Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Advance Group LLC
(PTAN: 5270510001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-1955

Decision No. CR4126

Date: August 17, 2015

DECISION

There is no basis for the revocation of the Medicare enrollment and billing privileges of Petitioner, Advance Group LLC.

I. Procedural History and Jurisdiction

Palmetto GBA (Palmetto), operating as the National Supplier Clearinghouse, notified Petitioner by letter dated June 30, 2014, that Petitioner's Medicare enrollment as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) was revoked retroactive to May 5, 2014. Palmetto imposed a two year bar to re-enrollment. Centers for Medicare & Medicaid Services (CMS) Exhibit (Ex.) 1 at 18-19. Palmetto cited 42 C.F.R. §§ 405.800, 424.57(c)(7) and (e), 424.535(a)(1) and (5)(ii), and 424.535(g)[1] as the legal authority for the revocation based on noncompliance with 42 C.F.R. §§ 424.57(c)(7) (supplier standard 7).

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[1] Citations are to the 2013 revision of the Code of Federal Regulations (C.F.R.), unless otherwise stated.

Petitioner requested reconsideration of the initial determination to revoke by letter dated July 2, 2014. CMS Ex. 1 at 22-23. Palmetto issued a reconsidered determination on July 25, 2014, upholding the revocation of Petitioner's Medicare enrollment and billing number based on a violation of supplier standard 7 (42 C.F.R. § 424.57(c)(7)).[2] CMS Ex. 1 at 1-5. Petitioner requested a hearing before an administrative law judge (ALJ) on September 22, 2014 (RFH). The case was assigned to me for hearing and decision on October 6, 2014, and an Acknowledgment and Prehearing Order (Prehearing Order) was issued at my direction. No issue has been raised as to the timeliness of Petitioner's request for hearing, the parties do not challenge my authority to decide this case, and I conclude that I have jurisdiction.

CMS filed a motion for summary judgment, a memorandum in support of the motion (CMS Br.), and CMS Exs. 1 through 3, on November 5, 2014. Petitioner filed its opposition to the CMS motion for summary judgment and supporting brief (P. Br.) with P. Exs. 1 and 2 on December 5, 2014. CMS waived its right to file a reply brief. On February 3, 2015, I denied CMS's motion for summary judgment and ordered the parties to file a joint status report advising me of their availability to participate in a two-day hearing to be conducted by video teleconference (VTC). The parties filed joint status reports on March 2 and 4, 2015. On March 5, 2015, I set the case for hearing on June 17 and 18, 2015. Petitioner waived an oral hearing on May 26, 2015, and requested judgment on the pleadings and documentary evidence. CMS did not object or request an oral hearing. On May 28, 2015, I accepted the waiver of oral hearing and cancelled the hearing. The parties have not objected to my consideration of the exhibits and CMS Exs. 1 through 2 and P. Exs. 1 and 2 are admitted as evidence. Petitioner did not object to my consideration of CMS Ex. 3. However, CMS Ex. 3 relates only to an attempted site visit of Petitioner on April 10, 2014. Because the attempted site visit on April 10, 2014, is not cited in the reconsidered determination as a basis for revocation of Petitioner's enrollment and billing privileges (CMS Ex. 1 at 1-5), CMS Ex. 3 is not relevant. Accordingly, CMS Ex. 3 is not admitted as evidence.

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[2] The reconsidered determination cites 42 C.F.R. § 424.57(e). CMS Ex. 1 at 4. CMS advises me that is a clerical error and that the correct citation is 42 C.F. R. § 424.57(d), which authorizes revocation for failure to meet standards established by 42 C.F.R. § 424.57(b) and (c). CMS Br. at 7, n.3. I accept the CMS representation that this was a clerical error.

II. Discussion

A. Applicable Law

Section 1831 of the Social Security Act (the Act) (42 U.S.C. § 1395j) establishes the supplementary medical insurance benefits program for the aged and disabled known as Medicare Part B. Administration of the Part B program is through contractors, such as Palmetto. Act § 1842(a) (42 U.S.C. § 1395u(a)). Payment under the program for services rendered to Medicare-eligible beneficiaries may only be made to eligible providers of services and suppliers.[3] Act §§ 1834(j)(1) (42 U.S.C. § 1395m(j)(1)); 1835(a) (42 U.S.C. § 1395n(a)); 1842(h)(1) (42 U.S.C. § 1395(u)(h)(1)). Petitioner is a DMEPOS supplier.

The Act requires the Secretary to issue regulations that establish a process for the enrollment of providers and suppliers, including the right to a hearing and judicial review in the event of denial or non-renewal. Act § 1866(j) (42 U.S.C. § 1395cc(j)). Pursuant to 42 C.F.R. § 424.505, a supplier must be enrolled in the Medicare program and be issued a billing number to have billing privileges and to be eligible to receive payment for services rendered to a Medicare eligible beneficiary. To receive direct-billing privileges, a DMEPOS supplier must meet and maintain the Medicare application certification standards set forth in 42 C.F.R. § 424.57(c). Among other requirements, a DMEPOS supplier must maintain a physical facility on an appropriate site. 42 C.F.R. § 424.57(c)(7). An appropriate site for the physical facility must meet certain criteria, including that the practice location is in a location accessible to the public, Medicare beneficiaries, and CMS and its agents, and that the practice location must be accessible and staffed during posted hours of operation. 42 C.F.R. § 424.57(c)(7)(i)(B), (C). A DMEPOS supplier must provide complete and accurate information in response to questions on its application for Medicare billing privileges and must report to CMS any changes in information supplied on the application within 30 days of the change. 42 C.F.R. § 424.57(c)(2). A DMEPOS supplier must permit CMS or its agent to conduct

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[3] A "supplier" furnishes services and supplies under Medicare. The term supplier applies to physicians or other practitioners and facilities that are not included within the definition of the phrase "provider of services." Act § 1861(d) (42 U.S.C. § 1395x(d)). A "provider of services," commonly shortened to "provider," includes hospitals, critical access hospitals, skilled nursing facilities, comprehensive outpatient rehabilitation facilities, home health agencies, hospice programs, and a fund as described in sections 1814(g) and 1835(e) of the Act. Act § 1861(u) (42 U.S.C. § 1395x(u)). The distinction between providers and suppliers is important because they are treated differently under the Act for some purposes.

on-site inspections to ascertain supplier compliance with the Medicare enrollment standards. 42 C.F.R. § 424.57(c)(8). All suppliers must be "operational," which means that a supplier "has a qualified physical practice location, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked . . . to furnish these items or services." 42 C.F.R. § 424.502.

The Secretary has delegated the authority to revoke enrollment and billing privileges to CMS. 42 C.F.R. § 424.535. CMS or its Medicare contractor may revoke an enrolled supplier's Medicare enrollment and billing privileges and supplier agreement for any of the reasons listed in 42 C.F.R. § 424.535. Specifically, CMS may revoke a supplier's enrollment and billing privileges if the supplier is determined not to be in compliance with the enrollment requirements. 42 C.F.R. § 424.535(a)(1). CMS may also revoke a currently enrolled supplier's Medicare enrollment and billing privileges if CMS determines, upon on-site review, that the supplier is no longer operational to furnish Medicare covered items or services, or the supplier fails 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. 42 C.F.R. § 424.535(a)(5)(ii). CMS may revoke a DMEPOS supplier's enrollment and billing privileges for failure to meet the supplier standards established by 42 C.F.R. § 424.57(b) and (c). 42 C.F.R. § 424.57(e). After a supplier's Medicare enrollment and billing privileges are revoked, the supplier is barred from re-enrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c).

A supplier whose enrollment and billing privileges have been revoked may request reconsideration and review as provided by 42 C.F.R. pt. 498. A supplier submits a written request for reconsideration to CMS or its contractor. 42 C.F.R. § 498.22(a). CMS or its contractor must give notice of its reconsidered determination to the supplier, giving the reasons for its determination and specifying the conditions or requirements the supplier failed to meet, and advising the supplier of its right to an ALJ hearing. 42 C.F.R. § 498.25. If the decision on reconsideration is unfavorable to the supplier, the supplier has the right to request a hearing by an ALJ and further review by the Departmental Appeals Board (the Board). Act § 1866(j)(8) (42 U.S.C. § 1395cc(j)(8)); 42 C.F.R. §§ 424.545, 498.3(b)(17), 498.5. A hearing on the record, also known as an oral hearing, is required under the Act. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748-751 (6th Cir. 2004). The supplier bears the burden to demonstrate that it meets enrollment requirements with documents and records. 42 C.F.R. § 424.545(c).

The Secretary's regulations do not address the allocation of the burden of proof or the standard of proof. However, the Board has addressed the allocation of the burden of proof in many decisions. The standard of proof is a preponderance of the evidence. 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. *Batavia Nursing & Convalescent Inn*, DAB No. 1911 (2004); *Batavia Nursing & Convalescent Ctr*., DAB No. 1904 (2004), *aff'd,* 129 F. App'x 181 (6th Cir. 2005); *Emerald Oaks*, DAB No. 1800 (2001); *Cross Creek Health Care Ctr.*, DAB No. 1665 (1998); *Hillman Rehab. Ctr*., DAB No. 1611 (1997) (*remand*), DAB No. 1663 (1998) (*aft. remand*), *aff'd*, *Hillman Rehab. Ctr. v. United States*, No. 98-3789 (GEB), 1999 WL 34813783 (D.N.J. May 13, 1999).

"Prima facie" means generally that the evidence is "[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted." *Black's Law Dictionary* 1228 (8th ed. 2004). Thus, CMS has the initial burden of coming forward with sufficient evidence to show that its decision to revoke Petitioner's Medicare participation and billing privileges is legally sufficient under the statute and regulations. CMS makes a prima facie showing of noncompliance if the credible evidence CMS relies on is sufficient to support a decision in its favor absent an effective rebuttal by Petitioner.

B. Issues

Whether there was a basis for the revocation of Petitioner's billing privileges and Medicare enrollment.

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold text followed by my findings of fact and analysis.

1. Judgment on the written pleadings and documentary evidence is permissible in this case.

Petitioner may waive its right to appear and present evidence at an oral hearing by filing a written waiver. 42 C.F.R. § 498.66(a). When a written waiver is filed by a petitioner, an ALJ need not conduct an oral hearing except in two circumstances: the ALJ concludes witness testimony is necessary to clarify facts at issue; or CMS shows good cause for presenting oral testimony. 42 C.F.R. § 498.66(b). Petitioner waived its right to an oral hearing consistent with the requirements of 42 C.F.R. § 498.66(a) and requested judgment on the pleadings and evidence already submitted by the parties. CMS concurred with Petitioner's waiver of oral hearing and request for judgment on the documents. I agree that oral testimony is not necessary for clarification of the facts at issue and CMS has not argued there is cause for presenting oral testimony. The record in this case consists of the documentary evidence admitted and the parties' pleadings. 42 C.F.R. § 498.66. The parties had a reasonable opportunity for rebuttal as reflected by their various filings. Accordingly, this decision is on the merits.

2. There was no 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).

It is necessary to delineate the specific issues before me.

Palmetto explained in its June 30, 2014 notice of initial determination that revocation was based on noncompliance with supplier standard 7 (42 C.F.R. § 424.57(c)(7)) because Petitioner's business was not open when inspectors attempted to conduct site visits during Petitioner's reported hours of operation on April 10, May 2, and May 5, 2014. The initial determination states "you are considered to be in violation of 42 C.F.R. § 424.535(a)(5)(ii) and all supplier standards as defined in 42 C.F.R. § 424.57(c)." CMS Ex. 1 at 19. The revocation was upheld on reconsideration based on the attempted site visits on May 2 and 5, 2014, only. CMS Ex. 1 at 14. CMS admits that the hearing officer that issued the reconsidered determination did not consider evidence related to the April 10, 2014 site visit because that evidence was not provided to her. CMS Br. at 7-8. Accordingly, I will not consider the April 10, 2014 site visit and related evidence in determining whether CMS had a basis to revoke Petitioner's Medicare billing privileges and enrollment. Pursuant to 42 C.F.R. § 498.5*(l),* a supplier such as Petitioner that is dissatisfied with an initial determination, may request reconsideration. The regulation provides no right to ALJ review of the initial determination related to Medicare enrollment or revocation of enrollment. 42 C.F.R. § 498.5. Pursuant to 42 C.F.R. § 498.5(l)(2), CMS or its contractor, or a supplier such as Petitioner, that is dissatisfied with a reconsideration determination is entitled to a hearing before an ALJ. This regulation clearly indicates that the reconsidered determination, the last determination of CMS or its agent, is the determination that is subject to ALJ review. *Neb Group of Arizona LLC*, DAB No. 2573 at 7 (2014); *Benson Ejindu, d/b/a Joy Medical Supply*, DAB No. 2572 at 5 (2014) (the reconsideration determination is the agency action that is subject to review).

Furthermore, in this case revocation was upheld on reconsideration based on Petitioner's failure to show compliance with 42 C.F.R. § 424.57(c)(7) (supplier standard 7) and not based on a violation of 42 C.F.R. § 424.535(a)(5). CMS Ex. 1 at 1-4. Although 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 of enrollment and billing privileges pursuant to 42 C.F.R. § 424.535(a)(5). Rather, she concluded that revocation was appropriate because Petitioner failed to show compliance with supplier standard 7. Whether 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. Accordingly, I conclude that the specific issue before me is whether or not Petitioner was in compliance with 42 C.F.R. § 424.57(c)(7) (supplier standard 7) during the site visits on May 2 and 5, 2014. It is well

established that even a single violation of a supplier standard is an adequate basis for revocation of billing privileges and enrollment. *Neb Group of Arizona LLC*, DAB No. 2573 at 7; *Benson Ejindu, d/b/a Joy Medical Supply*, DAB No. 2572 at 5; *Complete Home Care*, DAB No. 2525 at 6 (2013) (not necessary to determine whether or not operational to find a violation of supplier standard 7); *1866ICPayday.com*, DAB No. 2289 at 13 (2009) (failure to comply with even one supplier standard is a basis for revocation of enrollment and billing privileges). Although under 42 C.F.R. § 498.5(l)(2) CMS could have requested review of the reconsidered determination, CMS did not do so and did not preserve arguments regarding the April 10, 2014 site visit and whether or not Petitioner was operational when the site visits occurred.

a. Facts

On Friday, May 2, 2014 at 11:45 a.m. and on Monday, May 5, 2014 at 10:45 a.m., site visits were attempted at Petitioner's facility located at 1328 C Reisterstown Road, Pikesville, Maryland 21208. The attempts were made at the address on file with NSC as Petitioner's business location and during Petitioner's posted hours of operation, which were Monday through Friday, 9:00 a.m. – 5:00 p.m., and Saturday, 9:00 a.m. – 1:00 p.m. CMS Ex. 1 at 7-8; CMS Ex. 26.

CMS filed the declaration of Beverly Ailiff dated October 24, 2014 with a copy of her site investigation report. CMS Ex. 2. Ms. Ailiff was a Site Visit Inspector employed by Overland Solutions, a contractor for Palmetto who conducted the two attempted site inspections of Petitioner's location. Inspector Ailiff states in her declaration that during both site visits she found a sign on Petitioner's door stating "OPEN," however, the door was locked both times and the lights were not on "during at least one" of the site visits. CMS Ex. 2 at 2 (emphasis in original). Inspector Ailiff also states that she was able to see through the glass door at Petitioner's location and observed that Petitioner had "merchandise and counters, but no people." CMS Ex. 2 at 2. She asserts in her declaration that during the site visits she "rang the doorbell and knocked loudly," and "waited for several minutes both times." CMS Ex. 2 at 2 (emphasis in original). She states that for one of the site visits she "walked around the building and waited a few more minutes, and then rang and knocked at the entrance again." CMS Ex. 2 at 2. She maintains that there was no answer, response or any other sign of activity that someone was in the office. CMS Ex. 2 at 2.

The site investigation report completed by Inspector Ailiff on May 5, 2014, detailing her findings for the site visits on both May 2 and May 5, states that Petitioner had a permanent, visible sign with its business name posted and its hours of operation were posted. CMS Ex. 1 at 8-9, 13-14; CMS Ex. 2 at 5-6, 10. The report also states for both site visits that there was a sign on the door indicating that the facility was open, however, the door was locked. Inspector Ailiff specifically states in her report that she knocked but no one answered and she was not able to complete the site visits. Inspector Ailiff does

not state in her report that she attempted to ring the doorbell. CMS Ex. 1 at 9, 13; CMS Ex. 2 at 6, 10-11. Inspector Ailiff took five photos that are date and time stamped, three of the photos are of the front glass door at Petitioner's business location and two of the photos are of the exterior of the building, one of which shows that Petitioner is situated in a side alley of a shopping center. CMS Ex. 1 at 14-15; CMS Ex. 2 at 11-12. The photos show that the glass door is not obscured by blinds or curtains and allows visibility through the door. Also visible in the photos is a doorbell on the left side of Petitioner's front door. CMS Ex. 1 at 14; CMS Ex. 2 at 2, 11. Inspector Ailiff concluded based on the evidence she collected that Petitioner's office was not open, staffed, and accessible to the public at the time of her site visits.

I find that the assertion by Ms. Ailiff in her declaration dated October 24, 2014, that she rang the bell at Petitioner's facility on May 2 and 5, 2014 (CMS Ex. 2 at 2), is inconsistent with her May 5, 2014 report of site visit, a report made closer in time to the site visit. In her report of site visit, Ms. Ailiff notes only that she knocked and no one answered (CMS Ex. 2 at 10). The omission from her official site visit report that she rang the bell is not insignificant. Either her report was poorly done and not particularly reliable, or Ms. Ailiff may have been confusing her inspections of Petitioner with the many other similar inspections her declaration suggests she would have done in the five-month period between her inspections of Petitioner and the execution of her declaration.[4] I find her contemporaneous report more credible and weighty than her declaration made five months after the date of her site visits. I find that Ms. Ailiff knocked but did not ring the bell during her site visits and my finding is consistent with her contemporaneous report of investigation.

Petitioner does not deny that the door was locked when the CMS inspector attempted to visit Petitioner on May 2 and 5, 2014. RFH at 6; CMS Ex. 1 at 22; P. Br. at 5, 12-13.

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[4] This obvious inconsistency could have been addressed in direct examination at an oral hearing, subject to cross examination. The regulation clearly gives CMS the right to request an oral hearing even when Petitioner waives appearance. 42 C.F.R. § 498.66(b). All CMS needed to do was ask. Though some may assert that Petitioner waived the right to cross-examine the inspector by waiving oral hearing and that should, for some reason, enure to Petitioner's disadvantage, I point out that it is not Petitioner's burden to address or resolve inconsistencies in the government's evidence. I also note that CMS waived cross-examination of Petitioner's two witnesses, thus missing an opportunity to test the credibility of those witnesses. I recognize however, that CMS may have deemed it better strategy not to test the credibility of Petitioner's witnesses or subject its own inspector to cross examination or examination by the ALJ – such is the nature of the adversarial hearing provided by the Act and regulations.

Petitioner disagrees that its business location was closed to the public, not staffed, or that the inspector could not gain access. P. Br. at 5, 9. Petitioner argues that on the dates of the attempted site visits its staff was likely busy in the back room of the facility with packages or using the restroom and did not hear the inspector knocking. RFH at 6-7.

Petitioner filed the declaration of its owner and operator Yeduard Pastushenko. P. Ex. 2. Mr. Pastushenko testifies that he was at the facility at 1:00 p.m. on May 2, 2014; Ms. Akkerman was present at the facility; and the door was locked when he arrived. Mr. Pastushenko testifies that on May 5, 2014, he was at the facility until 10:00 a.m. and then returned later at 1:30 p.m. P. Ex. 2 at 1. He states that Ms. Akkerman came to work that day at 9:00 a.m. and was there for the complete day. He states that he locked the door when he left and when he returned later that day he rang the doorbell and Ms. Akkerman let him in. P. Ex. 2 at 1-2.

Petitioner also filed the declaration of Maya Akkerman, Petitioner's office manager, as P. Ex. 1. Ms. Akkerman states that she was present at the office on May 2 and 5, 2014, during posted business hours. Ms. Akkerman claims she was at the location on both days from 9 a.m. to 5 p.m., did not leave the location at all, and avers that the doorbell was working the days of both site visits because she heard it ring and was able to receive deliveries on both days and attended to customers. P. Ex. 1 at 2.

Petitioner submitted additional documents to the reconsideration hearing officer that included 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. Petitioner also provided copies of Ms. Akkerman's on-line activities for the site visit dates at issue. CMS Ex. 1 at 27-75.

b. Analysis

Supplier standard 7 (42 C.F.R. § 424.57(c)(7)) requires that Petitioner maintain an appropriate site that meets specified criteria, including that it be accessible and staffed during posted hours of operation. CMS or its agents must also be able to inspect the site during normal hours of operation to ensure compliance with participation requirements.

There is no dispute that Petitioner had a facility at 1328 C Reisterstown Road, Pikesville, Maryland 21208; that Petitioner's Reisterstown address was on file with Palmetto; that the site inspector visited the Reisterstown address on May 2 and 5, 2014; that Petitioner's hours of operation were displayed on the door during both visits; that there was a sign posted on Petitioner's door that said "OPEN;" and the door was locked during both site visits. CMS Br. at 2; P. Br. at 5. 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 standard 7, despite the fact the door was locked.

My review of whether or not CMS had a basis to revoke Petitioner's participation in Medicare is de novo. The CMS evidence, including the site investigation report and Ms. Ailiff's declaration are sufficient to constitute a prima facie showing that Petitioner was not open and accessible on May 2 and 5, 2014. There is no dispute that when Ms. Ailiff was inspecting she attempted to open the door and knocked but received no response and could not gain access. However, Ms. Ailiff's assertion in her declaration that she rang the bell at Petitioner's door is inconsistent with her site investigation report which she made contemporaneously with her site investigation – that report only states that she knocked on the door. Further, Ms. Ailiff's report and her declaration do not indicate that she attempted to call either of the telephone numbers clearly posted on Petitioner's door.

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 Yeduard Patushenko (P. Ex. 2) or Maya Akkerman (P. Ex. 1) or the evidence Petitioner presented on reconsideration (CMS Ex. 1 at 27-75). Petitioner offered without objection the declaration of Ms. Akkerman. Ms. Akkerman testified credibly that she was available in Petitioner's shop during the posted hours of operation. Ms. Akkerman 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 Mr. Pastushenko. I do not discount Mr. Pastushenko'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 Inspector Ailiff 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.

CMS argues that even if Ms. Akkerman was in the facility, the fact that the door was locked and she 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. CMS Br. at 15-16. 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 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 instruction 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.

III. Conclusion

For the foregoing reasons, I conclude that there is no basis for the revocation of Petitioner's Medicare enrollment and billing privileges.

/s/
Keith W. Sickendick
Administrative Law Judge