

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

El Jardin Pharmacy, Inc.,
(Supplier No: 4971250001),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-11-367

Decision No. CR2418

Date: August 23, 2011

DECISION

Petitioner, El Jardin Pharmacy, Inc., is a licensed pharmacy and supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS), located in Hialeah, Florida. Petitioner participated in the Medicare program until November 11, 2010, when the Centers for Medicare and Medicaid Services (CMS) revoked its Medicare supplier number, charging that, contrary to program requirements, the supplier changed its practice location without notifying the CMS contractor. The contractor was therefore unable to conduct a mandatory on-site visit.

Petitioner here appeals the revocation of its supplier number.

For the reasons discussed below, I find that Petitioner was not compliant with Medicare requirements and that CMS properly revoked its supplier number.

I. Background

In a letter dated November 19, 2010, the Medicare contractor, Palmetto GBA National Supplier Clearinghouse, notified Petitioner that its supplier number would be revoked effective November 11, 2010, because Petitioner's business was not located at the address on file with the contractor. As a result, the contractor's representative could not inspect the supplier's facility to verify its compliance with supplier standards. CMS Exhibit (Ex.) 1.

In a letter dated December 1, 2010, Petitioner claimed that the Medicare contractor "had been informed several times prior to August 30, 2010" that it "would be experiencing in the near future a change of location as well as a change of address," but, because of the "lack of a proper Form (sic) from [the contractor] for the conduction of address changes[,] all communication was conducted over the telephone." CMS Ex. 2.

In a letter dated December 22, 2010, Petitioner sought reconsideration and reaffirmed that, "several times prior to August 30, 2010," it "would be experiencing in the near future a change of location as well as a change of address." CMS Ex. 4. In a reconsideration decision dated March 25, 2010, a Medicare hearing officer affirmed the revocation of Petitioner's supplier number. CMS Ex. 5. Petitioner now appeals that determination.

In an order dated April 1, 2011, I directed the parties to submit pre-hearing briefs and proposed exhibits, including written direct testimony, in the form of an affidavit or declaration, of any proposed witness. The order advised Petitioner of its right to cross-examine any CMS witness whose direct testimony was offered but warned that Petitioner "must state that desire affirmatively." If its brief failed "to state affirmatively" that it wanted to cross examine a witness, I would assume that Petitioner did not want to do so. Acknowledgment and Pre-Hearing Order at 2-3, ¶ 4 (Apr. 1, 2011). The order also advised the parties that a hearing for purposes of cross-examining witnesses "will be necessary only if the parties have presented written direct testimony, which I have determined to be admissible, and a party desires to cross-examine a witness or witnesses." Acknowledgment and Pre-Hearing Order at 4, ¶ 9. The order says that "I will consider the record . . . closed and the case will be ready for me to decide . . . immediately after CMS files its reply to Petitioner's exchange unless I determine that cross-examination of a witness or witnesses is in order." Acknowledgment and Pre-Hearing Order at 4, ¶ 10.

CMS submitted its brief (CMS Br.) and nine exhibits (CMS Exs. 1-9). Among those exhibits are the written declarations of two witnesses, Tanya Mattingly and Humberto Marrero. CMS Exs. 8, 9. Petitioner filed its brief (P. Br.) and five exhibits (P. Exs. 1-5).¹ Petitioner did not express any desire to cross-examine either of CMS's witnesses. Although Petitioner listed one potential witness, the supplier owner and president, Xavier Ampuero, it did not submit his written witness declaration as required by my order. CMS filed a reply brief (CMS Reply).

CMS objects to the admission of three of Petitioner's exhibits: P. Ex. 2, identified as a State of Florida pharmacy inspection report; P. Ex. 3, identified as a State of Florida pharmacy license; and P. Ex. 5, a letter from CMS dated January 12, 2011. CMS argues that these documents were not previously submitted to CMS, and Petitioner has not shown good cause for failing to present them earlier, as required by 42 C.F.R. § 498.56(e). *See* Acknowledgment and Pre-Hearing Order at 2, ¶ 3. Petitioner did not respond to CMS's objections. I find the objections well-taken. The regulations require that I exclude from the record any evidence presented for the first time at this level, unless I find good cause for Petitioner's failure to submit it earlier. 42 C.F.R. § 498.56(e). Here, Petitioner has not even alleged good cause. I therefore decline to admit P. Exs. 2, 3, and 5.²

In the absence of further objections, I admit into evidence CMS Exs. 1-9 and P. Exs. 1 and 4.

Because Petitioner expressed no desire to cross-examine either of CMS's witnesses and offered no witness declaration for its own witness, I consider the record in this case closed, and the matter ready for decision.

II. Discussion

CMS properly revoked Petitioner's Medicare enrollment. Petitioner failed to meet Medicare requirements, because it did not inform the CMS contractor that it had moved its

¹ Contrary to the instructions in my pre-hearing order, Petitioner marked its exhibits as Exs. A-E. We have re-marked them as P. Exs. 1-5 to conform to Civil Remedies procedures.

² In any event, because Petitioner makes no showing that these documents are relevant or material to the issues before me, they need not be admitted into evidence. 42 C.F.R. § 498.60(b) (providing that the ALJ receives in evidence documents that are relevant and material).

*practice location, which meant that the CMS contractor could not perform an on-site inspection.*³

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 (Act) § 1834(j)(1)(A); 42 C.F.R. § 424.505.

To obtain and retain its supplier number, a 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), (e)(1); 42 C.F.R. § 424.535(a)(1).⁴ Among other requirements, the supplier must provide “complete and accurate information in response to questions on its application for billing privileges” and “report to CMS any changes in information supplied on the application within 30 days of the change.” 42 C.F.R. § 424.57(c)(2). It must submit enrollment information on the applicable enrollment application. 42 C.F.R. § 424.510(a).

The supplier must also 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). CMS may revoke billing privileges, if it determines, based on an on-site review, that the supplier is no longer operational to furnish Medicare covered items or services, or is not otherwise meeting Medicare enrollment requirements. 42 C.F.R. § 424.535(a)(5).

Petitioner's Relocation. Prior to August 30, 2010, Petitioner was a Medicare-enrolled DMEPOS supplier located at 2350 West 84th Street, Hialeah, Florida. CMS Ex. 2 at 1; CMS Ex. 6 at 3; CMS Ex. 8 at 1 (Mattingly Decl ¶¶ 3-5); CMS Ex. 9 (Marrero Decl.); P. Br. at 1. On, or shortly after August 30, 2010, Petitioner moved but did not report the change of address to the Medicare contractor by filing the required document – form CMS-855S, which is an enrollment application that must also be filed to report changes in information, including the supplier's relocation. Medicare Program Integrity Manual (MPIM) § 15.1.2; CMS Ex. 7 at 5-6; *see* 42 C.F.R. § 424.510(a).

On November 11, 2010, an inspector employed by the contractor attempted an onsite inspection at the 2350 West 84th Street location but found that the facility was no longer

³ I make this one finding of fact/conclusion of law.

⁴ As of November 11, 2010, the effective date of the revocation, 42 C.F.R. § 424.57(e)(1) directed CMS to revoke “a supplier's billing privileges if it is found not to meet the standards in [42 C.F.R. § 424.57] (b) and (c).” That language was ultimately removed. 76 *Fed. Reg.* 5862, 5962 (February 2, 2011). I cite the language here because it was in effect at the time of the revocation. CMS is still authorized to revoke a supplier's billing privileges, if it does not meet enrollment requirements. 42 C.F.R. § 424.535(a)(1).

there. CMS Ex. 9 (Marrero Decl. ¶¶ 4, 6). Obviously, he was not able to inspect the supplier's premises.

According to Tanya Mattingly, the contractor's representative, the contractor did not receive from Petitioner the required form CMS-855S until December 2010. Even then, the contractor rejected that submission, because Petitioner had not provided evidence of a surety bond. CMS Ex. 8 at 1 (Mattingly Decl ¶¶ 3-5).

In a letter dated December 22, 2010, Petitioner suggested, for the first time, that it had, in fact, submitted the required form on August 30, 2010. Petitioner offered no evidence to support that claim. CMS Ex. 4. Now, Petitioner claims to have submitted the form on August 31, 2010 (P. Br. at 2) and has filed what it characterizes as a copy of that submission. P. Ex. 1. But the document it submits was signed and dated March 10, 2011 – over six months *after* the date Petitioner claims to have submitted it to the contractor and four months after CMS sent the revocation notice letter. P. Ex. 1 at 29.⁵

Nor has Petitioner presented any declaration or other evidence from any individual claiming to have sent in the document. Further, in its earlier letter to the contractor dated December 1, 2010, Petitioner did not claim to have submitted the form CMS-855S or any other written notification of its relocation; it claimed to have provided the information by telephone. CMS Ex. 2. Finally, when Petitioner ultimately submitted the form, in December 2010, the contractor rejected it because Petitioner failed to provide evidence of a mandatory surety bond. CMS Ex. 8 at 1 (Mattingly Decl ¶ 5).

Petitioner nevertheless points to an obvious error in the hearing officer's reconsideration decision to claim that the CMS contractor had on file the address of the new location. CMS Ex. 5.⁶ In that decision, the hearing officer confused Petitioner's new address with the old one. He pointed to the "site investigation reports and accompanying photographs taken by the site inspector on the day of the site inspection" and concluded that the facility location was non-operational. Unfortunately, the hearing officer misstated the address of the site, filling in the new location, which the investigator did not visit, instead of the old location, which everyone agrees is the address the investigator visited. CMS Ex. 5 at 2. If, in fact, this were anything other than a clerical error, it would mean that the hearing officer concluded that the supplier was not operational at its new location, which also justifies revoking its billing privileges. But no evidence before the hearing officer or before me supports the finding that the contractor had on file Petitioner's new address. In

⁵ The exhibit's page numbers differ from the page numbers on the form itself. Page 29 of P. Ex. 1 is page 32 on the form.

⁶ In its brief Petitioner also included an incorrect address, stating Petitioner's address was 2310 West 84th Street rather than 2350 West 84th Street. P. Br. at 1; *see* CMS Ex. 6 at 3; CMS Ex. 8 at 1 (Mattingly Decl. ¶ 4); CMS Ex. 9 (Marrero Decl. ¶ 4); CMS Ex. 1 at 1.

