

# United States Senate

COMMITTEE ON VETERANS' AFFAIRS  
WASHINGTON, DC 20510

May 5, 2020

Director  
Office of Regulation Policy and Management  
Department of Veterans Affairs  
810 Vermont Avenue, NW  
Room 1064  
Washington, DC 20420

Dear Director,

We submit this comment in response to the proposed regulation titled, RIN 2900-AQ48, Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments under the VA MISSION Act of 2018.

## Summary

Created in title I of Public Law (P.L.) 111-163, the Caregiver and Veterans Omnibus Health Services Act of 2010, the Comprehensive Program on Family Caregiver Assistance (Caregivers Program) has helped approximately 20,000 caregivers get the assistance they need to care for their loved ones at home and avoid institutional care.

We write to support the expansion of the Caregivers Program to veterans of all eras as required by section 161 of P.L. 115-182, the VA MISSION Act of 2018 (MISSION Act). Pre-9/11 veterans and their families have waited for comprehensive assistance for decades and we stand ready to help the Administration execute this planned expansion timely and in fairness to the veterans affected. We are disappointed by the delays in expansion that have already occurred and urge the Administration to work expeditiously to get the Program up-and-running by the end of summer.

However, we note with much concern the probable effects of the Administration's proposed modifications of the Caregivers Program that will limit eligibility, remove current users from the Program and lower the stipend amount for many caregivers. Despite any argument to the contrary, these modifications are not MISSION Act-driven and undertaken wholly by the Administration without Congressional direction.

We support the Administration's proposal that would finally make veterans suffering from service-connected illnesses eligible for the Caregivers Program. Veterans who suffer from amyotrophic lateral sclerosis, debilitating loss of limbs from bacterial infections sustained while on active duty, cancer and other illnesses would become eligible to participate in the Caregivers Program. The stipend, respite care, health care and other wrap-around benefits that are facets of the Caregivers Program will help veterans and their families through the hardships that are associated with such illnesses.

While expanding the Caregivers Program to veterans of all eras and making veterans with service-connected illnesses eligible are significant, and highly supported, provisions in the proposed rule, we have concerns related to narrowed veteran eligibility for the Caregivers Program and planned modification for how caregivers' stipends are paid. In particular, we oppose the provisions that would narrow eligibility for the Program and urge the Administration to reconsider these proposals as discussed below.

### **Discussion**

The proposed regulation would primarily limit eligibility for the Caregivers Program to veterans rated as 70 percent service-connected and above and unable to perform an activity of daily living (ADL) without assistance each time the activity occurs. According to the Regulatory Impact Analysis (RIA), an unknown number of veterans currently assigned in the existing Program to tier 1 will not meet the requirement for assistance for an ADL each time the activity is performed and 2 percent of currently enrolled tier 2 and 3 veterans will not meet the 70 percent rating requirement and will be phased out of the Program. While the Administration cannot project the number of veterans affected by the ADL requirement, approximately 400 veterans will be removed from the Program as a result of the new rating threshold. We have several concerns with these new requirements and how they will effect Program eligibility.

Had Congress contemplated a minimum rating it would have included that requirement in the original or subsequent legislation. As recently as last year, Congress had not included the possibility for a minimum level of service-connection in P.L. 115-182. Further, materials contemporary to the vetting of S. 801, the Caregiver and Veterans Health Services Act of 2009, which later became P.L. 111-193, it is clear that Congress and early proponents of the Caregivers Program never intended that VA define a specific rating to establish a baseline eligibility for the Program. In fact, testimony before the Senate Committee on Veterans' Affairs by the Wounded Warrior Project on S. 801 noted, "Participation would be predicated on an objective, clinical determination of a veteran's need for extensive daily caregiving, and the family caregivers' capacity to provide the needed assistance." We offer that a clinical determination of a veteran's need is not a rating decision adjudicated by a non-health care professional at the Veterans Benefits Administration. Even as a floor for entry, the potential for a veteran and caregiver in need is too great to leave to an administrative process wholly separate from the Veterans Health Administration. In addition, eligibility criteria are explicitly stated in the statute and, while it includes flexibility for the Department to make additional categories of veterans eligible, the statute does not include authority for the Department to curtail the specified eligibility criteria. For reasons stated above, at minimum, we request the Administration eliminate this proposal.

We are also concerned that potential delays in rating decisions and appeals could hamper a veteran's ability to fulfill the initial requirement for entry into the Caregivers Program. Historically the timeliness and accuracy of decisions on claims for compensation have been wrought with well-deserved criticism for preventing veterans from receiving earned benefits. We believe that bureaucracy and red tape should not ever be a barrier to a veteran's ability to receive needed care in-home rather than in an institution when there is a caregiver willing and able to address a veteran's needs. Further, with no plan to expedite claims for those who are seeking entry into the Program, the Administration fails to recognize just how much of a roadblock this criteria could be to timely admission. In the era of the pandemic, when VA is

unable to perform needed examinations in-person, this concern is heightened and appears to be a purposeful roadblock with the goal of lowering the number of eligible individuals in the Caregivers Program with no other purpose than saving money at the expense of taking care of veterans.

The proposed regulation gives little information on why it is necessary to move from 3-tiers to 2-levels. Rather than addressing through better guidance what the Administration found to be inconsistent assignment of “amount and degree of personal care services provided,” and a “lack of clear thresholds” in the legacy Program, it scrapped one tier and limited overall eligibility for the Program. We believe this will ultimately be to the disadvantage of veterans and those who care for them.

We are disappointed by the lack of description on the process by which current participants will be evaluated to remain in the Program with possible stipend reductions, or leave the Caregivers Program as a result of the ADL requirement. Given past concerns about the variation in process in this nationwide Program, we would have appreciated more information on how VA intends to execute assessments and reassessments. Another concern is how VA plans to adjust for bias towards those with higher ratings in the new 2-level system. For example, would the individual conducting the assessment have access to the veteran’s rating decision and be persuaded to place the veteran in the more financially beneficial category if the veteran has a higher rating than 70 percent? This factor and others must be addressed.

Regarding ADLs, we are concerned that the inability to perform one ADL all of the time is too limiting. For example, some veterans might require assistance with performing multiple ADLs 75 percent of the time, perhaps able to accomplish tasks in some instances but not others due to muscle weakness or lack of conditioning brought on by illness. These veterans may need more assistance than those who cannot independently accomplish one ADL. We urge the Administration to review this requirement to ensure that it is fair to all veterans needing assistance.

Under the proposed rule, veterans placed in Level 1 would be those are able to self-sustain in the community and have at least one ADL that he or she is unable to complete independently each time the task is performed. These caregivers would be paid at the 62.5 percent rate. Veterans in Level 2 would be those who are unable to self-sustain in the community and be fully dependent in three ADLs. These caregivers would be paid at the 100 percent rate. The proposed rule lacks adequate information on what being able to self-sustain in the community means although it is a determining factor for which level a veteran is assigned.

The stipend rate for caregivers will transition from the Bureau of Labor Statistics (BLS) combined rate to the Office of Personnel Management’s (OPM) General Schedule 4 Step 1 within the veteran’s geographic area. The stipend will further be revised from fixed hours to a percentage of annual salary based on the new 2-level placement. While VA officials have noted to Congress that most legacy participants will see an increase in their stipends if looking at just the BLS to OPM payment rate, the effect of the new 2-level system and reassessments on how much caregivers will receive is largely unknown.

We know that according to the RIA, VA projects a savings of nearly \$22 million in reduced stipend costs in Fiscal Year (FY) 2020, \$69.5 million in FY 2021, \$67.9 million in FY 2022, \$69.2 million in FY 2023 and \$72 million in FY 2024, totaling a projected \$300.6 million over 5-years for Post-9/11 veterans. For the Post-9/11 population, in addition to individuals being removed from the legacy Caregivers Program, VA's proposed regulation will lead to lower stipends for some of those currently participating and fewer Post-9/11 veterans becoming eligible for the Program due to the more stringent eligibility criteria. While it is true that many veterans will benefit from how stipend payment rates will be based as a result of the proposed rule, we cannot discount the effect on legacy participants who will be removed from the Program and/or have their caregivers paid less due to the Program's new 2-level structure and eligibility requirements.

### Conclusion

We support the expansion of the Caregivers Program to veterans of all eras and the Administration's proposal that would finally make veterans suffering from service-connected illnesses eligible for the Program. However, as stated above, we fear that some of the proposals, in particular the 70 percent rating requirement and the one ADL needing to be performed independently each time it is performed, will leave many veterans and caregivers needing assistance out of the Caregivers Program. We urge you to re-evaluate these facets of the proposed regulation.

Signed,



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Jon Tester  
United States Senator



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Patty Murray  
United States Senator



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Bernard Sanders  
United States Senator



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Sherrod Brown  
United States Senator



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Richard Blumenthal  
United States Senator



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Mazie K. Hirono  
United States Senator