VETERANWARRIORS
"ONE FAMILY, ONE FIGHT"

VETERAN WARRIORS POSITION REGARDING THE COMPREHENSIVE ASSISTANCE FOR FAMILY CAREGIVERS PROGRAM AND PROPOSED RULE CHANGES

SUBJECT: VA's Comprehensive Assistance for Family Caregivers Program (PFAFC)
Proposed Rule Changes – Issued December 2019
RIN: 2900-AQ48

Purpose: To provide input relevant to VA's proposed regulatory changes to the Caregiver Program's operation. Veteran Warriors addresses them (in red) in the order presented by VA.

The PCAFC law was carefully drafted and was subjected to ***years*** of discussion among stakeholders; in order to provide veterans and their caregivers with the most comprehensive program model possible. The law was enacted in 2010 and effective in 2011; yet to date (nine years later), there is still NO policy manual issued to those who work in or participate in the program. There are substantial federal regulations in place, that govern nearly every aspect of, and definition required for the program, yet VA has not provided program staff with comprehensive training on the law or regulations. In fact, VA has refused to do so, claiming that it would be an unnecessary expense. With the passage of MISSION Act, the program eligibility was expanded to other eras (beyond Post 9/11) in a tiered calendar. Despite VA's claims, there were NO OTHER alterations to the program included in MISSION Act.

Veteran Warriors has met with VA leadership, White House officials and members of Congress on numerous occasions since 2016, when we discovered what appeared to be a concerted and systematic effort to shrink the participation in the program. By VA's own numbers and commentary by leaders, the participation shrunk to its current of 19,295 veterans in 2018 and has not increased or decreased since. Veteran Warriors has obtained hundreds of VA documents sent to caregivers and veterans; wherein VA personnel blatantly fabricated or falsified eligibility criteria in order to support revoking the family. We have been privy to "internal" communications whereby VA leadership issued mandates to conduct mass revocations and tier reductions – particularly in the highest tier, Tier 3. Each time, we have communicated with VA directly, in order to obtain verification of legal justification for these actions. Each time, the actions are cancelled and publicly denied.

This latest attempt by VA to create regulations goes to the very heart of this odyssey. Since 2014, VA has purposely created internal policies and procedures that directly violate the letter of the law and the existing regulations; and despite our concerted efforts to have these violations overturned, VA has been allowed to continue these actions unabated. In this latest effort, VA once again seeks to defy Congress and congressional authority, by creating regulations that conflict with the existing laws and regulations.

"In preparation for such expansion, VA proposes to revise its regulations that govern the PCAFC, which provide certain medical, travel, training, and stipend benefits to designated family caregivers of certain veterans and servicemembers who were seriously injured in the line of duty on or after September 11, 2001. This rulemaking would update the regulations by:

"(1) updating the scope of the program specific to residency requirement"; As this program is mandated by federal law and operated by a federal agency; there is no legal justification to create a "residency requirement". To institute one, would create yet another deliberative barrier to veterans who travel to southern states in the winter – of which, most will be the Vietnam era (and further back) to be affected as they are the eras that are more likely to do this type of semi-annual traveling. VA currently uses a veteran / caregiver team, (whether temporary or

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permanent) relocation to justify forcing them to reapply for the Program, after which, VA justifies denying the application under the guise of "No Longer Eligible". We have hundreds of cases of this from all VISN's.

"(2) revising and creating definitions"; Under Title 38, there are literally thousands of definitions for all manner of injuries, processes, services and benefits. Regarding this program, VA has yet to address that the current

regulations provide significantly more information regarding definitions and clarity for both VA and those they serve. As an example, the current regulations explicitly define "Primary Care Provider" and "Primary Care Team"; yet VA seeks to redefine it under this submission. The following is taken directly from the PFAFC Final Rule issued by VA on January 9, 2015; ***"We additionally make one change to the definition of ''Primary care team'' as that term is defined in § 71.15 to indicate that we are referring to a group of medical professionals who care for a patient and who are selected ''by VA.''***

"(3) expanding the scope of eligibility to all service eras"; As the existing PCAFC law is explicit in its language on eligibility and MISSION Act only expanded it to SPECIFIC ***eras*** *on a specific timeline; VA does not have the statutory authority to alter that.*

"(4) changing the stipend payment calculation"; The stipend calculations are specifically prescribed in the PCAFC law. VA does not have any statutory authority to alter the calculation method or the base they are derived from.

"(5) clarifying the time at which adjustments in stipend payments for Primary Family Caregivers would take effect"; The stipend adjustments are specifically prescribed in the PCAFC law. VA does not have any statutory authority to alter these.

"(6) requiring annual reassessment of eligibility for the program"; The initial assessment, and all quarterly assessments (one of which is required to be the annual reassessment) are already prescribed in the PCAFC law. VA does not have statutory authority to alter this.

"(7) revising the process for revocation and discharge from the program and providing for an extension of benefits in certain instances"; As we previously mentioned VA has no static or consistent (national) process for revocations. Each facility is permitted to run the program as it sees fit. We have provided VA and Congress with a (field tested with Social Security) process map for revocations, but it has been repeatedly ignored. We do support the development and enterprise wide propagation of a static policy for reductions and revocations. However, as the stipends and other program benefits are prescribed in the existing law, VA does not have the statutory authority to alter or add additional benefits.

"(8) removing the requirement that monitoring must occur at the eligible Veteran's home"; The mandate of an "in-home" annual assessment is part of the existing regulations. There is no need to remove it, rather creating alternatives such as the use of tele-health; would be more beneficial to all parties.

"(9) updating the terminology for monitoring visits and the purpose of such visits". No comment.

VA continues with: "*VA proposes to specify that only those Veterans residing in a state as defined by 38 U.S.C. 101(20) are eligible to participate in PCAFC. VA also* ***proposes to include new definitions of domestic violence (DV), intimate partner violence (IPV), long-term institutionalization, family caregiver, personal care services, serious injury, financial planning, legal services, joint application, legacy applicant, long term institutionalization, unable to self-sustain in the community, and need for regular or extensive instruction or***

supervision without which the ability of the individual to function in daily life would be seriously impaired. VA also proposes to revise the definitions of family caregiver, in the best interest of, primary care team, need for supervision or protection based on symptoms or residuals of neurological or other impairment or injury, and serious injury, which will be addressed later in this analysis. VA considered not defining residential eligibility in the current 71.10 and keeping the current regulation. *However, by not defining the term State to distinguish the U.S. States and Territories as eligible locations will continue to create confusion to the families that reside outside of the eligible areas".* VA asserts that there is "confusion" by families as to eligibility who may "reside outside of the eligible areas". We formally challenge VA to publicly provide even one example of such a request. As a federal agency, running a national program; the program is open to (upon meeting the prescribed by law, eligibility requirements), veterans in ALL fifty states and four territories. By allowing VA to add a "residency requirement" under this thinly veiled subterfuge, VA will utilize it to mandate revocation and reapplication by veterans who move from one state to another, whether permanently or semiannually; as VA already has this "policy" in place and utilizes it in every case of a veteran's move.

The eligibility criteria for the program is clearly defined in the law. The VA has made multiple attempts to restrict the program by allowing the use of terminology created at local facilities and propagated throughout the enterprise. We have repeatedly documented thousands of cases wherein Program employees have used such criteria as "bedridden", claimed that PTSd was not a qualifying injury, that PTSd is the only eligible injury, or claiming that the veteran's injuries do not even exist. The Program employees and leadership have attempted to redefined "most catastrophically injured", to one which is vastly different from what the VA has already adjudicated and utilizes within both VBA and VHA.

As recently as November 25, 2019; VA leaders met with representatives of The Independence Fund (TIF) (an organization which provides veterans with amputations, with all-terrain "trak" chairs"). TIF was the only VSO in attendance. TIF has over the last 3 years, repeatedly called for a "redefining" of the VA definition of "most catastrophically wounded". Any effort to restrict this program to only those veterans who have amputations or grant those with amputations special consideration for the mandated assessment schedule is pure discrimination and flies in the face of the spirit and letter of the law. Worse yet, it would significantly disenfranchise the very group of veterans the Program was created to help. The passage of MISSION Act accomplished the one thing that most agree was missing from the Program – that it be available to ALL eras of veterans. This surreptitious attempt to further restrict the Program should not be permitted unless Congress agrees to amend the PFAFC and MISSION laws. The following are the VA's widely used and accepted definitions of "Catastrophically Injured". There is no need to "redefine" it, especially solely for one program.

"VA also considered not changing and creating basic terms in the current 71.15 and keeping the current regulation. ***Defining new terms and changing current terms to reflect current practice and adhere to the laws outline in the MISSION Act of 2018*** *will provide additional detail that allows VA to increase consistency in implementation across medical centers".* The key statement here is "…reflect current practice…". Veteran Warriors reiterates that for nearly 4 years, VA has systematically sidestepped the existing law and regulations in its operation of this program. In doing so, VA has disenfranchised 67,000 veterans (between Jan. 2014 and Jan. 2019) from accessing this program. VA has allowed its facilities to create their own policies, ignore the law and policies

that Congress put in place. When those policies violate the law, the veteran and their families are left without recourse and turned away from the very program that they are eligible for.

To be clear, MISSION Act did not change any of the specific requirements of the law, other than ERA of Service. VA is claiming otherwise, and it is purely deceitful. VA truly expects that no one will actually read MISSION Act to know that they are bluffing.

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To perpetuate this illusion, VA requested that a Special Medical Advisory Group (SMAG) be seated. That committee was tasked with the lofty mission of helping VA "create a scoring methodology" and other tasks such as helping with the "redefinitions" VA seeks. The committee is well seated and there are legitimate scientists and scholars participating. However, after spending hours listening to their briefing and reviewing their work; it is apparent that SMAG is equally in the dark.

Why is the SMAG acting as if there has never been a scoring methodology? Congress created the current Scoring Methodology (using specific parts of the standards available), for a reason, it works great when used as intended. The problem arose when VA allowed facilities to manage the program at their own discretion and refuse to use the mandated scoring methodology.

VA established "Clinical Eligibility Teams" in direct contradiction of the law. These teams consist of Providers and Social Workers within the facility but are NOT part of the veteran's Primary Care Team. They are tasked with reviewing the record of the veteran to determine initial or ongoing eligibility. In fact, CET's are specifically **not** authorized in the public law (as noted above). CET's are also a waste of time, money, and resources when the veteran is required to see a member of their Primary Care Team at least once a year, meaning the PCT could complete the assessment at that time; as specifically stated in the law and existing federal regulations. Additionally, VA created a "Clinical Eligibility Assessment" which is what the CET uses to document their record review findings. Since the creation of these teams, the facilities have attempted to force veterans to submit to all manner of "assessments" – to include specifically banned ones such as a FIM, FAM and NPI. VA has gone so far as to demand that caregiver applicant's submit to psychological testing PRIOR to being approved for the program.

Elevating the CETs to VISN level would further blockade any appeals and further disenfranchise the very people (caregivers) the law is intended to empower.

There is NO transparency with the CETs, veterans and caregivers do not have any right to know who they are or to be involved with the process. Veteran Warriors has lobbied since their creation, to have them rescinded as their existence clearly violates the very letter of and spirit of the law. We have confirmed with the VA Office of General Counsel, that the Directive issued to create the CET and the use of a "Clinical Eligibility Assessment" (CEA) was NEVER cleared through that office and was issued by (former) Secretary Schulkin.

REFERENCES

"Catastrophic Injury"
https://www.va.gov/healthbenefits/assets/documents/publications/IB-10-435_Catastrophically_Disabled_Veterans.pdf

https://www.va.gov/OPTOMETRY/docs/Catastrophically_Disabled_Veteran_Evaluation_Enrollment_and_Certain_Copayment_Exemptions_VHA_Directive_1630(1).pdf

https://www.va.gov/opa/publications/benefits_book/benefits_chap01.asp

Interim Rule: https://www.va.gov/ORPM/docs/20110505_AN94_CaregiversProgram.pdf

Final Rule: https://www.ncbi.nlm.nih.gov/pubmed/25581943

PFAFC: https://www.law.cornell.edu/cfr/text/38/71.40

MISSION Act: https://www.congress.gov/115/bills/hr5674/BILLS-115hr5674rh.pdf

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