

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

ProMedical Equipment Supplies, LLC
Docket No. A-16-90
Decision No. 2786
April 19, 2017

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

Petitioner ProMedical Equipment Supplies, LLC (Petitioner) appeals an administrative law judge decision (ALJ Decision) upholding a decision by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's Medicare participation and billing privileges under 42 C.F.R. § 424.57(c)(2) for failing to timely report to CMS the information that an owner who had been excluded from Federal health care programs had transferred his ownership interest to another individual. CMS imposed the revocation effective June 18, 2015, but the ALJ modified the effective date to August 21, 2015, which is 30 days after CMS's revocation decision. The ALJ based the modification on CMS's determination, on reconsideration of the revocation decision, to change the basis for the revocation from one involving the fact of the owner's felony conviction to one limited to Petitioner's failure to disclose that owner's transfer of his ownership interest.¹ For the reasons stated below, we affirm the ALJ Decision.

Background

Applicable law

This case involves federal requirements applicable to suppliers of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) who participate in the Medicare program. In order to maintain Medicare enrollment and associated "billing privileges," a DMEPOS supplier must be in compliance with the standards in paragraphs (1) through (30) of 42 C.F.R. § 424.57(c). In addition, DMEPOS and other suppliers must comply with the requirements contained or referenced in 42 C.F.R. §§ 424.515 and 424.516.

¹ Neither party challenges the ALJ's alteration of the effective date, and the new date is consistent with the law applying to a revocation based on section 424.57(c)(2). Accordingly, we affirm that part of the ALJ Decision without further discussion.

CMS is authorized to revoke a DMEPOS supplier's Medicare enrollment for noncompliance with any of the standards in section 424.57(c). 42 C.F.R. § 424.57(d); *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.") In addition, CMS is authorized to revoke a supplier's enrollment for any of the "reasons" listed in paragraphs (1) through (12) of section 424.535(a), which applies to all types of Medicare "suppliers," including DMEPOS suppliers. *Id.*

*Relevant Facts*²

Prior to the revocation that is being appealed, Petitioner was enrolled in the Medicare program as a DMEPOS supplier. ALJ Decision at 2, citing CMS Ex. 1. On July 22, 2015, CMS contractor Palmetto GBA National Supplier Clearinghouse (NSC) issued an initial determination to revoke Petitioner's Medicare enrollment and billing privileges for two reasons: 1) Petitioner's violation of 42 C.F.R. § 424.535(a)(2) by, according to NSC's records, having an owner (Augustus Ejere) who had been excluded from participation in the Medicare, Medicaid and other Federal health care programs; and 2) Petitioner's allegedly not having comprehensive liability insurance, a violation of 42 C.F.R. § 424.57(c)(10). *Id.*, citing CMS Ex. 1, at 1, 2. NSC made the revocation effective retroactive to June 18, 2015, the date of the owner's exclusion. *Id.*, citing CMS Ex. 1, at 1.

Petitioner sought reconsideration and submitted information in support of its request. Petitioner presented a liability insurance policy and asserted it informed NSC in March 2014 of a change in ownership. *Id.*, citing CMS Ex. 3. On September 25, 2015, an NSC hearing officer, based on the information submitted, found Petitioner in compliance with section 424.57(c)(10) but upheld the revocation under 42 C.F.R. § 424.57(c)(2) which requires suppliers to report to CMS within 30 days, via an enrollment application (Form CMS 855S), changes in the information provided on a previous enrollment application.³ *Id.*, citing CMS Ex. 4, at 2-3. The hearing officer stated, "According to information on file with the NSC at the time, the NSC did not receive documentation to have Augustus Ejere removed from the supplier's file." *Id.*, citing CMS Ex. 4, at 3.

² This statement of relevant facts is based on the ALJ's findings of fact and the record. We make no new findings of fact but do discuss in footnote 6 one ALJ statement of a nonmaterial fact that, as stated by him, did not accurately reflect the record.

³ The ALJ did not consider Petitioner's initially alleged violation of section 424.535(a)(2) to be an issue because the reconsideration decision did not appear to rely on that ground. The ALJ also noted, as do we, that the "parties' briefs reflect that the only issue in this case is the alleged violation of 42 C.F.R. § 424.57(c)(2)." ALJ Decision at 3 (citations omitted).

Mr. Ejere ceased to be an owner of Petitioner on January 3, 2014, on which date he transferred his ownership interest to another individual. *Id.* at 4, citing P. Ex. C, at 48; P. Ex. A, at 22.⁴ Petitioner, however, did not report the termination of Mr. Ejere’s ownership interest on a CMS-855S until November 9, 2015. *Id.*, citing Hearing Request at 3 and P. Ex. A at 6-29. Petitioner had filed a CMS-855S in or about February 2014⁵ that reported under Section 9, “Ownership Interest and/or Managing Control Information (Individuals),” the addition of two individuals; however, Petitioner did not report on that CMS-855S that Mr. Ejere was no longer an owner.⁶ *Id.*, citing P. Ex. B at 31-44.

Petitioner timely requested a hearing and filed Petitioner Exhibits A through G, all of which the ALJ admitted. *Id.* at 2. CMS moved for summary judgment and submitted CMS Exhibits 1-4, all of which the ALJ admitted. *Id.* Neither party identified any proposed witnesses or submitted any written direct testimony as specified in the ALJ’s prehearing order. *Id.* at 3. Accordingly, the ALJ made his decision based on the written record.

Standard of Review

Our standard of review on a disputed conclusion of law is whether the ALJ decision is erroneous. Our standard of review on a disputed finding of fact is whether the ALJ decision is supported by substantial evidence on the record as a whole. *See Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider’s*

⁴ The ALJ noted that Petitioner’s exhibits were all uploaded together with its hearing request as a single unit and that the exhibits were not paginated. The ALJ cited to the letter designation of Petitioner’s exhibits but referred to the specific pages as they appeared as part of the single upload. *See* ALJ Decision at 3. To avoid confusion, we adopt the ALJ’s citation method.

⁵ For his statement of February 2014 as the approximate date this CMS-855S was submitted, the ALJ appears to have relied on the date (February 21, 2014) on a Palmetto letter acknowledging the submission but stating it was incomplete and requesting additional information. *See* P. Ex. B, at 31. Petitioner refers to this CMS-855S as having been filed “in April of 2014.” Hearing Request at 2. CMS, on the other hand, states it is unclear when Petitioner submitted this CMS-855S and refers to that date as “[i]n or around March 2014” based on a date on one of the “Authorized Official Certification Statement and Signature” pages of the CMS-855S. Response to Petitioner’s Request for Review at 3 and n.4. We note there are two pages with the quoted title, and while one of those pages indicates a signing date of “03-03-2014”, the other indicates a signing date of “01-03-2014”. *See* P. Ex. B, at 43; *compare* P. Ex. B, at 44. Since the parties agree that this CMS-855S was submitted in early 2014 and since the precise date is not material to our decision, we use the February 2014 date used by the ALJ.

⁶ The ALJ Decision says both of the individuals Petitioner added in February 2014 were added as owners. *See* ALJ Decision at 4. However, that is inaccurate, because while Petitioner reported the addition of both individuals under section 9 of the CMS-855S, Petitioner indicated that one was added as a “5% or Greater Direct/Indirect Owner” and the other as a “W-2 Managing Employee.” *See* P. Ex. B at 39-41. Neither party discusses the ALJ’s inaccurate statement about this section 9 information, and the inaccuracy is not material to our decision. Nonetheless, we use the information as to the capacity in which each individual was added, as it appears in Petitioner Exhibit B at pages 39-41.

or Supplier's Enrollment in the Medicare Program, <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/guidelines/enrollment/index.html?language=es>; *Golden Living Ctr. – Frankfort v. Sec’y of Health & Human Servs.*, 656 F.3d 421, 426-27 (6th Cir. 2011)(stating that this is “the correct standard of review”).

Discussion

The ALJ properly concluded that CMS had a basis for the revocation and, therefore, did not err in upholding it.

A. Petitioner’s request for review does not specifically dispute any of the findings of fact or conclusions of law in the ALJ Decision.

Parties who seek review of an ALJ Decision before the Board must comply with the regulations and with Board Guidelines regarding the content of requests for review. The regulations provide as follows: “A request for review of an ALJ decision or dismissal must specify the issues, the findings of fact or conclusions of law with which the party disagrees, and the basis for contending that the findings and conclusions are incorrect.” 42 C.F.R. § 498.82(b). Similarly, Board Guidelines require a request for review to “specify each finding of fact and conclusion of law [in the ALJ Decision] with which you disagree, and your basis for contending that each such finding or conclusion is unsupported or incorrect.” *Guidelines — Appellate Review of Decisions of Administrative Law Judges Affecting a Provider’s or Supplier’s Enrollment in the Medicare Program, Starting the Review Process, (d) Contents of request for review.* The Guidelines further provide that “[a] submission (including the request for review) may not incorporate by reference a brief or parts of a brief previously submitted to the ALJ.” *Id.*

The content of Petitioner’s request for review does not comply with the regulations and Board Guidelines. Although Petitioner purports in the Introduction section of that document to be appealing the ALJ Decision, the “brief” that follows is titled “Petitioner’s Pre-hearing Brief dated 01-28-2016” and consists of excerpts from the Pre-hearing Brief and Opposition to Summary Judgment Motion Petitioner filed in the ALJ proceeding on January 28, 2016. The request for review identifies no specific finding of fact or conclusion of law in the ALJ Decision with which Petitioner disagrees. Thus, Petitioner has failed to put before the Board any genuine issues for review.

- B. The undisputed fact that Petitioner did not file a CMS-855S disclosing Mr. Ejere's January 3, 2014 transfer of his ownership interest within 30 days of that transfer provided a legal basis for the revocation.

Aside from the fact that Petitioner's request for review does not specifically dispute any of the ALJ's findings of fact or conclusions of law, we find no basis for overturning the ALJ Decision since the material facts of record are undisputed, and the law applied to those facts requires affirmance of that decision.

These are the undisputed material facts: (1) Mr. Ejere was Petitioner's owner of record with CMS until January 3, 2014, on which date Mr. Ejere transferred his ownership interest to another individual (P. Ex. C at 48; *see also* P. Ex. A at 22); and (2) Petitioner did not file a CMS-855S disclosing Mr. Ejere's transfer of ownership until it filed its hearing request on November 9, 2015, nearly two years after the transfer (Hearing Request at 3; P. Ex. A at 6-29). These undisputed facts establish a clear violation of section 424.57(c)(2), which requires DMEPOS suppliers such as Petitioner to "report to CMS any changes in the information supplied on the [enrollment] application within 30 days of the change." 42 C.F.R. § 424.57(c)(2); *see also* 42 C.F.R. § 424.516(c); *Main Street Pharmacy, LLC*, DAB No. 2349, at 2 (2010).

Petitioner does not dispute that section 424.57(c)(2) required it to file a CMS-855S disclosing the January 3, 2014 transfer of Mr. Ejere's ownership interest within 30 days of the transfer or that failure to file such an 855S within the 30-day time limit provides a basis for revocation of billing privileges. Nor does Petitioner dispute that it did not file a CMS-855S that actually disclosed Mr. Ejere's transfer of ownership until November 2015, well beyond the 30-day time limit. Petitioner reiterates here its argument to the ALJ that the CMS-855S it filed in April 2014 to report the addition of an owner and manager should have sufficed to inform CMS that Mr. Ejere was no longer an owner, even though the form did not report his transfer of ownership. RR at 4; Hearing Request at 2-3; Petitioner Pre-Hearing Brief and Opposition to Summary Judgment Motion at 3. Petitioner states that "nowhere on the form 855S application does it affirmatively or in any way indicate that that the former owner had to include a separate Section 9 so that he would be removed from the [CMS] database" and that "the aforementioned change of ownership could have, and should have, been reasonably inferred." RR at 4.

The ALJ rejected Petitioner's argument that the CMS-855S did not indicate that a supplier needs to disclose transfer of any ownership interest in the supplier; the ALJ stated as follows:

In the instructions for "Currently Enrolled Medicare DMEPOS Suppliers" on the CMS-855S, it states under the title Change of Information Other than Adding a New Location" that "[a]ny change to your existing enrollment data must be reported within 30 days of the effective date of the change." P. Ex. B, at 32. Further, at the top of section 9 (i.e., the ownership interest section) of the CMS-855S application that Petitioner completed, it states: "If you are changing information about a currently reported individual owner . . . **or removing an individual owner** . . . check the applicable box" P. Ex. B at 39 (emphasis added). Immediately below this text are boxes to check, one of which is to "Remove." P. Ex. B, at 39.

ALJ Decision at 5. The ALJ also noted that in adding the new owner and manager Petitioner had completed section 9 twice, "suggesting that Petitioner read and understood the instructions for that section." *Id.*

Petitioner has raised no specific challenge to the ALJ's findings, and they are supported by the undisputed record. We agree with the ALJ's conclusion "that the CMS-855S is sufficiently clear that Petitioner ought to have known that it needed to report Mr. Ejere's sale of his ownership in ProMedical." *Id.* Furthermore, the Board has held that a supplier enrolling in the Medicare program has the responsibility to "be aware of and adhere to the applicable law, regulations and policies governing supplier participation in Medicare." *Main Street Pharmacy*, DAB No. 2349, at 8 (internal quotation marks omitted). We also note that Petitioner has not explained why it would have been reasonable for CMS to infer from Petitioner's mere reporting that it had added a new owner and manager that Mr. Ejere was no longer an owner. Such an inference could, in fact, be found unreasonable since section 9 of the CMS-855S requires reporting of any ownership interest of "5% or greater" and, thus, anticipates that suppliers may have multiple owners. In any event, the regulations do not require CMS to draw inferences from incomplete information on the CMS-855S. Section 424.57(c)(2) provides not only that a DMEPOS supplier must report within 30 days any changes in the information previously submitted on an CMS-855S but also that "[t]he supplier must provide complete and accurate information in response to questions on its application for billing privileges." By failing to specifically report

Mr. Ejere’s transfer of ownership in section 9 of the CMS-855S that it submitted in February 2014, Petitioner did not “provide complete and accurate information in response to the questions on [section 9] of its application” It was Petitioner’s responsibility to disclose Mr. Ejere’s transfer of ownership on a CMS-855S in timely fashion, and its failure to do so provided a basis for the revocation.

C. The ALJ correctly held that he was not authorized to grant Petitioner’s request for equitable relief.

Petitioner restates here the request for equitable relief he made to the ALJ. More specifically, Petitioner argues against a “formulaic application of section 424.59(c), asserting that “[t]raditional notions of fairness, equity, and substantial justice mitigate in favor of the Petitioner [’s] continued ability to conduct its business and serve Newark’s disabled citizens.” RR at 6; *see also* Petitioner Pre-hearing Brief at 6. The ALJ correctly concluded that he is not authorized to award equitable relief. ALJ Decision at 5, citing *US Ultrasound*, DAB No. 2302, at 8 (2010). As indicated by *US Ultrasound* and other decisions, the Board has consistently held that it too lacks any authority to provide equitable relief. *See, e.g., Jersey City Medical Supplies, Inc.*, DAB No. 2766, at 8 (2017); *Zille Shah, M.D. and Zille Huma Zaim, M.D., PA*, DAB No. 2688, at 17 (2016).

Conclusion

For the reasons stated above, we affirm the ALJ Decision.

/s/

Christopher S. Randolph

/s/

Leslie A. Sussan

/s/

Sheila Ann Hegy
Presiding Board Member