

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

MedTrac Solutions  
(PTAN: 7120950001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-899

Decision No. CR4176

Date: August 28, 2015

**DECISION**

The Centers for Medicare & Medicaid Services (CMS), through its administrative contractor, Palmetto GBA National Supplier Clearinghouse (NSC), revoked the enrollment of MedTrac Solutions (MedTrac or Petitioner) as a Medicare supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) because MedTrac was not accessible during posted hours of operation. MedTrac requested a hearing to dispute the revocation. Based on the evidence in the record, I affirm CMS's determination to revoke MedTrac's enrollment in the Medicare program.

**I. Background**

MedTrac was enrolled in the Medicare program as a DMEPOS supplier. In an October 16, 2014 initial determination, NSC revoked MedTrac's Medicare billing privileges. CMS Exhibit (Ex.) 1 at 1-2. NSC provided the following reason for its decision:

Recently, a representative of the NSC attempted to conduct a visit on your facility on September 5, 2014 and September 17, 2014; however, the visits were unsuccessful because the business was closed during posted hours of operation on both

attempts. Because we could not complete an inspection of your facility, we could not verify your compliance with the supplier standards. Based upon a review of the facts, we have determined that your facility is not operational to furnish Medicare covered items and services. Thus, you are considered to be in violation of 42 CFR §§ 424.535(a)(5)(ii) and all supplier standards as defined in 42 CFR 424.57(c).

CMS Ex. 1 at 2. NSC made the effective date for revocation retroactive to September 17, 2014, the date CMS determined MedTrac's supplier location was not operational. CMS Ex. 1 at 1.

In an October 22, 2014 letter, MedTrac requested reconsideration of the initial determination. MedTrac indicated in its request that MedTrac's office at 1801 North Tryon Street, Suite B-111, Charlotte, North Carolina, has posted business hours from 10 a.m. to 4 p.m., Monday through Friday. MedTrac stated that a part-time administrative assistant works from 10 a.m. to 2 p.m. and MedTrac's Chief Executive Officer is present for the remainder of the time. Because MedTrac is located near a homeless shelter and MedTrac personnel have been threatened by homeless individuals, MedTrac keeps its doors locked when the administrative assistant is alone at MedTrac's office location. MedTrac stated that it did not know that locking its doors would cause it to be nonoperational. MedTrac indicated that it would resolve the situation by hiring security. CMS Ex. 2.

In her November 25, 2014 reconsidered determination, the NSC hearing officer concluded:

The fact remains that the site inspector was unable to complete a site inspection for MedTrac Solutions in order to verify compliance with the supplier standards because the facility was closed during posted hours of operation, and not accessible to the site inspector. This hearing officer concludes the NSC made the correct determination based upon the events at the time.

**Pursuant to 42 CFR §§ 405.800, 424.57(e), 424.535(a)(1), 424.535(a)(5)(ii) and 424.535(g), your Medicare supplier number (7120950001) for [DMEPOS] issued by [NSC] is revoked. The date of this effective revocation has been made retroactive to September 17, 2014 which is the date [CMS] determined your practice location was not operational.**

Review of the case file and additional submitted documentation for MedTrac Solutions **does not verify compliance with supplier standard 7**, and the NSC is deemed appropriate in their revocation based upon the information on the record at the time.

CMS Ex. 1 at 6 (emphasis added).

On January 8, 2015,<sup>1</sup> MedTrac requested a hearing. I issued an Acknowledgement and Pre-hearing Order (Order) on January 20, 2015. In response to my Order, on February 24, 2015, CMS filed its brief and seven exhibits (CMS Exs. 1-7). On March 25, 2015, MedTrac requested a 60-day extension of time to file its exchange because its counsel needed to leave town due to an emergency. CMS did not oppose the extension request and I granted it. On June 1, 2015, MedTrac filed a brief (MedTrac Br.) and seven exhibits (MedTrac Exs. 8-14).<sup>2</sup> On June 9, 2015, CMS requested to file a reply brief and objections by June 22, 2015. I granted the request and CMS filed its reply brief (CMS Reply Br.) on June 22, 2015.

## II. Evidentiary Rulings

MedTrac did not object to any of CMS's exhibits and CMS did not object to MedTrac Exs. 8-10, 12, and 14. *See* Order ¶ 7. Therefore, I admit CMS Exs. 1-7 and MedTrac Exs. 8-10, 12, and 14 into the record.

CMS objected to MedTrac's Exs. 11 and 13, which are written direct testimony from two witnesses. CMS argues that this testimony was not submitted in the form of a declaration and not signed under penalty of perjury as required by Civil Remedies Division Procedures (CRDP) § 19(b). CMS Reply Br. at 2-3. A review of those exhibits reveals that the written direct testimony was not made as an affidavit under oath or as a declaration under penalty of perjury. Further, MedTrac did not reply to CMS's objection or file corrected written direct testimony.

Provider and supplier revocation cases are adjudicated under the procedures in 42 C.F.R. Part 498. 42 C.F.R. §§ 405.803(a), 424.545(a)(1). Under those procedures, witnesses must "testify under oath or affirmation." 42 C.F.R. § 498.62. By statute, individuals are permitted to make declarations under penalty of perjury even if regulations require that statements be made under oath. 28 U.S.C. § 1746. Consistent with these authorities, my Order requires that "[a] witness statement must be submitted in the form of an affidavit

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<sup>1</sup> MedTrac's hearing request is dated December 17, 2014; however, MedTrac did not electronically file the hearing request until January 8, 2015.

<sup>2</sup> MedTrac did not submit exhibits marked 1 through 7.

made under oath or as a written declaration.” Order ¶ 8. Because MedTrac’s proposed written direct testimony was not made under oath or under penalty of perjury, I sustain CMS’s objection and exclude MedTrac Exs. 11 and 13.

### **III. Decision on the Record**

I directed the parties to submit written direct testimony for each proposed witness. Order ¶ 8. I have admitted the written direct testimony from two CMS witnesses (CMS Exs. 5, 7) and one MedTrac witness (MedTrac Ex. 14). I also advised the parties that an in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Order ¶ 9 (“I will assume that Petitioner does not wish to cross-examine any proposed CMS witness if Petitioner’s brief fails to affirmatively state so.”); CRDP § 16(b).

CMS stated that it did not believe that an in-person hearing was necessary in this case. CMS Reply Br. at 4. MedTrac generally indicated that I should hold a hearing in this case; however, MedTrac did not specifically state that it wanted to cross-examine one or both of CMS’s witnesses. MedTrac Br. at 4. Because MedTrac did not request to cross-examine either of CMS’s witnesses, I decide this case based on the written record. Order ¶¶ 10-11; CRDP § 19(b), (d).

### **IV. Issue**

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)) and/or to be accessible during posted hours of operation (42 C.F.R. § 424.57(c)(7)).

### **V. Jurisdiction**

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

### **VI. Findings of Fact, Conclusions of Law, and Analysis<sup>3</sup>**

The Secretary of Health and Human Services (Secretary) has the authority to create regulations that establish enrollment standards for providers and suppliers, and to create supplier requirements for DMEPOS suppliers. 42 U.S.C. §§ 1395m(j)(1)(B)(ii), 1395cc(j). The Secretary promulgated a regulation that requires providers and suppliers to be operational. 42 C.F.R. § 424.535(a)(5)(ii). To be “operational,” a provider or

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<sup>3</sup> My numbered findings of fact and conclusions of law are set forth in italics and bold in the discussion captions of this decision.

supplier must be “*open to the public* for the purpose of providing health care related services . . . and [be] *properly staffed* . . . to furnish these services.” 42 C.F.R. § 424.502 (emphasis added). The Secretary also promulgated regulations establishing DMEPOS supplier standards, which a DMEPOS supplier must meet and maintain. 42 C.F.R. § 424.57(c). The supplier standards require a DMEPOS supplier to be “open to the public a minimum of 30 hours per week” and the DMEPOS supplier must “post[] hours of operation.” *Id.* § 424.57(c)(7)(i)(D), (c)(30). Most important for this case, the facility must be “accessible and staffed during posted hours of operation.” *Id.* § 424.57(c)(7)(i)(C). CMS or its contractors may conduct inspections of a supplier’s premises at any time to determine if a supplier is in compliance with Medicare enrollment requirements or the supplier standards. *See* 42 C.F.R. §§ 424.57(c)(8), 424.510(d)(8), 424.515(c), 424.517(a), (a)(8).

***1. On September 5, 2014, at 11:03 a.m. and September 17, 2014, at 3:08 p.m., site inspectors from NSC were unable to gain entry into MedTrac’s office at 1801 North Tryon Street, Suite B-111, Charlotte, North Carolina, because the door was locked and no one answered the door when the site inspectors knocked.***

On September 5, 2014, at 11:03 a.m., NSC site inspector Carolina McRoy arrived at MedTrac’s office located at 1801 North Tryon Street, Suite B-111, Charlotte, North Carolina, to conduct a site inspection in order to determine whether MedTrac was in compliance with regulatory requirements. CMS Ex. 4 at 1; CMS Ex. 5 ¶¶ 2, 3, 5. Ms. McRoy testified that MedTrac’s office was located inside a commercial building. Ms. McRoy stated that MedTrac’s office had a single door with a window covered with a sign and tinfoil so that she could not see into MedTrac’s office. The sign indicated MedTrac’s office hours were from 10 a.m. to 6 p.m., Monday through Friday, and included an after-hours emergency telephone number. CMS Ex. 5 ¶ 5. Ms. McRoy took date and time stamped photographs of MedTrac’s office door. CMS Ex. 4 at 2-16.

In her report of the attempted site visit, Ms. McRoy stated: “Knocked the door several times and nobody answer[ed]. Asked a neighboring business in suite b119 if they know the supplier and he said no that he has not seen anybody at that suite.” CMS Ex. 4 at 1; *see also* CMS Ex. 5 ¶¶ 6-7. Ms. McRoy also indicated in the report that MedTrac: was not open for business; did not appear to have employees or staff present; did not appear to have signs of customer activity; and did not appear to be operational. Ms. McRoy indicated that MedTrac had a sign with its business name. CMS Ex. 4 at 1. Although Ms. McRoy marked on the report that there was inventory present, she testified that she accidentally checked a “Y” instead of an “N” to the question on the report form asking if she saw inventory. Ms. McRoy testified that she could not see into MedTrac’s office or gain access to it, therefore, she was not able to see whether any inventory was present. CMS Ex. 4 at 1; CMS Ex. 5 ¶ 4.

On September 17, 2014, at 3:08 p.m., NSC site inspector Marlena Harris arrived at MedTrac's 1801 North Tryon Street office location to attempt a site inspection. CMS Ex. 6; CMS Ex. 7 ¶¶ 2, 3, 5. In her report of the attempted site visit, Ms. Harris stated: "Arrived at facility, door was locked. Knocked on the door and there was no response. Waited about 5 minutes no one arrived." CMS Ex. 6 at 1; *see also* CMS Ex. 7 ¶ 6. Ms. Harris made a number of observations about the outside of MedTrac's office that are consistent with Ms. McRoy's observations summarized above, and Ms. Harris took date and time stamped photographs of the outside of MedTrac's office. CMS Ex. 6; CMS Ex. 7 ¶ 5.

***2. CMS had a legitimate basis to revoke Petitioner's Medicare billing privileges because Petitioner's location was not operational, and was not accessible and staffed during posted hours of operation.***

MedTrac asserts that it needed to keep its door locked all of the time for safety and security reasons. MedTrac's Chief Executive Officer, Gary Smith, testified that the property manager where MedTrac's office is located suggested keeping MedTrac's door locked for security reasons. MedTrac Ex. 14 ¶ 4. Mr. Smith also testified that he established a policy of locking the office's door because of the "proximity of the Men's Shelter of Charlotte and the high population of homeless individuals near the office . . . ." MedTrac Ex. 14 ¶ 3. MedTrac provided evidence that there is a homeless shelter not far from the MedTrac office. MedTrac Exs. 8-10. Mr. Smith further testified that he was working at MedTrac's office on the afternoon of September 17, 2014, and that he did not hear anyone knock at the door. CMS Ex. 14 ¶¶ 3-4.

Although MedTrac appears to dispute that NSC's inspectors actually appeared at MedTrac's office on the dates and times alleged by CMS, CMS provided significant evidence, both testimonial and documentary, that NSC's inspectors attempted site inspections at MedTrac's office on September 5 and 17, 2014, during MedTrac's posted hours of operation.<sup>4</sup> CMS Exs. 4-7. The pictures that the site inspectors took of MedTrac's door look the same as MedTrac's own picture of its door, thus proving the inspectors were present. CMS Ex. 4 at 4; CMS Ex. 6 at 3; MedTrac Ex. 12 at 1. The inspectors' time and date stamped pictures provide support that they appeared at MedTrac's office on the dates and times in their reports. CMS Exs. 4, 6.

To the extent that MedTrac asserts that its office was staffed during the attempted site inspections and that the inspectors' knocks were simply not heard, such a scenario provides no defense to revocation when there are no alternative means of gaining entry to

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<sup>4</sup> MedTrac asserts that its posted hours of operation were 10 a.m. to 4 p.m., instead of 10 a.m. to 6 p.m., as noted by the site inspectors. CMS Ex. 2. Because the attempted site inspections both occurred after 10 a.m., but before 4 p.m., this issue does not need to be resolved.

supplier's office. *Norpro Orthotics & Prosthetics*, DAB No. 2577, at 6 (2014); *Benson Ejindu*, DAB No. 2572, at 6 (2014). Whether it is the supplier standard requirement that a DMEPOS supplier be accessible during posted hours of operation (42 C.F.R. § 424.57(c)(7)) or the requirement that a supplier be operational, i.e., "open to the public for the purpose of providing health care related services" (42 C.F.R. §§ 424.502, 424.535(a)(5)(ii)), MedTrac had two chances to answer the door for inspectors and, by failing to do so, showed that it was not accessible or operational during posted hours or operation.

## **V. Conclusion**

For the reasons stated above, I affirm CMS's revocation of MedTrac's Medicare enrollment and billing privileges.

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/s/  
Scott Anderson  
Administrative Law Judge