

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENTAL APPEALS BOARD

DECISION OF MEDICARE APPEALS COUNCIL

In the case of

Patricia M. [REDACTED] o/b/o
John L. M. [REDACTED] (dec'd)
(Appellant)

John L. M. [REDACTED] (dec'd)
(Beneficiary)

Palmetto GBA
(Contractor)

Claim for

Supplementary Medical
Insurance Benefits (Part B)

431-55-2953A
(HIC Number)

999-15-7712
(Docket Number)

The Administrative Law Judge (ALJ) issued a decision dated August 30, 2002. The appellant has asked the Medicare Appeals Council to review this action. The Council grants the request for review because there is an error of law. See 20 C.F.R. §§ 404.967 and 404.970, incorporated by reference in 42 C.F.R. § 405.856.

Because this decision is fully favorable to the appellant, the Council has not issued a separate notice granting the request for review. We have entered the request for review into the record as Exhibit MAC-1. As further detailed below, we have also entered into evidence Exhibits MAC-2 and MAC-3. Copies of these exhibits are enclosed.

At issue in this case is augmentative and alternative communication software (EZ Keys for Windows and Eloquence voice synthesizer) and a knee operated "jelly bean" switch used in conjunction with the software (collectively a speech generating device (SGD)). The beneficiary purchased these items on September 14, 2000, for \$1650.00 from Words+, Inc., who did not accept assignment. The supplier submitted a bill to Medicare under HCPCS code E1399.¹ Exhs. 1 and 2. The beneficiary had amyotrophic lateral sclerosis. By mid-2000 he had lost the ability to sustain speech or operate a computer mouse and keyboard. A physician-ordered evaluation at the Tampa General Rehabilitation Center determined that he could effectively use a

¹ Present carrier guidelines indicate that the software would now be coded as K0545, and the switch would be billed as an access device under code K0547. Exh. 19, tab 2, p. 4.

Freedom 2000 system for communication. Exhs. 10 and 11. The Freedom 2000 system cost \$6269 and included a dedicated notebook computer and software. Exh. 2. Because the beneficiary already had a personal computer, he elected to purchase only the components necessary to adapt his computer for use as an SGD.

The Medicare carrier and hearing officer denied coverage because National Coverage Determination (NCD) 60-9 in effect at the time of purchase declared a communicator/SGD a convenience item that did not qualify under section 1861(n) of the Social Security Act as durable medical equipment (DME). The ALJ found that the SGD may have been medically necessary, but that it was not covered by Medicare. The ALJ acknowledged that he was not bound by NCD 60-9, but elected to follow the NCD and likewise denied coverage. We grant review. The ALJ erred in not independently evaluating whether the SGD qualified for Medicare coverage.

Medicare's longstanding policy defines DME as equipment 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.

See, e.g., 42 C.F.R. § 414.200.

The version of NCD 60-9 that was in effect on September 14, 2000, did not indicate why a communicator/SGD did not qualify as DME. Medicare began reviewing its coverage policy on communicators/SGDs in January 2000, at the request of Lewis Golinker, who is the appellant's counsel herein.² That review noted that the decision that communicators/SGDs were convenience items and not covered DME had been made a number of years ago. Medicare determined by April 2000, that communicators/SGDs were covered DME, and that carriers would be able to make their own coverage determinations effective January 1, 2001. However, upon further consideration Medicare subsequently issued an affirmative determination of coverage, NCD 60-23, for certain devices

² Information regarding this review is available on the internet at www.cms.hhs.gov/mcd. We have placed copies in the record as Exhibit MAC-2.

effective that same date. Speech generating devices are covered under NCD 60-23, among other things, if they have synthesized speech as output, with multiple methods of message formulation and multiple methods of device access. The SGD at issue herein meets these criteria.³

Advances in modern electronic hardware and software have produced devices with capabilities far in excess of those available only ten or twenty years ago. We have independently applied the long-standing criteria for DME and conclude that the device at issue met the definition of DME when furnished. Moreover, consistent with the present criteria for coverage of SGD, it is clear that it would be covered for this beneficiary under the current, more-detailed standards as well. Accordingly, we find that the SGD at issue was covered DME and was medically necessary for Mr. Mills when furnished.

DECISION

It is the decision of the Medicare Appeals Council that the augmentative and alternative communication software (EZ Keys for Windows and Eloquence voice synthesizer) and a knee operated "jelly bean" switch used in conjunction with the software was a SGD and qualified as Medicare-covered DME when furnished.

MEDICARE APPEALS COUNCIL


Clausen J. Krzywicki

Administrative Appeals Judge


Bruce P. Gipe

Administrative Appeals Judge

Date: **MAR 25 2004**

³ Information regarding the software items is available on the internet from the manufacturers at www.words-plus.com (EZ Keys for Windows) and www.scansoft.com (Eloquence voice synthesizer). We have placed copies in the record as Exhibit MAC-3.