

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Daniel J. Sellinger, D.P.M., P.C.,
(PTAN: 1324940001),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-271

Decision No. CR4267

Date: October 1, 2015

DECISION

Petitioner, Daniel J. Sellinger, D.P.M., P.C., is a supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). Petitioner participated in the Medicare program until the Centers for Medicare & Medicaid Services (CMS) revoked its Medicare supplier number for reasons including that the contractor was unable to gain access to Petitioner's location to conduct a mandatory on-site visit.

Petitioner here appeals the revocation of its supplier number.

For the reasons discussed below, I find that Petitioner was not compliant with Medicare requirements and that CMS properly revoked its supplier number.

I. Background

In a letter dated July 28, 2014, the Medicare contractor, Palmetto GBA National Supplier Clearinghouse (NSC)¹, notified Petitioner that its supplier number would be revoked for a period of two years effective April 16, 2014, because Petitioner's business location on record with the contractor at 2340 E. Stadium Boulevard, Suite 5, in Ann Arbor, Michigan (herein "E. Stadium Boulevard") was, among other reasons, not accessible to the public, CMS, NSC and its agents. CMS Ex. 3 at 2. As a result, the contractor's representative could not inspect the supplier's facility to verify its compliance with supplier standards. CMS Exhibit (Ex.) 3.

In a letter and request for reconsideration dated August 20, 2014, Petitioner responded, at which time it conceded that the E. Stadium Boulevard location was not operational at the time of the attempted inspection and that the office had relocated to its new location on Dexter Road. In doing so, Petitioner explained that "[o]ver the last two years we have actually gone from two offices to one" and that "during a renovation we did hold three sites." Furthermore, Petitioner stated the following: "I am sure that you can appreciate that an address change, [sic] during this busy time could be overlooked." CMS Ex. 4 at 1.

In a reconsidered decision dated September 25, 2014, a Medicare hearing officer affirmed the revocation of Petitioner's supplier number based on a failure to meet Supplier Standards 2, 7, and 10. CMS Ex. 5. *See* 42 C.F.R. §§ 424.57 (c)(2), (c)(7), and (c)(10). Petitioner now appeals that determination.

In an order dated November 14, 2014, Administrative Law Judge Carolyn Cozad Hughes directed the parties to submit pre-hearing briefs addressing all issues of law and fact, including any motions for summary judgment, along with any proposed exhibits, including written direct testimony, in the form of an affidavit or declaration, of any proposed witness. Acknowledgment and Pre-Hearing Order at 3-5, ¶¶ 4, 8. The order advised Petitioner of its right to cross-examine any CMS witness whose direct testimony was offered. Acknowledgment and Pre-Hearing Order at 5, ¶ 9. The order also advised the parties that a hearing for purposes of cross-examining witnesses "will be necessary only if a party files admissible, written direct testimony, and the opposing party asks to cross-examine." Acknowledgment and Pre-Hearing Order at 6, ¶ 10. This case was subsequently transferred to me on September 1, 2015.

CMS submitted its brief and motion for summary disposition (CMS Br.) and five proposed exhibits. Petitioner submitted its brief (P. Br.) and eight proposed exhibits. CMS and Petitioner submitted several identical exhibits, and for identification purposes,

¹ NSC is the Medicare contractor responsible for enrollment and re-enrollment of DMEPOS suppliers. 42 C.F.R. § 424.57(a).

duplicative exhibits will be referred to herein only by the exhibit numbers furnished by CMS.

CMS, in its reply (CMS Reply), objects to the admission of two of Petitioner's proposed exhibits as inadmissible new evidence: P. Ex. 2, identified as a Debra Walters Email thread; and P. Ex. 3, identified as a CMS Approval Notice May 14, 2013. For reasons that will be discussed below, I will not admit P. Exs. 2 and 3. In the absence of further objections, I admit into evidence CMS Exs. 1-5 and P. Exs. 1, 4-6, and 8-9.²

While Petitioner expressed a desire to cross-examine NSC inspector Daniel Warner, CMS filed no written direct testimony for this individual, and I was not asked to subpoena Mr. Warner as a witness. Therefore, there is no basis for any cross-examination. Petitioner submitted the affidavits of Christina Hammond, P. Ex. 1, and Daniel Sellinger, P. Ex. 4, and CMS has not requested the opportunity to cross-examine these witnesses. I consider the record in this case to be closed, and the matter is ready for a decision on the merits.

II. Discussion

1. Petitioner has not shown good cause for offering new documentary evidence that it did not submit at the initial or reconsideration determination phases, and there is no basis to admit this evidence into the record.³

Petitioner submitted two proposed exhibits that it did not previously submit at either the initial or reconsideration determination levels. The first document is a printout of a March through May 2013 email thread with a subject line "Gmail – WPS Medicare Provider Enrollment Application – Action Required." P. Ex. 2. In that email thread, Christina Hammond, Petitioner's office manager, corresponded with Wisconsin Physicians Service, a Medicare enrollment contractor, regarding a form CMS-855I that had been submitted to update Petitioner's enrollment status. While the email thread does not reference the specific office location that is being updated, Ms. Hammond reported that "the address in Livonia is for the UofM surgery center." P. Ex. 2 at 6. The other proposed exhibit at issue is a letter from Wisconsin Physicians Service, dated May 14, 2013, indicating that the "[p]ractice location, correspondence address [was] changed from 19900 Haggerty Rd Livonia, MI 48152-1054 to 2550 Dexter Rd Ann Arbor, MI 48103-2702." P. Ex. 3 at 1.

² Petitioner has not submitted a document marked as P. Ex. 7.

³ Findings of fact and conclusions of law are made in bold and italic font.

CMS argues that Petitioner did not previously submit these documents and that Petitioner has not shown good cause for failing to present them earlier, as required by 42 C.F.R. § 498.56(e). CMS Reply at 5-6; *see* Acknowledgment and Pre-Hearing Order at 5, ¶ 6. Petitioner did not respond to CMS's objections. I find the objections to be persuasive.

I must examine any new documentary evidence that is offered by a provider or supplier and determine whether any good cause exists for receiving that evidence. 42 C.F.R. § 498.56(e)(1). I must exclude any new documentary evidence at the administrative law judge level of appeal if I do not find good cause for Petitioner's failure to offer that evidence at the initial or reconsideration determination levels. 42 C.F.R. § 498.56(e)(2)(ii). While "good cause" is not defined in the regulations, the term has been interpreted to mean an event beyond a party's control that prevents the party from offering the evidence timely. *See, e.g., City Crown Home Health Agency*, CR3130 (2014) at 4. Here, Petitioner offered neither of these proposed exhibits during either the initial or reconsideration determination phases of the case. The dates of the documents clearly suggest that they were in existence at the time of the initial and reconsidered determinations. Petitioner has not alleged any factor amounting to good cause, however, for why it did not submit the documents earlier.

Rather, Petitioner argues there is a fact dispute as to whether it provided the required notification of its office relocation. Even if I were to find good cause and admit them, the proposed exhibits offered by Petitioner do not evidence a dispute as to any material fact because they do not relate to the issue whether Petitioner provided the requisite notice to NSC of its relocation from the E. Stadium Boulevard address, which is the location of the failed attempted site inspection. Instead, the proposed exhibits address the office's relocation from a third office location in Livonia, Michigan, rather than the E. Stadium Boulevard location. In addition, the proposed exhibits pertain to Petitioner's owner's status as a Medicare-enrolled physician, rather than as a DMEPOS supplier. A form CMS-855I, which is referenced in the proposed exhibits, pertains to the enrollment of physician and non-physician practitioners and does not provide for the enrollment of DMEPOS suppliers, which is completed through a form CMS-855S, as discussed above. Additionally, the proposed exhibits suggest that Petitioner's owner notified the Medicare contractor, Wisconsin Physicians Service, regarding his office move, but they do not show that Petitioner ever notified NSC, the Medicare durable medical equipment contractor, as it acknowledged in its brief was required. Thus, even if I could accept these exhibits and admit them as evidence, they would not support Petitioner's appeal.

For the reasons stated above, I decline to admit P. Exs. 2 and 3.

2. CMS properly revoked Petitioner's Medicare DMEPOS supplier enrollment.

To receive Medicare payments for items furnished to a Medicare beneficiary, a supplier of medical equipment and supplies must have a supplier number issued by the Secretary of Health and Human Services. Social Security Act (Act) § 1834(j)(1)(A); 42 C.F.R. § 424.505. To obtain and retain its supplier number, a DMEPOS supplier must meet the standards set forth in 42 C.F.R. § 424.57(c), and CMS may revoke its billing privileges if it fails to do so. 42 C.F.R. §§ 424.57(c)(1), (e)⁴; 42 C.F.R. § 424.535(a)(1). Among other requirements, the supplier must provide “complete and accurate information in response to questions on its application for billing privileges” and “report to CMS any changes in information supplied on the application within 30 days of the change.” 42 C.F.R. § 424.57(c)(2). It must submit enrollment information on the applicable enrollment application. 42 C.F.R. § 424.510(a). The supplier must also permit CMS or its agents to conduct on-site inspections to ascertain its compliance with governing regulations and ensure its location is accessible to various entities such as the public, CMS, and NSC. 42 C.F.R. §§ 424.57(c)(7),(8).

Prior to its revocation, Petitioner was a Medicare-enrolled DMEPOS supplier located at E. Stadium Boulevard in Ann Arbor, Michigan. CMS Ex. 1 at 1; CMS Ex. 5 at 2. On April 16, 2014, an inspector employed by NSC attempted an on-site inspection at the E. Stadium Boulevard location but found that the supplier was no longer at the location. The practice location was closed, and there was no signage or posted hours of business. The suite appeared to be empty, and the inspector was unable to inspect the premises. CMS Ex. 1 at 6, 7. At some point prior to the failed site inspection on April 16, 2014, Petitioner moved to a new location but did not report the change of address to NSC by filing the form CMS-855S. 42 C.F.R. § 424.510(a); *see* MPIM § 15.1.2. Petitioner has not disputed the determination that the office on E. Stadium Boulevard was not accessible on the day of the attempted site visit. Nor has Petitioner alleged that it filed a form CMS-855S with NSC within 30 days of its relocation.

In a letter and request for reconsideration dated August 20, 2014, Petitioner acknowledged that the E. Stadium Boulevard office was not open at the time of the attempted inspection and that it had already relocated to its new office on Dexter Road. Petitioner speculated that the required report of the new office location may have been “overlooked” because its staff was overwhelmed at the time of the move. CMS Ex. 4 at

⁴ Paragraph (e) of section 424.57 was previously designated paragraph (d) and was redesignated by the rulemaking that imposed the surety bond requirements at paragraph (d); however, the redesignation was not incorporated in the Code of Federal Regulations (C.F.R.) until November 24, 2014. 79 Fed. Reg. 69,772, 69,773 (Nov. 24, 2014). Prior versions of the C.F.R. dating back to October 1, 2009 included an Editorial Note explaining the redesignation.

1. In a form CMS-855S that was submitted in August 2014, Petitioner reported that it started operating at its new Dexter Road location November 1, 2012. CMS Ex. 4 at 7, 22. Now, Petitioner's owner belatedly claims in its brief to have notified "CMS" through the submission of a form CMS-855I (Medicare Enrollment Application – Physicians and Non-Physician Practitioners), which is used for Medicare physician suppliers, but not DMEPOS suppliers, that was sent to the Medicare contractor. P. Br. at 5. As explained previously, Petitioner has not demonstrated how this notification to Wisconsin Physicians Service of his move from a Livonia, Michigan office constitutes the required timely notice to NSC that Petitioner relocated from the E. Stadium Boulevard location to the Dexter Road location. Petitioner makes no allegation that it notified NSC within the requisite time period or that it was operational at the E. Stadium Boulevard location at the time of the failed inspection, and the record does not include any such evidence.

Based on all of the discussion above, I find that Petitioner did not comply with Supplier Standard 2 that is set forth in 42 C.F.R. § 424.57(c)(2). Petitioner did not, within 30 days of the office relocation, advise the CMS contractor that it had changed locations.

Likewise, I agree with NSC's determinations in its reconsidered decision that Petitioner did not comply with Supplier Standards 7 and 10. I find that Petitioner did not comply with Supplier Standard 7, which requires, *inter alia*, a DMEPOS supplier to maintain "a physical facility on an appropriate site." 42 C.F.R. § 424.57(c)(7). Petitioner has conceded that the E. Stadium Boulevard office location was not accessible at the time of the April 16, 2014 inspection because it had already moved to a new location in the same city. CMS Ex. 4 at 1. I also find that Petitioner did not comply with Supplier Standard 10, which required it to maintain comprehensive liability insurance at its qualified physical location. 42 C.F.R. § 424.57(c)(10). Petitioner has not presented evidence that it carried the requisite liability insurance coverage at the E. Stadium Boulevard location after it moved to the Dexter Road location.

Finally, I also observe that Petitioner's owner, in a January 21, 2015 affidavit submitted contemporaneously with Petitioner's brief, reported that "[u]pon my knowledge and belief, CMS sends all correspondence to the Dexter Road address, which indicates that CMS had our current operational address on file." P. Ex. 4 at 2, ¶ 10. Likewise, Petitioner's office manager, in a January 22, 2015 affidavit submitted contemporaneously with Petitioner's brief, stated "CMS sends all correspondence to the Dexter Road address, which indicates that CMS had our current operational address on file." P. Ex. 1, ¶ 16. However, I observe that the July 28, 2014 initial determination from the CMS contractor was mailed to Petitioner's owner's *personal* residence address and not its business location on 2550 Dexter Road in Ann Arbor, Michigan (herein "Dexter Road"). CMS Ex. 3 at 1; CMS Ex. 4 at 2.

III. Conclusion

Petitioner did not meet all of the Medicare supplier requirements, and CMS properly revoked its supplier number and billing privileges for a period of two years.

/s/
Leslie C. Rogall
Administrative Law Judge