

Department of Health & Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

West Coast Mobile Orthopedics, Inc.
(Supplier No. 1052400001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-420

ALJ Ruling No. 2014-32

Date: May 28, 2014

ORDER OF REMAND

The National Supplier Clearinghouse (NSC), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), determined that Petitioner, West Coast Mobile Orthopedics, Inc., was neither operational nor in compliance with Medicare Supplier Standard 7 and revoked Petitioner's Medicare billing privileges. NSC made this determination after an NSC inspector was unable to complete a site inspection on two separate occasions because Petitioner's facility was not open during its posted hours of operation. Petitioner requested a hearing before an administrative law judge. Because Petitioner has presented sufficient evidence that an emergency situation necessitated a temporary closure of its facility on the day that NSC determined Petitioner was not operational, I remand this case to CMS to conduct an additional inspection of Petitioner's facility in order to determine whether Petitioner is compliant with Medicare Supplier Standards.

I. Background and Procedural History

Petitioner was enrolled in the Medicare program as a supplier of Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS). CMS Exhibit (Ex.) 1,

at 1. In a September 26, 2013 letter, Palmetto GBA, an administrative contractor working for NSC, notified Petitioner that NSC was revoking Petitioner's Medicare billing privileges effective August 23, 2013. CMS Ex. 1, at 1. NSC stated that an NSC representative was unable to complete an inspection of Petitioner's facility on August 21, 2013, and on August 23, 2013, because the facility was closed during its posted hours of operation and the representative could not verify Petitioner's compliance with the Medicare supplier standards. CMS Ex. 1, at 2. NSC concluded that Petitioner was "not operational to furnish Medicare covered items and services . . . [and was] considered to be in violation of 42 C.F.R. § 424.535(a)(5)(ii) and all supplier standards as defined in 42 C.F.R. § 424.57(c)." CMS Ex. 1, at 2. NSC also stated that Petitioner's "liability insurance policy on file with the NSC expired January 22, 2013." CMS Ex. 1, at 2 (emphasis omitted).

Petitioner filed a timely request for reconsideration and submitted a variety of documentation including its current liability insurance policy. CMS Ex. 3. Petitioner also argued to NSC that on August 23, 2013, at the time of the second attempted site inspection, Petitioner's owner was at a store obtaining supplies to fix a leak in the roof of its facility created by a storm on that date. CMS Ex. 3, at 21. Petitioner provided a photocopy of two receipts from nationally-recognized hardware stores and a picture of the roof with a tarp over it. CMS Ex. 3, at 23, 31.

In a November 25, 2013 letter, NSC issued an unfavorable reconsidered determination stating that Petitioner was non-compliant with "Supplier Standard #7: Section 42 C.F.R. Section 424.57 . . ." since "the site inspector was unable to complete a site investigation . . . because the facility location on record with the NSC was not open or accessible to the site inspector" CMS Ex. 5, at 4. However, the hearing officer found that Petitioner's current liability insurance policy demonstrated that Petitioner was compliant with Medicare Supplier Standard 10, listed at 42 C.F.R. § 424.57(c)(10). CMS Ex. 5, at 4.

Petitioner filed a timely request for hearing (RFH) before an administrative law judge, along with seven attachments. In response to my December 23, 2013 Acknowledgment and Pre-hearing Order, CMS timely filed a motion for summary judgment and a memorandum (CMS Br.) along with six proposed exhibits (CMS Exs. 1-6). On February 24, 2014, Petitioner's owner, Chris Rieger, emailed me, through the staff attorney working with me, an additional letter that my office electronically filed for him on February 27, 2014.

II. Discussion

On August 21, 2013, at approximately 11:49 a.m., an NSC inspector attempted to conduct a site inspection of Petitioner's facility. CMS Ex. 2, at 15. The NSC inspector made the attempt during Petitioner's posted hours of operation, Monday

through Friday, 9:00 a.m. to 5:00 p.m. CMS Ex. 2, at 5-6, 11. Petitioner does not dispute these hours of operation. RFH at 1. In his site investigation report, the NSC inspector made the following observations:

THE SUPPLIER APPEARS TO OPERATE FROM THEIR RESIDENCE. ON THE FIRST ATTEMPT THERE WAS A GATE AND LOCKED. INVESTIGATOR CALLED FROM THE GATE TO THE HOUSE AND HONKED THE HORN FROM THE CAR. THERE WAS A VEHICLE OBSERVED IN THE PARKWAY BUT THERE WAS NO ANSWER. INVESTIGATOR REMAINED IN THE AREA CALL ONCE AGAIN AND TOOK PICTURES [sic].

CMS Ex. 2, at 1. The NSC inspector documented his attempted site visit with time-stamped photographs. CMS Ex. 2, at 10-13 .

The NSC inspector's observation that Petitioner's facility was closed and no staff member was present during the August 21, 2013 attempted site inspection is corroborated by Petitioner. In Petitioner's request for reconsideration, Petitioner's owner, Chris Reiger, admits that the facility's "gate was shut for security," and states "[m]y wife was not at the office the week an inspection was made 8-21-13 / 8-23-13 and was on vacation I was out seeing patients when the audit took place" CMS Ex. 3, at 1.

On August 23, 2013, at approximately 3:13 p.m., the NSC inspector returned to Petitioner's facility for a site visit. CMS Ex. 2. In his site investigation report, the NSC inspector documented the following regarding his second attempted visit:

ON THE SECOND ATTEMPT THE GATE WAS AGAIN LOCKED AND THERE WAS NO CAR IN THE FACILITY. INVESTIGATOR AGAIN HONKED THE HORN AND CALLED FROM THE EXTERIOR. THERE WAS NO ANSWER. THE SIGN TO THE FACILITY IS OBSCURED AND COVERED BY THE HEDGES AND VERY DIFFICULT TO SEE FROM THE ROAD.

CMS Ex. 2, at 1. The NSC inspector documented his second attempted site visit with time-stamped photographs. CMS Ex. 2, at 14-15.

Petitioner admits that its facility was not open during the second attempted site visit but asserts that “there were extenuating circumstances on 8-21-13 and 8-23-13. The weather was inclement and therefore the gate was closed, the grinder was running . . . and a roof leak in the office was found [o]n 8-23-13 and had to be fixed to protect patient files.” RFH at 1. Petitioner argued this point in an October 7, 2013 letter to the hearing officer assigned to decide Petitioner’s request for reconsideration. In this letter, Petitioner stated “[t]he times that the site visit person came out here to my location, I was frantically rushing back and forth to Home Depot and Lowes buying [r]oofing supplies as my office was leaking from the [h]eavy down pours [sic] that [w]hole week 8-19-13 through 8-25”¹ CMS Ex. 3, at 21; P. Ex. 3. To support its claim, Petitioner submitted two receipts from hardware stores. CMS Ex. 3, at 23; P. Ex. 5. The first of these receipts, from the Home Depot, is dated August 23, 2013, and time-stamped 3:20 p.m. It lists one of the purchased items as “ROOF PATCH <A> LEAK STOPPER 10YR RUBBER PATCH 3.6QT.” CMS Ex. 3, at 23; P. Ex. 5.

The Social Security Act requires DMEPOS suppliers to maintain a physical facility on an appropriate site and authorizes the Secretary of Health and Human Services (Secretary) to create other requirements for DMEPOS suppliers. 42 U.S.C. § 1395m(j)(1)(B)(ii). The Secretary promulgated regulations establishing requirements for DMEPOS suppliers at 42 C.F.R. § 424.57. Supplier Standard 7 requires that a DMEPOS supplier maintain a physical facility on an appropriate site that is “accessible and staffed during posted hours of operation.” 42 C.F.R. § 424.57(c)(7)(i)(C). CMS has the authority to perform off-cycle visits to verify information on file with the contractor and to confirm compliance with Medicare enrollment requirements and the supplier standards. 42 C.F.R. §§ 424.57(c)(8), 424.515(d), 424.517(a).

While the regulations do not address the specifics of an inspector’s site visit, in section 15.20.1 of the Medicare Program Integrity Manual (MPIM), CMS states the following:

Site verifications should be done Monday through Friday (excluding holidays) during their posted business hours. If there are no hours posted, the site verification should occur between 9 a.m. and 5 p.m. If, during the first attempt, there are obvious signs that [the] facility is no longer operational no second

¹ I take official notice that an internet search revealed that Bonita Springs, Florida, was reported to have thunderstorms and rain in the afternoon hours of August 21, 2013, and thunderstorms and heavy rain in the afternoon hours of August 23, 2013. See www.friendlyforecast.com.

attempt is required. **If on the first attempt the facility is closed but there are no obvious indications the facility is non-operational, a second attempt on a different day during posted hours of operation should be made** (emphasis added).

Thus, according to CMS, if, during the first site inspection, a site inspector determines that there are obvious signs that a facility is no longer operational, there is no need for that inspector to return for a second site inspection. However, if the facility is closed when the inspector attempts the first site inspection and there are no obvious indications that the facility is non-operational, the inspector should return to attempt an inspection on a second day.

In the present case, the site inspector attempted to inspect Petitioner's facility on August 21, 2013. CMS Ex. 2, at 1. As he documented, the inspector found Petitioner's facility locked and Petitioner's staff failed to answer the inspector's calls and honks from his car horn. CMS Ex. 2, at 1. However, the inspector returned two days later to inspect the facility. CMS Ex. 2, at 1. According to the MPIM, if an inspector attempts a second site visit, it indicates that the inspector determined that the facility was not open on the first inspection date, but there were no obvious signs that the facility was non-operational on that first visit. It was only after the inspector was unable to inspect Petitioner's facility on the second day that CMS determined that Petitioner was non-compliant with Medicare's supplier standards. CMS Ex. 1. This inference is supported by the fact that NSC set the effective date for revocation as August 23, 2013, the day of the second attempted site inspection. CMS Exs. 1, at 1; 2, at 5, 14-15. Thus, this is the first day that NSC considered Petitioner not to be operational. *See* 42 C.F.R. § 424.535(g).²

Based on the site inspector's observations on August 23, 2013, it is understandable that he might conclude that Petitioner was not accessible or staffed. However, the inspector did not know that Petitioner's facility was damaged from a storm and was temporarily closed while its owner sought supplies to make repairs. CMS argues that Petitioner was neither "open to the public" nor "accessible," if the

² If CMS bases its initial revocation determination on violations of 42 C.F.R. §§ 424.57(c)(7) (accessibility and staffing) and 424.535(a)(5) (not operational), but the reconsidered determination affirmed the revocation based solely on a violation of 42 C.F.R. § 424.57(c)(7), then the only issue before an administrative law judge is that violation. *Neb Group of Arizona LLC*, DAB No. 2573, at 7 (2014). Such is the case here. However, this does not affect the reasoning above because the site inspector acted consistent with MPIM procedures and the reconsidered determination left unchanged the effective date of revocation.

supplier location is closed because the staff is out for lunch, on a break, or making patient deliveries or visits. CMS Br. at 7, citing *Ita Udeobong, d/b/a Midland Care Med. Supply & Equip.*, DAB No. 2324, at 6-7 (2010).³

When promulgating the regulations, the Secretary contemplated allowing facilities to temporarily close during posted hours of operation, but the Secretary chose to emphasize that a supplier's place of business must remain publicly accessible during posted hours of operation. *Complete Home Care Inc.*, DAB No. 2525, at 6 (2013). However, in the preamble to the final rule, the Secretary provided the following in response to a question concerning temporary absences:

We note that we have always made exceptions concerning posted hours for disasters and emergencies and Federal and State holidays. However, while we recognize that personal emergencies do occur, we believe that suppliers should be available during posted business hours. Moreover, we believe that a DMEPOS supplier should do its best to plan and staff for temporary absences.

75 Fed. Reg. 52,629, 52,637 (Aug. 27, 2010) (emphasis added). Therefore, just as a DMEPOS supplier would not need to be staffed on legal holidays, it does not need to be staffed when a disaster or emergency occurs. It appears that a "personal emergency" might not provide a reason for a temporary absence since the Secretary, in that circumstance, still admonishes the DMEPOS supplier to do its best to plan for such a temporary absence.

The exception for emergencies does not appear to have played a direct role in any Departmental Appeals Board case; however, it has been previously mentioned as part of a case involving a revocation.

CMS did not revoke [Petitioner]'s billing privileges because of a vacation, holiday, or emergency situation, or because of a failure to remain open 24 hours per day, 365 days per year. Thus, the question whether the regulations require such continuous operations was not before the ALJ.

I & S Healthcare Services, LLC, DAB No. 2519, at 6 (2013) (emphasis added).

³ Administrative decisions and rulings cited in this decision are accessible on the internet at: <http://www.hhs.gov/dab/decisions/index.html>.

