

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Marcus Singel, D.P.M.,
(Supplier No.: 085936400001)

Petitioner,

v.

Centers for Medicare & Medicaid Services

Docket No. C-14-1113

Decision No. CR3302

Date: July 21 , 2014

DECISION

I sustain the determination of a Medicare contractor, as adopted by the Centers for Medicare & Medicaid Services (CMS), to revoke the enrollment of Petitioner, Marcus Singel, D.P.M., as a supplier to the Medicare program of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). The uncontroverted facts establish that Petitioner did not comply with participation requirements governing DMEPOS and CMS is authorized to terminate Petitioner's participation on that basis.

I. Background

Petitioner requested a hearing to challenge an adverse reconsideration determination that affirmed CMS's determination to revoke, and the case was assigned to me for a hearing and a decision. CMS then moved for summary judgment, filing a brief and six proposed exhibits that are identified as CMS Ex. 1 – CMS Ex. 6. Petitioner filed a response to CMS's motion that included several attachments. Petitioner did not specifically identify these attachments as exhibits but I infer that he wants me to consider them as evidence supporting his arguments. The attachments consist of a photograph of Petitioner's office with a sign showing the office's days and hours of operations, a document showing proof

of payment of Petitioner's Medicare enrollment fee, and several invoices for product sales made on various dates.

I receive CMS's exhibits into the record. I also receive Petitioner's attachments, which I am consolidating into a single exhibit, P. Ex. 1. It is unclear whether Petitioner offered these attachments at reconsideration of his case and his failure to do so could be a basis for excluding them. However, CMS has raised no objection to my receiving the attachments.

CMS characterizes its motion as a motion for summary judgment. It is unnecessary for me to determine whether the criteria for summary judgment are met here because neither party has demanded to present testimony at an in-person hearing. Therefore, I decide the case based on the parties' written submissions.

II. Issues, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether Petitioner failed to comply with DMEPOS participation requirements, thereby justifying CMS's determination to terminate Petitioner's Medicare participation.

B. Findings of Fact and Conclusions of Law

Petitioner's participation as a supplier in Medicare is governed by regulations at 42 C.F.R. pt. 424. A supplier must comply with Medicare participation requirements. Failure by a supplier to comply will result in revocation of its participation. 42 C.F.R. §§ 424.57(c)(24), (d). Moreover, CMS may revoke a supplier's participation if it determines that the supplier is no longer "operational." 42 C.F.R. § 424.535(a)(5). The term "operational" is defined to mean that a supplier:

has a qualified physical practice location, is open to the public for the purposes of providing health care related services, is prepared to submit valid Medicare claims, and is properly staffed, equipped, and stocked . . . to furnish . . . items or services.

42 C.F.R. § 424.502.

The regulatory requirements – in addition to the requirement that it be operational – that a DMEPOS supplier must comply with include the requirement that it be accessible to the public and staffed during posted hours of operation and that it maintain a permanent and visible sign in plain view that posts its hours of operation. Additionally, the supplier

must permit agents of a Medicare contractor or of CMS to conduct on-site inspections in order to verify compliance with participation requirements. 42 C.F.R. §§ 424.57(c)(7)(i), (8).

The material facts are uncontroverted. On January 3 and 7, 2014, during normal working hours (1:59 p.m. and 11:40 a.m.), an inspector visited Petitioner's office. On both occasions the inspector found the office to be locked and no one responded to her knocking. There was no sign posted showing hours of operations. CMS Ex. 1.

These facts are ample support for CMS's determination. Petitioner was not open to the public on the dates and times in question, he did not have a sign posting his hours of operation, and he was not "operational" in that he was not open to the public for purposes of providing health care related services. Furthermore, he effectively denied the contractor's inspector access to his premises on the dates in question.

Petitioner has provided nothing that would support a conclusion that he was complying with regulatory requirements. He asserts that on January 3, 2014 his office was "closed for the holidays" and that it reopened on January 7, 2014. That is not a defense because, as a requirement for Medicare participation, his business had to be open and operational on the dates in question. Moreover, Petitioner's assertion that his business reopened on January 7, 2014 is belied by the inspector's inability to gain access to the premises on that date.

Petitioner also asserts that he posted a sign showing his hours of operation immediately upon receiving a notice from the Medicare contractor advising him that his participation as a supplier had been terminated. That action was belated, however. Petitioner does not assert that he had the requisite sign in January 2014.

Finally, Petitioner asserts that he has paid his Medicare provider re-enrollment fee. However, CMS is not asserting at this time that failure to pay that fee was a basis for terminating Petitioner's Medicare participation as a supplier.

/s/
Steve T. Kessel
Administrative Law Judge