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DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 17

RIN 2900-AP34

Payment of Emergency Medication by VA

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its medical regulations that govern reimbursement of emergency treatment provided by non-VA medical care providers. VA proposes to clarify its regulations insofar as it involves the reimbursement of medications prescribed or provided to the veteran during the episode of non-VA emergency treatment.

DATES: Comments must be received by VA on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through <http://www.Regulations.gov>; by mail or hand-delivery to: Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. (This is not a toll-free telephone number.) Comments should indicate that they are submitted in response to

“RIN 2900-AP34-Payment of Emergency Medication by VA.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free telephone number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.Regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Kristin J. Cunningham, Director, Business Policy, Chief Business Office (10NB6), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420; (202) 382-2508. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: VA is authorized under 38 U.S.C. 1725 to reimburse an eligible veteran (or the provider of the emergency treatment or another person or entity who paid such expenses on the veteran’s behalf) for the reasonable value of emergency treatment furnished to the Veteran at a non-VA medical facility. Under 38 U.S.C. 1728, VA is authorized to reimburse eligible veterans (or the provider of the emergency treatment or another person or entity who paid such expenses on the veteran’s behalf) for the customary and usual charges of non-VA emergency treatment furnished to the veteran.

Section 1725 provides that in order for VA to reimburse a veteran for the reasonable value of non-VA emergency treatment under that section, such veteran must, among other things, be personally liable for the emergency treatment received in a non-VA medical facility, be enrolled in the VA health care system, and must have received medical care under chapter 17 of title 38 U.S.C. within the 24-month period prior to the receipt of such emergency treatment. Reimbursement is authorized under section 1728 when non-VA emergency treatment was rendered to such veteran for: the treatment of an adjudicated service-connected disability; a non-service-connected disability associated with and held to be aggravating a service-connected disability; any disability of a veteran if the veteran has a total disability permanent in nature from a service-connected disability; and for any illness, injury or dental condition if the veteran is participating in a vocational rehabilitation program and is determined to be in medical need of care or treatment to make possible the veteran's entrance into a course of training, or prevent interruption of a course of training, or hasten the return to a course of training which was interrupted because of such illness, injury, or dental condition.

Current VA regulations implementing 38 U.S.C. 1725 and 1728 each state that covered emergency treatment includes "medication, including a short course of medication related to and necessary for the treatment of the emergency condition that is provided directly to the patient for use after the emergency condition is stabilized and the patient is discharged." See 38 CFR 17.120(b) and 17.1002. It is undisputed that medications directly provided to the veteran or administered to the veteran as part of the emergency treatment are covered. However, the language "provided directly to the

patient” has been found to be vague inasmuch as it does not clearly indicate that it also extends to a short course of necessary medication provided to the veteran by way of a prescription that is written or called in to an outpatient or commercial pharmacy by the emergency non-VA provider with instructions to the veteran-patient to obtain and use the medication post-discharge, as directed. We note this issue was not addressed in the original rulemakings associated with the implementation of section 1725; it was raised however in subsequent amendatory rulemaking in 2011. In 2011, final rulemaking for §§ 17.120(b) and 17.1002 included changes to further define “emergency treatment.” Among other things, new language was added to §§ 17.120(b) and 17.1002 to indicate that emergency treatment includes “medication, including a short course of medication related to and necessary for the treatment of the emergency condition that is provided directly to the patient for use after the emergency condition is stabilized and the patient is discharged.” It was explained that such change merely reflected VA’s original intention and was done for clarification purposes only, in response to a commenter’s concerns. See 76 FR 79067, 79069-79070 (Dec. 21, 2011).

VA has interpreted, and still interprets, emergency treatment, for purposes of both §§ 17.120 and 17.1002, to extend to situations where the veteran receives, during the emergency treatment episode, a prescription from the non-VA emergency provider for a short course of necessary medication (related to and necessary for treatment of the emergency condition post-stabilization) which the veteran-patient is directed to obtain post-discharge and use at home as directed. Nor should it matter whether the non-VA emergency provider, in the course of providing such emergency treatment,

provides the prescription in writing or, at the request of a patient, calls it into an outpatient or commercial pharmacy on the patient's behalf. Again it was never intended or contemplated that the language "directly provided to the patient" would be interpreted to mean only medications actually administered to the patient during the emergency treatment episode and exclude such related prescriptions. The proposed amendments would be consistent with VA policy and would help ensure our regulations are not interpreted more narrowly than VA intends (as discussed herein).

Specifically, we propose to amend § 17.120(b) to clarify that VA would reimburse the cost of a short course of medication prescribed for the veteran at the time that the veteran was receiving emergency treatment, by stating that emergency treatment would include "a short course of medication related to and necessary for the treatment of the emergency condition that is provided directly to or prescribed for the patient for use after the emergency condition is stabilized and the patient is discharged." We propose to make similar amendment to the introductory paragraph of § 17.1002.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as proposed to be revised by this rulemaking, would represent the exclusive legal authority on this subject. No contrary rules or procedures would be authorized. All VA guidance would be read to conform with this proposed rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking.

Paperwork Reduction Act

This proposed rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would 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. This proposed rule would directly affect only individuals and would not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 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,” requiring review by the Office of Management and Budget (OMB), unless OMB waives such review, 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. VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's Web site at <http://www.va.gov/orpm/>, by following the link for “VA Regulations Published From FY 2004 Through Fiscal Year to Date.”

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 the 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 proposed rule would have no such effect on State, local, and tribal governments, or on 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 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.024, VA Homeless Providers Grant and Per Diem Program.

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. Robert L. Nabors II, Chief of Staff, Department of Veterans Affairs, approved this document on July 20, 2015, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Health care, Health facilities, Health professions, Health records, Homeless, Mental health programs, Nursing homes, Veterans.

Dated: July 22, 2015

William F. Russo
Acting Director
Office of Regulation Policy & Management,
Office of the General Counsel,
Department of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to amend 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.

§ 17.120 [Amended]

2. Amend the first sentence of § 17.120(b) by adding “or prescribed for” immediately after “provided directly to”.

§ 17.1002 [Amended]

3. Amend the introductory text of § 17.1002 by adding “or prescribed for” immediately after “provided directly to”.

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