



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 17

RIN 2900-AP20

Third Party Billing for Medical Care Provided under Special Treatment Authorities

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its medical regulations to clarify that VA will not bill third party payers for care and services provided by VA under certain statutory provisions, which we refer to as “special treatment authorities.” These special treatment authorities direct VA to provide care and services to veterans based upon discrete exposures or experiences that occurred during active military, naval, or air service. VA is authorized, but not required by law, to recover or collect charges for care and services provided to veterans for non-service connected disabilities. This proposed rule would establish that VA would not exercise its authority to recover or collect reasonable charges from third party payers for care and services provided under the special treatment authorities.

DATES: Comments must be received by VA on or before [insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted by email through <http://www.regulations.gov>; by mail or hand-delivery to Director, Regulations Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue, N.W.,

Room 1063B, 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-AP20, Third Party Billing for Medical Care Provided under Special Treatment Authorities.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, 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 <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Joseph Duran, Director, Policy and Planning VHA Office of Community Care (10D1A1), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (303-370-1637). (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Many veterans enrolled in VA’s health care system also have private insurance. VA is authorized by law under 38 U.S.C. 1729 to recover or collect reasonable charges from third parties under certain situations for care and services provided for non-service-connected disabilities. For example, VA may recover or collect such charges when a veteran requires medical care following a motor vehicle accident or an injury at work. 38 U.S.C. 1729(a)(2)(A)-(B). These provisions are reflected in regulation at 38 CFR 17.101. VA does not have authority to recover or

collect charges from third parties for care or services provided for service-connected disabilities.

Under the statutes referred to as the special treatment authorities, which are codified at 38 U.S.C. 1710(a)(2)(F) and (e), 1720D, and 1720E, VA provides care and services to veterans for conditions and disabilities that are related to certain exposures or experiences during active military, naval, or air service, regardless of whether such condition or disability is formally adjudicated by the Veterans Benefits Administration (VBA) to be service-connected. Specifically, these statutory provisions do not expressly refer to the conditions or disabilities resulting from such exposures or experiences as service-connected. Therefore, if veterans meet the eligibility criteria of these discrete categories in law, they receive the health care benefits enumerated in the special treatment authorities. A brief description of each of the special treatment authorities follows.

Subject to the availability of appropriations, under 38 U.S.C. 1710(a)(2)(F), VA provides hospital care and medical services, and may furnish nursing home care, to veterans who were exposed to a toxic substance, radiation, or other conditions identified in 38 U.S.C. 1710(e) for the treatment of the disabilities described in subsection (e). More specifically, subject to the requirements in 38 U.S.C. 1710(e)(2)-(4), such care and services are available under 38 U.S.C. 1710(a)(2)(F) and 1710(e) (at no cost to the veteran) as follows:

- For the treatment of any disability of a Vietnam-era, herbicide-exposed veteran, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure;

- For the treatment of any disease specified by 38 U.S.C. 1112(c)(2) or for which the Secretary, based on the advice of the Advisory Committee on Environmental Hazards, determines that there is credible evidence of a positive association between occurrence of the disease in humans and exposure to ionizing radiation, of any radiation-exposed veteran;
- For treatment of any disability of a veteran who served on active duty between August 2, 1990, and November 11, 1998, in the Southwest Asia theater of operations during the Persian Gulf War, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such service;
- For treatment of any illness suffered by a veteran who served on active duty in a theater of combat operations during a period of war after the Persian Gulf War or in combat against a hostile force during a period of hostilities after November 11, 1998, notwithstanding that there is insufficient medical evidence to conclude that such condition is attributable to such service;
- For treatment of any illness suffered by a veteran who participated in a test conducted by the Department of Defense Desert Test Center as part of a program for chemical and biological warfare testing from 1962 through 1973 (including the program designated as “Project Shipboard Hazard and Defense (SHAD)” and related land-based tests) notwithstanding that there is insufficient medical evidence to conclude that such illness is attributable to such testing; and

- For treatment of certain illnesses or conditions identified by statute suffered by a veteran who served on active duty in the Armed Forces at Camp Lejeune, North Carolina, for not fewer than 30 days during the period beginning on August 1, 1953, and ending on December 31, 1987, notwithstanding that there is insufficient medical evidence to conclude that such illnesses or conditions are attributable to such service.

Under 38 U.S.C. 1720D, VA is authorized to provide counseling and appropriate care and services to help veterans overcome psychological trauma, which in the judgment of a mental health professional employed by VA, resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the veteran was serving on active duty, active duty for training, or inactive duty training.

Under 38 U.S.C. 1720E, VA is authorized to provide any veteran, whose service records include documentation of nasopharyngeal radium irradiation treatments, a medical examination, hospital care, medical services, and nursing home care that is needed for the treatment of any cancer of the head or neck that the Secretary finds may be associated with the veteran's receipt of those treatments in active military, naval, or air service; additionally, notwithstanding the absence of such documentation, VA may provide such care to a veteran who served as an aviator in the active military, naval, or air service before the end of the Korean conflict or a veteran who underwent submarine training in active naval service before January 1, 1965.

The special treatment authorities do not require an adjudication of service-connection to establish eligibility for care. These veterans are eligible under those

authorities for treatment of specific conditions, which although not adjudicated as service-connected, are the practical equivalent for medical care purposes. VA proposes, therefore, in the interest of equity, to add a new paragraph (a)(9) in § 17.101 to exclude from recovery or collections any reasonable charges from third parties for care and services provided under the special treatment authorities. This would conform the regulation to the current general practice of not seeking recovery or collection from third parties for medical care and services related to conditions and disabilities under the special treatment authorities.

Proposed paragraph (a)(9)(i) would state that, notwithstanding any other provision in this part authorizing VA to recover or collect such charges, VA will not seek to recover or collect reasonable charges from a third party payer for care and services when such care and services are being provided under any of the special treatment authorities discussed above. Proposed paragraphs (a)(9)(i)(A)-(C) would cite each of these authorities.

The special treatment authorities of 38 U.S.C. 1710(a)(2)(F) and (e) do not extend, however, to conditions and disabilities that the Under Secretary for Health determines, consistent with the terms of 38 U.S.C. 1710(e)(2)(A)-(B), have resulted from causes other than those described in the special treatment authorities. In these cases, needed treatment is still provided to the veteran but, depending on the facts, the veteran may be subject to copayment requirements in connection with the receipt of such treatment. In proposed § 17.101(a)(9)(ii), VA would clarify that we would continue to have the right to recover or collect reasonable charges from third parties, pursuant to 38 C.F.R. 17.101, for the cost of care that VA provides to these same veterans for

conditions and disabilities that VA determines are not covered by any of the special treatment authorities. For example, VA would not recover or collect charges from a third party payer for treatment of a veteran's lung cancer if that veteran served on active duty in the Armed Forces at Camp Lejeune, North Carolina, for not fewer than 30 days during the period beginning on August 1, 1953, and ending on December 31, 1987. However, VA could recover or collect reasonable charges from a third party payer for treatment of the same veteran's broken leg incurred in a post-deployment automobile accident. Similarly, VA would not recover or collect charges from a third party payer for treatment of a Vietnam-era herbicide-exposed veteran's disability found to be possibly related to such exposure, but VA could recover or collect reasonable charges from a third party payer for treatment of a condition determined by the Under Secretary for Health to have resulted from a cause other than such exposure. Continuing with this last example, the determination of whether a Vietnam-era herbicide-exposed veteran's disability may be related to that exposure is strictly a clinical judgment to be made by the responsible physician (acting in accordance with the guidelines issued by the Under Secretary of Health and a report issued in accordance with section 3 of the Agent Orange Act of 1991 by the National Academy of Sciences).

Finally, VA also proposes to amend the list of authorities appearing at the end of § 17.101 to include 38 U.S.C. 1720D and 1720E. These are two of the special treatment authorities previously discussed. The list of authorities already includes 38 U.S.C. 1710.

#### Effect of Rulemaking

The Code of Federal Regulations, as proposed to be revised by this proposed rulemaking, would represent the exclusive legal authority on this subject. No contrary rules or procedures would be authorized. All VA guidance would be read to conform with this proposed rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking.

#### Paperwork Reduction Act

Although this action contains provisions constituting collections of information at 38 CFR 17.101, under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501-3521), no new or proposed collections of information are associated with this proposed rule.

The information collection requirements for § 17.101 are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control number 2900-0606.

#### Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would 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. The Secretary certifies that this proposed rule will not result in a significant economic impact on a substantial number of small entities. We have not proposed any new requirements that would have such an effect. Our proposed standards would almost entirely conform to the existing statutory requirements and existing practices in the program. Therefore, pursuant to 5

U.S.C. 605(b), this rule 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 OMB, unless OMB waives such review, 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 proposed rule have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866. VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at <http://www1.va.gov/orpm>, by following the link for "VA Regulations Published."

### 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 an 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 one year. This proposed rule would 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 program numbers and titles for this 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; 64.011, 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; 64.016, Veterans State Hospital Care; 64.018, Sharing Specialized

Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing home care, Philippines, Reporting and recordkeeping requirements, scholarships and fellows, travel, and transportation expenses, veterans.

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. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on November 6, 2017, for publication.

Date: November 17, 2017

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Janet Coleman,  
Chief,  
Office of Regulation Policy & Management,  
Office of the Secretary,  
Department of Veterans Affairs.

For the reasons set forth in the preamble, VA proposes to amend 38 CFR part 17 as follows:

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 § 17.101 by:

a. Adding a new paragraph (a)(9).

b. Amending the authority citation at the end of the section.

The revisions read as follows:

§ 17.101 Collection or recovery by VA for medical care or services provided or furnished to a veteran for a nonservice-connected disability.

(a) \* \* \*

(9) Care provided under special treatment authorities.

(i) Notwithstanding any other provisions in this section, VA will not seek recovery or collection of reasonable charges from a third party payer for:

(A) Hospital care, medical services, and nursing home care provided by VA or at VA expense under 38 U.S.C. 1710(a)(2)(F) and (e).

(B) Counseling and appropriate care and services furnished to veterans for psychological trauma authorized under 38 U.S.C. 1720D.

(C) Medical examination, and hospital care, medical services, and nursing home care furnished to veteran for cancer of the head or neck as authorized under 38 U.S.C. 1720E.

(ii) VA may continue to exercise its right to recover or collect reasonable charges from third parties, pursuant to 38 C.F.R. 17.101, for the cost of care that VA provides to these same veterans for conditions and disabilities that VA determines are not covered by any of the special treatment authorities.

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AUTHORITY: 38 U.S.C. 101, 501, 1701, 1705, 1710, 1720D, 1720E, 1721, 1722, 1729.

[FR Doc. 2017-25269 Filed: 11/21/2017 8:45 am; Publication Date: 11/22/2017]