

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Guardian Care Services, Inc.,
(CCN: 10-7633),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-2684

Decision No. CR4195

Date: September 9, 2015

DECISION

I grant summary judgment in favor of the Centers for Medicare & Medicaid Services (CMS), sustaining the determination of one of its contractors to revoke the Medicare billing privileges of Petitioner, Guardian Care Services, Inc., a home health agency, effective November 3, 2014. Revocation is justified because Petitioner was not operational within the meaning of 42 C.F.R. §§ 424.535(a)(5) and 424.502.

I. Background

Petitioner requested a hearing to challenge a reconsidered determination that affirmed the contractor's determination that it was not operational. CMS Ex. 8. CMS moved for summary judgment and Petitioner opposed the motion. CMS offered exhibits along with its motion that are identified as CMS Ex. 1 – CMS Ex. 11. I receive these exhibits into the record. Petitioner filed 22 exhibits with its request for hearing. These exhibits consist of documents that Petitioner also offered with its request for reconsideration. I am identifying these as P. Ex. 1 –P. Ex. 22 and I receive them into the record.

Petitioner offered 13 additional exhibits with its opposition to CMS's motion for summary judgment. Confusingly, Petitioner identified these exhibits as P. Ex. 1 – P. Ex. 13. I am renumbering these exhibits as P. Ex. 23 – P. Ex. 35. I receive P. Ex. 25 – P. Ex. 35 into the record. CMS objected to my receiving P. Ex. 23 – P. Ex. 24. I sustain CMS's objections to P. Ex. 23 and P. Ex. 24. These two exhibits are documents that relate directly to Petitioner's argument that it maintained an operational business. Petitioner did not offer these exhibits at reconsideration and has not established good cause for its failure to present these exhibits at reconsideration. I exclude these exhibits because Petitioner failed to satisfy the requirements of 42 C.F.R. § 498.56(e).

CMS also objected to my receiving P. Exs. 26-29 and 31-34 on the grounds that they are irrelevant and cumulative. These exhibits consist of declarations from some of Petitioner's employees. I agree with CMS that these exhibits are of questionable relevance. They certainly do not establish a dispute as to material facts. However, I see no harm in receiving them at this juncture of the case.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether CMS is authorized to revoke Petitioner's billing privileges on the ground that Petitioner was not operational.

B. Findings of Fact and Conclusions of Law

CMS may revoke a provider or a supplier's Medicare billing privileges if it determines:

[u]pon on-site review or other reliable evidence, . . . that the provider or supplier is either of the following: (i) No longer operational to furnish Medicare-covered items or services. (ii) Otherwise fails to satisfy any Medicare enrollment requirement.

42 C.F.R. § 424.535(a)(5). "Operational" is defined to mean:

[T]he provider or supplier 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 (emphasis added).

CMS offers the following facts. Petitioner holds itself out as being open to the public during the following hours of operation: Monday through Friday, from 8:30 a.m. to 5:00 p.m. CMS Ex. 1 at 1, 6; CMS Ex. 9 at 2; CMS Ex. 10 at 1. However, on three occasions in November 2014 inspectors working for a Medicare contractor appeared at Petitioner's facility during Petitioner's advertised business hours and found it to be closed to the public.

On November 3, 2014, inspectors arrived at Petitioner's facility. They found signs on the front door of the facility announcing that the facility was closed because it was being fumigated. CMS Ex 1 at 5-6; CMS Ex. 9 at 2; CMS Ex. 10 at 1. The inspectors returned the next day, November 4, 2014, during Petitioner's announced business hours. CMS Ex. 2. The sign announcing that the facility was closed due to fumigation was no longer present. However, the office door was locked. CMS Ex. 2; CMS Ex. 9 at 2. On November 12, 2014, an inspector made a third attempt to inspect Petitioner's facility during business hours. CMS Ex. 3. Once again, the facility was locked, and there were signs announcing that the facility was closed because it was being fumigated. *Id.* at 2, 4, 6-8; CMS Ex. 11 at 1-2.

Petitioner does not deny any of these facts. It does not deny that its facilities were locked when the inspectors arrived on November 3, 4, and 12. Nor does it deny that it had posted signs announcing that its facility was closed due to it being fumigated.

The undisputed facts establish that Petitioner was not operational within the meaning of 42 C.F.R. §§ 424.535(a)(5) and 424.502. Therefore, CMS is authorized to revoke Petitioner's billing privileges. As is stressed by the emphasized language in 42 C.F.R. § 424.502, in order to be operational, a participating provider or supplier must be open to the public for the purpose of providing health care related services. Petitioner was not open to the public on the three dates in question. Its facility was not only inaccessible to the public but Petitioner posted signs on two of the three days telling the public that its facility was closed.

Petitioner contends that it was operational on the dates in question even if its office was closed to the public. Petitioner's opposition to CMS's motion at 2 – 3. In support of that assertion Petitioner contends that home health administrative services were occurring within Petitioner's facility and that its staff nurses and home health aides were in the field and actively providing care to patients. *Id.* at 3. It supports this assertion by reciting a variety of business records that include

various payment records, employee timesheets, evidence of payment of telephone and utility bills, and payroll checks to several of its employees. *Id.*

For purposes of deciding CMS's motion, I am accepting as true all of Petitioner's representations that it was actively doing business as a home health agency on the three dates in question. But those representations do not address the reason why the contractor and CMS found Petitioner not to be operational on those dates. The regulation requires a participating supplier or provider to be open to the public during its normal business hours. That means it must be accessible to the public, and not just doing business in other ways. Petitioner plainly was not open to the public on the dates in question. Therefore, it was not operational consistent with Medicare participation requirements even if it was actively doing business on those dates.

Petitioner seems to argue that its business activities as a home health agency do not require its office staff to come into face-to-face contact with members of the public since home health services are provided to Medicare beneficiaries at their residences. Petitioner's opposition to CMS's motion at 5. It appears to contend that the requirement that it be open to the public shouldn't apply to its operations. I disagree. The regulatory language is explicit and does not suggest that there are exceptions to the rule that a provider or a supplier has an office that is accessible to the public. Moreover, Petitioner has offered no facts to show that members of the public would have no reason to visit its office. To the contrary, there are reasons why members of the public would want to visit Petitioner's office directly. The fact that a home health agency delivers care at locations other than its office premises does not mean that there wouldn't be times when either beneficiaries or members of their families would have need to talk to Petitioner's office staff in person. They might wish to visit in person to ask questions about what home health care consists of and their eligibility for such care. They might do so to seek instructions about care to be given to relatives or to ask questions about that care.

Petitioner contends that a water main break on November 2, 2014, forced it to relocate its business activities to the rear of its facility on that date. Petitioner's opposition to CMS's motion at 4. But, assuming that to be true, this does not excuse Petitioner from its obligation to be open to the public during business hours. Petitioner does not explain why, for example, it could not have directed the public to that part of its facility that remained staffed after the water main break. Obviously, its employees were able to move to that location. Nor does it explain why it would tell potential visitors on two dates occurring after November 2 that its facility was closed because it was being fumigated.

Petitioner asserts also that there are factual errors in a CMS exhibit that summarizes a meeting between Petitioner's president and a representative of the CMS contractor. *See* CMS Ex. 4; Petitioner's opposition to CMS's motion at 4-5. However, even if that exhibit contains some inaccuracies, Petitioner has not explained how those inaccuracies impact on the material facts offered by CMS. Those facts, as I have explained, are undisputed. Consequently, inaccuracies in CMS's exhibit, if they exist, are irrelevant.

Finally, Petitioner avers that there are disputed issues of material fact in this case that preclude the entry of summary judgment. However, Petitioner hasn't identified a single fact that contradicts the material facts offered by CMS and shows that Petitioner was not operational.

/s/
Steven T. Kessel
Administrative Law Judge