

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Dan Weldon d/b/a Well-Done Medical Supply,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-908

Decision No. CR3552

Date: January 6, 2015

DECISION

Palmetto GBA National Supplier Clearinghouse (NSC), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment and billing privileges of Petitioner, Dan Weldon d/b/a Well-Done Medical Supply, a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). Petitioner appealed, and CMS now argues the revocation was proper and moves for summary judgment. Because Petitioner was not open for inspection during his posted hours, I must sustain CMS's determination to revoke his Medicare enrollment and billing privileges.

I. Background and Procedural History

Petitioner participated in the Medicare program as a supplier of DMEPOS. *See* 42 C.F.R. § 424.57. In a letter dated February 21, 2014, NSC notified Petitioner that NSC was retroactively revoking Petitioner's Medicare supplier number, pursuant to 42 C.F.R. §§ 405.800, 424.57(e), 424.535(a)(1), 424.535(a)(5)(ii), and 424.535(g). The letter explained that one of the contractor's representatives attempted to visit Petitioner on January 21 and 23, 2014. The business was closed on both occasions, so the representative could not complete an inspection. CMS Exhibit (Ex.) 3. NSC also

imposed a two-year bar on Petitioner's re-enrollment in the Medicare program. CMS Ex. 3, at 3.

Petitioner sought reconsideration. On March 25, 2014, NSC issued a reconsidered determination affirming the revocation. CMS Ex. 1. The hearing officer stated that NSC was authorized to perform revalidation site inspections in order to verify the information that NSC had on file for suppliers and to confirm compliance with all supplier standards. CMS Ex. 1, at 2. The hearing officer concluded that Petitioner was not open during his posted hours of operation on two separate occasions when a NSC inspector attempted to complete an unannounced on-site visit, and the NSC inspector was unable to verify compliance with the supplier standards. CMS Ex. 1, at 2-3. The hearing officer thus affirmed the revocation of Petitioner's supplier number, citing 42 C.F.R. § 424.57, and stated that Petitioner "has not shown compliance with supplier standard 7" and because Petitioner "has not provided evidence to show they have complied with the standard for which they were non-compliant, they cannot be granted access to the Medicare Trust Fund by way of a Medicare supplier number." CMS Ex. 1, at 4. The hearing officer did not address the effective date of Petitioner's revocation.

Petitioner filed a request for a hearing with the Departmental Appeals Board, Civil Remedies Division, on April 4, 2014. The case was assigned to me, and I issued an Acknowledgment and Pre-hearing Order (Pre-hearing Order). In accordance with that order, CMS timely filed its pre-hearing exchange, consisting of a motion for summary judgment and brief (CMS Br.) along with seven proposed exhibits, CMS Exs. 1-7. Petitioner then filed his pre-hearing exchange, which included an affidavit in opposition to CMS's motion for summary judgment (P. Br.). Petitioner did not object to CMS's proposed exhibits, and I admit them into the record.

The Pre-hearing Order also 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. Pre-hearing Order ¶¶ 8, 9, and 10; *Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823, at 8 (2002) (concluding that the use of written direct testimony for witnesses is permissible as long as the opposing party has the opportunity to cross-examine those witnesses). CMS listed one witness, the NSC site inspector, and submitted an affidavit of written direct testimony for him. CMS Ex. 6. Petitioner did not request to cross-examine him. Petitioner submitted his affidavit of written direct testimony, and CMS did not request to cross-examine him. My Pre-hearing Order required the parties to brief all arguments in advance, regardless of whether a party chose to also file a motion for summary judgment. I find, therefore, that an in-person hearing for cross-examination purposes is unnecessary, and this matter may be decided on the written record, without resolving whether the standards for summary judgment are satisfied.

II. Analysis

A. Issue

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

B. Finding of Fact and Conclusion of Law

1. *CMS had a legitimate basis to revoke Petitioner's Medicare supplier number because a NSC inspector was not able to access Petitioner's location, on January 21 and 23, 2014, during Petitioner's posted hours of operation.*

To receive Medicare payments for items furnished to a Medicare-eligible beneficiary, the Secretary of Health and Human Services must issue a supplier billing number to a DMEPOS supplier. Social Security Act (Act) § 1834(j)(1)(A); 42 U.S.C. § 1395m(j)(1)(A). Among other requirements, a DMEPOS supplier must be in a location accessible to the public, and CMS and must be accessible and staffed during posted hours of operation. 42 C.F.R. § 424.57(c)(7)(i)(B),(C).

CMS will revoke a currently-enrolled Medicare supplier's billing privileges if CMS or its agent determines that the supplier is not in compliance with any supplier enrollment standard. *See 1866ICPayday.com*, DAB No. 2289, at 13 (2009) (“[F]ailure to comply with even one supplier standard is a sufficient basis for revoking a supplier's billing privileges.”). Where, as here, a contractor's representative finds the facility closed during its posted hours, the supplier does not meet the regulatory requirements, and CMS may appropriately revoke its billing privileges. *Ita Udeobong, d/b/a Midland Care Med. Supply and Equip.*, DAB No. 2324 (2010). Suppliers who have had their billing privileges revoked “are barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar,” which is “a minimum of 1 year, but not greater than 3 years depending on the severity of the basis for revocation.” 42 C.F.R. § 424.535(c).

CMS argues the site inspector reasonably concluded, based upon available evidence, that Petitioner was not open to the public and accessible during posted hours of operation. Thus, CMS argues that NSC properly revoked Petitioner's Medicare billing privileges. Petitioner argues the revocation was not authorized and contends the office was properly staffed, even though no staff members were present at the facility at the time of the January 21 and January 23 attempted on-site inspections.

According to the site inspector's report, he visited the facility at 11:20 a.m. on Tuesday, January 21, 2014 and returned at 10:15 a.m. on Thursday, January 23, 2014. CMS Ex. 4, at 2. The facility's hours of operation were posted: 9:00 a.m. to 4:00 p.m. Monday through Friday. CMS Ex. 4, at 3; CMS Ex. 6 (Browning Decl.). On both occasions, the business was closed; the door was locked, and no one answered the inspector's knocks on the door. CMS Ex. 4, at 7; CMS Ex. 6. The inspector took photographs on both days, and the photographs indicate the dates and times cited in the report. CMS Ex. 4, at 8; CMS Ex. 6.

Petitioner concedes that the facility was closed on the dates and times in question. In a letter included with Petitioner's request for hearing, Petitioner contends that "[o]n the two days that [the inspector] visited our office . . . the only office staff employee, was away assisting at . . . senior centers for a two hour period. She had her office phone with her, but failed to receive [the inspector's] call on the morning of January 21, 2014."

Petitioner states that he is aware of the requirement that the office be operational during posted hours "but felt that since we had no walk-in business . . . a two hour visit to assist at the center (for the promotion of our company) was considered appropriate hours of operation. We have reviewed this compliance issue and corrective measures are already in place." Moreover, in Petitioner's affidavit in opposition to CMS's motion for summary judgment, Petitioner states, "I readily admit that on the two occasions that the inspector came to the physical site my staff was not present and were at the Senior Citizen Home informing the beneficiaries of the services of [Petitioner's] business and a display of the shoes available to the beneficiaries." P. Br. at 1. Petitioner further represents that staff was present at the office "on most all occasions" but most of Petitioner's services "were provided to the beneficiaries on site at nursing homes, residences, and Senior Citizen Centers" P. Br. at 1-2. Petitioner contends the facility was thus operational during Petitioner's posted hours of operation. P. Br. at 2.

A supplier must be in a location accessible to the public, Medicare beneficiaries, CMS, NSC, and its agents, and the supplier must be accessible and staffed during posted hours of operation. 42 C.F.R. § 424.57(c)(7)(i)(B),(C). Petitioner has not offered any evidence or argument in Petitioner's reconsideration request, hearing request, or briefing in this proceeding suggesting that Petitioner was open, accessible, and staffed at the time of the attempted on-site inspections on January 21 and January 23, 2014. Instead, Petitioner admits the facility was closed and no staff members were present at the time of both attempted on-site inspections.

I find that Petitioner was not in compliance with all of the regulatory standards for suppliers. The facility's posted hours of operation were 9:00 a.m. to 4:00 p.m. Monday through Friday. Yet, as Petitioner admits, no person was present at Petitioner's facility at the time of the attempted site inspections during Petitioner's posted hours. The regulatory standard would have no meaning if suppliers were not always required to adhere to their posted hours of operation. Moreover, even if Petitioner had left a note on

the facility's door indicating staff were out promoting Petitioner's products at a retirement community and would return within a couple hours (which Petitioner did not), posting a "will-return" sign whenever the office is closed is not sufficient to satisfy the requirement that the facility actually be open and accessible during its posted hours of operation. *Udeobong*, DAB No. 2324, at 6-7. A supplier may not close, even for a few hours, during posted hours of operation and must be available to meet the needs of beneficiaries. *Complete Home Care, Inc.*, DAB No. 2525, at 5 (2013). Petitioner is responsible for making the necessary arrangements to keep his business open and allow beneficiaries to access the business during posted hours of operation while allowing for patient consultations, promotional activities, and breaks for staff members. As explained in a similar case:

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.

A to Z DME, LLC, DAB CR1995, at 6 (2009), *aff'd*, DAB No. 2303 (2010). Also, the regulatory drafters contemplated allowing facilities to temporarily close during posted hours to account for circumstances including short-term closures but instead chose to emphasize that a supplier's place of business must always remain publicly accessible. *Complete Home Care, Inc.*, DAB No. 2525, at 6. The drafters explained in the preamble to the final rule that they believed a supplier "should be available during posted business hours" and "should do its best to plan and staff for temporary absences." 75 Fed. Reg. 52,629, 52,636 (2010).

Additionally, CMS is authorized to revoke a supplier's Medicare billing privileges based upon the failure to be open when an inspector visits the supplier's address, regardless of whether the facility may have been open and accessible at some earlier or later time. *See, e.g., Mission Home Health et al.*, DAB No. 2310 (2010). CMS and its contractors have limited resources and cannot be compelled to attempt multiple on-site inspections to determine if the facility complies with all Medicare requirements.

NSC originally relied on several bases for revocation, but NSC specifically relied upon the revocation basis of section 424.57(c)(7) in its reconsidered determination. In his request for hearing, Petitioner did not challenge CMS's determination of the effective date of Petitioner's revocation, and neither party presented arguments regarding the effective date of revocation. Moreover, the reconsidered determination did not address the effective date of revocation. Therefore, I do not modify the effective date of Petitioner's revocation here.

Petitioner's noncompliance with one supplier standard is a sufficient basis for revoking Petitioner's Medicare enrollment, and I need not address other possible grounds for revocation. *See 1866ICPayday.com*, DAB No. 2289, at 13. I find Petitioner did not comply with all the Medicare application certification standards set forth in 42 C.F.R. § 424.57(c) because Petitioner was not accessible to the public, Medicare beneficiaries, and NSC, and was not staffed during posted hours of operation on two separate occasions. I find, therefore, CMS was authorized to revoke Petitioner's Medicare enrollment and billing privileges.

/s/

Joseph Grow
Administrative Law Judge