Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Benson Ejindu, d/b/a Joy Medical Supply
Docket No. A-14-30
Decision No. 2572
May 14, 2014

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Benson I. Ejindu, d/b/a Joy Medical Supply (Petitioner), appeals a November 27, 2013 decision in which the Administrative Law Judge (ALJ) sustained the revocation of Petitioner's Medicare billing privileges by the Centers for Medicare & Medicaid Services (CMS). *Benson I. Ejindu d/b/a Joy Medical Supply*, DAB CR3009 (2013) (ALJ Decision). For the reasons stated below, we affirm the ALJ's conclusion that CMS lawfully revoked Petitioner's Medicare billing privileges. We also hold that Petitioner's revocation became effective on March 22, 2013, rather than on February 7, 2013, the effective date applied by CMS.

Background

Prior to the events which led to this proceeding, Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). In order to maintain Medicare enrollment and associated "billing privileges," a DMEPOS supplier must be in compliance with the standards in paragraphs (1) through (30) of 42 C.F.R. § 424.57(c). In addition, DMEPOS and other suppliers must comply with the requirements contained or referenced in 42 C.F.R. §§ 424.515 and 424.516. CMS (through its contractors) performs on-site inspections to verify compliance with these and other Medicare requirements. *See* 42 C.F.R. §§ 424.57(c)(8), 424.517.

CMS is authorized to revoke a DMEPOS supplier's Medicare enrollment for noncompliance with any of the standards in section 424.57(c). 42 C.F.R. § 424.57(d).[1] In addition, CMS is authorized to revoke a supplier's enrollment for any of the "reasons"

[1] The editorial note following section 424.57 states that a January 2, 2009 final rule (74 Fed. Reg. 198) re-designated paragraph (d) of section 424.57 as paragraph (e) but that this and other changes to section 424.57 were not incorporated into the codified text of the regulation because of an "inaccurate amendatory instruction."

listed in paragraphs (1) through (12) of section 424.535(a). *Id.* § 424.535(a). (Section 424.535 applies to all types of Medicare "suppliers," not just DMEPOS suppliers.) In a letter dated February 20, 2013, CMS, through its contractor, notified Petitioner that his Medicare supplier number had been revoked because of noncompliance with section 424.57(c)(7). CMS Ex. 1, at 1-2. That regulation requires a DMEPOS supplier to "[m]aintain[ ] a physical facility on an appropriate site" and further states, in relevant part, that an "appropriate site" must be "*accessible* and staffed during posted hours of operation." 42 C.F.R. § 424.57(c)(7)(i)(C) (italics added). CMS's February 20, 2013 notice of revocation also stated that Petitioner's supplier number had been revoked "pursuant to" section 424.535(a)(5)(ii), which authorizes revocation if an "on-site review" determines that the supplier "*is no longer operational* to furnish Medicare covered items or services" (italics added). CMS Ex. 1, at 1.

In support of its February 20, 2013 revocation determination, the CMS contractor advised Petitioner that its inspectors had recently made two unsuccessful attempts to enter his place of business, finding it "closed during posted hours of operation" and "not operational to provide Medicare covered items and services." CMS Ex. 1, at 2. CMS also notified Petitioner that the revocation of his billing privileges became effective on February 7, 2013, the date of the second attempted on-site inspection. *Id.* at 1.

Petitioner filed a request for reconsideration, alleging that he was in his office when the inspectors came. CMS Ex. 2. However, a hearing officer upheld the initial revocation determination, finding that Petitioner had failed to demonstrate compliance with 42 C.F.R. § 424.57(c)(7). CMS Ex. 3, at 3. Although the hearing officer cited the regulatory definition of "operational" in 42 C.F.R. § 424.502, the hearing officer did not make a finding that Petitioner was "no longer operational."

Petitioner appealed the CMS hearing officer's reconsidered determination by requesting a hearing before the ALJ. CMS responded with a motion for summary judgment, asserting that "undisputed material facts establish that [it] properly revoked" Petitioner's Medicare billing privileges "because his office was inaccessible and unstaffed during posted hours of operation on two occasions, in violation of 42 C.F.R. § 424.57(c)(7)." In support of its motion, CMS relied principally on declarations from the two inspectors involved (CMS Exs. 5-6), their written site investigation reports (CMS Ex. 1, at 2-12), and photographs of the outside of Petitioner's place of business, including its front door (*id.* at 13-19).

CMS argued in support of its motion for summary judgment that the following facts were undisputed based on the evidence it submitted. On Thursday, January 31, 2013 at approximately 10:15 a.m., an inspector made an unannounced visit to Petitioner's place of business (an office suite) for the purpose of verifying his compliance with Medicare

requirements. A light inside the suite was on, but the inspector found the front door locked. She knocked on that door but no one responded. A sign on the door (which the inspector photographed) listed Petitioner's business hours as 10:00 a.m. to 4:00 p.m., Monday through Friday. The sign also listed two telephone numbers, one of them identified as being for calls "after hours." There was no information on the sign or elsewhere explaining why Petitioner's office was locked during the posted hours or when it might re-open, or instructing potential customers to call the phone numbers if the door was locked and there was no answer to a knock on the door.

On February 7, 2013 at approximately 11:02 a.m., a different inspector made another unannounced visit to Petitioner's place of business. Again, the inspector found the front door locked, and there was nothing on door indicating why the office appeared to be closed. The inspector knocked on the door "several times" but received no response.

Petitioner filed a response to CMS's summary judgment motion. He stated that when the inspectors arrived on January 31 and February 7, 2013, he was inside the office suite but did not hear the inspectors' knocking. Petitioner produced phone records which, he alleged, showed that he was inside the suite during posted hours on both days. P. Exs. 1-2. Petitioner also stated that he had locked the suite's front door for the following reason:

> The US MARINE CORPS has their recruiting office across from my office . . . . A lot of people looking for the US MARINE CORPS office end up in my office for direction because their office cannot be seen from the parking lot. So when I am about to make a call I lock my door.

Finally, Petitioner asserted that the inspectors should have called one of the telephone numbers listed on the sign that was posted on the door when they received no response to their knocking.

The ALJ found no material facts in dispute and, for the purpose of ruling on CMS's summary judgment motion, accepted as true Petitioner's assertion that he was inside the office suite when the attempted inspections occurred on January 31 and February 7, 2013. ALJ Decision at 4. Nonetheless, the ALJ concluded, for the following reasons, that Petitioner's place of business was not "*accessible* . . . during posted hours of operation" (italics added) in violation of section 424.57(c)(7):

> 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.

DAB CR3009, at 4 (italics added). Because he found that the undisputed facts established that Petitioner's place of business was not "accessible" in violation of section 424.57(c)(7), the ALJ concluded that CMS had lawfully revoked Petitioner's Medicare billing privileges and was therefore entitled to summary judgment. *Id.* at 4-5.

Petitioner then filed the request for review now before us, asserting (among other things) that the front door to his facility "was locked for a reason" but that "[i]f a customer calls the posted phone number for service, we open the door."

Discussion

Before addressing the merits of Petitioner's appeal, we dispose of two preliminary matters. First, we note that the regulatory provision that the ALJ relied upon in granting summary judgment, section 424.57(c)(7)(i)(C), has two requirements: (1) that the supplier be "accessible" during posted hours of operation; and (2) that the supplier be "staffed" during those hours. CMS's motion for summary judgment alleged noncompliance with both requirements. However, the ALJ appeared to rest his decision solely on the accessibility requirement, perhaps because he assumed that Petitioner was inside his place of business (and thus arguably "staffed") on the two days in question. For that reason, and because CMS's appeal brief does not contain a clear and direct legal argument that Petitioner violated the staffing requirement as well as the accessibility requirement,[2] we address only whether his facility was accessible during posted hours of operation.

[2] *See* CMS Response at 1, 6-7 (asserting in the introductory paragraph that Petitioner's office was not "staffed" but failing in the "Argument" section to argue explicitly that Petitioner was not staffed and further stating that "whether the business was staffed during posted hours is immaterial" because Petitioner's failure to meet the accessibility requirement was a sufficient basis on which to uphold the revocation).

The second preliminary matter concerns the ALJ's use of the term "operational" in the heading to his "Findings of Fact and Conclusions of Law." The ALJ stated there that CMS was entitled to summary judgment because Petitioner was "not *operational* in violation of 42 C.F.R. § 424.57(c)(7)." ALJ Decision at 3. Contrary to what the heading implies, the term "operational" does not appear in section 424.57(c)(7). The term has a defined meaning in a different subpart of the regulations – *see* 42 C.F.R. § 424.502, which sets out definitions of terms used in 42 C.F.R. Part 424, subpart P (sections 424.500-.575) – and a finding by CMS that a supplier is "no longer operational" authorizes CMS to revoke a supplier's Medicare enrollment pursuant to section 424.535(a)(5)(ii). Despite the ALJ's use of the term "operational" in the heading to the ALJ's factual findings and legal conclusions, it is clear from the analysis underneath that heading that the ALJ did *not* uphold the revocation pursuant to section 424.535(a)(5)(ii) based on a finding that Petitioner was not "no longer operational." Rather, he decided only whether Petitioner's Medicare enrollment had been properly revoked under section 424.57(c)(7). The ALJ properly refrained from going beyond that issue to address other possible grounds for revocation because the reconsidered determination which Petitioner appealed (in contrast to the initial determination) did not rely on any additional legal ground for revocation. *See* P. Ex. 3, at 3 (stating that revocation was being sustained because Petitioner had not demonstrated compliance with "supplier standard 7" (section 424.57(c)(7)); 42 C.F.R. § 498.5(l)(2) (with respect to denial or revocation of billing privileges, the provider or supplier's appeal rights lie from the reconsidered or revised reconsidered determination, not initial determinations).

We turn now to Petitioner's challenge to the ALJ Decision. We review the ALJ's grant of summary judgment *de novo*, construing the facts in the light most favorable to Petitioner and giving him the benefit of all reasonable inferences. *See Livingston Care Ctr.*, DAB No. 1871, at 5 (2003), *aff'd, Livingston Care Ctr. v. U.S. Dep't of Health & Human Servs.*, 388 F.3d, 168, 172-73 (6th Cir. 2004). Summary judgment is appropriate when there is no genuine dispute about a fact or facts material to the outcome of the case and the moving party is entitled to judgment as a matter of law. *Id*.; *Celotex Corp. v Catrett*, 477 U.S. 317, 322-25 (1986). The party moving for summary judgment (here, CMS) has the initial burden of demonstrating that there is no genuine issue of material fact for trial and that it is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party carries that burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986) (quoting Rule 56(e) of the Federal Rules of Civil Procedure).

In support of its motion for summary judgment, CMS presented evidence that on two days within the space of approximately one week: (1) the door to Petitioner's facility was locked during the posted business hours; (2) CMS's inspector found nothing on the door indicating why it was locked during the posted hours or instructing the customer

how to gain access; and (3) Petitioner did not respond to knocks on the door. These facts are sufficient to establish that Petitioner was not "accessible . . . during posted hours of operation" in violation of section 424.57(c)(7)(i)(C). The word "accessible" has multiple meanings, but, in this context, three natural and appropriate definitions are "providing access," "capable of being reached," or "capable of being used or seen." *Webster's Third New International Dictionary, Unabridged*, available at http://www.merriam-webster.com/dictionary/accessible?show=0&t=1395146836 (last visited May 13, 2014). A DMEPOS supplier's facility does not "provid[e] access" to a Medicare beneficiary, and cannot be "used" or physically "reached" by the beneficiary, if its entry door is locked during posted hours, no one responds to a knock on the door, and there is no alternative means of gaining entry for a customer seeking to purchase or at least consider purchasing Medicare-covered supplies.

Our holding concerning the meaning of the term "accessible" is consistent with the objectives underlying the DMEPOS supplier standards. One of those objectives is to ensure that Medicare beneficiaries, especially those with disabilities or with limited or unreliable means of transportation, can readily obtain Medicare-covered items and services from a supplier at its place of business without undue inconvenience or burden. *See* Final Rule, *Medicare Program; Establishing Additional Medicare Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Supplier Enrollment Safeguards*, 75 Fed. Reg. 52,629, 52,632 (Aug. 27, 2010) ("Given that Medicare beneficiaries may not be able to find transportation during limited operating hours, the DMEPOS supplier must be open and available for periods long enough for beneficiaries to readily access their facility."); *id.* at 52,637 ("Since most DMEPOS suppliers are not solely service facilities, we believe that these enrolled suppliers must provide reasonable access for Medicare beneficiaries in the event that a beneficiary has a problem or requires prompt service."). Another objective is to enable CMS to verify, through unannounced on-site inspections, that a supplier is equipped to provide Medicare-covered items and services and meets all other Medicare requirements. *Id.* at 52,644 (stating that "maintain[ing] a minimum number of hours *open to the public* . . . will ensure that the DMEPOS supplier is operational and allows CMS . . . to conduct unannounced site visits to ensure compliance with the standards set forth at § 424.57" (italics added)) and 52,637 ("It is . . . essential that CMS or [its] agents have access during posted hours of operations to ensure that the supplier continues to meet the supplier standards in § 424.57."). In promulgating the supplier standards, CMS made it clear that, to achieve these objectives, a supplier must be "open and available" to the public during "regularly scheduled hours." *Id.* at 52,643. In this case, CMS offered evidence, discussed above, that these conditions did not exist when an inspector arrived at Petitioner's facility on January 31 and February 7.

Petitioner's primary response to the summary judgment motion was an allegation that he was inside his office when CMS's inspectors attempted to visit. In support of that allegation, he produced records of phone calls he made or received on January 31 and February 7, 2013.[3] P. Exs. 1-2. We assume, as the ALJ did, that Petitioner was inside his
office suite on those two days and was talking on his phone.[4] However, these facts are immaterial. What matters is that the common sense means of gaining access (trying to open the door and knocking upon finding it locked) did not result in gaining access and that Petitioner did not provide customers with any alternative instruction for gaining entry. By locking the front door during the posted hours, failing to respond to repeated knocking, and failing to post a notice that specified an alternative method to request and obtain prompt access, Petitioner failed to be accessible.

In his request for review, Petitioner urges us to "consider the fact that if any customer comes to the office, that the customer will *obey the posted sign on the door and call for service*" (italics added). This statement does not create a genuine dispute of fact material to deciding whether Petitioner was "accessible" within the meaning of section 424.57(c)(7). Petitioner's assertion that a visitor would "obey" his posted sign implies that the sign instructed the visitor in some way. However, as it appears in the inspectors' photographs,[5] *see* CMS Ex. 1, at 13-19, the posted sign did not instruct a customer to call one of the listed phone numbers – or advise the customer to take any other action in order to gain access – in the event that the door was locked during the posted hours. Furthermore, an instruction to call one of the listed telephone numbers would have been of dubious help to a customer who was not carrying a mobile phone. Petitioner submitted no evidence from which the ALJ (or this Board) could reasonably infer that persons without mobile phones could have contacted him and obtained entry to his facility without undue delay or inconvenience.

Petitioner's assertion that he locked his office "for a reason" – the reason being that he wanted to prevent persons looking for the Marine Corps recruiting office from mistakenly entering his suite while he was on the telephone – does not create a material issue. We

[3] Petitioner submitted only two other pieces of evidence, neither of which is material: a photograph of the outside of his office building (but not the entrance to his office suite); and a photograph of the United States Marine Corps emblem that presumably adorned a nearby recruiting office. P. Ex. 3.

[4] We note, however, that the ALJ did not discuss some apparent problems with the phone records. See P. Exs. 1-2. One problem is that the records do not identify a telephone number that matches the daytime phone number posted on the door of Petitioner's office. A second, more significant problem is that the phone records are for a "T-Mobile" phone – a mobile phone, not a landline associated with a physical address. These problems undercut Petitioner's contention that a visitor seeking access during regular business hours would have reached him *in his office* by calling the posted daytime phone number.

[5] Petitioner did not submit a photograph of the sign posted on his front door or dispute the accuracy of the inspectors' photographs.

need not decide whether this practice would be categorically prohibited by section 424.57(c)(7) because even if it was not, Petitioner would have needed to ensure that the practice did not unreasonably impede customer access. In other words, Petitioner needed to provide a customer who encountered a locked door during regularly scheduled hours with a reliable and effective means to overcome that barrier and obtain prompt entry. As our previous discussion indicates, there is no evidence that Petitioner took even minimal steps to ensure that potential customers received prompt access. The sign on the front door did not instruct customers to call one of the posted numbers in the event the door was locked during business hours, and photographs do not show that the front door had an intercom (or other comparable system) that would have allowed a Medicare beneficiary who lacked a mobile phone to communicate immediately with someone inside the facility in order to request access. *See* CMS Ex. 1, at 13-19. In addition, a reasonable inference from Petitioner's statement that he locked the door while he was on the phone is that he was on the phone in the office when the inspectors arrived and found the door locked. If Petitioner was on the phone, a question arises as to whether he would have been able to promptly respond to a call from a customer even if the customer was carrying a mobile phone and called one of the numbers listed on the sign.

In short, the record on summary judgment, even when viewed in the light most favorable to Petitioner, could not lead a rational trier of fact to conclude that Petitioner's place of business was "accessible . . . during posted hours of operation." For that reason, we conclude that CMS lawfully revoked Petitioner's Medicare enrollment under section 424.57(c)(7) and is entitled to summary judgment.

In light of our decision to sustain Petitioner's revocation based on section 424.57(c)(7), we find it necessary to modify the revocation's effective date.[6] In its February 20, 2013 notice of revocation, CMS advised Petitioner that his revocation became effective on February 7, 2013 because he was "not operational" on that date. CMS Ex. 1, at 1. In choosing the effective date, CMS was apparently applying 42 C.F.R. § 424.535(g). That regulation states a general rule that the effective date of a revocation is 30 days from the date CMS mails the supplier notice of its revocation determination. However, if CMS issues a revocation based on section 424.535(a)(5)(ii), which requires a finding by CMS that the supplier is "no longer operational," then section 424.535(g) provides that the effective date is the "date that CMS or its contractor determined that the provider or supplier was no longer operational."

[6] The ALJ did not address the effective-date issue, and neither party raised it on appeal. For that reason, the Board notified the parties of its proposed resolution of the issue in an April 9, 2014 letter and gave them an opportunity to comment. CMS submitted no comment. Petitioner submitted a brief comment that did not address the effective-date issue. He asserted, instead, that our change to the effective date entitles him to "compensation" for "lost income" he allegedly suffered as a result of CMS applying the earlier (February 7, 2013) effective date. The Board has no authority to award, or to direct CMS to award, such compensation. *See Experts Are Us, Inc.*, DAB No. 2342, at 5 (2010) (rejecting supplier's argument that the ALJ was authorized to hear its claims for damages resulting from CMS's and the contractor's allegedly wrongful conduct in revoking its billing privileges).

That exception cannot properly be applied in this case. Although CMS's initial (February 20, 2013) determination contained a finding that Petitioner was not operational and therefore subject to revocation under section 424.535(a)(5)(ii), CMS's reconsidered determination did not. The reconsidered determination based the revocation only on a finding of noncompliance with section 424.57(c)(7). CMS Ex. 3, at 3. Similarly, the ALJ sustained Petitioner's revocation, as do we, based solely on a finding that Petitioner was "not accessible" in violation of section 424.57(c)(7), rather than on a finding that Petitioner was "no longer operational" (and therefore subject to revocation under section 424.535(a)(5)(ii)).

Because the sole basis for revocation in this case is noncompliance with section 424.57(c)(7), the effective date of revocation should be determined in accordance with section 424.57's effective-date provision. As it currently appears in the Code of Federal Regulations, paragraph (d) of section 424.57 states that the effective date of a revocation based on a violation of section 424.57(c) "is effective *15 days* after the [supplier] is sent notice of the revocation" (italics added). The regulation's editorial note states that a January 2, 2009 final rule (74 Fed. Reg. 198) re-designated paragraph (d) of section 424.57 as paragraph (e) but that this and other changes to section 424.57 were not incorporated into the codified text of the regulation because of an "inaccurate amendatory instruction." Also, on August 27, 2010, CMS published a final rule in the Federal Register which revised paragraph (e) (that is, the re-designated paragraph (d)) to extend the effective date of a revocation based on section 424.57(c) *from 15 to 30 days* after the supplier is notified of the revocation. Final Rule, *Medicare Program; Establishing Additional Medicare Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Supplier Enrollment Safeguards*, 75 Fed. Reg. 52,629, 52,648-52,649 (Aug. 27, 2010). CMS indicated that it was making this change "[i]n order to be consistent with [its] regulations at [42 C.F.R.] § 424.535(g)[.]" *Id.* at 52,645. As re-designated and amended by the January 2, 2009 and August 27, 2010 final rules, the effective date provision in section 424.57 now provides in relevant part:

> (e) Failure to meet standards — (1) Revocation. CMS revokes a supplier's billing privileges if it is found not to meet the standards in paragraphs (b) and (c) of this section. Except as otherwise provided in this section, the revocation is effective 30 days after the entity is sent notice of the revocation, as specified in § 405.874 of this subchapter. . . .

Id. at 52,648.[7] Applying that rule,[8] we find that the effective date of Petitioner's revocation is March 22, 2013.

Conclusion

Because CMS is entitled to summary judgment concerning its determination that Petitioner was in violation of 42 C.F.R. § 424.57(c)(7), we affirm the ALJ Decision and further hold that the effective date of Petitioner's revocation is March 22, 2013.

/s/
Stephen M. Godek

/s/
Leslie A. Sussan

/s/
Sheila Ann Hegy
Presiding Board Member

[7] The reference to section 405.874 in section 424.57(e) is outdated. The relevant portions of that regulation have been moved to 42 C.F.R. § 405.800(b). *See* 77 Fed. Reg. 29,002, 29,016-29,017 (May 12, 2012). Section 405.800(b)(2) presently states that "[t]he revocation of a provider's or supplier's billing privileges is effective 30 days after CMS or the CMS contractor mails notice of its determination to the provider or supplier, except if the revocation is based on a Federal exclusion or debarment, felony conviction, license suspension or revocation, or the practice location is determined by CMS or its contractor not to be operational."

[8] In its April 9, 2014 letter to the parties, the Board advised the parties of its preliminary analysis that it should apply section 424.57's effective-date provision as amended by the final rule published in the August 27, 2010 Federal Register, even though the revision has not been incorporated into the Code of Federal Regulations. The Board cited statutes and case law indicating that lack of codification in the Code of Federal Regulations does not necessarily render a revision finally published in the Federal Register ineffective or legally invalid. *See, e.g.*, 44 U.S.C. § 1507 (stating that "[t]he contents of the Federal Register shall be judicially noticed") and § 1510(a), (b) (providing that the Code of Federal Regulations is a codification of agency documents "having general applicability and legal effect" that are "promulgated by the agency by publication in the Federal Register"); 5 U.S.C. § 552(a)(1)(D) (requiring publication of "substantive rules of general applicability" in the "Federal Register"); *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384–85 (1947) ("Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents."). Neither party objected to the Board's analysis.