

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Eleazar Lopez d/b/a Western Alliance Mobility,
(PTAN: 5649200001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-567

Decision No. CR3255

Date: June 4, 2014

DECISION

Petitioner, Eleazar Lopez d/b/a Western Alliance Mobility, is a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS), located in Rio Grande City, Texas who, until recently, participated in the Medicare program. The Centers for Medicare & Medicaid Services (CMS) has revoked his Medicare provider number, and Petitioner appeals. CMS now moves for summary judgment.

CMS presents the written declaration of only one witness, and Petitioner has no witnesses. Petitioner has not asked to cross-examine CMS's witness, so an in-person hearing would serve no purpose. *See Acknowledgment and Prehearing Order at 5-6 (¶¶ 8-10)*. This matter may therefore be decided on the written record, without considering whether the standards for summary judgment are satisfied.

Because the supplier was not open for inspection during its posted hours, CMS properly revoked its supplier number.

Background

Until its Medicare supplier number was revoked, effective September 11, 2013, Petitioner participated in the Medicare program as a supplier of DMEPOS. *See* 42 C.F.R. § 424.57. In a letter dated September 27, 2013, the Medicare contractor, National Supplier Clearinghouse (a division of Palmetto GBA), notified Petitioner that its Medicare supplier number was revoked retroactively, pursuant to 42 C.F.R. §§ 405.800; 424.57(e); 424.535(a)(1); 424.535(a)(5)(ii); and 424.535(g).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 noted that one of the contractor's representatives attempted to visit the facility on August 26 and September 11, 2013. The business was closed on both occasions, so the representative could not inspect the premises. CMS Ex. 4.

Petitioner sought reconsideration. In a reconsideration determination dated November 25, 2013, a Medicare hearing officer affirmed the revocation of Petitioner's supplier number. CMS Ex. 1. Petitioner now appeals that determination pursuant to 42 C.F.R. § 424.545.¹

With its brief, CMS submits eleven exhibits (CMS Exs. 1-11). Petitioner submits a brief (P. Br.), which it has captioned "Petitioner's Motion to Dismiss," with two documents attached, including a copy of CMS Ex. 7, page 3, and page 6 from a Medicare application form, CMS-855S. In the absence of any objection, I admit into evidence CMS Exs. 1-11. I also admit as P. Ex. 1, page 6 of the CMS-855S.

¹ In reaching her determination, the hearing officer considered whether the supplier was "operational," i.e. had a qualified practice location, was open to the public for the purpose of providing healthcare related services, was prepared to submit valid Medicare claims, and was properly staffed, equipped and stocked. She concluded that, because the inspector was not able to complete a site investigation, despite multiple attempts, and was unable to verify compliance with supplier standards, particularly standard 7 (42 C.F.R. § 424.57(c)(7)), the contractor properly revoked its billing privileges. Thus, even though the hearing officer may have omitted citation to 42 C.F.R. § 424.535(a)(5)(ii), she explicitly found that the supplier was not operational within the meaning of 42 C.F.R. § 424.535. CMS Ex. 1 at 3; *see* CMS Ex. 3 (in which the contractor argues, at the reconsideration level, that it properly revoked the supplier's billing privileges because the supplier violated 42 C.F.R. §§ 424.535(a)(5)(ii) and 424.57).

Discussion

CMS properly revoked the supplier's billing privileges, because the facility was not open for inspection during its posted hours of operation.²

Requirements for a DMEPOS supplier's Medicare participation. To receive Medicare payments for items furnished to a Medicare-eligible beneficiary, a supplier of medical equipment and supplies must have a supplier number issued by the Secretary of Health and Human Services. Social Security Act § 1834(j)(1)(A).

To obtain and retain its supplier number, a Medicare supplier must be operational and must meet the standards set forth in 42 C.F.R. § 424.57(c), and CMS may revoke its billing privileges if it fails to do so. 42 C.F.R. § 424.57(c)(1) and (d); 42 C.F.R. § 424.535(a)(1), (5). To be operational, the supplier must, among other requirements, have a qualified physical practice location, be open to the public, and be properly staffed, equipped, and stocked to furnish items and services. 42 C.F.R. § 424.502. Among other requirements, the supplier's location must be accessible during reasonable business hours, and the supplier must maintain a visible sign and post its hours of operation. It must permit CMS or its agents to conduct on-site inspections to ascertain its compliance with governing regulations. 42 C.F.R. § 424.57(c)(7) and (8). Where, as here, a contractor's representative finds the facility closed during its posted hours, the supplier does not meet the requirements of section 424.57(c), and CMS may appropriately revoke its billing privileges. *Ita Udeobong, d/b/a Midland Care Med. Supply and Equip.*, DAB No. 2324 (2010) *see* 42 C.F.R. § 424.535(a)(5)(ii) (authorizing CMS to revoke billing privileges, if the supplier fails to satisfy any Medicare enrollment requirement).

Here, according to a site investigation report, signed by Inspector Carolyn Morris, she visited the facility at 1:04 p.m. on August 26, 2013 and returned at 8:50 a.m. on September 11, 2013. CMS Ex. 7 at 2; CMS Ex. 11 at 2 (Morris Decl.). The facility's hours of operation were posted: 8:00 a.m. to 5:00 p.m. Monday through Friday closed Saturday and Sunday. CMS Ex. 7 at 3, 13. On both occasions, the premises were closed; the door was locked, and the inspector's knocks on the door were not answered. CMS Ex. 7 at 3, 7; CMS Ex. 11 at 2 (Morris Decl.). The inspector took pictures on both days, and the pictures indicate the dates and times cited in the report. CMS Ex. 7 at 13; CMS Ex. 11 at 2 (Morris Decl.).

Petitioner concedes that the facility was closed on the dates and times in question and has offered several excuses. In his request for reconsideration, Petitioner Lopez claimed that August 26, 2013 was the first day of school, so the office opened an hour late that day. On September 11, 2013, staff (his wife and himself) "were in and out of the office doing

² I make this one finding of fact/conclusion of law.

deliveries” and assessing a client that day. He also claimed that the facility put up a sign with instructions for contacting staff if staff are out on delivery. CMS Ex. 5.

Now, Petitioner maintains that staff were still at lunch when the inspector arrived on August 26. Further, he asserts that the facility’s actual hours of operation are 8:00 a.m. to noon and 1:00 p.m. to 5:00 p.m. Petitioner attaches to his brief a page from a Medicare application showing that, effective April 3, 2013, these were the business’s new hours. P. Ex. 1.

On September 11, he claims that no one was in the office, because his wife was sick, and he was out on a delivery.

Based on these facts, I find that Petitioner was not in compliance with all of the standards set forth in section 424.57(c). First, the facility’s posted hours of operation were 8:00 a.m. to 5:00 p.m. Yet, as Petitioner admits, it was closed from noon until 1:00 p.m. every day. On a regular basis, the facility was not open and accessible to beneficiaries during its posted hours of operation. It therefore did not comply with 42 C.F.R. § 424.57(c)(7). The standard would have no meaning if suppliers were not also required to adhere to the posted hours of operation. Posting an “out-to-lunch” or a “will-return” sign whenever the office is closed is not sufficient to satisfy the requirement that the facility actually be open and accessible during its posted hours of operation. *Udeobong*, DAB No. 2324 at 6-7.³

Moreover, because the contractor was unable to perform an on-site review, it could not determine that the supplier was operational. Because of this, and because the supplier failed to satisfy all Medicare enrollment requirements, CMS properly revoked its billing privileges. 42 C.F.R. §§ 424.57(d); 424.535(a)(5)(ii).

³ To sustain its supplier number, a DMEPOS supplier must permit CMS or its agents to conduct on-site inspections. 42 C.F.R. § 424.57(c) (8). Here, Petitioner had two opportunities to meet this requirement, but, by his own admission, the business was not accessible and therefore did not permit the on-site inspection. I note that CMS and its contractors must, with scarce resources, monitor the performance of a vast number of providers and suppliers. Inspections are supposed to be unannounced. An investigator should be able to rely on the posted hours of operation in determining when to conduct an inspection. Requiring an investigator to return multiple times to a single facility in the hopes of finding it open is simply unreasonable.

Conclusion

Because the facility was not open for inspection during its posted hours, I sustain CMS's revocation of Petitioner's supplier number.

 /s/
Carolyn Cozad Hughes
Administrative Law Judge