Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Cornerstone Medical, Inc.
Docket No. A-14-42
Decision No. 2585
July 24, 2014

REMAND OF ADMINISTRATIVE LAW JUDGE DECISION

The Centers for Medicare & Medicaid Services (CMS) requests review of the December 6, 2013 decision of an Administrative Law Judge (ALJ). *Cornerstone Medical, Inc.*, DAB CR3022 (2013) (ALJ Decision). The ALJ determined that the Oakwood, Georgia location of Cornerstone Medical, Inc. (Cornerstone), a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS), was "operational and staffed" at the times a CMS contractor attempted to conduct an on-site review. Accordingly, the ALJ concluded that CMS improperly revoked Cornerstone's Medicare supplier number and billing privileges. We remand the case to the ALJ for her to clarify the legal and factual basis for her decision.

Background

In order to maintain Medicare enrollment and associated "billing privileges," a DMEPOS supplier must be in 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. § 424.57(c)(7)(i)(C). CMS (through its contractors) performs on-site inspections to verify compliance with the supplier standards and other Medicare requirements. *See id.* §§ 424.57(c)(8), 424.517. CMS is authorized to revoke a DMEPOS supplier's billing privileges for noncompliance with any of the supplier standards. *Id.* § 424.57(e).

CMS is also authorized to revoke a supplier's billing privileges for any of the "reasons" listed in section 424.535(a). (Section 424.535 applies to all types of Medicare "suppliers," not just DMEPOS suppliers.) Section 424.535(a)(5)(ii) provides in relevant part that CMS may 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." A supplier is "operational" if it "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.

Cornerstone operates in several locations, including one in Oakwood, Georgia. By letter dated January 25, 2013, CMS, through its contractor Palmetto GBA National Supplier Clearinghouse (Palmetto), notified Cornerstone that it was revoking the Medicare supplier number and billing privileges for Cornerstone's Oakwood location effective January 11, 2013. The letter explained that one of Palmetto's inspectors attempted to visit the location on January 8 and 11, 2013 during its posted hours of operation, but the facility was closed and the inspector was unable to complete an inspection to verify compliance with the supplier standards. The letter stated that CMS had determined Cornerstone was not in compliance with the supplier standard at 42 C.F.R. § 424.57(c)(7). CMS Ex. 3, at 9-10. The letter also stated that CMS had determined Cornerstone's Oakwood facility was "not operational to furnish Medicare covered items and services," so it was "in violation of 42 C.F.R. § 424.535(a)(5)(ii) and all supplier standards as defined in 42 C.F.R. § 424.57(c)." *Id.* at 10.

Cornerstone requested reconsideration, arguing that there was no evidence a Palmetto representative actually visited the facility on the days claimed. On April 24, 2013, a Medicare hearing officer issued a reconsideration decision rejecting Cornerstone's contention and upholding the revocation based on noncompliance with section 424.57(c)(7). CMS Ex. 1. The hearing officer also referred to the regulatory definition of "operational," but did not cite section 424.535(a)(5)(ii) (the "nonoperational" ground for revocation) as a basis for the decision. *Id.* at 3.

Cornerstone then requested a hearing before an ALJ. CMS moved for summary judgment in its favor, arguing that it properly revoked Cornerstone's billing privileges pursuant to section 424.535(a)(5)(ii) because Cornerstone's facility was not operational at the time of the on-site inspections and that revocation was also appropriate under section 424.57(e) because Cornerstone failed to comply with the supplier standards at section 424.57(c)(7) and (8).[1] In a decision based on the written record, the ALJ denied CMS's motion and reversed the revocation of Cornerstone's billing privileges and supplier number, concluding that Cornerstone had established that its facility was "operational and staffed when the contractor's inspector visited." ALJ Decision at 5.

[1] Neither the initial nor the reconsideration decision found that Cornerstone failed to comply with section 424.57(c)(8), which requires a DMEPOS supplier to permit CMS or its agents to conduct on-site inspections to ascertain compliance with the requirements of section 424.57.

It appears that the ALJ reached this conclusion based mainly on the affidavit of a Cornerstone employee. *See* ALJ Decision at 5-6, citing P. Ex. 4. In the affidavit, the employee stated that he worked at the Oakwood location on January 8 and 11, 2013, clocking in between 8:12 and 8:31 a.m. and clocking out between 7:01 and 7:30 p.m.; that his car was parked in front of the facility on both days and was both shown in a photo taken by the inspector to document the January 11, 2013 visit and referenced in the inspector's notes during each inspection; that the facility was open for operation on both days; and that the facility is a large building that used to be a warehouse. P. Ex. 4. In addition to the affidavit, Cornerstone proffered a time card report for the employee that included January 8 and 11, 2013; a Real Time Data report for the same time period, indicating the employee's hours; delivery tickets and purchase orders from January 8 and 11, 2013; and the floor plan and dimensions of the facility. P. Exs. 1-3, 5. CMS did not object to the employee affidavit but did object to Petitioner Exhibits 1-3 and 5 because they had not been submitted to the hearing officer on reconsideration. The ALJ noted but did not rule on CMS's objections, stating, "Ultimately I need not resolve this question, because, as discussed below, even without considering these additional documents, the evidence establishes that staff were present and the supplier was operational on the dates in question." ALJ Decision at 4.

CMS requested Board review of the ALJ Decision, arguing that the ALJ erred both in finding that Cornerstone's Oakwood facility was operational on the dates of the on-site visits and in failing to find that the facility was out of compliance with section 424.57(c)(7) and (8) on those dates. Instead of responding to the merits of CMS's appeal, Cornerstone initially submitted a motion to dismiss for mootness, arguing that there is no justiciable dispute or live controversy because it voluntarily terminated its supplier number for the Oakwood facility effective December 31, 2013. After we denied Cornerstone's motion, Cornerstone submitted a response brief arguing that the ALJ appropriately ruled in its favor because CMS failed to counter Cornerstone's contention that it was "open and operational" at the time of the on-site inspections.[2]

Analysis

It is unclear whether the ALJ determined only that Cornerstone's Oakwood facility was "operational" on January 8 and 11, 2013, and thus that CMS was not authorized to revoke Cornerstone's billing privileges and supplier number under section 424.535(a)(5)(ii), or if she also determined that the facility was "accessible and staffed during posted hours of operation" on those dates, and so concluded that Cornerstone was in compliance with section 424.57(c)(7)(i)(C) as well. Accordingly, we are remanding the case to the ALJ for her to clarify the legal and factual basis for her decision.

[2] A copy of our ruling on Cornerstone's motion to dismiss is included as an attachment to this decision.

Some statements in the ALJ Decision suggest that it was based solely on a determination that the revocation was not justified under section 424.535(a)(5)(ii). In the opening section of the decision, the ALJ stated: "I find that Petitioner was operational at the time of its on-site review and that CMS improperly revoked its billing privileges." ALJ Decision at 1. The ALJ made a similar statement at the end of the decision, concluding that "the facility was operational at the times the inspector arrived for its on-site reviews." *Id.* at 6.

However, other statements in the decision suggest that the ALJ also concluded that Cornerstone was in compliance with section 424.57(c)(7), and so determined that the revocation was not authorized under section 424.57(e) either. In the "Discussion" section of the decision, the ALJ made the specific "finding of fact/conclusion of law" that Cornerstone had established that its facility was "operational and staffed when the contractor's inspector visited." ALJ Decision at 4 n.1, 5. The ALJ also determined that the evidence established "that staff were present and the supplier was operational on the dates in question." *Id.* at 4. Although these statements do not state whether the facility was also "accessible" during its posted hours of operation within the meaning of section 424.57(c)(7), in the course of discussing the DMEPOS supplier standards in the "Background" section of the decision, the ALJ stated: "Among other requirements, the supplier must be operational, which includes being accessible and staffed during its posted hours of operation. 42 C.F.R. § 424.57(c)(7)(i)(C)." *Id.* at 2. Thus, the ALJ arguably intended her conclusion that Cornerstone's Oakwood location was operational as a conclusion that the location was "accessible and staffed during posted hours of operation" in accordance with section 424.57(c)(7)(i)(C), as well as a conclusion that it was "operational" as defined in section 424.502 and addressed in section 424.535(a)(5)(ii).

It is necessary to remand for clarification. In order for the ALJ to overturn the reconsidered determination, which was the determination before her, *see, e.g., Neb Group of Arizona, LLC*, DAB No. 2573 (2014), she needed to conclude that Petitioner was accessible and staffed during the posted hours of operation as required by section 424.57(c)(7)(i)(C). It is not clear the ALJ made this requisite determination.

Conclusion

For the foregoing reasons, we remand the case to the ALJ. On remand, the ALJ is not precluded from ruling on the admissibility of the four exhibits that Cornerstone proffered over CMS's objection and may conduct further proceedings as appropriate. Either party may appeal the ALJ's decision on remand to the Board pursuant to 42 C.F.R. Part 498, subpart E.

/s/
Judith A. Ballard

/s/
Leslie A. Sussan

/s/
Sheila Ann Hegy
Presiding Board Member

Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Cornerstone Medical, Inc.
Docket No. A-14-42
Decision No. 2585
April 17, 2014

RULING ON MOTION TO DISMISS & REQUEST FOR EXTENSION OF TIME

Cornerstone Medical, Inc. (Cornerstone) moves to dismiss the appeal filed by the Centers for Medicare & Medicaid Services (CMS) of an Administrative Law Judge (ALJ) decision reversing CMS's determination to revoke the supplier number and billing privileges for Cornerstone's location in Oakwood, Georgia, *Cornerstone Medical, Inc.*, DAB CR3022 (2013) (ALJ Decision). In the alternative, Cornerstone seeks an extension of time to file a response brief to CMS's request for review. For the reasons discussed below, we deny the motion to dismiss but grant the request for an extension of time.

Background

Cornerstone is a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) with multiple locations, including one in Oakwood, Georgia. CMS revoked the supplier number and billing privileges for Cornerstone's Oakwood location effective January 11, 2013 based on CMS's determination that Cornerstone was not in compliance with the supplier standard at 42 C.F.R. § 424.57(c)(7). Cornerstone challenged CMS's determination before an ALJ. In a decision based on the written record, the ALJ reversed the revocation of Cornerstone's supplier number and billing privileges. CMS timely appealed the ALJ Decision to the Board.

Rather than responding to the merits of CMS's appeal, Cornerstone submitted a motion to dismiss for mootness, arguing that there is no justiciable dispute or live controversy because it voluntarily terminated its supplier number for the Oakwood location effective December 31, 2013. In the alternative, Cornerstone requested an extension of time to file a substantive response brief.

CMS opposes Cornerstone's motion, arguing that there is still a live controversy because the outcome of CMS's appeal will determine (1) whether Cornerstone will have Medicare billing privileges for the time period between January 11, 2013 (the effective date of CMS's revocation) and December 31, 2013 (the date Cornerstone voluntarily surrendered its supplier number); and (2) whether Cornerstone is subject to the two-year re-

enrollment bar that CMS imposed, as authorized by 42 C.F.R. § 424.535(c), after revoking Cornerstone's billing privileges. CMS also argues that Cornerstone has not shown good cause for its failure to submit a substantive response to CMS's request for review of the ALJ Decision within 30 days of its receipt of the request.

In its reply in support of the motion, Cornerstone contends that CMS overly relies on the "case and controversy" requirement of Article III, emphasizing that the requirement is not directly applicable to administrative proceedings. Cornerstone contends that a case before an administrative adjudicatory body is moot when a decision would provide no meaningful remedy or when the outcome would be the same regardless of the decision, and that this standard is met here. Cornerstone argues – and submitted an affidavit from its President and CEO averring – that its Oakwood location (1) has not and will not submit Medicare claims for dates of service between January 11 and December 31, 2013, and (2) will not re-enroll with Medicare within two years of January 11, 2013 and has no intention of ever re-enrolling. Cornerstone also asserts that if its motion to dismiss is denied, there is good cause for extending the deadline to file a response brief. Cornerstone says that shortly after CMS filed its request for review, Cornerstone asked CMS to dismiss the request in light of Cornerstone's voluntary termination of the supplier number for its Oakwood location. According to Cornerstone, CMS did not indicate whether it would agree to dismiss its request for review until the day before Cornerstone's response brief was due.

Analysis

Cornerstone's motion to dismiss is denied. Although, as Cornerstone observes, Article III's "case and controversy" requirement does not bind administrative agencies like the Board, those agencies may look to the principles underlying that requirement when deciding motions to dismiss for mootness in the administrative context. *See Climax Molybdenum Co. v. Sec'y of Labor, Mine Safety, & Health Admin.*, 703 F.2d 447, 451 (10th Cir. 1983); *Yakima Valley School*, DAB No. 2422, at 7 (2011). The Supreme Court has generally rejected the proposition, asserted by Cornerstone, that a defendant's voluntary cessation of a challenged practice is sufficient to deprive a reviewing court of its power to determine the legality of the practice. *See Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). If it did, the Court has explained, "the courts would be compelled to leave the defendant . . . free to return to his old ways." *Id.* The Court uses a "stringent" and "formidable" standard when determining whether a case has been mooted by a defendant's voluntary conduct: the defendant must show that it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 189-90. Cornerstone has not met this burden.

The fact pattern in this case parallels that in *City of Erie v. Pap's A.M.*, where the Supreme Court considered a case involving a nude dancing establishment's challenge to a city's public indecency ordinance banning nudity in public places. 529 U.S. 277 (2000).

The state supreme court found the ordinance unconstitutional, but when the city appealed that court's decision to the Supreme Court, the operator of the nude dancing establishment moved to dismiss the case as moot on the ground that it had ceased operating the establishment. The Court denied the motion, holding that "[s]imply closing [the establishment] is not sufficient to render this case moot." 529 U.S. at 287. The Court noted that the operator was "still incorporated" under state law and so could decide to reopen a nude dancing establishment in the city. *Id.* The Court also observed that "this is not a run of the mill voluntary cessation case" because "it is the plaintiff who, having prevailed below, now seeks to have the case declared moot," and it was the city, which had lost below, that was seeking review. *Id.* at 288. The Court reasoned that the city had an "ongoing injury" because it could not enforce its ordinance, and that if the ordinance was found constitutional, the city could enforce it, so the "availability of such relief is sufficient to prevent the case from being moot." *Id.* The Court also concluded that its "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsels against a finding of mootness here." *Id. Cf. City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001) (granting motion to dismiss for mootness where dismissal would not keep municipality "under the weight of an adverse judgment, or deprive [it] of its victory in state court," or "reward an arguable manipulation of" the Court's jurisdiction).

Here, as in *Erie*, the prevailing party below (Cornerstone) seeks to have the case dismissed as moot. If the Board were to dismiss CMS's appeal, the ALJ Decision reversing CMS's revocation determination would still stand. CMS had both revoked Cornerstone's billing privileges effective January 11, 2013 and imposed a two-year re-enrollment bar, but the ALJ Decision reversed these actions. Although Cornerstone's President and CEO averred that Cornerstone's Oakwood location will not bill Medicare for services provided between January 11 and December 31, 2013 and will not re-enroll in Medicare within two years of January 11, 2013, his affidavit does not make it "absolutely clear" that these actions will not occur as a matter of fact, and Cornerstone cites no legal authority by which CMS could prevent such billing or re-enrollment absent reversal of the ALJ Decision.

In *Crescent Healthcare*, DAB No. 1888, at 11 (2003), a home health agency argued that CMS's involuntary termination of its provider agreement was improper because it had voluntarily ceased operation prior to the effective date of the termination. An ALJ dismissed the case as moot, reasoning that there were no "consequences either way" if the termination was voluntary or involuntary. *Id.* at 5. In reversing the ALJ's finding of mootness, the Board concluded that the case presented a "live controversy" because involuntary termination has "legal consequences relating to the hurdles that a provider faces in attempting to return to the Medicare program." *Id.* at 14. The Board also observed that "the reinstatement requirements apply to the provider, not the owner," so "[e]ven though the facility is not currently in operation, either the present owner or a new owner might choose to seek a new or reinstated provider agreement at some point in the

future."[1] *Id.* at 11 (emphasis in original). Here, similarly, revocation would have legal consequences different from voluntary termination of a supplier number. *See* 42 C.F.R. § 424.535(c)-(h). The President and CEO's affidavit does not bind the supplier under present or future ownership from submitting bills for the applicable time period and seeking re-enrollment, as the revocation would, if upheld. Thus, the current owner or a new owner of the Oakwood location could decide to submit bills for January 11 to December 31, 2013 or to apply to re-enroll in Medicare within two years of January 11, 2013. Accordingly, the correctness of CMS's revocation determination, which barred these actions, is still live, and so CMS's appeal is not moot.

In addition, as in *Erie*, because Cornerstone prevailed before the ALJ, dismissing CMS's appeal would "reward an arguable manipulation" of the Board's jurisdiction. We also note that, although Cornerstone has voluntarily terminated its supplier agreement, it is still in business. This fact at least arguably makes the case against mootness here even stronger than in *Erie* where the business moving for dismissal on mootness grounds had closed.

Because we have determined that CMS's appeal is not moot, we must address Cornerstone's alternative request for an extension of time to submit a response brief, a request opposed by CMS. The Board's procedures provide that the opponent of the party that filed an appeal must submit a response within 30 days of receipt of the request for review. *See* Departmental Appeals Board, Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program, available at http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html. The procedures also provide that the Board will grant an extension of time only for good cause shown, and that the Board generally expects any party needing an extension to file a request for an extension before the original due date. *Id.*

Cornerstone did not file its motion to dismiss and alternative request for an extension until the date that its response brief was due. We do not condone this practice. As CMS points out, Cornerstone could have immediately raised the mootness issue to the Board when Cornerstone received CMS's request for review or could have submitted a substantive response as an alternative to its motion to dismiss. Nonetheless, we conclude that Cornerstone has established good cause for extending the deadline to file a response brief because CMS does not deny that it did not confirm that it would not voluntarily

[1] In *Crescent*, the Board also rejected the ALJ's reliance on *Hospicio en el Hogar Mayaguez, Inc.*, DAB CR370 (1995), an ALJ decision on which Cornerstone relies for the proposition that appellate review of CMS's termination of a provider or supplier's participation in the Medicare program is made moot where the provider or supplier voluntarily terminates its participation. The Board distinguished *Hospicio* and also noted that "[t]he decision of another ALJ in a different context is not binding on this ALJ and certainly not on the Board." DAB No. 1888, at 14. The Board's reasons for rejecting *Hospicio* in *Crescent* also apply here.

dismiss its request for review until the day before Cornerstone's filing deadline. CMS also has not shown that it will be prejudiced by any delay in the Board's decision-making that might result from the extension.

Cornerstone's response is due 30 days from the date that it receives this ruling. Within 15 days after receipt of the response, CMS may submit a reply.

Conclusion

For the reasons discussed above, Cornerstone's motion to dismiss is denied and its request for an extension of time to file a response brief is granted. The remaining briefing deadlines are adjusted as indicated.

/s/
Judith A. Ballard

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Leslie A. Sussan

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Sheila Ann Hegy
Presiding Board Member

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