



38 CFR Parts 17 and 51

RIN 2900-AR61

Determining Eligibility for Domiciliary Care

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its medical regulations and State Veterans Home (State home) regulations. VA proposes to update the criteria used by VA in determining whether a veteran has no adequate means of support relative to eligibility for domiciliary care, and to shift the focus of the regulatory language from the veterans' ability to pursue substantially gainful employment to a broader consideration of available support systems and medical conditions or disabilities that might impact the veteran's ability to live independently. In addition, we propose amending our State home regulations to implement VA's authority to waive certain eligibility requirements for receipt of State home domiciliary care per diem.

DATES: Comments must be received by VA on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments must be submitted through www.regulations.gov. Except as provided below, comments received before the close of the comment period will be available at www.regulations.gov for public viewing, inspection, or copying, including

any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on the following website as soon as possible after they have been received: <http://www.regulations.gov>. VA will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm an individual. VA encourages individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment period's closing date is considered late and will not be considered in the final rulemaking.

FOR FURTHER INFORMATION CONTACT: Jennifer Burden, PhD, National Mental Health Director, Mental Health Residential Rehabilitation and Treatment Programs (11MHSP), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420; (540) 819-1190 (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Section 1710(b)(2) of title 38, United States Code (U.S.C.) authorizes VA to provide needed domiciliary care to veterans whose annual income does not exceed the applicable maximum annual rate of VA pension and to veterans VA determines have no adequate means of support. Historically, domiciliary care in VA has primarily been focused on delivering care to older residents who cannot live independently but who do not require admission to a nursing home, although the scope of domiciliary care provided by VA has expanded over the decades to meet the changing needs of veterans.

The term domiciliary care is defined in § 17.30(b) of title 38, Code of Federal Regulations (CFR), which reflects the two alternative models of domiciliary care VA is authorized to provide to eligible veterans. Domiciliary care is defined at § 17.30(b)(1)(i) to mean the furnishing of a temporary home to a veteran, embracing the furnishing of shelter, food, clothing, and other comforts of home, including necessary medical services. This model focuses on the needs of veterans eligible for VA domiciliary care who cannot live independently but who do not require admission to a nursing home. While VA retains the authority to directly provide domiciliary care under this model, it currently pays a per diem to State homes to provide this model of domiciliary care to eligible veterans. The statutory authority for the payment program is set forth at 38 U.S.C. 1741-43. VA has published regulations governing this program at 38 CFR Part 51. VA regulates eligibility for VA payment of State home domiciliary care per diem at § 51.51.

The second model for providing domiciliary care is defined in § 17.30(b)(1)(ii). There, domiciliary care is defined to mean the furnishing of a day hospital program consisting of intensive supervised rehabilitation and treatment provided in a therapeutic residential setting for residents with mental health or substance use disorders and co-occurring medical or psychosocial needs such as homelessness and unemployment. This model focuses on the needs of veterans eligible for domiciliary care and who are receiving care through VA's Mental Health Residential Rehabilitation Treatment Program, including Domiciliary Care for Homeless Veterans Program; General Domiciliary; Domiciliary Substance Use Programs; and Domiciliary Post-Traumatic Stress Disorder Programs. Today, a VA domiciliary consists of intensive supervised rehabilitation and treatment provided in a therapeutic residential setting that is aligned with VA medical facilities.

Veterans must meet the eligibility criteria found in 38 CFR 17.46(b) as well as §§ 17.47(b)(2) and 17.47(c) to receive domiciliary care in a VA domiciliary. Per § 17.46(b) domiciliary care may be furnished when needed to any veteran whose annual income does not exceed the maximum annual rate of pension payable to a veteran in need of regular aid and attendance, or any veteran who VA determines had no adequate means of support. There is an additional requirement in that paragraph that the veteran must be able to perform certain listed activities related to self-care. In turn, 38 CFR 17.47(b)(2) addresses how VA determines whether a veteran has no adequate means of support for purposes of eligibility for domiciliary care. Finally, 38 CFR 17.47(c) establishes that to be provided domiciliary care, the veteran must have a disability, disease, or defect which is essentially chronic in type and is producing disablement of such degree and probable persistency as will incapacitate from earning a living for a prospective period. Eligibility criteria found in §§ 17.46 and 17.47 are applicable to domiciliary care provided by VA in residential rehabilitation treatment venues. The same eligibility criteria generally are reflected in current 38 CFR 51.51 and are applicable to State home domiciliary veterans for purposes of per diem payment eligibility.

We propose multiple changes to our regulations. Initially, we propose to make a technical change in part 17 to remove the word domiciliary from a regulation that does not address domiciliary care. VA also proposes amending both Part 17 and 51 regulations that address how VA determines whether a veteran has no adequate means of support for purposes of eligibility for domiciliary care or domiciliary care per diem. VA proposes to amend its regulations to update the criteria used by VA in determining whether a veteran has no adequate means of support relative to eligibility for domiciliary care, and to shift the focus in the regulatory language from the veterans' ability to pursue substantially gainful employment to a broader consideration of the availability of

a family and/or community support system to assist the veteran in living independently, consideration of the veteran's ability to access that support system, and any medical conditions or disabilities that might impact that ability. In addition, we propose amending our State home regulations to implement VA's authority to waive certain eligibility requirements for eligibility for State home domiciliary care per diem and to permit waivers of these eligibility requirements retroactive to January 5, 2021.

Section 17.43 Persons entitled to hospital or domiciliary care.

The title of this section references domiciliary care as does the introductory sentence. However, the remaining content focuses on eligibility for hospital care. Eligibility for domiciliary care, as noted above, is addressed in subsequent sections of Part 17. We propose deleting references to domiciliary care in § 17.43.

Section 17.46 Eligibility for hospital, domiciliary or nursing home care of persons discharged or released from active military, naval, or air service.

Current § 17.46(b)(2) states that domiciliary care may be provided to any veteran who the Secretary determines had no adequate means of support. This paragraph further states that a veteran eligible for domiciliary care must be able to make rational and competent decisions as to their desire to remain or leave the facility and perform tasks related to self-care listed at § 17.46(b)(2)(i)-(viii). One task on the list, at paragraph (b)(2)(vii), provides that the veterans must be able to share in some measure, however slight, in the maintenance and operation of the facility. We propose removing this requirement, as the purpose of providing domiciliary care is treatment and rehabilitation, and requiring the veteran to participate in the maintenance and operation of the facility is inconsistent with that purpose. For this reason, we propose removing this requirement and redesignating current (b)(2)(viii) as (b)(2)(vii).

Section 17.47 Considerations applicable in determining eligibility for hospital care, medical services, nursing home care, or domiciliary care.

Current § 17.47(b)(2) specifies that "...the phrase *no adequate means of support* refers to an applicant for domiciliary care whose annual income exceeds the annual rate of pension for a veteran in receipt of regular aid and attendance, as defined in 38 U.S.C. 1503, but who is able to demonstrate to competent VA medical authority, on the basis of objective evidence, that deficits in health and/or functional status render the applicant incapable of pursuing substantially gainful employment, as determined by the Chief of Staff of the VA medical center, and who is otherwise without the means to provide adequately for self, or be provided for in the community."

The foci of current 38 CFR 17.47(b)(2) is on the ability to engage in substantially gainful employment and on self-reliance and achieving or sustaining independence in the community. VA believes that predicating eligibility for domiciliary care on the ability of the veteran to engage in gainful employment, is inconsistent with delivery of patient centered care. In patient-centered care, an individual's specific health needs and desired health outcomes are the driving force behind all health care decisions. Historically, domiciliary care in VA was primarily focused on delivering care to older residents who could not live independently but who did not require admission to a nursing home. The scope of domiciliary care provided by VA has expanded over the decades to meet the changing needs of veterans. Today, VA domiciliary care consists of intensive supervised rehabilitation and treatment provided in a therapeutic residential setting that is aligned with VA medical facilities. As discussed in further detail below, VA proposes taking a different approach to determining whether a veteran has no adequate means of support.

To determine that a veteran has no adequate means of support, current § 17.47(b)(2) requires a determination by VA on separate but interconnected issues. VA must determine that the veteran has an annual income that *exceeds* the annual rate of pension for a veteran in receipt of regular aid and attendance, as defined in 38 U.S.C. 1503. In addition, VA must determine that the veteran is able to demonstrate to VA medical authority that deficits in health and/or functional status render them incapable of pursuing substantially gainful employment and that the veteran is otherwise without the means to provide adequately for self, or be provided for in the community. VA does not consider the inability to pursue substantially gainful employment as a prime determinant in assessing a veteran's need for domiciliary care. VA believes that it also needs to consider the veteran's condition, medical and financial, in its entirety in the context of the veteran's ability to sustain and maintain independence in the community given available support systems and the veteran's ability to access those systems. For the purpose of determining eligibility for domiciliary care, VA believes that veterans with annual income above the rate set in the current regulation could still not have adequate means of support because having adequate means of support may also require the availability of a family and/or community support system to assist the veteran in living independently and the veteran's ability to access that support system, which takes into account any medical conditions or disabilities that might impact that ability.

VA proposes to amend § 17.47(b)(2) to state that for purposes of determining eligibility for domiciliary care, the phrase no adequate means of support refers to an applicant for or recipient of domiciliary care whose annual income exceeds the maximum annual rate of pension for a veteran in receipt of regular aid and attendance, as defined in 38 U.S.C. 1503, whose deficits in health and/or functional status may render the veteran incapable of achieving or sustaining independence in the community as determined by the Chief of Staff of the VA medical center, or designee. In assessing

a veteran's ability to achieve or sustain independence in the community, the Chief of Staff or designee will make a determination of eligibility for domiciliary care based on objective evidence, considering factors including, but not limited to: (i) the impact of the severity of the veteran's medical condition, disabilities, and symptoms on the veteran's safety in the community; (ii) the impact of the severity of the veteran's medical condition, disabilities, and symptoms on the veteran's ability to provide self-care; (iii) the availability of community or family support systems; (iv) the impact of the severity of the veteran's medical condition, disabilities, and symptoms on the veteran's ability to access and utilize community support systems; (v) the risk of loss of housing in the community; (vi) the risk of loss of the veteran's income; (vii) access to outpatient mental health and substance use disorder care; and (viii) the current effectiveness of any outpatient mental health and substance use disorder care provided to the veteran.

VA believes that this list of factors that must be considered, which is not intended to be all inclusive, would provide guidance to the Chief of Staff of a VA medical center, or designee, on the criteria that must be considered in determining eligibility for domiciliary care in those cases where the veteran's annual income exceeds the annual rate of pension for a veteran in receipt of regular aid and attendance.

Additionally, VA proposes to clarify existing language in 38 CFR 17.47(b)(2) by referring to the "maximum annual rate of pension" as opposed to "annual rate of pension". Section 17.47(b)(2) addresses how VA determines whether a veteran has no adequate means of support, while § 17.46(b) provides the eligibility requirements for domiciliary care. Specifically, § 17.46(b)(1) refers to the maximum annual rate of pension. VA believes that this is a non-substantive change that will maintain consistency with §§ 17.46(b)(1) and 17.47(b)(2). Further, VA proposes to add "or designee" when referring to the Chief of Staff. The authority to make determinations on eligibility for domiciliary care is exercised by the Chief of Staff of the VA medical center;

however, the Chief of Staff may delegate this responsibility to another clinical reviewer in the VA medical center.

We propose deleting paragraph (c) and marking that paragraph designation as Reserved. Current § 17.47(c) addresses three distinct issues. It provides a definition for the term disability, disease, or defect; it clarifies that domiciliary care is intended to provide a temporary home (not permanent) with ambulant care as needed; and it provides that to receive domiciliary care from VA, an applicant must consistently have a disability, disease, or defect which is essentially chronic in type and that disables the veteran to such a degree and probable persistency that the veteran will be unable to earn a living for a prospective period. The term disability, disease, or defect was used in earlier versions of our Part 17 regulations as an eligibility criterion for one class of veterans eligible for domiciliary care. The term disability, disease, or defect is not used anywhere else in Part 17 of 38 CFR except in the last sentence of current § 17.47(c), which is discussed below. We note that it is used in the definition of domiciliary care found in § 59.2, which defines terms relevant to grants to States for construction or acquisition of State homes. However, there is no reference to § 17.47(c) in § 59.2, and VA believes that the § 17.47(c) definition of disability, disease, or defect is not necessary for understanding the use of that term in Part 59. For those reasons, we propose removing the definition of disability, disease, or defect.

The second sentence in paragraph (c) states that “domiciliary care, as the term implies, is the provision of a temporary home, with such ambulant medical care as is needed.” This definition of domiciliary care is not as complete as the definition already in § 17.30(b) which includes the following: The term domiciliary care . . . [m]eans the furnishing of . . . [a] temporary home to a veteran, embracing the furnishing of shelter, food, clothing and other comforts of home, including necessary medical services.

Because the regulations already have a more complete definition of domiciliary care in § 17.30(b), we propose deleting the second sentence in § 17.47(c).

The final sentence in current § 17.47(c) states that to be provided with domiciliary care, the applicant must consistently have a disability, disease, or defect which is essentially chronic in type and is producing disablement of such degree and probable persistency as will incapacitate from earning a living for a prospective period. We propose removing this sentence because it ties eligibility for domiciliary care solely to incapacity to earn a living, which is inconsistent with VA's view that eligibility for domiciliary care needs to consider the veteran's condition, medical and financial, in its entirety as noted above.

Section 51.42 Payment procedures.

Section 51.42 addresses per diem payment procedures under part 51, and we propose to add a new paragraph (c) to implement per diem payments to a State home domiciliary because of the new authority granted by Public Law (Pub. L.) 116-315, section 3007(a). As explained later in this rulemaking, we propose to revise eligibility for per diem for domiciliary care in § 51.51(b) to implement the new authority as of January 5, 2021. In proposed § 51.42(c) we would state that VA will make per diem payments under this part retroactive to the date specified by § 51.42(b)(3), or January 5, 2021, whichever date is later, if all the requirements in proposed § 51.42(c)(1) through (4) are met. We would make per diem payments retroactive pursuant to § 51.42(b)(3) (i.e., from the date of receipt of the completed forms or from the date care began if the State home submitted completed forms (no later than 10 calendar days after care began)). State homes have and continue to be required to submit the following forms no later than 10 calendar days after care begins to receive payments retroactive to the date of admission: (1) VA Form 10-10EZ, Application for Medical Benefits (or VA Form

10-10EZR, Health Benefits Renewal Form); and (2) VA Form 10-10SH, State Home Program Application of Care - Medical Certification. Further, we believe State homes that have admitted veterans in reliance on this new discretionary authority have continued to submit completed forms for per diem payments for these veterans under § 51.42.

Proposed § 51.42(c)(1) would set forth one of the requirements that must be met for VA to make per diem payments under this part retroactive to the date specified by paragraph (b)(3) of this section: that within 30 calendar days of the effective date of the rule, a State home provides VA a written list of veterans' names for whom completed forms were received by VA on or after January 5, 2021, and the State home requests that VA consider them for a waiver under proposed § 51.51(b)(2). It would be administratively burdensome for VA to conduct a retrospective review of every denied application since January 5, 2021 and review current applications in a timely manner. Not all denied applications would be eligible for a waiver under § 51.51(b). Therefore, we would require State homes to submit to VA a written list of veterans whose completed forms have been denied pursuant to current § 51.51(b) on or after January 5, 2021, and whom the State home wants to have considered for a waiver under proposed § 51.51(b)(2). We believe this would result in the most efficient retrospective review of denied applications and allow VA to process applicable retroactive per diem payments in a timely manner. We would require that the list be provided within 30 days of the effective date of the rule because we believe State homes have already been tracking which veterans they believe might receive a waiver under this new authority and would be on notice upon publication of this proposed rule of our intent to require that a written list be provided within that time period. Also, we would limit retrospective reviews to completed forms received by VA on or after January 5, 2021. We would use January 5, 2021, as this is consistent with the effective date of Pub. L. 116-315, section 3007(a)

granting the new authority and the date we propose to use in 38 CFR 51.51(b)(1). We would focus on completed forms received because 38 U.S.C. 1743 only allows VA to pay per diem from the date that VA receives the request for VA to determine the veteran's eligibility or from the date care began if the request is received within 10 days after care begins. If the required forms are received after 10 days from the date care begins, then payments will be made from the date VA receives the required forms. *Id.* Therefore, we believe that VA lacks the statutory authority to make per diem retroactive to the date veterans began receiving care in a State home domiciliary in reliance on Pub. L. 116-315, section 3007(a), unless the State home submitted the required forms (i.e., VA Form 10-10EZ and VA Form 10-10SH) within 10 days of that date. For example, if a State home admitted a veteran in reliance of Pub. L. 116-315, section 3007(a) on January 5, 2021, and to date has not submitted the required forms, then the earliest VA may make per diem payments is as of the date VA receives the required forms. In the same example, if a State home submitted the required forms no later than 10 days from January 5, 2021, then the State home may receive per diem retroactive to January 5, 2021, so long as all of the requirements in proposed 38 CFR 51.42(c)(1) through (4) are met. In the same example, if a State home submitted the required forms on the day on which care began, e.g., January 25, 2022, then the State home may receive per diem retroactive to January 25, 2022, so long as all the requirements in proposed § 51.42(c)(1) through (4) are met. Further, we note that in the proposed regulatory text for this paragraph, the effective date is referenced as “[EFFECTIVE DATE OF FINAL RULE]”. It is VA's intent to replace this language with the actual effective date of this rule which will be determined upon publication of the final rule.

Two other requirements would need to be met for a State home to receive retroactive per diem for care provided prior to the effective date of this regulation. Proposed § 51.42(c)(2) and (c)(3) would provide that with respect to the veterans on the

written list under proposed (c)(1), VA denied the State's request for per diem for the veterans when their forms were originally submitted and the denial was solely because the veteran did not meet the requirements under § 51.51(b) and that, upon VA review, the veteran would have received a waiver under proposed § 51.51(b)(2) if this regulation had been in effect when the request for per diem was originally submitted, respectively. Upon receipt of a list of veterans whom the State home wants to have considered for a waiver under proposed § 51.51(b)(2), VA would verify that the claim was denied solely pursuant to current § 51.51(b), which lists the eight tasks and activities a veteran must be able to perform to establish eligibility for VA per diem for State home domiciliary care, because, as discussed below, Pub. L. 116-315, section 3007(a) requires VA to amend 38 CFR 51.51(b) to allow waivers of these requirements under certain conditions. Further, as discussed below we propose to revise § 51.51(b) by creating a new paragraph (b)(2) to implement the new authority. Therefore, after verifying that a claim was denied solely due to a veteran's inability to perform the eight tasks and activities listed in current § 51.51(b), we would then determine whether the claim is eligible for a waiver under proposed § 51.51(b)(2). We note we will not continue to conduct a retrospective review if the claim was denied for a reason other than the eligibility requirement under current § 51.51(b). Therefore, if a claim was denied because the veteran did not meet the eligibility requirements in current § 51.51(a), VA would not grant a waiver under proposed § 51.51(b)(2).

The final requirement that would need to be met for a State home to receive retroactive per diem for care provided prior to the effective date of this regulation is in proposed § 51.42(c)(4). That provision would require the State home to submit to VA a completed VA Form 10-5588, State Home Report and Statement of Federal Aid Claimed, for each month that the State home provided domiciliary care to a veteran for whom the home is requesting a waiver. The form would cover only the veterans not

originally included on the form when submitted previously for that month. This requirement would enable VA to make applicable retroactive per diem payments to State homes. VA Form 10-5588 is an invoice in VA's payment system and is required for State homes to receive payments. The submission of VA Form 10-5588 will enable VA to make a supplemental payment to State homes for veterans who meet the requirements for retroactive per diem.

We believe the changes discussed above will allow VA to provide retroactive per diem payments to a State home domiciliary if the requirements under proposed § 51.41(c)(1) through (4) are met, irrespective of when this rulemaking is effective.

Section 51.51 Eligible veterans—domiciliary care.

Section 51.51 specifies the Veterans on whose behalf State homes may receive per diem payments from VA for domiciliary care in State home domiciliaries. The criteria reflected in this section derive primarily from §§ 17.46(b) and 17.47(b)(2). VA determinations regarding which veterans on whose behalf VA may pay per diem payments for domiciliary care in State homes and which are eligible for domiciliary care in a VA domiciliary, and the factors considered by VA in making those determinations, are currently the same regardless of whether the domiciliary care is provided directly by VA or by a State home. See 38 U.S.C. 1741. As discussed below, under section 3007 of Pub. L. 116-315, VA is required to modify 38 CFR 51.51(b) to provide VA the authority to waive the requirements under current § 51.51(b) for a veteran to be eligible for per diem payments for domiciliary care at a State home if—

(1) the veteran has met not fewer than four of the requirements set forth in such section; or

(2) such waiver would be in the best interest of the veteran.

Current § 51.51(a)(2) substantively mirrors current § 17.47(b)(2), and for purposes of consistency, we propose amending § 51.51(a)(2) consistent with proposed § 17.47(b)(2). We note that the addition of these factors that must be considered when determining if a veteran has no adequate means of support would not affect the waiver authority granted by Pub. L. 116-315, section 3007(a). Some of the factors in proposed §§ 51.51(a)(2) and (b)(1) overlap. For example, a veteran's ability to provide self-care in proposed paragraph (a)(2) and a veteran's ability to perform daily ablutions, dress or feed oneself in proposed paragraph (b)(1). However, the factors listed under proposed § 51.51(a)(2) are focused, in part, on any medical conditions or disabilities that might impact a veteran's ability to live independently; whereas the factors listed under proposed § 51.51(b) are tasks that a veteran must be able to perform and would thus be indicative of a veteran's ability to live independently. We believe that any requirement waived under proposed § 51.51(b) would be indicative of a veteran's inability to live independently. Therefore, a factor waived under proposed § 51.51(b)(2) could be considered under the proposed factors in proposed § 51.51(a)(2) to determine whether a veteran has no means of adequate support.

Current § 51.51(b) mirrors current § 17.46(b)(2), listing tasks and abilities that a veteran must exhibit to be eligible for domiciliary care. Pub. L. 116-315, section 3007(a) states that notwithstanding 38 U.S.C. 1741, the Secretary of Veterans Affairs shall modify 38 CFR 51.51(b) (or successor regulations), to provide the Secretary the authority to waive the requirements under § 51.51(b) for a veteran to be eligible for per diem payments for domiciliary care at a State home if (1) the veteran has met not fewer than four of the requirements set forth in such section; or (2) such waiver would be in the best interest of the veteran.

The authority to make decisions on eligibility for domiciliary level of care is exercised by the Chief of Staff of the VA medical center of jurisdiction, or designee. VA

believes that this local VA official is in the best position to evaluate whether there is sufficient evidence to establish that an individual veteran is eligible for the purposes of payment of per diem for domiciliary care in a State home, and to know the capabilities and level of care provided by the State home domiciliary.

We propose revising § 51.51(b) by listing the tasks and activities a veteran must be able to perform for VA to pay the State home a per diem for domiciliary care on behalf of the veteran in a new paragraph (b)(1) and creating a new paragraph (b)(2) to implement the new authority in Pub. L. 116-315, section 3007(a) to waive the requirements in paragraph (b)(1).

Proposed § 51.51(b)(1) would list the tasks and activities a veteran must be able to perform for VA to pay per diem on behalf of the veteran to the State home for domiciliary care. This list is similar to current 51.51(b), with differences discussed below, and would mirror that in proposed § 17.46(b)(2), with one substantive difference discussed below. Proposed § 17.46(b)(2)(vii) states that a veteran eligible for domiciliary care must be able to make rational and competent decisions as to his or her desire to remain or leave the facility. This is an important requirement for domiciliary care provided via a day hospital residential rehabilitation treatment model, as the primary goal is rehabilitation. However, State homes are residential sites operated for veterans by the States. In those cases, authority to make decisions as to whether to remain or leave the facility is governed by State law. In proposed 51.51(b)(1)(vii), we would keep the same language in current 51.51(b)(8); however, we would add additional language to address that in cases of veterans who lack the general capacity needed to decide to remain in or to leave a State Home, which is a community residential placement decision, their legal representative as designated under State law is empowered to make this decision behalf of the veteran.

In our discussion of the rationale for removing the requirement in current § 17.46(b)(2)(vii) that a veteran eligible for domiciliary care be able to share in some measure, however slight, in the maintenance and operation of the facility, we stated that the purpose of providing domiciliary care is treatment and rehabilitation, and requiring the veteran to share in the maintenance and operation of the facility is inconsistent with that purpose. As noted, we likewise propose removing this similar requirement found in current § 51.51(b)(7) for eligibility for per diem for domiciliary care provided by a State home. The requirement that the veteran must “participate in some measure, however slight, in work assignments that support the maintenance operation of the State home” is inconsistent with the mission and goals of the State home domiciliary program, to include domiciliary care as a temporary home as one of its primary goals. Further, some States prohibit their State homes from requiring any type of work from domiciliary residents. By removing this requirement, the list of tasks that a veteran must be capable of performing, except in those instances where the Chief of Staff of the VA medical center of jurisdiction, or designee, grants a waiver under paragraph (b)(2), is reduced from eight to seven tasks. Therefore, we believe that the removal of this requirement neither diminishes the effect nor is contrary to the new waiver authority granted by Pub. L. 116-315, section 3007(a).

In proposed 38 CFR 51.51(b)(2), we would state that the Chief of Staff of the VA medical center of jurisdiction, or designee, may waive the requirements in § 51.51(b)(1) for purposes of per diem for domiciliary care in a State home on or after January 5, 2021, if the veteran is able to perform not fewer than four of the requirements set forth in such paragraph; or such waiver would be, based on a clinical determination, in the best interest of the veteran because receipt of domiciliary care in the particular State home would likely be beneficial to the veteran. This clinical determination must consider whether receiving domiciliary care in the State home would significantly

enhance the veteran's ability to live safely, would support the veteran's potential progress in rehabilitation, if such potential exists, and would create an environment that supports the health and well-being of the veteran. In granting a waiver of paragraph (b)(1) of this section, the Chief of Staff of the VA medical center of jurisdiction, or designee, must make a finding that the State home has the capability to provide the domiciliary care that the veteran needs.

We would use January 5, 2021, as this is consistent with the effective date of Pub. L. 116-315, section 3007(a) granting this authority. Also, we would include language to define "in the best interest" as used in this paragraph. VA believes that determinations of "in the best interest" must be a clinical determination, guided by VA health professionals' judgment on what care will best support the health and well-being of the veteran – including that which offers the best opportunity for recovery and rehabilitation, whenever possible. In some cases, a clinician may determine that other care and maintenance options would better promote the veteran's functional capabilities and potential for greater independence, or that a higher level of care may better ensure that the veteran receives the level of care necessary. Further, we would require the Chief of Staff of the VA medical center of jurisdiction, or designee, to make a finding that the State home has the capability to provide the domiciliary care that the veteran needs to clearly indicate that the decision to waive a particular regulatory requirement for domiciliary care cannot be made independent of an understanding of the State home's capabilities and level of care provided to domiciliary residents. State home domiciliaries vary in the type of resident that can be admitted, based on factors such as building structure, staffing expertise, staffing levels, and availability of support equipment. If the veteran's medical status is beyond the scope of care that can be provided by the State home domiciliary to which admission is sought, we do not believe VA should encourage the State home domiciliary to accept the veteran as a resident by paying the home a per

diem for the veteran. If waiver is requested of an eligibility requirement in proposed 38 CFR 51.51(b)(1) VA must make a determination that the State home domiciliary is capable of providing the level of care necessary if such waiver is granted. Evaluating the capabilities provided in the State home domiciliary is an integral element that must be considered when determining to grant a waiver. Although this is not explicitly stated in current § 51.51, such consideration has been longstanding VA policy and practice.

Section 51.300 Resident rights and behavior; State home practices; quality of life.

Current 38 CFR 51.300(b) states that the State home resident must participate, based on his or her ability, in some measure, however slight, in work assignments that support the maintenance and operation of the State home. It requires the State home to create a written policy to implement the work requirement and integrate the work requirement into a comprehensive care plan. As we would remove the requirement that a State home resident participate to some degree in work in support of maintenance and operation of the State home, we likewise propose removing this paragraph and marking it as reserved.

Paperwork Reduction Act

This proposed rule includes provisions constituting a revised collection of information under the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521) that requires approval by the Office of Management and Budget (OMB). Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review and approval.

OMB assigns control numbers to collection of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. If OMB does not

approve the collection of information as requested, VA will immediately remove the provisions containing the collection of information or take such other action as is directed by OMB.

Comments on the new collection of information contained in this rulemaking should be submitted through www.regulations.gov. Comments should indicate that they are submitted in response to “RIN 2900-AR61, Determining Eligibility for Domiciliary Care” and should be sent within 60 days of publication of this rulemaking. The collection of information associated with this rulemaking [can be viewed at: www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain).

OMB is required to make a decision concerning the collection of information contained in this rulemaking between 30 and 60 days after publication of this rulemaking in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the provisions of this rulemaking.

The Department considers comments by the public on a new collection of information in-

- Evaluating whether the new collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
 - Evaluating the accuracy of the Department’s estimate of the burden of the new collection of information, including the validity of the methodology and assumptions used;
 - Enhancing the quality, usefulness, and clarity of the information to be collected;
- and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or

other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The collection of information associated with this rulemaking contained in 38 CFR 51.42(c) is described immediately following this paragraph, under its respective title. This new information collection will be added to OMB control number 2900-0160, containing State home program forms 10-5588, 10-5588A, and 10-10SH, which has a current PRA clearance.

Title: List of Veteran Names for Claim Reconsideration.

OMB Control No: 2900-0160.

CFR Provision: 38 CFR 51.42(c).

- *Summary of collection of information:* The revised collection of information in proposed 38 CFR 51.42(c) would allow State homes to submit a list of veteran names whose completed forms were received by VA on or after January 5, 2021, but VA subsequently denied the State home's request for payment for the care of these veterans pursuant to current § 51.51(b), to VA for consideration of a waiver under proposed § 51.51(b)(2). This is a time limited opportunity – the list of names must be received within 30 days of the effective date of the rule.

- *Description of need for information and proposed use of information:* The information will be used by VA to conduct retrospective reviews of denied applications and allow VA to process applicable retroactive payments in a timely manner.

- *Description of likely respondents:* State home administrators and State homes that have admitted veterans in reliance on the authority granted by Pub. L. 116-315, section 3007(a) and that want these veterans considered for a waiver under proposed § 51.51(b)(2).

- *Estimated number of respondents:* Two.

- *Estimated frequency of responses:* Once.

- *Estimated average burden per response:* 90 minutes.
- *Estimated total annual reporting and recordkeeping burden:* 3 hours.
- *Estimated cost to respondents per year:* VA estimates the one-time annual cost

to respondents to be \$177.21. Using VA's average annual number of respondents, VA estimates the total information collection burden cost to be \$177.21 per year* (3 burden hours for x \$59.07 per hour).

*To estimate the total information collection burden cost, VA used the Bureau of Labor Statistics (BLS) mean hourly wage for "General and Operations Managers" of \$59.07 per hour. This [information is available at](#)

https://www.bls.gov/oes/current/oes_nat.htm#13-0000.

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. This proposed rule would directly affect only individuals who are veterans applying for domiciliary care as well as States operating State homes and would not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Executive Orders 12866, 13563, and 14094

Executive Order 12866 (Regulatory Planning and Review) directs 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 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is not a significant regulatory action under Executive Order 12866, as amended by Executive Order 14094. The Regulatory Impact Analysis associated with this rulemaking can be found [as a supporting document](#) at www.regulations.gov..

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

Assistance Listing

The Assistance Listing number and title for the program affected by this document is 64.014 - Veterans State Domiciliary Care.

List of Subjects

38 CFR Part 17

Administrative practice and procedure, Claims, Domiciliary care, Government contracts, Health care, Health facilities, Mental health programs, Reporting and recordkeeping requirements, Veterans.

38 CFR Part 51

Administrative practice and procedure, Claims, Domiciliary care, Government contracts, Health care, Health facilities, Mental health programs, Reporting and recordkeeping requirements, Veterans.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved this document on August 24, 2023, 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.

Consuela Benjamin,

Regulation Development Coordinator

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

For the reasons set forth in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR parts 17 and 51 as follows:

PART 17 – MEDICAL

1. The authority citation for part 17 is amended by adding an entry in numerical order for § 17.47 to read as follows:

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

Section 17.47 is also issued under 38 U.S.C. 1701, 1710, 1721, 1722, 1729, 3104(a)(9), 7333, Pub. L. 99-272; 42 U.S.C. 1396 et seq.

§ 17.43 [Amended]

2. Amend § 17.43 by removing the words “or domiciliary” in the section heading and introductory text.

§ 17.46 [Amended]

3. Amend § 17.46 by removing paragraph (b)(2)(vii), and redesignating paragraph (b)(2)(viii) as paragraph (b)(2)(vii).

4. Amend § 17.47 by:

a. Removing the authority citations immediately following paragraphs (b)(1), (b)(2), (c), (d)(1)(i), (d)(1)(iii), (d)(2), (d)(3), (d)(4), (d)(5), (e)(1), (e)(2), (f), (g)(1)(ii), (g)(2)(iv), (i)(2)(vii), (j), and (k).

b. Revise paragraph (b)(2).

c. Remove and reserve paragraph (c).

Revisions read as follows:

§ 17.47 Considerations applicable in determining eligibility for hospital care, medical services, nursing home care, or domiciliary care.

* * * * *

(b) * * *

(2) For purposes of determining eligibility for domiciliary care under § 17.46(b)(2) of this part, the phrase no adequate means of support refers to an applicant for or recipient of domiciliary care whose annual income exceeds the maximum annual rate of pension for a veteran in receipt of regular aid and attendance, as defined in 38 U.S.C. 1503, whose deficits in health and/or functional status may render the veteran incapable of achieving or sustaining independence in the community as determined by the Chief of Staff of the VA medical center, or designee. In assessing a veteran's ability to achieve or sustain independence in the community, the Chief of Staff or designee will make a determination of eligibility for domiciliary care based on objective evidence, considering factors including, but not limited to:

(i) the impact of the severity of the veteran's medical condition, disabilities, and symptoms on the veteran's safety in the community;

(ii) the impact of the severity of the veteran's medical condition, disabilities, and symptoms on the veteran's ability to provide self-care;

(iii) the availability of community or family support systems;

(iv) the impact of the severity of the veteran's medical condition, disabilities, and symptoms on the veteran's ability to access and utilize community support systems;

(v) the risk of loss of housing in the community;

(vi) the risk of loss of the veteran's income;

(vii) access to outpatient mental health and substance use disorder care; and

(viii) the current effectiveness of any outpatient mental health and substance use disorder care provided to the veteran.

(c) [Reserved]

* * * * *

Part 51 - PER DIEM FOR NURSING HOME, DOMICILIARY, OR ADULT DAY HEALTH CARE OF VETERANS IN STATE HOMES

5. The authority citation for part 51 is amended by revising § 51.42, and adding an entry in numerical order for § 51.51 to read as follows:

* * * * *

Section 51.42 also issued under 38 U.S.C. 510, 1744, and Pub. L. 116-315 section 3007.

* * * * *

Section 51.51 also issued under Pub. L. 116-315 section 3007.

* * * * *

6. Amend § 51.42 by adding paragraph (c) to read as follows:

§ 51.42 Payment procedures.

* * * * *

(c) *Retroactive payments.* VA will make per diem payments under this part retroactive to the date specified by paragraph (b)(3) of this section, or January 5, 2021, whichever date is later, if all the following are met:

(1) Within 30 calendar days of [EFFECTIVE DATE OF FINAL RULE]] the State home provides VA a written list of veterans' names for whom completed forms were received by VA on or after January 5, 2021, and the State home requests that VA consider them for a waiver under § 51.51(b)(2);

(2) With respect to the veterans on the written list under paragraph (c)(1), VA denied the State's request for per diem for the veterans when their forms were originally submitted and the denial was solely because the veteran did not meet the requirements under 38 CFR 51.51(b) (2021);

(3) Upon VA review, the veteran would have received a waiver under § 51.51(b)(2) if that paragraph had been in effect when the request for per diem was originally submitted; and

(4) The State home submits to VA a completed VA Form 10-5588, State Home Report and Statement of Federal Aid Claimed, for each month that the State home provided domiciliary care to a veteran for whom the home is requesting a waiver. The form would only cover the veterans not originally included on the form when submitted previously for that month.

7. Amend § 51.51 by revising paragraphs (a)(2) and (b) to read as follows:

§ 51.51 Eligible veterans—domiciliary care.

(a) * * *

(1) * * *

(2) A veteran who VA determines has no adequate means of support. When an applicant's annual income exceeds the rate of pension described in paragraph (a)(1) of this section, VA will determine if the applicant has no adequate means of support. This determination will be made through an assessment of the veteran's deficits in health or functional status that may render the veteran incapable of achieving or sustaining independence in the community as determined by the Chief of Staff of the VA medical center of jurisdiction, or designee. Assessment of whether the veteran has no adequate means of support will be based on objective evidence that considers factors that are inclusive of but not limited to:

(i) the impact of the severity of the veteran's medical condition, disabilities, and symptoms on the veteran's safety in the community;

(ii) the impact of the severity of the veteran's medical condition, disabilities, and symptoms on the veteran's ability to provide self-care;

(iii) the availability of community or family support systems;

(iv) the impact of the severity of the veteran's medical condition, disabilities, and symptoms on the veteran's ability to access and utilize community support systems;

(v) the risk of loss of housing in the community;

(vi) the risk of loss of the veteran's income;

(vii) access to outpatient mental health and substance use disorder care; and

(viii) the current effectiveness of any outpatient mental health and substance use disorder care provided to the veteran.

(b) (1) For purposes of this section, the eligible veteran must be able to perform the following:

(i) Daily ablutions, such as brushing teeth, bathing, combing hair, and body eliminations, without assistance.

(ii) Dress himself or herself with a minimum of assistance.

(iii) Proceed to and return from the dining hall without aid.

(iv) Feed himself or herself.

(v) Secure medical attention on an ambulatory basis or by use of a personally propelled wheelchair.

(vi) Have voluntary control over body eliminations or have control by use of an appropriate prosthesis.

(vii) Make rational and competent decisions as to the veteran's desire to remain in or leave the State home; or, if the veteran lacks the general capacity to make this residential care placement decision, as defined by State law, then the veteran's legal representative designated in accordance with State law, is authorized to make this decision on behalf of the veteran.

(2) The Chief of Staff of the VA medical center of jurisdiction, or designee, may waive the requirements in paragraph (b)(1) of this section for purposes of payment of per diem for domiciliary care in a State home on or after January 5, 2021, if the veteran is able to perform not fewer than four of the requirements set forth in such paragraph; or such waiver would be, based on a clinical determination, in the best interest of the veteran because receipt of domiciliary care in the particular State home would likely be beneficial to the veteran. This clinical determination must consider whether receiving domiciliary care in the State home would significantly enhance the veteran's ability to

live safely, would support the veteran's potential progress in rehabilitation, if such potential exists, and would create an environment that supports the health and well-being of the veteran. In granting a waiver of paragraph (b)(1) of this section, the Chief of Staff of the VA medical center of jurisdiction, or designee, must make a finding that the State home has the capability to provide the domiciliary care that the veteran needs.

§ 51.300 [Amended]

8. Amend § 51.300 by removing and reserving paragraph (b).

[FR Doc. 2023-18921 Filed: 8/31/2023 8:45 am; Publication Date: 9/1/2023]