

DATE: 03-11-91

CITATION: VAOPGCPREC 22-91
Vet. Aff. Op. Gen. Couns. Prec. 22-91

TEXT:

SUBJECT: Autopsy on Veteran who dies outside VA Facility while in Post-Hospital Care Status.

(This opinion, previously issued as Opinion of the General Counsel 13-71, dated May 26, 1971, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

To: Chief Medical Director

QUESTIONS PRESENTED:

(1) Whether VA may perform an autopsy on a veteran who dies outside of the VA facility while undergoing post-hospital care under the provisions of 38 U.S.C. § 612(f)(2), when the cause of death is unknown or uncertain and the results of an autopsy may enable VA to complete its hospital records, assuming proper authorization by the next of kin is obtainable; and

(2) If so, may the same conclusion be applied in the case of a veteran whose post-hospital care outpatient treatment status arises from other statutory authority.

COMMENTS:

In Op.G.C. 2-61, January 12, 1961, this office concluded that a veteran who died while in post-hospital care status was not within the provisions of 38 U.S.C. § 903 and therefore transportation costs of the body were not payable. DM & S has applied this conclusion to other situations but now finds that significant information is lacking in certain cases, particularly those involving heart pacemaker implantation, and asks that the matter be reconsidered.

In Op.Sol. 210-51, May 3, 1951, in an opinion approved by the Administrator, the Solicitor stated:

"7. The laws authorizing the VA to furnish hospital and medical treatment and domiciliary care to veterans (Section 6, Public No. 2, 73d Congress, as amended by Public No. 312, 74th Congress, Section 706, Title 38 U.S.C.A.) authorize the

Administrator of Veterans Affairs 'under such limitations as he may prescribe, and within the limits of existing Veterans' Administration facilities,' to furnish medical and hospital treatment and domiciliary care to the classes of veterans therein enumerated.

"8. Public Law 293, 79th Congress (38 U.S.C. § 15), establishes in the VA a Department of Medicine and Surgery, the functions of which 'shall be those necessary for a complete medical and hospital service to be prescribed by the Administrator of Veterans' Affairs.'

"9. In view of the provision in Public Law 312, 74th Congress, quoted in paragraph 7, it is my opinion that within reasonable limits the Administrator has the legal power to promulgate a regulation authorizing autopsies on the bodies of patients who shall have died in a VA facility if he concludes that such action is necessary for purposes of the VA including increase of medical knowledge. If such regulation is promulgated, obviously it ought to prescribe reasonable conditions, including denial of autopsy if the patient in his life, or his surviving spouse, if any, or next of kin, expresses objection or declines to consent; and in all cases after notice to such spouse or, if none, the next of kin."

Pursuant thereto, there was issued what is now VA Regulation 6155. VAR 6155 provides:

"(A) Except as provided in this paragraph, no autopsy will be performed by the VA unless there is no known surviving spouse or known next of kin; or without the consent of the surviving spouse or, in a proper case, the next of kin, unless the patient or domiciled person was abandoned by the spouse, if any, or, if no spouse, by the next of kin for a period of not less than 6 months next preceding his death. Where no inquiry has been made for or in regard to the decedent for a period of 6 months next preceding his death, he shall be deemed to have been abandoned.

"(B) If there is no known surviving spouse or known next of kin, or if the decedent shall have been abandoned or if the request is sent and the spouse or, in proper cases, the next of kin fails to reply within the reasonable time stated in such request of the VA for permission to perform the autopsy, the Director is hereby authorized to cause an autopsy to be performed if in his descretion [sic] he concludes that such autopsy is reasonably required for any necessary purpose of the VA, including the completion of official records and advancement of medical knowledge.

"(C) If it is suspected that death resulted from crime or the cause of death is unknown and if the United States has exclusive jurisdiction over the area where the body is found, the Director of the hospital or center will inform the appropriate Chief Attorney of the known facts concerning the death. Thereupon the Chief Attorney will transmit all such information to the United States Attorney for such

action as he deems appropriate and will inquire whether the United States Attorney objects to an autopsy if otherwise it be appropriate. If the United States Attorney has no objection, the procedure as to autopsy will be the same as if the death had not been reported to him.

"(D) If the United States does not have exclusive jurisdiction over the area where the body is found, the local coroner will be informed. If the local coroner declines to assume jurisdiction, the procedure will be the same as is provided in subparagraph (C) of this paragraph. If a Federal crime is indicated by the evidence, the procedure of subparagraph (C) of this paragraph will also be followed.

"(E) The laws of the decedent's domicile are determinative as to whether the spouse or the next of kin is the proper person to grant permission to perform an autopsy and of the question as to the order of preference among such persons. Usually the spouse is first entitled, except in some situations of separation; followed by children, parents, brothers and sisters, etc. When the next of kin as defined by the laws of decedent's domicile consists of a number of persons as children, parents, brothers and sisters, etc., permission to perform an autopsy may be accepted when granted by the person in the appropriate class who assumes the right and duty of burial."

M-1, Part I, paragraph 14.03 provides in part:

"a. The purpose of an autopsy is to contribute to knowledge of the causes and cures of disease and disability, and in some cases to satisfy medico-legal requirements as to the cause of death. These objectives can be met only by the participation of qualified physicians. Accordingly, the request for permission to perform an autopsy normally will be made by a physician who is fully qualified and prepared to explain the purposes and the reasons for the need to perform one. The physician responsible for care of the patient at the time of death is the one most suitable and will be designated for this purpose whenever possible. When a physician is not available, the Chief of Medical Administration, or his designee, may seek the required permission. In no event will chaplains be used to secure permission for autopsies. Chaplains may and should, however, provide advice and counsel to relatives when it is sought by the relatives.

"b. The provisions of VA Regulation 6155 and DM & S Manual M-2, part VI, chapter 8, apply ..."

Similarly, M-2, part VI, chapter 8, contains the following:

"8.01 Statement of Policy

"An attempt will be made to procure legal permission for autopsies on all patients who die in VA hospitals, and a protocol will be prepared.

"8.02 Preparation of Autopsy Protocol

"Where legal permission can be secured, an autopsy will be performed on all patients who die in VA hospitals, and a protocol will be prepared and disposed of as follows: ..."

Several observations can reasonably be drawn from the foregoing. At the outset, it would appear that there is no legal prohibition to the performance of an autopsy under the conditions stated, assuming such action is not contrary to applicable State law; see Op.GC 3-70. If it is administratively determined to implement this conclusion, it would appear desirable that the regulations and manual provisions be amended to reflect such policy. In order for VA to perform an autopsy, current directives impliedly require that the individual have a status of VA patient or be a domiciled person. A veteran discharged from the hospital and placed in a post-hospital care status does not satisfy this requirement. Further, we construe VAR 6155(D) as relating to the type and extent of jurisdiction of which the facility is located, rather than to the status of the individual who is deceased and, therefore, do not consider the subject area as pre-empted thereby.

It is to be noted that the foregoing conclusion authorizing autopsy under specific circumstances is premised on the responsibility of the Administrator to furnish care and treatment to veterans, and the relationship between the veteran and the VA arising therefrom (which continues while care and treatment are still being furnished), rather than on the language of section 612(f)(2). Accordingly, this conclusion is for application under similar post-hospital care outpatient treatment circumstances, regardless of the source of the authority for the relationship; for example, service-connected veterans under section 612(a), Spanish-American War or Indian wars veterans under section 612(e), and those veterans whose eligibility for medical services arises under section 612(g).

In addition to the question of whether VA has the authority to perform autopsy under the conditions stated (which was answered in the affirmative, *supra*), there is the related question of authority of VA to pay for the transportation of the body, when such is necessary in order to perform the autopsy. In an unpublished opinion of November 7, 1966, we stated:

"6. 'Treatment' is a broad term covering all steps taken to effect a cure of an injury or disease, and includes examination and diagnosis as well as the application of remedies (70 CJS 817; Kirschner v. Equitable Life Assurance Soc., 284 NYS 506). The word 'treatment,' in its common and accepted sense, is the means employed to cure a disease, and the management of diseases or diseased patients (70 CJS 817; Goldwater v. Citizens Casualty Co. of New York, 7 NYS2d 242). Knowledge obtained from autopsies, and other pathological diagnostic studies, is used not only to obtain a correct final diagnosis with respect to the injury or disease of the deceased veteran, but is also used to cure or

manage diseases of future veteran-patients. Viewed in this light, it is my opinion that the performance of such procedures may be considered to be within the broad meaning of the term 'treatment,' as used in 38 U.S.C. § 4116.

"7. Accordingly, it is my opinion that any action filed in a state court against your medical personnel, as a result of autopsies, or other pathological diagnostic studies, performed by them while exercising their duties in or for the Department of Medicine and Surgery, may be removed to the applicable Federal District Court (under the provisions of 38 U.S.C. § 4116), and treated as an action against the United States under the Federal Tort Claims Act."

In my opinion, therefore, when an autopsy is performed as reasonably required for any necessary purpose of the VA, transportation of the body for such an autopsy could be accomplished under the provisions of 38 U.S.C. § 213. To the extent that an unpublished opinion of this office dated March 14, 1966, is not in accord with this holding, it is no longer to be considered controlling.

HELD:

(1) There is authority to perform an autopsy on a veteran who dies outside the VA facility while receiving post-hospital treatment under 38 U.S.C. § 612(f)(2) when the cause of death is unknown or uncertain, if it is concluded that such autopsy is reasonably required for any necessary purpose of the VA, including the completion of official records and advancement of medical practice, and when proper authorization of the next of kin is obtained. Such authority encompasses the furnishing of transportation of the body. If a research purpose is to be accomplished, both the transportation of the remains and the costs of autopsy are properly chargeable to the appropriation for research. (2) The conclusion in (1), supra, is for application under similar post-hospital care outpatient treatment circumstances regardless of the source of authority for the relationship; e.g., service-connected veterans under section 612(a), Spanish-American War or Indian wars veterans under section 612(e), and those veterans whose eligibility for medical services arises under section 612(g).

VETERANS ADMINISTRATION GENERAL COUNSEL
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