

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Potomac Medical Equipment, Inc.
(Supplier No. 1265740001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-1356

Decision No. CR3268

Date: June 20, 2014

DECISION

Palmetto GBA National Supplier Clearinghouse (NSC), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), determined that Petitioner, Potomac Medical Equipment, Inc., was not operational and failed to comply with Supplier Standard 7. Because NSC revoked Petitioner's Medicare billing privileges, Petitioner requested a hearing before an administrative law judge to dispute NSC's determination. For the reasons stated below, I affirm NSC's determination to revoke Petitioner's Medicare billing privileges.

I. Background and Procedural History

John Dwyer, Petitioner's sole shareholder and owner, established Petitioner in 1999. Petitioner Exhibit (P. Ex.) 1, at 1. For 14 years, Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, orthotics, prosthetics, and supplies (DMEPOS). CMS Ex. 4, at 1. Until April 23, 2013, Petitioner's office was located at

19415 Deerfield Avenue, Suite 204, Lansdowne, Virginia 20176 (19415 Deerfield Avenue). CMS Ex. 4, at 1. After that time, Petitioner's address has been 41338 Raspberry Drive, Leesburg, Virginia 20176 (41338 Raspberry Drive). CMS Ex. 4, at 2.

On April 25, 2013, an inspector with NSC attempted to conduct an unannounced inspection of Petitioner's office at 19415 Deerfield Avenue. CMS Ex. 2. The inspector noted the following in her report: "Supplier has vacated this location. There was no sign or indication left as to if or where the supplier relocated too [sic]." CMS Ex. 2, at 7. Based on this information, NSC issued a June 5, 2013 initial determination to revoke Petitioner's Medicare billing privileges based on a failure to maintain a facility on an appropriate site (42 C.F.R. § 424.57(c)(7)) and a failure to be operational (42 C.F.R. § 424.535(a)(5)(ii)). CMS Ex. 3, at 1-2. NSC established a retroactive revocation effective date of April 25, 2013, and a two-year reenrollment bar. CMS Ex. 3, at 1.

Petitioner, through its owner, filed a timely request for reconsideration. CMS Exs. 4; 5. In the reconsideration request, Petitioner admitted that the 19415 Deerfield Avenue location was vacant on April 25, 2013, because Petitioner had moved to the 41338 Raspberry Drive location on April 23, 2013. CMS Ex. 4, at 1. Petitioner asserted that it mailed a Form CMS-855S to NSC on May 14, 2013, in which it informed NSC of Petitioner's change in address. CMS Ex. 4, at 1. Petitioner enclosed with the reconsideration request a copy of a Form CMS-855S signed on May 14, 2013. CMS Ex. 4, at 3-9.

In a July 24, 2013 reconsidered determination, an NSC hearing officer upheld the revocation. The NSC hearing officer indicated that the location on file with NSC on the date of the attempted inspection was 19415 Deerfield Avenue, and that "after examining the information on file with the NSC, there is no indication that [Petitioner] submitted the required change of information CMS 855S application for the change of location." CMS Ex. 6, at 2. The NSC hearing officer noted that she asked Petitioner's owner during a telephone call "if he had any postal or mailing documentation that would substantiate that the change of information had been received at the NSC. [Petitioner's owner] stated that he did not have any documents to submit for verification." CMS Ex. 6, at 3. The hearing officer then concluded:

The fact remains that the site inspector could not access [Petitioner's] facility to verify compliance with the supplier standards because the facility location on file with NSC was

non-operational. The supplier location must be accessible and staffed. . . . It is found by this hearing officer that the NSC was appropriate in its revocation based upon the information on file with NSC at the time. Review of the case file for [Petitioner] does not verify compliance with supplier standard number 7.

CMS Ex. 6, at 3.

Petitioner, through counsel, timely filed a request for a hearing (RFH) before an administrative law judge. In the RFH, Petitioner asserted that the NSC hearing officer incorrectly upheld the revocation of Petitioner's billing privileges because Petitioner's owner "personally prepared and mailed the form CMS-855S reflecting [Petitioner's] change of address on or about 05/14/2013 so that it was timely delivered to the NSC within 30 days after [Petitioner's] relocation [to 41338 Raspberry Drive]." RFH at 2.

After being assigned to hear and decide this case, I issued an Acknowledgment and Pre-hearing Order (Order) on September 26, 2013. In response to the Order, CMS filed a brief (CMS Br.) and seven exhibits (CMS Exs. 1-7), one of which was the written direct testimony of an NSC employee (CMS Ex. 1). Petitioner filed a motion for summary judgment and a brief, and five exhibits (P. Exs. 1-5), four of which were the written direct testimony of: Petitioner's owner (P. Ex. 1); Petitioner's former Office Manager (P. Ex. 2); Petitioner's Patient Services Coordinator (P. Ex. 3); and the spouse of Petitioner's owner (P. Ex. 4). Petitioner later filed an amended P. Ex. 1 and withdrew P. Ex. 4.

After denying Petitioner's motion for summary judgment, I held a hearing on March 13, 2014. At the hearing, I admitted CMS Exs. 1-7 and P. Exs. 1-3 and 5 into the record. March 13, 2014 Hearing Transcript (Tr.) 8, 9, 13, 32, 40. Further, at the hearing the following witnesses were cross-examined: the NSC employee; Petitioner's owner; and Petitioner's former Office Manager. Following the hearing, Petitioner filed a post-hearing brief (P. Post-Hearing Br.), CMS filed a post-hearing brief (CMS Post-Hearing Br.), and Petitioner filed a reply brief (P. Reply Br.). This matter is now ready for decision.

II. Issues¹

1. Whether CMS has a legitimate basis to revoke Petitioner's enrollment as a DMEPOS supplier in the Medicare program based on a determination that Petitioner was not operational (42 C.F.R. § 424.535(a)(5)(ii)) and failed to comply with Supplier Standard 7 (42 C.F.R. § 424.57(c)(7)).
2. Whether Petitioner reported a change of address to CMS within 30-days of moving to its new site location.

III. Jurisdiction

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

IV. Findings of Fact, Conclusions of Law, and Analysis²

In order to participate in the Medicare program as a supplier, a prospective supplier must complete the applicable Form CMS-855 enrollment application, which requires disclosure of the supplier's address. *See* 42 C.F.R. § 424.510(a). Once enrolled, a DMEPOS supplier must report, within 30 days, any changes in its enrollment information. *See* 42 C.F.R. §§ 424.57(c)(2), 424.516(c). CMS may perform periodic revalidations and site visits to verify the enrollment information submitted to CMS, the supplier's compliance with Medicare enrollment requirements, the supplier's compliance with DMEPOS Supplier Standards, and whether the supplier is operational. 42 C.F.R. §§ 424.57(c)(8), 424.510(d)(8), 424.515(c), 424.517(a). If CMS or a CMS contractor determines that a supplier is not operational, then CMS or the CMS contractor may revoke the supplier's Medicare billing privileges retroactive to the date that CMS or the CMS contractor determined that the supplier was not operational. 42 C.F.R. § 424.535(a)(5)(ii), (g).

¹ I informed the parties of the issues in this case in the March 3, 2014 Notice of Hearing and provided the parties with an opportunity to object to these issues. Neither party filed a written objection.

² My numbered findings of fact and conclusions of law appear in bold and italics.

1. ***An NSC inspector attempted a site inspection on April 25, 2013, at the address on file for Petitioner's office (19415 Deerfield Avenue, Suite 204, Lansdowne, Virginia); however, the location was vacant and no staff was present to allow the inspector to enter the office.***

On April 25, 2013, at approximately 12:45 p.m., an inspector with NSC attempted to conduct an unannounced site inspection of Petitioner's office at the 19415 Deerfield Avenue location. CMS Ex. 2. This was Petitioner's address on file with NSC on that date. CMS Ex. 6, at 2; *see also* CMS Ex. 2, at 1. The inspector observed that Petitioner vacated this location with no indication of a new address. CMS Ex. 2, at 7. Petitioner admits that it vacated the 19415 Deerfield Avenue location on April 23, 2013. CMS Ex. 4, at 1; P. Ex. 1, at 1-2; P. Br. at 1-2. Therefore, I find that an NSC inspector was unable to conduct an unannounced site inspection of Petitioner's office location address on file with NSC on April 25, 2013, because Petitioner's office was vacant and not staffed.

2. ***CMS had a legitimate basis to revoke Petitioner's enrollment in the Medicare program because Petitioner was not operational pursuant to 42 C.F.R § 424.535(a)(5).***

CMS may revoke a currently enrolled supplier's Medicare billing privileges if:

Upon on-site review, CMS determines that-

* * * *

(ii) A Medicare Part B supplier is no longer operational to furnish Medicare covered items or services, or the supplier has failed to satisfy any or all of the Medicare enrollment requirements, or has failed to furnish Medicare covered items or services as required by statute or regulations.

42 C.F.R. § 424.535(a)(5)(ii). A supplier is "operational" when 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 (as applicable based on the

type of facility or organization, provider or supplier specialty, or the services or items being rendered) to furnish these items or services.

42 C.F.R. § 424.502.

In the present matter, CMS provided undisputed evidence that Petitioner was not operational on April 25, 2013, at its business address on file with NSC (i.e., 19415 Deerfield Avenue). Therefore, I conclude that CMS had a legal basis to revoke Petitioner's billing privileges under 42 C.F.R. § 424.535(a)(5).

Petitioner raised the issue that it was fully operational on April 25, 2013, at its 41338 Raspberry Drive location. However, the regulatory definition of the term "operational" refers to the "qualified physical practice location" of a supplier. 42 C.F.R. § 424.502. Significantly, the enrollment application requests the address of a supplier's practice location (CMS Ex. 4, at 5) and a supplier must be able to provide documentation of its "practice location" with its enrollment application. 42 C.F.R. § 424.510(d)(2)(ii). CMS may perform on-site inspections to verify that the enrollment information submitted by a supplier is accurate and to determine compliance with Medicare requirements. 42 C.F.R. § 424.517(a). This means that CMS will inspect the "qualified physical practice location" that has been provided by the supplier and is currently on file with CMS. *See, e.g., JIB Enterprises, LLC, d/b/a Drug Plus Pharmacy, DAB CR3010, at 9 (2013).*³ In the present case, on April 25, 2013, that location was 19415 Deerfield Avenue.⁴

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

⁴ As indicated above, Petitioner suggests it maintained a physical facility on April 25, 2013, at 41338 Raspberry Drive (CMS Ex. 4, at 1-2, 14-19; P. Exs. 1; 3; 5), although this was not the address in NSC's file at the time of the attempted site inspection. However, whether or not Petitioner may have technically complied with section 424.57(c)(7) is no longer an issue I need to address because I have concluded that CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges under 42 C.F.R. § 424.535(a)(5). Section 424.535(a)(5) authorizes CMS to revoke Medicare billing privileges regardless of compliance with section 424.57(c) and, unlike section 424.57(c)(7), a violation of section 424.535(a)(5) results in a retroactive effective date for the revocation. 42 C.F.R. § 424.535(g).

3. *Petitioner did not effectively report its change of address to CMS, from 19415 Deerfield Avenue, Suite 204, Lansdowne, Virginia, to 41338 Raspberry Drive, Leesburg, Virginia, within 30 days of April 23, 2013, the date Petitioner asserts it changed locations.*

Although Petitioner does not dispute that its location at 19415 Deerfield Avenue was vacant on April 25, 2013, Petitioner asserts that it moved to a new location at 41338 Raspberry Drive on April 23, 2013, and reported to CMS the change of address within 30 days of April 23, 2013. A DMEPOS “supplier must report to CMS any changes in the information supplied on the [enrollment] application within 30 days of the change.” 42 C.F.R. § 424.57(c)(2). As indicated above, a supplier provides its practice location on the enrollment application. *See* 42 C.F.R. § 424.510(d)(2)(ii); CMS Ex. 4, at 5. Therefore, Petitioner had 30 days from April 23, 2013, to report its change of address to CMS. Because NSC never stated that 42 C.F.R. § 424.57(c)(2) was a basis for revocation, I interpret Petitioner’s position as an affirmative defense to revocation for failing to be operational. Therefore, Petitioner bears the burden of proving that it timely reported its change of address to CMS.⁵

Petitioner’s owner testified that on May 14, 2013, he personally: completed the Form CMS-855S indicating the change of address for Petitioner; signed and dated the application; addressed a manila envelope with NSC’s address and Petitioner’s return address; drove to a United States Postal Service (USPS) office and asked a clerk to weigh the envelope for postage; paid for the postage in cash; and observed the clerk place the postage stamp on the manila envelope and place the envelope in the outgoing mail. Petitioner’s owner also testified that Petitioner never received the envelope back from the USPS. P. Ex. 1, at 2.

Supporting this testimony is that of Petitioner’s former office manager who testified that, on May 14, 2013, Petitioner’s owner asked her to look up Petitioner’s supplier number so that he could enter it on the Form CMS-855S. Further, the former office manager

⁵ Even if Petitioner did not raise this matter as an affirmative defense, in provider and supplier enrollment and revocation appeals, providers and suppliers must be able to demonstrate that they meet the enrollment requirements. 42 C.F.R. § 424.545(c). Therefore, the ultimate burden of proving compliance with the regulations is on the provider or supplier. *See MediSource Corp.*, DAB No. 2011 (2006).

testified that on May 15, 2013, she noticed that a copy of the completed Form CMS-855S was on her desk for filing and Petitioner's owner told the office manager that he had mailed the Form CMS-855S. P. Ex. 2, at 1; Tr. at 33.

Petitioner argues that it has proven that it mailed the Form CMS-855S within 30 days of its change in location based on testimony it provided and because Petitioner submitted, with its reconsideration request, a signed and dated copy of the Form CMS-855S that he alleges to have mailed to NSC. *See* CMS Ex. 4, at 3-6. Petitioner argues that it is sufficient to merely prove that Petitioner mailed the Form CMS-855S because the common law "mailbox rule" creates a presumption that NSC received Petitioner's Form CMS-855S because Petitioner's owner mailed it in the ordinary course of business. P. Br. at 7-8; P. Post-Hearing Br. at 4. Further, Petitioner avers that CMS has failed to rebut this presumption through the testimony of NSC's employee because NSC's employee was unable to testify that she conducted an inquiry as to whether the NSC's mailroom received the Form CMS-855S.

I am not convinced that Petitioner proved that it mailed the Form CMS-855S to NSC. Although Petitioner provided significant evidence that its owner mailed the Form CMS-855S, Petitioner has failed to produce any objective evidence to corroborate Petitioner's owner's testimony, such as a sales receipt from the USPS.⁶ It is questionable why Petitioner has not submitted such a receipt since Petitioner's owner testified that he personally paid cash to a USPS clerk to mail the Form CMS-855S. This situation is particularly perplexing given that Petitioner's owner and former office manager both testified that a copy of the Form CMS-855S was filed in their records. One would think that such careful record keeping would have included the receipt from the USPS. If for no other reason, Petitioner's owner would have had an incentive to keep the receipt for book-keeping purposes and as proof of a business expense that could possibly be deducted from income taxes. It does not seem likely that Petitioner's owner would have discarded the USPS receipt.

In any event, even if Petitioner provided sufficient evidence to prove that Petitioner's owner mailed the Form CMS-855S to NSC, I conclude that this is insufficient evidence to prove that Petitioner actually reported its change of address within 30 days to NSC. As cited earlier, 42 C.F.R. § 424.57(c)(2) requires DMEPOS suppliers to report changes

⁶ Although Petitioner's former office manager provided some supporting testimony, she was not able to testify that she saw Petitioner's owner actually mail the Form CMS-855S. Tr. at 34.

in the information provided on its enrollment application within 30 days of the change. The preamble to the notice of proposed rulemaking in which that provision was proposed states that the DMEPOS supplier “must notify [CMS] within 35 days of any change” 63 Fed. Reg. 2,926, 2,928 (Jan. 20, 2008). Although the final rule modified the length of time to report from 35 days to 30 days, and moved the provision from subparagraph (c)(3) to (c)(2), there was no other discussion concerning the specific meaning of the word “report” as used in 42 C.F.R. § 424.57(c)(7). *See* 65 Fed. Reg. 60,366, 60,368 (Oct. 11, 2000).

I interpret the regulatory requirement as meaning that a DMEPOS supplier must effectively report to CMS (or notify CMS of) the change of its address. A DMEPOS supplier cannot merely attempt to report to CMS (or notify CMS of) that information. *See JIB Enterprises*, DAB CR3010, at 4 (inferring from the petitioner’s assertion that it mailed notice of an address change “that NSC actually received Petitioner’s correctly completed Form CMS-855S and should have known of Petitioner’s new location” in order to conclude a material fact was in dispute to deny CMS’s motion for summary judgment.) (emphasis added); *cf. Sherye Epps d/b/a Sunshine Shoes*, DAB CR2215, at 11 (2010) (“Apart from her own assertions in briefing, Petitioner’s only evidence to prove that NSC received a voluntary termination form in September of 2009 is the letter from the postal employee.”) (emphasis added).

Petitioner also argues that if it is required to provide proof of receipt of the Form CMS-855S, such a requirement would mandate, without rulemaking, that providers and suppliers make all submissions using certified mail or another type of service that tracks the delivery of submissions. P. Reply Br. at 2-3. Petitioner’s argument misconstrues CMS’s position. CMS agrees that the regulations do not require that providers and suppliers send documents by certified mail; however, if they fail to do so, they will be deprived of evidence they need to prove NSC received those documents. This point was stated concisely in *JIB Enterprises*:

Petitioner also did not file a copy of any postal receipt, certified mail or otherwise, that supported the claims made in the affidavits. Indeed, there is no requirement that a CMS-855S be sent by certified mail, but, as this case demonstrates, it may clarify later discrepancies if they arise.

DAB CR3010, at 6; *cf. Sherye Epps d/b/a Sunshine Shoes*, DAB CR2215, at 12 (“Petitioner could have taken measures within her own control to establish the date of receipt of her voluntary termination form (such as using certified mailing) and simply failed to do so.”).

Further, I decline to apply the “mailbox rule” because Petitioner does not cite any authority, and I know of none, that would authorize me to presume that NSC received a Form CMS-855S to report a change of address. Even if application of the “mailbox rule” is appropriate, the record demonstrates that NSC did not receive the Form CMS-855S that Petitioner asserts was mailed on May 14, 2013.

A review of the record reveals no evidence supporting the conclusion that NSC received Petitioner’s May 14, 2014 Form CMS-855S. Petitioner’s owner admitted that he did not know for certain whether NSC received the Form CMS-855S and that he did not have proof that NSC received the Form CMS-855S. Tr. at 41. Significantly, CMS has provided evidence, in the form of testimony from an NSC employee, to show that NSC has no record of receiving the Form CMS-855S.

An NSC employee testified that when mail is delivered to the NSC, employees in the mailroom open the mail, stamp the documents, assign the documents a control number, and scan the documents. CMS Ex. 1, at 1. The scanned documents are then uploaded into NSC’s computer system that controls and tracks applications that it receives. CMS Ex. 1, at 2. After uploading, an NSC analyst associates the scanned documents with the proper application at NSC. Tr. at 16. The NSC employee testified that on October 31, 2013, she conducted a search of NSC’s computer system and did not find any record of receiving a Form CMS-855S in May 2013. CMS Ex. 1, at 2. The NSC employee attached the results of her search. CMS Ex. 1, at 5-8.

As Petitioner points out, the NSC employee does not work in the NSC mailroom or supervise anyone in the NSC mailroom. Tr. at 15. Further, the NSC employee’s search of NSC’s computer records did not include a search of the mailroom; rather, the NSC employee assumed that all documents received in the mail were scanned and uploaded by mailroom personnel. *See* Tr. at 17-19; P. Post-Hearing Br. at 7-8.

Despite the NSC employee’s assumption that the mailroom necessarily always scans and uploads incoming mail, I am persuaded that her testimony provides sufficient evidence for me to conclude that the NSC did not receive the Form CMS-855S in May 2013.

While it would be virtually impossible for NSC to say with complete certainty that it never misplaced a piece of mail, the NSC employee testified that she believed all mail that NSC received is scanned and uploaded because the NSC mailroom has set guidelines to follow. Tr. at 26. I take this to mean that NSC has uniform procedures for handling the mail and that if mail is received, mailroom personnel will scan it and upload it. I find that the search conducted by the NSC employee is sufficient to comply with any duty it may have had to check for receipt of Petitioner's Form CMS-855S. *See El Jardin Pharmacy, Inc.*, DAB No. 2438, at 5 (2012) ("There is, moreover, substantial evidence in the record to support [a finding that notice of a change of address was not sent until December 2010], including the testimony of the NSC representative that NSC did not have anything in its files about Petitioner's change in location at the time of the on-site inspection or receive a CMS855S from Petitioner prior to December 2010.").

V. Conclusion

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

/s/

Scott Anderson
Administrative Law Judge