

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Complete Home Care, Inc.
(Supplier No.0399220001),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-13-127

Decision No. CR2783

Date: May 14, 2013

DECISION

The Centers for Medicare and Medicaid Services (CMS) revoked Petitioner's Medicare enrollment and billing privileges. Petitioner, Complete Home Care, Inc., appeals, and CMS and Petitioner have filed cross motions: CMS moves for summary judgment and Petitioner's moves to dismiss CMS's revocation action. As discussed below, the uncontroverted facts compel revocation of Petitioner's supplier billing number. I accordingly grant CMS's motion for summary judgment and deny Petitioner's motion to dismiss.

I. Background

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). CMS Exhibit (Ex.) 1. A CMS contractor from the National Supplier Clearinghouse (NSC) attempted to conduct two site inspections at Petitioner's location. CMS Ex. 4. At the time of the two inspection attempts, Petitioner's posted hours of operation were Monday through Friday, from 9 a.m. to 6 p.m. *Id.* The NSC inspector attempted the first site visit on June 26, 2012, at 9:30 a.m, but the inspector reported that no one was there. A sign on the door

indicated that an employee would return at 2 p.m., and the NSC inspector returned at 2:45 p.m., but found no one there. CMS Ex. 4 at 2, 7, 9, and 10. The inspector attempted a second site visit on June 27, 2012, at 10:30 a.m. *Id.* at 2, 7, and 10. He knocked on the door, and he reported there was no answer. CMS Ex. 4 at 7. He also called the telephone contact number on the sign posted on the door, and there was no answer. CMS Ex. 4 at 7. The NSC inspector could not complete either site visit inspection because he found nobody at the site to let him inside. *Id.* On August 16, 2012, NSC sent a letter notifying Petitioner that it was revoking Petitioner's Medicare billing number effective June 27, 2012, the date CMS determined that Petitioner's practice location was not operational. CMS Ex. 1. NSC barred Petitioner from re-enrolling for two years from this effective date. *Id.*

The notice letter specifically stated that the basis for the revocation was that Petitioner was in violation of 42 C.F.R. § 424.57(c)(7) and 42 C.F.R. § 424.535(a)(5)(ii)¹ because it was closed during posted hours of operation on June 26 and 27, 2012, when a NSC inspector attempted to complete site inspections to verify Petitioner's compliance with supplier standards. *Id.* at 2. The notice letter further informed Petitioner of its right to request reconsideration of the revocation determination within 60 days of the postmark of the notice. Petitioner filed a timely request for reconsideration, which NSC received on August 28, 2012. CMS Exs. 2, 3. On October 23, 2012, the Hearing Officer issued an unfavorable decision and upheld the revocation of Petitioner's billing number because Petitioner was not in compliance with the Medicare enrollment requirements. CMS Ex. 3.

Petitioner requested a hearing with the Civil Remedies Division of the Departmental Appeals Board (DAB). With its hearing request, Petitioner attached several documents.² This case was assigned to me for written decision.

¹ This subsection states: "(a) *Reasons for revocation.* CMS may revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement for the following reasons: . . . (5) *On-site review.* CMS determines, upon on-site review, that the provider or supplier is no longer operational to furnish Medicare covered items or services, or is not meeting Medicare enrollment requirements under statute or regulation to supervise treatment of or to provide Medicare covered items or services for, Medicare patients. Upon on-site review, CMS determines that -- . . . (ii) A Medicare Part B supplier is no longer operational to furnish Medicare covered items or services, or the supplier has failed to satisfy any or all of the Medicare enrollment requirements, or has failed to furnish Medicare covered items or services as required by the statute or regulations."

² Petitioner did not submit these documents as marked exhibits when it filed its hearing request, and I now identify and mark them as follows: Petitioner Exhibit (P. Ex.) 1

CMS filed its motion for summary judgment accompanied by four exhibits, CMS Exs. 1-4. Pursuant to my Acknowledgment and Pre-hearing Order, Petitioner submitted its pre-hearing exchange accompanied by two exhibits, which I mark as P. Ex. 1A and P. Ex. 2A to avoid confusion with the exhibits previously submitted with the request for hearing.

II. Applicable Law

To receive Medicare payments for items furnished to a Medicare-eligible beneficiary, the Secretary of the U.S. Department 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 also meet and maintain each of the 25 supplier enrollments standards set forth in 42 C.F.R. §§ 424.57(c)(1)-(25). 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, and which maintains a visible sign and posted hours of operation. 42 C.F.R. §424.57(c)(7). Also, a DMEPOS must permit CMS or its agent to conduct on-site inspections to ascertain supplier compliance with each of these enrollment standards. 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

(Facility Photos); P. Ex. 2 (Pharmacy Licenses); P. Ex. 3 (Pharmacy Inspection Report); P. Ex. 4 (HQAA Award of Accreditation); P. Ex. 5 (Certificate of Liability Insurance); P. Ex. 6 (Building Inspection Report-Fire Department); P. Ex. 7 (Copies of Account Payables and Account Receivables for site visit days); P. Ex. 8 (Copies of Delivery Slips, Invoices, Ongoing Business transactions); P. Ex. 9 (Palmetto GBA October 23, 2012 Reconsideration Decision letter). CMS has moved to exclude these exhibits, and I find them immaterial and lacking good cause for admission at this late stage of the proceeding pursuant to 42 C.F.R. § 498.56(e). Nonetheless, they will remain a part of the record for purposes of any further appeal.

privileges. 42 C.F.R. § 424.535(a)(5)(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 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 I decide here is whether CMS is entitled to summary judgment because, when considering the evidence in the light most favorable to the Petitioner, it is undisputed that CMS had a legitimate basis to revoke Petitioner’s Medicare billing privileges.

IV. Findings of Fact and Conclusions of Law

A. This case is appropriate for summary judgment.

CMS filed a Motion for Summary Judgment. The Departmental Appeals Board (the Board) stated the standard for summary judgment as follows:

Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing law. . . . In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party’s favor.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The role of an administrative law judge (ALJ) in deciding a summary judgment motion differs from the ALJ’s role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame*, DAB No. 2291, at 4-5 (2009). Petitioner has not disputed the material facts that CMS alleges: no one was continually present at Petitioner’s location on the dates of the on-site visits attempted during Petitioner’s posted hours of operation.

B. CMS had a legitimate basis to revoke Petitioner's supplier number as non-operational because Petitioner was not staffed during its hours of operation.

On June 26, 2012, the NSC inspector attempted to conduct an unannounced site inspection on behalf of CMS at Petitioner's location during its posted hours of operation. However, the NSC inspector found that he could not enter because the location was closed. He noted that the door sign indicated Petitioner's office hours were Monday through Friday from 9 a.m. through 6 p.m. There also was a sign posted on the door stating someone would return by 2 p.m. and instructing deliveries to be left by the door. CMS Ex. 4 at 7, 9. He returned at 2:45 p.m., but no one was there, and the sign now stated someone would return at 5 p.m. CMS Ex. 4 at 7, 10. He noted that the door was locked, he knocked on the door, and there was no response. He also took date-stamped photographs. CMS Ex. 4 at 9, 10. On June 27, 2012, at 10:30 a.m., the NSC inspector made a second attempt at a site visit; however, the door was locked again. He noted that the lights were on so he knocked on the door, but no one appeared to be inside the office. A sign posted on the door indicated that someone would return by 5 p.m. He took date-stamped photographs. CMS Ex. 4 at 2, 7, 10. The NSC inspector reported he also tried to call the number listed on the sign posted on the door, but no one answered. CMS Ex. 4 at 7.

In its request for hearing, Petitioner's owner states, that at the time of the two site visits, the location at 1104 W. Russell Street was open with limited hours 'due to a family emergency' and that this location "was temporary [sic] closed at the time of the inspection visits." Request for Hearing (RFH) at 1. Petitioner's owner further contends that his staff was supporting all calls and services at a second location. RFH at 1. In his prehearing brief, Petitioner's owner now contends that Petitioner's pharmacist opened the location at 9 a.m., and another staff member was present for part of the day but later went home feeling ill. At noon the pharmacist reportedly went to a VA hospital, placed a sign on the inside door indicating someone would return by 2 p.m., returned to the location at 1:45 p.m., and then left at 2:30 p.m. to take care of another client at the VA. He then reportedly posted the sign saying he would return by 5 p.m. Similarly, Petitioner's owner contends that on June 27, 2012, the pharmacist had to make two visits to the VA hospital and again missed the site inspector when he visited at 10:30 a.m.³

³ Petitioner does not state when, if at all, anyone was present at the W. Russell Street location on June 27th. The site inspector reportedly arrived there at 10:30 a.m. to find no one there and a sign posted on the inside door stating that someone would return by 5 p.m. Petitioner does not dispute the recitation of these facts or that the site inspector called the telephone number posted on the door and no one answered. By way of explanation, Petitioner supposes that the call may have been blocked "by the hospital system" when the pharmacist was in the VA hospital.

Petitioner's owner concedes that even though there were times during the day of June 26 and June 27th when no one was physically at this location and the doors were locked, the facility nevertheless was open for business because the outside entrance doors to the building were open with a message posted on the inside door that someone would return to the location to service them. Petitioner's owner further claims that Petitioner's telephone number is maintained in the telephone directory together with a toll-free number available through directory assistance, and, if someone called those numbers, an employee at its other location would answer. Therefore, Petitioner contends the location was accessible and open to the public because visitors could see the sign posted and call the number posted on the sign if they needed assistance. Petitioner does not dispute that the telephone number on the sign was the cell phone number of the pharmacist. Petitioner also does not dispute that the site inspector called this number, but the call was not answered. However Petitioner's owner then argues that if the NSC inspector had called the main business number (which was not the number listed on the facility's door nor the temporary signage), he is confident that the staff would not have missed that call. Petitioner's owner requested to cross-examine the inspector with regard to this disputed fact, however, I will accept these facts as true for purposes of summary judgment.

Petitioner presented its exhibits in an effort to show that its business was active during the relevant period and that someone was at the office at some point during the dates of the two site visits. However, these records and documents do not present a dispute of material fact as to whether anyone was continually present during Petitioner's hours of operation on the dates the inspector attempted the on-site visits.

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 (emphasis added). Among other things, a DMEPOS supplier must permit CMS or its agent to conduct on-site inspections to ascertain supplier compliance with each of the enrollment standards, and the supplier must be accessible and staffed during posted hours of operation to beneficiaries and to CMS. 42 C.F.R. § 424.57(c)(7). A supplier is neither "open to the public" nor "accessible," if the supplier location is closed due to staff making patient deliveries or visits. It is incumbent on Petitioner to make whatever reasonable arrangements are necessary to keep its business open while allowing for patient consultations and visits. "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 A to Z DME, LLC*, DAB No. 2303 (2010).

The Board also has held that the supplier standard "would have no meaning if suppliers could deviate from their posted hours of operation on a regular basis." *Ita Udeobong*,

d/b/a/ Midland Care Med. Supply and Equipment, DAB No. 2324, at 7 (2010). In *Udeobong*, the petitioner admitted that it was closed from noon until 1 p.m. every day for lunch, which was outside of its regularly posted hours of 10 a.m. to 5 p.m., Monday through Friday. The Board further held that “[t]his problem would not be cured even if . . . its employees posted temporary signs when they left, stating when they would return.” *Id.* Therefore, considering Petitioner concedes that staff was not physically present at its facility at all times during the posted hours of operation on the dates of the NSC site visits, I concur with CMS that Petitioner was not operational. CMS and its contractors have limited resources and cannot be compelled to attempt multiple on-site inspections during a supplier’s posted business hours to determine if a supplier is complying with all Medicare requirements.

C. *I am unauthorized to grant Petitioner’s request for equitable relief because it did not meet the legal requirements for enrollment.*

Petitioner makes an argument for equitable relief despite not meeting the legal staffing requirements for being open during posted business hours on the dates of the two attempted site visits. Specifically, in a response to CMS’s objections to Petitioner’s exhibits, Petitioner’s owner argues that I should consider that both of his supplier locations have maintained certain accreditations since 2009. However, Petitioner never disputed that no one was in fact available at Petitioner’s location at all times during Petitioner’s hours of operation or claimed that the NSC inspector was at the wrong address. Even if Petitioner could show that it had been operational for some time prior to or after the on-site visit, it would not provide a legitimate basis for reversing the revocation. *See Mission Home Health et al.*, DAB No. 2310, at 7 (2010).

Even though I may sympathize with Petitioner’s predicaments, I am without authority to order CMS to provide an exemption to Petitioner under the circumstances because Petitioner’s equitable arguments give me no grounds to restore Petitioner’s billing privileges. *See US Ultrasound*, DAB No. 2302, at 8 (2010) (“[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet statutory or regulatory requirements.”). Moreover, I have no authority to declare statutes or regulations invalid or ultra vires. *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009) (“[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground.”).

V. Conclusion

I find the undisputed facts establish Petitioner was not operational when it was not open and accessible on two separate occasions during its posted hours of operation. I grant CMS’s motion for summary judgment, I deny Petitioner’s motion to dismiss CMS’s revocation action, and I sustain the revocation of Petitioner’s supplier number for

