ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

HEALTH AFFAIRS

19 AUG 1981

FINAL DECISION: OASD (HA) Case File 14-80
[illegible] Appeal

The Hearing File of Record, the tape of oral testimony presented at the hearing, the Hearing Officer's RECOMMENDED DECISION and the Memorandum of Noncurrence from the Director, OCHAMPUS, on OASD(HA) Appeal Case No. 14-8 have been reviewed. The amount in dispute (both hospital and physician costs) is $3,538.93. It was the Hearing Officer's recmmendation that the CHAMPUS benefits for the surgical implantation of the inflatable penile prosthesis, including the associated hospital, anesthesia and inhospital medical care expenses, incurred during the period 14 October 1976 through 20 October 1976, be reversed. It was his finding that the surgical implantation of the penile prosthesis was necessary to restore normal sexual function and was essential and proper treatment for the patient's impotence. The Director, OCHAMPUS, did not concur with the Hearing Officer's findings and conclusions, suggesting that his recommended reversal not be accepted, and that the FINAL DECISION be based on the record.

After due consideration and careful review of the evidence presented, the Principal Deputy Assistant Secretary for Defense (Health Affairs), does not accept the RECOMMENDED DECISION. It is the position of the Office of the Assistant Secretary of Defense (Health Affairs) that the Hearing Officer did not correctly interpret the law and regulation applicable in this case. This FINAL DECISION is, therefore, based on the facts contained in the Hearing File of Record and as presented in oral testimony. It is the finding of the Principal Deputy Secretary of Defense (Health Affairs) that the penile implant procedure in dispute in this appeal failed to qualify for CHAMPUS benefits under the law and applicable regulation.

PRIMARY ISSUE

The primary issue in dispute in this case is whether the elective procedure, surgical implantation of an inflatable Small Carrion penile prosthesis (and the related hospital, anesthesia and medical care costs), qualifies for CHAMPUS benefits. Chapter 55, Title 10, U.S. Code, Section 1077 (a) (2) (B), excludes all prosthetic devices except artificial limbs and artificial eyes.

The applicable implementing regulation in effect at the time the services were performed contained a provision which identified those services/supplies not authorized and which stated, "Prosthetic devices (other than artifical limbs, artifical eyes...) [are excluded]" (Reference: Army Regulation AR 40-121, Chapter 5, Section 5-4, e.)

The applicable regulation also defines medically necessary as, "Necessary services or supplies ... essential to the care of the patient or the treatment of the medical or surgical condition." [emphasis added] (Reference: Army Regulation AR 40-121, Chapter 1, Section 1-3, c.)

In addition, at the time the surgery was performed, the Department of Defense Appropriations Act for Fiscal Year 1977 (1 October 1976 through 30 September 1977, the period during which the disputed surgery was performed) precluded the expenditure of CHAMPUS appropriated funds for "... therapy [treatment] or counseling for sexual dysfunctions or sexual inadequacies." This same section further prohibited extending CHAMPUS benefits for reconstructive surgery done primarily for psychiatric purposes. (Reference: Public Law 94-419, 90, Stat. 1298, Section 743)

The appealing party submitted statements and presented oral testimony detailing the issues and factors which, in his view, supported the position that surgical implantation of the penile prosthesis qualified for benefits under CHAMPUS. Nonetheless, it is the decision of the Principal Deputy Assistant Secretary of Defense (Health Affairs) that the initial determination to deny benefits for the surgical procedure, as well as the device itself, was proper. In order to ensure that the appealing party fully understands the bases upon which the initial denial decision is being reaffirmed and upheld, each of the points presented by the appealing party is addressed in this FINAL DECISION.

1. Impotency. The appealing party claimed to have experienced episodes of impotency for approximately ten years prior to the penile implant surgery and further, claimed that relief was not obtained through conservative medical treatment which included medication. It was his assertion that the impotency caused him significant mental frustration. He cited impotency as related to a bodily function and therefore took strong exception that CHAMPUS benefits were not forthcoming. Impotency is the persistant inability in the human male to obtain and maintain penile erection sufficient to access orgasm and satisfactory

ejaculation during intercourse. There are basically three types of impotence: erectile, the persistent difficulty in obtaining and maintaining an erection; ejaculatory, the failure to ejaculate; and premature ejaculation. Impotency may be total or partial, constant or intermittent. The origin of the disorder is usually psychogenic but may also be organic. In males over 50 years of age, impotency can also be related to the aging process. Although very limited information was made available in the Hearing File of Record (and what is there is primarily anecdotal in nature), it appears the type of impotence experienced by the appealing party was erectile in nature and probably intermittant, at least intially. Whether the condition progressed to total impotency was not revealed. According to the appealing party's testimony and a statement from the attending physician, the impotence was related to peripheral neuropathy secondary to Diabetes Mellitus for which he had been treated since 1954. The impotence in this case was attributed to the deterioration of nerve function associated with the diabetic condition and was described as having an organic basis--not psychogenic in origin. Although there was no clinical documentation submitted to support this claim, impotency is known to occur in a high percentage of aging males particularly those who have Diabetes Mellitus. The actual presence of the impotence or its probable cause is, however, moot because whether or not the appealing party actually experienced this dysfunction was never questioned. Rather the issue in this case relates to whether or not the implanted device is a <u>prosthesis</u> and whether impotency can be considered a <u>sexual dysfunction or inadequacy</u>. The implant surgery was therefore denied because (a) it was determined that the implanted device, was in fact, a prosthesis (and was other than an artificial limb or eye) and (b) that the impotency represented a sexual dysfunction. Notwithstanding the Hearing Officer's redefinition of the terms prosthesis and therapy in order to support his recommendation of a reversal, based on the available evidence in the Hearing File of Record it is our conclusion that while impotency in all probability was present in the appealing party and may well have been organic in its origin, it still constitutes a sexual dysfunction which was corrected by surgical treatment [therapy] through insertion of a penile prosthesis. Therefore both the condition and the treatment (including the device) are excluded by law and regulation. (<u>Reference</u>: Public Law 94-419, 90 Stat. 1298, Section 743, Chapter 55, Title 10, US Code, 1077 (a) (2) (B); and Army Regulation AR 40-121, Chapter 5, Section 5-4,e.)

2. Penile Implant: Prosthetic Device. The implant used in the appealing party's case was a Small-Carrion device with attachments, surgically implanted in its entirety. The appealing party, to the extent he discussed the specific issue of whether or not the device is a prosthesis, tended to take positions that CHAMPUS benefits should be available in this case for other reasons, regardless of whether the device is a prosthesis. The Hearing Officer did attempt to clarify what is and is not a covered prosthesis. Unfortunately the oral discussion at the hearing served only to confuse the issue further and apparently caused him to reach some erroneous conclusions.

- Similar to Hip Replacement. The appealing party implied that even if the penile implant is a prosthesis--it is no different from a hip replacement--a prosthesis which he understood qualifies for CHAMPUS benefits. Both the appealing party and the Hearing Officer made the point that the penile implant and hip replacement are surgically implanted prostheses and therefore if one is covered, under the applicable regulation, both should be. What was not clarified at the hearing is that the law under which CHAMPUS operates excludes prosthetic devices except artifical limbs or eyes. The definition of "limb," according to Dorland's Illustrated Medical Dictionary (25th Edition), is "1. One of paired appendages of the body used in locomotion or grasping. In man, an arm or leg with all its component parts ..." In comparing the penile implant and hip replacement the appealing party and the hearing officer failed to recognize that the hip is composed of the head of the femur (i.e., the upper portion of the leg), which is the part generally replaced in hip prosthesis surgery. Therefore, a hip replacement appropriately falls within the exception to the exclusion on prostheses--i.e., an arm or a leg with all its component parts. The penis does not qualify as a limb; therefore the implanted penile prosthesis does not qualify as an exception to the statutory exclusion on prosthetic devices.

- Penile Implant: Similar to Pacemaker or Heart Valve. The Hearing Officer raised the question as to whether CHAMPUS covered a pacemaker or heart valve. The discussion at the hearing was confused and inconclusive. It should have been asserted by the OCHAMPUS representative at the hearing that these items are considered

to be prostheses and under the applicable regulation were excluded since they do not qualify under the permitted exception--i.e., an artificial limb or eye. Again, Dorland's Illustrated Medical Dictionary (25th Edition) defines prosthesis as, "... an artificial substitute for a missing body part ..." Under the definition it lists examples of prostheses, both external and internal, including an aortic valve replacement.

- Prosthesis: External vs Internal. Despite stating that the CHAMPUS administrative appeal process could not challenge law or policy, the hearing officer then contradicted himself and proceeded to define the term prosthesis in such a way as to support his reversal recommendation. Instead of referring to an authoratative source such as Dorland's, he took the position that since the law or applicable regulation did not specifically define prosthesis he would personally define it as limited to external devices only--apparently on the basis that the exceptions permitted were limited to external prostheses. This conclusion is not accepted. The law under which CHAMPUS operates does not limit the exclusion to external prostheses only. Further, the regulation in effect at the time the disputed surgical implantation procedure was performed, where any interpretive language would have appeared, was silent on any intent relative to prosthetic devices other than that specifically expressed in the law--i.e., exclusion of all prostheses except artificial limbs and eyes. In the absence of any such interpretive language, it cannot be assumed that further exceptions were contemplated under the applicable regulation. Despite the various assertions by the appealing party, and the Hearing Officer's attempt to redefine "prosthesis," it is our finding that the penile implant is without any doubt or reservation, a prostheic device. This question is essentially settled by the manufacturer--where it is consistently referred to as a "prosthetic" device. Further, physicians quoted in the various articles submitted for the record by the appealing party also refer to the penile implant as a "prosthesis." Efforts to ignore the issue or to circumvent it by redefining the term "prosthesis" cannot overcome the preponderance of evidence which classifies the penile implant device as a prosthesis. And as such, it must be excluded from benefits since it does not

fall within the limited exception to the exclusion of prosthetic devices. (References: Chapter 10, Title SS, United States Code, 1077, (a)(2)(b); Army Regulation AR 40-121, Chapter 5, Section 5-4(e))

3. Sexual Dysfunction: Surgery Does Not Constitute Therapy. The appealing party questioned the Program's position that the law which excludes "therapy" for sexual dysfunction applied to surgery. It was essentially his position that his impotency was of organic origin and denied that psychiatric evaluation or care was recommended in his case, thus implying that the term "therapy" denoted only those practices generally associated with mental health care not surgery. The Hearing Officer also appeared to imply that the term "therapy" was probably intended to be applied only to those forms of treatment available through mental health sources. These were personal views only, and were not supported by any authoritative documentation that would indicate the term therapy is limited to noninavasive forms of medical practice. Dorland's Illustrated Medical Dictionary (25th Edition) refers to therapy as "treatment." Further, within the general medical community the term therapy is used in referring to all forms of treatment including medical, surgical, psychiatric and pharmacological services. Therefore, the term "therapy," as it appears in the Defense Appropriation Act of 1977 has been enterpreted to preclude the payment of CHAMPUS benefits for any type of service/supply related to sexual dysfunction or sexual inadequacy. Since there is no question of fact that impotency, whether of organic or psychogenic origin, falls within the context of sexual dysfunction or sexual inadequacy, it is our finding that any type of service related to the condition is therefore excluded. (Reference: Public Law 94-419, 90 Stat 1298, Section 743)

4. Surgical Insertion of Penile Implant Device: Medically Necessary. It was strongly asserted by the appealing party that the surgical procedure to insert the penile implant was medically necessary and [it was emplied] notwithstanding any other restriction or limitation, benefits should therefore be extended for the costs associated with the surgical procedure.

- Appropriate Candidate for Surgery. While it was not questioned that impotency existed, the Hearing File of Record did not contain definitive evidence as to cause, type or extent of the condition. The attending physician claimed the impotency was organic in origin, the result of peripheral neuropathy which

had resulted from Diabetes Mellitis. The appealing party also claimed numerous other medical problems including vascular disease, heart trouble and arteriosclerosis. Based on the appealing party's further report that his vascular problems resulted in the loss of his lower right leg and left great toe, and that he was required to undergo vascular bypass surgery to save his left leg (all recognized unfortunate sequelae of Diabetes Mellitis), the assumption that the disease was at least a contributing factor to the impotent condition can be made. The extent aging was also a factor was never discussed by the attending physician, however--certainly pertinent when the surgical candidate is past fifty (50) years of age. Nor were the types, dosages and frequency of medications used by the appealing party presented. Since many medications affect the sexual drive, particularly of the male, absence of this information is critical in any assessment of medical necessity and the appropriateness of proceeding with a penile implant procedure. Nor was there any information concerning prior treatment related to impotency--only an indication there had been previous care. Further, since there was no documentation that nocturnal penile tumescence testing was performed during REM sleep (this test is considered to be definitive for determining whether erectile impotence is of organic origin), there is no clinical basis for reaching a conclusion that the appealing party was or was not an appropriate candidate for the penile implant surgery. Information concerning age, medication, testing, etc. would have to be reviewed in order to reach any conclusion as to medical necessity.

- <u>"Essential" Care vs Desirable Care</u>. No conclusive evidence was presented that would confirm that the restoration of sexual function is medically necessary. It certainly may be desirable, particularly from a psychiatric point-of-view (it is noted the appealing party claimed "frustration" because he could not sustain an erection), but it must be classified as highly elective and clearly not medically essential. Additionally, the surgical procedure did not treat the condition of impotence itself--i.e., it only provided a mechanical means of participating in sexual intercourse. There is no dispute that from an personal perspective a penile implant may be important and it is perfectly acceptable for an individual to

choose to have such a procedure performed; but it cannot be concluded that the surgery represented medically necessary (i.e., "essential") treatment.

- Generally Accepted Procedure to Correct Results of Impotency. The appealing party claimed the surgical implantation of a penile implant device was a generally accepted procedure. The peer review report also indicated that the implant procedure was generally accepted as being a part of good medical practice and apparently this position was heavily relied upon by the Hearing Officer. While this assumption can be questioned inasmuch as the prosthesis itself is still under review by the Food and Drug Administration, whether or not the procedure was generally accepted was never at issue in this case.

The lack of clear information concerning the appealing party's impotency, the age factor, use of medication and performance of definitive testing as to whether or not the impotency was, in fact, of physical origin, leave questions as to the appropriateness of the implant surgery in this case. Further, whether or not appropriate, the surgery was not essential in order to treat a medical or surgical condition. The only purpose of the surgically implanted prosthesis was to provide a mechanical means to accomplish sexual intercourse. Notwithstanding these discussions, however, the issue of medical necessity and appropriateness is irrelevent because even if it was was determined that the surgery was "medically necessary" treatment such a determination would still be overcome by the specific exclusions related to prosthetic devices and treatment of sexual dysfunction. In this instance regardless of claimed medical necessity, the services/ supplies in dispute are specifically excluded by law and applicable regulation. (Reference: Chapter 55, Title 10, U.S. Code 1077 (a) (2)(B); Army Regulation AR 40-121, Chapter 5, Section 5-4.e; and Public Law 94-419, 90, Stat 1290, Section 743.)

5. Penile Implant: For Psychiatric Purposes. The appealing party, while denying a psychiatric need, nonetheless made a strong point concerning his "frustration." In oral testimony at the hearing he explained that for several years prior to having the penile implant performed, he could not maintain an erection, and therefore could not participate

in sexual intercourse. This resulted in the described "frustration," a symptom generally associated with emotional-type disorders. Other than personal statements orally presented by the appealing party, no documentation was submitted to support a psychiatric purpose to the surgery. The issue is moot, however, since the same section of the FY 77 Defense Apropriations Act which precludes payment of services related to sexual dysfunction also excludes surgery primarily for psychiatric purposes. It is acknowledged the appealing party's inability to sustain an erection could have resulted in frustration, which may have contributed to a decline in his mental health. And such mental health problem may have been overcome as a result of the implant procedure; however, surgery performed primarily for psychiatric reasons, regardless of merit, is excluded. (Reference: Public Law 94-419, 90 Stat, 1298, Section 743)

6. Restoration of Function. The appealing party claimed that because the penile implant restored his sexual function, CHAMPUS was required to extend its benefits. He referred to an undated Military Service information letter which indicated reconstructive surgery to improve bodily function was covered. As previously discussed, the penile implant procedure itself did not treat the impotency, nor did it create any new physical ability to become erectile or to ejaculate, if none was present prior to the surgery. The prosthetic device inserted in the penis simply permitted an erection to be mechanically maintained, thus enabling the appealing party to participate in sexual intercourse. While this could be interpreted as "restoring function," the issue is irrelevant due to the overriding exclusions contained in the applicable laws and regulation--i.e., which preclude the payment of CHAMPUS benefits for a prosthesis (other than an artificial limb or eye) and for any services related to sexual dysfunction. These exclusions overcome any claim based on restoration of function. (References: Chapter 10, Title 55, United States Code 1077, (a) (2) (B); Army Regulation AR 40-121, Chapter 5, Section 5-4(e); and Public Law 94-419, 90, Stat 1298, Section 743)

7. Service-Connected Disability. The appealing party also repeatedly claimed that since the impotency was the result of Diabetes Mellitus, which he asserted was a service-connected illness, CHAMPUS benefits were payable. He quoted a January 15, 1979 newspaper article as "proving" that CHAMPUS now paid for service-connected illness at injury. First of all, no clinical documentation was submitted to the Hearing File of Record which supported the claim that the appealing party's Diabetes Mellitus was, in fact, service-connected or

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that the impotency was caused by the diabetes. During oral testimony the appealing party stated the Veterans Administration was treating him for his diabetes, but this was not documented. If VA was, in fact, treating the appealing party for his diabetes, a reasonable question is why didn't VA also provide the penile implant surgery? (This question could cast some doubt as to the cause of the impotency.) Again, this line of inquiry is moot, since the assumption on the part of the appealing party that the 1979 article created CHAMPUS benefits for all care rendered for service-connected illness or injury is in error. What actually occurred was that the statute under which the Program operates required that CHAMPUS always be "last pay" if a retiree (or his/her dependent) had other coverage or health plan through law or employment. Since VA benefits are available through law and since VA directly provides or pays for any approved covered medical care in full, this had the net effect of excluding from CHAMPUS any service-connected care because of entitlement under the VA program. When the current CHAMPUS regulation was being developed (i.e. the regulation which was implemented 1 June 1977, after the disputed surgery in this appeal was performed), this issue again surfaced with many groups representing retiree organizations claiming that CHAMPUS beneficiaries with service-connected illness or injuries should be able to choose between either CHAMPUS or VA and not be limited to VA. Key Congressional Committees indicated general agreement with this position and several bills were introduced to amend the CHAMPUS statute to permit this choice. In recognition of Congressional intent in this matter, the Assistant Secretary of Defense (Health Affairs), acting under transitional authority contained in the current regulation (which is not the applicable regulation in this appeal), waived the requirement that all service-connected cases much go to VA, instead permitting a choice to be exercised by the beneficiary pending Congressional action. (It was this action that was reported in the article referred to by the appealing party.) Such Congressional action took the form of P.L. 96-173 subsequently enacted on 29 December 1979. The effect of this Act was (1) to remove the requirement that medical care related to service-connected illness or injury be automatically excluded under CHAMPUS and (2) to provide the retiree with a choice for his service-connected care--CHAMPUS or VA (but not both). This amendment did not provide for any change in scope of CHAMPUS benefits for service-connected cases--all the same exclusions, limitations and requirement remained in place. Therefore, if a service and/or supply is excluded when provided for a non-service-connected-case, it is equally excluded in those cases involving service-connected illness or injury. Here again, discussion

of this issue is irrelevant due to overriding exclusions contained in the applicable laws and regulation--i.e., precluding the payment of CHAMPUS benefits both for a prosthesis (other than artificial limb or eye) and for services related to sexual dysfunction. As stated previously, these exclusions overcome any other claim. And even if PL 96-173 had changed the scope of benefits for service-connected illness or injury, it would not impact the decision in this case since the Hearing File of Record contains no documentation which established that the Diabetes Millitus was service-connected nor that it was the primary cause of the impotency. (Reference: Public Law 96-173)

SECONDARY ISSUES

The appealing party, while strongly supporting his claim that the penile implant surgery was medically necessary and restored function, also directed substantial attention to secondary issues which he asserted should receive special consideration for the extension of CHAMPUS benefits in this case.

1. Surgery Recommended by Military Physician. It was the claim of the appealing party that the surgical implantation of the penile prosethesis was recommended by a Military physician and therefore it should not be questioned. In taking this position [by implication] he challenged the right of CHAMPUS to "overrule" a Military physician. First, there was nothing in the Hearing File of Record which verified this assertion by the appealing party. Further, even if such a recommendation was made, the point is moot. A Military physician is free to treat, recommend and refer patients in keeping with applicable Uniformed Service regulations. This would not, however, commit CHAMPUS to extend benefits for any services that might be received in the civilian sector as a result of such actions. Regardless of the merits of the referral and/or recommendation as seen by a Military physician, consideration for CHAMPUS benefits is a separate decision. Only CHAMPUS and its Fiscal Intermediaries, acting as the Program's Agents, have authority to make benefit decisions which obligate Program funds. Such decisions may only be made after a proper claim is filed or a written Request for Preauthorization is received. The fact that a Military physician arranges, refers or supports obtaining certain medical or dental care from the civilian sector is not controlling or binding on the Program. In determining whether CHAMPUS benefits can be extended for a specific service or supply, the law and applicable regulations are controlling.

2. Issuance of Certificate of Nonavailability (CNA): Authorization of CHAMPUS Benefits. It was also implied that issuance of the Nonavailability Statement constituted a recommendation for the penile implant procedure by the issuing Military hospital and/or referring physician. The appealing party further opined that had the doctor known that CHAMPUS would not provide benefits he would have made it known to him. [1] Despite his claim, the appealing party really made no serious attempt to deny knowledge of the intent and purpose of the Statement of Nonavailability except to claim it was evidence of referral. It would therefore appear that he comprehended that the use of the Nonavailability Statement was limited to affirming that the requested care was not available at the Uniformed Services facility at the time requested, and nothing more. It should also be noted that the document contains information indicating that issuance of the statement does not assure that CHAMPUS will provide benefits for the requested services.

3. Penile Prosthesis Implantation was Available in Direct Care System. The appealing party indicated that he had information that penile implant surgery was being performed in Uniformed Services Facilities and therefore [it was impled] that CHAMPUS benefits must be available for the cost of his civilian surgery. The source of his information was not revealed nor was any documented evidence presented to support this claim .

   - First, it is true that penile implant surgery is performed in certain Uniform Services Hospitals on a limited basis, but it is not routinely available. Such surgery is permitted in some facilities for the purpose of maintaining professional competency in certain specialities. The candidates for such procedures are selected on the basis of very specific criteria. In addition, the selected candidates are required to pay for the prosthetic device since the law which excludes the devices under CHAMPUS also excudes them from being provided in the direct care system.

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[1] The CNA which was issued to the appealing party preceded implementation of the CHAMPUS logo and the old term "Medicare" appeared on the form. CHAMPUS was orginally called "Medicare" before this term was overtaken by the Social Security Program. When this occurred the acronym "CHAMPUS" (for Civilian Health and Medical Program of the Uniformed Service) was adopted. The appealing party while noting that he was not enrolled in "Medicare" (i.e., as we know it today), he also appeared to understand that in this instance "Medicare" and "CHAMPUS" were the same.

- Second, even if the appealing party had contacted a direct care facility which had the professional capability to provide the procedure, there is no guarantee he would have been accepted. As a retiree, the appealing party's access to Uniformed Service direct care facilities is, by law, on a space available basis only. His priority for care is third level--with active duty members first, followed by the dependents of active duty members. Primarily due to the shortage of certain physician specialties, many Uniformed Service facilities are unable to accept retirees. In addition there is a serious question that the appealing party could have met patient selection criteria considering his age and his numerous medical conditions which were present, even if space and professional capability were available.

- Finally, concerning the specific surgery in dispute in this case, the fiscal year 1977 Appropriations Act which limited the use of CHAMPUS funds for any service or supply used in connection with conditions which fall into the category of sexual dysfunction or sexual inadequacy does not apply to services/supplies provided in the direct care system. So even though such surgery is precluded under CHAMPUS, no such statutory limitation has been imposed on the direct care system.

In view of the above, the claim that because the penile implant surgery is done in some Uniformed Services hospitals [therefore CHAMPUS benefits must be extended], has no relevance to the issues under consideration in this appeal.

4. <u>Penile Implant Surgery Available in Veterans Administration Hospital</u>. It was similarly asserted by the appealing party that because the penile implant surgery is performed in Veterans Administration hospital that, this [somehow] automatically makes CHAMPUS benefits available. The appealing party reported in oral testimony that the Veterans Administration was taking care of his Diabetes Mellitus; however, there was no indication he had requested the VA to provide the penile implant surgery despite the fact he asserted it was service-connected. The Veterans Administration medical care system and that of CHAMPUS and the Uniformed Services are operated under different authorizing laws, and have been charged with different missions.

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What is or is not available or authorized by the Veterans Administration has no bearing on CHAMPUS and is totally irrelevant to this CHAMPUS appeal.

5. Retirees: Promise of Medical Care. The appealing party was most disturbed by what be considered to be a broken promise on the part of the Government. It was his position that he had been assured that after twenty (20) years in the Armed Forces he would be taken care of with a pension and full medical care. It is not doubted that the appealing party believes this to be true or that he may have been told he would receive full medical care. Unfortunately at one time certain extravagant recruiting promises were made for which there was no authority in law including a "guarantee" of free medical care. This practice has long since been corrected and the Department of Defense has made an aggressive effort to correct the misinformation. Nonetheless retirees continue to believe in the promise of full medical care. The appealing party certainly received full medical care while on active duty; however, despite unfortunate statements to the contrary, the law has never provided full medical care for retirees. Even care received from a Military medical facility is not free (currently the charge for inpatient care is $5.50 per day). When the appealing party retired in 1957, CHAMPUS was not available for retirees at all--only active duty dependents were eligible for benefits. The amendments to the Dependents Medical Care Act, which eventually became known as CHAMPUS, were not enacted until 1966--almost ten (10) years later. (During that interim period if the appealing party could not obtain his medical care from a Uniformed Service or Veterans Administration facility, any medical care received from civilian sources was a personal expense.) One of the reasons Congress enacted the CHAMPUS amendment to provide coverage for retirees was in recognition of the moral obligation to this group because of their widely held perceptions of having earned full medical care for life (similar to that expressed by the appealing party). CHAMPUS was never a full pay plan, however. It was specifically designed by Congress as a cost sharing Program with limitations and exclusions. In summary, although it is not doubted that the appealing party believed he was entitled to full medical care as a retiree, it is not supported by law.

6. Cure Attributed to Penile Implant. It was the appealing party's position that his organic impotence was cured by the penile implant because [since the surgery was performed] he has been able to perform sexually as a normal male. By implication he claimed this should qualify the disputed surgery for benefits. In spite of his claims, the fact remains that the appealing party continues to be impotent to the same degree as he was prior to the surgery. The implantation of the penile device provided only a mechanical means of maintaining penile erection and makes no claim to relieve or cure the impotent condition. Whether or not the treatment in question was or was not successful is not relevent, however. Payment of CHAMPUS benefits is not limited to those situations when a treatment is successful or a cure is effected. In fact, success of treatment is not a consideration in an individual case. In this appeal the primary issues are whether the implant device is a prosthesis and whether impotency can be classified as a sexual dysfunction. Since it has been determined that the answer is in the affirmative on both issues, the disputed surgery and the penile implant device are therefore specifically excluded by law and Regulation. (References: Chapter 10, Title 55, United States Code, 1077 (a) (2) (B), Army Regulation AR 40-121, Chapter 5, Section 5-4 (e); and Public Law 94-419, 90, Stat 1298, Section 743).

7. Benefits Extended in Error. It was claimed that because benefits were initially extended for the surgery and medical care services rendered during the hospital confinement, all related costs should be reimbursed. A review of the Hearing File of Record confirms that the CHAMPUS Fiscal Intermediary did, in error, provide such benefits (the hospital care and anesthesia were properly denied). When the error was identified, recoupment action was initiated in keeping with the established Program procedures. The fact that erroneous payments are made (whether or not subsequently identified and recouped) is not in any way binding on the Program in connection with future benefit payments. An error cannot be used as the basis for making further erroneous payments; to do otherwise would result in perpetuating a mistake instead of correcting it. In this case, once the error was identified, the CHAMPUS Fiscal Intermediary acted properly in initiating recoupment of the incorrect payments.

8. CHAMPUS Similar to Medicare. In rendering his decision the Hearing Officer apparently relied heavily on the assumption that the CHAMPUS law and the Social Security Act [Medicare] are of similar purpose. He stated that the courts have repeatedly held the broad purpose of the Social Security Act requires a liberal construction in favor of disability. He cited a 1966 Sixth Circuit Court case. His arguments are not persuasive. First, the CHAMPUS law and the Social Security Act are not similar in purpose--they provide for different missions, serving unique populations. Second, even if the two laws could be construed as having a similar purpose, the fact of disability is not at issue in this case. The dispute in this appeal centers on questions of fact--i.e., whether the device and condition fell within specific statutory exclusions. Further, the court case cited is neither controlling nor pursuasive in this, a CHAMPUS administrative appeal matter.

9. Eligibility for Medical Care Under Other Laws. Although not documented in the written record, during his oral testimony presented at the hearing the appealing party asserted on several occasions he was eligible for medical care at Federal Government expense under "other laws"--i.e., apparently other than CHAMPUS or VA. He was not sufficiently specific, however, to permit any comment on this point. This assertion, therefore, could not be considered in reviewing this appeal.

SUMMARY

This FINAL DECISION in no way implies that the appealing party in anyway is restricted from obtaining any type of medical service he chooses or that the surgery in dispute was not beneficial to him within its intended purpose. It only confirms that the penile implant is a prosthetic device and the surgery performed related to sexual dysfunction (i.e., impotency) and thus could not qualify for CHAMPUS benefits.

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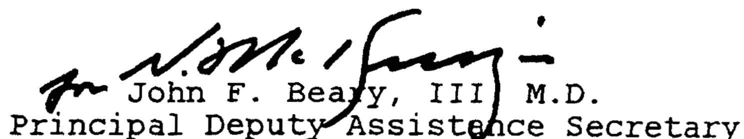
Our review indicates the appealing party has received full due process in his appeal. Issuance of this FINAL DECISION is the concluding step in the CHAMPUS appeals process. No further administrative appeal is available.



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