DATE: 03-11-91

CITATION: VAOPGCPREC 41-91
Vet. Aff. Op. Gen. Couns. Prec. 41-91

TEXT:

Subject: FURNISHING DRUGS AND MEDICINES PRESCRIBED BY PRIVATE PHYSICIANS.

(This opinion, previously issued as Opinion of the General Counsel 11-83, dated October 11, 1983, 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:

Is 38 U.S.C. s 612(h) the sole legal authority for providing a veteran with drugs and medicines prescribed by the veteran's private physician, when the VA has no involvement, fee basis or otherwise, in the treatment of the veteran.

COMMENTS:

Section 612(h) provides in pertinent part:

(h) The Administrator shall furnish to each veteran who is receiving additional compensation or allowance under chapter 11, or increased pension as a veteran of the Mexican border period, World War 1, World War II, the Korean conflict, or the Vietnam era, by reason of being permanently housebound or in need of regular aid and attendance, such drugs and medicines as may be ordered on prescription of a duly licensed physician as specific therapy in the treatment of any illness or injury suffered by such veteran....

the language of section 612(h) is clear. It is unambiguous in describing the benefits and the classes of veterans covered by the provision. It authorizes VA provision of privately prescribed drugs and medicines to veterans who receive increased benefits because they are housebound or in need of regular aid and attendance.

Section 612(h) originated with enactment of Pub.L. No . 88-664. That law provided that certain veterans receiving increased pension based on need of regular aid and attendance "may be furnished drugs or medicines ordered on prescription of a duly licensed physician as specific therapy in the treatment of an illness or injury suffered by the veteran." This new provision made two

significant departures from past law. First, it authorized the VA to provide drugs for nonservice-connected disabilities even though there had been no prescriptions by any physician as opposed to a VA staff or fee-basis physician. Prior to enactment of Pub.L. No. 88-664, the VA was authorized to provide outpatient medical services only for service-connected disabilities, except when care was needed for nonservice-connected disabilities either to prepare a war veteran for hospitalization or to complete care initiated during a period of hospitalization. 38 U.S.C.A. § 612 (West 1959) (amended by Pub.L. No. 86-639, 1960). As stated in S.Rep. No. 1591, reprinted in 1964 U.S.Code Cong. & Ad.News 4010, 4015, Congress extended this new benefit to pensioners receiving aid and attendance benefits "without reference to hospitalization ... because of their severe disabilities."

The scope of section 612(h) was subsequently expanded by Pub.L. No. 90- 77. That law made three changes to the subsection. First, it extended the "privately prescribed drugs" benefit to all service-connected veterans receiving increased compensation (as opposed to pension), based upon their need for regular aid and attendance. Second, it extended the benefit to all pensioners in need of regular aid and attendance. The earlier law was restricted to only certain categories of pensioners.Third, the new law changed the language of section 612(h) from veterans "may be furnished drugs and medicines ..." to " the Administrator shall furnish ..." such drugs and medicines.

The last major substantive change to section 612(h) was made by Pub.L. No. 91-500 in 1970. That law extended the "privately prescribed drugs" benefit to all veterans receiving increased compensation or pension based upon their being permanently housebound.

We believe the underlying rationale for enactment of section 612(h) by the Congress was that certain veterans were so sick and disabled that in many cases they would be unable to come to the VA for medical care and treatment. The legislative history of section 612(h) is replete with references to the severity of the disabilities suffered by those who are housebound or in need of aid and attendance. For example, when Congress extended the application of section 612(h) to those veterans who are permanently housebound, it was stated that the benefit was being provided to a "demonstrably needy group" of "seriously disabled veterans," who are either "so helpless or blind as to need the regular aid and attendance of another person" or "so disabled as to require them to remain in their homes constantly" (emphasis added). See S.Rep. No. 91- 481, reprinted in 1970 U.S.Code Cong. & Ad.News 4343-4346. Many of those veterans who were not able to leave their homes or who needed another person to care for them on a regular basis, could not reasonably be expected to come to the VA in every instance for needed medical care. It was understood that those persons might therefore have to rely on more convenient private physicians for their "hands on" medical care. However, as an effort to have the VA provide some

some medical service to these severely disabled veterans, congress permitted the VA to fill their prescriptions by mail.

As noted above, section 612(h) provides VA with authority to furnish privately prescribed drugs only to veterans receiving VA benefits based upon their being housebound or in need of regular aid and attendance. Thus, if eligibility exists for such benefits for other categories of veterans, such as all service-connected veterans, or veterans who were POW's, it must be based on other legal authority.

The VA is authorized to provide outpatient medical services to various categories of veterans in accordance with subsections (a), (e), (f), and (g) of section 612 of title 38, United States Code. the term "medical services," as defined in 38 U.S.C. § 601(6), includes, among other things both "treatment," and "such other supplies and services as the Administrator determines to be reasonably necessary." We believe that provision of drugs and medicines is medical "treatment," but arguably, it could also be considered "supplies and services." In either case, it has been suggested that drugs and medicines prescribed by private non-VA physicians could be considered "medical services" making it legal for the VA to provide such drugs and medicines to veterans under the authority of subsections (a), (e), (f), and (g) of section 612 as well as under the specific authority of section 612(h). Because nothing in the legislative history of section 601(6) supports the conclusion that privately prescribed drugs are a medical service, and on the basis of a fundamental rule of statutory construction, we believe that the term "medical services" cannot be construed to permit provision of drugs and medicines ordered by private non- VA physicians.

Reference to a principle of statutory construction highlights the flaws in the argument that section 601(6) would establish any basis for VA provision of privately prescribed drugs. The maxim Expressio unius est excludio alterius, means that when a statute specifically names persons or things to which it applies, it excludes all others. (See Sands, Sutherland Statutory Construction, 4th Ed., s 47.23, and cases cited therein.) Because section 612(h) names, with specificity, both the benefit which is authorized, and the classes of veterans eligible for it, that rule would hold that other classes of veterans are to be excluded from receiving the benefit. Clearly, this maxim must be applied to section 612 as a whole, if not to all of chapter 17 of title 38, United States Code. Subsection (h) must be viewed as expressly listing the class of veterans eligible for the benefit, thus precluding any construction which would expand the class of eligibles under a combined reading of section 601(6) and section 612(a), (e), (f), and (g).

Congress established the Department of Medicine and Surgery to "provide a complete medical and hospital service" for veterans, 38 U.S.C. § 4101. The scope of the medical and hospital services is defined in chapter 17 of Title 38, United States Code. We view those provisions as contemplating generally a VA

role of providing, within the limits of available resources, all needed, authorized care to eligible veterans. We believe that the specific authority for VA to dispense to certain veterans drugs and medicines prescribed by private physicians, i.e., to provide only one limited facet of needed treatment, is an exception to this principle and was authorized by Congress for good reasons, discussed above, to a limited category of veterans. In view of the VA's statutory health care mission, noted above, and the implications of VA's providing only a limited element of otherwise authorized care, we believe that if congress had intended further such exceptions it would have provided therefor specifically. Accordingly, we believe it would be unreasonable, and inconsistent with the statutory scheme of title 38, United States code, to assume that Congress in a statute defining medical services, intended that the broad nonspecific words of section 601(6) (treatment, or other supplies and services) be interpreted to implicitly include the provisions of drugs and medicines prescribed by a private physician.

If the term "medical services" as defined in section 601(6) could be interpreted as including privately prescribed drugs, then it logically must be interpreted as allowing the VA to provide an eligible veteran medical services such as x-rays, laboratory studies, or other diagnostic studies upon the prescription order of the veteran's private physician, for the use of that private physician in treating the veteran. As stated above, we believe that in authorizing the VA to furnish "medical services," the Congress intended VA to provide all the authorized services needed to treat any eligible veteran's disability through VA personnel and facilities. We believe Congress intended except as specifically provided in section 612(h), that VA personnel and medical facilities be providers of care, not simply diagnostic consultants or pharmacies for veterans who otherwise obtain their care from non-VA physicians.

Although we strongly hold the view that section 612(h) is the exclusive authority to provide privately prescribed drugs and medicines, we believe it is appropriate to address arguments which have been made that categories of veterans, in addition to those named in section 612(h), are legally eligible to receive the "privately prescribed drug" benefit. Two such arguments have been propounded.

It has been suggested that there are provisions in the legislative history of section 612(h) which support the proposition that prior to the enactment of section 612(h) veterans with service-connected disabilities were eligible to receive drugs and medicines prescribed by private non-VA physicians for their service-connected disabilities. As discussed earlier in this opinion, section 612(h) originated with Pub.L. No. 88-664 and it was amended by Pub.L. No. 90-77. Actually, the series of changes made to section 612(h) in Pub.L. No. 90- 77, described above, had their origins during the 89th Congress when H.R. 11934 was passed by the House. Language similar to that in H.R. 11934 was enacted as Pub.L. No. 90-77. The House Report accompanying H.R. 11934 explained

that the privately prescribed drugs benefit was being extended to veterans receiving aid and attendance for their nonservice-connected conditions. The report, H.R.Rep. No. 1504, 89th Cong., 2d Sess. 2(1966), states, in part:

Such veterans service-connected veterans in receipt of aid and attendance benefits are eligible for drugs and medicines for their service-connected disabilities. this legislation would give them the same sort of eligibility for drugs and medicines even though the condition for which drugs and/or medicine is prescribed is nonservice-connected in character.

Mr. Teague of Texas entered remarks in the May 16, 1966, Congressional Record which were identical to those in the House Report. Similarly, a letter from the Administrator of Veterans Affairs commenting on the bill, which is included in the House Report, provides:

Under the present law veterans who receive additional compensation for service-connected disability by reason of being in need of aid and attendance may therefore be treated for their service conditions but generally are not eligible for out-patient treatment, including drugs and medicines, from the Veterans' Administration for a nonservice-connected condition unless it is associated with and held to be aggravating the service-connected condition.

The few references in the legislative history of Pub.L. No. 90-77, which are cited as indicating that service-connected veterans were eligible, at the time (1966), to receive drugs and medicines on an out-patient basis, for their service-connected disabilities cannot be read in isolation, but must be read in the context of the medical care system as it then existed. the better reading of the above quoted references would be as referring to the veterans' eligibility to receive such drugs for their service-connected conditions when under VA care, the situation which existed at the time of enactment. It is noteworthy that in enacting section 612(h) Congress provided a medical benefit to certain veterans considered so disabled that they could not come to the VA for medical care. It would appear that Congress did not see the need to afford a similar benefit to service-connected veterans except those who are housebound or in need of aid and attendance. It is also noteworthy that at that time, and continuing to the present, no centralized written VA policy, in manual, circular, or letter form, has ever officially santioned provision of privately prescribed drugs to these individuals. Both of those strongly suggest that such authority was not recognized in 1966, and that these references in the legislative history simple note that certain veterans were eligible to receive drugs when prescribed by a VA staff or fee-basis physician. We believe it is obvious that the legislative history of Pub.L. No. 90-77 contains no sound basis for the proposition advanced, and that the only rational conclusion is that section 612(h) is the exclusive authority to provide privately prescribed drugs.

It has also been suggested that the use of the word "shall" in section 612(h),

instead of the word "may," is indicative of a congressional recognition that VA has discretionary authority in addition to the requirement in section 612(h), to provide veterans with drugs prescribed by their private physicians. The argument assumes that by using "shall," Congress intended that the benefits must be provided to the named categories of veterans (Aid and Attendance and housebound), but that it was permissible to provide the benefit to other categories of veterans. The fallacy of this argument is that when section 612(h) was initially enacted, the word "may" was used not the word "shall."As mentioned above, the word was changed to "shall" with enactment of Pub.L. No. 90-77. The legislative history of Pub.L. No. 90-77 indicates that the reason for the change was to encourage VA to continue implementation of the earlier Pub.L. No. 88-664. The change was not intended to "restrict the Administrator's regulatory authority to define terms and prescribe reasonable limitations consistent with the purposes of the program." VA Report on H.R.1983, 90th Cong., Committee on Veterans Affairs, No. 26.

HELD:

38 U.S.C. § 612(h) is the exclusive legal authority for providing a veteran with drugs and medicines prescribed by the veteran's private physician, when the VA has no involvement, fee basis or otherwise, in the treatment of the veteran.

VETERANS ADMINISTRATION GENERAL COUNSEL
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