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SOCIAL SECURITY ADMINISTRATION  
Office of Hearings and Appeals

DECISION

IN THE CASE OF

CLAIM FOR

Joan G. B. [REDACTED]  
(Appellant)

Supplemental Medical Insurance Benefits  
(Part B)

Same  
(Beneficiary)

999-01-0782  
(HICN)

DMERC Region A  
(Carrier/Intermediary/PRO)

999-01-0782  
(Docket Number)

INTRODUCTION

This case is properly before the undersigned Administrative Law Judge pursuant to a timely appeal on behalf of the appellant, Mrs. Joan B. [REDACTED], the Medicare beneficiary. The appellant appeals from an adverse determination of a Medicare hearing, affirming the Durable Medical Equipment Regional Carrier's denial of coverage and reimbursement under Part B of title XVIII of the Social Security Act ("Medicare Part B") for an augmentative communication (AAC) device known as a Delta Talker. The appellant 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 appellant is entitled to Medicare Part B reimbursement for the Delta Talker at issue. The Delta Talker meets the Medicare criteria for durable medical equipment, and no binding authority or persuasive non-binding authority requires its exclusion from coverage. The documentary evidence also establishes the Delta Talker is reasonable and necessary for treatment of the appellant's severe communication disabilities, apraxia and fluent aphasia. This fully favorable decision is therefore being made on the documentary record without an oral hearing.

### EVALUATION OF THE EVIDENCE

The record reflects that the appellant had a cerebral aneurysm in 1991 that caused a related severe expressive communication disability. The appellant was evaluated by an speech-language pathologist, Ms. Tracy Bombara, M.S., CCC-SLP, who diagnosed the appellant's communication disability as apraxia and Wernicke's (fluent) aphasia. Exhibits 15A-C. The appellant's condition is characterized by the use of stereotypical speech, in which she says words and phrases repeatedly, but which are not responsive to the context or content of the conversation, or a correct representation of what the appellant intends to say. *Id.* The appellant received speech-language therapy services, which were not successful in overcoming this condition. Ms. Bombara then recommended the appellant for an augmentative communication device. *Id.* A trial period was arranged with several different devices, and the Delta Talker ultimately was determined to be the most appropriate AAC device for the appellant. *Id.* The Delta Talker is a lightweight, rechargeable-battery powered augmentative communication device that allows the appellant to formulate messages, which the device will speak aloud in a synthesized voice. Exhibits 11. With the Delta Talker, the appellant is able to communicate with familiar and unfamiliar conversation partners, in person and by telephone, her 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. Exhibits 15A-C; 16. The Delta Talker was purchased by the appellant, based on a prescription and medical documentation provided by her treating physician, Joseph Rubacky, D.O., and she continues to use it at present. Exhibits 13A-B; 15A-C; 16.

### 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 is a Medicare benefits category for which reimbursement is made. The undersigned concludes, based on the appellant's attorney's letter brief dated December 4, 2001, that the Delta Talker 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 Delta Talker satisfies the criteria referenced above. The Delta Talker is durable: it is powered by rechargeable batteries and has been used by the appellant for approximately 5 years.

The Delta Talker has been determined to be the only effective method of treatment for the appellant's communication disabilities. Exhibits 15A-C. The authorities cited by the appellant's attorney establish that AAC 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. No individual will have use for a device such as the Delta Talker in the absence of severe communication disability. The Delta Talker is a dedicated augmentative communication device, which serves no other purpose. Finally, the Delta Talker is a lightweight, portable device, used by the appellant in her home, and in other settings in which her communication needs arise.

These facts establish that the Delta Talker meets the Medicare criteria for durable medical equipment. The undersigned also notes that a Delta Talker has been approved as durable medical equipment by another administrative law judge reviewing a Medicare reimbursement appeal. Exhibit 6F. It also is noted that Medicare has adopted guidance regarding AAC devices which acknowledge that they fit the definition of DME [April 26, 2000, HCFA Decision Memorandum, Exhibit 9; National Coverage Determination (CIM § 60-23, November 30, 2000), Exhibit 10; and Regional Medical Review Policy on Speech Generating Devices, Exhibit 14]. Although this guidance is not applicable to claims with dates of service prior to January 1, 2001, and therefore, it does not expressly apply to this appeal, it is consistent with and provides further support for the conclusion that the Delta Talker meets the Medicare definition of DME. The criteria in CIM § 60-23 emphasize that the speech augmentation device must be able to produce or synthesize speech from either speech or mechanical inputs, must be exclusively dedicated to the speech production needs of the speech-impaired user, and may not be usable or adaptable for other purposes by the speech-impaired user or any other person. The Delta Talker meets these criteria. As the Delta Walker at issue here was purchased, rather than rented, and, as the appellant has continued to appeal the adverse determinations of the DMERC up through and beyond January 1, 2001, it is appropriate to consider the content of HCFA's favorable coverage determinations in April 2000, effective January 1, 2001, as applicable to the ongoing adjudication of her reimbursement claim (i.e., it no longer matters now whether the appellant is allowed one-time reimbursement either as of January 1, 2001, or as of the original purchase date).

The undersigned also concludes that the Delta Talker, as an item of 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 appellant has established that the Delta Talker is both reasonable and necessary to treat the appellant's apraxia and aphasia. The need for and appropriateness of this device was established by a speech-language pathologist's reports Exhibits 15A-C, and the record establishes the appellant has used the device for years, and continues to use it to engage in a wide range of in person and telephone communication with family, friends, and community acquaintances. Exhibits 13A-B; 15A-C; 16.

With respect to the "reasonableness" factors, the undersigned concludes that the Delta Talker has been well documented as providing benefits to the appellant that are not outweighed by the cost of the device, and that among the other AAC devices that are comparable to the Delta Talker and that the appellant used in a trial period, the Delta Talker is the least expensive among these alternatives. It also is clear from Ms. Bombara's reports, Exhibits 15A-C, and from her doctor, Exhibit 16, that the benefits the appellant derives from the Delta Talker could not be obtained through any alternative course of treatment. Nor does the Delta Talker duplicate any form of treatment otherwise available to the appellant.

The undersigned concludes that the Delta Talker, as durable medical equipment, is a medically reasonable and necessary device for treatment of the appellant's apraxia and aphasia, and that as a result of its use, the appellant 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 on ALJs. (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 once again noted 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, Exhibit 9, and that as of January 1, 2001, augmentative communication devices such as the Delta Talker have been 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. Exhibit 10.

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. This conclusion also is consistent with the uniform decisions of 16 other Medicare Administrative Law Judges who have reviewed AAC device appeals. Exhibits 1,2, 3, 4A-C, 6A-J.

The determination of a reasonable charge allowance for the Delta Walker was not previously at issue before the DMERC, which is responsible for such a determination. The record does not provide an evidentiary basis upon which the Administrative Law Judge may make such a determination. Accordingly, such determination remains as a post-decisional matter to be addressed by the DMERC.

### FINDINGS


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 Delta Talker satisfies the Medicare definition of durable medical equipment; moreover, it fully satisfies the Medicare coverage criteria in HCFA's National Coverage Decision, codified at CIM, § 60-23, effective January 1, 2001.
4. The Delta Talker has been established to be reasonable and necessary for the treatment of the appellant's apraxia and aphasia that it is necessary for the appellant to meet the communication needs that arise in her daily activities, and that the Delta Talker is not a convenience item; and
5. The Delta Talker is a covered item for purpose of reimbursement under Medicare Part B

### DECISION

It is the decision of the Administrative Law Judge that Medicare may reimburse the appellant for the Delta Talker augmentative communication device as an item of durable medical equipment covered under Medicare Part B. Medicare covered item. The determination of an appropriate



reasonable charge allowance for the Delta Walker was not previously at issue before the DMERC, which is responsible for such determination.

  
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John M. Fitzpatrick  
Administrative Law Judge

DEC 14 2001

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Date