ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

TH AFFAIRS

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

3 JUN 1982

Appeal of the Estate of	)	
	)	
Deceased	)	
	)	OASD(HA) File 80-15
Sponsor:	)	
	)	FINAL DECISION
SSN:	)	
	)	

This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPUS Appeal OASD(HA) Case File 80-15 pursuant to 10 U.S.C. 1071-1089 and DoD 6010.8-R, chapter X. The appealing party is the executor of the estate of the deceased beneficiary. The appeal involves the denial of private duty nursing services provided the beneficiary at home during August 2 through 4 and August 12 through 19, 1975 and at Trafalgar Hospital, New York, New York from August 4 through 12 and August 19 through 31, 1975. The amount in dispute involves billed charges of $2,520. The Hearing File of Record, the tape of oral testimony and argument presented at the hearing, the Hearing Officer's Recommended Decision and the Memorandum of Nonconcurrence from the Director, OCHAMPUS have been reviewed. It is the Hearing Officer's recommendation that CHAMPUS denial of cost-sharing for the private duty nursing services be upheld for the home nursing care and reversed for the inpatient care. The Hearing Officer found the home (outpatient) private duty nursing was custodial care and excluded under Army Regulation 40-121, the applicable joint-service regulation governing CHAMPUS at the time the care was rendered. The inpatient private duty nursing was found by the Hearing Officer to be necessary services and not custodial in nature. The Director, OCHAMPUS nonconcurs with, and recommends rejection of, the Hearing Officer's Recommended Decision. The Director also recommends issuance of a FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) denying both the outpatient and inpatient private duty nursing. Under Department of Defense Regulation DoD 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, concludes the Recommended Decision does not reflect proper evaluation and weighting of the evidence and contains erroneous application of regulatory authorities.

The FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) is therefore to deny CHAMPUS coverage for the private duty nursing services provided August 2 through 4 and 12 through 19, 1975 in the beneficiary's home and August 4 through 12 and 19 through 31, 1975, at Trafalgar Hospital based on a determination that the services were essentially custodial care and not necessary services. This FINAL DECISION is based on the appeal record stated above.

FACTUAL BACKGROUND

The beneficiary was furnished private duty nursing services by Gotham Registry, an employment agency for nurses, in her residence (August 2 through 4, 1975 and August 12 through 19, 1975) and while an inpatient at Trafalgar Hospital in New York, New York (August 4 through 12, 1975, and August 19 through 31, 1975). The record contains very little medical documentation concerning the beneficiary's history except that the attending physician claimed, both at the hearing and in a written statement dated April 29, 1980, there was substantial alcohol abuse which resulted in hepatic cirrhosis, hepatorenal failure, and hepatorenal encephalopathy, and that some hypertension had been diagnosed in the past.

The physician testified that the beneficiary's drinking produced psychotic episodes and that during these periods, her judgement was impaired and there was a potential for self-destruction. No nurses' notes of the services provided on an outpatient (in the residence) basis are available. The records made available at Trafalgar Hospital are limited to copies of the nurses' notes, but that information indicates that at the time of admission on August 4, 1975, the patient was agitated and restless and required sedation.

The diagnosis on the nursing service records is "Pneumonia, Rt lobe"; this record also notes that there was an alcohol problem. The record makes no note of the diagnoses described by the attending physician, i.e., hepatic cirrhosis, hepatorenal failure, and hepato-renal-encephalopathy; nor is there any indication that the patient was to be monitored for psychotic episodes or that suicide precautions should be instituted. Neither do the records indicate that there was a hypertensive problem. The available nurses' notes indicate that the hospital course was relatively benign and there was no adverse reaction to the treatment plan which included antibiotics and ataractic medications, plus anticonvulsives and sedatives.

The records reveal that the patient was discharged on August 12, 1975. No specific details are available regarding the patient's condition after discharge except for the physician's statement that deterioration (whether due to alcohol intake is unknown) was noted, and that the patient was rehospitalized at Trafalgar Hospital on August 19, 1975 with a diagnosis of acute bronchitis. The patient then was under the care of a new physician.

The nurses' admission note indicates that the patient admitted to alcoholism, but was not in an agitated or restless state. There was no report of disorientation, or delusional or hallucinatory activity, nor was there a notation of suicidal preoccupation. Further, the nurses' notes did not report any acute physical distress on admission. The nurses' records reported a temperature elevation beginning August 22, 1975, which continued until August 24, 1975 and which required medication and other measures.

Episodes of dyspnea (shortness of breath) also occurred at this time and nasal oxygen was initiated for relief. Breathing problems were also reported after the patient smoked cigarettes. The original attending physician resumed management of the case on August 29, 1975. The available records indicate that the treatment plan consisted of multiple vitamin preparations, antibotics, expectorants, sedatives, and a series of ataractic medications (Haldol, Elavil, Triavil) for treatment of the mental condition. Except for the brief episodes of elevated temperature and breathing problems, the hospital course was essentially uneventful and the patient was discharged on September 9, 1975.

Her condition thereafter is unknown; she reportedly expired on September 30, 1975. There is no documentation of the circumstances surrounding her death. In oral testimony, the attending physician stated "... I was under the impression that she committed suicide at home..." but this was apparently denied by the executor-representative of the appealing party. This statement was not confirmed by the executor nor was the certificate of death presented. The available information concerning the patient's condition presents a picture of chronic deterioration associated with alcohol abuse.

According to the executor of the beneficiary's estate, a CHAMPUS claim was submitted in July 1976 for the private duty nursing services to the CHAMPUS Fiscal Intermediary for New York, at that time Blue Cross of Greater New York. The claim was allegedly lost by the fiscal intermediary and not adjudicated. On December 27, 1978, the executor submitted another claim to the current CHAMPUS Fiscal Intermediary for New York, Blue Cross of Rhode Island in the amounts of $1,370 for private duty nursing services while in an inpatient status and $1,158 for the home nursing services. Blue Cross of Rhode Island initially denied the claim as untimely. Following a

request by the executor, OCHAMPUS granted an exception to the claim filing deadline. The claim was again denied by Blue Cross of Rhode Island based on the Department of Defense Regulation 6010.8-R exclusion of private nursing services when a hospital has an intensive care unit. Informal review and reconsideration affirmed the initial denial.

As DoD 6010.8-R, was not implemented until June 1, 1977 its provisions regarding benefits are not applicable to care rendered prior to that date. As the care in this appeal was rendered in 1975, the applicable regulation governing CHAMPUS benefits is Army Regulation 40-121. OCHAMPUS review affirmed the previous denials based on the exclusions of custodial care, insufficient documentation of necessity of the services and lack of physician certification under the correct regulation, AR 40-121.

A hearing was requested by the executor of the beneficiary's estate and a physician's certification was furnished by the attending physician. A hearing was held at New York, New York on September 12, 1980, before William Eugene Anderson, Hearing Officer. The Hearing Officer has submitted his recommended decision. All prior levels of administrative review have been exhausted and issuance of a FINAL DECISION is proper.

ISSUES AND FINDINGS OF FACT

The primary issues in this appeal are whether (1) the private duty nursing services provided during the periods in issue were custodial care and (2) constitute services necessary and essential for the treatment of the patient, under Army Regulation 40-121.

Custodial Care

Under the law (10 U.S.C. 1077), custodial care is specifically excluded as a CHAMPUS benefit. As stated above, the applicable joint-service regulation governing CHAMPUS benefits in 1975 is Army Regulation 40-121. Under AR 40-121, chapter 5, paragraph 5-4, custodial care is not authorized. Chapter 1, paragraph 1-2.g. defines domiciliary/custodial care as:

> "The type of care designed essentially to assist the individual in meeting his activities of daily living, i.e., services which constitute personal care such as help in walking and getting in or out of bed, assistance in bathing, dressing, feeding, preparation of special diets, and supervision over medication which can usually be self-administered and which does not entail or require the continuing attention of trained

> medical or paramedical personnel. (Chronically ill patients whose conditions are stabilized but who need medical services to maintain the achieved stability that can be provided safely only by or under the direct supervision of physicians, nurses, or other paramedical personnel, e.g., irrigations, catheterizations, application of dressings or bandages, administration of medications and other prescribed treatments requiring skill in administration would not be considered as receiving custodial care.) Thus, the essential characteristic that is to be considered in determining whether a person is receiving domiciliary or custodial care is the level of care and medical supervision that the patient requires, rather than such factors as the diagnosis, the type of condition, or the degree of functional limitation."

Therefore this provision requires a determination as to whether the particular services of the private duty nurses, inpatient and outpatient, essentially assisted the beneficiary in meeting her activities of daily living. The level of care and medical supervision that the patient required are the essential characteristics. The services provided at home (outpatient) and at Trafalgar Hospital will be analyzed separately.

Outpatient Private Duty Nursing. At the hearing, the attending physician testified the home nursing care was required to administer medications, monitor vital functions and to observe and report signs of deterioration to him. This was necessary according to the physician because of the multitude of conditions afflicting the beneficiary - hepatic cirrhosis, hepatorenal failure, and hepato-renal-encephalopathy together with alcohol induced psychotic behavior. The private duty nurse was also required to assist in the prevention of suicide by the beneficiary and surreptitiously obtaining of alcohol. He testified only skilled nursing care could observe and report her signs of deterioration on which he could act. It is noted that none of the above conditions were listed as diagnoses upon the admissions to Trafalgar Hospital.

The attending physician also testified that "99% of the medications were specific and had to be given by skilled personnel...." He implied that some medications were administered by injection. He did not identify these medications nor state if the private duty nurses administered them. The attending physician did not testify from his records nor submit them for the record but testified from his recollection. No nurses' notes are available to confirm what care was provided. Review of the nurses' notes for the inpatient care during the same month reveals only infrequent administration of medications by injection. As the

beneficiary's chronic conditions did not change during August 1975, it would appear the medications (oral) administered in the hospital would be similar, if not identical, to those given at home. In the above quoted Regulation definition, supervision over self-administered medications which can usually be self-administered is an example of custodial care while administration of medications requiring skill (for example, injections) is not considered custodial. While the attending physician testified the home care involved injections, based on a recollection of events five years earlier, there are no confirming records and the contemporary hospital care is contradictory to his testimony.

The attending physician testified the private duty nurse observed the beneficiary for psychotic behavior; however, again, contemporaneous hospital records do not confirm the presence of an overt psychosis, specifically upon discharge from the hospital on August 19, 1975. Even if the possibility of suicide were present, as claimed by the physician, prevention would not require skilled nursing care, but only a companion. The same conclusion applies to the physician's testimony the private duty nurse was to prevent the beneficiary from obtaining alcohol - certainly not a skilled nursing service, but services of a companion.

As the private duty nurses performed personal care in the hospital (see below), it is assumed similar care was provided at home. Based on the testimony of the attending physician and the available medical records, I have concluded the primary purpose of the home private duty nursing was observation of the beneficiary. No services were provided that required skill in administration. Even if some skilled nursing services were provided, there are no records on which the qualifying services could be separated for payment (on a hourly basis) from the unskilled services. The employment registry claimed no nurses records were kept by them or the private nurses.

In conclusion, I find the services provided in the beneficiary's home by private duty nurses from August 2 through 4, 1975 and from August 12 through 19, 1975, have not been proven to constitute skilled nursing services. The weight of the evidence requires a finding the care was designed essentially to support the essentials of daily living and did not require trained medical personnel. The Hearing Officer concluded likewise. Therefore, I find the services are custodial care and excluded under AR 40-121.

Inpatient Private Duty Nursing. To justify the inpatient private duty nursing services, the appealing party relied primarily on (1) the attending physician's testimony of the alcohol related psychosis and physical condition of the beneficiary described above and (2) a hospital rule requiring a patient with possible psychotic behavior and physical

complications to be placed in a private room with a private duty nurse. The second of these contentions is addressed first.

As CHAMPUS is a federal statutory health benefits program, it is not bound in the administration of benefits by local hospital rules. Contrawise, the CHAMPUS coverage of particular care is judged solely against statutory and regulatory requirements. Therefore, the existence (or non-existence) of such a hospital rule has no bearing on the decision in this appeal.

Regarding the physical condition of the beneficiary as requiring a private duty nurse, review of the nursing service records from Trafalgar Hospital reveals no skilled nursing services were performed by the private duty nurses during either period of hospitalization. The notes of the floor nurses refer consistently to "attendants" and "companion," not private duty nurses. Medications administered included oral multiple vitamins, antibiotics, cough mixtures and sedatives. The nurses' notes indicate only the "attendant" or "companion" was present in the room. The records further reveal the prescribed medications were administered orally; on only two documented occasions were injections given. One was administered by a staff nurse and one by the attending physician. The physician also administered vitamin injections on several occasions.

The nursing service records from Trafalgar Hospital indicate that the nursing care required by the patient was performed and recorded by the staff nursing personnel and that the recommended treatment plan prescribed for the patient was the responsibility of the staff nurses. Furthermore, the nurses' notes do not indicate that the "attendants" reported the patient's condition, complaints, symptoms, or reactions to the staff; none of the nurses' notations state that the attendants "observed" or "reported." It appears from the available documentation that the medically necessary nursing care during the patient's hospitalization was performed by staff nurses, and that the "attendants" provided only those services related to bathing, assisting in ambulation, and acting as a companion.

The attending physician insists the diagnoses listed above together with potential psychotic behavior related to alcohol, required observation by a private duty nurse. However, the medical records reveal the diagnoses upon the hospital admissions were pneumonia and acute bronchitis. There is no mention of the diagnoses offered by the physician and the notes reveal no overt distress or psychotic behavior of the beneficiary. The course of the hospitalization on both occasions appears uneventful. No specific precautions or instructions appear in the record as to potential suicide or psychotic behavior. Therefore, I conclude the record does not document the condition of the beneficiary was such that constant medical supervision was required. Peer review by physicians associated with the Colorado Foundation for Medical Care,

specialists in internal medicine, concluded the inpatient private duty nursing services were provided essentially to assist in activities of daily living.

As no skilled services were performed by the private duty nurses and as the services performed did support the essentials of daily living, I find the private duty nursing services while in an inpatient status from August 4 through 12, 1975 and August 19 through 31, 1975, to be custodial care and excluded under AR 40-121.

Essential For Treatment

Under AR 40-121, chapter 5, paragraph 5-2.m., services of other professional personnel are CHAMPUS benefits when ordered by a physician as essential for the proper care and treatment of the patient. Services of nurses are included within this section. Private duty nurses are specifically defined in chapter I, paragraph 1-3, e. as:

> "(1) A professional registered nurse (R.N.).
>
> (2) A technical registered nurse (R.N.).
>
> (3) A licensed practical nurse (L.P.N.).
>
> (4) A licensed vocational nurse (L.V.N.).
>
> (5) Nurses aide or unlicensed practical nurse only if an R.N., L.P.N., or L.V.N. is not available."

Corresponding with the concept of essential services is the coverage of necessary services and supplies. (AR 40-121, chapter 5, paragraph 5-2.w.) Necessary services and supplies are defined as:

> "Those services, consumable supplies, and supportive devices ordered by the provider of care as essential for the care of the patient or treatment of the patient's medical or surgical condition. Includes other professional services, surgical dressings, irrigation equipment, disposable syringes, colostomy bags and necessary accounterments."

Home nursing services are a specific benefit under AR 40-121 when certified by the attending physician as medically necessary (chapter 5, paragraph 5-8k).

Under these provisions, CHAMPUS coverage would include only those private duty nursing services medically necessary (essential) for the care of the patient or treatment of the

patient's medical condition as ordered by a physician. The record in this appeal reveals the attending physician did order the services of the private duty nurses.

As to the inpatient private duty nursing services, the record, as analyzed above, does not document the services performed by the private duty nurses were essential for the proper care or treatment of the beneficiary. The services of bathing, assistance in ambulation and companionship are not treatment of a medical condition. Even if these services were required for the proper care of the patient, there is no documentation the staff nurses were not capable of providing this care. Skilled nursing services appear to have been performed by the staff nurses. In the absence of the private duty nurses subsequent to August 31, 1975, the staff nurses provided this attendant care. Further, as the services of the staff nurses are included within the hospital daily rate for inpatient care, to authorize cost-sharing of the private duty nursing services would be a duplication of the payments for staff nursing.

Based on the above facts and analysis, I find the inpatient private duty nursing services were not essential for the proper care and treatment of the beneficiary and therefore are not CHAMPUS covered services.

Regarding the outpatient (home) private duty nursing services, the record again does not document the services were medically necessary (essential) for the care and treatment of the beneficiary. While the administration of oral medication may have required professional oversight for a psychiatric patient, the medical records upon discharge from the hospital reveal the beneficiary was in reasonably stable condition and no evidence of overt psychosis was indicated. The taking of vital signs may have been needed, but did not require the skills of a nurse. An average adult could have adequately performed the recording of vital signs, administration of oral medication and observation of the beneficiary. The stated aim of preventing the beneficiary from consuming alcohol certainly cannot be considered a service requiring a professional nurse.

Therefore, I must conclude the home nursing services were not medically necessary or essential for treatment of the beneficiary and are not covered under CHAMPUS. It must be noted that under DoD 6010.8-R, which appeal procedures are applicable herein, the burden of producing evidence in support of the claim of authorized services performed by the private duty nurses is on the appealing party. The sparse inpatient notes, often contradicting of testimony, and the absence of outpatient notes do not provide a basis on which to extend coverage of the care.

SECONDARY ISSUE

Estoppel

The appealing party has asserted that previous claims for similar care were paid by the prior CHAMPUS Fiscal Intermediary and therefore the claims herein should also be cost-shared. This has the appearance of an estoppel argument and must be summarily dismissed. There is no documentation similar claims were cost-shared. If such occurred under the same or similar facts in this appeal, I would consider the payment erroneous and in violation of the above cited statutory and regulatory authorities. Regardless, it is an established legal principle that the United States is not estopped by the acts of its agents in violation of law.

SUMMARY

In summary, it is the FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) that the private duty nursing services provided at home from August 2 through 4 and August 12 through 19, 1975 and on an inpatient basis from August 4 through 12 and August 19 through 31, 1975 were custodial care and not medically necessary nor essential care for the treatment of the beneficiary. Therefore, the claim for private duty nursing on the above dates and the appeal of the estate of the beneficiary are 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 Beary

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