

**SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals
ON-THE-RECORD
DECISION**

IN THE CASE OF

CLAIM FOR

Margaret H. M[REDACTED]
(Appellant)

Supplementary Medical Insurance Benefits
(Claim Type)

Mary Alice H[REDACTED]
(Beneficiary)

999-07-4077
(Docket No.)

Palmetto Government
Benefits Administrators
(Carrier)

262-12-0095
(HCN)

This case is before the undersigned Administrative Law Judge pursuant to a timely appeal on behalf of the beneficiary, Mrs. Mary Alice H[REDACTED]. The beneficiary appeals from an adverse determination of a Medicare hearing officer, affirming the Durable Medical Equipment Regional Carrier's denial of Medicare coverage for an augmentative communication device known as a Dynavox. The beneficiary is represented by an attorney, Lewis Golinker, Esq.

The amount in controversy exceeds the jurisdictional requirements.

CONCLUSIONS

After review of the documentary evidence, the undersigned concludes that the beneficiary is entitled to payment for the Dynavox at issue. There are no facts in dispute, and the resolution of the legal issues can be addressed without a hearing. The undersigned concludes that the Dynavox meets the Medicare criteria as durable medical equipment, and that no binding authority or persuasive non-binding authority requires its exclusion from coverage. The documentary evidence also establishes that the Dynavox is reasonable and necessary for treatment of the beneficiary's severe communication disability, dysarthria. This fully favorable decision is therefore being made on the record.

EVALUATION OF THE EVIDENCE

The record shows that the beneficiary, age 90, has had one or more strokes which has left her with exceedingly limited physical abilities, as well as an expressive communication disability, severe dysarthria. Dysarthria is characterized by the loss of intelligibility of speech. The

beneficiary is unable to use her voice to communicate, and no speech-language pathology treatment is going to be effective to restore her speech (Exhibit 2; 21).

The beneficiary was evaluated by Mary Pat Tweedle, M.A., C.C.C.-S.L.P., who determined that the Dynavox augmentative communication device was that most appropriate method by which the beneficiary could meet her daily communication needs. With the Dynavox, the beneficiary is able to communicate her basic physical needs, emotional status, self care needs, engage in social communicative interaction with family and friends (Exhibit 2; 20).

The Dynavox was purchased by the beneficiary in April 1999, and she has demonstrated her ability to use it to communicate with her children, grandchildren, and great-grandchildren, daily care providers, and friends (Exhibit 20A-20C).

APPLICABLE LAWS AND RULES

Part B of the Medicare program excludes coverage for items or services that do not meet the criteria for Medicare benefits categories, and excludes reimbursement for "items and services which are not 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. § 1395y(1)(1)). Durable medical equipment and prosthetic devices are two benefits categories for which reimbursement is made. The undersigned concludes, based on the beneficiary's argument, that the Dynavox satisfies the Medicare 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 Dynavox satisfies the criteria referenced above. The Dynavox has been used by the beneficiary for more than a year, and is expected to continue to be of use to her. The Dynavox is a dedicated augmentative communication device, designed, marketed, and sold only to people with severe communication disabilities (Exhibit 15). The authorities cited by the beneficiary's attorney establish that augmentative communication devices are a long- and well-accepted form of speech-language pathology treatment offered when an individual cannot meet daily functional communication needs through natural communication methods, such as oral speech. In addition, there is no use for the Dynavox in the absence of severe communication disability. Finally, the Dynavox is a portable device, used by the beneficiary in her home, and because it is mounted on her wheelchair, it is capable of being used by her in any setting in which her communication needs arise.

These facts establish that the Dynavox meets the Medicare criteria for durable medical equipment. The undersigned also notes that a HCPCS coding review concluded in 1999 that augmentative communication devices with characteristics matching those of the Dynavox were entitled to a HCPCS code within the DME category (Exhibit 17); that at least two other administrative law judges have concluded that the Dynavox meets the durable medical equipment criteria (Exhibit 10A; 10C); and that in 2000, the Health Care financing Administration issued a Decision Memorandum (April 26, 2000, Exhibit 13), and a National Coverage Determination (CIM § 60-23, November 30, 2000, Exhibit 14) which both conclude augmentative communication devices such as the Dynavox meet the Medicare criteria for durable medical equipment.

The next issue to be addressed is whether the Dynavox, as durable medical equipment, is "reasonable and necessary for the treatment of illness or injury". An item is considered to be "necessary" "when it can be expected to make a meaningful contribution to the patient's illness or injury...." (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 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 the beneficiary has established that the Dynavox is both reasonable and necessary to treat her dysarthria. The need for and appropriateness of this device was established by a speech-language pathologist's report (Exhibit 2), and the beneficiary has demonstrated her ability to use the device by engaging in communication with family, friends, and care-givers (Exhibits 2; 20A-20C). As the beneficiary's daughter reported: "Though my mother is unable to do anything physically for herself, she still has a sharp mind. The Dynavox is a Godsend because it gives her the ability to express her needs and share her thoughts" (Exhibit 20A).

With respect to the "reasonableness" factors, the undersigned concludes that the Dynavox has been documented as providing benefits that are not outweighed by the cost of the device, and that cannot be obtained through any alternative course of treatment. Nor does the Dynavox duplicate any form of treatment otherwise available to the beneficiary.

The undersigned concludes that the Dynavox, as durable medical equipment, is a medically reasonable and necessary device for treatment of the beneficiary's dysarthria, and that as a result of its use, the beneficiary has the ability to meet her daily functional communication needs.

The final point to address is whether there is any binding guidance on the administrative law judge that requires the exclusion of augmentative communication devices from coverage. The undersigned concludes no such guidance exists. National Coverage Decision, CIM § 60-9, which describes augmentative communication devices as "convenience items" is not the type of Medicare National Coverage Decision that is binding on administrative law judges. This guidance states its basis is 42 U.S.C. § 1861x(n), which is the Medicare definition of durable medical equipment. By contrast, only National Coverage Decisions based on 42 U.S.C. § 1395y(a)(1) are binding (42 C.F.R. § 405.860(1)(2)). Thus, the National Coverage Decision referenced at CIM § 60-9 is not binding on administrative law judges.

Moreover, it is noted but not controlling that the Health Care Financing Administration, on April 26, 2000, issued a Decision Memorandum that announced the withdrawal of the above referenced National Coverage Decision, and that as of January 1, 2001, augmentative communication devices such as the Dynavox will be covered by Medicare as durable medical equipment. On November 30, 2000, the Health Care Financing Administration formally replaced the augmentative communication device National Coverage Decision, codified at CIM § 60-9, with a new National Coverage Decision, codified at CIM § 60-23, which expressly states augmentative communication devices are covered as durable medical equipment. The Decision Memorandum and replacement NCD are not controlling authority for this appeal because they state they are applicable to claims with dates of service after January 1, 2001.

While these Decision Memorandum are not binding on the undersigned as such, it is clear that HCFA has acknowledged that the earlier one was an incorrect interpretation as to the status of an augmentative communication device for patients like Ms. Herlong for whom it represents the only means of effective communication because of her medical condition, severe dysarthria.

While philosophically, the undersigned is inclined to the minority view that the device her at issue is more like a prosthesis, there is no compelling need to reject the majority view now accepted by the government that speech augmentative devices are durable medical equipment.


FINDINGS

After careful consideration of the entire record, the undersigned finds:

1. The amount of controversy in this claim is more than \$500;
2. The augmentative communication device is reasonable and necessary for treating intelligible speech for that beneficiary with severe dysarthria so that she can meet the communication needs arising in her daily life at home. It is not merely a convenience item just because it also improves the quality of life.
3. The augmentative communication device known as the Dynavox, which was prescribed for the beneficiary's use by her physician, following an evaluation by a speech-language pathologist, satisfies the Medicare definition of durable medical equipment;
4. The cost of the Dynavox for this beneficiary is covered under Section 1861(n) of the Social Security Act.

DECISION

It is the decision of the Administrative Law Judge that reimbursement shall be made to the beneficiary for the purchase of an augmentative communication device to the extent now authorized for such devices under CIM § 60-23.


DAVID G. DANZIGER
Administrative Law Judge

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Date