DEPARTMENT OF VETERANS AFFAIRS 8320-01

38 CFR Part 17

RIN 2900-AN98

Payment for Home Health Services and Hospice Care to Non-VA Providers

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its regulations concerning the billing methodology for non-VA providers of home health services and hospice care. Because the newly applicable methodology cannot supersede rates for which VA has specifically contracted, this rulemaking will only affect home health and hospice care providers who do not have existing negotiated contracts with VA. This rule also rescinds internal guidance documents that could be interpreted as conflicting with this final rule.

DATES: Effective Date: This final rule is effective November 15, 2013.

FOR FURTHER INFORMATION CONTACT: Lisa Brown, Chief, Policy Management Department, Health Administration Center, Veterans Health Administration, Department of Veterans Affairs, 3773 Cherry Creek Drive North, East Tower, Ste. 485, Denver, CO 80209, (303) 331-7829. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: In a document published in the Federal Register on November 21, 2011 (76 FR 71920), VA proposed to amend its regulations concerning the billing methodology for non-VA providers of home health services and hospice care.

The proposed rulemaking indicated it would make the VA regulation governing payments for certain non-VA health care, 38 CFR 17.56, applicable to non-VA home health services and hospice care. Section 17.56 provides, among other things, that Medicare fee schedule or prospective payment system amounts will be paid to certain non-VA providers, unless VA negotiates other payment amounts with such providers. See 38 CFR 17.56(a)(2)(i). Interested persons were invited to submit comments to the proposed rule on or before December 21, 2011. We received one comment, which supported the proposed rule because it would standardize VA's payment methodology for non-VA home health and hospice care. The comment indicated, however, that the projected loss in revenue for home care and hospice providers due to the application of § 17.56 rates may affect the level of care provided to veterans.

We make no changes to the rule based on this comment. We are not aware of any evidence that supports an inference that, because of potentially lower payments, home care and hospice providers will offer a lower level of care to veterans than these providers have offered to veterans in the past. We are also not aware of evidence that suggests that home care and hospice providers offer a substandard level of care to any patient for which the provider receives the applicable Medicare rate, which is the rate that will now apply to veterans

under this rule. Additionally, as stated in the proposed rule, we estimate that each home health care and hospice provider that does not separately negotiate a payment rate with VA may lose up to $1,346.28 annually, which is not a significant amount when compared to the average annual revenue for home health and hospice agencies of $4.7 million (as indicated by data from the Medicare Payment Advisory Commission as well as the Census Bureau). Lastly, to the extent any affected provider makes significantly less than $4.7 million of annual revenue on average, we also reiterate from the proposed rule that affected providers may benefit from any "phase-in" of the § 17.56 rates as contemplated by Medicare rates themselves, as set forth in § 17.56(a)(2)(i), which requires that VA pay "[t]he applicable Medicare fee schedule or prospective payment system amount ('Medicare Rate') for the period in which the service was provided." 38 CFR 17.56(a)(2)(i).

Based on the rationale set forth in the proposed rule and in this document, VA is adopting the provisions of the proposed rule as a final rule with no changes.

Effect of rulemaking

Title 38 of the Code of Federal Regulations, as revised by this rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be

read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This final rule contains no collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. About 8,400 providers without negotiated contracts offer home health care or hospice care to veterans at rates that are equivalent to, or not significantly higher than, those offered by this final rule. VA costs of purchased skilled home care were compared to Medicare Home Health Prospective Payment System (HH-PPS) reimbursement for a 60-day period. The average VA reimbursement level per veteran for a 60-day period was $2,537.40 in fiscal year (FY) 2010. The average Medicare reimbursement level for skilled home care per beneficiary was $2,312.94 in FY 2010. This difference amounts to providers receiving $3.74 less per day from VA for a 60-day episode of care. On average, each provider cares for six veterans at VA expense. The potential annual revenue loss will be approximately $1,346.28 per provider, an insignificant amount of revenue for these providers. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is

exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a "significant regulatory action," which requires review by the Office of Management and Budget (OMB), as "any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or the private sector.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.009, Veterans Medical Care Benefits and 64.010, Veterans Nursing Home Care.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document 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. Jose D. Riojas, Interim Chief of Staff, Department of Veterans Affairs, approved this document on April 30, 2013 for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs-health, Government programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Veterans.

Dated: May 1, 2013

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Robert C. McFetridge,
Director of Regulation Policy and Management,
Office of General Counsel,
Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 17 as follows:

PART 17 – MEDICAL

1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

2. Amend § 17.56(a) introductory text by removing “and except for non-contractual payments for home health services and hospice care”.

[FR Doc. 2013-10694 Filed 05/03/2013 at 8:45 am; Publication Date: 05/06/2013]