ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

HEALTH AFFAIRS

25 March 1985

BEFORE THE OFFICE, ASSISTANT

SECRETARY OF DEFENSE (HEALTH AFFAIRS)

UNITED STATES DEPARTMENT OF DEFENSE

Appeal of	)	
	)	
Sponsor:	)	OASD(HA) File 85-10
deceased	)	FINAL DECISION
	)	
SSN:	)	

This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPUS Appeal OASD(HA) Case File 85-10 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 deceased retired member of the United States Navy. The appeal involves the denial of CHAMPUS cost-sharing of inpatient services provided at skilled nursing facilities from June 18, 1981, through March 31, 1983. The amount in dispute is approximately $32,250.00, which represents the maximum 75 percent cost-share of an average billed charge of $1,500.00 per month for 21.5 months, the period for which the record contains CHAMPUS claims. Additional amounts potentially in dispute are not evidenced by CHAMPUS claims in the record. However, the evidence makes clear that the beneficiary remained confined in inpatient skilled nursing care facilities at least through the date of the hearing in June 1984.

The hearing file of record, 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 of the entire episode of care in the skilled nursing care facilities be denied with exceptions that cost-sharing be allowed for prescription drugs as well as for physical therapy provided following injuries sustained by the beneficiary. The basis of this recommendation is a finding by the Hearing Officer that the care provided was custodial in nature and thus excluded by specific provisions of the law and regulation which govern CHAMPUS.

The Director, OCHAMPUS, substantially concurs with the Hearing Officer's Recommended Decision and recommends its adoption by the Assistant Secretary of Defense (Health Affairs) as the FINAL DECISION with minor modifications. These modifications involve clarification of the Hearing Officer's findings and recommendations with respect to the issues of

appropriate level of care and certain episodes involving diagnosis and treatment of personal injuries sustained by the beneficiary.

The Assistant Secretary of Defense (Health Affairs), after due consideration of the appeal record, adopts and incorporates by reference the Hearing Officer's Recommended Decision as modified in accordance with the recommendation of the Director, OCHAMPUS, to deny CHAMPUS cost-sharing of the beneficiary's claims for inpatient care in skilled nursing care facilities from June 18, 1981, through March 31, 1983, and continuing. The basis of this decision is a finding that the services were custodial and thus excluded under CHAMPUS. In addition, I find that the claims must be denied CHAMPUS cost-sharing as involving services above the appropriate level of care. Under the regulation provisions regarding custodial care, however, I find that CHAMPUS may cost-share claims for prescription drugs as well as the medically necessary diagnostic services and physical therapy related to treatment of conditions other then the condition for which the beneficiary is receiving custodial care.

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

Custodial Care

The Hearing Officer recommends that the entire episode of care in the skilled nursing facilities (except prescription drugs) be denied as custodial and I concur with that recommendation. However, in summarizing the opinions of the medical reviewers, the Hearing Officer left unaddressed a potential inconsistency. The Hearing Officer's summary of the medical review of care received after the patient's admission to a new skilled nursing facility on August 31, 1981, noted, among other opinions, that "she did not require assistance to support the essentials of daily living at the time of initial admission, but did require such assistance as her condition deteriorated." The Hearing Officer did not specifically address this opinion, although it suggests that, for the initial months of confinement at the new facility, the patient may not have met one of the criteria for custodial care.

In making his recommendation that the beneficiary's entire period of confinement in both skilled nursing facilities be considered custodial care, the Hearing Officer had to have concluded that evidence in the file supported a finding that the patient required assistance to support the essentials of daily living. After review of the file, I agree. While the patient initially may have been independent in some areas (e.g., walking,

hygiene, and dressing), she required assistance in other areas (e.g., meals and supervision of medication). I find that the record indicates that, because of her mental deterioration, the patient required supervision of all activities (i.e., assistance to support the essentials of daily living) during the entire episode of care from June 18, 1981, through March 31, 1983 (and continuing), in both skilled nursing facilities.

Appropriate Level of Care.

The Hearing Officer identified the questions of medical necessity and the appropriateness of the level of the care being provided to the beneficiary as at issue in this appeal. However, because he found the skilled nursing care to be custodial and thus not a benefit of CHAMPUS, he declined to make a specific finding on this issue. His words are as follows:

> "Having reached the conclusion that this is a custodial care case, and that a factual basis has not been demonstrated for obtaining benefits in connection with specific skilled nursing services as an exception to that exclusion, the Hearing Officer concludes that no reasonable purpose can be served by a finding as to the reasonable level of care issue since the custodial exclusion would prohibit benefits even if the level were found to be appropriate."

However, as the Hearing Officer also makes clear, the record establishes that the services provided to the beneficiary were above the appropriate level of care and were thus not medically necessary under CHAMPUS. As stated by the Hearing Officer:

> "This Hearing Officer is also satisfied from the evidence that skilled nursing services as defined in the regulation, although available to the beneficiary on a 24-hour a day basis, were not actually and specifically provided to this beneficiary on any basis other than an extremely infrequent and intermittent basis. If there were such services as gastrostomy feedings or tracheostomy aspiration being provided on a daily basis to this beneficiary, then she would be entitled to benefits for skilled nursing services, up to one hour daily. The evidence in this case falls short of such a standard, and in fact the attending physician concedes that she receives less than one hour of such services per day and that these specific services which are provided are infrequent and intermittent."

I agree with this analysis of the Hearing Officer and, accordingly, also find that inpatient confinement in the skilled nursing facilities was above the appropriate level and thus was not medically necessary under CHAMPUS. Therefore, CHAMPUS claims for care in the skilled nursing facilities also must be denied cost-sharing under CHAMPUS as above the appropriate level of care.

Subsequent Claims

The hearing case file documents CHAMPUS claims only through March 31, 1983. However, it is also clear that the beneficiary continued as an inpatient in a skilled nursing facility at least through the date of the hearing in June 1984. Based upon the findings and analysis made herein, CHAMPUS claims for any care subsequent to March 31, 1983, will be denied, based on the authority of this FINAL DECISION, under the custodial care provisions of DoD 6010.8-R unless it is affirmatively established through medical review that the beneficiary's condition was no longer custodial or the care qualified under a specific provision of the CHAMPUS regulation regarding benefits available in connection with custodial care.

Acute Hospitalization

The record establishes that the beneficiary was hospitalized on at least one occasion, in May 1982, due to a fall in which she suffered a broken humerus. CHAMPUS claims were appropriately submitted and paid for all services related to this episode of care. The beneficiary also suffered other falls and experienced episodes of congestive heart failure while confined to a skilled nursing facility. Testimony at the hearing suggests that she may have required hospitalization on some of these occasions had she not been in a skilled nursing facility. I agree with the Hearing Officer that these facts do not make the skilled nursing facility care payable under CHAMPUS for any period of time she might have been hospitalized. However, it is appropriate in cases such as this, for CHAMPUS to cost-share any medically necessary diagnostic tests and ancillary services required to determine if hospitalization is required as the result of a separate medical condition or an acute exacerbation of the patient's primary medical condition. Under the circumstances of this case, such ancillary services include medically necessary physical therapy for the treatment of separate medical conditions involving arm and back injuries.

SUMMARY

In summary, the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) is to deny, as custodial care and as services above the appropriate level of care, CHAMPUS cost-sharing of the entire episode of the beneficiary's inpatient confinement in skilled nursing facilities from June 18, 1981, through March 31, 1983, and any subsequent care of a similar nature. The claims and appeal of the beneficiary are, therefore,

denied. This denial includes claims for any ancillary services and physician care related to the beneficiary's primary custodial conditions. Allowed are claims for prescription medications, as well as diagnostic tests and ancillary services, including physical therapy, for unrelated conditions or acute exacerbation of the primary custodial condition as described herein. As CHAMPUS payments were issued by the fiscal intermediary for some of the noncovered services, the matter of potential recoupment is referred to the Director, OCHAMPUS, for consideration under the Federal Claims Collection Act. In addition, as concerns those services authorized CHAMPUS cost-sharing by this FINAL DECISION, including the care related to her injuries, the Director, OCHAMPUS, shall ensure that CHAMPUS paid or pays as second payor to the beneficiary's other insurance. The issuance of this FINAL DECISION completes the administrative appeal process under DoD 6010.8-R, chapter X, and no further administrative appeal is available.

William Mayer, M.D.

REC DEC
55-10

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

Appeal of	)	
	)	
Sponsor:	)	RECOMMENDED
	)	DECISION
	)	
SSN:	)	

This is the Recommended Decision of CHAMPUS Hearing Officer William E. Anderson in the CHAMPUS appeal case file of , and is authorized pursuant to DoD .6010.8-R, chapter X. The appealing party is the beneficiary represented by attorney Carol S. Hawkins. The appeal involves the denial of CHAMPUS benefits for inpatient care rendered in one skilled nursing facilty from June 18, 1981 to August 30, 1981, and in another from August 31, 1981 to the date of this Recommended Decision, with billed charges of approximately $1,500 per month for approximately forty (40) months.

The Hearing file of record has been reviewed. It is the OCHAMPUS Position that the care was custodial. It is the appealing party's position that the care was appropriate and medically necessary. Based on the evidence of record, the Recommended Decision of the Hearing Officer is (1) that the Formal Review Decision be upheld, denying benefits from August 31, 1981 through the date of that decision, (2) that similar benefits be denied to the date of this Recommended Decision, (3) that the scope of the inquiry be enlarged to include the prior episode of care, (4) that benefits be denied from June 18, 1981 through August 30, 1981, (5) except, however, that benefits be allowed for prescription drugs and for physical therapy following the arm and back injuries sustained by the beneficiary.

FACTUAL BACKGROUND

This appeal concerns care provided at two nursing homes for an elderly female beginning at her age 83 and continuing for approximately 40 months through the date of hearing and presumably thereafter. Having been admitted to an acute care hospital in May, 1981 because of symptoms of intestinal obstruction, surgery was performed and care provided to her there for approximately one month. She was discharged to Driftwood Nursing Home on June 18, 1981. The diagnosis upon discharge from the hospital was (1) abdominal adhesions, (2) carcinoma of the colon, (3) anemia, (4) depression, (5) arteriolosclerotic heart disease, and (6) cerebral vascular disease. At the time of admission to Driftwood, her restorative potential was classified as (1) ambulatory with assistance, (2) ability to feed herself with assistance, working toward independence, (3) urinary control, (4) adequate vision, (5) no hearing problem, and (6) mental dexterity was observed as forgetful and senile, with a prognosis that her con-

dition will remain the same or deteriorate. She was depressed, anxious, unhappy, and fearful of being left alone. On August 31, 1981, the patient was transferred to Medical Park Nursing Center in another town and state to be nearer her daughter. The admitting diagnosis was similar to the diagnosis at the time of discharge from the acute care hospital, with the addition of a notation of a significant degree of senile dementia.

There were subsequent acute care hospitalizations in May, 1982, for a fractured left elbow resulting from a fall while at the nursing facility and in June, 1982, for a back injury also resulting from a fall. On June 14, 1982, the attending physician reported that: "Subsequently, she has continued not to do too well and is perhaps a bit more confused, etc., than before. The situation, otherwise, is fairly stable. It is my medical opinion that she should continue to be placed in a Skilled Nursing Facility." (Ex. 2, p. 80)

Subsequently, her condition has continued to decline. She does not recognize her daughter who visits almost daily, but is able to carry on conversations with her. The patient is not able to feed, dress or bathe herself, to administer medication to herself, to ambulate or to sit up by herself without risk of falling, except when in restraint, is not able to describe her symptoms or to assess her health. She is not expected to be able to return to a normal life without assistance with the essentials of daily living.

Her attending physicians and nurses have consistently stated as their opinions to family members and to OCHAMPUS that the patient should not be in any other type of environment than a skilled nursing facility. By November, 1983 (Ex. 2, p. 3), the diagnosis of the patient's arteriolosclerotic heart disease included border-line congestive heart failure and an additional condition, hypothyroidism.

The representative submitted claims for the Medical Park Nursing Center, the physician, and the prescription medications to the fiscal intermediary from August, 1981 through August, 1982, which were paid without question by the fiscal intermediary. However, the fiscal intermediary did not instruct the representative that inpatient hospitalization beyond the initial 90 days had to be preauthorized by OCHAMPUS Benefit and Provider Authorization Branch. Claims for Medical Park Nursing Center were paid through August 31, 1982 by the fiscal intermediary.

On November 17, 1982, the fiscal intermediary informed the representative that inpatient skilled nursing facility services rendered after the first 90 days must be preauthorized by OCHAMPUS and the claim for October, 1982 could not be paid without such preauthorization. There is undated correspondence (Ex. 10) following that from Mrs. in December, 1982 or early January, 1983 to the fiscal intermediary in Columbia, South Carolina which was handling the claim.

The response from OCHAMPUS to the requested preauthorization, which denied care after November 29, 1982, as beyond the 90th day of hospitalization, was based on an administrative error to the effect that the office handling this matter, the OCHAMPUS Benefit and Provider

Authorization Branch, apparently understood August 31, 1982 as the admission date rather than August 31, 1981.

Regarding this circumstance the formal review decision states the following: "However, authorization was not sent to the fiscal intermediary as the error was discovered." The Hearing Officer understands this to mean simply that no approval of payment for that 90 days was issued. It appears from the record that the fiscal intermediary paid for services between August, 1981 through August, 1982 and the Formal Review Decision states that this was "because they assumed the care was eligible for CHAMPUS benefits under the grandfather clause for custodial care."

During May, June, and July, 1983, Mrs. corresponded with various persons at OCHAMPUS and at ASD(HA) and she was advised by Mr. Donald Wagner by letter dated July 28, 1983 that the medical review was in progress. Further correspondence requesting and advising the status of the matter occurred in October, 1983 and in February, 1984.

The issues were referred to the Colorado Foundation for Medical Care for peer review in June, 1983. Following receipt of the peer review opinions at OCHAMPUS, reviews were conducted by the OCHAMPUS Policy Division and subsequently by the OCHAMPUS Medical Director, and was resubmitted for additional review to the OCHAMPUS Medical Director for an opinion regarding the providing of specific skilled nursing services. Those memoranda are of record.

The Formal Review Decision was issued on February 29, 1984, denying benefits from August 31, 1981 to the date of the Decision.

The hearing requested on behalf of the beneficiary was scheduled to be heard on June 19, 1984, in Goldsboro, North Carolina. Notice was duly given and the matter duly heard by the undersigned Hearing Officer as scheduled. Persons present at the hearing included the beneficiary's attorney, Ms. Carol S. Hawkins; OCHAMPUS counsel, Ms. Barbara Udelhofen; and Mr. , Jr., Mrs. , Mrs. , Dr. H. G. Kornegay, and Ms. Lynn Hardee, R.N.

At the hearing, the scope of the inquiry was enlarged to include a post-hearing review of the benefits provided from June 16, 1981 through August 31, 1981. Documentation was subsequently obtained from the Driftwood Health Care Center and forwarded to the Colorado Foundation for Medical Care for peer review. The peer review physicians, consisting of two internal medicine specialists, concluded that her care was essentially custodial, that skilled nursing level of care was not appropriate and necessary from June 16, 1981 through August 31, 1981, that the facility was essentially a substitute home, that she needed someone to watch over her, that her disability was expected to continue and be prolonged, that she was confused and disoriented at times and required protection and monitoring, that she required assistance with some activities of daily living and supervision for other activities, that she was not given medical therapy which would be exepcted to reduce her disability and permit her to function outside a protected monitored and

controlled environment. Further, specific services which are considered to be skilled nursing services were not provided, and she did not require skilled nursing care each day.

The evidence received by the Hearing Officer at the hearing included the official file of documents duly transmitted to the Hearing Officer and the beneficiary's attorney prior to the hearing consisting of Exhibits 1 through 40 and an Index of those exhibits, additional Exhibits 41 through 46; subsequently, Exhibits numbered 47 through 50 have been filed with the Hearing Officer including documentation from the Driftwood facility and a peer review by the Colorado Foundation for Medical Care, a supplemental statement of OCHAMPUS and a response thereto by attorney Hawkins.

ISSUES AND FINDINGS OF FACT

The primary issues in dispute are whether the beneficiary's inpatient care from June 18, 1981 through August 31, 1981, and from August 31, 1981 through the present, should be cost-shared under applicable regulations, e.g.: (a) whether such inpatient care is medically necessary treatment for this patient and at the appropriate level of care or (b) whether it is custodial as that term is defined in the regulation and therefore not covered.

Secondary issues that will be addressed include (1) enlarging the scope of inquiry to the prior admission which is part of the same general episode of care, (2) information given to this beneficiary's family members regarding CHAMPUS benefits as described in government publications, (3) the suggestion that OCHAMPUS is estopped from denying claims as a result of routine payment of claims for a period of approximately 18 months, and (4) comments regarding delays in processing the consideration of these claims. The claimant's representative has requested that the propriety of recoupement be considered within this Recommended Decision. However, based on authority contained in the Final Decision at the Assistant Secretary of Defense for Health Affairs level in case number 83-39, wherein it was concluded that "recoupement matters are not the proper subject of consideration in a CHAMPUS appeal and the placing in issue and consideration of this matter by the Hearing Officer was erroneous . . .," no ruling has been made on that issue.

PRIMARY ISSUES

Medical Necessity/Appropriate Medical Care/Custodial Care

The CHAMPUS regulation includes the following:

> Chapter IV, subsection A.1., provides for medically necessary services and supplies required in the diagnosis and treatment of illness or injury.
>
> Chapter II, subsection B.14., defined "appropriate medical care," in part, as that medical care where the medical services performed in the treatment of a disease or injury are in keeping with the generally acceptable norm for medical practice in

the United States and specifies that the medical environment in which the medical services are performed must be at the level adequate to provide the required medical care.

Chapter II, subsection B.47., defines "custodial care" as "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.

Chapter II, subsection B.67., defines the "essentials of daily living" as ". . . care which consists of providing food (including special diets), clothing and shelter; personal hygiene services; observation and general monitoring, bowel training and/or management; safety precautions; general preventive procedures (such as turning to prevent bed sores); passive exercise; companionship; recreation; transportation; and such other elements of personal care which can reasonably be performed by an untrained adult with minimal instruction and/or supervision."

Chapter IV. subsection G.7., excludes custodial care "regardless of where rendered except as otherwise specifically provided in paragraph E.12.3. of this Chapter IV."

Chapter IV.E.12. provides that the "statute under which CHAMPUS operates specifically excludes custodial care. This is a very difficult area to administer. Further, many beneficiaries (and spouses) 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."

Custodial care is defined, and limited benefits provided, as follows:

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, minitored 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 deugs 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.

Chapter II, subsection B.161., defines skilled nursing services 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 tracheostomy aspiration and insertions. Skilled nursing services are other than those services which primarily provide support for the esssentials of daily living or which could be performed by an untrained adult with minimum instruction and/or supervision.

Chapter IV.C.3.g. provides for benefits for physical therapy in facilities other than hospitals.

There is little controversy in this case as to the diagnosis or prognosis for this beneficiary. There is little question that she has benefited from the care being provided her and that it is being provided in a competent professional manner. The question is, rather, whether the CHAMPUS regulation provides for benefits in such a case. On the one hand, the CHAMPUS regulation does provide benefits for a patient in a skilled nursing facility if that is the patient's appropriate level of care, but does not include benefits for nursing homes. In this case the attending physicians have consistently prescribed care in a skilled nursing facility. The peer review physicians have on each occasion (e.g., as to Medical Park and as to

Driftwood) given their opinions to the effect that the care provided was essentially custodial care rather than medically necessary care. The alternatives to a skilled nursing facility would be an acute care hospital on the one hand and on the other hand, either an intermediate care facility or home care with adequate supervision and some physical therapy following the falls.

It is recognized by this Hearing Officer that the practical difficulties involved for family members to provide home care for a patient in such a condition as the beneficiary are indeed substantial, and in that context the peer review opinion that the care could be provided at home appears to be more theoretical than practical. However, the point the peer review physicians are making is still valid: that a skilled nursing facility is designed to be a place where an individual can obtain skilled nursing services, which this patient did not require except perhaps in the most minimal fashion on an infrequent basis.

The peer review recommendations were, essentially (1.a) she required custodial care rather than medically necessary care, (1.b) she required more assistance and monitoring after November, 1982, (2) the care could have been provided in an intermediate care facility or at home, (3) the care could have been provided in the home setting with adequate supervision and assistance, plus a physical therapist, (4) the institutionalization serves primarily as a substitute home and as her condition deteriorated it became less likely that she would ever leave the nursing home, (5) her condition deteriorated and her disability was expected to continue and be prolonged, (6) she required a protected, monitored and controlled environment because of disorientation, confusion and increasing physical disability, (7) she does not require assistance to support the essentials of daily living at the time of the initial admission, but did require such assistance as her condition deteriorated, (8) the patient was actively treated to reduce the disability from her fractured arm, but otherwise her care was not designed to reduce her overall disability to the extent that she would be able to function outside the protected, monitored and controlled environment, (9) total skilled nursing care per day involved less than one hour, (10) the physical therapy was appropriate treatment, (11) the physical therapy was not a general exercise program, (12) it was both active and passive and was not a comprehensive physical therapy program, and (13) the medical necessity and reasonable anticipated results of the physical therapy services was documented.

The testimony included that of the attending physician, Dr. Kornegay. He is a family physician, trained at Bowman Gray School of Medicine, North Carolina Baptist Hospital and North Carolina Memorial Hospital at Chapel Hill. He received his degree in 1957 and his specialty is family practice, in which he engages. He holds a position as Clinical Professor of Family Medicine at East Carolina University and also holds faculty appointments at Duke University Hospital. He is currently President of the North Carolina Academy of Family Physicians.

Dr. Kornegay testified that he is one of the patient's attending physicians, that he has had opportunities to examine her, that it would not be medically prudent at all for her to live at home with a sitter, that he recommended she be put in the skilled care section, that in November, 1982, (Ex. 13) he confirmed this recommendation and confirmed this recommendation again as to a skilled nursing facility by letter dated January, 1983, (Ex. 19) that upon admission a skilled nursing facility was appropriate medical care for this patient, that as medical director of this facility he probably would not have accepted her in a lower level of care at that time, that she has been receiving an appropriate level of care since that time, that she is chronically ill, that the care she is receiving is designed to maintain and stabilize her condition.

He testified that she does receive a great deal of custodial care but there have been notable instances in which she would have received acute hospital care if she had not been in a skilled nursing home, including when she had a fractured humerus, she would have been hospitalized a couple of weeks but for the nursing home, and that placing a patient in that condition in a lower level of care would not have been manageable, either at home or at a lesser level of care. Similarly, when she injured her back and had congestive heart failure, she did not require hospitalization because she was in a skilled nursing facility. If he had gone to her home and found her with the congestive heart failure he would not have kept her at home but would have kept her in a hosiptal for a while.

She is seen by a physician once or twice a month. The medicine could be given at home but it is a strong dieuretic which needs to be monitored on a fairly regular basis, that this is a skilled type of monitoring, that there is a physician in the facility every day for acute care needs and the nurses would call problems to the attention of the physician. Everyone who is hospitalized who is chronically ill is in a controlled environment and receives the essentials of daily living. The reason for her admission is particularly important. She had intestinal obstruction secondary to adhesions; it is not clear that it was cancer but they expected a recurrence of colonic cancer; it has not recurred, or at least there have been no signs of it, but that was strongly in the mind of her family and the physicians, that she would succumb to that disease. In summary, 90% of the patients in the nursing home would fall in the CHAMPUS category of custodial care.

It would be possible to keep Mrs. at home only when she had a hired nurse 24 hours a day. She needs constant attention and frequent examination with a stethoscope in the event of congestion. She also needs things done with physical therapy which he considers to be skilled but CHAMPUS may not. He thinks that for her overall care she needed the supervision of a skilled nurse.

Dr. Kornegay was asked to give his opinion on the conclusions reached by the peer review physicians. Regarding the peer review recommendation 1.a finding that she requires custodial care, Dr. Kornegay stated that it was accurate as far as it goes, but that it failed to indicate that her post colonic cancer situation was a major part of

her medical condition and that she was suffering from hyperalimentation which was also of significance. Regarding item 1.b he agreed out that the care rendered to this patient after her arm and back injuries could have been done elsewhere than in a nursing home to the extent that it could have been done in a hospital. With reference to each of the three situations which would have called for hospitalization, he estimated that a normal hospitalization period would have been 10 to 14 days for the broken elbow, one to three weeks for the back injury and seven to 10 days for the congestive heart failure condition. Regarding recommendation number 2, he stated that physical therapy was not available at home during the relevant time period in this geographical area.

He explained that skilled nursing facility has skilled nursing available 24 hours a day. In an intermediate care facility, there are skilled nurses available eight hours a day and nursing care available the remaining hours. In the last three years the nursing home has changed such that the nursing home is basically all skilled nursing facility now.

Dr. Kornegay concurred with the peer reviewers' conclusions on numbers 4 through 8. He concurs with the peer review paragraphs 10 through 13 regarding physical therapy. Regarding paragraph 9 dealing with one hour of skilled nursing care per day, Dr. Kornegay stated that skilled nursing care was available to her 24 hours a day and that based on that he feels that his skilled nursing patients receive skilled nursing services 24 hours a day.

Looking specifically at services actually provided to this patient, he agrees that less than one hour a day of services were provided, but declined to make an estimate in the range of between one minute and one hour.

The skilled nursing services regarding I.V. fluids was a short time process. Other than the I.V. services and stethoscope monitoring there are not other specific skilled nursing services provided to this patient. Symptoms of bladder infection could be picked up by an unskilled nurse. A skilled nurse does evaluate this patient on an on going basis with reference to her heart and lungs. In summary, Dr. Kornegay does not feel that this patient would be accepted to other than a skilled nursing facility.

Ms. Lynn Hardy, a Registered Nurse who was formerly Director of Nursing at Medical Park, stated that she was familiar with this pateint. In her opinion this patient could not have functioned in intermediate care, and that there is not much difference any more in the type of patients between their intermediate care facilities and their skilled nursing facility but, as defined, the difference between the two units is based on what is required by the patient. This patient does not know her nurse or her daughter, and does not know if she is well or sick. This patient recently ran a fever of 101 or 102 and did not even know she was sick. She is not able to assess her condition or tell anyone of her symptoms. She walks with assistance but she is not allowed out of her chair without assistance. Her mental state is worse now; she does not know her daughter.

In her opinion the patient is in the appropriate level of care and home care would not be appropriate because of the patient's level of mental incapability. Someone would have to sit with her, keep an eye on her; she would try to ambulate or would fall. You don't routinely restrain patients in a home setting. Those are not normally the type of patients you keep at home. Skilled nursing services would involve the monitoring that is provided for her. Skilled persons recognize symptoms earlier than non-skilled persons. In her opinion this patient could not function in intermediate care because of her need for complete and total care and that she requires people to make assessments for her. Her condition is more demanding than what you would find in intermediate care. In summary, this patient could not be taken care of in an intermediate care level because of her nursing needs.

Mrs. [redacted], daughter of the patient, testified that in the summer of 1981 she got the brochure identified as Exhibit 44 and relied on the statement on page 4 of that to obtain CHAMPUS benefits. The treating physician informed her brother than home care would risk their mother's life and that she would need emergency care. They were afraid to try home care. At the date of her first admission she had seen her mother for six weeks in an acute care hosital. The Franke Home in Charleston investigated her mother's condition and checked out her mother's records but would not take her mother because they felt she needed a higher level of care. Her mother is worse off now than in August, 1981.

Mrs. testified at length regarding the efforts she has made from time to time in connection with processing the claims and delays of various durations with reference to making decisions on the claims. This is illustrated by the large chart labeled as Exhibit 55 and by the voluminous correspondence in the record. She stated that in a telephone conference with Mr. John Shager in April, 1983, which is referenced in the July 28, 1983 letter from Mr. Wagner, that Mr. Shager urged her to apply to Social Security, that she said Social Security benefits were not available because of her father's military and federal service and that Mr. Shager said that OCHAMPUS would not attempt to recoup past benefits. In her opinion Exhibit 30 appears to be the first indication of an attempt to review the whole episode of care.

Mrs. stated that in her opinion no one would get paid under the custodial care criteria. She cannot believe that Columbia Blue Cross is not paying on skilled nursing home claims similar to this. She stated that she has had to pay the nursing home because CHAMPUS was so slow with the payments, that the nursing home would then sign over the CHAMPUS checks to her and that the nursing home was now receiving recoupement letters. She made all appropriate efforts to make sure that there were no double payments. She sent all double payments back and did not accept any double payments. She stated that she had done everything within her power to attempt to maintain and file the records in an honest and appropriate manner and that she would never have submitted the claim in the first place if she had not thought it was the right thing to do based on the brochures

provided to her describing the CHAMPUS benefits program. She would have appealed if she had gotten a denial at first but would have accepted the decision. The reason for denial was changed from time to time in various correspondence and that if she had been given a full explanation from the first she would have realized that her mother does not fit the examples given by OCHAMPUS for skilled services.

She has relied on both the blue brochure and the green brochure which was in effect when her mother entered this facility. Her mother could not administer medicine or prepare her own meals. She visits her mother from 15 minutes to one hour daily about the same time each day after lunch. She sees them give her mother oral medication but does not see them provide other nursing services. The Franke Home into which they considered placing Mrs. does not take you unless you can walk in. The head nurse from that facility classified her mother as needing skilled nursing services and the administrator said they would not accept her.

Mr. , son of the patient, testified that he wanted to take his mother home when she got out of the hospital but Dr. Jenkins who performed the surgery stated that it would not be appropriate. He had contracted with a lady who would come and move into his home and look after his mother but the doctor felt that it would be inadequate care. He cannot visualize a person 84 to 86 years old entering a nursing home and being expected to improve to the point that they could get out.

From an examination of the evidence, it appears to the Hearing Officer that some relatively intense and frequent level of supervisory care is necessary for the maintenance of the beneficiary's life and health. A substantial amount of the controversy in this case involves the conclusion by the peer reviewers that placement of this patient in a skilled nursing facility was not medically necessary, which is simply the converse of saying that she could have been cared for in a lower level facility or as an outpatient with constant help. Conversely, Dr. Kornegay and nurse Hardy were adamant in their opinions that she needed the level of care available in a skilled nursing facility, and the testimony of family members indicates that the facility they investigated involving a lower level of care declined to accept the beneficiary because of her problems with ambulation.

On the other hand, this case is not really so much about determining the appropriate level of care as it is simply a matter of determining whether her care was and is custodial, for if it was and is custodial, then it is specifically excluded as a benefit, and she would not be entitled to benefits for services provided at a lower level of care type of facility, or services provided as an outpatient, except as limited to skilled nursing services provided at the facility, or private duty skilled nursing services provided at the residence of some family member where she might reside. If the exclusion is found to apply, then the beneficiary is not entitled to benefits except the prescription drugs, limited skilled nursing services, physical therapy, and benefits provided in connection with a hospital admission for

the presence of another condition (Chapter IV.E.12.d(1)) or for an accute exacerbation (Chapter IV.E.12.d(2)).

Chapter IV.E.12.(a), in defining custodial care, contains as the various elements of that definition care that is rendered to a patient (a) who is mentally or physically disabled and such disability is expected to continue and be prolonged, (b) the patient requires a protected, monitored and/or controlled environment, (c) the patient requires assistance to support the essentials of daily living, and (d) the patient is not under active and specific medical, surgical and/or psychiatric treatment which will reduce disability to the extent necessary to enable the patient to function outside a protected, monitored and/or controlled environment.

In this case, the beneficiary (a) is mentally and physically disabled, most readily observable from her significant difficulties with ambulation and her mental decline resulting from her cerebral vascular condition, with these disabilities expected to continue and be prolonged, for the duration of her natural life, (b) the beneficiary requires the services of a combination of nurses and attendants which would quite reasonably be described as a protected, monitored and/or controlled environment, since the evidence is clear that she cannot reside alone or be left alone for substantial periods of time, (c) the beneficiary requires assistance with food, clothing, shelter, hygeine, observation and general monitoring, safety precautions, general preventive procedures, companionship, and would require that transportation be provided for her if she were to be removed from this facility to a hospital or to a lower level of care; these types of day-to-day aspects of life and associated services are defined in the CHAMPUS regulation as aspects of the "essentials of daily living" and (d) this beneficiary is not at present under active and specific medical, surgical and/or psychiatric care which will reduce disability to the extent necessary to enable her to function outside a protected, monitored and/or controlled environment.

Previous decisions which have gone to a Final Decision at the Assistant Secretary of Defense for Health Affairs level demonstrate that the Assistant Secretary of Defense for Health Affairs has interpreted the CHAMPUS regulation excluding benefits for custodial care as applying to cases similar to the one at hand.

In the ASOD(HA) case number 82-05, the beneficiary was found to have received custodial and domiciliary care while in a hospital for some months prior to his subsequent transfer to a VA hospital, where his admission to the hospital had been in connection with diagnosis and treatment for a malignancy. The care was determined to be custodial and it was noted that skilled nursing services were not required except on a few specified occasions. (In that case the last approximately six weeks of the period were determined to be domiciliary care. Domiciliary care is, of course, not an issue in this case.)

In the ASD(HA) case number 06-80, the beneficiary was confined to a skilled nursing facility for approximately 11 months as a result of severe brain damage due to anoxia following a myocardial infarction. This followed a course of treatment in a civilian hospital, then five

months in a military hospital, followed to transfer to the skilled nursing facility. The beneficiary in that case was kept in restraints and sedation as a result of his physical and mental disabilities for the greater part of his stay there. Various secondary complications arose for which the treatment was essentially supportive. The confinement concluded with the death of the beneficiary, apparently resulting from complications from infections and ulcers. The nursing services principally involved care associated with the essentials of daily living, as well as certain specific skilled nursing services including oxygen administration and suctioning during periods of respiratory distress. After an extensive examination of the issues, the decision concluded with the following summary: "Notwithstanding the level of care issue, this final decision confirms the finding that the care rendered the deceased patient in this case was primarily custodial in nature . . . ." (Case File ASD(HA) 06-80, p. 17)

Technically speaking, this Hearing Officer is satisfied that the elements of custodial care are established by the facts in this case. Generally speaking, this Hearing Officer is satisfied that this is indeed the type of case to which the custodial care exclusion was intended by the drafters of the regulation to apply, and the type of case to which the exclusion has been applied in previous decisions at the Assistant Secretary of Defense level. Having reached those conclusions, it is impossible to reach a decision which will provide the requested relief to this beneficiary, no matter how much one would wish to be able to do so.

This Hearing Officer is also satisfied from the evidence that skilled nursing services as defined in the regulation, although available to the beneficiary on a 24-hour a day basis, are not actually and specifically provided to this beneficiary on any basis other than an extremely infrequent and intermittent basis. If there were such services as gastrostomy feedings or tracheostomy aspiration being provided on a daily basis to this beneficiary, then she would be entitled to benefits for skilled nursing services, up to one hour daily. The evidence in this case falls short of such a standard, and in fact the attending physician concedes that she receives less than one hour of such services per day and that these specific services which are provided are infrequent and intermittent.

Having reached the conclusion that this is a custodial care case, and that a factual basis has not been demonstrated for obtaining benefits in connection with specific skilled nursing services as an exception to that exclusion, this Hearing Officer concludes that no reasonable purpose can be served by a finding as to the reasonable level of care issue since the custodial exclusion would prohibit benefits even if the level were found to be appropriate.

The only remaining issue for determination is, then, whether the beneficiary is entitled to benefits in the nature of payment to this skilled nursing facility for those periods of time when she would have been placed in a hopsital but for her being in this facility. While such a result would appear to be an equitable thing to do, awarding coverage or benefits to her for the approximately six weeks

to which that description would apply, the regulation itself appears to prohibit the payment of such benefits unless the beneficiary was actually admitted to an acute care general or special hospital. (Chapter IV.E.12.(d)) The benefits which would be payable would under such circumstances be payable to that hospital and not to the facility. In view of the specific language of that regulation it does not appear to be within the terms of the regulation for this Hearing Officer to award compensation on the basis of a "but-for" theory.

SECONDARY ISSUES

Recoupment

The counsel for the claimant has proposed that the Hearing Officer, as a secondary issue in this appeal, make a recommendation as to recoupment. Recoupment refers to recovery of funds previously paid. Recoupment is provided for under Chapter VII.J.3. It is specifically stated in subsection 3.a. of that regulation that recoupment procedures include requests by the fiscal intermediaries for refunds or offsets, ". . . and in appropriate cases, referral to the Director, OCHAMPUS (or a designee), for review and consideration for submission to the Department of Justice." The exercise of discretion, if there is any provided by the law, would lie in the jurisdiction of the Director, OCHAMPUS, or the Department of Justice.

The role of the Hearing Officer is to apply the regulation to the facts in order to determine whether benefits are allowed and no matter how much one might wish to make a recommendation in a particular case, it has been ruled in at least one Final Decision at the ASD(HA) level, in case number 83-39, that recoupment is not an issue before the Hearing Officer. This Hearing Officer is, accordingly, bound by that ruling and makes no findings in that regard herein.

Estoppel

The counsel for the claimant has strenuously urged that consideration should be given to the history of payment of benefits in this case by the fiscal intermediary over a substantial period of time. The argument suggests that CHAMPUS is presently estopped from denying the availability of such benefits paid in good faith under similar circumstances. Similarly, counsel has offered evidence from Mrs. and documentary evidence consisting of CHAMPUS brochures describing the availability of benefits for skilled nursing care. The claimant's argument in that regard is to the effect that those brochures were misleading, that particular interpretation of them by Mrs. was in good faith, and therefore, CHAMPUS is estopped from denying benefits in this case.

Third, attention is called to Exhibit 17 in which it was stated on November 29, 1982 in a letter from OCHAMPUS that "This office does not review care provided during the first 90 days of hospitalization." Regarding this third issue, the Hearing Officer understands that quoted comment to apply to the pre-authorization review procedure and not to a later review of claims paid or denied. The com-

ment is not understood to be material to this appeal. If it were, consideration of it is governed by the estoppel issue as treated hereinafter.

The principal evidence in this record in connection with the estoppel issue consists of Mrs. _ s testimony dealing with two CHAMPUS brochures, one - a CHAMPUS handbook which is green and white in color and published in 1978-79 containing on page 17 thereof the following language: "Services and Supplies in Authorized Institutions Other Than Hospitals - See Covered Services and Supplies furnished and billed for by an authorized institution other than a hospital (i.e., a skilled nursing facility, a residential treatment center, or a specialized treatment facility) include: room and board, general nursing, cloths and medicines, medical supplies, medical equipment, diagnostic tests (not including CAT scan), blood and its derivatives, physical therapy, oxygen, intravenous injections, shock therapy, chemotherapy, psychogical evaluation tests when required by diagnosis, renal dialysis, other medical services or supplies specifically approved by OCHAMPUS . . . ." and on page 44 thereof under the heading Institutional Providers, the following: "The following types of institutions are CHAMPUS-authorized if they meet the requirements and regulations specifically outlined in the CHAMPUS Regulation: . . . Skilled Nursing Facilities - institutions whose primary purpose is to provide skilled nursing care for sick or convalescent patients; does not include facilities such as retirement homes, nursing homes, homes for the aged or infirm, or halfway houses . . . ."

The claimant also offered a blue and white brochure identified as (CHAMPUS FS-2) and published in 1976 in which the following language is highlighted: "Skilled nursing care performed by a professional Registered Nurse, Licensed Practical Nurse, or Licensed Vocational Nurse, is an authorized benefit if an attending physician certifies that the care is medically necessary . . . . CHAMPUS will share the costs for inpatient care including ordinary staff nursing, in such approved health care facilities as skilled nursing facilities, ..." Additional language is highlighted as follows: "Some types of facilities are not approved as inpatient care facilities for CHAMPUS beneficiaries and CHAMPUS will not pay the total facility charges for care. CHAMPUS may, however, pay a share of the nursing costs in such facilities by considering the nursing services as outpatient care ordered by the attending physician; but room and board charges will not be paid." The note penciled in on this brochure by Mrs. and consistent with her testimony is that she interprets the language "but room and board charges will not be paid" to mean in those types of facilities which are not approved as mentioned in the preceding paragraph.

Other language from that brochure highlighted by the claimant is the following: "The bill from the facility must show the nature of the services provided and the amount of the charges; and the physician's statement must show the diagnosis, the need for nursing care, and describe in detail the nature of the services required by the patient. . . . CHAMPUS will not share the cost for domiciliary or custodial care. Examples of domiciliary or custodial care include

help with walking, getting in and out of bed, bathing, feeding, dressing and preparing meals and supervision of medication that can usually be self-administered without the continuing attention of physicians, nurses, or other health care professionals. Care required by chronically ill patients to maintain a stabilized condition that can be provided only by or under the direct supervision of physicians is not domiciliary or custodial."

The claimant contends that Mrs. is a chronically ill patient who requires the sort of care presently being provided to maintain a stabilized condition and that it is in fact under the direct supervision of physicians. The argument is thus that her care is not custodial and OCHAMPUS is estopped from asserting that it is by virtue of that publication.

The approach taken by OCHAMPUS in cases of this sort where benefits have been paid by a fiscal intermediary, as expressed by OCHAMPUS counsel and as understood by this Hearing Officer, is that if such benefits were paid in error the Director, OCHAMPUS and in turn the Assistant Secretary of Defense for Health Affairs considers the payment to have been made in violation of the statutory and regulatory authorities and not binding as precedent or as a factual basis for estoppel. Further, it has been stated in at least one Final Decision issued at the Assistant Secretary of Defense of Health Affairs level in a case originally heard before this Hearing Officer, case number 80-15, that "Regardless, it is an established legal principle that the United States is not estopped by the acts of its agents in violation of law."

The legal basis for that "established legal principle" has not been fully briefed and explored in the record in this case and this Hearing Officer is therefore not in a position to determine any basis for finding this case to be an exception from what this Hearing Officer must consider to be an established principle. Therefore, the response to the estoppel argument, whether it arises from the history of past payments, from Exhibit 17, or from the brochure writing style would be the same response: that the United States is not estopped by the acts of its agents in making erroneous payments or statements or in authoring the abbreviated descriptions of benefits. This Hearing Officer is bound by that principle or rule and makes no finding herein in regard to the presence of any facts in this case which would estop OCHAMPUS from denying benefits.

Summary

It is thus the Recommended Decision of this Hearing Officer that the Formal Review Decision be upheld, denying benefits from August 31, 1981 through the date of that decision, that benefits be denied from June 18, 1981 through August 30, 1981 in the prior facility related to this same episode of care, and that benefits be denied through the date of this Recommended Decision.

William E. Anderson
Hearing Officer

21 November 1984