

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Ortho Rehab Designs  
Prosthetics and Orthotics, Inc.  
(Supplier No. 0377170001),

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-14-410

Decision No. CR3193

Date: April 8, 2014

**DECISION**

The National Supplier Clearinghouse (NSC), a contractor for the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment of Petitioner, Ortho Rehab Designs Prosthetics and Orthotics, Inc. NSC cited two attempted on-site inspections that found Petitioner's location locked, unstaffed, and not operational. NSC upheld its determination on reconsideration. Petitioner requested a hearing and CMS now moves for summary judgment.

For the reasons explained below, I grant summary judgment in favor of CMS affirming the revocation of Petitioner's Medicare enrollment effective July 18, 2013.

**I. Case Background**

Petitioner is located in Las Vegas, Nevada, and until recently had been enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) subject to the participation requirements at 42 C.F.R. § 424.57 and 42 C.F.R. Part 424, Subpart P. It is undisputed that on July 17, 2013, at 3:01 p.m., an

NSC site inspector attempted to conduct an unannounced site inspection of Petitioner's facility. CMS Exhibit (Ex.) 1. The inspector found Petitioner's location locked and no one answered when the inspector knocked on the front door. The hours posted on the front door stated that Petitioner was open during the week (Monday through Friday) from 9:00 a.m. to 5:00 p.m. The following day, July 18, 2013, at 2:07 p.m., the inspector again attempted a site inspection of Petitioner's facility. Again, the inspector found Petitioner's location locked. CMS Ex. 1, Attachments A-C.

By letter dated August 5, 2013, NSC notified Petitioner that it was revoking Petitioner's Medicare enrollment pursuant to 42 C.F.R. §§ 424.57(e), 424.535(a)(1), 424.535(a)(5), and 424.535(g), based on its two attempted site inspections. NSC also imposed a two-year bar on Petitioner's re-enrollment. CMS Ex. 2. On October 3, 2013, Petitioner requested reconsideration and acknowledged that its facility was closed on July 17 and 18, 2013, because its owner and staff were on vacation. Petitioner requested that NSC conduct another site inspection now that it had reopened. CMS Ex. 3. On November 24, 2013, NSC issued a reconsidered determination that upheld the revocation of Petitioner's Medicare enrollment and billing privileges. The hearing officer determined that her review was limited to whether Petitioner was compliant with the enrollment requirements at the time of the site inspection and thus rejected Petitioner's suggestion for another inspection. CMS Ex. 4.

On December 3, 2013, Petitioner requested a hearing before an administrative law judge. CMS subsequently filed a motion for summary judgment and supporting brief (CMS Br.) and five proposed exhibits marked as CMS Exs. 1-5. Petitioner filed a brief opposing summary judgment (P. Br.) and nine proposed exhibits marked as P. Exs. 1-9. Petitioner did not object to CMS's proposed exhibits, so I admit CMS Exs. 1-5.

CMS did not object to Petitioner's proposed exhibits, but the admission of a supplier's evidence that was not previously submitted at the reconsideration level is governed by 42 C.F.R. § 424.56(e) and requires a showing of good cause. It is not clear from the record whether Petitioner's proposed exhibits had been submitted at the reconsideration level, though Petitioner acknowledges that P. Exs. 4 and 9 are being admitted at this level of appeal for the first time. P. Br. at 6, 9. As a showing of good cause, Petitioner states that it "did not understand that [the evidence] would be an important factor in this case." P. Br. at 6, 9. While Petitioner's assertion represents a strategic error that is ordinarily not sufficient for a showing of good cause, I will accept Petitioner's exhibits because CMS has not objected to their admission and NSC did not notify Petitioner that it had to submit all of its evidence at the reconsideration level or run the risk of having it permanently excluded. *See* CMS Ex. 2, at 2 ("You may submit additional information with the reconsideration that you believe may have a bearing on the decision."). Therefore, I admit P. Exs. 1-9.

## II. Issue

The issue here is whether the applicable regulations authorize NSC, acting for CMS, to revoke Petitioner's Medicare billing privileges based on two attempted site inspections on July 17-18, 2013.

## III. Findings of Fact, Conclusions of Law, and Analysis

### *1. Petitioner was not operational on July 17 and July 18, 2013, and did not comply with the enrollment requirements for suppliers of DMEPOS because it was not open to the public during its posted hours.*

The enrollment regulations for which Petitioner agreed to be bound provide that CMS reserves the right “to perform onsite review of a provider or supplier to verify that the enrollment information submitted to CMS or its agents is accurate and to determine compliance with Medicare enrollment requirements.” 42 C.F.R. § 424.517(a). The regulations authorize CMS to revoke a supplier's Medicare enrollment and billing privileges when:

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.

42 C.F.R. § 424.535(a)(5)(ii). “Operational” means that the supplier “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.

Suppliers of DMEPOS must also comply with all enrollment requirements set forth in 42 C.F.R. 424.57(c). These requirements include, among other things, that the supplier:

Maintains a physical facility on an appropriate site. An appropriate site must meet all of the following:

(i) Must meet the following criteria:

\* \* \*

(C) Is accessible and staffed during posted hours of operation.

\* \* \*

42 C.F.R. § 424.57(c)(7)(i)(C).

In this case, the site inspector documented two attempted site inspections, on July 17 and July 18, 2013, and each time found the facility closed and unstaffed. CMS Ex. 1. The inspector noted that Petitioner's posted hours of operation were Monday through Friday from 9:00 a.m. to 5:00 p.m., and also that he found delivery attempt notice slips dated July 15 and July 16, 2013 from United Parcel Service (UPS) attached to Petitioner's front door. *See* CMS Ex. 1, Attachment A-B.

Petitioner does not dispute the site inspector's findings. Petitioner has explained that its location was closed for one week between July 15 and July 19, 2013 because its owner and staff were on vacation. CMS Ex. 3; P. Br. at 5. Apparently such week-long closures were a yearly ritual for Petitioner and its staff. CMS Ex. 3. Petitioner asserts that its owner posted a sign on July 12, 2013, that indicated the location would be closed the following week. P. Br. at 5; P. Ex. 4. When staff reopened Petitioner's facility on July 22, 2013, the sign indicating the office was closed "had fallen onto the floor under the window coverings . . . ." P. Br. at 6. Petitioner's staff also found "two UPS notices" on the front door. P. Br. at 6.

The undisputed facts demonstrate that Petitioner was not "operational" on July 17 or July 18, 2013, because its locked doors and unstaffed status meant it was not open to the public to provide health care related services and was not properly staffed to furnish these items or services. *See* 42 C.F.R. 424.502. Petitioner could not have been "accessible and staffed" during its posted business hours when its doors were closed and no one was inside. *See* 42 C.F.R. § 424.57(c)(7)(i)(C). The record is therefore clear that at the time of the attempted on-site inspections, Petitioner was not operational to furnish Medicare covered items or services and had failed to satisfy all of the enrollment requirements specific for suppliers of DMEPOS. *See* 42 C.F.R. § 424.535(a)(5)(ii).

Petitioner's justification for its week-long closure provides it no relief from revocation. The regulations — which I am bound to follow — do not permit such week-long closures to accommodate a supplier's staff taking a simultaneous vacation. *See* 42 C.F.R. §§ 424.57(c), 424.502, 424.535(a)(5)(ii). Even if Petitioner's closure notice had stayed

adhered to its front door (P. Ex. 4), that fact would not have made it compliant with the enrollment requirements. Closure during posted business hours, even if only temporary, violates the regulations. *See Complete Home Care, Inc.*, DAB No. 2525, at 5 (2013).

Petitioner argues that unlike other cases involving site inspections, the inspector here attempted two inspections on two consecutive days. P. Br. at 4-5. Petitioner cites several other cases decided in this forum where an NSC inspector attempted two site inspections weeks apart. P. Br. at 4-5. Petitioner argues that if that same pattern had been followed in this case the second attempted inspection should have been after it had reopened on July 22, 2013. However, the regulations do not require CMS to perform (or attempt) a second site inspection before a determination to revoke may be properly made pursuant to 42 C.F.R. § 424.535(a)(5). Also, the Medicare Program Integrity Manual (MPIM), which is not a legally binding publication but provides guidance for CMS contractors, states:

Site verifications should be done Monday through Friday (excluding holidays) during their posted business hours. If there are no hours posted, the site verification should occur between 9 a.m. and 5 p.m. If, during the first attempt, there are obvious signs that facility is no longer operational no second attempt is required. If, on the first attempt the facility is closed but there are no obvious indications the facility is non-operational, a second attempt on a different day during posted hours of operation should be made.

MPIM, CMS Pub. 100-08, § 15.20.1.B (Site Verifications, Timing) (2013). CMS directs the contractor to visit “on a different day” if there are no obvious signs of being non-operational, but does not require a second attempted inspection be done during a separate week or month. Therefore, by attempting two site inspections on two consecutive days, NSC did not apply an “unfair standard” as Petitioner claims.

Petitioner also refutes the NSC hearing officer’s assertion that she attempted to call Petitioner’s owner but could not reach the owner or a voicemail system. P. Br. at 9; CMS Ex. 4, at 3. Petitioner produced a copy of its owner’s cellphone records to demonstrate that the hearing officer did not attempt to call Petitioner’s owner. P. Ex. 9. But the dispute about whether the hearing officer called Petitioner’s owner is not material to whether Petitioner was open and properly staffed at the time of inspection. Therefore, even accepting as true that the hearing officer did not call Petitioner’s owner during the reconsideration level of appeal, that fact does not open Petitioner’s doors or staff its location on July 17 and July 18, 2013.

Finally, Petitioner claims that it was not required to be open more than 30 hours per week pursuant to 42 C.F.R. § 424.57(c)(30), and implies that it was therefore permitted to close during the week of July 15 to July 19, 2013. P. Br. at 10-11. Petitioner overlooks that its

posted hours of operation were Monday through Friday, 9:00 a.m. to 5:00 p.m., and it was required to be “accessible and staffed” during those posted hours. 42 C.F.R. § 424.57(c)(7)(i)(C).

***2. The regulations authorize CMS to revoke Petitioner’s Medicare enrollment and billing privileges retroactive to July 18, 2013.***

CMS revoked Petitioner’s enrollment retroactively to July 18, 2013, the date of the second attempted inspection when the NSC investigator determined Petitioner was non-operational. By regulation, the effective date of revocation is:

30 days after CMS or the CMS contractor mails notice of its determination to the provider or supplier, except if . . . the practice location is determined by CMS or its contractor not to be operational. When . . . the practice location is determined by CMS or its contractor not to be operational, the revocation is effective with the date . . . that CMS or its contractor determined that the provider or supplier was no longer operational.

42 C.F.R. § 424.535(g). Here, the contractor cited various regulatory provisions as a basis for revoking Petitioner’s enrollment (CMS Ex. 2, at 1), but only 42 C.F.R. § 424.535(a)(5)(ii) supports a retroactive revocation. I have found that Petitioner was not operational on the dates of the attempted site visits and was not compliant with the enrollment requirements for suppliers of DMEPOS. Revocation is therefore authorized pursuant to 424.535(a)(5)(ii), meaning retroactive revocation to July 18, 2013, the date Petitioner was determined to be non-operational, is authorized by 42 C.F.R. § 424.535(g).

**IV. Conclusion**

For the reasons explained above, the undisputed facts demonstrate that Petitioner was not operational at the time of two attempted site inspections. The regulations authorize CMS to revoke Petitioner’s Medicare enrollment. In the absence of any genuine dispute of material fact, I grant summary judgment in favor of CMS and affirm the revocation of Petitioner’s Medicare enrollment effective July 18, 2013.

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/s/  
Steven T. Kessel  
Administrative Law Judge