

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

A Familiar Face Home Health Services, Inc.
(NPI: 1558320218),

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-1580

Decision No. CR3622

Date: February 4, 2015

DECISION

The Centers for Medicare & Medicaid Services (CMS), through its administrative contractor Palmetto GBA, revoked the Medicare billing privileges of Petitioner, A Familiar Face Home Health Services, Inc. Based on three attempted on-site inspections of Petitioner's offices, Palmetto determined that Petitioner was no longer operational to furnish Medicare items or services and was not meeting Medicare enrollment requirements. Petitioner requested a hearing before an administrative law judge (ALJ) to dispute CMS's determination. For the reasons stated below, I affirm CMS's determination to revoke Petitioner's Medicare billing privileges.

I. Background and Procedural History

Petitioner is a home health agency (HHA) licensed by the state of Florida. Petitioner was enrolled in the Medicare program as a provider. On March 27, 2014, Palmetto GBA revoked Petitioner's Medicare billing privileges, effective August 22, 2013, because "[t]hree (3) activity checks conducted on August 22, 2013, November 6, 2013, and February 5, 2014, at the practice location of 3222 17th Street, Sarasota, Florida, revealed that the facility was closed and unattended. The facility is not operational." CMS

Exhibit (Ex.) 3 at 1. The revocation also resulted in the termination of Petitioner's Medicare provider agreement and the imposition of a two-year reenrollment bar. CMS Ex. 3.

Petitioner sent CMS a letter dated April 8, 2014, in which Petitioner stated that the revocation was incorrect and that the problems Petitioner had been experiencing were corrected. CMS Ex. 2. On June 4, 2014, CMS concluded that Petitioner had not provided sufficient evidence to show that it corrected the deficiency noted in the revocation letter and stated that "the proposed corrective action plan/ Reconsideration are hereby denied." CMS Ex. 1 at 2.

On July 27, 2014, Annah C. Murphy, Vice President of Operations for Hometown Homecare, LLC, requested a hearing to dispute the CMS determination to revoke Petitioner's Medicare billing privileges. Ms. Murphy stated that Petitioner was "under the Management and 100% control of Hometown Homecare effective March 27, 2014." On August 4, 2014, I issued an Acknowledgement and Prehearing Order (Order). On September 29, 2014, attorneys from the law firm of Baker & McKenzie, LLP, noticed their appearance "as counsel for Hometown Homecare, LLC, in its capacity as Manager and Operator of Petitioner, A Familiar Face Home Health Services, Inc."

In response to my Order, CMS filed a motion for summary judgment (CMS Motion) with ten exhibits (CMS Exs. 1-10). Petitioner filed a brief in response (P. Br.) together with two exhibits (P. Exs. A and B).

After the pre-hearing exchange process was complete, on November 10, 2014, Petitioner's counsel electronically filed a notice that Hometown Homecare, in its capacity as Manager of Petitioner, had terminated its business relationship with Petitioner and, as a result of the termination of that relationship, the attorneys representing and appearing in this proceeding withdrew their appearance. Upon inquiry with counsel, my office learned that all inquiries as to Petitioner's intentions regarding this case should be directed to Ms. Donna Ventura. Ms. Ventura appears to be Petitioner's sole owner. CMS Ex. 9 at 22, 24. Following the issuance of an order to show cause, Ms. Ventura timely submitted a letter dated November 28, 2014, in which she indicated that Petitioner wanted to pursue the appeal in this matter. On December 15, 2014, Ms. Ventura submitted a letter and multiple documents (P. December 15 Submission).¹

¹ These documents were not identified as exhibits, nor were they marked as required by the Civil Remedies Division Procedures. However, the documents were identified in a Table of Contents with a number and an explanation of each document. I note that the first item is a letter addressed to the staff attorney assisting me in this matter and is dated September 15, 2014, although filed on December 15, 2014. The Civil Remedies Division had not previously received this letter.

II. Decision on the Record

I admit CMS Exs. 1-10, P. Exs. A and B, and the unmarked documents in P. December 15 Submission because neither party has objected to any of this evidence.

I decide this case on the written record. Both parties submitted written direct testimony (CMS Ex. 4 at 2, CMS Ex. 5 at 2, CMS Ex. 7 at 2, and P. Ex. B); however, neither party requested to cross-examine the other party's witness as required by my Order.² Order ¶ 8-10. Therefore, no hearing is necessary. Order ¶ 11; *Marcus Singel, D.P.M.*, DAB No. 2609, at 5-6 (2014).

III. Issue

Whether CMS had a legitimate basis for revoking Petitioner's Medicare billing privileges pursuant to 42 C.F.R. § 424.535(a)(5).

IV. Jurisdiction

I have jurisdiction to decide the issues in this case. 42 C.F.R. §§ 405.803, 498.3(b)(17), 498.5(1)(2); *see also* 42 U.S.C. § 1395cc(j)(8).

V. Findings of Fact, Conclusions of Law, and Analysis³

To participate in Medicare program, an HHA must enroll as a provider by meeting all enrollment requirements stated in the regulations and in the applicable enrollment application.⁴ 42 C.F.R. §§ 424.500, 424.510, 424.516, 424.530. One enrollment requirement is that a provider "must be operational to furnish Medicare covered items or services" *Id.* § 424.510(d)(6). During the enrollment process, CMS may conduct an on-site inspection (also called an on-site review) to ascertain compliance with enrollment requirements and to determine whether the prospective provider is operational. *Id.* § 424.510(d)(8). Once enrolled, a provider has "billing privileges,"

² Ms. Ventura's November 28, 2014 letter appears to indicate she anticipated that a hearing would be held in this matter; however, neither Petitioner's previous counsel nor Ms. Ventura requested to cross-examine any witnesses. In any event, I indicated to Ms. Ventura in my order to show cause that I had received all prehearing submissions and this matter was ready for decision and she did not object in her response or anytime thereafter.

³ My numbered findings of fact and conclusions of law appear in bold and italics.

⁴ HHAs are considered providers for purposes of the Medicare program. 42 C.F.R. § 400.202 (definition of *Provider*).

which is the right to file claims to receive Medicare payment for services provided to Medicare beneficiaries. *See id.* §§ 424.502 (definition of *Enroll/Enrollment*), 424.505.

Enrolled providers must maintain compliance with enrollment requirements in order to maintain billing privileges. *Id.* § 424.500. CMS may conduct on-site inspections “when deemed necessary . . . to verify that the enrollment information submitted to CMS or its agents is accurate and to determine compliance with Medicare enrollment requirements.” *Id.* § 424.517(a). The results of the on-site inspection may be used to support revocation of billing privileges. *Id.*

- 1. CMS attempted to perform on-site inspections of Petitioner’s offices at the address on file with CMS on Thursday, August 22, 2013, at 12:15 p.m., Wednesday, November 6, 2013, at 1:28 p.m., and Wednesday, February 5, 2014, at 12:00 p.m. to ascertain whether Petitioner was operational and in compliance with Medicare enrollment requirements; however, Petitioner’s offices were closed during each attempted on-site inspection.***

In January 2012, Petitioner filed a revalidation enrollment application with CMS in which it indicated that its only practice location was 3222 17th Street, Sarasota, Florida 34235. CMS Ex. 9 at 12. CMS attempted to perform three on-site inspections at this address.

On Thursday, August 22, 2013, an inspector from SafeGuard Services, LLC, a CMS contractor, arrived at Petitioner’s facility at 12:15 p.m. The inspector found the main entrance door locked, the interior ceiling lights were off (as observed through the main door), and no employee or patient traffic. The inspector found no hours of operation posted. The inspector observed a handwritten note attached to the main door advising, “Please call 942-365-9474. A Familiar Face. If you need us I am out seeing patients and our office girl is out [with] flu bug. Thank you, Donna Ventura, RN.” CMS Ex. 4 at 1, 4. The inspector also found a Florida Power and Light disconnect notice dated August 21, 2013, stating that \$218.70 must be paid by the end of the day or the electrical service would be disconnected. CMS Ex. 4 at 1, 5.

On Wednesday, November 6, 2013, at 1:28 p.m., a second SafeGuard inspector attempted an on-site inspection of Petitioner offices at the 3222 17th Street address. CMS Ex. 5. This inspector also found no one present; however, he saw the same handwritten note posted to the door of Petitioner’s offices indicating that Ms. Ventura was out seeing patients and the “office girl” was out with a flu bug. CMS Ex. 5 at 1, 5. He found no hours of operation posted. CMS Ex. 5 at 1. The inspector saw that some interior lights were on, but he thought the facility appeared inactive and that items were being placed in boxes. CMS Ex. 5 at 1.

On Wednesday, February 5, 2014, a third inspector, this time from CMS contractor US Investigation Services, LLC (USIS), attempted to conduct an on-site inspection at approximately 12 p.m. CMS Ex. 6. The inspector found that “the office appears to be in use[;] however[,] not set up for patients. The office was locked and dark at 12:00. Sign indicated to call a posted phone number.” CMS Ex. 6 at 6; *see also* CMS Ex. 6 at 2. A sign with the company’s name and phone number was attached to the main door. CMS Ex. 6 at 3.

2. CMS had a legitimate basis to revoke Petitioner’s Medicare enrollment under 42 C.F.R. § 424.535(a)(5) because Petitioner has not shown that it was operational to furnish Medicare covered items or services.

In both its reconsideration request and its request for hearing, Petitioner generally disputes CMS’s finding it was not operational, arguing that it has come into compliance since the attempted site inspections. CMS Ex. 2. Petitioner concedes its location at 3222 17th Street was not open on the three dates in question, but nevertheless contends that it met all of the indices of operability under the regulations on the three dates of the attempted on-site inspections and throughout Petitioner’s enrollment as a Medicare provider.⁵ P. Br. at 4-6; P. Ex. B at ¶¶ 14, 15, 18, 19, 21, and 23. Petitioner claims that it always maintained a physical practice location even if it was not open at the time of the attempted on-site inspections. Petitioner contends that being operational does not mean the practice location must be open all of the time. P. Br. 4-5.

⁵ Ms. Ventura provided information related to the problems Petitioner faced in the summer of 2013. Petitioner was in the process of being sold to another company and that company was serving as the management company for Petitioner. However, the buyer/management company allegedly failed to make a variety of payments on Petitioner’s behalf, including payroll, which led Ms. Ventura to terminate its relationship with the buyer/management company. P. December 15 Submission at 34-53. At around the time that Ms. Ventura was able to obtain control of Petitioner again, she suffered two significant personal problems, one of which allegedly included an unauthorized change of Petitioner’s business address with the United States Postal Service, resulting in further disruption to the administration of Petitioner. P. December 15 Submission at 5, 85-96. It is important to note that I do not have the authority to reverse CMS’s revocation because Petitioner presents reasons why it was unavailable for CMS’s on-site inspections. CMS determines, in its discretion, when to revoke or not revoke a provider’s billing privileges. My review is limited to determining whether CMS had a legitimate basis for determining that Petitioner was not operational. Ms. Ventura’s problems, while extremely unfortunate, appear to support CMS’s conclusion that Petitioner may not have been operational in August 2013.

CMS may revoke a provider's Medicare billing privileges when "CMS determines, upon on-site review" that the provider "is no longer operational to furnish Medicare covered items or services" 42 C.F.R. § 424.535(a)(5). The term "operational" means:

the provider 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.

42 C.F.R. § 424.502 (definition of *Operational*) (emphasis added).

Contrary to Petitioner's argument that an HHA may be operational even though its offices are closed, CMS is authorized "to revoke billing privileges if a provider is not operational when an inspector visits its address during normal business hours" *I & S Healthcare Services, LLC*, DAB No. 2519, at 6 (2013). At that point, it is Petitioner's obligation to show that it was in compliance with the enrollment requirements at the time of the site visits. 42 C.F.R. § 424.545(c). However, Petitioner did not submit such evidence. The testimony of Ms. Ventura is insufficient to meet Petitioner's burden of showing that it was operational at the time of the three attempted site visits. She testified that on all three occasions of the attempted site visits, the office administrator was coincidentally out of the office and that Ms. Ventura was out providing services to clients.⁶ Petitioner provided no other documentary evidence to support these statements.

In contrast, CMS provided well-documented evidence, supported by declarations from two of the inspectors, that on three separate occasions, months apart, Petitioner's location was closed. The attempted inspections took place on weekdays in the middle of each

⁶ In addition to maintaining compliance with enrollment requirements, providers are required to comply with conditions of participation applicable to its provider type. 42 C.F.R. § 489.53(a)(3). A condition of participation for HHAs requires that the HHA furnish services in compliance with all applicable federal, state, and local laws and regulations. 42 C.F.R. § 484.12(a). Florida regulations require the following of an HHA: "When the administrator and the director of nursing are not on the premises during designated business hours, a staff person must be available to answer the phone and the door and must be able to contact the administrator and the director of nursing by telecommunications. This individual can be a clerical staff person." Fla. Admin. Code § 59A-8.003(10)(b). Far from assisting Petitioner's case, Ms. Ventura's testimony appears to support the conclusion that Petitioner did not comply with the Florida regulations concerning staffing on the days of CMS's attempted on-site inspections.

day.⁷ The inspectors could reasonably infer that Petitioner was no longer operational because the premises were closed, there was a Florida Power and Light disconnect notice at the door, and the same handwritten note concerning Ms. Ventura's absence and that of the "office girl" who had the flu was posted in the same location on the August 22 and November 6, 2013.⁸ *Compare* CMS Ex. 4 at 4 *with* CMS Ex. 5 at 5.

Although Petitioner argues in its request for hearing, with attached supporting documents, that Petitioner has subsequently returned to compliance and has passed several other surveys of its business, this is insufficient to show that Petitioner was operational on August 22, 2013. 73 Fed. Reg.36,448, at 36,452 (June 27, 2008) ("Accordingly, a provider or supplier is required to furnish evidence that demonstrates that the Medicare contractor made an error at the time an adverse determination is made, not that the provider or supplier is now in compliance.").

VI. Conclusion

For the reasons stated above, I affirm CMS's revocation of Petitioner's Medicare billing privileges.

/s/
Scott Anderson
Administrative Law Judge

⁷ Ms. Ventura provides pictures of the signs indicating Petitioner's hours of operation that were allegedly posted at a second entrance to Petitioner's offices that the inspectors apparently did not observe. P. December 15 Submission at 4, 9-10, 13. Based on the inspectors' reports, they attempted all three visits within the normal hours of operation as indicated in the signs submitted Ms. Ventura.

⁸ Ms. Ventura asserts that this sign was the normal sign she would post when an office employee was sick. P. December 15 Submission at 5. However, Ms. Ventura, who is a registered nurse, did not explain why she would indicate that an employee had the flu when she meant the sign to be used whenever an office employee was sick. And, no such note or any note explaining the office closure appeared on the door at the time of the last attempted site visit on February 5, 2014.