Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

Marcus Singel, D.P.M.
Docket No. A-14-107
Decision No. 2609
December 18, 2014

FINAL DECISION ON REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION

Marcus Singel (Petitioner), a doctor of podiatric medicine who was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS), requests review of an Administrative Law Judge (ALJ) decision dated July 21, 2014. *Marcus Singel, D.P.M.*, DAB CR3302 (2014) (ALJ Decision). The ALJ affirmed the determination by the Centers for Medicare & Medicaid Services (CMS) to revoke Petitioner's Medicare billing privileges and related supplier number, effective January 7, 2014. The ALJ concluded that CMS had a legitimate basis to revoke Petitioner's Medicare enrollment because the evidence of record established that Petitioner did not comply with the participation requirements governing DMEPOS suppliers.

As discussed below, we conclude that the ALJ properly affirmed CMS's revocation of Petitioner's Medicare billing privileges because Petitioner failed to post his facility's hours of operation, in violation of the DMEPOS supplier standard found at 42 C.F.R. § 424.535(c)(7)(i)(D). However, we also conclude that the ALJ erred in determining that CMS had a basis to revoke under section 424.535(a)(5)(ii) based on a finding that the facility was not operational. Because the effective date for the revocation here was based on a provision that applied only to revocation on the latter basis, we modify the effective date of the revocation to April 6, 2014 in accordance with 42 C.F.R. § 424.57(e), which governs the effective date of instances of noncompliance with any of the DMEPOS supplier standards set forth in section 424.57(c).

Legal Background

In order to maintain Medicare enrollment and associated "billing privileges," a DMEPOS supplier must be in compliance with the 30 "supplier standards" set forth in 42 C.F.R. § 424.57(c). Under section 424.57(c)(7) (Supplier Standard 7), a DMEPOS supplier is required to maintain "a physical facility on an appropriate site." An "appropriate site"

must, among other things, be "accessible and staffed during posted hours of operation." 42 C.F.R. § 424.57(c)(7)(i)(C). An appropriate site also must maintain "a permanent visible sign in plain view" that "posts hours of operation." *Id.* § 424.57(c)(7)(i)(D).

CMS, through its contractors, performs on-site inspections to verify compliance with the supplier standards and other Medicare requirements. *See id.* §§ 424.57(c)(8), 424.517. CMS is authorized to revoke a DMEPOS supplier's billing privileges for noncompliance with any of the supplier standards. *Id.* § 424.57(e).[1] Section 424.57(e) provides that the effective date of revocation for noncompliance with any of the supplier standards under section 424.57(c) is 30 days after the supplier is sent notice of the revocation. *See* 75 Fed. Reg. 52,629, 52,648-52,649 (Aug. 27, 2010).

CMS is also authorized to revoke a provider's or supplier's billing privileges for any of the "reasons" listed in section 424.535(a). (Section 424.535 applies to all types of Medicare providers and suppliers, not just DMEPOS suppliers.) Section 424.535(a)(1) provides that "[a]ll providers and suppliers are granted an opportunity to correct the deficient compliance requirement before a final determination to revoke billing privileges, except for those imposed under paragraphs (a)(2), (a)(3), or (a)(5) of this section." Under section 424.535(a)(5)(ii), CMS may revoke a supplier's billing privileges if an on-site review reveals that the supplier is "no longer operational." A supplier is operational if, among other things, it "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 [the] items or services [being rendered]." *Id.* § 424.502. The effective date of revocation on this basis is the date CMS determines the supplier was "no longer operational" as a result of an on-site review. *Id.* § 424.535(g).

Factual Background[2]

Petitioner operates a facility in Las Vegas, Nevada called Foot & Ankle Specialists of Southern Nevada. On Friday, January 3, 2014 at approximately 2 p.m., and again on Tuesday, January 7, 2014 at approximately 11:40 a.m., a CMS-contracted inspector attempted to conduct unannounced site visits at Petitioner's facility. The facility did not

[1] Section 424.57(e) currently appears in the Code of Federal Regulations as section 424.57(d). However, the section was redesignated section 424.57(e), which explains our use of the latter citation here. *See* Editorial Note following section 424.57 in the Code of Federal Regulations (October 1, 2012 revision); *see also Neb Group of Arizona*, DAB No. 2573, at 7-8 (2014) and *Benson Ejindu, d/b/a Joy Medical Supply*, DAB No. 2572, at 9-10 (2014) (explaining history of the redesignation).

[2] The factual information in this section, unless otherwise indicated, is drawn from the ALJ Decision and undisputed facts in the record and is presented to provide a context for the discussion of the issues raised on appeal. Nothing in this section is intended to replace, modify, or supplement the ALJ's findings of fact.

have any posted hours of operation at the time of the visits. According to the inspector's report, on both visits the door to the facility was locked, no one responded to the inspector's knocks, no staff or customers appeared to be present, and there was no signage explaining why the facility was closed. CMS Ex. 1.

By letter dated March 7, 2014, CMS, through a contractor, informed Petitioner that it was revoking his Medicare supplier number and billing privileges based on noncompliance with several supplier standards, including Supplier Standard 7.[3] The letter explained that CMS had determined Petitioner was noncompliant with Supplier Standard 7 because Petitioner's facility was closed on the dates the inspector attempted to visit. CMS Ex. 2, at 2. Based upon the same facts, the letter also stated that CMS had determined Petitioner's facility was not operational to furnish Medicare covered items and services and considered Petitioner "to be in violation of 42 C.F.R. § 424.535(a)(5)(ii) and all supplier standards as defined in 42 C.F.R. § 424.57(c)." *Id.* The letter further explained that the effective date of the revocation was January 7, 2014, which is the date CMS "determined [Petitioner's] practice location is not operational," and that Petitioner was barred from reenrolling in the Medicare program for two years. *Id.* at 1.

In response, Petitioner submitted a corrective action plan (CAP). CMS Ex. 3. CMS, through its contractor, returned Petitioner's CAP materials, explaining that Petitioner's supplier number was revoked for noncompliance with section 424.535(a)(5)(ii) and that Petitioner had been given the opportunity to request reconsideration of CMS's decision, not to submit a CAP. CMS Ex. 4.

Petitioner then requested reconsideration of the revocation decision. CMS Ex. 5. By letter dated April 25, 2014, a Medicare hearing officer issued an unfavorable reconsideration decision. As a rationale for upholding the revocation, the hearing officer cited Petitioner's noncompliance with the requirements of Supplier Standard 7, including the requirement to have a "permanent visible sign in plain view" with "post[ed] hours of operation" and also stated that the inspector could not access Petitioner's facility "to verify compliance with the supplier standards because the facility location on file with

[3] CMS also determined that Petitioner was noncompliant with Supplier Standard 1 (which requires a DMEPOS supplier to operate its business and furnish Medicare-covered items in compliance with applicable state and federal regulatory requirements) and Supplier Standard 21 (which requires a DMEPOS supplier to provide to CMS, upon request, any information required by the Medicare statute and implementing regulations) on the ground that Petitioner failed to pay the fee for processing his application to revalidate his Medicare enrollment. CMS Ex. 2, at 1-2; *see* 42 C.F.R. § 424.57(c)(1), (21). However, Petitioner later submitted evidence, which CMS accepted, that he had paid the fee, and before the ALJ CMS took the position that "the fee payment is not an issue in this matter." CMS Pre-Hr. Br. at 4 n.1. Thus, we do not address Petitioner's purported noncompliance with Supplier Standards 1 and 21 further here.

[the contractor] was not open on the days and times of the attempted site visits.." CMS Ex. 6, at 3-4. The hearing officer also stated the definition of "operational." However, the hearing officer did not make a finding that Petitioner's facility was no longer operational. *Id.* at 4.

Petitioner requested a hearing before an ALJ to challenge the reconsidered decision. Before the ALJ, Petitioner admitted that his facility was closed when the inspector attempted to visit on January 3 and 7, 2014. He explained that on January 3 his "office was closed for the short first week of the new year," and that the "following Tuesday, January 7, my staff and I were in our satellite office, as we are every Tuesday and Thursday morning." HR at 1st p. (unnumbered). Petitioner also alleged that after his office complex was burglarized "several years ago," he stopped posting his facility's hours of operation on the advice of the Las Vegas Police Department. Pet. Summ. of Events at 2nd p. (unnumbered). But Petitioner further alleged that he reposted the facility's hours immediately after receiving CMS's initial revocation decision. *Id.* In addition, Petitioner submitted an undated photo of the entrance to the facility that showed posted hours of operation of 7:30 a.m. to 4:30 p.m. Monday, Wednesday, and Friday, and 1 p.m. to 4:30 p.m. Tuesday and Thursday. *Id.* at 8th p.

CMS moved for summary judgment, arguing that Petitioner admitted he had violated the requirement in Supplier Standard 7 to maintain posted hours of operation. CMS Pre-Hr. Br. at 6. In addition, CMS contended that it had a reasonable basis for determining that Petitioner's facility was not operational because at the times of the attempted inspections the facility was "locked and unattended with no indication that it might ever be open." *Id.* at 8. CMS also advanced a new basis for the revocation not relied on in the initial or reconsidered revocation decisions, arguing that because the inspector was unable to access Petitioner's facility, Petitioner had violated Supplier Standard 8, which requires a DMEPOS supplier to permit CMS or its contractors to conduct on-site inspections to ascertain the supplier's compliance with the requirements of section 424.57. *Id.* at 6; *see* 42 C.F.R. § 424.57(c)(8).

The ALJ declined to determine whether summary judgment was appropriate and issued a decision based on the written record, reasoning that "neither party has demanded to present testimony at an in-person hearing." ALJ Decision at 2. The ALJ concluded that the undisputed facts supported CMS's decision to revoke Petitioner's enrollment and billing privileges. *Id.* at 3. The ALJ reasoned that Petitioner (1) was "not open to the public on the dates and times in question" and did "not have a sign posting his hours of operation" (as Supplier Standard 7 requires); (2) "effectively denied the contractor's inspector access to his premises on the dates in question" (in contravention of Supplier Standard 8); and (3) was "not 'operational' in that [Petitioner's facility] was not open to the public for purposes of providing health care related services." *Id.*

Petitioner timely requested that the Board review the ALJ Decision.

Analysis

1. The ALJ correctly disposed of the case on the written record.

Petitioner contends that the ALJ erroneously disposed of the case on the written record. Petitioner emphasizes that he twice requested a hearing in the brief he filed with the ALJ. RR at 1st p. (unnumbered). Although the ALJ did not fully explain the basis for his conclusion that the case could be disposed of on the written record, his conclusion is consistent with prior decisions of the Board and free of legal error.

The hearing procedures in subpart D of 42 C.F.R. Part 498, which applied here, generally contemplate an oral hearing at which witnesses will testify and may be cross-examined, unless the parties have waived their right to a hearing in writing. *See* 42 C.F.R. § 498.66. We do not lightly uphold any limitation on statutory hearing rights. *Big Bend Hosp. Corp., d/b/a Big Bend Med. Ctr.*, DAB No. 1814, at 13 (2002). However, as the Board explained in *Big Bend*, under certain circumstances, decision on the written record is appropriate even if the parties have not submitted a written waiver of their hearing rights. The Board gave as an example a case where "the proffered testimony, even if accepted as true, would not make a difference." *Id.* There is no requirement to hold a hearing in this circumstance because convening a hearing "where no proffered evidence would have any effect on the outcome would be an empty formalism and a waste of administrative and litigant resources." *Id.* at 15. Holding a hearing is a particularly empty endeavor where neither party seeks to present or cross-examine witnesses, as the hearing would not add new evidence to the record. Not holding a hearing in such an instance also raises no due process concerns. Thus, the Board has not found a procedural issue where ALJs have issued decisions on the written record in cases where the parties either did not proffer any proposed witnesses or did not request to cross-examine witnesses. *See, e.g., Ronald J. Grason, M.D.*, DAB No. 2592, at 3 (2014) (noting that ALJ decided case on written record where neither party sought to cross-examine witnesses); *Keller Orthotics, Inc.*, DAB No. 2588, at 4 (2014) (same).[4]

Here, the ALJ informed the parties in his Pre-Hearing Order that he would convene an in-person hearing *only* if a party filed admissible, written direct testimony *and* the opposing party asked to cross-examine that testimony. Ack. & Pre-Hr. Order at 6. Petitioner did not object to this process. In their submissions to the ALJ, neither CMS nor Petitioner filed proposed written direct testimony, and both parties expressly stated that they did not

[4] The petitioners in *Grayson* and *Keller Orthotics*, unlike Petitioner here, did not allege that the ALJ erred in issuing a decision on the written record. However, based on the facts of this case, we see no reason why the same rationale for why decision on the written record is appropriate would not apply here.

intend to call any witnesses. CMS's List of Proposed Exhs. & Witnesses at 3; Pet. Summ. of Events at 5th p. With no proposed testimony offered or challenged, there was nothing to be gained from holding an in-person hearing. Accordingly, the ALJ was not required to convene a hearing, despite Petitioner's request for one.

2. The ALJ properly sustained the revocation of Petitioner's billing privileges pursuant to section 424.57(e) based on Petitioner's noncompliance with a requirement of Supplier Standard 7.

Petitioner admitted that he stopped posting his facility's hours of operation "several years ago" and did not repost them until after he received CMS's initial revocation decision dated March 7, 2014. Pet. Summ. of Events at 2nd p. This admission establishes that Petitioner failed to comply with Supplier Standard 7. As noted above, Supplier Standard 7 requires a DMEPOS supplier to maintain "a permanent visible sign in plain view" that "posts hours of operation." 42 C.F.R. § 424.57(c)(7)(i)(D). Thus, Petitioner directly contravened the requirements of Supplier Standard 7 by failing to maintain a sign posting his facility's hours of operation.

Petitioner contends that he was not out of compliance with Supplier Standard 7 because he stopped posting his facility's hours of operation on the advice of the Las Vegas Police Department after his office complex was burglarized. RR at 2nd p. However, the rationale behind Petitioner's decision not to post his facility's hours is irrelevant for purposes of determining his compliance with Supplier Standard 7. Nothing in the text of Supplier Standard 7 provides for an exception to the requirement that suppliers must post their hours of operation based on the reasoning behind the failure to post. Nor would such an exception be consistent with the purpose of the requirement. As the Board has recognized, the purpose of requiring suppliers to post their hours of operation is "to facilitate both on-site inspections and transactions with beneficiaries in need of items or services." *Ita Udeobong, d/b/a Midland Care Med. Supply & Equip.*, DAB No. 2324, at 7 (2010).

Petitioner relies on an article explaining that, according to one of CMS's contractors, certain types of DMEPOS suppliers may post "By Appointment Only" as their hours of operation. Petitioner's reliance on the article is misplaced. As an initial matter, because he did not rely on the article before the ALJ, Petitioner is precluded from relying on it for the first time on appeal. *See* 42 C.F.R. § 498.86(a) (excluding provider and supplier enrollment appeals from provisions allowing Board to admit evidence that was not considered by ALJ); *Guidelines -- Appellate Review of Decisions of Administrative Law Judges Affecting a Provider's or Supplier's Enrollment in the Medicare Program*, http://www.hhs.gov/dab/divisions/appellate/guidelines/prosupenrolmen.html. Moreover, even assuming that Petitioner qualified as the type of supplier who could post "By Appointment Only" as his facility's hours of operation – Petitioner has not proffered any evidence establishing that he does so qualify – nothing in the record suggests that he had

such a sign posted. To the contrary, photographs taken by the inspector on January 3 and 7, 2014 do not show *any* signage at the entrance to Petitioner's facility regarding the facility's hours. CMS Ex. 1, at 2.

Petitioner also alleges that he reposted his hours of operation "immediately" after receiving CMS's initial revocation decision. RR at 2nd p. The Board has explained, however, that corrections made after revocation are immaterial to whether the revocation was authorized in the first place. *See Orthopaedic Surgery Assoc.*, DAB No. 2594, at 6 (2014); *Neb Group of Ariz*., DAB No. 2573, at 6 (2014); *A to Z DME, LLC*, DAB No. 2303, at 6-7 (2010), citing 73 Fed. Reg. 36,448, 36,452 (June 27, 2008). We also note that Petitioner admittedly failed to post his hours of operation for "several years," which undermines his attempt to minimize the duration of his noncompliance.

Because Petitioner failed to post his facility's hours of operation, the ALJ correctly concluded that Petitioner was not in compliance with Supplier Standard 7. Failure to comply with even one supplier standard is a sufficient basis for revoking a supplier's billing privileges under section 424.57(e). *See A to Z DME*, at 3; *1866ICPayday.com*, DAB No. 2289, at 13 (2009). Thus, the ALJ's conclusion that Petitioner's noncompliance with Supplier Standard 7 provides a legitimate basis for CMS to revoke Petitioner's billing privileges pursuant to section 424.57(e) is free of legal error.

3. Because the reconsideration decision did not make a finding that Petitioner's facility was not operational, the ALJ erred in determining that there also was a basis to revoke on the alternative ground that Petitioner was not operational as defined in section 424.502.

Because the ALJ based his determination of the effective date of the revocation on his additional conclusion that Petitioner's facility was not operational within the meaning of section 424.502, we must address the propriety of that conclusion.[5] *See* ALJ Decision at 3.

Although CMS's initial determination stated that Petitioner's facility was not operational and that the facility's non-operational status under section 424.535(a)(5)(ii) was a basis for the revocation, the reconsidered decision did not. *Compare* CMS Ex. 2, at 2 *with* CMS Ex. 6, at 3-4, 6. In the reconsidered determination, the hearing officer quoted the definition of "operational" in the course of explaining why Petitioner's facility was out of compliance with Supplier Standard 7, but did not make a finding that the facility was non-operational or cite section 424.535(a)(5)(ii) as grounds for the revocation. CMS Ex. 5, at 3-4.

[5] Whether Petitioner also was not in compliance with Provider Standard 8 was not a basis for the reconsidered decision and, therefore, not an issue properly before or decided by the ALJ.

Petitioner's right of appeal was from the reconsidered determination, not the initial determination. 42 C.F.R. § 498.5(l)(2); *see also Keller Orthotics, Inc.*, DAB No. 2588, at 7 (2014), citing *Neb Group of Arizona*, at 5-6; *Joy Medical Supply*, at 5. Thus, the issue of whether Petitioner's facility was not operational – thereby subjecting Petitioner's billing privileges to revocation under section 424.535(a)(5)(ii) – was not properly before the ALJ. Accordingly, the ALJ erred in reaching a revocation ground not before him and concluding that Petitioner's Medicare billing privileges could additionally be revoked on the ground that Petitioner's facility was not operational.

4. Under section 424.57(e), the correct effective date for the revocation of Petitioner's billing privileges based on his failure to meet the requirements of Supplier Standard 7 is April 6, 2014.

In light of our decision to sustain the revocation of Petitioner's billing privileges based solely on his noncompliance with Supplier Standard 7, it is necessary to modify the effective date of the revocation determined by CMS and upheld by the ALJ. In its March 7, 2014 notice of revocation, CMS, through its contractor, advised Petitioner that the revocation was effective January 7, 2014 based on the determination that Petitioner's facility was "not operational" on that date. CMS Ex. 2, at 1. Although the reconsideration decision did not uphold the revocation on the ground that Petitioner's facility was not operational, that decision did not discuss or alter the January 7, 2014 effective date. CMS Ex. 6. Under section 424.535(g), the effective date of a revocation is 30 days from the date CMS mails a supplier notice of CMS's revocation determination, except where CMS issues a revocation based on a finding that the supplier is "no longer operational" (or on several other specified bases). Where being found no longer operational is the basis for revocation, section 424.535(g) provides that the effective date is the "date that CMS or its contractor determined that the provider or supplier was no longer operational." This provision cannot properly be applied here because, as discussed above, the reconsidered determination did not make a finding that Petitioner's facility was no longer operational, and we have concluded that the ALJ's upholding the revocation on that ground was error.

Because the sole basis for revocation properly decided by the ALJ and affirmed by the Board in this appeal is Petitioner's noncompliance with Supplier Standard 7, the effective date of revocation should be determined in accordance with section 424.57(e)'s effective-date provision. As the Board discussed in several recent decisions, section 424.57(d) in the Code of Federal Regulations (October 1, 2012 revision) states that a revocation based on a violation of section 424.57(c) "is effective *15 days* after the [supplier] is sent notice of the revocation" (italics added), but this provision does not accurately reflect regulatory history as to either the section's designation or the timing of the effective date. *See Keller Orthotics*, at 9; *Norpro Orthotics & Prosthetics, Inc.*, DAB No. 2577, at 7-8 (2014); *Neb Group of Arizona*, at 7; *Joy Medical Supply*, at 5. The regulation's editorial note states that a January 2, 2009 final rule (74 Fed. Reg. 198) re-designated paragraph

(d) of section 424.57 as paragraph (e) but that this and other changes to section 424.57 were not incorporated into the codified text of the regulation because of an "inaccurate amendatory instruction." On August 27, 2010, CMS published a final rule in the Federal Register which revised paragraph (e) – that is, the re-designated paragraph (d) – to extend the effective date of a revocation based on section 424.57(c) *from 15 to 30 days* after the supplier is notified of the revocation. 75 Fed. Reg. at 52,648-52,649. Applying that rule here, we conclude that the proper effective date of the revocation is April 6, 2014, 30 days from the date of CMS's March 7, 2014 letter notifying Petitioner of the revocation.

Conclusion

For the reasons discussed above, we affirm the ALJ's decision to uphold the revocation of Petitioner's Medicare billing privileges based on Petitioner's noncompliance with the requirements of section 424.57(c)(7)(i)(D), but we modify the effective date of the revocation to April 6, 2014.

/s/
Sheila Ann Hegy

/s/
Leslie A. Sussan

/s/
Stephen M. Godek
Presiding Board Member