

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

A Plus Diabetic Footwear and Supplies,

Petitioner,

v.

Centers for Medicare and Medicaid Services.

Docket No. C-13-146

Decision No. CR2788

Date: May 16, 2013

DECISION

Palmetto GBA (Palmetto), an administrative contractor acting on behalf of the Centers for Medicare and Medicaid Services (CMS), found A Plus Diabetic Footwear and Supplies (Petitioner) not to be operational and revoked Petitioner's billing privileges as a supplier in the Medicare program. Petitioner appealed. For the reasons stated below, I affirm the determination to revoke Petitioner's enrollment.

I. Background

In September 2011, Petitioner completed an application to enroll in the Medicare program as a supplier of durable medical equipment, orthotics, prosthetics, and supplies (DMEPOS). CMS Ex. 1. Petitioner provided its address as 951 North 1st Street, Albemarle, NC 28001. CMS Ex. 1, at 3. In November 2011, Petitioner was enrolled as a supplier. CMS Ex. 2. However, by the beginning of November 2011, Petitioner had vacated the premises at 951 North 1st Street. CMS Ex. 3, at 6. On or about November 28, 2011, Petitioner signed and submitted a Form CMS-855S to inform CMS that its mailing address had changed to 1205 Ash Street, Albemarle, NC 28001; Petitioner clearly stated that "[w]e are not changing business location, just the mailing address." CMS Ex. 6, at 1-5. Petitioner did not otherwise inform CMS of a change of address. CMS Ex. 7 ¶ 16. On June 15, 2012, an inspector for Palmetto attempted to conduct an

on-site inspection of Petitioner at its enrolled business address, 951 N. 1st Street, Albemarle, North Carolina 28001. CMS Ex. 3. The site investigator found Petitioner not to be operational at that address. CMS Ex. 3, at 1, 2, 6. On July 2, 2012, CMS revoked Petitioner's enrollment as a supplier in the Medicare program, effective June 15, 2012, and established a two year re-enrollment bar. CMS Ex. 4. On July 17, 2012, Petitioner requested reconsideration of the revocation, and submitted a corrective action plan (CAP) with a Form CMS-855S indicating that Petitioner's mailing address was 1205 Ash Street, Albemarle, NC 28001 and physical address was 1205 Ash Street, New London, NC 28127. CMS Ex. 8. Palmetto rejected the CAP because a site inspector determined that Petitioner's purported address in New London, NC did not exist. CMS Ex. 9 at 2. On October 24, 2012, CMS issued an unfavorable reconsidered determination affirming the revocation. CMS Ex. 5.

Petitioner timely filed a request for a hearing (RFH) with the Departmental Appeals Board, Civil Remedies Division.¹ In response to my November 30, 2012 Acknowledgment and Pre-hearing Order (Order), CMS filed a Motion for Summary Judgment and nine proposed exhibits. CMS listed one witness, Tameka Harris, and included a declaration from Ms. Harris as CMS exhibit (Ex.) 7. Petitioner filed a two page brief without any exhibits or listing any witnesses (P. Br.). Because Petitioner did not object to CMS's witness or any of CMS's proposed exhibits, I admit CMS Exs. 1 through 9 into the record. Petitioner failed to affirmatively state that it wishes to cross-examine CMS's witness, as directed by my Acknowledgement and Prehearing Order. Order ¶¶ 9-10. Accordingly, no hearing will be held, the record is closed, and I will issue this decision based on the written record. *See* Order ¶ 11.

II. Discussion

In order to participate in the Medicare program as a supplier, a prospective supplier must complete the applicable Form CMS-855 enrollment application, which requires disclosure of the supplier's address. *See* 42 C.F.R. § 424.510(a). CMS may perform periodic revalidations and on-site reviews to verify the enrollment information submitted to CMS, determine the supplier's compliance with Medicare enrollment requirements, and determine whether the supplier is operational. 42 C.F.R. §§ 424.510(d)(8); 424.515(c), 424.517(a). CMS may revoke a supplier's enrollment if it is not operational. 42 C.F.R. § 424.535(a)(5). CMS may revoke a DMEPOS supplier's enrollment if it fails

¹ Petitioner has the right to administrative law judge review of an unfavorable reconsidered determination to revoke billing privileges. 42 C.F.R. §§ 498.3(b)(17); 498.5(l)(2); 498.40. However, the denial of a CAP is not reviewable in this proceeding. *Home Health Connect*, DAB No. 2419, at 10-11 (2011).

to comply with any of the supplier standards. 42 C.F.R. § 424.57(d). Supplier standard seven requires a supplier to maintain a physical facility on an appropriate site. 42 C.F.R. § 424.57(c)(7).

A. Issue

Whether CMS has a legitimate basis to revoke Petitioner's enrollment as a supplier in the Medicare program based on a determination that Petitioner was not operational under 42 C.F.R. § 424.535(a)(5) and that it failed to comply with supplier standard seven under 42 C.F.R. § 424.57(c)(7).

B. Findings of Fact, Conclusions of Law, and Analysis²

- 1. During the June 15, 2012 site visit, the site inspector observed that another business was located at the address Petitioner provided as its business location and concluded that Petitioner did not otherwise appear operational.***

Palmetto's site inspector conducted his site visit of Petitioner's business location at 11:05 a.m. on June 15, 2012. CMS Ex. 3. The site inspector went to the location listed as the business address on Petitioner's enrollment application, 951 N. 1st Street, Albemarle, North Carolina 28001. CMS Ex. 1, at 3. This location did not have a sign with the supplier's business name posted on the facility and did not have hours of operation posted. CMS Ex. 3, at 2. The site inspector noted on the site survey form that he was unable to conduct the site inspection because another business, First Street Thrift, was now operating in the space that should have been Petitioner's business location. CMS Ex. 3, at 6. The owner of First Street Thrift told the site inspector that he took over the space in November 2011 and that A Plus Diabetic Footwear and Supplies was no longer in business. CMS Ex. 3, at 2, 6.

Consistent with the inspector's observations, Petitioner admitted that it had "relocated as of 11-01-2011 to the current date" to another location. Petitioner's RFH at 1. Somewhat contradictorily, Petitioner later stated that it was "still in the [N. 1st Street] location through 2011, until [it] had established through the city zoning that we would operate the business from 1205 Ash Street." P. Br. at 1. Petitioner explained that:

I can honestly say I do not understand what the problem is: we couldn't afford the rent at the other place, moved to our new location, told our patients and updated our business license and insurance, WE JUST

² My findings of fact and conclusions of law are set forth, in italics and bold font.

FORGOT TO TELL MEDICARE. . . . [W]hy does it matter where we were operating from, we would have eventually realized we needed to inform you

P. Br. at 2 (emphasis in original). Therefore, I find that Petitioner was not operational at the location listed on its Medicare application and did not inform Medicare of its change to a new location prior to the time the site inspector conducted the site survey on June 15, 2012.

2. CMS has a legitimate basis to revoke Petitioner's enrollment in the Medicare program because Petitioner was not operational pursuant to 42 C.F.R. § 424.535(a)(5) and did not comply with 42 C.F.R. § 424.57(c)(7).

CMS may revoke a currently enrolled supplier's Medicare billing privileges if:

CMS determines, upon on-site review, that the provider or supplier is no longer operational to furnish Medicare covered items or services 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 statute or regulations.

42 C.F.R. § 424.535(a)(5)(ii).

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." *Id.* § 424.502. CMS has authority to perform off cycle revalidations that may be accompanied by site visits. *Id.* § 424.515(d). The purpose of a site visit is to verify information on file with the contractor and to confirm compliance with Medicare supplier standards. § 424.517(a). The Palmetto enrollment file, and the Provider Enrollment, Chain, and Ownership System do not indicate that Petitioner notified Palmetto of its change in business address prior to the revocation. CMS Ex. 7 ¶¶ 13, 16. Petitioner admits that it did not submit a change of business address prior to the revocation. P. Br. at 2. In the present matter, the undisputed facts indicate that CMS performed a site visit that was within its authority and

found that another business was operating at the business address listed in Petitioner's enrollment application, and Petitioner did not notify Medicare that it had moved to a different location.

In its brief, Petitioner does not dispute the observations of the site inspector during the June 15, 2012 attempted site visit. Instead, Petitioner states, "I do not understand why [the site inspector] did not contact us at that time and request where we were located at, so that we could discuss with him what paperwork needed to be completed."

P. Br. at 1. Petitioner cannot place the burden of locating a supplier on the contractor or its employees. Petitioner must timely notify the contractor of any change in location. 42 C.F.R. § 424.516(d)(2).

It is also undisputed that on November 28, 2011, Petitioner submitted a change of mailing address form listing 951 N. 1st Street, Albemarle, North Carolina 28001 as its business location and 1205 Ash Street Albemarle, North Carolina only as its new mailing address. CMS Ex. 6, at 1-9; CMS Ex. 7 ¶ 14. Petitioner included a hand written comment on this form stating: "We are not changing our business location, just the mailing address. We are having problems with our mail service at the business location." CMS Ex. 6, at 1. This form was signed November 28, 2011, 27 days after the purported relocation date referred to in Petitioner's hearing request. RFH at 1.

Revocation of enrollment is a discretionary act of CMS, *see* 42 C.F.R. § 424.535(a), and through the reconsideration process, CMS can decide to exercise its discretion not to revoke a supplier should the circumstances warrant such action. *See* 42 C.F.R. § 498.24. However, I do not have the authority to review CMS's discretionary act to revoke a provider or supplier. *Letantia Bussell*, DAB No. 2196, at 13 (2008). Rather, "the right to review of CMS's determination by an [administrative law judge] serves to determine whether CMS has the authority to revoke [the provider's or supplier's] Medicare billing privileges, not to substitute the [administrative law judge's] discretion about whether to revoke." *Id.* Once CMS establishes a legal basis on which to proceed with a revocation, then the action to revoke is a permissible exercise of discretion. *See id.* at 10.

In the present matter, CMS provided evidence, which is undisputed, that Petitioner was not operational on June 15, 2012, at its business address listed in Petitioner's enrollment application and that Petitioner had not been operational at that location since the end of 2011. Petitioner clearly understood that it needed to provide CMS with information concerning an address change because it timely submitted a change in its mailing address. Despite Petitioner's failure to properly change its business address, Palmetto sent a site inspector to the physical address provided by Petitioner in its CAP; however, Petitioner provided an incorrect address and the site inspector could not find Petitioner's business address listed in New London, North Carolina. CMS Ex. 5, at 3. During both attempted site inspections, the site inspector was unable to access Petitioner's facility to verify compliance with the supplier standards. Petitioner submitted no evidence that it had

timely submitted any paperwork to CMS of its alleged change of business address prior to the revocation. Therefore, I conclude that CMS had a legal basis to revoke Petitioner's billing privileges under 42 C.F.R. § 424.535(a)(5)(i) and 42 C.F.R. § 424.57(c)(7).

III. Conclusion

Because Petitioner was not operational at the business location listed in its enrollment application when CMS conducted a site visit and Petitioner did not notify CMS of a change of address, CMS's revocation of Petitioner's enrollment and billing privileges in the Medicare program is affirmed.

/s/
Scott Anderson
Administrative Law Judge