

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Cookie's DME, Inc.,  
(Supplier No.: 6367990001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-455

Decision No. CR2915

Date: August 30, 2013

**DECISION**

Petitioner, Cookie's DME, Inc., appeals the Centers for Medicare & Medicaid Services' (CMS's) decision to revoke its Medicare supplier number and billing privileges. For the reasons set forth below, I sustain CMS's determination to revoke the Medicare supplier number of Petitioner.

**I. Background**

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). In a letter dated October 19, 2012, National Supplier Clearinghouse (NSC), a Medicare contractor, notified Petitioner that its supplier number would be revoked retroactive to August 28, 2012. CMS Exhibit (Ex.) 2, at 1. The notice letter stated that the basis for the revocation was that Petitioner was in violation of 42 C.F.R. § 424.57(c)(7) and 42 C.F.R. § 424.535(a)(5)(ii) because it was closed during posted hours of operation on July 31, 2012 and August 28, 2012, when a site surveyor attempted to complete site inspections to verify Petitioner's compliance

with supplier standards. CMS Ex. 2, at 2. The notice letter also stated that Petitioner was barred from re-enrolling in the Medicare program as a supplier for two years from the effective date. CMS Ex. 2, at 1.

Petitioner timely requested a reconsidered determination and on December 18, 2012, the hearing officer issued an unfavorable decision and upheld the revocation. CMS Ex. 4. Petitioner timely requested a hearing with the Civil Remedies Division of the Departmental Appeals Board. On February 25, 2013, I issued an Acknowledgment and Pre-Hearing Order (Order). Pursuant to that Order, CMS filed a Motion for Summary Judgment (CMS Br.), along with five exhibits. Petitioner also filed a Motion for Summary Judgment (P. Br.), along with two unmarked exhibits, which I now mark as Petitioner's Exhibits (P. Exs.) 1 and 2.

By letter dated May 30, 2013, I denied the parties' motions for summary judgment. I explained that I was unable to resolve the matter based on the record before me and instructed that this matter must be resolved through a full hearing. I gave the parties the option of holding a hearing via video teleconference or by deciding the case on its merits based on the written record, including any additional documents and written arguments the parties wished to proffer. On June 12, 2013, the parties advised that they agreed that this case be submitted on the written record. On June 21, 2013, CMS proffered Ex. 6 and on June 27, 2013, Petitioner submitted six unmarked exhibits, which I now mark as P. Exs. 3-8. In the absence of objection from either party, I admit all the proffered exhibits, CMS Exs. 1-6 and P. Exs. 1-8, into the record. I issue this decision on the full written record.

## **II. Applicable Law**

Pursuant to section 1834(j)(1)(A) of the Social Security Act, a DMEPOS supplier may not be reimbursed for items provided to an eligible Medicare beneficiary unless the supplier has a supplier number issued by the Secretary of the U.S. Department of Health & Human Services. To receive a supplier number, a DMEPOS supplier must meet and maintain each of the supplier enrollments standards set forth in 42 C.F.R.

§§ 424.57(c)(1)-(30). Among other things, a DMEPOS supplier must maintain a physical facility on an appropriate site which is in a location that is accessible to the public, staffed during posted hours of operation, and maintained with a visible sign and posted hours of operation. 42 C.F.R. §424.57(c)(7). Also, a DMEPOS supplier must permit CMS or its agent to conduct on-site inspections to determine supplier compliance with each of the enrollment standards. 42 C.F.R. § 424.57(c)(8). 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. 42 C.F.R. § 424.57(d); *see also 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.”).

In addition, if an on-site visit reveals that a supplier is no longer operational, or otherwise fails to meet one of the supplier standards, CMS may revoke the supplier's Medicare billing privileges. 42 C.F.R. § 424.535(a)(5)(ii). A provider or supplier is operational if it "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 . . . to furnish these items or services." 42 C.F.R. § 424.502. The effective date of revocation is the date CMS determines the supplier was no longer operational. 42 C.F.R. § 424.535(g). 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).

### **III. Issue**

The issue before me is whether CMS had a legitimate basis to revoke Petitioner's Medicare supplier number.

### **IV. Findings of Facts and Conclusions of Law**

#### **A. *CMS had a legitimate basis to revoke Petitioner's Medicare supplier number when its surveyor found Petitioner's facility was not staffed and accessible during two attempted site inspections on July 31, 2012 and August 28, 2012.***

Suppliers must maintain physical facilities that are "accessible and staffed during posted hours of operation." 42 C.F.R. § 424.57(c)(7)(i)(C). In addition, suppliers must permit CMS or its agents to conduct on-site inspections to determine the supplier's compliance with the regulatory standards. 42 C.F.R. § 424.57(c)(8). Petitioner was a DMEPOS supplier that participated in the Medicare program. Petitioner's posted hours of operation were Monday through Friday, 9:00 a.m. through 5:00 p.m. CMS Ex. 5, at 1. On July 31, 2012, at 9:34 a.m., an NSC site surveyor attempted to inspect Petitioner's facility, but found it closed and no one there. CMS Ex. 1, at 4, 9. Petitioner explains that its employee left the office to assist the owner with a flat tire, but transferred the telephones to an answering service and left a note on the door that included contact numbers. P. Br. at 4. Thus, there is no dispute that Petitioner's facility was not open and accessible during its posted hours of operation and that the surveyor was unable to conduct a site inspection at the time of the first visit.

The surveyor attempted a second site visit on August 28, 2012, but, according to the surveyor, Petitioner's facility was again closed. CMS Ex. 6, at 1. On this date, however, there was someone at Petitioner's facility. According to the surveyor, there was a man "just hanging around the office." CMS Ex. 6, at 1. The surveyor states that she asked the man whether anyone was at Petitioner's facility, he stated no and offered to call the

owner. CMS Ex. 6, at 1. In the site visit report, the surveyor's notes do not indicate the presence of the man with whom she spoke, but indicates that the office was locked and no one was there. CMS Ex. 1, at 9. The surveyor took pictures of Petitioner's facility, including a note on the door stating, "OUT IN THE FIELD MAKING DELIVERIES" and providing a phone number for assistance. CMS Ex. 5, at 4.

Petitioner's version of the second visit varies, but only slightly. Petitioner states that the person present at the time of the second site visit was an employee who has been continually employed by Petitioner since 2009. P. Br. at 6. According to Petitioner, its employee greeted two individuals (which Petitioner assumes were the surveyors), stated he was the only one there and offered to call the owner. P. Br. at 5; P. Ex. 3, at 1. Petitioner surmises that "[the surveyors] thought [the employee] was merely a yard boy and not the current staff." P. Br. at 6; *see also* Request for Hearing (RFH) at 2. Petitioner states that the employee performs several job duties, which include opening the office and transferring calls. RFH at 1. In support of this contention, Petitioner submits the employee's 1040 tax forms for 2010 and 2011 (P. Exs. 5 and 6) and W-2s for 2009 through 2012 and a 1099-MISC form for 2012 (P. Ex. 7). In addition, Petitioner submits various training documents and an employee acknowledgment form, signed and dated for various dates in 2012. P. Ex. 8. Finally, Petitioner acknowledges the sign stating that Petitioner was in the field making deliveries was visible, but states the employee was nevertheless physically present. P. Br. at 6.

The essential question before me is whether the employee's presence outside the Petitioner's facility, not engaged in activities obviously related to the operation of the facility and in the absence of self-identification as an employee authorized to conduct Petitioner's business, is sufficient to meet the requirement that Petitioner be accessible and staffed during posted hours of operation. I conclude that it does not. For a supplier to be "operational," it 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. "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 A to Z DME, LLC*, DAB No. 2303 (2010). If the employee at issue in this case was indeed able and permitted to provide health care related services and conduct business on Petitioner's behalf, then I am at a loss as to why he would not identify himself as such. Instead, by both accounts, the employee stated no one was in the facility and offered to call the owner. In addition, there was a sign on Petitioner's door stating Petitioner was out in the field making deliveries and provided a telephone number "for assistance." CMS Ex. 5, at 4. The sign directing visitors to the facility to call for assistance, coupled with the employee's conduct supports the conclusion that Petitioner's facility was not accessible and staffed during its posted hours of operation at the time of the second attempted site visit.

Nor does the evidence provided by Petitioner warrant an opposite conclusion. The tax documents provided by Petitioner shows that this person was indeed employed by it in some capacity. As previously stated, however, the question is whether the employee was one who could provide services to Medicare beneficiaries and perform Petitioner's business, or someone employed in some other capacity and who was merely present. The training documents provided by Petitioner relate to first aid, infection control, and abuse and neglect, and they are all signed and dated by the employee at issue. *See* P. Ex. 8. Notably these documents are all dated for various dates in 2012, including an employee acknowledgment form dated for March 14, 2012. P. Ex. 8, at 13. If the employee at issue was trained and employed since 2009, then Petitioner conspicuously fails to provide evidence of such. In addition, other than the employee's signatures and dates there are no other markings, such as markings for correctness that support the reliability of the documents. Thus, I do not find the training documents credible. I also note that while Petitioner provided an affidavit from the employee at issue, the employee fails to attest to his specific job duties and functions. *See* P. Ex. 3. The central issue in this case is the employee and his role at Petitioner's facility, that employee's failure to state with specificity in what capacity he works cuts against the conclusion that his presence on August 28, 2012 rendered the facility open, accessible and staffed. I find that the record does not support Petitioner's contention that its facility was accessible and staffed at the time of the second visit as required by the regulations and, therefore, that CMS had a legitimate basis to revoke Petitioner's supplier number.

## **V. Conclusion**

For the foregoing reasons, I find that Petitioner was not operational when it was not open and accessible at the time of the two attempted site visits during Petitioner's posted hours of operation. Therefore, I sustain the revocation of Petitioner's supplier number, effective August 28, 2012. Accordingly, Petitioner is barred from re-enrolling for two years from the effective date of its revocation.

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/s/  
Richard J. Smith  
Administrative Law Judge