

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Superior Oxygen & Medical Equipment, Inc.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-452

Decision No. CR4691

Date: August 26, 2016

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its administrative contractor, Palmetto GBA National Supplier Clearinghouse (NSC), revoked the Medicare enrollment and billing privileges of Superior Oxygen & Medical Equipment, Inc. (Superior Oxygen or Petitioner) because Superior Oxygen failed to inform CMS that it opened a second location from which it was providing items to Medicare beneficiaries and failed to enroll that new location in the Medicare program. Superior Oxygen requested a hearing before an administrative law judge (ALJ) to dispute the revocation, arguing that Superior Oxygen ceased providing items to Medicare beneficiaries from the second location before CMS revoked Petitioner's Medicare enrollment and billing privileges. As explained below, I affirm CMS's determination to revoke Superior Oxygen because the undisputed facts establish that Petitioner provided items to Medicare beneficiaries from a second location that was not yet enrolled in the Medicare program.

I. Background and Procedural History

Superior Oxygen was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). In an October 22, 2015 initial determination, NSC revoked Superior Oxygen's Medicare enrollment and billing

privileges for violations of 42 C.F.R. § 424.57(c)(1) and (2). CMS Exhibit (Ex.) 2. Specifically, NSC alleged that Petitioner “failed to enroll and disclose to the NSC additional locations used to service Medicare beneficiaries,” and NSC identified one of these “additional locations” as “438 W. Duke St., Lancaster, PA 17602.”¹ CMS Ex. 2 at 2. NSC barred Superior Oxygen from re-enrolling in the Medicare program for one year. CMS Ex. 2 at 3.

Superior Oxygen submitted a corrective action plan (CAP) to NSC, asserting that it had submitted an enrollment application for its second location and was now in compliance with all regulatory requirements. CMS Ex. 3. NSC denied the CAP stating that “NSC was unable to verify receipt of a CMS 855S [enrollment] application for the location 438 [N.] Duke Street, Lancaster, PA.” CMS Ex. 5 at 2.

Superior Oxygen timely requested reconsideration of the revocation. CMS Ex. 4. In the reconsideration request, Petitioner stated that in 2015 it had been operating from a second location (438 North Duke Street, Lancaster, PA) based on the mistaken belief that it could service Medicare beneficiaries using Superior Oxygen’s Medicare provider number associated with its main practice location until CMS enrolled the second practice location in the Medicare program. On July 9, 2015, during an inspection of Superior Oxygen’s main practice location (545 Penn Avenue, West Reading, PA), an accreditation “Compliance Team” informed Superior Oxygen that it needed to cease serving Medicare beneficiaries from the 438 North Duke Street location until that location was accredited and enrolled in the Medicare program. Petitioner asserted that it immediately stopped serving Medicare beneficiaries at the 438 North Duke Street location and sought to obtain accreditation. CMS Ex. 4 at 1-2. As it had stated in the CAP, Petitioner asserted that it had filed a Medicare enrollment application for the 438 North Duke Street location (CMS Ex. 4 at 1), but in an email to NSC, Petitioner clarified that it had not yet filed the enrollment application because the new location was still in the process of being accredited. CMS Ex. 7 at 1.

¹ The record is inconsistent as to whether the address of Petitioner’s second location is West Duke Street (CMS Ex. 2 at 2; CMS Ex. 3 at 4; CMS Ex. 5 at 2) or North Duke Street (CMS Ex. 1 at 1, 3-7; CMS Ex. 4 at 1-3; CMS Ex. 7; CMS Ex. 10 at 1-3). In two documents, both addresses are referred to interchangeably. CMS Ex. 8 at 2; CMS Ex. 9 at 3-6. I conclude that all references to Petitioner’s location on West Duke Street and North Duke Street are to the same address. Further, I conclude that the correct address is North Duke Street because almost all references to West Duke Street appear in NCS-created documents, whereas North Duke Street appears on most of Petitioner’s documents, including its enrollment application for that location, and on documents proving the existence of that location. CMS Ex. 1 at 3-7; CMS Ex. 4 at 1-3; CMS Ex. 7; CMS Ex. 10 at 1-3. Therefore, for the rest of this decision, I will refer to North Duke Street as the correct address for Petitioner’s second location.

On March 11, 2016, an NSC hearing officer issued an unfavorable reconsidered determination in which she concluded that Petitioner had violated 42 C.F.R. § 424.57(c)(1) and (2). CMS Ex. 9.

On April 1, 2016, Petitioner timely requested a hearing. On April 12, 2016, I issued an Acknowledgement and Pre-hearing Order (Order). In response to the Order, CMS filed a motion for summary judgment and brief (CMS Br.) with 10 exhibits (CMS Exs. 1-10). Petitioner filed a brief in response (P. Br.). CMS then filed a reply brief (CMS Reply).

II. Decision on the Record

I admit CMS Exs. 1-10 into the record without objection. Order ¶ 7; Civil Remedies Division Procedures (CRDP) § 14(e).

The parties neither identified any proposed witnesses nor submitted any written direct testimony for witnesses. Order ¶ 8; CRDP §§ 16(b), 19(b). Therefore, I issue this decision based on the written record. Order ¶¶ 10-11; CRDP § 19(d).

III. Issue

Whether CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges.

IV. Jurisdiction

I have jurisdiction to hear and decide this case. 42 C.F.R. §§ 405.803, 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

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

Exercising statutory authority, the Secretary of Health and Human Services (Secretary) established both requirements for providers and suppliers to enroll in the Medicare program and DMEPOS supplier standards. 42 U.S.C. §§ 1395m(j)(1)(B)(ii), 1395cc(j); 42 C.F.R. §§ 424.57, 424.505-530. CMS revokes the Medicare billing privileges of a DMEPOS supplier that violates the DMEPOS standards. 42 C.F.R. § 424.57(e)(1).

- 1. Superior Oxygen furnished items to Medicare beneficiaries from at least May 2015, to July 9, 2015, from its location at 438 North Duke Street, Lancaster, Pennsylvania; however, that location was not enrolled in the Medicare program during that time period.***

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

In or about 2006, CMS enrolled Superior Oxygen in the Medicare program as a DMEPOS supplier. Superior Oxygen's enrolled physical location was at 545 Penn Avenue, West Reading, Pennsylvania. CMS Ex. 1 at 2; *see also* CMS Ex. 2 at 1.

In May 2015, NSC received an anonymous complaint alleging that Superior Oxygen was serving Medicare beneficiaries from its new second location at 438 North Duke Street, Lancaster, Pennsylvania, but that Superior Oxygen's Medicare billing for those beneficiaries showed that the beneficiaries were being serviced from Superior Oxygen's address in West Reading, Pennsylvania. The complaint further stated that a review of CMS's National Plan & Provider Enumeration System (NPPES) showed that CMS did not have a record of Superior Oxygen's 438 North Duke Street location. CMS Ex. 1 at 1. Enclosed with the complaint were the following documents: the NPPES entry for Superior Oxygen, printed from the internet on April 14, 2015, showing its 545 Penn Avenue address; a Whitepages entry for Superior Oxygen listing its address as 438 North Duke Street, printed from the internet on April 14, 2015; a Yellow Pages advertisement for Superior Oxygen's 438 North Duke Street location, printed from the internet on April 14, 2015; an entry for Superior Oxygen's 438 North Duke Street offices on <http://businessfinder.pennlive.com>, printed from the internet on April 14, 2015; a sheet showing search results on the internet search engine Bing for "Superior Oxygen in Lancaster, Pennsylvania," printed from the internet on April 14, 2015; and photographs allegedly showing Superior Oxygen's offices at 438 North Duke Street. CMS Ex. 1 at 2-10.

Superior Oxygen did not dispute the truth of the statements in the May 2015 complaint. On the contrary, Superior Oxygen admitted that it had been operating from 438 North Duke Street, but ceased serving Medicare beneficiaries from that location on July 9, 2015. P. Br. at 1-2; CMS Ex. 3 at 4; CMS Ex. 4 at 1. Petitioner sought and obtained accreditation of the 438 North Duke Street location, and then ultimately filed an application in March 2016 to enroll that location in Medicare. CMS Ex. 7 at 1; CMS Ex. 10.

2. Superior Oxygen violated 42 C.F.R. § 424.57(c)(1) when it failed to operate its business and furnish items under Medicare in compliance with 42 C.F.R. § 424.57(b)(1), which requires a DMEPOS supplier to enroll in the Medicare program each physical location it uses to furnish Medicare-covered items.

A DMEPOS supplier must operate its business and furnish Medicare-covered items in compliance with "[f]ederal regulatory requirements that specify requirements for the provision of DMEPOS" 42 C.F.R. § 424.57(c)(1)(i). In order for a DMEPOS supplier to be eligible to receive payment for Medicare-covered items, it must submit an enrollment application to CMS for each "separate physical location[] it uses to furnish Medicare-covered DMEPOS" 42 C.F.R. § 424.57(b)(1). CMS issues a Medicare

billing number after CMS enrolls the supplier. 42 C.F.R. § 424.505. CMS issues one supplier billing number per physical location that a DMEPOS supplier enrolls, and a DMEPOS supplier may only receive payment for an “item furnished on or after the date CMS issued to the supplier a DMEPOS supplier number conveying billing privileges.” 42 C.F.R. § 424.57(b)(2). CMS is prohibited from paying a DMEPOS supplier for Medicare-covered items unless the supplier obtained billing privileges. 42 C.F.R. § 424.555(a).

The facts in this case are clear that Petitioner was enrolled as a DMEPOS supplier at its 545 Penn Avenue location, but opened a second location to serve Medicare beneficiaries at 438 North Duke Street. Petitioner commenced using this second location no later than May 2015 (i.e., the date of the complaint), but probably did so earlier than that given it had internet listings in place in mid-April 2015. CMS Ex. 1. Further, the complaint against Petitioner asserted, and Petitioner admitted, that it served Medicare beneficiaries at the 438 North Duke Street location, but billed using its supplier number from the 545 Penn Avenue location. CMS Ex. 1 at 1; CMS Ex. 7 at 2 (“Initially we were under the assumption that we could bill at our secondary location under our main # until all paperwork was submitted and processed for the second location to have its own provider #.”); *see also* CMS Ex. 4 at 1 (“We were servicing Medicare patients at the second location At that moment [on July 9, 2015], a phone call was made to our secondary location to immediately stop dispensing any and all equipment to Medicare beneficiaries.”). Therefore, I conclude that Petitioner failed to enroll its 438 North Duke Street location in the Medicare program before furnishing Medicare-covered items to beneficiaries in violation of 42 C.F.R. § 424.57(b)(1). I also conclude that 42 C.F.R. § 424.57(b)(1) is a DMEPOS regulatory requirement and that Petitioner’s violation of that regulation necessarily means Petitioner violated 42 C.F.R. § 424.57(c)(1).³

Petitioner argues that CMS illegitimately revoked its Medicare billing privileges under 42 C.F.R. § 424.57(c)(1). Specifically, Petitioner asserts that it ceased selling Medicare-

³ Although a violation of 42 C.F.R. § 424.57(b)(1) is sufficient grounds to revoke billing privileges (42 C.F.R. § 424.57(e)(1)), the initial determination revoked Petitioner’s Medicare enrollment and billing privileges based on Petitioner’s violation of 42 C.F.R. § 424.57(c)(1), due to a violation of 42 C.F.R. § 424.57(b)(1). CMS Ex. 2 at 1. The NSC hearing officer upheld this theory on reconsideration. CMS Ex. 9 at 4 (“The supplier states that they were unclear as to when they were to submit the CMS 855S enrollment application for the location of 438 W. Duke St., Lancaster, PA 17602, however, that does not exclude them from following and adhering to federal regulations found in 42 C.F.R. Section 424.57(c)(1). The application should have been submitted for the location servicing Medicare patients at 438 W. Duke St., Lancaster, PA 17602.”). Although unnecessary, NSC’s use of 42 C.F.R. § 424.57(c)(1) as the basis for revocation is not erroneous.

covered items to beneficiaries on July 9, 2015, which was more than 3 months before NSC issued the initial determination to revoke Petitioner's Medicare enrollment and billing privileges. Petitioner avers that it was in compliance with the regulations on the date of the initial determination. Petitioner relies on text from a federal register notice, 73 Fed. Reg. 36,448, 36,452 (June 27, 2008), which states that "appeal rights are limited to provider or supplier eligibility at the time the Medicare contractor made the adverse determination." P. Br. at 5-8.

As an initial matter, the context of the quoted material comes from public comments received on a proposed regulatory requirement that providers and suppliers submit all evidence in an enrollment case at the reconsideration stage of the appeals process, rather than permit providers or suppliers to submit new evidence to an ALJ. The Secretary's response, which Petitioner quoted, is primarily aimed at indicating that providers and suppliers cannot submit evidence of later compliance in order to obtain a reversal of an adverse decision, but instead must prove that the basis for the adverse decision was incorrect at the time the decision was made. As an example, the Secretary indicated that:

[I]f a Medicare contractor determines that a provider or supplier does not meet State licensure requirements on June 1, 2007, it is the provider's responsibility to demonstrate during the appeals process that State licensure requirements were met on June 1, 2007. Conversely, if a provider only can demonstrate that State licensure requirements were met on a later date; such as, August 16, 2007, we believe that the contractor made the correct determination

73 Fed. Reg. at 36,452.

In the present case, Petitioner needs to show that its 438 North Duke Street location was enrolled in the Medicare program on or before the date Petitioner commenced selling Medicare-covered items to beneficiaries, or show that it did not sell Medicare-covered items to beneficiaries from that location. However, Petitioner did not do this. Rather, Petitioner asserted that it cured its violation of the regulations when it ceased furnishing Medicare-covered items to beneficiaries.

The cessation of Petitioner's conduct that violated the regulations provides no defense to revocation. It may, however, provide Petitioner with the possibility that CMS will accept its efforts to correct its past conduct as part of a CAP. In fact, Petitioner filed such a CAP (CMS Ex. 3), but NSC denied the CAP. CMS Ex. 5. That denial is not subject to review in this forum. 42 C.F.R. § 405.809(b)(2); *see also* 42 C.F.R. § 498.3(b); *DMS Imaging, Inc.*, DAB No. 2313 at 5-8 (2010). Therefore, Petitioner's efforts to stop violating the regulations in July 2015 play no part in my decision.

For the reasons stated above, I reject Petitioner's argument that CMS could not revoke Petitioner's Medicare enrollment and billing privileges because Petitioner ceased to violate 42 C.F.R. § 424.57(c)(1) by the time CMS issued its initial determination.

3. *It is unnecessary for me to decide whether Superior Oxygen violated 42 C.F.R. § 424.57(c)(2).*

As indicated above, I have concluded that Superior Oxygen violated 42 C.F.R. § 424.57(c)(1). One violation of the DMEPOS supplier standards is sufficient to require CMS to revoke Medicare billing privileges. *See* 42 C.F.R. § 424.57(e)(1); *1866ICPayday.com, L.L.C.*, 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.”). Therefore, I need not determine whether a second violation of the DMEPOS supplier standards occurred.

VI. Conclusion

I affirm CMS's revocation of Superior Oxygen's Medicare enrollment and billing privileges based on a violation of 42 C.F.R. § 424.57(c)(1).

/s/
Scott Anderson
Administrative Law Judge