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Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 95

Covering period of *Federal Register* issues
through March 3, 2010

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Title 38, Part 3

Adjudication

Veterans Benefits Administration

Supplement No. 95

3 March 2011

Covering the period of Federal Register issues
through March 3, 2011

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Book B, Supplement No. 95

March 3, 2011

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HIGHLIGHTS

Book B, Supplement No. 95 March 3, 2011

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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 25 January 2011, the VA published a final rule, effective 24 February 2011, to amend VA adjudication, medical, and vocational rehabilitation and employment regulations to incorporate relevant provisions of the Veterans Benefits Act of 2003. Specifically, this document amends VA regulations regarding herbicide exposure of certain veterans who served in or near the Korean demilitarized zone and regulations regarding spina bifida in their children. Changes:

- In §3.27, revised paragraph (c);
- In §3.29, revised paragraph (c);
- In §3.31, revised the introductory text;
- In §3.105, revised paragraph (g);
- In §3.114, revised paragraph (a);
- In §3.216, revised the introductory text;
- In §3.261, revised paragraph (a)(40);
- In §3.262, revised paragraph (y);
- In §3.263, revised paragraph (g);
- In §3.272, revised paragraph (u);
- In §3.275, revised paragraph (i);

- In §3.307, added paragraph (a)(6)(iv);
- In §3.403, revised paragraph (b) and added paragraph (d);
- In §3.503, revised paragraph (b); and
- In §3.814, revised the section heading, paragraph (a) and paragraph (e) introductory text; redesignated paragraphs (c)(2) and (3) as (c)(3) and (4) respectively; and added new paragraph (c)(2).





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§3.26 Section 306 and old-law pension annual income limitations.

(a) The annual income limitations for section 306 pension shall be the amounts specified in section 306(a)(2)(A) of Pub. L. 95-588, as increased from time to time under section 306(a)(3) of Pub. L. 95-588.

(b) If a beneficiary under section 306 pension is in need of aid and attendance, the annual income limitation under paragraph (a) of this section shall be increased in accordance with 38 U.S.C. 1521(d), as in effect on December 31, 1978.

(c) The annual income limitations for old-law pension shall be the amounts specified in section 306(b)(3) of Pub. L. 95-588, as increased from time to time under section 306(b)(4) of Pub. L. 95-588.

(d) Each time there is an increase under section 306(a)(3) or (b)(4) of Pub. L. 95-588, the actual income limitations will be published in the “Notices” section of the *Federal Register*. (Authority: 38 U.S.C. 501(a))

[52 FR 34908, Sept. 14, 1987]

§3.27 Automatic adjustment of benefit rates.

(a) *Improved pension.* Whenever there is a cost-of-living increase in benefit amounts payable under section 215(i) of Title II of the Social Security Act, VA shall, effective on the dates such increases become effective, increase by the same percentage each maximum annual rate of pension. (Authority: 38 U.S.C. 5312(a))

(b) *Parents' dependency and indemnity compensation—maximum annual income limitation and maximum monthly rates.* Whenever there is a cost-of-living increase in benefit amounts payable under section 215(i) of Title II of the Social Security Act, VA shall, effective on the dates such increases become effective, increase by the same percentage the annual income limitations and the maximum monthly rates of dependency indemnity compensation for parents. (Authority: 38 U.S.C. 5312(b)(1))

(c) *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.* Whenever there is a cost-of-living increase in benefit amounts payable under section 215(i) of Title II of the Social Security Act, VA shall, effective on the dates such increases become effective, increase by the same percentage the monthly allowance rates under 38 U.S.C. chapter 18. (Authority: 38 U.S.C. 1805(b)(3), 1815(d), 1821, 5312)

(d) *Medal of Honor pension.* Beginning in the year 2004, VA shall, effective December 1 of each year, increase the monthly Medal of Honor pension by the same percentage as the percentage by which benefit amounts payable under section 215(i) of Title II of the Social Security Act are increased effective December 1 of such year. (Authority: 38 U.S.C. 1562(e))

(e) *Publishing requirements.* Increases in pension rates, parents' dependency and indemnity compensation rates and income limitation, the monthly allowance rates under 38 U.S.C. chapter 18 and the Medal of Honor pension made under this section shall be published in the *Federal Register*. (Authority: 38 U.S.C. 1805(b)(3), 1815(d), 5312(c)(1))

[44 FR 45934, Aug. 6, 1979, as amended at 52 FR 34908, Sept. 14, 1987; 62 FR 51278, Sept. 30, 1997; 67 FR 49586, July 31, 2002; 68 FR 55467, Sept. 26, 2003; 76 FR 4247, Jan. 25, 2011]

Supplement *Highlights* references: 31(1), 54(2), 60(1), 95(1).

§3.28 Automatic adjustment of section 306 and old-law pension income limitations.

Whenever the maximum annual rates of improved pension are increased by reason of the provisions of 38 U.S.C. 5312, the following will be increased by the same percentage effective the same date.

(a) The maximum annual income limitations applicable to continued receipt of section 306 and old-law pension; and

(b) The dollar amount of a veteran's spouse's income that is excludable in determining the income of a veteran for section 306 pension purposes. (See §3.262(b)(2))

These increases shall be published in the *Federal Register* at the same time that increases under §3.27 are published. (Authority: Sec. 306, Pub. L. 95-588).

[52 FR 34908, Sept. 14, 1987]

Cross reference: Section 306 and old law pension annual income limitations.
See § 3.26.

§3.29 Rounding.

(a) *Annual rates.* Where the computation of an increase in improved pension rates under §§3.23 and 3.24 would otherwise result in a figure which includes a fraction of a dollar, the benefit rate will be adjusted to the next higher dollar amount. This method of computation will also apply to increases in old-law and section 306 pension annual income limitations under §3.26, including the income of a spouse which is excluded from a veteran's countable income, and parents' dependency and indemnity compensation benefit rates and annual Income limitations under §3.25. (Authority: 38 U.S.C. 5312(c)(2))

(b) *Monthly or other periodic pension rates.* After determining the monthly or other periodic rate of improved pension under §§3.273 and 3.30 or the rate payable under section 306(a) of Pub. L. 95-588 (92 Stat. 2508), the resulting rate, if not a multiple of one dollar, will be rounded down to the nearest whole dollar amount. The provisions of this paragraph apply with respect to amounts of pension payable for periods beginning on or after June 1, 1983, under the provisions of 38 U.S.C. 1521, 1541 or 1542, or under section 306(a) of Pub. L. 95-588. (Authority: 38 U.S.C. 5123)

(c) *Monthly rates under 38 U.S.C. chapter 18.* When increasing the monthly monetary allowance rates 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, VA will round any resulting rate that is not an even dollar amount to the next higher dollar. (Authority: 38 U.S.C. 1805(b)(3), 1815(d), 1821, 5312)

[48 FR 34471, July 29, 1983, as amended at 65 FR 35282, June 2, 2000; 67 FR 49586, July 31, 2002; 76 FR 4247, Jan. 25, 2011]

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

§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, reopened, 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, reopened, 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]

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

§3.105 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) *Error.* Previous determinations which are final and binding, including decisions of service connection, degree of disability, age, marriage, relationship, service, dependency, line of duty, and other issues, will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. For the purpose of authorizing benefits, the rating or other adjudicative decision which constitutes a reversal 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.

(b) *Difference of opinion.* Whenever an adjudicative agency is of the opinion that a revision or an amendment of a previous decision is warranted, 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 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)

[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]

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).

§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).

§3.112 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 reopened 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]

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

§3.214 Court decisions; unmarried surviving spouses.

Effective July 15, 1958, a decision rendered by a Federal court in an action to which the United States was a party holding that a surviving spouse of a veteran has not remarried will be followed in determining eligibility for pension, compensation or dependency and indemnity compensation.

[31 FR 2782, Feb. 16, 1966, as amended at 52 FR 19349, May 22, 1987; 61 FR 56626, Nov. 4, 1996; 62 FR 5529, Feb. 6, 1997]

Cross references: Abandoned claims. See 3.158. Change in status of dependents. See §3.651. Dependency, income and estate. See §3.660. Evidence of dependents and age. See §3.204.

Supplement *Highlights* reference: 27(2)

§3.215 Termination of marital relationship or conduct.

On or after January 1, 1971, benefits may be resumed to an unmarried surviving spouse upon filing of an application and submission of satisfactory evidence that the surviving spouse has ceased living with another person and holding himself or herself out openly to the public as that person's spouse or that the surviving spouse has terminated a relationship or conduct which had created an inference or presumption of remarriage or related to open or notorious adulterous cohabitation or similar conduct, if the relationship terminated prior to November 1, 1990. Such evidence may consist of, but is not limited to, the surviving spouse's certified statement of the fact. (Authority: 38 U.S.C. 103)

[52 FR 19349, May 22, 1987; 56 FR 25044, June 3, 1991; 57 FR 10426, Mar. 26, 1992; 58 FR 32445, June 10, 1993]

Cross reference: Evidence of dependents and age. See §3.204.

Supplement *Highlights* reference: 8(2a).

§3.216 Mandatory disclosure of social security numbers.

Any person who applies for or receives any compensation or pension benefit as defined in §§3.3, 3.4, or 3.5 of this part, or a monetary allowance under 38 U.S.C. chapter 18, shall, as a condition for receipt or continued receipt of benefits, furnish the Department of Veterans Affairs upon request with his or her social security number and the social security number of any dependent or beneficiary on whose behalf, or based upon whom, benefits are sought or received. However, no one shall be required to furnish a social security number for any person to whom none has been assigned. Benefits will be terminated if a beneficiary fails to furnish the Department of Veterans Affairs with his or her social security number or the social security number of any dependent or beneficiary on whose behalf, or based upon whom, benefits are sought or received, within 60 days from the date the beneficiary is requested to furnish the social security number. (Authority: 38 U.S.C. 1832, 5101(c))

(Approved by the Office of Management and Budget under control number 2900-0522)

[57 FR 8268, Mar. 9, 1992; as amended at 57 FR 27935, June 23, 1992; 65 FR 35282, June 2, 2000; 67 FR 49586, July 31, 2002; 76 FR 4248, Jan. 25, 2011]

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

§3.261 Character of income; exclusions and estates.

The following factors will be considered in determining whether a claimant meets the requirements of §§3.250, 3.251 and 3.252 with reference to dependency, income limitations and corpus of estate:

(a) <i>Income</i>	<i>Dependency (parents)</i>	<i>Dependency and indemnity compensation</i>	<i>Pension; old-law (veterans, Surviving spouses, and children)</i>	<i>Pension; Section 306 (veterans, Surviving spouses, and children)</i>	<i>See</i>
(1) Total income from employment, business, investments, or rents					
	Included	Included	Included	Included	§3.262(a)
(2) Income of spouse					
	Included	Included	Excluded	Included	§3.262(b)
(3) Earnings of members of family under legal age					
	Included	Excluded	Excluded	Excluded	§3.250(b)(2) §3.252(e)(3)
(4) Earned income of child-claimant					
			Included	Excluded	
(5) Gifts, including contributions from adult members of family:					
Property	Included	Included	Included	Excluded	§3.262(k)
Money	Included	Included	Included	Included	
(6) Value of maintenance by relative, friend, or organization					
	Excluded	Excluded	Excluded	Excluded	§3.262(c)
(7) Rental value of property owned by and resided in by claimant					
	Excluded	Excluded	Excluded	Excluded	
(8) Charitable donations					
	Excluded	Excluded	Included	Excluded	§3.262(d)
(9) Family allowance authorized by service personnel					
	Included	Included	Included	Included	
(10) Reasonable value of allowances to person in service in addition to base pay					
	Included	Included	Included	Included except as earned income of child-claimant	
(11) Mustering-out pay					
	Excluded	Included	Excluded	Included except as earned income of child-claimant	
(12) Six-months' death gratuity					
	Excluded	Excluded	Excluded	Excluded	

(a) <i>Income</i>	<i>Dependency (parents)</i>	<i>Dependency and indemnity compensation</i>	<i>Pension; old-law (veterans, Surviving spouses, and children)</i>	<i>Pension; Section 306 (veterans, Surviving spouses, and children)</i>	<i>See</i>
(13) Bonus or similar cash gratuity paid by any State based on service in Armed Forces of United States					
	Excluded	Excluded	Excluded	Excluded	
(14) Retired Serviceman's Family Protection Plan; Survivor Benefit Plan (10 U.S.C. ch. 73):					
Retired Serviceman's Family Protection Plan (Subch. I):					
Annuities	Excluded	Excluded	Excluded	Excluded	
Refund (10 U.S.C. 1446)	Included	Included	Included	Included	
Survivor Benefit Plan (Subch. II)					
(Pub. L. 92-425; 86 Stat. 706)	Included	Included	Included	Included	§3.262(e)
Annuity under §653, Pub. L. 100-456	Included	Included	Excluded	Excluded	§3.262(r)
(15) Retirement pay received direct from service department					
	Included	Included	Included	Included	§3.262(e) §3.262(h)
(16) Retirement benefits; general					
	Included	Included	Included	Included	§3.262(e)
(17) Social security benefits:					
Old age and survivors', and disability insurance					
	Included	Included	Included	Included	§3.262(f)
Charitable programs					
	Excluded	Excluded	Included	Excluded	
Lump-sum death payments					
	Included	Excluded	Included	Excluded	
Supplemental security income					
	Excluded	Excluded	Included	Excluded	
(18) Railroad Retirement benefits					
	Excluded	Included	Disability pension— Excluded; Death pension— Included	Included	§3.262(g)
(19) Retirement pay waived under Federal statute					
	Excluded	Excluded	Excluded	Included	§3.262(h)

(a) Income	Dependency (parents)	Dependency and indemnity compensation	Pension; old-law (veterans, Surviving spouses, and children)	Pension; Section 306 (veterans, Surviving spouses, and children)	See
(20) Department of Veterans Affairs payments:					
Pension					
	Excluded	Excluded	Excluded	Excluded	
Compensation and dependency and indemnity compensation					
	Excluded	Excluded	Excluded	Excluded	
World War I adjusted compensation					
	Excluded	Included	Excluded	Included	
U.S. Government life insurance or national service life insurance for disability or death, maturity of endowment policies, and dividends, including special and termination dividends					
	Excluded	Excluded	Excluded	Excluded	
Service members' group life insurance					
	Excluded	Excluded	Excluded	Excluded	
Veterans' group life insurance					
	Excluded	Excluded	Excluded	Excluded	
Servicemembers' indemnity					
	Excluded	Excluded	Excluded	Excluded	
Subsistence allowance (38 U.S.C. ch. 31)					
	Included	Included	Included	Included	
Veterans educational assistance in excess of amounts expended for training (38 U.S.C. ch. 34)					
	Included	Included	Included	Included	
Educational assistance (38 U.S.C. ch. 35)					
	---	---	Excluded	Excluded	
Special allowance under 38 U.S.C. 1312(a)					
	Excluded	Included	Excluded	Included	
Statutory burial allowance					
	Excluded	Excluded	Excluded	Excluded	
Accrued					
	Excluded	Included, except accrued as reimbursement	Excluded	Included, except accrued as reimbursement	
(21) Compensation (civilian) for injury or death					
	Included	Included	Included	Included	§3.262(i)
(22) Contributions by a public or private employer to a:					
Public or private health or hospitalization plan for an active or retired employee					
	Excluded	Excluded	Excluded	Excluded	
Retired employee as reimbursement for premiums for supplementary medical insurance benefits under the Social Security Program (Pub. L. 91-588; 84 Stat. 1580)					
	Included	Included	Excluded	Excluded	

(a) <i>Income</i>	<i>Dependency (parents)</i>	<i>Dependency and indemnity compensation</i>	<i>Pension; old-law (veterans, Surviving spouses, and children)</i>	<i>Pension; Section 306 (veterans, Surviving spouses, and children)</i>	<i>See</i>
(23) Overtime pay; Government employees					
	Included	Included	Disability pension— Excluded. Death pension— Included	Included	
(24) Commercial life insurance; disability, accident, or health insurance, less payments of medical or hospital expenses resulting from the accident or disease for which payments are made.					
	Included (as received)	Included (as received)	Included, (special provision)	Included (as received)	§3.262(j)
(25) Commercial annuities or endowments					
	Included (as received)	Included (special provision)	Included, (special provision)	Included (special provision)	§3.262(j)
(26) Dividends from commercial insurance					
	Excluded	Excluded	Excluded	Excluded	
(27) Insurance under Merchant Marine Act of 1936, as amended					
	Included	Included	Included	Included	
(28) Reimbursement for casualty loss (Pub. L. 100-456).					
	Included	Excluded	Included	Included	§3.262(t)
Other fire insurance					
	Excluded	Excluded	Excluded	Excluded	§3.262(t)
(29) Bequests, devises and inheritances:					
Property	Included	Excluded	Included	Excluded	§3.262(k)
Money	Included	Included	Included	Included	
Joint bank accounts	Included	Included	Included	Excluded	§3.262(k)(1)
(30) Profit from sale of property					
	Excluded	Excluded	Excluded	Excluded	§3.262(k)
(31) Jury duty or obligatory civic duties					
	Excluded	Excluded	Excluded	Excluded	
(32) Relocation payments (Pub. L. 90-448; Pub. L. 90-495)					
	Excluded	Excluded	Excluded	Excluded	§3.262(c)

(a) Income	Dependency (parents)	Dependency and indemnity compensation	Pension; old-law (veterans, Surviving spouses, and children)	Pension; Section 306 (veterans, Surviving spouses, and children)	See
(33) The following programs administered by the ACTION agency:					
Foster Grandparent Program and Older Americans Community Service Programs payments (Pub. L. 93-29; 87 Stat. 55)					
	Excluded	Excluded	Excluded	Excluded	§3.262(q)(1)
Volunteers in Service to America (VISTA),					
University Year for ACTION (UYA),					
Program for Local Services (PLS),					
ACTION Cooperative Volunteers (ACV),					
Foster Grandparent Program (FGP), and					
Older American Community Service Programs,					
Retired Senior Volunteer Program (RSVP),					
Senior Companion Program (Pub. L. 93-113; 87 Stat. 394)					
	Excluded	Excluded	Excluded	Excluded	§3.262(q)(2)
(34) The Service Corps of Retired Executives (SCORE) and Active Corps of Executives (ACE) administered by the Small Business Administration. (Pub. L. 93-113; 87 Stat. 394)					
	Excluded	Excluded	Excluded	Excluded	§3.262(q)(2)
(35) Agent Orange settlement payments (Pub. L. 101-201)					
	Excluded	Excluded	Excluded	Excluded	§3.262(s)
(36) Restitution to individuals of Japanese ancestry (Pub. L. 100-383).					
	Excluded	Excluded	Excluded	Excluded	§3.262(u)
(37) Income received by American Indian beneficiaries from Trust or Restricted lands (Pub. L. 103-66)					
	Excluded	Excluded	Excluded	Excluded	§3.262(v)
(38) Income received under Section 6 of the Radiation Exposure Compensation Act (Pub. L. 101-426)					
	Excluded	Excluded	Excluded	Excluded	§3.262(w)
(39) Cash, stock, land or other interests received from a Native Corporation under the Alaska Native Claims Settlement Act (43 U.S.C. 1601, <i>et seq.</i>)					
	Excluded	Excluded	Excluded	Excluded	§3.262(x)
(40) 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 (38 U.S.C. 1833(c))					
	Excluded	Excluded	Excluded	Excluded	§3.262(y)
(41) Income received under the Victims of Crime Act of 1984 (42 U.S.C. 10601-10605).					
	Excluded ¹	Excluded ¹	Excluded ¹	Excluded ¹	§3.262(z)
(42) Income received under Medicare prescription drug discount card and transitional assistance program (42 U.S.C. 1395w-141(g)(6)).					
	Excluded	Excluded	Excluded	Excluded	§3.262(aa)

(b) <i>Deduction of Amounts Paid by Claimant</i>	<i>Dependency (parents)</i>	<i>Dependency and indemnity compensation</i>	<i>Pension; old-law (veterans, Surviving spouses, and children)</i>	<i>Pension; Section 306 (veterans, Surviving spouses, and children)</i>	<i>See</i>
(1) Unusual medical expenses					
	Not authorized	Authorized	Not authorized	Authorized	§§3.262(b)(1), & (l)
(2) Veteran: just debts, expenses of last illness, and burial					
	Not authorized	Authorized, except debts	Not authorized	Authorized	§§3.262(m) & (o)
(3) Veteran's spouse or child: expenses of last illness and burial					
	Not authorized	Not authorized	Not authorized	Authorized	§3.262(n)
(4) Parent's spouse: just debts; expenses of last illness and burial					
	Not authorized	Authorized	---	---	§3.262(o)
(5) Prepayments on real property mortgage after death of spouse (Pub. L. 91-588)					
	Not authorized	Not authorized	Not authorized	Authorized	§3.262(k)(6)
(c) <i>Corpus of estate</i>	<i>Dependency (parents)</i>	<i>Dependency and indemnity compensation</i>	<i>Pension; old-law (veterans, Surviving spouses, and children)</i>	<i>Pension; Section 306 (veterans, Surviving spouses, and children)</i>	<i>See</i>
	Considered Conditionally	Not considered	Not considered	Considered	§3.263

1. The compensation received through a crime victim compensation program will be excluded from income computations unless the total amount of assistance received from all federally funded programs is sufficient to fully compensate the claimant for losses suffered as a result of the crime.

[28 FR 31, Jan. 1, 1963, as amended at 29 FR 15205, Nov. 11, 1964; 31 FR 15632, Dec. 13, 1966; 33 FR 15286, Oct. 15, 1968; 36 FR 8446, May 6, 1971; 37 FR 6677, Apr. 1, 1972; 37 FR 7092, Apr. 8, 1972; 37 FR 21436, Oct. 11, 1972; 38 FR 872, Jan. 5, 1973; 38 FR 26804, Sept. 26, 1973; 38 FR 28826, Oct. 17, 1973; 40 FR 13305, Mar. 26, 1975; 40 FR 57459, Dec. 10, 1975; 41 FR 17386, Apr. 26, 1976; 42 FR 43834, Aug. 31, 1977; 57 FR 59298, Dec. 15, 1992; 58 FR 12174, Mar. 3, 1993; 58 FR 31909, June 7, 1993; 58 FR 33766, June 21, 1993; 59 FR 37695, July 25, 1994; 60 FR 2522, Jan. 10, 1995; 60 FR 18355, Apr. 11, 1995; 62 FR 35970, July 3, 1997; 62 FR 51278, Sept. 30, 1997; 67 FR 49586, July 31, 2002; 68 FR 60852, Oct. 24, 2003; 70 FR 15591, Mar. 28, 2005; 76 FR 4248, Jan. 25, 2011]

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

[Reserved]

(u) *Restitution to individuals of Japanese ancestry.* Effective August 10, 1988, for the purposes of old law pension, section 306 pension, parents' death compensation, and parents' dependency and indemnity compensation, there shall be excluded from income computation any payment made as restitution under Public Law 100-383 to individuals of Japanese ancestry who were interned, evacuated, or relocated during the period December 7, 1941, through June 30, 1946, pursuant to any law, Executive Order, Presidential proclamation, directive, or other official action respecting these individuals. (Authority: Sec. 105, Pub. L. 100-383; 102 Stat. 905; Sec. 6, Pub. L. 102-371; 106 Stat. 1167, 1168)

(v) *Income received by American Indian beneficiaries from trust or restricted lands.* There shall be excluded from income computation payments of up to \$2,000 per calendar year to an individual Indian from trust lands or restricted lands as defined in 25 CFR 151.2. (January 1, 1994) (Authority: Sec. 13736, Pub. L. 103-66; 107 Stat. 663)

(w) *Radiation Exposure Compensation Act.* For the purposes of parents' dependency and indemnity compensation, there shall be excluded from income computation payments under Section 6 of the Radiation Exposure Compensation Act of 1990. (Authority: 42 U.S.C. 2210 note)

(x) *Alaska Native Claims Settlement Act.* There shall be excluded from income computation any cash (including cash dividends on stock received from a Native Corporation) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum; stock (including stock issued or distributed by a Native Corporation as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from a Native Corporation as a dividend or distribution on stock); and an interest in a settlement trust.

(y) *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.* There shall be excluded from income computation any allowance paid under the provisions of 38 U.S.C. chapter 18 to or for an individual who is a child of a Vietnam veteran or a child of a veteran with covered service in Korea. (Authority: 38 U.S.C. 1833(c))

(z) *Victims of Crime Act.* For purposes of old law pension, section 306 pension, and parents' dependency and indemnity compensation, amounts received as compensation under the Victims of Crime Act of 1984 will not be considered income unless the total amount of assistance received from all federally funded programs is sufficient to fully compensate the claimant for losses suffered as a result of the crime. (Authority: 42 U.S.C. 10602(c))

(aa) *Medicare Prescription Drug Discount Card and Transitional Assistance Program.* For purposes of old law pension, section 306 pension, and parents' dependency and indemnity compensation, the payments received under the Medicare transitional assistance program and any savings associated with the Medicare prescription drug discount card will not be considered income. (Authority: 42 U.S.C. 1395w-141(g)(6))

[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]

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).

§3.263 Corpus of estate; net worth.

(a) *General.* The following rules are for application in determining the corpus of estate of a parent where dependency is a factor under §3.250, and the net worth of a veteran, surviving spouse or child where pension is subject to Pub. L. 86-211 (73 Stat. 432) under §3.252(b). Only the estate of the parent, in claims based on dependency, or the estate of the veteran, surviving spouse or child-claimant in claims for pension, will be considered. In the absence of contradictory information, the claimant's statement as to ownership and estimate of value will be accepted.

(b) *Definition.* "Corpus of estate" and "net worth" mean the market value, less mortgages or other encumbrances, of all real and personal property owned by the claimant except the claimant's dwelling (single-family unit) including a reasonable lot area, and personal effects suitable to and consistent with the claimant's reasonable mode of life.

(c) *Ownership.* See §3.262(k).

(d) *Evaluation.* In determining whether some part of the claimant's estate should be consumed for his or her maintenance, consideration will be given to the amount of the claimant's income, together with the following factors: whether the property can be readily converted into cash at no substantial sacrifice; ability to dispose of property as limited by community property laws; life expectancy; number of dependents who meet the requirements of §3.250(b)(2); potential rate of depletion, including unusual medical expenses under the principles outlined in §3.262(l) for the claimant and his or her dependents.

(e) *Agent Orange settlement payments.* There shall be excluded from the corpus of estate or net worth of a claimant any payment made from the Agent Orange Settlement Fund or any other fund established pursuant to the settlement in the In re Agent Orange product liability litigation, M.D.L. No. 381 (E.D.N.Y.). (January 1, 1989). (Authority: Pub. L. 101-201, 103 Stat. 1795)

(f) *Restitution to individuals of Japanese ancestry.* Effective August 10, 1988, for the purposes of section 306 pension and parents' death compensation, there shall be excluded from the corpus of estate or net worth of a claimant any payment made as restitution under Public Law 100-383 to individuals of Japanese ancestry who were interned, evacuated, or relocated during the period December 7, 1941, through June 30, 1946, pursuant to any law, Executive order, Presidential proclamation, directive, or other official action respecting these individuals. (Authority: Sec. 105, Pub. L. 100-383; 102 Stat. 905; Sec. 6, Pub. L. 102-371; 106 Stat. 1167, 1168)

(g) *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.* There shall be excluded from the corpus of estate or net worth of a claimant any allowance paid under the provisions of 38 U.S.C. chapter 18 to or for an individual who is a child of a Vietnam veteran or a child of a veteran with covered service in Korea. (Authority: 38 U.S.C. 1833(c))

(h) *Victims of Crime Act.* There shall be excluded from the corpus of estate or net worth of a claimant any amounts received as compensation under the Victims of Crime Act of 1984 unless the total amount of assistance received from all federally funded programs is sufficient to fully compensate the claimant for losses suffered as a result of the crime. (Authority: 42 U.S.C. 10602(c))

(i) *Medicare Prescription Drug Discount Card and Transitional Assistance Program.* There shall be excluded from the corpus of estate or net worth of a claimant payments received under the Medicare transitional assistance program and any savings associated with the Medicare prescription drug discount card. (Authority: 42 U.S.C. 1395w-141(g)(6))

[28 FR 33, Jan. 1, 1963, as amended at 39 FR 28527, Aug. 8, 1974; 44 FR 45936, Aug. 6, 1979; 57 FR 59299, Dec. 15, 1992; 58 FR 33767, June 21, 1993; 62 FR 51279, 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]

Cross references: Reductions and discontinuances; dependency. See §3.500(h). Material change in income, net worth or change in status. See §3.660. Income and net worth questionnaires. See §3.661.

Supplement *Highlights* references: 6(2), 8(3), 31(1), 54(2), 61(1), 65(1), 95(1).

Next Section is §3.270

(q) *Cash surrender value of life insurance.* That portion of proceeds from the cash surrender of a life insurance policy which represents a return of insurance premiums. (Authority: 38 U.S.C. 501(a))

(r) *Income received by American Indian beneficiaries from trust or restricted lands.* Income of up to \$2,000 per calendar year to an individual Indian from trust lands or restricted lands as defined in 25 CFR 151.2. (January 1, 1994) (Authority: Sec. 13736, Pub. L. 103-66; 107 Stat. 633)

(s) *Radiation Exposure Compensation Act.* Any payment made under Section 6 of the Radiation Exposure Compensation Act of 1990. (Authority: 42 U.S.C. 2210 note)

(t) *Alaska Native Claims Settlement Act.* Any receipt by an individual of cash (including cash dividends on stock received from a Native Corporation) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum; stock (including stock issued or distributed by a Native Corporation as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from a Native Corporation as a dividend or distribution on stock); and an interest in a settlement trust. (November 2, 1994) (Authority: §506, Pub. L. 103-446)

(u) *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.* Any allowance paid under the provisions of 38 U.S.C. chapter 18 to or for an individual who is a child of a Vietnam veteran or a child of a veteran with covered service in Korea. (Authority: 38 U.S.C. 1833(c))

(v) *Victims of Crime Act.* Amounts received as compensation under the Victims of Crime Act of 1984 unless the total amount of assistance received from all federally funded programs is sufficient to fully compensate the claimant for losses suffered as a result of the crime. (Authority: 42 U.S.C. 10602(c))

(w) *Medicare Prescription Drug Discount Card and Transitional Assistance Program.* The payments received under the Medicare transitional assistance program and any savings associated with the Medicare prescription drug discount card. (Authority: 42 U.S.C. 1395w-141(g)(6))

(x) *Life insurance proceeds.* Lump-sum proceeds of any life insurance policy on a veteran. (Authority: 38 U.S.C. 1503(a)(11))

[44 FR 45936, Aug. 6, 1979, as amended at 46 FR 9580, Jan. 29, 1981; 53 FR 23235, June 21, 1988; 53 PR 24831, June 30, 1988; 56 FR 65846, Dec. 19, 1991; 57 FR 59300, Dec. 15, 1992; 58 FR 25563, Apr. 27, 1993; 59 FR 35266, July 11, 1994; 59 FR 37696, July 25, 1994; 59 FR 45976, Sept. 6, 1994; 60 FR 2523, Jan. 10, 1995; 60 FR 18355, Apr. 11, 1995; 62 FR 5528, Feb. 6, 1997; 62 FR 51279, Sept. 30, 1997; 67 FR 9209, Feb. 28, 2002; 67 FR 49587, July 31,

2002; 68 FR 60852, Oct. 24, 2003; 70 FR 15591, Mar. 28, 2005; 71 FR 44918, Aug. 8, 2006; 76 FR 4248, Jan. 25, 2011]

Supplement *Highlights* references: 6(2), 7(5), 12(4, 7), 13(2), 14(4), 15(3), 27(1), 31(1), 51(1), 54(2), 61(1), 65(1), 72(2), 95(1).

§3.275 Criteria for evaluating net worth.

(a) *General.* The following rules are for application in determining the corpus of estate or net worth of a veteran, surviving spouse or child under §3.274.

(b) *Definition.* The terms “corpus of estate” and “net worth” mean the market value, less mortgages or other encumbrances, of all real and personal property owned by the claimant, except the claimant’s dwelling (single family unit), including a reasonable lot area, and personal effects suitable to and consistent with the claimant’s reasonable mode of life.

(c) *Ownership.* See §3.271(d).

(d) *Evaluation.* In determining whether some part of the claimant’s estate (or combined estates under §3.274(a) and (e)) should be consumed for the claimant’s maintenance, consideration will be given to the amount of the claimant’s income together with the following: Whether the property can be readily converted into cash at no substantial sacrifice; life expectancy; number of dependents who meet the definition of “member of the family” (the definition contained in §3.250(b)(2) is applicable to the improved pension program); potential rate of depletion, including unusual medical expenses under the principles outlined in §3.272(g) for the claimant and the claimant’s dependents.

(e) *Educational expenses.* There shall be excluded from the corpus of estate or net worth of a child reasonable amounts for actual or prospective educational or vocational expenses. The amount so excluded shall not be such as to provide for education or training beyond age 23. (Authority: 38 U.S.C. 501(a))

(f) *Agent Orange settlement payments.* There shall be excluded from the corpus of the estate or net worth of a claimant any payment made from the Agent Orange Settlement Fund or any other fund established pursuant to the settlement in the *In re Agent Orange product liability litigation*, M.D.L. No. 381 (E.D.N.Y.). (January 1, 1989) (Authority: Pub. L. 101-201, 103 Stat. 1795)

(g) *Restitution to individuals of Japanese ancestry.* There shall be excluded from the corpus of estate or net worth of a claimant any payment made as restitution under Public Law 100-383 to individuals of Japanese ancestry who were interned, evacuated, or relocated during the period December 7, 1941, through June 30, 1946, pursuant to any law, Executive order, Presidential proclamation, directive, or other official action respecting these individuals. (August 10, 1988) (Authority: Sec. 105, Pub. L. 100-383; 102 Stat. 905)

(h) *Radiation Exposure Compensation Act.* There shall be excluded from the corpus of estate or net worth of a claimant any payment made under Section 6 of the Radiation Exposure Compensation Act of 1990. (Authority: 42 U.S.C. 2210 note)

(i) *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.* There shall be excluded from the corpus of estate or net worth of a claimant any allowance paid under the provisions of 38 U.S.C. chapter 18 to or for an individual who is a child of a Vietnam veteran or a child of a veteran with covered service in Korea. (Authority: 38 U.S.C. 1833(c))

(j) *Victims of Crime Act*. There shall be excluded from the corpus of estate or net worth of a claimant any amounts received as compensation under the Victims of Crime Act of 1984 unless the total amount of assistance received from all federally funded programs is sufficient to fully compensate the claimant for losses suffered as a result of the crime. (Authority: 42 U.S.C. 10602(c))

(k) *Medicare Prescription Drug Discount Card and Transitional Assistance Program*. There shall be excluded from the corpus of estate or net worth of a claimant payments received under the Medicare transitional assistance program and any savings associated with the Medicare prescription drug discount card. (Authority: 42 U.S.C. 1395w-141(g)(6))

[44 FR 45936, Aug. 6, 1979, as amended at 57 FR 59300, Dec. 15, 1992; 60 FR 2523, Jan. 10, 1995; 62 FR 51279, 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]

Supplement *Highlights* references: 6(2), 14(4), 31(1), 54(2), 61(1), 65(1), 95(1).

§3.306 Aggravation of preservice disability.

(a) *General.* A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease. (Authority: 38 U.S.C. 1153)

(b) *Wartime service; peacetime service after December 31, 1946.* Clear and unmistakable evidence (obvious or manifest) is required to rebut the presumption of aggravation where the preservice disability underwent an increase in severity during service. This includes medical facts and principles which may be considered to determine whether the increase is due to the natural progress of the condition. Aggravation may not be conceded where the disability underwent no increase in severity during service on the basis of all the evidence of record pertaining to the manifestations of the disability prior to, during and subsequent to service.

(1) The usual effects of medical and surgical treatment in service, having the effect of ameliorating disease or other conditions incurred before enlistment, including postoperative scars, absent or poorly functioning parts or organs, will not be considered service connected unless the disease or injury is otherwise aggravated by service.

(2) Due regard will be given the places, types, and circumstances of service and particular consideration will be accorded combat duty and other hardships of service. The development of symptomatic manifestations of a preexisting disease or injury during or proximately following action with the enemy or following a status as a prisoner of war will establish aggravation of a disability. (Authority: 38 U.S.C. 1154)

(c) *Peacetime service prior to December 7, 1941.* The specific finding requirement that an increase in disability is due to the natural progress of the condition will be met when the available evidence of a nature generally acceptable as competent shows that the increase in severity of a disease or injury or acceleration in progress was that normally to be expected by reason of the inherent character of the condition, aside from any extraneous or contributing cause or influence peculiar to military service. Consideration will be given to the circumstances, conditions, and hardships of service.

[26 FR 1580, Feb. 24, 1961; 57 FR 59296, Dec. 15, 1992]

Supplement *Highlights* reference: 6(3).

§3.307 Presumptive service connection for chronic, tropical or prisoner-of-war related disease, or disease associated with exposure to certain herbicide agents; wartime and service on or after January 1, 1947.

(a) *General.* A chronic, tropical, prisoner of war related disease, or a disease associated with exposure to certain herbicide agents listed in §3.309 will be considered to have been incurred in or aggravated by service under the circumstances outlined in this section even though there is no evidence of such disease during the period of service. No condition other than one listed in §3.309(a) will be considered chronic.

(1) *Service.* The veteran must have served 90 days or more during a war period or after December 31, 1946. The requirement of 90 days' service means active, continuous service within or extending into or beyond a war period or which began before and extended beyond December 31, 1946, or began after that date. Any period of service is sufficient for the purpose of establishing the presumptive service connection of a specified disease under the conditions listed in §3.309(c) and (e).

(2) *Separation from service.* For the purpose of paragraph (a)(3) and (4) of this section the date of separation from wartime service will be the date of discharge or release during a war period, or if service continued after the war, the end of the war period. In claims based on service on or after January 1, 1947, the date of separation will be the date of discharge or release from the period of service on which the claim is based.

(3) *Chronic disease.* The disease must have become manifest to a degree of 10 percent or more within 1 year (for Hansen's disease (leprosy) and tuberculosis, within 3 years; multiple sclerosis, within 7 years) from the date of separation from service as specified in paragraph (a)(2) of this section.

(4) *Tropical disease.* The disease must have become manifest to a degree of 10 percent or more within 1 year from date of separation from service as specified in paragraph (a)(2) of this section, or at a time when standard accepted treatises indicate that the incubation period commenced during such service. The resultant disorders or diseases originating because of therapy administered in connection with a tropical disease or as a preventative may also be service connected. (Authority: 38 U.S.C. 1112)

(5) *Diseases specific as to former prisoners of war.* The diseases listed in §3.309(c) shall have become manifest to a degree of 10 percent or more at any time after discharge or release from active service. (Authority: 38 U.S.C. 1112)

(6) *Diseases associated with exposure to certain herbicide agents.*

(i) For the purposes of this section, the term *herbicide agent* means a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, specifically: 2,4-D; 2,4,5-T and its contaminant TCDD; cacodylic acid; and picloram. (Authority: 38 U.S.C. 1116(a)(4))

(ii) The diseases listed at §3.309(e) shall have become manifest to a degree of 10 percent or more at any time after service, except that chloracne or other acneform disease consistent with chloracne, porphyria cutanea tarda, and acute and subacute peripheral neuropathy shall have become manifest to a degree of 10 percent or more within a year after the last date on which the veteran was exposed to an herbicide agent during active military, naval, or air service.

(iii) A veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. The last date on which such a veteran shall be presumed to have been exposed to an herbicide agent shall be the last date on which he or she served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975. *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. (Authority: 38 U.S.C. 501(a) and 1116(a)(3))

(iv) A veteran who, during active military, naval, or air service, 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, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. See also 38 CFR 3.814(c)(2). (Authority: 38 U.S.C. 501(a), 1116(a)(3), and 1821)

(b) *Evidentiary basis.* The factual basis may be established by medical evidence, competent lay evidence or both. Medical evidence should set forth the physical findings and symptomatology elicited by examination within the applicable period. Lay evidence should describe the material and relevant facts as to the veteran's disability observed within such period, not merely conclusions based upon opinion. The chronicity and continuity factors outlined in §3.303(b) will be considered. The diseases listed in §3.309(a) will be accepted as chronic, even though diagnosed as acute because of insidious inception and chronic development, except:

(1) Where they result from intercurrent causes, for example, cerebral hemorrhage due to injury, or active nephritis or acute endocarditis due to intercurrent infection (with or without identification of the pathogenic micro-organism); or

(2) Where a disease is the result of drug ingestion or a complication of some other condition not related to service. Thus, leukemia will be accepted as a chronic disease whether diagnosed as acute or chronic. Unless the clinical picture is clear otherwise, consideration will be given as to whether an acute condition is an exacerbation of a chronic disease. (Authority: 38 U.S.C. 1112)

(c) *Prohibition of certain presumptions.* No presumptions may be invoked on the basis of advancement of the disease when first definitely diagnosed for the purpose of showing its

existence to a degree of 10 percent within the applicable period. This will not be interpreted as requiring that the disease be diagnosed in the presumptive period, but only that there be then shown by acceptable medical or lay evidence characteristic manifestations of the disease to the required degree, followed without unreasonable time lapse by definite diagnosis. Symptomatology shown in the prescribed period may have no particular significance when first observed, but in the light of subsequent developments it may gain considerable significance. Cases in which a chronic condition is shown to exist within a short time following the applicable presumptive period, but without evidence of manifestations within the period, should be developed to determine whether there was symptomatology which in retrospect may be identified and evaluated as manifestation of the chronic disease to the required 10-percent degree.

(d) *Rebuttal of service incurrence or aggravation.*

(1) Evidence which may be considered in rebuttal of service incurrence of a disease listed in §3.309 will be any evidence of a nature usually accepted as competent to indicate the time of existence or inception of disease, and medical judgment will be exercised in making determinations relative to the effect of intercurrent injury or disease. The expression “affirmative evidence to the contrary” will not be taken to require a conclusive showing, but such showing as would, in sound medical reasoning and in the consideration of all evidence of record, support a conclusion that the disease was not incurred in service. As to tropical diseases the fact that the veteran had no service in a locality having a high incidence of the disease may be considered as evidence to rebut the presumption, as may residence during the period in question in a region where the particular disease is endemic. The known incubation periods of tropical diseases should be used as a factor in rebuttal of presumptive service connection as showing inception before or after service.

(2) The presumption of aggravation provided in this section may be rebutted by affirmative evidence that the preexisting condition was not aggravated by service, which may include affirmative evidence that any increase in disability was due to an intercurrent disease or injury suffered after separation from service or evidence sufficient, under §3.306 of this part, to show that the increase in disability was due to the natural progress of the preexisting condition. (Authority: 38 U.S.C 1113 and 1153)

[26 FR 1581, Feb. 24, 1961, as amended at 35 FR 18281, Dec. 1 1970; 39 FR 34530, Sept. 26, 1974; 43 FR 45347, Oct. 2, 1978; 47 FR 11655, Mar. 18, 1982; 58 FR 29109, May 19, 1993; 59 FR 5106, Feb. 3, 1994; 59 FR 29724, June 9, 1994; 61 FR 57588, Nov. 7, 1996; 62 FR 35422, July 1, 1997; 67 FR 67793, Nov. 7, 2002; 68 FR 34541, June 10, 2003; 76 FR 4248, Jan. 25, 2011]

Supplement *Highlights* references: 7(8), 10(1), 12(1), 24(3), 30(1), 56(2), 57(1), 95(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 (§3.854)*. 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 notice of the expected or actual birth meeting the requirements of an informal claim, 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]

Supplement Highlights references: 31(1), 54(2), 95(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 reopened 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]

(b) *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.* The effective date of discontinuance of the monthly allowance under 38 U.S.C. chapter 18 will be the last day of the month before the month in which the death of the individual occurred.

(Authority: 38 U.S.C. 501, 1832, 5112(b))

[26 FR 1597, Feb. 24, 1961, as amended at 27 FR 11890, Dec. 1, 1962; 30 FR 14983, Dec. 3, 1965; 34 FR 839, Jan. 18, 1969; 38 FR 872, Jan. 5, 1973; 41 FR 55875, Dec, 23, 1976; 53 FR 23237, June 21, 1988; 62 FR 51279, Sept. 30, 1997; 67 FR 49587, July 31, 2002; 76 FR 4248, Jan. 25, 2011]

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

Reserved

§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 original claim, a claim reopened after final disallowance, or a claim for increase 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]

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

original claim, a claim reopened after final disallowance, or a claim for increase, 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]

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