ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

HEALTH AFFAIRS

JAN 10 1985

BEFORE THE OFFICE, ASSISTANT

SECRETARY OF DEFENSE (HEALTH AFFAIRS)

UNITED STATES DEPARTMENT OF DEFENSE

Appeal of deceased	)	
Sponsor:	)	OASD(HA) File 84-46
SSN:	)	FINAL DECISION

This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPUS Appeal OASD(HA) Case File 84-46 pursuant to 10 U.S.C. 1071-1092 and DoD 6010.8-R, chapter X. The appealing party is the beneficiary's estate which was represented by the administrator of the estate. The beneficiary, who was also the sponsor, was a retired noncommissioned officer of the United States Air Force. The appeal involves the denial of CHAMPUS cost-sharing for care provided in the Laurel Heights Nursing Home, London, Kentucky, from November 5, 1981, through April 4, 1982. The amount in dispute is $9,660.60.

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 finding that the services provided to the beneficiary in the Laurel Heights Nursing Home during the period in question were custodial in nature and were, thus, not covered under the CHAMPUS Basic Program. Consequently, the Hearing Officer recommended that CHAMPUS cost-sharing for these services be denied with the exception of one hour per day of skilled nursing services and prescription medications which he recommended be allowed under the custodial care provision of the CHAMPUS regulation.

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 recommendations of the Hearing Officer and the Director, OCHAMPUS, and hereby adopts the Recommended Decision 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 inpatient private duty nursing care provided at the Laurel Heights Nursing Home from November 5, 1981, to April 4, 1982, with the exception of one hour per day of skilled nursing care and claims for prescription medications.

This determination is based upon findings that during the entire period in question: (1) the beneficiary was mentally and physically disabled and that disability was expected to continue and be prolonged; (2) the beneficiary required a protected, monitored, and controlled environment; (3) the beneficiary required assistance to support the essentials of daily living; and (4) the beneficiary was not under any active medical or surgical treatment designed to reduce the disability to the extent necessary to enable him to function outside of the protected, monitored, and controlled environment. Based upon these findings, I additionally find that the care in question was custodial care under the CHAMPUS Basic Program and thus, not a benefit of CHAMPUS.

FACTUAL BACKGROUND

The beneficiary suffered a severe stroke in July 1981. He was initially treated at a VA facility and was subsequently transferred on August 11, 1981, to a nursing home. On October 26, 1981, he was again admitted to a hospital for treatment of falling blood pressure, facial twitching, vomiting, and a diagnosed electrolyte imbalance. The beneficiary was comatose upon admission and remained unresponsive until his discharge on November 5, 1981, to the Laurel Heights Nursing Home on November 5, 1981. During his entire stay at Laurel Heights, the beneficiary remained comatose. The course of treatment at Laurel Heights involved nursing care which included frequent suctioning of a tracheostomy, tube feeding, decubitus of the right hip, contractions of the extremities, and the administration of intravenous feedings.

The first 90 days of services at the nursing facility were cost-shared by the CHAMPUS fiscal intermediary. Care after the 90th day was denied as custodial. The administrator of the beneficiary's estate has appealed that denial, and, OCHAMPUS has placed the initial 90-day period of care at issue as also involving custodial care.

The Hearing Officer's Recommended Decision describes in sufficient detail the events leading to the inpatient stay at the nursing facility, the beneficiary's medical condition, and the treatment he received. Because the Hearing Officer adequately discussed the factual record, it would be unduly repetitive to further summarize the record here, and, it is accepted in full in this FINAL DECISION.

The Hearing Officer has also provided a detailed summary of the procedural history of this appeal including the previous

appeals that were made and the previous denials. He also provided a summary of the peer reviews, and the medical opinions of the OCHAMPUS Medical Director, and the attending physician.

The hearing was held on April 17, 1984, at the County Courthouse, London, Kentucky, before OCHAMPUS Hearing Officer, Don F. Wiginton. Present at the hearing were administrator of the estate and her daughter. 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 care provided to the beneficiary at the Laurel Height Nursing Home from November 5, 1981, through April 4, 1982, was custodial care under the CHAMPUS Basic Program and, thus, excluded as a benefit.

The Hearing Officer in his Recommended Decision correctly stated the issues and correctly referenced the applicable law and regulations. Based upon his analysis of the factual background and the applicable law and regulations, the Hearing Officer entered specific findings with respect to each of the four elements of the CHAMPUS custodial care definition. In each instance he found that this patient's condition, prognosis or treatment met the definition of custodial care. Consequently, he correctly concluded that the care provided to the beneficiary was custodial under CHAMPUS and not a benefit. In addition, the Hearing Officer found that the beneficiary had received skilled nursing care which included tracheostomy care, tube feeding, the administration of intravenous feedings, and the decubitus of the right hip. Based upon these findings, the Hearing Officer recommended that the claims in question be denied with the exception of one hour of skilled nursing care and prescription medications which are both allowable under the CHAMPUS custodial care provision.

I concur in full with the Hearing Officer's findings and recommendations. I hereby adopt in the Hearing Officer's Recommended Decision, including the findings and recommendations, as the FINAL DECISION in this appeal. I find necessary one minor correction to the Recommended Decision. The Hearing Officer variously refers to "Dr. Rodriguez" and to "Dr. Beck" as both the OCHAMPUS Medical Director and as a peer reviewer for the Colorado Foundation for Medical Care. Dr. Rodriguez is the OCHAMPUS Medical Director and Dr. Beck is a peer reviewer for the Colorado Foundation.

SUMMARY

In summary, the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) is to deny CHAMPUS cost-sharing of the inpatient nursing care provided to the beneficiary at the Laurel Heights Nursing Home from November 5, 1981, through April 4, 1982, as custodial care. It is further the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) that claims for

one hour per day of skilled nursing care and claims for prescription medications are allowable under CHAMPUS. Consequently, the Director, OCHAMPUS, is directed to review the claims history in this case and determine the appropriate administrative action to be taken under the Federal Claims Collection Act, with respect to any erroneous payments made for the care at issue in this appeal. In so doing, the Director shall ensure that proper credit is given for the care which is determined to be payable hereunder. Issuance of this FINAL DECISION completed 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 deceased,	)	
	)	
Sponsor:	)	
	)	RECOMMENDED DECISION
SSN:	)	
	)	
Administrator of the Estate:	)	

This is the Recommended Decision of the CHAMPUS Hearing Officer, Don F. Wiginton, in the CHAMPUS appeal case file of and is authorized pursuant to Title 10 USC 1071-1089 and DOD 6010.8-R, CHAPTER X. The appealing party is the estate of the deceased beneficiary, as represented by his administrator, The appeal involves the denial of CHAMPUS cost-sharing for care in the Laurel Heights Nursing Home for services rendered during the period November 5, 1981 through April 4, 1982. The amount in dispute is Nine Thousand Six Hundred Sixty and 60/100 Dollars ($9,660.60).

The hearing file has been reviewed. It is the OCHAMPUS position that the formal review decision dated December 28, 1983 be upheld; that CHAMPUS deny cost-sharing as the care was primarily custodial in nature as defined in DOD 6010.8-R, but that coverage be authorized for one (1) hour of skilled nursing care per day as well as the cost for prescription drugs and medicines that would otherwise be covered under the CHAMPUS program.

The Hearing Officer, after due consideration of the appeal record, concurs in the recommendation of OCHAMPUS to deny CHAMPUS cost-sharing.

The Recommended Decision of the Hearing Officer is, therefore, to deny cost-sharing for inpatient stay between November 5, 1981 to April 4, 1982 as the care was primarily custodial. The Hearing Officerfurther finds that one (1) hour of skilled care per day may be cost-shared as well as the cost of prescription drugs and medicines.

FACTUAL BACKGROUND

The sixty-three (63) year old beneficiary suffered a stroke in July, 1981 and was treated at a V. A. Hospital. Subsequently, the beneficiary was transferred to Sunrise Manor Nursing Home where he remained until he was readmitted to the hospital on October 26, 1981 (Exhibit 5, page 1). Upon admission to the hospital, the patient

was comatose. The patient was unresponsive at all times while he was at the Medical Center. He was intubated for feeding and had a tracheostomy and catheter. He laid motionless and exhibited decerebrate poster and was discharged to the Laurel Heights on November 5, 1981 (Exhibit 4). The beneficiary remained at Laurel Heights until he died on April 4, 1982. During the course of the beneficiary's stay at Laurel Heights, he never recovered from the comatose state (Exhibits 7 and 8). During the stay at Laurel Heights, the beneficiary received frequent suctioning of his tracheostomy, tube feeding, decubitus R. hip, contractions of the extremities, i.v. fluids involving skilled nursing care (Exhibit 15, page 3).

The fiscal intermediary cost-shared the first ninety (90) days of inpatient care at the skilled nursing facility on the basis that the patient was receiving skilled nursing care. Care after ninety (90) days was denied on the basis that the care was custodial. The administrator of the beneficiary's estate appealed the review. A medical peer review was conducted by the Colorado Foundation for Medical Care which determined that the care was not oriented to enable in the patient to leave the controlled monitored environment (Exhibit 22, page 1). Dr. Rodriguez with the Foundation determined that the beneficiary needed skilled care and that the services were rendered at the appropriate level of care (Exhibit 22). On December 28, 1983 the formal review decision by CHAMPUS determined that CHAMPUS cost-shared the inpatient stay from November 5, 1981 through February 3, 1982 in error and that the services received by the beneficiary at Laurel Heights Nursing Home were custodial (Exhibit 23).

On March 5, 1984, Dr. John B. Rypstra wrote the following concerning his treatment of the beneficiary.

> "Mr. was then treated by me at Laurel Heights Nursing Home. He had been transferred to that facility in order to add a very important supportive modality to his treatment. His sister, Mrs. lives in London and was able to visit with him more often and thus was able to give him psychological, mental and moral stimuli that was so necessary in his condition. She visited with him on a regular and daily basis, which had proved to be impossible when he was in Somerset due to the distance and finances.
>
> I treated Mr. with hopes of his eventual recovery and Mrs. supportive stimuli was most necessary." (Exhibit 27, page 1).

On April 5, 1984, CHAMPUS wrote the Colorado Foundation for Medical Care concerning the case and on April 12, 1984 received the following responsives from their questions.

> "1. After November 5, 1981 did the patient have a mental or physical disability which was expected to continue and be prolonged?

Yes. The patient was comatose on admission, and from the records after November 5, 1981, it does not appear that he became responsive through the period of inpatient care. His disability was expected to continue and be prolonged.

2. After November 5, 1981, did the patient require a protected, monitored and/or controlled enviornment?

   Yes. The patient was unresponsive, bedridden, he had a tracheostomy and required tube feedings. This required a protected, monitored and controlled environment.

3. After November 5, 1981, did the patient require assistance to support the essentials of daily living?

   Yes. Nursing records state he required total nursing care and help with activities of daily living.

4. After November 5, 1981, was the patient under active and specific medical treatment which would reduce the disability to the extent necessary to enable him to function outside the protected, monitored, and controlled environment?

   No. The care provided to this patient was not expected to reduce the disability to enable him to function outside the protected, monitored and controlled environment. The care was essentially maintenance of an unresponsive patient who was not expected to get better.

5. If the answer to question #1-3 is yes, and for #4 is no:

   a. After November 5, 1981, did the patient require hospitalization for a condition other than the conditions for which custodial care was provided? If yes, state for how long. In either case, identify specific clinical facts which led to your conclusion.

      From November 5, 1981 to April 4, 1982, it appears this patient was continuously in a nursing facility. There is no evidence of a condition that required hospital confinement during this time.

   b. After November 5, 1981, was there an acute exacerbation of the conditions for which custodial care was being received which required active inpatient treatment? Please state specific clinical facts which led to your conclusion.

> The records do not show the patient required active care for his condition. He required continuous maintenance care until his death in April, 1982. Maintenance care included tube feedings, tracheostomy care, personal care, turning and positioning, medication administration, decubitus care, and catheter care."

At the hearing Mrs. appeared with her daughter, , Route 8, Box 389-F, London, Kentucky. Mrs. stated the consideration for moving her uncle to Laurel Heights was that the facility was approved by CHAMPUS and was close to , sister to the beneficiary, who would be able to visit regularly (Exhibit 24, page 5, Exhibit 29). Mrs. stated that her uncle received skilled nursing care within the definition of that service by CHAMPUS (Exhibit 24, page 7). The beneficiary's physician, Dr. John B. Rypstra, felt the visits by Mrs. were beneficial to the decedent (Exhibit 27, page 1). Mrs. stated that the fiscal intermediary failed to respond to the bills sent to them by Laurel Hieghts until after the death of her uncle. She stated that this delayed action prejudiced their ability to apply for Medicare and Medicaid in time to cover the bills. She further stated that all the medical records were signed by a LPN (Exhibits 7 and 8) and it would be impossible for her or anyone else to determine what amount of time was actually spent by the LPNs in rendering the skilled nursing care. She stated that in her judgment it would certainly be in excess of one (1) hours per day.

Mrs. stated that the family was told when Mr. left the hospital that he "could get better". She said that to look at the medical record in retrospect and conclude that it was impossible for the beneficiary to recover and then determine medical coverage on the basis of that hindsight; is unfair to the beneficiary's estate. At the time there was a lively hope for recovery encouraged by the physician and the health care institution.

She further stated that the fiscal intermediary's failure to advise that the care was custodial within the meaning of DOD 6010.8-R, compounded the damages when the patient could have qualified for Medicare and Medicaid. She pointed out that Dr. Rodriguez of the Colorado Foundation concluded the beneficiary needed skilled nursing care. In fact, the nursing care was performed by a LPN, at the minimum, except for bathing and turning which was performed by a nurse's aide. She stated that the beneficiary was turned every two (2) hours, tube fed every several hours and given oral medication when tube fed. She further stated that physical therapy began the first week with the arms and legs being extended. The patient was restrained in his bed at all times and never got out of bed along. The patient engaged in no conversation and was comatose the entire time at Laurel Heights Nursing Home.

The hearing was conducted on April 17, 1984 in the Community Room in the basement of the County Courthouse in London, Kentucky.

ISSUES AND FINDINGS OF FACT

The primary issue in dispute is whether the care rendered by the Laurel Heights Nursing Home between November 5, 1981 and April 4, 1982 was custodial care.

Custodial Care

Under the CHAMPUS law, 10 U.S.C. 1077(b)(1), custodial care is specifically excluded from CHAMPUS cost-sharing. DOD 6010.8-R, Chapter IV, E.12 implements this exclusion by providing, in part, as follows:

> "12. Custodial Care. The statute under which CHAMPUS operates specifically excludes custodial care. This is a very difficult area to administer. Further, many beneficiaries (and sponsors) misunderstand what is meant by custodial care, assuming that because custodial care is not covered, it implies the custodial care is not necessary. This is not the case; it only means the care being provided is not a type of care for which CHAMPUS benefits can be extended.
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> 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.
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> 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 per-senile and senile dementia. These conditions do not necessarily result in custodial care but are indicative of the types of

conditions that sometimes do. It is not the condition itself that is controlling but whether the care being rendered falls within the definition of custodial care.

c. Benefits Available in Connection with a Custodial Care Case. CHAMPUS benefits are not available for services and/or supplies related to a custodial care case (including the supervisory physician's care), with the following specific exceptions:

(1) Prescription Drugs. Benefits are payable for otherwise covered prescription drugs, even if prescribed primarily for the purpose of making the person receiving custodial care manageable in the custodial environment.

(2) Nursing Services: Limited. It is recognized that even though the care being received is determined to be primarily custodial, an occasional specific skilled nursing service may be required. Where it is determined such skilled nursing services are needed, benefits may be extended for one (1) hour of nursing care per day.

(3) Payment for Prescription Drugs and Limited Skilled Nursing Services Does not Affect Custodial Care Determination. The fact that CHAMPUS extends benefits for prescription drugs and limited skilled nursing services in no way affects the custodial care determination if the case otherwise falls within the definition of custodial care.

d. Beneficiary Receiving Custodial Care: Admission to a Hospital. CHAMPUS benefits may be extended for otherwise covered services and/or supplies directly related to a medically necessary admission to an acute care general or special hospital, under the following circumstances:

(1) Presence of Another Condition. When a beneficiary receiving custodial care requires hospitalization for the treatment of a condition other than the condition for which he or she is receiving custodial care (an example might be a broken leg as a result of a fall) or

(2) Acute Exacerbation of the Condition for Which Custodial Care is Being Received. When there is an acute exacerbation of the condition for which custodial care is being received which requires active inpatient treatment which is otherwise covered.

The CHAMPUS definition of "custodial care" includes care furnished to a patient who meets four (4) specified conditions:

1. That the patient's disability be expected to continue and be prolonged,

2. That the patient requires a protected, monitored and/or controlled environment,

3. That the patient requires assistance to support the essentials of daily living and,

4. Who is not under active and specific medical and surgical treatment which will reduce the disability to the extent necessary to enable the patient to function outside of the protected, monitored and/or controlled environment.

o That the patient's disability be expected to continue and be prolonged.

The medical record (Exhibits 4, 5, 6, 7, and 8) are clear that when the beneficiary was admitted to Laurel Heights Nursing Home that he was in a comatose state and without a reasonable basis for positive prognosis. Dr. Robert T. Quigley with the Colorado Foundation for Medical Care stated "his (beneficiary's) disability was expected to continue and be prolonged" (Exhibit 28). Additionally, Dr. Robert E. Beck with the Colorado Foundation for Medical Care opined that the patient's condition was "terminal" (Exhibit 22). Dr. Alex R. Rodriguez, OCHAMPUS Medical Director concurred in that opinion after reviewing the medical records (Exhibit 22).

Although Dr. John B. Rypstra, who treated the beneficiary during his stay at Laurel Heights Nursing Home, stated that he treated Mr. with hopes of his eventual recovery. This "hope" is not supported in the medical record or treatment regimen.

o That the patient requires a protected, monitored and/or controlled enviornment.

The beneficiary's comatose stated certainly required he be in a protected, monitored and/or controlled environment. His total dependence on that environment is illuminated by the type skilled nursing services rendered (Exhibit 24, page 10). Dr. Robert Quigley of the Colorado Foundation for Medical Care stated that the patient required a protected, monitored and/or controlled environment (Exhibit 28) and this conclusion is uncontroveted in the record.

o That the patient requires assistance to support the essentials of daily living.

The beneficiary was totally unable to assist himself with the requirements for daily living. He had to be turned on the bed, tube fed with frequent suctioning of his tracheostomy. The patient was totally unresponsive due to his cardiovascular accident.

o Who is not under active and specific medical and surgical treatment which will reduce the disability to the extent necessary to enable the patient to function outside of the protected, monitored and/or controlled environment.

While the beneficiary was under some minimal periodic physical therapy (extensions and contractions of the legs and arms) the records do not reflect a treatment regimen designed to reduce his disability.

In view of the above, the Hearing Officer finds that the services rendered by Laurel Heights Nursing Home were custodial and not covered under the CHAMPUS Basic Program

Secondary Issue

Skilled Nursing Care

Under DOD 6010.8-R, Chapter IV, E.12, the regulation provides that, even though the care received is determined to be custodial, benefits may be extended for up to one hour of skilled nursing care per day. Skilled nursing care is defined in DOD 6010.8-R, Chapter II, B.161, as :

> "...a service which can only be furnished by an RN (or LPN or LVN), and required to be performed under the supervision of a physician in order to assure the safety of the patient and achieve the medically desired result. Examples of skilled nursing services are intravenous or intramuscular injects, levin tube or gastrostomy feeding, 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 minimal instruction and/or supervision. (DOD 6010.8-R, Chapter II, B.161).

The medical record (Exhibits 4, 5, 6, 7 and 8) specifies a variety of skilled nursing services rendered by RNs and LPNs at the Laurel Heights Nursing Home. Some of those services are enumerated in Exhibit 24, page 10 as follows:

1. Tracheostomy in place with frequent suctioning to remove mucus that had accumulated.

2. N/G tube feeding.

3. Decubitus R. hip.

4. I.V. fluids.

Some of the daily services received by the beneficiary was performed by aides or by untrained adults with minimal instruction and/or supervision. Mrs. stated that she assisted in the "therapy" of exercising her brother's arms by extensions and contractions. Mr. was receiving skilled nursing care at Sunrise Manor Nursing Home (Exhibit 24, page 6) and the Medical Director of OCHAMPUS, Dr. Robert E. Beck, opined that the patient needed

skilled care, particularly the tracheostomy, decubitus, and tube feeding required skilled nrusing care.

The Hearing Officer finds that one (1) hour of skilled nursing services per day were required by the beneficiary for the period November 5, 1981 through April 4, 1982.

Prescription Drugs

DOD Regulation 6010.8-R, Chapter IV, E.12(c)(1) provides that prescription drugs may be cost-shared even if prescribed primarily for the purpose of making the person receiving custodial care manageable in the custodial environment. Even though the primary care of the beneficiary was custodial in nature, the drugs and medication necessary to maintain his condition and prevent further deterioration were medically necessary and covered under CHAMPUS Basic Program.

The Hearing Officer finds that the prescription drugs and medication received by the beneficiary were medically necessary and covered under CHAMPUS Basic Program.

SUMMARY

In summary it is the Recommended Decision of the Hearing Officer that the services received by the beneficiary at the Laurel Heights Nursing Home from the period November 5, 1981 through April 4, 1982 were custodial in nature and not covered under the CHAMPUS Basic Program. The Hearing Officer further finds one (1) hour of skilled nursing care per day was required and can be cost-shared under CHAMPUS. Additionally, prescription drugs and medication prescribed for the beneficiary are also covered under the CHAMPUS Program and may be cost-shared.

Done this the 3rd day of May, 1984.

Don F. Wiginton, Hearing Officer