

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Framsl Medical Equipment and Supply, LLC
(PTAN: 7852100001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-825

Decision No. CR5019

Date: February 2, 2018

DECISION

The Centers for Medicare & Medicaid Services (CMS) revoked the supplier number and Medicare billing privileges of Petitioner, Framsl Medical Equipment and Supply, LLC. Petitioner requested a hearing to challenge the revocation. As discussed below, the evidence of record supports CMS's determination. Therefore, I affirm the revocation of Petitioner's Medicare supplier number and billing privileges.

I. Background

Petitioner, a seller of hospital beds and other durable medical equipment, was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). CMS Exhibit (Ex.) 1 at 1-9. Petitioner held a one-year state license to sell used bedding, and its license expired on May 18, 2016. CMS Ex. 2 at 21. Petitioner had one-year liability insurance policy that expired on July 8, 2016. CMS Ex. 1 at 10. Petitioner also had a \$50,000 surety bond, and the surety bond company reported to the National Supplier Clearinghouse (NSC),¹ by letter dated August 15, 2016, that it

¹ "The National Supplier Clearinghouse is the single organizational entity responsible for issuing and revoking Medicare supplier billing privileges for suppliers of [DMEPOS]."

had “received a request to cancel or nonrenew this bond” and had “cancelled and voided” the surety bond as of September 30, 2016. CMS Ex. 1 at 11.

On January 5, 2017, a site visit contractor attempted to conduct a site investigation at Petitioner’s location that was on file with NSC. CMS Ex. 1 at 12-19 (Form CMS-R-263, Site Investigation for Suppliers of Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS)). The site visit contractor was unable to conduct a site investigation because “the security gate was closed at the time of the inspection.” CMS Ex. 1 at 18 (capitalization in original omitted). A January 17, 2017, computer entry documents that a fraud analyst with the NSC Supplier Audit and Compliance Unit reported that “NSC OPS attempted to contact the supplier multi[ple] times but the telephone number had been disconnected.” CMS Ex. 2 at 23; *see* CMS Ex. 1 at 24 (letter signed by the author of the entry that identifies her as a fraud analyst with the NSC Supplier Audit and Compliance Unit).

On January 31, 2017, NSC issued an initial determination revoking Petitioner’s Medicare supplier number, effective September 30, 2016. CMS Ex. 1 at 20-24. NSC determined that Petitioner was not in compliance with 42 C.F.R. § 424.535(a)(5) because it was not operational and was not in compliance with six separate supplier standards, 42 C.F.R. § 424.57(c)(1), (2), (7), (9), (10), and (26). CMS Ex. 1 at 20-21. NSC barred Petitioner from re-enrolling in the Medicare program for two years, effective 30 days from the postmark date of the letter. CMS Ex. 1 at 20. The U.S. Postal Service was unable to deliver the January 31, 2017 initial determination and was unable to forward the correspondence. CMS Ex. 1 at 25. On March 29, 2017, Petitioner received telephonic notification of the initial determination from an NSC analyst when its owner, Adelekan Adekoya, called to request guidance about how it should report its relocation. CMS Ex. 2 at 1-2.

On March 30, 2017, Petitioner filed a request for reconsideration with NSC and submitted documents in support of its request (CMS Ex. 2 at 3-20), at which time Petitioner’s owner contended, *inter alia*, that he was ill on the day of the January 5, 2017 site visit and “did return the next day and worked [sic] continued during our posted hours of operation.” CMS Ex. 2 at 4. On April 25, 2017, an NSC hearing officer issued an unfavorable reconsidered determination upholding the revocation of Petitioner’s Medicare billing privileges on the basis that Petitioner was noncompliant with 42 C.F.R. § 424.535(a)(5) and Supplier Standards 1, 2, 7, 9, 10, and 26 (42 C.F.R. § 424.57(c)(1), (2), (7), (9), (10), and (26)). Docket Entry no. 1a (Recon.).

<https://www.palmettogba.c.om/palmetto/providers.nsf/DocsCatHome/Providers~National%20Supplier%20Clearinghouse?Open> (last visited January 16, 2018). Palmetto GBA is the administrative contractor for NSC.

On June 14, 2017, Petitioner timely filed a request for hearing before an administrative law judge (ALJ), at which time it contended that it “was in compliance with all 30 DMEPOS Supplier Standards and have always remained without incident in compliance with the DMEPOS 30 Medicare provider [standards].” On June 30, 2017, I issued an Acknowledgment and Pre-Hearing Order (Pre-Hearing Order). Pursuant to the Pre-Hearing Order, CMS filed a motion for summary judgment, supporting brief (CMS Br.), and two exhibits (CMS Exs. 1 - 2).² Petitioner submitted a brief (P. Br.) and three exhibits (P. Exs. 1 - 3), along with an affidavit from Mr. Adekoya (Adekoya Affidavit).³ In the absence of any objections, I admit CMS Exs. 1 - 2, P. Exs. 1 - 3, and the Adekoya Affidavit into the record.

The Pre-Hearing Order directed the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Pre-Hearing Order, §§ 8-10; *see, e.g., HeartFlow, Inc., DAB No. 2781 at 17-18 (2017)* (holding that the use of written direct testimony for witnesses is permissible so long as the opposing party has the opportunity to cross-examine those witnesses). Petitioner submitted written direct testimony for one proposed witness, and CMS did not object to that testimony or request an opportunity to cross-examine the witness. Therefore, a hearing is unnecessary for the purpose of cross-examination of witnesses. Pre-Hearing Order, §§ 8-10. The matter is ready for a decision on the merits.⁴

² I note that CMS Exs. 1 and 2 contain numerous documents. *See* Pre-Hearing Order, § 5 (requiring each exhibit to be filed as a separate documents in DAB E-File). Although I have admitted CMS’s exhibits, I caution that CMS should ensure compliance with all directives. Further, CMS filed CMS Ex. 2 twice, without withdrawing its initial filing of CMS Ex. 2. I have admitted CMS’s substituted version of CMS Ex. 2, and I construe that CMS has withdrawn the initial filing of CMS Ex. 2. *See* Docket Entry 5 (indicating the latter filed version of CMS Ex. 2 includes corrected page numbers).

³ I directed the parties to “exchange *as a proposed exhibit* the complete, written direct testimony of any proposed witness,” either as an “affidavit made under oath or as a written declaration . . . sign[ed] under penalty of perjury” Pre-Hearing Order, § 8 (emphasis added). Petitioner’s witness affidavit is not marked or otherwise identified as an exhibit. In the absence of any objection by CMS, I admit it into evidence. Additionally, Petitioner failed to file an exhibit list, as required by the Civil Remedies Division Procedures (CRDP) and my Pre-Hearing Order. CRDP, § 14(c); Pre-Hearing Order, § 4(c)(ii).

⁴ As an in-person hearing to cross-examine witnesses is not necessary, it is unnecessary to further address CMS’s motion for summary judgment.

II. Issue

Whether CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges for failing to comply with 42 C.F.R. § 424.535(a)(5) and DMEPOS Supplier Standards 1, 7, 9, 10, and 26 (42 C.F.R. § 424.57(c)(1), (7), (9), (10), and (26)).⁵

III. Jurisdiction

I have jurisdiction to decide this case. 42 C.F.R. §§ 424.545(a), 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

IV. Findings of Fact, Conclusions of Law, and Analysis⁶

1. *Petitioner's New York registration to sell used bedding expired on May 18, 2016, and Petitioner did not renew its registration earlier than March 29, 2017.*
2. *Petitioner's landlord evicted it from its location at 3987 Laconia Avenue, Bronx, NY 10466, the location on file with NSC, on or about November 23, 2016, and thereafter it did not maintain a physical location until it secured a new location at 3421 Boston Road, Bronx, NY 10469, on March 28, 2017.*
3. *The NSC site visit contractor could not access Petitioner's reported physical location at 3987 Laconia Avenue, Bronx, NY 10466 on January 5, 2017.*
4. *Petitioner's primary business telephone number was disconnected on January 17, 2017, at which time an NSC fraud analyst attempted to reach it by telephone at its primary business telephone number.*
5. *Petitioner's liability insurance expired on July 8, 2016, and the record does not evidence that Petitioner obtained a new comprehensive liability insurance policy thereafter.*
6. *On September 30, 2016, Petitioner cancelled its surety bond, and it did not obtain a new surety bond until March 30, 2017.*

⁵ NSC cited 42 C.F.R. § 424.57(c)(2) as a basis for revocation in its reconsidered determination, but CMS does not pursue this basis and I will not further address it. CMS Br. at 2 n.1.

⁶ My findings of fact and conclusions of law are set forth in italics and bold font.

- 7. CMS had a legitimate basis to revoke Petitioner's Medicare supplier number because Petitioner did not comply with state licensure requirements, as required by 42 C.F.R. § 424.57(c)(1)(ii); did not maintain a physical location or a primary business telephone at its physical location, as required by 42 C.F.R. § 424.57(c)(7), (9); was not operational at the practice location on file, as required by C.F.R. § 424.535(a)(5)(i); and did not have liability insurance or a surety bond, as required by 42 C.F.R. § 424.57(c)(10), (26).**

To receive Medicare payments for items furnished to a Medicare beneficiary, a supplier of medical equipment and supplies must have a supplier number issued by the Secretary of Health and Human Services. Social Security Act (Act) § 1834(j)(1)(A); 42 C.F.R. § 424.505. To obtain and retain its supplier number, a DMEPOS supplier must meet the standards set forth in 42 C.F.R. § 424.57(c), and CMS may revoke its billing privileges if it fails to do so. 42 C.F.R. §§ 424.57(c)(1), (e); 42 C.F.R. § 424.535(a)(1). To receive direct-billing privileges, a DMEPOS supplier must operate in compliance with, *inter alia*, state licensure and regulatory requirements. 42 C.F.R. § 424.57(c)(1)(ii). A DMEPOS supplier must maintain a physical location that is accessible and staffed during posted hours, 42 C.F.R. § 424.57(c)(7)(i)(C), and must maintain a primary business telephone at its physical location. 42 C.F.R. § 424.57(c)(9). In addition, pursuant to 42 C.F.R. § 424.57(c)(10), a supplier must have a comprehensive liability insurance policy, and a DMEPOS supplier must have a surety bond. 42 C.F.R. § 424.57(c)(26), (d). The supplier must also permit CMS or its agents to conduct on-site inspections to ascertain its compliance with governing regulations and ensure its location is accessible to various entities such as the public, CMS, and NSC. 42 C.F.R. § 424.57(c)(7). CMS may revoke a currently enrolled DMEPOS supplier's Medicare enrollment and billing privileges if CMS determines, upon on-site review, that the DMEPOS supplier is no longer operational to furnish Medicare covered items or services, the supplier fails to satisfy any of the Medicare enrollment requirements, or has failed to furnish Medicare covered items or services as required by the statute or regulations. 42 C.F.R. § 424.535(a)(5)(ii). After a DMEPOS supplier's Medicare enrollment and billing privileges are revoked, it is barred from re-enrolling in the Medicare program for a period of one to three years. 42 C.F.R. § 424.535(c). Ordinarily, but with exceptions, a revocation is effective 30 days from the date the supplier is sent the notice of revocation. 42 C.F.R. §§ 424.57(e)(1), 424.535(g).

Petitioner did not comply with the requirements listed above, and it has not argued otherwise in its brief. *See* P. Br. at 4 (Petitioner's concession that revocation is appropriate because it was not operational at the location on record and did not comply with Supplier Standards 1, 7, 9, 10, and 26). Under New York state law, sellers of used bedding must "file a notice with the department of state which: (a) states such person's name and address; and (b) affirms that such used bedding has been sanitized in accordance with the standards established in regulation by the department of state in

consultation with the department of health.” N.Y. GEN. BUS. LAW § 385-a.1 (McKinney 1999). Petitioner had been issued a registration certificate, effective May 18, 2015, that permitted it to sell used bedding in the state of New York. CMS Ex. 2 at 21. Petitioner’s registration expired on May 18, 2016, and it did not renew its registration until March 29, 2017 or later.⁷ CMS Ex. 2 at 20. Petitioner’s failure to maintain continuous registration to sell used bedding amounts to noncompliance with Supplier Standard 1 because Petitioner was not in compliance with New York’s state regulatory requirements. 42 C.F.R. § 424.57(c)(1)(ii).

Petitioner similarly failed to comply with Supplier Standards 7 and 9, along with 42 C.F.R. § 424.535(a)(5). Petitioner had reported a practice location of 3987 Laconia Avenue, Bronx, NY 10466, and it had a primary business telephone number at the same address. CMS Ex. 1 at 2. On January 5, 2017, a site visit contractor attempted to inspect Petitioner’s practice location, but was unable to access the location because the building’s security gate was closed. CMS Ex. 1 at 12-18. A neighboring business owner informed the site visit contractor that the site had been cleared out and vacated approximately one-to-two months prior.⁸ CMS Ex. 1 at 18. On January 17, 2017, an NSC fraud analyst attempted to reach Petitioner at its business telephone number and documented that the telephone number had been disconnected. CMS Ex. 2 at 23. The written testimony of Petitioner’s owner, Mr. Adekoya, is consistent with the aforementioned evidence, in that Mr. Adekoya testified that Petitioner’s landlord evicted it from that location on November 23, 2016, and had locked Petitioner out prior to that date. Adekoya Affidavit at 1-2; P. Ex. 2. Thereafter, following its eviction on November 23, 2016, Petitioner did not have a physical location until it secured a new location on March 28, 2017. Adekoya Affidavit at 2; P. Ex. 3. Petitioner did not comply with Supplier Standards 7 and 9 because it did not maintain a physical location or a primary business telephone number at its physical location. 42 C.F.R. § 424.57(c)(7), (9). In addition, Petitioner did not comply with 42 C.F.R. § 424.535(a)(5) because it was not operational at the practice

⁷ CMS contends that Petitioner did not renew its New York registration until June 2, 2017. CMS Br. at 8, citing CMS Ex. 2 at 22. It is not necessary for me to determine the precise date that Petitioner renewed its registration because it is undisputed that Petitioner had a gap in its status as a registered seller of used bedding.

⁸ As previously discussed, Petitioner’s owner, in the request for reconsideration, had claimed that he was ill on January 5, 2017, the day of the site inspection, and that he “did return the next day and worked [sic] continued . . . during our posted hours.” CMS Ex. 2 at 3-4. Petitioner states otherwise in his current appeal. P. Br. at 2 (discussion that Petitioner had been evicted for rental arrears on November 23, 2016); P. Br. at 3 (“In or about the end of March, 2017, the Petitioner entered into a new lease agreement”); *see also* Adekoya Affidavit.

location listed in its Medicare enrollment record. *See Viora Home Health, Inc.*, DAB No. 2690 at 13 (2016) (holding that CMS properly revoked Medicare enrollment when a practice location of record was not operational upon onsite review).

Petitioner also failed to comply with Supplier Standards 10 and 26. Petitioner's certificate of liability insurance, dated October 28, 2015, indicates that Petitioner's liability insurance policy went into effect July 8, 2015, and expired July 8, 2016. CMS Ex. 1 at 10. Petitioner does not claim, and the record does not show, that it obtained a new liability insurance policy. In addition, Petitioner cancelled its surety bond, as of September 30, 2016. CMS Ex. 1 at 11. Petitioner did not obtain another surety bond until March 30, 2017. CMS Ex. 2 at 17-18. By allowing its liability insurance coverage to lapse, Petitioner did not comply with Supplier Standard 10; likewise, Petitioner did not comply with Supplier Standard 26 after it no longer met the surety bond requirement. 42 C.F.R. § 424.57(c)(10), (c)(26), (d).

Petitioner does not contend that NSC improperly revoked its supplier number. To the contrary, Petitioner argues:

As a preface, Petitioner concedes that pursuant to the strict guidelines of the 42 C.F.R. § 424.57(c)(1),(7),(9),(10), and [(26)], and 42 C.F.R. § 424.535(a)(5) and existing case law that Petitioner fails as a matter of law. In this spirit, Petitioner does not make a legal argument nor legal defense – rather, Petitioner appeals to the Court's sense of equity in granting this application for reinstatement of billing privileges with CMS.

P. Br. at 4. Petitioner requests that it be “given a warning, with reinstatement,” and that “[s]uch request is respectfully made in the name of equity.” P. Br. at 5. I have no authority to grant Petitioner's request. *US Ultrasound*, DAB No. 2302 at 8 (2010) (“Neither the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements.”); *see Donna Maneice, M.D.*, DAB No. 2826 at 7 (2017) (“On appeal of CMS's revocation, neither the ALJ nor the Board has authority to reverse an authorized revocation for reasons of equity.”) (citations omitted).⁹ I cannot grant Petitioner relief on this basis because I do not have the authority to “[f]ind invalid or refuse to follow Federal statutes

⁹ I point out that the effective date of revocation could have been more than two months earlier. CMS correctly points out that Petitioner's liability insurance expired on July 8, 2016, which would have supported revocation retroactive to an earlier date of July 8, 2016. CMS Br. at 11 n.6 (citing 42 C.F.R. § 424.57(c)(10) (“Failure to maintain required insurance at all times will result in revocation of the supplier's billing privileges retroactive to the date the insurance lapsed.”)).

or regulations or secretarial delegations of authority.” *See, e.g., 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 a constitutional one.”).

V. Conclusion

For the reasons stated above, I affirm the revocation of Petitioner’s DMEPOS supplier number and Medicare billing privileges, pursuant to 42 C.F.R. § 424.57(c)(1)(ii), (c)(7), (c)(9), (c)(10), (c)(26), (d)(11)(i) and 424.535(a)(5).

_____/s/
Leslie C. Rogall
Administrative Law Judge