Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Experts Are Us, Inc.
Docket No. A-12-14
Decision No. 2452
April 3, 2012

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Experts Are Us, Inc. (Experts) appeals the July 15, 2011 decision of Administrative Law Judge (ALJ) Joseph Grow granting summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS). *Rita Lemons d/b/a Experts Are Us, Inc.*, DAB CR2398 (2011) (ALJ Decision).[1] At issue are CMS's denials of three Medicare reenrollment applications that Experts filed after CMS had revoked Experts' billing privileges as a Medicare durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) supplier. In his decision, the ALJ upheld CMS's denials, which were based on CMS's findings that Experts was not in compliance with all Medicare DMEPOS standards and/or not operational.

We uphold the ALJ Decision. Below we first discuss the history of these disputes before the Board. We then review the ALJ's findings of fact and conclusions of law (FFCLs) and Experts' exceptions to those FFCLs. We explain why we reject Experts' arguments and uphold the ALJ Decision.

BACKGROUND AND PROCEDURAL HISTORY

In 2009, ALJ Carolyn Cozad Hughes issued a decision in Docket No. C-09-724 dismissing Experts' request for hearing on a 2004 determination by a CMS contractor, Palmetto GBA (Palmetto), revoking Experts' Medicare billing privileges as a DMEPOS supplier and determinations refusing to approve three of Experts' subsequent applications as a DMEPOS supplier. *Experts Are Us, Inc.*, DAB CR2047, at 2-4 (2009). ALJ Hughes determined that Experts had no right to ALJ review of the revocation because it occurred before the effective date of the statutory provision that created this hearing right. *Id.* at 3. ALJ Hughes also concluded that Experts had no right to review of Palmetto's subsequent

[1] Rita Lemons owns Experts Are Us, Inc. and acts as its pro se representative in these proceedings. *See, e.g.*, CMS Ex. 6, at 31. The ALJ Decision refers to Ms. Lemons as the Petitioner. We treat Experts Are Us, Inc. as the Petitioner since it is the entity that applied for and was denied enrollment in Medicare. *See, e.g.*, CMS Ex. 1, 2, 6.

dispositions of Experts' applications because they were "applications for reinstatement" after revocation and, therefore, not reviewable under 42 C.F.R. Part 498. *Id.* at 4.

Experts appealed the dismissal to the Departmental Appeals Board (Board). In response to the Board's Order to Develop the Record, CMS stated that Palmetto's determinations on three of Experts' applications were denials of reenrollment applications that were subject to ALJ review.[2] (CMS's position was contrary to its prior position at the ALJ level, in which it had argued that these contractor determinations were only rejections of requests for reinstatement after revocation, for which there is no right of review under Part 498.) After upholding ALJ Hughes' conclusion that she lacked authority to review the revocation, the Board remanded the case to the ALJ for "further proceedings consistent with this decision" as to the contractor's denials (dated August 1, 2007, December 11, 2007, and May 30, 2008) of three of Experts' reenrollment applications. *Experts Are Us, Inc.*, DAB No. 2322, at 12. The Board also ruled that it did not have authority to review Experts' assertions that employees of CMS and its contractor had violated Experts' constitutional rights, committed fraud against Experts, and wrongfully denied hundreds of thousands of dollars in reimbursement.

Pursuant to 42 C.F.R. § 498.78(b), ALJ Hughes subsequently remanded the case to "CMS or its Medicare contractor to reconsider its . . . [initial] determinations denying [Experts'] applications for reenrollment in the Medicare program." *Experts Are Us, Inc.*, DAB CR2180, at 1-2 (2010).[3]

Upon remand, CMS referred the August 1, 2007, December 11, 2007, and May 30, 2008 initial determinations denying reenrollment to Palmetto for reconsideration pursuant 42 C.F.R. § 498.24. CMS Exs. 1, 7, and 12. On November 23, 2010, a Palmetto Hearing Officer (Hearing Officer) issued three reconsideration determinations upholding Palmetto's initial determinations denying Experts' three reenrollment applications. *Id.*

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[2] As explained in our prior decisions, the Board's Order was limited to the August 1, 2007, December 11, 2007 and May 30, 2008 denials because "(1) those are disposition letters that Experts submitted with its hearing request [in C-09-724] and (2) those are the disposition letters for which NSC made its determinations on failures associated with site inspections, either because the business was allegedly closed when the inspections were attempted or the site inspection allegedly established noncompliance with DMEPOS standards." DAB No. 2322, at 4, n.5 (2010). In its subsequent Request for Reconsideration of DAB No. 2322, Experts argued that the Board should have also ordered a hearing on CMS's disposition of an application Experts allegedly filed in February 2008. The Board explained in DAB No. 2342 why it had not so ordered and why its having declined to do so was not a basis for reopening DAB No. 2322. DAB No. 2342, at 6-7 (2010).

[3] In response to the ALJ Remand Decision, Experts submitted to the Board a set of documents. After reviewing those documents, the Board concluded that they were most reasonably and fairly understood to be: (1) a request to reopen the Board's decision in DAB No. 2322; (2) an appeal of the ALJ Remand Decision in DAB CR2180; (3) a request to file additional evidence; and (4) a request for admissions and subpoenas. *Experts Are Us, Inc.*, DAB No. 2342, at 3. The Board declined to reopen DAB No. 2322 and upheld the ALJ Remand Decision. The Board also denied Experts' other requests. *Id.* at 1.

Experts timely appealed the three reconsideration decisions, and the case was assigned to ALJ Grow and docketed as C-11-226. CMS then filed a Motion for Summary Judgment and Supporting Brief-in-Chief (CMS MSJ) accompanied by 17 proposed exhibits. ALJ Grow admitted all CMS Exhibits into the proceeding before him. Experts submitted Plaintiff's Response and Supplement to Appeal (P. Response to MSJ) with a set of bound proposed exhibits that were not numbered in accordance with ALJ Grow's Pre-Hearing Order.[4] ALJ Decision at 3. ALJ Grow renumbered Experts' proposed exhibits as Petitioner Exhibit 1, paginated that exhibit sequentially from page 1 to page 256, and admitted all of Experts' documents into the proceeding before him.[5] ALJ Grow then granted CMS's motion and upheld Palmetto's reconsideration determinations denying Experts' three reenrollment applications.[6] (With his decision, he also provided a copy of Experts' renumbered exhibits to Experts and CMS.)

Experts filed with the Board a 27-page request for review of the ALJ Decision.[7] With its request, Experts submitted 196 pages of additional documents most of which appeared, from their markings, to be copies of the documents the ALJ marked as Petitioner Exhibit 1 in Docket No. C-11-226. In its letter acknowledging Experts' request, the Board referred to these documents and wrote:

> If these documents are copies of documents already in the record in Docket No. C-11-226, as appears to be the case, the Board will review them as part of that record. However, to the extent that Experts' documents are additional evidence, the Board cannot accept them as part of its record. Section 498.86(a) of 42 C.F.R. precludes the Board, in "supplier and provider enrollment appeals," from admitting "evidence into the record in addition to evidence introduced at the ALJ hearing (or the documents considered by the ALJ if the hearing was waived)". *See*

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[4] Experts also submitted a pleading denominated as a Motion for Summary Judgment requesting that the ALJ order CMS to reimburse Experts for items it allegedly supplied to Medicare beneficiaries prior to CMS's revocation of its billing privileges. As discussed in prior decisions, neither the ALJ nor the Board has jurisdiction to order such reimbursement. *Experts*, DAB No. 2322, at 11; *Experts*, DAB No. 2342, at 5.

[5] Experts repeatedly objects to the ALJ's sequentially paginating its exhibits. *See, e.g.* P. Reply at ¶ 10 (characterizing his action as "prov[ing his] sheer incompetence and ignorance to the rules"). However, ALJ Grow paginated Experts' exhibits because Experts had not marked the exhibits as directed by his Pre-hearing Order and they were difficult to follow. The sequential pagination makes the exhibits easier to find and cite.

[6] The ALJ noted that "the only issues raised in response to CMS's Motion for Summary Judgment relate to whether CMS had a legitimate basis to deny each of Experts' three Medicare reenrollment applications in its November 23, 2010 reconsideration decisions." ALJ Decision at 3. ALJ Grow noted that "Petitioner's other arguments have been fully addressed in previous iterations of this matter." *Id.* at 3, *citing Experts.*, DAB No. 2342.

[7] Whether or not we explicitly discuss every argument made by Experts herein, we have considered all of the relevant briefing and evidence in reaching our decision. We also decline to address, as did the ALJ, Experts' numerous other allegations and requests for relief that are irrelevant and/or beyond the authority of the Board, including those in Experts' emails of March 18, 2012 and April 2, 2012.

> *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 3-4 (2009) (rejecting new evidence under section 498.86(a) in an appeal of an ALJ summary disposition decision). In order to avoid any confusion about the record before the Board, we are returning these documents to Experts.

Board acknowledgment letter at 2. While these documents are not part of the record for decision in this case, we retained a copy of them in our administrative record. We have carefully reviewed this submission to determine whether Experts tried to submit therein any document identified by the ALJ as cited by Experts but not among the documents before him and to determine whether the submission contains any other relevant documents that are not also in the exhibits in C-11-226 or the prior docket numbers. We found no such documents.

The Board offered Experts an opportunity to "amend its request for review to conform relevant citations therein to the pagination used by the ALJ in Petitioner Exhibit 1 in Docket No. C-11-226" and informed Experts that "[c]onforming citations in this manner will facilitate the Board's review of Experts' arguments." *Id.* (emphasis in original). Experts elected not to conform the citations in its request for review.

CMS filed a Response Brief. Experts filed a reply only after the Board notified the parties on January 9, 2012, some three weeks after a reply was due, that it had closed the record. Experts' email dated January 9, 2012. Experts alleged that it had failed to file a timely reply because it had been "grossly overwhelmed with litigations and personal matters." Experts' email dated January 10, 2012. Under our practice guidelines, we are not required to review Experts' Reply because it was untimely and Experts failed to follow the directions in Board guidelines for requesting an extension of time in which to file the reply. *Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, http://www.hhs.gov/dab/divisions/appellate/guidelines/index.html. However, we review the Reply and discuss the one arguably additional argument Experts makes therein to ensure that we have considered all relevant objections Experts has raised to the ALJ Decision.

APPLICABLE LAW

In order to receive Medicare payments for items furnished to a Medicare-eligible beneficiary, a DMEPOS supplier must have a supplier number issued by the Secretary of Health and Human Services. Social Security Act (Act), § 1834(j)(1)(A). A DMEPOS supplier seeking reenrollment must submit a new application and supporting documentation, which must be validated before the entity can become enrolled as a Medicare supplier and receive Medicare billing privileges. *See* 42 C.F.R. § 424.505. To become enrolled and receive billing privileges a DMEPOS supplier is required to meet and maintain compliance with each of the specific DMEPOS supplier enrollment

standards, which, for the time periods at issue, are set forth in 42 C.F.R. §§ 424.57(c)(1)-(25) (2006).[8]

Under section 424.530(a)(5)(ii), CMS may deny the application of a supplier if the supplier is "no longer operational to furnish Medicare covered items or services, or the supplier has failed to satisfy any or all of the Medicare enrollment requirements . . . ." Section 424.57(c) provides that a DMEPOS supplier "must meet" each of the DMEPOS standards set forth in that section in order to qualify for enrollment or re-enrollment. Therefore, failure to comply with one supplier standard is a sufficient basis for denying the enrollment application. 42 C.F.R. § 424.530(a)(5)(ii); *cf. 866ICPayday.com, L.L.C.*, DAB No. 2289, at 13 ("[F]ailure to comply with even one supplier standard is a sufficient basis for revoking a supplier's billing privileges.")

STANDARD OF REVIEW

Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *1866ICPayday.com, L.L.C.,* DAB No. 2289, at 2, *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986). The party moving for summary judgment bears the initial burden of demonstrating that there is no genuine dispute of material fact for trial and that it is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. The moving party may show the absence of a genuine factual dispute by presenting evidence so one-sided that it must prevail as a matter of law, or by showing that the non-moving party has presented no evidence "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Livingston Care Ctr. v Dep't of Health & Human Servs.*, DAB No. 1871, at 5 (2003); *aff'd, Livingston Care Ctr. v. U.S. Dep't of Health & Human Servs.*, 388 F.3d 168 (6th Cir. 2004), (quoting *Celotex.*, 477 U.S. at 322). If a moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio, Ltd.*, 475 U.S. 574, at 587 (1986)(quoting FRCP 56(e)).[9]

To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact — a fact that, if proven, would affect the outcome of the case

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[8] The DMEPOS standards in effect during the time period at issue (2007 and 2008) were adopted at 65 Fed. Reg. 60,377 (Oct. 11, 2000) and 71 Fed. Reg. 48,409 (Aug. 18, 2006). For the standards, the ALJ cited the 2006 edition of the Code of Federal Regulations, as do we.

[9] The ALJ informed the parties that he would apply Rule 56 of the Federal Rules of Civil Procedure in reviewing summary judgment motions. Pre-hearing Order at 2, incorporating the Civil Remedies Division Procedures found at htt/www.hhs.gov/dab/division/civil/procedures/divisionprocedures.html.

under governing law. *Id.* at 586, n.ll (quoting FRCP 56(c)); *Celotex*, 477 U.S. at 322-323. In order to demonstrate a genuine issue, the opposing party must do more than show that there is "some metaphysical doubt as to the material facts .... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 586. In making this determination, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *See e.g., U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Whether summary judgment is appropriate is a legal issue that we address de novo. *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 2, *citing Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004). Our 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,
http://www.hhs.gov/dab/divisions/appellate/guidelines/index.html

EVIDENCE REVIEWED FOR THIS DECISION

The record before ALJ Grow, as transmitted to the Board on appeal, consisted of the documents filed and the exhibits submitted to ALJ Grow by CMS and Experts in Docket No. C-11-226.[10] ALJ Decision at 3. The record sent to us does not indicate that ALJ Grow had before him all of the documents that the parties had filed in Experts' related cases previously docketed by the Civil Remedies Division as C-09-724 and C-10-813 and the Appellate Division as A-10-38 and A-10-96.

In its request for an ALJ hearing in C-11-226, Experts made general statements about the Hearing Officer's alleged obligation to review all of the documents previously submitted and requests for those documents to be reviewed. *See, e.g.*, P. Request for ALJ Hrg. at 11 (requesting "consider[ation] of all the submitted documentations/exhibits in support of the multiple appeal briefs submitted to the Civil Remedies Division, Administrative Law Judge, and the Departmental Appeal Board"). In its Response to CMS's Motion for Summary Judgment, Experts stated that it was "reassert[ing] each and every allegation presented in the previous appeals submitted to the . . . ALJ and the DAB as if fully

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[10] As to the exhibits presented by Experts, the ALJ noted that, in a supplier enrollment case under 42 C.F.R. § 498.56(e), he was required to "exclude any documentary evidence that is submitted for the first time at the ALJ level, unless Petitioner has established good cause for not submitting it previously." ALJ Decision at 6. Experts had not specifically alleged the exhibits were not being submitted for the first time at the ALJ level or, alternatively, good cause in support of their submission. However, the ALJ stated, "to fully consider the evidence in the light most favorable to the non-moving party, and because I am not certain whether there is new evidence due to the lack of any objection from CMS, I will not exclude any evidence Petitioner has submitted that might establish compliance with the supplier standards." *Id.*

incorporated here within this supplement." P. Response to MSJ at 1. However while making these broad statements, Experts did not, before the ALJ or the Board, cite by exhibit number any relevant document in the prior docket numbers, rather it cited to its exhibits in C-11-226. Nor did Experts cite any authority for its assertion that the ALJ was required to incorporate by reference its allegations in other cases.

For the following reasons, we conclude that the issues in this case can be fairly and efficiently resolved in this decision without regard to whether the ALJ had all of the documents from the prior docket numbers before him. First, as discussed herein, ALJ Grow's decision is fully supported by the evidence before him. Second, since the ALJ admitted all of the evidence Experts submitted to him, Experts could have submitted any documents from an earlier case (or other documents) that it believed supported its position in response to CMS's Motion for Summary Judgment. Third, our review on summary judgment provides an opportunity for de novo review of the record. Therefore, while Experts does not cite to any relevant document in a prior docket number by exhibit number and argue that the document would tend to raise a dispute of material fact, we have carefully examined all of the exhibits in the related cases for their possible relevance to Experts' assertions in opposing the summary judgment motion. In doing so, we found one document that could reasonably be construed to support part of Experts' position as to one DMEPOS standard and several documents that undercut Experts' positions on those standards. In our decision, we discuss these documents and append them to the decision in an appendix. We proceed in this manner out of an abundance of caution to ensure that Experts has had a full and fair review of its relevant arguments.

We note that the ALJ stated that Experts had referred "to many documents" that he found Experts had not included in its "bound submissions of proposed exhibits" before him.[11] ALJ Decision at 3, 11. Experts does not specifically address the ALJ's statements about the absence of these specific documents, or allege where the missing documents to which he refers can be found in C-11-226 or the prior document numbers. We could not find the documents identified as missing by the ALJ in C-11-226. However, we have carefully reviewed the exhibits in the prior docket numbers to see if we could find the documents the ALJ specifically identified as missing.

In our discussion of the evidence we reviewed, we refer to conducting a "document search." By this term we mean a search, in the exhibits in the prior docket numbers (including C-11-226) and in the exhibits submitted by Experts with it request for review,

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[11] As for documents cited by Experts by exhibit number, the ALJ stated that he could not find "the affidavits of several individuals (described as P. Exs. E-6 through E-10)" (ALJ Decision at 3) and "exhibits "E" and "V" for assertions related to "inventory, credit agreements, and repair contracts" (*id.* at 11). As discussed in the decision, we also cannot find these documents.

for any documents relevant to Experts' assertions in opposing CMS's summary judgment motion in the proceeding before ALJ Grow.

ANALYSIS

At issue in this case are denials of three reenrollment applications filed by Experts. The dates of the initial determinations for these denials are August 1, 2007 (CMS Ex. 2), December 11, 2007 (CMS Ex. 8) and May 30, 2008 (CMS Ex. 13). Below we discuss the ALJ's consideration of each of those denials.

1) Experts raised no genuine dispute of material fact that would preclude summary judgment upholding CMS's determination to deny Experts' June 2007 Medicare reenrollment application on the ground that Experts was not in compliance with all regulatory DMEPOS standards.

The Palmetto Hearing Officer upheld Palmetto's initial determination dated August 1, 2007 denying Experts' reenrollment application on the ground that Experts was not in compliance with nine separate DMEPOS standards found at section 424.57(c).[12] CMS Ex. 1, at 3-4.

Palmetto's determination was based in part on the July 18, 2007 on-site review by a Palmetto investigator of Experts' facility at 303 Ulrich Street, Suite J, Sugarland, Texas. CMS Ex. 4. Experts does not dispute that the investigator provided to Ms. Lemons a written notice regarding each DMEPOS standard on a "Site Visit Acknowledgement" Form. CMS Ex. 4, at 6; P. Ex. 1, at 34. As the ALJ found –

> [b]y Ms. Lemons' signing this form [as received], Petitioner acknowledged the following: Petitioner had been provided notice of the 21 supplier standards listed at 42 C.F.R. § 424.57; the investigator requested specific items listed on the 'Site Visit Acknowledgement' form to be faxed to the fraud investigator within 2 business days; and notice that Petitioner's failure to provide the requested information could result in the denial or revocation of Petitioner's Medicare supplier billing number.

ALJ Decision at 6, *citing* CMS Ex. 4, at 6. 7.

In its response to CMS's Motion for Summary Judgment, Experts claimed that Ms. Lemons faxed the investigator 19 pages that showed its compliance with the applicable

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[12] The ALJ and CMS characterize the August 1, 2007 denial as related to a June 2007 application. ALJ Decision at 5; CMS Response at 7. The Hearing Officer stated and Experts asserts that this denial was related to an April 2007 application. CSM Ex. 1, at 1; RR at 16. It is not necessary for us to resolve this discrepancy because it is not material to our conclusions about that August 1, 2007 determination.

DMEPOS standards. P. Response to MSJ at 3, 25. However, as the ALJ found, Experts did not proffer the full fax response but rather a fax transmission sheet listing documents that were allegedly faxed to the investigator on July 18, 2007. ALJ Decision at 7, *citing* P. Ex. 1, at 35-36. CMS, in its exhibits, however, provided many of the documents which Experts listed on the fax cover sheet. *Compare, e.g.,* P. Ex. 1, at 35 with CMS Ex. 4, at 14-16. Indeed, CMS characterizes these documents as those "provided" to the inspector by Ms. Lemons. CMS MSJ at 6. The ALJ reviewed the documents from Experts as submitted by CMS in addition to other documents Experts filed before him.

The ALJ discussed each of the nine DMEPOS standards under which Palmetto found Experts noncompliant. He found that there was no dispute of material fact as to Experts' noncompliance with five of these DMEPOS standards. Below we discuss each of the standards on which the ALJ relied in granting summary judgment. We uphold his determination under four of these standards, any one of which would be sufficient to uphold the ALJ's ultimate conclusion that CMS was authorized to deny this enrollment application.[13]

DMEPOS Standard 4 (failure to have its own inventory)

DMEPOS standard 4 requires that a supplier "[f]ills orders, fabricates, or fits items from its own inventory or by contracting with other companies for the purchase of items necessary to fill the order. If it does, it must provide, upon request, copies of contracts or other documentation showing compliance with this standard . . . ." 42 C.F.R. § 424.57(c)(4). As the ALJ recognized, this regulation requires a supplier who contracts with other companies "for the purchase of items necessary to fill the orders" to produce documentation of those commercial arrangements even if the supplier also fills orders from its own inventory. ALJ Decision at 8.

As to inventory present at Experts' site on July 18, the inspector documented seeing only some diapers, expired diabetic supplies, some surgical dressings, and a used hoyer lift.[14]

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[13] For the same reason, we need not, and do not, address Experts' arguments here that it was in compliance with standards on which the ALJ did not grant summary judgment. *See, e.g.,* RR at 19, 20.

[14] In its application for reenrollment, Experts represented that it would furnish the following products: accessories; commodes; diabetic equipment and supplies; durable medical equipment; heat/cold applications; hospital beds – accessories only; nebulizers; patient lifts and seat lift mechanisms; power mobility devices including power operated vehicles (or scooters) and power wheelchairs; respiratory equipment including bi-level positive airway pressure, continuous positive airway pressure, and intermittent positive pressure breathing; speech generating device; suction pump; support surfaces for beds and for wheelchair/power mobility devices; surgical dressings; tens units; traction equipment; urinals and bedpans; walkers, canes and crutches; and manual wheelchairs. CMS Ex. 6, at 4.

CMS Ex. 4, at 4. The inspector noted on the form that the inventory was "insufficient."[15] *Id.* The inspector specifically requested Experts to supply "credit agreements or invoices" pursuant to DMEPOS standard 4. ALJ Decision at 8, *citing* CMS Ex. 4, at 6.

The inspector's request for this additional documentation was in accord with Experts' assertion that, in addition to its inventory, it relied on agreements with other companies to fill its orders, an assertion it made in July and August of 2007 to Palmetto, before the ALJ, and on appeal to the Board. Specifically, before the ALJ Experts stated that it "contracted with a wholesaler and a private individual to purchase equipment and supplies as needed for a fee" and asserted "Supplier was contracted with VGR which covered any inventory issues and in contract with Le Roy Lemons." P. Response to MSJ at 25, 26. As the ALJ found, however, Experts did not support these assertions with evidence of any such contractual arrangements. ALJ Decision at 8. In our document search, we also found no such documents. Experts' assertion before the ALJ that it had contracts with other entities that would enable it to fill orders is not evidence but merely an assertion for which Experts provided no evidence. Experts cannot create a genuine dispute of material fact precluding summary judgment with mere assertions about the existence of documents it is required to have. *See 1866ICPayday.com, L.L.C.,* DAB No. 2289, at 11 (upholding summary judgment where nonmoving party had failed to produce documentary evidence); *Livingston Care*, DAB No. 1871, at 5 (stating that "[t]o defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact . . ." citing *Matsushita,* 475 U.S. at 586, n.11; *Celotex*, 477 U.S. at 322).

On appeal before the Board, Experts argues:

> Petitioners provided general service agreement and reported the fact that a contractual agreement existed between Le Roy Lemons and Experts Are Us Inc. Petitioner reported the fact that a contractual agreement existed between Experts Are Us Inc and VGM. Therefore inventory issues are not a valid reason to find Experts Are Us Inc. non compliant. These documents were verifiable. Furthermore Appellant could provide any of these documents upon development of the record requests.

P. Request for Review (RR) at 20 (emphasis added). Again, this is a bare assertion unsupported by the submission of any evidence. It does not create a genuine dispute of

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[15] The ALJ stated that Experts claimed to have in its inventory the items listed on page 19 of CMS Exhibit 4. ALJ Decision at 8, *citing* P. Response to CMS MSJ at 25. We see no such claim by Experts. In any event, that exhibit is not an inventory list but a blank form titled "PATIENT POST EDUCATON FORM" that lists many DMEPOS items. CMS Ex. 4, at 19. The presence of items on the form does not establish that they were in Experts' inventory, and, indeed, Experts' assertions before the ALJ indicate that it intended to supply items it sold through contracts with other companies as well as from its inventory. P. Response to CMS MSJ at 26.

material fact precluding summary judgment. Moreover, we note that Experts does not even allege in this statement that it supplied, to Palmetto in July 2007, to the Palmetto Hearing Officer in 2011, or to the ALJ in Docket No. C-11-14, copies of such "contracts or other documentation showing" that it was "contracting with other companies for the purchase of items necessary to fill" its orders even though the regulation requires production of such documents "on request," a request Palmetto first made in 2007. Finally, while Experts now alleges that it previously provided a "general service agreement," it does not explain to whom the agreement was provided or the agreement's relationship to this DMEPOS standard; nor does it identify where the agreement can be located in the documents filed before ALJ Grow or in its other cases. In our document search, we see nothing in the nature of a general service agreement.

In its untimely reply in the instant appeal, Experts also says, without supporting citation to exhibits, that it "object[s]" to the summary judgment "because supplier had inventory and the pictures prove it."[16] P. Reply at ¶ 44. This argument is without merit. As explained above, regardless of whether a DMEPOS supplier has inventory of its own, when the supplier also fills orders by contracting with other companies (as Experts represents it did), section 424.57(c)(4) requires the supplier to produce those "contracts or other documentation." Our decision, therefore, does not turn on either acceptance or rejection of the inspector's notation that Experts' inventory was "inadequate." The material issue here is not whether Experts had more items in inventory than the inspector listed but whether Experts failed to produce the documentation required by DMEPOS standard 4, i.e. documentation as to its contracts with other companies for filling orders.

We thus conclude that there is no genuine dispute of material fact related to Experts' failure to produce contracts or other documentation of any arrangements for filling DMEPOs orders through other companies, and conclude, therefore, that the ALJ properly granted summary judgment on DMEPOS standard 4.

DMEPOS Standard 5 (failure to advise of rental/purchase option agreements)

DMEPOS standard 5 provides that the supplier –

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[16] The exhibits cited by Experts in its Response to CMS's Motion for Summary Judgment contain no pictures of inventory or other information about inventory. An exhibit submitted in Docket No. C-09-724 does contain photocopied pictures of inventory that Experts apparently submitted to Palmetto in July or August of 2007. The pictures are not clear, but, to the extent they can be relied on to document anything, they primarily corroborate the inspector's findings as to Experts' inventory items. P. Exs. 27(A)16; 27(A)21; 27(A)22; 27(A)31 in Docket No. C-09-724 (attached as App. A). The few items Experts claims are depicted (an "infrared lamp," "child incontinence" supplies, a "4 prong walker," a "portable potty," "diabetic supplies," "hoyer and hospital bed semi-electric") indicate that Experts, as found by the inspector and admitted by Experts, was not operating the business solely on the basis of its inventory.

> [a]dvises beneficiaries that they may either rent or purchase inexpensive or routinely purchased durable medical equipment, and of the purchase option for capped rental durable medical equipment, as defined in § 414.220(a) of this subchapter. (The supplier must provide, upon request, documentation that it has provided beneficiaries with this information, in the form of copies of letters, logs, or signed notices.)

42 C.F.R. § 424.57(c)(5). The ALJ found that the investigator requested Experts' rental/purchase option agreements and a "new policy with IRP notification" pursuant to this DMEPOS standard. ALJ Decision at 8 citing CMS Ex. 4, at 6. Before the ALJ, Experts asserted that exhibit "E-S.l" was its "E-rent or own purchase form," which had been previously faxed to Palmetto. P. Response to MSJ at 5, 12, 25. The ALJ stated that he could "find no evidence in the record indicating that Experts provided this documentation to the fraud investigator or other evidence that would raise a genuine dispute of material fact with regard to whether Experts complied with this standard." ALJ Decision at 8. The ALJ correctly found that neither the exhibit cited by Experts nor any other relevant exhibit was in the exhibits before him. The ALJ appears to have granted summary judgment as to this DMEPOS standard based on the absence of such evidence.

On appeal to the Board, Experts objects to the entry of summary judgment on this DMEPOS standard. RR at 20. Although Experts fails to identify where documentation related to "rental/purchase option agreements" or a "new policy with IRP notification" can be found, Experts did submit in Docket No. C-09-724 a blank form under Experts' letterhead at 303 Ulrich that discusses purchase or rental options and on which a customer could have indicated his/her preference for purchase or rental. *See* P. Ex. 26L4, September 15, 2009 submission in C-09-724 (attached as App. B). We make no findings as to whether Experts actually provided this form to Palmetto in response to the inspector's July 2007 visit or as to whether this form in and of itself would be material to or demonstrate compliance with section 424.57(c)(5). However, because the ALJ did not have this form before him and because it arguably raises a dispute of fact at least relevant to Experts' compliance with DMEPOS standard 5, we do not base our decision on lack of compliance with DMEPOS standard 5.

DMEPOS Standard 12 (failure to have written instructions or information for beneficiaries on the use of equipment)

DMEPOS standard 12 provides that the supplier --

> must be responsible for the delivery of Medicare covered items to beneficiaries and maintain proof of delivery. (The supplier must document that it or another qualified party has at an appropriate time, provided beneficiaries with necessary

> information and instructions on how to use Medicare-covered items safely and effectively)[.]

42 C.F.R. § 424.57(c)(12). For this DMEPOS standard, the inspector checked the box requesting Experts to provide "documentation for written instructions/information on beneficiary use/maintenance of supply" and, in an adjacent note, wrote "educational material/training material." CMS Ex. 4, at 6.

The ALJ found two documents in the proceeding before him to be relevant to this standard: a blank Experts' form titled "Customer Briefing Form" and a blank Experts' form titled "Patient Post Education Form." ALJ Decision at 11, citing CMS Ex. 4 at 15, 19. The first is a form on which a customer could sign that he or she had "received, read and/or been instructed in detail on the following information" including "Product usage and safe operations, cleaning and storage of delivered item." CMS Ex. 4, at 15. The second is a form that lists items of equipment (including a "Hoyer Lift") and on the second page contains a set of instruction topics such as calling 911, storage, proper and safe usage, cleaning, and safety precautions. CMS Ex. 4, at 19-20.

The ALJ granted summary judgment because he found that these blank forms were "totally devoid of any meaningful written instructions or information to assist Medicare beneficiaries with their supplies." ALJ Decision at 11.

On appeal, Experts argues:

> Object to violation of non compliance with Standard 12 and the granting of Summary Judgment. Object to judge's conclusion that the blank forms are devoid of any meaningful written instructions. Appellants object to the Judges, hearing officer, fraud investigator's desire for this supplier to perform fraud to satisfy their unreasonable expectations for pre written instructions on items not supplied or delivered. The forms are proper in their blank state, because they don't even come into the factor until after the doctor has authorize[d] and the supplier has delivered a specified item. . . . Petitioner submitted the blank forms because it is impossible to give a beneficiary instructions on an item not delivered to them. Therefore the blank forms are sufficient in proving Supplier compliance with this standard upon the specified and authorized item being delivered. I object to the Judge, hearing Officer, Fraud Investigator's unreasonable desire for this Supplier to perform fraud to satisfy their unreasonable expectation for pre written instructions on items not supplied or delivered.

RR at 21. With respect to standard 12, we understand Experts to be arguing that, as of July 18, 2007, it had not actually sold DMEPOS items to customers that would require "instructions on how to use Medicare-covered items safely and effectively," and,

therefore, it was unreasonable of Palmetto to ask it to produce completed forms and instructions for such items.

For the following reasons, we reject Experts' argument. As the ALJ found, the "instruction" forms on which Experts relies do not provide specific information and instructions on how to use safely and effectively a particular item, as required by DMEPOS standard 12. Thus even if we were to accept for sake of argument here that Experts had not yet sold a DMEPOS item that required specific use or safety instruction, Experts has not shown that there is a genuine dispute of material fact regarding its compliance with DMEPOS standard 12. At the very least, to show compliance, Experts would have to show that it was prepared, upon its sale or renting of such an item, to provide instructional material for it. For example, Experts agrees that, as observed by the inspector, it had a hoyer lift in its inventory. CMS Ex. 4, at 4; App. A at 4. A hoyer lift is an item that requires specific instructions on safety precautions, etc. At a minimum, Experts should have had and should have produced, after being requested to do so by Palmetto, the relevant "educational material/training material" for this lift. CMS Ex. 4, at 6.

We also note that the Medicare regulations require a supplier to be operational in order to enroll in Medicare. 42 C.F.R. § 434.530(a)(5)(ii). Section 424.502 provides:

> Operational means 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.

The Board has held that, to be considered operational under section 424.502, a supplier must "have a qualified physical practice location and actually be furnishing the types of covered Medicare services that it holds itself out as furnishing." *CompRehab Wellness Group, Inc.*, DAB No. 2406, at 7 (2011), *citing* 42 C.F.R. 424.502 and *A To Z DME, LLC,* DAB No. 2302. As the Board said in *CompRehab,* "The on-site visits that CMS and its contractors conduct permit the Secretary of HHS to 'to verify . . . that he is paying an entity that actually exists or that is providing a service that it represented it would provide in its enrollment application.'" DAB No. 2406, at 7, citing 71 Fed. Reg. at 20,755 (April 21, 2005). The absence of completed instruction forms raises a question about whether Experts was operational on July 18, 2007.

We thus conclude that there is no genuine dispute of material fact related to Experts' failure to produce information and instructions on how to use Medicare-covered items safely and effectively when requested to do so by Palmetto and conclude, therefore, that the ALJ properly granted summary judgment on DMEPOS standard 12.

DMEPOS Standard 6 (failure to have documentation of warranty coverage)

DMEPOS standard 6 provides that a supplier must honor –

> all warranties expressed and implied under applicable State law. A supplier must not charge the beneficiary or the Medicare program for the repair or replacement of Medicare covered items or for services covered under warranty. This standard applies to all purchased and rented items, including capped rental items, as described in § 414.229 of this subchapter. The supplier must provide, upon request, documentation that it has provided beneficiaries with information about Medicare covered items covered under warranty, in the form of copies of letters, logs, or signed notices.

42 C.F.R. § 424.57(c)(6). The investigator specifically requested that Experts provide "proof of warranty coverage" pursuant to this DMEPOS standard and, in an adjacent handwritten addition on the survey form, wrote "(disclosures to [beneficiaries])". CMS Ex. 4, at 6.

The ALJ discussed and Experts relies on a blank form titled "Customer Briefing Form" on which a customer could sign that he or she had "received, read and/or been instructed in detail on the following information" including "Products and Warranty." ALJ Decision at 9, citing CMS Ex. 4, at 15; RR at 20; P. Response to MSJ at 19.

The ALJ concluded that this form did not constitute documentation "indicating that Experts ever provided CMS with product and warranty information provided to beneficiaries in the form of letters, logs, or signed notices." ALJ Decision at 9. The ALJ therefore concluded that "it is undisputed that [Experts] has not provided documentation that [it] has provided beneficiaries with information about Medicare covered items covered under warranty" and "Petitioner is not in compliance with supplier standard 6." *Id.*

In its request for review, Experts states:

> Object to conclusion and granting of Summary Judgment for violation of standard 6 because petitioners provided requested information to Porter on July 18, 2007 in person and via facsimile and provided the same information to Gadson via facsimile on July 18, 2007. Petitioners have met the burden of proving a genuine issue and material facts exist. As a matter of law the Petitioners are entitled to Summary Judgment.

RR at 20.

Experts' argument does not address the basis for the ALJ's determination. The fax cover sheet sent to the inspector listed Experts' "Customer Briefing" form and the ALJ discussed a Customer Form. Therefore, the ALJ was not saying Experts did not timely provide this form to Palmetto; he was saying the blank form was inadequate to raise a genuine dispute as to whether Experts complied with the DMEPOS standard. Experts does not address the basis for the ALJ's conclusion and our document search produced no evidence to put in question that conclusion.

We thus conclude that there is no genuine dispute of material fact related to Experts' failure to produce documentation related to warranties when requested to do so by Palmetto and conclude, therefore, that the ALJ properly granted summary judgment on supplier DMEPOS standard 6.

DMEPOS Standard 14 (failure to have a repair or service contract)

To comply with DMEPOS standard 14, a supplier "[m]ust maintain and replace at no charge or repair directly, or through a service contract with another company, Medicare-covered items it has rented to beneficiaries. The item must function as required and intended after being repaired or replaced." 42 C.F.R. § 424.57(c)(14) (emphasis added).

The ALJ found that the investigator specifically requested, "within two business days, a repair contract/service agreement and a return policy" but that "Petitioner has not provided any supporting evidence of such a repair contract/service agreement." ALJ Decision at 11. The ALJ referred to a blank "PROOF OF DELIVERY" form that set out Experts' "NO RETURN POLICY" and found this form did not comply with DMEPOS standard 14. *Id. citing* CMS Ex. 4, at 14. The ALJ found further, as do we, that while Experts cited to its exhibits "E" and "V" and CMS Exhibit 4 as containing information on its "repair contracts," there were no such contracts in those exhibits. *Id. citing* P. Response to MSJ at 22. He therefore granted summary judgment on DMEPOS standard 14.

On appeal Experts argues:

> Object to violation of non compliance of Standard 14 and the granting of Summary Judgment in favor of the Respondents, because the blank form prove[s] suppliers readiness upon the need for a repair or maintenance service on one of its products.

RR at 21. Experts does not identify by exhibit number the "blank form" to which it is referring. For the following reasons, we conclude its argument is without merit.

DMEPOS standard 14 requires a supplier to replace or repair items it rents to beneficiaries. A supplier may do the repairs "directly, or through a service contract with

another company." While Experts represented before ALJ Grow that it provided to the inspector its "general repair agreement" (P. Response to MSJ at 19) and "repair contracts" (*id.* at 23, *citing* to P. Exhibits E and V) to document its capacity to repair rented equipment under this DMEPOS standard, the ALJ found no such evidence. ALJ Decision at 11. Our document search also produced no such executed agreement or contract. We do find, however, an unexecuted form contract under Experts' letterhead titled "Service Agreement Contract" for contracting for equipment repairs. P. Ex. 27C1, at 4 in Docket No. C-09-724 (attached at App. C) If this is the "blank form" to which Experts refers in its request for review, the form does not support a reasonable inference that Experts had entered into any repair services contract with a third party at the time of the August 1, 2007 denial since the form is unexecuted. Thus, this form is not sufficient to create a genuine dispute of material fact as to whether Experts was prepared to "repair directly, or through a service contract with another company," items that it rented to customers.

DMEPOS standard 14 also provides that a supplier could alternatively elect to "replace [rented items] at no charge." The inspector requested a copy of Experts' "return policy." CMS Ex. 4, at 6. As the ALJ found, the only evidence of a policy related to return of items in the record before him was set forth in Experts' statement of its "NO RETURN POLICY." ALJ Decision at 11, *citing* CMS Ex. 4, at 14. In its request for review or elsewhere, Experts does not deny that it rented or planned to rent DMEPOS items or assert that its no return policy statement was intended for purchasers and not renters. The policy stated that items could not be returned, that customers should not accept equipment if they were not satisfied, and that, if "you accept equipment knowing of fraudulent acts, you will be responsible for all payment of items accepted and criminal charges may be pressed against you . . . ." CMS Ex. 4, at 14. Even viewed in the light most favorable to Experts, this statement of policy does not show that Experts was complying with DMEPOS standard 14 by replacing rented items at no charge instead of repairing them. Indeed, the statement that an item could not be returned is incompatible with having a replacement policy. Our document search produced no other statements of an Experts' return policy.

We thus conclude that there is no genuine dispute of material fact related to Experts' failure to show that it would "replace at no charge" or could and would "repair directly, or through a service contract with another company" Medicare-covered items rented to beneficiaries. We conclude, therefore, that the ALJ properly granted summary judgment on DMEPOS standard 14.

2) Experts has raised no genuine dispute of material fact that would preclude summary judgment upholding CMS's determination to deny Experts' August 2007 Medicare reenrollment application on the ground that Experts was not in compliance with DMEPOS standard 8 because it was closed during reasonable business hours on October 16 and 17, 2007 and, therefore, was not accessible to the CMS contractor or beneficiaries as required by that standard.

The Palmetto Hearing Officer issued a November 23, 2010 reconsideration decision reviewing a December 11, 2007 initial determination by Palmetto that denied Experts' August 2007 reenrollment application for 6420 Richmond Avenue, Suite 326, Houston, Texas. CMS Exs. 7, 8, 11. Palmetto based this denial on its assertion that Experts was closed on two occasions when the same inspector attempted on-site inspections to ascertain whether it was complying with DMEPOS standards. CMS Ex. 7.

Section 424.57(c)(8) requires that DMEPOS suppliers permit CMS (or its agent) to conduct on-site inspections to ascertain supplier compliance with the DMEPOS standards. In addition, the section requires that a DMEPOS supplier "must be accessible during reasonable business hours to beneficiaries and to CMS, and must maintain a visible sign and posted hours of operation." CMS asserted, and Experts admitted, that on October 16, 2007 the inspector attempted an on-site inspection of Experts' site at 6420 Richmond Avenue, Suite 326 and found it closed. CMS Ex. 9; CMS Ex. 10; CMS Ex. 11, at 8; P. Response to MSJ at 6. CMS also asserted that the inspector found the site closed in a visit the next day at 11:40 A.M. Finally, CMS asserted that the inspector also found that Experts had no posted hours of operation at the time of these visits. CMS Ex. 9, at 2, 7; CMS Ex. 7, at 3. As proof of its allegations, CMS submitted the inspector's report stating that he had found the site closed on October 16 at and 12:15 P.M. and October 17 at 11:40 A.M., pictures of the front door of the suite and the building, the notice of the visit left by the inspector on October 16 and the inspector's sworn testimony saying he had visited the site those two days at the specified times and found the site closed. CMS Exs. 9, at 1, 6-8; 17.

Before the ALJ, Experts disputed that the inspector made the second visit on October 17 and argued there was, therefore, a genuine dispute of material fact. P. Response at 6. We note at the outset that this argument assumes that Palmetto's inspectors are required to make multiple unsuccessful inspection attempts. The regulation on its face does not specify any number of visits. The ALJ concluded with respect to the second April visit that "even if I were to infer that the fraud investigator did not make a second attempt at an on-site inspection . . ., it is immaterial to my decision." ALJ Decision at 15, *citing Mission Home Health*, DAB No. 2310 (2010). In *Mission Home Health,* the Board held that CMS could deny a supplier's Medicare billing privileges based upon the undisputed failure to be operational when the inspector visited the supplier's address, regardless of whether it may have been operational at some earlier or later time. However, we need

not decide in this case whether more than one visit is required given our conclusion that Experts has not proffered any evidence to support its assertions challenging the inspector's second visit in response to CMS's evidence supporting both visits.

The ALJ rejected Experts' argument as to the second visit, partially on the basis of his mistaken belief that Experts was also asserting that it had been "locked out illegally" from the site by its landlord during this timeframe. ALJ Decision at 13, *citing* Experts' Response to MSJ at 2. While we see how the ALJ could have been confused by what Experts said in its Response, the ALJ's statement that Experts had asserted that it was locked out of its site in October 2007 is incorrect. Experts' allegations about a lockout are relevant to denial of the April 2008 application, not this one. *See* RR at 24 (stating that ALJ was wrong in saying Experts was locked out in October.) However, the ALJ's mistake is not material to our decision, and, for the following reasons, we conclude that the record supports upholding CMS's determination denying the August 2007 application for 6420 Richmond Avenue.

In moving for summary judgment on the basis of the inspector's alleged visits on October 16 and 17, CMS relied on a report done in the ordinary course of business and sworn testimony from a person with personal knowledge stating that he found the site closed on both these days. In contrast, Experts submitted no sworn testimony, even though the parties were directed to do so by the ALJ's Pre-hearing Order. Instead, Experts relies on Ms. Lemons' unsworn statements denying CMS's assertion that the inspector visited its premises on October 17. P. Ex. 1, at 5. More important, Ms. Lemons' unsworn denials are without foundation. Ms. Lemons did not say (before the ALJ or on appeal to the Board) that she was at the site on October 17, much less at 11:40 A.M., nor did she say that an employee of Experts was at the site at that time and told her the inspector did not visit, nor does she say that the business was open and operating on that day or provide evidence that would support such an assertion. Thus, even if her denials were sworn, no rational trier of fact would find in favor of Experts based on her statements.[17]

We thus conclude that there is no genuine dispute of material fact that Experts' site was closed and therefore inaccessible for inspection and to beneficiaries during reasonable business hours on October 16 and 17. We conclude, therefore, that the ALJ properly granted summary judgment on DMEPOS standard 8.

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[17] Ms. Lemons alleges that this inspector falsely claimed to have conducted site visits to Experts' premises on other occasions. This allegation is unsupported by any evidence and irrelevant. The issue is not whether the inspector conducted site visits at other times; it is whether he conducted the site visits on October 16 and 17, 2007. Experts admits that the inspector came to its premises on October 16 and has not raised a genuine dispute of fact in response to CMS's evidence that Experts' site was not available to the inspector or accessible to beneficiaries on October 17.

3) Experts raised no genuine dispute of material fact that would preclude summary judgment upholding CMS's determination to deny Experts' April 2008 Medicare reenrollment application on the ground that Experts was not in compliance with DMEPOS standard 8 and was not operational.

The Palmetto Hearing Officer issued a November 23, 2010 reconsideration decision upholding a May 30, 2008 initial determination by Palmetto that denied Experts' April 2008 reenrollment application for 6420 Richmond Avenue, Suite 326, Houston, Texas. CMS Exs. 12, 13, 16. Palmetto based this denial on its finding that Experts was closed when the same inspector attempted to make on-site inspections to ascertain whether Experts was complying with DMEPOS standards. CMS Ex. 13.

CMS moved for summary judgment on the basis of evidence it argued established that, on April 22 and 23, 2008 when the inspector attempted to conduct site visits, Experts' site was locked by the landlord and, therefore, Experts was not in compliance with section 424.57(c)(8) and was not operational as required by section 424.530(a)(5)(ii). CMS MSJ at 8-9. CMS submitted evidence that on April 22, 2008 at 8:45 a.m., the same investigator attempted an on-site inspection at Experts' place of business at 6420 Richmond Avenue and found that a property management company had placed a plaque on Experts' door. CMS Ex. 14, at 7 (site visit report); CMS Ex. 17, at 4 (affidavit of inspector). The plaque stated that the property management had changed the lock on Experts' door due to delinquent rent. *Id.* The investigator reported making a second attempt at a site inspection on April 23, 2008 at 8:30 a.m. and found the same plaque on Experts' door.[18] CMS Ex. 14; CMS Ex. 17, at 4.

Before ALJ Grow, Experts conceded the inspector made a site visit on April 22 and that the site was locked by the landlord at that time but asserted that the landlord "wrongfully locked supplier out of suite, then later gave supplier a credit for the inappropriate lock out of its suite." P. Response to MSJ at 8. Experts disputed CMS's assertion that the inspector made a second inspection attempt on April 23, 2008. *Id.* at 27. In support of its assertions, Experts cited to purported affidavits (*id.),* but the ALJ found Experts had not included affidavits with its response brief and exhibits. ALJ Decision at 15. Our document search has produced no such affidavits.

The ALJ concluded that Experts had "not furnished any evidence of a dispute concerning a material fact that, if proven, would affect the outcome of the case under governing law" because:

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[18] The inspector also reported that Experts' business phone number was no longer listed with directory assistance at this time. CMS Ex. 14, at 10; CMS Ex. 17, at 4. Section 424.57(c))(9) requires suppliers to maintain a business phone under the name of the business. The Hearing Officer and the ALJ did not rely on this allegation. Since there are other grounds to uphold this denial, it is unnecessary for us to address the allegation.

> Petitioner does not support the claim that the office was illegally closed with any evidence. Petitioner merely makes statements that Petitioner previously complained about this issue to other governmental authorities.

ALJ Decision at 13, citing P. Response to MSJ at 2. The ALJ concluded that "Petitioner's statements alone, without supporting evidence or documentation, do not create a genuine issue of disputed material fact" as to whether it had been locked out illegally. *Id.*

While our document search has not produced the affidavits which Experts cites, we do find an earlier statement in which Ms. Lemons confirmed that nonpayment of rent was the reason for the lockout. She wrote:

> My leasing management locked me out of the office for being 21 days late. LeRoy Lemons paid the $496.00. In the later part of May I received an invoice stating that because of the prepaid rent on April 23, 2008 I only owed $110.00 for rent for the month of June. This peculiar lock out was misappropriate and it is the reason no one was at the office on April 21, 22, 2008. My employee was at the store site from 7:30 am until 2:30 pm, awaiting the removal of the lock on April 23, 2008.

Docket No. A-10-38, Tab A, at 17 (attached as App. D)(emphasis added). As the ALJ stated, Experts does "not support the claim the office was illegally closed with any evidence." ALJ Decision at 13. In addition, the earlier statements by Ms. Lemons on behalf of Experts constitute an admission that Experts was locked out for not timely paying its rent, and describe the credit as due because of prepaid rent on April 23 (after the lockout) not as a credit for an inappropriate lockout. Moreover, Experts produced no evidence that, but for the landlord's allegedly illegal conduct (and we make no finding that it was illegal), Experts' site would have been accessible to inspection and open to beneficiaries.

We thus conclude that there is no genuine dispute of material fact that on April 21 and 22 and at least part of April 23, 2008, Experts was not operational and its site was not accessible to the CMS contractor and to beneficiaries during reasonable business hours. We therefore conclude that the ALJ properly granted summary judgment on the basis of DMEPOS standard 8 and Experts' failure to be operational.

4. Experts' other arguments are without merit.

Experts raises some additional arguments that we find without merit for the reasons explained below.

Experts argues that, under sections 424.525 and 424.535 of 42 C.F.R., it was "entitled" to "an opportunity to comply within the 30 days to any found deficiencies" in the July 2007 inspection, instead of the two days provided by the inspector. RR at 17; *see also* at 23.

The two regulations cited by Experts are irrelevant.

- Section 424.525 governs CMS's authority to reject a supplier's application for failure "to furnish complete information on the provider/supplier enrollment application within 30 calendar days from the date of the contractor request for the missing information." CMS did not reject the applications at issue under section 424.525 for failure to furnish complete information on the applications; it denied these applications under section 424.530 for failure to comply with Medicare regulations, as documented by site inspections or attempted inspections.

- Section 424.535 governs revocations of provider/supplier enrollment and billing privileges and provides, in certain situations, for a limited opportunity to correct a "deficient compliance requirement" before the contractor and CMS make a final revocation determination. Section 424.535 does not apply here because Palmetto's actions at issue were denials of reenrollment applications made under section 424.530, not revocations of enrollment and billing privileges under section 424.535.

Experts argues that the facts that it had been approved for a "Device Distributor license" and for commercial liability insurance after an inspection "prove Experts Are Us Inc. was compliant" with Medicare DMEPOS standards because "the state and Federal rules are similar." RR at 16, *see also* 8, 17. This argument is without merit. Under 424.57(c), a DMEPOS supplier "must meet and must certify in its application for billing privileges that it meets and will continue to meet" the standards set forth in that section. Even assuming for the sake of argument that other inspection authorities had "similar" standards and those authorities found Experts compliant with their standards, such findings would not satisfy the Medicare enrollment process, which is governed by federal law.

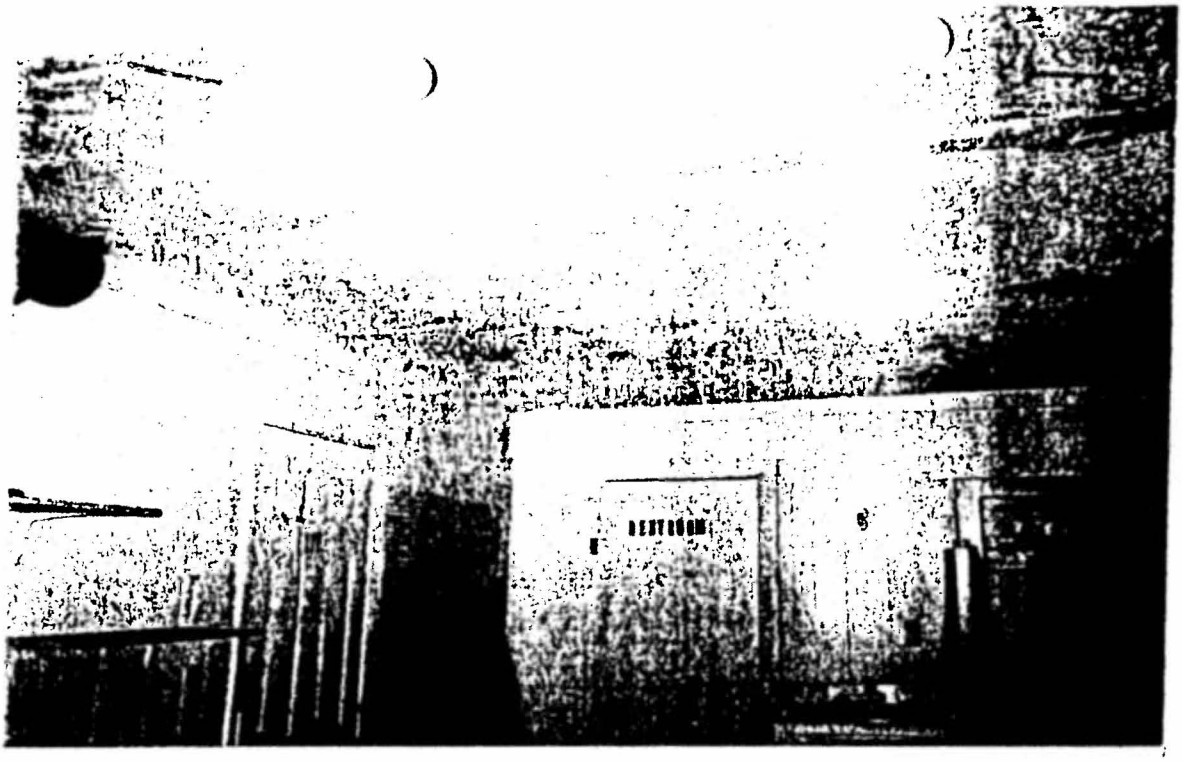
CONCLUSION

For the reasons stated above, we uphold the ALJ's decision in this case.

/s/
Judith A. Ballard

/s/
Constance B. Tobias

/s/
Sheila Ann Hegy
Presiding Board Member



Light on Facility Operation

Cubicle Curtain Separates Lunch/Dining Area)

#16

Exhibit 27(A) 16

Arthritus Infrared Lamp

Heat Therapy Area

Top [illegible] visible from left
① child maintenance
② Dialysis – pump area

Sign on door

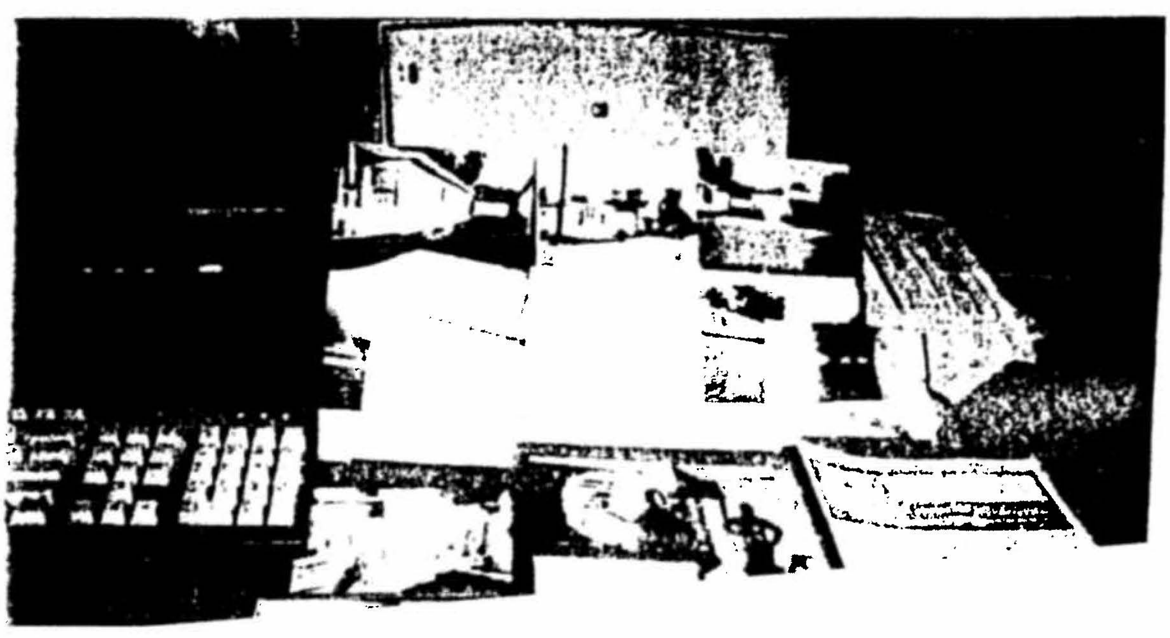
#21

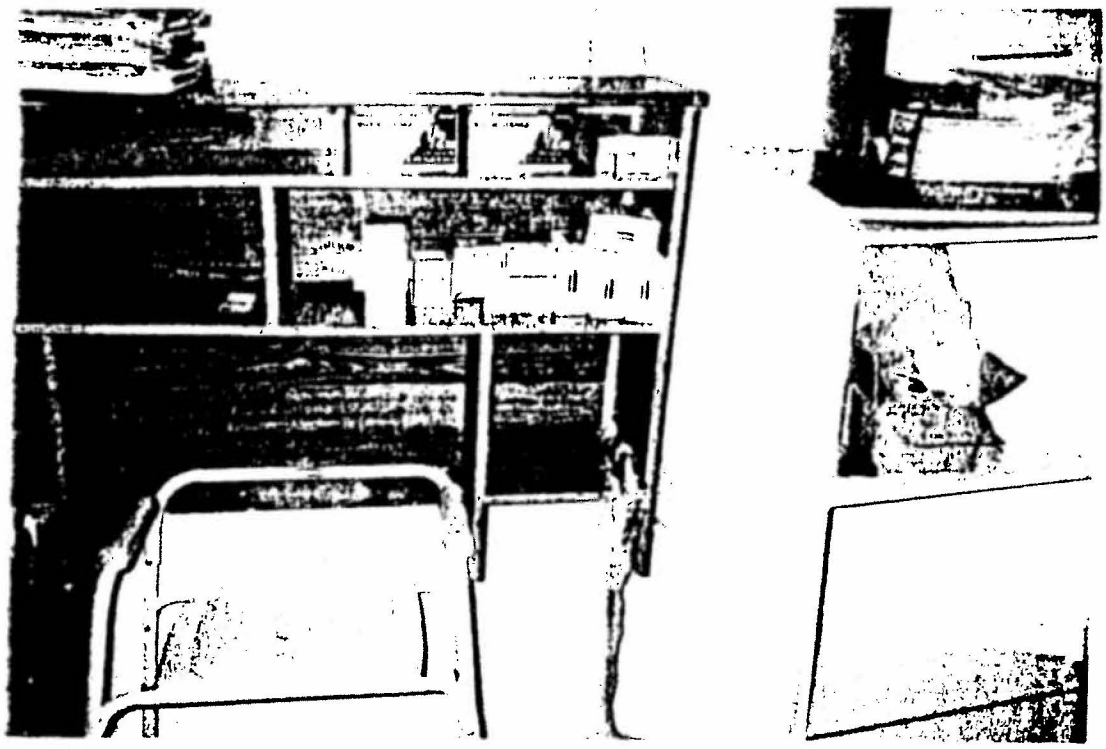
Exhibit 27(A) 21

Appendix A
Page 2 of 4
Docket No. A-12-14

Right
Tax permit
distributor
e license
License above

[illegible]

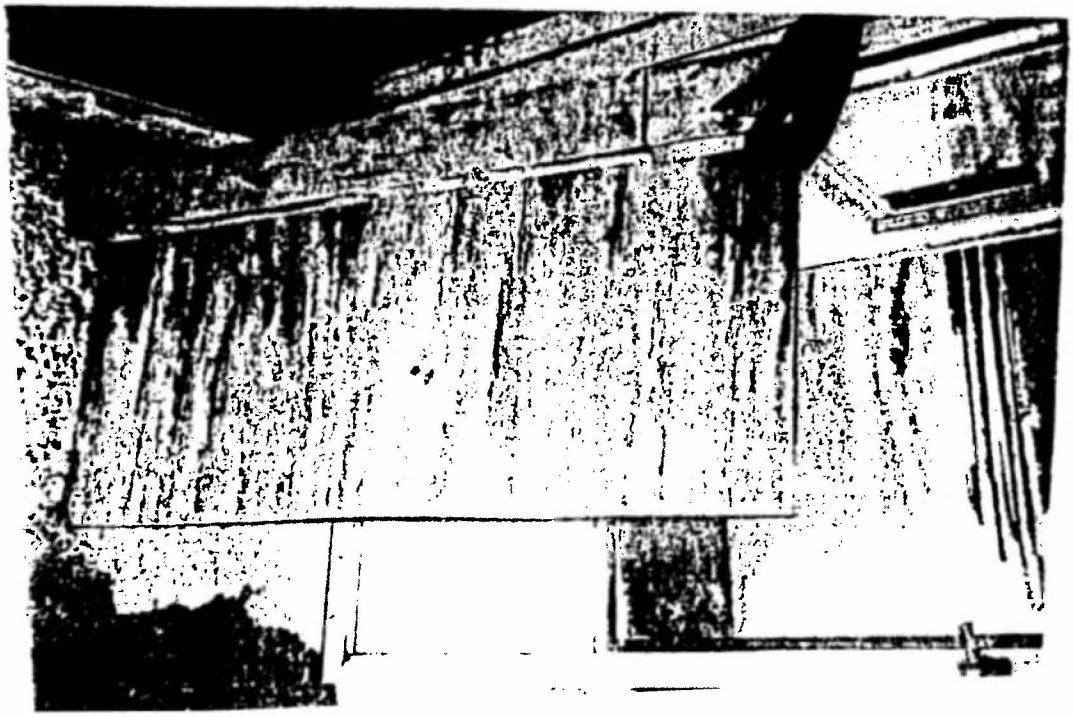




#22

Exhibit inventory ② 4 prong walker
① Portable potty
③ diebetic supplies

Exhibit 27(A)22



(Portable ramps was at store when inspector came)
Ramp made of solid pine wood
The prodigal Board ramp was replaced

Pg 31

Hoyer 8 Hospital Bed Semi Electric

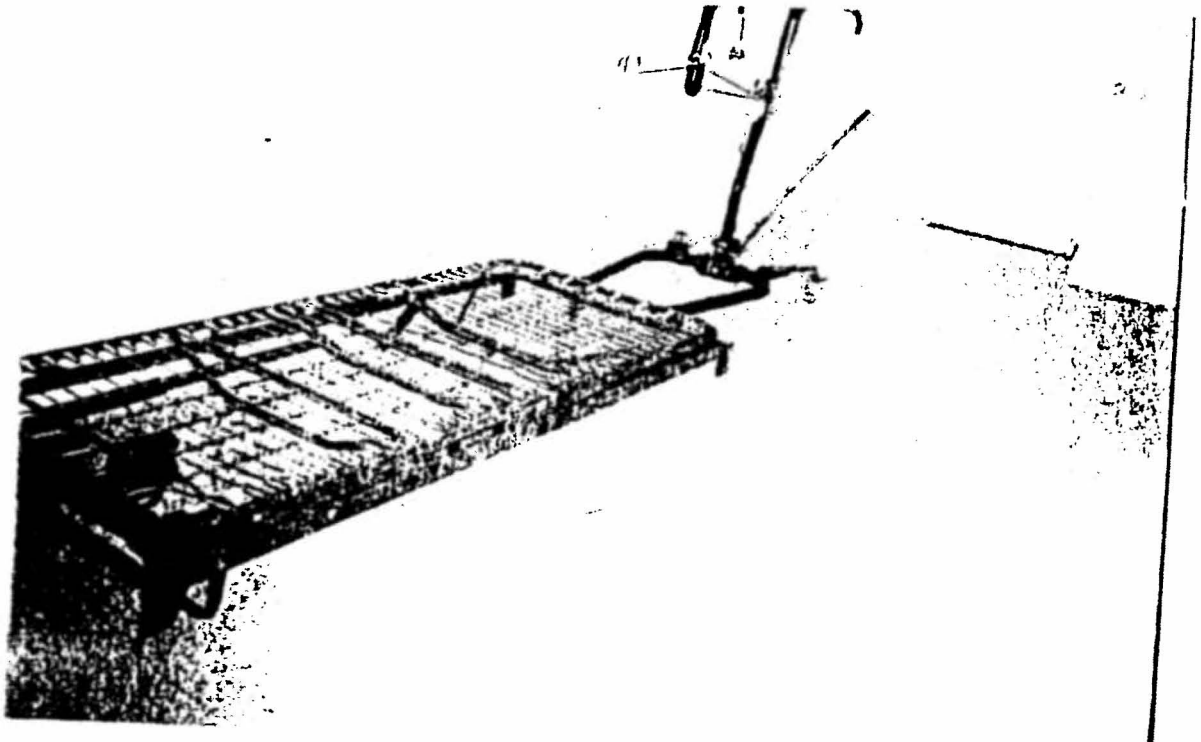


Exhibit 29(A) R1

: Ex.

age

EXPERTS ARE US INC.
6420 Richmond Ave.
Suite.326 Houston Texas. 77057
BUS: (281)-565-6316

Durable Medical equipment can be sold with the option of purchase or rental. The customer is the one who decides which option is best suitable to meet their individual need, (unless specified differently by the client's physician or insurance carrier). Please indicate your choice of purchase or rental by initializing, place your initials in the appropriate blank.

I WOULD LIKE TO PURCHASE _____. I WOULD LIKE TO RENT _____.
Delivered Item: _____, _____Date: _____

Medical Equipment and Supplies:

Sales
Hospital Beds
Hoyer Lifts
Stair Lifts
Manual Wheelchairs
Motorized Wheelchairs
Incontinence Supplies
Diebetic Equipment and Supplies
Tens Units
Lymphadema Pump and Supplies
Suction Pump and Supplies

Rental/lease
Hospital Beds
Hoyer Lifts
Stair Lifts
Manual Wheelchairs
Motorized Wheelchairs
Dialysis Equipment and Supplies
Tens Units
Lymphadema Pump and Supplies
Kangaroo Pump and Supplies

Thank You Valued Customer:

Your satisfaction and awareness is a few of our primary concerns. You as a consumer of durable medical equipment have the option of purchasing or renting prescribed medical equipment. All equipment comes with a (1) one year manufacture warranty. After the manufactures warranty has expired and you have an issue with products supplied by Experts Are Us medical equipment, please contact our customer service department (@ (281) 416-0781). We ask that you would complete this simple survey to assist us with being able to ensure we provide you with exceptional customer service now and in the future.

Thank You,

Rita Lemons

Office Address
6420 Richmond Ave.
Suite 326
Houston, Tx 77057

Exhibit # 24 L4

Experts Are Us Inc.
303 Ulrich
Sugar Land, Texas 77478

SERVICE AGREEMENT CONTRACT

This is an agreement between Houston based Experts Are Us Inc. located at 303 Ulrich Sugar Land, Texas 77478 and _____, contractor located at _____. The contractor will perform repair on Durable Medical Equipment for Experts Are Us Inc.'s clients. This agreement is an On Call/ As Needed Contract per job assignmen
The contractor will provide liability coverage to Experts Are Us Inc.
The Corporation will contact contractor and provide work order.
The contractor will be paid a set agreed fee established between the Corporation and Contractor.
Experts Are Us Inc. and service providers who perform services to Experts Are Us Inc.'s clients will observe Hippa and other applicable laws governing the aging and disabled population.

Sign: _____ Date: ___-___-_____
Print:_____ Title: _____
Experts Are Us Representative

Sign: _____ Date: ___-___-_____
Print: _____ Title: _____
Service Contractor

Mailing Address
9420 Katy Freeway
Suite 326
Houston, TX 77055

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assist the inspector, or the business was closed. The inspector only came on October 16, 2007. I responded and requested an appeal to the 1st letter dated December 11, 2007, Tracking number 70072680000329159720

I received a denial letter dated December 11, 2007 sent to 303 Ulrich Sugar Land, Texas 77478. The letter stated that requested information was not received from me in a timely manner. (I have post mark dated receipt from the United States Postal Service) Tracking number 70072680000329159720, 12-19-2007 and 23040050000006136842 01-09-2008. On May 30, 2008 I received another denial for application submitted on 04-04-2007.
The denial stated that on two or more occasion an inspector came to inspect the store. My leasing management locked me out of the office for being 21 days late. LeRoy Lemons paid the $496. 00. In the later part of May I received an invoice stating that because of the prepaid rent on April 23, 2008 I only owed $110.00 for rent for the month of June. This peculiar lock out was misappropriate and it is the reason no one was at the office on April 21, 22, 2008. My employee was at the store site from 7:30 am until 2:30 pm, awaiting the removal of the lock on April 23, 2008.

I submitted another application on June 04, 2008 because I was told I have no appeal rights and Ms. Kianna was told I nor my company had no appeal rights. Inspector Mark Porter came out on June 17, 2008 and he left a site visit acknowledgement and I submitted the information he requested with in the 2 days as he instructed on the acknowledgment sheet. Please note Mark Porter gave me 3 days when he came on July 18, 2007 with the predated site visit acknowledgement form dated 07-17-2008. I sent the documentations the same day of his visit 07-18-2008. I emailed a copy of the pictures of the newly portable ramp on July 26, 2007. I requested reconsideration according to rule 405.722 , 42 424.57(8). As indicated in correspondence sent from me I was diligently trying to comply and was and is entitle to review hearing and or Appeal because my store was compliant at time of specified site visits. If due diligence to verify whether or not store my store was/ is compliant at time of inspection My billing number would be active. I am also requesting in writing a Request for Reconsideration as provided in rule 405.720.