

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Orthopaedic Surgery Associates
(PTAN: 0689190003)
(NPI: 1306923149),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-440

Decision No. CR3221

Date: May 6, 2014

DECISION

The Centers for Medicare & Medicaid Services (CMS) revoked the Medicare billing privileges of Petitioner, Orthopaedic Surgery Associates. Petitioner appealed. As discussed below, the evidence of record supports CMS's determination. Therefore, I affirm the revocation of Petitioner's Medicare billing privileges.

I. Background

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). CMS Exhibit (Ex.) 2. On July 12 and 26, 2013, a CMS contractor from Palmetto GBA, the National Supplier Clearinghouse (NSC), attempted to conduct a site inspection at Petitioner's location on file with CMS. CMS Ex. 1. A site inspection could not be completed on either date and, on September 20, 2013, NSC issued an initial determination revoking Petitioner's

Medicare supplier number effective July 26, 2013, the date CMS determined that Petitioner's practice location was not operational. CMS Ex. 2. NSC barred Petitioner from re-enrolling in the Medicare program for two years from the effective date. CMS Ex. 2.

Petitioner filed a timely request for reconsideration with NSC and later submitted evidence to the NSC hearing officer assigned to the case. CMS Exs. 3, 4. On October 24, 2013, the NSC hearing officer issued an unfavorable reconsidered determination upholding the revocation of Petitioner's Medicare billing privileges. CMS Ex. 5.

On December 12, 2013,¹ Petitioner timely filed a request for hearing (RFH) before an administrative law judge. On January 3, 2014, I issued an Acknowledgement and Pre-hearing Order (Order). Pursuant to the Order, CMS filed its brief (CMS Br.) and five exhibits (CMS Exs. 1-5). Petitioner submitted a brief (P. Br.) and one exhibit (P. Ex. 1).

II. Decision on the Record

In the absence of objection, I admit CMS Exs. 1-5 and P. Ex. 1 into the record. With its RFH, Petitioner submitted documents that have been admitted as CMS Exs. 2-5. Petitioner also submitted copies of emails that Petitioner's Associate Administrator wrote to NSC's hearing officer who conducted the reconsideration of the initial determination to revoke Petitioner's Medicare billing privileges. Petitioner did not resubmit these emails as exhibits, therefore, I will not admit these documents into the record as exhibits. However, I have reviewed the emails and they are part of the record because the emails were attached to Petitioner's RFH.

My Pre-hearing Order 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. Order ¶¶ 8-11; *see Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823, at 7-8 (2002) (holding that the use of written direct testimony for witnesses is permissible so long as the opposing party has the opportunity to cross-examine those witnesses).² CMS did not submit any direct testimony for witnesses and CMS did not request to cross-

¹ Petitioner's request for a hearing is dated November 11, 2013, but was postmarked on December 12, 2013. However, it is undisputed Petitioner's request for a hearing is timely.

² Administrative decisions cited in this decision are accessible on the internet at: <http://www.hhs.gov/dab/decisions/index.html>.

examine any of the individuals for whom Petitioner submitted affidavits (P. Ex. 1).³ Therefore, there is no need for an in-person hearing and I issue this decision based on the written record. Order ¶¶ 9-11.

III. Issue

Whether CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges for failing to comply with Supplier Standard 7 (42 C.F.R. § 424.57(c)(7)) and failing to be operational (42 C.F.R. § 424.535(a)(5)). I have jurisdiction to decide this issue. 42 C.F.R. §§ 498.3(b)(17), 498.5(1)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

IV. Findings of Fact, Conclusions of Law, and Analysis⁴

In order for a DMEPOS supplier to receive Medicare payments for items furnished to a Medicare-eligible beneficiary, the Secretary of Health and Human Services must first issue a supplier number to that DMEPOS supplier. 42 U.S.C. § 1395m(j)(1)(A). To receive direct-billing privileges, a DMEPOS supplier must meet and maintain each of the supplier enrollment standards, including the requirement to maintain a physical location that is accessible and staffed during posted hours. 42 C.F.R. § 424.57(c)(7)(i)(C). CMS may revoke a currently enrolled DMEPOS supplier's Medicare billing privileges if CMS determines, upon on-site review, that the DMEPOS supplier is no longer operational to furnish Medicare covered items or services, or the supplier fails to satisfy any of the Medicare enrollment requirements, or has failed to furnish Medicare covered items or services as required by the statute or regulations. 42 C.F.R. § 424.535(a)(5)(ii). After a DMEPOS supplier's Medicare billing privileges are revoked, it is barred from reenrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c).

1. The NSC site inspector could not gain entry to Petitioner's facility at 1401 NW 9th Avenue in Boca Raton, Florida, when site inspections were attempted on July 12 and 26, 2013.

³ Petitioner submitted affidavits for three individuals as P. Ex. 1. The affidavits do not substantively provide any direct testimony. Each affidavit states only that the individual is: "over 18 years of age and competent to testify of my own knowledge of the facts stated herein"; that "[a]ll the facts stated by me herein are true, correct and complete to the best of my knowledge and understanding"; and that the individual "[w]ill testify . . . in the case of Orthopaedic Surgery Associates v. Centers for Medicare and Medicaid Services." P. Ex. 1, at 1-3.

⁴ My findings of fact and conclusions of law are set forth in italics and bold in the discussion captions of this decision.

On Friday, July 12, 2013, at approximately 11:05 a.m., an NSC inspector attempted to conduct an unannounced site inspection at Petitioner's facility located at 1401 NW 9th Avenue, Boca Raton, Florida. CMS Ex. 1, at 2. Petitioner's posted hours of operation were listed as Monday, Thursday and Friday from 8:00 a.m. to 6:00 p.m. CMS Ex. 1, at 5. The inspector's report "found supplier closed; non-operational despite posted days/hours of operation." CMS Ex. 1, at 2. On Friday, July 26, 2013, at approximately 10:11 a.m., the NSC inspector attempted another site inspection and again found the facility to be closed during Petitioner's posted hours of operation. CMS Ex. 1, at 2. The NSC inspector's observation that Petitioner's office was closed and no personnel were present during the attempted site inspections is corroborated by Petitioner. In Petitioner's request for reconsideration and Petitioner's RFH, Petitioner states: "We apologize for not being available to complete an inspection of our facility. We had physicians out of the office at that time which resulted in a change in office hours." CMS Ex. 3, at 1. Again in Petitioner's brief, it states: "Admittedly we were not available to complete an inspection of our facility. We had physicians out of the office at that time which resulted in a change in office hours." P. Br. at 1. Thus, Petitioner admits that both of the attempted site inspections could not be completed because Petitioner's personnel were not in the office during its posted hours of operation.

Therefore, based on the evidence of record, I find that the NSC inspector attempted to conduct site inspections of Petitioner's facility at 1401 NW 9th Avenue in Boca Raton, Florida, on July 12 and 26, 2013, during Petitioner's posted hours of operation. However, the NSC inspector was unable to gain entry to the facility and complete the inspections because none of Petitioner's personnel were present at the location.

2. CMS had a legitimate basis to revoke Petitioner's Medicare billing privileges because Petitioner's location was not accessible and staffed during posted hours of operation, and was not operational, as required by 42 C.F.R. §§ 424.57(c)(7)(i)(C) and 424.535(a)(5)(ii).

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 (emphasis added). Further, DMEPOS suppliers must permit CMS or its agents to conduct on-site inspections to ascertain supplier compliance with enrollment standards, and the supplier must be accessible and staffed during posted hours of operation to beneficiaries and to CMS. 42 C.F.R. § 424.57(c)(7)(i)(C), (c)(8). CMS may perform periodic site visits to determine whether the supplier is operational and complying with Medicare enrollment requirements. 42 C.F.R. §§ 424.510(d)(8), 424.515(c), 424.517(a).

The facts in this case establish that Petitioner's location was not open and available for the NSC's site inspector to conduct site inspections on July 12 and 26, 2013. Therefore, CMS had a legitimate basis to conclude that Petitioner was not operational under 42 C.F.R. § 424.535(a)(5)(ii) and was not in compliance with the supplier standards found at 42 C.F.R. § 424.57(c)(7)(i)(C).

In its brief, Petitioner admits that its staff was not available at the time of the attempted site inspections because physicians were out of the office at the time which resulted in a change in office hours. P. Br. at 1. Petitioner argues it should have been contacted by phone to verify compliance or given an opportunity to file a Corrective Action Plan (CAP) before CMS made a final determination to revoke Petitioner's supplier number. P. Br. at 1. Petitioner contends it has "updated our office hours and are in full compliance with the DMEPOS supplier standards." P. Br. at 1.

However, a DMEPOS supplier is neither "open to the public" nor "accessible" if the supplier location is closed because the staff is out for lunch, on a break, making patient visits, or out of the office for any reason. *See Ita Udeobong, d/b/a Midland Care Med. Supply & Equip.*, DAB No. 2324, at 6-7 (2010). Even assuming Petitioner's staff members were out of the office for a short period of time due to a change in office hours, this is not a sufficient excuse, as it does not show that Petitioner was accessible and properly staffed when NSC attempted site inspections during Petitioner's posted hours of normal operation. CMS Ex. 1. A supplier may not close, even temporarily, during its posted hours of operation. *Complete Home Care, Inc.*, DAB No. 2525, at 5 (2013). It is incumbent on Petitioner to make whatever reasonable arrangements are necessary to keep its business open while allowing for patient consultations and visits as well as breaks for staff members. As stated in a previous 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, and instead chose to emphasize that a supplier's place of business must always remain publicly accessible during posted hours. *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).

Therefore, I conclude that CMS has a basis for its determination that Petitioner's location was not operational because it was not accessible and staffed during posted business hours and CMS properly revoked Petitioner's Medicare billing privileges. 42 C.F.R. §§ 424.57(c)(7)(i)(C), 424.535(a)(5)(ii).

3. Petitioner had no right to file a Corrective Action Plan (CAP) and I have no jurisdiction to review CMS's denial of a CAP.

Petitioner argues that CMS should have afforded Petitioner the opportunity to file a CAP before revoking Petitioner's Medicare billing privileges. P. Br. at 1. Along with its reconsideration request, Petitioner submitted a form CMS 855S to update its office hours as a CAP. CMS Ex. 3, at 1. The updated schedule indicates that Petitioner is open on Monday, Tuesday and Thursday from 8:00 a.m. to 6:00 p.m. CMS Ex. 3, at 8. However, NSC did not provide Petitioner with notice of a right to submit a CAP in the initial revocation determination. CMS Ex. 2. The lack of opportunity to submit a CAP is consistent with 42 C.F.R. § 424.535(a)(1), which states that a supplier is "granted an opportunity to correct the deficient compliance requirement before a final determination to revoke billing privileges, **except for those imposed under paragraphs (a)(2), (a)(3), or (a)(5) of this section.**" (Emphasis added). Petitioner's Medicare billing privileges were revoked, in part, pursuant to 42 C.F.R. § 424.535(a)(5), after CMS determined that Petitioner was nonoperational after an on-site review. Thus, Petitioner is exempt from the requirement that a supplier be given the opportunity to file a CAP before a final determination to revoke billing privileges and Petitioner had no right to file a CAP. In any event, I do not have jurisdiction to review CMS's decision to reject a CAP. 42 C.F.R. § 405.809 (CAP decisions are not initial determinations subject to appeal under 42 C.F.R. Part 498); *Pepper Hill Nursing & Rehab. Ctr.*, DAB No. 2395, at 9-10 (2011); *DMS Imaging, Inc.*, DAB No. 2313, at 7-10 (2010).

V. Conclusion

Based on the reasons stated above, I affirm the determination to revoke Petitioner's DMEPOS supplier number and Medicare billing privileges effective July 26, 2013, pursuant to 42 C.F.R. §§ 424.57(c)(7)(i)(C), 424.535(a)(5)(ii).

/s/
Scott Anderson
Administrative Law Judge