Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Biomed Texas Inc., d/b/a Alliance Pharmacy,
(PTAN: 6494950001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-852

Decision No. CR4791

Date: February 13, 2017

DECISION

I sustain the determination of a Medicare contractor, as affirmed on reconsideration, to revoke the Medicare enrollment and billing privileges of Petitioner, Biomed Texas, Inc., d/b/a Alliance Pharmacy.

I. Background

The Centers for Medicare & Medicaid Services (CMS) moved for summary judgment. With its motion it filed 12 proposed exhibits, identified as CMS Ex. 1-CMS Ex. 4, CMS Ex. 6, and CMS Ex. 8-CMS Ex. 14. Petitioner opposed the motion and filed three proposed exhibits, identified as P. Ex. 1-P. Ex.3. I directed CMS to file a reply brief to address issues raised by Petitioner that CMS had not addressed in its brief in support of its motion. CMS filed a reply brief and two additional proposed exhibits, identified as CMS Ex. 15-CMS Ex. 16.

I receive all of the parties' exhibits into evidence for purposes of deciding this case with the exception of CMS Ex. 16. I do not receive that exhibit, consisting of the written declaration of Tanya Mattingly, because it adds nothing substantive to the documents that

are of record. Rather, it is commentary that draws conclusions based on those exhibits. It is unnecessary for me to consider the opinions and conclusions in that declaration in order to decide this case.

Although CMS styled its motion as a motion for summary judgment I find it unnecessary that I decide whether the criteria for summary judgment are present here. CMS did not request to cross-examine Petitioner's witness, John Ginzler. *See* P. Ex. 3. I have excluded the testimony of Ms. Mattingly for the reasons that I state above. Consequently, no purpose would be served by convening an in-person hearing. I decide this case based on the parties' arguments and the exhibits that I receive into evidence.

II. Issues, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether a basis exists to revoke Petitioner's enrollment in the Medicare program and its Medicare billing privileges.

B. Findings of Fact and Conclusions of Law

CMS asserts that there are three bases for revoking Petitioner's participation in Medicare as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) and the loss of its Medicare billing privileges. It contends that Petitioner did not comply with three DMEPOS supplier standards set forth at 42 C.F.R. § 424.57(c)(21), (22), and (26). Petitioner's noncompliance with any of these standards would justify revocation of enrollment and loss of billing privileges. 42 C.F.R. § 424.57(e).

The documentary evidence unequivocally supports CMS's assertions of noncompliance. Petitioner did not establish that it was accredited as is required by 42 C.F.R. § 424.57(c)(22). It did not show that it had a surety bond that satisfies the requirements of 42 C.F.R. § 424.57(c)(26) and (d). And, it failed timely to provide information to the Medicare program in compliance with 42 C.F.R. § 424.57(c)(21).

A DMEPOS supplier must be accredited by a CMS-approved accrediting organization. Its accreditation must state the specific products and supplies for which the supplier is accredited. 42 C.F.R. § 424.57(c)(22). Petitioner submitted an August 18, 2015 letter to the Medicare contractor along with supporting information, in which it asserted that it was properly accredited. CMS Ex. 4 at 1-4. However, Petitioner's accreditation was for "infusion therapy" and other pharmacy services. On its face, the accreditation did not cover supplying durable medical equipment, prosthetics, orthotics, and supplies at the

address that is the subject of CMS's determination, the Alliance Pharmacy, located at 4108 Amon Carter Blvd., Suite 208, Ft. Worth, TX 76155 (the Amon Carter facility). Consequently, the accreditation is invalid for the DMEPOS items supplied by Petitioner.

Petitioner evidently operates out of more than one location. The accreditation that Petitioner received for another facility, located at 950 Calcon Hook Rd., Suite 19, Sharon Hill, PA 19079 (the Sharon facility) is not relevant to this case. Not only is that a separate facility, but it is located in a different state (Pennsylvania) from the Amon Carter facility, which is located in Texas. Each of these facilities has its own national provider identification number (NPI) and is distinct.

In its opposition Petitioner avers that it was accredited at all times relevant to this case. Petitioner's pre-hearing brief at 3. However, it has not offered any documentation that proves that the Amon Carter facility had the requisite accreditation to furnish DMEPOS items. In his declaration, John Ginzler, Petitioner's chief financial officer, asserts that the Joint Commission accredited Petitioner on August 1, 2015. P. Ex. 3 at 1. But, Mr. Ginzler offers no documentation of that accreditation nor does he rebut CMS's assertion that there is no evidence that the Amon Carter facility received accreditation for DMEPOS items.

Petitioner's failure to establish accreditation is in and of itself sufficient to sustain the determination to revoke its Medicare participation and billing privileges. However, the evidence unequivocally establishes additional grounds for revocation.

Medicare regulations require that a DMEPOS supplier have a surety bond for each assigned NPI to which Medicare has assigned billing privileges. 42 C.F.R. § 424.57(d)(1)(ii). CMS avers that Petitioner failed to provide evidence of a surety bond covering the Amon Carter facility. Petitioner provided a continuation certificate involving a bond that applies to the Sharon facility in Pennsylvania. That plainly fails to meet regulatory requirements because it does not apply specifically to the Amon Carter facility in Texas.

Moreover, the documents that Petitioner offered with its reconsideration request – which, purportedly, show that it has a surety bond meeting regulatory requirements – do not, in fact, establish these regulatory requirements, in addition to the requirement that each specific NPI be bonded, are satisfied. CMS Ex. 9, CMS Ex. 10, P. Ex. 1 at 51-52. They do not establish that the surety is liable for unpaid claims, civil money penalties, or assessments relating to the Amon Carter facility that occur during the term of the bond as is required by 42 C.F.R. § 424.57(d)(5)(i)-(ii). Nor do they establish a guarantee of payment within 30 days as is required by 42 C.F.R. § 424.57(d)(5)(i).[1]

[1] As CMS points out, the documents submitted by Petitioner consist of a continuation certificate and not a copy of the underlying bond. CMS Ex. 10. It is not possible to

Finally, CMS provided proof that the bond covering the Amon Carter facility had been cancelled. CMS Ex. 15. Petitioner did not rebut this evidence by offering proof that the Amon Carter facility had a current bond that satisfied regulatory requirements.

Petitioner asserts that at all relevant times it held a surety bond. Petitioner's pre-hearing brief at 4. However, the evidence offered by Petitioner, consisting of a continuation premium billing notice, applies specifically to the Sharon Hill facility. It contains no mention of the Amon Carter facility and, moreover, it does not address the specific bonding requirements of 42 C.F.R. § 424.57(d). Nothing in the evidence offered by Petitioner explains the terms of the bond's coverage or even whether it applies to the Amon Carter facility.

A third basis for revocation lies in Petitioner's failure timely to provide requested information to the Medicare contractor. A DMEPOS supplier must provide information "on request" to Medicare or one of its contractors. 42 C.F.R. § 424.57(c)(21). Petitioner failed to comply with this requirement. On November 12, 2015, Petitioner received a letter from a Medicare contractor in which the contractor requested specific information, including information concerning accreditation and bonding. CMS Ex. 1 at 1-2. Petitioner failed to respond to this letter. CMS Ex. 2. It did not supply information to the contractor concerning its bonding and accreditation until it requested reconsideration of the contractor's February 3, 2016 determination to revoke Petitioner's Medicare participation and billing privileges.

Petitioner has offered nothing that rebuts evidence showing that it did not timely reply to the contractor's information request.[2]

/s/
Steven T. Kessel
Administrative Law Judge

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ascertain the exact terms of the bond from the continuation certificate. Petitioner had the burden of proving that it is bonded and that the terms of its bond satisfied regulatory requirements. It failed to meet that burden by supplying incomplete and ambiguous information.

[2] Petitioner argues that a two-year revocation of its Medicare participation may not be based solely on its failure to supply requested information. I need not address this assertion here because there are multiple grounds that justify revocation.