

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Texas Rejuvenation Medical Supply
(Supplier Number 6206250001),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-977

Decision No. CR2340

Date: March 12, 2011

DECISION

I reverse the determination of the Centers for Medicare and Medicaid Services (CMS) to revoke the Medicare supplier number of Petitioner, Texas Rejuvenation Medical Supply. I find Petitioner was in compliance with the supplier standards because it has successfully overcome CMS's showing that Petitioner did not report its change of address within 30 days.

I. Background

Petitioner participated in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) in Houston, Texas. *See* 42 C.F.R. § 424.57. In a letter dated May 6, 2010, the Medicare contractor, Palmetto GBA National Supplier Clearinghouse (NSC), notified Petitioner that its supplier number would be revoked pursuant to 42 C.F.R. §§ 405.874, 424.57(e), 424.535(a), 424.535(a)(5)(ii), and 424.535(g). The letter noted that a NSC inspector had attempted to conduct a site inspection of Petitioner's facility on April 22, 2010, but he was unable to because Petitioner's business was no longer located at the address on file with the NSC. Therefore, NSC could not verify Petitioner's compliance with the supplier standards and

found that Petitioner was not operational to furnish Medicare covered items and services in violation of 42 C.F.R. § 424.535(a)(5)(ii).

Petitioner sought reconsideration on May 18, 2010. In its letter requesting reconsideration, Petitioner noted that it had “submitted the required 855S form with address change/update . . . to Medicare” and had “confirmed that this was received on May 04, 2010 and is currently in process.” CMS Ex. 3.

In a reconsideration decision dated July 19, 2010, the Medicare Hearing Officer found that Petitioner was out of compliance with Supplier Standard 8, dealing with on-site inspections, and affirmed the revocation of Petitioner’s supplier number.¹ CMS Ex. 1, at 7. The Hearing Officer stated the following facts: (1) on April 22, 2010, an NSC inspector attempted to conduct an inspection of Petitioner’s facility; (2) on May 4, 2010, NSC received Petitioner’s change of address; (3) on May 6, 2010, NSC mailed Petitioner a certified letter advising that its billing privileges would be revoked effective April 22, 2010; and (4) on June 1, 2010, NSC received Petitioner’s request for reconsideration. The Hearing Officer explained that Supplier Standard 8 requires a supplier to “permit CMS or its agents to conduct on-site inspections to ascertain the supplier’s compliance with these standards” and requires the supplier location to “be accessible to beneficiaries during reasonable business hours, and [have] a visible sign and posted hours of operation.” CMS Ex. 1.

In explaining her decision, the Hearing Officer stated, “in the site investigation reports and accompanying photographs taken by the inspector on April 22, 2010, [Petitioner] was non-operational.” CMS Ex. 1, at 3. The Hearing Officer points to the inspector’s statement in the investigation report that “this facility is no longer in business. There is brown paper over all the windows and door. I called the leasing company and spoke with George Adams who stated a Stephen Padgett returned the key to Mr. Adams on March 31, 2010.” CMS Ex. 1, at 7. The Hearing Officer stated also that NSC had received notification of a change of address from Petitioner on the CMS-855S change of information form on May 4, 2010. She noted that the document stated that the date of the change was effective as of April 1, 2010, but that NSC had not received this information until May 4, 2010, “which was after the 30 day time frame required in which to notify the NSC of any changes.” CMS Ex. 1, at 7. The Hearing Officer concluded, “[t]he fact remains that [Petitioner] did not provide complete information in the time-frame allotted for the change of location.” CMS Ex. 1, at 7.

¹ The Hearing Officer also acknowledged having received documentation from Petitioner showing that its surety bond had been reinstated with no lapse in coverage (Petitioner’s surety bond had been revoked at some point in May or June 2010). The Hearing Officer thus found that Petitioner was in compliance with the corresponding Supplier Standard 26. CMS Ex. 1, at 7-8.

By letter dated September 14, 2010, Petitioner requested a hearing, asserting, among other things, that it was in operation and in full compliance with Supplier Standard 8 on April 22, 2010 and had timely filed a CMS-855S form within the 30-day time frame notifying NSC of its change of address.

This appeal was initially assigned to Board Member Leslie A. Sussan pursuant to 42 C.F.R. § 498.44, which permits a Member of the Departmental Appeals Board (Board) to hear appeals under Part 498. This case was subsequently transferred to me on October 25, 2010. The parties were instructed to comply with the instructions and pre-hearing exchange deadlines contained in Board Member Sussan's Acknowledgment and Pre-Hearing Order (Pre-Hearing Order) dated September 20, 2010. The Board Member instructed the parties to submit sworn affidavits or written declarations, which would be used as direct testimony, and no hearing would be convened if neither party requested to cross-examine any of the witnesses for which direct testimony was submitted.

On October 21, 2010, CMS submitted a motion for summary judgment and supporting brief (CMS Br.) and CMS Exhibits (CMS Exs.) 1-11. On November 20, 2010, Petitioner submitted a response brief and eight witness affidavits of direct testimony marked as Petitioner's Exhibits (P. Exs.) 12-19. In the absence of any objections, I admit CMS Exs. 1-11 and P. Exs. 12-19.

II. Issue

The issues in this case are whether CMS:

1. Is entitled to summary disposition; and, if not,
2. Had a basis to revoke Petitioner's Medicare supplier number.

III. Relevant Legal Authority

Pursuant to section 1834(j)(1)(A) of the Social Security Act (Act), a supplier of medical equipment and supplies may not be paid for items provided to an eligible beneficiary unless the supplier has a supplier number issued by the Secretary. To participate in Medicare as a DMEPOS supplier and obtain a supplier number, an entity must meet the 26 supplier standards specified at 42 C.F.R. § 424.57(c)(1) through (26). Among these, the regulation provides that a supplier –

(c)(2) . . . provide complete and accurate information in response to questions on its application for billing privileges. The supplier must report to CMS any changes in information supplied on the application within 30 days of the change.);

* * *

(c)(7) Maintains a physical facility on an appropriate site. The physical facility must contain space for storing business records including the supplier's delivery, maintenance, and beneficiary communication records. For purposes of this standard, a post office box or commercial mailbox is not considered a physical facility. In the case of a multi-site supplier, records may be maintained at a centralized location; [and]

(c)(8) Permits CMS, or its agents to conduct on-site inspections to ascertain supplier compliance with the requirements of this section. The supplier location 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)(2), (c)(7), and (c)(8).

If a supplier is found not to meet the standards for suppliers in 42 C.F.R. § 424.57(b) and (c), CMS, or its contractor NSC, will revoke the supplier's billing privileges (*i.e.* supplier number), effective 30 days after CMS or NSC mails the notice of revocation. *See* 42 C.F.R. § 424.57(d); *see also* 42 C.F.R. § 405.874(b)(2).

The revocation of a supplier number is governed by 42 C.F.R. § 424.535. CMS may use an on-site review to determine whether a "supplier is no longer operational to furnish Medicare covered items or services, or is not meeting Medicare enrollment requirements . . ." 42 C.F.R. § 424.535(a)(5). A supplier is operational when 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.

If a physician, non-physician practitioner, or other provider or supplier is determined not to be operational, the Medicare contractor shall revoke the Medicare billing privileges of the provider or supplier, **unless the provider or supplier has submitted a change which notified the Medicare contractor of a change in practice location.** Medicare Program Integrity Manual (MPIM), ch. 15, § 22.1 (emphasis added).

42 C.F.R. Part 498 sets forth the procedures for hearings and appeals. Section 1866(j)(2) of the Act allows providers and suppliers equal appeal rights as section 1866(h)(1)(A) of the Act describes. In cases subject to Part 498, the Board has found that CMS must establish a *prima facie* showing of a regulatory violation and the regulated entity then bears the burden of showing by a preponderance of the evidence that it was compliant

with the Act or regulations, or that it had a defense. *Evergreene Nursing Care Ctr.*, DAB No. 2069, at 7-8 (2007); *Batavia Nursing and Convalescent Inn*, DAB No. 1911 (2004); *Batavia Nursing and Convalescent Ctr.*, DAB No. 1904 (2004); *Emerald Oaks*, DAB No. 1800 (2001); *Cross Creek Health Care Ctr.*, DAB No. 1665 (1998). The Board has found this allocation of the burden of going forward with the evidence and the burden of persuasion properly applied in the DMEPOS supplier cases. *MediSource Corp.*, DAB No. 2011, at 2-3 (2006).

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

I set out my findings of fact and conclusions of law in the headings below, followed by my supporting analysis.

A. CMS is not entitled to summary disposition.

CMS filed a motion for summary judgment. The Board has 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 when resolving a summary judgment motion. *Holy Cross Vill. at Notre Dame, Inc.*, DAB No. 2291, at 4-5 (2009).

I deny CMS's motion for summary judgment on the grounds that there exists a disputed issue of material fact as to the date when Petitioner effectively moved from its old address to its new address. CMS asserts that the effective date of Petitioner's change of address was April 1, 2010. Petitioner contends, however, that it moved its practice

location from its old address after closing on Friday April 2, 2010, and opened at the new address on its next regularly scheduled operating day, Monday April 5, 2010. Petitioner contends it submitted a CMS-855S form to NSC to update its address, and NSC received the CMS-855S form on May 4, 2010, exactly 30 days after Petitioner claims its move became effective. Based on the testimonial evidence from Petitioner, I find that a dispute of material fact exists as to the effective date of Petitioner's move. For this reason, I conclude that CMS is not entitled to summary judgment.

I note that, in accordance with Board Member Sussan's Pre-Hearing Order, CMS was required to submit, 30 days after receipt of the Order, any written direct testimony as part of its exchange of evidence and argument. With its motion for summary judgment, CMS submitted 11 exhibits but chose not to submit a witness list or any written direct testimony. Petitioner submitted eight witness affidavits of direct testimony with its ordered evidentiary exchange and its response to CMS's motion for summary judgment. By electronic mail dated February 28, 2011, CMS advised me that it declined to cross-examine any of Petitioner's witnesses. Therefore, now that I deny CMS's motion, I find no need to hold an in-person hearing, and I decide this case on the full merits of the written record in accordance with the Board Member's Pre-Hearing Order.

B. Petitioner has rebutted CMS's prima facie case and demonstrated compliance with 42 C.F.R. § 424.57(c)(2), (c)(7), and (c)(8).

CMS contends that Petitioner violated three supplier standards, namely 42 C.F.R. § 424.57(c)(2), (c)(7), and (c)(8). In the reconsideration decision, the Medicare Hearing Officer found that Petitioner was only out of compliance with Supplier Standard 8. CMS Ex. 1, at 3, 7. However, in the decision, the Medicare Hearing Officer noted that NSC had received Petitioner's CMS-855S form on May 4, 2010, advising of a change of address, and that the CMS-855S form stated that the effective date of the change was April 1, 2010. The Medicare Hearing Officer found that Petitioner had submitted the form "after the 30 day time frame required in which to notify the NSC of any changes." CMS Ex. 1, at 3, 7. Based on this finding by the Medicare Hearing Officer, it appears that she also concluded that Petitioner was out of compliance with 42 C.F.R. § 424.57(c)(2) (Supplier Standard 2). Further, because the Medicare Hearing Officer notes that the inspector found that Petitioner was no longer in business at its enrolled address on April 22, 2010, I find that, while not expressly stated, her language is suggestive of a finding that Petitioner was also out of compliance with 42 C.F.R. § 424.57(c)(7) (Supplier Standard 7). CMS is now proceeding on arguments that Petitioner was out of compliance with 42 C.F.R. § 424.57(c)(2), (c)(7), and (c)(8).

CMS contends that an NSC inspector visited Petitioner's facility on Thursday, April 22, 2010, at its enrolled address at 13655 Bissonnet St., Ste. 106, Houston TX 77083 at 9:15 a.m. CMS alleges that the inspector was unable to conduct an inspection because

Petitioner's office was vacant and closed for business, with no business hours posted.² CMS Br. at 7. CMS asserts further that, on May 4, 2010, NSC received a CMS-855S form from Petitioner that indicated a change of address. CMS argues that Petitioner reported the effective date of its move as April 1, 2010, which essentially means 34 days had passed from the move date versus the 30 day notice the regulations require. *See* CMS Br. at 3-4.

In support of its position, CMS submits as evidence a note handwritten by the NSC inspector that was attached to his report. The note states the following:

This facility is no longer in business. There is brown paper over all the windows & door. I called the leasing company and spoke with George Adams who stated a Stephen Padgett with PLEPHORE [phone number omitted] returned the key to Mr. Adams on March 31, 2010. This # should be revoked immediately.

CMS Ex. 7, at 9.³

With its response brief, Petitioner submitted the witness affidavits of direct testimony for eight individuals. These affidavits consist of the sworn statements of: Yvonne Lee (P. Ex. 12); Stephen Padgett (P. Ex. 13); Larry Enzler (P. Ex. 14); Ryan Gober (P. Ex. 15); Marcos Olmeda, III (P. Ex. 16); Carl Cole (P. Ex 17); Darlene Warren (P. Ex.18); and Scheron Washington (P. Ex. 19).

The affidavit of Yvonne Lee, a partner with Plethore Management, Inc. (Plethore), which contracts with Petitioner to manage its business, asserts that she prepared and submitted a CMS-855S change of information application form notifying NSC that Petitioner had moved its business to a new location. Ms. Lee's direct testimony asserts:

Unbeknownst to me, I mistakenly indicated in Section 4.A of [Petitioner's] CMS-855s that the move was effective April 1, 2010. In fact, [Petitioner] moved to the New Location and opened for business effective April 5, 2010. My mistake was that I put the effective date of the property lease for the New Location on the CMS Form-855S, which was April 1, 2010, rather than the actual

² However, the inspector's photo shows Petitioner's business hours posted as Monday to Friday, from 9 a.m. to 5 p.m. CMS Ex. 7, at 11.

³ There is another handwritten note by the NSC inspector found at CMS Ex. 7, at 3. The main difference between the notes is that the note found at CMS Ex. 7, at 9 contains complete sentences, while the note at CMS Ex. 7, at 3 contains phrases. In both notes, the inspector has written essentially the same information.

date [Petitioner] opened for business at the New Location, which was April 5, 2010. I was not aware of this mistake until the Medicare Hearing Officer issued her decision in July 2010.

P. Ex. 12, at 2.

Petitioner acknowledges therefore that it reported April 1, 2010 as the effective date of its move, but it contends that this was an innocent mistake by Ms. Lee, who completed the CMS-855S form. P. Br. at 5-6, 15, 19. Petitioner explains that Ms. Lee mistakenly entered the effective date of Petitioner's property lease for its new address, which was April 1, 2010, rather than the actual date Petitioner opened for business at its new address, which was April 5, 2010. P. Br. at 6; P. Ex. 12, at 2. Petitioner claims that there was no intention on its part or on the part of its contracted management company to deceive the Medicare program by making a false statement or misrepresentation on the form. P. Br. at 19. Considering that this explanation went unchallenged by CMS and that it is consistent with the other testimonial evidence discussed below, I will accept Ms. Lee's explanation as plausible with regard to the date error she reported on Petitioner's CMS-855S change of information form.

Petitioner's testimonial evidence also supports that it operated at its original location up until it opened for business at its new location on April 5, 2010.

In an affidavit, Stephen Padgett, Plethore's CEO, asserts that he met with George Adams, the property manager for Petitioner's original location on or about March 25, 2010, at which time they agreed that Petitioner would leave the keys to the "Old Location" on a ledge outside its front door after it vacated the space over the weekend of April 3-4, 2010. Mr. Padgett asserts further that he was traveling March 30, 2010 through April 2, 2010, and he never met with or returned a key to the "Old Location" to Mr. Adams, on March 31, 2010, as the NCS inspector note suggests, or at any other time. Mr. Padgett states that he visited the "New Location" on Saturday, April 3, 2010, to check on the status of Petitioner's move and that Petitioner moved to the "New Location" during the weekend of April 3-4, 2010. Mr. Padgett states further that he observed that Petitioner was open for business at the "New Location" on April 5, 2010. P. Ex. 13, at 2. According to Mr. Padgett's affidavit, "[a]ll phone service including [Petitioner's] regular, business voice and facsimile telephone lines were transferred from the Old Location to the Current Location effective April 5, 2010," and "[a]ll electric and water service was discontinued at the Old Location as of April 5, 2010." P. Ex. 13, at 2-3. Mr. Padgett also asserts that he applied for, and was issued, a new sales tax permit for Petitioner to reflect the new address with an effective date of April 5, 2010. P. Ex. 13, at 3.

The direct testimony of Larry Enzler, one of Petitioner's managers, asserts that after Petitioner closed for business at its original location on Friday, April 2, 2010, at its regular closing time of 5 p.m., he assisted in moving Petitioner's business to its new

address. Mr. Enzler states that he was assisted in the move the weekend of April 3-4, 2010, by Ryan Gober. Mr. Enzler claims that he “left the key on the doorsill on April 4, 2010.” P. Ex. 14, at 2.

The direct testimony of Ryan Gober states that Larry Enzler asked him for assistance with Petitioner’s move, and he met Mr. Enzler at Petitioner’s former location on April 3, 2010, to assist with the move. Mr. Gober states that they completed the move on April 4, 2010. P. Ex. 15, at 2.

In an affidavit, Marcos Olmeda, III, a part owner of Plethore, asserts that he was present on April 5, 2010, and observed that Petitioner was open for business at its new location. Mr. Olmeda states that he was present when the telephone lines were set up and tested at the new location on April 5, 2010. P. Ex. 16, at 2.

The direct testimony of Carl Cole, a delivery driver for Plethore, asserts that he was present on April 5, 2010, and he observed that Petitioner was open for business at its new location. P. Ex. 17, at 2.

In the direct testimony of Darlene Warren, Plethore’s intake coordinator, she states that she was present on April 5, 2010, and observed that Petitioner was open for business at its new location. P. Ex. 18, at 2.

In the direct testimony of Scheron Washington, the billing manager with Familia Care, Inc., a company that contracts with Plethore, Mr. Washington asserts that he met with Mr. Padgett on March 31, 2010 in Familia Care’s offices in Irving, Texas, as well as periodically throughout the day on April 1 and 2, 2010. P. Ex. 19, at 2. This provides further support to Mr. Padgett’s testimony that Mr. Padgett was out of town and did not return a key to the property manager of the original location on March 31, 2010 in Houston.

Petitioner’s affidavits contain support that Petitioner moved to a new address the weekend of April 3-4, 2010, was operational at its original address on Friday April 2, 2010, and opened for business at its new address on April 5, 2010. These statements are in direct conflict with CMS’s arguments that Mr. Padgett returned the key to the landlord at the old address on March 31, 2010.

As stated above, CMS did not submit the direct testimony of any witness including its inspector or the landlord who allegedly collected a key from Mr. Padgett on March 31, 2010. CMS also declined to cross-examine any of Petitioner’s affiants. Therefore, as support for its contention that Petitioner moved on or around March 31, 2010, CMS relies on the inspector’s note, which is hearsay evidence that I admitted. Because CMS did not offer any witness testimony in support of the inspector’s note, I am unable to fully ascertain the context of the statements that appear in the inspector’s note in contradiction

of Petitioner's conflicting evidence. A written note by itself is not subject to cross-examination as to its reliability.

Given that Petitioner was limited in exploring the inspector's statements, I am compelled to provide them less weight in the face of Mr. Padgett's direct testimony that contradicts them, especially considering several other witnesses' affidavits corroborate Mr. Padgett's direct testimony.

Although I realize a potential for bias with Petitioner's witnesses in that they all seem to be affected by the financial livelihood of Petitioner, this was not something factually explored because CMS declined to cross-examine the witnesses. Considering the number of witnesses Petitioner produced, representing a diversity of business relationships to Petitioner, and considering the consistency of their testimony, I am inclined to give greater weight to Petitioner's unchallenged testimonial evidence. I conclude that Petitioner's testimonial evidence has overcome CMS's prima facie case showing of a violation of the supplier standards and establishes that Petitioner moved to a new location, without a break in its operations, effective April 5, 2010, and Petitioner properly notified CMS within the required 30 days of its move.

V. Conclusion

For the reasons explained above, I reverse CMS's determination to revoke Petitioner's Medicare billing privileges pursuant to 42 C.F.R. § 424.57(c)(2), (7), and (8) because I find that Petitioner moved without a break in its operations and timely notified CMS of its change of address within the required 30 days.

/s/
Joseph Grow
Administrative Law Judge