



14 MAY 1981

HEALTH AFFAIRS

FINAL DECISION: OASD(HA) Case File 01-80
Appeal

The Hearing File of Record, the tape of the oral testimony presented at the hearing, and the Hearing Officer's RECOMMENDED DECISION (along with the Memorandum of Concurrence from the Director, OCHAMPUS) on OASD(HA) Appeal Case No. 01-80, have been reviewed. The amount in dispute is \$2,718.33.

The Hearing Officer recommended that the CHAMPUS Fiscal Intermediary's initial denial of CHAMPUS benefits for the 26 May 1977 removal of scar tissue from the left breast and the bilateral breast surgery for correction of breast asymmetry (which included both mammary augmentation and reduction procedures), as well as the related hospital and anesthesia services, be partially reversed. It was the Hearing Officer's conclusion that the excision of the scar on the left breast and reduction mammoplasty of the right breast were medically necessary to alleviate back, shoulder, and breast pain and to restore normal function of the left arm. This conclusion was apparently based upon personal statements of the appealing party and her spouse. The Hearing Officer also concluded that CHAMPUS benefits should continue to be denied for the augmentation by prosthesis of the left breast and the implant insertion in the right breast following the reduction mammoplasty, finding that these procedures were primarily cosmetic in nature and as such were not medically necessary (i.e., essential) as defined in the applicable regulation. The Director, OCHAMPUS, while admitting the appealing party's claim of pain and restricted movement were not substantiated, nonetheless agreed with the Hearing Officer's findings.

After due consideration and careful review the Principal Deputy Assistant Secretary of Defense (Health Affairs), acting as the authorized designee of the Assistant Secretary, finds that the Hearing Officer erred in his rationale and conclusion and therefore does not accept the RECOMMENDED DECISION. It is the Principal Deputy's finding that the Hearing Officer failed to give proper weight to the clinical evidence (or lack thereof) contained in the Hearing File of Record. Instead, he apparently chose to rely on the personal, but largely unsubstantiated, claims of the appealing party and her spouse. This failure on

the part of the Hearing Officer to properly apply weight to the available evidence results in his recommendation being deficient. With the finding that the Hearing Officer's recommendation is deficient, then it follows that the concurring position of the Director, OCEAMPUS, is also in error. This FINAL DECISION is therefore based on the evidence contained in the Hearing File of Record and as presented in oral testimony, and upholds the initial denial of CHAMPUS benefits for all procedures related to the bilateral breast surgery currently in dispute.

To assure that the appealing party fully understands the bases on which the initial denial is being affirmed and upheld, each point at issue is addressed in this FINAL DECISION.

PRIMARY ISSUES

The primary issue in dispute in this case is whether or not the bilateral breast surgery was performed primarily for cosmetic purposes or whether the care was essential for medical treatment of a covered condition. Army Regulation AR 40-121, in effect at the time the disputed surgery was performed, stated that CHAMPUS benefits are authorized for "... necessary services and supplies ..." (Reference: Army Regulation AR 40-121, Chapter 5, Section 5-2.w.) The applicable regulation also defines "necessary" services and supplies as "... services ... ordered by the provider of care as essential for the care of the patient or treatment of the patient's medical or surgical condition ..." [emphasis added] (Reference: Army Regulation AR 40-121, Chapter 1, Section 1-3 (c)) The applicable regulation contained a provision identifying services and supplies not authorized, stating "... Prosthetic devices (other than artificial limbs, artificial eyes) ... [are excluded]" (Reference: AR 40-121, Chapter 5, Section 5-4.e.)

In addition, the Defense Appropriations Act, 1977, stated "...none of the funds contained in the act available for the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) shall be available for ... (e) reconstructive surgery justified solely on psychiatric need including, but not limited to, mammary augmentation ..." (Reference: Public Law 94-419, Section 743(e))

The appealing party, her husband (and sponsor), her legal representative, and physicians who treated her at various times, submitted statements setting forth factors which in their view, supported the position that the breast surgery was primarily to relieve pain in the shoulder and back caused by breast asymmetry and to alleviate pain caused by contractures of a keloid scar on

the left breast. Despite these assertions, however, it is the finding of the Principal Deputy Assistant Secretary of Defense (Health Affairs) that the evidence made available in this appeal does not support a finding of essential care--rather the evidence is strongly persuasive that the bilateral breast surgery was performed primarily for cosmetic purposes (and/or psychiatric reasons).

1. History of Fibrocystic Disease. The appealing party described a history of fibrocystic disease and [it was implied] that this should qualify the bilateral breast surgery for CHAMPUS benefits. The Hearing File of Record does indicate a history of fibrocystic disease. In 1973 a benign tumor of the left breast required excision. In 1974 the appealing party again consulted a plastic surgeon because of another suspected lump in the left breast. At that time her breasts were described as "fibronodular," but there is no indication this resulted in further surgery. That the appealing party did suffer from fibrocystic disease was never questioned by CHAMPUS however. Further, it is a moot point because the presence of fibrocystic disease was never an issue in this case nor was it ever claimed by the appealing party or the various physicians involved that the breast surgery in dispute in was in anyway related to treatment of fibrocystic disease. The stated reason for the surgery was breast asymmetry. The the bilateral surgery was denied on the basis it was performed primarily for cosmetic purposes (and/or psychiatric reasons) and thus not necessary [essential], and specifically excluded by law. (Reference: AR 40-121, Chapter 1, Section 1-3c; Public Law 94-419, Section 743 (e))

2. Scar on Left Breast: Pain and Restricted Arm Movement. The appealing party, her spouse (and sponsor) and the Military physicians who helped arrange for the bilateral breast surgery strongly asserted the excision of scar on the left breast, which resulted from the 1973 removal of the benign tumor, was necessary to eliminate or alleviate pain and to restore full motion to the left arm.

o Presence of Scar. The scar on the left breast was confirmed by photographic evidence in the form of a colored slide. It showed an irregular, reddish linear area in the upper outer quadrant of the left breast. The slide indicated some widening through the mid-section of the scar.

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- o Keloid Formation: Contractures. First it was claimed by the appealing party that the scar on the left breast from the 1973 surgery had developed into keloid formation causing contractures with resulting pain and restriction in arm movement. A keloid is a benign tumor that usually has its origin in a scar from surgery or a burn or other injury. It is a growth, irregularly shaped, that is sharply elevated above the skin surface, rounded, hard, shiny and usually white. Keloid tissue tends to be somewhat unsightly. It occurs due to the formation of excessive amounts of collagen in the corium during connective tissue repair. According to the Encyclopedia and Dictionary of Medicine and Surgery, keloids are generally considered harmless and noncancerous, although they may produce contractures. Further, they usually cause no trouble beyond an occasional itching sensation.

The Hearing File of Record was carefully reviewed for documentation to support the claim that keloid formation, in fact, was present. A January 1974 Military Health Record indicates an impression of Fibrocystic disease and "keloid." Disposition shows "routine," with a six month follow-up. A plastic surgery consultation was also requested at that time for breast asymmetry. This clinical record does not indicate a physical examination was performed or that any tests were requested or administered to verify keloid formation. There was no mention of restricted arm movement which the appealing party claimed had been present since the 1973 breast surgery. Further, there was no indication that any therapeutic measures were employed or prescribed for pain or restricted arm movement, including medication. The record does not show the results of the plastic surgery consultation if it was performed. Beyond this one instance in January 1974, the available record is silent on the issue of keloid formation except for personal statements by the appealing party. The Military physician who did the initial examination of the appealing party in April 1977 (which eventually resulted in the bilateral breast surgery currently in dispute) makes no mention of keloid formation being a cause of pain contractures or limiting arm motion in any way. The only reason for the contemplated bilateral surgery at that point was breast asymmetry. The record indicates that at the time of the April 1977 visit to the Military medical facility, the appealing

party had already been seen by the civilian plastic surgeon who eventually performed the bilateral breast surgery. (The record is somewhat ambiguous and it cannot be determined whether she was directly referred by a Military physician or made independent contact with the civilian surgeon.) In any event, the purpose of her visit to the Military facility apparently was to obtain a Certificate of Nonavailability and a statement of medical need for the breast surgery to assure the payment of benefits by CHAMPUS. The Military physician's Request for Consultation prepared at that time specifically calls attention to the need to prepare a strong statement supporting the medical need [as opposed to cosmetic purposes] for the bilateral breast surgery. With the obvious recognition on the part of the appealing party and both the examining and consulting Military physicians as to the potential CHAMPUS denial of benefits for the bilateral breast surgery due to its basic cosmetic nature, it would appear reasonable that had keloid formation and contractures been observed in the left breast scar, it would have been emphasized in the record.

The Hearing File of Record also contains the clinical report of physical examination performed by the civilian plastic surgeon, preparatory to performing the bilateral breast surgery. This report contains no reference to keloid formation or contractures. This is particularly significant since it is characteristic for keloid formation to recur in individuals. Again, the Encyclopedia and Dictionary of Medicine and Surgery specifically states, "Surgical removal [of keloid tissue] is not usually effective because it results in a high rate of recurrence." It would therefore appear that the plastic surgeon would have considered the presence of keloid tissue of major concern. His report of examination did not reflect this concern; in fact, not only was he totally silent on the issue of keloid, his report specifically indicated the patient's skin to be normal throughout. Further, the scar tissue he excised from the left breast was not referred for pathological examination--another indication there was no concern relative to keloid formation, either past or future. His operative report discloses no special procedures or precautions related to keloid were undertaken.

- o Extension of Scar into Axilla. It was also asserted by the appealing party that because the left breast scar extended into the axilla (arm pit), this also

contributed to the pain and restriction of arm movement. Again the Hearing File of Record was carefully reviewed concerning the location and extent of the left breast scar prior to its excision. A photograph submitted for the record visually shows the scar was limited to the breast itself and that it did not extend beyond the breast into the axilla. Further, the operative report of the July 1973 excision of the benign tumor (which caused the scar) does not mention surgical dissection of the axilla. We cannot, therefore, conclude that the scar extended beyond the breast as claimed.

- o Presence of Pain: Restricted Arm Movement. The appealing party insisted there was pain in the left breast, arm, and shoulder. Tenderness in the scar area of the left breast was apparently reported by the patient to an examining physician in January 1974. This was the only clinical mention of any discomfort found in the record. The appealing party and her husband, in oral testimony and in written statements, personally asserted that the appealing party had been severely limited in left arm motion since the 1973 breast surgery. The record, however, does not reveal any medical evidence of arm or shoulder pain or that therapy for such pain was ever prescribed or carried out. Neither is there evidence that pain medication was ever prescribed. There are no physician statements substantiating that any treatment to reduce or eliminate pain was recommended or provided. In oral testimony, the appealing party did not indicate she had received or requested such care. Further, the civilian plastic surgeon did not list pain as one of the symptoms on his report of the patient's history and physical examination. This same clinical report of the physical examination did not support existence of any limitation of motion, noting specifically that there was normal range of motion and no muscular asymmetry, tenderness, or atrophy.

The applicable regulation and the 1977 Defense Appropriations Act preclude the extension of CHAMPUS benefits for surgery that is not medically necessary [essential]. The type of breast procedures that are at issue in this appeal--i.e., scar excision, mammary augmentation and mammary reduction plus augmentation, particularly when the stated surgical objective is to attain breast symmetry--are considered to be cosmetic procedures. To overcome this basic classification requires compelling evidence to the contrary.

On the issue of the scar itself it would require establishing beyond a reasonable doubt that the scar was, in fact, a keloid, that it extended beyond the breast itself into the axilla, that it caused substantial pain, and resulted in significant restriction in the functioning of the arm. An unsubstantiated personal claim that pain and limited motion was present is not sufficient. Despite the various assertions made by the appealing party and her spouse, and contrary to the positions taken by the Hearing Officer and Director, OCHAMPUS, it is our finding that the excision of the left breast was not medically required [essential] and that the only reasonable conclusion is that the surgery was motivated primarily by cosmetic (and/or psychiatric) considerations. (References: Army Regulation AR 40-121, Chapter 1, Section 1-3(c); and Public Law 94-149, Section 743(e)).

3. Breast Asymmetry: Shoulder and Back Pain. The appealing party and her spouse also claimed that breast asymmetry (the appealing party's right breast was larger than the left) caused back and right shoulder pain. It was asserted that it was therefore medically necessary to perform the bilateral breast surgery (augmentation left breast; reduction plus augmentation right breast) which is in dispute in this appeal. The reduction procedure plus augmentation performed on the right breast included transposition of the nipple, deepethelization of dermal pedicle, excision of tissue and insertion of small 60 cc (2 ounce) lumer prosthesis. The left breast augmentation included excision of scar and insertion of a double lumen McGann prosthesis with a total volume of 150 cc (5 ounces). The stated purpose of the surgery was to accomplish breast symmetry.

- o Breast Asymmetry. The preoperative, frontal view photograph contained in the Hearing File of Record clearly establishes the presence of breast asymmetry. The photograph shows the right breast to be larger than the left and somewhat pendulous although not grossly so. Breast asymmetry was consistently noted by the examining and consulting military physicians and the civilian plastic surgeon as the reason for the bilateral breast surgery. The difference in breast size was attributed to the 1973 surgery for benign tumor, exaggerated by a subsequent pregnancy. Although no information was provided concerning specific size and weight difference between the breasts, the photographic evidence fully supports the claim that breast asymmetry was present. The photograph indicates that the larger breast would not be considered exceptionally large and heavy for the appealing party's body structure.

- o Related Back and Shoulder Pain. The appealing party claimed the breast asymmetry caused back and shoulder pain. The Hearing File of Record indicates no clinical confirmation of back or shoulder pain, nor is there any indication of posture problems ("slumping") resulting from breast asymmetry. There is no apparent history of any medical care for back or shoulder pain nor were any treatment regimens prescribed--i.e., physical therapy, use of surgical bra, medication (either palliative or therapeutic), etc. The report of physical examination conducted by the civilian plastic surgeon, again preparatory to performing the bilateral breast surgery, is silent as to the presence of pain or impairment of movement. Concerning the neck, and extremities, "... normal range of motion..." was reported; for the musculoskeletal system, "... no muscular asymmetry, tenderness or atrophy."

The available clinical evidence does not support a finding of pain or restricted movement. The appealing party may have experienced some discomfort at one time or another, but there is no evidence that the degree of pain or restriction of movement was of sufficient severity to support a finding of medical necessity for the bilateral breast surgery. It is admitted that the breast asymmetry did result in a less than a attractive appearance which may well have produced an adverse psychological reaction on the part of the appealing party or her spouse. This may have created a desire to have the condition surgically corrected. Understandable as this might be, it would not qualify the bilateral breast surgery as essential care, necessary to treat a covered medical condition. Our review of the clinical documentation strengthens the finding that the surgery was done for cosmetic purposes (and/or psychiatric reasons).

(Reference: Army Regulation AR 40-121 Chapter 5, Section 5-2.w.; Public Law 94-419 Section 743(e))

- 4. Medical Necessity: Essential Care vs Cosmetic. Despite claims to the contrary by the appealing party and her spouse, the clinical evidence in the Hearing File of Record does not support the position that the surgery was necessary [essential] to treat any covered medical condition. While there may have been some physical discomfort associated with the scar or breast asymmetry no significant pain or restricted physical movement was reported, verified or treated. Again, it is our finding that medical necessity was not the primary reason for the surgery; rather that it was done for cosmetic purposes (and/or psychiatric reasons). The Hearing File of

Record indicates that as far back as 1974 plastic surgery was being considered to correct the breast asymmetry. The record also establishes that the appealing party, her spouse and the Military physicians who referred her for the surgery, were cognizant of the generally cosmetic nature of the planned breast surgery. The assertions made for the purpose of establishing medical necessity are not, however, sufficiently compelling to overcome the finding that the surgery was primarily cosmetic in nature. (Reference: AR 40-121, Chapter 5, Section 5-2w; Public Law 94-419, Section 743(e).)

5. Statutory Limitation on Prostheses. Our review of this appeal indicates that throughout the review process a major point has been overlooked. With the exception of the scar excision, the purpose of the bilateral breast surgery was to insert breast implants--i.e., prostheses. The left breast surgery consisted only of the augmentation--i.e., insertion of the prosthesis. While the right breast surgery included removal of tissue a reduction mammoplasty), the objective of the reduction was to prepare the breast for the insertion of a prosthesis. The law under which CHAMPUS is authorized specifically excludes all prosthesis except artificial limbs and eyes. This exclusion would also encompass any related surgery or other services/supplies required to put a non-authorized prosthesis in place. Therefore, even if the bilateral breast surgery in this appeal had been found necessary in the treatment of associated medical complications, benefits could not have been extended for the left breast augmentation mammoplasty and the right breast reduction mammoplasty plus augmentation, because the purpose of the surgery was to prepare the breasts for the prostheses (implants). (Reference: Chapter 55, Title 10, US Code; Army Regulation AR 40-121, Chapter 5-4.e.)

SECONDARY ISSUES

Several secondary issues also emerged in this appeal.

1. CHAMPUS Advisor Misinformation. The Appealing party's spouse maintained that the CHAMPUS Advisor at his post of duty had assured him that CHAMPUS benefit were available for the bilateral breast surgery and thus [he implied] benefits should be extended. While there is no documentation in the Hearing File of Record to support this claim, such verification is moot. Every effort is made to train CHAMPUS Advisors

so they can provide assistance and accurate information to beneficiaries. Any interpretation as to whether a specific medical service will be covered, however, is not an official decision of the Program. Whether or not CHAMPUS benefits are payable cannot be ascertained until a fully completed claim is submitted and adjudicated. And while it is truly unfortunate when an advisor provides misleading, incomplete or incorrect information to a sponsor or beneficiary, such errors are not binding on the Program. The decision in this or any other appeal must be based on the merits of the case, in compliance with the law and applicable regulations.

2. Financial Hardship. The appealing party's spouse, somewhat indirectly, requested administrative consideration on the basis of financial hardship. His general position was that the breast surgery had been performed with the expectation that CHAMPUS would extend its benefits--and because CHAMPUS had denied liability, he and his family had been adversely affected. First, there is strong indication that the appealing party was aware of the basically cosmetic nature of the bilateral breast surgery so it must be assumed that the possibility of a CHAMPUS denial had also been contemplated prior to the surgery being performed. This is beside the point, however. It is always deeply regretted when a Program decision causes financial problems for a Military family. Financial hardship per se is not, a valid basis on which to consider an appeal. To assure uniform, consistent and unbiased Program decisions, consideration must be made on the basis of the substantive issues as they relate to application of law and regulations.
3. Weight of Evidence. Subsequent to the hearing the appealing party submitted a statement from the surgeon who performed the 1973 breast surgery (removal of benign tumor) which resulted in the left breast scar. It was his opinion that the bilateral breast surgery under dispute in this appeal was medically necessary. The weight of evidence, however, must be given to the clinical documentation (including photographs) obtained for the Hearing File of Record from the surgeon who actually performed the surgery under appeal. These records do not support the presence of keloid formation or contractures in the left breast scar, nor that the scar extended into the axilla. There was no indication of associated pain and discomfort, and the physical examination specifically denies any restricted arm or shoulder movement. The stated purpose of the surgery was to correct breast asymmetry. The Hearing File of Record does not clinically document any associated medical complications.

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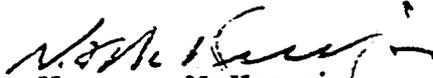
Based on the evidence presented, no other conclusion can reasonably be drawn than the one presented in this FINAL DECISION--i.e., that the surgery was for cosmetic purposes (and/or psychiatric reasons). (References: Army Regulation AR 40-121 Chapter 5, Section 5-2,w; Public Law 94-419, Section 743(e).)

SUMMARY

This FINAL DECISION does not imply that it is inappropriate for surgery to be performed for the purpose of accomplishing breast symmetry or that unsightly scar tissue should not be removed. Whether or not to undergo such surgery is solely a personal decision. This FINAL DECISION simply confirms the finding that the surgery was for cosmetic purposes (and/or psychiatric reasons) and thus does not qualify for CHAMPUS benefits.

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Our review indicates that the appealing party has received full due process in her appeal. Issuance of this FINAL DECISION is the concluding step in the CHAMPUS appeals process. No further administrative appeal is available.



Vernon McKenzie

Principal Deputy Assistant Secretary
of Defense (Health Affairs)