

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Promptcare New England Respiratory, LLC,
(PTAN: 5735960004),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-1069

Decision No. CR3910

Date: May 28, 2015

DECISION

I sustain the determination of the Centers for Medicaid & Medicare Services (CMS) to revoke the Medicare billing privileges of Petitioner, Promptcare New England Respiratory, LLC. CMS alleged that Petitioner failed to comply with Medicare participation requirements in two respects: (1) it was not open and accessible during two on-site inspections; and (2) it did not have its hours of operation posted on either its front door or the main entrance to the building. Credible evidence establishes that Petitioner did not comply with Supplier Standard 7's (42 C.F.R. § 424.57(c)(7)) requirement to post its hours of operation at the main entrance to its building or on its door, and its revocation is effective as of August 27, 2014.¹

¹ CMS originally revoked Petitioner's enrollment and billing privileges effective June 11, 2014. CMS Exhibit (Ex.) 5 at 4. However, it subsequently changed the effective date of the revocation to August 27, 2014. CMS Brief (Br.) at 5 n 3.

I. Background

On July 28, 2014, CMS notified Petitioner that its Medicare enrollment and billing privileges were being revoked. CMS Ex. 3. Petitioner requested reconsideration. CMS Ex. 4. CMS's determination was affirmed on reconsideration. CMS Ex. 5. Petitioner requested a hearing to challenge the adverse reconsideration determination, and the case was assigned to me for a hearing and decision. CMS moved for summary judgment and filed a brief (CMS Br.) and five proposed exhibits that are identified as CMS Ex. 1 – CMS Ex. 5. Petitioner filed a brief in opposition (P. Br.), and five proposed exhibits that are identified as P. Ex. 1 – P. Ex. 5, including the direct testimony of one witness. CMS requested to file a Reply brief, and I granted its request. Petitioner requested to file a Sur-Reply brief, and I denied Petitioner's request because CMS's Reply did not raise new arguments or issues that Petitioner had not already briefed. May 11, 2015 Letter Denying Petitioner's Request to File Sur-Reply. I receive all exhibits into the record.

Though CMS filed a motion for summary judgment, Petitioner's exhibits create a dispute as to the material facts of the case and for that reason I deny CMS's motion for summary judgment. However, I am proceeding to decide this case on the merits and evaluating the parties' evidence without an in-person hearing because a hearing is unnecessary. CMS has not proposed any witnesses and has not requested to cross-examine Petitioner's one witness. *See* P. Ex. 1; Acknowledgement and Pre-Hearing Order at ¶¶ 9-11.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether Petitioner failed to comply with the requirements of 42 C.F.R. § 424.57(c)(7), thereby justifying CMS's determination to revoke Petitioner's Medicare enrollment and billing privileges.²

B. Findings of Fact and Conclusions of Law

CMS contends that Petitioner did not post its hours of operation at the main entrance to its building and was not accessible and staffed during two on-site visits, as required by Supplier Standard 7. CMS Br. at 11; 42 C.F.R. § 424.57(c)(7)(i)(B)-(D). CMS has offered evidence demonstrating that Petitioner failed to post its hours of operation on either the building's main entrance or on its front door. CMS Exs. 1, 2; 42 C.F.R. § 424.57(c)(i)(D).

² The reconsideration determination also upheld the revocation of Petitioner's enrollment and billing privileges pursuant to 42 C.F.R. § 424.57(c)(2). CMS Ex. 5. CMS chose not to argue that I uphold Petitioner's revocation on that basis, however. CMS Br. at 2 n 1.

Petitioner offers a great deal of argument for a contention that is, at root, as follows: CMS didn't photograph Petitioner's actual entrance, which was the side, handicap-accessible entrance adjoining its suite, and that was where it posted its hours of operation. P. Br. at 8-13. However, the credible evidence demonstrates that Petitioner failed to post its hours of operation at the building's main entrance, the side entrance, or on its door and, therefore, Petitioner was noncompliant with Supplier Standard 7.

Petitioner offers a declaration from one of its employees in which the employee states that Petitioner posted its hours of operation at the handicap-accessible entrance on the side of the building. P. Ex. 1 at 3. Petitioner does not offer any documentary evidence, such as a photograph, that it posted its hours of operation at the side, handicap-accessible entrance. It does offer a photograph of the outside of the side entrance, however, which does not display its hours of operation. P. Ex. 4. The employee's declaration is undermined by arguments and even documentary evidence that Petitioner itself previously submitted at the reconsideration stage.

In its Request for Reconsideration, Petitioner argued that it "posted its hours of operation on the two inside lobby placards that are located upon entry in the front and back doors to the office building . . . there are *only two entrances* to the building (front and back)." CMS Ex. 4 at 2 (emphasis added). For emphasis, Petitioner maintained that "[a]ny individual entering the building would walk past the lobby placards that displayed PromptCare's hours of operation." CMS Ex. 4 at 2. Petitioner offered a photograph of the building, which depicts not the side, handicap-accessible entrance, but the front of the building. CMS Ex. 4 at 66. Petitioner also offered photographs showing its hours of operation posted on one of the lobby's placards and on the front door to its offices. CMS Ex. 4 at 68, 72. Petitioner made no mention of the handicap-accessible entrance that it now maintains is the building's main entrance. *See* P. Br. at 5 ("Site Inspector Harris did not enter the main entrance of the building because she did not enter the handicap accessible entrance.").

Before me, CMS offered a time and date-stamped photograph taken during the first attempted onsite-inspection showing that Petitioner had not, in fact, posted its hours of operation on at least one of the lobby placards, directly contradicting Petitioner's earlier statement. CMS Ex. 2 at 4. CMS also offered a time and date-stamped photograph of Petitioner's front door showing that its hours were not posted there either. CMS Ex. 2 at 2. When confronted by this contradictory evidence, Petitioner now admits, as it must, that the lobby placard "did not display Promptcare's hours of operation at the time of the inspection." P. Br. at 3. However, while Petitioner characterizes this as a "miscommunication in [its] Request for an Administrative Law Judge Hearing Appeal," it was nothing of the sort – Petitioner also made this "miscommunication" in its Request

for Reconsideration. CMS Ex. 4 at 2. Petitioner also repudiates its previous photographic evidence showing that its hours of operation were posted on the front door to its office. P. Br. at 3 (“Ms. Harris knocked on Promptcare’s door—which was unlocked and did not contain Promptcare’s hours of operation.”).

Despite the fact that Petitioner previously maintained that “there are only two entrances to the building (front and back),” CMS Ex. 4 at 2, Petitioner would have me believe that its “main” entrance was the handicap-accessible entrance at the side of the building. P. Br. at 2-3, 5, 10-11. However, Petitioner’s own diagram shows that its “Reception Area” is on the opposite side of its offices from the entrance it purports to be its “main” entrance. P. Br. at 5; P. Ex. 3. It would make no sense for Petitioner to have its reception area on the opposite side of the office from the entrance that the public primarily uses. Further, Petitioner describes the building’s “main” entrance as the handicap-accessible entrance; yet, this entrance appears to offer access only to Petitioner’s office, rather than to all of the building’s offices. P. Br. at 5; P. Ex. 3. No one would rationally consider a building’s “main” entrance to be one that offers access only to one of the building’s tenants, rather than to all of its tenants, and Supplier Standard 7 expressly requires that Petitioner’s hours of operation “must be visible at the main entrance of the *building*,” rather than of Petitioner’s offices. 42 C.F.R. § 424.57(c)(7)(i)(D) (emphasis added).

The myriad contradictions in Petitioner’s arguments and the evidence CMS has presented lead me to conclude that the credible evidence shows that Petitioner did not post its hours of operation at the front entrance of the building or anywhere else. Petitioner violated Supplier Standard 7 and CMS was within its rights to revoke Petitioner’s Medicare enrollment and billing privileges.

/s/
Steve T. Kessel
Administrative Law Judge