Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

E & I Medical Supply Services, Inc.
Docket No. A-10-106
Decision No. 2363
February 17, 2011

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

The Centers for Medicare & Medicaid Services (CMS) requested review of the July 20, 2010 decision by Board Member Leslie A. Sussan (Board Member) in which she reversed CMS's determination to revoke the Medicare billing privileges of E & I Medical Supply Services, Inc.[1] *E & I Medical Supply Services, Inc.*, DAB CR2189 (2010) (Hearing Decision). CMS had issued the revocation determination on the ground that E & I was closed during posted hours of operation and therefore was not "operational" within the meaning of 42 C.F.R. § 424.535(a)(5)(ii). Following an evidentiary hearing, the Board Member concluded that CMS had failed to present credible or persuasive evidence supporting its revocation determination. For the following reasons, we sustain the Board Member's decision to reverse the revocation determination.

Case Background

Title XVIII of the Social Security Act (Act) establishes the Medicare program. *See* 42 U.S.C. § 1395 *et seq.* Medicare is administered by CMS, a component of the Department of Health and Human Services (HHS). CMS in turn delegates certain program functions to private insurance companies that function as CMS's agents in administering the program. *See Fady Fayed, M.D.,* DAB No. 2266, at 2 (2009) (citing various legal authorities).

Section 1866(j) of the Act requires the Secretary of HHS to promulgate regulations governing the "enrollment" in Medicare of health care providers and suppliers.[2] 42

[1] Pursuant to 42 C.F.R. § 498.44, the Board Member was designated as the hearing official to hear provider and supplier enrollment appeals under 42 C.F.R. Part 498, subpart P and was assigned this case to issue a hearing decision.

[2] "Enrollment" means the process that Medicare uses to establish a provider's or supplier's eligibility to submit claims for Medicare-covered services and supplies. 42 C.F.R. § 424.502.

U.S.C. § 1395cc(j). Pursuant to section 1866(j) (and other authorities), CMS issued regulations —found in 42 C.F.R. Part 424, subpart P (§§ 424.500-.565) – specifying requirements that providers and suppliers must meet in order to enroll in Medicare and be eligible to bill the program or its beneficiaries for covered medical items or services. *See* 42 C.F.R. § 424.510. One of those enrollment requirements is that the provider or supplier "must be *operational* to furnish Medicare covered items or services[.]" *Id.* § 424.510(d)(6) (italics added).

Once enrolled, a provider or supplier must maintain compliance with applicable enrollment requirements or risk revocation of its billing privileges. *See* 42 C.F.R. § 424.535(a). Hence, section 424.535(a)(5)(ii) permits CMS to revoke the billing privileges of a currently enrolled provider or supplier if CMS determines, "upon on-site review," that the provider or supplier is "no longer operational." The term "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.

42 C.F.R. § 424.502 (italics and emphasis added).[3]

A supplier whose Medicare enrollment has been revoked under section 424.535(a) may ask for reconsideration of that revocation by a contractor hearing officer. 42 C.F.R. § 498.5(l)(1). If the supplier is dissatisfied with the reconsideration determination, the supplier may request a hearing before an administrative law judge ("ALJ"). *Id.*

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[3] Title 42 C.F.R. § 424.57 contains additional enrollment rules applicable to E & I and other suppliers of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). Section 424.57(c) provides that a DMEPOS supplier "must meet and must certify in its application for billing privileges that it meets and will continue to meet" 26 enumerated "application certification standards." 42 C.F.R. §§ 424.57(c)(1)-(26). Under standard 8, a supplier must:

> [p]ermit CMS, or its agents to conduct on-site inspections to ascertain the supplier's compliance with these standards. The supplier location must be accessible during reasonable business hours to beneficiaries and to CMS, and must maintain a visible sign and posted hours of operation.

Id. § 424.57(c)(8). Section 424.57(d) (recently re-designated as section 424.57(e)) states that CMS will revoke a currently-enrolled Medicare supplier's billing privileges if CMS (or its agent) determines that the supplier is not in compliance with any standard in section 424.57(c). *See also A to Z DME, LLC*, DAB No. 2303, at 3 (2010); *1866ICPayday.com*, DAB No. 2289, at 13 (2009) ("failure to comply with even one supplier standard [in section 424.57(c)] is a sufficient basis for revoking a supplier's billing privileges"). In this case, the Board Member determined that the sole legal basis for the challenged revocation determination was CMS's finding under section 424.535(a)(5)(ii) that E & I was not "operational," rather than a finding that E & I was noncompliant with one or more of the application certification standards in section 424.57(c). *See* Hearing Decision at 20.

§ 498.5(l)(2). If dissatisfied with the ALJ's decision, the supplier has a right to Departmental Appeals Board review of that decision. *Id.* § 498.5(l)(3).

Case Background

The following facts are drawn from the Hearing Decision and the record and are undisputed.

Beginning in 2005, E & I was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). Hearing Decision at 1. During the period relevant to this dispute, E & I's place of business was 9898 Bissonnet Street, Suite 290, in Houston Texas. *Id.*

By letter dated September 8, 2009, the National Supplier Clearinghouse (NSC),[4] a CMS contractor, revoked E & I's Medicare supplier number effective August 13, 2009, finding that E & I was not "operational" on that date. Hearing Decision at 1-2. In support of that determination, the September 8 notice letter stated that a NSC representative had visited E & I on April 27 and 28, 2009 and on August 4 and 13, 2009 but found its office to be "closed during posted hours of operation." *Id.*

E & I asked for reconsideration, asserting that it had been operational at all times. Hearing Decision at 2. During the ensuing reconsideration process, the same NSC investigator reportedly made two additional visits to E & I's place of business on October 12 and 13, 2009 but found it to be closed on each occasion. *See id.* at 7-9.

On December 15, 2009, a NSC hearing officer upheld the initial revocation determination, finding that an inspector had been unable to enter E & I's place of business on October 12 and 13, 2009 in order to "'verify that E & I . . . was open and operational and compliant with state and Medicare requirements.'" Hearing Decision at 2 (citing and quoting CMS Ex. 1, at 2-4).

Dissatisfied with the hearing officer's decision, E & I requested an evidentiary hearing before an ALJ. Hearing Decision at 2. CMS responded with a motion for summary judgment, relying principally on written site investigation reports prepared and signed by NSC investigator Mark V. Porter (and included in the record as CMS Exhibits 9, 11, and 12). *See* Hearing Decision at 2; CMS's Motion for Summary Disposition (March 16, 2010) at 6-7. According to these site investigation reports: (1) Mr. Porter visited E & I's place of business on April 27-28, August 4 and 13, and October 12 and 13, 2009; (2) E & I's posted hours of operation were from 9:00 a.m. to 5:00 p.m., Monday to Friday; (3) Mr. Porter's on-site visits to E & I occurred during its posted business hours;

[4] NSC is the CMS contractor responsible for the enrollment and re-enrollment process for DMEPOS suppliers. 42 C.F.R. § 424.502.

and (4) E & I's office was closed – that is, Mr. Porter was unable to gain access to the office – during each of the visits. CMS Ex. 9, at 2, 3, 4, 8; CMS Ex. 11, at 2, 3, 4, 8; CMS Ex. 12, at 2, 3 4, 8.

Along with Mr. Porter's site investigation reports, CMS submitted photocopies of photographs taken by Mr. Porter that purportedly depict the front door, front window, and signage of E & I's office suite. *See* CMS Ex. 10; CMS Ex. 11, at 9-12; CMS Ex. 12, at 9-12. The photographs bear date-and-time stamps that correspond to the dates and times of the visits described in Mr. Porter's site investigation reports.

In response to CMS's summary judgment motion, E & I presented telephone logs and various other business records which, it claimed, were evidence that it was operational on the dates of Mr. Porter's visits. *See* Petitioner's Prehearing Response (March 31, 2010); Hearing Decision at 17.

Finding that there were disputed issues of material fact, the Board Member denied CMS's summary judgment motion and convened an evidentiary hearing (conducted by videoconference). Hearing Decision at 4. During that proceeding, Mr. Porter testified that he had visited E & I's place of business on April 27-28, August 4 and 13, and October 12-13, 2009 and that he had documented his findings for each visit in the site investigation reports found in CMS Exhibits 9, 11, and 12. Tr. at 25, 28, 29-32, 39-41, 44-45. Mr. Porter further testified that during each site visit, he found the door of E & I's office suite to be locked. Tr. at 31-32, 34, 44, 46, 48-49. In addition, Mr. Porter testified that he used a digital camera to take photographs of the front door and signage of E & I's office suite. Tr. 34-36, 38, 42-43, 46-47. He also testified that he then downloaded electronic copies of those photographs to a computer and printed them on regular photocopying paper. *Id*. In response to a question by the Board Member, Mr. Porter acknowledged that NSC did not retain the original "digital files" of the relevant photographs. Tr. at 78.

In support of its claim of being operational, E & I elicited testimony from its two "directors," Theresa Anakor and Evangeline Ibeziako. They testified that E & I's office was always open – with one or both of them physically present in the office – during its posted business hours, including the hours of Mr. Porter's alleged on-site visits. *See* Hearing Decision at 17-18 (citing Tr. at 124-26, 131-32, 139-41, 150-52).

E & I also presented testimony from Stanley U. Ajukor and Iris E. Linden, both of whom worked on the same floor as E & I's office suite. In general, these witnesses testified that they saw or spoke with E & I's directors daily and that, based on their personal observations and recollection, E & I was always open during its posted business hours. *See* Hearing Decision at 16-17 (citing or quoting Tr. at 96-97, 116-17). CMS did not submit any additional evidence in an attempt to rebut the testimony of E & I's witnesses.

The Hearing Decision

In framing her legal analysis of the dispute, the Board Member preliminarily considered whether all six of the reported on-site visits – on April 27-28, August 4 and 13, and October 12-13 – were "properly at issue before me." Hearing Decision at 6. For reasons that are not relevant to this decision, the Board Member found that CMS's reliance on the October 12 and 13 visits was "prejudicial" to E & I, and thus those visits were insufficient to support – or not an "independent basis for" – the revocation determination. *Id.* at 6-12. The Board Member further held that the legality of the challenged revocation determination depended on whether E & I was "operational" *as of August 13, 2009,* the date of the on-site visit that immediately preceded NSC's issuance of the initial revocation determination. *Id.* Although she found the operational status of E & I during the August 13, 2009 visit dispositive, the Board Member also considered the evidence regarding Mr. Porter's other site visits.[5] (Neither party contends, in this appeal, that the Board Member erroneously identified the dispositive issue as E & I's operational status on August 13, 2009.[6])

The Board Member then considered the evidence of E & I's operational status. The Board Member stated because the photographs submitted by CMS "cannot establish whether [E & I's] office was open or whether the investigator tried to enter or knock, the claim that [E & I] was not open for business at the times and dates cited depends wholly on the personal credibility of Mr. Porter." Hearing Decision at 12. Noting that she had observed Mr. Porter "closely" during the hearing, the Board Member stated that she did "not . . . find [his] testimony sufficiently credible that I can be sure that he was [at E & I's place of business] on any specific date or time or that he actually tried the doors and knocked but found no one present on any specific date or time." *Id.* at 16.

In support of that credibility finding, the Board Member noted that there was an inconsistency between Mr. Porter's assertion, on direct examination, that he remembered "pretty much all of [his] site visits" to E & I, including the six he made during 2009, and his subsequent admission, on cross-examination, that he could not recall a June 25, 2008 visit to E & I during which he had found it compliant with Medicare requirements. *See* Tr. at 33, 63-64. Based on Mr. Porter's testimony, the Board Member concluded:

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[5] The Board Member stated she treated the evidence of site visits that occurred before or after August 13, 2009 "as admissible in that repeated findings that the office was closed would be probative in making it more likely that E & I was non-operational on August 13, 2009, than it would be if no other visits took place, but I do not treat those visits as an independent basis for the revocation." Hearing Decision at 12.

[6] This particular holding by the Board Member is consistent with the Board's application of section 424.535(a)(5)(ii) in other decisions, including *A To Z DME,* LLC. In that decision, the Board held that, in evaluating the merits of a revocation determination based on section 424.535(a)(5)(ii), the proper inquiry is to assess the supplier's operational status *at the time of the on-site review* because the intent of the applicable regulations "is that a supplier must maintain, and be able to demonstrate, *continued compliance* with the requirements for receiving Medicare billing privileges. DAB No. 2303, at 7 (italics added); *see also id.* at 6 ("Under the facts of this case, the material time for determining whether A To Z was operational was the dates of the [two] attempted on-site inspections and [multiple] phone calls . . . .").

> I do not find credible Mr. Porter's convenient claim to have a clear present memory of each of the six visits in 2009, on which CMS relied (and "pretty much all of [his] site visits"), while having no memory of any other "numerous," evidently successful, site visits to the same facility. He appeared to me to be willing to overstate or exaggerate where his claims might serve to make him appear more successful to his employers.

Hearing Decision at 14.

The Board Member further noted that Mr. Porter's testimony about his site visit photographs "raised further concerns in my mind." Hearing Decision at 14. Mr. Porter testified that he did not manually add the date-and-time stamps that appear on those photographs:

> Q: Are the photographs the product of a computer-generating software?
>
> A: Yes. It's the Canon software that comes with the digital computer that I'm assigned to use.
> Q: So is it fair to say that you don't actually manually, by hand, label these photographs in any way, shape, or form?
>
> A: No, I don't do any manual manipulation or labeling. This is, the way it prints is exactly the way the software system prints it for me.

Tr. at 38-39. The Board Member found that this testimony failed to acknowledge that the date-and-time stamps that appear on the photographs of the October 2009 on-site visits are different in appearance than the stamps on the photographs of the April and August 2009 visits. The Board Member observed that while the stamps on the October photographs appear to be "embedded" in the images, the stamps on the April and August photographs appear to be "typewritten" and "overlaid [in white boxes] on the photographs." Hearing Decision at 15, 16. On cross-examination, Mr. Porter tried to account for this difference:

> I used two different digital cameras. On the April date, I had an old digital camera, and . . . whenever I got to print, the photos, it was a camera that would imprint a date directly onto the photo. So whenever I printed from a software that I use, I would have to select that the date to be implanted on top of the photo. So it was a different [camera] that I use for April 27th. And I received a new camera by . . . the October visits, where I could imprint the photo directly onto the photo. But the April 27th and 28th photos, the dates and times that you see there, those are generations from the computer software due to the camera that I was using at the time.

Tr. at 57-58. The Board Member found this testimony "difficult to make sense of and not convincing evidence that the dates and times shown on the earlier photographs were reliable proof of when the camera shots were made." Hearing Decision at 15. She also found that Mr. Porter's statement that he "did not physically cut and paste anything to any photo on record," even if true, "leaves open in my mind several possibilities, including the possibility that the dates "may have been manipulated using the camera's software rather than retained as part of the photographs when they were taken." *Id.*

At one point, Mr. Porter testified that he received the "new" camera in "mid-2009" because it was "hard for the [old camera's] software system itself to emplace the date and time on the photo itself," and that the "software program itself laid the date on top of the photo." Tr. at 78. The Board Member characterized this testimony as "defensive," indicating that it raised further questions about when Mr. Porter received the new camera and why he did not start using it until October 2009. Hearing Decision at 16. She also noted that "[a]ny effort to verify the source of the date and time inputs would be futile since Mr. Porter further testified that the digital files" had been destroyed. *Id.* at 15.

In contrast to her view of Mr. Porter's testimony, the Board Member found E & I's witnesses to be credible, especially Mr. Akujor and Ms. Linden, who testified that they interacted with E & I's co-owners multiple times each day and observed light and activity in E & I's office suite during its business hours. *See* Hearing Decision at 17-18. Although the Board Member acknowledged that "it is not physically impossible that Mr. Porter arrived six times at intervals when neither director was present at moments when Mr. Anakor and Ms. Linden did not observe their absences, I find it more probable that Mr. Porter took photographs of the site but did not actually verify that no one was present." *Id.* at 19.

Based on these findings, the Board Member concluded that "CMS has not presented credible or persuasive evidence that E & I was not operational on August 13, 2009." Hearing Decision at 19. For this reason, and because she found that the "sole basis" for the revocation was E & I's alleged failure to be "operational," the Board Member further determined that CMS "lack[ed] legal authority to revoke E & I's Medicare supplier number." *Id.* at 20.

CMS timely filed the pending request for review, contending, on various grounds, that the Board Member's decision is erroneous and that the revocation should be upheld because E & I "was not operational on August 13, 2009 within the meaning of 42 C.F.R. § 424.502 . . . ." Request for Review (RR) at 2.

Standard of Review

The standard of review on factual issues is whether the hearing decision is supported by substantial evidence in the whole record. The standard of review on issues of law is whether the hearing decision is erroneous. *See Guidelines — Appellate Review of*

Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program at http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html; *Experts Are Us, Inc.*, DAB No. 2322, at 2 (2010).

Discussion

As indicated, the Board Member overturned the revocation on the ground that CMS did "not present credible or persuasive evidence that E & I was not operational on August 13, 2009." Hearing Decision at 19.

The basis for that conclusion was the Board Member's finding that CMS's witness, Mr. Porter, was not credible when he testified that he visited E & I on August 13, 2009 and other dates but each time found its office "closed" during its posted business hours. *See* Hearing Decision at 12-16. The Board Member's credibility assessment touched on the precise timing of the visits and whether Mr. Porter had, in fact, taken steps sufficient to verify that E & I's office was not open to the public:

> I believe that Mr. Porter was at the correct location on at least some occasions and took photographs of E & I's office door and surroundings. I do not, however, find Mr. Porter's testimony sufficiently credible that I can be sure that he was there *on any specific date or tim*e *or that he actually tried the doors and knocke*d but found no one present on any specific date or time.

Hearing Decision at 16 (italics added).

The Board Member also held that CMS's claim that E & I was not operational as of August 13, 2009 "depend[ed] wholly" on Mr. Porter's credibility "[g]iven that [his] photographs cannot establish whether the office was open or whether the investigator tried to knock." Hearing Decision at 12. CMS does not disagree with the Board Member's assertion that CMS's case depended wholly on Mr. Porter's credibility. Thus, our focus is properly on the Board Member's credibility finding.

Our review standard for a credibility finding is well-settled: "[u]nless there are *compelling reasons* not to, [the Board] defers to the findings of the ALJ on weight and credibility of testimony." *Koester Pavilion*, DAB No. 1750, at 15, 21 (2000) (italics added).

In its request for review, CMS does not recite or acknowledge this review standard or assert that there are "compelling" reasons to overturn the Board Member's credibility finding. As discussed below, we do not find compelling reasons here to overturn the Board Member's credibility determination.

As our recounting of the case background shows, the Board Member gave specific reasons why she did not find Mr. Porter believable. First, she perceived him to have given inconsistent testimony concerning his recollection of site visits. Second, she found that Mr. Porter had given unconvincing and "defensive" testimony about the date-and-time stamps which appear on the photographs purportedly taken during April and August 2009, casting doubt on the reliability of that evidence and his testimony about it.

In its appeal brief, CMS does not expressly mention these reasons, suggest that they were unfounded, or assert that they were inadequate to support the Board Member's adverse credibility finding. Instead, CMS asks the Board to find – de novo – that Mr. Porter was a credible witness because his testimony was consistent with the dates and times shown on his photographs and the site investigation reports. RR at 9-10 (asserting that "Mr. Porter's testimony was very credible").

We deny this request for several reasons. First, under the substantial evidence standard applicable to findings of fact by an ALJ (or other trier-of-fact), the Board does not make credibility findings, re-weigh the evidence, or substitute its evaluation of the evidence for that of the ALJ. *Life Care Center at Bardstown*, DAB No. 2233 (2009) (citing cases).

Second, CMS did not, as we indicated, take issue with the Board Member's reasons for disbelieving Mr. Porter. Under our principle of deference, we will not overturn a credibility finding absent some claim or demonstration that the stated reasons for that finding are clearly unfounded, unreasonable, or inadequate in light of the record as a whole.

Third, the Board Member expressly noted in her decision that she observed Mr. Porter closely during his testimony and further found that some of his testimony appeared "defensive." Thus, it is apparent that her credibility finding rested partly on an assessment of Mr. Porter's demeanor or deportment. Because only the written record is before us, we are not in a position to second guess this element of the Board Member's evaluation.

Fourth, we cannot say that the evidence as a whole requires us to reject the Board Member's credibility finding. CMS contends that Mr. Porter's site investigation reports confirm the accuracy of his testimony. However, the testimony and reports are not completely identical. Mr. Porter testified that he tried to enter E & I's office during his April and August site visits but was unable to do so because the office's front door was locked, implying that he unsuccessfully attempted to enter the office. Tr. at 31-32. Although Mr. Porter indicated in the site investigation reports for the April and August visits that E & I's office was "closed" on each occasion, he did not document in the reports precisely *how* he made that determination – for example, by knocking on or trying to open the door or by calling E & I's office phone. *See* CMS Ex. 11, at 2, 8; CMS Ex. 12, at 2, 8. Indeed, those two site reports – the report of the August visits being the most probative – do not state that the door was locked. *Id.* In contrast, the site report for the

October 2009 visits, which the parties concede are not dispositive, provides more detail about how Mr. Porter arrived at his conclusions, including stating that he knocked on the office door and that the door was "locked." CMS Ex. 9, at 2, 8.

CMS suggests that the site investigation reports are inherently reliable because they were prepared "in the ordinary course of business." RR at 9. Assuming that those reports carry some presumption of reliability, the presumption extends only to the factual information actually conveyed in the reports, and, as indicated, the reports for four of the six visits – *including the report for the two August visits* – do not indicate that Mr. Porter tried to enter E & I's office suite or otherwise specify how he ascertained that E & I was "closed." Consequently, these reports are not, in themselves, sufficient – or prima facie evidence – that E & I was not operational on August 13, 2009. Moreover, we are unaware of any legal principle that would preclude the finder of fact from discounting a record's reliability when he or she has found that the record's author has not testified credibly concerning matters reflected in the report. Although the Board Member did not expressly discuss whether Mr. Porter's site investigation reports were, apart from his testimony, sufficient to establish that E & I was not operational as of August 13, 2009, absent evidence to the contrary, it is reasonable to infer that, having found Mr. Porter not credible, she also considered the investigation reports which summarize his observations to be equally unreliable.

CMS points out that Mr. Porter's testimony is consistent with the photographic evidence. RR at 8. However, that evidence does not materially enhance Mr. Porter's credibility because he did not, as the Board Member found, adequately explain why the date-and-time stamps on the April and August 2009 photographs should be regarded as accurate or reliable evidence of when he visited E & I's place of business. CMS offered no evidence to bolster Mr. Porter's testimony on that issue, such as corroboration for his claim that the "overlaid" appearance of those stamps on the April and August photographs was generated by the software used to print them. Moreover, Mr. Porter admitted that NSC did not retain the digital record of the photographs, casting further doubt about the accuracy of the stamps. In addition, the Board Member correctly held that the photographs do not prove, or tend to prove, that E & I was "*open to the public* for the purpose of providing health care related services." Hearing Decision at 12, citing 42 C.F.R. 424.502 (definition of "operational") (italics added). The photographs show only that E & I's business hours were from 9:00 a.m. to 5:00 p.m. and were posted on its office suite's front door. They do not verify that Mr. Porter knocked on or tried to open the door in an effort to verify that E & I was, in fact, open to the public for the purpose of furnishing health care services. Moreover, this argument is unconvincing because it ignores the previously described information gaps in the April and August site investigation reports and because it overlooks testimony by E & I's four witnesses – testimony that the Board Member expressly found to be credible – that E & I was open to the public during the relevant period for the purpose of providing health care services.

In *Udeobong, d/b/a Midland Care Medical Supply and Equipment*, DAB No. 2324 (2010), the Board upheld the revocation of a DMEPOS supplier based on the supplier's admission that it was not open routinely during its posted hours of operation. In contrast, E & I proffered testimony, credited by the Board Member, that it was always open during its posted hours. *See* Hearing Decision at 17-18. Although this testimony was very general and did not specifically address the precise times that Mr. Porter stated that he visited E & I's place of business, we do not find this lack of specificity a compelling reason to abandon our principle of deference to a trier-of-fact's credibility findings, especially since the trier-of-fact here explained the basis for her decision in such detail.

In addition, CMS asserts that the Board Member "erred when she stated that the dates shown on the photographs may have been manipulated or overlaid on the photographs" absent direct evidence that Mr. Porter had manipulated the stamps to convey false or inaccurate information about dates and times of the site visits. RR at 9. We find no prejudicial error in the Board Member's comments on this issue. As we read the Board Member's statement, its purpose was not to speculate about the possible ways in which the stamps could have been imprinted on the photographs, or to accuse Mr. Porter of manipulation, but to emphasize that Mr. Porter's less-than-convincing and "defensive" testimony had cast legitimate doubt on reliability of the photographic evidence. CMS does not directly confront the Board Member's finding that Mr. Porter's testimony left room for such doubt.

Conclusion

For the reasons discussed above, we affirm the Board Member's decision to reverse the revocation of E & I's Medicare billing privileges.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Stephen M. Godek
Presiding Board Member