

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 14,230

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Appeal of)

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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-six-year-old man who has cerebral palsy with spastic quadriplegia, mental retardation and a seizure disorder. He ambulates via a wheelchair and is able to use his hands for pointing. His ability to vocalize is very limited despite years of therapy. He lives in a supervised home and receives Medicaid benefits.
2. The petitioner uses some limited sign language, "yes" and "no" gestures and a board with letters and symbols to communicate. His ability to communicate is limited to his basic needs; complex ideas or temporal events are almost impossible for him. The vast majority of the time, he can only be understood by his personal caretaker who must interpret his attempts to communicate to others. The petitioner is seldom able to communicate his physical symptoms such as pain, choking or medication toxicity and has difficulty directing his attendants as to his needs. Although he likes to socialize through communication, he finds it mainly a frustrating event which often leads to anger and withdrawal. The petitioner's lack of motor control makes it difficult for him to improve his hand or pointing gestures to any degree.
3. The petitioner was evaluated by a speech language pathologist who recommended a "Dynavox", a multi-voice output communication aid which uses synthesized speech. After a trial of five weeks, it was determined that the petitioner's ability to communicate (beyond the two hundred words he can use through pointing) had progressed considerably through the use of this device. His physician prescribed the device as "an appropriate replacement for [petitioner's] malfunctioning speech musculature" and added

I believe the Dynavox is a reasonable and necessary form of treatment for [petitioner]. This equipment will enable him to participate in his own medical treatment and habilitation. The Dynavox will provide

him with a means for communicating his medical needs. This device will reduce the handicapping effects of his medical conditions by allowing him to gain maximum benefits from his therapies and enabling him to reach his maximum potential functionally.

4. The petitioner requested Medicaid coverage for the "Dynavox" communication device on November 21, 1995, but was denied on December 13, 1995, based on a determination by the Department that the device was not medically necessary and was not considered durable medical equipment under the Medicaid coverage regulations.

ORDER

The decision of the Department is reversed.

REASONS

The facts of this case are indistinguishable from those in Fair Hearings No. 13,296 and 13,809. In those cases, the Board determined that computerized speech devices prescribed for a woman with cerebral palsy and a man who had a stroke were medically necessary to facilitate in communication. In 13,809, the Board followed the ruling of the Eighth Circuit Court of Appeals in Meyers v. Reagan, 776 F2d.241 (1985) that AAC devices meet the definition of "medically necessary" when prescribed by a speech rehabilitation specialist to correct a speech disorder. 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 also relied on the defining language of the federal regulation which describes prosthetic devices 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).

The Board concluded in both those cases 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 Hearings No. 13,296 and 13,809. Instead, it informs the Board that it is taking steps to specifically exclude speech computers from coverage under the Medicaid prosthetics program. 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 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 decisions, which were 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 existing agency interpretation.

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 voice 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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