

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Health First Medical Suppliers, LLC,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-606

Decision No. CR4721

Date: October 14, 2016

DECISION

The Centers for Medicare & Medicaid Services (CMS), through an administrative contractor, revoked the enrollment of Health First Medical Suppliers, LLC (Health First or Petitioner) as a Medicare supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS), because Health First was not considered accessible and staffed during posted hours of operation under 42 C.F.R. § 424.57(c)(7) and was not operational under 42 C.F.R. § 424.535(a)(5). Health First requested a hearing to dispute the revocation. Because Petitioner's physical location was neither staffed nor open when a site inspector attempted to conduct various site visits during Petitioner's posted hours of operation, I conclude that Petitioner violated 42 C.F.R. §§ 424.57(c)(7) and 424.535(a)(5). Therefore, I affirm CMS's determination to revoke the enrollment of Health First effective March 8, 2016.

I. Background

Health First was enrolled in the Medicare program as a DMEPOS supplier. In a March 30, 2016 initial determination, a CMS administrative contractor revoked Health First's Medicare enrollment and billing privileges. CMS Ex. 2. The initial determination indicated a retroactive effective date of March 8, 2016, for the revocation and that

Petitioner could not seek reenrollment as a supplier in the Medicare program for two years. CMS Ex. 2 at 1. The initial determination provided the following as the basis for the revocation:

A representative of the [CMS administrative contractor] made multiple attempts to conduct a visit of your facility on December 21, 2015, December 22, 2015 and recently on March 8, 2016; however, the visits were unsuccessful because your facility was closed during your posted business hours. Because we could not complete an inspection of your facility, we could not verify your compliance with the supplier standards. Based upon a review of the facts, we have determined that your facility is not operational to furnish Medicare covered items and services. Thus, you are considered to be in violation of 42 CFR §§ 424.535(a)(5), all supplier standards defined in 42 CFR 424.57(c) and pursuant to 424.535(g), the revocation is effective the date CMS determined that you were no longer operational.

CMS Ex. 2 at 2.

Health First requested reconsideration of the initial determination. Health First stated that it needed to reduce its hours of operation “[d]ue to [Health First’s] budget” and admitted that it was “aware [Health First] missed [a] numerous amount of on-site visits.” CMS Ex. 5. Petitioner also asserted that Health First passed an on-site visit from Molina Medicaid Services. CMS Ex. 5.

On May 26, 2016, the CMS administrative contractor’s hearing officer issued an unfavorable reconsidered determination upholding the findings that Health First violated 42 C.F.R. §§ 424.57(c)(7) and 424.535(a)(5). CMS Ex. 1.

On June 1, 2016, Health First requested further review of the revocation. On June 27, 2016, I was assigned to hear and decide this case, and on that date issued an Acknowledgment and Pre-hearing Order (Order). In response to my Order, CMS filed a brief and five exhibits (CMS Exs. 1-5). Petitioner initially did not file a brief or exhibits, but later filed four substantive exhibits (P. Exs. 1-4) and a letter brief (marked as P. Ex. 5) after I issued an order to show cause.

II. Decision on the Record

I admit all of the parties’ proposed exhibits into the record because neither party objected to them. Order ¶ 7; Civil Remedies Division Procedures (CRDP) § 14(e).

Neither party submitted written direct testimony for any witnesses. Therefore, I decide this case based on the written record. Order ¶¶ 8, 11; CRDP § 19(b), (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. §§ 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 Analysis¹

The Secretary of Health and Human Services (Secretary) has the authority to create regulations that establish enrollment standards for providers and suppliers, and supplier requirements for DMEPOS suppliers. 42 U.S.C. §§ 1395m(j)(1)(B)(ii), 1395cc(j). The Secretary promulgated a regulation requiring providers and suppliers to be operational. 42 C.F.R. § 424.535(a)(5). To be “operational,” a provider or supplier must be “open to the public for the purpose of providing health care related services” 42 C.F.R. § 424.502. The Secretary also promulgated regulations establishing DMEPOS supplier standards, which a DMEPOS supplier must meet and maintain. 42 C.F.R. § 424.57(c). The supplier standards require a DMEPOS supplier to be “open to the public a minimum of 30 hours per week,” post its hours of operation, and be “accessible and staffed during posted hours of operation.” 42 C.F.R. § 424.57(c)(7)(i), (c)(30).

CMS or its contractors may conduct inspections of a supplier's premises at any time to determine if a supplier is in compliance with Medicare enrollment requirements or the supplier standards. *See* 42 C.F.R. §§ 424.57(c)(8), 424.510(d)(8), 424.515(c), 424.517(a). A supplier is subject to revocation of its Medicare billing privileges if it violates the DMEPOS supplier standards or the regulatory requirements applicable to all suppliers. 42 C.F.R. §§ 424.57(e)(1), 424.535(a). When CMS revokes a supplier based on failing to be operational, the effective date of revocation is the date CMS determined the supplier to be nonoperational. 42 C.F.R. § 424.535(g).

¹ My numbered findings of fact and conclusions of law are set forth below in italics and bold.

- 1. On December 21, 2015, at approximately 3:10 p.m. and 3:51 p.m., December 22, 2015, at approximately 1:00 p.m. and 1:43 p.m., and March 8, 2016, at 1:50 p.m., a CMS administrative contractor site inspector observed that Petitioner's store front at 532 William Street, East Orange, New Jersey was closed.***

On December 21, 2015, at approximately 3:10 p.m. and later at 3:51 p.m., a site inspector for the CMS administrative contractor attempted a site visit at Health First's store front at 532 William Street, East Orange, New Jersey. CMS Ex. 3 at 2. The inspector noted that Health First's posted business hours were 9:00 a.m. to 4:00 p.m., Monday through Friday, and 10:00 a.m. to 3:00 p.m. on Saturdays. CMS Ex. 3 at 3, 10. The inspector also saw a phone number posted on Health First's window and called it; however, this call went to a message indicating that no one was at Health First's store front. CMS Ex. 3 at 7, 9. The inspector took time and date stamped photographs at 3:15 p.m., 3:16 p.m. and 3:51 p.m., showing Health First's store front and that the location did not have anyone present. CMS Ex. 3 at 7, 9-15.

On December 22, 2015, at approximately 1:00 p.m., the site inspector again attempted a site visit at Health First's store front. CMS Ex. 3 at 2. The site inspector observed that no one was present and, when the inspector called Health First's phone number, he heard the same message as the previous time he called. CMS Ex. 3 at 7. The inspector again took date and time stamped photographs at 1:02 p.m. and 1:03 p.m. showing Health First's store front and that the location did not have anyone present. CMS Ex. 3 at 7, 16-18. While taking the pictures, a man who identified himself as the cousin of Health First's owner approached the inspector and inquired why he was taking pictures. The man called Health First's owner. The owner spoke to the inspector and told him that he had a family emergency, but would come to Health First's store front in five minutes. The owner arrived 20 minutes later and found the inspector while the inspector was starting to leave. The owner again indicated he had a family emergency. The inspector stated that the owner ought to have posted a sign and change his phone message. The owner expressed surprise that CMS would send an inspector and stated that he shows up at Health First's store front when he knows someone is coming there. The owner also told the inspector that business had been slow and that he had been unable to hire someone. The owner offered to go back to Health First's store front so that the inspection could be carried out; however, the inspector declined, stating that he already had tried three times to conduct the site visit. The inspector returned at 1:43 p.m. to Health First's store front and noted that it was still closed. CMS Ex. 3 at 7, 19.

On March 8, 2016, at approximately 1:50 p.m., the site inspector again attempted a site visit at Health First's store front. CMS Ex. 4 at 2. The site inspector observed that despite displaying the same business hours as before, Health First was closed. CMS Ex. 4 at 7. The inspector took time and date stamped photographs at 1:48 p.m. showing Health First's store front and that the location did not have anyone present. CMS Ex. 4 at 9-11.

- 2. CMS had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges because Petitioner's location was not accessible and staffed during posted hours of operation in violation of 42 C.F.R. § 424.57(c)(7), and was not open to the public for the purpose of providing health care services in violation of 42 C.F.R. § 424.535(a)(5).**

Petitioner is obligated to be accessible and staffed during its posted hours of operation. 42 C.F.R. § 424.57(c)(7). The requirement to be staffed and accessible during normal hours of operation is a rule that has few exceptions. *See Norpro Orthotics & Prosthetics, Inc.*, DAB No. 2577, at 5 (2014) (indicating that the regulatory history of 42 C.F.R. § 424.57(c)(7) makes exceptions for disasters, emergencies, and state and federal holidays); *see also Benson Ejindu*, DAB No. 2572, at 6 (2014). A DMEPOS supplier is not “accessible” if the supplier’s 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*, DAB No. 2324, at 6-7 (2010). A supplier may not close, even temporarily, during its posted hours of operation. *Complete Home Care, Inc.*, DAB No. 2525, at 5 (2013).

To be “operational,” a provider or supplier must be “open to the public for the purpose of providing health care related services” 42 C.F.R. § 424.502.

Health First’s posted business hours of operation were 9:00 a.m. to 4:00 p.m., Monday through Friday, and 10:00 a.m. to 3:00 p.m. on Saturdays. CMS Ex. 3 at 10, 14, 17; CMS Ex. 4 at 10. However, during the posted hours of operation on December 21 and 22, 2015, and March 8, 2016, Petitioner’s store front was closed and did not have staff present. CMS Exs. 3, 4. Petitioner admits this. CMS Ex. 5 (“We are aware we have missed [a] numerous amount of on-site visits.”). Therefore, Petitioner failed to comply with 42 C.F.R. §§ 424.57(c)(7) and 424.535(a)(5).

In its letter brief in this case, Petitioner asserts that it changed its business hours and that “[w]e are a functional business Monday through Friday opening at 10:00 AM and closing at 4:00 PM. We have been servicing numerous patients and medical offices within our community in Essex County, NJ since we have been denied our Medicare privileges You are more than welcome to re-evaluate our office under Medicare guidelines.” P. Ex. 5. Petitioner also provided photographs of its store front to support these assertions. P. Exs. 1-4.

Petitioner’s letter brief and exhibits are an attempt to show that Petitioner took corrective action following the initial determination to revoke. However, suppliers may only submit corrective action plans when the original basis for revocation is a failure to comply with enrollment requirements under 42 C.F.R. § 424.535(a)(1) and, therefore, is not applicable to this case. *See* 42 C.F.R. 405.809(a)(1). Even if it were, I have no jurisdiction to

determine whether to accept the corrective action taken by a supplier. *See* 42 C.F.R. 405.809(b)(2). My review is limited to determining whether Petitioner violated the regulations at the time that CMS alleges, and not whether Petitioner returned to compliance at a later date. *See* 73 Fed. Reg. 36,448, 36,452 (June 27, 2008).

VI. Conclusion

I affirm CMS's revocation of Health First's Medicare enrollment and billing privileges.

_____/s/
Scott Anderson
Administrative Law Judge