Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Bentley Pharmacy, Inc.,
(NPI: 1598760761),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-630

Decision No. CR2235

Date: September 3, 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, Bentley Pharmacy, Inc., was not in compliance with Medicare program requirements, and, as a consequence, CMS has the authority 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 durable medical equipment 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 suppliers of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) 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:
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> * * * *
>
> (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)).[1]

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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[1] 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

Petitioner is a Medicare DMEPOS supplier. NSC determined that Petitioner was not in compliance with 42 C.F.R. § 424.57(c)(26) (supplier standard 26) and revoked Petitioner's Medicare supplier number by notice letter dated November 10, 2009. CMS Ex. 1.

The notice letter stated that the revocation was effective 30 days from the date of postmark and that Petitioner was barred from re-enrolling in the Medicare program for one year from the effective date of the revocation. CMS Ex. 1; *see* 42 C.F.R. § 405.874(b)(2) (revocation effective 30 days after CMS or the CMS contractor mails the notice of its determination). The letter informed Petitioner that it could appeal the decision by requesting reconsideration within 60 days of the date of postmark, and/or it could submit a corrective action plan (CAP) within 30 days. CMS Ex. 1, at 2.

By letter dated November 20, 2009, Petitioner submitted a CAP to NSC, enclosed a surety bond dated September 23, 2009, and stated that it had mailed that surety bond to the contractor on September 24, 2009. CMS Ex. 2. Petitioner also submitted a rider indicating that effective October 13, 2009, the principal's name was modified from SAD Realty Holdings I, LTD d/b/a Bentley Medical to Bentley Pharmacy, Inc., d/b/a Bentley Medical Supply. *Id*. at 12. The contractor denied Petitioner's CAP on December 8, 2009, noting that the surety bond listed an incorrect legal business name for the principal and was not signed by a person listed as an affiliate of the supplier.[2] CMS Ex. 3; *see* CMS Ex. 2, at 10-13. The notice further advised Petitioner of its right to request reconsideration before a Medicare hearing officer and stated that the request was due by January 9, 2010. CMS Ex. 3.

By letter dated December 16, 2009, Petitioner filed a request for reconsideration. CMS Ex. 4, at 1. With its request, Petitioner included a revised surety bond that listed the legal business name as the bond's principal and was signed by the supplier's authorized official. CMS Ex. 4, at 2-3; *see* CMS Ex. 2, at 9. This revised surety bond was also

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[2] CMS's decision to not reinstate the supplier based on its CAP is not an initial determination and not reviewable by an ALJ. 42 C.F.R. § 405.874(e). Thus, the disposition of the CAP is not before me. The Departmental Appeals Board (Board) has held that a contractor has discretion as to whether to accept such later correction and reverse a revocation. *DMS Imaging, Inc.*, DAB No. 2313, at 5 (2010). During the reconsideration and appeal process, the issue is whether a basis for revocation legally sufficient to support CMS's action existed at the time of the revocation notice, not whether the basis was later eliminated pursuant to a CAP.

dated September 23, 2009, presumably back-dated because also in this submission Petitioner indicated that the surety bond previously submitted was incorrect, and enclosed "a copy of [its] Surety Bond with the corrected name." CMS Ex. 4, at 1.

The Medicare hearing officer issued an unfavorable decision on April 2, 2010. The hearing officer noted that, although Petitioner attempted to satisfy the surety bond requirement with the newly submitted surety bond, her scope of review was limited to whether the contractor's reason for imposing the initial revocation was valid at the time the revocation was issued. CMS Ex. 7 at 2. Further, "[i]f a provider or supplier provides evidence that demonstrates or proves that they met or maintained compliance after the date of denial or revocation, the contractor shall exclude this information from the scope of the review." *Id.*, quoting Medicare PIM, ch. 10, § 19.A. The hearing officer concluded that the supplier was not compliant with supplier standard 26 at the time of revocation. CMS Ex. 7, at 2.

Petitioner timely requested a hearing before an Administrative Law Judge (ALJ). Petitioner submitted a hearing request dated April 15, 2010 (HR) and included yet another amended surety bond and rider issued April 12, 2010 amending the name of the principal. This case was assigned to me for hearing and decision pursuant to 42 C.F.R. § 498.44, which permits designation of a member of the Board to hear appeals taken under part 498. I issued an initial order on April 20, 2010.

On May 20, 2010, pursuant to the briefing schedule, CMS filed a motion for summary judgment and supporting memorandum (CMS Br.). CMS accompanied its May 20, 2010 submission with CMS Exhibits 1-11, which I admit into evidence without objection. On May 25, 2010, Petitioner filed its response (P. Br.) to CMS's submission and included one exhibit, which I also admit without objection.[3]

In its motion, CMS argues that the September 23, 2009 surety bond submitted with Petitioner's reconsideration request should not be admitted because it is not relevant to determine whether the initial decision to revoke Petitioner's enrollment was correct when made. CMS Br. at 11-12. Similarly, CMS argues that the surety bond and rider effective April 12, 2010, submitted with Petitioner's hearing request, should be excluded as new evidence and that they are, in any case, not relevant because the rider became effective well past the October 2, 2009 deadline. *Id*. at 12-13. I address below CMS's objections.

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[3] Petitioner's exhibit 1 is a document indicating that Petitioner was found in compliance with the "Community Health Accreditation Program," a private non-governmental accrediting program. I note that an outside body's finding of compliance with that organization's standards is not related to whether Petitioner is in compliance with the standard for participation in the Medicare program for which Petitioner was cited nor to whether Petitioner's enrollment as a supplier was rightfully revoked.

III. Issue

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

IV. Applicable Standard

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 and followed by my supporting discussion:

> ***CMS was authorized to revoke Petitioner's billing privileges based on undisputed evidence that Petitioner did not obtain 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." One of these requirements is that the "surety bond must name the DMEPOS supplier as Principal, CMS as Obligee, and the surety . . . as surety." 42 C.F.R. § 424.57(d)(10). 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 determinations, when a provider or supplier fails to meet the requirements for Medicare billing privileges, states "we believe 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).

Petitioner admits that it was not in compliance with the surety bond requirement at the time CMS revoked its supplier number. *See* HR. In its response to CMS's motion, Petitioner states that it experienced difficulties because it was in the process of a sale that did not finalize and, as a consequence, did not provide the correct DMEPOS name as principal. Specifically, Petitioner asserts that –

> the new supervisor was working on purchasing the surety bond. The new supervisor did not know how the company should be legally listed on the bond. Then they realized their mistake and tried again with a rider, but was still not the legal name. When this was finally discovered by the manager and owner of Bentley Medical, we quickly got this taken care of, but it was after the fact.
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> We realize we were out of compliance with [M]edicare but we made a very hard attempt to correct this once we were informed of this matter, which was in February. We have the surety bond now and it has the correct legal name on it. I feel that we have an honest reason for this mistake and for the reason this has happened.

P. Br. at 1. On its face, this letter discloses that Petitioner had not successfully obtained a compliant surety bond in accordance with the requirements of 42 C.F.R. § 424.57(d) at the time of the revocation action.

The issue before me is not whether Petitioner intended to be compliant or can belatedly achieve compliance with the surety bond requirements, but whether CMS correctly found that, *at the time of the revocation action*, Petitioner was not in compliance. If CMS

correctly found that Petitioner was not in compliance with the regulatory requirements, CMS had authority to revoke Petitioner's supplier number.

As noted, CMS objects to the admission of the revised surety bond that Petitioner submitted with its request for reconsideration and the surety bond that Petitioner submitted with its hearing request. CMS argues that these surety bonds do not bear on the question of whether the initial decision of revocation was correct when made, and also that the April 12, 2010 surety bond was new evidence because it was not submitted on reconsideration. CMS Br. at 11-13.[4] I agree that the April 12, 2010 surety bond constitutes new evidence and is therefore not admissible absent a showing of good cause, which Petitioner's account of events does not establish. I conclude, however, that regardless of whether these surety bonds are admissible, they are both immaterial.

First, as noted, the issue before me is not whether Petitioner has belatedly achieved compliance with the surety bond requirement, but whether CMS correctly found that, at the time of the revocation, Petitioner was not in compliance and that CMS therefore had authority to revoke. Petitioner admits it did not have a compliant surety bond at the time of the revocation. Although Petitioner appears to have belatedly obtained a surety bond with the corrected name which the surety made retroactively effective, I find no authority by which that action may be found to cause Petitioner to be retroactively compliant. That a surety was willing to undertake to cover Petitioner's potential overpayments after the fact does not mean that CMS was protected at the relevant time from fraud or billing errors by Petitioner. Furthermore, it is unlikely that a surety would undertake such retroactive coverage for a supplier had fraud or abuse been discovered during the past period when no coverage for Petitioner's legal business was in place. Therefore, a belated retroactive surety bond does not satisfy the statutory and regulatory purpose of providing continuous protection to the Medicare program from the risk of loss due to a supplier's fraud or abuse.

Second, I must apply the regulations as they are stated. The applicable regulations clearly required Petitioner to have *in place* a *compliant* surety bond by October 2, 2009. Petitioner points to no source of authority for me to waive the compliance requirement or grant an exemption on equitable grounds. Moreover, I have no authority to declare the statute or the regulation invalid or ultra vires. *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009) ("An ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground."). Even if I did have such authority, there would be no basis where, as here, the regulation does what the statute grants the Secretary the authority to do, that is, to require DMEPOS suppliers to demonstrate that

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[4] The bond presented to the hearing officer is not "new evidence" for purposes of 42 C.F.R. § 498.56(e) (requiring a showing of good cause for submission of documentary evidence "for the first time at the ALJ level"). The bond submitted with the hearing request may be considered new evidence under this standard.

they have obtained a surety bond "in a form specified by the Secretary" and maintain such coverage "on a continuing basis." 42 U.S.C. § 1395m(a)(16)(B).

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 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*, DAB No. 2289, at 13 ("[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). In addition, a supplier that has 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 and the re-enrollment bar is a minimum of 1 year. 42 C.F.R. § 424.535(c).

The regulatory language is plain. A supplier must comply with *all* standards, or CMS will revoke its billing privileges. I am bound by applicable laws and have no authority to invalidate or change an existing regulation or grant Petitioner an exemption from compliance with regulatory requirements. *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009). I must sustain CMS's determination where the facts establish noncompliance with one or more of the regulatory standards.
I 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. I therefore uphold the

revocation of Petitioner's Medicare billing privileges and supplier number and the one-year bar on re-enrollment.

VI. Conclusion

For the reasons explained above, I grant summary judgment in favor of CMS.

/s/

Leslie A. Sussan
Board Member