

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

All-Care Medical Supply Corporation
(PTAN: 5964090001),
Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-17-23

Decision No. CR4828

Date: April 20, 2017

DECISION

Palmetto GBA, in its capacity as the National Supplier Clearinghouse (NSC), an administrative contractor of the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment and billing privileges of All-Care Medical Supply Corporation (Petitioner). The NSC determined that Petitioner failed to maintain a physical facility that is open and accessible during business hours and accordingly was not operational to furnish Medicare covered items and services. As explained more fully below, Petitioner's location was not open and accessible during its posted business hours; accordingly, CMS properly revoked Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. §§ 424.535(a)(5) and 424.57(c)(7). I therefore affirm CMS's revocation of Petitioner's Medicare enrollment and billing privileges.

I. Background and Procedural History

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). CMS Exhibit (Ex.) 2 at 1. Petitioner operated its business from a storefront facility located at 8937 S. Western Ave., Los Angeles, CA 90047 (Western Ave.). CMS Ex. 1. The Western Ave. address was on file with NSC as the location of Petitioner's facility. *Id.* On April 26 and 27, 2016, an inspector with the NSC Supplier Audit and Compliance Unit (SACU) attempted to

conduct a site inspection of Petitioner's Western Ave. facility during the posted hours of operation. CMS Ex. 1 at 2. The NSC inspector was unable to complete the site inspection on either date. CMS Ex. 1 at 3. According to the inspector, the security gate was closed and locked during both attempts preventing access to the front entrance. CMS Ex. 1 at 7.

By letter June 7, 2016, the NSC notified Petitioner that it was revoking Petitioner's Medicare enrollment and billing privileges effective April 27, 2016. CMS Ex. 2 at 1. The letter further stated that the NSC had determined Petitioner's practice location was not operational and that Petitioner's liability insurance policy had expired. CMS Ex. 2 at 1-2. For these reasons, NSC concluded that Petitioner was not in compliance with supplier standards codified at 42 C.F.R. §§ 424.57(c)(7) and 424.57(c)(10). *Id.* The letter also informed Petitioner that it was barred from re-enrolling in the Medicare program for a period of two years, effective 30 days from the postmark date of the letter. CMS Ex. 2 at 1.

In response to the initial determination, on June 27, 2016, Petitioner filed a Corrective Action Plan (CAP). CMS Ex. 3. With its CAP, Petitioner submitted pictures of new signage and copies of a rental lease, a surety bond, an insurance policy, and a certificate of training. *Id.* By letter dated August 18, 2016, the NSC determined that Petitioner's CAP was acceptable to demonstrate compliance with supplier standard 42 C.F.R. § 424.57(c)(10) (supplier must maintain a comprehensive liability insurance policy). CMS Ex. 4. However, the NSC concluded that Petitioner had not demonstrated compliance with supplier standard 7 (i.e. 42 C.F.R. § 424.57(c)(7)) and informed Petitioner that the case would be forwarded to a Medicare hearing officer for reconsideration. CMS Ex. 4 at 4. On September 26, 2016, the NSC issued an unfavorable reconsidered determination upholding the revocation of Petitioner's Medicare enrollment and billing privileges pursuant to 42 C.F.R. §§ 424.57(c)(7), and 424.535(a)(5). CMS Ex. 6.

By letter dated October 6, 2016, Petitioner requested a hearing before an administrative law judge. The case was assigned to me, and I issued an Acknowledgement and Pre-Hearing Order dated October 17, 2016 (Order). My Order directed each party to file a pre-hearing exchange consisting of a brief and any supporting documents, and also set forth the deadlines for those filings. Order ¶ 4. In response to the October 17, 2016 Order, CMS filed a brief (CMS Br.), including a motion for summary judgment and six exhibits (CMS Exs. 1-6). Petitioner filed a brief (P. Br.) along with attachments. Neither party objected to the exhibits offered by the opposing party. In the absence of objection, I admit CMS Exs. 1-6 and Petitioner's attachments filed with its brief. Neither party offered the written direct testimony of any witness as part of its pre-hearing exchange.

II. Jurisdiction

I have jurisdiction to decide this case. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

III. Issue

The issue in this case is whether CMS had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges.

IV. Discussion

A. Statutory and Regulatory Background

To receive Medicare payments for items furnished to a Medicare-eligible beneficiary, the Secretary of Health and Human Services must issue a billing number to a DMEPOS supplier. Social Security Act (Act) § 1834(j)(1)(A). To receive such direct-billing privileges, a DMEPOS supplier must initially comply and maintain compliance with the supplier enrollment standards set forth in 42 C.F.R. § 424.57(c). 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, with a visible sign and posted hours of operation. 42 C.F.R. § 424.57(c)(7). Also, a DMEPOS supplier must permit CMS or its agent to conduct on-site inspections to ascertain supplier compliance with each enrollment standard. 42 C.F.R. § 424.57(c)(8). 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. 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. *See* 42 C.F.R. § 424.57(d); *A to Z DME, LLC*, DAB No. 2303 at 3 (2010); *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.”).

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)(i)-(ii). The effective date of revocation is the date CMS determines the supplier was no longer operational. 42 C.F.R. § 424.535(g). Suppliers that 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).

B. Findings of Fact, Conclusions of Law and Analysis

1. I decide this case based on the written record.¹

CMS moved for summary judgment. CMS Br. at 3, 11. Petitioner did not cross-move for summary judgment; neither did Petitioner request to present evidence at an in-person hearing. P. Br. Moreover, as noted above, neither party offered the written direct testimony of any witness as part of its pre-hearing exchange. As I explained in my October 17, 2016 Order, “[a]n in-person hearing to cross-examine witnesses will be necessary only if a party files admissible, written direct testimony, and the opposing party asks to cross-examine.” Order ¶ 10; *see Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823 at 7-8 (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). I further informed the parties that, if cross-examination of witnesses was not required, I would close the record and issue my decision once the parties completed their pre-hearing exchanges. Order ¶ 11. Based on these criteria, there is no need for an in-person hearing in this case, and I issue my decision based on the written record. Because I issue this decision based on the written record, I need not decide whether the standard for summary judgment is met. That is, even if there are disputed issues of material fact, I will resolve them based on the evidence of record.

2. An NSC site inspector was unable to complete an on-site inspection of Petitioner’s facility on either April 26 or April 27, 2016, because the facility was closed and the security gate locked at the time of the attempted inspections.

Petitioner operated its business from a storefront facility located at 8937 S. Western Ave., Los Angeles, CA 90047. CMS Ex. 1 at 1-2. The posted hours of operation for Petitioner’s facility were 9:00 a.m. to 5:00 p.m. Monday through Friday. CMS Ex. 1 at 1. On April 26, 2016, at 10:38 a.m. and on April 27, 2016, at 1:47 p.m., an NSC site inspector attempted to conduct an inspection of Petitioner’s facility. CMS Ex. 1 at 2. The inspector was unable to complete the site inspection on either date. *Id.* The NSC inspector was unable to gain access to the facility because “[t]he security gate was closed and locked during both attempts preventing access to the front entrance.” CMS Ex. 1 at 7, 8, 10. Petitioner does not contend that its facility was open and staffed on the dates and times that the NSC site inspector attempted to inspect the facility. Instead, Petitioner explains that, on April 26 and 27, 2016, only one staff member was present because two other staff members had “called out.” P. Br. at 1. Petitioner further explains that, at the

¹ My findings of fact/conclusions of law appear as headings in bold italic type.

times in question, the single staff member on duty had left the facility to make deliveries. *Id.* I therefore find that Petitioner’s facility was not open or staffed at the time of the attempted site inspections, which occurred during Petitioner’s posted business hours.

3. CMS had a legal basis to revoke Petitioner’s Medicare enrollment and billing privileges pursuant to 42 C.F.R. §§ 424.535(a)(5) and 424.57(c)(7)(i)(C).

DMEPOS suppliers must permit CMS or its agents to conduct on-site inspections to ascertain supplier compliance with enrollment standards, and the supplier must be accessible to beneficiaries and to CMS and staffed during posted hours of operation. 42 C.F.R. § 424.57(c)(7)(i)(C), (c)(8). CMS may perform periodic site visits to determine whether the supplier is complying with Medicare enrollment requirements. 42 C.F.R. §§ 424.510(d)(8), 424.515(c), 424.517(a).

In the present case, it is undisputed that the NSC site inspector unsuccessfully attempted to conduct an inspection at Petitioner’s Western Ave. facility on April 26, at 10:38 a.m. and again on April 27, at 1:47 p.m. The inspector was unable to complete a site inspection on either date because the security gate was closed and locked. CMS Ex. 1. Petitioner’s failure to be open to the public on either of the days that the inspector attempted site visits prevented the inspector from determining whether Petitioner continued to comply with enrollment requirements. Therefore, CMS had a legitimate basis to conclude that Petitioner was not in compliance with supplier standard 7, 42 C.F.R. § 424.57(c)(7)(i)(C).

Petitioner acknowledges that its staff member was out and the office was temporarily closed. P. Br. at 1. However, Petitioner states that it had posted a sign to notify patients that the staff member was making deliveries and would return shortly. *Id.* Petitioner explains that the sign must have blown off the window, leading to a “misunderstanding” by the inspector. *Id.* In Petitioner’s view, the inspector mistakenly assumed that staff would only be away from the office during the posted lunch hour (12 p.m. – 1 p.m.). P. Br. at 1, 9. Petitioner further represents that “moving forward” it will ensure that staff are always present during its posted hours of operation.² P. Br. at 1.

² To the extent Petitioner is arguing that it has changed its business practices so that it will no longer leave its facility unattended during its posted hours, this is merely a reiteration of Petitioner’s CAP. The NSC rejected Petitioner’s CAP as it related to Petitioner’s compliance with section 424.57(c)(7)(i)(C). CMS Ex. 4 at 3. I do not have authority to review CMS’s or its contractor’s actions on a CAP. 42 C.F.R. § 405.809(b)(2) (“[t]he refusal of CMS or its contractor to reinstate a . . . supplier’s billing privileges based on a corrective action plan is not an initial determination under part 498 of this chapter”).

Whether or not the NSC site inspector observed or considered Petitioner's sign regarding its employee's absence has no bearing on whether Petitioner complied with the DMEPOS supplier standards. The fact that Petitioner's location was closed during its posted hours of operation establishes Petitioner's non-compliance with supplier standard 7, even if the location was closed for only a short period of time to accommodate the need to make deliveries. A DMEPOS supplier is neither "open to the public" nor "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 similar reasons, even if the supplier posts a temporary sign. *See Ita Udeobong, d/b/a Midland Care Med. Supply & Equip.*, 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).

It is incumbent on Petitioner to manage its operations so that its facility remains open while it performs other required functions, such as making deliveries to patients and accommodating breaks for staff members. *See Ocean Orthopedic Services, Inc.*, DAB CR4218 at 5 (2015). As another administrative law judge has stated:

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). Nor does the fact that staff may be accessible by telephone during posted hours of operation establish compliance with supplier standard 7 (42 C.F.R. § 424.57(c)(7)(i)(C)). *See Complete Home Care, Inc.*, DAB No. 2525 at 6.

The conclusion that suppliers must remain open and staffed continuously during their posted hours of operation is reinforced by language in the preamble to the final rule establishing additional enrollment safeguards for DMEPOS suppliers.³ The regulatory drafters explained in the preamble 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 (August 27, 2010). The drafters made these statements in response to comments suggesting that exceptions be made for temporary office closures needed to accommodate "patient deliveries, emergencies, and other unforeseen occurrences." *Id.* The preamble language thus emphasizes CMS's

³ The preamble language can be read to support an exception to the requirement for continuous operation in case of a disaster or other emergency. *See* 75 Fed. Reg. at 52,636 ("we have always made exceptions concerning posted hours for disasters and emergencies"). However, Petitioner does not contend that its temporary closures on April 26, and 27, 2016, were due to disaster or emergency.

