Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Pepper Hill Nursing & Rehabilitation Center, LLC
Docket No. A-11-45
Decision No. 2395
June 30, 2011

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Pepper Hill Nursing & Rehabilitation Center, LLC (Pepper Hill, Petitioner) requests review of the December 14, 2010 decision by Administrative Law Judge (ALJ) Joseph Grow, *Pepper Hill Nursing & Rehabilitation Center, LLC*, DAB CR2293 (2010) (ALJ Decision). The ALJ granted summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS), thereby upholding the revocation of Pepper Hill's Medicare billing privileges as a Medicare supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) because Pepper Hill had failed to obtain a surety bond by October 2, 2009 as required by regulations governing DMEPOS suppliers. The ALJ concluded Pepper Hill did not meet this requirement by obtaining a surety bond on January 1, 2010 that had a retroactive effective date of March 3, 2009. On appeal, Pepper Hill contends that the ALJ erred because the retroactive surety bond was sufficient to protect CMS's ability to recover any overpayments, assessments, or civil money penalties (CMPs) incurred by Pepper Hill since October 2, 2009. However, Pepper Hill does not dispute that it did not obtain a surety bond by October 2, 2009, and raises no issue of disputed material fact. For the reasons stated below, we agree that the retroactive surety bond was not sufficient to meet the surety bond requirement in the regulations. We therefore uphold the ALJ Decision and sustain the revocation of Pepper Hill's billing privileges.

Applicable Law

Section 1834(a)(16)(B) of the Social Security Act (Act) states that the Secretary shall not issue or renew a Medicare provider number to a DMEPOS supplier unless the supplier "provides the Secretary on a continuing basis . . . with a surety bond in a form specified by the Secretary and in an amount that is not less than $50,000."[1] CMS's regulations in turn require that "beginning October 2, 2009" each DMEPOS supplier must submit "a surety bond from an authorized surety of $50,000" which "is continuous," names "CMS

[1] The current version of the Act can be found at www.ssa.gov/OP_Home/ssact/comp-ssa.htm. Each section of the Act on that website contains a reference to the corresponding United States Code chapter and section.

as Obligee," and provides that "[t]he surety is liable for unpaid claims, CMPs, or assessments that occur during the term of the bond." 42 C.F.R. § 424.57(c)(26), (d)(1)(ii), (2), (4), (5), (10). "The term of the initial surety bond must be effective on the date that the application is submitted to the NSC [National Supplier Clearinghouse, a Medicare contractor]." 42 C.F.R. § 424.57(d)(2)(i). Section 424.57(c) requires that the supplier "must meet and must certify in its application for billing privileges that it meets and will continue to meet the following standards," including the requirement at section 424.57(c)(26) that it "[m]ust meet the surety bond requirements specified in paragraph (d)" of section 424.57. The surety bond requirement is among the "supplier standards" at section 424.57(c), and is referred to as "supplier standard 26" because it is implemented by paragraph (c)(26).

Failure to submit a surety bond is a ground for revocation of a supplier's billing privileges. 42 C.F.R. § 424.57(d)(11) ("CMS revokes the DMEPOS supplier's billing privileges if an enrolled supplier fails to obtain, file timely, or maintain a surety bond as specified in this subpart and CMS instructions."); *see also* 42 C.F.R. § 424.57(d)(4)(ii)(B) ("CMS revokes or denies a DMEPOS supplier's billing privileges based upon the submission of a bond that does not reflect the requirements of paragraph (d) of this section."). More generally, section 424.57 provides that CMS "will revoke a supplier's billing privileges if it is found not to meet" any of the supplier standards in section 424.57(c), including the requirement for a compliant surety bond in section 424.57(c)(26). 42 C.F.R. § 424.57(e) (formerly § 424.57(d));[2] *see also 1866ICPayday.com*, DAB No. 2289, at 13 (2009) ("failure to comply with even one supplier standard is a sufficient basis for revoking a supplier's billing privileges"). Additionally, 42 C.F.R. § 424.535(a)(1) states that CMS or its contractor may revoke a provider or supplier's Medicare billing privileges where the provider or supplier is determined not to be in compliance with enrollment requirements applicable for its provider or supplier type and has not submitted a corrective action plan (CAP).

A supplier whose Medicare enrollment or billing privileges have been revoked may request reconsideration of the revocation by a contractor hearing officer. 42 C.F.R. §§ 424.545(a), 498.5(l), 498.22(a). A supplier dissatisfied with the reconsideration determination may request a hearing before an ALJ and, if dissatisfied with the ALJ's

[2] 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 were not incorporated in the C.F.R. volumes issued October 1, 2009 and 2010 "due to inaccurate amendatory instruction," and the text added by revised paragraph (d) appears in that volume as an "Editorial Note" to section 424.57. References are to the regulation as redesignated.

decision, may request review of the ALJ's decision by the Board. 42 C.F.R. §§ 498.3(b)(17), 498.40, 498.80.

Background[3]

By letter dated November 10, 2009, NSC notified Pepper Hill that its Medicare supplier number would be revoked in 30 days for failure to comply with 42 C.F.R. § 424.57(c)(26) and (d) the surety bond requirement. CMS Ex. 1. The letter stated that Pepper Hill could submit a CAP along with "sufficient evidence that you are now in full compliance with all Medicare requirements" within 30 days or appeal the revocation by requesting reconsideration within 60 days, or both. *Id*. at 2.

Pepper Hill submitted a CAP to NSC by letter dated November 13, 2009, and enclosed a "continuation certificate" indicating that a surety bond issued in favor of the "Department of Health and Environmental Control" as obligee continued in force effective December 20, 2008 through December 20, 2009.[4] CMS Ex. 2. NSC acknowledged receipt of the CAP but in a letter dated November 30, 2009, denied reinstatement of Pepper Hill's billing Medicare privileges because "[a] surety bond was not attached to your CAP." CMS Ex. 3. The November 30 letter also advised Pepper Hill that it could request reconsideration before a Medicare hearing officer by January 30, 2010. *Id*. Pepper Hill responded by submitting a reconsideration request with a copy of a surety bond, executed January 1, 2010, listing CMS as obligee and covering claims "related to overpayments or other events that occurred on or after March 3, 2009." CMS Ex. 4.

A Medicare hearing officer denied reconsideration on April 26, 2010, concluding that Pepper Hill had not shown compliance with supplier standard 26. CMS Ex. 5. The hearing officer noted Pepper Hill's submission of the January 1, 2010 surety bond, and stated that Pepper Hill "has passed the allotted time to satisfy the requirement for a surety bond, which was October 2, 2009, as noted in the terms set forth for the bond, mandated by 42 CFR 424.57(c) and 42 CFR 424.57 (d)." *Id*.

Pepper Hill timely appealed the hearing officer's decision by requesting a hearing before an ALJ. P. Ex. 1. In the request, Pepper Hill stated that on May 5, 2010, "a rider was attached to the surety bond" executed January 1, 2010, "which amended the effective date of the bond to October 1, 2009." *Id*. at 2. Pepper Hill later submitted that rider to the ALJ as its Exhibit 5. Pepper Hill argued that in light of the retroactive surety bond,

[3] The information in this section is drawn from the ALJ Decision and the record before the ALJ and is intended to provide a context for a discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact or conclusions of law.

[4] The ALJ found that this obligee was presumably a South Carolina state agency, and not CMS as required by 42 C.F.R. § 424.57(d)(10). ALJ Decision at 3 n.1. Pepper Hill "concedes that it submitted the wrong surety bond with its CAP[.]" P. Request for Review of ALJ Decision (RR) at 5.

revocation would "be contrary to public policy and the purposes for the surety bond requirement," such as limiting the risk of harm to the Medicare program from fraudulent suppliers and ensuring that the program can recoup erroneous payments. P. Ex. 1, at 7.

The ALJ granted CMS's motion for summary judgment, making the "single finding and conclusion" that "[t]he undisputed evidence establishes that CMS was authorized to revoke Petitioner's billing privileges based on undisputed evidence that Petitioner did not obtain a surety bond, as 42 C.F.R. § 424.57(c)(26) and (d) required." ALJ Decision at 5. He thus held that "[t]he undisputed evidence establishes that Petitioner was not in compliance with Medicare program requirements of 42 C.F.R. § 424.57(c)(26) and (d) by October 2, 2009, as required." *Id*. at 9.

Standard of Review

Whether summary judgment is appropriate is a legal issue that we address de novo. *Andrew J. Elliott, M.D.*, DAB No. 2334, at 4 (2010); *Lebanon Nursing and Rehabilitation Center*, DAB No. 1918 (2004). The party moving for summary judgment bears the initial burden of demonstrating that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *Everett Rehabilitation and Medical Cente*r, DAB No. 1628, at 3 (1997). If a moving party carries its initial 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*, 474 U.S. 575, 587 (1986) (quoting Fed. R. Civ. Pro. 56(e)). In deciding a summary judgment motion, a tribunal must view the entire record in the light most favorable to the nonmoving party, drawing all reasonable inferences from the evidence in that party's favor. *Madison Health Care, Inc.*, DAB No. 1927, at 3-7 (2004).

Our standard of review on a disputed conclusion of law is whether the decision below is erroneous. *See Guidelines – Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program* at http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html. Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Under the substantial evidence standard, the reviewer must examine the record as a whole and take into account whatever in the record fairly detracts from the weight of the evidence relied on in the decision below. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Analysis

1. Summary Judgment was appropriate.

Pepper Hill argues that "[t]he ALJ's Decision did not address the [NSC] Hearing Officer's incorrect finding" that the surety bond Pepper Hill submitted with its request for reconsideration "was effective" on January 1, 2010. RR at 5, citing CMS Ex. 5, at 2 (hearing officer decision). Pepper Hill averred that this surety bond "was executed on January 1, 2010, but was effective for claims occurring on or after March 3, 2009." RR at 2. The ALJ effectively accepted this representation as an undisputed fact by his statement that Pepper Hill "readily concedes that it not only submitted the surety bond late, but that it executed the surety bond after the regulatory deadline." ALJ Decision at 5 (emphasis in original); *see also id*. at 3, citing CMS Ex. 4, at 2-3, and P. Ex. 3, at 3 (noting Pepper Hill's submission of "a surety bond that listed CMS as obligee and was executed on January 1, 2010" and which "indicated that it was valid for claims 'related to overpayments or other events that occurred on or after March 3, 2009.'"). By accepting Pepper Hill's representations about the bond it executed on January 1, 2010, the ALJ viewed the record in the light most favorable to Pepper Hill, as was appropriate in considering CMS's motion for summary judgment. Absent any dispute that Pepper Hill obtained the surety bond after the October 2, 2009 regulatory deadline, the ALJ correctly proceeded to consider whether obtaining the bond later but with a retroactive effective date earlier than October 2, 2009 satisfied the regulatory requirement, and he concluded that it did not. For the reasons explained below, we find no error in the ALJ's conclusion on this legal question.

2. The ALJ did not err in concluding that CMS was authorized to revoke Petitioner's billing privileges based on undisputed evidence that Petitioner did not obtain a surety bond as required by 42 C.F.R. § 424.57(c)(26) and (d).

The ALJ acknowledged that Pepper Hill had executed a surety bond on January 1, 2010, with a retroactive effective date of March 3, 2009, but concluded that there was "no authority by which that action may cause Petitioner to be retroactively compliant" and that "a belated retroactive surety bond does not satisfy the statutory and regulatory purpose of providing continuous protection to the Medicare program from the risk of loss due to a supplier's fraud or abuse." ALJ Decision at 6-7. He thus concluded that Pepper Hill "was not compliant with the surety bond requirements of 42 C.F.R. § 424.57(c)(26) and (d) by October 2, 2009." *Id*. at 9.

The ALJ's conclusion was not erroneous. The regulations that implement the statutory requirement to provide the Secretary with a surety bond state that "each Medicare-enrolled DMEPOS supplier must meet the requirement specified in paragraph (d)" of section 424.57 – the surety bond requirement – "beginning October 2, 2009 . . . ." 42 C.F.R. § 424.57(d)(1)(ii) (emphasis added); *see* ALJ Decision at 5 (citing § 425.57(c),

(d)). In addition to having a compliant surety bond by October 2, 2009, suppliers were further required to maintain continuous surety coverage thereafter, as 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 in section 424.57(c). 42 C.F.R. § 424.57(c) (emphasis added). Those supplier standards include the requirement in paragraph (c)(26) that the supplier "[m]ust meet the surety bond requirements specified" in section 424.57(d). 42 C.F.R. § 424.57(c)(26). Moreover, "CMS may at any time require a DMEPOS supplier to show compliance with the requirements of paragraph (d) of this section." 42 C.F.R. § 424.57(d)(12). Finally, the regulations state that CMS will revoke billing privileges of a supplier that "fails to obtain, file timely, or maintain a surety bond" as required by section 424.57(c)(26) and (d). 42 C.F.R. § 424.57(d)(11). Those regulations required suppliers to timely file a compliant bond by October 2, 2009.

The ALJ thus correctly concluded that "the applicable regulations clearly required Petitioner to have in place a compliant surety bond by October 2, 2009." ALJ Decision at 8 (emphasis in original). Pepper Hill failed to meet this requirement because it readily concedes that on October 2, 2009 it did not have a surety bond "in place" and, in fact, did not obtain one prior to January 1, 2010, when it executed the retroactive surety bond. Thus, CMS was authorized to revoke Pepper Hill's billing privileges.[5] 42 C.F.R. § 424.57(d)(11), (d)(4)(ii)(B), (e).

The ALJ additionally stated that the issue before him was "whether CMS correctly found that, at the time of the revocation action, Petitioner was not in compliance." ALJ Decision at 6 (emphasis in original). The ALJ's focus on compliance at the time of the revocation action (November 10, 2010) is consistent with the preamble to the regulations implementing the appeals process for suppliers whose billing privileges are revoked and with CMS's guidance set forth in the Medicare Program Integrity Manual (MPIM). The Secretary explained in the preamble that "appeal rights are limited to provider or supplier eligibility at the time the Medicare contractor made the adverse determination" including the "revocation of billing privileges." 73 Fed. Reg. 36,448, 36,452 (June 27, 2008). The preamble further states that "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." *Id*. The MPIM that was in effect at the time of Pepper Hill's request for reconsideration similarly stated that in considering a request for reconsideration, a hearing officer reviews "the Medicare contractor's reason for imposing a . . . revocation at the time it issued the

[5] Based on regulations limiting a petitioner's ability to introduce before the ALJ documents that it did not submit on reconsideration, the ALJ excluded the May 5, 2010 "rider" to the January 1, 2010 surety bond. ALJ Decision at 6, citing 42 C.F.R. § 498.56(e). According to Pepper Hill, this rider "amended the effective date of the [January 1, 2010] bond to October 1, 2009 . . . ." RR at 2-3. The ALJ found that even if admitted, the May 5, 2010 rider was "immaterial" because, like the January 1, 2010 surety bond it amended, the rider "was executed after-the-fact." ALJ Decision at 6. Because we agree with the ALJ that the rider is not material for the reason he stated, we need not address whether he properly applied the regulation limiting submission of evidence.

action . . . ." MPIM ch. 10, § 19.A.[6] Pepper Hill's subsequent execution of a surety bond on January 1, 2010 (or the rider executed May 5, 2010) does not demonstrate that Pepper Hill was in compliance with the surety bond requirement at the time of NSC's determination to revoke Pepper Hill's billing privileges, November 10, 2010, or when that action became effective 30 days thereafter.

Nevertheless, Pepper Hill contends that it was in compliance with the requirements of section 424.57(d)(1)(ii) because the surety bond it subsequently obtained on January 1, 2010 contained an effective date prior to October 2, 2009. RR at 5-6. Pepper Hill also argues that its retroactive surety bond fulfilled the overall purpose of the surety bond requirement "to prevent fraudulent suppliers from misappropriating Medicare funds [because] Pepper Hill in no way resembles a fraudulent or abusive supplier." *Id*. at 8. Contrary to Pepper Hill's argument, the retroactive surety bond on which Pepper Hill relies does not establish that CMS was afforded protection from fraud or billing errors as of October 2, 2009, as required by section 424.57(d)(1)(ii), for the simple reason that the bond did not exist as of that date or as of the date that NSC determined to revoke Pepper Hill's billing privileges. As the ALJ observed, the fact that "a surety was willing to undertake to cover Petitioner's potential overpayments after the fact does not mean that CMS was protected at the relevant time from Petitioner's [potential] fraud or billing errors." *Id.* at 6. The ALJ also observed, "it is unlikely that a surety would undertake such retroactive coverage for a supplier had fraud or abuse been discovered during the past period when no coverage for Petitioner's legal business was in place." *Id.* While Pepper Hill contests these observations on the ground that Pepper Hill has not "given CMS any indication that it is anything less than a legitimate supplier," RR at 8, Pepper Hill provided no evidence before the ALJ, and does not even represent on appeal, that its insurer would have provided a surety bond with retroactive coverage had there existed any of the contingencies that the bond was intended to cover. Finally, the issue before the ALJ and the Board is not whether Pepper Hill is a "legitimate supplier" or the degree to which the revocation advances the purposes of the surety bond requirement, but simply whether CMS was authorized under the regulations to revoke Pepper Hill's billing privileges.

We thus conclude that the ALJ did not err in determining that the undisputed evidence established Pepper Hill did not timely obtain a surety bond as required by 42 C.F.R. § 424.57(c)(26) and (d), thereby authorizing CMS to revoke its billing privileges.

[6] CMS deleted section 19 of MPIM chapter 10 and issued a new section governing administrative appeals at MPIM chapter 15, section 15.25, effective July 30, 2010. CMS Trans. 347 (July 15, 2010). Section 15.25 states that in reviewing a revocation, the hearing officer "should limit the scope of its review to the Medicare contractor's reason for imposing a denial or revocation at the time it issued the action and whether the Medicare contractor made the correct decision (i.e., denial/revocation)."

3. Pepper Hill's lack of notice of the surety bond requirement does not provide a basis to excuse its noncompliance with that requirement.

Pepper Hill argues that it did not receive any notification of the requirement to obtain a surety bond prior to the November 10, 2009 revocation notice. Pepper Hill disputes what it calls CMS's "unsupported assertion that Pepper Hill was personally notified of the surety bond requirements in an August 21, 2009 letter" in which, CMS states, "NSC reminded its suppliers, including Petitioner, of the surety bond requirements and deadline." P. Reply at 1-2; CMS Resp. at 5, citing CMS Ex. 6. Pepper Hill submitted to the ALJ an affidavit of its operator and administrator stating that it did not receive the August 21, 2010 letter. P. Ex. 4. Pepper Hill also states that it did not receive advance notice of the regulation imposing the surety bond requirement that was published on January 2, 2009. RR at 7 n.3. Pepper Hill asserts that "its lack of actual notice of the surety bond requirement is a material issue of fact relevant to the impropriety of the revocation of its billing privileges." RR at 4 n.2. It suggests that its lack of notice raises "Constitutional concerns" that "may be a matter beyond the scope of this tribunal." P. Reply at 2.

For the purpose of reviewing the ALJ's grant of summary judgment in favor of CMS, we accept as true, as did the ALJ, that Pepper Hill did not receive actual notice of the surety bond requirement. ALJ Decision at 7. The absence of notice, however, does not relieve Pepper Hill of the requirement to obtain a compliant surety bond by October 2, 2009. The requirement for DMEPOS suppliers to obtain a surety bond was imposed by statute and regulation, and, like other participants in the Medicare program, Medicare suppliers are presumed to have constructive notice of the statutes and regulations that govern their participation as a matter of law. In *Waterfront Terrace, Inc.*, DAB No. 2320 (2010), the Board noted with approval the ALJ's observation that a provider of Medicare services "should be expected to possess at least a rudimentary understanding of program rules and terminology." DAB No. 2320, at 7, citing *Heckler v. Community Health Servs. of Crawford County*, 467 U.S. 51, 63, 64 (1984) (participant in the Medicare program had "duty to familiarize itself with the legal requirements" for cost reimbursement); *see also Thomas M. Horras and Christine Richards*, DAB No. 2015, at 34 (2006) (officer and principal of provider had responsibility to be aware of and adhere to applicable law and regulations), *aff'd, Horras v. Leavitt*, 495 F.3d 894 (8th Cir. 2007).

Additionally, the statute and regulations afforded a greater period of notice of the requirement to obtain surety bonds than Pepper Hill suggests. While the final regulations imposing the October 2, 2009 deadline for obtaining a surety bond were published January 2, 2009 (74 Fed. Reg. 166, 198), the rule requiring each supplier to a obtain surety bond was proposed on August 1, 2007 (72 Fed. Reg. 42,001, 42,009), and the

statutory provision requiring a surety bond had been in place since August 5, 1997.[7] Pub. L. No. 105-33, § 4312(a), 111 Stat. 251, 386, 787 (1997). The fact that Pepper Hill was purportedly not aware of the laws and regulations governing its participation in the Medicare program that had been in existence for several years provides no basis to excuse its failure to comply with the requirements in the current regulations for maintaining Medicare billing privileges.

4. NSC's failure to reinstate Pepper Hill's billing privileges pursuant to its CAP was not subject to ALJ or Board review.

Pepper Hill disputes the ALJ's determination that he had no authority to reinstate Pepper Hill's supplier number based on the CAP it submitted to NSC.[8] The ALJ did not err in this respect. The Board stated in *DMS Imaging, Inc.*, DAB No. 2313, at 5 (2010), that "[n]either the Social Security Act nor the implementing regulations provide for administrative review of a contractor's refusal to reinstate a supplier's billing privileges on the basis of a CAP." As the Board explained there, 42 C.F.R. §§ 424.545(a) and 405.874 permit a Medicare supplier or provider whose enrollment or billing privileges have been revoked to appeal under Part 498, which governs appeals to ALJs and the Board. Section 498.3(b) provides that a supplier may appeal CMS's "initial determinations" and lists actions that constitute initial determinations. *See also* 42 C.F.R. § 405.874(c)(1) (supplier or provider may appeal under Part 498 the "initial determination" to revoke billing privileges). Section 498.3(b)(17) states that "[w]hether to . . . revoke a . . . supplier's Medicare enrollment in accordance with . . . § 424.535" is an initial determination. A contractor's refusal to reinstate a supplier's enrollment or billing privileges based on a CAP, however, is not listed as an "initial determination" under section 498.3(b). Moreover, section 405.874(e) specifically states that "[a] CMS contractor's refusal to reinstate a supplier's billing privileges based on a [CAP] is not an initial determination under part 498 of this chapter." While the regulations require a contractor to provide a supplier with an opportunity to submit a CAP, they nowhere indicate that a supplier may appeal a contractor's rejection of a CAP proffered after notice of revocation. *DMS Imaging, Inc.* at 5-8; s*ee also A TO Z DME, LLC*, DAB No.

[7] CMS explained the requirement to obtain a surety bond by October 2, 2009 when it published the final surety bond regulations in the Federal Register on January 2, 2009. CMS stated that while it had originally proposed to give "DMEPOS suppliers already enrolled in Medicare" only 60 days after publication of the rule to obtain surety bonds, it had instead "delayed the requirement of a surety bond for certain existing DMEPOS suppliers until 9 months after the effective date of this final rule [i.e., October 2, 2009], and 120 days after the effective date of this final rule for certain new DMEPOS suppliers." 74 Fed. Reg. at 173. "These delays," CMS explained, "will give existing suppliers an opportunity to assess and determine whether they will continue to participate in the Medicare program during the accreditation implementation without incurring additional costs associated with a surety bond." *Id*.

[8] Section 424.535(a)(1) of 42 C.F.R. states that "[a]ll providers and suppliers are granted an opportunity to correct the deficient compliance requirement before a final determination to revoke billing privileges." The notice of revocation states that Pepper Hill's billing privileges were being revoked pursuant to this regulation, among others. CMS Ex. 1, at 1.

2303, at 8-10 (2010) ("The ALJ's determination not to review CMS's rejection of A TO Z's plan of corrective action was not erroneous."). Thus, the ALJ did not err in determining that the decision not to reinstate Pepper Hill as a supplier based on its CAP was not reviewable by an ALJ. ALJ Decision at 7, citing 42 C.F.R. § 405.874(e).

5. Equitable relief is not available.

Pepper Hill also argues that the lack of notice of the surety bond requirement and its purchase of the retroactive surety bond entitle it to equitable relief. RR at 7-8; P. Reply. The ALJ rejected this argument on the grounds that Pepper Hill "points to no source of authority for me to waive the compliance requirement or grant an exemption on equitable grounds," and that he had "no authority to declare the statute or the regulation invalid or ultra vires." ALJ Decision at 8. On appeal, CMS cites two Board decisions for the proposition that ALJs and the Board have no authority to grant equitable relief contrary to the clear requirements of regulations. CMS Resp. at 7-8, citing *US Ultrasound*, DAB No. 2302 (2010), and *Community Hospital of Long Beach*, DAB No. 1938 (2004). Pepper Hill argues that these cases "are not applicable to the facts and circumstances of this proceeding." P. Reply at 2. We disagree.

Pepper Hill first argues that in *US Ultrasound* the Board found that neither it nor the ALJ had the authority "to require reimbursement or enrollment of a prospective supplier on equitable grounds where statutory or regulatory requirements are not met" and "the prospective supplier did not qualify as a 'supplier' under the applicable law[.] *Id*. at 2-3 (emphasis in original). According to Pepper Hill, the equitable relief it seeks here is "entirely different" because it is an existing supplier that is currently "in compliance with all applicable standards" such that "revocation is not warranted." *Id*. at 3. However, as we have already discussed, Pepper Hill, like the prospective supplier in *US Ultrasound*, was not in compliance with the relevant requirements for billing Medicare, in this case the requirement to obtain a surety bond required by October 2, 2009.

Regarding *Community Hospital of Long Beach*, Pepper Hill argues that "the petitioner requested reimbursement for services provided prior to the effective date of the provider agreement, claiming [that] theories of equitable estoppel and quantum meruit supported its request for remuneration," and asserts that the present case is distinguishable because Pepper Hill "has not asked this Board or any authority on appeal for an award of damages for the revocation of its billing privileges." *Id*. (emphasis in original). The "damages" that Pepper Hill says were sought in *Community Hospital of Long Beach* are essentially the same as the relief Pepper Hill seeks here, the ability to receive Medicare payment. In *Community Hospital of Long Beach*, the Board cited a prior decision holding that an ALJ did not have authority to grant "a remedy in the nature of damages based purely on equitable grounds," and that "the inquiry before the ALJ ends once there is a legally and factually sound determination that [p]etitioner did not meet the statutory and regulatory requirements" for certification (in that case as a Medicare provider or supplier).

Community Hospital of Long Beach at 12-13, citing *National Behavioral Center, Inc.*, DAB No. 1760, at 3-4 (2001). As in *Community Hospital of Long Beach*, CMS's determination (to revoke Pepper Hill's billing privileges) was legally and factually sound, given Pepper Hill's undisputed failure to have obtained a compliant surety bond by October 2, 2009 as required by the regulations.

Moreover, we specifically found in *US Ultrasound* that "[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements." *US Ultrasound* at 8. The Board and the ALJs are bound by the applicable statute and regulations. *See 1866ICPayday* at 14 (stating "an ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground"); *see also Sentinel Medical Laboratories, Inc.*, DAB No. 1762, at 9 (2001), *aff'd*, *Teitelbaum v. Health Care Financing Admin.*, 32 F. App'x 865 (9th Cir. 2002), *reh'g denied*, No. 01-70236 (9th Cir. May 22, 2002).

Conclusion

For the reasons stated above, we uphold the ALJ Decision granting summary judgment in favor of CMS and sustaining the revocation of Pepper Hill's Medicare billing privileges.

/s/
Sheila Ann Hegy

/s/
Constance B. Tobias

/s/
Stephen M. Godek
Presiding Board Member