Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Reverence Home Health and Hospice
(NPI: 1649524331)
(PTAN: 1235530002),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-1746

Decision No. CR3597

Date: January 23, 2015

DECISION

Petitioner, Reverence Home Health and Hospice, challenges the original denial of its enrollment in the Medicare program as a Durable Medical Equipment, Orthotics, Prosthetics and Supplies (DMEPOS) supplier and, following the acceptance of its Corrective Action Plan (CAP), the assigned effective date of enrollment. For the reasons stated below, I affirm the original determination to deny Petitioner's enrollment application and conclude that the subsequently assigned effective date of October 9, 2013, is permissible.

I. Background and Procedural History

Petitioner acquired an infusion pharmacy from Genesys Health Enterprises on January 1, 2013. CMS Exhibit (Ex.) 7 at 1. Petitioner believed that Genesys Health Enterprises previously obtained a provider transaction access number (PTAN) for the infusion pharmacy location that Petitioner purchased, however, that location was not separately enrolled as a Medicare supplier. CMS Ex. 7 at 1-2. Due to the change in ownership of the infusion pharmacy, Petitioner submitted a Form CMS-855S enrollment application to Palmetto GBA National Supplier Clearinghouse (Palmetto NSC or NSC), an

administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), seeking an effective enrollment date of January 1, 2013. CMS Ex. 1. The enrollment application was signed on February 4, 2013. CMS Ex. 1 at 39.

On April 30, 2013, Palmetto NSC requested additional information from Petitioner in order to process the enrollment application. CMS Ex. 1 at 89. Petitioner responded and Palmetto NSC received the requested information on May 7, 2013. CMS Ex. 1 at 79-91. On April 30, 2013, NSC arranged for an inspector to conduct a site inspection of Petitioner's location. CMS Ex. 1 at 92; CMS Ex. 2 at 1. NSC specifically requested that the inspector "take pictures of the sign . . . ." CMS Ex. 1 at 92.

The site inspection took place on May 29, 2013. CMS Ex. 2 at 1, 2. The inspection report included comments by the inspector that "[Petitioner] does not have a sign on the building and supplier states . . . a sign will probably not be put up. There is a sign in the building on the door." CMS Ex. 2 at 6, 7. The inspector also noted that Petitioner shared a building entrance with another supplier of durable medical equipment. CMS Ex. 2 at 3. The inspector commented that "[Petitioner] is located in the Materials Management Building on the Genesys Hospital Campus. It shares an entrance with Genesys Health Enterprises." CMS Ex. 2 at 7.

The inspector requested additional information and on June 6, 2013, Petitioner faxed the information to Palmetto NSC. CMS Ex. 2 at 32-35.

NSC issued an initial determination on September 4, 2013, denying billing privileges to Petitioner based on noncompliance with Supplier Standards 7, 14, and 29. Palmetto NSC offered Petitioner an opportunity to file a CAP or a reconsideration request.[1] CMS Ex. 3.

Petitioner filed a CAP and reconsideration request, separately. Both were dated September 26, 2013. Petitioner's CAP and reconsideration request filings are very similar and at times include identical text. They also have the same attachments. Both filings were timely. CMS Ex. 4; CMS Ex. 5.

[1] Although page 1 of the initial determination indicated that Petitioner may file a CAP or reconsideration request, on page 3 it also stated that Petitioner has the "right to request reconsideration under 42 CFR 498.22, which will be conducted by an independent fair hearing officer." CMS Ex. 3 at 1, 3. I do not construe NSC's use of the disjunctive in the initial determination to mean that NSC intended to force Petitioner to choose between filing a CAP and a reconsideration request. I know of no legal basis for requiring such a choice and CMS has not taken the position that Petitioner's filing of a CAP precluded Petitioner from filing a reconsideration request. Petitioner apparently did not believe it was precluded from filing both a CAP and reconsideration request because it filed both on the same day. *See* CMS Ex. 4; CMS Ex. 5.

On October 10, 2013, Palmetto NSC issued a decision in which it found that Petitioner was in compliance with all the DMEPOS supplier standards based on the CAP Petitioner submitted. CMS Ex. 6 at 3. On October 11, 2013, Palmetto sent a determination to Petitioner that set October 9, 2013 as the effective date for billing privileges; however, this determination did not provide any notice of appeal rights. CMS Ex. 6 at 1.

After Palmetto NSC set the October 9, 2013 effective date, Petitioner continued to press its reconsideration request, disputing the basis for the initial denial of its enrollment application and seeking to obtain additional relief in the form of an earlier effective date. CMS Ex. 7; CMS Ex. 8. In response, Palmetto NSC sent an email indicating that it was upholding the October 9, 2013 effective date determination. CMS Ex. 8 at 2. Petitioner filed a request for hearing with the Civil Remedies Division on December 11, 2013. CMS Ex. 9.

In its hearing request, Petitioner continued to dispute, among other things, that it had been out of compliance with the supplier standards during the May 2013 site inspection, and specifically disputed the October 9, 2013 effective date. CMS Ex. 9. The Director of the Civil Remedies Division docketed the request as C-14-449, and administratively assigned the case to me for a hearing and decision. In response to my December 24, 2013 Acknowledgment and Prehearing Order, CMS filed a motion to dismiss or in the alternative a motion for summary judgment arguing that Petitioner had never filed a reconsideration request; CMS later withdrew the motion after Petitioner submitted a copy of the reconsideration request. CMS Ex. 10 at 2. CMS conceded that it never issued a formal reconsidered determination but urged me to adjudicate the case because it was clear that if I remanded the case, Palmetto NSC would uphold the initial determination to deny. CMS Ex. 10 at 2. CMS also stated that if Petitioner requested remand, CMS would consent. CMS Ex. 10 at 2. I remanded the case for Palmetto NSC to assign a contract hearing officer to consider Petitioner's request for reconsideration because, under the regulations, a hearing officer needed to render the reconsidered determination. I also stated that NSC's email was probably not intended as a reconsidered determination because it did not meet the regulatory requirements of a reconsidered determination. Specifically, the email did not provide a basis for denying the reconsideration request and a notice of appeal rights. The remand order stated that when the contract hearing officer rendered the reconsidered determination, notice would be provided to Petitioner that it had the right to request a hearing. CMS Ex. 10 at 3.

Following remand, a Palmetto NSC hearing officer issued a reconsidered determination on June 18, 2014, in which it upheld Palmetto NSC's previous action. The hearing officer noted that on reconsideration, its scope of review was limited to the circumstances as presented during the initial determination to deny enrollment. The hearing officer reiterated that at the time of the May 2013 inspection, Petitioner did not meet the compliance standards. However, the hearing officer explained that the Palmetto NSC reviewed Petitioner's CAP and determined that subsequent to the May 2013 inspection,

Petitioner met the compliance standards. The hearing officer stated that the Palmetto NSC correctly determined Petitioner's enrollment effective October 9, 2013 based on 42 C.F.R. § 405.812. CMS Ex. 11.

Petitioner filed another request for hearing on August 15, 2014, in which it again disputed NSC's determination that Petitioner had been out of compliance with the supplier standards during the May 2013 site inspection and that the October 9, 2013 effective date was correct. Petitioner requested an effective date of enrollment of January 1, 2013 or, in the alternative, May 17, 2013. This request was docketed as C-14-1746, and the Director of the Civil Remedies Division administratively assigned this case to me for a hearing and decision. In response to my September 2, 2014 Acknowledgment and Prehearing Order (Order), CMS filed a motion for summary disposition and supporting brief (CMS Br.) with eleven proposed exhibits marked as CMS Exs. 1-11. Petitioner filed an opposition to the CMS motion (P. Br.) and one proposed exhibit marked as P. Ex. 1. CMS then filed a reply brief (CMS Reply).

II. Decision on the Record

The parties have not objected to any of the submitted exhibits. Order ¶ 7. Therefore, I admit CMS Exs. 1-11 and P. Ex. 1 into the record.

CMS did not offer any witnesses to testify in this case and did not submit any written direct testimony. Petitioner submitted a witness list with one witness, but did not provide any written direct testimony as required by my Order. Order ¶ 8. As stated in my Order, an in-person hearing to cross-examine witnesses would only be necessary if a party files admissible, written direct testimony, and the opposing party requests to cross-examine the witness. Order ¶ 10. Because there was no written direct testimony offered by the parties, neither party could request to cross-examine a witness. Therefore, I will issue a decision based on the written record. *See Marcus Singel, D.P.M.*, DAB No. 2609, at 5-6 (2014).

III. Issue

Whether CMS had a legitimate basis for denying Petitioner's enrollment application.

IV. Jurisdiction

The denial of a supplier's enrollment in the Medicare program is an initial determination that is subject to review by an administrative law Judge (ALJ). 42 U.S.C. § 1395cc(j)(8); 42 C.F.R. §§ 405.803; 498.3(b)(17); 498.5(*l*)(2); *see also* 42 C.F.R. § 405.812 (stating rules for setting effective date of enrollment if an ALJ determines that a DMEPOS supplier should not have been denied enrollment). Therefore, I have jurisdiction to consider the issue stated above.

Without expressly challenging my jurisdiction, CMS indicates in its brief that once Palmetto NSC approved Petitioner's CAP and established the October 9, 2013 effective date, Petitioner's original reconsideration request of the denial of the enrollment application (CMS Ex. 5) was moot. CMS Br. at 8. This is incorrect because Palmetto NSC, following its decision to accept Petitioner's CAP, established Petitioner's effective date as one that is later than could have been assigned should Petitioner have prevailed on the merits of its reconsideration request. A determination on reconsideration by a contract hearing officer or a decision by an ALJ favorable to Petitioner could have resulted in an effective date as early as the date of the initial determination denying Petitioner's enrollment application (42 C.F.R. § 405.812), which in this case was September 4, 2013. CMS Ex. 3 at 1. Therefore, because the approval of the CAP did not provide full redress to Petitioner, Petitioner, as a prospective supplier, had the right to a reconsidered determination as the initial determination still "affects" Petitioner. 42 C.F.R. § 498.22(a); *see also* 42 C.F.R. § 498.5(*l*)(1); *Victor Alvarez, M.D.*, DAB No. 2325, at 3(2010) (indicating that CMS's determination to set an effective date for billing privileges that is later than the date sought by a supplier is consider to be a denial of enrollment for purposes of appeal rights). Petitioner timely filed a reconsideration request. Therefore, unless Palmetto NSC's CAP decision granted Petitioner a fully favorable determination, Palmetto NSC was under an obligation to issue a reconsidered determination under 42 C.F.R. § 498.24-498.25; *see also* 42 C.F.R. §§ 405.803 (providing that suppliers have the right to appeal the initial determination to deny a supplier's enrollment application by following the procedures in 42 C.F.R. Part 498 and indicating that a contract hearing officer will conduct the reconsideration), 405.806(d) (discussing consequences of the reversal of a denial of enrollment), 405.812 (provides instructions for setting an effective date for billing privileges if a contract hearing officer determines that a DMEPOS supplier's denied enrollment application meets the supplier standards and any other requirements that apply).

Further, since the reconsidered determination that Palmetto NSC issued was not fully favorable (CMS Ex. 11), Petitioner was still an affected party (*see* 42 C.F.R. § 498.2 (definition of *Affected party*) and has the right to ALJ review. 42 C.F.R. §§ 498.5(*l*)(2), 498.40(a). In fact, both of Petitioner's requests for hearing specifically continue to dispute that Petitioner failed to be in compliance with three supplier standards, the reason that Palmetto NSC denied Petitioner's enrollment application in the initial determination. Request for Hearing (RFH) at 2-3; CMS Ex. 9 at 2-3.

CMS's assertion that Petitioner's case was moot is enlightening as it provides an explanation why Palmetto NSC refused to assign Petitioner's timely reconsideration request to a contract hearing officer so that a reconsidered determination could be issued, and instead responded to Petitioner in an informal email. *See* CMS Ex. 8 at 2. Without remand of this case, Petitioner would have been deprived of the review it sought of the initial determination (review from the reconsideration level through judicial review), as is Petitioner's right under the Social Security Act (42 U.S.C. § 1395cc(j)(8)) and the

regulations (42 C.F.R. §§ 498.5-498.95). When a CMS contractor refuses to provide review as required by the regulations, an ALJ may remand the case for CMS to consider a reconsideration request. *Victor Alvarez, M.D.*, DAB CR2070, at 5-6 (2010) (interpreting a request for hearing as a reconsideration request and remanding to CMS to issue a reconsidered determination) *aff'd*, DAB No. 2325, at 11-12 ("we conclude that the ALJ appropriately remanded the case for reconsideration.").

Although the procedural history of this case appears complex, the authority to review this case is simple. Petitioner, as a prospective supplier that had been denied enrollment and then provided an effective date later than it sought, is entitled to further review of CMS's actions. Between the contract hearing officer's reconsidered determination and the findings of fact and conclusions of law that follow, Petitioner has now been provided with such review.

V. Findings of Fact and Conclusions of Law[2]

In order for a DMEPOS supplier to receive Medicare payments for items furnished to a Medicare-eligible beneficiary, the Secretary of Health and Human Services (Secretary) must first issue a supplier number to that supplier. 42 U.S.C. § 1395m(j)(1)(A). The Social Security Act establishes as a basic requirement that a DMEPOS supplier must maintain a physical facility on an appropriate site, and further authorizes the Secretary to create other DMEPOS supplier requirements. *Id*. § 1395m(j)(1)(B)(ii). The Secretary promulgated regulations establishing DMEPOS supplier enrollment standards that a DMEPOS supplier must meet and maintain. 42 C.F.R. §§ 424.57(c)(1)-(30), 424.520(c), 424.57(b). Most important for this case, the supplier standards require that the supplier maintain a permanent, visible sign in plain view and post its hours of operation. *Id*. § 424.57(c)(7)(i)(D). Additionally, the referenced standard requires that if the supplier's business is in a building complex, as is the case with Petitioner, then the posted sign needs to be visible "at the main entrance of the building." *Id*. CMS may conduct on-site reviews and inspections to ascertain supplier compliance with enrollment requirements and supplier standards. *Id*. §§ 424.57(c)(8), 424.510(d)(8), 424.517(a).

1. On the day of the site inspection (May 29, 2013), Petitioner did not have a permanent, visible sign with Petitioner's name posted on Petitioner's facility.

On April 30, 2013, a site visit was ordered and the inspection took place of May 29, 2013. CMS Ex. 2 at 1. The reason for the inspection is listed as: "Application." CMS Ex. 2 at 1, 2. The order for the inspection specifically requires the inspector to "take pictures of the sign . . . ." CMS Ex. 2 at 1. The inspector reported that Petitioner did not have "a permanent, visible sign with the supplier's business name posted on the facility." CMS Ex. 2 at 2, 3. The inspector commented: "[Petitioner] does not have a sign on the

[2] My numbered findings of fact and conclusions of law appear in bold and italics.

building and supplier states . . . a sign will probably not be put up. There is a sign in the building on the door." CMS Ex. 2 at 7.

In addition to the evidence from the inspector's report, Petitioner admitted in its reconsideration request that it did not have a permanent sign posted on the building with its name: "At the time of the site inspection a permanent sign had already been ordered. The sign arrived and was installed shortly after the site inspector's visit." CMS Ex. 5 at 1. Petitioner even enclosed a picture of the new sign installed after the site visit. CMS Ex. 5 at 7-8. Petitioner made the same admissions in the September 26, 2013 CAP it submitted to Palmetto NSC. CMS Ex. 4.

Based on the undisputed evidence of record, I find that Petitioner failed to have a permanent, visible sign posted on the outside of the building that housed its offices.

2. CMS was authorized to deny Petitioner's Medicare enrollment because Petitioner was not in compliance with Supplier Standard 7 (42 C.F.R. § 424.57(c)(7)(D)) at the time of the site inspection.

Supplier Standard 7 requires DMEPOS suppliers to maintain a permanent, visible sign in plain view and post its hours of operation. 42 C.F.R. § 424.57(c)(7)(i)(D). Additionally, the standard requires that if the supplier's business is in a building complex, as is the case with Petitioner, then the posted sign needs to be visible "at the main entrance of the building." *Id.* As found above, the record supports the conclusion that Petitioner did not have a permanent, visible sign posted on the outside of the building at the main entrance. Although the inspector's external pictures are unhelpful because of their poor quality, the inspector's report, along with Petitioner's admission, is sufficient to show that Petitioner failed to meet Supplier Standard 7 at the time of the site visit. Further, it is Petitioner's obligation to show compliance with enrollment requirements. 42 C.F.R. § 424.545(c). This, Petitioner did not do.

Petitioner argues in its request for hearing that it successfully passed an accreditation survey and that this should be sufficient for it to have been found to be in compliance with the DMEPOS supplier standards. RFH at 2. However, as CMS points out, accreditation is a separate requirement and does not replace the CMS ordered site inspection. 42 C.F.R. § 424.57(c)(22).

Based on the undisputed evidence, I conclude that Petitioner failed to comply with Supplier Standard 7 because it did not maintain a permanent, visible sign in plain view as required by 42 C.F.R. § 424.57(c)(7)(i)(D). Therefore, I conclude that CMS had a legitimate basis to deny Petitioner's enrollment application. A prospective DMEPOS supplier must meet the supplier standards in section 424.57(c) to be enrolled. 42 C.F.R. § 424.57(c) (introductory text); *see also* 42 C.F.R. § 424.57(a) (definition of DMEPOS supplier). A failure to meet even one of the supplier standards is sufficient to deny the

enrollment application. *See 1866ICPayday.com*, L.L.C., DAB No. 2289, at 13 (2009); 42 C.F.R. § 424.57(c). Therefore, I do not need to consider the other alleged violations of the supplier standards that served as the basis for denial.

3. I have no authority to grant equitable relief in this case.

CMS determined Petitioner's effective date of enrollment as October 9, 2013. The regulations specifically state that billing privileges cannot commence until a supplier number issues. 42 C.F.R. §§ 424.57(b)(2), 424.520(c). Further, when a DMEPOS supplier has been denied enrollment, the subsequently assigned effective date cannot be earlier than the date of the original denial. 42 C.F.R. § 405.812. In the present case, CMS concluded, based on Petitioner's CAP, that Petitioner was in compliance by October 9, 2013. The assigned effective date of October 9, 2013, is permissible under the regulations.

Petitioner avers that it incurred substantial financial harm because of Palmetto NSC's failure to meet the requirement in Medicare Program Integrity Manual (MPIM) § 15.8.4(b) that a denial of enrollment should be issued within five days of determining noncompliance. P. Br. at 2, 3. Petitioner seeks an earlier effective date as a remedy. P. Br. at 2-3.

Even if the MPIM places such a requirement on Palmetto NSC, the applicable regulations in this case do not require the issuance of a determination in that time-frame. The MPIM provides guidance and procedures, but cannot override the regulations. To the extent that Petitioner's request is based on equitable considerations, I have no authority to grant equitable relief and must apply the regulations as written. *See US Ultrasound*, DAB No. 2302, at 8 (2010); *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14. Therefore, I uphold the effective date assigned by Palmetto NSC.

V. Conclusion

For the reasons stated above, I affirm CMS's determination to deny Petitioner's enrollment application.

/s/
Scott Anderson
Administrative Law Judge