SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	CLAIM FOR
Shirley L[redacted]	Medicare Part B Reimbursement
(Claimant)	
	999-12-5566/563-32-3060
(Wage Earner)	(Social Security Number)

INTRODUCTION

This case is before the undersigned Administrative Law Judge pursuant to a timely appeal on behalf of the appellant, Shirley L[redacted]. The appellant appeals from an adverse determination of a Medicare hearing officer (Exhibit B-11), affirming the Durable Medical Equipment Regional Carrier's denial of Medicare coverage for an augmentative communication device known as a LightWriter. The appellant is represented by the Washington Protection & Advocacy System and its Staff Attorney, Michael J. Smith.

The amount in controversy exceeds the jurisdictional requirements. The amount in controversy is $2,796.66, or 80% of the cost of the augmentative communication device purchased for the claimant on January 26, 2000, for which the claimant seeks reimbursement.

After review of the documentary evidence, I have concluded that the appellant is entitled to payment for the LightWriter at issue. There are no facts in dispute, and the resolution of the legal issues can be addressed without a hearing. I find that the LightWriter meets the Medicare criteria as durable medical equipment. I also find that it is covered by the April 26, 2000, Health Care Financing Administration decision memorandum (Exhibit B-24), and the accompanying national coverage determination (CIM § 60-23, November 30, 2000) (Exhibit B-23), which both include augmentative communication devices such as the LightWriter as meeting the Medicare criteria for durable medical equipment. These guidelines assign the LightWriter a specific HCPCS Code, K 0543. The documentary evidence also establishes the LightWriter was reasonable and necessary for treatment of the beneficiary's severe communication disability, dysarthria. This fully favorable decision is therefore being made on the record.

EVALUATION OF THE EVIDENCE

In 1999, the beneficiary had cancer and extensive surgery which caused severe dysarthria, characterized by her inability to produce intelligible speech (Exhibits B-1, B-15, B-16 and B-20). Despite speech therapy services, her ability to speak was not restored. In the period between

November 4, 1999 and December 30, 1999, the beneficiary was evaluated by Ms. Kathryn R. Hauser, MA, CCC of the Assistive Technology Clinic and Augmentative Communication Center, part of the Department of Rehabilitative Medicine of the University of Washington Medical Center in Seattle, Washington, who recommended a LightWriter Model SL 35 and carrying case, at a cost of $ 3,495.83 (Exhibits B-1, B-2, and B-3). This augmentative communication device was subsequently prescribed for the beneficiary's use by her treating physician, Ernest Weymuller, M.D. The LightWriter is a small, light-weight device with a QWERTY keyboard that requires the user to type a word, phrase or message, which the device will thereafter "speak" aloud in a synthesized voice (Exhibit B-16).

The LightWriter was purchased by the beneficiary and she uses it on a continuing basis for communication. With the LightWriter, the beneficiary is able to communicate 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 B-20 and B-1, B-15).

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 and prosthetic devices are two benefits categories for which reimbursement is made. I conclude, based on the beneficiary's argument, that the LightWriter 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).

I find that the LightWriter satisfies the criteria referenced above. The LightWriter has been used successfully by the beneficiary for over two years. The LightWriter is a dedicated augmentative communication device, designed, marketed, and sold only to people with severe communication disabilities (Exhibit B-16. pages 10 and 11). The authorities cited by the appellant establishes that augmentative communication 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. In addition, there is no use for the LightWriter in the absence of severe communication disability. Finally, the LightWriter is a portable device, used by the beneficiary in her home, and is used by her in any setting in which her communication needs arise.

These facts establish that the LightWriter meets the Medicare criteria for durable medical equipment. As noted above, on April 26, 2000, the Health Care Financing Administration issued

a decision memorandum and a national coverage decision (CIM § 60-23, November 30, 2000), which both conclude that augmentative communication devices such as the LightWriter meet the Medicare criteria for durable medical equipment. These guidelines assign the LightWriter a specific HCPCS Code, K 0543. The applicability of this decision will be discussed subsequently in this decision.

Another issue to be addressed is whether the LightWriter, as 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)

I find that the appellant has established that the LightWriter was both reasonable and necessary to treat the beneficiary's dysarthria. The need for and appropriateness of this device was established by a speech-language pathologist's report (Exhibit B-1), and the record establishes the beneficiary demonstrates her ability to use the device by reestablishing a wide range of communication with family, friends, and community acquaintances (Exhibits B-20 and B-1, B-15).

With respect to the "reasonableness" factors, I find that the LightWriter has been documented as providing benefits that are not outweighed by the cost of the device, and that could not have been obtained through any alternative course of treatment. Nor did the LightWriter duplicate any form of treatment otherwise available to the beneficiary. It was recommended, prescribed and provided only after a course of evaluation which determined that speech therapy services designed to restore natural speech could not be successful (Exhibits B-1 and B-16).

In summary, I find that the LightWriter, as durable medical equipment, is a medically reasonable and necessary device for treatment of the beneficiary's dysarthria, and that as a result of its use, the beneficiary 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 such augmentative communication devices from coverage. The undersigned concludes no such guidance exists. The prior national coverage decision, CIM § 60-9 (Exhibit B-13), which describes augmentative communication devices as "convenience items," was issued several years ago and was changed on January 1, 2001 pursuant to the Health Care Financing Administration's April 26, 2000 decision memorandum that announced the

withdrawal of the above referenced national coverage decision (Exhibit B-24), and the decision effective January 1, 2001 that augmentative communication devices such as the LightWriter are 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 B-23).

I find that the decision memorandum and replacement national coverage decision are controlling authority for this appeal. The effective date for the new coverage decision memorandum was January 1, 2001, but there is no language that limited it's applicability to only those claims with dates of service or purchase of the durable medical equipment after January 1, 2001. There are no rules or guidance provisions that make the date of purchase of potentially covered durable medical equipment the fixed date for determining coverage, as opposed to the date that a decision or determination of coverage is made on the equipment. As is the general practice on coverage of new regulations and directives in administrative law, such as the effective dates for Social Security Administration Disability regulations, guidelines and rulings, the new coverage decision memorandum applies to all claims which were still in active review and appeals by the Health Care Financing Administration (now the Centers for Medicare and Medicaid Services, or CMS) and the carriers for coverage after January 1, 2001. There is no logic or applicable law or regulations which rule out coverage of active claims just because the equipment in issue was purchased before January 1, 2001. If the claim for reimbursement is still being considered by the Administration and the carrier after January 1, 2001, the new coverage decision applies, and that is the case here. The hearing officer did not cite any law or regulations as the basis for her decision that the new coverage memorandum did not apply, but merely relied on the fact of the effective date as if it were controlling by itself.

In addition, it is instructive to note that the decision memorandum of April 26, 2000 specifically stated that the old coverage decision, 60-9, was reversed, and the Administration was "permitting carriers to make local coverage decisions." Pending the results of research on various aspects of the use of these augmentative devices, a new national coverage memorandum was being postponed, and it was not issued until January 1, 2001. The decision memo simply noted that implementation instructions to contractors would follow and that the effective date for the decision would be "no later than January 1, 2001." There was no expressed or implied intent that the mandates of the old coverage memo which was reversed as of April 26, 2000 would continue to dictate the results for approval of augmentation devices such as the LightWriter which were then under review by the contractors until a new national coverage memo could be issued. To the contrary, the implication in the decision memo was that until the coverage memo could be issued, carriers were to review claims on a case-by-case basis and apply the Medicare requirements to the claimed equipment to determine coverage. The original decision by the carrier denying the coverage requested was made on September 28, 2000 and the fair hearing officer decision upholding the denial of coverage was made on March 20, 2001, both after the decision memorandum of April 26, 2000. Yet the decisions were made solely on the basis of the old national coverage memorandum which had been reversed, and without recognition of the new decision memo issued on April 26, 2000. This failure to apply the new determination of the status of these devices on a case-by-case basis as stated in the decision memo was incorrect and

was arbitrary and capricious. The correct procedure for the carrier to have followed at both dates when this claim was pending before it was to have made the decision based on the specific criteria for coverage without relying solely on the old coverage memo, in the case of the original decision, and on the basis of the new national coverage decision in the case of the fair hearing decision. I am now correcting this error by finding that the decision memorandum of April 26, 2000 and the national coverage decision memorandum of January 1, 2001 must be applied to the claim by Ms. Leitch, and that the augmentative device of the LightWriter fits the criteria and is covered.

I also note as instructive the Medicare regulations at 42 CFR 405.860, which deal with the review of national coverage decisions (NCDs). This regulation specifically provides that in the case of a court remand of a claim for reconsideration of coverage by the Centers for Medicare and Medicaid Services (CMS), the successor of the Health Care Financing Administration, if the CMS reverses the NCD "it forwards the case to the ALJ who issues a new decision applying the revised NCD to the facts of the claim(s) under consideration." In other words, as long as the claim is still under review and consideration at some stage in the process and has not become a final decision, it is subject to any new NCD adopted during the pendantcy of the claim.

The criteria to be applied under the new national coverage decision 60-23 (CIM § 60-23), are that the "patient suffers from a severe speech impairment and the medical condition warrants the use of a device," which is based on specific definitions of what constitutes "Speech Generating Devices." Such speech generating devices "are defined as speech aids that provide an individual who has a severe speech impairment with the ability to meet his functional speaking needs." The LightWriter device in question meets these criteria, and has one or more of the characteristics listed in CIM § 60-23. The claimant's claim for reimbursement at the allowed rate must be granted.

FINDINGS

1. The amount in controversy in this claim is more than $ 500;

2. The augmentative communication device national coverage decision, CIM § 60-23 is applicable to the device which is the subject of this claim.

3. The augmentative communication device known as the LightWriter, which was prescribed for the beneficiary's use by her physician, following an evaluation by a speech-language pathologist, satisfies the Medicare definition of durable medical equipment;

4. The LightWriter has been established to have been reasonable and necessary for the treatment of the beneficiary's dysarthria, that it is necessary for the beneficiary to meet the communication needs that arise in her daily activities, and that the LightWriter is not a convenience item;