

**Department of
Veterans Affairs**

Memorandum

Date: March 21, 2014

VAOPGCPREC 1-2014

From: General Counsel (023)

Subj: Provision of Primary Care for Residents in State Home Domiciliaries

To: Under Secretary for Health (16)

QUESTION PRESENTED:

Is a State home domiciliary required to provide primary care to a resident on whose behalf VA pays per diem for that care?

HELD:

In order for a State to receive per diem payments from VA for a resident in its State home domiciliary, the home must provide primary care to the resident.

DISCUSSION:

1. You requested our opinion whether State home domiciliary programs are required to provide primary care services. VA is required to pay per diem to a State which provides "domiciliary care" to eligible Veterans in a State home. 38 U.S.C. § 1741(a)(1)(A). The term "domiciliary care" is defined in 38 U.S.C. § 1701(7):

The term "domiciliary care" includes necessary medical services and travel and incidental expenses pursuant to the provisions of section 111 of this title.

The term "medical services" is defined in 38 U.S.C. § 1701(6):

The term "medical services" includes, in addition to medical examination, treatment, and rehabilitative services, the following:

- (A) Surgical services.
- (B) Dental services and appliances as described in sections 1710 and 1712 of this title.
- (C) Optometric and podiatric services.
- (D) Preventive health services.

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(E) Noninstitutional extended care services, including alternatives to institutional extended care that the Secretary may furnish directly, by contract, or through provision of case management by another provider or payer.

(F) In the case of a person otherwise receiving care or services under this chapter--

(i) wheelchairs, artificial limbs, trusses, and similar appliances;

(ii) special clothing made necessary by the wearing of prosthetic appliances; and

(iii) such other supplies or services as the Secretary determines to be reasonable and necessary.

(G) Travel and incidental expenses pursuant to section 111 of this title.

2. VA has implemented this statutory authority to pay per diem for domiciliary care through regulations in 38 C.F.R. §§ 17.190-17.200. Section 17.30(b) defines the term "domiciliary care":

Domiciliary care. The term domiciliary care means the furnishing of a home to a veteran, embracing the furnishing of shelter, food, clothing and other comforts of home, including necessary medical services. The term further includes travel and incidental expenses pursuant to § 17.143.

The term "medical services" is defined in 38 C.F.R. § 17.30(a):

(a) *Medical services.* The term *medical services* includes, in addition to medical examination, treatment, and rehabilitative services:

(1) Surgical services, dental services and appliances as authorized in §§ 17.160 through 17.166, optometric and podiatric services, (in the case of a person otherwise receiving care or services under this chapter) the preventive health care services set forth in 38 U.S.C. 1762, noninstitutional extended care, wheelchairs, artificial limbs, trusses and similar appliances, special clothing made necessary by the wearing of prosthetic appliances, and such other supplies or services as are medically determined to be reasonable and necessary.

(2) Consultation, professional counseling, marriage and family counseling, training, and mental health services for the members of the immediate family or legal guardian of the veteran or the individual in whose household the veteran certifies an intention to live, as necessary in connection with the veteran's treatment.

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- (i) Of the service-connected disability of a veteran pursuant to § 17.93(a);
 - (ii) Of the nonservice-connected disability of a veteran where such services were initiated during the veteran's hospitalization and the provision of such services is essential to permit the release of the veteran from inpatient care;
- for the members of the immediate family or legal guardian of the veteran, or the individual in whose household such veteran certifies an intention to live, as may be essential to the effective treatment and rehabilitation of the veteran or dependent or survivor of a veteran receiving care under § 17.84(c). For the purposes of this paragraph, a dependent or survivor of a veteran receiving care under § 17.84(c) shall be eligible for the same medical services as a veteran; and
- (3) Transportation and incidental expenses for any person entitled to such benefits under the provisions of § 17.143.

3. In sum, both the statutes and VA regulations set forth above provide that VA may only pay per diem to States for domiciliary care in State homes if the home provides "medical services" to Veterans on whose behalf the per diem payments are made. Primary care can be defined as "[t]he medical care received upon first contact with the health care system, before referral elsewhere within the system." *American Heritage Dictionary of the English Language* 1393 (4th ed. 2000). "Primary care" is thus part of what is included in "medical services." Therefore, based on these statutes and regulations, VA cannot pay per diem to a State for domiciliary care of a Veteran in a State home if the home does not provide that Veteran with primary care.¹

¹ In 1992, the Veterans Health Administration issued a Manual that set forth standards that State home domiciliaries had to meet to receive VA per diem payments. VHA Manual M-5, Part VIII, Chapter 2, paragraph 2.08. With respect to medical care, the manual stated:

- d. Medical care. There is [a] comprehensive ambulatory medical care program designed to meet the needs of domiciliary patients.
 - (1) The facility ensures the provision of professional medical services for the patients.
 - (2) Each patient has a primary physician responsible for medical care.
 - (3) Patients are classified in the domiciliary according to the level of supervision required.
 - (4) A patient treatment plan is established and maintained for each domiciliary patient.
 - (5) Primary care medical services are provided for domiciliary patients as needed.

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4. State homes cannot fulfill their duty to provide primary care to Veterans by referring them to VA unless the State agrees to pay for the care. Veterans enrolled in the VA healthcare system are generally eligible for the care set forth in the medical benefits package. 38 C.F.R. § 17.36(a)(2). The medical benefits package lists the hospital and outpatient care that VA provides to enrolled Veterans. *Id.* § 17.38. This package specifically excludes “[h]ospital and outpatient care for a veteran who is either a patient or inmate in an institution of another government agency if that agency has a duty to give the care or services.” *Id.* § 17.38(c)(5); see 38 U.S.C. § 1710(h). As discussed above, State homes have a duty to provide primary care for the Veterans who reside in a State home domiciliary on whose behalf the State receives per diem payments from VA. In accordance with 38 C.F.R. § 17.38(c)(5), therefore, VHA facilities cannot provide these Veterans with primary care as part of the medical benefits package. VHA facilities, however, may provide this care to State homes under sharing agreements with VA pursuant to 38 U.S.C. § 8153 under which States must agree to pay for the care.

5. If VHA believes that a State home is not providing “medical services” to the residents of its domiciliary on whose behalf VA pays per diem, VHA should first work with the State to resolve the situation. The next step would be to conduct a VA inspection of the domiciliary and determine whether the State complies with applicable laws and regulations including those discussed above addressing the provision of medical services. See 38 C.F.R. § 17.199 which provides:

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- (6) Each patient has a complete medical reevaluation annually and as needed.
 - (7) There is provision made for preventive and maintenance dental and other health services.
 - (8) Transportation is available for patients needing medical, dental, and other health services.
 - (9) Domiciliary patients are admitted to an infirmary when necessary.
 - (10) There is a written agreement with one or more hospitals to accept a patient requiring hospitalization.
 - (11) Domiciliary patients are admitted to nursing home care or hospital care if medically necessary.

The provision in the manual that required State homes to provide “professional medical services” for their domiciliary patients in effect required the homes to provide primary care. On May 17, 2010, however, VHA rescinded this manual provision. See the transmittal sheet for VHA Handbook 1145.01. Rescinding this provision, however, did not rescind the statutory and regulatory requirements discussed above.

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Representatives of the Department of Veterans Affairs may inspect any State home at such times as are deemed necessary. Such inspections shall be concerned with the physical plant; records relating to admissions, discharges and occupancy; fiscal records; and all other areas of interest necessary to a determination of compliance with applicable laws and regulations relating to the payment of Federal aid. The authority to inspect carries with it no authority over the management or control of any State home.

Depending on the results of that survey, VHA may need to consider terminating the payment of per diem to the State for domiciliary care in that State home.

A handwritten signature in black ink, appearing to read "Will A. Gunn", with a long horizontal flourish extending to the right.

Will A. Gunn