

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Lyncourt Footcare, PC
(Supplier No. 6380430001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-573

Decision No. CR3214

Date: May 1, 2014

DECISION

The Centers for Medicare & Medicaid Services (CMS) revoked the Medicare billing privileges of Petitioner, Lyncourt Footcare, PC. Petitioner appealed. As discussed below, the evidence of record supports CMS's determination. Therefore, I affirm the revocation of Petitioner's Medicare billing privileges.

I. Background

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). In June 2013, Petitioner's owner, Douglas Dickson, D.P.M., submitted a Form CMS-855S to CMS in order to revalidate Petitioner as a DMEPOS supplier. CMS Ex. 1, at 1-26. Because its application was found to be incomplete, Petitioner submitted further information in July 2013. CMS Ex. 1, at 27-38. On the revalidation enrollment application, Petitioner indicated that its office was located at 792 N. Main Street, North Syracuse, New York 13212 and its hours of operation were Monday to Friday from 8:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:00 p.m. CMS Ex. 1, at 7.

On Thursday, August 15, 2013, at 4:02 p.m. and Friday, September 6, 2013, at 4:03 p.m. a site inspector affiliated with the National Supplier Clearinghouse (NSC), an administrative contractor for CMS, attempted to conduct a site inspection of Petitioner's 792 N. Main Street office. Several businesses were located in the building at that address. During both attempted inspections, the inspector observed that Petitioner's service window had a blind pulled down. On the August 15, 2013 attempt, the inspector spoke with an employee from one of the other businesses in the building and learned that Petitioner is regularly closed on Thursdays. CMS Ex. 2.

On October 9, 2013, NSC issued an initial determination revoking Petitioner's Medicare supplier number effective September 6, 2013. Based on the site inspector's attempted inspections, NSC determined that Petitioner failed to post its hours of operation and was not operational. Further, NSC found that Petitioner's liability insurance policy indicated an incorrect address. NSC barred Petitioner from reenrolling in the Medicare program for two years from this effective date. CMS Ex. 3.

Petitioner filed a timely request for reconsideration. CMS Ex. 4. However, on December 24, 2013, a NSC hearing officer issued an unfavorable reconsidered determination upholding the revocation of Petitioner's Medicare billing privileges. CMS Ex. 5.

On January 19, 2014, Petitioner timely filed a request for hearing (RFH) before an administrative law judge, which included five photographs (RFH Supporting Documents 1-5). On January 28, 2014, I issued an Acknowledgment and Pre-hearing Order (Order). Pursuant to the Order, CMS filed its brief (CMS Br.) and five exhibits (CMS Exs. 1-5). Petitioner submitted a brief (P. Br.) and a supplemental brief (P. Supp. Br.). CMS filed a reply brief (CMS Reply Br.).

II. Decision on the Record

In the absence of objection, I admit CMS Exs. 1-5 and Petitioner's RFH Supporting Documents 1-5 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 only be necessary if the opposing party requested an opportunity to cross-examine a witness. Order ¶¶ 8-11; *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).¹ Neither party offered written direct testimony. Therefore, there is no need for an in-person hearing and I issue this decision based on the written record. Order ¶¶ 9-11.

III. Issues

Whether CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges for failing to: be operational (42 C.F.R. § 424.535(a)(5)(ii)), post hours of operation (42 C.F.R. § 424.57(c)(7)(i)(D)); and have a comprehensive liability policy (42 C.F.R. § 424.57(c)(10)). I have jurisdiction to decide this issue. 42 C.F.R. §§ 498.3(b)(17), 498.5(1)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

IV. Findings of Fact, Conclusions of Law, and Analysis²

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 must first issue a supplier number to that DMEPOS supplier. 42 U.S.C. § 1395m(j)(1)(A). To receive direct-billing privileges, a DMEPOS supplier must meet and maintain each of the Supplier Standards in 42 C.F.R. § 424.57(c). CMS may revoke a currently enrolled DMEPOS supplier's Medicare enrollment and billing privileges if CMS determines that the DMEPOS supplier is not in compliance with any of the Supplier Standards or, upon on-site review, that the DMEPOS supplier is no longer operational to furnish Medicare covered items or services. 42 C.F.R. §§ 424.57(d), 424.535(a)(5)(ii). After a DMEPOS supplier's Medicare enrollment and billing privileges are revoked, it is barred from reenrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c).

1. Petitioner's location at 792 N. Main Street, North Syracuse, New York was not open and staffed when an NSC inspector attempted to conduct site inspections on August 15, 2013, and September 6, 2013.

The record reflects that an NSC site inspector appeared at Petitioner's 792 N. Main Street office on August 15, 2013, at 4:02 p.m., and September 6, 2013, at 4:03 p.m., but observed that there were no employees or customers present and that the service window had a blind drawn. CMS Ex. 2, at 1. The inspector documented these observations with photographs. CMS Ex. 2, at 2. The site inspector concluded that Petitioner was closed on both dates. CMS Ex. 2, at 1.

¹ Administrative decisions cited in this decision are accessible on the internet at: <http://www.hhs.gov/dab/decisions/index.html>.

² My findings of fact and conclusions of law are set forth in italics and bold in the discussion captions of this decision.

Petitioner admits that its 792 N. Main Street office was not open or staffed on Thursday, August 15, 2013, because Dr. Dickson sees patients in Fulton, New York each Thursday. CMS Ex. 4, at 1. Indeed, during the attempted inspection on that date, an employee of another office located in the building at 792 N. Main Street told the inspector that Petitioner was closed each Thursday. CMS Ex. 2, at 1. However, Petitioner asserts that on September 6, 2013, “we were operating under normal business hours all day.” CMS Ex. 4, at 1. Petitioner explains that Dr. Dickson sees patients by appointment and that the receptionist will often lower the blind on the service window when Dr. Dickson is not seeing patients in order to avoid being distracted by questions from individuals visiting other offices in the building who are not patients of Dr. Dickson. P. Br. at 1.

Although Petitioner asserts that it was staffed on September 6, 2013, Petitioner has provided no evidence of this. For example, Petitioner did not submit an affidavit from its receptionist who was allegedly present. Further, Petitioner’s admission that it is only open by appointment and that the blind on the service window was purposely drawn on September 6, 2013, is evidence that Petitioner was not open when the site inspector arrived.

Therefore, based on the evidence of record, I find that the NSC inspector attempted to conduct site inspections of Petitioner’s location at 792 N. Main Street, on August 15, 2013, and September 6, 2013, but that the NSC inspector was unable to complete the inspections because Petitioner’s office was closed and there is no evidence that any of Petitioner’s personnel were present at the location.

2. CMS had a legitimate basis to revoke Petitioner’s Medicare billing privileges because, based on two site inspections, Petitioner’s location was not operational as required by 42 C.F.R. § 424.535(a)(5)(ii).

For a supplier to be “operational,” it must be “open to the public for the purpose of providing health care related services . . . and [be] properly staffed, equipped, and stocked (as applicable, based on the type of facility and organization, provider or supplier specialty, or the services or items being rendered), to furnish these items or services.” 42 C.F.R. § 424.502. CMS may perform periodic site inspections to determine whether the supplier is operational and complying with Medicare enrollment requirements. 42 C.F.R. §§ 424.510(d)(8), 424.515(c), 424.517(a).

The facts in this case establish that Petitioner’s location was not open and available for the NSC’s site inspector to conduct inspections on August 15, 2013, and September 6, 2013. Therefore, CMS had a legitimate basis to conclude that Petitioner was not operational under 42 C.F.R. § 424.535(a)(5)(ii).

Petitioner argues that it is operational because it has a practice location, submits valid Medicare claims, and sees patients by appointment. P. Br. at 1. Further, Petitioner argues that as a physician DMEPOS supplier, it is not subject to the requirement that its office be open at least 30 hours a week. P. Supp. Br. at 1.

Petitioner is correct that a DMEPOS supplier may be a physician and that when a physician furnishes DMEPOS to patients as part of his professional services, that physician DMEPOS supplier is not required to be open for a minimum of 30 hours a week. 42 C.F.R. § 424.57(a) (definition of DMEPOS supplier), (c)(30). However, Petitioner submitted a revalidation enrollment application in June 2013, along with additional information in July 2013, in which Petitioner indicated that its 792 N. Main Street office was open Monday through Friday from 9:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:00 p.m. CMS Ex. 1, at 7. Significantly, Petitioner did not indicate on the enrollment form that patients were seen by appointment only. CMS Ex. 1, at 7. Further, as late as July 30, 2013, Dr. Dickson signed a certification statement indicating that he read the revalidation enrollment application and that the information it contained was “true, correct, and complete.” CMS Ex. 1, at 33.

A supplier is responsible for the information certified on an enrollment application and the resulting revocation that may result. *Cf. Integrated Homecare Servs. Chicago Corp.*, DAB CR3070, at 8 (2014). Petitioner does not address the fact that its revalidation enrollment application stated that it was open all week during normal business hours. Further, Petitioner does not assert and the record does not reflect that Petitioner sought to inform CMS that its hours of operation changed between July 30, 2013, and August 15, 2013.

The NSC inspector’s well-documented attempts to conduct a site inspection outweigh Petitioner’s statements in its pleadings and briefs, which are not supported by evidence. Therefore, I uphold Petitioner’s revocation based on 42 C.F.R. § 424.535(a)(5)(ii).

3. CMS was required to revoke Petitioner’s Medicare billing privileges because Petitioner failed to post its hours of operation as required by 42 C.F.R. § 424.57(c)(7)(i)(D).

The site inspector noted that Petitioner did not have any posted hours of operation at the 792 N. Main Street office. CMS Ex. 2, at 1. CMS submitted photographs to support this observation. CMS Ex. 2, at 2. Petitioner admits that it did not have posted hours of operation and submitted pictures of the sign it posted with its hours of operation following the revocation of its Medicare billing privileges. RFH; RFH Supporting Documents 3 and 5.

All DMEPOS suppliers must post their hours of operation, either at the main entrance to a supplier's building or at the entrance to a supplier's offices if the supplier is located in an office complex. 42 C.F.R. § 424.57(c)(7)(i)(D). I find that Petitioner failed to post its hours of operation and conclude that Petitioner violated 42 C.F.R. § 424.57(c)(7)(i)(D). Therefore, the regulations require the revocation of Petitioner's Medicare billing privileges. 42 C.F.R. § 424.57(d).

4. Petitioner demonstrated compliance with the requirements of 42 C.F.R. § 424.57(c)(10).

In the initial determination, NSC stated that Petitioner violated the regulatory requirement that DMEPOS suppliers have comprehensive liability insurance. *See* 42 C.F.R. § 424.57(c)(10). The initial determination stated: "The certificate of liability your company submitted does not have the correct address of your facility." CMS Ex. 3, at 2.

The Certificate of Liability Insurance that Petitioner submitted to NSC indicated that Petitioner's address was 792½ N. Main Street. CMS Ex. 1, at 38. Petitioner informed the insurance company of the mistake and submitted a corrected copy with its reconsideration request that now shows Petitioner's address as 792 N. Main Street. CMS Ex. 4, at 4. Interestingly, the NSC hearing officer did not rely on this basis to uphold Petitioner's revocation on reconsideration. CMS Ex. 5. However, CMS counsel resurrected the issue in its brief and argues that Petitioner maintained liability insurance on a location that was not Petitioner's actual office in violation of the regulation. CMS Br. at 12-13.

CMS's argument is too clever by half. Other than noticing that the insurance company made a minor typographical error on the Certificate of Liability Insurance, CMS's position that Petitioner's office was uninsured has no support. Petitioner's ability to rapidly obtain a corrected Certificate of Liability Insurance from the insurance company is sufficient to show that the error on the Certificate of Liability Insurance did not substantively affect the insurance coverage. As stated at the top of the certificate: "This certificate is issued as a matter of information only This certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below." CMS Ex. 1, at 38.

Further, it appears that NSC was not entirely certain of its position related to Petitioner's alleged lack of liability insurance coverage. Had it been, NSC would have set a retroactive effective date back to the date when Petitioner's liability insurance lapsed. 42 C.F.R. § 424.57(c)(10). Based on the record before NSC, the effective date of

revocation ought to have been no later than July 24, 2013, which is the date on the defective certificate that Petitioner submitted to NSC. CMS Ex. 1, at 38. However, NSC established a revocation effective date of September 6, 2013, which is clearly based on its finding that Petitioner was non-operational as of the second site visit. *See* 42 C.F.R. § 424.535(g).

Revocation of Medicare billing privileges creates significant hardships for suppliers. It may even cause them to go out of business. As the NSC hearing officer understood on reconsideration, CMS ought to avoid basing such a serious administrative sanction on the most minor of typographical errors.

5. I do not have the authority to provide equitable relief or consider the corrective action that Petitioner has taken since its Medicare billing privileges were revoked.

Petitioner has raised a number of reasons as to why CMS should reconsider its action to revoke him. As mentioned above, Petitioner provided proof with his reconsideration request that he obtained a corrected copy of his liability insurance certificate. CMS Ex. 4, at 4. In his RFH, Petitioner indicated that he posted hours of operation and provided photographs as proof. RFH; RFH Supporting Documents 3 and 5. Petitioner has also argued in his briefs that he has been a supplier for over ten years, has not had any previous problems with CMS, that humans make mistakes and should not be penalized for them when they have corrected those mistakes, and that Petitioner's elderly patients will be adversely affected by Petitioner's revocation. RFH; P. Br at 1-2; P. Supp. Br.

I cannot consider any of these issues. I simply 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 (2009). I also have no authority to review a decision by CMS not to accept the corrective action proposed or taken by a supplier. *See DMS Imaging, Inc.*, DAB No. 2313 (2010); *see also* 42 C.F.R. § 405.809.

V. Conclusion

Based on the reasons stated above, I affirm the determination to revoke Petitioner's DMEPOS supplier number and Medicare billing privileges effective September 6, 2013.

/s/
Scott Anderson
Administrative Law Judge