

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Betty A. Jetawo, d/b/a Golden Hawk Medical
(Supplier No. 6523760001),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-14-1325

Decision No. CR3514

Date: December 15, 2014

DECISION

Palmetto GBA National Supplier Clearinghouse (NSC), an administrative contractor acting on behalf of the Centers for Medicare & Medicaid Services (CMS), determined that Petitioner, Betty A. Jetawo, d/b/a Golden Hawk Medical, failed to be accessible and staffed during posted hours of operation. Based on these findings, NSC revoked Petitioner's Medicare billing privileges. Petitioner requested a hearing before an administrative law judge to dispute NSC's determination. For the reasons stated below, I uphold CMS's determination to revoke Petitioner's Medicare billing privileges, but I establish a new effective date of April 13, 2014.

I. Background

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). On January 14 and 22, 2014, an NSC inspector attempted to conduct site inspections at the address CMS had on file for Petitioner's place of business. CMS Ex. 1, at 3. The inspector could not complete an inspection on either date and, on March 14, 2014, NSC issued an initial determination revoking Petitioner's Medicare supplier number and related billing privileges because Petitioner was not operational (42 C.F.R. § 424.535(a)(5)(ii)) and not accessible or

staffed during posted hours of operation (42 C.F.R. § 424.57(c)(7)). CMS Ex. 4. On the notice, NSC stated that the revocation was retroactive to January 22, 2014, the date CMS determined that Petitioner's practice location was not operational. NSC advised Petitioner that it was barred from re-enrolling in the Medicare program for two years from the effective date of the revocation. CMS Ex. 4, at 1.

Petitioner filed a timely request for reconsideration with NSC. CMS Ex. 5. On April 25, 2014, an NSC hearing officer issued an unfavorable reconsidered determination upholding the revocation of Petitioner's Medicare billing privileges. CMS Ex. 6. The reconsidered determination upheld revocation based on Petitioner's failure to be accessible and staffed during posted hours of operation (42 C.F.R. § 424.57(c)(7)). CMS Ex. 6, at 2-4. The reconsidered determination did not specify that revocation was based on Petitioner being non-operational (42 C.F.R. § 424.535(a)(5)(ii)) or state the effective date of the revocation.

On June 18, 2014, Petitioner timely filed a request for hearing (RFH) before an administrative law judge. On June 26, 2014, I issued an Acknowledgement and Pre-hearing Order (Order). In response to the Order, CMS filed a motion for summary judgment (CMS Motion) with six exhibits (CMS Exs. 1-6), which included the written direct testimony of one witness. Petitioner did not file an opposition to the CMS Motion or a prehearing exchange in accordance with my Order. I issued an Order to Show Cause (OSC) why I should not dismiss the RFH for abandonment. Petitioner responded to the OSC (P. Response to OSC) and included supporting documents/exhibits (P. Supporting Documents).

II. Decision on the Record

Although Petitioner did not explain why Petitioner failed to file the prehearing exchange, Petitioner responded to the OSC and continues to dispute the revocation. Accordingly, I conclude that Petitioner has not abandoned the RFH and I will decide this case on the merits.

I admit CMS exhibits (CMS Exs. 1-6) and Petitioner's Supporting Documents because neither party objects to them. Order ¶¶ 7.

CMS offered written direct testimony for one witness and Petitioner did not request to cross-examine that witness. Petitioner offered no witnesses. Consequently, there is no need for an in-person hearing. Order ¶¶ 8-11. I issue this decision based on the written arguments submitted by the parties and the evidence admitted into the record.

III. Issues

- 1) Whether CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges for failing to be accessible and staffed during posted hours of operation, in violation of the requirements of Supplier Standard 7 (42 C.F.R. § 424.57(c)(7)).
- 2) If CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges under 42 C.F.R. § 424.57(c)(7), but CMS cannot rely on its previous finding of a violation under 42 C.F.R. § 424.535(a)(5)(ii) as a basis for revocation,¹ does the effective date of Petitioner's revocation need to be adjusted.

IV. Jurisdiction

I have jurisdiction to decide the issues in this case. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

V. Findings of Fact, Conclusions of Law, and Analysis²

In order for a DMEPOS supplier to receive Medicare payments for items furnished to a Medicare beneficiary, the Secretary of Health and Human Services (Secretary) must first issue a supplier number to that supplier. 42 U.S.C. § 1395m(j)(1)(A). The Social Security Act establishes as a basic requirement that a DMEPOS supplier must maintain a physical facility on an appropriate site, but further authorizes the Secretary to create other DMEPOS supplier requirements. *Id.* § 1395m(j)(1)(B)(ii). The Secretary promulgated regulations establishing DMEPOS supplier enrollment standards that a DMEPOS supplier must meet to enroll and maintain to remain enrolled. 42 C.F.R. § 424.57(c). DMEPOS suppliers must also periodically revalidate their enrollment. *See id.* § 424.57(e).

To obtain a supplier number, a prospective supplier must complete the applicable Form CMS-855S enrollment application, which requires disclosure of the supplier's address. *See id.* § 424.510(a). Once enrolled, a DMEPOS supplier must maintain a physical

¹ Although the reconsidered determination defined the term "operational" and indicated that Petitioner was not open, the NSC hearing officer did not expressly uphold the initial determination's finding that Petitioner was not operational under 42 C.F.R. § 424.535(a)(5)(ii). Based on recent Departmental Appeals Board (DAB) decisions indicating review of any issue not stated in the reconsidered determination is precluded, I will not consider whether the initial determination's finding that Petitioner was not operational is a basis for revocation.

² My numbered findings of fact and conclusions of law appear in bold and italics.

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 visible sign and posted hours of operation. *Id.* § 424.57(c)(7).

CMS may conduct on-site reviews and inspections to ascertain a supplier's compliance with enrollment requirements and supplier standards, and to determine if the supplier is operational. 42 C.F.R. §§ 424.57(c)(8), 424.510(d)(8), 424.515(c), 424.517(a). If CMS or a CMS contractor determines that a supplier is not operational, then CMS or the CMS contractor may revoke the supplier's Medicare billing privileges retroactive to the date that CMS or the CMS contractor determined that the supplier was not operational. 42 C.F.R. § 424.535(a)(5)(ii), (g). CMS may revoke the billing privileges of a DMEPOS supplier that has not complied with the supplier standards in 42 C.F.R. § 424.57(b) and (c) and such revocation will be effective 30 days from CMS's revocation notice. 42 C.F.R. § 424.57(e) (2010).³ The failure by the supplier to comply with even one supplier standard is a sufficient basis for CMS or the CMS contractor to revoke the supplier's billing privileges. *1866ICPayday.com*, DAB No. 2289, at 13 (2009).

- 1. An NSC inspector attempted two site inspections on January 14 and 22, 2014, at the address on file for Petitioner's business location; however, the location was not accessible or staffed as required by 42 C.F.R. § 424.57(c)(7).***

To determine whether Petitioner was currently in compliance with Medicare enrollment standards, on January 14, 2014, at approximately 3:14 p.m., and then on January 22, 2014, at approximately 11:11 a.m., an inspector with NSC attempted to conduct unannounced site inspections of Petitioner's business at 4402 Broadway Boulevard, Suite 2, in Garland, Texas, during Petitioner's hours of operation. CMS Ex. 1, at 3. There is no dispute that 4402 Broadway Boulevard was Petitioner's address on file with CMS on January 14 and January 22, 2014, or that its posted hours of operation, as relevant here, were Tuesdays from 9:00 a.m. to 4:00 p.m. and Wednesdays 9:00 a.m. to 3:00 p.m. CMS Ex. 3, at 3, 7. In his written declaration, the NSC inspector testified that on January 14,

³ Recent DAB decisions applying 42 C.F.R. § 424.57(e) (2010) do not expressly cite the year of the Code of Federal Regulations that the DAB references when citing 42 C.F.R. § 424.57(e) as the authority to set the effective date of a revocation. The 2010 volume of the Code of Federal Regulations is the only one in which 42 C.F.R. § 424.57(e) provides text related to the effective date for revocations based on supplier standards violations. The DAB continues to apply this provision to cases arising after 2010. *See e.g., Benson Ejindu, d/b/a Joy Medical Supply*, DAB No. 2572 (2014). Therefore, I reference the year when citing this regulation because from 2011 to the present, 42 C.F.R. § 424.57(e) only discusses revalidation of DMEPOS suppliers.

the glass entry door was locked, that he knocked several times, but no one responded. He could see through the glass entry door that the lights were off, but could see a Christmas wreath on one of the display shelves that contained medical supplies. He did not see a sign on the door or windows indicating why the business was closed during its posted hours of operation. CMS Ex. 1, at 3. The NSC inspector further testified that during his second attempt, the glass entry door was locked, that he knocked several times, but no one responded. He stated that “the display shelves appeared to be unchanged from the first attempted site visit.” CMS Ex. 1, at 3. Finding that Petitioner was not open for business and there were no staff present during both site inspections, the inspector determined that Petitioner was “non-operational.” CMS Ex. 1, at 4. The photographs the NSC inspector took on these two occasions support his representation of the events. CMS Ex. 3.

In its reconsideration request, Petitioner did not dispute that its business location was closed during the time of the inspections and admits that the owner was out of the country. Petitioner states that it had a part-time staff come in around her school schedule to check the mail and do minor paperwork “but it was extreme ‘part-time.’” CMS Ex. 5, at 1, 3-4. In its RFH, Petitioner appears to admit that personnel were not at its location for the inspections, but appears to further assert that Petitioner had provided for coverage during the owner’s absence. In Petitioner’s Response to the OSC, Petitioner explains that coverage was by a “work-study student” who visited the office daily. P. Response to OSC at 2. At no point, however, does Petitioner contend that it had staff (work-study student or other) present to keep Petitioner’s office open for all hours of operation. I find that Petitioner’s business location was closed on the two dates and times in which the site inspector attempted visits. CMS Exs. 1-3.

DMEPOS suppliers must be open to the public for a minimum of 30 hours per week and those hours must be posted. 42 C.F.R. §§ 424.57(c)(7)(D), 424.57(c)(30)(i). The inspector attempted two visits during Petitioner’s posted hours of operation. CMS Ex. 1, at 3; CMS Ex. 2, at 1; CMS Ex. 3, at 3, 7. Therefore, even if Petitioner had a student present some of the time each day Petitioner’s owner was absent, this would not be sufficient to show Petitioner’s location was accessible and staffed during the posted hours of operation. Accordingly, I conclude that the record supports CMS’s determination that Petitioner was not accessible and staffed during posted hours of operation in violation of 42 C.F.R. § 424.57(c)(7)(C).

Petitioner does not suggest that its office was accessible and staffed at the times of the attempted site visits. Rather, Petitioner asserts that its owner was absent during the attempted site visits due to the passing of the owner’s father, and that this resulted in Petitioner’s owner travelling outside the United States. CMS Ex. 5, at 1. Petitioner submitted significant documentation in support of her assertion. Petitioner’s owner submitted a copy of her father’s death certificate showing that he passed on December 28, 2013, and a copy of her flight itinerary showing an international flight departing

January 13, 2014 and returning January 24, 2014. CMS Ex. 5, at 1, 3-4. Petitioner characterizes this as “an uncontrollable life experience” and “uncontrollable absence.” RFH. Petitioner asserts that there should be an exception to the requirement that a DMEPOS supplier be accessible and staffed during posted hours of operation when a DMEPOS owner suffers a death in the family. P. Response to OSC at 2.

When promulgating the regulations, the Secretary contemplated allowing facilities to temporarily close during posted hours of operation, but the Secretary chose to emphasize that a supplier’s place of business must remain publicly accessible during posted hours of operation. *Complete Home Care Inc.*, DAB No. 2525, at 6 (2013). In the preamble to the final rule, the Secretary provided the following in response to a question concerning temporary absences: “We note that *we have always made exceptions concerning posted hours for disasters and emergencies and Federal and State holidays.*” 75 Fed. Reg. 52,629, 52,637 (Aug. 27, 2010) (emphasis added). Therefore, CMS will make an exception to the requirements of 42 C.F.R. § 424.57(c)(7) on legal holidays and when a DMEPOS supplier is not staffed due to a disaster or emergency.

However, when modifying the supplier standards, the preamble to the final rule responded to public comments concerning personnel emergencies in the following way:

We note that we have always made exceptions concerning posted hours for disasters and emergencies and Federal and State holidays. However, while we recognize that personal emergencies do occur, we believe that suppliers should be available during posted business hours. Moreover, we believe that a DMEPOS supplier should do its best to plan and staff for temporary absences.

75 Fed. Reg. 52,629, 52,636 (Aug. 27, 2010). Further, the preamble stated the following:

While we recognize that emergencies do occur, it is the responsibility of the DMEPOS supplier to establish staff contingencies to ensure that their business remains open to the public in spite of a personal emergency.

75 Fed. Reg. at 52,643.

In this case, Petitioner’s emergency, although tragic, was one of a personal nature. The Secretary was clear that DMEPOS suppliers were tasked with establishing “staff contingencies to ensure that their business remains open to the public in spite of a personal emergency.” *Id.* Although I understand Petitioner’s personal emergency and the financial limitations of a small business, the regulations do not allow me to make an exception for personnel emergencies.

Petitioner's owner asserts that she was told (presumably by an NSC representative) that, based on the reason she was absent from the office, another inspector would be sent to conduct another site visit; however, this never happened. RFH; P. Response to OSC at 2. It is true that NSC has the authority to do this. As stated in the preamble to the final rule:

While we understand that unexpected or emergency business closings can occur, we believe that it is essential that DMEPOS suppliers establish practices and procedures to address unexpected or emergency situations. In addition, we understand the nature of unforeseen emergencies and when warranted, the NSC will conduct an unannounced follow-up visit prior to denying or revoking billing privileges.

75 Fed. Reg. at 52,637. Although Petitioner's circumstances appear to warrant another opportunity to show compliance with the supplier standards, I am without authority to review CMS's discretion as to whether it should provide such an opportunity.

The facts in this case show that, on the two dates the NSC inspector attempted to perform site visits, Petitioner was not accessible and staffed during its posted hour of operation. Petitioner was not accessible and staffed when the NSC inspector attempted to conduct the site inspections at the 4402 Broadway Boulevard location on file with CMS. I must uphold a revocation based on such circumstances and may not grant Petitioner relief based on equitable considerations.⁴ See *US Ultrasound*, DAB No. 2302, at 8 (2010); *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 . . .”).

- 2. Because revocation is premised only on the violation of a supplier standard and not a finding that Petitioner was not operational, the retroactive effective date of the revocation imposed by CMS in the initial determination is no longer appropriate, and the effective date must be changed from January 22, 2014, to April 13, 2014, which is 30 days after the date CMS mailed its initial determination to revoke Petitioner's billing privileges in this case.***

NSC's March 14, 2014 initial determination imposed an effective date of revocation that was retroactive to January 22, 2014, the date that Petitioner was found not to be operational. CMS Ex. 4, at 1. This is appropriate under 42 C.F.R. § 424.535(g) when CMS has made a finding that a supplier is not operational pursuant to 42 C.F.R.

⁴ The term “equitable” in this context refers to what is just, based on fairness and not legal technicalities.

§ 424.535(a)(5)(ii). However, because the reconsidered determination in this case failed to make a finding that Petitioner was not operational, there is no longer a valid reason to impose a retroactive effective date of revocation.

As stated in the most recent DAB decision on this issue:

Because the sole basis for revocation properly decided by the ALJ and affirmed by the Board in this appeal is [Petitioner's] noncompliance with Supplier Standard 7, the effective date of revocation should be determined in accordance with section 424.57(e) [(2010)]'s effective-date provision Applying that rule here, we conclude that the proper effective date of the revocation is . . . 30 days from the date of NSC's letter notifying [Petitioner] of the revocation.

Orthopaedic Surgery Associates, DAB No. 2594, at 8 (2014).

Having found that Petitioner was not in compliance with Supplier Standard 7 (42 C.F.R. § 424.57(c)(7)), I uphold CMS's revocation of Petitioner's Medicare billing privileges, but the new effective date should be April 13, 2014. This is 30 days from the date of the March 14, 2014 initial determination in this case. 42 C.F.R. § 424.57(e) (2010).

VI. Conclusion

For the reasons stated above, I affirm CMS's revocation of Petitioner's Medicare billing privileges, but modify the effective date of the revocation to April 13, 2014.

/s/
Scott Anderson
Administrative Law Judge