

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

J.K. Optical, Inc.,
(NPI: 1578713665),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-12-79

Decision No. CR2522

Date: March 30, 2012

DECISION

The Centers for Medicare & Medicaid Services (CMS) has revoked Petitioner's Medicare supplier number. Petitioner, J.K. Optical, Inc., appeals and CMS moves for summary judgment. Petitioner opposes. As discussed below, even drawing every reasonable inference in Petitioner's favor, the uncontroverted facts establish that Petitioner did not comply with Medicare requirements. CMS therefore properly revoked Petitioner's supplier number, and I grant CMS's motion for summary judgment.

Background

Until its Medicare supplier number was revoked on July 7, 2011, Petitioner participated in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) in Honolulu, Hawaii. *See* 42 C.F.R. § 424.57. In letters dated July 21, 2011 and August 31, 2011, the Medicare contractor, Palmetto GBA National Supplier Clearinghouse, notified Petitioner that its supplier number would be revoked because the supplier did not comply with supplier standards listed in 42 C.F.R. § 424.57. Among other problems, the contractor's investigator had twice been unable to

inspect the premises at the supplier's reported physical sites during the hours it claimed to be open to the public. CMS Exs. 3, 7.

Petitioner sought reconsideration. In a reconsideration determination dated October 19, 2011, a Medicare hearing officer affirmed the revocation of Petitioner's supplier number. CMS Ex. 9. Petitioner now appeals that determination.

CMS moves for summary judgment. CMS has filed a Pre-hearing Brief/Motion for Summary Judgment with ten exhibits (CMS Exs. 1-10). Attached to CMS Ex. 10 are two documents, labeled Exhibits 1 and 2. To avoid confusion, we have relabeled those documents Attachments (Attach.) 1 and 2. Petitioner has submitted a brief and seven exhibits (P. Exs. 1-7).

Discussion

CMS is entitled to summary judgment because the undisputed evidence establishes that the supplier, J.K. Optical, Inc., did not satisfy Medicare enrollment requirements.¹

Summary Judgment. The Departmental Appeals Board has, on multiple occasions, discussed the well-settled principles governing summary judgment. *See, e.g., 1866ICPayday.com, L.L.C.*, DAB No. 2289, at 2-3 (2009). Summary judgment is appropriate if a case presents no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *1866ICPayday* at 2; *Illinois Knights Templar Home*, DAB No. 2274, at 3-4 (2009), and cases cited therein.

The moving party may show the absence of a genuine factual dispute by presenting evidence so one-sided that it must prevail as a matter of law, or by showing that the non-moving party has presented no evidence "sufficient to establish the existence of an element essential to [that party's] case, and on which [that party] will bear the burden of proof at trial." *Livingston Care Center v. Dep't of Health & Human Services*, 388 F.3d 168, 173 (6th Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). To avoid summary judgment, the non-moving party must then act affirmatively by tendering evidence of specific facts showing that a dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.11 (1986); *see also Vandalia Park*, DAB No. 1939 (2004); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004).

¹ I make this one finding of fact/conclusion 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

Illinois Knights Templar, at 4 (emphasis in original); *Livingston Care Center*, DAB No. 1871, at 5 (2003).

In examining the evidence for purposes of determining the appropriateness of summary judgment, I must draw all reasonable inferences in the light most favorable to the non-moving party. *1866ICPayday, L.L.C.* at 3; *Brightview Care Center*, DAB No. 2132, at 2, 9 (2007); *Livingston Care Center*, 388 F.3d at 172; *Guardian Health Care Center*, DAB No. 1943, at 8 (2004); *but see, Brightview*, DAB No. 2132, at 10 (entry of summary judgment upheld where inferences and views of non-moving party are not reasonable). Moreover, drawing factual inferences in the light most favorable to the non-moving party does not require that I accept the non-moving party’s legal conclusions. *Cf. Guardian Health Care Center*, DAB No. 1943, at 11 (“A dispute over the conclusion to be drawn from applying relevant legal criteria to undisputed facts does not preclude summary judgment if the record is sufficiently developed and there is only one reasonable conclusion that can be drawn from those facts.”)

Requirements for a DMEPOS supplier’s Medicare participation. To receive Medicare payments for items furnished to a Medicare-eligible beneficiary, a supplier of medical equipment and supplies must have a supplier number issued by the Secretary of Health and Human Services. Social Security Act (Act) § 1834(j)(1)(A); 42 C.F.R. § 424.505.

To obtain and retain its supplier number, a supplier must meet the standards set forth in 42 C.F.R. § 424.57(c), and CMS may revoke its billing privileges if it fails to meet even one of those standards. 42 C.F.R. §§ 424.57(d); 424.57(c)(24); 424.535(a)(1); *1866ICPayday.com, L.L.C.*, DAB No. 2289 at 13.

Among other requirements, the supplier must provide “complete and accurate information in response to questions on its application for billing privileges” and “report to CMS any changes in information supplied on the application within 30 days of the change.” 42 C.F.R. § 424.57(c)(2). It must submit enrollment information on the applicable enrollment application. 42 C.F.R. § 424.510(a).

The supplier must maintain a physical facility at an appropriate site that, among other requirements, is accessible to the public, Medicare beneficiaries, CMS, NSC (the National Supplier Clearinghouse), and its agents. It must maintain a visible sign in plain view and post its hours of operation; it must be staffed during its posted hours of operation. 42 C.F.R. § 424.57(c)(7). Except under circumstances not applicable here, the supplier must be open to the public a minimum of 30 hours per week. 42 C.F.R. § 424.57(c)(30).

The supplier must also permit CMS or its agents to conduct on-site inspections to ascertain its compliance with governing regulations. 42 C.F.R. § 424.57(c)(8). CMS may revoke billing privileges if it determines, based on an on-site review, that the supplier is no longer operational to furnish Medicare covered items or services or is not otherwise meeting Medicare enrollment requirements. 42 C.F.R. § 424.535(a)(5).

Undisputed facts and application of law to those facts. Petitioner was a Medicare enrolled DMEPOS supplier doing business at 1142 Koko Head Avenue, Honolulu. But the Medicare contractor, Palmetto GBA National Supplier Clearinghouse, suspected that Petitioner was no longer at that address when the post office returned a payment as “undeliverable” because of a change of address. In a letter dated June 28, 2011, the contractor advised Petitioner that the payment had been returned and told the supplier either to verify its current address (in case the post office had made a mistake), or, within 30 days, notify the contractor of its change of address by completing and submitting CMS form 855S. CMS Ex. 1.

On July 7, 2011, the contractor’s investigator visited the site of Petitioner’s registered business location at 1142 Koko Head Avenue. He found that the premises were vacant. CMS Ex. 2; CMS Ex. 10 at 2 (Akiona Decl. ¶¶ 3, 4). In a letter dated July 21, 2011, the contractor advised Petitioner that its supplier number would be revoked effective July 7, 2011, because the premises were vacant and could not be inspected to verify compliance with supplier standards. The letter told Petitioner that it could request reconsideration and/or submit a corrective action plan (CAP). CMS Ex. 3.

In the meantime, Petitioner responded to the contractor’s June 28, 2011 letter by submitting a CAP. In the CAP, Petitioner listed its business address as 2011 South King Street, effective July 2, 2011.² Petitioner listed its hours as 10:00 a.m. to 6:00 p.m., Monday through Saturday, and said that it was “available to the public” a total of 48 hours per week. CMS Ex. 5.

² The CAP is confusing, though, because it also says, in error, that business terminated at this location on July 1, 2011. Petitioner likely meant that its business terminated at the Koko Head Avenue address on July 1. P. Br. at 3-4. CMS does not rely on this error to justify revoking Petitioner’s supplier number.

In a letter dated July 27, 2011, Petitioner responded to the contractor's July 7 notice letter. In that letter, Petitioner says that the contractor should have taken more time to locate Petitioner's offices, which moved from the Koko Head Avenue location to 2011 South King Street. Petitioner advised the contractor that it had submitted a CAP in response to the contractor's June 28 letter, and asked that the supplier revocation be reversed. CMS Ex. 4.

On August 18, 2011, at 1:00 p.m., the contractor's investigator went to the 2011 South King site. He was unable to inspect the premises, because the doors were locked; nobody was there. CMS Ex. 6. He took photographs. The photographs show a closed sign in the window; no posted business hours are visible; and, according to the investigator, business hours were not posted. Visible through the glass doors are furniture, file cabinets, boxes, and equipment. An upended stool sits atop another stool. The room is unquestionably in disarray, looking more like a storage room than an operating business. CMS Ex. 6 at 9; CMS Ex. 10 at 3 (Akiona Decl. ¶¶ 6, 7).

Petitioner does not claim that it was accessible to the public or the contractor's investigator when he arrived at its place of business. Although Petitioner maintained, in its reconsideration request, that "we are open for business from 10:00 am to 6:00 pm Monday thru Saturday," it conceded that this did not mean it was accessible to the public, suggesting that the inspector return between 1:30 and 5:00 p.m., "as we are doing lens ordering or are at the post office during the morning hours." CMS Ex. 8. In its brief, Petitioner does not claim that the business was open nor that staff were present when the investigator arrived, but faults the investigator for not studying more thoroughly the closed sign, which indicated that the optician would be back following his lunch. P. Br. at 4; P. Ex. 4; P. Ex. 7.

Petitioner suggests that, so long as the business is not permanently closed, i.e., so long as it can show that it has taken and filled prescriptions and issued invoices, it need not be open to the public during the hours listed on its enrollment application. In Petitioner's view, the inspector had a duty to ascertain that the business was closed for lunch and that staff would return at 1:30 p.m. In this regard, Petitioner points to a photograph of the "closed" sign hanging in the window with a clock on it indicating "will return at" 1:30. P. Br. at 4; P. Ex. 7. Petitioner's photograph seems consistent with that provided by CMS. CMS Ex. 10, Attach. 2 at 9. *But see Ita Udeobong d/b/a Midland Care Medical Supply and Equipment*, DAB No. 2324 at 7 (2010) (finding that a temporary sign stating when staff will return does not satisfy the requirement that the supplier be open and accessible during its posted hours of operation).

Petitioner also suggests that its business hours were posted as 10:00 a.m. to 6:00 p.m., but closed for lunch from 12:30 p.m. to 1:30 p.m. P. Br. at 3. Petitioner has come forward with its own photograph showing:

JARREN KUNIMURA
Master Optician
Open 10:00 AM TO 6:00 PM
LUNCH 12:30 TO 1:30 PM
CLOSED ON SUNDAYS

P. Ex. 4. Petitioner submits no declaration or other evidence explicitly establishing that this sign was in place on August 18. Its submitted photograph is not dated. CMS's photograph, on the other hand, is dated August 18, 2011 and shows no such sign on the door. Whether I can reasonably infer, based on the record before me, that Petitioner's sign was in place on August 18 is highly questionable. But that fact is not material, because, even if, for purposes of summary judgment, I find that the sign was in place on August 18, Petitioner still failed to meet all of the enrollment standards of section 424.57(c).

The undisputed facts establish that the supplier represented to the contractor that its hours were from 10:00 a.m. to 6:00 p.m. Monday through Saturday, and that it was available to the public for a total of 48 hours per week. CMS Ex. 5. Yet, by its own admission, the business was closed for at least one of those hours each day, and sometimes even more hours because staff were "doing lens ordering or [were] at the post office." CMS Ex. 8. Petitioner thus misinformed the contractor (CMS Ex. 5), violating section 424.57(c)(2) because it did not provide the contractor with "complete and accurate information."³

Nor was the supplier in compliance with section 424.57(c)(8). Because it was not open when it told the contractor it would be open, it did not permit the contractor's agents to inspect the premises. CMS and its contractors must, with scarce resources, monitor the performance of a vast number of providers and suppliers. Inspections are supposed to be unannounced. In determining when to conduct an inspection, an investigator should be able to rely on the supplier's representations as to its posted hours. I find it unreasonable to require an investigator to reschedule its investigation because the supplier provided faulty information. *See Ita Udeobong d/b/a Midland Care Medical Supply and Equipment*, DAB CR2088 (2010), *aff'd*. DAB No. 2324 (2010).

Finally, based on the flimsiest of evidence, Petitioner charges the contractor hearing officer with bias. Because my review here is *de novo*, those arguments are irrelevant.

³ If, as Petitioner suggests in its reconsideration request, the office was regularly open from 1:30 p.m. to 5:00 p.m., it might not meet the requirement that it be open a minimum of 30 hours per week. 42 C.F.R. § 424.57(c)(30); CMS Ex. 8.

Conclusion

Because the undisputed facts establish that Petitioner has not satisfied Medicare enrollment requirements, I grant CMS's motion for summary judgment and sustain the revocation of Petitioner's supplier number.

/s/
Carolyn Cozad Hughes
Administrative Law Judge