



HEALTH AFFAIRS

ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D. C. 20301

30 JUL 1979

FINAL DECISION:

(OASD(HA) Appeal File No. 03-79)

The Hearing File of Record and the Hearing Officer's RECOMMENDED DECISION (along with the Memorandum of Concurrence from the Director, OCHAMPUS) on OASD(HA) Appeal Case No. 03-79 have been reviewed. It was the Hearing Officer's Recommendation that the CHAMPUS Contractor's initial determination to deny private duty nursing (LPN) services rendered to the appealing party in her home during the period 25 October 1975 through 9 February 1976 be upheld. It was his finding that the disputed nursing services were custodial in nature, essentially designed to assist the appealing party in meeting her activities of daily living. The Acting Assistant Secretary of Defense (Health Affairs) concurs with this recommendation and accepts it as the FINAL DECISION, subject to the following comments and clarification.

PRIMARY ISSUE IN DISPUTE

The primary issue in dispute in this case is whether services rendered in the home by the private duty nurses (LPN's) constituted skilled nursing care or whether the services were primarily custodial in nature. By law, CHAMPUS is precluded from paying its benefits for custodial care. CHAPTER 55, Title 10, United States Code, Section 1077 (b) (1) specifically excludes custodial care.

In presenting this case the appealing party, her attorney and her physician/witness (a psychiatrist) raised several points to support the position that the nursing services were not primarily custodial.

To assure that the appealing party fully understands the bases upon which the initial denial is being reaffirmed and upheld (i.e., why it has been determined the nursing care in question was, in fact, custodial), each such point is addressed in this FINAL DECISION.

1. Type of Services Rendered Required a LPN. First, it was claimed that the type of nursing services rendered to the appealing party required the proficiency of a LPN. While none of the nurses maintained daily nursing notes or made any written reports, the personal statement provided by the appealing party's spouse (and signed by one of the five LPN's who rendered the nursing care), and other anecdotal information in the Hearing File of Record, indicated the following services were performed by the nurses in the home:

- o Administration of oral medication;
- o Exercises;
- o Use of electric vibrator on hand;
- o Assisting patient in and out of bed;
- o Assisting patient to bedside commode;
- o Walking;
- o Bathing and massaging patient;
- o Personal hygiene services;
- o General observation;
- o Accompanying patient on visits to physicians' office; and
- o Providing companionship.

None of these services is a skilled nursing service that can safely be performed only by an LPN. The services are those that can readily be performed by any willing adult, with minimum direction or

supervision. This is further confirmed by the fact that an LPN was only on duty one shift per day, from 7:00 a.m. to 3:00 p.m. At other times the appealing party's spouse rendered the care. Further, after the nurses were no longer available, the housekeeper administered the medications, assisted with the exercises and performed other personal services for the appealing party.

2. Special Monitoring Required. Second it was claimed that because of the appealing party's medical history, she required special monitoring which could be done only by someone with the level of training of an LPN. However, the physician issued no instructions to the nurses. Medically necessary monitoring would, at a minimum, included the scheduled taking and recording of vital signs. Further, the only medication which required special monitoring (coumadin) could not be monitored by the LPN--it required a laboratory procedure and physician supervision. This was done by the appealing party's attending internist. There was no scheduled or structured oversight of the LPN's by the physician who initially ordered the home care (the physiatrist). The physician may have discussed the patient with one or more of the nurses but only on an informal, ad hoc basis when and if an LPN accompanied the appealing party on a visit to his office.
3. Nursing Care was Ordered by Physician. Third, it was claimed that the physician (physiatrist) who initially ordered the LPN care, directed that it continue for the entire three and half month period. It should be noted, however, that during this period the physiatrist had turned the patient over to her regular attending physician (an internist), who apparently exercised no oversight of the LPN's. Further, the hospital record indicated the physician (physiatrist) initially recommended one week of LPN care (with "attendants" thereafter). The only documentation that the physician did order this nursing continued for the three and a half month period was an after-the-fact statement in the form of a letter to the CHAMPUS contractor, written a year after the nursing care was rendered. (This was

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also orally reaffirmed by the physician at the hearing.) Retroactive authorization does not meet CHAMPUS requirements that private duty nursing care must be ordered by a physician. In addition, the ordering physician is expected to supervise any private duty nursing that he/she orders.

There was no evidence presented in this case which refuted the basis on which the initial determination to deny benefits was made--i.e., that the home nursing care was primarily custodial. Rather, the evidence strongly supports the position that the type of nursing care rendered was a classic example of custodial care as defined in the applicable regulation. (Reference: Army Regulation AR 40-121, Chapter 12, Paragraph 1-1 (3) g.) That regulation further states, "Home nursing services are not authorized for a patient who requires only domiciliary custodial care." emphasis added (Reference: Army Regulation AR 40-121, CHAPTER 5, Section 8, k.)

#### RELATED ISSUE

Inpatient Private Duty Nursing. The Hearing File of Record includes information concerning the services rendered by round-the-clock private duty nurses during the period the appealing party was an inpatient at the Rehabilitation Center. The information indicates that the services rendered were essentially the same as the disputed home nursing which was rendered immediately following discharge from the hospital--i.e., essentially acting as a companion and rendering personal or unskilled services. The fact that the appealing party was in a rehabilitation facility and not in an acute hospital in itself belies the need for the level of extra nursing care which could only be provided by a professionally trained private duty nurse. If a patient desires to have an attendant available, that is a personal decision to be personally financed, not a Program responsibility. If CHAMPUS benefits were extended for the inpatient private duty nursing it was done in error. Because of the time that has elapsed, recoupment is being waived (as permitted under the Government Claims Collection Act of 1966). However, it should be clearly understood by the appealing party, her attorney/representative and her

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physician that the type of inpatient private duty nursing care she received during her 1975 inpatient stay at the rehabilitative was not then, nor is it now, the type of care for which CHAMPUS benefits may be properly extended.

#### SUMMARY

From the evidence presented it appears that the appealing party had become very dependent on the private nurses during her inpatient stay. The Hearing File of Record also strongly suggests there may have been a psychological need for the home nursing support, both on the part of the appealing party and her spouse. This FINAL DECISION in no way implies that it was inappropriate to recommend or secure the home nursing services, or that having the LPN's for one shift per day did not contribute to the patient's comfort and sense of well being. It only confirms that the home nursing services in dispute represented primarily custodial care, which is specifically excluded by law and regulation and therefore cannot qualify for benefit consideration under CHAMPUS.

Our review of this case verifies that the appealing party has been afforded full due process by CHAMPUS. Issuance of this FINAL DECISION is the concluding step in the CHAMPUS appeals process. No further administrative appeal is available.

SIGNED

Vernon McKenzie  
Acting Assistance Secretary of Defense  
(Health Affairs)