

DATE: 11-12-92

CITATION: VAOPGCPREC 23-92
Vet. Aff. Op. Gen. Couns. Prec. 23-92

TEXT:

QUESTION PRESENTED:

Is payment of the greater aid-and-attendance allowance, provided under 38 U.S.C. § 1114(r)(2) for veterans in need of a higher level of care, authorized where a veteran is receiving residential or nursing-home care in an institution at the veteran's own expense?

COMMENTS:

1. You have requested a precedent opinion on whether a veteran who resides in a private residential or nursing institution at his or her own expense may be eligible for the greater aid-and-attendance allowance for a higher level of care provided under 38 U.S.C. § 1114(r)(2). We conclude that the enhanced aid- and-attendance allowance may be paid to such a veteran regardless of his or her residence in such an institution, if the veteran is otherwise eligible.

2. Title 38, United States Code, section 1114(r)(2), provides for the payment of a specified monthly aid-and-attendance allowance to a veteran if, in addition to needing regular aid and attendance, the veteran: (1) needs a higher level of care; and, (2) would require hospitalization, nursing-home care, or other residential institutional care in the absence of the higher level of care. The statute further requires that need for a higher level of care be considered to be "need for personal health-care services provided on a daily basis in the veteran's home" by a person licensed to provide such services or a person regularly supervised by a licensed health-care professional. Implementing regulations, codified at 38 C.F.R. ss 3.350(h) and 3.352(b), generally track the statutory terms concerning the need for a higher level of care, provide examples of what services constitute "personal health- care services," and define the classes of persons who may provide such services. Neither the statute, nor the regulations, specifically addresses the case of a veteran institutionalized at his or her own expense. Thus, the question may be formulated: Is the allowance payable to a veteran who needs daily personal health-care services by a qualifying person and who would require hospitalization, nursing-home care, or other residential institutional care in the absence of such care, but who resides in an institution where such care is provided at the veteran's expense?

3. The legislative history of 38 U.S.C. § 1114(r)(2) indicates that the enhanced allowance was intended to better meet the substantial financial needs of certain severely disabled veterans and to give veterans in need of daily health care an

alternative to institutionalization. In offering an amendment containing the enhanced aid-and-attendance allowance to legislation that became Pub. L. No. 95-479, 92 Stat. 1560 (1978), Senator Alan Cranston, Chairman of the Committee on Veterans' Affairs, stated two justifications for providing an increased aid-and-attendance allowance for certain veterans:

First, the current amount of \$563 per month--\$6,756 per annum--is insufficient to pay for adequate aid-and-attendance-type care in some cases. Second, a higher rate would assist some veterans who cannot survive away from the hospital without full-time, 24-hour care at home....

... I believe that it is justifiable to provide an increased allowance to permit some veterans who cannot survive without care to live away from the hospital or nursing home.

124 Cong. Rec. 18,467 (1978) (statement of Sen. Cranston).

Several other legislators also commented on how the provision would help veterans avoid institutionalization and remain in their homes. One stated, " t his additional so-called 'second tier A & A' will provide necessary financial assistance to enable many of these catastrophically disabled veterans to avoid being permanently institutionalized since the additional \$300 will permit many of them to obtain the necessary life - sustaining services within the environs of their own home." 124 Cong. Rec. 31,700 (1978) (statement of Rep. Hammerschmidt).

Another commented, " t he new level will provide the assistance necessary to help these veterans remain in their homes." Id. (statement of Rep. Abdnor).

Yet another noted, " w e believe this additional assistance will make it possible for many catastrophically disabled veterans to avoid being permanently institutionalized. The added \$300 monthly should help many to obtain needed services within their own home." 124 Cong. Rec. 33,095 (1978) (statement of Sen. Stafford).

4. The Senate Committee on Veterans' Affairs reported that "[t]he current amount of \$563 per month--\$6,756 per annum--is insufficient to pay for adequate aid-and-attendance-type care in some cases" and stated the Committee's strong belief "that it is very desirable to enable such very seriously disabled veterans to reside in their own homes, rather than in institutions, if the nature of their disabilities is such that they are able to live at home with the aid and attendance of another person." S. Rep. No. 1054, 95th Cong., 2d Sess. 21 (1978), reprinted in 1978 U.S.C.C.A.N. 3465, 3479. The primary purposes, then, behind 38 U.S.C. § 1114(r)(2) are to provide adequate funds to meet the substantial health-care needs of certain severely disabled veterans and to enable veterans in need of a higher level of care to remain in their homes. These purposes are effected by payment of a higher level aid-and- attendance allowance, which helps to defray the cost of daily health care.

5. We interpret the second stated purpose behind 38 U.S.C. § 1114(r)(2) as not being to keep veterans out of institutions, but rather to enable them to remain at home if they prefer. The permissive language used in the excerpts quoted above suggests this. For example, Senator Cranston said that the increased allowance would "permit some" veterans to live away from the hospital or nursing home, and Senator Stafford said that the additional assistance would make it "possible for many" veterans to avoid institutionalization. This distinction is pertinent in determining whether payment of the allowance to veterans institutionalized at their own expense is consistent with the legislative purpose behind the law.

6. Since the statutory language does not require that veterans actually receive daily health care at home to be eligible for the enhanced benefit, only that they need such care to avoid institutionalization, paying the allowance to otherwise qualified veterans who reside in an institution would not conflict with the terms of the statute. In addition, payment of the extra allowance to veterans residing in private institutions at their own expense would help defray the cost incurred by such veterans for daily health care, just as it would help defray the cost of receiving care at home. Helping defray the cost of needed daily health care, whether it be provided in an institution or in the home, furthers the purpose of meeting the substantial financial needs of severely disabled veterans. In fact, paying the allowance to veterans residing in private institutions at their own expense satisfies a disability-related financial need more than does paying the allowance to veterans whose relatives or other household members provide them with health care in the home and thereby spare them the cost of purchasing such care. Payment of the allowance is not prohibited in the latter situation. 38 C.F.R. § 3.352(c). Benefits would not be duplicated in cases in which the Government is already paying for institutional care, since the aid-and-attendance allowance is expressly not payable to veterans hospitalized at Government expense. See 38 U.S.C. § 5503(e); 38 C.F.R. §§ 3.350(h) and 3.352(b)(2).

7. Paying the second-tier allowance to veterans who need a level of care higher than regular aid and attendance, but who actually reside at their own expense in a private institution where such care is provided, would not advance the purpose behind 38 U.S.C. § 1114(r)(2) of assisting severely disabled veterans to remain in their homes. However, neither would it frustrate that purpose. It would provide such veterans the option of living at home or in an institution and receiving needed health-care services in either location.

8. In the Explanatory Statement on the compromise version of the legislation which became Pub. L. No. 95-479, the Committees on Veterans' Affairs noted that "ordinarily the laws governing veterans' benefits are to be liberally construed but that in this instance it is the intention of the Committees that this new provision be strictly construed by ... VA and that the higher allowance be granted only when the need is clearly established and the amount of services required by the veteran each day is substantial." Explanatory Statement on H.R. 11886, 124 Cong. Rec. 31,697, 31,698 (1978), reprinted in 1978 U.S.C.C.A.N. 3526,

3528; see also 124 Cong. Rec. 33,089 (1978) (statement of Sen. Cranston) ("The Committees have agreed that this provision is intended to be strictly construed by ... VA so that the new allowance would be granted only where the veteran's need is clearly established and the amount of health-care services required only on a daily basis is substantial."). This legislative intent is reflected in the implementing regulations at 38 C.F.R. § 3.352(b)(5). However, the qualifying language in the legislative history of 38 U.S.C. § 1114(r)(2), referring to need and the amount of services required, suggests that Congress intended strict application in determining whether a particular veteran really needs the higher level of care. The legislative history does not indicate an intention that the law be strictly construed so as to deny the higher level aid-and-attendance allowance to veterans who are in fact in need of a higher level of care.

9. We therefore conclude that residence in a private institution at a veteran's own expense would not preclude payment of the aid-and-attendance allowance for a higher level of care.

HELD:

The greater aid-and-attendance allowance, provided under 38 U.S.C. § 1114(r)(2) for veterans in need of a higher level of care, may be paid where an otherwise eligible veteran is receiving residential or nursing-home care in an institution at the veteran's own expense.

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