

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Advanced Mobility B & G, Inc.,
(Supplier No.: 6244940001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-457

Decision No. CR2790

Date: May 16, 2013

DECISION

I grant the motion of the Centers for Medicare & Medicaid Services (CMS) for summary disposition and sustain the revocation of the Medicare supplier number for Advanced Mobility B & G, Inc. (Petitioner).

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). In a letter dated October 26, 2012, National Supplier Clearinghouse (NSC), the CMS contractor, informed Petitioner that its billing number would be revoked retroactive to October 4, 2012. CMS Exhibit (Ex.) 3. The letter stated an NSC representative twice attempted to conduct a visit to Petitioner's facility, 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. 3, at 2. On October 30, 2012, Petitioner requested reconsideration. In its reconsideration request, Petitioner acknowledges "[t]he violations did occur[,]" but offers explanations as to why its facility was not open on those two occasions. CMS Ex. 4, at 1-2. The Medicare hearing officer

issued an unfavorable reconsideration decision on December 18, 2012. CMS Ex. 5. Petitioner timely filed a request for hearing (RFH) before an administrative law judge (ALJ) by letter dated February 15, 2013 and I issued an Acknowledgment and Initial Docketing Order (Order).

Pursuant to the Order, on March 29, 2013, CMS filed a Motion for Summary Disposition and Memorandum in Support Thereof (CMS Motion). CMS proffered six exhibits in support of its Motion. On April 15, 2013, Petitioner filed its Response to CMS's Motion for Summary Disposition (P. Response) and proffered three exhibits. In the absence of objection from either party, I admit all the proffered exhibits into the record. My decision is based on the record before me, which includes the documentary evidence admitted and the parties' pleadings.

II. Controlling Statutes and Regulations

Pursuant to section 1834(j)(1)(A) of the Social Security Act (Act), 42 U.S.C. § 1395m(j)(1)(A), a supplier of equipment and supplies may not be paid for items provided to an eligible beneficiary unless the supplier has a supplier number issued by the Secretary of the Department of Health & Human Services (Secretary). In order to participate in the Medicare program as a DMEPOS supplier and obtain a supplier number, an entity must meet the standards specified at 42 C.F.R. § 424.57(b) and (c)(1)-(29). Once billing privileges are issued, CMS or the CMS contractor may revoke a supplier's billing privileges for failure to meet the standards specified in the regulations. 42 C.F.R. § 424.57(d); *see also* 42 C.F.R. § 424.535(a)(1). It is well-established that failure to comply with even one standard is a basis for revocation. *See, e.g., Rita Lemons d/b/a Experts Are Us Inc.*, DAB CR2398, at 7 (2011).

Supplier standard seven requires a supplier to maintain a physical facility that, among other things, is accessible and staffed during posted hours of operation. 42 C.F.R. § 424.57(c)(7)(i)(C). The regulations further provide that CMS may revoke a supplier's billing number if it determines that the supplier is no longer operational to furnish Medicare covered items or services, or has failed to satisfy any or all of the Medicare enrollment requirements. 42 C.F.R. § 424.535(a)(5)(ii).

III. Issues, Findings of Facts and Conclusions of Law

A. Issue

The issue before me in this case is whether NSC and CMS had a basis to revoke Petitioner's Medicare supplier number.

B. Findings of Facts and Conclusions of Law

CMS is entitled to summary disposition because the undisputed facts establish that Petitioner was not in compliance with supplier standard seven, 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 should 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 operations are Monday through Friday, 8:00 a.m. through 12:00 p.m., and 1:00 p.m. through 5:00 p.m. CMS Ex. 2, at 3; *see also* RFH, Attachment (Att.) B, at 1. On September 21, 2012 at 2:00 p.m., an NSC site inspector attempted to inspect Petitioner’s facility and found the office was not open. CMS Ex. 2, at 7; CMS Ex. 3, at 1. The site inspector attempted a second site visit on October 4, 2012 at 11:35 a.m., but again the Petitioner’s facility was closed. CMS Ex. 2, at 7. According to the site inspector’s report, Petitioner left a sign on the door indicating someone would return at 4:00 p.m. and left a telephone number where the supplier could be reached. CMS Ex. 2, at 7. The site inspector called the number and the supplier answered, stating that he was out making a delivery and would return by 4:00 p.m. CMS Ex. 2, at 7. Petitioner confirms the foregoing facts as true. P. Response at 3; *see also* CMS Ex. 4. Thus, the undisputed facts establish the Petitioner’s facility was closed on September 21, 2012 and October 4, 2012, at the times the site inspector attempted a site visit. 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). Based on the undisputed facts then, Petitioner failed to meet these standards.

Petitioner nevertheless argues that the facts show that the facility was accessible and staffed on October 4, 2012, because an employee of Petitioner answered the telephone when the site inspector called. P. Response at 3. Petitioner’s argument is unavailing. It is well-established that leaving a sign on the door whenever the office is closed does not satisfy the standard that facilities be accessible and staffed during posted hours of operation. *Ita Udeobong d/b/a Midland Care Medical Supply and Equipment*, DAB CR2088 (2010), *aff’d* DAB No. 2324 (2010). Nor does the fact that Petitioner was available by telephone to let the inspector know that the facility would be open later in the day cure the deficiency. “A supplier is neither ‘staffed’ nor ‘accessible,’ if the supplier’s location is closed and locked.” *Amman’s Orthopedics and Prosthetics, Inc.* DAB CR2337, at 5 (2011).

Because I find that Petitioner failed to meet the supplier standards in 42 C.F.R. § 424.57(c), I need not consider Petitioner’s argument that the record shows Petitioner was operational during the relevant time period. The regulations state, and the Board has reaffirmed, that “failure to comply with even one supplier standard is a sufficient basis for revoking a supplier’s billing privileges.” *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 13 (2009).

Thus, for the reasons stated above, I find that CMS appropriately revoked Petitioner’s supplier number for failure to comply with the DMEPOS supplier requirements.

IV. Conclusion

Because the undisputed facts establish that Petitioner did not meet all the standards required by 42 C.F.R. § 424.57(c), I grant CMS’s motion for summary disposition and sustain the revocation of Petitioner’s supplier number.

/s/
Richard J. Smith
Administrative Law Judge