

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900-AL48

Charges Used for Recovery From Tortiously Liable Third Parties for Medical Care or Services Provided by the Department of Veterans Affairs

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) medical regulations with respect to charges used for the purpose of recovering from tortiously liable third parties the reasonable value of medical care and services provided by VA. The effect of this action is to amend VA's medical regulations to conform with the decision of the Director of the Office of Management and Budget regarding the charges that are to be used for this purpose.

DATES: *Effective Date:* These amendments are effective January 7, 2004.

FOR FURTHER INFORMATION CONTACT: David Cleaver, Chief Business Office (168), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 254-0361. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: This document amends VA's medical regulations that are set forth at 38 CFR part 17. More specifically, we are amending the regulations with respect to charges used for the purpose of recovering from tortiously liable third parties the reasonable value of medical care and services provided by VA.

We are amending these regulations to reflect the decision of the Director of the Office of Management and Budget (OMB) to adopt the charges determined in accordance with the provisions of 38 CFR 17.101 for the purpose of recovering from tortiously liable third parties the reasonable value of medical care and services provided by VA under circumstances subject to the Federal Medical Care Recovery Act (FMCRA), 42 U.S.C. 2651-2653. Previously, the regulations stated that the rates generated by the methodology at 38 CFR 17.102(h) would be used for this purpose. Consistent with the OMB Director's decision, we are deleting that statement from § 17.102(h), and adding a note at the end of § 17.101 to indicate that OMB is prescribing the charges determined in accordance with that section for use for this purpose. Finally,

we are adding a statement to § 17.102(h) indicating that either VA or OMB will publish in the **Federal Register** the rates generated by the methodology of that section for the purposes described therein.

There are two basic reasons for this change. First, VA's community-based "reasonable charges" more accurately reflect the reasonable value of the medical care and treatment furnished by VA to the injured person, consistent with 42 U.S.C. 2651 and 2652, than do VA's cost-based *per-diem* tort rates.

Second, VA's present dual-rate billing system (tortfeasor and health plan), using significantly different charges, is confusing and difficult to justify. VA claims, for example, may be made both against the tortfeasor who caused the injury, using the current FMCRA *per-diem* rates, and against the veteran's health plan, using the significantly higher reasonable charges, for the same VA medical care. This not only is confusing to VA billing officials and makes settling claims more difficult, but such dual billing also may disadvantage veterans by providing a *per-diem* rate bill to assert against the tortfeasor while exposing veterans to subrogation claims from their health plans who paid at the higher reasonable charges rates. Making the charges billed to all liable parties in FMCRA cases uniform will eliminate confusion and remove an impediment to allowing injured veterans to assert the higher reasonable charges rates for their causally related health care as a necessary and proper element of damages in their cases against the responsible tortfeasors.

This change has been agreed to by (1) the Department of Justice, which has jurisdiction over VA tort cases under the Federal Medical Care Recovery Act; (2) the Office of Management and Budget, which has the authority to prescribe the charges used for this purpose; and (3) the Department of Veterans Affairs.

Administrative Procedure Act

Since the changes made in this regulatory amendment are informational or technical revisions conforming to the OMB decision described above, we have concluded that good cause exists for dispensing with the prior notice and comment and delayed effective date provisions of 5 U.S.C. 553. Under these circumstances, such procedures would be impracticable, unnecessary, and contrary to the public interest.

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any

rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any given year. This rule would have no such effect on State, local, or tribal governments, or the private sector.

Paperwork Reduction Act

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

Executive Order 12866

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that this regulatory amendment will 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 amendment would directly affect only individual tortfeasors. Accordingly, pursuant to 5 U.S.C. 605(b), this 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 for the programs affected by this rule are 64.005, 64.007, 64.008, 64.009, 64.010, 64.011, 64.012, 64.013, 64.014, 64.015, 64.016, 64.018, 64.019, 64.022, and 64.025.

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: September 17, 2003.

Anthony J. Principi,
Secretary of Veterans Affairs.

■ For the reasons set out in the preamble, 38 CFR part 17 is amended as set forth below:

PART 17—MEDICAL

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, 1721, unless otherwise noted.

■ 2. Section 17.101 is amended by adding a Note immediately preceding the information collection parenthetical to read as follows:

§ 17.101 Collection or recovery by VA for medical care or services provided or furnished to a veteran for a nonservice-connected disability.

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Note to § 17.101: The charges generated by the methodology set forth in this section are the same charges prescribed by the Office of Management and Budget for use under the Federal Medical Care Recovery Act, 42 U.S.C. 2651–2653.

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§ 17.102 [Amended]

■ 3. In § 17.102, paragraph (h), the last sentence is amended by removing “are the same rates prescribed by the Office

of Management and Budget and published in the **Federal Register** for use under the Federal Medical Care Recovery Act, 42 U.S.C. sections 2651–2653” and adding, in its place, “will be published by either VA or OMB in the ‘Notices’ section of the **Federal Register.**”

[FR Doc. 04–319 Filed 1–6–04; 8:45 am]

BILLING CODE 8320–01–P