

**SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals**

DECISION

IN THE CASE OF

CLAIM FOR

Linda W. [REDACTED] o/b/o
(Appellant)

Supplementary Medical
Insurance Benefits
(Claim Type)

Richard O. [REDACTED]
(Beneficiary)

349-18-5811
(HICN/SSN)

Palmetto Government
Benefits Administrators
(Carrier)

Dynavox System Inc.
(Provider)

Docket No: 999-06-9259

This case is before the undersigned Administrative Law Judge pursuant to a timely appeal on behalf of the beneficiary, Mr. Richard O. [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 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 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 in 1996, the beneficiary's condition was diagnosed as progressive supranuclear palsy, PSP, a neurological disorder characterized by the degeneration of the nerve cells in the basal ganglia and brain stem. Dysarthria is recognized as a speech impairment associated with PSP. Dysarthria is characterized by the loss of intelligibility of speech. The beneficiary's condition had progressed such that he lost the functional ability to speak, and could make only groaning sounds. His inability to communicate caused frustration and psychological symptoms sufficient to require a 10 month course of therapy, from September 1999 to July 2000. (Exhibit 2, 16, 19).

The beneficiary was evaluated by Patty Smith, M.A., C.C.C. - S.L.P., who determined that the Dynavox augmentative communication device was the most appropriate method by which the beneficiary could meet his daily communication needs. With the Dynavox the beneficiary is able to communicate his basic physical needs, emotional status, self care needs, engage in social communicative interaction with family and friends, and carry out communicative interactions in the community. (Exhibit 16).

The Dynavox was purchased by the beneficiary and he has demonstrated his ability to use it to communicate with his spouse, children and grandchildren, other family members, medical services providers (e.g., the Dynavox was used throughout the course of therapy referenced above), friends, and individuals encountered in public settings. (Exhibit 19).

The Dynavox is able to adapt and has been adapted to changes in the beneficiary's physical condition due, so that it continues to be of use.

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(a)(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 him. The Dynavox is a dedicated augmentative communication device, designed, marketed, and sold only to people with severe communication disabilities. (Exhibit 13.) 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 his home, and capable of being used by him in any setting in which his 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 15); that at least two other administrative law judges have concluded that the Dynavox meets the durable medical equipment criteria (Exhibit 8A; 8C); and that in 2000, the Health Care Financing Administration issued a Decision Memorandum (April 26, 2000, Exhibit 11), and a National Coverage Determination (CIM § 60-23, November 30, 2000, Exhibit 12) 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 that the beneficiary has established that the Dynavox is both reasonable and necessary to treat his dysarthria. The need for and appropriateness of this device was established by a speech-language pathologist's report (Exhibit 16), and the beneficiary has demonstrated his ability to use the device by reestablishing a wide range of communication with family, friends, and community acquaintances. It also has been an important contributing factor to his successful course of psychological counseling. For example, his therapist reported: "I am quite certain that this [reported accomplishment of all treatment goals] would have been impossible if the Dynavox communication device had not been available to allow Mr. Olson to engage fully in the therapy process."

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 his 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(a)(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.

Nonetheless, the undersigned concludes there is no binding guidance that requires the exclusion of augmentative communication devices, and no persuasive evidence to defer to the augmentative communication device national coverage decision even as non-binding guidance.

FINDINGS

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

1. The amount in controversy in this claim is more than \$ 500;
2. The augmentative communication device national coverage decision, CIM, § 60-9 is not binding authority on administrative law judges;
3. The augmentative communication device known as the Dynavox, which was prescribed for the beneficiary's use by his physician, following an evaluation by a speech-language pathologist, satisfies the Medicare definition of durable medical equipment;
4. The Dynavox has been established as reasonable and necessary for the treatment of the beneficiary's dysarthria, that it is necessary for the beneficiary to meet the communication needs arising in his daily activities, and that the Dynavox is not a convenience item; and
5. The Dynavox as prescribed for this beneficiary meets the requirements for coverage under Part B of Medicare.

DECISION

It is the decision of the Administrative Law Judge that reimbursement shall be made to the beneficiary for the cost of augmentative communication device pursuant to Section 1832(a)(2)(G) and 1834(a)(13) of the Social Security Act.


DAVID G. DANZIGER
Administrative Law Judge

101701
Date