

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Orthotic Prosthetic Associates Inc.,
d/b/a RJM Orthotic & Prosthetic Associates, Inc.
(PTAN: 1247220001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-2262

Decision No. CR4336

Date: October 20, 2015

DECISION

Petitioner, Orthotic Prosthetic Associates Inc., d/b/a RJM Orthotic & Prosthetic Associates, Inc., appeals the Centers for Medicare & Medicaid Services' (CMS's) decision to revoke its Medicare enrollment and billing privileges. As explained below, I find Petitioner was not in compliance with all Medicare requirements, and I uphold CMS's revocation determination. However, I modify the effective date of the revocation from October 31, 2014 to January 4, 2015.

I. Background and Procedural History

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). By letter dated December 5, 2014, Palmetto GBA National Supplier Clearinghouse (NSC), a Medicare contractor, notified Petitioner that it was revoking Petitioner's Medicare supplier number retroactive to October 31, 2014, and that Petitioner was barred from re-enrolling in the Medicare program as a supplier for two years from this date. CMS Ex. 4, at 1. The notice letter explained that site visits by a NSC representative on October 22 and 31, 2014, were unsuccessful because on both attempts Petitioner's facility was closed during its posted

hours of operation. The letter further explained that because an inspection could not be completed, NSC could not verify Petitioner's compliance with the supplier standards. Accordingly, NSC determined that Petitioner was not operational to furnish Medicare covered items and services and was in violation of 42 C.F.R. §§ 424.57(c)(7), 424.535(a)(5)(ii), and all other supplier standards in 42 C.F.R. § 424.57(c). The notice letter also stated that, according to NSC's records, Petitioner was not accredited, in violation of 42 C.F.R. § 424.57(c)(22). CMS Ex. 4, at 1-2.

Petitioner requested reconsideration. CMS Ex. 5. On February 24, 2015, a hearing officer issued an unfavorable decision upholding the revocation, finding that Petitioner was not in compliance with Medicare enrollment requirements, specifically Supplier Standards 7 and 22 (42 C.F.R. § 424.57(c)(7), (22)). CMS Ex. 1, at 1-4. Petitioner then timely requested a hearing with the Civil Remedies Division of the Departmental Appeals Board. On May 7, 2015, I issued an Acknowledgment and Pre-Hearing Order (Order). Pursuant to this Order, on June 8, 2015, CMS filed its pre-hearing brief and motion for summary judgment (CMS Br.), along with five exhibits (CMS Exs. 1-5). On August 17, 2015, Petitioner filed its pre-hearing brief opposing CMS's motion for summary judgment and cross-moving for summary judgment (P. Br.), along with six exhibits (P. Exs. 1-6) and the written direct testimony of its owner (Manfredi Cert.). Neither party objected to the other's exhibits, nor did CMS object to the written direct testimony proffered by Petitioner, so I admit all proffered exhibits and testimony into the record.

My Order advised the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would be necessary only if the opposing party affirmatively requested an opportunity to cross-examine a witness. Pre-Hearing Order ¶¶ 8, 9; *see Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823, at 7-8 (2002) (holding that the use of written direct testimony for witnesses is permissible so long as the opposing party has the opportunity to cross-examine those witnesses). CMS did not propose any witnesses, nor did it request to cross-examine the one witness, Petitioner's owner, proposed by Petitioner. I find, therefore, that an in-person hearing in this case is unnecessary, and I issue this decision on the full merits of the written record.

II. Analysis

A. Issue

The issue in this case is whether the evidence establishes that CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges.

B. Findings of Fact and Conclusions of Law

1. CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges because a NSC inspector was not able to access Petitioner's location on October 22 and 31, 2014, during Petitioner's posted hours of operation, in violation of Supplier Standard 7.

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) (42 U.S.C. § 1395m(j)(1)(A)). To enroll in Medicare and receive billing privileges, a DMEPOS supplier is required to meet and maintain compliance with the 30 “supplier standards” set forth in 42 C.F.R. § 424.57(c). In pertinent part, Supplier Standard 7 requires a DMEPOS supplier to be in a location accessible to the public and CMS and to be accessible and staffed during its posted hours of operation. 42 C.F.R. § 424.57(c)(7)(i)(B),(C).

If a DMEPOS supplier is found not to meet the standards in section 424.57(c), CMS will revoke the supplier's billing privileges. 42 C.F.R. § 424.57(e). Where a Medicare contractor's representative finds the supplier's facility closed during its posted hours, the supplier does not meet the regulatory requirements of section 424.57(c)(7), and CMS may appropriately revoke the supplier's billing privileges. *See Ita Udeobong*, DAB No. 2324 (2010).

In support of its revocation determination, CMS introduced the inspection report of the NSC investigator who attempted to visit Petitioner's location. According to the report, the investigator attempted to visit Petitioner's facility at approximately 11:45 a.m. on Wednesday, October 22, 2014, and at approximately 3:55 p.m. on Friday, October 31, 2014. On both attempts, the inspector noted that the facility was closed, no staff appeared to be present, and no signs of customer activity were present. CMS Ex. 3 at 1. Date- and time-stamped photographs support the investigator's observations and show that the location's posted hours were Monday-Friday 8:30 a.m.-4:30 p.m. CMS Ex. 3 at 2-5.

Petitioner concedes that the investigator was not able to access its location during its posted hours of operation on October 22 and 31, 2014. Petitioner argues, however, that its closure at those times was a “de minimis” deviation from its posted hours, not reflective of its standard operations, and that there are reasonable explanations for the closures. P. Br. at 6-7.

According to Petitioner, the location was inaccessible on October 22 because staff briefly locked the front door to take a lunch break or to use the bathroom. Petitioner asserts that its business involves meeting with customers by appointment, so it allows staff flexible

lunch periods during times when there are no scheduled appointments. Petitioner also asserts that it is office policy for staff to lock up while using the bathroom to ensure the safety and security of its employees, files, and inventory. P. Br. at 6-7; Manfredi Cert. at ¶¶ 7-10.

Petitioner says that it was inaccessible on October 31 because its owner allowed a staff member to close early to spend Halloween with her children. P. Br. at 7; Manfredi Cert. at ¶¶ 11-13. Petitioner argues that by attempting to visit the location on Halloween, a “widely celebrated holiday,” the investigator violated CMS’s own written protocols on the timing of inspections. P. Br. at 7-8.

I find that Petitioner’s closures on October 22 and 31, 2014, constituted noncompliance with Supplier Standard 7. As Petitioner admits, its location was not accessible at certain times during its posted hours of operation on those dates. Although Petitioner argues that it was inaccessible for only brief periods and that there were sound management rationales for the closures, the regulations require a supplier to make whatever reasonable arrangements are necessary to keep its business open during all of its posted hours of operation. *A to Z DME, LLC*, DAB CR1995, at 6 (2009), *aff’d*, *A to Z DME, LLC*, DAB No. 2303 (2010). (“A Medicare supplier differs from a strictly private business in that it is an integral part of a publicly run program. The requirement that a supplier be open at all times during normal business hours reflects CMS’s determination that a supplier be available to beneficiaries to meet their needs and to alleviate their medical conditions.”). This is true even in situations where beneficiaries do not routinely visit a supplier’s facility. 73 Fed. Reg. 4503, 4506 (2008) (preamble to proposed rule).

Further, CMS guidance does instruct contractors not to perform site verifications on “holidays,” without elaborating what is meant by that term. CMS Pub. 100-08, Medicare Program Integrity Manual, Ch. 15, § 15.20.1(B). However, in the preamble to the final rule that implemented section 424.57(c)(7)(i)(B) and (C), in response to comments suggesting that CMS should allow facilities to temporarily close during posted hours to account for circumstances including holidays, the drafters noted that CMS has “always made exceptions concerning posted hours for disasters and emergencies and Federal and State holidays.” 75 Fed. Reg. 52,629, 52,636 (2010) (emphasis added). Thus, suppliers may be excused for closing during their posted hours of operation on federal and state holidays, and it may not be appropriate for contractors to perform site inspections on those days. Halloween is not a federal or state holiday, however.

Because Petitioner failed to comply with Supplier Standard 7, CMS had a legitimate basis to revoke Petitioner’s Medicare enrollment and billing privileges. 42 C.F.R. § 424.57(e). Failure to comply with even one supplier standard on one occasion is a sufficient basis

for revocation, so I do not address Petitioner's purported noncompliance with Supplier Standard 22 in order to sustain CMS's decision to revoke. *See 1866ICPayday.com*, DAB No. 2289, at 13 (2009).

2. The correct effective date for the revocation is January 4, 2015, 30 days after the date that NSC issued the initial revocation determination.

NSC's initial notice letter to Petitioner dated December 5, 2014, informed Petitioner that its billing privileges were revoked effective October 31, 2014, "the date [CMS] determined your practice location is not operational." CMS Ex. 4 at 1. In setting October 31, 2014, as the effective date of the revocation, CMS was apparently relying on 42 C.F.R. § 424.535(g), which provides in part that if CMS revokes a provider or supplier's billing privileges on the ground that the provider or supplier's practice location is not operational, the revocation is effective as of the date that CMS or its contractor determined the provider or supplier was no longer operational. As a general rule, however, the regulations provide that a revocation becomes effective 30 days after the provider or supplier is sent notice of the revocation. *See* 42 C.F.R. §§ 424.57(e), 424.535(g). The general rule, rather than the exception present in section 424.535(g), should govern here.

NSC's initial notice letter explained that Petitioner had been found not operational, in violation of 42 C.F.R. § 424.535(a)(5)(ii), as well as out of compliance with 42 C.F.R. § 424.57(c)(7) and (22). CMS Ex. 4 at 1-2. But the Medicare hearing officer's reconsidered decision dated February 24, 2015 – which is the determination before me for review (*see* 42 C.F.R. § 498.5(1)(2); *Neb Group of Arizona*, DAB No. 2573, at 5-6; *Joy Medical Supply*, DAB No. 2572, at 5) – did not conclude that Petitioner was not operational. The hearing officer cited the definition of "operational," but she found only that Petitioner "has not shown compliance with supplier standard[s] 7 and 22" and she stated that her decision was made "in accordance with Medicare guidelines, as outlined in . . . 42CFR424.57."¹ CMS Ex. 1 at 2-4.

The hearing officer's reconsidered decision did not modify the effective date of the revocation of Petitioner's billing privileges. However, because the hearing officer did not find that Petitioner's practice location was not operational and instead found only that Petitioner was out of compliance with the supplier standards in section 424.57, the effective date should have been determined in accordance with section 424.57(e). Thus, the proper effective date for the revocation of Petitioner's billing privileges is January 4, 2015, 30 days after the date that NSC issued the initial revocation determination.

¹ I also note that CMS argued before me only that the revocation was appropriate because Petitioner violated Supplier Standards 7 and 22, not because Petitioner's practice location was not operational.

III. Conclusion

I sustain the revocation of Petitioner's supplier number and billing privileges because CMS has shown that Petitioner was not accessible and staffed on October 22 and 31, 2014, during Petitioner's posted hours of operation, as the regulations require. However, in accordance with 42 C.F.R. § 424.57(e), I modify the effective date of the revocation to January 4, 2015. Petitioner is barred from re-enrolling in Medicare for two years from this date.

/s/

Joseph Grow
Administrative Law Judge