

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Cotton Orthotic and Prosthetic Associates, LLC,
(PTAN: 6684110001),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-15-146

Decision No. CR3571

Date: January 13, 2015

DECISION

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS) to revoke the enrollment of Petitioner, Cotton Orthotic and Prosthetic Associates, LLC, as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) to the Medicare program. I establish the effective date of CMS's revocation determination to be June 27, 2014, 15 days after June 12, 2014, the date when CMS sent notice of revocation to Petitioner.

I. Background

Petitioner requested reconsideration of CMS's determination to revoke its participation and reconsideration was denied. Petitioner requested a hearing before me in order to challenge CMS's determination. CMS moved for summary judgment and Petitioner opposed CMS's motion. CMS filed two proposed exhibits, identified as CMS Ex. 1 – CMS Ex. 2, in support of its motion. Petitioner filed seven proposed exhibits, identified as P. Ex. 1 – P. Ex. 7, in opposition to CMS's motion.

Neither side has filed objections to my receiving these exhibits. I receive them for purposes of deciding CMS's motion.¹

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are: whether a basis exists to revoke Petitioner's participation in Medicare; and, the effective date of the revocation determination.

B. Findings of Fact and Conclusions of Law

As a DMEPOS supplier Petitioner is bound by regulations at 42 C.F.R. Part 424 and in particular the special payment rules established by 42 C.F.R. § 424.57. Among the requirements of that regulation is the requirement that a DMEPOS supplier must maintain a physical facility on an appropriate site. 42 C.F.R. § 424.57(c)(7). In order to assure compliance, CMS must have access to a DMEPOS supplier's site and must be able to inspect that site. 42 C.F.R. § 424.57(c)(8).

The undisputed material facts of this case are that on two occasions an inspector on behalf of CMS attempted to visit Petitioner's business location in order to verify, among other things, that Petitioner was compliant with the requirements of 42 C.F.R. § 424.57(c)(7). On both occasions the inspector found the facility to be closed, locked, and unstaffed. CMS Ex. 1 at 262-70. That made it impossible for the inspector to verify compliance. In particular, it made it impossible for the inspector to verify whether Petitioner maintained a physical facility that complied with all of the requirements of 42 C.F.R. § 424.57, more specifically, the requirements of 42 C.F.R. § 424.57(c)(7). Moreover, the facility was not accessible for inspection in violation of the requirements of 42 C.F.R. § 424.57(c)(8). That noncompliance was ample basis for CMS to revoke Petitioner's Medicare enrollment.

Petitioner offers several arguments in its defense, but I find them to be unpersuasive. Petitioner argues that, at the first visit to Petitioner's facility, on May 9, 2014, the first attempted inspection date, its owner was away, providing a service to a patient. Normally, another individual would staff the facility, but on that occasion, she was forced to return home to retrieve a laptop computer that she had inadvertently left there.

¹ In fact, nearly all of the evidence contained in these exhibits is irrelevant. As I shall discuss, the undisputed material facts of this case are extremely simple: on two occasions an inspector, working on behalf of CMS, attempted to visit Petitioner's facility during normal business hours and found it to be closed and unattended. All of the other facts presented by the parties are collateral and, as I explain below, it is unnecessary that I consider them.

Consequently, and unavoidably, the facility was briefly closed during what would otherwise be normal business hours. CMS Ex. 1 at 8; 18-30. Petitioner contends that, on May 12, 2014, the date of the second attempted inspection, its owner also was away providing service to a patient and the facility was closed only because its employee was on vacation on that date. *Id.*

I accept all of these asserted facts as true but they do not provide Petitioner with a defense. Applicable regulations require that a DMEPOS supplier be open during business hours and they require also that the facility be accessible for inspection. These regulations allow for no exception to the requirement. Petitioner was not in compliance and consequently, that justifies CMS's determination.

Petitioner asserts also that, on May 9, its employee placed a sign at the entrance of the facility indicating that it would be closed temporarily. Petitioner asserts that there is a fact dispute concerning this sign because the inspector did not report having seen it. But, I find no dispute as to a *material* fact. Whether or not the employee placed a sign, the facility was closed during normal business hours on May 9. That was a violation of regulatory requirements. Moreover, even if Petitioner was excused for being closed on May 9 it nonetheless was closed on May 12 due to its employee's decision to be on vacation.

Petitioner argues also that it is CMS's policy to give a DMEPOS supplier two opportunities to comply with the requirement that it be accessible for inspection. It reasons that, if it was in compliance on May 9, then its noncompliance on May 12 was its first regulatory violation and it should have been given another chance to comply. However, there is no regulation that embodies this asserted "two bites at the apple policy." If such policy exists, it is a matter of discretion for CMS. The regulations require, simply, that a facility be open and accessible. Petitioner's failure to be open and accessible on May 12 is sufficient basis to justify CMS's determination to revoke Petitioner's Medicare participation.

Finally, Petitioner asserts that it was "operational" on the dates in question because it was actively providing services and goods to Medicare beneficiaries. But, assuming that to be true, it is not a defense for Petitioner's failure to have an open and accessible facility on the dates in question.

