ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

HEALTH AFFAIRS

OCT 2 5 1984

BEFORE THE OFFICE, ASSISTANT

SECRETARY OF DEFENSE (HEALTH AFFAIRS)

UNITED STATES DEPARTMENT OF DEFENSE

Appeal of	)	
	)	
Sponsor:	)	OASD(HA) Case File 84-25
	)	FINAL DECISION
SSN:	)	

This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPUS Appeal OASD(HA) Case File 84-25 pursuant to 10 U.S.C. 1071-1089 and DoD 6010.8-R, chapter X. The appealing party in this case is the estate of the deceased beneficiary, represented by the sponsor. On November 11, 1981, the beneficiary died in Fort Worth, Texas, at a nursing home; cause of death was listed as aspiration due to Jakob-Creutzfeldt syndrome. The appeal involves inpatient care received at All Saints Episcopal Hospital, Fort Worth, Texas, from August 13, 1981, through October 2, 1981. The amount in dispute is approximately $4,859.75, less the physician's charges for services furnished prior to August 13, 1981, and the allowance for CHAMPUS cost-sharing of prescription drugs and 1 hour of skilled nursing care per day for the period of August 13, 1981, through October 2, 1981.

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 beneficiary's inpatient hospital care and related services and supplies provided from August 13, 1981, through October 2, 1981, be denied CHAMPUS cost-sharing as care above the medically necessary appropriate level of care and as custodial care. The Hearing Officer, however, recommended that CHAMPUS coverage be authorized during this period for prescription drugs and 1 hour of skilled nursing care per day as authorized under the CHAMPUS regulation provision regarding custodial care.

The Director, OCHAMPUS, concurs with the Hearing Officer's Recommended Decision and recommends adoption of the Hearing Officer's Recommended Decision as the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs).

The Assistant Secretary of Defense (Health Affairs), after due consideration of the appeal record, adopts and incorporates by reference the Hearing Officer's Recommended Decision denying

CHAMPUS cost-sharing of the appealing party's inpatient hospitalization and related services and supplies, except for prescription drugs and 1 hour of skilled nursing care per day, provided from August 13, 1981, to October 2, 1981. CHAMPUS cost-sharing of the care in dispute is based on findings that the care was above the appropriate level of care, not medically necessary, and excluded as custodial care.

The FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) is, therefore, to deny CHAMPUS coverage for services/supplies provided to the beneficiary at All Saints Episcopal Hospital and all related professional services from August 13, 1981, through October 2, 1981, as custodial care.

In my view, I find the Recommended Decision adequately states and analyzes the issues, applicable authorities, and evidence of record, including medical opinions, in this appeal. The findings are fully supported by the Recommended Decision and the appeal record. Additional factual and regulation analyses of the issues are not required. The Recommended Decision is acceptable for adoption as the FINAL DECISION by this office.

SUMMARY

In summary, the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) is to deny CHAMPUS cost-sharing except for authorized prescription drugs and 1 hour of skilled nursing care per day and the inpatient care and related services and supplies furnished the beneficiary at All Saints Espicopal Hospital from August 13, 1981, through October 2, 1981, as the care was above the appropriate level of care, was not medically necessary, and was excluded under CHAMPUS as custodial care. The appeal of the estate of the deceased beneficiary, therefore, is denied. The Director, OCHAMPUS, is directed to review the claims records in this case and take appropriate action under the Federal Claims Collection Act to recover any erroneous CHAMPUS payments less any authorized payments not previously made for prescription drugs and 1 hour of skilled nursing care per day. Issuance of this FINAL DECISION completes the administrative process under DoD 6010.8-R, chapter X, and no further administrative appeal is available.

for William Mayer, M.D.

84-25

RECOMMENDED HEARING DECISION
Claim for Benefits under the
Civilian Health & Medical
Program of the Uniformed Services
(CHAMPUS)

Beneficiary:

Sponsor:

Sponsor's SS No.:

This case is before the undersigned Hearing Officer pursuant to the sponsor's request for hearing dated July 12, 1983, which was granted by the Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS) on July 28, 1983. The hearing was held pursuant to Regulation DOD 6010.8-R, Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), Chapter X, Sec. F, Paragraph 4, and Sec. H, Paragraph 2(b). The hearing was held September 8, 1983, in the Federal Office Building, Room W-2140, 2800 Cottage Way, Sacramento, California. was present at the hearing, as was Barbara Udelhofen, Attorney/Advisor, Office of Appeals and Hearings -OCHAMPUS. is the beneficiary's sponsor and is the personal representative of her estate.

OGA File Copy

ISSUES AND STATEMENT OF LAW

The general issue before this hearing officer is whether the inpatient hospital care provided to Mrs. from August 10 through October 2, 1981, at All Saints Episcopal Hospital, Ft. Worth, Texas, is a benefit of the CHAMPUS program or was it above the appropriate level of care which was medically necessary and in addition, was the care primarily custodial in nature and therefore, specifically excluded from the CHAMPUS program. A concurrent issue is if such care if found to be custodial in nature and excluded from CHAMPUS coverage, are all services and supplies furnished in connection with the care also excluded. The appealing party raised the issue of whether delayed notification of the need for preauthorization for inpatient care beyond 90 days and delayed notification that such authorization was being denied overcome exclusions from CHAMPUS benefits, if any, in this claim.

Regulation DOD 6010.8-R is issued under the authority of and in accordance with Chapter 55, Title X, United States Code. It establishes uniform policy for the world-wide operation of the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS). Chapter IV of the Regulation defines basic program benefits and paragraph A-1 provides in pertinent part as follows:

"Scope of Benefits - Subject to any and all applicable definitions, conditions, limitations and/or exclusions specified or enumerated in this regulation, the CHAMPUS Basic Program will pay for medically necessary services and supplies required in the diagnosis and treatment of illness or injury, including maternity care. Benefits include specified medical services and supplies provided to eligible beneficiaries from authorized civilian sources such as hospitals or other authorized institutional providers, physicians and other authorized individual professional providers..."

Medically necessary is defined in Chapter 2(B)104 as follows: "Medically necessary means the level of services and supplies (i.e. frequency, extent and kinds) adequate for the diagnosis and treatment of illness or injury. Medically necessary includes concept of appropriate medical care."

"Appropriate medical care" is further defined as that care rendered in keeping with the generally accepted norm for medical practice in the United States by an authorized professional provider and "The medical environment in which medical services are performed at the level adequate to provide the required medical care". (Chapter II, p. 14).

CHAMPUS benefits may be extended for covered services and supplies provided by a hospital or other authorized institutional provider, subject to any applicable definitions, conditions, limitations, exceptions and/or exclusions. (Chapter IV(B)(1). Chapter IV, (1)(a) provides as follows: "For purposes of inpatient care, the level of institutional care for which basic program benefits may be extended must be at the appropriate level required to provided the medically necessary treatment...".

This restriction is repeated in the specific exclusions of IV(G) which provides "In addition to any definitions, requirements, conditions and/or limitations enumerated and described in other chapters of this Regulation, the following are specifically excluded from the CHAMPUS Basic Program: (emphasis theirs)

3. Institutional level of care. Services and supplies related to inpatient stays in hospitals or other authorized institutions above the appropriate level required to provide necessary medical care.

7. Custodial care. Custodial care regardless of where rendered.

At the conclusion of the specific exclusions is the following note: "The fact that a physician may prescribe or recommend or approve a service or supply does not of itself make it medically necessary or make the charge an allowable expense, even though it is not specifically listed as an exclusion".

There are certain medical issues which are covered in the CHAMPUS Regulation in the Section titled "Special Benefit Information", (Chapter IV(E)). These are special circumstances and/or limitations which "impact the extension of benefits and which require special emphasis and explanation". The section relevant to this hearing is as follows:

Chapter IV(E)(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 patient's comfort, and/or assure 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.

SUMMARY OF THE EVIDENCE

Mrs. who lived in California, was admitted on May 11, 1981, to Sutter Memorial Hospital with a diagnosis of psychotic behavior. She remained there until May 21st, at which time she went to Texas where she had family and was admitted on May 22nd to the Psychiatric Institute in Ft. Worth, Texas. She remained in that institution through the 11th of June, 1981 and was then transferred to All Saints Episcopal Hospital in Ft. Worth, Texas, where she was hospitalized until her discharge on October 2nd, 1981. The fiscal intermediary, Wisconsin Physician's Service, authorized CHAMPUS benefits through September 3rd, 1981, and denied benefits beyond that period. Upon inquiry from Col. , a reconsideration was made by OCHAMPUS and it was determined that care from August 9th through discharge on October 2nd, 1981, would be denied. Col. requested further review and a Formal Review Decision was issued by OCHAMPUS on March 10th, 1982. This decision denied benefits for inpatient

hospital care at All Saints Episcopal Hospital from August 10th through October 2nd, 1981, except it was determined that charges for prescription drugs given to Mrs. .. ..ould be allowed as would the cost of one hour of skilled nursing care per day. It was the determination of OCHAMPUS that the care from August 10th, 1981 until her discharge on October 2nd, 1981 was above the appropriate level of institutional care required and was specifically excluded as custodial care.

For purposes of this hearing, OCHAMPUS issued a Statement of Position and, as part of this statement, the OCHAMPUS Medical Director determined that inpatient hospital benefits should be provided through August 12, 1981 (change from previous denial from August 10, 1981), but after that date he found the care became custodial in nature. He also approved the one hour skilled nursing service per day for gastrostomy tube care and the prescription drugs.

At the hearing it was unclear what amounts had been paid by CHAMPUS for medical services and hospitalization after August 12, 1981. Ms. Udelhofen obtained this information from the Fiscal Intermediary. They are as follows:

Provider	Date of Service	Amount Paid
Harris Hospital	10/25/81	18.42
Nursing Home	11/2-11/10/81	9.94
Regional Ambulance	10/25/81	38.25
All Saints Episcopal Hospital	8/10-10/2/81	3954.61
Dr. [illegible]	5/25-9/26/81	838.50

Thus the amount at issue in this hearing is $4859.75 less the allowance for prescription drugs, one hour of skilled nursing care per day and medical care by Dr. from May 25 through August 10, which was allowed.

At the time of the reconsideration decision OCHAMPUS sent Mrs. medical records to the Colorado Foundation for Medical Care Peer Review Committee for their report and recommendation. The case was reviewed by two doctors, a specialist in neurology and the other in internal medicine. (Exhibit 33, p. 4 and 5). They concurred in their "Evaluation of patient medical status - The documentation on this patient shows a steady decline in neurological functioning. There was little to do for this patient except to provide total supportive care to the end. With this diagnosis it would not be expected the patient would ever improve to the point she did not require intense supportive care". They found the patient would no longer need acute care hospitalization "once the diagnosis was established and the patient was being adequately maintained on a supportive care plan." They also found Mrs. disability was expected to continue and required a protected, monitored and controlled environment because of her dementia and her inability to care for herself requiring total support with the activities of daily

living. They concluded the patient was not receiving any therapy towards the end of her hospitalization which would reduce the disability, nor was it expected "that the patient would ever be able to function outside the protected, monitored and controlled environment." They also reported that the care received by Mrs. was "primarily custodial and could have been rendered by personnel with less skill than a licensed nurse."

The Medical Director for OCHAMPUS also reviewed the medical records and file (Exhibit No. 33, page 1) to establish an exact date on which the care became primarily custodial and concluded it was sometime during the period of August 8th through 12th, 1981. He found in reviewing the progress notes that on August 3rd Dr. , who was Mrs. treating physician, noted that she demonstrated "steady deterioration", and on August 6th, "progressive deterioration", at which time sedative medications where increased "to provide for her comfort -the duration of her life is difficult to establish." The report continues, " DM (Director of Medicine) can only conclude from the entries in the record that Dr. recognized that Mrs. had a terminal condition for which there was little to provide except limited supportive medical care and that care on or about 12 August, 1981, was by OCHAMPUS regulatory definition custodial." The Medical Director went on to discuss the letter submitted by the Chairman of the Utilization Review Committee at All Saints Hospital, dated November 12, 1981, and said that while the Chairman disagreed with the decision that the care was custodial after August 8th, he offered no medical evidence to the contrary. The Medical Director concluded that although the patient continued to have a low grade fever until the time of her discharge, "she received no active diagnostic procedures/treatments that would have treated the underlying cause or which would have been expected to reduce the disability to the extent necessary to enable the patient to function outside the protected, monitored or controlled environment; therefore, hospitalization at All Saints for inpatient acute care should have been terminated during the period 8-12 August, 1981."

In his report the Medical Director stated there were other issues that probably impinged on the medical decisions made regarding inpatient care for Mrs. . He reported that, although the sponsor and the provider were legally responsible for being informed of the regulatory restrictions on care, it is "still not uncommon that a decision will be made by a physician to allow a patient to expire in a hospital, particularly if death is suspected soon, the patient has significant life support needs, or the hospital is either ignorant of third party coverage limitations or does not have an active utilization review process". He concluded that the provider made a conscientious effort to provide quality care for this terminally ill woman.

The hearing file shows a request for payment was made on what appears to be August 28th, 1981, for services provided to Mrs. at All Saints Hospital. Dr. was named as the

attending physician and the diagnosis was "Jacob-Creuzfeldt disease." This form was signed by Dr. on July 11th, 1981 (Exhibit 1, page 16). A bill submitted by Dr. on June 24th, 1981, lists Jacob-Creuzfeldt as a diagnosis (Exhibit No. 2, page 14). On June 15th, 1981, Dr. wrote to Col. Exhibit No. 2, p. 105), stating that Col. wife was under his care for "a difficult nuerological diagnostic problem. It is possible this represents the syndrome called "Jacob-Creuzfeldt." The letter explained the need for special care over and above that provided by the hospital staff; it was their concern she would crawl out of the bed and fall, necessitating constant company. The letter concludes "EEGs have been done which are distinctly abnormal suggesting the correctness of the above diagnosis. Expected length of stay in this hospital is one to two months". The statement from Dr. signed June 30th, 1981, also lists Jacob-Creuzfeldt as the diagnosis(Exhibit 2, page 100). Claims for services of Drs. dated July 27, 1981, show diagnosis of Jacob- disease. (Exhibit 2, page 28). Claim submitted by the hospital for cerebral angiogram on June 12, 1981 lists diagnosis as Jacob-Creuzfeldt disease.

The hospital statement dated September 8, 1981, for care provided in August and early September shows current charges for the month of $5,575.55, almost totally for room and care and pharmacy. There is only a $9 laboratory charge (Exhibit 1, p. 10). The statement dated October 6, 1981, contains only charges for room and care, supplies, drugs and personal items (Exhibit 1, p. 15). The physicians orders show there was active treatment in June with 21 entries made in the orders and directions. In July, there were 17 orders written, covering active care with some diagnostic procedures. Physicians notes for August 3rd say to discontinue isolation and there are only 7 orders written for the entire month concerned mostly with medication and urinalysis on August 12th (Exhibit No. 5, page 2 through 4). In the month of September there are only 3 physicians orders written on the chart and a discharge order on October 2nd (Exhibit No. 5, page 1). These appear to be concerned with feeding and medication and approval of a haircut. On June 22nd, 1981, Dr. wrote, "continued neurological decline - I plan no further studies and would anticipate only those measures which would afford comfort (feeding, gastostomy, e.g.)", (Exhibit 6, page 9). On June 24th a different physician has signed the progress notes stating "I do not have anything further to suggest" (Exhibit No. 6, page 8). Dr. on the 26th wrote "Steady decline in mental functions. EEG will be repeated Monday". On June 29th, he wrote "Progressive worsening, EEG clearly indicative of this encephalopathy. I've asked the nursing staff not to employ any heroic measures for resusitation". The 8 progress notes written in August by Dr. show a gradual deterioration with concern about the patient's life. The 3 progress notes in September do mention the possibility of a diagnosis of meningitis; one on September 16th states "believes meningitis is unlikely" and on the 21st of September, states "although meningitis is a possibility, I believe it to be a low

possibility and won't reflect culture". This same note states "anticipate discharge". The progress note on October 2nd states "discharge this A.M. I can continue exploring possibility of an unreadable, treatable meningitis at the nursing home". There is no indication in the record of what led Dr. to mention meningitis in his last few notes nor is there any evidence that active treatment was going on or diagnostic procedures performed. In his discharge note Dr. indicates he can continue to observe for possible meningitis at the nursing home.

The Social Service Consult note on September 30th, 1981 (Exhibit No. 7, page 1), discusses the CHAMPUS termination of benefits retroactive to August 8th and states, "Patient has relatively rare and fatal illness which has begun to progress with rapidity. Patient totally unresponsive - is being tube fed and receiving all oral meds". It goes on to state "her needs are custodial" and Dr. agrees to nursing home placement. On October 1st, they contacted Mrs. sister and referred her to Autumn Years Nursing Home. On October 2nd the patient was transferred to the nursing home by ambulance (Exhibit 7, pages 1 and 2).

Careful reading of the nursing notes from August through October 2nd (Exhibit 8) shows the patient to be resting most of the time, unaware of what was going on, being fed through the gastrostomy tube - no response to oral stimuli - nurses would observe, change positions, care for the gastrostomy tube. They contain the observations: "patient was unresponsive, with an occasional twitching of the extremeties-resting quietly a great deal of time." The care being provided by the nurses was primarily care directed towards making the patient comfortable, dealing with the catheter and its care and the gastrostomy tube and feeding. During some of this period there was a "sitter" hired by the family who stayed in the room with Mrs.

Dr. wrote several letters contained in Exhibit 22. One was to K.V.I. Center on August 18, 1981 (p. 2) in which he stated he originally saw Mrs. on May 22, 1981 at the Psychiatric Institute: "at that time the diagnosis of Jacob-Creuzfeldt syndrome was made." He also wrote to Ms. of OCHAMPUS on August 6, 1981 stating Mrs. has Jacob-Creuzfeldt syndrome, is terminally ill and "her care in the present hospital environment is necessary. This is an acute hospital. Her care in a less skilled hospital environment is not possible." No explanation was given by Dr. for his conclusion that Mrs. required an acute care facility, nor was any mention made of continuing diagnostic evaluation as to her condition.

At the hearing, Col. raised five issues he thought should be considered by me as Hearing Officer. The first of these was that the notice he received from OCHAMPUS advising him that he had to have prior authorization for benefits to extend beyond 90 days of inpatient hospitalization was untimely, received on the 89th day of Mrs. hospitalization and

contained barely legible handwritten portions of the form. He testified that the very next day after receiving it, he mailed Form 190 back. At the bottom of the letter received from OCHAMPUS it said if he did not respond authorization would be denied, and he assumed that since he did respond authorization would be granted or that he would receive a timely notice. He received a letter on September 30, 1981, which was the first notice he had that inpatient hospital care was being denied from OCHAMPUS and they applied it retroactively for 54 days back to August 8th. He testified that if timely notice had been received, he could have made other arrangements.

Col. second and third arguments addressed the same general issue. On day eighty-eight of hospitalization, Mrs. physician, Dr. r, wrote to OCHAMPUS describing his wife's condition and he wrote again on day 142 of her hospitalization. Both of his letters stated that she needed continued inpatient acute hospital care and he was unable as a layman, many thousand miles away, to question the care that the doctor said was necessary for her well-being.

The fourth point made by Col. was that on December 12, 1981, Dr. who is head of the Utilization Review Committee at All-Saints Episcopal Hospital, Ft. Worth, Texas, wrote stating this was a very rare disease that had no established length of stay. He reiterated that she needed intensive acute care and continued inpatient hospitalization.

Another consideration raised by Col. was that in the hearing file there are several letters from various officers in the U.S. Air Force stating they felt the way the claim had been handled by OCHAMPUS was unfair and that some consideration should be given to the financial hardship it was causing Col. . He asked a rhetorical question, "Are their opinions worthless?". The general argument made by him was that health insurance benefits were a benefit earned for 23 years of active duty to his country and OCHAMPUS has an obligation and duty to administer the program fairly with the best interests of beneficiaries in mind subject to applicable statutory requirments. He argued that he was entitled to more than a literal and inflexible application of the letter of the law. In conclusion, he discussed the legal principle of estoppel and his detrimental reliance during the extended period when he felt he rightly assumed benefits would be paid; only to have OCHAMPUS deny them retroactively. He stated this was a doctrine used by the Office of the Comptroller and Federal Courts to avoid a harsh and inequitable result and Col. urged that this principle be applied to his claim.

Col. testified that he spoke regularly with Dr. in Ft. Worth, estimating it was at least every 4 or 5 days. In response to questioning, he was unable to remember the exact date he was first told by the doctor that his wife had Jacob-Creuzfeldt disease, but later he said he thought it was at the end of the hospitalization at the Psychiatric Institute in Ft.

Worth. Dr. told him they wanted to rule out other possibilities but the disease process was described to Col. as "slowly drying up of both sides of the brain" and he was told the prognosis was very guarded. He said that Dr. moved his wife to All Saints Hospital without much input from Col. . He testified it was clear that her condition was deteriorating and he was advised of this by the doctor but he was unable to put a time frame on when other certain specific organic entities were ruled out or when the final diagnosis was confirmed. It was necessary for him to be in California because of their property and he was not able to discuss these issues with Dr. except via telephone.

Col. testified that Dr. was the first to receive the notification from OCHAMPUS that benefits would be denied after August 8th because the care being provided from that date was custodial care and excluded from coverage under the CHAMPUS regulation. He said Dr. called and told him his wife would have to be moved immediately to a nursing home. Up until that time, Col. said there had been no discussion at all about moving her to a nursing home. He said that if he had realized or been aware earlier of the need for authorization after 90 days that he would have investigated this possibility and certainly would have discussed it with the doctor. Once it was determined that she had to be moved, this was accomplished within a period of 2 days by her relatives living in Texas. Col. said he was not aware of any problems finding a nursing home that would accept her.

EVALUATION OF THE EVIDENCE

The record is clear that Mrs. suffered a rare and difficult illness. The initial sketchy records show that for the first six weeks to two months of her hospitalization in California and at the Psychiatric Institute of Ft. Worth the diagnosis was unclear and several different treatments were attempted. Although I do not have the records from the Psychiatric Institute hospitalization, what is available in the file shows Dr. made the tentative diagnosis of Jacob-Creuzfeldt syndrome while he was seeing her in consultation at the Psychiatric Institute. He transferred her to All Saints Episcopal Hospital and actively pursued confirming the diagnosis and, probably more importantly, attempting to rule out other disease processes which might be more amenable to treatment. There is a consultation letter in the hearing file stating that, because of the severe prognosis of Jacob-Creuzfeldt syndrome, all other avenues should be pursued. The hospital record shows this was initially done but the level of nursing care and the number of diagnostic procedures--even the visits from the treating physician--show a marked change sometime during the first week in August. A careful reading of these records leads me to conclude that around this time it was felt the diagnosis had been confirmed and there was very little medically that could be done for Mrs. other than to keep her as comfortable as possible. In fact, as early as June 22nd, Dr. wrote in the physician notes

that he planned no further studies and would anticipate only those measures which would afford her comfort. There is only documentation of 8 visits by Dr. during the entire month of August and 3 during the month of September. There is nothing in the record to indicate that these visits could not have been made to a convenient nursing home and, indeed, when Mrs. was discharged from the hospital, the notes indicate that Dr. planned to visit her at the nursing home and continue his observation for meningitis.

Col. told me at the hearing that he had not read the nursing notes because it was very painful for him and I can certainly understand his position. I have read the nursing notes for the months of August and September and the only conclusion that can be reached is that during this period the hospital staff was doing everything possible to keep Mrs. as comfortable as possible and provide her loving care, but there were no services rendered that required the training of skilled personnel present in an acute care facility, except for the care connected with the gastrostomy tube.

The CHAMPUS Regulation is clear that payments can only be made for a level of care which is appropriate to provide medically neccesary services. Except for the statements made by Dr. of Utilization Review subsequent to Mrs. discharge, there is no evidence in the record to substantiate or to identify what specific services were provided to Mrs. that required an acute hospital setting. Col. made the point at the hearing that he had to rely on the doctors who were treating his wife and I certainly understand his position. It is unfortunate he was so far away and was not personally able to observe his wife's condition and the care she was receiving. If so, he might have been able to investigate other possibilities for care. The record shows that once notice of benefit denial was received and a decision was made to transfer Mrs. to a nursing home, this transfer was effected simply and quickly. The CHAMPUS Regulation speaks directly to this issue and bears repeating in part: "The fact that a physician may prescribe or recommend or approve a service or supply does not of itself make it medically necessary to make the charge an allowable expense."

In addition to requiring that the care provided to a CHAMPUS beneficiary be an appropriate level of services and supplies for the treatment of a particular illness, there is also a specific exclusion for custodial care. There are four parts to the test as to whether care is custodial and they are: 1. a patient who is mentally or physically disabled, 2. such disability is expected to continue and be prolonged and 3. who requires a protected environment and assistance to support the essentials of daily living. The fourth requirement is "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." I believe the record is clear and everyone would agree that Mrs. met the first three

criteria during the last two month of her hospitalization. It is Col. position that the doctors felt she needed acute hospital care and thus the fourth criteria for custodial care was not met. The doctors treating her made a determination that she should stay in an acute hospital setting until it was eventually determined that CHAMPUS benefits were no longer available. The decision I make is not whether Mrs. should have stayed in the hospital, but only whether benefits will be provided under the CHAMPUS program for that hospitalization. A patient and her family is always free to seek medical care of any type and in whatever place she and her family feel is appropriate. In order for CHAMPUS coverage to be extended for that care certain specific requiremets must be met and I am bound by those in making my decision. The two physicians conducting the peer review as well as the medical director of OCHAMPUS all found that during the last two months of her hospitalization, Mrs. was not receiving any active specific medical and/or psychiatric treatment with the goal of reducing her disability. Dr. and Dr. disagree with this conclusion, but do not point out any specific active treatment which was being given and I can find none in my review of the hospital records. The CHAMPUS Regulation also provides as a specific exclusion in Chapter IV(G)(66) that "all services and supplies (including inpatient institutional costs) related to a non-covered condition or treatment; or provided for by an unauthorized provider." The charges paid by the fiscal intermediary after August 12th are listed above. I am unable to separate out what part of the charges paid to Dr. for the period May 25 through September 26 were for visits made to Mrs. after August 12th. I don't believe there were many visits during that time based upon the notes in the hospital chart.

The main points raised by Col. , both in his correspondence prior to the hearing and at the hearing, were the inequities caused by the delay in advising him of the need for authorization beyond 90 days of inpatient care, the delay in advising him that the authorization was not being granted and the retroactive denial of CHAMPUS benefits. He also reported several other problems. There was some confusion about whether he could obtain a certificate of non-availability or whether one was even needed. In addition, he personally paid approximately $5000 for a medically trained attendant for his wife after he had been told by a CHAMPUS adviser that this expense would be covered. Again, he found out, after he had incurred a large expense, that it would not. In response to my pointing out to him that the denial of benefits for this medical assistant was not at issue in this hearing, Col. said he realized that and he was not contesting that denial but only using it as an example of another instance of misinformation he had received during this difficult time. From testimony at the hearing, it also appears that the nursing home where Mrs. stayed after her discharge from the hospital was not an authorized provider and CHAMPUS benefits were not available for that care.

Col. testified as to the financial hardship the CHAMPUS denial nad caused him and also briefly discussed the letters in the hearing file from certain officers in the Air Force asking that an exception be made in this case because of this financial hardship and the delay in receiving notification. As hearing officer, I certainly regret that the decision regarding CHAMPUS benefits causes financial hardship to Col. , or to any beneficiary, but to assure uniform, consistent and appropriate benefit decisions, appeal decisions must be made on the basis of the substantive issues as they relate to application of the law and regulation, and not on the particular circumstances of one case. As Col. stated at the hearing, if he had been aware that benefits would not be paid, he would have investigated the possibility of transferring his wife from the hospital setting prior to the time when she was actually moved. It is unfortunate that word was received regarding denial of benefits after the fact, but the CHAMPUS program is not aware a service or supply has been provided or continued until a claim has been submitted, which is always after the fact, and each claim must be determined on its own merit regardless of whether benefits were extended for other care.

Certain errors did occur in processing this claim and there appears to be a delay in notification that benefits would be denied for custodial care, even though one must realize it does take some time for that decision to be made based upon a review of the hospital records and, in this case, a request for peer review. Notwithstanding the fact that errors or delays may have occurred, they have no bearing on the final decision in this case. The CHAMPUS program is not bound by errors made by one of its employees or agents and my appeal decision must be made on its own merits on the basis of the substantive issues in accordance with the authorizing statute and applicable Regulation governing the program. The substantive issue in this case involves specific statutory provisions regarding custodial care, which are binding upon me as hearing officer, OCHAMPUS, and upon Col. irrespective of any error committed by the fiscal intermediary or error regarding any information provided to him. Although the information received regarding the attendant for his wife is not at issue in this hearing, it is part of the larger argument Col. makes as to the administrative mixups regarding this claim. The CHAMPUS regulation states tht CHAMPUS advisers may assist beneficiaries in applying for benefits but it goes on to say "the CHAMPUS adviser is not responsible for CHAMPUS policies and procedures and has no authority to make benefit determinations or obligate government funds." (Chapter 1(K)). This is a specific statement of the general principle that CHAMPUS is not bound by the errors of its employees and agents.

The final point raised by Col. is that of estoppel or detrimental reliance. Col. made a vigorous argument regarding this at the hearing and stated it was a doctrine applied in federal and state courts to avoid harsh and inequitable results. He is correct in that estoppel is a legal doctrine

which is applied by the courts in certain situations. Unfortunately, estoppel is not applicable to the federal government except in circumstances where there has been "affirmative misconduct" on the part of a governmental agency. Mere error or inaction on the part of an agent or employee does not bind the federal governmet and make a doctrine of estoppel or detrimental reliance applicable. In a prior Final Decision by the Assistant Secretary of Defense (Health Affairs), the argument of estoppel was raised because of an unreasonable delay in denying claims:

"The appealing party contends that OCHAMPUSEUR unreasonably delayed denial of the claims in this case. By this issue the appealing party attempts to raise the argument of estoppel against the government; however, such argument is without merit. Except for specific preauthorization cases as provided in the regulation, CHAMPUS is an "at risk" program whereby the beneficiary obtains care and submits an after-the-fact claim for processing by the government or its fiscal intermediaries. A beneficiary is expected to be familiar with the law and regulation with regard to CHAMPUS coverage and exclusions and may not rely on the delayed response as approval of a claim. Where treatment is a personal choice of the patient, a CHAMPUS claim must be allowed or denied based on the law and regulation. OASD(HA 83-01)"

It is stated in the Regulation that a finding of custodial care does not imply that care is not necessary. The seriousness of the patient's condition and the need for life support functions are understood; however, the level of care furnished is not the type of care for which CHAMPUS payments can be made. The above quoted Regulation also provdes that a maximum of one hour per day may be provided for skilled nursing services. Due to the serious physical and mental condition of the beneficiary, it is evident that occasional skilled nursing services were required and it is clear that these were required for the handling of the gastrostomy tube. I therefore find the maximum one hour of skilled nursing services per day is allowable. The record also supports the allowance for prescription drugs furnished to Mrs. during her hospitalization.

My decision in this case no way questions the attending physician's right to recommend continued acute care hospitalization, nor that it was or was not appropriate for him to do so given his knowledge of the personal, social and family circumstances of his patient and her husband. My decision though, as to the program benefits, must be based upon the applicable law and Regulation rather than personal circumstances. The evidence in the record does not support the finding that the care rendered after August 12th in the general hospital was other than custodial, which is a level of care that is certainly appropriate in some circumstances, but for which CHAMPUS benefits are not available based on a specific Regulatory exclusion.

FINDINGS OF FACT

1. Mrs. was admitted to All Saints Episcopal Hospital, Ft. Worth, Texas, on June 11, 1981, and discharged on October 2, 1981.

2. From August 13th until her discharge, Mrs. had a mental/physical disability which was expected to continue and be prolonged which necessitated a protected environment where assistance to support her daily living was required.

3. From August 13th until her discharge, Mrs. was not under active and specific medical and/or psychiatric treatment which would reduce the disability to the extent necessary to enable her to function outside the protected, monitored and/or controlled environment, and thus the care from that date forward was custodial under the CHAMPUS law and Regulation and above the appropriate level of medically necessary care.

4. During the period from August 13th until her discharge, Mrs. required occasional specific skilled nursing service in connection with the gastrostomy tube and benefits should be allowed for one hour of nursing care per day.

5. Payment for otherwise covered prescription drugs should be made under the CHAMPUS Regulation for the period from August 13 through October 2, 1981.

6. All other services and supplies related to Mrs. care after August 13, 1981, are not covered as a CHAMPUS benefit.

RECOMMENDED DECISION

It is the recommended decision of the hearing officer that inpatient hospital care and related services and supplies provided to Mrs. after August 12, 1981, except for prescription drugs and one hour of skilled nursing care per day, be denied as a benefit of the CHAMPUS program because it was above the medically necessary appropriate level of care and specifically excluded as custodial care.

Dated this 25th day of October, 1983.

Hanna M. Warren
Hearing Officer