Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Clairmont Nichols Opticians
(PTAN: 0869270001),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-715

Decision No. CR2265

Date: October 8, 2010

DECISION

For the reasons set forth below, I grant the Centers for Medicare & Medicaid Services' (CMS's) motion for summary judgment. The undisputed evidence establishes that Petitioner, Clairmont Nichols Opticians (Clairmont/Petitioner), was not in compliance with the Medicare program surety bond requirement. As a consequence, CMS has the authority to revoke Petitioner's Medicare supplier number.

I. Applicable Law and Regulations

Section 1834(a)(16)(B) of the Social Security Act (Act), 42 U.S.C. § 1395m(a)(16)(B), states that the Secretary of Health and Human Services (Secretary) "shall not provide for the issuance (or renewal) of a provider number for a supplier of durable medical equipment for purposes of payment" for durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) furnished by the supplier "unless the supplier provides the Secretary on a continuing basis . . . with a surety bond in a form specified by the Secretary and in an amount that is not less than $50,000."

CMS's regulations implement these requirements among the "supplier standards" at 42 C.F.R. § 424.57(c), which DMEPOS suppliers must meet to maintain Medicare billing privileges. As relevant here, section 424.57(c) provides:

> (c) *Application certification standards.* The supplier must meet and must certify in its application for billing privileges that it meets and will continue to meet the following standards. The supplier:
>
> * * * *
>
> (26) Must meet the surety bond requirements specified in paragraph (d) of this section.

The surety bond requirements at 42 C.F.R. § 424.57(d), referenced in supplier standard 26, state, as relevant here, that "*beginning October 2, 2009,* each Medicare-enrolled DMEPOS supplier must meet the requirements of paragraph (d)," which include "a bond that is continuous," which "meet[s] the minimum requirements of liability coverage ($50,000)," and provides that "[t]he surety is liable for unpaid claims, CMPs [civil money penalties], or assessments that occur during the term of the bond." 42 C.F.R. § 424.57(d)(1)(ii), (4), (5)(emphasis added). "The term of the initial surety bond must be *effective on the date that the application is submitted* to the NSC [National Supplier Clearinghouse, a Medicare contractor]." 42 C.F.R. § 424.57(d)(2)(emphasis added).

The regulations provide that failure to submit a surety bond as required is grounds for revocation of a supplier's billing privileges. 42 C.F.R. § 424.57(d)(4)(ii)(B). Section 424.57(d)(11) further makes abundantly clear the consequences of a failure to maintain a compliant surety bond:

> CMS revokes the DMEPOS supplier's billing privileges if an enrolled supplier fails to obtain, file timely, or maintain a surety bond as specified in this subpart and CMS instructions. Notwithstanding paragraph (e) of this section, the revocation is effective the date the bond lapsed and any payments for items furnished on or after that date must be repaid to CMS by the DMEPOS supplier.

The regulations also provide more generally that CMS "will revoke a supplier's billing privileges if it is found not to meet" the supplier standards or other requirements in section 424.57(c). 42 C.F.R. § 424.57(e) (formerly § 424.57(d)). [1]

[1] 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 have not yet been incorporated into the Code of Federal Regulations. *See* 42 C.F.R. Ch. IV § 424.57, Editorial Note (Oct. 1, 2009). References are to the regulation as redesignated.

A supplier that has had its billing privileges revoked is "barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar. The re-enrollment bar is a minimum of 1 year, but not greater than 3 years depending on the severity of the basis for revocation." 42 C.F.R. § 424.535(c).

CMS may at any time require a DMEPOS supplier to show compliance with the surety bond requirement. 42 C.F.R. § 424.57(d)(12).

II. Background

By letter received May 20, 2010, Petitioner requested review of the Medicare hearing officer's reconsideration decision dated April 23, 2010 (HR).[2] The hearing officer found Petitioner noncompliant with supplier standard 26. The hearing officer stated in the reconsideration decision:

> Lloyd A. Malsin, president of Clairmont Nichols of 1st Ave Inc. in his reconsideration request stated in pertinent part, "For some reason we did not receive information regarding the need for a surety bond and have been compliant except for the bond. We have now secured the necessary bond effective 12-3-2009, Policy #70836196 through CNA Ins Co." To educate the supplier community, information was posted on the NSC Web site-

[2] With its hearing request letter, Petitioner submitted: a copy of the reconsideration decision; a copy of an email from Mr. Malsin to Colleen Jais, the Medicare Hearing Officer, indicating that he sent the required surety bond to Ms. Jais; a copy of the acknowledgment of request for reconsideration decision by hearing officer; a copy of a surety bond with an effective date of December 3, 2009; a copy of a letter dated November 23, 2009 from Bollinger, Inc., an insurance agency, to Mr. Malsin regarding the renewals of two insurance policies; a copy of an invoice for a new surety bond effective December 3, 2009; a memorandum dated December 15, 2009 to Petitioner from Bollinger, Inc., indicating the surety bond for durable medical equipment effective December 3, 2009 is attached; a copy of the surety bond indicated in the memorandum dated December 15, 2009; a letter from Palmetto GBA – National Supplier Clearinghouse (NSC), a CMS contractor, dated August 12, 2009 indicating re-enrollment is updated for Clairmont; a letter from NSC dated July 8, 2009 requesting additional information that was missing from Clairmont's re-enrollment application; a letter from NSC dated June 8, 2009 notifying Clairmont that it is required to submit a re-enrollment application at this time and enclosed a preprinted CMS 855S form; a copy of the CMS 855S form and attachments; a copy of Clairmont's letter requesting a corrective action plan and/or reconsideration; a copy of Clairmont's fax log for a facsimile transmission sent on November 17, 2009; and a copy of page 2 of form 10-E DMEPOS including indemnity information and signed November 23, 2009 by Mr. Malsin.

> www.palmettogba.com/nsc regarding the surety bond requirements starting January 2009. On August 21, 2009 the NSC notified providers whose supplier file did not reflect the required surety bond.
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> Sent to this hearing officer from Clairmont Nichols of 1st Ave Inc. is a copy of their surety bond with an effective date of December 3, 2009. However, Clairmont Nichols of 1st Ave Inc. has passed the allotted time to satisfy the requirement for a surety bond, which was October 2, 2009, as noted in the terms set forth for the bond, mandated by 42 CFR 424.57(c) and 42 CFR 424.57(d). The supplier Clairmont Nichols of 1st Ave Inc., failed to obtain their surety bond in the time frame allotted; consequently the NSC revoked their billing privileges appropriately.

The appeal was assigned to me pursuant to 42 C.F.R. § 498.44(a). I issued an order on May 24, 2010, acknowledging receipt of Petitioner's hearing request and setting a briefing schedule for the parties. In accordance with my order, CMS filed a motion for summary disposition accompanied by CMS exhibits 1 through 15. My staff attorney telephoned Petitioner after not receiving a response to CMS's motion, in order to confirm that Petitioner received CMS's motion. Petitioner indicated at that time that it did receive CMS's motion but had no additional information to submit.

III. Issue

The issue in this case is whether CMS is entitled to summary disposition on the ground that the undisputed facts demonstrate that the revocation of Petitioner's Medicare billing privileges was legally authorized.

IV. Applicable Standard

CMS's motion made clear that the disposition it sought was in the nature of summary judgment. CMS Br. at 11-12. The Board stated the standard for summary judgment as follows.

> Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . 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 – a fact that, if proven, would affect the outcome of the case under governing law. . . . In determining whether there are genuine issues of material fact for trial, the

> reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The role of an ALJ in deciding a summary judgment motion differs from the ALJ's role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 5 (2009).

V. Findings of Fact, Conclusions of Law, and Discussion

I make a single finding and conclusion set out in bold and italics below, followed by my supporting discussion:

> ***CMS was authorized to revoke Petitioner's billing privileges based on undisputed evidence that Petitioner had not obtained a surety bond by October 2, 2009 as 42 C.F.R. § 424.57(c)(26) and (d) required.***

As noted above, the statute states that the Secretary shall not issue or renew a DMEPOS supplier number "unless the supplier provides the Secretary on a continuing basis . . . with a surety bond . . . ." 42 U.S.C. § 1395m(a)(16)(B).

This requirement for continuous compliance is implemented in the regulations that the Secretary issued. The introductory language of 42 C.F.R. § 424.57(c) states, in pertinent part, "[t]he supplier must meet and must certify in its application for billing privileges that it meets and will continue to meet" the supplier standards listed within. Those standards include section 424.57(c)(26) (supplier standard 26), which states that a supplier "[m]ust meet the surety bond requirements specified in paragraph (d) of this section," as of October 2, 2009. It follows that a supplier must meet the surety bond requirements specified in paragraph (d) on a continuing basis starting October 2, 2009. Consistent with this, the preamble to the final rule on appeals of CMS enrollment determinations states that CMS believes that "all providers and suppliers must meet and maintain all Federal and State requirements for their provider or supplier type to enroll or maintain their enrollment in the Medicare Program." 73 Fed. Reg. 36,448, 36,452 (June 27, 2008).

In its hearing request letter, Petitioner admits that it was not in compliance with the surety bond requirement, but asserts that, at the time of the hearing request, it had achieved compliance because it obtained a surety bond with an effective date of December 3, 2009 as soon as it was notified that a surety bond was required. HR. Petitioner explains that it submitted an application to re-enroll in June 2009, as required by the Medicare

regulations for the three-year revalidation,[3] and none of the correspondence regarding the re-enrollment notified Petitioner of the surety bond requirement. HR.

The issue before me is not whether Petitioner has belatedly achieved compliance with the surety bond requirement, but whether CMS correctly found that, at the time of the revocation, Petitioner was not in compliance and that CMS therefore had authority to revoke Petitioner's enrollment. Petitioner does not dispute that it did not have a compliant surety bond at the time of the revocation. A belatedly obtained surety bond does not satisfy the statutory and regulatory purpose of providing continuous protection to the Medicare program from the risk of loss due to a supplier's fraud or abuse. That a surety was later willing to undertake to cover Petitioner does not mean that CMS was protected from fraud or billing errors by Petitioner continuously from October 3, 2009 to December 3, 2009.[4]

In regard to notification of the surety bond requirement during Petitioner's July 2009 re-enrollment correspondence, a surety bond was not yet required at that time. Therefore, I find no relevance to the Petitioner's arguments that the requirement was not mentioned in the correspondence. The requirement that Petitioner submit a copy of a surety bond arose not from the regular three-year revalidation, but from the change in regulations adding the surety bond requirement. *See Baker's Bay Nursing Ass'n*, DAB CR2177, at 9-10 (2010). The request amounted to an off-cycle revalidation under section 424.515(d), empowering CMS to request information demonstrating compliance with applicable requirements at any appropriate time.

In regard to notification of the surety bond requirement in general, the Hearing Officer stated:

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[3] A DMEPOS supplier must resubmit and recertify the accuracy of its enrollment information every three years. 42 C.F.R. §§ 424.515 and 424.57(f).

[4] CMS goes further in its brief suggesting that permitting Petitioner to comply on a retroactive basis would "undermine legislative intent and regulatory mandate." CMS Br. at 13. CMS's own regulations, however, do allow for the possibility of achieving compliance belatedly by permitting suppliers who receive a revocation notice to submit corrective action plans (CAPs) (within 30 days) showing that they are now in compliance and/or to seek reconsideration (within 60 days). 42 C.F.R. §§ 424.535(a)(1); 498.22. Petitioner sought both. CMS Ex. 8. Its CAP was rejected on January 26, 2009 because it did not include the required surety bond. CMS Ex. 9. Petitioner did not dispute that, although the effective date of the bond was December 3, 2009, the bond was not submitted to CMS or NSC until Petitioner sent it to the NSC Hearing Officer on March 3, 2010. The rejection of a CAP is not appealable and the reconsideration, which is appealable, determines whether the Petitioner was in compliance at the time of the revocation not whether compliance was achieved later.

> To educate the supplier community, information was posted on NSC Web site – www.palmettogba.com/nsc regarding the surety bond requirements starting January 2009. On August 21, 2009 the NSC notified providers whose supplier file did not reflect the required surety bond.

Reconsideration Decision dated April 23, 2010, at 2. CMS further asserts that NSC notified suppliers of the surety bond requirement in its newsletters to existing suppliers. CMS Br. at 16. CMS also maintains that NSC sent all suppliers that had not yet met the surety bond requirement a letter dated August 21, 2009, notifying suppliers that their billing privileges would be subject to revocation if they failed to submit proof of a surety bond by October 2, 2009. [5] CMS Br. at 12; CMS Ex. 6. For purposes of summary judgment, however, I accept the Petitioner's factual assertion that it did not receive actual notice that the surety bond requirement applied to it until the revocation notice dated November 9, 2009 and that Petitioner thereafter moved quickly to acquire a surety bond. HR; CMS Ex. 7, at 1.

Regardless, as the Supreme Court has stated, participants in the Medicare program have a "duty to familiarize [themselves] with the legal requirements for cost reimbursement." *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 64 (1984). Petitioner's failure to realize that it was subject to the surety bond requirement is no ground for relief. As a Medicare supplier, Petitioner was charged with knowing the requirements for maintaining enrollment. *See Waterfront Terrace, Inc.*, DAB No. 2320, at 7 (2010), citing *Heckler*, 467 U.S. at 63-64 ("As a participant in the Medicare program, respondent had a duty to familiarize itself with the legal requirements" of the program); *see also Manor of Wayne Skilled Nursing & Rehab.*, DAB No. 2249, at 10-11 (2009) and *Regency on the Lake*, DAB No. 2205, at 5-6 (2008) (noting facilities participating in Medicare have constructive notice of regulations). The law expressly holds Medicare suppliers responsible for knowing the regulatory requirements and the information in the accompanying preambles published in the *Federal Register* and treats such publication as constructive notice whether or not the supplier actually was aware of the requirements. 42 C.F.R. § 411.406(e)(2).

Therefore, even accepting that Petitioner did not receive any of the letters or newsletters to existing suppliers announcing the requirement and did not visit any of the NSC or CMS websites with information about DMEPOS surety bonds, I cannot conclude that Petitioner lacked legal notice of a requirement in a regulation published in the Federal Register. The preamble to the regulation states in regard to 42 C.F.R. § 424.57(d)(2): "[w]e specify that, unless a DMEPOS supplier meets the requirements for an exception in

[5] However, I give this evidence of notice no weight because this letter is addressed to supplier types subject to both the accreditation and surety bond requirements. CMS Ex. 6 ("Although certain supplier types are exempt from the surety bond and/or the accreditation requirement, our records indicate that your supplier type is subject to both . . . ." (emphasis added)). Moreover, CMS has not submitted any evidence that this letter was sent to Petitioner.

§ 424.57(d)(15), the enrolling Medicare DMEPOS supplier or the Medicare-enrolled DMEPOS supplier must obtain a surety bond for each National Provider Identifier (NPI) from an authorized surety." 74 Fed. Reg. 165, 185-86 (Jan. 2, 2009). Petitioner does not claim that it met the requirements in section 424.57(d)(15). The applicable regulations thus unambiguously required Petitioner to have *in place* a compliant surety bond by October 2, 2009. Petitioner cannot excuse the failure to comply on the basis that it did not receive individualized notice that the requirement was applicable to it.

Petitioner also asserts that it received misleading information in consulting NSC while completing a re-enrollment application for the three-year revalidation in June 2009. Thus, Petitioner asserts:

> Referring to section 12 [of the re-enrollment application] and in regard to surety bond we called the phone number indicated [on the application] and explained that we do not accept assignment of any services. We bill so as to get reimbursement for [M]edicare members. We were told to check box on section A of page 26 indicating we were not required to obtain surety bond and we proceeded to section 13 as indicated. Again we were told by Palmetto GBA that the bond was not necessary as we were not billing [M]edicare on our own behalf.

HR.

It is well-established that the government cannot be estopped from applying the law or forced to expend federal funds based on inaccurate representations by its agents absent, at the least, a showing of affirmative misconduct about which Petitioner makes no allegations. *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414 (1990); *Heckler*, 467 U.S. 51; *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Shenandoah Prof'l Stds. Review Found.*, DAB No. 652 (1985). I therefore need not reach whether all of the traditional elements of estoppel, including reasonable reliance, were met. As I noted earlier, though, a core element would appear not to present, since the information about no surety bond being required appears to have been accurate at the time it was given to Petitioner.

The regulation at 42 C.F.R. § 424.535 plainly authorizes CMS to revoke a supplier's Medicare enrollment whenever the supplier fails to maintain compliance with enrollment requirements. Section 424.535(a)(1) provides that a supplier's billing privileges are revoked when the supplier "is determined not to be in compliance with the enrollment requirements described in this section, or in the enrollment application applicable for its provider or supplier type, and has not submitted a plan of corrective action as outlined in part 488 of this chapter."

In summary, it is an enrollment requirement that "[t]he supplier must meet and must certify in its application for billing privileges that it meets and will continue to meet" the

supplier standards in 42 C.F.R. § 424.57(c), which includes the surety bond requirement of section 424.57(c)(26). CMS may revoke the supplier's Medicare billing privileges if the supplier fails to meet any of these standards. 42 C.F.R. § 424.57(e); *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 13 (2009) ("[F]ailure to comply with even one supplier standard is a sufficient basis for revoking a supplier's billing privileges."). The regulatory language is plain. A supplier must comply with all standards, or CMS will revoke its billing privileges.

I therefore conclude that the undisputed facts establish that CMS acted within its regulatory authority to revoke Petitioner's Medicare supplier number, because Petitioner was not compliant with the surety bond requirements of 42 C.F.R. § 424.57(c)(26) and (d) by October 2, 2009.

VI. Conclusion

For the reasons explained above, I grant summary judgment in favor of CMS and sustain the revocation of Petitioner's enrollment in Medicare.

/s/
Leslie A. Sussan
Board Member