

STATEMENT OF THE CASE

In each of the eight cases¹ before the undersigned Administrative Law Judge, Medicare covered the primary surgical procedure necessary to correct the patient's condition, but denied payment for the use of the operating microscope (CPT code 69990) in all eight cases and denied payment for the needle electromyography used for a baseline facial nerve study (CPT code 95867) in three of the cases². In its respective redetermination decisions, the Medicare Carrier (Carrier) found that (1) the microsurgery add-on could not be paid separately from the primary surgical procedures and (2) the diagnosis codes provided did not support the need for the electrodiagnostic study. The Medicare Hearing Officer affirmed the Carrier's decision to deny coverage, finding that the microsurgery was bundled into the primary surgical procedure and so could not be paid separately and that there was no medical necessity for the baseline nerve study. Pursuant to a timely filed request for hearing, an in-person hearing was held in this case on December 15, 2005. Appellant was represented by counsel, Sheri Byrne-Haber. The amount in controversy meets the jurisdictional requirement and is based on the billed amount.

ISSUE

The general issue is whether payment may be made under Part B of Title XVIII of the Social Security Act (the Act) for Medicare services furnished to multiple beneficiaries. The specific Issues are:

1. Whether the appellant may be separately reimbursed under CPT code 69990 for use of the operating microscope for all eight beneficiaries; and
2. Whether the baseline electrodiagnostic study (CPT code 95867) was medically necessary for three of the beneficiaries.

EVALUATION OF THE EVIDENCE

A. Facts of the Case

CPT code 69990 - Operating Microscope

In the case of each of the eight beneficiaries an operating microscope was used during ear surgery. Middle ear bones are the smallest in the body and the structures surrounding the middle ear are equally small, delicate, and easily damaged. Damage to any of these structures can lead to very serious life-altering consequences including permanent hearing loss, chronic vertigo, dizziness, and/or partial facial paralysis. The operating microscope allows the ear surgeon to clearly visualize and monitor the very small structures of the middle and inner ear, therefore enabling the surgeon to perform the necessary surgery on and around those structures while minimizing the risk of damage. All beneficiaries in this case underwent surgery of the middle and/or inner ear and Medicare made payment for their primary surgical procedures which were

¹ This appeal involves claims related to 8 beneficiaries with 8 separate Health Insurance Claim Numbers (HICN): Bliss, Mary, HICN 572-24-6361 A; Evans, David, HICN 552-44-1406A; Frank, Eugene, HICN 562-40-5197 A; Kwon, Ke Won, HICN 558-7J-2391M; Lyon, Yvonne, HICN 549-46-8844B; Messenger, Mona, HICN 528-22-5816A; Messerly, Kay, HICN 529-48-3097A; and Pacheco, Anthony, HICN 569-54-5841A.

² These three cases are D. Evans, Y. Lyon, and K. Messerly.

medically reasonable and necessary. The issue is whether the microsurgery add-on under CPT code 69990 may be billed separately from the primary surgical procedure.

At the hearing on this issue Ms. Byrne-Haber argued that the operating microscope may be properly billed as a separate procedure under CPT code 69990, citing the CPT Manual which states that microsurgical techniques, requiring use of an operating microscope, may be billed separately *in addition to* the primary surgical procedure codes in some cases.

Code 69990 is described in the Current Procedural Terminology (CPT) Manual as, "*Microsurgical techniques, requiring use of operating microscope. List separately in addition to code for primary procedure.*" Ms. Byrne-Haber argued that the CPT Manual clearly allows the use of an operating microscope to be billed separately from the primary surgical procedure under code 69990.

Ms. Byrne-Haber further argued that the primary procedures at issue here are **not** on the list of excluded procedures where use of the operating microscope is an inclusive component, citing the CPT Manual instructions:

The surgical microscope is employed when the surgical services are performed using the techniques of microsurgery. Code 69990 should be reported ... in addition to the code for the primary procedure performed *Do not report code 69990 in addition to procedures where the use of the operating microscope is an inclusive component (15756-15758, 19364, 19368, 20955-20962, 20969-20973, 26551, 26554, 26556, 31526, 31531, 31536, 31541, 31561, 43116, 49906, 61548, 60375-60378, 64727, 65091-68850).*

[Emphasis added.]

As noted by Ms. Byrne-Haber, no auditory system CPT codes are listed with the specifically enumerated codes to which 69990 is "an inclusive component." Specifically, none of the primary CPT codes at issue - CPT Codes 69660, 69930, 69662, 69646, 69633 and 60714 – are enumerated as a code which includes 69990. Thus, the AMA-authored CPT manual gives *implied* support for the use of CPT code 69990 as an add-on code with the primary "auditory systems" surgical procedures.

Moreover, in the October 1999 AMA "CPT Assistant" newsletter, Ms. Byrne-Haber found *express* support for the use of Code 69990 as a separate add-on procedure to the primary "auditory system" surgical procedure:

... [I]f an operating microscope was used to perform microsurgery techniques in conjunction with the procedures in the code range 69000-69979, then the use of the operating microscope may be reported separately using code 69990.

Joselyn E. Bailey, M.D., testified as an impartial medical expert at the hearing on December 15, 2005. Dr. Bailey is Board-certified in Internal Medicine. Dr. Bailey did not have any prior communication with the ALJ, beneficiaries, provider, intermediary, Carrier, or any other interested party regarding the merits of this claim, nor did Dr. Bailey conduct a medical examination of any of the beneficiaries. Dr. Bailey rendered her impartial medical expert opinion and found that the use of the operating microscope was properly documented and billed under the appropriate billing code as a separate procedure.

CPT Code 95867 - Baseline electrophysiologic nerve study

The operative reports for three beneficiaries (Evans, Lyon and Messerly) detail their respective auditory system surgical procedures, during which the 7th cranial (i.e., facial) nerve was

"monitored" throughout the entire surgical procedure. Nerve monitoring is done to protect the facial nerve during the performance of a middle or inner ear surgical procedure. This *intraoperative* procedure was billed, and paid by Medicare, under CPT code 95920. The overall surgical facial nerve monitoring process also includes a *pre-operative* baseline facial nerve study using needle electromyography. This procedure was billed under CPT code 95867 and denied by Medicare on the ground that it was not deemed a "medical necessity" because the diagnosis codes for the three beneficiaries were not included on the list of diagnosis codes that support medical necessity in Local Coverage Determination L13569.

In connection with this issue, Ms. Byrne-Haber argued that Code 95867 represents a separately payable, medically reasonable and necessary baseline study which is an essential component of the intraoperative nerve monitoring in two regards. First, in order to protect the facial nerve during surgery, the surgeon must be sure the nerve monitor is working correctly before the surgery can begin. Further, the surgeon must establish a "baseline" of what is "normal" for the patient before beginning the surgery. It is these two components that make up the procedure billed under Code 95867.

Dr. Bailey rendered her impartial medical expert opinion and testified that a *pre-operative* baseline test is needed to guide the surgeon *during* the operation. Dr. Bailey further opined that a surgeon cannot perform a procedure that requires intraoperative monitoring if there is no baseline established *pre-operatively* with which to compare the intraoperative functioning.

Dr. Bailey's assessment is reasonable and consistent with the evidence of record. The Administrative Law Judge accepts Dr. Bailey's testimony and finds that a preoperative baseline electrodiagnostic study is necessary to inform and illuminate the surgeon's intraoperative nerve monitoring. On this basis, the limitations contained in LCD L13569 are found to be inapplicable here.

B. Principles of Law

Section 1832 of Title XVIII of the Social Security Act (the Act) establishes the scope of the benefits provided under the Medicare Part B supplementary medical insurance program. Section 1861 of the Act and Center for Medicare and Medicaid Services (CMS) regulation 42 CFR § 410.3 define many of the types of medical and other health services which are covered under Medicare. Section 1861(q) of the Act and 42 CFR § 410.20 define "physicians' services" as including surgery.

42 CFR § 414.40 provides that CMS establishes uniform national definitions of services, codes to represent services, and payment modifiers to the codes. Specifically, CMS establishes uniform national ancillary policies necessary to implement the fee schedule for physician services. These include, but are not limited to: global surgery policies; professional and technical components; and payment modifiers (including those for distinct procedure services).

Chapter 12, Section 30 of the Medicare Claims Processing Manual (former Section 15068(A) of the Medicare Carrier Manual) provides that under the Medicare Correct Coding Policy, all services integral to accomplishing a procedure are considered bundled into that procedure and, therefore, are considered a component part of the procedure code. Accordingly, it is inappropriate to separately report these services based on standard medical and surgical principles. The principles for this correct coding policy are: the service represents the standard of care in accomplishing the overall procedure; the service is necessary to successfully accomplish the comprehensive procedure (failure to perform the service may compromise the success of the

procedures); and the service does not represent a separately identifiable procedure unrelated to the comprehensive procedure planned. Currently, Chapter 12, Section 30.3 of the Medicare Claims Processing Manual (CMS Publication 100-04) provides the criteria under the Correct Coding Policy for otolaryngologic codes and Section 40 provides the criteria for the global surgical package.

Section 1862(a)(1) of the Act and 42 CFR § 411.15(k) exclude from Medicare coverage and payment items and services not medically reasonable and necessary to diagnose and treat an illness or injury or to improve the functioning of a malformed body member.

Section 1833(e) of the Act and 42 CFR § 424.5(a)(6) provide that claims for payment must be supported by sufficient information and documentation.

C. Analysis

After a thorough review of the evidence, the undersigned finds that appellant is entitled to separate payment for the microsurgery add-on under CPT code 69990 for all eight beneficiaries, and is entitled to payment for the baseline electrophysiologic study under CPT code 95867 for three beneficiaries (Evans, Lyon, and Messerly).

The evidence of record supports the conclusion that the baseline electrophysiologic study conducted on three beneficiaries was medically reasonable and necessary as required by Section 1862(a)(1) of the Social Security Act and 42 CFR § 411.15(k). Dr. Bailey, a medical expert, reviewed the medical evidence of record and opined that in these cases a *pre-operative* baseline test was needed for each patient to guide the surgeon *during* the operation. The evidence shows that Medicare paid for code 95920, the intraoperative nerve monitoring procedure for the three beneficiaries at issue, and that a pre-operative baseline facial nerve study (CPT code 95867) is necessary to establish the standard from which deviation might occur intraoperatively.

There is also sufficient information and documentation to show that use of the operating microscope on all eight beneficiaries was separately billable and billing code 69990 in addition to the primary surgical procedures was acceptable under Section 1833(e) of the Act and 42 CFR § 424.5(a)(6). The CPT Manual for billing code 69990 explicitly states that use of a surgical microscope **may** be billed separately from the primary procedure. In addition, the CPT manual includes instructions for the use of code 69990 that does not include any auditory system primary surgical procedure code to which code 69990 is "an inclusive component." None of the primary surgical procedure codes for the patients in the instant case are listed as codes which include 69990.

Dr. Bailey, a medical expert, reviewed the medical evidence of record and opined that the use of an operating microscope was properly documented and billed under the appropriate billing code (CPT code 69990) as a separate procedure.

In conclusion, I find that the use of the operating microscope is not an included component of the primary surgical procedures for the eight beneficiaries here and the appellant was justified in billing for this add-on procedure separately using CPT code 69990. I find further that the baseline nerve study (CPT code 95867) was medically necessary for three of the beneficiaries (Evans, Lyon, and Messerly) and reimbursement must be made for the service at issue.

Accordingly, the Carrier is directed to make separate payment for the services in question under procedure codes 69990 and 95867, in accordance with the Medicare Fee Schedule.

FINDINGS OF FACT

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The appellant furnished the beneficiaries with surgical services requiring the use of microsurgical techniques for the applicable dates of service.
2. The Medicare Carrier allowed reimbursement for the primary surgical procedures, but denied Medicare reimbursement for the microsurgery add-on under procedure code 69990.
3. CPT code 69990 is not an included component of the primary surgical procedure codes for the eight beneficiaries.
4. The appellant is entitled to Medicare reimbursement for the services in question under procedure code 69990 for all eight beneficiaries.
5. The appellant furnished beneficiaries Evans, Lyon, and Messerly with intraoperative nerve monitoring for the applicable dates of service.
6. The overall surgical facial nerve monitoring process includes: a) a baseline electrophysiologic facial nerve study, and b) continuous intraoperative monitoring of the facial nerve for the length of the surgical procedure.
7. The Medicare contractor allowed reimbursement for the intraoperative nerve monitoring under CPT code 95920, but denied Medicare reimbursement for the baseline nerve study under CPT code 95867.
8. The baseline nerve study is necessary to establish the standard from which deviation might occur intraoperatively.
9. The appellant is entitled to Medicare reimbursement for the services in question under procedure code 95867 for beneficiaries Evans, Lyon, and Messerly.
10. The amount in controversy exceeds \$100.00 and meets the jurisdictional requirements of 42 CFR Section § 505.815.

DECISION

It is the decision of the Administrative Law Judge that the use of the operating microscope is covered as a separate procedure under the Medicare program for all eight beneficiaries and that the baseline nerve study provided to three of the beneficiaries was reasonable and necessary. Accordingly, the Carrier is directed to determine the allowable amount for the services under procedure codes 69990 and 95867, and to make appropriate payment under Part B of Title XVIII of the Social Security Act. The prior determination is reversed.