DATE**:** 03-11-91

CITATION**:** VAOPGCPREC 43-91
Vet. Aff. Op. Gen. Couns. Prec. 43-91

TEXT:

SUBJECT: VA Prosthetic and Medical Equipment Loan Program-Consequences of Damage to Loaned Equipment.

(This opinion, previously issued as Opinion of the General Counsel 6-85, dated September 5, 1985, 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: Director

QUESTION PRESENTED:

When VA-loaned medical or prosthetic equipment is damaged or destroyed, does the Agency have any claim against the veteran, or may VA refuse to furnish replacement equipment?

COMMENTS:

The question presented arose in the context of two specific cases. The first case involved a veteran who was furnished adaptive equipment on a van in May 1981. In addition to the conventional items of adaptive equipment, the veteran was provided on loan a highly specialized low effort steering system which had been purchased by the VA at a cost of $20,205. The veteran signed a VA loan agreement (FL 10-405) acknowledging his acceptance of the steering system on an indefinite loan basis. On November 3, 1983, the veteran was involved in an accident and the van was destroyed by fire. There was evidence that the veteran's negligence caused the accident. The veteran's insurance company paid claims for destruction of the van and for destruction of the low effort steering system belonging to the VA, the latter in the amount of $20,288. The veteran requested that the VA reimburse him in the amount of $22,542 for a new steering system, and an additional $1,200 for delivery of a newly adapted vehicle.

The second case involved accidental destruction of a motorized wheelchair which was loaned to a veteran by the VA. In that case, the veteran's wife was driving their van into the garage when the hand controls apparently malfunctioned causing the accelerator to stick. The van struck the veteran causing him severe injury and destroying the wheelchair. The veteran made a claim against his homeowner's insurance for damage to the wheelchair, and

the insurance paid $2,490 on the claim. Subsequently, the VA provided the veteran with a new motorized wheelchair at a cost of $4,364.

The threshold question is whether there is a basis in law for the practice of loaning equipment to veterans rather than simply giving such equipment to the individual. The three pertinent statutory provisions under which VA loans equipment, 38 U.S.C. §§ 612, 617, and 1902, state that the Administrator "may furnish" (sections 612 and 617) and "shall provide" (section 1902 eligible veterans with such equipment. We believe that language authorizes the Administrator to either give or loan the equipment, to the veteran. The Congress gave no guidance in any of these provisions on how the benefit was to be provided to the veteran. Loaning equipment satisfies the basic purpose of section 612, which is to provide medical services, and sections 617 and 1902, which are to provide for the rehabilitation and assistance of the disabled veteran. We are unaware of anything in the legislative history of the provisions which would be inconsistent with providing the equipment on a loan basis.

We also believe that the VA's longstanding interpretation of the words "provide" and "furnish" as allowing the loaning of equipment is entitled to great deference. Congressional acquiescence in the interpretation may be found simply by congressional silence in the face of the interpretation. Haig v. Agee, 453 U.S. 280 (1981), Zenith Radio Corporation v. U.S., 437 U.S. 443 (1978), Red Lion Broadcasting Co, v. FCC, 395 U.S. 367 (1969), Zemel v. Rusk, 384 U.S. 1 (1965). The very fact that Congress fails to change an administrative interpretation may "constitute persuasive evidence that that interpretation is the one intended by Congress." Zemel v. Rusk, supra at 11. The VA's loan program has existed for many years; programs to provide adaptive and prosthetic equipment to veterans have also been the subject of congressional oversight hearings. The lack of any congressional expression of disagreement with the existence of the loan program is persuasive evidence that legal authority for the program exists. Accordingly, we believe the practice of providing some equipment by means of an outright grant, and some by means of loan approach, is legally permissable.

The next question is whether the VA has any legal claim under the loan agreement against either of the two veterans for the replacement value of the loaned equipment regardless of whether or not the veteran has insurance. That agreement, Form Letter 10-219, which is signed by the veteran when the loaned equipment is furnished, provides, in pertinent part:

1. I understand that this Government property is furnished to me on an "Indefinite Loan" basis for my personal use only; that it is to be returned to the Veterans Administration at the time I need a replacement for the item(s); and that in the event of serious damage, destruction, or loss of the item(s) I may be required to pay for that part which may have been caused by my own negligence.

2. In signing this receipt I agree to accept responsibility for proper care and safeguarding of the item(s), and for returning (it) (them) to the Veterans Administration when required.. I understand that I am not authorized to sell, give away, or otherwise dispose of these item(s).

It is our view that the agreement would ordinarily be considered a bailment contract. When one party, the bailee, aquires property from another party, the bailor, and agrees to return the property either on demand or at a stipulated time, a bailment is created. 8 Am.Jur.2d, Bailments, § 54. The bailee, in this case the veteran, is obligated to take appropriate care of the property and is liable for damage due to negligence. 8 Am.Jur.2d Bailments § 213. It is our view, however, that it is inappropriate to apply the standard rules of bailment in this situation.

Under title 38, United States Code, the Veterans Administration provides eligible veterans with an array of benefits, including prosthetic appliance, medical equipment, and automobile adaptive equipment, and those benefits are furnished to veterans in different ways. In a few instances, VA provides these benefits by loaning them rather than actually giving them to the veteran. That is done for the benefit of the government so that the equipment or device may be reacquired by VA and loaned to other veterans. We believe all veterans eligible for a benefit should be treated alike. To require that veterans who are loaned equipment be held liable, under bailment law, for damage to the equipment, while veterans who are given the equipment would not, is basically inequitable. The veteran who is loaned a wheelchair so he may achieve mobility should not be treated differently from the amputee who is given an artificial limb so he may also achieve mobility. Accordingly, it is our view that the loan agreement (FL 10-219) should be changed so that it does not require the veteran to agree to be liable for damage to loaned equipment.

A final question concerns how the Agency may deal with cases which involve negligent or willful damage or destruction of equipment, particularly where it occurs on a repeated basis. If there is evidence that a veteran has willfully misused or destroyed prosthetic or other medical equipment, whether loaned or issued, we believe the VA, pursuant to properly issued regulations, may simply refuse to provide the veteran with replacement equipment. In general, ar regards the provision of medical equipment under chapter 17, the Administrator has discretion to determine whether to provide a benefit under that chapter, and to which categories of veterans it may be provided. Acting pursuant to 38 U.S.C. § 210(c)(1), we believe the Administrator may promulgate detailed regulations limiting provision of medical equipment only to veterans who do not willfully or negligently abuse the program much as procedures and limitations now apply to the provision of medical care to abusive patients or to incarcerated veterans.

We believe similar limitation could be imposed on the provision of adaptive equipment authorized by 38 U.S.C. § 1902(c).That subsection provides:

(c) In accordance with regulations which the Administrator shall prescribe, the Administrator shall ... (2) provide ... such adaptive equipment for any automobile or other conveyance which an eligible person may previously or subsequently have acquired. (Emphasis Added)

HELD:

By using the mandatory language "shall provide." rather than the permissive "may furnish" used in sections 612 and 617, Congress did not grant the Administrator the same wide discretion to determine that an authorized benefit will not be provided at all. However, by adding the language, " I n accordance with regulations which the Administrator shall prescribe," we believe the Administrator is given wide latitude to place conditions on provision of the benefit.

Accordingly, the Administrator may promulgate regulations limiting provision of equipment under section 1902(c) to only those veterans who do not abuse the system by negligently or willfully damaging or destroying equipment loaned to them.

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 43-91