

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

Complete Home Care, Inc.
Docket No. A-13-70
Decision No. 2525
July 29, 2013

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

Complete Home Care, Inc., a company in Sioux Falls, South Dakota that was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS), requests review of an Administrative Law Judge (ALJ) decision dated May 14, 2013. *Complete Home Care, Inc.*, DAB CR2783 (2013) (ALJ Decision). The ALJ granted summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS), thereby sustaining its revocation of Complete Home Care's Medicare billing privileges and related supplier number. The ALJ determined that CMS was authorized to revoke Complete Home Care's enrollment under 42 C.F.R. § 424.535(a)(5) on the ground that it was not "operational" because the undisputed facts established that on two separate dates Complete Home Care's facility was not open and staffed during its posted hours of operation. We conclude that CMS had authority to revoke Complete Home Care's enrollment based on the same facts because it was out of compliance with the DMEPOS supplier standard at 42 C.F.R. § 424.57(c)(7). Therefore, we affirm the revocation of Complete Home Care's enrollment and billing privileges, but on a different legal basis.

Legal Background

In order to receive Medicare payments for items furnished to a Medicare-eligible beneficiary, a DMEPOS supplier must have a supplier number issued by the Secretary of Health and Human Services. Social Security Act (Act) § 1834(j)(1)(A).¹ To enroll in Medicare and receive billing privileges, a DMEPOS supplier is required to meet and maintain compliance with the 30 "supplier standards" set forth in 42 C.F.R. § 424.57(c). Under section 424.57(c)(7), a DMEPOS supplier is required to maintain "a physical facility on an appropriate site." An "appropriate site" must, among other things, be "accessible and staffed during posted hours of operation." 42 C.F.R.

¹ The current version of the Social Security Act can be found at http://www.socialsecurity.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

§ 424.57(c)(7)(i)(C). If a DMEPOS supplier is found not to meet the standards in section 424.57(c), CMS will revoke the supplier's billing privileges. *Id.* § 424.57(e).²

Section 424.535, which applies to all providers and suppliers enrolled in the Medicare program, sets forth several grounds on which CMS may revoke a provider's or supplier's billing privileges. Section 424.535(a)(5)(ii) authorizes CMS to revoke a supplier's billing privileges if CMS determines, upon on-site review, that the supplier is "no longer operational to furnish Medicare covered items or services, . . . has failed to satisfy any or all of the Medicare enrollment requirements, or has failed to furnish Medicare covered items or services as requires by the statute or regulations." A supplier is "operational" if it 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 items and services. *Id.* § 424.502.

Background

The following facts from the ALJ Decision and the record are undisputed.

At approximately 9:30 a.m. on June 26, 2012, an inspector from the National Supplier Clearinghouse (NSC), a CMS contractor, attempted to conduct a site inspection at Complete Home Care's Russell Street facility. (Complete Home Care also operated a second facility at another location.) The facility's posted hours of operation were Monday through Friday from 9 a.m. to 6 p.m., but when the inspector arrived the facility was locked. A sign on the door indicated that an employee would return by 2 p.m., but when the inspector returned at 2:45 the facility was locked and a new sign indicated that someone would return by 5. The inspector attempted to conduct a second site inspection the following day at 10:30 a.m. Again, the facility was locked and a new sign on the door indicated that someone would return by 5 p.m. The sign also provided the cell phone number for Complete Home Care's owner, who worked as a pharmacist at the facility. According to the inspector, when he dialed that number, no one answered.

By letter dated August 16, 2012, CMS notified Complete Home Care that its Medicare supplier number was being retroactively revoked effective June 27, 2012 for a two-year period "pursuant to 42 CFR §§ 405.874, 424.57(e), 424.535(a), 424.535(a)(5)(ii) and 424.535(g)." CMS Ex. 1, at 1. The letter stated that CMS had determined Complete Home Care was not in compliance with the supplier standard at 42 C.F.R. § 424.57(c)(7). The letter explained that the NSC inspector had attempted to visit Complete Home Care's

² Paragraph (e) of section 424.57 was previously designated paragraph (d) and was redesignated by the rulemaking that imposed the surety bond requirements at paragraph (d); however, the redesignations were not incorporated in the C.F.R. volumes issued October 1, 2009, 2010, 2011, or 2012 "due to inaccurate amendatory instruction," and the text added by revised paragraph (d) appears in those volumes as an "Editorial Note" to section 424.57. References are to the regulation as redesignated.

Russell Street facility on July 26 and 27, 2012, but “the visit was unsuccessful because the business was closed on both attempts during posted business hours with a sign posted stating that you will return.” *Id.* at 2. Because CMS could not complete an inspection of the facility, the letter continued, CMS could not verify Complete Home Care’s compliance with the supplier standards and had determined that the facility “is not operational to furnish Medicare covered items and services.” *Id.* Accordingly, Complete Home Care was “considered to be in violation of 42 CFR § 424.535(a)(5)(ii) and all supplier standards as defined in 42 CFR § 424.57(c).” *Id.*

Complete Home Care requested reconsideration, but in a reconsidered determination dated October 23, 2012, CMS again concluded that Complete Home Care was non-compliant with section 424.57(c)(7) and non-operational. CMS Ex. 3, at 2-3. CMS noted that “the site inspector was unable to complete a site investigation . . . to verify compliance with the [supplier] standards because the facility was not open or properly staffed during posted hours of operation.” *Id.* at 3.

Complete Home Care then requested a hearing before an ALJ. CMS moved for summary judgment and Complete Home Care moved to dismiss CMS’s revocation action. Complete Home Care argued that its Russell Street facility was “accessible and open to the public” on the dates the inspector attempted to visit because its exterior entrance doors were open, a sign on the locked interior doors informed customers that an employee would return, and its “staff was only a phone call away.” *Mot. to Dismiss & Pre-Hr. Br.* at 2. Complete Home Care asserted that its owner had left his cell phone number on the sign on the door “for any client to contact him immediately as needed” and that its primary business telephone number, which was listed in a local directory and reachable via directory assistance, operated on a “network phone system” so when a customer called the number staff at either location could answer the call. *Id.*

The ALJ Decision

The ALJ granted CMS’s motion for summary judgment and denied Complete Home Care’s motion to dismiss. The ALJ first determined that the case was appropriate for summary judgment because Complete Home Care had not disputed the material facts alleged by CMS: No one “was continually present” at the inspected facility during its posted hours of operation on the dates the inspector attempted to visit. *ALJ Decision* at 4.

In concluding that CMS had a legitimate basis to revoke Complete Home Care’s enrollment and billing privileges, the ALJ noted that to be “operational” a supplier “must be ‘*open to the public*’ for the purpose of providing health care related services . . . and [be] *properly staffed* . . . to furnish these services.” *Id.* at 6, citing 42 C.F.R. § 424.502 (emphasis in *ALJ Decision*). The ALJ also noted that under section 424.57(c)(7), a DMEPOS supplier must be accessible and staffed during posted hours of operation to

beneficiaries and CMS. *Id.* The ALJ determined that Complete Home Care had violated both of these requirements, reasoning that a “supplier is neither ‘open to the public’ nor ‘accessible,’ if the supplier location is closed due to staff making patient deliveries or visits,” which was what Complete Home Care alleged had caused its facility to be locked at the time of the inspector’s attempted visits. *Id.* Despite finding these two violations, the ALJ rested his decision on the ground that “the undisputed facts establish [Complete Home Care] was not operational when it was not open and accessible on two separate occasions during its posted hours of operation.” *Id.* at 7.

The ALJ also denied Complete Home Care’s request to restore its billing privileges in light of the fact that its facilities had maintained certain accreditations since 2009, reasoning that he lacked the authority to grant equitable relief or to “declare statutes or regulations invalid or ultra vires.” *Id.*

Complete Home Care timely requested review by the Board.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address de novo. Summary judgment is appropriate if there are no genuine disputes of fact material to the result. In reviewing whether there is a genuine dispute of material fact, we view proffered evidence in the light most favorable to the non-moving party. *Elant at Fishkill*, DAB No. 2468, at 5-6 (2012) (citations omitted). Our standard of review on a disputed issue of law is whether the ALJ decision is erroneous. Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare and Medicaid Programs (Guidelines), available at <http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html>.

Analysis

1. The ALJ appropriately disposed of the case on summary judgment.

Complete Home Care argues that summary judgment was inappropriate because it disputed that the NSC inspector actually called its owner’s cell phone number listed on the facility door on June 27, 2012. It asserts that any failure by the inspector to call the number would “possibly negate” the allegation that its facility was not properly staffed during its posted hours of operation and would show that CMS did not make “an appropriate and complete effort to contact” it. Request for Review (RR) at 2nd p. (unnumbered).

As an initial matter, Complete Home Care did not clearly dispute before the ALJ that the inspector called the cell phone number, and the Board will not consider issues which could have been presented to the ALJ but were not. *See* Guidelines. In its pre-hearing brief, Complete Home Care stated that it “would like to find out if there is something we can do to prevent the missed call” and asked to cross-examine the inspector “regarding his trial to make the connection with our staff.” Mot. to Dismiss & Pre-Hr. Br. at 2. Complete Home Care expressed confidence that its staff “should not miss any call that was made to our primary pharmacy phone number” and speculated that the inspector’s call to its owner’s cell phone might have been blocked by the walls of the VA hospital while the owner was there working with clients. *Id.* The ALJ interpreted these statements to mean Complete Home Care did not dispute that the inspector unsuccessfully attempted to call the cell phone number, but alleged that its staff would have answered a call to the main business number if the inspector had called that number. ALJ Decision at 6. The ALJ accepted this allegation as true for purposes of summary judgment. *Id.*

In any event, as our discussion below indicates, whether the inspector called the cell phone number and whether Complete Home Care’s owner was accessible by cell phone are immaterial to the determination that CMS had a legitimate basis for revoking Complete Home Care’s enrollment. Accordingly, the ALJ correctly determined that there were no genuine disputes of material fact and that the case could be disposed of on summary judgment.

2. CMS had a legitimate basis for revoking Complete Home Care’s enrollment and billing privileges because the undisputed facts establish that Complete Home Care violated section 424.57(c)(7).

Complete Home Care contends that it met all of the supplier standards in section 424.57(c), but it does not dispute that its Russell Street facility was not continually staffed during its posted hours of operation on the days the inspector attempted to visit. RR at 3rd-4th pp. As noted above, under section 424.57(c)(7)(i)(C), to be an “appropriate site” a facility must be “accessible and staffed during posted hours of operation.” The ALJ correctly concluded that a facility does not meet this requirement if it is temporarily closed during its posted hours of operation. ALJ Decision at 6.

Complete Home Care maintains that its Russell Street facility was accessible and staffed during its posted hours of operation because its owner was available via his cell phone and staff at its other location was available through its networked primary business telephone number. RR at 3rd p. To the contrary, the fact that Complete Home Care’s staff might have been reachable by phone has no bearing on whether its Russell Street facility was in compliance with section 424.57(c)(7)(i)(C). The requirement that a

DMEPOS supplier maintain a primary business telephone is found in section 424.57(c)(9) and thus is distinct from the requirements in section 424.57(c)(7) regarding what makes a DMEPOS supplier's physical facility an "appropriate site."

The text of the preamble further refutes Complete Home Care's contention that a facility is accessible and staffed during its posted hours of operation if staff is reachable by phone, even if the facility's doors are closed and no staff is present. The preamble to the proposed rule that added section 424.57(c)(7)(i)(C) explained:

The supplier's place of business must be staffed during the supplier's posted hours of operation. The supplier's place of business must be accessible to the public, CMS, the NSC and any of its agents during the supplier's posted hours of operation regardless of whether beneficiaries routinely visit the facility. . . . A supplier is not in compliance with this standard if no one is available during the posted hours of operation.

73 Fed. Reg. 4503, 4506 (2008). If the regulatory drafters had contemplated that a supplier could meet the requirements of section 424.57(c)(7)(i)(C) by ensuring that staff is always available by phone during posted hours of operation, they would not have emphasized that a supplier's place of business must remain publicly accessible during posted hours even if beneficiaries do not regularly visit it in person. In addition, in response to comments suggesting that CMS should allow facilities to temporarily close during posted hours to account for circumstances including short-term closures and patient deliveries, the drafters explained in the preamble to the final rule that they believed a supplier "should be available during posted business hours" and "should do its best to plan and staff for temporary absences." 75 Fed. Reg. 52,629, 52,636 (2010). Nothing in this response suggests that during temporary absences it would be sufficient for staff to be reachable by phone.

Because Complete Home Care's facility was not continually staffed during its posted hours of operation on the two days that the inspector attempted to visit, the ALJ correctly concluded that it did not meet the requirements of section 424.57(c)(7)(i)(C) on those dates. Failure to comply with even one supplier standard is a sufficient basis for revoking a supplier's billing privileges under section 424.57(e), so we do not need to address the ALJ's additional conclusion that the closures to the facility justified revocation on the ground that Complete Home Care was non-operational.³ *See A to Z DME*, DAB No. 2303, at 3 (2010); *see also 1866ICPayday.com*, DAB No. 2289, at 13 (2009) ("failure to comply with even one supplier standard is a sufficient basis for revoking a supplier's billing privileges").

³ Because we are not addressing the ALJ's conclusion that Complete Home Care was non-operational, we also need not address Complete Home Care's challenge to the ALJ's decision to exclude certain exhibits that Complete Home Care argues show it was operational on June 26 and 27, 2012. RR at 3rd p.

3. The Board lacks the authority to restore Complete Home Care’s billing privileges on equitable grounds.

Complete Home Care asks the Board to restore its billing privileges on equitable grounds, arguing that it is a “paragon of medical care in its community that, unfortunately, was difficult to contact for two days.” Reply Br. at 4. It does not specifically challenge the ALJ’s conclusion that he lacked the authority to grant equitable relief, but contends that the ALJ knew his ruling was “against the principle and purpose behind the written law.”⁴ *Id.* The ALJ correctly concluded that he lacked the authority to restore Complete Home Care’s billing privileges on equitable grounds, and the Board lacks that authority as well. *See Letantia Bussell, M.D.*, DAB No. 2196, at 12-13 (2008) (explaining that ALJs and the Board are authorized to review only whether CMS has a legal basis to revoke a provider or supplier’s billing privileges).

Conclusion

For the reasons stated above, we affirm the ALJ Decision.

_____/s/
Leslie A. Sussan

_____/s/
Constance B. Tobias

_____/s/
Stephen M. Godek
Presiding Board Member

⁴ Complete Home Care also requests that the Board “order a new inspection through CMS, . . . or reduce the revocation duration from two years to one year.” Reply Br. at 4. However, Complete Home Care did not make these requests for relief before the ALJ, so even if the Board had the authority to grant the requests, we would not consider doing so here. *See* Guidelines.