

Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF

CLAIM FOR

Kimberly D. [REDACTED]
(Appellant)

Supplementary Medical
Insurance Benefits
(Claim Type)

Kimberly D. [REDACTED]
(Beneficiary)

005-54-3819
(HICN/SSN)

Federal Hearings & Appeals Service
(Carrier/Intermediary)

000-19-3751
(Docket Number)

PROCEDURAL HISTORY

This matter is before the undersigned Administrative Law Judge ("ALJ") on the timely appeal of the beneficiary, Kimberly D. [REDACTED]. Kimberly D. [REDACTED] appeals from an adverse determination of a Medicare hearing officer, affirming the Durable Medical Equipment Region A carrier's (DMERC's) denial of Medicare Coverage for an augmentative communication speech device known as a Light Writer.

In a fair hearing decision dated September 23, 1999, the carrier's hearing officer determined that the Light Writer was not covered by Part B of Medicare because the device was not "reasonable and necessary." The hearing officer relied on the Region A DMERC Supplier Manual, section 12-43 and the Coverage Issues Manual, section 60-9, in finding that an Augmentative Communication device or Communicator was a convenience item and not primarily medical in nature. (Exhibit 3)

A hearing in this matter was held before the undersigned on June 1, 2000 in Portland, Maine. The beneficiary appeared with her representative, Mr. Lewis Golinker. Also appearing and offering testimony were Mrs. Ann D. [REDACTED], Kimberly's mother; Mr. Dennis D. [REDACTED], Kimberly's uncle; Mr. Mark Hammon, Kimberly's Speech Pathologist and State of Maine Senator Jill Golwath, who appeared in an official capacity. The amount in controversy in this case is \$3,224.00, which satisfies the Part B \$500.00 minimum amount in controversy requirement for an Administrative Law Judge appeal. 42 C.F.R. §§ 405.815, 405.817(a)(1).

ISSUES

The issue to be determined in this appeal is whether payment should be made under Part B of Title XVIII of the Social Security

Act for the augmentative communication device known as a Light Writer.

CONCLUSIONS

The undersigned Administrative Law Judge has reviewed the record and considered the testimony and has concluded that the augmentative communication device purchased by the beneficiary is reasonable and necessary and is a Medicare covered item as durable medical equipment.

EVALUATION OF THE EVIDENCE

The evidence in the case file and the testimony adduced at the hearing establish that the beneficiary has cerebral palsy in conjunction with two associated conditions: quadriplegia and severe dysarthria. Due to her quadriplegia, the beneficiary is unable to use her hands to write; her severe dysarthria, according to Mark Hammond, a licensed speech-language pathologist, renders her speech unintelligible, even to familiar listeners.

The beneficiary is recognized as having normal intelligence and significant expressive language skills. However, due to her motor impairments, she lacks the ability to engage in expressive communication using natural speech, or other unaided means. Exhibit 11.

The beneficiary's treating physician prescribed a Light Writer, a type of augmentative communication device, Exhibit 12, which was subsequently purchased by the beneficiary. The beneficiary operates this device by means of a helmet-mounted pointing device. She also operates a power wheelchair by this same method. The Light Writer was one of a group of devices identified by Mr. Hammond, the speech-language pathologist as equally effective alternatives (testimony).

Numerous exhibits from family, services providers, members of the community attest to the beneficiary's use of the Light Writer and the benefits she derives from it. The beneficiary states that she uses it "constantly," and is able to engage in the full range of conversational communication that is typical of an adult. Exhibits 1, 3, 4, 5, 6, 7, 8, 9, 11. The beneficiary also demonstrated the use of the Light Writer at the hearing.

The beneficiary filed a Medicare claim with the Region A DME Regional Carrier and pursued appeals through the initial, review/reconsideration, and carrier hearing levels of review. Exhibits 13, 14, 15.

The beneficiary's claim and prior appeal decisions were all

adverse. The basis for these adverse decisions was a National Coverage Determination (NCD) which describes AAC devices as a "convenience item" and therefore not medical in nature. The full text on which the hearing officer relied states, in relevant part, as follows:

Augmentative Communication Device	See Communicator
Communicator	Deny -- convenience item, not primarily medical in nature. (§ 1861(n) of the Act).

NCDs are binding on Carriers [42 C.F.R. § 405.860(a)(1)], but not all NCDs are binding on ALJs. Only certain national coverage decisions are binding on Administrative Law Judges, i.e., those based on section 1862(a)(1) of the Social Security Act, 42 U.S.C. § 1395y(a)(1). 42 C.F.R. § 405.860(a)(2); (b).

The AAC device NCD is not based in § 1862(a)(1). Rather, it is based on § 1861(n) of the Act, which contains the definition of durable medical equipment. 42 U.S.C. § 1395x(n). See also, the Medicare Coverage Issues Manual, Forward, § A, which states, in pertinent part:

All [National Coverage] decisions that items, services, etc., are not covered are based on § 1862(a)(1) of the Social Security Act (the "not reasonable and necessary" exclusion) **unless otherwise specifically noted. Where another statutory authority for denial is indicated, that is the sole authority for the denial.**

In addition, it should be noted that on April 16, 2000 Health Care Financing Administration issued a "Decision Memorandum" stating that it was withdrawing the AAC national coverage decision. HCFA concluded that AAC devices did meet the Medicare definition of durable medical equipment and left the determination as to whether the device was covered to the regional DMERCs. Exhibit 31.

The appellant argues that AAC devices, such as the Light Writer, meet the requirements of durable medical equipment as defined by Medicare regulations. An item of durable medical equipment must have the following characteristics: 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 illness or injury; and 4) is appropriate for use in the home. 42 C.F.R. § 404.202.

The appellant argues that AAC devices such as the Light Writer meet all of these criteria. They are durable; the beneficiary reports that she has used this device "constantly" since she acquired it 2 years ago. Exhibit 5. This device is itself a replacement for an AAC device, approved by Medicare in 1986, Exhibit 21, which ceased to function after approximately ten years' use. Exhibits 5, 11.

The testimony offered at the hearing established that the AAC device also has a medical purpose. The beneficiary testified that she relies on the Light Writer to communicate with health care providers regarding symptoms, complaints of pain and other medical needs. She can use the Light Writer in conjunction with the telephone to call for help in the case of a medical or other emergency. As noted by Mark Hammond, the beneficiary's speech-language pathologist, the Light Writer is the only effective treatment for the beneficiary's dysarthria. The device was prescribed for the beneficiary by her doctor. Exhibit 12.

The exhibits referenced above which describe the beneficiary's use of and benefit from the Light Writer establish that this device is "reasonable and necessary" for treatment of the beneficiary's dysarthria, serves a medical purpose and would therefore be covered by Medicare. This AAC device allows the beneficiary to engage in the full range of communication with family, services providers, and individuals in the community.

Accordingly, the Administrative Law Judge finds that the Light Writer AAC device meets the requirement of the Medicare definition of durable medical equipment and is reasonable and necessary for the treatment of the beneficiary's dysarthria. As a result, Medicare coverage is appropriate.

FINDINGS OF FACT

After careful consideration of the entire record, the Administrative Law Judge finds:

1. The amount in controversy in this claim is more than \$ 500 (421 C.F.R. §§ 801(a); 855)
2. The augmentative communication device national coverage decision, C.I.M. § 60-9 is not binding on Administrative Law Judges.
3. The augmentative communication device known as the Light Writer, which was prescribed for the beneficiary's use by her doctor, satisfies the Medicare definition of durable medical equipment (42 C.F.R. § 404.202)
4. The Light Writer is not a convenience item, but is

medically necessary and reasonable for the treatment of the beneficiary's dysarthria, and to enable her to meet the communication needs arising in her daily activities.

5. The Light Writer is a Medicare covered item.

DECISION

It is the decision of the Administrative Law Judge that the Light Writer augmentative communication device purchased by the beneficiary is a Medicare covered item.



DAWN LIEB
Administrative Law Judge

JUL 28 2000

Date