



ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D. C. 20301

SEP 17 1984

HEALTH AFFAIRS

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

Appeal of)
)
Sponsor:) OASD(HA) Case File 84-16
)
SSN:) FINAL DECISION
)

This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPUS Appeal OASD(HA) Case File 84-16 pursuant to 10 U.S.C. 1071-1092 and DoD 6010.8-R, chapter X. The appealing party is the CHAMPUS beneficiary, now deceased, as represented by her sponsor, a retired officer of the United States Air Force. The appeal involves the denial of CHAMPUS cost-sharing for private duty home nursing services provided on May 29, 1982, June 7, 1982, October 1 through October 8, 1982, October 15, 1982, and December 30, 1982, through January 3, 1983. The amount in dispute involves \$1,485.81 in billed charges.

The hearing file of record, the tape of oral testimony and argument presented at the hearing, the Hearing Officer's Recommended Decision, and the Analysis and Recommendation of the Director, OCHAMPUS, have been reviewed. The Hearing Officer has recommended denial of CHAMPUS cost-sharing of the private duty home nursing services based on findings the care was custodial, not medically necessary, and failed to meet the Regulation criteria for skilled nursing services. The Hearing Officer did recommend CHAMPUS cost-sharing of 1 hour per day of skilled nursing services and all prescription drugs.

The Director, OCHAMPUS, concurs in the Recommended Decision and recommends its adoption as the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) with one modification. The modification recommended is the denial of CHAMPUS cost-sharing of 1 hour of skilled nursing services per day and prescription drugs. The Director, OCHAMPUS, recommends the modification because the appeal file does not document skilled nursing services were performed and because CHAMPUS cost-sharing of prescription drugs is not at issue in this appeal.

The Assistant Secretary of Defense (Health Affairs) after due consideration of the appeal record, concurs in the recommendation of the Hearing Officer to deny cost-sharing of the

private duty nursing services and hereby adopts the Recommended Decision with the modification recommended by the Director, OCHAMPUS, as the FINAL DECISION.

The FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) is, therefore, to deny CHAMPUS cost-sharing of the private duty home nursing services provided on May 29, June 7, October 1 through October 8, and October 15, 1982, and December 30, 1982, through January 3, 1983, as custodial care, not medically necessary, and not qualifying under the Regulation criteria for skilled nursing services.

FACTUAL BACKGROUND

The appeal involves private duty home nursing services received by the beneficiary during calendar year 1982 and early 1983. Four CHAMPUS claims, including one duplicate claim, were filed by the beneficiary for private duty home nursing care on May 29, 1982, June 7, 1982, October 1 through October 8, 1982, October 15, 1982, and December 30, 1982, through January 3, 1983. The total charge for the nursing services on these dates was \$1,837.90. At the hearing, the sponsor testified that the beneficiary received private duty nursing services on many days other than those claimed under CHAMPUS but the sponsor's other insurance paid for the nursing care.

The beneficiary's diagnoses at the time of care were acute myelomonocytic leukemia, refractory anemia, pancytopenia, and renal insufficiency. On September 22, 1982, she was hospitalized after she broke her hip in a fall. Surgery to repair the broken hip was not performed because of the beneficiary's hematologic disorders and the possibility of infection. She was discharged to home on September 29, 1982, and home nursing care was ordered by the attending physician for an indefinite period to monitor medications, a toe infection, and to supervise attempts at weight bearing on her right leg with a walker. The beneficiary was again hospitalized from December 26 to December 30, 1982, with bronchitis, left conjunctivitis, and anemia and from January 19 through March 8, 1983, with an acute exacerbation of the leukemia.

The nurses' notes for the dates in issue reveal the private duty nurses (including both registered nurses and licensed vocational nurses) assisted the beneficiary in ambulation with a walker, gave bed baths, monitored vital signs and oral medications, gave warm soaks to the infected toe four times daily during October 1982, and generally observed the beneficiary.

Of the \$1,837.90 involved in the four CHAMPUS claims for the private duty nursing services, the sponsor's other insurance paid \$352.09; the CHAMPUS Fiscal Intermediary allowed \$63.00 and paid \$10.20. The remaining charges were denied CHAMPUS cost-sharing because the services were determined to be not medically necessary, not meeting the criteria for skilled nursing services, and as excluded custodial care. Following appeal, the OCHAMPUS

First Level Appeal Decision denied cost-sharing of all the claimed nursing services as not meeting the Regulation requirements for private duty skilled nursing services.

The beneficiary, through her appointed representative, the sponsor, requested a hearing. A hearing was held on March 6, 1984, at Laguna-Nigel, California, before Sherman R. Bendalin, OCHAMPUS Hearing Officer. The Hearing Officer has submitted his Recommended Decision and issuance of a FINAL DECISION is proper.

ISSUES AND FINDINGS OF FACT

The primary issues in this appeal are (1) whether the private duty (special) nursing services provided on May 29, June 7, October 1 through October 8, and October 15, 1982, and December 30, 1982 through January 3, 1983, met specific requirements of DoD 6010.8-R for CHAMPUS cost-sharing of private duty nursing; (2) whether the services were medically necessary; and (3) whether the services were custodial care.

Private Duty Nursing

The Department of Defense Regulation governing CHAMPUS, DoD 6010.8-R, provides specific criteria for coverage of private duty (special) nursing. As defined by the Regulation, private duty (special) nursing services means:

". . . 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 (RN) 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 providing 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).

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 not the professional status of

the private duty (special) nurse rendering the services.

"(1) . . .

"(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."

Consistent with these provisions, a skilled nursing service is defined 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 feedings, or tracheostomy 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.)

As specified in the above regulation provisions, the private duty nurses services must be skilled nursing services rendered to a patient requiring intensified skilled nursing care which can only be provided with skills possessed by a registered (or other qualifying) nurse. The services must be ordered by a physician and certified to be medically necessary.

The Hearing Officer found the services in issue could have been rendered by an adult, were primarily supportive, and were primarily to support the essentials of daily living. He concluded the services were not skilled nursing services under CHAMPUS. I concur in and adopt these findings. The daily nurses' notes do not document any skilled nursing was provided. The notes indicate that the nurses assisted in ambulation, monitored oral medications and vital signs, gave personal care, and, during October 1982, provided warm soaks for the toe infection. Medical review by a physician (a specialist in internal medicine) associated with the Colorado Foundation for Medical Care resulted in an opinion that the services could have been performed by the average adult with minimal instruction and consisted primarily of transfer assistance, help with personal hygiene, and skin care for the infected toe. I agree. The documented services were not skilled nursing services under the above cited authorities. An average adult could have provided these services, and the technical proficiency of a registered nurse was not required.

In summary, the evidence of record does not establish the services in issue meet the Regulation requirements for cost-sharing of private duty nursing services. Therefore, I find the services are not covered under CHAMPUS.

Medical Necessity

Under DoD 6010.8-R, chapter IV, A.1., the CHAMPUS Basic Program provides cost-sharing for medically necessary services and supplies required in the diagnosis and treatment of illness or injury, subject to all applicable limitations and exclusions. Services which are not medically necessary are specially excluded (DoD 6010.8-R, chapter IV, G.1.). Under DoD 6010.8-R, chapter II, B.104., medically necessary is defined as:

". . . the level of services and supplies
(that is, frequency, extent and kinds)
adequate for the diagnosis and treatment of
illness or injury"

As the services in issue could have been provided by an average adult, primarily involved support for the essentials of daily living, and were not skilled services, I find that performance of these services by the private duty nurses were not medically necessary in the treatment of an illness or injury. The claimed services are, therefore, not covered under CHAMPUS.

Custodial Care

Under the CHAMPUS law, 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. . . ."

The Hearing Officer found the private duty nursing services were custodial, and I concur in this finding. The four criteria of custodial care are documented in the record.

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

The record reflects the beneficiary had myelomonocytic leukemia. The date of onset of this disease is not stated in the record; however, hospital discharge summaries state the patient was well known indicating the disease had been present for some time. The medical records also indicate the disease was progressing, and the beneficiary was hospitalized for acute exacerbations of the leukemia in December 1982 and again from January to March 1983. Leukemia and the complications of infections disabled the beneficiary, and the disability was

expected to continue and be prolonged. The beneficiary was periodically confined to bed during the period in issue due to the leukemia and the broken hip. The requirement for assistance with ambulation and personal care illustrate the disability. The sponsor, representing the beneficiary, did not disagree that the beneficiary was disabled or that her disability was expected to be prolonged. Finally, upon medical review, a specialist in internal medicine also agreed that this criterion of custodial care was documented in the appeal record.

- o Requires a protected, monitored and/or controlled environment.

There is also no dispute that the beneficiary required a protected, monitored and/or controlled environment during the dates of care in issue. The medical reviewer stated that the nurses' notes show the beneficiary required some protection and monitoring in May and June 1982 and particularly in September 1982 after she broke her hip. At the hearing the sponsor agreed the beneficiary met this criterion of custodial care. Monitoring of medications, assistance during ambulation with the walker due to the broken hip, and monitoring of infections illustrate a protected and monitored environment was required.

- o Requires assistance to support the essentials of daily living.

This criterion is also well documented in the medical records. The private duty nurses provided assistance in ambulation and gave personal care. Medical review also supports this finding. The record indicates that during October 1982 and December 1982 through January 1983, assistance to support the activities of daily living was particularly evident as the beneficiary's activities were extremely limited due to the broken hip and exacerbations of leukemia.

- o 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 a protected, monitored and/or controlled environment.

The Hearing Officer found the private duty nursing services were not designed to reduce the disability to the extent necessary to enable the beneficiary to function outside of a protected environment. Regretfully, I must agree. The goals of private duty nursing in May and June 1982, and December 30, 1982 through January 3, 1983, are not well defined in the record; however, no active medical care appears to have been performed during these dates of care. In October 1982, the medical records do reveal the beneficiary was receiving some active care to enable her to walk; however, the care was not medical care requiring the skills of a registered nurse. Records of her hospitalization from January 19 through March 8, 1983, reveal the beneficiary was able to walk with the aid of a cane or walker.

However, the underlying disability caused by the acute myelomonocytic leukemia continued to exist, and the beneficiary continued to require assistance in the activities of daily living. The medical records in the appeal file do not evidence the beneficiary was under active medical care designed to reduce the disability caused by the leukemia. Hospital records relating to her inpatient stay from January 19 through March 8, 1983, reveal the beneficiary would continue to require supportive blood transfusions but that her prognosis was very poor. While the blood transfusions could be considered active medical care, that treatment does not appear to have been designed to reduce the disability, according to the statement of the attending physician. Medical review supports the Hearing Officer's finding in stating restoration to independent environment was unlikely.

I recognize the possibility of remission of diseases such as leukemia and do not desire to end CHAMPUS cost-sharing of active treatment of such diseases; however, the treatment herein appears primarily supportive and cost-sharing of additional treatment of the leukemia is not at issue. Therefore, based on the medical records, particularly the private duty nursing notes, I find the nursing services were not designed to reduce the beneficiary's disability to the extent necessary for the beneficiary to function outside of a protected and controlled environment. Of course, a custodial care determination does not affect cost-sharing of inpatient care, such as the January to March 1983 hospitalization, which was required for acute exacerbations of the leukemia.

In weighing the medical review in this appeal, I have considered the challenge of the sponsor to the OCHAMPUS medical review on the basis that a specialist in hematology should have reviewed the medical records instead of a specialist in internal medicine. I do not agree. Hematology is a subspecialty of internal medicine and the private duty nursing, not treatment of leukemia, is the primary issue in this appeal. An internist is certainly qualified to render a medical opinion on the nature of nursing care.

As I have found the criteria of custodial care have been met in this case, I must consider the recommendation of the Hearing Officer to cost-share 1 hour of skilled nursing care per day and prescription drugs. The recommendation to cost-share the prescription drugs is correct under the custodial care provision but is not applicable to this hearing. Prescription drugs are not at issue.

As discussed above, the nurses' notes do not document any skilled nursing services were provided on the dates of care in issue. Therefore, I cannot authorize cost-sharing of 1 hour per day of skilled nursing services and must reject this recommendation of the Hearing Officer.

SUMMARY

In summary, the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) is to deny CHAMPUS cost-sharing of private duty nursing services provided May 29, June 7, October 1 through October 8, and October 15, 1982, and December 30, 1982 through January 3, 1983. The decision is based on findings that the care does not qualify as private duty nursing under applicable Regulation criteria, as not medically necessary, and constituted custodial care. Issuance of this FINAL DECISION completes the administrative appeals process under DoD 6010.8-R, chapter X, and no further administrative appeal is available.

William Mayer
William Mayer, M.D.