Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Omni Medical Supplies, LLC,
(Supplier No. 5810380001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-806

Decision No. CR3440

Date: October 31, 2014

DECISION

The National Supplier Clearinghouse (NSC) of Palmetto, GBA, an administrative contractor for the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment and billing privileges of Omni Medical Supplies, LLC (Petitioner) for not complying with two standards for suppliers of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS), which are stated in 42 C.F.R. § 424.57(c). In its reconsidered determination, NSC affirmed the revocation and specifically cited the basis for revocation as Petitioner's noncompliance with supplier standard 7, relating to accessibility and staffing. Petitioner appealed. Both parties now move for summary judgment.

For the reasons set forth below, I find that Petitioner does not dispute the factual findings resulting from two attempted site inspections of its location or the legal basis for the revocation of its Medicare billing privileges. Petitioner has also not raised a valid defense to the revocation action. Therefore, I grant summary judgment in favor of CMS affirming the revocation of Petitioner's Medicare enrollment and two-year reenrollment bar.

I. Case Background and Procedural History

Petitioner was located in Brooklyn, New York and enrolled in the Medicare program as a supplier of DMEPOS. It is undisputed that on September 10 and September 16, 2013, NSC attempted to conduct an on-site inspection of Petitioner's establishment. On each occasion, the site inspector found Petitioner's location closed, with its doors locked and no one present. As a result of these attempted on-site inspections, NSC notified Petitioner by letter dated October 23, 2013 that its Medicare enrollment and privileges were revoked effective September 16, 2013 because NSC determined that Petitioner was not operational and did not comply with Medicare supplier standards. NSC also imposed a two year bar on Petitioner's re-enrollment in the Medicare program. CMS Exhibit (Ex.) 3, at 1-2.

On December 18, 2013, Petitioner's representative submitted a request for reconsideration. CMS Ex. 4. Petitioner did not dispute the site inspector's findings but instead stated that "due to Omni not being awarded a Medicare DMEPOS competitive bidding contract for their line of business, *Omni had no alternative but to close the business effective August 31, 2013*." CMS Ex. 4, at 2 (emphasis in original). Petitioner also asserted that as part of closing its business, it submitted a form CMS-855S to NSC, post-marked August 15, 2013, that sought to terminate its Medicare enrollment voluntarily. CMS Ex. 4, at 2. Petitioner requested that the revocation be reversed and that NSC allow Petitioner to terminate its Medicare enrollment voluntarily effective August 31, 2013.

NSC issued its reconsidered determination on January 24, 2014, which affirmed the revocation of Petitioner's enrollment and billing privileges. CMS Ex. 6. The hearing officer found that Petitioner was closed at the time of both attempted on-site inspections and that Petitioner had not shown that NSC ever received the CMS-855S that Petitioner mailed on August 15, 2013. CMS Ex. 6, at 2-3. The hearing officer also pointed out that Petitioner's hours of operation were still posted at its location, and there was no sign that it was no longer in business or other reason for being closed at the time of the attempted on-site inspections. CMS Ex. 6, at 3. The hearing officer concluded that Petitioner had not shown compliance with supplier standard 7, relating to accessibility and staffing, and "cannot be granted access to the Medicare Trust Fund by way of a Medicare supplier number." CMS Ex. 6, at 5. The hearing officer did not address the effective date of Petitioner's revocation.

On March 18, 2014, Petitioner submitted its request for a hearing arguing that NSC did not give proper consideration to all of the underlying facts of the case when making its reconsidered determination. Petitioner challenged the NSC hearing officer's findings regarding whether there was a legitimate factual basis for the revocation action and whether Petitioner had established a valid defense. CMS moved for summary judgment and provided a supporting brief (CMS Br.) arguing there is no genuine issue of disputed

material fact and that Petitioner had not provided a defense to its noncompliance with the supplier standards. CMS also filed eight proposed exhibits (CMS Exs. 1-8). Petitioner filed a cross-motion for summary judgment and a supporting brief (P. Br.), arguing that Petitioner submitted a CMS-855S on August 15, 2013, that voluntarily terminated Petitioner's Medicare enrollment, making the September 10 and 16, 2013 on-site inspections moot because Petitioner previously had ceased participation in the Medicare program. Petitioner also submitted two proposed exhibits (P. Exs. 1-2). Absent objections, I enter all proposed exhibits into the record.

II. Findings of Fact and Conclusions of Law

1. *Summary judgment is appropriate*.

Summary judgment is appropriate if "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." *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010) (citations omitted). The moving party must show that there are no genuine issues of material fact requiring an evidentiary hearing and that it is entitled to judgment as a matter of law. *Id.* If the moving party meets its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial . . . .'" *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574,587 (1986). "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." *Senior Rehab.*, DAB No. 2300, at 3. To determine whether there are genuine issues of material fact for hearing, an administrative law judge (ALJ) must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *Id.*

Here, CMS moved for summary disposition and provided documentary evidence that sufficiently establishes the material facts of the case. CMS Br. at 1; CMS Exs. 1-8. CMS has offered documentary evidence showing Petitioner's business was closed and unstaffed at the time of both attempted on-site inspections. CMS Ex. 2. Petitioner does not dispute the evidence that CMS submitted establishing that Petitioner was closed and not staffed on September 10 and September 16, 2013. *See* P. Br. at 3 ("The representative was unable to conduct the inspections because Petitioner had ceased doing business as of August 31, 2013."). However, Petitioner has filed a cross-motion for summary judgment and has come forward with evidence that it mailed a CMS-855S to terminate its Medicare enrollment effective August 31, 2013, prior to the site inspections. P. Br. at 5; CMS Ex. 4, at 39; P. Ex. 2 ¶¶ 3-5. CMS has not sufficiently disputed that Petitioner indeed mailed the CMS-855S as it asserts. *See* CMS Br. at 12-13 (disputing whether NSC ever *received* the August 15, 2013 CMS-855S but not raising any genuine factual dispute about whether Petitioner *mailed* it). Thus, I find that the facts presented

by each party do not present a genuine issue of disputed material fact. The only issue I need to resolve in this case is a matter of law, which, as discussed below, must be decided in CMS's favor. Summary judgment is therefore appropriate.

2. *Petitioner does not dispute that it was not in compliance with supplier standard 7 (42 C.F.R. § 424.57(c)) at the time of the two attempted on-site inspections because it was not accessible and staffed.*

A supplier of DMEPOS must, among other things, be "accessible and staffed during posted hours of operation." 42 C.F.R. § 424.57(c)(7)(i)(C). NSC determined that Petitioner was not open, accessible, or staffed during its posted hours of operation, in violation of supplier standard 7. CMS Ex. 3. Petitioner has not offered any evidence or argument in its reconsideration request, hearing request, or briefing in this proceeding, suggesting that it was open, accessible, and staffed at the time of the attempted on-site inspections on September 10 and September 16, 2013. Petitioner has in fact repeatedly acknowledged that it ceased operating as a business on August 31, 2013. CMS Ex. 4, at 1-3; Hearing Request at 2-3; P. Br. at 3. Therefore, absent a valid defense, NSC's determination that Petitioner was not in compliance with supplier standard 7 at the time of two attempted on-site inspections and the revocation action taken pursuant to that finding must be summarily affirmed because the factual findings that underpin the revocation action remain unchallenged.

3. *Without coming forward with any proof of receipt, Petitioner has not created a genuine issue of material fact by simply proving that Petitioner mailed its termination notice.*

Petitioner has come forward with documentary and testimonial evidence that shows it mailed a CMS-855S to NSC on August 15, 2013, which sought to terminate its enrollment as a supplier of DMEPOS in the Medicare program. CMS Ex. 4, at 12-39; P. Ex. 2. Petitioner argues that its proof of mailing the CMS-855S is sufficient to establish that it notified NSC of its intent to terminate enrollment voluntarily and that it was ceasing all business operations as of August 31, 2013. P. Br. at 10. Petitioner contends NSC should not have attempted to inspect Petitioner's location and held it to the enrollment standards of a DMEPOS supplier because Petitioner was no longer enrolled in the Medicare program as a DMEPOS supplier. CMS, however, argues and comes forward with testimonial evidence from an NSC representative that NSC never received the CMS-855S that Petitioner mailed on August 15, 2013. CMS Ex. 1.

Whatever actually happened to the CMS-855S dated August 15, 2013, remains unknown. However, whether it is was mishandled by the United States Postal Service, returned to Petitioner but missed in its winding-down operations, or arrived at NSC but was misplaced, the evidence the parties presented in this case with the motions for summary judgment is sufficient for at least one determination: Petitioner has not come forward

with evidence that, if proven, would show that it effectively notified NSC that it was ceasing all business operations and voluntarily terminating its Medicare enrollment.

Petitioner, not CMS, bears the burden of establishing by a preponderance of the evidence any defense to an otherwise appropriate revocation. *See MediSource Corp.*, DAB No. 2011, at 2-3 (2006). Indeed, Petitioner has acknowledged its burden. *See* P. Br. at 12 ("[A]ll that is required is that the supplier show compliance by a preponderance of the evidence . . . ."). Thus, Petitioner's ultimate burden is to show that, more likely than not, NSC was on notice that Petitioner intended to cease operations on August 31, 2013 and voluntarily terminate its enrollment. Petitioner claims that its proof of mailing sufficiently meets that burden.

However, while Petitioner was not required to mail the CMS-855S using certified mail or some other tracking service that can provide evidence of receipt, this case highlights the supplier's dilemma by not doing so and the inability of a supplier to carry its burden of showing that it effectively notified the CMS contractor of certain information. Petitioner has come forward with evidence to prove that it mailed the CMS-855S to NSC on August 15, 2013, and I will infer that fact for purposes of summary judgment. Petitioner has not come forward, however, with any evidence to prove that NSC ever received it.

Petitioner claims that proof of mailing is sufficient to carry its burden because the regulations only require a supplier of DMEPOS to "report changes in their enrollment status," but do not require NSC to receive and properly process the reported changes for the supplier to have effectively "reported" those changes. P. Br. at 11 (citing 42 C.F.R. § 424.57(c)(2)). Petitioner also claims that CMS is applying an incorrect standard – "a new regulatory requirement without the benefit of rulemaking" (P. Br. at 11) – by *requiring* a supplier to send notifications to CMS contractors through a special method of delivery. Petitioner is correct that such a requirement does not exist in the regulations applicable to suppliers of DMEPOS; Petitioner is incorrect, however, in asserting that CMS has required Petitioner to prove NSC's receipt of certain notifications in order to comply with the regulations. CMS's position – with which I agree – is that Petitioner is required to show that NSC received the August 15, 2013 CMS-855S in order to ultimately *meet its burden of proof* with regard to its own defense to the revocation, by showing that NSC was effectively on notice of Petitioner's voluntary termination from the Medicare program. Definitive proof that Petitioner mailed this notice alone simply does not carry that burden.

Petitioner relies on a legal presumption of receipt, the "mailbox rule," to support its argument that it effectively notified NSC that it was terminating its Medicare enrollment. P. Br. at 17-19. However, there is no general authority that permits the application of the "mailbox rule" in provider and supplier enrollment cases, and doing so is inconsistent with other requirements that CMS has imposed on providers and suppliers when filing enrollment applications, which require actual receipt, not just the mailing, of an

application. *See* 73 Fed. Reg. 69,725, 69,769 (Nov. 19, 2008) (discussing "date of filing" in 42 C.F.R. § 424.520 as the date the contractor "receives" the enrollment application). To permit a supplier of DMEPOS to presume that NSC has received an enrollment application in some instances (such as terminating enrollment) but not in others (such as initial enrollment) is too arbitrary of a standard to apply. Therefore, in the absence of any authority permitting the application of the "mailbox rule" in cases such as this one, and to maintain consistency among Medicare provider and supplier enrollment cases, I decline to apply the "mailbox rule" in this case.

I note that Petitioner provides a diligent and thorough analysis of prior cases similar to this one and presents evidence here that either the ALJ or the Board noted was missing in those prior cases. P. Br. at 15-18. Petitioner's case is unique from those prior cases because I am inferring it mailed a CMS-855S that sought to voluntarily terminate its Medicare enrollment *prior to* the attempted on-site inspections. Thus, the ultimate legal question here is: does proof of mailing and proof of what was actually mailed more likely than not show that the CMS contractor had notice of the information mailed? As stated above, I conclude that it does not. Absent any proof of receipt, CMS and Petitioner are simply left accusing one another: CMS claims that Petitioner did not properly notify it; Petitioner claims that the CMS contractor mishandled the notification. CMS Br. at 12-17; P. Br. at 10-11.

Considering the burden to show proper notice is on the party making the assertion – Petitioner in this case – the mere inference of the fact Petitioner mailed its termination notice does not create an issue of material fact regarding whether CMS or its agent received that notice. I note further that, in addition to of a lack of delivery receipt here, Petitioner has not similarly come forward with any other evidence suggesting NSC had awareness of its termination notice such as, for example, an NSC acknowledgment or mail addressed to Petitioner's forwarding address. Therefore, I must grant summary judgment in CMS's favor and sustain Petitioner's revocation.

/s/
Joseph Grow
Administrative Law Judge