SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	**CLAIM FOR**
SARA B WILSON (Appellant)	Supplemental Medical Insurance Benefits (Part B)
(Beneficiary)	999-08-9436 (HICN)
WILSON, SARA B (Carrier/Intermediary/PRO	999-08-9436 (Docket Number)

PROCEDURAL HISTORY

This case is before the undersigned Administrative Law Judge ("ALJ") on a request for hearing filed by [illegible] the Appellant herein. Services to the Appellant/Beneficiary were provided by New York University School of Medicine (Exhibit 10) ("Provider"), but that entity has decided not to participate in these proceedings. A hearing in the matter took place before me on October 17, 2001 in White Plains, New York at which the Appellant appeared pro se, after waiving the right to appear through counsel.

ISSUES

The issue to be determined is whether the Appellant is entitled to reimbursement for the cost of "programming and mapping" her cochlear implant.

The evidence shows that the Appellant received a cochlear implant for her right ear at the Provider's Medical Center pursuant to a routine operation that was covered by Medicare. After the item was implanted, the claimant returned to the Medical Center for periodic adjustments of the device. The services were performed by a duly qualified audiologist who is part of the NYU School of Medicine Cochlear Implant team and billed under Medicare procedure code 92510, which the Provider claims has routinely been paid by Medicare (Exhibit 10).

The Medicare Hearing Officer denied six claims referable to the period between August 21, 1999 and December 29, 1999 (claim control numbers: 99263481221000, 999263481220000,

99280433397000, 99300320167000, 99350420650000 and 00024426324000) on the grounds that the procedures were performed by a "privately practicing audiologist" who was not "physician directed"; consequently, the cost thereof was neither included in the global fee for the surgery nor "incident to a physician's services" (Exhibits 13 & 15).

THE LAW

Title XVIII of the Social Security Act[1] - commonly known as the Medicare Act - establishes programs that provide medical benefits to the elderly (i.e., people who are 65 or older) and to persons who are disabled. At all times relevant to this case, these programs are administered by the Health Care Financing Administration ("HCFA") of the Department of Health and Human Services ("DHHS"). Section 1871 of the Act (42 U.S.C. 1395hh] authorizes the Secretary to prescribe such regulations as may be necessary to carry out the administration of the insurance programs established thereunder.

Part B of Medicare is a voluntary insurance program which provides supplemental medical insurance benefits to cover other health care costs (including physicians' services) for those individuals who elect to enroll under the program [42 U.S.C. §§ 1395j-1395w-4]. HCFA's directives are communicated through both the Medicare Carriers' Manual ("MCM") and the Federal Register.

The Part B program is funded by monthly premiums paid by beneficiaries and contributions made by the government to the Federal Supplementary Medical Insurance Trust Fund. The benefits provided consist of "entitlement to have payment made . . . for medical and other health services . . . " [Section 1832(a)(1)]. The term "medical and other health services" is defined by Section 1861(s)(2) and includes:

> (A) services and supplies . . . furnished as an incident to a physician's professional service . . . .;
> (C) diagnostic services which are . . . furnished to an individual as an outpatient by a hospital or by others under arrangements with them made by a hospital . . . ;
> (K) services which would be physicians' services if furnished by a physician . . . and which are performed by a physician assistant . . . under the supervision of a physician . . . in a hospital . . .

The general rule established by Regulations at 42 C.F.R. 410.12 (a) is that medical related services are covered under Medicare Part B if they are <u>not excluded</u> under 42 CFR 411.1. <u>et seq.</u> provided that

(a) The services are furnished while the beneficiary is in a period of entitlement [42 C.F.R. §410.12(a)(1)].

(b) The services are furnished by a facility or other entity specified in 42 CFR 410.14 through 410.69.

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[1] Title XVIII appears in the United States Code as 42 U.S.C. § 1395 <u>et seq.</u>

In order to implement the Medicare program, the Center for Medicare and Medicaid Services [hereinafter CMS, formerly the Health Care Financing Administration – "HCFA"] issues manuals in which it addresses the reasonableness and necessity of many items/procedures. The portion of the Manual applicable to this case (see Exhibit 23 for excerpts) explains that a cochlear implant device is an electronic instrument, part of which is implanted surgically to stimulate auditory nerve fibers, and part of which is worn or carried by the individual to capture, analyze and code sound (page 3). Medicare coverage is provided for a cochlear implant (COV 65-14) only upon a showing of severe-to-profound hearing loss. Following the cochlear implant, Medicare authorizes payment for "Aural Rehabilitation" under Procedure Code 92510:

> . . . includes evaluation of aural rehabilitation status and hearing, therapeutic services-**with** or without **speech processor programming**. (Exhibit 28, page 2).

According to HCFA's letter of 2/28/00 (Exhibit 7), Medicare Carriers Manual section 15300 defines cochlear rehabilitation as a "tune up" and states that it **may** be performed by an audiologist "incident to" a physician's services. It is thus evident that Medicare does not contest whether the appropriate services were performed in accordance with Code 92510; rather, it contests whether the person who actually performed the services was "appropriate" since Medicare determined that he/she was an "independent audiologist" who was not under a physician's supervision.

EVALUATION OF THE EVIDENCE

Evidence has been submitted by the American Speech-Language-Hearing Association (Exhibits 6 & 8) to the effect that programming of a cochlear implant speech processor is a "separate and distinct" service from that of "aural rehabilitation" and that it is also a "diagnostic service" since it is necessarily connected with the patient's ability to hear by using the implant. In fact, the claimant testified that she would have been unable to hear if the initial programming (or "tune-up") was not performed. The evidence suggests that cochlear implants are highly specialized devices that must be adjusted to suit each individual patient, in much the same way as a pacemaker or a prosthesis must be adjusted to suit the individual patient's needs after they are provided. Having not received any contrary evidence from the Medicare carrier (the carrier did not participate in the hearing process), I found the aforesaid evidence to be compelling. The services provided to the Appellant were in the nature of "diagnostic services" relating to her ability to her and to the ability of her implant to function as intended.

The 7/6/00 letter submitted by Noel L. Cohen, M.D. of the NYU School of Medicine (Exhibit 10) demonstrates that a separate and distinct "Cochlear Implant team" works together with the Faculty Practice Audiology Department in treating patients at the hospital run by the medical school. Dr. Cohen specifically stated that the audiologist performing the programming and mapping services is not a "private individual", but one who is part of the "team" that is supervised by Dr. Cohen (the chairman of the department). Consequently, the services performed in this case were performed under the supervision of a physician.

HCFA Hearing – Medicare rejection(s) - Additional testimony/statement for hearing on October 17 2001 before the Honorable Dennis Katz

Coverage for the programming of Cochlear Implant Speech Processor has been denied under current Medicare regulations as interpreted by Empire Medicare. I am continuing my appeal.

In May of 2001 Mark Hobratschk of the American Speech-Language-Hearing Association met with HCFA to address the problem of coverage so that" independently practicing" audiologists may bill Medicare directly. He and other representatives of ASLAHA have since met with the AMA America Medical Association to revise the CPT code for speech processor programming.

At the meeting in May HCFA indicated that they wanted to hear from CI physicians. As of June 29 2001 ASLHA had received letters in support of changing the CPT code from physicians at NYU and Midwest Ear Institute

Different HCFA officials have varying opinions on this issue. Overall, they tend to agree that the service is unique and does not fit well within Medicare rules.

When so many other people are being covered for speech processor programming it is very hard to understand why some of us covered by Medicare are not similarly covered.

I want to go on record with the following:
Speech processor programming is not aural rehabilitation and Faculty Practice Audiology, while doing its billing separately from the NYU School of Medicine Implant Center, is not separate from the Center. And the requirement that a physician be directly supervising the procedure is inappropriate. Requiring direct supervision of the programming by the physician carries the implication that doctors are competent and trained to perform it, which is not the case.

Respectfully submitted [redacted] October 17, 2001

* NOTE: There was information in the Medicare file that was new to me: the Carrier Medical Director, Norbert W. Rainford, M.D is a cardiologist. As such he is unlikely to have had any training in the new specialty of Cochlear Implants. I challenged Dr Rainford's qualifications to rule on my case.

Judge Katz asked why I was pursuing this on my own and why the provider was not involved in my appeal. I told him that my reading of the Medicare denials put the burden on me. They give 6 months from the date of the denial to appeal and if I didn't go through the appeal process they would consider it closed and I would have no recourse at a later date.

He said he knew nothing about Cochlear Implants and wanted to know what is involved, is it like a hearing aid, is it considered to be a major operation. I gave him the whole story, who qualifies, what is done, recuperation time, the waiting for hook up and the difference it has made in my life. He asked if it was like a prothesis. I said it was more like a pacemaker and periodic reprogramming of the speech processor is a necessary follow up to the surgery. Without it there could be serious damage due to changes in the auditory nerve. Medicare's denial of coverage for reprogramming could put people who can not afford the cost at serious risk.