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Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 121

Covering period of *Federal Register* issues
through February 1, 2019

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Supplemental Materials for *Book B*

Code of Federal Regulations

Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 121

5 February 2019

Covering the period of Federal Register issues
through February 1, 2019

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Book B, Supplement No. 121 February 5, 2019

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HIGHLIGHTS

Book B, Supplement No. 121 February 5, 2019

Note: Where substantive changes are made in the text of regulations, the paragraphs of *Highlights* sections are cited at the end of the relevant section of text. Thus, if you are reading §3.263, you will see a note at the end of that section which reads: “Supplement *Highlights* references—6(2).” This means that paragraph 2 of the *Highlights* section in Supplement No. 6 contains information about the changes made in §3.263. By keeping and filing the *Highlights* sections, you will have a reference source explaining all substantive changes in the text of the regulations.

Supplement frequency: This Book B (*Adjudication*) was originally supplemented four times a year, in February, May, August, and November. Beginning 1 August 1995, supplements will be issued *every month* during which a final rule addition or modification is made to the parts of Title 38 covered by this book. Supplements will be numbered consecutively as issued.

Modifications in this supplement include the following:

1. On 18 January 2019, the VA published a final rule, effective 18 February 2019, to amend its claims adjudication, appeals, and Rules of Practice of the Board of Veterans' Appeals (Board) regulations. In addition, this rule revises VA's regulations with respect to accreditation of attorneys, agents, and Veterans Service Organization (VSO) representatives; the standards of conduct for persons practicing before VA; and the rules governing fees for representation. This rulemaking implements the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), which amended the procedures applicable to administrative review and appeal of VA decisions on claims for benefits, creating a new, modernized review system. Unless otherwise specified in this final rule, VA amends its regulations applicable to all claims processed under the new review system, which generally applies where an initial VA decision on a claim is provided on or after the effective date or where a claimant has elected to opt into the new review system under established procedures. Changes:

- In §3.1, revised paragraph (p),
- In §3.31, replaced “reopened” with “supplemental”,
- In §3.103, revised the section heading and paragraphs (b)(1), (c), (d), and (f),
- In §3.104, revised the section heading, paragraphs (a), (b) and (c),
- In §3.105, revised paragraphs (a) and (b), and added paragraph (j),
- In §3.110, revised paragraph (b),
- In §3.114 replaced “reopened” with “supplemental”,
- In §3.151, revised paragraph (a) and added paragraphs (c) and (d),

- In §3.155, revised introductory text and paragraph (d)(1),
- In §3.156, revised the section heading, introductory text and paragraphs (a) and (b), and added paragraph (d),
- In §3.158, revised paragraph (a),
- In §3.159, revised paragraphs (a)(3), (b)(1), (b)(3), (c), (c)(4)(iii) and (d); added paragraphs (b)(4) and (c)(4)(iv),
- In §3.160, revised paragraphs (a) (d) and (e); removed paragraph (f),
- Removed §3.161,
- In §3.321, replaced “reopened” with “supplemental”,
- In §3.326, replaced “reopened” with “supplemental”,
- In §3.328, revised paragraphs (b) and (c),
- In §3.372, replaced “reopened” with “supplemental”,
- In §3.400, revised introductory text and paragraphs (h)(1) through (3) and (z)(2); added paragraph (z)(3),
- In §3.401, replaced “reopened” with “supplemental”,
- In §3.402, replaced “reopened” with “supplemental”,
- In §3.404, replaced “reopened” with “supplemental”,
- In §3.655, replaced “reopened” with “supplemental”,
- In §3.814, revised paragraph (e),
- In §3.815, revised paragraph (i),
- Added §§3.2400, 3.2500, 3.2501, 3.2502 and 3.2601,
- In §3.2600, revised the section heading, introductory text and paragraph (g).

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Page numbers have three parts: (1) the section number, (2) a hyphen, and (3) the page number within that section; e.g., 3.272-4.

This loose-leaf book has two indices. The first is arranged by *section number* and presents the contents of Part 3 in the order in which they appear in the *Code of Federal Regulations*. The second is arranged by *section title*, and presents the titles of all sections in Part 3 in alphabetical order, grouped by topic. The *section title* index begins on page B-17.

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**Subpart A—Pension, Compensation, and Dependency
and Indemnity Compensation**

Authority: 38 U.S.C. 501(a), unless otherwise noted.

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§3.1 Definitions.

(a) “Armed Forces” means the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, including their Reserve components.

(b) “Reserve component” means the Army, Naval, Marine Corps, Air Force and Coast Guard Reserves and the National and Air National Guard of the United States.

(c) “Reserves” means members of a Reserve component of one of the Armed Forces.

(d) “Veteran” means a person who served in the active military, naval, or air service and who was discharged or released under conditions other than dishonorable.

(1) For compensation and dependency and indemnity compensation the term “veteran” includes a person who died in active service and whose death was not due to willful misconduct.

(2) For death pension the term “veteran” includes a person who died in active service under conditions which preclude payment of service-connected death benefits, provided such person had completed at least 2 years honorable military, naval or air service, as certified by the Secretary concerned. (See §§3.3(b)(3)(i) and 3.3(b)(4)(i)). (Authority: 38 U.S.C. 501(a))

(e) “Veteran of any war” means any veteran who served in the active military, naval or air service during a period of war as set forth in §3.2.

(f) “Period of war” means the periods described in §3.2.

(g) “Secretary concerned” means:

- (1) The Secretary of the Army, with respect to matters concerning the Army;
- (2) The Secretary of the Navy, with respect to matters concerning the Navy or the Marine Corps;
- (3) The Secretary of the Air Force, with respect to matters concerning the Air Force;
- (4) The Secretary of Homeland Security, with respect to matters concerning the Coast Guard;
- (5) The Secretary of Health and Human Services, with respect to matters concerning the Public Health Service; and
- (6) The Secretary of Commerce, with respect to matters concerning the Coast and Geodetic Survey, the Environmental Science Services Administration, and the National Oceanic and Atmospheric Administration.

(h) “Discharge or release” includes retirement from the active military, naval, or air service.

(i) “State” means each of the several States, Territories and possessions of the United States, the District of Columbia, and Commonwealth of Puerto Rico.

(j) “Marriage” means a marriage valid under the law of the place where the parties resided at the time of marriage, or the law of the place where the parties resided when the right to benefits accrued. (Authority: 38 U.S.C. 103(c))

(k) “Service-connected” means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service.

(l) “Nonservice-connected” means, with respect to disability or death, that such disability was not incurred or aggravated, or that the death did not result from a disability incurred or aggravated, in line of duty in the active military, naval, or air service.

(m) “In line of duty” means an injury or disease incurred or aggravated during a period of active military, naval, or air service unless such injury or disease was the result of the veteran’s own willful misconduct or, for claims filed after October 31, 1990, was a result of his or her abuse of alcohol or drugs. A service department finding that injury, disease or death occurred in line of duty will be binding on the Department of Veterans Affairs unless it is patently inconsistent with the requirements of laws administered by the Department of Veterans Affairs. Requirements as to line of duty are not met if at the time the injury was suffered or disease contracted the veteran was:

(1) Avoiding duty by desertion, or was absent without leave which materially interfered with the performance of military duty.

(2) Confined under a sentence of court-martial involving an unremitted dishonorable discharge.

(3) Confined under sentence of a civil court for a felony as determined under the laws of the jurisdiction where the person was convicted by such court. (Authority: 38 U.S.C. 105)

Note: See §3.1(y)(2)(iii) for applicability of “in line of duty” in determining former prisoner of war status.

(n) “Willful misconduct” means an act involving conscious wrongdoing or known prohibited action. A service department finding that injury, disease or death was not due to misconduct will be binding on the Department of Veterans Affairs unless it is patently inconsistent with the facts and the requirements of laws administered by the Department of Veterans Affairs.

(1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.

(2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.

(3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death. (See §§3.301, 3.302)

(o) “Political subdivision of the United States” includes the jurisdiction defined as a State in paragraph (i) of this section, and the counties, cities or municipalities of each.

(p) Claim means a written or electronic communication requesting a determination of entitlement or evidencing a belief in entitlement, to a specific benefit under the laws administered by the Department of Veterans Affairs submitted on an application form prescribed by the Secretary. (See scope of claim, §3.155(d)(2); complete claim, §3.160(a); issues within a claim, §3.151(c)).

(1) Initial claim. An initial claim is any complete claim, other than a supplemental claim, for a benefit on a form prescribed by the Secretary. The first initial claim for one or more benefits received by VA is further defined as an original claim. (See original claim, §3.160(b)). Initial claims include:

(i) A new claim requesting service connection for a disability or grant of a new benefit, and

(ii) A claim for increase in a disability evaluation rating or rate of a benefit paid based on a change or worsening in condition or circumstance since the last decision issued by VA for the benefit.

(2) Supplemental claim. A supplemental claim is any complete claim for a VA benefit on an application form prescribed by the Secretary where an initial or supplemental claim for the same or similar benefit on the same or similar basis was previously decided. (See supplemental claim; §3.2501.)

(q) “Notice” means written notice sent to a claimant or payee at his or her latest address of record.

(r) “Date of receipt” means the date on which a claim, information or evidence was received in the Department of Veterans Affairs, except as to specific provisions for claims or evidence received in the State Department (§3.108), or in the Social Security Administration (§3.153, §3.201), or Department of Defense as to initial claims filed at or prior to separation. However, the Under Secretary for Benefits may establish, by notice published in the *Federal Register*, exceptions to this rule, using factors such as postmark or the date the claimant signed the correspondence, when he or she determines that a natural or man-made interference with the normal channels through which the Veterans Benefits Administration ordinarily receives correspondence has resulted in one or more Veterans Benefits Administration offices experiencing extended delays in receipt of claims, information, or evidence from claimants served by the affected office or offices to an extent that, if not addressed, would adversely affect such claimants through no fault of their own. (Authority: 38 U.S.C. 501(a), 512(a), 5110)

(s) “On the borders thereof” means, with regard to service during the Mexican border period, the States of Arizona, California, New Mexico, and Texas, and the nations of Guatemala and British Honduras. (Authority: 38 U.S.C. 101(30))

(t) “In the waters adjacent thereto” means, with regard to service during the Mexican border period, the waters (including the islands therein) which are within 750 nautical miles (863 statute miles) of the coast of the mainland of Mexico. (Authority: 38 U.S.C. 101(30))

(u) “Section 306 pension” means those disability and death pension programs in effect on December 31, 1978, which arose out of Pub. L. 86-211; 73 Stat. 432.

(v) “Old-Law pension” means the disability and death pension programs that were in effect on June 30, 1960. Also known as protected pension, i.e. protected under section 9(b) of the Veteran’s Pension Act of 1959 (Pub. L. 86-211; 73 Stat. 432).

(w) “Improved pension” means the disability and death pension programs becoming effective January 1, 1979, under authority of Pub. L. 95-588; 92 Stat. 2497.

(x) “Service pension” is the name given to Spanish-American War pension. It is referred to as a service pension because entitlement is based solely on service without regard to nonservice-connected disability, income and net worth. (Authority: 38 U.S.C. 1512, 1536)

(y) *Former prisoner of war.* The term “former prisoner of war” means a person who, while serving in the active military, naval or air service, was forcibly detained or interned in the line of duty by an enemy or foreign government, the agents of either, or a hostile force.

(1) *Decisions based on service department findings.* The Department of Veterans Affairs shall accept the findings of the appropriate service department that a person was a prisoner of war during a period of war unless a reasonable basis exists for questioning it. Such findings shall be accepted only when detention or internment is by an enemy government or its agents.

(2) *Other decisions.* In all other situations, including those in which the Department of Veterans Affairs cannot accept the service department findings, the following factors shall be used to determine prisoner of war status:

(i) *Circumstances of detention or internment.* To be considered a former prisoner of war, a serviceperson must have been forcibly detained or interned under circumstances comparable to those under which persons generally have been forcibly detained or interned by enemy governments during periods of war. Such circumstances include, but are not limited to, physical hardships or abuse, psychological hardships or abuse, malnutrition, and unsanitary conditions. Each individual member of a particular group of detainees or internees shall, in the absence of evidence to the contrary, be considered to have experienced the same circumstances as those experienced by the group.

(ii) *Reason for detention or internment.* The reason for which a serviceperson was detained or interned is immaterial in determining POW status, except that a serviceperson who is detained or interned by a foreign government for an alleged violation of its laws is not entitled to be considered a former POW on the basis of that period of detention or

internment, unless the charges are a sham intended to legitimize the period of detention or internment.

(3) *Central Office approval.* The Director of the Compensation and Pension Service, VA Central Office, shall approve all VA regional office determinations establishing or denying POW status, with the exception of those service department determinations accepted under paragraph (y)(1) of this section.

(4) *In line of duty.* The Department of Veterans Affairs shall consider that a serviceperson was forcibly detained or interned in line of duty unless the evidence of record discloses that forcible detainment or internment was the proximate result of the serviceperson's own willful misconduct.

(5) *Hostile force.* The term "hostile force" means any entity other than an enemy or foreign government or the agents of either whose actions are taken to further or enhance anti-American military, political or economic objectives or views or to attempt to embarrass the United States. (Authority: 38 U.S.C. 101(32))

(z) "Nursing home" means:

(1) Any extended care facility which is licensed by a State to provide skilled or intermediate-level nursing care,

(2) A nursing home care unit in a State veterans' home which is approved for payment under 38 U.S.C. 1742, or

(3) A Department of Veterans Affairs Nursing Home Care Unit.

(aa) "Fraud":

(1) As used in 38 U.S.C. 103 and implementing regulations, fraud means an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for the purpose of obtaining, or assisting an individual to obtain an annulment or divorce, with knowledge that the misrepresentation or failure to disclose may result in the erroneous granting of an annulment or divorce; and (Authority: 38 U.S.C. 210(c))

(2) As used in 38 U.S.C. 110 and 359 and implementing regulations, fraud means an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for the purpose of obtaining or retaining, or assisting an individual to obtain or retain, eligibility for Department of Veterans Affairs benefits, with knowledge that the misrepresentation or failure to disclose may result in the erroneous award or retention of such benefits. (Authority: 38 U.S.C. 501(a))

[26 FR 1563, Feb. 24, 1961, as amended at 27 FR 4023, Apr. 27, 1962; 27 FR 11886, Dec. 1, 1962; 28 FR 320, Jan. 11, 1963; 32 FR 6840, May 4, 1967; 36 FR 5341, Mar. 20, 1971; 36 FR 8445, May 6, 1971; 40 FR 16064, Mar. 3, 1975; 44 FR 45931, Aug. 6, 1979; 47 FR 38122, Aug. 30, 1982; 48 FR 38821, Aug. 26, 1983; 54 FR 31828, Aug. 2, 1989; 54 FR 34981, Aug. 23, 1989; 55 FR 8141, Mar. 7, 1990; 56 FR 19579, Apr. 20, 1991; 60 FR 27408, May 24, 1995; 61 FR 56627, Nov. 4, 1996; 69 FR 42880, July 19, 2004; 70 FR 51590, Aug. 31, 2005; 71 FR 44918, Aug. 8, 2006; 79 FR 57694, Sep. 25, 2014; 84 FR 166, Jan. 18, 2019]

Cross-References: Pension. See §3.3. Compensation. See §3.4. Dependency and indemnity compensation. See §3.5. Preservation of disability ratings. See §3.951. Service-connection. See §3.957.

Supplement *Highlights* references: 16(1), 24(2), 62(2), 68(1), 72(2), 111(1), 121(1).

Reserved

§3.30 Frequency of payment of improved pension and parents' dependency and indemnity compensation (DIC).

Payment shall be made as shown in paragraphs (a), (b), (c), (d), (e) and (f) of this section; however, beneficiaries receiving payment less frequently than monthly may elect to receive payment monthly in cases in which other Federal benefits would otherwise be denied. (Authority: 38 U.S.C. 501(a))

(a) *Improved pension—Monthly.* Payment shall be made monthly if the annual rate payable is \$228 or more.

(b) *Improved pension—Quarterly.* Payment shall be made every 3 months on or about March 1, June 1, September 1, and December 1, if the annual rate payable is at least \$144 but less than \$228.

(c) *Improved pension—Semiannually.* Payment shall be made every 6 months on or about June 1, and December 1, if the annual rate payable is at least \$72 but less than \$144.

(d) *Improved pension—Annually.* Payment shall be made annually on or about June 1, if the annual rate payable is less than \$72. (Authority: 38 U.S.C. 1508)

(e) *Parents' DIC—Semiannually.* Benefits shall be paid every 6 months on or about June 1, and December 1, if the amount of the annual benefit is less than 4 percent of the maximum annual rate payable under 38 U.S.C. 1315.

(f) *Payment of less than one dollar.* Payments of less than \$1 shall not be made.

[44 FR 45935, Aug. 6, 1979, as amended at 51 FR 1790, Jan. 15, 1988; 53 FR 7903, Mar. 11, 1988; 57 FR 10425, Mar. 26, 1992; 71 FR 52290, Sept. 5, 2006]

Cross reference: Pension. See §3.3(a)(3), (b)(4).

Supplement *Highlights* reference: 73(1)

§3.31 Commencement of the period of payment.

Regardless of VA regulations concerning effective dates of awards, and except as provided in paragraph (c) of this section, payment of monetary benefits based on original, supplemental, or increased awards of compensation, pension, dependency and indemnity compensation, or a monetary allowance under 38 U.S.C. chapter 18 for an individual who is a child of a Vietnam veteran or a child of a veteran with covered service in Korea may not be made for any period prior to the first day of the calendar month following the month in which the award became effective. However, beneficiaries will be deemed to be in receipt of monetary benefits during the period between the effective date of the award and the date payment commences for the purpose of all laws administered by the Department of Veterans Affairs except that nothing in this section will be construed as preventing the receipt of retired or retirement pay prior to the effective date of waiver of such pay in accordance with 38 U.S.C. 5305.

(a) *Increased award defined.* For the purposes of this section the term “increased award” means an award which is increased because of an added dependent, increase in disability or disability rating, or reduction in income. The term also includes elections of improved pension under section 306 of Pub. L. 95-588 and awards pursuant to paragraphs 29 and 30 of the Schedule for Rating Disabilities except as provided in paragraph (c) of this section.

(b) *General rule of applicability.* The provisions of this section apply to all original, supplemental, or increased awards unless such awards provide only for continuity of entitlement with no increase in rate of payment.

(c) *Specific exclusions.* The provisions of this section do not apply to the following types of awards.

(1) Surviving spouse’s rate for the month of a veteran’s death (for exception see §3.20(b))

(2) In cases where military retired or retirement pay is greater than the amount of compensation payable, compensation will be paid as of the effective date of waiver of such pay. However, in cases where the amount of compensation payable is greater than military retired or retirement pay, payment of the available difference for any period prior to the effective date of total waiver of such pay is subject to the general provisions of this section.

(3) Adjustments of awards—such as in the case of original or increased apportionments or the termination of any withholding, reduction, or suspension by reason of:

- (i) Recoupment,
- (ii) An offset to collect indebtedness,
- (iii) Institutionalization (hospitalization),
- (iv) Incompetency,

(v) Incarceration,

(vi) An estate that exceeds the limitation for certain hospitalized incompetent veterans, or

(vii) Discontinuance of apportionments.

(4) Increases resulting solely from the enactment of legislation—such as:

(i) Cost-of-living increases in compensation or dependency and indemnity compensation,

(ii) Increases in Improved Pension, parents' dependency and indemnity compensation, or a monetary allowance under 38 U.S.C. chapter 18 pursuant to §3.27, or

(iii) Changes in the criteria for statutory award designations.

(5) Temporary total ratings pursuant to paragraph 29 of the Schedule for Rating Disabilities when the entire period of hospitalization or treatment, including any period of post-hospitalization convalescence, commences and terminates within the same calendar month. In such cases the period of payment shall commence on the first day of the month in which the hospitalization or treatment began. (Authority: 38 U.S.C. 1805, 1815, 1821, 1832, 5111)

[48 FR 34472, July 29, 1983; 48 FR 37031, Aug. 16, 1983, as amended at 49 FR 47003, Nov. 30, 1984; 65 FR 35282, June 2, 2000; 67 FR 49586, July 31, 2002; 76 FR 4247, Jan. 25, 2011; 84 FR 166, Jan. 18, 2019]

Supplement *Highlights* References: 42(1), 54(2), 95(1), 121(1).

§3.32 Exchange rates for foreign currencies.

When determining the rates of pension or parents' DIC or the amounts of burial, plot or headstone allowances or accrued benefits to which a claimant or beneficiary may be entitled, income received or expenses paid in a foreign currency shall be converted into U.S. dollar equivalents employing quarterly exchange rates established by the Department of the Treasury.

(a) *Pension and parents' DIC.*

(1) Because exchange rates for foreign currencies cannot be determined in advance, rates of pension and parents' DIC shall be projected using the most recent quarterly exchange rate and shall be adjusted retroactively based upon actual exchange rates when an annual eligibility verification report is filed.

(2) Retroactive adjustments due to fluctuations in exchange rates shall be calculated using the average of the four most recent quarterly exchange rates. If the claimant reports income and expenses for a prior reporting period, the retroactive adjustment shall be calculated using the average of the four quarterly rates which were the most recent available on the closing date of the twelve-month period for which income and expenses are reported.

(b) *Burial, plot or headstone allowances and accrued benefits.* Payment amounts for burial, plot or headstone allowances and claims for accrued benefits as reimbursement from the person who bore the expenses of a deceased beneficiary's last illness or burial shall be determined using the quarterly exchange rate for the quarter in which the expenses forming the basis of the claim were paid. If the claim is filed by an unpaid creditor, however, the quarterly rate for the quarter in which the veteran died shall apply. When entitlement originates during a quarter for which the Department of the Treasury has not yet published a quarterly rate, amounts due shall be calculated using the most recent quarterly exchange rate. (Authority: 38 U.S.C. 501(a))

Cross references: Accrued benefits. See §3.1000. Accrued benefits payable to foreign beneficiaries. See §3.1008.

[55 FR 8140, Mar. 7, 1990; 55 FR 10867, Mar. 23, 1990]

Next Section is §3.40

§3.102 Reasonable doubt.

It is the defined and consistently applied policy of the Department of Veterans Affairs to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not justifiable basis for denying the application of the reasonable doubt doctrine if the entire complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships. (Authority: 38 U.S.C. 501(a))

[50 FR 34458, Aug. 26, 1985, as amended at 66 FR 45630, Aug. 29, 2001]

Supplement *Highlights* reference: 47(1)

§3.103 Procedural due process and other rights.

(a) *Statement of policy.* Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3, except that the provisions of this section governing hearings apply only to hearings conducted before the VA office having original jurisdiction over the claim. Hearings before the Board of Veterans' Appeals are governed by part 20 of this chapter.

(b) *The right to notice:*

(1) *General.* Claimants and their representatives are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice will clearly set forth the elements described under paragraph (f) of this section, the right to a hearing on any issue involved in the claim as provided in paragraph (d) of this section, the right of representation, and the right, as well as the necessary procedures and time limits to initiate a higher-level review, supplemental claim, or appeal to the Board of Veterans' Appeals.

(2) *Advance notice and opportunity for hearing.* Except as otherwise provided in paragraph (b)(3) of this section, no award of compensation, pension or dependency and indemnity compensation shall be terminated, reduced or otherwise adversely affected unless the beneficiary has been notified of such adverse action and has been provided a period of 60 days in which to submit evidence for the purpose of showing that the adverse action should not be taken.

(3) *Exceptions.* In lieu of advance notice and opportunity for a hearing, VA will send a written notice to the beneficiary or his or her fiduciary at the same time it takes an adverse action under the following circumstances:

(i) An adverse action based solely on factual and unambiguous information or statements as to income, net worth, or dependency or marital status that the beneficiary or his or her fiduciary provided to VA in writing or orally (under the procedures set forth in §3.217(b)), with knowledge or notice that such information would be used to calculate benefit amounts.

(ii) An adverse action based upon the beneficiary's or fiduciary's failure to return a required eligibility verification report.

(iii) Evidence reasonably indicates that a beneficiary is deceased. However, in the event that VA has received a death certificate, a terminal hospital report verifying the death of a beneficiary or a claim for VA burial benefits, no notice of termination (contemporaneous or otherwise) will be required.

(iv) An adverse action based upon a written and signed statement provided by the beneficiary to VA renouncing VA benefits (see §3.106 on renouncement).

(v) An adverse action based upon a written statement provided to VA by a veteran indicating that he or she has returned to active service, the nature of that service, and the date of reentry into service, with the knowledge or notice that receipt of active service pay

precludes concurrent receipt of VA compensation or pension (see §3.654 regarding active service pay).

(vi) An adverse action based upon a garnishment order issued under 42 U.S.C. 659(a). (Authority: 38 U.S.C. 501(a))

(4) *Restoration of benefits.* VA will restore retroactively benefits that were reduced, terminated, or otherwise adversely affected based on oral information or statements if within 30 days of the date on which VA issues the notification of adverse action the beneficiary or his or her fiduciary asserts that the adverse action was based upon information or statements that were inaccurate or upon information that was not provided by the beneficiary or his or her fiduciary. This will not preclude VA from taking subsequent action that adversely affects benefits.

(c) Submission of evidence—

(1) General rule. VA will include in the record, any evidence whether documentary, testimonial, or in other form, submitted by the claimant in support of a pending claim and any issue, contention, or argument a claimant may offer with respect to a claim, except as prescribed in paragraph (c)(2) of this section and §3.2601(f).

(2) Treatment of evidence received after notice of a decision. The evidentiary record for a claim before the agency of original jurisdiction closes when VA issues notice of a decision on the claim. The agency of original jurisdiction will not consider, or take any other action on evidence that is submitted by a claimant, associated with the claims file, or constructively received by VA as described in paragraph (c)(2)(iii) of this section, after notice of decision on a claim, and such evidence will not be considered part of the record at the time of any decision by the agency of original jurisdiction, except as described in §3.156(c) and under the following circumstances:

(i) Receipt of a complete claim. The agency of original jurisdiction subsequently receives a complete application for a supplemental claim or initial claim; or

(ii) Board and higher-level review returns. A claim is pending readjudication after identification of a duty to assist error (which includes an error resulting from constructive receipt of evidence prior to the notice of decision), during a higher-level review or appeal to the Board of Veterans' Appeals. Those events reopen the record and any evidence previously submitted to the agency of original jurisdiction or associated with the claims file while the record was closed will become part of the evidentiary record to be considered upon readjudication.

(iii) Constructive receipt of VA treatment records. Records within the actual custody of the Veterans Health Administration are deemed constructively received by the Veterans Benefits Administration at the time when the Veterans Benefits Administration had knowledge of the existence of said records through information furnished by the claimant sufficient to locate those records (see 38 U.S.C. 5103A(c)).

(d) The right to a hearing.

(1) Upon request, a claimant is entitled to a hearing on any issue involved in a claim within the purview of part 3 of this chapter before VA issues notice of a decision on an initial or supplemental claim. A hearing is not available in connection with a request for higher-level review under §3.2601. VA will provide the place of hearing in the VA field office having original jurisdiction over the claim, or at the VA office nearest the claimant's home having adjudicative functions, or videoconference capabilities, or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available. VA will provide one or more employees who have original determinative authority of such issues to conduct the hearing and be responsible for establishment and preservation of the hearing record. Upon request, a claimant is entitled to a hearing in connection with proposed adverse actions before one or more VA employees having original determinative authority who did not participate in the proposed action. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

(2) The purpose of a hearing is to permit the claimant to introduce into the record, in person, any available evidence which he or she considers relevant and any arguments or contentions with respect to the facts and applicable law which he or she may consider pertinent. All testimony will be under oath or affirmation. The claimant is entitled to produce witnesses, but the claimant and witnesses must be present. The agency of original jurisdiction will not normally schedule a hearing for the sole purpose of receiving argument from a representative. It is the responsibility of the VA employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position. To assure clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony.

(e) *The right to representation.* Subject to the provisions of §§14.626 through 14.637 of this title, claimants are entitled to representation of their choice at every stage in the prosecution of a claim.

(f) Notification of decisions. The claimant or beneficiary and his or her representative will be notified in writing of decisions affecting the payment of benefits or granting of relief. Written notification must include in the notice letter or enclosures or a combination thereof, all of the following elements:

- (1) Identification of the issues adjudicated;
- (2) A summary of the evidence considered;
- (3) A summary of the laws and regulations applicable to the claim;
- (4) A listing of any findings made by the adjudicator that are favorable to the claimant under §3.104(c);
- (5) For denied claims, identification of the element(s) required to grant the claim(s) that were not met;
- (6) If applicable, identification of the criteria required to grant service connection or the next higher-level of compensation;
- (7) An explanation of how to obtain or access evidence used in making the decision; and
- (8) A summary of the applicable review options under §3.2500 available for the claimant to seek further review of the decision.

[55 FR 13527, Apr. 11, 1990; 55 FR 17530, Apr. 25, 1990, as amended at 55 FR 20148, May 15, 1990; 55 FR 25308, June 21, 1990; 57 FR 56993, Dec. 2, 1992; 58 FR 16359, Mar. 26, 1993; 58 FR 59366, Nov. 9, 1993; 59 FR 6218, Feb. 10, 1994; 59 FR 6901, Feb. 14, 1994; 66 FR 56613, Nov. 9, 2001; 76 FR 52574, Aug. 23, 2011; 84 FR 166, Jan. 18, 2019]

Supplement *Highlights* references: 7(2), 9(3), 10(2), 10(3), 48(1), 97(1), 121(1).

Reserved

§3.104 Binding nature of decisions.

(a) *Binding decisions.* A decision of a VA rating agency is binding on all VA field offices as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. 5104. A binding agency decision is not subject to revision except by the Board of Veterans' Appeals, by Federal court order, or as provided in §§3.105, 3.2500, and 3.2600.

(b) *Binding administrative determinations.* Current determinations of line of duty, character of discharge, relationship, dependency, domestic relations questions, homicide, and findings of fact of death or presumptions of death made in accordance with existing instructions, and by application of the same criteria and based on the same facts, by either an Adjudication activity or an Insurance activity are binding one upon the other in the absence of clear and unmistakable error.

(c) *Favorable findings.* Any finding favorable to the claimant made by either a VA adjudicator, as described in §3.103(f)(4), or by the Board of Veterans' Appeals, as described in §20.801(a) of this chapter, is binding on all subsequent agency of original jurisdiction and Board of Veterans' Appeals adjudicators, unless rebutted by evidence that identifies a clear and unmistakable error in the favorable finding. For purposes of this section, a finding means a conclusion either on a question of fact or on an application of law to facts made by an adjudicator concerning the issue(s) under review.

[29 FR 1462, Jan. 29, 1964, as amended at 29 FR 7547, June 12, 1964; 56 FR 65845, December 19, 1991; 66 FR 21874, May 2, 2001; 66 FR 23763, May 9, 2001; 84 FR 167, Jan. 18, 2019]

Supplement *Highlights* references: 46(1), 121(1).

§3.105 Revision of decisions.

The provisions of this section apply except where an award was based on an act of commission or omission by the payee, or with his or her knowledge (§3.500(b)); there is a change in law or a Department of Veterans Affairs issue, or a change in interpretation of law or a Department of Veterans Affairs issue (§3.114); or the evidence establishes that service connection was clearly illegal. The provisions with respect to the date of discontinuance of benefits are applicable to running awards. Where the award has been suspended, and it is determined that no additional payments are in order, the award will be discontinued effective date of last payment.

(a)

(1) *Error in final decisions.* Decisions are final when the underlying claim is finally adjudicated as provided in §3.160(d). Final decisions will be accepted by VA as correct with respect to the evidentiary record and the law that existed at the time of the decision, in the absence of clear and unmistakable error. At any time after a decision is final, the claimant may request, or VA may initiate, review of the decision to determine if there was a clear and unmistakable error in the decision. Where evidence establishes such error, the prior decision will be reversed or amended.

(i) *Definition of clear and unmistakable error.* A clear and unmistakable error is a very specific and rare kind of error. It is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable. Generally, either the correct facts, as they were known at the time, were not before VA, or the statutory and regulatory provisions extant at the time were incorrectly applied.

(ii) *Effective date of reversed or revised decisions.* For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal or revision of a prior decision on the grounds of clear and unmistakable error has the same effect as if the corrected decision had been made on the date of the reversed decision. Except as provided in paragraphs (d) and (e) of this section, where an award is reduced or discontinued because of administrative error or error in judgment, the provisions of §3.500(b)(2) will apply.

(iii) *Record to be reviewed.* Review for clear and unmistakable error in a prior final decision of an agency of original jurisdiction must be based on the evidentiary record and the law that existed when that decision was made. The duty to assist in §3.159 does not apply to requests for revision based on clear and unmistakable error.

(iv) *Change in interpretation.* Clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the decision being challenged, there has been a change in the interpretation of the statute or regulation.

(v) *Limitation on Applicability.* Decisions of an agency of original jurisdiction on issues that have been decided on appeal by the Board or a court of competent jurisdiction are not subject to revision under this subsection.

(vi) *Duty to assist not applicable.* For examples of situations that are not clear and unmistakable error see 38 CFR 20.1403(d).

(vii) *Filing Requirements—*

(A) *General.* A request for revision of a decision based on clear and unmistakable error must be in writing, and must be signed by the requesting party or that party's authorized representative. The request must include the name of the claimant; the name of the requesting party if other than the claimant; the applicable Department of Veterans Affairs file number; and the date of the decision to which the request relates. If the applicable decision involved more than one issue, the request must identify the specific issue, or issues, to which the request pertains.

(B) *Specific allegations required.* The request must set forth clearly and specifically the alleged clear and unmistakable error, or errors, of fact or law in the prior decision, the legal or factual basis for such allegations, and why the result would have been manifestly different but for the alleged error. Non-specific allegations of failure to follow regulations or failure to give due process, or any other general, non-specific allegations of error, are insufficient to satisfy the requirement of the previous sentence.

(2) *Error in binding decisions prior to final adjudication.* Prior to the time that a claim is finally adjudicated, previous decisions which are binding will be accepted as correct by the agency of original jurisdiction, with respect to the evidentiary record and law existing at the time of the decision, unless the decision is clearly erroneous, after considering whether any favorable findings may be reversed as provided in §3.104(c).

(b) *Difference of opinion.* Whenever an adjudicative agency is of the opinion that a revision or an amendment of a previous decision is warranted on the basis of the evidentiary record and law that existed at the time of the decision, a difference of opinion being involved rather than a clear and unmistakable error, the proposed revision will be recommended to Central Office. However, a decision may be revised under §3.2600 or §3.2601 without being recommended to Central Office.

(c) *Character of discharge.* A determination as to character of discharge or line of duty which would result in discontinued entitlement is subject to the provisions of paragraph (d) of this section.

(d) *Severance of service connection.* Subject to the limitations contained in §§3.114 and 3.957, service connection will be severed only where evidence establishes that it is clearly and unmistakably erroneous (the burden of proof being upon the Government). (Where service connection is severed because of a change in or interpretation of a law or Department of Veterans Affairs issue, the provisions of §3.114 are for application.) A change in diagnosis may be accepted as a basis for severance action if the examining physician or physicians or other proper medical authority certifies that, in the light of all accumulated evidence, the diagnosis on which service connection was predicated is clearly erroneous. This certification must be accompanied by a summary of the facts, findings, and reasons supporting the conclusion. When severance of service connection is considered warranted, a rating proposing severance will be prepared setting forth all material facts and reasons. The claimant will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor and will be given 60

days for the presentation of additional evidence to show that service connection should be maintained. Unless otherwise provided in paragraph (i) of this section, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued, if in order, effective the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final rating action expires. (Authority: 38 U.S.C. 5112(b)(6))

(e) *Reduction in evaluation—compensation.* Where the reduction in evaluation of a service-connected disability or employability status is considered warranted and the lower evaluation would result in a reduction or discontinuance of compensation payments currently being made, a rating proposing the reduction or discontinuance will be prepared setting forth all material facts and reasons. The beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence to show that compensation payments should be continued at their present level. Unless otherwise provided in paragraph (i) of this section, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued effective the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final rating action expires. (Authority: 38 U.S.C. 5112(b)(6))

(f) *Reduction in evaluation—pension.* Where a change in disability or employability warrants a reduction or discontinuance of pension payments currently being made, a rating proposing the reduction or discontinuance will be prepared setting forth all material facts and reasons. The beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence to show that pension benefits should be continued at their present level. Unless otherwise provided in paragraph (i) of this section, if additional evidence is not received within that period, final rating action will be taken and the award will be reduced or discontinued effective the last day of the month in which the final rating action is approved. (Authority: 38 U.S.C. 5112(b)(5))

(g) *Reduction in evaluation—monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans or children of veterans with covered service in Korea.* Where a reduction or discontinuance of a monetary allowance currently being paid under 38 U.S.C. chapter 18 is considered warranted, VA will notify the beneficiary at his or her latest address of record of the proposed reduction, furnish detailed reasons therefor, and allow the beneficiary 60 days to present additional evidence to show that the monetary allowance should be continued at the present level. Unless otherwise provided in paragraph (i) of this section, if VA does not receive additional evidence within that period, it will take final rating action and reduce the award effective the last day of the month following 60 days from the date of notice to the beneficiary of the proposed reduction. (Authority: 38 U.S.C. 1805, 1815, 1821, 1832, 5112(b)(6))

(h) *Other reductions/discontinuances.* Except as otherwise specified at §3.103(b)(3) of this part, where a reduction or discontinuance of benefits is warranted by reason of information received concerning income, net worth, dependency, or marital or other status, a proposal for the reduction or discontinuance will be prepared setting forth all material facts and reasons. The beneficiary will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor and will be given 60 days for the presentation of additional

evidence to show that the benefits should be continued at their present level. Unless otherwise provided in paragraph (i) of this section, if additional evidence is not received within that period, final adverse action will be taken and the award will be reduced or discontinued effective as specified under the provisions of §§3.500 through 3.503 of this part. (Authority: 38 U.S.C. 5112)

(i) *Predetermination hearings.*

(1) In the advance written notice concerning proposed actions under paragraphs (d) through (h) of this section, the beneficiary will be informed that he or she will have an opportunity for a predetermination hearing, provided that a request for such a hearing is received by VA within 30 days from the date of the notice. If a timely request is received, VA will notify the beneficiary in writing of the time and place of the hearing at least 10 days in advance of the scheduled hearing date. The 10 day advance notice may be waived by agreement between VA and the beneficiary or representative. The hearing will be conducted by VA personnel who did not participate in the proposed adverse action and who will bear the decision-making responsibility. If a predetermination hearing is timely requested, benefit payments shall be continued at the previously established level pending a final determination concerning the proposed action.

(2) Following the predetermination procedures specified in this paragraph and paragraph (d), (e), (f), (g) or (h) of this section, whichever is applicable, final action will be taken. If a predetermination hearing was not requested or if the beneficiary failed without good cause to report for a scheduled predetermination hearing, the final action will be based solely upon the evidence of record. Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant or beneficiary, death of an immediate family member, etc. If a predetermination hearing was conducted, the final action will be based on evidence and testimony adduced at the hearing as well as the other evidence of record including any additional evidence obtained following the hearing pursuant to necessary development. Whether or not a predetermination hearing was conducted, a written notice of the final action shall be issued to the beneficiary and his or her representative, setting forth the reasons therefor and the evidence upon which it is based. Where a reduction or discontinuance of benefits is found warranted following consideration of any additional evidence submitted, the effective date of such reduction or discontinuance shall be as follows:

(i) Where reduction or discontinuance was proposed under the provisions of paragraph (d) or (e) of this section, the effective date of final action shall be the last day of the month in which a 60-day period from the date of notice to the beneficiary of the final action expires.

(ii) Where reduction or discontinuance was proposed under the provisions of paragraphs (f) and (g) of this section, the effective date of final action shall be the last day of the month in which such action is approved.

(iii) Where reduction or discontinuance was proposed under the provisions of paragraph (h) of this section, the effective date of final action shall be as specified under the provisions of §3.500 through §3.503 of this part. (Authority: 38 U.S.C. 5112)

(j) Supplemental claims and higher-level review. VA may revise an earlier decision denying benefits, if warranted, upon resolution of a supplemental claim under §3.160(c) or higher-level review under §3.2601.

[26 FR 1569, Feb. 24, 1961, as amended at 27 FR 11886, Dec. 1, 1962; 39 FR 17222, May 14, 1974; 55 FR 13528, Apr. 11, 1990; 56 FR 65845, December 19, 1991; 57 FR 56993, Dec. 2, 1992; 62 FR 51278, Sept. 30, 1997; 66 FR 21874, May 2, 2001; 67 FR 49586, July 31, 2002; 76FR 4247, Jan. 25, 2011; 84 FR 167, Jan. 18, 2019]

Cross references: Effective dates. See §3.400. Reductions and discontinuances. See §3.500. Protection; service connection. See §3.957.

Supplement *Highlights* references: 31(1), 46(1), 54(2), 95(1), 121(1).

§3.106 Renoucement.

(a) Any person entitled to pension, compensation, or dependency and indemnity compensation under any of the laws administered by the Department of Veterans Affairs may renounce his or her right to that benefit but may not renounce less than all of the component items which together comprise the total amount of the benefit to which the person is entitled nor any fixed monetary amounts less than the full amount of entitlement. The renoucement will be in writing over the person's signature. Upon receipt of such renoucement in the Department of Veterans Affairs, payment of such benefits and the right thereto will be terminated, and such person will be denied any and all rights thereto from such filing. (Authority: 38 U.S.C. 5306(a))

(b) The renoucement will not preclude the person from filing a new application for pension, compensation, or dependency and indemnity compensation at any future date. Such new application will be treated as an original application, and no payments will be made thereon for any period before the date such new application is received in the Department of Veterans Affairs. (Authority: 38 U.S.C. 5306(b))

(c) Notwithstanding the provisions of paragraph (b) of this section, if a new application for pension or parents' dependency and indemnity compensation is filed within one year after the date that the Department of Veterans Affairs receives a renoucement of that benefit, such application shall not be treated as an original application and benefits will be payable as if the renoucement had not occurred. (Authority: 38 U.S.C. 5306(c))

(d) The renoucement of dependency and indemnity compensation by one beneficiary will not serve to increase the rate payable to any other beneficiary in the same class.

(e) The renoucement of dependency and indemnity compensation by a surviving spouse will not serve to vest title to this benefit in children under the age of 18 years or to increase the rate payable to a child or children over the age of 18 years.

[26 FR 1569, Feb. 24, 1961, as amended at 37 FR 5384, Mar. 15, 1972; 39 FR 17222, May 14, 1974; 60 FR 18355, Apr. 11, 1995; 62 FR 5529, Feb. 6, 1997]

Supplement *Highlights* references: 15(3), 27(2).

§3.107 Awards where not all dependents apply.

Except as provided in §3.251(a)(4), in any case where claim has not been filed by or on behalf of all dependents who may be entitled, the awards (original or amended) for those dependents who have filed claim will be made for all periods at the rates and in the same manner as though there were no other dependents. However, if the file reflects the existence of other dependents who have not filed claim and there is potential entitlement to benefits for a period prior to the date of filing claim, the award to a person who has filed claim will be made at the rate which would be payable if all dependents were receiving benefits. If at the expiration of the period allowed, claims have not been filed for such dependents, the full rate will be authorized for the first payee.

[29 FR 9564, July 15, 1964, as amended at 61 FR 67950, Dec. 26, 1996]

Supplement *Highlights* reference: 25(1).

§3.108 State Department as agent of Department of Veterans Affairs.

Diplomatic and consular officers of the Department of State are authorized to act as agents of the Department of Veterans Affairs and therefore a complete claim as set forth in § 3.160(a) or an intent to file a claim as set forth in § 3.155(b) or evidence submitted in support of a claim filed in a foreign country will be considered as filed in the Department of Veterans Affairs as of the date of receipt by the State Department representative.

[26 FR 1569, Feb. 24, 1961; 79 FR 57695, Sep. 24, 2014]

Cross reference: Evidence from foreign countries. See §3.202.

Supplement *Highlights* References: 111(1).

§3.109 Time limit.

(a) *Notice of time limit for filing evidence.*

(1) If a claimant's application is incomplete, the claimant will be notified of the evidence necessary to complete the application. If the evidence is not received within 1 year from the date of such notification, pension, compensation, or dependency and indemnity compensation may not be paid by reason of that application (38 U.S.C. 5103(a)). Information concerning the whereabouts of a person who has filed claim is not considered evidence.

(2) The provisions of this paragraph are applicable to original initial applications, to applications for increased benefits by reason of increased disability, age, or the existence of a dependent, and to applications for reopening or resumption of payments. If substantiating evidence is required with respect to the veracity of a witness or the authenticity of documentary evidence timely filed, there will be allowed for the submission of such evidence 1 year from the date of the request therefor. However, any evidence to enlarge the proofs and evidence originally submitted is not so included.

(b) *Extension of time limit.* Time limits within which claimants or beneficiaries are required to act to perfect a claim or challenge an adverse VA decision may be extended for good cause shown. Where an extension is requested after expiration of a time limit, the action required of the claimant or beneficiary must be taken concurrent with or prior to the filing of a request for extension of the time limit, and good cause must be shown as to why the required action could not have been taken during the original time period and could not have been taken sooner than it was. Denials of time limit extensions are separately appealable issues. (Authority: 38 U.S.C. 501(a))

[26 FR 1569, Feb. 24, 1961, as amended at 26 FR 2231, Mar. 15, 1961; 29 FR 1462, Jan. 29, 1964; 30 FR 133, Jan. 7, 1965; 55 FR 13529, Apr. 11, 1990; 79 FR 57695, Sep. 24, 2014]

Supplement *Highlights* References: 111(1).

§3.110 Computation of time limit.

(a) In computing the time limit for any action required of a claimant or beneficiary, including the filing of claims or evidence requested by VA, the first day of the specified period will be excluded and the last day included. This rule is applicable in cases in which the time limit expires on a workday. Where the time limit would expire on a Saturday, Sunday, or holiday, the next succeeding workday will be included in the computation.

(b) “The first day of the specified period” referred to in paragraph (a) of this section shall be the date of mailing of notification to the claimant or beneficiary of the action required and the time limit therefor. The date of the letter of notification shall be considered the date of mailing for purposes of computing time limits. As to appeals, see §§19.52, 20.203, and 20.110 of this chapter. (Authority: 38 U.S.C. 501(a))

[55 FR 13529, Apr. 11, 1990; 58 FR 32443, June 10, 1993; 84 FR 168, Jan. 18, 2019]

Supplement *Highlights* references: 8(1), 121(1).

§3.111 [Reserved]

§3.112 Fractions of one cent.

In all cases where the amount to be paid under any award involves a fraction of a cent, the fractional part will be excluded.

[26 FR 1570, Feb. 24, 1961]

§3.113 [Removed]

§3.114 Change of law or Department of Veterans Affairs issue.

(a) *Effective date of award.* Where pension, compensation, dependency and indemnity compensation, or a monetary allowance under 38 U.S.C. chapter 18 for an individual who is a child of a Vietnam veteran or child of a veteran with covered service in Korea is awarded or increased pursuant to a liberalizing law, or a liberalizing VA issue approved by the Secretary or by the Secretary's direction, the effective date of such award or increase shall be fixed in accordance with the facts found, but shall not be earlier than the effective date of the act or administrative issue. Where pension, compensation, dependency and indemnity compensation, or a monetary allowance under 38 U.S.C. chapter 18 for an individual who is a child of a Vietnam veteran or child of a veteran with covered service in Korea is awarded or increased pursuant to a liberalizing law or VA issue which became effective on or after the date of its enactment or issuance, in order for a claimant to be eligible for a retroactive payment under the provisions of this paragraph the evidence must show that the claimant met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA issue and that such eligibility existed continuously from that date to the date of claim or administrative determination of entitlement. The provisions of this paragraph are applicable to original and supplemental claims as well as claims for increase.

(1) If a claim is reviewed on the initiative of VA within 1 year from the effective date of the law or VA issue, or at the request of a claimant received within 1 year from that date, benefits may be authorized from the effective date of the law or VA issue.

(2) If a claim is reviewed on the initiative of VA more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of administrative determination of entitlement.

(3) If a claim is reviewed at the request of the claimant more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of receipt of such request. (Authority: 38 U.S.C. 1805, 1815, 1821, 1832, 5110(g))

(b) *Discontinuance of benefits.* Where the reduction or discontinuance of an award is in order because of a change in law or a Department of Veterans Affairs issue, or because of a change in interpretation of a law or Department of Veterans Affairs issue, the payee will be notified at his or her latest address of record of the contemplated action and furnished detailed reasons therefor, and will be given 60 days for the presentation of additional evidence. If additional evidence is not received within that period, the award will be reduced or discontinued effective the last day of the month in which the 60-day period expired. (Authority: 38 U.S.C. 5112(b)(6))

[27 FR 11886, Dec. 1, 1962, as amended at 55 FR 13529, Apr. 11, 1990; 62 FR 17706, Apr. 11, 1997; 65 FR 35282, June 2, 2000; 67 FR 49586, July 31, 2002; 76 FR 4247, Jan. 25, 2011; 84 FR 168, Jan. 18, 2019]

Supplement *Highlights* references: 28(2), 42(1), 54(2), 95(1), 121(1).

[Reserved]

Claims

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3.160	Status of claims.....	3.160-1
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§3.150 Forms to be furnished.

(a) Upon request made in person or in writing by any person applying for benefits under the laws administered by the Department of Veterans Affairs, the appropriate application form will be furnished. (Authority: 38 U.S.C. 5102)

(b) Upon receipt of notice of death of a veteran, the appropriate application form will be forwarded for execution by or on behalf of any dependent who has apparent entitlement to pension, compensation, or dependency and indemnity compensation. If it is not indicated that any person would be entitled to such benefits, but there is payable an accrued benefit not paid during the veteran's lifetime the appropriate application form will be forwarded to the preferred dependent. Notice of the time limit will be included in letters forwarding applications for benefits.

[26 FR 1570, Feb. 14, 1961, as amended at 30 FR 133, Jan. 7, 1965; 67 FR 40867, June 14, 2002; 79 FR 57695, Sep. 25, 2014]

Cross reference: Extension of time limit. See §3.109(b).

Supplement *Highlights* References: 111(1).

§3.151 Claims for disability benefits.

(a) General. A specific claim in the form prescribed by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by VA. (38 U.S.C. 5101(a)). A claim by a veteran for compensation may be considered to be a claim for pension; and a claim by a veteran for pension may be considered to be a claim for compensation. The greater benefit will be awarded, unless the claimant specifically elects the lesser benefit. (See scope of claim, §3.155(d)(2); complete claim, §3.160(a); supplemental claims, §3.2501(b)).

(b) *Retroactive disability pension claims.* Where disability pension entitlement is established based on a claim received by VA on or after October 1, 1984, the pension award may not be effective prior to the date of receipt of the pension claim unless the veteran specifically claims entitlement to retroactive benefits. The claim for retroactivity may be filed separately or included in the claim for disability pension, but it must be received by VA within one year from the date on which the veteran became permanently and totally disabled. Additional requirements for entitlement to a retroactive pension award are contained in §3.400(b) of this part. (Authority: 38 U.S.C. 5110(b)(3))

(c) *Issues within a claim.*

(1) To the extent that a complete claim application encompasses a request for more than one determination of entitlement, each specific entitlement will be adjudicated and is considered a separate issue for purposes of the review options prescribed in §3.2500. A single decision by an agency of original jurisdiction may adjudicate multiple issues in this respect, whether expressly claimed or determined by VA to be reasonably within the scope of the application as prescribed in §3.155(d)(2). VA will issue a decision that addresses each such identified issue within a claim. Upon receipt of notice of a decision, a claimant may elect any of the applicable review options prescribed in §3.2500 for each issue adjudicated.

(2) With respect to service-connected disability compensation, an issue for purposes of paragraph (c)(1) of this section is defined as entitlement to compensation for a particular disability. For example, if a decision adjudicates service-connected disability compensation for both a knee condition and an ankle condition, compensation for each condition is a separate entitlement or issue for which a different review option may be elected. However, different review options may not be selected for specific components of the knee disability claim, such as ancillary benefits, whether a knee injury occurred in service, or whether a current knee condition resulted from a service-connected injury or condition.

(d) *Evidentiary record.* The evidentiary record before the agency of original jurisdiction for an initial or supplemental claim includes all evidence received by VA before VA issues notice of a decision on the claim. Once the agency of original jurisdiction issues notice of a decision on a claim, the evidentiary record closes as described in §3.103(c)(2) and VA no longer has a duty to assist in gathering evidence under §3.159. (See §3.155(b), submission of evidence).

[50 FR 25981, June 24, 1985; 79 FR 57695, Sep. 25, 2014; 84 FR 168, Jan. 18 2019]

Cross reference: Intent to file a claim. See §3.155(b).

Supplement Highlights References: 111(1).

§3.155 How to file a claim.

The following paragraphs describe the manner and methods in which a claim can be initiated and filed. The provisions of this section are applicable to all claims governed by part 3, with the exception that paragraph (b) of this section, regarding intent to file a claim, does not apply to supplemental claims.

(a) *Request for an application for benefits.* A claimant, his or her duly authorized representative, a Member of Congress, or some person acting as next friend of a claimant who is not of full age or capacity, who indicates a desire to file for benefits under the laws administered by VA, by a communication or action, to include an electronic mail that is transmitted through VA's electronic portal or otherwise, that does not meet the standards of a complete claim is considered a request for an application form for benefits under §3.150(a). Upon receipt of such a communication or action, the Secretary shall notify the claimant and the claimant's representative, if any, of the information necessary to complete the application form or form prescribed by the Secretary.

(b) *Intent to file a claim.* A claimant, his or her duly authorized representative, a Member of Congress, or some person acting as next friend of claimant who is not of full age or capacity may indicate a claimant's desire to file a claim for benefits by submitting an intent to file a claim to VA. An intent to file a claim must provide sufficient identifiable or biographical information to identify the claimant. Upon receipt of the intent to file a claim, VA will furnish the claimant with the appropriate application form prescribed by the Secretary. If VA receives a complete application form prescribed by the Secretary, as defined in paragraph (a) of §3.160, appropriate to the benefit sought within 1 year of receipt of the intent to file a claim, VA will consider the complete claim filed as of the date the intent to file a claim was received.

(1) An intent to file a claim can be submitted in one of the following three ways:

(i) *Saved electronic application.* When an application otherwise meeting the requirements of this paragraph (b) is electronically initiated and saved in a claims-submission tool within a VA web-based electronic claims application system prior to filing of a complete claim, VA will consider that application to be an intent to file a claim.

(ii) *Written intent on prescribed intent to file a claim form.* The submission to an agency of original jurisdiction of a signed and dated intent to file a claim, on the form prescribed by the Secretary for that purpose, will be accepted as an intent to file a claim.

(iii) *Oral intent communicated to designated VA personnel and recorded in writing.* An oral statement of intent to file a claim will be accepted if it is directed to a VA employee designated to receive such a communication, the VA employee receiving this information follows the provisions set forth in §3217(b), and the VA employee documents the date VA received the claimant's intent to file a claim in the claimant's records.

(2) An intent to file a claim must identify the general benefit (e.g., compensation, pension), but need not identify the specific benefit claimed or any medical condition(s) on which the claim is based. To the extent a claimant provides this or other extraneous information on the designated form referenced in paragraph (b)(1)(ii) of this section that the form does not solicit, the provision of such information is of no effect other than that it is added to the file for

appropriate consideration as evidence in support of a complete claim if filed. In particular, if a claimant identifies specific medical condition(s) on which the claim is based in an intent to file a claim, this extraneous information does not convert the intent to file a claim into a complete claim or a substantially complete application. Extraneous information provided in an oral communication under paragraph (b)(1)(iii) of this section is of no effect and generally will not be recorded in the record of the claimant's intent to file.

(3) Upon receipt of an intent to file a claim, the Secretary shall notify the claimant and the claimant's representative, if any, of the information necessary to complete the appropriate application form prescribed by the Secretary.

(4) If an intent to file a claim is not submitted in the form required by paragraph (b)(1) of this section or a complete claim is not filed within 1 year of the receipt of the intent to file a claim, VA will not take further action unless a new claim or a new intent to file a claim is received.

(5) An intent to file a claim received from a service organization, an attorney, or agent indicating a represented claimant's intent to file a claim may not be accepted if a power of attorney was not executed at the time the communication was written. VA will only accept an oral intent to file from a service organization, an attorney, or agent if a power of attorney is of record at the time the oral communication is received by the designated VA employee.

(6) VA will not recognize more than one intent to file concurrently for the same benefit (e.g., compensation, pension). If an intent to file has not been followed by a complete claim, a subsequent intent to file regarding the same benefit received within 1 year of the prior intent to file will have no effect. If, however, VA receives an intent to file followed by a complete claim and later another intent to file for the same benefit is submitted within 1 year of the previous intent to file, VA will recognize the subsequent intent to file to establish an effective date for any award granted for the next complete claim, provided it is received within 1 year of the subsequent intent to file.

(c) *Incomplete application form.* Upon receipt of a communication indicating a belief in entitlement to benefits that is submitted on a paper application form prescribed by the Secretary that is not complete as defined in §3.160(a) of this section, the Secretary shall notify the claimant and the claimant's representative, if any, of the information necessary to complete the application form prescribed by the Secretary. If a complete claim is submitted within 1 year of receipt of such incomplete application form prescribed by the Secretary, VA will consider it as filed as of the date VA received the incomplete application form prescribed by the Secretary that did not meet the standards of a complete claim. See §3.160(a) for Complete Claim.

(d) *Claims.*

(1) *Requirement for complete claim and date of claim.* A complete claim is required for all types of claims, and will generally be considered filed as of the date it was received by VA for an evaluation or award of benefits under the laws administered by the Department of Veterans Affairs.

(i) *Supplemental claims.* Upon receipt of a communication indicating a belief in entitlement to benefits that is submitted in writing or electronically on a supplemental claim form prescribed by the Secretary that is not complete as defined in §3.160(a) of this section, the Secretary shall notify the claimant and the claimant's representative, if any, of the information necessary to complete the application form prescribed by the Secretary. If VA receives a complete claim within 60 days of notice by VA that an incomplete claim was filed, it will be considered filed as of the date of receipt of the incomplete claim (see §3.2501).

(ii) *For other types of claims.* If VA receives a complete claim within 1 year of the filing of an intent to file a claim that meets the requirements of paragraph (b) of this section, it will be considered filed as of the date of receipt of the intent to file a claim. Only one complete claim for a benefit (e.g., compensation, pension) may be associated with each intent to file a claim for that benefit, though multiple issues may be contained within a complete claim. In the event multiple complete claims for a benefit are filed within 1 year of an intent to file a claim for that benefit, only the first claim filed will be associated with the intent to file a claim. In the event that VA receives both an intent to file a claim and an incomplete application form before the complete claim as defined in §3.160(a) is filed, the complete claim will be considered filed as of the date of receipt of whichever was filed first provided it is perfected within the necessary timeframe, but in no event, will the complete claim be considered filed more than one year prior to the date of receipt of the complete claim.

(2) *Scope of claim.* Once VA receives a complete claim, VA will adjudicate as part of the claim entitlement to any ancillary benefits that arise as a result of the adjudication decision (e.g., entitlement to 38 U.S.C. Chapter 35 Dependents' Educational Assistance benefits, entitlement to special monthly compensation under 38 CFR 3.350, entitlement to adaptive automobile allowance, etc.). The claimant may, but need not, assert entitlement to ancillary benefits at the time the complete claim is filed. VA will also consider all lay and medical evidence of record in order to adjudicate entitlement to benefits for the claimed condition as well as entitlement to any additional benefits for complications of the claimed condition, including those identified by the rating criteria for that condition in 38 CFR Part 4, VA Schedule for Rating Disabilities. VA's decision on an issue within a claim implies that VA has determined that evidence of record does not support entitlement for any other issues that are reasonably within the scope of the issues addressed in that decision. VA's decision that addresses all outstanding issues enumerated in the complete claim implies that VA has determined evidence of record does not support entitlement for any other issues that are reasonably within the scope of the issues enumerated in the complete claim.

[26 FR 1570, Feb. 24, 1961, as amended at 52 FR 27340, July 21, 1987; 79 FR 57695, Sep. 25, 2014; 84 FR 168, Jan. 18, 2019]

Cross references: Complete claim. See § 3.160(a). Effective dates. See § 3.400.

Supplement *Highlights* References: 111(1), 121(1).

§3.156 New evidence.

(a) *New and material evidence.* For claims to reopen decided prior to the effective date provided in §19.2(a), the following standards apply. A claimant may reopen a finally adjudicated legacy claim by submitting new and material evidence. New evidence means evidence not previously considered by agency adjudicators. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim. (Authority: 38 U.S.C. 501, 5103A(h), 5108)

(b) *Pending legacy claims not under the modernized review system.* New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed (including evidence received prior to an appellate decision and referred to the agency of original jurisdiction by the Board of Veterans Appeals without consideration in that decision in accordance with the provisions of §20.1304(b)(1) of this chapter), will be considered as having been filed in connection with the claim which was pending at the beginning of the appeal period. (Authority: 38 U.S.C. 501(a))

(c) *Service department records.*

(1) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:

(i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;

(ii) Additional service records forwarded by the Department of Defense or the service department to VA any time after VA's original request for service records; and

(iii) Declassified records that could not have been obtained because the records were classified when VA decided the claim.

(2) Paragraph (c)(1) of this section does not apply to records that VA could not have obtained when it decided the claim because the records did not exist when VA decided the claim, or because the claimant failed to provide sufficient information for VA to identify and obtain the records from the respective service department, the Joint Services Records Research Center, or from any other official source.

(3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received the

previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

(4) A retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly, except as it may be affected by the filing date of the original claim. (Authority: 38 U.S.C. 501(a))

(d) *New and relevant evidence.* On or after the effective date provided in §19.2(a), a claimant may file a supplemental claim as prescribed in §3.2501. If new and relevant evidence, as defined in §3.2501(a)(1), is presented or secured with respect to the supplemental claim, the agency of original jurisdiction will readjudicate the claim taking into consideration all of the evidence of record.

[27 FR 11887, Dec. 1, 1962, as amended at 55 FR 20148, May 15, 1990; 55 FR 52275, Dec. 21, 1990; 58 FR 32443, June 10, 1993; 66 FR 45630, Aug. 29, 2001; 71 FR 52457, Sept. 6, 2006; 84 FR 169, Jan. 18, 2019]

Cross references: Effective dates—general. See §3.400. Correction of military records. See §3.400(g).

Supplement *Highlights* references: 8(1), 47(1), 73(2), 121(1).

Reserved

§3.157 [Removed]

[26 FR 1571, Feb. 24, 1961, as amended at 27 FR 4421, May 9, 1962; 31 FR 12055, Sept. 15, 1966; 40 FR 56434, Dec. 3, 1975; 52 FR 27340, July 21, 1987; 60 FR 27409, May 24, 1995; 79 FR 57696, Sep. 25, 2014]

Supplement *Highlights* reference: 16(2), 111(1).

§3.158 Abandoned claims.

(a) *General.* Except as provided in §3.652, where evidence requested in connection with an initial claim or supplemental claim or for the purpose of determining continued entitlement is not furnished within 1 year after the date of request, the claim will be considered abandoned. After the expiration of 1 year, further action will not be taken unless a new claim is received. Should the right to benefits be finally established, pension, compensation, dependency and indemnity compensation, or monetary allowance under the provisions of 38 U.S.C. chapter 18 based on such evidence shall commence not earlier than the date of filing the new claim. (Authority: 38 U.S.C. 501(a))

(b) *Department of Veterans Affairs examinations.* Where the veteran fails without adequate reason to respond to an order to report for Department of Veterans Affairs examination within 1 year from the date of request and payments have been discontinued, the claim for such benefits will be considered abandoned.

(c) *Disappearance.* Where payments of pension, compensation, dependency and indemnity compensation, or monetary allowance under the provisions of 38 U.S.C. chapter 18 have not been made or have been discontinued because a payee's present whereabouts is unknown, payments will be resumed effective the day following the date of last payment if entitlement is otherwise established, upon receipt of a valid current address.

[27 FR 11887, Dec. 1, 1962, as amended at 28 FR 13362, Dec. 10, 1963; 52 FR 43063, Nov. 9, 1987; 62 FR 51278, Sept. 30, 1997; 67 FR 49586, July 31, 2002; 84 FR 169, Jan. 18, 2019]

Cross references: Periodic certification of continued eligibility. See §3.652. Failure to report for VA examination. See §3.655. Disappearance of veteran. See §3.656.

Supplement *Highlights* references: 31(1), 54(2), 121(1).

§3.159 Department of Veterans Affairs assistance in developing claims.

(a) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Competent medical evidence* means evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions. Competent medical evidence may also mean statements conveying sound medical principles found in medical treatises. It would also include statements contained in authoritative writings such as medical and scientific articles and research reports or analyses.

(2) *Competent lay evidence* means any evidence not requiring that the proponent have specialized education, training, or experience. Lay evidence is competent if it is provided by a person who has knowledge of facts or circumstances and conveys matters that can be observed and described by a lay person.

(3) *Substantially complete application* means an application containing:

- (i) The claimant's name;
- (ii) His or her relationship to the veteran, if applicable;
- (iii) Sufficient service information for VA to verify the claimed service, if applicable;
- (iv) The benefit sought and any medical condition(s) on which it is based;
- (v) The claimant's signature; and
- (vi) In claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income;
- (vii) In supplemental claims, identification or inclusion of potentially new evidence (see §3.2501);
- (viii) For higher-level reviews, identification of the date of the decision for which review is sought.

(4) For purposes of paragraph (c)(4)(i) of this section, *event* means one or more incidents associated with places, types, and circumstances of service giving rise to disability.

(5) *Information* means non-evidentiary facts, such as the claimant's Social Security number or address; the name and military unit of a person who served with the veteran; or the name and address of a medical care provider who may have evidence pertinent to the claim.

(b) *VA's duty to notify claimants of necessary information or evidence.*

(1) Except as provided in paragraph (3) of this section, when VA receives a complete or substantially complete initial or supplemental claim, VA will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim (hereafter in this paragraph referred to as the "notice"). In the notice, VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information

and evidence, if any, that VA will attempt to obtain on behalf of the claimant. The information and evidence that the claimant is informed that the claimant is to provide must be provided within one year of the date of the notice. If the claimant has not responded to the notice within 30 days, VA may decide the claim prior to the expiration of the one-year period based on all the information and evidence contained in the file, including information and evidence it has obtained on behalf of the claimant and any VA medical examinations or medical opinions. If VA does so, however, and the claimant subsequently provides the information and evidence within one year of the date of the notice in accordance with the requirements of paragraph (b)(4) of this section, VA must readjudicate the claim. (Authority: 38 U.S.C. 5103)

(2) If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information. (Authority: 38 U.S.C. 5102(b), 5103A(3))

(3) No duty to provide the notice described in paragraph (b)(1) of this section arises:

(i) Upon receipt of a supplemental claim under §3.2501 within one year of the date VA issues notice of a prior decision;

(ii) Upon receipt of a request for higher-level review under §3.2601;

(iii) Upon receipt of a Notice of Disagreement under §20.202 of this chapter; or

(iv) When, as a matter of law, entitlement to the benefit claimed cannot be established.

(4) After VA has issued a notice of decision, submission of information and evidence substantiating a claim must be accomplished through the proper filing of a review option in accordance with §3.2500 on a form prescribed by the Secretary. New and relevant evidence may be submitted in connection with either the filing of a supplemental claim under §3.2501 or the filing of a Notice of Disagreement with the Board under 38 CFR 20.202, on forms prescribed by the Secretary, and election of a Board docket that permits the filing of new evidence (see 38 CFR 20.302 and 20.303).

(c) *VA's duty to assist claimants in obtaining evidence.* VA has a duty to assist claimants in obtaining evidence to substantiate all substantially complete initial and supplemental claims, and when a claim is returned for readjudication by a higher-level adjudicator or the Board after identification of a duty to assist error on the part of the agency of original jurisdiction, until the time VA issues notice of a decision on a claim or returned claim. VA will make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim. VA will not pay any fees charged by a custodian to provide records requested. When a claim is returned for readjudication by a higher-level adjudicator or the Board after identification of a duty to assist error, the agency of original jurisdiction has a duty to correct any other duty to assist errors not identified by the higher-level adjudicator or the Board.

(1) *Obtaining records not in the custody of a Federal department or agency.* VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency, to include records from State or local governments, private medical care providers, current or former employers, and other non-Federal governmental sources. Such reasonable

efforts will generally consist of an initial request for the records and, if the records are not received, at least one follow-up request. A follow-up request is not required if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile. If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought, then reasonable efforts will include an initial request and, if the records are not received, at least one follow-up request to the new source or an additional request to the original source.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including the person, company, agency, or other custodian holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the person, company, agency, or other custodian holding the records. (Authority: 38 U.S.C. 5103A(b))

(2) *Obtaining records in the custody of a Federal department or agency.* VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to military records, including service medical records; medical and other records from VA medical facilities; records from non-VA facilities providing examination or treatment at VA expense; and records from other Federal agencies, such as the Social Security Administration. VA will end its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include those in which the Federal department or agency advises VA that the requested records do not exist or the custodian does not have them.

(i) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal agency or department custodians. If requested by VA, the claimant must provide enough information to identify and locate the existing records, including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. In the case of records requested to corroborate a claimed stressful event in service, the claimant must provide information sufficient for the records custodian to conduct a search of the corroborative records.

(ii) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records. (Authority: 38 U.S.C. 5103A(b))

(3) *Obtaining records in compensation claims.* In a claim for disability compensation, VA will make efforts to obtain the claimant's service medical records, if relevant to the claim; other relevant records pertaining to the claimant's active military, naval or air service that are held or maintained by a governmental entity; VA medical records or records of

examination or treatment at non-VA facilities authorized by VA; and any other relevant records held by any Federal department or agency. The claimant must provide enough information to identify and locate the existing records including the custodian or agency holding the records; the approximate time frame covered by the records; and, in the case of medical treatment records, the condition for which treatment was provided. (Authority: 38 U.S.C. 5103A(c))

(4) *Providing medical examinations or obtaining medical opinions.*

(i) In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim. A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim, but:

(A) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability;

(B) Establishes that the veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in §3.309, §3.313, §3.316, and §3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption; and

(C) Indicates that the claimed disability or symptoms may be associated with the established event, injury, or disease in service or with another service-connected disability.

(ii) Paragraph (4)(i)(C) could be satisfied by competent evidence showing post-service treatment for a condition, or other possible association with military service.

(iii) For requests to reopen a finally adjudicated claim received prior to the effective date provided in §19.2(a) of this chapter, this paragraph (c)(4) applies only if new and material evidence is presented or secured as prescribed in §3.156.

(iv) This paragraph (c)(4) applies to a supplemental claim only if new and relevant evidence under §3.2501 is presented or secured.

(d) *Circumstances where VA will refrain from or discontinue providing assistance.* VA will refrain from providing assistance in obtaining evidence for an initial or supplemental claim, if the substantially complete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include, but are not limited to:

(1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;

(2) Claims that are inherently incredible or clearly lack merit; and

(3) An application requesting a benefit to which the claimant is not entitled as a matter of law. (Authority: 38 U.S.C. 5103A(a)(2))

(e) *Duty to notify claimant of inability to obtain records.*

(1) If VA makes reasonable efforts to obtain relevant non-Federal records but is unable to obtain them, or after continued efforts to obtain Federal records concludes that it is reasonably certain they do not exist or further efforts to obtain them would be futile, VA will provide the claimant with oral or written notice of that fact. VA will make a record of any oral notice conveyed to the claimant. For non-Federal records requests, VA may provide the notice at the same time it makes its final attempt to obtain the relevant records. In either case, the notice must contain the following information:

(i) The identity of the records VA was unable to obtain;

(ii) An explanation of the efforts VA made to obtain the records;

(iii) A description of any further action VA will take regarding the claim, including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and

(iv) A notice that the claimant is ultimately responsible for providing the evidence.

(2) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the records and request that the claimant provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will request that the claimant obtain the records and provide them to VA. (Authority: 38 U.S.C. 5103A(b)(2))

(f) For the purpose of the notice requirements in paragraphs (b) and (e) of this section, notice to the claimant means notice to the claimant or his or her fiduciary, if any, as well as to his or her representative, if any. (Authority: 38 U.S.C. 5102(b), 5103(a))

(g) The authority recognized in subsection (g) of 38 U.S.C. 5103A is reserved to the sole discretion of the Secretary and will be implemented, when deemed appropriate by the Secretary, through the promulgation of regulations. (Authority: 38 U.S.C. 5103A(g))

[55 FR 52273, Dec. 21, 1990, as amended at 66 FR 45630, Aug. 29, 2001; 73 FR 23356, Apr. 30, 2008; 73 FR 24868, May 6, 2008; 84 FR 169, Jan. 18 2019]

Supplement *Highlights* references: 47(1), 79(1), 121(1).

§3.160 Types of claims.

(a) *Complete claim.* A submission of an application form prescribed by the Secretary, whether paper or electronic, that meets the following requirements:

(1) A complete claim must provide the name of the claimant; the relationship to the veteran, if applicable; and sufficient information for VA to verify the claimed service, if applicable.

(2) A complete claim must be signed by the claimant or a person legally authorized to sign for the claimant.

(3) A complete claim must identify the benefit sought.

(4) A description of any symptom(s) or medical condition(s) on which the benefit is based must be provided to the extent the form prescribed by the Secretary so requires.

(5) For nonservice-connected disability or death pension and parents' dependency and indemnity compensation claims, a statement of income must be provided to the extent the form prescribed by the Secretary so requires; and

(6) For supplemental claims, potentially new evidence must be identified or included.

(b) *Original claim.* The initial complete claim for one or more benefits on an application form prescribed by the Secretary.

(c) *Pending claim.* A claim which has not been finally adjudicated.

(d) *Finally adjudicated claim.* A claim that is adjudicated by the Department of Veterans Affairs as either allowed or disallowed is considered finally adjudicated when:

(1) For legacy claims not subject to the modernized review system, whichever of the following occurs first:

(i) The expiration of the period in which to file a Notice of Disagreement, pursuant to the provisions of §19.52(a) or §20.502(a) of this chapter, as applicable; or

(ii) Disposition on appellate review.

(2) For claims under the modernized review system, the expiration of the period in which to file a review option available under §3.2500 or disposition on judicial review where no such review option is available.

(e) *Reopened claims prior to effective date of modernized review system.* An application for a benefit received prior to the effective date provided in §19.2(a) of this chapter, after final disallowance of an earlier claim that is subject to readjudication on the merits based on receipt of new and material evidence related to the finally adjudicated claim, or any claim based on additional evidence or a request for a personal hearing submitted more than 90 days following notification to the appellant of the certification of an appeal and transfer of applicable records to the Board of Veterans' Appeals which was not considered by the Board in its decision and was referred to the agency of original jurisdiction for consideration as provided in §20.1304(b)(1) of this chapter. As of the effective date provided in §19.2(a) of this chapter, claimants may no longer file to reopen a claim, but may file a supplemental claim as prescribed in §3.2501 to apply for a previously disallowed benefit. A request to reopen a finally decided claim that has not been adjudicated as of the effective date will be processed as a supplemental claim subject to the modernized review system. (Authority: 38 U.S.C. 501, 5108)

[27 FR 11887, Dec. 1, 1962, as amended at 31 FR 12056, Sept. 15, 1966; 55 FR 20148, May 15, 1990; 59 FR 32443, June 10, 1993; 79 FR 57696, Sep. 25, 2014; 84 FR 170, Jan. 18, 2019]

Supplement *Highlights* references 8(1), 111(1), 121(1).

§3.161 [Removed and Reserved].

[73 FR 65732, Nov. 5, 2008; as amended at 84 FR 170, Jan. 18, 2019]

Supplement *Highlights* references: 84(1), 121(1)

Next Section is §3.200

(u) *Income tax returns.* VA will exclude from income payments from income tax returns. See §3.279(d)(1). (Authority: 26 U.S.C. 6409)

(v) *Statutory exclusions.* Other amounts excluded from income by statute. See §3.279. VA will exclude from income any amount designated by statute as not countable as income, regardless of whether or not it is listed in this section or in §3.279.

[28 FR 32, Jan. 1, 1963; 57 FR 59298, Dec. 15, 1992; 58 FR 33767, June 21, 1993; 59 FR 35266, July 11, 1994; 59 FR 37696, July 25, 1994; 60 FR 2522, Jan. 10, 1995; 60 FR 18355, Apr. 11, 1995; 62 FR 5529, Feb. 6, 1997; 62 FR 51278, Sept. 30, 1997; 67 FR 49587, July 31, 2002; 68 FR 60852, Oct. 24, 2003; 70 FR 15591, Mar. 28, 2005; 76 FR 4248, Jan. 25, 2011; 83 FR 47268, Sept. 18, 2018; 83 FR 52323, Oct. 17, 2018]

Supplement *Highlights* references: 6(2), 8(3), 12(4, 7), 14(4), 15(3), 27(2), 31(1), 54(2), 61(1), 65(1), 95(1), 120(1), 120b(1).

[Reserved]

§ 3.320 [Reserved]

§3.321 General rating considerations.

(a) *Use of rating schedule.* The 1945 Schedule for Rating Disabilities will be used for evaluating the degree of disabilities in claims for disability compensation, disability and death pension, and in eligibility determinations. The provisions contained in the rating schedule will represent as far as can practicably be determined, the average impairment in earning capacity in civil occupations resulting from disability. (Authority: 38 U.S.C. 1155)

(b) *Extra-schedular ratings in unusual cases:*

(1) *Disability compensation.* Ratings shall be based, as far as practicable, upon the average impairments of earning capacity with the additional proviso that the Secretary shall from time to time readjust this schedule of ratings in accordance with experience. To accord justice to the exceptional case where the schedular evaluation is inadequate to rate a single service-connected disability, the Director of Compensation Service or his or her delegate is authorized to approve on the basis of the criteria set forth in this paragraph (b), an extra-schedular evaluation commensurate with the average impairment of earning capacity due exclusively to the disability. The governing norm in these exceptional cases is a finding by the Director of Compensation Service or delegatee that application of the regular schedular standards is impractical because the disability is so exceptional or unusual due to such related factors as marked interference with employment or frequent periods of hospitalization.

(2) *Pension.* Where the evidence of record establishes that an applicant for pension who is basically eligible fails to meet the disability requirements based on the percentage standards of the rating schedule but is found to be unemployable by reason of his or her disability(ies), age, occupational background and other related factors, the following are authorized to approve on an extra-schedular basis a permanent and total disability rating for pension purposes: the Veterans Service Center Manager or the Pension Management Center Manager; or where regular schedular standards are met as of the date of the rating decision, the rating board.

(3) *Effective dates.* The effective date of these extra-schedular evaluations granting or increasing benefits will be in accordance with §3.400(b)(1) and (2) as to original and supplemental claims and in accordance with §3.400(o) in claims for increased benefits.

(c) *Advisory opinion.* Cases in which application of the schedule is not understood or the propriety of an extra-schedular rating is questionable may be submitted to Central Office for advisory opinion.

Cross references: Effective dates; disability benefits. See §3.400(b). Effective dates; increases. See §3.400(o).

[26 FR 1583, Feb. 24, 1961, as amended at 29 FR 1463, Jan. 29, 1964; 37 FR 10442, May 23, 1972; 39 FR 5315, Feb. 12, 1974; 39 FR 32988, Sept. 13, 1974; 40 FR 57459, Dec. 10, 1975; 61 FR 20727, May 8, 1996; 67 FR 46868, July 17, 2002; 74 FR 26959, June 5, 2009; 82 FR 57830, Dec. 8, 2017; 84 FR 170, Jan. 18, 2019]

Supplement Highlight references: 87(2), 116(1), 121(1).

§3.326 Examinations.

For purposes of this section, the term examination includes periods of hospital observation when required by VA.

(a) Where there is a claim for disability compensation or pension but medical evidence accompanying the claim is not adequate for rating purposes, a Department of Veterans Affairs examination will be authorized. This paragraph applies to original and supplemental claims as well as claims for increase submitted by a veteran, surviving spouse, parent, or child. Individuals for whom an examination has been scheduled are required to report for the examination.

(b) Provided that it is otherwise adequate for rating purposes, any hospital report, or any examination report, from any government or private institution may be accepted for rating a claim without further examination. However, monetary benefits to a former prisoner of war will not be denied unless the claimant has been offered a complete physical examination conducted at a Department of Veterans Affairs hospital or outpatient clinic.

(c) Provided that it is otherwise adequate for rating purposes, a statement from a private physician may be accepted for rating a claim without further examination. (Authority: 38 U.S.C. 5107(a))

[36 FR 14467, Aug. 6, 1971, as amended at 40 FR 56435, Dec. 3, 1975; 55 FR 49521, Nov. 29, 1990; 59 FR 35851, July 14, 1994; 60 FR 27409, May 24, 1995; 60 FR 52864, Oct. 11, 1995; 61 FR 13424, Mar. 27, 1996; 66 FR 45632, Aug. 29, 2001; 84 FR 170, Jan. 18, 2019]

Cross reference: Failure to report for VA examination. See §3.655.

Supplement *Highlights* references: 12(6), 16(2), 18(3), 21(3), 47(1), 121(1).

§3.327 Reexaminations.

(a) *General.* Reexaminations, including periods of hospital observation, will be requested whenever VA determines there is a need to verify either the continued existence or the current severity of a disability. Generally, reexaminations will be required if it is likely that a disability has improved, or if evidence indicates there has been a material change in a disability or that the current rating may be incorrect. Individuals for whom reexaminations have been authorized and scheduled are required to report for such reexaminations. Paragraphs (b) and (c) of this section provide general guidelines for requesting reexaminations, but shall not be construed as limiting VA's authority to request reexaminations, or periods of hospital observation, at any time in order to ensure that a disability is accurately rated. (Authority: 38 U.S.C. 501(a))

(b) *Compensation cases:*

(1) *Scheduling reexaminations.* Assignment of a prestabilization rating requires reexamination within the second 6 months period following separation from service. Following initial Department of Veterans Affairs examination, or any scheduled future or other examination, reexamination, if in order, will be scheduled within not less than 2 years nor more than 5 years within the judgment of the rating board, unless another time period is elsewhere specified.

(2) *No periodic future examinations will be requested.* In service-connected cases, no periodic reexamination will be scheduled:

(i) When the disability is established as static;

(ii) When the findings and symptoms are shown by examinations scheduled in paragraph (b)(2)(i) of this section or other examinations and hospital reports to have persisted without material improvement for a period of 5 years or more;

(iii) Where the disability from disease is permanent in character and of such nature that there is no likelihood of improvement;

(iv) In cases of veterans over 55 years of age, except under unusual circumstances;

(v) When the rating is a prescribed scheduled minimum rating; or

(vi) Where a combined disability evaluation would not be affected if the future examination should result in reduced evaluation for one or more conditions.

(c) *Pension cases.* In nonservice-connected cases in which the permanent total disability has been confirmed by reexamination or by the history of the case, or with obviously static disabilities, further reexaminations will not generally be requested. In other cases further examination will not be requested routinely and will be accomplished only if considered necessary based upon the particular facts of the

individual case. In the cases of veterans over 55 years of age, reexamination will be requested only under unusual circumstances.

[26 FR 1585, Feb. 24, 1961, as amended at 30 FR 11855, Sept. 16, 1965; 36 FR 14467, Aug. 6, 1971; 55 FR 49521, Nov. 29, 1990; 60 FR 27409, May 24, 1995]

Cross reference: Failure to report for VA examination. See §3.655.

Supplement *Highlights* reference: 16(2)

§3.328 Independent medical opinions.

(a) *General.* When warranted by the medical complexity or controversy involved in a pending claim, an advisory medical opinion may be obtained from one or more medical experts who are not employees of VA. Opinions shall be obtained from recognized medical schools, universities, clinics or medical institutions with which arrangements for such opinions have been made, and an appropriate official of the institution shall select the individual expert(s) to render an opinion.

(b) *Requests.* A request for an independent medical opinion in conjunction with a claim pending before VA may be initiated by the office having jurisdiction over the claim, by the claimant, or by his or her duly appointed representative. The request must be submitted in writing and must set forth in detail the reasons why the opinion is necessary. All such requests shall be submitted through the Veterans Service Center Manager or Pension Management Center Manager of the office having jurisdiction over the claim, and those requests which in the judgment of the Veterans Service Center Manager merit consideration shall be referred to the Compensation Service or the Pension and Fiduciary Service for approval.

(c) *Approval.* (1) Requests for independent medical opinions shall be approved when one of the following conditions is met:

(i) The director of each Service from which a benefit is sought, or his or her designee, determines that the issue under consideration poses a medical problem of such complexity or controversy as to justify solicitation of an independent medical opinion; or

(ii) The independent medical opinion is required to fulfill the instructions contained in a remand order from the Board of Veterans' Appeals.

(2) A determination that an independent medical opinion is not warranted may be contested only as part of an appeal to the Board of Veterans' Appeals on the merits of the decision rendered on the primary issue by VA. (Authority: 38 U.S.C. 5109, 5701(b)(1); 5 U.S.C. 552a(f)(3))

(d) *Notification.* The Compensation Service or the Pension and Fiduciary Service shall notify the claimant when the request for an independent medical opinion has been approved with regard to his or her claim and shall furnish the claimant with a copy of the opinion when it is received. If, in the judgment of the Secretary, disclosure of the independent medical opinion would be harmful to the physical or mental health of the claimant, disclosure shall be subject to the special procedures set forth in §1.577 of this chapter. (Authority: 38 U.S.C. 5109, 5701(b)(1); 5 U.S.C. 552a(f)(3))

[55 FR 18602, May 3, 1990, as amended at 67 FR 46868, July 17, 2002; 79 FR 2100, Jan. 13, 2014; 79 FR 2100, Jan. 13, 2014]

Supplement *Highlights Reference*: 107(1).

§3.329 [Removed]

[55 FR 49521, Nov. 29, 1990]

§3.372 Initial grant following inactivity of tuberculosis.

When service connection is granted initially on an original or supplemental claim for pulmonary or nonpulmonary tuberculosis and there is satisfactory evidence that the condition was active previously but is now inactive (arrested), it will be presumed that the disease continued to be active for 1 year after the last date of established activity, provided there is no evidence to establish activity or inactivity in the intervening period. For a veteran entitled to receive compensation on August 19, 1968, the beginning date of graduated ratings will commence at the end of the 1-year period. For a veteran who was not receiving or entitled to receive compensation on August 19, 1968, ratings will be assigned in accordance with the Schedule for Rating Disabilities (Part 4 of this chapter). This section is not applicable to running award cases.

[33 FR 16275, Nov. 6, 1968; as amended at 84 FR 170, Jan. 18, 2019]

Supplement *Highlights* Reference(s): 121(1)

§3.373 [Reserved]

§3.374 Effect of diagnosis of active tuberculosis.

(a) *Service diagnosis.* Service department diagnosis of active pulmonary tuberculosis will be accepted unless a board of medical examiners, Clinic Director or Chief, Outpatient Service certifies, after considering all the evidence, including the favoring or opposing tuberculosis and activity, that such diagnosis was incorrect. Doubtful cases may be referred to the Chief Medical Director in Central Office.

(b) *Department of Veterans Affairs diagnosis.* Diagnosis of active pulmonary tuberculosis by the medical authorities of the Department of Veterans Affairs as the result of examination, observation, or treatment will be accepted for rating purposes. Reference to the Clinic Director or Chief Outpatient Service, will be in order in questionable cases and, if necessary, to the Chief Medical Director in Central Office.

(c) *Private physician's diagnosis.* Diagnosis of active pulmonary tuberculosis by private physicians on the basis of their examination, observation or treatment will not be accepted to show the disease was initially manifested after discharge from active service unless confirmed by acceptable clinical, X-ray or laboratory studies, or by findings of active tuberculosis based upon acceptable hospital observation or treatment.

[26 FR 1591, Feb. 24, 1961, as amended at 27 FR 6387, July 6, 1962; 33 FR 16275, Nov. 6, 1968; 43 FR 45348, Oct. 2, 1978]

§3.375 Determination of inactivity (complete arrest) in tuberculosis.

(a) *Pulmonary tuberculosis.* A veteran shown to have had pulmonary tuberculosis will be held to have reached a condition of “complete arrest” when a diagnosis of inactive is made.

(b) *Nonpulmonary disease.* Determination of complete arrest of nonpulmonary tuberculosis requires absence of evidence of activity for 6 months. If there are two or more foci of such tuberculosis, one of which is active, the condition will not be considered to be inactive until the tuberculous process has reached arrest in its entirety.

(c) *Arrest following surgery.* Where there has been surgical excision of the lesion or organ, the date of complete arrest will be the date of discharge from the hospital, or 6 months from the date of excision, whichever is later.

[33 FR 16275, Nov. 6, 1968, as amended at 43 FR 45348, Oct. 2, 1978]

Effective Dates

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§3.400 General.

Except as otherwise provided, the effective date of an evaluation and award of pension, compensation, or dependency and indemnity compensation based on an initial claim or supplemental claim will be the date of receipt of the claim or the date entitlement arose, whichever is later. For effective date provisions regarding revision of a decision based on a supplemental claim or higher-level review, see §3.2500. (Authority: 38 U.S.C. 5110(a))

(a) *Unless specifically provided.* On basis of facts found.

(b) *Disability benefits:*

(1) *Disability pension (§3.3).* An award of disability pension may not be effective prior to the date entitlement arose.

(i) *Claims received prior to October 1, 1984.* Date of receipt of claim or date on which the veteran became permanently and totally disabled, if claim is filed within one year from such date, whichever is to the advantage of the veteran.

(ii) *Claims received on or after October 1, 1984.*

(A) Except as provided in paragraph (b)(1)(ii)(B) of this section, date of receipt of claim.

(B) If, within one year from the date on which the veteran became permanently and totally disabled, the veteran files a claim for a retroactive award and establishes that a physical or mental disability, which was not the result of the veteran’s own willful misconduct, was so incapacitating that it prevented him or her from filing a disability pension claim for at least the first 30 days immediately following the date on which the veteran became permanently and totally disabled, the disability pension award may be effective from the date of receipt of claim or the date on which the veteran became permanently and totally disabled, whichever is to the advantage of the veteran. While rating board judgment must be applied to the facts and circumstances of each case, extensive hospitalization will generally qualify as sufficiently incapacitating to have prevented the filing of a claim. For the purposes of this subparagraph, the presumptive provisions of §3.342(a) do not apply.

(2) *Disability compensation:*

(i) *Direct service connection (§3.4(b)).* Day following separation from active service or date entitlement arose if claim is received within 1 year after separation from service; otherwise, date of receipt of claim, or date entitlement arose, whichever is later.

Separation from service means separation under conditions other than dishonorable from continuous active service which extended from the date the disability was incurred or aggravated.

(ii) *Presumptive service connection* (§§3.307, 3.308, 3.309). Date entitlement arose, if claim is received within 1 year after separation from active duty; otherwise date of receipt of claim, or date entitlement arose, whichever is later. Where the requirements for service connection are met during service, the effective date will be the day following separation from service if there was continuous active service following the period of service on which the presumption is based and a claim is received within 1 year after separation from active duty.

(c) *Death benefits:*

(1) *Death in service* (38 U.S.C. 5110(j), Pub. L. 87-825) (§§3.4(c), 3.5(b)). First day of the month fixed by the Secretary concerned as the date of actual or presumed death, if claim is received with 1 year after the date the initial report of actual death or finding of presumed death was made; however benefits based on a report of actual death are not payable for any period for which the claimant has received, or is entitled to receive an allowance, allotment, or service pay of the veteran.

(2) *Service-connected death after separation from service* (38 U.S.C. 5110(d), Pub. L. 87-825) (§§3.4(c), 3.5(b)). First day of the month in which the veteran's death occurred if claim is received within 1 year after the date of death; otherwise, date of receipt of claim.

(3) *Nonservice-connected death after separation from service.*

(i) For awards based on claims received prior to October 1, 1984, or on or after December 10, 2004, first day of the month in which the veteran's death occurred if claim is received within one year after the date of death; otherwise, date of receipt of claim.

(ii) For awards based on claims received between October 1, 1984, and December 9, 2004, first day of the month in which the veteran's death occurred if claim is received within 45 days after the date of death; otherwise, date of receipt of claim. (Authority: 38 U.S.C. 5110(d))

(4) *Dependency and indemnity compensation:*

(i) *Deaths prior to January 1, 1957* (§3.702). Date of receipt of election.

(ii) *Child* (38 U.S.C. 5110(e), Pub. L. 87-835). First day of the month in which entitlement arose if claim is received within 1 year after the date of entitlement; otherwise, date of receipt of claim.

(iii) *Deaths on or after May 1, 1957 (in-service waiver cases)* (§§3.5(b)(3) and 3.702). Date of receipt of election. (See §3.114(a)).

(d) [Removed]

(e) *Apportionment (§§3.450 through 3.461, 3.551)*. On original claims, in accordance with the facts found. On other than original claims from the first day of the month following the month in which:

(1) Claim is received for apportionment of a veteran's award, except that where payments to him (her) have been interrupted, apportionment will be effective the day following date of last payment if a claim for apportionment is received within 1 year after that date;

(2) Notice is received that a child included in the surviving spouse's award is not in the surviving spouse's custody, except that where payments to the surviving spouse have been interrupted, apportionment will be effective the day following date of last payment if such notice is received within 1 year after that date.

(f) *Federal employees' compensation cases (§3.708)*. Date authorized by applicable law, subject to any payments made by the Office of Workers' Compensation Programs under the Federal Employees' Compensation Act over the same period of time.

(g) *Correction of military records (38 U.S.C. 5110(i); Pub. L. 87-825)*. Where entitlement is established because of the correction, change or modification of a military record, or of a discharge or dismissal, by a Board established under 10 U.S.C. 1552 or 1553, or because of other corrective action by competent military naval, or air authority, the award will be effective from the latest of these dates:

(1) Date application for change, correction, or modification was filed with the service department, in either an original or a disallowed claim;

(2) Date of receipt of claim if claim was disallowed; or

(3) One year prior to date of reopening of disallowed claim.

(h) *Difference of opinion (§3.105)*.

(1) As to decisions not finally adjudicated (see §3.160(d)) prior to timely receipt of an application for higher-level review, or prior to readjudication on VA initiative, the date from which benefits would have been payable if the former decision had been favorable.

(2) As to decisions which have been finally adjudicated (see §3.160(d)), and notwithstanding other provisions of this section, the date entitlement arose, but not earlier than the date of receipt of the supplemental claim.

(3) As to decisions which have been finally adjudicated (see 3.160(d)) and readjudication is undertaken solely on VA initiative, the date of Central Office approval authorizing a favorable decision or the date of the favorable Board of Veterans' Appeals decision.

(4) Where the initial determination for the purpose of death benefits is favorable, the commencing date will be determined without regard to the fact that the action may reverse, on a difference of opinion, an unfavorable decision for disability purposes by an adjudicative

agency other than the Board of Veterans Appeals, which was in effect at the date of the veteran's death.

(i) *Disability or death due to hospitalization, etc. (38 U.S.C. 5110(c), (d); Public Law 87-825; §§3.358, 3.361, and 3.800.):*

(1) *Disability.* Date injury or aggravation was suffered if claim is received within 1 year after that date; otherwise, date of receipt of claim.

(2) *Death.* First day of month in which the veteran's death occurred if a claim is received within 1 year following the date of death; otherwise, date of receipt of claim.

(j) *Election of Department of Veterans Affairs benefits (§3.700 series).*

(1) Unless otherwise provided, the date of receipt of election, subject to prior payments.

(2) July 1, 1960, as to pension payable under Pub. L. 86-211, where pension is payable for June 30, 1960, under the law in effect on that date, including an award approved after that date, if the election is filed within (generally) 120 days from date of notice of the award. The award will be subject to prior payments over the same period of time.

(3) January 1, 1965, as to pension payable under Pub. L. 86-211 (73 Stat. 432) as amended by Pub. L. 88-664 if there was basic eligibility for pension on June 30, 1960, under the law in effect on that date and an election if filed prior to May 1, 1965.

(4) January 1, 1965, as to pension payable under Pub. L. 86-211 (73 Stat. 432) as amended by Pub. L. 88-664 if there was basic eligibility on that date for pension on the basis of service in the Indian wars or Spanish-American War and an election is filed prior to May 1, 1965.

(5) January 1, 1969, as to pension payable under Pub. L. 86-211 (73 Stat. 432), as amended by Pub. L. 90-275 (82 Stat. 64), if there was basic eligibility for pension on June 30, 1960, under the law in effect on that date and an election is filed prior to May 1, 1969.

(6) August 1, 1972, as to pension payable under Pub. L. 86-211 (73 Stat. 432) as amended by Pub. L. 92-328 (86 Stat. 393) if there was basic eligibility on that date based on death of a veteran of the Spanish-American War and an election is filed prior to December 1, 1972.

(k) *Error (§3.105).* Date from which benefits would have been payable if the corrected decision had been made on the date of the reversed decision.

(l) *Foreign residence.* (See §3.653).

(m) *Forfeiture (§§3.901, 3.902).* Day following date of last payment on award to payee who forfeited.

(n) *Guardian.* Day following date of last payment to prior payee or fiduciary.

Note: Award to guardian shall include amounts withheld for possible apportionments as well as money in Personal Funds of Patients.

(o) *Increases (38 U.S.C. 5110(a) and 5110(b)(2), Pub. L. 94-71, 89 Stat. 395; §§3.109, 3.156, 3.157):*

(1) *General.* Except as provided in paragraph (o)(2) of this section and §3.401(b), date of receipt of claim or date entitlement arose, whichever is later. A retroactive increase or additional benefit will not be awarded after basic entitlement has been terminated, such as by severance of service connection.

(2) *Disability compensation.* Earliest date as of which it is factually ascertainable based on all evidence of record that an increase in disability had occurred if a complete claim or intent to file a claim is received within 1 year from such date, otherwise, date of receipt of claim. When medical records indicate an increase in a disability, receipt of such medical records may be used to establish effective date(s) for retroactive benefits based on facts found of an increase in a disability only if a complete claim or intent to file a claim for an increase is received within 1 year of the date of the report of examination, hospitalization, or medical treatment. The provisions of this paragraph apply only when such reports relate to examination or treatment of a disability for which service-connection has previously been established. (Authority: 38 U.S.C. 501, 5101).

(p) *Liberalizing laws and Department of Veterans Affairs issues.* See §3.114.

(q) *New and material evidence (§3.156) other than service department records.*

(1) *Received within appeal period or prior to appellate decision.* The effective date will be as though the former decision had not been rendered. See §§20.1103, 20.1104 and 20.1304(b)(1) of this chapter.

(2) *Received after final disallowance.* Date of receipt of new claim or date entitlement arose, whichever is later.

(r) *Reopened claims.* (§§3.109, 3.156, 3.157, 3.160(e)) Date of receipt of claim or date entitlement arose, whichever is later, except as provided in §20.1304(b)(1) of this chapter. (Authority: 38 U.S.C. 501(a))

(s) *Renouncement (§3.106).* Except as provided in §3.106(c), date of receipt of new claim.

(t) *Whereabouts now known.* (See §3.158(c).)

(u) *Void, annulled or terminated marriage of a child (38 U.S.C. 5110(a), (k), (l); Pub. L. 93-527, 88 Stat. 1702; §3.55):*

(1) *Void*. Date the parties ceased to cohabit or date of receipt of claim, whichever is later.

(2) *Annulled*. Date the decree of annulment became final if claim is filed within 1 year after that date; otherwise date of receipt of claim.

(3) *Death*. Date of death if claim is filed within 1 year after that date; otherwise date of receipt of claim. Benefits are not payable unless the provisions of §3.55(b) of this part are met. (Authority: 38 U.S.C. 103)

(4) *Divorce*. Date the decree became final if claim is filed within 1 year of that date; otherwise date of receipt of claim. Benefits are not payable unless the provisions of §3.55(b) of this part are met. (Authority: 38 U.S.C. 103)

(v) *Termination of remarriage of surviving spouse (38 U.S.C. 5110(a), (k); 38 U.S.C. 103(d) and 5110(l) effective January 1, 1971; §3.55)*:

(1) *Void*. Date the parties ceased to cohabit or date of receipt of claim whichever is the later.

(2) *Annulled*. Date the decree of annulment became final if claim is filed within 1 year after that date; otherwise date of receipt of claim.

(3) *Death*. Date of death if claim is filed within 1 year after that date; otherwise date of receipt of claim. Benefits are not payable unless the provisions of §3.55(a) of this part are met. (Authority: 38 U.S.C. 103)

(4) *Divorce*. Date the decree became final if claim is filed within 1 year after that date; otherwise date of receipt of claim. Benefits are not payable unless the provisions of §3.55(a) of this part are met. (Authority: 38 U.S.C. 103)

(w) *Termination of relationship or conduct resulting in restriction on payment of benefits (38 U.S.C. 5110(m), effective January 1, 1971; §§3.50(b)(2) and 3.55)*. Date of receipt of application filed after termination of relationship and after December 31, 1970. Benefits are not payable unless the provisions of §3.55(a), as applicable, of this part are met. (Authority: 38 U.S.C. 103)

(x) *Effective date of determination of incompetency (§3.353)*. Date of rating of incompetency. (Not applicable to an incompetency determination made for insurance purposes under 38 U.S.C. 1922).

(y) *Effective date of determination restoring competency (§3.353)*. Date shown by evidence of record that competency was regained.

(z) *Claims based on service in the Women's Air Forces Service Pilots (WASP), or on service in a similarly situated group (Pub. L. 95-202).*

(1) *Original claim:* Date of receipt of claim or date entitlement arose, whichever is later, or as otherwise provided under this section (e.g., paragraph (b)(1) of this section) except that no benefits shall be awarded for any period prior to November 23, 1977.

(2) Reopened claims received prior to the effective date provided in §19.2(a) of this chapter: Latest of the following dates:

(i) November 23, 1977.

(ii) Date entitlement arose.

(iii) One year prior to date of receipt of reopened claim.

(3) Supplemental claims received more than one year after notice of decision: Latest of the following dates:

(i) Date entitlement arose.

(ii) One year prior to date of receipt of a supplemental claim.

[26 FR 1593, Feb. 24, 1961; 56 FR 25044, June 3, 1991; 57 FR 10426, Mar. 26, 1992; 58 FR 32443, June 10, 1993; 60 FR 18356, Apr. 11, 1995; 60 FR 5286, Oct. 11, 1995; 61 FR 67950, Dec. 26, 1996; 62 FR 5529, Feb. 6, 1997; 68 FR 34542, June 10, 2003; 69 FR 46434, Aug. 3, 2004; 71 FR 44919, Aug. 8, 2006; 71 FR 52457, Sept. 6, 2006; 79 FR 57696, Sep. 25, 2014; 84 FR 170, Jan. 19, 2019]

Supplement *Highlights* references: 8(1), 15(3), 18(2), 25(1), 27(2), 57(1), 63(1), 72(2), 73(2), 111(1), 121(1).

Editorial note: For other *Federal Register* citations affecting §3.400, see the List of CFR Sections Affected in the Finding Aids section of Title 38 of the *Code of Federal Regulations*.

§3.401 Veterans.

Awards of pension or compensation payable to or for a veteran will be effective as follows:

(a) *Aid and attendance and housebound benefits.*

(1) Except as provided in §3.400(o)(2), the date of receipt of claim or date entitlement arose, whichever is later. However, when an award of pension or compensation based on an original or supplemental claim is effective for a period prior to the date of receipt of the claim, any additional pension or compensation payable by reason of need for aid and attendance or housebound status shall also be awarded for any part of the award's retroactive period for which entitlement to the additional benefit is established. (Authority: 38 U.S.C. 501(a); 5110(b)(1), (3))

(2) Date of departure from hospital, institution, or domiciliary. (Authority: 38 U.S.C. 501(a))

(3) Spouse, additional compensation for aid and attendance: Date of receipt of claim or date entitlement arose, whichever is later. However, when an award of disability compensation based on an original or supplemental claim is effective for a period prior to date of receipt of the claim additional disability compensation payable to a veteran by reason of the veteran's spouse's need for aid and attendance shall also be awarded for any part of the award's retroactive period for which the spouse's entitlement to aid and attendance is established. (Authority: 38 U.S.C. 501(a); 5110(b)(1), (2))

(b) *Dependent, additional compensation or pension for.* Latest of the following dates:

(1) Date of claim. This term means the following, listed in their order of applicability:

(i) Date of veteran's marriage, or birth of his or her child, or, adoption of a child, if the evidence of the event is received within 1 year of the event otherwise.

(ii) Date notice is received of the dependent's existence, if evidence is received within 1 year of the Department of Veterans Affairs request.

(2) Date dependency arises.

(3) Effective date of the qualifying disability rating provided evidence of dependency is received within 1 year of notification of such rating action. (Authority: 38 U.S.C. 5110(f))

(4) Date of commencement of veteran's award. (Other increases, see §3.400(o). For school attendance see §3.667.) (Authority: 38 U.S.C. 5110 (f), (n))

(c) *Divorce of veteran and spouse.* See §3.501(d).

(d) [Reserved].

(e) *Retirement pay* (§3.750):

- (1) *Election*. Date of entitlement if timely filed. Subject to prior payments of retirement pay.
- (2) *Waiver*. Day following date of discontinuance or reduction of retirement pay.
- (3) *Reelection*. Day the reelection is received by the Department of Veterans Affairs.

(f) *Service pension* (§3.3(a)). Date of receipt of claim.

(g) *Tuberculosis, special compensation for arrested*. As of the date the graduated evaluation of the disability or compensation for that degree of disablement combined with other service-connected disabilities would provide compensation payable at a rate less than \$67. See §3.350(g).

(h) *Temporary increase “General Policy in Rating,” 1945 Schedule for Rating Disabilities*:

(1) *Section 4.29 of this chapter*. Date of entrance into hospital, after 21 days of continuous hospitalization for treatment.

(2) *Section 4.30 of this chapter*. Date of entrance into hospital, after discharge from hospitalization (regular or release to non-bed care).

(i) *Increased disability pension based on attainment of age 78*. First day of the month during which veteran attains age 78.

[26 FR 1594, Feb. 24, 1961, as amended at 27 FR 11889, Dec. 1, 1962; 36 FR 4599, Mar. 10, 1971; 39 FR 17222, Mar. 14, 1974; 41 FR 36493, Aug. 30, 1976; 41 FR 55874, Dec. 23, 1976; 41 FR 56804, Dec. 30, 1976; 45 FR 34886, May 23, 1980; 54 FR 34981, Aug. 23, 1989; 62 FR 5529, Feb. 6, 1997; 83 FR 32738, July 13, 2018; 84 FR 171, Jan. 18, 2019]

Supplement *Highlights* references: 27(2), 118(1), 121(1).

§3.402 Surviving spouse.

Awards of pension, compensation, or dependency and indemnity compensation to or for a surviving spouse will be effective as follows:

(a) *Additional allowance of dependency and indemnity compensation for children §3.5(e).* Commencing date of surviving spouse's award. See §3.400(c).

(b) *Legal surviving spouse entitled.* See §3.657.

(c) *Aid and attendance and housebound benefits.*

(1) Date of receipt of claim or date entitlement arose whichever is later. However, when an award of dependency and indemnity compensation (DIC) or pension based on an original or supplemental claim is effective for a period prior to date of receipt of the claim, any additional DIC or pension payable to the surviving spouse by reason of need for aid and attendance or housebound status shall also be awarded for any part of the award's retroactive period for which entitlement to the additional benefit is established. (Authority: 38 U.S.C. 501(a); 5110(d))

(2) Date of departure from hospital institutional or domiciliary care at Department of Veterans Affairs expense. This is applicable only to aid and attendance benefits. Housebound benefits may be awarded during hospitalization at Department of Veterans Affairs expense. (Authority: 38 U.S.C. 501(a))

[45 FR 34887, May 23, 1980; as amended at 84 FR 171, Jan. 18, 2019]

Supplement *Highlights* Reference(s): 121(1).

§3.403 Children.

(a) Awards of pension, compensation, or dependency and indemnity compensation to or for a child, or to or for a veteran or surviving spouse on behalf of such child, will be effective as follows:

(1) *Permanently incapable of self support (§3.57(a)(3))*. In original claims, date fixed by §§3.400(b) or (c) or 3.401(b). In claims for continuation of payments, 18th birthday if the condition is claimed prior to or within 1 year after that date; otherwise from date of receipt of claim.

(2) *Majority (§3.100)*. Direct payment to child if competent, from date of majority or, date of last payment, whichever is the earlier date.

(3) *Posthumous child*. Date of child's birth if proof of birth is received within 1 year of that date, or if a claim or an intent to file a claim as set forth in §3.155(b) is received within 1 year after the veteran's death; otherwise, date of claim. (Authority: 38 U.S.C. 5110(n))

(4) *School attendance*. (See §3.667.)

(5) *Adopted child*. Date of adoption either interlocutory or final or date of adoptive placement agreement, but not earlier than the date from which benefits are otherwise payable.

(b) *Monetary allowance under 38 U.S.C. 1805 for an individual suffering from spina bifida who is a child of a Vietnam veteran*. Except as provided in §3.814(e), an award of the monetary allowance under 38 U.S.C. 1805 to or for an individual suffering from spina bifida who is a child of a Vietnam veteran will be effective either date of birth if claim is received within one year of that date, or the later of the date of claim or the date entitlement arose, but not earlier than October 1, 1997. (Authority: 38 U.S.C. 1805, 1832, 5110)

(c) *Monetary allowance under 38 U.S.C. 1815 for an individual with covered birth defects who is a child of a woman Vietnam veteran*. Except as provided in §3.114(a) or §3.815(i), an award of the monetary allowance under 38 U.S.C. 1815 to or for an individual with one or more covered birth defects who is a child of a woman Vietnam veteran will be effective as of the date VA received the claim (or the date of birth if the claim is received within one year of that date), the date entitlement arose, or December 1, 2001, whichever is latest. (Authority: 38 U.S.C. 1815, 1832, 1834, 5110)

(d) *Monetary allowance under 38 U.S.C. 1821 for an individual suffering from spina bifida who is a child of a veteran with covered service in Korea*. Except as provided in §3.814(e), an award of the monetary allowance under 38 U.S.C. 1821 based on the existence of an individual suffering from spina bifida who is a child of a veteran with covered service in Korea will be effective from either the date of birth if claim is received within 1 year of that date, or the later of the date of claim or date entitlement arose, but not earlier than December 16, 2003. (Authority: 38 U.S.C. 1821, 1832, 5110)

[26 FR 1594, Feb. 24, 1961, as amended at 27 FR 11889, Dec. 1, 1962; 36 FR 4599, Mar. 10, 1971; 38 FR 872, Jan. 5, 1973; 39 FR 20204, June 7, 1974; 41 FR 36493, Aug. 30, 1976; 45 FR 34887, May 23, 1980; 62 FR 51279, Sept. 30, 1997; 67 FR 49587, July 31, 2002; 76 FR 4248, Jan. 25, 2011; 79 FR 57697, Sep. 25, 2014; 83 FR 32738, July 13, 2018]

Supplement Highlights references: 31(1), 54(2), 95(1), 111(1), 118(1).

§3.404 Parents.

Awards of additional amounts of compensation and dependency and indemnity compensation based on a parent's need for aid and attendance will be effective the date of receipt of claim or date entitlement arose, whichever is later. However, when an award of dependency and indemnity compensation based on an original or supplemental claim is effective for a period prior to date of receipt of claim, any additional dependency and indemnity compensation payable by reason of need for aid and attendance may also be awarded for any part of the award's retroactive period for which entitlement to aid and attendance is established. When the parent is provided hospital, institutional or domiciliary care at Department of Veterans Affairs expense, the effective date will be the date of departure therefrom. (Authority: 38 U.S.C. 501(a); 5110(d))

[45 FR 34887, May 23, 1980; as amended at 84 FR 171, Jan. 18, 2019]

Supplement *Highlights* Reference(s): 121(1).

§3.654 Active service pay.

(a) *General.* Pension, compensation, or retirement pay will be discontinued under the circumstances stated in §3.700(a)(1) for any period for which the veteran received active service pay. For the purposes of this section, active service pay means pay received for active duty, active duty for training or inactive duty training.

(b) *Active duty.*

(1) Where the veteran returns to active duty status, the award will be discontinued effective the day preceding reenrance into active duty status. If the exact date is not known, payments will be discontinued effective date of last payment and as of the correct date when the date of reenrance has been ascertained from the service department.

(2) Payments, if otherwise in order, will be resumed effective the day following release from active duty if claim for recommencement of payments is received within 1 year from the date of such release: otherwise payments will be resumed effective 1 year prior to the date of receipt of a new claim. Prior determinations of service connection will not be disturbed except as provided in §3.105. Compensation will be authorized based on the degree of disability found to exist at the time the award is resumed. Disability will be evaluated on the basis of all facts, including records from the service department relating to the most recent period of active service. If a disability is incurred or aggravated in the second period of service, compensation for that disability cannot be paid unless a claim therefor is filed.

(c) *Training duty.* Prospective adjustment of awards may be made where the veteran waives his or her Department of Veterans Affairs benefit covering anticipated receipt of active service pay because of expected periods of active duty for training or inactive duty training. Where readjustment is in order because service pay was not received for expected training duty, retroactive payments may be authorized if a claim for readjustment is received within 1 year after the end of the fiscal year for which payments were waived.

[27 FR 11890, Dec. 1, 1962]

§3.655 Failure to report for Department of Veterans Affairs examination.

(a) *General.* When entitlement or continued entitlement to a benefit cannot be established or confirmed without a current VA examination or reexamination and a claimant, without good cause, fails to report for such examination, or reexamination, action shall be taken in accordance with paragraph (b) or (c) of this section as appropriate. Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant, death of an immediate family member, etc. For purposes of this section, the terms “examination” and “reexamination” include periods of hospital observation when required by VA.

(b) *Original or supplemental claim, or claim for increase.* When a claimant fails to report for an examination scheduled in conjunction with an original compensation claim, the claim shall be rated based on the evidence of record. When the examination was scheduled in conjunction with any other original claim, a supplemental claim for a benefit which was previously disallowed, or a claim for increase, the claim shall be denied.

(c) *Running award.*

(1) When a claimant fails to report for a reexamination and the issue is continuing entitlement, VA shall issue a pretermination notice advising the payee that payment for the disability or disabilities for which the reexamination was scheduled will be discontinued or, if a minimum evaluation is established in part 4 of this title or there is an evaluation protected under §3.951(b) of this part, reduced to the lower evaluation. Such notice shall also include the prospective date of discontinuance or reduction, the reason therefor and a statement of the claimant’s procedural and appellate rights. The claimant shall be allowed 60 days to indicate his or her willingness to report for a reexamination or to present evidence that payment for the disability or disabilities for which the reexamination was scheduled should not be discontinued or reduced.

(2) If there is no response within 60 days, or if the evidence submitted does not establish continued entitlement, payment for such disability or disabilities shall be discontinued or reduced as of the date indicated in the pretermination notice or the date of last payment, whichever is later.

(3) If notice is received that the claimant is willing to report for a reexamination before payment has been discontinued or reduced, action to adjust payment shall be deferred. The reexamination shall be rescheduled and the claimant notified that failure to report for the rescheduled examination shall be cause for immediate discontinuance or reduction of payment. When a claimant fails to report for such rescheduled examination, payment shall be reduced or discontinued as of the date of last payment and shall not be further adjusted until a VA examination has been conducted and the report reviewed.

(4) If within 30 days of a pretermination notice issued under paragraph (c)(1) of this section the claimant requests a hearing, action to adjust payment shall be deferred as set forth in §3.105(i)(1) of this part. If a hearing is requested more than 30 days after such pretermination notice but before the proposed date of discontinuance or reduction, a hearing shall be scheduled, but payment shall nevertheless be discontinued or reduced as of the date proposed in the

pretermination notice or date of last payment, whichever is later, unless information is presented which warrants a different determination. When the claimant has also expressed willingness to report for an examination, however, the provisions of paragraph (c)(3) of this section shall apply. (Authority: 38 U.S.C. 501(a))

[27 FR 11890, Dec. 1, 1962, as amended at 36 FR 14467, Aug. 6, 1971; 55 FR 49521, Nov. 29, 1990; 58 FR 46865, Sept. 3, 1993; 80 FR 18117, Apr. 3, 2015; 84 FR 171, Jan. 18, 2019]

Supplement *Highlights* References: 112(1), 121(1).

Cross references: Procedural due process and appellate rights. See §3.103. Examinations. See §3.326. Reexaminations. See §3.327. Resumption of rating when veteran subsequently reports for VA examination. See §3.330.

§3.656 Disappearance of veteran.

(a) When any veteran has disappeared for 90 days or more and his or her whereabouts remain unknown to the members of his or her family and the Department of Veterans Affairs, disability compensation which he or she was receiving or entitled to receive may be paid to or for his or her spouse, children and parents, effective the day following the date of last payment to the veteran if a claim is received within 1 year after that date; otherwise from the date of receipt of a claim. The total amount payable will be the lesser of these amounts:

(1) Dependency and indemnity compensation.

(2) Amount of compensation payable to the veteran at the time of disappearance, subject to authorized insurance deductions.

(b) Where a veteran's whereabouts become known to the Department of Veterans Affairs after an award to dependents has been made as provided in this section, the award to the dependents will be discontinued effective date of last payment, and appropriate action will be taken to adjust the veteran's award in accordance with the facts found. (Authority: 38 U.S.C. 1158)

(c) Awards to dependents will not be continued under this section in any case where the facts are such as to bring into effect the presumption of death under §3.212.

(d) When any veteran has disappeared for 90 days or more and the veteran's whereabouts remain unknown to members of the veteran's family and the Department of Veterans Affairs, any improved pension, section 306 or service pension which the veteran was receiving or entitled to receive may be paid to or for the spouse or children. The status of the veteran at the time of disappearance, with respect to permanent and total disability, income and net worth will be presumed to continue unchanged. Payment for the spouse or children will be effective the day following the date of last payment to the veteran if a claim is received within 1 year after that date; otherwise from date of receipt of a claim. The total amount payable will be the lesser of these amounts:

(1) The service death pension rate if the veteran was receiving service pension or the improved death pension rate if the veteran was receiving section 306 or improved pension.

(2) The amount of pension payable to the veteran at the time of disappearance. (Authority: 38 U.S.C. 1507)

[26 FR 1599, Feb. 24, 1961, as amended at 27 FR 11891, Dec. 1, 1962; 30 FR 6649, May 14, 1965; 40 FR 14313, Mar. 31, 1975; 44 FR 45942, Aug. 6, 1979]

§3.814 Monetary allowance under 38 U.S.C. chapter 18 for an individual suffering from spina bifida whose biological father or mother is or was a Vietnam veteran or a veteran with covered service in Korea.

(a) *Monthly monetary allowance.* VA will pay a monthly monetary allowance under subchapter I of 38 U.S.C. chapter 18, based upon the level of disability determined under the provisions of paragraph (d) of this section, to or for a person who VA has determined is an individual suffering from spina bifida whose biological mother or father is or was a Vietnam veteran or a veteran with covered service in Korea. Receipt of this allowance will not affect the right of the individual or any related person to receive any other benefit to which he or she may be entitled under any law administered by VA. An individual suffering from spina bifida is entitled to only one monthly allowance under this section, even if the individual's biological father and mother are or were both Vietnam veterans or veterans with covered service in Korea.

(b) [Removed and reserved]

(c) *Definitions.*

(1) *Vietnam veteran.* For the purposes of this section, the term “Vietnam veteran” means a person who performed active military, naval, or air service in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, without regard to the characterization of the person’s service. Service in the Republic of Vietnam includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

(2) *Covered service in Korea.* For the purposes of this section, the term “veteran with covered service in Korea” means a person who served in the active military, naval, or air service in or near the Korean DMZ between September 1, 1967, and August 31, 1971, and who is determined by VA, in consultation with the Department of Defense, to have been exposed to an herbicide agent during such service. Exposure to an herbicide agent will be conceded if the veteran served between April 1, 1968, and August 31, 1971, in a unit that, as determined by the Department of Defense, operated in or near the Korean DMZ in an area in which herbicides are known to have been applied during that period, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service.

(3) *Individual.* For the purposes of this section, the term “individual” means a person, regardless of age or marital status, whose biological father or mother is or was a Vietnam veteran and who was conceived after the date on which the veteran first served in the Republic of Vietnam during the Vietnam era, or whose biological father or mother is or was a veteran with covered service in Korea and who was conceived after the date on which the veteran first had covered service in Korea as defined in this section. Notwithstanding the provisions of §3.204(a)(1), VA will require the types of evidence specified in §§3.209 and 3.210 sufficient to establish in the judgment of the Secretary that a person is the biological son or daughter of a Vietnam veteran or a veteran with covered service in Korea.

(4) *Spina bifida.* For the purposes of this section, the term “spina bifida” means any form and manifestation of spina bifida except spina bifida occulta.

(d) *Disability evaluations.*

(1) Except as otherwise specified in this paragraph, VA will determine the level of payment as follows:

(i) *Level I.* The individual walks without braces or other external support as his or her primary means of mobility in the community, has no sensory or motor impairment of the upper extremities, has an IQ of 90 or higher, and is continent of urine and feces without the use of medication or other means to control incontinence.

(ii) *Level II.* Provided that none of the disabilities is severe enough to warrant payment at Level III, and the individual: walks with braces or other external support as his or her primary means of mobility in the community; or, has sensory or motor impairment of the upper extremities, but is able to grasp pen, feed self, and perform self care; or, has an IQ of at least 70 but less than 90; or, requires medication or other means to control the effects of urinary bladder impairment and no more than two times per week is unable to remain dry for at least three hours at a time during waking hours; or, requires bowel management techniques or other treatment to control the effects of bowel impairment but does not have fecal leakage severe or frequent enough to require wearing of absorbent materials at least four days a week; or, has a colostomy that does not require wearing a bag.

(iii) *Level III.* The individual uses a wheelchair as his or her primary means of mobility in the community; or, has sensory or motor impairment of the upper extremities severe enough to prevent grasping a pen, feeding self, and performing self care; or, has an IQ of 69 or less; or, despite the use of medication or other means to control the effects of urinary bladder impairment, at least three times per week is unable to remain dry for three hours at a time during waking hours; or, despite bowel management techniques or other treatment to control the effects of bowel impairment, has fecal leakage severe or frequent enough to require wearing of absorbent materials at least four days a week; or, regularly requires manual evacuation or digital stimulation to empty the bowel; or, has a colostomy that requires wearing a bag.

(2) If an individual who would otherwise be paid at Level I or II has one or more disabilities, such as blindness, uncontrolled seizures, or renal failure that result either from spina bifida, or from treatment procedures for spina bifida, the Director of the Compensation and Pension Service may increase the monthly payment to the level that, in his or her judgment, best represents the extent to which the disabilities resulting from spina bifida limit the individual's ability to engage in ordinary day-to-day activities, including activities outside the home. A Level II or Level III payment will be awarded depending on whether the effects of a disability are of equivalent severity to the effects specified under Level II or Level III.

(3) VA may accept statements from private physicians, or examination reports from government or private institutions, for the purpose of rating spina bifida claims without further examination, provided the statements or reports are adequate for assessing the level of disability due to spina bifida under the provisions of paragraph (d)(1) of this section. In the absence of adequate medical information, VA will schedule an examination for the purpose of assessing the level of disability.

(4) VA will pay an individual eligible for a monetary allowance due to spina bifida at Level I unless or until it receives medical evidence supporting a higher payment. When required to reassess the level of disability under paragraph (d)(5) or (d)(6) of this section, VA will pay an individual eligible for this monetary allowance at Level I in the absence of evidence

adequate to support a higher level of disability or if the individual fails to report, without good cause, for a scheduled examination. Examples of good cause include, but are not limited to, the illness or hospitalization of the claimant, death of an immediate family member, etc.

(5) VA will pay individuals under the age of one year at Level I unless a pediatric neurologist or a pediatric neurosurgeon certifies that, in his or her medical judgment, there is a neurological deficit that will prevent the individual from ambulating, grasping a pen, feeding himself or herself, performing self care, or from achieving urinary or fecal continence. If any of those deficits are present, VA will pay the individual at Level III. In either case, VA will reassess the level of disability when the individual reaches the age of one year.

(6) VA will reassess the level of payment whenever it receives medical evidence indicating that a change is warranted. For individuals between the ages of one and twenty-one, however, it must reassess the level of payment at least every five years.

(e) *Effective dates.* Except as otherwise provided, VA will award the monetary allowance for an individual suffering from spina bifida based on an initial claim or supplemental claim as of the date VA received the claim (or the date of birth if the claim is received within 1 year of that date) or the date entitlement arose, whichever is later.

(1) VA will increase benefits as of the earliest date the evidence establishes that the level of severity increased, but only if the beneficiary applies for an increase within one year of that date.

(2) If a claimant reopens a previously disallowed claim based on corrected military records, VA will award the benefit from the latest of the following dates: the date the veteran or beneficiary applied for a correction of the military records; the date the disallowed claim was filed; or, the date one year before the date of receipt of the reopened claim.

(f) *Reductions and discontinuances.* VA will generally reduce or discontinue awards according to the facts found except as provided in §§3.105 and 3.114(b).

(1) If benefits were paid erroneously because of beneficiary error, VA will reduce or discontinue benefits as of the effective date of the erroneous award.

(2) If benefits were paid erroneously because of administrative error, VA will reduce or discontinue benefits as of the date of last payment.

(Authority: 38 U.S.C. 501, 1805, 1811, 1812, 1821, 1831, 1832, 1833, 1834, 5101, 5110, 5111, 5112)

Cross Reference: 38 CFR 3.307(a)(6)(iv).

[62 FR 51279, Sept. 30, 1997, as amended at 65 FR 35282, June 2, 2000; 66 FR 13436, Mar. 6, 2001; 67 FR 49587, July 31, 2002; 76 FR 4248, Jan. 25, 2011; 84 FR 171, Jan. 18, 2019]

Supplement *Highlights* references: 31(1), 42(1), 44(1), 54(2), 95(1), 121(1).

§3.815 Monetary allowance under 38 U.S.C. chapter 18 for an individual with disability from covered birth defects whose biological mother is or was a Vietnam veteran; identification of covered birth defects.

(a) *Monthly monetary allowance.*

(1) *General.* VA will pay a monthly monetary allowance under subchapter II of 38 U.S.C. chapter 18 to or for an individual whose biological mother is or was a Vietnam veteran and who VA has determined to have disability resulting from one or more covered birth defects. Except as provided in paragraph (a)(3) of this section, the amount of the monetary allowance paid will be based upon the level of such disability suffered by the individual, as determined in accordance with the provisions of paragraph (e) of this section.

(2) *Affirmative evidence of cause other than mother's service during Vietnam era.* No monetary allowance will be provided under this section based on a particular birth defect of an individual in any case where affirmative evidence establishes that the birth defect results from a cause other than the active military, naval, or air service of the individual's mother during the Vietnam era and, in determining the level of disability for an individual with more than one birth defect, the particular defect resulting from other causes will be excluded from consideration. This will not prevent VA from paying a monetary allowance under this section for other birth defects.

(3) *Nonduplication; spina bifida.* In the case of an individual whose only covered birth defect is spina bifida, a monetary allowance will be paid under §3.814, and not under this section, nor will the individual be evaluated for disability under this section. In the case of an individual who has spina bifida and one or more additional covered birth defects, a monetary allowance will be paid under this section and the amount of the monetary allowance will be not less than the amount the individual would receive if his or her only covered birth defect were spina bifida. If, but for the individual's one or more additional covered birth defects, the monetary allowance payable to or for the individual would be based on an evaluation at Level I, II, or III, respectively, under §3.814(d), the evaluation of the individual's level of disability under paragraph (e) of this section will be not less than Level II, III, or IV, respectively.

(b) *No effect on other VA benefits.* Receipt of a monetary allowance under 38 U.S.C. chapter 18 will not affect the right of the individual, or the right of any person based on the individual's relationship to that person, to receive any other benefit to which the individual, or that person, may be entitled under any law administered by VA.

(c) *Definitions.*

(1) *Vietnam veteran.* For the purposes of this section, the term *Vietnam veteran* means a person who performed active military, naval, or air service in the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975, without regard to the characterization of the person's service. Service in the Republic of Vietnam includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

(2) *Individual.* For the purposes of this section, the term individual means a person, regardless of age or marital status, whose biological mother is or was a Vietnam veteran and who was conceived after the date on which the veteran first entered the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975. Notwithstanding the provisions of §3.204(a)(1), VA will require the types of evidence specified in §§3.209 and 3.210 sufficient to establish that a person is the biological son or daughter of a Vietnam veteran.

(3) *Covered birth defect.* For the purposes of this section, the term *covered birth defect* means any birth defect identified by VA as a birth defect that is associated with the service of women Vietnam veterans in the Republic of Vietnam during the period beginning on February 28, 1961, and ending on May 7, 1975, and that has resulted, or may result, in permanent physical or mental disability. However, the term covered birth defect does not include a condition due to a:

- (i) Familial disorder;
- (ii) Birth-related injury; or
- (iii) Fetal or neonatal infirmity with well-established causes.

(d) *Identification of covered birth defects.* All birth defects that are not excluded under the provisions of this paragraph are covered birth defects.

(1) Covered birth defects include, but are not limited to, the following (however, if a birth defect is determined to be familial in a particular family, it will not be a covered birth defect):

- (i) Achondroplasia;
- (ii) Cleft lip and cleft palate;
- (iii) Congenital heart disease;
- (iv) Congenital talipes equinovarus (clubfoot);
- (v) Esophageal and intestinal atresia;
- (vi) Hallerman-Streiff syndrome;
- (vii) Hip dysplasia;
- (viii) Hirschprung's disease (congenital megacolon);
- (ix) Hydrocephalus due to aqueductal stenosis;
- (x) Hypospadias;
- (xi) Imperforate anus;
- (xii) Neural tube defects (including spina bifida, encephalocele, and anencephaly);
- (xiii) Poland syndrome;
- (xiv) Pyloric stenosis;
- (xv) Syndactyly (fused digits);
- (xvi) Tracheoesophageal fistula;
- (xvii) Undescended testicle; and
- (xviii) Williams syndrome.

(2) Birth defects that are familial disorders, including hereditary genetic conditions, are not covered birth defects. Familial disorders include, but are not limited to, the following, unless the birth defect is not familial in a particular family:

- (i) Albinism;
- (ii) Alpha-antitrypsin deficiency;
- (iii) Crouzon syndrome;
- (iv) Cystic fibrosis;
- (v) Duchenne's muscular dystrophy;
- (vi) Galactosemia;
- (vii) Hemophilia;
- (viii) Huntington's disease;
- (ix) Hurler syndrome;
- (x) Kartagener's syndrome (Primary Ciliary Dyskinesia);
- (xi) Marfan syndrome;
- (xii) Neurofibromatosis;
- (xiii) Osteogenesis imperfecta;
- (xiv) Pectus excavatum;
- (xv) Phenylketonuria;
- (xvi) Sickle cell disease;
- (xvii) Tay-Sachs disease;
- (xviii) Thalassemia; and
- (xix) Wilson's disease.

(3) Conditions that are congenital malignant neoplasms are not covered birth defects. These include, but are not limited to, the following:

- (i) Medulloblastoma;
- (ii) Neuroblastoma;
- (iii) Retinoblastoma;
- (iv) Teratoma; and
- (v) Wilm's tumor.

(4) Conditions that are chromosomal disorders are not covered birth defects. These include, but are not limited to, the following:

- (i) Down syndrome and other Trisomies;
- (ii) Fragile X syndrome;
- (iii) Klinefelter's syndrome; and
- (iv) Turner's syndrome.

(5) Conditions that are due to birth-related injury are not covered birth defects. These include, but are not limited to, the following:

- (i) Brain damage due to anoxia during or around time of birth;
- (ii) Cerebral palsy due to birth trauma;
- (iii) Facial nerve palsy or other peripheral nerve injury;
- (iv) Fractured clavicle; and
- (v) Horner's syndrome due to forceful manipulation during birth.

(6) Conditions that are due to a fetal or neonatal infirmity with well-established causes or that are miscellaneous pediatric conditions are not covered birth defects. These include, but are not limited to, the following:

- (i) Asthma and other allergies;
- (ii) Effects of maternal infection during pregnancy, including but not limited to, maternal rubella, toxoplasmosis, or syphilis;
- (iii) Fetal alcohol syndrome or fetal effects of maternal drug use;
- (iv) Hyaline membrane disease;
- (v) Maternal-infant blood incompatibility;
- (vi) Neonatal infections;
- (vii) Neonatal jaundice;
- (viii) Post-infancy deafness/hearing impairment (onset after the age of one year);
- (ix) Prematurity; and
- (x) Refractive disorders of the eye.

(7) Conditions that are developmental disorders are not covered birth defects. These include, but are not limited to, the following:

- (i) Attention deficit disorder;
- (ii) Autism;
- (iii) Epilepsy diagnosed after infancy (after the age of one year);
- (iv) Learning disorders; and
- (v) Mental retardation (unless part of a syndrome that is a covered birth defect).

(8) Conditions that do not result in permanent physical or mental disability are not covered birth defects. These include, but are not limited to:

- (i) Conditions rendered non-disabling through treatment;
- (ii) Congenital heart problems surgically corrected or resolved without disabling residuals;
- (iii) Heart murmurs unassociated with a diagnosed cardiac abnormality;
- (iv) Hemangiomas that have resolved with or without treatment; and
- (v) Scars (other than of the head, face, or neck) as the only residual of corrective surgery for birth defects.

(e) *Disability evaluations.* Whenever VA determines, upon receipt of competent medical evidence, that an individual has one or more covered birth defects, VA will determine the level of disability currently resulting, in combination, from the covered birth defects and associated disabilities. No monetary allowance will be payable under this section if VA determines under this paragraph that an individual has no current disability resulting from the covered birth defects, unless VA determines that the provisions of paragraph (a)(3) of this section are for application. Except as otherwise provided in paragraph (a)(3) of this section, VA will determine the level of disability as follows:

(1) *Levels of disability.*

(i) *Level 0.* The individual has no current disability resulting from covered birth defects.

(ii) *Level I.* The individual meets one or more of the following criteria:

(A) The individual has residual physical or mental effects that only occasionally or intermittently limit or prevent some daily activities; or

(B) The individual has disfigurement or scarring of the head, face, or neck without gross distortion or gross asymmetry of any facial feature (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(iii) *Level II.* The individual meets one or more of the following criteria:

(A) The individual has residual physical or mental effects that frequently or constantly limit or prevent some daily activities, but the individual is able to work or attend school, carry out most household chores, travel, and provide age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene, and communication, behavior, social interaction, and intellectual functioning are appropriate for age; or

(B) The individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of one facial feature or one paired set of facial features (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(iv) *Level III.* The individual meets one or more of the following criteria:

(A) The individual has residual physical or mental effects that frequently or constantly limit or prevent most daily activities, but the individual is able to provide age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene;

(B) The individual is unable to work or attend school, travel, or carry out household chores, or does so intermittently and with difficulty;

(C) The individual's communication, behavior, social interaction, and intellectual functioning are not entirely appropriate for age; or

(D) The individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of two facial features or two paired sets of facial features (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(v) *Level IV.* The individual meets one or more of the following criteria:

(A) The individual has residual physical or mental effects that prevent age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene;

(B) The individual's communication, behavior, social interaction, and intellectual functioning are grossly inappropriate for age; or

(C) The individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of three facial features or three paired sets of facial features (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

(2) *Assessing limitation of daily activities.* Physical or mental effects on the following functions are to be considered in assessing limitation of daily activities:

- (i) Mobility (ability to stand and walk, including balance and coordination);
- (ii) Manual dexterity;
- (iii) Stamina;
- (iv) Speech;
- (v) Hearing;
- (vi) Vision (other than correctable refraction errors);
- (vii) Memory;
- (viii) Ability to concentrate;
- (ix) Appropriateness of behavior; and
- (x) Urinary and fecal continence.

(f) *Information for determining whether individuals have covered birth defects and rating disability levels.*

(1) VA may accept statements from private physicians, or examination reports from government or private institutions, for the purposes of determining whether an individual has a covered birth defect and for rating claims for covered birth defects. If they are adequate for such purposes, VA may make the determination and rating without further examination. In the absence of adequate information, VA may schedule examinations for the purpose of determining whether an individual has a covered birth defect and/or assessing the level of disability.

(2) Except in accordance with paragraph (a)(3) of this section, VA will not pay a monthly monetary allowance unless or until VA is able to obtain medical evidence adequate to determine that an individual has a covered birth defect and adequate to assess the level of disability due to covered birth defects.

(g) *Redeterminations.* VA will reassess a determination under this section whenever it receives evidence indicating that a change is warranted.

(h) *Referrals.* If a regional office is unclear in any case as to whether a condition is a covered birth defect, it may refer the issue to the Director of the Compensation and Pension Service for determination.

(i) *Effective dates.* Except as provided in §3.114(a) or paragraph (i)(1) or (2) of this section, VA will award the monetary allowance under subchapter II of 38 U.S.C. chapter 18, for an individual with disability resulting from one or more covered birth defects, based on an initial

claim or supplemental claim, as of the date VA received the claim (or the date of birth if the claim is received within one year of that date), the date entitlement arose, or December 1, 2001, whichever is latest. Subject to the condition that no benefits may be paid for any period prior to December 1, 2001:

(1) VA will increase benefits as of the earliest date the evidence establishes that the level of severity increased, but only if the beneficiary applies for an increase within one year of that date.

(2) If a claimant reopens a previously disallowed claim based on corrected military records, VA will award the benefit from the latest of the following dates: the date the veteran or beneficiary applied for a correction of the military records; the date the disallowed claim was filed; or, the date one year before the date of receipt of the reopened claim.

(j) *Reductions and discontinuances.* VA will generally reduce or discontinue awards under subchapter II of 38 U.S.C. chapter 18 according to the facts found except as provided in §§3.105 and 3.114(b).

(1) If benefits were paid erroneously because of beneficiary error, VA will reduce or discontinue benefits as of the effective date of the erroneous award.

(2) If benefits were paid erroneously because of administrative error, VA will reduce or discontinue benefits as of the date of last payment.

(Authority: 38 U.S.C. 501, 1811, 1812, 1813, 1814, 1815, 1816, 1831, 1832, 1833, 1834, 5101, 5110, 5111, 5112)

[67 FR 49587, July 31, 2002; 76 FR 4249, Jan. 25, 2011; 84 FR 171, Jan. 18, 2019]

Supplement *Highlights* reference: 54(2), 95(1), 121(1).

Subpart D—Universal Adjudication Rules That Apply to Benefit Claims Governed by Part 3 of This Title

Authority: 38 U.S.C. 501(a), unless otherwise noted.

Source: 66 FR 18195, Apr. 6, 2001, unless otherwise indicated.

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§3.2100 Scope of Applicability.

Unless otherwise specified, the provisions of this subpart apply only to claims governed by part 3 of this title. (Authority: 38 U.S.C. 501(a)).

Supplement *Highlights* reference: 45(1)

§3.2130 Will VA accept a signature by mark or thumbprint?

VA will accept signatures by mark or thumbprint if:

- (a) They are witnessed by two people who sign their names and give their addresses, or
- (b) They are witnessed by an accredited agent, attorney, or service organization representative, or
- (c) They are certified by a notary public or any other person having the authority to administer oaths for general purposes, or
- (d) They are certified by a VA employee who has been delegated authority by the Secretary under 38 CFR 2.3. (Authority: 38 U.S.C. 5101).

Supplement *Highlights* reference: 45(1)

§3.2400 Applicability of modernized review system.

(a) *Applicability.* The modernized review system defined in 38 CFR 19.2(b) applies to all claims, requests for reopening of finally adjudicated claims, and requests for revision based on clear and unmistakable error:

(1) For which VA issues notice of an initial decision on or after the effective date of the modernized review system as provided in 38 CFR 19.2(a); or

(2) Where a claimant has elected review of a legacy claim under the modernized review system as provided in paragraph (c) of this section.

(b) *Legacy claims.* A legacy claim is a claim, or request for reopening or revision of a finally adjudicated claim, for which VA provided notice of a decision prior to the effective date of the modernized review system and the claimant has not elected to participate in the modernized review system as provided in paragraph (c) of this section.

(c) *Election into the modernized review system.* For claims governed by this part, pursuant to election by a claimant, the modernized review system applies where:

(1) Rapid appeals modernization program election. A claimant with a legacy appeal elects to opt-in to the modernized review system on or after November 1, 2017, as part of a program authorized by the Secretary pursuant to section 4 of Public Law 115-55; or

(2) Election after receiving a statement of the case. A claimant with a legacy appeal elects to opt-in to the modernized review system, following issuance, on or after the effective date of the modernized system, of a VA Statement of the Case or Supplemental Statement of the Case, by filing for a review option under the new system in accordance with §3.2500 on a form prescribed by the Secretary within the time allowed for filing a substantive appeal under 38 CFR 19.52(b) and other applicable provisions in part 19 of this chapter.

(d) *Effect of election.* Once an eligible claimant elects the modernized review system with respect to a particular claim, the provisions of 38 CFR parts 3, 19, and 20 applicable to legacy claims and appeals no longer apply to that claim.

[84 FR 171, Jan. 18, 2019]

Supplement *Highlights* references: 121(1).

§3.2500 Review of decisions.*(a) Reviews available.*

(1) Within one year from the date on which the agency of original jurisdiction issues a notice of a decision on a claim or issue as defined in §3.151(c), except as otherwise provided in paragraphs (c), (e), and (f) of this section, a claimant may elect one of the following administrative review options by timely filing the appropriate form prescribed by the Secretary:

- (i) A request for higher-level review under §3.2601 or
- (ii) An appeal to the Board under §20.202 of this chapter.

(2) At any time after VA issues notice of a decision on an issue within a claim, a claimant may file a supplemental claim under §3.2501.

(b) Concurrent election prohibited. With regard to the adjudication of a claim or an issue as defined in §3.151(c), a claimant who has filed for review under one of the options available under paragraph (a) of this section may not, while that review is pending final adjudication, file for review under a different available option. While the adjudication of a specific benefit is pending on appeal before a federal court, a claimant may not file for administrative review of the claim under any of options listed in paragraph (a) of this section.

(c) Continuously pursued issues. A claimant may continuously pursue a claim or an issue by timely and properly filing one of the following administrative review options, as specified (except as otherwise provided in paragraphs (c), (e), and (f) of this section), after any decision by the agency of original jurisdiction, Board of Veterans' Appeals, or entry of judgment by the U.S. Court of Appeals for Veterans Claims, provided that any appeal to the U.S. Court of Appeals for Veterans Claims is timely filed as determined by the court:

(1) Following notice of a decision on an initial claim or a supplemental claim, the claimant may file a supplemental claim, request a higher-level review, or appeal to the Board of Veterans' Appeals.

(2) Following notice of a decision on a higher-level review, the claimant may file a supplemental claim or appeal to the Board of Veterans' Appeals. (See appeal to the Board, 38 CFR 20.202).

(3) Following notice of a decision on an appeal to the Board of Veterans' Appeals, the claimant may file a supplemental claim or file a notice of appeal to the Court of Appeals for Veterans Claims.

(4) Following a decision on an appeal to the Court of Appeals for Veterans Claims, the claimant may file a supplemental claim.

(d) *Voluntary withdrawal.* A claimant may withdraw a supplemental claim or a request for a higher-level review at any time before VA renders a decision on the issue. A claimant must submit in writing or through electronic submission in a manner prescribed by the Secretary any notice of withdrawal of an issue under the selected review option to the agency of original jurisdiction. The withdrawal will be effective the date VA receives it. A claimant may withdraw an appeal to the Board of Veteran's Appeals as prescribed in §20.205.

(e) *Changing review options while a review is pending adjudication—*

(1) Within one year of prior decision notice. A claimant may change the review option selected by withdrawing the request as prescribed in §3.2500(d) and filing the appropriate application for the requested review option within one year from the date on which VA issued notice of a decision on an issue.

(2) More than one year after notice of a decision. A claimant may change the review option selected to a supplemental claim after expiration of one-year following the date on which VA issued a notice of decision on an issue by following the procedure specified in paragraph (e)(1) of this section. Where VA receives the supplemental claim application after expiration of the one-year period, continuous pursuit of the claim will be broken and VA will apply the effective date provisions under paragraph (h)(2) of this section, unless VA grants an extension of the one-year period for good cause shown under §3.109(b) and the supplemental claim application is received within the extension period allowed.

(f) *Applicability.* This section applies to claims and requests under the modernized review system as set forth in §3.2400, with the exception that a supplemental claim may not be filed in connection with a denial of a request to revise a final decision of the agency of original jurisdiction based on clear and unmistakable error.

(g) *Review of simultaneously contested claims.* Notwithstanding other provisions of this part, a party to a simultaneously contested claim may only seek administrative review of a decision by the agency of original jurisdiction on such claim by filing an appeal to the Board as prescribed in §20.402 of this chapter within 60 days of the date VA issues notice of the decision on the claim. (See contested claims, 38 CFR 20.402).

(h) *Effective dates—*

(1) *Continuously pursued claims.* Except as otherwise provided by other provisions of this part, including §3.400, the effective date will be fixed in accordance with the date of receipt of the initial claim or date entitlement arose, whichever is later, if a claimant continuously pursues an issue by timely filing in succession any of the available review options as specified in paragraph (c) of this section within one year of the issuance of the decision (or the time period specified in paragraph (f) of this section, as applicable to simultaneously contested claims), provided that any appeal to the U.S. Court of Appeals for Veterans Claims must be accepted as timely by that court.

(2) *Supplemental claims received more than one year after notice of decision.*

Except as otherwise provided in this section, for supplemental claims received more than one year after the date on which the agency of original jurisdiction issues notice of a decision or the Board of Veterans' Appeals issued notice of a decision, the effective date will be fixed in accordance with the date entitlement arose, but will not be earlier than the date of receipt of the supplemental claim.

[84 FR 171, Jan. 18, 2019]

Supplement *Highlights* references: 121(1).

§3.2501 Supplemental claims.

Except as otherwise provided, a claimant or his or her authorized representative, if any, who disagrees with a prior VA decision may file a supplemental claim (see §3.1(p)(2)) by submitting in writing or electronically a complete application (see §3.160(a)) on a form prescribed by the Secretary any time after the agency of original jurisdiction issues notice of a decision, regardless of whether the claim is pending (see §3.160(c)) or has become finally adjudicated (see §3.160(d)). If new and relevant evidence is presented or secured with respect to the supplemental claim, the agency of original jurisdiction will readjudicate the claim taking into consideration all of the evidence of record. If new and relevant evidence is not presented or secured, the agency of original jurisdiction will issue a decision finding that there was insufficient evidence to readjudicate the claim. In determining whether new and relevant evidence is presented or secured, VA will consider any VA treatment records reasonably identified by the claimant and any evidence received by VA after VA issued notice of a decision on the claim and while the evidentiary record was closed (see 3.103(c)).

(a) *New and relevant evidence.* The new and relevant standard will not impose a higher evidentiary threshold than the previous new and material evidence standard under §3.156(a).

(1) *Definition.* New evidence is evidence not previously part of the actual record before agency adjudicators. Relevant evidence is information that tends to prove or disprove a matter at issue in a claim. Relevant evidence includes evidence that raises a theory of entitlement that was not previously addressed.

(2) *Receipt prior to notice of a decision.* New and relevant evidence received before VA issues its decision on a supplemental claim will be considered as having been filed in connection with the claim.

(b) *Evidentiary record.* The evidentiary record for a supplemental claim includes all evidence received by VA before VA issues notice of a decision on the supplemental claim. For VA to readjudicate the claim, the evidentiary record must include new and relevant evidence that was not of record as of the date of notice of the prior decision.

(c) *Duty to assist.* Upon receipt of a substantially complete supplemental claim, VA's duty to assist in the gathering of evidence under §3.159 of this part is triggered and includes any such assistance that may help secure new and relevant evidence as defined in paragraph (a) of this section to complete the supplemental claim application.

(d) *Date of filing.* The filing date of a supplemental claim is determined according to §3.155, with the exception of the intent to file rule found in §3.155(b) which applies to initial claims. (Authority: 38 U.S.C. 501, 5103A(h), 5108)

[84 FR 171, Jan. 18, 2019]

Supplement *Highlights* references: 121(1).

§3.2502 Return by higher-level adjudicator or remand by the Board of Veterans' Appeals.

Upon receipt of a returned claim from a higher-level adjudicator or remand by the Board of Veterans' Appeals, the agency of original jurisdiction will expeditiously readjudicate the claim in accordance with 38 U.S.C. 5109B. The agency of original jurisdiction retains jurisdiction of the claim. In readjudicating the claim, the agency of original jurisdiction will correct all identified duty to assist errors, complete a new decision and issue notice to the claimant and or his or her legal representative in accordance with 3.103(f). The effective date of any evaluation and award of pension, compensation or dependency and indemnity compensation will be determined in accordance with the date of receipt of the initial claim as prescribed under §3.2500(g).

[84 FR 172, Jan. 18, 2019]

Supplement *Highlights* references: 121(1).

[Reserved]

Revisions

§3.2600 Legacy review of benefit claims decisions.

This section applies only to legacy claims as defined in §3.2400 in which a Notice of Disagreement is timely filed on or after June 1, 2001, under regulations applicable at the time of filing.

(a) A claimant who has filed a Notice of Disagreement submitted in accordance with the provisions of §20.201 of this chapter, and either §20.302(a) or §20.501(a) of this chapter, as applicable, with a decision of an agency of original jurisdiction on a benefit claim has a right to a review of that decision under this section. The review will be conducted by a Veterans Service Center Manager, Pension Management Center Manager, or Decision Review Officer, at VA's discretion. An individual who did not participate in the decision being reviewed will conduct this review. Only a decision that has not yet become final (by appellate decision or failure to timely appeal) may be reviewed. Review under this section will encompass only decisions with which the claimant has expressed disagreement in the Notice of Disagreement. The reviewer will consider all evidence of record and applicable law, and will give no deference to the decision being reviewed.

(b) Unless the claimant has requested review under this section with his or her Notice of Disagreement, VA will, upon receipt of the Notice of Disagreement, notify the claimant in writing of his or her right to a review under this section. To obtain such a review, the claimant must request it not later than 60 days after the date VA mails the notice. This 60-day time limit may not be extended. If the claimant fails to request review under this section not later than 60 days after the date VA mails the notice, VA will proceed with the traditional appellate process by issuing a Statement of the Case. A claimant may not have more than one review under this section of the same decision.

(c) The reviewer may conduct whatever development he or she considers necessary to resolve any disagreements in the Notice of Disagreement, consistent with applicable law. This may include an attempt to obtain additional evidence or the holding of an informal conference with the claimant. Upon the request of the claimant, the reviewer will conduct a hearing under §3.103(c).

(d) The reviewer may grant a benefit sought in the claim notwithstanding §3.105(b), but, except as provided in paragraph (e) of this section, may not revise the decision in a manner that is less advantageous to the claimant than the decision under review. A review decision made under this section will include a summary of the evidence, a citation to pertinent laws, a discussion of how those laws affect the decision, and a summary of the reasons for the decision.

(e) Notwithstanding any other provisions of this section, the reviewer may reverse or revise (even if disadvantageous to the claimant) prior decisions of an agency of original jurisdiction (including the decision being reviewed or any prior decision that has become final due to failure to timely appeal) on the grounds of clear and unmistakable error (see §3.105(a)).

(f) Review under this section does not limit the appeal rights of a claimant. Unless a claimant withdraws his or her Notice of Disagreement as a result of this review process, VA will proceed with the traditional appellate process by issuing a Statement of the Case.

[66 FR 21874, May 2, 2001, as amended at 67 FR 46868, July 17, 2002; 74 FR 26959, June 5, 2009; 79 FR 57697, Sep. 25, 2014; 84 FR 172, Jan. 18, 2019]

Supplement *Highlights* references: 87(2), 111(1), 121(1).

§3.2601 Higher-level review.

(a) *Applicability.* This section applies to all claims under the modernized review system, with the exception of simultaneously contested claims.

(b) *Requirements for election.* A claimant who is dissatisfied with a decision by the agency of original jurisdiction may file a request for higher-level review in accordance with §3.2500, by submitting a complete request for review on a form prescribed by the Secretary.

(c) *Complete request.* A complete request for higher-level review is a submission of a request on a form prescribed by the Secretary, whether paper or electronic, that meets the following requirements:

(1) A complete request must provide the name of the claimant and the relationship to the veteran, if applicable;

(2) A complete request must be signed by the claimant or a person legally authorized to sign for the claimant; and

(3) A complete request must specify the date of the underlying decision for which review is requested and specify the issues for which review is requested.

(d) *Filing period.* A complete request for higher-level review must be received by VA within one year of the date of VA's issuance of the notice of the decision. If VA receives an incomplete request form, VA will notify the claimant and the claimant's representative, if any, of the information necessary to complete the request form prescribed by the Secretary. If a complete request is submitted within 60 days of the date of the VA notification of such incomplete request or prior to the expiration of the one-year filing period, VA will consider it filed as of the date VA received the incomplete application form that did not meet the standards of a complete request.

(e) *Who may conduct a higher-level review.* Higher-level review will be conducted by an experienced adjudicator who did not participate in the prior decision. Selection of a higher-level adjudicator to conduct a higher-level review is at VA's discretion. As a general rule, an adjudicator in an office other than the office that rendered the prior decision will conduct the higher-level review. An exception to this rule applies for claims requiring specialized processing, such as where there is only one office that handles adjudication of a particular type of entitlement. A claimant may request that the office that rendered the prior decision conduct the higher-level review, and VA will grant the request in the absence of good cause to deny such as when processing is centralized at one office within the agency of original jurisdiction or when the office that rendered the prior decision does not have higher-level review personnel available to conduct the review.

(f) *Evidentiary record.* The evidentiary record in a higher-level review is limited to the evidence of record as of the date the agency of original jurisdiction issued notice of the prior decision under review and the higher-level adjudicator may not consider additional evidence. The higher-level adjudicator may not order development of additional evidence that may be relevant to the claim under review, except as provided in paragraph (g) of this section.

(g) *Duty to assist errors.* The higher-level adjudicator will ensure that VA complied with its statutory duty to assist (see §3.159) in gathering evidence applicable prior to issuance of the decision being reviewed. If the higher-level adjudicator both identifies a duty to assist error that existed at the time of VA's decision on the claim under review and cannot grant the maximum benefit for the claim, the higher-level adjudicator must return the claim for correction of the error and readjudication. Upon receipt, the agency of jurisdiction will expeditiously readjudicate the claim in accordance with 38 U.S.C. 5109B.

(1) For disability evaluations, the maximum benefit means the highest schedular evaluation allowed by law and regulation for the issue under review.

(2) For ancillary benefits, the maximum benefit means the granting of the benefit sought.

(3) For pension benefits or dependents indemnity compensation, the maximum benefit means granting the highest benefit payable.

(h) *Informal conferences.* A claimant or his or her representative may include a request for an informal conference with a request for higher-level review. For purposes of this section, informal conference means contact with a claimant's representative or, if not represented, with the claimant, telephonically, or as otherwise determined by VA, for the sole purpose of allowing the claimant or representative to identify any errors of law or fact in a prior decision based on the record at the time the decision was issued. If requested, VA will make reasonable efforts to contact the claimant and/or the authorized representative to conduct one informal conference during a higher-level review, but if such reasonable efforts are not successful, a decision may be issued in the absence of an informal conference. The higher-level adjudicator with determinative authority over the issue will conduct the informal conference, absent exceptional circumstances. VA will not receive any new evidence or introduction of facts not present at the time of the prior decision or apart of the evidentiary record in support of the higher-level review during the informal conference in accordance with paragraph (d) of this section. Any expenses incurred by the claimant in connection with the informal conference are the responsibility of the claimant.

(i) *De novo review.* The higher-level adjudicator will consider only those decisions and claims for which the claimant has requested higher-level review, and will conduct a de novo review giving no deference to the prior decision, except as provided in §3.104(c).

(j) *Difference of opinion.* The higher-level adjudicator may grant a benefit sought in the claim under review based on a difference of opinion (see §3.105(b)). However, any finding favorable to the claimant is binding except as provided in §3.104(c) of this part. In addition, the higher-level adjudicator will not revise the outcome in a manner that is less advantageous to the claimant based solely on a difference of opinion. The higher-level adjudicator may reverse or revise (even if disadvantageous to the claimant) prior decisions by VA (including the decision being reviewed or any prior decision) on the grounds of clear and unmistakable error under §3.105(a)(1) or (a)(2), as applicable, depending on whether the prior decision is finally adjudicated.

(k) *Notice requirements.* Notice of a decision made under this section will include all of the elements described in §3.103(f), a general statement indicating whether evidence submitted while the record was closed was not considered, and notice of the options available to have such evidence considered.

(Authority: 38 U.S.C. 5109A and 7105(d))

[84 FR 171, Jan. 18, 2019]

Supplement *Highlights* references: 121(1).

End of Subpart D

End of Book B