



ASSISTANT SECRETARY OF DEFENSE

APR 15 1982

WASHINGTON, D. C. 20301

HEALTH AFFAIRS

BEFORE THE OFFICE, ASSISTANT SECRETARY

OF DEFENSE (HEALTH AFFAIRS)

UNITED STATES DEPARTMENT OF DEFENSE

Appeal of)	
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Sponsor:)	OASD(HA) File 82-01
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SSN)	FINAL DECISION
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This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs), in the CHAMPUS Appeal OASD(HA) Case File 82-01 pursuant to 10 U.S.C. 1071-1089 and DoD 6010.8-R, Chapter X. The appealing party in this case is the New York Hospital-Cornell Medical Center, Westchester Division, White Plains, New York as the participating provider of care. The Hearing File of Record, the tape of oral testimony presented at the hearing, the Hearing Officer's Recommended Decision and the Memorandum of Nonconcurrency from the Director, OCHAMPUS have been reviewed. The amount in dispute in this appeal is approximately \$12,809.57. It is the Hearing Officer's recommendation that CHAMPUS recognize the propriety of claims (charges) for "special nursing" provided by mental health workers during inpatient psychiatric hospitalization from February 1 through May 31, 1977, but that the claims (charges) for "special nursing" during inpatient psychiatric hospitalization from June 1 through July 8, 1977 be rejected. The Director, OCHAMPUS, non-concurs in this recommended decision and recommends the denial of CHAMPUS cost-sharing for the "special nursing" for the entire period of February 1 through July 8, 1977.

The Acting Assistant Secretary of Defense (Health Affairs) after due consideration of the appeal record, rejects the Hearing Officer's Recommended Decision. It is the finding of the Acting Assistant Secretary of Defense (Health Affairs) that the Hearing Officer's Recommended Decision does not reflect proper evaluation of the evidence or interpretation of the applicable regulations.

The FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) therefore is to deny CHAMPUS claims for the services of the mental health workers from February 1 - July 8, 1977 as not medically necessary services. This FINAL DECISION is based on the appeal record as stated above.

FACTUAL BACKGROUND

The beneficiary was admitted to New York Hospital, Westchester Division, White Plains, New York on September 13, 1976. The diagnosis upon admission was schizophrenia, chronic undifferentiated type (295.90). This was the seventh psychiatric hospitalization for the beneficiary who was transferred to New York Hospital from St. Elizabeth's Hospital, Boston, MA. He was discharged from New York Hospital on July 8, 1977 and transferred to Taunton State Hospital, Taunton, MA.

The medical records pertaining to his hospitalization in New York Hospital reveal the beneficiary was unpredictable in behavior, uncooperative in taking medication, assaulted the staff, mental health workers and other patients on numerous occasions and was delusional and hallucinating constantly in the latter course of hospitalization. Due to his assaultiveness, the beneficiary was placed in the "quiet room" approximately 2-3 times per week (with the door locked) during his hospitalization. The beneficiary was given nineteen electric shock treatments because of his inability to tolerate certain medications and his increasing assaultiveness. Individual psychotherapy by the staff psychiatrists progressed from brief sessions two or three times a day in October, 1976, to four sessions per week of 30-45 minutes duration. The therapists' summaries describe the beneficiary as extremely frightened, aggressive with depression, delusional and hallucinating at times.

From February 1 - July 8, 1977, "special nurses" (mental health workers) were assigned to the beneficiary on a one-on-one basis twenty-four hours a day. The discharge summary notes the beneficiary was on constant one-on-one observation because of his episodes of increasingly frequent assaultiveness. CHAMPUS claims for the hospitalization including the "special nursing" were submitted to the CHAMPUS Fiscal Intermediary for New York, Blue Cross of Rhode Island. The claimed charges for the "special nursing" in the amount of \$12,809.57 were denied by Blue Cross of Rhode Island and the decision was affirmed upon informal review and reconsideration. Upon appeal to OCHAMPUS, the denials were affirmed during formal review. The hospital appealed and requested a hearing. The hearing was held on June 25, 1981, at New York, New York. The Hearing Officer

has issued his Recommended Decision. All levels of administrative appeal have been completed and issuance of a FINAL DECISION is proper. Only the charges for the special nursing in the amount of \$12,809.57 are in dispute. All other claims and charges have been paid.

ISSUES AND FINDINGS OF FACT

The primary issue in this appeal is the medical necessity of the "special nursing" provided by mental health workers. As the current Department of Defense Regulation (DoD 6010.8-R) governing CHAMPUS was implemented June 1, 1977, the prior regulation, Army Regulation 40-121, is applicable for the care provided February 1 - May 31, 1977. DoD 6010.8-R is applicable for the care from June 1 - July 8, 1977.

Under the Department of Defense Appropriation Act of 1977 (Public Law 94-419, Section 743), applicable to the period of October 1, 1976 through September 30, 1977, funds are not available under CHAMPUS to cost-share any service or supply which is not medically necessary to diagnose and treat a mental or physical illness, injury or bodily malfunction.

Under AR 40-121, Chapter 5, 5-2.w, necessary services ordered by the attending physician are covered benefits. Necessary services are defined in AR 40-121 as:

"Those services ... ordered by the provider of care as essential for the care of the patient or treatment of the patient's medical or surgical condition. (AR 40-121, Chapter 1-3c.)

Further, services of "other professional providers" are authorized when ordered by a physician as essential for the proper care and treatment of the patient. (AR 40-121, Chapter 5, 5-2.m.)

As stated above, mental health workers were employed as "special nurses" by the hospital and assigned to the beneficiary beginning on February 1, 1977. The record indicates the mental health workers were not staff employees of the hospital. The attending physician provided statements for the appeal record indicating the mental health workers were assigned to provide more human contact with the beneficiary and to provide security for the staff, the beneficiary and other patients. The nurses notes reveal the mental health workers primarily observed the beneficiary's behavior, went to meals with him, attempted to engage him in conversation (often he would not respond), played pool and monopoly with him and

accompanied him on walks. From testimony at the hearing and the documentary evidence, the mental health workers merely observed the beneficiary while he was asleep.

At the hearing a staff psychiatrist at the Westchester Division, New York Hospital, testified on behalf of the hospital. The psychiatrist was not on the hospital unit when the beneficiary was an inpatient and testified based on his review of the record and his knowledge of the hospital's practices for patients with problems similar to the beneficiary herein. The staff psychiatrist is presently assigned to the long-term unit of the Westchester Division, the same unit in which the beneficiary was an inpatient. He testified that the mental health workers were provided to establish a "bonding" with the beneficiary to enable him to develop a trust in his environment. This "bonding" process between the individual mental health workers and the beneficiary, established over time, was intended to make the beneficiary less aggressive and frightened and to enable normal psychotherapy to proceed. The staff psychiatrist described this "bonding" as a primitive form of psychotherapy as the beneficiary was not, at that time, capable of responding to normal methods. He further testified that the staff nurses and staff mental health workers were not available for long-term individual assignment to a beneficiary and that the "bonding" could not be established without individual attention. Security, according to the staff psychiatrist, was also a function of the mental health workers, but was not the primary purpose. The mental health workers interacted with the beneficiary, talked to him and observed his interaction with others. The staff psychiatrist additionally testified that, in his opinion, the services of the mental health workers were not required after the end of May, 1977.

Under the definition of necessary services of AR 40-121, quoted above, the care must be essential for the treatment of the patient. Therefore, to constitute a CHAMPUS covered service, the "special nursing" services must be both essential for treatment and, correspondingly, treatment of the patient.

The Hearing Officer has recommended cost-sharing for the period of February 1 - May 31, 1977, based on his finding that security was not the primary purpose of the mental health workers but skilled care was provided. It is my determination that the record does not support these findings. The record in this appeal establishes that the beneficiary was an extremely frightened and dangerous patient who did not respond to normal psychiatric care. The medications and electric shock treatments had no more than a very temporary

effect on his behavior. Throughout his hospitalization the beneficiary was unpredictable and assaultive. Despite the testimony of the hospital's witnesses that the mental health workers did not primarily provide security, I find the record does not support this position. The discharge summary and monthly summaries clearly document the concern of the staff for the safety of the beneficiary, other patients and themselves. Indeed, the assignment of the mental health workers was noted by the attending physician to be for purposes of observation because of the episodes of assaultiveness.

The appealing party contends the primary purpose was a "bonding" to make the beneficiary more secure in his environment which, in turn, would lessen his aggressiveness. Closely viewed, this amounts to providing nothing more than protection and security for the beneficiary and the staff. If the beneficiary through "bonding" would be less aggressive and more secure in his environment, security was in fact provided and the main objective of the care.

Providing protection for a patient and the staff was clearly required in this case. However, it is the responsibility of the institution to provide the security for its patients and staff. If the hospital does not have sufficient staff or the staff cannot provide the level of security required, the patient should be transferred to an institution which is so equipped. Herein, the beneficiary did cause a tremendous drain on resources as noted by the attending physician and he was transferred to a state hospital perhaps better equipped to provide for this beneficiary on a long-term basis. Therefore, I find the primary purpose of the mental health workers was to provide security and protection and that such is not medical treatment. Further, aside from the question of whether the "bonding" or security was the primary purpose, review of the records does not reveal any treatment of the beneficiary by the mental health workers. Observing him, playing pool and monopoly, for example, simply do not qualify as psychotherapeutic treatment. Equally, as the services were not treatment and security is the responsibility of the hospital within its own resources the hiring of outside mental health workers was not essential to his treatment.

Further, testimony by the staff psychiatrist indicates the "bonding" process was sought because the beneficiary did not respond to normal psychotherapy methods. The hospital did not provide any medical literature supporting the therapeutic value of the "bonding" process. As previously determined,

the medical records do not reveal any counseling or other psychotherapy performed by the mental health workers; and, even if present, such psychotherapy would be duplicitous of the individual psychotherapy provided by the staff psychiatrists.

As the beneficiary failed to respond to traditional psychotherapy on this his seventh inpatient admission, serious doubt as to his continued care at New York Hospital should have arisen. Instead of transferring the beneficiary to the state hospital as was ultimately done, the hospital undertook what is admittedly other than a normal psychotherapeutic method. As the services as described by the staff psychiatrist were not normal (generally accepted) psychotherapy and the primary purpose being security, I find the services were not treatment nor essential to treatment of the patient and are not covered services under Public Law 94-419 and the CHAMPUS regulation, AR 40-121, applicable to the claims for "special nursing" care from February 1 through May 31, 1977.

As previously stated, the applicable CHAMPUS regulation for care on or after June 1, 1977 is DoD 6010.8-R. Under DoD 6010.8-R, Chapter IV, A.1., the CHAMPUS Basic Program will cost-share medically necessary services and supplies required in the diagnosis and treatment of illness or injury, subject to all applicable limitations and exclusions. Services which are not medically necessary are specifically excluded (Chapter IV, G.1.). Under Chapter II B.104, medically necessary is defined as:

"... the level of services and supplies (that is, frequency, extent, and kinds) adequate for the diagnosis and treatment of illness or injury Medically necessary includes the concept of appropriate medical care."

Appropriate medical care is defined in DoD 6010.8-R, Chapter II, B.14, as:

"That medical care where the medical services performed in the treatment of a disease or injury, ... are in keeping with the generally accepted norm for medical practice in the United States."

The record in this appeal reveals in early May, 1977, a decision was made by the attending physician to transfer the beneficiary to either another private hospital or a state hospital. The reason given by the attending physician for this decision was the increase in assaultiveness of the beneficiary. The staff psychiatrist testified at the hearing

that, in his opinion, the decision to transfer the beneficiary at the end of May, 1977 indicated the mental health workers were no longer required after that date.

The Hearing Officer found the "special nursing" subsequent to May 31, 1977 no longer necessary or essential for treatment, but was provided more to control the beneficiary. The above cited testimony of the staff psychiatrist and my finding that the services do not constitute treatment support the Hearing Officer conclusion, and I adopt his finding on this issue. Therefore, I find the services provided from June 1 through July 8, 1977 were not medically necessary nor appropriate medical care and are excluded from CHAMPUS coverage under the above cited authorities.

SECONDARY ISSUES

Private Duty Nursing. Under AR 40-12, Chapter 1, 1-3.e., a private duty nurse is defined to include a registered nurse, licensed practical nurse, a licensed vocational nurse or a nurse's aide or unlicensed practical nurse only if an RN, LPN, or LVN is not available. DoD 6010.8-R, Chapter IV, Paragraph C.3.o., also requires private duty nursing services to be performed by an RN, LPN, or LVN and further that the services be rendered to a beneficiary requiring intensified skilled nursing care which can only be provided with the technical proficiency and scientific skills of an RN.

As discussed above, the record does not reveal any skilled nursing services were provided by the mental health workers and the record does not indicate the mental health workers were in fact registered or other qualifying nurses. Testimony from the staff psychiatrist establishes that nursing services (e.g., medication) were performed by the staff registered nurses. Therefore, I find the services of the mental health workers do not qualify as private duty nursing under either AR 40-121 or DoD 6010.8-R.

Custodial Care

Under 10 U.S.C. 1077, custodial care is specifically excluded from CHAMPUS coverage. This prohibition was implemented under AR 40-121 at Chapter 5, Paragraph 5-4a and under DoD 6010.8-R at Chapter IV, E.12.

The testimony of the staff psychiatrist regarding the necessity of the care following May 31, 1977 and my finding the services of "special nurses" were not treatment raises the question whether the hospitalization itself was custodial beginning on February 1, 1977. As the CHAMPUS cost-sharing of the hospital charges, other than the "special nursing," had not been previously questioned, the potential custodial

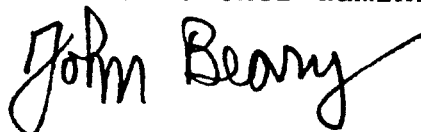
nature of the care was excluded as an issue at the hearing. However, in consideration of the record, I find this issue should be briefly addressed.

Under the definition of custodial care in AR 40-121, Chapter I, Paragraph 1-2g, chronically ill patients whose conditions are stabilized but who need medical services which can be provided safely only by or under the supervision of physicians (such as skilled administration of medication) would not be considered as receiving custodial care. The record in this appeal clearly establishes the chronic nature of the beneficiary's illness. Medication requiring skill in administration was given. Further, some period of time would be allowed to arrange transfer of the beneficiary to a state hospital as was ultimately accomplished. In view of the narrow definition of custodial care in AR 40-121, I do not find the inpatient care from February 1 through May 31, 1977 to be custodial.

Under the current Regulation, custodial care is defined more specifically and would appear to exclude the inpatient charges from CHAMPUS coverage (DoD 6010.8-R, Chapter IV, E.12). However, an exception is granted under Subparagraph E.12.e, for reasonable care for which benefits were authorized or reimbursed prior to June 1, 1977. Under this exception, care which would be excluded as custodial under the current Regulation continued to be authorized if the care was reasonable (at the same level of benefits) and continuous. I find the hospitalization of the beneficiary herein from June 1 through July 8, 1977 meets the requirements of the custodial care exception and the inpatient charges were properly cost-shared by CHAMPUS. This finding in no way affects the above determination regarding the services of the "special nurses."

SUMMARY

In summary, it is the FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) that the services provided by the mental health workers from February 1 - July 8, 1977 were not necessary under AR 40-121 and not medically necessary under DoD 6010.8-R, and therefore not covered under CHAMPUS. The appeal of New York Hospital, Westchester Division, is therefore denied. Issuance of this FINAL DECISION completes the administrative appeals process under DoD 6010.8-R, Chapter X, and no further administrative appeal is available.



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