

SOCIAL SECURITY ADMINISTRATION  
Office of Hearings and Appeals

DECISION

IN THE CASE OF

Ms. Colleen R. [REDACTED]  
(Appellant)

Ms. Colleen R. [REDACTED]  
(Beneficiary)

Cigna Health Care  
(Carrier/Intermediary/PRO)

CLAIM FOR

Supplementary Medical  
Insurance Benefits

518-26-9441  
(HICN)

999-06-1282  
(Docket Number)

INTRODUCTION

This case is before the Administrative Law Judge upon a request for hearing filed March 9, 2000. The appellant is Colleen R. [REDACTED], who is also the beneficiary. A hearing was held on October 20, 2000, in Boise, Idaho. The appellant was represented at the hearing by Mary Jo Butler, Attorney-at-Law for Comprehensive Advocacy, Incorporated. Also, appearing and testifying were medical expert Michelle Taggart, B.S., M.S. and Melissa Honsinger, M.A., CCC-SLP, Director of Speech Pathology at the Idaho Elks Rehabilitation Hospital. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits 1 through 21, the testimony at the hearing, and the arguments presented.

ISSUES

The specific issue is whether the equipment at issue is covered under sections 1861(n) and (s)(6) of the Act and Health Care Financing Administration (HCFA) regulations 42 CFR sections 410.38 and 414.202.

LAW AND REGULATIONS

Section 1832 of the Act states, in pertinent part:

- (a) The benefits provided to an individual by the

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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 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.



(b) An institution that is used as a home may not be a hospital or a SNF as defined in sections 1861(e)(1) and 1861(j)(1) of the Act, respectively.

(c) Wheelchairs may include a power-operated vehicle that may be appropriately used as a wheelchair, but only if the vehicle--

(1) Is determined to be necessary on the basis of the individual's medical and physical condition; and

(2) Meets any safety requirements specified by HCFA; and

(3) Except as provided in paragraph (c)(2) of this section is ordered in writing by a specialist in physical medicine, orthopedic surgery, neurology, or rheumatology, the written order is furnished to the supplier before the delivery of the vehicle to the beneficiary and the beneficiary requires the vehicle and is capable of using it. [This provision is effective for items furnished beginning 01/06/93.]

(4) A written prescription from the beneficiary's physician is acceptable for ordering a power-operated vehicle if a specialist in physical medicine, orthopedic surgery, neurology or rheumatology is not reasonably accessible. For example, if travel to the specialist would be more than one day's trip from the beneficiary's home or if the beneficiary's medical condition precluded travel to the nearest available specialist, these circumstances would satisfy the "not reasonably accessible" requirement.

(d) Medicare Part B pays for medically necessary equipment that is used for the treatment of decubitus ulcers if--

(1) The equipment is ordered in writing by the beneficiary's attending physician, or by a specialty physician on referral from the beneficiary's attending physician and the written order is furnished to the supplier before the delivery of the equipment; and

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(2) The prescribing physician has specified in the prescription that he or she will be supervising the use of the equipment in the course of treatment. [This provision is effective for items furnished beginning 01-06-93.]

(e) Medicare Part B pays for a medically necessary seat-lift if it --

(1) Is ordered in writing by the beneficiary's attending physician, or by a specialty physician on referral from the beneficiary's attending physician, and the written order is furnished to the supplier before the delivery of the seat-lift;

(2) Is for a beneficiary who has a diagnosis designated by HCFA as requiring a seat-lift; and

(3) Meets safety requirements specified by HCFA. [This provision is effective for items furnished beginning 01/06/93.]

(f) Medicare Part B pays for transcutaneous electrical nerve stimulator units that are--

(1) Determined to be medically necessary; and

(2) Ordered in writing by the beneficiary's attending physician, or by a specialty physician on referral from the beneficiary's attending physician, and the written order is furnished to the supplier before the delivery of the unit to the beneficiary. [This provision is effective for items furnished beginning 01/06/93.]

(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;



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(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 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 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.

#### EVALUATION OF THE EVIDENCE

The beneficiary, a 70 year old woman, suffered two strokes resulting in right hemiparesis in 1996. Also as a result of these strokes, she experienced a significant decrease in expressive language. Ms. R. [REDACTED] underwent an augmentative communication evaluation on May 1, 1997 by Ms. Sandra R. Wood, M.S., CCC-SLP, a speech and language pathologist employed at that time by the Rehabilitation Department of St. Luke's Medical Center. This evaluation indicated that she had difficulty initiating utterances or phrases and was limited to responding only to yes/no questions. At the time of this evaluation, the beneficiary had successfully completed a trial period using the Dynavox communication system by demonstrating the ability to communicate complex communication ideas beyond those she was able to communicate verbally. (Ex. 14) Therefore, the speech pathologist recommended the purchase of the device, and the



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claimant's treating physician, Steven Montamat, M.D., concurred and prescribed the device on September 17, 1997. (Ex. 15)

A claim in the amount of \$5,352.00 was submitted to the Medicare contractor by Colleen R [REDACTED], the beneficiary, for Medicare Part B services provided to her. Upon initial and reconsideration review, it was determined that no allowance was appropriate for the Dynavox communication system because the beneficiary's larynx was still intact and, as such, did not qualify for a speech aid as being medically necessary (Ex. 9).

As a result, the amount still in controversy for this beneficiary is \$5,352.00 ((amount claimed - amount allowed) - unmet deductible] x 80 percent).

The beneficiary's attorney disagreed with this determination and contended in a legal memorandum dated October 6, 2000 that, since the beneficiary began using the Dynavox Dynamite Communication Systems device, her cognitive abilities have remained intact. The attorney also contended that the device is necessary for the beneficiary to express herself and communicate with friends, family and medical personnel regarding care needs, emergencies and illnesses and cited relevant and persuasive Administrative Law Judge's decisions to support a finding that a communicative device does, in fact, meet the definition of a prosthetic device within the meaning of Title XVII of the Social Security Act. (Ex. 21)

At the hearing, Ms. Taggart, the medical expert testified that the Dynavox communication device at question does not technically replace all or part of a body organ, and is probably considered more of a prosthetic device or an electronic speech aid. She stated it was a durable box-like device which sits within reach so that one can push various buttons for menus or programs to assist in speaking. The medical expert also testified that the particular device in question was preferable since a cheaper device, like an alphabet board, would not allow for fast enough communication for this particular beneficiary's cognitive ability. Ms. Taggart opined that she agreed with Exhibit 17 in that the device is not just a "convenience item". She also agreed with the speech pathologist's report at Exhibit 14 as well the attorney's affidavit found at Exhibit 21 that the beneficiary's larynx is not permanently inoperative nor has it been operated on, but rather it is a cognitive problem. Ms. Taggart further opined that the device in question is durable medical equipment and is a augmentative and alternative communication device, as opposed to an augmentative communication device in that it does not really augment, but rather is an

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alternative speech device. Therefore, Ms. Taggart testified that the device in question was appropriate, met the requirements for reimbursement and should be paid for.

The Administrative Law Judge recognizes that the claimant suffered a stroke in 1996, and the communication device was bought in 1998; therefore, by this time it was clear the beneficiary was not going to get any better cognitively or speech wise, and the device was truly necessary.

Based on the above, the undersigned finds that the testimony and evidence received after Cigna Health Care made its reconsideration determination is given great weight in that they were and are competent and appropriate in explaining the claimant's condition at the time prior to when the equipment was purchased as well as during the time the equipment was used by the beneficiary.

Furthermore, considering her total condition, the undersigned is of the opinion that the Dynavox Dynamite Communication System device was reasonable and necessary in terms of her restoration potential and that she did make progress in terms of goals.

#### FINDINGS

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

1. The amount in controversy is \$5,352.00.
2. The following equipment was provided by Sentient Systems Technology, Incorporated on July 10, 1998, to Colleen R [REDACTED]: Dynavox Dynamite Communication System (E1399).
3. The Dynavox Dynamite Communication System (E1399) 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)



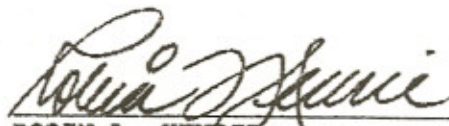
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6. of the Act; 42 CFR § 411.15(k)).  
The equipment at issue is covered under the provisions of section 1861(n) of the Act and HCFA regulations 42 CFR section 414.202.

DECISION

It is the decision of the undersigned that the equipment at issue, a Dynavox Dynamite Communication System (E1399), is covered under the provisions of section 1861(n) of the Act and HCFA regulations 42 CFR section 414.202. Therefore, the contractor is directed to determine the allowable amount for the equipment and to make appropriate payment under Part B of Title XVIII of the Social Security Act.



ROBIN L. HENRIE  
Administrative Law Judge

JAN 25 2001

Date

dbm