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DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 17

RIN 2900-AO47

Authorization for Non-VA Medical Services

AGENCY: Department of Veterans Affairs.

ACTION: Direct final rule.

SUMMARY: The Department of Veterans Affairs (VA) is taking direct final action to amend its regulation governing payment by VA for non-VA outpatient care under VA's statutory authority to provide non-VA care. Under this authority, VA may contract for certain hospital care (inpatient care) and medical services (outpatient care) for eligible veterans when VA facilities are not capable of providing such services due to geographical inaccessibility or are not capable of providing the services needed. This amendment revises VA's existing regulation in accordance with statutory authority to remove a limitation on which veterans are eligible for medical services under this authority.

DATES: This final rule is effective on [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], without further notice, unless VA receives a significant adverse comment by [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through [www.Regulations.gov](http://www.Regulations.gov); by mail or hand-delivery to the Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW, Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. This is not a toll-free number. Comments should indicate that they are submitted in response to “RIN 2900-AO47—Authorization for Non-VA Medical Services.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. This is not a toll-free number. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at [www.Regulations.gov](http://www.Regulations.gov).

FOR FURTHER INFORMATION CONTACT: Lisa Brown, Chief, Policy Management Department, Department of Veterans Affairs, Chief Business Office, Purchased Care, 3773 Cherry Creek North Drive, Suite 450, Denver, CO 80209 at (303) 331-7829. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

Over the past two decades, the healthcare industry has increasingly emphasized providing care in the least restrictive environment. Care that was provided in hospitals is now provided with a full range of outpatient and ambulatory care options previously unavailable. VA has adopted this trend

toward outpatient and ambulatory care and, whenever possible, provides treatment options to veterans in these less restrictive modes of healthcare delivery. Although VA has made great strides to expand the delivery of healthcare to veterans, VA is, like the rest of the healthcare industry, economically unable to provide all possible services at all VA-operated venues of care. VA addresses this in part by authorizing non-VA care when necessary to meet the veteran's plan of care.

VA uses the authority in 38 U.S.C. 1703 to provide certain hospital care and medical services to eligible veterans when VA facilities are not capable of providing such services due to geographical inaccessibility or are not capable of providing the services needed, ensuring the continuity of care for the patient and the maximization of healthcare resources. VA may use this authority to provide needed non-VA care using community resources, such as private physicians or community hospitals. Care provided under VA's authority in 38 U.S.C. 1703 is usually referred to as the Non-VA Care program. Non-VA care enables VA to maximize resources and available options for patient care at the local level, providing care in the least restrictive mode possible and closer to the patient's home.

Public Law 104-262, 104(b)(2)(B) amended 38 U.S.C. 1703(a)(2)(B) to expand VA's authority to provide non-VA medical services under the non-VA care authority. As amended, the law authorizes VA to provide such medical services for a veteran who has been furnished hospital care, nursing home care,

domiciliary care, or medical services and who requires medical services to complete treatment incident to such care or services.

At present, 38 CFR 17.52(a)(2)(ii) provides that “[a] veteran who has received VA inpatient care for treatment of nonservice-connected conditions for which treatment was begun during the period of inpatient care” is eligible for non-VA medical services under the non-VA care authority. The existing VA regulation does not reflect the amendment made by Public Law 104-262 to 38 U.S.C. 1703(a)(2)(B). This VA regulation thus does not permit VA to complete a veteran’s treatment through non-VA providers under the non-VA care authority unless the VA treatment was begun during a period of hospitalization.

VA is amending its regulation at 38 CFR 17.52(a)(2)(ii) to reflect the current statutory authority found at 38 U.S.C. 1703(a)(2)(B). In doing so, VA will increase the availability of care in areas where VA cannot directly provide the care. Paragraph (a)(2)(ii) of this revised regulation provides that veterans who have been furnished hospital care, nursing home care, domiciliary care, or medical services, and who require medical services to complete treatment incident to such care or services, are eligible for non-VA medical services under the non-VA care authority. By expanding veterans’ eligibility for non-VA care, VA will be able to better utilize resources and enhance patient care at the local level. This regulation will give VA greater flexibility to refer patients for care in the least restrictive and most convenient setting.

This revision to § 17.52(a)(2)(ii) clarifies the time period during which veterans are eligible to receive non-VA care to complete their treatments.

Currently, § 17.52(a)(2)(ii) states that the non-VA care treatment period, which includes “care furnished in both facilities of VA and non-VA facilities or any combination of such modes of care,” is limited to no more than 12 months after the veteran is discharged from the hospital, unless VA determines that the veteran requires continued non-VA care “by virtue of the disabilities being treated.” This revision clarifies that each authorization for non-VA care needed to complete treatment may continue for up to 12 months, and that VA may issue new authorizations as needed. The requirement to issue a new authorization gives VA an opportunity to determine whether non-VA care continues to be the appropriate means of providing the veteran’s treatment.

We note that this amendment only affects the eligibility of certain veterans for medical services provided by a non-VA provider under the non-VA care authority in 38 U.S.C. 1703; this amendment does not require providers outside of VA to accept VA patients. We also note that this amendment does not affect other provisions in this regulation that specify veterans’ eligibility for non-VA care.

#### Administrative Procedure Act

VA believes this rule is non-controversial, anticipates that this rule will not result in any significant adverse comment and, therefore, is issuing this regulatory amendment as a direct final rule. Previous actions of this nature, which remove restrictions on VA medical benefits to improve health outcomes, have not been controversial and have not resulted in significant adverse comments or objections. However, in the “Proposed Rules” section of the

Federal Register, VA is publishing a separate, substantially identical proposed rule that will serve as a proposal for the provisions in this direct final rule in the event that any significant adverse comment is received by VA. (See RIN 2900-AO46.)

For purposes of the direct final rulemaking, a significant adverse comment is one that explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or why it would be ineffective or unacceptable without change. If VA receives a significant adverse comment, VA will publish a notice of receipt of a significant adverse comment in the Federal Register and withdraw the direct final rule. In determining whether an adverse comment is significant and warrants withdrawing a direct final rule, we will consider whether the comment raises an issue serious enough to warrant a substantive response in a notice-and-comment process in accordance with section 553 of the Administrative Procedure Act (5 U.S.C. 553). Comments that are frivolous, insubstantial, or outside the scope of the rule will not be considered adverse under this procedure. For example, a comment recommending an additional change to the rule will not be considered a significant comment unless the comment states why the rule would be ineffective or unacceptable without the additional change.

Under direct final rule procedures, if no significant adverse comment is received within the comment period, this rule will become effective on the date specified above. After the close of the comment period, VA will publish a document in the Federal Register indicating that VA received no significant

adverse comment and restating the date on which the final rule will become effective. VA will also publish a notice in the Federal Register withdrawing the proposed rule, RIN 2900-AO46.

In the event that VA withdraws the direct final rule because of receipt of any significant adverse comment, VA will proceed with the rulemaking by addressing the comments received and publishing a final rule. The comment period for the proposed rule runs concurrently with that of the direct final rule. VA will treat any comments received in response to the direct final rule as comments regarding the proposed rule. VA will consider such comments in developing a subsequent final rule. Likewise, VA will consider any significant adverse comment received in response to the proposed rule as a comment regarding the direct final rule. VA has determined that it is not necessary to provide a 60-day comment period for this rulemaking that would merely align a current regulation with existing statutory authority and make a minor modification concerning determination of the time period during which veterans are eligible to receive non-VA care to complete their treatments. VA has instead specified that comments must be received within 30 days of publication in the Federal Register.

#### 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.

#### 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).

#### Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. This rule affects only VA beneficiaries and does not affect a substantial number of small entities. Because this rule updates an existing regulation to make it consistent with existing statutory authority and reflect current and long-standing VA practices, VA anticipates no additional expenditures or actions as a result of this rule. Therefore, under 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### 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” requiring 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.”

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

#### Unfunded Mandates Reform Act

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 expenditures 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 one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

#### Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 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 November 19, 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, Government programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Veterans.

Dated: November 21, 2012

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Robert C. McFetridge,  
Director, 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. Revise § 17.52(a)(2)(ii) to read as follows:

§ 17.52 Hospital care and medical services in non-VA facilities.

(a) \* \* \*

(2) \* \* \*

(ii) A veteran who has been furnished hospital care, nursing home care, domiciliary care, or medical services, and requires medical services to complete treatment incident to such care or services (each authorization for non-VA treatment needed to complete treatment may continue for up to 12 months, and new authorizations may be issued by VA as needed), and

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