



38 CFR Part 70

RIN 2900-AS03

Changes in Rates VA Pays for Special Modes of Transportation; Delay of Effective Date

AGENCY: Department of Veterans Affairs.

ACTION: Final rule; delay of effective date.

SUMMARY: The Department of Veterans Affairs (VA) published in the Federal Register on February 16, 2023, a final rule to amend its beneficiary travel regulations to establish a new payment methodology for special modes of transportation available through the VA beneficiary travel program. The preamble of that final rule stated the effective date was February 16, 2024. This rulemaking delays that effective date to February 16, 2025.

DATES: The effective date for the final rule published February 16, 2023, at 88 FR 10032, is delayed from February 16, 2024, until February 16, 2025.

FOR FURTHER INFORMATION CONTACT: Ben Williams, Director, Veterans Transportation Program (15MEM), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (404) 828-5691. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On November 5, 2020, VA proposed amending its beneficiary travel regulations to implement the discretionary authority in 38 U.S.C. 111(b)(3)(C), which permits VA to pay the lesser of the actual charge for ambulance transportation or the amount determined by the Centers for Medicare and Medicaid Services (CMS) Medicare Part B Ambulance Fee Schedule (hereafter referred to the CMS ambulance fee schedule) established under section 1834(l) of the Social Security Act (42 U.S.C. 1395m(l)),

unless VA has entered into a contract for that transportation. We provided a 60-day comment period that ended on January 4, 2021, and we received six comments, five of which were substantive. Those five comments all raised similar concerns to 38 CFR 70.30(a)(4) introductory text and (a)(4)(i) and (ii) as proposed, related to using the CMS ambulance fee schedule or, in the case of travel by modes other than ambulance, the posted rates from each State. We responded to all comments in a final rule published in the Federal Register on February 16, 2023 (88 FR 10032), wherein we stated that we would not make changes from the proposed rule related to application of the CMS ambulance fee schedule but would delay the effective date of the final rule by one year (to be February 16, 2024) to ensure that ambulance providers have adequate time to adjust to VA's new methodology for calculating ambulance rates (88 FR 10035). We further stated in the final rule that such adjustment could include ambulance providers entering negotiations with VA to contract for payment rates different than those under the CMS ambulance fee schedule, as contemplated in the final rule.

Since publication of the final rule, however, VA has received feedback from both internal and external stakeholders, including VA employees, ambulance providers, and industry experts, that more time is necessary for successful implementation of the rule. Specifically, the delay of the effective date is necessary to accommodate unforeseen difficulties in air ambulance broker contracting. These difficulties relate to air ambulance brokers requiring a contract or subcontract in place with all potential air ambulance providers that covers emergency, non-VA initiated trips. Based on this feedback and evaluation of the continued effort that would be required by air ambulance brokers to negotiate and enter into contracts before February 16, 2024, VA is delaying the effective

date of the regulation by one year. VA believes a 12-month delay is appropriate based on its experience with contracting, especially in circumstances like this where subcontracting actions are required.

Administrative Procedure Act

The Administrative Procedure Act (APA), codified in part at 5 U.S.C. 553, generally requires that agencies publish substantive rules in the Federal Register for notice of proposed rulemaking and to solicit public comment. However, pursuant to 5 U.S.C. 553(b)(B) of the APA, general notice and the opportunity for public comment are not required with respect to a rulemaking when an “agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”

VA finds that there is good cause under the APA to issue this rule without prior notice and opportunity for public comment. The final rule published at 88 FR 10032 will become effective February 16, 2024. Given the imminence of the effective date, seeking prior notice and the opportunity for public comment on this delay is impractical. Specifically, if prior notice and opportunity for public comment are required to delay the effective date to February 16, 2025, this final rule will not be issued prior to February 16, 2024. As a result, the current final rule will become effective February 16, 2024, and ambulance providers without contracts in place would be subject to those payment methodologies until contracts have been implemented. For those entities engaged in the contracting process, this is likely to cause confusion and uncertainty.

VA also finds that prior notice and opportunity for comment would be contrary to the public interest because it could adversely impact veteran care or result in veterans being billed directly for services. Under the new regulation, VA

will pay the lesser of actual charge associated with an air ambulance service, or the CMS ambulance fee schedule rate for that service, unless a separate rate has been established based on local contracts between air ambulance providers and local VA medical centers. As discussed above, since publication of the final rule, VA has received feedback that more time is necessary to accommodate unforeseen difficulties in air ambulance broker contracting, which relate to air ambulance brokers requiring a contract or subcontract in place with all potential air ambulance providers that covers emergency, non-VA initiated trips. The negotiation and implementation of these contracts will not be completed by February 16, 2024. As a result, absent the delayed effective date, the current final rule will go into effect on February 16, 2024, and ambulance providers would be subject to those payment methodologies until contracts have been implemented. This could be especially concerning for those entities whose negotiated rates could be higher than the applicable CMS ambulance fee schedule rate in the event VA determines it may be justified based on local considerations, such as for rural areas. Air ambulance providers contend that the Medicare reimbursement rate that would apply absent a contract is unsustainable for their business operations, potentially leading to reduction in the availability of air ambulance services for veterans. While VA is not aware that veterans are currently receiving preferential treatment from air ambulance providers by virtue of VA paying billed charges, or that such preferential treatment would stop were VA to pay CMS ambulance fee schedule rates in the absence of a contract, VA acknowledges that there is a risk that veterans could be billed directly for the difference between the Medicare rate that VA pays for emergency, non-VA initiated trips and the amount billed by the ambulance provider. For these reasons, VA finds that good cause exists to dispense with the prior notice and

public comment procedures for this final rule, as it concludes that such procedures are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(B).

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved and signed this document on December 22, 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.

Jeffrey M. Martin,

Assistant Director,

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

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