

DATE: 03-11-91

CITATION: VAOPGCPREC 35-91  
Vet. Aff. Op. Gen. Couns. Prec. 35-91

**TEXT:**

**SUBJECT:** Continued Hospitalization of a Veteran.

(This opinion, previously issued as Opinion of the General Counsel 8-76, dated May 10,, 1976, 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:**

Does care at a contract nursing home under VA auspices constitute care by the VA within the meaning of 38 U.S.C. § 627, so as to allow readmission to a VA hospital from the contract nursing home without regard to current eligibility criteria?

**COMMENTS:**

The individual in this case was originally hospitalized in 1922 as an eligible beneficiary under the War Risk Insurance Act. Under then existing eligibility criteria he was rated permanent and total for a service-connected condition and received compensation as well as hospitalization. He remained in the VA facility continuously until May 13, 1975, at which time he was placed in a nursing home under VA contract. He remained at the nursing home until November 19, 1975, at which time he was readmitted to the VA hospital.

Each time new eligibility criteria have been enacted into law, the question has been raised as to entitlement to continued treatment of persons who theretofore had been within the definition of those entitled to hospital care and were thereafter excluded by definition. For example, following the enactment in 1944 of Public 346, 78th Congress, the question was raised with regard to those who had previously been eligible for medical benefits under Public 2, 73rd Congress. At that time, the agency reiterated the position, based on the principle of res judicata, originally expressed in a memorandum opinion of June 2, 1933, that a finding of entitlement to hospital care and grant thereof contemplated that treatment would be continued until it had been completed, and the patient was ready for discharge. (See 80 Op.Sol. 225, June 4, 1945.) This legal principle is

still valid and for application; however, the Congress subsequently enacted, with agency approval and recommendation, specific statutory savings provisions, as currently reflected in section 627 of title 38, U.S.C., which serve to protect the entitlement of all individuals who were eligible for benefits prior to the enactment of 38 U.S.C. § 627, and who are not now eligible under current eligibility criteria because of failure to meet service requirements. Accordingly, in the case at hand, despite subsequent determinations that this man is not currently eligible for VA benefits, and in fact, that he is not even a veteran by current definition, he was eligible in 1922 when his treatment began and he, therefore, remains eligible to continue in treatment by the VA as long as his protected status (i.e., continuously in treatment by the VA) exists.

This individual was transferred from care under the direct and exclusive jurisdiction of the VA to care by a private nursing home under VA contract. We believe the protected status of this man is retained throughout transfers to and from nursing home care at VA expense. It is clear to us from past decisions and opinions on the status of contract nursing home care vis-a- vis "care being furnished by the VA," that for the purpose of entitlement to other benefits and for continued hospital benefits which are dependent on such care continuously, care at a private facility at VA expense is the equivalent to care at a VA facility. The extent to which care at a contract nursing home can be defined as care at a "VA facility" has been determined with respect to other areas of veterans' law. The agency recently took the position in its claim for funds in the estate of a deceased veteran who died in a contract nursing home while intestate, that care at a contract nursing home is tantamount to care at a facility of the VA within the contemplation of the vesting statute, 38 U.S.C. § 5220. In re Estate of Wallace, 186 Neb. 271, 182 N.W.2d 829 (1971). Furthermore, the Comptroller General has ruled in 47 Comp.Gen. 89 that for the purpose of reduction in retired pay as a result of being in receipt of hospital care by the VA, transfer to a contract nursing home for continued care by the VA is tantamount to continuous hospitalization at a VA facility.

**HELD:**

Care at the contract nursing home does constitute care by the VA and, therefore, continued treatment in the case of this veteran is authorized both under the current statutory saving provision (38 U.S.C. § 627) , and under precedents based on the principle of res judicata, established prior to the enactment of this provision of law. Under the res judicata principle, protected status depends on continuous treatment and would be terminated by break in treatment.

VETERANS ADMINISTRATION GENERAL COUNSEL  
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