

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Signature Prosthetics, Inc.  
(Supplier No: 1049610001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-09-754

Decision No. CR2090

Date: March 11, 2010

**DECISION**

The Centers for Medicare & Medicaid Services (CMS) has revoked Petitioner's Medicare supplier number. Petitioner, Signature Prosthetics, Inc., appeals, and CMS moves for summary judgment.

As discussed below, the uncontroverted facts compel revocation of Petitioner's supplier number. I therefore grant CMS's motion for summary judgment.

**I. Background**

Until its Medicare supplier number was revoked on July 18, 2009, Petitioner participated in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). *See* 42 C.F.R. § 424.57. In a letter dated June 18, 2009, the Medicare contractor, Palmetto GBA National Supplier Clearinghouse, notified Petitioner that its supplier number would be revoked pursuant to 42 C.F.R. §§ 424.57(e),

424.535(a), 424.535(a)(5)(ii) and other regulations.<sup>1</sup> The letter noted that, despite making four attempts during the facility's posted office hours, one of the contractor's investigators was unable to inspect the supplier's facility because it was closed. The doors were locked, and no one responded to the investigator's knocks. CMS Ex. 1.

Petitioner sought reconsideration. In a reconsideration decision dated August 25, 2009, a Medicare hearing officer affirmed the revocation of Petitioner's supplier number. CMS Ex. 4. Petitioner now appeals that determination.

In an order dated September 29, 2009, I directed the parties to submit their evidence and briefs "addressing all issues of law and fact." CMS complied with that order but Petitioner did not. In a notice dated December 15, 2009, I directed Petitioner to show cause in writing why its request should not be dismissed as abandoned pursuant to 42 C.F.R. § 498.69(b)(2). In order to continue this appeal, the order directed Petitioner to submit its evidence and argument. In a letter dated December 21, 2009, Fernando J. Nunez, who is apparently Petitioner's owner and operator, said that he had "already filed its our [sic] exchange of evidence and argument," apparently referring to Petitioner's hearing request and the documents attached thereto. Those documents are not marked as exhibits as called for in my order and Civil Remedies Division procedures. However, the evidence Petitioner alludes to is included among CMS's Exhibits. CMS Exs. 6, 7.

CMS moves for summary judgment. With its motion and brief, CMS submits seven exhibits (CMS Exs. 1-7).

## II. Discussion

***CMS is entitled to summary judgment because the undisputed evidence establishes that the supplier, Signature Prosthetics, Inc., did not satisfy Medicare enrollment requirements.***<sup>2</sup>

Summary judgment. The Departmental Appeals Board has, on multiple occasions, discussed the well-settled principles governing summary judgment. *See, e.g., 1866ICPayday.com, L.L.C., DAB No. 2289, at 2-3 (2009).* Summary judgment is

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<sup>1</sup> Inconsistently, the letter said that Petitioner's supplier number would be "revoked effective 30 days from the postmark of this letter," and that "the effective date of this revocation has been made retroactive to April 8, 2009." However, the Medicare hearing officer resolved that inconsistency. According to the reconsideration decision, "The effective date of the revocation is 30 days from the postmark of the [June 18, 2009 notice] letter.

<sup>2</sup> I make this one finding of fact/conclusion of law.

appropriate if a case presents no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *1866ICPayday*, at 2; *Illinois Knights Templar Home*, DAB No. 2274, at 3-4 (2009), and cases cited therein.

The moving party may show the absence of a genuine factual dispute by presenting evidence so one-sided that it must prevail as a matter of law, or by showing that the non-moving party has presented no evidence “sufficient to establish the existence of an element essential to [that party’s] case, and on which [that party] will bear the burden of proof at trial.” *Livingston Care Center v. Dep’t of Health & Human Services*, 388 F.3d 168, 173 (6th Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). To avoid summary judgment, the non-moving party must then act affirmatively by tendering evidence of specific facts showing that a dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (1986); *see also Vandalia Park*, DAB No. 1939 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004).

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 . . . .

*Illinois Knights Templar*, at 4 (emphasis in original); *Livingston Care Center*, DAB No. 1871, at 5 (2003).

In examining the evidence for purposes of determining the appropriateness of summary judgment, I must draw all reasonable inferences in the light most favorable to the non-moving party. *1866ICPayday, L.L.C.*, at 3; *Brightview Care Center*, DAB No. 2132, at 2, 9 (2007); *Livingston Care Center*, 388 F.3d at 172; *Guardian Health Care Center*, DAB No. 1943, at 8 (2004); *but see Brightview*, DAB No. 2132, at 10 (entry of summary judgment upheld where inferences and views of non-moving party are not reasonable). Moreover, drawing factual inferences in the light most favorable to the non-moving party does not require that I accept the non-moving party’s legal conclusions. *Cf. Guardian Health Care Center*, DAB No. 1943, at 11 (“A dispute over the conclusion to be drawn from applying relevant legal criteria to undisputed facts does not preclude summary judgment if the record is sufficiently developed and there is only one reasonable conclusion that can be drawn from those facts.”).

Requirements for a DMEPOS supplier’s Medicare participation. To receive Medicare payments for items furnished to a Medicare-eligible beneficiary, a supplier of medical equipment and supplies must have a supplier number issued by the Secretary of Health and Human Services. Social Security Act § 1834(j)(1)(A).

To obtain and retain its supplier number, a Medicare supplier must meet the standards set forth in 42 C.F.R. § 424.57(c), and CMS may revoke its billing privileges if it fails to do so. 42 C.F.R. §§ 424.57(c)(1) and (d); 42 C.F.R. § 424.535(a)(1). Among other requirements, the supplier must permit CMS or its agents to conduct on-site inspections to ascertain its compliance with governing regulations. Its location must be accessible during reasonable business hours, and it must maintain a visible sign and post its hours of operation. 42 C.F.R. § 424.57(c)(8).

Undisputed facts and application of law to those facts. Here, CMS has come forward with evidence establishing that, prior to July 18, 2009, Petitioner was a Medicare-enrolled DMEPOS supplier located at 9102 Firestone Blvd., Suite E, Downey, California. Its posted hours were 10:00 a.m. to 6:00 p.m. Monday through Friday. At 11:58 a.m. on March 12, 2009, Kimberly Smith-Owens, a fraud investigator employed by the contractor, attempted an onsite inspection at that location. Although the lights were on, the entrance was locked and no one responded to her knocks. She returned to the facility three more times: at 11:43 a.m. on March 25; at 10:08 a.m. on March 26; and at 10:39 a.m. on April 8. On each occasion the entrance was locked and the lights were off. No one responded to her knocks. CMS Ex. 5. Because the investigator could not inspect the premises, the contractor revoked Petitioner's supplier number.

Petitioner does not dispute any of these facts. In his June 22, 2009 letter to the contractor, Mr. Nunez claimed that he is self-employed, with no employees. He said that he makes business-related visits (to doctors, hospitals) during lunch – which he takes from noon to 2:00 p.m. -- and that he sometimes returns late. He said that the facility is also closed on Wednesdays. CMS Ex. 6, at 27. He supplied an order dated April 6, 2009, from Staples Office Supply, for the purchase of a sign saying “Closed 12 p.m. – 2 p.m. for Lunch” and “Closed Wednesdays,” and providing an emergency contact telephone number. CMS Ex. 6, at 23-24. Among some undated photographs are pictures of the facility's entrance with that signage on the door adjacent to the door showing the former posted hours (“Mon. – Fri. 10:00 a.m. to 6:00 p.m.”). CMS Ex. 6, at 6, 7, 8; CMS Ex. 7, at 18, 19.

In a letter dated July 15, 2009, Petitioner advised the contractor of the facility's new business hours: 10 a.m. to 12:00 p.m. and 2:00 p.m. to 6:00 p.m. Monday, Tuesday, Thursday, and Friday. CMS Ex. 6, at 14.

For summary judgment purposes, I draw all reasonable inferences in the light most favorable to Petitioner, and accept that its facility is closed on Wednesdays, and closed from noon to 2:00 p.m. daily. I also accept that, sometime after April 6, 2009, it changed

its signage to reflect these hours, and that it notified the contractor of its more limited hours in the July 15, 2009 letter.<sup>3</sup>

Based on these facts, I find that Petitioner was not in compliance with all of the standards set forth in section 424.57(c). To sustain its supplier number, a DMEPOS supplier must permit CMS or its agents to conduct on-site inspections. 42 C.F.R. § 424.57(c)(8). Even accepting that the facility's actual hours of operation were 10:00 a.m. to 12:00 noon and 2:00 to 6:00 p.m. four days per week (Mon., Tues., Thurs., Fri.), the undisputed facts establish that Petitioner was not open and accessible to program beneficiaries and CMS during those hours. March 12, 2009, was a Thursday, and Investigator Smith-Owens found it locked at 11:58 a.m., just before the purported lunch hour closing. March 26, 2009 was also a Thursday, and Investigator Smith-Owens found it locked at 10:08 a.m., well before its closing time.

Petitioner thus did not meet all of the standards of 42 C.F.R. § 424.57(c), and CMS properly revoked its billing privileges. 42 C.F.R. § 424.57(d).

### **III. Conclusion**

Because the undisputed facts establish that Petitioner has not satisfied Medicare enrollment requirements, I grant CMS's motion for summary judgment and sustain the revocation of Petitioner's supplier number.

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/s/  
Carolyn Cozad Hughes  
Administrative Law Judge

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<sup>3</sup> Because the facility's hours of operation were different than those posted on its door when the investigator visited, it was not open and accessible during its posted hours of operation, and therefore violated the standard. 42 C.F.R. § 424.57(c)(8). I do not here address whether a subsequent correction precludes CMS from revoking its supplier number, based on the situation the investigator found in March 2009.