Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Cornerstone Medical, Inc.,
(NPI: 0525630009),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-941

Decision No. CR3022

Date: December 6, 2013

DECISION

Petitioner, Cornerstone Medical, Inc., is a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS), located in Oakwood, Georgia, that, until recently, participated in the Medicare program. The Centers for Medicare & Medicaid Services (CMS) has revoked its Medicare supplier number, and Petitioner appeals. CMS has moved for summary judgment.

For the reasons discussed below, I deny CMS's motion. Nevertheless, because neither party has asked to cross-examine the opposing party's witness, this case is ready for decision based on the written record. I find that Petitioner was operational at the time of its on-site review and that CMS improperly revoked its billing privileges.

Background

Requirements for a DMEPOS supplier's Medicare participation. To receive Medicare payments for items furnished to a Medicare-eligible beneficiary, a supplier of medical equipment and supplies must have a supplier number issued by the Secretary of Health and Human Services. Social Security Act § 1834(j)(1)(A).

To obtain and retain its supplier number, a Medicare supplier must meet the standards set forth in 42 C.F.R. § 424.57(c), and CMS may revoke its billing privileges if it fails to do so. 42 C.F.R. § 424.57(c)(1); 42 C.F.R. § 424.535(a)(1). 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). It must permit CMS or its agents to conduct on-site inspections to ascertain its compliance with governing regulations. 42 C.F.R. § 424.57(c)(8).

Until its Medicare supplier number was revoked, effective January 11, 2013, Petitioner participated in the Medicare program as a supplier of DMEPOS. In a letter dated January 25, 2013, the Medicare contractor, Palmetto GBA, notified Petitioner that its Medicare supplier number was revoked effective January 11, 2013, because it was not in compliance with supplier standard 42 C.F.R. § 424.57(c)(7). The letter said that a contractor representative attempted to visit the facility on January 8 and January 11, 2013, but the business was closed during posted hours of operation, and the representative could not complete an inspection to verify its compliance with supplier standards. The supplier was therefore "considered to be 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)." CMS Ex. 3 at 7.

In a letter dated March 19, 2013, Petitioner requested reconsideration, arguing that no evidence established that a contractor representative visited the business on the dates alleged. CMS Ex. 3 at 13.

The contractor hearing officer issued a reconsidered determination, dated April 24, 2013, affirming the revocation. CMS Ex. 1. Petitioner now appeals that determination. CMS has filed a motion for summary judgment and memorandum in support (CMS Br.), along with five exhibits (CMS Exs. 1-5). Petitioner has filed a response to CMS's motion for summary judgment/prehearing brief (P. Br.) and five exhibits (P. Exs. 1-5).

CMS objects to my admitting four of Petitioner's five exhibits: P. Exs. 1-3 and P. Ex. 5. These are documents that were not submitted to the hearing officer:

- Delivery tickets, signed and dated January 8 and 11, 2013, by the vendor and the customer, from LIFE GAS, with corresponding purchase orders (P. Ex. 1);

- Time card reports for employee David E. Shirley, indicating that he worked from 8:12 a.m. until 7:01 p.m. on January 8 and from 8:31 a.m. until 7:30 p.m. on January 11, 2013 (P. Ex. 2);

- Real Time Data report for those days, indicating that Mr. Shirley worked those hours (P. Ex. 3);

- The floor plan and dimensions of the facility (P. Ex. 5).

CMS objects to the admission of these documents (P. Exs. 1, 2, 3, and 5), citing 42 C.F.R. § 498.56(e). Under that provision, I may consider new documentary evidence only if I find good cause for Petitioner's having submitted it for the first time at this level. Petitioner concedes that it did not submit these documents at the reconsideration level, but argues that good cause justifies my admitting the documents.

Petitioner complains that the initial notice letter did not specify which of the many standards it purportedly violated. The letter charges that Petitioner was not in compliance with 42 C.F.R. § 424.57(c) and lists the requirements under that section (square footage, accessible to public, staffed during posted hours of operation, adequate signage, adequate storage space). CMS Ex. 3 at 6-7. In contrast, the contractor hearing officer based her decision on just one factor: that the facility be accessible and staffed during posted hours of operation. CMS Ex. 1 at 3. At the ALJ level, CMS has added an additional basis for the revocation: 42 C.F.R. § 424.57(c)(8), which requires the supplier to permit on-site inspections.

CMS points out, however, that the underlying factual basis for revocation remains unchanged and supports revocation under both (c)(7) and (c)(8). The notice letter sets forth, in italics for emphasis, that the contractor representative was unable to visit and inspect the facility on the dates in question, because the business was closed. The contractor therefore determined that the supplier violated all the section 424.57(c) standards, because the contractor could not determine otherwise. CMS Ex. 3 at 6-7. In CMS's view, this notice sufficiently alerted Petitioner to submit all evidence that the business was open and staffed. I agree with CMS that the notice letter adequately set forth the factual basis for the revocation, and Petitioner should have understood that any evidence establishing the presence of an employee would be relevant, if not necessarily dispositive.

I am more concerned that the contractor's initial notice letter does not tell the supplier that it *must* submit its documents at the reconsideration level. It invites the petitioner to submit additional information – "you *may* submit additional information with the reconsideration that you believe may have a bearing on the decision" – but it does not suggest that this will be the supplier's *only* opportunity to submit such evidence. CMS Ex. 3 at 7 (emphasis added). The supplier, who was not then represented by counsel, could easily have been misled into assuming that it would have additional opportunities to do so if necessary, particularly since this instruction appears in a the middle of a paragraph that warns of dire consequences for other failures:

> You *must* request the reconsideration in writing . . .within 60 calendar days. . . . The reconsideration *must* state the issues or findings of fact with which you disagree and the reasons

> for disagreement. . . . The reconsideration *must* be signed and dated by the authorized or delegated official . . . . Failure to timely request a reconsideration is deemed a *waiver of all rights* to further administrative review.

CMS Ex. 3 at 7 (emphasis added).

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.

In the absence of any objection, I admit into evidence CMS Exs. 1-5 and P. Ex. 4. I decline to rule on the admissibility of Petitioner's remaining exhibits.

Discussion

1. CMS is not entitled to summary judgment, because Petitioner has come forward with admissible evidence establishing a dispute of material fact.[1]

CMS has moved for summary judgment, arguing that no material facts are in dispute. Summary judgment is appropriate when a case presents no issue of material fact, and its resolution turns on questions of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *1886ICPayday.com, L.L.C.*, DAB No. 2289 at 2-3 (2009); *Illinois Knights Templar Home*, DAB No. 2274 at 3-4 (2009) (citing *Kingsville Nursing Ctr.*, DAB No. 2234 at 3-4 (2009)); *Livingston Care Ctr. v. U.S. Dep't of Health & Human Servs.*, 388 F. 3d 168, 173 (6th Cir. 2004).

The moving party may show the absence of a genuine factual dispute by presenting evidence so one-sided that it must prevail as a matter of law, or by showing that the non-moving party has presented no evidence "sufficient to establish the existence of an element essential to [that party's] case, and on which [the party] will bear the burden of proof at trial." *Livingston Care Ctr.*, 388 F.3d at 173 (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). To avoid summary judgment, the non-moving party must then act affirmatively by tendering evidence of specific facts, in the form of affidavits and/or admissible discovery material, showing that a dispute exists. *Crestview Parke Care Ctr.*, DAB No. 1836 at 6 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n. 11(1986)); *see also Vandalia Park*, DAB No. 1939 (2004); *Lebanon Nursing & Rehab. Ctr.*, DAB No. 1918 (2004).

[1] My findings of fact/conclusions of law are set forth, in italics and bold, in the discussion captions of this decision.

This case turns on questions of fact: whether the business was closed and locked, with no staff present, when the contractor's representative visited on January 8 and 11, 2013. Petitioner has come forward with evidence to show that the business was open and operational on the dates and times in question. Even without considering the documents to which CMS objects, Petitioner's witness declaration establishes a dispute of material fact. *See* 42 C.F.R. § 498.56(e) and discussion, below.

I therefore deny CMS's motion.

Nevertheless, because neither party justifies my convening an in-person hearing, I close the record and decide the case. My pre-hearing order directed the parties to file, among other submissions, a list of all proposed witnesses, and to include, as a proposed exhibit, the written direct testimony of any proposed witness. Acknowledgment and Pre-hearing Order at 3 ¶4(c)(iv). The order explains that an in-person hearing is necessary only if a party files a witness's admissible, written direct testimony, and the opposing party asks to cross-examine. *Id*. at 5 ¶ 10. Because neither party asks to cross-examine any witness, an in-person hearing would serve no purpose. The case can therefore be decided based on the written record.

2. Petitioner has established that the supplier was operational and staffed when the contractor's inspector visited.

According to a site investigation report, signed by Inspector Joseph W. Lakey, he visited the facility at 3:00 p.m. on January 8, 2013, and returned at 10:25 a.m. on January 11, 2013. CMS Ex. 3 at 21. The facility's hours of operation were posted: 8:30 a.m. to 11:30 a.m. and 2:30 p.m. to 5:30 p.m. Monday through Friday. CMS Ex. 3 at 22, CMS Ex. 4 at 1. On both occasions, the door was locked. The inspector knocked "a couple of times" but did not get an answer. CMS Ex. 3 at 26; CMS Ex. 5 at 1 (Lakey Decl. ¶¶ 2, 3). He took pictures on both days, and those pictures indicate a date and time. CMS Ex. 4. One of those pictures shows a lone car in the parking lot. CMS Ex. 4 at 1.

Petitioner submits the written declaration of David E. Shirley, the supplier's assistant branch manager, who testifies that he worked at the facility on the days in question, and that it was open for business. On January 8, 2013, he clocked in at 8:12 a.m. and clocked out at 7:01 p.m. P. Ex. 4 at 2 (Shirley Decl. ¶ 4). On January 11, 2013, he clocked in at 8:31 a.m. and clocked out at 7:30 p.m. P. Ex. 4 at 3 (Shirley Decl. ¶ 5). He points out that the building is quite large, having once served as a warehouse, which reasonably explains his not responding immediately to the inspector's knock. P. Ex. 4 at 2 (Shirley Decl. ¶ 7). As Petitioner pointed out, Inspector Lakey indicates that he knocked on the door "a couple of times," but he does not indicate how long he waited for a response. CMS Ex. 5 at 1(Lakey Decl. ¶¶ 2, 3).

The inspector saw a parked car in the lot in front of the store, and took a picture of the car at the time of his second visit. CMS Ex. 3 at 26, 28; CMS Ex. 4 at 1; CMS Ex. 5 at 1 (Lakey Decl. ¶ 3). Assistant Branch Manager Shirley testified that the car, a 4-door gold Toyota Camry, is his. P. Ex. 4 at 2 (Shirley Decl. ¶ 8).

I find the testimony of both witnesses generally credible. Petitioner does not dispute that the inspector arrived at the facility at the times claimed, took pictures, knocked on the door, and departed. Nor has CMS offered any evidence to undermine Assistant Branch Manager Shirley's claims that he worked the entire day, and that the facility was large enough that he might not have heard the knock or managed to get to the door before the inspector left. His testimony is buttressed by the undisputed presence of his car in the parking lot. I can reasonably infer that his car would not have been there unless he was also there. I therefore conclude that the facility was operational at the times the inspector arrived for its on-site reviews.

Conclusion

For the reasons discussed above, I find that CMS improperly revoked Petitioner's supplier number and I reverse that revocation.

/s/
Carolyn Cozad Hughes
Administrative Law Judge