

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Emerald Medical Services, LLC,
(Supplier No: 5556280002),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-989

Decision No. CR2328

Date: February 25, 2011

DECISION

Petitioner Emerald Medical Services, LLC (“Petitioner”) appeals a reconsideration decision by a Medicare hearing officer with National Supplier Clearinghouse Palmetto GBA (NSC), a CMS contractor. The undisputed evidence establishes that Petitioner, a medical equipment supplier, was not in compliance with Medicare program requirements, and as a consequence I grant the motion of the Centers for Medicare and Medicaid Services (CMS) for summary judgment and uphold the determination to revoke Petitioner’s enrollment in the Medicare program.

I. Applicable Law and Regulations

Section 1834(j)(1) of the Social Security Act, 42 U.S.C. § 1395m(j)(1), states the requirements for the issuance and renewal of a supplier number for suppliers of medical equipment and supplies. That section provides that “no payment may be made . . . for items furnished by a supplier of medical equipment and supplies unless such supplier obtains (and renews at such intervals as the Secretary may require) a supplier number.”

To participate in Medicare as a medical equipment supplier and to maintain a supplier number, an entity must also meet the specific requirements, referred to as “supplier standards,” at 42 C.F.R. § 424.57(c) for suppliers of “durable medical equipment, prosthetics, orthotics, and supplies” (DMEPOS). 42 C.F.R. § 424.57(a). As relevant here, supplier standard 4, which took effect October 2, 2006 (71 *Fed. Reg.* 48,354 (Aug.18, 2006)), provides that a supplier “[f]ills orders, fabricates, or fits items from its own inventory or by contracting with other companies for the purchase of items necessary to fill the order. 42 C.F.R. § 424.57(c)(4). If it does [contract to purchase these items], it must provide, upon request, copies of contracts or other documentation showing compliance with this standard. . . .” *Id.* Supplier standard 21 requires that a supplier “[p]rovides to CMS, upon request, any information required by the Medicare statute and implementing regulations.” 42 C.F.R. § 424.57(c)(21).

Further regulations provide that CMS will revoke a supplier’s billing number 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), 424.535(a)(1).

II. Background and Procedural History

Petitioner is a DMEPOS supplier. On January 25, 2010, NSC conducted an on-site review of Petitioner’s facility.¹ At the conclusion of the on-site review, the reviewer provided Petitioner with a checklist, instructing Petitioner to fax ten items of information to an NSC representative “within **2 business days.**” CMS Ex. 1, at 9 (emphasis in the original). Among other items, CMS specifically requested a review of Petitioner’s credit agreement(s) or invoices from June of 2009 to November of 2009 to establish that Petitioner had an inventory source from which it purchased power wheelchairs, accessories, and options that Petitioner billed to Medicare. CMS calculates the amount Petitioner billed Medicare during this time frame to be \$53,264.00, and Petitioner does not dispute this. CMS Ex. 1, at 8.

An employee of Petitioner signed the checklist indicating that Petitioner would provide all the requested information to CMS within 2 business days. CMS Ex. 1, at 9. The checklist is dated January 25, 2010 and specifically noted “the supplier’s failure to provide the requested information could result in the denial or revocation of a Medicare supplier billing number.” *Id.*

CMS claims that Petitioner never faxed the required information within two business days. The NSC investigation file contained a note indicating “[f]ax not received as of 1-27-10 at 8 p.m.” CMS Ex. 1, at 7. Petitioner contends that it faxed the requested information to NSC on the day of the site visit. CMS Ex. 4, at 1. However, the facsimile

¹ Overland Solutions, Inc. (OSI), an NSC subcontractor, performed the actual site review.

confirmation report Petitioner presents as proof that it submitted the requested information lists no facsimile number to where Petitioner faxed the response; instead, it contains a blank space where a facsimile number would reasonably be expected. CMS Ex. 4, at 5.

NSC also then sent a letter by certified mail that gave Petitioner another opportunity to submit the requested information. The letter, dated February 19, 2010, notified Petitioner that it was out of compliance with four different Medicare supplier standards and advised Petitioner that it had 21 calendar days to provide NCS with the requested information. CMS Ex. 2. The letter also indicated that the failure to provide NCS with information to verify Petitioner's full compliance with the DMEPOS supplier standards within the 21-day deadline could result in the revocation of Petitioner's Medicare supplier number. CMS Ex. 2, at 2. The United States Postal Service (USPS) made two documented attempts on February 20, 2010 and March 10, 2010 to deliver the certified letter, but both attempts were unsuccessful. CMS Ex. 2, at 3-6. Petitioner states that "it has not received mail . . . in the past due to suspected mishandling of mail by [USPS]." P. Br. at 6.

By letter dated April 7, 2010, CMS notified Petitioner that it failed to provide any proof of compliance with the regulatory requirements of 42 C.F.R. § 424.57(c)(1), (4), (10), and (21), and, as a result, CMS planned to revoke Petitioner's Medicare supplier number effective 30 days from the postmark of the letter. CMS Ex. 3. Petitioner included with its April 23, 2010 request for reconsideration some of the documents and information NCS had previously requested. Among other items, Petitioner provided a letter of credit in the amount of \$20,000 from ActiveCare Medical, a DMEPOS wholesaler, and one invoice from ActiveCare Medical for Lift Gate Services totaling \$991.92. CMS Ex. 4. However, Petitioner still did not provide credit agreements or any other invoices from June 2009 to November 2009 to show proof of inventory as NCS originally requested.

NSC received Petitioner's April 23, 2010 Reconsideration Request on April 26, 2010 and acknowledged receipt by letter dated May 19, 2010. CMS Ex. 6. Effective May 7, 2010, CMS revoked Petitioner's Medicare supplier number. NSC submitted a hearing summary in support of CMS's decision to revoke Petitioner's Medicare supplier number. CMS Ex. 5. On July 19, 2010, a Medicare hearing officer issued a reconsideration decision upholding the revocation of Petitioner's Medicare supplier number. The hearing officer determined that Petitioner did not provide evidence to show it fully complied with the requirements of 42 C.F.R. § 424.57, and Petitioner did not show compliance with supplier standards 1, 4, 10, and 21. CMS Ex. 7, at 3.

On August 31, 2010, Petitioner filed a hearing request with the Civil Remedies Division (CRD) of the Departmental Appeals Board (Board) to appeal the reconsideration decision. This case was initially assigned to Board Member Leslie A. Sussan pursuant to

42 C.F.R. § 498.44, which permits a Board Member to hear appeals under 42 C.F.R. Part 498. An Acknowledgment and Pre-hearing Order was sent to the parties on September 23, 2010.

On October 25, 2010, this case was reassigned to me for hearing and decision. On October 25, 2010, CMS filed a motion for summary judgment. With its brief (CMS Br.), CMS submitted eleven exhibits (CMS Exs. 1-11). On December 3, 2010, Petitioner filed a brief in response to CMS's motion for summary judgment (P. Br.). With its brief, Petitioner submitted eight exhibits (P. Exs. 1-8), including the affidavits of three proposed witnesses. On December 20, 2010, CMS filed a reply brief (CMS Reply). On January 5, 2010, Petitioner filed a sur-reply brief (P. Sur-Reply). In the absence of objection, I admit CMS Exs. 1-11 and P. Exs. 1-8 to the record.

III. Issue, Findings of Fact, Conclusions of Law

A. Issue

The sole issue in this case is whether CMS was legally authorized to revoke Petitioner's enrollment as a supplier in the Medicare program

B. 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 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). The Board has further stated, "[i]n addition, it is appropriate for the tribunal to consider whether a rational trier of fact could regard the parties'

presentation as sufficient to meet their evidentiary burden under the relevant substantive law.” *Dumas Nursing and Rehab., L.P.*, DAB No. 2347, at 5 (2010).

B. Findings of Fact and Conclusions of Law

My findings and conclusions are in the italicized heading supported by the subsequent discussion below.

- 1. CMS was authorized to revoke Petitioner’s supplier number based on undisputed evidence that Petitioner failed to adequately respond to CMS’s request for specific documentation, as sections 424.57(c)(4) and 424.57(c)(21) require.***

NSC determined that “[d]uring a . . . site inspection, [Petitioner] failed to display sufficient inventory for the amount billed to Medicare. . . .” CMS Ex. 3, at 2. NSC requested Petitioner to submit credit agreements or invoices for a six-month time period to document \$53,264.00 of power wheelchairs and accessories Petitioner billed to Medicare.

Upon receiving the April 7, 2010 revocation letter, Petitioner provided some information, including one invoice from ActiveCare Medical totaling \$991.92, responsive to NSC’s original request of January 25, 2010. CMS Ex. 4, at 20. Petitioner argues that it believed that its noncompliance with Supplier Standard 4 was based solely on the fact that the letter of credit it submitted was not in the proper NSC format. Petitioner contends that it never understood that NSC was requesting specific proof that Petitioner obtained and sold the specific items of durable medical supplies to account for the \$53,264.00 that Petitioner billed Medicare from June 2009 through November 2009. P Br. at 11-13. This argument strains credulity considering the specific language in the revocation letter:

During a recent site inspection, you failed to display sufficient inventory for the amount billed to Medicare. You were asked to provide documentation and failed to provide the credit agreements/contracts you have with other companies and the invoices for the claims filed between June 1, 2009 and November 30, 2009. Please submit all the requested documentation to prove compliance with this standard.

CMS Ex. 2, at 1.

Petitioner argues that, when it received the reconsideration decision dated July 19, 2010, it learned that the credit term agreement it submitted was not in the required NSC format. P. Br. at 11; CMS Ex. 7, at 2. However, prior to revoking Petitioner’s supplier number, I find NSC clearly requested all credit agreements or invoices to prove compliance with 42 C.F.R. § 424.57(c)(4).

The fact that Petitioner eventually submitted a letter of credit from ActiveCare Medical (P. Ex. 5) under which the equipment *could* have been purchased does not establish documentation for the inventory of the power wheelchairs billed to Medicare between June 1, 2009 and November 30, 2009. Regardless of the formatting requirements that NSC prescribed, the January 12, 2009 letter of credit with ActiveCare Medical clearly does not show that Petitioner purchased items under this agreement during the relevant time period. Thus, the documentation Petitioner submitted is not sufficient to meet the requirements of 42 C.F.R. § 424.57(c)(4). Upon request, suppliers must produce contract evidence if the supplier lacks inventory of its own. *Id.* The on-site review revealed that Petitioner did not have inventory of its own (CMS Ex. 1, at 10-11), and Petitioner clearly did not provide sufficient contract evidence.

No exemption from the requirements of 42 C.F.R. § 424.57(c)(4) exists for suppliers that fail to meet the standard, despite their best efforts, or misunderstand what is necessary to demonstrate compliance with the regulatory requirement. Suppliers have an affirmative obligation to certify present and future compliance with the Medicare supplier standards. 42 C.F.R. § 424.57(c). As CMS points out, Petitioner did not provide proper documentation to demonstrate compliance with 42 C.F.R. § 424.57(c)(4) at the time: (1) of the on-site review; (2) of the revocation of Petitioner's Medicare supplier number; (3) when Petitioner was afforded an opportunity to submit a Corrective Action Plan; and (4) when Petitioner was afforded an opportunity to submit a request for reconsideration. CMS Reply at 8.

Also, due to Petitioner's failure to adequately respond to NSC's request for specific documentation under section 424.57(c)(4), NSC reasonably found that Petitioner was not in compliance with section 424.57(c)(21), which requires a supplier to provide to CMS, upon request, any information that the Medicare statute and implementing regulations require. Because I have established that Petitioner did not meet the requirements of two supplier standards, I need not consider the argument that CMS was also authorized to revoke Petitioner's supplier number based on its noncompliance with supplier standards 1 and 10. *See 1866ICPayday.com*, DAB No. 2289, at 13 (2009) (“[F]ailure to comply with even one supplier standard is a sufficient basis for revoking a supplier's billing privileges.”).

2. *I decline to consider the new documentary evidence that Petitioner submitted because this evidence was not provided to CMS prior to this appeal at the ALJ level.*

Petitioner now attempts to introduce new documentary evidence, including another letter of credit from ActiveCare Medical dated August 31, 2010 (P. Ex. 2) and supply invoices (P. Ex. 3), as proof that it was in compliance with 42 C.F.R. § 424.57(c)(4), during the months of June 2009 to November 2009. Petitioner claims that it has been unrepresented by counsel until recently and was unaware of the NSC's formatting requirements for

contracts. P. Br. at 12; P. Ex. 6. Petitioner also claims that it did not previously submit this documentation because it believed that NSC was only requesting general proof of its ability to obtain durable medical supplies during the months of June 2009 through November 2009. P. Br. at 12; *see* P. Ex. 6 and P. Ex. 7. Petitioner thus attempts to argue that good cause exists for me to now consider Petitioner's new evidence as proof of its compliance with 42 C.F.R. § 424.57(c)(4). Petitioner essentially argues that its failure to previously produce this documentation was not intentional and was the result of "a limited number of miscommunications" between NSC and Petitioner. P. Br. at 14.

Petitioner must establish good cause for me to admit new evidence. 42 C.F.R. § 498.56(e) precludes an ALJ from considering documentary evidence that had not been presented to CMS prior to requesting a hearing, absent a showing of good cause for submitting the new evidence for the first time at the ALJ level. *A to Z DME, LLC*, DAB No. 2303, at 10 (2010). The relevant regulations do not contain any exception for me to consider evidence for the first time simply because a party chose not to be represented by counsel during the reconsideration process. *Id.* at 11.

It is undisputed that the new documentary evidence Petitioner seeks to introduce was not provided to CMS prior to this appeal. As discussed above, Petitioner had many opportunities to submit documentation to demonstrate compliance with 42 C.F.R. § 424.57(c)(4) and failed to do so. CMS's requests for information were clear and specific, and Petitioner has no right to now address its noncompliance with new evidence without Petitioner showing good cause, which I find Petitioner fails to do.

IV. Conclusion

A supplier must comply with all required standards. Applicable laws bind me, and I lack authority to invalidate or change an existing regulation or grant Petitioner an exemption from compliance with regulatory requirements. *1866ICPayday.com*, DAB No. 2289, at 14. I must sustain CMS's determination where the facts establish noncompliance with one or more of the regulatory standards. For the reasons explained above, I conclude that CMS appropriately revoked Petitioner's supplier number for failure to comply with Medicare DMEPOS supplier requirements and grant summary judgment in favor of CMS.

/s/
Joseph Grow
Administrative Law Judge