

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In the Case of:)	
)	
Tide Medical Supply,)	Date: August 17, 2009
)	
Petitioner,)	
)	
- v. -)	Docket No. C-09-462
)	Decision No. CR1992
Centers for Medicare &)	
Medicaid Services.)	
_____)	

DECISION

I sustain the determination of the Centers for Medicare & Medicaid Services (CMS) to revoke the Medicare billing privileges of Petitioner, Tide Medical Supply.

I. Background

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, and orthotics and supplies (DMEPOS). Its participation in Medicare as a DMEPOS supplier was governed by section 1834(j) of the Social Security Act and by implementing regulations at 42 C.F.R. Part 424.

On January 30, 2009, National Medical Clearinghouse, a CMS contractor, sent a notice to Petitioner advising it that its Medicare billing privileges were being revoked. Petitioner requested reconsideration and, on reconsideration, the determination to revoke Petitioner's participation was upheld. Petitioner then requested a hearing and the case was assigned to me for a hearing and a decision.

CMS filed a pre-hearing brief, proposed exhibits, and a motion for summary disposition. CMS filed a total of eight proposed exhibits which it identified as CMS Ex. 1 – CMS Ex. 8. Petitioner replied to the motion with a brief and four proposed exhibits which it identified as P. Ex. 1 – P. Ex. 4. In its transmittal letter it asserted that it was submitting a

list of proposed witnesses and exhibits, however, Petitioner did not submit a list of proposed witnesses and exhibits:

On August 5, 2009, I held a telephone pre-hearing conference with the parties at which they informed me that they did not desire to present evidence in person. Consequently, I determined that the case was ready for a decision.

I receive into evidence CMS Ex. 1 – CMS Ex. 8 and P. Ex. 1 – P. Ex. 4.

II. Issue, findings of fact and conclusions of law

A. Issue

The issue in this case is whether CMS was authorized to revoke Petitioner's Medicare billing privileges.

B. Findings of fact and conclusions of law

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each finding below as a separate heading.

1. CMS will revoke a DMEPOS supplier's Medicare billing privileges where the DMEPOS supplier has failed to comply with standards governing its participation.

In order to participate in Medicare a DMEPOS supplier must meet all of the application certification standards that are set forth at 42 C.F.R. § 424.57(c)(1) through (25). CMS will revoke the supplier's Medicare billing privileges if the DMEPOS supplier fails to meet any of these standards. 42 C.F.R. § 424.57(d).

The regulatory language is plain. A DMEPOS supplier must comply with the letter of all standards or CMS will revoke its billing privileges. And, I must sustain CMS's determination where the facts establish noncompliance with one or more of the regulatory standards. There is nothing in the regulation that establishes a good cause exception to the requirement that a DMEPOS supplier comply with all certification standards. Nor is there any language to suggest that I have the authority to waive the compliance requirement in cases of extenuating circumstances or where a DMEPOS supplier asserts that, as a matter of equity, I should not hold it strictly accountable for compliance.

2. The undisputed material facts establish that Petitioner failed to comply with the requirements of 42 C.F.R. § 424.57(c)(8). Therefore, CMS was authorized to terminate Petitioner's Medicare billing privileges.

As a prerequisite to participation in Medicare a DMEPOS supplier must permit:

CMS, or its agents to conduct on-site inspections to ascertain supplier compliance with the requirements of . . . [42 C.F.R. § 424.57]. The supplier location must be accessible during reasonable business hours to beneficiaries and to CMS, and must maintain a visible sign and posted hours of operation.

42 C.F.R. § 424.57(c)(8).

The undisputed facts establish unequivocally that Petitioner failed to comply with the regulatory requirement. CMS was thus authorized to revoke Petitioner's Medicare billing privileges. On four separate occasions in December 2008, CMS's contractor's agent attempted to make an on-site visit to Petitioner's business office in order to ascertain whether Petitioner was complying with certification standards. Attempts were made on December 2, 5, 17, and 18, 2008. CMS Ex. 2; CMS Ex. 7, at 2. All four of the attempted visits were made during normal business hours of between 9:00 a.m. and 5:00 p.m. CMS Ex. 7, at 2. Although Petitioner had posted a sign stating that it was open, Petitioner's office was closed on the occasion of all four of these attempted visits. CMS Ex. 2, at 7; CMS Ex. 7, at 2. The agent spoke with the manager of the building in which Petitioner maintained offices and the manager stated he had no information as to Petitioner's whereabouts. CMS Ex. 7, at 2. The agent also attempted to call Petitioner after at least three of the four visits, and each time, the call was routed to voice mail or an answering machine. *Id.*

Petitioner argues that there were extenuating circumstances that justify it not being open for business on the dates at issue. According to Petitioner's it was not open for business on December 2 and 5, 2008 because its proprietor was temporarily away delivering supplies to clients. Petitioner's Brief at 2. Petitioner asserts that the business had to be closed because the proprietor's wife (his assistant) was absent during December 2008 due to health issues. As for the December 17, and 18, 2008, Petitioner asserts that its proprietor's wife had surgery and was in the hospital on those dates. *Id.*

As I explain above, at Finding 1, there is no equitable defense for failing to comply with participation standards. The regulation requires that a DMEPOS supplier be accessible to CMS during normal business hours and Petitioner plainly was not. Moreover, the defense presented by Petitioner – assuming the facts on which it is premised to be true – provides Petitioner with no equitably compelling argument for its failure to be open in

