Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jean Bicais Optical Co, Inc. d/b/a Bicais Optical
(NPI: 0361099993),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-646

Decision No. CR2234

Date: September 3, 2010

DECISION

Petitioner, Jean Bicais Optical Co., Inc., d/b/a Bicais Optical, is an optician's office, which is considered a supplier of Medicare durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS supplier). The Centers for Medicare & Medicaid Services (CMS) 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 on November 9, 2009. A reconsideration decision dated February 18, 2010 upheld the revocation. Petitioner timely appealed the reconsideration.

For the reasons set forth below, I conclude that the undisputed evidence establishes that Petitioner 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 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. 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]

[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

(continued…)

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).

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 April 19, 2010, Petitioner requested a hearing on the revocation of its Medicare supplier number. Petitioner states that the issue is "whether the exemption of Jean Bicais Optical from accreditation requirements does also exempt Jean Bicais Optical from surety bond requirements as stated in 42 C.F.R. Section 424.57(c)." Hearing Request letter dated Apr. 19, 2010 (HR). Petitioner argues that the surety bond requirements were not made clear prior to the revocation of Petitioner's supplier number.[2] HR. Petitioner argues that the surety bond information was made more obscure because the relevant questions are located within the accreditation application in the 2003 and 2006 CMS 855S enrollment application forms. HR. Since it is undisputed that Petitioner is exempt from accreditation, Petitioner asserts that it would not have located the surety bond requirement information because it would not have looked in the accreditation sections of the applications. HR. For that reason, Petitioner argues that it should have been notified specifically of the new applicability of the surety bond requirement to suppliers exempt from accreditation and that "[m]erely adding a supplier standard 26 to state '[m]ust meet the surety bond requirements specified in 42 C.F.R. 424.57([d])' is not adequate or reasonable notification of a change." HR.

In response to Petitioner's request for hearing, I issued an initial order on April 29, 2010, acknowledging receipt of Petitioner's request and setting a briefing schedule for the parties. CMS filed a motion and supporting memorandum for summary disposition (CMS Br.) in accordance with my order, accompanied by exhibits (CMS Exs.) 1 through

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[1] (…continued)
(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.

[2] Specifically, Petitioner states in its brief, "[n]ot until receipt of the unfavorable [reconsideration] decision was the Petitioner aware of the distinction being made by the Respondent between the requirement for accreditation and the requirement for the surety bond at which point the opportunity to comply with the [surety bond] requirement had expired." P. Br. at 5.

12. Petitioner filed a response to CMS's motion (P. Br.), accompanied by one exhibit (P. Ex. 1).

By email dated May 4, 2010, Petitioner indicated that it wanted to waive any in-person hearing and consented to my deciding on the written record. Upon review of the record as a whole, I determined that it was appropriate to decide this case on the merits, and I directed the parties that in the absence of an objection from CMS, I would decide this case on the written record. By email dated May 6, 2010, CMS indicated that it did not object to a decision based on the written record. I therefore decline to issue a summary disposition and instead address the merits below based on a full record review.

III. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue in this case is whether the record demonstrates that CMS's revocation of Petitioner's Medicare billing privileges was legally authorized.

B. Findings of fact and conclusions of law

I make one finding and conclusion below, supported by the subsequent discussion:

CMS was authorized to revoke Petitioner's billing privileges based on undisputed evidence that Petitioner had not obtained a surety bond as required by 42 C.F.R. § 424.57(c)(26) and (d).

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) (emphasis added).

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 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. P. Br. at 1-2. However, Petitioner argues that the Medicare contractor, National Supplier Clearinghouse (NSC), failed "to notify Petitioner of 2009 re-enrollment with direct delivery of 2009 CMS 855S application as required by 42 C.F.R. [§ 424.57(f)[3]] thus failing to provide Petitioner with a significant opportunity to comply with requirements or to voluntarily terminate its Medicare number." P. Br. at 1-2.

I do not agree that section 424.57(f) imposes an obligation on the Medicare contractor (in this case, NSC) to send out a new application under the circumstances of this case. Section 424.57(f) reads:

> (f) *Renewal of billing privileges*. A supplier must renew its application for billing privileges every 3 years after the billing privileges are first granted. (Each supplier must complete a new application for billing privileges 3 years after its last renewal of privileges.)

Here, the requirement that Petitioner submit a copy of a surety bond was not part of a regular three-year revalidation. Rather, the change in regulations adding the surety bond requirement triggered an off-cycle revalidation. *See Baker's Bay Nursing Ass'n*, DAB CR2177, at 9-10 (2010). In accordance with section 424.515(d), which governs off-cycle revalidations, CMS reserves the right to perform off-cycle revalidations in addition to the regular revalidations described in the introductory text of section 424.515.[4] Section 424.515(d) reads, in pertinent part:

> [CMS] may request that a provider or supplier recertify the accuracy of the enrollment information when warranted to assess and confirm the validity of the enrollment information maintained by CMS. Off cycle revalidations may be triggered as a result of random checks, information indicating local health care fraud problems, national initiatives, complaints, or other reasons that cause CMS to question the compliance of the provider or supplier with Medicare enrollment requirements.

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[3] Paragraph (f) of section 424.57 was previously designated paragraph (e) 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.

[4] A DMEPOS supplier must resubmit and recertify the accuracy of its enrollment information every three years. 42 C.F.R. §§ 424.515 and 424.57(f).

Nothing in section 424.515(d) imposes an obligation on the Medicare contractor to send out new enrollment application forms during the revalidation process. Petitioner does not point to, and I do not find, any other basis for imposing such a requirement.

Petitioner further argues that "the ambiguity of the language contained in 42 C.F.R. § 424.57(d)(15), which provides exemptions from the surety bond requirements, along with Respondent's failure to clearly interpret such language in a timely manner also caused Petitioner to lose the opportunity to comply with requirements or to voluntarily terminate its Medicare number." P. Br. at 2.

In regard to the use of ambiguous language, Petitioner cites, as examples of language needing interpretation, the categories "physicians or other non-physician practitioners" and "state-licensed orthotic and prosthetic personnel in private practice making custom-made orthotics and prosthetics," both of which are exempt from the surety bond requirements. P. Br. at 7. Petitioner argues as follows:

> For example, as an optician, Petitioner makes custom-made products according to a physician's prescription, is state licensed and is in private practice. Furthermore, Medicare.gov lists conventional eyeglasses and cataract eyeglasses as "Prosthetic Lenses" which would put Petitioner, as a supplier who makes and dispenses conventional and cataract eyeglasses, in the category of prosthetic personnel.

P. Br. at 7. Petitioner attached a page from the Medicare website with categories of DMEPOS products including prosthetic lenses and explained that this list "is being offered as an illustrative example of how language can create confusion, and is not intended to prove a fact." *Id*.

First, this list does not indicate that Petitioner is exempt from surety bond requirements if it makes or dispenses prosthetic lenses. On the contrary, the regulation makes explicit that prosthetic personnel are only exempt when they are "in private practice making custom made orthotics and prosthetics . . . if -- (1) The business is solely-owned and operated by the orthotic and prosthetic personnel, and (2) The business is only billing for orthotic, prosthetics, and supplies." 42 C.F.R. § 424.57(d)(15)(B). Petitioner does not claim that it meets all the requirements of this exemption or any other exemptions listed at 42 C.F.R. § 424.57(d)(15). I therefore see no reason that the list of DMEPOS products would create confusion about Petitioner's eligibility for a surety bond exemption and agree that the list does not serve to prove any material fact.

Second, Petitioner does not claim that it actually relied on an alternative reasonable interpretation of the surety bond exemptions in concluding that the surety bond

requirement did not apply to it.[5] Instead, Petitioner essentially argues that it could reasonably assume that the surety bond requirement would not apply to it when it is exempt from the accreditation requirement, because the surety bond information used to be solicited in the same part of the enrollment application as accreditation information. P. Br. at 4, referring to 2003 and 2006 applications. Petitioner further states, "Petitioner believed it was not required to obtain a surety bond and had NSC provided [the] 2009 CMS 855S [in which the surety bond requirement is not part of the accreditation application], Petitioner would have checked the exempt box as it had done in 2003 and 2006." P. Br. at 8 (emphasis in original). Petitioner refers to page 25 of the 2009 application, which reads, in pertinent part:

> A. Check Box: Check the box if this DMEPOS supplier believes it is not required to obtain a surety bond for Medicare enrollment. Information on supplier types exempt from getting a surety bond can be found at *www.palmettogba.com/nsc* or by calling the NSC customer service line at (866) 238-9652.

CMS Ex. 8, at 1 (emphasis added). Petitioner argues that "the language of the 2009 CMS 855S instructions . . . leaves open to interpretation whether a surety bond needs to be submitted." P. Br. at 8. The question of the proper interpretation of a regulation arises only in the context of an ambiguous *regulation,* not simply ambiguous language in a form. Petitioner identifies no ambiguity in the exemption language quoted above as it applies to its optical business.

At the same time, Petitioner admits that section 424.57(d)(15) exemptions were interpreted in the September 2009 issue of NSC News, a newsletter published by the Medicare contractor, twenty days before the surety bond requirement deadline (October 2, 2009). P. Br. at 7; CMS Ex. 11. Petitioner contends that twenty days was not sufficient notice. *Id.* However, CMS submitted a copy of an NSC newsletter dated May 2009, which explains the exemptions of the surety bond requirement, and includes a list

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[5] Petitioner does argue that the argument section of NSC's reconsideration request decision (CMS Ex. 6, at 2) is confusing because it points to notification of new "accreditation standards," from which both parties agree Petitioner is exempt. P. Br. at 9. Petitioner states: "If the surety bond requirement is referred to as an 'accreditation standard' by NSC and Petitioner is exempt from accreditation, then why is Petitioner not exempt from surety bond requirement?" *Id.* Petitioner, however, could not have relied on this language in failing to comply with the surety bond requirements, because the reconsideration decision was sent to Petitioner after its failure to comply.

of non-physicians covered under this exception that does not include opticians.[6] CMS Ex. 10, at 5.

Petitioner states that it "relied on Jurisdiction D administrator NAS [Noridian Administrative Services] for Medicare information." P. Br. at 2. It was unreasonable to for Petitioner to rely solely on the regional Medicare contractor (NAS) for Medicare information when Petitioner admits knowing that CMS contracts with NSC for enrollment and re-enrollment of DMEPOS suppliers and to determine if DMEPOS suppliers are in compliance with applicable standards. *Id*. Had Petitioner maintained awareness of updates and information provided by NSC to DMEPOS suppliers, it would have read the May 2009 NSC newsletter explaining the surety bond exemptions. CMS Ex. 10, at 5. Regardless, as the Supreme Court has stated, it is well-established that participants in the Medicare program have a "duty to familiarize [themselves] with the legal requirements for cost reimbursement." *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 64 (1984). The surety bond requirements and exemptions were contained in published regulations of which Petitioner had constructive notice and were clear on their face.

I must therefore 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 regulatory or 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 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(a)(1) provides that a

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[6] CMS maintains that NSC also sent all suppliers that had not yet met the surety bond requirement a letter dated August 21, 2009 notifying them that their billing privileges would be subject to revocation if they failed to submit proof of a surety bond by October 2, 2009. CMS Br. at 3. However, I give this evidence of notice no weight because as Petitioner correctly points out, this letter is addressed to supplier types subject to both the accreditation and surety bond requirements. CMS Ex. 12 ("Although certain supplier types are exempt from the surety bond and/or the accreditation requirement, our records indicate that your supplier type is subject to both . . . ." (emphasis added)). Moreover, CMS has not submitted any evidence that this letter was sent to Petitioner.

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, as follows:

> 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).

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.

IV. Conclusion

For the reasons explained above, 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.

/s/
Leslie A. Sussan
Board Member