

DATE: 03-11-91

CITATION: VAOPGCPREC 17-91
Vet. Aff. Op. Gen. Couns. Prec. 17-91

TEXT:

SUBJECT: Home Dialysis.

(This opinion, previously issued as Opinion of the General Counsel 5-70, dated October 2, 1970, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

To: Associate Deputy Administrator and Chief Medical Director

QUESTIONS PRESENTED:

(1) Whether VA can finance hemodialysis in the home for veterans whose kidney disease is either of service-connected or non-service-connected origin?

(2) If so, whether VA can authorize Government-owned home dialysis equipment to be installed in a community hospital for the treatment of an eligible veteran and, in exchange for the use of the hospital's facilities and staff in dialyzing the veteran, permit the hospital to dialyze non-veterans when the equipment is not being used for treatment of veterans?

COMMENTS:

Dialysis treatment in the home is a form of outpatient care, which is supplemental to the dialysis treatment furnished in units established in various VA hospitals, and results in expanded use of the hospital facilities and equipment. The general authority of VA to furnish outpatient care to veterans is found in 38 U.S.C. § 612(a), which provides:

"Except as provided in subsection (b), the Administrator, within the limits of Veterans' Administration facilities, may furnish such medical services as he finds to be reasonably necessary to any veteran for a service-connected disability. In the case of any veteran discharged or released from the active military, naval, or air service for a disability incurred or aggravated in line of duty, such services may be so furnished for that disability, whether or not service-connected for the purposes of this chapter." (emphasis added).

Although the statute does not contain an all-inclusive definition of "medical services", some light on its scope is shed by 38 U.S.C. § 601(6), which provides:

"The term 'medical services' includes, in addition to medical examination and treatment, optometrists' services, dental and surgical services, and (except under the conditions described in section 612(f)(1)) dental appliances, wheelchairs, artificial limbs, trusses, and similar appliances, special clothing made necessary by the wearing of prosthetic appliances, and such other supplies as the Administrator determines to be reasonably and necessary."

This has traditionally been considered authority for the furnishing of prosthetic appliances to disabled service-connected veterans on an outpatient basis. See 89 Op Sol 328 and A.D. 702.

Prosthetic appliances are defined in M-2, Part IX (August 6, 1970), paragraph 1.01, subparagraph h, as follows:

"All aids, appliances, parts or accessories which are required to replace, support, or substitute for a deformed, weakened, or missing anatomical portion of the body, but not including dental prostheses ..."

In 87 Op Sol 110, it was stated "The word 'prosthesis' is defined in Webster's New International Dictionary (2nd Edition):

'The addition to the human body of some artificial part to replace one wanting, as a leg, eye, or tooth ...' "

It is readily apparent that a home dialysis unit comes within either definition of a prosthetic appliance and, as such, may be provided to an eligible service-connected veteran just as any other prosthetic appliance would be provided under 38 U.S.C. § 612(a). (We believe that this basic conclusion is not altered in any way by the fact that there has been an administrative classification which includes home dialysis equipment under the designation of "medical equipment", found in subparagraph e of the same manual paragraph.)

An exception to this restriction of outpatient treatment only for service-connected disorders was added in 1960 by Public Law 86-639 and, as amended, now appears in section 612(f) of title 38 as follows:

"(f) The Administrator may also furnish medical services for a non- service-connected disability under the following circumstances:

- (1) ...
- (2) Where a veteran has been granted hospital care, and outpatient care is reasonably necessary to complete treatment incidence to such hospital care,
- (3) where a veteran of any war has a total disability permanent in nature resulting from a service-connected disability."

Hence, outpatient care of a non-service-connected disability may be furnished to round out an episode of VA hospitalization, thereby making a bed available for another patient in need of treatment. In practice, this authority is generally exercised by providing this "follow-up" treatment at the hospital clinic, but the service could be legally provided in the home if more feasible, there being no limitation in this provision to directly operated VA facilities. This authorization was not intended to afford outpatient treatment on a permanent basis (see House Report No. 1533, and Senate Report No. 1662, to accompany H.R. 7965, 86th Congress.)

If the post-hospital treatment authorized by section 612(f) is continued for a year, involves a veteran who is receiving increased pension or compensation based on the need for regular aid and attendance, and the disease entity is one of six specified in section 612(g) of title 38, outpatient treatment may be continued on a permanent basis. Among the specified disease entities is "cardiovascularrenal disease, including hypertension".

In addition to the authority found in section 612(a) for service-connected conditions and sections 612(f) and (g) for non-service-connected conditions, there is for consideration the applicability of section 617 to the instant question. 38 U.S.C. § 617 provides:

"The Administrator may furnish an invalid lift, or any type of therapeutic or rehabilitative device, as well as other medical equipment and supplies (excluding medicines), if medically indicated, to any veteran who is receiving (1) compensation under subsections 314(1)-(p) (or the comparable rates provided pursuant to section 334) of this title, or (2) pension under chapter 15 of this title by reason of being in need of regular aid and attendance."

Manifestly, the types of therapeutic or rehabilitative devices and equipment and supplies contemplated by this section have changed over the years. When Congress was considering making this benefit available, the Committee reports listed a limited number of items as reflecting examples of what might be issued (Senate Report No. 1293 and House Report No. 680, to accompany HR 8009, 88th Congress) to pensioners eligible for an invalid lift. Following the enactment of PL 88-450, the class of persons eligible has been broadened by subsequent legislation and the concept of what is included has also been broadened. See, for example, Senate Report No. 1478 and House Report No. 1380, to accompany HR 16027, 90th Congress, wherein it clearly shows that the VA estimate of the costs includes a substantial sum for home dialysis units to be provided under the authority of section 617 as amended by PL 90-493. Accordingly, we perceive no objection to the furnishing of home dialysis equipment to any veteran, service-connected or non-service-connected, who qualifies under the provisions of 38 U.S.C. § 617.

In summary as to the first question--home dialysis may be furnished under the general outpatient care program (section 612(a)) for service-connected conditions; under the post-hospital care provisions of sections 612(f) and 612(g) for non-service-connected conditions; and under the provisions of section 617 for either service-connected or non-service-connected veterans who qualify therefor.

As to the second question, currently the VA, upon a finding of feasibility and medical need, will lend a home dialysis unit to an eligible veteran, pay normal installation costs, train someone in the veteran's household in its use, and furnish expendable supplies. The Chief Medical Director advises that there are instances where home dialysis, even though medically indicated, is not feasible because there are no members of the household capable of coping with a home program or there is inadequate availability of essentials, such as space, water, electricity, etc.

Such situations might be resolved by the alternative of having VA install the home dialysis equipment in a community hospital, with the initial and continuing VA contributions being no more than what would have been provided if the installation were in the veteran's home. The community hospitals that have shown an interest in the proposal have conditioned their cooperation on being permitted to utilize the VA-owned equipment on non-veteran patients when it is not needed for the treatment of veterans. Although the proposal does not lend itself to application of the sharing principles of Subchapter IV to chapter 81 of title 38, United States Code, it is our opinion that the VA may lend the dialysis unit to a community hospital under the conditions stated by grant of a revocable license.

VA had occasion to submit to the Comptroller General the question whether a revocable license could be granted to a private party to use Government-owned computers on a reimbursable basis when not in use by VA. In his reply of January 23, 1968, 47 Comp.Gen. 387, the Comptroller General Said:

"As we stated in 44 Comp.Gen. 824, there are many decisions of this Office and of the Attorney General of the United States relative to granting revocable licenses for the use of Government property under certain circumstances and conditions. See, for example, 38 Comp.Gen. 36; 36 id. 561; 25 id. 909; B-57383, February 25, 1947; 34 Op.Atty.Gen. 320; 30 id. 470; 22 id. 240. Such decisions have held generally that the head of a Government department or agency has authority to grant to a private individual or business a revocable license to use Government property, subject to termination at any time at the will of the Government, provided that such use does not injure the property in question and serves some purpose useful or beneficial to the Government itself. The Attorney General has stated that the question as to whether the granting of such a license in any given case is beneficial to the Government is for the

exercise of the judgment of the official vested with the power to grant, rather than a question of law to be determined in advance by the law officers of the Government. 30 Op.Atty.Gen. 470, 482."

We recognize that the situations are not identical, but we consider them sufficiently similar to warrant application of the same principles. Accordingly, it is our view that, if the Administrator determines the indicated use by a community hospital (1) will serve a useful or beneficial purpose of the Government, (2) will not injure the property, and (3) is to be subject to termination at any time at the will of the Government, he may authorize placement of home dialysis units in community hospitals, under the circumstances outlined, by means of a revocable license. Whether VA should undertake placing home dialysis units in community hospitals is for administrative determination. It should also be noted that, if any proceeds are received by VA under the terms of a revocable license agreement, they are for deposit without deduction into the Treasury of the United States to the credit of miscellaneous receipts, as provided in 38 U.S.C. § 484, and not for credit to the VA medical appropriation.

HELD:

(1) Home dialysis may be furnished an otherwise eligible veteran: (a) under section 612(a) as an incident to the general outpatient care program for service-connected conditions; (b) under the post-hospital care provisions of sections 612(f) and 612(g) for non-service-connected conditions; and (c) under the provisions of section 617 for either service-connected or non-service-connected conditions for veterans who qualify therefor.

(2) VA has authority to place Government-owned home dialysis units in a community hospital with the understanding that the unit may be used for treatment of non-veterans when it is not being used for veterans, pursuant to a revocable license agreement properly setting forth the limitations outlined by the Comptroller General.

VETERANS ADMINISTRATION GENERAL COUNSEL

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