

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

In the Case of:)	DATE: July 9, 2010
)	
Ita Udeobong, d/b/a)	
Midland Care Medical Supply)	
and Equipment,)	
)	
Petitioner,)	Civil Remedies CR2088
)	App. Div. Docket No. A-10-58
)	
)	Decision No. 2324
- v. -)	
)	
Centers for Medicare &)	
Medicaid Services.)	
)	

FINAL DECISION ON REVIEW OF
ADMINISTRATIVE LAW JUDGE DECISION

Ita Udeobong, d/b/a Midland Care Medical Supply and Equipment (Midland Care), a company in Stafford, Texas that was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS), requests review of a decision by Administrative Law Judge (ALJ) Carolyn Cozad Hughes, dated March 9, 2010. Ita Udeobong d/b/a Midland Care Medical Supply and Equipment, DAB CR2088 (2010) (ALJ Decision). The ALJ granted summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS), thereby sustaining its revocation of Midland Care's Medicare billing privileges and related supplier number. The ALJ concluded that CMS was authorized to revoke Midland Care's Medicare enrollment because the undisputed facts established that Midland Care did not satisfy Medicare enrollment requirements.

For the reasons discussed below, we conclude that the ALJ properly granted summary judgment in favor of CMS.

Applicable Law

In order to receive Medicare payments for items furnished to a Medicare-eligible beneficiary, a DMEPOS supplier must have a supplier number issued by the Secretary of Health and Human Services. Social Security Act (Act), § 1834(j)(1)(A).¹ To receive such billing privileges, a DMEPOS supplier must also meet and maintain each of the 25 supplier enrollment standards set forth in 42 C.F.R. §§ 424.57(c)(1)-(25).² Among other things, a DMEPOS supplier must permit CMS (or its agent) to conduct on-site inspections to ascertain supplier compliance with each of these enrollment standards. Section 424.57(c)(8). In addition, a DMEPOS supplier "must be accessible during reasonable business hours to beneficiaries and to CMS, and must maintain a visible sign and posted hours of operation." *Id.* CMS will revoke a currently-enrolled Medicare supplier's billing privileges if CMS (or its agent) determines that the supplier is not in compliance with any of these supplier enrollment standards. 42 C.F.R. § 424.57(d); A to Z DME, LLC, DAB No. 2303, at 3 (2010); 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").

Background

The following facts from the ALJ Decision and the record are undisputed.

Prior to the revocation at issue in this case, Midland Care, which is owned and operated by Ita Udeobong, was enrolled in the Medicare program as a DMEPOS supplier located at 610 Murphy

¹ The current version of the Social Security 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.

² "Enrollment" means the process that Medicare uses to establish a supplier's eligibility to submit claims for Medicare-covered services and supplies. 42 C.F.R. § 424.502. DMEPOS suppliers enrolled in Medicare receive a supplier number conveying Medicare billing privileges. *Id.*; § 424.57(b)(2).

Road, Suite 105, Stafford, Texas. P. Ex. 1, at 1. In a letter dated January 30, 2009, the National Supplier Clearinghouse (NSC), a CMS contractor, notified Midland Care that its Medicare supplier number would be revoked based on its determination that the facility was not operational to furnish Medicare covered items and services in violation of 42 C.F.R.

§ 424.535(a)(5)(ii). CMS Ex. 1, at 1-2. NSC's determination was based upon the results of an attempted on-site inspection of Midland Care's premises by a NSC representative who found that the facility was closed, the doors were locked, and the leasing agent had posted a letter on the door denying access to the facility due to a failure to pay rent. Id. at 2. The January 30 letter further stated that NSC had determined that Midland Care was not in compliance with several supplier enrollment standards set forth at 42 C.F.R. § 424.57(c). Id.; see also CMS Exs. 6 at 1; P. Ex. 1. NSC provided Midland Care with an opportunity to complete a corrective action plan (CAP) within 30 days and to submit sufficient evidence demonstrating that it was in full compliance with all Medicare requirements. CMS Ex. 1, at 3. On March 20, 2009, Midland Care submitted a CAP stating its intention to correct its failure to meet these supplier enrollment standards. CMS Ex. 2.

After receiving Midland Care's CAP, NSC ordered a site inspection to verify Midland Care's compliance with all supplier enrollment standards. CMS Exs. 4, at 1; 5. At 11:58 a.m. on April 15, 2009, a certified fraud examiner employed by NSC (NSC investigator) arrived at Midland Care's premises and attempted to conduct an on-site inspection. CMS Ex. 7, at 3. The NSC investigator observed a sign on Midland Care's door posting its business hours of operation as 10:00 a.m. to 5:00 p.m. Monday through Friday and a sign in the window stating "Open, Come In." Id.; CMS Ex. 3, at 9. However, the NSC investigator also found that the facility's door was locked, the lights were off, and no one answered the door after he knocked several times. CMS Ex. 7, at 3. The NSC investigator returned to Midland Care's premises the next day at 11:03 a.m. Id. Again, the NSC investigator observed that Midland Care was closed, with the door locked, the lights were off, and no one was present at the facility. Id.; P. Ex. 1, at 2.

Because its investigator could not complete the attempted on-site inspections, NSC could not verify that Midland Care had implemented its CAP and was in compliance with all supplier enrollment standards. CMS Exs. 5; 7, at 4. NSC subsequently notified Midland Care in a letter dated May 5, 2009, that its Medicare billing privileges would be revoked because Midland

Care was not in compliance with the requirements of sections 424.57(c)(8) and (9). CMS Ex. 5.

On May 19, 2009, Midland Care requested reconsideration of NSC's revocation decision. CMS Ex. 4. In a letter dated July 28, 2009, a Medicare hearing officer affirmed NSC's decision to revoke Midland Care's billing privileges pursuant to section 424.57(d) because it was not in compliance with the requirements of section 424.57(c)(8) and because it was not operational in violation of section 424.535(a)(5)(ii).³ CMS Ex. 6.

Midland Care subsequently filed an appeal of NSC's reconsideration decision. ALJ Decision at 2. CMS moved for summary judgment and submitted a brief and seven exhibits supporting the motion. Id. Midland Care opposed the motion and submitted two exhibits with its brief. Id.

The ALJ Decision

The ALJ Decision notes that although Midland Care "argues about the quality of the evidence, it does not dispute any of the facts asserted." ALJ Decision at 4. The ALJ cited the declaration of Mr. Udeobong, where he acknowledged that Midland Care was not open and no one was present when the NSC investigator visited the premises on April 15 and 16, 2009. Id., citing P. Ex. 1, at 2. Specifically, Mr. Udeobong stated that on April 15, 2009, "no one was available to allow the surveyor into the office" when the NSC investigator arrived "during the office's lunch hours[,] which are from 12:00 pm to 1:00 pm." P. Ex. 1, at 2. Mr. Udeobong's declaration further stated that when the NSC inspector returned the next day, "the office personnel in the office that day was presented with an emergency situation requiring immediate leave of the office." Id.

The parties disputed whether, during the two attempted on-site inspections, a temporary sign listing lunch hours was posted on the door of Midland Care's facility. ALJ Decision at 4. However, for summary judgment purposes, the ALJ "accept[ed] as true Mr. Udeobong's assertion that, on April 15, 2009, his employee posted a sign displaying the lunch hours, which the employee removed when he/she returned from lunch." Id., citing

³ The Medicare hearing officer also determined that Midland Care was in compliance with the requirements of section 424.57(c)(9). CMS Ex. 6, at 3.

P. Ex. 1, at 2; P. Ex. 2. The ALJ also "accept[ed] as true that, when the employee suddenly left the facility on April 16, he/she 'placed a sign on the door informing the public that no one would be available until after lunch.'" Id.

Based on the undisputed material facts and Mr. Udeobong's admissions, the ALJ concluded that Midland Care was not in compliance with the requirements of section 424.57(c)(8). ALJ Decision at 4. First, the ALJ found that "as [Midland Care] admits, it was closed from noon until 1:00 p.m. every day[]" even though its posted hours of operation were 10:00 a.m. to 5:00 p.m. Id. The ALJ thus concluded that "[o]n a regular basis, the facility was not open and accessible to beneficiaries during its posted hours of operation." Id. Second, the ALJ concluded that the undisputed facts established that Midland Care "by its own admission, . . . was not accessible [to the NSC investigator on two occasions] and therefore did not permit the on-site inspection." Id. The ALJ granted CMS's motion for summary judgment and sustained the revocation of Midland Care's Medicare billing privileges pursuant to section 424.57(d). Id. at 5.

Standard of review

The Board has previously held that whether summary judgment is appropriate is a legal issue that we address de novo. 1866ICPayday.com at 2, citing Lebanon Nursing and Rehabilitation Center, DAB No. 1918 (2004). Summary judgment is appropriate when the record shows that there is no genuine dispute of fact material to the result. See 1866ICPayday.com at 2, citing Celotex Corp. v. Catrett, 477 U.S. 317, 322-25 (1986). Our standard of review on a disputed issue of law is whether the ALJ decision is erroneous. Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program, www.hhs.gov/dab/divisions/appellate/guidelines/index.html.

Analysis

Before the Board, Midland Care does not dispute any of the facts the ALJ cited as material in her decision. Nor does Midland Care challenge the ALJ's reliance on the admissions by Mr. Udeobong to support her conclusion that the facility was not in compliance with the requirements of section 424.57(c)(8). Indeed, Midland Care does not even contend that the ALJ erroneously concluded that it violated the requirements of

section 424.57(c)(8). Instead, Midland Care raises two collateral arguments on appeal.

First, Midland Care contends that the NSC investigator's on-site investigation report (CMS Exhibit 3) relied upon by CMS is "void on its face" because the NSC investigator "failed to sign and date the survey contemporaneously to the time the survey was being conducted." P. Br. at 3-4. Midland Care further contends that this failure also renders the NSC investigator's declaration (CMS Exhibit 7) invalid because it was executed nearly eight months after the attempted on-site inspections. Id. at 4. This argument is without merit because Midland Care does not dispute any of the material facts asserted in the on-site investigation report and declaration. Indeed, Mr. Udeobong admitted the material facts relied upon the ALJ - i.e., that Midland Care was not open from noon to 1:00 p.m. every day even though its posted hours of operation were from 10:00 a.m. to 5:00 p.m. and that it was not open or accessible to CMS (and its agents) during the two attempted on-site inspections. Thus, even if Midland Care's challenge about the authenticity of this evidence had merit, it does not undercut the ALJ's conclusion.

Second, Midland Care argues that a "simple mistake" where no one was available at the facility for a "few hours" on the two days that NSC attempted to conduct its on-site inspection has resulted in the revocation of its supplier number, which is "a draconian measure that has deprived [Mr. Udeobong] of his livelihood." P. Br. at 5-6.⁴ This argument mischaracterizes the gravamen of the ALJ Decision and the basis for CMS's revocation of Midland Care's Medicare billing privileges. Although Midland Care was closed for business every day from 12:00 p.m. to 1:00 p.m. for lunch, Midland Care posted its hours of operation as 10:00 a.m. to 5:00 p.m., Monday through Friday. See CMS Ex. 3, at 9, 11, 13, 14; P. Ex. 1, at 2. Midland Care does not dispute that this posted sign contains no indication that, on a regular basis, Midland Care would in fact not be open from noon to 1:00 p.m. to serve beneficiaries or to permit CMS (and its agents) to

⁴ Midland Care also contends that "[j]ust because Petitioner was unavailable during those few hours does not mean he was not operational." P. Br. at 6. Although NSC revoked Midland Care's billing privileges on the alternative ground that Midland Care was not "operational" in violation of section 424.535(a)(5)(ii), we do not need to address this argument because the ALJ did not sustain the revocation based on that ground.

conduct an on-site inspection. Midland Care should have posted its actual hours of operation as being from 10:00 to noon and 1:00 p.m. to 5:00 p.m. to comply with the requirements of section 424.57(c)(8), yet it did not. The evidence thus shows that the revocation of Midland Care's Medicare billing privileges was not the result of a "simple mistake."

We also agree with the ALJ that section 424.57(c)(8) would have no meaning if suppliers could deviate from their posted hours of operation on a regular basis. See ALJ Decision at 4. Section 424.57(c)(8) provides in part that the supplier must permit CMS or its agents to conduct on-site inspections and must be accessible during reasonable business hours to beneficiaries and CMS. The purpose of requiring suppliers to post their hours of operation is thus to facilitate both on-site inspections and transactions with beneficiaries in need of items or services. In light of this purpose, Midland Care could not reasonably interpret section 424.57(c)(8) as permitting the posting of hours it knew it would deviate from on a regular basis. This would lead an NSC investigator or a beneficiary to think the facility would be accessible during hours when in fact no one would be present to admit them. For example, if a beneficiary had arrived at Midland Care's facility before 10:00 a.m., he or she could have reasonably expected, based on the posted hours of 10:00 a.m. to 5:00 p.m., that the business would be open during the noon hour, and returned at that time only to find it closed. This problem would not be cured even if, as Midland Care alleged, its employees posted temporary signs when they left, stating when they would return.

In sum, the undisputed material facts demonstrate that Midland Care did not comply with the requirements of section 424.57(c)(8).

Conclusion

For the reasons stated above, we conclude that the ALJ properly granted summary judgment in favor of CMS, thereby sustaining its

revocation of Midland Care's Medicare billing privileges
pursuant to section 424.57(d).

_____/s/_____
Judith A. Ballard

_____/s/_____
Constance B. Tobias

_____/s/_____
Stephen M. Godek
Presiding Board Member