

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

JIB Enterprises, LLC,  
d/b/a Drug Plus Pharmacy,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-862

Decision No. CR3010

Date: November 26, 2013

**DECISION**

The National Supplier Clearinghouse (NSC), an administrative contractor for the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment and billing privileges of JIB Enterprises, LLC, doing business as Drug Plus Pharmacy (Petitioner). A February 19, 2013 on-site inspection found that Petitioner was not operational at the location on file with NSC. A reconsidered determination upheld the revocation of Petitioner's enrollment and billing privileges. Petitioner requested a hearing before an administrative law judge asserting that it remained operational at a new location and sent notice to NSC and CMS of its change in location prior to the February 19, 2013 on-site inspection. CMS now moves for summary judgment, which Petitioner opposes.

For the reasons set forth below, I find that summary judgment is not appropriate because there is a genuine dispute of material fact in this case. Upon evaluating and weighing the evidence, however, I find that Petitioner has not shown that it timely notified NSC of its change in practice location prior to the February 19, 2013 on-site inspection. Therefore, NSC (on behalf of CMS) was authorized by regulation to revoke Petitioner's Medicare enrollment and billing privileges because Petitioner was not operational at the location on file with NSC and CMS.

## **I. Case Background & Procedural History**

Petitioner is a licensed pharmacy and supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) that participated in the Medicare program. There is no dispute that until approximately November 1, 2012, Petitioner was located at 2451 West Horizon Ridge Parkway, Suite 110 in Henderson, Nevada (the 2451 West Horizon location). There is also no dispute now that on or around November 1, 2012, Petitioner moved to 1590 West Horizon Ridge Parkway, Suite 130 also in Henderson, Nevada (the 1590 West Horizon location). A central factual dispute in this case is whether Petitioner timely notified NSC of that change.

On February 19, 2013, an inspector with NSC's Supplier Audit and Compliance Unit attempted to conduct an on-site inspection of Petitioner at the 2451 West Horizon location. CMS Exhibit (Ex.) 1, at 2. The NSC site inspector went to that location because, according to her report, it was the location on file with NSC at the time. CMS Ex. 1, at 2. The site inspector found that Petitioner was no longer at the 2451 West Horizon location. CMS Ex. 1, at 3. NSC subsequently notified Petitioner by letter dated March 1, 2013, that it was revoking Petitioner's Medicare billing privileges effective February 19, 2013, because Petitioner was not operational to furnish Medicare-covered items and services and therefore did not comply with 42 C.F.R. §§ 424.57(c)(7) and 424.535(a)(5)(ii). CMS Ex. 2, at 1. NSC also imposed a two-year bar on Petitioner's reenrollment in the Medicare program. CMS Ex. 2, at 2.

Petitioner requested reconsideration explaining that it had relocated in November 2012 and posted a sign to that effect on its door. CMS Ex. 3, at 1. Its reconsideration request did not claim that Petitioner had previously attempted to notify NSC of its change in practice location. With the reconsideration request, Petitioner submitted evidence showing that its surety bond and state operating license reflected the new 1590 West Horizon location. CMS Ex. 3, at 2-4.

On April 23, 2013, NSC issued a reconsidered determination that upheld the revocation of Petitioner's Medicare billing privileges. CMS Ex. 5. The hearing officer stated that the 2451 West Horizon location was the location on file with NSC at the time of the inspection and that, "after examining the information on file with NSC, there is no indication that [Petitioner] completed or submitted a change of information CMS 855S application for the change of location." CMS Ex. 5, at 2. The hearing officer concluded that Petitioner was not in compliance with 42 C.F.R. §§ 424.57(c)(7) because "the site inspector could not access [Petitioner's] facility to verify compliance with the supplier standards because the facility location on file with the NSC was non-operational." CMS Ex. 5, at 3.

Petitioner then filed its request for hearing (RFH) before an administrative law judge, stating for the first time that it had mailed a CMS-855S form to NSC before moving locations, “but it seems as if it had never made it to the destination and had not been returned back to [Petitioner].” RFH at 1. Petitioner asserted that it remained in compliance with Supplier Standard 7, at 42 C.F.R. § 424.57(c)(7), requiring a physical facility at an appropriate site. RFH at 1. On June 14, 2013, I issued an Acknowledgement and Prehearing Order (June 14, 2013 Order) directing the parties on how to develop this case for a hearing, if necessary, and decision. CMS filed a prehearing brief that included a motion for summary judgment (CMS Br.) along with five proposed exhibits (CMS Exs. 1-5). CMS included the written direct testimony of the surveyor as one of its proposed exhibits. CMS Ex. 1. Petitioner filed a responsive prehearing brief including an opposition to summary judgment (P. Br.) and nine proposed exhibits (P. Exs. 1-9). Petitioner included the written direct testimony of three individuals as three separate proposed exhibits. P. Exs. 5-7. Petitioner also included photographs of its new location. P. Exs. 8-9. Petitioner did not object to the admission of CMS’s proposed exhibits, nor request to cross-examine CMS’s proposed witness. CMS did not object to the admission of Petitioner’s proposed exhibits, nor request to cross-examine Petitioner’s proposed witnesses.

In the absence of objections, I admit CMS Exhibits 1-5 and Petitioner Exhibits 1-9 into the record. Neither party requested an opportunity to cross-examine witnesses, so there is no need for me to convene a hearing. *See* June 14, 2013 Order at 6, ¶ 10.

## **II. Analysis**

### **a. Issues**

This case presents the following issues:

1. Whether summary judgment is appropriate;
2. Whether Petitioner was “operational” at the time and location of the on-site inspection;
3. Whether Petitioner timely notified NSC when it changed its location on or around November 1, 2012; and
4. Whether NSC, acting on behalf of CMS, was authorized to revoke Petitioner’s Medicare enrollment and billing privileges.

## **b. Findings of Fact & Conclusions of Law**

### ***1. Summary judgment is not appropriate because there is a genuine dispute of material fact.***

CMS has moved for summary judgment, which Petitioner opposes. CMS argues that it is undisputed that NSC's on-site investigator found Petitioner non-operational on February 19, 2013, and that the regulations authorize it to revoke Petitioner's Medicare billing privileges. Petitioner asserts that it was operational at its new location and had timely notified NSC of its change in location. Petitioner provides three affidavits to support that assertion. P. Exs. 4-6.

Summary judgment is appropriate if there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010) (citations omitted). The party moving for summary judgment must first show that there is no dispute of material fact and that it is entitled to judgment as a matter of law. *Id.* "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. . . ." *Id.* An administrative law judge must view the evidence in a light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Id.* When considering summary judgment, an administrative law judge must not assess credibility or weigh conflicting evidence. *Holy Cross Village at Notre Dame, Inc.*, DAB No. 2291, at 5 (2009).

NSC conducts an on-site review of a supplier of DMEPOS to determine, among other things, whether a supplier is operational at a physical facility on an appropriate site. 42 C.F.R. §§ 424.57(c)(8), 424.535(a)(5). The on-site inspection must necessarily be at the location on file with NSC. *See* 42 C.F.R. § 424.517(a) (stating that one goal of the on-site review is to "verify that the enrollment information submitted to CMS or its agents is accurate . . ."). To ensure the accuracy of enrollment information, the regulations require that suppliers of DMEPOS must notify NSC of any changes in its location within 30 days in large part to ensure that NSC inspects the correct location. *See* 42 C.F.R. § 424.57(c)(2). Thus, the address on file with NSC, and whether NSC should have known of a new one, is material to the outcome of this case.

Prior to November 1, 2012, Petitioner's address was the 2451 West Horizon location. Petitioner claims that it moved on or around November 1, 2012, and notified NSC to that effect by mailing a CMS-855S form. Three affidavits support that claim. If true, and presuming that the form was properly completed, then NSC should have known of Petitioner's new location and should have sent its inspector to Petitioner's new location in February 2013 rather than the 2451 West Horizon location. NSC, therefore, would not have a basis for revoking Petitioner's enrollment based on the February 2013 attempted

inspection because it would have been at the wrong location. Accepting Petitioner's claim as true — *i.e.*, that it sent timely notice of its change of address to NSC — and drawing all reasonable inferences in favor of Petitioner — *i.e.*, that NSC actually received Petitioner's correctly completed CMS-855S and should have known of Petitioner's new location — it is clear that there are material facts in dispute and CMS is not entitled to judgment in its favor. Summary judgment is therefore not appropriate to resolve this case.

The remainder of this decision is based on an evaluation the evidence in the record, including assessments of the appropriate weight accorded to that evidence.

***2. Petitioner was not operational at the 2451 West Horizon location on February 19, 2013.***

As part of the enrollment process, a prospective supplier must state its location on its enrollment application. *See* 42 C.F.R. § 424.510(a). Once enrolled, a DMEPOS supplier must report within 30 days any changes in its enrollment information. *See* 42 C.F.R. §§ 424.57(c)(2), 424.516(c). CMS may perform periodic revalidations and on-site reviews to verify the enrollment information submitted to CMS, determine the supplier's compliance with Medicare enrollment requirements, and determine whether the supplier is operational. 42 C.F.R. §§ 424.510(d)(8), 424.515(c), 424.517(a). The regulations define "operational" as:

The provider or 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.

On February 19, 2013, at 1:47 p.m., the NSC site inspector found that Petitioner was not operational at the 2451 West Horizon location. CMS Ex. 1, at 2 ¶ 3. The store was vacant with the door padlocked. CMS Ex. 1, at 2 ¶ 4. There were no signs on the front door. CMS Ex. 1, at 12. An individual at a neighboring business told the inspector that the prior occupants of the 2451 West Horizon location had moved out about two months before. CMS Ex. 1, at 2 ¶ 4.

While Petitioner asserts that it was "operational" on February 19, 2013, at the 1590 West Horizon location, it does not dispute that it was no longer open at the 2451 West Horizon location at the time of the attempted inspection. Indeed, the 2451 West Horizon location was not staffed, equipped, or stocked to furnish Medicare-covered items or services. *See*

CMS Ex. 1. Nor was the location open to the public to provide health care related services. Accordingly, Petitioner was not operational at the 2451 West Horizon location on February 19, 2013, when NSC attempted an on-site inspection.

**3. *Petitioner has not met its burden of showing by a preponderance of the evidence that it notified NSC of its change in location prior to the February 19, 2013 on-site inspection.***

CMS has presented evidence that the address for Petitioner on file with NSC was the 2451 West Horizon location. NSC sent a site inspector to that location and later mailed its initial and reconsidered determinations to that location. CMS Ex. 1, at 5; CMS Exs. 2, 5. *See El Jardin Pharmacy, Inc.*, DAB No. 2438, at 6 (2012) (finding that un rebutted evidence which showed CMS sent an inspector to a certain location and a revocation notice to the same location was substantial evidence to show that location was the one on file with CMS). Moreover, Petitioner does not dispute that it was at the 2451 West Horizon location prior to November 2012.

Petitioner claims as an affirmative defense that it moved locations around November 1, 2012, and that it mailed a CMS-855S form to NSC notifying it of the change. P. Br. at 13. In cases subject to 42 C.F.R. 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 Social Security Act or regulations, or that it had an affirmative defense. *Evergreene Nursing Care Ctr.*, DAB No. 2069, at 7-8 (2007); *Batavia Nursing & Convalescent Inn*, DAB No. 1911 (2004); *Batavia Nursing & Convalescent Ctr.*, DAB No. 1904 (2004), *aff'd*, 129 Fed. App'x 181 (6th Cir. 2005); *Emerald Oaks*, DAB No. 1800 (2001); *Cross Creek Health Care Ctr.*, DAB No. 1665 (1998). Petitioner has offered three affidavits, two from pharmacy employees, and one from a consultant that helped Petitioner complete the CMS-855S form. The crux of all the affidavits is the same: Petitioner completed a CMS-855S form on November 1, 2012 to notify NSC of the change of address, and one of Petitioner's employees mailed that form by first-class mail to NSC on or around November 1, 2012.<sup>1</sup> *See* P. Ex. 5, at 2; P. Ex. 6, at 2; P. Ex. 7, at 2.

These affidavits alone, however, fall short of establishing the essential facts they assert. No other evidence supports the claims made in the affidavits. For example, Petitioner did

---

<sup>1</sup> Petitioner also claims that it "resent" the CMS-855S on May 29, 2013, in response to NSC's revocation notice. P. Br. at 3. Whether Petitioner sent the CMS-855S form in May 2013 is not relevant here. The focus of this case is on Petitioner's operational status at the time of the attempted on-site inspection and subsequent revocation. *See E & I Med. Supply Servs., Inc.*, DAB No. 2363, at 5 n.6 (2011).

not file a copy of the CMS-855S that it claims to have sent on November 1, 2012.<sup>2</sup> Normal business practices — and, more simply, due diligence — suggest that Petitioner should have retained a copy of the form it sent, especially one of such importance. Yet that form is not in the record. Petitioner also did not file a copy of any postal receipt, certified mail or otherwise, that supported the claims made in the affidavits. Indeed, there is no requirement that a CMS-855S be sent by certified mail, but, as this case demonstrates, it may clarify later discrepancies if they arise.

Also, two of the three affidavits here are from employees with a continuing financial interest in the overall success of Petitioner and, thus, in the outcome of the case. One affiant, the pharmacy manager, states that a pharmacy technician mailed the completed CMS-855S, but she does not assert how she knows that fact to be true. *See* P. Ex. 7, at 2 (“[A] pharmacy tech with [Petitioner] put the packet in the mail for me . . .”). The pharmacy technician states that she mailed the CMS-885S “through the United States Postal [S]ervice” but does not say whether she paid for shipping, used certified mail, or obtained any record of mailing it. P. Ex. 5, at 2. The pharmacy technician does not explain how, absent a receipt or documentation, she remembered mailing a specific form on a specific date that was nearly 10 months prior to her making that recollection. Another affiant, the consultant, makes no mention of mailing the CMS-885S form, just that he helped prepare it on November 1, 2012. P. Ex. 6. Notably, the first mention of Petitioner’s alleged November 1, 2012 CMS-855S form came *after* NSC issued a reconsidered determination that upheld the revocation in part because Petitioner had failed to file that form. *See* CMS Ex. 5, at 2 (“[T]here is no indication that [Petitioner] completed or submitted a change of information CMS 855S application for the change of location.”). The timing of Petitioner’s claim certainly calls into question the overall veracity of the assertions in the affidavits. Ultimately, aside from the three affidavits, two of which have a significant potential for bias, the third of which does not make any assertion about whether the CMS-855S was mailed or not, and all of which were submitted only after NSC indicated that a CMS-855S had not been filed, there is not enough record support that Petitioner actually mailed a CMS-855S to NSC on or around November 1, 2012. Without additional corroboration in the record, I do not find the three affidavits worthy of significant weight, and they are not sufficient to show by a preponderance of the evidence that Petitioner mailed the CMS-855S when it claims to have done so. *See Vanguard Vein & Vascular, et al.*, DAB No. 2523, at 5 (2013) (rejecting assertions in affidavit that the administrative law judge and Board considered were “speculative and unsupported”).

---

<sup>2</sup> It is unlikely that Petitioner believed that it could not present a copy of the CMS-855S form as a proposed exhibit in this proceeding because it offered new evidence and argued at length in its brief for the acceptance of that new evidence into the record. P. Br. at 8-12; *see* 42 C.F.R. § 498.56(e) (restricting the admission of evidence not presented to CMS or its contractor at the reconsideration level of appeal absent a showing of good cause to admit the new evidence).

Even if I were to accept that Petitioner mailed a CMS-855S form on November 1, 2012, there would not be sufficient evidence to determine whether that CMS-855S form would have been *effective* in changing Petitioner's address in NSC's file. There is no way to ensure Petitioner correctly and accurately completed the form it allegedly sent to NSC. For example, the CMS-855S may have been missing required information, may have not accurately stated other information, and may not have been properly signed under the attestation language. Thus, it is simply not enough to assert that the form was mailed and assume that it was correctly done.

**4. NSC was authorized to revoke Petitioner's Medicare billing privileges effective February 19, 2013.**

CMS may revoke a supplier's Medicare billing privileges and any corresponding provider agreement if:

CMS determines, upon on-site review, that the provider or supplier is no longer operational to furnish Medicare covered items or services . . . . Upon on-site review, CMS determines that —

\* \* \*

(ii) A Medicare Part B supplier is no longer operational to furnish Medicare covered items or services, or the supplier has failed to satisfy any of all of the enrollment requirements, or has failed to furnish Medicare covered items or services as required by the statute or regulations.

42 C.F.R. § 424.535(a)(5)(ii).<sup>3</sup>

---

<sup>3</sup> NSC cited 42 C.F.R. § 424.57(d), redesignated to section 424.57(e), as a separate authority to revoke Petitioner's Medicare billing privileges. CMS Ex. 2, at 1. But it is apparent that NSC must have relied solely on 42 C.F.R. § 424.535(a)(5) in revoking Petitioner's billing privileges, because it did so retroactive to the date of the on-site inspection. CMS Ex. 2, at 1. The regulation at 42 C.F.R. § 424.57(e) does not permit retroactive revocation; a revocation done pursuant to that section is effective 15 days after the notice is sent. 42 C.F.R. § 424.57(e). The regulation at 42 C.F.R. § 424.535 permits retroactive revocation under paragraph (g). Therefore, because NSC revoked Petitioner's billing privileges retroactively, it must have done so pursuant to the independent revocation authority at section 424.535. *See Neb Group of Arizona, LLC*, DAB CR2970, at 11 (2013) (finding that retroactive revocation had to be authorized by section 424.535, not section 424.57).



As explained, Petitioner was not “operational” at the location on file with NSC and CMS. The location was vacant, and Petitioner was unable to furnish Medicare covered items or services. *See* 42 C.F.R. § 424.502; CMS Ex. 1. Although Petitioner may have been “operational” at its new location, as noted above, an on-site inspection takes place at the location on-file with CMS to ensure the accuracy of the supplier’s information and status. 42 C.F.R. § 424.517(a). Clearly, Petitioner’s information was not accurate. Therefore, NSC, acting for CMS, was authorized to revoke Petitioner’s Medicare billing privileges.

The effective date of a revocation pursuant to 42 C.F.R. § 424.535 is 30 days after the revocation notice is sent, unless certain exceptions apply. 42 C.F.R. § 424.535(g). One exception is if “the practice location is determined by CMS or its contractor not to be operational.” *Id.* In such cases, the revocation is effective “the date that CMS or its contractor determined that the provider or supplier was no longer operational.” *Id.* Here, NSC revoked Petitioner’s billing privileges effective February 19, 2013, the date that the on-site inspection determined Petitioner was not operational at the 2451 West Horizon location. The regulation authorizes retroactive revocation to February 19, 2013.

### **III. Conclusion**

For the foregoing reasons, I find that Petitioner was not operational at the location on file with NSC at the time of the February 19, 2013 attempted on-site inspection and that NSC, on behalf of CMS, was authorized to revoke Petitioner’s Medicare billing privileges effective February 19, 2013. Petitioner did not come forward with sufficient evidence to prove its affirmative defense that it was operational at a different location and had notified NSC of that new location. Therefore, I affirm the reconsidered determination that revoked Petitioner’s billing privileges, and Petitioner will not be eligible to reenroll for two years.

\_\_\_\_\_  
/s/  
Joseph Grow  
Administrative Law Judge