



On the March

Insurers brace for increased costs due to returning United States veterans.

by James E. Pocius

According to the U.S. Census Bureau, 21.5 million veterans resided in the United States as of 2011. Veterans 65 and older totaled 9.2 million, leaving 12.3 million veterans under retirement age.

This veteran population bubble, largely buoyed by the recent Gulf wars, is starting to have an effect on an already stressed insurance environment due to increased collection efforts by the U.S. government.

Based in part on the government's success in obtaining major

Medicare-related monetary recoveries over the past 10 years, the Department of Veterans Affairs is currently stepping up its efforts to recover payments under the terms and provisions of federal statute 38 U.S.C. Section 1729.

When a veteran is involved in an auto accident or has a workers' compensation case, and if he or she is furnished care or services for a nonservice-connected disability, the United States has the right to recover or collect reasonable charges for such care or services from a third party (to the extent that the veteran would be eligible to receive payment for such care or services from the third party).

Disability is defined under federal law governing VA benefits as a "disease, injury or other physical or mental defect." This is a very broad definition and covers most injuries.

Key Points

► **What Happened:** The Department of Veterans Affairs is currently stepping up its efforts to recover payments under the terms and provisions of a federal statute.

► **What It Means:** When a veteran is in an auto accident or has a workers' comp case, and if he or she is furnished care or services for a nonservice-connected disability, the VA can recover reasonable charges from a third party.

► **Watch For:** Collection efforts will increase the costs of settling automobile liability and workers' comp cases involving veterans.

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The VA can recover when the incident causing the veteran's disability is covered under a workers' comp law or plan that provides for payment for the cost of health care and services provided to the veteran because of the disability.

The VA can also subrogate in cases that result from a motor vehicle accident in any state that requires the owners or operators of motor vehicles registered in that state to have enforced automobile accident reparations insurance.

Additionally, it can subrogate in cases that are the result of a crime of personal violence that occurred in a state, or political subdivision of a state, in which the person injured as a result of such crime is entitled to receive health care services.

In many cases, the veteran has been receiving care for a service-related disability and, as a logical extension, continues to go to the VA for services after an accident or a workers' compensation injury. On other occasions, the veteran may be denied benefits from the auto insurance carrier or workers' compensation carrier and returns to the VA because treatment is needed for the injuries. Specifically, the VA can recover from third parties liable for care only if the injury or disease results from circumstances creating a liability under the state law where the injury occurred.

Auto Liability Cases

The courts have liberally construed the provisions of the Federal Medical Care Recovery Act. Federal courts have continually held that the provisions of the statute give the U.S. government an independent right to recovery and collection subject only to substantive state laws which create the cause of action.

Essentially, the United States has an independent cause of action that supersedes any conflicting or restrictive state law. For instance, courts have held that:

- A state statute of limitations does not defeat the federal claim.
- A release by the plaintiff to the defendant does not affect the cause of action.
- The government does not have to notify the third party or the

insured of its third-party claim.

- The government's failure to intervene in the injured party's lawsuit does not bar a subsequent independent action by the government.

In a typical case, *United States vs. State of Ohio* (1992), the VA brought an action against the Ohio Victims of Crime Fund after a veteran applied for benefits as the victim of a violent crime. The U.S. District Court awarded recovery, noting that any conflict with the Ohio law preempting payment was superseded by federal law. Similar decisions regarding crime funds were reached in the 3rd U.S. Circuit Court of Appeals (*U.S. vs. New Jersey* 1987) and the 4th U.S. Circuit Court of Appeals (*U.S. vs. Maryland* 1990).

All of these cases prove that the government has a broad power to collect for health care services provided by the VA.

In these cases, the veteran or beneficiary has a duty to notify the VA that a third-party action or workers' compensation case is ongoing. There also is a requirement, which applies to active servicemen and -women, that the beneficiary notify the government of any potential third-party recovery actions and requires the beneficiary to cooperate with any collection effort.

Workers' Compensation

In workers' compensation cases, the VA has authority to recover from third parties for payments made for the injury-related medical care for nonservice-connected disability.

Here, the ability to recover is from the employer or carrier. The statute also grants the VA the right to intervene in the workers' comp case as a party. Obviously, in order to consider workers' compensation as a source of government recovery, the injured veteran must first qualify for workers' comp benefits under the applicable state statute.

Once that occurs, if the VA supplies services for a claimant's medical care for these nonrelated service injuries, it merits a subrogation interest. In most states, the employer has a responsibility to pay for medical care once an injury has been accepted, either by agreement or litigation. If an employer does not provide all of the proper medical treatment to the veteran and the veteran goes to the VA for care, it has the right to subrogate.

In workers' compensation cases, as in liability cases, the government has a broad power to recover; however, it is not necessarily bound by procedural rules in the state in which the workers' compensation case arose.

Who and How Much to Pay

The only way for a third-party payer to satisfy its obligation to the VA is to pay the facility that provided care, or any other authorized representative of the U.S. government. Payment by a third party to the beneficiary does not satisfy the federal regulations.

Nothing in the law permits the VA to recover from the injured veteran. This could mean that any third-party payer in workers' compensation or liability could be subject to a double payment if the VA is not paid directly out of the settlement—something that should be avoided at all costs.

The VA can recover the cost of the care it gives to veterans with a non-service-connected disability to the same extent that an injured party of a private care provider would have received if the care or services had not been provided by the VA.

Further, the third-party payer can either pay the billed charges described by the VA or the amount that the health plan demonstrates is the amount it would pay for care or services furnished by providers other than entities of the U.S. government for the same care.

If the amount submitted by

the third party is less than the VA care amount, the VA would accept, subject to verification, the lower amount. However, contrast that with a provision for charges for medical care or services provided by non-VA providers at the VA's expense. When this occurs, the charges billed for such care or services will be the higher of the charges determined according to this particular section or the amount the VA paid to the non-VA provider.

Under this provision, it is possible (though not common) for the VA to demand a higher amount than it actually paid. Finally, it's important to note that the VA can waive or negotiate its lien based on the specifics of any case.

The VA has increased its collection efforts over the past year, and it may only be a matter of time before further amendments are made to the VA claims statute that would give it the same powers that Medicare has, or that are currently being used with regard to active military personnel. This will increase the costs of settling automobile liability and workers' compensation cases involving veterans, and it will also provide further challenges to the participants in these cases.

Navigation Aids

Based on the insurance industry's previous experiences with delays in utilizing the Medicare Secondary Payer Act, similar delays with regard to settlements and increased costs of settlements will probably become more common as more veterans are fed into the employment and liability systems.

From a legal standpoint, use these practical measures to help navigate these situations:

1. Try to obtain all VA medical records pertaining to your claimant's case as early as possible. It is a lengthy process fraught with its own perils and frustrations.

2. Initial discovery on both

workers' compensation and liability cases should deal with whether or not the injured party is a veteran or was ever in active military service, and received care from the VA.

3. Any settlement documents should also include a paragraph as to how the VA lien was resolved and should include a letter from the VA noting that their interests have been satisfied. This will elim-

inate any future problems with the VA.

The VA's collection efforts have ramped up as a result of the number of veterans residing in the United States. All parties dealing with automobile liability and workers' compensation cases should be cognizant of this and be able to take care of these interests when resolving or litigating these cases. **BR**

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