Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Champion Medical Systems, LLC,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-536

Decision No. CR2892

Date: August 16, 2013

DECISION

The Centers for Medicare & Medicaid Services (CMS) has revoked Petitioner's Medicare supplier number. Petitioner, Champion Medical Systems, appeals, and CMS has moved for summary judgment.

For the reasons discussed below, I deny CMS's motion. However, my pre-hearing order directed the parties to submit the written direct testimony of any proposed witness. Acknowledgment and Pre-hearing Order at 3 (¶ 4.c.iv). CMS presents no witnesses of its own, so there are no witnesses for Petitioner to cross-examine at an in-person hearing. Petitioner has submitted the direct testimony of three witnesses, but CMS has expressed no desire to cross-examine any of them. *See* Acknowledgment and Pre-hearing Order at 5 (¶¶ 8, 9). We would therefore have nothing to do at an in-person hearing. I therefore close the record and decide the matter on the written record without further proceedings.

I find that CMS properly revoked Petitioner's Medicare supplier number.

Background

Until its Medicare supplier number was revoked on November 14, 2012, Petitioner participated in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). *See* 42 C.F.R. § 424.57. In a letter dated December 27, 2012, the Medicare contractor, Palmetto GBA National Supplier Clearinghouse, notified Petitioner that its supplier number would be revoked retroactively pursuant to 42 C.F.R. §§ 405.800; 424.57(e); 424.535(a)(1); 424.535(a)(5)(ii); and 424.535(g). The letter noted that one of the contractor's representatives attempted to visit the facility on November 13 and 14, 2012. The business was closed on both occasions, so the representative could not inspect the premises. CMS Ex. 3.

Petitioner sought reconsideration. In a reconsideration determination dated February 22, 2013, a Medicare hearing officer affirmed the revocation of Petitioner's supplier number. CMS Ex. 1. Petitioner now appeals that determination. 42 C.F.R. § 424.545.

CMS moves for summary judgment. With its motion and brief, CMS submits eight exhibits (CMS Exs. 1-8). Petitioner submits a response to CMS's motion, along with three written declarations (P. Exs. 1-3).[1] CMS also filed a reply.

In the absence of any objection, I admit into evidence CMS Exs. 1-8.

CMS objects to my admitting P. Exs. 1-3, citing 42 C.F.R. § 498.56(e). That provision directs the administrative law judge (ALJ) to examine any *documentary* evidence submitted for the first time at the ALJ level to determine whether the supplier has good cause for submitting the evidence for the first time at this level. 42 C.F.R. § 498.56(e)(1). If the ALJ finds no good cause, she must exclude the evidence from the proceeding and may not consider it in reaching a decision. 42 C.F.R. § 498.56(e)(2)(ii). Because P. Exs. 1-3 are testimony and not documentary evidence, the regulation does not apply. I therefore admit P. Exs. 1-3. *Arkady B. Stern, M.D.*, DAB No. 2329 at 4, n.4 (2010) (Observing that "[t]estimonial evidence that is submitted in written form in lieu of live in-person testimony is not 'documentary evidence' within the meaning of 42 C.F.R. § 498.56(e).").

[1] Petitioner did not mark the written declarations of its three witnesses. In this opinion, I refer to the Donnell Lee declaration as P. Ex. 1; the Melina Stimpson declaration as P. Ex. 2; and the Tony Nzeribe declaration as P. Ex. 3. Petitioner's additional submissions, described as "supporting documents," are already in the record as CMS Ex. 4 and Petitioner's hearing request.

Discussion

1. Because Petitioner has furnished evidence of a dispute concerning a material fact, CMS is not entitled to summary judgment.[2]

The Departmental Appeals Board has, on multiple occasions, discussed the well-settled principles governing summary judgment. *See, e.g., 1866ICPayday.com, L.L.C.*, DAB No. 2289 at 2-3 (2009). Summary judgment is appropriate if a case presents no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *1866ICPayday* at 2; *Illinois Knights Templar Home*, DAB No. 2274 at 3-4 (2009) and cases cited therein.

To defeat a motion for summary judgment, the non-moving party must tender evidence of specific facts, in the form of affidavits and/or admissible discovery material, in support of its contention that a dispute exists. *Crestview Parke Care Ctr.*, DAB No. 1836 at 6 (*citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (1986)). In submitting the written testimony of three witnesses who challenge the dispositive factual dispute in this case – whether the facility was open for business when the contractor's representative visited – Petitioner has established that a factual dispute exists. CMS is therefore not entitled to summary judgment.

2. CMS properly revoked the supplier's billing privileges, because the facility was not open for inspection during its posted hours of operation.

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 § 1834(j)(1)(A).

To obtain and retain its supplier number, a Medicare 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) and (d); 42 C.F.R. § 424.535(a)(1). Among other requirements, the supplier must permit CMS or its agents to conduct on-site inspections to ascertain its compliance with governing regulations. The supplier's location must be accessible during reasonable business hours, and the supplier must maintain a visible sign and post its hours of operation. 42 C.F.R. § 424.57(c)(8). Where, as here, a contractor's representative finds the facility closed during its posted hours, the supplier does not meet

[2] My findings of fact/conclusions of law are set forth, in italics and bold, in the discussion captions of this decision.

the requirements of section 424.57(c)(8), and CMS may appropriately revoke its billing privileges. *Ita Udeobong, d/b/a Midland Care Medical Supply and Equipment*, DAB No. 2324 (2010).

According to a site investigation report, signed by Inspector Benjamin Grimm, he visited the facility at 9:05 a.m. on November 13, 2012, and returned at 1:55 p.m. on November 14, 2012. CMS Ex. 6 at 2. The hours of operation were posted: 9:00 to 3:00 Monday through Friday, closed Saturday. CMS Ex. 6 at 3. On both occasions, the entrance was locked, and the inspector's knocks on the door were not answered. CMS Ex. 6 at 7. The inspector took pictures on both days, and the pictures indicate a date and time, although the report explains that the times indicated are one hour later than the actual times the pictures were taken, because the camera had not yet been adjusted to standard time. CMS Ex. 6 at 7-9.

Petitioner submits written declarations from three employees, suggesting, for the first time, that the facility was open on the dates and times in question and that at least one employee was there (albeit not necessarily an employee capable of interacting with customers).

Affiants Donnell Lee and Melina Stimpson are supplier employees who, according to their declarations,"assist in assembling, moving, cleaning, and storing equipment." P. Ex. 1 at 1 (Lee Decl. ¶ 2); P. Ex. 2 at 1 (Stimpson Decl. ¶ 2). They are not trained in sales "or other related aspects of [the] operation," and apparently are not authorized to assist beneficiaries in the purchase of durable medical equipment. P. Ex. 3 at 2 (Nzeribe Decl. ¶ 7). Both assert that they were "in the office on November 13, 2012 before and after 9:05 a.m." P. Ex. 1 at 1 (Lee Decl. ¶ 5); P. Ex. 2 at 1 (Stimpson Decl. ¶ 5). The office manager, Tony Nzeribe, maintains that he arrived at the office at 9:10 a.m. on November 13, and left with Mr. Lee to deliver equipment. P. Ex. 3 at 1 (Nzeribe Decl. ¶ 4). He and Affiant Lee say that Melina Stimpson remained in the office. P. Ex. 1 at 1 (Lee Decl. ¶ 5); P. Ex. 3 at 1 (Nzeribe Decl. ¶ 4). On November 14, the two left the office at about 9:55 a.m. to deliver equipment. P. Ex. 1 at 1 (Lee Decl. ¶ 6); P. Ex. 3 at 1-2 (Nzeribe Decl. ¶ 5). They do not say when they returned.

For her part, Affiant Stimpson declares that she was "doing inventory" that week and did not see or hear anyone knock on the door or attempt to enter the office. P. Ex. 2 at 1 (Stimpson Decl. ¶ 5). She claims that the office was open and easily accessible. P. Ex. 2 at 1 (Stimpson Decl. ¶ 5).

To the extent that they claim that the office was open and accessible when the inspector's report indicates that it was not, I find these declarations not credible; they are not consistent with any of Petitioner's prior assertions. The December 27, 2012 notice letter emphasizes that the inspector found the facility closed during posted business hours on November 13 and 14, 2012. CMS Ex. 3 at 2. Manager Nzeribe admitted that "[a]t the

times of representative visits," he left the facility with his deliveryman to assist with deliveries. He said that he was not gone for more than an hour and that "[a] notice was posted on our door during the time." CMS Ex. 4 at 4. He did not mention any other employee or claim that the office was open. Although he now denies saying "that the office was closed during their alleged visits. . . . ," he plainly admitted that it was. P. Ex. 3 at 2 (Nzeribe Decl. ¶ 9).

Nor could he have been confused. The reconsideration determination unambiguously states that, when the site investigation attempts took place, "on November 13, 2012 at 9:05 am, and November 14, 2012, at 1:55 pm," the "facility was not open." The decision quotes the inspector's report: "The entrance was locked on both attempts and knocks on the door were not answered." CMS Ex. 1 at 2. Yet, Petitioner's hearing request does not challenge this finding. It does not suggest that the facility was open or that anyone was present at the relevant times.[3] I simply do not find it credible that the supplier repeatedly forgot to mention the presence of staff, if, in fact, they were present.

Conclusion

Because the credible evidence establishes that the facility was not open for inspection during its posted hours, I sustain CMS's revocation of Petitioner's supplier number.

/s/
Carolyn Cozad Hughes
Administrative Law Judge

[3] The hearing request is supposed to identify the findings of fact and conclusions of law with which the affected party disagrees and specify the basis for contending that the findings and conclusions are incorrect. 42 C.F.R. § 498.40(b).