Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Trans Medical Promotional,	)	Date: April 1, 2009
	)	
Petitioner,	)	
	)	
- v. -	)	Docket No. C-09-54
	)	Decision No. CR1937
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, Trans Medical Promotional.

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 Petitioner's billing number was revoked by NSC because, on two occasions during Petitioner's posted business hours, an NSC investigator went to Petitioner's business facility and found that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 Exhibit (Ex.) 1. The NSC notice gave as grounds for revocation the charge that it was not possible for the investigator to complete an inspection of Petitioner's facility and, therefore, NSC could not verify Petitioner's compliance with the standards. Petitioner was told that it was in violation of 42 C.F.R. § 424.535(a)(5)(ii) as well as supplier standards 1 through 25 as identified in 42 C.F.R. § 424.57(c) of the regulations. *Id.*

[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).

Petitioner requested reconsideration and the Medicare Hearing Officer held a telephone hearing on September 12, 2008. Petitioner's owner, Mr. Aglas Inyang, testified at the telephone hearing before the Medicare Hearing Officer, stating that the business was open and that he was working at the time of the two site inspections, May 20, 2008, at 10:10 AM and May 29, 2008, at 10:15 AM. CMS Ex. 5, at 2. Petitioner also proffered to the Hearing Officer copies of patient documentation and invoices supporting his assertion that he was open. That documentation included client invoices and copies of its telephone bills. Following review of the documentation presented by Petitioner, the Hearing Officer found that the additional documentation provided did not substantiate Mr. Inyang's assertion that Petitioner was operational on May 20 and May 29, 2008:

> …the patient information and order documentation are not signed or dated by any of the beneficiaries. A delivery form is also filled out, but not signed or dated by the beneficiary. A phone bill has been included, but no calls were logged on the days of the site inspection. Also sent for review was an invoice for product purchase statement with a balance indicating it was paid on May 31, 2008.

CMS Ex. 5, at 2.

The Hearing Officer concluded that Petitioner had failed to present evidence verifying the business facility was open and operational during the two site visits on May 20 and May 29 and failed to substantiate its compliance with supplier standard 8 at the relevant time. The Hearing Officer therefore determined that the denial of Petitioner's Medicare suppler number was appropriate. CMS Ex. 5, at 3.

On September 27, 2008, the Hearing Officer issued her decision. CMS Ex. 5. By letter dated October 15, 2008, Petitioner timely requested a hearing and perfected its appeal of the Hearing Officer's decision. Petitioner's request was received at the Civil Remedies Division of the Departmental Appeal Board, docketed as C-09-54, and assigned to me for hearing and decision.

I convened a telephone prehearing conference on November 6, 2008, in order to discuss the issues presented by the 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 November 13, 2008.

On November 25, 2008, CMS timely filed its Motion for Summary Disposition and supporting Brief-in-Chief (CMS Br.) and CMS Exs. 1-8. On December 23, 2008, Petitioner requested an extension of time, until January 8, 2009, to file its Answer Brief, which had been due by December 19, 2008. Petitioner's request was granted by Order of December 29, 2008. On January 13, 2009, Petitioner filed a motion for leave to file its Answer Brief out-of-time. Petitioner's motion was granted on January 14, 2009, and on the last day allowed, January 28, 2009, the Civil Remedies Division received Petitioner's Answer Brief (P. Br.) and Petitioner's Exhibits (P. Exs.) 2, 3, and 4.[2] CMS filed a Reply Brief, and on February 20, 2009, after my repeated insistence, the documents comprising P. Exs. 1 and 5 were finally received.

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 admitted exhibits CMS Exs. 1-8 and P. Exs. 1- 5.

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). If a supplier is subsequently found not to meet the standards, NSC must revoke the supplier's number, effective 15 days[3] after NSC mails the notice of revocation. 42 C.F.R. § 405.874(b). 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).

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[2] Although Petitioner's filing included cover pages for P. Exs. 1 and 5, the submission did not contain any actual documents to make up those exhibits.

[3] The regulation at 42 C.F.R. § 405.874 was amended in 2008, making the effective date of a revocation 30 days, rather than 15 days, from the mailing of the notice. As this change became effective August 26, 2008, it does not apply to the effective date of Petitioner's supplier number revocation. 42 C.F.R. § 405.874(b)(2); see 73 Fed. Reg. 36,460 (June 27, 2008).

Revocation of a supplier's billing number is governed by 42 C.F.R. § 424.535. CMS or its contractor NSC, will revoke a supplier's billing privileges (i.e. supplier number) if the suppler does not meet the standards in 42 C.F.R. § 424.57(b) and (c). 42 C.F.R. § 424.57(d). 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 "the provider or supplier has a qualified physical location, is open to the public for the purpose of providing health care related services, is prepared to submit a 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; *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, located at 104 Industrial Boulevard, Suite L, Sugar Land, Texas, on May 20, 2008. CMS Ex. 2; CMS Ex. 7.

2. Mr. Porter also attempted to conduct a site inspection of Petitioner's business facility on May 29, 2008. CMS Ex. 2: CMS Ex. 7.

3. Petitioner's posted business hours for May 2008 were Monday - Friday, 10:00 AM – 5 PM. CMS Ex. 2, at 7.

4. Petitioner's business facility was not operational, open, and accessible during its posted business hours to the NSC inspector, to Medicare beneficiaries, and to the public on May 20, 2008, at 10:10 AM.

5. Petitioner's business facility was not operational, open, and accessible during its posted business hours to the NSC inspector, to Medicare beneficiaries, and to the public on May 29, 2008, at 10:15 AM.

6. Petitioner's failure to be open during posted business hours on May 20 and May 29, 2008 was a violation of supplier standard 8. 42 C.F.R. § 424.57(c)(8).

7. The inspections conducted on May 20 and May 29, 2008, established a basis for revocation of Petitioner's supplier number. 42 C.F.R. § 424.515(d).

8. Petitioner's billing number must be revoked pursuant to 42 C.F.R. § 424.57(d).

9. 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. 1928 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004).

V. Discussion

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

A. Petitioner has failed to overcome CMS's *prima facie* showing that its business facility was not open and operational on May 20 and May 29, 2009.

CMS has established a *prima facie* case that Petitioner's business facility was closed when visited on May 20 and May 29, 2008. As previously noted, Petitioner's posted hours of operation were Monday through Friday, from 10 AM to 5 PM. When Mr. Porter attempted to inspect the facility at 104 Industrial Boulevard, Suite L, Sugar Land, Texas, during Petitioner's posted business hours, no one answered. Thus, during Petitioner's posted hours of operation, staff were not available to beneficiaries and to CMS or, in this case CMS's contractor NCS, as required by the standard. This situation was addressed in *Medisource Corp*., DAB No. 2011, at 10, n.12, when the Board wrote "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."

CMS relies on the affidavit of the NSC inspector, Mr. Porter. Mr. Porter has an extensive background in, and is familiar with, the relevant supplier requirements and regulations. He is a trained and experienced investigator, and has personally visited the address of Petitioner's facility. CMS Ex. 7. Mr. Porter stated that he follows the same procedures for each site visit:

> When I receive a request for a site inspection, I drive to the location. I find the suite/office. I make note on the site visit questionnaire if there is a sign for the business name and if there are posted hours of operation. I will turn the doorknob and if the door is unlocked, I will enter, announce myself and conduct the site inspection. If the door is locked, I make a note on the site visit questionnaire indicating I made a first attempt, and I leave the location. I physically turn the knob each time with force enough to open the door. I do not leave a note that I was at the location. Site visits are all unannounced. I will later make a second attempt to conduct an on-site investigation during the posted hours of operation. I will go through the same steps. . . I am required to make only two attempts of a suppler site visit for a particular location before failing the site inspection. I will also take photographs of the location during a site inspection. Photos are mandatory for every site inspection. . . . I am required to take photos of the business sign, and hours of operation . . . .

CMS Ex. 7, 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. 2; CMS Ex. 7. Mr. Porter took multiple photographs to corroborate his investigation and to confirm that he visited Petitioner's site the second time on May 29, 2008. CMS proffered five photographs from the second site visit. The first photograph shows a sign with Petitioner's name, and that sign lists its days and hours of operation and its telephone number. CMS Ex. 2, at 7. The second photograph shows a sign with Petitioner's name and the words "Suite L." The third and fourth photographs show the exterior of the building. CMS Ex. 2, at 8. The last photograph shows the number 104 on the exterior of a building. Petitioner does not dispute that these are photographs of its physical location; rather, Petitioner questions the day and time the photographs were taken, suggesting that they could have been taken at virtually any time, and for that reason should be afforded no evidentiary value at all. But I find fully credible Mr. Porter's statement that he would have taken the pictures in CMS Ex. 2 of Petitioner's physical site location when he could not complete the on-site visit, that being on the second site inspection on May 29, 2008. CMS Ex. 7, at 3. Therefore, based on the evidence before me, I find that Mr. Porter visited Petitioner's facility on May 20, 2008 at 10:10 AM and observed that facility to be closed. I further find that Mr. Porter visited Petitioner's facility on May 29, 2008 at 10:15 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, nor accessible to Medicare beneficiaries and the public on May 20 and May 29, 2008.

Petitioner asserts that on May 20, 2008 at 10:10 AM and on May 29, 2008 at 10:15 AM it "was open and operational . . . and located in a qualified physical location." P. Br. at 3. Petitioner argues that the Hearing Officer based her decision solely on the statement provided by the NSC inspector, Mr. Porter. P. Br. at 4. Petitioner avers that Mr. Porter's statement in and of itself does not meet the substantial evidence standard. *Id.* Petitioner complains of the Hearing Officer's evaluation of its exhibits, stating that the client invoices it submitted to the Hearing Officer for the months of May and June were not signed because the items had not yet been delivered. P. Br. at 4-5. Petitioner avers that the phone bills showed that it was conducting business telephonically during normal business hours. *Id*. at 4.

In this proceeding, Petitioner has proffered as exhibits a series of documents, and it may be worthwhile to review them carefully here. Those documents include a copy of an amendment to the commercial lease of Petitioner's premises effective from April 1, 2008 through March 31, 2010 (P. Ex. 2); a copy of the amendment to the commercial lease effective from October 1, 2008 through September 30, 2011 (P. Ex. 3); and copies of cancelled checks for lease payments dated in January, March, May and June of 2008 (P. Ex. 4). Petitioner states that since its

inception, it has operated its business from the same location. Additionally, Petitioner has proffered the affidavit of Mr. Inyang (P. Ex. 1) and a lease agreement executed on April 2, 2007, for lease of the property located at 104 Industrial Boulevard in Sugar Land, Texas. (P. Ex. 5). I note that the lease agreement set out in P. Ex. 5 is for the term April 1, 2007 through March 31, 2008, and does not cover May 2008, the month that is at issue. Moreover, the lease agreements Petitioner proffered as P. Exs. 2 and 3, and the cancelled checks proffered as P. Ex. 4, lend no support – even by inference – to Petitioner's assertion that it was actually open and operational on the mornings of May 20 and May 29, 2008, when the NSC inspector attempted to conduct a site inspection. The exhibits may very well show that Petitioner was entitled to occupy the premises, but that is hardly the material question in this appeal. The material question is whether Petitioner's facility was open, operational, and available for inspection when visited by Mr. Porter in his official capacity.

In his affidavit Mr. Inyang discusses staffing problems he was having during May 2008 and June 2008, stating that the "day to day functioning of the business fell solely on me" which included "having the business open, manning the phones, conducting all clerical and operational duties and at times making deliveries." P. Ex. 1. He then states: "It is possible that I may have gotten to work several minutes late a day or two, but during the days in question, Trans Medical was open for business." *Id.* Petitioner thus makes a serious admission against his interest by conceding that he did not have adequate staff during the relevant periods of May 2008 and June 2008, and by that admission implicitly explains why it cannot dispute convincingly the Porter affidavit's assertion that Petitioner's business facility was locked and inaccessible on May 20 and May 29, 2008 during Petitioner's posted hours of operation. P. Ex. 1; CMS Ex. 7. I find that the evidence Petitioner presents fails to support its assertions that it was in compliance with supplier standards 1 through 25, and that Petitioner's business facility was operational on May 20 and May 29, 2008 during its posted hours of operation, as required by 42 C.F.R. § 424.57(c)(8).

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

B. Petitioner's challenge to CMS's exhibit 2, at 7-9.

Petitioner also challenges the authenticity of the photos taken by Mr. Porter to substantiate his visit to Petitioner's facility. Petitioner argues that the evidence is "insufficient" and "inadmissible." P. Br. at 5.

The theory behind Petitioner's main attack on CMS's case deserves brief mention, not because it is sound, but because it is so obtuse as to demand comment.

Although Petitioner's hearing request makes no mention of this theory – or of any other matters required by the explicit terms of 42 C.F.R. § 498.40(b) – the heart of Petitioner's defense is the notion that the photographs of its premises taken on May 29, 2008, are inadmissible because:

> These pictures have no date stamp, nothing to authenticate the date in which the visit was made, nor when the pictures were taken. Therefore, this evidence is insufficient, inadmissible by law and unlawful, thus it will not pass muster under scrutiny. Further, this evidence is inadmissible because it does not fall within one of the exceptions to hearsay; for example, it is not self authenticated nor is it is a government record.

P. Br. at 4.

It may be best to consider this statement line by line. First, I am unable to discern any connection between the authentication of the photographs and the last sentence of Petitioner's objection quoted above. Next, it is perfectly true that the photographs in CMS Ex. 2, at 7-9, do not show the now-common feature of a date-and-time superimposed by the camera itself. Photographs without that feature have been accepted as evidence long before the advent of the technology that made such a feature common, well before and ever since the adoption of the FEDERAL RULES OF EVIDENCE in 1973. Moreover, even if the photographs did display a date-and-time feature, as Petitioner's counsel demands in such perfervid terms, that feature would be meaningless unless there were some evidence that the date-and-time setting programmed into the camera had been programmed accurately and verified accurate when the photographs were taken. But the principal point to be made is this: when Petitioner's counsel asserts that this record contains nothing to authenticate the photographs by date and time, he deliberately and materially distorts the facts: the Porter affidavit establishes with specificity that the photographs were taken at 10:15 AM on May 29, 2008. CMS Ex. 7, at 3. Mr. Porter's field notes corroborate the factual assertions in his affidavit. CMS Ex. 2, at 1-6. Thus, the photographs are *authenticated* by the Porter affidavit, while the affidavit itself is *corroborated* by the field notes *and* the photographs.

In assessing the admissibility of any photographic evidence, the touchstone is the degree to which the photograph accurately depicts the scene shown at the relevant time and in relevant detail, in essence, the degree to which the photograph *in fact* shows what its proponent *claims* it shows. See, *e.g.*, FED. R. EVID. 901(a). Few photographs are completely self-authenticating, and most require some parallel evidence to establish that the image in the photograph is an accurate representation of the objects shown by the image at a certain time, and perhaps from a certain

perspective. That parallel evidence is usually called a "foundation," and it is usually "laid" by a witness who can testify to familiarity with the actual scene shown in the photograph, and who can go on to say that the photograph is a substantially true, accurate, and faithful representation of that scene. If the details and conditions of the photographed scene at a particular time are relevant, then additional foundation testimony may be required as to the time the photograph was taken as a measure of insuring that the photograph accurately represents those details and conditions. It is not necessary that the foundation be laid by the actual photographer, or even that the photograph be one unique to the case: for example, a picture postcard of the Washington Monument, if offered to show its height in comparison to any of the surrounding buildings, would be perfectly admissible if supported by foundation testimony that the postcard showed the scene truly, accurately, and faithfully.

In this case, the Porter affidavit supplies a satisfactory foundation for the admission of the photographs in CMS Ex. 2, at 7-9. The photographs are relevant, for they are probative of the situation at Petitioner's facility at 10:15 AM on May 29, 2008, and they are material, because that situation is at issue and is at the heart of this case. Whether assessed by the standards applicable in this forum, 42 C.F.R. §§ 498.60(b) and 498.61, or by the stricter standards of FED. R. EVID. 901, the photographs are admissible and entitled to be accorded great evidentiary weight. Petitioner's objection is transparently frivolous.

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 (3rd. 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.

VI. Conclusion

For the reasons set out above, I find and conclude that Petitioner's Medicare billing number was appropriately revoked pursuant to 42 C.F.R. § 424.57(d). The CMS Motion for Summary Disposition should be, and it is, GRANTED.

/s/
Richard J. Smith
Administrative Law Judge