

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Empowered Intimates, Inc.,
(PTAN: 6692360001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-476

Decision No. CR2880

Date: July 31, 2013

DECISION

Petitioner, Empowered Intimates, Inc., appeals the Centers for Medicare & Medicaid Services' (CMS's) decision to revoke its Medicare supplier number and billing privileges. As explained below, the undisputed evidence establishes that Petitioner was not in compliance with Medicare program requirements. Therefore, I uphold CMS's determination to revoke Petitioner's enrollment in the Medicare program.

I. Background

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). In a letter dated October 26, 2012, National Supplier Clearinghouse (NSC), a Medicare contractor, notified Petitioner that its supplier number would be revoked retroactive to October 11, 2012. CMS Exhibit (Ex.) 3, at 1. The notice letter stated that the basis for the revocation was that Petitioner was in violation of 42 C.F.R. § 424.57(c)(7) and 42 C.F.R. § 424.535(a)(5)(ii) because it was closed during posted hours of operation on October 5 and 11, 2012, when an NSC inspector attempted to complete site inspections to verify Petitioner's compliance with

supplier standards. CMS Ex. 3, at 2. The notice letter also stated that Petitioner was barred from re-enrolling in the Medicare program as a supplier for two years from the effective date. CMS Ex. 3, at 3.

Petitioner requested a reconsideration determination by letter dated November 5, 2012. CMS Ex. 4; P. Ex. F. On December 18, 2012, the hearing officer issued an unfavorable decision and upheld the revocation of Petitioner's billing number because Petitioner was not in compliance with the Medicare enrollment requirements. CMS Ex. 5. Petitioner timely requested a hearing with the Civil Remedies Division of the Departmental Appeals Board. On March 1, 2013, I issued an Acknowledgment and Pre-Hearing Order (Order). Pursuant to that Order, CMS filed a Pre-Hearing Brief and Motion for Summary Judgment (CMS Br.), along with six exhibits. On May 10, 2013, Petitioner filed a letter that I accept as Petitioner's Brief and response to CMS's motion for summary judgment (P. Br.). Along with its brief, Petitioner filed Exs. A-N, three photos, one business card and two brochures. I admit all the proffered exhibits into the record.

My 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. Pre-hearing Order ¶¶ 8, 9, and 10; *see Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823, at 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). CMS counsel listed one proposed witness for whom he also filed an affidavit of written direct testimony. CMS Ex. 6. Petitioner did not request to cross-examine CMS's proposed witness. I find, therefore, that an in-person hearing in this case is unnecessary, and I issue this decision on the full merits of the written record.

II. Applicable Law

Pursuant to section 1834(j)(1)(A) of the Social Security Act (Act), 42 U.S.C. § 1395m(j)(1)(A), a DMEPOS supplier may not be reimbursed for items provided to an eligible Medicare beneficiary unless the supplier has a supplier number issued by the Secretary of the U.S. Department of Health & Human Services (Secretary). To receive a supplier number, a DMEPOS supplier must meet and maintain each of the supplier enrollments standards set forth in 42 C.F.R. §§ 424.57(c)(1)-(29). Among other things, a DMEPOS supplier must maintain a physical facility on an appropriate site which is in a location that is accessible to the public, staffed during posted hours of operation, and maintained with a visible sign and posted hours of operation. 42 C.F.R. §424.57(c)(7). Also, a DMEPOS must permit CMS or its agent to conduct on-site inspections to determine supplier compliance with each of the enrollment standards. 42 C.F.R. § 424.57(c)(8). CMS will revoke a currently-enrolled Medicare supplier's billing privileges if CMS or its agent determines that the supplier is not in compliance with any

supplier enrollment standard. 42 C.F.R. § 424.57(d); *see also 1866ICPayday.com*, 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.”).

In addition, if an on-site visit reveals that a supplier is no longer operational, or otherwise fails to meet one of the supplier standards, CMS may revoke the supplier’s Medicare billing privileges. 42 C.F.R. § 424.535(a)(5)(ii). A provider or supplier is operational if 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 . . . to furnish these items or services.” 42 C.F.R. § 424.502. The effective date of revocation is the date CMS determines the supplier was no longer operational. 42 C.F.R. § 424.535(g). Suppliers who have had their billing privileges revoked “are barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar,” which is “a minimum of 1 year, but not greater than 3 years depending on the severity of the basis for revocation.” 42 C.F.R. § 424.535(c).

III. Issue

The issue before me is whether CMS had a legitimate basis to revoke Petitioner’s Medicare supplier number.

IV. Findings of Facts and Conclusions of Law

A. *CMS had a legitimate basis to revoke Petitioner’s Medicare supplier number when an inspector found it closed during attempted inspections on October 5, 2013 and October 11, 2013.*

Suppliers must maintain physical facilities that are “accessible and staffed during posted hours of operation.” 42 C.F.R. § 424.57(c)(7)(i)(C). In addition, suppliers must permit CMS or its agents to conduct on-site inspections to determine the supplier’s compliance with the regulatory standards. 42 C.F.R. § 424.57(c)(8). Petitioner was a DMEPOS supplier that participated in the Medicare program. Petitioner’s posted hours of operation were Monday through Friday, 9:00 a.m. through 4:00 p.m. CMS Ex. 2, at 3. On October 5, 2012 at 11:50 a.m., an NSC site inspector attempted to inspect Petitioner’s facility and found the facility was closed. CMS Ex. 2, at 2. The site inspector attempted a second site visit on October 11, 2012, at 10:27 a.m., but again Petitioner’s facility was closed. CMS Ex. 2, at 2. On both occasions, the inspector knocked with no answer and the lights were off. CMS Ex. 2, at 7. Petitioner does not dispute these facts.

While acknowledging that its facility was closed at the time of the two attempted site visits, Petitioner states, “I decided to go around the community in the mornings, once or twice a week throughout [October] . . . [], but I was still in my store every day by noon or

1:00 p.m.” P. Br. at 3. Petitioner also provides documentary evidence to show that the business was active during the relevant period. Essentially, Petitioner argues that it was operational during the time period of the two site visits despite the office being closed at the time of the site visits. 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. “A supplier is neither ‘staffed’ nor ‘accessible,’ if the supplier’s location is closed and locked.” *Amman’s Orthopedics and Prosthetics, Inc.*, DAB CR2337, at 5 (2011). Thus, while I assume Petitioner’s statements are true, the regulations require Petitioner to make whatever reasonable arrangements are necessary to keep its business open during *all* of its posted hours of operation. *A to Z DME, LLC*, DAB CR1995, at 6 (2009), *aff’d A to Z DME, LLC*, DAB No. 2303 (2010) (“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.”).

B. *I am unauthorized to consider Petitioner’s remedial efforts or grant Petitioner’s requests for equitable relief despite not meeting the legal requirements.*

Petitioner’s assertion that it now has “someone in my store during the posted business hours” is also of no avail. P. Br. at 3. Even if I fully accept Petitioner’s statement as true, I am still bound by the applicable regulations. The issue before me is whether CMS had a legitimate basis to revoke Petitioner’s supplier number at the time of the revocation action. *Restwell Mattress Company d/b/a Restwell Mattress Factory*, DAB CR2194, at 5 (2010) (citing 73 Fed. Reg. 36,448, 36,452 (June 27, 2008) (“[A] . . . supplier is required to furnish evidence that demonstrates that the Medicare contractor made an error at the time an adverse determination was made, not that the . . . supplier is now in compliance.”)). As previously stated, the undisputed facts establish that the site inspector was unable to inspect Petitioner’s facility at the time of the two attempted site visits because the facility was closed. Thus, because there is a legitimate basis for CMS’s determination, I must uphold the revocation.

While arguing her Medicare supplier number should not be revoked, Petitioner also explains the circumstances and reasons why she entered the post-mastectomy business. Petitioner further alleges generally that there are other DMEPOS suppliers that commit similar violations but have not had their supplier numbers revoked. P. Br. at 4. These are appeals to equity. I am without authority to order CMS to provide an exemption to Petitioner under the circumstances because Petitioner’s equitable arguments give me no grounds to restore Petitioner’s billing privileges. *See US Ultrasound*, DAB No. 2302, at 8 (2010) (“[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory

requirements.”). Moreover, I have no authority to declare statutes or regulations invalid or *ultra vires*. *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009) (“[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground.”).

V. Conclusion

I find the undisputed facts establish Petitioner was not open and accessible at the times of the two attempted site visits during Petitioner’s posted hours of operation. Therefore, I sustain the revocation of Petitioner’s supplier number for DMEPOS Medicare billing privileges, effective October 11, 2012. Accordingly, Petitioner is barred from re-enrolling for two years from the effective date of its revocation.

/s/

Joseph Grow
Administrative Law Judge