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Veteran Warriors Investigation Results and Recommendations

Regarding:

The Implementation and Execution of

THE CAREGIVERS AND VETERANS OMNIBUS

HEALTH SERVICES ACT OF 2010

Introduction

The Caregiver and Veterans Omnibus Health Services Act of 2010 (Public Law 111-163) went into effect in February 2011. The Caregiver Support Program currently provides stipends, health insurance, respite care and other resources to 22,631 veterans and their caregivers. The levels of support are broken out into "Tiers" (Tier 1, 2 and 3); each one based on the number of hours a caregiver provides assistance to the veteran, Tier 3 being the highest level of care equating to 40 hours a week. The criteria both for the veteran eligibility and the caregiver's assistance are defined by the law. The eligible injuries are also defined under the law. The law states as follows:

> ***§ 71.20 Eligible veterans and servicemembers.***
>
> *A veteran or servicemember is eligible for a Primary or Secondary Family Caregiver under this part if she or he meets all of the following requirements:*
>
> ***(a)*** *The individual is either:*
>
> ***(1)*** *A veteran; or*
>
> ***(2)*** *A member of the Armed Forces undergoing a medical discharge from the Armed Forces.*
>
> ***(b)*** *The individual has a serious injury, including traumatic brain injury, psychological trauma, or other mental disorder, incurred or aggravated in the line of duty in the active military, naval, or air service on or after September 11, 2001.*
>
> ***(c)*** *Such serious injury renders the individual in need of personal care services for a minimum of 6 continuous months (based on a clinical determination authorized by the individual's primary care team), based on any one of the following clinical criteria:*
>
> ***(1)*** *An inability to perform an activity of daily living.*

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(2) *A need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury, including traumatic brain injury.*

(3) *Psychological trauma or a mental disorder that has been scored, by a licensed mental health professional, with Global Assessment of Functioning (GAF) test scores of 30 or less, continuously during the 90-day period immediately preceding the date on which VA initially received the caregiver application. VA will consider a GAF score to be "continuous" if there are at least two scores during the 90-day period (one that shows a GAF score of 30 or less at the beginning of the 90-day period and one that shows a GAF score of 30 or less at the end of the 90-day period) and there are no intervening GAF scores of more than 30.*

(4) *The veteran is service connected for a serious injury that was incurred or aggravated in the line of duty in the active military, naval, or air service on or after September 11, 2001, and has been rated 100 percent disabled for that serious injury, and has been awarded special monthly compensation that includes an aid and attendance allowance.*

(d) *A clinical determination (authorized by the individual's primary care team) has been made that it is in the best interest of the individual to participate in the program.*

(e) *Personal care services that would be provided by the Family Caregiver will not be simultaneously and regularly provided by or through another individual or entity.*

(f) *The individual agrees to receive care at home after VA designates a Family Caregiver.*

(g) *The individual agrees to receive ongoing care from a primary care team after VA designates a Family Caregiver.*

Discussion

In the fall of 2016, Veteran Warriors began an investigation into multiple media reports of "mass revocations and tier reductions" happening within the program. We began by reaching out to those who had been revoked (terminated) or lowered from the program and asked them to share their cases with us. By January 2017, we established a blind survey (housed both on Facebook and Survey Planet, though identical) that would capture the demographics of the veteran (including type of injuries), process map the revocation and any appeals that followed. The responses were consistent across the nation and injury type; the veterans were either stable in their conditions or had worsened. We have yet to find a case where the veteran's conditions had improved – especially so far as to be completely removed from the program.

In February 2017, we obtained copies of presentations made in 2011, 2012, 2014 and 2016, by the program's National Director, Ms. Margaret Kabat, in which Ms. Kabat detailed the numbers of caregivers having applied to and admitted to the program as well as those denied inclusion in it. To finalize our data analysis, we requested and obtained from Ms. Kabat, the numbers from 2016 through our request date (February 23, 2017). We compiled and analyzed the data and determined that since 2014, over 26,000 caregivers have been revoked from the program. Additionally, over 68 percent of all applications have been denied. More startling is how many Tier 3 caregivers have been lowered.

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YEAR	TIER 3	National AVG TIER $	TIER 2	National AVG TIER $	TIER 1	National AVG TIER $	TOTAL	Dropped from Program	AVG MONTHLY $	APPLIED	# of NOT APPROVED	Percentage of Applications NOT Approved
(Oct) 2011	836	$1,650.00	516	$810.00	333	$409.00	1685		$1,933,557.00	3946	2261	57.30%
(May) 2012	1871	$1,740.00	1871	$870.00	1314	$435.00	5056	-1686	$5,454,900.00	8428	3372	40.01%
(May) 2014	6000	$2,320.00	6000	$1,470.00	3600	$600.00	15600	-5488	$24,900,000.00	30400	14800	48.68%
(Sept) 2014	6700	$2,330.00	6700	$1,510.00	4400	$630.00	17800	13400	$28,500,000.00	36700	18900	51.50%
(Apr) 2016	7000	$2,400.00	8900	$1,500.00	7000	$640.00	22900	12700	$34,630,000.00	73000	50100	68.63%
(Feb) 2017	6048	$2,400.00	8721	$1,500.00	7862	$640.00	22631	Not Available Yet	$32,628,380.00		-22631	#DIV/0!
								18926	Total Revoked Since the Inception of the Program			
								26100	Revoked since early 2014			

What is clearly shown is that beginning in 2014, there is a concerted effort to 1) deny applications into the program, 2) revoke Caregiver's from the program at a consistent higher than statistical allowance rate and 3) show that while the demand for the program increased as publicity about the program expanded, those approved were at an actually lower percentage than previous reporting periods.

The revocations have climbed exponentially since early 2014 – over 26,000 Caregivers revoked since the September 2014 reporting. That number DOES NOT include those Caregivers whose Tiers were dramatically lowered without medical / psychiatric justification. Additionally, the number of applications denied is now at an unprecedented high of nearly 69 percent. Yet, with every press statement, the leadership of the program insists that they are not "culling the herd" or revoking anyone without justification. Unfortunately, the evidence that has been supplied by the Caregivers affected belies VACO's statements at every turn.

As our survey continued, the consistency of the statements spread. In late February 2017, we began collecting case evidence from those willing to provide it. To date, we have collected nearly 400 cases of evidence. We have had many of them reviewed by a licensed Registered Nurse whose career entails exactly what the VA nurses (for the program) are supposed to do; In-Home Assessments of severely disabled individuals.

What we found was:

- Medicare compliance violations
- Deliberately ignored medical evidence that supported the veteran remaining at Tier level or at least in the program
- Use of providers not affiliated with the veterans care team to make clinical determinations
- Denial of services to veterans and caregivers
- Alterations and falsifications of records in order to support revocations
- Evidence of retaliation and retribution against caregivers who challenged Coordinators actions and decisions

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- Consistent reports (nationally) of the "boards" (appeal and VISN appeal) being non-existent or whose membership and makeup are highly questionable as Coordinators are reporting that "they are the only one who handles the appeal. Additionally, when requested for the composition and credentials of the appeal board members, even Congressional leaders are denied the information; leading to the logical conclusion that the "boards" actually do not exist
- Multiple reports of revocations being based on "time in the program"; many are being told that 3 years is the "limit" as it is a "rehabilitation / recovery-based" program.

Leadership Involvement

In reviewing the earliest media reports surrounding the revocations, there was one consistent factor; that the National Director's office was aware of the situation. Ms. Kabat was interviewed for these early reports by several of the reporters. Each time, her responses were non-committal and she professed no knowledge of any deliberate action by VA employees to conduct mass revocations. In March of 2016, a caregiver / advocate personally met with Ms. Kabat to review 32 cases of revocations that had been clinically reviewed and were found to have been unlawful. To date, none of the cases were reviewed, let alone reinstated. Reports from those involved reflect that Ms. Kabat has provided two (2) emails in response to requests for updates.

In February 2016, we discovered that the previous November, VISN 8 had issued a "Mandatory Caregiver Agreement" and was demanding that each caregiver in the program sign it under threat of revocation for non-compliance. (The document is attached). Nearly every word of this "Agreement" were violations of the Final Rule and Law. We contacted Ms. Kabat and provided her with a copy. We were assured that it would be pulled. The following week, one of the facility publically posted that while they had received word from the Director's office to rescind and cease using this "Agreement", they had questioned what to do with the nearly 80% of their caseload that had already signed them. They were told by the Director to "hold on to them for later use". Only a few days ago, yet another evolution of this document was disseminated by VISN 8 and we again contacted the Director. She claimed no knowledge of it and promised to look into the matter. As of today, we still have not had a response from her as to the final outcome. It has been this complete lack of interest and engagement that prompted our investigation and requests to Congress for intervention.

During our investigation, dozens of caregivers have reached out directly to Director's office (either Dr. Kaplan or Ms. Kabat) without any success in obtaining intervention or even a review of their case. The consistent answer they receive has been that the Director and her Deputy "don't have the authority to make the VISN do anything". This particular response is preposterous both in statement and context. As the Director and Deputy, any violations of law (regarding their program); are their responsibility to correct and their intervention is expected.

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Violations and Alterations of Law

We have hundreds of cases where there has been the use of unlawful terms to validate revocation of the stipends to caregivers. The unlawful language includes words such as; "Graduated", Short-Term, Recovery/Recovery-Based". None of these words are in the law or the Final Rule. To be precise, the Final Rule actually states:

> *"…As we stated in the interim final rule, we believe that it is reasonable to interpret section 1720G, which premises eligibility upon a serious injury incurred or aggravated in the line of duty, to require that the serious injury form the basis for the individual's need for a Family Caregiver. It would not have been reasonable for Congress to have authorized VA to provide Family Caregiver services to veterans and servicemembers with serious injuries but not to have also required that the need for such services be specifically linked with the serious injuries. We also interpret section 1720G to provide Family Caregiver support and assistance for the benefit of individuals with longterm disabilities, and not episodic flare ups that temporarily establish the need for a Family Caregiver; this is the basis for the required six-month period. We reiterate from the interim final rule that this requirement meets the intent of the statute to benefit persons with longer term care needs. The law contemplates training, payment of compensation, and ongoing monitoring of veterans receiving Family Caregiver services in their homes, all of which support a framework that will benefit those with longer-term care needs."*

Alongside these unlawful terminations have been threats to caregivers and outright intimidation. There are "clinical evaluations" that appear to be cursory reviews of exclusively VA medical records and those Coordinators who are doing this; have in many cases, deliberately excluded recent, significant medical information in these evaluations. In many cases, the Coordinators are aware of the veteran's deterioration(s) yet annotate the file that the veteran has "significantly improved" and "no longer requires a caregiver".

There has been openly contradictory language provided to caregivers regarding actual eligibility based on the "Activities of Daily Living" (ADL); in many cases, they are told that most of the ADL's listed are "wifely duties". There have been publications sent out by many VISN's which actually prescribe that "assisting with dressing, cooking, shopping are not considered eligible functions as they benefit the family". We have dozens of samples from across the nation of their use.

The law states: (https://www.law.cornell.edu/cfr/text/38/71.15)

> *"Inability to perform an activity of daily living (ADL) means any one of the following:*
>
> **(1)** *Inability to dress or undress oneself;*
>
> **(2)** *Inability to bathe;*

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(3) *Inability to groom oneself in order to keep oneself clean and presentable;*

(4) *Frequent need of adjustment of any special prosthetic or orthopedic appliance that, by reason of the particular disability, cannot be done without assistance (this does not include the adjustment of appliances that nondisabled persons would be unable to adjust without aid, such as supports, belts, lacing at the back, etc.);*

(5) *Inability to toilet or attend to toileting without assistance;*

(6) *Inability to feed oneself due to loss of coordination of upper extremities, extreme weakness, inability to swallow, or the need for a non-oral means of nutrition; or*

(7) *Difficulty with mobility (walking, going up stairs, transferring from bed to chair, etc.).*
"

The law goes on to elaborate and defines these terms specifically:

"In the best interest means, for the purpose of determining whether it is in the best interest of the veteran or servicemember to participate in the Program of Comprehensive Assistance for Family Caregivers under 38 U.S.C. 1720G(a), a clinical determination that participation in such program is likely to be beneficial to the veteran or servicemember . Such determination will include consideration, by a clinician, of whether participation in the program significantly enhances the veteran or servicemember's ability to live safely in a home setting, supports the veteran or servicemember's potential progress in rehabilitation, if such potential exists, and creates an environment that supports the health and well-being of the veteran or servicemember.

Need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury means requiring supervision or assistance for any of the following reasons:

(1) *Seizures (blackouts or lapses in mental awareness, etc.);*

(2) *Difficulty with planning and organizing (such as the ability to adhere to medication regimen);*

(3) *Safety risks (wandering outside the home, danger of falling, using electrical appliances, etc.);*

(4) *Difficulty with sleep regulation;*

(5) *Delusions or hallucinations;*

(6) *Difficulty with recent memory; or*

(7) *Self regulation (being able to moderate moods, agitation or aggression, etc.).*

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Personal care services means care or assistance of another person necessary in order to support the eligible veteran's health and well-being, and perform personal functions required in everyday living ensuring the eligible veteran remains safe from hazards or dangers incident to his or her daily environment…

Serious injury means any injury, including traumatic brain injury, psychological trauma, or other mental disorder, incurred or aggravated in the line of duty in the active military, naval, or air service on or after September 11, 2001, that renders the veteran or servicemember in need of personal care services.

Recommendations

The following recommendations are made with the continuity of the program in mind. They are also made to bring the entire program and all participants into compliance with the Final Rule and Law. Each is based on actual occurrences or situations in which Coordinators, Social Workers, Supervisors and Leaders have created or used an internally created definition, process, policy or personal opinions to execute the program requirements rather than following the letter and intent of the law. In absence of overt direction based in the law, the Director and Deputy must be actively involved and responsible for retraining, broadcasting of process changes to the entire enterprise and managing any deviations from revised protocols.

A team comprised of an Internal Medicine physician, a Neurologist, a Psychiatrist and an Orthopedist, as well as clinical compliance expert will review all revocations in the last 24 months for compliance with the law and policy. The review will entail all of the veteran's medical records (both VA and Non-VA) as well as any psychiatry records (both VA and Non-VA) and any external records that pertain directly to the veteran's ability to remain in the home, with a caregiver. These will include but are not limited to; law enforcement records, family member statements – must have direct, daily interaction with the veteran and any other agency or service that has direct (at least weekly) interaction with the veteran.

A compliance review expert will provide guidance to the Director to implement one document to be used for "In-Home Assessments" and another for "phone / quarterly assessments". These documents are used universally in the civilian clinical world and as the VHA must remain Medicare compliant, this particular issue is imperative to provide uniformity across the enterprise.
The Director will establish a training program for all Coordinators, Social Workers and their leadership of the program. This training will be comprised of the use of universal official forms for all assessments, training on the actual process of conducting assessments and documenting the results, the processes by which a Coordinator is to consistently and promptly respond to requests from the veteran or caregiver, the processes by which recommendations of providers are managed with the veteran and caregiver, additional training on providing comprehensive documentation to the veteran and caregiver of any action or recommendations in their case.

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The Director will provide retraining to all employees in the program as to the law and policy requirements and criteria; especially focusing on consistency in application of the criteria. All incoming new employees will go through the same training to be completely familiar with the law and policy.

The Director will immediately screen all Coordinators, Social Workers, Nurses and any program support personnel to confirm that they are credentialed properly for the position. Any personnel who are not credentialed to conduct assessments will be replaced. In multiple cases, there are Social Workers conducting In-Home Assessments and quarterly assessments. These assessments are the basis for participation in the program and Social Workers do not have the proper and necessary medical training to be conducting them. As an example; Definition and recognized Scope of Practice for LCSW (LICENSED Clinical Social Worker) https://abecsw.org/clinical-social-work/clinical-social-work-described/

The Director shall establish a policy by which any local appeal board or VISN appeal board members will be comprised of at least one (1) primary member of the veteran's care team and that the credentials and names of all board members will be made available to the veteran, caregiver or their agent acting on their behalf, within three (3) business days.

The Director shall mandate that all records pertaining to a veterans case be solely maintained in the veteran's medical records and that no further exclusive use of alternative record systems will be allowed.

The Director shall provide immediate retraining to all program employees with regard to altering or removal of any files, records or pertinent document of the program. We have found numerous instances of these actions by VA employees and these actions are violations of 44 U.S.C. Chapter 31, § 3106;

Unlawful removal, destruction of records

> (a) FEDERAL AGENCY NOTIFICATION.—The head of each Federal agency shall notify the Archivist of any actual, impending, or threatened unlawful removal, defacing, alteration, corruption, deletion, erasure, or other destruction of records in the custody of the agency, and with the assistance of the Archivist shall initiate action through the Attorney General for the recovery of records the head of the Federal agency knows or has reason to believe have been unlawfully removed from that agency, or from another Federal agency whose records have been transferred to the legal custody of that Federal agency.

Attachments:

Poll Data

CSP Numerical Data

VISN 8 Mandatory Agreement