

## **First of Two Decisions**

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

REQUEST January 14, 1997  
PRIOR APPROVAL #  
CASE#  
CENTER# OMM  
FH# 2614932Z

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In the Matter of the Appeal of :  
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:  
R. \_\_\_\_\_ C. \_\_\_\_\_ : DECISION  
: AFTER  
: FAIR  
: HEARING  
:  
from a determination by the Office of Medicaid :  
Management of the New York State Department of :  
Health (hereinafter referred to as the Agency or OMM) :

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JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of Title 18 NYCRR, (hereinafter regulations), a fair hearing was held on September 3, 1997, in Steuben County, before Thomas Rebhan, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

R . \_\_\_\_\_ C. \_\_\_\_\_ , Appellant; Kenneth Shiotani, Southern Tier Legal Services; B \_\_\_\_\_.; Appellant's fiance

For the Office of Medicaid Management

No Appearance, Waiver Issued

ISSUE

Was the Agency's determination to deny the Appellant's physician's prior approval request for an Uppertone Exercise Unit correct?

FACT FINDING

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The Appellant, age 45, has been in receipt of a Medical Assistance authorization,

FH# 2614932Z

1. The Appellant, age 45, has been in receipt of a Medical Assistance authorization,
2. Appellant is diagnosed with traumatic quadriplegia as a result of a spinal cord injury in 1970,
3. Appellant resides in his own home in Hornell, New York with his fiancée, \_\_\_\_\_, age 31, and her two children ages ten and eight,
4. The Appellant receives three hours of LPN care two times each week, and three hours of personal care service once a week.
5. On May 31, 1996, the Appellant's physician, \_\_\_\_\_, MD requested prior approval for the Uppertone Exercise Unit for the Appellant in the hopes that the equipment would help to maintain and improve the strength and functional use of Appellant's upper extremities, improve circulation, and help prevent illnesses such as decubitus and aspiration pneumonitis.
6. On or about June 13, 1996, the Agency determined to deny the Appellant's physician's prior approval request on the grounds that the Uppertone Unit does not meet the definition of durable medical equipment for Agency purposes, that the equipment is not medically necessary, and that similar equipment is available through the rehabilitation department of Appellant's local hospital,
7. On June 25, 1996, the Appellant requested a fair hearing to challenge the Agency's denial, which was held on September 20, 1996 before Administrative Law Judge Howard.
8. By decision dated October 1, 1996, the Commissioner affirmed the denial of the Uppertone Exercise Unit on the grounds that it was not durable medical equipment, and that it was not medically necessary, but rather a convenience for the Appellant.
9. In December 1996, the Appellant was hospitalized for decubitus and aspiration pneumonitis with respiratory arrest, which conditions may have been prevented, according to his physician, Dr. \_\_\_\_\_, if Appellant had the use of the Uppertone Exercise Unit available.
10. On January 13, 1997, the Appellant requested the above mentioned fair hearing be re-opened on the grounds that the Agency failed to produce a copy of the denial notice at the hearing, and the reasons for the denial conflicted with the testimony presented by the Appellant at the hearing.
11. On January 17, 1997, the Appellant's request to re-open the prior fair hearing was granted de novo in order to accept testimony and other evidence necessary from all parties to complete the record and ensure that a proper decision is rendered in this matter, In addition the Agency was directed to submit a copy of its denial notice as part of its fair hearing summary.

FH# 2614932Z

APPLICABLE LAW

Section 365-a of the Social Services Law provides in part:

2. "Medical Assistance" shall mean payment of part or all of the cost of medically necessary medical, dental and remedial care, services and supplies, as authorized by this title or the regulations....., which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with such person's capacity for normal activity, or threaten some significant handicap and which are furnished an eligible person in accordance with this title and the regulations of ....

Section 364.2 of the Social Services Law provides in part, as follows:

The Department of Health shall be responsible for.....

- (b) establishing and maintaining standards for all non-institutional health care and services rendered pursuant to this title, . . .

\* \* \*

Pursuant to regulations at 18 NYCRR 513.0, where prior approval of medical, dental and remedial care, services or supplies is required under the MA program, such prior approval will be granted when the medical, dental and remedial care, services or supplies are shown to be medically necessary to prevent, diagnose, correct or cure a condition of the recipient which: (1) causes acute suffering; (2) endangers life; (3) results in illness or infirmity; (4) interferes with the capacity for normal activity; or (5) threatens to cause a significant handicap, Pursuant to 18 NYCRR 513.6, the determination to grant, modify or deny a request initially must be made by qualified Department of Health professional staff exercising professional judgment based upon objective criteria and the written guidelines of the Department of Health and regulations, and commonly accepted medical practice.

Section 2,1,4 of the New York State Medicaid Management Information System (MMIS) Durable Medical Equipment Provider Manual defines prior approval as the process of evaluating the aspects of a plan of care which may be for a single service or an ongoing series of services in order to determine the medical necessity and appropriateness of the care requested.

Section 2.2.2.B. of the MMIS Durable Medical Equipment Provider Manual and, effective February 20, 1991, Regulations at 18 NYCRR 505.5(a)(1) define "Durable Medical Equipment" as:

devices and equipment, other than prosthetic or orthotic appliances, which have been ordered by a qualified practitioner in the treatment of a specific medical condition and which have all of the following characteristics:

FH# 2614932Z

- Can withstand repeated use for a protracted period of time;
- Are primarily and customarily used for medical purposes;
- Are generally not useful to a person in the absence of an illness or injury;  
and
- Are usually not fitted, designed or fashioned for a particular individuals use,
- Are usually not fitted, designed or fashioned for a particular individuals use,
- Where equipment is intended for use by only one patient, it may be either custom made, or customized.

"Custom-made" means fabricated solely for a particular individual and cannot be readily changed to conform to another recipient's needs. It usually requires the recipient to be measured for custom fitting and/or molding of components.

"Customized" refers to a stock item that has modifications made and/or attached (to it) to meet a recipient's needs. These modifications may be changed (by adding or deleting items such as armrests, etc.) to return the item to stock.

### DISCUSSION

The record reflects that the Agency's denial was based on the following grounds:

1. The Uppertone Exercise Unit does not meet the definition of durable medical equipment.
2. The Uppertone Exercise Unit is not medically necessary, but is rather a convenience item and, similar equipment is available through the rehabilitation department of Appellant's local hospital, and the proposed equipment would be duplicative.

In response to the Agency's argument that the proposed piece of equipment does not meet the definition of durable medical equipment, the Appellant introduced prior fair hearing decision 2358524K dated January 24, 1996, which held that the Uppertone Exercise Unit qualifies as durable medical equipment as defined in MMIS Durable Medical Equipment Provider Manual. Based on this prior fair hearing, referring to the same piece of equipment requested herein, the Agency's argument that the Uppertone Exercise Unit does not fall within the scope of the definition of durable medical equipment is rejected. In addition, the Appellant introduced printed material distributed by the manufacturer supporting his claim that the Uppertone Exercise Unit is manufactured specifically for quadriplegics, and is not useful to a person in the absence of this condition, The equipment is expressly designed for use by the wheelchair bound with limited use of the arms and hands.

FH# 2614932Z

The record further reflects that the Appellant has established that the Uppertone Exercise Unit is medically necessary to meet the decreased strength and functional mobility of Appellant's upper extremities brought on by his diagnoses, and also to prevent additional illnesses which correlate to his condition. The Appellant –introduced medical reports from his orthopedist, general physician, and physical therapist which cumulatively establish the medical necessity of the equipment proposed herein. The Appellant's orthopedist, \_\_\_\_\_, MD, recommends the Uppertone Exercise Unit, as a unit expressly designed for quadriplegics to maintain strength in the remaining muscles in his upper extremities. The Appellant's general physician, Dr. \_\_\_\_\_, causally relates the maintenance of strength in Appellant's upper extremity to preventing additional medical complications such as decubitus respiratory illnesses and infections. The report of \_\_\_\_\_, PT, indicates the necessity to increase and maintain the strength in appellant's upper extremities, and to improve his overall circulation and functional use of his extremities. The Agency's unsupported opinion from a registered nurse, who has not examined the Appellant herein, fails to rebut the evidence submitted by two doctors and a physical therapist, all of whom have worked closely with the Appellant in determining that the Uppertone Exercise Unit is medically necessary,

In making its argument that the Uppertone Exercise Unit is not medically necessary the Agency argued that the same results could be achieved using a traditional exercise regime prescribed by a physical therapist and/or physician. However, the Agency fails to support this statement by describing what their proposed exercise regime entails, who can administer it, and where it can be obtained. The trapeze equipment suggested by the Agency is rejected based on the testimony of the Appellant as to his exploration of this alternative, and its impracticability due to its requirement that the user grip the equipment with his hands, a function impossible to the Appellant based upon his condition, and which was readily observable at the hearing. In addition, any support given to the Agency's statement is outweighed by the reports and recommendations of Appellant's two physicians and physical therapist, all of whom prescribe the Uppertone Exercise Unit as the best way of meeting Appellant's medical need.

In addition, in its undated denial notice to the Appellant, submitted as part of this re-opened fair hearings the Agency indicates that similar exercise equipment is available on an outpatient basis through the rehabilitation department of Appellant's local hospital. The Appellant testified that he not only explored this alternative through his local hospital in Hornell, but also in surrounding hospitals in Dansville (18 miles away), Bath (25 miles away), and Wellsville (45 miles away), and that none of these sites offer exercise equipment similar to the Uppertone to meet his needs. Also, the Appellant's physician, Dr. \_\_\_\_\_ indicated that the Uppertone Exercise Unit is more cost effective than obtaining therapy at a local hospital or through the Rochester Rehabilitation Center, which is approximately 60 miles away.

FH# 2614932Z

DECISION AND ORDER

The determination of the Agency to deny the Appellant's physician's prior approval request was not correct and is reversed.

1 . The Agency is directed to provide prior approval for the procurement, under the Appellant's Medicaid Authorization, for the Uppertone Exercise Unit as requested.

As required by 18 NYCRR 358-6.4 the Agency must comply immediately with the directives set forth above.

DATED: Albany, New York  
October 8, 1997

NEW YORK STATE DEPARTMENT  
OF HEALTH

By

Commissioner's Designee

**Second of Two Decisions**





STATE OF NEW YORK  
DEPARTMENT OF SOCIAL SERVICES

REQUEST October 16, 1995  
PRIOR APPROVAL # 000000  
CASE# 000000  
CENTER# ONSM  
FH# 2358524K

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In the Matter of the Appeal of :  
 :  
N A : DECISION  
 : AFTER  
 : FAIR  
 : HEARING  
 :  
from a determination by the Office of Health :  
Systems Management of the New York State Department :  
of Health (hereinafter referred to as the Agency or OHSM) :  
\_\_\_\_\_ :

JURISDICTION

Pursuant to Section 22 of the New York State Social Services Law (hereinafter Social Services Law) and Part 358 of the Regulations of the New York State Department of Social Services (Title 18 NYCRR, hereinafter Regulations), a fair hearing was held on November 9, 1995, in Steuben County, before Victoria Venn, Administrative Law Judge. The following persons appeared at the hearing:

For the Appellant

N A ., Appellant

For the Office of Health Systems Management

OSHM--appeared on papers in lieu of personal appearance

ISSUE

Was the Agency's determination to deny the Appellant's prior approval request for an Uppertone Exercise Unit correct?

FACT FINDING

An opportunity to be heard having been afforded to all interested parties and evidence having been taken and due deliberation having been had, it is hereby found that:

1. The disabled Appellant has been in receipt of Medical Assistance. The Appellant is a quadriplegic who is confined to a wheelchair,
2. On September 11, 1995, the Appellant's provider requested prior approval for an Uppertone Exercise Unit for the Appellant.
3. On September 25, 1995, the Agency determined to deny the Appellant's provider's prior approval request.

FH# 2358524K

4. On October 16, 1995, the Appellant requested this fair hearing.

APPLICABLE LAW

Section 365-a of the Social Services Law provides in part:

2."Medical Assistance" shall mean payment of part or all of the cost of medically necessary medical, dental and remedial care, services and Supplies, as authorized by this title or the regulations of the department, which are necessary to prevent, diagnose, correct or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with such person's capacity for normal activity, or threaten some significant handicap and which are furnished an eligible person in accordance with this title and the regulations of the department.

Section 364.2 of the Social Services Law provides in part, as follows:

The department of health shall be responsible for.....

- (b) establishing and maintaining standards for all non-institutional health care and services rendered pursuant to this title,.....

\* \* \*

Pursuant to Department regulations at 18 NYCRR 513.0, where prior approval of medical, dental and remedial care, services or supplies is required under the MA program, such prior approval will be granted when the medical, dental and remedial care, services or supplies are shown to be medically necessary to prevent, diagnose, correct or cure a condition of the recipient which: (1) causes acute suffering; (2) endangers life; (3) results in illness or infirmity (4) interferes with the capacity for normal activity; or (5) threatens to cause a significant handicap. Pursuant to 18 NYCRR 513.6, the determination to grant, modify or deny a request initially must be made by qualified Department of Health professional staff exercising professional judgment based upon objective criteria and the written guidelines of the Department of Health and the regulations of this Department, and commonly accepted medical practice.

Section 2.1.4 of the New York State Medicaid Management Information System (MMIS) Durable Medical Equipment Provider Manual defines prior approval as the process of evaluating the aspects of a plan of care which may be for a single service or an ongoing series of services in order to determine the medical necessity and appropriateness of the care requested,

Section 2.2.2.B. of the MMIS Durable Medical Equipment Provider Manual and, effective February 20, 1991, Department Regulations at 18 NYCRR 505.5(a)(1) define "Durable Medical Equipment" as:

devices and equipment other than prosthetic or orthotic appliances, which have been ordered by a qualified practitioner in the treatment of a specific medical condition and which have all of the following

FH# 2358524K

characteristics:

- Can withstand repeated use for a protracted period of time;

- Are primarily and customarily used for medical purposes;
- Are generally not useful to a person in the absence of an illness or injury; and
- Are usually not fitted, designed or fashioned for a particular individual's use.
- Where equipment is intended for use by only one patient it may be either custom made, or customized.

"Custom-made" means fabricated solely for a particular individual and cannot be readily changed to conform to another recipient's needs, It usually requires the recipient to be measured for customs fitting and/or molding of components.

"Customized" refers to a stock item that has modifications made and/or attached (to it) to meet a recipient's needs, These modifications may be changed (by adding or deleting items such as armrests, etc.) to return the item to stock.

### DISCUSSION

The Agency denied the Appellant's request for prior approval of the uppertone exercise unit on the grounds that the unit does not meet the definition of durable medical equipment, The Agency indicated on the denial notice that exercise equipment is not considered to be durable medical equipment,

The Appellant contended that the unit is durable medical equipment and testified in support of his contention that this equipment is specifically designed to be used by individuals confined to a wheel chair and who have limited use of their hands; that the exercise equipment available in health clubs and/or gymnasiums is not accessible to individuals with the Appellant's disability; that he used to obtain treatment through a physical therapist that is similar to the benefit that would be obtained by using the uppertone unit; that he is not able to go to a gym as the equipment is not accessible to him; that use of the uppertone unit was recommended by a physical therapist to decrease the chance of further deterioration of his medical condition and to maintain the condition of his body to aid in carrying out the necessary activities of life. The Appellant provided an August 15, 1995 statement from physical therapist, Cathy Leonard, in which she stated that it is imperative that the Appellant continue to exercise to ensure proper bone density prevent contractures and improve strength. The physical therapist stated that this activity would enable the Appellant to continue his independent life style.

The Appellant provided sufficient information to support the conclusion that the uppertone exercise unit is durable medical equipment as defined

FH# 238524K

in the regulations as follows:

Section 2.2.2.B, of the MIS Durable Medical Equipment Provider Manual and, effective February 20, 1991, Department Regulations at 18 NYCRR 505.5(a)(1) define "Durable Medical Equipment" as:

devices and equipment other than prosthetic or orthotic appliances, which have been ordered by a qualified practitioner in the treatment of a specific medical condition;-and which have all of the following characteristics:

- Can withstand repeated use for a protracted period of time;

- Are primarily and customarily used for medical purposes;
- Are generally not useful to a person in the absence of an illness or injury; and
- Are usually not fitted, designed or fashioned for a particular individual's use.

The Appellant provided printed material distributed by the manufacturer of the equipment supporting his claim that the uppertone exercise unit is not useful to a person in the absence of an injury such as the Appellants. The equipment is designed to be used by the wheelchair bound with limited use of the arms. This type of equipment is primarily and customarily used for Medical purposes as continuing this type of rehabilitation is essential to maintaining the Appellant's condition and in preventing further injury. The physical therapist indicated that the use of the equipment would ensure proper bone density, prevent contracture, and improve strength--helping to correct conditions that result in illness and infirmity, interfere with the Appellant's capacity for normal activity and threaten significant handicap. A rehabilitative exercise unit specifically designed for use by quadriplegics to maintain condition to ensure the ability to function and to prevent further injury should not be considered equivalent to exercise equipment used by individuals in the absence of illness or injury and primarily for recreation.

#### DECISION AND ORDER

The determination of the Agency to deny the Appellant's provider's prior approval request is not correct and is reversed.

The Agency is directed to make a new determination of the Appellant's prior approval request for the uppertone exercise equipment and to advise the Appellant of its new determination.

As required by Department Regulations at 18 NYCRR 358-6.4, the Agency must comply immediately with the directives set forth above.

FH#2358524K

Dated: Albany, New York  
January 24, 1996

New York State Department  
Of Social Services

By

Commissioner's Designee