DATE: 03-11-91

CITATION**:** VAOPGCPREC 32-91
Vet. Aff. Op. Gen. Couns. Prec. 32-91

TEXT:

SUBJECT: Hospital Based Home Care Program for Spinal Cord Injury Rehabilitation--Home Renovations.

(This opinion, previously issued as Opinion of the General Counsel 22-75, dated June 10, 1975, 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:

What guidelines should be established for the furnishing of rehabilitative or therapeutic devices which might be construed as temporary home improvements?

COMMENTS:

On October 4, 1974, this office released an unpublished opinion relating to a proposal to widen bathroom doors and construct wheelchair ramps in the private homes of spinal cord injury patients, as part of the hospital based home care program. In that opinion, we discussed in some detail the authority of the VA to provide medical services to a veteran in a non-hospital status. We expressed the view that specially adapted housing may not be furnished a veteran unless he qualifies for the assistance provided under chapter 21 of title 38. Accordingly, we held that proposals to make certain modifications to a veteran's home, as part of the medical care and treatment authorized by chapter 17 of title 38, could not be carried out, since we do not believe such term could be construed in such a broad manner as to encompass remodeling private homes, merely because it would make life outside the hospital more available to a veteran. We pointed out that if such a construction were permissible, there would be nothing to keep one from extending such term to include any other type of renovation that might be desirable for the veteran's well-being, although not treatment, per se, even going so far as including the
procurement of a home on the basis that if the veteran did not have adequate living accommodations, he would have to be rehospitalized by the VA. We indicated that we could not support such a conclusion.

We were asked for clarification of this opinion in the light of requests being received for assistance under the provisions of 38 U.S.C. § 617, which authorizes certain eligible veterans to receive therapeutic or rehabilitative devices, as well as other medical equipment and supplies, if medically indicated. In a memorandum of December 9, 1974, it was indicated that under this statutory authority, the VA has been furnishing certain rehabilitative or therapeutic devices which might be construed as temporary home improvements. These requests are initiated as medical prescriptions, and included among them are such devices as wheel-o-vators (an outdoor electrically operated elevator which lifts a wheelchair patient up to 72" for access into his home); temporary ramps constructed by a carpenter for similar access; wecolator stairway elevators (a stairway glide on which the patient sits to ride up and down the stairway); home elevators; central electronic air cleaners; swimming pool slide and stair safety rails; and powered remote control garage door openers. Other items are approved locally without the need for Central Office approval, and include such miscellaneous items as grab-bars and rails in home bathrooms, temporary wooden ramps,
plumbing and electrical connections for the installation of home dialysis units, similar electrical connections for the installation of window air conditioning units, and other gadgets. These might include an elevated toilet seat and personal hygienic washers and dryers for after bowel movement care. Concern has been expressed that some of these items, although medically prescribed, may be construed as being required "merely because it would make life outside a hospital more available to a veteran."

The request for clarification with respect to the items listed above refers specifically to the ones which can be provided as therapeutic or rehabilitative devices under the purview of 38 U.S.C. § 617. However, certain of these devices may also be provided as part of medical services, defined in 38 U.S.C. § 601(6), which mentions such items as:

"... dental appliances, wheelchairs, artificial limbs, trusses, and similar appliances, special clothing made necessary by the wearing of prosthetic appliances, and such other supplies as the Administrator determines to be reasonable and necessary."

The delineation of these items in the definition of the term "medical services" is, of course, in addition to the delineation of "such home health services as the Administrator determines to be necessary or appropriate for the effective and economical treatment of disability."

It has been pointed out in a memorandum to this office dated January 30, 1975, that many items are also furnished under the "medical services" provision to veterans who derive their eligibility solely from the fact that they are in a posthospital status (38 U.S.C. § 612(f)). This category includes automatic van lifters, automatic door openers, power seats, shoulder safety belts, factory air

conditioning, hydraulic lifts, and compressed speech machines. Since there is some overlap in the authority to provide medical services, and the authority to provide therapeutic or rehabilitative devices, we think it would be appropriate to consider both provisions of law in providing the requested clarification.

The provisions of 38 U.S.C. § 617 read as follows:

"The Administrator may furnish an invalid lift, or any type of therapeutic or rehabilitative device, as well as other medical equipment and supplies (excluding medicines), if medically indicated, to any veteran who is receiving (1) compensation under subsections 314 (1)-(p) (or the comparable rates provided pursuant to section 334) of this title, or (2) pension under chapter 15 of this title by reason of being in need of regular aid and attendance."

In our opinion relating to placing hemodialysis units in a veteran's home (Op.G.C. 5-70), we acknowledged that the types of therapeutic or rehabilitative devices and equipment covered by this section have changed over the years. When Congress was considering making this benefit available, the Committee Report listed a limited number of items as reflecting what might be issued (Senate Report 1293 and House Report 680, to accompany H.R. 8009, 88th Congress). However, the class of persons eligible has been broadened by subsequent legislation, and the concept of what can be included has also, in our opinion, been broadened. Accordingly, we indicated in our 1970 opinion that we saw no objection to furnishing home dialysis equipment to any eligible veteran under the authority of 38 U.S.C. § 617. While we did not specifically consider the provisions of 38 U.S.C. § 617 at the time we wrote our 1974 opinion on renovating homes, we did state that we felt the term "treatment" could not be construed in such a manner as to encompass the proposed remodeling of private homes, citing the well-established rule that appropriations may not be used for permanent improvement of private property in the absence of specific legislative authority therefor. We concluded that chapter 17 of title 38 does not provide the type of specific authority for permanent improvement to private property (which could not be considered treatment, per se, such as central air conditioning) that we believe to be required by law. This conclusion would apply equally, therefore, to the provisions of 38 U.S.C. § 617, as well as to the provisions of 38 U.S.C. § 612.

We reaffirm the conclusion reached in our October 4, 1974, opinion, cited above. We believe, however, that many of the items cited could be furnished an eligible veteran without losing their identity as therapeutic or rehabilitative devices, and without being considered as permanent improvements to private property. While there is no all-encompassing rule of determining when an item of personalty which is attached to a home becomes a permanent part of the home itself, it can be generally stated that, if the item that is attached can be removed without material damage to the premises, it does not become a part of the realty. There are, of course, other factors which are considered, such as the mode of

annexation to the property, the extent to which the article is specifically adapted to the premises, and the extent to which the article is treated as an essential part of the premises. While some of the items under consideration might be temporarily attached to the property, they are subject to later removal without major alterations or damages to the home itself. The most notable exception within the examples cited is the elevator, which obviously cannot be either installed or removed without major renovations. Accordingly, we believe it would fall within the basic rule established by the Comptroller General against improvement of private property without specific statutory authority, and would be affected by the conclusion reached in our decision of October 4, 1974, relating to door widening.

We are not unaware of the position taken by some that many home modifications which will make home living more accessible and comfortable to a disabled person may actually reduce the resale value of the home, rather than increasing it, and, therefore, should not be considered to come within the prohibition established by the Comptroller General relating to permanent "improvement" of private property. This argument, in our opinion, fails to take cognizance of the fact that the term "improvement" is obviously subjective in nature, since what will be considered an improvement by one individual might not be so considered by another. It must be assumed, however, that a home modification being requested by a veteran will be an improvement to him or it would not have been requested. Furthermore, we view the Comptroller General's decision as directed generally toward the expenditure of federal funds on private property, rather than to just those items which everyone would agree to be an improvement (something which would be unique in this age of diversity of opinions).

Some of the examples cited bring up another issue. The language of section 617 contains the phrase "if medically indicated" in specifying what type of therapeutic or rehabilitative device may be furnished to eligible veterans thereunder. We realize this type of determination can only be made by medical personnel. We also realize, however, that the line may be difficult to draw between those items which are medically indicated and those items which cannot be considered to be medically indicated. It was concern in this area which brought about the request for clarification of our earlier opinion.

Upon reviewing the legislative history of the authority of this agency to issue medical accessories, whether called "therapeutic or rehabilitative devices" or "similar appliances," we noted an unpublished opinion by the Solicitor to the Chief Medical Director, dated July 23, 1952, which considered the law in this area, dating back to the War Risk Insurance Act of 1917. That opinion discussed the authority set forth in section 302(3) of the War Risk Insurance Act, which provided that certain supplies, artificial limbs, trusses, and similar appliances could be provided as determined to be useful and reasonably necessary. It also cited the then existent VA regulation 6060(A),

which authorized the furnishing of outpatient treatment, and set forth authority to furnish necessary medicines, prosthetic appliances, and other supplies. In both authorities, the word "necessary"was included, which could, we believe, also be related to the term "medically indicated" now used in section 617. In discussing this word, the Solicitor set forth a distinction which we believe is very much applicable today, and which might affect a determination to issue several of the items listed.

In his 1952 opinion, the then Solicitor acknowledged that what is useful and reasonably necessary, so far as treatment is concerned, involves a question of medical fact. However, in making this determination, he pointed out that a distinction must be made between those items which are useful and necessary for treatment, and those items, the use of which may lend to the comfort of the patient and thus be useful, but which are not necessary as treatment. In other words, in making a similar determination under § 617 as to what is "medically indicated," we believe a distinction must be made between those items which are necessary and, therefore, indicated as part of the medical treatment, and those items which would lead to greater comfort of the individual and/or make like outside the hospital setting more available, but which are not medically indicated or medically necessary.

As was stated earlier in this opinion, our 1970 opinion (Op.G.C. 5-70) acknowledged that there was some overlap between items which could be furnished an eligible veteran under 38 U.S.C. § 617, and those items which could be provided under 38 U.S.C. § 612 as part of the medical services defined in 38 U.S.C. § 601(6). The "medical services" provision has traditionally been considered as authority for furnishing prosthetic appliances to veterans on an outpatient basis (see 89 Op.Sol. 328 and A.D. 702). Prosthetic appliances are defined in M-2, Part IX,
Paragraph 1.01, subparagraph h, as including:

"All aids, appliances, parts or accessories which are required to replace, support, or substitute for a deformed, weakened, or missing anatomical portion of the body."

It is readily apparent that many of the items listed could be classified as prosthetic appliances or medical supplies, and would come within the definition of medical services contained in 38 U.S.C. § 601(6). However, the language contained in the present definition of this term also includes the words "reasonable and necessary," which were considered in the 1952 opinion described earlier. Therefore, the same differentiation must be made between those items which are reasonably necessary for medical treatment and those items which are useful and lend to the comfort of the individual, but cannot be considered necessary for treatment. Furthermore, as we pointed out in our unpublished opinion dated November 30, 1973, items coming within the purview of the "similar appliance" language of 38 U.S.C. § 601(b) can be

provided to non- service-connected veterans who are receiving their outpatient care under the authority of 38 U.S.C. § 612(f), only if they are in a posthospital care status. Therefore, we are assuming that any appliances which are furnished to this category of veteran are determined (in accordance with VAR 6060(F)) to be reasonably necessary to complete the treatment the veteran received while hospitalized.

While the term "medical services" is being discussed, we believe it is also necessary to discuss the impact, if any, of the addition of the language "such home health services as the Administrator determines to be necessary or appropriate for the effective and economical treatment of a disability of a veteran," which was added by P.L. 93-82. There are some who contend that this language has an exceedingly broad application, and would authorize almost anything that is deemed necessary or appropriate
to make the treatment of a disability of a veteran in his home more effective and economical than continued stay in a hospital. However, the legislative history of this language (to the extent that there is any) makes it clear that the addition of such language as part of the medical services definition provided no new authority, but merely provided a specific reference to the type of activity already being carried out by the VA, citing two examples, the first of which was the installation of home kidney
dialysis units, and the second of which was providing special care for the spinal cord injured at home (see for example, Senate Report 92-776 at p. 27, and also at p. 112). Furthermore, it should be noted that whatever is provided under this language must be specifically related to the actual <u>treatment</u> process.

Informal discussions with Congressional staff members indicate that this terminology may have been adopted from terminology used in the Medicare law, which defines the term in a very limited manner. Such definition, contained in 42 U.S.C. § 1395x(m), reads as follows:

"The term 'home health services' means the following items and services .

"(1) part-time or intermittent nursing care provided by or under the supervision of a registered professional nurse;

"(2) physical, occupational, or speech therapy;

"(3) medical social services under the direction of a physician;

"(4) to the extent permitted in regulations, part-time or intermittent services of a home health aid;

”(5) medical supplies (other than drugs and biologicals), and the use of medical appliances, while under such a plan;

"(6) in the case of a home health agency which is affiliated or under common control with a hospital, medical services provided by an intern or resident-in-training of such hospital, under a teaching program of such hospital approved as provided in the last sentence of subsection (b) of this section; ..."

Furthermore, the Social Security Administration affords a very strict interpretation of what can be construed to be "home health services" of the purposes of Medicare law, giving strong emphasis to the exclusion from the coverage set forth in 42 U.S.C. § 1395y(a)(6) of any personal comfort items.

With this background, we cannot agree with the broadinterpretation of the home health services language that some propose. If such a broad new program was intended by the Congress when the language was added by P.L. 93-82, it is obvious that there would have been more discussion of the proposal, either during the hearings, floor debate, or in the Committee reports. As was pointed out in a Decision of the Administrator dated June 7, 1946 (A.D. 702), in which a proposal was considered and rejected to provide specially adapted automobiles to disabled veterans, where medically indicated, under the authority of Veterans Regulation No. 7(a) (which contained language similar to that now contained in the medical services definition set forth in 38 U.S.C. § 601(6) as follows,

"... it is not within the power of an administrative official to read into an Act of Congress any intent or purpose not explicitly or implicitly contained in the language which the Congress saw fit to employ in expressing its intent and purposes."

The Administrator, in utilizing that language, referred to the absence of legislative history, and all would agree that there is an absence of legislative history associated with the addition of the home health services language. Where it is discussed, there is merely reference to providing specific authority for what obviously was an ongoing program. That ongoing program did not encompass the type of nontreatment proposals that some are now suggesting, and was actually the type of activity that is encompassed within the present definition of home health services contained in the Medicare law.

We have reviewed again the examples of what has been requested to be furnished as part of medical services to non-service-connected, outpatient veterans. We feel we cannot comment with respect to the medical necessity of each of these items, since that is a determination which must be made by the Chief Medical Director. As pointed out earlier, however, the appliance furnished must be necessary to complete the treatment received while the veteran was hospitalized.

HELD:

The home health services language cannot be construed to authorize something which can be considered a personal comfort item that would make life outside a hospital more acceptable, but which could not be considered necessary for medical treatment. The determination of what is reasonable and necessary for treatment is a question of medical fact.

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 32-91