



ASSISTANT SECRETARY OF DEFENSE  
WASHINGTON, D.C. 20301

JAN 10 1985

HEALTH AFFAIRS

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

Appeal of )  
Sponsor: ) OASD(HA) File 84-44  
SSN: ) FINAL DECISION

This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPUS Appeal OASD(HA) Case File 84-44 pursuant to 10 U.S.C. 1071-1092 and DoD 6010.8-R, chapter X. The appealing parties are the participating provider Frank H. Bochm, M.D., and Vanderbilt University Hospital. The beneficiary is the spouse of an active duty enlisted member of the United States Army. The appeal involves the denial of CHAMPUS cost-sharing for services rendered in connection with a therapeutic abortion which was performed on December 30, 1982. The amount in dispute is \$2,439.65 in billed charges.

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 the the hospitalization and medical expenses related to the December 30, 1982, therapeutic abortion by dilation and curettage and antepartum care be denied CHAMPUS cost-sharing. Although the termination of the beneficiary's pregnancy was medically necessary and appropriate care, the mother's life was not endangered, and the requirements of DoD 6010.8-R and Public Law 97-377, Section 775, were not met. The Hearing Officer also found that certain services provided to the beneficiary prior to the therapeutic abortion were not related services and are thus allowable under CHAMPUS.

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 the appealing party's claims for the medical services related to the therapeutic abortion rendered on December 29 and 30, 1982. This determination is based on findings that: (1) therapeutic

abortions are specifically excluded as CHAMPUS benefits by law (P.L. 97-377, Section 755) unless the life of the mother is endangered by carrying the fetus to term; (2) the beneficiary suffered from an anencephalic pregnancy; (3) the anencephalic pregnancy presented a degree of higher risk than normal to the mother; (4) the risk to the mother was a potential and not an actual risk; and (5) there must be an actual risk to the beneficiary to warrant cost-sharing by CHAMPUS.

#### FACTUAL BACKGROUND

The beneficiary is the spouse of an active duty enlisted man in the United States Army. She was hospitalized at Vanderbilt University Medical Center, Nashville, Tennessee, on December 29 and 30, 1982, with a diagnosis of intrauterine pregnancy with anencephalic fetus. Based upon this diagnosis the beneficiary, in consultation with her husband and her physician, determined to terminate the pregnancy and was admitted to the hospital for this purpose.

Anencephaly is a fetal malformation of unknown etiology characterized by cerebral hemispheres which are either rudimentary or absent, and the absence of the overlying skull. Typically, the pituitary gland is also absent and there is also an extreme diminution in the size of the adrenal glands. Because of the gross nature of the deformation involved, anencephalic fetuses cannot survive after birth.

CHAMPUS claims for the services provided to the beneficiary in connection with the termination of this pregnancy included a claim for the inpatient hospital charges, a claim for pathology services, a claim for the attending physician's services, and a claim for anesthesia services. The claims for these services were denied with the exception of the claim for anesthesia services which was paid by the fiscal intermediary in error. The OCHAMPUS Reconsideration Decision upheld the denial of claims for services related to the termination of the beneficiary's pregnancy, including the claim for the anesthesia services. Certain portions of the claims, however, relating to diagnostic services performed in the diagnosis of the anencephalic fetus were found to be allowable. The Hearing Officer essentially concurred and recommended that the portion of the attending physician's charges relating to diagnostic services performed on December 28 be allowed. In addition, he recommended that charges for a pathologist's services on December 22 and 27 be allowed as related to the diagnostic service and not the therapeutic abortion.

The Hearing Officer's Recommended Decision describes in detail the beneficiary's medical condition, the events leading to the termination of her pregnancy, and the reason for it. The Hearing Officer has provided a detailed summary of the factual background, including the appeals that were made and the previous denials, and the medical opinion of the appealing providers and the OCHAMPUS Medical Director. Because the Hearing Officer

adequately discussed the factual record, it would be unduly repetitive to further summarize the record, and it is accepted in full in this FINAL DECISION.

The hearing was held on March 2, 1984, at Nashville, Tennessee, before OCHAMPUS Hearing Officer Joseph L. Walker. Present at the hearing were the sponsor; the attending physician, Frank Bochm, M.D., and his secretary; and the hospital provider's attorney, Sara Sedgewick. The Hearing Officer has issued his Recommended Decision and issuance of a FINAL DECISION is proper.

#### ISSUES AND FINDINGS OF FACT

The primary issue in this appeal is whether the life of the mother would have been endangered if the fetus had been carried to term. If this question is answered in the negative, then the denial of cost-sharing by the fiscal intermediary and OCHAMPUS was correct under DoD 6010.8-R and the funding limitation of Public Law 97-377, Section 755.

The Hearing Officer in his Recommended Decision correctly stated the issues and correctly referenced the applicable law and regulations.

The specific limitation on CHAMPUS cost-sharing for abortion services results from Congressional restrictions on CHAMPUS funding. The 1979 Department of Defense Appropriation Act prohibited payment for abortions except where the life of the mother would be endangered or her health seriously damaged if the pregnancy were carried to term. It also allowed for CHAMPUS cost-sharing for the victims of rape or incest when promptly reported. The 1980 Department of Defense Appropriation Act further limited benefits by eliminating serious physical health damage to the mother as a basis for CHAMPUS cost-sharing. The Department of Defense Appropriation Act, 1982, again further limited the benefits available for abortion services by eliminating the exception for rape or incest. Thereunder, CHAMPUS cost-sharing is available for abortion services only where the life of the mother would be threatened if the fetus were carried to term. Most recently, this restriction has been made a part of the basic law which governs CHAMPUS, rather than a part of annual appropriation legislation, by the addition of section 1093 to title 10, United States Code. That section states: "Funds available to the Department of Defense may not be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."

The Hearing Officer in evaluating the evidence of record found that although an anencephalic pregnancy presented a degree of risk higher than that of a normal pregnancy, there was no evidence of actual endangerment to the mother's life in this case. Based thereon, he concluded that the denial of CHAMPUS cost-sharing was proper. I agree. The appealing parties argued that the higher than normal risk presented by this beneficiary's pregnancy should be considered an endangerment to her life, and,

that the requirement of the law was thereby met. However, to base the determination of CHAMPUS benefits for therapeutic abortions solely upon a finding that a given pregnancy presents a higher risk than that which is considered normal, would substantially frustrate the Congressional intent to significantly restrict funding for abortion services. I do not find that Congress intended to authorize funding for the termination of high-risk pregnancies without the presence of an actual risk to the life of the mother. The standard established by Congress is a high one requiring an endangerment to life and not just to physical or emotional health. I find that the Hearing Officer correctly interpreted this Congressionally-mandated restriction to require the presence of an actual condition which endangers the life of the mother. I also agree with the Hearing Officer that the medical care provided to this beneficiary was medically necessary and appropriate care and that the termination of her pregnancy was fully in keeping with the standards of generally accepted medical practice in the United States. It was, however, not a service for which CHAMPUS benefits are available because of the specific limitations placed upon the CHAMPUS benefit structure.

In making his recommended findings on the primary issue, the Hearing Officer made the following statement:

"No evidence has been presented in this appeal that would establish that the mother's life either was in danger or would be endangered at any time prior to the abortion. The possibility of such a risk occurring is duly noted, but such potential risk is not sufficient to override the language employed by the Congress. . . ."

While I fully agree that the Hearing Officer reached a correct decision in this case, I do not agree with the standard established by this statement. Of concern is the concept implied in this statement that an actual threat to life must exist "at any time prior to the abortion." I find that by requiring (or implying) a threat to life prior to the abortion, the Hearing Officer has unduly restricted the standard established by Congress for evaluating such cases. The Congressional restriction precludes payment for abortions except where the life of the mother would be endangered if the fetus were carried to term. CHAMPUS has implemented this restriction by including a list of life endangering conditions in its Policy Manual. Included on the listing are those conditions in which there is a reasonable probability of a significant mortality risk should the pregnancy be continued. I find this to be the correct standard for evaluating these cases. Thereunder, there is a requirement for the presence of an actual medical condition which presents a reasonable probability of a significant mortality risk should the pregnancy be continued. There is no requirement, however, for an actual significant mortality risk to be present at the time of or prior to the abortion. As stated above, the evidence of record

establishes that the condition of the fetus in this case, while presenting a higher than normal risk to the beneficiary, did not present a reasonable probability of a significant mortality risk to her and thus cannot be cost-shared by CHAMPUS.

The Hearing Officer also addressed two secondary issues in evaluating this appeal. These involved a question relating to possible fiscal intermediary misinformation in describing the benefits of CHAMPUS with respect to therapeutic abortions and the question of the payability of services related to the noncovered service. I find that the Hearing Officer correctly raised and discussed these issues and I concur with his findings on them.

As stated above, I concur in the Hearing Officer's findings and recommendations. I hereby adopt in full the Hearing Officer's Recommended Decision, including the findings and recommendations, as the FINAL DECISION in this appeal.

#### SUMMARY

In summary, the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) is to deny CHAMPUS cost-sharing of the surgery and related medical expenses for the therapeutic abortion performed on December 30, 1982, because this procedure is excluded as a CHAMPUS benefit by law and thus not subject to CHAMPUS cost-sharing. Further, it is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) to allow CHAMPUS cost-sharing of diagnostic services performed prior to December 30, 1982, as recommended by the Hearing Officer. The Director, OCHAMPUS, is directed to review this case and to insure that appropriate claims adjustment is taken with respect to the services allowed herein. The Director, OCHAMPUS, is further directed to take appropriate recoupment action in accordance with the Federal Claims Collection Act for any claim erroneously paid. 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