

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division**

El Jardin Pharmacy, Inc.
Docket No. A-12-15
Decision No. 2438
February 1, 2012

**FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION**

El Jardin Pharmacy, Inc. (Petitioner), a licensed pharmacy that had been enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS), appeals the August 23, 2011 decision of Administrative Law Judge (ALJ) Carolyn Cozad Hughes upholding the revocation of Petitioner's Medicare supplier number and billing privileges. *El Jardin Pharmacy, Inc.*, DAB CR2418 (2011) (ALJ Decision). The ALJ found that the Centers for Medicare & Medicaid Services (CMS) properly revoked Petitioner's billing privileges effective November 11, 2010 because Petitioner did not notify CMS within 30 days of changing its location. *Id.* at 4-6. The ALJ concluded that Petitioner was out of compliance with certain Medicare enrollment requirements found in 42 C.F.R. § 424.57(c) and subject to having its billing privileges revoked under 42 C.F.R. § 424.535(a)(5)(ii). *Id.*

Petitioner argues on appeal that the ALJ erred by finding that Petitioner did not notify CMS of the relocation within 30 days of the relocation occurring. For support, Petitioner relies on a letter that Palmetto GBA National Supplier Clearinghouse (NSC), a CMS contractor, mailed to Petitioner's new location on December 16, 2010. Pet. Request for Review (RR) at 1; *see also* CMS Ex. 3. Petitioner argues that NSC's use of Petitioner's new location demonstrates adequate and timely notice of Petitioner's relocation. *Id.* For the reasons set forth below, we reject Petitioner's argument and affirm the ALJ Decision.

Applicable Legal Standards

The Social Security Act (Act) requires, in relevant part, that a DMEPOS supplier must obtain a supplier number from the Secretary of the Department of Health & Human Services (Secretary) to establish the supplier's billing privileges within the Medicare program. Act § 1834(j)(1)(A).¹ The Act requires any DMEPOS supplier to comply with

¹ The current version of the Act is available at http://www.socialsecurity.gov/OP_Home/ssact/ssact.htm. On this website, each section of the Act contains a reference to the corresponding chapter and section in the United States Code.

the applicable licensure and regulatory requirements, to maintain a physical facility on an appropriate site, and to have proof of appropriate liability insurance. Act § 1834(j)(1)(B)(ii)(I)-(III). The Act further authorizes the Secretary to establish by regulation additional requirements that DMEPOS suppliers must meet in order to be issued and maintain a supplier number and billing privileges in the Medicare program. Act § 1834(j)(1)(B)(ii)(IV).

The Secretary has established 30 standards that a DMEPOS supplier must certify it meets and will continue to meet in its application for a supplier number and billing privileges. 42 C.F.R. § 424.57(c)(1)-(30); *Main Street Pharmacy, Inc.*, DAB No. 2349, at 2 (2010). The provisions relevant to this case require that the DMEPOS supplier provide CMS with complete and accurate information in the application for billing privileges, and must “report to CMS any changes in information supplied on the application within 30 days of the change.” Section 424.57(c)(2). Additionally, the DMEPOS supplier must permit CMS, NSC, or any agents thereof “to conduct on-site inspections to ascertain supplier compliance with the requirements of this section.” Section 424.57(c)(8). If a DMEPOS supplier already enrolled in the Medicare program fails to comply with any of the requirements set forth in section 424.57(c), CMS will revoke that supplier’s billing privileges. Section 424.57(e)²; *see also 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.”).

Section 424.535, which applies to all providers and suppliers enrolled in the Medicare program, sets forth several grounds upon which CMS may revoke a provider’s or supplier’s billing privileges. Relevant to this case, section 424.535(a)(5) authorizes CMS to revoke a supplier’s billing privileges if “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.” Revocation under this section results in the termination of any provider or supplier agreement with Medicare as well as a ban on re-enrollment for a minimum of one year, but no more than three years. Section 424.535(b)-(c).

² 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 were not incorporated in the C.F.R. volumes issued October 1, 2009 and 2010 “due to inaccurate amendatory instruction,” and the text added by revised paragraph (d) appears in that volume as an “Editorial Note” to section 424.57. References are to the regulation as redesignated.

Case Background³

By letter dated November 19, 2010, NSC notified Petitioner that it was revoking Petitioner's Medicare supplier number and billing privileges retroactive to November 11, 2010, the date an NSC inspector attempted to conduct an on-site inspection at 2350 West 84th Street, Hialeah, Florida (West 84th Street location or old location). CMS Ex. 1. The NSC inspector reported that he found the West 84th Street location vacant and that a construction crew renovating the interior told the investigator the location had been vacant for approximately one month. CMS Ex. 6, at 3. NSC stated in its letter that Petitioner was "no longer located at the address listed on file with the NSC" and was therefore "not operational to furnish Medicare covered items and services," a basis for revocation under section 424.535(a)(5)(ii). CMS Ex. 1. Petitioner responded by letter from Xavier Ampuero, its President and Chief Executive Officer, dated December 1, 2010, asserting that it had notified NSC of its change in location "over the telephone" prior to changing locations and advising NSC that its address was now 4375 West 16th Avenue, Hialeah, Florida (West 16th Avenue location or new location). CMS Ex. 2, at 1.

On December 16, 2010, NSC sent a letter to Petitioner at the West 16th Avenue location wherein NSC reaffirmed that Petitioner's billing privileges were subject to revocation under section 424.535(a)(5)(ii). CMS Ex. 3. NSC also determined that Petitioner did not comply with two of the supplier standards in section 424.57(c), specifically the standard in subsection (c)(2), requiring the supplier to notify NSC of any changes in the supplier's information within 30 days, and the standard in subsection (c)(8), requiring the supplier to permit an on-site inspection of its facility. *Id.* Petitioner responded by letter dated December 22, 2010, reiterating that it had notified NSC about the change in practice location prior to the change occurring, but stating that it believed NSC "did not receive the CMS 855S Change of Address original application which was sent back [on] August 30, 2010." *Id.* Petitioner stated that it submitted a "secondary copy" of the application form to NSC on December 1, 2010, along with its corrective action plan. *Id.*

NSC issued its reconsideration decision on March 25, 2011. CMS Ex. 5. Consistent with NSC's prior decision, the hearing officer found that Petitioner had violated the DMEPOS supplier standards in sections 424.57(c)(2) and (c)(8). *Id.* at 1-2. The hearing officer found that the only properly-completed CMS-855S form received by NSC was mailed by Petitioner on March 14, 2011. *Id.* at 2. This form, the hearing officer stated, was outside the "30-day time frame required in which to notify the NSC of any changes." *Id.*

³ The facts presented in this general background are undisputed and are drawn from the record before the ALJ as well as the ALJ Decision. These facts are to provide a general framework for understanding the rest of our decision and are not to be treated as new findings.

Petitioner requested an ALJ hearing on NSC's reconsideration decision, arguing that a copy of the "original CMS-855S application" accompanied the corrective action plan on December 1, 2010, and this "original" application showed compliance with the notification standard in section 424.57(c)(2). In her decision, the ALJ found that Petitioner moved its location from the West 84th Street location to the West 16th Avenue location "on, or shortly before August 30, 2010." *Id.* at 4. Relying on the testimony of the NSC inspector, the ALJ also found that on November 11, 2010, the inspector attempted an on-site inspection at the West 84th Street location, but was unable to do so because "the facility was no longer there." *Id.* at 4-5.

Based on testimony of an NSC representative, the ALJ found that NSC "did not receive from Petitioner the required form CMS-855S until December 2010." *Id.* at 5. The ALJ further concluded that "form CMS-855S . . . is an enrollment application that must also be filed to report changes in information, including the supplier's relocation." *Id.* at 4 (citing Medicare Program Integrity Manual (MPIM) § 15.1.2 and 42 C.F.R. § 424.510(a)). The ALJ pointed out that Petitioner offered no evidence to support the claim in its letter dated December 22, 2010 that it had, in fact, submitted the required form on August 30, 2010. *Id.* The ALJ found that "when Petitioner ultimately submitted the form, in December 2010, [NSC] rejected it because Petitioner failed to provide evidence of a mandatory surety bond." *Id.* Additionally, the ALJ found that Petitioner's unsupported claim about notifying NSC "over the telephone" was "wholly insufficient to satisfy the notification requirements . . ." *Id.* at 6. The ALJ concluded that Petitioner "was not in compliance with section 424.57(c)(2), because it did not, within 30 days, advise the CMS contractor that it changed locations." *Id.*

The ALJ also found that the hearing officer made "a clerical error" in the reconsideration decision when he identified Petitioner's new location as the location visited by the NSC inspector. The ALJ cited to the investigation report, which shows that the address on file with NSC was Petitioner's old location on the date of the attempted inspection, as well as the testimony of the NSC investigator, which identified Petitioner's old location as the address on file at that time. *Id.* (citing CMS Ex. 6, at 3 and CMS Ex. 9). The ALJ concluded that "no evidence before the hearing officer or me supports the finding that [NSC] had on file Petitioner's new address." *Id.*

Petitioner timely appealed the ALJ Decision to the Board.

Standard of Review

We review a disputed finding of fact as to whether the ALJ's decision is supported by substantial evidence on the record as a whole. *Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's Participation in the Medicare and Medicaid Programs*, at <http://www.hhs.gov/dab/divisions/appellate/guidelines/index.html>. Substantial evidence is "more than a mere scintilla. It means such

relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). When applying the substantial evidence standard, “the reviewer must examine the record as a whole and take into account whatever in the record fairly detracts from the weight of the evidence relied on in the decision below.” *Universal Healthcare/King*, DAB No. 2215, at 3 (2011) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Analysis

Petitioner argues before us that the ALJ erred by finding that Petitioner did not notify CMS of the change in location within 30 days as required by section 424.57(c)(2). Petitioner claims that NSC’s mailing of the December 16th letter to Petitioner’s new location rather than its old location demonstrates that NSC had in its files at the time of the on-site inspection the West 16th Avenue location as Petitioner’s actual location. RR at 2. We disagree and, as discussed below, conclude that substantial evidence in the record supports the ALJ’s finding.

We note preliminarily that Petitioner does not pursue its earlier claim that it notified NSC “over the telephone” about the relocation. In any event, we agree with the ALJ that “vague references to telephone calls purportedly made prior to the move by some unidentified supplier representative to an unidentified contractor representative” are “wholly insufficient to satisfy the notification requirements” ALJ Decision at 6.

In addition, Petitioner does not specifically dispute the ALJ’s finding that Petitioner first submitted a CMS-855S form with the new location in December 2010.⁴ There is, moreover, substantial evidence in the record to support that finding, including the testimony of the NSC representative that NSC did not have anything in its files about Petitioner’s change in location at the time of the on-site inspection or receive a CMS-855S from Petitioner prior to December 2010. CMS Ex. 8, at 1. Petitioner submitted no evidence that, on its face, undercuts this finding. The only CMS-855S form that Petitioner submitted to the ALJ in support of its position was not executed until March 10, 2011. Pet. Ex. 1, at 29. As the ALJ said, this was “over six months *after* the date Petitioner claims to have submitted it to [NSC] and four months after CMS sent the revocation notice letter.” ALJ Decision at 5 (*italics in original*).

Petitioner asks that we infer from the fact that NSC mailed the December 16th letter to its new location that Petitioner gave timely notice of its new location. We find this inference unreasonable. To be timely, Petitioner’s notice of its change in location should have been given to NSC at least by September 29, 2010 (30 days after the date Petitioner said it

⁴ In light of our conclusion, discussed below, that Petitioner did not notify NSC in writing of its relocation within the required 30-day period, we need not reach the question of whether, as the ALJ concluded, the CMS-855S form is the only means permitted for notifying CMS of such a change.

relocated). However, it is undisputed that on November 11, 2010, NSC attempted an on-site inspection at Petitioner's old location and then mailed a letter to Petitioner's old location on November 19, 2010. *See* CMS Ex. 1; CMS Ex. 6; CMS Ex. 9. Petitioner offers no explanation for why NSC would have used Petitioner's old location for these purposes if it had been timely notified of Petitioner's new location. Moreover, it seems more plausible that NSC sent the December 16th letter to Petitioner's new location because NSC was advised of the new location by Petitioner's December 1, 2010 letter.

In addition, the fact that the December 16th letter was addressed to the new location does not show *timely* notice of Petitioner's relocation. Petitioner argues that the destination of the December 16th letter is indicative of NSC having a CMS-855S with the new location on file prior to the mailing of that letter. RR at 2. However, no evidence in the record supports a finding that, even if such a CMS-855S with the new location were on file at that time, it was provided to NSC by September 29, 2010.

In sum, substantial evidence in the record supports the ALJ's finding that Petitioner did not timely notify CMS of the change in location. Additionally, Petitioner failed to point to any evidence in the record that fairly detracts from the ALJ's finding. CMS was therefore authorized to revoke Petitioner's supplier number and billing privileges under section 424.535(a)(5)(ii).

Conclusion

For all of the foregoing reasons, we affirm the ALJ's decision to uphold the revocation of Petitioner's Medicare billing privileges.

/s/
Stephen M. Godek

/s/
Leslie A. Sussan

/s/
Judith A. Ballard
Presiding Board Member