Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

MedAlert Medical Equipment and Supplies, Inc.
(PTAN: 6339530001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-16-274

Decision No. CR4667

Date: July 29, 2016

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its administrative
contractor, Palmetto GBA National Supplier Clearinghouse (NSC), revoked the
enrollment of MedAlert Medical Equipment and Supplies, Inc. (MedAlert or Petitioner)
as a Medicare supplier of durable medical equipment, prosthetics, orthotics, and supplies
(DMEPOS) because MedAlert: failed to timely inform CMS of its change of address;
was not operational or accessible during its posted hours of operation at its practice
location on file with CMS; and failed to maintain a comprehensive liability insurance
policy. MedAlert requested a hearing to dispute the revocation. For the reasons
explained below, I affirm CMS's determination to revoke MedAlert's enrollment in the
Medicare program; however, I modify the effective date of revocation from July 14,
2015, to October 1, 2015.

I. Background and Procedural History

MedAlert was enrolled in the Medicare program as a DMEPOS supplier. In a September
1, 2015 initial determination, NSC revoked MedAlert's Medicare enrollment and billing
privileges. CMS Exhibit (Ex.) 4. NSC based the revocation on the following:

1) 42 C.F.R. § 424.57(c)(2) ("[MedAlert] failed to notify the NSC regarding the closure of [MedAlert's] business.");

2) 42 C.F.R. §§ 424.57(c)(7) and 424.535(a)(5) ("Recently, a representative of the NSC attempted to conduct a visit of [MedAlert's] facility on July 14, 2015; however, the visit was unsuccessful because [MedAlert is] no longer at the address listed in [MedAlert's] supplier file with the NSC and the facility is vacant. Because we could not complete an inspection of [MedAlert's] facility, we could not verify [MedAlert's] compliance with the supplier standards. Based upon a review of the facts, we have determined that [MedAlert's] facility is not operational to furnish Medicare covered items or services."); and

3) 42 C.F.R. § 424.57(c)(10) ("The general liability policy on file with NSC has expired.").

CMS Ex. 4 at 1-2. NSC made the effective date for revocation retroactive to July 14, 2015, the date CMS determined MedAlert's supplier location was not operational. CMS Ex. 4 at 1.

In a September 30, 2015 letter, MedAlert requested reconsideration of the initial determination. MedAlert asserted in that request that the roof of its practice location at 4116 Live Oak Street, Dallas, Texas, was damaged by hail, which resulted in leakage of water whenever it rained. MedAlert stated that the leakage of rain damaged its inventory; however, the landlord would not fix the roof. Following a June 27, 2015 rain storm, MedAlert expeditiously moved to 4908 Ross Avenue, Dallas, Texas. MedAlert then tried to "put things together at new place" while waiting for documentation to be issued (i.e., state license, proof of liability insurance) with MedAlert's new address on it. CMS Ex. 3.

In her November 27, 2015 reconsidered determination, the NSC hearing officer concluded:

> I have reviewed all of the documentation in the file for this case and my decision has been made in accordance with Medicare guidelines, . . . as outlined in 42CFR424.57 [sic]. [MedAlert] is in violation of 42 CFR § 424.57(c)(7) and 424.535(a)(5)(ii) and was out of compliance with applicable Medicare requirements, as stated in supplier standards 2, 7 and 10.

CMS Ex. 2 at 6.

On January 25, 2016, MedAlert requested a hearing to dispute the revocation. I issued an Acknowledgement and Pre-hearing Order (Order) on February 4, 2016. In response to

my Order, CMS filed a motion for summary judgment and prehearing brief (CMS Br.), and six exhibits (CMS Exs. 1-6). One exhibit was the written direct testimony of an NSC site inspector, Larry Seals. CMS Ex. 6. MedAlert filed a prehearing brief (P. Br.) in opposition to summary judgment along with seven exhibits (P. Exs. 1-7). One exhibit was the written direct testimony of MedAlert's owner, Christian Ogwuegbu. P. Ex. 1.

II. Decision on the Record

Neither party objected to any of the proposed exhibits; therefore, I admit them all into the record. *See* Order ¶ 7; Civil Remedies Division Procedures (CRDP) § 14(e).

I directed the parties to submit written direct testimony for each proposed witness and advised the parties that an in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Order ¶¶ 8, 9; CRDP § 16(b). Neither party requested to cross-examine the opposing party's witness. Therefore, I decide this case based on the written record. Order ¶¶ 10-11; CRDP § 19(b), (d).

III. Issue

Whether CMS had a legitimate basis for revoking Petitioner's Medicare enrollment and billing privileges.

IV. Jurisdiction

I have jurisdiction to hear and decide this case. 42 C.F.R. §§ 498.3(b)(17), 498.5(l)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

V. Findings of Fact, Conclusions of Law, and Analysis[1]

The Secretary of Health and Human Services (Secretary) has the authority to create provider and supplier enrollment standards, and DMEPOS supplier requirements. 42 U.S.C. §§ 1395m(j)(1)(B)(ii), 1395cc(j). The Secretary promulgated a regulation that requires providers and suppliers to be operational. 42 C.F.R. § 424.535(a)(5)(i). To be "operational," a provider or supplier 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. The Secretary also promulgated regulations establishing DMEPOS supplier standards. 42 C.F.R. § 424.57(c). The supplier standards require a DMEPOS supplier to report to CMS any changes in its enrollment information within 30 days. 42 C.F.R. § 424.57(c)(2). They also require a DMEPOS supplier to maintain, "at

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

all times" a comprehensive liability insurance policy. 42 C.F.R. § 424.57(c)(10). Further, each DMEPOS supplier must also be "open to the public a minimum of 30 hours per week," "post[] hours of operation," and be "accessible and staffed during posted hours of operation." 42 C.F.R. § 424.57(c)(7), (c)(30).

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 or the supplier standards. *See* 42 C.F.R. §§ 424.57(c)(8), 424.510(d)(8), 424.515(c), 424.517(a). A supplier is subject to revocation of its Medicare billing privileges if it violates the DMEPOS supplier standards or the regulatory requirements applicable to all providers and suppliers. 42 C.F.R. §§ 424.57(e)(1), 424.535(a).

1. ***On July 14, 2015, at 4:09 p.m., an NSC site inspector visited MedAlert's address that was on file with CMS (4116 Live Oak Street, Dallas, Texas) and determined that MedAlert's office was vacant.***

2. ***After obtaining supporting documents, MedAlert mailed a CMS-855S form to NSC on October 1, 2015, informing CMS that it moved its office from its 4116 Live Oak Street, Dallas, Texas address to 4908 Ross Avenue, Dallas, Texas.***

In 2012, MedAlert notified CMS, using a CMS-855S form, that MedAlert's new address would be 4116 Live Oak Street, Dallas, Texas. CMS Ex. 1. In 2015, the roof of the building at the 4116 Live Oak Street address was damaged by hail, resulting in a roof that leaked when it rained. CMS Ex. 3; P. Ex. 1 at 1. When the roof leaked, some of MedAlert's inventory would be damaged. CMS Ex. 3; P. Ex. 1 at 1. The landlord of the building did not make timely repairs and, either on June 27, 2015 or July 2, 2015, it rained sufficiently hard to cause enough damage that MedAlert "quickly relocated our products to 4908 Ross Avenue, Dallas, TX 75206 because more rain was forecast." P. Ex. 1 at 1; *see also* CMS Ex. 3 at 1. On July 1, 2015, MedAlert's lease for the 4908 Ross Avenue location commenced. P. Ex. 2. MedAlert left the 4116 Live Oak Street address on July 4, 2015, at which time it "put a note on the door for people to know we moved to a new [l]ocation with the address and our phone number." CMS Ex. 3.

On July 14, 2015, at 4:09 p.m., NSC site inspector Larry Seals arrived at MedAlert's office at 4116 Live Oak Street in order to conduct a site inspection. CMS Ex. 5 at 1-2. Mr. Seals noted that the hours of operation, Monday to Friday, 9 a.m. to 5 p.m., were posted. CMS Ex. 5 at 2. However, Mr. Seals observed that MedAlert was not open, did not have staff present, did not have customer activity, did not have a sign with MedAlert's name on it, did not appear to have inventory, and did not appear to be operational. CMS Ex. 5 at 2. Mr. Seals also saw on the office door a "City of Dallas Construction Permit stating the building was 'Vacant Floor Space.'" CMS Ex. 5 at 2, 4. Mr. Seals spoke to a construction worker at the location who confirmed that the building was not occupied. CMS Ex. 5 at 2. Mr. Seals testified that he "discovered that Petitioner

was no longer conducting business at its address of record, 4116 Live Oak Street, Dallas, Texas 75204." CMS Ex. 6 ¶ 5. Therefore, I find that MedAlert's office at the address on file with CMS was vacant on July 14, 2015, the date on which an NSC inspector attempted a site visit.

3. CMS had a legitimate basis to revoke MedAlert's Medicare enrollment and billing privileges because MedAlert did not report to CMS its change in practice location within 30 days in accordance with 42 C.F.R. § 424.57(c)(2).

When a DMEPOS supplier files an enrollment application, it must provide "Business Location Information," which "must be a specific street address as recorded by the United States Postal Service." P. Ex. 6 at 2. CMS may require documentation of a supplier's "practice location" with its application. 42 C.F.R. § 424.510(d)(2)(ii). A DMEPOS supplier must "report any changes in information supplied on the [enrollment] application within 30 days of the change." 42 C.F.R. §§ 424.57(c)(2); 424.516(c). The CMS-855S form states that in order for a DMEPOS supplier to change its address with CMS, a DMEPOS supplier must submit "professional and business licenses for the new address, and proof of insurance covering the new address." P. Ex. 6 at 2.

MedAlert concedes that it had moved from the 4116 Live Oak Street address in early July 2015. P. Br. at 1; CMS Ex. 3. MedAlert also concedes that it did not submit a CMS-855S form to notify CMS of its change of address until October 1, 2015. P. Br. at 2; P. Ex. 7; CMS Ex. 1 at 2. However, MedAlert argues that it had to move its location due to an emergency and that it took time to obtain new license and insurance documents with MedAlert's 4908 Ross Avenue address on them. P. Br. at 2; P. Ex. 1 at 1. MedAlert asserts that its owner had contacted "Medicare" before the move and learned that to change its address, MedAlert needed to provide those documents, reflecting the new address, with a completed CMS-855S. P. Br. at 2; CMS Ex. 1 at 1. Although MedAlert received an updated liability insurance document on July 29, 2015, it did not receive an updated state license and surety bond documents until September 30, 2015, and October 1, 2015, respectively. P. Br. at 2; P. Ex. 1 at 1-2. Based on these facts, MedAlert argues that revocation is inappropriate because its deficiencies did not pose any health or safety risks to the public and that MedAlert was "at all times making best efforts to submit the required documents in order to remain in compliance." P. Br. at 2.

As indicated above, the regulations require a DMEPOS supplier to report changes in its enrollment application information within 30 days of the change. Although the CMS-855S indicates that documents must be submitted reflecting the new address, an inability to provide the documents does not absolve MedAlert from promptly reporting the change of address. MedAlert's move to a new location took place on July 4, 2015 (CMS Ex. 3); therefore, MedAlert had until August 3, 2015, to report the change in address to CMS. By that time, MedAlert already had the new liability insurance document reflecting the updated address (P. Ex. 1 at 1; P. Ex. 3), and MedAlert could have submitted this with the

CMS-855S, along with documentation that it was in the process of obtaining a new license and surety bond. Further, while MedAlert states that it took significant time to obtain updated license and surety bond documents, MedAlert did not provide any specific information as to when it sought those documents or why it took so much time to receive them. Therefore, I do not know if MedAlert acted immediately to secure those documents. My concern related to this issue is heightened by the fact that the CMS-855S form that MedAlert submitted on October 1, 2015, indicates that the effective date of the change in MedAlert's address was August 15, 2015, and not July 4, 2015, as MedAlert stated in its reconsideration request. CMS Ex. 6 at 2. MedAlert's owner certified this information as "true, correct, and complete" on August 15, 2015. CMS Ex. 6 at 3. This clearly incorrect information calls into question the credibility of MedAlert's owner. In any event, MedAlert failed to report its change of address within 30 days of moving to a new location. Therefore, I conclude that MedAlert violated 42 C.F.R. § 424.57(c)(2).

4. CMS failed to make a prima facie showing that Petitioner was not operational.

A supplier is "operational" when 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 (as applicable based on the type of facility or organization, provider or supplier specialty, or the services or items being rendered) to furnish these items or services.

42 C.F.R. § 424.502. CMS may revoke a currently enrolled supplier's Medicare billing privileges in the following circumstance.

> Upon on-site review or other reliable evidence, CMS determines that the provider or supplier is . . . .
>
> > (i) No longer operational to furnish Medicare-covered items or services.

42 C.F.R. § 424.535(a)(5)(i).

Although MedAlert asserts that it had an office at 4908 Ross Avenue on July 14, 2015, i.e., the date of NSC's attempted site inspection, the regulatory definition of the term "operational" refers to the "qualified physical practice location" of a supplier. 42 C.F.R. § 424.502. The "qualified physical practice location" is the address a supplier provided to CMS and is currently on file with CMS. *Care Pro Health, Inc.*, DAB No. 2723 at 6 (2016). Therefore, it follows that:

> when CMS or [its] contractor determines that a provider or supplier, including a DMEPOS supplier, is no longer operating at the practice location provided to Medicare on a paper or electronic Medicare enrollment application that the revocation should be effective with the date that CMS or [its] contractor determines that the provider or supplier is no longer operating at the practice location.

73 Fed. Reg. 69,725, 69,865 (Nov. 18, 2008).

The 4116 Live Oak Street address was MedAlert's address on file with CMS on July 14, 2015. CMS Ex. 1; CMS Ex. 5 at 1, 2. Further, an NSC site inspector verified that MedAlert no longer was operational at that practice location on July 14, 2015. CMS Exs. 3, 5, 6. CMS revoked based on these facts. CMS Ex. 2 at 4-5; CMS Ex. 4 at 2.

However, due to the holding in *Adora Healthcare Services, Inc.*, DAB No. 2714 at 3-7 (2016), I reverse CMS's conclusion that MedAlert violated 42 C.F.R. § 424.535(a)(5)(i) because CMS failed to conduct a second site visit to the 4116 Live Oak address after August 3, 2015 (i.e., the date on which Petitioner was required to provide CMS notice that it changed its practice location).

5. The effective date of Petitioner's revocation is October 1, 2015.

Providers and suppliers are retroactively revoked to the date that CMS determines that the provider or supplier was not operational. 42 C.F.R. § 424.535(g). In its initial determination in this case, NSC made July 14, 2015, Petitioner's revocation effective date, which is the date NSC determined that Petitioner was no longer operational. CMS Ex. 4 at 1, 2. However, I must change the effective date of revocation because I reverse NSC's conclusion that Petitioner was not operational in violation of 42 C.F.R. § 424.535(a)(5).

Petitioner violated 42 C.F.R. § 424.57(c)(2), which is a DMEPOS supplier standard. When CMS revokes a DMEPOS supplier for violating a supplier standard, the revocation is effective 30 days after CMS sends the notice of revocation. In the present case, the initial determination to revoke Petitioner was sent on September 1, 2015. CMS Ex. 4 at 1. Therefore, the correct effective date for Petitioner's revocation is October 1, 2015.

6. It is unnecessary for me to decide whether MedAlert violated 42 C.F.R. § 424.57(c)(7) and (c)(10).

As indicated above, I have concluded that MedAlert violated 42 C.F.R. § 424.57(c)(2). One violation of the DMEPOS supplier standards is sufficient to require CMS to revoke

Medicare billing privileges. *See* 42 C.F.R. § 424.57(e)(1); *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 13 (2009) ("[F]ailure to comply with even one supplier standard is a sufficient basis for revoking a supplier's billing privileges."). Therefore, I need not determine whether further violations of the DMEPOS supplier standards occurred.

VI. Conclusion

I affirm CMS's revocation of MedAlert's Medicare enrollment and billing privileges based on a violation of 42 C.F.R. § 424.57(c)(2). Because I reversed CMS's determination that Petitioner was not operational, I modify the effective date of Petitioner's revocation to October 1, 2015.

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            /s/

Scott Anderson
Administrative Law Judge

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