Department of Veterans Affairs

Memorandum

Date: September 17, 1998 VAOPGCPREC 11-98

From: Acting General Counsel (02)

Subj: Priorities for Care Under VA's New Patient Enrollment System

To: Under Secretary for Health (10)

QUESTIONS PRESENTED:

May a veteran with a catastrophic, nonservice-connected disability, whose income is above the means test threshold and who would otherwise be enrolled in priority group 7, be placed in priority group 4 in VA's patient enrollment system on the basis of his or her catastrophic disability?

DISCUSSION:

1. The "Veterans' Health Care Eligibility Reform Act of 1996," Public Law No. 104-262, (Eligibility Reform Act) became law on October 9, 1996. The Act made major changes in the laws governing eligibility for VA health care benefits. The new law amended 38 U.S.C. § 1710 which authorizes VA to furnish hospital care, medical services (i.e., outpatient care), and nursing home care to veterans. The Eligibility Reform Act also added a new section, 38 U.S.C. § 1705, directing VA to establish a patient enrollment system to manage the provision of the care and services. In short, section 1705 establishes seven priority groups and directs VA to enroll veterans in accordance with the priorities, in the order listed in the law. You request an opinion addressing the status of catastrophically disabled veterans for whom the VA *may* provide hospital and outpatient care pursuant to 38 U.S.C. § 1710(a)(3). Specifically, you ask whether these priority group 7 veterans may be enrolled in priority group 4 if they are catastrophically disabled. To provide a framework for addressing this question, we will first discuss the eligibility scheme established by the new law.

Basic Eligibility – Mandatory and Discretionary Veterans

2. Subsections 1710(a)(1) and (2) of title 38, United States Code, direct the Secretary to provide hospital and outpatient care to the specific categories of veterans listed therein. The subsections state that the Secretary *shall* furnish needed hospital and outpatient care to those veterans. 38 U.S.C. § 1710(a)(1) and (2). The law further provides that VA shall furnish care to these veterans "only to the extent and in the amount provided in advance in appropriations Acts for such purposes." 38 U.S.C. § 1710(a)(4). The Secretary is further authorized, though not directed, to provide hospital and outpatient care to all other veterans. For these veterans, the law states that VA *may* furnish needed

hospital and outpatient care. 38 U.S.C. § 1710(a)(3). VA may furnish care to these veterans "to the extent resources and facilities are available." *Id.*

3. In this opinion, we shall refer to veterans in the first category, those to whom VA shall furnish care, as "mandatory veterans" [historically "category A" veterans]. Mandatory veterans include all veterans who have a compensable service-connected disability, former prisoners of war, veterans of the Mexican border period or World War I, recipients of benefits under section 1151, veterans discharged or released from service for disabilities incurred or aggravated in the line of duty, and nonservice-connected veterans who are unable to defray the expenses of necessary care as determined under 38 U.S.C. § 1722. The mandatory category also includes veterans exposed to atomic radiation after World War II or during weapons testing, veterans exposed to Agent Orange in Vietnam, and veterans with conditions specifically associated with service in the Persian Gulf War. This last group of veterans has mandatory eligibility for care only for the disabilities associated with the exposure or service in the Persian Gulf. *See* 38 U.S.C. § 1710(a).

4. The second category of veterans will be referred to as "discretionary veterans" [historically "category C" veterans]. Discretionary veterans are all veterans who are not mandatory or category A veterans and who agree to pay the applicable copayment. There are two groups of veterans within the large discretionary category. Included are all nonservice-connected veterans with attributable income above the means test threshold as determined under 38 U.S.C. § 1722, and veterans with service-connected disabilities rated noncompensable.

5. Section 1710(a) is, in essence, a priority scheme. If available funds are insufficient to provide needed care to all veterans eligible for VA services, the history associated with this legislation suggests that Congress intended that veterans with mandatory eligibility receive care prior to veterans with discretionary eligibility. *See* Joint Explanatory Statement of the Committee of Conference, Title XIX – Veterans' Program, *printed in* Staff of the Senate Committee on Veterans' Affairs, 99th Cong., 2D Sess., Compilation of the Legislation and Legislative History of the Veterans' Health-Care Amendments of 1986, 99-150, at 4-6 (Comm. Print 1986); Floor Statement of Senator Murkowski, *id* at 40-45. This general distinction between mandatory and discretionary veterans was most recently reiterated by Congress in the Veterans' Health Care Eligibility Reform Act of 1996, Pub.L.No. 104-262, 110 Stat. 3177 (1996). The applicable portion of the Act restates the general distinction between mandatory and discretionary veterans, clarifies that the requirement that VA provide care to mandatory veterans is effective to the extent and in the amount provided in appropriation Acts, *see* 38 U.S.C. § 1710(a)(4), and states that the Secretary may provide care to discretionary veterans to the extent that resources and facilities are available. *See* 38 U.S.C. § 1710(a)(3).

<u>Patient Enrollment</u>

6. To address the concern that VA's annual appropriation for medical care may be insufficient to provide care to all mandatory and discretionary veterans requesting VA care and to provide a framework for the rational management of the demand for care,

Congress enacted 38 U.S.C. § 1705, directing that VA establish and operate a system of annual patient enrollment. Section 1705 directs that VA enroll veterans in accordance with the following seven priorities, in the order listed:

> (1) Veterans with service-connected disabilities rated 50 percent or greater.
> (2) Veterans with service-connected disabilities rated 30 percent or 40 percent.
> (3) Veterans who are former prisoners of war, veterans with service-connected disabilities rated 10 percent or 20 percent, and veterans described in subparagraphs (B) and (C) of section 1710(a)(2) of this title.
> (4) Veterans who are in receipt of increased pension based on a need of regular aid and attendance or by reason of being permanently housebound and other veterans who are catastrophically disabled.
> (5) Veterans not covered by paragraphs (1) through (4) who are unable to defray the expenses of necessary care as determined under section 1722(a) of this title.
> (6) All other veterans eligible for hospital care, medical services, and nursing home care under section 1710(a)(2) of this title.
> (7) Veterans described in section 1710(a)(3) of this title.

If funds are insufficient to provide care for all veterans requesting services, this priority list will be used to establish a "cut-off" point for enrollment purposes.[1]

7. In our view, there is an irreconcilable conflict between section 1710(a) and section 1705. On the one hand, as discussed in paragraph 5, section 1710(a) establishes basic priority for hospital and outpatient care by granting mandatory care to some veterans and discretionary care to others. If funds are insufficient to provide care for all veterans requesting VA care, services to discretionary veterans must be limited before eliminating services to veterans with mandatory entitlement. *See* 38 U.S.C. § 1710(a)(4). On the other hand, section 1705 conflicts with this basic premise if it is read to take one category of discretionary veterans (*i.e.*, discretionary veterans who are catastrophically disabled) and elevate them, for enrollment purposes, ahead of veterans who are to receive mandatory care (*i.e.,* those in enrollment category 5 and 6). In other words, reading section 1705 to require enrollment of all catastrophically disabled veterans in priority group 4 regardless of whether they are mandatory or discretionary veterans, is inconsistent with the statutory requirement to provide care on a mandatory basis to some veterans, and to provide care on a discretionary basis to other veterans.[2]

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[1] VA has recently published proposed regulations to implement this statutory mandate. *See* 63 Fed. Reg. 37299 (1998)(to be codified at 38 C.F.R. pt. 17)(proposed July 10, 1998).

[2] For example, if a veteran in the discretionary category, *i.e.*, section 1710(a)(3), becomes catastrophically disabled in a car accident subsequent to service, he or she could be elevated into enrollment group 4 and receive a higher enrollment priority than veterans in enrollment groups 5 and 6 (*i.e.*, veterans who are unable to defray the cost of necessary

8. It is a well-established rule of statutory construction that the clear and unambiguous language of a statute is to be read to mean what it plainly expresses. *See* 2A Norman J. Singer, Sutherland Statutory Construction, §§ 46.01 – 46.04. (5th ed. 1992). When statutes dealing with the same subject matter are in apparent conflict, they should be construed to give meaning to both statutes if such a reading is reasonably possible. *See* Singer, *supra*, paragraph 8, § 46.05 ("A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole."). Statutes that deal with the same subject matter, *i.e.*, that are *in para materia* with one another, should be read together to discover the true intent of the legislature. This rule of statutory construction is based on the assumption that when the legislature enacts a provision, it has in mind previous statutes relating to the same subject matter and purpose. *See* 2B Singer, *supra*, paragraph 8, §§ 51.01 – 51.03. On the other hand, when faced with irreconcilable statutes, the general rule of statutory construction is to rely on the more recent of the two statutes. *See* 2B, Singer, *supra,* paragraph 8, § 51.02 (The more recent of two irreconcilably conflicting statutes governs); *see also Virginia R. Co. v. System Federation No. 40,* 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789; *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22.

9. In this case, the "plain meaning" rule will not apply, as a plain reading of section 1705, which may allow catastrophically disabled, discretionary veterans to receive a higher enrollment priority than certain mandatory veterans, would render meaningless the mandatory/discretionary or "may/shall" distinction of section 1710. Further, because section 1710 and section 1705 directly conflict with one another on the priority to be given to catastrophically disabled, discretionary veterans, the two statutes cannot be harmonized. The rule pertaining to the more recent of two irreconcilably conflicting statutes is not clearly applicable here because section 1705 was enacted and section 1710 was significantly revised in the same public law.

10. We are left with a conflict between the general provision of section 1710(a), requiring VA to provide care first to mandatory veterans and then to discretionary veterans, and the specific requirement of section 1705 to enroll catastrophically disabled veterans in category 4, without regard to whether or not the catastrophically disabled veteran is a "mandatory" or "discretionary" veteran. The specific provision in section 1705 conflicts with the general provision in section 1710(a). In this situation, the rules of statutory construction require deference to the more specific provision. *See* Singer, *supra,* § 46.05 ("Where there is inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail."); §51.05 ("Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict,

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care, and veterans of the Mexican boarder period, World War I, and veterans exposed to a toxic substance, radiation or environmental hazards).

the latter will prevail . . . [footnotes omitted]"); *see also Fourco Glass Company v. Transmirra Products Corporation*, 353 U.S. 222, 228, 77 S.Ct. 787, 791, 1 L.Ed.2d 786 (1957), *citing Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208, 52 S.Ct. 322, 323, 76 L.Ed. 704 ("Specific terms prevail over the general in the same or another statute which otherwise might be controlling."). Applying this rule to the instant case, VA must rely on the specific statutory provision in section 1705 to enroll all catastrophically disabled veterans in category 4, regardless of the conflicting but more general provision in section 1710(a).

11. The legislative history does not conflict with this conclusion. The joint explanatory statement that accompanied Public Law 104-262 describes the House and Senate bills on which the compromise legislation is based. With regard to the House bill, it states that section 4 of H.R. 3118 would establish a system of patient enrollment in which veterans are to be enrolled according to a prescribed priority system. The highest priority group would be veterans with service-connected disabilities rated 30% or higher, and the lowest priority group listed would be all other category A veterans. The priority scheme devised by the House bill does not include discretionary [Category C] veterans in the priority ranking. *See* Joint Explanatory Statement, 104th Cong., 2d Sess., 142 Cong. Rec. S11646, (September 28, 1996), *reprinted in* 1996 U.S.C.C.A.N. 3616, 3617.

12. The joint explanatory statement also describes the Senate version of the bill. The Senate version states that VA shall furnish health care to certain categories of veterans (including health care to a veteran for a service-connected disability, for any veteran who is 50% or more service-connected, for former prisoners of war, for veterans of World War I or the Mexican border period and hospital care for the treatment of any disability of a veteran with a compensable disability); shall, to the extent resources and facilities are available, furnish health care to all other category A veterans (other than veterans with a non-compensable disability) ; and may furnish health care, subject to copayment requirements, to any other veteran. *Id* at 3610. With regard to enrollment, the joint explanatory statement describes the Senate bill as follows:

> Section 4 would require that VA manage provision of care under new section 1710 through a system of annual patient enrollment, with enrollment of veterans (who are not automatically enrolled) to be managed in accordance with specified priorities in the order listed, from veterans with service-connected disabilities rated 50 percent or greater having the highest priority and category C veterans the lowest.

Id. at 3620.

13. These sections of the joint explanatory statement suggest that both the House and the Senate versions of the bill anticipated a scheme where mandatory or category A veterans receive a higher priority than category C veterans. Yet, other portions of the legislative history seem to contemplate placing catastrophically disabled veterans in enrollment category 4 without regard to whether they are mandatory or discretionary veterans. The joint explanatory statement noted above states that the version of section 1705 that

ultimately passed, section 104 of the Eligibility Reform Act, is derived substantially from H.R. 3118, with revisions based primarily on the Senate bill. *Id.* at 3620. Therefore, the House Report for H.R. 3118 is an additional source of useful information on the legislative history of this Eligibility Reform Act. The background and discussion portion of the House report discusses the relationship between section 1705 and section 1710 in more detail. In describing the new enrollment scheme, the report states:

> The relative priority classifications in new section 1705, which assigns highest priority to veterans with service-connected disabilities rated 30 percent or greater, are derived substantially from the prioritization requirement in current law at section 1712(i) of title 38 [*i.e.,* the former outpatient priority scheme]. In refining that prioritization requirement, the measure would make noteworthy changes. First, the measure would elevate to a second tier the priority of former prisoners of war, who under current law occupy a third priority tier. And second, it would create a category of priority for those otherwise eligible veterans under a new section 1710(a) who are catastrophically disabled, such as veterans with spinal cord injuries. Such veterans would be included in a third tier priority with other profoundly disabled nonservice-connected veterans who receive increased pension based on a need of regular aid and attendance or permanent housebound status.

H.R. Rep. No. 104-690, 104th Cong., 2d Sess. Veterans Health Care Eligibility Reform Act of 1996, at 7. The language in this report suggests that under the House bill, *all* catastrophically disabled veterans may be able to move into a higher priority group based on their catastrophic disability, along with certain other nonservice-connected veterans who receive increased pension.[3] Other portions of the legislative history, including the statements of Senators Simpson and Rockefeller, discuss the anticipated impact of

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[3] In considering this legislative history, it should be noted that the House version of section 1705 is interrelated with a proposed revision of section 1710 that was not included in the compromise bill ultimately enacted by Congress. The House bill's proposed revision to section 1710 is critical to understanding the operation of the House's version of the priority system. Specifically, the proposed revision of section 1710 was to include just two paragraphs in section 1710(a): paragraph (1), which described all of the mandatory veterans who are described in what now constitutes 38 U.S.C. § 1710(a)(1) and (2); and paragraph (2), which described the discretionary veterans who are described in what now constitutes 38 U.S.C. § 1710(a)(3). The House bill's version of section 1705 states that the purpose of the enrollment system is to manage the provision of hospital care and medical services *under section 1710(a)(1)*. Yet section 1710(a)(1), as contemplated in this House bill, describes *only* the veterans who are eligible for mandatory care. The discretionary veterans described in section 1710(a)(2) are not included in the House version of section 1705's enrollment scheme. In other words, under the priority system envisioned by the House's version of the bill, it is not clear that discretionary veterans who are catastrophically disabled would move to a higher priority group, as they are not even included in the list of prioritized veterans.

section 1705 on the provision of services to veterans; however, this legislative history does not directly address the conflict between sections 1705 and 1710(a). *See generally* 142 Cong. Rec. S 11624, 11644-11654 (September 28, 1996) (statements of Senators Simpson and Rockefeller).

14. The legislative history associated with this Act does not resolve the conflict between sections 1705 and 1710(a). Neither does it conflict with our conclusion that in the instant case, where sections of the same Act are irreconcilable, the more specific provision in section 1705 must control over the more general pronouncement in section 1710(a).

HELD

The rules of statutory construction and associated case law support enrolling all catastrophically disabled veterans in enrollment category four, as directed by section 1705(a)(4), regardless of whether the veterans are mandatory or discretionary veterans for purposes of section 1710(a).

John H. Thompson