

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jersey City Medical Supplies, Inc.,

Petitioner,

v.

The Centers for Medicare & Medicaid Services.

Docket No. C-16-449

Decision No. CR4651

Date: June 28, 2016

DECISION

I sustain the determination by a contractor operating on behalf of the Centers for Medicare & Medicaid Services (CMS), as affirmed on reconsideration and ratified by CMS, to revoke the billing privileges of Petitioner, Jersey City Medical Supplies, Inc. However, I modify the effective date of revocation to February 6, 2016 (30 days after the contractor sent notice of revocation to Petitioner), from the October 2, 2015 revocation date determined by the contractor.

I. Background

Petitioner requested a hearing to challenge the contractor's determination to revoke its Medicare billing privileges. CMS moved for summary judgment (CMS Br.) and, with its motion, it filed 18 proposed exhibits that are identified as CMS Ex. 1 – CMS Ex. 18. Petitioner opposed the motion and filed one exhibit that is identified as P. Ex. 1. However, Petitioner, who is appearing *pro se* in this case, also attached documents to its hearing request that contain relevant information. I identify the hearing request as P. Ex. 2.

I receive CMS Ex. 1 – CMS Ex. 18 into evidence. The documents that are contained in P. Ex. 2 appear to be documents that Petitioner filed in connection with its reconsideration request and I receive them as well. I also receive P. Ex. 1. Petitioner did not file this exhibit with its reconsideration request. However, Petitioner explained to my satisfaction that it did not understand the relevance of the document to reconsideration, and I therefore find good cause for receiving it now.

Although CMS characterizes its motion as being one for summary judgment I find it unnecessary to decide whether the criteria for summary judgment are met here. Neither party offered the written direct testimony of witnesses and, consequently, there would be no purpose in convening an in-person hearing. I base my decision on the written evidence offered by the parties.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are: whether Petitioner failed to comply with supplier standards of participation, thereby justifying the contractor's determination to revoke its billing privileges; and whether October 2, 2015, as opposed to February 6, 2016, is the correct date of revocation of Petitioner's billing privileges.

B. Findings of Fact and Conclusions of Law

Petitioner is a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). Supplier standards ("application certification standards") at 42 C.F.R. § 424.57(c) govern generally a DMEPOS supplier's participation in Medicare. There are additional standards at 42 C.F.R. § 424.57(d) that establish surety bond requirements for all DMEPOS suppliers.

A DMEPOS supplier, such as Petitioner, must comply with all of the requirements of 42 C.F.R. § 424.57. A DMEPOS supplier must satisfy all of the standards contained in 42 C.F.R. §§ 424.57(c) and (d). Failure by a supplier to comply with any of these requirements is a basis for revoking that supplier's billing privileges.

CMS alleges that Petitioner failed to comply with four of the requirements of 42 C.F.R. §§ 424.57(c) and (d). Specifically, CMS contends that Petitioner failed to comply with the requirements of 42 C.F.R. §§ 424.57(c)(10) (comprehensive liability insurance), (c)(21) (requirement to provide information to CMS), (c)(22) (accreditation), and (c)(26) (surety bond). I find that Petitioner failed to comply with the accreditation requirements of 42 C.F.R. § 424.57(c)(22). The weight of the evidence is that it complied with the requirements that it maintain comprehensive liability insurance at 42 C.F.R. § 424.57(c)(10) and possess an acceptable surety bond at 42 C.F.R. § 424.57(c)(26). It is

unnecessary that I decide whether Petitioner failed to comply with the information requirements of 42 C.F.R. § 424.57(c)(21) inasmuch as its failure to comply with the accreditation requirement is ample basis for revoking its billing privileges.

A DMEPOS supplier must be accredited by a CMS-approved accreditation organization in order to participate in Medicare. 42 C.F.R. § 424.57(c)(22). The evidence in this case establishes that Petitioner was not accredited as of January 7, 2016, the date when the contractor sent notice to Petitioner of revocation of its billing privileges. Consequently, Petitioner failed to comply with the accreditation requirement and revocation is justified on that basis alone.

An entity known as the Healthcare Quality Association on Accreditation (HQAA) accredited Petitioner beginning August 13, 2009. CMS Ex. 2 at 42. The HQAA certificate was good for a period of three years. *Id.* Petitioner's accreditation from HQAA expired on July 10, 2015. CMS Ex. 15 at 1-2; CMS Ex. 18 at 5. Petitioner then sought and obtained accreditation from a different organization, the Accreditation Commission for Health Care (ACHC). Petitioner asserted that its accreditation by ACHC commenced effective July 14, 2015. CMS Ex. 4 at 1; P. Br. at 4 (arguing that it was "completely covered" by the two accreditation organizations). But, Petitioner offered no proof that this allegation is correct. It proved only that it was accredited by ACHC beginning February 3, 2016. CMS Ex. 10 at 7. Petitioner offered a screenshot that appears to show that it submitted an application to ACHC on July 14, 2015, and that its application status was "In Progress." P. Ex. 2 at unnumbered 7; CMS Ex. 8 at 5-6. This screenshot is roughly consistent with CMS Ex. 16, which shows that Petitioner submitted its completed application for accreditation with ACHC on July 23, 2015, and ACHC surveyed Petitioner for accreditation on October 1, 2015. However, Petitioner's accreditation was not actually *effective* until February 3, 2016. CMS Ex. 16 at 2; CMS Ex. 10 at 7. The evidence therefore establishes that there was a period during which Petitioner was not accredited by any organization, and it was not accredited as of January 7, 2016, the date on which the contractor sent Petitioner notice of its revocation determination. Revocation is justified in this case by Petitioner's failure to be accredited as of the date that the contractor sent notice to it.

The weight of the evidence does not substantiate CMS's contention that Petitioner lacked comprehensive liability insurance as is required by 42 C.F.R. § 424.57(c)(10). CMS acknowledges that Petitioner maintained a comprehensive liability insurance policy. CMS Br. at 20; *see also* CMS Ex. 10 at 6. However, CMS asserts that the policy is invalid because it lists Petitioner's business address as being different from that which Petitioner had listed with the contractor as its place of business. CMS's Br. at 20.

There is no dispute that, as of January 2016, Petitioner was doing business at an address other than the address it had filed as its official place of business. Petitioner's failure to update the location information that it was obligated to provide to the contractor and

CMS is a violation of the DMEPOS requirements and, arguably, would be an independent basis for revocation of its billing privileges. However, CMS did not rely on Petitioner's failure to update its business address location as grounds for revoking its billing privileges. *See* CMS Ex. 11.

The insurance requirement of 42 C.F.R. § 424.57(c)(10) requires that a policy cover the supplier's "place of business and all customers and employees of the supplier." Petitioner literally complied with this requirement in that its policy appears to apply to its *actual* place of business. That makes perfect sense. Indeed, it would make no sense for the policy to apply to the former place of business and not the actual place of business, in that Petitioner no longer did business from the former location.

I reiterate that CMS could have revoked Petitioner's billing privileges for its failure to provide the contractor with information concerning its change of business address. But, it may not bootstrap that requirement onto an entirely separate regulation as it plainly attempts to do here.

Similarly, I find that Petitioner proved that it had a surety bond that complied with regulatory requirements as of October 2, 2015. P. Ex. 1. The bonding requirements at 42 C.F.R. § 424.57(d) are comprehensive. However, the requirements' only reference to a DMEPOS supplier's practice location is as follows:

A DMEPOS supplier enrolling a new practice location must submit to the CMS contractor a new surety bond from an authorized surety or an amendment or rider to the existing bond, showing that the new practice location is covered by an additional base surety bond

42 C.F.R. § 424.57(d)(2)(iii). This language would appear to apply to added practice locations as opposed to relocations. However, if it does apply to relocations Petitioner literally complied with it inasmuch as Petitioner furnished the contractor with proof that it had obtained a surety bond for its actual place of business.

Ordinarily, revocation of a DMEPOS supplier's billing privileges for failure to comply with regulatory requirements becomes effective 30 days after the contractor sends the supplier notice of noncompliance. 42 C.F.R. § 424.57(e)(1). The contractor's revocation letter in this case is dated January 7, 2016. CMS Ex. 3. In the ordinary run of things, Petitioner's privileges would terminate on February 6, 2016. CMS contends that in this case revocation should be made retroactive to October 2, 2015, due to Petitioner's asserted noncompliance with the liability insurance and surety bond requirements. CMS Br. at 20.

I find no basis for sustaining revocation as of October 2, 2015, inasmuch as Petitioner was in compliance with the liability insurance and surety bond requirement as of then. I find grounds for revocation based on Petitioner's failure to be accredited on January 7, 2016.

I have considered Petitioner's arguments in reaching this decision. Petitioner addresses at length the issue of its liability insurance and surety bond. It does not respond effectively to the evidence showing that it was not accredited.

/s/

Steven T. Kessel
Administrative Law Judge