Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Laguna Honda Hospital and Rehabilitation Center
(PTAN 5676360001),
Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-677

Decision No. CR2272

Date: October 18, 2010

DECISION

I grant the motion of the Centers for Medicare and Medicaid Services (CMS) for summary disposition and sustain the revocation of Petitioner' billing privileges as a Medicare supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). I conclude based on undisputed evidence that Petitioner failed to timely comply with requirements in the Medicare supplier regulations. Specifically, Petitioner did not meet the requirements that it be accredited by a CMS-approved accrediting organization by October 1, 2009, and that it provide CMS by October 2, 2009 with either a surety bond meeting federal requirements or documentation that it qualified for an exception as a government-operated DMEPOS supplier holding a comparable surety bond under state law.

I. Applicable Law and Regulations

Section 1834(a)(20)(F)(i) of the Social Security Act (Act), 42 U.S.C. § 1395m(a)(20)(F)(i), states that the Secretary of Health and Human Services (Secretary) "shall require suppliers furnishing [Medicare supplies] . . . on or after October 1, 2009 . . . to have submitted to the Secretary evidence of accreditation by an accreditation organization designated . . . as meeting applicable quality standards . . . ."

Section 1834(a)(16) of the Act states that the 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 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 states that "[t]he supplier must meet and must certify in its application for billing privileges that it meets and will continue to meet the following standards." Section 424.57(c)(22) [supplier standard 22] states:.

> All suppliers of DMEPOS and other items and services must be accredited by a CMS-approved accreditation organization in order to receive and retain a supplier billing number. The accreditation must indicate the specific products and services, for which the supplier is accredited in order for the supplier to receive payment for those specific products and services.

Section 424.57(c)(26) [supplier standard 26] requires that the supplier "[m]ust meet the surety bond requirements specified in paragraph (d) of this section." Those surety bond requirements at section 424.57(d) in turn state, as relevant here, that "beginning October 2, 2009, each Medicare-enrolled DMEPOS supplier must meet the requirements of paragraph (d)," which include submission of "a surety bond from an authorized surety of $50,000" which bond "is continuous" 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), (2), (4), (5). "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). "Authorized surety means a surety that has been issued a Certificate of Authority by the U.S. Department of the Treasury as an acceptable surety on Federal bonds and the certificate has neither expired nor been revoked." 42 C.F.R. § 424.57(a).

The surety bond provision also states that "Government-operated DMEPOS suppliers are provided an exception to the surety bond requirement **if the DME supplier has provided CMS with a comparable surety bond under State law**." 42 C.F.R. § 424.57(d)(15) (emphasis added).

Failure to submit a surety bond as required is a ground for revocation of a supplier's billing privileges. 42 C.F.R. § 424.57(d)(11) ("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."); *see also* 42 C.F.R. § 424.57(d)(4)(ii)(B) ("CMS revokes or denies a DMEPOS supplier's billing privileges based upon the submission of a bond that does not reflect the requirements of paragraph (d) of this section."). More generally, section 424.57 provides that CMS "will revoke a supplier's billing privileges if it is found not to meet" the supplier standards (including

the accreditation and surety bond requirements) or other requirements in section 424.57(c). 42 C.F.R. § 424.57(e) (formerly § 424.57(d)).[1]

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).

II. Background

By letter dated October 9, 2009, NSC revoked Petitioner's DMEPOS supplier billing privileges effective in 30 days for failure to comply with supplier standards 22 and 26, the accreditation and surety bond requirements. CMS Ex. 1; P. Ex. 1, at 1-2. Petitioner timely requested reconsideration from NSC by letter dated December 4, 2009, and an NSC hearing officer sustained the termination in a reconsideration decision dated March 3, 2010, which Petitioner now appeals. P. Ex. 1, at 3-4; P. Ex. 2. The appeal was assigned to me for hearing and decision pursuant to 42 C.F.R. § 498.44, which permits designation of a Member of the Departmental Appeals Board (Board) to hear appeals taken under Part 498. Pursuant to my order setting procedures for this case, CMS, on June 4, 2010, submitted a motion for summary disposition and supporting brief (CMS Br.), Petitioner submitted its response (P. Resp.) on July 7, 2010, and CMS requested and was granted permission to file a reply (CMS Reply), which it did on July 20, 2010.

With its response, Petitioner submitted its Exhibits 1 through 5, among which are the materials that Petitioner submitted earlier as exhibits to its hearing request (HR), and two offers of witness testimony in the form of declarations (P. Ex. 3). CMS with its motion and brief submitted its Exhibits 1 through 7, including a proffer of testimony of one witness in the form of a declaration. CMS Ex. 2, at 1-2. In the absence of any objections, I admit each of the parties' exhibits to the record.[2] Petitioner requested a hearing to cross-examine CMS's witness. P. Resp. at 2.

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[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 were not incorporated in the volume of the Code of Federal Regulations issued October 1, 2009 "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.

[2] The regulations governing ALJ hearings in supplier enrollment appeals require that a Petitioner have "good cause" for submitting "new documentary evidence" for the first time before me. 42 C.F.R. § 498.56(e). The two declarations in Petitioner's Exhibit 3, dated July 7, 2010, are proffers of testimony not considered documentary evidence covered by that rule. *Arkady B. Stern, M.D.*, DAB No. 2329, at 4 n.4 (2010) ("[t]estimonial evidence that is submitted in written form in lieu of live in-person

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III. Issue, Applicable Standard, Findings of Fact and Conclusions of Law

A. Issue

The issue in this case is whether CMS is entitled to summary judgment on the ground that the undisputed facts demonstrate that Petitioner failed to comply with at least one of the two supplier standards at issue, authorizing the revocation of its DMEPOS billing privileges.

B. Applicable Standard

CMS's motion made clear that the summary disposition it seeks is in the nature of summary judgment. CMS Br. at 8-9. 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).

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testimony is not 'documentary evidence' within the meaning of 42 C.F.R. § 498.56(e)"). The hearing officer's analysis in the reconsideration decision indicates that Petitioner's other exhibits, not necessarily including materials issued by CMS or NSC, to which the rule also does not apply, were submitted on reconsideration. In any event, CMS did not object to any of Petitioner's exhibits.

C. Findings of Fact and Conclusions of Law

My findings and conclusions are in the italicized headings supported by the subsequent discussions below.

1. Undisputed facts establish that Petitioner did not comply with the two supplier standards by the applicable deadlines, authorizing the revocation.

Petitioner does not dispute that it failed to obtain, or submit evidence to the Secretary (via CMS and NSC) of, appropriate accreditation by October 1, 2010, and that it failed to provide the Secretary a surety bond (or comparable surety bond under state law as required of government-operated suppliers) by October 2, 2009, as required by statute and regulation. Act § 1834(a)(16), (a)(20)(F)(i); 42 C.F.R. § 424.57(c)(22), (26), (d). Indeed, Petitioner states that it "was not aware of the existence of either of these new requirements for enrollment as a DMEPOS supplier before October 9, 2009" the date of the revocation letter, and that it was thus "unable to provide evidence of its compliance" with the two requirements. P. Resp. at 3.

When a supplier "is found not to meet" the supplier standards, "CMS will revoke" its billing privileges, 42 C.F.R. § 424.57(e), as redesignated, and "failure to comply with even one supplier standard is a sufficient basis for revoking a supplier's billing privileges," *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 13 (2009). CMS argues it was therefore authorized to revoke Petitioner's billing privileges here.

Petitioner contends that the revocation should be reversed nevertheless. Petitioner argues that it is exempt from the surety bond requirement because it is a government-operated supplier, and further that its status as a government-owned and operated, dually-licensed skilled nursing facility and acute care hospital supplying DMEPOS only to its patients in itself assures that the purposes of the accreditation and surety bond requirements are met.

Petitioner also argues that CMS failed to inform Petitioner of the two requirements in time to meet the deadlines for compliance, as Petitioner says CMS was obliged to do, and is estopped from revoking Petitioner's billing privileges because after the deadline, CMS and NSC representatives told Petitioner that it was exempt from the surety bond requirement. Petitioner argues that, at a minimum, summary disposition is not appropriate because it has raised disputed issues of material fact over whether CMS provided notice of the requirements before the deadline for compliance and incorrect information after the revocation.

As explained below, none of these arguments provide any basis for reversing the revocation. Moreover, while Petitioner raises disputes of fact and seeks to cross examine CMS's only witness, none of the facts Petitioner seeks to establish are material to the issue before me, i.e. whether CMS had legal grounds to revoke Petitioner's billing

privileges. Thus, summary judgment in CMS's favor is appropriate.

2. Petitioner was neither exempt from the two requirements nor excused from compliance by virtue of the nature of its business or its state licensure.

Petitioner argues that it should be "deemed to be in compliance with the Accreditation Requirement because its state license combined with its status as a government-owned, certified Medicare and MediCal provider ensures compliance with the DMEPOS quality standards" and that it "is fundamentally in compliance with the Surety Bond requirement because it poses no threat whatsoever of defrauding the Medicare system by failing to pay its obligations." HR at 4. Petitioner similarly argues that it should be held "exempt from the Accreditation and Surety bond requirements under a reasonable interpretation of the regulations" because it meets the purposes for which those rules were promulgated. P. Resp. at 8.

These arguments must fail, given Petitioner's undisputed failure to have timely complied with the actual requirements of the two supplier standards. The essence of Petitioner's stance is that, notwithstanding the explicit requirements of the regulations, the government should be obliged to accept Petitioner's view that it can somehow be trusted to achieve the same ends which the regulations were designed to fulfill simply because it is state-owned and licensed. My role here, however, is to apply the law and regulations as written and determine whether undisputed facts demonstrate that CMS had a legal basis for the revocation. I have no authority to render an opinion over whether Petitioner managed to achieve some or all of the goals underlying the supplier standards and CMS's quality standards, notwithstanding Petitioner's undisputed failure to comply with the specific requirements of the two supplier standards at issue.

Regarding the accreditation requirement, Petitioner reports that it submitted to NSC, as evidence of its compliance, its state license, which Petitioner says "is only issued after an extensive survey that ensures Laguna Honda is in compliance with participation requirements . . . ." HR at 3-4. Petitioner acknowledges, however, that its state license "is not strictly an accreditation by one of the ten approved national accreditation organizations." *Id.* Petitioner offers no basis to conclude that the state licensing survey covers the same requirements as Medicare demands of an accreditation organization. The regulators might, perhaps, have chosen to include state surveys of state-owned facilities as equivalent to the approved accreditation organizations, but they did not do so. At best, Petitioner suggests that it would not be unreasonable to read such an extension into the regulations. That suggestion does not suffice to overcome CMS's reliance on the plain language of the regulation. Petitioner has thus offered no basis for me to find unreasonable CMS's interpretation of the regulations as requiring compliance with their explicit provisions. This is particularly so in light of the fact that the drafters plainly contemplated government-owned suppliers (carving a specific exception for them in

relation to surety bonds as discussed next) and yet did not include any exception for government-owned, state-licensed facilities from the accreditation requirement.

Petitioner also asserts that, as a government-owned supplier providing durable medical equipment "only incident to its operation as one of the nation's largest skilled nursing facilities and rehabilitation centers" it "naturally follows" CMS's DMEPOS quality standards, which the approved accrediting organizations apply in issuing the accreditation required by section 424.57(c)(22).[3] P. Resp. at 9. Petitioner argues that the accreditation requirement "should be read to exclude" Petitioner because those quality standards, which CMS has described as "basic good business practices," 71 Fed. Reg. 48,354, 48,393 (Aug. 18, 2006), are aimed at for-profit "*businesses* that sell DMEPOS" and not government-owned entities like Petitioner, which, it says, "already must implement the type of quality standards that the Accreditation Requirement aims to ensure . . . ." P. Resp. at 9.

In essence, Petitioner asks me to overlook the requirements of the law and regulations and excuse its noncompliance, relief not available in this forum. The supplier standard required Petitioner to both have been accredited by an approved accrediting organization, and to have submitted evidence of the accreditation by October 1, 2009, neither of which Petitioner did. I find nowhere in the preamble language Petitioner cites the suggestion that in the circumstances of this case, the accreditation requirement could be met by anything other than actual accreditation by one of the approved organizations. Additionally, the revocation and this appeal concern compliance with the supplier standards in § 424.57 424.57(c), not the quality standards addressed during the accreditation process. 75 Fed. Reg. 52,629, 52,634 (Aug. 27, 2010) ("The supplier standards in § 424.57 are separate from the quality standards which are used by accrediting organizations."). I am not empowered to substitute my judgment for that of one of the approved accrediting organizations that is required to accredit DMEPOS suppliers, which is essentially what Petitioner asks. None of Petitioner's arguments allege any actual error in the finding that Petitioner at the time of the revocation was not in compliance with the two supplier standards.

Regarding the requirement to provide CMS with a compliant surety bond, Petitioner argues that Laguna Honda, "because it is a government-owned skilled nursing facility, is already in compliance with the Surety Bond requirement." HR at 4. Petitioner cites the preamble to the final rule implementing the surety bond requirement in the supplier standards, where CMS explained that the basis for the exception to the surety bond

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[3] CMS issued the DMEPOS quality standards in October 2008, pursuant to section 1834(a)(20) of the Act, which requires the Secretary to "establish and implement quality standards for suppliers of items and services" described in the law, "to be applied by recognized independent accreditation organizations." (www.cms.gov/MedicareProviderSupEnroll/Downloads/DMEPOSAccreditationStandardsCMB.pdf, accessed Oct. 15, 2010.)

requirement for government-operated suppliers is that it is "unlikely that these DMEPOS suppliers will be unable to pay their Medicare debts" and that such suppliers "by their public nature, furnish a comparable or greater guarantee of payment than would be afforded us by a surety bond issued by a private surety." 74 Fed. Reg. 166, 167-68 (Jan. 2, 2009). The preamble, however, does not suggest any blanket exception for government-operated suppliers. It instead makes clear that such suppliers would have to qualify for the exception by providing CMS "with a comparable surety bond required under State law," and that a "government-operated supplier that did not qualify for an exception would have to submit a surety bond." *Id*. at 167. Here, Petitioner cites only its status as a government-owned and operated supplier and does not suggest that any bond required under state law exists that affords CMS with protection comparable to that which private suppliers must provide through a surety bond.[4] Thus, there is no basis to conclude that Petitioner qualified for the exception for government-operated suppliers.

3. Petitioner's lack of specific notice of the supplier standards and the deadlines for compliance does not excuse its noncompliance.

Petitioner argues that CMS and NSC should not have revoked Petitioner's billing privileges because they were obligated but failed to have provided Petitioner with notice of the accreditation and surety bond requirements prior to October 1, 2009, to allow it to complete "the time-consuming accreditation process and purchase a surety bond." P. Resp. at 5. Petitioner argues that CMS "clearly recognized the need to inform suppliers of the new regulations in advance of their implementation date," *Id*., and cites as evidence language in a CMS update to its Medicare Program Integrity Manual (PIM) instructing NSC to take steps to notify suppliers of the surety bond requirement. The update states:

> The NSC shall conduct outreach to the DMEPOS community regarding the new surety bond requirements. The NSC shall notify DMEPOS suppliers about the requirements: (1) through listserv announcements, (2) via announcements and presentations attended by the NSC with interested organizations, and (3) by posting general information on the surety bond requirement on the NSC Web site. Educational material shall be developed and released no later than April 20, 2009.

[4] The reconsideration decision discusses why "a letter from the City and Council of San Francisco regarding other insurance coverages for the facility" that Petitioner submitted was "not comparable to a surety bond" and "does not satisfy the NSC requirements for an acceptable surety bond for DMEPOS suppliers" as required by the supplier standard. CMS Ex. 6, at 2. On appeal, Petitioner does not address this conclusion of the hearing officer and does not assert that it has "provided CMS with a comparable surety bond under State law" as required for the exception to apply. 42 C.F.R. § 424.57(d)(15).

P. Ex. 4, at 12 (CMS Pub. 100-08, Medicare Program Integrity, Trans. 287 (Mar. 27, 2009), www.cms.gov/Transmittals/Downloads/R287PI.pdf, accessed Oct. 15, 2010). Petitioner asserts that it "was never notified of either requirement through any listserv announcement or other announcement by NSC" and notes that CMS in its motion for summary disposition does not dispute that Petitioner was entitled to notice of the two requirements before October 1, 2009. P. Resp. at 5-6. Petitioner disputes the proffered testimony of CMS's witness, Tanya Mattingly, an employee of NSC's parent company Palmetto GBA, that a letter was sent to Petitioner six weeks prior to the date of compliance. Petitioner notes that the letter is a form letter addressed to "Supplier," denies having received a copy of the letter, and states that CMS has submitted no evidence that Petitioner actually received it. CMS Ex. 2, at 1-3.

For the purpose of ruling on CMS's motion for summary disposition, I resolve in Petitioner's favor any dispute over the factual issue of notice and assume that neither CMS nor NSC provided specific, advance notice of the two requirements to Petitioner individually. The failure to provide such notice, however, did not relieve Petitioner of the requirement to attain timely compliance, notwithstanding any obligation that CMS may have imposed on its contractor to notify suppliers of the surety bond requirements. This is because two requirements were imposed by statute and duly promulgated regulations, of which participating suppliers are presumed to have notice. *See, e.g., Waterfront Terrace, Inc.*, DAB No. 2320, at 7 (2010) (provider of Medicare services should be expected to possess at least a rudimentary understanding of program rules and terminology), citing *Heckler v. Community Health Servs. of Crawford County*, 467 U.S. 51, 63, 64 (1984) (participant in the Medicare program had "duty to familiarize itself with the legal requirements" for cost reimbursement); *Thomas M. Horras and Christine Richards*, DAB No. 2015, at 34 (2006) (officer and principal of provider had responsibility to be aware of and adhere to applicable law and regulations), *aff'd Horras v. Leavitt*, 495 F.3d 894 (8th Cir. 2007).[5]

Additionally, CMS's failure to have notified Petitioner individually does not empower me to hold CMS estopped from enforcing the two requirements. As the Board and the ALJs have repeatedly observed, estoppel against the federal government, if available at all, is presumably unavailable absent "affirmative misconduct," such as fraud. *See, e.g., Pacific Islander Council of Leaders*, DAB No. 2091, at 12 (2007); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 421 (1990). No such misconduct has been established here,

[5] CMS cited 42 C.F.R. § 411.406(e)(1) and (2) for the proposition that "Petitioner is expected to know the content of CMS notices, including manual issuances, bulletins, or other written guidelines or directives from Intermediaries, Carriers, or set forth in the Federal Register." CMS Reply at 2. CMS did not show that this regulation, titled "Criteria for determining that a provider, practitioner, or supplier knew that services were excluded from coverage as custodial care or as not reasonable and necessary," is applicable here.

and such a showing would not in any event authorize me to refuse to apply regulations that by their plain language clearly authorized or required CMS to revoke Petitioner's billing privileges.

The existence of legal requirements for accreditation and surety bonds is not so novel as Petitioner suggests. The Act's requirement that suppliers submit evidence of their accreditation by October 1, 2009 was imposed by a statute that became law on July 15, 2008. Medicare Improvements for Patients and Providers Act of 2008, Pub. L. No. 110-275, § 154(b)(1)(ii), (e); 122 Stat. 2564, 2568 2596. Even before enactment of that law, the Act has, since December 8, 2003, required the Secretary to "establish and implement quality standards for suppliers" to be applied "by recognized independent accreditation organizations" and with which suppliers "shall be required to comply" in order to receive Medicare reimbursement. Act § 1834(a)(20), Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), Pub. L. No. 108–173, § 302(a)(1). Pursuant to that law, CMS on August 18, 2006 published current supplier standard 22, effective October 2, 2006, requiring that all DMEPOS suppliers "must be accredited by a CMS-approved accreditation organization in order to receive and retain a supplier billing number." 71 Fed. Reg. at 48,409.

Moreover, while the current specific surety bond requirements in the supplier standards were published January 2, 2009 (74 Fed. Reg. at 198), the rule was proposed on August 1, 2007 (72 Fed. Reg. 42,001, 42,009), and the Act provision requiring a surety bond had been in place since August 5, 1997.[6] Pub. L. No. 105-33, § 4312(a), 111 Stat. 251, 386, 787.

Thus, I find puzzling Petitioner's professed total ignorance of the existence of either of these requirements, especially given Petitioner's claimed status as a "one of the nation's largest skilled nursing facilities and rehabilitation centers." HR at 3. I question the claim that Petitioner could function at the level it describes and yet be totally unaware of the existence of laws and regulations setting the conditions of its participation in the Medicare program as a DMEPOS supplier. I can not overlook Petitioner's failure to apprize itself of and comply with federal laws and regulations governing its conduct as a DMEPOS supplier claiming Medicare funds.

[6] CMS did not issue an earlier final rule to implement the surety bond requirement because, as CMS explained in the preamble to the January 2, 2009 rule, the MMA in 2003 "prohibit[ed] the Secretary from finalizing a proposed rule related to Title 18 that was published more than 3 years earlier except under exceptional circumstances." 74 Fed. Reg. at 166-67.

4. I have no authority to find CMS estopped from applying the clear requirements of the law and regulations, which are binding on the parties and on this forum.

Petitioner further argues that CMS is estopped from revoking Petitioner's billing privileges for failure to timely comply with the surety bond requirement because representatives of CMS and NSC told Petitioner, in response to its inquiries after receiving the revocation notice, that it was exempt as a government supplier from the surety bond requirement. Petitioner submitted a declaration of Diana Guevara, its Director of Patient Financial Services, stating that she "spoke by telephone with Mark Majestic, a representative of [NSC], who orally informed me that Laguna Honda was exempt from the surety bond requirement due to its status as a government-owned supplier." P. Ex. 3, at 2. Petitioner also submitted e-mail dated November 10, 2009, from Merle A. Corpuz, a CMS Health Insurance specialist from the CMS Division of Financial Management, Fee for Service Operations, Program Protection Brand, stating that "as a government-owned DMEPOS supplier, LH is exempt from obtaining a surety bond." *Id*. at 7. CMS does not dispute that the CMS and NSC representatives provided this advice as alleged; instead, CMS argues that "this CMS employee was not authorized to speak on behalf of CMS concerning the issue affecting Petitioner's DMEPOS supplier status or this case." CMS Br. at 8

As discussed above, federal courts and the Board have consistently held that the doctrine of estoppel is not available against the federal government, absent a showing of affirmative misconduct, and Petitioner has not demonstrated that incorrect understandings of regulatory requirements apparently shared by CMS or contractor employees rises to the level of affirmative misconduct. *See, e.g.*, *Huron Potawatomi, Inc.*, DAB No. 1889, at 5 (2003) (allegation that incorrect advice was provided not evidence of affirmative misconduct).

Additionally, even if I could hold CMS estopped, I would not be able to do so here, given that Petitioner clearly did not rely on the erroneous advice in failing to meet the deadlines for compliance with the two supplier standards. Petitioner admits it was unaware of the two requirements prior to October 9, 2009, the date of the revocation notice, only after which was the incorrect advice given that it was exempt from the surety bond requirement as a government-owned supplier.[7] The Board has noted that "[c]ertainly

[7] Petitioner submitted what appears to be a CMS web page with no date or URL visible, listing without qualification "Government-owned suppliers" as among "DMEPOS suppliers exempt from the bonding requirement" with no qualifying language. P. Ex. 1, at 9. A current version of this web page, last modified August 9, 2010, is worded differently and describes those suppliers as "Government-owned suppliers that have provided CMS with a comparable surety bond under state law" which "shall state that CMS is an obligee and cover obligations concerning claims . . . ."

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estoppel is unavailable where the party fails to show even the traditional elements of estoppel, such as reasonable reliance." *Family Health Servs. of Darke County, Inc.*, DAB No. 2269, at 19 (2009), citing *Heckler*, 467 U.S. at 60 (fiscal intermediary gave provider incorrect advice but provider failed to show reasonable reliance). I am "bound by applicable laws and regulations" *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14. Petitioner also points to no source of authority for me to waive the compliance requirement or grant an exemption on equitable grounds.

Finally, even if I could Petitioner exempt from the surety bond requirement based on the provision of incorrect information, Petitioner's admitted failure to have complied with the accreditation requirement provides sufficient legal grounds for CMS to revoke its billing privileges.

I do not premise my rejection of Petitioner's argument on CMS's suggestion that suppliers making program-related inquiries to CMS should assume that CMS Health Insurance Specialists are not authorized to speak on behalf of or otherwise represent CMS in its administration of the Medicare program. A narrower claim that such officials are not authorized to alter CMS policy or make pronouncements binding on the agency that are inconsistent with agency interpretations or policy might be well-founded. I note, however, that CMS itself relied on the declaration of a Palmetto employee as support for CMS's position in this contested proceeding. Given that CMS does not challenge either the e-mail from its employee stating that Petitioner was exempt from the surety bond requirement or the declaration from Petitioner's Director of Patient Financial Services stating that she received similar information from NSC's Mr. Majestic, I find unhelpful to my resolution of this appeal CMS's characterization of Petitioner assertions in this regard as "disingenuous." CMS Br. at 7. In any case, my conclusion is simply that Petitioner has identified no material fact in dispute and that CMS's action is authorized as a matter of law.

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(www.cms.gov/MedicareProviderSupEnroll/05_DMEPOS%20Surety%20Bond.asp, accessed Oct. 15, 2000). CMS did not question the validity of the undated page that Petitioner submitted. Petitioner, however, made no claim that it reviewed or relied on the web page at any time prior to the October 2, 2009 deadline for providing a surety bond.

IV. Conclusion

The undisputed facts demonstrate that Petitioner was not in compliance with two supplier standards and entitle CMS to summary disposition as a matter of law. I therefore grant summary judgment in favor of CMS and sustain the revocation of Petitioner's billing privileges.

/s/
Leslie A. Sussan
Board Member