WISCONSIN LEGISLATIVE COUNCIL
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CLEARINGHOUSE RULE 09-091

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]

Preliminary Note: In March 2009, the department submitted to the Rules Clearinghouse two separate rules relating to the assistance to needy veterans program, which became Clearinghouse Rules (CR) 09-025 and 09-026. In reviewing those rules, the Clearinghouse commented that it would have been simpler to submit just one rule. However, the department also has an emergency rule in effect relating to the program (EmR0911) and has submitted for Clearinghouse review the corresponding permanent rule (CR 09-091) to which this report relates. To avoid further confusion, it is suggested that the department withdraw CR 09-025 at this time. In modified form, its provisions have been incorporated either in CR 09-026, which was promulgated and took effect on November 1, 2009, or in EmR0911 and CR 09-091.

1. Statutory Authority

A question is raised regarding the department's statutory authority for this rule, as it was in the Clearinghouse report on CR 09-025. The previous comment noted that under former s. 45.40 (2) (b), 2005-06, Stats., limits were set on the amount that could be paid under the Assistance to Needy Veterans Program for dental, vision, and health care, but that those limitations were repealed in 2007 Wisconsin Act 20. However, as with the earlier rule, this rule

would reimpose limits on those services. For example, in s. VA 2.01 (3) (d), dental procedures would not be permitted to exceed $500 in a 12-month period and, in s. VA 2.01 (3) (e), hearing care could not exceed $200 in a 12-month period. The department appears to be aware of the statutory change, because it references it in the fiscal note attached to the rule. Further, the recently promulgated CR 09-026 repealed the language in s. VA 2.01 (3) (c) that set monetary limits for dental, hearing, and vision care. The only remaining reference to a monetary limitation in the current rule is to the $7,500 cumulative total payments available to a veteran under the program, which is a statutory requirement under s. 45.40 (3), Stats.

Section 45.40 (3m), Stats., cited by the department as authority for this rule, requires rules for establishing eligibility criteria and household income limits, but not for setting limits on payments for specific types of care.

The department should explain more fully its statutory authority for reimposing limits on individual payments for dental, vision, and health care services.

2. Form, Style and Placement in Administrative Code

a. The format of the introductory clause should be as follows: "The Wisconsin Department of Veterans Affairs proposes an order to create VA 2.01 (1) (u) and (v) and (3) (d), (e), (f), and (g), relating to the assistance to needy veterans grant program." [s. 1.02 (1), Manual].

b. Once the suggested substantive changes have been made in the rule, the plain language analysis should be revised accordingly.

c. Following the agency contact information, the place to which comments may be submitted should be indicated. [See s. 1.02 (2) (a), Manual.]

d. None of the text in this rule should be underscored, as it is all newly created material. [See s. 1.06 (1), Manual.]

e. In s. VA 2.01 (1) (u):

(1) The definition of "vision care" should state what elements comprise "vision care" under the program and nothing more. Any substantive requirements or limitations should be in one or more substantive provisions, separate from the definition. [See s. 1.01 (7), Manual] For example, the language limiting a person to one vision examination could be moved to s. VA 2.01 (3) (f).

(2) Should the "licensed health care provider" refer more specifically to a *vision* care provider? Also, are all such providers "licensed", rather than, for example, "certified"? The term could be defined to list specific types of vision care providers from whom a participant may receive services (for example, ophthalmologist, optometrist, etc.). Note that in s. VA 2.01 (3) (g), reference is made to a "vision care provider" in one place, and "optometrist" and "ophthalmologist" later in the provision. Consistent use of terminology is important to an understanding of the rule's requirements.

(3) It is suggested that "corrective eyewear" be defined to specify the types of eyewear covered by the program. For example, does "corrective eyewear" include contact lenses? The question is raised in part because the statutory provision on health care covered under the program refers to "vision care, including eyeglass frames and lenses", without specifying contact lenses. [s. 45.40 (2) (a), Stats.] It is also raised because in s. VA 2.01 (3) (f), the terms "replacement glasses" and "eyewear" are used, while in sub. (3) (g), "corrective eyewear" is used. Again, consistent use of terminology is needed throughout the rule.

(4) Also, see comments on this provision under heading 5., below.

f. In s. VA 2.01 (1) (v) and elsewhere, the use of the slashed alternative "and/or" should be avoided, because it is unclear whether "and" is meant, which requires meeting all the conditions set forth or "or is meant," which requires meeting any one condition. See, also, comment 5. b., below. [See s. 1.01 (3), Manual.]

g. In s. VA 2.01 (3) (d), "dental health care professional" should be defined to specify the types of providers who may treat participants in the program. Note that "licensed" does not appear before "dental health care professional," but does for both vision and audiological professionals. The same comment applies to "licensed audiological health care professional" in s. VA 2.01 (3) (e). Also in the latter provision, "participant" should be defined, so it is clear who may receive program services. The definition should specify which family members of veterans may be "participants" in the program, in addition to the veteran. Finally, in sub. (3) (d), the word "most" should be replaced by the word "shall."

h. The last sentence of the effective date provision seems instead to be initial applicability language. It should be in a separate initial applicability clause directly after the rule text, to provide that "this rule first applies to applications for health care aid that are submitted on the effective date of this rule" (if that is the department's intent).

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. VA 20.1 (1) (u), the word "the" should be inserted before each occurrence of the word "provision."

b. In s. VA 2.01 (1) (v), does a "change in refractive error" occur only if there is an *increase* of sphere, cylinder or power as specified, rather than a decrease? It is unnecessary to capitalize "Sphere Power," "Cylinder Power," and "Axis Change".

c. In s. VA 2.01 (3) (d), it is unclear when, and to whom, a dental health care professional must indicate that the procedures performed were directly necessary to dental care. Is this a condition that is authorized or required by the statute governing the program? What happens if it is determined that the procedures were not directly necessary to dental care, after

the services have been provided? Would the participant then be expected to pay for the services or repay a grant already awarded to pay for the services?

Similar requirements exist in sub. (3) (e) with respect to hearing care and sub. (3) (g) with respect to vision care, requiring that the health care professional identify the compelling medical circumstances "which have required this added assistance." The wording implies that this is an after-the-fact assertion by the audiology or vision professional. The definition of "hearing care" in current s. VA 2.01 (1) (n) is broadly defined as "any care related to hearing, including, but not limited to, hearing exams or hearing aids. Does this expansive definition of "hearing care" not cover situations in which a person needed a more costly hearing aid and additional examination? If the requirement is retained in these two provisions, the wording is awkward and should be re-phrased to read: "compelling medical circumstances that require this additional assistance." Again, in all three provisions, it should be clear in what circumstances, with what timing, and to whom, the provider must make that determination.

d. Section VA 2.01 (3) (f) should conclude with a period.