DATE: 03-11-91

CITATION: VAOPGCPREC **34-91**
Vet. Aff. Op. Gen. Couns. Prec. 34-91

TEXT:

SUBJECT: Provision of Additional Water and/or Electrical Service for Home Dialysis Patients.

(This opinion, previously issued as Opinion of the General Counsel 26-75, dated August 20, 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 PRESENTED:

Under the current law, is it possible to provide modification of utility systems for home dialysis patients?

COMMENTS:

This is in response to a request that we review current law applicable to the above subject and state whether any modification of prior opinions of this office is indicated. We have conducted an in-depth review, as will appear hereinafter, and have concluded that a more liberal interpretation and application can now be made than that reflected in our prior opinions. Under this approach, there are three basic questions which must be answered affirmatively before the utility system modifications may be authorized at VA expense to privately owned property; first, whether the proposal for modifying the water or electrical service is deemed essential to, and an integral part of, the home dialysis treatment; second, whether failure to make the necessary treatment available in the home would result in the readmission of the veteran to a VA hospital; and third, whether the modifications would result in the effective and economical treatment of the disability.

On October 6, 1970, this office released an unpublished opinion relating to drilling a well for home dialysis purposes, which held, after discussing the legal ramifications in depth, that VA may not pay the cost of drilling a deep well as a necessary and appropriate charge incident to providing home dialysis for an eligible veteran. This opinion was premised, in part, upon the limitations which have been established by the Comptroller General on the use of appropriated funds for the permanent improvement of privately owned property

by an agency of the United States, in the absence of express statutory authority therefor.

Since the release of the 1970 opinion, additional language has been added to the definition of medical services contained in 38 U.S.C.§ s 601(6), so that the term now includes such home health services as the Administrator determines to be necessary or appropriate for the effective and economical treatment of a disability. While the legislative history of that language indicates that its addition merely provided specific reference to existing authority of the VA, to stress the type of home health care it had already started by installing home kidney dialysis units, and by providing special care for the spinal cord injured at home (see Senate Report 92-776), such language was cited by the Comptroller General in support of his decision, B-179837, dated November 21, 1973, relating to the authority to provide central air conditioning units in the home of certain disabled veterans who suffer from a severe impairment of the heat regulatory mechanisms in their bodies. Window units had been provided since 1952, but a question arose concerning the authority to install central units which would then become a permanent improvement to the veteran's home. The Comptroller General held that the home health services language could be construed to encompass the central air conditioning, particularly when considered in the light of the broadened authority to provide outpatient care where it will obviate hospital care (38 U.S.C. § 612(f)(1)). In effect, the Comptroller General held that air conditioning was a form of medical services which would obviate hospitalization. Under these circumstances, the Comptroller General indicated that the usual prohibition against improving privately owned property would not apply.

The question has now been asked whether this precedent relating to central home air conditioning is sufficient to overcome the 1970 opinion on drilling a well to supply a home dialysis unit with necessary water. As indicated, this could include well drilling, installation of septic tanks, connection to city water systems, and/or installation of, or upgrading, existing electrical service, with no apparent monetary limitations. Authorization for this additional support would be granted on the assumption that, if the utilities are not provided for these veterans at home, it would be necessary to treat them at a hospital, or a contract dialysis unit, at a considerably higher cost. It is felt that the present proposal can be distinguished in rationale from the previous proposal to widen the bathroom doors of non-service-connected veterans, in that providing for processed water and electrical utilities is an integral part of the treatment process for the dialysis.

We have again reviewed the precedents of this office, as well as legislative history of the statutory authority under which dialysis home units are now provided veterans. We noted with interest an unpublished opinion dated July 23, 1952, to the Chief Medical Director from the then Solicitor (at a time, incidentally, when the issuance of a home air conditioning unit was first being considered), reviewing the broad authority and history of the law related to the issuance of medical accessories dating back to the War Risk Insurance Act of October 6,

1917. The opinion pointed out that the determination of whether a medical accessory was authorized or not, while involving a question of medical fact, also was predicated on a finding that the item is not only useful, but, more than that, is necessary for the treatment of the veteran. It was stressed that the distinction must be made between supplies or accessories which are useful and necessary for treatment and items which may lend to the comfort of the patient, and thus be useful, but which are not necessary as treatment. We stress the treatment aspect since we feel this distinction is still valid in connection with the decisions now being made to provide medical services to a veteran in his home.

For illustration, the 1952 decision used the air conditioning unit as an example, and stated that if the unit was furnished on the premise that it would lead solely to greater comfort of the individual, there was no authority to furnish the same at VA expense. On the other hand, if the issuance of the air conditioning unit was deemed necessary for the proper medical treatment of the patient, it would be legally acceptable. There can be no question but that a home dialysis unit provides treatment, and would meet the test laid out earlier between those items which are useful and necessary for treatment, and those which may lend to the comfort of the patient, but are not necessary as treatment.

We believe the distinction in rationale between the previous proposal to modify the homes of certain veterans, and the present proposal to assure that adequate water and electricity are available for the dialysis machine, is important. In the one case, we are talking about items that are an essential part of the treatment modality, whereas in the other case we are talking about an item which cannot be considered an integral part of the treatment program. The issue which must be resolved, however, is how far one can go in providing those essential resources.

The question of installation costs also arose during the consideration of our opinion of October 2, 1970 (Op.G.C. 5-70), in which we held that home dialysis may be furnished an otherwise eligible veteran (1) under the authority of 38 U.S.C. § 612(a) as a part of the general outpatient care program for service-connected conditions; (2) under the post-hospital care authority of 38 U.S.C. § 612(f) and (g) for non-service-connected conditions; and (3) under the provisions of 38 U.S.C. § 617 for either service-connected or non-service- connected conditions to veterans who qualify therefor. That opinion reviewed the authority of the VA to furnish prosthetic appliances, as well as the authority to furnish medical services on an outpatient basis. After reviewing this authority, it was concluded that the VA, upon a finding of feasibility and medical need, could lend a home dialysis unit to an eligible veteran, pay normal installation costs, and train someone in the veteran's household in its use, as well as furnishing expendable supplies. Although this opinion specifically referred to normal installation costs, it must be noted that no attempt was made to discuss the legality of other than normal installation costs, where such might be necessary to make the dialysis unit operational.

We think it reasonable to presume that the authority to provide home health services anticipates there is, in fact, a home which is capable of sheltering the veteran and in which the services and treatment authorized can be furnished. Conversely, carrying this logic to the extreme, we cannot believe that Congress, in amending the language of 38 U.S.C. § 601(6) to spell out our authority to provide medical services outside the hospital, intended to provide a veteran with a home and all that it takes to maintain a home, in order that medical care and treatment could be provided to the veteran therein. On the other hand, we believe this presumption can be limited to that part of the home and its resources which are essential for normal living needs. In other words, while there should be water and electricity already available in sufficient supply to care for normal living needs, this does not mean that we can presume that there is also sufficient additional water or electricity to service the dialysis unit. It is the provision of this additional utility supply toward which this submission is directed.

Any decision to provide treatment to a veteran in his home must be made on the basis of a number of factors, including not only whether the treatment could be successfully provided in that environment, but also whether it would be economical. Obviously, there are situations where the cost of providing a specific type of treatment in a veteran's home would be so prohibitive as to make it more economical to provide treatment in the hospital. It is this type of decision which was recognized by the Congress when it included a specific recognition, in the definition of the term "medical services," of the type of home health services which the VA has been providing to veterans. I am referring to the addition of the following language in 38 U.S.C. § 601(6):

"... 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 ..."

The recently published opinion, of June 10, 1975, subject: "Hospital-Based Home Care for Spinal Cord Injury Rehabilitation-Home Renovations," held that "home health services" must be specifically related to the actual treatment process, that the legislative history warrants this interpretation, and that VA is not free to read into the law an intent or purpose not found in the language Congress employed.

In light of the above, and upon reconsideration, we feel our earlier decisions relating to proposals to assure an adequate water and electrical supply for the home dialysis unit should be modified. The decision as to how much should be expended to provide the necessary electricity and water must be made on the basis of the economic factor set forth in the statute. We believe, however, that it must be limited to providing the excess water and electricity which is needed to run the machine, since it must be presumed that treatment will not be attempted in a home which does not contain the basic essentials of home living.We point out, in this regard, that the law requires a determination that home

treatment can be effectively provided. WE can only assume that, if a home is totally lacking in those facilities or resources which are necessary to support the treatment process, such treatment could not be effectively provided in that environment. Moreover, any action by the VA which would result in the permanent improvement of private property should be strictly limited to those facilities or resources which are an integral part of the treatment process (obviously electricity and water are as essential to the operations of a dialysis machine as is a moving part of the machine).

HELD:

The law does allow for modification of utility systems in a veteran's home, when such modifications are deemed essential to, and are an integral part of, the home dialysis treatment, and where failure to make the necessary treatment available in the home would result in the readmission of the veteran to a VA hospital. The basic criteria which must be considered in determining the extent of these modifications is that set forth in 38 U.S.C. § 601(6); namely, that it would result in "the effective and economical treatment of a disability of a veteran."

VETERANS ADMINISTRATION GENERAL COUNSEL
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