Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Ita Udeobong d/b/a Midland Care Medical Supply and Equipment,
(Supplier No: 4517410001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-09-736

Decision No. CR2088

Date: March 9, 2010

DECISION

The Centers for Medicare & Medicaid Services (CMS) has revoked Petitioner's Medicare supplier number. Petitioner, Ita Udeobong d/b/a Midland Care Medical Supply and Equipment, appeals, and CMS moves for summary judgment. Petitioner opposes. As discussed below, the uncontroverted facts compel revocation of Petitioner's supplier number. I therefore grant CMS's motion for summary judgment.

I. Background

Until its Medicare supplier number was revoked on March 1, 2009, Petitioner participated in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). *See* 42 C.F.R. § 424.57. In a letter dated January 30, 2009, the Medicare contractor, Palmetto GBA National Supplier Clearinghouse, notified Petitioner that its supplier number would be revoked pursuant to 42 C.F.R. §§ 424.57(d), 424.535(a)(1), 424.535(a)(5)(ii) and other regulations. Among other problems, the letter noted that a contractor representative was unable to conduct an inspection of the supplier's facility because the facility was closed, and its doors were

locked. A note from the leasing agent said that Petitioner would be locked out until back rent was paid. CMS Ex. 1.

Petitioner sought reconsideration. In a reconsideration decision dated July 28, 2009, a Medicare hearing officer affirmed the revocation of Petitioner's supplier number. CMS Ex. 6. Petitioner now appeals that determination.

CMS moves for summary judgment. With its motion and brief, CMS submits seven exhibits (CMS Exs. 1-7). Petitioner opposes, and with its brief submits two exhibits (P. Exs. 1-2).

II. Discussion

> ***CMS is entitled to summary judgment because the undisputed evidence establishes that the supplier, Ita Udeobong d/b/a Midland Care Medical Supply and Equipment, did not satisfy Medicare enrollment requirements.***[1]

Summary judgment. The Departmental Appeals Board has, on multiple occasions, discussed the well-settled principles governing summary judgment. *See, e.g.*, *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 2-3 (2009). Summary judgment is appropriate if a case presents no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *1866ICPayday*, at 2; *Illinois Knights Templar Home*, DAB No. 2274, at 3-4 (2009), and cases cited therein.

The moving party may show the absence of a genuine factual dispute by presenting evidence so one-sided that it must prevail as a matter of law, or by showing that the non-moving party has presented no evidence "sufficient to establish the existence of an element essential to [that party's] case, and on which [that party] will bear the burden of proof at trial." *Livingston Care Center v. Dep't of Health & Human Services*, 388 F.3d 168, 173 (6th Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). To avoid summary judgment, the non-moving party must then act affirmatively by tendering evidence of specific facts showing that a dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (1986); *see also Vandalia Park*, DAB No. 1939 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004).

> To defeat an adequately supported summary judgment motion, the non-moving party **may not rely on the denials in**

[1] I make this one finding of fact/conclusion of law.

> **its pleadings or briefs, but must furnish evidence** of a dispute concerning a material fact . . . .

Illinois Knights Templar, at 4 (emphasis in original); *Livingston Care Center*, DAB No. 1871, at 5 (2003).

In examining the evidence for purposes of determining the appropriateness of summary judgment, I must draw all reasonable inferences in the light most favorable to the non-moving party. *1866ICPayday, L.L.C.* at 3; *Brightview Care Center*, DAB No. 2132, at 2, 9 (2007); *Livingston Care Center*, 388 F.3d at 172; *Guardian Health Care Center*, DAB No. 1943, at 8 (2004); *but see Brightview*, DAB No. 2132, at 10 (entry of summary judgment upheld where inferences and views of non-moving party are not reasonable). Moreover, drawing factual inferences in the light most favorable to the non-moving party does not require that I accept the non-moving party's legal conclusions. *Cf. Guardian Health Care Center*, DAB No. 1943, at 11 ("A dispute over the conclusion to be drawn from applying relevant legal criteria to undisputed facts does not preclude summary judgment if the record is sufficiently developed and there is only one reasonable conclusion that can be drawn from those facts.").

Requirements for a DMEPOS supplier's Medicare participation. To receive Medicare payments for items furnished to a Medicare-eligible 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 § 1834(j)(1)(A).

In order to obtain and retain its supplier number, a 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) and (d); 42 C.F.R. 424.535(a)(1). Among other requirements, the supplier must permit CMS or its agents to conduct on-site inspections to ascertain its compliance with governing regulations. Its location must be accessible during reasonable business hours, and it must maintain a visible sign and post its hours of operation. 42 C.F.R. § 424.57(c)(8). CMS may also revoke billing privileges if it determines, based on an on-site review, that the supplier is no longer operational to furnish Medicare covered items or services, or is not otherwise meeting Medicare enrollment requirements. 42 C.F.R. § 424.535(a)(5).

Undisputed facts and application of law to those facts. Here, CMS has come forward with evidence establishing that, prior to March 1, 2009, Petitioner was a Medicare-enrolled DMEPOS supplier located at 610 Murphy Road, Suite 105, Stafford, Texas. CMS Ex. 3, at 3. Its posted hours were 10:00 a.m. to 5:00 p.m. Monday through Friday. At 11:58 a.m. on April 15, 2009, Mark Porter, a fraud investigator employed by the contractor, attempted an onsite inspection at that location, but found that the facility was closed, the lights were off, the door was locked and no one was there. No sign on the door indicated why the business was closed during its posted hours of operation. CMS

Exs. 3, 7. He returned the following day at 11:03 a.m. Again, the facility was closed, with lights off, door locked and no one there. No sign indicated why the business was closed during its posted hours of operation. CMS Exs. 3, 7. Because the investigator could not inspect the premises, the contractor revoked Petitioner's supplier number.

Although Petitioner argues about the quality of CMS's evidence, it does not dispute any of the facts asserted. Indeed, Petitioner submits the declaration of Ita Udeobong, the owner and operator of Midland Care Medical Supply, who confirms that his business was not open and no one was available when Investigator Porter visited. Mr. Udeobong asserts that on April 15, 2009, the inspector "arrived at 11:59 am during the office's lunch hours which are from 12:00 pm to 1:00 pm." He admits that when the inspector arrived at 11:03 a.m. on April 16, 2009, the office was empty, but claims that "an emergency situation" compelled his employee to leave the office immediately. P. Ex. 1, at 2. Although he does not identify the employee, nor provide any additional explanation, for summary judgment purposes, I accept his assertions as true.

The parties dispute whether, when Investigator Porter visited, lunch hours were posted on the door or anywhere else visible to the public. *Compare* CMS Ex. 3, at 9-14, and CMS Ex. 7, at 3 *with* P. Ex. 1, at 2, and P. Ex. 2. Again, for summary judgment purposes, I accept as true Mr. Udeobong's assertion that, on April 15, 2009, his employee posted a sign displaying the lunch hours, which the employee removed when he/she returned from lunch. I also accept as true that, when the employee suddenly left the facility on April 16, he/she "placed a sign on the door informing the public that no one would be available until after lunch." P. Ex. 1, at 2; P. Ex. 2.

Based on these facts, I find that Petitioner was not in compliance with all of the standards set forth in section 424.57(c). First, the facility's posted hours of operation were 10:00 a.m. to 5:00 p.m. Yet, as Petitioner admits, it was closed from noon until 1:00 p.m. every day. On a regular basis, the facility was not open and accessible to beneficiaries during its posted hours of operation. It therefore did not comply with 42 C.F.R. § 424.57(c)(8). The standard would have no meaning if suppliers were not also required to adhere to the posted hours of operation. I find that posting an "out-to-lunch" or a "will-return" sign whenever the office is closed is not sufficient to satisfy the requirement that the facility actually be open and accessible during its posted hours of operation.

Moreover, to sustain its supplier number, a DMEPOS supplier must also permit CMS or its agents to conduct on-site inspections. 42 C.F.R. §§ 424.57(c)(8). Here, Petitioner had two opportunities to meet this requirement, but, by its own admission, it was not accessible and therefore did not permit the on-site inspection. I note that CMS and its contractors must, with scarce resources, monitor the performance of a vast number of providers and suppliers. Inspections are supposed to be unannounced. An investigator should be able to rely on the posted hours of operation in determining when to conduct an

inspection. Requiring an investigator to return multiple times to a single facility in the hopes of finding it open is simply unreasonable.

Petitioner did not meet all of the standards of section 424.57(c), and CMS properly revoked its billing privileges. 42 C.F.R. § 424.57(d).

III. Conclusion

Because the undisputed facts establish that Petitioner has not satisfied Medicare enrollment requirements, I grant CMS's motion for summary judgment and sustain the revocation of Petitioner's supplier number.

/s/
Carolyn Cozad Hughes
Administrative Law Judge