

DATE: 03-11-91

CITATION: VAOPGCPREC 40-91  
Vet. Aff. Op. Gen. Couns. Prec. 40-91

**TEXT:**

**Subject:** AUTHORITY TO LIMIT THE PROVISION OF OUTPATIENT SERVICES UNDER 38 U.S.C. § 109.

(This opinion, previously issued as Opinion of the General Counsel 5-79, dated October 29, 1976, 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: Chief Medical Director**

**QUESTION PRESENTED:**

What is VA's authority for application of M-1, Part 1, Chapter 16, p 16.20- authority to limit outpatient services afforded discharged members of allied armed forces under 38 U.S.C. § 109 so that nonemergent treatment would be rendered to the extent that it did not interfere with the treatment or service provided VA beneficiaries?

**COMMENTS:**

In pertinent part, section 109(a)(1) of title 38 provides:

(a)(1) In consideration of reciprocal services extended to the United States, the Administrator, upon request of the proper officials of the government of any nation allied or associated with the United States in World War I (except any nation which was an enemy of the United States during World War II), or in World War II, may furnish to discharged members of the armed forces of such government, under agreements requiring reimbursement in cash of expenses so incurred, at such rates and under such regulations as the Administrator may prescribe, medical, surgical, and dental treatment, hospital care, transportation and traveling expenses, prosthetic appliances, education, training, or similar benefits authorized by the laws of such nation for its veterans, and services required in extending such benefits. Hospitalization in a Veterans' Administration facility shall not be afforded under this section, except in emergencies, unless there are available beds surplus to the needs of veterans of this country....

While section 109(a)(1) explicitly provides that non-emergent hospital admissions are limited to the availability of beds surplus to veteran needs, it is noteworthy

that that section also authorizes reimbursable medical and other treatment "at such rates and "under such regulations as the Administrator may prescribe."

(Underscoring supplied.) Further, in a memorandum of June 1976 this office expressed the view that the explicit grant of authority in section 621, title 38, to set limitations upon the furnishing of hospital and domiciliary care did not require a narrow reading that would preclude the Administrator from setting rules to govern provision of outpatient treatment. On the contrary, it was pointed out that implicit in the grant of authority to direct and manage the VA health care delivery care delivery system was general authority to set rules and guidelines for effective management of all modalities. Similarly, in this instance, imposing specific limitations on hospitalization alone does not preclude establishing a similar administrative guideline upon the provision of outpatient services.

More significantly, however, such a limitation is in effect dictated by the relative standing for health care purposes of the discharged member of an allied force under section 109 as against the VA beneficiary. The former is clearly not a beneficiary of the VA (see 38 U.S.C. § 610). That difference in status is underlined in two unpublished decisions of the Comptroller General, B-156510 of June 7, 1965, and June 22, 1965, which relate to the VA's authority to hospitalize merchant seamen for nonemergent conditions. It is noted that except as a humanitarian service in emergency cases, the VA would have no authority other than on a reimbursable interagency service basis to admit merchant seaman. Further:

The rendering of service under 31 U.S.C. § 686 if it can be considered a function of an agency is at best a secondary or incidental function. It certainly was not intended to replace or substitute the primary function of an agency, which in the case of the Veterans Administration is the "administration of laws relating to the relief and other benefits provided by law for veterans \* \* \*." 38 U.S.C. § 201. (Decision of the Comptroller General, unpublished, B-156510, June 22, 1965.)

**HELD:**

The Administrator's primary responsibility to veterans may not be supplanted by the provision of nonemergent outpatient treatment to allied beneficiaries to the extent that it interferes with services provided VA beneficiaries.

VETERANS ADMINISTRATION GENERAL COUNSEL  
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