Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

First Care Medical Equipment, LLC,
(Supplier No. 6156690001),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-922

Decision No. CR2316

Date: February 3, 2011

DECISION

The Centers for Medicare and Medicaid Services (CMS) revoked Petitioner's supplier number. Petitioner, First Care Medical Equipment, LLC, appeals, and CMS and Petitioner have filed cross motions for summary judgment. As discussed below, the uncontroverted facts compel revocation of Petitioner's supplier billing number. Therefore, I grant CMS's motion for summary judgment.

I. Background

Petitioner is owned by Rosie and Arturo Valdez and was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). CMS Ex. 1, at 2. A CMS contractor from the National Supplier Clearinghouse (NSC) attempted to conduct two site inspections at Petitioner's location. At the time of the two inspection attempts, Petitioner's posted hours of operation were Monday through Friday, from 8:30 a.m. to 4:30 p.m. *Id.*; CMS Ex. 3, at 45, 51. The NSC inspector attempted the first site visit on February 16, 2010 at 9:15 a.m. CMS Ex. 1, at 2. He attempted a second site visit on February 24, 2010 at 1:45 p.m. *Id*. The NSC inspector could not complete either site visit because he found nobody at the site to let

him inside. *Id*. On March 16, 2010, NSC, sent a letter notifying Petitioner that it was revoking Petitioner's supplier number effective February 24, 2010, the date CMS determined that Petitioner was not operational. CMS Ex. 3, at 39-41.

The notice letter specifically stated that the basis for the revocation was that Petitioner was in violation of 42 C.F.R. § 424.535(a)(5)(ii)[1] because it was closed during posted hours of operation on February 16 and 24, 2010, when a NSC inspector attempted to complete site inspections to verify Petitioner's compliance with supplier standards. *Id.* In addition, the notice letter informed Petitioner that it failed to comply with supplier standard number ten, which requires liability insurance. *Id*. at 40. On or about April 5, 2010, Petitioner submitted a Corrective Action Plan and also requested a reconsideration decision. CMS Ex. 3, at 5-26. On May 7, 2010, Petitioner submitted additional documentation, including documentation of liability insurance. CMS Ex. 2, at 1-15. On June 23, 2010, the Hearing Officer issued an unfavorable decision, upholding the revocation of Petitioner's supplier number because Petitioner was not in compliance with 42 C.F.R. § 424.535(a)(5)(ii). CMS Ex. 1, at 1-3. However, the Hearing Officer found that Petitioner was in compliance with supplier standard ten. *Id.* at 2-3.

On August 19, 2010, Petitioner requested a hearing with the Civil Remedies Division of the Departmental Appeals Board (Board). With its hearing request, Petitioner attached a telephone bill for February 2010 and a schedule of hours for its receptionist. Although Petitioner did not submit the telephone bill and schedule as properly marked exhibits when it filed its motion for summary judgment, I accept them as part of the record and mark them as Administrative Law Judge (ALJ) Exhibit (Ex.) 1 and ALJ Ex. 2. This case was initially assigned to Board Member Leslie A. Sussan, pursuant to 42 C.F.R. § 498.44, which permits a Board Member to hear appeals for initial decision under 42 C.F.R. Part 498. It was subsequently transferred to me for decision, and the parties accordingly were notified by letter dated October 25, 2010.

CMS filed its motion for summary judgment accompanied by four exhibits, CMS Exs.

---

[1] This section states: (a) *Reasons for revocation*. CMS may revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement for the following reasons: . . . (5) *On-site review*. CMS determines, upon on-site review, that the provider or supplier is no longer operational to furnish Medicare covered items or services, or is not meeting Medicare enrollment requirements under statute or regulation to supervise treatment of or to provide Medicare covered items or services for, Medicare patients. Upon on-site review, CMS determines that -- . . . (ii) A Medicare Part B supplier is no longer operational to furnish Medicare covered items or services, or the supplier has failed to satisfy any or all of the Medicare enrollment requirements, or has failed to furnish Medicare covered items or services as required by the statute or regulations.

1-4. CMS requested and was granted leave to supplement the administrative record by submitting a fifth exhibit, CMS Ex. 5, the affidavit of Gina Bertram, a CMS-contracted Fraud Analyst. Petitioner filed a cross motion for summary judgment and a response to CMS's motion for summary judgment (P. Br.), accompanied by six exhibits (P. Exs. 1-6). By electronic mail dated November 17, 2010, CMS stated that it would not file a reply to Petitioner's motion for summary judgment.

II. Applicable Law

To receive Medicare payments for items furnished to a Medicare-eligible beneficiary, the Secretary of the Department of Health and Human Services must issue a supplier number to a DMEPOS supplier. Social Security Act (Act) § 1834(j)(1)(A). To receive such billing privileges, a DMEPOS supplier must also meet and maintain each of the 25 supplier enrollments standards set forth in 42 C.F.R. §§ 424.57(c)(1)-(25). Among other things, a DMEPOS supplier must permit CMS or its agent to conduct on-site inspections to ascertain supplier compliance with each of these enrollment standards. 42 C.F.R. § 424.57(c)(8). A provider or 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 . . . to furnish these items or services." 42 C.F.R. § 424.502. In addition, a DMEPOS supplier "must be accessible during reasonable business hours to beneficiaries and to CMS, and must maintain a visible sign and posted hours of operation." 42 C.F.R. § 424.57(c)(8) CMS will revoke a currently-enrolled Medicare supplier's billing privileges if CMS or its agent determines that the supplier is not in compliance with any supplier enrollment standard. *See* 42 C.F.R. § 424.57(d); *A to Z DME, LLC*, DAB No. 2303, at 3 (2010); *see also 1866ICPayday.com*, DAB No. 2289, at 13 (2009) ("[F]ailure to comply with even one supplier standard is a sufficient basis to for revoking a supplier's billing privileges."). If an on-site visit reveals that a supplier is no longer operational, or otherwise fails to meet one of the supplier standards, CMS may revoke the supplier's Medicare billing privileges. 42 C.F.R. § 424.535(a)(5)(ii).

III. Issue

The issue is whether CMS is entitled to summary judgment because, when considering the evidence in the light most favorable to the Petitioner, it is undisputed that CMS had a legitimate basis to revoke Petitioner's Medicare billing privileges.

IV. Analysis

My findings of fact and conclusions of law are set forth in italics and bold in the discussion captions of this decision.

1. P. Exs. 1 and 2 are accepted into the record before me.

Petitioner has submitted two exhibits (P. Exs. 1 and 2) that were not offered to the Hearing Officer during the reconsideration decisional process. If a supplier fails to provide evidence before the contractor's Hearing Officer issues a decision, the supplier is precluded from introducing new evidence at higher levels of the appeal process. 42 C.F.R. § 405.874(c)(5). However, an ALJ may consider new evidence if the supplier demonstrates good cause for the late submission of the evidence. 42 C.F.R. § 498.56(e). Petitioner's first exhibit is a delivery ticket of items delivered to a beneficiary on February 16, 2010. P. Ex. 1. Petitioner's next exhibit is a facsimile dated February 16, 2010. P. Ex. 2. Both of Petitioner's exhibits would be relevant to my determination of whether Petitioner was in compliance with Medicare regulations. However, Petitioner has not satisfactorily explained why this evidence was not presented to the Hearing Officer. Nonetheless, because this determination is made in the context of summary judgment, and because I do find these exhibits to be material to the outcome of the case, I will afford Petitioner every reasonable opportunity to make its case in the evidentiary record before me. Accordingly, I accept these two exhibits submitted for the first time at this level of its appeal. *See 1866ICPayday.com, L.L.C.*, DAB CR1976, at 9-11 (2009).

2. This case is appropriate for summary judgment.

CMS filed a Motion for Summary Judgment. 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*, DAB No. 2291, at 4-5 (2009). The Board has further stated that, "[i]n addition, it is appropriate for the tribunal to consider whether a rational trier of fact could regard the parties' presentation as

sufficient to meet their evidentiary burden under the relevant substantive law." *Dumas Nursing and Rehab., L.P.*, DAB No. 2347, at 5 (2010).

3. CMS had a legitimate basis to revoke Petitioner's supplier number.

On February 16, 2010 at 9:15 a.m., the NSC inspector attempted to conduct an unannounced site inspection on behalf of CMS at Petitioner's location during its posted hours of operation. When the inspector attempted the site visit, he found that he could not enter because the door was locked, even though there was a sign stating "OPEN" and "COME IN." On February 24, 2010 at 1:45 pm, the inspector made a second attempt; however, the door was locked again. During the second attempt, there was a sign stating "OPEN," "COME IN," and also a sign saying "Will Return" with a clock indicating the time 8:30. CMS Ex. 3, at 43-52; CMS Ex. 4, at 2. The inspector included date stamped photographs with the site inspection report as evidence of this signage. CMS Ex. 1, at 2; CMS Ex. 3, at 51-52. Petitioner does not dispute any of these facts.

Specifically, when one of the Petitioner's owners, Ms. Valdez, submitted Petitioner's May 7, 2010 request for consideration, she explained:

> We just recently hired our full time receptionist. For the last 2 years it has really just been my husband and I running the business. . . . The 1st time Medicare came to visit we were out of the office. I was actually making sales calls and my husband was out delivering. The second time Medicare came, my receptionist was here and stepped out to Subway to grab lunch. When we submitted our information for reconsideration, I attached a copy of her schedule and I can prove that I did pay her for that day, so I am not sure how we would have missed the Medicare personnel. However, since then, we have changed our hours, made a permanent change on our door, and have notified Medicare in writing about our change in hours of operation." [2]

CMS Ex. 2, at 2.

Although Petitioner does not dispute that no one was present during the attempted site visits, Petitioner argues that it was still operational on both February 16 and 24, 2010. Petitioner submitted several exhibits as evidence claiming that it was still operational. With its hearing request, Petitioner submitted telephone records showing that telephone

[2] With its hearing request, Petitioner submitted a photograph of its door with its new hours. The door now states that office hours are: Monday through Thursday, 9 a.m. - 5 p.m.; Friday, 9 a.m.-noon; and closed Saturday. The door has a sign stating it is closed for lunch 12:00 p.m.-1:00 p.m. This photograph is irrelevant to this matter because it does not show the hours of operation on the days at issue, the dates of the attempted site visits.

calls were made from Petitioner's location on both those dates. ALJ Ex. 1. I note, however, that no telephone calls were made prior to 10:37 a.m. on the morning of February 16, 2010. *Id.* The facsimile, dated February 16, 2010, and the delivery ticket, dated February 16, 2010, also do not establish that anyone was at Petitioner's business location at 9:15 a.m. on February 16, 2010, when the NSC inspector attempted a site visit. P. Exs. 1, 2.

The telephone records also indicate that the last telephone call made on February 24, 2010 was at noon. ALJ Ex. 1. These records do not present a dispute of fact whether anyone was present when the inspector attempted his on-site visit at 1:45 p.m. that day. Petitioner also submitted a copy of its receptionist's schedule. CMS Ex. 3, at 9; P. Ex. 3. For purposes of summary judgment, I accept as true that Petitioner paid its receptionist for the full day on February 24, 2010. Also, I accept as true that Petitioner's receptionist was scheduled to work from 9:00 a.m. to 5:00 p.m. on February 24, 2010. However, these facts do not establish that any staff member was actually present at Petitioner's location at 1:45 p.m. on February 24, 2010. Petitioner admits that its receptionist left the premises to go to lunch. Even though the inspector observed the clock sign on the door that indicated someone "Will Return" at 8:30, I will accept as true for purposes of summary judgment that the receptionist returned to the office after a reasonable lunch break.

The August 25, 2010 Acknowledgment and Pre-hearing Order explicitly stated that a party must exchange as a proposed exhibit the complete written direct testimony of any proposed witness. Although Petitioner listed a number of proposed witnesses, it did not submit written direct testimony for any witness. Petitioner has not claimed that anyone was present during the time of the attempted second site visit, nor has Petitioner submitted any evidence that establishes a dispute concerning a material fact.

The definition of "operational" clearly states that 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." 42 C.F.R. § 424.502 (emphasis added). Among other things, a DMEPOS supplier must permit CMS or its agent to conduct on-site inspections to ascertain supplier compliance with each of the enrollment standards, and the supplier must be "*accessible during reasonable business hours* to beneficiaries and to CMS." 42 C.F.R. § 424.57(c)(8) (emphasis added). A supplier is neither "open to the public" nor "accessible," if the supplier location is closed due to staff making patient deliveries or sales calls. It is incumbent on Petitioner to make whatever reasonable arrangements are necessary to keep its business open while allowing for patient deliveries. "A Medicare supplier differs from a strictly private business in that it is an integral part of a publicly run program. The requirement that a supplier be open at all times during normal business hours reflects CMS's determination that a supplier be available to beneficiaries to meet their needs and to alleviate their medical conditions." *A to Z DME, LLC*, DAB CR1995, at 6 (2009).

Petitioner argues that evidence suggesting that a business is customarily operational can overcome evidence of a brief absence. The Board has held, however, that the supplier standard "would have no meaning if suppliers could deviate from their posted hours of operation on a regular basis." *Ita Udeobong, d/b/a/ Midland Care Med. Supply and Equipment*, DAB No. 2324, at 7 (2010). In *Udeobong*, the petitioner admitted that it was closed from noon until 1:00 p.m. every day for lunch which was outside of its regularly posted hours of 10 am to 5 pm, Monday through Friday. The Board further held that "[t]his problem would not be cured even if . . . its employees posted temporary signs when they left, stating when they would return." *Id.* CMS and its contractors have limited resources and cannot be compelled to attempt multiple on-site inspections during a supplier's posted business hours to determine if a supplier is complying with all Medicare requirements.

V. Conclusion

Considering the undisputed facts in the light most favorable to the Petitioner, I find the Petitioner was not operational when it was not open and accessible on two separate occasions during its posted hours of operation. I grant CMS's motion for summary judgment and sustain the revocation of Petitioner's supplier billing number.

/s/
Joseph Grow
Administrative Law Judge