DATE: 03-11-91

CITATION: VAOPGCPREC 23-91
Vet. Aff. Op. Gen. Couns. Prec. 23-91

TEXT:

SUBJECT: Community Contract Nursing Home Program--Additional Payments.

(This opinion, previously issued as Opinion of the General Counsel 9-72, dated December 11, 1972, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

To: Chief Medical Director

QUESTION PRESENTED:

Whether there is any prohibition to the payment of additional amounts by the veteran or his family to obtain benefits from a contract nursing home for creature comforts not considered part of the basic nursing home care provided by the VA.

COMMENTS:

This question was raised in two identical situations involving two nursing homes which provided two veterans an additional benefit, a private room, for which the veteran or his family paid an amount over the usual contract nursing home cost. It is questioned whether by receiving such additional money the nursing home violated paragraph 10 of the contract which exists between the VA and these facilities.

Paragraph 10 of the contract in question reads as follows:

"It is understood that payments made by the Veterans Administration under this agreement will constitute the total cost of nursing home care. The nursing home agrees that no additional charges will be billed to the veteran or his family, either by the nursing home or any third party furnishing services or supplies required for such care."

Although this paragraph can be construed as prohibiting the action taken by the two nursing homes, it can also be interpreted to mean that the only thing prohibited is the payment of an additional amount for the nursing home care for which the VA is paying.

In the past, it has been the policy of the VA to administratively prohibit the payment of any additional amounts by the veteran or his family, regardless of what the payment is for, on the basis that the VA payment is intended to cover the total cost of the nursing home care. We do not believe, however, that such a prohibition is required by the provisions of 38 U.S.C. s 620, which was introduced by Public Law 88-450. A review of VA Regulation 6051, et seq., and the explanations accompanying each change thereto, reveals no such prohibition. Similarly, M-1, part I, chapter 12, section 3, dealing with community nursing home care, does not prohibit such additional benefits.

The legislative history of this Act, and subsequent amendatory legislation, fails to furnish any guidance as to the intent of Congress, or the thinking of the VA, as to whether it was intended that enactment of this provision would restrict the veteran and his family from obtaining any benefits form the contract nursing home other than those contracted for by the VA. The VA has, in the past, taken a position with respect to several subsequent legislative proposals (e.g., H.R. 14722, H.R. 853, and S.1949, all 91st Congress bills), opposing any cost sharing. The rationale for this position is illustrated by the following statement contained in our report of these bills:

"Under existing authority the VA contracts for total cost of community nursing home care for certain of its patients. Under the terms of such a contract, we have a clearly delineated responsibility, and some control over the veteran during the period he receives care at our expense. In a cost sharing proposal such as this, responsibility for the patient's needs would be fragmented among those persons who participate in the cost sharing arrangements. This may not always be in the veteran's best interest and the end result could well be a level of nursing care below that which is expected from those nursing homes in which the VA pays the total costs. Or conversely the VA would never know whether in some instances services are being provided and charged against the veteran over and above those required in our contract.

"Support contributions over and above the VA rate might well encourage nursing care costs to skyrocket to levels above VA's allowance in Alaska and Hawaii. It might also encourage nursing homes in the 48 contiguous States to raise their rates on the theory that the sharing program would be expanded to cover them. It should be pointed out that the cited legislative position is merely an explanation of what was then considered to be a desirable policy, and was not based upon any specific legal restrictions. Furthermore, it addressed itself to proposals which are distinguishable from those involved in the two cases that are the subject of your proposed letters, in that it involved situations whereby the cost for the basic nursing home care would be shared by the VA and public or private persons or organizations. We believe this cannot be equated with a situation where additional comforts are requested by a veteran or a member of his family that are not considered a part of basic nursing home care paid for by the VA,

such as a color television set, or a private room where one is not required to adequately care for the veteran's medical condition.

In our opinion, any restrictive language involving additional payments for creature comforts not considered part of basic nursing home care must be based upon policy rather than legal considerations. In this connection, therefore, once it has been determined that the veteran's condition does not require such additional comforts, they are not considered a part of the basic nursing home care paid for by the VA, and, as such, any attempt to prohibit these requests, unless based upon sound medical reasons, would go beyond the authority of the Administrator as set forth in 38 U.S.C. § 620.

In the past, concern has been expressed that any relaxation in the present restrictive policy could lead to situations where patients who are not fortunate enough to be able to sustain additional costs might be shunted to less desirable quarters, and less intensive services. In this connection, we agree that there is an obligation to establish basic nursing care standards, and insure they are met. We believe this could be accomplished, however, by the utilization of a requirement that any charges billed to the veteran or his family for comforts not considered a part of the basic medical care provided by the VA, must be specifically approved in advance by the VA. Since most of the problems seem to involve single as opposed to double room occupancy, it is interesting to note that where an individual is eligible for Medicare, the Government only pays for double room occupancy and the individual involved is allowed to chose a single room and pay the difference if he so desires. We believe a similar procedure applied to VA nursing home care could be adopted. On the other hand, we agree that if the veteran's physical condition requires a private room, it would not be a "creature comfort", and the costs should be born by the VA. A decision of this nature should, however, be based upon the facts of each particular case, rather than on a uniform policy basis.

HELD:

For the reasons set forth above, we believe the present restrictive policy should be clarified, and paragraph 10 of the nursing home care contract modified to permit the payment of additional amounts by the veteran or his family, with prior VA approval, for creature comforts not considered a part of the basic nursing home care provided by the VA.

VETERANS ADMINISTRATION GENERAL COUNSEL
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