Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Texas Medical Care, LLC,
(NPI: 1104101120),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-779

Decision No. CR4764

Date: December 21, 2016

DECISION

Petitioner, Texas Medical Care, LLC, is a home health agency (HHA) that, until recently, participated in the Medicare program as a provider of services. The Centers for Medicare & Medicaid Services (CMS) revoked its Medicare provider number, finding that it is not operational. Petitioner appeals.

For the reasons set forth below, I find that CMS properly revoked Petitioner's provider number.

Background

Until its Medicare provider number was revoked on June 26, 2014, Petitioner participated in the Medicare program as a home health agency in Bellaire, Texas.

In a letter dated September 12, 2014, the Medicare contractor, Palmetto GBA, notified Petitioner that its provider number was revoked effective June 26, 2014, pursuant to 42 C.F.R. § 424.535(a)(5), because, based on an on-site visit, the HHA was not

operational to furnish Medicare covered items or services and did not meet Medicare enrollment requirements. CMS Exhibit (Ex.) 1. Petitioner sought reconsideration. CMS Ex. 2.

In a reconsideration determination, dated November 3, 2014, CMS affirmed the revocation. CMS Ex. 6. Petitioner now appeals that determination. CMS has moved for summary judgment, which Petitioner opposes. I decline to rule on CMS's motion. My pre-hearing order directed each party to submit the written direct testimony of any proposed witness and to indicate affirmatively its intent to cross-examine any proposed witness. Acknowledgment and Pre-hearing Order at 5 (¶¶ 8, 9). Because neither party asks to cross-examine any of the opposing party's witnesses, we would have nothing to do at an in-person hearing. I therefore close the record and decide the case on the written submissions, without further proceedings.

With its motion for summary judgment/pre-hearing brief (CMS Br.), CMS submitted seven exhibits (CMS Exs. 1-3 and 5-8). CMS obviously intended to submit eight exhibits and lists eight in its exhibit list, but, in error, CMS filed the same document twice, marked as CMS Exs. 3 and 4. The document CMS intended to submit as CMS Ex. 4, an October 10, 2014 letter from Petitioner, is in the record, however, as P. Ex. C, p. 4, so CMS need not submit an additional copy.

Petitioner objects to two of CMS's exhibits: CMS Ex. 7 and CMS Ex. 8.

- CMS Ex. 7 is a copy of the Site Verification Survey Form, prepared by the site investigator, Paul Farmer, to which copies of photographs are attached. Petitioner complains that the document is not signed or dated by the investigator, and does not comply with sections 15.19.2.2; 15.20; and 15.20.1 of the Medicare Program Integrity Manual.

- CMS Ex. 8 is Paul Farmer's written declaration, to which additional photographs are attached. Paul Farmer is the contractor's site investigator, who testifies that he twice attempted an on-site review of Petitioner's practice location. Petitioner objects that the declaration is not dated and violates 28 U.S.C. § 1746 (which requires declarations to be dated). In response, CMS submitted an amended, dated version of the declaration, explaining that it had inadvertently omitted the date from the first version.

No manual provision dictates whether evidence is admissible in this forum. The regulations governing these proceedings authorize me to admit evidence that is relevant and material. 42 C.F.R. § 498.60(b)(1).[1] *See also* 42 C.F.R. § 498.61 (providing that evidence may be admitted "even though inadmissible under the rules of evidence applicable to court procedure."). I therefore overrule Petitioner's objections and admit CMS Exs. 1-3 and 5-8.

Petitioner submits its own pre-hearing brief and opposition to CMS's motion (P. Br.). With its hearing request, it submitted exhibits marked P. Exs. A-E, and, with its brief, it submitted exhibits marked P. Exs. 9-13.[2] In the absence of any objection, I admit into evidence P. Exs. A-E and 9-13.

Discussion

> ***Because the HHA was not operational when the site inspector visited its premises in June 2014, CMS properly revoked its Medicare enrollment pursuant to 42 C.F.R. § 424.535(a)(5).*** [3]

To maintain its Medicare enrollment and billing privileges, providers (which include home health agencies) must be operational and comply with program requirements. *See* 42 C.F.R. §§ 400.202; 424.500; 424.505; 424.510; 424.516; 424.530. To be operational, the provider must, among other requirements, have a "qualified practice location" that is "open to the public for the purpose of providing health care related services." It must be properly staffed, equipped, and stocked (based on the type of provider it is) to furnish those services. 42 C.F.R. § 424.502.

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[1] In any event, the cited manual provisions instruct investigators to document their visits and, based on specified criteria, to determine whether the provider/supplier is operational. Here, the investigator's written declaration supplies the information he omitted from the form.

[2] Petitioner submits an exhibit list identifying P. Exs. A-E as P. Exs. 1-5. Although it did not submit P. Exs. 6 through 8, those exhibits are listed and describe documents already in the record: the reconsideration determination (P. Ex. 6, which is admitted as CMS Ex. 6), the request for hearing (P. Ex. 7), and site visit report (P. Ex. 8, which is admitted as CMS Ex. 7).

[3] I make this one finding of fact/conclusion of law.

CMS may perform an on-site inspection to determine the provider's compliance with Medicare enrollment requirements. 42 C.F.R. §§ 424.510(d)(8); 424.517(a)(1). If, upon on-site review, CMS determines that the provider is no longer operational to furnish Medicare-covered items and services, it may revoke Medicare billing privileges. 42 C.F.R. § 424.535(a)(5)(i).

In this case, at 12:20 p.m. on June 24, and at 12:00 p.m. on June 26, 2014, Paul Farmer, a site investigator working for the Medicare contractor, went to Petitioner's practice location, 4539 Wedgewood Drive, Bellaire, Texas. CMS Ex. 8 at 1-2 (Farmer Decl. ¶¶ 2, 3). On both occasions, he found what appeared to be a private residence in a residential neighborhood. He saw no signage identifying the agency, and no hours of operation were posted. He knocked on the door but no one answered. CMS Ex. 8 at 2 (Farmer Decl. ¶ 4). He took photographs, which confirm his description of the premises. CMS Ex. 8 at 2 (Farmer Decl. ¶¶ 5, 7); *see* CMS Ex. 8 at 4-13. Petitioner concedes the accuracy of those photographs. P. Br. at 6 (stating that Texas Medical Care "is not alleging that the photos taken by the surveyor are incorrect.").

Petitioner nevertheless maintains that it was operational on June 24 and 26. In support, it submits written declarations from the agency's owner and several employees. All maintain, without providing much detail, that the HHA was "open for business and fully operational" at the time of Investigator Farmer's on-site visit. P. Ex. 9 at 2 (Kirmani Decl. ¶ 6); P. Ex. 11 at 1 (Whyte Decl. ¶ 5); P. Ex. 13 at 1 (Clark Decl. ¶ 4). That the business had employees or even some clients does not make it "operational." Petitioner has not established that it was "properly staffed, equipped, and stocked," criteria essential for establishing that an HHA is operational.

Without offering specifics (such as an exact date), Owner Faisal Kirmani also suggests that the agency had "problems" with the doorbell and made efforts to repair it. P. Ex. 9 at 2 (Kirmani Decl. ¶ 5). But Investigator Farmer testified that, on both occasions, he knocked on the agency door; a malfunctioning doorbell does not explain why staff – if present – did not respond to Investigator Farmer's knocks. CMS Ex. 8 at 2 (Farmer Decl. ¶ 4).

Petitioner also submits evidence that is, at best, irrelevant and may even suggest that the HHA did not comply with enrollment requirements as of June 2014:

- Petitioner submits a certificate of liability insurance indicating that the agency obtained insurance coverage effective October 2014, more than three months after the failed site inspection. P. Ex. C at 3.

- Petitioner submits a one line statement from the city fire inspector indicating that an October 10, 2014 inspection of the premises revealed no violations of the city

fire code. P. Ex. C at 5. Again, even if the record reflected the significance of this inspection (which it does not), it came months after the failed site inspection.

- Finally, Petitioner submits a written declaration from the HHA's director of nursing indicating that she began working for the agency on August 14, 2014, again well after the date of the unsuccessful inspection. P. Ex. 12 (Dandie Decl.).

Based on these facts, I find that Petitioner was not operational within the meaning of 42 C.F.R. § 424.535(a)(5) and CMS properly revoked its Medicare billing privileges.

Finally, Petitioner complains about an erroneous sentence in the reconsideration determination: "[The HHA] has demonstrated that they (sic) made a change of address with the appropriate state agencies, however, no evidence has been provided to demonstrate that any change of practice location was sent to CMS." CMS Ex. 6 at 1-2. Obviously, this case involves no change in practice location, and the sentence was added in error. Nevertheless, the reconsideration determination accurately sets forth the basis for revoking Petitioner's billing privileges; it includes the correct date for one of the site visits, and the practice location's correct address. Petitioner thus had adequate notice of the basis for its revocation. *See Fady Fayad*, DAB No. 2266 at 11-12 (2009) (holding that the *de novo* proceedings before an ALJ cured alleged deficiencies of the reconsideration determination).

Conclusion

Because the undisputed facts establish that Petitioner was not operational, CMS properly revoked its provider number and billing privileges pursuant to 42 C.F.R. § 424.535(a)(5).

____/s/_____
Carolyn Cozad Hughes
Administrative Law Judge