Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Genuine Care Rehabilitation Services, Inc.
Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-13-1185

Decision No. CR3077

Date: January 14, 2014

DECISION

The Centers for Medicare & Medicaid Services (CMS) revoked Petitioner's Medicare supplier number. Petitioner, Genuine Care Rehabilitation Services, Inc., appeals. As discussed below, the uncontroverted facts compel revocation of Petitioner's supplier billing number. Therefore, I affirm the decision to revoke Petitioner's billing privileges.

I. Background

The following facts are undisputed unless otherwise noted. Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). CMS Exhibit (Ex.) 2, at 7. A CMS contractor from the National Supplier Clearinghouse (NSC) attempted to conduct two site inspections at Petitioner's location on file with the NSC: 7520 Broadway Ext., Suite 204, Oklahoma City, Oklahoma 73116. CMS Ex.1, at 3; CMS Ex. 2, at 27-33. The first was May 20, 2013 at approximately 11 a.m. and the second on May 21, 2013 at approximately 10 am. At the time of the two inspection attempts, Petitioner's posted hours of operation at the business entrance were Monday through Friday, from 9:30 a.m. to 4 p.m. CMS Ex. 2, at 33.[1] On

[1] A photo of Petitioner's front door indicates its hours of operation and immediately below what appears to be a telephone number with one of the numbers missing and with no area code. CMS Ex. 2, at 33.

both visits, the NSC inspector knocked on the door and no one answered, and the windows were heavily tinted so the inspector was unable to see inside. CMS Ex. 2, at 32. The door was locked. There was no one at the location to provide entry to the facility so that the inspector could continue the on-site inspection. CMS Ex. 2, at 32. On June 5, 2013, NSC sent a letter notifying Petitioner that it was revoking Petitioner's supplier number effective May 21, 2013, the date CMS determined that Petitioner's practice location was not operational. CMS Ex. 2, at 7. NSC barred Petitioner from re-enrolling for two years from this effective date. *Id.*

The notice letter specifically stated that the basis for the revocation was that Petitioner was in violation of 42 C.F.R. § 424.57(c)(7) and 42 C.F.R. § 424.535(a)(5)(ii)[2] because it was closed during posted hours of operation when a NSC inspector attempted to complete site inspections to verify Petitioner's compliance with supplier standards. *Id.* at 2. The notice letter further informed Petitioner of its right to request reconsideration of the revocation determination within 60 days of the postmark of the notice. Petitioner filed a timely request for reconsideration on June 13, 2013. CMS Ex. 2, at 11. On July 24, 2013, a hearing officer issued an unfavorable decision and upheld the revocation of Petitioner's supplier number because Petitioner was not in compliance with Suppler Standard 7. CMS Ex. 1, at 2; 42 C.F.R. § 424.57(c)(7).

By submission-filed on August 6, 2013, Petitioner requested a hearing with the Civil Remedies Division of the Departmental Appeals Board (DAB). With its hearing request, Petitioner attached a copy of the reconsideration decision as well as a 12 other attachments and six photos. This case was assigned to me for decision.

On September 19, 2013, we received Petitioner's prehearing exchange consisting of 15 exhibits, P. Exs. 1-15. On September 20, 2013, CMS filed its prehearing exchange and brief supporting its motion for summary judgment together with two exhibits, CMS Exs. 1-2. On December 6, 2013, we received Petitioner's "Written Summary" dated

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[2] This subsection states: "(a) *Reasons for revocation*. CMS may revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement for the following reasons: . . . (5) *On-site review*. CMS determines, upon on-site review, that the provider or supplier is no longer operational to furnish Medicare covered items or services, or is not meeting Medicare enrollment requirements under statute or regulation to supervise treatment of or to provide Medicare covered items or services for, Medicare patients. Upon on-site review, CMS determines that -- . . . (ii) A Medicare Part B supplier is no longer operational to furnish Medicare covered items or services, or the supplier has failed to satisfy any or all of the Medicare enrollment requirements, or has failed to furnish Medicare covered items or services as required by the statute or regulations."

November 26, 2013, postmarked November 27, 2013, together with three additional exhibits marked P. Exs. 1-3, in response to CMS's brief. To avoid any confusion with Petitioner's other exhibits, I re-mark these exhibits as P. Exs. 16-18.[3]

II. Applicable Law

To receive Medicare payments for items furnished to a Medicare-eligible beneficiary, the Secretary of the U.S. Department of Health and Human Services issues a supplier number to a DMEPOS supplier. Social Security Act (Act) § 1834(j)(1)(A). To receive such direct-billing privileges, a DMEPOS supplier must also meet and maintain each of the 25 supplier enrollment standards set forth in 42 C.F.R. § 424.57(c)(1)-(25). Among other things, a DMEPOS supplier must maintain a physical facility on an appropriate site which is accessible to the public, is accessible and staffed during posted hours of operation, and which maintains a visible sign and posted hours of operation. 42 C.F.R. § 424.57(c)(7). Also, a DMEPOS must permit CMS or its agent to conduct on-site inspections to ascertain supplier compliance with each of these enrollment standards. 42 C.F.R. § 424.57(c)(8). A provider or supplier is operational if 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 these items or services." 42 C.F.R. § 424.502. CMS will revoke a currently-enrolled Medicare supplier's billing privileges if CMS or its agent determines that the supplier is not in compliance with any supplier enrollment standard. *See* 42 C.F.R. § 424.57(d); *A to Z DME, LLC*, DAB No. 2303, at 3 (2010); *see also 1866ICPayday.com*, 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.").

Suppliers who have had their billing privileges revoked "are barred from participating in the Medicare program from the effective date of the revocation until the end of the re-enrollment bar," which is "a minimum of 1 year, but not greater than 3 years depending on the severity of the basis for revocation." 42 C.F.R. § 424.535(c).

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[3] Also, the DAB E-file record (items 15 and 16) indicates we uploaded to our system on December 30, 2013 duplicates of Petitioner's December 6, 2013 submission which apparently were mailed to our office on October 3, 2013 (received October 15, 2013) and October 11, 2013 (received October 17, 2013), but were not uploaded to the DAB E-file system at that time due to the government shutdown. Because I was not aware of these submissions, I issued an Order to Show Cause to Petitioner to which Petitioner promptly responded. In retrospect there was no need for the Order to Show Cause as Petitioner timely responded to CMS's submission. P. Ex. 16 is the BOC Accreditation Certificate for Petitioner's 7510 Broadway location; P. Ex. 17 is the BOC Accreditation Certificate for Petitioner's 4800 N. Classen Boulevard location; and P. Ex. 18 is a copy of a November 13, 2013 email from Mr. Barlow to my staff attorney.

III. Issue

The issue is whether CMS had a legitimate basis to revoke Petitioner's Medicare billing privileges.

IV. Findings of Fact and Conclusions of Law

A. This case is appropriate for summary judgment.

CMS filed a Motion for Summary Judgment. Board Members of the Appellate Division of the DAB (the Board) stated the standard for summary judgment as follows:

> Summary judgment is appropriate when the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. . . . The party moving for summary judgment bears the initial burden of showing that there are no genuine issues of material fact for trial and that it is entitled to judgment as a matter of law. . . . To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact – a fact that, if proven, would affect the outcome of the case under governing law. . . . In determining whether there are genuine issues of material fact for trial, the reviewer must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.

Senior Rehab. & Skilled Nursing Ctr., DAB No. 2300, at 3 (2010) (citations omitted). The role of an ALJ in deciding a summary judgment motion differs from the ALJ's role in resolving a case after a hearing. The ALJ should not assess credibility or evaluate the weight of conflicting evidence. *Holy Cross Vill. at Notre Dame*, DAB No. 2291, at 4-5 (2009). Here, Petitioner has not disputed the material facts that CMS alleges: no one was present at Petitioner's location during the Medicare on-site visits attempted during Petitioner's posted hours of operation.

B. CMS had a legitimate basis to revoke Petitioner's supplier number because Petitioner was not open and accessible to inspectors or the public.

On May 20, 2013, the NSC inspector attempted at 11:00 a.m. to conduct an unannounced site inspection on behalf of CMS at Petitioner's location during its posted hours of operation. However, she found that she could not enter because the office was closed. She noted that the door sign indicated that office hours were Monday through Friday,

9:30 a.m. through 4 p.m. CMS Ex. 2, at 28. She knocked, but no one answered. CMS Ex. 2, at 32. The inspector made a second attempt to inspect arriving on May 21, 2013 at 10 a.m. CMS Ex. 2, at 27. Again the office was closed.

The inspector took date-stamped photographs of the suite's door with the posted hours of operation as well as photographs of the exterior of the building and the handicap access to the building. CMS Ex. 2, at 33. Petitioner did not have any staff at the store to allow the inspector access, nor was the store "open" on these two occasions for business during posted hours of business.

Petitioner concedes that at the time of the two site visits, the staff was temporarily unavailable at the 7510 Broadway location. Petitioner explains that it did not schedule appointments on these days and had the phone forwarded to the office administration for emergencies because Petitioner's staff were in meetings related to the relocation and remodel to a new location, 4800 N. Classen Boulevard. RFH; November 26, 2013 Written Summary (P. Summary). Petitioner contends nevertheless that it was operational. Petitioner further contends that a contact number was located on the entrance to the facility, and the inspector could have called and someone would have responded as soon as possible. P. Summary. Petitioner further argues that knowing the ramifications of a revoked billing privilege, a courtesy call should have been made and that it was just coincidence that the very days of the onsite inspections, the staff were in meetings discussing and planning for the relocation. Petitioner contends that this revocation will put Petitioner out of business.

Petitioner presented certain documents in an effort to show that its business was an ongoing concern. However, these records and documents do not present a dispute of material fact as to whether anyone was present when the inspector attempted the on-site visits. P. Ex. 3 (Liability Insurance effective March 16, 2013); P. Ex. 7 (the rental agreement for the new location indicating that the rental began on July 8, 2013); P. Ex. 13 (a facility relocation application from Petitioner to the Board of Certification/Accreditation indicating Petitioner's new address and its hours of operation, dated August 6, 2013).

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). Among other things, a DMEPOS supplier must permit CMS or its agent to conduct on-site inspections to ascertain supplier compliance with each of the 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). A supplier is neither "open to the public" nor "accessible," if the supplier's location is closed due to staff out for lunch, on a break, or making patient deliveries or visits. It is incumbent on Petitioner to make whatever reasonable arrangements are necessary to keep its business open while allowing for patient

consultations and visits. "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 A to Z DME, LLC*, DAB No. 2303 (2010).

The Board also has held that the supplier standard "would have no meaning if suppliers could deviate from their posted hours of operation on a regular basis." *Ita Udeobong, d/b/a/ Midland Care Med. Supply and Equipment*, DAB No. 2324, at 7 (2010). In *Udeobong*, the petitioner admitted that it was closed from noon until 1:00 p.m. every day for lunch, which was during its regularly posted hours of 10 a.m. to 5 p.m., Monday through Friday. The Board further held that "[t]his problem would not be cured even if . . . its employees posted temporary signs when they left, stating when they would return." *Id.* CMS and its contractors have limited resources and cannot be compelled to attempt multiple on-site inspections during a supplier's posted business hours to determine if a supplier is complying with all Medicare requirements.

While Petitioner submitted evidence, such as copies of its liability insurance and surety bond riders, that would indicate its intention to remain a DMEPOS at the new location, there was no evidence to show that Petitioner was open and accessible on May 20 and 21, 2013. Nor is there evidence to show that somehow the NSC inspector would have reason to know why Petitioner's offices were closed on the two days she tried to inspect the facility. Moreover, while Petitioner contends that the inspector should have called, the part of the telephone number on the door was missing. *See* CMS Ex. 2 at 33 (photo of door shows digit missing from phone number). Nevertheless, even if Petitioner's staff were reachable by phone during temporary absences, Petitioner would still not meet the requirement to remain open and accessible during its hours of operation. *Complete Home Care, Inc.*, DAB No. 2525, at 6 (2013). What the inspector could ascertain, and what would appear to the general public if they were to arrive at this location, was that the office was closed for two consecutive days and it was not open or accessible.

C. I am unauthorized to grant Petitioner's requests for equitable relief for enrollment because it did not meet the legal requirements for enrollment.

Petitioner makes various arguments for equitable relief despite not meeting the legal requirements for being open and accessible during posted business hours on the dates and times of the two attempted site visits. However, I am without authority to order CMS to provide an exemption to Petitioner under the circumstances because Petitioner's equitable arguments give me no grounds to restore Petitioner's billing privileges. *See US Ultrasound*, DAB No. 2302, at 8 (2010) ("[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not meet

statutory or regulatory requirements."). Moreover, I have no authority to declare statutes or regulations invalid or ultra vires. *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009) ("[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground.").

V. Conclusion

I find Petitioner was not in compliance with Medicare enrollment requirements when it was not open and accessible on two separate occasions during its posted hours of operation. I therefore grant CMS's motion for summary judgment and sustain the revocation of Petitioner's supplier number for DMEPOS Medicare billing privileges, effective May 21, 2013. Accordingly, Petitioner is barred from re-enrolling for two years from the effective date of its revocation.

/s/
Joseph Grow
Administrative Law Judge