Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Eagle Eye DME, LLC,
(Supplier No. 6286890001),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-12-307

Decision No. CR2564

Date: July 10, 2012

DECISION

The Centers for Medicare and Medicaid Services (CMS) revoked Petitioner's supplier number. Petitioner, Eagle Eye DME, LLC, appeals, and CMS and Petitioner have filed cross motions for summary judgment. As discussed below, the uncontroverted facts compel revocation of Petitioner's supplier billing number. Therefore, I grant CMS's motion for summary judgment and deny Petitioner's motion for summary judgment.

I. Background

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). CMS Ex. 1. A CMS contractor from the National Supplier Clearinghouse (NSC) attempted to conduct two site inspections at Petitioner's location. CMS Ex. 2. At the time of the two inspection attempts, Petitioner's posted hours of operation were Monday through Friday, from 9 a.m. to 5 p.m. *Id.* The NSC inspector attempted the first site visit on August 12, 2011, at 3:30 p.m. CMS Ex. 2, at 2. He attempted a second site visit on August 17, 2011, at 9:15 a.m. *Id*. at 7. The NSC inspector could not complete either site visit because he found nobody at the site to let him inside. *Id*. On September 12, 2011, NSC sent a letter

notifying Petitioner that it was revoking Petitioner's supplier number effective August 17, 2011, the date CMS determined that Petitioner was not operational. CMS Ex. 1. NSC barred Petitioner from re-enrolling for two years from this effective date. *Id.*

The notice letter specifically stated that the basis for the revocation was that Petitioner was in violation of 42 C.F.R. § 424.535(a)(5)(ii)[1] because it was closed during posted hours of operation on August 12 and 17, 2011, when a NSC inspector attempted to complete site inspections to verify Petitioner's compliance with supplier standards. *Id.* at 2. The notice letter further informed Petitioner of its right to complete a corrective action plan (CAP) within 30 days, or to request reconsideration of the revocation determination within 60 days, of the postmark of the notice. Petitioner filed a timely request for reconsideration, which NSC received on October 31, 2011.[2] CMS Ex. 3. On December 16, 2011, the Hearing Officer issued an unfavorable decision and upheld the revocation of Petitioner's supplier number because Petitioner was not in compliance with 42 C.F.R. § 424.535(a)(5)(ii). CMS Ex. 4.

By submission postmarked January 25, 2012, Petitioner requested a hearing with the Civil Remedies Division of the Departmental Appeals Board (DAB). With its hearing request, Petitioner attached several documents.[3] This case was assigned to me for decision.

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[1] This subsection states: "(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: . . . (5) *On-site review*. CMS determines, upon on-site review, that the provider or supplier is no longer operational to furnish Medicare covered items or services, or is not meeting Medicare enrollment requirements under statute or regulation to supervise treatment of or to provide Medicare covered items or services for, Medicare patients. Upon on-site review, CMS determines that -- . . . (ii) A Medicare Part B supplier is no longer operational to furnish Medicare covered items or services, or the supplier has failed to satisfy any or all of the Medicare enrollment requirements, or has failed to furnish Medicare covered items or services as required by the statute or regulations."

[2] Petitioner filed a CAP on October 10, 2011. Petitioner however was required to have the CAP request signed by an authorized official, owner or partner of the business. By letter dated October 20, 2011, NSC denied the CAP request because the documentation provided was not signed by an appropriate individual and because the 30 days for submission of the CAP had passed. ALJ Ex. 2. However, by letter dated November 15, 2011, NSC acknowledged receipt of Petitioner's request for reconsideration for revocation of its Medicare supplier number.

[3] Although Petitioner did not submit these documents as properly marked exhibits when it filed its motion for summary judgment, I accept them as part of the record and identify

CMS filed its motion for summary judgment accompanied by four exhibits, CMS Exs. 1-4. Pursuant to my Acknowledgment and Pre-hearing Order, Petitioner was directed to file its pre-hearing exchange by April 4, 2012. When I did not receive a submission from Petitioner, I issued an Order to Show Cause dated April 24, 2012 indicating that Petitioner's failure to file a submission suggests that Petitioner abandoned its hearing request. I directed that I would consider the hearing request abandoned unless Petitioner, within ten days of the date of that Order, responded to it with a showing of good cause for its failure to meet the deadlines and submitted the required briefing if it still desired a hearing. If it did not dispute the facts set forth in CMS's motion, I directed that Petitioner should indicate that it would like me to decide the case based upon the written record of all the documents previously submitted. By postmark dated May 8, 2012, Petitioner's owner, Ms. Gurley, filed a response to the Order to Show Cause indicating Petitioner was also requesting a motion for summary judgment and did not dispute any of the facts CMS presented.

II. Applicable Law

To receive Medicare payments for items furnished to a Medicare-eligible beneficiary, the Secretary of the Department of Health and Human Services must issue a supplier number to a DMEPOS supplier. Social Security Act (Act) § 1834(j)(1)(A). To receive such direct-billing privileges, a DMEPOS supplier must also meet and maintain each of the 25 supplier enrollments standards set forth in 42 C.F.R. §§ 424.57(c)(1)-(25). Among other things, a DMEPOS supplier must permit CMS or its agent to conduct on-site inspections to ascertain supplier compliance with each of these enrollment standards. 42 C.F.R. § 424.57(c)(8). A provider or supplier is operational if it "has a qualified physical practice location, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked . . . to furnish these items or services." 42 C.F.R. § 424.502. In addition, a DMEPOS supplier "must be accessible during reasonable business hours to beneficiaries and to CMS, and must maintain a visible sign and posted hours of operation." 42 C.F.R. § 424.57(c)(8). CMS will revoke a currently-enrolled Medicare supplier's billing

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and mark them as follows: Administrative Law Judge (ALJ) Exhibit (Ex.) 1 (Ms. Gurley's letter to NSC Hearing Officer Jais); ALJ Ex. 2 (Ms. Gurley's original unsigned statement/letter to NSC); ALJ Ex. 3 (November 15, 2011 acknowledgment letter from Hearing Officer Jais); ALJ Ex. 4 (October 20, 2011 letter from NSC indicating that time for submitting CAP had passed); ALJ Ex. 5 (September 12, 2011 notice letter from NSC indicating that Petitioner's Medicare supplier number is revoked); ALJ Ex. 6 (Telephone records); ALJ Ex. 7 (Facsimiles received by Petitioner and sent to Petitioner on September 29, 2011); ALJ Ex. 8 (Petitioner's DME/Delivery Van Log for August 12 and August 17, 2011); ALJ Ex. 9 (letters from the community on behalf of Petitioner).

privileges if CMS or its agent determines that the supplier is not in compliance with any supplier enrollment standard. *See* 42 C.F.R. § 424.57(d); *A to Z DME, LLC*, DAB No. 2303, at 3 (2010); *see also 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.").

If an on-site visit reveals that a supplier is no longer operational, or otherwise fails to meet one of the supplier standards, CMS may revoke the supplier's Medicare billing privileges. 42 C.F.R. § 424.535(a)(5)(ii). Suppliers who have had their billing privileges revoked "are barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar," which 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).

III. Issue

The issue is whether CMS is entitled to summary judgment because, when considering the evidence in the light most favorable to the Petitioner, it is undisputed that CMS had a legitimate basis to revoke Petitioner's Medicare billing privileges.

IV. Analysis

My findings of fact and conclusions of law are set forth in italics and bold in the discussion captions of this decision.

A. This case is appropriate for summary judgment.

CMS filed a Motion for Summary Judgment. Board Members of the Appellate Division of the DAB (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 not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame*, DAB No. 2291, at 4-5 (2009). The Board has further stated that, "[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). Petitioner has not disputed the material facts that CMS alleges: no one was present at Petitioner's location during the Medicare on-site visits attempted during Petitioner's posted hours of operation.

B. CMS had a legitimate basis to revoke Petitioner's supplier number because Petitioner was not operational.

On August 12, 2011, at 3:30 p.m., the NSC inspector attempted to conduct an unannounced site inspection on behalf of CMS at Petitioner's location during its posted hours of operation. However, he found that he could not enter because the office was closed. He noted that the door sign indicated that office hours were Monday through Friday, 9 a.m. through 5 p.m. He also knocked on the door, but there was no response. There was no note on the door to indicate why the business was not open. He also took date-stamped photographs. CMS Ex. 2, at 2, 9. On August 17, 2011, at 9:15 a.m., the inspector made a second attempt; however, the door was locked again. He knocked on the door, but no one appeared to be inside the office. He took date-stamped photographs. There was no note on the door to explain why the business was not open. He departed at around 9:21 a.m. CMS Ex. 2, at 7, 9-10. Petitioner clearly did not have any staff at the store to allow access to the inspector, nor was the store "open" on these two occasions for business during posted hours of business.

Petitioner's owner states, that at the time of the two site visits, she was absent from the office due to a family illness. She explained that she had two full-time employees who were assisting her as well as a part-time, as-needed, delivery technician. At the time of the two site visits her two full-time employees were needed to deliver and repair equipment to patients. CMS Ex. 3, at 39, 42; CMS Ex. 2, at 9-10. I will accept these facts as true for purposes of summary judgment.

Petitioner also presented certain documents in an effort to show that someone was at the office on the dates of the two site visits but, perhaps due to making deliveries, was just not present at the time the inspector came for the site visits. With its hearing request, Petitioner submitted telephone records showing that someone made telephone calls from Petitioner's location on August 17. ALJ Ex. 6. I note, however, that no telephone calls were made on August 12, 2011, and no calls were made on August 17 prior to 3:47 p.m. or after 4:01 p.m. Thus, these records do not present a dispute of fact as to whether anyone was present when the inspector attempted the on-site visits.

For a supplier to be "operational," it must be "*open to the public* for the purpose of providing health care related services . . . and [be] *properly staffed* . . . to furnish these services." 42 C.F.R. § 424.502 (emphasis added). Among other things, a DMEPOS supplier must permit CMS or its agent to conduct on-site inspections to ascertain supplier compliance with each of the enrollment standards, and the supplier must be "*accessible during reasonable business hours* to beneficiaries and to CMS." 42 C.F.R. § 424.57(c)(8) (emphasis added). A supplier is neither "open to the public" nor "accessible," if the supplier location is closed due to staff making patient deliveries or sales calls. It is incumbent on Petitioner to make whatever reasonable arrangements are necessary to keep its business open while allowing for patient deliveries. "A Medicare supplier differs from a strictly private business in that it is an integral part of a publicly run program. The requirement that a supplier be open at all times during normal business hours reflects CMS's determination that a supplier be available to beneficiaries to meet their needs and to alleviate their medical conditions." *A to Z DME, LLC*, DAB CR1995, at 6 (2009), *aff'd A to Z DME, LLC,* DAB No. 2303 (2010).

The Board also has held that the supplier standard "would have no meaning if suppliers could deviate from their posted hours of operation on a regular basis." *Ita Udeobong, d/b/a/ Midland Care Med. Supply and Equipment,* DAB No. 2324, at 7 (2010). In *Udeobong,* the petitioner admitted that it was closed from noon until 1:00 p.m. every day for lunch, which was outside of its regularly posted hours of 10 a.m. to 5 p.m., Monday through Friday. The Board further held that "[t]his problem would not be cured even if . . . its employees posted temporary signs when they left, stating when they would return." *Id.* CMS and its contractors have limited resources and cannot be compelled to attempt multiple on-site inspections during a supplier's posted business hours to determine if a supplier is complying with all Medicare requirements.

C. I am unauthorized to grant Petitioner's requests for equitable relief for enrollment because it did not meet the legal requirements for enrollment.

Petitioner makes various arguments for equitable relief despite acknowledging that Petitioner did not meet the legal requirements for being open during posted business hours on the dates and times of the two attempted site visits. Petitioner argued that she had to care for a sick family member, and she also obtained several written statements from customers and from the mayor of a neighboring town who support the business. However, Petitioner never disputed that no one was in fact available at the business location or claimed that the inspector was at the wrong address.

Even though I may sympathize with Petitioner's predicaments, I am without authority to order CMS to provide an exemption to Petitioner under the circumstances because Petitioner's equitable arguments give me no grounds to restore her billing privileges. *See*

US Ultrasound, DAB No. 2302, at 8 (2010) ("[n]either 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."). Moreover, I have no authority to declare statutes or regulations invalid or ultra vires. *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009) ("[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground.").

V. Conclusion

I find the undisputed facts establish Petitioner was not operational when it was not open and accessible on two separate occasions during its posted hours of operation. I grant CMS's motion for summary judgment, I deny Petitioner's motion for summary judgment, and I sustain the revocation of Petitioner's supplier number for direct Medicare billing privileges. Accordingly, Petitioner is barred from re-enrolling for two years from the effective date of its revocation.

/s/
Joseph Grow
Administrative Law Judge