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DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 17

RIN 2900-AO03

Autopsies at VA Expense

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its regulation that governs the performance of autopsies on veterans. This final rule updates outdated cross-references to a statute that previously authorized certain outpatient and ambulatory care, which included post-hospitalization autopsies, and its implementing regulation. This final rule clarifies that consent for an autopsy is implied if a known surviving spouse or next of kin has either not responded to a VA request for permission or has not inquired as to the decedent for 6 months before the decedent's death. This final rule modifies the current regulation to make the laws of the jurisdiction in which the autopsy will be performed the controlling laws for purposes of determining who has authority to grant permission for the autopsy. This final rule also clarifies the authorized purposes of a VA autopsy. Lastly, this final rule clarifies that the authority to order an autopsy includes transporting the body at VA's expense to the place where the autopsy will be performed.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Kristin J. Cunningham, Director, Business Policy, Chief Business Office, Department of Veterans Affairs, 810 Vermont Ave. NW, Washington, DC 20420; (202) 461-1599. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

Prior to this final rulemaking, 38 CFR 17.170 stated that under certain specified circumstances, “[t]he Director of a [VA] facility is authorized to cause an autopsy to be performed on a veteran who dies outside of a [VA] facility while undergoing post-hospital care under the provisions of 38 U.S.C. 1712 and 38 CFR 17.93.” These cross-references are outdated and incomplete. Post-hospital care is now governed by section 1710, not section 1712, and the implementing regulation is now at 38 CFR 17.38. In addition, VA is authorized, under § 17.52, to contract with non-VA facilities to furnish hospital care and medical services to certain veterans in non-VA facilities. This final rule updates the cross-references in § 17.170 to allow VA to order an autopsy of an individual who dies while receiving fee-basis care under § 17.52 and to pay the expense of transporting the body for purposes of performing the autopsy.

This final rule also amends § 17.170 by reorganizing and clarifying the provisions governing whether an autopsy should be performed, including clarifying the applicability of local laws and the determination of the individual authorized to consent to autopsy. This clarifying language allows for ease of interpretation of the methods used to obtain consent for autopsy.

In a document published in the Federal Register on December 2, 2011 (76 FR 75509), VA proposed the above-described amendments to § 17.170. We provided a 60 day comment period, which ended on January 31, 2012. We received one comment from a member of the general public.

The commenter agreed with all of the proposals. Therefore, VA will make no changes based on this comment. The commenter stated that “[w]hen an autopsy is required for this purpose it is necessary to complete it in a timely fashion. Simplifying the language will help to achieve this goal by clarifying which laws to consult, addressing the requirements needed to achieve consent, and stating clearly the limitations on time.” We thank the commenter for taking the time to review this rulemaking.

Based on the rationale set forth in the preamble to the proposed rule and in this final rule, VA is adopting the proposed rule as a final rule without any substantive changes. We made a couple of nonsubstantive edits to proposed § 17.170(a)(1).

#### Effect of rulemaking

Title 38 of the Code of Federal Regulations, as revised by this rulemaking, represents VA’s implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any given year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

### Paperwork Reduction Act

This final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

### Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget (OMB), as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or

more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.”

VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action, and it has been determined not to be a significant regulatory action under Executive Order 12866.

#### Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This final rule will not cause a significant economic impact on health care providers, suppliers, or entities since only a small portion of the business of such entities concerns VA beneficiaries. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program numbers and titles for this

final rule are as follows: 64.005, Grants to States for Construction of State Home Facilities; 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.024, VA Homeless Providers Grant and Per Diem Program.

#### Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on June 21, 2012, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure; Alcohol abuse; Alcoholism; Claims; Day care; Dental health; Drug abuse; Government contracts; Grant programs-health; Grant programs-veterans; Health care; Health facilities; Health professions; Health records; Homeless; Mental health programs; Nursing homes; Philippines; Reporting and recordkeeping requirements; Veterans.

Dated: June 21, 2012

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Robert C. McFetridge, Director,  
Office of Regulation Policy and Management,  
Office of the General Counsel,  
Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 17 as follows:

#### PART 17—MEDICAL

1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

2. Amend § 17.170 by:

- a. Revising paragraph (a).
- b. Removing paragraph (b).
- c. Redesignating paragraph (c) as new paragraph (b) and adding a paragraph heading.
- d. Redesignating paragraph (d) as new paragraph (c) and adding a paragraph heading.
- e. In newly redesignated paragraph (c), removing “paragraph (c)” each time it appears and adding, in its place, “paragraph (b)”.
- f. Redesignating paragraph (e) as new paragraph (d) and revising newly redesignated paragraph (d).
- g. Redesignating paragraph (f) as new paragraph (e) and revising newly redesignated paragraph (e).
- h. Adding an authority citation at the end of the section.

The revisions and additions read as follows:

§ 17.170 Autopsies.

(a) General. (1) Except as otherwise provided in this section, the Director of a VA facility may order an autopsy on a decedent who died while undergoing VA care authorized by § 17.38 or § 17.52, if the Director determines that an autopsy is required for VA purposes for the following reasons:

- (i) Completion of official records; or
- (ii) Advancement of medical knowledge.

(2) VA may order an autopsy to be performed only if consent is first obtained under one of the following circumstances:

- (i) Consent is granted by the surviving spouse or next of kin of the decedent;
- (ii) Consent is implied where a known surviving spouse or next of kin does not respond within a specified period of time to VA's request for permission to conduct an autopsy;

(iii) Consent is implied where a known surviving spouse or next of kin does not inquire after the well-being of the deceased veteran for a period of at least 6 months before the date of the veteran's death; or

(iv) Consent is implied where there is no known surviving spouse or next of kin of the deceased veteran.

(b) Death resulting from crime. \* \* \*

(c) Jurisdiction. \* \* \*

(d) Applicable law. (1) The laws of the state where the autopsy will be performed are to be used to identify the person who is authorized to grant VA

permission to perform the autopsy and, if more than one person is identified, the order of precedence among such persons.

(2) When the next of kin, as defined by the laws of the state where the autopsy will be performed, consists of a number of persons such as children, parents, brothers and sisters, etc., permission to perform an autopsy may be accepted when granted by the person in the appropriate class who assumes the right and duty of burial.

(e) Death outside a VA facility. The Director of a VA facility may order an autopsy on a veteran who was undergoing VA care authorized by §§ 17.38 or 17.52, and whose death did not occur in a VA facility. Such authority also includes transporting the body at VA's expense to the facility where the autopsy will be performed, and the return of the body. Consent for the autopsy will be obtained as stated in paragraph (d) of this section. The Director must determine that such autopsy is reasonably required for VA purposes for the following reasons:

- (1) The completion of official records; or
- (2) Advancement of medical knowledge.

(Authority: 38 U.S.C. 501, 1703, 1710)

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