

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Reeves-Sain Extended Care, LLC,)	Date: January 22, 2008
)	
Petitioner,)	
)	
- v. -)	Docket No. C-06-616
)	Decision No. CR1727
Centers for Medicare & Medicaid)	
Services.)	
_____)	

DECISION

I affirm the determination of the Medicare Hearing Officer (Hearing Officer) to deny the application of Reeves-Sain Extended Care, LLC, (Petitioner) for a Medicare supplier number for durable medical equipment, prosthetics, orthotics and supplies (DMEPOS).

I. Background

Petitioner is co-owned by W. Shane Reeves, and Richard Sain. Mr. Reeves and Mr. Sain operate three businesses in Tennessee. The three businesses are: Murfreesboro Pharmaceutical and Nursing Supply d/b/a/ Reeves Medical Equipment and Supply (Murfreesboro), established in 1993; Reeves-Sain Infusion Services, Inc. (Infusion), a Sub-Chapter S corporation, established in 1994; and Petitioner, a long-term care pharmacy, established in 1995. All three businesses are located at 1809 Memorial Boulevard in Murfreesboro, Tennessee. The business address of all three businesses is the same, except that the infusion business includes the designation "Suite C" in the business address. In addition, Mr. Reeves and Mr. Sain are equal owners in a fourth Tennessee corporation known as Reeves-Sain Family of Medical Services, Inc. (management corporation), which provides management services for the other businesses owned by Mr. Reeves and Mr. Sain. P. Br. at 7.

By letter dated April 25, 2006, the Centers for Medicare & Medicaid Services (CMS), acting through the National Supplier Clearinghouse (NSC),¹ notified Petitioner that its application for a DMEPOS Medicare supplier number was denied. In the April 25, 2006 letter, NSC stated that the reason for the denial of the supplier number was Petitioner's noncompliance with supplier standard number seven.

Supplier standard number seven states that a supplier must maintain a physical facility on an appropriate site. 42 C.F.R. § 424.57(c)(7). The site must contain space for storing business records. *Id.* The April 25, 2006 letter stated that Petitioner was not compliant with supplier standard seven because it was sharing space with two other suppliers with active provider numbers. CMS Ex. 1.

By letter dated May 23, 2006, Petitioner filed a hearing request with NSC. CMS Ex. 2. By ruling dated June 30, 2006, the Hearing Officer affirmed the decision to deny Petitioner's application for a DMEPOS Medicare supplier number. CMS Ex. 4. By letter dated August 7, 2006 Petitioner requested that the Hearing Officer's denial be reviewed by the Departmental Appeals Board (DAB). This case was assigned originally to Chief Administrative Law Judge (ALJ) Marion Silva and subsequently transferred to me for hearing and decision.

I convened a prehearing conference on September 16, 2006. At the conference, Mr. Reeves participated *pro se* as the representative for Petitioner. The parties agreed that an in-person hearing would not be necessary and that this case could be decided on written submissions. I set a briefing schedule. By motion dated November 13, 2006, Petitioner moved for an extension of time to file its brief because Petitioner had retained counsel to represent it and the parties had conferred and proposed a revised briefing schedule. I granted the request for an extension of time.

On October 16, 2006, CMS filed a brief accompanied by eight exhibits, CMS Exhibits (CMS Exs.) 1-8. On December 18, 2006, Petitioner submitted its Response brief accompanied by three exhibits, labeled A through C. To conform to Civil Remedies Division procedures, I have remarked these exhibits as Petitioner Exhibits (P. Exs.) 1-3. On January 8, 2007, CMS submitted a reply brief. I admit into evidence CMS Exs. 1-8 and P. Exs. 1-3. My decision is based on the parties' submissions, including exhibits and the applicable law.

¹ NSC is the entity authorized by CMS to issue, revoke, and reinstate DMEPOS Medicare supplier numbers.

II. Applicable Law

Section 1861 of the Social Security Act (Act) defines medical and other health services that are eligible for Medicare reimbursement by DMEPOS suppliers. Under section 1834(j)(1)(A) of the Act “no payment may be made under this part . . . for items furnished by a supplier of medical equipment and supplies unless such supplier obtains (and renews at such intervals as the Secretary may require) a supplier number.” Act, § 1834(j)(1)(A). Pursuant to section 1834(j)(1)(B) of the Act, “a supplier may not obtain a supplier number unless . . . the supplier meets revised standards prescribed by the Secretary . . . that shall include requirements that the supplier . . . meet such other requirements as the Secretary may specify.” Act, § 1834(j)(1)(B)(ii)(IV).

CMS regulations set forth the conditions that a DMEPOS supplier must meet in order to receive payment for a Medicare-covered item. *See* 42 C.F.R. § 424.57(b) and (c). CMS will deny an application for a supplier number if an entity does not meet the standards in 42 C.F.R. § 424.57(b) and (c). An application for a supplier number is also known by its application number, “CMS 855S.”

Section 1866(j) of the Act, as amended by section 936(b)(3) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, authorized the Secretary of Health and Human Services (Secretary) to establish a process for the enrollment in the Medicare program of providers of services and suppliers. Specifically, section 1866(j)(2) of the Act grants “[a] provider of services or supplier whose application to enroll (or, if applicable, to renew enrollment) under this title is denied” a “hearing and judicial review of such denial under the procedures that apply under subsection (h)(1)(A).”² Those procedures are set out at 42 C.F.R. Part 498, *et seq.* and provide for hearings by ALJs and review by the DAB.

The DAB has held that section 1866(j)(2) of the Act gives appeal rights to suppliers. “Section 1866(j)(2) of the Social Security Act (the Act) gives suppliers appeal rights, for certain determinations involving enrollment, using the procedures that apply under section 1866(h)(1)(A) of the Act. Those procedures are at 42 C.F.R. Part 498 and provide for ALJ hearings and Board review.” *MediSource Corporation*, DAB No. 2011, at 2 (2006).

² Previously, supplier appeals were governed by 42 C.F.R. § 405.874, which provided for review by a fair hearing officer and then a CMS official, designated by the Administrator of CMS.

Further, the Board has recognized the procedures and the burden of persuasion established by the Secretary in the Program Integrity Manual (PIM, Pub. 100-08) at Chapter 10, § 19.

The Medicare Provider Integrity Manual provides: ‘The burden of persuasion is on the . . . supplier . . . to show that its enrollment application was incorrectly disallowed or that the revocation of its billing number was incorrect.’ [Citing PIM, Ch. 10, § 19.B.] This provision is consistent with the Board’s conclusion in provider appeals under 42 C.F.R. Part 498 that a provider must prove substantial compliance by the preponderance of the evidence, once CMS has established a prima facie case that the provider was not in substantial compliance with relevant statutory or regulatory provisions.

Id. at 2-3.

III. Issue

The issue in this case is whether Petitioner’s application for a supplier number was properly denied.

IV. Discussion

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below as a separate heading. I discuss each Finding in detail.

1. Petitioner’s application for a DMEPOS supplier number was properly denied.

An entity that wishes to bill Medicare as a supplier of DMEPOS must meet the 21 supplier standards listed at 42 C.F.R. § 424.57(c). Supplier standard seven requires that a supplier:

Maintains a physical facility on an appropriate site. The physical facility must contain space for storing business records including the supplier’s delivery, maintenance, and beneficiary communication records. For purposes of this standard, a post office box or commercial mailbox is not considered a physical facility. In the case of a multi-site supplier, records may be maintained at a centralized location.

42 C.F.R. § 424.57(c)(7).

This regulation implements similar language in the Social Security Act which states: “A supplier may not obtain a supplier number unless . . . the supplier . . . maintain[s] a physical facility on [an] appropriate site.” Act, § 1834(j)(1)(B)(ii)(II). This statutory language was enacted in 1994 as part of an effort to curb supplier abuses and provide additional protection for beneficiaries. An appellate panel of the DAB in *Medisource Corp.*, DAB No. 2011, at 9 discussed the effort to curb supplier abuses, provide additional protection for beneficiaries and the reason behind the requirement for a physical facility on an appropriate site and stated, “[t]he physical facility required by suppliers is the place where patients can contact the supplier directly . . . [s]taff must be available at the facility during posted hours of operation.”

NSC interprets the language of supplier standard seven to mean one provider, one location. Consequently, NSC denied Petitioner’s application for a DMEPOS Medicare supplier number because two other businesses, Murfreesboro and Infusion, each having their own Medicare supplier numbers, were operating at the same address.

a. Petitioner did not disclose the existence of a managing corporation on its 855S application.

The Hearing Officer, in her June 30, 2006 decision, affirmed NSC’s decision to deny Petitioner a DMEPOS Medicare supplier number. The Hearing Officer gave five reasons for her decision. The Hearing Officer found “most troubling” that Petitioner had not disclosed on the 855S application all of its ownership and managing control interests. CMS Ex. 4, at 2. During the telephone hearing before the Hearing Officer, Petitioner’s Vice-President of Finance Nancy Robinson gave testimony that there exists a fourth corporation, a management company, that provides management of the other corporations owned by Mr. Reeves and Mr. Sain.³ The management company provides “payroll operations and delivery staff” for Murfreesboro, Infusion and Petitioner. P. Br. at 7. Petitioner claims that this omission was made by Ms. Robinson inadvertently and that it was Ms. Robinson’s first time filling out an Medicare supplier 855S application.

I find Petitioner’s argument unpersuasive. Ms. Robinson was Petitioner’s financial vice-president. In her position, as a financial vice-president, Ms. Robinson cannot claim ignorance. Further, the regulations require that the application be complete and accurate prior to certification as a Medicare supplier. 42 C.F.R. § 424.57(c)(2). Even Petitioner

³ The Hearing Officer and CMS refer to the managing company as a holding company. Petitioner denies that the management company is a holding company and since this determination is not necessary for this Decision, I do not address this dispute. P. Ex. 2.

admits in its brief that, “this entity probably should have disclosed [the existence of the managing company] in Section 5.” P. Br. at 5. Petitioner’s failure to disclose the existence of the managing company, by itself, is enough to affirm the Hearing Officer’s decision.

b. Murfreesboro, Infusion and Petitioner have only one sign that identifies all three businesses.

Murfreesboro, Infusion and Petitioner have the same physical address. All three businesses are located at 1809 Memorial Boulevard in Murfreesboro, Tennessee. The business address of all three businesses is the same, except that the infusion business includes the designation “Suite C” in the business address. The photographs provided to me show the sign in front of the building. The words “REEVE – SAIN”, are in large letters, and then underneath is the word “MEDICAL”, in medium letters, and then further underneath are the words “– EXTENDED CARE– ”, in smaller letters, and then at the bottom of the sign is the word “– INFUSION – ”, also in smaller letters. CMS Ex. 4, 5. The Hearing Officer stated when viewing the photographs of the sign in front of the building at 1809 Memorial Boulevard that in her opinion “if one enters the door marked 1809, one would find the medical, extended care, and infusion company all in one. There does not appear to be any clear demarcation to the Medicare public as to where one company starts and the other begins.” CMS Ex. 4, at 9. I agree. The sign is confusing to the Medicare public.

The Act at section 1834(j)(1)(B)(ii)(II) requires a supplier to maintain a physical facility at an appropriate site. This requirement has been interpreted as serving the purpose of giving the Medicare public a place where a supplier can be contacted directly. *Medisource Corp.*, DAB No. 2011. A sign that is confusing to the Medicare public does not serve this purpose.

Petitioner urges that any confusion could be cured by changing the sign. Petitioner also argues that it does not serve customers off the street and therefore there will be no actual confusion of the Medicare public. Petitioner urges that no confusion will actually occur since it serves residents in nursing homes only and the pharmaceuticals are delivered to the nursing homes. However, Petitioner’s argument fails because it does not address the issue of a family member or representative of a resident of a nursing home who has a grievance or other matter it wishes to discuss in person with Petitioner’s staff. Since all three businesses are all in one building and the sign is unclear, it would be confusing as to where an individual would go to deal directly with Petitioner. Petitioner’s plan to change the sign might, depending on how any new sign would read, cure the current problem with the sign, but would not cure the other defects which prohibit Petitioner from complying with supplier standard seven.

c. Three companies exist at the same physical building.

Murfreesboro, Infusion and Petitioner have the same physical address. All three businesses are located at 1809 Memorial Boulevard in Murfreesboro, Tennessee. The business address of all three businesses is the same, except that the infusion business includes the designation “Suite C” in the business address. The building that houses all three companies is relatively small. The sign suggests that the three companies are really one. Both Murfreesboro and Infusion already have Medicare supplier numbers. If Petitioner were to be granted its own Medicare supplier number, then there would be three companies with Medicare supplier numbers at the same physical address.

In her declaration, Shanna Goldsborough, project coordinator of NSC, states that the Act prohibits more than one supplier number per address. The aim of the Act is to “prevent Medicare fraud where one company has billing issues or problems and its supplier number is revoked, but continues billing Medicare through another business at the same address.” CMS Ex. 7. Ms. Goldsborough stated that her “experience working in this area for four years leads me to think that Reeves-Sain was able to get a second supplier number because the infusion service’s business address includes a suite.” CMS Ex. 3, at 3. A third supplier number at the same physical address runs into the problem that Murfreesboro and Petitioner have completely identical business addresses, without differentiating suite numbers. I conclude that NSC properly denied Petitioner’s application for a third supplier number at the same physical address because it did not meet supplier standard seven because there were already two other businesses with Medicare supplier numbers operating at the same address, one of which has an identical business address in that neither Petitioner nor Murfreesboro has any designation of a suite in their business address.

d. Murfreesboro, Infusion and Petitioner have a commingling of operations.

As previously discussed the management company provides payroll services and delivery staff to Murfreesboro, Infusion, and Petitioner. In addition, Petitioner shares at least one employee, Lee Golden, who is listed as the Pharmacy Director for both Infusion and Petitioner. CMS Ex. 8. This one employee is a key employee since Petitioner is a long-term care pharmacy.

Petitioner argues that Murfreesboro, Infusion, and Petitioner are separate and distinct entities. However, if the three companies were indeed separate and distinct there would be no commingling of operations and they would not share any employees, certainly not a prominent and key employee, such as the Pharmacy Director in a company that is a long-term care pharmacy.

e. Petitioner does not fit within the subsidiary exception of the Act.

The main thrust of Petitioner's argument is that it is entitled to a supplier number under the subsidiary exception of the Act. CMS counters this argument by claiming that the subsidiary exception does not apply to Petitioner because Petitioner is not a subsidiary corporation but a limited liability company (LLC). The Hearing Officer also concluded that the subsidiary exception could not be applied to Petitioner because it was a limited liability company. Petitioner responds that subsidiary, within the meaning of section 1834(j)(1)(D) of the Act means "under another's control." Petitioner argues that the term subsidiary is not limited to corporations and that a subsidiary corporation is only an example of being under another's control. P. Br. at 3-4.

The subsidiary exception of the Act provides that:

PROHIBITION AGAINST MULTIPLE SUPPLIER NUMBERS – The Secretary may not issue more than one supplier number to any supplier of medical equipment and supplies unless the issuance of more than one number is appropriate to identify subsidiary or regional entities under the supplier's ownership or control.

Act, § 1834(j)(1)(D).

The plain meaning of this section of the Act is that where there is a controlling entity that has a DMEPOS Medicare supplier number, a subsidiary or regional entity may be granted an additional supplier number under this exception for purposes of identity. Whether the subsidiary entity is a subsidiary corporation or not, as the parties have argued before me, is not a question that I need reach in this case. Both parties have totally ignored the fact that the management company, the controlling entity in this case, does not have its own DMEPOS Medicare supplier number. It is clear that the subsidiary exception cannot be applied to Petitioner because the controlling entity, the management company, does not itself have a DMEPOS supplier number which is a necessary prerequisite under the Act. Only Murfreesboro and Infusion, the other two companies at the same address as Petitioner, have supplier numbers. Furthermore, Petitioner has consistently argued that Murfreesboro, Infusion, and Petitioner are separate and distinct entities.

In addition, the subsidiary exception implies that the subsidiary be at another location from the controlling entity, either another site or region. Petitioner is in the same building as two other businesses of similar name and therefore the exception does not apply. No information was provided to me about the location of the management company.

V. Conclusion

For the reasons discussed above, I find that CMS properly denied Petitioner's application for a DMEPOS Medicare supplier number.

/s/
Alfonso J. Montano
Administrative Law Judge