



ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

HEALTH AFFAIRS

BEFORE THE OFFICE, ASSISTANT

JAN 16 1985

SECRETARY OF DEFENSE (HEALTH AFFAIRS)

UNITED STATES DEPARTMENT OF DEFENSE

Appeal of)	
)	
Sponsor:)	OASD(HA) Case File 84-50
)	FINAL DECISION
SSN:)	

This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPUS Appeal OASD(HA) Case File 84-50 pursuant to 10 U.S.C. 1071-1092 and DoD 6010.8-R, chapter X. The appealing party is the CHAMPUS beneficiary, the spouse of a retired officer of the United States Air Force, as represented by her attorney, Robert C. Neal, San Diego, California. The appeal involves the denial of CHAMPUS cost-sharing for private duty nursing, physical therapy and speech therapy, anesthesia services provided the beneficiary on March 16, 1983, for dental surgery, and glycerin swabs and absorbent underpads. The amount in dispute is approximately \$32,000.00.

The hearing file of record, the tape of oral testimony and the argument 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 CHAMPUS cost-sharing for the private duty nursing care, physical therapy and speech therapy, anesthesia services for dental surgery, and glycerin swabs and absorbent underpads be denied.

The Hearing Officer found that the private duty nursing care was custodial care. The Hearing Officer also found the physical therapy and speech therapy were not eligible for CHAMPUS cost-sharing because the appealing party failed to document the degree of functional impairment, the date of onset of the condition, the type, length, time and frequency of the therapy required, and the expected treatment goal. Further, the Hearing Officer noted that the appealing party failed to provide evaluation reports that would summarize the patient's progress, document the physician's evaluation of the patient's status, and document the treatment modality and procedure. The Hearing Officer found that the beneficiary failed to present satisfactory evidence to establish that the physical therapy and speech therapy were medically necessary and eligible for CHAMPUS cost-sharing.

The Hearing Officer also determined that the anesthesia services were services and supplies related to the patient's dental care and were excluded from CHAMPUS coverage. Finally, the Hearing Officer found that the glycerin swabs and absorbent underpads were not documented to have been used for a covered medical condition, illness, or injury.

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

The FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) is, therefore, to deny CHAMPUS cost-sharing of private duty nursing care, physical therapy and speech therapy, anesthesia services for the dental surgery, and glycerin swabs and absorbent underpads in issue. This determination is based on findings that: (1) the private duty nursing was custodial care; (2) the nursing care provided the beneficiary did not require the skill or expertise of a skilled nurse and could have been performed by an untrained adult with minimal instruction/supervision and is not skilled nursing care which would authorize CHAMPUS cost-sharing one hour per day; (3) the physical therapy and speech therapy were not adequately documented as medically necessary; (4) the anesthesia services were services for a dental rather than a medical condition and are thus excluded from CHAMPUS cost-sharing because these services do not constitute adjunctive dental care; and (5) the glycerin swabs and absorbent underpads were used for a noncovered condition.

FACTUAL BACKGROUND

The beneficiary, the spouse of a retired United States Air Force Colonel, suffered a cardiovascular accident on January 24, 1981, when she ruptured a congenital aneurysm in her brain and suffered a severe intracerebral hemorrhage. The beneficiary underwent an emergency craniotomy at Sharp Hospital, San Diego, California, and subsequently received outpatient nursing care, speech therapy and physical therapy, and inpatient dental care.

Outpatient Nursing Care

Following the emergency surgery, the beneficiary was transferred to the Sharp Rehabilitation Center where she received multidisciplinary therapies. On April 30, 1981, the beneficiary was transferred to the Knollwood Convalescent Hospital. Subsequently, the beneficiary was discharged to her home where she began receiving home nursing care. CHAMPUS, in the Formal Review Decision issued November 30, 1983, cost-shared the home nursing care through December 1982 but denied cost-sharing after December 31, 1982, on the basis that the care received by the beneficiary was custodial care. This decision authorized prescription drugs but denied 1 hour of skilled nursing care

because the appeal record lacked documentation that the beneficiary required skilled nursing care. This decision also advised the fiscal intermediary to recoup any erroneous payments for nursing care provided after December 1982.

Physical and Speech Therapy

In conjunction with the private nursing care, the beneficiary also received speech and physical therapy at her home. The physical therapy included gait training and range of motion exercises. The Formal Review Decision held that speech therapy and physical therapy provided after December 1982 were not subject to CHAMPUS cost-sharing because they were not related to a covered medical condition, i.e., custodial care. The Formal Review Decision also instructed the fiscal intermediary to recoup any erroneous payments for speech therapy and physical therapy paid after December 1982.

Services of the Anesthesiologist

On March 16, 1983, dental surgery was performed on the beneficiary at Sharp Hospital. The dental surgery was necessary to treat ". . . rampart dental caries with an infected tooth and severe gingival loss throughout the mouth with associated severe problems due to her stroke." Because of the beneficiary's condition, it was necessary to perform the dental surgery in the operating room under anesthesia. The sponsor submitted a claim in the amount of \$594.00 for these services which was denied by the fiscal intermediary. Sharp Hospital submitted a bill for \$2,187.70 for the March 16, 1983, dental surgery. This amount was paid in full by the fiscal intermediary and is not in dispute in this appeal. The Formal Review denied the anesthesiologist's services in conjunction with the dental surgery on the basis that the anesthesiologist's services related to nonadjunctive dental care which is not a CHAMPUS benefit.

Medical Supplies

The record indicates that the sponsor submitted claims for glycerin swabs (used to clean the beneficiary's teeth) for the period of August 27, 1981, through February 28, 1983. The claims were denied by the fiscal intermediary. The record also indicates that a claim was also denied for absorbent underpads furnished during the period of April 28, 1983, through May 27, 1983. CHAMPUS cost-sharing of these medical supplies was denied in the Formal Review Decision on the basis that these supplies were not used for a covered medical condition.

A hearing was requested by the sponsor which was held on June 27, 1984, at San Diego, California, before OCHAMPUS Hearing Officer, Sherman R. Bendalin. Present at the hearing were the sponsor, the attorney for the sponsor and beneficiary, Mr. Robert C. Neal, and William N. Voharas, the CHAMPUS representative. The Hearing Officer has issued his Recommended Decision and issuance of a FINAL DECISION is proper.

ISSUES AND FINDINGS OF FACT

The issues in this appeal are: (1) whether the private duty nursing care provided the beneficiary from January 1, 1983, through January 27, 1984, was custodial care; (2) whether the private duty nursing care provided the beneficiary from January 1, 1983, through January 27, 1984, qualified as skilled nursing care for which CHAMPUS could authorize up to 1 hour per day; (3) whether the physical therapy and speech therapy provided to the beneficiary after December 1982 were medically necessary and related to a covered medical condition; (4) whether the anesthesia services provided the beneficiary on March 16, 1983, for dental surgery were services and supplies which related to hospitalization for the patient's dental care; and (5) whether the glycerin swabs and absorbent underpads used during the period of August 27, 1981, through May 27, 1983, are covered medical supplies under the CHAMPUS Program.

Custodial Care

Under 10 U.S.C. 1077(b), custodial care is specifically excluded from CHAMPUS cost-sharing. Department of Defense Regulation 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. When 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 care 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."

It is clear that the beneficiary's care meets the four criteria in the CHAMPUS definition of custodial care. The record reflects that the beneficiary, after the cerebral hemorrhage, was quadriplegic, unable to speak, required a ventriculo-atrial shunt, gastrostomy, and other surgical and emergency procedures to maintain her life.

Although the beneficiary displayed improvement, i.e., speaking more clearly; ambulatory with the help of a walker; riding a stationary bicycle; and eating per orium rather than by gastrostomy, I agree with the opinions of the medical review physicians. Specifically, I find that the beneficiary remained significantly impaired in spite of the improvements mentioned above and that her disability was expected to be prolonged. As stated by the medical reviewers in the first medical review (Exhibit 42):

"The patient is not able to care for herself independently and consequently requires a protected, monitored and controlled environment. As examples, she requires protection while using the walker and monitoring of medications.

* * *

"In March 1983 the physical therapist reports that she requires moderate to maximal assistance with wheelchair and bed transfers, plus maximal assistance with balance for ambulation in a walker. She also requires help with personal care.

* * *

"The records do not show that there has been significant change and improvement since December 1982. She was at the same functional level in April 1983 as she was in December 1982. It appears she has reached maximal improvement at this time and her care is more maintenance level care rather than active treatment to reduce the disability. It is hard to predict whether her disability will improve further to allow her to function outside a protected, monitored and controlled environment.

* * *

"The patient appeared to require less than one hour per day of skilled nursing care. The services by the nurses were primarily personal care, speech and physical exercises, medication administration and observation. Actual skilled care required was minimal, and most of the nursing care was not skilled care."

Because of the submission of additional information, a subsequent medical review was performed by the original reviewing physicians. This review (Exhibit 62) reaffirmed the findings of the first medical review as follows:

"The patient's disability is expected to continue and be prolonged. Although she has improved since the onset of her problem in 1981, the records in 1983 show she remains significantly impaired with short term memory deficit, limited use of her upper extremities, ambulation deficit, and speech and language deficits.

"The patient continued to require a protected, monitored and controlled environment. She is not able to care for herself independently. She requires assistance with daily routine, and she is basically bed/wheelchair bound.

"Nurses helped with all daily routines including bathing, bed and wheelchair transfers, assistance in using the walker and personal care.

"Records in 1983 show the patient was at a maintenance level of care. This is not to say she would not or could not improve further, but it appeared from the records that she had reached a plateau and further significant improvement was not documented. The care she received maintained her level of function. It did not reduce her disabilities.

* * *

"After looking through the nursing records, it appears the services of the nurses were primarily non-skilled care such as medication administration, personal care, physical exercises, transfers. Skilled nursing services would require less than one hour per day.

"The services provided to this patient could have been rendered by the average intelligent adult with minimal instruction and supervision [sic]. The services were non-skilled.

"The nursing care provided to this patient was primarily for the purpose of maintaining the patient's level of function and assisting in daily activities of living such as personal care and transfers.

"Range of motion exercises were necessary for this patient to maintain joint mobility because of quadriparesis and contractures. Such exercises would not be expected to reduce her disabilities, they would be expected to maintain her level of function."

As stated in the Regulation, a finding of custodial care does not imply that the care is not necessary. The seriousness of the patient's condition and the need for life support functions are understood. However, the type of care furnished is not covered under CHAMPUS.

The Regulation does authorize coverage of prescription drugs when medically necessary to treat a person receiving custodial care. Prescription drugs are defined in DoD 6010.8-R, chapter II, B.138., in part, as:

". . . those drugs and medicine . . . which by law of the United States requires a physician's or dentist's prescription. . . ."

Therefore, all otherwise authorized prescription drugs are payable in this case. I concur in the findings of the medical reviewers:

"Raglan was given for nausea, Ludiomil for depression, Dalmane for sleep, Inderal for hypertension, Symetrel to control Parkinson symptoms which may be from the Ludiomil or may stem from the brain. These were reasonable and necessary."

Private Duty Nursing

Even if the beneficiary's case had not been determined primarily to involve custodial care, the private duty nursing care would not have met the criteria for CHAMPUS coverage specified in Department of Defense Regulation 6010.8-R. As defined by the Regulation, private (special) nursing services mean:

". . . skilled nursing services rendered to an individual patient requiring intensive medical care. Such private duty (special) nursing must be by an actively practicing Registered Nurse (R.N.) or Licensed Practical or Vocational Nurse (L.P.N. or L.V.N.), only when the medical condition of the patient requires intensified skilled nursing services (rather than primarily provided the essentials of daily living) and when such skilled nursing care is ordered by the attending physician." (DoD 6010.8-R, chapter II, B.142.).

Skilled nursing service is defined as:

". . . a service which can only be furnished by an R.N. or (L.P.N. or L.V.N.), and required to be performed under the supervision of a physician in order to assure the safety of the patient and achieve the medically desired result. Examples of skilled nursing services are intravenous or intramuscular injections, levin tube or gastrostomy feedings, or tracheotomy aspiration and insertion. Skilled nursing services are other than those services which primarily provide support for the essentials of daily living or which could be performed by an untrained adult with minimum

instruction and/or supervision." (DoD 6010.8-R, chapter II, B.161.)

The extent of benefits for private duty nursing is specified in DoD 6010.8-R, chapter IV, C.3.o., in part, as follows:

"Private Duty (Special) Nursing. Benefits are available for the skilled nursing services rendered by a private duty (special) nurse to an individual beneficiary/patient requiring intensified skilled nursing care which can only be provided with the technical proficiency and scientific skills of an R.N. The specific skilled nursing services being rendered are controlling, not the condition of the patient nor the professional status of the private duty (special) nurse rendering the services.

"(1) Inpatient private duty (special) nursing services are limited to those rendered to an inpatient in a hospital which does not have an intensive care unit

"(2) The private duty (special) nursing care must be ordered and certified to be medically necessary by the attending physician.

"(3)

"(4) Private duty (special) nursing care does not, except incidentally, include services which primarily provide and/or support the essentials of daily living, or acting as a companion or sitter.

"(5) If the private duty (special) nursing care services being performed are primarily those which could be rendered by the average adult with minimal instruction and/or supervision, the services would not qualify as covered private duty (special) nursing services regardless of whether performed by an R.N., regardless of whether or not ordered and certified to by the attending physician, and regardless of the condition of the patient."

DoD 6010.8-R, chapter IV, E.12.c.(2) provides:

"(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. When it is determined such skilled nursing services are needed, benefits may be extended for one (1) hour of nursing care per day."

As specified in the above quoted regulatory provisions, to qualify for CHAMPUS benefits the private duty nursing services must be skilled services, not services which primarily provide support for the essentials of daily living or could be performed by an average adult with minimal instruction/supervision. Although the attending physician indicated that the beneficiary needed skilled nursing for two shifts and the husband provided the care during the third shift, the OCHAMPUS medical reviewers opined in their first medical review that:

"The services provided by the nurses were not skilled services requiring the technical proficiency and scientific skills of an R.N. The services could have been provided by an intelligent adult with minimal instruction and supervision. A visiting nurse could have made periodic checks to monitor the patient's condition. Private duty nursing care, in our opinion, was not medically necessary in this case.

* * *

"The nurses did not act as companions or sitters. They monitored the patient, assisted with transfers and personal care, and gave physical range of motion exercises and some speech exercises. To a large extent these primarily supported the essentials of daily living and maintained the patient's functional status."

This medical opinion of the two medical reviewers is supported by the nursing notes of record and the medical review quoted above. The nursing care plan indicates the nurses would administer medication, watch for side effects, encourage the beneficiary to ventilate her feelings, involve the patient in outside activities, attend to the beneficiary's comfort, assist the beneficiary in walking, etc. The services provided by the private nurses could have been provided by an untrained adult with minimum instruction/supervision. Consequently, these services are not eligible for CHAMPUS cost-sharing as skilled nursing care under the above cited authorities. As noncovered nursing services, the care does not qualify for cost-sharing under the limited exception of the custodial care exclusion of 1 hour per day of skilled nursing care.

Physical and Speech Therapy

The CHAMPUS regulation (DoD 6010.8-R, chapter II, B.14.) defines appropriate medical care as:

"14. Appropriate Medical Care. "Appropriate Medical Care" means:

"a. That medical care where the medical services performed in the treatment of a disease or injury, or in connection with an obstetrical case, are in keeping with the generally acceptable norm for medical practice in the United States;

"b. The authorized individual professional provider rendering the medical care is qualified to perform such medical services by reason of his or her training and education and is licensed and/or certified by the state where the service is rendered or appropriate national organization or otherwise meets CHAMPUS standards; or

"c. The medical environment in which the medical services are performed is at the level adequate to provide the required medical care."

The definition of medically necessary is also relevant to this issue. At chapter II, section B.104., medically necessary is defined as follows:

"104. Medically Necessary. 'Medically Necessary' means the level of services and supplies (that is, frequency, extent, and kinds) adequate for the diagnosis and treatment of illness or injury (including maternity care). Medically necessary includes concept of appropriate medical care."

Exclusions and limitations, also defined in the Regulation, are applicable. At chapter IV, section G, the following exclusions and limitations are found:

"G. Exclusions and Limitations. 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:

"1. Not Medically Necessary. Services and supplies which are not medically necessary for the diagnosis and/or

treatment of a covered illness or injury. ...

* * *

"7. Custodial Care. Custodial care regardless of where rendered except as otherwise specifically provided in paragraph E.12.e. of this Chapter IV."

In order for the physical and speech therapy to be cost-shared by CHAMPUS, the beneficiary has the burden of proof to establish that the physical and speech therapy were medically necessary and appropriate medical care.

Final Decisions 83-02 and 83-01 set forth the criteria to be met to establish that physical therapy is medically necessary. There must be a showing by the treating physician of the degree of functional impairment, the date of onset, the type, length, time and frequency of the therapy required, and the expected treatment goal. The therapist must provide evaluation reports summarizing the patient's progress and document the physician's evaluation of the patient's current status. Additionally, an itemization of the treatment modality/procedure performed must be provided. I concur with the finding of the Hearing Officer that the beneficiary has not met all the factors mentioned above. Consequently, she has failed to establish medical necessity of the physical and speech therapy. Therefore, care cannot be cost-shared by CHAMPUS.

Moreover, as I have found the beneficiary was receiving custodial care, cost-sharing of the physical and speech therapies is not allowed under the Regulation.

Anesthesia Services/
Adjunctive Dental Care

Chapter IV., subsection E.10., states:

"The CHAMPUS Program does not include a dental benefit. Under very limited circumstances, benefits are available for dental services and supplies when the dental services are adjunctive to otherwise covered medical treatment.

"a. Adjunctive Dental Care: Limited. Adjunctive dental care is limited to that dental care which is medically necessary in the treatment of an otherwise covered medical (not dental) condition, is an integral part of the treatment of such medical condition and is essential to the control of the primary medical condition.

"(1) Elimination of a non-local infection (such as cellulitis of osteoitis) which is clearly exacerbating and directly affecting a medical condition currently under treatment would be an example of adjunctive dental care.

"(2) Another example of adjunctive dental care would be where teeth and tooth fragments must be removed in order to treat and repair facial trauma resulting from an accidental injury.

"NOTE: The test of whether or not dental trauma is covered is whether or not the trauma is solely dental trauma. Dental trauma must be related to, and an integral part of, medical trauma in order to be covered as adjunctive dental care.

"b. General Exclusions. Generally, preventive, routine, restorative, prosthodontic and/or emergency dental care are not covered by CHAMPUS.

"(1) Dental care which is essentially preventive and (even if performed to prevent a potential medical condition) which is not an integral part of the treatment of a medical (not dental) condition, does not qualify as adjunctive dental care for the purposes of CHAMPUS. An example would be routine dental care provided a rheumatic heart patient as a "preventive" measure.

"(2) Adjunctive care does not include dental services which involve only the teeth and/or their supporting structure, even if the result of an accident. An example would be the child who falls and breaks, chips or loosens a tooth.

"(3) Adjunctive dental care does not include restoration or periodontal splinting of teeth and/or dental prosthesis, whether permanent or temporary and whether required as a result of an accidental injury or whether injured, affected or fractured during the medical or surgical management of a medical condition.

"(4) Adjunctive care does not include treatment of peridontal disease and/or the consequence of peridontal disease; nor does it include such dental services as filling cavities or adding or modifying bridgework to assist in mastication whether or not related to gastrointestinal or hematopoietic diseases.

"(5) All orthodontia is specifically excluded, except when directly related to and as an integral part of, surgical correction of a cleft palate congenital anomaly.

"c. Preauthorization Required.

Adjunctive dental care, in order to be covered, requires prior approval and written preauthorization from the Director, OCHAMPUS (or a designee).

"(1) The preauthorization request must include a detailed statement from the dentist as to the dental procedure to be performed and the cost, and a statement from the attending physician providing the medical evidence as to its relationship to a medical condition currently under treatment.

"(2) Such preauthorization is for specific dental service and is valid for only ninety (90) days from date of issuance.

"(3) If the approved adjunctive dental care is not rendered within the ninety (90) day period, a new preauthorization is required. However, unless some unusual medical circumstance occurs, the fact that the dental care was not rendered during the specified time limit will raise significant question as to whether it was, in fact, adjunctive.

"(4) Preauthorization is required for each specific adjunctive dental service or appliance (i.e., the instance of dental care), even though related to an ongoing medical episode. A preauthorization is not valid for any adjunctive dental service or supply

except as specifically stated in the preauthorization.

"(5) Where adjunctive dental care involves an emergency medical (not dental) situation (such as facial injuries resulting from an accident), pre- authorization is waived. However, such waiver is limited to the essential adjunctive dental care related to the medical condition requiring the immediate emergency treatment. When claims are submitted for such adjunctive dental care rendered in an emergency situation, a complete explanation along with supporting medical documentation must be submitted.

"d. Covered Oral Surgery.

Notwithstanding the above limitations on dental care, there are certain oral surgical procedures which are performed by both physicians and dentists, and which are essentially medical rather than dental care. For the purposes of CHAMPUS, the following procedure, whether performed by a physician or dentist, is considered to be in this category and benefits may be extended for otherwise covered services and supplies without preauthorization:

"(1) Excision of tumors and cysts of the jaws, cheeks, lips, tongue, roof and floor of the mouth, when such conditions require a pathological (histological) examination.

"(2) Surgical procedures required to correct accidental injuries of the jaws, cheeks, lips, tongue, roof and floor of the mouth.

"(3) Treatment of oral and/or facial cancer.

"(4) Treatment of fractures of facial bones.

"(5) External (extra-oral) incision and drainage of cellulitis.

"(6) Surgery of accessory sinuses, salivary glands or ducts.

"(7) Reduction of dislocations and the excision of the temporomandibular joints, when surgery is a necessary part of the reduction.

"(8) Any oral surgical procedure which falls within the cosmetic, reconstructive and/or plastic surgery definition is subject to the limitations and requirements set forth in Chapter IV, Subsection E.8 of Chapter IV of the Regulation 'Basic Program Benefits.'

"NOTE: Preparation of the mouth for dentures is not a covered oral surgery procedure. Also excluded are the removal of unerupted or partially erupted, malposed and/or impacted teeth, with or without the attached follicular or development tissues.

"e. Inpatient Hospital Stay in Connection with Non-Adjunctive, Non-Covered Dental Care. Institutional benefits specified in Section B. of this CHAPTER IV may be extended for inpatient hospital stays related to non-covered non-adjunctive dental care when such inpatient stay is medically necessary to safeguard the life of the patient from the effects of dentistry because of the existence of a specific and serious non-dental organic impairment currently under active treatment. (Hemophilia is an example of a condition that could be considered a serious non-dental impairment.) Preauthorization by OCHAMPUS is required for such inpatient stay to be covered in the same manner as required for adjunctive dental care described in Paragraph E.10.c. (and its subparts) of this CHAPTER IV. Regardless of whether or not the preauthorization request for the hospital admission is approved and thus qualifies for institutional benefits, the professional service related to the non-adjunctive dental care is not covered."

Thus, institutional benefits may be extended for inpatient hospital stays related to non-covered, non-adjunctive dental care when the inpatient stay is medically necessary to safeguard the life of the patient from the effects of dentistry because of the existence of a specific and serious non-dental organic impairment

currently under active treatment. Regardless of whether or not the preauthorization request for the hospital admission is approved and thus qualifies for institutional benefits, the professional service related to the nonadjunctive dental care is not covered.

In this case, the hospitalization costs have been cost-shared and are not at issue. The record establishes the inpatient care was medically necessary because of the previous cardiovascular accident. However, under CHAMPUS, in order for the anesthesiologist's claim to be authorized for cost-sharing, the dental care provided to the beneficiary must qualify as adjunctive dental care. Following my review of the record, I find the dental care received by the beneficiary does not qualify as adjunctive dental care as defined by the Regulation.

The operative report describes the patient's preoperative diagnosis as "(r)ampant dental caries with an infected tooth, severe gingival loss throughout the mouth with associated severe problems due to her stroke." According to this report, the purposes of the operation were "repair of dental caries, impression for bridges, extract infected tooth."

The operative report describes the procedure as follows:

". . . the upper right second primary molar was prepared for a crown, the upper right second bicuspid was prepared for a crown. The upper left first bicuspid, the upper left first permanent molar and the upper left second permanent molar were areas where crowns were to be placed in position at a later date. The upper left second permanent molar was extracted. The upper left first and second bicuspid and the second permanent molar had buccal alloy restorations. The lower left first and second molars had distal buccal alloy restorations. The lower right first and second bicuspid (had) distal mesial buccal alloy restorations. The patient also had a prophylaxis and that was all."

This evidence clearly establishes the dental care provided to the beneficiary was restoration of teeth, preparation of teeth for crowns and extraction of a permanent molar. Adjunctive dental care does not include dental services which involve only the teeth and/or their supporting structure; this exclusion would include extraction of a molar. Adjunctive dental care also does not include restoration of teeth or dental services which involve dental prosthesis which would include preparation of teeth for crowns. Therefore, I find the dental care provided to this patient is not adjunctive dental care as defined by DoD 6010.8-R, chapter IV, E.10. because it is restoration of teeth, involves dental prostheses, and involves only the teeth and/or their supporting structure. As the care does not qualify as adjunctive

dental care, the professional services and anesthesia, cannot be cost-shared under the above cited authorities.

Further, the appeal record does not document that preauthorization for the hospitalization associated with the dental surgery was obtained. Although the Regulation requires preauthorization, it is the policy of CHAMPUS to not deny an appeal or deny benefits when preauthorization was not requested, provided the record establishes that preauthorization would have been granted if requested. Therefore, I find, based on the record, that preauthorization would have been granted, and CHAMPUS may cost-share the inpatient charges for the dental surgery.

Medical Supplies

Medical supplies are covered under CHAMPUS when the regulatory requirements are met. In chapter IV, section B.(1)(f), related services and supplies are defined as follows:

"f. Related Services and Supplies. Covered services and supplies must be rendered in connection with and directly related to a covered diagnosis and/or definitive set of symptoms requiring otherwise authorized medically necessary treatment."

The other definition applicable to this issue is that of consumables or medical supplies and dressing. Chapter IV, D.(3)(c), defines consumables as follows:

"c. Medical Supplies and Dressings (Consumables). The medical supplies and dressings (consumables) are those which do not withstand prolonged, repeated use. Such items must be directly related to an appropriate and verified covered medical condition of the specific beneficiary for whom the item was purchased, and obtained from a medical supply company, a pharmacy, or authorized institutional provider. Examples of covered medical supplies and dressings are disposable syringes for a known diabetic, colostomy sets, irrigations sets, Ace bandages, etc. An external surgical garment specifically designed for use following a mastectomy is considered a medical supply item.

"NOTE: Generally, the reasonable charge of a medical supply item will be under one hundred (\$100.00) dollars. Any item in excess of this amount must be reviewed to make sure it would not qualify as an item of durable medical equipment. If it is, in fact, a

medical supply item and does not represent an excessive charge, it can be considered for benefits under this Paragraph c."

Following my review of the record, I find the glycerin swabs and the absorbent underpads were properly denied CHAMPUS cost-sharing as neither was directly related to a documented covered medical condition. There is no evidence in the record that established the items met this requirement. The beneficiary did not submit written documentation, nor was any testimony received at the hearing on this issue. Accordingly, I concur with the Hearing Officer's finding that the glycerin swabs and absorbent underpads are not covered under CHAMPUS.

SUMMARY

In summary, the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) is to deny CHAMPUS cost-sharing of: (1) the private duty nursing care provided the beneficiary from January 1, 1983, through January 27, 1984, as excluded custodial care and not qualifying as skilled nursing care under CHAMPUS; (2) the physical therapy and speech therapy provided the beneficiary after December 31, 1982, as not medically necessary; (3) the anesthesia services performed on March 16, 1983, for dental surgery as nonadjunctive dental care, and (4) the glycerin swabs and absorbent underpads used by the beneficiary from August 21, 1981, through May 27, 1983, as not related to a covered medical condition. Because I have found that the above medical services are ineligible for CHAMPUS cost-sharing, the Director, OCHAMPUS, is directed to review this case for appropriate recoupment action in accordance with the Federal Claims Collection Act. Issuance of this FINAL DECISION completes the administrative appeals process under DoD 6010.8-R, chapter X, and no further administrative appeal is available.



Vernon McKenzie

Acting Principal Deputy Assistant Secretary

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

Appeal of)
Sponsor:) R E C O M M E N D E D
SSN:) D E C I S I O N
_____)

This is the Recommended Decision of CHAMPUS Hearing Officer Sherman R. Bendalin in the CHAMPUS appeal case file and is authorized pursuant to 10 U.S.C. § 1071-1089 and DoD Regulation 6010.8-R, Chapter X. The appealing party is the Sponsor and Authorized Representative, Col., USAF, Retd., pursuant to a Power of Attorney dated September 23, 1972. (Exhibit file, Volumn 2 of 4, Exhibit 32.) (Hereinafter "E. _____.") The appeal involved the denial of CHAMPUS cost-sharing for nursing care, physical therapy and speech therapy, dental care, and covered medical supplies, provided to the beneficiary from February 14, 1982 through January 27, 1984.

The issues are four in number. The first issue is whether the private duty nursing care provided from January 1, 1983 through January 27, 1984 was custodial care. If so, it would be excluded from coverage under the CHAMPUS Regulation, DoD 6010.8-R. (Hereinafter "Regulation.") The second issue is whether the physical therapy and speech therapy provided to the patient was medically necessary and related to a covered medical condition; if not, it would also be excluded from coverage. The third issue is whether the anesthesia services on March 16, 1983, for dental surgery were services and supplies related to the hospitalization for the patient's dental care. The fourth and last issue is whether glycerin swabs and absorbent underpads are covered medical supplies.

The hearing was commenced by the undersigned Hearing Officer in San Diego, California at the United States Army Reserve Center, Admiral Baker Road, on June 27, 1984. The hearing commenced at 10:14 o'clock a.m. and concluded at 12:23 o'clock p.m. Appearing on behalf of the Beneficiary was the Sponsor and attorney-in-fact. The Sponsor and Beneficiary were represented by Robert C. Neal, Attorney at Law, 530 Broadway, Suite 1130, San Diego, California 92101. Appearing on behalf of OCHAMPUS was Attorney/Advisor William N. Voharas.

The amount in dispute was agreed upon prior to the hearing at approximately \$32,000.00.

The Hearing file has been expanded to include Exhibits 57 through 72. All Exhibits have been reviewed. The undersigned has reviewed the tape recording of the hearing. The undersigned Hearing Officer, after due consideration of the appeal record, concurs in the recommendation of OCHAMPUS to deny CHAMPUS cost-sharing for the private duty nursing care provided from January 1, 1983 through January 27, 1984. The undersigned also concurs in the recommendation to deny cost-sharing for physical therapy and speech therapy; to deny CHAMPUS cost-sharing for the anesthesia services received by the Beneficiary on March 16, 1983; and, finally, to deny CHAMPUS cost-sharing for the glycerin swabs and absorbent underpads.

FACTUAL BACKGROUND

The Beneficiary, born October 10, 1923, underwent a cardiovascular accident on January 24, 1981 when, without provocation, she ruptured a congenital aneurysm in her brain and suffered a severe intracerebral hemorrhage. (E. 39.) She underwent emergency craniotomy in San Diego, underwent outpatient nursing care, speech therapy, and physical therapy, as well as inpatient dental care. (E. 62.)

Claims for the nursing care, dental care and physical therapy were submitted to Fiscal Intermediary Blue Shield of California and Blue Cross of Washington-Alaska. Some of the claims were cost-shared.

By April 13, 1983 Fiscal Intermediary Blue Cross of Washington-Alaska had denied part of the bills submitted for nursing services from February 14, 1982 through January 25, 1983. Additional claims were submitted and additional denials were rendered. By Reconsideration Review issued June 13, 1983, denials were upheld for cost-sharing in the amount of approximately \$10,000.00. An additional Reconsideration Review, dated September 2, 1983 upheld denials for additional nursing care. All denials for nursing care have been combined for purposes of the instant hearing. (E. 62, p. 2.)

The Fiscal Intermediary, on April 26, 1983 denied cost-sharing for physical therapy claims. The Reconsideration Review, issued May 12, 1983 upheld the denial.

The claim for the March 16, 1983 anesthesia for dentistry services was denied, and the Reconsideration Review, dated June 6, 1983, upheld the initial denial of cost-sharing. Finally, the prescription medical supplies claim was initially denied and by Reconsideration Review dated June 3, 1983, the initial denial was affirmed.

By a series of letters, the first one dated May 20, 1983, and the last one dated October 4, 1983, the Sponsor appealed the denials of cost-sharing. (E. 62.)

By Formal Review decision, dated November 30, 1983, OCHAMPUS continued to deny the various claims affirming, in their totality, the prior decisions made by CHAMPUS. Additionally, as a result of the Formal Review decision, recoupment action was initiated by the appropriate Fiscal Intermediary. The hearing request was timely filed, and accepted by OCHAMPUS. (E. 53, 54.)

A Notice of Hearing was issued by the undersigned Hearing Officer dated May 1, 1984, setting the matter to hearing on May 15, 1984. (E. 58.) After additional correspondence between the Sponsor and OCHAMPUS, the matter was continued and set for hearing on June 27, 1984 by Amended Notice of Hearing. (E. 60.)

The undersigned Hearing Officer has considered Exhibits 1 through 8, the Physical Therapy Exhibits; Exhibits 1 through 5, the anesthesia Exhibits; Exhibits 1 through 5, the medical supplies Exhibits; and Exhibits 1 through 56, the nursing services Exhibits, provided to the Sponsor and the Hearing Officer in Volumes 1 through 4 of the Hearing file. Additionally, considered and admitted were Exhibits 57 through 72. Exhibit 57 is correspondence from Donald F. Wagner, Chief, Appeals and Hearings, OCHAMPUS to the Sponsor dated March 30, 1984. Exhibit 58 is the original Notice of Hearing dated May 1, 1984. Exhibit 59 is correspondence between the Sponsor, _____, and the undersigned Hearing Officer dated May 7, 1984. Exhibit 60 is the amended Notice of Hearing dated May 24, 1984. Exhibit 61 is correspondence dated June 17, 1984 between the Sponsor and the undersigned Hearing Officer. Exhibit 62 is the STATEMENT OF OCHAMPUS POSITION, with enclosures, including cover letter of Attorney/Advisor William N. Voharas, dated May 24, 1984. Exhibit 63 is a letter from William Voharas to Robert C. Neal, Attorney at Law, dated June 22, 1984. Several exhibits were received at the Hearing. Exhibit 64 is a Memo for OCHAMPUS Hearing Officer, dated June 24, 1984, bearing the signature of Jennifer Putnam, R.N. Exhibit 65 is a letter dated June 22, 1984 authored by Bernice P. Danylchuk. Exhibit 66 is a three page handwritten memoranda, signed by Allen Lininger, R.P.T. to the Hearing Officer dated June 26, 1984. Exhibit 67 is a memo prepared by the Sponsor, _____, entitled "Memo for Record," dated May 21, 1984. Exhibit 68 is a similar memo prepared by the Sponsor, entitled "Status of Claims for 1983 Nursing Care Services," dated May 18, 1984. Finally, the last exhibit received at the Hearing was a "Memo for Record Subject Telcon . . .", authored by the Sponsor, _____, dated May 26, 1984.

Three exhibits have been received post-Hearing. Exhibit 70 is the letter of confirmation regarding the post-Hearing comment schedule, authored by the undersigned Hearing Officer, dated June 28, 1984. Exhibit 71 is a letter from William N. Voharas, Attorney/Advisor, OCHAMPUS, to the Hearing

Officer dated July 2, 1984. The final exhibit, Exhibit 72, is a letter from Robert C. Neal, Attorney at Law, attorney for the Sponsor and Beneficiary, to the undersigned Hearing Officer, dated July 6, 1984.

ISSUES AND FINDINGS OF FACT

I. CUSTODIAL CARE

The issues in this appeal are four in number. As aforementioned, the first issue is whether the private duty nursing care provided from January 1, 1983 through January 27, 1984 was custodial care. This issue will be discussed first. The remaining issues will be discussed seriatim.

Chapter II of the Regulation consists of definitions used in the Regulation. Section B(47) defines Custodial Care, and reads as follows:

"47. Custodial Care. "Custodial Care" means that care rendered to a patient (a) who is mentally or physically disabled and such disability is expected to continue and be prolonged, and (b) who requires a protected, monitored and/or controlled environment whether in an institution or in the home, and (c) who requires assistance to support the essentials of daily living, and (d) 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. or L.P.N.

NOTE: The determination of custodial care in no way implies that the care being rendered is not required by the patient; it only means that it is the kind of care that is not covered under the CHAMPUS Basic Program."

Also contained in the definitions in Chapter II is a definition of Skilled Nursing Service. At Chapter II, §B(161) the definition reads as follows:

"161. Skilled Nursing Service. "Skilled Nursing Service" means 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 tracheotomy aspiration and insertion. Skilled nursing services are other than those services which primarily provide support for the essentials of daily living or which could be performed by an untrained adult with minimum instruction and/or supervision."

Basic Program Benefits are set forth in the Regulation at Chapter IV, § A(1). That section reads as follows:

"A. General. The CHAMPUS Basic Program is essentially a supplemental Program to the Uniformed Services direct medical care system. In many of its aspects, the Basic Program is similar to private medical insurance programs, and is designed to provide financial assistance to CHAMPUS beneficiaries for certain prescribed medical care obtained from civilian sources.

1. 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, other authorized institutional providers, physicians and other authorized individual professional providers as well as professional ambulance service, prescription drugs, authorized medical supplies and rental of durable equipment."

Also as part of Chapter IV, § C(3), Private Duty or Special Nursing is defined. That section reads as follows:

"O. Private Duty (Special) Nursing. Benefits are available for the skilled nursing service rendered by a private duty (special) nurse to an individual beneficiary/patient requiring intensified skilled nursing care, which can only be provided with the technical proficiency and scientific skills of an R.N. The specific skilled nursing services being rendered are controlling, not the condition of the patient nor the professional status of the private duty (special) nurse rendering the services.

- (1) Inpatient private duty (special) nursing services are limited to those rendered to an inpatient in a hospital which does not have an intensive care unit. In addition, under specified circumstances, private duty (special) nursing in the home setting is also covered.
- (2) The private duty (special) nursing care must be ordered and certified to be medically necessary by the attending physician.
- (3) The skilled nursing care must be rendered by a private duty (special) nurse who is not a member of the immediate family or is not a member of the beneficiary/patient's household.
- (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.
- (6) In order for such services to be considered for benefits, a private duty (special) nurse is required to maintain detailed daily nursing notes, whether the case involves inpatient nursing services or nursing services rendered in the home setting.

- (7) Claims for continuing private duty (special) nursing care should be submitted at least every thirty (30) days. (i.e., monthly). Each claim will be reviewed and the nursing care evaluated as to whether it continues to be appropriate and eligible for benefits.
- (8) In most situations involving private duty (special) nursing care rendered in the home setting, benefits will be available for only a portion of the care, i.e., providing benefits only for that time actually required to perform medically necessary skilled nursing services. In the event that full time private duty (special) nursing services are engaged, usually for convenience and/or to provide personal services to the patient, CHAMPUS benefits are payable only for that portion of the day during which skilled nursing services are rendered, but in no event is less than one (1) hour of nursing care payable in any twenty-four (24) hour period during which skilled nursing services are determined to have been rendered. Such situations are often better accommodated through the use of visiting nurses. This allows the personal services, which are not coverable by CHAMPUS, to be obtained at lesser cost from other than an R.N. Skilled nursing services provided by visiting nurses are covered under CHAMPUS.

NOTE: Where the services of an R.N. are not available, benefits may be extended for the otherwise covered services of an L.P.N. or L.V.N."

Custodial care is also defined as part of the Basic Program benefits at Chapter IV, § E(12). (See Appendix I.)

Chapter IV, § G (66) defines as an exclusion and limitation non-covered conditions. That definition is as follows:

"66. Noncovered Condition: Unauthorized Provider. All services and supplies (including inpatient institutional costs) related to a noncovered condition or treatment; or provided by an unauthorized provider."

The Sponsor and the Beneficiary herein have the burden of proof to establish by substantial evidence the bases of their

various claims. That requirement is found in the Regulation at Chapter X, § A (3), and reads as follows:

- "3. Burden of proof. The burden of proof is on the appealing party, affirmatively to establish by substantial evidence, the appealing party's entitlement under law and this Regulation to the authorization of CHAMPUS benefits or approval as an authorized provider. Any cost or fee associated with the production or submission of information in support of an appeal shall not be paid by CHAMPUS."

Also applicable to the instant claim are prior decisions of the Assistant Secretary of Defense, Health Affairs, United States Department of Defense. As applied to the instant matter, the decisions are 15-79, 83-01 and 83-02. (Hereinafter "Final Decision _____.")

In order for care to be considered custodial, a four part test is applied. That test is promulgated in the regulations as set forth above and is discussed at length in the three Final Decisions referred to above. Consequently, if private duty nursing care is determined custodial, or fits the definition of custodial as found in the Regulation, then pursuant to the Regulation CHAMPUS cost-sharing is precluded.

The Fiscal Intermediary, the Reconsideration Determination, and the Formal Review Decision dated November 30, 1983 (E. 47.), after reviewing all the facts and circumstances, concluded that indeed the care rendered the Beneficiary from January 1, 1983 through January 27, 1984 met the four element test and therefore was precluded from CHAMPUS cost-sharing as being custodial care. As indicated above, I affirm that decision.

Two peer reviews have concluded that the care at issue was custodial after applying the four-part test. The original peer review of September 29, 1983, found in the file as Exhibit 42, opines that the care is custodial. In addition, at page 3 of Exhibit 42, the peer review concludes that the care received by the Beneficiary is not skilled nursing care. As the basis for that decision, the peer reviewers reason that the care received by the Beneficiary was primarily personal care, speech and physical exercise, involved the administration of medication and was observation. The peer reviewers, therefore, conclude that the actual skilled care required was minimal.

Admitted as part of Exhibit 62 was a supplementation of the September 29, 1983 peer review. At pages 15 and 16 of Exhibit 62, the peer reviewers opine that the Beneficiary's condition was expected to continue and be prolonged; that the

Beneficiary continued to require a protected, monitored and controlled environment; that the records of 1983 indicate that the Beneficiary was at a maintenance level of care; that the majority of the care received by the Beneficiary was primarily non-skilled care, could have been rendered by an average intelligent adult with minimal instruction and supervision, and were administered to the Beneficiary primarily for the purpose of maintaining her level of function and assisting in daily activities of living such as personal care and transfers. Finally, the peer reviewers agree that the range of motion exercises were necessary for the Beneficiary to maintain joint mobility and, therefore, would not be expected to reduce her disability, rather, they would be expected to maintain her level of function. (E. 62, p. 15-16.)

Final Decision 15-79, referred to above, suggests that a review of the nursing notes is instructive in making the determination of custodial care. Consequently, a review of the nursing notes in the instant claim is appropriate. [Because of the volume of nurses' notes herein, only a sample will be discussed; nevertheless, in the opinion of the undersigned Hearing Officer, the sample is indicative of the vast majority of the nursing notes involving the Beneficiary in this claim.] Nursing notes are found as part of Volume 4, Exhibit 3. For example, at page 136-139, a series of forms are contained entitled "Nursing Care Plan Continuance Sheet". A review of these documents shows that there is no indication of problems or complications involved except those that an untrained adult with minimum instruction and supervision could resolve. The same conclusion can be reached after review of notes from Volume 4, Exhibit 3, pages 91-94, 144-147 and 240-243; no observations are contained which required notification of a supervisor nor is there any indication of a situation that could not be resolved by an untrained adult with minimum instruction and supervision.

These documents are to be contrasted with a notation in the file regarding the type of nursing care rendered the Beneficiary. (E. 37, p. 15.) Therein, it is indicated that a nurse was necessary to watch for any signs of reaction of the Beneficiary in taking her medication; nevertheless, there appears to be few if any recorded instances of a reaction or episode requiring skilled nursing care.

Moreover, since the Sponsor and the Beneficiary have the burden of proof, as set forth above, it was their requirement to persuade the undersigned with substantial evidence that the care rendered was other than custodial care. Having failed in their burden of proof, the CHAMPUS decision must be affirmed.

One comment regarding hearing testimony is in order. During the hearing, counsel for the Sponsor and Beneficiary argued that since the records, and particularly the new exhibits submitted by the Sponsor at the Hearing, indicated that the

Beneficiary was indeed making progress, wouldn't it be sufficient to meet the requirement of progress from the Regulations if the Beneficiary could be rehabilitated after say fifteen or twenty years. That is, wouldn't it suffice the Regulation requirement if the Beneficiary, after twenty years, would be able to care for herself outside the controlled environment. In way of comment, that hypothetical clearly has merit. Nevertheless, there is no indication whatsoever in the file that any practitioner of the healing arts was of the opinion that the Beneficiary ultimately could leave the protected, monitored and controlled environment, could ever at a given point dispense with assistance to support the essentials of her daily living, and would ever reach a condition such that her physical disability would not be expected to be continued and prolonged. Consequently, as a hypothetical the argument is meritorious; however, it lacks the support of any substantial evidence in the record and, therefore, is and must be rejected by the undersigned Hearing Officer.

Consequently, based on the Regulations and the Final Decisions, and a review of the record, the undersigned Hearing Officer is upholding the previous decision of CHAMPUS to deny cost-sharing for private duty nursing provided from January 1, 1983 through January 27, 1984 as such private duty nursing care was custodial in nature.

II. PHYSICAL AND SPEECH THERAPY.

As set forth above, the second issue in this claim involves physical and speech therapy. Specifically, the second issue is whether the physical therapy and speech therapy provided to the patient was medically necessary and related to a covered medical condition.

Applicable regulations to this issue involve the definition of appropriate medical care. At Chapter II, Section B(14), the definition of appropriate medical care is found, which reads as follows:

"14. Appropriate Medical Care. "Appropriate Medical Care" means:

- a. That medical care where the medical services performed in the treatment of a disease or injury, or in connection with an obstetrical case, are in keeping with the generally acceptable norm for medical practice in the United States;
- b. The authorized individual professional provider rendering the medical care is qualified to perform such medical ser-

vices by reason of his or her training and education and is licensed and/or certified by the state where the service is rendered or appropriate national organization or otherwise meets CHAMPUS standards; and

- c. The medical environment in which the medical services are performed is at the level adequate to provide the required medical care."

The definition of medically necessary is also relevant to this issue. Also at Chapter II, § B(104), medically necessary is defined as follows:

"104. Medically Necessary. "Medically Necessary" means the level of services and supplies (that is, frequency, extent, and kinds) adequate for the diagnosis and treatment of illness or injury (including maternity care). Medically necessary includes concept of appropriate medical care."

Exclusions and Limitations, also defined in the Regulation, are applicable. At Chapter IV, § G, the following exclusions and limitations are found:

"G. Exclusions and Limitations. 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:

1. Not Medically Necessary. Services and supplies which are not medically necessary for the diagnosis and/or treatment of a covered illness or injury. ...
7. Custodial Care. Custodial care regardless of where rendered except as otherwise specifically provided in paragraph E.12.e. of this Chapter IV."

Consequently, in order for the physical and speech therapy to be available for cost-sharing by CHAMPUS, the Sponsor and Beneficiary had, as their burden of proof, to prove by substantial evidence that the physical and speech therapy were medically necessary and appropriate medical care. The various CHAMPUS decisions heretofore have determined that they were not. I concur.

Final Decisions 83-02 and 83-01, previously discussed, both set forth requirements before a finding of medical necessity can be found when physical therapy is at issue. For example, from the treating physician the requirements are a showing of the degree of functional impairment, the date of onset, the type, length, time and frequency of the therapy required, and the expected treatment goal. From the therapist, evaluation reports summarizing the patient's progress and documenting the physician's evaluation of the patient's current status is also required. Additionally, the third requirement is an itemization of the treatment modality/procedure performed. The Sponsor and Beneficiary, by their submission into evidence of Exhibit 64 through 66 attempt to meet these three requirements. They have, however, not completely met all the requirements. Consequently, they have failed to submit substantial evidence and the prior decisions of OCHAMPUS must be affirmed.

Moreover, since custodial care is specifically excluded by the Regulation as a covered benefit, and since the Beneficiary was receiving nursing care that has already been determined to be custodial in nature, the Beneficiary and Sponsor are not entitled to any other benefits since all benefits for custodial care are excluded by the Regulation.

There is, however, an element of confusion on this issue in the undersigned's mind. At Exhibit 42, the original peer reviewers indicated that physical therapy was medically necessary in this case to maintain the patient's functional level. (E. 42, p. 4) That was in September of 1983. By the time they authored the supplement to the peer review, which appears as pages 15 and 16 of Exhibit 62, the same doctors were now of the opinion that the range of motion exercises given to the Beneficiary were still necessary, not to reduce her disability but rather to maintain her level of function. Consequently, the totality of the medical evidence persuades the undersigned Hearing Officer that maintenance, not reduction of disabilities, was involved in the physical therapy and, therefore, cannot be cost-shared by OCHAMPUS since they are not medically necessary or appropriate medical care.

III. ANESTHESIA SERVICES.

The third issue in the instant appeal is whether the anesthesia services on March 16, 1983 for dental surgery are services and supplies related to the hospitalization for the patient's dental care. If so, they were properly precluded from CHAMPUS cost-sharing as non-adjunctive medical care. On the contrary, if the services are adjunctive dental care, they would be capable of being CHAMPUS cost-shared.

The CHAMPUS dental benefit is found in Chapter IV, Basic Program Benefits, in Section E, Special Benefit Information. At sub-section 10, the dental benefits are described. (See Appendix II.)

In addition, prosthetic devices are also excluded from the CHAMPUS Basic Program, since at Chapter IV, Section G (53) the following exclusion and limitation is found:

"53. Prosthetic Devices. Prostheses, except artificial limbs and eyes, or if an item is surgically inserted in the body as an integral part of a surgical procedure. All dental prostheses are excluded, except for those specifically required in connection with otherwise covered orthodontia directly related to the surgical correction of a cleft palate anomaly."

Donald G. Landale, M.D., was and has been the Beneficiary's treating physician. In a comprehensive consultation report dated December 9, 1983, Dr. Landale opines that the dental care is related to the primary illness, her stroke, and

"[H]er dental deterioration would not have occurred had she not had the severe neurological problems that she did, preventing proper dental care for a long period." (E. 62, p. 41.)

Attached to Dr. Landale's report is the operative report of Albert L. Anderson, D.D.S.. That report is also discussed in detail in the STATEMENT OF OCHAMPUS POSITION, found at Exhibit 62, pages 8 through 10.

The Sponsor and Beneficiary have done nothing more to supplement the original record on this matter. No testimony was given, as far as the record is concerned, regarding the dental care during the hearing. No post-hearing exhibits were submitted, nor were additional exhibits submitted prior to the hearing. The Sponsor and Beneficiary having had the opportunity to review the STATEMENT OF OCHAMPUS POSITION, and the reasoning contained therein, the undersigned submits that clearly the substantial evidence requirement has not been met by the Sponsor and Beneficiary, and that the record, as it stands, supports the previous decisions of CHAMPUS that the dental care received by the Beneficiary on March 16, 1983 is non-adjunctive, does not meet the requirements of the Regulation, and therefore was properly denied for cost-sharing.

IV. COVERED MEDICAL SUPPLIES.

The fourth issue in this matter is whether the glycerin swabs and absorbent underpads are covered medical supplies, i.e.,

whether they are directly related to care for a documented illness, injury or medical condition.

In order for the consumables involved herein to be a covered CHAMPUS benefit, they have to meet the various requirements of the Regulation. First, as part of the Basic Program Benefits, at Chapter IV, Section B(1)(f), Related Services and Supplies are defined, the definition reading as follows:

"f. Related Services and Supplies.

Covered services and supplies must be rendered in connection with and directly related to a covered diagnosis and/or definitive set of symptoms requiring otherwise authorized medically necessary treatment."

The other definition applicable to this issue is that of consumables, or medical supplies and dressing. As part of the Basic Program Benefits, at Chapter IV § D(3)(c) that definition reads as follows:

"c. Medical Supplies and Dressings (Consumables).

The medical supplies and dressings (consumables) are those which do not withstand prolonged, repeated use. Such items must be directly related to an appropriate and verified covered medical condition of the specific beneficiary for whom the item was purchased, and obtained from a medical supply company, a pharmacy, or authorized institutional provider. Examples of covered medical supplies and dressings are disposable syringes for a known diabetic, colostomy sets, irrigation sets, Ace bandages, etc. An external surgical garment specifically designed for use following a mastectomy is considered a medical supply item.

NOTE: Generally, the reasonable charge of a medical supply item will be under one hundred (\$100.00) dollars. Any item in excess of this amount must be reviewed to make sure it would not qualify as an item of durable medical equipment. If it is, in fact, a medical supply item and does not represent an excessive charge, it can be considered for benefits under this Paragraph c."

As set forth in the STATEMENT OF OCHAMPUS POSITION, both the glycerin swabs and the absorbent underpads were properly denied for CHAMPUS cost-sharing since neither was consumed pursuant to a documented covered medical condition nor was either

related to a documented illness or injury. There is nothing in the record to suggest otherwise. The Sponsor and the Beneficiary did not submit additional written documentation, nor was any testimony received at the hearing on this issue. In the STATEMENT OF OCHAMPUS POSITION, CHAMPUS sets forth the rationale of the previous decisions to deny cost-sharing. (E. 62, p. 10.) There being no other evidence, either written or oral, to dispute the previous decisions of CHAMPUS, the undersigned Hearing Officer affirms those series of decisions to deny CHAMPUS cost-sharing benefits.

SUMMARY

As set forth above, it is the Recommended Decision of the undersigned Hearing Officer that the prior decisions be affirmed in each of the four issues presented herein. Private duty nursing care provided the Beneficiary from January 1, 1983 through January 27, 1984 clearly is custodial care. All four elements of the custodial care test, set forth in the Regulations and the Final Decisions, are met by the facts and circumstances surrounding the nursing care provided the Beneficiary. This is not to say that the Beneficiary was not making gains, this is not to say that she was not improving, and this is not to say that she will not continue to improve and make gains in the future. However, the Regulation is quite precise in the definition. All four parts of the definition must be overcome before private duty nursing care can be considered non-custodial. It is the decision of the undersigned Hearing Officer that the Beneficiary and the Sponsor have failed to rebutt the definition of the care rendered to the Beneficiary by substantial evidence. It has been properly defined as custodial care, and therefore is precluded from CHAMPUS cost-sharing.

The physical therapy and speech therapy is found not to be medically necessary, not to be appropriate medical care, and not related to a covered medical condition. Therefore, it properly has been excluded from CHAMPUS coverage. No substantial evidence exists in the record to support a decision contrary to the series of decisions heretofore made by CHAMPUS.

The anesthesia services on March 16, 1983 are clearly non-adjunctive dental care. As such, they are barred from CHAMPUS cost-sharing by the Regulations. The medical care, according to the totality of the record including the treating dentist's operative report conclusively show that the dental care received by the Beneficiary on March 16, 1983 were for her teeth and supporting structures, and was treatment of peridontal disease, both of which are specifically excluded by the Regulation from CHAMPUS cost-sharing.

Finally, the claims for glycerin swabs and absorbent underpads are barred by the Regulation since neither was consumed

by the Beneficiary pursuant to a covered medical condition or to a documented illness or injury covered by the Regulation.

DATED: August 15, 1984.

Sherman R. Bendalin
Sherman R. Bendalin
CHAMPUS Hearing Officer

APPENDIX I

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 patient treatment which is otherwise covered.

* e. Reasonable Care for Which Benefits Were Authorized or *
* Reimbursed Prior to June 1, 1977. It is recognized that *
* care for which benefits were authorized or reimbursed prior *
* to the implementation date of the regulation may be excluded *
* under the custodial care limitations set forth in this *
* regulation. Therefore, an exception to the custodial care *
* limitations set forth in this regulation exists whereby *
* reasonable care for which benefits authorized or reimbursed *
* under the Basic Program prior to June 1, 1977 shall continue *
* to be authorized even though the care would be excluded as a *
* benefit under the custodial care limitations of the regulation. *
* Continuation of CHAMPUS benefits in such cases is limited as *
* follows: *

* (1) Initial Authorization or Reimbursement Prior to *
* June 1, 1977. The initial CHAMPUS authorization or *
* reimbursement for the care occurred prior to June 1, *
* 1977; and, *

* (2) Continued Care. The care has been continuous since *
* the initial CHAMPUS authorization or reimbursement; *
* and, *

* (3) Reasonable Care. The care is reasonable. CHAMPUS *
* benefits shall be continued for reasonable care up *
* to the same level of benefits and for the same period *
* of eligibility authorized or reimbursed prior to *
* June 1, 1977. Care that is excessive or otherwise *
* unreasonable will be reduced or eliminated from the *
* continued care authorized under this exception. *

APPENDIX II

10. Dental. The CHAMPUS Program does not include a dental benefit. Under very limited circumstances benefits are available for dental services and supplies when the dental services are adjunctive to otherwise covered medical treatment.

a. Adjunctive Dental Care: Limited. Adjunctive dental care is limited to that dental care which is medically necessary in the treatment of an otherwise covered medical (not dental) condition, is an integral part of the treatment of such medical condition and is essential to the control of the primary medical condition.

- (1) Elimination of a non-local oral infection (such as cellulitis or osteitis) which is clearly exacerbating and directly affecting a medical condition currently under treatment would be an example of adjunctive dental care.
- (2) Another example of adjunctive dental care would be where teeth and tooth fragments must be removed in order to treat and repair facial trauma resulting from an accidental injury.

NOTE: The test of whether or not dental trauma is covered is whether or not the trauma is solely dental trauma. Dental trauma must be related to, and an integral part of, medical trauma in order to be covered as adjunctive dental care.

b. General Exclusions. Generally, preventive, routine, restorative, prosthodontic and/or emergency dental care are not covered by CHAMPUS.

- (1) Dental care which is essentially preventive and (even if performed to prevent a potential medical condition) which is not an integral part of the treatment of a medical (not dental) condition, does not qualify as adjunctive dental care for the purposes of CHAMPUS. An example would be routine dental care provided a rheumatic heart patient as a "preventive" measure.
- (2) Adjunctive care does not include dental services which involve only the teeth and/or their supporting structure, even if the result of an accident. An example would be the child who falls and breaks, chips or loosens a tooth.
- (3) Adjunctive dental care does not include restoration or periodontal splinting of teeth and/or dental

prosthesis, whether permanent or temporary and whether required as a result of an accidental injury or whether injured, affected or fractured during the medical or surgical management of a medical condition.

(4) Adjunctive care does not include treatment of periodontal disease and/or the consequence of periodontal disease; nor does it include such dental services as filling cavities or adding or modifying bridgework to assist in mastication whether or not related to gastrointestinal or hematopoietic diseases.

(5) All orthodontia is specifically excluded, except when directly related to and as an integral part of, surgical correction of a cleft palate congenital anomaly.

c. Preauthorization Required. Adjunctive dental care, in order to be covered requires prior approval and written preauthorization from the Director, OCHAMPUS (or a designee).

(1) The preauthorization request must include a detailed statement from the dentist as to the dental procedure to be performed and its cost, and a statement from the attending physician providing the medical evidence as to its relationship to a medical condition currently under treatment.

(2) Such preauthorization is for specific dental service and is valid for only ninety (90) days from date of issuance.

(3) If the approved adjunctive dental care is not rendered within the ninety (90) day period, a new preauthorization is required. However, unless some unusual medical circumstance occurs, the fact that the dental care was not rendered during the specified time limit will raise significant question as to whether it was, in fact, adjunctive.

(4) Preauthorization is required for each specific adjunctive dental service or appliance (i.e., each instance of dental care), even though related to an ongoing medical episode. A preauthorization is not valid for any adjunctive dental service or supply except as specifically stated in the preauthorization.

(5) Where adjunctive dental care involves an emergency medical (not dental) situation (such as facial injuries resulting from an accident), preauthorization is waived.

However, such waiver is limited to the essential adjunctive dental care related to the medical condition requiring the immediate emergency treatment. When claims are submitted for such adjunctive dental care rendered in an emergency situation, a complete explanation along with supporting medical documentation must be submitted.

- d. Covered Oral Surgery. Notwithstanding the above limitations on dental care, there are certain oral surgical procedures which are performed by both physicians and dentists, and which are essentially medical rather than dental care. For the purposes of CHAMPUS, the following procedures, whether performed by a physician or dentist, are considered to be in this category and benefits may be extended for otherwise covered services and supplies without preauthorization:
- (1) Excision of tumors and cysts of the jaws, cheeks, lips, tongue, roof and floor of the mouth, when such conditions require a pathological (histological) examination.
 - (2) Surgical procedures required to correct accidental injuries of the jaws, cheeks, lips, tongue, roof and floor of the mouth.
 - (3) Treatment of oral and/or facial cancer.
 - (4) Treatment of fractures of facial bones.
 - (5) External (extra-oral) incision and drainage of cellulitis.
 - (6) Surgery of accessory sinuses, salivary glands or ducts.
 - (7) Reduction of dislocations and the excision of the temporomandibular joints, when surgery is a necessary part of the reduction.
 - (8) Any oral surgical procedure which falls within the cosmetic, reconstructive and/or plastic surgery definition is subject to the limitations and requirements set forth in Subsection E.8. of CHAPTER IV of this Regulation, "Basic Program Benefits."

NOTE: Preparation of the mouth for dentures is not a covered oral surgery procedure. Also excluded are the removal of unerupted or partially erupted, malposed and/or impacted teeth, with or without the attached follicular or development tissues.

e. Inpatient Hospital Stay in Connection with Non-Adjunctive, Non-Covered Dental Care. Institutional benefits specified in Section d. of this CHAPTER IV may be extended for inpatient hospital stays related to non-covered, non-adjunctive dental care when such inpatient stay is medically necessary to safeguard the life of the patient from the effects of dentistry because of the existence of a specific and serious non-dental organic impairment currently under active treatment. (Hemophilia is an example of a condition that could be considered a serious non-dental impairment.) Preauthorization by OCHAMPUS is required for such inpatient stay to be covered in the same manner as required for adjunctive dental care described in Paragraph E.10.c. (and its subparts) of this CHAPTER IV. Regardless of whether or not the preauthorization request for the hospital admission is approved and thus qualifies for institutional benefits, the professional service related to the non-adjunctive dental care is not covered.