

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

SME Medical Equipment, Inc.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-180

Decision No. CR3605

Date: January 29, 2015

DECISION

Palmetto GBA National Supplier Clearinghouse (NSC), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment and billing privileges of Petitioner, SME Medical Equipment, a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). I find Petitioner was not open and accessible during its posted hours, and CMS properly revoked its Medicare enrollment and billing privileges.

I. Background

In a letter dated July 10, 2013, NSC revoked Petitioner's Medicare supplier number, pursuant to 42 C.F.R. §§ 405.800; 424.57(e); 424.535(a)(1); 424.535(a)(5)(ii); and 424.535(g). The letter notes that an NSC inspector attempted to visit Petitioner's business location on April 15, April 19, and April 22, 2013. The NSC inspector could not access the premises on any of these occasions, and the inspector could not complete an on-site visit. CMS Exhibit (Ex.) 1, at 8-23. NSC also imposed a two-year bar on Petitioner's re-enrollment in the Medicare program. CMS Ex. 1, at 23.

Petitioner sought reconsideration. On September 24, 2013, NSC issued a reconsideration decision affirming the revocation. Petitioner's Request for Hearing (RFH), Ex. C. The hearing officer stated that NSC is authorized to perform revalidation site inspections in order to verify the information that NSC has on file for suppliers and to confirm compliance with all supplier standards. RFH, Ex. C. The hearing officer concluded that Petitioner was not open during its posted hours of operation on three separate occasions when a NSC inspector attempted to complete an unannounced on-site visit, and the NSC inspector could not verify compliance with the supplier standards. RFH, Ex. C. The hearing officer affirmed the revocation of Petitioner's supplier number, citing 42 C.F.R. § 424.57, and concluded that Petitioner "has not shown compliance with supplier standard 7" and "has not provided evidence to show they have complied with the standard for which they were non-compliant, they cannot be granted access to the Medicare Trust Fund by way of a Medicare supplier number." RFH, Ex. C. The hearing officer did not address the effective date of Petitioner's revocation.

Petitioner filed a request for a hearing with the Departmental Appeals Board, Civil Remedies Division, on October 28, 2013. The case was assigned to me, and I issued an Acknowledgment and Pre-hearing Order (Pre-hearing Order). In accordance with my Pre-hearing Order, CMS timely filed its pre-hearing exchange, consisting of a motion for summary judgment and brief (CMS Br.) along with CMS Ex. 1. Petitioner then filed its pre-hearing exchange, including a prehearing brief and response to the CMS motion for summary judgment (P. Br.) and Petitioner's exhibits (P. Exs.) 1-2. CMS also filed a response to Petitioner's prehearing brief, an updated exhibit list, and CMS Ex. 2.

I denied CMS's motion for summary judgment on February 28, 2014, and I scheduled a prehearing conference. At the prehearing conference, the parties did not object to any of the proposed exhibits, and I admitted them to the record. I also scheduled a video-teleconference (VTC) hearing, for the purpose of cross-examination of the NSC inspector, CMS's proposed witness, and Basma Arain, Petitioner's proposed witness. March 20, 2014 Order Following Prehearing Conference.

I convened the VTC hearing on May 21, 2014. I participated from the Civil Remedies Division office in Washington, and counsel for CMS, counsel for Petitioner, and both witnesses participated from a VTC site in Chicago, Illinois. At the hearing the witnesses authenticated their direct testimony, and counsel cross-examined them. After the hearing, both parties filed post-hearing briefs and post-hearing reply briefs.

II. Analysis

A. Issue

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

B. Findings of Fact and Conclusions of Law

1. CMS properly revoked Petitioner's Medicare supplier number because an NSC inspector could not access Petitioner's facility during Petitioner's posted hours of operation.

A DMEPOS supplier¹ must meet and maintain the Medicare application certification standards set forth in 42 C.F.R. § 424.57(c) in order to receive Medicare billing privileges. One of the standards requires that all suppliers must be in a location accessible to the public and CMS, and they must be accessible and staffed during posted hours of operation. 42 C.F.R. § 424.57(c)(7)(i)(B),(C).

According to the site investigation report, the NSC inspector attempted to perform an inspection of Petitioner's facility at 2:20 p.m. on Monday, April 15, 2013, at 10:35 a.m., on Friday, April 19, 2013, and at 10:45 a.m. on Monday, April 22, 2013. CMS Ex. 1, at 10. On all three days, the NSC inspector noted that the business was closed, the door was locked, and no one answered his knocks on the door. CMS Ex. 2 (NSC inspector Decl.). When the NSC inspector attempted to visit the facility for the second time, he noted that the facility posted hours of operation. CMS Ex. 2. The posted hours were: 9:00 a.m. to 5:00 p.m. Monday through Friday. CMS Ex. 1, at 9; CMS Ex. 2. The NSC inspector took photographs on each visit, and the photographs indicate the dates and times cited in the report. CMS Ex. 1, at 15-18; CMS Ex. 2.

The NSC inspector testified that he will typically make an unannounced site visit attempt, note the attempt, and come back another time. Transcript (Tr.) at 36. When the NSC inspector attempted onsite inspections of Petitioner's facility, each time he found the entrance door locked, and no one answered when he knocked. Tr. at 31, 37-39. The NSC inspector visited Petitioner's facility for approximately two minutes on each occasion, and each time he would "walk to the door and knock on the door, look around, take some pictures, and leave." Tr. at 31. When the NSC inspector returned to attempt to visit the facility on April 22nd, he tried to open the door, but it was again locked, and he also knocked on the door. Tr. at 37. He did not recall a doorbell at the facility but stated he "would have pushed it if there would have been one." Tr. at 37. The NSC inspector

¹ Petitioner, as a supplier of DMEPOS, is considered a "supplier" for Medicare purposes. See 42 C.F.R. § 498.2 (definition of "Supplier").

waited 10-15 seconds after knocking, and he stated that “[i]n the meantime you’re kind of looking inside to see if there’s any movement or there’s any light. You kind of try to make a judgment, okay, is anybody here. You knock again after waiting, you know, a minute, 90 seconds, two minutes, depending.” Tr. at 37. The NSC inspector took photographs of the posted hours and also took a photograph of mail in front of Petitioner’s door “because it indicated to me that . . . there was nobody there because the mail had not been picked up.” Tr. at 38. The NSC inspector testified that he could not get inside the business, could not see any light or movement within the business, and determined the business was closed on each of the three site inspection attempts. *See* Tr. at 38-40; CMS Ex. 2.

Petitioner contends it was not in violation of the relevant regulatory requirements because someone was present during the attempted on-site visits. Petitioner’s Chief Operating Officer, Basma Arain, testified she worked at Petitioner’s facility on April 15, 19, and 22, 2013. Tr. at 11, 20. Ms. Arain testified that when Petitioner moved locations in December of 2012 and in April of 2013, several employees left. Tr. at 15, 21. Ms. Arain hired another person in May of 2013, and there are currently five employees working for Petitioner. Tr. at 14, 21. However, at the time of the attempted site inspections in April of 2013, Petitioner was “short-staffed,” and Ms. Arain was the only employee working in the facility during posted business hours. Tr. at 15, 20-21. During this time period, Ms. Arain would stock inventory, answer phone calls, and conduct all of the day-to-day operations of the business. Tr. at 21. Ms. Arain testified that Petitioner’s facility is about 2,500 square feet and is “a long and deep office.” Tr. at 14. Ms. Arain typically sits in an office near the entrance to the facility, but during April of 2013, she was “juggling . . . multiple office duties at that time and [she worked] in the middle of the office towards the back answering phones or doing other office stuff in the back.” Tr. at 15.

Ms. Arain testified that hours of operation were not posted at the time of the NSC inspector’s April 15, 2013 visit because she was “in the process of changing the old posted hours . . . to make it look more presentable.” Tr. at 16. Ms. Arain also indicated that mail is sometimes left by the front door of the facility. Tr. at 17. Ms. Arain testified she worked alone during Petitioner’s posted hours all day on April 15, 19 and 22, 2013, and she ate her lunch at the office. Tr. at 20, 27. She worked near the back of the office some of the day and stated that she might have locked the front door for a short period of time “to keep the office secure since I was the only one there. I might have been in the back or doing something and I wasn’t able to tend to the front office” Tr. at 21-22. When questioned, Ms. Arain stated that if she were in the back of the office, she did not think she would be able to hear a knock at the front door of the facility. Tr. at 22. She also testified that Petitioner’s doorbell did not work. Tr. at 22. Ms. Arain agreed that it is possible that the NSC inspector visited Petitioner on April 15, 19, and 22, 2013 and attempted to make staff aware of his visits, but Ms. Arain was unable to hear his knocks on those days because she was not near the front door. Tr. at 23.

The regulation at 42 C.F.R. § 424.57(c)(7)(i)(B),(C) mandates that a supplier be in a location accessible to the public, Medicare beneficiaries, CMS, NSC, and its agents. Further, it must be accessible and staffed during posted hours of operation. I find the NSC inspector's testimony regarding his attempts to visit Petitioner's business location to be very credible. The NSC inspector testified in detail regarding his recollections of his visits to Petitioner on three separate occasions. The NSC inspector's testimony is supported by other evidence in the record, including his site inspection report and photographs taken contemporaneously with the site inspection attempts. Moreover, Ms. Arain did not generally dispute the NSC inspector's account of the events and agreed that on the dates and times in question the door to Petitioner's facility may have been locked, and she might not have heard the NSC inspector's knocks at the door. Tr. at 21-23.

Based on these facts, I agree that Petitioner was not in compliance with all of the standards set forth in section 424.57(c). The facility posted hours of operation from 9:00 a.m. to 5:00 p.m. Monday through Friday. Yet, because Petitioner employed only one office staff member in April of 2013, Petitioner's facility could not be accessed at the time of the attempted site inspections during Petitioner's posted hours. During the three attempted site visits, any member of the public, Medicare beneficiary, or CMS inspector could not access Petitioner's facility because its door was locked, the doorbell was not working, and knocks could not be heard by the one staff member working in the back of the facility. Petitioner therefore did not comply with 42 C.F.R. § 424.57(c)(7).

The regulatory standard would have no meaning if suppliers were not always required to adhere to their posted hours of operation and keep their facilities accessible to the public. A supplier may not be inaccessible, even for a short period of time, during its posted hours of operation and must be available to meet the needs of beneficiaries. *Complete Home Care, Inc.*, DAB No. 2525, at 5 (2013). Petitioner is responsible for making the necessary arrangements to keep its business open and allow beneficiaries to access the facility during posted hours of operation while allowing for stocking of inventory, phone calls, breaks for staff members, and any other business activities. As explained in a similar 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, regulatory drafters contemplated allowing facilities to temporarily close during posted hours to account for circumstances including short-term closures but instead chose to emphasize that a supplier's place of business must always remain publicly accessible. See *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).

2. I am unable to reverse NSC’s revocation of Petitioner even though it was compliant with Medicare supplier standards during prior inspections.

Petitioner also argues it should not have its Medicare billing privileges revoked because Petitioner is a legitimate DMEPOS supplier and has always maintained compliance with Medicare enrollment requirements. At the hearing, the NSC inspector agreed that he inspected Petitioner on several previous occasions when Petitioner was located at another location, and he found Petitioner to be open, accessible, and operating. Tr. at 32. The NSC inspector also agreed that Petitioner’s business operated for a number of years and Petitioner had “passed our inspections . . . has inventory . . . has the records that are required [and] the licenses that are needed” Tr. at 35. There is no dispute that prior to the spring of 2013, Petitioner was a legitimate DMEPOS supplier at its previous location, operating in compliance with Medicare enrollment requirements.

However, showing that Petitioner was in compliance with all Medicare requirements for several years and previous inspections does not provide a basis for reversing Petitioner’s revocation. The revocation of Petitioner’s Medicare enrollment is based on three attempted site visits conducted in April of 2013, during which the inspector found Petitioner’s business not accessible on all occasions. CMS is authorized to revoke a supplier’s Medicare billing privileges based upon the failure to be accessible when an inspector visits its address, regardless of whether it may have been open and accessible at some earlier or later time. *See Mission Home Health et al.*, DAB No. 2310, at 6 (2010).

Petitioner’s noncompliance with even one supplier standard is a sufficient basis for revoking Petitioner’s Medicare enrollment, and I need not address other possible grounds for revocation. *See 1866ICPayday.com*, DAB No. 2289, at 13. I find Petitioner did not maintain all the Medicare application certification standards set forth in 42 C.F.R. § 424.57(c) because Petitioner was not accessible to the public, Medicare beneficiaries, and NSC, and it was not properly staffed during its posted hours of operation. Thus, I find CMS was authorized to revoke Petitioner’s Medicare enrollment and billing privileges.

/s/

Joseph Grow
Administrative Law Judge