Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Incare Home Healthcare, Inc.,

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-711

Decision No. CR2469

Date: December 6, 2011

DECISION

I grant summary judgment in favor of the Centers for Medicare and Medicaid Services (CMS) sustaining its determination to revoke the Medicare supplier number of Petitioner, Incare Home Healthcare, Inc.

I. Background

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies. Petitioner's Medicare billing privileges are conditioned on its continuing compliance with Medicare requirements as set forth in statutes and in regulations at 42 C.F.R. Part 424. Particularly relevant here are the standards that are set forth at 42 C.F.R. § 424.57(c)(1) – (26). Petitioner must comply with each of these standards to remain eligible.

On March 24, 2011, CMS notified Petitioner that its Medicare supplier number would be revoked, based on CMS's determination that Petitioner had failed to comply with three regulatory standards. These standards are: 42 C.F.R. § 424.57(c)(10), which requires a supplier to have comprehensive liability insurance in an amount of at least $300,000, covering both the supplier's place of business and all of its customers and employees; 42 C.F.R. § 424.57(c)(21), which requires

a supplier to furnish CMS with any information required pursuant to the Medicare statutes and implementing regulations; and 42 C.F.R. § 424.57(c)(26), which requires a supplier to meet surety bond requirements.

Petitioner requested reconsideration of this determination. Reconsideration was denied on June 8, 2011. Petitioner then requested a hearing. CMS, at my direction, filed a pre-hearing exchange that included eight proposed exhibits, identified by CMS as CMS Exhibit (Ex.) 1 – CMS Ex. 8. Additionally, CMS moved for summary judgment. Petitioner did not initially file a pre-hearing exchange. I sent Petitioner an order to show cause, and, in response, it filed an exchange that included an affidavit by Tasha Duhamell. I identify that affidavit as P. Ex. 1. I receive CMS Ex. 1 – CMS Ex. 8 and P. Ex. 1 into the record.

II. Issue, Findings of Fact, and Conclusions of Law

A. Issue

The issue in this case is whether CMS properly revoked Petitioner's Medicare supplier billing number.

B. Findings of Fact and Conclusions of Law

CMS or the National Supplier Clearinghouse (NSC), acting on CMS's behalf, may revoke a supplier's Medicare billing privileges if that supplier fails to satisfy any of the requirements contained in 42 C.F.R. § 424.57(c). 42 C.F.R. § 405.874(b)(2). Here, the undisputed facts show that Petitioner failed to meet three of those requirements. Consequently, CMS was justified in revoking Petitioner's Medicare supplier number.

The undisputed facts show that, on October 14, 2010, the Supplier Audit and Compliance Unit of the NSC notified Petitioner that it could not verify that Petitioner had complied with the requirements of 42 C.F.R. §§ 424.57(c)(10) and (26). Specifically, the NSC told Petitioner that the liability insurance policy that Petitioner had on file with the NSC had expired on April 9, 2010 and that the NSC had received notification that Petitioner's surety bond had was cancelled on October 2, 2010. CMS Ex. 1.

Petitioner did not reply to NSC's October 14 letter and did not furnish information to NSC about its liability insurance or its surety bond. On March 24, 2011, CMS revoked Petitioner's Medicare billing number because of its failures to: provide proof of comprehensive liability insurance; maintain a surety bond; and provide information requested by NSC. 42 C.F.R. § 424.57(c)(10), (21), (26).

Petitioner's response to this letter was to request reconsideration and to file a corrective action plan. Petitioner did not deny that it had allowed its liability insurance to expire. Rather, Petitioner stated that it had renewed its liability insurance on April 10, 2011. However, it provided no proof of this assertion. Petitioner submitted only a certificate of liability insurance that had expired on April 9, 2011. CMS Ex. 3 at 4. Moreover, Petitioner conceded that its surety bond had been cancelled. Petitioner averred that it was working on obtaining a new one but implicitly acknowledged that it had no surety bond even as of the date that it requested reconsideration. *Id.* at 2. Finally, Petitioner did not deny that it had failed to provide NSC with requested information, stating only that it had overlooked the request due to staffing changes in its office. *Id.* at 1.

These undisputed facts are sufficient grounds for me to grant summary judgment sustaining CMS's determination. As I have stated, a supplier must remain in compliance with all Medicare regulatory requirements to retain its supplier number. CMS may revoke a supplier's Medicare billing privileges at any time that the supplier fails to comply with requirements. Here, the undisputed facts that I have recited show that Petitioner was noncompliant with Medicare supplier standards as of March 24, 2010. CMS was, therefore, entitled to revoke Petitioner's Medicare billing privileges.

Petitioner now argues that it was in compliance with Medicare requirements and that there is at least a fact dispute as to that compliance. Therefore, according to Petitioner, summary judgment should not be imposed against it. As support for this argument, Petitioner relies on the affidavit of Tasha Duhamell. P. Ex. 1. In her affidavit, Ms. Duhamell asserts that:

> By April 21, 2011 the proper documentation was provided to NSC to prove . . . [Petitioner] was in compliance and working to maintain compliance going forward.

Id. at 1. Ms. Duhamell does not explain exactly what this alleged compliance consists of, except to aver that the insurance certificate that Petitioner provided in its corrective action plan (presumably the certificate showing insurance that had expired on April 9, 2011) provided the name, address, and phone number of Petitioner's insurer, and that it also provided the name of Petitioner's surety bond company. *Id.* at 2. Ms. Duhamell asserts that NSC could have called these entities to ascertain Petitioner's insurance and surety bond status. *Id.*

But calling Petitioner's insurers and bondholders was not NSC's obligation. NSC sent several requests for information to Petitioner that were unanswered or answered by Petitioner with incomplete information, or information showing that Petitioner's insurance policy had expired. NSC had no obligation to contact

agencies that Petitioner might be doing business with to verify Petitioner's status. The duty to supply relevant information rested solely on Petitioner, and it bears full liability for its failure to supply that information.

Petitioner has not proven that, as of March 24, 2010, it had the requisite liability insurance and bond. To this day, it has not provided certification of that status. Asserting, as Petitioner does, that contacting its insurer and bondholder would have clarified Petitioner's status is not the same as averring affirmatively that it had the requisite insurance and bond. Petitioner simply has not offered facts from which any reasonable fact finder could infer that it was in compliance with Medicare regulatory requirements.

Petitioner also complains that the notices it received from NSC and CMS were ambiguous. I am hard put to find ambiguity in these notices. But, even assuming the notices were ambiguous, that does not relieve Petitioner of its responsibility to comply with Medicare requirements. What Petitioner has *never* shown – in response to NSC's information requests, in its corrective action plan, or before me – is that it had the requisite insurance and bond at the time that CMS determined that Petitioner was noncompliant.

/s/
Steven T. Kessel
Administrative Law Judge