

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,809

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Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department of Social Welfare denying his request for an electronic augmentative communication device through the Medicaid program.

FINDINGS OF FACT

1. The petitioner is a thirty-nine-year-old man who, up until June of 1994, worked as a mechanic and supported his wife and two children. On that day, he suffered a severe stroke (a Pontine Cerebral Vascular Accident) which has affected his gross and fine motor skills and his oral skills as well. He is totally paralyzed from the neck down (quadriplegia), unable to communicate verbally (severe dysarthria), and has difficulty swallowing (dysphagia). He now receives SSI and Medicaid benefits.
2. The petitioner receives rehabilitative therapy as an outpatient but his prognosis for recovering his former abilities is poor. He is attempting to cope with his inability to communicate through use of an "eye gaze" communication system which requires him to stare at letters of the alphabet on a plexiglass board held at eye level by a "listener" who attempts to understand what he is trying to spell out. He cannot use this system without another person's help and it is extremely difficult for an inexperienced person to assist him. Currently, only his wife, who has practiced with the board for over a year and who intuitively knows many of his needs, is able to assist him with this method of communication. Without her, the petitioner is physically helpless and unable to communicate his needs which is frustrating, uncomfortable and dangerous for him. The medical, psychological and social difficulties which this presents for him are set out in detail in a letter from his speech pathologist which is attached hereto and incorporated by reference as Attachment One.
3. The petitioner's certified speech pathologist, that pathologist's physician supervisor (a Board certified specialist in Rehabilitation Medicine), and the petitioner's primary care physician have joined in prescribing an augmentative communication system (AAC) as necessary to meet his basic physical, medical and social needs. This system consists of a laptop computer which has the ability to translate the petitioner's thoughts via finger tap into synthesized speech. Such a device is considered a prosthesis in the speech pathology field because it replaces a damaged part--the brain's speech center and muscles of speech--and corrects a malfunctioning organ. The detailed opinions of those health providers as to the necessity and functioning of the AAC are attached hereto as Attachments 2 through 5 and are

incorporated herein by reference. Based on the evidence in this paragraph and the prior one, including the exhibits, it is found that the AAC device is a medically necessary prosthetic device which has been prescribed for the petitioner by his physicians.

4. The petitioner requested the speech computer in June of 1995, and was denied Medicaid payment for the device in July of 1995, based on a finding by the Department that the device is not medically necessary and because it is not considered "durable medical equipment".

ORDER

The decision of the Department is reversed.

REASONS

This case is virtually indistinguishable from that of Fair Hearing No. 13,296 decided by the Board in June of this year. In that case, the Board determined that a computerized speech device prescribed for a woman with cerebral palsy was medically necessary to facilitate in her communication. The Board concluded that such an item is not specifically included (or excluded) under the Medicaid regulation's "all-inclusive" list of "durable medical equipment" contained in Medicaid Manual (MM) § M841. However, the Board concluded that such a speech device was a prosthetic device under the "plain meaning" of § M844 which provides as follows:

Prosthetic devices (other than dental) and repairs to these devices are covered when medically necessary and ordered by a physician.

Payment for prosthetic devices requires prior authorization be granted by the Medicaid Division. The prescribing physician must submit a written request with pertinent diagnostic and clinical data to justify the request.

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The Board concluded that the Department had acted in error when it denied the petitioner's request for payment of the speech device and ordered its provision as a covered prosthetic device under the Medicaid program.

The Department makes no attempt to distinguish these facts from those in Fair Hearing No. 13,296. Instead, it informs the Board that it is taking steps to specifically exclude speech computers from coverage under the Medicaid prosthetics program.⁽¹⁾ In the interim it continues to take the position that applicants for these devices will be denied because such devices are not medically necessary, are not covered durable equipment and are not included as prosthetic devices in M844.

However, the Department has offered absolutely no new medical evidence or legal argument in support of its policy. In light of the Board's prior decision that such devices are covered under the state Medicaid regulations, it is incumbent upon the Department to present some new persuasive evidence or argument to justify continuing this practice of denial. Its failure to do so is an abuse of the process which recognizes the Board's prior decision, which was approved by the Secretary pursuant to 3 V.S.A. § 3091 (h)(2), as the final agency interpretation of M844 in the Medicaid program. Disagreement by the

Department with Secretary approved interpretations issued by the Board should be dealt with through statutory change in the regulation affecting future applicants, if so desired, and not by issuing bad faith denials to individuals who are clearly eligible under the agency interpretation.

The petitioner has, contrary to the Department,

presented considerable new evidence and legal argument bolstering the prior decision made by the Board. The petitioner has pointed out that the Eighth Circuit Court of Appeals in Meyers v. Reagan 776 F2d. 241 (1985) has also ruled that AAC devices meet the definition of "medically necessary" when prescribed by a speech rehabilitation specialist to correct a speech disorder. He has also brought to the Board's attention the definition of "prosthetic devices" in the federal Medicaid regulation⁽²⁾ itself which supports inclusion of an AAC device in that category because, as his evidence amply demonstrates, the AAC corrects a malfunction of the speech centers of the brain and vocal muscles. Finally, he further points out that a speech computer was considered a prosthetic device by the Social Security Administration in a Medicare appeal "where it replaced part of the function of an individual's damaged brain, thereby allowing him to communicate." In re Emlyn J. (U.S. Social Security Admin., Office of Hearings and Appeals, Aug. 18, 1993, p. 3.)

The evidence and argument in this case shows that there is every reason for the Board to continue its prior ruling that AAC devices prescribed by a physician to facilitate communication in a brain damaged individual is a medically necessary prosthetic device covered under the Department's regulations at § M844. The Department's decision to the contrary is, once more, reversed.

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1. The petitioner's memorandum of law puts forward several arguments as to why that action might be illegal under federal statutes and regulations. However, as the Board has already determined that such devices are a medical necessity when prescribed by a physician to aid in communication under the prosthetic device provision, it is not necessary to consider those arguments at present.
2. The Vermont regulations do not define the term "prosthetic device" but the federal regulations describe them as "replacement, corrective, or supportive devices prescribed by a physician. . . to . . . (2) prevent or correct physical deformity or malfunction; or (3) support a weak or deformed portion of the body." 42 C.F.R. § 440.120(c).