

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Med-Caire, Inc.
(Supplier No. 0545010002),

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-13-188

Decision No. CR2803

Date: May 29, 2013

DECISION

The Centers for Medicare and Medicaid Services (CMS) revoked the Medicare billing privileges of Petitioner, Med-Caire, Inc. Petitioner appealed. As discussed below, the evidence of record supports CMS's determination. Therefore, I affirm the revocation of Petitioner's billing privileges.

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. On June 12 and 15, 2012, a CMS contractor from the National Supplier Clearinghouse (NSC) attempted, without success, to conduct site inspections at Petitioner's location. CMS Exs. 6, 8. On August 7, 2012, NSC sent a letter advising Petitioner that it was revoking Petitioner's Medicare supplier number effective June 15, 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. CMS Ex. 1.

Petitioner filed a timely request for reconsideration with NSC and later submitted evidence to the NSC hearing officer assigned to the case. CMS Exs. 2, 3. On October 24, 2012, the NSC hearing officer issued an unfavorable determination upholding the revocation of Petitioner's Medicare billing privileges. CMS Ex. 4.

On December 7, 2012, Petitioner timely filed a request for hearing (RFH) before an administrative law judge. On December 10, 2012, I issued an Acknowledgement and Pre-hearing Order (Order). Pursuant to the Order, CMS filed its brief (CMS Br.) and eight exhibits (CMS Exs. 1-8), including the written direct testimony of Richard Spagnole. CMS Ex. 8. Petitioner submitted a brief (P. Br.) and six exhibits (P. Exs. 1-6), which included a written statement from Richard Johnson. P. Ex. 3. Because neither party objected to any of the proposed exhibits, I admit all of them into the record. Further, because neither party requested to cross-examine Messrs. Spagnole or Johnson, I decide this case based on the written record. Order ¶¶ 9-11.

II. Discussion

In order for a DMEPOS supplier to receive Medicare payments for items furnished to a Medicare-eligible beneficiary, the Secretary of Health and Human Services must first issue a supplier number to that DMEPOS supplier. 42 U.S.C. § 1395m(j)(1)(A). To receive direct-billing privileges, a DMEPOS supplier must meet and maintain each of the supplier enrollments standards, including the requirement to maintain a physical location that is accessible and staffed during posted hours. 42 C.F.R. § 424.57(c)(7)(i)(C). If CMS determines that a DMEPOS supplier fails to meet or maintain any of the supplier standards, CMS must revoke the supplier's billing privileges. 42 C.F.R. § 424.57(d).

A. Issue

Whether CMS had a legitimate basis to revoke Petitioner's Medicare billing privileges.

B. Findings of Fact, Conclusions of Law, and Analysis¹

1. Petitioner's location at 360 University Avenue, Westwood, Massachusetts was not open when an NSC inspector attempted to conduct site inspections on June 12, 2012 and June 15, 2012.

On June 12, 2012, at approximately 11:15 a.m., an NSC inspector attempted to conduct an unannounced site inspection at Petitioner's facility located at 360 University Avenue, Westwood, Massachusetts. CMS Ex. 6. This attempt was made during Petitioner's

¹ My findings of fact and conclusions of law are set forth in italics and bold in the discussion captions of this decision.

posted hours of operation, which were Monday through Friday, 9 a.m. through 5 p.m. CMS Ex. 6, at 9-10; CMS Ex. 8, at 1-2. However, the inspector found that he could not enter Petitioner's premises because, after checking at both the front and back entrances, and ringing the bell, the inspector concluded that no one was at the premises. Exs. 6, at 6, 8; 8, at 2. On the back door was a sign stating:

HAD TO STEP OUT
PLEASE LEAVE ALL
DELIVERYS [sic] INSIDE
DOOR
THANKS, STEVE VALENCIA
MED-CAIRE
CONTACT NUMBER 1-508-802-1080

CMS Exs. 6, at 9; 8, at 2.

The inspector took date-stamped photographs of both the front door with the posted hours of operation and the back door with the posted out-of-office sign. CMS Ex. 6, at 9.

On June 15, 2012, at 9:20 a.m., the NSC inspector made a second attempt to enter Petitioner's premises; however, the door was locked again. He rang the bell, but no one answered. CMS Exs. 6, at 8; 8, at 2. He also went to the back door of the office location and the same out-of-office sign was posted. CMS Exs. 6, at 10; 8, at 2. He again took date stamped photographs of both the front door and the back door. CMS Exs. 6, at 9, 10; 8, at 2-3.

In response to CMS's evidence concerning the attempted site inspections, Petitioner's owner asserts that at the time of the June 12, 2012 attempted inspection, Petitioner's location was manned and open. RFH at 1. Further, Petitioner contends that on June 12, 2012, a staff member, Richard Johnson, spoke with the NSC inspector and, as a result, the inspector stated he could come back later when the manager was present. RFH at 1; P. Br. at 1-2. As support, Petitioner submits a written statement from Mr. Johnson and the relevant time sheets for its employees.

Petitioner's evidence is insufficient to refute CMS's evidence concerning the June 12, 2012 attempted site inspection. Although Mr. Johnson claims to have spoken with the NSC inspector, the individual Mr. Johnson spoke to "said he was from the state." P. Ex. 3. However, the NSC inspector is an employee of a Medicare contractor and not a state. CMS Ex. 8, at 1. Further, Mr. Johnson places the date of this conversation as "[o]n or about June 10, 2012," as opposed to June 12, 2012. P. Ex. 3. Finally, Petitioner's payroll records indicate that Mr. Johnson did not start working on June 12, 2012, until 11:40 a.m., or approximately 20 minutes after the NSC inspector documented his attempted inspection with photographs imprinted with the date and time. CMS Ex. 6, at 9.

Therefore, it appears that Mr. Johnson spoke to an entirely different individual on a different day than NSC's attempted inspection.

Petitioner also argues that another one of its employees, Stephen Valencia, was present on June 12, 2012, at the time that the NSC inspector appeared. Petitioner relies on its payroll records to show this. CMS Ex 5; P. Ex. 6. However, as noted by CMS in its brief (CMS Br. at 12), the payroll records for Mr. Valencia for June 12, 2012, was subject to a "Manual Edit." CMS Ex 5; P. Ex. 6. Although CMS disputed the reliability of Petitioner's payroll records, Petitioner, in its brief, provided no explanation as to why the payroll record had been edited. *See* P. Br. at 3. Further, the out-of-office sign that the inspector photographed on June 12, 2012, indicated that Mr. Valencia was not on the premises at the 11:15 a.m. time that the inspector was present. CMS Ex. 6, at 9. Therefore, even if the payroll record is correct, Mr. Valencia appears not to have been present when the inspector attempted the inspection.

As for the second visit on June 15, 2012, Petitioner claims the Inspector apparently came when the staff member was on a lunch break. RFH at 1. Petitioner again argues that its payroll records prove that Mr. Johnson was present at Petitioner's location at the time of the June 15 attempted inspection. P. Br. at 3. However, Petitioner's payroll shows that the June 15, 2012 entry for Mr. Johnson was manually edited, and Petitioner failed to explain this in its brief. CMS Ex 5; P. Ex. 6. Therefore, the reliability of this exhibit is once again called into doubt. Further, as CMS argues in its brief, the inspector documented through time and date stamped photographs that the same out-of-office sign he found on the back door on June 12 was still present on June 15. CMS Ex. 6, at 9-10. This sign indicates that Mr. Valencia, and not Mr. Johnson, had to temporarily leave the premises. Finally, Petitioner's assertion that its employee was out to lunch during the attempted inspection on June 15 is unreasonable; the attempted inspection took place at approximately 9:20 a.m. CMS Ex. 6, at 8, 10. Accepting Petitioner's payroll records as true, this would mean that Mr. Johnson took his lunch break within 20 minutes of starting his shift at 9:00 a.m. *See* CMS Ex. 5, P. Ex. 6.

Petitioner's imprecise and questionable evidence is insufficient to refute CMS's well-documented inspection efforts that are fully supported by the testimony of its inspector. CMS Exs. 6, 8. Therefore, based on the evidence of record, I find that the NSC inspector attempted to conduct site inspections of Petitioner's location on June 12, 2012, at approximately 11:15 a.m. and June 15, 2012, at approximately 9:20 a.m., but that he was unable to conduct either inspection because none of Petitioner's personnel were present at the location.

2. CMS had a legitimate basis to revoke Petitioner's Medicare billing privileges because Petitioner's location was not accessible and staffed during posted hours of operation, and, therefore, not operational.

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). CMS or its contractors may conduct inspections of a supplier's premises at any time to determine if a supplier is in compliance with Medicare enrollment requirements. *See* 42 C.F.R. §§ 424.510(d)(8), 424.517, 424.535(a)(8). Further, DMEPOS suppliers must permit CMS or its agent to conduct on-site inspections to ascertain supplier compliance with 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)(i)(C).

The facts in this case establish that Petitioner's location was not open and available for the NSC's site inspector to conduct an inspection on either June 12 or 15, 2012. Therefore, CMS had a legitimate basis to conclude that Petitioner was not operational under 42 C.F.R. § 424.535(a)(5)(ii) and was not in compliance with the supplier standards found at 42 C.F.R. § 424.57(c)(7).

Petitioner attempts to prove that it is operational by providing evidence that does not directly relate to June 12 or 15, 2012. P. Ex. 1-2, 4-5. Petitioner also argues that staff had been to lunch or on a break during an attempted site inspection by NSC.

However, a supplier is neither “open to the public” nor “accessible,” if the supplier location is closed because the staff is out for lunch, on a break, or making patient deliveries or visits. *See Ita Udeobong, d/b/a Midland Care Med. Supply and Equip.*, DAB No. 2324, at 6-7 (2010). It is incumbent on Petitioner to make whatever reasonable arrangements are necessary to keep its business open while allowing for patient consultations and visits. As stated in a previous case:

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* DAB No. 2303 (2010). Therefore, I conclude that CMS has sufficient evidence to support its determination that Petitioner's location was not operational because it was not accessible and staffed during posted hours. 42 C.F.R. §§ 424.57(c)(7)(i)(C), 424.535(a)(5). Because Petitioner failed to comply with a supplier standard CMS had to revoke Petitioner's billing privileges. *Id.* § 424.57(d).

3. I have no jurisdiction to consider Petitioner's corrective action plan.

For the first time since NSC revoked Petitioner's Medicare billing privileges, Petitioner submitted a corrective action plan (CAP). P. Ex. 4. Petitioner intentionally did not submit a CAP to NSC because Petitioner believes that NSC's revocation is invalid. P. Br. at 4. However, Petitioner now requests that the CAP be considered as part of the record on appeal. P. Br. at 4.

To the extent that Petitioner wants me to consider the CAP as part of this appeal, remedial action is not relevant to whether Petitioner was operational or available for inspection on June 12 and 15, 2012. If Petitioner wants me to approve the CAP, I am without authority to consider or approve a CAP. *See DMS Imaging*, DAB No. 2313, at 7-9 (2010).

V. Conclusion

Because the record in this case establishes that Petitioner was not operational on June 12 and 15, 2012, I affirm the determination to revoke Petitioner's DMEPOS supplier number and Medicare billing privileges effective June 15, 2012.

/s/
Scott Anderson
Administrative Law Judge