



ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

APR 18 1983

HEALTH AFFAIRS

BEFORE THE OFFICE, ASSISTANT
SECRETARY OF DEFENSE (HEALTH AFFAIRS)
UNITED STATES DEPARTMENT OF DEFENSE

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| Appeal of |) | |
| |) | |
| Sponsor: |) | OASD(HA) File 82-06 |
| |) | |
| SSN: |) | FINAL DECISION |
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This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPUS Appeal OASD(HA) Case File 82-06 pursuant to 10 U.S.C. 1071-1089 and DoD 6010.8-R, chapter X. The appealing party is the estate of the deceased beneficiary as represented by the sponsor, a retired officer of the United States Air Force. The appeal primarily involves the denial of inpatient care provided the beneficiary from September 12, 1979 through August 31, 1980 at the

The amount in dispute is approximately \$12,731.08 in billed charges. The hearing file of record, the tapes of oral testimony and argument presented at the hearing, the Hearing Officer's Recommended Decision and the Analysis and Recommendation of the Director, OCHAMPUS have been reviewed.

It is the Hearing Officer's recommendation that the OCHAMPUS denial of cost-sharing of the inpatient care in question be upheld subject to cost-sharing of one hour of skilled nursing care per day and prescription drugs. The Hearing Officer found the care to be custodial and above the appropriate level of care and therefore excluded from CHAMPUS coverage except as noted. The Director, OCHAMPUS, concurs in the Recommended Decision and recommends its adoption, as modified, as the FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs). The modification recommended by the Director, OCHAMPUS is that up to one hour of skilled nursing care per day be cost-shared only for those days which skilled nursing services were actually performed.

The Acting Assistant Secretary of Defense (Health Affairs) after due consideration of the appeal record, concurs in the

recommendation of the Hearing Officer to deny CHAMPUS benefits and hereby adopts the recommendation of the Hearing Officer as the FINAL DECISION with Director's recommended modification. The FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) is therefore to deny the CHAMPUS cost-sharing of inpatient care at the during the period in issue and to allow cost-sharing of one hour of skilled nursing care per day on those days during which skilled services were provided. While prescription drugs are also found to be payable, the record does not reflect any claim for prescription drugs. This decision is based on the findings the care provided was custodial and provided above the appropriate level of care.

FACTUAL BACKGROUND

The beneficiary underwent a craniotomy in October 1976 for removal of a right temporal lobe, grade II astrocytoma at The diagnosis was right temporal grade II astrocytoma, encephalopathy, secondary with mild to moderate organic mental syndrome, left hemiparesis, left homonymous hemianopsia, left central facial paresis and proptosis. The beneficiary was admitted again, in April and November 1977, to following increased weakness and lethargy. Upon discharge from she was confined at a skilled nursing facility, from December 1977 to April 1978. CHAMPUS claims for the care at were paid according to the sponsor and are not at issue in this appeal.

The prognosis by physicians at was that the beneficiary was not expected to improve and would need 24 hour highly skilled professional nursing care for the remainder of her life. Progressive deterioration of her physical and mental faculties was predicted. During her care at the beneficiary made improvement and was able to return home in May 1979, and resumed some of her household duties according to statements of her husband. She was seen monthly during this period at In September 1979, however, the beneficiary's condition deteriorated as she became confused, refused to eat and was unable to care for her personal needs. She was admitted to a skilled nursing facility, on September 12, 1979. The admitting diagnosis was astrocytoma, grade II, left hemiparesis, left hemianopsia, mild organic mental syndrome and chronic bronchitis. The beneficiary remained in this facility until her death on October 19, 1980, except for three periods of hospitalization at from June 28 to July 1, 1980, from August 29 to September 10, 1980, and from September 13 through September 16, 1980, during acute exacerbations of her condition.

Nurses' notes during the period in issue list services of monitoring vital signs, observation, repositioning in bed, assistance in ambulation, feeding and toileting, administration

of medical douches, suppositories and enemas, pessary maintenance every five weeks, and suctioning of phlegm. Medications prescribed included Tylenol, Codeine, Ampicillin, Metamucil, mysoline, mycolog cream, dulcolax suppositories, surfac and robitussin. Statements from the attending physician note the prognosis for the beneficiary was poor, her condition was not expected to improve and she was receiving supportive nursing care.

A request for authorization of extended hospitalization dated February 14, 1980, was filed with OCHAMPUS by the sponsor for care beyond 90 days at [redacted] A nonparticipating CHAMPUS claim, undated, was subsequently filed in 1980 by the sponsor as his wife's representative. This claim included charges for care provided September 12, 1979 through August 31, 1980 in the amount of \$12,731.08. No claim for care from September 1, 1980 through October 19, 1980 exists in the record.

The request for extended hospitalization was denied by OCHAMPUS in May 1980, on the basis the care was custodial and excluded from CHAMPUS coverage. Payment of the CHAMPUS claim was also denied by the fiscal intermediary on the basis the care was above the appropriate level of care.

There is apparently some confusion regarding the exact period in issue in this appeal. While the claim states care was provided at [redacted] from September 12, 1979 through August 31, 1980, the nurses notes and discharge summary state the beneficiary was transferred to [redacted] on August 29, 1980. The Hearing Officer stated the period in dispute began on September 29, 1979, yet the nurses' notes state the admission date to be September 12, 1979. Further confusion is added by the sponsor's testimony he paid (and is assumed to have claimed) for room and board at the nursing facility when the beneficiary was actually at [redacted] during the three periods of hospitalization in 1980. A statement in the record from the facility confirms the sponsor's testimony.

CHAMPUS cannot cost-share charges where no medical care was received; however, as a claim has been filed including these periods, I find the period in issue in this appeal should include the total claimed charges. The evidence of record establishes the beginning date of care as September 12, 1979. Therefore, I find the period in issue to be September 12, 1979 through August 31, 1980.

The appeal file does not reflect a claim for care at the skilled nursing facility from September 1, 1980 through October 19, 1980, the date of death. The sponsor testified at the hearing he did not know if he had filed a claim for this period and may not have. If a claim were filed presently, it would be denied under the CHAMPUS claims filing deadline. The appeal file does not contain medical records pertaining to this time period; however, I believe the care provided during September/October

1980 would be similar to the care provided during the period actually claimed. Therefore, a decision on the coverage of the care provided during the period in issue of September 12, 1979 through August 31, 1980, would indicate the scope of CHAMPUS coverage of the subsequent care.

The sponsor appealed both the OCHAMPUS and fiscal intermediary denials. The fiscal intermediary affirmed the denial of the claim upon informal review and reconsideration and an appeal was made to OCHAMPUS. The OCHAMPUS First Level Appeal Review consolidated the issues and affirmed the previous denials finding the care from September 12, 1979 to August 31, 1980, to be custodial and above the appropriate level of care. The sponsor, as personal representative of the estate of the beneficiary, requested a hearing. The hearing was held at
on April 21, 1981, before

The Hearing Officer has submitted her recommended decision. All prior administrative levels of appeal have been exhausted and issuance of a FINAL DECISION is proper.

ISSUES AND FINDINGS OF FACT

Custodial Care

Under the CHAMPUS law, 10 U.S.C. 1077(b)(1), custodial care is specifically excluded from CHAMPUS cost-sharing. The Department of Defense Regulation implementing CHAMPUS, DoD 6010.8-R, chapter II, B.47., defines custodial care as follows:

"... that care rendered to a patient
(1) who is mentally or physically disabled and such disability is expected to continue and be prolonged, and (2) who requires a protected, monitored and/or controlled environment whether in an institution or in the home, and (3) who requires assistance to support the essentials of daily living, and (4) who is not under active and specific medical, surgical and/or psychiatric treatment, which will reduce the disability to the extent necessary to enable the patient to function outside the protected, monitored and/or controlled environment. A custodial care determination is not precluded by the fact that a patient is under the care of a supervising and/or attending physician and that services are being ordered and prescribed to support and generally maintain the patient's condition, and/or provide for the patient's comfort, and/or assure the manageability of the patient. Further, a custodial care determination is not precluded because the ordered and prescribed services and

supplies are being provided by an R.N., L.P.N., or L.V.N." (See DoD 6010.8-R, chapter IV, E.12.)

The regulatory provisions emphasize the care rendered the patient is controlling and not the condition itself. The record in this appeal must be reviewed in light of these four criteria.

- o Mentally or physically disabled and such disability is expected to continue and be prolonged.

The record in this appeal clearly establishes the beneficiary was physically disabled and the disability was expected to continue and be prolonged. From 1976 until her death in October 1980, the beneficiary's conditions of encephalopathy, organic mental syndrome, left hemiparesis and homonymous hemianopsia were not expected to improve according to statements of her military and civilian physicians. The probability of progressive deterioration of her mental and physical faculties was noted by her physician at [redacted]. The same diagnosis and prognosis were offered during 1977 by physicians at [redacted]. While she improved significantly following the nursing care at Medicenter of [redacted] during mid-1979, her condition deteriorated rapidly in the summer of 1979 as foretold by her physicians, resulting in the continued supportive care in issue. Medical review by physicians with specialties of neurology and internal medicine opined the beneficiary's disability was expected to continue or be prolonged. The Hearing Officer found the beneficiary was physically disabled and her disability was expected to continue. I agree and adopt the Hearing Officer's conclusion.

- o Requires a protected, monitored and controlled environment whether in an institution or in the home.

In reviewing the record in this appeal, I must also agree with the Hearing Officer that the beneficiary required a protected, monitored and controlled environment. The record reveals the beneficiary required assistance in ambulation, frequent repositioning in bed, monitoring of vital signs and, due to the left hemiparesis, protection from injury or falling from her bed. The attending physician noted supportive care was necessary to deter possible further injury. Medical review opined a protected and monitored environment was required. The Hearing Officer adopted this opinion. I also find such an environment was required for this beneficiary.

- o Assistance to support the essentials of daily living.

This criteria is also well documented in the record. The attending physician stated in March 1980:

"At this time the patient is given supportive care, which is providing

necessary assistance to aid the patient in eating, cleansing, feeding and ambulation necessary to deter possible further injury without such assistance."

The nurses' notes state the beneficiary required total "ADL" (assistance in daily living) including ambulation, toileting (she was frequently incontinent and also required periodic enemas), repositioning in bed and assistance in eating later in the confinement. Again, the medical reviewers stated assistance in the essentials of daily living was required and the Hearing Officer also reached that conclusion. I must also agree and adopt the finding on this criteria.

- o Not under active and specific medical, surgical and/or psychiatric treatment which would reduce the disability to the extent necessary to enable the beneficiary to function outside of a protected, monitored and/or controlled environment.

Under this criteria, the treatment plans at the skilled nursing facility must be designed to reduce the disability to enable the beneficiary to live outside a protected environment. A protected environment (custodial care) can exist equally in an institution or the home. A determination on this criteria requires analysis of the care rendered to the beneficiary and the medical opinion on her prognosis.

The opinions of the OCHAMPUS medical reviewers (physicians associated with the Colorado Foundation for Medical Care) and the beneficiary's civilian and military physicians essentially agree. The reviewing physicians opined the beneficiary was not under active care to reduce the disability. The attending civilian physician stated on two occasions in March 1980 that the beneficiary was not expected to improve and that the beneficiary required supportive care. The military physician stated her condition was not expected to improve and she probably would have progressive deterioration of her physical and mental faculties. The sponsor, _____ in his request for extended hospitalization noted discharge from the nursing facility was "not probable." The nurses' notes frequently state the short-term goal of treatment as "some level of self-care" and the long-term goal as "function at the highest level." The notes also report these goals were not being obtained by the care at the facility.

Review of the nurses' notes reveal the following services:

1. Monitoring vital signs
2. Observation and reporting
3. Assistance in ambulation
4. Assistance in feeding, toileting, etc.
5. Administration of oral medication
6. Administration of medicated douches, suppositories and enemas

7. Pessary maintenance every five weeks

At the hearing, the sponsor questioned the quality of the nurses' notes and testified as to specific services he alleged were skilled services, of which fluoride treatment for radiation damage does not appear in the notes. The sponsor also reiterated the recommendations of the beneficiary's civilian and military physicians that twenty-four hour skilled nursing was required. In his testimony, the sponsor did not address the specific criteria of custodial care but instead insisted the care was skilled nursing services. While a secondary issue may exist regarding whether the services constituted skilled nursing care, the primary issue in a custodial care case is whether the actual services provided were the kind of treatment which would reduce the beneficiary's disability to the extent necessary to enable the patient to function outside a protected, monitored and/or controlled environment.

The services in dispute did not meet this requirement. The services are supportive "ADL" services only, as stated by the attending physician and the nurses' notes.

The medications listed in the Factual Background section also are palliative only. A physical therapy program was apparently designed for the beneficiary; however, the medical records and statements of the attending physician contain no information regarding the extent, frequency or nature of the therapy.

In view of the above, I find the beneficiary was not under active and specific medical care which would reduce the beneficiary's disability to the extent necessary to enable the beneficiary to function outside a protected environment.

In summary, analysis of the entire record in this appeal including the nurses' notes, physicians' statements, medication records and medical review opinions establishes the beneficiary's care at the skilled nursing facility met the four criteria of custodial care as defined in DoD 6010.8-R. The Hearing Officer concluded the care was custodial and I adopt her recommendation. Therefore I find the care from September 12, 1979 through August 31, 1980 is excluded from CHAMPUS coverage as custodial care.

Additionally, I have noted the claim for care from September 12, 1979 through August 31, 1980 include two periods, June 28 to July 1, 1980 and August 29 - 31, 1980, during which the beneficiary was not a patient at the skilled nursing facility, but was hospitalized in . As CHAMPUS is a program to cost-share medical care, it is axiomatic that CHAMPUS coverage does not include charges for care not rendered.

I also noted from the record the sponsor has challenged the opinion of the medical reviewers. Primarily, as noted by the Hearing Officer, the sponsor was concerned that the medical review physicians did not personally examine the beneficiary. I

do not share the sponsor's concern regarding the medical review. The custodial care criteria listed in the Regulation require factual findings based on the care rendered. The Hearing Officer found that the opinion of the medical reviewers and the beneficiary's civilian and military physicians did not disagree regarding the beneficiary's condition, only whether skilled care was required. Her condition met the criteria for custodial care without question. These criteria, as established by Regulation, were not addressed by the civilian and military physicians in their opinions. The medical documentation and statements of the beneficiary's physicians confirm the care was custodial, and I would reach the same conclusion regarding the custodial nature of the care without the medical reviewers' opinions.

Skilled Nursing Care

Under DoD 6010.8-R, chapter IV E. 12 provides that, even though the care received is determined to be custodial, benefits may be extended for up to one hour of skilled nursing care per day. Skilled nursing is defined as a

"service which can only be furnished by an RN (or LPN or LVN), and required to be performed under the supervision of a physician in order to assure the safety of the patient and achieve the medically desired result. Examples of skilled nursing services are intravenous or intramuscular injections, levin tube or gastrostomy feedings, or tracheotomy aspiration and insertion. Skilled nursing services are other than those services which primarily provide support for the essentials of daily living or which could be performed by an untrained adult with minimum instruction and/or supervision."
(DoD 6010.8-R, chapter II B. 161.)

As stated above, the sponsor and the beneficiary's physicians contend the beneficiary required (and received) skilled nursing care. Review of the above cited nursing services listed in the notes does not reveal skilled nursing care was the primary focus of the confinement. Assistance in ambulation, personal care, monitoring of vital signs, and administration of oral medication do not qualify as skilled services under the CHAMPUS definition. These services did not require the skills of a registered nurse and primarily provided support for the essentials of daily living as stated in the nurses' notes. Maintenance of the pessary would constitute a skilled service; however, the notes reflect this was performed only once every five weeks.

The sponsor submitted a list of services divided into "skilled" and "non-skilled" services, as well as his own definition of "skilled care." The origin of these documents is unclear; the sponsor testified they were developed by Medicare. Medicare is, of course, a program separate and distinct from CHAMPUS. For

example, the definition of "skilled care" in these submissions includes nursing home care which is specifically excluded from CHAMPUS coverage. I also noted several of the services checked by the sponsor as performed at cannot be confirmed in the record, such as physical therapy and intravenous feeding. Perhaps the sponsor has confused care received at the military hospitals with the skilled nursing facility care.

Under DoD 6010.8-R, chapter IV E.12.c, prescription drugs and a maximum of one hour of skilled nursing care per day are payable benefits in a custodial care case. The Hearing Officer found one hour of skilled nursing care per day was payable based on the need for continued care of the pessary and medicated douches. I must disagree with the Hearing Officer and reject this recommendation. Administration of medicated douches is not a service requiring the skills of a registered nurse under the supervision of a physician and as stated above, maintenance of the pessary was not performed each day. The medical review opinion specifically addressed this issue stating one hour of skilled services were not required each day. The services were such that they could have been provided by a reasonably trained adult and did not require a skilled nurse. Therefore, I reject the Hearing Officer's recommendation of cost-sharing one hour of skilled nursing services everyday, but find one hour is payable only on those days the pessary was maintained.

The Hearing Officer further found prescription drugs to be payable; however, the claim in issue does not itemize any prescription drugs. Prior to final adjudication of the claim, I will allow amendment of the original claim to include any prescription drug charges. Upon such amendment and appropriate documentation, I direct the fiscal intermediary to cost-share the prescription drugs in accordance with the above cited regulatory provision.

Appropriate Level of Care

Under DoD 6010.8-R, chapter IV, B.1.g., the level of institutional care for which CHAMPUS benefits may be extended must be at the appropriate level of care required to provide the medically necessary treatment. Appropriate medical care means:

"The medical environment in which the medical services are performed is at the level adequate to provide the required medical care." DoD 6010.8-R, chapter II, B.14.c.

Appropriate medical care is included within the definition of medically necessary. DoD 6010.8-R, chapter II, B.104. Care that is above the appropriate level of care is excluded under DoD 6010.8-R, chapter IV, G.3. from CHAMPUS coverage.

The Hearing Officer found the hospitalization during the period in issue to be above the appropriate level of care. I concur in this finding and adopt it in this FINAL DECISION. The sponsor primarily relies on statements from the beneficiary's various physicians that highly skilled professional nursing care was required for the beneficiary. A 1977 statement from _____ opined home or a strictly domiciliary facility would not provide satisfactory medical care for the beneficiary. The record, however, does not document a skilled nursing facility was the appropriate level of care. Analysis of the nurses' notes, discussed above, does not reveal sufficient skilled services to justify care at that level. Primarily described as supportive in 1980 by the attending physician, the services documented in the medical record could have been provided in a nursing home or at her home with periodic visits by registered or licensed practical nurses. Peer review opinion supports this conclusion. If the services were not primarily skilled services, I must conclude a skilled nursing facility was not required. Based on evidence of record, I find the care during the period in issue could have been provided at a lower level of care and therefore is excluded from CHAMPUS coverage under the above cited authorities.

SUMMARY

In summary, it is the FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) that the inpatient care at _____ during September 12, 1979 through August 31, 1980, was custodial care and is excluded from CHAMPUS coverage. As noted above, no claim has been filed for care from September 1, to October 19, 1980. As the available medical records document the care was custodial on August 31, 1980, I also conclude the subsequent care would similarly be custodial and excluded from coverage. I further find that, under the custodial care provision, skilled nursing services up to one hour per day are found to be covered for those days in which the skilled services for pessary maintenance was provided. Likewise, I find prescription drugs utilized during the period in issue are payable if properly itemized on an amended CHAMPUS claim. I additionally find the care to have been provided above the appropriate level and excluded from CHAMPUS coverage for that reason. This decision does not imply that the services were not necessary; it only means that the care received is not the type of care for which CHAMPUS payments can be extended. Issuance of this FINAL DECISION completes the administrative appeals process under DoD 6010.8-R, chapter X, and no further administrative appeal is available.


John F. Beary, III, M.D.
Acting Assistant Secretary

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John F. Beary III, M.D.
Acting Assistant Secretary