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DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF

Blanche Benjamin o/b/o Estate
of Warren Benjamin
(Appellant)

Warren Benjamin (Deceased)
(Beneficiary)

Pennsylvania Blue Shield
(Carrier/Intermediary/IRO)

CLAIM FOR

Supplementary Medical
Insurance Benefits

067-12-8692A
(HICN)

000-24-0399
(Docket Number)

This case is before the Administrative Law Judge upon a request for hearing. Inasmuch as this decision is fully favorable to the appellant, an oral hearing is not necessary.

INTRODUCTION

A claim in the amount of \$3,079.00 was submitted to the Medicare contractor by Adaptive Communication Systems, Inc. for Medicare Part B equipment provided to the beneficiary. After an initial determination, a review by the contractor, and a hearing by a contractor hearing officer, it was determined that no allowance was appropriate.

As a result, the amount still in controversy for this beneficiary is \$2,463.20 ((amount claimed - amount allowed) - unmet deductible) x 80 percent).

ISSUES

The general issue is whether payment may be made under Part B of Title XVIII of the Social Security Act (the Act) for Medicare services furnished to the beneficiary by Adaptive Communication Systems, Inc. on June 14, 1991.

The specific issue is whether the equipment at issue is covered under section 1861(n) and (s)(6) of the Act, Health Care Financing Administration (HCFA) regulations 42 CFR Section 410.36(b) or 410.38, and sections 60-9 or 65-5 of the Medicare

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Coverage Issues Manual (also known as National Coverage Determinations (NCD)).

LAW AND REGULATIONS

Section 1832 of the Act establishes the scope of the benefits provided under the Medicare Part B supplementary medical insurance (SMI) program. Section 1861 of the Act and HCFA regulation 42 CFR Section 410.3 define many of the kinds of medical and other health services which are covered under Medicare, subject to various conditions, limitations and exclusions.

Section 1832 of the Act states, in pertinent part:

(a) The benefits provided to an individual by the insurance program established by this part shall consist of--

(1) entitlement to have payment made to him or on his behalf (subject to the provisions of this part) for medical or other health services . . .

Section 1861 of the Act states, in pertinent part:

. . .

(s) The term "medical and other health services" means any of the following items or services:

(6) durable medical equipment;

. . .

(n) The term "durable medical equipment" includes iron lungs, oxygen tents, hospital beds, and wheelchairs (which may include a power-operated vehicle that may be appropriately used as a wheelchair, but only where the use of such a vehicle is determined to be necessary on the basis of the individual's medical and physical condition and the vehicle meets such safety requirements as the Secretary may prescribe) used in the patient's home (including an institution used as his home other than an institution that meets the requirements of subsection (e)(1) of this section or section 1819(a)(1)), whether furnished on a rental basis or purchased; except that such term does not include such equipment furnished by a supplier who has used, for the demonstration and use of specific equipment, an individual who has not met such minimum training standards as the Secretary may establish with

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respect to the demonstration and use of such specific equipment. With respect to a seat-lift chair, such term includes only the seat-lift mechanism and does not include the chair.

HCFA Regulation 42 CFR section 410.38 provides, in pertinent part:

(a) Medicare Part B pays for the rental or purchase of durable medical equipment, including iron lungs, oxygen tents, hospital beds, and wheelchairs, if the equipment is used in the patient's home or in an institution that is used as a home.

(g) As a requirement for payment, HCFA may determine through carrier instructions, or carriers may determine that an item of durable medical equipment requires a written physician order before delivery of the item.

HCFA regulation 42 CFR section 414.202 provides, in pertinent part:

Durable Medical Equipment means equipment, furnished by a supplier or a home health agency that--

- (1) Can withstand repeated use;
- (2) Is primarily and customarily used to serve a medical purpose;
- (3) Generally is not useful to an individual in the absence of an illness or injury; and
- (4) Is appropriate for use in the home.

Section 2100 of the Carriers Manual further provides that expenses for the rental or purchase of durable medical equipment are reimbursable if three requirements are met. These requirements are: (1) the equipment meets the definition of durable medical equipment; (2) the equipment is necessary and reasonable for the treatment of the beneficiary's illness or injury or to improve the functioning of a malformed body member; and (3) the equipment is used in the beneficiary's home.

Section 60-9 of the Coverage Issues Manual is a national coverage determination (NCD) and is comprised of the durable medical equipment reference list. That list is designed as a quick reference tool for determining the coverage status of certain items for equipment. Section 60-9 provides that when a claim for equipment does not fall logically into any of the listed generic categories, a determination must be based upon section 2100ff of

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the Carriers Manual and section 3113ff of the Intermediary Manual. In addition, section 60-9 discloses whether coverage for an item is denied as being not primarily medical in nature under section 1861(n) of the Act or a personal comfort item under section 1862(a)(6) of the Act.

RATIONALE

The issue in this case is whether the Medicare Part B program covers a "Real Voice" laptop talking computer purchased by the now-deceased beneficiary on November 29, 1991 at a cost of \$3079. Counsel for the claimant argued -- in a detailed brief accompanied by several items of medical evidence -- that the device was covered either as a "prosthetic device" under 42 CFR Section 410.36(b), or an item of "durable medical equipment" under 42 CFR Section 410.38 (see Exh. 6, and various letters from treating physicians and a speech therapist present throughout the file). The facts are not in dispute, and the controlling issue is one of law.

The Carrier Hearing Officer acknowledged that the equipment at issue might be covered either as a prosthetic device or an item of durable medical equipment. However, this written analysis (as far as it went) really addressed only his reason for concluding that the item could not be considered an allowable prosthetic device, and not why it did not fit the definition of covered "durable medical equipment." Apparently he must have felt that if the device was excluded as a prosthesis, it must ipso facto not be allowable as durable medical equipment (without actually having been explicit about such a conclusion). Furthermore, in affirming the carrier's earlier adverse rulings, the Carrier Hearing Officer implicitly affirmed their conclusion that the beneficiary (or his estate) was liable for the cost of the computer, without any discussion of whether any waiver of such liability might be appropriate under applicable statutory provisions. (I note that according to the purchase order, the computer was sold pursuant to an agreement in which the supplier accepted assignment -- i.e., agreed to consider as full payment [except for the 20% co-payment] such amount as the carrier might determine was allowable on the claim. The record does not reveal whether or not the supplier violated this agreement by demanding payment from the beneficiary for the billed cost.)

There are three sources of law to which an Administrative Law Judge must look in determining whether an item or service is covered under the Medicare Part B program: the statute (Social Security Act, Title XVIII); regulations officially promulgated pursuant thereto; and certain formally-published National Coverage Determinations (NCD's) issued by the Health Care Financing Administration (HCFA). Other substantive sources -- such as other types of NCD's (see discussion below), unofficial

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or unpublished HCFA determinations, and the view of Medicare carriers set forth in manuals or elsewhere -- may serve as guidance to Administrative Law Judges to the extent they are persuasive on an otherwise undetermined issue of coverage, but are not binding on Administrative Law Judges as the other items are. In his decision, the Carrier Hearing Officer relies upon and cites some, but not all, of these sources, both binding and non-binding on me.

The Carrier Hearing Officer provides a carrier manual definition of "durable medical equipment" that is similar to, although not precisely the same as, the definition set forth in the regulations cited above, and quoted fully in relevant part at page 6-7 of counsel's brief (Exh. 6, pg. 12-13). He also cites to a carrier's manual section dealing with electronic speech aids, which contains virtually the same language as an NCD binding on Administrative Law Judges and carrying the same number (65-5) as the manual section cited.

NCD 65-5 discusses two types of "electronic speech aids" that are covered under Medicare Part B as "prosthetic devices." The Carrier Hearing Officer assumes that any device that permits a person to communicate other than by normal vocal channels is not a covered prosthetic device unless it fits the description of one of the two devices described in that NCD. I disagree. The simple fact is that the item for which claimant seeks compensation is not an "electronic speech aid" as described in that that NCD -- it is an entirely different type of electronic equipment that substitutes voice stimulation evoked by non-speech organs for ordinary or augmented speech generated in part by the customary vocal apparatus. I therefore do not conclude -- as did the Carrier Hearing Officer -- that NCD precludes a finding that the item here at issue is not a covered "prosthetic device" within the meaning of Section 410.36(b) of the regulations.

More in point -- though not binding on me -- is a 1986 carrier memo nonspecifically citing an undated response from an unidentified HCFA source that concluded that certain communication devices different from, but somewhat similar to, the one here involved did not constitute "prosthetic devices" covered by the Medicare program (see Exh. 6, pg. 17). It is not at all clear that the conclusion quoted in that memo would constitute the "official" HCFA position on this particular device at this time, but in any event, I am unaware of the existence of any formally promulgated HCFA policy controlling whether or not the equipment involved here is or is not now considered to be a covered "prosthetic device." I therefore proceed on the assumption that there is no binding policy on point one way or the other, affecting my adjudicative authority.

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Nevertheless, I acknowledge that there is a serious question whether a laptop computer or similar device may realistically be considered to constitute a "prosthetic device" as that term is commonly used, understood, and defined in the regulations cited in the record. While I disagree with taking a cramped approach that would demand a one-to-one relationship between the device in question and a particular body organ that it replaces, I think it is stretching the point a bit to say that the computer in this case "replaced" an organ or organs of speech of the beneficiary in the sense that a prosthetic device ordinarily does. Therefore, I choose to avoid this potentially hazardous area by premitting the question of whether a device such as that involved in this appeal may ever be treated as a "prosthetic device," since I conclude for reasons hereinafter stated that it is covered as "durable medical equipment."

Unlike the Carrier Hearing Officer apparently did, I do not believe that a medical item that does not constitute a covered "prosthetic device" is automatically ineligible for coverage by Medicare as "durable medical equipment." Indeed, I believe there are separate sections dealing with coverage of those two types of items precisely because they are meant to be separately applied, so that coverage under either of them makes the other one irrelevant. This is particularly so where, as here, I find it much more natural to speak of the computer in question as "durable medical equipment" than as a "prosthetic device."

There is no doubt whatsoever in my mind that the computer in this case meets the general definition of "durable medical equipment" set forth in the regulations. It can stand (and did stand) repeated use; is primarily if not exclusively designed to serve a medical purpose; generally would not be useful to a person in the absence of an illness like the beneficiary's and is appropriate (and indeed, designed) for use in the home. The only remaining question, therefore, is whether there is any other binding source of law that excludes such equipment from the Medicare program.

As mentioned, I am confident that neither NCD 65-5 nor 42 CFR Section 410.36(b) does so. They are provisions identifying when (in general or specifically) prosthetic devices that are eligible for Medicare coverage, not when durable medical equipment is or is not eligible. For the latter purpose, one must look to the applicable regulation (Section 410.38), the statute (no section of which limits the regulatory definition as applicable to this particular equipment), and the NCD's dealing with durable medical equipment.

There are many such NCD's. Some are quite specific, and as to those, none deals with any type of equipment of the kind involved here. There is also a general table of policy regarding DME items, contained at NCD 60-9. That table arguably does have a

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provision relevant to the equipment involved here -- though it was not cited by the CPO. Specifically, the table contains entries entitled "Augumentative Communication Device" and "Communicator," with the former simply cross-referencing to the latter. Under "Communicator," the table states, in full: "Deny--convenience [sic] item; not primarily medical in nature (Section 1861(n) of the Act)."

If the computer involved in this appeal is the sort of "communicator" meant to be covered by the cited entry, then obviously it presents some difficulties for appellant's position. However, I conclude that I need not decide whether or not HCFA had this particular type of device in mind when it made that entry, because the "communicator" entry is (as explained below) one of those that is not binding on Administrative Law Judges in their determinations of whether or not a particular piece of DME is covered under the Medicare Part B program.

Section 1869(b)(3)(A) of the Social Security Act (42 U.S.C. Section 1395ff) provides that Administrative Law Judges may not "review" (i.e., contradict) NCD's excluding or restricting Medicare coverage of particular items or classes of items if they are promulgated "under section 1862(a)(1)" of the Act (which excludes items not medically necessary for the treatment of injury or illness). However, not all NCD's are promulgated under section 1862(a)(1). In the introductory material to the manual of NCD's published in 1989 (54 Federal Register 34555, 34556; August 21, 1989), it is stated in pertinent part: "The statutory basis for all national coverage decisions...is section 1862(a)(1)(A) of the Act [the 'not reasonable and necessary' exclusion] unless otherwise specified. If a decision to exclude or limited [sic] a service is imposed under another statutory authority, that statutory basis for exclusion or limitation constitutes the sole basis for that decision, unless otherwise specified. The section 1862(a)(1)(A) exclusion is applicable only if no other statutory basis for exclusion applies." It is by virtue of that critical introductory language that I cited the entire tabular reference to exclusion of "Communicators," since it cites Section 1861(n) of the Act (defining "durable medical equipment" as its source of authority, thereby, by definition, identifying it as not an NCD promulgated "under Section 1862(a)(1)" and thus not precluded from review by an Administrative Law Judge.

The clear purpose of this statutory scheme -- in my view -- is to leave with HCFA the authority to make nationwide, binding pronouncements concerning items deemed not to be medically necessary, but to leave within the discretion of Administrative Law Judges the authority to decide whether many items of DME do or do not fit the general criteria of the Act and regulations in specific instances. Exercising that authority here, I conclude

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that even if HCFA meant to express its view that the computer in question here was not a covered item of DME, I disagree with that conclusion, for the reasons eloquently argued in counsel's brief.

For the above reasons, I find that whether or not the laptop computer in this case is a covered "prosthetic device," it is a covered item of DME, and should have been allowed by the carrier at a rate determined in accordance with legal standards for reimbursement of DME in effect at the time of its purchase. Since the supplier accepted assignment at the time of sale, no greater amount than the 20% co-payment may be charged to the beneficiary or his estate, and if any more has been, the appellant's counsel may wish to pursue appropriate legal remedies.

FINDINGS

After careful consideration of the entire record, the undersigned Administrative Law Judge makes the following findings:

1. The amount in controversy is \$2463.20.
2. The following equipment was provided by Adaptive Communication Systems, Inc., on June 14, 1991, to the beneficiary: Augmentative Communicative System.
3. The equipment meets the definition of durable medical equipment (§1861(n) of the Act; 42 CFR §414.202).
4. The equipment was made to withstand repeated use, was primarily and customarily used to serve a medical purpose, was used in the beneficiary's home, and was generally not useful absent a relevant medical condition (§1861(n) of the Act; 42 CFR §414.202).
5. The equipment was reasonable and necessary for the treatment of an illness or injury or to improve the functioning of a malformed body member (§1862(a)(1)(A) of the Act; 42 CFR §411.15(k)).
6. The equipment at issue is covered under the provisions of section 1861(n) of the Act and HCFA regulations 42 CFR section 414.202.

DECISION

It is the decision of the undersigned that the following services, supplies and/or equipment at issue are covered under the provisions of section 1861(s)(6)(n), 42 CFR 410.38. Therefore, the contractor is directed to determine the allowable

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amount for the equipment and to make appropriate payment under
Part B of Title XVIII of the Social Security Act.


Kenneth G. Levin
Administrative Law Judge

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Date