

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Florence Ezeaku-Olie d/b/a Floxie Medical Services,
(Supplier Number: 5371150001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-465

Decision No. CR2202

Date: August 06, 2010

DECISION

Petitioner Florence Ezeaku-Olie d/b/a Floxie Medical Services (“Petitioner”) appeals a reconsideration decision by a Medicare hearing officer with National Supplier Clearinghouse Palmetto GBA (NSC), a CMS contractor, dated January 20, 2010. The hearing officer sustained NSC’s August 28, 2009 decision to revoke Petitioner’s Medicare supplier number on the grounds that Petitioner did not submit documentation to reflect compliance with supplier standard 4 or supplier standard 21, as section 1834(j)(1)(A) of the Social Security Act (Act) and 42 C.F.R. § 424.57(c)(4) and (c)(21) require.

The undisputed evidence establishes that Petitioner was not in compliance with Medicare program requirements, and, as a consequence, CMS had the authority to revoke Petitioner’s Medicare supplier number.

I. Applicable Law and Regulations

Section 1834(j)(1) of the Act, 42 U.S.C. § 1395m(j)(1), states the requirements for the issuance and renewal of a supplier number for suppliers of medical equipment and supplies. That section provides that “. . . no payment may be made . . . for items furnished by a supplier of medical equipment and supplies unless such supplier obtains (and renews at such intervals as the Secretary may require) a supplier number.” Section 1834(j)(1)(A).

In order to participate in Medicare as a medical equipment supplier and maintain a supplier number, an entity must also meet the specific requirements, referred to as “supplier standards” at 42 C.F.R. § 424.57(c), for suppliers of “durable medical equipment, prosthetics, orthotics, and supplies” (DMEPOS). 42 C.F.R. § 424.57(a). As relevant here, supplier standard 4, which took effect October 2, 2006 (71 Fed. Reg. 48,354 (Aug.18, 2006)), provides that a supplier “[f]ills orders, fabricates, or fits items from its own inventory or by contracting with other companies for the purchase of items necessary to fill the order. If it does [contract to purchase these items], it must provide, upon request, copies of contracts or other documentation showing compliance with this standard. . . .” 42 C.F.R. § 424.57(c)(4). Supplier standard 21, which also took effect October 2, 2006 (71 Fed. Reg. 48,354 (Aug.18, 2006)), requires that a supplier “[p]rovides to CMS, upon request, any information required by the Medicare statute and implementing regulations.” 42 C.F.R. § 424.57(c)(21).

Further regulations provide 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

II. Undisputed Facts and Procedural History

Petitioner is a DMEPOS supplier. On March 5, 2009, NSC conducted an on-site inspection of Petitioner’s facility. The inspector noted a “minimal amount of inventory” in her report on the facility. CMS Ex. 1, at 6. CMS asserts, and Petitioner does not dispute, that the site inspector’s photographs show that inventory on hand included less than 10 power wheelchairs. CMS Br. at 5 n.4; CMS Ex. 1, at 7-9.

Based on the inspection, the inspector determined that the supplier was not in compliance with DMEPOS supplier standards 4, 10, 12, and 20. CMS Ex. 1, at 6. After reviewing the inspector’s report, NSC determined that “[t]he inventory displayed and the purchase agreements submitted . . . were not sufficient based on the amount [Petitioner] billed to Medicare.” CMS Ex. 2, at 1.

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 in the Code of Federal Regulations. *See* 42 C.F.R. Ch. IV (Oct. 1, 2009) § 424.57, Editorial Note.

In a letter dated May 21, 2009, NSC informed Petitioner that, based on its evaluation of the on-site inspection of the facility, it had been found not in compliance with 42 C.F.R. §§ 424.57(c)(4) and 424.57(c)(10) of the supplier standards.² CMS Ex. 2. Thus, NSC required Petitioner to submit invoices in order to document its source for the number of power wheelchairs it billed to Medicare. The letter advised Petitioner that, “[i]n order to prove compliance with this standard (C.F.R. § 424.57(c)(4)), you will need to submit invoices for the months of September 1, 2008 to February 28, 2009, for the Power Wheelchairs sold during these months.” *Id.* at 1. CMS asserts, and Petitioner does not dispute, that during those months Petitioner billed Medicare a total of \$389,111.79 for 74 power wheelchairs, \$84,788.47 for wheelchair options and accessories, and \$9,361.35 for hospital beds and accessories.³ CMS. Br. at 2, 5 n.4; CMS Ex. 4.

NSC gave Petitioner 21 days to remedy all the identified compliance issues and informed Petitioner that the failure to comply could result in the revocation of its supplier number. CMS Ex. 2, at 2. By letter dated June 10, 2009, Petitioner sought to remedy these deficiencies by sending NSC “invoices from Major Mobisist for chairs bought”⁴ and a

² NSC’s letter did not rely on the site inspector’s findings about supplier standards 12 and 20.

³ These are the amounts represented in CMS Exhibit 4, a printout entitled “Supplier Billing History for Policy Groups with > \$5,000 in Submitted Charges, PDAC Receipt Dates: 9/1/2008-2/28/2009.” I note that in the Site Investigation Report, CMS Exhibit. 1, the site investigator states that, “Florence C Olie (Owner) is the wife of the owner at J Wood Medical Services (James Woodbury). This supplier billed the same amount as J Wood Medical Services \$489,851.18 from 9/2008-3/2009 in hospital beds, wheelchairs motorized and wheelchair options/accessories.” However, CMS does not mention this comment in its brief and the amount referenced does not match exactly with the billing history presented in CMS Exhibit 4. Since neither party developed this issue, and it is not material to my decision, I do not discuss it further.

⁴ The documentation submitted by Petitioner in response to NSC’s May 21, 2009 letter (marked as CMS Exhibit 3 and P. Exhibit D) consists of four invoices dated between November 8, 2008 and February 27, 2009. These four invoices total \$21,599.68. Petitioner also submitted five invoices dated between April 3, 2008 and May 12, 2008. The five invoices dated outside the time frame requested by NSC total \$17,976.75. In addition, Petitioner enclosed seven monthly billing statements dated between February 29, 2008 and April 30, 2009. The issues surrounding the documentation submitted by Petitioner are discussed in greater detail *infra*.

certificate of liability showing NSC as the certificate holder.⁵ CMS Ex. 3, at 1. However, only four invoices are dated during the period of time requested by NSC. These requested invoices show a total purchase amount of \$21,599.68 during six months in which Petitioner billed Medicare \$483,261.61.⁶ CMS Ex. 3, at 2-5; CMS Ex. 4. Thus, NSC determined that Petitioner had not provided sufficient documentation to show that it had inventory or purchase orders to support its billing of Medicare during the time period indicated in NSC's letter dated May 21, 2009. CMS Ex. 3, at 1-4.

Based on this determination, NSC notified Petitioner, by letter dated August 28, 2009, that its Medicare supplier number would be revoked effective 30 days from the postmark of the letter because of Petitioner's failure to comply with 42 C.F.R. §§ 424.57(c)(4) and 424.57(c)(21). CMS Ex. 5, at 1. The contractor cited supplier standard 21 based on Petitioner's failure to provide the requested information in its documentation. The revocation notice informed Petitioner that it could complete a corrective action plan (CAP) within 30 days to show current compliance and seek reinstatement and/or seek reconsideration within 60 days.

Petitioner sent a CAP and a request for reconsideration to NSC on October 30, 2009. P. Ex. D, at 1-2. The Medicare hearing officer acknowledged the receipt of Petitioner's reconsideration request and CAP on December 2, 2009. CMS Ex. 6. The CAP was not accepted and the contractor proceeded to a reconsideration in which the hearing officer determined that NSC's revocation of Petitioner's supplier number was appropriate and issued a decision on January 20, 2010. CMS Ex. 7. The hearing officer determined that Petitioner failed to comply with the requirements of 42 C.F.R. § 424.57(c)(4) because the contract that was submitted to NSC to show where Petitioner purchased durable medical equipment did not cover the period of time in question, and the four invoices submitted by Petitioner in response to NSC's May 21, 2009 request for documentation "did not substantiate the amount billed during the specific time frame in question." CMS Ex. 7, at 2. The decision also concludes that Petitioner failed to comply with 42 C.F.R. § 424.57(c)(21), because the documentation sent to NSC was not the information that was requested. *Id.*

⁵ NSC subsequently determined that the certificate of liability submitted satisfied the requirements of 42 C.F.R. § 424.57(c)(10), so this is no longer at issue in this case.

⁶ In its brief, Petitioner claims that it "billed exactly \$284,320.67 to Medicare for various durable medical equipment sold, of which only \$41,685.57 was paid by Medicare." P. Br. at 2; P. Decl. ¶ 5. Petitioner submits no documentation to support this allegation, however, does not explain what "various" equipment it included in this total or what time period is covered, and gives no reason that the amount paid to date by Medicare, as opposed to the amount billed to Medicare by Petitioner, has any relevance to the issues before me.

Petitioner submitted a hearing request on February 9, 2010 arguing that CMS improperly revoked Petitioner's supplier number. This case was originally assigned to Administrative Law Judge (ALJ) Alfonso J. Montañó and transferred to me pursuant to 42 C.F.R. § 498.44, which permits a Member of the Departmental Appeals Board (Board) to be designated to hear appeals taken under Part 498. I conducted a telephone conference and subsequently issued a Pre-Hearing Order, dated March 30, 2010, outlining the procedures in this case.

CMS filed a motion for summary disposition with supporting brief and 7 exhibits, marked as CMS Exhibits 1-7. Petitioner filed a Brief and Request for Reinstatement of Supplier Billing Privileges, a Declaration of Florence Ezeaku-Olie (P. Decl.), and five exhibits marked as Petitioner's Exhibits A-E.

I have reviewed CMS's motion, Petitioner's brief, and the exhibits and other documentation in this matter. Neither party objected to the admission of any exhibit, and I admit all exhibits into the record in this case.

III. Issue, Findings of Fact, Conclusions of Law

A. Issue

The sole issue in this case is whether the undisputed facts demonstrate that the revocation of Petitioner's Medicare supplier number was legally authorized.

B. Applicable Standard

CMS moved for summary disposition. Both parties agreed that this appeal could be decided on the written record without recourse to an in-person hearing. Pre-Hearing Order. I therefore decide the matter on the merits based on the written record before me.

C. Findings of Fact and Conclusions of Law

My findings and conclusions are in the italicized heading supported by the subsequent discussion below.

- 1. CMS was authorized to revoke Petitioner's supplier number based on undisputed evidence that Petitioner did not submit documentation, as sections 424.57(c)(4) and 424.57(c)(21) required.***

After a site visit, NSC determined that "*the inventory displayed and the purchase agreements submitted during the site visit*" were not sufficient based on the amount Petitioner billed to Medicare. CMS Ex. 2, at 1 (italics in original). NSC required

Petitioner to submit invoices for a six-month time period in order to document the number of power wheelchairs sold from September 1, 2008 to February 28, 2009. *Id.* As noted, CMS asserts that Petitioner billed Medicare \$389,111.79 for 74 power wheelchairs during that time period. CMS. Br. at 2; CMS Ex. 4. Petitioner responded to NSC's request by submitting invoices, only four of which were dated during the period of time requested by NSC, and those four invoices totaled only \$21,599.68.⁷

Petitioner contends that it complied with the requirements of sections 424.57(c)(4) and 424.57(c)(21) by submitting sufficient documentation to NSC. In support of this argument, Petitioner asserts that it recently located an additional contract with Major's Wholesale that provides "evidence to support [P]etitioner's compliance." P. Br. at 4-5. According to Petitioner, on December 21, 2004 it contracted with Major's Wholesale Medical Supply to purchase inventory later sold by Petitioner. P. Br. at 4-5. Petitioner states that, in May of 2008, the wholesale company changed ownership, became known as Major's Mobosist, and required Petitioner to sign a new agreement. P. Br. at 2; P. Decl. ¶ 2-4.

Petitioner believes that the original agreement, not previously submitted, provides evidence of an ongoing business relationship with Major's Wholesale prior to and during the relevant time frame and that I should allow this agreement to be admitted as evidence. P. Br. at 4-5. Petitioner argues that it had good cause to submit the older agreement belatedly so that section 498.56(e) should not bar its admission. According to Petitioner, its copy of the agreement was "misplaced" because it was so old and the wholesale company "took a significant amount of time to locate" its copy in storage. P. Br. at 5. Petitioner describes this as "excusable neglect" but "not any deliberate refusal to cooperate" *Id.* While I accept Petitioner's uncontested assertion that the delay in producing this document was not deliberate, I do not find that excusable neglect constitutes good cause for late submission.

However, even if I were to consider the December 21, 2004 agreement, I would find it immaterial because Petitioner's contract with Major's Wholesale is not at issue in this matter. NSC requested a review of Petitioner's invoices during a particular time frame in order to establish that Petitioner had a source from which it was purchasing the volume of power wheelchairs Petitioner billed to Medicare. Evidence of the December 21, 2004 agreement does not show that Petitioner purchased items under this contract during the relevant time as necessary to fill orders for wheelchairs. The agreement is thus not sufficient to document compliance with the standard.

⁷ CMS mistakenly refers to the total as 20,296.51. CMS Br. at 6. The error appears to be based on an invoice dated February 13, 2009 which shows invoicing for a total sale of \$4,939.93 but subtracts \$1,303.17 as already paid. P. Ex. D at 8. CMS apparently included only the balance after payment in its calculation rather than the full amount of the sale invoiced.

Supplier standard 4 states that if a supplier fill orders “by contracting with other companies for the purchase of items necessary to fill the order . . . , it must provide, upon request, copies of contracts or other documentation showing compliance with this standard. . . .” 42 C.F.R. § 424.57(c)(4). NSC reasonably requested actual invoices or purchase agreements as “other documentation” in addition to the contract itself. Petitioner failed to prove compliance with this standard when it did not submit the requested invoices for equipment sold from September 1, 2008 to February 28, 2009. The existence of a contract under which the equipment *could* have been purchased does not establish documentation that the inventory of the power wheelchairs allegedly sold during these dates was derived from that contract. Any issues surrounding the delay of acquiring the December 21, 2004 agreement or the substance of the agreement itself are thus immaterial to my finding as to Petitioner’s failure to respond to NSC’s request for documentation of the sources of wheelchairs claimed to have been provided to Medicare beneficiaries.

Petitioner states in its brief that it “provided to NSC all invoices received from Major’s Wholesale and Major’s Mobosist from February 29, 2008 through March 31, 2009.”⁸ P. Br. at 3. CMS contends that much of this documentation does not date from the time period for which NSC requested documentation, and is thus irrelevant to determining Petitioner’s compliance with sections 424.57(c)(4) and 424.57(c)(21). CMS Br. at 6. The four invoices that are dated during the relevant time period total, as mentioned above, only \$21,599.68 and therefore do not account for large volume of claims submitted to Medicare. Further, as CMS points out, many of the invoices submitted appear to include wheelchair accessories in addition to power wheelchairs. CMS Ex. 3, at 2-5. Thus, limiting my review to Petitioner’s claims for power wheelchairs would demonstrate an even greater disparity between what Petitioner billed Medicare and what Petitioner documented to NSC.

I could infer, as Petitioner proposes, that at least some of the equipment sold during the time frame on which NSC focused might have been purchased prior to that time frame. *See* P. Ex. D at 6 (September 2, 2009 letter to NSC stating that the pre-September 2008 documentation was meant to show “a lot of inventories which carried over to those months in question”). Petitioner represents, however, that the invoices submitted to me constitute *all* of its purchases from February 29, 2008 through March 31, 2009. P. Br. at 3. I note in passing that both parties repeatedly refer to these documents as 15

⁸ This time frame differs from the “September of 2008 to March of 2009” reference in Petitioner’s letter dated September 2, 2009 to NSC enclosing the invoices. P. Ex. D at 6. NSC specifically requested that Petitioner submit invoices for the power wheelchairs sold from September 1, 2008 to February 28, 2009. CMS Ex. 2, at 1.

“invoices.”⁹ A careful examination shows that these documents actually consist of only nine invoices showing itemized equipment and accessory purchases (totaling purchases of \$39,576.43) along with seven monthly billing statements for past purchases.¹⁰ The balances shown in these statements are associated with invoice numbers that can in many cases be identified with invoices provided. *See, e.g.*, P. Ex. D at 2, 3, 17, and 18; *see also* P. Ex. D at 7, 8, 11-12, and 19. Furthermore, the same invoices are included repeatedly in the monthly balances as those bills were carried over as 30, 60 or 90 days overdue with accumulating late charges. *Compare, e.g.*, P. Ex. D at 19, 20, and 21. Hence, including the total balances from the statements as evidence of additional purchases of equipment would result in massive duplication. Furthermore, wheelchairs purchased by Petitioner after February 28, 2009 could not correspond to the wheelchairs sold and billed to Medicare on or before that date yet Petitioner includes statements from March and April 2009.¹¹

Thus, the undisputed facts in this case show that Petitioner’s Medicare supplier number was revoked due to Petitioner’s failure to comply with sections 424.57(c)(4) and 424.57(c)(21). NSC reasonably concluded that Petitioner did not submit sufficient documentation to substantiate the amounts billed to Medicare during the requested time period and Petitioner was therefore not in compliance with the requirements of

section 424.57(c)(4). Also, due to Petitioner’s failure to adequately respond to NSC’s request for specific documentation, NSC reasonably found that Petitioner was not in compliance with section 424.57(c)(21).

⁹ Petitioner calls them “invoices” in its brief, but, in its September 2, 2009 letter to NSC, Petitioner correctly stated that it was “sending both the statements and invoices.” *Compare* P. Br. at 3, 5 *with* P. Ex. D, at 6.

¹⁰ I note that the invoices which do identify the items purchased show (read most favorably to Petitioner) only 28 items that could be wheelchairs and scooters. This volume again fails to remotely explain where Petitioner obtained the 74 wheelchairs for which it billed Medicare during the relevant period.

¹¹ CMS also argues that, even if the totals shown on all of these documents are summed they represent less than \$160,000.00 in billing and include items other than power wheelchairs. CMS Br. at 6-7. While I find this total meaningless and exaggerated for the reasons explained in the text, it still would not come close to explaining Petitioner’s claims for \$389,111.79 to Medicare for power wheelchairs alone.

IV. Conclusion

For the reasons explained above, I conclude that CMS appropriately revoked Petitioner's supplier number.

_____/s/
Leslie A. Sussan
Board Member