

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Health Gate LLC,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-1162

Decision No. CR3611

Date: January 30, 2015

DECISION

I grant the motion of the Centers for Medicare & Medicaid Services (CMS) for summary judgment finding the undisputed evidence supports the revocation of Petitioner's Medicare enrollment and billing privileges because it was not accessible and properly staffed during its hours of operation.

I. Background

Petitioner participated in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). *See* 42 C.F.R. § 424.57. In a letter dated February 7, 2014, Palmetto GBA National Supplier Clearinghouse (NSC), an administrative contractor acting on behalf of CMS, notified Petitioner that NSC retroactively revoked Petitioner's Medicare supplier number pursuant to 42 C.F.R. §§ 405.800; 424.57(e); 424.535(a)(1); 424.535(a)(5)(ii); and 424.535(g). The letter states that an NSC inspector attempted to visit Petitioner on December 4, 2013, January 13, 2014, and January 15, 2014. The NSC inspector reportedly could not access Petitioner's premises on any of these occasions in order to complete an on-site visit. CMS Exhibit (Ex.) 1, at 7-9. NSC imposed a two-year bar on Petitioner's re-enrollment in the Medicare program. CMS Ex. 1, at 9.

Petitioner sought reconsideration, and NSC issued a reconsidered determination affirming the revocation. CMS Ex. 1, at 1-6. The hearing officer stated that NSC is authorized to perform revalidation site inspections in order to verify the information that NSC has on file for suppliers and to confirm compliance with all supplier standards. CMS Ex. 1, at 4. The hearing officer concluded that Petitioner was not open during its posted hours of operation on several occasions when a NSC inspector attempted to complete an unannounced on-site visit, and therefore the NSC inspector could not verify compliance with the supplier standards. CMS Ex. 1, at 4. The hearing officer affirmed the revocation of Petitioner's supplier number, citing 42 C.F.R. § 424.57, and concluded that Petitioner "has not shown compliance with supplier standard 7" and "has not provided evidence to show they have complied with the standard for which they were non-compliant, they cannot be granted access to the Medicare Trust Fund by way of a Medicare supplier number." CMS Ex. 1, at 4. The hearing officer did not disturb the effective date of the revocation.

Petitioner electronically filed a request for a hearing with the Departmental Appeals Board, Civil Remedies Division, on May 20, 2014. He did not dispute any specific findings of the reconsideration decision. The case was assigned to me, and I issued an Acknowledgment and Pre-hearing Order (Pre-hearing Order). In accordance with my Pre-hearing Order, CMS timely filed its pre-hearing exchange, consisting of a motion for summary judgment and brief along with CMS Exs. 1-7. Petitioner did not timely file a pre-hearing exchange as ordered. On August 26, 2014, I issued an Order to Show Cause to determine whether Petitioner's failure to file a pre-hearing exchange as ordered might indicate that Petitioner abandoned its request for a hearing. *See* 42 C.F.R. § 498.69. If Petitioner did not intend to abandon its request, I directed Petitioner to file, within 10 days, the required briefing and an explanation for Petitioner's failure to timely file a pre-hearing exchange.

On September 4, 2014, Petitioner, who is represented by counsel, filed a response to the Order to Show Cause. Petitioner's counsel stated that he is unfamiliar with the procedures of the Civil Remedies Division, he did not receive my Pre-hearing Order, and he was unaware of the deadlines. Petitioner's attorney apologized "for failing to make an appropriate inquiry into why I had received nothing from the Court." Petitioner also filed a response to CMS's motion for summary judgment (P. Br.), Petitioner's witness list and exhibit list, and an affidavit.¹

¹ The affidavit included with Petitioner's response to CMS's motion for summary judgment is listed as Petitioner's Proposed Exhibit 4, but the affidavit is not properly marked as an exhibit. Petitioner's exhibit list also includes affidavits, referenced as Petitioner's Proposed Exhibits 1-3, that are not included in Petitioner's filing. However, these affidavits were apparently included with Petitioner's request for reconsideration, which CMS listed as a proposed exhibit. CMS Ex. 2, at 2-8. Absent objection to the exhibits themselves, I admit them to the record.

CMS filed an objection to Petitioner's response to the Order to Show Cause and asks that I dismiss the appeal arguing that Petitioner fails to show good cause for the untimely filing of Petitioner's pre-hearing exchange. CMS also states that CMS's counsel emailed a courtesy copy of CMS's motion for summary judgment and pre-hearing exchange to Petitioner's counsel on July 7, 2014. *See* CMS Attachment 1. CMS argues Petitioner should have been aware that some action was required when Petitioner's attorney received a copy of CMS's motion for summary judgment, even if Petitioner's attorney did not receive my Pre-hearing Order. CMS also points out that Petitioner did not make any inquiry into the status of its appeal for over three months, from the time it filed an appeal on May 20, 2014, until after Petitioner received the Order to Show Cause on about August 26, 2014. CMS contends that negligence or lack of diligence on the part of Petitioner's counsel does not demonstrate good cause.

A hearing request is abandoned if a party fails to respond to an Order to Show Cause (for not filing submissions as ordered) with a showing good cause for the untimely filing. 42 C.F.R. § 498.69(b). The relevant regulations do not define good cause but leave that determination to the administrative law judge (ALJ). The Departmental Appeals Board (the Board) has supported dismissal when the Board found that a party did not show good cause under "any reasonable definition of that term." *See, e.g., Brookside Rehab & Care Ctr.*, DAB No. 2094 at 7 n.7 (2007). Negligence or lack of diligence of a Petitioner's counsel is typically not considered to be beyond a party's ability to control or to be good cause for an untimely filing. *See NBM Healthcare Inc.*, DAB No. 2477, at 4-5 (2012). As one ALJ concluded "the avoidable failure of counsel to discharge responsibilities on a [party's] behalf or the miscommunication between a [party] and its counsel have been found to constitute avoidable human error, rather than circumstances beyond the [party's] ability to control." *Cnty. Care Ctr. of Seymour*, DAB CR758 (2001) (finding no good cause when a Petitioner missed an ordered briefing deadline due to a change in counsel). The ALJ explained that "delays or failures of communication caused by Petitioner's former counsel . . . were entirely within Petitioner's control. It was Petitioner's ultimate responsibility, as the party in interest, to remain apprised of the status of its appeal" *Id.*

The facts surrounding the untimely filing do not suggest good cause under any reasonable definition of that term. Petitioner's counsel argues he was not informed of the deadlines I established in my Pre-hearing Order and "fail[ed] to make an appropriate inquiry into why [Petitioner's counsel] had received nothing from the Court." However, Petitioner does not dispute that Petitioner's counsel received CMS's July 7, 2014 pre-hearing exchange and motion for summary judgment. Petitioner did not respond in any manner to CMS's motion for summary judgment prior to the issuance of my August 26, 2014 Order to Show Cause. Petitioner had a responsibility to follow my Pre-hearing Order and to remain apprised as to the status of its appeal. *See NBM Healthcare Inc.*, DAB No. 2477 at 5. Petitioner filed an untimely pre-hearing exchange and does not argue that there is any legal precedent to find good cause for its untimely filing. Rather,

Petitioner's only argument that I should accept its untimely filing pertains to the lack of diligence of Petitioner's counsel. However, I am reluctant to dismiss Petitioner's hearing request considering the undisputed facts in the brief included with Petitioner's untimely exchange clearly show a basis to uphold NSC's revocation action.

II. Discussion

A. Issue

Whether the undisputed evidence supports a legitimate basis for NSC to revoke Petitioner's Medicare enrollment and billing privileges.

B. Findings of Fact and Conclusions of Law

1. It is undisputed that Petitioner was closed due to an emergency medical situation on December 4, 2013.

In Petitioner's response to CMS's motion for summary judgment, Petitioner admits it is undisputed that during its posted hours of operation on December 4, 2013, Petitioner's "office was closed on an emergency basis since [Petitioner's owner] was ill and had to be attended to by a physician . . ." P. Br. at 2. However, Petitioner contends it was open and accessible during its posted hours of operation on January 13 and January 15, 2014, the other days when NSC attempted to complete an on-site visit. P. Br. at 2-3. For summary judgment purposes, I will infer Petitioner closed its place of business, during its posted hours, due to a medical emergency on December 4, 2013.

2. NSC had a legitimate basis to revoke Petitioner's Medicare enrollment and billing privileges because it was not accessible and properly staffed during its hours of operation.

The DMEPOS supplier standards require that a supplier must be accessible to the public and CMS and staffed during posted hours of operation. 42 C.F.R. § 424.57(c)(7)(i)(B),(C). When a CMS contractor's representative finds the facility inaccessible during its posted hours, the supplier does not meet the requirements of section 424.57(c). *Ita Udeobong, d/b/a Midland Care Med. Supply and Equip.*, DAB No. 2324 (2010). CMS will revoke a Medicare supplier's enrollment and billing privileges if CMS or its agent determines that the supplier is not in compliance with any supplier enrollment standard. *See 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.").

I find Petitioner was not in compliance with all of the standards set forth in section 424.57(c). It is undisputed that Petitioner was closed during its posted hours of operation on December 4, 2013, and that an NSC inspector could not access Petitioner's facility at the time of an attempted site inspection. The regulatory standard would have no meaning if suppliers were not always required to adhere to the posted hours of operation. A supplier may not be inaccessible, even for a few hours, during its posted hours of operation and must be available to meet the needs of beneficiaries. *Complete Home Care, Inc.*, DAB No. 2525, at 5-6 (2013). Petitioner is responsible for making the necessary arrangements to keep its business open and allow beneficiaries to access the business during posted hours of operation while allowing for patient consultations promotional activities, and breaks for staff members. As stated in a similar revocation case:

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*, DAB No. 2303 (2010). Also, regulatory drafters contemplated allowing facilities to close temporarily during posted hours to account for circumstances including short-term closures, and they instead chose to emphasize that a supplier's place of business must always remain publicly accessible. 75 Fed. Reg. 52,629, 52,636 (2010)). The drafters explained in the preamble to the final rule that they believed a supplier "should be available during posted business hours" and "should do its best to plan and staff for temporary absences." *Id.*

Petitioner argues that other than on December 4, 2013, Petitioner "has been open for business during posted hours and has always been accessible and staffed during posted hours of operation." P. Br. at 2-3. However, a showing that Petitioner has been open and properly staffed at some time prior to, or after, a site visit would not provide a basis for reversing the revocation. CMS is authorized to revoke a supplier's Medicare billing privileges based upon the failure to be open when the inspector visited its address, regardless of whether it may have been open and accessible at some earlier or later time. *See Mission Home Health et al.*, DAB No. 2310, at 6 (2010). CMS and its contractors have limited resources and cannot be compelled to attempt multiple on-site inspections to determine if the facility complies with all Medicare requirements.

Petitioner's failure to comply one supplier standard is a sufficient basis for revoking Petitioner's Medicare enrollment. *See 1866ICPayday.com*, DAB No. 2289, at 13. I find Petitioner did not maintain all the Medicare application certification standards set forth in 42 C.F.R. § 424.57(c) because Petitioner was not accessible to the public, Medicare beneficiaries, and NSC, and it was not staffed during its posted hours of operation on

December 4, 2013. Because the facility admits it was not open for inspection during its posted hours when NSC attempted an on-site review to determine Petitioner's compliance with Medicare requirements, CMS was authorized to revoke Petitioner's Medicare enrollment and billing privileges.

_____/s/
Joseph Grow
Administrative Law Judge