



ASSISTANT SECRETARY OF DEFENSE  
WASHINGTON, D. C. 20301

MAR 3 1983

HEALTH AFFAIRS

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

Appeal of )  
Sponsor: ) OASD(HA) Case File 83-2  
SSN: ) FINAL DECISION

This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPUS appeal OASD(HA) Case File 83-2 pursuant to 10 U.S.C. 1071-1089 and DoD 6010.8-R, chapter X. The appealing party in this case is the estate of the beneficiary, as represented by counsel. The appeal primarily involves care received in a skilled nursing facility, Oak Manor, Inc., from October 20, 1977 through September 30, 1978. The amount in dispute primarily involves \$20,721.98 in billed charges from Oak Manor, Inc. as represented by claims in the Hearing File of Record.

The Hearing File of Record, the tape of oral testimony presented at the hearing, the Hearing Officer's Recommended Decision and the Analysis and Recommendation of the Director, OCHAMPUS have been reviewed. It is the Hearing Officer's recommendation that the OCHAMPUS Formal Review Decision denying coverage of the beneficiary's care as being primarily custodial care, be upheld, but specifically for the period of October 20, 1977 through September 30, 1978. Additionally, the Hearing Officer recommended that CHAMPUS coverage be authorized during the period in question for prescription drugs and up to one hour of skilled nursing services per day. Finally, the Hearing Officer recommended that any CHAMPUS overpayment for care received from October 20, 1977 to January 19, 1978 be waived.

The Director, OCHAMPUS concurs in part, and nonconcurrs in part, with the Hearing Officer's Recommended Decision. The Director recommends issuance of a FINAL DECISION by this office denying CHAMPUS cost-sharing for the entire period of care at Oak Manor, Inc., with the exception of one hour of skilled nursing care per day and authorized prescription drugs. The Director further recommends that the FINAL DECISION reject the Hearing Officer's recommendation to waive collection of erroneous payments of care.

Under Department of Defense Regulation 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, concurs with the Director, OCHAMPUS and rejects that portion of the Hearing Officer's Recommended Decision which recommends waiver of erroneous CHAMPUS payments. The rejected portion of the Hearing Officer's Recommended Decision fails to consider the authorities relevant to the issues involved. The FINAL DECISION is based on the evidence of record.

The FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) is therefore to deny CHAMPUS coverage for services provided to the beneficiary while confined in Oak Manor, Inc., a skilled nursing facility, from October 20, 1977 through September 30, 1978, as being custodial care and for failing to comply with regulatory criteria for CHAMPUS coverage of private duty nursing services. It is further determined that one hour of skilled nursing services per day and prescription drugs will be allowed and cost-shared under the custodial care provisions of Department of Defense Regulation 6010.8-R. The issue of collection or waiver of erroneous payments is not a subject of this appeal, but is referred to OCHAMPUS for appropriate resolution under the Federal Claims Collection Act.

#### FACTUAL BACKGROUND

The beneficiary in this appeal is the female dependent spouse of a retired enlisted member of the United States Army. On April 26, 1976, at age 53, the beneficiary suffered postoperative cardiac arrest (testimony by her civilian physician, Dr. \_\_\_\_\_, indicates it was respiratory arrest) while a patient at Martin Army Hospital, Fort Benning, Georgia. She has been comatose since May 5, 1976.

On or about June 23, 1977, a Trust Agreement was entered into by and between the United States of America (trustor) and the Trust Company of Columbus (trustee) whereby a Trust Estate of Three Hundred Forty-Eight Thousand Dollars (\$348,000) was established to provide care, maintenance, support and medical expenses of the beneficiary for any physical or mental condition resulting from the injury sustained on April 26, 1976. Pursuant to terms of the Trust Agreement, no payments from the Trust Estate shall be made for medical care from any institution of the United States Government, or to the extent the beneficiary is eligible to receive from the United States reimbursement for medical care under CHAMPUS or any other provision of law, except as such medical care or reimbursement is insufficient to meet all costs of such care. Finally, upon the death of the beneficiary, the

remaining Trust Estate and accumulated income shall revert to the Treasurer of the United States.

On October 20, 1977, the beneficiary was transferred from Martin Army Hospital to Oak Manor, Inc. skilled nursing facility. The admitting diagnosis was cardiac arrest, with a secondary diagnosis of decubitus ulcers on both hips. Dr. testified that the patient had in fact suffered "respiratory arrest" although the medical records indicate "cardiac arrest".

Upon admission, Mrs. condition was described as "comatose with contractures of all extremities." The medical history, patient care plan, physician's orders and progress notes reflect the following conditions upon admission to Oak Manor, Inc., or immediately thereafter: "mental condition - vegetative, ambulation - no" "discharge planning - terminal cardiac arrest, due to condition unable to participate in any activities" and, patient "has assumed a vegetative state since April 26, 1976, and has assumed the fetal position with contractures of all extremities. She has multiple decubitus ulcers on shoulders, hips and pelvis".

In accordance with the requirements of the Trust Agreement, CHAMPUS claims for inpatient care at Oak Manor, Inc., were filed with the CHAMPUS Fiscal Intermediary for the State of Georgia, Mutual of Omaha Insurance Company. The Oak Manor, Inc., claims are as follows:

<u>Dates of Care</u>	<u>Billed</u>	<u>Paid</u>
10/20/77 to 11/30/77	\$2,553.45	\$1,915.09 (3/20/78)
12/1/77 to 12/31/77	1,793.98	1,345.48 (1/30/78)
1/1/78 to 1/31/78	2,104.15	1,578.11 (5/1/78)
2/1/78 to 2/28/78	1,853.71	1,390.28 (5/17/78 and 3/22/78)
3/1/78 to 3/31/78	1,721.47	1,291.10 (5/16/78)
4/1/78 to 4/30/78	1,508.20	1,131.15 (7/28/78)
5/1/78 to 5/31/78	1,800.84	1,350.63 (7/6/78)
6/1/78 to 6/30/78	1,667.64	Disallowed (8/31/78)
7/1/78 to 7/31/78	1,972.89	1,479.67 (9/12/78)
8/1/78 to 8/31/78	1,936.09	Disallowed (10/24/78)
8/28/78 to 9/24/78	1,809.56	Disallowed (10/26/78)

In general, the patient's medical records reveal the following care on a daily, periodic or as needed basis commencing on October 20, 1977: Foley Catheter and UTI care, physical therapy, decubitus and skin care, correct positioning to prevent further contractures, naso-gastric tube feeding, IV fluids, medications by naso-gastric tube suctioning, monitoring and observation to maintain open airways, and oxygen on an as needed basis.

The nurses' records indicate that private duty nursing services (in addition to services furnished by Oak Manor, Inc.) commenced January 2, 1978, on a two shift (7-3 and 3-11) basis. The Oak Manor Inc., staff attended the patient during the 11-7 shift.

The first mention in the physician's orders concerning the possible use of private duty nurses was recorded in late December of 1977. By letter dated March 3, 1978, Dr. [redacted] stated that "special nursing care was necessary to ensure proper turning, feeding, and caring for [the patient's] decubitus ulcer. The ulcers have developed because of lack of adequate nursing care." An undated statement of Dr. [redacted] indicates that two shifts of private duty nurses were required during all of calendar year 1978. A third shift of private duty nursing was recommended by Dr. [redacted] during acute stays. The record indicates that a third shift was provided from July 22 through July 24, 1978, during a seizure episode.

The beneficiary was sent to Homer D. Cobb Memorial Hospital on July 24, 1978, for tests and returned to Oak Manor, Inc., the same day. The CHAMPUS cost-share for the hospital tests was paid on August 24, 1978.

The nursing notes also indicate that a sitter was in attendance as follows: July 15, 1978, 7-3 shift; August 5, 1978, 7-3 shift and November 24, 1978, 7-3 shift. The record documents that both private duty nurses and sitters provided the same services; and beginning March 19, 1979 the private duty nurses were discontinued and replaced by sitters attending the patient on a daily basis.

As a result of a request for extended inpatient care under the CHAMPUS an OCHAMPUS Initial Determination was issued on April 21, 1977, denying CHAMPUS coverage of the care at the Oak Manor, Inc., skilled nursing facility. By Letter dated August 17, 1978, the sponsor appealed the OCHAMPUS determination on behalf of his incapacitated wife.

The medical record for the period October 20, 1977 through December 31, 1978, was referred to the OCHAMPUS medical consultants with the Colorado Foundation for Medical Care. The physicians, with specialities in neurology, general practice and internal medicine, opined that "the extent of care rendered to this patient is not medically necessary and the skilled nursing level of care is not appropriate. It appears this patient's care could be administered safely at a lower level of care, such as custodial or home. It also appears that private duty nursing care is not medically necessary for two shifts per day, and that two hours per day would be sufficient for the patient's needs in a lower level of care." In addition, the medical consultants opined that the case met the CHAMPUS regulation definition of custodial care. In consideration of the medical consultants opinions, the OCHAMPUS Reconsideration Decision affirmed the Initial Determination denying coverage of the beneficiary's care as being primarily custodial care.

By letter dated June 26, 1979, [redacted], Attorney, requested formal review of the OCHAMPUS decision. The OCHAMPUS Formal Review Decision was issued affirming the previous decision denying CHAMPUS coverage of the care as being primarily custodial

care. The decision further stated that the care was determined to be custodial beginning the 91st day of inpatient care.

A request for hearing was made by \_\_\_\_\_, Attorney for the beneficiary. The Statement of OCHAMPUS Position submitted prior to the hearing placed in issue the entire episode of care at the Oak Manor, Inc. skilled nursing facility, including the private duty nursing care, from October 20, 1977 through September 30, 1978. The Hearing was held on April 29, 1981, at Columbus, Georgia, before \_\_\_\_\_, OCHAMPUS Hearing Officer. The Hearing Officer has issued his Recommended Decision. All levels of administrative appeal have been completed and issuance of a FINAL DECISION is proper.

#### ISSUES AND FINDINGS OF FACT

The primary issues in this appeal are (1) whether the care received by the beneficiary while an inpatient at Oak Manor, Inc. from October 20, 1977 through September 30, 1978 was custodial care, and (2) whether the private duty nursing services received during her confinement at Oak Manor, Inc. met the specific requirements of Department of Defense regulation 6010.8-R for CHAMPUS coverage?

#### Custodial Care

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

"12. Custodial Care. The statute under which CHAMPUS operates specifically excludes custodial care. This is a very difficult area to administer. Further, many beneficiaries (and sponsors) misunderstand what is meant by custodial care, assuming that because custodial care is not covered, it implies the custodial care is not necessary. This is not the case; it only means the care being provided is not a type of care for which CHAMPUS benefits can be extended.

#### a. Definition of Custodial Care.

Custodial care is defined to mean that care rendered to a patient (1) who is mentally or physically disabled and such disability is expected to continue and be prolonged, and (2) who requires a protected, monitored and/or controlled environment whether in an institution or in the home, and (3) who requires assistance to support the essentials of daily living, and (4) who is not under active and specific medical, surgical and/or psychiatric treatment which will reduce the

disability to the extent necessary to enable the patient to function outside the protected, monitored and/or controlled environment. A custodial care determination is not precluded by the fact that a patient is under the care of a supervising and/or attending physician and that services are being ordered and prescribed to support and generally maintain the patient's condition, and/or provide for the manageability of the patient. Further, a custodial care determination is not precluded because the ordered and prescribed services and supplies are being provided by a R.N., L.P.N., or L.V.N.

b. Kinds of Conditions that Can Result in Custodial Care. There is no absolute rule that can be applied. With most conditions there is a period of active treatment before custodial care, some much more prolonged than others. Examples of potential custodial care cases might be a spinal cord injury resulting in extensive paralysis, a severe cerebral vascular accident, multiple sclerosis in its latter stages, or pre-senile and senile dementia. These conditions do not necessarily result in custodial care but are indicative of the types of conditions that sometimes do. It is not the condition itself that is controlling but whether the care being rendered falls within the definition of custodial care.

c. Benefits Available in Connection with a Custodial Care Case. CHAMPUS benefits are not available for services and/or supplies related to a custodial care case (including the supervisory physician's care), with the following specific exceptions:

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

(2) Nursing Services: Limited. It is recognized that even though the care being received is determined to be primarily custodial, an occasional specific skilled nursing service may be required. Where it is determined such skilled nursing services are

needed, benefits may be extended for one (1) hour of nursing care per day.

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

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

(1) Presence of Another Condition.

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

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

. . . . "

It is clear that the beneficiary's care meets the four criteria in the CHAMPUS definition of custodial care. The record reflects that the beneficiary was disabled upon admission to Oak Manor, Inc. on October 20, 1977. Her condition was "comatose with contractures of all extremities" and her mental condition was described as "vegetative". Dr. testified that she was non-communicative -- with no expression whatever. Her discharge planning was listed as "terminal cardiac arrest, due to condition unable to participate in any activities." Dr. further testified at the hearing that her condition was not expected to improve unless "a miracle occurred."

The record clearly establishes both the requirement for a protected, controlled or monitored environment and the requirement for assistance to support the essentials of daily living. Her care consisted of Foley Catheter and UTI care, physical therapy, decubitus ulcer and skin care, positioning to

prevent further contractures, medication by naso-gastric tube, suctioning, monitoring and observation to maintain open airways, and oxygen. In addition, she was described "vegetative", with no ambulation, and unable to participate in any activities.

Finally, the available records, the physicians' statements and the nurses' notes do not establish any active medical treatment designed to reduce the beneficiary's disability to the extent necessary to enable her to function outside the controlled environment. In fact the discharge planning was stated as "terminal cardiac arrest" and Dr.                      opined that only a miracle could cause an improvement in the patient's condition.

The Colorado Foundation for Medical Care reviewed the case and opined that the evidence available indicated the extent of care was not medically necessary and the patient's care could have been administered safely at a lower level of care, such as custodial or home. In their professional opinions, the case records indicated the care met the CHAMPUS definition of custodial care.

Testimony at the hearing did not contradict the custodial nature of the care. Dr.                      indicated that the care had been able to improve the quality of life for the beneficiary, but not much improvement could be otherwise anticipated. Therefore, I find the care furnished to the beneficiary in Oak Manor, Inc., from October 20, 1977 through September 30, 1978 to be custodial care and excluded from CHAMPUS coverage.

As stated in the Regulation, a finding of custodial care does not imply that the care is not necessary. The seriousness of the patient's condition and the need for life support functions are understood. However, the level of care furnished is not the type of care for which CHAMPUS payments can be made.

Pursuant to the above quoted regulation provision, a maximum of one hour per day may be cost-shared for skilled nursing services. Due to the serious physical and mental condition of the beneficiary, it is evident occasional skilled nursing services were required. Therefore, I find the maximum of one hour of skilled nursing services per day allowable.

In addition, the regulation authorizes coverage of prescription drugs when medically necessary to treat a person receiving custodial care. Prescription drugs are defined in DoD 6010.8-R, chapter II, B.138, in part, as:

"... those drugs and medicine ... which by law of the United States require a physician's or dentist's prescription..."

Therefore, all otherwise authorized prescription drugs are payable in this case.



The record reflects that payments were made by the CHAMPUS fiscal intermediary for care furnished the beneficiary as an inpatient in Oak Manor, Inc. Potential recoupment of the difference between the erroneous payments made and the appropriate payments for prescription drugs and one hour of skilled nursing services per day authorized by the FINAL DECISION exists. Therefore, this matter is referred to OCHAMPUS for determination of the correct payment for services in question and initiation of recoupment action if appropriate under the Federal Claims Collection Act.

#### Private Duty Nursing

Even if the beneficiary's case had not been determined primarily to involve custodial care, the private duty nursing care would not have meet criteria for CHAMPUS coverage specified in Department of Defense Regulation 6010.8-R. As defined by the Regulation, private (special) nursing services mean:

"... skilled nursing services rendered to an individual patient requiring intensive medical care. Such private duty (special) nursing must be by an actively practicing Registered Nurse (R.N.) or Licensed Practical or Vocational Nurse (L.P.N. or L.V.N.), only when the medical condition of the patient requires intensified skilled nursing services (rather than primarily provided the essentials of daily living) and when such skilled nursing care is ordered by the attending physician." (DoD 6010.8-R, chapter II, B.142).

Skilled nursing service is defined as:

"... a service which can only be furnished by an R.N. or (L.P.N. or L.V.N.), and required to be performed under the supervision of a physician in order to assure the safety of the patient and achieve the medically desired result. Examples of skilled nursing services are intravenous or intramuscular injections, levin tube or gastrostomy feedings, or tracheotomy aspiration and insertion. Skilled nursing services are other than those services which primarily provide support for the essentials of daily living or which could be performed by an untrained adult with minimum instruction and/or supervision." (DoD 6010.8-R, chapter II, B.161.)

The extent of benefits for private duty nursing is specified in DoD 6010.8-R, chapter IV, C.3.o., in part, as follows:

"Private Duty (Special) Nursing. Benefits are available for the skilled nursing services rendered by a private duty (special) nurse to an individual beneficiary/patient requiring intensified skilled nursing care which can only be provided with the technical proficiency and scientific skills of an R.N. The specific skilled nursing services being rendered are controlling, not the condition of the patient nor the professional status of the private duty (special) nurse rendering the services.

(1). Inpatient private duty (special) nursing services are limited to those rendered to an inpatient in a hospital which does not have an intensive care unit . . . .

(2) The private duty (special) nursing care must be ordered and certified to be medically necessary by the attending physician.

(3) . . . .

(4) Private duty (special) nursing care does not, except incidentally, include services which primarily provide and/or support the essentials of daily living, or acting as a companion or sitter.

(5) If the private duty (special) nursing care services being performed are primarily those which could be rendered by the average adult with minimal instruction and/or supervision, the services would not qualify as covered private duty (special) nursing services regardless of whether performed by an R.N., regardless of whether or not ordered and certified to by the attending physician, and regardless of the condition of the patient.

. . . ."

: As specified in the above quoted regulatory provision, to qualify for CHAMPUS benefits, the private duty nursing services must be skilled services, not services which primarily provide support for the essentials of daily living or could be performed by an average adult with minimal instruction/supervision.

Although Dr. testified that the patient needed skilled nursing -- usually two shifts and at certain times three shifts, the OCHAMPUS medical consultants opined that the private duty nursing care was not medically necessary and that up to two hours

per day would have been sufficient for the patient's needs in a lower level of care.

This medical opinion is supported by the nursing notes of record. Although private duty nurses were initially employed to perform the services, sitters or attendants subsequently replaced the nurses. The record documents that both the nurses and sitters provided the same services, indicating that the services did not require the intensified skilled nursing care which can only be provided with the technical proficiency and scientific skills of an R.N. Any services requiring a R.N. could and should have been provided by the staff of the skilled nursing facility.

More importantly, the above cited regulation provision limits CHAMPUS coverage of inpatient private duty (special) nursing services "to an inpatient in a hospital which does not have an intensive care unit..." Here, the patient was not in a hospital, but in a skilled nursing facility. As such, the skilled nursing facility is expected to furnish the necessary skilled nursing required by the patient and CHAMPUS will not cover private duty nursing care furnished to a patient in a skilled nursing facility.

I have already determined one hour of skilled nursing care per day by the staff of Oak Manor, Inc., from October 20, 1977 through September 30, 1978 was required and authorized under the CHAMPUS custodial care provision of the Regulation. However, I find that the private duty nursing care furnished while the patient was confined in the skilled nursing facility not to be covered by CHAMPUS because the care was not medically necessary and CHAMPUS does not cost-share private duty nursing services furnished to an inpatient in a skilled nursing facility. The private duty nursing services, therefore, do not meet the CHAMPUS regulation criteria as authorized care. If any CHAMPUS payments have been made for private duty nursing services in this case, appropriate recoupment action should be taken by OCHAMPUS under the Federal Claims Collection Act.

## SECONDARY ISSUES

### Eligibility

The beneficiary continued to receive care in Oak Manor, Inc. subsequent to September 30, 1978; however, claims for that care are not in issue in this appeal. The Hearing File of Record contains documentation of the beneficiary's entitlement to Medicare, Parts A and B, effective October 1, 1978. The Military Medical Benefits Amendments of 1966, Public Law 89-614, denies CHAMPUS eligibility to any dependent of a military retiree when that dependent is entitled to Medicare, Part A. As implemented by DoD 6010.8-R, chapter IV, E.3.f., dependents of military retirees lose their eligibility for CHAMPUS if, because of disability, they become entitled to Medicare, Part A.

The loss of CHAMPUS eligibility is by operation of law and is not a matter of dispute under the CHAMPUS appeals and hearing procedures established by DoD 6010.8-R, chapter X. Therefore, only the period of care from October 20, 1977 through September 30, 1978 has been considered in this FINAL DECISION.

#### Other Care

As previously discussed in this FINAL DECISION, once a case is determined to involve custodial care only certain specified benefits are authorized under the CHAMPUS regulation. DoD 6010.8-R, chapter IV, E.12.c., states, in part,

"CHAMPUS benefits are not available for services and/or supplies related to a custodial care case (including the supervising physician's care), with the following specific exceptions: (emphasis added)"

The exceptions for payment of prescription drugs and one hour of skilled nursing care per day have previously been discussed. However the Hearing File of Record is silent regarding the receipt and adjudication of claims for the services of attending physicians or other medical personnel. In addition, it is noted the the patient was returned to the hospital on at least one occasion during the period in dispute. Claims related to this care can be paid only upon documentation of a medically necessary hospital admission for an acute exacerbation of the condition for which custodial care is being received or hospitalization for treatment of some other condition.

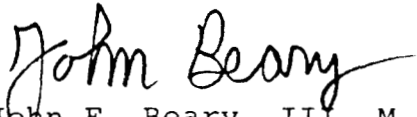
As specified in the above cited provision of the CHAMPUS regulation, any claims for services or supplies related to a custodial care case which do not meet the limited exceptions should have been denied. The Director, OCHAMPUS should have the claims file in this case reviewed to verify the payment only of proper claims in accordance with the Regulation. Any claims on which erroneous payments were made should be appropriately processed under the Federal Claims Collection Act.

#### SUMMARY

In summary, it is the FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) that, except for authorized prescription drugs and one hour of skilled nursing care per day, care furnished the beneficiary while an inpatient at Oak Manor, Inc., from October 20, 1977 through September 30, 1978, is excluded from CHAMPUS coverage because it is primarily custodial care and because the private duty nursing services do not qualify under the applicable regulation criteria. This decision does not imply that all the services were not necessary; it only means that the care received is not the type of care for which CHAMPUS payments can be extended. While I realize the overwhelming problems associated with the case of an incapacitated

individual, I am bound to adjudicate CHAMPUS claims in accordance with statutory limitations and regulatory confines.

The matter of appropriate payment and consideration of recoupment actions are referred to OCHAMPUS by this FINAL DECISION. Issuance of this FINAL DECISION completes the administrative process under DoD 6010.8-R, chapter X, and no further administrative appeal is available.

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