



ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D. C. 20301

OCT 26 1984

HEALTH AFFAIRS

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

Appeal of .)
Sponsor:) OASD(HA) FILE 84-19
SSN:) FINAL DECISION

This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPUS Appeal OASD(HA) Case File 84-19 pursuant to 10 U.S.C. 1071-1092 and DoD 6010.8-R, chapter X. The appealing party is the wife of a retired enlisted member of the United States Air Force. The appeal involves the denial of CHAMPUS preauthorization of cost-sharing for surgery involving repair of orbital herniae, complete bilateral plastic to the face, and an implant to the chin. Billed charges totaled approximately \$5,725.00 of which \$1,897.24 was paid by the beneficiary's other health insurance.

The hearing file of record, the tape of that part of the oral testimony presented at the hearing that was not lost and the summary of that part of the hearing that was taped and lost, 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 surgery undergone by the beneficiary in July 1982 be denied CHAMPUS cost-sharing because the surgery was cosmetic, reconstructive, or plastic surgery related to the aging process. The Director, OCHAMPUS, concurs and recommends adoption of the Recommended Decision as the FINAL DECISION by the Assistant Secretary of Defense (Health Affairs).

The Assistant Secretary of Defense (Health Affairs), after due consideration of the appeal record, agrees with the Director, OCHAMPUS, and adopts the Hearing Officer's Recommended Decision. The FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) is, therefore, to deny CHAMPUS cost-sharing of the surgery in question and to deny the beneficiary's appeal.

FACTUAL BACKGROUND

On July 7, 1982, the beneficiary underwent repair of orbital herniae, bilateral plastic to face, had an implant to her chin, and a dermabrasion. Prior to undergoing this surgical procedure,

the beneficiary requested on June 2, 1982, preauthorization for reconstructive surgery as required by the CHAMPUS regulation. Documentation initially submitted by the beneficiary in support of her position included:

1. A May 17, 1982, letter from David B. Franklin, D.D.S., to McCarthy DeMere, M.D., the physician who performed the surgery, which stated:

"[The beneficiary] was seen in my office in February and September of 1979. I saw a lack of muscular strength in her right side. Muscle exercises to strengthen and restore these muscles were advised. [The beneficiary] has not returned at this time, so we don't know if these exercises helped."

2. A March 25, 1982, letter from Thomas A. Currey, M.D., F.A.C.S., to Dr. DeMere, which stated:

"I saw [the beneficiary] yesterday. She gave a history of a brain tumor being removed in May 1979. She said her muscles in her face and eyelids had relaxed as a result of this.

"Her visual acuity was 20/20 in each eye with J.V.50 at near. Her intraocular pressure was 9/9. Harrington flocks was normal. She has a right VII nerve weakness and excess skin of the eyelids.

"[The beneficiary] has dermatochalasis and nystagmus on lateral gaze."

3. A March 18, 1982, letter from Dr. DeMere that stated:

"This patient was first seen by me on 3-17-82. She stated that in 1979, she had a brain tumor, a benign meningioma. This patient was operated on by Dr. Joe Hudson. She had some weakness of the face and some difficulty with hearing in the right ear following that. She has had relaxation of the face since that time. She also has some symptomatic orbital hernias and some difficulty focusing her eyes.

"EXAMINATION: Reveals symptomatic orbital hernias, some relaxation of the entire right face. She has relaxation around the neck and chin."

5. Dr. DeMere's operative report for the July 7, 1982, surgery states:

"Preoperative Diagnosis: Deformity of right face, bilateral orbital herniae, deformity of chin.

"Post Operative Prognosis: Same.

"Operation: Repair of orbital herniae, bilateral plastic to face, implant to chin.

"Findings: This patient has had a brain tumor with weakness of the entire right face, also has orbital herniae and deformity of chin.

"Findings and Procedure: Under general endotracheal anesthesia, a routine repair of orbital herniae was done. Following this, a routine bilateral plastic to face and a silastic sponge implant to the chin. Surgical abrasion of forehead and upper lip done. Mineral oil pressure dressing applied."

In a letter dated October 1, 1982, the Chief, Benefit and Provider Authorization Branch, OCHAMPUS, denied the beneficiary's request for preauthorization. The beneficiary requested a reconsideration. Prior to the issuance of the reconsideration, OCHAMPUS obtained the medical opinion of the OCHAMPUS Medical Director. The Medical Director opined that:

"Question: Was the surgical repair of the orbital herniae medically necessary?

"Response: The bilateral orbital hernia could reasonably have resulted from the brain meningioma and could result in the difficulty focusing expressed by the beneficiary. However, dysfunction is not suggested by the March 25, 1982, examination by T. A. Currey, M.D., which reflects bilateral 20/20 vision and otherwise normal eye exam.

The beneficiary, through her attorney, Mr. Keith M. Alexander, appealed the February 4, 1983, Reconsideration Decision denying preauthorization.

Following the appeal, the OCHAMPUS Medical Director again reviewed the file. No additional medical opinions, other than those previously submitted by the beneficiary, were submitted by her attorney. The Medical Director in a transcribed case conference gave his opinion that:

"The beneficiary's visual acuity was described as being 20/20 in each eye with

normal intraocular pressure. What she did have was nystagmus on lateral gaze which in no way generally interferes with vision. Nystagmus on lateral gaze, as a matter of fact, is a relatively normal finding in people who otherwise have normal eyesight. Dermatochalasis is literally indicative of excess skin of the eyelids which is what Dr. Currey has indicated that she had. This is due to aging and not specifically a consequence or sequelae of her condition; at least it has not been defined specifically as a consequence by the ophthalmologic evaluation."

The Medical Director went on to note that there was no evidence whatsoever to substantiate that the implant to the chin would have been anything but a cosmetic procedure.

The Medical Director also stated with regard to the letter from the dentist who advised the beneficiary to perform certain muscle exercises that:

"Muscle weakness is a consequence of the brain tumor, and the sequelae of that would not be unexpected. To say that the surgery would somehow or other repair dysfunction related to muscular weakness, there is no basis in fact for that at all."

The Medical Director concluded:

"The cosmetic bilateral plasty to the face would be cosmetic. She had cosmetic surgery. There was no loss of function; there was a loss of form in the sense that there was some sagging or whatever; the tacking of the face would have essentially improved the sense of droop that she had. But it was weakness, it was not paralysis. There is no objective evidence whatsoever that there was any loss of function. Our only assumption would be the usual functions using the seventh nerve might have been affected along with other nerves affected by the brain tumor, but there is no defined loss of function; they have not spelled out loss of function. Particularly the surgeries that were provided would not in any way, to my knowledge, improve any function."

In a Formal Review Decision dated August 26, 1983, OCHAMPUS denied the appeal. The beneficiary appealed and requested a hearing; the beneficiary's attorney also submitted an October 20, 1983, letter from Dr. Currey. The letter stated:

"This is regarding surgery done on [the beneficiary] by Dr. McCarthy DeMere. There was bodily disfunction [sic] of the right side of [the beneficiary's] face caused by her brain tumor in 1979. This dysfunction was a right VII nerve weakness which caused relaxation of the muscles and eyelids of the right side of her face. I found this in my examination of her on March 24, 1982. The surgery was necessary to correct the relaxation of tissue and muscles of the face and eyelids so that her face would be symmetrical."

Prior to the hearing, OCHAMPUS obtained from the Colorado Foundation for Medical Care a medical review by a specialist in plastic surgery, George M. Lacey, M.D. Dr. Lacey opined:

"File documentation indicates this patient has some type of weakness around the right side of the face, neck and chin areas, along with bilateral orbital hernias. Her history includes a 1979 operation for a brain tumor. From a definitional standpoint, the surgery done in this case did not involve revision of disfiguring scars resulting from neoplastic surgery. It did not involve scars at all, and the photographs do not evidence any facial scars.

"The repair orbital hernias, plastic surgery to the face and chin implant were primarily cosmetic procedures. The procedures were primarily to improve physical appearance (although the patient did not have a poor physical appearance in her photographs) by reshaping facial contour with the orbital hernia repair and chin implant, along with a face lift.

"The orbital hernia repair, plastic surgery to the face and chin implant would not primarily restore a bodily function. It would primarily alter the contour and appearance of the patient's face.

"Orbital hernia repair, plastic surgery to the face and chin implant were not medically necessary to treat injury, illness or disease. No injury, illness or disease was documented for which this particular surgery would be considered medically necessary."

The surgeon who performed the operation, Dr. DeMere, submitted a letter dated January 5, 1983 [sic 1984]. He noted

that his examination "revealed orbital hernias, relaxation of the face particularly on the right, and some weakness of the seventh nerve." Dr. DeMere went on to state that:

"I consider that all of her procedure was of a functional nature because of the difficulty with the brain tumor and the seventh nerve and the symptomatic orbital hernias. She came to me with difficulty with her vision which was caused from the redness, itching, puffiness, swelling, and constant eye strain. She also complained that after sleeping she would awake with swelling and a heavy mucous discharge on her eyes which caused her increased difficulty in reading and pain for several hours. In addition to the constant eye strain she was also extremely sensitive to changes in light. I have examined her both before and after her procedure and I think that her condition has definitely improved and the cause of the eye strain was eliminated completely."

Also submitted by the beneficiary were copies of office notes from Joseph S. Hudson, the physician who removed the meningioma in 1979. Dr. Hudson's notes state:

"Patient returns [July 16, 1979] for a follow-up evaluation doing extremely well. The incision is well healed. She is still a little unsteady on her feet and has a little difficulty focusing. On exam she has some nystagmus bilaterally, greater to the right than to the left.

* * *

"This patient returns [August 27, 1979] for follow-up evaluation. She is now 3 months post-op removal of her meningioma. Overall, she is doing extremely well. She is still a little unsteady on her gait and is unable to tandem walk, tending to fall to her right. She still has this horizontal nystagmus bilaterally, but this is better. She has a little slight intention tremor, but also this is better. Overall, I think she is doing very well. I will see her back in 3 months."

The hearing was held on December 19, 1983, in Memphis, Tennessee, before OCHAMPUS Hearing Officer William E. Anderson. Present at the hearing were the beneficiary, the sponsor, and the beneficiary's attorney, Mr. Keith M. Alexander, Esquire. Inadvertently, one of the two hearing tapes that were made at the hearing was misplaced or lost. A stipulation was prepared that

was signed by both the beneficiary's attorney and the attorney for OCHAMPUS summarizing the testimony that was included on the tape that was lost. The Hearing Officer has issued his Recommended Decision and issuance of a FINAL DECISION is proper.

ISSUES AND FINDINGS OF FACT

The primary issues in dispute are whether the care provided the beneficiary was medically necessary to restore function or was cosmetic, reconstructive, or plastic surgery, or was correction of disfiguring and scarring resulting from neoplasty surgery.

Medical Necessity

The Department of Defense Appropriation Act, 1982, Public Law 97-114, section 742, prohibits the use of CHAMPUS funds for ". . . any service or supply which is not medically or psychologically necessary to prevent, diagnose, or treat a mental or physical illness, injury, or bodily malfunction as assessed or diagnosed by a physician, dentist, [or] clinical psychologist. . . ." This restriction has consistently appeared in each Department of Defense Appropriation Act since 1976.

The CHAMPUS regulation, DoD 6010.8-R, in chapter IV, A.1., defines the scope of benefits 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. . . ."

The Regulation in chapter IV, E.8., in considerable detail addresses cosmetic, reconstruction, and/or plastic surgery. To avoid an unnecessarily long quote, only the key provisions as relate to this appeal are quoted:

"Cosmetic, Reconstructive and/or Plastic Surgery. For the purposes of CHAMPUS, cosmetic, reconstructive and/or plastic surgery is that surgery which can be expected primarily to improve physical appearance and/or which is performed primarily for psychological purposes and/or which restores form, but which does not correct or materially improve a bodily function.

* * *

"a. Limited Benefits Under CHAMPUS. Benefits under the CHAMPUS Basic Program are

generally not available for cosmetic, reconstructive and/or plastic surgery. However, under certain limited circumstances, benefits for otherwise covered services and supplies may be provided in connection with cosmetic, reconstructive and/or plastic surgery, as follows:

- "(1) Correction of a congenital anomaly; or
- "(2) Restoration of body form following an accidental injury; or
- "(3) Revision of disfiguring and extensive scars resulting from neoplastic surgery;
- "(4) Generally, benefits are limited to those cosmetic, reconstructive and/or plastic surgery procedures performed no later than December 31 of the year following the year in which the related accidental injury or surgical trauma occurred. However, special consideration for exception will be given to cases involving children who may require a growth period.

"b. General Exclusions.

* * *

"(2) Cosmetic, reconstructive, and/or plastic surgery procedures performed primarily for psychological reasons or as a result of the aging process are also excluded.

"(3) Procedures performed for elective correction of minor dermatological blemishes and marks or minor anatomical anomalies are also excluded.

* * *

"c. Noncovered Surgery. All Related Services and Supplies Excluded. When it is determined that a cosmetic, reconstructive, and/or plastic surgery procedure does not qualify for CHAMPUS benefits, all related services and supplies are excluded, including any institutional costs.

"d. Preauthorization Required. In order for CHAMPUS benefits to be extended for cosmetic, reconstructive, and plastic surgery procedures which might qualify under this

subsection E.8. of this CHAPTER IV, preauthorization is required from the Director, OCHAMPUS (or a designee).

* * *

"e. Examples of Non-Covered Cosmetic, Reconstructive and/or Plastic Surgery Procedures. The following is a partial list of cosmetic, reconstructive and/or plastic surgery procedures which DO NOT QUALIFY FOR BENEFITS under CHAMPUS. This list is for example purposes only, and is not to be construed as being all-inclusive.

"(1) Any procedure performed for personal reasons, to improve the appearance of an obvious feature or part of the body which would be considered by an average observer to be normal and acceptable for the patient's age and/or ethnic and/or racial background.

"(2) Cosmetic, reconstructive and/or plastic surgical procedures which are justified primarily on the basis of a psychological or psychiatric need.

* * *

"(4) Face lifts and other procedures related to the aging process.

* * *

"(7) Repair of sagging eyelids (without demonstrated and medically documented significant impairment of vision).

* * *

"(10) Dermabrasion of the face.

* * *

"(12) Revision of scars resulting from surgery and/or a disease process, except disfiguring and extensive scars resulting from neoplastic surgery."

The Regulation in chapter II, B.45., defines cosmetic, reconstructive, and/or plastic surgery as follows:

"'Cosmetic, reconstructive, and/or plastic surgery' means that surgery which can be expected primarily to improve the physical

appearance of the beneficiary, and/or which is performed primarily for psychological purposes, and/or which restores form, it does not correct or materially improve a bodily function."

The Regulation, in chapter IV, G.24., specifically excludes:

"Services and supplies in connection with cosmetic, reconstructive, and/or plastic surgery except as specifically provided in subsection E.8. of this chapter IV."

Amendment 9 to the Regulation published in 46 Federal Register 55515 (November 10, 1981) amended the provisions on reconstructive surgery to permit, under certain circumstances, postmastectomy breast reconstruction. The amendment makes no changes that affect the care involved in this appeal.

The Hearing Officer described the issue in the following manner:

"The inquiry thus becomes whether the surgery in this case falls within the category of 'cosmetic, reconstructive, and/or plastic surgery' which is defined by chapter IV E.8. as surgery which is 'expected primarily to improve physical appearance' or 'primarily for psychological purposes' or which restores form but which 'does not correct or materially improve a bodily function.'"

The Hearing Officer went on to summarize the beneficiary's argument as follows:

"The claimant's argument is to the effect that her sagging facial skin and orbital hernias resulted from a weakening in a facial nerve (nerve VII) that was in turn related to the tumor or the surgery to remove the tumor."

In his Recommended Decision the Hearing Officer stated:

"There is some support in the claimant's evidence that some portion of her problem relating to sagging facial skin was in turn related to a weakening of the seventh nerve which was in turn related to the tumor or its surgical removal. In attempting to discover whether a convincing linkage exists, however, between the two, it is helpful to review the post-operative notes by Dr. Hudson who performed tumor surgery. Dr. Hudson's notes do not reveal any observation of sagging

facial skin or a weakness of the VIIth nerve or any stated history of such problems postoperatively. He observed lateral nystagmus. He noted the patient's particular history of difficulty in focusing. Both of these symptoms may reasonably have been related to the tumor and/or its surgery, but not to sagging of the skin. If it existed at that time, a weakening nerve VII would possibly have been related to the tumor or its surgical removal. He [Dr. Hudson] noted no evidence of that."

The Hearing Officer concluded:

"Certain conclusions seem to emerge from a comprehensive consideration of the evidence. First, the subject surgery is not covered under the specific provisions regarding the revision of disfiguring and extensive scars resulting from neoplastic surgery. Second, with a reference to the form versus function controversy and the specific exclusion for face lifts and other procedures related to the aging process and for the repair of sagging eyelids, a separate inquiry needs to be made separating out for purposes of analysis the muscular weakness of the facial skin and the sagging eyelids, or orbital hernias. The subject surgical procedures were three-fold: Repair of orbital hernias, bilateral plasty to face, and the chin implant.

* * *

"The beneficiary's witnesses, in attempting to lump together all the procedures and to claim that they were all occasioned by the claimed seventh nerve weakening, have in effect elected to treat this as an 'all or nothing' claim, and in doing so the claim is less persuasive than it might have been if some limited portion of the claim had been related to the seventh nerve and the remainder had been related to aging.

"On the other hand, the controverted surgical procedures are clearly 'related to the aging process,' even if there should exist some element of some portion also being 'related' to the tumor. Accordingly, the specific exclusion appears to govern, even if there were some convincingly demonstrated linkage

to the tumor and/or that prior operation, which there is not.

"On the other hand, repair of sagging eyelids, or orbital hernias, is specifically excluded regardless of whether there is a neurological etiology or merely an aging process, unless there is a 'demonstrated and medically documented significant impairment of vision.' The evidence in this case demonstrates and medically documents some difficulty with discomfort of the eye and vision problems but it does not rise to the level of 'significant impairment of vision.' Even if the problem were linked conclusively by the evidence to some specific etiology other than the aging process it would not be allowed benefit without a significant impairment of vision. Not only is the linkage tenuous, but the requisite degree of impairment has not been demonstrated.

"The chin implant would appear to be an 'other procedure' also related to the aging process within that exclusion.

"There was, apparently, also a dermabrasion of the forehead and upper lip, as related by the beneficiary's counsel and performed, as contended by the beneficiary's counsel, as incidental to the other procedures. There was no specific individual billing for this procedure. Dermabrasion of the face is specifically excluded from coverage"

The Hearing Officer found that the surgery was cosmetic, reconstructive, or plastic surgery related to the aging process and does not fall within any of the exceptions to the exclusions for coverage for that type of surgery. I agree. The Hearing Officer also concluded the surgery was not covered under the provisions regarding revision of disfiguring and extensive scars resulting from neoplastic surgery. I also agree with this conclusion.

As noted by the Hearing Officer, there was no medical evidence from the surgeon who removed the beneficiary's tumor that indicated there was bodily dysfunction following the removal. Rather, the operation was considered successful. The limited number of follow-up visits by the beneficiary supports this conclusion. The beneficiary's emphasis on bodily dysfunction being the need for the surgery is, again as pointed out by the Hearing Officer, undercut by the cosmetic procedures (i.e., the chin implant and the dermabrasion) which had no relationship to the problem the beneficiary complained of. There was no evidence of scarring from the prior surgery. Dr. Lacey

specifically noted, "It did not involve scars at all, and the photographs do not evidence any facial scars."

The primary purpose for the surgery, for it to be a CHAMPUS benefit, must have been to restore function. The Hearing Officer found that the evidence in this case demonstrates and medically documents some difficulties with discomfort with the eyes and vision problems, but it did not rise to the level of significant impairment of vision.

The weight of the evidence establishes the primary purpose of the operation was cosmetic. The Hearing Officer's findings and conclusions are well supported by the record, and I hereby adopt the Hearing Officer's Recommended Decision as the FINAL DECISION. I find the surgery was cosmetic, reconstructive, or plastic surgery related to the aging process and that the primary purpose was not to correct or materially improve a bodily function. I further find it did not involve revision of disfiguring and extensive scars from neoplastic surgery.

SECONDARY ISSUES

Peer Review and Agency Medical Opinions

Counsel for the beneficiary objected to the admission of the medical opinion of Doctors Rodriguez and Lacey because neither physician was a treating or examining physician and Dr. Rodriguez is employed by the agency. The Hearing Officer correctly concluded that any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons rely upon in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil or criminal actions. The Hearing Officer properly considered the medical opinions from the medical reviewer for the Colorado Foundation for Medical Care and the OCHAMPUS Medical Director.

Payment by "Other Insurance"

The Hearing Officer noted that the beneficiary contended, in part, that coverage should be extended because coverage was extended under her other health insurance policy. CHAMPUS is a Federal statutory benefits program operated pursuant to law and regulation. While private insurance companies are free to contractually extend benefits without reference to enabling legislation, CHAMPUS is constrained by statutory provisions, including various exclusions and limitations. Any decision regarding entitlement to CHAMPUS cost-sharing must be based solely on statutory and regulatory provisions.

SUMMARY

In summary, it is the FINAL DECISION of the Assistant Secretary Defense (Health Affairs) that the request for preauthorization for reconstructive surgery by the beneficiary

was properly denied, and the reconstructive surgery undergone by the beneficiary was primarily for cosmetic purposes and not to restore function or correct disfiguring and extensive scars from neoplastic surgery. Therefore, the appeal of the beneficiary and the claim for cost-sharing are denied. Issuance of this FINAL DECISION completes the administrative appeals process under DoD 6010.8-R, chapter X, and no further administrative appeal is available.

END

. William Mayer, M.D.,