

**Social Security Administration
OFFICE OF HEARINGS AND APPEALS**

DECISION

IN THE CASE OF

CLAIM FOR

Charles Mc _____
(Beneficiary)

Medicare+Choice _____
(Claim Type)

Elizabeth Mr _____ o/b/o
Charles Mr _____
(Appellant)

A _____
(HICN/SSN)

Universa Health Care, WNY
d/b/a SeniorChoice _____
(Medicare+Choice Plan)

(pre-service) _____
(Provider/Service Dates)

PROCEDURAL HISTORY

This case is before the undersigned Administrative Law Judge on a request for hearing filed September 28, 1999.

The request for hearing was filed to appeal the reconsideration determination by the Center for Dispute Resolution (hereinafter "CHDR") issued on August 19, 1999. The beneficiary's spouse, Elizabeth M. _____, holds a durable power of attorney, and has submitted statements on the appellant/beneficiary's behalf. The beneficiary is represented by attorney Ronald M. Hager of Neighborhood Legal Services, Inc. Universa Health Care is represented in this matter by Deborah L. Marine, Esq. Both the appellant and the respondent have requested a ruling on the record, by letters dated January 18, 2000. Accordingly, no hearing has been held on this matter.

ISSUES

The general issue is whether the beneficiary is entitled to have payment made, under the Medicare+Choice program of Title XVIII of the Social Security Act, for the provision of an augmentative communication device, called a Dynamite 3100. Two specific issues are addressed: whether this item meets the statutory requirements for coverage as durable medical equipment or as a prosthetic device.



After careful consideration of all the documentary evidence contained in the record, and the arguments presented, the Administrative Law Judge finds that the beneficiary is entitled to coverage for the Dynamite 3100 device.

LAW AND REGULATIONS

Title XVIII of the Social Security Act provides for the payment of hospital insurance benefits (Medicare Part A) and supplemental medical insurance (Medicare Part B) for eligible individuals.

Section 4001 of Public Law 105-33, the Balanced Budget Act of 1997, added sections 1851 through 1859 to the Social Security Act ("the Act") to establish Part C of the Medicare Program, known as Medicare+Choice. Under section 1851 of the Act, an eligible individual may elect to receive his or her Medicare benefits through enrollment in an approved Medicare+Choice ("M+C") plan.

The Health Care Financing Administration Regulations ("the Regulations") provide generally that an enrollee in an M+C plan is entitled to receive and have payment made for all the basic benefits that otherwise would be available, in the geographic area of the enrollee's residence, to an eligible individual under the Medicare Part A and Medicare Part B programs (42 CFR 422.101).

Pertinent to this decision is 42 CFR 404.202, which imposes requirements for an item to be covered as "durable medical equipment" as follows:

- 1) Can withstand repeated use;
- 2) Is primarily and customarily use 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 1862 (a)(1) of the Social Security Act provides for coverage of items which are "reasonable and necessary for the diagnosis or treatment of illness or injury, or to improve the functioning of a malformed body member..."

Finally, the Medicare Carrier's Manual provides a definition of prosthetic devices which includes items prescribed by a physician to "...replace all or part of the function of a permanently inoperative or malfunctioning internal body organ..." MCM Section 2130.

EVALUATION OF THE EVIDENCE

The beneficiary, Charles M is a member of Senior Choice of Universa Health Plan, a Medicare + Choice organization, and is eligible for coverage of, through the provision of, or payment for, Medicare services. The amount in controversy, is over \$100.

The beneficiary's counsel provided, along with a letter outlining his arguments, copies of several decisions, purportedly by the Administration, to support his claim. These are without precedential value, and are not considered of any evidentiary value, and thus are not admitted into the record.

The beneficiary suffers from a progressive and debilitating neurological disorder, Amyotrophic Lateral Sclerosis (ALS), also known as "Lou Gehrig's Disease."

There is no dispute as to the facts. The beneficiary's neurological illness has caused him to lose, among other things, the ability to control the muscles of the tongue and lips. The beneficiary was examined and evaluated at the Buffalo Hearing & Speech Center in April 1999 by Martha J. Farewell, M.A., CCC-LSLP, a speech language pathologist, upon referral by his primary care physician, Robert Krenzer, M.D. Ms. Farewell reported that the beneficiary presented with "severe verbal dysarthria," significant hypernasality, low voice pitch and a rough and gravelly voice quality. These factors converge to place significant limitations on verbal intelligibility, so that even highly familiar listeners, such as the beneficiary's wife, are able to understand only 10% to 20% of his speech. Despite this condition, the claimant's cognitive and linguistic abilities are intact, and the beneficiary experiences frustration at his inability to effectively communicate. Telephone communication is particularly problematic due to the inability of the listener to interpret visual input or cues which the beneficiary is able to impart to a listener present in the room. The beneficiary has essentially lost the ability to communicate by phone. He seeks coverage for a portable communication device, the "Dynamite" communicator, termed a "speech prosthesis" by his treating neurologist, Hirosho Mitsumoto, M.D.

The respondent HMO has argued that the claimant seeks coverage for an augmentative communication device (ACD) which is not covered by Medicare as durable medical equipment, but rather is specifically excluded as a "convenience" or "personal comfort" item, under section 1862 and is "not primarily medical in nature" as required by 42 CFR 414.202.

The Administrative Law Judge considers these arguments, and, although noting that the device is designated a "communicator"

looks to its actual function and purpose as well as considering the opinions of physicians involved, to determine whether it is medically necessary. First, the beneficiary's total condition must be considered to determine the function and purpose of the proposed device.

The beneficiary, in addition to his dysarthria, is also losing muscle control of other muscles and organs. He is unable to walk more than 50 feet, and mostly uses a wheelchair. He has circulatory problems in his legs and feet, and has asthma, requiring the use of a bi-pap machine for 4 hours daily. He also occasionally uses an in-exsufflator and a suctioning machine. The beneficiary provided a list of 19 medications which he takes on a regular daily basis and several others which he uses on an as needed basis. Among these "as needed" medications are a bronchodilator (Albuterol and Atrovent) delivered by nebulizer. He is cared for at home by his wife.

According to the beneficiary's wife, and corroborated by the speech pathologist, she interprets for her husband when he has doctor's appointments and interacts on his behalf with others who cannot understand him. The beneficiary cannot communicate over the phone. This matter is clearly distinguishable from a hypothetical situation in which a person is unable to speak clearly, but is otherwise able to care for himself. The inability to communicate, particularly in an emergency situation, poses a very substantial danger to a person who is also unable to ambulate. Furthermore, it is essential that the beneficiary be able to communicate directly and in detail with his doctors, particularly in light of his complex medical condition, and multiple medications. The Administrative Law Judge finds that the communication device, regardless of its nomenclature is indeed medically necessary in this matter, and is used primarily for a medical purpose, rather than mere comfort or convenience. As such it meets the requirements for coverage as durable medical equipment.

The device in question has a dual purpose, both as medical equipment and as a prosthesis. The beneficiary has lost the control over the muscles in his lips and tongue, thereby losing his ability to form recognizable speech. In that respect, its function and use is equivalent to electronic speech aids, or implantable devices used to restore speaking ability in individuals with throat cancer or other laryngeal defects. These devices have long been recognized as prosthetic devices in that they meet the definition of improving the use or functionality of a diseased or malformed body organ and are prescribed by a physician. The claimant's treating physician, Robert Krenzer, M.D., has submitted a prescription, dated May 21, 1999, for the item.

Accordingly, the Administrative Law Judge finds that, under the particular circumstances of this case, the Dynamite communicator meets the requirements of both durable medical equipment and prosthetic device under the Social Security Act. The weight of substantial medical evidence therefore requires that the decision of CHDR must be reversed; and coverage provided for this device, as prescribed.


FINDINGS

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

1. The amount in controversy in this claim is more than \$100 (42 CFR 422.66).
2. The beneficiary is a member of Universa Health Care, which is a Medicare+Choice Plan.
3. The "Dynamite" communicator, and associated supplies are durable medical equipment and prosthetic devices.
4. The prescribed device and associated supplies are medicare covered items for which payment shall be made.

DECISION

It is the decision of the Administrative Law Judge that payment be made on the beneficiary's behalf, under Title XVIII of the Social Security Act and Universa Health Care's Medicare+Choice plan, for the Dynamite 3100 communicator and associated equipment, as prescribed.



JAMES E. DOMBECK
U.S. Administrative Law Judge
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Date: March 27, 2000