

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Keller Orthotics Inc.,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-1206

Decision No. CR3085

Date: January 16, 2014

DECISION

The Centers for Medicare & Medicaid Services (CMS) revoked the Medicare billing privileges of Petitioner, Keller Orthotics Inc. Petitioner appealed. As discussed below, the evidence of record supports CMS's determination. Therefore, I affirm the revocation of Petitioner's Medicare 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.) 4. On April 1 and 9, 2013, a CMS contractor from the National Supplier Clearinghouse (NSC) attempted to conduct a site inspection at Petitioner's location on file with CMS. CMS Exs. 1, 4. A site inspection could not be completed on either date and, on May 3, 2013, NSC issued an initial determination revoking Petitioner's Medicare supplier number effective April 9, 2013, the date CMS determined that Petitioner's practice location was not operational. CMS Ex. 4. NSC barred Petitioner from re-enrolling in the Medicare program for two years from this effective date. CMS Ex. 4.

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 June 24, 2013, the NSC hearing officer issued an unfavorable reconsidered determination upholding the revocation of Petitioner's Medicare billing privileges. CMS Ex. 1.

On August 13, 2013, Petitioner timely filed a request for hearing (RFH) before an administrative law judge. On August 22, 2013, I issued an Acknowledgement and Pre-hearing Order (Order). Pursuant to the Order, CMS filed its brief (CMS Br.) and four exhibits (CMS Exs. 1-4). Petitioner submitted a brief (P. Br.) and five exhibits (P. Exs. A-E).

II. Decision on the Record

In the absence of objection, I admit CMS Exs. 1-4 and P. Exs. A-E into the record.

My Pre-hearing Order advised the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Order ¶¶ 8 - 11; *see Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823, at 7-8 (2002) (holding that the use of written direct testimony for witnesses is permissible so long as the opposing party has the opportunity to cross-examine those witnesses).¹ Petitioner did not request to cross-examine NSC's inspector and CMS did not request to cross-examine either of the witnesses who signed a joint statement (P. Ex. E.). Therefore, there is no need for an in-person hearing and I issue this decision based on the written record. Order ¶¶ 9-11.

III. Issue

Whether CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges for failing to comply with Supplier Standards 7 and 10 (42 C.F.R. § 424.57(c)(7), (c)(10)) and failing to be operational (42 C.F.R. § 424.535(a)(5)). I have jurisdiction to decide this issue. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

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

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

¹ Administrative decisions cited in this decision are accessible on the internet at: <http://www.hhs.gov/dab/decisions/index.html>.

² My findings of fact and conclusions of law are set forth in italics and bold in the discussion captions of this decision.

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 enrollment 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). CMS may revoke a currently enrolled DMEPOS supplier's Medicare enrollment and billing privileges if CMS determines, upon on-site review, that the DMEPOS supplier is no longer operational to furnish Medicare covered items or services, or the supplier fails to satisfy any 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). After a DMEPOS supplier's Medicare enrollment and billing privileges are revoked, it is barred from reenrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c).

1. Petitioner's location at 1611 West Harrison Street, Suite 109 in Chicago, Illinois was open when an NSC inspector attempted to conduct a site inspection on April 1, 2013, but the NSC inspector decided to return to conduct the inspection on another date.

On April 1, 2013, at approximately 2:27 p.m., an NSC inspector attempted to conduct an unannounced site inspection at Petitioner's facility located at 1611 West Harrison Street, Suite 109, Chicago, Illinois. CMS Ex. 4, at 14. According to the inspector's report, this attempt was made during Petitioner's posted hours of operation and that the "office was closed." CMS Ex. 4, at 15, 19. Petitioner disputes that it was closed.

Petitioner submitted written testimony from two of its employees who spoke with the NSC inspector on April 1, 2013. One of the employees was present at the 1611 West Harrison Street location and spoke to the NSC inspector. Further, this employee telephoned the other employee, Georg Keller. Mr. Keller spoke directly to the inspector on the telephone and told her that he could be at the 1611 West Harrison Street office in 20 minutes in order to assist with the inspection. However, the NSC inspector indicated that she could not wait that long and would return at a later date for another inspection. P. Ex. E.

The written testimony of Petitioner's two witnesses outweighs the limited evidence CMS presents. Petitioner's witnesses provided significantly more detail than the site inspector. Their testimony is consistent with Petitioner's request for reconsideration, which stated that one of Petitioner's employees was present at the 1611 West Harrison Street location for the entire day and that "[t]he representative of NSC mentioned a return visit at a later date." CMS Ex. 3, at 2. In contrast, CMS only provided a brief notation about April 1 from the inspector's report (CMS Ex. 4, at 19), which the inspector indicated was written, contradictorily, on April 9 and 15, 2013. CMS Ex. 4, at 13, 18. Further, while the inspector took a photograph of Petitioner's location, the photograph merely proves that the inspector was present at Petitioner's office and does not prove that Petitioner's office

was closed. Finally, the time and date stamp on the photograph indicates it was taken at 2:53 p.m. on April 1, 2013. CMS Ex. 4, at 21. The time stamped on the picture means either that the inspector incorrectly stated in the report that she attempted the inspection at 2:27 p.m., which would further undermine her report, or that Petitioner's version of events is likely to have happened because there would have been enough time from the start of the inspection until the picture was taken for the inspector to engage in conversations with two of Petitioner's employees.

Therefore, I find that Petitioner's 1611 West Harrison Street, Suite 109 in Chicago was open and staffed on April 1, 2013. However, the site inspection was not completed on that date.

2. Petitioner's location at 1611 West Harrison Street, Suite 109, Chicago, Illinois was not open, accessible, and staffed when an NSC inspector attempted to conduct a site inspection on April 9, 2013.

On April 9, 2013, at approximately 10:56 a.m., the NSC inspector visited Petitioner's 1611 West Harrison Street location for a second time and noted: "Second attempt office was closed knock no answers. Lights off." CMS Ex. 4, at 14, 19. Photographs taken by the NSC inspector show that Petitioner's posted business hours were Monday to Friday from 8:00 a.m. to 4:30 p.m., and Petitioner does not dispute these posted hours of operation. CMS Ex. 4, at 21-22. Only one of the photographs taken by the NSC inspector clearly indicates it was taken on April 9, 2013. CMS Ex. 4, at 21.

The NSC inspector's observation that Petitioner's office was closed and no staff were present during the second attempted site inspection is corroborated by Petitioner. In Petitioner's request for reconsideration, Petitioner states: "When the representative of NSC attempted to conduct a visit of our facility on 4/9/2013, the office staff was out of the W. Harrison location due to a staff meeting at our Main facility. (Please see attached Minutes of Meeting)." CMS Ex. 3, at 2; *see also* RFH at 6; CMS Ex. 3, at 5; P. Ex. D. Petitioner states that it intends to correct this violation and "will post on our office door a 'out of office sign' along with time, our office will be reopened, with a contact phone number." CMS Ex. 3, at 2. In its brief, Petitioner states that there was one staff member on site at the 1611 West Harrison Street location on April 9, 2013, but the staff member "had stepped away for his break and was to return at noon, when the surveyor attempted the second on-site inspection, however, there was a sign on the window . . . indicating a return time of noon on Tuesday, April 9, 2013." P. Br. at 5-6; CMS Ex. 4, at 21.

Therefore, based on the evidence of record, I find that the NSC inspector attempted to conduct a site inspection of Petitioner's location at 1611 West Harrison Street, Suite 109 in Chicago on April 9, 2013, at approximately 10:56 a.m., but that the NSC inspector was unable to complete the inspection because the office was closed and none of Petitioner's personnel were present at the location.

3. 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 was not operational, as required by 42 C.F.R. §§ 424.57(c)(7) and 424.535(a)(5).

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). Further, DMEPOS suppliers must permit CMS or its agents 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). CMS may perform periodic site visits to determine whether the supplier is operational and complying with Medicare enrollment requirements. 42 C.F.R. §§ 424.510(d)(8), 424.515(c), 424.517(a).

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 April 9, 2013. 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)(i)(C).

In its brief, Petitioner argues that while all of Petitioner's office staff was at a meeting at Petitioner's main office on the date of the second attempted site inspection; their “practitioner” was at the 1611 West Harrison Street location on April 9, 2013. P. Br. at 4. However, Petitioner contends that the practitioner “had stepped away for his break and was to return at noon” when the NSC inspector attempted the second site inspection at approximately 10:56 a.m. on April 9, 2013. P. Br. at 5.³ Petitioner also asserts that the

³ In its brief, Petitioner indicates that their practitioner is not considered “office staff.” P. Br. at 4, n.1. However, later in the brief, Petitioner appears to refer to the practitioner as a “staff member.” See P. Br. at 5. If Petitioner meant in its brief that a staff member other than the practitioner was present during the attempted site inspection on April 9, 2013, Petitioner did not provide written testimony from the practitioner/staff member to corroborate this, nor indicate that any person would have answered the door when the site inspector knocked. Instead, Petitioner appears to indicate that the practitioner or staff member had “stepped away for his break” at approximately 10:56 a.m. on April 9, 2013, when NSC attempted the second site inspection. P. Br. at 5, 7. Moreover, any assertion regarding a staff member's presence at the 1611 West Harrison Street location at the time of the attempted site inspection on April 9, 2013, has no evidentiary support in the record and is contradicted by the Petitioner's own statements in its request for reconsideration and request for hearing. Thus, I will assume the practitioner was the only “staff member”

NSC inspector's photographs show that a sign was posted on the door indicating that someone would be back in the office at noon. P. Br. at 4.

However, a DMEPOS 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 & Equip.*, DAB No. 2324, at 6-7 (2010). Even assuming a staff member left a sign on Petitioner's door indicating someone would reopen the location at noon, this is not sufficient, as it does not show that Petitioner was accessible and properly staffed when NSC attempted a site inspection during Petitioner's posted hours of normal operation. CMS Ex. 4, at 15, 21-22; P. Ex. C. A supplier may not close, even temporarily, during its posted hours of operation. *Complete Home Care Inc.*, DAB No. 2525, at 5 (2013). 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 well as lunches and breaks for staff members. 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). Also, the regulatory drafters contemplated allowing facilities to temporarily close during posted hours to account for circumstances including short-term closures, and chose to emphasize that a supplier's place of business must always remain publicly accessible during posted hours. *Complete Home Care Inc.*, DAB No. 2525, at 6. The drafters explained in the preamble to the final rule that they believed a supplier "should be available during posted business hours" and "should do its best to plan and staff for temporary absences." 75 Fed. Reg. 52,629, 52,636 (2010).

Therefore, I conclude that CMS has presented sufficient evidence to support its determination that Petitioner's 1611 W. Harrison Street location was not operational, because it was not accessible and staffed during posted business hours and CMS properly revoked Petitioner's Medicare billing privileges. 42 C.F.R. §§ 424.57(c)(7)(i)(C), 424.535(a)(5).

working the morning of April 9, 2013 at 1611 W. Harrison Street, Suite 109 in Chicago. See P. Br. at 5-7.

4) *Petitioner has demonstrated compliance with the requirements of 42 C.F.R. § 424.57(c)(10)*

In its initial and reconsidered determination, NSC determined that Petitioner's liability insurance lapsed on March 1, 2012. CMS Exs. 1, at 3; 4, at 2. However, Petitioner has submitted proof of insurance coverage in an amount exceeding \$300,000 commencing on March 1, 2012 through March 1, 2013, and from March 1, 2013 through March 1, 2014. P. Exs. A, B.⁴ Because Petitioner has submitted evidence proving compliance with the requirements of 42 C.F.R. § 424.57(c)(10), I find that CMS did not have a basis for revoking Petitioner's DMEPOS supplier number because Petitioner failed to provide a certificate of insurance that demonstrated liability coverage from March 1, 2012 to February 28, 2013 to CMS or NSC.

III. Conclusion

Based on the reasons stated above, I affirm the determination to revoke Petitioner's DMEPOS supplier number and Medicare billing privileges effective April 9, 2013, pursuant to 42 C.F.R. §§ 424.57(c)(7)(i)(C), 424.535(a)(5)(ii).

_____/s/
 Scott Anderson
 Administrative Law Judge

⁴ The reconsidered determination indicates that Petitioner only submitted proof to NSC of insurance coverage from March 1, 2013 through March 1, 2014. CMS Ex. 1, at 3. Petitioner's request for reconsideration appears to be consistent with this (CMS Ex. 3, at 3-4). However, Petitioner asserts in its brief that Petitioner submitted proof of its liability insurance coverage from March 1, 2012 through March 1, 2013 with its reconsideration request. P. Br. at 4, 6, 8. Because CMS did not specifically object to P. Ex. A (showing insurance coverage from March 1, 2012 through March 1, 2013), as required by my Acknowledgment and Pre-hearing Order at ¶ 7, I admit P. Ex. A into the record and rely on it in this decision.