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B-167656 June 18, 1971

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The Honorable Clement J. Zablocki House of Representatives

Dear Mr. Zablocki:

This is in further reference to your letter of February 26, and March 10, 1971, requesting our opinion on several questions you have raised therein in connection with the Veterans Administration's (VA) implementation of section 2 of Public Law 88-450, as amended, 38 U. S. C. 620, which authorizes protracted nursing home care for certain veterans at Government expense. We have received a statement of views from the VA with respect to the questions posed in your February 26 letter to this Office, and shall make reference to the VA comments in our answers to your questions.

The questions and our answers thereto will set forth below in the order presented. Also since certain of our answers are equally responsive to the questions raised in your February 1 letter to the VA Administrator, there is in our opinion, no need for additional comment with specific reference to those questions, as you had requested.

Section 620 of title 38, United States Code, provides, in pertinent part, as follows:

"(a) Subject to subsection (b) of this section, the Administrator may transfer any veteran, who has been furnished care by the Administrator in a hospital under the direct and exclusive jurisdiction of the Administrator, to any public or private institution not under the jurisdiction of the Administrator which furnishes nursing home care, for care at the expense of the United States, if the Administrator determines that -

"(1) such veteran has received maximum benefits from such care in such hospital, but will require a protracted period of nursing home care which can be furnished in such institution, and

"(2) the cost of such nursing home care in such institution will not exceed 40 percent of the cost of care furnished by the Veterans' Administration in a general hospital under the direct and exclusive jurisdiction of the Administrator, as such cost may be determined from time to time by the Administrator.

"Nursing home care may not be furnished pursuant to this section at the expense of the United States for more than six months in the aggregate in connection

with any one transfer, except (A) in the case of the veteran whose hospitalization was primarily for a service-connected disability, or (B) where in the judgement of the Administrator a longer period is warranted in the case of any other veteran. ***

"(b) No veteran may be transferred to any institution for nursing home care under this section, unless such institution is determined by the Administrator to such institution is determined by the Administrator to meet such standards as he may prescribe."

The first question is:

"1) Within the meaning of the law and the intent of Congress, does the Administrator have sole and absolute discretion in the implementation of this program? Is he authorized (and therefore required) to grant the six month nursing home care in community nursing homes at VA expense to qualified veterans or is he granted the authority to grant this benefit solely upon his discretion?"

In the view of the VA:

"The above-quoted language of section 620, in our opinion, clearly vests the Administrator with discretionary authority to furnish the nursing home care involved. The many administrative and professional determinations required by the statute under the specific conditions and limitations therein prescribed would preclude implementation of the program on a mandatory basis. ***"

We agree with this reading of section 620. We note that the act employs discretionary language in that the Administrator "may transfer" a veteran to a nursing care facility "if the Administrator determines," among other things, that a period of protracted care is necessary. The legislative history discloses that this section "authorizes" the Administrator to make such transfers (S. Rept. No. 1293; H. Rept. 680), and there is nothing in the cited House and Senate Reports to indicate the Congress intended the provision to impose a mandatory duty on the Administrator. Referring to section 1 of Public Law 88-450, which authorized the establishment of "not less than" four thousand additional nursing care beds in VA facilities, the above-cited reports explicitly state that such authority is discretionary, despite the Congress' intent that the beds be provided at the earliest practicable date. Id. Page 2.

"2) Within the meaning of the law and the intent of Congress, are the terms 'space available' and 'Funds available' synonymous?"

The VA, after noting that neither term is used in section 620 of title 38, stated that such terms may or may not be synonymous, depending on the context in which used.

"The community nursing home care program is one of several activities funded from the Veterans Administration medical care appropriation, currently representing about $20 million of the $2 billion annual medical care appropriation level. It is not a separate element in the agency appropriation structure or its system of administrative control under apportionment's and, therefore, is not separately controlled for anti- deficiency purposes. The Administrator has authority to reprogram funds within the total medical care appropriation as required to meet unbudgeted needs of particular medical care

programs, including the community nursing home care program. Only when such reprogramming is not feasible because of overall medical care fund requirements would a supplemental appropriation request based on unbudgeted program needs be in order."

Obviously, the programming and reprogramming of funds within the total medical care appropriation as part of the overall management of the total VA medical care program is, and must be, discretionary with the Administrator. There is no provision in Public Law 88-450 which would require the Administrator to request supplemental funding in order to meet unanticipated needs of an element of the medical care program, the so- called Antideficiency Act, 31 U. S. C. 665(c)(1), imposes on the heads of Federal agencies and departments a responsibility to apportion and expend fiscal year appropriations so as to prevent obligation or expenditure thereof in a manner which would indicate the necessity for either a deficiency or supplemental appropriation or exhaust the funds before the end of the period for which they are appropriated. See 38 Comp. Gen 501 (1959), 36 Comp. Gen. 699 (1957). Subsection (c) (1) provides, in pertinent part, as follows:

"(c)(1) Except as otherwise provided in this section all appropriations or funds available for obligation for a definite period of time shall be so apportioned as to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period; ***."

We might note here that, as pointed out by the VA, the funds for the community nursing home care program are included in the VA medical care appropriation and that that program is only one of several activities funded form such appropriation. The Antideficiency Act applies to the medical care appropriation and would not apply to the individual activities or programs funded from such appropriation, unless a specific amount is provided in the appropriation for a particular activity or program. This is not the case as regards the community nursing home properly apportioned there would be no violation of the Antideficiency Act if the activity involved here is not carried on by the VA for the full fiscal year.

"4) If the VA does not request sufficient funding and the budget for this program is depleted the first six months of the Fiscal Year, are they under any obligation to provide this benefit to qualified veterans?"

The VA response to this question is as follows:

"Funds for this program on a national basis are controlled in relation to a projected annual workload. Where individual stations experience workloads at variance with their estimates, adjustments are made by redistributing funds from stations under their assignment to stations above assigned loads. This is a continuing process to meet changing requirements. Based upon our projected workload nationwide, funding is sufficient for the fiscal year." (Emphasis added.)

Given the discretionary nature of the Administrator's authority, there is, in our view no requirements on the VA to provide the service absent sufficient funds during the last six-months of the fiscal year. In any event it should be noted that the VA advises that based on its projected workload nationwide, funding is sufficient for the community nursing home care program for the fiscal year.

"5) Would a veteran denied this benefit have any recourse or claim against the government?"

There would appear to be no legal authority under which a veteran denied VA benefits would have standing to maintain a legal action in order to gain such benefits, since 38 U. S. C. 211 (a) provides, with certain exceptions not pertinent here, that -

"*** the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision."

"6) When the VA's budget for this program is depleted, is it legal for them to make use of Medicare funds to fulfill their own primary administration function vested in them by Congress?

"7) If this procedure is valid, should the VA be required to stand any expense not fully covered by Medicare which would ordinarily be billed to the qualified veteran by Medicare - approved nursing homes?

"8) Is it legal for the VA to refer qualified veterans to Medicaid when their budget for the program is depleted?"

To these questions, the VA replied as follows:

"(6) The Veterans Administration has no authority to use Medicare funds to assist in the financing of the community nursing home care program contemplated by 38 U. S. C. 620. Entitlement under Medicare or Medicaid may be an additional resource for the veteran. There are many veterans, of course, who are eligible for such programs and who do mot need to avail themselves of the temporary benefit afforded by the VA program which is designed to aid the veteran and his family in making the transition from hospital care to community living.

"(7) After the veteran elects to obtain Medicare benefits, Veterans Administration responsibility is terminated. This agency, therefore, would not be authorized to pay for expenses not fully covered by Medicare.

"(8) The veteran is assisted by the Veterans Administration in mobilizing community resources, including Medicaid, which may be available to meet his need for nursing home care."

We see no legal objection to the above responses. We would point out that the agency position relative to the sharing of costs (question (6)), as stated above and in the Administrator's letter to you dated February 19, 1971, is based on agency policy, rather than any statutory requirement, and that while this position appears consistent with the overall discretionary nature of the Administrator's authority, we find nothing in the law which would preclude the VA from paying nursing home care expenses not fully covered by Medicare.

"9) Does the service - connected veteran have a guaranteed right to this program or is that also up to the discretion of the Administrator?"

The VA replied as follows:

"The service - connected veteran does not have a guaranteed right to this program. Our procedures do provide for priority admission of service - connected veterans to VA nursing home care units. As noted in the quoted provisions of section 620, the six - month limitation on community nursing home care does not apply to the veteran whose hospitalization was primarily for a service - connected disability."

While the legislative history referred to above in response to question (2) indicates that service - connected veterans have a right to VA hospital care, we agree that there is nothing in section 620 vesting a similar right regarding nursing home care.

With respect to your final question as to restrictions that could be placed upon the VA to preclude premature expenditure of fiscal year funds for the community nursing home care program, to insure the allocation of funds expressly for such program it would be necessary to provide in the appropriation involved a specific amount to be used for such purpose.

We trust the above information is responsive to your request and will be of some assistance to you.

Sincerely yours,

R. F. KELLER Assistant Comptroller General of the United States