

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Devon DME LLC d/b/a Kratos Medical Supply,
(NPI No. 6622720001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-880

Decision No. CR3266

Date: June 17, 2014

DECISION

I grant summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS) sustaining its determination to terminate the Medicare enrollment and billing privileges of Petitioner, Devon DME LLC d/b/a Kratos Medical Supply. The undisputed material facts prove that Petitioner was not operational as is required by 42 C.F.R. § 424.535(a)(5)(ii) and also that it was not in compliance with the supplier standard that is set forth at 42 C.F.R. § 424.57(c)(7).

I. Background

A contractor, acting on behalf of CMS, determined to revoke Petitioner's Medicare enrollment and billing privileges, based on its determination that Petitioner was not complying with the two regulations that I cite in the opening paragraph of this decision. Petitioner requested reconsideration and the determination was affirmed. Petitioner then requested a hearing and the case was assigned to me. CMS moved for summary judgment. It filed a brief and 10 proposed exhibits, identified as CMS Ex. 1 – CMS Ex. 10. Petitioner opposed the motion and filed 12 proposed exhibits that it identified as P. Ex. A – P. Ex. L. I receive the parties' exhibits into the record.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether Petitioner failed to comply with the requirements of either 42 C.F.R. §§ 424.535(a)(5)(ii) or 424.57(c)(7), thereby justifying the determination to revoke Petitioner's Medicare enrollment and billing privileges.

B. Findings of Fact and Conclusions of Law

The following facts are undisputed. Petitioner enrolled in Medicare as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). Petitioner stated in its enrollment application that its business location was 1100 First Avenue, Suite 105, King of Prussia, Pennsylvania 19406. It listed its hours of operation as being from Monday through Friday from 8:30 through 4:30. CMS Ex. 10 at 18.

A representative of the Medicare contractor attempted to make a site visit to Petitioner's listed business location on May 28, 2013. CMS Ex. 1. A receptionist at the front desk of the building in which Petitioner purportedly was located would not allow the inspector to go directly to Petitioner's listed office. *Id.* at 7. The receptionist made several attempts to call Petitioner's office but there was no answer. The inspector left his contact information at the building's front desk. Subsequently, a representative of Petitioner called the inspector and advised him that the business had been closed for about two to three weeks. *Id.* The contractor received no prior notification from Petitioner that its business was closed, nor did it receive notification from Petitioner advising it that its status – i.e., its office address – would be changed. CMS Ex. 3 at 2 – 3.

Based on these facts the contractor determined that Petitioner was not complying with regulatory requirements. It subsequently sent an e-mail to Petitioner in which it afforded Petitioner the option to voluntarily terminate its enrollment in Medicare. Petitioner did not respond to the e-mail.

Petitioner disputes none of these facts and, in particular, does not dispute that its business was closed on the date when the inspector visited it. Indeed, Petitioner admits that its business was closed – temporarily – at the time of the inspection. As Petitioner admits, it closed its business from May 3, 2013 through June 14, 2013 while it reconstructed its business office. CMS Ex. 7 at 2. Petitioner does not contend that it advised CMS of this temporary closure or of its office reconstruction.

CMS will terminate a DMEPOS supplier's enrollment and revoke its billing privileges if the supplier fails to meet any of the participation standards set forth in 42 C.F.R. § 424.57. Those standards include the standard contained at 42 C.F.R. § 424.57(c)(7). That standard requires a DMEPOS supplier to maintain: "a physical facility on an

appropriate site.” The standard explains that the facility must contain space for storing business records and that maintaining a mailing address is not sufficient to establish the existence of a physical facility. The undisputed facts unequivocally establish that Petitioner failed to satisfy this standard during the period between May 3 and June 14, 2013 because it was not operating a business facility during this period. Thus, CMS was authorized to terminate Petitioner’s Medicare enrollment and revoke its billing privileges based solely on this failure to comply with the regulatory standard.

CMS may also terminate a Medicare supplier’s enrollment and revoke its billing privileges where the supplier fails to remain operational. 42 C.F.R. § 424.535(a)(5)(ii). As Petitioner admits, it ceased to operate as a supplier providing DMEPOS to eligible beneficiaries during the May 3 – June 14, 2013 period. That is an additional basis for termination of its enrollment and revocation of its billing privileges.

The undisputed facts therefore establish two regulatory bases for termination of Petitioner’s Medicare enrollment and revocation of its billing privileges. Either of these grounds is sufficient to support the determination in this case. It is unnecessary that both of them be established.

Petitioner raises several arguments in opposition to CMS’s motion for summary judgment. I have considered these and I find them to be without merit.

First, Petitioner contends that it should have been afforded the opportunity to file a corrective action plan in order to address any deficiencies that were identified by the investigator. Petitioner’s Opposition Brief to Motion for Summary Judgment (Petitioner’s Brief) at 7 – 9. I find this argument to be without merit for two reasons. First, Petitioner had the opportunity to raise it in its reconsideration request and failed to do so. Petitioner has not established good cause for me to consider it now. More important, Petitioner’s argument rests on an incorrect reading of the law. CMS has no obligation to afford Petitioner the opportunity to file a corrective action plan.

There is nothing in 42 C.F.R. § 424.57 that directs CMS to afford a DMEPOS supplier the opportunity to file a corrective action plan where it has been found to be out of compliance with the standard set forth at subsection (c)(7) of the regulation. CMS is directed to terminate a supplier’s Medicare participation and revoke its billing privileges for failure to comply with the subsection and there is no opportunity granted by the regulation for the supplier to take corrective action to stave off termination and revocation. Thus, Petitioner’s failure to comply with subsection (c)(7) is a basis for termination and revocation without recourse and irrespective of whether Petitioner might have a right to file a corrective action plan to address other deficiencies not encompassed by 42 C.F.R. § 424.57.

Furthermore, although 42 C.F.R. § 424.535 affords suppliers the opportunity to correct *some* deficiencies, it does not afford suppliers – and Petitioner – the opportunity to correct the deficiency that is at issue here. Petitioner was noncompliant with the requirement that is stated at 42 C.F.R. § 424.535(a)(5)(ii). 42 C.F.R. § 424.535(a)(1) affords deficient suppliers the opportunity to file corrective action plans to correct deficiencies *except for* certain enumerated deficiencies, including failure to comply with the requirements of subsection (a)(5). Petitioner clearly had no right under the regulation to file a corrective action plan.

Second, Petitioner asserts that there is a fact dispute as to whether it ever received an e-mail from the contractor affording it the opportunity to voluntarily terminate its Medicare enrollment. It does not deny that the e-mail may have been sent but asserts that it never received it. Petitioner’s assertion does not raise a dispute as to a material fact. Neither the contractor nor CMS had a legal obligation to afford Petitioner the opportunity to terminate its enrollment voluntarily. Petitioner has not cited any legal authority for the proposition that CMS had such duty. So, even if the e-mail was not received, and even if it was not sent at all, that is irrelevant to my decision in this case.

Finally, Petitioner asserts that the period of revocation imposed by CMS – two years – is inequitable and should be one year at most. However, there is no basis in law for me to direct that CMS shorten the period of revocation. A determination of how long to revoke a supplier’s billing privileges is an act of discretion that I may not question.

/s/
Steven T. Kessel
Administrative Law Judge