuant to 42 C.F.R. § 424.535(c), Advance Group "is barred from re-enrolling for a period of two (2) years in the Medicare program from the effective date of the revocation." *Id*.

Advance Group timely requested reconsideration by a NSC hearing officer (*id*. at 22-23) and later submitted additional documents to the hearing officer including "claims and delivery tickets for items delivered to Petitioner's customers on the dates of the attempted site visits; attestations from the UPS® drivers, FedEx® delivery personnel, Petitioner's accountant, and sales representatives in support of its claim that it was staffed and accessible to the public on the days of the attempted site visits." ALJ Decision at 9; CMS Ex. 1, at 31-65. The hearing officer issued an "unfavorable decision," stating that Advance Group "has not shown compliance with supplier standard 7 . . . [and] cannot be granted access to the Medicare Trust Fund by way of a Medicare supplier number." Ltr. dated 7/25/14 (attached to hearing request) at 4. The hearing officer's decision refers only to the attempted site visits on May 2, 2014 and May 5, 2014, apparently because evidence of the April 10, 2014 visit was not provided to the hearing officer. *Id.* at 1, 3; ALJ Decision at 6.

Advance Group requested an ALJ hearing on the reconsideration decision but later waived an oral hearing and requested judgment on the pleadings and documentary evidence. ALJ Decision at 2. CMS did not object or request an oral hearing, and the ALJ cancelled the hearing. *Id*.

CMS's exhibits include the declaration of the site visit inspector, in which she states that "[o]n both site visits, the sign on the door said 'OPEN,' but the door was locked;" the "lights in the office were off during at least one of the visits;" and she "could see merchandise and counters, but no people." CMS Ex. 2, at 2 (emphasis in original). In addition, the inspector states that she "rang the doorbell and knocked loudly during both visits;" waited "for several minutes both times;" "[r]ang and knocked twice on both visits;" and during one of the visits "walked around the building and waited a few more minutes, and then rang and knocked at the entrance again." *Id*. (emphasis in original). Finally, the inspector states that "[t]here was no response or any other sign of activity that anyone was in the office during either site visit." *Id.*

Advance Group's exhibits include the declarations of its office manager (P. Ex. 1) and its owner and operator (P. Ex. 2). The office manager states that she was present at the office on May 2, 2014 and May 5, 2014 from 9:00 a.m. to 5:00 p.m. and did not leave at any time. P. Ex. 1, at 2. She also states that on May 2 she –

> was in the facility alone from 9:00a.m. until 1:00p.m. when [the owner] came to the office as well. The door was locked until 1:00p.m., as I was there alone. Once he arrived he did unlock the door. However the doorbell was working because I did get several deliveries that day from representatives who rang the bell to gain access.

Id. In addition, she states that on May 5, she –

> did lock the door at 10:00a.m. after [the owner] left briefly to make a delivery. I did hear the doorbell that day and opened the door for delivery personnel as well as for customers.

Id. The owner states in his declaration that on May 2, he—

> arrived at the facility at 1:00p.m. and . . . [the office manager] had been there since 9:00a.m. that morning. I had been in constant contact with her that morning. She did have the door locked because she was at the facility alone . . . .

P. Ex. 2, at 1. The owner also states that on May 5, he—

> was in the facility from 7:00a.m. until 10:00a.m. then I returned at 1:30 p.m. [The office manager] came into work at 9:00a.m. that day and was there the entire day without leaving. When I left at 10:00a.m. I was in constant contact with her until I returned. I did lock the door at 10:00a.m. when I left to make a delivery because [the office manager] was there alone. . . .

Id.

The ALJ Decision

The ALJ identified the issue before him as whether there was a "basis to revoke Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. §§ 424.57(e) and 424.535(a)(1) based on a violation of 42 C.F.R. § 424.57(c)(7) (supplier standard 7)." ALJ Decision at 6. The ALJ stated that "[a]lthough the reconsideration hearing officer sets forth the definition of operational and states that a supplier must be operational, she did not specifically conclude that Petitioner was not operational and therefore subject to revocation" pursuant to section 424.535(a)(5) but instead "concluded that revocation was appropriate because Petitioner failed to show compliance with supplier standard 7." *Id*.; *see also id*., citing 42 C.F.R. § 498.5(l)(2), *Neb Group of Arizona LLC*, DAB No. 2573 (2014), and *Benson Ejindu, d/b/a Joy Medical Supply*, DAB No. 2572 (2014), for the holding that the reconsidered determination is the determination that is subject to ALJ review.

The ALJ further stated, "What is in dispute is whether Petitioner was properly staffed and accessible to the public during the attempted site visits on May 2, and 5, 2014, as required by supplier 7, despite the fact [that] the door was locked." ALJ Decision at 9-10. The ALJ continued:

> The CMS evidence, including the site investigation report and [the inspector's] declaration are sufficient to constitute a prima facie showing that Petitioner was not open and accessible on May 2 and 5, 2014.[3] There is no dispute that when [the inspector] was inspecting she attempted to open the door and knocked but received no response and could not gain access. However [her] assertion in her declaration that she rang the bell at Petitioner's door is inconsistent with her site investigation – that report only states that she knocked on the door. Further, [her] report and her declaration do not indicate that she attempted to call either of the telephone numbers clearly posted on Petitioner's door.

Id. at 10. The ALJ specifically found the inspector's "contemporaneous report more credible and weighty than her declaration made five months after the date of her site visits" and that she "knocked but did not ring the bell during her site visits. . . ." *Id*. at 8.

[3] The ALJ stated elsewhere: "CMS has the burden of coming forward with the evidence and making a prima facie showing of a basis, in this case, for revocation of Petitioner's enrollment. Petitioner bears the burden of persuasion to rebut the CMS prima facie showing by a preponderance of the evidence or to establish any affirmative defense." ALJ Decision at 4-5 (citations omitted).

The ALJ then addressed Advance Group's evidence as follows:

> Petitioner has presented credible and weighty evidence that its office was staffed and accessible to the public at the times of the site visits on May 2 and 5, 2014, and that access could be achieved by simply ringing the doorbell clearly pictured in the CMS evidence. CMS Ex. 2 at 11. I conclude that Petitioner has satisfied its burden to rebut the CMS prima facie showing. I have no reason to discount the credibility of either [Petitioner's owner] (P. Ex. 2) or [Petitioner's office manager] (P. Ex. 1) or the evidence Petitioner presented on reconsideration (CMS Ex. 1 at 27-75). Petitioner offered without objection the declaration of [its office manager]. [She] testified credibly that she was available in Petitioner's shop during the posted hours of operation. [She] testified that she was in the facility on both days of May 2 and May 5 conducting business. P. Ex. 1 at 2. Petitioner offered without objection the declaration of [its owner]. I do not discount [the owner's] statements regarding his observations while at the facility on May 2 and May 5, 2014. Although his statements are credible, he was not present at the times when [the inspector] was conducting the two site visits. P. Ex. 2. I accept as credible and weighty Petitioner's evidence that someone was present in Petitioner's store and it was accessible to the public by ringing the doorbell or by calling the telephone number clearly posted on the door.

Id. at 10.[4]

The ALJ also found unpersuasive CMS's argument that, even if the office manager was in the facility, "the fact that the door was locked and [the office manager] did not respond to the investigator's attempts to gain entry is sufficient to conclude that Petitioner was not open to the public or accessible." *Id*., citing CMS Br. at 15-16. The ALJ continued:

> The fact that Petitioner's door was locked is not alone a sufficient basis to revoke Petitioner's billing privileges and Medicare enrollment. CMS points to no law that prohibits a supplier enrolled in Medicare from locking its doors for safety or any other reason. Keeping the door locked is not prohibited by the statute as long as the public has access to the facility. Therefore, as the Board has suggested, a locked door must be attended so that the door may be opened to the public upon request. The Board in *Benson Ejindu d/b/a Joy Medical Supply* chose not to decide whether a supplier locking the door would be categorically prohibited by 42 C.F.R. § 424.57(c)(7), but commented that Petitioner needed to provide customers who encountered a locked door during regularly scheduled hours with a

[4] It is immaterial that, except in one instance, the ALJ Decision refers to a single telephone number when there were in fact three telephone numbers on the door.

> reliable and effective means to overcome the barrier and obtain prompt entry. DAB 2572 at 8 (2014). The Board specifically noted that the petitioner in that case did not have a sign on its door that provided instruction to customers to call a posted number if they encountered a locked door during posted business hours. *Id*. In this case, Petitioner had a clearly visible doorbell adjacent to the door handle and a telephone number to call if the door was locked that was visibly posted on its front door. Even though there was no instruction to ring the bell or call the telephone number if the door was locked, the presence of the bell button, which the evidence shows was operational, and the telephone number are sufficient even for one of less than average intelligence. I consider these reasonable and effective means for a customer or CMS and its agent to obtain entry when the door was locked. In this case there is credible evidence that a staff member was present who could have responded to either the doorbell or a telephone call at the time of the site inspections.
>
> Accordingly, I conclude that there was no violation of 42 C.F.R. § 424.57(c)(7) (supplier standard 7) and no basis for revocation of Petitioner's enrollment and billing privileges as a DMEPOS supplier.

ALJ Decision at 10-11.

Standard of Review

The Board's standard of review on a disputed factual issue is whether the ALJ decision is supported by substantial evidence in the record as a whole. The Board's standard of review on a disputed issue of law is whether the ALJ decision is erroneous. *Guidelines—Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, available at http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html.

Analysis

On appeal, CMS argues that the ALJ erred in finding that CMS was not justified in revoking Advance Group's Medicare enrollment and billing privileges based on a violation of section 424.57(c)(7), and more specifically, that "the ALJ erred in finding that Advance Group satisfied its burden of rebutting CMS' prima facie showing that Advance Group was not open and accessible to the public." CMS's Request for Review (RR) at 1. CMS also argues that "the ALJ erred in finding that the Hearing Officer did not find Petitioner was not operational, pursuant to 42 C.F.R. § 424.535(a)(5), as a basis for the revocation on reconsideration." *Id*. According to CMS, it properly revoked Advance Group's enrollment and billing privileges on the basis that Advance Group was not operational as well as on the basis that it failed to comply with section 424.57(c)(7). *Id*. at 9.

1. The ALJ's conclusion that CMS was not authorized to revoke Advance Group's Medicare enrollment and billing privileges based on section 424.57(c)(7) is not supported by substantial evidence and is not free from legal error.

We conclude that the ALJ erred in finding that there was no basis for revocation under section 424.57(c)(7).

As noted, the ALJ found that even without any instruction on Advance Group's door to ring the doorbell or call the posted telephone numbers to gain access, "the presence of the bell button . . . and the telephone number are sufficient instruction even for one of less than average intelligence" and thus were "reasonable and effective means for a customer or CMS and its agent to obtain entry when the door was locked." ALJ Decision at 11. CMS does not dispute the ALJ's finding that the fact that the door was locked was insufficient to find that Advance Group's office was not accessible and staffed. However, CMS argues that the ALJ "erred in finding that Petitioner's facility was open and accessible to the public via the doorbell and the posted telephone number on the door." RR at 12.[5]

With respect to the telephone numbers, CMS argues that the ALJ "misinterprets" the Board's decision in *Benson Ejindu d/b/a Joy Medical Supply* "regarding the lack of instruction to customer to call a posted number if the door is locked during posted business hours." RR at 15. CMS quotes the following language from that decision:

> Furthermore, an instruction to call one of the listed telephone numbers would have been of dubious help to a customer who was not carrying a mobile phone. Petitioner submitted no evidence from which the ALJ (or this Board) could reasonably infer that persons without mobile phones could have contacted him and obtained entry to his facility without undue delay or inconvenience.

Id., quoting *Ejindu* at 7.

[5] CMS also argues that the ALJ erred in finding that Advance Group's office manager was in the office at the time of the attempted site visits on May 2, 2014 and May 5, 2014. According to CMS, the ALJ should have considered statements in Advance Group's reconsideration request that CMS says "proclaim [] it has a routine practice of leaving the facility unstaffed, and that the locked door would not be answered for periods of time during its posted business hours." RR at 11, citing CMS Ex. 1, at 22-23. Having waived the opportunity to challenge through cross-examination the office manager's declaration that she was in the office at the time of both site visits, CMS is arguably precluded from challenging her credibility based on language in the reconsideration request. However, we need not consider this matter in view of our conclusion that the ALJ erred in finding that the doorbell and the telephone numbers posted on the door established that customers and CMS could gain entry when the door was locked.

CMS suggests that *Ejindu* holds that a "telephone number is insufficient to overcome the barrier of a locked door, since it is unreasonable to infer that Medicare beneficiaries without mobile phones could contact [a petitioner] without undue delay or inconvenience." RR at 15-16. We agree with CMS that the ALJ's reliance on *Ejindu* was misplaced even if its holding is not that narrow. As *Ejindu* states, a supplier "does not 'provid[e] access' to a Medicare beneficiary . . . if its entry door is locked during posted hours, no one responds to a knock on the door, and there is no alternative means of gaining entry . . . ." *Ejindu* at 6. It is the supplier's responsibility to provide alternative means of gaining entry, not the beneficiary's or other customer's responsibility to puzzle out what that might be. Since Advance Group posted no instructions at all to that end, we need not decide whether, as CMS suggests, posting a phone number would always be insufficient, even given the presence of arguably adequate instructions on how to use the phone to obtain entry. We find in this case that merely posting the phone numbers was not sufficient to facilitate access to the supplier's facility. Our finding is supported, at least indirectly, by the fact that in response to the appeal, Advance Group does not rely on the fact that it posted its telephone numbers on the door, but rather on the fact that there was a doorbell. P. Br. at 19.

With respect to the doorbell, CMS argues that the ALJ erred in not considering that "[i]n its Reconsideration Request Petitioner admits that '[w]e have some clients who do not see the doorbell right away and call us to say they believe we are closed.'" RR at 12, quoting CMS Ex. 1, at 22. According to CMS, this "admission . . . further supports that Petitioner is not open and accessible when the door is locked." *Id*. CMS maintains that this "leaves open the possibility that a Medicare beneficiary or a member of the public would experience a similar fate if they also did not see the doorbell." *Id*.

We agree with CMS that the ALJ erred in not considering the statement in Advance Group's reconsideration request. The ALJ's conclusion that even "one of less than average intelligence" would know to ring the doorbell if the door was locked appears to be based on the ALJ's finding that the doorbell was "clearly visible." ALJ Decision at 11. The ALJ based this finding on his review of the photographs taken by the inspector, which he stated "clearly pictured" a doorbell that he described as "adjacent to the door handle." *Id*. at 10-11. However, the photographs in CMS Exhibit 1 do not necessarily establish that the doorbell was "clearly visible" to someone standing in front of the door. Advance Group's statement in its reconsideration request that "some clients" do not even see the doorbell further undercuts the ALJ's finding that the doorbell was "clearly visible." Since the reconsideration request was signed by Advance Group's owner, who likely had first-hand knowledge since he worked in Advance Group's office, it is probative evidence that the presence of the doorbell was not sufficient to establish that customers and CMS could gain entry when the door to Advance Group's office was

locked.[6] We also note the ALJ's finding that there were no instructions to ring the doorbell. ALJ Decision at 11. The ALJ appears to have attributed no significance to this fact since he found that "the presence of the bell button . . . and the telephone number are sufficient instruction even for one of less than average intelligence." *Id*. However, we regard the absence of instructions to use the bell as a significant impediment to accessing the supplier's facility in light of Advance Group's admission that customers did not always see the bell, an admission the ALJ did not discuss.

We therefore conclude that, contrary to what the ALJ held, Advance Group failed to show that it was accessible and staffed within the meaning of section 424.57(c)(7).

2. The ALJ did not err in finding that the hearing officer's decision upholding the revocation on reconsideration was not based on a determination that Advance Group was not operational.[7]

Before the ALJ, CMS took the position that there was a basis for revocation on the ground that Advance Group was not operational as well as on the ground that it did not meet supplier standard 7. The ALJ found that "[w]hether or not there was a basis for revocation pursuant to 42 C.F.R. § 424.535(a)(5) on the theory that Petitioner was not operational is not at issue before me because it was not a basis for revocation upheld on reconsideration." ALJ Decision at 6. CMS argues here that this finding was error. RR at 1, 6-7. CMS does not deny that Advance Group's right of appeal was from the reconsideration decision by the hearing officer, not from the Medicare contractor's initial determination. *See* 42 C.F.R. § 498.5(l)(2); *see also Orthopaedic Surgery Assocs*., DAB No. 2594, at 7 (2014) (citing regulation and cases). However, CMS disputes the ALJ's finding that the reconsideration decision did not rely on a determination that Advance Group was "no longer operational" within the meaning of section 424.535(a)(5) because the hearing officer did not "specifically conclude that Petitioner was not operational and therefore subject to revocation of enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(5)." RR at 6, quoting ALJ Decision at 6. According to CMS, the hearing officer "could not have been more clear in her statement that Petitioner's facility was not operational." RR at 6. CMS points to the following language in the reconsideration decision:

[6] Advance Group asserts in its response to CMS's appeal that "any person coming to that door would know to push the button on that doorbell to gain entry" if the door is locked and there is an 'OPEN' sign on the door during posted business hours. P. Br. at 19. This assertion is inconsistent with its statement in its reconsideration request.

[7] Having upheld the revocation under section 424.57(c), we would not need to reach the issue of whether, as CMS asserts, there is a second ground for the revocation but for the fact that CMS continues to argue for an effective date of revocation that does not apply to revocations under section 424.57(c).

> Pursuant to. . .42 C.F.R. §§ 405.800, 424.57(e), 424.535(a)(1), 424.535(a)(5)(ii), 424.535(g), your Medicare supplier number…for DMEPOS issued by the…NSC is revoked. The date of this effective revocation has been made retroactive to May 5, 2014 *which is the date…CMS determined your practice location was not operational."* CMS Ex. 1 at 4.

Id. (emphasis added). CMS also states:

> The Hearing Officer specified that the definition of "operational" requires that the location be "open to the public for the purpose of providing healthcare related services." The Hearing Officer further found that Petitioner "was not open and accessible."

Id.

CMS misreads the hearing officer's decision. Significantly, the section of the reconsideration decision captioned "DECISION" contains no suggestion that the hearing officer relied on any provision other than section 424.57(c)(7). The section states in its entirety:

> I have reviewed all of the documentation in the file for this case and my decision has been made in accordance with Medicare guidelines, as outlined in [42 C.F.R. 424.57]. Advance Group LLC has not shown compliance with supplier standard 7.
> Since Advance Group LLC has not provided evidence to show they have complied with the standard for which they were non-compliant, they cannot be granted access to the Medicare Trust Fund by way of a Medicare supplier number.

CMS Ex. 1, at 4.

Moreover, we agree with the ALJ that merely "set[ting] forth the definition of operational and stat[ing] that a supplier must be operational" is not itself a determination that Advance Group was not operational. ALJ Decision at 6. In addition, we are not persuaded that the hearing officer's finding that Advance Group "was not open and accessible" refers to the definition of the term "operational" in section 424.502, which does not include the word "accessible." That definition also states that a supplier is "open to the public for the purpose of providing healthcare related services." Nothing in the hearing officer's decision establishes that her statement "the site inspector could not access Advance Group LLC facility to verify compliance with the supplier standards because the facility location on file with the NSC was not open and accessible" was also

a finding that Advance Group was not "open to the public . . . ." CMS Ex. 1, at 4. Finally, the following sentence, stating that the "supplier location must be accessible and staffed," clearly paraphrases the requirement in section 424.57(c)(7) that a supplier "[i]s accessible and staffed during posted hours of operation."

Furthermore, the fact that the reconsideration decision includes a citation to section 424.535(a)(5)(ii) among the authorities "[p]ursuant to" which Advance Group's Medicare supplier number is revoked does not show that a failure to be "operational" was a basis for the revocation. Section 424.535(a)(5)(ii) refers to multiple grounds for revocation that may be identified by an on-site review: "A Medicare Part B supplier is no longer operational to furnish Medicare covered items or services, or the supplier has failed to satisfy any or all of the Medicare enrollment requirements, or has failed to furnish Medicare covered items or services as required by the statute or regulations." (Emphasis added.) Thus, not being operational is merely one ground for revocation under section 424.535(a)(5)(ii) and citation to that section does not alone establish that the revocation was for that reason.

CMS's reliance on the sentence of the reconsideration decision that identifies the effective date of the revocation as "the date CMS…determined your practice location was not operational" is also misplaced. Under section 424.535(g), that is the effective date where being found no longer operational is the basis for revocation. However, the sentence quoted by CMS follows a citation to section 424.57(e), which specifies that where revocation is based on a supplier's failure to meet the standards in section 424.57(b) and (c), the effective date of the revocation is calculated based on the date CMS notifies the supplier of the revocation.[8] In light of that citation, it appears that the hearing officer simply misstated the applicable effective date as the date of a determination that the supplier is not operational, not that she was making an affirmative determination that Advance Group was not operational.

Accordingly, we conclude that the ALJ did not err in concluding that the issue of whether Advance Group was operational was not before him.

3. Under section 424.57(e), the correct effective date for the revocation of Advance Group's billing privileges based on its failure to meet the requirements of section 424.57(c)(7) (supplier standard 7) is July 30, 2014.

Since the ALJ reversed CMS's revocation of Advance Group's Medicare enrollment based on CMS's determination that Advance Group was not in compliance with section 424.57(c)(7) and concluded that no other basis for revocation was properly before him,

[8] We discuss that calculation in the next section.

he did not consider what the effective date should have been had he concluded that CMS properly revoked Advance Group's privileges based on its noncompliance with section 424.57(c)(7).

Since we conclude that CMS properly revoked Advance Group's Medicare enrollment based on Advance Group's noncompliance with section 424.57(c)(7) and that CMS did not on reconsideration rely on any other basis for revocation, we must also conclude that the effective date of revocation stated in the reconsideration decision is incorrect. The hearing officer followed the effective date rule in section 424.535(g) that would have applied had she determined that Advance Group was no longer operational. However, the effective date of revocation should be determined in accordance with section 424.57(e)'s effective date provision since section 424.57(c)(7) is the sole basis for revocation. Section 424.57(d) in the edition of the Code of Federal Regulations that was in effect when CMS notified Advance Group of the revocation stated that a revocation based on a violation of section 424.57(c) "is effective *15 days* after the [supplier] is sent notice of the revocation" (emphasis added). However, the Board has previously stated that this provision did "not accurately reflect regulatory history as to either the section's designation or the timing of the effective date." *Orthopaedic Surgery Assocs*. at 8, citing *Keller Orthotics*, DAB No. 2588, at 9 (2014); *Norpro Orthotics & Prosthetics, Inc.*, DAB No. 2577, at 7-8 (2014); *Neb Group of Arizona*, DAB No. 2573, at 7 (2014); *Benson Ejindu d/b/a Joy Medical Supply* at 5. The Board explained:

> 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." 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. 75 Fed. Reg. at 52,648-52,649.

Orthopaedic Surgery Assocs. at 8 (emphasis in original).[9]

Applying the August 27, 2010 final rule here, we conclude that the proper effective date of the revocation is July 30, 2014, 30 days from the date of NSC's letter notifying Advance Group of the revocation.

[9] The provisions of the August 27, 2010 final rule first appear in the October 1, 2015 edition of the Code of Federal Regulations.

Conclusion

For the foregoing reasons, we reverse the ALJ's decision that Advance Group was in compliance with section 424.57(c)(7) and uphold CMS's revocation of Advance Group's Medicare enrollment and billing privileges on that basis. However, having concluded that the revocation could not also be upheld under section 424.535(a)(5), we hold that the effective date of the revocation is July 30, 2014 instead of May 5, 2014, the date stated in the reconsideration letter. Pursuant to section 424.535(c), the two-year re-enrollment bar imposed by CMS began on the effective date of the revocation, July 30, 2014.

/s/
Sheila Ann Hegy

/s/
Susan S. Yim

/s/
Christopher S. Randolph
Presiding Board Member