



ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

HEALTH AFFAIRS

14 JUL 1983

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

Appeal of)
) OASD(HA) File 83-13
SPONSOR:)
) FINAL DECISION
SSN:)

This is the FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) in the CHAMPUS Appeal OASD(HA) case file 83-13 pursuant to 10 U.S.C 1071-1089 and DoD 6010.8-R, chapter X. The appealing party is the CHAMPUS beneficiary, a retired sergeant of the United States Army. The beneficiary was represented at the hearing by his attorney and by a former spouse with a power of attorney for the beneficiary. The appeal involves the denial of CHAMPUS coverage for up to twenty-four hours per day private nursing care in the home provided by Health Care Services and Care Nursing. The nursing services were provided from March 27, 1980 through November 1980. Claims were submitted by the beneficiary for the March 27, 1980 through May 23, 1980 period and totaled \$14,313.92 of which \$11,451.14 was paid by other insurance. The claim was denied by the CHAMPUS fiscal intermediary as primarily involving custodial care, leaving \$2,862.78 as the amount in dispute for the March 27, 1980 through May 23, 1980 period of care. No specific claims were submitted for the continuing nursing care provided through November 3, 1980. In addition, private duty nursing services were furnished by a third source for approximately two weeks after November 3, 1980, without the submission of a CHAMPUS claim. The record makes clear that all private duty nursing care related to this episode of care was included in this appeal.

The hearing file of record, the tape of oral testimony and the 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 First Level Appeal determination by OCHAMPUS denying coverage of the care as custodial care be reversed. The Hearing Officer found "the services provided the beneficiary between March and May 1980 were skilled nursing services, which required the technical proficiency and scientific skills of a registered nurse and were

not custodial in nature." The Director, OCHAMPUS recommends rejection of the Hearing Officer's Recommended Decision on the basis it is not supported by the evidence of record and is contrary to applicable law and regulation. The Director recommends issuance of a FINAL DECISION by this office denying CHAMPUS cost-sharing for the entire period of private duty nursing care in the home as custodial care and for failing to comply with regulatory criteria for CHAMPUS coverage of private duty nursing services.

Under Department of Defense Regulation 6010.8-R, chapter X, the Assistant Secretary of Defense (Health Affairs) may adopt or reject the Hearing Officer's Recommended Decision. In the case of rejection, a FINAL DECISION may be issued by the Assistant Secretary of Defense (Health Affairs) based on the appeal record.

The Acting Assistant Secretary of Defense (Health Affairs) after due consideration of the appeal record, concurs with the recommendation of the Director, OCHAMPUS and hereby rejects the Recommended Decision of the Hearing Officer for failure to fully address all issues and for failure to apply applicable law and regulation.

The FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) is therefore to deny CHAMPUS coverage for private nursing services in the home from March 27 through November 1980 as the care was primarily custodial in nature and excluded from CHAMPUS coverage. In addition the nursing care is excluded from CHAMPUS coverage for failing to meet the regulatory criteria for CHAMPUS coverage of private duty nursing care. Assistance with the essentials of daily living and monitoring the patient for crisis intervention are not skilled nursing services under the CHAMPUS criteria for coverage of private duty nursing care or within the custodial care exception under which CHAMPUS can cost-share up to one hour of skilled nursing care per day.

FACTUAL BACKGROUND

The record reflects that the beneficiary suffered a cerebral vascular accident (CVA) that was apparently caused by a near collision while he was driving a truck for his employer. The file contains medical records associated with his treatment and CHAMPUS claim, as well as medical records apparently prepared for worker's compensation evaluations. Following his discharge from Hospital on March 27, 1980, the beneficiary received private duty nursing care in his home in , Texas from Health Care Services and Nursing from March 27, 1980 to November 3, 1980. At the hearing it was brought out that the beneficiary also had private duty nursing care for approximately two weeks after November 3, 1980 from a nurse not employed with either or Care for which no CHAMPUS claim was submitted.

The beneficiary suffered another CVA on February 13, 1981 and was again hospitalized at Hospital. He was later

transferred to the Veterans Administration Hospital in and then, apparently, discharged to a nursing home in Texas.

The beneficiary in a claim dated July 25, 1980, submitted a CHAMPUS claim for charges billed by the initial provider of private duty nursing, Health Care Services. These charges totaled \$4,482.90 for the period from March 27, 1980 to April 18, 1980. The beneficiary in an undated claim also submitted a CHAMPUS claim for private duty nursing from Care Nursing. The billed charges from Quality Care totaled \$9,831.12 for the April 18 through May 23, 1980 period. Both claims indicated there was other health insurance coverage from Connecticut General, that the illness was work related and that 80 percent of the charges were paid by Connecticut General.

The two claims totaled \$14,313.92 in billed charges. Because 80 percent was paid by other insurance, the CHAMPUS amount in dispute for the March through May period is \$2,862.78. In addition, this appeal also covers the unclaimed nursing care through November 3, 1980, as well as the nursing care received from another source for two weeks subsequent to November 3, 1980, since the specific issues raised by the beneficiary and addressed by OCHAMPUS have preserved the continuing care question.

The Hearing Officer's statement that monthly billings were sent to the fiscal intermediary is erroneous. The claim covering is dated July 25, 1980, approximately three months after the services were rendered. The other claim is undated but apparently was sent in at approximately the same time. The claims were filed by the beneficiary and were not participating claims filed by the nursing care providers.

The fiscal intermediary denied both claims as being custodial in nature. The claims were again denied following informal review and the beneficiary, by letter dated November 24, 1980, requested a First Level Appeal from OCHAMPUS. The beneficiary described his condition in essentially the same language as in previous correspondence:

"I have a problem with swallowing and getting choked when I eat or drink and require professional care in case of aspiration. I also require range of motion exercises to regain my walking ability. I also require shots for arthritis which takes a skilled nurse to administer."

The beneficiary included a letter from , M.D., the attending physician, dated October 28, 1980, which stated:

"It is my medical opinion that [the beneficiary] requires skilled nursing care during the daylight hours. [He] has improved to the extent that he does not need care from

11:00 P.M. to 7:00 A.M., with the provision that he not eat or drink during that time."

The beneficiary also enclosed a letter from Dr. , dated September 17, 1980, that stated:

"This patient is under 24 hour nursing care. This is not custodial care. He suffered severe mid brain CVA which has left him severely limited in speech, swallowing and motor coordination. He is unable to speak without slurring words and some words he cannot pronounce at all. He has severe swallowing difficulty to the point of aspiration into the trachea due to the loss of pharyngeal and lottis muscle control.

There is severe motor skill limitations, he is unable to write or perform hand dexterity maneuver without aid. He cannot dress or care for his personal and sanitary needs.

The nursing need is for skilled care, able to recognize emergency situations such as strangling, seizure, or a recurring CVA. The type of care needed cannot be performed by a sitter or maid."

In response to a request from OCHAMPUS, Dr. by letter dated March 23, 1981 provided the following information to OCHAMPUS:

- Dr. advised that the patient had also been treated by Dr. , and furnished copies of consult and CAT reports. The CVA was mid brain with difficulty swallowing and motor coordination.
- Patient was admitted to Hospital 2-24-80 and discharged on 3-26-80 [sic]. (The record has different references to the date of discharge, the hospital discharge and nursing notes show March 27, 1980 as the date of discharge and the date private duty nursing care began.)
- Round the clock nursing was initiated on 3-26-80 [sic] when [the beneficiary] was discharged to his home.
- The patient had to be fed with a tube and a suction unit available in case of aspiration because of the loss of pharyngeal and lottis muscle control.

The information included the patient history from the subsequent CVA in February 1981, that states:

"This patient has been admitted to the hospital in the past six months. He has had multiple CVA's and apparently has had another CVA which hit him suddenly. His last admission he had speech impediment and was unable to talk for approximately six months. Finally his speech improved. He has been having around-the-clock nurses at his home due to swallowing difficulty. However, in the past couple of months he has been on his own and has been doing relatively well until the present illness. ... In his left upper extremity some deformity was present and some weakness and some stiffness but the patient did have some use of this to the point where he was a truck driver The patient otherwise has had no particular problems as far as other surgical procedures or serious illness. The patient has been doing well at home since his last admission and the only significant finding is the sudden onset of the weakness and paralysis of the left arm and leg."

The discharge summary from _____ Hospital for the period from February 24, 1980 to discharge on March 27, 1980, the hospitalization prior to the private nursing care in dispute, provided the following diagnosis:

"This patient was admitted with the diagnosis of dizziness, inability to speak, probable CVA. It was found that this patient had had a mid brain cerebrovascular accident. ... The patient continued to have difficulty in swallowing and developed an aspiration pneumonia which was treated and was cleared.

He had minimal improvement but did stabilize and was not showing any progression of the involvement from the CVA. Talking with the members of the family and the patient's exwife, the patient refused to go to a nursing home which was recommended. The patient was discharged to home with around-the-clock nurses to care for the patient. He had suction, hospital bed, bedside commode and other facilities to make it easier for his care at home which at best is going to be very difficult. I feel the patient is going to continue to have difficulty until he is able to swallow with less difficulty and less risk of aspiration. It was explained to the family and to the persons taking care of the patient at home that they would have to blend his food and

have to help him with eating and to be very cautious about giving him a lot of water with his meals and to use a suction machine liberally if any signs of patient trying to choke or aspirate. I feel that the prognosis of this patient is guarded at this time. Will follow the patient closely as an outpatient. Discharged somewhat improved."

Following the receipt of the medical records from Dr. , CHAMPUS obtained a medical review from the Colorado Foundation for Medical Care. The medical review was conducted by two medical doctors; one a specialist in neurology, the other in internal medicine. The medical reviewers stated:

"New documentation furnished on this case indicates that placement in a nursing home was recommended but the patient refused nursing home placement. Primary problems at home would be the possibility of recurrent aspiration pneumonia due to swallowing difficulties and choking. The patient was fed pureed diet and a suction machine was available at bedside in case of difficulty. We believe the physician's recommendation for nursing home placement was appropriate, but since the patient refused and had been having difficulty swallowing, we can see justification for skilled nursing care in the home at least initially to assist with feeding and observe for signs of choking and aspiration of foods and liquids. However, we do not see that this would be necessary for more than a few weeks if no problems were being encountered. The nurses' records show the patient was ambulating with assistance, tolerating a pureed diet well without evidence of need for suctioning during the first few weeks. By May 1st the patient was ad lib [sic] about the house, needing assistance with walking and supervision at meals. We believe by this time it should have been evident that patient no longer required skilled nursing care in the home."

The medical reviewers also stated:

"[T]he services rendered were primarily to assist with essentials of daily living and supervision of meals. We did not find that the patient was having problems which required skilled nursing care.

After the first few weeks we can find no reason why a licensed nurse was medically

necessary for assistance in walking, supervision of meals and medications and help in activities of daily living. These could have been rendered by an average trained adult.

A monitored environment was needed.

Assistance was required to support essentials of daily living."

The following questions were asked by OCHAMPUS and answered by the medical reviewers:

"Was this patient under active and specific medical treatment provided by the nurses which would reduce his disability to the extent necessary to enable him to function outside a protected, monitored and/or controlled environment?

No. The nursing care was not active medical care. It was primarily assistance and supervision.

In your opinion did this man require one hour of skilled nursing care per day?

For the first few weeks we could justify skilled nursing care to see that he did not have difficulty with aspiration. We don't believe he continued to require daily skilled nursing care for more than the first few weeks as his course was relatively uneventful."

By letter dated June 29, 1981, OCHAMPUS in its First Level Appeal denied CHAMPUS coverage. This determination stated:

"The nursing services provided are again found to be primarily for the purposes of monitoring and assisting. It is concluded that you did not require skilled nursing care as your course was relatively uneventful. The nursing notes indicate you were ambulatory with assistance and needed supervision in meals only. The nurses notes did not show active medical care was being rendered."

The beneficiary, by letter dated July 7, 1981, appealed the CHAMPUS First Level Decision and requested a hearing.

The additional information provided by the beneficiary with his request for a hearing was forwarded to the Colorado Foundation

for Medical Care. In a memorandum dated August 18, 1981, the medical reviewers concluded:

"The care provided to this patient as documented in the case records was not active care designed to reduce the patient's disability. Instead it was primarily assistance and supervision with daily activities which does not require the skills and training of a Registered Nurse. The new information does not change the opinion the care provided was primarily custodial in nature."

A number of documents including medical records were submitted by counsel for the beneficiary both at the hearing and subsequent to the hearing. They included a statement by the treating physician concerning his March 1980 discharge summary explaining the words "refused to go" in reference to placement in a nursing home as follows:

"Considering the physical and mental state of the patient and considering the convenience of his guardian and friends, the patient, through his guardian, chose to be discharged to his home. This alternative was recommended provided he had round the clock skilled nursing care."

Also submitted was a letter dated October 19, 1981 from the treating physician, in which he states:

"The purpose of this letter is for assurance that [the beneficiary] was under active and specific medical treatment after discharge from the hospital, requiring the skills and training of licensed nurses, which would reduce his disability to the extent necessary to enable the patient to function outside protected, monitored and/or a controlled environment."

The letter did not enumerate what the active and specific treatment was.

A CHAMPUS home nursing certification signed by the treating physician and dated November 4, 1980 states:

"Specific needs of patient which in your opinion require nursing skills ...: range of motion exercises, calculated diabetic diet, clinitest and acetone test for diabetes. Daily wt record. Regulate dosage of minipres if drop in BP. Assist with eating and

drinking because of swallowing difficulty and danger of choking.

How long do you anticipate this patient will require skilled nursing care? Indefinitely."

A nursing certificate form signed by Dr. on August 25, 1980 also provided essentially the same information as quoted above. The physician's plan of treatment for Quality Care dated October 21, 1980 indicates the beneficiary's diet consisted of liquid or ground solids and, that the beneficiary "needs assistance in caring for personal and sanitary needs. Assistance with walking and feeding. Vigilance against aspiration." Physician's orders as of October 21, 1980 included range of motion, skilled observations for signs of secondary complications, observe while eating, chokes easily, ER protocol.

A letter from the treating physician dated July 11, 1980 states the beneficiary, "is totally and permanently disabled." The record also includes opinions from consulting physicians. A physician who examined the beneficiary on December 5, 1980 described the beneficiary in the following manner:

"He is now 55 years old, totally disabled from a cerebrovascular accident, likely involving the region of the brainstem. He has two medical problems, which are associated with stroke -- that is, diabetes and hypertension or high blood pressure."

The physician went on to conclude:

"I think it would be worthwhile to have him see [physicians named] for an aggressive physical therapy program.... This patient probably, with the physical therapy, would be improved in his functional capability, and I would hope that could be carried out at least an evaluation here in , and then proceeded on with home program in ."

This was the only statement in the record by a physician that mentioned the possibility of physical therapy for the beneficiary.

At the hearing two licensed vocational nurses testified they helped the beneficiary learn to walk and to talk again. He was described as still disabled but improved, though what point in time they were referring to was not made clear. It was also brought out that some of the nursing notes from Care were not adequate and so were done over. It was not known which notes were revised and what additional information was added.

One nurse testified that the beneficiary would not have progressed to the state he had without nurses. There was also

testimony by a nurse that she considered custodial care to be bathing, feeding, and clothing the patient, which is only a portion of the CHAMPUS definition of custodial care.

The hearing was held in _____, Texas on October 22, 1981 before OCHAMPUS Hearing Officer, Mr. _____. The beneficiary was represented by counsel, Mr. _____, and by his former wife. The Hearing Officer has issued his Recommended Decision and issuance of a FINAL DECISION is proper.

ISSUES AND FINDINGS OF FACT

The primary issues in dispute are whether the care provided the appealing party was custodial care as described in DoD 6010.8-R, chapter IV, E.12 and whether the home private duty nursing care was intensified, skilled nursing care which required the technical proficiency and scientific skills of a Registered Nurse as required by DoD 6010.8-R, chapter IV, C.3.o.

Custodial Care

The statutory authorization for CHAMPUS benefits specifically provides at 10 U.S.C. 1077(b)(1) that "the following types of health care may not be provided under section 1076 of this title: (1) Domiciliary or Custodial Care." This statutory exclusion is implemented in the CHAMPUS Regulation at DoD 6010.8-R, chapter IV, E.12, which provides:

"Custodial Care. The statute under which CHAMPUS operates specifically excludes custodial care. This is a very difficult area to administer. Further, many beneficiaries (and sponsors) misunderstand what is meant by custodial care, assuming that because custodial care is not covered, it implies the custodial care is not necessary. This is not the case; it only means the care being provided is not a type of care for which CHAMPUS benefits can be extended.

a. Definition of Custodial Care. Custodial Care is defined to mean 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 [sic] 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 a R.N., L.P.N. or L.V.N.

b. Kinds of Conditions that Can Result in Custodial Care. There is no absolute rule that can be applied. With most conditions there is a period of active treatment before custodial care, some much more prolonged than others. Examples of potential custodial care cases might be a spinal cord injury resulting in extensive paralysis, a severe cerebral vascular accident, multiple sclerosis in its latter stages, or pre-senile and senile dementia. These conditions do not necessarily result in custodial care but are indicative of the types of conditions that sometimes do. It is not the condition itself that is controlling but whether the care being rendered falls within the definition of custodial care.

c. Benefits Available in Connection with a Custodial Care Case. CHAMPUS benefits are not available for services and/or supplies related to a custodial care case (including the supervisory physician's care), with the following specific exceptions:

(2) Nursing Services: Limited. It is recognized that even though the care being received is determined to be primarily custodial, an occasional specific skilled nursing service may be required. Where it is determined such skilled nursing services are needed, benefits may be extended for one (1) hour of nursing care per day."

The CHAMPUS definition of "custodial care" includes care furnished to a patient who meets four specified conditions. It is undisputed and the record clearly establishes that the beneficiary in this case met the first three conditions; i.e., (1) he was disabled and his disability was expected to continue; (2) he required a protected, monitored and/or controlled

environment; and (3) he required assistance to support the essentials of daily living. The various physicians who examined the patient subsequent to his severe mid-brain CVA found him to be permanently disabled. The physicians also determined the patient needed a protected, monitored and/or controlled environment and recommended placement in a nursing home. As an alternative to the nursing home, round-the-clock nursing care in the home was the proposed controlled or monitored environment; i.e., to monitor the patient's condition and to provide assistance if needed for crisis intervention. Finally, the physicians all recognized the patient's need for assistance to support the essentials of daily living due to his inability to dress and care for his personal and sanitary needs.

It is the fourth and final condition of the CHAMPUS custodial care definition which is in dispute in this appeal. That is, was the patient under active and specific medical treatment which would reduce the disability to the extent necessary to enable the patient to function outside the protected, monitored and/or controlled environment?

The medical record in this appeal is quite extensive, yet there are virtually no references in it to any specific treatment designed to reduce the beneficiary's disability. One letter from the treating physician, dated October 19, 1981 (almost one year after the care in question) states there was "active and specific treatment... which would reduce his disability." However, the physician did not enumerate what active and specific treatment was being carried out. In all of the previous reports provided to OCHAMPUS by the treating physician, there were no references to active and specific treatment designed to reduce the beneficiary's disability. Although, one consulting physician recommended physical therapy, no specific physical therapy program (other than passive exercises by the nurse) or specific rehabilitative measures were instituted. The hospital discharge summary stated the beneficiary's condition had stabilized but that he had minimal improvement. The discharge summary demonstrated concern over the risk that the beneficiary might choke, but made no reference to any specific treatment to be carried out.

The medical opinions of the two doctors reviewing the records for the Colorado Medical Foundation that the nursing care was not active medical care and that it was primarily assistance and supervision and was not active and specific medical treatment which would reduce his disability to the extent necessary to enable him to function outside a protected, monitored and/or controlled environment, are supported by the record. The mere statement by the treating physician that there was active treatment without a single example of such treatment is not specific medical evidence sufficient to outweigh the medical opinion of the two physicians who conducted the review. The testimony of the two licensed vocational nurses, who apparently were unaware of the CHAMPUS definition of custodial care and who failed to enumerate active and specific treatment that would

reduce the beneficiary's disability, is not sufficient to outweigh the medical record and the opinion of the medical reviewers.

Counsel for the appealing party stated in his closing remarks that if there was a lack of evidence to specifically state treatment was to reduce disability, there was no negative evidence to say it was not. However, the appealing party has the responsibility of providing whatever facts are necessary to support the opposition to the CHAMPUS determination. Since the appealing party failed to establish specific treatment to reduce his disability, the OCHAMPUS decision that it was custodial care is supported by the record and will not be overturned. Given the many and detailed medical reports that were in the record which contain no reference to, nor itemization of, active and specific medical treatment which would reduce the beneficiary's disability to the extent necessary to enable the patient to function outside the protected, monitored and/or controlled environment, it must be concluded that there was none. The Hearing Officer's failure to provide any analysis of evidence that referred to active and specific medical treatment leaves his conclusion that the care was not custodial without support and it is rejected as erroneous. Therefore, I find the home nursing care furnished to the beneficiary from March 27, 1980 through November 1980 to be primarily custodial care and excluded from CHAMPUS coverage.

As stated in the Regulation provision on custodial care, a finding of custodial care does not imply that the care was not necessary. However, the level of care furnished to the beneficiary is not the type of care for which CHAMPUS payments can be made.

Private Duty Nursing

Even if the beneficiary's care had not been determined primarily to involve custodial care, the private duty nursing care would not have met criteria for CHAMPUS coverage specified in Department of Defense Regulation 6010.8-R. As defined by the Regulation, private (special) nursing services mean:

"... skilled nursing services rendered to an individual patient requiring intensive medical care. Such private duty (special) nursing must be by an actively practicing Registered Nurse (R.N.) or Licensed Practical or Vocational Nurse (L.P.N. or L.V.N.), only when the medical condition of the patient requires intensified skilled nursing services (rather than primarily providing the essentials of daily living) and when such skilled nursing care is ordered by the attending physician." (DoD 6010.8-R, chapter II, B.142).

Skilled nursing service is defined as:

"... a service which can only be furnished by an R.N. or (L.P.N. or L.V.N.), 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.)

The extent of benefits for private duty nursing is specified in DoD 6010.8-R, chapter IV, C.3.o., in part, as follows:

Private Duty (Special) Nursing. Benefits are available for the skilled nursing services rendered by a private duty (special) nurse to an individual beneficiary/patient requiring intensified skilled nursing care which can only be provided with the technical proficiency and scientific skills of an R.N. The specific skilled nursing services being rendered are controlling, not the condition of the patient nor the professional status of the private duty (special) nurse rendering the services.

(1) Inpatient private duty (special) nursing services are limited to those rendered to an inpatient in a hospital which does not have an intensive care unit. In addition, under specified circumstances, private duty (special) nursing in the home setting is also covered.

(4) Private duty (special) nursing care does not, except incidentally, include services which primarily provide and/or support the essentials of daily living, or acting as a companion or sitter.

(5) If the private duty (special) nursing care services being performed are primarily those which could be rendered by the average adult with minimal instruction and/or supervision, the services would not qualify as covered private duty (special) nursing services regardless of whether performed by an R.N., regardless of whether or not ordered and certified to by the attending physician,

and regardless of the condition of the patient.

(6) In order for such services to be considered for benefits, a private duty (special) nurse is required to maintain detailed daily nursing notes, whether the case involves inpatient nursing service or nursing services rendered in the home setting.

(8) In most situations involving private duty (special) nursing care rendered in the home setting, benefits will be available for only a portion of the care, i.e., providing benefits only for that time actually required to perform medically necessary skilled nursing services. In the event that full time private duty (special) nursing services are engaged, usually for convenience and/or to provide personal services to the patient, CHAMPUS benefits are payable only for that portion of the day during which skilled nursing services are rendered, but in no event is less than one (1) hour of nursing care payable in any twenty-four (24) hour period during which skilled nursing services are determined to have been rendered. Such situations are often better accommodated through the use of visiting nurses. This allows the personal services, which are not coverable by CHAMPUS, to be obtained at lesser cost from other than an R.N. Skilled nursing services provided by visiting nurses are covered under CHAMPUS.

NOTE: Where the services of an R.N. are not available, benefits may be extended for the otherwise covered services of an L.P.N. or L.V.N.

As specified in the above quoted regulatory provision, to qualify for CHAMPUS benefits, the private duty nursing services must be skilled services, not services which primarily provide support for the essentials of daily living or could be performed by an average adult with minimal instruction/supervision. In addition the skilled services must be rendered to an individual patient requiring intensive medical care.

The private duty nursing care rendered in the home to the beneficiary in this appeal can be divided into two categories. In one category the nurses provided assistance with walking, personal and sanitary needs, range of motion exercises, providing a controlled diet by preparing meals and blending them, and assistance with eating to prevent choking. The CHAMPUS

regulation 6010.8-R chapter II, B.67 defines the essentials of daily living as:

"'Essentials of Daily of Living' means care which consists of providing food (including special diets), clothing and shelter; personal hygiene services; observation and general monitoring, bowel training and/or management; safety precautions; general preventive procedures (such as turning to prevent bed sores); passive exercise; companionship; recreation; transportation; and such other elements of personal care which can reasonably be performed by an untrained adult with minimal instruction and/or supervision."

The above listed examples of care provided by the nurses clearly was care that is within the definition of "essentials of daily living." This care is not a covered benefit nor is it nursing care "which can only be provided with the technical proficiency and scientific skills of an R.N." The Hearing Officer's finding, that all nursing care provided was skilled when the above described care can only be consider housekeeping-type care and clearly within the definition of "essentials of daily living," is without support in the record and is clearly erroneous.

The other category of care provided by the nurses involved monitoring the beneficiary's condition and the ability to recognize and assist should the beneficiary choke or undergo another CVA. In a prior decision, OASD(HA) case file 06-80, this office addressed whether routine administration of medications, taking of vital signs, passive range of motion exercises and general observation and monitoring as well as periodically administering oxygen and suctioning was care that could only be rendered by a scientifically trained registered nurse. It was concluded the care represented primarily supportive services and not ongoing skilled nursing services. A similar result was reached in OASD(HA) case file 82-05. In that case the patient required constant observation because of the probability of seizures, a situation similar to the one the beneficiary in this appeal faced. Such observation or monitoring was not active medical treatment and therefore was custodial care.

Assistance with eating is a type of private duty nursing care explicitly excluded from cost-sharing even though there is concern over choking by the patient. The need to guard against or prevent choking and aspiration and to be able to recognize an emergency situation, such as another CVA, appears to have been the most serious need for care of the patient. This need, in the opinion of the medical reviewers, was only during the first few weeks following discharge from the hospital. However, assistance with feeding and monitoring for signs of choking and aspiration of foods and liquids do not qualify as skilled nursing care under the criteria for CHAMPUS coverage of skilled nursing care.

In view of the above, the Hearing Officer's finding that the nursing care furnished "the beneficiary between March and May 1980 were skilled nursing services, which required the technical proficiency and scientific skills of a registered nurse" is not supported by the evidence of record and is contrary to the CHAMPUS regulation and previous case decisions. I reject the Hearing Officer's finding and determine that the private duty home nursing care furnished the beneficiary from March 27, 1980 through November 1980 fails to meet the criteria for CHAMPUS coverage based upon the evidence of record.

Pursuant to the Regulation provision on custodial care, DoD 6010.8-R, chapter IV, E.12.c., a maximum of one hour per day of skilled nursing services may be cost-shared even if the care is determined primarily to be custodial care. However, a finding that the record failed to substantiate the existence of nursing care which meets the criteria for CHAMPUS coverage of private duty nursing care precludes coverage under the custodial care exception.

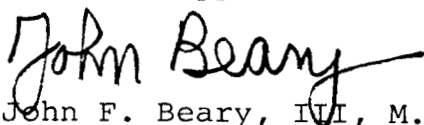
Secondary Issue

The Regulation in chapter VIII, F provides that, "All CHAMPUS benefits are specifically excluded for any medical services and/or supply provided a CHAMPUS beneficiary in the treatment of a work-related (that is, occupational) illness or injury for which benefits are available under applicable worker's compensation benefits (whether applied for or paid)." The Regulation further provides "If a CHAMPUS beneficiary exhausts available workmen's compensation benefits, CHAMPUS will assume the case ... [if certain] conditions are met."

The claims submitted indicate the condition was work related. Had it been concluded that the type of care received was a covered benefit, the appeal would have had to be remanded to determine whether the exclusion for worker's compensation applied.

SUMMARY

In summary it is the FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) that the private duty home nursing care provided the beneficiary from March 27, 1980 through November 1980 be denied CHAMPUS cost-sharing because the care was primarily custodial and failed to meet the regulatory criteria for CHAMPUS coverage of private duty nursing care. Therefore, the claims on the dates in issue and the appeal of the beneficiary are denied. Issuance of this FINAL DECISION completes the administrative appeal process under DoD 6010.8-R, chapter X, and no further administrative appeal is available.


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