

ASSISTANT SECRETARY OF DEFENSE  
WASHINGTON, D. C. 20304

JUN 27 1983

HEALTH AFFAIRS

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

Appeal of )  
Sponsor: ) OASD (HA) FILE 83-07  
SSN: ) FINAL DECISION

This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPUS Appeal OASD(HA) Case File 83-07 pursuant to 10 U.S.C. 1071-1089 and DoD 6010.8-R, chapter X. The appealing party is the beneficiary, the spouse of an active duty United States Air Force member. The appeal involves the denial of inpatient care and professional services for scar revision and bilateral breast capsulotomies provided April 30 to May 2, 1980 at the County Memorial Hospital, New Jersey. The amount in dispute for these services is \$1189.78. The hearing file of record, 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 CHAMPUS cost-sharing should not be allowed for capsulotomies and the scar revision. The Hearing Officer found reconstructive breast surgery, performed in 1979, was cosmetic, reconstruction and/or plastic surgery excluded under CHAMPUS. The services provided in 1980 were found to be complications essentially similar to previous non-covered care and also excluded under CHAMPUS.

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 to include an additional basis of denial of the lack of preauthorization. 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, with the Director's recommended modification, as the FINAL DECISION.

The FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) is therefore to deny CHAMPUS cost-sharing of the inpatient care and related professional charges for scar revision and bilateral breast capsulotomies performed on April 30 to May 2, 1980. This decision is based on the findings the care

provided constituted a complication essentially similar to previous noncovered care and required preauthorization was not obtained.

#### FACTUAL BACKGROUND

The record in this appeal reveals the beneficiary underwent bilateral subcutaneous mastectomy and breast reconstruction on May 25, 1979. The attending physician for this surgery stated the surgery was performed because of multiple breast masses, chronic breast pain, a history of fibrocystic disease and a positive family history of breast cancer. During this initial surgery, breast prostheses were inserted. CHAMPUS cost-shared this care except for the breast prostheses according to the record and testimony of the beneficiary.

Following the 1979 surgery, the beneficiary experienced pain and limitation of movement of her arms. In 1980, the beneficiary was evaluated by Dr. . who opined the prostheses had become constricted and pain was present in both breasts due to the tight capsule about the prostheses. On April 30, 1980, the beneficiary was admitted to County Medical Hospital, , New Jersey. On May 1, 1980, scar revision and capsulotomies were performed on both breasts. The attending physician has stated for the record:

"The scar revision was done in the capsules around each breast prostheses by resecting, or portion of, thick capsules and enlarging the pocket around each prostheses.

This patient's pain was due to pressure on surrounding tissue and this pain was reduced by this surgery."

The beneficiary was discharged on May 2, 1980. The record does not reveal any request for preauthorization of the surgery. The beneficiary stated in correspondence to OCHAMPUS that the CHAMPUS advisor, , New Jersey advised her that prior approval for the surgery was not required because CHAMPUS covered the first operation. However, as previously noted, CHAMPUS had denied coverage of the insertion of breast prostheses at the time of the mastectomy.

Three CHAMPUS claims were filed for the inpatient care and related professional charges. The hospital submitted a claim for \$733.78 for inpatient care for which payment was issued of \$708.78 after deduction of the beneficiary cost-share by the CHAMPUS fiscal intermediary for New Jersey, Blue Cross of Rhode Island. The anesthesiologist submitted a claim for \$171.00 which was also cost-shared for that amount by Blue Cross of Rhode Island.

The attending physician's claim of \$310.00 was cost-shared for \$20 for an office visit, which was applied to the deductible; the surgery claim was denied on the basis the care was cosmetic. The beneficiary appealed. Informal review confirmed the denial; however, the hospital and anesthesia charges were not considered. No appeal rights were given to the beneficiary at this time. She did request OCHAMPUS review which determined none of the services, including the hospital and anesthesia claims, were covered by CHAMPUS. Various correspondence appears in the record concerning the coverage of the surgery under the Fiscal Year 1981 Department of Defense Appropriations which provided for payment of reconstructive breast surgery following a mastectomy. It was finally and correctly determined the 1981 Appropriations Act did not affect the care performed in May 1980 as the Act became effective on October 1, 1980.

The fiscal intermediary then issued a Reconsideration decision denying coverage for all services and supplies provided during the inpatient care on the basis the care was cosmetic and excluded from CHAMPUS coverage. The fiscal intermediary also requested the beneficiary refund the payments previously made.

The beneficiary again appealed to OCHAMPUS. The OCHAMPUS First Level Appeal decision affirmed the fiscal intermediary denial finding, based on medical review, the procedures restored form but not function and were therefore cosmetic in nature and excluded under CHAMPUS.

The beneficiary appealed and requested a hearing. The hearing was held on February 16, 1983 at \_\_\_\_\_, South Carolina before \_\_\_\_\_, Hearing Officer. The Hearing Officer has issued his Recommended Decision. All prior levels of administrative review have been exhausted and issuance of a FINAL DECISION is proper.

#### ISSUES AND FINDINGS OF FACT

##### Cosmetic, Reconstructive and/or Plastic Surgery Complications (Unfortunate Sequelae)

Under the Department of Defense Appropriations Act of 1979, Public Law 97-457, appropriating funds for the fiscal year ending September 30, 1979, Section 715 provided:

"None of the funds contained in this Act available for the Civilian Health and Medical Program of the Uniformed Services under the provisions of Section 1079(a) of the Title 10, United States Code, shall be available for (a) .... (e) reconstructive surgery justified solely on psychiatric needs including, but not limited to, mammary augmentation, face lifts and sex gender exchanges;...."

Department of Defense Regulation 6010.8-R, the applicable regulation governing CHAMPUS implements this funding restriction on reconstructive surgery in chapter IV E.8 providing as follows:

"Cosmetic, Reconstructive and/or Plastic Surgery. For the purposes of CHAMPUS, cosmetic, reconstructive and/or plastic surgery is that surgery which can be expected primarily to improve physical appearance and/or which is performed primarily for psychological purposes and/or which restores form, but which does not correct or materially improve a bodily function.

NOTE: If a surgical procedure primarily restores function, whether or not there is also a concomitant improvement in physical appearance, the surgical procedure does not fall within the provisions set forth in this Subsection E.8., if this CHAPTER IV.

a. Limited Benefits Under CHAMPUS. Benefits under the CHAMPUS Basic Program are generally not available for cosmetic, reconstructive and/or plastic surgery. However, under certain limited circumstances, benefits for otherwise covered services and supplies may be provided in connection with cosmetic, reconstructive and/or plastic surgery, as follows:

- (1) Correction of a congenital anomaly; or
- (2) Restoration of body form following an accidental injury; or
- (3) Revision of disfiguring and extensive scars resulting from neoplastic surgery;
- (4) Generally, benefits are limited to those cosmetic, reconstructive and/or plastic surgery procedures performed no later than December 31 of the year following the year in which related accidental injury or surgical trauma occurred. However, special consideration for exception will be given to cases involving children who may require a growth period.

b. General Exclusions

- (1) ...

- (2) Cosmetic, reconstructive, and/or plastic surgery procedures performed primarily for psychological reasons or as a result of an aging process are also excluded.
- (3) ...
- (4) In addition, whether or not they would otherwise qualify for benefits under this paragraph E.8.a. of this CHAMPUS IV; the breast augmentation mamoplasty, surgical insertion of prosthetic testicles and the penile implant procedure are specifically excluded.

c. Noncovered Surgery. All Related Services and Supplies Excluded. When it is determined that a cosmetic, reconstructive, and/or plastic surgery procedure does not qualify for CHAMPUS benefits, all related services and supplies are excluded, including any institutional costs.

d. Preauthorization Required. In order for CHAMPUS benefits to be extended for cosmetic, reconstructive, and plastic surgery procedures which might qualify under this subsection E.8. of this CHAPTER IV, preauthorization is required from the Director, OCHAMPUS (or a designee).

- (1) Such preauthorization requests must include full details of the proposed cosmetic, reconstructive, and/or plastic surgery procedure, including photographs of the defect to be surgically corrected.
- (2) When a preauthorization request is approved, it is for a specific surgical procedure and is valid for only ninety (90) days from date of issuance.
- (3) If the approved cosmetic, reconstructive and/or plastic surgical procedure is not performed within the ninety (90) day period, a new preauthorization is required.
- (4) Preauthorization is required for each specific procedure even though a series of surgical procedures is related to the correction of one defect or condition (for example, on which requires that the corrective surgery be done in steps). A

preauthorization is not valid for any surgical procedure except as specifically stated in the preauthorization.

NOTE: If a surgical procedure primarily restores function, whether or not there is a concomitant improvement in physical appearance, there is no requirement for preauthorization. However, if a surgical procedure only marginally improves function or if there is any question on the part of the surgeon or beneficiary (or spouse), OCHAMPUS should be contacted for a determination prior to performing the surgery.

e. Examples of Non-Covered Cosmetic, Reconstructive and/or Plastic Surgery Procedures. The following is a partial list of cosmetic, reconstructive and/or plastic surgery procedures which DO NOT QUALIFY FOR BENEFITS under CHAMPUS. This list is for example purposes only, and is not to be construed as being all-inclusive.

- (1) Any procedure performed for personal reasons, to improve appearance of an obvious feature or part of the body which would be considered by an average observer to be normal and acceptable for the patient's age and/or ethnic and/or racial background.
- (2) Cosmetic, reconstructive and/or plastic surgical procedures which are justified primarily on the basis of a psychological or psychiatric need.
- (3) Augmentation mamoplasties.
- (4) ....
- (5) Reduction mamoplasties (unless there is medical documentation of intractable pain not amendable to other forms of treatment, as the result of increasingly large pendulous breasts).
- (6) Panniculectomy; body sculpture procedures.
- (7) ....
- (8) ....

- (9) ....
- (10) ....
- (11) ....
- (12) Revision of scars resulting from surgery and/or a disease process, except disfiguring and extensive scars resulting from neoplastic surgery.
- ...
- (18) ...."

As stated in the FACTUAL BACKGROUND section, there was an initial question in this appeal whether the surgery performed on May 1, 1980 was covered under the Department of Defense Appropriations Act of 1981 which authorized breast reconstruction following mastectomy. However, it is clear the surgery at issue in this appeal was performed on May 1, 1980 and is not covered by either the 1981 Appropriations Act, effective October 1, 1980 or the subsequent Amendment to DoD 6010.8-R authorizing such surgery. As implemented by OCHAMPUS Instruction 6010.40, the 1981 Appropriations Act and subsequent amendment to DoD 6010.8-R, authorized CHAMPUS coverage of post mastectomy reconstruction of the breast only for such medical "services and supplies required on or after October 1, 1980."

The record in this appeal reflects initial breast reconstruction was performed in May 1979. The evidence of record is that CHAMPUS cost-shared the mastectomy, but not the prostheses. The record does not reflect if a reduction was made in the surgery charge for the reconstruction. While the mastectomies performed in 1979 were covered services, the breast reconstruction was not. The beneficiary testified at the hearing she knew CHAMPUS would not pay for the implants. Under the above cited authorities, surgery for psychological reasons to restore form but not function are excluded under CHAMPUS as cosmetic procedures. The reconstructive breast surgery performed in 1979 would not restore the function of the breast but would restore form only. The reconstructive surgery was therefore not a CHAMPUS benefit. The Hearing Officer found the initial reconstruction was not a benefit and I adopt this finding. The beneficiary and her sponsor do not appear to question this determination.

Following complications to the initial reconstruction involving severe pain, the beneficiary underwent scar revision and capsulotomies of both breasts. These procedures were designed to relieve the constriction of the breast capsules which, according to the attending physician, was causing the pain. The case file was referred to the OCHAMPUS Medical Director, a physician, for medical review. In his opinion, the pain experienced by the beneficiary was a complication of the initial noncovered service and was essentially similar in nature to the original procedure

since it required reduction in size of the breast capsules. Further, the complication was not uncommon or unanticipated following reconstructive surgery and the capsulotomies were a "re do" of the original procedure. The operative report clearly indicates the breast capsules were made larger to accommodate the prostheses.

DoD 6010.8-R, Chapter IV E.9. provides:

"9. Complications (Unfortunate Sequelae) Resulting from Non-Covered Initial Surgery/Treatment. Benefits are available for otherwise covered services and supplies required in the treatment of complications resulting from a noncovered incident of treatment (such as nonadjunctive dental care, transsexual surgery, and cosmetic surgery), but only if the subsequent complication represents a separate medical condition such as a systemic infection, cardiac arrest, or acute drug reaction. Benefits may not be extended for any subsequent care or procedure related to the complication that is essentially similar to the initial noncovered care. Examples of complications similar to the initial episode of care (and thus not covered) would be repair of facial scarring resulting from dermabrasion for acne or repair of a prolapsed vagina when in a biological male who had undergone transsexual surgery."

Applying this provision to the facts in this appeal, the initial reconstructive breast surgery to implant the prostheses was not a covered CHAMPUS benefit. If the subsequent complication (pain) was not a separate medical condition or the procedure was essentially similar to the initial noncovered care, then the capsulotomies to relieve the pain are also not CHAMPUS covered. The evidence of record clearly establishes the complication was not a separate medical condition and the procedure to enlarge the capsule is also essentially similar to the function of the capsules. The Hearing Officer found the care was excluded under the unfortunate sequelae provision and I concur in and adopt this finding.

#### Preauthorization

Under the above cited provisions of DoD 6010.8-R, preauthorization of reconstructive surgery is required by OCHAMPUS unless the surgical procedure primarily restores function. Herein, the breast reconstruction and subsequent capsulotomies to relieve pain caused by the tight capsules would not restore the function of the breast. Therefore, preauthorization was required. A statement for the record by and the testimony of the beneficiary indicates the beneficiary was advised by the CHAMPUS advisor at



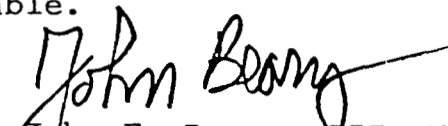
, New Jersey that the capsulotomies were CHAMPUS covered because the initial surgery was covered and prior approval was not required. This evidence is somewhat contradictory in view of the beneficiary's statement that she knew prior to the 1979 breast reconstruction that CHAMPUS would not pay for the breast prostheses. However, it is well established in decisions of this office that misinformation, while regrettable, cannot bind CHAMPUS to pay for care that is excluded by law or regulation. The CHAMPUS advisor is merely that--an advisor. Advisors may assist beneficiaries in applying for CHAMPUS benefits but have no authority to make benefit determinations or obligate Government funds. Advice given to beneficiaries as to determination of benefits is not binding on OCHAMPUS (See DoD 6010.8-R, Chapter I.K.)

The beneficiary apparently questioned the advice of the CHAMPUS advisor but did not take the precaution of requesting preauthorization from OCHAMPUS. Had the beneficiary done this, she would have been advised the care was not covered. However, in view of the pain she was experiencing, I doubt the denial of preauthorization would have deterred the beneficiary from having seeking care.

I find the beneficiary did not request preauthorization and that such preauthorization was required. Therefore, absent preauthorization, the services provided April 30 to May 2, 1980 are not CHAMPUS benefits.

#### SUMMARY

In summary, it is the FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) that the inpatient care at Burlington County Memorial Hospital, including the services of the attending physician and anesthesiologist, are excluded from CHAMPUS as treatment of complications not representing a separate medical condition and essentially similar to initial noncovered breast reconstructive surgery. I further find preauthorization of these services was required but not obtained and the care is also excluded from coverage on that basis. These findings result in an overpayment by CHAMPUS of \$878.78 and the matter of potential recoupment of these funds, if not previously accomplished by the fiscal intermediary, is referred to the Director, OCHAMPUS (or designee) for appropriate consideration. 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