

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Homemakers A+ Services
(PTAN 2083636890),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-10-926

Decision No. CR2322

Date: February 14, 2011

DECISION

For the reasons set forth below, I grant the Centers for Medicare and Medicaid Services' (CMS's) motion for summary judgment. The undisputed evidence establishes that Homemakers A+ Services (Petitioner) did not notify CMS that it moved to another location, and CMS was therefore not able to conduct an on-site visit of Petitioner's facility. Therefore, I sustain the CMS determination that Petitioner was not operational and conclude that CMS had the authority to revoke Petitioner's billing privileges pursuant to 42 C.F.R. § 424.535(a)(5)(ii).

I. Background

Petitioner is a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) engaged in the business of furnishing hospital beds and accessories, as well as motorized wheelchairs and accessories. CMS Ex. 1, at 1; CMS Ex. 7, at 16. The following facts are not in dispute. On May 11, 2010 at 11:45 a.m. and 3:05 p.m., an inspector for the National Supplier Clearinghouse (NSC), a CMS contractor, attempted to conduct a site inspection of Petitioner at its enrolled address, 1546 Joliet Street, Dyer, Indiana 46311. CMS Ex. 1, at 1, 2, 7-9. The inspector reported that when he arrived at the office in the morning, and again in the afternoon, Petitioner's office was closed.

CMS Ex. 1, at 7. The inspector had visited Petitioner a few times in the past and knew Petitioner was leasing space from another company, Abode Flooring and Blinds, which was also closed during the attempted site inspection. *Id.* There was a large business sign for Petitioner about 15 feet from the street, but Petitioner did not have any other business sign or posted hours. *Id.* On May 12, 2010, the inspector called Petitioner's phone number and reached a recorded message. *Id.* On May 13, 2010, the inspector called Abode Flooring and Blinds, Petitioner's landlord. A male answered the phone and told the inspector that Petitioner had moved to another location. *Id.* During the afternoon of May 13, 2010, the inspector called Petitioner's office again. This time, a person answered the phone and told the inspector that Petitioner moved about six weeks ago to 910 Richard Road, Dyer, Indiana. *Id.* The person who answered Petitioner's phone did not know if Petitioner had notified NSC that it moved. *Id.*

As a result of the failed attempts at a site visit, in a letter dated May 28, 2010, NSC notified Petitioner that its supplier number would be revoked retroactively to May 11, 2010, the date CMS determined Petitioner's practice location to not be operational. CMS Ex. 2, at 1. The notice explained that a site visit was attempted on May 11, 2010, but the visit was "unsuccessful because the location was vacant with no hours of operation posted." *Id.* at 1. Because the site visit could not be completed, CMS could not verify Petitioner's compliance with supplier standards, and therefore the facility was found "not operational to furnish Medicare covered items and services" in violation of 42 C.F.R. § 424.535(a)(5)(ii). CMS Ex. 2, at 1-2.

NSC received Petitioner's undated reconsideration request and acknowledged its receipt on June 23, 2010. CMS Ex. 4. In the acknowledgment, NSC advised Petitioner that it could submit additional documentation to support its reconsideration request. *Id.* Petitioner responded via facsimile on July 6, 2010, with documentation that it argued was proof that it attempted to notify CMS within 30 days of its move. CMS Ex. 5.¹

Petitioner stated "that the [NSC] representative went to our old office that we had just moved from and no one was there. We have our hours posted at our new location, and someone is always here during those hours." CMS Ex. 3, at 2; P. Ex. 3, at 2. In response to CMS's determination that the facility was not operational at the address of record, Petitioner stated, "I believe this was just a misunderstanding as we were trying to have our new address switched over from the old one." CMS Ex. 3, at 2; P. Ex. 3, at 2.

¹ The documentation that Petitioner submitted included: a handwritten CMS-855S change of business location form dated May 5, 2010, showing an address change to 910 Richard Road, Suite B, Dyer, Indiana 46311-2027; a copy of a picture of a sign with Petitioner's business hours; and a phone bill from April 14, 2010 to May 13, 2010 addressed to Petitioner at the 910 Richard Road address. CMS Ex. 5, at 1-5.

In a reconsideration decision dated July 19, 2010, a Medicare Hearing Officer affirmed CMS's decision to revoke Petitioner's Medicare supplier number. CMS Ex. 6, at 3. The Hearing Officer determined that Petitioner did not comply with supplier standard 8, which requires a supplier to: permit "CMS, or its agents, to conduct on-site inspections to ascertain supplier compliance;" be "accessible during reasonable business hours to beneficiaries and to CMS;" and have "posted hours of operation." CMS Ex. 6 at 2; 42 C.F.R. § 424.57(c)(8). Additionally, the Hearing Officer referenced Petitioner's CMS-855S change of business location form and concluded that CMS did not receive the form according to the information in the case file. CMS Ex. 6 at 2.

On August 16, 2010, Petitioner filed a hearing request with the Civil Remedies Division (CRD) of the Departmental Appeals Board (Board) to appeal the reconsideration decision. P. Ex. 7, at 1-2. In its hearing request, Petitioner stated the following undisputed facts. On April 9, 2010, Petitioner moved from 1546 Joliet Street, Dyer, Indiana to a new facility at 910 Richard Road, Suite B, Dyer, Indiana. Petitioner claimed it was unable to leave a message posted at the old location that detailed its recent move with directions to its new location. *Id.* at 1. On May 4, 2010, CMS's contractor informed Petitioner that it had never received the CMS-855S application reflecting the address change. On May 5, 2010, Petitioner completed and mailed a change of address notice that was returned for insufficient postage on May 11, 2010. *Id.* at 1-2. Petitioner then stated it planned to move back to its original location at 1546 Joliet Street, Dyer, Indiana, effective August 18, 2010. *Id.* at 2. Petitioner decided that "it was best to go back to its original location . . . to maintain the original address submitted to CMS and the State of Indiana requiring no additional documentation." P. Br. at 4. Attached to Petitioner's hearing request was its completed CMS-855S application with the address change form. *See* P. Ex. 7, at 8-55.

In response to Petitioner's hearing request, on August 26, 2010, Board Member Leslie A. Sussan issued an Acknowledgment and Pre-Hearing Order setting procedures for this appeal.² CMS submitted a motion for summary judgment (CMS Br.), dated September 27, 2010, and seven exhibits (CMS Exs. 1-7). Petitioner submitted a response to CMS's Motion (P. Br.), characterized as a motion for summary judgment, dated October 25, 2010, and attached twelve exhibits (P. Exs. 1-12). CMS submitted a reply to Petitioner's response (CMS Reply), dated November 5, 2010. This case was transferred to me on October 25, 2010. Neither party objected to the admission of any exhibit. Pursuant to the Prehearing Order in this case, Petitioner may not offer new documentary evidence in this case, absent a showing of good cause for failing to present that evidence previously to CMS. 42 C.F.R. § 498.56(e). Therefore, I exclude P. Exs. 8-12, as they are new evidence, and Petitioner did not show good cause by explaining why it did not present these exhibits earlier to CMS's contractor. I admit CMS Exs. 1-7 and P. Exs. 1-7.

² Pursuant to 42 C.F.R. § 498.44, a member of the Board may hear appeals taken under part 498.

II. Applicable Legal Authority

Regulations provide that CMS may revoke a currently enrolled supplier's Medicare billing privileges, when "CMS determines, upon on-site review, that the . . . supplier is no longer operational to furnish Medicare covered items or services . . ." 42 C.F.R. § 424.535(a)(5). CMS has adopted a list of supplier standards, including operational requirements that DMEPOS suppliers must meet on a continuing basis. Among these, the regulation provides that a supplier –

(2) Has not made, or caused to be made, any false statement or misrepresentation of a material fact on its application for billing privileges. (The supplier must 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.);

* * *

(8) Permit 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).

The term "operational" is defined to mean that a supplier –

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 (as applicable, based on the type of facility or organization, provider or supplier specialty, or the services or items being rendered), to furnish these items or services.

42 C.F.R. § 424.502.

When CMS bases a revocation on a non-operational determination by CMS, or its contractor, the revocation is effective on the date that CMS, or its contractor, determined that the provider or supplier was no longer operational. 42 C.F.R. § 424.535(g).

III. Issues

The issues before me are whether CMS:

1. Had a legitimate basis to revoke Petitioner's billing privileges; and
2. Is entitled to summary judgment.

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

My conclusions are in the italicized headings followed by discussion.

a. CMS had a legitimate basis to revoke Petitioner's billing privileges because Petitioner was not operational pursuant to the regulations.

CMS contends that it was unable to conduct an on-site survey of Petitioner's business since it was no longer operational at the enrolled address. CMS Br. at 1. Pursuant to 42 C.F.R. § 424.57(c)(8), a supplier is required to "permit CMS, or its agents to conduct on-site inspections to ascertain supplier compliance . . . [t]he 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." Additionally, CMS argues that Petitioner did not meet supplier standard 2, which requires the supplier to notify CMS of any changes in information supplied on the application within 30 days of the change, and supplier standard 7, which requires the supplier to maintain a physical facility on an appropriate site. CMS Br. at 3.

Petitioner acknowledges that it moved to a new location on April 9, 2010, and it did not post notice of the new location at the old location. P. Ex. 7, at 1. The attempted site visits occurred over a month later on May 11, 2010. CMS Ex. 1, at 7. Petitioner concedes that CMS did not receive notice that Petitioner changed its business address because Petitioner's notification was returned to Petitioner on May 11, 2010, for insufficient postage. P. Br. at 4; P. Ex. 7, at 1-2. This is consistent with the determination of the Medicare Hearing Officer that CMS did not receive Petitioner's CMS-855S change of business location notification. CMS Ex. 6, at 2. There is no indication in the record below that, after Petitioner received the returned notification, Petitioner attempted to re-submit the notification to CMS. With its hearing request dated August 16, 2010, Petitioner finally submitted its enrollment update with the change of address information. However, in its brief, Petitioner stated it was relocating back to its original location. Petitioner explained "it was best to go back to its original location . . . to maintain the original address submitted to CMS and the State of Indiana requiring no additional documentation." P. Br. at 4.

Not only did Petitioner's temporary move make it impossible for CMS to conduct an on-site visit to verify compliance for more than four months, but this surreptitious relocation also denied Medicare beneficiaries and the general public access to Petitioner's business. It is undisputed that Petitioner did not meet the criteria of supplier standard 8 and was therefore not operational on the date CMS attempted to conduct an on-site visit. It is also undisputed that Petitioner did not meet the criteria of supplier standard 2, which requires a supplier to report any change in information on its supplier enrollment application within 30 days of the change. CMS has scarce resources to regulate a vast number of suppliers through unannounced site visits, and the change of address rules, which Petitioner clearly did not take reasonable care to follow, serve an important function in this compliance work. Because it has been 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 standard 7. *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.”).

Petitioner attributes its revocation to having been deliberately misled by its delegated manager that all needed documentation, including notification to CMS of its address change, was provided and approved by Medicare. P. Br. at 1. For the purposes of summary judgment, I accept Petitioner's assertions as true. Nevertheless, once Petitioner's owner was on notice that the change of business location form was returned for insufficient postage in May 2010, it was not until August 2010, after the reconsideration hearing, that Petitioner's owner took action to submit the change of address form and application along with its hearing request. Petitioner's owner knew then that CMS had no record of its whereabouts for an extended period of time, and he still did not take reasonable steps to ensure proper notification. Therefore, I do not find Petitioner's explanation grounds to disturb CMS's revocation.

b. CMS is entitled to summary judgment.

CMS's moves for summary judgment asserting that there are no material facts in dispute. CMS Reply at 3. Petitioner does not argue that summary judgment is inappropriate but instead argues that the revocation should be reversed based on the actions of its manager. P. Br. at 1. No genuine issues of material fact in dispute exist in this case, and summary judgment is appropriate. 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. and Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The role of an administrative law judge (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).

This case requires an application of the law to the undisputed facts. The issues in this case turn on the legal interpretation of the regulations, 42 C.F.R. §§ 424.57(c) and 424.535, and other regulatory provisions that govern denial of enrollment and revocation of billing privileges. As previously discussed, Petitioner does not dispute that CMS was not able to conduct an on-site visit because it did not properly notify CMS that it had moved. Neither party asserts that a genuine dispute as to a material fact exists, and the evidence does not reflect such a dispute. Accordingly, summary judgment is appropriate.

V. Conclusion

After reviewing the evidence in the light most favorable to Petitioner, I conclude that the regulatory language is plain, and there is no genuine issue of material fact here. I therefore grant summary judgment to CMS because CMS acted within its regulatory authority to revoke Petitioner’s billing privileges, pursuant to 42 C.F.R. § 424.535(a)(5)(ii).

_____/s/
Joseph Grow
Administrative Law Judge