

SOCIAL SECURITY ADMINISTRATION  
Office of Hearings and Appeals

DECISION

IN THE CASE OF

Mr. Norman J. [REDACTED]  
(Appellant)

(Beneficiary)

(Carrier/Intermediary/PRO)

CLAIM FOR

Supplementary Medical  
Insurance Benefits

(HICN)

999-07-4285

(Docket Number)

This case is before the undersigned Administrative Law Judge following a Request for Hearing filed by Norman J. [REDACTED], hereinafter referred to as the Claimant, on July 17, 2000. After careful consideration of the pertinent documentary evidence in this case, the undersigned Administrative Law Judge has determined that a decision, fully favorable to the Claimant, can be entered on the record.

ISSUES

The general issue in this case is whether payment under Part B of Title XVIII of the Social Security Act, as amended, may be made for the purchase of a Lightwriter Communication Device on March 15, 1999. The specific issue upon which findings of fact will be made and conclusions of law will be reached is whether the Lightwriter Communication Device satisfies the definition of either durable medical equipment or a prosthetic device under the appropriate provisions of the Social Security Act, the Health Care Financing Administration's Regulations, and the Medicare Coverage Issues Manual.

EVALUATION OF THE EVIDENCE

The record in this case shows that, on March 15, 1999, the Claimant purchased a Lightwriter communication device from Zygo

Industries, Inc., of Portland, Oregon. In July 1998, Mr. J. [REDACTED] suffered a cerebrovascular accident (his second within fourteen months) that left him unable to swallow and incapable of intelligible speech. Despite aggressive speech therapy, the Claimant did not improve, and his inability to speak resulted in depression and social withdrawal. Accordingly, Susan Shields, M.S., his speech therapist, recommended the purchase of an argumentative and alternative communication (ACC) device, and the Lightwriter device was chosen because of its portability. A prescription for the ACC device was issued by Mr. J. [REDACTED]'s treating physician on March 5, 1999, and the order was placed ten days later. The cost of the unit, including shipping and handling, was \$3,015.

Mr. J. [REDACTED] subsequently submitted a claim for payment of the ACC device under Part B of Title XVIII of the Social Security Act, as amended. His claim was denied by Cigna HealthCare, the Medicare Part B Fiscal Intermediary, on October 13, 1999. Mr. J. [REDACTED] requested reconsideration, but on December 21, 1999, and after a Carrier Fair Hearing in May 2000, the initial determination was affirmed.

Citing a DMERC Suppliers Manual provision, the Fiscal Intermediary described the Lightwriter communication device and other types of ACC devices as "convenience" items that are non-medical in nature. As such, it was found that ACC devices are not properly categorized as durable medical equipment, as that term is defined under law.

The Fiscal Intermediary further stated that, although certain types of "electronic speech aids" can be covered under Part B as prosthetic devices, payment can be made only if a beneficiary has had a laryngectomy (or if the larynx is permanently inoperative), and the device must operate either by placing a vibrating head against the throat or by amplification of sound waves through a tube inserted in the beneficiary's mouth. Mr. J. [REDACTED]'s larynx has not been removed or been made permanently inoperative, and keyboard units, such as the Lightwriter ACC device, do not operate either by vibration against the throat or amplification of sound waves through a tube.

For these reasons, Cigna Healthcare concluded that ACC devices are not covered under Part B of the Medicare program. Being dissatisfied, the Claimant filed a Request for Hearing on July 17, 2000.

Pursuant to 42 CFR 414.210, Medicare pays for 80 percent of the cost of durable medical equipment, prosthetics and orthotics. In



view of the DMERC Suppliers Manual section cited by the Fiscal Intermediary, it appears that the Lightwriter unit purchased by the Claimant in March 1999 simply does not fall within the definition of a prosthetic device. Thus, the only way that Mr. J. [REDACTED] can prevail is if he can establish that the Lightwriter ACC device satisfies the regulatory definition of durable medical equipment (DME), and is not otherwise excluded under law.

The Regulations, i.e., 42 CFR 414.202, define DME as 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 1869(b)(3) of the Social Security Act, as amended, provides that national coverage determinations issued by the Health Care Financing Administration are not reviewable by Administrative Law Judges. On August 21, 1989, HCFA published a notice in the Federal Register which listed current Medicare National Coverage Decisions to be included in the Medicare Coverage Issues Manual. Section 60-9 of that manual pertains to durable medical equipment and includes a reference list which sets forth specific covered and non-covered equipment. According to Section 60-9, when an item does not appear to logically fall into any of the generic categories listed, the Administrative Law Judge has the authority and responsibility to decide whether the cost of the item can be paid under the Medicare program. However, the decision must be based upon the general coverage instructions set forth in Section 2100 of the Medicare Carriers Manual. That section reflects the statutory and regulatory definitions of durable medical equipment in its requirement that the primary use and purpose of such equipment must be medical in nature, and that such equipment generally is not useful to an individual in the absence of an illness or injury.

In the instant case, the Health Care Financing Administration issued National Coverage Decision, 60-23, on November 30, 2000, that states:

"Effective January 1, 2001, augmentative (sic) and alternative communication devices or communicators . . . hereafter referred to as "speech generating devices" are now considered to fall within DME benefit category established by Section 1861(n) of the Social Security Act. They may be covered



if the contractor's medical staff determines that the patient suffers from a severe speech impairment and that the medical condition warrants the use of the device . . ."

The National Coverage Decision requires that, to qualify for coverage, an ACC device must be a dedicated speech device used solely by an individual who has a severe speech impairment. Devices that are not dedicated speech devices, but are devices capable of running software for purposes other than speech generation, e.g., device that can also run a word processing package, an accounting program, or perform other non-medical functions, are not covered.

The Lightwriter unit uses liquid crystal to display text that is then transformed to speech. Its memory is capable of using abbreviations to expand text, speed writing, and storing 36 memos of up to 250 characters each. While there is an 8-function calculator within the unit, the Lightwriter cannot run software for purposes other than speech generation.

Accordingly, if the Claimant, who is now deceased, had purchased his Lightwriter unit on or after January 1, 2001, there is no question that 80% of its cost would have been paid as DME under Part B of the Medicare program. However, even if ACC devices, prior to January 1, 2001, were not specifically listed and did not appear to logically fall into any of the generic categories set forth in Section 60-9 of the Medicare Coverage Issues Manual (published in 1989), the undersigned Administrative Law Judge still has the authority and responsibility to decide whether the cost of such items can be paid as DME under the Medicare program.

As noted earlier, 42 CFR 414.202, defines DME as equipment that can withstand repeated use, is primarily and customarily used to serve a medical purpose, is generally is not useful to an individual in the absence of an illness or injury, and is appropriate for use in the home.

Regardless of the effective date of National Coverage Decision 60-23, the Health Care Financing Administration has clearly concluded that ACC devices, such as the Lightwriter unit purchased by the Claimant in March 1999, are not merely convenience items, non-medical in nature, as determined by the Fiscal Intermediary. Furthermore, they would not be useful to individuals not afflicted by severe speech impairments, there is no question that they are appropriate for use in the home, and because they are the most effective way severely speech-impaired individuals can communicate, they are designed to withstand

repeated use.

Thus, the Lightwriter unit purchased by Mr. J. [REDACTED] in March 1999 satisfies the statutory and regulatory definition of durable medical equipment, and payment for such device will be made under Part B of Title XVIII of the Social Security Act, as amended.

#### FINDINGS

1. On March 15, 1999, the Claimant purchased a Lightwriter communication device from Zygo Industries, Inc., of Portland, Oregon.
2. In July 1998, Mr. J. [REDACTED] suffered a cerebrovascular accident (his second within fourteen months) that left him unable to swallow and incapable of intelligible speech. Despite aggressive speech therapy, the Claimant did not improve, and his inability to speak resulted in depression and social withdrawal.
3. A prescription for an ACC device was issued by Mr. J. [REDACTED]'s treating physician on March 5, 1999. The cost of the unit, including shipping and handling, was \$3,015.
4. Pursuant to 42 CFR 414.210, Medicare pays for 80 percent of the cost of durable medical equipment, prosthetics and orthotics.
5. The Lightwriter unit purchased by the Claimant in March 1999 does not fall within the definition of a prosthetic device.
6. The Regulations, i.e., 42 CFR 414.202, define DME as 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.
7. Section 1869(b)(3) of the Social Security Act, as amended, provides that national coverage determinations issued by the Health Care Financing Administration are not



reviewable by Administrative Law Judges.

8. The Health Care Financing Administration issued National Coverage Decision, 60-23, on November 30, 2000, that states that, effective January 1, 2001, augmentative and alternative communication devices or communicators are now considered to fall within DME benefit category established by Section 1861(n) of the Social Security Act.
9. Accordingly, if the Claimant, who is now deceased, had purchased his Lightwriter unit on or after January 1, 2001, there is no question that 80% of its cost would have been paid as DME under Part B of the Medicare program.
10. However, even if ACC devices, prior to January 1, 2001, were not specifically listed and did not appear to logically fall into any of the generic categories set forth in Section 60-9 of the Medicare Coverage Issues Manual (published in 1989), the undersigned Administrative Law Judge still has the authority and responsibility to decide whether the cost of such items can be paid as DME under the Medicare program.
11. Regardless of the effective date of National Coverage Decision 60-23, the Health Care Financing Administration has clearly concluded that ACC devices, such as the Lightwriter unit purchased by the Claimant in March 1999, are not merely convenience items, non-medical in nature, as determined by the Fiscal Intermediary. Furthermore, they would not be useful to individuals not afflicted by severe speech impairments, there is no question that they are appropriate for use in the home, and because they are the most effective way severely speech-impaired individuals can communicate, they are designed to withstand repeated use.
12. Thus, the Lightwriter unit purchased by Mr. J. [REDACTED] in March 1999 satisfies the statutory and regulatory definition of

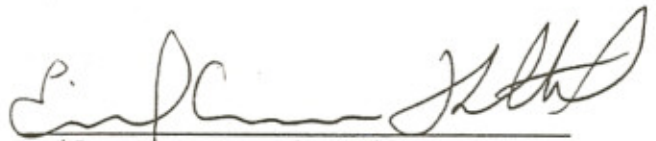
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durable medical equipment, and payment for such device will be made under Part B of Title XVIII of the Social Security Act, as amended.

DECISION

It is the decision of the undersigned Administrative Law Judge that payment may be made under Part B of Title XVIII of the Social Security Act, as amended, for the purchase of a Lightwriter Communication Device by Norman J. [REDACTED] on March 15, 1999.

  
Emily Cameron Shattil  
Administrative Law Judge

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Date