HEALTH AFFAIRS

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

MAR 29 1983

BEFORE THE OFFICE, ASSISTANT

SECRETARY OF DEFENSE

(HEALTH AFFAIRS)

UNITED STATES DEPARTMENT OF DEFENSE

Appeal of	)	
	)	
Sponsor:	)	OASD(HA) File 82-12
	)	FINAL DECISION
SSN:	)	
	)	

This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPUS appeal OASD(HA) Case File 82-12 pursuant to 10 U.S.C. 1071-1089 and DoD 6010.8-R, Chapter X. The appealing party in this case is the beneficiary, represented by the CHAMPUS sponsor.

The appeal involves the question of CHAMPUS coverage of inpatient psychiatric care provided the beneficiary from August 10, 1979 to March 7, 1980 and from March 10, 1980 to July 7, 1980. The total hospital charge incurred by the beneficiary for these dates was $50,570.39 and the total physician's charge was $17,720.00. The CHAMPUS fiscal intermediary denied coverage because the hospitalization and medical services were for mental retardation and custodial care which is not a CHAMPUS medical benefit.

The Hearing File of Record, the tapes and oral testimony presented at the hearing, the Hearing Officer's Recommended Decision and the Analysis and Recommendation of the Director, OCHAMPUS have been reviewed. Other insurance available through the parent's employment paid as primary coverage all charges except $1,119.00 in hospital charges and $776.00 in physicians charges. The CHAMPUS amount in dispute, therefore, is $1,895.00.

It is the Hearing Officer's recommendation that CHAMPUS coverage for inpatient care and professional services from August 10, 1979 to March 7, 1980 and from March 10, 1980 to July 7, 1980 be denied because it is custodial care, care for minimal brain dysfunction, above the appropriate level and not medically necessary. The psychiatric hospitalization from April 13, 1979 to July 24, 1979 does qualify for CHAMPUS benefits. The Director, OCHAMPUS concurs in the Recommended Decision and recommends its adoption as the FINAL DECISION of the Acting 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 payment for care and services rendered from August 10 1979 to March 7, 1980 and from March 10, 1980 to July 7, 1980 and hereby adopts the recommendation of the Hearing Officer as the FINAL DECISION. The FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) is therefore to approve CHAMPUS coverage for inpatient care for psychiatric hospitalization from April 13, 1979 to July 24, 1979, and to deny coverage from August 10, 1979 to March 7, 1980 and March 10, 1980 to July 7, 1980. The decision to deny coverage from August 10, 1979 to March 7, 1980 and March 10, 1980 to July 7, 1980 is based on the findings that such care was custodial care, related to minimal brain dysfunction (which is specifically excluded from coverage), not medically necessary and above the appropriate level of care.

FACTUAL BACKGROUND

The beneficiary, two and one-half to three years after his birth, contracted chicken pox which was complicated by severe encephalitis. The disease left him temporarily blind, deaf and with severe motor disturbances. Prior to contacting encephalitis, the beneficiary's development was normal. Afterwards his development was abnormal in terms of psychosocial development. Because of his mental retardation the beneficiary has spent much of his life in institutions.

Shortly after the discovery of his mental retardation he was placed under the care of the . He remained their for almost two years where his progress was slow and he was unable to learn. In January 1972 the child was placed in the . Here he made excellent progress and was released on August 31, 1973 to return to his family.

After returning to his family he was placed in the for Mentally Retarded Children. The child did well in the classroom setting and the teacher felt he was making progress. However he was a problem going to and from school, at home, and in the neighborhood. As a result of these problems, coupled with the mental retardation, a Navy doctor recommended the child be placed in a residential school and treatment center.

He was placed in , a mental retardation facility, where he remained for approximately a year. officials felt he was ready for placement in a foster home; however, his parents objected to this and enrolled him in a mental retardation school.

On April 13, 1979 the beneficiary at age 14, was first placed in . He was transferred to this hospital as an emergency from the County Hospital for being totally unmanageable and uncontrollable at home. The admission diagnosis was behavioral disorder of adolescence and mild mental retardation (secondary to encephalitis at age two). The child

progressed reasonably well; but, just prior to his anticipated discharge date, he developed viral infection. He was referred to a pediatrician who admitted him to the pediatric service of Hospital on July 24, 1979 for evaluation and management of seizures and possible meningitis. He was discharged on August 10, 1979; his diagnosis at discharge was (1) Behavioral disorder of adolescence, unsocialized behavior (secondary to mental retardation) and (2) Mild mental retardation secondary to early age encephalitis. The hospitalization from April 13, 1979 to August 10, 1979 was for medically necessary care and is not in issue in this appeal.

Upon Discharge from the pediatric service, the patient was readmitted to the child/adolescent unit of Hospital as an emergency because he was unmanageable and uncontrollable in the pediatric service. The child was once again placed under the care of a psychiatrist. The admission diagnosis for the August 10, 1979 hospitalization was unsocialized aggressive reaction of adolescence with a complication of mental retardation (secondary to encephalitis).

During the course of this hospitalization the patient received a wide range of treatment modalites for his unsocialized behavior, hyperactivity, physical handicaps, enuresis, and school and learning problems. When discharged the attending physician noted that the patient had partially improved but was in need of long-term hospitalization due to the "... chronicity of illness and the presence of numerous behavioral problems..."

Within three days of the last discharge (March 7, 1980) the child was once again admitted to Hospital for treatment of the same problems diagnosed at the previous admission. During the course of this hospitalization the child received medication to control his severe impulsive behavior. The medication included Benadryl, Ritalin, Mellauil, and Thorazine. He also participated in individual psychotherapy, play therapy, group therapy, occupational therapy, and recreational therapy. On July 8, 1980 the child was discharged to the care of his parents. He was prescribed 50 mg b.i.d. of Thorazine and 10 mg a.m. of Ritalin. The attending physician indicated the patient had improved but prognosis was guarded with respect to the mental retardation and the visual and hearing defects. He recommended that the patient be referred to for emotionally disturbed children.

CHAMPUS claims for the one hundred two day hospitalization (April 13, 1979 to July 24, 1979) were filed with the CHAMPUS Fiscal Intermediary, Blue Shield of California. The hospital and doctor were informed that their claims for this period were denied because services and/or supplies for mental retardation are not payable benefits under the CHAMPUS program. This decision was upheld during Informal Review and Reconsideration levels of appeal by the fiscal intermediary.

While this review was pending additional claims were received covering the hospitalization from August 10, 1979 to March 7, 1980 and from March 10, 1980 to July 7, 1980. The fiscal intermediary denied these hospital and physician claims on the basis that services and supplies for mental retardation are not payable benefits under the CHAMPUS program. The fiscal intermediary did cost share the claims submitted by the attending physician for individual psychotherapy through December 1, 1979.

Prior to conducting the first level appeal, OCHAMPUS referred the case to the CHAMPUS Psychiatric Peer Review, American Psychiatric Association, for review and consideration. It was the opinion of the reviewing psychiatrist that the inpatient care from August 10, 1979 to March 7, 1980 and March 10, 1980 to July 7, 1980 was not medically necessary, above the appropriate level of care, custodial/domiciliary care, and care for Organic Brain Syndrome.

As a result of the OCHAMPUS review at the first level appeal it was determined that the psychiatric hospitalization from April 13, to July 24, 1979 did qualify as a CHAMPUS benefit as medically necessary. However, the hospitalization from August 10, 1979 to March 7, 1980 and from March 10 to July 7, 1980 could not be cost-shared because it was custodial care for mental retardation and above the appropriate level of care.

Because the last two periods of hospitalization were denied, a request for hearing was submitted. During the pre-hearing review OCHAMPUS discovered that the beneficiary's mother had family insurance through her employer which was primary payor on all claims submitted from April 13, 1972 to July 7, 1980.

The coordination of benefits review resulted in a recovery of CHAMPUS payments from Blue Shield of Florida and Aetna Life Insurance Company. Thus, all amounts billed were covered by the primary insurance except for $1,119.00 for hospitalization during March 10, 1980 to July 7, 1980 and $776.00 in doctor bills during the period of August 10, 1979 to July 7, 1980. As secondary payer, CHAMPUS will pay these amounts provided they are otherwise covered benefits. However, CHAMPUS had previously determined that the medical services rendered during these periods was not medically necessary, custodial care and above the appropriate level of care.

A hearing was held by , Hearing Officer, on October 15, 1982. The Hearing Officer has submitted his Recommended Decision and all prior levels of administrative reviews have been exhausted. Issuance of a FINAL DECISION is proper.

ISSUES AND FINDINGS OF FACT

The primary issue in this appeal is whether the inpatient care received at Hospital and the professional services provided by Dr. from August 10, 1979 to March 7, 1980 and from March 10, 1980 to July 7, 1980 are authorized care under

CHAMPUS. In resolving this issue it must be determined (1) whether the care rendered during the periods in issue was custodial care and thus excluded from coverage, (2) whether the care and services provided during the periods in issue are services and supplies related to minimal brain dysfunction and thus excluded from coverage, and (3) whether the care for the periods in issue were medically necessary and provided at the appropriate level of care.

Custodial Care

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

> ...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 managebility 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.

Based on the Hearing File of Record, it is clear that the beneficiary's inpatient care from August 10, 1979 to March 7, 1980 and from March 10, 1980 to July 7, 1980, meets the criteria in the CHAMPUS definition of custodial care. First, the beneficiary suffers from a mental disabiltiy which is expected to continue through the patient's lifetime. The patient required a protected, monitored and controlled environment to maintain the patient's condition, without which the chronic condition would likely deteriorate and regress. The patient required assistance to support the essentials of daily living available within a structured and supervised environment to compensate for his poor personal hygiene manifested by poor eating habits and inability

to care for himself. Finally, the treatment plans were primarily to maintain the patient and did not include active medical or psychiatric treatment which would reduce the patient's disability to the extent necessary to enable the patient to function outside the protected, monitored and controlled environment.

The nurses' notes for the two periods of hospitalization (209 days) indicate that treatment was limited to psychiatric and nueological evaluation. The hospital staff, when establishing the treatment plan, targeted five problem areas.

The first area, unsocialized behavior manifested by defiance of authority or rules, destruction of property, cruelty to peers or animals, frequent temper tantrums, and implusiveness, was partially improved but only because the child was in a well supervised and well structured environment of the hospital. The attending physician stated this problem was chronic and deeply rooted and likely to deteriorate and regress if not continued in a controlled environment. The medication which was prescribed during the hospitalization was Bendaryl, Mellanil and Haldol for severe impulse disorders and destructive behavior. As stated by the physician the treatment for this problem merely maintained the patient and did not enable him to function outside the protected and controlled environment of the hospital.

The second problem targeted for treatment was maniac like behavior manifested by hyperactivity and clownish, noisy and demanding behavior. This problem was primarily addressed by chemotherapy. However, the nurses notes and discharge summary do not indicate the treatment reduced the problem to such a level to allow the patient to function outside a controlled environment.

The third problem, physical signs and symptoms manifested by speech defect, seizure, physical handicap and enurosis, was treated and responded primarily to the controlled setting of the hospital. Once out of the hospital the patient regressed.

The fourth problem under treatment was poor personal hygiene manifested by poor eating habits and inability of the patient to care for himself. This problem responded favorably only when the patient was in the well structured and well supervised environment of the hospital.

The final problem under the treatment plan was school and learning deficiencies manifested by reading, writing and math difficulties, impulsiveness, short attention span, poor concentration, failure to achieve and a history of mental retardation. This problem was treated by a teacher who specialized in teaching emotionally disturbed children. In addition to the teacher, a speech therapist from the hospital assisted with the education program.

It is clear from this treatment plan and the progress notes provided by the attending physician that the care provided this mentally retarded child was primarily in support of the

essentials of daily living in a controlled environment. Although the patient showed some improvement while in the hospital, the treatment plans would not reduce this beneficiary's disability to a level where he could function outside the controlled environment of the hospital. In fact the opposite is true. As stated by the physician, the patient is very vulnerable to a nonsupervised environment and cannot be managed at home. Further, he recommended long-term hospitalization due to the "...chronicity of illness and the presence of numerous behavioral problems.."

The fact the patient was also hospitalized for mental illness does not alter the finding that the hospital care for the period was custodial care because the hospitalization was provided to assure the manageability of the patient. This is borne out by the discharge summary and nurses' notes which indicate the treatment plan was designed mainly to assure the manageability of the patient.

OCHAMPUS obtained the professional opinion of a child psychiatrist under the auspices of the American Psychiatric Association CHAMPUS Peer Review Project. The specialist in psychiatry and child psychiatry opined that the first sixty days (i.e. the hospitalization from April 13 1979 to July 24, 1979) was necessary and not custodial care. However, with respect to the hospitalization after that period, it is his opinion that the remainder of the hospitalization was for maintenance of behavioral control, custodial in nature, and above the appropriate level of care (patient should have been referred for long term placement within 60 days of acute care).

The reviewing psychiatrist also indicated the patient suffers from chronic Organic Brain Syndrome with severe mental retardation which will probably last the patient's life and the repeated hospitalizations were a result of the patient's inability to be maintained outside a controlled environment.

According to the information contained in the Hearing File of Record, this patient could not be maintained at home and was returned to the hospital because he could only be controlled in this type of environment. As indicated by the admitting physician, the beneficiary was readmitted on March 10, 1980 because he was uncontrollable and unmanageable at home.

Having determinted that the inpatient care from August 10, 1979 to March 7, 1980 and from March 10, 1980 to July 7, 1980, is excluded from CHAMPUS coverage as custodial care, it is necessary to determine if any of the inpatient care may be cost-shared. DoD 6010.8-R, chapter IV, E.12.c. provides:

> c. <u>Benefits Available in Connection with a Custodial Care Case</u>. 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.

In view of this provision, the supervising physician's claims must be denied once a determination of custodial care has been made. However, all prescription drugs which are otherwise medically necessary may be cost-shared. If the hospital can itemize the prescription drugs and submit a separate CHAMPUS claim, it may be cost-shared.

Under the Regulation, up to one hour of skilled nursing care per day may be authorized in a custodial care case. DoD 6010.8-R, chapter 11, defines skilled nursing services as follows:

> "... 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."

As previously noted, the nurses' notes indicate that treatment was limited to psychiatric and neurological evaluation. The record does not document skilled nursing services authorized under CHAMPUS were furnished in this case. Therefore, none of the nursing services may be cost-shared under the custodial care provisions.

Medical Necessity/Appropriate Level of Care

The Department of Defense Appropriations Act, 1979, Public Law 95-457, prohibits the use of CHAMPUS funds for "... any service or supply which is not medically or psychologically necessary to prevent, diagnose or treat a mental or physical illness, injury or bodily malfunction as assessed or diagnosed by a physician, dentist, [or] clinical psychologist,..." This restriction has consistently appeared in each subsequent Department of Defense Appropriation Act.

Department of Defense Regulation DoD 6010.8-R, in paragraph B. 104, Chapter II, defines medically necessary 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 concept of appropriate medical care."

Under these statutory and regulatory provisions, the inpatient care in question must be found to be medically necessary (essential) for the care or treatment of a diagnosed condition.

A thorough review of the Hearing File of Record leads me to conclude that hospitalization for the periods of August 10, 1979 to March 7, 1980 and March 10, 1980 to July 7, 1980 was not medically necessary in the treatment of this patient. It appears the patient was in need of long term care and was placed in the hospital because he was unmanageable at home. As a result of my review, I find that the record fails to document the medical necessity of the inpatient care at Hospital from August 10, 1979 to March 7, 1980 and March 10, 1980 to July 7, 1980. While this youth may have required some treatment, inpatient care in this hospital was not essential for the care of the patient or the treatment of the patient's medical condition and was above the appropriate level of care. As opined by the psychiatric consultant, the patient should have been referred for long term placement and not retained in the acute hospital setting after the first 60 days (April 13, 1979 to July 24, 1979) of acute care. The inpatient care does not meet the requirements of the Department of Defense Appropriations Acts, or the CHAMPUS regulation and is not authorized CHAMPUS care.

Minimal Brain Dysfunction/Organic Brain Syndrome

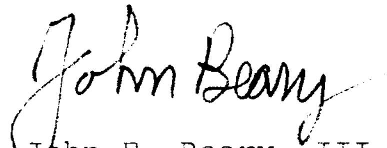
Supplies and services related to minimal brain dysfunction are specifically excluded CHAMPUS benefits (DoD 6010.8-R, Chapter IV, Paragraph G. 32). The patient was diagnosed as having minimal brain dysfunction on at least five occassions. A review of the

treatment plans formulated by the attending physician for both hospitalizations in question indicate the treatment was basically to treat the patient's handicaps resulting from the minimal brain dysfunction.

Based on the testimony, documentation and professional opinions, I find that the hospitalization from August 10, 1979 to March 7, 1980 and March 10, 1980 to July 7, 1980 was primarily care for minimal brain dysfunction, thus excluded under CHAMPUS.

SUMMARY

In summary, it is the FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) that the inpatient care at Hospital for the dates August 10, 1979 to March 7, 1980 and March 10, 1980 to July 7, 1980 be denied as the care is not medically necessary, above the appropriate level of care, excluded care for minimal brain dysfunction, and custodial care. Therefore, the claims for hospitalization and professional services for this period are denied. If prescription drugs during the period of hospitalization can be itemized and a separate claim filed, coverage may be authorized under the custodial care provision. However, such a claim must specifically itemize payments made by other insurance as primary coverage for the prescription drugs. Issuance of the 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