

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Human Services Board Serving North Central Health Care  
(PTAN: 0750600001),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-638

Decision No. CR2266

Date: October 13, 2010

**DECISION**

For the reasons set forth below, I grant the Centers for Medicare & Medicaid Services' (CMS's) motion for summary judgment. The undisputed evidence establishes that Petitioner, Human Services Board Serving North Central Health Care, a durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) supplier, was not in compliance with the Medicare program surety bond requirement. CMS was therefore authorized to revoke Petitioner's Medicare supplier number.

**I. Applicable Law and Regulations**

Section 1834(a)(16)(B) of the Social Security Act (Act), 42 U.S.C. § 1395m(a)(16)(B), states that the Secretary of Health and Human Services (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 DMEPOS 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 DMEPOS suppliers must meet to maintain Medicare billing privileges. As relevant here, section 424.57(c) provides:

(c) *Application certification standards.* The supplier must meet and must certify in its application for billing privileges that it meets and will continue to meet the following standards. The supplier:

\* \* \* \*

(26) Must meet the surety bond requirements specified in paragraph (d) of this section.

The surety bond requirements at 42 C.F.R. § 424.57(d), referenced in supplier standard 26, state, as relevant here, that "beginning October 2, 2009, each Medicare-enrolled DMEPOS supplier must meet the requirements of paragraph (d)," which include "a bond that is continuous," which "meet[s] the minimum requirements of liability coverage (\$50,000)," 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), (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).

The regulations provide that failure to submit a surety bond as required is grounds for revocation of a supplier's billing privileges. 42 C.F.R. § 424.57(d)(4)(ii)(B); *see also* 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."). The regulations also provide more generally that CMS "will revoke a supplier's billing privileges if it is found not to meet" the supplier standards or other requirements in section 424.57(c). 42 C.F.R. § 424.57(e) (formerly § 424.57(d)).<sup>1</sup>

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).

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<sup>1</sup> 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 have not yet been incorporated into the Code of Federal Regulations. *See* 42 C.F.R. Ch. IV § 424.57, Editorial Note (Oct. 1, 2009). References are to the regulation as redesignated.

CMS may at any time require a DMEPOS supplier to show compliance with the surety bond requirement. 42 C.F.R. § 424.57(d)(12).

## **II. Background**

By letter dated April 19, 2010, Petitioner requested review of the Medicare contractor's reconsideration decision dated February 19, 2010 (HR). The contractor found Petitioner noncompliant with 42 C.F.R. § 424.57(c)(22) which sets accreditation requirements,<sup>2</sup> and 424.57(c)(26), which requires that suppliers "[m]ust meet surety bond requirements specified in paragraph (d) of [42 C.F.R. § 424.57]." The contractor stated that, despite Petitioner's apology for "inadvertently missing the deadline of October 2, 2009, for submission of the surety bond," the applicable regulations permit "no time extension for the submission of a surety bond." The hearing officer added that the "document provided does not have many of the required elements directed by CMS to be considered an acceptable bond for DMEPOS suppliers as mandated. . . ."

With its hearing request letter, Petitioner submitted documentation including: a copy of the initial revocation notice; a copy of Petitioner's request for reconsideration; a copy of the contractor's reconsideration decision; a copy of a nursing home surety bond for patient funds to be held in trust through WAUSAU Insurance Companies; a Rider advising that WAUSAU Insurance Company is replaced by Liberty Mutual Insurance Company; and copies of invoices, a check, and a general agreement of indemnity from Liberty Mutual Insurance Company, all related to a nursing home surety bond.

I issued an order on April 23, 2010, acknowledging receipt of Petitioner's hearing request and setting a briefing schedule for the parties. In accordance with my order, CMS filed a motion for summary disposition, accompanied by exhibits 1-8. On July 15, 2010, Petitioner indicated that it had no additional information to submit and would stand on the written record.

## **III. Issue**

The issue in this case is whether CMS is entitled to summary disposition on the ground that the undisputed facts demonstrate that the revocation of Petitioner's Medicare billing privileges was legally authorized.

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<sup>2</sup> Petitioner argues that the hearing officer improperly introduces a new reason for revocation, i.e., the accreditation requirement, which was not part of the initial notice of revocation. HR. CMS does not address the contractor's finding regarding accreditation and I do not address it since my resolution of the surety bond issue makes it unnecessary to reach the question of whether Petitioner required or had accreditation.

#### IV. Applicable Standard

CMS's motion made clear that the disposition it sought was in the nature of summary judgment. CMS Br. at 4-5. 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).

#### V. Findings of Fact, Conclusions of Law, and Discussion

I make a single finding and conclusion set out below, followed by my supporting discussion:

***CMS was authorized to revoke Petitioner's billing privileges based on undisputed evidence that Petitioner had not obtained a surety bond as 42 C.F.R. § 424.57(c)(26) and (d) required.***

As noted above, the statute states that the Secretary shall not issue or renew a DMEPOS supplier number "unless the supplier provides the Secretary on a continuing basis . . . with a surety bond . . . ." 42 U.S.C. § 1395m(a)(16)(B).

This requirement for continuous compliance is implemented in the regulations that the Secretary issued. The introductory language of 42 C.F.R. § 424.57(c) states, in pertinent part, "[t]he supplier must meet and must certify in its application for billing privileges that it meets and will continue to meet" the supplier standards listed within. Those standards include section 424.57(c)(26) (supplier standard 26), which states that a

supplier “[m]ust meet the surety bond requirements specified in paragraph (d) of this section.” It follows that a supplier must meet the surety bond requirements specified in paragraph (d) on a continuing basis.

Consistent with this, the preamble to the final rule on appeals of CMS enrollment determinations states that CMS believes that “all providers and suppliers must meet and maintain all Federal and State requirements for their provider or supplier type to enroll or maintain their enrollment in the Medicare Program.” 73 Fed. Reg. 36,448, 36,452 (June 27, 2008).

In its hearing request, Petitioner does not deny this requirement but contends that an exception to the surety bond requirement for government-operated DMEPOS suppliers applies. HR. That exception is governed by 42 C.F.R. § 424.57(d)(15), which reads, in pertinent part:

(15) *Exception to the surety bond requirement---*(i) *Qualifying entities and requirements.* (A) 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.

Petitioner argues that the Liberty Mutual surety bond submitted with its hearing request meets the requirements of a comparable surety bond under the exception and was effective prior to the October 2, 2009, deadline. CMS takes exception to Petitioner raising this new argument when it was not before the hearing officer on reconsideration. CMS further contends that Petitioner does not meet the requirements for a government-operated DMEPOS supplier and that Petitioner has not provided CMS with a comparable surety bond as required under the exception.

Petitioner has not identified any factual evidence which could be construed as placing in dispute whether Petitioner is a “government-operated” DMEPOS supplier as contemplated under the exception. Petitioner simply relies on its unverified assertion that it is one of the county boards responsible for the provision of a range of treatment and rehabilitation services as enacted by State statute. HR. As explained above, a mere assertion or denial in a pleading does not suffice to block summary judgment. The non-movant must proffer some evidence that, viewed in the most favorable light, could support an inference that would defeat the movant’s position. Petitioner did not present documentary evidence of its ownership status and did not offer testimonial evidence on the topic.

Furthermore, the undisputed facts show that Petitioner has not submitted proof that it had in place on October 2, 2009 a “comparable surety bond under State law” to meet this exception. The Liberty Mutual surety bond Petitioner relies upon is on its face wholly inadequate. The bond does not purport to protect CMS from loss due to overpayments or

civil money penalties incurred by a DMEPOS supplier, but rather protects nursing home residents' funds.

The purposes of the surety bond requirement are to:

(1) Limit the Medicare program risk to fraudulent DME suppliers; (2) enhance the Medicare enrollment process to help ensure that only legitimate DME suppliers are enrolled or are allowed to remain enrolled in the Medicare program; (3) ensure that the Medicare program recoups erroneous payments that result from fraudulent or abusive billing practices by allowing CMS or its designated contractor to seek payments from a Surety up to the penal sum; and (4) help ensure that Medicare beneficiaries receive products and services that are considered reasonable and necessary from legitimate DME suppliers.

72 Fed. Reg. 42,003 (Aug. 1, 2007).

The surety bond Petitioner submitted does not even relate to Petitioner as a DMEPOS supplier, let alone provide the protections envisioned by this regulation. Even assuming Petitioner can raise this argument at this point in the appeal process, and even if Petitioner had established that it is a government-operated DMEPOS supplier, it is clear that Petitioner failed to submit a "comparable surety bond" as the exception requires. The terms of the bond are clear on its face and thus are not in dispute. No matter how favorably the terms of the bond are viewed, they neither meet the specific requirements for the content of compliant surety bonds nor provide assurance comparable in any meaningful sense. I therefore uphold the contractor's determination that Petitioner failed to establish compliance with the surety bond requirement under section 424.57(c)(26).

The regulation at 42 C.F.R. § 424.535 plainly authorizes CMS to revoke a supplier's Medicare enrollment whenever the supplier fails to maintain compliance with enrollment requirements. Section 424.535(a)(1) provides that a supplier's billing privileges are revoked when the supplier "is determined not to be in compliance with the enrollment requirements described in this section, or in the enrollment application applicable for its provider or supplier type, and has not submitted a plan of corrective action as outlined in part 488 of this chapter."

It is an enrollment requirement that "[t]he supplier must meet and must certify in its application for billing privileges that it meets and will continue to meet" the supplier standards in 42 C.F.R. § 424.57(c), which includes the surety bond requirement of section 424.57(c)(26). CMS may revoke the supplier's Medicare billing privileges if the supplier fails to meet any of these standards. 42 C.F.R. § 424.57(e); *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 424.57(d)(11) further makes abundantly clear the consequences of a failure to maintain a compliant surety bond:

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. Notwithstanding paragraph (e) of this section, the revocation is effective the date the bond lapsed and any payments for items furnished on or after that date must be repaid to CMS by the DMEPOS supplier.

42 C.F.R. § 424.57(d)(11); *see also* 42 C.F.R. § 424.57(c)(26).

The regulatory language is plain. A supplier must comply with all standards, or CMS will revoke its billing privileges. And I must sustain CMS's determination where the facts establish noncompliance with one or more of the regulatory standards.

I therefore conclude that CMS acted within its regulatory authority to revoke Petitioner's Medicare supplier number, because Petitioner was not compliant with the surety bond requirements of 42 C.F.R. § 424.57(c)(26) and (d) by October 2, 2009.

## **VI. Conclusion**

For the reasons explained above, I grant summary judgment in favor of CMS and sustain the revocation of Petitioner's enrollment in Medicare.

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/s/  
Leslie A. Sussan  
Board Member