Date: October 5, 1995 VAOPGCPREC 23-95

From: General Counsel (022)

Subj: Request for Opinion -- Application of Estate Limitation to Incompetent Veteran Receiving Rehabilitation Services -- XXXXXXX, XXXXX X. CSS XXX XX XXXX

To: Director, Compensation & Pension Service (211C)

QUESTION PRESENTED:

Under what circumstances do residential rehabilitation services provided to a veteran in a private facility at Department of Veterans Affairs (VA) expense constitute hospital treatment or institutional or domiciliary care furnished by the United States for purposes of the $1,500 estate limitation of 38 U.S.C. § 5503(b)(1)(A) and 38 C.F.R. § 3.557(b)?

COMMENTS:

1. The question presented arose in the following context. In 1986, the veteran was adjudicated incompetent and assign-ed a 100-percent disability rating due to organic brain syndrome. Disability compensation was terminated effective January 1, 1987, because the veteran was hospitalized at a VA medical center, had no spouse or dependent child, and had an estate which exceeded $1,500. On August 10, 1992, VA accepted a proposal from a private facility to provide the veteran at VA expense with residential rehabilitative serv-ices. Services began on August 17, 1992, and continued until August 17, 1994, when the veteran was discharged. The program provided by the private facility involved assess-ment, supervision, and rehabilitative training in a resi-dential environment as a means for the veteran to achieve abilities which would permit some degree of independent living. Compensation at the 100-percent level was reestab-lished effective the date of discharge. You wish to deter-mine whether the services provided by the private facility fall within the scope of laws limiting payment of benefits to certain incompetent veterans receiving care at government expense.
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2. Section 5503(b)(1)(A) of title 38, United States Code, provides that:

> In any case in which a veteran having neither spouse nor child is being furnished hospital treatment or institutional or domiciliary care without charge or otherwise by the United States, or any political subdivision thereof, is rated by the Secretary . . . as being incompetent, and the veteran's estate . . . equals or exceeds $1,500, further payments of pension, compensation, or emer-gency officers' retirement pay shall not be made until the estate is reduced to $500.

Similarly, 38 C.F.R. § 3.557(b) provides that, where a veteran is rated incompetent by VA, has neither spouse nor child, and is "hospitalized, institutionalized or domiciled by the United States or any political subdivision, with or without charge," and has an estate, derived from any source, which equals or exceeds $1,500, further payments of pension, compensation, or emergency officer's retirement pay will not be made until the estate is reduced to $500. [1]

3. The applicability of the $1,500 rule for the period of the veteran's residence in the private facility turns pri-marily on whether, under 38 U.S.C. § 5503(b)(1)(A), the veteran's participation in the VA-funded rehabilitative program of independent living services must be considered "hospital treatment or institutional or domiciliary care" furnished by the United States. The General Counsel recent-ly issued an opinion, VAOPGCPREC 2-95 (O.G.C. Prec. 2-95), which extensively discussed the terms and history of section 5503(b)(1)(A) and implementing regulations. That opinion held that the $1,500 rule is applicable to veterans hospi-talized in any hospital, including a private facility, when care is provided at the expense of the United States.

[1] The limitation on payment of benefits established by section 5503(b) and its implementing regulation, 38 C.F.R. § 3.557(b), is commonly referred to as "the 1,500 rule."

4. Although VAOPGCPREC 2-95 dealt with hospital treatment only, the rationale for that opinion applies as well to institutional and domiciliary care. In particular, interpretation of the reference in section 5503(b)(1)(A) to institutional or domiciliary care "furnished . . . by the United States" to include care furnished at a private facil-ity at government expense is consistent with the references in the history of that provision to care "at public expense." S. Rep. No. 344, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S.C.C.A.N. 2048. Further, chapter 17 of title 38, United States Code, authorizes the Secretary of Veterans Affairs to "furnish" nursing home as well as hos-pital care under contract with non-VA facilities. 38 U.S.C. §§ 1710(a)(3), 1720. Moreover, VA's contemporaneous con-struction of predecessor statutes to section 5503(b)(1)(A)
as applying to care furnished at VA or government expense applied to institutional and domiciliary care in addition to hospital treatment. *See* Emergency Interim Issue (EM) 27-12, para. D.4. (11-25-60); former 38 C.F.R. § 3.255 (1949); Administrator's Instruction No. 1, Section 1, Public Law No. 662, 79th Congress, para. 4 (9-11-46). In any event, we cannot attribute to Congress an intention to establish a different rule for different types of services referred to in the same provision of a statute.

5. VAOPGCPREC 2-95 did not address whether rehabilitative programs such as the one provided to the subject veteran constitute "hospital treatment or institutional or domiciliary care" for purposes of section 5503(b)(1)(A). Whether a particular rehabilitation program falls within the applica-tion of the $1,500 rule is a factual matter dependent upon the specific nature of the services provided. Although we are not prepared to offer an opinion as to how this, or any similar case, should be adjudicated, we can provide guidance regarding the meaning of the statutory and regulatory refer-ences to hospital treatment and institutional and domicil-iary care. [2]

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[2] Section 3.551(a) of title 38, Code of Federal Regulations, states in pertinent part that "[e]xcept as otherwise indicated the terms "hospitalized" and "hospitalization" in 38 C.F.R. §§ 3.551 through 3.559 mean: (1) Hospital treatment in a [VA] hospital or in any hospital at [VA] expense. (2) Institutional, domiciliary or nursing home care in a [VA] institution or domiciliary or at [VA] expense."

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6. Congress may be presumed to intend that the terms it uses in statutes will be given their commonly accepted meanings. *See, e.g.*, 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.28 (5th ed. 1992). With regard to "hospital treatment," [3] the term "hospital" is defined as "[a]n institution for the treatment and care of sick, wounded, infirm, or aged persons," Black's Law Dictionary 737 (6th ed. 1990), or as "an institution or place where sick or injured persons are given medical or surgical care." Webster's Third New International Dictionary 1093 (1981). "Treatment" is described as "[a] broad term covering all the

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Section 3.557(b)(3) distinguishes between "hospitalized," "institutionalized," and "domiciled," whereas 38 C.F.R. § 3.551(a) includes institutional and domiciliary care within the general definition of "hospitalization." Other provisions governing application of the $1,500 rule use the terms "hospitalized" or "hospitalization" without distinguishing among hospital, institutional, or domiciliary care. *See* 38 C.F.R. §§ 3.557(d), 3.558(a), 3.559(a). The provi-sions referring only to "hospitalized" or "hospitalization" may be considered governed by the definition provided by section 3.551(a). To the extent section 3.557(b)(3) lists separately the three types of care, that section may be considered to fall within the "[e]xcept as otherwise indicated" exception to section 3.551(a). In either case, the result is the same; the regulatory provisions governing application of the $1,500 rule are made applicable to hos-pital, institutional, and domiciliary care.

[3] The controlling statute, 38 U.S.C. § 5503(b)(1)(A), prohibits benefit payments to certain incompetent veterans who are receiving "hospital treatment" at VA expense. VA's implementing regulation at 38 C.F.R. § 3.557(b) uses the term "hospitalized" in describing the same prohibition. Since the regulation appears to be intended to track the statute, and could not validly depart from its requirements, we interpret the statutory and regulatory terms as referring to provision of the same services.

steps taken to effect a cure of an injury or disease; including examination and diagnosis as well as application of remedies." Black's Law Dictionary 1502 (6th ed. 1990). The term is also defined as "the action or manner of treating a patient medically or surgically." Webster's Third New International Dictionary 2435 (1981). Thus, the term "hos-pital treatment would generally connote medical or surgical steps taken to provide relief to an individual from an in-jury or disease, when those steps are taken in an institu-tion maintained for the purpose of providing such care.

7. With regard to "institutional care," the term "institution" is defined as "[a]n establishment, especially one of an eleemosynary or public character or one affecting a community." Black's Law Dictionary 800 (6th ed. 1990). The term "care," as used in this context, suggests "supervision, management: responsibility for or attention to safety and well-being . . . custody." Webster's Third New Interna-tional Dictionary 338 (1981). Accordingly, "institutional care" may be considered supervision or management of an individual in the custody of an entity of a charitable or public character.

8. In the case of "domiciliary care," the term "domicile" refers to "[t]hat place where a man has his true, fixed, and permanent home." Black's Law Dictionary 484 (6th ed. 1990). In addition, the term "domiciliary" has acquired a specific meaning as referring to "a rest home for chronically ill or permanently disabled war veterans requiring minimal medical attention." Webster's Third New International Dictionary 671 (1981). For purposes of chapter 17 of title 38, United States Code, governing VA hospital, nursing home, domicil-iary, and medical care, 38 U.S.C. § 1701(7) defines domicil-iary care to include necessary medical services and travel and incidental expenses. Thus, "domiciliary care" may be considered supervision, management, or custody generally provided or maintained on a permanent basis to chronically ill or permanently disabled individuals, including a level of medical services consistent with those generally associated with a domiciliary facility.

9. A broad interpretation of the referenced terms is suggested by the history and purpose of section 5503(b). In 1959, Congress enacted Pub. L. No. 86-146, § 2, 73 Stat. 297, 298 (1959), broadening the $1,500 rule to prohibit continued payment of veterans' benefits to incompetent veterans without a spouse or children whose estates exceeded $1,500 and who were "being furnished hospital treatment, institutional or domiciliary care without charge or otherwise by the United States, or any political subdivision thereof." Previously, the prohibition had only applied to treatment or care provided by the Veterans' Administration. The Senate Report on the bill that became Pub. L. No. 86-146 included the following statement of purpose: "This bill is designed to prevent gratuitous benefits for incompetent vet-erans receiving care at public expense from accumulating in excessive amounts and passing upon the death of the veteran to relatives having no claim against the Government on ac-count of the veteran's military service." S. Rep. No. 344, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S.C.C.A.N. 2048; *see also* H.R. Rep. No. 303, 86th Cong., 1st Sess. (1959) (referring generally to incompetent veterans without spouse or child "being cared for at public expense"). Thus, the legislation appears to have been aimed generally at a specified class of incompetent veterans "receiving care at public expense."

10. The Veterans' Administration's contemporaneous construction of Pub. L. No. 86-146 reflects an understanding that the $1,500 rule was to be applied broadly. Emergency Interim Issue (EM) 27-12 (11-25-60), issued by the Chief Benefits Director, established interim guidelines for applying the $1,500 rule of Pub. L. No. 86-146. Paragraph D.4. of EM 27-12 stated that the "[p]rovisions of PL 86-146 apply to any case where an incompetent veteran is confined *for any reason* at the expense of the United States or a political subdivision thereof." (Emphasis added.) *See also* VAOPGC 16-60 (10-10-60) ($1,500 rule broad enough to include confinement of an incompetent individual in a penal institu-tion). [4]

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[4] Consistent with this broad interpretation, the General Counsel subsequently determined, in Undigested Opinion, 8-24-83 (7-5 Domiciliary Care), that services provided under an individualized independent living program would be considered institutional care for purposes of what is now 38 U.S.C. § 5503(b)(1)(A).

HELD:

The provisions of 38 U.S.C. § 5503(b)(1)(A) and 38 C.F.R. § 3.557(b) generally require withholding of compensation and pension payments from incompetent veterans with estates in excess of $1,500 who have neither a spouse nor child and who are being furnished hospital treatment or institutional or domiciliary care by the United States or any political sub-division thereof. The terms of the statute and regulation encompass services provided by a private facility at govern-ment expense. Determination of whether the services pro-vided to a particular veteran by a private facility fit any of the statutory categories of hospital treatment or insti-tutional or domiciliary care requires an examination of the veteran's files to determine the nature and purpose of the services. With regard to hospital treatment, an assessment should be made as to whether the facility may be considered an institution the purpose of which is to provide medical and surgical care to sick, injured, or infirm persons and whether the veteran received such care at the institution. In the case of institutional care, a determination should be made whether the facility may be considered a charitable or public establishment which had custody of the veteran and which provided supervision or management of the veteran, having assumed responsibility for the veteran's well being. Finally, with respect to domiciliary care, the same factors concerning custody and supervision would be relevant. In addition, an assessment should be made concerning the permanence of the veteran's residence at the facility and whether the medical services provided the veteran were

consistent with those generally associated with a domiciliary facility.

Mary Lou Keener