Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Restwell Mattress Company d/b/a Restwell Mattress Factory,
(PTANs 5783260002, 5783260003)
Petitioner

v.

Centers for Medicare & Medicaid Services.

Docket Nos. C-10-490, C-10-491

Decision No. CR2194

Date: July 23, 2010

DECISION

I grant the motion of the Centers for Medicare & Medicaid Services (CMS) for summary disposition and sustain the revocation of the Medicare supplier numbers of two locations of Petitioner, Restwell Mattress Company d/b/a Restwell Mattress Factory, based on Petitioner's acknowledged failure to comply timely with the requirement that a CMS-approved accrediting organization accredit them by October 1, 2009.

I. Applicable Law and Regulations

Section 1834(a)(20)(F)(i) of the Social Security Act (Act), 42 U.S.C. § 1395m(a)(20)(F)(i), states that the Secretary of Health and Human Services "shall require suppliers furnishing [Medicare supplies] . . . on or after October 1, 2009 . . . to have submitted to the Secretary evidence of accreditation by an accreditation organization designated . . . as meeting applicable quality standards . . . ."

CMS implemented this requirement through "supplier standards" at 42 C.F.R. § 424.57(c) that suppliers of "durable medical equipment, prosthetics, orthotics, and supplies" (DMEPOS) (42 C.F.R. § 424.57(a)) must meet to maintain Medicare billing

privileges. As relevant here, supplier standard 22, which took effect October 2, 2006 (71 Fed. Reg. 48,354 (Aug.18, 2006)), provides:

> (22) All suppliers of DMEPOS and other items and services must be accredited by a CMS-approved accreditation organization in order to receive and retain a supplier billing number. The accreditation must indicate the specific products and services, for which the supplier is accredited in order for the supplier to receive payment for those specific products and services.

42 C.F.R. § 424.57(c)(22). CMS "will revoke a supplier's billing privileges if it is found not to meet" the supplier standards or other requirements in section 424.57(c). 42 C.F.R. § 424.57(e) (formerly § 424.57(d)).[1]

A supplier that has had its billing privileges revoked is "barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar. The re-enrollment bar 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(d).

II. Undisputed Facts and Procedural History

Petitioner appeals two reconsideration decisions by a Medicare hearing officer with the National Supplier Clearinghouse (NSC), a CMS contractor, dated January 27, 2010. The hearing officer in both decisions sustained NSC's October 9, 2009 decision to revoke the Medicare supplier numbers for two of Petitioner's locations[2] and to impose a one-year re-enrollment bar, on the grounds that a CMS-approved accredited organization had not accredited Petitioner by October 1, 2009, as section 1834(a)(20)(F)(i) of the Act and 42 C.F.R. § 424.57(c)(22) required.[3] *See* CMS Ex. 2. The hearing officer found that

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[1] Paragraph (e) of section 424.57 was previously designated paragraph (d) and was redesignated by the rulemaking that imposed the surety bond requirements at paragraph (d); however, the redesignations have not yet been incorporated in the Code of Federal Regulations. *See* 42 C.F.R. Ch. IV (Oct. 1, 2009) § 424.57, Editorial Note.

[2] Petitioner has a corporate office in St. Louis Park, Minnesota, and two business locations that are the subject of the revocation actions, one in St. Louis Park, Minnesota and one in Bloomington, Minnesota. P. Hearing Request (HR).

[3] NSC also revoked the supplier numbers on the ground that Petitioner failed to obtain surety bonds for the two locations by October 2, 2009, as section 1834(a)(16)(B) of the Act and 42 C.F.R. § 424.57(c)(26) and (d) required. CMS Ex. 1, at 20-21; CMS Ex. 2, at 1-3; P. Ex. 3. The hearing officer sustained that determination, finding that the surety bonds Petitioner submitted to her were either not signed by Petitioner's authorized or

(continued…)

Petitioner had not initiated the accreditation process until after the October 1, 2009 deadline. Among other things, the hearing officer cited a February 11, 2010 letter from an accrediting organization, the Healthcare Quality Association on Accreditation (HQAA) stating that Petitioner was "currently awaiting" site surveys required for accreditation. CMS Ex. 2, at 10; P. Ex. 3, at 2, 5.

The two appeals were originally assigned to Administrative Law Judge (ALJ) Richard J. Smith, who ordered them consolidated. ALJ Order in Lieu of Prehearing Conference (Mar. 25, 2010). He determined that the case could be addressed in summary fashion in the context of a CMS motion for summary disposition but left open the possibility of convening an evidentiary hearing if needed. ALJ Smith set a schedule for submission of CMS's motion for summary judgment and supporting brief, Petitioner's answer brief, and CMS's reply. The case was transferred to me pursuant to 42 C.F.R. § 498.44, which permits a Member of the Departmental Appeals Board (Board) to be designated to hear appeals taken under Part 498. CMS submitted a motion for summary judgment and a supporting memorandum of law (CMS Br.) and four exhibits. Petitioner filed its answer brief (P. Resp.) with no exhibits. CMS declined to submit a reply.

With its hearing request, Petitioner submitted 16 pages of documents that were not designated as exhibits. I assign the following exhibit numbers to these documents: a letter to Petitioner from the HQAA dated February 11, 2010, and three certificates of accreditation dated January 26, 2010 (P. Ex. 1; 4 pages); two surety bonds (P.Ex. 2; 6 pages); the two NSC reconsideration decisions, dated January 27, 2010 (P. Ex. 3; 6 pages). Absent any objection to the admission of any exhibits, or any representation by CMS that Petitioner's exhibits constitutes new documentary evidence, the admission of which is limited by 42 C.F.R. § 498.56(e), I admit both parties' exhibits.

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[3](…continued)

delegated official or were submitted after the date of the revocation. P. Ex. 3. Petitioner has, however, submitted copies of surety bonds that were appropriately signed and effective October 2, 2009, indicating that Petitioner had compliant surety bonds in place, and CMS has not objected to their admission. P. Ex. 2. CMS does not allege that this bond differs from the copy sent to the hearing officer on reconsideration. As Petitioner's failure to comply with the accreditation requirement suffices to authorize the revocation, I base my decision sustaining the revocation solely on that ground and do not further address the surety bond issue.

III. Issue, Findings of Fact, Conclusions of Law

A. Issue

The sole issue in this case is whether CMS is entitled to summary disposition on the ground that the undisputed facts demonstrate that the revocation of Petitioner's Medicare billing privileges was legally authorized.

B. Applicable Standard

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, Inc*, DAB No. 2291, at 5 (2009).

C. Analysis

My findings and conclusions are in the italicized headings below supported by the subsequent discussions.

1. CMS was authorized to revoke Petitioner's billing privileges based on undisputed evidence that Petitioner was not accredited by October 1, 2009, as 42 C.F.R. § 424.57(c)(22) required.

Petitioner does not dispute, and indeed concedes, that its two locations were not accredited on October 1, 2010. Petitioner's Vice President states the "re accreditation process was initiated in October, 2009 [and] was completed January 26, 2010." HR. This concession is consistent with the record, which includes "three-year accreditation

award" certificates for Petitioner's locations dated January 26, 2010. CMS Ex. 3, at 2-5; P. Ex. 1. Petitioner's Vice President attributes the tardy commencement of the accreditation process to a mistaken belief that the two enrolled locations would not have to demonstrate compliance with enrollment requirements until their enrollments were to be renewed in March 2007. P. Resp. at 2. She states that Petitioner "became a Provider in March, 2007" and that she "understood that there would be a three year renewal process . . . [m]y target effort for renewal then would be March 2010."[4] *Id*.; *see* 42 C.F.R. § 424.57(f) ([A] supplier "must renew its application for billing privileges every 3 years after the billing privileges are first granted."). She states that she "had heard about the Oct 1, 2009 date" but believed that, because "Restwell had been through the process and expense so recently, it would not be applicable to us, so I thought." P. Resp. at 2. Meeting the October 1, 2009 requirement, she states, would have required beginning the accreditation process some six months earlier. *Id*. Thus, no dispute exists that Petitioner was not accredited when NSC revoked its billing privileges.

Petitioner's showing of accreditation over three months after the revocation is not a ground to reverse the revocation. The regulations require that a supplier "must meet and must certify in its application for billing privileges that it meets ***and will continue to meet***" the supplier standards. 42 C.F.R. § 424.57(c) (emphasis added). The preamble to the regulations implementing the reconsideration and appeals process for suppliers whose billing privileges are revoked explained:

> When a Medicare contractor makes an adverse enrollment determination (for example, enrollment denial or revocation of billing privileges) . . . appeal rights are limited to provider or supplier eligibility at the time the Medicare contractor made the adverse determination. . . . Accordingly, a provider or supplier is required to furnish the evidence that demonstrates that the Medicare contractor made an error at the time an adverse determination was made, not that the provider or supplier is now in compliance.

73 Fed. Reg. 36,448, 36,452 (June 27, 2008). Thus, CMS's Medicare Provider Integrity Manual (MPIM) provides that "evidence that demonstrates or proves that [the supplier or provider] met or maintained compliance after the date of denial or revocation" must be excluded from the hearing officer's review. MPIM, ch. 10, § 19.A. Petitioner's demonstration that it received accreditation on January 26, 2010 shows no error in the revocation of its supplier numbers on October 9, 2009. As the Board has explained, the

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[4] While the vice president describes Petitioner as a provider, Petitioner is a Medicare supplier. "Supplier means 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. *See* 42 C.F.R. § 405.802 (A "supplier" includes a supplier of durable medical equipment Prosthetics, orthotics, or supplies (DMEPOS).).

issue before me in a supplier revocation matter is whether the "substantive factual findings underlying CMS's revocation determination are incorrect." *A to Z DME, LLC*, DAB No. 2303, at 6 (2010). Given that Petitioner does not dispute that it was not accredited on October 1, 2009 or at the time of revocation, CMS is entitled to summary disposition sustaining the revocation on the basis of failure to comply with supplier standard 22.

Petitioner's Vice President makes what is essentially an appeal to equity. She states that the loss of Petitioner's Medicare business "would basically shut . . . down" a "65-year old Minnesota small business" that pays all of its employees' "medical, dental and life insurance." P. Resp. at 3. She states that Petitioner has a "crisp track record" in providing Medicare supplies, such as electric beds, and "hope[s] you find . . . that we do in fact deserve to continue doing business with Medicare; to serve their patients and provide a great product." *Id*. While she "understand[s] there are people defrauding the Medicare system, and . . . can see that the new standards were intended to wash out those very people," she states that "Restwell is not one of them" and "take[s] the privilege of being a Provider of hospital beds very seriously." *Id*.

Given that Petitioner admittedly failed to comply with the requirement that it be accredited by October 1, 2009, I have no authority to grant the equitable relief it seeks. The regulations clearly authorize CMS to revoke Petitioner's supplier numbers for its failure to meet the accreditation requirement. Section 424.57(e) states that CMS "will revoke a supplier's billing privileges if it is found not to meet" the supplier standards or other requirements in section 424.57(c). *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."). One of the requirements that suppliers "must meet" (section 424.57(c)) is the requirement, which became effective October 2, 2006, that a CMS-approved accrediting organization accredit the supplier. Petitioner points to no source of authority for me to waive that compliance requirement or grant an exemption on equitable grounds, nor am I aware of one. It is well-established that ALJs are bound by statute and regulations. *See, e.g., Sentinel Medical Laboratories, Inc*., DAB No. 1762, at 9 (2001). Where a regulation speaks clearly on its face and applies to the question before me, I am bound to follow it.

Finally, Petitioner's reported failure to realize that it was subject to the accreditation requirement is no ground for relief. As a Medicare supplier, Petitioner was charged with knowing, and had constructive notice of, the requirements for maintaining enrollment. *See Waterfront Terrace, Inc.*, DAB No. 2320, at 7 (2010), citing *Heckler v. Cmty. Health Servs. of Crawford County*, 467 U.S. 51, 64 (1984) ("As a participant in the Medicare program, respondent had a duty to familiarize itself with the legal requirements" of the program.); *see also Manor of Wayne Skilled Nursing & Rehab.*, 2249, at 10-11 (2009) and *Regency on the Lake*, DAB No. 2205, at 5-6 (2008) ([F]acilities participating in

Medicare had constructive notice of regulations.). Also, as CMS points out, Medicare suppliers were informed of the accreditation requirement in communications including an NSC "Dear Supplier" letter dated August 21, 2009. CMS Br. at 4; CMS Ex. 4.

IV. Conclusion

The undisputed facts entitle CMS to summary disposition as a matter of law. I therefore grant summary judgment in favor of CMS and sustain the revocation of Petitioner's supplier numbers.

/s/
Leslie A. Sussan
Board Member