ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

HEALTH AFFAIRS

SEP 29 1983

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

UNITED STATES DEPARTMENT OF DEFENSE

Appeal of	)	
	)	
Sponsor:	)	OASD(HA) File 83-23
	)	FINAL DECISION
	)	
SSN:	)	

This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPVA Appeal OASD (HA) case file 83-23 pursuant to 10 U.S.C. 1071-1089 and DoD 6010.8-R, chapter X. The appealing party in this case is the beneficiary, as represented by her son.

The appealing party is a beneficiary of the Civilian Health and Medical Program of the Veterans Administration (CHAMPVA), as the spouse of a 100% disabled veteran. CHAMPVA is administered under the same or similar limitations as the medical care furnished certain beneficiaries of the Civilian Health and Medical Programs of the Uniformed Services (CHAMPUS). By agreement between the Administrator, Veterans Administration, and the Secretary of Defense, pursuant to the provisions of Title 38, U.S.C. 613, CHAMPVA claims are processed and appealed under rules and procedures established by the CHAMPUS regulation, DoD 6010.8-R.

This appeal involves a question of CHAMPVA coverage of private duty home nursing care provided the beneficiary from May 23, 1980, through August 1, 1980. The total charge for the private duty nursing care incurred by the beneficiary for these dates was $15,063.12. The CHAMPUS/CHAMPVA fiscal intermediary denied coverage because the private duty nursing care was for organic brain syndrome and was custodial care, both of which are excluded from CHAMPVA medical coverage.

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. The amount in dispute is $15,063.12. It is the Hearing Officer's Recommendation that CHAMPUS coverage for the private duty nursing care from May 23, 1980, through August 1, 1980, be denied based on findings that the care was custodial care and that the beneficiary did not require skilled nursing care. The Director, OCHAMPUS, concurs in the Recommended Decision and recommends its adoption 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 CHAMPVA payment for private duty nursing care provided the beneficiary from May 23, 1980, through August 1, 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 deny coverage of private duty home nursing services from May 23,1980, through August 1, 1980. The decision to deny coverage of the care in question is based on findings that such care was custodial care and failed to meet the regulatory criteria for CHAMPVA coverage of private duty nursing care.

FACTUAL BACKGROUND

The beneficiary, spouse of a 100% disabled veteran, was in good health until December 1979. According to the history obtained from her husband, on that date she suddenly fell forward and became unresponsive. Because of this she was hospitalized and diagnosed as having suffered cerebral vascular accident with left hemiplegia. On March 7, 1980, the beneficiary was admitted to the Institute for Rehabilitation and remained in this facility until she was discharged on May 19, 1980. While in this institute the beneficiary's attending physician noted that there had been no recovery of the muscle strength since her stroke. Further, her talking responses were limited and she had difficulty swallowing liquids and solids; however, she did recognize her husband and family members.

The purpose of the admission to the Institute was to begin a program of rehabilitation. Upon admission she received a physical examination. This examination revealed that the patient was a well-developed, well-nourished female who was alert and cooperative. Blood Pressure was 132/96, and her pulse was 100 and regular. The beneficiary reponded to questions but trailed off into jargon; her intelligible responses, however, were accurate. An examination indicated the right extremities were functionally normal; the left upper extremities were painful with limitation in shoulder range of motion. There was swelling of the left hand and no voluntary muscle power noted. The left lower extremity revealed limitations in range of the ankle and no voluntary muscle power. Laboratory tests were conducted as well as x-rays and electrocardiograms. The electrocardiogram did show sinus tachycardia.

The purpose of hospitalization was to provide physical therapy consisting of range of motion, muscle reeducation to the left arm and leg, general conditioning exercises, and occupational and speech therapy. The discharge diagnosis by the attending physician was cerebral vascular accident with complete left hemiplegia, facial paresis, left homonymous hemianopsia, severe perceptual deficits, severe reactive depression, essential

hypertension, and a history of bypass surgery. Upon discharge she was prescribed Dulcolax suppository, Milk of Magnesia, Colace, Hygrotom, Kay Ciel Elixer, Darvon, Mandelamyne, ascorbic acid, and Elavil. The discharge summary recommended discharge to her home to the care of her family and noted that the beneficiary remained essentially dependent in most areas of self-care although she could assist somewhat in grooming and feeding. The beneficiary was to receive physical therapy at home from the visiting nurse service and was to return in six weeks for follow-up examination. The condition on discharge was noted as being only slightly improved.

By letter dated May 15, 1980, the attending physician stated that due to the ". . . multitude of problems and the need for monitoring of blood pressure and extensive medication, it is my view that [the patient] will require the care at home of a practical nurse on the 7 to 3 and 3 to 11 shifts daily." Based on this recommendation, the sponsor obtained the services of Temporary Nursing Services Incorporated to provide the nursing care. Before obtaining these services, the son of the beneficiary made an attempt to determine if such nursing care was a covered benefit under the CHAMPVA program. In this regard two letters were sent; one to the Veterans Administration and one to the fiscal intermediary for the CHAMPVA program for New Jersey, at that time, Blue Cross of Rhode Island. The response from the Veterans Administration indicated that the beneficiary was entitled to receive medical benefits provided by CHAMPVA until November 22, 1981. They also enclosed a CHAMPVA phamplet and noted that under authorized circumstances, nursing care may be covered by the CHAMPVA program. The sponsor relied on this information when contracting with Temporary Nursing Services Incorporated. The representative contends that, based on reading the handbook, an individual would conclude that nursing services are a covered benefit if they are ordered by the attending physician and are certified as being medically necessary by that physician. Based on this information he feels that the sponsor, beneficiary and Temporary Nursing Services Incorporated acted in good faith and are entitled to CHAMPVA cost-sharing of the private duty nursing services.

A review of the nursing notes for the entire period of private duty nursing services reveals that the patient's temperature and pulse were taken on a daily basis and generally the treatment regimen of the patient was uneventful with two exceptions. On July 16, 1980, the attending nurse noted that the blood pressure check of that morning was 98/64. Therefore, a call was made to the attending physician's office concerning this low blood pressure reading and whether or not to continue with the medication for blood pressure. The attending physician called back with instructions to stop the medication; however, to check blood pressure every day. The beneficiary also became ill with bronchitis and a fever for a few days and special care for that condition was noted when necessary. Aside from these two incidents, the nursing record reveals that medications were given routinely, range of motion exercises were conducted almost

every day, meals were given to the beneficiary, notations were made as to the mood of the beneficiary, and the attending nurses assisted the beneficiary in her ambulatory needs such as movement from a bed to a chair or a wheelchair.

On July 2, 1980, the beneficiary was reevaluated by the attending physician at the Institute for Rehabilitation. In that reevaluation report, the attending physician noted that, in his opinion, the beneficiary needed a physical therapist. He also noted that the beneficiary continued to show left hemiplegia, continued to remain significantly depressed, and had problems with accepting her medication. He noted major tightness in range of motion above the shoulder and in the fingers of the left hand and that there was no functional recovery of strength in either extremity. The attending physician also discussed with the sponsor the possibility of referring the beneficiary to a local nursing home. The sponsor indicated that they were awaiting Medicaid approval and then would transfer the beneficiary to a nursing home.

CHAMPVA claims for the private duty nursing care provided from May 23, 1980, through August 1, 1980, were filed with the CHAMPVA fiscal intermediary, Blue Shield of Rhode Island. The beneficiary and the provider were informed by the fiscal intermediary that their claims for this period were denied because the services provided were not payable benefits under the CHAMPVA program. The rationale for this decision was that the administration of all medications taken by the beneficiary could be performed by non-skilled nursing care and the care received by this beneficiary was custodial care. This decision was upheld during informal and reconsideration reviews by the fiscal intermediary.

Prior to conducting the First Level Appeal, OCHAMPUS referred the case to the Colorado Foundation for Medical Care for medical review. The review was conducted by two physicians - one with a specialty in neurology and the other with a specialty in internal medicine. It was the opinion of these reviewing physicians that the nursing services documented in this file do not require the skills of a registered nurse. These services could be performed by someone with less than the training of a registered nurse. The care was primarily providing services for the essentials of daily living including moving the beneficiary from bed to wheelchair to couch, etc., assistance with eating and bathing and administration of medications. In addition, the record disclosed that the nurses acted primarily as companions with most of their duties including assisting the beneficiary with the essentials of daily living. It was their opinion that the average adult with minimal instructions and supervision could perform these services with the exception of the services rendered by the visiting physical therapist. They indicated that the disability of this patient was expected to continue, be prolonged and that the patient required a protected, monitored and controlled environment and assistance with activities of daily living due to

her condition. They further opined that the services rendered by the visiting nurses would not be expected to reduce the patient's disability to a level that the patient would be able to function outside the protected, monitored and controlled environment. Further, it was their opinion that the patient did not require one hour of skilled nursing care per day.

As a result of the OCHAMPUS review at the First Level Appeal it was determined that the skilled nursing services from May 23, 1980, through August 1, 1980, did not qualify as a CHAMPUS benefit and could not be cost-shared because it was custodial care, care for organic brain syndrome and above the appropriate level of care. Because the skilled nursing services were denied a request for hearing was submitted. A hearing was held by Ms. , Hearing Officer on April 22, 1982. The Hearing Officer has submitted her 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 skilled nursing services provided in the beneficiary's home from May 23, 1980 through August 1, 1980 are authorized care under CHAMPVA. In resolving this issue it must be determined (1) whether the care rendered during the period in issue was custodial care and thus excluded from coverage and (2) whether the care for the period in issue was authorized skilled nursing care.

Custodial Care

Under CHAMPUS law, 10 U.S.C. 1077(b)(1), custodial care is specifically excluded from CHAMPUS cost-sharing. Under CHAMPVA law, 38 U.S.C. 613, CHAMPVA cost-sharing is subject to the same or similar limitations as medical care furnished under CHAMPUS and CHAMPVA claims are processed under the rules established by CHAMPUS regulation.

The CHAMPUS regulation, DoD Regulation 6010.8-R, chapter IV.E.12. implements the statutory exclusion of custodial care 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.

. . . . "

Based on the hearing file of record it is clear that the beneficiary's care meets the four criteria in the CHAMPUS/CHAMPVA definition of custodial care. The record reflects that the beneficiary was disabled and the disability was expected to continue and be prolonged. She surfered a disabling cerebral

vascular accident for which she was hospitalized and received physical therapy, muscle medications, general conditioning exercise and occupational and speech therapy. The attending physician noted that she had no voluntary muscle power in her upper left and lower left extremities and no recovery of muscle strength after her stroke. Finally, the reviewing physicians from the Colorado Foundation for Medical Care opined that the disability of the patient was expected to continue and be prolonged.

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. The attending physician noted that, while hospitalized, the patient had difficulty swallowing solids and liquids. On discharge from the hospital, the attending physician noted the patient remained essentially dependent in most areas of self-care. On discharge from the hospital the attending physicians noted that the patient had a multitude of problems and a need for monitoring of blood pressure and extensive medication, and recommended the assistance of practical nurses during the patient's waking hours. Subsequent to the patient's discharge from the hospital the attending physician even suggested placement in a nursing home. The nurses' notes indicated a monitoring of vital signs, administration of medication and assistance in patient movement from bed to chair, etc. The reviewing physicians opined that the patient required a protected, monitored and controlled environment and that the private duty nurses primarily acted as companions assisting the patient with the activities of daily living.

Finally, the available records, the physician's statements and the nurses' notes do not establish any active medical treatment designed to reduce the patient's disability to the extent necessary to enable her to function outside the controlled environment. Although physical therapy was provided by a visiting nurse service, it was the opinion of the medical reviewers that such physical therapy did not make a significant difference in her condition and the physical therapy would not reduce the patient's disability to the extent necessary to enable the patient to function outside a protected, monitored and controlled environment. This opinion coincides with the attending physician's suggestion that the patient be placed in a nursing home.

The Hearing Officer concluded that the patient's condition and care almost exactly matched the CHAMPUS/CHAMPVA definition and description of custodial care and found that the care in dispute was custodial care. I agree with the Hearing Officer's finding and adopt the recommendation to deny CHAMPVA coverage of the private duty nursing care from May 23, 1980, through August 1, 1980, as primarily involving custodial care.

As stated in the Regulation, a finding of custodial care does not imply that the care was not necessary. Having suffered a debilitating cerebral vascular accident it is clear that neither the patient nor her 100% disabled veteran husband was able to care for the beneficiary or assist in the performance of the essentials of daily living. However, the level of care furnished is not the type of care for which CHAMPVA payments may be made.

The above cited Regulation provision provides that even if care is determined primarily to involve custodial care, certain specified benefits are available for coverage under CHAMPVA. As relates to this appeal, those benefits include prescription drugs and up to one hour of skilled nursing care per day if skilled nursing care is determined to be necessary. While any prescription drugs used by the appealing party are authorized coverage in this case, I do not find any medical necessity for even one hour of skilled nursing care per day. The basis for this finding is the opinion of the medical reviewers as further discussed below under the heading of Private Duty Nursing Care. Even the services rendered in connection with the two incidents (i.e., the one instance of low blood pressure and the noted bronchitis and fever) did not require the technical proficiency and scientific skills of an R.N. Therefore, I find that none of the private duty nursing care received from May 23, 1980, through August 1, 1980, qualify for CHAMPVA coverage under the limited skilled nursing provision related to custodial care cases.

Private Duty Nursing Care

Even if the beneficiary's case had not been determined primarily to involve custodial care, the private duty nursing [illegible] not have met criteria for CHAMPVA 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 CHAMPVA 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.

The Hearing Officer found that the nursing notes failed to demonstrate that skilled nursing services were performed for the patient. Although it was contended at the hearing that the nurses were required to constantly monitor the patient's pulse, blood pressure, respiration, and urinary output, the Hearing Officer discounted this testimony. The nurses' notes indicate that vital signs, i.e., blood pressure, pulse, were noted only on 10 occassions during the two plus months of private duty nursing care and the attending physician eventually discontinued the blood pressure medication due to the normal range of blood pressure. In addition, the nurses' notes are silent with regard to the measurement of urinary output.

The Hearing Officer found that the nurses' notes concentrate on assistance given to the patient with bathing, changing of diapers, feeding, administering medications orally or in suppository form, and noting the patient's moods.

The medical reviewers opined that the services provided by the private duty nurses did not require the skills of a registered nurse and that the average adult with minimal instructions and supervision could have performed all services except those of the physical therapist. Finally, the medical reviewers opined that the record indicates that the nurses acted primarily as companions for the beneficiary and assisted with the essentials of daily living.

The record includes reference to New Jersey law which precludes anyone other than a professional nurse from administering "any drugs (even aspirin) to a patient." However, as noted by the Hearing Officer, any such state law is not binding on CHAMPUS/CHAMPVA in a determination of what services are cost-shared under the established benefits program. Assuming that the New Jersey law is as portrayed, the use of a "professional nurse" in the administration of the drugs involved in this case does not require the level of technical proficiency and scientific skills of an R.N. This conclusion is not only supported by the medical reviewers' opinions but also by the attending physician's recommendation that the services be performed by "practical nurses."

The Hearing Officer found that the beneficiary did not require skilled nursing care in this case and I agree. Based on the hearing record, I find that the care provided from May 23, 1980, through August 1, 1980, did not require intensified skilled nursing care which can only be provided with the technical proficiency and scientific skills of an R.N.; the nursing care primarily provided or supported the essentials of daily living and resulted in acting as a companion or sitter; and the care could have been performed by the average adult with minimal instructions or supervision. Because the nature of the services rendered are the determinative factor, and not the condition of the patient or the professional status of the private duty nurses rendering the services, I find that the care in question did not meet the Regulation requirements for CHAMPVA coverage as private duty (special) nursing care.

Secondary Issue

Good Faith Care

In testimony at the hearing, it was emphasized that the patient's family acted on what was considered the best course of action in obtaining private duty nursing care based on the recommendation of the attending physician. Testimony was given concerning the difficulty in obtaining information regarding CHAMPVA coverage of the patient's private duty nursing services. The most informative response appears to be the Veterans Administration correspondence in the record which noted that under authorized circumstances nursing care may be covered under CHAMPVA.

As noted by the Hearing Officer, it is understood that the beneficiary's family acted in good faith in obtaining what was considered the best course of care. However, except in limited circumstances specified by Regulation, preauthorization of care is not available under CHAMPUS/CHAMPVA and private duty nursing care is not one of the specified circumstances. CHAMPUS/CHAMPVA are "at risk" programs with cost-sharing of claims after review of medical documentation related to the care. As noted above in the discussion of private duty nursing care, it is the actual care rendered that determines whether the care is cost-shared. In such cases, it is not possible to give a definite decision on the coverage of nursing care prior to review of the nurses' notes and other case documentation. In this case, the Veterans Administration provided a correct response in noting that "under authorized circumstances nursing care may be covered under CHAMPVA." While the response did not reference the Regulation criteria for coverage of private duty nursing care, it gave notice that not all nursing care is cost-shared by CHAMPUS/CHAMPVA.

SUMMARY

In summary it is the FINAL DECISION of the Acting Assistant Secretary of Defense (Health Affairs) that the nursing care at the beneficiary's home for the dates of May 23, 1980 through August 1, 1980 be denied as the care was primarily custodial care

and failed to meet the regulatory provisions for coverage as private duty (special) nursing care. Therefore, the claims for nursing care for this period and the appeal are denied. If prescription drugs during this period of treatment can be itemized and have not previously been cost-shared by CHAMPVA, coverage may be authorized under the custodial care provision. Issuance of this FINAL DECISION completes the administrative appeals process under DoD 6010.8-R, chapter X and no further administrative appeal is available.

John Beary

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