

Jurisdiction	Applicable date	FEDERAL REGISTER citation	
		Volume and page	Date
Arizona:			
Apache County .....	Nov. 1, 1968 .....	36 FR 5809 .....	Mar. 27, 1971.
Apache County .....	Nov. 1, 1972 .....	40 FR 49422 .....	Oct. 22, 1975.
Cochise County .....	Nov. 1, 1968 .....	36 FR 5809 .....	Mar. 27, 1971.
Coconino County .....	Nov. 1, 1968 .....	36 FR 5809 .....	Mar. 27, 1971.
Coconino County .....	Nov. 1, 1972 .....	40 FR 49422 .....	Oct. 22, 1975.
Mohave County .....	Nov. 1, 1968 .....	36 FR 5809 .....	Mar. 27, 1971.
Navajo County .....	Nov. 1, 1968 .....	36 FR 5809 .....	Mar. 27, 1971.
Navajo County .....	Nov. 1, 1972 .....	40 FR 49422 .....	Oct. 22, 1975.
Pima County .....	Nov. 1, 1968 .....	36 FR 5809 .....	Mar. 27, 1971.
Pinal County .....	Nov. 1, 1968 .....	36 FR 5809 .....	Mar. 27, 1971.
Pinal County .....	Nov. 1, 1972 .....	40 FR 49422 .....	Oct. 22, 1975.
Santa Cruz County .....	Nov. 1, 1968 .....	36 FR 5809 .....	Mar. 27, 1971.
Yuma County .....	Nov. 1, 1964 .....	31 FR 982 .....	Jan. 25, 1966.

The Voting Section maintains a current list of those jurisdictions that have maintained successful declaratory judgments from the United States District Court for the District of Columbia pursuant to section 4 of the Act on its Web site at <http://www.justice.gov/crt/voting>.

Dated: May 27, 2010.

**Eric H. Holder, Jr.,**  
Attorney General.

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**DEPARTMENT OF VETERANS AFFAIRS**

**38 CFR Part 17**

**RIN 2900-AN49**

**Payment or Reimbursement for Emergency Treatment Furnished by Non-VA Providers in Non-VA Facilities to Certain Veterans With Service-Connected or Nonservice-Connected Disabilities**

**AGENCY:** Department of Veterans Affairs.  
**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) is proposing to amend its regulations concerning emergency hospital care and medical services provided to eligible veterans for service-connected and nonservice-connected conditions at non-VA facilities as a result of the amendments made by section 402 of the Veterans' Mental Health and Other Care Improvements Act of 2008. These amendments would require VA payment for emergency treatment of eligible veterans at non-VA facilities and expand the circumstances under which payment for such treatment is authorized. In addition, these amendments would make nonsubstantive technical changes such as correcting grammatical errors and updating obsolete citations.

**DATES:** Comments must be received by VA on or before August 10, 2010.

**ADDRESSES:** Written comments may be submitted through <http://www.regulations.gov>; by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AN49-Payment or Reimbursement for Emergency Treatment Furnished by Non-VA Providers in Non-VA Facilities to Certain Veterans with Service-connected or Nonservice-connected Disabilities." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 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 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:** Joseph Duran, Policy Specialist, VHA CBO Fee Program Office, VHA Chief Business Office, Department of Veterans Affairs, P.O. Box 469066, Denver, CO 80246. Telephone (303) 398-5191. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Sections 1725 and 1728 of title 38, United States Code, authorize the Secretary of Veterans Affairs to reimburse eligible veterans for costs related to non-VA emergency treatment furnished at non-VA facilities, or to pay providers directly for such costs. Specifically, section 1725 authorizes reimbursement for emergency treatment for eligible veterans with nonservice-connected conditions. In contrast, section 1728

authorizes reimbursement for emergency treatment for eligible veterans with service-connected conditions. These statutory provisions are implemented at 38 CFR 17.1000 through 17.1008 for nonservice-connected conditions, and at 38 CFR 17.120 and 17.121 for service-connected conditions. Sometimes a veteran will require continued, non-emergent treatment after the veteran's medical condition is stabilized. However, until recently VA was not authorized to reimburse or pay for treatment provided after "the veteran can be transferred safely to a [VA] facility or other Federal facility." 38 U.S.C. 1725(f)(1)(C) (2007). Thus, if no such facility could immediately accept the transfer, VA was unable to provide payment to the veteran or medical provider for services rendered beyond the point the veteran was determined to be stable.

On October 10, 2008, the Veterans' Mental Health and Other Care Improvements Act of 2008, Public Law 110-387, was enacted. Section 402 of Public Law 110-387 amended the definition of "emergency treatment" in section 1725(f)(1), extending VA's payment authority until "such time as the veteran can be transferred safely to a [VA] facility or other Federal facility and such facility is capable of accepting such transfer," or until such transfer was accepted, so long as the non-VA facility "made and documented reasonable attempts to transfer the veteran to a [VA] facility or other Federal facility." Section 402(a)(1) amended section 1725(a)(1) by striking the term "may reimburse" and inserting "shall reimburse" in its place. This change would require VA to reimburse the covered costs for emergency care received at non-VA facilities for eligible veterans, rather than at the discretion of the Secretary.

Section 402(b) of Public Law 110-387 amended 38 U.S.C. 1728(a). First,

section 402(b)(1) authorized VA to reimburse or pay for “customary and usual charges of emergency treatment” when a veteran makes payment directly to the provider of non-VA emergency care from sources other than VA, whereas the statute had previously authorized reimbursement for “the reasonable value of such care or services.” This amendment relates to the amount of payment and will be the subject of another rulemaking. Second, section 402(b)(3) made the definition of “emergency treatment” in section 1725(f)(1) applicable to section 1728. As described above, the definition of emergency treatment now includes care or services furnished until “such time as the veteran can be transferred safely to a [VA] facility or other Federal facility and such facility is capable of accepting such transfer,” or until such transfer was accepted, so long as the non-VA facility “made and documented reasonable attempts to transfer the veteran to a [VA] facility or other Federal facility.”

This proposed rule would amend the following VA regulations to comply with the amendments made to 38 U.S.C. 1725 and 1728, and would make technical changes such as correcting grammatical errors and updating obsolete regulatory citations: 38 CFR 17.120, 17.121, 17.1002, 17.1005, 17.1006, and 17.1008.

We propose to amend 38 CFR 17.120 by renaming it, “Payment or reimbursement for emergency treatment furnished by non-VA providers to certain veterans with service-connected disabilities.” This new heading would clarify that this section covers only eligible veterans who have service-connected disabilities. This is a nonsubstantive change made only to improve the clarity of our regulations. We also propose to amend the introductory text of § 17.120 by striking “may be paid” and replacing it with “will be paid.” This amendment reflects the amendment made to 38 U.S.C. 1728(a) by section 402(b)(1), requiring VA to reimburse the covered costs. In addition, we propose to revise § 17.120(a) by striking the terms “care” and “medical services” and the phrase “care or services” in the places they occur, and replacing them with the term “emergency treatment.” This amendment would reflect the change made by section 402(b)(1), which replaced the term “hospital care or medical services” in section 1728(a) with the term “emergency treatment.”

We propose to revise § 17.120(b) to replace the former standard for determining the existence of a medical emergency with the “prudent layperson” standard. Section 402(b)(3) added a new

paragraph (c) to section 1728, which states that the term “emergency treatment,” for the purposes of section 1728, “has the meaning given such term in [38 U.S.C.] 1725(f)(1).” Under section 1725(f)(1)(B), emergency treatment means medical care furnished “in a medical emergency of such nature that a prudent layperson reasonably expects that delay in seeking immediate medical attention would be hazardous to life or health.” In addition, we propose to add clarifying language regarding the “prudent layperson standard” derived from current 38 CFR 17.1002(b), the regulation that implements section 1725(f)(1), which, again, is now the statutory authority for the definition of “emergency treatment” for both nonservice-connected and service-connected eligible veterans.

We also propose several amendments to 38 CFR 17.121 in order to implement section 402 and reorganize and clarify existing provisions. Our proposed substantive changes to § 17.121 are described below.

We propose to strike the phrase “emergency hospital care and medical services” in all places it occurs in § 17.121 and replace it with the term “emergency treatment,” for consistency with the defined term in section 1725(f)(1). We also propose to amend § 17.121 to include the provisions in section 402(a)(2) authorizing reimbursement of non-emergent treatment in certain circumstances. This revision would authorize VA to pay or reimburse for the costs of continued, non-emergent treatment furnished to eligible veterans beyond the point of stabilization if both “the non-VA facility notified VA at the time that the veteran could be safely transferred” but the transfer was not accepted and “the non-VA facility made and documented reasonable attempts to transfer the veteran to a VA facility (or other Federal facility with which VA has an agreement to furnish health care services for veterans).”

Proposed § 17.121(a) would establish the clinical decision maker as the designated VA clinician at the VA facility for purposes of payments or reimbursement of costs under the proposed rule. Although not required by Public Law 110–387, this change adopts similar customary practice utilized in the health care industry. In the health care industry, it is customary practice to utilize the services of health care professionals, such as nurses, for purposes of clinical review. For this reason, establishing the clinical decision maker as a “designated VA clinician” would align VA with customary health care industry practice (*see Utilization*

Review Accreditation Commission) as well as promote greater efficiency in the use of VA physician services.

Proposed § 17.121(b)(2) would define a reasonable attempt to mean contact with the local VA facility’s transfer coordinator, administrative officer of the day, or designated staff in the facility responsible for accepting transfer of patients, and would require documentation of such contact in the veteran’s progress/physicians’ notes, discharge summary, or other applicable medical record for that episode of care. It is VA’s expectation that documentation within the applicable medical record represents standard business practice throughout the health care industry. Additionally, by regulating the contact and documentation requirements in this way, potentially eligible veterans would be appropriately afforded ample opportunity to qualify for this expanded benefit.

Based on the nature of the amendments made by section 402, we interpret Congress’s intent to be that payment for continued non-emergent non-VA care be limited only to those circumstances where a VA or Federal facility with which VA has an agreement to provide care are unavailable to provide treatment. As such, we would clarify § 17.121(c) to state that in the event that a stabilized veteran refuses transfer to an available VA or Federal facility with which VA has an agreement to provide care, we would limit VA payment for an otherwise eligible veteran to the point of stability as determined by a VA clinician.

Finally, we propose to amend the authority citation for § 17.121 to be consistent with the authority citation for § 17.120.

With respect to reimbursement for eligible veterans with nonservice-connected conditions, the introductory text of 38 CFR 17.1002 would be amended by striking “may” in the first paragraph and replacing it with “will.” This amendment would reflect the amendment made to section 1725(a)(1) by section 402(a)(1), requiring VA to reimburse the covered costs. Section 17.1002(d) would be removed and paragraphs (e) through (i) would be redesignated as paragraphs (d) through (h).

Proposed paragraph (c) of § 17.1005 would implement the provisions of section 402(b)(3), allowing for reimbursement of non-emergent treatment in certain circumstances. In addition, proposed paragraph (c) includes nonsubstantive language changes for clarity purposes. Based on

the nature of the amendments made by section 402, we interpret Congress's intent to be that payment for continued non-emergent non-VA care be limited only to those circumstances where a VA or Federal facility with which VA has an agreement to provide care are unavailable to provide treatment. As such, proposed paragraph (d) of § 17.1005 would be inserted after the newly added paragraph (c) and would limit VA payment for non-VA emergency treatment when a stabilized veteran who is in need of continued non-emergent treatment refuses transfer to a VA or other Federal facility with which VA has an agreement. When a stabilized veteran refuses transfer to an available VA or other Federal facility with which VA has an agreement to furnish health care services for veterans, VA authorization for payment would be limited to the point of stability.

We propose to amend § 17.1006 to update clinical decision maker terminology consistent with the proposed amendment to § 17.121(a) described above. Currently listed as "the Fee Service Review Physician or equivalent officer," we would change this term to "the designated VA clinician."

Finally, we propose to amend § 17.1008 to add, after "emergency treatment" and before "shall," the following: "and any non-emergent hospital care that is authorized under § 17.1005(c) of this part." This statement would update § 17.1008 to comply with the new provisions added by section 402.

#### 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 an 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.

#### Paperwork Reduction Act

This action contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

#### Executive Order 12866

Executive Order 12866 directs agencies to assess all 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, and other advantages; distributive impacts; and equity). The Executive Order classifies 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 the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined and it has been determined to be a significant regulatory action under the Executive Order because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

#### 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 *et seq.* This proposed rule will not cause a significant economic impact on health care providers, suppliers, or entities since only a small portion of the business of such entities concerns VA beneficiaries. Therefore, pursuant to 5 U.S.C. 605(b), this proposed amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

#### Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; and 64.011, Veterans Dental 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. John R. Gingrich, Chief of Staff, approved this document on February 3, 2010, 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, Grant programs—Veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and recordkeeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Approved: June 8, 2010.

#### Robert C. McFetridge,

*Director of Regulation Policy and Management, Office of the General Counsel.*

For the reasons set forth 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, 1721, and as noted in specific sections.

2. Amend § 17.120 by:
  - a. Revising the section heading.
  - b. In the introductory text, removing "may be paid" and adding, in its place, "will be paid", removing "care" and adding, in its place, "emergency treatment", and removing "medical services" and adding, in its place, "emergency treatment".
  - c. Revising paragraph (a) introductory text.
  - d. In paragraph (a)(3), removing "United State" and adding, in its place, "United States" and adding the word "or" at the end of paragraph (a)(3).
  - e. In paragraph (a)(4), removing "§ 17.48(j); and" and adding, in its place, "§ 17.47(i);".
  - f. Revising paragraph (b).

The revisions read as follows:

**§ 17.120 Payment or reimbursement for emergency treatment furnished by non-VA providers to certain veterans with service-connected disabilities.**

\* \* \* \* \*

(a) *For veterans with service connected disabilities.* Emergency treatment not previously authorized was rendered to a veteran in need of such emergency treatment:

\* \* \* \* \*

(b) *In a medical emergency.* Emergency treatment, not previously authorized, including ambulance services, was rendered in a medical emergency of such nature that a prudent layperson would have reasonably expected that delay in seeking immediate medical attention would have been hazardous to life or health (this standard is met by an emergency medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) that a prudent layperson who possesses an average knowledge of health and medicine could reasonably expect the absence of immediate medical attention to result in placing the health of the individual in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part); and

\* \* \* \* \*

3. Section 17.121 is revised to read as follows:

**§ 17.121 Limitations on payment or reimbursement of the costs of emergency treatment not previously authorized.**

(a) *Emergency Treatment.* Except as provided in paragraph (b) of this section, VA will not approve claims for payment or reimbursement of the costs of emergency treatment not previously authorized for any period beyond the date on which the medical emergency ended. For the purpose of payment or reimbursement of the expense of emergency treatment not previously authorized, VA considers that an emergency ends when the designated VA clinician at the VA facility has determined that, based on sound medical judgment, a veteran:

(1) Who received emergency treatment could have been transferred from the non-VA facility to a VA medical center for continuation of treatment for the disability, or

(2) Who received emergency treatment could have reported to a VA medical center for continuation of treatment for the disability.

(b) *Continued non-emergent treatment.* Claims for payment or reimbursement of the costs of emergency treatment not previously authorized may only be made for continued, non-emergent treatment, if:

(1) The non-VA facility notified VA at the time the veteran could be safely transferred to a VA facility (or other Federal facility with which VA has an agreement to furnish health care

services for veterans), and the transfer of the veteran was not accepted; and

(2) The non-VA facility made and documented reasonable attempts to request transfer of the veteran to a VA facility (or to another Federal facility with which VA has an agreement to furnish health care services for veterans), which means that the non-VA facility contacted either the VA Transfer Coordinator, Administrative Officer of the Day, or designated staff responsible for accepting transfer of patients, at a local VA (or other Federal facility) and documented such contact in the veteran's progress/physicians' notes, discharge summary, or other applicable medical record.

(c) *Refusal of transfer.* If a stabilized veteran who requires continued non-emergent treatment refuses to be transferred to an available VA facility (or other Federal facility with which VA has an agreement to furnish health care services for veterans), VA will make payment or reimbursement only for the expenses related to the initial evaluation and the emergency treatment furnished to the veteran up to the point of stabilization, as set forth in paragraph (a) of this section.

(Authority: 38 U.S.C. 1724, 1728, 7304)

4. Amend § 17.1002 by:

- a. Revising the introductory text.
- b. Removing paragraph (d).
- c. Redesignating paragraphs (e) through (i) as new paragraphs (d) through (h) respectively.

The revision reads as follows:

**§ 17.1002 Substantive conditions for payment or reimbursement.**

Payment or reimbursement under 38 U.S.C. 1725 for emergency treatment will be made only if all of the following conditions are met:

\* \* \* \* \*

5. In § 17.1005, revise paragraph (b) and add paragraphs (c) and (d) as follows:

**§ 17.1005 Payment limitations.**

\* \* \* \* \*

(b) Except as provided in paragraph (c) of this section, VA will not approve claims for payment or reimbursement of the costs of emergency treatment not previously authorized for any period beyond the date on which the medical emergency ended. For the purpose of payment or reimbursement of the expense of emergency treatment not previously authorized, VA considers that an emergency ends when the designated VA clinician at the VA facility has determined that, based on sound medical judgment, a veteran:

(1) Who received emergency treatment could have been transferred

from the non-VA facility to a VA medical center for continuation of treatment for the disability, or

(2) Who received emergency treatment could have reported to a VA medical center for continuation of treatment for the disability.

(c) Claims for payment or reimbursement of the costs of emergency treatment not previously authorized may only be made for continued, non-emergent treatment, if:

(1) The non-VA facility notified VA at the time the veteran could be safely transferred to a VA facility (or other Federal facility with which VA has an agreement to furnish health care services for veterans) and the transfer of the veteran was not accepted, and

(2) The non-VA facility made and documented reasonable attempts to request transfer of the veteran to VA (or to another Federal facility with which VA has an agreement to furnish health care services for veterans), which means that the non-VA facility contacted either the VA Transfer Coordinator, Administrative Officer of the Day, or designated staff responsible for accepting transfer of patients at a local VA (or other Federal facility) and documented such contact in the veteran's progress/physicians' notes, discharge summary, or other applicable medical record.

(d) If a stabilized veteran who requires continued non-emergent treatment refuses to be transferred to an available VA facility (or other Federal facility with which VA has an agreement to furnish health care services for veterans), VA will make payment or reimbursement only for the expenses related to the initial evaluation and the emergency treatment furnished to the veteran up to the point of stabilization as set forth in paragraph (a) of this section.

\* \* \* \* \*

**§ 17.1006 [Amended]**

6. Amend § 17.1006 by removing "Fee Service Review Physician or equivalent officer" and adding, in its place, "designated VA clinician".

**§ 17.1008 [Amended]**

7. Amend § 17.1008 by removing "treatment" in both places it appears, and adding, in each place, "treatment and any non-emergent treatment that is authorized under § 17.1005(c) of this part".

[FR Doc. 2010-14110 Filed 6-10-10; 8:45 am]

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