

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,919

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare denying her request for medicaid coverage for a Dynavox speech prosthesis device. The issue is whether such a device is a covered item under the pertinent regulations.

FINDINGS OF FACT

The petitioner's medical status and need for a prosthetic speech device is set forth in the following letter, dated November 15, 1995, from her treating physician:

[Petitioner] is a 44 year old woman with a primary diagnosis of Cerebral Palsy and Mental Retardation. She resides at [place] where she receives 24 hour supervision by staff of the Community Access Program. [Petitioner] is unable to walk except for very short distances so spends her waking hours in a wheelchair. She receives physical therapy on a regular basis and wears AFO's to allow for improved foot position with transfers.

[Petitioner's] treatment plan also includes ongoing speech therapy. Although [petitioner] is non-verbal, she appears to understand most of what is said to her and responds appropriately by vocalizing yes no responses and using facial expressions. Her current means of communication method requires that staff recognize when she is uncomfortable or in need of something and attempt to determine what the need is by asking "twenty questions" that require yes/no responses. This method is both frustrating and dangerous for [petitioner]. for example, on several occasions in the past few months her P.T. programming had to be put on hold because she was unable to communicate what part of the therapy was causing her pain. As a result she is forced either to refuse to cooperate or to crying to communicate discomfort. In order to both avoid injury and enhance her P.T. program it is necessary for her to be able to communicate. Furthermore, because she wears AFO's it is particularly important that she be able to alert staff of any problems in regard to fit, skin comfort, and pressure.

Her inability to communicate prevents her from participating in her own medical care. She is unable to communicate when she is ill and may need medical assistance. [Petitioner] is unable to describe

symptoms of illness. For example she can not communicate what she is feeling (pain, nausea, fatigue, fear, discomfort, sadness etc), where she is hurting, or for how long she has been hurting. She is also unable to communicate any questions she has and provide need input in regard to her medical care and treatment.

I understand that several alternative communication methods have been considered for [petitioner]. Unfortunately, she has neither the range of motion for signing or the spelling vocabulary and physical stamina necessary for communicating through writing. By all accounts, the Dynavox seems to be the most appropriate speech prosthesis for [petitioner]. She has already participated in a trial use period with this particular device and has proven that she can use it accurately, dependably, quickly and meaningfully.

For all of the above reasons, I request that Medicaid authorize payment for the prescribed speech prosthesis which I believe is medically necessary for treating [petitioner's] communication disorder.

The above assessment of the petitioner's needs is reiterated and supported by the reports of two speech pathologists, an educational consultant, her R.N./case manager, her physical therapist, and an occupational therapist, all of whom appear to be intimately familiar with her needs.

The above reports are uncontroverted. The Dynavox system sought by the petitioner is considered by all the above professionals to be a prosthesis necessary to replace the petitioner's non-functioning natural ability to speak. It is, therefore, found that the Dynavox is a medically necessary prosthetic device that has been universally prescribed to the petitioner by virtually every medical professional associated with this aspect of her care.

ORDER

The Department's decision is reversed.

REASONS

The Department concedes that this case is indistinguishable as a matter of fact and applicable law from Fair Hearing Nos. 13,809 and 13,296. In those cases the Board determined that similar speech devices prescribed for petitioners with similar limitations were medically necessary to facilitate their communication. The Board concluded that such items are 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 speech devices are prosthetic devices 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.

...

The Board concluded that the Department had acted in error when it denied those petitioners' requests for payment of the speech devices and ordered their provision as covered prosthetic devices under the Medicaid program.

The Department makes no attempt to distinguish the facts herein from those in Fair Hearing Nos. 13,809 and 13,296. Instead, as it did in Fair Hearing No. 13,809, it informs the Board that it is still in the process of taking steps to specifically exclude speech devices 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 still offered absolutely no new medical evidence or legal argument in support of its policy. As was pointed out in Fair Hearing No. 13,809, but apparently ignored by the Department in this case, as well, in light of the Board's prior decisions 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.

As was noted by the Board in Fair Hearing No. 13,809, the Eighth Circuit Court of Appeals in Meyers v. Reagan 776 F2d. 241 (1985) has ruled that speech devices meet the definition of "medically necessary" when prescribed by a speech rehabilitation specialist to correct a speech disorder. The Board also noted in that fair hearing that the definition of "prosthetic devices" in the federal Medicaid regulation⁽²⁾ supports inclusion of a speech device in that category because, as the evidence in these cases amply demonstrates, these devices correct a malfunction of the speech centers of the brain and vocal muscles. Finally, the Board noted that speech devices were 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 uncontroverted medical evidence in this case shows that there is every reason for the Board to continue its prior rulings that speech 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, is reversed.

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1. In Fair Hearing No. 13,809, the petitioner's memorandum of law put forward several arguments as to why that action might be illegal under federal statutes and regulations. Again, 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).