Date: January 27, 1993 O.G.C. Precedent 3-93

From: Acting General Counsel (022)

Subject: Applicability of 38 C.F.R. § 3.552(b)(1), Governing Adjustment of Aid and Attendance Allowance, When a Third Party Reimburses the Government for the Cost of VA Hospitalization

To: Under Secretary for Benefits (20)

QUESTION PRESENTED:

If a third party reimburses the Government for the reasonable cost of a veteran's hospitalization at a Department of Veterans Affairs (VA) medical facility for a nonservice-connected disability, is increased improved pension for aid and attendance payable to the veteran throughout the period of hospitalization?

COMMENTS:

1. The factual situation which led to the request for this opinion is as follows. The veteran, who is in receipt of increased improved pension for aid and attendance, was hospitalized for a nonservice-connected disability at a VA medical center from February 26, 1990, through May 12, 1990. Effective April 1, 1990, the veteran's award of increased pension for aid and attendance was discontinued because the veteran was hospitalized at VA expense. Benefits were resumed effective May 12, 1990, the date the veteran was discharged from the hospital. Thereafter, the veteran forwarded to VA a copy of a Medical Explanation of Benefits form which showed that his health insurance company had been billed $22,030 for the cost of hospitalization at the VA medical center and that the insurer had issued a check to the VA medical center in the amount of $21,223.72, representing the total amount payable under the veteran's policy. The veteran requested that his award of increased pension for aid and attendance be restored for the period April 1, 1990, through May 11, 1990, because he was not hospitalized at VA expense.

2. Section 3.552(b)(1) of title 38, Code of Federal Regulations, provides as follows:

> Where a veteran is admitted for hospitali-zation on or after October 1, 1964, the additional compensation or increased

> pension for aid and attendance will be dis-continued effective the last day of the month following the month in which the veteran is admitted for hospitalization at the expense of the Department of Veterans Affairs.

In considering the application of this provision, it is helpful to examine the development of the laws relating to payment of aid and attendance allowance during periods of hospitalization. Also, it is necessary to review the law permitting the Government to recover the cost of hospitalization from third-party insurers.

3. VA and its predecessor agencies have long applied the general rule that the aid and attendance allowance should be discontinued when a veteran is hospitalized at agency expense. This rule had its origin in a 1920 opinion of the Bureau of War Risk Insurance General Counsel. The Act of December 24, 1919, ch. 16, § 11, 41 Stat. 371, 373, amended the War Risk Insurance Act to authorize the Director of the Bureau of War Risk Insur-ance to pay such additional compensation as deemed reasonable, not exceeding $20 per month, to disabled persons who were so helpless as to be in constant need of a nurse or attendant. In a memorandum to the Chief Medical Advisor dated July 14, 1920, the General Counsel of the Bureau of War Risk Insurance held that a veteran could not receive both hospital treatment furnished by the Government, and the additional allowance for a nurse or attendant authorized by the War Risk Insurance Act. The General Counsel reasoned that "there can be only one allowance for a nurse or attendant under the War Risk Insurance Act." 10 Op. G.C. 4552 (7-14-20).

4. The Act of December 18, 1922, ch. 10, 42 Stat. 1064, expanded the allowance to authorize the Director to pay such additional sums of compensation as deemed reasonable, not exceeding $50 per month, to persons who were blind, legless, or armless and so in constant need of a nurse or attendant. In 23 Op. G.C. 675 (3-1-23), the General Counsel of the Veterans' Bureau considered the question of whether such additional sum was payable when the claimant was in a Veterans' Bureau hospital. The General Counsel, relying on the July 14, 1920, opinion, concluded that, when "the claimant is in a hospital and all charges for nursing are being paid by the Government, it seems obvious that no additional allowance for that purpose could be deemed reasonable by the Director." 23 Op. G.C. at 676. Thereafter, this interpretation was incorporated into

paragraph 10 of Veterans' Bureau General Order No. 170 (April 24, 1923) ("During the time when a claimant is a patient in a hospital and being furnished necessary treatment including attendant and nursing care, additional allowance to the claimant for hire of an attendant shall not be granted.").

5. The World War Veterans' Act, 1924, ch. 320, § 202(5), 43 Stat. 607, 619, also contained a provision for payment of an additional sum to disabled persons who were so helpless as to be in constant need of a nurse or attendant. Consistent with its previous interpretations, the Veterans' Bureau concluded that where hospitalization and treatment were being furnished by the Veterans' Bureau, no allowance for an attendant would be made. See U.S. Veterans' Bureau Regulation No. 79, § 3300 (Sept. 30, 1924); U.S. Veterans' Bureau Circular No. 272-A, para. 6 (Feb. 27, 1928). In an opinion involving a veteran hospitalized at an institution operated in part with Federal appropriations, the Veterans' Bureau General Counsel held that, where the cost of hospitalization "was in part at least defrayed by the Government," the additional compensation was not payable. 52 Op. G.C. 195, 196 (5-21-28) (emphasis added).

6. Vet. Reg. No. 1(a), part I, paragraph II(1), issued pursuant to the Economy Act of 1933, ch. 3, 48 Stat 8, and promulgated by Exec. Order No. 6156 (June 6, 1933), also authorized increased payments to veterans in need of regular aid and attendance. The Administrator of Veterans Affairs, in A.D. No. 201 (10-31-33), interpreted Vet. Reg. No. 1(a), part I, paragraph II(1), stating:

> [T]he purpose of authorizing the payment of a greater amount in these circumstances than the rate fixed for total disability is to provide for the expense of furnishing the regular aid and attendance. In cases where the veteran is being maintained in a Government institution, the regular aid and attendance is being furnished in kind at Government expense and the payment of the greater sum [for aid and attendance] would result, in effect, in the Government twice bear- ing the obligation, something which it must be presumed was not contemplated.

On this basis, the Administrator held that, when a veteran is hospitalized by the Government, the veteran is not entitled to the additional sum payable by reason of need of regular aid and attendance.

7. In 1949, a provision was added to the Code of Federal Regu-lations, providing that additional compensation for aid and attendance would be discontinued in most cases where a veteran was being furnished nursing or attendant's service in connection with hospital treatment or institutional or domiciliary care furnished by the Veterans Administration. Former 38 C.F.R. 3.237(b) (1949). Congress incorporated this principle into the veterans' benefit statutes in a limited manner in 1958, when it enacted legislation which provided for payment of an aid and attendance allowance to certain severely disabled veterans, i.e., those receiving benefits under what was then 38 U.S.C. § 314(r) (now § 1114(r)), during periods in which they were not hospitalized at Government expense. Pub. L. No. 85-782, 72 Stat. 936 (1958). In 1961, VA issued 38 C.F.R. § 3.552, 26 Fed. Reg. 1561 (1961), which, while incorporating the statutory requirement pertaining to veterans receiving "r-rate" benefits and hospitalized at "Government expense," went further, providing generally for discontinuance of additional pension or compensation for aid and attendance for veterans hospitalized in a VA hospital or in any hospital at VA expense. See also 38 C.F.R. § 3.551(a)(1) (defining "hospitalized"). Discontinuance of benefits was from the date of admission. Former 38 C.F.R. § 3.552(j) (1962 Supp.).

8. In 1962, Congress amended 38 U.S.C. § 3203 to defer discon-tinuance of the aid and attendance allowance of those veterans receiving compensation under what is now 38 U.S.C. § 1114(r) until the first day of the second calendar month after admission for hospitalization at Government expense. Pub. L. No. 87-645, § 2(b), 76 Stat. 441 (1962) (adding former 38 U.S.C. 3203(f), which is now codified at 38 U.S.C. § 5503(e)). Congress subsequently amended former 38 U.S.C. § 3203(f) to defer discontinuance of the aid and attendance allowance for all veterans receiving increased compensation or pension based on the need for regular aid and attendance until the first day of the second calendar month after hospitali-zation by the Veterans Administration. Pub. L. No. 88-450, § 5, 78 Stat. 500, 504 (1964). In enacting Pub. L. No. 88-450, Congress recognized and accepted VA's practice of discontinuing aid and attendance benefits to veterans hospitalized by VA or at VA expense, while deferring to VA as to the need for and application of the limitation.

9. Section 1729(a) of title 38, United States Code, permits the United States to recover or collect from a third party the reasonable cost of medical care and services furnished by VA to a veteran for a nonservice-connected disability to the extent that the veteran or the provider of the care and services would

be eligible to receive payment from the third party if the care or services had not been provided by a department or agency of the United States. VA cannot require any veteran to pay a deductible or copayment charge to VA in order to receive VA care. 38 C.F.R. § 17.62(h)(2)(i). Regardless of whether the veteran pays the deductible or copayment, the United States may only recover or collect the reasonable cost of VA-furnished care in excess of the amount of the deductible or copayment. 38 U.S.C. § 1729(a)(3)(B).

10. The Secretary is required to prescribe regulations to govern determinations of the reasonable cost of medical care and services for purposes of section 1729. 38 U.S.C. section 1729(c)(2)(A). The rates that represent the reasonable cost of VA-furnished medical care and services are the same rates prescribed by the Office of Management and Budget and published in the Federal Register for use under the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653. 38 C.F.R. § 17.62(h)(3). The applicable rates established for the cost of VA-furnished care during a veteran's hospitalization are calculated as follows:

> The actual costs and per diem rates by type of care for the previous year are added to the estimated costs for depreciation of buildings and equipment, administrative overhead, interest on capital invest- ment, and Government employee retirement and disa- bility charges. These computed rates are then adjusted by the budgeted percentage change to arrive at the estimated rates for the fiscal year under review.

55 Fed. Reg. 949 (1990). However, "the reasonable cost of care or services sought to be recovered or collected from a third party liable under a health-plan contract may not exceed the amount that such third party demonstrates . . . it would pay for the care or services if provided by [non-Federal] facilities . . . in the same geographic area." 38 U.S.C. § 1729(c)(2)(B); see also 38 C.F.R. § 17.62(h)(4).

11. Amounts recovered or collected from third parties are deposited in the Department of Veterans Affairs Medical-Care Cost Recovery Fund (Fund) established in the Treasury. 38 U.S.C. § 1729(g)(1) and (2). Such sums are available for payment of necessary expenses for the identification, billing, and collection of the cost of medical care and services furnished by VA and for payment for services and utilities,

recovery and collection activities, and administration of the Fund. 38 U.S.C. § 1729(g)(3). Unobligated sums remaining in the Fund at the close of the fiscal year are deposited into the Treasury as miscellaneous receipts. 38 U.S.C. § 1729(g)(4).

12. In view of the foregoing, we conclude that the veteran must be considered to have been hospitalized at VA expense for purposes of 38 C.F.R. § 3.552(b)(1). As discussed above, under section 1729, the rates representing the "reasonable cost" of VA-furnished medical care and services are determined in accordance with regulatory criteria. Further, it is our understanding that the United States typically does not recover the full amount determined to represent the reasonable cost of VA-furnished medical services. Recovery of the reasonable cost of VA-furnished medical care and services is limited to the extent of medical coverage under a health-plan contract. The amount that the United States may collect or recover is reduced by any deductible or copayment. 38 U.S.C. § 1729(a)(3)(B). The limitation on aid and attendance payments for hospitalized veterans was early determined to apply where hospitalization was provided in part at Government expense, see 52 Op. G.C. 195 (5-21-28), and this is consistent with the objective of avoiding duplicative Government expenditures.

13. Further, monies recovered or collected pursuant to section 1729 are not returned to VA to offset the cost of medical care and services. Instead, amounts in excess of the costs of collection and administration of the Fund are deposited into the Treasury as miscellaneous receipts. 38 U.S.C. § 1729(g)(4). Thus, while the Government may be reimbursed in part for its expenditures on behalf of the veteran, VA does not in fact recover any of its medical-care costs. In this regard, we note that the portion of 38 C.F.R. § 3.552 dealing with pension recipients refers to hospitalization at VA expense, rather than Government expense.

14. Our conclusion regarding the applicability of section 3.552(b)(1) in this case is consistent with the objectives of both the aid and attendance allowance and the medical cost recovery program. The purpose of the aid and attendance allowance is to enable seriously disabled veterans to defray the expense of obtaining attendant care. See A.D. No. 201 (10-31-33). As veterans hospitalized at VA medical centers are being furnished such care without financial sacrifice on their part, paying the allowance throughout the period of hospitali-zation would not further the objective of the allowance.

15. Further, the legislative history of 38 U.S.C. § 1729 (formerly § 629), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 19013, 100 Stat. 82, 382 (1986), clearly shows that its primary objective was reduction of the Federal deficit. S. Rep. No. 146, 99th Cong. 1st Sess. 554-58, 578 (1985), reprinted in 1986 U.S.C.C.A.N. 42, 43, 497-501, 521. The legislative history of this provision contains no reference to its effect on other sections of title 38, United States Code, nor any statement suggesting that Congress intended to liberalize then-existing law regarding discontinuance of aid and attendance for veterans hospitalized at VA expense. We would undermine the deficit-reduction objective of section 1729 were we to conclude that the operation of that provision has the effect of authorizing continued payment of aid and attendance to veterans hospitalized in VA facilities.

HELD:

Regardless of whether a third party reimburses the Government under 38 U.S.C. § 1729(a) for the reasonable cost of a veteran's hospitalization at a Department of Veterans Affairs (VA) medical facility for a nonservice-connected disability, the veteran may be considered hospitalized at VA expense for purposes of 38 C.F.R. § 3.552(b)(1), which requires discontinuance of increased improved pension for aid and attendance effective the last day of the first calendar month following the month of a veteran's admission for hospitalization at VA expense.

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