

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Revolution Sport & Spine Therapy, LLC,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-507

Decision No. CR4862

Date: June 8, 2017

DECISION

The Centers for Medicare & Medicaid Services (CMS), through an administrative contractor, denied the application of Revolution Sport & Spine Therapy, LLC (Revolution Sport or Petitioner) to enroll in the Medicare program because the practice location listed on the enrollment application was still under construction when a site inspector from the CMS administrative contractor attempted a site visit. Revolution Sport requested a hearing before an administrative law judge to dispute the denial. More specifically, Revolution Sport wants the CMS administrative contractor to send another site inspector to its facility because it is now open and seeing patients. Based on the undisputed facts in this case, I must affirm CMS's denial of Revolution Sport's enrollment application because Revolution Sport was not operational on the date that it was supposed to be open. However, I urge the CMS administrative contractor to reopen Revolution Sport's enrollment application and send another inspector so that Revolution Sport may continue forward in the enrollment process.

I. Background and Procedural History

Revolution Sport submitted an application to enroll in the Medicare program as a supplier on or about October 31, 2016. Hearing Request at 1.

In a December 12, 2016 initial determination, a CMS administrative contractor denied Revolution Sport's enrollment application for the following reason:

(42 CFR §424.530(a)(5))-On-Site Review/Other Reliable Evidence that Requirements Not Met

An onsite review was conducted on December 1, 2016 at 35249 Kenai Spur Hwy, Ste C, Soldotna, AK 99669-7623 and the onsite failed.

The location appears to still be under construction and therefore not currently open for business.

CMS Exhibit (Ex.) 5 at 1.

Revolution Sport timely requested reconsideration of the denial. CMS Ex. 2. In the reconsideration request, Revolution Sport stated:

I was informed that our application was denied because we failed the site visit. I met the inspector when he came down to check our clinic site. He toured the clinic with me and validated that our new clinic business was for real. We had some delays with our remodel and our construction crew was onsite working at the time. If it were not for the construction delays, we would have been treating patients at the time he came to inspect.

I would like to please appeal your denial. Myself and my business partners all quit our jobs with the local hospital so that we could chase our dream of having an independent clinic. We think that we can provide better care, better customer service and better outcomes than what the status quo is in our area. If you need to do another site visit, then could we arrange that without having to start from scratch with re-filing for individual and group provider numbers. We are trying to in good-faith to follow all of the correct Medicare enrollment rules and procedures

CMS Ex. 4 at 1.

On March 7, 2017, the CMS administrative contractor issued an unfavorable reconsidered determination that upheld the denial of enrollment. CMS Ex. 1.

Revolution Sport requested a hearing to dispute the reconsidered determination. Revolution Sport submitted with the hearing request pictures of its completed facility. On April 5, 2017, I issued an Acknowledgment and Pre-Hearing Order (Order), which established a submission schedule for pre-hearing exchanges. In response, CMS filed a motion for summary judgment and prehearing brief along with six exhibits. Petitioner also filed a motion for summary judgment and prehearing brief (P. Br.); however, Petitioner did not file any exhibits.

II. Decision on the Written Record

I admit CMS Exs. 1 through 6 into the record because Petitioner did not object to them. Order ¶ 7; Civil Remedies Division Procedures (CRDP) § 14(e).

My Order advised the parties to submit written direct testimony for each of their witnesses and that I would only hold an in-person hearing if a party requested to cross-examine a witness. Order ¶¶ 8-10; CRDP §§ 16(b), 19(b). Neither party submitted any written direct testimony. Therefore, I issue this decision based on the written record. Order ¶ 10; CRDP § 19(d).

III. Issue

Whether CMS had a legitimate basis to deny Petitioner's Medicare enrollment application.

IV. Jurisdiction

I have jurisdiction to hear and decide this case. 42 U.S.C. § 1395cc(j)(8); 42 C.F.R. §§ 405.803(a), 424.545(a), 498.3(b)(17), 498.5(l)(2).

V. Findings of Fact and Conclusions of Law

- 1) Revolution Sport signed a lease for its facility on September 14, 2016. Hearing Request at 1.
- 2) Revolution Sport immediately began remodeling work after leasing the facility. Hearing Request at 1.

- 3) Revolution Sport submitted a supplier enrollment application to CMS on October 31, 2016. Hearing Request at 1.
- 4) When Revolution Sport filed the enrollment application, Revolution Sport indicated that it expected to be open for business no later than December 1, 2016. P. Br. at 1.
- 5) Revolution Sport's remodeling work on its facility was delayed because the landlord of its facility needed to upgrade the wiring at the facility to meet local building code standards. Hearing Request at 1; P. Br. at 1.
- 6) On December 1, 2016, at approximately 10:30 a.m., a site inspector from the CMS administrative contractor conducted a site visit of Petitioner's facility. CMS Ex. 6; Hearing Request at 1.
- 7) Revolution Sport's chief executive officer (CEO) showed the site inspector Petitioner's facility. Hearing Request at 1.
- 8) Due to the delays in remodeling the facility, construction was still underway when the inspector was at Petitioner's facility. Hearing Request at 1.
- 9) The site inspector took pictures of the construction taking place at Petitioner's facility. CMS Ex. 6 at 2; Hearing Request at 1.
- 10) The site inspector prepared a report in which he indicated that: Revolution Sport was not open for business; Revolution Sport's facility did not appear to have employees present; there did not appear to be signs of customer activity at Revolution Sport's facility; and Revolution Sport's facility did not appear operational. The site inspector also noted that Revolution Sport's facility was under construction and that the CEO indicated plans to open the facility in January 2017. CMS Ex. 6 at 1.
- 11) CMS had a legitimate basis to deny Revolution Sport's Medicare enrollment application under 42 C.F.R. § 424.530(a)(5) because Revolution Sport was not operational at its practice location by the date it indicated in its enrollment application.

VI. Analysis

The Social Security Act (Act) authorizes the Secretary of Health and Human Services (Secretary) to promulgate regulations governing the enrollment process for providers and suppliers. 42 U.S.C. §§ 1302, 1395cc(j). A “supplier” is “a physician or other practitioner, a facility, or other entity (other than a provider of services) that furnishes items or services” under the Medicare provisions of the Act. 42 U.S.C. § 1395x(d); *see also* 42 U.S.C. § 1395x(u). This definition would encompass a group physical therapy practice like Revolution Sport.

A supplier must enroll in the Medicare program in order to receive payment for covered Medicare items or services. 42 C.F.R. § 424.505. The term “*Enroll/Enrollment* means the process that Medicare uses to establish eligibility to submit claims for Medicare-covered items and services.” 42 C.F.R. § 424.502. A provider or supplier seeking billing privileges under the Medicare program “must submit enrollment information on the applicable enrollment application.” 42 C.F.R. § 424.510(a)(1). “Once the provider or supplier successfully completes the enrollment process . . . CMS enrolls the provider or supplier into the Medicare program.” 42 C.F.R. § 424.510(a)(1).

However, in order to enroll, a supplier must be operational. 42 C.F.R. § 424.510(d)(8). Further, CMS may deny a supplier’s enrollment application if, upon an on-site review, CMS determines that the provider is not operational to provide Medicare-covered items or services. 42 C.F.R. § 424.530(a)(5)(i).

The term “operational” means:

the provider or supplier has a qualified physical practice location, is open to the public for the purpose of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked (as applicable, based on the type of facility or organization, provider or supplier specialty, or the services or items being rendered), to furnish these items or services.

42 C.F.R. § 424.502 (definition of *Operational*). In order “[t]o be ‘operational’ in accordance with the definition in section 424.502, a provider, among other things, must have a ‘qualified physical practice location’ that is ‘open to the public for the purpose of providing health care related services.’” *Viora Home Health, Inc.*, DAB No. 2690 at 7 (2016).

Petitioner admits that it filed an application for enrollment in the Medicare program and that it expected to be open by December 1, 2016. P. Br. at 1. The undisputed facts in this case show that a site inspector from the CMS administrative contractor conducted a site visit of Petitioner's facility on December 1, 2016; however, on that date, Petitioner's facility was not open to the public because it was still under construction.

These facts are sufficient for me to conclude that Petitioner was not operational by December 1, 2016. Therefore, because Petitioner's practice location, as identified in its enrollment application, was not open on December 1, 2016, I conclude that CMS had a legal basis to deny Petitioner's enrollment application under 42 C.F.R. § 424.530(a)(5) because Petitioner was not operational at its practice location.

I note that while I must uphold CMS's discretionary decision to deny Petitioner's enrollment application, CMS's decision is disconcerting. Revolution Sport's CEO met the site inspector at its facility on December 1, 2016. The site inspector saw Petitioner's facility under construction and recorded in his report that the CEO told him that Petitioner now planned on opening in January 2017. The CMS contractor could have recognized that the opening of a new facility might be delayed by unforeseen circumstances and set a new date for the site visit in January 2017. There would have been no threat of fraudulent billing because the effective date of Petitioner's Medicare billing privileges would have been the later of "[t]he date of filing of a Medicare enrollment application that was subsequently approved by a Medicare contractor, or [t]he date that the supplier first began furnishing services at a new practice location." 42 C.F.R. § 424.520(d). Therefore, Petitioner could not have billed Medicare until it actually started to provide services at its new facility.

Petitioner indicates that it is the largest physical therapy practice in their community in Alaska, and that many other physical therapists do not take Medicare. P. Br. at 1. If this is true, Medicare beneficiaries may have a reduced ability to obtain physical therapy services. To avoid this, CMS could reopen this matter under 42 C.F.R. § 498.30-.32 and conduct another site inspection to determine whether Petitioner is operational and meets enrollment requirements.

VII. Conclusion

I affirm CMS's determination to deny Revolution Sport's enrollment in the Medicare program.

/s/
Scott Anderson
Administrative Law Judge