NVLSP

NATIONAL VETERANS LEGAL SERVICES PROGRAM

Reimbursement of Emergency Medical Expenses

Overview

- Relevant law for reimbursement of non-VA unauthorized medical expenses
- **Relevant law for reimbursement for non-VA emergency treatment**
- CAVC decision in *Staab v. McDonald*
- **CAVC decision in *Wolfe v. Wilkie***

Statutes and Regulations

What is the difference between Statutes and Regulations?

Statutes and Regulations

- **Statutes**: written by Congress
- **Regulations**: written by federal agency (VA)
  - Must be consistent with statutes
  - Provide more details than statutes
  - Public has chance to comment on proposed regs

Reimbursement of non-VA Emergency Medical Expenses

- Relevant statutes and regs covering reimbursement of non-VA emergency medical expenses
  - **38 U.S.C. § 1728 (Reimbursement of Certain Medical Expenses)**
    - 38 C.F.R. § 17.120
  - **38 U.S.C. § 1725 (Reimbursement for Emergency Treatment)**
    - 38 C.F.R. § 17.1002

Reimbursement of Certain Medical Expenses
38 U.S.C. § 1728, 38 C.F.R. § 17.120

- VA will reimburse a Vet entitled to cost-free VA medical care the cost of care received from sources other than VA if all of the following are met:

1. **The hospital care or medical services were provided in a medical emergency such that a prudent lay person would have reasonably expected that delay in seeking immediate medical attention would be hazardous to the Vet's life or health**

Reimbursement of Certain Medical Expenses
38 U.S.C. § 1728, 38 C.F.R. § 17.120

2. **The care or services were provided to a Vet in need of such care for:**
   - SC disability
   - NSC disability aggravating an SC disability
   - Any disability, if Vet has a P&T SC disability; or
   - Any illness, injury, or dental condition, if Vet participating in a VA Voc Rehab program and care is necessary to enter into, continue, or hasten return to program that was interrupted by the illness, injury or dental condition.

Reimbursement of Certain Medical Expenses
38 U.S.C. § 1728, 38 C.F.R. § 17.120

3. **VA or other federal facilities were not feasibly available and an attempt to use them beforehand would not have been reasonable.**

THE FIRST REQUIREMENT:
MEDICAL SERVICES MUST HAVE BEEN PROVIDED IN AN EMERGENCY

1st Requirement: Medical Services Must Have Been Provided in an Emergency

- A prudent layperson would have reasonably expected that delay in seeking immediate medical attention would have been hazardous to life or health
  - **an emergency medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) that a prudent layperson who possesses an average knowledge of health and medicine could reasonably expect the absence of immediate medical attention to result in placing the health of the individual in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part**

1st Requirement: Medical Services Must Have Been Provided in an Emergency

- Both medical and lay evidence can be considered to determine whether there was a medical emergency
- Key consideration is whether a "prudent lay person" would think situation was a medical emergency
  - **Statement from a doctor that a situation was not a medical emergency would not be determinative, because situation must be viewed from perspective of a lay person**

1st Requirement: Medical Services Must Have Been Provided in an Emergency

- Medical emergency ends when:
  - **Vet could have been transferred or reported to a VAMC or VA-contracted federal facility for continuation of treatment**

THE SECOND REQUIREMENT:
TREATMENT FOR CERTAIN TYPES OF DISABILITIES

The 2nd Requirement: Treatment for Certain Types of Disabilities

- Care or services were provided for:
  - **SC disability**
  - **NSC disability aggravating an SC disability**
  - **Any disability, if Vet has a P&T SC disability**
  - **Almost any illness, injury, or dental condition, if Vet participating in a VA Voc Rehab program**

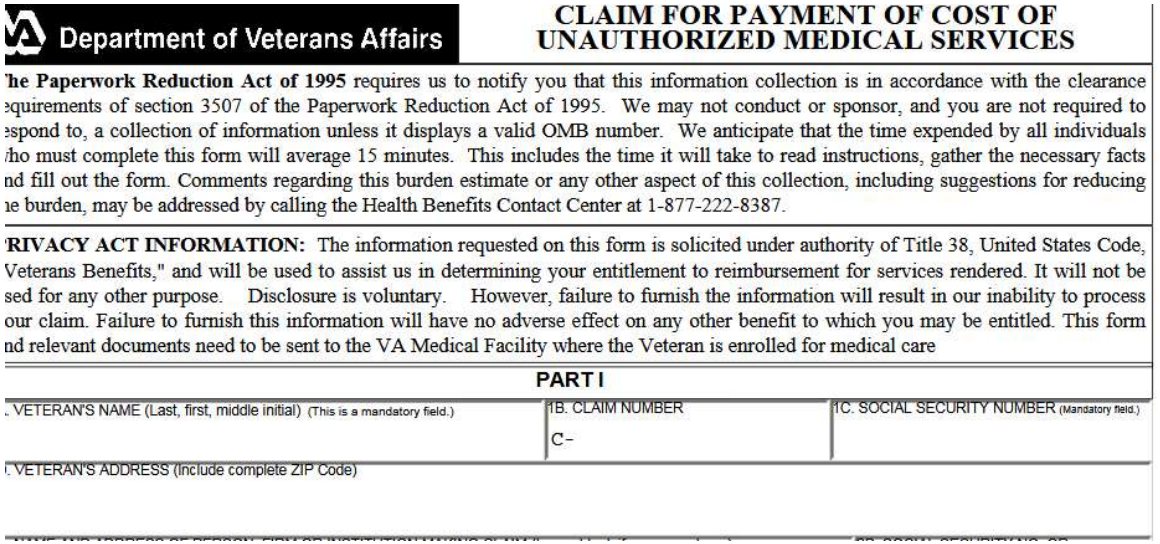
THE THIRD REQUIREMENT:
VA OR FEDERAL FACILITY NOT FEASIBLY AVAILABLE

3rd Requirement: VA or Federal Facility Not Feasibly Available

- A VA facility is not feasibly available when it is necessary or economically advisable to use public or private facilities, due to
  - **the urgency of the medical condition**
  - **the relative distance of the travel involved, or**
  - **the nature of the treatment required**
    - 38 C.F.R. § 17.53

Applying for Reimbursement of Unauthorized Medical Expenses

- Claim for reimbursement under § 1728 **must be filed within 2 years** of the date the treatment was provided
- **VA Form 10-583**, Claim for Payment of Cost of Unauthorized Medical Services



Department of Veterans Affairs

CLAIM FOR PAYMENT OF COST OF UNAUTHORIZED MEDICAL SERVICES

he Paperwork Reduction Act of 1995 requires us to notify you that this information collection is in accordance with the clearance equirements of section 3507 of the Paperwork Reduction Act of 1995. We may not conduct or sponsor, and you are not required to espond to, a collection of information unless it displays a valid OMB number. We anticipate that the time expended by all individuals ho must complete this form will average 15 minutes. This includes the time it will take to read instructions, gather the necessary facts nd fill out the form. Comments regarding this burden estimate or any other aspect of this collection, including suggestions for reducing ie burden, may be addressed by calling the Health Benefits Contact Center at 1-877-222-8387.

RIVACY ACT INFORMATION: The information requested on this form is solicited under authority of Title 38, United States Code, Veterans Benefits," and will be used to assist us in determining your entitlement to reimbursement for services rendered. It will not be sed for any other purpose. Disclosure is voluntary. However, failure to furnish the information will result in our inability to process our claim. Failure to furnish this information will have no adverse effect on any other benefit to which you may be entitled. This form nd relevant documents need to be sent to the VA Medical Facility where the Veteran is enrolled for medical care

PART I

. VETERAN'S NAME (Last, first, middle initial) (This is a mandatory field.)	1B. CLAIM NUMBER	1C. SOCIAL SECURITY NUMBER (Mandatory field.)
	C-	
. VETERAN'S ADDRESS (Include complete ZIP Code)		

Reimbursement for Emergency Treatment
38 U.S.C. § 1725, 38 C.F.R. § 17.1002

- If Vet is not eligible for reimbursement under § 1728, VA should consider Vet's entitlement to reimbursement under § 1725
  - **VA generally considers eligibility under § 1728 first**

Reimbursement for Emergency Treatment
38 U.S.C. § 1725, 38 C.F.R. § 17.1002

- VA will reimburse Vet for the reasonable value of **emergency treatment** furnished to Vet in a non-VA facility, if Vet is:
  - **personally liable for the treatment, and**
  - **an active participant in the VA health care system**

Reimbursement for Emergency Treatment
38 U.S.C. § 1725, 38 C.F.R. § 17.1002

- Emergency treatment:
  - VA or other Fed facilities not feasibly available and an attempt to use them beforehand would not have been reasonable
  - Care provided in medical emergency of such nature that a prudent layperson would reasonably expect that delay in seeking immediate medical attention would be hazardous to life or health

Reimbursement for Emergency Treatment
38 U.S.C. § 1725, 38 C.F.R. § 17.1002

- Medical emergency ends when:
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Reimbursement for Emergency Treatment
38 U.S.C. § 1725, 38 C.F.R. § 17.1002

- Vet **"personally liable"** if:
  - **Financially liable to the provider of emergency treatment for that treatment; and**
  - **Has no entitlement to care or services under a health-plan contract; and**
  - **Has no other contractual or legal recourse against a third party that would, in whole, extinguish such liability to the provider; and**
  - **Is not eligible for reimbursement for medical care or services under § 1728**

Reimbursement for Emergency Treatment
38 U.S.C. § 1725, 38 C.F.R. § 17.1002

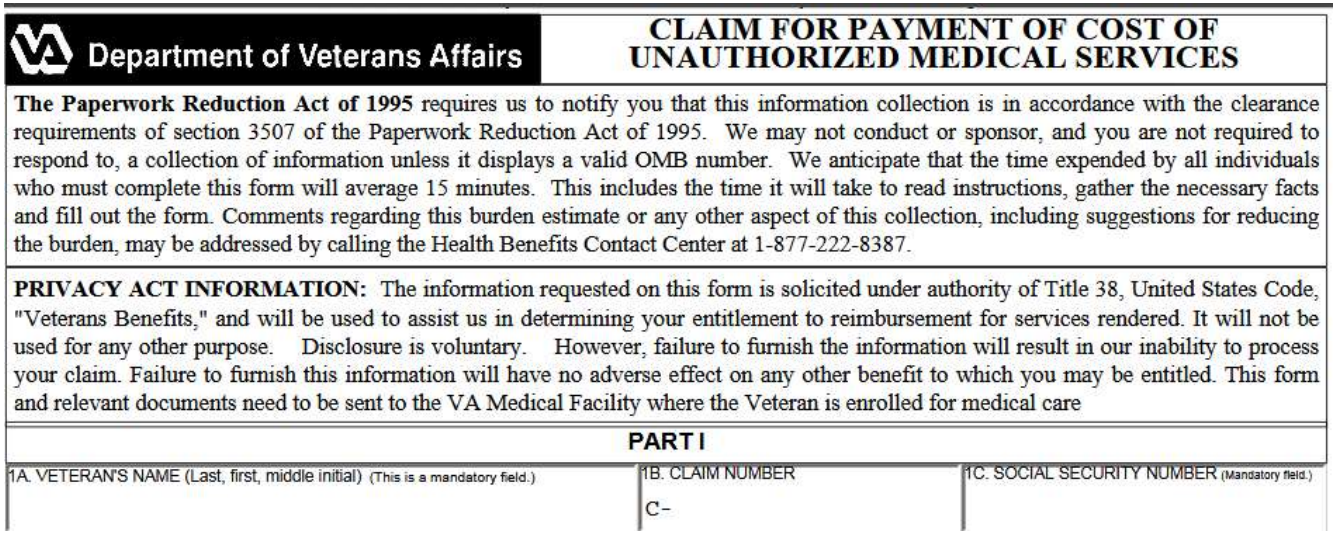
- Vet an **"active participant"** in the VA health care system if:
  - **Enrolled in the VA health care system, and**
  - **Has received care from VA w/in 24 months prior to the time the emergency medical expenses were incurred**

Reimbursement for Emergency Treatment
38 U.S.C. § 1725, 38 C.F.R. § 17.1002

- **Must file claim for reimbursement w/in 90 days of latest of date of:**
  - **Discharge from facility that furnished emergency treatment**
  - **Death (if it took place during transport to facility for emergency treatment or at the facility itself)**
  - **Finally exhausting, w/out success, action to obtain payment or reimbursement for the treatment from third party**

Reimbursement for Emergency Treatment
38 U.S.C. § 1725, 38 C.F.R. § 17.1002

- **VA Form 10-583**, Claim for Payment of Cost of Unauthorized Medical Services
  - Same as for claim under § 1728



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PRIVACY ACT INFORMATION: The information requested on this form is solicited under authority of Title 38, United States Code, "Veterans Benefits," and will be used to assist us in determining your entitlement to reimbursement for services rendered. It will not be used for any other purpose. Disclosure is voluntary. However, failure to furnish the information will result in our inability to process your claim. Failure to furnish this information will have no adverse effect on any other benefit to which you may be entitled. This form and relevant documents need to be sent to the VA Medical Facility where the Veteran is enrolled for medical care

PART I

1A. VETERAN'S NAME (Last, first, middle initial) (This is a mandatory field.)	1B. CLAIM NUMBER	1C. SOCIAL SECURITY NUMBER (Mandatory field.)
	C-	

Emergency Care Fairness Act of 2010

- **Before ECFA / Pre-2010**, 38 C.F.R. § 17.1002(f), stated that reimbursement for emergency treatment under § 1725 could only be made if Vet "has **no coverage** under a health-plan contract for payment or reimbursement, **in whole or in part**, for the emergency treatment."
- **In 12/2009**, Congress amended 38 U.S.C. § 1725 in ECFA to allow VA to reimburse Vets for treatment in a non-VA facility, if they have a third-party insurer that would pay for only a portion of the emergency care

Reimbursement for Emergency Treatment
38 U.S.C. § 1725, 38 C.F.R. § 17.1002

- Following Congress's amendment of § 1725, VA did not revise its regulation
- VA stated that § 1725(b)(3)(B) requires that the Vet "have 'no entitlement to care or services under a health-plan contract,' which means that any entitlement, even a partial one, bars eligibility under section 1725(b)."
  - **77 Fed. Reg. 23,615-16 (Apr. 20, 2012)**

Continued Care at Non-VA Facilities Under Both § 1728 and § 1725

- Vets can be reimbursed for cost of unauthorized continued non-emergency treatment, if:

1. **The non-VA facility notified VA at the time the Vet could be safely transferred to a VA facility, and the transfer of the Vet was not accepted, AND**

2. **The non-VA facility made and documented reasonable attempts to request transfer of the Vet to a VA facility**

Continued Care at Non-VA Facilities Under Both § 1728 and § 1725

- Making and documenting reasonable attempts to request transfer of Vet to a VA facility:
  - **The non-VA facility contacted either the VA Transfer Coordinator, Admin Officer of the Day, or designated staff responsible for accepting transfer of patients, at a local VA facility and documented such contact in Vet's progress/physicians' notes, discharge summary, or other applicable medical record**

Staab v. McDonald

28 Vet. App. 50 (2016)

Staab v. McDonald

- Issue before the Court:
  - **Is a Vet entitled to reimbursement for medical expenses incurred for emergency treatment in a non-VA facility, when part of the Vet's expenses were covered by a third party (in this case, Medicare)?**

Staab – Facts

- 11/1952-11/1956: Vet served on active duty
- 12/2010: Vet suffered heart attack and one or more strokes, and was hospitalized in a non-VA hospital
  - **Underwent open heart surgery at hospital**
- 6/2011: Vet discharged from hospital

Staab – Facts

- Vet's care not coordinated with VA, and he did not seek approval or authorization from VA for treatment
- Some of Vet's medical bills for this treatment were covered by Medicare, but he sought reimbursement by VA for the remainder
- Cost of care owed by Vet was estimated by him to be about $48,000

Staab – Facts

- VA **denied** Vet's claim for reimbursement of the costs of the private medical care from 12/2010 to 6/2011
- 5/2012: Vet advised VA that he could not have obtained VA pre-approval for the treatment, because his stroke had rendered him unable to think clearly and communicate. He also informed VA that his family was not apprised of need to coordinate care or coverage with VA

Staab – Facts

- 12/2013: BVA denied reimbursement for the non-VA medical care
  - **Found Vet ineligible for reimbursement under § 1725 because he was covered by Medicare**
  - **Noted Vet only seeking reimbursement for expenses not covered by Medicare, but stated the fact that not all medical expenses were covered by Medicare was not relevant under § 17.1002(f)**

Staab – Facts

- BVA concluded that since Vet had a health plan that covered part of his emergency treatment, he did not meet the requirements of § 17.1002(f); thus, he was not entitled to reimbursement by VA for remaining expenses

Staab – Vet's Arguments

- BVA erred in finding him ineligible for reimbursement under § 1725 because:
  - **Under the plain meaning of the statute, the partial coverage of his medical expenses by Medicare does not render him ineligible for reimbursement**
  - **Legislative history of amendments to § 1725 supported this reading and application of the statute**
  - **38 C.F.R. § 17.1002(f) inconsistent with 38 U.S.C. § 1725 and invalid**

Staab – CAVC Holding

- CAVC held that VA reimbursement is warranted when coverage by a third party is less than total
- Congress intended VA to reimburse a Vet for that portion of expenses not covered by a health-plan contract and for which they are personally responsible

Staab – CAVC Holding

- After Congress amended 38 U.S.C. § 1725, VA's reg became inconsistent with 38 U.S.C. § 1725
  - **VA failed to update 38 C.F.R. § 17.1002(f) so that it complied with the amended statute**
- Because VA's reg did not execute the language of the statute or the intent of Congress, it was invalid

Staab – Result

- CAVC sent case back to the Board for it to readjudicate the claim and properly apply § 1725

Post-*Staab* Developments

Post-*Staab* Developments

- CAVC issued *Staab* decision 4/8/2016
- **VA appealed to Federal Circuit**
- After Congressional pressure, VA withdrew appeal in 7/2017
- **But, VA held claims affected by *Staab* in abeyance until it updated its regs in 1/2018**

Post-*Staab* Developments

- Ever since the Emergency Care Fairness Act of 2010, the statute—38 U.S.C. § 1725—stated:
  - **VA "may not reimburse a veteran under this section for any copayment or similar payment that the veteran owes the third party . . . ."**
- Jan. 2018: VA amended its regulation to state:
  - **VA "will not reimburse a veteran under this section for any copayment, deductible, coinsurance, or similar payment that the veteran owes the third party . . . ."**

Post-*Staab* Developments

- Co-insurance: % of costs the enrollee must pay. Not a predetermined dollar figure
- Deductible: Amount an insured must pay each year before the insurance source pays its share
- Co-payment: fixed amount paid for a covered health care service after insured paid the deductible

Post-*Staab* Developments

- From **1/2018 to 2/2019**, VA also **sent letters** to Vets advising them that a requirement for reimbursement of costs associated with emergency care for NSC conditions from non-VA providers is that the Vet "must not have coverage under a health-plan contract for payment or reimbursement, in whole or in part, for the emergency treatment."

  - **This is the language found invalid in *Staab*!**

Wolfe v. Wilkie

32 Vet. App. 1 (2019)

Wolfe v. Wilkie

- 10/2018: NVLSP filed lawsuit to challenge 38 C.F.R. § 17.1005(a)(5) and erroneous VA letters, arguing:
  - **§ 17.1005(a)(5) inconsistent with 38 U.S.C. § 1725(c)(4)(D) and *Staab* to the extent if forbids VA from reimbursing Vets for coinsurance and deductible payments**
  - **38 U.S.C. § 1725(c)(4)(D) only prohibits reimbursement for a "copayment or similar payment" that Vet owes third party or is responsible for under a health-plan contract**

Wolfe v. Wilkie

- NVLSP Argued:
  - **Co-insurance** and **deductible** amounts can vary widely and be thousands of dollars
  - They are not "similar to" a **co-payment**, which is typically a minimal fixed amount

Wolfe v. Wilkie

- NVLSP argued that § 17.1005(a)(5) undermined Congress's intent in amending § 1725
  - **VA, not Vet should be responsible for excess cost of emergency services**
  - **Vets should not be saddled with massive ER bills**
  - **Gives Vets disincentive to obtain 3rd party insurance**
    - Costs VA more if Vet has no 3rd party insurance

Wolfe v. Wilkie

- NVLSP asked Court to:
  - **Find § 17.1005(a)(5) invalid to the extent it prohibits VA from reimbursing coinsurance and deductible payments**
  - **Invalidate VA denials of reimbursement for coinsurance and deductible payments and readjudicate claims**
  - **Invalidate VA decisions that denied reimbursement due to partial coverage under a health plan contract**

Wolfe v. Wilkie

- NVLSP asked Court to:
  - **Stop VA from issuing letters to Vets with incorrect info about requirements for reimbursement**
  - **Re-issue letters sent by VA after 4/8/2016 that incorrectly stated that a requirement for reimbursement is no coverage at all under a health-care plan and reset applicable deadlines for appealing denials associated with letters**
    - Prior to CAVC decision: VA agreed to this demand

Wolfe Decision

- 9/9/2019: CAVC granted class certification to:
  - **All claimants whose claims for reimbursement of emergency medical expenses incurred at non-VA facilities VA has already denied or will deny, in whole or in part, on the ground that the expenses are part of the deductible or coinsurance payments for which the Vet was responsible**

Wolfe Decision

- CAVC found in favor of all of NVLSP's arguments:
  - **Regulation § 17.1005(a)(5) invalid because it is contrary to 38 U.S.C. § 1725(c)(4)(D)**
  - **VA's decisions under § 17.1005(a)(5) are invalid to extent they denied reimbursement for medical expenses deemed deductibles or coinsurance**
  - **VA must readjudicate reimbursement claims under § 1725(c)(4)(D)'s proper interpretation**

Wolfe Decision

- CAVC found (cont.):
  - **Regulation § 17.1005(a)(5) is not based on a permissible construction of 38 U.S.C. § 1725(c)(4)(D) for two related, but distinct, reasons:**
    1) It is inconsistent with *Staab's* interpretation of 38 U.S.C. § 1725, and
    2) Deductibles and coinsurance are not "similar" to a copayment

Sample Faulty VA "Correction" Letter

Community Care Program: 38 U.S.C. § 1725

The Department of Veteran Affairs (VA) recently received and processed a claim for emergency treatment furnished to you by a non-VA provider in connection with the episode(s) of care listed on reverse side.

Correcting language

Your claim was properly rejected for lack of needed information, as described below, but there was content in the rejection notice that may have been misleading or confusing. In describing the criteria for reimbursement under 38 U.S.C. 1725, the notice incorrectly stated that VA cannot reimburse claims if the Veteran has other health insurance (OHI). In fact, when a Veteran has OHI, VA is a secondary payer, meaning VA pays after any payment by OHI up to the VA maximum allowable amount, provided all the criteria for VA reimbursement are met.

Your claim was rejected because our records indicate you have OHI, but we do not have an Explanation of Benefits (EOB) or other remittance from the insurance company or your provider to show what was paid by OHI. This information is required for VA to determine if VA reimbursement is allowable.

We have requested the EOB or Remittance Advice from your community provider. You may also submit this information. If required information is not received, we cannot take any further action.

Wrong under Wolfe

It is important to note that VA has no legal authority to pay a Veteran's cost shares, deductibles, or copayments associated with their other health insurance.

If you or your provider have already submitted OHI information or you have any questions, please contact us at 1-877-466-7124.

Wolfe Letters

- CAVC ordered VA to:
  - **Stop sending "corrective" notices, because they incorrectly state:**
    - "It is important to note that VA has no legal authority to pay a Veteran's cost shares, deductibles, or copayments associated with their other health insurance."
  - **Prepare a plan to correct the incorrect notices that have already been sent and submit plan to Court for approval**

Letter VA Sent in 2020 to Over-73,000 Vets

Denial for Personal Responsibility (Template 2)

This letter is being sent to you by the Department of Veterans Affairs (VA) as a result of an Order of the U.S. Court of Appeals for Veterans Claims ("the Court") in the class action known as *Wolfe v. Wilkie,* 32 Vet. App. 1 (2019) ("the *Wolfe* case"). You are a member of the class in the *Wolfe* case.

VA denied your claim or claims for reimbursement of costs associated with the episode(s) of care referenced in this notice because the amounts claimed were coinsurance or deductibles you owed under your health insurance plan. On September 9, 2019, the Court ruled in the *Wolfe* case that VA's interpretation of the applicable statute was wrong and that VA cannot deny reimbursement of coinsurance and deductible amounts owed by a Veteran under a health insurance plan.

As a result, VA will re-decide your claim(s) and will issue a new decision. There is no need for you to take any action at this point.

If you have questions, you may contact the lawyers who represent you and the other members of the class in the *Wolfe* case at [contact information to be supplied by class counsel after the Court decides disputed issues].

{Signature}

{Contact Information}

Letter VA Sent in 2020 to Over 1 Million Vets

Rejected, and Rejection Letter Contained Erroneous Language (Template 4)

This letter is being sent to you by the Department of Veteran Affairs (VA) as a result of an Order of the U.S. Court of Appeals for Veterans Claims ("the Court") in the class action known as *Wolfe v. Wilkie,* 32 Vet. App. 1 (2019) ('the *Wolfe* case"). VA received and processed your claim or claims for reimbursement of costs you incurred in connection with the episode(s) of care referenced in this notice. Between January 8, 2018 and February 8, 2019, you received one or more notices from VA stating that your claim was rejected because we lacked information needed to process the claim.

Your claim was initially rejected for lack of needed information, as described below, but there was content in the rejection notice that may have been misleading or confusing. In describing the criteria for reimbursement under 38 U.S.C. 1725, the notice incorrectly stated that VA cannot reimburse claims if the Veteran has other health insurance (OHI).

After you received notice that your claim or claims were rejected, VA may have mailed you a second notice stating that VA lacked authority under the applicable statute, 38 U.S.C. 1725, to reimburse Veterans for the coinsurance and deductible amounts they owed under their health insurance plan. On September 9, 2019, the Court ruled in the *Wolfe* case that VA's interpretation of the applicable statute was wrong and that VA cannot deny reimbursement of coinsurance and deductible amounts owed by a veteran under a health insurance plan.

Although your claim was initially rejected because VA lacked information necessary to process the claim, we recognize that your decision as to whether to continue to pursue your reimbursement claim or claims may have been impacted by VA's erroneous statement of the law.

If you have not submitted the needed information, we encourage you to do so. Once the needed information is received, your claim will be processed in accordance with current applicable law.

{Signature}

{Contact Information}

Staab & Wolfe: Lessons Learned

- Even if Vet has health insurance covering part of the cost of emergency medical treatment at a non-VA facility, the Vet can still qualify for reimbursement under 38 U.S.C. § 1725
- Under 38 U.S.C. § 1725, VA must reimburse Vet for **co-insurance and deductible payments**, but not co-payments

Advocacy Advice – Rejected Claims

- Review letter to see if VA "rejected" the claim, rather than denied claim.
  - **VA did not "deny" the benefits**
- Determine *why* VA rejected the claim, and try to correct
  - **Missing Explanation of Benefits? Submit it!**
  - **Other missing info? Submit it!**

NVLSP's Role for 72,000 Class Members

- NVLSP is monitoring class member cases to ensure VA correctly adjudicates them.
- If you have contact with a Wolfe class member, let us know:
  - **Email: Wolfeclass@nvlsp.org**
  - **Phone: 888-659-1258**

VA Advice for Reimbursement Claimants Who Are Not *Wolfe* Class Members

- Template 4 letters contain a VA address (P.O. Box 30751, Tampa, FL 33630) where Vets can send any questions related to their claim. Any correspondence to VA should include the Vet's name, DOB, SSN, date(s) of applicable emergency treatment at a non-VA facility, and personal contact info. If the Vet would like a call from a VA representative, they can indicate so in their correspondence to VA.

Questions?