



ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

HEALTH AFFAIRS

BEFORE THE OFFICE, ASSISTANT

DEC 27 1983

SECRETARY OF DEFENSE (HEALTH AFFAIRS)

UNITED STATES DEPARTMENT OF DEFENSE

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| Appeal of |) | |
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| Sponsor: | ,) | OASD(HA) File 83-44 |
| |) | FINAL DECISION |
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| SSN: |) | |

This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPUS Appeal OASD(HA) Case File 83-44 pursuant to 10 U.S.C. 1071-1089 and DoD 6010.8-R, chapter X. The appealing party is the beneficiary, the widow of a retired enlisted member of the United States Navy, as represented by her daughter. The appeal involves the denial of CHAMPUS coverage of hospitalization subsequent to February 10, 1980, inpatient care at a skilled nursing facility subsequent to May 6, 1980, and physician visits in excess of one visit per month subsequent to February 10, 1980. The amount in dispute totals approximately \$37,000 in billed charges on submitted claims. The hearing file of record, the Hearing Officer's Recommended Decision, and the Analysis and Recommendation of the Director, OCHAMPUS, have been reviewed.

The Hearing Officer has recommended upholding the OCHAMPUS Formal Review Decision denying cost-sharing of hospitalization subsequent to February 10, 1980, and physician visits in excess of one visit per month from February 10 through May 6, 1980. The Hearing Officer found the hospitalization subsequent to February 10, 1980, was above the appropriate level of care; the care received subsequent to May 6, 1980, was custodial care; and the physician visits in excess of one visit per month were related to care above the appropriate level and excluded from CHAMPUS coverage. The Director, OCHAMPUS, concurs in the Recommended Decision and recommends its adoption as the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs).

The Acting Principal Deputy Assistant Secretary of Defense (Health Affairs), acting as the authorized designee for the Assistant Secretary, after due consideration of the appeal record, concurs in the recommendation of the Hearing Officer to deny CHAMPUS benefits as stated above and hereby adopts the recommendation of the Hearing Officer as the FINAL DECISION.

The FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) is, therefore, to deny CHAMPUS cost-sharing of the beneficiary's hospitalization subsequent to February 10, 1980 (except that the hospitalization may be cost-shared at the skilled nursing facility rate from February 10 through May 6, 1980), physician visits in excess of one visit per month from February 10 through May 6, 1980, and care subsequent to May 6, 1980, at a skilled nursing facility.

FACTUAL BACKGROUND

The 64-year-old beneficiary was admitted to Good Samaritan Hospital, West Islip, New York, on December 6, 1979, with diagnostic impressions of cerebral thrombosis, diabetes mellitus, and hypertension. She had suffered a cerebrovascular accident in her home and had been found with slurred speech and an inability to move. At the time of hospital admission, the beneficiary had slurred speech and showed extreme lethargy and weakness but was able to bear her weight, follow directions, and move all four limbs. Following her admission, the beneficiary's condition slowly worsened. Her blood pressure vacillated; she was fed with a Levin nasogastric tube and required Foley catheterization. A CAT scan revealed evidence of a left posterior cerebral artery obstruction. A spinal tap revealed red blood cells in the spinal fluid. The beneficiary also had recurrent urinary tract infections. During December 1979, the beneficiary was lethargic and generally responsive only to painful stimuli; however, in January 1980, the beneficiary began to respond at times to verbal stimuli. Progress notes reveal the beneficiary began to stabilize and referral to a rehabilitation center was considered on February 10, 1980. The attending physician stated the patient required a long-term skilled nursing facility and physical therapy. Physiotherapy was begun with limited success. Physician entries state discharge was awaiting nursing home placement. In late April 1980, the Levin tube was removed and the beneficiary was able to swallow and eat pureed foods.

On May 6, 1980, the beneficiary was discharged to Berkshire Nursing Home, West Babylon, New York. The discharge diagnoses were acute cerebrovascular accident with cerebral infarction and left hemiplegia with motor aphasia, hypertension, essential type, diabetes mellitus, and recurrent urinary tract infections. Medical records for the skilled nursing facility reveal the beneficiary required total care. Prognosis was listed as both "guarded" and "bleak." She continued to require a Foley catheter and was incontinent of bowels. Speech and physical therapies were continued with poor and minimal success; the beneficiary remained aphasic. In October 1980, the attending physician stated the beneficiary required "heavy nursing care" and was helpless to perform acts of daily living. The appeal file reflects the beneficiary remains in the skilled nursing facility at this time.

CHAMPUS claims were filed by the Good Samaritan Hospital in the amount of \$26,640.87 for the hospitalization from December 6, 1979, through May 6, 1980. The attending physician filed claims of \$1,980.00 for hospital visits from February 1 through May 6, 1980. (Claims for physician care from December 6, 1979, through January 31, 1980, were apparently cost-shared and are not at issue in this appeal.) Berkshire Nursing Center filed claims for inpatient skilled nursing care from May 6 through October 31, 1980, in the amount of \$10,561.00. The appeal file does not contain claims from the Berkshire Nursing Center for care subsequent to October 31, 1980.

The CHAMPUS Fiscal Intermediary for New York, Blue Cross of Rhode Island, allowed \$12,263.57 on the claim for hospitalization at Good Samaritan Hospital from December 6, 1979, through February 6, 1980. After deduction of the beneficiary cost-share, \$9,797.00 was paid to the hospital. Claims for hospitalization from February 7 through May 6, 1980, were denied as the fiscal intermediary determined the care was provided above the appropriate level required and was excluded from CHAMPUS coverage.

Claims filed by Berkshire Nursing Center were initially allowed for the period May 6 through June 30, 1980, and payment was issued in the amount of \$2,476.00 after deduction of the beneficiary cost-share. CHAMPUS coverage was denied for care at the skilled nursing facility subsequent to June 30, 1980, as the fiscal intermediary found the care to be above the appropriate level and excluded from CHAMPUS coverage. The fiscal intermediary also advised the beneficiary that a request of extended inpatient care in the skilled nursing facility beyond 90 days had to be requested from OCHAMPUS.

Claims filed by the attending physician were cost-shared in the amount of \$225.00 for the period February 1 through February 29, 1980, and denied cost-sharing for the period March 1 through May 6, 1980, based on findings the services were related to care above the appropriate level.

A request for extended inpatient care in excess of 90 days in the skilled nursing facility was filed with OCHAMPUS. OCHAMPUS determined the care beyond 90 days at Berkshire Nursing Center was custodial care and excluded from coverage under CHAMPUS except for 1 hour of skilled nursing care per day and prescription drugs.

Upon appeal, the fiscal intermediary affirmed the denial of physician visits and hospitalization subsequent to February 6, 1980, based on a finding the care was custodial. The beneficiary then appealed directly to OCHAMPUS and did not request a reconsideration by the fiscal intermediary. OCHAMPUS accepted the appeal and consolidated the OCHAMPUS and fiscal intermediary determinations into one appeal decision. The OCHAMPUS Reconsideration Decision denied the claims for hospitalization subsequent to February 6, 1980, as above the

appropriate level of care. Care provided by the skilled nursing facility was also denied after 90 days (May 6 through August 5, 1980) based on a finding the care subsequent to August 5, 1980, was custodial. Physician visits were authorized once per week during the period February 16 through May 6, 1980.

The beneficiary appealed the partial denial of hospital charges and physician visits but accepted the decision on the skilled nursing facility claims. The OCHAMPUS Formal Review Decision modified the Reconsideration Decision finding hospitalization through February 10, 1980, was authorized but denied the remaining care at Good Samaritan Hospital as above the appropriate level of care. The Formal Review Decision also corrected the Reconsideration Decision by authorizing only one physician visit per month rather than one visit per week.

The beneficiary appealed and requested a hearing. The beneficiary elected a hearing on the record which was held before Valentino D. Lombardi, OCHAMPUS Hearing Officer. The Hearing Officer has issued his Recommended Decision and issuance of a FINAL DECISION is proper.

ISSUES AND FINDINGS OF FACT

The issues in this appeal are (1) whether the hospitalization at Good Samaritan Hospital from February 10 through May 6, 1980, was the appropriate level of institutional care; (2) whether the physician visits from February 10 through May 6, 1980, are related to care above the appropriate level; and (3) whether the care provided at Berkshire Nursing Center subsequent to May 6, 1980, was custodial care.

Institutional Level of Care

Under the Department of Defense regulation governing CHAMPUS, DoD 6010.8-R, chapter IV, B.1.g., the level of institutional care for which benefits may be extended must be at the appropriate level required to provide the medically necessary treatment. This section further provides:

" . . . If an appropriate lower level care facility would be adequate but is not available in the general locality, benefits may be continued in the higher level care facility but CHAMPUS institutional benefit payments shall be limited to the reasonable cost that would have been incurred in the appropriate lower level care facility, as determined by the Director, OCHAMPUS (or a designee). If it is determined that the institutional care can reasonably be provided in the home setting, no CHAMPUS institutional benefits are payable."

Under DoD 6010.8-R, chapter IV, G.3., services and supplies related to inpatient stays above the appropriate level are excluded from CHAMPUS coverage.

In this appeal, the Hearing Officer found the beneficiary's condition on February 10, 1980, did not require acute hospitalization and that continued hospitalization from February 11, 1980, to May 6, 1980, was above the appropriate level of care. Physician visits in excess of one per month were found also to be excluded as services relating to inpatient care provided above the appropriate level.

Following my review of the evidence in this appeal, I concur in and adopt the Hearing Officer's findings on this issue. The beneficiary's condition had stabilized around February 10, 1980, and the nursing and progress notes reveal no acute episode during the last 3 months of care at Good Samaritan Hospital. Skilled nursing services involving the Foley catheter and Levin tube were still required; however, these services and the total care this beneficiary required are routinely provided by a skilled nursing facility. Transfer to a rehabilitation facility was considered on February 10, 1980, but not implemented, as the beneficiary was not physically able to enter the program; however, consideration of a lower level of care, which appears several times in the medical records, is evidence that an acute setting was not required. Further, the attending physician stated on February 10, 1980, that the beneficiary required a long-term skilled nursing facility and discharge would be considered after 12 days of physical therapy.

The records in this appeal were twice referred for medical review by physicians associated with the Colorado Foundation for Medical Care. The initial review by specialists in internal medicine was conducted without hospital records being made available and resulted in the opinion that 60 days of hospitalization (December 6, 1979, through February 6, 1980) could be considered active medical care; a lower level facility such as a skilled nursing facility was considered appropriate after 60 days of inpatient hospitalization. The second medical review, performed by physicians with specialties in internal medicine and neurology, was based on additional documentation including the entire hospital record. In this review, the physicians opined acute hospitalization was not the appropriate level of care after February 10, 1980, as the beneficiary appeared stable at that time and care could have been provided in a lower level care facility. In both reviews, the physicians opined that an additional 90 days in a lower level care facility was an appropriate level of care. Therefore, a total of 150 days of inpatient care was deemed active care by the medical reviewers, 65 days of acute hospitalization (December 6, 1979, through February 10, 1980) and 85 days (February 11 through May 6, 1980) at a skilled nursing facility level.

Based on the evidence of record and medical review, the Hearing Officer found no significant additional problems developed during the last 2 months of hospitalization that warranted an acute level of care. He found the treatment provided the beneficiary subsequent to February 10, 1980, could have been easily rendered in a nursing home (skilled nursing) facility. I concur in and adopt these findings. Hospitalization after February 10, 1980, was above the appropriate level required to provide the necessary services and is excluded from CHAMPUS coverage with the following exception. The Hearing Officer found a skilled nursing facility was the appropriate level of care from February 10 through May 6, 1980, but such a facility was not available in the general locality. Under the CHAMPUS regulation, the Hearing Officer found that cost-sharing of the hospitalization could continue during this period, with payments limited to the reasonable cost that would have been incurred at an appropriate lower level of care facility. I concur in and adopt these findings.

As cited above, applicable regulatory provisions allow partial payment of the hospitalization if a lower level of care facility is not available in the general locality. Herein, there is evidence of record that a skilled nursing facility was not available until May 1980. Therefore, CHAMPUS may cost-share the hospitalization from February 11 through May 6, 1980, at the skilled nursing facility rate. I specifically find that rate to be the rate charged by Berkshire Nursing Center.

Physician Visits

The attending physician has claimed daily hospital visits to the beneficiary from February 1 through May 6, 1980. The fiscal intermediary cost-shared the physician's claim for service provided February 1 through February 16, 1980, and denied the remaining charges.

Under DoD 6010.8-R, chapter IV, G.3., services and supplies related to inpatient stays above the appropriate level are excluded. The Hearing Officer found this exclusion applied to the physician visits and I concur. As the hospitalization has been found to be above the appropriate level of care after February 10, 1980, the daily physician visits relating to this care are also excluded from coverage after that date. However, medical review opined that one physician visit per month would have been appropriate in a lower level care facility and the Hearing Officer agreed. While a literal interpretation of the Regulation would appear to exclude these services completely, I find it unreasonable to cost-share the hospitalization at a skilled nursing rate and not provide similar treatment of the physician visits. Therefore, I find the physician visits can also be cost-shared at one visit per month for March, April, and May 1980. As the daily visits have been cost-shared through February 16, 1980, the additional authorized cost-sharing shall be offset against the daily visit payments previously made for the period February 1-16, 1980. If any erroneous payment balance

exists after this offset, the Director, OCHAMPUS, shall take appropriate action under the Federal Claims Collection Act to recover the funds.

Custodial Care

Under 10 U.S.C. 1077(b)(1), custodial care is specifically excluded from CHAMPUS cost-sharing. DoD 6010.8-R, chapter IV, E.12., implements this exclusion by providing, in part, as follows:

"12. 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 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 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:

"(1) Prescription Drugs. Benefits are payable for otherwise covered prescription drugs, even if prescribed primarily for the purpose of making the person receiving custodial care manageable in the custodial environment.

"(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.

"(3) Payment for Prescription Drugs and Limited Skilled Nursing Services Does not Affect Custodial Care Determination. The fact that CHAMPUS extends benefits for prescription drugs and limited skilled nursing services in no way affects the custodial care determination if the case otherwise falls within the definition of custodial care.

"d. Beneficiary Receiving Custodial Care: Admission to a Hospital. CHAMPUS benefits may be extended for otherwise covered services and/or supplies directly related to a medically necessary admission to an acute care general or special hospital, under the following circumstances:

;(1) Presence of Another Condition. When a beneficiary receiving custodial care requires hospitalization for the treatment of a condition other than the condition for which he or she is receiving custodial care (an example might be a broken leg as a result of a fall); or

"(2) Acute Exacerbation of the Condition for Which Custodial Care is Being Received. When there is an acute exacerbation of the condition for which custodial care is being received which requires active inpatient treatment which is otherwise covered."

The beneficiary was admitted to Berkshire Nursing Center on May 6, 1980, upon discharge from the acute hospital. While claims have been filed only through October 31, 1980, the file reflects the beneficiary remains in the nursing facility at this time. The fiscal intermediary initially cost-shared the care from May 6 through June 30, 1980. Subsequent OCHAMPUS decisions authorized skilled nursing care at Berkshire Nursing Center for 90 days (May 6, 1980, through August 5, 1980). The file does not reflect if the fiscal intermediary cost-shared the care at the skilled nursing facility from July 1 through August 5, 1980.

The beneficiary elected not to appeal the OCHAMPUS determination that the care at Berkshire Nursing Center was custodial after August 5, 1980. OCHAMPUS and the Hearing Officer, however, placed the entire episode of care after December 6, 1979, in issue. To fully apprise the beneficiary of the regulatory provisions governing CHAMPUS, the issue of custodial care will be discussed and findings made. My findings will not result in lesser or greater payment on the various claims, only proper adjustment of the periods of care that may be cost-shared under the applicable regulatory provisions.

Review of the medical records in this appeal clearly reveals the beneficiary was receiving custodial care subsequent to May 6, 1980.

The beneficiary was physically disabled and the disability was expected to continue and be prolonged. The skilled nursing facility records report the prognosis as "guarded" and "bleak," and the attending physician stated the beneficiary was severely disabled. A protected and controlled environment was also clearly required. The beneficiary required monitoring of her blood pressure and was in danger of aspiration when being fed. She also required assistance in the essentials of daily living as evidenced by the "total care" notes in the medical records of the nursing facility. The attending physician also stated the beneficiary was helpless to perform acts of daily living. Finally, the medical records primarily reveal supportive care by the nursing facility with the goal of maintaining her present status. Only the speech therapy and physical therapy would be

considered active care, and no real progress was made in these areas. The care was neither designed nor capable of reducing the disability to the extent the beneficiary could function outside the controlled environment. Her continued stay at the facility unfortunately confirms this conclusion. Medical review on two occasions concluded the four criteria of custodial care were present.

The Hearing Officer found the care at Berkshire Nursing Center was custodial, and I adopt this finding. Therefore, I find the care from May 6 through October 31, 1980, the period in issue, was custodial and excluded from CHAMPUS coverage except for the following limited services and supplies.

Under DoD 6010.8-R, chapter IV, E.10., quoted above, prescription drugs and up to 1 hour of skilled nursing per day are allowable in a custodial care case. In my review of the medical records, I find the beneficiary required at least 1 hour of skilled nursing care per day and, therefore, authorize cost-sharing all prescription drugs and 1 hour of skilled nursing per day through October 31, 1980. While no claims have been filed for care subsequent to October 31, 1980, these benefits can be authorized for the continuing care upon review by the fiscal intermediary if the claims are now filed on a participating basis and an exception to the claims filing deadline is requested and granted for the services provided November 1, 1980, through December 31, 1981. Claims for 1982-83 will be timely filed if filed before December 31, 1983.

SUMMARY

In summary, it is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) that the hospitalization at Good Samaritan Hospital from December 6, 1979, through February 10, 1980, was appropriate and was properly cost-shared under CHAMPUS; however, the care from February 11 through May 6, 1980, was above the appropriate level of care and the acute inpatient care was excluded from CHAMPUS coverage. I additionally find the daily physician visits after February 10, 1980, were related to institutional care above the appropriate level and are also excluded from CHAMPUS coverage. The appropriate level of care of the beneficiary for approximately 90 days after February 10, 1980, was a skilled nursing facility. Because a skilled nursing facility was not available in the general locality until May 6, 1980, I have determined the hospitalization can be cost-shared under CHAMPUS at the skilled nursing facility rate from February 11 through May 6, 1980. Similarly, I find the physician visits can be cost-shared under CHAMPUS at one visit per month during this period. Finally, I have determined the care provided at Berkshire Nursing Center from May 6 through October 31, 1980, to be custodial care and excluded from CHAMPUS coverage except for prescription drugs and 1 hour of skilled nursing services per day. CHAMPUS claims may be filed for these authorized services subsequent to October 31, 1980, subject to review and granting of an exception to the claims filing deadline, as applicable. This

decision does not imply that the claimed services were not necessary; it only means that the care received is not the type of care for which CHAMPUS payments can be extended.

As this decision adjusts the payment of the period of care, the matter is referred to OCHAMPUS to determine what additional payments, if any, are due the beneficiary. Although the hospital charges for care received from February 11, 1980, through May 6, 1980, were originally denied, 56 days of care (May 6, 1980, through June 30, 1980) at the Berkshire Nursing Center have been erroneously paid. Correct application of the original authorization for 90 days of skilled nursing facility care requires coverage of the inpatient hospital stay from February 11, 1980, through May 6, 1980, at the skilled nursing facility rate. As previously stated, the adjustment of the authorized periods of care and claim payment will not result in a decrease in CHAMPUS payments in the total hospital and nursing facility claims; therefore, appropriate offsets should be made on any claims processing under this FINAL DECISION for any erroneous payments which may have been made. Issuance of this FINAL DECISION completes the administrative process under DoD 6010.8-R, chapter X, and no further administrative appeal is available.



Vernon McKenzie

Acting Principal Deputy Assistant Secretary