

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Ocean Orthopedic Services, Inc.  
(NPI: 0266200001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-747

Decision No. CR4218

Date: September 15, 2015

**DECISION**

The Centers for Medicare & Medicaid Services (CMS) revoked the Medicare billing privileges of Petitioner, Ocean Orthopedic Services, Inc. Petitioner requested a hearing to challenge the revocation. As discussed below, the evidence of record supports CMS's determination. Therefore, I affirm the revocation of Petitioner's Medicare billing privileges.

**I. Background**

Petitioner was enrolled in the Medicare program as a supplier of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). CMS Exhibits (Exs.) 3, 4. On June 10 and 11, 2014, an inspector from a CMS administrative contractor, the National Supplier Clearinghouse (NSC), attempted to conduct a site inspection at Petitioner's location that is on file with CMS. CMS Ex. 1. A site inspection could not be completed on either date and, on July 11, 2014, NSC issued an initial determination

revoking Petitioner's Medicare supplier number effective June 11, 2014.<sup>1</sup> The initial determination stated that Petitioner was not operational and not accessible and staffed during its posted hours of operation.<sup>2</sup> NSC barred Petitioner from re-enrolling in the Medicare program for two years from the effective date. CMS Ex. 4.

Petitioner filed a timely request for reconsideration with NSC and submitted additional evidence to the NSC hearing officer assigned to the case. CMS Ex. 5. On October 24, 2014, the NSC hearing officer issued an unfavorable reconsidered determination upholding the revocation of Petitioner's Medicare billing privileges on the basis that Petitioner "ha[d] not shown compliance with supplier standards [sic] 7." CMS Ex. 6 at 4.

On December 19, 2014, Petitioner timely filed a request for hearing (RFH) before an administrative law judge. CMS Ex. 7. On January 7, 2015, Administrative Law Judge Carolyn Cozad Hughes issued an Acknowledgement and Pre-hearing Order (Order). Pursuant to the Order, CMS filed a motion for summary judgment, supporting brief (CMS Br.), and seven exhibits (CMS Exs. 1-7). Petitioner submitted a brief (P. Br.) and six exhibits (P. Exs. 1-6). On September 2, 2015, this case was transferred to me.

## II. Decision on the Record

In the absence of objection, I admit CMS Exs. 1-7 and P. Exs. 1-6 into the record. With its RFH, Petitioner submitted a copy of the reconsidered determination that has been admitted as CMS Ex. 6. Petitioner also submitted with the RFH an updated Form CMS-855S, dated December 15, 2014, and an updated copy of the signage posting the hours it is currently open to the public. The RFH and its accompanying documents are found at CMS Ex. 7.

The Order advised the parties that they must submit written direct testimony for each proposed witness and that an in-person hearing would only be necessary if the opposing party requested an opportunity to cross-examine a witness. Order ¶¶ 8-11; *see Vandalia Park*, DAB No. 1940 (2004); *Pacific Regency Arvin*, DAB No. 1823, at 7-8 (2002) (holding that the use of written direct testimony for witnesses is permissible so long as

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<sup>1</sup> CMS subsequently agreed to change the effective date of Petitioner's revocation to August 11, 2014, which is consistent with a revocation based on noncompliance with Supplier Standard 7 and 42 C.F.R. § 424.57(e)(1). CMS Br. at 4 n.4.

<sup>2</sup> NSC also found that Petitioner failed to comply with Supplier Standard 10 (42 C.F.R. § 424.57(c)(10)). CMS Ex. 4 at 2. However, the NSC hearing officer determined upon reconsideration that Petitioner complied with this requirement. CMS Ex. 6 at 4.

the opposing party has the opportunity to cross-examine those witnesses).<sup>3</sup> Neither party submitted proposed witnesses or written direct testimony. Therefore, there is no need for an in-person hearing, and I issue this decision based on the written record. Order ¶¶ 8-11.

### III. Issue

Whether CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges for failing to comply with Supplier Standard 7 (42 C.F.R. § 424.57(c)(7)). I have jurisdiction to decide this issue. 42 C.F.R. §§ 498.3(b)(17), 498.5(1)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

### IV. Findings of Fact, Conclusions of Law, and Analysis<sup>4</sup>

In order for a DMEPOS supplier to receive Medicare payments for items furnished to a Medicare-eligible beneficiary, the Secretary of Health and Human Services must first issue a supplier number to that DMEPOS supplier. 42 U.S.C. § 1395m(j)(1)(A). To receive direct-billing privileges, a DMEPOS supplier must meet and continually comply with each of the supplier enrollment standards, including Supplier Standard 7, the requirement to maintain a physical location that is accessible and staffed during posted hours of operation. 42 C.F.R. § 424.57(c)(7)(i)(C). CMS will revoke a DMEPOS supplier's billing privileges if the supplier is found not to meet the standards found at 42 C.F.R. § 424.57(b) and (c). The revocation is then effective 30 days from the date the supplier is sent the notice of revocation. 42 C.F.R. § 424.57(e)(1). After a DMEPOS supplier's Medicare billing privileges are revoked, it is barred from re-enrolling in the Medicare program for one to three years. 42 C.F.R. § 424.535(c).

***1. The NSC site inspector could not gain entry to Petitioner's facility at 872 Charles Street, North Providence, Rhode Island, when the inspector attempted to inspect the facility on June 10 and 11, 2014.***

On June 10 and 11, 2014, an NSC inspector attempted to conduct an unannounced site inspection at Petitioner's facility located at 872 Charles Street, North Providence, Rhode Island. CMS Exs. 1, 4, 6. Petitioner's posted hours of operation were listed as Monday, from 9:00 am to 4:30 pm; and Tuesday, Wednesday, and Friday, from 9:00 am to 2:00 pm. The sign posted on the door also provided a telephone number to call for an appointment. CMS Exs. 1 at 3; 2 at 1. I observe that Petitioner's Medicare enrollment application, Form CMS-855S, dated June 12, 2012, listed the following hours of

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<sup>3</sup> Administrative decisions cited in this decision are accessible on the internet at: <http://www.hhs.gov/dab/decisions/index.html>.

<sup>4</sup> My findings of fact and conclusions of law are set forth in italics and bold in the discussion captions of this decision.

operation: Monday to Friday, 8:00 am to 4:30 pm. CMS Ex. 3 at 16. The inspector's report found that at approximately 1:32 pm on June 10, 2014, the facility was closed and the door was locked, the lights were off, and there was no answer when she knocked on the door. On June 11, 2015, at approximately 9:38 am, the NSC inspector attempted another site inspection and again found the facility to be closed during Petitioner's posted hours of operation. At that time, the NSC inspector observed that the doors were locked, the lights were off, and there was no response after she knocked twice. CMS Ex. 1 at 2, 7. The NSC inspector's observations that Petitioner's office was closed on both occasions are corroborated by Petitioner, in that Petitioner acknowledged in its request for reconsideration that its office hours are "by appointment." CMS Ex. 5 at 1. Subsequently, Petitioner admitted in its brief that it erred in "not updating the National Supplier Clearinghouse of the new office hours and not posting the new office hours at 872 Charles Street, North Providence, RI 02904." P. Br. at 1. Petitioner reported that the incorrectly posted hours of operation was an "administrative over site [sic]" and a "clerical error." *Id.* Thus, Petitioner has not disputed that it was not open at the time of both attempted site inspections.

Therefore, based on the evidence of record, I find that the NSC inspector attempted to conduct site inspections of Petitioner's facility at 872 Charles Street, North Providence, Rhode Island, on June 10 and 11, 2014, during Petitioner's posted hours of operation. However, the NSC inspector was unable to gain entry to the facility and complete the inspections because the office was closed.

***2. CMS had a legitimate basis to revoke Petitioner's Medicare billing privileges because Petitioner's location was not accessible and staffed during its posted hours of operation as required by 42 C.F.R. § 424.57(c)(7)(i)(C).***

DMEPOS suppliers must permit CMS or its agents to conduct on-site inspections to ascertain supplier compliance with enrollment standards, and the supplier must be accessible to beneficiaries and to CMS and staffed during posted hours of operation. 42 C.F.R. § 424.57(c)(7)(i)(C), (c)(8). CMS may perform periodic site visits to determine whether the supplier is complying with Medicare enrollment requirements. 42 C.F.R. §§ 424.510(d)(8), 424.515(c), 424.517(a).

The facts in this case establish that Petitioner's practice location was not open and available for the NSC's site inspector to conduct site inspections on June 10 and 11, 2014. Therefore, CMS had a legitimate basis to conclude that Petitioner was not in compliance with Supplier Standard 7, 42 C.F.R. § 424.57(c)(7)(i)(C).

In its brief, Petitioner "admits the error of not updating the [NSC]" and "not posting the new office hours." P. Br. at 1. Petitioner acknowledges that it was not open at the time of the attempted site inspections because there was an oversight and clerical error

regarding the hours of operation that were included on the enrollment application and posted on its door. *Id.* Petitioner contends that it has subsequently changed its hours to be “by appointment only”; however, the subsequent change of its hours does not remedy the fact that it was not open at the time of two attempted site inspections that were made during the hours in which it had claimed to be open, both in its enrollment application and in its posted hours.

A DMEPOS supplier is neither “open to the public” nor “accessible” if the supplier’s location is closed due to such reasons as the staff being out for lunch, on a break, making patient visits, or out of the office for any reason. *See Ita Udeobong, d/b/a Midland Care Med. Supply & Equip.*, DAB No. 2324, at 6-7 (2010). Even if Petitioner’s staff members had been out of the office for a short period of time due to a change in office hours, which is not the case here, this is not a sufficient excuse, as it does not show that Petitioner was accessible and properly staffed when NSC attempted site inspections during Petitioner’s posted hours of normal operation. CMS Ex. 1. A supplier may not close, even temporarily, during its posted hours of operation. *Complete Home Care, Inc.*, DAB No. 2525, at 5 (2013). It is incumbent on Petitioner to make whatever reasonable arrangements are necessary to keep its business open while allowing for patient consultations and visits as well as breaks for staff members. As stated in a previous 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, the regulatory drafters contemplated allowing facilities to temporarily close during posted hours to account for circumstances such as short-term closures, and instead chose to emphasize that a supplier’s place of business must always remain publicly accessible during posted hours of operation. *Complete Home Care, Inc.*, DAB No. 2525, at 6. The drafters explained in the preamble to the final rule establishing additional enrollment requirements for DMEPOS suppliers that they believed a supplier “should be available during posted business hours” and “should do its best to plan and staff for temporary absences.” 75 Fed. Reg. 52,629, 52,636 (August 27, 2010).

Petitioner, citing to *Wayne View Convalescent Ctr.*, DAB CR1502 (2006), urges that I should disregard this “incident” because it is “de minimus” [sic] and argues that Petitioner has historically been compliant with Medicare supplier standards. P. Br. at 2. The authority Petitioner relies upon is not persuasive, in that the aforementioned decision involved the imposition of civil monetary penalties for failing to comply substantially with federal program requirements for long-term care facilities, which require CMS to consider, *inter alia*, “the facility’s history of noncompliance.” 42 C.F.R. § 488.438(f)(1).

A history of compliance is not an enumerated factor among the supplier standards listed in 42 C.F.R. § 424.57(c). Thus, a history of noncompliance is not relevant to the instant determination, and I have no such authority to disregard an unsuccessful inspection attempt that has been found by CMS to be a basis for the revocation of billing privileges. Moreover, Petitioner acknowledges that “[t]he hours of operation have been consistent for over 20 years.” P. Br. at 1. Petitioner’s statement suggests that its hours have either been incorrectly posted for a very long time or were not correctly listed when it first posted them. Therefore, I conclude that CMS has a basis for its determination that Petitioner was not in compliance with Supplier Standard 7 because it was not accessible and staffed during posted business hours, and CMS properly revoked Petitioner’s Medicare billing privileges. 42 C.F.R. § 424.57(c)(7)(i)(C).

## **V. Conclusion**

Based on the reasons stated above, I affirm the determination to revoke Petitioner’s DMEPOS supplier number and Medicare billing privileges, pursuant to 42 C.F.R. § 424.57(c)(7)(i)(C), effective August 11, 2014.

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/s/  
Leslie C. Rogall  
Administrative Law Judge