

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Madison Medical Center
(NPI: 1083680001),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-696

Decision No. CR2236

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, Madison Medical Center, was not in compliance with the Medicare program surety bond requirement and was not exempt from this requirement under the exemption at 42 C.F.R. § 424.57(d)(15)(A) for government-operated durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) suppliers. 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 DMEPOS 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 DMEPOS suppliers 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:

* * * *

(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. *See* 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).

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

By letter dated May 6, 2010, Petitioner requested review of the Medicare hearing officer's reconsideration decision dated April 2, 2010 (HR). The hearing office found Petitioner noncompliant with 42 C.F.R. § 424.57(c)(26) (supplier standard 26), which requires that suppliers "[m]ust meet surety bond requirements specified in paragraph (d) of [42 C.F.R. § 424.57]." The hearing officer stated in the reconsideration decision:

The bond sent to the NSC with the CAP [corrective action plan] was a Fiduciary Liability Coverage Declaration for the facility; however this information did not meet the requirements of a surety bond.^{12]} Sent to this hearing officer for review is a surety bond obtained through Western Surety Company. However, its effective date is March 4, 2010, and it is not signed by the principal, Madison Medical Center's authorized representative. This bond does not fulfill all requirements of a surety bond as noted in the terms set forth for the bond as mandated by 42 CFR 424.57(c) and 42 CFR 424.57(d). The supplier, Madison Medical Center, failed to obtain their surety bond in the time frame allotted; consequently the NSC revoked their billing privileges appropriately. . . . The supplier has surpassed the allotted time to satisfy the requirements for the surety bond (October 2, 2009).

With its hearing request letter, Petitioner submitted: a copy of the reconsideration decision; a copy of a new Western Surety Company bond with an effective date of October 1, 2009 and signed by the principal of Madison Medical Center on April 29, 2010; and a copy of the Western Surety Company power of attorney dated April 29, 2010.

I issued an order on May 14, 2010, acknowledging receipt of Petitioner's hearing request and setting a briefing schedule for the parties. In accordance with my order, CMS filed a motion to dismiss and/or motion for summary judgment, accompanied by exhibits 1 and

² Petitioner initially argued to NSC that it was exempt from the surety bond requirement as a government-operated DMEPOS supplier. *See* 42 C.F.R. § 424.57(d)(15)(A). To meet the government exemption, the DME supplier must provide CMS with a comparable surety bond under State law. *Id.* Petitioner had submitted the Fiduciary Liability Coverage Declaration mentioned in the reconsideration decision in an attempt to meet that requirement in its CAP. CMS Ex. 2, at 4-5. The documentation was found not to constitute a "comparable" surety bond under State law, however, so the CAP was denied. *Id.*

2.³ My staff attorney telephoned Petitioner after not receiving a response to CMS's motion, in order to confirm that Petitioner received CMS's motion. Petitioner indicated at that time that it did receive CMS's motion but had no additional information to submit.

III. Issue

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

IV. Applicable Standard

CMS's motion made clear that the disposition it sought was in the nature of summary judgment. CMS Br. at 2, 11. 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).

³ CMS moved to dismiss on the grounds that Petitioner has no right to appeal effective date determinations but only denials of enrollment applications or revocations. CMS Br. at 4-6. Since Petitioner's supplier number was revoked and no effective date determination is at issue in this case, I presume that CMS included this motion in error and I do not discuss it further.

V. Findings of Fact, Conclusions of Law, and Discussion

I make a single finding and conclusion set out below, followed by my supporting discussion:

CMS was authorized to revoke Petitioner's billing privileges based on undisputed evidence that Petitioner had not obtained 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.” 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 enrollment determinations states that CMS believes that “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).

In its hearing request letter, Petitioner states:

We would like to appeal the enclosed Reconsideration Decision dated 4/2/10. We had the surety bond company re-issue our bond with an effective date of 10/1/09 and it is signed (see enclosed). We are requesting that our DME supplier number . . . be reinstated.

HR. Essentially, Petitioner admits that it was not in compliance with the surety bond requirement, but asserts that now, at the time of the hearing request, it is in compliance because it has had the surety bond company re-issue a surety bond that originally had an effective date of March 4, 2010 with a new effective date of October 1, 2009. *Compare* surety bond attached to HR *with* CMS Ex. 1, at 5.

First, 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's enrollment. Petitioner does not dispute that it did not have a compliant surety bond at the time of the revocation. 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 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.

Secondly, 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. They do not merely require Petitioner to obtain a surety bond at some point with coverage retroactive to October 2, 2009.

As I noted, Petitioner did claim an exemption from the surety bond requirement for government-operated DMEPOS suppliers in a letter to NSC dated September 28, 2009, and again in its CAP and reconsideration request letter dated November 20, 2009. CMS Ex. 2, at 8, 11. That exemption is governed by 42 C.F.R. § 424.57(d)(15), which reads, in pertinent part:

(15) *Exception to the surety bond requirement*---(i) *Qualifying entities and requirements.* (A) Government-operated DMEPOS suppliers are provided an exception to the surety bond requirement if the DME supplier has provided CMS with a comparable surety bond under State law.

Petitioner has not submitted proof that it had in place on October 2, 2009 a "comparable surety bond under State law" to meet this exemption, nor has Petitioner, in its hearing request quoted above, disputed the finding in the reconsideration decision that the exemption does not apply. CMS Ex. 1, at 2; CMS Ex. 2, at 4, 5, 45-49. Therefore, I uphold the decision of the Medicare contractor finding that Petitioner does not meet the exemption for government-operated DMEPOS suppliers.

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(a)(1) 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, L.L.C.*, DAB No. 2289, at 13 (2009) (“[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.

See 42 C.F.R. § 424.57(d)(11); *see also* 42 C.F.R. § 424.57(c)(26).

The regulatory language is plain. A supplier must comply with all standards, or CMS will revoke its billing privileges. And I must sustain CMS’s determination where the facts establish noncompliance with one or more of the regulatory standards.

I therefore 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.

VI. Conclusion

For the reasons explained above, I grant summary judgment in favor of CMS and sustain the revocation of Petitioner’s enrollment in Medicare.

/s/
Leslie A. Sussan
Board Member