

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Benson I. Ejindu d/b/a Joy Medical Supply,  
(PTAN: 6686720001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-850

Decision No. CR3009

Date: November 27, 2013

**DECISION**

I grant the motion of the Centers for Medicare & Medicaid Services (CMS) for summary disposition and sustain the revocation of Petitioner Benson I. Ejindu d/b/a Joy Medical Supply's enrollment and billing privileges as a supplier in the Medicare program.

**I. Background**

Prior to the revocation at issue in this case, Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS).<sup>1</sup> In a letter dated February 20, 2013, National Supplier Clearinghouse (NSC), the CMS contractor, informed Petitioner that his billing number was revoked retroactively to February 7, 2013. CMS Exhibit (Ex.) 1. The letter stated that on January 31, 2013 and February 7, 2013, an NSC site inspector attempted to conduct a site visit of Petitioner's business location, but was unsuccessful because the facility was closed during the posted hours of operation, in violation of 42 C.F.R. §§ 424.57(c) and 424.535(a)(5)(ii). CMS Ex. 1. On February 28, 2013, Petitioner requested

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<sup>1</sup> A "supplier" is a "physician or other practitioner, or an entity other than a provider, that furnishes health care services under Medicare." 42 C.F.R. § 400.202.

reconsideration. CMS Ex. 2. The Medicare hearing officer issued an unfavorable reconsideration decision on April 24, 2013. CMS Ex. 3. Petitioner timely filed a request for hearing (RFH) before an Administrative Law Judge (ALJ) by letter dated May 15, 2013, and I issued an Acknowledgment and Initial Docketing Order (Order).

Pursuant to the Order, on June 26, 2013, CMS filed a Motion for Summary Judgment and Brief in Support Thereof (CMS Motion). CMS proffered six exhibits in support of its Motion (CMS Exs. 1-6). On July 11, 2013, Petitioner filed his response to the CMS Motion (P. Response) and proffered three exhibits in support of his response (P. Exs. 1-3). In the absence of objection from either party, I admit all the proffered exhibits into the record.

## II. Controlling Statutes and Regulations

Pursuant to section 1834(j)(1)(A) of the Social Security Act, a DMEPOS supplier may not be reimbursed for items provided to an eligible Medicare beneficiary unless the supplier has a supplier number issued by the Secretary of the U.S. Department of Health & Human Services. To receive a supplier number, a DMEPOS supplier must meet and maintain each of the supplier enrollments standards set forth in 42 C.F.R. § 424.57(c)(1)-(30). Among other things, a DMEPOS supplier must maintain a physical facility on an appropriate site which is in a location that is accessible to the public, staffed during posted hours of operation, and maintained with a visible sign and posted hours of operation. 42 C.F.R. § 424.57(c)(7). Also, a DMEPOS supplier must permit CMS or its agent to conduct on-site inspections to determine supplier compliance with each of the enrollment standards. 42 C.F.R. § 424.57(c)(8). CMS will revoke a currently-enrolled Medicare supplier's billing privileges if CMS or its agent determines that the supplier is not in compliance with any supplier enrollment standard. 42 C.F.R. § 424.57(d); *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.”).

In addition, 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). 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. The effective date of revocation is the date CMS determines the supplier was no longer operational. 42 C.F.R. § 424.535(g).

### III. Issues, Findings of Facts and Conclusions of Law

#### A. Issue

The issue before me in this case is whether CMS or its contractor had a basis to revoke Petitioner's enrollment as a supplier in the Medicare program.

#### B. Findings of Facts and Conclusions of Law

***CMS is entitled to summary disposition because the undisputed facts establish that Petitioner was not operational in violation of 42 C.F.R. § 424.57(c)(7).***

Summary disposition is appropriate when a case presents no issue of material fact, and its resolution turns on questions of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The Departmental Appeals Board (Board) has stated that, “[w]hile the Federal Rules of Civil Procedure (FRCP) are not binding in this administrative appeal, we are guided by those rules and by judicial decisions on summary judgment . . . .” *Senior Rehabilitation and Skilled Nursing Center*, DAB No. 2300, at 3 (2010) (internal citation omitted). The party moving for summary judgment carries the initial burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Id.* If the moving party carries its burden, then the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Id.*

Furthermore, in determining whether there are genuine issues of material fact, I must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *Id.* (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Finally, the Board has instructed that for purposes of summary judgment, an ALJ must not engage in assessing credibility or evaluating the weight of conflicting evidence. *Holy Cross Village at Notre Dame*, DAB No. 2291, at 5 (2009).

I find that summary disposition is appropriate in this case because there are no material facts in dispute, and because this case turns entirely on questions of law. I conclude that CMS's position is correct as a matter of law.

In this case, the material and dispositive facts are not in dispute. Petitioner was a DMEPOS supplier that participated in the Medicare program. Petitioner's posted hours of operation were explicitly Monday through Friday, 10:00 a.m. through 4:00 p.m. CMS Ex. 4. On January 31, 2013, at approximately 10:15 a.m., an NSC site inspector attempted to inspect Petitioner's facility, but no one responded to her knocking although a light inside the office was on. *Id.* at 3, 9; CMS Ex. 5. On February 11, 2013, at approximately 11:02 a.m., an NSC site inspector made another attempt to inspect

Petitioner's facility, but again no one responded to the inspector's knock. CMS Ex. 4 at 3, 9; CMS Ex. 6.

Petitioner argues that he was present in the facility during the two investigator visits. P. Response at 1. Further, Petitioner provides evidence in support of his assertion in the form of cellular telephone records from the dates at issue. P. Exs. 1, 2. Petitioner explains that he locks the door when he makes telephone calls when he is alone in the shop. P. Response at 2.

For the purposes of summary judgment, I accept Petitioner's assertions as true, but even if true they are unavailing. The regulations require suppliers to maintain facilities that are "accessible and staffed during posted hours of operation." 42 C.F.R.

§ 424.57(c)(7)(i)(C). In this context, "accessible" takes on a common-sense meaning: it means an unlocked door that swings open when a visitor to the facility pushes or pulls it, or that is opened by the occupant in response to a knock or bell, allowing the visitor to enter the facility. If the door to the facility is locked, then the common-sense question is whether the facility door is promptly unlocked in immediate response to a knock or a bell or a buzzer. The result-driven criterion for a facility's being "accessible" seems obviously to be the access available to the potential customer. And thus, if the facility is not accessible when entry is attempted during posted hours of operation, then it is not in conformance with the supplier regulation. 42 C.F.R. § 424.57(c)(7)(i)(C). In the present case, even assuming that Petitioner was in the back office on a telephone call, if he did not hear the inspector knock, then he would not have heard a customer knock either. The facts of this case show that on two visits, the facility was for all practical purposes closed to anyone who sought entry, and was just as inaccessible at those times as it would have been if Petitioner had been completely absent from the premises.

The undisputed facts establish the Petitioner's facility was not open and accessible on January 31, 2013 and on February 11, 2013, at the times of the attempted site visits. Based on the undisputed facts set out above, Petitioner failed to meet these standards.

Thus, for the reasons stated above, I find that CMS had a basis to revoke Petitioner's supplier number for failure to comply with the DMEPOS supplier requirements.

