THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

December 15, 2005

The Honorable Lane Evans
Ranking Democratic Member
Committee on Veterans' Affairs
U. S. House of Representatives
Washington, D.C. 20515

Dear Congressman Evans:

Earlier this year, you wrote expressing a concern with the Department of Veterans Affairs' (VA) interpretation of 38 U.S.C. § 1725, a law that authorizes VA to reimburse for emergency care furnished to veterans in non-VA facilities. Specifically, you expressed the view that VA inappropriately denies reimbursement for non-VA care in situations when VA cannot accept a transfer of the veteran to a VA facility because VA does not have a bed available. You asked whether VA's Office of General Counsel has issued an opinion addressing your specific concern, and if not, you asked that office to prepare such an opinion. Finally, you wrote that if the VA General Counsel's opinion supports the position VA has been following, that you would like VA to offer assistance in drafting legislation to change the law to bring it into conformity with your view of the matter.

On November 16, 2005, the General Counsel issued the enclosed opinion. The opinion supports the interpretation of the law that VA has followed since implementation of the law in 2001. If you wish to draft legislation to change the law to mandate that VA pay for care until VA is able to accept transfer of the veteran, VA's General Counsel suggests that you amend the statutory definition of the term "emergency care" contained in 38 U.S.C. § 1725(f)(1). Specifically, he suggests that you amend clause (C) in the definition to read, "until such time as the veteran is offered the opportunity to be transferred safely to a Department facility or other Federal facility." The suggested language is furnished as a technical drafting service only, as the Department has no cleared position on the merits of any such amendment.

I sincerely regret the length of time that was necessary to prepare the opinion and respond to your letter.

Sincerely yours,

R. James Nicholson

Enclosure

Department of Veterans Affairs

Memorandum

Date: November 16, 2005

VAOPGCADV 11-2005

From: General Counsel (02)

Subj: VA's Authority to Pay For Emergency Care Under 38 U.S.C. § 1725

To: Under Secretary for Health (10)

QUESTION PRESENTED:

Under 38 U.S.C. § 1725, may VA deny reimbursement for care furnished to a veteran by a non-VA facility after the point in time that the veteran could be transferred safely to a VA facility to receive such care, when VA cannot accept the transfer because VA does not have a bed available?

DISCUSSION:

1. In 1999, Congress enacted 38 U.S.C. § 1725, which authorizes VA to pay for emergency care furnished to nonservice-connected veterans in non-VA facilities, subject to certain limitations. In particular, VA's authority to pay for the emergency care extends only up to the point that the veteran can be transferred safely from the non-VA facility to a VA or other Federal facility. The law contemplates that at that point, the veteran would be transferred to VA to receive any additional needed care. However, on occasion, a VA facility may not have a bed available and must refuse to accept the transfer, leaving the non-VA facility to provide the continued care. VA does not pay for this additional care. This situation has given rise to questions by members of Congress, most recently Congressman Lane Evans, regarding the legality of VA's refusal to pay for this additional care.

Applicable Law

2. Section 1725 of title 38, United States Code, provides, in part:

> **(a) General authority.**—(1) Subject to subsections (c) and (d), the Secretary may reimburse a veteran described in subsection (b) for the reasonable value of emergency treatment furnished the veteran by a non-Department facility.

Section 1725(f) defines the term "emergency treatment."

> (1) The term "emergency treatment" means medical care or services furnished, in the judgment of the Secretary—

> (A) when Department or other Federal facilities are not feasibly available and an attempt to use them beforehand would not be reasonable;
>
> (B) when such care or services are rendered 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; and
>
> (C) until such time as the veteran can be transferred safely to a Department facility or other Federal facility.

Applicable Regulations

3. In 2001, VA issued regulations to implement 38 U.S.C. § 1725. Certain provisions in those regulations are pertinent to the question being considered in this opinion. First, 38 C.F.R. § 17.1002 establishes several conditions that must be met for VA payment for care under 38 U.S.C. § 1725. One of those conditions is as follows:

> (d) The claim for payment or reimbursement for any medical care beyond the initial emergency evaluation and treatment is for a continued medical emergency of such a nature that the veteran could not have been safely discharged or transferred to a VA or other facility (the medical emergency lasts only until the time the veteran becomes stabilized);

38 C.F.R. § 17.1002(d). Second, 38 C.F.R. § 17.1001 defines various terms used in the regulations, including the following:

> (d) The term *stabilized* means that no material deterioration of the emergency medical condition is likely, within reasonable medical probability, to occur if the veteran is discharged or transferred to a VA or other Federal facility.
>
> 38 C.F.R. § 17.1001(d).

Question Posed by Congressman Lane Evans

4. In a letter dated May 5, 2005, Congressman Lane Evans wrote to the Secretary about 38 U.S.C. § 1725 and the implementing regulations. Referring to the statutory definition of emergency care quoted above, and one of the regulations quoted above, he wrote:

> In my view the law requires VA to pay for emergency care until such time as the veteran can be safely transported to a Department or other Federal facility. If there is no Department or Federal facility available to provide the care, there is no place to which the veteran can be safely transferred. Coverage should be terminated only if the veteran refuses transfer to a feasibly available facility after stabilization of the medical condition. As long as there is no other facility to which the veteran can be safely transported, all of the three conditions (A), (B), and (C) continue to be met and payment should be made.
>
> The final condition requires two conditions to be met. First that that veteran be "stabilized" (a term that is further defined in 38 CFR Ch.1§17.1001(d)), and second that the VA or other government facility that is closest to the treating facility *accepts* a transfer. I believe that Congress clearly meant for the VA to offer the eligible veteran a continuous benefit where the episode of care is either reimbursed or directly provided by VA.

<u>Analysis</u>

5. Congressman Evans has correctly identified the statutory language critical to answering the question presented. It is the language in the definition of "emergency care" which states that, in the judgment of the Secretary, the emergency care lasts "until such time as the veteran can be transferred safely to a Department facility or other Federal facility." 38 U.S.C. § 1725(f)(1)(C). That language is ambiguous and susceptible to at least two interpretations. One meaning is that given to it by Congressman Evans. A second interpretation is that the emergency ends when the veteran could be transferred safely, regardless of whether the veteran is actually transferred. VA articulated that interpretation in the regulations issued to implement the law.

6. The VA regulations implementing 38 U.S.C. § 1725, use the term "stabilized" to identify the point in time beyond which VA would not pay for continued care in a private facility. Thus, 38 C.F.R. § 17.1002(d), initially repeats the statute by stating that any claim for reimbursement must be for a medical emergency that would prevent a safe transfer to a VA or other Federal facility. The regulation then states that the medical emergency lasts only until the time the veteran becomes stabilized. The regulations define the term "stabilized" in 38 C.F.R. § 17.1001(d) to mean that "no material deterioration of the emergency medical condition is likely, within reasonable medical probability, to occur if the veteran is transferred to a VA or other Federal facility." Thus, the regulations make it clear that VA cannot reimburse for care beyond the point of stabilization, a point measured by reference to "deterioration" in the veteran's condition, not in terms of whether the veteran can be transferred safely.

7. In Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Supreme Court established the now familiar two-step approach for determining whether an agency's interpretation of a law is valid. The first step is to determine whether the plain language of the statute is clear on its face. If so, the agency must carry out that unambiguous Congressional intent. If, however, there is ambiguity in the language of the statute, the agency's construction will be considered valid so long as it is a reasonable reading of the statute. As stated in paragraph five, the language of 38 U.S.C. § 1725(f)(1)(C) is not clear, but rather is susceptible to at least two different readings, that given to it by VA, and that given to it by Congressman Evans. That being the case, the Department's construction of that law, embodied in the regulations discussed in paragraph six, are valid so long as they are not "arbitrary, capricious, or manifestly contrary to the statute." Chevron, 467 U.S. at 843. As discussed below, the Department's construction is a reasonable interpretation of the law.

8. If Congress clearly intended that VA reimburse for care beyond the point when the veteran could have been transferred to VA, it could have used different language in 38 U.S.C. § 1725(f)(1)(C). For example, instead of providing for payment up to the point that the veteran "can be transferred safely" to a VA facility, they might have more explicitly provided for payment until the veteran "is transferred safely" or "is offered the opportunity to be transferred."

9. The legislative history of 38 U.S.C. § 1725 also provides support for VA's narrow construction of the law. The history is largely found in the House Committee Report, H.R. REP. No. 237, 106th Cong., 1st Sess., pp. 38-40. The report explains that the provision "defines emergency care narrowly to cover only situations in which to delay treatment would be hazardous to life or health (and does not cover care rendered after the patient's condition has been stabilized)" (emphasis added). *Id.* at 38. The committee report is also replete with other admonitions regarding the need to narrowly define and strictly enforce the provisions of the statute in order to contain costs. *Id.* at 39-40.

HELD:

Under 38 U.S.C. § 1725, VA may deny reimbursement for care furnished to a veteran by a non-VA facility after the point in time that the veteran could be transferred safely to a VA facility to receive such care, when VA cannot accept the transfer because VA does not have a bed.

Tim S. McClain