Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Davilda Home Health, LLC
(NPI: 1588961262),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-677

Decision No. CR4976

Date: November 28, 2017

DECISION

National Government Services (NGS), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment and billing privileges of Petitioner, Davilda Home Health, LLC, because NGS determined Petitioner was not operational to furnish Medicare-covered items or services and was not in compliance with the Medicare enrollment requirements. Specifically, a site visit contractor was unable to gain entry during business hours on two consecutive days, and Petitioner was not reachable by telephone on a third day in August 2016. For the reasons stated herein, I affirm CMS's revocation of Petitioner's Medicare enrollment and billing privileges.

I. Background and Procedural History

Petitioner is a provider that was enrolled as a home health agency (HHA) in the Medicare program. *See* 42 U.S.C. § 1395x(u) (classifying an HHA as a "provider" in the Medicare program). On August 15, 2016, at approximately 2:45 pm, and August 16, 2016, at approximately 1:55 pm, an NGS site visit contractor attempted to conduct a site visit at Petitioner's office located at 1500 E. Tropicana Avenue, Suite # 122, Las Vegas, Nevada (herein "1500 E. Tropicana Ave. location"). CMS Exhibit (Ex.) 2 at 1. The site visit

contractor observed that the door to Petitioner's office was locked and the lights were turned off. CMS Ex. 2 at 1. The site visit contractor reported that Petitioner was not open for business, that employees/staff were not present, and that Petitioner did not appear to be operational. CMS Ex. 2 at 1. The site visit contractor placed a telephone call to Petitioner several days later, on August 19, 2016, and reached a "recording on an answering machine." CMS Ex. 2 at 1. Photographs taken by the site visit contractor confirm that he visited Petitioner's practice location. CMS Ex. 2 at 2-3.

In a November 29, 2016 initial determination, NGS revoked Petitioner's Medicare enrollment and billing privileges effective August 15, 2016 because the site verification surveys conducted on August 15 and 16, 2016 determined that Petitioner was not in compliance with 42 C.F.R. § 424.535(a)(5).[1] CMS Ex. 3 at 1. NGS also informed Petitioner that it would be barred from re-enrolling in the Medicare program for a period of two years, effective 30 days from the postmark date of the letter. CMS Ex. 3 at 2.

Petitioner requested reconsideration of the initial determination revoking its enrollment and billing privileges. CMS Ex. 1. Petitioner explained that it had a business meeting at the time of the site inspections, and the employee responsible for being present at the office was unexpectedly unavailable due to illness. CMS Ex. 1. Petitioner also stated it left a sign on the front door with an emergency telephone phone number. CMS Ex. 1.

CMS, through its Provider Enrollment & Oversight Group (PEOG), issued a reconsidered determination on March 17, 2017, at which time it explained that Petitioner's Medicare enrollment had been revoked pursuant to 42 C.F.R. §§ 424.535(a)(5) because the two failed site visits and an unanswered telephone call revealed that Petitioner was not operational to furnish Medicare-covered items or services at the 1500 E. Tropicana Ave. location. [2] CMS Ex. 6 at 4. CMS considered the evidence and arguments that Petitioner submitted in its request for reconsideration, and explained that Petitioner's reconsideration request "failed to provide any documentation to evidence that it was operational . . . ." CMS Ex. 6 at 4-5.

Petitioner filed a request for an administrative law judge (ALJ) hearing on May 5, 2017, which the Civil Remedies Division received on May 9, 2017. On May 19, 2017, I issued an Acknowledgment and Pre-Hearing Order (Pre-Hearing Order) directing the parties to

[1] NGS also cited 42 C.F.R. § 424.510(a)(1) as a basis for revocation, but CMS later reported that it had "incorrectly cited" that basis for revocation. CMS Exs. 3 at 1; 6 at 1.

[2] The letter from the PEOG also cited 42 C.F.R. § 424.535(a)(1) as a basis for revocation. CMS limited the arguments in its brief to Petitioner's noncompliance with 42 C.F.R. § 424.535(a)(5).

file pre-hearing exchanges, consisting of a brief by CMS and a response brief by Petitioner, along with supporting evidence, in accordance with specific requirements and deadlines.

In response to the Order, CMS filed a pre-hearing brief and motion for summary judgment (CMS Br.), and six proposed exhibits (CMS Exs. 1-6). Petitioner filed a letter in response to CMS's pre-hearing brief and motion for summary judgment (P. Br.) and eleven proposed exhibits (P. Exs. 1-11). In the absence of any objections, I admit CMS Exs. 1-6 and P. Exs. 1-11 into the record.

Neither party has submitted the written direct testimony of any witnesses, as permitted by Section 8 of my Pre-Hearing Order. *See, e.g., Lena Lasher*, DAB No. 2800 at 4 (2017) (discussing that when neither party submits written direct testimony as directed, "no purpose would be served by holding an in-person hearing"). I consider the record to be closed and the matter ready for a decision on the merits.[3] Pre-Hearing Order, §§ 9, 10.

II. Issue

Whether CMS has a legal basis to revoke Petitioner's Medicare enrollment and billing privileges because Petitioner was not operational at the practice location on file with CMS.

III. Jurisdiction

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

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

In order to participate in the Medicare program as a provider, entities must meet certain criteria to enroll and receive billing privileges. 42 C.F.R. §§ 424.505, 424.510. CMS may revoke the enrollment and billing privileges of a provider for any reason stated in 42 C.F.R. § 424.535. When CMS revokes a provider's Medicare billing privileges, CMS establishes a re-enrollment bar for a period ranging from one to three years. 42 C.F.R. § 424.535(c). Generally, a revocation becomes effective 30 days after CMS mails the initial determination revoking Medicare billing privileges, but if CMS finds a provider to be non-operational, as it did here, the revocation is effective from the date that CMS determines that the provider was not operational. 42 C.F.R. § 424.535(g).

[3] As an in-person hearing to cross-examine witnesses is not necessary, it is unnecessary to further address CMS's motion for summary disposition.

On-site review is addressed in 42 C.F.R. § 424.535(a)(5). Pursuant to 42 C.F.R. § 424.535(a)(5)(i), (ii), a supplier is non-operational if CMS determines upon an on-site review that it is "no longer operational to furnish Medicare-covered items or services" or that it otherwise fails to satisfy any Medicare enrollment requirement.

1. ***Petitioner's location at 1500 E. Tropicana Ave. was not open, accessible, and staffed when a site visit contractor attempted to conduct a site inspection on both August 15 and 16, 2016.***

On August 15, 2016, at 2:45 pm, and August 16, 2016, at 1:55 pm, a site visit contractor visited Petitioner's 1500 E. Tropicana Ave. location and observed that the door was locked, the lights were off, it was not open for business, and no employees or staff were present. CMS Ex. 2 at 1. Petitioner has acknowledged that its business hours were between 9:00 am and 5:00 pm, Monday through Friday. CMS Ex. 1. Petitioner admitted that due to an "unfortunate coincidence," no one was at its practice location at the time of the failed site visits. CMS Ex. 1.

Based on the undisputed evidence of record, the site visit contractor attempted to conduct two separate site inspections of Petitioner's location at 1500 E. Tropicana Ave. on August 15, 2016 at 2:45 pm and August 16, 2016 at 1:55 pm, but the site visit contractor was unable to complete the inspection because the office was closed and Petitioner's personnel were not present at the location.

2. ***CMS had a legitimate basis to revoke Petitioner's Medicare enrollment under 42 C.F.R. § 424.535(a)(5) because Petitioner has not shown that its qualified physical practice location was open to the public on August 15 and 16, 2016.***

CMS may revoke a provider's enrollment and billing privileges if, upon an on-site review, CMS determines that the provider is no longer operational to provide Medicare-covered items or services, or the provider fails to meet enrollment requirements. 42 C.F.R. § 424.535(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). A provider's "qualified physical practice location" is the provider's address that is on file with CMS at the time of a site visit. *Care Pro Home Health, Inc*., DAB No. 2723 at 5-6 (2016) (footnote omitted).

Petitioner does not dispute that the site visit contractor unsuccessfully attempted to conduct site visits on two consecutive days at the location on file with CMS. Both attempted site visits occurred during the Petitioner's posted business hours. CMS Exs. 1; 2 at 2-3. These facts are sufficient for me to conclude that Petitioner was not open to the public, and therefore, not operational on August 15 and 16, 2016. In making this conclusion, I am mindful "that the proper inquiry is to assess the [provider's] operational status *at the time of the onsite review* because the intent of the applicable regulations 'is that a [provider] must maintain, and be able to demonstrate, continued compliance with the requirements for receiving Medicare billing privileges.'" *Viora*, DAB No. 2690 at 7 n.7 (emphasis added), quoting *A to Z DME, LLC*, DAB No. 2303 at 7 (2010). Petitioner's failure to be open to the public on either August 15 or 16, 2016, prevented the site visit contractor from determining whether Petitioner continued to be compliant with enrollment requirements.

The undisputed evidence establishes that Petitioner's 1500 E. Tropicana Ave. location was not operational because it was not accessible and staffed during posted business hours; therefore, CMS properly revoked Petitioner's Medicare billing privileges. 42 C.F.R. § 424.535(a)(5). *See Care Pro,* DAB No. 2723 at 6 (holding that CMS lawfully revoked a supplier's Medicare enrollment based on its non-operational status at a single location); *see also Viora*, DAB No. 2690 at 13 (holding that CMS properly revoked Medicare enrollment when a practice location of record was not operational upon onsite review).

Petitioner attributes the closure of its practice location to employee attendance at both a marketing meeting and an educational meeting, and the unexpected illness of another employee who was scheduled to be present at the office on the dates of the failed site visits. No matter the reason for the "unfortunate coincidence" and "Murphy's Law" circumstances described by Petitioner (P. Br. at 1), the simple fact is that Petitioner was not open, and operational, during its posted business hours. Therefore, Petitioner is not considered operational as set forth in 42 C.F.R. § 424.535(a)(5)(i).

Likewise, even though Petitioner asserts that it is "always open during business hours from 9:00 am to 5:00 pm and has proper staff to accommodate business operations" and has submitted letters from individuals who have observed that Petitioner was open, at other times, during business hours, such evidence does not refute that Petitioner was not operational at the time of the failed site visits. P. Br. at 1; P. Exs. 6, 8, and 11; *Viora*, DAB No. 2690 at 13.

To the extent that Petitioner may be requesting equitable relief, I am unable to grant equitable relief. P. Br. at 2 (stating that Petitioner "cannot bill Medicare customers for almost a year and . . . our business suffers considerably."); *see US Ultrasound*, DAB No. 2302 at 8 (2010) (stating that an ALJ may not grant equitable relief in an instance where statutory or regulatory requirements are not met).

3. The effective date of Petitioner's revocation is set by regulation.

The regulation at 42 C.F.R. § 424.535(g) states that when a revocation is based on a provider not being operational, the revocation of the provider's billing privileges is effective as of the date the practice location is determined by CMS or its contractor not to be operational. Pursuant to section 424.535(g), Petitioner's revocation is effective August 15, 2016, the date of the first failed site visit.

4. The two-year length of the re-enrollment bar is not reviewable.

The Departmental Appeals Board (DAB) has explained that "CMS's determination regarding the duration of the re-enrollment bar is not reviewable." *Vijendra Dave, M.D.*, DAB No. 2672 at 11 (2016). The DAB explained that "the only CMS actions subject to appeal under Part 498 are the types of initial determinations specified in section 498.3(b)." *Id.* The DAB further explained that "[t]he determinations specified in section 498.3(b) do not, under any reasonable interpretation of the regulation's text, include CMS decisions regarding the severity of the basis for revocation or the duration of a revoked supplier's re-enrollment bar." *Id.* The DAB discussed that a review of the rulemaking history showed that CMS did not intend to "permit administrative appeals of the length of a re-enrollment bar." *Id.* I have no authority to review this issue and I do not disturb the two-year re-enrollment bar.

V. Conclusion

I affirm CMS's revocation of Petitioner's Medicare enrollment and billing privileges.

/s/
Leslie C. Rogall
Administrative Law Judge