IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

AMANDA JANE WOLFE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Vet. App. No. 18-6091
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Respondent.	)	

RESPONDENT'S RESPONSE TO
THE COURT'S SEPTEMBER 9, 2019 ORDER

Pursuant to the Court's order of September 9, 2019, Respondent, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully proffers the attached declaration of Dr. Kameron L. Matthews, Deputy Under Secretary for Health for Community Care, Veterans Health Administration. In its September 9, 2019 decision, the Court ordered the Secretary to submit "a plan for providing notice to Veterans affected by the provision of notice that contained an incorrect statement of the law concerning reimbursement of costs for non-VA emergency care." In her declaration, Dr. Matthews describes the first corrective action plan VA undertook in response to the claim asserted by Peter E. Boerschinger, dubbed "Corrective Action Plan I," and the Secretary's second corrective action plan, "Corrective Action Plan II," which he formulated in response to the Court's order.

Summarized, Dr. Matthews avers that the agency is undertaking efforts to determine how to process reimbursement claims for coinsurance and deductibles

in light of the Court's decision. This includes determining whether such claims can be processed under existing regulatory criteria and whether new regulatory action is needed. Notably, Dr. Matthews states that in most instances claims for reimbursement of coinsurance or deductibles may be processed without adopting additional regulations. Further, Dr. Matthews describes VA's plan to implement global process changes in order to address these claims, including assembling a specialized team of claims processors, developing appropriate training and procedures, updating VA correspondence templates, and implementing a quality assurance plan.

Finally, in response to the Court's specific direction to propose a plan for providing notice to veterans affected by the provision of notice that contained an incorrect statement of the law concerning reimbursement of costs for non-VA emergency care, Dr. Matthews avers that affected claimants in Categories A and B of Corrective Action Plan I will receive re-adjudications of their claims and will be notified of the prior erroneous notice and the change in the law. As Dr. Matthews explains, only a subset of Category B claimants will receive re-adjudications and corrected notice, as the Category B notices sent as part of Corrective Action Plan I did not contain the incorrect statement of law that was contained in the Category A and C notices. Because of this, the only portion of Category B claimants who need to receive re-adjudications and corrected notice are those whose claims were denied because the amounts at issue were comprised of coinsurance or

deductibles. Claimants in Category C of Corrective Action Plan I will receive corrected rejection notices advising them of the prior erroneous notice and explaining that, once their claims are complete, they will be adjudicated consistent with the Court's decision and other VA reimbursement regulations.

WHEREFORE, Respondent, Robert L. Wilkie, Secretary of Veterans Affairs, respectfully submits this response to the Court's September 9, 2019 Order.

Respectfully submitted,

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DECLARATION OF KAMERON L. MATTHEWS, M.D., JD, FAAFP

I. I, Kameron L. Matthews, M.D., JD, FAAFP, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury the following:

a. I am the Deputy Under Secretary for Health for Community Care, Veterans Health Administration (VHA). This declaration is in response to the U.S. Court of Appeals for Veterans Claims' September 9, 2019 decision in the matter of *Wolfe v. Wilkie*, __ Vet.App. __, No. 18-6091 (Sept. 9, 2019). The facts attested to herein are based on my personal knowledge.

II. Relevant Background

a. In *Staab v. McDonald*, 28 Vet.App. 50 (2016), the Court invalidated 38 C.F.R. § 17.1002(f), which prohibited reimbursement under 38 U.S.C. § 1725 of emergency medical expenses incurred at non-VA hospitals for treatment of non-service-connected (NSC) conditions if the claimant had any coverage under a health-plan contract (also referred to as other health insurance (OHI)). The Court interpreted Section 1725 to bar reimbursement only if payment by the Veteran's health-plan contract fully extinguishes the Veteran's liability to the emergency provider.

b. VA revised its regulations to implement *Staab*, *i.e.* to address VA's payment responsibility as a secondary payer after partial payment by a health-plan contract, by publishing an Interim Final Rule on January 9, 2018. 83 Fed.Reg. 974 (Jan. 9, 2018).

c. VHA did not, however, concurrently update all template language in its claims processing systems to ensure its notices properly explained the revised eligibility criterion related to a Veteran's coverage under a health-plan contract.

d. As a result, decision denial notices ("denial notices") and rejection notices requesting additional information needed to adjudicate the claims ("rejection notices") issued after January 9, 2018, continued to include language stating that VHA must deny claims for reimbursement if the Veteran has any coverage under a health-plan contract.[1]

e. These errors were the subject of Peter E. Boerschinger's claim in the Amended Petition for Class Relief in *Wolfe*. In response to the Amended Petition, on March 15, 2019, the Secretary submitted to the Court a declaration signed by me outlining a corrective action plan ("Corrective Action Plan I") to address the aforementioned errors in denial and rejection notices that were issued after January 9, 2018.

f. Corrective Action Plan I categorized affected claims into the following three groups for the purpose of taking corrective action:

    1. Category A claims were identified as claims that VHA had incorrectly denied based on the presence of any coverage under a health-plan contract. VHA agreed to notify claimants who received denial notices with the incorrect template language of the error and to reopen and re-adjudicate the claims consistent with VA's January 9, 2018, Interim Final Rule.

    2. Category B claims were identified as claims that VHA had properly denied for reasons other than the presence of OHI but for which VHA had sent denial notices that potentially included erroneous template language stating that a Veteran must have no coverage under a health-

[1] A rejection is different from a denial. A rejection notice informs the claimant what they must do in order to get the claim processed. Reasons for rejection include: duplicate claims submission, missing information (*e.g.*, the explanation of benefits or medical records), and International Classification of Disease diagnosis codes that are missing or invalid. Once a rejected claim is completed or corrected, VHA proceeds to adjudicate and either grant or deny the claim.

plan contract for the claim to be reimbursable. VHA agreed to inform these claimants of the mistake and apprise them of the correct legal criteria to substantiate a claim under Section 1725.

3. Category C claims were identified as claims that VHA rejected as incomplete and sent rejection notices that potentially included erroneous template language stating that a Veteran must have no coverage under a health-plan contract for the claim to be reimbursable. VHA agreed to send corrected rejection notices advising claimants of the mistake and apprising them of the correct legal criteria to substantiate a claim.

g. The corrective notices for Category A and C claims contained the following language based on VA's payment regulations at 38 C.F.R. § 17.1005(a)(5): "It is important to note that VA has no legal authority to pay a Veteran's cost share, deductibles, or copayments associated with their other health insurance."

h. The corrective notices for Category B claims did not contain this language or any other reference to coinsurance or deductibles.

III. **The *Wolfe* Decision**

a. On September 9, 2019, the Court issued a per curiam order in *Wolfe v. Wilkie*, __ Vet.App. __, No. 18-6091 (Sept. 9, 2019).

b. The Court invalidated 38 C.F.R. § 17.1005(a)(5), which prohibited VA from reimbursing, in addition to copayments, which specifically are barred from reimbursement by 38 U.S.C. § 1725(c)(4)(D), coinsurance and deductible payments incurred during emergency visits to non-VA hospitals for NSC conditions.

c. The Court certified a class of "all claimants whose claims for reimbursement of emergency medical expenses incurred at non-VA facilities VA has already denied or will deny, in whole or in part, on the grounds that the expenses are part of the deductible or coinsurance payments for which the veteran was responsible."

d. The Court invalidated any claims decisions denying reimbursement to *Wolfe* class members based on the invalidated regulation and ordered VA to re-adjudicate those denied claims.

e. The Court ordered VA to stop sending notices under Corrective Action Plan I because they contained incorrect statements of the law, *i.e.* language stating that VA is prohibited from reimbursing coinsurance and deductibles.

f. The Court ordered the Secretary, within 45 days, to submit to the Court for approval "a plan for providing notice to Veterans affected by the provision of notice that contained an incorrect statement of the law concerning reimbursement of costs for non-VA emergency care."

IV. Corrective Action Plan II

a. The corrective actions described below constitute VA's plan for providing notice to Veterans affected by the provision of notice during Corrective Action Plan I that contained an incorrect statement of the law concerning reimbursement of costs for non-VA emergency care as required by the Court's September 9, 2019, order in *Wolfe.*

b. The corrective actions are presented in two categories: (1) global corrective actions to ensure VHA claims processing systems, claims processing staff, and claims processing procedures are ready and able to accurately determine and reimburse Veterans' remaining coinsurance and deductible liability; and (2) corrective actions needed to notify claimants of the incorrect information in notices mailed under Corrective Action Plan I.

c. **Global Corrective Actions**

1. VHA stopped sending notices under Corrective Action Plan I.

2. VHA undertook a manual audit of a sample of Explanations of Benefits (EOBs) submitted with reimbursement claims to determine if VHA could, consistent with *Wolfe*, adjudicate pending and new claims by applying its existing payment regulations, except invalidated 38 C.F.R. § 17.1005(a)(5). VHA determined that in most instances, applying VA's current regulatory structure would result in VA's payment extinguishing a Veteran's liability for coinsurance and deductibles.

3. Under 38 C.F.R. § 17.1005(a), if a claimant has personal liability to a provider of emergency treatment after payment by a health-plan contract, VA generally will pay the lesser of the claimant's remaining liability or 70 percent of the applicable Medicare fee schedule amount for such treatment.

4. Based on the audit of a sample of EOBs, VHA believes that in most instances (with exceptions noted below), the claimant's remaining liability, including coinsurance and deductibles owed under a health-plan contract, will be less than 70 percent of Medicare, meaning that VA could reimburse the claimant's remaining liability, except copayments, in full.

5. VHA will review its IT systems and pricing capabilities for its claims processing systems to determine what systems changes or manual processes will be needed to process these claims.

6. VHA will designate a special team of experienced claims processors to focus on claims with health-plan contract payments and develop comprehensive training and processes, including standard operating procedures.

7. All templates in the VHA claims processing system will be updated to remove incorrect statements that VHA may not reimburse coinsurance or deductibles owed by a Veteran under a health-plan contract.

8. All VHA correspondence, *i.e.* denial notices and rejection notices, issued after the Court approves this plan will be issued using the revised templates.

9. All notices will direct claimants to a single customer service call center line if they have questions to ensure consistency in responses. VHA will develop call scripts for this purpose.

10. VHA will develop a quality assurance plan and perform ongoing monitoring to ensure the VHA claims processing systems do not permit denial notices to be issued on the basis that the Veteran's remaining liability is comprised of coinsurance or deductibles or rejection notices to be issued that state VHA is prohibited from reimbursing coinsurance and deductibles.

11. Quarterly checks of the language used in the software templates for denial and rejection notices will be conducted to ensure only the prescribed templates are used.

12. As noted, VHA believes that applying its existing regulatory payment methodology will result in some instances in which the 70 percent of Medicare cap would result in VA not being able to cover the full amount of the Veteran's coinsurance and deductible liability. This may occur, for example, if a Veteran has a high deductible health-plan contract and her remaining annual deductible amount exceeds 70 percent of Medicare.

13. To address this, VHA will undertake to update its regulations to allow it to reimburse the full amount of the coinsurance and/or deductible liability in these cases, in accordance with *Wolfe*.

d. **Corrective Notices for Category A, B, and C Claims**

1. **Category A Claims**—See paragraph II.e.1., above, for the description of this category.

i. Pursuant to Corrective Action Plan I, Category A claimants were previously mailed a letter advising them that VHA would reopen and re-adjudicate their reimbursement claims.

ii. As noted above, Category A letters that were issued pursuant to Corrective Action Plan I contained the following language: "It is important to note that VA has no legal authority to pay a Veteran's cost shares, deductibles, or copayments associated with their other health insurance."

iii. To the extent this statement includes "deductibles, or coinsurance," it is an incorrect statement of law after the *Wolfe* Court's invalidation of 38 C.F.R. § 17.1005(a)(5). Copayments still may not be reimbursed in light of 38 U.S.C. § 1725(c)(4)(D).

iv. To address this issue, VHA will reopen and re-adjudicate Category A claims, consistent with *Wolfe*, and notify Category A claimants of its prior erroneous notice and the change in law.

2. **Category B Claims**—See paragraph II.e.2., above, for the description of this category.

i. Pursuant to Corrective Action Plan I, Category B claimants were mailed a letter advising them that they previously received a denial notice that, while properly decided on other grounds, may have included erroneous template language regarding the legal effect of possessing OHI coverage. To address the possibility that the claimants may have decided not to appeal because of the erroneous description of the law, the letters also informed claimants that their one-year appeal period would be reset.

ii. Category B letters issued pursuant to Corrective Action Plan I contained the following language: "Your claim was properly denied but there was content in the decision notice that may have been misleading or confusing." These letters did not mention coinsurance or deductibles.

iii. A subset of the Category B claims were "properly denied" because the only remaining amounts owed by the Veteran were copayments, coinsurance, or deductibles, which VA was barred from reimbursing under 38 C.F.R. § 17.1005(a)(5) prior to *Wolfe*. To the extent the Veteran's remaining liability was comprised of coinsurance or deductibles, these decisions are no longer valid after the Court's invalidation of Section 17.1005(a)(5).

iv. To address this issue, VHA will reopen and re-adjudicate this subset of Category B claims, consistent with *Wolfe*, and notify the claimants of its prior erroneous notice and the change in the law.

v. Category B claims that were denied for reasons unrelated to personal responsibility (*i.e.*, coinsurance and deductibles) will not receive any additional correspondence. The corrected denial notices previously mailed pursuant to Corrective Action Plan I did not contain any language regarding the now-invalidated bar on reimbursing coinsurance and deductibles, and the appeal period for these claims was reset based on the date of mailing of those corrective notices.

3. **Category C Claims**—See paragraph II.e.3., above, for the description of this category.

   i. Pursuant to Corrective Action Plan I, Category C claimants were mailed corrected rejection notices. The corrected rejection notices explained that the prior rejection notice may have included erroneous information regarding eligibility criteria, namely the OHI-related eligibility criterion, necessary to substantiate their claim for reimbursement.

   ii. The revised rejection notices explained that these claims were rejected as incomplete because they were submitted without an EOB or other remittance from the Veteran's OHI showing the amount paid by the OHI.

   iii. As noted above, Category C letters issued pursuant to Corrective Action Plan I contained the following language: "It is important to note that VA has no legal authority to pay a Veteran's cost share, deductibles, or copayments associated with their other health insurance."

iv. To the extent this statement includes "deductibles, or coinsurance" it is an incorrect statement of law after the *Wolfe* Court's invalidation of 38 C.F.R. § 17.1005(a)(5). Copayments still may not be reimbursed in light of 38 U.S.C. § 1725(c)(4)(D).

v. To address this, Category C claimants will receive a corrected rejection notice advising them of the error and explaining that once the EOB is received, VHA will adjudicate the claim to determine the VA maximum allowable amount, excluding copayments, if all other criteria for reimbursement under 38 U.S.C. § 1725 are met.

Executed on **October 24, 2019**

10/24/2019

X

Kameron L. Matthews, M.D., JD, FAAFP
VHA Deputy Under Secretary for Heath
Signed by: Kameron L. Matthews 1433120