Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Pepper Hill Nursing & Rehabilitation Center, LLC,
(Supplier No: 6142820001),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-795

Decision No. CR2293

Date: December 14, 2010

DECISION

For the reasons set forth below, I grant the Centers for Medicare and Medicaid Services' (CMS) motion for summary judgment. The undisputed evidence establishes that Petitioner, Pepper Hill Nursing & Rehabilitation Center, LLC (Pepper Hill), was not in compliance with Medicare program requirements of 42 C.F.R. § 424.57(c)(26) and (d) by October 2, 2009, as required. As such, CMS had 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 "supplier standards," set forth at 42 C.F.R. § 424.57(c), which suppliers of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) must meet to maintain Medicare billing privileges. Specifically, section 424.57(c)(26) (Supplier Standard 26) 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:
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> * * * *
>
> (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) 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" that "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).

Under the regulations, 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 42 C.F.R. § 424.57(c). 42 C.F.R. § 424.57(e).

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 require a DMEPOS supplier to show compliance with the surety bond requirement at any time. 42 C.F.R. § 424.57(d)(12).

I. Background

By letter dated November 10, 2009, the National Supplier Clearinghouse (NSC), a Medicare contractor, notified Petitioner, a Medicare DMEPOS supplier, that it was not in compliance with 42 C.F.R. § 424.57(c)(26) and revoked Petitioner's Medicare supplier number. CMS Ex. 1; P. Ex. 3 at 1. The notice stated that the revocation was effective 30 days after the date of postmark and that Petitioner was barred from re-enrolling in the

Medicare program for one year from the effective date of the revocation. CMS Ex. 1; *see* 42 C.F.R. § 405.874(b)(2) (setting forth that revocation effective 30 days after CMS, or the CMS contractor, mails the notice of its determination). The letter informed Petitioner that it could submit a corrective action plan (CAP) within 30 days, or it could appeal the decision by requesting reconsideration within 60 days, or both. CMS Ex. 1, at 2.

By letter dated November 13, 2009, Petitioner submitted a CAP to NSC and enclosed a "continuation certificate," effective December 20, 2008 through December 20, 2009. CMS Ex. 2. The certificate references a surety bond and lists the "Department of Health and Environmental Control" as obligee.[1] CMS Ex. 2, at 2. The NSC denied Petitioner's CAP on November 30, 2009, noting that a "surety bond was not attached to [Petitioner's] CAP." CMS Ex. 3. The notice further advised Petitioner of its right to request reconsideration before a Medicare hearing officer and stated that the request was due by January 30, 2010. CMS Ex. 3.

By letter dated January 25, 2010, Petitioner filed a request for reconsideration. CMS Ex. 4, at 1. With its request, Petitioner included a surety bond that listed CMS as obligee and was executed on January 1, 2010. CMS Ex. 4, at 2-3. The January 1, 2010 surety bond indicated that it was valid for claims "related to overpayments or other events that occurred on or after March 3, 2009." P. Ex. 3 at 3.

The Medicare hearing officer issued an unfavorable reconsideration decision on April 26, 2010. CMS Ex. 5. The hearing officer explained that, although Petitioner attempted to satisfy the surety bond requirement with the newly submitted surety bond, her scope of review was limited to whether the contractor's reason for imposing the initial revocation was valid at the time the revocation was issued. *Id.* at 2. Further, "[i]f a provider or supplier provides evidence that demonstrates or proves that they met or maintained compliance after the date of denial or revocation, the contractor shall exclude this information from the scope of the review." *Id.* (quoting Medicare Program Integrity Manual, ch. 10, § 19.A). Although the hearing officer noted that Petitioner's authorized representative did not sign the newly submitted bond, she concluded that, at the time of the revocation, Petitioner was not compliant with supplier standard 26. Thus, she determined the NSC appropriately revoked Petitioner's supplier number. CMS Ex. 5, at 2.

On June 24, 2010 Petitioner timely filed a hearing request (HR) pursuant to 42 C.F.R. § 498.40, in which it asserted, among other things, that although it did not have a compliant surety bond at the time of its enrollment revocation, it subsequently obtained a surety bond on January, 1, 2010 and a rider on May 5, 2010, both which the surety agreed

[1] The referenced obligee is presumably the "South Carolina Department of Health and Environmental Control." *See* http://www.scdhec.gov/administration/aboutDHEC.htm. In any event, the named oblige is clearly not CMS as 42 C.F.R. § 424.57(d)(10) required.

to be retroactively effective prior to the October 2, 2009 deadline. HR. This case was originally assigned to Board Member Leslie A. Sussan, pursuant to 42 C.F.R. § 498.44, which permits a Member of the Departmental Appeals Board (Board) to hear appeals under Part 498. The case was subsequently transferred to me for decision, and the parties were notified by letter dated November 18, 2010.

Pursuant to the July 1, 2010 Acknowledgement & Pre-Hearing Order, CMS filed a motion for summary judgment and supporting memorandum (CMS Br.) on July 27, 2010. In its motion, CMS averred that the rider Petitioner executed May 5, 2010, referenced in its hearing request, should be excluded as new evidence under 42 C.F.R. § 498.56(e) and that, in any case, it is not relevant, because the rider became effective well past the October 2, 2009 deadline. CMS Br. at 4 n.2. CMS accompanied its submission with CMS Exhibits 1-6, which I admit into evidence without objection. On August 27, 2010, Petitioner filed its response (P. Br.) and included Exhibits 1-4.

III. Issue

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

IV. Applicable Standard

The Board stated the standard for summary judgment:

> 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 Administrative Law Judge (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).

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

I make a single finding and conclusion set out below:

> ***The undisputed evidence establishes that CMS was authorized to revoke Petitioner's billing privileges based on undisputed evidence that Petitioner did not obtain a surety bond, as 42 C.F.R. § 424.57(c)(26) and (d) required.***

Petitioner contends:

> Pepper Hill's surety bond, while *executed* on January 1, 2010, had an *effective* date of March 3, 2009. This bond is in all respects valid and covers a period greater than that required by law. Therefore, a mere submission of the bond is inconsequential and, most importantly, does not in any way affect CMS's ability to recover any overpayments, assessments, or CMPs incurred by Pepper Hill since October 2, 2009. A late submission, without more, should not warrant revocation of billing privileges.

P. Br. at 7-8 (emphasis in original). In its argument, Petitioner readily concedes that it not only submitted the surety bond late, but that it *executed* the surety bond after the regulatory deadline.

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).

The regulations implement this requirement for continuous compliance. 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 "beginning October 2, 2009, each Medicare enrolled DMEPOS supplier . . . [m]ust meet the surety bond requirements specified in paragraph (d) of this section." 42 C.F.R. § 424.57(c) and (d). These requirements include that the "surety bond must name the DMEPOS supplier as Principal, CMS as Obligee, and the surety . . . as surety." 42 C.F.R. § 424.57(d)(10). It follows that a supplier must continually meet the surety bond requirements specified in paragraph (d).

Consistent with this, the preamble to the final rule on appeals of CMS determinations 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 concedes that it was not in compliance with the surety bond requirement at the time CMS revoked its supplier number. *See* P. Br. at 5, 8. However, Petitioner argues that it subsequently submitted a surety bond that, although executed on January 1, 2010, was "effective" March 3, 2009, well before the October 2, 2009, regulatory requirement. P. Br. at 6.

The issue before me, however, is not whether Petitioner can belatedly achieve compliance with the surety bond requirements, but whether CMS correctly found that, *at the time of the revocation action*, Petitioner was not in compliance. If CMS correctly found that Petitioner was not in compliance with the regulatory requirements, CMS had authority to revoke Petitioner's supplier number.

As noted, CMS objects to the admission of the surety bond rider executed May 5, 2010, because it was new evidence that 42 C.F.R. § 498.56(e) precluded. CMS Br. at 4 n.2; *see* HR; P. Ex. 3 at 6. CMS also argues "that it is irrelevant to these proceedings since the date of the alleged rider is May 5, 2010, which is well beyond the October 2, 2009 deadline." CMS Br. at 4 n.2. Although Petitioner argues that it is not new evidence, I agree with CMS that the May 5, 2010 rider constitutes new evidence and is therefore not admissible absent a showing of good cause, which Petitioner's account of events does not establish. I conclude, however, that, regardless of whether the rider is admissible, it is immaterial.

First, like the "continuation certificate," the rider lists the incorrect obligee. P. Ex. 3, at 3; *see* CMS Ex. 2, at 2. On its face, the rider does not name CMS as the obligee, as required. 42 C.F.R. § 424.57(d)(10). However, even if the submitted rider named CMS as obligee and was admitted, it would remain immaterial, because it was executed after-the-fact.

Petitioner's surety bond executed January 1, 2010 (for claims beginning March 3, 2009), which I admitted into evidence, likewise provides no relief for Petitioner. *See* P. Ex. 3, at 3-4. As noted, the issue before me is whether CMS correctly found that, at the time of the revocation, Petitioner was not in compliance and therefore had authority to revoke. Petitioner admits it did not have a compliant surety bond at the time of the revocation. Although Petitioner appears to have belatedly obtained a surety bond correctly naming CMS as the obligee and the surety was willing to be retroactively liable, I find no authority by which that action may cause Petitioner to be retroactively compliant.

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 Petitioner's fraud or billing errors. 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 for Petitioner's legal business 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.[2]

Petitioner asserts that "[a] surety bond can be retroactive and have an effective date prior to the date of execution" as long as "an intent to be so liable is indicated." P. Br. at 6-7 (*citing S.L. Reed and Western Casualty & Surety Co. v. Maryland Casualty Co.*, 244 F.2d 857, 862 (5th Cir. 1957)). Petitioner relies exclusively on *S.L. Reed* for its assertion. In that case, the court allowed for a retrospective surety bond in relation to construction and contract law as interpreted under section 274 of the Mississippi Code of 1942. *Id*. A retroactive surety bond, as permitted in *S.L. Reed*, is not applicable in this context of administrative regulatory compliance where federal regulations directly required Petitioner to submit a compliant surety bond, including a continuity requirement, by date certain.

Petitioner further argues that "CMS's own appeals process implies that retroactive surety bonds are acceptable," namely, providing suppliers with an opportunity to correct a deficiency through a CAP. P. Br. at 7. CMS's decision whether or not to reinstate a supplier based on a CAP is not an initial determination and not reviewable by an ALJ. 42 C.F.R. § 405.874(e). In addition, I am specifically prohibited from considering new evidence in this type of enrollment appeal without good cause, which I do not find here. *See* 42 C.F.R. § 498.56(e). Therefore I disagree with the argument that, because CMS may have the specific authority to retroactively allow a correction to a surety bond defect during the CAP process, this implies I have the same ability at the ALJ level of review.

Petitioner further asserts that it did not receive actual notice of the surety bond requirements and therefore summary judgment is not appropriate. P. Br. at 4. For purposes of summary judgment, I will accept as true Petitioner's factual assertion that it did not receive actual notice of the surety bond requirement. Nonetheless, as the Supreme Court has stated, participants in the Medicare program have a "duty to

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[2] The preamble sets forth the surety bond requirement's purposes, which are to:

> (1) Limit the Medicare program risk to fraudulent DME suppliers; (2) enhance the Medicare enrollment process to help ensure that only legitimate DME [durable medical equipment] suppliers are enrolled or are allowed to remain enrolled in the Medicare program; (3) ensure that the Medicare program recoups erroneous payments that result from fraudulent or abusive billing practices by allowing CMS or our designated contractor to seek payments from a surety up to the penal sum; and (4) help ensure that Medicare beneficiaries receive products and services that are considered reasonable and necessary from legitimate DME suppliers.

74 *Fed. Reg*. 166, 180 (Jan.2, 2009).

familiarize [themselves] with the legal requirements for cost reimbursement." *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 64 (1984). Petitioner's failure to realize that it was subject to the surety bond requirement provides no ground for relief. As a Medicare supplier, Petitioner was charged with knowing the requirements for maintaining enrollment. *See Waterfront Terrace, Inc.*, DAB No. 2320, at 7 (2010); *see also Manor of Wayne Skilled Nursing & Rehab.*, DAB No. 2249, at 10-11 (2009), *Regency on the Lake*, DAB No. 2205, at 5-6 (2008) (noting facilities participating in Medicare have constructive notice of regulations).

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. Petitioner points to no source of authority for me to waive the compliance requirement or grant an exemption on 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, no basis exists 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).

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 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*, 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:

> 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). In addition, a supplier that has 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, and the re-enrollment bar is a minimum of one year. 42 C.F.R. § 424.535(c).

The regulatory language is plain. A supplier must comply with *all* standards, or CMS will revoke its billing privileges. I am bound by applicable laws and have no authority to invalidate or change an existing regulation or grant Petitioner an exemption from compliance with regulatory requirements. *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14. I must sustain CMS's determination where the facts establish noncompliance with one or more of the regulatory standards.

I 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. I therefore uphold the revocation of Petitioner's Medicare billing privileges and supplier number and the one-year bar on re-enrollment.

VI. Conclusion

For the reasons explained above, I grant summary judgment in favor of CMS. The undisputed evidence establishes that Petitioner was not in compliance with Medicare program requirements of 42 C.F.R. § 424.57(c)(26) and (d) by October 2, 2009, as required. As such, CMS had the authority to revoke Petitioner's Medicare supplier number under 42 C.F.R. § 424.57(d)(11).

/s/
Joseph Grow
Administrative Law Judge