

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Uzzie Medical Supply, LLC,)	Date: August 7, 2009
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-300
)	Decision No. CR1984
Centers for Medicare & Medicaid)	
Services.)	
)	

DECISION

I sustain the determination of the National Supplier Clearinghouse (NSC)¹ and the Centers for Medicare & Medicaid Services (CMS) to revoke the Medicare supplier number of Petitioner, Uzzie Medical Supply, LLC.

I. Procedural Background

Prior to the revocation at issue in this case, Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). Petitioner's billing number was revoked by NSC because, on two occasions during Petitioner's posted business hours, an NSC investigator went to Petitioner's business facility and found that Petitioner was not open. CMS Exhibits (Exs.) 3, 9. By letter dated October 24, 2008, NSC informed Petitioner that its billing number would be revoked because the inspector attempted to complete an inspection at Petitioner's facility but found that the company had moved to a new suite. On two instances, the inspector attempted to conduct the investigation at both addresses, but each time the facility was closed. Therefore, NSC could not verify Petitioner's compliance with the supplier

¹ NSC is the entity authorized by CMS to issue, revoke, and reinstate DMEPOS supplier numbers. 42 C.F.R. §§ 405.874(a); 421.210(e)(3); *see* 57 Fed. Reg. 27,290 (June 18, 1992); 58 Fed Reg. 60,789 (Nov. 18, 1993).

standards. CMS Ex. 3, at 1. Petitioner was told that it was in violation of 42 C.F.R. § 424.535(a)(5)(ii). That regulation provides in part that CMS may revoke a currently enrolled supplier's supplier number or supplier agreement if the supplier "has failed to satisfy *any* or all of the Medicare enrollment requirements." 42 C.F.R. § 424.535(a)(5)(ii) (emphasis added).

Petitioner requested reconsideration and submitted two affidavits and additional documentation for the Medicare Hearing Officer's review. CMS Exs. 4, 6-8. In his affidavit, Petitioner's owner, Mr. Lawrence Dioh, stated that the business was open on the dates of both attempted inspections, with all its door signs posted as required. CMS Ex. 7, at 2. He explained that while his new lease went into effect on August 1, 2008, the move was completed on August 20, 2008. A sign with the company name and hours of operation was posted on the new suite's door on August 1, 2008. According to Mr. Dioh, Medicare rules allowed him 30 days to reflect the changes on his licenses and report to Medicare. On September 11, 2008, he received his Texas State license. On September 12-13, 2008, Hurricane Ike hit the area, and as a result of wind and water damage, the office building was closed on September 14, 2008. On September 23, 2008, building management temporarily relocated most tenants, including Petitioner, while repairs were made. On September 29, 2008, Mr. Dioh called to notify Medicare about the situation and was told to make the changes after he moved back to his new permanent address. On November 26, 2008, Petitioner was able to move back into his new permanent suite. CMS Ex. 7, at 2-3.

Petitioner also submitted the affidavit of a neighboring business owner, Mr. Ganiyu Alashe. CMS Ex. 8, at 2. Mr. Alashe stated that he sees Mr. Dioh when Mr. Dioh "leaves or come[s to] his office." CMS Ex. 8, at 2. Mr. Alashe also stated that Mr. Dioh "was in his office on August 26th and 27th 2008." CMS Ex. 8, at 2.

Following review of the documentation presented by Petitioner, the Hearing Officer found that Petitioner was out of compliance with supplier Standards 2 and 8. CMS Ex. 9, at 2. The additional documentation provided did not substantiate Mr. Dioh's assertion that Petitioner was operational on August 26 and August 27, 2008. "The fact remains that the site inspector could not access the office on two separate occasions to verify that Uzzie Medical Supply was open and operational." CMS Ex. 9, at 3.

The Hearing Officer concluded that Petitioner had failed to present evidence verifying that the business facility was open and operational at either address during the two site visits on August 26 and August 27 and failed to substantiate its compliance with supplier standard 8 at the relevant time. The Hearing Officer also found that Petitioner failed to report changes to its DMEPOS supplier application (i.e., location) within 30 days as required by standard 2. The Hearing Officer therefore determined that the revocation of Petitioner's Medicare supplier number was appropriate. CMS Ex. 9, at 2-3.

On February 26, 2009, the Hearing Officer issued her decision. CMS Ex. 9. By letter dated March 6, 2009, Petitioner timely requested a hearing and perfected its appeal of the Hearing Officer's decision.

On March 25, 2009, I convened a telephone prehearing conference to discuss the issues of this case and procedures for addressing those issues. The parties were advised that based upon my review of the file, it appeared that the issues could be addressed in summary fashion, and I established a schedule for further development of the evidentiary record and the filing of briefs. The substance of the prehearing conference is memorialized in my Order of March 26, 2009.

On April 16, 2009, CMS filed its Motion for Summary Disposition and supporting Brief-in-Chief (CMS Br.) and CMS Exs. 1-13. On May 8, 2008, Petitioner filed its Answer Brief (P. Br.) and Petitioner's Exhibits (P. Exs.) 1-7. On May 18, 2009, CMS filed its Reply Brief.

All briefing is now complete, and the record in this case is closed. The evidentiary record before me on which I decide the issue contains the parties' pleadings and exhibits CMS Exs. 1-13 and P. Exs. 1-7.

II. Issue

The issue in this case is whether NSC and CMS had a basis to revoke Petitioner's Medicare supplier number.

III. Controlling Statutes and Regulations

Pursuant to section 1834(j)(1)(A) of the Social Security Act (Act), a supplier of medical equipment and supplies may not be paid for items provided to an eligible beneficiary unless the supplier has a supplier number issued by the Secretary. In order to participate in Medicare as a DMEPOS supplier and obtain a supplier number, an entity must meet the 25 standards specified at 42 C.F.R. § 424.57(c)(1) through (25). Standard 2 sets requirements not only for false statements or misrepresentations, but also for reporting changes and updates to Medicare enrollment information. 42 C.F.R. § 424.57(c)(2). Standard 8 sets the requirements for a supplier's location and provides that the location "must be accessible during reasonable business hours to beneficiaries and to CMS" 42 C.F.R. § 424.57(c)(8).

If a supplier is found not to meet the standards in 42 C.F.R. § 424.57(b) and (c), CMS or its contractor NSC, will revoke the supplier's billing privileges (i.e. supplier number), effective 30 days after CMS or NSC mails the notice of revocation. 42 C.F.R. § 424.57(d); *see also* 42 C.F.R. § 405.874(b)(2).

The revocation of a supplier number is governed by 42 C.F.R. § 424.535. CMS may use an on-site review to determine whether a “supplier is no longer operational to furnish Medicare covered items or services, or is not meeting Medicare enrollment requirements” 42 C.F.R. § 424.535(a)(5). A supplier is operational when it “has a qualified physical practice location, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked . . . to furnish these items or services.” 42 C.F.R. § 424.502.

The procedures for hearings and appeal are set out in 42 C.F.R. Part 498. Section 1866(j)(2) of the Act allows providers and suppliers equal appeal rights as described by section 1866(h)(1)(A) of the Act. The hearing before an Administrative Law Judge (ALJ) is a *de novo* proceeding. In cases subject to Part 498, the Departmental Appeals Board (Board) has found that CMS must establish a *prima facie* showing of a regulatory violation and the regulated entity then bears the burden of showing by a preponderance of the evidence that it was compliant with the Act or regulations, or that it had a defense. *Batavia Nursing and Convalescent Center*, DAB No. 1904 (2004); *Batavia Nursing and Convalescent Inn*, DAB No. 1911 (2004); *Emerald Oaks*, DAB No. 1800 (2001); *Cross Creek Health Care Center*, DAB No. 1665 (1998); *Evergreene Nursing Care Center*, DAB No. 2069, at 7-8 (2007). The Board has found this allocation of the burden of going forward with the evidence and the burden of persuasion properly applied in the DMEPOS supplier cases. *MediSource Corporation*, DAB No. 2011, at 2-3 (2006). The parties have urged no different allocation in this case.

IV. Findings and Conclusions

I find and conclude as follows:

1. Mark D. Porter, an investigator employed by NSC, attempted to conduct a site inspection of Petitioner’s business facility at the address on file, Suite 330C, 6250 Westpark Drive, Houston, Texas 77057, on August 26, 2008. CMS Ex. 1; CMS Ex. 3; CMS Ex. 9.
2. Mr. Porter also attempted to conduct a site inspection of Petitioner’s business facility at Suite 135, 6250 Westpark Drive, Houston, Texas 77057, on August 26, 2008. CMS Ex. 1; CMS Ex. 3; CMS Ex. 9.
3. Mr. Porter again attempted to conduct a site inspection of Petitioner’s business facility on August 27, 2008, at the address on file, Suite 330C. CMS Ex. 1; CMS Ex. 3; CMS Ex. 9.
4. Mr. Porter also attempted to conduct a site inspection of Petitioner’s business facility on August 27, 2008 at Suite 135. CMS Ex. 1; CMS Ex. 3; CMS Ex. 9.

5. Petitioner's posted business hours were Monday – Friday, 9:00 AM to 5 PM; lunch, 12:30 PM to 1:30 PM; Saturday, 10:00 AM to 3:00 PM; closed Sunday. CMS Ex. 1, at 3; CMS Ex. 9, at 3.
6. Petitioner's business facility was not operational, open, and accessible – at either the old or the new location – during its posted business hours to the NSC inspector, to Medicare beneficiaries, and to the public on Tuesday, August 26, 2008, at 2:20 PM.
7. Petitioner's business facility was not operational, open, and accessible – at either the old or the new location – during its posted business hours to the NSC inspector, to Medicare beneficiaries, and to the public on Wednesday, August 27, 2008, at 10:10 AM.
8. Petitioner's failure to be open during posted business hours on August 26 and August 27, 2008 was a violation of supplier Standard 8. 42 C.F.R. § 424.57(c)(8).
9. The inspections conducted on August 26 and August 27, 2008, established a basis for revocation of Petitioner's supplier number. 42 C.F.R. § 424.515(d).
10. Petitioner's billing number must be revoked pursuant to 42 C.F.R. § 424.57(d).
11. There are no disputed issues of material fact and summary disposition is therefore appropriate in this matter. *Brightview Care Center*, DAB No. 2132 (2007); *Residence at Kensington Place*, DAB No. 1963 (2005); *Community Hospital of Long Beach*, DAB No. 1938 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004).

V. Discussion

The supplier standards at issue before me are set forth at 42 C.F.R. § 424.57(c)(2) and (8). Standard 8 requires that the supplier's physical location be accessible during reasonable business hours, providing that a supplier:

Permits CMS, or its agents to conduct on-site inspections to ascertain supplier compliance with the requirements of this section. The supplier location must be accessible during reasonable business hours to beneficiaries and to CMS, and must maintain a visible sign and posted hours of operation.

42 C.F.R. § 424.57(c)(8).

Standard 2 requires that a supplier

provide complete and accurate information in response to questions on its application for billing privileges. The supplier must report to CMS any changes in information supplied on the application within 30 days of the change.

42 C.F.R. § 424.57(c)(2).

A. Petitioner has failed to overcome CMS’s *prima facie* showing that its business facility was not open and operational on August 26 and August 27, 2008.

CMS has established a *prima facie* case that Petitioner’s business facility was closed when visited on August 26 and August 27, 2008. As previously noted, Petitioner’s posted hours of operation Monday through Friday were from 9 AM to 5 PM. On August 26 and 27, during Petitioner’s business hours, Mr. Porter attempted to inspect the facility at the address on record, Suite 330C, 6250 Westpark Drive, in Houston, Texas. On both visits he found the suite locked. There was no sign connecting the suite to Petitioner. There was, however, a sign on the placard that read “Moved to Suite 135.” CMS Ex. 1, at 3, 12; CMS Br. at 6. NSC had not been notified of the move, but Mr. Porter went to Suite 135 on both visits and found it locked as well. The placard at Suite 135 read “Uzzie Medical Supply, L.L.C.” and listed the hours of operation. CMS Ex. 1, at 3, 13.

Petitioner’s owner, Mr. Dioh, asserts that Suite 135 was open on August 26 and 27 and that no one came in or attempted to come in for an inspection. CMS Ex. 7, at 2. Petitioner also asserts that specifically on August 27, 2008, Mr. Dioh was in a meeting with a client from 9:25 AM to 11:30 AM. P. Br. at 2; CMS Ex. 10, at 3. However, these assertions do not contradict the investigator’s statements that the location was locked and therefore not open for business at the times of his visits. Mr. Dioh’s presence at the office is irrelevant to the question of whether the location was “accessible during reasonable business hours to beneficiaries and to CMS,” or in this case CMS’s contractor NCS, as required by the standard. 42 C.F.R. § 424.57(c)(8). The Board addressed the same situation in *MediSource Corp.*, DAB No. 2011, at 10, n.12 (2006): “The clear purpose of the posting requirement is to inform the public of the actual hours of operation, and the supplier cannot operate during those hours if no staff is available . . . the NSC website informs suppliers that staff must be *available* at the facility during posted business hours.” (emphasis added).

CMS relies on the affidavit of the NSC inspector, Mr. Porter, who has an extensive background in, and is familiar with, the relevant supplier requirements and regulations.² He is a trained and experienced investigator, and has personally visited the address of Petitioner's facility. CMS Ex. 1. Mr. Porter stated that he follows the same procedures for each site visit. CMS Ex. 1, at 2.

I find Mr. Porter's affidavit credible and persuasive, and I cannot find inconsistencies between his affidavit and the site investigation report. CMS Ex. 1. Petitioner argues that both sets of undated notes in the comments section of Mr. Porter's investigation report appear to have been made after the second attempt, and thus, Petitioner maintains, the inspector cannot prove the times of the alleged inspection attempts. P. Br. at 2; *see* CMS Ex. 1, at 5, 11. As Petitioner notes, Mr. Porter does not explain in his affidavit what notes he made on what day. I nevertheless find his affidavit and investigation report to be credible and persuasive. The notes themselves are patently not offered as evidence of the dates or times of the visits, and I have not considered them for that purpose; they are merely part of the investigation report, which itself is entirely corroborative of Mr. Porter's affidavit, but hardly the primary source of information about the dates and times of Mr. Porter's visits. That primary source is the Porter affidavit itself.

Mr. Porter took multiple photographs to corroborate his investigation and to confirm that he visited the correct location.³ CMS Ex. 1, at 3, 12-14. CMS has proffered five photographs that Mr. Porter took during the investigation. The first photograph shows the placard at Suite 330 that reads, "Moved to Suite 135." CMS Ex. 1, at 12. The third photograph shows the placard at Suite 135 with Petitioner's name and its days and hours of operation. CMS Ex. 1, at 13. The fourth and fifth photographs show the exterior of the building. CMS Ex. 1, at 13-14. Petitioner does not dispute that these are photographs of its physical location but asserts that the photographs are not time and date stamped

² There appears to be a typographical error in Mr. Porter's affidavit. While the caption reads Uzzie Medical Supply, L.L.C. Petitioner, vs. The Centers for Medicare and Medicaid Services, Respondent, Docket No. C-09-300, in the third paragraph of the affidavit Mr. Porter says that he is providing the affidavit in connection with the matter entitled *Trans Medical Promotional Inc. v. Centers for Medicare & Medicaid Services*, DAB Docket No. C-09-54. Even if Mr. Porter intended it to be submitted for another case, which is doubtful, the affidavit describes Mr. Porter's attempts to visit Uzzie Medical Supply and references the facility's addresses. Since Mr. Porter was the investigator in *Trans Medical Promotional*, DAB CR1937, the much-more-likely explanation is a simple typographical error.

³ Mr. Porter states that the purpose of taking photographs was to verify that he visited the correct location. CMS Ex. 1, at 3. Because the photographs are not intended to provide evidence of the dates or times of the site visits, it is immaterial whether the photographs were taken on August 26 or August 27, 2008.

making it impossible to prove the times of each inspection attempt. P. Br. at 2. That argument is meritless: it failed in *Trans Medical Promotional*, DAB CR1937 (April 1, 2009), and for the reasons there set out it fares no better here.

I find fully credible Mr. Porter's statement that he would have taken the pictures in CMS Ex. 1 of Petitioner's physical site location when he could not complete the on-site visit on August 27, 2008. CMS Ex. 1, at 3. Therefore, based on the evidence before me, I find that Mr. Porter visited Petitioner's facility, checking Suite 330C and at Suite 135, on August 26, 2008, at 2:20 PM and observed the facility to be closed. I further find that Mr. Porter visited Petitioner's facility, checking Suite 330C and at Suite 135, on August 27, 2008, at 10:10 AM and observed the facility to be closed. CMS has shown *prima facie* that Petitioner's business facility was not operational, open, and accessible to the NSC inspector to conduct a site inspection, nor accessible to Medicare beneficiaries and the public on August 26 and August 27, 2008.

Petitioner argues that per 42 C.F.R. § 424.535(a)(1) *Noncompliance*, CMS was required to grant it an opportunity to correct the deficient compliance but that CMS did not do so before issuing the final determination on October 24, 2008. P. Br. at 3. However, the regulation that applies in this situation is 42 C.F.R. § 424.535(a)(5) *On-site review*, which does not require CMS to grant providers or suppliers an opportunity to correct.⁴ Nevertheless, Petitioner was given a second chance, because Mr. Porter visited both offices a second time and found them inaccessible again.

Accordingly, I conclude that there was a basis for the revocation of Petitioner's Medicare supplier number.

B. I need not determine whether Petitioner failed to report to CMS any changes in information supplied on the application within 30 days of the change since Petitioner was not in compliance with 42 C.F.R. § 424.57(c)(8).

In its prehearing brief, Petitioner asserts that it posted its business name and hours of operation at the new suite in anticipation of an August 1, 2008 move-in date, but that the move was delayed until August 20, 2008 while Petitioner awaited the issuance of required state licenses. P. Br. at 2. Petitioner argues that it was required to report the change of location to NSC on or around September 19, 2008, and that “[o]n or about September 20, 2008, the supplier contacted the region C DMERC [Durable Medical Equipment Regional Carrier] to advise them of the natural disaster and was advised to notify Medicare after the supplier returned to business location.” P. Br. at 2-3.

⁴ On-site inspections, or compliance surveys, are unannounced to assure program integrity.

However, the assertion in Petitioner's brief is unsubstantiated and Mr. Dioh has changed his story several times. In a December 16, 2008 letter to NSC, he claims he moved to his new location on August 1, 2008, and that the inspector probably did not attempt to visit the new location, but he makes no representation about the date on which he informed Medicare of the move. CMS Ex. 4, at 1-2. In a February 12, 2009 affidavit he claims that the sign with the hours was posted at his new location on August 1, 2008, but that the move was not finalized until August 20, 2008, and that he notified Medicare around September 29, 2008 about the situation. CMS Ex. 7, at 2-3. In a March 9, 2008 affidavit he claims that he was renting both suites, and that he completed the move to the new suite on August 20, 2008, and that he notified Jurisdiction C and NSC on September 15, 2008 of the situation "especially [the] change of address." CMS Ex. 10, at 2-3.

The facts surrounding Petitioner's compliance with this standard are unclear, but even its full compliance with this standard would not change the outcome of my decision. Because I have already determined that there is a basis for the revocation of Petitioner's supplier number under 42 C.F.R. § 424.57(c)(8), I need not decide this issue.

C. Summary Disposition is appropriate.

Petitioner's hearing rights in this case are governed by 42 C.F.R. Part 498. These regulations do not address explicitly the circumstances under which an ALJ may grant summary disposition or judgment. However, the regulations have been interpreted consistently in this forum and by the Board to allow summary disposition in those circumstances where summary judgment would be appropriate under FED. R. CIV. P. 56(c).

Summary disposition is appropriate where there are no disputed issues of material fact and where the only questions that must be decided involve either questions of law or the application of the law to the undisputed facts. *Livingston Care Center*, DAB No. 1871, at 6 (2003). A party opposing summary disposition must allege facts that, if true, would refute the facts relied upon by the moving party. *See, e.g.*, FED. R. CIV. P. 56(c); *Garden City Medical Center*, DAB No. 1763 (2001); *Everett Rehabilitation and Medical Center*, DAB No. 1628, at 3 (1997). A party may not simply state that it disputes allegations of fact in order to avoid the entry of summary disposition; it must describe the asserted facts credibly in order to establish a dispute. In evaluating whether there is a genuine issue as to a material fact, an administrative law judge must view the facts and the inferences reasonably to be drawn from the facts in the light most favorable to the nonmoving party. *See Pollock v. American Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986); *Madison Health Care, Inc.*, DAB No. 1927, at 5-7 (2004). This latter formulation of the summary-disposition principle has been emphasized by the Board in *Brightview Care Center*, DAB No. 2132 (2007), and in *Oklahoma Heart Hospital*, DAB No. 2183 (2008), and I have applied that standard here. Having applied it, I find and conclude that CMS is entitled to summary disposition in its favor.

