

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF

CLAIM FOR

Jeanine F. [REDACTED]
(Appellant)

Medicare + Choice

Jeanine F. [REDACTED]
(Beneficiary)

124-36-6185
(HICN)

Oxford Health Plan
(Medicare + Choice Plan)

This case is before the undersigned pursuant to a timely request for a hearing before an administrative law judge. The appellant seeks review of a determination by an Appeals Officer with the Center for Health Dispute Resolution denying payment for an augmentative communication device under the Medicare + Choice Program of Title XVIII of the Social Security Act. The appellant/beneficiary, Jeanine F. [REDACTED], is represented by an attorney, Lewis Golinker, Esquire.

The issue in these cases is whether the appellant is entitled to have payment made, under the Medicare + Choice Program, for a "Light Writer," a type of augmentative communication device.

The amount in controversy exceeds the jurisdictional requirements.

After review of the documentary evidence, the undersigned concludes that the appellant is entitled to payment for the augmentative communication device at issue. This decision is therefore being made on the record. The Medicare HMO is hereby directed to authorize payment for the device.

The record reflects that the claimant suffers from cortico-basal ganglia degeneration, a neuro-motor condition with symptoms similar to those of Parkinson's Disease. These symptoms include impairment of voluntary movements, such as walking, writing and speaking. In the beneficiary's case, it has caused aphonia, a condition characterized by a complete loss of voice and the inability to produce intelligible speech. The beneficiary is unable to provide information verbally. Furthermore, due to her neurological condition, she likewise has difficulty with other forms of communication, including writing. As noted by a consultative otolaryngologist, the beneficiary's "speech has become weaker . . . and she is unable to produce sufficient speech for people to understand her." (Appellant's Brief, Exhibit 3).

On October 15, 1999, the beneficiary's treating physician wrote a prescription for an augmentative communication device (Appellant's Brief, Exhibit 4). The beneficiary was then examined by a speech-language pathologist, who concluded that the LightWriter was the most appropriate augmentative communication device for the beneficiary. The LightWriter is a lightweight speech-synthesizer that relies on spelling to create words, phrases and sentences which are then "spoken" out loud by the device (Appellant's Brief, page 12).

In the fall of 1999, the beneficiary submitted a request to her Medicare HMO for approval of an augmentative communication evaluation and for the purchase of a LightWriter, as recommended by her speech-language pathologist. Her requests were denied on the basis that the device is not covered by Medicare.

Part B of the Medicare Program provides reimbursement for "items and services which are reasonable and necessary for the diagnosis and treatment of illness or injury, or to improve the functioning of a malformed body member." (42 U.S.C. 1395) Durable medical equipment and prosthetic devices are among those items and services for which reimbursement is made. The undersigned accepts the appellant's argument that the LightWriter device at issue satisfies the criteria for durable medical equipment.

Durable medical equipment under the Medicare Program must satisfy the following criteria:

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

(42 C.F.R. 402.202)

The undersigned agrees that the LightWriter at issue satisfies the criteria outlined above. The literature submitted establishes that the device is in fact intended for repeated use. Furthermore, the only foreseeable use is for a medical purpose, and the undersigned can see no useful purpose absent illness or injury. Finally, the record establishes that the device is appropriate for use in the home, as it is compact, lightweight, and easy to learn and use. The undersigned concludes that the LightWriter augmentative communication device satisfies the criteria for durable medical equipment.

The appellant has also raised the question of whether the LightWriter can also be viewed as a prosthetic device, which replaces "all or part of an internal body organ . . ." (42 U.S.C. 1395). The appellant argues that the intent of the Medicare guidelines is that the replacement be a functional replacement, not necessarily a physical replacement. However, as it has already been determined that the LightWriter satisfies the criteria for durable medical equipment, it is not necessary to address the issue of whether it also meets the criteria for classification as a prosthetic device under the Medicare guidelines.

The next issue to be addressed is whether the LightWriter, as durable medical equipment, is reasonable and necessary for the treatment of illness or injury or if it is necessary to improve the functioning of a malformed body member. An item is considered to be medically reasonable and necessary "when it can be expected to make a meaningful contribution to the patient's illness or injury or to the improvement of his malformed body member." (Medicare Carriers Manual, 2100.2) "Reasonableness" is evaluated in light of the following factors:

(1) Would the expense of the item to the program be clearly disproportionate to the therapeutic benefits which could ordinarily be derived from the use of the equipment?

(2) Is the item substantially more costly than a medically appropriate and realistically feasible alternative pattern of care?

(3) Does the item serve essentially the same purpose as equipment already available to the beneficiary?

(Medicare Carriers Manual, 2100.2)

The undersigned concludes that the appellant has provided ample evidence that the LightWriter is medically necessary to treat the beneficiary's aphonia and to improve her severe speech disability. The appellant has submitted medical records documenting the need for this device from both the beneficiary's treating physician and speech-language pathologist.

The undersigned has also taken into consideration the interrogatory responses from an impartial medical expert maintained on the panel of experts with the Office of Hearings and Appeals. Michael Falkove, M.D., reviewed the file and prepared a report in which he confirmed that the beneficiary has progressive basal ganglia disorder and a progressive inability to communicate. In his report, Dr. Falkove stated that the beneficiary's vocal cords do not move properly and that there is no hope of recovery. Dr. Falkove further noted that, according to the report from a consultative otolaryngologist, there is no medical therapy that can help this. The beneficiary has failed speech therapy and a speech therapist has recommended the use of the alternative augmentative communication device at issue, as did the otolaryngologist. Dr. Falkove opined that although this type of device does not correct her primary medical condition, it does address the results of her primary problem, the progressive basal ganglia degenerative disorder, and it does enable her to communicate with those around her by an alternative means. Dr. Falkove opined that the device meets the criteria of durable medical equipment and that it enables the beneficiary to communicate, which is a necessary function. Dr. Falkove concluded that a device of this type should therefore be provided as it is necessary and reasonable for the beneficiary's treatment.

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With respect to the "reasonableness" factors, the undersigned likewise concludes that the LightWriter satisfies these criteria. The undersigned can find no justification to say that the therapeutic benefits derived from this device would be disproportionate to the expense of the item to the program. The ability to communicate is one of the most vital physical functional abilities for an individual. The ability to communicate likewise assists a patient with other areas of treatment, as it gives the individual the ability to communicate his or her comments regarding treatment and how they are or are not improved by treatment. There is also no evidence submitted by the HMO that this device is substantially more costly than another medically appropriate and realistically feasible alternative pattern of care. Absent any such submission, it is not for the undersigned to make a finding that other such alternative methods exist. Furthermore, the undersigned finds that, based on the records from the beneficiary's treating physician and speech-language pathologist, there are apparently no other items available to the beneficiary which serve essentially the same purpose as the LightWriter.

The undersigned concludes that the LightWriter, as durable medical equipment, is a medically reasonable and necessary device for treatment of the beneficiary's illness and to improve her speech functioning. The appellant is therefore entitled to reimbursement for this item from the Medicare HMO.

While the undersigned is cognizant of the National Coverage Determination (NCD) which states that such augmentative communication devices are mere convenience items and are not reimbursable (Medicare Coverage Issues Manual, 60-9), the undersigned concludes that such NCD is not binding on the undersigned. An NCD is only binding on an administrative law judge when it is made pursuant to section 1862(a)(1) of the Act (42 U.S.C. 1395y(a)(1)). The National Coverage Determination at issue in fact is not based on 42 U.S.C. 1395y(a)(1), but rather on section 1861(n) of the Act. It is therefore not binding on the undersigned.

The Medicare + Choice HMO is hereby directed to take all appropriate action consistent with this decision and to grant reimbursement for the durable medical equipment at issue.

Findings

The undersigned Administrative Law Judge makes the following findings of fact and conclusions of law:

1. The augmentative communication device at issue, the LightWriter, is "durable medical equipment," as that term is defined in the Social Security Act and Regulations.
2. The device at issue is medically reasonable and necessary for the treatment of the beneficiary's illness and for improvement of her speech impairment, as established by expert opinion.
3. The appellant is entitled to reimbursement for the LightWriter from the Medicare + Choice HMO.

Conclusion

It is the decision of the undersigned that Medicare coverage should be approved for the LightWriter as durable medical equipment, as it is medically reasonable and necessary for the treatment of the beneficiary's illness and for improvement of her speech impairment. The Medicare + Choice HMO is directed to take all action necessary to implement this decision.

MARTIN K. KAHN
Administrative Law Judge

NOV 21 2000

Date