Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:	DATE: December 16, 2009
1866ICPayday.com, L.L.C.,	
Petitioner,	Civil Remedies CR1976 App. Div. Docket No. A-09-113
	Decision No. 2289
- v. -	
Centers for Medicare & Medicaid Services.	

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

The company known as 1866ICPayday.com, L.L.C. (Payday) requested review of the decision by Administrative Law Judge (ALJ) Richard J. Smith in 1866ICPayday.com, L.L.C., CR1976 (2009)(ALJ Decision). The ALJ Decision granted summary disposition (in the nature of summary judgment) in favor of the Centers for Medicare & Medicaid Services (CMS) and its contractor, the National Supplier Clearinghouse (NSC), upholding the determination to revoke Payday's Medicare supplier number. The ALJ found that Payday was not in compliance with two standards for Medicare suppliers as of May 29, 2008, the date of an on-site visit to Payday's office by an NSC inspector.

On appeal, Payday contends generally that the ALJ Decision is "a clear abuse of discretion and improper application of the standard for sustaining summary disposition" because it "not

only fails to properly apply the correct standard of review but demonstrates an obvious bias in support of the government." Request for Review (RR) at 1-2. Payday contends that it proffered evidence to the ALJ that, viewed in the light most favorable to it, shows that there is a genuine dispute of material fact regarding whether it met the two standards at issue. Payday also submitted additional evidence on appeal that it asks us to consider. Finally, Payday raises a number of procedural issues regarding actions by NSC or by the Hearing Officer who first reviewed the NSC determination.

For the reasons stated below, we decline to admit the additional evidence submitted on appeal and conclude that the ALJ did not err in granting summary disposition in favor of CMS and upholding the revocation, based on the record before him.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address de novo. Lebanon Nursing and Rehabilitation Center, DAB No. 1918 (2004). We review disputed conclusions of law for error. Departmental Appeals Board Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs, http://www.hhs.gov/ dab/guidelines/prov.html.

On appeal, Payday cites to court cases addressing summary judgment standards under Rule 56 of the Federal Rules of Civil Procedure (FRCP). FRCP Rule 56 does not apply by its own terms to administrative proceedings under 42 C.F.R. Part 498, like this one. The ALJ's pre-hearing order thus informed the parties that Part 498 "does not specify summary disposition procedures, but this forum looks to [FRCP Rule] 56 as guidance in applying the procedures in the context of the regulations." Order of 3/11/09, at 4.

The following summary judgment principles are well-settled. 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. See 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 issue of material fact for trial and that it is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. This burden may be discharged by showing that

there is no evidence in the record to support a judgment for the non-moving party. Id. at 325. 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, 475 U.S. 574, 587 (1986) (quoting FRCP 56(e)). 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 under governing law. Id. at 586, n.ll; Celotex, 477 U.S. at 322. 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 587. 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).

Analysis

Below, we first address the threshold issue of whether to admit additional evidence Payday submitted for the first time on appeal. We then address whether the ALJ erred in granting summary disposition in CMS's favor with regard to the two supplier standards at issue, referred to as Supplier Standards 9 and 12. Finally, we explain why we reject Payday's procedural challenges, including its argument that the ALJ was biased.

1. The Board's authority to admit new evidence on appeal does not apply here.

Payday argues that the Board should admit into the record the new evidence Payday submitted on appeal, citing the procedural regulation at 42 C.F.R. § 498.86(a). While that provision generally authorizes the Board to admit evidence in addition to that introduced at an ALJ hearing, the provision was revised in June 2008 to add the phrase "[e]xcept for provider or supplier enrollment appeals." The reason for the exception is that, in enrollment cases, the provider or supplier has an opportunity for reconsideration by an independent hearing officer prior to

an ALJ hearing. Thus, the preamble to the final rule adding the exception explained:

> *Comment:* One commenter recommended that § 498.86(a), concerning evidence admissible on review by the DAB, adopt and follow the good cause exception set forth in proposed § 498.56(e) for ALJ proceedings.
> *Response:* By the time the DAB hears the provider enrollment appeal, the applicant has been afforded ample opportunity to submit any evidence germane to the adverse determination. Accordingly, we do not believe it is efficient or administratively effective to establish a "good cause" provision within the language at § 498.86(a).

73 Fed. Reg. 36,448, 36,452 (June 27, 2008).

We also note that the proffered additional evidence is irrelevant to the issue before us in this appeal -- whether the ALJ erred in granting summary disposition to CMS based on the record before him.

Thus, we decline to admit the newly proffered evidence and discuss below only those arguments based on the record before the ALJ.

2. The ALJ did not err in concluding that Payday did not raise a genuine dispute of material fact regarding whether Payday complied with Supplier Standard 9.

Supplier Standard 9 is set out in the regulations governing Medicare qualification of suppliers of durable medical equipment, orthotics, prosthetics, and supplies (DMEPOS). That standard requires that the DMEPOS supplier-

> [m]aintains a primary business telephone listed under the name of the business locally or toll-free for beneficiaries. The supplier must furnish information to beneficiaries at the time of delivery of items on how the beneficiary can contact the supplier by telephone. The exclusive use of a beeper number, answering service, pager, facsimile machine, car phone, or an answering machine may not be used as the primary business telephone for purposes of this regulation.

42 C.F.R. § 424.57(c)(9). The preamble of the final rule implementing this standard explained:

> This proposed standard states that a supplier must maintain a primary business telephone at the physical facility. This telephone number must be listed under the name of the business and in the business portion of the local telephone company directory. The exclusive use of a beeper number, answering service, pager, facsimile machine, car phone, or an answering machine may not be used as the primary business telephone.

65 Fed. Reg. 60,366, 60,371 (Oct. 11, 2000)(emphasis added). The general purpose of this and other standards is to "ensure that suppliers of DMEPOS are qualified to provide the appropriate health care services" and to "help safeguard the Medicare program and its beneficiaries from any instances of fraudulent or abusive billing practices." 65 Fed. Reg. at 60,366. NSC newsletters from 2002 and 2003 were issued to inform suppliers that a cell phone is not acceptable as a "primary business telephone" under this standard and this information was also posted on the NSC website. CMS Exs. 11, at 4; 12, at 5; and 13, at 3.

The ALJ concluded that "[n]either a cell phone nor a facsimile machine suffices to meet the requirements of standard 9" since the wording of the regulation specifically prohibits the exclusive use of a facsimile machine and "suppliers were provided ample notice from NSC that a supplier number could be revoked . . . based on a supplier's use of a cell phone number as its primary business number." ALJ Decision at 8.

The ALJ noted that the Hearing Officer had found that Payday's telephone number was 832-884-0498 (a cell phone number) and that 281-679-1680 was Payday's fax number. Id. at 7. The ALJ listed the evidence CMS had presented to support its assertion that Payday "used as its primary business phone 832-884-0498, and as its fax number 281-679-1680." Id. The cited evidence included delivery forms the NSC inspector said he obtained during his May 2008 site visit, Payday's August 2006 Medicare enrollment application, a tax report, various supplier telephone listings, and invoices sent to Payday. CMS Exs. 1, 5, 7, and 8. The ALJ noted that Payday did not dispute before him the finding that 832-884-0498 is a cell phone number, but relied on a declaration by Lawrence Tyler, Payday's manager, stating that documents

submitted by Payday show that "the primary business telephone listed under 1866ICPayday.com L.L.C. is (281) 679-1680." Id. at 8, citing P. Ex. 11, at 9. The ALJ described the three documents referred to by Mr. Tyler, concluding:

> Mr. Tyler's declaration may be bold, but it is conspicuously incomplete, for not one of these three references conveys any information about the nature of the listed number, that is, whether the instrument to which the number is assigned is a conventional telephone, a cell phone, a pager, or a facsimile machine. Mr. Tyler's declaration is patently insufficient to raise a genuine issue of material fact in response to CMS's well-documented assertions.

Id. The ALJ further rejected as unsupported Payday's assertion that 281-679-1680 is a conventional telephone connection or "landline." Id. The ALJ concluded that "Mr. Tyler's unsupported and uncorroborated assertions, and any inferences that I might reasonably draw from them, do not create a genuine issue of material fact as to whether 832-884-0498 was used by [Payday] as its primary business telephone number." Id.

On appeal, Payday does not contest the ALJ's legal conclusion that Payday had notice that neither a cell phone number nor a fax number meets the requirements of Supplier Standard 9. Nor does Payday dispute the finding that 832-884-0498 was a cell phone number. Instead, Payday argues that the ALJ "violated the cardinal rule of drawing inferences favorable to the nonmoving party" in deciding a summary judgment motion. RR at 1-2. Payday acknowledges that the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Id. at 2. Payday argues, however, that Mr. Tyler's declaration "and the authenticated documentary proof referenced therein established material fact issues concerning" the alleged noncompliance with Supplier Standard 9. Id. at 7.

We disagree. Even assuming that the number 281-679-1680 is associated with a landline as Mr. Tyler said, Payday points to no statement in his declaration from which we could reasonably infer that the landline assigned that number was, in fact, connected to a telephone, not a facsimile machine. Yet, it was clear from the Hearing Officer's decision and CMS's motion that a key issue was whether the number 281-679-1680 was connected to a facsimile machine (i.e., was a fax number). Moreover,

contrary to what Payday argues, the ALJ's statement that that number was a fax number was not "based only upon conclusory statements made by the Hearing Officer." RR at 8. Instead, the ALJ cited and discussed the evidence proffered by CMS that shows that Payday itself had identified that number as a fax number on its enrollment application in 2006, that documents from several of Payday's wholesale suppliers listed that number as a fax number, and that Payday had faxed documents from that number. ALJ Decision at 7. The ALJ also explained why he rejected Payday's argument that CMS's exhibits should not be admitted because CMS had not authenticated them, noting that Payday had not asserted that the documents were not authentic or complete and that Payday relied solely on the authentication requirement of FRCP Rule 56, which does not automatically apply in administrative proceedings. Id. at 10-11.

Payday proffered no evidence to the ALJ specifically addressing whether 281-679-1680 was a fax number. Nor did Payday proffer any evidence directly disputing the factual finding that Payday was using 832-886-0498 as its primary business telephone.

Mr. Tyler did assert conclusorily in his declaration that Payday had provided "documentation from yellowbook, yellowpages, and whitepages showing that the primary business telephone listed [for Payday] is (281) 679-1680" and that this proves that Payday "maintains a primary business telephone listed under the name of the business locally for beneficiaries." P. Ex. 11, at 9 (emphasis added), referring to P. Ex. 4, at 1-3. We agree with the ALJ that these statements, even when viewed in the light most favorable to Payday, did not meet Payday's burden to show there is a genuine dispute of material fact.

First, these statements are in the form of legal conclusions about the "primary" nature of the number and what the cited listings allegedly prove, rather than statements of fact regarding how Payday actually used 281-679-1680. Moreover, Mr. Tyler offered no explanation of why, if 281-679-1680 was Payday's primary business telephone number, Payday identified this number on its enrollment application and elsewhere as a fax number, not a telephone number. Payday now explains that it instead gave its cell phone number as a "contact number for the convenience of [its] customers" and that it is "customary in most businesses" to have "both a business line number and a cell number listed as contact information." RR at 9-10. This may be true, but is irrelevant to whether listing a cell number and a

fax number meets the Medicare requirements. Supplier Standard 9 is intended to ensure that Medicare beneficiaries have telephonic access to the supplier during business hours to receive additional information, if necessary, or to resolve maintenance or repair concerns; another purpose is to help ensure that the supplier actually has an accessible physical site, where beneficiary records are maintained. See 63 Fed. Reg. 2926, 2929 (Jan. 28, 1998)(preamble to proposed rule). Thus, while the standard does not preclude an additional listing for a cell phone, it requires a primary business telephone at the physical facility, where the records are maintained.

Second, the statements in Mr. Tyler's declaration do not raise a genuine dispute about the factual findings based on which NSC revoked Payday's billing privileges. It is not material whether Payday had 281-679-1680 as its primary business number at the time Mr. Tyler submitted his declaration in 2009, yet his statements are all in the present tense. Nor does it matter whether, as Payday asserts on appeal, "when the number is called, the line is picked up by a receptionist," and one does not hear a "fax tone." RR at 9. The preamble to the regulations implementing the appeals process for suppliers whose billing privileges are revoked explained:

> . . . these appeal rights are limited to provider or supplier eligibility at the time the Medicare contractor made the adverse determination. . . . Accordingly, a provider or supplier is required to furnish the evidence that demonstrates that the Medicare contractor made an error at the time an adverse determination was made, not that the provider or supplier is now in compliance. Thus, we believe that it is essential that providers and suppliers submit documentation that supports their eligibility to participate in the Medicare program during the reconsideration step of the provider enrollment appeals process.

73 Fed. Reg. 36,448, 36,452 (June 27, 2008); see also 73 Fed. Reg. 9479, 9486 (March 2, 2007)(discussing proposal to clarify that the "provider/supplier would be required to furnish the evidence that clearly shows the determination by [the Medicare fee-for-service contractor] was in error at the time it was made"). This rulemaking also amended the enrollment regulations to provide that "suppliers have the opportunity to submit evidence related to the enrollment action" and "must, at the

time of their request [for reconsideration], submit all evidence that they want to be considered." 42 C.F.R. § 405.874(c)(3).

Yet, neither Mr. Tyler's declaration nor the undated telephone listings to which he refers contains anything from which one could reasonably infer that Payday was in compliance with Supplier Standard 9 at the relevant point in time.[1]

3. The ALJ did not err in concluding that Payday did not raise a genuine dispute of material fact regarding whether Payday was in compliance with Supplier Standard 12 during the on-site inspection on May 29, 2008.

Supplier Standard 12 requires 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). To support its motion for summary disposition based on this standard, CMS relied on the declaration of an inspector for NSC, Mark D. Porter, who had done the on-site visit at Payday's office on May 29, 2008, on a Payday "Delivery Form" (which contains no space for indicating that a beneficiary has been provided with necessary information and instructions), on photographs of the delivery form and other items, and on a "Site Visit Acknowledgment" requesting

[1] Payday did submit to the Hearing Officer yellowpages.com and yellowbook listings that are dated, but the dates are in December 2008, after the revocation determination was issued. CMS Ex. 9. Moreover, CMS pointed out in its motion that these listings were not in a local telephone company directory, as required, but were on "websites that allow the customers to self-submit and/or update their own listing." CMS Motion at 7-8 and n.5. In response, Payday did not dispute either CMS's description of the listings or CMS's legal position regarding their insufficiency, nor did Payday seek to show that the undated listings it submitted to the ALJ as its Exhibit 4 were listings in a local telephone company directory, rather than in online directories (which they appear to be).

documentation of "written instruction/information on beneficiary use/maintenance." CMS Ex. 1. Mr. Porter attested, among other things, that he took photographs during his inspection, including of the contents of trash bags filled with items including "neoprene soft goods that are typically billed under the orthotic and prosthetic Medicare benefit" and that the trash bags had "delivery tickets indicating the names of Medicare beneficiaries to whom these 'goods' were going to be delivered." CMS Ex. 1, at 3-4.[2] He also attested that, at the time of his site visit, there were two office doors that were locked and inaccessible to him for the inspection, that the only person present was unable or unwilling to provide the information he requested, that he had left an acknowledgment form with her requesting information. Id.

In support of its arguments related to Supplier Standard 12, Payday provided to the Hearing Officer Purchase Option Letters and patient insurance information signed by beneficiaries. After reviewing these documents, the Hearing Officer found:

> The beneficiary has initialized on each of these Purchase Option Letters that are signed and dated, that they, the beneficiary, had been instructed on use of the equipment, as well as the warranty coverage. However no documentation outlining proper administration of the product has been sent for review to verify what information the patient received.

P. Ex. 1, at 3. The ALJ (referring to this as "somewhat murky language") said that he did not need to decide the question of

[2] As noted above, Payday challenged whether CMS had properly authenticated the documents on which it relied for summary judgment, but did not allege that the documents were not authentic. Nor did Payday assert that the Delivery Form that CMS submitted (and is also shown on one of the photographs CMS submitted) is different from the delivery ticket that Mr. Porter described. Payday did proffer evidence to support its assertions that Mr. Tyler arrived at the office within an hour of Mr. Porter's arrival but Mr. Porter had already left, that Payday kept its files behind a locked door to protect patient confidentiality, and that the employee who was present for the inspection was only a receptionist. P. Ex. 11, at 1. For purposes of this decision, we accept these assertions as true.

whether the described documents in fact indicated that the beneficiaries received instructions on how to use the Medicare-covered items safely and effectively because—

> [t]he plain fact is that the dates on the documents cover the period between June 26 and November 18, 2008, a period of time well after the May 29, 2008 on-site inspection. They are valueless as support for [Payday's] assertion that it was in compliance with supplier standard 12 at the time of the on-site inspection, on May 29, 2008. Thus, CMS's assertion – that [Payday] was not in compliance with supplier standard 12 at the time of that inspection – remains unchallenged. No genuine issue of material fact exists with reference to CMS's assertion.

ALJ Decision at 9-10; see also ALJ Decision at 9 (listing dates on the signed documents in P. Ex. 5).

On appeal, Payday does not claim that the documents it submitted to the ALJ show it was in compliance with Supplier Standard 12 at the time of the on-site inspection. Nor does Payday contest the ALJ's conclusion that, to prevail on summary judgment, Payday would have to proffer evidence to show it was in compliance as of May 29, 2008. Instead, Payday relies on additional documents, submitted for the first time on appeal to us, which it says indicate that beneficiaries "received instructions on how to use the Medicare-covered items safely and effectively for dates of service prior to the May 29, 2008 on-site inspection." RR at 12. Payday also points out that, in addition to the documents in its Exhibit 5, it previously submitted a sworn declaration from Mr. Tyler "stating that every beneficiary is provided with the manufacture[rs'] instructions that accompany each product upon delivery." Id. at 11.

For the reasons explained above, we do not consider the new documents submitted on appeal. Thus, the only question before us is whether Mr. Tyler's statements were sufficient to meet Payday's burden to show that there is a genuine issue of material fact regarding whether Payday was in compliance with Supplier Standard 12 on May 29, 2008.

Mr. Tyler attested that—

> Medicare beneficiaries are provided with the necessary information and instructions on how to use Medicare covered

> items safely and effectively. Every product delivered to beneficiaries is accompanied by written manufacture instructions for that specific product. During the delivery, the beneficiaries are also provided with verbal instructions on the safe and effective use of the Medicare covered items.

P. Ex. 7 (emphasis added); see also P. Ex. 11, at 11-12 (similar statements by Mr. Tyler). The ALJ did not address these statements by Mr. Tyler, but this failure is harmless.

First, like his statements with respect to Supplier Standard 9, Mr. Tyler's statements with respect to Supplier Standard 12 are consistently stated in the present tense. Thus, even when viewed in the light most favorable to Payday, these statements do not meet Payday's burden to show there is a genuine dispute of fact about the key findings on which the adverse determination and CMS's motion for summary disposition were based. Those findings called into question whether Payday was documenting at the time of the on-site inspection that it had provided the requisite information and instructions to each beneficiary, or only had the beneficiary sign the delivery form, which does not document that such information and instructions were given.[3] Yet, not only are Mr. Tyler's statements only in the present tense, but even Payday's assertions in its request for review do not consistently allege compliance at the relevant point in time. Compare RR at 15 (Payday "has always been in compliance") with RR at 13 (the supplier has been in compliance since the date of the on-site survey on May 29, 2008 . . . .").

Second, no rational trier of fact would find an important documentation requirement such as Supplier Standard 12 to have been met based solely on statements such as those made by Mr. Tyler, in the absence of some reasonable explanation about why the relevant documents themselves were not produced.

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[3] Mr. Tyler did attest vaguely that Payday had "files" in the room with the locked door and that he "promptly faxed all of the requested documents to Mr. Porter" the day of the inspection. P. Ex. 11, at 2. Payday does not explain, however, why if it in fact had documents showing that it was in compliance at the time of the on-site inspection, it did not submit them to the Hearing Officer or to the ALJ.

Finally, even if we concluded that Payday had raised a genuine dispute regarding its compliance with Supplier Standard 12, that would not make a difference to the outcome of this case. As the ALJ noted and Payday does not deny, failure to comply with even one supplier standard is a sufficient basis for revoking a supplier's billing privileges. 42 C.F.R. § 424.57(d).

4. None of Payday's procedural challenges has merit.

On appeal, Payday raises a number of challenges to actions by NSC and the Hearing Officer, and asserts that the ALJ, by failing to properly apply summary judgment principles, showed that he was biased.

With respect to actions by NSC, Payday argues:

> Revoking [Payday's] Medicare supplier number on December 25, 2008 when the supplier has been in compliance with supplier standards since the date of the on-site survey on May 29, 2008 is a due process violation of the 5th Amendment of the United States Constitution. . . . NSC violated the Fifth and Fourteenth Amendments to the U.S. Constitution by, among other things, ignoring the Congressional directive to establish a fair appeal process and violating 42 C.F.R. § 405.874 by conducting an illegitimate and inadequate survey, ignoring evidence showing compliance, and by not affording [Payday] a chance to demonstrate and prove compliance before revoking its supplier number. NSC deprived [Payday] of the administrative process due a Medicare supplier by conducting a bad faith and illegitimate on-site determination, failing to extend pre-deprivation opportunity to demonstrate compliance, and by ignoring evidence that establishes compliance with the Supplier Standards. Further, Defendant's conduct amounted to an unlawful taking in violation of Article 1, § 19 of the Constitution of the State of Texas and the Fifth and Fourteenth Amendments of the U.S. Constitution.

RR at 13. With respect to the Hearing Officer, Payday asserts that she violated Payday's due process rights by upholding the revocation without properly applying the regulations and that her conduct also constituted an unconstitutional taking. Id. at 13-14. Payday also asserts that the Hearing Officer abused her discretion "by not following the law." Id. at 13-14.

The ALJ dismissed Payday's constitutional arguments as "beyond his authority to consider." ALJ Decision at 10. The ALJ, nonetheless, effectively addressed Payday's complaints about the Hearing Officer to the extent relevant to the standards at issue here. The Hearing Officer had faulted Payday for not submitting "documentation outlining proper administration of the product . . . to verify what information the patient received." P. Ex. 1, at 3. Payday had contended in effect that the Hearing Officer went beyond the regulations and unfairly faulted Payday for not submitting documentation to verify what information the patient received. As noted above, the ALJ indicated that he did not need to decide whether the types of documents submitted to the Hearing Officer could be sufficient to show compliance if they were signed and dated before May 29, 2008 because the documents in fact submitted had later dates and therefore were irrelevant. Moreover, the ALJ determined that there was good cause for admitting documents (such as owners' manuals for wheelchairs) that Payday had proffered to the ALJ to show the nature of the information it said it provides to beneficiaries. ALJ Decision at 11. Thus, any alleged failure by the Hearing Officer to properly apply the regulation or to give notice of what was at issue was cured at the ALJ level.

With respect to Payday's procedural arguments related to actions by NSC, we note that they are not limited to the types of constitutional concerns an ALJ has no authority to remedy. An ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground, even a constitutional one. But an ALJ may, consistent with the applicable regulations and statutes, take steps to ensure procedural fairness. The main flaws in Payday's arguments, however, are that Payday does not identify any specific language in the applicable statutes or regulations that NSC allegedly violated and does not specify how any alleged procedural error was prejudicial to Payday or constituted an unlawful taking.

Congress did provide a hearing right for any supplier whose Medicare enrollment is revoked, by enacting section 1866(j) of the Social Security Act, effective December 8, 2003. This hearing right was implemented not only by the regulation at section 405.874, but also by the amendments to Part 498 in 2008. Payday suggests that, under these provisions, it was entitled to a pre-revocation hearing and an opportunity to correct its deficiencies prior to the revocation (or at least an opportunity to submit documentation prior to the revocation). Nothing in

section 1866(j) (or in the provisions referenced in that section), however, requires that the hearing to be provided is a pre-revocation hearing or that a supplier must have an opportunity to correct any deficiencies prior to revocation. Moreover, the regulation at section 405.874(c) provides that a revocation will be effective at the latest 30 days after mailing of the required notice of the revocation determination, so it clearly does not contemplate a pre-revocation hearing. While section 405.874(e) permits a supplier to submit a corrective action plan as an alternative to an appeal, it also provides that such a plan may lead to "reinstatement" of a supplier's billing privileges at a later date, rather than retroactive to the effective date of the revocation.

We also note that, while there is a dispute as to whether NSC received the documents Payday says it sent to Mr. Porter immediately after his on-site visit per his request, Payday did not dispute his assertion that he provided Payday an opportunity to submit the requested documents before the revocation notice was issued. CMS Ex. 1, at 4.

In any event, even if the record viewed in the light most favorable to Payday raises some questions about NSC's or the Hearing Officer's actions, Payday does not explain how it was prejudiced by those alleged actions, nor does it claim that it did not have a full opportunity to present documents to the ALJ after adequate notice of the issues. Thus, we conclude that any procedural defects were adequately cured.

Finally, Payday's allegation of "bias" on the part of the ALJ lacks merit. Payday's allegation is based solely on its identification of what it says were flaws in the ALJ's summary judgment analysis. RR at 1-2. These alleged flaws, however, do not evidence bias that would disqualify the ALJ. In Edward J. Petrus, Jr., M.D., and The Eye Center of Austin, DAB No. 1264 at 23-26 (1991), *aff'd sub nom.,* Petrus v. I.G., 966 F.2d 675 (5th Cir. 1992), *cert. denied*, 506 U.S. 1048 (1993), the Board described the standard for disqualifying a judge on a charge of bias. The Supreme Court, the Board noted, has held that-

> "[t]he alleged bias and prejudice, to be disqualifying, must stem from an extrajudicial source and result in an opinion on the merits on some other basis than what the judge learned from his participation in the case . . . ." United States v. Grinnell Corp., 384 U.S. 563, 583 (1966);

> see also Tynan v. United States, 376 F.2d 761 (D.C. Cir. 1967), cert. denied, 389 U.S. 845 (1967); Duffield v. Charleston Area Medical Center, 503 F.2d 512, 517 (4th Cir. 1974).

Petrus at 23-26; see also Meadow Wood, DAB No. 1841, at 10 (2002), *aff'd*, Civ. No. 02-4115 (6th Cir. March 2, 2004); St. Anthony Hospital, DAB No. 1728 (2000), *aff'd*, 309 F.3d 680 (10th Cir. 2002); Britthaven of Goldsboro, DAB No. 1960 (2005); Tri-County Extended Care Center, DAB No. 1936 (2004). Here, Payday did not point to any extrajudicial source of bias or to anything indicating that the ALJ Decision had any basis other than what the ALJ learned as a result of the proceedings before him.

In sum, none of Payday's procedural challenges has merit.

Conclusion

For the reasons stated above, we conclude that the ALJ did not err in granting summary disposition in favor of CMS, upholding the revocation of Payday's billing privileges.

/s/
Leslie A. Sussan

/s/
Constance B. Tobias

/s/
Judith A. Ballard
Presiding Board Member