

# Reforming VA's Medication Copayment Statute

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## I. INTRODUCTION

The use of medications in the Veterans Health Administration (VHA) and the cost savings associated with the Department of Veterans Affairs (VA) National Formulary represent a major component of the success of VHA as a leader in the health care industry.<sup>2</sup> However, the current medication copayment that many veterans are charged is based on outdated legislation that was designed to prevent high-income veterans from taking advantage of the VHA prescription drug benefit.<sup>3</sup> As a result, veterans that are charged a copayment for medication must now pay \$24 for prescriptions that are available at Wal-Mart for \$10.<sup>4</sup>

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<sup>2</sup> See David Blumenthal and Roger Herdman, eds., DESCRIPTION AND ANALYSIS OF THE VA NATIONAL FORMULARY 189-93 (Washington, D.C.: National Academy Press, 2000) (discussing the savings directly attributable to VA's implementation of the VA National Formulary); Phillip Longman, *The Best Care Anywhere*, WASHINGTON MONTHLY (January/February 2005), <http://www.washingtonmonthly.com/features/2005/0501.longman.html> (last visited Nov. 5, 2008) (favorably comparing the VA healthcare system to private healthcare organizations and suggesting the VA system as a model for health care reform).

<sup>3</sup> OFFICE OF INSPECTOR GEN., DEP'T OF VETERANS AFFAIRS, AUDIT OF VETERANS HEALTH ADMINISTRATION (VHA) PHARMACY COPAYMENT LEVELS AND RESTRICTIONS ON FILLING PRIVATELY WRITTEN PRESCRIPTIONS FOR PRIORITY GROUP 7 VETERANS (2000), <http://www.va.gov/oig/52/reports/2001/99-00057-4.pdf> (suggesting changes to VA's current prescription medication services).

<sup>4</sup> See Press Release, *Wal-Mart Launches Phase Three of \$4 Prescription Program*, May 5, 2008, [http://i.walmart.com/i/if/hmp/fusion/four\\_dollar\\_press\\_release.pdf](http://i.walmart.com/i/if/hmp/fusion/four_dollar_press_release.pdf) (last visited Sept. 5, 2008) (detailing Wal-Mart's policy of providing a 90-day supply of generic prescription medications for \$10); see also DEP'T OF VETERANS AFFAIRS, 2008 COPAY REQUIREMENTS AT A GLANCE, FACT SHEET 164-68 (2008), <http://www.va.gov/healtheligibility/Library/pubs/CopayGlance/CopayGlance.pdf> (noting the \$8 copayment required for each 30-day supply of prescription medication for Priority Group 7 veterans).

Further, the medication copayment is in no way related to what VA pays for the medication. This is in spite of the fact that legislative history suggests that the drafters of the copayment statute envisioned a tiered formulary, where the copayment was directly related to the medication's cost.<sup>5</sup>

This paper will examine the history of VA's medication copayment statute and provide an overview of how the current copayment affects veterans. It will then suggest ways in which the copayment statute could be improved in order to provide better health care to veterans and fulfill the intent of the original legislation.

## II. HISTORY

The original VA medication copayment statute went into effect in 1990 and states that “the Secretary [of VA] shall require a veteran to pay the United States \$2 for each 30-day supply of medication furnished such veteran under this chapter on an outpatient basis . . . .”<sup>6</sup> The statute provides for several limitations on the medication copayment.<sup>7</sup>

First, only medications given on an outpatient basis for the treatment of a non-service-connected disability or condition<sup>8</sup> require a copayment.<sup>9</sup> Second, “the Secretary may not require a veteran to pay an amount in excess of the cost to the Secretary for medication.”<sup>10</sup>

Further, the copayment does not apply to a veteran with a service-connected disability rated at 50 percent or more<sup>11</sup> or to a veteran whose

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<sup>5</sup> See H.R. REP. NO. 106-237, at 43 (1999) (suggesting that a higher copayment might be appropriate for certain expensive “quality of life” drugs prescribed for non-service-connected conditions).

<sup>6</sup> 38 U.S.C. § 1722A (2000).

<sup>7</sup> *Id.*

<sup>8</sup> A service-connected disability or condition is defined as “a disability that VA determines was incurred or aggravated while on active duty in the military and in the line of duty. A service-connected rating is an official ruling by VA that your illness/condition is directly related to your active military service. Service-connected ratings are established by VA Regional Offices located throughout the country.” DEPT OF VETERANS AFFAIRS, VA HEALTH CARE ELIGIBILITY & ENROLLMENT (2008), available at <http://www.va.gov/healtheligibility/Library/Glossary>.

<sup>9</sup> 38 U.S.C. § 1722A(a)(1) (2000).

<sup>10</sup> 38 U.S.C. § 1722A(a)(2).

<sup>11</sup> 38 U.S.C. § 1722A(a)(3)(A).

annual income does not exceed statutorily prescribed maximums.<sup>12</sup> Finally, the statute gives the Secretary the ability to prescribe regulations that increase the copayment amount<sup>13</sup> and to establish maximum monthly and annual copayment amounts for veterans with multiple prescriptions.<sup>14</sup>

The statutory copayment amount of \$2 for each 30-day prescription was in place from 1990 until 2001.<sup>15</sup> A December 20, 2000, VA Office of Inspector General (OIG) report determined that “[t]he current pharmacy copayment level needs to be increased to more appropriately recover the increasing direct cost of prescriptions.”<sup>16</sup> Presumably as a result of this report, on December 6, 2001, the Secretary for the first time increased the copayment.<sup>17</sup>

This increase was put in place through 38 C.F.R. §17.110, which established the copayment for February 4, 2002, through December 31, 2002, at \$7.<sup>18</sup> It is uncertain how the \$7 copayment amount was determined. The 2000 OIG report states that a copayment rate of \$5 was approved by a VHA policy board, but suggests that a \$10 copayment was better supported by both industry patterns and VA experience.<sup>19</sup> A report from that time suggests that the rate of \$7 was established in order to cover losses from a decrease in the inpatient hospital visit copayment.<sup>20</sup>

Besides establishing the current rate at \$7, the regulation also put in place a formula for determining future medication copayment amounts based on the Prescription Drug component of the Medical Consumer Price Index.<sup>21</sup>

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<sup>12</sup> 38 U.S.C. § 1722A(a)(3)(C). The current maximum income standards will be discussed further in Section III of this paper.

<sup>13</sup> 38 U.S.C. § 1722A(b)(1).

<sup>14</sup> 38 U.S.C. § 1722A(b)(2).

<sup>15</sup> 38 U.S.C. § 1722A.

<sup>16</sup> OFFICE OF INSPECTOR GEN., *supra* note 3, at i.

<sup>17</sup> See 38 C.F.R. § 17.110 (2002) (increasing copayment amount to \$7).

<sup>18</sup> 38 C.F.R. § 17.110(b)(1).

<sup>19</sup> OFFICE OF INSPECTOR GEN., *supra* note 3, at i-ii.

<sup>20</sup> Mary Ellen Butler, *VA Fully Enrolls Despite Shortfall, Copay Raised*, U.S. MED. INFO. CTR., Jan. 2002, available at <http://www.usmedicine.com/article.cfm?articleID=332&issueID=34>.

<sup>21</sup> 38 C.F.R. § 17.110(b)(1) (2002).

### III. CURRENT STATUS

As of January 1, 2006, the medication copayment was increased to \$8 based on the formula given in 38 C.F.R. § 17.110.<sup>22</sup> There was no increase in the copayment for 2007 or 2008.<sup>23</sup>

As noted above, not all veterans receiving medications from VA are charged a copayment.<sup>24</sup> The determination of whether or not a veteran will be charged a copayment is based on the VA priority group in which the veteran is classified.<sup>25</sup> While the determination of priority groups can be complex, for the purposes of this paper, it is sufficient to realize that most veterans who are charged a medication copayment have incomes above a set threshold, are not 50 percent or more disabled, and are not receiving the medication for a service-connected disability.<sup>26</sup>

The income threshold for requiring a medication copayment is set at “the maximum annual rate of VA pension which would be payable to such veteran if such veteran were eligible for pension under 38 U.S.C. § 1521.”<sup>27</sup> To determine income, “all payments of any kind or from any source shall be included.”<sup>28</sup> Certain expenses, including unreimbursed medical expenses, can be deducted from the veteran’s annual income for purposes of determining if the copayment is applicable.<sup>29</sup> The 2008 maximum annual rate of VA pension for a single veteran is \$11,181.<sup>30</sup>

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<sup>22</sup> Copayment for Medications, 70 Fed. Reg. 72,326 (Dec. 2, 2005).

<sup>23</sup> See Copayment for Medications, 72 Fed. Reg. 4773 (Feb. 1, 2007); see also Copayment for Medications, 73 Fed. Reg. 1914 (Jan. 10, 2008) (noting that the copayment rate would remain at \$8 for calendar years 2007 and 2008 respectively).

<sup>24</sup> 38 U.S.C. § 1722A(a)(3)(2000); 38 C.F.R. § 17.110(c) (2002).

<sup>25</sup> DEP’T OF VETERANS AFFAIRS, 2008 COPAY REQUIREMENTS AT A GLANCE, FACT SHEET 164-68 (2008), <http://www.va.gov/healtheligibility/Library/pubs/CopayGlance/CopayGlance.pdf>; see also DEP’T OF VETERANS AFFAIRS, VA HEALTH CARE ELIGIBILITY & ENROLLMENT, ENROLLMENT PRIORITY GROUPS (2008), available at <http://www.va.gov/healtheligibility/eligibility/PriorityGroups.asp>.

<sup>26</sup> 38 U.S.C. § 1722A(a)(3) (2000); 38 C.F.R. § 17.110(c) (2001); see also DEP’T. OF VETERANS AFFAIRS, DID YOU KNOW...MEDICATION COPAY (2007), <http://www.va.gov/healtheligibility/Library/pubs/MedCopay/MedCopay.pdf>.

<sup>27</sup> 38 C.F.R. § 17.110(c)(3) (2001).

<sup>28</sup> B.V.A., No. 05-11 490, 2005 WL 3902708 (BVA Apr. 22, 2005) (citing 38 U.S.C. § 1503; 38 C.F.R. § 3.271).

<sup>29</sup> *Id.*

<sup>30</sup> DEP’T OF VETERANS AFFAIRS, VA COMPENSATION AND PENSION PAYMENT

The limitation imposed by the copayment legislation that prevents VA from charging the veteran more than the cost of the medication to VA has led to at least one case before the Board of Veterans' Appeals (Board).<sup>31</sup> This case involved “pill splitting,” a practice where VA provides medication in a dosage that is higher than needed, and then has the patient split a single pill into two separate doses.<sup>32</sup> What was once a 30-day supply of medication then becomes a 60-day supply, and the medication copayment charged is \$16, or \$8 for each 30-day supply.

According to the facts of the case, the veteran was prescribed 12.5 mg of a medication.<sup>33</sup> He then received 15 25 mg tablets from VA and was instructed by his physician to split the tablets in half, so that the 15 tablets equaled a 30-day supply.<sup>34</sup> Under the relevant medication copayment statute, the veteran was charged a \$7 copayment for this 30-day supply of medication.<sup>35</sup> The veteran argued that the copayment charged was excessive.<sup>36</sup> Specifically, he claimed that because he was splitting the supplied medication in half, then his copayment should also be split in half.<sup>37</sup>

The Board reviewed the medication copayment statutes and held that the medication copayment was not excessive and that the veteran “is obligated to pay VA a copayment for each 30-day or less supply of medication . . . .”<sup>38</sup> This conclusion consisted of three parts: (1) Regardless of whether or not the veteran must split the tablets, he is receiving a 30-day supply of medication; (2) the cost of medication referred to by 38 U.S.C. § 1722A refers to VA's cost in dispensing the medication; and (3) a Federal

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RATES, IMPROVED DISABILITY BENEFITS PENSION RATE TABLE-EFFECTIVE 12/1/07 (2007), <http://www.vba.va.gov/bln/21/rates/pen01.htm>.

<sup>31</sup> B.V.A., No. 05-16 561, 2007 WL 3209431 (BVA Mar. 13, 2007) (vacated and remanded on other grounds [claims file was lost following the BVA decision] by the U.S. Court of Appeals for Veterans Claims on August 27, 2007).

<sup>32</sup> DEP'T OF VETERANS AFFAIRS, VA TECHNOLOGY ASSESSMENT PROGRAM VATAP, VA TECHNOLOGY ASSESSMENT PROGRAM PROJECT REPORT—PATIENT SUMMARY ON TABLET SPLITTING, <http://www.va.gov/vatap/patientinfo/tabletsplitting.htm> (last visited Sept. 1, 2008).

<sup>33</sup> B.V.A., No. 05-16 561, 2007 WL 3209431 (BVA Mar. 13, 2007).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

Register notice indicating that the cost to VA for dispensing an outpatient medication was \$7.28, “even without consideration of the actual cost of the medication.”<sup>39</sup> The Board then concluded that since the cost to VA for the 30-day supply of medication was at least \$7.28, the \$7 copayment charged the veteran did not exceed VA’s cost.

In support of the Board’s conclusion that “the reference to the cost of medication contained in 38 U.S.C.A. §1722A clearly pertains to VA’s cost in dispensing the medication, not the cost to the appellant,” the Board cites only the VA’s Federal Register notice enacting the copayment regulations.<sup>40</sup> On its face, the statutory requirement only mentions the cost of the medication and says nothing about the dispensing or other related costs.<sup>41</sup>

While the Board may have technically been correct in this case, in that the veteran must pay a copayment for each 30-day supply of medication regardless of the quantity of medication obtained, the facts lead to an interesting question. If it costs VA \$7.28 to supply this veteran with 15 tablets he splits for a 30-day supply, then it should similarly cost VA \$7.28 to dispense 30 tablets which could be split for a 60-day supply.<sup>42</sup> In this latter case, the veteran would currently be charged a copayment of \$16.<sup>43</sup> Then, whether or not the copayment exceeded the cost to VA, supplying the medication would depend on the actual cost of the medication.

This problem is not limited to cases where the veteran is splitting tablets. In fact, based on VA’s increased efficiency and price negotiation in the pharmaceutical arena, it seems very likely that under the current copayment plan many veterans are charged excessive copayments by VA.<sup>44</sup>

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<sup>39</sup> *Id.* (citing Copayments for Medication, 66 Fed. Reg. 36,960 (July 16, 2001)).

<sup>40</sup> *Id.*

<sup>41</sup> 38 U.S.C. § 1722A(a)(2) (2000).

<sup>42</sup> Shilpa P. Parikh et. al, *Ninety-Day Versus Thirty-Day Drug-Dispensing Systems*, 58 AM. J. HEALTH-SYS. PHARMACY 13 (2001).

<sup>43</sup> See 38 C.F.R. § 17.110 (2001) (requiring payment for each 30-day supply of medication); See also 70 Fed. Reg. 72326 (Dec. 2, 2005) (noting the implementation of an \$8 copayment effective January 1, 2006).

<sup>44</sup> See Chester B. Good & Michael Valentino, *Access to Affordable Medications: The Department of Veterans Affairs Pharmacy Plan as a National Model*, 97 AM. J. PUB. HEALTH 6, 8 (2007) (discussing briefly VA’s use of standardization contracts to attain deep discounts on prescription medications).

In the Federal Register notice cited by the Board in the tablet splitting case, VA cites a study by the VHA that determined “VA incurred a cost of \$7.28 to dispense an outpatient medication even without consideration of the actual cost of the medication. This amount covers the cost of consultation time, filling time, dispensing time, an appropriate share of the direct and indirect personnel costs, physical overhead and materials, and supply costs.”<sup>45</sup> Unfortunately, the study cited in the Federal Register speaks only to “an outpatient medication” while the copayment statute refers to a 30-day supply of medication.<sup>46</sup>

In order for veterans to properly file a claim based on the restriction that the Secretary may not charge a copayment amount greater than the cost of the medication, the veteran would have to know VA’s dispensing cost for 30, 60, and 90-day prescriptions, as well as the cost of the medication.

Since the Veterans Claim Assistance Act of 2000 (VCAA)<sup>47</sup>, VA has been required to “make reasonable efforts to notify a claimant of the relevant evidence necessary to substantiate a claim for benefits under laws administered by VA.”<sup>48</sup> In the pill splitting case, this may have required VA to provide the veteran with not only the cost to VA of the medication provided, but also VA’s dispensing cost for 30-day supplies of the medication.

However, instead of being forced to supply this information and possibly change the copayment system based on a case before the Board, Congress can improve the copayment system through enhanced legislation.

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<sup>45</sup> Copayments for Medications, 66 Fed. Reg. 36,960 (proposed July 16, 2001).

<sup>46</sup> *Id.*

<sup>47</sup> Pub. L. No. 106-475, 114 Stat. 2096 (2000).

<sup>48</sup> B.V.A., No. 05-11 490, 2007 WL 3209431 (BVA Apr. 22, 2005) (citing 38 U.S.C.A. §§ 5103, 5103A (West 2002 & Supp 2005); 38 C.F.R. § 3.159 (2004)).

## IV. IMPROVED LEGISLATION

While VA has the authority to improve the current regulations, a legislative approach would ensure that a similar problem is not encountered in the future. There are several possible improvements to the current medications copayment system.

First, VA could consider a flat medication copayment where veterans pay a flat rate for their medications regardless if the medication is for 30, 60, or 90 days. The current legislation states that the veteran must pay a minimum copayment of \$2 for each 30-day supply.<sup>49</sup> Therefore, a flat payment of at least \$6 would still meet the requirements of the current statute. With a flat cost of prescribing at \$6 or even \$7, VA could be sure that it was not overcharging veterans, based on the \$7.28 dispensing cost.

Another option, and one favored highly in other health care plans, is that of a “tiered” copayment system, where different copayments are charged based on the cost of the drug. As noted, this seems to be the type of system envisioned by Congress when the original legislation was enacted.<sup>50</sup>

A tiered copayment system of this nature raises a question of equity: Why should a veteran be charged more for a drug simply because his or her medical condition requires expensive treatment, as in the case of cancer? While troubling, there is a response to this argument. By definition, veterans only pay medication copayments for conditions that are not service-connected.<sup>51</sup> Therefore, those paying higher copayments would be doing so for drugs received for conditions not related to their service. If the veteran was to attempt to receive these medications outside VA, he or she would almost certainly be charged a much higher copayment, assuming that the drugs were even covered by private health care plans.

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<sup>49</sup> 38 U.S.C. § 1722A(a)(1) (2000).

<sup>50</sup> H.R. REP. NO. 106-237, *supra* note 5 (suggesting that a higher copayment might be appropriate for certain expensive “quality of life” drugs prescribed for non-service-connected conditions).

<sup>51</sup> 38 C.F.R. § 17.110(a)(2) (2001).



A final reason why legislation should be enacted to establish a tiered copayment system comes from the current trend of “\$4 generics,” offered at stores across the country, such as Wal-Mart. Under the current program, veterans are charged an \$8 copayment for many prescriptions that would cost them only \$4 at Wal-Mart.<sup>52</sup> If veterans choose to receive their drugs from sources other than VA, it could result in negative health care outcomes for the veteran as well as a poor public image for VA.

## V. CONCLUSION

The current medication copayment system can be greatly improved in order to provide for more equitable treatment of veterans in terms of copayment requirements and to ensure that VA meets its statutory obligations. This improved copayment system should be based on a tiered formula where the copayment charged is directly related to the cost of the drug supplied. Such a system would charge veterans based on the cost of their medication, and would prevent VA from inadvertently charging veterans more than the cost of the medication to VA in violation of the medication copayment statute.

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<sup>52</sup> *Compare* Press Release, *Wal-Mart \$4 Prescription Program*, June 5, 2008, available at [http://i.walmart.com/i/iff/hmp/fusion/customer\\_list\\_6-5-08.pdf](http://i.walmart.com/i/iff/hmp/fusion/customer_list_6-5-08.pdf) (last visited Sept. 3, 2008) with DEP'T OF VETERANS AFFAIRS, PHARMACY BENEFITS MANAGEMENT SERVICES, CRITERIA FOR USE (2008), available at <http://www.pbm.va.gov/CriteriaForUse.aspx> (last visited Sept. 3, 2008) (listing drugs for which VA's current \$8 copayment is available for a 30-day supply).