

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Promedics, Inc.,)	
(Supplier No. 4431810001))	Date: January 19, 2010
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-722
)	Decision No. CR2059
Centers for Medicare & Medicaid)	
Services.)	
)	
_____)	

DECISION

This supplier appeal is back before me following my May 2009 remand. I remanded the case so that, as provided for in 42 C.F.R. § 498.22, the Medicare contractor could reconsider its determination to revoke Petitioner’s Medicare supplier number. Thereafter, in a reconsideration decision dated July 28, 2009, a Medicare hearing officer affirmed the revocation. Petitioner appeals. The Centers for Medicare and Medicaid Services (CMS) has moved for summary judgment, which Petitioner opposes.

As discussed below, the uncontroverted facts compel revocation of Petitioner’s supplier number. I therefore grant CMS’s motion for summary judgment.

I. Background

Until its Medicare supplier number was revoked on November 30, 2008, Petitioner, Promedics, Inc., participated in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics and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 October 31, 2008, its Medicare carrier, Palmetto GBA National Supplier Clearinghouse, notified Petitioner that its supplier number would be revoked pursuant to 42 C.F.R. § 424.535(a)(5)(ii) and other regulations because the carrier determined that it was no longer operational. CMS Ex. 1. Petitioner timely appealed, but, in error, the carrier declined to reconsider its determination. CMS Exs. 3, 4, 5; P. Ex. 6. Petitioner then timely requested a hearing before an administrative law judge, and its appeal was assigned to me (Docket No. C-09-354). Thereafter, the parties jointly requested remand

to the carrier for reconsideration of the revocation. By order dated May 19, 2009, I remanded the matter.

In her subsequent reconsideration determination, dated July 28, 2009, the Medicare hearing officer affirmed the revocation of Petitioner's supplier number. Petitioner now appeals that determination.

CMS moves for summary judgment. With its motion and brief, CMS submits eight exhibits (CMS Exs. 1-8). Petitioner opposes, and with its brief submits nine exhibits (P. Exs. 1-9).

II. Discussion

CMS is entitled to summary judgment because the undisputed evidence establishes that the supplier, Promedics, did not satisfy Medicare enrollment requirements.¹

Summary judgment. 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.

The moving party may show the absence of a genuine factual dispute by presenting evidence so one-sided that it must prevail as a matter of law, or by showing that the non-moving party has presented no evidence "sufficient to establish the existence of an element essential to [that party's] case, and on which [that party] will bear the burden of proof at trial." *Livingston Care Center v. Dep't of Health & Human Services*, 388 F.3d 168, 173 (6th Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). To avoid summary judgment, the non-moving party must then act affirmatively by tendering evidence of specific facts showing that a dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (1986); *see also Vandalia Park*, DAB No. 1939 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004).

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

Illinois Knights Templar, at 4; *Livingston Care Center*, DAB No. 1871, at 5 (2003).

¹ I make this one finding of fact/conclusion of law.

In examining the evidence for purposes of determining the appropriateness of summary judgment, I must draw all reasonable inferences in the light most favorable to the non-moving party. *1866ICPayday, L.L.C.* at 3; *Brightview Care Center*, DAB 2132, at 2, 9 (2007); *Livingston Care Center*, 388 F.3d at 172; *Guardian Health Care Center*, DAB No. 1943, at 8 (2004); *but see, Brightview*, DAB 2132, at 10 (entry of summary judgment upheld where inferences and views of non-moving party are not reasonable). Moreover, drawing factual inferences in the light most favorable to the non-moving party does not require that I accept the non-moving party's legal conclusions. *Cf. Guardian Health Care Center*, DAB No. 1943, at 11 ("A dispute over the conclusion to be drawn from applying relevant legal criteria to undisputed facts does not preclude summary judgment if the record is sufficiently developed and there is only one reasonable conclusion that can be drawn from those facts.")

Requirements for a DMEPOS supplier's Medicare participation. In order to be eligible to receive payment for a Medicare-covered item, a DMEPOS supplier must submit to the carrier (which acts on behalf of CMS) a completed application. 42 C.F.R. § 424.57(b)(1). The supplier must also maintain a physical facility on an appropriate site and, if it has more than one, must separately enroll each physical location. 42 C.F.R. §§ 424.57(b)(1), 424.57(c)(7).

The supplier must meet and certify in its application for billing privileges that it operates in compliance with all applicable federal and state licensure and regulatory requirements. 42 C.F.R. § 424.57(c)(1). It must have in place a comprehensive liability insurance policy that covers its place of business as well as all customers and employees. "Failure to maintain required insurance at all times will result in revocation of the supplier's billing privileges retroactive to the date the insurance lapsed." 42 C.F.R. § 424.57(c)(10).

The supplier must permit CMS or its agents to conduct on-site inspections to ascertain its compliance with governing regulations. Its location must be accessible during reasonable business hours, and it must maintain a visible sign and post its hours of operation. 42 C.F.R. § 424.57(c)(8). It must maintain a primary business telephone, its number listed under the name of the business. Exclusive use of a beeper number, answering service, pager, facsimile machine, car phone, or answering machine does not satisfy this requirement. 42 C.F.R. § 424.57(c)(9).

CMS will revoke a supplier's billing privileges if it fails to meet these and the other requirements set forth in 42 C.F.R. § 424.57(b) and (c). 42 C.F.R. § 424.57(d); 42 C.F.R. § 424.535(a)(1). CMS may also revoke billing privileges if it determines, based on on-site review, that the supplier is no longer operational to furnish Medicare covered items or services, or is not otherwise meeting Medicare enrollment requirements. 42 C.F.R. § 424.535(a)(5).

Undisputed facts and application of law to those facts. Here, the basic and dispositive facts are not in dispute. Prior to July 31, 2008, Petitioner was a Medicare-enrolled DMEPOS supplier located at 1120 Commerce Drive, Richardson, Texas. CMS Ex. 3, at

1. For summary judgment purposes, I accept Petitioner's assertion that it relocated the business to 2121 West Northwest Highway, Suite 115, Garland, Texas, on August 1, 2008. P. Br. at 1; P. Ex. 2; *but see*, P. Ex. 1, at 13, 15, 16, 28 (enrollment application listing October 1, 2008, as the effective date of the change in location). According to Petitioner, it "immediately called and notified" the carrier about the relocation, including the new address and telephone number, and, for purposes of summary judgment, I accept this as true. P. Br. at 2.

However, Petitioner concedes that it did not submit to the carrier the documentation required of a relocating supplier – an enrollment application (CMS Form 855S) and supporting documents – until October 29, 2008. P. Ex. 1; CMS Ex. 3, at 1; P. Br. at 2. Petitioner was unable to submit the required documentation because it had not yet obtained a state license nor certificate of liability insurance. P. Br. at 2. Carrier staff advised Petitioner that all required documents (including the liability insurance policy and necessary licenses) had to be submitted with the enrollment application. P. Br. at 9, 10-11; P. Ex. 1, at 10, 13, 31.

In the meantime, on September 2, 2008, the carrier's fraud investigator, Larry Seals, attempted an onsite inspection at Petitioner's former location -- 1120 Commerce Drive, Richardson, Texas – and determined that the supplier was not operational at that address. CMS Ex. 2, at 2, 7, 8; CMS Ex. 8, at 2 (Seals Decl.). Because the investigator could not inspect the premises, Petitioner's supplier number was revoked.

Petitioner does not dispute any of this, but argues that the carrier should have accepted its enrollment application at the time of its move, without requiring the supporting documentation. I note first that the carrier's insistence that the supplier submit all documentation with its enrollment application is fully supported by the regulations. 42 C.F.R. § 424.57(b)(1) (supplier must submit a completed application). Moreover, here, Petitioner's inability to submit timely a complete enrollment application was not simply a question of paperwork. By its own admission, Petitioner could not submit the necessary certifications because it did not meet the requirements underlying those certifications. Its state license was not issued until September 30, 2008. P. Ex. 4. Its certificate of liability insurance was issued on October 28, 2008, with an effective date of October 14, 2008. P. Ex. 5. Either one of these factors, by itself, justified revocation of Petitioner's supplier number. 42 C.F.R. § 424.57(c)(1) and (c)(10). So, without regard to the filing of its enrollment application, from the time of its relocation until at least October 14, 2008, the supplier was not eligible to participate in the Medicare program.

Nor has Petitioner established that it became operational at its new location. At 3:00 p.m. on December 16, 2008; at 10:15 a.m. on December 17, 2008; at 1:23 p.m. and 3:26 p.m. on May 13, 2009; and at 2:25 p.m. on May 14, 2009, Investigator Seals went to the new location – 2121 W. Northwest Highway, Garland, Texas – to conduct the onsite inspection. The office was closed on every one of these occasions. He also attempted to call the supplier's listed telephone number, but no one answered and no answering machine picked up the call. CMS Exs. 2, at 10-27.

On May 13, 2009, Investigator Seals called an after-hours number that was listed on the supplier's door; the supplier's owner answered and told Investigator Seals that he had an appeal pending before the Departmental Appeals Board. The owner called Investigator Seals back the following day and said that his shop was not open because his supplier number had been revoked and Medicare would not pay him; he was, however, available by telephone to respond to previous customers' requests for service. CMS Ex. 2, at 23; CMS Ex. 8, at 3.

Petitioner complains about the carrier's efforts to inspect its new location. Petitioner admits that it is "not open to provide healthcare related services" because revocation of its supplier number "made it impossible . . . to sustain the cost of operation." P. Br. at 14. It also suggests that, because an appeal is pending, an on-site inspection is improper unless ordered by the administrative law judge. P. Br. at 18-19. These positions are without merit. To sustain its supplier number, Petitioner must be accessible during reasonable business hours and it must permit CMS or its agents to conduct on-site inspections. 42 C.F.R. §§ 424.57(7) and (8). By its own admission, it does not meet these requirements, and is therefore ineligible to participate in the Medicare program.

III. Conclusion

Because the undisputed facts establish that Petitioner has not satisfied Medicare enrollment requirements since its August 1, 2008 relocation, I grant CMS's motion for summary judgment and sustain the revocation of Petitioner's supplier number.

/s/
Carolyn Cozad Hughes
Administrative Law Judge