Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Absecon Manor Nursing Home Association
d/b/a Absecon Manor Nursing & Rehabilitation Center,
(PTAN: 0582520001),

Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket No. C-10-441

Decision No. CR2188

Date: July 20, 2010

DECISION

Petitioner, Absecon Manor Nursing Home Association d/b/a Absecon Manor Nursing & Rehabilitation Center (Absecon) is a long-term care facility located in Absecon, New Jersey, which participates in the Medicare program. Petitioner is also a supplier of Medicare durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS supplier). The Centers for Medicare & Medicaid Services (CMS) determined that Absecon was not in compliance with 42 C.F.R. § 424.57(c)(26) (supplier standard 26) and has revoked Petitioner's Medicare supplier number.

Petitioner timely challenged CMS's determination. CMS sought summary disposition, and Petitioner filed a cross motion for summary judgment. For the reasons set forth below, I find that CMS is entitled to summary judgment, and I deny Petitioner's cross motion. The undisputed evidence establishes that Absecon was not in compliance with Medicare program requirements, and, as a consequence, CMS has the authority to revoke Absecon'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 requirements among the "supplier standards" at 42 C.F.R. § 424.57(c), which DMEPOS suppliers must meet to maintain Medicare billing privileges. As relevant here, section 424.57(c) 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:
>
> * * * *
>
> (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) referenced in supplier standard 26 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," which "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). "The term of the initial surety bond must be effective on the date that the application is submitted to the NSC [National Supplier Clearinghouse, a Medicare contractor]." 42 C.F.R. § 424.57(d)(2).

The regulations provide that failure to submit a surety bond as required is grounds for revocation of a supplier's billing privileges:

> CMS requires a supplier to submit a bond that on its face reflects the requirements of this section. CMS revokes or denies a DMEPOS supplier's billing privileges based upon the submission of a bond that does not reflect the requirements of paragraph (d) of this section [42 C.F.R. § 424.57].

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 section 424.57(c). 42 C.F.R. § 424.57(e) (formerly § 424.57(d)).[1]

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

II. Background

By letter dated February 9, 2010, Petitioner requested a hearing pursuant to section 1866(j)(2) of the Act, 42 U.S.C. § 1395cc(j)(2) and 42 C.F.R. Part 498. Petitioner's hearing request (HR) was submitted in response to the January 21, 2010 reconsideration decision of a Medicare Hearing Officer. CMS Ex. 10. In that decision, the Medicare Hearing Officer found Petitioner noncompliant with supplier standard 26, which requires DMEPOS suppliers to meet surety bond requirements.[2] *Id.*

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[1] Paragraph (e) of section 424.57 was previously designated paragraph (d) and was redesignated by the rulemaking that imposed the surety bond requirements at paragraph (d); however, the redesignations have not yet been incorporated into the Code of Federal Regulations. *See* 42 C.F.R. Ch. IV § 424.57, Editorial Note (Oct. 1, 2009). References are to the regulation as redesignated.

[2] CMS initially revoked Petitioner's Medicare supplier number, because - -

> [i]n accordance with 42 C.F.R. §§ 424.57(c)(22) and 424.57(d), the NSC has not received proof of accreditation as required by October 1, 2009. In addition, in accordance with 42 C.F.R. §§ 424.57(c)(26) and 424.57(d), "All existing DMEPOS suppliers subject to the bonding requirement shall submit a copy of the required surety bond to the NSC no later than October 2, 2009." You failed to submit the surety bond to the NSC as required.

CMS Ex. 7 (Revocation Letter Dated Oct. 9, 2009). Upon reconsideration, the Medicare Hearing Officer found Petitioner was compliant with supplier standard 22 of 42 C.F.R. § 424.57(c), requiring all suppliers to be accredited by a CMS-approved accreditation organization. CMS Ex. 10, at 1-2. That finding is not at issue on appeal.

Petitioner acknowledges that the Hearing Officer found noncompliance with the surety bond requirement but argues:

> We did submit a valid continuation of the Surety Bond which did not include the signature of our authorized or delegated official as it was a continuation to the existing bond. Upon speaking with a representative at National Supplier Clearinghouse, we obtained a Surety Bond for the facility only, which shows the signature of our authorized or delegated official.
>
> We are hoping that this correction to the Surety Bond will show us in compliance with Supplier Standard #26, and you will grant us a Favorable Decision . . . .

HR. This case was originally assigned to Administrative Law Judge (ALJ) Richard J. Smith. It was reassigned to me for hearing and decision pursuant to 42 C.F.R. § 498.44, which permits designation of a Member of the Departmental Appeals Board (Board) to hear appeals taken under part 498.

ALJ Smith convened a prehearing conference by telephone on March 25, 2010, which he summarized in an Order issued that same day. Based on ALJ Smith's review of the file, he determined the case could be addressed in summary fashion in the context of a motion for summary disposition. Order Following Prehearing Conference at 3 (Mar. 25, 2010). ALJ Smith set a briefing schedule accordingly. *Id.* at 3-4.

CMS argues in support of summary disposition that Petitioner did not meet the surety bond requirements as of October 2, 2009. Specifically, CMS argues that Petitioner submitted a "Decrease Rider" as evidence that it met the surety bond requirement, and that submission on its face is not in compliance with 42 C.F.R. § 424.57(c)(26) and (d). CMS Br. at 12-14; *see* Reconsideration Decision Letter, dated Jan. 21, 2010, at 2-3; CMS Ex. 11, at 1 (Decrease Rider). For example, CMS points out that the obligee listed on the Decrease Rider is the State of New Jersey, whereas section 424.57(d)(10) requires that the obligee be CMS. CMS Br. at 13-14; *see* CMS Ex. 11, at 1.

CMS objects to Petitioner's filing of additional evidence of a surety bond, dated February 5, 2010, with its hearing request. CMS Br. at 14. CMS argues that "the provider is precluded from introducing new evidence at 'higher levels of the appeals process'" and that "[r]egulations governing ALJ hearings further provide that the ALJ will only consider newly submitted evidence if the provider or supplier can demonstrate good cause for submitting such evidence for the first time at the ALJ level." *Id.*, citing 42 C.F.R. §§ 405.874(c)(5) and 498.56(e).

With its motion and brief, CMS filed 14 exhibits (CMS Exs. 1-14). Petitioner opposed CMS's motion and also filed a cross motion for summary disposition (P. Br.). CMS submitted a reply to Petitioner's cross motion (CMS Reply).

Petitioner did not object to any of CMS's exhibits, and I admit them into the record. I address below CMS's objection to the documents attached to the Hearing Request as "new evidence" within the meaning of section 498.56(e).

III. Issues

The issues in this case are:

1. Whether CMS has the authority to require existing DMEPOS suppliers, such as Petitioner, to submit a surety bond in compliance with 42 C.F.R. § 424.57(c)(26) and (d) by October 2, 2009, at a time when Petitioner allegedly was not making a change of ownership or responding to a revalidation or reenrollment request;

2. If so, whether CMS is entitled to summary disposition on the ground that the undisputed facts demonstrate that the revocation of Petitioner's Medicare billing privileges was legally authorized; and

3. Whether Petitioner is entitled to summary disposition on the grounds that the undisputed facts demonstrate that it was in compliance with the surety bond requirements.

IV. Applicable Standard

Both parties have moved for summary disposition in the nature of summary judgment. Neither alleges that any material facts are in dispute. The parties debate whether: (1) the regulation authorizes CMS to request Petitioner to submit a surety bond at the time that it did; and (2) undisputed facts authorize the revocation of Petitioner's Medicare supplier number under the applicable regulation.

The Board stated the standard for summary judgment as follows.

> 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 assess credibility or evaluate the weight of conflicting evidence when resolving a summary judgment motion. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 4-5 (2009).

V. Findings of Fact and Conclusions of Law

Petitioner essentially argues throughout its brief that CMS acted outside of its statutory and regulatory authority by requiring Petitioner to submit a surety bond in compliance with 42 C.F.R. § 424.57(d) by October 2, 2009. Petitioner maintains that only limited times exist at which CMS is authorized to make such a requirement, specifically at enrollment, renewal, or when making a change of ownership, and Petitioner was outside of those limited times. P. Br. at 4-6. I address this argument first.

Petitioner subsequently argues that, even if CMS had the authority to require the submission of a surety bond when it did, Petitioner was in compliance with the surety bond requirement, because the surety bond in effect at that time satisfies the surety bond requirement's purpose. P. Br. at 8. Petitioner maintains that to permit revocation of its supplier number for the shortcomings that CMS identified "elevates form over substance, places the letter of the law over the spirit of the law and defies common sense." *Id.* CMS contends that the undisputed facts demonstrate Petitioner's failure to timely comply with applicable surety bond requirements. CMS Br. at 1. I address the evidence relating to Petitioner's compliance second.

My findings and conclusions are set forth in the bold italicized headings and supported by the discussions in the sections below.

1. CMS acted within its authority when it required Petitioner to submit a surety bond in compliance with 42 C.F.R. § 424.57(d) by October 2, 2009.

Petitioner argues that the Secretary's statutory and regulatory authority to require existing DMEPOS suppliers to submit a surety bond is limited to certain enumerated times. Petitioner relies on the language of the authorizing statute, 42 U.S.C. § 1395m(a)(16)(B), which prohibits the Secretary from providing for the "issuance (or renewal)" of a provider number, unless the supplier of durable medical equipment furnishes the Secretary with a surety bond in a form that the Secretary specified in an amount not less than $50,000. Petitioner interprets the use of the words "issuance" and "renewal" to limit

when the Secretary can refuse to allow a supplier billing privileges. Petitioner argues that CMS's authority is limited to refusing "to issue a Medicare Supplier Number at the time of a supplier's application to become a participating Medicare DMEPOS supplier or . . . to renew a current supplier's number at the time of renewal." P. Br. at 5.

Petitioner's narrow interpretation of "issuance" and "renewal" is without merit. The statutory language does not constrain how the Secretary is to avoid issuing or renewing a Medicare number to a supplier lacking a valid surety bond. Nothing in the statute suggests that the Secretary could not reasonably meet that requirement by ensuring that all suppliers having Medicare numbers obtain and maintain the required surety bonds. In fact, 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) (emphasis added).

This requirement for continuous compliance is implemented in the regulations that the Secretary issued. Thus, 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. (Emphasis added.) Those standards include section 424.57(c)(26) (supplier standard 26), which states that a supplier "[m]ust meet the surety bond requirements specified in paragraph (d) of this section." It follows that a supplier must meet the surety bond requirements specified in paragraph (d) on a continuing basis.

Consistent with this, the preamble to the final rule on appeals of CMS determinations when a provider or supplier fails to meet the requirements for Medicare billing privileges 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) (emphasis added).

To ensure that a supplier maintains compliance with the surety bond requirement, section 424.57(d)(12) permits "CMS . . . **at any time** [to] require a DMEPOS supplier to show compliance with the requirements of paragraph (d) of this section." (Emphasis added).

I conclude that these regulations are directly applicable, are unambiguous, and in no way conflict with the statute.

Petitioner, however, points to section 424.57(d)(2), which sets out "minimum requirements for a DMEPOS supplier" and requires "a supplier enrolling in the Medicare program, making a change in ownership, or responding to a revalidation or reenrollment request" to submit a compliant surety bond. P. Br. at 5, citing 42 C.F.R. § 424.57(d)(2)(i). Petitioner maintains that "[n]owhere in either the statute or the

regulation is a supplier required to submit a surety bond to CMS at any time outside of the time of application or renewal." *Id.*

First, Petitioner fails to address section 424.57(d)(1)(i), which plainly required existing DMEPOS suppliers, such as Petitioner, to meet the surety bond requirement by October 2, 2009.[3] That requirement reads as follows:

> (ii) *Existing DMEPOS suppliers.* Except as provided in paragraph (d)(15) of this section, beginning October 2, 2009, each Medicare-enrolled DMEPOS supplier must meet the requirements of paragraph (d) of this section for each assigned NPI to which Medicare has granted billing privileges.

Contrary to Petitioner's argument, existing suppliers were thus directly required to be in compliance by October 2, 2009, and the plain language of section 424.57(d)(12) permitted CMS to request proof of compliance with the surety bond requirement at any time thereafter.[4]

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[3] The preamble to the final rule describes the timeframe for implementation of the surety bond requirement separately for existing DMEPOS suppliers. *See* 74 Fed. Reg. 166, 173 (Jan. 2, 2009). CMS intentionally allowed a longer time for existing DMEPOS suppliers to obtain a surety bond to "give existing suppliers an opportunity to assess and determine whether they will continue to participate in the Medicare program during the accreditation implementation [by October 1, 2009] without incurring additional costs associated with a surety bond." *Id.* Thus, DMEPOS suppliers already enrolled in the Medicare program, as of the publication date of this final rule, were required to obtain a surety bond no later than nine months after the effective date of the final rule (October 2, 2009). *Id.* In contrast, any DMEPOS supplier seeking to enroll a new practice location, or to change the ownership of an existing DMEPOS supplier after the publication date of this rule, was required to submit a surety bond beginning 120 days after the effective date of this rule (May 4, 2009). *Id.*

[4] I thus disagree with Petitioner that CMS relies for its only basis to require submission of a surety bond by existing suppliers on a provision in a transmittal to its Program Integrity Manual (PIM), which reads: "All existing DMEPOS suppliers subject to the bonding requirement shall submit a copy of the required surety bond to the NSC no later than October 2, 2009." PIM, CMS Pub. No. 100-08, Transmittal 287, (issued March 27, 2009; eff. April 6, 2009) (This provision was superseded in the PIM after the October 2009 deadline had passed.). While Petitioner is correct that the PIM does not have the force of law but rather represents CMS's interpretation and clarification of the statutory and regulatory requirements, those requirements, as discussed above, amply support

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Furthermore, Petitioner has not demonstrated that the circumstances here do not constitute "responding to a revalidation . . . request" within the meaning of section 424.57(d)(2). The preamble of this final rule indicates that the "revalidation process . . . ensure[s] that [CMS] collect[s] and maintain[s] complete and current information on all Medicare providers and suppliers and ensure[s] continued compliance with Medicare requirements." 71 Fed. Reg. 20,754, 20,768 (Apr. 21, 2006).

In accordance with section 424.515(d), CMS reserves the right to perform off cycle revalidations in addition to the regular revalidations described in the introductory text of section 424.515.[5] Section 424.515(d) reads, in pertinent part:

> [CMS] may request that a provider or supplier recertify the accuracy of the enrollment information when warranted to assess and confirm the validity of the enrollment information maintained by CMS. Off cycle revalidations may be triggered as a result of random checks, information indicating local health care fraud problems, national initiatives, complaints, or other reasons that cause CMS to question the compliance of the provider or supplier with Medicare enrollment requirements.

Here, the change in regulations adding the surety bond requirement in effect triggered an off cycle revalidation. A revalidation occurred in October 2009, when CMS required Petitioner to submit proof of a compliant surety bond.

In *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261 (2009), *aff'd*, *Ahmed v. Sebelius*, __ F.Supp.2d __, 2010 WL 1852132 (D. Mass. 2010), the petitioner raised a similar argument as that raised in the instant case. Ahmed argued, *inter alia*, that "his revocation is illegal because CMS failed to conduct a pre-revocation revalidation process." DAB No. 2261, at 5. Although the facts in *Ahmed* are different in that his billing privileges were revoked because he pled guilty to a "financial crime" within the meaning of section 424.535(a)(3)(i)(B), the process by which CMS carried out the revocation is similar to that of the instant case. *Id.* at 4-5. The Board held that "a revalidation occurred in November 2007 when CMS or its contractor acquired and reviewed information that Petitioner had pled guilty to obstruction of a criminal investigation of health care offenses." *Id.* at 15. The Board analogized the case to *Robert F. Tzeng, M.D.*, DAB No.

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CMS's authority to require submission of a surety bond by existing suppliers, such as Petitioner. *Cf.* P. Br. at 7-8, 7 n.3.

[5] A DMEPOS supplier must resubmit and recertify the accuracy of its enrollment information every three years. 42 C.F.R. §§ 424.515 and 424.57(f).

2169, at 11 (2008), where the Board held that a CMS contractor had done a revalidation when it acquired and reviewed information about a supplier's conviction to determine whether the supplier should remain enrolled in the Medicare program. *Id.*

Similarly here, by requesting and reviewing surety bonds of existing DMEPOS suppliers, CMS conducted a revalidation for all existing DMEPOS suppliers to determine whether they should remain enrolled in the program and whether they continued in compliance with its requirements, including those newly in effect as of October 2, 2009, the date by which DMEPOS suppliers were required to submit a surety bond.

In summary, compliance with the Medicare regulations is required at all times that a supplier is enrolled in the Medicare program. CMS has the authority to require suppliers to submit evidence of their compliance at any time to revalidate their enrollment. CMS acted within its regulatory authority in requiring Petitioner to submit a surety bond in conformance with the requirements of 42 C.F.R. § 424.57(d) by October 2, 2009.

2. CMS was authorized to revoke Petitioner's billing privileges based on undisputed evidence that Petitioner had not submitted a surety bond that met the requirements set forth in 42 C.F.R. § 424.57(c)(26) and (d).

Petitioner acknowledges receiving a letter from NSC in August 2009, informing it of the requirement that existing DMEPOS suppliers submit a surety bond to NSC by October 2, 2009. P. Br. at 3, citing CMS Ex. 6. Petitioner further acknowledges receiving, on October 14, 2009, a letter dated October 9, 2009 informing Petitioner that its Medicare enrollment under its supplier number would be revoked in 30 days, because Petitioner "*failed to submit the surety bond to the NSC as required*." P. Br. at 3, citing CMS Ex. 7 (italics in original). The revocation notice advised Petitioner that it could submit a corrective action plan within 30 days providing evidence that it was currently in compliance and/or could request reconsideration if it believed the revocation was "incorrect." CMS Ex. 7, at 2.

Petitioner submitted a request for reconsideration on October 28, 2009, stating that there "was either a misunderstanding or miscommunication in whether or not we needed to keep the DME supplier number. We would like to retain our supplier number." CMS Ex. 8, at 1. Petitioner asserts that, on December 14, 2009, after speaking to the Medicare Hearing Officer, it "submitted a revised form CMS855S and other related documents . . . ." P. Br. at 3.[6]

[6] Petitioner neither describes these documents further nor submits them for my consideration. The reconsideration decision, however, includes a summary of submitted documentation, which lists two items: a copy of the State of New Jersey Department of

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As I have noted, an unfavorable reconsideration decision ensued. The Medicare Hearing Officer concluded as follows:

> Sent to this hearing officer for review is the copy of Absecon Manor Nursing Home Association surety bond information. This information does not show that the supplier submitted a valid surety bond for this location by the required deadline of October 2, 2009. It is noted in the documentation on file with the NSC that Absecon Manor Nursing Home Association submitted a surety bond, however**, the document provided does not have many of the required elements** directed by CMS to be considered an acceptable bond for DMEPOS suppliers as mandated, 42 C.F.R. Section 424.57(c)(22)(26) and 424.57(d). In the additional submitted documentation sent to this hearing officer for review, Absecon Manor Nursing Home Association sent a copy of the surety bond. This surety bond had been determined to not contain required elements mandated by CMS. A required element **includes, but is not exclusive of: a surety bond must be signed by the individual who has indicated themselves as the authorized or delegated official**. In this case there is no signature on the surety bond from an authorized or delegated official of Absecon Manor Nursing Home Association. Consequently, the NSC revoked the billing privileges [of] Absecon Manor Nursing Home Association appropriately.

CMS Ex. 10, at 2 (emphasis added). The document that Petitioner submitted with its request for reconsideration purports to be a Decrease Rider, in the amount of $265,000, on behalf of "Absecon Manor Nursing Home Associates, LP" as principal and in favor of "State of New Jersey, Department of Health" as obligee signed by the surety company's representative. CMS Ex. 11, at 1. CMS points out that the underlying Decrease Rider was not submitted by October 2, 2009. CMS Br. at 12. Furthermore, CMS argues that, on its face, the Decrease Rider does not meet surety bond requirements in multiple respects. *Id*. at 13. Among those shortcomings, CMS alleges that the Decrease Rider does not guarantee that the surety will, within 30 days notice from CMS, pay CMS up to the total penal amount of the bond, or the amount of any unpaid claim, plus accrued interest, or the amount of any civil money penalties or assessments that CMS imposed, plus accrued interest, and that CMS was not shown as the obligee. *Id*.

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[6](…continued)

Health and Senior Services Medicaid Program Continuation of Provider Agreement; and surety bond documentation. CMS Ex. 10, at 2. CMS submitted a copy of a "Decrease Rider," stating this document is the one that was submitted upon reconsideration to meet the surety bond requirement. CMS Ex. 11. Petitioner does not dispute that this exhibit reflects what it submitted as its surety bond on reconsideration.

I agree with CMS that the Decrease Rider is inadequate to demonstrate submission of a compliant surety bond within the requirements of 42 C.F.R. § 424.57(c)(26) and (d) by October 2, 2009, and therefore Petitioner was not in compliance as of the revocation on October 9, 2009. Specifically, pursuant to 42 C.F.R. § 424.57(d)(10), the surety bond must name the DMEPOS supplier as principal, CMS as obligee, and the surety as surety. The Decrease Rider submitted failed to show CMS as the obligee, listing instead, "State of New Jersey, Department of Health" as obligee. CMS Ex. 11, at 1. I find that the submission was thus non-compliant on its face.

Petitioner argues that even were Absecon "required to submit a surety bond to CMS on October 2, 2009, the issue is moot as the Facility has a surety bond that was in effect and provides coverage on October 2, 2009 and before." P. Br. at 8. In that regard, Petitioner points to a surety bond that it obtained on February 5, 2010 and that it asserts provides coverage "from March 3, 2009 to the present, including all times after October 2, 2009." P. Br. at 3; CMS Ex. 13, at 5-6.

As noted, CMS objected to the admission of this 2010 surety bond, which was attached to the hearing request on the grounds that this was new evidence for which Petitioner had not shown good cause for failing to present it on reconsideration. CMS also, however, included a copy of the 2010 surety bond in its own exhibits. On the one hand, Petitioner obviously could not have submitted the new bond to the hearing officer on reconsideration, because it was not yet executed. On the other hand, for the same reason, the 2010 bond cannot be evidence of compliance at the time of the revocation. Even if the 2010 surety bond were admissible, it would be irrelevant.

Petitioner maintains that "all purposes of the surety bond requirements are completely satisfied" by the surety bond effective, and providing coverage to CMS as obligee, as of March 3, 2009.[7] P. Br. at 8. Petitioner explains that "[t]he bond is secured, CMS is fully

[7] The purposes of the surety bond requirement are stated in the preamble as:

> (1) Limit the Medicare program risk to fraudulent DME suppliers; (2) enhance the Medicare enrollment process to help ensure that only legitimate DME 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. at 180.

protected and all purposes of requiring a surety bond are satisfied." *Id.* Petitioner argues that revoking Absecon's supplier number "elevates form over substance, places the letter of the law over the spirit of the law and defies common sense." *Id.*

I disagree. First, the issue before me is not whether Petitioner has belatedly achieved compliance with the surety bond requirement, but whether CMS correctly found that, at the time of the revocation, Petitioner was not in compliance and that CMS therefore had authority to revoke. As explained above, at the time of the revocation, Petitioner did not have a compliant surety bond. 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 fraud or billing errors by Petitioner. 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 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.

Secondly, 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, there would be no basis 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."

The regulation at 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. Thus, section 424.535 provides:

> **Revocation of enrollment and billing privileges in the Medicare program.**
> (a) *Reasons for revocation.* CMS may revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement for the following reasons:
> (1) *Noncompliance.* The provider or 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). (Emphasis added). 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, as follows:

> 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).

The regulatory language is plain. A supplier must comply with all standards, or CMS will revoke its billing privileges. And I must sustain CMS's determination where the facts establish noncompliance with one or more of the regulatory standards.

I therefore 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.

VI. Conclusion

For the reasons explained above, I grant summary judgment in favor of CMS.

/s/
Leslie A. Sussan
Board Member