



ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

HEALTH AFFAIRS

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

AUG 23 1983

UNITED STATES DEPARTMENT OF DEFENSE

Appeal of)	
)	
Sponsor:)	OASD(HA) FILE 83-20
)	FINAL DECISION
SSN:)	

This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPUS Appeal OASD(HA) Case File 83-20 pursuant to 10 U.S.C. 1071-1089 and DoD 6010.8-R, chapter X. The appealing party is the CHAMPUS beneficiary, a retired Sergeant First Class of the United States Army. The beneficiary was represented at the hearing by his wife, pursuant to a general power of attorney. The appeal involves inpatient care received in a skilled nursing facility, Convalescent and Nursing Care Center, from May 19, 1981 to July 30, 1981. The amount in dispute is the billed charges of \$2,422.80 (\$33.65 per day).

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 First Level Appeal determination denying coverage of the beneficiary's care as being custodial, domiciliary and above the appropriate level of care be upheld. The Director, OCHAMPUS, concurs with the Hearing Officer's Recommended Decision and recommends issuance of a FINAL DECISION denying CHAMPUS cost-sharing for the entire period of care in the skilled nursing facility as being custodial, domiciliary, and above the appropriate level of care.

The Acting Assistant Secretary of Defense (Health Affairs), after due consideration of the appeal record, concurs with the Director, OCHAMPUS, and adopts the Recommended Decision of the Hearing Officer as the FINAL DECISION.

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 Convalescent and Nursing Care Center from May 19, 1981, through July 30, 1981, as custodial care, as domiciliary care, and not skilled nursing care as defined in the Regulation and, therefore, above the appropriate level of care.

FACTUAL BACKGROUND

The beneficiary was admitted to a skilled nursing facility on May 19, 1981, due to the effects of progressive spinocerebellar degeneration with ataxia. The beneficiary remained in the facility until July 30, 1981, when he was transferred to a Veterans Administration nursing center.

The record reflects that the beneficiary had increasing symptomatology of spinocerebellar degeneration. The beneficiary began to exhibit problems with gait approximately five years prior to a January 1981 evaluation by the military treatment facility at Fort Hood, Texas. This was followed by progression of symptomatology to include dysarthria, memory lapses, tremor, decreased coordination and mood swayings. The beneficiary was hospitalized at Fort Hood from January 8, 1981, to January 21, 1981. The Army physician noted that, "The possibility of nursing home care was discussed with the patient's wife who wishes to maintain her home environment as long as possible; therefore, patient is discharged to home on 21 Jan 81."

On April 29, 1981, the beneficiary was readmitted to the facility at The history of this admission indicated, "Patient has a five year history of rapidly progressing spinocerebellar degeneration with ataxia, and mental status changes with secondary neurogenic bladder with incontinence." The primary cause of admission was "acute upper GI bleed, secondary to erosive esophagogastritis." The hospital notes state that, "On the 30th of April the patient underwent an esophagogastro-duodenoscopy which revealed gastroesophageal reflux with erosive gastritis and a small esophagogastic ulcer. The patient was started on Tagamet and showed no further evidence of GI bleed during hospitalization, with resolution of acute problems. Patient was maintained in the hospital until nursing home placement could be obtained. This has been arranged by his wife, and he was discharged on 29 April 1981 [sic] to a nursing home."

The CHAMPUS nursing home certification, dated July 16, 1981, and signed by the treating physician at , Dr. , states:

"Specific needs of patient which in your opinion require nursing skills... include type(s), frequency and duration of nursing services: Resident totally dependent on staff for all physical needs (24 hour professional care - skilled) must be fed, bathed, dressed and assisted totally to wheel chair."

Collateral treatment (frequency and type) currently or to be provided by other than nursing personnel...: Physician will be advised as needed for adjustments in medication....

Additional information/comments on patient's need for nursing care: condition will be more debilitating.

How long do you anticipate this patient will require skilled nursing care... indefinitely (due to deteriorating disease)."

In a letter dated March 25, 1982, the physician for stated, "During admission in Nursing Home, [the beneficiary] was at times combative, 'refused' medication, was totally dependent on staff for all physical and medical needs. Required wheel chair for most mobilizations - waist restraints required while in chair due to physical instability." In a February 20, 1982, letter, Dr. of the Veterans Administration stated the beneficiary required skilled care. He went on to state, "custodial care implies basic provision of room and board and minimal supervision: He requires much more than this."

During the beneficiary's stay at Convalescent and Nursing Care Center, a claim was submitted for the period from May 19, 1981, to July 19, 1981, in the billed amount of \$2,052.65. Upon the beneficiary's discharge, this was amended to cover the period from May 19, 1981, to date of discharge, July 30, 1981, with billed charges totaling \$2,422.80 which were computed at \$33.65 per day.

The claim was denied by the CHAMPUS fiscal intermediary and the beneficiary appealed. The OCHAMPUS First Level Appeal Decision, dated August 24, 1982, determined that the care provided the beneficiary from May 19 through July 30, 1981, at the skilled nursing facility was custodial, domiciliary, and above the appropriate level of care and, therefore, excluded from CHAMPUS cost-sharing. The beneficiary appealed and requested a hearing.

The First Level Appeal determination was based in part upon a medical review by the Colorado Foundation for Medical Care. Review was conducted by two medical doctors both specialists in internal medicine. The medical reviewers stated:

"The documentation of this patient shows that there was marked cerebellar impairment, dysarthria and his extremities were very rigid. A CT scan has shown diffuse atrophy and increased ventricular size. He required total assistance to feed, bathe, dress, turn, lift and help with toilet needs. He required a wheelchair with restraints for mobilization and had secondary neurogenic bladder with incontinence.

....

The documentation shows this patient was mentally and physically disabled and disability was expected to continue and be

prolonged. Disability consisted of marked mental impairment, speech impairment, and inability to use his arms and legs. The evidence shows that his condition was getting worse and was considered terminal in nature.

... he was totally dependent on others for his needs and thus required a protected, monitored, and controlled environment.

... the documentation shows this patient required total support with activities of daily living including feeding, dressing, ambulation and hygiene.

... the care provided during this nursing home stay was not active and specific to reduce the patient's disability. It doesn't appear that he was expected to get better to the extent that he would no longer require a protected, monitored and controlled environment. One physician wrote that his condition is progressive and terminal in nature.

No evidence was shown that the patient required any specific skilled nursing services. He did require assistance with nearly every activity of daily living, but this kind of assistance is not skilled care requiring the technical expertise of a registered nurse.

... The care could have been provided in the patient's home or in a custodial care facility so long as there were interested people available to meet the patient's daily needs. He did not require skilled nursing care."

The record includes a letter dated November 4, 1982, from an Army physician who is the Chief, In-patient Neurology, Army Medical Center. The letter states:

"[the beneficiary] was a patient of mine at , Texas from July 1980 until entering the nursing home in May 1981. The decision to place [the beneficiary] in a nursing home was generated because his deteriorating condition warranted close chronic nursing supervision and care, which our hospital was no longer able to supply, and which was physically impossible for [the beneficiary's wife] to render.

It is true that [the beneficiary] primary diagnosis is one for which no treatment is known. However, like many similar degenerative neurologic diseases death most often arrives prematurely because of acute or chronic infections which can be treated appropriately with antibiotics and skilled nursing care including such procedures as proper suctioning, and bladder care. ... It is very easy to overlook potentially treatable secondary infections when the primary disease is degenerative in nature. It should be stressed that infections in such circumstances are more the rule than the exception.

In this respect, it will be most appreciated if you would reconsider his care as being more than simply custodial...."

The hearing was held in _____, Texas on January 4, 1983, before OCHAMPUS Hearing Officer, Mr. _____. The beneficiary was represented by his wife, who has a general power of attorney on behalf of the beneficiary. The Hearing Officer has issued his Recommended Decision and issuance of a FINAL DECISION is proper.

ISSUES AND FINDINGS OF FACT

Custodial Care

Under the CHAMPUS law, 10 U.S.C. 1077(b)(1), custodial care is specifically excluded from CHAMPUS cost-sharing. DoD #10.8-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.

. . . . "

The record contains a letter from Dr. _____ of the Veterans Administration which states, in part:

"... custodial care implies basic provisions of room and board and minimal supervision. [The beneficiary] requires much more than this."

Dr. _____ obviously was not using the above cited regulation definition of custodial care which is the only definition that can be considered in determining CHAMPUS coverage. The record in this appeal must be reviewed under the four criteria specified in the CHAMPUS definition of custodial care.

- o Mentally or physically disabled and such disability is expected to continue and be prolonged.

The record in this appeal clearly establishes the beneficiary was physically disabled and the disability was expected to continue and be prolonged. The CHAMPUS nursing care certification signed by the nursing home physician indicated that the beneficiary was totally dependent on the staff for all physical needs. It went on to indicate the beneficiary was conscious but unable to communicate, that his condition was indefinite but will be more debilitating due to the disease. One of the Army physicians who treated the beneficiary while he was at _____ stated that his condition warranted close chronic nursing supervision and care. The medical reviewers for the Colorado Foundation for Medical Care concluded that the beneficiary was mentally and psychologically disabled and the disability was expected to continue and be prolonged. The disability consisted of marked mental impairment, speech impairment and inability to use his arms and legs. The condition was getting worse and was considered terminal in nature. At the hearing both the wife of the beneficiary and a witness on her behalf, Mrs.

_____, R.N., the Director of Nursing at the Convalescent and Nursing Care Center, agreed that the beneficiary's condition was within the above criteria.

- o Requires a protected, monitored and controlled environment whether in an institution or in the home.

In reviewing the record in this appeal, I must also agree with the Hearing Officer that the beneficiary required a protected, monitored and controlled environment. The record reflects the beneficiary required assistance with his meals, bathing, dressing, and his personal and sanitary needs. The beneficiary due to his condition would frequently refuse his medication and it was difficult to administer his medication. Often times it would require two or three persons to place the beneficiary in his wheelchair and he needed to be restrained at the waist while he was in his wheelchair to prevent his falling. At the hearing Mrs _____, R.N., testified that the beneficiary required a protected, monitored and controlled environment.

- o Assistance to support the essentials of daily living.

That the beneficiary satisfies this criteria is also well documented in the record. The nursing certification signed by the physician states the beneficiary was, "Totally dependent on staff for all physical needs." The certification goes on to state that the beneficiary "must be fed, bathed, dressed, and assisted totally to wheelchair." The medical reviewers stated assistance with the essentials of daily living was required. The Hearing Officer also reached this conclusion and the testimony of Mrs. _____, R.N., supported this conclusion. I must also agree and adopt the findings of the Hearing Officer that this criteria was met.

- o Not under active and specific medical, surgical and/or psychiatric treatment which would reduce the disability to

the extent necessary to enable the beneficiary to function outside of a protected, monitored, and/or controlled environment.

Under this criterion, the treatment plan at the skilled nursing facility must be designed to reduce the disability to enable the beneficiary to live outside a protected environment. A protected environment (custodial care) can exist equally in an institution or in the home. A determination on this criterion requires analysis of the care rendered to the beneficiary and the medical opinion regarding his prognosis.

The nursing care certification states that the condition of the beneficiary will become more debilitating. A letter in support of the beneficiary from Major , an Army physician, states that, "It is true that [the beneficiary's] primary diagnosis is one for which no treatment is known." The medical reviewers concluded that, "The care provided during this nursing home stay was not active and specific to reduce the patient's disability. It doesn't appear that he was expected to get better to the extent he would no longer require protected, monitored, and controlled environment." Initially Mrs. , R.N., testified that she did not know whether there was specific treatment though she did not enumerate any specific treatment. She then noted it was a progressive disease and that with the diagnosis and the beneficiary's medical history, that it was not specific treatment. There simply is no evidence in the record that indicated the beneficiary was receiving any active specific treatment designed to reduce his disability. This requirement is clearly distinguishable from the beneficiary's need for care and medication due to his illness.

The Hearing Officer concluded that this criterion was met. In view of the above, I also find the beneficiary was not under active and specific medical care which would reduce the beneficiary's disability to the extent necessary to enable the beneficiary to function outside a protected environment.

In summary, analysis of the entire record in this appeal establishes the beneficiary's care at the skilled nursing facility met the four criteria of custodial care as defined in DoD 6010.8-R. The testimony by the witnesses at the hearing offered no contradiction to this conclusion but rather either supported the conclusion or conceded the beneficiary's care met the four criteria of the CHAMPUS definition of custodial care. The Hearing Officer concluded the care was custodial and I adopt his recommendation. Therefore, I find the care from May 19, 1981, through July 30, 1981, is excluded from CHAMPUS coverage as custodial care.

Skilled Nursing Care

Under DoD 6010.8-R, chapter IV, E.12, the regulation provides that, even though the care received is determined to be

custodial, benefits may be extended for up to one hour of skilled nursing care per day. Skilled nursing care is defined in DoD 6010.8-R, chapter II, B. 161, as:

"... a service which can only be furnished by an RN (or LPN or LVN), 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 feeding, 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 minimal instruction and/or supervision. (DoD 6010.8-R, chapter II, B.161.)

The beneficiary's representative and the Director of Nursing from initially contended the beneficiary required and received skilled nursing care. Mrs. , the Director of Nursing, initially based her opinion that it was skilled nursing care on a Medicare classification of skilled nursing. After reviewing the CHAMPUS definition of skilled nursing she stated that the care rendered at Bell Haven did not satisfy the CHAMPUS definition. Review of the care provided reveals that skilled nursing care was not the primary focus of the confinement. Rather assistance in ambulation, personal care, monitoring of vital signs, and administration of medication and assistance with sanitary needs were the primary services rendered. This type of care does not qualify as skilled services under the CHAMPUS definition. The services did not require the skills of a registered nurse and primarily provided support for the essentials of daily living. Mrs. testimony indicated that she considered the need for monitoring and observation of the patient as the primary need for professional care. However, the patient's requirement for general observation by nursing personnel is not the equivalent of specific medical treatment nor does it constitute the type of care that comes within the CHAMPUS definition of skilled nursing.

The Hearing Officer concluded there was no evidence that any skilled nursing services were rendered and therefore none of the care qualifies for CHAMPUS coverage under the one hour of skilled nursing care per day exception allowed in custodial care cases. This conclusion is supported by the medical reviewers from the Colorado Foundation for Medical Care who opined that no evidence existed indicating that the patient required any specific skilled nursing services. The beneficiary did require assistance with nearly every activity of daily living but this kind of assistance is not skilled care requiring the technical expertise of a registered nurse. Therefore, I must agree, based on the record, with the Hearing Officer and find that the care rendered was not skilled nursing care under DoD 6010.8-R.

Appropriate Level of Care

Under DoD 6010.8-R, chapter IV, B.1.g., the level of institutional care for which CHAMPUS beneficiaries may be extended cost-sharing 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 under DoD 6010.8-R, chapter IV, G.3 from CHAMPUS coverage.

The Hearing Officer found that the testimony of the Director of Nursing and that of the beneficiary's representative did not furnish evidence that the level of care rendered by was medically necessary or appropriate for the beneficiary's condition. He found that their testimony clearly supports the conclusion of the OCHAMPUS First Level Review and the medical reviewers, and concluded that the care provided was above the appropriate level of care and not appropriate nor medically necessary.

The services documented in the medical record could have been provided in a nursing home or at the beneficiary's home. Since the services were not primarily skilled services, I must conclude a skilled nursing facility was not required. Based on the evidence of record, I found the care during the period in issue could have been provided at a lower level of care and therefore is excluded from CHAMPUS coverage under the above cited authorities.

Secondary Issue

Under CHAMPUS law, 10 U.S.C. 1077, domiciliary care is specifically excluded from CHAMPUS coverage. The CHAMPUS regulation implements the statutory exclusion in DoD 6010.8-R, Chapter IV, G.8. In Chapter IV, E.13.a domiciliary care is defined as:

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

The record reflects the beneficiary's wife cared for him in her home as long as she was physically able to do so. Due to the progressive nature of his disease, a greater need for monitoring

was required, which the beneficiary's wife could not perform on a 24-hour-per-day basis. Nor could she by herself physically assist the beneficiary with ambulating and transferring him from his bed to his wheelchair or by herself persuade the beneficiary to take his medication.

The unfortunate conclusion is the beneficiary's condition had deteriorated to where one person could no longer take care of him in the home. This does not make confinement in a skilled nursing facility medically necessary.

The Hearing Officer found that the testimony of the beneficiary's wife at the hearing indicated that her principal concern, beyond the 24-hour-per-day observation which was needed, was that she could not physically lift her husband from his bed to a wheelchair. He went on to conclude this function obviously requires little training or experience and could have been provided by interested persons other than trained professionals at a skilled nursing facility. The Hearing Officer concluded that the care provided was domiciliary care and excluded from CHAMPUS benefits under DoD 6010.8-R. Based upon the record, I must agree with the Hearing Officer.

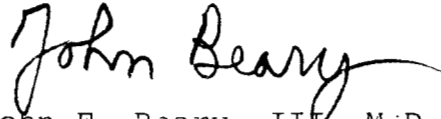
Prescription Drugs

The Regulation provides that 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. The record reflects that the beneficiary was receiving one prescription drug Tagamet. No claim has ever been submitted for this prescription. It may have been that the nursing facility included the costs of the prescriptive drug in the daily billing rate. However, a finding that the care received was custodial does not bar the beneficiary from submitting claims for prescription drugs such as Tagamet.

SUMMARY

In summary, it is the FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) that the inpatient care at the Convalescent and Nursing Care Center from May 19, 1981, through July 30, 1981, was custodial care and therefore specifically excluded from CHAMPUS coverage. I further find that the care rendered was not skilled nursing services and therefore the custodial care provision allowing a maximum of one hour per day for skilled nursing services is not applicable. The care rendered could have been provided in a nursing home or the home setting rather than a skilled nursing facility, therefore, I find the care was above the appropriate level of care. The charges for the prescription drug Tagamet utilized during the period in issue are payable, if properly itemized on an amended CHAMPUS claim. This decision does not imply that the services were not

necessary, but only means the care received is not the type care for which CHAMPUS payment can be extended. Issuance of this FINAL DECISION completes the administrative appeals process under DoD 6010.8-R, chapter X and no further administrative appeal is available.

A handwritten signature in cursive script that reads "John Beary". The signature is written in black ink and is positioned above the typed name.

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