Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Forroux Orthotics & Prosthetics, Inc.,
(PTAN: 0243960003),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-3769

Decision No. CR4589

Date: April 19, 2016

DECISION

I sustain the determination of a Medicare contractor, as affirmed on reconsideration and adopted by the Centers for Medicare & Medicaid Services (CMS), to revoke the Medicare billing privileges of Petitioner, Fourroux Orthotics & Prosthetics, Inc. The provision at 42 C.F.R. § 424.57(e)(1) authorizes revocation because Petitioner was not compliant with Supplier Standard 7 (42 C.F.R. § 424.57(c)(7)) and Supplier Standard 8 (42 C.F.R. § 424.57(c)(8)). Pursuant to 42 C.F.R. § 424.57(e)(1), the revocation is effective June 14, 2015.

I. Background

Petitioner is a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). It requested a hearing in order to challenge a reconsideration determination affirming revocation of its participation in Medicare. CMS moved for summary judgment and Petitioner opposed the motion. With its motion CMS filed 10 proposed exhibits that are identified as CMS Exhibit (Ex.) 1- CMS Ex. 10. In opposition Petitioner filed two proposed exhibits that are identified as Petitioner's Exhibit (P. Ex.) 1 and P. Ex. 2. I receive all of these exhibits into the record.

Petitioner argued that summary judgment should be denied because there are disputed issues of material fact. It is unnecessary that I apply the criteria for summary judgment to the parties' fact allegations because neither side has requested an in-person hearing for the purpose of cross-examining witnesses. Consequently, this case may be decided based on the parties' written exchanges and I may resolve any fact disputes without an in-person hearing.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether there exists a regulatory basis to revoke Petitioner's Medicare participation.

B. Findings of Fact and Conclusions of Law

I find the material facts to be as follows. Petitioner has a facility in Dahlonega, Georgia. The facility is located in a building that is part of the University of North Georgia. The entity housing Petitioner's facility is a primary care medical clinic. CMS Ex. 1 at 7-8; CMS Ex. 5 ¶¶ 4-5. Entry to Petitioner's facility may be obtained only by passing through the clinic and through a doorway that is marked with Petitioner's name. *Id.* On the dates that are relevant to this decision – March 5 and April 13, 2015 – the door to Petitioner's facility was locked and the facility was unstaffed. A paper sign was present on the door on both occasions. The sign specified that Petitioner's hours of operation were on Monday and that its facility was open by appointment only. The sign also displayed a toll free telephone number. CMS Ex. 1 at 8-9; CMS Ex. 5 ¶¶ 8, 9, 12, 13.

An auditor employed by a Medicare contractor attempted to visit Petitioner's facility on March 5, 2015, in order to conduct an on-site inspection. Finding the facility to be unstaffed, the auditor subsequently called Petitioner's toll free number in order to make an appointment to conduct an inspection. CMS Ex. 5 ¶ 10. The person answering that call gave the auditor another telephone number – Petitioner's corporate office number – which the auditor called and then spoke to an individual who identified herself as "Wendy."[1] Wendy told the auditor that someone would call her in order to schedule an appointment. No one called the auditor to schedule an appointment. CMS Ex. 5 ¶ 10. On April 8, the auditor left a message informing Petitioner that she intended to inspect the Dahlonega facility and that it was necessary to make an appointment so that she could conduct the inspection. P. Ex. 2; CMS Ex. 1 at 6. Also on April 8, the auditor again

[1] Wendy Palmer is Petitioner's Credentialing & Accounts Receivable Manager. CMS Ex. 9.

called Petitioner and reached Wendy, who this time told the auditor that she "did not know" when one of Petitioner's staff members could meet the auditor at the facility. CMS Ex. 5 ¶ 11.

No representative of Petitioner would schedule an appointment with the auditor prior to April 13, 2015. On that date the auditor made a second attempt to inspect the facility and found it again to be locked and unstaffed. CMS Ex. 5 ¶¶ 12-13.

Based on these facts the contractor determined to revoke Petitioner's Medicare participation. That determination was affirmed on reconsideration and CMS concurred. CMS asserts that Petitioner was not compliant with Supplier Standards 7 and 8. CMS also argues that Petitioner was not compliant with the requirements stated at 42 C.F.R. §§ 424.535(a)(1) and (a)(5)(ii) because it was not operational and was not meeting enrollment requirements. CMS Br. at 7.

Contrary to CMS's argument, 42 C.F.R. § 424.535(a)(1) does not permit revocation here because Petitioner was not afforded the opportunity to submit a corrective action plan, as that section requires. CMS Ex. 4 at 3. While 42 C.F.R. § 424.535(a)(5)(ii) could support the revocation, the hearing officer who issued the reconsideration determination appears not to have realized that this regulation changed several months before the CMS contractor issued the initial determination, and the subsection no longer permitted revocation because a supplier is non-operational. *See* 79 Fed. Reg. 72500, 72532 (Dec. 5, 2014) (eff. Feb. 2, 2015). In relevant part, the reconsideration determination focuses on the hearing officer's conclusion that Petitioner was non-operational and does not mention its failure to satisfy Medicare enrollment requirements, to which 42 C.F.R. § 424.535(a)(5)(ii) exclusively applied when the contractor issued the initial determination.

Nevertheless, CMS may revoke a Medicare supplier's participation where the supplier is determined not to be in compliance with the standards found at 42 C.F.R. § 424.57(c). 42 C.F.R. § 424.57(e)(1). The hearing officer specifically cited 42 C.F.R. 424.57(e) as a basis for revocation, and CMS refers to that as a ground for revocation although it did not brief the applicability of that section specifically. CMS Ex. 4 at 4, 5; CMS Brief at 12. I therefore find that Petitioner had notice that 42 C.F.R. § 424.57(e)(1) serves as a basis for revocation in this case. CMS asserts that the attempted, but failed, on-site inspections of Petitioner's facility revealed the following:

- Petitioner was not compliant with the DMEPOS participation criterion stated at 42 C.F.R. § 424.57(c)(7) in that Petitioner failed to be accessible and staffed during posted hours of operation. 42 C.F.R. § 424.57(c)(7)(i)(C).

- Petitioner was not compliant with the DMEPOS participation criterion stated at 42 C.F.R. § 424.57(c)(8) in that it did not permit a Medicare contractor's agent to conduct on-site inspections.

The facts that I have found support both of CMS's allegations of noncompliance and are grounds for concluding that Petitioner was not compliant with Supplier Standards 7 and 8. First, Petitioner was required to make its facility available for inspection. It plainly failed to comply with that requirement. An auditor was effectively denied access to Petitioner's facility twice and even after she had attempted to arrange an inspection by appointment. That is, by itself, grounds for revoking Petitioner's Medicare participation.

Petitioner argued that it, in fact, attempted to set up an appointment for an inspection but was unable to communicate with the auditor. Keith Watson, Petitioner's owner, stated in Petitioner's reconsideration request that on April 9, 2015, Petitioner received a voicemail from the auditor, Donna Watkins, and that he "returned the call and left a voicemail." CMS Ex. 3. Mr. Watson does not state what were the contents of that asserted voicemail nor does he aver in his reconsideration request that he offered any assistance in setting up an appointment for an inspection. Mr. Watson did not offer a declaration so there is no sworn evidence from Petitioner that Mr. Watson, in fact, attempted to return Ms. Watkins' call. I do not find Petitioner's assertion that Mr. Watson called Ms. Watkins in order to arrange an inspection to be credible in the absence of any sworn testimony or corroborating evidence.

Petitioner also offered Wendy Palmer's declaration for the proposition that she received a voicemail, evidently from Ms. Watkins, on April 9, 2015. P. Ex 1 ¶ 5; *see* P. Ex. 2. She asserts that she attempted to call Ms. Watkins but that Ms. Watkins did not answer. Ms. Palmer offers no information concerning what she attempted to communicate to Ms. Watkins. Significantly, she does not aver that she left a message suggesting dates or times when an inspection could be arranged. Moreover, she does not dispute that she told Ms. Watkins she "did not know when someone could meet" Ms. Watkins to permit an inspection. CMS Ex. 5 ¶ 11.

Thus, Petitioner has not provided any credible affirmative proof to show that it actually communicated an offer to Ms. Watkins of a specific date or a time when Ms. Watkins could inspect Petitioner's facility. In the absence of such proof, I find that Petitioner failed to make its facility accessible for inspection. Revocation is justified on that basis alone. 42 C.F.R. § 424.57(c)(8), (e)(1).

Furthermore, Petitioner failed to comply with the requirement that it be accessible and staffed during posted hours of operation. *See* 42 C.F.R. § 424.57(c)(7)(i)(C). Its posted hours of operation stated that the facility would be accessible by appointment only. If, in fact, that is what Petitioner intended, then it had to assure that individuals who wished to visit its facility actually could make appointments to visit. It is evident, however, given

the difficulties that Ms. Watkins faced attempting to make such an appointment, that Petitioner did not actually have in place a working mechanism that allowed visits to its facility even by appointment. The facts are that Ms. Watkins called the toll-free number that the facility posted only to be told by the individual who answered the call that she had to call another number to arrange an appointment. Ms. Watkins called that second number without success in accessing the facility.

Ms. Palmer avers that she finally spoke with Ms. Watkins on April 13, 2015, only to be told that it was too late to arrange an inspection because Ms. Watkins had a plane to catch and would no longer be available. With that assertion Petitioner suggests that it had made a reasonable effort to arrange an appointment for an inspection and that it was Ms. Watkins who was being unreasonable by telling Ms. Palmer that it was too late.

I disagree. The evidence establishes that Ms. Watkins attempted to arrange appointments on more than one occasion over a period of several days. The requirement that a facility be accessible does not mean "accessible with difficulty." Ms. Watkins' efforts to arrange an inspection were more than accommodating to Petitioner and, in fact, more than what is required by the regulations. Revocation was justified because Petitioner was not accessible and staffed during its posted hours of operation. 42 C.F.R. § 424.57(c)(7)(i)(C), (e)(1).

/s/
Steven T. Kessel
Administrative Law Judge