

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

NORPRO Orthotics & Prosthetics, Inc.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-1137

Decision No. CR3081

Date: January 14, 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, NORPRO Orthotics & Prosthetics, Inc. (Supplier No. 0644080006), was not in compliance with Supplier Standard 7 and revoked Petitioner's Medicare billing privileges as a supplier. Petitioner appealed. Because the record establishes that Petitioner was not open to the public and properly staffed when an NSC inspector attempted three site visits, I uphold NSC's revocation of Petitioner's Medicare billing privileges. However, because Petitioner was only revoked due to a violation of the Supplier Standards, I am modifying the effective date of revocation to April 17, 2013. Therefore, Petitioner may bill Medicare for any covered items or services provided between March 5, 2013 and April 16, 2013.

## I. Background

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, orthotics, prosthetics, and supplies (DMEPOS). Petitioner has multiple offices in Florida, including an office located at 4175 South Congress Avenue, Lake Worth, Florida 33461.

In an April 2, 2013 initial determination, NSC informed Petitioner that it was revoking Petitioner's Medicare billing privileges, citing 42 C.F.R. §§ 424.57(c)(1) (failure to have a state license); 424.57(c)(7) (failure to maintain facility on an appropriate site); 424.57(c)(10) (failure to have liability insurance); and 424.535(a)(5)(ii) (failure to be operational). The revocation was retroactively effective to March 5, 2013, and NSC established a two-year reenrollment bar. CMS Exhibit (Ex.) 1.

Petitioner filed a timely request for reconsideration disputing that there was a basis to revoke its Medicare billing privileges. Petitioner attached documentation as proof that Petitioner was in compliance with the regulations. CMS Ex. 3.

In a June 24, 2013 reconsidered determination, an NSC hearing officer found Petitioner compliant with 42 C.F.R. § 424.57(c)(1) and (c)(10). CMS Ex. 4, at 3-4. However, the NSC hearing officer upheld the revocation based on finding a violation of 42 C.F.R. § 424.57(c)(7), stating:

The fact remains that the site inspector was unable to complete a site investigation for Norpro Prosthetics & Orthotics, Inc., Inc [sic] because the facility location on record with the NSC was not open during the posted hours of operation, therefore, not properly staffed at the times of the site visit attempts, and the site inspector was unable to verify compliance with the supplier standards.

CMS Ex. 4, at 3.

Petitioner timely filed a request for a hearing (RFH) before an administrative law judge. In response to my August 9, 2013 Acknowledgment and Pre-hearing Order (Order), CMS filed a Motion for Summary Judgment (CMS Br.) and four proposed exhibits (CMS Exs. 1-4). Petitioner did not file a response. On November 8, 2013, I issued an Order to Show Cause why I should not dismiss Petitioner's RFH as abandoned. Petitioner responded that it did not believe it needed to respond to CMS's submission and requested that I issue a decision based on the information already in the record.

## II. Decision on the Record

Petitioner submitted a written waiver of its right to an in-person hearing, and I do not find that any of the exceptions to issuing a decision on the record apply. *See* 42 C.F.R. § 498.66(a)-(b). In particular, neither party submitted a witness list or written direct testimony from any witnesses. Order at ¶ 8. Therefore, I find that an in-person hearing is unnecessary and grant Petitioner's motion for a decision on the record. *See* Order at ¶ 11. In the absence of objection from Petitioner, I admit CMS Exs. 1-4 into the record. *See* 42 C.F.R. § 498.66(d)(1).

## III. Issues

1. Whether CMS has a legitimate basis to revoke Petitioner's enrollment as a DMEPOS supplier in the Medicare program based on a determination that Petitioner did not comply with Supplier Standard 7 (42 C.F.R. § 424.57(c)(7)).
2. Whether the effective date of revocation should be altered because the reconsidered determination based revocation only on a violation of Supplier Standard 7 (42 C.F.R. § 424.57(c)(7)).

## IV. Findings of Fact, Conclusions of Law, and Analysis<sup>1</sup>

1. ***An NSC inspector attempted three site visits at Petitioner's office located at 4175 South Congress Avenue, Lake Worth, Florida, on February 21, 2013, and March 5, 2013; however, no staff was present to allow the inspector to enter the office and inspect it.***

On Thursday, February 21, 2013, at 12:29 p.m., an NSC site inspector went to Petitioner's office at 4175 South Congress Avenue to conduct an "ad hoc" site visit. CMS Ex. 2, at 1, 6. The inspector documented this attempt with photographs. CMS Ex. 2, at 8-9. In particular, the inspector noted that she was present during the hours of operation that Petitioner posted, which were 8:30 to 5:00 p.m., Monday through Thursday, and Friday by appointment. CMS Ex. 2, at 2, 6, 9. The site inspector indicated that the door to the office was locked and that despite knocking several times, no one answered the door.

The NSC site inspector attempted another site visit at Petitioner's office on March 5, 2013, at 10:06 a.m. and 11:23 a.m. CMS Ex. 2, at 1, 6. The site inspector described her efforts as follows:

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<sup>1</sup> My numbered findings of fact and conclusions of law appear in bold and italics.

On 3/5/13 at 10:06 am, I attempted to conduct a [site visit] during the posted hours of operation. The front door to the facility was unlocked. Upon entering, I observed no one present in the lobby area or behind a reception desk. After waiting a few minutes for someone to arrive, I called out several times but no response. I tried to open an interior door that allows passage from the lobby into the facility but found it locked. I knocked very loudly several times on the interior door and still no response. The lights were on inside and only the faint sound of a radio playing in the rear of the facility was heard. I returned later at 11:23 am, when I again found no one responding to me being present in the facility.

CMS Ex. 2, at 6. The site inspector documented these attempted site visits with photographs. CMS Ex. 2, at 10-14.

Petitioner asserted in its request for reconsideration that its office located at 4175 South Congress Avenue was open and should have been staffed on the days and at the times that NSC's site inspector attempted to perform the site visits. Specifically, Petitioner stated that an unnamed former employee was hired to make certain that Petitioner's office was staffed during its hours of operation. Petitioner indicated that the employee would have been present all day, except from noon until 1:00 p.m., because that was the employee's lunch time. Petitioner indicated that if the employee was not present, Petitioner did not have any knowledge of it. CMS Ex. 3, at 1. Petitioner also submitted a schedule of patient appointments from February 25 and 26, 2013, and March 5, 11, and 12, 2013. CMS Ex. 3, at 5-7.

In Petitioner's RFH, Petitioner indicated that it paid an employee to staff its 4175 South Congress Avenue office, but that it appears the employee may not have been doing her job. RFH at 1. Although Petitioner maintains it paid an employee to be present during its hours of operation, Petitioner admits that it cannot dispute the site inspector's report. *See* Petitioner's November 15, 2013 Response to Order to Show Cause.

Based on the evidence of record, I find that Petitioner's office was not open when the NSC site inspector attempted site visits on February 21, 2013 and March 5, 2013.

2. ***CMS was required to revoke Petitioner's enrollment in the Medicare program because Petitioner's office located at 4175 South Congress Avenue, Lake Worth, Florida, was not accessible and staffed during the posted hours of operation in violation of Supplier Standard 7 (42 C.F.R § 424.57(c)(7)).***

The Social Security Act requires DMEPOS suppliers to maintain a physical facility on an appropriate site and authorizes the Secretary of Health and Human Services (Secretary) to create other requirements for DMEPOS suppliers. 42 U.S.C. § 1395m(j)(1)(B)(ii). The Secretary promulgated regulations (i.e., the Supplier Standards) establishing requirements for DMEPOS suppliers at 42 C.F.R. § 424.57. Supplier Standard 7 requires that a DMEPOS supplier maintain a physical facility on an appropriate site that is “accessible and staffed during posted hours of operation.” 42 C.F.R. § 424.57(c)(7)(i)(C). CMS has authority to perform off cycle site visits to verify information on file with the contractor and to confirm compliance with Medicare enrollment requirements and the Supplier Standards. 42 C.F.R. §§ 424.57(c)(8), 424.515(d), 424.517(a).

In the present matter, CMS provided sufficient evidence to show that Petitioner’s office was not accessible and staffed during its posted hours of operation and Petitioner has not refuted CMS’s evidence. However, Petitioner raises some issues in its defense. None of these assertions provides a legal excuse to Petitioner’s failure to comply with Supplier Standard 7.

Petitioner asserts that Petitioner’s employee was to be at the office during the posted hours of operation, except for a lunch break from noon until 1:00 p.m., and if the employee was not present, Petitioner did not know it. The site visit attempted on February 21, 2013, took place during the employee’s lunch time and this may be the reason that no one answered the door when the site inspector knocked. However, the office’s posted hours of operation did not indicate that the office would be closed from noon until 1:00 p.m. CMS Ex. 2, at 9. Petitioner needed to expressly indicate that the office would not be open from noon until 1:00 p.m. *See Ita Udeobong, d/b/a Midland Care Medical Supply and Equipment*, DAB No. 2324, at 6-7 (2010).<sup>2</sup> Even if Petitioner was unaware that its employee was not present during the posted hours of operation on March 5, 2013, Petitioner is responsible for ensuring compliance with the Supplier Standards and for the conduct of its employees. *Cf. Louis J. Gaefke, D.P.M.*, DAB No. 2554, at 5-6 (2013) (holding that a supplier is responsible for improper claims filed by others on his behalf).

Petitioner submitted its schedule of patient appointments at the office for February and March 2013. Presumably this documentation is meant to show that Petitioner’s office was open and operating. However, none of the scheduled appointments occurred during any of the attempted site visits. Therefore, I cannot consider this as evidence that Petitioner was in fact open and staffed during its

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<sup>2</sup> Administrative decisions cited in this decision are accessible on the internet at: <http://www.hhs.gov/dab/decisions/index.html>.

posted hours of operation because the site inspector noted days and times when Petitioner was not open or staffed during its posted hours. *Complete Home Care Inc.*, DAB No. 2525, at 6 (2013) (“Because [petitioner’s] facility was not continually staffed during its posted hours of operation on the two days that the inspector attempted to visit, . . . [petitioner] did not meet the requirements of section 424.57(c)(7)(i)(C).”).

Petitioner asserts that it has corrected the situation at its office and the office is now staffed and open during posted business hours. Further, the employee Petitioner blames for failing to be present during the attempted site visits is no longer employed by Petitioner. Although it is laudable that Petitioner has taken corrective action, I am unable to consider this because I do not have jurisdiction to review CMS’s determination as to whether to accept a corrective action plan implemented by a supplier. *See DMS Imaging*, DAB No. 2313, at 7-10 (2010).

I conclude that Petitioner violated Supplier Standard 7 (42 C.F.R. § 424.57(c)(7)). When CMS determines that a DMEPOS supplier has violated the Supplier Standards, it must revoke the supplier’s billing privileges. 42 C.F.R. § 424.57(d). Even a single violation requires revocation. *1866ICPayday.com*, DAB No. 2289, at 13 (2009). Therefore, the regulations required CMS to revoke Petitioner’s Medicare billing privileges.

***3. Because the only basis for revocation upheld in the reconsidered determination was Supplier Standard 7 (42 C.F.R. § 424.57(c)(7)), the effective date for the revocation is governed by 42 C.F.R. § 424.57(d), which requires the revocation to be effective 15 days after the date of the initial determination.***

NSC’s initial determination indicated that Petitioner was not operational and identified 42 C.F.R. § 424.535(a)(5)(ii) as one of the bases for revocation. Based on this finding, NSC imposed retroactive revocation back to March 5, 2013, the date NSC determined that Petitioner was not operational. CMS Ex. 1, at 1. The regulations state that “the revocation is effective with the date . . . that CMS or its contractor determined that the . . . supplier was no longer operational.” 42 C.F.R. § 424.535(g).

However, in the reconsidered determination, NSC did not make any finding that Petitioner was not operational and relied solely on a violation of Supplier Standard 7 as the basis to revoke Petitioner.<sup>3</sup> CMS Ex. 4. When a revocation is based on a

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<sup>3</sup> Similarly, CMS’s brief in this case only argues that Petitioner violated Supplier Standard 7.

failure to meet the Supplier Standards, “revocation is effective 15 days after the entity is sent notice of the revocation.” 42 C.F.R. § 424.57(d).

In a provider or supplier enrollment case, it is the reconsidered determination upon which administrative law judge review is predicated. *See Hiva Vakil, M.D.*, DAB No. 2460, at 4-5 (2012) (holding that a supplier cannot obtain administrative law judge review of the initial determination; the supplier may only obtain administrative law judge review when there is a reconsidered determination); *see also* 42 C.F.R. §§ 498.5(l), 498.20(b)(1), 498.24(c), 498.25(b)(2).

In the present case, NSC issued a reconsidered determination that significantly modified the initial determination’s stated reasons for revocation. Based on that determination, the effective date for Petitioner’s revocation is April 17, 2013, or 15 days from the issuance of the April 2, 2013 initial determination. Petitioner is, therefore, eligible to file claims for the items or services provided to Medicare beneficiaries from March 5, 2013 through April 16, 2013.

## **V. Conclusion**

For the reasons stated above, I affirm NSC’s revocation of Petitioner’s Medicare billing privileges, but modify the effective date of the revocation to April 17, 2013.

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/s/  
Scott Anderson  
Administrative Law Judge