

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Onic Medical Supply, L.L.C.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-1046

Decision No. CR3068

Date: January 10, 2014

**DECISION**

Petitioner, Onic Medical Supply, L.L.C.,<sup>1</sup> appeals the Centers for Medicare & Medicaid Services' (CMS's) decision to revoke its Medicare enrollment and direct billing privileges. As explained below, I find Petitioner was not in compliance with all Medicare requirements and uphold CMS's determination.

**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 February 27, 2013, Palmetto GBA National Supplier Clearinghouse (NSC), a Medicare contractor, notified Petitioner that it was revoking its Medicare supplier number retroactive to February 13, 2013. CMS Ex. 5, at 6. The notice letter explained that site visits by a NSC

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<sup>1</sup> This case was originally captioned "Onic Medical Supply." July 19, 2013 Acknowledgment and Pre-Hearing Order. CMS requests that the caption be amended to reflect that Petitioner applied to be a Medicare supplier, and then had its privileges revoked, as "Onic Medical Supply, L.L.C.," not simply as "Onic Medical Supply." CMS Brief in Support of Centers for Medicare & Medicaid Services' Motion for Summary Judgment (CMS Br.) at 1 n.1. In the absence of objection, I amend the caption to read "Onic Medical Supply, L.L.C."

representative, on January 31 and February 13, 2013, were unsuccessful because Petitioner's facility was closed on both attempts and Petitioner posted no sign showing its business hours. Because the inspection could not be completed, NSC could not verify Petitioner's compliance with other supplier standards. NSC determined that Petitioner was not operational to furnish Medicare covered items and services and that Petitioner was in violation of 42 C.F.R. §§ 424.57(c)(7), 424.535(a)(5)(ii), and all supplier standards in 42 C.F.R. § 424.57(c). 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 of its revocation. CMS Ex. 5, at 6-8.

Petitioner requested reconsideration by letter dated April 4, 2013. CMS Ex. 5, at 10-12. On May 23, 2013, a hearing officer issued an unfavorable decision and upheld the revocation finding Petitioner was not in compliance with Medicare enrollment requirements, specifically Supplier Standard 7 (42 C.F.R. § 424.57(c)(7)). CMS Ex. 4, at 1-5. On July 8, 2013, Petitioner timely requested a hearing with the Civil Remedies Division of the Departmental Appeals Board. On July 19, 2013, I issued an Acknowledgment and Pre-Hearing Order (Order). Pursuant to this Order, on August 23, 2013, CMS filed its brief and motion for summary judgment (CMS Br.), along with six exhibits. On September 26, 2013, Petitioner filed its response to CMS's motion for summary judgment (P. MSJ Resp.) and its pre-hearing brief (P. Br.), along with two exhibits. On October 1, 2013, CMS requested leave to file a reply brief, with the reply brief attached. In the absence of objection, I accept CMS's reply brief. I admit all 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 affirmatively requested an opportunity to cross-examine a witness. Pre-Hearing Order ¶¶ 8, 9; *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). Neither party properly offered the written direct testimony of a witness as an affidavit signed under penalty of perjury. CMS counsel lists one witness, the investigator who performed the site investigations of Petitioner's facility on January 31 and February 13, 2013. CMS asserts the investigator's written direct testimony consists of the site investigation report documents he prepared for the January 31 and February 13, 2013 site visits. "CMS' Proposed Witness" list, citing CMS Ex. 5, at 15-25. The report includes his signed declaration that the documents which make up the site investigation report are "a true and accurate account of the events that occurred and transpired on the dates described therein . . . based on my personal knowledge or . . . information provided to me in my official capacity." CMS Ex. 5, at 15-25. Petitioner's counsel proposes one witness, Petitioner's "President/CEO" Henry Ejemole. Petitioner asserts I should consider as written direct testimony a letter signed by Mr. Ejemole, not under oath or by declaration, dated April 4, 2013, sent to NSC, and entitled "Request to Withdraw

Revocation of PTAN # 6416020001.” Petitioner “Proposed Witness” list, citing CMS Ex. 5, at 10-11. CMS did not affirmatively request to cross-examine Mr. Ejemole based on this letter, and Petitioner did not affirmatively request to cross-examine the site investigator based on his site investigation report. 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.

CMS is also asserting an alternative basis for the revocation, which it did not rely on either when the Medicare contractor issued its revocation letter or at the reconsideration level of appeal. Specifically, CMS asserts that it discovered, recently at this level of review, Petitioner represented in its enrollment application that it was a limited liability company when actually its corporate status as a limited liability company was forfeited one year prior to Petitioner filing its enrollment application. CMS requests, therefore, that I add as an independent basis for upholding revocation Petitioner’s noncompliance based on this false information, citing 42 C.F.R. §§ 424.57(c)(2), 424.535(a)(4), and 498.56. Petitioner’s alleged misrepresentation of its corporate status may authorize CMS to revoke its supplier number and billing privileges. However, as I find Petitioner noncompliant with 42 C.F.R. §§ 424.57(c)(7) and 424.535(a)(5)(ii) on the grounds originally relied upon by the contractor and CMS, I do not need to address CMS’s argument regarding whether Petitioner included false information in its enrollment application.

## **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 enrollment standards set forth in 42 C.F.R. § 424.57(c)(1)-(29). Among other requirements, 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 permanent visible sign and posted hours of operation. 42 C.F.R. § 424.57(c)(7)(B), (C), (D). Also, a DMEPOS supplier must permit CMS or its agent to conduct on-site inspections to determine 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(e)<sup>2</sup>;

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<sup>2</sup> Paragraph (e) of section 424.57 was previously designated paragraph (d) and was re-designated by the rulemaking that imposed the surety bond requirements at paragraph (d); however, the re-designations were not incorporated in the C.F.R. volumes issued October 1, 2009, 2010, 2011, or 2012 “due to inaccurate amendatory instruction,” and the text

*Complete Home Care, Inc.*, DAB No. 2525, at 6 (2013); *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.”).

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 billing privileges and enrollment in Medicare as a supplier.

### IV. Findings of Fact and Conclusion of Law

**CMS had a legitimate basis to revoke Petitioner’s Medicare supplier number and billing privileges because a NSC investigator was not able to access Petitioner’s location on February 13, 2013, and the NSC investigator found Petitioner’s hours of operation were not posted on January 31 and February 13, 2013.**

An investigator representing NSC performed on-site investigations of Petitioner on January 31 and February 13, 2013. The results of the investigations are documented in a single site investigation report. CMS Ex. 5, at 16-25. The investigator declares that on January 31, 2013, at 9:30 a.m., he “arrived to find door locked to suite, no response to knock on door, and lights apparently off in suite.” On February 13, 2013, at 2:45 p.m., he explained he found the “[s]ame situation as 1<sup>st</sup> attempt. No building manager office on site to check with.” CMS Ex. 5, at 17, 22. The investigator documents in his site investigation report that Petitioner was housed in a “Suite-Office Building,” that there was a permanent visible sign with Petitioner’s business name posted, but that Petitioner’s

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added by revised paragraph (d) appears in those volumes as an “Editorial Note” to section 424.57. References are to the regulation as re-designated.

hours of operation were not posted. CMS Ex. 5, at 17-18. The investigator documents that he was unable to complete the site visit. CMS Ex. 5, at 18, 22.

Mr. Ejemole, Petitioner's President and CEO, states that "[on] January 31, 2013, I personally was in the office but had an emergency situation that compelled me to leave the office." He also states that on February 13, 2013 he "was in and out on service calls but one of my assistant[s] was in the office and it surprises me that my [sic] CMS representative did not find anybody when my establishment was visited." With regard to signage, he states that "company signs are conspicuously and strategically located throughout the building, and in uniform with other establishments. Based on your letter the building management company has allowed me to post more outside signs and hours of operation which is Monday through Friday (10am-4pm) for walk-ins and contact phone numbers for after hours and emergencies." CMS Ex. 5, at 10.

Petitioner asserts that it informed CMS in its enrollment application that its hours were 10:00 a.m. to 4:00 p.m., and it argues that on January 31, 2013 the site investigator attempted his investigation at 9:30 a.m., when Petitioner would be expected to be closed. P. MSJ Response at 4-5; P. Br. at 2, 5; CMS Ex. 2, at 12; CMS Ex. 5, at 10. Petitioner argues further that it was not cited for the failure to post its hours of operation during an earlier site visit on December 3, 2012. Petitioner asserts it explained to the site investigator during the December 3, 2012 site visit that its hours of operation could not be posted at the entrance to the building, and the investigator agreed that its hours could be posted inside Petitioner's suite. P. MSJ Response at 4-5; P. Ex. 1. Petitioner also argues that during the site visits in question, NSC's investigator should have contacted it by telephone before making any determination that it was not operational. P. MSJ Response at 6. Also, as referenced in Mr. Ejemole's letter to NSC, Petitioner argues that its staff was present during the site investigation on February 13, 2013. P. Br. at 2, 5. Finally, Petitioner argues that photos taken by the investigator are insufficient to show that Petitioner was closed or not operational on February 13, 2013. P. Br. at 5.

With regard to Petitioner's argument that NSC's investigator should not have attempted to inspect Petitioner prior to 10:00 a.m., I note that Mr. Ejemole does not state that he or anyone else was at Petitioner's location after 10:00 a.m. In fact, Mr. Ejemole allegedly had a medical emergency that kept him from work until Monday, February 4, 2013. CMS Ex. 5, at 12. Petitioner has introduced no evidence at all to show that at any point on January 31, 2013 he, or anyone in his employ, was in his office.

While Petitioner argues a site visit acknowledgment from an earlier site visit (that of December 3, 2012 (P. Ex. 1, at 1)) shows that CMS granted it permission to post its hours of operation on the interior of its office rather than the exterior, the document it references does not support Petitioner's argument. The document it references, P. Ex. 1, at 1, does not show that Petitioner was granted permission to post its hours of operation in the interior of its office. Petitioner's hours of operation are not referenced in the

document. Petitioner offers no documentary or testimonial evidence to show that CMS ever affirmatively allowed it to post its hours on the interior of its office. Mr. Ejemole's letter to NSC, which Petitioner offers as Petitioner's only written direct testimonial evidence, does not state that Petitioner was ever granted such permission. CMS Ex. 5, at 10-11.

Petitioner has not shown that it was accessible and staffed on February 13, 2013. Mr. Ejemole's statement does not assert that someone was at Petitioner's office at 2:45 that afternoon. Mr. Ejemole states instead that he was "in and out on service calls" and does not otherwise verify that one of his "assistant[s]" was there at all times. Mr. Ejemole does not say who among his "assistants" was there or offer any evidence at all to corroborate his assertion that someone on staff was in its office during the relevant time.

Petitioner does not dispute that photographs taken by NSC's investigator were of its location or assert that the investigator did not present himself at Petitioner's location. Petitioner does not dispute that its hours of operation were not posted outside its suite at the relevant times. Further, a site investigator is not required to telephone a supplier to find out why its location is closed. *See Complete Home Care*, DAB No. 2525, at 5-6.

The investigator's site investigation report, accompanied by his written declaration, is credible and consistent. It shows he twice attempted to investigate Petitioner's location and no-one was there when he knocked on the office door. It also shows that Petitioner's hours of operation were not posted. The investigator declares that the situation at Petitioner's location was the same on February 13 as on January 31, 2013.

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). The regulations require a 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. 2323. ("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.").

Even if I were to determine that Petitioner was open from 10:00 a.m. to 4:00 p.m. on January 31, 2013, Petitioner still would not prevail. The NSC investigator's report shows, at a minimum, that on February 13, 2013, Petitioner was not accessible because no one responded to his knock on the door and the lights were off in Petitioner's suite, and on both January 31 and February 13, 2013, Petitioner did not post its hours of

operation. Either of these deficiencies, which Petitioner has not rebutted, are violations of 42 C.F.R. § 424.57(c)(7) and justify revocation of Petitioner's supplier number and billing privileges. Further, Petitioner was not operational under 42 C.F.R. § 424.535(a)(5)(ii), justifying revocation, because it was not open to furnish services on February 13, 2013, as it was not open to the public and properly staffed. 42 C.F.R. § 424.502.

## **V. Conclusion**

I sustain the revocation of Petitioner's supplier number and billing privileges, effective February 13, 2013, because CMS has shown that Petitioner was not open and accessible and properly staffed on February 13, 2013 and because CMS has shown that Petitioner failed to post its hours of operation. Petitioner will be barred from re-enrolling for a two-year period effective from the date of Petitioner's revocation.

/s/

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Joseph Grow  
Administrative Law Judge