



ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D. C. 20301

HEALTH AFFAIRS

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

8 JUN 1982

Appeal of)	
)	OASD(HA) File 82-05
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 82-05 pursuant to 10 U.S.C. 1071-1089 and DoD 6010.8-R, chapter X. The appealing party is the spouse of the beneficiary as executrix of the estate of the deceased beneficiary. The appeal primarily involves the denial of inpatient hospitalization provided the beneficiary from January 17-29, January 31 - February 18, and February 20-27, 1979. The amount in dispute is approximately \$4,000. Professional claims of physicians providing treatment during the inpatient stay have also been considered. The hearing file of record, the tapes of oral testimony and argument presented at the hearing, the Hearing Officer's Recommended Decision and the Memorandum of Concurrence from the Director, OCHAMPUS have been reviewed. It is the Hearing Officer's recommendation that the OCHAMPUS denial of cost-sharing for the hospitalization on the above dates be upheld subject to cost-sharing of one hour of skilled nursing care per day, prescription drug charges and physical therapy charges on an outpatient basis at two sessions per week for sixty days. The Hearing Officer found the care to be custodial, domiciliary and above the appropriate level of care and therefore excluded from CHAMPUS coverage except as noted. The Director, OCHAMPUS, concurs in the Recommended Decision and recommends its adoption, as modified, as the FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs).

The Acting Assistant Secretary of Defense (Health Affairs) after due consideration of the appeal record, concurs in the recommendation of the Hearing Officer to deny CHAMPUS benefits and hereby adopts the recommendation of the Hearing Officer as the FINAL DECISION, with modification. The FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) is

therefore to deny the CHAMPUS cost-sharing of inpatient hospitalization at Winchester Memorial Hospital during the period in issue and to allow cost-sharing of one hour of skilled nursing care per day for three days, prescription drugs, and physical therapy on an outpatient basis for two sessions per week for sixty days. This decision is based on the findings the care provided was custodial, domiciliary and above the appropriate level of care.

FACTUAL BACKGROUND

The beneficiary was admitted to Winchester Memorial Hospital, Winchester, Virginia on November 11, 1978 with complaints of nausea, vomiting and dizziness. He was evaluated by _____ on November 13, 1978 who initially diagnosed a probable left hemispheric CVA. An EMI scan revealed a bilobular lesion and on November 21, 1978, a right parietal craniotomy with subtotal tumor excision was performed by _____. Pathological examination revealed the tumor was malignant astrocytoma. The beneficiary received radiation, inhalation and physical therapies during the hospitalization. The beneficiary improved and was able to ambulate with assistance and a cane.

During his hospitalization episodes of grand mal seizures were observed on January 30 and February 19, 1979. The progress notes by the radiologist on January 11, 1979 state "... there is little more we can offer him and that transfer to VAH [Veteran's Administration Hospital] is indicated." Progress notes by the surgeon indicate the Veteran's Administration Hospital was contacted on January 16, 1979 but was unable to accept the beneficiary's transfer at that time. _____ also stated "we need to get this patient out of the hospital." The notes of the hospital social service worker also on January 16, 1979 reveal the VA did not have a chronic care bed available but would admit the beneficiary when a bed became available. Interim transfer to a treatment center was discussed pending VA admission of the beneficiary. On January 18, 1979, _____ noted he planned disposition to a nursing home or preferably the Veteran's Administration Hospital. His notes on January 25, 1979 indicate the beneficiary would be discharged to home the next week. _____ again planned discharge two days after the seizures of January 30, 1979; however, the beneficiary's wife had problems with that disposition. The beneficiary remained in Winchester Memorial until February 27, 1979 when he was transferred by ambulance to the Martinsburg, Virginia Veteran's Administration Hospital. The diagnosis upon discharge was primary brain tumor, glioma of right posterior hemisphere, grade IV. The discharge summary noted the "... hospitalization was prolonged excessively because he could not be taken home since he lived in an icy and remote area where access was poor and because physical therapy was desirable."

Winchester Memorial Hospital filed four CHAMPUS claims for the inpatient care provided the beneficiary from November 11, 1978 through February 27, 1979 with the CHAMPUS Fiscal Intermediary for Virginia during that period, Blue Cross of Southwestern Virginia. Claims for inpatient care from November 11, 1979 through January 16, 1979 were cost-shared; claims for January 17 through February 27, 1979 were denied. The partial denial was upheld by the fiscal intermediary upon informal review and reconsideration. These decisions were based on findings the care subsequent to January 16, 1979 was custodial and excluded from CHAMPUS coverage. Upon appeal to OCHAMPUS, the partial denial was affirmed with the exception of hospitalization on January 30 and February 19, 1979. Hospitalization on these dates was determined to be medically necessary due to the episodes of grand mal seizures. A hearing was requested by the beneficiary's spouse as executrix of the estate of the beneficiary, then deceased. The hearing was held on October 21, 1981 at Winchester, Virginia before _____, Hearing Officer. The Hearing Officer has submitted her recommended decision. All prior administrative levels of appeal have been exhausted and issuance of a FINAL DECISION is proper.

CHAMPUS claims were also submitted by physicians providing care to the beneficiary during his inpatient stay. As a custodial care determination would exclude all related services, I have considered the affect of my determination on the CHAMPUS coverage of the attendant professional services as discussed herein.

ISSUES AND FINDINGS OF FACT

Custodial Care

As set forth in the Recommended Decision, the Department of Defense regulation governing CHAMPUS, DoD 6010.8-R, excludes custodial care defined as follows:

"... 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 patient's comfort, and/or assure the manageability of the patient. Further, a custodial care determination is not precluded because the ordered and prescribed services and supplies are being provided by an R.N., L.P.N., or L.V.N." (DoD 6010.8-R, chapter IV, E.12, see also, chapter IV, G.7.)

This provision implements the statutory exclusion of custodial care in 10 U.S.C. 1077. The regulatory provisions emphasize it is the care rendered the patient that is controlling and not the condition itself.

Applying the above quoted criteria to the record in this appeal, it is clear the beneficiary was physically disabled and the disability was expected to continue and be prolonged. The beneficiary required a protected and controlled environment. The probability of seizures required constant observation (a tongue depressor was kept under his pillow). The beneficiary's representative was cautioned on the possibility of injury from falling. He required assistance in ambulance, bathing, medication, eating and personal needs - essentials of daily living. Progress notes quoted above reveal no active medical treatment was required after January 16, 1979 (except for the two seizure episodes). Regarding the seizure episodes of January 30 and February 19, 1979, I find hospitalization to be medically necessary on those dates and properly cost-shared by CHAMPUS. The beneficiary's representative testified as to the care rendered by the hospital staff and by herself, concluding only the administration of medication was solely provided by the nursing staff. As she testified the medication was oral, this too could have been provided without professional assistance. Additionally, the appeal record reflects peer review by physicians of the Colorado Foundation for Medical Care. In the opinion of the reviewing physicians (specialists in internal medicine and neurology), the care provided the beneficiary during the period in issue met the criteria of custodial care.

Based on the medical records and hearing testimony, I concur in the hearing officer's finding and determine the care provided during the dates in issue to be custodial and excluded under CHAMPUS. It is clear the beneficiary required care; however, it is not the type of care on which CHAMPUS may cost-share.

Under DoD 6010.8-R, chapter IV, E.12.c, it is recognized that in a custodial care situation, an occasional specific skilled nursing service may be required. Under this provision, a maximum of one hour of skilled nursing care per day may be authorized. The Hearing Officer has recommended benefits be extended for one hour of nursing care per day for the period in this appeal. I must disagree with and reject the Hearing Officer's recommendation on this issue. The nurses notes do not reflect skilled nursing services were performed each day. Bathing, feeding, ambulation and administration of oral medication are not skilled nursing services. In reviewing the record, I find only three days (January 31, February 1-2, 1979) in which skilled nursing services were provided - administration of an I.V. Therefore, I find skilled nursing of one hour for three days is properly allowable under the above cited provision.

Prescription drugs are also covered benefits in a custodial care case. The Hearing Officer has recommended cost-sharing of covered prescription drugs during the period in issue and I concur in this recommendation.

Domiciliary Care

As cited in the Recommended Decision, DoD 6010.8-R, chapter IV, E.13, (implementing 10 U.S.C. 1077), excludes domiciliary care from CHAMPUS coverage (see also chapter IV, G.8). Domiciliary care is defined:

"... to mean inpatient institutional care provided the beneficiary, not because it is medically necessary, but because the care in the home setting is not available, is unsuitable and/or members of the patient's family are unwilling to provide the care."

Further definition of domiciliary care is stated as institutionalization essentially to provide a substitute home - not because it is medically necessary for the beneficiary to be in the institution. In the Recommended Decision, the Hearing Officer found the care to be domiciliary during the period in issue and excluded from CHAMPUS coverage under the above cited provisions. I concur in and adopt the Hearing Officer's findings on this issue.

The medical records quoted above reveal the beneficiary received the full benefit of active medical treatment by January 16, 1979. Beginning at that time, transfer to the Veteran's Administration Hospital, a nursing home or discharge to home was discussed. The need to discharge the beneficiary is apparent from the progress notes. As noted above, the discharge summary candidly states hospitalization was

prolonged because the beneficiary could not be discharged to his home due to icy roads and remoteness of his home. At the hearing the beneficiary's representative testified as to the inclement weather conditions (ice, snow) during January/February 1979 and due to the remote location of her home, she could not bring her husband home. However, she also testified she did not contact local ambulance services regarding transportation to her home. She further testified she was afraid medical assistance at her home would not be available if required for the beneficiary, again due to the weather conditions. She additionally related at the hearing that due to a "bad back" she would not be able to assist her husband in moving about the house. From her testimony I conclude the beneficiary's wife was primarily concerned medical assistance would not be available in the event further seizures occurred. While I am mindful of the emotional and physical responsibilities of caring for the beneficiary in the home, particularly during inclement weather, CHAMPUS law and regulation require extension of benefits only for medically necessary care. The evidence in this appeal clearly establishes the primary reason for the hospitalization subsequent to January 16, 1979 (except for the two seizure episodes) was not for medical treatment but to provide a substitute home until weather conditions improved or the Veteran's Administration Hospital could accept transfer of the beneficiary. Based on this evidence, I must conclude the care for the period in issue was domiciliary care and excluded from CHAMPUS coverage.

Appropriate Level of Care

Under DoD 6010.8-R, chapter IV, B.1.g., the level of institutional care for which CHAMPUS benefits may be extended must be at the appropriate level of care required to provide the medically necessary treatment. Appropriate medical care means:

"The medical environment in which the medical services are performed is at the level adequate to provide the required medical care." DoD 6010.8-R, chapter II, B.14.c.

Appropriate medical care is included within the definition of medically necessary. DoD 6010.8-R, chapter II, B.104. Care that is above the appropriate level of care is excluded from CHAMPUS coverage. DoD 6010.8-R, chapter IV, G.3. The Hearing Officer found the hospitalization during the period in issue to be above the appropriate level of care. I concur in this finding and adopt it in this FINAL DECISION. As the record clearly establishes discharge to the home was attempted, hospitalization was not therefore the appropriate level of care. The appropriate level of care was the home environment for the beneficiary subsequent to January 16, 1979. The peer review opinion referenced above concluded likewise. Therefore, I must find the care in issue is excluded from CHAMPUS coverage as above the appropriate level of care.

Physical Therapy

The Hearing Officer has further recommended cost-sharing of physical therapy on an outpatient basis up to the regulatory norm of two sessions per week for 60 days. The Hearing Officer found physical therapy was required subsequent to January 16, 1979. From the record, I concur and adopt this recommendation. Physical therapy is a covered CHAMPUS benefit on an outpatient basis (DoD 6010.8-R, chapter IV, C.3.j). As inpatient care was not appropriate following January 16, 1979, it can be logically assumed physical therapy would have continued on an outpatient basis. Progress notes reveal slow but steady improvement was obtained through the physical therapy.

Physical therapy benefits are generally limited to two sessions per week for 60 days. Therapy in excess of these limitations requires documentation of the medical necessity of the therapy and anticipated results. Such documentation is not present in the appeal record. Herein, the beneficiary received physical therapy almost every day from January 17 - February 26, 1979. While intensive therapy on an inpatient basis is necessary immediately following surgery, the beneficiary had already received six weeks of therapy prior to January 17, 1979. Outpatient therapy is commonly of much less frequency. Based on the beneficiary's illness and physical therapy notes, I conclude the normal allowable physical therapy benefits should apply in this appeal.

SECONDARY ISSUE

Professional Claims

The appeal file reflects CHAMPUS claims were filed for professional services provided during the beneficiary's hospitalization. Claims by Winchester Radiologists, Winchester Anesthesia, Dr. _____ and Dr. _____ (Winchester Neurological Associates) were paid by the CHAMPUS Fiscal Intermediary.

The claims of Winchester Radiologists and Winchester Anesthesia involved the administration of radiation therapy and surgical anesthesia prior to January 16, 1979 and thus are not included within the period of custodial care found in this appeal. The services of Dr. _____, the initial attending physician does include brief hospital visits subsequent to January 16, 1979 and therefore fall under the custodial care determination. Under DoD 6010.8-R, chapter IV, E.12.c., CHAMPUS benefits are not available for services related to a custodial care case with enumerated exceptions. The explanation of benefits form included in the appeal file notes billing by Dr. _____ of \$147.50 for brief hospital visits (procedure code 90240) from January 1 to February 28, 1979. A total of \$147.50 was allowed by the fiscal intermediary. As I

have determined the inpatient care subsequent to January 16, 1979 was custodial and as I find no documentation of medically necessary services performed by Dr. [redacted] subsequent to that date, including the dates of the seizure episodes, I must find the services are excluded from CHAMPUS and improperly cost-shared by the fiscal intermediary. As no itemized statement was apparently submitted, I must direct OCHAMPUS to determine, through the fiscal intermediary, the amount of the charges pertaining to services subsequent to January 16, 1979 and refer the matter of the erroneous payment to the Office of General Counsel, OCHAMPUS for consideration of recoupment action.

The remaining professional claim was submitted by the surgeon, Dr. [redacted]. The explanation of benefits in the appeal file reveals Dr. [redacted] billed charges of \$3,097 included \$2,987 for the surgery and aftercare. A total of \$1,600 was allowed by the fiscal intermediary, including \$1,500 for the surgery and aftercare. Under DoD 6010.8-R, chapter IV, C.3.d., the benefit payments made for surgery include normal aftercare whether billed on an all-inclusive basis or separately. Herein, Dr. [redacted] billed separately for the surgery and aftercare. The amount of the total allowance (reasonable charge) for a medical procedure is determined in accordance with statutory and regulatory authorities and is not subject to appeal within the CHAMPUS appeals system.

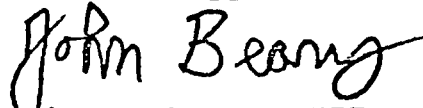
OCHAMPUS has informed this office of an inquiry subsequent to the hearing by the beneficiary's representative regarding the claim of Dr. [redacted]. OCHAMPUS has furnished this office with a copy of correspondence to the beneficiary's representative explaining the reasonable charge methodology applied to this claim and a copy of the claim in question. While Dr. [redacted] has included charges for services subsequent to January 16, 1979, the reasonable charge includes only applicable amounts for the surgery and normal aftercare. Therefore, the custodial care determination herein does not affect the payment of this claim. No additional amounts are due on this claim and no erroneous payment was made.

SUMMARY

In summary, it is the FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) that the inpatient care at Winchester Memorial Hospital provided the beneficiary herein be denied during the period in issue stated above as the care is found to be custodial, domiciliary and above the appropriate level of care and thereby excluded from CHAMPUS coverage. Further, I find three hours of skilled nursing care and all prescription drugs beginning January 17, 1979 to be CHAMPUS benefits under the custodial care regulatory provision. I also find physical therapy of two sessions per

week beginning January 17, 1979 to be covered benefits payable on an outpatient basis. Regarding the professional services, I find the services of Dr. _____ subsequent to January 16, 1979, to be excluded under the custodial care provision. Upon receipt of this FINAL DECISION, CHAMPUS is directed to forward the applicable documentation to the CHAMPUS Fiscal Intermediary for appropriate cost-sharing of the above benefits subject to potential recoupment, including offset from the additional CHAMPUS payments, of the erroneous payment to Dr.

All other claims for inpatient care by Winchester Memorial Hospital 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 F. Beary, III, M.D.
Acting Assistant Secretary