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to submit an annual report to the Congress, containing a brief summary of each recommendation for relief and its disposition. Preparation of the report shall be the responsibility of the General Counsel.

(c) The authority to grant the equitable relief, referred to in paragraphs (a) and (b) of this section, has not been delegated and is reserved to the Secretary. Recommendation for the correction of administrative error and for appropriate equitable relief therefrom will be submitted to the Secretary, through the General Counsel. Such recommendation may be initiated by the head of the administration having responsibility for the benefit, or of any concerned staff office, or by the Chairman, Board of Veterans Appeals. When a recommendation for relief under paragraph (a) or (b) of this section is initiated by the head of a staff office, or the Chairman, Board of Veterans Appeals, the views of the head of the administration having responsibility for the benefit will be obtained and transmitted with the recommendation of the initiating office.

[37 FR 22864, Oct. 26, 1972, as amended at 49 FR 30693, Aug. 1, 1984; 54 FR 34981, Aug. 23, 1989]

§ 2.8 Delegation of authority to authorize allowances for Department of Veterans Affairs employees who are notaries public.

(a) Employees occupying or acting in the positions designated in paragraph (b) of this section are authorized to designate those employees who are required to serve as notaries public in connection with the performance of official business and to pay an allowance for the costs therefor not to exceed the expense required to be incurred by them in order to obtain their commission.

(Authority: 5 U.S.C. 5945)

(b) Designated positions: Deputy Secretary, Chief Benefits Director, Director, Office of Data Management and Telecommunications, Chief Medical Director, General Counsel, Directors of regional offices, hospitals, domiciliaries, and centers.

[35 FR 13771, Aug. 29, 1970, as amended at 49 FR 30693, Aug. 1, 1984]

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EDITORIAL NOTE: Nomenclature changes to part 3 appear at 61 FR 7216, Feb. 27, 1996.

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

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

GENERAL

§3.1 Definitions.

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

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

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

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

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

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

(Authority: 38 U.S.C. 501)

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

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

(g) *Secretary concerned* means:

(1) The Secretary of the Army, with respect to matters concerning the Army;

(2) The Secretary of the Navy, with respect to matters concerning the Navy or the Marine Corps;

(3) The Secretary of the Air Force, with respect to matters concerning the Air Force;

(4) The Secretary of Transportation, with respect to matters concerning the Coast Guard;

(5) The Secretary of Health and Human Services, with respect to matters concerning the Public Health Service; and

(6) The Secretary of Commerce, with respect to matters concerning the Coast and Geodetic Survey, the Environmental Science Services Administration, and the National Oceanic and Atmospheric Administration.

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

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

(j) *Marriage* means a marriage valid under the law of the place where the parties resided at the time of marriage, or the law of the place where the parties resided when the right to benefits accrued.

(Authority: 38 U.S.C. 103(c))

(k) *Service-connected* means, with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line

of duty in the active military, naval, or air service.

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

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

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

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

(3) Confined under sentence of a civil court for a felony as determined under the laws of the jurisdiction where the person was convicted by such court.

(Authority: 38 U.S.C. 105)

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

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

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

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

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

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

(p) *Claim—Application* means a formal or informal communication in writing requesting a determination of entitlement or evidencing a belief in entitlement, to a benefit.

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

(r) *Date of receipt* means the date on which a claim, information or evidence was received in the Department of Veterans Affairs, except as to specific provisions for claims or evidence received in the State Department (§3.108), or in the Social Security Administration (§§3.153, 3.201), or Department of Defense as to initial claims filed at or prior to separation.

(s) *On the borders thereof* means, with regard to service during the Mexican border period, the States of Arizona, California, New Mexico, and Texas, and the nations of Guatemala and British Honduras.

(Authority: 38 U.S.C. 101(30))

(t) *In the waters adjacent thereto* means, with regard to service during the Mexican border period, the waters (including the islands therein) which are within 750 nautical miles (863 statute miles) of the coast of the mainland of Mexico.

(Authority: 38 U.S.C. 101(30))

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

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

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

(x) *Service pension* is the name given to Spanish-American War pension. It is referred to as a service pension because entitlement is based solely on service without regard to nonservice-connected disability, income and net worth.

(Authority: 38 U.S.C. 1512, 1536)

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

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

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

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

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

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

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

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

(Authority: 38 U.S.C. 101(32))

(z) *Nursing home* means

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

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

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

(aa) *Fraud*:

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

(Authority: 38 U.S.C. 501)

(2) As used in 38 U.S.C. 110 and 1159 and implementing regulations, fraud means an intentional misrepresentation of fact, or the intentional failure to disclose pertinent facts, for the purpose of obtaining or retaining, or assisting an individual to obtain or retain, eligibility for Department of Veterans Affairs benefits, with knowledge that the misrepresentation or failure to disclose may result in the erroneous award or retention of such benefits.

(Authority: 38 U.S.C. 501)

[26 FR 1563, Feb. 24, 1961]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §3.1, see the List of Sections Affected in the Finding Aids section of this volume.

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

§ 3.2 Periods of war.

This section sets forth the beginning and ending dates of each war period beginning with the Indian wars. Note that the term *period of war* in reference to pension entitlement under 38 U.S.C. 1521, 1541 and 1542 means all of the war periods listed in this section except the Indian wars and the Spanish-American War. See §3.3(a)(3) and (b)(4)(i).

(a) *Indian wars.* January 1, 1817, through December 31, 1898, inclusive. Service must have been rendered with the United States military forces against Indian tribes or nations.

(b) *Spanish-American War.* April 21, 1898, through July 4, 1902, inclusive. If the veteran served with the United States military forces engaged in hostilities in the Moro Province, the ending date is July 15, 1903. The Philippine Insurrection and the Boxer Rebellion are included.

(c) *World War I.* April 6, 1917, through November 11, 1918, inclusive. If the veteran served with the United States military forces in Russia, the ending date is April 1, 1920. Service after November 11, 1918 and before July 2, 1921 is considered World War I service if the veteran served in the active military, naval, or air service after April 5, 1917 and before November 12, 1918.

(d) *World War II.* December 7, 1941, through December 31, 1946, inclusive. If the veteran was in service on December 31, 1946, continuous service before July 26, 1947, is considered World War II service.

(e) *Korean conflict.* June 27, 1950, through January 31, 1955, inclusive.

(f) *Vietnam era.* The period beginning on February 28, 1961, and ending on May 7, 1975, inclusive, in the case of a veteran who served in the Republic of Vietnam during that period. The period beginning on August 5, 1964, and ending on May 7, 1975, inclusive, in all other cases.

(Authority: 38 U.S.C. 101(29))

(g) *Future dates.* The period beginning on the date of any future declaration of war by the Congress and ending on a date prescribed by Presidential proclamation or concurrent resolution of the Congress.

(Authority: 38 U.S.C. 101)

(h) *Mexican border period.* May 9, 1916, through April 5, 1917, in the case of a veteran who during such period served in Mexico, on the borders thereof, or in the waters adjacent thereto.

(Authority: 38 U.S.C. 101(30))

(i) *Persian Gulf War.* August 2, 1990, through date to be prescribed by Presidential proclamation or law.

(Authority: 38 U.S.C. 101(33))

[26 FR 1563, Feb. 24, 1961, as amended at 32 FR 13223, Sept. 19, 1967; 36 FR 8445, May 6, 1971; 37 FR 6676, Apr. 1, 1972; 40 FR 27030, June 26, 1975; 44 FR 45931, Aug. 6, 1979; 56 FR 57986, Nov. 15, 1991; 62 FR 35422, July 1, 1997]

§ 3.3 Pension.

(a) *Pension for veterans*—(1) *Service pension; Spanish-American War.* A benefit payable monthly by the Department of Veterans Affairs because of service in the Spanish-American War. Basic entitlement exists if a veteran:

(i) Had 70 (or 90) days or more active service during the Spanish-American War; or

(ii) Was discharged or released from such service for a disability adjudged service connected without benefit of presumptive provisions of law, or at

the time of discharge had such a service-connected disability, shown by official service records, which in medical judgment would have justified a discharge for disability.

(Authority: 38 U.S.C. 1512)

(2) *Section 306 pension.* A benefit payable monthly by the Department of Veterans Affairs because of nonservice-connected disability or age. Basic entitlement exists if a veteran:

(i) Served 90 days or more in either the Mexican border period, World War I, World War II, the Korean conflict, or the Vietnam era, or served an aggregate of 90 days or more in separate periods of service during the same or during different war periods, including service during the Spanish-American War (Pub. L. 87–101, 75 Stat. 218; Pub. L. 90–77, 81 Stat. 178; Pub. L. 92–198, 85 Stat. 663); or

(ii) Served continuously for a period of 90 consecutive days or more and such period ended during the Mexican border period or World War I, or began or ended during World War II, the Korean conflict or the Vietnam era (Pub. L. 87–101, 75 Stat. 218; Pub. L. 88–664, 78 Stat. 1094; Pub. L. 90–77, 81 Stat. 178; Pub. L. 91–588, 84 Stat. 1580; Pub. L. 92–198, 85 Stat. 663; Pub. L. 94–169, 89 Stat. 1013; Pub. L. 95–204, 91 Stat. 1455); or

(iii) Was discharged or released from such wartime service, before having served 90 days, for a disability adjudged service connected without the benefit of presumptive provisions of law, or at the time of discharge had such a service-connected disability, shown by official service records, which in medical judgment would have justified a discharge for disability; and

(iv) Is permanently and totally disabled (*a*) from nonservice-connected disability not due to the veteran's own willful misconduct or vicious habits, or (*b*) by reason of having attained the age of 65 years or by reason of having become unemployable after age 65; and

(v)(*a*) Is in receipt of section 306 pension or (*b*) has an application for pension pending on December 31, 1978, or (*c*) meets the age or disability requirements for such pension on December 31, 1978, and files a claim within 1 year of that date and also within 1 year after meeting the age or disability requirements.

(vi) Meets the income and net worth requirements of 38 U.S.C. 1521 and 1522 as in effect on December 31, 1978, and all other provisions of title 38, United States Code, in effect on December 31, 1978, applicable to section 306 pension.

NOTE: The pension provisions of title 38 U.S.C., as in effect on December 31, 1978, are available in any VA regional office.

(3) *Improved pension; Pub. L. 95–588 (92 Stat. 2497).* A benefit payable by the Department of Veterans Affairs to veterans of a period or periods of war because of nonservice-connected disability or age. The qualifying periods of war for this benefit are the Mexican border period, World War I, World War II, the Korean conflict, the Vietnam era and the Persian Gulf War. Payments are made monthly unless the amount of the annual benefit is less than 4 percent of the maximum annual rate payable to a veteran under 38 U.S.C. 1521(b), in which case payments may be made less frequently than monthly. Basic entitlement exists if a veteran:

(i) Served in the active military, naval or air service for 90 days or more during a period of war (38 U.S.C. 1521(j)); or

(ii) Served in the active military, naval or air service during a period of war and was discharged or released from such service for a disability adjudged service-connected without presumptive provisions of law, or at time of discharge had such a service-connected disability, shown by official service records, which in medical judgment would have justified a discharge for disability (38 U.S.C. 1521(j)); or

(iii) Served in the active military, naval or air service for a period of 90 consecutive days or more and such period began or ended during a period of war (38 U.S.C. 1521(j)); or

(iv) Served in the active military, naval or air service for an aggregate of 90 days or more in two or more separate periods of service during more than one period of war (38 U.S.C. 1521(j)); and

(v) Is permanently and totally disabled from nonservice-connected disability not due to the veteran's own willfull misconduct; and

(Authority: 38 U.S.C. 1502(a))

(vi) Meets the net worth requirements under § 3.274 and does not have an annual income in excess of the applicable maximum annual pension rate specified in § 3.23.

(b) *Pension for survivors*—(1) *Indian war death pension*. A monthly benefit payable by the Department of Veterans Affairs to the surviving spouse or child of a deceased veteran of an Indian war. Basic entitlement exists if a veteran had qualifying service as specified in 38 U.S.C. 1511. Indian war death pension rates are set forth in 38 U.S.C. 1534 and 1535.

(2) *Spanish-American War death pension*. A monthly benefit payable by the Department of Veterans Affairs to the surviving spouse or child of a deceased veteran of the Spanish-American War, if the veteran:

(i) Had 90 days or more active service during the Spanish-American War; or

(ii) Was discharged or released from such service for a disability service-connected without benefit of presumptive provisions of law, or at time of discharge had such a service-connected disability, as shown by official service records, which in medical judgment would have justified a discharge for disability.

(Authority: 38 U.S.C. 1536, 1537)

(3) *Section 306 death pension*. A monthly benefit payable by the Department of Veterans Affairs to a surviving spouse or child because of a veteran's nonservice-connected death. Basic entitlement exists if:

(i) The veteran (as defined in § 3.1(d) and (d)(2)) had qualifying service as specified in paragraph (a)(2)(i), (ii), or (iii) of this section; or

(ii) The veteran was, at time of death, receiving or entitled to receive compensation or retired pay for service-connected disability based on wartime service; and

(iii) The surviving spouse or child (A) was in receipt of section 306 pension on December 31, 1978, or (B) had a claim for pension pending on that date, or (C) filed a claim for pension after that date but within 1 year after the veteran's death, if the veteran died before January 1, 1979; and

(iv) The surviving spouse or child meets the income and net worth requirements of 38 U.S.C. 1541, 1542 or 1543 as in effect on December 31, 1978, and all other provisions of title 38, United States Code in effect on December 31, 1978, applicable to section 306 pension.

NOTE: The pension provisions of title 38, United States Code, as in effect on December 31, 1978, are available in any VA regional office.)

(4) *Improved death pension, Public Law 95–588*. A benefit payable by the Department of Veterans Affairs to a veteran's surviving spouse or child because of the veteran's nonservice-connected death. Payments are made monthly unless the amount of the annual benefit is less than 4 percent of the maximum annual rate payable to a veteran under 38 U.S.C. 1521(b), in which case payments may be made less frequently than monthly. Basic entitlement exists if:

(i) The veteran (as defined in § 3.1(d) and (d)(2)) had qualifying service as specified in paragraph (a)(3)(i), (ii), (iii), or (iv) of this section (38 U.S.C. 1541(a)); or

(ii) The veteran was, at time of death, receiving or entitled to receive compensation or retired pay for a service-connected disability based on service during a period of war. (The qualifying periods of war are specified in paragraph (a)(3) of this section.) (38 U.S.C. 1541(a)); and

(iii) The surviving spouse or child meets the net worth requirements of § 3.274 and has an annual income not in excess of the applicable maximum annual pension rate specified in §§ 3.23 and 3.24.

(Authority: 38 U.S.C. 1541 and 1542).

[44 FR 45931, Aug. 6, 1979, as amended at 56 FR 19579, Apr. 29, 1991; 56 FR 22910, May 17, 1991; 56 FR 25044, June 3, 1991; 56 FR 57986, Nov. 15, 1991]

CROSS REFERENCES: Section 306 pension. See § 3.1(u). Improved pension. See § 3.1(w). Improved pension rates. See § 3.23. Improved pension rates; surviving children. See § 3.24. Frequency of payment of improved pension. See § 3.30. Relationship of net worth to pension entitlement. See § 3.274.

§3.4 Compensation.

(a) *Compensation.* This term means a monthly payment made by the Department of Veterans Affairs to a veteran because of service-connected disability, or to a surviving spouse, child, or parent of a veteran because of the service-connected death of the veteran occurring before January 1, 1957, or under the circumstances outlined in paragraph (c)(2) of this section. If the veteran was discharged or released from service, the discharge or release must have been under conditions other than dishonorable.

(Authority: 38 U.S.C. 101(2), (13))

(b) *Disability compensation.* (1) Basic entitlement for a veteran exists if the veteran is disabled as the result of a personal injury or disease (including aggravation of a condition existing prior to service) while in active service if the injury or the disease was incurred or aggravated in line of duty.

(Authority: 38 U.S.C. 1110, 1131)

(2) An additional amount of compensation may be payable for a spouse, child, and/or dependent parent where a veteran is entitled to compensation based on disability evaluated as 30 per centum or more disabling.

(Authority: 38 U.S.C. 1115)

(c) *Death compensation.* Basic entitlement exists for a surviving spouse, child or children, and dependent parent or parents if:

(1) The veteran died before January 1, 1957; or

(2) The veteran died on or after May 1, 1957, and before January 1, 1972, if at the time of death a policy of United States Government Life Insurance or National Service Life Insurance was in effect under waiver of premiums under 38 U.S.C. 1924 unless the waiver was granted under the first proviso of section 622(a) of the National Service Life Insurance Act of 1940, and the veteran died before return to military jurisdiction or within 120 days thereafter. (See §3.5(d) as to Public Health Service.)

(Authority: 38 U.S.C. 1121, 1141)

[26 FR 1564, Feb. 24, 1961, as amended at 38 FR 21923, Aug. 14, 1973; 39 FR 34529, Sept. 26, 1974; 44 FR 22717, Apr. 17, 1979]

§3.5 Dependency and indemnity compensation.

(a) *Dependency and indemnity compensation.* This term means a monthly payment made by the Department of Veterans Affairs to a surviving spouse, child, or parent:

(1) Because of a service-connected death occurring after December 31, 1956, or

(2) Pursuant to the election of a surviving spouse, child, or parent, in the case of such a death occurring before January 1, 1957.

(Authority: 38 U.S.C. 101 (14))

(b) *Entitlement.* Basic entitlement for a surviving spouse, child or children, and parent or parents of a veteran exists, if:

(1) Death occurred on or after January 1, 1957, except in the situation specified in §3.4(c)(2); or

(2) Death occurred prior to January 1, 1957, and the claimant was receiving or eligible to receive death compensation on December 31, 1956 (or, as to a parent, would have been eligible except for income), under laws in effect on that date or who subsequently becomes eligible by reason of a death which occurred prior to January 1, 1957; or

(3) Death occurred on or after May 1, 1957, and before January 1, 1972, and the claimant had been ineligible to receive dependency and indemnity compensation because of the exception in subparagraph (1) of this paragraph. In such case dependency and indemnity compensation is payable upon election. (38 U.S.C. 410, 416, 417, Public Law 92-197, 85 Stat. 660)

(c) *Exclusiveness of remedy.* No person eligible for dependency and indemnity compensation by reason of a death occurring on or after January 1, 1957, shall be eligible by reason of such death for death pension or compensation under any other law administered by the Department of Veterans Affairs, except that, effective November 2, 1994, a surviving spouse who is receiving dependency and indemnity compensation may elect to receive death pension instead of such compensation.

(Authority: 38 U.S.C. 1317)

(d) *Group life insurance.* No dependency and indemnity compensation or

death compensation shall be paid to any surviving spouse, child or parent based on the death of a commissioned officer of the Public Health Service, the Coast and Geodetic Survey, the Environmental Science Services Administration, or the National Oceanic and Atmospheric Administration occuring on or after May 1, 1957, if any amounts are payable under the Federal Employees' Group Life Insurance Act of 1954 (Pub. L. 598, 83d Cong., as amended) based on the same death.

(Authority: Sec. 501(c)(2), Pub. L. 881, 84th Cong. (70 Stat. 857), as amended by Sec. 13(u), Pub. L. 85–857; (72 Stat. 1266); Sec. 5, Pub. L. 91–621 (84 Stat. 1863))

(e) *Surviving spouses' rate.* (1) When death occurred on or after January 1, 1993, the monthly rate of dependency and indemnity compensation for a surviving spouse shall be the amount set forth in 38 U.S.C. 1311(a)(1). This rate shall be increased by the amount set forth in 38 U.S.C. 1311(a)(2) in the case of the death of a veteran who at the time of death was in receipt of or was entitled to receive (or but for the receipt of retired pay or retirement pay was entitled to receive) compensation for a service-connected disability that was evaluated as totally disabling for a continuous period of at least eight years immediately preceding death. In determining the eight year period, only periods during which the veteran was married to the surviving spouse shall be considered. The resulting rate is subject to increase as provided in paragraphs (e) (3) and (4) of this section.

(2) The monthly rate of dependency and indemnity compensation for a surviving spouse when the death of the veteran occurred prior to January 1, 1993, is based on the ''pay grade'' of the veteran, unless the formula provided in paragraph (e)(1) of this section results in a greater monetary benefit. The Secretary of the concerned service department will certify the ''pay grade'' of the veteran and the certification will be binding on the Department of Veterans Affairs. The resulting rate is subject to increase as provided in paragraphs (e) (3) and (4) of this section.

(Authority: 38 U.S.C. 1311(a) and 1321)

(3) If there is a surviving spouse with one or more children under the age of 18 (including a child not in the surviving spouse's actual or constructive custody and a child who is in active military, air, or naval service), the total amount payable shall be increased by the amount set forth in 38 U.S.C. 1311(b) for each child.

(4) If the surviving spouse is determined to be in need of regular aid and attendance under the criteria in § 3.352 or is a patient in a nursing home, the total amount payable shall be increased by the amount set forth in 38 U.S.C. 1311(c). If the surviving spouse does not qualify for the regular aid and attendance allowance but is housebound under the criteria in § 3.351(f), the total amount payable shall be increased by the amount set forth in 38 U.S.C. 1311(d).

[29 FR 10396, July 25, 1964, as amended at 35 FR 18661, Dec. 9, 1970; 37 FR 6676, Apr. 1, 1972; 39 FR 34529, Sept. 26, 1974; 44 FR 22717, Apr. 17, 1979; 58 FR 25561, Apr. 27, 1993; 58 FR 27622, May 10, 1993; 60 FR 18355, Apr. 11, 1995]

§ 3.6 Duty periods.

(a) *Active military, naval, and air service.* This includes active duty, any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty, and any period of inactive duty training during which the individual concerned was disabled or died from an injury incurred or aggravated in line of duty.

(b) *Active duty.* This means:

(1) Full-time duty in the Armed Forces, other than active duty for training;

(2) Full-time duty (other than for training purposes) as a commissioned officer of the Regular or Reserve Corps of the Public Health Service:

(i) On or after July 29, 1945, or

(ii) Before that date under circumstances affording entitlement to *full military benefits,* or

(iii) At any time, for the purposes of dependency and indemnity compensation.

(3) Full-time duty as a commissioned officer of the Coast and Geodetic Survey or of its successor agencies, the

Environmental Science Services Administration and the National Oceanic and Atmospheric Administration:

(i) On or after July 29, 1945, or

(ii) Before that date:

(*a*) While on transfer to one of the Armed Forces, or

(*b*) While, in time of war or national emergency declared by the President, assigned to duty on a project for one of the Armed Forces in an area determined by the Secretary of Defense to be of immediate military hazard, or

(*c*) In the Philippine Islands on December 7, 1941, and continuously in such islands thereafter, or

(iii) At any time, for the purposes of dependency and indemnity compensation.

(4) Service at any time as a cadet at the United States Military, Air Force, or Coast Guard Academy, or as a midshipman at the United States Naval Academy;

(5) Attendance at the preparatory schools of the United States Air Force Academy, the United States Military Academy, or the United States Naval Academy for enlisted active-duty members who are reassigned to a preparatory school without a release from active duty, and for other individuals who have a commitment to active duty in the Armed Forces that would be binding upon disenrollment from the preparatory school;

(6) Authorized travel to or from such duty or service; and

(7) A person discharged or released from a period of active duty, shall be deemed to have continued on active duty during the period of time immediately following the date of such discharge or release from such duty determined by the Secretary concerned to have been required for him or her to proceed to his or her home by the most direct route, and, in all instances, until midnight of the date of such discharge or release.

(Authority: 38 U.S.C. 106(c))

(c) *Active duty for training.* (1) Full-time duty in the Armed Forces performed by Reserves for training purposes;

(2) Full-time duty for training purposes performed as a commissioned officer of the Reserve Corps of the Public Health Service:

(i) On or after July 29, 1945, or

(ii) Before that date under circumstances affording entitlement to *full military benefits,* or

(iii) At any time, for the purposes of dependency and indemnity compensation:

(3) Full-time duty performed by members of the National Guard of any State, under 32 U.S.C. 316, 502, 503, 504, or 505, or the prior corresponding provisions of law or full-time duty by such members while participating in the reenactment of the Battle of First Manassas in July 1961;

(4) Duty performed by a member of a Senior Reserve Officers' Training Corps program when ordered to such duty for the purpose of training or a practice cruise under chapter 103 of title 10 U.S.C.

(i) The requirements of this paragraph are effective—

(A) On or after October 1, 1982, with respect to deaths and disabilities resulting from diseases or injuries incurred or aggravated after September 30, 1982, and

(B) October 1, 1983, with respect to deaths and disabilities resulting from diseases or injuries incurred or aggravated before October 1, 1982.

(ii) Effective on or after October 1, 1988, such duty must be prerequisite to the member being commissioned and must be for a period of at least four continuous weeks.

(Authority: 38 U.S.C. 101(22)(D) as amended by Pub. L. 100–456)

(5) Attendance at the preparatory schools of the United States Air Force Academy, the United States Military Academy, or the United States Naval Academy by an individual who enters the preparatory school directly from the Reserves, National Guard or civilian life, unless the individual has a commitment to service on active duty which would be binding upon disenrollment from the preparatory school.

(6) Authorized travel to or from such duty.

(Authority: 38 U.S.C. 101(22))

The term does not include duty performed as a temporary member of the Coast Guard Reserve.

(d) *Inactive duty training.* This means: (1) Duty (other than full-time duty) prescribed for Reserves (including commissioned officers of the Reserve Corps of the Public Health Service) by the Secretary concerned under 37 U.S.C. 206 or any other provision of law;

(2) Special additional duties authorized for Reserves (including commissioned officers of the Reserve Corps of the Public Health Service) by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned; and

(3) Training (other than active duty for training) by a member of, or applicant for membership (as defined in 5 U.S.C. 8140(g)) in, the Senior Reserve Officers' Training Corps prescribed under chapter 103 of title 10 U.S.C.

(4) Duty (other than full-time duty) performed by a member of the National Guard of any State, under 32 U.S.C. 316, 502, 503, 504, or 505, or the prior corresponding provisions of law. The term *inactive duty training* does not include:

(i) Work or study performed in connection with correspondence courses,

(ii) Attendance at an educational institution in an inactive status, or

(iii) Duty performed as a temporary member of the Coast Guard Reserve.

(Authority: 38 U.S.C. 101(23))

(e) *Travel status—training duty (disability or death from injury).* Any individual:

(1) Who, when authorized or required by competent authority, assumes an obligation to perform active duty for training or inactive duty training; and

(2) Who is disabled or dies from an injury incurred while proceeding directly to or returning directly from such active duty for training or inactive duty training shall be deemed to have been on active duty for training or inactive duty training, as the case may be. The Department of Veterans Affairs will determine whether such individual was so authorized or required to perform such duty, and whether the individual was disabled or died from injury so incurred. In making such determinations, there shall be taken into consideration the hour on which the individual began to proceed or return; the hour on which the individual was scheduled to arrive for, or on which the individual ceased to perform, such duty; the method of travel performed; the itinerary; the manner in which the travel was performed; and the immediate cause of disability or death. Whenever any claim is filed alleging that the claimant is entitled to benefits by reason of this paragraph, the burden of proof shall be on the claimant.

(Authority: 38 U.S.C. 106 (d))

[26 FR 1564, Feb. 24, 1961, as amended at 26 FR 6767, July 28, 1961; 27 FR 4023, Apr. 27, 1962; 29 FR 14171, Oct. 15, 1964; 36 FR 5341, Mar. 20, 1971; 41 FR 26881, June 29, 1976; 49 FR 47003, Nov. 30, 1984; 54 FR 51200, Dec. 13, 1989; 55 FR 23931, June 13, 1990; 60 FR 57179, Nov. 14, 1995; 61 FR 11731, Mar. 22, 1996]

§ 3.7 Persons included.

The following are included:

(a) *Aerial transportation of mail* (*Pub. L. 140, 73d Congress*). Persons who were injured or died while serving under conditions set forth in Pub. L. 140, 73d Congress.

(b) *Aliens.* Effective July 28, 1959, a veteran discharged for alienage during a period of hostilities unless evidence affirmatively shows he or she was discharged at his or her own request. A veteran who was discharged for alienage after a period of hostilities and whose service was honest and faithful is not barred from benefits if he or she is otherwise entitled. A discharge changed prior to January 7, 1957, to honorable by a board established under authority of section 301, Pub. L. 346, 78th Congress, as amended, or section 207, Pub. L. 601, 79th Congress, as amended (now 10 U.S.C. 1552 and 1553), will be considered as evidence that the discharge was not at the alien's request. (See § 3.12.)

(Authority: 38 U.S.C. 5303(c))

(c) *Army field clerks.* Included as enlisted men.

(d) *Army Nurse Corps, Navy Nurse Corps, and female dietetic and physical therapy personnel.* (1) Army and Navy nurses (female) on active service under order of the service department.

(2) Dietetic and physical therapy (female) personnel, excluding students

and apprentices, appointed with relative rank on or after December 22, 1942, or commissioned on or after June 22, 1944.

(e) *Aviation camps.* Students who were enlisted men during World War I.

(f) *Cadets and midshipmen.* See § 3.6(b)(4).

(g) *Coast and Geodetic Survey, and its successor agencies, the Environmental Science Services Administration and the National Oceanic and Atmospheric Administration.* See § 3.6(b)(3).

(h) *Coast Guard.* Active service in Coast Guard on or after January 29, 1915, while under jurisdiction of the Treasury Department, Navy Department, or the Department of Transportation. (See § 3.6 (c) and (d) as to temporary members of the Coast Guard Reserves.)

(i) *Contract surgeons.* For compensation and dependency and indemnity compensation, if the disability or death was the result of disease or injury contracted in line of duty during a war period while actually performing the duties of assistant surgeon or acting assistant surgeon with any military force in the field, or in transit or in hospital.

(j) *Field clerks, Quartermaster Corps.* Included as enlisted men.

(k) *Lighthouse service personnel.* Transferred to the service and jurisdiction of War or Navy Departments by Executive order under the Act of August 29, 1916. Effective July 1, 1939, service was consolidated with the Coast Guard.

(l) *Male nurses.* Persons who were enlisted men of Medical Corps.

(m) *National Guard.* Members of the National Guard of the United States and Air National Guard of the United States are included as Reserves. See § 3.6 (c) and (d) as to training duty performed by members of a State National Guard and paragraph (o) of this section as to disability suffered after being called into Federal service and before enrollment.

(n) *Persons heretofore having a pensionable or compensable status.*

(Authority: 38 U.S.C. 1152, 1504)

(o) *Persons ordered to service.* (1) Any person who has:

(i) Applied for enlistment or enrollment in the active military, naval, or air service and who is provisionally accepted and directed, or ordered, to report to a place for final acceptance into the service, or

(ii) Been selected or drafted for such service, and has reported according to a call from the person's local draft board and before final rejection, or

(iii) Been called into Federal service as a member of the National Guard, but has not been enrolled for Federal service, and

(iv) Suffered injury or disease in line of duty while going to, or coming from, or at such place for final acceptance or entry upon active duty,

is considered to have been on active duty and therefore to have incurred such disability in active service.

(2) The injury or disease must be due to some factor relating to compliance with proper orders. Draftees and selectees are included when reporting for preinduction examination or for final induction on active duty. Such persons are not included for injury or disease suffered during the period of inactive duty, or period of waiting, after a final physical examination and prior to beginning the trip to report for induction. Members of the National Guard are included when reporting to a designated rendezvous.

(p) *Philippine Scouts and others.* See § 3.8.

(q) *Public Health Service.* See § 3.6 (a) and (b).

(r) *Reserves.* See § 3.6 (a), (b), and (c).

(s) *Revenue Cutter Service.* While serving under direction of Secretary of the Navy in cooperation with the Navy.

(t) *Training camps.* Members of training camps authorized by section 54 of the National Defense Act, except members of Student Army Training Corps Camps at the Presidio of San Francisco, Plattsburg, New York, Fort Sheridan, Illinois, Howard University, Washington, D.C., Camp Perry, Ohio, and Camp Hancock, Georgia, from July 18, 1918, to September 16, 1918.

(u) *Women's Army Corps (WAC).* Service on or after July 1, 1943.

(v) *Women's Reserve of Navy, Marine Corps, and Coast Guard.* Same benefits as members of the Officers Reserve Corps or enlisted men of the United States Navy, Marine Corps or Coast Guard.

(w) *Russian Railway Service Corps.* Service during World War I as certified by the Secretary of the Army.

(x) *Active military service certified as such under section 401 of Pub. L. 95–202.* Such service if certified by the Secretary of Defense as active military service and if a discharge under honorable conditions is issued by the Secretary. The effective dates for an award based upon such service shall be as provided by § 3.400(z) and 38 U.S.C. 5110, except that in no event shall such an award be made effective earlier than November 23, 1977. Service in the following groups has been certified as active military service.

(1) Women's Air Forces Service Pilots (WASP).

(2) Signal Corps Female Telephone Operators Unit of World War I.

(3) Engineer Field Clerks.

(4) Women's Army Auxiliary Corps (WAAC).

(5) Quartermaster Corps Female Clerical Employees serving with the AEF (American Expeditionary Forces) in World War I.

(6) Civilian Employees of Pacific Naval Air Bases Who Actively Participated in Defense of Wake Island During World War II.

(7) Reconstruction Aides and Dietitians in World War I.

(8) Male Civilian Ferry Pilots.

(9) Wake Island Defenders from Guam.

(10) Civilian Personnel Assigned to the Secret Intelligence Element of the OSS.

(11) Guam Combat Patrol.

(12) Quartermaster Corps *Keswick* Crew on Corregidor (WWII).

(13) U.S. Civilian Volunteers Who Actively Participated in the Defense of Bataan.

(14) United States Merchant Seamen Who Served on Blockships in Support of Operation Mulberry.

(15) American Merchant Marine in Oceangoing Service during the Period of Armed Conflict, December 7, 1941, to August 15, 1945.

(16) Civilian Navy IFF Technicians Who Served in the Combat Areas of the Pacific during World War II (December 7, 1941 to August 15, 1945). As used in the official name of this group, the acronym *IFF* stands for Identification Friend or Foe.

(17) U.S. Civilians of the American Field Service (AFS) Who Served Overseas Operationally in World War I during the Period August 31, 1917 to January 1, 1918.

(18) U.S. Civilians of the American Field Service (AFS) Who Served Overseas Under U.S. Armies and U.S. Army Groups in World War II during the Period December 7, 1941 through May 8, 1945.

(19) U.S. Civilian Employees of American Airlines Who Served Overseas as a Result of American Airlines' Contract with the Air Transport Command During the Period December 14, 1941 through August 14, 1945.

(20) Civilian Crewmen of United States Coast and Geodetic Survey Vessels Who Performed Their Service in Areas of Immediate Military Hazard While Conducting Cooperative Operations with and for the United States Armed Forces Within a Time Frame of December 7, 1941, to August 15, 1945.

(21) Honorably Discharged Members of the American Volunteer Group (Flying Tigers) Who Served During the Period December 7, 1941 to July 18, 1942.

(22) U.S. Civilian Flight Crew and Aviation Ground Support Employees of United Air Lines (UAL), Who Served Overseas as a Result of UAL's Contract With the Air Transport Command During the Period December 14, 1941, through August 14, 1945.

(23) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Transcontinental and Western Air (TWA), Inc., Who Served Overseas as a Result of TWA's Contract With the Air Transport Command During the Period December 14, 1941, through August 14, 1945.

(24) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Consolidated Vultree Aircraft Corporation (Consairway Division) Who Served Overseas as a Result of a Contract With the Air Transport Command During the Period December 14, 1941, through August 14, 1945.

(25) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Pan American World Airways and Its Subsidiaries and Affiliates, Who Served Overseas as a Result of Pan American's

Contract With the Air Transport Command and Naval Air Transport Service During the Period December 14, 1941 through August 14, 1945.

(26) Honorably Discharged Members of the American Volunteer Guard, Eritrea Service Command During the Period June 21, 1942 to March 31, 1943.

(27) U.S. Civilian Flight Crew and Aviation Ground Support Employees of Northwest Airlines, Who Served Overseas as a Result of Northwest Airline's Contract with the Air Transport Command during the Period December 14, 1941 through August 14, 1945.

(28) U.S. Civilian Female Employees of the U.S. Army Nurse Corps While Serving in the Defense of Bataan and Corregidor During the Period January 2, 1942 to February 3, 1945.

(Authority: Sec. 401, Pub. L. 95–202, 91 Stat. 1450)

[26 FR 1565, Feb. 24, 1961]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §3.7, see the List of CFR Sections Affected in the Finding Aids section of this volume.

CROSS REFERENCE: Office of Workers' Compensation Programs. See §3.708.

§3.8 Philippine and Insular Forces.

(a) *Regular Philippine Scouts.* Service in the Philippine Scouts (except that described in paragraph (b) of this section), the Insular Force of the Navy, Samoan Native Guard, and Samoan Native Band of the Navy is included for pension, compensation, dependency and indemnity compensation, and burial allowance. Benefits are payable in dollars.

(b) *Other Philippine Scouts.* Service of persons enlisted under section 14, Pub. L. 190, 79th Congress (Act of October 6, 1945), is included for compensation and dependency and indemnity compensation. Such benefits are payable at a rate of $0.50 for each dollar authorized under the law. All enlistments and reenlistments of Philippine Scouts in the Regular Army between October 6, 1945, and June 30, 1947, inclusive were made under the provisions of Pub. L. 190 as it constituted the sole authority for such enlistments during that period. This paragraph does not apply to officers who were commissioned in connection with the administration of Pub. L. 190.

(Authority: 38 U.S.C. 107)

(c) *Commonwealth Army of the Philippines.* (1) Service is included, for compensation, dependency and indemnity compensation, and burial allowance, from and after the dates and hours, respectively, when they were called into service of the Armed Forces of the United States by orders issued from time to time by the General Officer, U.S. Army, pursuant to the Military Order of the President of the United States dated July 26, 1941. Service as a guerrilla under the circumstances outlined in paragraph (d) of this section is also included. Service on or after July 1, 1946, is not included. Benefits are payable at a rate of $0.50 for each dollar authorized under the law.

(Authority: 38 U.S.C. 107)

(2) Unless the record shows examination at time of entrance into the Armed Forces of the United States, such persons are not entitled to the presumption of soundness. This also applies upon reentering the Armed Forces after a period of inactive service.

(d) *Guerrilla service.* (1) Persons who served as guerrillas under a commissioned officer of the United States Army, Navy or Marine Corps, or under a commissioned officer of the Commonwealth Army recognized by and cooperating with the United States Forces are included. (See paragraph (c) of this section.) Service as a guerrilla by a member of the Philippine Scouts or the Armed Forces of the United States is considered as service in his or her regular status. (See paragraph (a) of this section.)

(2) The following certifications by the service departments will be accepted as establishing guerrilla service:

(i) Recognized guerrilla service;

(ii) Unrecognized guerrilla service under a recognized commissioned officer only if the person was a former member of the United States Armed Forces (including the Philippine Scouts), or the Commonwealth Army. This excludes civilians.

A certification of *Anti-Japanese Activity* will not be accepted as establishing guerrilla service.

(e) *Combined service.* Where a veteran who had Commonwealth Army or guerrilla service and also had other service, wartime or peacetime, in the Armed Forces of the United States, has disabilities which are compensable separately on a dollar and a $0.50 for each dollar authorized basis, and the disabilities are combined under the authority contained in 38 U.S.C. 1157, the evaluation for which dollars are payable will be first considered and the difference between this evaluation and the combined evaluation will be the basis for computing the amount payable at the rate of $0.50 for each dollar authorized.

[26 FR 1565, Feb. 24, 1961, as amended at 31 FR 14454, Nov. 10, 1966; 60 FR 18355, Apr. 11, 1995]

CROSS REFERENCE: Computation of service. See § 3.15.

§ 3.9 Philippine service.

(a) For a Regular Philippine Scout or a member of one of the regular components of the Philippine Commonwealth Army while serving with Armed Forces of United States, the period of active service will be from the date certified by the Armed Forces as the date of enlistment or date of report for active duty whichever is later to date of release from active duty, discharge, death, or in the case of a member of the Philippine Commonwealth Army June 30, 1946, whichever was earlier. Release from active duty includes:

(1) Leaving one's organization in anticipation of or due to the capitulation.

(2) Escape from prisoner-of-war status.

(3) Parole by the Japanese.

(4) Beginning of missing-in-action status, except where factually shown at that time he was with his or her unit or death is presumed to have occurred while carried in such status: *Provided, however,* That where there is credible evidence that he was alive after commencement of his or her missing-in-action status, the presumption of death will not apply for Department of Veterans Affairs purposes.

(5) Capitulation on May 6, 1942, except that periods of recognized guerrilla service or unrecognized guerrilla service under a recognized commissioned officer or periods of service in units which continued organized resistance against Japanese prior to formal capitulation will be considered return to active duty for period of such service.

(b) Active service of a Regular Philippine Scout or a member of the Philippine Commonwealth Army serving with the Armed Forces of the United States will include a *prisoner-of-war* status immediately following a period of active duty, or a period of recognized guerrilla service or unrecognized guerrilla service under a recognized commissioned officer. In those cases where following release from active duty as set forth in paragraph (a) of this section, the veteran is factually found by the Department of Veterans Affairs to have been injured or killed by the Japanese because of anti-Japanese activities or his or her former service in the Armed Forces of the United States, such injury or death may be held to have been incurred in active service for Department of Veterans Affairs purposes. Determination shall be based on all available evidence, including service department reports, and consideration shall be given to the character and length of the veteran's former active service in the Armed Forces of the United States.

(c) A prisoner-of-war status based upon arrest during general zonification will not be sufficient of itself to bring a case within the definition of return to military control.

(d) The active service of members of the irregular forces *guerrilla* will be the period certified by the service department.

[26 FR 1566, Feb. 24, 1961, as amended at 26 FR 4612, May 26, 1961]

§ 3.10 [Reserved]

§ 3.11 Homicide.

Any person who has intentionally and wrongfully caused the death of another person is not entitled to pension, compensation, or dependency and indemnity compensation or increased pension, compensation, or dependency and indemnity compensation by reason of such death. For the purpose of this

section the term *dependency and indemnity compensation* includes benefits at dependency and indemnity compensation rates paid under 38 U.S.C. 1318.

[44 FR 22718, Apr. 17, 1979, as amended at 54 FR 31829, Aug. 2, 1989]

§3.12 Character of discharge.

(a) If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. 101(2)). A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.

(b) A discharge or release from service under one of the conditions specified in this section is a bar to the payment of benefits unless it is found that the person was insane at the time of committing the offense causing such discharge or release or unless otherwise specifically provided (38 U.S.C. 5303(b)).

(c) Benefits are not payable where the former service member was discharged or released under one of the following conditions:

(1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful order of competent military authorities.

(2) By reason of the sentence of a general court-martial.

(3) Resignation by an officer for the good of the service.

(4) As a deserter.

(5) As an alien during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release. See §3.7(b).

(6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. This bar to benefit entitlement does not apply if there are compelling circumstances to warrant the prolonged unauthorized absence. This bar applies to any person awarded an honorable or general discharge prior to October 8, 1977, under one of the programs listed in paragraph (h) of this section, and to any person who prior to October 8, 1977, had not otherwise established basic eligibility to receive Department of Veterans Affairs benefits. The term *established basic eligibility to receive Department of Veterans Affairs benefits* means either a Department of Veterans Affairs determination that an other than honorable discharge was issued under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in paragraph (h) of this section. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (paragraph (b) of this section) or a decision of a board of correction of records established under 10 U.S.C. 1552 can estalish basic eligibility to receive Department of Veterans Affairs benefits. The following factors will be considered in determining whether there are compelling circumstances to warrant the prolonged unauthorized absence.

(i) Length and character of service exclusive of the period of prolonged AWOL. Service exclusive of the period of prolonged AWOL should generally be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation.

(ii) Reasons for going AWOL. Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be evaluated in terms of the person's age, cultural background, educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted. Hardship or suffering incurred during overseas service, or as a result of combat wounds of other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began.

(iii) A valid legal defense exists for the absence which would have precluded a conviction for AWOL. Compelling circumstances could occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice. For purposes of this paragraph the defense must go directly to the substantive issue of absence rather than to procedures, technicalities or formalities.

(d) A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.

(1) Acceptance of an undesirable discharge to escape trial by general court-martial.

(2) Mutiny or spying.

(3) An offense involving moral turpitude. This includes, generally, conviction of a felony.

(4) Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.

(5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

(e) An honorable discharge or discharge under honorable conditions issued through a board for correction of records established under authority of 10 U.S.C. 1552 is final and conclusive on the Department of Veterans Affairs. The action of the board sets aside any prior bar to benefits imposed under paragraph (c) or (d) of this section.

(f) An honorable or general discharge issued prior to October 8, 1977, under authority other than that listed in paragraphs (h) (1), (2) and (3) of this section by a discharge review board established under 10 U.S.C. 1553 set aside any bar to benefits imposed under paragraph (c) or (d) of this section except the bar contained in paragraph (c)(2) of this section.

(g) An honorable or general discharge issued on or after October 8, 1977, by a discharge review board established under 10 U.S.C. 1553, sets aside a bar to benefits imposed under paragraph (d), but not paragraph (c), of this section provided that:

(1) The discharge is upgraded as a result of an individual case review;

(2) The discharge is upgraded under uniform published standards and procedures that generally apply to all persons administratively discharged or released from active military, naval or air service under conditions other than honorable; and

(3) Such standards are consistent with historical standards for determining honorable service and do not contain any provision for automatically granting or denying an upgraded discharge.

(h) Unless a discharge review board established under 10 U.S.C. 1553 determines on an individual case basis that the discharge would be upgraded under uniform standards meeting the requirements set forth in paragraph (g) of this section, an honorable or general discharge awarded under one of the following programs does not remove any bar to benefits imposed under this section:

(1) The President's directive of January 19, 1977, implementing Presidential Proclamation 4313 of September 16, 1974; or

(2) The Department of Defense's special discharge review program effective April 5, 1977; or

(3) Any discharge review program implemented after April 5, 1977, that does not apply to all persons administratively discharged or released from active military service under other than honorable conditions.

(Authority: 38 U.S.C. 5303 (e))

(i) No overpayments shall be created as a result of payments made after October 8, 1977, based on an upgraded honorable or general discharge issued under one of the programs listed in paragraph (h) of this section which would not be awarded under the standards set forth in paragraph (g) of this section. Accounts in payment status on or after October 8, 1977, shall be terminated the end of the month in which it is determined that the original other than honorable discharge was not issued under conditions other than dishonorable following notice from the appropriate discharge review board that the discharge would not have been upgraded under the standards set forth in paragraph (g) of this section, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment or April 7, 1978, whichever is the earliest.

(j) No overpayment shall be created as a result of payments made after October 8, 1977, in cases in which the bar contained in paragraph (c)(6) of this section is for application. Accounts in payment status on or after October 8, 1977, shall be terminated at the end of the month in which it is determined that compelling circumstances do not exist, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment, or April 7, 1978, whichever is the earliest.

(k) *Uncharacterized separations.* Where enlisted personnel are administratively separated from service on the basis of proceedings initiated on or after October 1, 1982, the separation may be classified as one of the three categories of administrative separation that do not require characterization of service by the military department concerned. In such cases conditions of discharge will be determined by the VA as follows:

(1) *Entry level separation.* Uncharacterized administrative separations of this type shall be considered under conditions other than dishonorable.

(2) *Void enlistment or induction.* Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation, with reference to the provisions of §3.14 of this part, to determine whether separation was under conditions other than dishonorable.

(3) *Dropped from the rolls.* Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation to determine whether separation was under conditions other than dishonorable.

(Authority: 38 U.S.C. 501)

[28 FR 123, Jan. 4, 1963, as amended at 41 FR 12656, Mar. 26, 1976; 43 FR 15153, Apr. 11, 1978; 45 FR 2318, Jan. 11, 1980; 49 FR 44099, Nov. 2, 1984; 62 FR 14823, Mar. 28, 1997]

CROSS REFERENCES: Validity of enlistments. See §3.14. Revision of decisions. See §3.105. Effective dates. See §3.400(g). Minimum active-duty service requirement. See §3.12a.

§3.12a Minimum active-duty service requirement.

(a) *Definitions.* (1) The term *minimum period of active duty* means, for the purposes of this section, the shorter of the following periods.

(i) Twenty-four months of continuous active duty. Non-duty periods that are excludable in determining the Department of Veterans Affairs benefit entitlement (e.g., see §3.15) are not considered as a break in service for continuity purposes but are to be subtracted from total time served.

(ii) The full period for which a person was called or ordered to active duty.

(2) The term *benefit* includes a right or privilege but does not include a refund of a participant's contributions under 38 U.S.C. Ch. 32.

(b) *Effect on Department of Veterans Affairs benefits.* Except as provided in paragraph (d) of this section, a person listed in paragraph (c) of this section who does not complete a minimum period of active duty is not eligible for any benefit under title 38, United States Code or under any law administered by the Department of Veterans Affairs based on that period of active service.

(c) *Persons included.* Except as provided in paragraph (d) of this section, the provisions of paragraph (b) of this section apply to the following persons:

(1) A person who originally enlists (enlisted person only) in a regular component of the Armed Forces after September 7, 1980 (a person who signed a delayed-entry contract with one of the service branches prior to September 8, 1980, and under that contract was assigned to a reserve component until entering on active duty after September 7, 1980, shall be considered to have enlisted on the date the person entered on active duty); and

(2) Any other person (officer as well as enlisted) who enters on active duty after October 16, 1981 and who has not previously completed a continuous period of active duty of at least 24 months or been discharged or released from active duty under 10 U.S.C. 1171 (early out).

(d) *Exclusions.* The provisions of paragraph (b) of this section are not applicable to the following cases:

(1) To a person who is discharged or released under 10 U.S.C. 1171 or 1173 (early out or hardship discharge).

(2) To a person who is discharged or released from active duty for a disability adjudged service connected without presumptive provisions of law, or who at time of discharge had such a service-connected disability, shown by official service records, which in medical judgment would have justified a discharge for disability.

(3) To a person with a compensable service-connected disability.

(4) To the provision of a benefit for or in connection with a service-connected disability, condition, or death.

(5) To benefits under chapter 19 of title 38, United States Code.

(e) *Dependent or survivor benefits*—(1) *General.* If a person is, by reason of this section, barred from receiving any benefits under title 38, United States Code (or under any other law administered by the Department of Veterans Affairs based on a period of active duty, the person's dependents or survivors are also barred from receiving benefits based on the same period of active duty.

(2) *Exceptions.* Paragraph (e)(1) of this section does not apply to benefits under chapters 19 and 37 of title 38, United States Code. (38 U.S.C. 5303A)

[47 FR 24549, June 7, 1982]

§ 3.13 Discharge to change status.

(a) A discharge to accept appointment as a commissioned or warrant officer, or to change from a Reserve or Regular commission to accept a commission in the other component, or to reenlist is a conditional discharge if it was issued during one of the following periods:

(1) World War I; prior to November 11, 1918. As to reenlistments, this subparagraph applies only to Army and National Guard. No involuntary extension or other restrictions existed on Navy enlistments.

(2) World War II, the Korean conflict or the Vietnam era; prior to the date the person was eligible for discharge under the point or length of service system, or under any other criteria in effect.

(3) Peacetime service; prior to the date the person was eligible for an unconditional discharge.

(b) Except as provided in paragraph (c) of this section, the entire period of service under the circumstances stated in paragraph (a) of this section constitutes one period of service and entitlement will be determined by the character of the final termination of such period of active service except that, for death pension purposes, § 3.3(b)(3) and (4) is controlling as to basic entitlement when the conditions prescribed therein are met.

(c) Despite the fact that no unconditional discharge may have been issued, a person shall be considered to have been unconditionally discharged or released from active military, naval or air service when the following conditions are met:

(1) The person served in the active military, naval or air service for the period of time the person was obligated to serve at the time of entry into service;

(2) The person was not discharged or released from such service at the time of completing that period of obligation due to an intervening enlistment or reenlistment; and

(3) The person would have been eligible for a discharge or release under conditions other than dishonorable at

that time except for the intervening enlistment or reenlistment.

[26 FR 1566, Feb. 24, 1961, as amended at 27 FR 4024, Apr. 27, 1962; 32 FR 13224, Sept. 19, 1967; 43 FR 15154, Apr. 11, 1978; 46 FR 23926, Apr. 29, 1981]

§3.14 Validity of enlistments.

Service is valid unless the enlistment is voided by the service department.

(a) *Enlistment not prohibited by statute.* Where an enlistment is voided by the service department for reasons other than those stated in paragraph (b) of this section, service is valid from the date of entry upon active duty to the date of voidance by the service department. Benefits may not be paid, however, unless the discharge is held to have been under conditions other than dishonorable. Generally discharge for concealment of a physical or mental defect except incompetency or insanity which would have prevented enlistment will be held to be under dishonorable conditions.

(b) *Statutory prohibition.* Where an enlistment is voided by the service department because the person did not have legal capacity to contract for a reason other than minority (as in the case of an insane person) or because the enlistment was prohibited by statute (a deserter or person convicted of a felony), benefits may not be paid based on that service even though a disability was incurred during such service. An undesirable discharge by reason of the fraudulent enlistment voids the enlistment from the beginning.

(c) *Misrepresentation of age.* Active service which was terminated because of concealment of minority or misrepresentation of age is honorable if the veteran was released from service under conditions other than dishonorable. Service is valid from the date of entry upon active duty to the date of discharge.

(d) *Honorable discharges.* Determinations as to honorable service will be made by the service departments and the finding shall be binding on the Department of Veterans Affairs, but, in the case of an alien, the effect of the discharge will be governed by §3.7(b).

[26 FR 1567, Feb. 24, 1961, as amended at 27 FR 4024, Apr. 27, 1962]

§3.15 Computation of service.

For nonservice-connected or service-connected benefits, active service is countable exclusive of time spent on an industrial, agricultural, or indefinite furlough, time lost on absence without leave (without pay), under arrest (without acquittal), in desertion, while undergoing sentence of court-martial or a period following release from active duty under the circumstances outlined in §3.9. In claims based on Spanish-American War service, leave authorized under General Order No. 130, War Department, is included.

[40 FR 16064, Apr. 9, 1975]

CROSS REFERENCE: Duty periods. See §3.6(b)(6).

§3.16 Service pension.

In computing the 70 or 90 days required under §3.3(a) active service which began before or extended beyond the war period will be included if such service was continuous. Broken periods of service during a war period may be added together to meet the requirement for length of service.

[41 FR 18299, May 3, 1976, as amended at 44 FR 45932, Aug. 6, 1979]

§3.17 Disability and death pension; Mexican border period and later war periods.

In computing the 90 days' service required for pension entitlement (see §3.3), there will be included active service which began before and extended into the Mexican border period or ended during World War I, or began or ended during World War II, the Korean conflict, the Vietnam era or the Persian Gulf War, if such service was continuous. Service during different war periods may be combined with service during any other war period to meet the 90 days' service requirement.

(Authority: 38 U.S.C. 1521)

[37 FR 6676, Apr. 1, 1972, as amended at 44 FR 45932, Aug. 6, 1979; 56 FR 57986, Nov. 15, 1991]

§§3.18—3.19 [Reserved]

§3.20 Surviving spouse's benefit for month of veteran's death.

(a) Where the veteran died on or after December 1, 1962, and before October 1,

1982, the rate of death pension or dependency and indemnity compensation otherwise payable for the surviving spouse for the month in which the death occurred shall be not less than the amount of pension or compensation which would have been payable to or for the veteran for that month but for his or her death.

(Authority: 38 U.S.C. 5310)

(b) Where the veteran dies on or after October 1, 1982, the surviving spouse may be paid death pension or dependency and indemnity compensation for the month in which the veteran died at a rate equal to the amount of compensation or pension which would have been payable to the veteran for that month had death not occurred, but only if such rate is greater than the monthly rate of death pension or dependency and indemnity compensation to which the surviving spouse is entitled. Otherwise, no payment of death pension or dependency and indemnity compensation may be made for the month in which the veteran died.

(Authority: 38 U.S.C. 5111(c))

(c)(1) Where a veteran receiving compensation or pension dies after December 31, 1996, the surviving spouse, if not entitled to death compensation, dependency and indemnity compensation, or death pension for the month of death, shall be entitled to a benefit for that month in an amount equal to the amount of compensation or pension the veteran would have received for that month but for his or her death.

(2) A payment issued to a deceased veteran as compensation or pension for the month in which death occurred shall be treated as payable to that veteran's surviving spouse, if the surviving spouse is not entitled to death compensation, dependency and indemnity compensation or death pension for that month and, if negotiated or deposited, shall be considered to be the benefit to which the surviving spouse is entitled under paragraph (c)(1) of this section. However, if such payment is in an amount less than the amount of the benefit under paragraph (c)(1) of this section, the unpaid difference shall be treated in the same manner as an accrued benefit under § 3.1000 of this part.

(Authority: 38 U.S.C. 5310(b))

[48 FR 34471, July 29, 1983, as amended at 62 FR 35422, July 1, 1997]

§ 3.21 Monetary rates.

The rates of compensation, dependency and indemnity compensation for surviving spouses and children, and section 306 and old-law disability and death pension, are published in tabular form in appendix B of the Veterans Benefits Administration Manual M21–1 and are to be given the same force and effect as if published in the regulations (title 38, Code of Federal Regulations). The maximum annual rates of improved pension payable under Pub. L. 95–588 (92 Stat. 2497) are set forth in §§ 3.23 and 3.24. The monthly rates and annual income limitations applicable to parents' dependency and indemnity compensation are set forth in § 3.25.

[44 FR 45932, Aug. 6, 1979]

CROSS REFERENCES: Section 306 pension. See § 3.1(u). Old-law pension. See § 3.1(v). Improved pension. See § 3.1(w).

§ 3.22 Benefits at DIC rates in certain cases when death is not service connected.

(a) *Entitlement criteria.* Benefits authorized by section 1318 of title 38 U.S.C., shall be paid to a deceased veteran's surviving spouse (see § 3.54(c)(2)) or children in the same manner as if the veteran's death is service connected when the following conditions are met:

(1) The veteran's death was not caused by his or her own willful misconduct; and

(2) The veteran was in receipt of or for any reason (including receipt of military retired or retirement pay or correction of a rating after the veteran's death based on clear and unmistakable error) was not in receipt of but would have been entitled to receive compensation at the time of death for a service-connected disablement that either:

(i) Was continously rated totally disabling by a schedular or unemployability rating for a period of 10 or more years immediately preceding death; or

(ii) Was continuously rated totally disabling by a schedular or unemployability rating from the date of the veteran's discharge or release from active duty for a period of not less than 5 years immediately preceding death.

(b) *Effect of judgment or settlement.* If a surviving spouse or child eligible for benefits under paragraph (a) of this section receives any money or property pursuant to a judicial proceeding based upon, or a settlement or compromise of, any cause of action or other right of recovery for damages for the death of the veteran, benefits payable under paragraph (a) of this section shall not be paid for any month following the month in which such money or property is received until the amount of benefits that would otherwise have been payable under paragraph (a) of this section equals the total of the amount of money received and the fair market value of the property received. The provisions of this paragraph do not apply, however, to any portion of such benefits payable for any period preceding the end of the month in which such money or property of value is received.

(Authority: 38 U.S.C. 501)

(c) *Social security and worker's compensation.* Benefits received under social security or worker's compensation are not subject to recoupment under paragraph (b) of this section even though such benefits may have been awarded pursuant to a judicial proceeding.

(d) *Beneficiary's duty to report.* Any person entitled to benefits under paragraph (a) of this section shall promptly report to the Department of Veterans Affairs the receipt of any money or property received pursuant to a judicial proceeding based upon, or a settlement or compromise of, any cause of action or other right of recovery for damages for the death of the veteran. The amount to be reported is the total of the amount of money received and the fair market value of property received. Expenses incident to recovery, such as attorney's fees, may not be deducted from the amount to be reported.

(e) *Relationship to survivor benefit plan.* For the purpose of 10 U.S.C. 1448(d) and 1450(c) eligibility for benefits under paragraph (a) of this section shall be deemed eligibility for dependency and indemnity compensation under 38 U.S.C. 1311(a).

(Authority: 38 U.S.C. 1318)

[44 FR 22718, Apr. 17, 1979, as amended at 48 FR 41161, Sept. 14, 1983; 53 FR 23235, June 21, 1988; 54 FR 31829, Aug. 2, 1989]

CROSS REFERENCES: Marriage dates. See §3.54. Homicide. See §3.11.

§3.23 Improved pension rates—Veterans and surviving spouses.

(a) *Maximum annual rates of improved pension.* The maximum annual rates of improved pension for the following categories of beneficiaries shall be the amounts specified in 38 U.S.C. 1521 and 1542, as increased from time to time under 38 U.S.C. 5312. Each time there is an increase under 38 U.S.C. 5312, the actual rates will be published in the ''Notices'' section of the FEDERAL REGISTER. (1) Veterans who are permanently and totally disabled.

(Authority: 38 U.S.C. 1521(b) or (c))

(2) Veterans in need of aid and attendance.

(Authority: 38 U.S.C. 1521(d))

(3) Veterans who are housebound.

(Authority: 38 U.S.C. 1521(e))

(4) Two veterans married to one another; combined rates.

(Authority: 38 U.S.C. 1521(f))

(5) Surviving spouse alone or with a child or children of the deceased veteran in custody of the surviving spouse .

(Authority: 38 U.S.C. 1541(b) or (c))

(6) Surviving spouses in need of aid and attendance.

(Authority: 38 U.S.C. 1541(d))

(7) Surviving spouses who are housebound.

(Authority: 38 U.S.C. 1541(e))

(b) *Reduction for income.* The maximum rates of improved pension in paragraph (a) of this section shall be reduced by the amount of the countable annual income of the veteran or surviving spouse.

(Authority: 38 U.S.C. 1521, 1541)

(c) *Mexican border period and World War I veterans.* The applicable maximum annual rate payable to a Mexican border period or World War I veteran under this section shall be increased by the amount specified in 38 U.S.C. 1521(g), as increased from time to time under 38 U.S.C 5312. Each time there is an increase under 38 U.S.C. 5312, the actual rate will be published in the ''Notices'' section of the FEDERAL REGISTER.

(Authority: 38 U.S.C. 1521(g))

(d) *Definitions of terms used in this section*—(1) *Dependent.* A veteran's spouse or child. A veteran's spouse who resides apart from the veteran and is estranged from the veteran may not be considered the veteran's dependent unless the spouse receives reasonable support contributions from the veteran. (Note that under § 3.60 a veteran and spouse who reside apart are considered to be living together unless they are estranged.) A child of a veteran not in custody of the veteran and to whose support the veteran is not reasonably contributing, may not be considered the veteran's dependent.

(Authority: 38 U.S.C. 1521(b)).

(2) *In need of aid and attendance.* As defined in § 3.351(b).

(3) *Housebound.* As defined in § 3.351(d)(2), (f). This term also includes a veteran who has a disability or disabilities evaluated as 60 percent or more disabling in addition to a permanent and totally disabling condition. See § 3.351(d)(1).

(4) *Veteran's annual income.* This term includes the veteran's annual income, the annual income of the veteran's dependent spouse, and the annual income of each child of the veteran (other than a child for whom increased pension is not payable under 38 U.S.C. 1522(b)) in the veteran's custody or to whose support the veteran is reasonably contributing (to the extent such child's income is reasonably available to or for the veteran, unless in the judgment of the Department of Veterans Affairs to do so would work a hardship on the veteran.) There is a rebuttable presumption that all of such a child's income is reasonably available to or for the veteran.

(Authority: 38 U.S.C. 1521 (c), (h))

(5) *Surviving spouse's annual income.* This term includes the surviving spouse's annual income and the annual income of each child of the veteran (other than a child for whom increased pension is not payable under 38 U.S.C. 1543(a)(2)) in the custody of the surviving spouse to the extent that such child's income is reasonably available to or for the surviving spouse, unless in the judgment of the Department of Veterans Affairs to do so would work a hardship on the surviving spouse. There is a rebuttable presumption that all of such a child's income is available to or for the surviving spouse.

(Authority: 38 U.S.C. 1541(c), (g))

(6) *Reasonable availability and hardship.* For the purposes of paragraphs (d)(4) and (d)(5) of this section, a child's income shall be considered ''reasonably available'' when it can be readily applied to meet the veteran's or surviving spouse's expenses necessary for reasonable family maintenance, and ''hardship'' shall be held to exist when annual expenses necessary for reasonable family maintenance exceed the sum of countable annual income plus VA pension entitlement. *Expenses necessary for reasonable family maintenance* include expenses for basic necessities (such as food, clothing, shelter, etc.) and other expenses, determined on a case-by-case basis, which are necessary to support a reasonable quality of life.

(Authority: 38 U.S.C. 501)

[44 FR 45933, Aug. 6, 1979, as amended at 52 FR 34907, Sept. 14, 1987; 53 FR 23235, June 21, 1988]

CROSS REFERENCES: Improved pension. See § 3.1(w). Child. See § 3.57(d). Definition of *living with.* See § 3.60. Exclusions from income. See § 3.272.

§ 3.24 Improved pension rates—Surviving children.

(a) *General.* The provisions of this section apply to children of a deceased veteran not in the custody of a surviving spouse who has basic eligibility to receive improved pension. Children in custody of a surviving spouse who has basic eligibility to receive improved

pension do not have separate entitlement. Basic eligibility to receive improved pension means that the surviving spouse is in receipt of improved pension or could become entitled to receive improved pension except for the amount of the surviving spouse's countable annual income or the size of the surviving spouse's estate (See §3.274(c)). Under §3.23(d)(5) the countable annual income of a surviving spouse includes the countable annual income of each child of the veteran in custody of the surviving spouse to the extent the child's income is reasonably available to or for the surviving spouse, unless in the judgment of the Department of Veterans Affairs to do so would work a hardship on the surviving spouse.

(b) *Child with no personal custodian or in the custody of an institution.* In cases in which there is no personal custodian, i.e., there is no person who has the legal right to exercise parental control and responsibility for the child's welfare (See §3.57(d)), or the child is in the custody of an institution, pension shall be paid to the child at the annual rate specified in 38 U.S.C. 1542, as increased from time to time under 38 U.S.C. 5312, reduced by the amount of the child's countable annual income. Each time there is an increase under 38 U.S.C. 5312, the actual rate will be published in the ''Notices'' section of the FEDERAL REGISTER.

(c) *Child in the custody of person legally responsible for support*—(1) *Single child.* Pension shall be paid to a child in the custody of a person legally responsible for the child's support at an annual rate equal to the difference between the rate for a surviving spouse and one child under §3.23(a)(5), and the sum of the annual income of such child and the annual income of such person or, the maximum annual pension rate under paragraph (b) of this section, whichever is less.

(2) *More than one child.* Pension shall be paid to children in custody of a person legally responsible for the children's support at an annual rate equal to the difference between the rate for a surviving spouse and an equivalent number of children (but not including any child who has countable annual income equal to or greater than the maximum annual pension rate under paragraph (b) of this section) and the sum of the countable annual income of the person legally responsible for support and the combined countable annual income of the children (but not including the income of any child whose countable annual income is equal to or greater than the maximum annual pension rate under paragraph (b) of this section, or the maximum annual pension rate under paragraph (b) of this section times the number of eligible children, whichever is less).

(Authority: 38 U.S.C. 1542)

[44 FR 45933, Aug. 6, 1979, as amended at 52 FR 34907, Sept. 14, 1987; 61 FR 20727, May 8, 1996]

CROSS REFERENCES: Child. See §3.57(d). Exclusions from income. See §3.272.

§3.25 Parent's dependency and indemnity compensation (DIC)—Method of payment computation.

Monthly payments of parents' DIC shall be computed in accordance with the following formulas:

(a) *One parent.* Except as provided in paragraph (b) of this section, if there is only one parent, the monthly rate specified in 38 U.S.C 1315(b)(1), as increased from time to time under 38 U.S.C. 5312, reduced by $.08 for each dollar of such parent's countable annual income in excess of $800. No payments of DIC may be made under this paragraph, however, if such parent's countable annual income exceeds the amount specified in 38 U.S.C. 1315(b)(3), as increased from time to time under 38 U.S.C. 5312, and no payment of DIC to a parent under this paragraph may be less than $5 a month.

(b) *One parent who has remarried.* If there is only one parent and the parent has remarried and is living with the parent's spouse, DIC shall be paid under paragraph (a) or paragraph (d) of this section, whichever shall result in the greater benefit being paid to the veteran's parent. In the case of remarriage, the total combined annual income of the parent and the parent's spouse shall be counted in determining the monthly rate of DIC.

(c) *Two parents not living together.* The rate computation method in this paragraph applies to:

(1) Two parents who are not living together, or

(2) An unremarried parent when both parents are living and the other parent has remarried.

The monthly rate of DIC paid to such parent shall be the rate sepcified in 38 U.S.C. 1315(c)(1), as increased from time to time under 38 U.S.C. 5312, reduced by an amount no greater than $.08 for each dollar of such parent's countable annual income in excess of $800, except tht no payments of DIC may be made under this paragraph if such parent's countable annual income exceeds the amount specified in 38 U.S.C. 1315(c)(3), as increased from time to time under 38 U.S.C. 5312, and no payment of DIC to a parent under this paragraph may be less than $5 monthly. Each time there is a rate increase under 38 U.S.C. 5312, the amount of the reduction under this paragraph shall be recomputed to provide, as nearly as possible, for an equitable distribution of the rate increase. The results of this computation method shall be published in schedular format in the ''Notices'' section of the FEDERAL REGISTER as provided in paragraph (f) of this section.

(d) *Two parents living together or remarried parents living with spouse.* The rate computation method in this paragraph applies to each parent living with another parent and to each remarried parent when both parents are alive. The monthly rate of DIC paid to such parents shall be the rate specified in 38 U.S.C. 1315(d)(1), as increased from time to time under 38 U.S.C. 5312, reduced to an amount no greater than $.08 for each dollar of such parent's and spouse's combined countable annual income in excess of $1,000 except that no payments of DIC to a parent under this paragraph may be less than $5 monthly. Each time there is a rate increase under 38 U.S.C. 5312, the amount of the reduction under this paragraph shall be recomputed to provide, as nearly as possible, for an equitable distribution of the rate increase. The results of this computation method shall be published in schedular format in the ''Notices'' section of the FEDERAL REGISTER as provided in paragraph (f) of this section.

(e) *Aid and attendance.* The monthly rate of DIC payable to a parent under this section shall be increased by the amount specified in 38 U.S.C. 1315(g), as increased from time to time under 38 U.S.C. 5312, if such parent is:

(1) A patient in a nursing home, or

(2) Helpless or blind, or so nearly helpless or blind as to need or require the regular aid and attendance of another person.

(f) *Rate publication.* Each time there is an increase under 38 U.S.C. 5312, the actual rates will be published in the ''Notices'' section of the FEDERAL REGISTER.

(Authority: 38 U.S.C. 501)

[52 FR 34907, Sept. 14, 1987, as amended at 61 FR 20727, May 8, 1996]

§ 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)

[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) *Publishing requirements.* Increases in pension rates and parents' dependency and indemnity compensation rates and income limitation made under this section shall be published in the FEDERAL REGISTER.

(Authority: 38 U.S.C. 5312(c)(1))

[44 FR 45934, Aug. 6, 1979, as amended at 52 FR 34908, Sept. 14, 1987]

§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 REFERENCES: 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)

[48 FR 34471, July 29, 1983]

§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) *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 l,

and December 1, if the annual rate payable is at least $144 but less the $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, 1986; 53 FR 7903, Mar. 11, 1988; 57 FR 10425, Mar. 26, 1992]

CROSS REFERENCE: Pension. See §3.3(a)(3), (b)(4).

§ 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 or dependency and indemnity compensation 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 or parents' dependency and indemnity compensation 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. 5111(c))

[48 FR 34472, July 29, 1983; 48 FR 37031, Aug. 16, 1983, as amended at 49 FR 47003, Nov. 30, 1984]

§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.

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

(Authority: 38 U.S.C. 501)

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

RELATIONSHIP

§3.50 Spouse and surviving spouse.

(a) *Spouse.* ''Spouse'' means a person of the opposite sex whose marriage to the veteran meets the requirements of §3.1(j).

(b) *Surviving spouse.* Except as provided in §3.52, ''surviving spouse'' means a person of the opposite sex whose marriage to the veteran meets the requirements of §3.1(j) and who was the spouse of the veteran at the time of the veteran's death and:

(1) Who lived with the veteran continuously from the date of marriage to the date of the veteran's death except where there was a separation which was due to the misconduct of, or procured by, the veteran without the fault of the spouse; and

(2) Except as provided in §3.55, has not remarried or has not since the death of the veteran and after September 19, 1962, lived with another person of the opposite sex and held himself or herself out openly to the public to be the spouse of such other person.

[62 FR 5529, Feb. 6, 1997]

§3.52 Marriages deemed valid.

Where an attempted marriage of a claimant to the veteran was invalid by reason of a legal impediment, the marriage will nevertheless be deemed valid if:

(a) The marriage occurred 1 year or more before the veteran died or existed for any period of time if a child was born of the purported marriage or was

born to them before such marriage (see § 3.54(d)), and

(b) The claimant entered into the marriage without knowledge of the impediment, and

(c) The claimant cohabited with the veteran continuously from the date of marriage to the date of his or her death as outlined in § 3.53, and

(d) No claim has been filed by a legal surviving spouse who has been found entitled to gratuitous death benefits other than accrued monthly benefits covering a period prior to the veteran's death.

(Authority: 38 U.S.C. 103(a))

[26 FR 1567, Feb. 24, 1961, as amended at 27 FR 1215, Feb. 9, 1962; 32 FR 13224, Sept. 19, 1967; 41 FR 18299, May 3, 1976]

CROSS REFERENCE: Definition, marriage. See § 3.205(c).

§ 3.53 Continuous cohabitation.

(a) *General.* The requirement that there must be continuous cohabitation from the date of marriage to the date of death of the veteran will be considered as having been met when the evidence shows that any separation was due to the misconduct of, or procured by, the veteran without the fault of the surviving spouse. Temporary separations which ordinarily occur, including those caused for the time being through fault of either party, will not break the continuity of the cohabitation.

(b) *Findings of fact.* The statement of the surviving spouse as to the reason for the separation will be accepted in the absence of contradictory information. If the evidence establishes that the separation was by mutual consent and that the parties lived apart for purposes of convenience, health, business, or any other reason which did not show an intent on the part of the surviving spouse to desert the veteran, the continuity of the cohabitation will not be considered as having been broken. State laws will not control in determining questions of desertion; however, due weight will be given to findings of fact in court decisions made during the life of the veteran on issues subsequently involved in the application of this section.

[41 FR 18300, May 3, 1976, as amended at 59 FR 32659, June 24, 1994]

§ 3.54 Marriage dates.

A surviving spouse may qualify for pension, compensation, or dependency and indemnity compensation if the marriage to the veteran occurred before or during his or her service or, if married to him or her after his or her separation from service, before the applicable date stated in his section.

(a) *Pension.* Death pension may be paid to a surviving spouse who was married to the veteran:

(1) One year or more prior to the veteran's death, or

(2) For any period of time if a child was born of the marriage, or was born to them before the marriage, or

(3) Prior to the applicable delimiting dates, as follows:

(i) Civil War—June 27, 1905.

(ii) Indian wars—March 4, 1917.

(iii) Spanish-American War—January 1, 1938.

(iv) Mexican border period and World War I—December 14, 1944.

(v) World War II—January 1, 1957.

(vi) Korean conflict—February 1, 1965.

(vii) Vietnam era—May 8, 1985.

(viii) Persian Gulf War—January 1, 2001.

(Authority: 38 U.S.C. 532(d), 534(c), 536(c), 541(e), 541(f))

(b) *Compensation.* Death compensation may be paid to a surviving spouse who, with respect to date of marriage, could have qualified as a surviving spouse for death compensation under any law administered by the Department of Veterans Affairs in effect on December 31, 1957, or who was married to the veteran:

(1) Before the expiration of 15 years after termination of the period of service in which the injury or disease which caused the veteran's death was incurred or aggravated, or

(2) One year or more, or

(3) For any period of time if a child was born of the marriage, or was born to them before the marriage.

(Authority: 38 U.S.C. 1102)

(c) *Dependency and indemnity compensation.* (1) Dependency and indemnity compensation payable under 38 U.S.C. 1310(a) may be paid to the surviving spouse of a veteran who died on or after January 1, 1957, who was married to the veteran:

(i) Before the expiration of 15 years after the termination of the period of service in which the injury or disease causing the death of the veteran was incurred or aggravated, or

(ii) For 1 year or more, or

(iii) For any period of time if a child was born of the marriage, or was born to them before the marriage.

(Authority: 38 U.S.C. 1304)

(2) In order for a surviving spouse to be entitled to benefits under section 1318 of title 38 U.S.C., in the same manner as if death is service connected, the marriage to the veteran shall have been for a period of not less than 1 year immediately preceding the date of the veteran's death, or for any period of time if a child was born of the marriage, or was born to them before the marriage.

(Authority: 38 U.S.C. 1318)

(d) *Child born.* The term *child born of the marriage* means a birth on or after the date of the marriage on which the surviving spouse's entitlement is predicated. The term *born to them before the marriage* means a birth prior to the date of such marriage. Either term includes a fetus advanced to the point of gestation required to constitute a birth under the law of the jurisdiction in which the fetus was delivered.

(e) *More than one marriage to veteran.* For periods commencing on or after January 1, 1958, where a surviving spouse has been married legally to a veteran more than once, the date of the original marriage will be used in determining whether the statutory requirement as to date of marriage has been met.

(Authority: 38 U.S.C. 103(b))

[26 FR 1567, Feb. 24, 1961, as amended at 27 FR 6498, July 10, 1962; 32 FR 13224, Sept. 19, 1967; 40 FR 16064, Apr. 9, 1975; 40 FR 48680, Oct. 17, 1975; 41 FR 18300, May 3, 1976; 44 FR 22718, Apr. 17, 1979; 54 FR 31829, Aug. 2, 1989; 56 FR 5756, Feb. 13, 1991; 56 FR 57986, Nov. 15, 1991]

§ 3.55 Reinstatement of benefits eligibility based upon terminated marital relationships.

(a) *Surviving spouse.* (1) Remarriage of a surviving spouse shall not bar the furnishing of benefits to such surviving spouse if the marriage:

(i) Was void, or

(ii) Has been annulled by a court having basic authority to render annulment decrees, unless it is determined by the Department of Veterans Affairs that the annulment was obtained through fraud by either party or by collusion.

(2) On or after January 1, 1971, remarriage of a surviving spouse terminated prior to November 1, 1990, or terminated by legal proceedings commenced prior to November 1, 1990, by an individual who, but for the remarriage, would be considered the surviving spouse, shall not bar the furnishing of benefits to such surviving spouse provided that the marriage:

(i) Has been terminated by death, or

(ii) Has been dissolved by a court with basic authority to render divorce decrees unless the Department of Veterans Affairs determines that the divorce was secured through fraud by the surviving spouse or by collusion.

(3) On or after January 1, 1971, the fact that a surviving spouse has lived with another person and has held himself or herself out openly to the public as the spouse of such other person shall not bar the furnishing of benefits to him or her after he or she terminates the relationship, if the relationship terminated prior to November 1, 1990.

(4) On or after January 1, 1971, the fact that benefits to a surviving spouse may previously have been barred because his or her conduct or a relationship into which he or she had entered had raised an inference or presumption that he or she had remarried or had been determined to be open and notorious adulterous cohabitation, or similar conduct, shall not bar the furnishing of benefits to such surviving spouse after he or she terminates the conduct or relationship, if the relationship terminated prior to November 1, 1990.

(b) *Child.* (1) Marriage of a child shall not bar the furnishing of benefits to or on account of such child, if the marriage:

(i) Was void, or

(ii) Has been annulled by a court having basic authority to render annulment decrees, unless it is determined by the Department of Veterans Affairs that the annulment was obtained through fraud by either party or by collusion.

(2) On or after January 1, 1975, marriage of a child terminated prior to November 1, 1990, shall not bar the furnishing of benefits to or for such child provided that the marriage:

(i) Has been terminated by death, or

(ii) Has been dissolved by a court with basic authority to render divorce decrees unless the Department of Veterans Affairs determines that the divorce was secured through fraud by either party or by collusion.

(Authority: 38 U.S.C. 103; 105 Stat. 424, 106 Stat. 4322)

[58 FR 32444, June 10, 1993, as amended at 60 FR 52863, Oct. 11, 1995]

CROSS REFERENCES: Evidence. See §§3.206 and 3.207. Termination of marital relationship or conduct. See §3.215.

§ 3.56 [Reserved]

§ 3.57 Child.

(a) *General.* (1) Except as provided in paragraphs (a)(2) and (3) of this section, the term *child* of the veteran means an unmarried person who is a legitimate child, a child legally adopted before the age of 18 years, a stepchild who acquired that status before the age of 18 years and who is a member of the veteran's household or was a member of the veteran's household at the time of the veteran's death, or an illegitimate child; and

(i) Who is under the age of 18 years; or

(ii) Who, before reaching the age of 18 years, became permanently incapable of self-support; or

(iii) Who, after reaching the age of 18 years and until completion of education or training (but not after reaching the age of 23 years) is pursuing a course of instruction at an approved educational institution.

(2) For the purposes of determining entitlement of benefits based on a child's school attendance, the term *child* of the veteran also includes the following unmarried persons:

(i) A person who was adopted by the veteran between the ages of 18 and 23 years.

(ii) A person who became a stepchild of the veteran between the ages of 18 and 23 years and who is a member of the veteran's household or was a member of the veteran's household at the time of the veteran's death.

(3) Subject to the provisions of paragraphs (c) and (e) of this section, the term *child* also includes a person who became permanently incapable of self-support before reaching the age of 18 years, who was a member of the veteran's household at the time he or she became 18 years of age, and who was adopted by the veteran, regardless of the age of such person at the time of adoption.

(Authority: 38 U.S.C. 101(4)(A))

(b) *Stepchild.* The term means a legitimate or an illegitimate child of the veteran's spouse. A child of a surviving spouse whose marriage to the veteran is deemed valid under the provisions of §3.52, and who otherwise meets the requirements of this section is included.

(c) *Adopted child.* Except as provided in paragraph (e) of this section, the term means a child adopted pursuant to a final decree of adoption, a child adopted pursuant to an unrescinded interlocutory decree of adoption while remaining in the custody of the adopting parent (or parents) during the interlocutory period, and a child who has been placed for adoption under an agreement entered into by the adopting parent (or parents) with any agency authorized under law to so act, unless and until such agreement is terminated, while the child remains in the custody of the adopting parent (or parents) during the period of placement for adoption under such agreement. The term includes, as of the date of death of a veteran, such a child who:

(1) Was living in the veteran's household at the time of the veteran's death, and

(2) Was adopted by the veteran's spouse under a decree issued within 2 years after August 25, 1959, or the veteran's death whichever is later, and

(3) Was not receiving from an individual other than the veteran or the veteran's spouse, or from a welfare organization which furnishes services or assistance for children, recurring contributions of sufficient size to constitute the major portion of the child's support.

(Authority: 38 U.S.C. 101(4))

(d) Definition of *child custody*. The provisions of this paragraph are for the purpose of determining entitlement to improved pension under §§3.23 and 3.24.

(1) Custody of a child shall be considered to rest with a veteran, surviving spouse of a veteran or person legally responsible for the child's support if that person has the legal right to exercise parental control and responsibility for the welfare and care of the child. A child of the veteran residing with the veteran, surviving spouse of the veteran who is the child's natural or adoptive parent, or person legally responsible for the child's support shall be presumed to be in the custody of that individual. Where the veteran, surviving spouse, or person legally responsible for the child's support has not been divested of legal custody, but the child is not residing with that individual, the child shall be considered in the custody of the individual for purposes of Department of Veterans Affairs benefits.

(2) The term *person legally responsible for the child's support* means a person who is under a legally imposed obligation (e.g., by statute or court order) to provide for the child's support, as well as a natural or adoptive parent who has not been divested of legal custody. If the child's natural or adoptive parent has remarried, the stepparent may also be considered a person legally responsible for the child's support. A child shall be considered in the joint custody of his or her stepparent and natural or adoptive parent so long as the natural or adoptive parent and the stepparent are not estranged and residing apart, and the natural or adoptive parent has not been divested of legal custody. When a child is in such joint custody the combined income of the natural or adoptive parent and the stepparent shall be included as income of the person legally responsible for support under §3.24(c).

(3) A person having custody of a child prior to the time the child attains age 18 shall be considered to retain custody of the child for periods on and after the child's 18th birthday, unless the person is divested of legal custody. This applies without regard to when a child reaches the age of majority under applicable State law. This also applies without regard to whether the child was entitled to pension prior to age 18, or whether increased pension was payable to a veteran or surviving spouse on behalf of the child prior to the child's 18th birthday. If the child's custodian dies after the child has attained age 18, the child shall be considered to be in custody of a successor custodian provided the successor custodian has the right to exercise parental control and responsibility for the welfare and care of the child.

(Authority: 38 U.S.C. 501, 1521(c), 1541(c))

(e) *Child adopted under foreign law*—(1) *General.* The provisions of this paragraph are applicable to a person adopted under the laws of any jurisdiction other than a State. The term *State* is defined in 38 U.S.C. 101(20) and also includes the Commonwealth of the Northern Mariana Islands. The term *veteran* includes, for the purposes of this paragraph, a Commonwealth Army veteran or new Philippine Scout as defined in 38 U.S.C. 3566.

(2) *Adopted child of living veteran.* A person residing outside any of the States shall not be considered to be a legally adopted child of a veteran during the lifetime of the veteran unless all of the following conditions are met.

(i) The person was less than 18 years of age at the time of adoption.

(ii) The person is receiving one-half or more of the person's support from the veteran.

(iii) The person is not in the custody of the person's natural parent unless the natural parent is the veteran's spouse.

(iv) The person is residing with the veteran (or in the case of divorce following adoption, with the divorced spouse who is also a natural or adoptive parent) except for periods during which the person is residing apart from

the veteran for purposes of full-time attendance at an educational institution or during which the person or the veteran is confined in a hospital, nursing home, other health-care facility, or other institution.

(3) *Adopted child of deceased veteran.* A person shall not be considered to have been a legally adopted child of a veteran as of the date of the veteran's death and thereafter unless one of the following conditions is met.

(i) The veteran was entitled to and was receiving for the person a dependent's allowance or similar monetary benefit payable under title 38, United States Code at any time within the 1-year period immediately preceding the veteran's death; or

(ii) The person met the requirements of paragraph (e)(2) of this section for a period of at least 1 year prior to the veteran's death.

(4) *Verification.* In the case of an adopted child of a living veteran, the requirements of paragraphs (e)(2)(ii), (iii) and (iv) of this section are for prospective application. That is, in addition to meeting all of the requirements of paragraph (e)(2) of this section at the time of initial adjudication, benefits are not payable thereafter for or to a child adopted under the laws of any jurisdiction other than a State unless the requirements of paragraphs (e)(2)(ii), (iii) and (iv) of this section continue to be met. Consequently, whenever Department of Veterans Affairs benefits are payable to or for a child adopted under the laws of any jurisdiction other than a State, and the veteran who adopted the child is living, the beneficiary shall submit, upon Department of Veterans Affairs request, a report, or other evidence, to determine if the requirements of paragraph (e)(2)(ii), (iii), and (iv) of this section were met for any period for which payment was made for or to the child and whether such requirements will continue to be met for future entitlement periods. Failure to submit the requested report or evidence within a reasonable time from date of request may result in termination of benefits payable for or to the child.

(Authority: 38 U.S.C. 101(4), 501)

[44 FR 45935, Aug. 6, 1979 and 45 FR 1878, Jan. 9, 1980, as amended at 45 FR 25391, Apr. 15, 1980; 49 FR 47003, Nov. 30, 1984]

CROSS REFERENCES: Improved pension rates. See § 3.23. Improved pension rates; surviving children. See § 3.24. Child's relationship. See § 3.210. Helplessness. See § 3.403(a). Helplessness. See § 3.503(c). School attendance. See § 3.667. Helpless children—Spanish-American and prior wars. See § 3.950.

§ 3.58 Child adopted out of family.

A child of a veteran adopted out of the family of the veteran either prior or subsequent to the veteran's death is nevertheless a *child* within the meaning of that term as defined by § 3.57 and is eligible for benefits payable under all laws administered by the Department of Veterans Affairs.

[26 FR 1568, Feb. 24, 1961]

CROSS REFERENCE: Veteran's benefits not apportionable. See § 3.458.

§ 3.59 Parent.

(a) The term *parent* means a natural mother or father (including the mother of an illegitimate child or the father of an illegitimate child if the usual family relationship existed), mother or father through adoption, or a person who for a period of not less than 1 year stood in the relationship of a parent to a veteran at any time before his or her entry into active service.

(b) Foster relationship must have begun prior to the veteran's 21st birthday. Not more than one father and one mother, as defined, will be recognized in any case. If two persons stood in the relationship of father or mother for 1 year or more, the person who last stood in such relationship before the veteran's last entry into active service will be recognized as the *parent*.

(Authority: 38 U.S.C. 101(5))

[26 FR 1568, Feb. 24, 1961, as amended at 44 FR 45935, Aug. 6, 1979]

§ 3.60 Definition of "living with".

For the purposes of determining entitlement to pension under 38 U.S.C. 1521,

a person shall be considered as living with his or her spouse even though they reside apart unless they are estranged.

(Authority: 38 U.S.C. 1521(h)(2))

[44 FR 45935, Aug. 6, 1979]

ADMINISTRATIVE

§3.100 Delegations of authority.

(a) Authority is delegated to the Under Secretary for Benefits and to supervisory or adjudicative personnel within the jurisdiction of the Veterans Benefits Administration designated by the Under Secretary to make findings and decisions under the applicable laws, regulations, precedents, and instructions, as to entitlement of claimants to benefits under all laws administered by the Department of Veterans Affairs governing the payment of monetary benefits to veterans and their dependents, within the jurisdiction of Compensation and Pension Service.

(b) Authority is delegated to the Director, Compensation and Pension Service, and to personnel of that service designated by him to determine whether a claimant or payee has forfeited the right to gratuitious benefits or to remit a prior forfeiture pursuant to the provisions of 38 U.S.C. 6103 or 6104. See §3.905.

(Authority: 38 U.S.C. 512(a))

[29 FR 7547, June 12, 1964, as amended at 31 FR 14455, Nov. 10, 1966; 37 FR 10442, May 23, 1972; 53 FR 3207, Feb. 4, 1988; 60 FR 18355, Apr. 11, 1995; 61 FR 20727, May 8, 1996]

§3.102 Reasonable doubt.

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

(Authority: 38 U.S.C. 501)

[50 FR 34458, Aug. 26, 1985]

§3.103 Procedural due process and appellate rights.

(a) *Statement of policy.* Every claimant has the right to written notice of the decision made on his or her claim, the right to a hearing, and the right of representation. Proceedings before VA are ex parte in nature, and it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law while protecting the interests of the Government. The provisions of this section apply to all claims for benefits and relief, and decisions thereon, within the purview of this part 3.

(b) *The right to notice*—(1) *General.* Claimants and their representatives are entitled to notice of any decision made by VA affecting the payment of benefits or the granting of relief. Such notice shall clearly set forth the decision made, any applicable effective date, the reason(s) for the decision, the right to a hearing on any issue involved in the claim, the right of representation and the right, as well as the necessary procedures and time limits, to initiate an appeal of the decision.

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

(3) *Exceptions.* Pretermination/reduction notice is not required but notice contemporaneous with the adverse action is required when:

(i) An adverse action is based solely on written, factual, unambiguous information as to income, net worth, dependency or marital status provided to VA by the beneficiary or his/her fiduciary with knowledge or notice that such information would be used to calculate benefits, and the legal standards applied to this information are numerical in nature,

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

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

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

(v) An adverse action is based upon a written statement provided to VA by a veteran indicating that he or she has returned to active service, the nature of that service, and the date of reentry into service, with the knowledge or notice that receipt of active service pay precludes concurrent receipt of VA compensation or pension (see § 3.654 regarding active service pay), or

(vi) An adverse action is based upon a garnishment order issued under 42 U.S.C. 659(a).

(Authority: 38 U.S.C. 501(a))

(c) *The right to a hearing.* (1) Upon request, a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of part 3 of this chapter, subject to the limitations described in § 20.1304 of this chapter with respect to hearings in claims which have been certified to the Board of Veterans Appeals for appellate review. VA will provide the place of hearing in the VA office having original jurisdiction over the claim or at the VA office nearest the claimant's home having adjudicative functions, or, subject to available resources and solely at the option of VA, at any other VA facility or federal building at which suitable hearing facilities are available. VA will provide one or more employees who have original determinative authority of such issues to conduct the hearing and be responsible for establishment and preservation of the hearing record. Hearings in connection with proposed adverse actions and appeals shall be held before one or more VA employees having original determinative authority who did not participate in the proposed action or the decision being appealed. All expenses incurred by the claimant in connection with the hearing are the responsibility of the claimant.

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

basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may request visual examination by a physician designated by VA and the physician's observations will be read into the record.

(Authority: 38 U.S.C. 501)

(d) *Submission of evidence.* Any evidence whether documentary, testimonial, or in other form, offered by the claimant in support of a claim and any issue a claimant may raise and any contention or argument a claimant may offer with respect thereto are to be included in the records.

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

(f) *Notification of decisions.* The claimant or beneficiary and his or her representative will be notified in writing of decisions affecting the payment of benefits or granting relief. All notifications will advise the claimant of the reason for the decision; the date the decision will be effective; the right to a hearing subject to paragraph (c) of this section; the right to initiate an appeal by filing a Notice of Disagreement which will entitle the individual to a Statement of the Case for assistance in perfecting an appeal; and the periods in which an appeal must be initiated and perfected (See part 20 of this chapter, on appeals). Further, any notice that VA has denied a benefit sought will include a summary of the evidence considered.

(Authority: 38 U.S.C. 5104)

[55 FR 13527, Apr. 11, 1990; 55 FR 17530, Apr. 25, 1990, as amended at 55 FR 20148, May 15, 1990; 55 FR 25308, June 21, 1990; 57 FR 56993, Dec. 2, 1992; 58 FR 16360, Mar. 26, 1993; 58 FR 59366, Nov. 9, 1993; 59 FR 6218, Feb. 10, 1994; 59 FR 6901, Feb. 14, 1994]

§3.104 Finality of decisions.

(a) A decision of a duly constituted rating agency or other agency of original jurisdiction shall be final and binding on all field offices of the Department of Veterans Affairs as to conclusions based on the evidence on file at the time VA issues written notification in accordance with 38 U.S.C. 5104. A final and binding agency decision shall not be subject to revision on the same factual basis except by duly constituted appellate authorities or except as provided in §3.105 of this part.

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

[29 FR 1462, Jan. 29, 1964, as amended at 29 FR 7547, June 12, 1964; 56 FR 65846, Dec. 19, 1991]

§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.

(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 (h) 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 (h) 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 (h) 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) *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 (h) 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)

(h) *Predetermination hearings.* (1) In the advance written notice concerning proposed actions under paragraphs (d) through (g) 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) or (g) 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 paragraph (f) 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 (g) 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 65846, Dec. 19, 1991; 57 FR 56993, Dec. 2, 1992]

CROSS REFERENCES: Effective dates. See § 3.400. Reductions and discontinuances. See

§ 3.500. Protection; service connection. See § 3.957.

§ 3.106 Renouncement.

(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 renouncement will be in writing over the person's signature. Upon receipt of such renouncement 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 renouncement 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 renouncement of that benefit, such application shall not be treated as an original application and benefits will be payable as if the renouncement had not occurred.

(Authority: 38 U.S.C. 5306(c))

(d) The renouncement 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 renouncement 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]

§ 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]

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

Diplomatic and consular officers of the Department of State are authorized to act as agents of the Department of Veterans Affairs and therefore a formal or informal claim or evidence submitted in support of a claim filed in a foreign country will be considered as filed in the Department of Veterans Affairs as of the date of receipt by the State Department representative.

[26 FR 1569, Feb. 24, 1961]

CROSS REFERENCE: Evidence from foreign countries. See § 3.202.

§ 3.109 Time limit.

(a) *Notice of time limit for filing evidence.* (1) If a claimant's application is incomplete, the claimant will be notified of the evidence necessary to complete the application. If the evidence is not received within 1 year from the

date of such notification, pension, compensation, or dependency and indemnity compensation may not be paid by reason of that application (38 U.S.C. 5103(a)). Information concerning the whereabouts of a person who has filed claim is not considered evidence.

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

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

(Authority: 38 U.S.C. 501)

[26 FR 1569, Feb. 24, 1961, as amended at 26 FR 2231, Mar. 16, 1961; 29 FR 1462, Jan. 29, 1964; 30 FR 133, Jan. 7, 1965; 55 FR 13529, Apr. 11, 1990]

§3.110 Computation of time limit.

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

(b) *The first day of the specified period* referred to in paragraph (a) of this section shall be the date of mailing of notification to the claimant or beneficiary of the action required and the time limit therefor. The date of the letter of notification shall be considered the date of mailing for purposes of computing time limits. As to appeals, see §§20.302 and 20.305 of this chapter.

(Authority: 38 U.S.C. 501)

[55 FR 13529, Apr. 11, 1990, as amended at 58 FR 32443, June 10, 1993]

§3.111 [Reserved]

§3.112 Fractions of one cent.

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

[26 FR 1570, Feb. 24, 1961]

§3.113 Signature by mark.

All signatures by mark or thumbprint must be:

(a) Witnessed by two persons who can write and who have signed their names and addresses; or

(b) Certified by a notary public or other person having authority to administer oaths for general purposes; or

(c) Certified by a Department of Veterans Affairs employee under authority of Department of Veterans Affairs Form 4505 series.

[27 FR 4365, May 8, 1962]

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

(a) *Effective date of award.* Where pension, compensation, or dependency and indemnity compensation 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, or dependency and indemnity compensation 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. 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]

§ 3.115 Access to financial records.

(a) The Secretary of Veterans Affairs may request from a financial institution the names and addresses of its customers. Each such request, however, shall include a certification that the information is necessary for the proper administration of benefits programs under the laws administered by the Secretary, and cannot be obtained by a reasonable search of records and information of the Department of Veterans Affairs.

(b) Information received pursuant to a request referred to in paragraph (a) of this section shall not be used for any purpose other than the administration of benefits programs under the laws administered by the Secretary if the disclosure of that information would otherwise be prohibited by any provision of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 through 3422).

(Authority: 38 U.S.C. 5319)

[58 FR 32445, June 10, 1993]

CLAIMS

§ 3.150 Forms to be furnished.

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

(Authority: 38 U.S.C. 5102)

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

(c) When disability or death is due to Department of Veterans Affairs hospital treatment, training, medical or surgical treatment, or examination, a

specific application for benefits will not be initiated.

[26 FR 1570, Feb. 14, 1961, as amended at 30 FR 133, Jan. 7, 1965]

CROSS REFERENCE: Failure to furnish claim form or notice of time limit. See §3.109(b).

§3.151 Claims for disability benefits.

(a) *General.* A specific claim in the form prescribed by the Secretary must be filed in order for benefits to be paid to any individual under the laws administered by VA. (38 U.S.C. 5101(a)). A claim by a veteran for compensation may be considered to be a claim for pension; and a claim by a veteran for pension may be considered to be a claim for compensation. The greater benefit will be awarded, unless the claimant specifically elects the lesser benefit.

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

(Authority: 38 U.S.C 5110(b)(3))

[50 FR 25981, June 24, 1985]

CROSS REFERENCE: Informal claims. See §3.155(b).

§3.152 Claims for death benefits.

(a) A specific claim in the form prescribed by the Secretary (or jointly with the Secretary of Health and Human Services, as prescribed by §3.153) must be filed in order for death benefits to be paid to any individual under the laws administered by VA. (See §3.400(c) concerning effective dates of awards.)

(Authority: 38 U.S.C. 5101(a))

(b)(1) A claim by a surviving spouse or child for compensation or dependency and indemnity compensation will also be considered to be a claim for death pension and accrued benefits, and a claim by a surviving spouse or child for death pension will be considered to be a claim for death compensation or dependency and indemnity compensation and accrued benefits.

(Authority: 38 U.S.C. 5101(b)(1))

(2) A claim by a parent for compensation or dependency and indemnity compensation will also be considered to be a claim for accrued benefits.

(Authority: 38 U.S.C. 5101(b)(2))

(c)(1) Where a child's entitlement to dependency and indemnity compensation arises by reason of termination of a surviving spouse's right to dependency and indemnity compensation or by reason of attaining the age of 18 years, a claim will be required. (38 U.S.C. 5110(e).) (See paragraph (c)(4) of this section.) Where the award to the surviving spouse is terminated by reason of her or his death, a claim for the child will be considered a claim for any accrued benefits which may be payable.

(2) A claim filed by a surviving spouse who does not have entitlement will be accepted as a claim for a child or children in her or his custody named in the claim.

(3) Where a claim of a surviving spouse is disallowed for any reason whatsoever and where evidence requested in order to determine entitlement from a child or children named in the surviving spouse's claim is submitted within 1 year from the date of request, requested either before or after disallowance of the surviving spouse's claim, an award for the child or children will be made as though the disallowed claim had been filed solely on their behalf. Otherwise, payments may not be made for the child or children for any period prior to the date of receipt of a new claim.

(4) Where payments of pension, compensation or dependency and indemnity compensation to a surviving spouse have been discontinued because of remarriage or death, or a child becomes eligible for dependency and indemnity compensation by reason of attaining the age of 18 years, and any necessary evidence is submitted within

1 year from date of request, an award for the child or children named in the surviving spouse's claim will be made on the basis of the surviving spouse's claim having been converted to a claim on behalf of the child. Otherwise, payments may not be made for any period prior to the date of receipt of a new claim.

(Authority: 38 U.S.C 501)

[50 FR 25981, June 24, 1985]

CROSS REFERENCES: State Department as agent of Department of Veterans Affairs. See § 3.108. Change in status of dependents. See § 3.651.

§ 3.153 Claims filed with Social Security.

An application on a form jointly prescribed by the Secretary and the Secretary of Health, Education, and Welfare filed with the Social Security Administration on or after January 1, 1957, will be considered a claim for death benefits, and to have been received in the Department of Veterans Affairs as of the date of receipt in Social Security Administration. The receipt of such an application (or copy thereof) by the Department of Veterans Affairs will not preclude a request for any necessary evidence.

(Authority: 38 U.S.C. 5105)

[26 FR 1570, Feb. 24, 1961]

§ 3.154 Injury due to hospital treatment, etc.

A formal claim for pension, compensation, dependency and indemnity compensation or any statement in a communication showing an intent to file a claim for disability or for death benefits resulting from the pursuit of a course of vocational rehabilitation, hospitalization, medical or surgical treatment, or examination under Department of Veterans Affairs laws may be accepted as a claim.

(Authority: 38 U.S.C. 1151)

[27 FR 11887, Dec. 1, 1962]

CROSS REFERENCES: Effective dates. See § 3.400. Disability or death due to hospitalization, etc. See § 3.800(a).

§ 3.155 Informal claims.

(a) Any communication or action, indicating an intent to apply for one or more benefits under the laws administered by the Department of Veterans Affairs, from a claimant, his or her duly authorized representative, a Member of Congress, or some person acting as next friend of a claimant who is not sui juris may be considered an informal claim. Such informal claim must identify the benefit sought. Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution. If received within 1 year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim.

(b) A communication received from a service organization, an attorney, or agent may not be accepted as an informal claim if a power of attorney was not executed at the time the communication was written.

(c) When a claim has been filed which meets the requirements of § 3.151 or § 3.152, an informal request for increase or reopening will be accepted as a claim.

[26 FR 1570, Feb. 24, 1961, as amended at 52 FR 27340, July 21, 1987]

CROSS REFERENCES: State Department as agent of VA. See § 3.108. Report of examination or hospitalization—as claim for increase or to reopen. See § 3.157.

§ 3.156 New and material evidence.

(a) *New and material evidence* means evidence not previously submitted to agency decisionmakers which bears directly and substantially upon the specific matter under consideration, which is neither cumulative nor redundant, and which by itself or in connection with evidence previously assembled is so significant that it must be considered in order to fairly decide the merits of the claim.

(Authority: 38 U.S.C. 501)

(b) New and material evidence received prior to the expiration of the appeal period, or prior to the appellate decision if a timely appeal has been filed (including evidence received prior to an appellate decision and referred to the agency of original jurisdiction by the Board of Veterans Appeals without consideration in that decision in accordance with the provisions of § 20.1304(b)(1) of this chapter), will be

considered as having been filed in connection with the claim which was pending at the beginning of the appeal period.

(Authority: 38 U.S.C. 501)

(c) Where the new and material evidence consists of a supplemental report from the service department, received before or after the decision has become final, the former decision will be reconsidered by the adjudicating agency of original jurisdiction. This comprehends official service department records which presumably have been misplaced and have now been located and forwarded to the Department of Veterans Affairs. Also included are corrections by the service department of former errors of commission or omission in the preparation of the prior report or reports and identified as such. The retroactive evaluation of disability resulting from disease or injury subsequently service connected on the basis of the new evidence from the service department must be supported adequately by medical evidence. Where such records clearly support the assignment of a specific rating over a part or the entire period of time involved, a retroactive evaluation will be assigned accordingly except as it may be affected by the filing date of the original claim.

[27 FR 11887, Dec. 1, 1962, as amended at 55 FR 20148, May 15, 1990; 55 FR 52275, Dec. 21, 1990; 58 FR 32443, June 10, 1993]

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

§3.157 Report of examination or hospitalization as claim for increase or to reopen.

(a) *General.* Effective date of pension or compensation benefits, if otherwise in order, will be the date of receipt of a claim or the date when entitlement arose, whichever is the later. A report of examination or hospitalization which meets the requirements of this section will be accepted as an informal claim for benefits under an existing law or for benefits under a liberalizing law or Department of Veterans Affairs issue, if the report relates to a disability which may establish entitlement. Acceptance of a report of examination or treatment as a claim for increase or to reopen is subject to the requirements of §3.114 with respect to action on Department of Veterans Affairs initiative or at the request of the claimant and the payment of retroactive benefits from the date of the report or for a period of 1 year prior to the date of receipt of the report.

(Authority: 38 U.S.C. 5110(a))

(b) *Claim.* Once a formal claim for pension or compensation has been allowed or a formal claim for compensation disallowed for the reason that the service-connected disability is not compensable in degree, receipt of one of the following will be accepted as an informal claim for increased benefits or an informal claim to reopen. In addition, receipt of one of the following will be accepted as an informal claim in the case of a retired member of a uniformed service whose formal claim for pension or compensation has been disallowed because of receipt of retirement pay. The evidence listed will also be accepted as an informal claim for pension previously denied for the reason the disability was not permanently and totally disabling.

(1) *Report of examination or hospitalization by Department of Veterans Affairs or uniformed services.* The date of outpatient or hospital examination or date of admission to a VA or uniformed services hospital will be accepted as the date of receipt of a claim. The date of a uniformed service examination which is the basis for granting severance pay to a former member of the Armed Forces on the temporary disability retired list will be accepted as the date of receipt of claim. The date of admission to a non-VA hospital where a veteran was maintained at VA expense will be accepted as the date of receipt of a claim, if VA maintenance was previously authorized; but if VA maintenance was authorized subsequent to admission, the date VA received notice of admission will be accepted. The provisions of this paragraph apply only when such reports relate to examination or treatment of a disability for which service–connection has previously been established or when a claim specifying the benefit sought is received within one year from

the date of such examination, treatment or hospital admission.

(Authority: 38 U.S.C. 501)

(2) *Evidence from a private physician or layman.* The date of receipt of such evidence will be accepted when the evidence furnished by or in behalf of the claimant is within the competence of the physician or lay person and shows the reasonable probability of entitlement to benefits.

(3) *State and other institutions.* When submitted by or on behalf of the veteran and entitlement is shown, date of receipt by the Department of Veterans Affairs of examination reports, clinical records, and transcripts of records will be accepted as the date of receipt of a claim if received from State, county, municipal, recognized private institutions, or other Government hospitals (except those described in paragraph (b)(1) of this section). These records must be authenticated by an appropriate official of the institution. Benefits will be granted if the records are adequate for rating purposes; otherwise findings will be verified by official examination. Reports received from private institutions not listed by the American Hospital Association must be certified by the Chief Medical Officer of the Department of Veterans Affairs or physician designee.

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

§ 3.158 Abandoned claims.

(a) *General.* Except as provided in § 3.652 of this part, where evidence requested in connection with an original claim, a claim for increase or to reopen or for the purpose of determining continued entitlement is not furnished within 1 year after the date of request, the claim will be considered abandoned. After the expiration of 1 year, further action will not be taken unless a new claim is received. Should the right to benefits be finally established, pension, compensation, or dependency and indemnity compensation based on such evidence shall commence not earlier than the date of filing the new claim.

(Authority: 38 U.S.C. 501)

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

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

[27 FR 11887, Dec. 1, 1962, as amended at 28 FR 13362, Dec. 10, 1963; 52 FR 43063, Nov. 9, 1987]

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

§ 3.159 Department of Veterans Affairs assistance in developing claims.

(a) Although it is the responsibility of any person filing a claim for a benefit administered by the Department of Veterans Affairs to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded, the Department of Veterans Affairs shall assist a claimant in developing the facts pertinent to his or her claim. This requirement to provide assistance shall not be construed as shifting from the claimant to the Department of Veterans Affairs the responsibility to produce necessary evidence.

(b) When information sufficient to identify and locate necessary evidence is of record, the Department of Veterans Affairs shall assist a claimant by requesting, directly from the source, existing evidence which is either in the custody of military authorities or maintained by another Federal agency. At the claimant's request, and provided that he or she has authorized the release of such evidence in a form acceptable to the custodian thereof, the Department of Veterans Affairs shall assist a claimant by attempting to obtain records maintained by State or

local governmental authorities and medical, employment, or other nongovernment records which are pertinent and specific to the claim. The Department of Veterans Affairs shall not pay any fees charged by the custodian for providing such evidence.

(c) Should its efforts to obtain evidence prove unsuccessful for any reason which the claimant could rectify, the Department of Veterans Affairs shall so notify the claimant and advise him or her that the ultimate responsibility for furnishing evidence rests with the claimant.

(Authority: 38 U.S.C. 5107)

[55 FR 52273, Dec. 21, 1990]

§3.160 Status of claims.

The following definitions are applicable to claims for pension, compensation, and dependency and indemnity compensation.

(a) *Informal claim.* See §3.155.

(b) *Original claim.* An initial formal application on a form prescribed by the Secretary. (See §§3.151, 3.152).

(c) *Pending claim.* An application, formal or informal, which has not been finally adjudicated.

(d) *Finally adjudicated claim.* An application, formal or informal, which has been allowed or disallowed by the agency of original jurisdiction, the action having become final by the expiration of 1 year after the date of notice of an award or disallowance, or by denial on appellate review, whichever is the earlier. (See §§20.1103 and 20.1104 of this chapter.)

(e) *Reopened claim.* Any application for a benefit received after final disallowance of an earlier claim, or any application based on additional evidence or a request for a personal hearing submitted more than 90 days following notification to the appellant of the certification of an appeal and transfer of applicable records to the Board of Veterans Appeals which was not considered by the Board in its decision and was referred to the agency of original jurisdiction for consideration as provided in §20.1304(b)(1) of this chapter.

(Authority: 38 U.S.C. 501)

(f) *Claim for increase.* Any application for an increase in rate of a benefit being paid under a current award, or for resumption of payments previously discontinued.

[27 FR 11887, Dec. 1, 1962, as amended at 31 FR 12056, Sept. 15, 1966; 55 FR 20148, May 15, 1990; 58 FR 32445, June 10, 1993]

EVIDENCE REQUIREMENTS

§3.200 Testimony certified or under oath.

(a) All oral testimony presented by claimants and witnesses on their behalf before any rating or authorization body will be under oath or affirmation. (See §3.103(c).)

(b) All written testimony submitted by the claimant or in his or her behalf for the purpose of establishing a claim for service connection will be certified or under oath or affirmation. This includes records, examination reports, and transcripts material to the issue received by the Department of Veterans Affairs at the instance of the claimant or in his or her behalf or requested by the Department of Veterans Affairs from State, county, municipal, recognized private institutions, and contract hospitals.

[40 FR 36329, Aug. 20, 1975]

§3.201 Exchange of evidence; Social Security and Department of Veterans Affairs.

(a) A claimant for dependency and indemnity compensation may elect to furnish to the Department of Veterans Affairs in support of that claim copies of evidence which was previously furnished to the Social Security Administration or to have the Department of Veterans Affairs obtain such evidence from the Social Security Administration. For the purpose of determining the earliest effective date for payment of dependency and indemnity compensation, such evidence will be deemed to have been received by the Department of Veterans Affairs on the date it was received by the Social Security Administration.

(b) A copy or certification of evidence filed in the Department of Veterans Affairs in support of a claim for dependency and indemnity compensation will be furnished the Social Security

Administration upon request from the agency.

(Authority: 38 U.S.C. 501(a) and 5105)

[26 FR 1571, Feb. 24, 1961, as amended at 58 FR 25562, Apr. 27, 1993]

CROSS REFERENCE: Claims filed with Social Security. See § 3.153.

§ 3.202 Evidence from foreign countries.

(a) Except as provided in paragraph (b) of this section, where an affidavit or other document is required to be executed under oath before an official in a foreign country, the signature of that official must be authenticated by a United States Consular Officer in that jurisdiction or by the State Department. Where the United States has no consular representative in a foreign country, such authentication may be made as follows:

(1) By a consular agent of a friendly government whereupon the signature and seal of the official of the friendly government may be authenticated by the State Department; or

(2) By the nearest American consul who will attach a certificate showing the result of the investigation concerning its authenticity.

(b) Authentication will not be required: (1) On documents approved by the Deputy Minister of Veterans Affairs, Department of Veterans Affairs, Ottawa, Canada: or

(2) When it is indicated that the attesting officer is authorized to administer oaths for general purposes and the document bears his or her signature and seal; or

(3) When the document is executed before a Department of Veterans Affairs employee authorized to administer oaths; or

(4) When a copy of a public or church record from any foreign country purports to establish birth, adoption, marriage, annulment, divorce, or death, provided it bears the signature and seal of the custodian of such record and there is no conflicting evidence in the file which would serve to create doubt as to the correctness of the record; or

(5) When a copy of the public or church record from one of the countries comprising the United Kingdom, namely: England, Scotland, Wales, or Northern Ireland, purports to establish birth, marriage, or death, provided it bears the signature or seal or stamp of the custodian of such record and there is no evidence which would serve to create doubt as to the correctness of the records; or

(6) When affidavits prepared in the Republic of the Philippines are certified by a Department of Veterans Affairs representative located in the Philippines having authority to administer oaths.

(c) Photocopies of original documents meeting the requirements of this section will be accepted if they satisfy the requirements of § 3.204 of this part.

(Authority: 38 U.S.C. 501

[26 FR 1571, Feb. 24, 1961, as amended at 40 FR 36329, Aug. 20, 1975; 52 FR 19348, May 22, 1987; 59 FR 46338, Sept. 8, 1994]

CROSS REFERENCE: State Department as agent of Department of Veterans Affairs. See § 3.108.

§ 3.203 Service records as evidence of service and character of discharge.

(a) *Evidence submitted by a claimant.* For the purpose of establishing entitlement to pension, compensation, dependency and indemnity compensation or burial benefits the Department of Veterans Affairs may accept evidence of service submitted by a claimant (or sent directly to the Department of Veterans Affairs by the service department), such as a DD Form 214, Certificate of Release or Discharge from Active Duty, or original Certificate of Discharge, without verification from the appropriate service department if the evidence meets the following conditions:

(1) The evidence is a document issued by the service department. A copy of an original document is acceptable if the copy was issued by the service department or if the copy was issued by a public custodian of records who certifies that it is a true and exact copy of the document in the custodian's custody; and

(2) The document contains needed information as to length, time and character of service; and

(3) In the opinion of the Department of Veterans Affairs the document is

genuine and the information contained in it is accurate.

(b) *Additional requirements for pension claimants.* In addition to meeting the requirements of paragraph (a) of this section, a document submitted to establish a creditable period of wartime service for pension entitlement may be accepted without verification if the document (or other evidence of record) shows:

(1) Service of 4 months or more; or

(2) Discharge for disability incurred in line of duty; or

(3) Ninety days creditable service based on records from the service department such as hospitalization for 90 days for a line of duty disability.

(c) *Verification from the service department.* When the claimant does not submit evidence of service or the evidence submitted does not meet the requirements of paragraph (a) of this section (and paragraph (b) of this section in pension claims), the Department of Veterans Affairs shall request verification of service from the service department. However, payment of nonservice-connected burial benefits may be authorized, if otherwise in order, based upon evidence of service which VA relied upon to authorize payment of compensation or pension during the veteran's lifetime, provided that there is no evidence which would serve to create doubt as to the correctness of that service evidence. If it appears that a length of service requirement may not be met (e.g., the 90 days wartime service requirement to receive pension under 38 U.S.C. 1521(j)), the Department of Veterans Affairs shall request a complete statement of service to determine if there are any periods of active service that are required to be excluded under §3.15.

[45 FR 72654, Nov. 3, 1980, as amended at 46 FR 51246, Oct. 19, 1981; 58 FR 37857, July 14, 1993; 58 FR 42623, Aug. 10, 1993]

§3.204 Evidence of dependents and age.

(a)(1) Except as provided in paragraph (a)(2) of this section, VA will accept, for the purpose of determining entitlement to benefits under laws administered by VA, the written statement of a claimant as proof of marriage, dissolution of a marriage, birth of a child, or death of a dependent, provided that the statement contains: the date (month and year) and place of the event; the full name and relationship of the other person to the claimant; and, where the claimant's dependent child does not reside with the claimant, the name and address of the person who has custody of the child. In addition, a claimant must provide the social security number of any dependent on whose behalf he or she is seeking benefits (see §3.216).

(2) VA shall require the types of evidence indicated in §§3.205 through 3.211 where: the claimant does not reside within a state; the claimant's statement on its face raises a question of its validity; the claimant's statement conflicts with other evidence of record; or, there is a reasonable indication, in the claimant's statement or otherwise, of fraud or misrepresentation of the relationship in question.

(Authority: 38 U.S.C. 5124)

(b) *Marriage or birth.* The classes of evidence to be furnished for the purpose of establishing marriage, dissolution of marriage, age, relationship, or death, if required under the provisions of paragraph (a)(2), are indicated in §§3.205 through 3.211 in the order of preference. Failure to furnish the higher class, however, does not preclude the acceptance of a lower class if the evidence furnished is sufficient to prove the point involved.

(c) *Acceptability of photocopies.* Photocopies of documents necessary to establish birth, death, marriage or relationship under the provisions of §§3.205 through 3.215 of this part are acceptable as evidence if the Department of Veterans Affairs is satisfied that the copies are genuine and free from alteration. Otherwise, VA may request a copy of the document certified over the signature and official seal of the person having custody of such record.

(Authority: 38 U.S.C. 501)

[26 FR 1572, Feb. 24, 1961, as amended at 40 FR 53581, Nov. 19, 1975; 45 FR 72655, Nov. 3, 1980; 59 FR 46338, Sept. 8, 1994; 61 FR 56626, Nov. 4, 1996]

§ 3.205 Marriage.

(a) *Proof of marriage.* Marriage is established by one of the following types of evidence:

(1) Copy or abstract of the public record of marriage, or a copy of the church record of marriage, containing sufficient data to identify the parties, the date and place of marriage, and the number of prior marriages if shown on the official record.

(2) Official report from service department as to marriage which occurred while the veteran was in service.

(3) The affidavit of the clergyman or magistrate who officiated.

(4) The original certificate of marriage, if the Department of Veterans Affairs is satisfied that it is genuine and free from alteration.

(5) The affidavits or certified statements of two or more eyewitnesses to the ceremony.

(6) In jurisdictions where marriages other than by ceremony are recognized the affidavits or certified statements of one or both of the parties to the marriage, if living, setting forth all of the facts and circumstances concerning the alleged marriage, such as the agreement between the parties at the beginning of their cohabitation, the period of cohabitation, places and dates of residences, and whether children were born as the result of the relationship. This evidence should be supplemented by affidavits or certified statements from two or more persons who know as the result of personal observation the reputed relationship which existed between the parties to the alleged marriage including the periods of cohabitation, places of residences, whether the parties held themselves out as married, and whether they were generally accepted as such in the communities in which they lived.

(7) Any other secondary evidence which reasonably supports a belief by the Adjudicating activity that a valid marriage actually occurred.

(b) *Valid marriage.* In the absence of conflicting information, proof of marriage which meets the requirements of paragraph (a) of this section together with the claimant's certified statement concerning the date, place and circumstances of dissolution of any prior marriage may be accepted as establishing a valid marriage, provided that such facts, if they were to be corroborated by record evidence, would warrant acceptance of the marriage as valid. Where necessary to a determination because of conflicting information or protest by a party having an interest therein, proof of termination of a prior marriage will be shown by proof of death, or a certified copy or a certified abstract of final decree of divorce or annulment specifically reciting the effects of the decree.

(c) *Marriages deemed valid.* Where a surviving spouse has submitted proof of marriage in accordance with paragraph (a) of this section and also meets the requirements of § 3.52, the claimant's signed statement that he or she had no knowledge of an impediment to the marriage to the veteran will be accepted, in the absence of information to the contrary, as proof of that fact.

(Authority: 38 U.S.C. 501)

[26 FR 1572, Feb. 24, 1961, as amended at 27 FR 6281, July 3, 1962; 36 FR 20946, Nov. 2, 1971; 40 FR 53581, Nov. 19, 1975; 45 FR 72655, Nov. 3, 1980; 47 FR 28096, June 29, 1982; 52 FR 19349, May 22, 1987; 58 FR 37857, July 14, 1993; 59 FR 46338, Sept. 8, 1994; 62 FR 5529, Feb. 6, 1997]

CROSS REFERENCES: Marriages deemed valid. See § 3.52. Definitions; marriage. See § 3.1(j). Evidence of dependents and age. See § 3.204.

§ 3.206 Divorce.

The validity of a divorce decree regular on its face, will be questioned by the Department of Veterans Affairs only when such validity is put in issue by a party thereto or a person whose interest in a claim for Department of Veterans Affairs benefits would be affected thereby. In cases where recognition of the decree is thus brought into question:

(a) Where the issue is whether the veteran is single or married (dissolution of a subsisting marriage), there must be a bona fide domicile in addition to the standards of the granting jurisdiction respecting validity of divorce;

(b) Where the issue is the validity of marriage to a veteran following a divorce, the matter of recognition of the divorce by the Department of Veterans Affairs (including any question of bona

fide domicile) will be determined according to the laws of the jurisdictions specified in §3.1(j).

(c) Where a foreign divorce has been granted the residents of a State whose laws consider such decrees to be valid, it will thereafter be considered as valid under the laws of the jurisdictions specified in §3.1(j) in the absence of a determination to the contrary by a court of last resort in those jurisdictions.

[27 FR 6281, July 3, 1962, as amended at 35 FR 16831, Oct. 31, 1970; 40 FR 53581, Nov. 19, 1975; 52 FR 19349, May 22, 1987]

CROSS REFERENCE: Evidence of dependents and age. See §3.204.

§3.207 Void or annulled marriage.

Proof that a marriage was void or has been annulled should consist of:

(a) *Void.* A certified statement from the claimant setting forth the circumstances which rendered the marriage void, together with such other evidence as may be required for a determination.

(b) *Annulled.* A copy or abstract of the decree of annulment. A decree regular on its face will be accepted unless there is reason to question the basic authority of the court to render annulment decrees or there is evidence indicating that the annulment may have been obtained through fraud by either party or by collusion.

[28 FR 2904, Mar. 3, 1963, as amended at 40 FR 53581, Nov. 19, 1975; 52 FR 19349, May 22, 1987; 59 FR 46338, Sept. 8, 1994]

CROSS REFERENCES: Effective dates, void or annulled marriage. See §3.400 (u) and (v). Evidence of dependents and age. See §3.204.

§3.208 Claims based on attained age.

In claims for pension where the age of the veteran or surviving spouse is material, the statements of age will be accepted where they are in agreement with other statements in the record as to age. However, where there is a variance in such records, the youngest age will be accepted subject to the submission of evidence as outlined in §3.209.

[40 FR 53581, Nov. 19, 1975, as amended at 52 FR 19349, May 22, 1987]

CROSS REFERENCE: Evidence of dependents and age. See §3.204.

§3.209 Birth.

Age or relationship is established by one of the following types of evidence. If the evidence submitted for proof of age or relationship indicates a difference in the name of the person as shown by other records, the discrepancy is to be reconciled by an affidavit or certified statement identifying the person having the changed name as the person whose name appears in the evidence of age or relationship.

(a) A copy or abstract of the public record of birth. Such a record established more than 4 years after the birth will be accepted as proof of age or relationship if, it is not inconsistent with material of record with the Department of Veterans Affairs, or if it shows on its face that it is based upon evidence which would be acceptable under this section.

(b) A copy of the church record of baptism. Such a record of baptism performed more than 4 years after birth will not be accepted as proof of age or relationship unless it is consistent with material of record with the Department of Veterans Affairs, which will include at least one reference to age or relationship made at a time when such reference was not essential to establishing entitlement to the benefit claimed.

(c) Official report from the service department as to birth which occurred while the veteran was in service.

(d) Affidavit or a certified statement of the physician or midwife in attendance at birth.

(e) Copy of Bible or other family record certified to by a notary public or other officer with authority to administer oaths, who should state in what year the Bible or other book in which the record appears was printed, whether the record bears any erasures or other marks of alteration, and whether from the appearance of the writing he or she believes the entries to have been made at the time purported.

(f) Affidavits or certified statements of two or more persons, preferably disinterested, who will state their ages, showing the name, date, and place of birth of the person whose age or relationship is being established, and that to their own knowledge such person is

the child of such parents (naming the parents) and stating the source of their knowledge.

(g) Other evidence which is adequate to establish the facts in issue, including census records, original baptismal records, hospital records, insurance policies, school, employment, immigration, or naturalization records.

(Authority: 38 U.S.C. 501)

[26 FR 1573, Feb. 24, 1961, as amended at 27 FR 1899, Feb. 28, 1962; 40 FR 53581, Nov. 19, 1975; 47 FR 28096, June 29, 1982; 52 FR 19349, May 22, 1987; 59 FR 46338, Sept. 8, 1994]

CROSS REFERENCE: Evidence of dependents and age. See § 3.204.

§ 3.210 Child's relationship.

(a) *Legitimate child.* Where it is necessary to determine the legitimacy of a child, evidence will be required to establish the legality of the marriage of the mother of the child to the veteran or to show that the child is otherwise legitimate by State laws together with evidence of birth as outlined in § 3.209. Where the legitimacy of a child is not a factor, evidence to establish legitimacy will not be required: *Provided,* That, evidence is on file which meets the requirements of paragraph (b) of this section sufficient to warrant recognition of the relationship of the child without regard to legitimacy.

(b) *Illegitimate child.* As to the mother of an illegitimate child, proof of birth is all that is required. As to the father, the sufficiency of evidence will be determined in accordance with the facts in the individual case. Proof of such relationship will consist of:

(1) An acknowledgment in writing signed by him; or

(2) Evidence that he has been identified as the child's father by a judicial decree ordering him to contribute to the child's support or for other purposes; or

(3) Any other secondary evidence which reasonably supports a finding of relationship, as determined by an official authorized to approve such findings, such as:

(i) A copy of the public record of birth or church record of baptism, showing that the veteran was the informant and was named as parent of the child; or

(ii) Statements of persons who know that the veteran accepted the child as his; or

(iii) Information obtained from service department or public records, such as school or welfare agencies, which shows that with his knowledge the veteran was named as the father of the child.

(c) *Adopted child.* Except as provided in paragraph (c)(1) of this section evidence of relationship will include a copy of the decree of adoption or a copy of the adoptive placement agreement and such other evidence as may be necessary.

(1) In jurisdictions where petition must be made to the court for release of adoption documents or information, or where release of such documents or information is prohibited, the following may be accepted to establish the fact of adoption:

(i) As to a child adopted into the veteran's family, a copy of the child's revised birth certificate.

(ii) As to a child adopted out of the veteran's family, a statement over the signature of the judge or the clerk of the court setting forth the child's former name and the date of adoption, or a certified statement by the veteran, the veteran's surviving spouse, apportionee, or their fiduciaries setting forth the child's former name, date of birth, and the date and fact of adoption together with evidence indicating that the child's original public record of birth has been removed from such records. Where application is made for an apportionment under § 3.458(d) on behalf of a child adopted out of the veteran's family, the evidence must be sufficient to establish the veteran as the natural parent of the child.

(2) As to a child adopted by the veteran's surviving spouse after the veteran's death, the statement of the adoptive parent or custodian of the child will be accepted in absence of information to the contrary, to show that the child was a member of the veteran's household at the date of the veteran's death and that recurring contributions were not being received for the child's maintenance sufficient to provide for the major portion of the child's support, from any person other than the veteran or surviving spouse or from

any public or private welfare organization which furnished services or assistance to children. (Pub. L. 86–195)

(d) *Stepchild.* Evidence of relationship of a stepchild will consist of proof of birth as outlined in §3.209, evidence of the marriage of the veteran to the natural parent of the child, and evidence that the child is a member of the veteran's household or was a member of the veteran's household at the date of the veteran's death.

[26 FR 1573, Feb. 24, 1961, as amended at 27 FR 1899, Feb. 28, 1962; 28 FR 2959, Mar. 26, 1963; 38 FR 871, Jan. 5, 1973; 47 FR 28096, June 29, 1982; 52 FR 19349, May 22, 1987; 59 FR 46338, Sept. 8, 1994]

CROSS REFERENCE: Evidence of dependents and age. See §3.204.

§3.211 Death.

Death should be established by one of the following types of evidence:

(a)(1) A copy of the public record of the State or community where death occurred.

(2) A copy of a coroner's report of death or a verdict of a coroner's jury of the State or community where death occurred, provided such report or verdict properly identified the deceased.

(b) Where death occurs in a hospital or institution under the control of the United States Government:

(1) A death certificate signed by a medical officer; or

(2) A clinical summary or other report showing fact and date of death signed by a medical officer.

(c) An official report of death of a member of a uniformed service from the Secretary of the department concerned where death occurs while deceased was on the retired list, in an inactive duty status, or in the active service.

(d) Where death occurs abroad:

(1) A United States consular report of death bearing the signature and seal of the United States consul; or

(2) A copy of the public record of death authenticated (see §3.202(b)(4) for exception) by the United States consul or other agency of the State Department; or

(3) An official report of death from the head of the department concerned, where the deceased person was, at the time of death, a civilian employee of such department.

(e) If the foregoing evidence cannot be furnished, the reason must be stated. The fact of death may then be established by the affidavits of persons who have personal knowledge of the fact of death, have viewed the body of the deceased, know it to be the body of the person whose death is being established, setting forth all the facts and circumstances concerning the death, place, date, time, and cause thereof.

(f) If proof of death, as defined in paragraphs (a) through (e) of this section cannot be furnished, a finding of fact of death, where death is otherwise shown by competent evidence, may be made by an official authorized to approve such findings. Where it is indicated that the veteran died under circumstances which precluded recovery or identification of the body, the fact of death should be established by the best evidence, which from the nature of the case must be supposed to exist.

(g) In the absence of evidence to the contrary, a finding of fact of death made by another Federal agency will be accepted for the purposes of paragraph (f) of this section.

[26 FR 1573, Feb. 24, 1961, as amended at 27 FR 1899, Feb. 28, 1962; 52 FR 19349, May 22, 1987; 59 FR 46338, Sept. 8, 1994]

CROSS REFERENCE: Evidence of dependents and age. See §3.204.

§3.212 Unexplained absence for 7 years.

(a) If satisfactory evidence is produced establishing the fact of the continued and unexplained absence of any individual from his or her home and family for a period of 7 years or more and that a diligent search disclosed no evidence of his or her existence after the date of disappearance, and if evidence as provided in §3.211 cannot be furnished, the death of such individual as of the expiration of such period may be considered as sufficiently proved.

(b) No State law providing for presumption of death will be applicable to claims for benefits under laws administered by the Department of Veterans Affairs and the finding of death will be final and conclusive except where suit

is filed for insurance under 38 U.S.C. 1984.

(Authority: 38 U.S.C. 108)

(c) In the absence of evidence to the contrary, a finding of death made by another Federal agency will be accepted if the finding meets the requirements of paragraph (a) of this section.

[26 FR 1573, Feb. 24, 1961, as amended at 27 FR 1899, Feb. 28, 1962; 52 FR 19349, May 22, 1987]

CROSS REFERENCE: Evidence of dependents and age. See § 3.204.

§ 3.213 Change of status affecting entitlement.

(a) *General.* For the purpose of establishing entitlement to a higher rate of pension, compensation, or dependency and indemnity compensation based on the existence of a dependent, VA will require evidence which satisfies the requirements of § 3.204. For the purpose of reducing or discontinuing such benefits, a statement by a claimant or payee setting forth the month and year of change of status which would result in a reduction or discontinuance of benefits to that person will be accepted, in the absence of contradictory information. This includes:

(1) *Veteran.* A statement by the veteran setting forth the month and year of death of a spouse, child, or dependent parent.

(2) *Surviving spouse.* A statement by the surviving spouse or remarried surviving spouse setting forth the month and year of remarriage and any change of name. (An award for a child or children who are otherwise entitled may be made to commence the day following the date of discontinuance of any payments to the surviving spouse.)

(3) *Child.* A statement by the veteran or surviving spouse (where an additional allowance is being paid to the veteran or surviving spouse for a child), or fiduciary, setting forth the month and year of the child's death, marriage, or discontinuance of school attendance. A similar statement by a child who is receiving payments direct will be accepted to establish the child's marriage or the discontinuance of school attendance. Where appropriate, the month and year of discontinuance of school attendance will be required in addition to the month and year of death or marriage of a child.

(Authority: 38 U.S.C. 501)

(4) *Parent.* A statement by a parent setting forth the month and year:

(i) Of marriage or remarriage;

(ii) When two parents or a parent and spouse ceased living together;

(iii) When two parents or a parent and spouse resumed living together following a period of separation;

(iv) Of divorce or death of a spouse.

(b) *Date not reported.* If the month and year of the event is not reported, the award will be reduced or discontinued, whichever is appropriate, effective date of last payment. The payee will be requested to furnish within 60 days from the date of request a statement setting forth the date of the event. Where payments are continued at a reduced rate, the award will be discontinued effective date of last payment if the required statement is not received within the 60-day period. Payments on a discontinued award may be resumed, if otherwise in order, from the date of discontinuance if the necessary information is received within 1 year from the date of request; otherwise from the date of receipt of a new claim.

(c) *Contradictory information.* Where there is reason to believe that the event reported may have occurred at an earlier date, formal proof will be required.

[26 FR 1574, Feb. 24, 1961, as amended at 27 FR 1899, Feb. 28, 1962; 27 FR 11888, Dec. 1, 1962; 52 FR 19349, May 22, 1987; 61 FR 56626, Nov. 4, 1996]

CROSS REFERENCES: Abandoned claims. See § 3.158. Change in status of dependents. See § 3.651. Material change in income, net worth or change in status. See § 3.660. Evidence of dependents and age. See § 3.204.

§ 3.214 Court decisions; unremarried 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]

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.

§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.

[57 FR 10426, Mar. 26, 1992, as amended at 58 FR 32445, June 10, 1993]

§3.216 Mandatory disclosure of social security number.

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 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. 8301)

(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]

DEPENDENCY, INCOME AND ESTATE

REGULATIONS APPLICABLE TO PROGRAMS IN EFFECT PRIOR TO JANUARY 1, 1979

§3.250 Dependency of parents; compensation.

(a) *Income*—(1) *Conclusive dependency.* Dependency of a parent (other than one who is residing in a foreign country) will be held to exist where the monthy income does not exceed:

(i) $400 for a mother or father not living together;

(ii) $660 for a mother and father, or remarried parent and spouse, living together:

(iii) $185 for each additional ''member of the family'' as defined in paragraph (b)(2).

(Authority: 38 U.S.C. 102(a))

(2) *Excess income.* Where the income exceeds the monthly amounts stated in paragraph (a)(1) of this section dependency will be determined on the facts in the individual case under the principles outlined in paragraph (b) of this section. In such cases, dependency will not be held to exist if it is reasonable that some part of the corpus of the claimant's estate be consumed for his or her maintenance.

(3) *Foreign residents.* There is no conclusive presumption of dependency. Dependency will be determined on the facts in the individual case under the principles outlined in this section.

(b) *Basic rule.* Dependency will be held to exist if the father or mother of the veteran does not have an income sufficient to provide reasonable maintenance for such father or mother and members of his or her family under legal age and for dependent adult members of the family if the dependency of such adult member results from mental or physical incapacity.

(1) ''Reasonable Maintenance'' includes not only housing, food, clothing, and medical care sufficient to sustain

life, but such items beyond the bare necessities as well as other requirements reasonably necessary to provide those conveniences and comforts of living suitable to and consistent with the parents' reasonable mode of life.

(2) ''Member of the family'' means a person (other than spouse) including a relative in the ascending as well as descending class, whom the father or mother is under moral or legal obligation to support. In determining whether other members of the family under legal age are factors in necessary expenses of the mother or father, consideration will be given to any income from business or property (including trusts) actually available, directly or indirectly, to the mother or father for the support of the minor but not to the corpus of the estate or the income of the minor which is not so available.

(c) *Inception of dependency.* The fact that the veteran has made habitual contributions to the father or mother, or both, is not conclusive evidence that dependency existed but will be considered in connection with all other evidence. In death claims, it is not material whether dependency arose prior or subsequent to the veteran's death. (See § 3.1000(d)(3) as to accrued.)

(Authority: 38 U.S.C. 102(a))

(d) *Remarriage.* Dependency will not be denied solely because of remarriage (38 U.S.C. 102(b)(1)). Compensation may be continued if the parent submits evidence to show that dependency exists, considering the combined income and expenses of the parent and spouse.

[28 FR 29, Jan. 1, 1963, as amended at 40 FR 16065, Apr. 9, 1975; 49 FR 47004, Nov. 30, 1984; 61 FR 20727, May 8, 1996]

§ 3.251 Income of parents; dependency and indemnity compensation.

(a) *Annual income limitations and rates.* (1) Dependency and indemnity compensation is not payable to a parent or parents whose annual income exceeds the limitations set forth in 38 U.S.C. 1315 (b), (c), or (d).

(2) Where there is only one parent, and the parent has remarried and is living with his or her spouse, dependency and indemnity compensation will be paid under either the formula in 38 U.S.C. 1315(b)(1) or the formula in 38 U.S.C. 1315(d), whichever will provide the greater monthly rate of dependency and indemnity compensation. The total combined annual income of the parent and spouse will be counted.

(Authority: 38 U.S.C. 1315)

(3) Where the claim is based on service in the Commonwealth Army of the Philippines, or as a guerrilla or as a Philippine Scout under section 14, Pub. L. 190, 79th Congress, the income limitation will be at a rate of $0.50 for each dollar. See § 3.100(b).

(Authority: 38 U.S.C. 107)

(4) If the remarriage of a parent has been terminated, or the parent is separated from his or her spouse, the rate of dependency and indemnity compensation for the parent will be that which would be payable if there were one parent alone or two parents not living together, whichever is applicable.

(5) Where there are two parents living and only one parent has filed claim, the rate of dependency and indemnity compensation will be that which would be payable if both parents had filed claim.

(b) *Basic rule.* Payments of any kind or from any source will be counted as income unless specifically excluded. Income will be counted for the calendar year in which it is received and total income for the full calendar year will be considered except as provided in § 3.260.

[28 FR 29, Jan. 1, 1963, as amended at 31 FR 14455, Nov. 10, 1966; 40 FR 16065, Apr. 9, 1975; 41 FR 15411, Apr. 13, 1976; 60 FR 18355, Apr. 11, 1995]

§ 3.252 Annual income; pension; Mexican border period and later war periods.

(a) *Annual income limitations; old-law pension.* Where the right to old-law pension is payable under section 306(b) of Pub. L. 95–588 (92 Stat. 2497), pension is not payable if the pensioner's annual income exceeds the income limitations prescribed by § 3.26(c).

(b) *Annual income and net worth limitations; Pub. L. 86–211.* Pension is not payable to a veteran, surviving spouse or child whose annual income exceeds the limitations set forth in 38 U.S.C.

1521, 1541 or 1542; or to a veteran, surviving spouse or child if it is reasonable that some part of the claimant's estate be consumed for his or her maintenance. Where a veteran and spouse are living together, the separate income of the spouse will be considered as the veteran's income as provided in § 3.262(b).

(Authority: 38 U.S.C. 1543)

(c) *Basic rule.* Payments of any kind or from any source will be counted as income unless specifically excluded. Income will be counted for the calendar year in which it is received and total income for the full calendar year will be considered except as provided in § 3.260.

(d) *Veteran with a spouse.* For the purpose of determining eligibility under paragraph (b) of this section the pension rates provided by 38 U.S.C. 1521(c) may be authorized for a married veteran if he or she is living with or, if estranged, is reasonably contributing to the support of his or her spouse. The determination of ''reasonable'' contribution will be based on all the circumstances in the case, considering the income and estate of the veteran and the separate income and estate of the spouse. Apportionment of the veteran's pension under § 3.451 meets the requirement of reasonable contribution.

(e) *Surviving spouse with a child*—(1) *Child.* The term ''child'' means a child as defined in § 3.57. Where a veteran's child is born after the veteran dies, the surviving spouse will not be considered a surviving spouse with a child prior to the child's date of birth.

(2) *Veteran's child not in surviving spouse's custody.* Where the veteran was survived by a surviving spouse and by a child, the income increments for a surviving spouse and child apply even though the child is not the child of the surviving spouse and not in his or her custody.

(3) *Income of child.* The separate income received by a child or children, regardless of custody, will not be considered in computing the surviving spouse's income. Where the separate income of the child is turned over to the surviving spouse, only so much of the money as is left after deducting any expenses for maintenance of the child will be considered the surviving spouse's income.

(4) *Alternative rate.* Whenever the monthly pension rate payable to the surviving spouse under the formula in 38 U.S.C. 1541(c) is less than the rate payable for one child under section 1542 if the surviving spouse were not entitled, the surviving spouse will be paid the child's rate.

(f) *Income over maximum; reduced aid and attendance allowance.* Beginning January 1, 1977, veterans in need of regular aid and attendance who are not receiving pension because their income exceeds the applicable statutory limitation may be eligible for a reduced aid and attendance allowance. The amount payable is the regular aid and attendance allowance authorized by 38 U.S.C. 1521(d)(1) reduced by 16.6 percent for each $100, or portion thereof, by which the veteran's annual income exceeds the applicable maximum income limitation. The reduced aid and attendance allowance is payable when:

(1) A veteran in need of regular aid and attendance is denied pension under 38 U.S.C. 1521 solely because the veteran's annual income exceeds the applicable maximum income limitation in 38 U.S.C. 1521 (b)(3) and (c)(3); or

(2) Pension payable under 38 U.S.C. 1521 to a veteran in need of regular aid and attendance is discontinued solely because the veteran's annual income exceeds the applicable maximum income limitation in 38 U.S.C. 1521 (b)(3) or (c)(3); and

(3) The veteran's annual income exceeds the applicable maximum income limitation in 38 U.S.C. 1521 (b)(3) or (c)(3) by an amount not greater than the amount specified in 38 U.S.C. 1521 (d)(2).

[28 FR 30, Jan. 1, 1963, as amended at 40 FR 16065, Apr. 9, 1975; 41 FR 15411, Apr. 13, 1976; 41 FR 56803, Dec. 30, 1976; 44 FR 45935, Aug. 6, 1979; 61 FR 20727, May 8, 1996; 62 FR 5529, Feb. 6, 1997]

CROSS REFERENCES: Basic pension determinations. See § 3.314. Determination of permanent need for regular aid and attendance and ''permanently bedridden''. See § 3.352.

§§ 3.253—3.255 [Reserved]

§ 3.256 Eligibility reporting requirements.

(a) *Obligation to report changes in factors affecting entitlement.* Any individual who has applied for or receives pension or parents' dependency and indemnity compensation must promptly notify the Secretary in writing of any change affecting entitlement in any of the following:

(1) Income;

(2) Net worth or corpus of estate;

(3) Marital status;

(4) Nursing home patient status;

(5) School enrollment status of a child 18 years of age or older; or

(6) Any other factor that affects entitlement to benefits under the provisions of this Part.

(b) *Eligibility verification reports.* (1) For purposes of this section the term eligibility verification report means a form prescribed by the Secretary that is used to request income, net worth (if applicable), dependency status, and any other information necessary to determine or verify entitlement to pension or parents' dependency and indemnity compensation.

(2) The Secretary shall require an eligibility verification report under the following circumstances:

(i) If the Social Security Administration has not verified the beneficiary's Social Security number and, if the beneficiary is married, his or her spouse's Social Security number;

(ii) If there is reason to believe that the beneficiary or, if the spouse's income could affect entitlement, his or her spouse may have received income other than Social Security during the current or previous calendar year; or

(iii) If the Secretary determines that an eligibility verification report is necessary to preserve program integrity.

(3) An individual who applies for or receives pension or parents' dependency and indemnity compensation as defined in §§ 3.3 or 3.5 of this part shall, as a condition of receipt or continued receipt of benefits, furnish the Department of Veterans Affairs an eligibility verification report upon request.

(c) If VA requests that a claimant or beneficiary submit an eligibility verification report but he or she fails to do so within 60 days of the date of the VA request, the Secretary shall suspend the award or disallow the claim.

(Authority: 38 U.S.C. 1315(e) and 1506)

[60 FR 51922, Oct. 4, 1995]

§ 3.257 Children; no surviving spouse entitled.

Where pension is not payable to a surviving spouse because his or her annual income exceeds the statutory limitation or because of his or her net worth, payments will be made to or for the child or children as if there were no surviving spouse.

[62 FR 5529, Feb. 6, 1997]

§§ 3.258—3.259 [Reserved]

§ 3.260 Computation of income.

For entitlement to pension or dependency and indemnity compensation, income will be counted for the calendar year in which it is received.

(a) *Installments.* Income will be determined by the total amount received or anticipated during the calendar year.

(b) *Deferred determinations.* Where there is doubt as to the amount of the anticipated income, pension or dependency and indemnity compensation will be allowed at the lowest appropriate rate or will be withheld, as may be in order, until the end of the calendar year when the total income received during the year may be determined.

(c) *Proportionate income limitations; excess income.* A proportionate income limitation will be established under the conditions set forth in paragraph (d) of this section except where application of a proportionate income limitation would result in payment of a lower rate than would be payable on the basis of income for the full calendar year.

(d) *Proportionate income limitations; computation.* Income limitations will be computed proportionately for the purpose of determining initial entitlement, or for resuming payments on an award which was discontinued for a reason other than excess income or a change in marital or dependency status. A proportionate income limitation will be established for the period from the date of entitlement to the end of that calendar year. The total amount

of income received by the claimant during that period will govern the payment of benefits. Income received prior to the date of entitlement will be disregarded.

(e) *Proportionate income limitations; spouse.* In determining whether proportionate computation is applicable to a claim under Pub. L. 86–211 (73 Stat. 432), the total income for the calendar year of entitlement of both veteran and that of the spouse available for use of the veteran will be considered. If a proportionate income limitation is then applicable, it will be applied to both the veteran's and the spouse's income. The spouse's income will not be included, however, where his or her total income for the calendar year does not exceed $1,200.

(f) *Rate changes.* In years after that for which entitlement to pension or dependency and indemnity compensation has been established or reestablished as provided in paragraph (d) of this section, total income for the calendar year will govern the payment of benefits. Where there is a change in the conditions of entitlement because of a change in marital or dependency status, entitlement for each period will be determined separately. For the period when the claimant was married or had a dependent, the rate payable will be determined under the annual income limitation or increment applicable to a claimant who is married or has a dependent. For the period when the claimant was unmarried or without a dependent, the rate payable will be determined under the annual income limitation or increment applicable to a claimant who is not married or has no dependent. Since these determinations will be based on total income for the calendar year, it is not material whether such income was received before or after the change of status.

(g) *Fractions of dollars.* In computing a claimant's annual income a fraction of a dollar will be disregarded for the purpose of determining entitlement to monthly payments of pension and dependency and indemnity compensation.

(Authority: 38 U.S.C. 1315(g)(2); 1503(b))

[28 FR 30, Jan. 1, 1963, as amended at 29 FR 2944, Mar. 4, 1964; 37 FR 6677, Apr. 1, 1972; 40 FR 16066, Apr. 9, 1975]

§ 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) *Income.*

Income	Dependency (parents)	Dependency and indemnity compensation (parents)	Pension; old–law (veterans, surviving spouses and children)	Pension; section 306 (veterans, surviving spouses and children)	See—
(1) Total income from employment, business, investments, or rents.	Included	Included	Included	Included	§ 3.262(a).
(2) Income of spouse	do	do	Excluded	do	§ 3.262(b).
(3) Earnings of members of family under legal age.	do	Excluded	do	Excluded	§ 3.250(b)(2). § 3.252(e)(3).
(4) Earned income of child-claimant			Included	do.	
(5) Gifts, including contributions from adult members of family:					
Property	do	Included	do	do	§ 3.262(k).
Money	do	do	do	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.	do	do	do	do.	
(8) Charitable donations	do	do	Included	do	§ 3.262(d).
(9) Family allowance authorized by service personnel.	Included	Included	do	Included.	
(10) Reasonable value of allowances to person in service in addition to base pay.	do	do	do	Included except as earned income of child-claimant.	
(11) Mustering-out pay	Excluded	do	Excluded	do.	
(12) Six-months' death gratuity	do	Excluded	do	Excluded.	

Income	Dependency (parents)	Dependency and indemnity compensation (parents)	Pension; old–law (veterans, surviving spouses and children)	Pension; section 306 (veterans, surviving spouses and children)	See—
(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	do	do	do	do.	
Refund (10 U.S.C. 1446)	Included	Included	Included	Included.	
Survivor Benefit Plan (Subch. II) (Pub. L. 92–425; 86 Stat. 706).	do	do	do	do	§ 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).
	do	do	do	do	§ 3.262(h).
(16) Retirement benefits; general	do	do	do	do	§ 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	do	Excluded.	
Lump-sum death payments	Included	do	do	do.	
Supplemental security income	Excluded	Excluded	do	do.	
(18) Railroad Retirement benefits	do	Included	Disability pension—Excluded Death pension—Included.	Included	§ 3.262(g).
(19) Retirement pay waived under Federal statute.	Excluded	Excluded	Excluded	do	§ 3.262(h).
(20) Department of Veterans Affairs payments:					
Pension	Excluded	Excluded	Excluded	Excluded.	
Compensation and dependency and indemnity compensation.	do	do	do	do.	
World War I adjusted compensation	do	Included	do	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.	
Servicemen's group life insurance	do	do	do	do.	
Veterans' group life insurance	do	do	do	do.	
Servicemen's indemnity	do	do	do	do.	
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).	do	do	do	do.	
Educational assistance (38 U.S.C. ch. 35).			Excluded	Excluded.	
Special allowance under 38 U.S.C. 1312(a).	Excluded	Included	do	Included.	
Statutory burial allowance	do	Excluded	do	Excluded.	
Accrued	do	Included, except accrued as reimbursement.	do	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.	

Income	Dependency (parents)	Dependency and indemnity compensation (parents)	Pension; old–law (veterans, surviving spouses and children)	Pension; section 306 (veterans, surviving spouses and children)	See—
(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 ...	.....do	Included (special provision).	.....do	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. 100–687).	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	.....do	§ 3.262(k).
Money	.....do	Included	.....do	Included.	
Joint bank accounts	.....do	.....do	.....do	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	.....do	.....do	.....do	.....do.	
(32) Relocation payments (Pub. L. 90–448; Pub. L. 90–495).	.....do	.....do	.....do	.....do	§ 3.262(c).
(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).	.....do	.....do	.....do	.....do	§ 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).	.....do	.....do	.....do	.....do	§ 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).	.....do	.....do	.....do	.....do	§ 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	Included	Included	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 *et seq.*).	Excluded	Excluded	Excluded	Excluded	§ 3.262(x)

(b) *Deduction of amounts paid by claimant.*

Deduction	Dependency (parents)	Dependency and indemnity compensation	Pension; old-law (veterans, surviving spouses, and children)	Pension; section 306 (veterans, surviving spouses, and children)	See
(1) Unusual medical expenses	Not authorized.	Authorized	Not authorized.	Authorized	§§ 3.262(b)(1) and (1).
(2) Veteran: just debts, expenses of last illness and burial.	Not authorized.	Authorized, except debts.	Not authorized.	Authorized	§§ 3.262(m) and (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) Prepayment on real property mortgages after death of spouse (Pub. L. 91–588).	Not authorized.	Not authorized.	Not authorized.	Authorized	§§ 3.262(k)(6).

(c) *Corpus of estate.*

	Dependency (parents)	Dependency and indemnity compensation	Pension; old-law (veterans, widows, and children)	Pension; section 306 (veterans, surviving spouses, and children)	See
	Considered conditionally	Not considered.	Not considered.	Considered	§ 3.263.

[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 37696, July 25, 1994; 60 FR 2522, Jan. 10, 1995; 60 FR 18355, Apr. 11, 1995]

§3.262 Evaluation of income.

(a) *Total income.* All income from sources such as wages, salaries, earnings, bonuses from employers, income from a business or profession or from investments or rents as well as the fair value of personal services, goods or room and board received in lieu thereof will be included.

(1) Salary is not determined by ''takehome'' pay, but includes deductions made under a retirement act or plan and amounts withheld by virtue of income tax laws.

(2) The gross income from a business or profession may be reduced by the necessary operating expenses, such as cost of goods sold, or expenditures for rent, taxes, and upkeep. Depreciation is not a deductible expense. The cost of repairs or replacement may be deducted. The value of an increase in stock inventory of a business is not considered income.

(3) A loss sustained in operating a business, profession, or farm or from investments may not be deducted from income derived from any other source.

(b) *Income of spouse.* Income of the spouse will be determined under the rules applicable to income of the claimant.

(1) *Parents.* Where the mother and father, or remarried parent and spouse are living together, the total combined income will be considered in determining dependency, or in determining the rate of dependency and indemnity compensation payable to the parent. This rule is equally applicable where both parents have remarried and each is living with his or her spouse. If the remarriage of a parent has been terminated, or the parent is separated from his or her spouse, income of the spouse will be excluded.

(2) *Veterans.* The separate income of the spouse of a disabled veteran who is entitled to pension under laws in effect on June 30, 1960, will not be considered. Where pension is payable under section 306(a) of Pub. L. 95–588, to a veteran who is living with a spouse there will be included as income of the veteran all income of the spouse in excess of whichever is the greater, the amount of the spouse income exclusion specified in section 306(a)(2)(B) of Pub. L. 95–588 as increased from time to time under section 306 (a)(3) of Pub. L. 95–588 or the total earned income of the spouse, which is reasonably available to or for the veteran, unless hardship to the veteran would result. Each time there is an increase in the spouse income exclusion pursuant to section 306(a)(3) of Pub. L. 95–588, the actual amount of the exclusion will be published in the ''Notices'' section of the FEDERAL REGISTER. The presumption that inclusion of such income is available to the veteran and would not work a hardship on him or her may be rebutted by evidence of unavailability or of expenses beyond the usual family requirements.

(Authority: 38 U.S.C. 1521(f); sec. 306(a)(2)(B) of Pub. L. 95–588)

(c) *Maintenance.* The value of maintenance furnished by a relative, friend, or a charitable organization (civic or governmental) will not be considered income. Where the claimant is maintained in a rest home or other community institution or facility, public or private, because of impaired health or advanced age, money paid to the home or to the claimant to cover the cost of maintenance will not be considered income, regardless of whether it is furnished by a relative, friend or charitable organization. The expense of maintenance is not deductible if it is paid from the claimant's income, except as provided in paragraph (l) of this section in claims for dependency and indemnity compensation.

(d) *Charitable donations.* Charitable donations from public or private relief or welfare organizations will not be considered income except in claims for pension under laws in effect on June 30, 1960. In the latter cases, additional charitable allowances received by a claimant for members of his or her family may not be divided per capita in determining the amount of the claimant's income.

(e) *Retirement benefits; general.* Retirement benefits, including an annuity or endowment, paid under a Federal, State, municipal, or private business or industrial plan are considered income as limited by this paragraph. Where the payments received consist of part principal and part interest, interest will not be counted separately.

(1) *Protected pension.* Except as provided in this paragraph (e)(1), effective January 1, 1965, in determining income for pension purposes under laws in effect on June 30, 1960, 10 percent of the retirement payments received by a veteran, surviving spouse, or child will be excluded. The remaining 90 percent will be considered income as received. Where the retirement benefit is based on the claimant's own employment, payments will not be considered income until the amount of the claimant's personal contribution (as distinguished from amounts contributed by the employer) has been received. Thereafter the 10 percent exclusion will apply.

(2) *Pension; Pub. L. 86–211.* Except as provided in this subparagraph, effective January 1, 1965, in determining income for pension purposes, under Pub. L. 86–211 (73 Stat. 432), 10 percent of the retirement payments received by a veteran, the veteran's spouse, surviving spouse, or child will be excluded. The remaining 90 percent will be considered income as received. Where a person was receiving or entitled to receive pension and retirement benefits based on his or her own employment on December 31, 1964, the retirement payments will not be considered income until the amount of the claimant personal contribution (as distinguished from amounts contributed by the employer) has been received. Thereafter the 10 percent exclusion will apply.

(3) *Compensation.* In determining dependency of a parent for compensation purposes, all payments will be considered income as received.

(4) *Dependency and indemnity compensation.* Except as provided in this subparagraph, effective January 1, 1967, in determining income for dependency and indemnity compensation purposes, 10 percent of the retirement payments received by a deceased veteran's parent or by the parent's spouse will be excluded. The remaining 90 percent will be considered income as received. Where a parent was receiving or entitled to receive dependency and indemnity compensation and retirement benefits based on his or her own employment on December 31, 1966, the retirement payments will not be considered income until the amount of the claimant's personal contribution (as distinguished from amounts contributed by the employer) has been received. Thereafter the 10 percent exclusion will apply.

(Authority: 38 U.S.C. 1315(g), 1503(a)(6))

(f) *Social security benefits.* Old age and survivor's insurance and disability insurance under title II of the Social Security Act will be considered income as a retirement benefit under the rules contained in paragraph (e) of this section. Benefits received under noncontributory programs, such as old age assistance, aid to dependent children, and supplemental security income are subject to the rules contained in paragraph (d) of this section applicable to charitable donations. The lumpsum death payment under title II of the Social Security Act will be considered as income except in claims for dependency and indemnity compensation and for pension under Pub. L. 86–211 (73 Stat. 432).

(g) *Railroad retirement benefits*—(1) *Parents, surviving spouses and children.* Retirement benefits received from the Railroad Retirement Board will be considered as income under the rules contained in paragraph (e) of this section. (See paragraph (h) of this section as to waivers.)

(2) *Veterans.* Effective July 1, 1959, retirement benefits received from the Railroad Retirement Board were excluded from consideration as income in determining eligibility for disability pension. (45 U.S.C. 228s–1) This exclusion continues to be applicable to claims under laws in effect on June 30, 1960. For purposes of section 306 pension, such retirement benefits will be considered as income under the rules contained in paragraph (e) of this section.

(h) *Retirement benefits waived.* Except as provided in this paragraph, retirement benefits (pension or retirement payments) which have been waived will be included as income. For the purpose of determining dependency of a parent, or eligibility of a parent for dependency and indemnity compensation or eligibility of a veteran, surviving spouse, or child for pension under laws in effect on June 30, 1960, retirement benefits from the following sources

which have been waived pursuant to Federal statute will not be considered as income:

(1) Civil Service Retirement and Disability Fund;

(2) Railroad Retirement Board (see paragraph (g)(2) of this section);

(3) District of Columbia, firemen, policemen, or public school teachers;

(4) Former lighthouse service.

(i) *Compensation* (*civilian*) *for injury or death*. (1) Compensation paid by the Bureau of Employees' Compensation, Department of Labor (of the United States), or by Social Security Administration, or by Railroad Retirement Board, or pursuant to any workmen's compensation or employer's liability statute, or damages collected because of personal injury or death, less medical, legal, or other expenses incident to the injury or death, or the collection or recovery of such moneys will be considered income as received, except as provided in paragraph (i)(2) of this section. The criteria of paragraph (i)(1) of this section are for application as to all medical expenditures after such award or settlement.

(Authority: Pub. L. 92–198, 85 Stat. 663)

(2) For pension, effective October 7, 1966, and for dependency and indemnity compensation effective January 1, 1967, if payments based on permanent and total disability or death are received from the Bureau of Employees' Compensation, Social Security Administration or Railroad Retirement Board, or pursuant to any workmen's compensation or employer's liability statute, there will be excluded 10 percent of the payments received after deduction of medical, legal, and other expenses as authorized by paragraph (i)(1) of this section. The 10 percent exclusion does not apply to damages collected incident to a tort suit under other than an employer's liability law of the United States or a political subdivision of the United States, or to determinations of dependency for compensation purposes.

(j) *Commercial insurance*—(1) *Annuity or endowment insurance.* For pension, effective January 1, 1965, or for dependency and indemnity compensation, effective January 1, 1967, the provisions of paragraph (e) of this section apply. In such cases, 10 percent of the payments received will be excluded. In dependency and indemnity compensation claims, where the parent is receiving or entitled to receive dependency and indemnity compensation on December 31, 1966, and is also receiving or entitled to receive annuity payments on that date, or endowment insurance matures on or before that date, no part of the payments received will be considered income until the full amount of the consideration has been received, after which 10 percent of the amount received will be excluded. For compensation, the full amount of each payment is considered income as received.

(2) *Life insurance; general.* In determining dependency, or eligibility for dependency and indemnity compensation, or for section 306 pension the full amount of payments is considered income as received. For section 306 pension, effective October 7, 1966, and for dependency and indemnity compensation, effective January 1, 1967, 10 percent of the payments received will be excluded.

(3) *Life insurance; old–law pension.* For pension under laws in effect on June 30, 1960, 10 percent of the payments received will be excluded. Where it is considered that life insurance was received in a lump sum in the calendar year in which the veteran died and payments are actually received in succeeding years, no part of the payments received in succeeding years will be considered income until an amount equal to the lump-sum face value of the policy has been received, after which 10 percent of the payments received will be excluded. The 10 percent exclusion is authorized effective October 7, 1966.

(4) *Disability, accident or health insurance.* For pension, effective October 7, 1966, and for dependency and indemnity compensation, effective January 1, 1967, there will be excluded 10 percent of the payments received for disability after deduction of medical, legal, or other expenses incident to the disability. For compensation, after deduction of such expenses, the full amount of payments is considered income as received.

(k) *Property*—(1) *Ownership.* The terms of the recorded deed or other evidence of title will constitute evidence

of ownership of real or personal property. This includes property acquired through purchase, bequest or inheritance except that, effective January 1, 1971, amounts in joint accounts in banks and similar institutions acquired by reason of the death of another joint owner shall not be considered income of a survivor for section 306 pension purposes. With the foregoing exception, if property is owned jointly each person will be considered as owning a proportionate share. The claimant's share of property held in partnership will be determined on the facts found. In the absence of evidence to the contrary, the claimant's statement as to the terms of ownership will be accepted.

(Authority: Sec. 306, Pub. L. 95–588; 92 Stat. 2508)

(2) *Income-producing property.* Income received from real or personal property owned by the claimant will be counted. The claimant's share will be determined in proportion to his right according to the rules of ownership.

(3) *Sale of property.* Except as provided in paragraphs (k)(4) and (5) of this section, net profit from the sale of real or personal property will be counted. In determining net profit from the sale of property owned prior to the date of entitlement, the value at the date of entitlement will be considered in relation to the selling price. Where payments are received in installments, payments will not be considered income until the claimant has received amounts equal to the value of the property at the date of entitlement. Principal and interest will not be counted separately.

(4) *Homes.* Net profit from the sale of the claimant's residence which is received during the calendar year of sale will not be considered as income under the following conditions:

(i) To the extent that it is applied within the calendar year of the sale, or the succeeding calendar year, to the purchase price of another residence as his principal dwelling;

(ii) Such application of the net profit is reported within 1 year following the date so applied, and

(iii) The net profit is so applied after January 10, 1962, to a purchase made after said date.

This exclusion will not apply where the net profit is applied to the price of a home purchased earlier than the calendar year preceding the calendar year of sale of the old residence.

(5) *Sale of property; section 306 pension and dependency and indemnity compensation.* For pension under section 306 pension and for dependency and indemnity compensation, profit from the sale of real or personal property other than in the course of a business will not be considered income. This applies to property acquired either before or after the date of entitlement. Any amounts received in excess of the sales price will be counted as income. Where payments are received in installments, principal and interest will not be counted separately. For pension, this provision is effective January 1, 1965; for dependency and indemnity compensation, January 1, 1967.

(Authority: 38 U.S.C. 1503(a)(10); 38 U.S.C. 1315(g))

(6) *Payments on mortgages on real property; section 306 pension.* Effective January 1, 1971, for the purposes of section 306 pension, an amount equaling any prepayments made by a veteran or surviving spouse on a mortgage or similar type security instrument in existence at the death of veteran or spouse on real property which prior to the death was the principal residence of the veteran and spouse will be excluded from consideration as income if such payment was made after the death and prior to the close of the year succeeding the year of death.

(Authority: 38 U.S.C. 1503(a)(14))

(l) *Unusual medical expenses.* Within the provisions of paragraphs (l)(1) through (4) of this section there will be excluded from the amount of the claimant's annual income any unreimbursed amounts which have been paid within the calendar year for unusual medical expenses regardless of the year the indebtedness was incurred. The term *unusual* means *excessive.* It does not describe the nature of a medical condition but rather the amount expended for medical treatment in relationship to the claimant's resources available for sustaining a reasonable mode of life. Unreimbursed expenditures which exceed 5 percent of the

claimant's reported annual income will be considered unusual. Health, accident, sickness and hospitalization insurance premiums will be included as medical expenses in determining whether the claimant's unreimbursed medical expenses meet the criterion for *unusual.* A claimant's statement as to amounts expended for medical expenses ordinarily will be accepted unless the circumstances create doubt as to its credibility. An estimate based on a clear and reasonable expectation that unusual medical expenditure will be realized may be accepted for the purpose of authorizing prospective payments of benefits subject to necessary adjustment in the award upon receipt of an amended estimate or after the end of the calendar year upon receipt of an income questionnaire.

(1) *Veterans.* For the purpose of section 306 pension, there will be excluded unreimbursed amounts paid by the veteran for unusual medical expenses of self, spouse, and other relatives of the veteran in the ascending as well as descending class who are members or constructive members of the veteran's household and whom the veteran has a moral or legal obligation to support.

(2) *Surviving spouses.* For the purpose of section 306 pension, there will be excluded unreimbursed amounts paid by the surviving spouse for the unusual medical expenses of self, the veteran's children, and other relatives of the surviving spouse in the ascending as well as descending class who are members or constructive members of the surviving spouse's household and whom the surviving spouse has a moral or legal obligation to support.

(3) *Children.* For the purpose of section 306 pension, there will be excluded unreimbursed amounts paid by a child for the unusual medical expenses of self, parent, and brothers and sisters of the child.

(4) *Parents.* For dependency and indemnity compensation purposes there will be excluded unreimbursed amounts paid by the parent for the unusual medical expenses of self, spouse, and other relatives of the parent in the ascending as well as descending class who are members or constructive members of the parent's household and whom the parent has a moral or legal obligation to support. If the combined annual income of the parent and the parent's spouse is the basis for dependency and indemnity compensation, the exclusion is applicable to the combined annual income and extends to the unusual unreimbursed medical expenses of the spouse's relatives in the ascending as well as descending class who are members or constructive members of the household and whom the parent's spouse has a moral or legal obligation to support.

(Authority: 38 U.S.C. 1315(f)(3); Sec. 306, Pub. L. 95–588; 92 Stat. 2508)

(m) *Veteran's final expenses; pension.* In claims for pension under section 306, there will be excluded, as provided in paragraph (p) of this section:

(1) From the income of a surviving spouse, amounts equal to amounts paid for the expenses of the veteran's last illness;

(2) From the income of a surviving spouse, or of a child of a deceased veteran where there is no surviving spouse, amounts equal to amounts paid by the surviving spouse or child for the veteran's just debts, for the expenses of the veteran's last illness, and burial to the extent such expenses are not reimbursed by the Department of Veterans Affairs. The term ''just debts'' does not include any debt that is secured by real or personal property.

(Authority: Sec. 306, Pub. L. 95–588; 92 Stat. 2508)

(n) *Final expenses of veteran's spouse or child; pension.* In claims for pension under section 306, there will be excluded, as provided in paragraph (p) of this section:

(1) From the income of a veteran, amounts equal to amounts paid by the veteran for the last illness and burial of the veteran's deceased spouse or child; and

(2) From the income of a spouse or surviving spouse, amounts equal to amounts paid by her as spouse or surviving spouse of the deceased veteran for the last illness and burial of a child of such veteran.

(Authority: Sec. 306, Pub. L. 95–588; 92 Stat. 2508)

(o) *Final expenses of veteran or parent's spouse; dependency and indemnity compensation.* In claims for dependency and indemnity compensation there will be excluded from the income of a parent, as provided in paragraph (p) of this section, amounts equal to amounts paid by the parent for:

(1) The expenses of the veteran's last illness and burial to the extent that such expenses are not reimbursed under 38 U.S.C. ch. 23.

(2) The parent's deceased spouse's just debts, the expenses of the spouse's last illness to the extent such expenses are not reimbursed under 38 U.S.C. ch. 51 and the expenses of the spouse's burial to the extent that such expenses are not reimbursed under 38 U.S.C. ch. 23 or 51. The term ''just debts'' does not include any debt that is secured by real or personal property.

(Authority: 38 U.S.C. 1315(f))

(p) *Final expenses; year of exclusion.* For the purpose of paragraphs (m), (n) and (o) of this section, in the absence of contradictory information, the claimant's statement will be accepted as to the nature, amount and date of payment, and identity of the creditor. Except as provided in this paragraph, payments will be deducted from annual income for the year in which such payments are made. Payments made by a veteran, the spouse or surviving spouse of a veteran, child or, in dependency and indemnity compensation claims, by a parent during the calendar year following the year in which the veteran, spouse or child died may be deducted from the claimant's income for the year of last illness or burial if this deduction is advantageous to the claimant.

(q) *Volunteer programs*—(1) *Payments under Foster Grandparent Program and Older Americans Community Service Programs.* Effective May 3, 1973, compensation received under the Foster Grandparent Program and the Older Americans Community Service Programs will be excluded from income in claims for compensation, pension and dependency and indemnity compensation.

(Authority: Pub. L. 93–29; 87 Stat. 55)

(2) *Payments under domestic volunteer service act programs.* Effective October 1, 1973, compensation or reimbursement received under a Domestic Volunteer Service Act Program (including 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 Program, Retired Senior Volunteer Program (RSVP), Senior Companion Program, Service Corps of Retired Executives (SCORE) and Active Corps of Executives (ACE), will be excluded from income in claims for compensation, pension and dependency and indemnity compensation.

(Authority: Pub. L. 93–113; 87 Stat. 394)

(r) *Survivor benefit annuity.* For the purposes of old law pension and section 306 pension, there shall be excluded from computation of income annuity paid by the Department of Defense under the authority of section 653, Public Law 100–456 to qualified surviving spouses of veterans who died prior to November 1, 1953. (September 29, 1988)

(Authority: Sec. 653, Pub. L. 100–456; 102 Stat. 1991)

(s) *Agent Orange settlement payments.* In claims for pension and parents' dependency and indemnity income, there shall be excluded from computation of income payments received by any person in the case of In re Agent Orange Product Liability Litigation in the United States District Court for the Eastern District of New York (MDL No. 381). (January 1, 1989)

(Authority: Pub. L. 101–201, 103 Stat. 1795)

(t) *Reimbursement for casualty loss.* The following sources of reimbursements for casualty loss will not be considered as income in determining entitlement to benefits under the programs specified. Amounts to be excluded from computation in parens' dependency and indemnity compensation claims are limited to amounts of reimbursement which do not exceed the greater of the fair market value or the reasonable replacement cost of the property involved at the time immediately preceding the loss.

(1) Reimbursement for casualty loss of any kind in determining entitlement to parents' dependency and indemnity

compensation benefits. For purposes of paragraph (t) of this section, the term ''casualty loss'' means the complete or partial destruction of property resulting from an identifiable event of a sudden, unexpected or unusual nature.

(2) Proceeds from fire insurance in determining dependency of a parent for compensation purposes or in determining entitlement to old-law and section 306 pension benefits.

(Authority: 38 U.S.C. 1315(f))

(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.

(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. (November 2, 1994)

(Authority: Sec. 506, Pub. L. 103–446)

(AUTHORITY: Sec. 105, Pub. L. 100–383; 102 Stat. 905; Sec. 6, Pub. L. 102–371; 106 Stat. 1167, 1168)

[28 FR 32, Jan. 1, 1963]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §3.262, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§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)

[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]

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.

§ 3.270 Applicability of various dependency, income and estate regulations.

(a) *Sections 3.250 to 3.270.* These sections are applicable to dependency, income and estate determinations needed to determine entitlement or continued entitlement for the following programs:

(1) Parents' death compensation.

(2) Old-law pension.

(3) Section 306 pension.

(4) Parents' dependency and indemnity compensation.

NOTE: Citations to title 38 U.S.C. in §§ 3.250 to 3.270 referring to section 306 or old-law pension generally refer to provisions of law in effect on December 31, 1978.

(b) *Sections 3.271 to 3.300.* These sections apply to income and estate determinations of entitlement to the improved disability and death pension program which became effective January 1, 1979.

[44 FR 45936, Aug. 6, 1979]

REGULATIONS APPLICABLE TO THE IMPROVED PENSION PROGRAM WHICH BECAME EFFECTIVE JANUARY 1, 1979

SOURCE: Sections 3.271 to 3.277 appear at 44 FR 45936, Aug. 6, 1979, unless otherwise noted.

§ 3.271 Computation of income.

(a) *General.* Payments of any kind from any source shall be counted as income during the 12-month annualization period in which received unless specifically excluded under § 3.272.

(Authority: 38 U.S.C. 501)

(1) *Recurring income.* Recurring income means income which is received or anticipated in equal amounts and at regular intervals (e.g., weekly, monthly, quarterly, etc.), and which will continue throughout an entire 12-month annualization period. The amount of recurring income for pension purposes will be the amount received or anticipated during a 12-month annualization period. Recurring income which terminates prior to being counted for at least one full 12-month annualization period will be treated as nonrecurring income for computation purposes.

(2) *Irregular income.* Irregular income means income which is received or anticipated during a 12-month annualization period, but which is received in unequal amounts or at irregular intervals. The amount of irregular income for pension purposes will be the amount received or anticipated during a 12-month annualization period following initial receipt of such income.

(3) *Nonrecurring income.* Nonrecurring income means income received or anticipated on a one-time basis during a 12-month annualization period (e.g., an inheritance). Pension computations of income will include nonrecurring income for a full 12-month annualization period following receipt of the income.

(b) *Salary.* Salary means the gross amount of a person's earnings or wages before any deductions are made for

such things as taxes, insurance, retirement plans, social security, etc.

(c) *Business, farm or professional income.* (1) This includes gross income from a business, farm or profession as reduced by the necessary operating expenses such as cost of goods sold, or expenditures for rent, taxes, and upkeep, or costs of repairs or replacements. The value of an increase in stock inventory of a business is not considered income.

(2) Depreciation is not a deductible expense.

(3) A loss sustained in operating a business, profession, farm, or from investments, may not be deducted from income derived from any other source.

(d) *Income from property.* Income from real or personal property is countable as income of the property's owner. The terms of a recorded deed or other evidence of title shall constitute evidence of ownership. This includes property acquired through purchase, gift, devise, or descent. If property is owned jointly, income of the various owners shall be determined in proportion to shares of ownership of the property. The owner's shares of income held in partnership shall be determined on the basis of the facts found.

(e) *Installments.*—Income shall be determined by the total amount received or anticipated during a 12-month annualization period.

(Authority: 38 U.S.C. 501)

(f) *Deferred determinations.* (1) When an individual is unable to predict with certainty the amount of countable annual income, the annual rate of improved pension shall be reduced by the greatest amount of anticipated countable income until the end of the 12-month annualization period, when total income received during that period will be determined and adjustments in pension payable made accordingly.

(Authority: 38 U.S.C. 501)

(2) When a claimed dependent is shown to have income which exceeds the additional amount of benefits payable based on the claimed dependency, but evidence requirements of §3.204, §3.205, §3.209, or §3.210 have not been met, the maximum annual rate of improved pension shall be determined without consideration of the claimed dependency. This amount shall be reduced by an amount which includes the income of the unestablished dependent. Adjustments in computation of the maximum annual rate of improved pension shall occur following receipt of evidence necessary to establish the dependency.

(Authority: 38 U.S.C. 501(a))

(g) *Compensation (civilian) for injury or death.* Compensation paid by the United States Department of Labor, Office of Workers' Compensation Programs, Social Security Administration, or the Railroad Retirement Board, or pursuant to any worker's compensation or employer's liability statute, or damages collected because of personal injury or death, will be considered income as received. However, medical, legal or other expenses incident to the injury or death, or incident to the collection or recovery of the amount of the award or settlement, may be deducted. The criteria in §3.272(g) apply as to all medical expenditures after the award or settlement.

(Authority: 38 U.S.C. 501)

(h) *Fractions of dollars.* Fractions of dollars will be disregarded in computing annual income.

[44 FR 45936, Aug. 6, 1979, as amended at 53 FR 23235, June 21, 1988; 57 FR 59299, Dec. 15, 1992]

§3.272 Exclusions from income.

The following shall be excluded from countable income for the purpose of determining entitlement to improved pension. Unless otherwise provided, expenses deductible under this section are deductible only during the 12-month annualization period in which they were paid.

(Authority: 38 U.S.C. 501)

(a) *Welfare.* Donations from public or private relief, welfare, or charitable organizations.

(Authority: 38 U.S.C. 1503(a)(1))

(b) *Maintenance.* The value of maintenance furnished by a relative, friend, or

a charitable organization (civic or governmental) will not be considered income. Where the individual is maintained in a rest home or other community institution or facility, public or private, because of impaired health or advanced age, money paid to the home or the individual to cover the cost of maintenance will not be considered income, regardless of whether it is furnished by a relative, friend, or charitable organization. The expense of maintenance is not deductible if it is paid from the individual's income.

(Authority: 38 U.S.C. 501, 1503(a)(1))

(c) *Department of Veterans Affairs pension benefits.* Payments under chapter 15 of title 38, United States Code, including accrued pension benefits payable under 38 U.S.C. 5121.

(Authority: 38 U.S.C. 1503(a)(2))

(d) *Reimbursement for casualty loss.* Reimbursement of any kind for any casualty loss. The amount to be excluded is not to exceed the greater of the fair market value or the reasonable replacement cost of the property involved at the time immediately preceding the loss. For purposes of this paragraph, the term ''casualty loss'' means the complete or partial destruction of property resulting from an identifiable event of a sudden, unexpected or unusual nature.

(Authority: 38 U.S.C. 1503(a)(5))

(e) *Profit from sale of property.* Profit realized from the disposition of real or personal property other than in the course of business, except amounts received in excess of the sales price, for example, interest on deferred sales is included as income. In installment sales, any payments received until the sales price is recovered are not included as income, but any amounts received which exceed the sales price are included, regardless of whether they represent principal or interest.

(Authority: 38 U.S.C. 1503(a)(6))

(f) *Joint accounts.* Amounts in joint accounts in banks and similar institutions acquired by reason of death of the other joint owner.

(Authority: 38 U.S.C. 1503(a)(7))

(g) *Medical expenses.* Within the provisions of the following paragraphs, there will be excluded from the amount of an individual's annual income any unreimbursed amounts which have been paid within the 12-month annualization period for medical expenses regardless of when the indebtedness was incurred. An estimate based on a clear and reasonable expectation that unusual medical expenditure will be realized may be accepted for the purpose of authorizing prospective payments of benefits subject to necessary adjustment in the award upon receipt of an amended estimate, or after the end of the 12-month annualization period upon receipt of an eligibility verification report.

(Authority: 38 U.S.C. 501)

(1) *Veteran's income.* Unreimbursed medical expenses will be excluded when all of the following requirements are met:

(i) They were or will be paid by a veteran or spouse for medical expenses of the veteran, spouse, children, parents and other relatives for whom there is a moral or legal obligation of support;

(ii) They were or will be incurred on behalf of a person who is a member or a constructive member of the veteran's or spouse's household; and

(iii) They were or will be in excess of 5 percent of the applicable maximum annual pension rate or rates for the veteran (including increased pension for family members but excluding increased pension because of need for aid and attendance or being housebound) as in effect during the 12-month annualization period in which the medical expenses were paid.

(2) *Surviving spouse's income.* Unreimbursed medical expenses will be excluded when all of the following requirements are met:

(i) They were or will be paid by a surviving spouse for medical expenses of the spouse, veteran's children, parents and other relatives for whom there is a moral or legal obligation of support;

(ii) They were or will be incurred on behalf of a person who is a member or a constructive member of the spouse's household; and

(iii) They were or will be in excess of 5 percent of the applicable maximum

annual pension rate or rates for the spouse (including increased pension for family members but excluding increased pension because of need for aid and attendance or being housebound) as in effect during the 12-month annualization period in which the medical expenses were paid.

(Authority: 38 U.S.C. 501)

(3) *Children's income.* Unreimbursed amounts paid by a child for medical expenses of self, parent, brothers and sisters, to the extent that such amounts exceed 5 percent of the maximum annual pension rate or rates payable to the child during the 12-month annualization period in which the medical expenses were paid.

(Authority: 38 U.S.C. 501)

(h) *Expenses of last illnesses, burials, and just debts.* Expenses specified in paragraphs (h)(1) and (h)(2) of this section which are paid during the calendar year following that in which death occurred may be deducted from annual income for the 12-month annualization period in which they were paid or from annual income for any 12-month annualization period which begins during the calendar year of death, whichever is to the claimant's advantage. Otherwise, such expenses are deductible only for the 12-month annualization period in which they were paid. Any such expenses paid subsequent to death but prior to date of entitlement are not deductible.

(Authority: 38 U.S.C. 501)

(1) *Veteran's final expenses.* (i) Amounts paid by a spouse before a veteran's death for expenses of the veteran's last illness will be deducted from the income of the surviving spouse.

(Authority: 38 U.S.C. 1503(a)(3))

(ii) Amounts paid by a surviving spouse or child of a veteran for the veteran's just debts, expenses of last illness and burial (to the extent such burial expenses are not reimbursed under chapter 23 of title 38 U.S.C.) will be deducted from the income of the surviving spouse or child. The term ''just debts'' does not include any debt that is secured by real or personal property.

(Authority: 38 U.S.C. 1503(a)(3))

(2) *Spouse or child's final expenses.* (i) Amounts paid by a veteran for the expenses of the last illness and burial of the veteran's deceased spouse or child will be deducted from the veteran's income.

(ii) Amounts paid by a veteran's spouse or surviving spouse for expenses of the last illness and burial of the veteran's child will be deducted from the spouse's or surviving spouse's income.

(Authority: 38 U.S.C. 1503(a)(4))

(i) *Educational expenses.* Amounts equal to expenses paid by a veteran or surviving spouse pursuing a course of education or vocational rehabilitation or training, to include amounts paid for tuition, fees, books, and materials, and in the case of a veteran or surviving spouse in need of regular aid and attendance, unreimbursed amounts paid for unusual transportation expenses in connection with the pursuit of such course. Unusual transportation expenses are those exceeding the reasonable expenses which would have been incurred by a nondisabled person using an appropriate means of transportation (public transportation, if reasonably available).

(Authority: 38 U.S.C. 1503(a)(9))

(j) *Child's income.* In the case of a child, any current work income received during the year, to the extent that the total amount of such income does not exceed an amount equal to the sum of the following:

(1) The lowest amount of gross income for which a Federal income tax return must be filed, as specified in section 6012(a) of the Internal Revenue Code of 1954, by an individual who is not married (as determined under section 143 of such Code), and is not a surviving spouse (as defined in section 2(a) of such Code), and is not a head of household (as defined in section 2(b) of such Code); and

(2) If the child is pursuing a course of postsecondary education or vocational rehabilitation or training, the amount paid by the child for those educational expenses including the amount paid for tuition, fees, books, and materials.

(Authority: 38 U.S.C. 1503(a)(10))

(k) *Domestic Volunteer Service Act Programs.* Payments received under a Domestic Volunteer Service Act (DVSA) Program (including Volunteers in Service to America (VISTA), University Year for ACTION (UYA), Foster Grandparent Program (FGP), Retired Senior Volunteer Program (RSVP), Senior Companion Program) shall be excluded as provided in paragraphs (k)(1) and (2) of this section:

(1) All DVSA payments received before December 13, 1979, shall be excluded from determining entitlement to improved pension.

(Authority: 42 U.S.C. 5044(g) (1973))

(2) DVSA payments received after December 12, 1979, shall be excluded from determining entitlement to improved pension unless the Director of the ACTION Agency has determined that the value of all DVSA payments, adjusted to reflect the number of hours served by the volunteer, equals or exceeds the minimum wage then in effect under the Fair Labor Standards Act of 1938 or the minimum wage of the State where the volunteer served, whichever is the greater.

(Authority: 42 U.S.C. 5044(g) (1979))

(l) *Distributions of funds under 38 U.S.C. 1718.* Distributions from the Department of Veterans Affairs Special Therapeutic and Rehabilitation Activities Fund as a result of participation in a therapeutic or rehabilitation activity under 38 U.S.C. 1718 and payments from participation in a program of rehabilitative services provided as part of the care furnished by a State home and which is approved by VA as conforming to standards for activities under 38 U.S.C. 1718 shall be considered donations from a public or private relief or welfare organization and shall not be countable as income for pension purposes.

(Authority: 38 U.S.C. 1718(f))

(m) *Hardship exclusion of child's available income.* When hardship is established under the provisions of § 3.23(d)(6) of this part, there shall be excluded from the available income of any child or children an amount equal to the amount by which annual expenses necessary for reasonable family maintenance exceed the sum of countable annual income plus VA pension entitlement computed without consideration of this exclusion. The amount of this exclusion shall not exceed the available income of any child or children, and annual expenses necessary for reasonable family maintenance shall not include any expenses which were considered in determining the available income of the child or children or the countable annual income of the veteran or surviving spouse.

(Authority: 38 U.S.C. 1521(h), 1541(g))

(n) *Survivor benefit annuity.* Annuity paid by the Department of Defense under the authority of section 653, Public Law 100–456 to qualified surviving spouses of veterans who died prior to November 1, 1953. (September 29, 1988)

(Authority: Sec. 653, Pub. L. 100–456; 102 Stat. 1991)

(o) *Agent Orange settlement payments.* Payments received by any person in settlement of the case of In re Agent Orange product liability litigation in the United States District Court for the Eastern District of New York (M.D.L. No. 381). (January 1, 1989)

(Authority: Pub. L. 101–201, 103 Stat. 1795)

(p) *Restitution to individuals of Japanese ancestry.* 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)

(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: Sec. 506, Pub. L. 103–446)

[44 FR 45936, Aug. 6, 1979, as amended at 46 FR 9580, Jan. 29, 1981; 53 FR 23235, June 21, 1988; 53 FR 24831, June 30, 1988; 56 FR 65847, 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]

§3.273 Rate computation.

The commencement date of change in benefit payments based on rate computations under the provisions of this section will be determined under the provisions of §3.31 or §3.660.

(a) *Initial award.* For the purpose of determining initial entitlement, or for resuming payments on an award which was previously discontinued, the monthly rate of pension payable to a beneficiary shall be computed by reducing the beneficiary's applicable maximum pension rate by the beneficiary's countable income on the effective date of entitlement and dividing the remainder by 12. Effective June 1, 1983, the provisions of §3.29(b) apply to this paragraph. Recomputation of rates due to changes in the maximum annual pension rate or rate of income following the initial date of entitlement are subject to the provisions of paragraph (b) of this section.

(b) *Running awards*—(1) *Change in maximum annual pension rate.* Whenever there is change in a beneficiary's applicable maximum annual pension rate, the monthly rate of pension payable shall be computed by reducing the new applicable maximum annual pension rate by the beneficiary's countable income on the effective date of the change in the applicable maximum annual pension rate, and dividing the remainder by 12. Effective June 1, 1983, the provisions of §3.29(b) apply to this paragraph.

(2) *Change in amount of income.* Whenever there is a change in a beneficiary's amount of countable income the monthly rate of pension payable shall be computed by reducing the beneficiary's applicable maximum annual pension rate by the beneficiary's new amount of countable income on the effective date of the change in the amount of income, and dividing the remainder by 12. Effective June 1, 1983, the provisions of §3.29(b) apply to this paragraph.

(c) *Nonrecurring income.* The amount of any nonrecurring countable income (e.g. an inheritance) received by a beneficiary shall be added to the beneficiary's annual rate of income for a 12-month annualization period commencing on the effective date on which the nonrecurring income is countable.

(Authority: 38 U.S.C. 501)

(d) *Recurring and irregular income.* The amount of recurring and irregular income anticipated or received by a beneficiary shall be added to determine the beneficiary's annual rate of income for a 12-month annualization period commencing at the beginning of the 12-month annualization, subject to the provisions of §3.660(a)(2) of this chapter.

[44 FR 45936, Aug. 6, 1979, as amended at 48 FR 34472, July 29, 1983; 57 FR 59300, Dec. 15, 1992]

§3.274 Relationship of net worth to pension entitlement.

(a) *Veteran.* Pension shall be denied or discontinued when the corpus of the estate of the veteran, and of the veteran's spouse, are such that under all the

circumstances, including consideration of the annual income of the veteran, the veteran's spouse, and the veteran's children, it is reasonable that some part of the corpus of such estates be consumed for the veteran's maintenance.

(Authority: 38 U.S.C. 1522(a))

(b) *Increased pension payable to a veteran for a child.* Increased pension payable to a veteran on account of a child shall be denied or discontinued when the corpus of the estate of the child is such that under all the circumstances including consideration of the veteran's and spouse's income and the income of the veteran's child or children, it is reasonable that some part of the corpus of such child's estate be consumed for the child's maintenance.

(Authority: 38 U.S.C. 1522(b))

(c) *Surviving spouse.* Pension payable to a surviving spouse shall be denied or discontinued when the corpus of the estate of the surviving spouse is such that under all the circumstances, including consideration of the surviving spouse's income and the income of any child for whom the surviving spouse is receiving pension, it is reasonable that some part of the corpus of the surviving spouse's estate be consumed for the surviving spouse's maintenance.

(Authority: 38 U.S.C. 1543(a)(1))

(d) *Increased pension payable to a surviving spouse for a child.* Increased pension payable to a surviving spouse on account of a child shall be denied or discontinued when the corpus of the estate of the child is such that under all the circumstances, including consideration of the income of the surviving spouse and child and the income of any other child for whom the surviving spouse is receiving increased pension, it is reasonable that some part of the corpus of the child's estate be consumed for the maintenance of the child.

(Authority: 38 U.S.C. 1543(a)(2))

(e) *Child.* Pension payable to a child shall be denied or discontinued when the corpus of the estate of the child is such that under all the circumstances, including consideration of the income of the child, the income of any person with whom the child is residing who is legally responsible for such child's support, and the corpus of estate of such person, it is reasonable that some part of the corpus of such estates be consumed for the child's maintenance.

(Authority: 38 U.S.C. 1543(b))

§ 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)

(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)

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

§3.276 Certain transfers or waivers disregarded.

(a) *Waiver of receipt of income.* Potential income, not excludable under §3.272 and whose receipt has been waived by an individual, shall be included as countable income of that individual for Department of Veterans Affairs pension purposes.

(b) *Transfer of assets.* For pension purposes, a gift of property made by an individual to a relative residing in the same household shall not be recognized as reducing the corpus of the grantor's estate. A sale of property to such a relative shall not be recognized as reducing the corpus of the seller's estate if the purchase price, or other consideration for the sale, is so low as to be tantamount to a gift. A gift of property to someone other than a relative residing in the grantor's household will not be recognized as reducing the corpus of the grantor's estate unless it is clear that the grantor has relinquished all rights of ownership, including the right of control of the property.

(Authority: 38 U.S.C. 501)

§3.277 Eligibility reporting requirements.

(a) *Evidence of entitlement.* As a condition of granting or continuing pension, the Department of Veterans Affairs may require from any person who is an applicant for or a recipient of pension such information, proofs, and evidence as is necessary to determine the annual income and the value of the corpus of the estate of such person, and of any spouse or child for whom the person is receiving or is to receive increased pension (such child is hereinafter in this section referred to as a *dependent child*), and, in the case of a child applying for or in receipt of pension in his or her own behalf (hereinafter in this section referred to as a *surviving child*), of any person with whom such child is residing who is legally responsible for such child's support.

(b) *Obligation to report changes in factors affecting entitlement.* Any individual who has applied for or receives pension must promptly notify the Secretary in writing of any change affecting entitlement in any of the following:

(1) Income;

(2) Net worth or corpus of estate;

(3) Marital status;

(4) Nursing home patient status;

(5) School enrollment status of a child 18 years of age or older; or

(6) Any other factor that affects entitlement to benefits under the provisions of this Part.

(c) *Eligibility verification reports.* (1) For purposes of this section the term eligibility verification report means a form prescribed by the Secretary that is used to request income, net worth, dependency status, and any other information necessary to determine or verify entitlement to pension.

(2) The Secretary shall require an eligibility verification report under the following circumstances:

(i) If the Social Security Administration has not verified the beneficiary's Social Security number and, if the beneficiary is married, his or her spouse's Social Security number;

(ii) If there is reason to believe that the beneficiary or his or her spouse

may have received income other than Social Security during the current or previous calendar year; or

(iii) If the Secretary determines that an eligibility verification report is necessary to preserve program integrity.

(3) An individual who applies for or receives pension as defined in § 3.3 of this part shall, as a condition of receipt or continued receipt of benefits, furnish the Department of Veterans Affairs an eligibility verification report upon request.

(d) If VA requests that a claimant or beneficiary submit an eligibility verification report but he or she fails to do so within 60 days of the date of the VA request, the Secretary shall suspend the award or disallow the claim.

(Authority: 38 U.S.C. 1506)

[44 FR 45936, Aug. 6, 1979, as amended at 60 FR 51922, Oct. 4, 1995]

RATINGS AND EVALUATIONS; BASIC ENTITLEMENT CONSIDERATIONS

§ 3.301 Line of duty and misconduct.

(a) *Line of duty.* Direct service connection may be granted only when a disability or cause of death was incurred or aggravated in line of duty, and not the result of the veteran's own willful misconduct or, for claims filed after October 31, 1990, the result of his or her abuse of alcohol or drugs.

(Authority: 38 U.S.C. 105)

(b) *Willful misconduct.* Disability pension is not payable for any condition due to the veteran's own willful misconduct.

(Authority: 38 U.S.C. 1521)

(c) *Specific applications; willful misconduct.* For the purpose of determining entitlement to service-connected and nonservice-connected benefits the definitions in §§ 3.1 (m) and (n) of this part apply except as modified within paragraphs (c)(1) through (c)(3) of this section. The provisions of paragraphs (c)(2) and (c)(3) of this section are subject to the provisions of § 3.302 of this part where applicable.

(Authority: 38 U.S.C. 501)

(1) *Venereal disease.* The residuals of venereal disease are not to be considered the result of willful misconduct. Consideration of service connection for residuals of venereal disease as having been incurred in service requires that the initial infection must have occurred during active service. Increase in service of manifestations of venereal disease will usually be held due to natural progress unless the facts of record indicate the increase in manifestations was precipitated by trauma or by the conditions of the veteran's service, in which event service connection may be established by aggravation. Medical principles pertaining to the incubation period and its relation to the course of the disease; i.e., initial or acute manifestation, or period and course of secondary and late residuals manifested, will be considered when time of incurrence of venereal disease prior to or after entry into service is at issue. In the issue of service connection, whether the veteran complied with service regulations and directives for reporting the disease and undergoing treatment is immaterial after November 14, 1972, and the service department characterization of acquisition of the disease as *willful misconduct* or as *not in line of duty* will not govern.

(2) The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin. (See §§ 21.1043, 21.5041, and 21.7051 of this title regarding the disabling effects of chronic alcoholism for the purpose of extending delimiting periods under education or rehabilitation programs.)

(Authority: 38 U.S.C. 501)

(3) *Drug usage.* The isolated and infrequent use of drugs by itself will not be

considered willful misconduct; however, the progressive and frequent use of drugs to the point of addiction will be considered willful misconduct. Where drugs are used to enjoy or experience their effects and the effects result proximately and immediately in disability or death, such disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of drugs and infections coinciding with the injection of drugs will not be considered of willful misconduct origin. (See paragraph (d) of this section regarding service connection where disability or death is a result of abuse of drugs.) Where drugs are used for therapeutic purposes or where use of drugs or addiction thereto, results from a service-connected disability, it will not be considered of misconduct origin.

(Authority: 38 U.S.C. 105, 1110, 1121, 1131, 1301, and 1521(a))

(d) *Line of duty; abuse of alcohol or drugs.* An injury or disease incurred during active military, naval, or air service shall not be deemed to have been incurred in line of duty if such injury or disease was a result of the abuse of alcohol or drugs by the person on whose service benefits are claimed. For the purpose of this paragraph, alcohol abuse means the use of alcoholic beverages over time, or such excessive use at any one time, sufficient to cause disability to or death of the user; drug abuse means the use of illegal drugs (including prescription drugs that are illegally or illicitly obtained), the intentional use of prescription or nonprescription drugs for a purpose other than the medically intended use, or the use of substances other than alcohol to enjoy their intoxicating effects.

(Authority: 38 U.S.C. 105(a))

[26 FR 1579, Feb. 24, 1961, as amended at 37 FR 24662, Nov. 18, 1972; 54 FR 31951, Aug. 3, 1989; 55 FR 13530, Apr. 11, 1990; 60 FR 27408–27409, May 24, 1995]

CROSS-REFERENCES: In line of duty. See §3.1(m). Willful misconduct. See §3.1(n). Extended period of eligibility. See §§21.1043 and 21.7051. Periods of entitlement. See §21.5041.

§3.302 Service connection for mental unsoundness in suicide.

(a) *General.* (1) In order for suicide to constitute willful misconduct, the act of self-destruction must be intentional.

(2) A person of unsound mind is incapable of forming an intent (mens rea, or guilty mind, which is an essential element of crime or willful misconduct).

(3) It is a constant requirement for favorable action that the precipitating mental unsoundness be service connected.

(b) *Evidence of mental condition.* (1) Whether a person, at the time of suicide, was so unsound mentally that he or she did not realize the consequence of such an act, or was unable to resist such impulse is a question to be determined in each individual case, based on all available lay and medical evidence pertaining to his or her mental condition at the time of suicide.

(2) The act of suicide or a bona fide attempt is considered to be evidence of mental unsoundness. Therefore, where no reasonable adequate motive for suicide is shown by the evidence, the act will be considered to have resulted from mental unsoundness.

(3) A reasonable adequate motive for suicide may be established by affirmative evidence showing circumstances which could lead a rational person to self-destruction.

(c) *Evaluation of evidence.* (1) Affirmative evidence is necessary to justify reversal of service department findings of mental unsoundness where Department of Veterans Affairs criteria do not otherwise warrant contrary findings.

(2) In all instances any reasonable doubt should be resolved favorably to support a finding of service connection (see §3.102).

[28 FR 183, Jan. 8, 1963, as amended at 54 FR 31951, Aug. 3, 1989; 55 FR 13530, Apr. 11, 1990]

CROSS REFERENCE: Cause of death. See §3.312.

RATINGS AND EVALUATIONS; SERVICE CONNECTION

§3.303 Principles relating to service connection.

(a) *General.* Service connection connotes many factors but basically it

means that the facts, shown by evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces, or if preexisting such service, was aggravated therein. This may be accomplished by affirmatively showing inception or aggravation during service or through the application of statutory presumptions. Each disabling condition shown by a veteran's service records, or for which he seeks a service connection must be considered on the basis of the places, types and circumstances of his service as shown by service records, the official history of each organization in which he served, his medical records and all pertinent medical and lay evidence. Determinations as to service connection will be based on review of the entire evidence of record, with due consideration to the policy of the Department of Veterans Affairs to administer the law under a broad and liberal interpretation consistent with the facts in each individual case.

(b) *Chronicity and continuity*. With chronic disease shown as such in service (or within the presumptive period under § 3.307) so as to permit a finding of service connection, subsequent manifestations of the same chronic disease at any later date, however remote, are service connected, unless clearly attributable to intercurrent causes. This rule does not mean that any manifestation of joint pain, any abnormality of heart action or heart sounds, any urinary findings of casts, or any cough, in service will permit service connection of arthritis, disease of the heart, nephritis, or pulmonary disease, first shown as a clearcut clinical entity, at some later date. For the showing of chronic disease in service there is required a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis including the word ''Chronic.'' When the disease identity is established (leprosy, tuberculosis, multiple sclerosis, etc.), there is no requirement of evidentiary showing of continuity. Continuity of symptomatology is required only where the condition noted during service (or in the presumptive period) is not, in fact, shown to be chronic or where the diagnosis of chronicity may be legitimately questioned. When the fact of chronicity in service is not adequately supported, then a showing of continuity after discharge is required to support the claim.

(c) *Preservice disabilities noted in service*. There are medical principles so universally recognized as to constitute fact (clear and unmistakable proof), and when in accordance with these principles existence of a disability prior to service is established, no additional or confirmatory evidence is necessary. Consequently with notation or discovery during service of such residual conditions (scars; fibrosis of the lungs; atrophies following disease of the central or peripheral nervous system; healed fractures; absent, displaced or resected parts of organs; supernumerary parts; congenital malformations or hemorrhoidal tags or tabs, etc.) with no evidence of the pertinent antecedent active disease or injury during service the conclusion must be that they preexisted service. Similarly, manifestation of lesions or symptoms of chronic disease from date of enlistment, or so close thereto that the disease could not have originated in so short a period will establish preservice existence thereof. Conditions of an infectious nature are to be considered with regard to the circumstances of the infection and if manifested in less than the respective incubation periods after reporting for duty, they will be held to have preexisted service. In the field of mental disorders, personality disorders which are characterized by developmental defects or pathological trends in the personality structure manifested by a lifelong pattern of action or behavior, chronic psychoneurosis of long duration or other psychiatric symptomatology shown to have existed prior to service with the same manifestations during service, which were the basis of the service diagnosis, will be accepted as showing preservice origin. Congenital or developmental defects, refractive error of the eye, personality disorders and mental deficiency as such are not diseases or injuries within the meaning of applicable legislation.

(d) *Postservice initial diagnosis of disease.* Service connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. Presumptive periods are not intended to limit service connection to diseases so diagnosed when the evidence warrants direct service connection. The presumptive provisions of the statute and Department of Veterans Affairs regulations implementing them are intended as liberalizations applicable when the evidence would not warrant service connection without their aid.

[26 FR 1579, Feb. 24, 1961]

§3.304 Direct service connection; wartime and peacetime.

(a) *General.* The basic considerations relating to service connection are stated in §3.303. The criteria in this section apply only to disabilities which may have resulted from service in a period of war or service rendered on or after January 1, 1947.

(b) *Presumption of soundness.* The veteran will be considered to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities, or disorders noted at entrance into service, or where clear and unmistakable (obvious or manifest) evidence demonstrates that an injury or disease existed prior thereto. Only such conditions as are recorded in examination reports are to be considered as noted.

(Authority: 38 U.S.C. 1111)

(1) History of preservice existence of conditions recorded at the time of examination does not constitute a notation of such conditions but will be considered together with all other material evidence in determinations as to inception. Determinations should not be based on medical judgment alone as distinguished from accepted medical principles, or on history alone without regard to clinical factors pertinent to the basic character, origin and development of such injury or disease. They should be based on thorough analysis of the evidentiary showing and careful correlation of all material facts, with due regard to accepted medical principles pertaining to the history, manifestations, clinical course, and character of the particular injury or disease or residuals thereof.

(2) History conforming to accepted medical principles should be given due consideration, in conjunction with basic clinical data, and be accorded probative value consistent with accepted medical and evidentiary principles in relation to value consistent with accepted medical evidence relating to incurrence, symptoms and course of the injury or disease, including official and other records made prior to, during or subsequent to service, together with all other lay and medical evidence concerning the inception, development and manifestations of the particular condition will be taken into full account.

(3) Signed statements of veterans relating to the origin, or incurrence of any disease or injury made in service if against his or her own interest is of no force and effect if other data do not establish the fact. Other evidence will be considered as though such statement were not of record.

(Authority: 10 U.S.C. 1219)

(c) *Development.* The development of evidence in connection with claims for service connection will be accomplished when deemed necessary but it should not be undertaken when evidence present is sufficient for this determination. In initially rating disability of record at the time of discharge, the records of the service department, including the reports of examination at enlistment and the clinical records during service, will ordinarily suffice. Rating of combat injuries or other conditions which obviously had their inception in service may be accomplished pending receipt of copy of the examination at enlistment and all other service records.

(d) *Combat.* Satisfactory lay or other evidence that an injury or disease was incurred or aggravated in combat will be accepted as sufficient proof of service connection if the evidence is consistent with the circumstances, conditions or hardships of such service even though there is no official record of such incurrence or aggravation.

(Authority: 38 U.S.C. 1154(b))

(e) *Prisoners of war.* Where disability compensation is claimed by a former prisoner of war, omission of history or findings from clinical records made upon repatriation is not determinative of service connection, particularly if evidence of comrades in support of the incurrence of the disability during confinement is available. Special attention will be given to any disability first reported after discharge, especially if poorly defined and not obviously of intercurrent origin. The circumstances attendant upon the individual veteran's confinement and the duration thereof will be associated with pertinent medical principles in determining whether disability manifested subsequent to service is etiologically related to the prisoner of war experience.

(f) *Post-traumatic stress disorder.* Service connection for post-traumatic stress disorder requires medical evidence establishing a clear diagnosis of the condition, credible supporting evidence that the claimed inservice stressor actually occurred, and a link, established by medical evidence, between current symptomatology and the claimed inservice stressor. If the claimed stressor is related to combat, service department evidence that the veteran engaged in combat or that the veteran was awarded the Purple Heart, Combat Infantryman Badge, or similar combat citation will be accepted, in the absence of evidence to the contrary, as conclusive evidence of the claimed inservice stressor. Additionally, if the claimed stressor is related to the claimant having been a prisoner-of-war, prisoner-of-war experience which satisfies the requirements of § 3.1(y) of this part will be accepted, in the absence of evidence to the contrary, as conclusive evidence of the claimed inservice stressor.

(Authority: 38 U.S.C. 1154(b))

[26 FR 1580, Feb. 24, 1961, as amended at 31 FR 4680, Mar. 19, 1966; 39 FR 34530, Sept. 26, 1974; 58 FR 29110, May 19, 1993]

§ 3.305 Direct service connection; peacetime service before January 1, 1947.

(a) *General.* The basic considerations relating to service connection are stated in § 3.303. The criteria in this section apply only to disabilities which may have resulted from service other than in a period of war before January 1, 1947.

(b) *Presumption of soundness.* A peacetime veteran who has had active, continuous service of 6 months or more will be considered to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities or disorders noted at the time thereof, or where evidence or medical judgment, as distinguished from medical fact and principles, establishes that an injury or disease preexisted service. Any evidence acceptable as competent to indicate the time of existence or inception of the condition may be considered. Determinations based on medical judgment will take cognizance of the time of inception or manifestation of disease or injury following entrance into service, as shown by proper service authorities in service records, entries or reports. Such records will be accorded reasonable weight in consideration of other evidence and sound medical reasoning. Opinions may be solicited from Department of Veterans Affairs medical authorities when considered necessary.

(c) *Campaigns and expeditions.* In considering claims of veterans who engaged in combat during campaigns or expeditions satisfactory lay or other evidence of incurrence or aggravation in such combat of an injury or disease, if consistent with the circumstances, conditions or hardships of such service will be accepted as sufficient proof of service connection, even when there is no official record of incurrence or aggravation. Service connection for such injury or disease may be rebutted by clear and convincing evidence to the contrary.

[26 FR 1580, Feb. 24, 1961, as amended at 28 FR 3088, Mar. 29, 1963; 39 FR 34530, Sept. 26, 1974]

§ 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, as amended at 57 FR 59296, Dec. 15, 1992]

§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 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, and respiratory cancers within 30 years, 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 and has a disease listed at § 3.309(e) 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))

(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 microorganism); 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. The consideration of service incurrence provided for chronic diseases will not be interpreted to permit any presumption as to aggravation of a preservice disease or injury after discharge.

(d) *Rebuttal of service incurrence.* 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.

(Authority: 38 U.S.C. 1113)

[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]

§3.308 Presumptive service connection; peacetime service before January 1, 1947.

(a) *Chronic disease.* There is no provision for presumptive service connection for chronic disease as distinguished from tropical diseases referred to in paragraph (b) of this section based on peacetime service before January 1, 1947.

(b) *Tropical disease.* In claims based on peacetime service before January 1, 1947, a veteran of 6 months or more service who contracts a tropical disease listed in §3.309(b) or a resultant disorder or disease originating because of therapy administered in connection with a tropical disease or as a preventative, will be considered to have incurred such disability in service when it is shown to exist to the degree of 10 percent or more within 1 year after separation from active service, or at a time when standard and accepted treatises indicate that the incubation period commenced during active service unless shown by clear and unmistakable evidence not to have been of service origin. The requirement of 6 months or more service means active, continuous service, during one or more enlistment periods.

(Authority: 38 U.S.C. 1133)

[39 FR 34530, Sept. 26, 1974]

§3.309 Disease subject to presumptive service connection.

(a) *Chronic diseases.* The following diseases shall be granted service connection although not otherwise established as incurred in service if manifested to a compensable degree within

the applicable time limits under § 3.307 following service in a period of war or following peacetime service on or after January 1, 1947, provided the rebuttable presumption provisions of § 3.307 are also satisfied.

Anemia, primary.
Arteriosclerosis.
Arthritis.
Atrophy, progressive muscular.
Brain hemorrhage.
Brain thrombosis.
Bronchiectasis.
Calculi of the kidney, bladder, or gallbladder.

Cardiovascular-renal disease, including hypertension. (This term applies to combination involvement of the type of arteriosclerosis, nephritis, and organic heart disease, and since hypertension is an early symptom long preceding the development of those diseases in their more obvious forms, a disabling hypertension within the 1-year period will be given the same benefit of service connection as any of the chronic diseases listed.)

Cirrhosis of the liver.
Coccidioidomycosis.
Diabetes mellitus.
Encephalitis lethargica residuals.
Endocarditis. (This term covers all forms of valvular heart disease.)
Endocrinopathies.
Epilepsies.
Hansen's disease.
Hodgkin's disease.
Leukemia.
Lupus erythematosus, systemic.
Myasthenia gravis.
Myelitis.
Myocarditis.
Nephritis.
Other organic diseases of the nervous system.
Osteitis deformans (Paget's disease).
Osteomalacia.
Palsy, bulbar.
Paralysis agitans.
Psychoses.
Purpura idiopathic, hemorrhagic.
Raynaud's disease.
Sarcoidosis.
Scleroderma.
Sclerosis, amyotrophic lateral.
Sclerosis, multiple.
Syringomyelia.
Thromboangiitis obliterans (Buerger's disease).
Tuberculosis, active.
Tumors, malignant, or of the brain or spinal cord or peripheral nerves.
Ulcers, peptic (gastric or duodenal) (A proper diagnosis of gastric or duodenal ulcer (peptic ulcer) is to be considered established if it represents a medically sound interpretation of sufficient clinical findings warranting such diagnosis and provides an adequate basis for a differential diagnosis from other conditions with like symptomatology; in short, where the preponderance of evidence indicates gastric or duodenal ulcer (peptic ulcer). Whenever possible, of course, laboratory findings should be used in corroboration of the clinical data.

(b) *Tropical diseases.* The following diseases shall be granted service connection as a result of tropical service, although not otherwise established as incurred in service if manifested to a compensable degree within the applicable time limits under § 3.307 or § 3.308 following service in a period of war or following peacetime service, provided the rebuttable presumption provisions of § 3.307 are also satisfied.

Amebiasis.
Blackwater fever.
Cholera.
Dracontiasis.
Dysentery.
Filariasis.
Leishmaniasis, including kala-azar.
Loiasis.
Malaria.
Onchocerciasis.
Oroya fever.
Pinta.
Plague.
Schistosomiasis.
Yaws.
Yellow fever.

Resultant disorders or diseases originating because of therapy administered in connection with such diseases or as a preventative thereof.

(c) *Diseases specific as to former prisoners of war.* If a veteran is: (1) A former prisoner of war and; (2) as such was interned or detained for not less than 30 days, the following diseases shall be service-connected if manifest to a degree of 10 percent or more at any time after discharge or release from active military, naval, or air service even though there is no record of such disease during service, provided the rebuttable presumption provisions of § 3.307 are also satisfied.

Avitaminosis.
Beriberi (including beriberi heart disease).
Chronic dysentery.
Helminthiasis.

Malnutrition (including optic atrophy associated with malnutrition).
Pellagra.
Any other nutritional deficiency.
Psychosis.
Any of the anxiety states.
Dysthymic disorder (or depressive neurosis).

Organic residuals of frostbite, if it is determined that the veteran was interned in climatic conditions consistent with the occurrence of frostbite.

Post-traumatic osteoarthritis.
Irritable bowel syndrome.
Peptic ulcer disease.
Peripheral neuropathy except where directly related to infectious causes.

NOTE: For purposes of this section, the term *beriberi heart disease* includes ischemic heart disease in a former prisoner of war who had experienced localized edema during captivity.

(Authority: 38 U.S.C. 1112)

(d) *Diseases specific to radiation-exposed veterans.* (1) The diseases listed in paragraph (d)(2) of this section shall be service-connected if they become manifest in a radiation-exposed veteran as defined in paragraph (d)(3) of this section, provided the rebuttable presumption provisions of §3.307 of this part are also satisfied.

(2) The diseases referred to in paragraph (d)(1) of this section are the following:

(i) Leukemia (other than chronic lymphocytic leukemia).

(ii) Cancer of the thyroid.

(iii) Cancer of the breast.

(iv) Cancer of the pharynx.

(v) Cancer of the esophagus.

(vi) Cancer of the stomach.

(vii) Cancer of the small intestine.

(viii) Cancer of the pancreas.

(ix) Multiple myeloma.

(x) Lymphomas (except Hodgkin's disease).

(xi) Cancer of the bile ducts.

(xii) Cancer of the gall bladder.

(xiii) Primary liver cancer (except if cirrhosis or hepatitis B is indicated).

(xiv) Cancer of the salivary gland.

(xv) Cancer of the urinary tract.

NOTE: For the purposes of this section, the term ''urinary tract'' means the kidneys, renal pelves, ureters, urinary bladder, and urethra.

(3) For purposes of this section:

(i) The term *radiation-exposed veteran* means either a veteran who while serving on active duty, or an individual who while a member of a reserve component of the Armed Forces during a period of active duty for training or inactive duty training, participated in a radiation-risk activity.

(ii) The term *radiation-risk activity* means:

(A) Onsite participation in a test involving the atmospheric detonation of a nuclear device.

(B) The occupation of Hiroshima or Nagasaki, Japan, by United States forces during the period beginning on August 6, 1945, and ending on July 1, 1946.

(C) Internment as a prisoner of war in Japan (or service on active duty in Japan immediately following such internment) during World War II which resulted in an opportunity for exposure to ionizing radiation comparable to that of the United States occupation forces in Hiroshima or Nagasaki, Japan, during the period beginning on August 6, 1945, and ending on July 1, 1946.

(iii) The term *atmospheric detonation* includes underwater nuclear detonations.

(iv) The term *onsite participation* means:

(A) During the official operational period of an atmospheric nuclear test, presence at the test site, or performance of official military duties in connection with ships, aircraft or other equipment used in direct support of the nuclear test.

(B) During the six month period following the official operational period of an atmospheric nuclear test, presence at the test site or other test staging area to perform official military duties in connection with completion of projects related to the nuclear test including decontamination of equipment used during the nuclear test.

(C) Service as a member of the garrison or maintenance forces on Eniwetok during the periods June 21, 1951, through July 1, 1952, August 7, 1956, through August 7, 1957, or November 1, 1958, through April 30, 1959.

(D) Assignment to official military duties at Naval Shipyards involving the decontamination of ships that participated in Operation Crossroads.

(v) For tests conducted by the United States, the term *operational period* means:

(A) For Operation *TRINITY* the period July 16, 1945 through August 6, 1945.

(B) For Operation *CROSSROADS* the period July 1, 1946 through August 31, 1946.

(C) For Operation *SANDSTONE* the period April 15, 1948 through May 20, 1948.

(D) For Operation *RANGER* the period January 27, 1951 through February 6, 1951.

(E) For Operation *GREENHOUSE* the period April 8, 1951 through June 20, 1951.

(F) For Operation *BUSTER-JANGLE* the period October 22, 1951 through December 20, 1951.

(G) For Operation *TUMBLER-SNAPPER* the period April 1, 1952 through June 20, 1952.

(H) For Operation *IVY* the period November 1, 1952 through December 31, 1952.

(I) For Operation *UPSHOT-KNOTHOLE* the period March 17, 1953 through June 20, 1953.

(J) For Operation *CASTLE* the period March 1, 1954 through May 31, 1954.

(K) For Operation *TEAPOT* the period February 18, 1955 through June 10, 1955.

(L) For Operation *WIGWAM* the period May 14, 1955 through May 15, 1955.

(M) For Operation *REDWING* the period May 5, 1956 through August 6, 1956.

(N) For Operation *PLUMBBOB* the period May 28, 1957 through October 22, 1957.

(O) For Operation *HARDTACK I* the period April 28, 1958 through October 31, 1958.

(P) For Operation *ARGUS* the period August 27, 1958 through September 10, 1958.

(Q) For Operation *HARDTACK II* the period September 19, 1958 through October 31, 1958.

(R) For Operation *DOMINIC I* the period April 25, 1962 through December 31, 1962.

(S) For Operation *DOMINIC II/PLOWSHARE* the period July 6, 1962 through August 15, 1962.

(vi) The term ''occupation of Hiroshima or Nagasaki, Japan, by United States forces'' means official military duties within 10 miles of the city limits of either Hiroshima or Nagasaki, Japan, which were required to perform or support military occupation functions such as occupation of territory, control of the population, stabilization of the government, demilitarization of the Japanese military, rehabilitation of the infrastructure or deactivation and conversion of war plants or materials.

(vii) Former prisoners of war who had an opportunity for exposure to ionizing radiation comparable to that of veterans who participated in the occupation of Hiroshima or Nagasaki, Japan, by United States forces shall include those who, at any time during the period August 6, 1945, through July 1, 1946:

(A) Were interned within 75 miles of the city limits of Hiroshima or within 150 miles of the city limits of Nagasaki, or

(B) Can affirmatively show they worked within the areas set forth in paragraph (d)(4)(vii)(A) of this section although not interned within those areas, or

(C) Served immediately following internment in a capacity which satisfies the definition in paragraph (d)(4)(vi) of this section, or

(D) Were repatriated through the port of Nagasaki.

(Authority: 38 U.S.C. 1110, 1112, 1131)

(e) *Disease associated with exposure to certain herbicide agents.* If a veteran was exposed to an herbicide agent during active military, naval, or air service, the following diseases shall be service-connected if the requirements of § 3.307(a)(6) are met even though there is no record of such disease during service, provided further that the rebuttable presumption provisions of § 3.307(d) are also satisfied.

Chloracne or other acneform disease consistent with chloracne
Hodgkin's disease
Multiple myeloma
Non-Hodgkin's lymphoma
Acute and subacute peripheral neuropathy
Porphyria cutanea tarda
Prostate cancer
Respiratory cancers (cancer of the lung, bronchus, larynx, or trachea)

Soft-tissue sarcoma (other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma)

NOTE 1: The term ''soft-tissue sarcoma'' includes the following:

Adult fibrosarcoma
Dermatofibrosarcoma protuberans
Malignant fibrous histiocytoma
Liposarcoma
Leiomyosarcoma
Epithelioid leiomyosarcoma (malignant leiomyoblastoma)
Rhabdomyosarcoma
Ectomesenchymoma
Angiosarcoma (hemangiosarcoma and lymphangiosarcoma)
Proliferating (systemic) angioendotheliomatosis
Malignant glomus tumor
Malignant hemangiopericytoma
Synovial sarcoma (malignant synovioma)
Malignant giant cell tumor of tendon sheath
Malignant schwannoma, including malignant schwannoma with rhabdomyoblastic differentiation (malignant Triton tumor), glandular and epithelioid malignant schwannomas
Malignant mesenchymoma
Malignant granular cell tumor
Alveolar soft part sarcoma
Epithelioid sarcoma
Clear cell sarcoma of tendons and aponeuroses
Extraskeletal Ewing's sarcoma
Congenital and infantile fibrosarcoma
Malignant ganglioneuroma

NOTE 2: For purposes of this section, the term *acute and subacute peripheral neuropathy* means transient peripheral neuropathy that appears within weeks or months of exposure to an herbicide agent and resolves within two years of the date of onset.

(Authority: 38 U.S.C. 501(a) and 1116)

[41 FR 55873, Dec. 23, 1976 and 47 FR 11656, Mar. 18, 1982, as amended at 47 FR 54436, Dec. 3, 1982; 49 FR 47003, Nov. 30, 1984; 53 FR 23236, June 21, 1988; 54 FR 26029, June 21, 1989; 57 FR 10426, Mar. 26, 1992; 58 FR 25564, Apr. 27, 1993; 58 FR 29109, May 19, 1993; 58 FR 41636, Aug. 5, 1993; 59 FR 5107, Feb. 3, 1994; 59 FR 25329, May 16, 1994; 59 FR 29724, June 9, 1994; 59 FR 35465, July 12, 1994; 60 FR 31252, June 14, 1995; 61 FR 57589, Nov. 7, 1996]

§3.310 Proximate results, secondary conditions.

(a) *General.* Disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition.

(b) *Cardiovascular disease.* Ischemic heart disease or other cardiovascular disease developing in a veteran who has a service-connected amputation of one lower extremity at or above the knee or service-connected amputations of both lower extremities at or above the ankles, shall be held to be the proximate result of the service-connected amputation or amputations.

(Authority: 38 U.S.C. 501, 1110–1131)

[44 FR 50340, Aug. 28, 1979]

§3.311 Claims based on exposure to ionizing radiation.

(a) *Determinations of exposure and dose*—(1) *Dose assessment.* In all claims in which it is established that a radiogenic disease first became manifest after service and was not manifest to a compensable degree within any applicable presumptive period as specified in §3.307 or §3.309, and it is contended the disease is a result of exposure to ionizing radiation in service, an assessment will be made as to the size and nature of the radiation dose or doses. When dose estimates provided pursuant to paragraph (a)(2) of this section are reported as a range of doses to which a veteran may have been exposed, exposure at the highest level of the dose range reported will be presumed.

(Authority: 38 U.S.C. 501)

(2) *Request for dose information.* Where necessary pursuant to paragraph (a)(1) of this section, dose information will be requested as follows:

(i) *Atmospheric nuclear weapons test participation claims.* In claims based upon participation in atmospheric nuclear testing, dose data will in all cases be requested from the appropriate office of the Department of Defense.

(ii) *Hiroshima and Nagasaki occupation claims.* In all claims based on participation in the American occupation of Hiroshima or Nagasaki, Japan, prior to July 1, 1946, dose data will be requested from the Department of Defense.

(iii) *Other exposure claims.* In all other claims involving radiation exposure, a request will be made for any available

records concerning the veteran's exposure to radiation. These records normally include but may not be limited to the veteran's Record of Occupational Exposure to Ionizing Radiation (DD Form 1141), if maintained, service medical records, and other records which may contain information pertaining to the veteran's radiation dose in service. All such records will be forwarded to the Under Secretary for Health, who will be responsible for preparation of a dose estimate, to the extent feasible, based on available methodologies.

(3) *Referral to independent expert.* When necessary to reconcile a material difference between an estimate of dose, from a credible source, submitted by or on behalf of a claimant, and dose data derived from official military records, the estimates and supporting documentation shall be referred to an independent expert, selected by the Director of the National Institutes of Health, who shall prepare a separate radiation dose estimate for consideration in adjudication of the claim. For purposes of this paragraph:

(i) The difference between the claimant's estimate and dose data derived from official military records shall ordinarily be considered material if one estimate is at least double the other estimate.

(ii) A dose estimate shall be considered from a ''credible source'' if prepared by a person or persons certified by an appropriate professional body in the field of health physics, nuclear medicine or radiology and if based on analysis of the facts and circumstances of the particular claim.

(4) *Exposure.* In cases described in paragraph (a)(2)(i) and (ii) of this section:

(i) If military records do not establish presence at or absence from a site at which exposure to radiation is claimed to have occurred, the veteran's presence at the site will be conceded.

(ii) Neither the veteran nor the veteran's survivors may be required to produce evidence substantiating exposure if the information in the veteran's service records or other records maintained by the Department of Defense is consistent with the claim that the veteran was present where and when the claimed exposure occurred.

(b) *Initial review of claims.* (1) When it is determined:

(i) A veteran was exposed to ionizing radiation as a result of participation in the atmospheric testing of nuclear weapons, the occupation of Hiroshima or Nagasaki, Japan, from September 1945 until July 1946, or other activities as claimed;

(ii) The veteran subsequently developed a radiogenic disease; and

(iii) Such disease first became manifest within the period specified in paragraph (b)(5) of this section; before its adjudication the claim will be referred to the Under Secretary for Benefits for further consideration in accordance with paragraph (c) of this section. If any of the foregoing 3 requirements has not been met, it shall not be determined that a disease has resulted from exposure to ionizing radiation under such circumstances.

(2) For purposes of this section the term ''radiogenic disease'' means a disease that may be induced by ionizing radiation and shall include the following:

(i) All forms of leukemia except chronic lymphatic (lymphocytic) leukemia;

(ii) Thyroid cancer;

(iii) Breast cancer;

(iv) Lung cancer;

(v) Bone cancer;

(vi) Liver cancer;

(vii) Skin cancer;

(viii) Esophageal cancer;

(ix) Stomach cancer;

(x) Colon cancer;

(xi) Pancreatic cancer;

(xii) Kidney cancer;

(xiii) Urinary bladder cancer;

(xiv) Salivary gland cancer;

(xv) Multiple myeloma;

(xvi) Posterior subcapsular cataracts;

(xvii) Non-malignant thyroid nodular disease;

(xviii) Ovarian cancer;

(xix) Parathyroid adenoma;

(xx) Tumors of the brain and central nervous system;

(xxi) Cancer of the rectum; and

(xxii) Lymphomas other than Hodgkin's disease.

(Authority: 38 U.S.C. 501)

(3) For purposes of paragraphs (a)(1) and (b)(1) of this section, ''radiogenic disease'' shall not include polycythemia vera.

(4) If a claim is based on a disease other than one of those listed in paragraphs (b)(2) or (b)(3) of this section, VA shall nevertheless consider the claim under the provisions of this section provided that the claimant has cited or submitted competent scientific or medical evidence that the claimed condition is a radiogenic disease.

(5) For the purposes of paragraph (b)(1) of this section:

(i) Bone cancer must become manifest within 30 years after exposure;

(ii) Leukemia may become manifest at any time after exposure;

(iii) Posterior subcapsular cataracts must become manifest 6 months or more after exposure; and

(iv) Other diseases specified in paragraph (b)(2) of this section must become manifest 5 years or more after exposure.

(Authority: 38 U.S.C. 501; Pub. L. 98–542)

(c) *Review by Under Secretary for Benefits.* (1) When a claim is forwarded for review pursuant to paragraph (b)(1) of this section, the Under Secretary for Benefits shall consider the claim with reference to the factors specified in paragraph (e) of this section and may request an advisory medical opinion from the Under Secretary for Health.

(i) If after such consideration the Under Secretary for Benefits is convinced sound scientific and medical evidence supports the conclusion it is at least as likely as not the veteran's disease resulted from exposure to radiation in service, the Under Secretary for Benefits shall so inform the regional office of jurisdiction in writing. The Under Secretary for Benefits shall set forth the rationale for this conclusion, including an evaluation of the claim under the applicable factors specified in paragraph (e) of this section.

(ii) If the Under Secretary for Benefits determines there is no reasonable possibility that the veteran's disease resulted from radiation exposure in service, the Under Secretary for Benefits shall so inform the regional office of jurisidiction in writing, setting forth the rationale for this conclusion.

(2) If the Under Secretary for Benefits, after considering any opinion of the Under Secretary for Health, is unable to conclude whether it is at least as likely as not, or that there is no reasonable possibility, the veteran's disease resulted from radiation exposure in service, the Under Secretary for Benefits shall refer the matter to an outside consultant in accordance with paragraph (d) of this section.

(3) For purposes of paragraph (c)(1) of this section, ''sound scientific evidence'' means observations, findings, or conclusions which are statistically and epidemiologically valid, are statistically significant, are capable of replication, and withstand peer review, and ''sound medical evidence'' means observations, findings, or conclusions which are consistent with current medical knowledge and are so reasonable and logical as to serve as the basis of management of a medical condition.

(d) *Referral to outside consultants.* (1) Referrals pursuant to paragraph (c) of this section shall be to consultants selected by the Under Secretary for Health from outside VA, upon the recommendation of the Director of the National Cancer Institute. The consultant will be asked to evaluate the claim and provide an opinion as to the likelihood the disease is a result of exposure as claimed.

(2) The request for opinion shall be in writing and shall include a description of:

(i) The disease, including the specific cell type and stage, if known, and when the disease first became manifest;

(ii) The circumstances, including date, of the veteran's exposure;

(iii) The veteran's age, gender, and pertinent family history;

(iv) The veteran's history of exposure to known carcinogens, occupationally or otherwise;

(v) Evidence of any other effects radiation exposure may have had on the veteran; and

(vi) Any other information relevant to determination of causation of the veteran's disease.

The Under Secretary for Benefits shall forward, with the request, copies of pertinent medical records and, where

available, dose assessments from official sources, from credible sources as defined in paragraph (a)(3)(ii) of this section, and from an independent expert pursuant to paragraph (a)(3) of this section.

(3) The consultant shall evaluate the claim under the factors specified in paragraph (e) of this section and respond in writing, stating whether it is either likely, unlikely, or approximately as likely as not the veteran's disease resulted from exposure to ionizing radiation in service. The response shall set forth the rationale for the consultant's conclusion, including the consultant's evaluation under the applicable factors specified in paragraph (e) of this section. The Under Secretary for Benefits shall review the consultant's response and transmit it with any comments to the regional office of jurisdiction for use in adjudication of the claim.

(e) *Factors for consideration.* Factors to be considered in determining whether a veteran's disease resulted from exposure to ionizing radiation in service include:

(1) The probable dose, in terms of dose type, rate and duration as a factor in inducing the disease, taking into account any known limitations in the dosimetry devices employed in its measurement or the methodologies employed in its estimation;

(2) The relative sensitivity of the involved tissue to induction, by ionizing radiation, of the specific pathology;

(3) The veteran's gender and pertinent family history;

(4) The veteran's age at time of exposure;

(5) The time-lapse between exposure and onset of the disease; and

(6) The extent to which exposure to radiation, or other carcinogens, outside of service may have contributed to development of the disease.

(f) *Adjudication of claim.* The determination of service connection will be made under the generally applicable provisions of this part, giving due consideration to all evidence of record, including any opinion provided by the Under Secretary for Health or an outside consultant, and to the evaluations published pursuant to §1.17 of this title. With regard to any issue material to consideration of a claim, the provisions of §3.102 of this title apply.

(g) *Willful misconduct and supervening cause.* In no case will service connection be established if the disease is due to the veteran's own willful misconduct, or if there is affirmative evidence to establish that a supervening, nonservice-related condition or event is more likely the cause of the disease.

(Authority: Pub. L. 98–542)

[50 FR 34459, Aug. 26, 1985, as amended at 54 FR 42803, Oct. 18, 1989; 58 FR 16359, Mar. 26, 1993. Redesignated at 59 FR 5107, Feb. 3, 1994, and amended at 59 FR 45975, Sept. 6, 1994; 60 FR 9628, Feb. 21, 1995; 60 FR 53277, Oct. 13, 1995]

§ 3.312 Cause of death.

(a) *General.* The death of a veteran will be considered as having been due to a service-connected disability when the evidence establishes that such disability was either the principal or a contributory cause of death. The issue involved will be determined by exercise of sound judgment, without recourse to speculation, after a careful analysis has been made of all the facts and circumstances surrounding the death of the veteran, including, particularly, autopsy reports.

(b) *Principal cause of death.* The service-connected disability will be considered as the principal (primary) cause of death when such disability, singly or jointly with some other condition, was the immediate or underlying cause of death or was etiologically related thereto.

(c) *Contributory cause of death.* (1) Contributory cause of death is inherently one not related to the principal cause. In determining whether the service-connected disability contributed to death, it must be shown that it contributed substantially or materially; that it combined to cause death; that it aided or lent assistance to the production of death. It is not sufficient to show that it casually shared in producing death, but rather it must be shown that there was a causal connection.

(2) Generally, minor service-connected disabilities, particularly those of a static nature or not materially affecting a vital organ, would not be held to have contributed to death primarily

due to unrelated disability. In the same category there would be included service-connected disease or injuries of any evaluation (even though evaluated as 100 percent disabling) but of a quiescent or static nature involving muscular or skeletal functions and not materially affecting other vital body functions.

(3) Service-connected diseases or injuries involving active processes affecting vital organs should receive careful consideration as a contributory cause of death, the primary cause being unrelated, from the viewpoint of whether there were resulting debilitating effects and general impairment of health to an extent that would render the person materially less capable of resisting the effects of other disease or injury primarily causing death. Where the service-connected condition affects vital organs as distinguished from muscular or skeletal functions and is evaluated as 100 percent disabling, debilitation may be assumed.

(4) There are primary causes of death which by their very nature are so overwhelming that eventual death can be anticipated irrespective of coexisting conditions, but, even in such cases, there is for consideration whether there may be a reasonable basis for holding that a service-connected condition was of such severity as to have a material influence in accelerating death. In this situation, however, it would not generally be reasonable to hold that a service-connected condition accelerated death unless such condition affected a vital organ and was of itself of a progressive or debilitating nature.

[26 FR 1582, Feb. 24, 1961, as amended at 54 FR 34981, Aug. 23, 1989; 54 FR 42803, Oct. 18, 1989]

CROSS REFERENCES: Reasonable doubt. See §3.102. Service connection for mental unsoundness in suicide. See §3.302.

§3.313 Claims based on service in Vietnam.

(a) *Service in Vietnam. Service in Vietnam* includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.

(b) *Service connection based on service in Vietnam.* Service in Vietnam during the Vietnam Era together with the development of non-Hodgkin's lymphoma manifested subsequent to such service is sufficient to establish service connection for that disease.

(Authority: 38 U.S.C. 501)

[55 FR 43124, Oct. 26, 1990]

§3.314 Basic pension determinations.

(a) *Prior to the Mexican border period.* While pensions are granted based on certain service prior to the Mexican border period, the only rating factors in claims therefor are:

(1) Claims based on service of less than 90 days in the Spanish-American War require a rating determination as to whether the veteran was discharged or released from service for a service-connected disability or had at the time of separation from service a service-connected disability, shown by official service records, which in medical judgment would have warranted a discharge for disability. Eligibility in such cases requires a finding that the disability was incurred in or aggravated by service in line of duty without benefit of presumptive provisions of law or Department of Veterans Affairs regulations.

(Authority: 38 U.S.C. 1512)

(2) Veterans entitled to pension on the basis of service in the Spanish-American War may be entitled to an increased rate of pension if rated as being in need of regular aid and attendance. Veterans who have elected pension under Pub. L. 86–211 (73 Stat. 432) who are not rated as being in need of regular aid and attendance may be entitled to increased pension based on 100 percent permanent disability together with independent disability of 60 percent or more or by reason of being permanently housebound as provided in §3.351 (d).

(Authority: 38 U.S.C. 1502 (b), (c), 512)

(b) *Mexican border period and later war periods.* Non-service-connected disability and death pension may be paid based on service in the Mexican border period, World War I, World War II, the Korean conflict and the Vietnam era. Rating determinations in such claims will be required in the following situations:

(1) Claims based on service of less than 90 days may require a determination as to whether the veteran was discharged or released from service for a service-connected disability or had at the time of separation from service a service-connected disability, shown by official service records, which in medical judgment would have warranted a discharge for disability. Eligibility in such cases requires a finding that the disability was incurred in or aggravated by service in line of duty without benefit of presumptive provisions of law or Department of Veterans Affairs regulations (38 U.S.C. 1521(g)(2)) unless, in the case of death pension, the veteran was, at the time of death, receiving (or entitled to receive) compensation or retirement pay based upon a wartime service-connected disability.

(Authority: 38 U.S.C. 1541(a) and 1542(a))

(2) Determinations of permanent total disability for pension purposes will be based on non-service-connected disability or combined non-service-connected and service-connected disabilities not the result of willful misconduct. However, for pension under Pub. L. 86–211 (73 Stat. 432), permanent and total disability will be presumed where the veteran has attained age 65 or effective January 1, 1977, where the veteran became unemployable after age 65.

(Authority: 38 U.S.C. 1502(a), 1523(a))

(3) Veterans entitled to nonservice-connected disability pension may be entitled to an increased rate of pension if rated as being in need of regular aid and attendance. Veterans entitled to protected pension or pension under Pub. L. 86–211 (73 Stat. 432) who are not rated as being in need of regular aid and attendance may be entitled to increased pension based on a 100 percent permanent disability together with independent disability of 60 percent or more or by reason of being permanently housebound as provided in § 3.351 (d) or (e).

(Authority: 38 U.S.C. 1502 (b), (c), 1521)

[31 FR 4680, Mar. 19, 1966, as amended at 32 FR 13224, Sept. 19, 1967; 36 FR 8446, May 6, 1971; 40 FR 56434, Dec. 3, 1975; 41 FR 56804, Dec. 30, 1976; 61 FR 20438, May 7, 1996]

§ 3.315 Basic eligibility determinations; dependents, loans, education.

(a) *Child over 18 years.* A child of a veteran may be considered a ''child'' after age 18 for purposes of benefits under title 38, United States Code (except ch. 19 and sec. 8502(b) of ch. 85), if found by a rating determination to have become, prior to age 18, permanently incapable of self-support.

(Authority: 38 U.S.C. 101(4)(B))

(b) *Loans.* If a veteran of World War II the Korean conflict or the Vietnam era had less than 90 days of service, or if a veteran who served after July 25, 1947, and prior to June 27, 1950, or after January 31, 1955, and prior to August 5, 1964, or after May 7, 1975, has less than 181 days of service on active duty as defined in §§ 36.4301 and 36.4501, eligibility of the veteran for a loan under 38 U.S.C. ch. 37 requires a determination that the veteran was discharged or released because of a service-connected disability or that the official service department records show that he or she had at the time of separation from service a service-connected disability which in medical judgment would have warranted a discharge for disability. These determinations are subject to the presumption of incurrence under § 3.304(b). Determinations based on World War II, Korean conflict and Vietnam era service are also subject to the presumption of aggravation under § 3.306(b) while determination based on service on or after February 1, 1955, and before August 5, 1964, or after May 7, 1975, are subject to the presumption of aggravation under § 3.306 (a) and (c). The provisions of this paragraph are also applicable, regardless of length of service, in determining eligibility to the maximum period of entitlement based on discharge or release for a service-connected disability. (See also the minimum service requirements of § 3.12a.)

(Authority: 38 U.S.C. 3702, 3707)

(c) *Veterans' educational assistance.* (1) A determination is required as to whether a veteran was discharged or released from active duty service because of a service-connected disability (or whether the official service department records show that the veteran

had at time of separation from service a service-connected disability which in medical judgment would have warranted discharge for disability) whenever any of the following circumstances exist:

(i) The veteran applies for benefits under 38 U.S.C. chapter 32, the minimum active duty service requirements of 38 U.S.C. 5303A apply to him or her, and the veteran would be eligible for such benefits only if—

(A) He or she was discharged or released from active duty for a disability incurred or aggravated in line of duty, or

(B) He or she has a disability that VA has determined to be compensable under 38 U.S.C. chapter 11; or

(ii) The veteran applies for benefits under 38 U.S.C. chapter 30 and—

(A) The evidence of record does not clearly show either that the veteran was discharged or released from active duty for disability or that the veteran's discharge or release from active duty was unrelated to disability, and

(B) The veteran is eligible for basic educational assistance except for the minimum length of active duty service requirements of §21.7042(a) or §21.7044(a) of this chapter.

(2) A determination is required as to whether a veteran was discharged or released from service in the Selected Reserve for a service-connected disability or for a medical condition which preexisted the veteran's having become a member of the Selected Reserve and which VA determines is not service connected when the veteran applies for benefits under 38 U.S.C. chapter 30 and—

(i) Either the veteran would be eligible for basic educational assistance under that chapter only if he or she was discharged from the Selected Reserve for a service-connected disability, or for a medical condition which preexisted the veteran's having become a member of the Selected Reserve and which VA finds is not service connected, or

(ii) The veteran is entitled to basic educational assistance and would be entitled to receive it at the rates stated in §21.7136(a) or §21.7137(a) of this chapter only if he or she was discharged from the Selected Reserve for a service-connected disability or for a medical condition which preexisted the veteran's having become a member of the Selected Reserve and which VA finds is not service connected.

(3) A determination is required as to whether a reservist has been unable to pursue a program of education due to a disability which has been incurred in or aggravated by service in the Selected Reserve when—

(i) The reservist is otherwise entitled to educational assistance under 10 U.S.C. chapter 1606, and

(ii) He or she applies for an extension of his or her eligibility period.

(4) The determinations required by paragraphs (c)(1) through (c)(3) of this section are subject to the presumptions of incurrence under §3.304(b) and aggravation under §3.306 (a) and (c) of this part, based on service rendered after May 7, 1975.

(Authority: 38 U.S.C. 3011(a)(1)(A)(ii), 3012(b)(1), 3202(1)(A), 10 U.S.C. 16133(b))

[38 FR 871, Jan. 5, 1973, as amended at 42 FR 22869, May 5, 1977; 50 FR 53315, Dec. 31, 1985; 51 FR 1510, Jan. 14, 1986; 55 FR 25974, June 26, 1990; 61 FR 67950, Dec. 26, 1996]

§3.316 Claims based on chronic effects of exposure to mustard gas and Lewisite.

(a) Except as provided in paragraph (b) of this section, exposure to the specified vesicant agents during active military service under the circumstances described below together with the subsequent development of any of the indicated conditions is sufficient to establish service connection for that condition:

(1) Full-body exposure to nitrogen or sulfur mustard during active military service together with the subsequent development of chronic conjunctivitis, keratitis, corneal opacities, scar formation, or the following cancers: Nasopharyngeal; laryngeal; lung (except mesothelioma); or squamous cell carcinoma of the skin.

(2) Full-body exposure to nitrogen or sulfur mustard or Lewisite during active military service together with the subsequent development of a chronic form of laryngitis, bronchitis, emphysema, asthma or chronic obstructive pulmonary disease.

(3) Full-body exposure to nitrogen mustard during active military service together with the subsequent development of acute nonlymphocytic leukemia.

(b) Service connection will not be established under this section if the claimed condition is due to the veteran's own willful misconduct (See § 3.301(c)) or there is affirmative evidence that establishes a nonservice-related supervening condition or event as the cause of the claimed condition (See § 3.303).

[59 FR 42499, Aug. 18, 1994]

§ 3.317 Compensation for certain disabilities due to undiagnosed illnesses.

(a)(1) Except as provided in paragraph (c) of this section, VA shall pay compensation in accordance with chapter 11 of title 38, United States Code, to a Persian Gulf veteran who exhibits objective indications of chronic disability resulting from an illness or combination of illnesses manifested by one or more signs or symptoms such as those listed in paragraph (b) of this section, provided that such disability:

(i) Became manifest either during active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War, or to a degree of 10 percent or more not later than December 31, 2001; and

(ii) By history, physical examination, and laboratory tests cannot be attributed to any known clinical diagnosis.

(2) For purposes of this section, ''objective indications of chronic disability'' include both ''signs,'' in the medical sense of objective evidence perceptible to an examining physician, and other, non-medical indicators that are capable of independent verification.

(3) For purposes of this section, disabilities that have existed for 6 months or more and disabilities that exhibit intermittent episodes of improvement and worsening over a 6-month period will be considered chronic. The 6-month period of chronicity will be measured from the earliest date on which the pertinent evidence establishes that the signs or symptoms of the disability first became manifest.

(4) A chronic disability resulting from an undiagnosed illness referred to in this section shall be rated using evaluation criteria from part 4 of this chapter for a disease or injury in which the functions affected, anatomical localization, or symptomatology are similar.

(5) A disability referred to in this section shall be considered service connected for purposes of all laws of the United States.

(b) For the purposes of paragraph (a)(1) of this section, signs or symptoms which may be manifestations of undiagnosed illness include, but are not limited to:

(1) Fatigue
(2) Signs or symptoms involving skin
(3) Headache
(4) Muscle pain
(5) Joint pain
(6) Neurologic signs or symptoms
(7) Neuropsychological signs or symptoms
(8) Signs or symptoms involving the respiratory system (upper or lower)
(9) Sleep disturbances
(10) Gastrointestinal signs or symptoms
(11) Cardiovascular signs or symptoms
(12) Abnormal weight loss
(13) Menstrual disorders.

(c) Compensation shall not be paid under this section:

(1) If there is affirmative evidence that an undiagnosed illness was not incurred during active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War; or

(2) If there is affirmative evidence that an undiagnosed illness was caused by a supervening condition or event that occurred between the veteran's most recent departure from active duty in the Southwest Asia theater of operations during the Persian Gulf War and the onset of the illness; or

(3) If there is affirmative evidence that the illness is the result of the veteran's own willful misconduct or the abuse of alcohol or drugs.

(d) For purposes of this section:

(1) The term ''Persian Gulf veteran'' means a veteran who served on active military, naval, or air service in the Southwest Asia theater of operations during the Persian Gulf War.

(2) The Southwest Asia theater of operations includes Iraq, Kuwait, Saudi

Arabia, the neutral zone between Iraq and Saudi Arabia, Bahrain, Qatar, the United Arab Emirates, Oman, the Gulf of Aden, the Gulf of Oman, the Persian Gulf, the Arabian Sea, the Red Sea, and the airspace above these locations.

(Authority: 38 U.S.C. 1117)

[60 FR 6665, Feb. 3, 1995, as amended at 62 FR 23139, Apr. 29, 1997]

§§3.318—3.320 [Reserved]

CROSS REFERENCES:[1] Permanent and total disability ratings for pension purposes. See §3.342. Special monthly dependency and indemnity compensation, death compensation and pension ratings. See §3.351. Determination of permanent need for regular aid and attendance and ''permanently bedridden.'' See §3.352. Conditions which determine permanent incapacity for self-support. See §3.356.

§3.321 General rating considerations.

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

(Authority: 38 U.S.C. 1155)

(b) *Exceptional cases*—(1) *Compensation.* Ratings shall be based as far as practicable, upon the average impairments of earning capacity with the additional proviso that the Secretary shall from time to time readjust this schedule of ratings in accordance with experience. To accord justice, therefore, to the exceptional case where the schedular evaluations are found to be inadequate, the Under Secretary for Benefits or the Director, Compensation and Pension Service, upon field station submission, is authorized to approve on the basis of the criteria set forth in this paragraph an extra-schedular evaluation commensurate with the average earning capacity impairment due exclusively to the service-connected disability or disabilities. The governing norm in these exceptional cases is: A finding that the case presents such an exceptional or unusual disability picture with such related factors as marked interference with employment or frequent periods of hospitalization as to render impractical the application of the regular schedular standards.

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

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

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

[26 FR 1583, Feb. 24, 1961, as amended at 29 FR 1463, Jan. 29, 1964; 37 FR 10442, May 23, 1972; 39 FR 5315, Feb. 12, 1974; 39 FR 32988, Sept. 13, 1974; 40 FR 57459, Dec. 10, 1975; 61 FR 20727, May 8, 1996]

CROSS REFERENCES: Effective dates; disability benefits. See §3.400(b). Effective dates; increases. See §3.400(o).

§3.322 Rating of disabilities aggravated by service.

(a) *Aggravation of preservice disability.* In cases involving aggravation by active service, the rating will reflect only the degree of disability over and above the degree of disability existing at the time of entrance into active service, whether the particular condition was noted at the time of entrance into active service, or whether it is determined upon the evidence of record to

[1] 39 FR 5315, Feb. 12, 1974.

have existed at that time. It is necessary to deduct from the present evaluation the degree, if ascertainable, of the disability existing at the time of entrance into active service, in terms of the rating schedule except that if the disability is total (100 percent) no deduction will be made. If the degree of disability at the time of entrance into service is not ascertainable in terms of the schedule, no deduction will be made.

(b) *Aggravation of service-connected disability*. Where a disease or injury incurred in peacetime service is aggravated during service in a period of war, or conversely, where a disease or injury incurred in service during a period of war is aggravated during peacetime service, the entire disability flowing from the disease or injury will be service connected based on the war service.

[26 FR 1583, Feb. 24, 1961]

CROSS REFERENCES: Principles relating to service connection. See §3.303. Aggravation of preservice disability. See §3.306.

§ 3.323 Combined ratings.

(a) *Compensation*—(1) *Same type of service.* When there are two or more service-connected compensable disabilities a combined evaluation will be made following the tables and rules prescribed in the 1945 Schedule for Rating Disabilities.

(2) *Wartime and peacetime service.* Evaluation of wartime and peacetime service-connected compensable disabilities will be combined to provide for the payment of wartime rates of compensation. (38 U.S.C. 1157) Effective July 1, 1973, it is immaterial whether the disabilities are wartime or peacetime service-connected since all disabilities are compensable under 38 U.S.C. 1114 and 1115 on and after that date.

(b) *Pension*—(1) *Nonservice-connected disabilities.* Evaluation of two or more nonservice-connected disabilities not the result of the veteran's own willful misconduct will be combined as provided in paragraph (a)(1) of this section.

(2) *Service-connected and nonservice-connected disabilities.* Evaluations for service-connected disabilities may be combined with evaluations for disabilities not shown to be service connected and not the result of the veteran's own willful misconduct.

[26 FR 1583, Feb. 24, 1961, as amended at 38 FR 21923, Aug. 14, 1973; 61 FR 20438, May 7, 1996]

CROSS REFERENCES: ''Willful misconduct.'' See §3.1(n). Pension. See §3.3. Line of duty and misconduct. See §3.301. Service connection for mental unsoundness in suicide. See §3.302.

§ 3.324 Multiple noncompensable service-connected disabilities.

Whenever a veteran is suffering from two or more separate permanent service-connected disabilities of such character as clearly to interfere with normal employability, even though none of the disabilities may be of compensable degree under the 1945 Schedule for Rating Disabilities the rating agency is authorized to apply a 10-percent rating, but not in combination with any other rating.

[40 FR 56435, Dec. 3, 1975]

§ 3.325 [Reserved]

§ 3.326 Examinations.

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

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

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

(c) Provided that it is otherwise adequate for rating purposes, a statement

from a private physician may be accepted for rating a claim without further examination.

(Authority: 38 U.S.C. 5107(a))

[60 FR 52864, Oct. 11, 1995]

CROSS REFERENCE: Failure to report for VA examination. See §3.655.

§3.327 Reexaminations.

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

(Authority: 38 U.S.C. 501)

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

(2) No periodic future examinations will be requested. In service-connected cases, no periodic reexamination will be scheduled: (i) When the disability is established as static;

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

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

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

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

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

(c) *Pension cases.* In nonservice-connected cases in which the permanent total disability has been confirmed by reexamination or by the history of the case, or with obviously static disabilities, further reexaminations will not generally be requested. In other cases further examination will not be requested routinely and will be accomplished only if considered necessary based upon the particular facts of the individual case. In the cases of veterans over 55 years of age, reexamination will be requested only under unusual circumstances.

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

CROSS REFERENCE: Failure to report for VA examination. See §3.655.

§3.328 Independent medical opinions.

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

(b) *Requests.* A request for an independent medical opinion in conjunction with a claim pending at the regional office level may be initiated by the office having jurisdiction over the claim, by the claimant, or by his or her

duly appointed representative. The request must be submitted in writing and must set forth in detail the reasons why the opinion is necessary. All such requests shall be submitted through the Adjudication Officer of the office having jurisdiction over the claim, and those requests which in the judgment of the Adjudication Officer merit consideration shall be referred to the Compensation and Pension Service for approval.

(c) *Approval.* Approval shall be granted only upon a determination by the Compensation and Pension Service that the issue under consideration poses a medical problem of such obscurity or complexity, or has generated such controversy in the medical community at large, as to justify solicitation of an independent medical opinion. When approval has been granted, the Compensation and Pension Service shall obtain the opinion. A determination that an independent medical opinion is not warranted may be contested only as part of an appeal on the merits of the decision rendered on the primary issue by the agency of original jurisdiction.

(d) *Notification.* The Compensation and Pension Service shall notify the claimant when the request for an independent medical opinion has been approved with regard to his or her claim and shall furnish the claimant with a copy of the opinion when it is received. If, in the judgment of the Secretary, disclosure of the independent medical opinion would be harmful to the physical or mental health of the claimant, disclosure shall be subject to the special procedures set forth in § 1.577 of this chapter.

(Authority: 38 U.S.C. 5109, 5701(b)(1); 5 U.S.C. 552a(f)(3))

[55 FR 18602, May 3, 1990]

§ 3.329 [Reserved]

§ 3.330 Resumption of rating when veteran subsequently reports for Department of Veterans Affairs examination.

Such ratings will be governed by the provisions of § 3.158, ''Abandoned Claims,'' and § 3.655, ''Failure to report for Department of Veterans Affairs examination.'' The period following the termination or reduction for which benefits are precluded by the cited regulations will be stated in the rating. If the evidence is insufficient to evaluate disability during any period following the termination or reduction for which payments are not otherwise precluded, the rating will contain a notation reading ''Evidence insufficient to evaluate from _____ to _____''.

[29 FR 3623, Mar. 21, 1964]

CROSS REFERENCE: Failure to report for Department of Veterans Affairs examination. See § 3.655.

§§ 3.331—3.339 [Reserved]

§ 3.340 Total and permanent total ratings and unemployability.

(a) *Total disability ratings*—(1) *General.* Total disability will be considered to exist when there is present any impairment of mind or body which is sufficient to render it impossible for the average person to follow a substantially gainful occupation. Total disability may or may not be permanent. Total ratings will not be assigned, generally, for temporary exacerbations or acute infectious diseases except where specifically prescribed by the schedule.

(2) *Schedule for rating disabilities.* Total ratings are authorized for any disability or combination of disabilities for which the Schedule for Rating Disabilities prescribes a 100 percent evaluation or, with less disability, where the requirements of paragraph 16, page 5 of the rating schedule are present or where, in pension cases, the requirements of paragraph 17, page 5 of the schedule are met.

(3) *Ratings of total disability on history.* In the case of disabilities which have undergone some recent improvement, a rating of total disability may be made, provided:

(i) That the disability must in the past have been of sufficient severity to warrant a total disability rating;

(ii) That it must have required extended, continuous, or intermittent hospitalization, or have produced total industrial incapacity for at least 1 year, or be subject to recurring, severe, frequent, or prolonged exacerbations; and

(iii) That it must be the opinion of the rating agency that despite the recent improvement of the physical condition, the veteran will be unable to effect an adjustment into a substantially gainful occupation. Due consideration will be given to the frequency and duration of totally incapacitating exacerbations since incurrence of the original disease or injury, and to periods of hospitalization for treatment in determining whether the average person could have reestablished himself or herself in a substantially gainful occupation.

(b) *Permanent total disability.* Permanence of total disability will be taken to exist when such impairment is reasonably certain to continue throughout the life of the disabled person. The permanent loss or loss of use of both hands, or of both feet, or of one hand and one foot, or of the sight of both eyes, or becoming permanently helpless or bedridden constitutes permanent total disability. Diseases and injuries of long standing which are actually totally incapacitating will be regarded as permanently and totally disabling when the probability of permanent improvement under treatment is remote. Permanent total disability ratings may not be granted as a result of any incapacity from acute infectious disease, accident, or injury, unless there is present one of the recognized combinations or permanent loss of use of extremities or sight, or the person is in the strict sense permanently helpless or bedridden, or when it is reasonably certain that a subsidence of the acute or temporary symptoms will be followed by irreducible totality of disability by way of residuals. The age of the disabled person may be considered in determining permanence.

(c) *Insurance ratings.* A rating of permanent and total disability for insurance purposes will have no effect on ratings for compensation or pension.

[26 FR 1585, Feb. 24, 1961, as amended at 46 FR 47541, Sept. 29, 1981]

§3.341 Total disability ratings for compensation purposes.

(a) *General.* Subject to the limitation in paragraph (b) of this section, total-disability compensation ratings may be assigned under the provisions of §3.340. However, if the total rating is based on a disability or combination of disabilities for which the Schedule for Rating Disabilities provides an evaluation of less than 100 percent, it must be determined that the service-connected disabilities are sufficient to produce unemployability without regard to advancing age.

(Authority: 38 U.S.C. 1155)

(b) *Incarcerated veterans.* A total rating for compensation purposes based on individual unemployability which would first become effective while a veteran is incarcerated in a Federal, State or local penal institution for conviction of a felony, shall not be assigned during such period of incarceration. However, where a rating for individual unemployability exists prior to incarceration for a felony, or prior to October 7, 1980, and routine review is required the case will be reconsidered to determine if continued eligibility for such rating exists.

(Authority: 38 U.S.C. 5313(c))

(c) *Program for vocational rehabilitation.* Each time a veteran is rated totally disabled on the basis of individual unemployability during the period beginning after January 31, 1985, the Vocational Rehabilitation and Counseling Division will be notified so that an evaluation may be offered to determine whether the achievement of a vocational goal by the veteran is reasonably feasible.

(Authority: 38 U.S.C. 1163)

[46 FR 47541, Sept. 29, 1981, as amended at 50 FR 52774, Dec. 26, 1985; 55 FR 17271, Apr. 24, 1990l; 58 FR 32445, June 10, 1993]

§3.342 Permanent and total disability ratings for pension purposes.

(a) *General.* Permanent total disability ratings for pension purposes are authorized for disabling conditions not the result of the veteran's own willful misconduct whether or not they are service connected.

(Authority: 38 U.S.C. 1502(a))

(b) *Criteria.* In addition to the criteria for determining total disability and permanency of total disability contained in §3.340, the following special considerations apply in pension cases:

(1) Permanent total disability pension ratings will be authorized for congenital, developmental, hereditary or familial conditions, provided the other requirements for entitlement are met.

(2) The permanence of total disability will be established as of the earliest date consistent with the evidence in the case. Active pulmonary tuberculosis not otherwise established as permanently and totally disabling will be presumed so after 6 months' hospitalization without improvement. The same principle may be applied with other types of disabilities requiring hospitalization for indefinite periods. The need for hospitalization for periods shorter or longer than 6 months may be a proper basis for determining permanence. Where, in application of this principle, it is necessary to employ a waiting period to determine permanence of totality of disability and a report received at the end of such period shows the veteran's condition is unimproved, permanence may be established as of the date of entrance into the hospital. Similarly, when active pulmonary tuberculosis is improved after 6 months' hospitalization but still diagnosed as active after 12 months' hospitalization permanence will also be established as of the date of entrance into the hospital. In other cases the rating will be effective the date the evidence establishes permanence.

(3) Special consideration must be given the question of permanence in the case of veterans under 40 years of age. For such veterans, permanence of total disability requires a finding that the end result of treatment and adjustment to residual handicaps (rehabilitation) will be permanent disability of the required degree precluding more than marginal employment. Severe diseases and injuries, including multiple fractures or the amputation of a single extremity, should not be taken to establish permanent and total disability until it is shown that the veteran after treatment and convalescence, has been unable to secure or follow employment because of the disability and through no fault of the veteran.

(4) The following shall not be considered as evidence of employability:

(i) Employment as a member-employer or similar employment obtained only in competition with disabled persons.

(ii) Participation in, or the receipt of a distribution of funds as a result of participation in, a therapeutic or rehabilitation activity under 38 U.S.C. 1718.

(Authority: 38 U.S.C. 1718(f))

(5) The authority granted the Secretary under 38 U.S.C. 1502(a)(2) to classify as permanent and total those diseases and disorders, the nature and extent of which, in the Secretary judgment, will justify such determination, will be exercised under § 3.321(b).

(c) *Temporary program of vocational rehabilitation training for certain pension recipients.* (1) When a veteran under age 45 is awarded disability pension during the period beginning on February 1, 1985, and ending on December 31, 1995, the Vocational Rehabilitation and Counseling Division will be notified so that an evaluation may be made, as provided in § 21.6050, to determine that veteran's potential for rehabilitation.

(2) If a veteran secures employment within the scope of a vocational goal identified in his or her individualized written vocational rehabilitation plan, or in a related field which requires reasonably developed skills and the use of some or all of the training or services furnished the veteran under such plan, not later than one year after eligibility to counseling under § 21.6040(b)(1) of this chapter expires, the veteran's permanent and total evaluation for pension purposes shall not be terminated by reason of the veteran's capacity to engage in such employment until the veteran has maintained that employment for a period of not less than 12 consecutive months.

(Authority: 38 U.S.C. 1524(c))

[26 FR 1586, Feb. 24, 1961, as amended at 26 FR 9674, Oct. 13, 1961; 29 FR 3624, Mar. 21, 1964; 39 FR 14944, Apr. 18, 1974; 46 FR 47541, Sept. 29, 1981; 50 FR 52775, Dec. 26, 1985; 53 FR 23235, June 21, 1988; 55 FR 17271, Apr. 24, 1990; 56 FR 25044, June 3, 1991; 56 FR 65851, Dec. 19, 1991; 58 FR 32445, June 10, 1993]

§ 3.343 Continuance of total disability ratings.

(a) *General.* Total disability ratings, when warranted by the severity of the condition and not granted purely because of hospital, surgical, or home

treatment, or individual unemployability will not be reduced, in the absence of clear error, without examination showing material improvement in physical or mental condition. Examination reports showing material improvement must be evaluated in conjunction with all the facts of record, and consideration must be given particularly to whether the veteran attained improvement under the ordinary conditions of life, i.e., while working or actively seeking work or whether the symptoms have been brought under control by prolonged rest, or generally, by following a regimen which precludes work, and, if the latter, reduction from total disability ratings will not be considered pending reexamination after a period of employment (3 to 6 months).

(b) *Tuberculosis; compensation.* In service-connected cases, evaluations for active or inactive tuberculosis will be governed by the Schedule for Rating Disabilities (part 4 of this chapter). Where in the opinion of the rating board the veteran at the expiration of the period during which a total rating is provided will not be able to maintain inactivity of the disease process under the ordinary conditions of life, the case will be submitted under §3.321.

(c) *Individual unemployability.* (1) In reducing a rating of 100 percent service-connected disability based on individual unemployability, the provisions of §3.105(e) are for application but caution must be exercised in such a determination that actual employability is established by clear and convincing evidence. When in such a case the veteran is undergoing vocational rehabilitation, education or training, the rating will not be reduced by reason thereof unless there is received evidence of marked improvement or recovery in physical or mental conditions or of employment progress, income earned, and prospects of economic rehabilitation, which demonstrates affirmatively the veteran's capacity to pursue the vocation or occupation for which the training is intended to qualify him or her, or unless the physical or mental demands of the course are obviously incompatible with total disability. Neither participation in, nor the receipt of remuneration as a result of participation in, a therapeutic or rehabilitation activity under 38 U.S.C. 1718 shall be considered evidence of employability.

(Authority: 38 U.S.C. 1718(f))

(2) If a veteran with a total disability rating for compensation purposes based on individual unemployability begins to engage in a substantially gainful occupation during the period beginning after January 1, 1985, the veteran's rating may not be reduced solely on the basis of having secured and followed such substantially gainful occupation unless the veteran maintains the occupation for a period of 12 consecutive months. For purposes of this subparagraph, temporary interruptions in employment which are of short duration shall not be considered breaks in otherwise continuous employment.

(Authority: 38 U.S.C. 1163(a))

[33 FR 16273, Nov. 6, 1968, as amended at 39 FR 14944, Apr. 29, 1974; 50 FR 52775, Dec. 26, 1985; 53 FR 23236, June 21, 1988; 55 FR 17271, Apr. 24, 1990; 57 FR 10426, Mar. 26, 1992; 58 FR 32445, June 10, 1993; 58 FR 46865, Sept. 3, 1993]

CROSS REFERENCE: Protection, total disability. See §3.951(b).

§3.344 Stabilization of disability evaluations.

(a) *Examination reports indicating improvement.* Rating agencies will handle cases affected by change of medical findings or diagnosis, so as to produce the greatest degree of stability of disability evaluations consistent with the laws and Department of Veterans Affairs regulations governing disability compensation and pension. It is essential that the entire record of examinations and the medical-industrial history be reviewed to ascertain whether the recent examination is full and complete, including all special examinations indicated as a result of general examination and the entire case history. This applies to treatment of intercurrent diseases and exacerbations, including hospital reports, bedside examinations, examinations by designated physicians, and examinations in the absence of, or without taking full advantage of, laboratory facilities and the cooperation of specialists in related lines. Examinations less full and complete than those on which payments were authorized or continued

will not be used as a basis of reduction. Ratings on account of diseases subject to temporary or episodic improvement, e.g., manic depressive or other psychotic reaction, epilepsy, psychoneurotic reaction, arteriosclerotic heart disease, bronchial asthma, gastric or duodenal ulcer, many skin diseases, etc., will not be reduced on any one examination, except in those instances where all the evidence of record clearly warrants the conclusion that sustained improvement has been demonstrated. Ratings on account of diseases which become comparatively symptom free (findings absent) after prolonged rest, e.g. residuals of phlebitis, arteriosclerotic heart disease, etc., will not be reduced on examinations reflecting the results of bed rest. Moreover, though material improvement in the physical or mental condition is clearly reflected the rating agency will consider whether the evidence makes it reasonably certain that the improvement will be maintained under the ordinary conditions of life. When syphilis of the central nervous system or alcoholic deterioration is diagnosed following a long prior history of psychosis, psychoneurosis, epilepsy, or the like, it is rarely possible to exclude persistence, in masked form, of the preceding innocently acquired manifestations. Rating boards encountering a change of diagnosis will exercise caution in the determination as to whether a change in diagnosis represents no more than a progression of an earlier diagnosis, an error in prior diagnosis or possibly a disease entity independent of the service-connected disability. When the new diagnosis reflects mental deficiency or personality disorder only, the possibility of only temporary remission of a super-imposed psychiatric disease will be borne in mind.

(b) *Doubtful cases.* If doubt remains, after according due consideration to all the evidence developed by the several items discussed in paragraph (a) of this section, the rating agency will continue the rating in effect, citing the former diagnosis with the new diagnosis in parentheses, and following the appropriate code there will be added the reference ''Rating continued pending reexamination ——— months from this date, §3.344.'' The rating agency will determine on the basis of the facts in each individual case whether 18, 24 or 30 months will be allowed to elapse before the reexamination will be made.

(c) *Disabilities which are likely to improve.* The provisions of paragraphs (a) and (b) of this section apply to ratings which have continued for long periods at the same level (5 years or more). They do not apply to disabilities which have not become stabilized and are likely to improve. Reexaminations disclosing improvement, physical or mental, in these disabilities will warrant reduction in rating.

[26 FR 1586, Feb. 24, 1961; 58 FR 53660, Oct. 18, 1993]

RATINGS FOR SPECIAL PURPOSES

§ 3.350 Special monthly compensation ratings.

The rates of special monthly compensation stated in this section are those provided under 38 U.S.C. 1114.

(a) *Ratings under 38 U.S.C. 1114(k).* Special monthly compensation under 38 U.S.C. 1114(k) is payable for each anatomical loss or loss of use of one hand, one foot, both buttocks, one or more creative organs, blindness of one eye having only light perception, deafness of both ears, having absence of air and bone conduction, or complete organic aphonia with constant inability to communicate by speech. This special compensation is payable in addition to the basic rate of compensation otherwise payable on the basis of degree of disability, provided that the combined rate of compensation does not exceed the monthly rate set forth in 38 U.S.C. 1114(l) when authorized in conjunction with any of the provisions of 38 U.S.C. 1114 (a) through (j) or (s). When there is entitlement under 38 U.S.C. 1114 (l) through (n) or an intermediate rate under (p) such additional allowance is payable for each such anatomical loss or loss of use existing in addition to the requirements for the basic rates, provided the total does not exceed the monthly rate set forth in 38 U.S.C. 1114(o). The limitations on the maximum compensation payable under this paragraph are independent of and do not preclude payment of additional compensation for dependents under 38 U.S.C. 1115, or the special allowance for

aid and attendance provided by 38 U.S.C. 1114(r).

(1) *Creative organ.* (i) Loss of a creative organ will be shown by acquired absence of one or both testicles (other than undescended testicles) or ovaries or other creative organ. Loss of use of one testicle will be established when examination by a board finds that:

(*a*) The diameters of the affected testicle are reduced to one-third of the corresponding diameters of the paired normal testicle, or

(*b*) The diameters of the affected testicle are reduced to one-half or less of the corresponding normal testicle and there is alteration of consistency so that the affected testicle is considerably harder or softer than the corresponding normal testicle; or

(*c*) If neither of the conditions (*a*) or (*b*) is met, when a biopsy, recommended by a board including a genitourologist and accepted by the veteran, establishes the absence of spermatozoa.

(ii) When loss or loss of use of a creative organ resulted from wounds or other trauma sustained in service, or resulted from operations in service for the relief of other conditions, the creative organ becoming incidentally involved, the benefit may be granted.

(iii) Loss or loss of use traceable to an elective operation performed subsequent to service, will not establish entitlement to the benefit. If, however, the operation after discharge was required for the correction of a specific injury caused by a preceding operation in service, it will support authorization of the benefit. When the existence of disability is established meeting the above requirements for nonfunctioning testicle due to operation after service, resulting in loss of use, the benefit may be granted even though the operation is one of election. An operation is not considered to be one of election where it is advised on sound medical judgment for the relief of a pathological condition or to prevent possible future pathological consequences.

(iv) Atrophy resulting from mumps followed by orchitis in service is service connected. Since atrophy is usually perceptible within 1 to 6 months after infection subsides, an examination more than 6 months after the subsidence of orchitis demonstrating a normal genitourinary system will be considered in determining rebuttal of service incurrence of atrophy later demonstrated. Mumps not followed by orchitis in service will not suffice as the antecedent cause of subsequent atrophy for the purpose of authorizing the benefit.

(2) *Foot and hand.* (i) Loss of use of a hand or a foot will be held to exist when no effective function remains other than that which would be equally well served by an amputation stump at the site of election below elbow or knee with use of a suitable prosthetic appliance. The determination will be made on the basis of the actual remaining function, whether the acts of grasping, manipulation, etc., in the case of the hand, or of balance, propulsion, etc., in the case of the foot, could be accomplished equally well by an amputation stump with prosthesis; for example:

(*a*) Extremely unfavorable complete ankylosis of the knee, or complete ankylosis of two major joints of an extremity, or shortening of the lower extremity of 3½ inches or more, will constitute loss of use of the hand or foot involved.

(*b*) Complete paralysis of the external popliteal nerve (common peroneal) and consequent footdrop, accompanied by characteristic organic changes including trophic and circulatory disturbances and other concomitants confirmatory of complete paralysis of this nerve, will be taken as loss of use of the foot.

(3) *Both buttocks.* (i) Loss of use of both buttocks shall be deemed to exist when there is severe damage by disease or injury to muscle group XVII, bilateral, (diagnostic code 5317) and additional disability making it impossible for the disabled person, without assistance, to rise from a seated position and from a stooped position (fingers to toes position) and to maintain postural stability (the pelvis upon head of femur). The assistance may be done by the person's own hands or arms, and, in the matter of postural stability, by a special appliance.

(Authority: 38 U.S.C. 1114(k))

(ii) Special monthly compensation for loss or loss of use of both lower extremities (38 U.S.C. 1114(l) through (n)) will not preclude additional compensation under 38 U.S.C. 1114(k) for loss of use of both buttocks where appropriate tests clearly substantiate that there is such additional loss.

(4) *Eye.* Loss of use or blindness of one eye, having only light perception, will be held to exist when there is inability to recognize test letters at 1 foot and when further examination of the eye reveals that perception of objects, hand movements, or counting fingers cannot be accomplished at 3 feet. Lesser extents of vision, particularly perception of objects, hand movements, or counting fingers at distances less than 3 feet is considered of negligible utility.

(5) *Deafness.* Deafness of both ears, having absence of air and bone conduction will be held to exist where examination in a Department of Veterans Affairs authorized audiology clinic under current testing criteria shows bilateral hearing loss is equal to or greater than the minimum bilateral hearing loss required for a maximum rating evaluation under the rating schedule.

(Authority: Pub. L. 88–20)

(6) *Aphonia.* Complete organic aphonia will be held to exist where there is a disability of the organs of speech which constantly precludes communication by speech.

(Authority: Pub. L. 88–22)

(b) *Ratings under 38 U.S.C. 1114(l).* The special monthly compensation provided by 38 U.S.C. 1114(l) is payable for anatomical loss or loss of use of both feet, one hand and one foot, blindness in both eyes with visual acuity of 5/200 or less or being permanently bedridden or so helpless as to be in need of regular aid and attendance.

(1) *Extremities.* The criteria for loss and loss of use of an extremity contained in paragraph (a)(2) of this section are applicable.

(2) *Eyes, bilateral.* 5/200 visual acuity or less bilaterally qualifies for entitlement under 38 U.S.C. 1114(l). However, evaluation of 5/200 based on acuity in excess of that degree but less than 10/200 (§ 4.83 of this chapter), does not qualify. Concentric contraction of the field of vision beyond 5 degrees in both eyes is the equivalent of 5/200 visual acuity.

(3) *Need for aid and attendance.* The criteria for determining that a veteran is so helpless as to be in need of regular aid and attendance are contained in § 3.352(a).

(4) *Permanently bedridden.* The criteria for rating are contained in § 3.352(a). Where possible, determinations should be on the basis of permanently bedridden rather than for need of aid and attendance (except where 38 U.S.C. 1114(r) is involved) to avoid reduction during hospitalization where aid and attendance is provided in kind.

(c) *Ratings under 38 U.S.C. 1114(m).* (1) The special monthly compensation provided by 38 U.S.C. 1114(m) is payable for any of the following conditions:

(i) Anatomical loss or loss of use of both hands;

(ii) Anatomical loss or loss of use of both legs at a level, or with complications, preventing natural knee action with prosthesis in place;

(iii) Anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place with anatomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place;

(iv) Blindness in both eyes having only light perception;

(v) Blindness in both eyes leaving the veteran so helpless as to be in need of regular aid and attendance.

(2) *Natural elbow or knee action.* In determining whether there is natural elbow or knee action with prosthesis in place, consideration will be based on whether use of the proper prosthetic appliance requires natural use of the joint, or whether necessary motion is otherwise controlled, so that the muscles affecting joint motion, if not already atrophied, will become so. If there is no movement in the joint, as in ankylosis or complete paralysis, use of prosthesis is not to be expected, and the determination will be as though there were one in place.

(3) *Eyes, bilateral.* With visual acuity 5/200 or less or the vision field reduced

to 5 degree concentric contraction in both eyes, entitlement on account of need for regular aid and attendance will be determined on the facts in the individual case.

(d) *Ratings under 38 U.S.C. 1114(n).* The special monthly compensation provided by 38 U.S.C. 1114(n) is payable for any of the conditions which follow: Amputation is a prerequisite except for loss of use of both arms and blindness without light perception in both eyes. If a prosthesis cannot be worn at the present level of amputation but could be applied if there were a reamputation at a higher level, the requirements of this paragraph are not met; instead, consideration will be given to loss of natural elbow or knee action.

(1) Anatomical loss or loss of use of both arms at a level or with complications, preventing natural elbow action with prosthesis in place;

(2) Anatomical loss of both legs so near the hip as to prevent use of a prosthetic appliance;

(3) Anatomical loss of one arm so near the shoulder as to prevent use of a prosthetic appliance with anatomical loss of one leg so near the hip as to prevent use of a prosthetic appliance;

(4) Anatomical loss of both eyes or blindness without light perception in both eyes.

(e) *Ratings under 38 U.S.C. 1114 (o).* (1) The special monthly compensation provided by 38 U.S.C. 1114(o) is payable for any of the following conditions:

(i) Anatomical loss of both arms so near the shoulder as to prevent use of a prosthetic appliance;

(ii) Conditions entitling to two or more of the rates (no condition being considered twice) provided in 38 U.S.C. 1114(l) through (n);

(iii) Bilateral deafness rated at 60 percent or more disabling (and the hearing impairment in either one or both ears is service connected) in combination with service-connected blindness with bilateral visual acuity 5/200 or less.

(iv) Service-connected total deafness in one ear or bilateral deafness rated at 40 percent or more disabling (and the hearing impairment in either one of both ears is service-connected) in combination with service-connected blindness of both eyes having only light perception or less.

(2) *Paraplegia.* Paralysis of both lower extremities together with loss of anal and bladder sphincter control will entitle to the maximum rate under 38 U.S.C. 1114(o), through the combination of loss of use of both legs and helplessness. The requirement of loss of anal and bladder sphincter control is met even though incontinence has been overcome under a strict regimen of rehabilitation of bowel and bladder training and other auxiliary measures.

(3) *Combinations.* Determinations must be based upon separate and distinct disabilities. This requires, for example, that where a veteran who had suffered the loss or loss of use of two extremities is being considered for the maximum rate on account of helplessness requiring regular aid and attendance, the latter must be based on need resulting from pathology other than that of the extremities. If the loss or loss of use of two extremities or being permanently bedridden leaves the person helpless, increase is not in order on account of this helplessness. Under no circumstances will the combination of ''being permanently bedridden'' and ''being so helpless as to require regular aid and attendance'' without separate and distinct anatomical loss, or loss of use, of two extremities, or blindness, be taken as entitling to the maximum benefit. The fact, however, that two separate and distinct entitling disabilities, such as anatomical loss, or loss of use of both hands and both feet, result from a common etiological agent, for example, one injury or rheumatoid arthritis, will not preclude maximum entitlement.

(4) *Helplessness.* The maximum rate, as a result of including helplessness as one of the entitling multiple disabilities, is intended to cover, in addition to obvious losses and blindness, conditions such as the loss of use of two extremities with absolute deafness and nearly total blindness or with severe multiple injuries producing total disability outside the useless extremities, these conditions being construed as loss of use of two extremities and helplessness.

(f) *Intermediate or next higher rate.* An intermediate rate authorized by this

paragraph shall be established at the arithmetic mean, rounded to the nearest dollar, between the two rates concerned.

(Authority: 38 U.S.C. 1114 (p))

(1) *Extremities.* (i) Anatomical loss or loss of use of one foot with anatomical loss or loss of use of one leg at a level, or with complications preventing natural knee action with prosthesis in place, shall entitle to the rate between 38 U.S.C. 1114(l) and (m).

(ii) Anatomical loss or loss of use of one foot with anatomical loss of one leg so near the hip as to prevent use of prosthetic appliance shall entitle to the rate under 38 U.S.C. 1114(m).

(iii) Anatomical loss or loss of use of one foot with anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place, shall entitle to the rate between 38 U.S.C. 1114(l) and (m).

(iv) Anatomical loss or loss of use of one foot with anatomical loss or loss of use of one arm so near the shoulder as to prevent use of a prosthetic appliance shall entitle to the rate under 38 U.S.C. 1114(m).

(v) Anatomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place with anatomical loss of one leg so near the hip as to prevent use of a prosthetic appliance, shall entitle to the rate between 38 U.S.C. 1114(m) and (n).

(vi) Anatomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place with anatomical loss or loss of use of one hand, shall entitle to the rate between 38 U.S.C. 1114 (l) and (m).

(vii) Anatomical loss or loss of use of one leg at a level, or with complications, preventing natural knee action with prosthesis in place with anatomical loss of one arm so near the shoulder as to prevent use of a prosthetic appliance, shall entitle to the rate between 38 U.S.C. 1114 (m) and (n).

(viii) Anatomical loss of one leg so near the hip as to prevent use of a prosthetic appliance with anatomical loss or loss of use of one hand shall entitle to the rate under 38 U.S.C. 1114(m).

(ix) Anatomical loss of one leg so near the hip as to prevent use of a prosthetic appliance with anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place, shall entitle to the rate between 38 U.S.C. 1114 (m) and (n).

(x) Anatomical loss or loss of use of one hand with anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place, shall entitle to the rate between 38 U.S.C. 1114 (m) and (n).

(xi) Anatomical loss or loss of use of one hand with anatomical loss of one arm so near the shoulder as to prevent use of a prosthetic appliance shall entitle to the rate under 38 U.S.C. 1114(n).

(xii) Anatomical loss or loss of use of one arm at a level, or with complications, preventing natural elbow action with prosthesis in place with anatomical loss of one arm so near the shoulder as to prevent use of a prosthetic appliance, shall entitle to the rate between 38 U.S.C. 1114 (n) and (o).

(2) Eyes, bilateral, and blindness in connection with deafness and/or loss or loss of use of a hand or foot.

(i) Blindness of one eye with 5/200 visual acuity or less and blindness of the other eye having only light perception will entitle to the rate between 38 U.S.C. 1114 (l) and (m).

(ii) Blindness of one eye with 5/200 visual acuity or less and anatomical loss of, or blindness having no light perception in the other eye, will entitle to a rate equal to 38 U.S.C. 1114(m).

(iii) Blindness of one eye having only light perception and anatomical loss of, or blindness having no light perception in the other eye, will entitle to a rate between 38 U.S.C. 1114 (m) and (n).

(iv) Blindness in both eyes with visual acuity of 5/200 or less, or blindness in both eyes rated under subparagraph (2) (i) or (ii) of this paragraph, when accompanied by service-connected total deafness in one ear, will afford entitlement to the next higher intermediate rate of if the veteran is already entitled to an intermediate rate, to the next higher statutory rate under 38 U.S.C. 1114, but in no event higher than the rate for (o).

(v) Blindness in both eyes having only light perception or less, or rated under subparagraph (2)(iii) of this paragraph, when accompanied by bilateral deafness (and the hearing impairment in either one or both ears is service-connected) rated at 10 or 20 percent disabling, will afford entitlement to the next higher intermediate rate, or if the veteran is already entitled to an intermediate rate, to the next higher statutory rate under 38 U.S.C. 1114, but in no event higher than the rate for (o).

(Authority: Sec. 112, Pub. L. 98–223)

(vi) Blindness in both eyes rated under 38 U.S.C. 1114 (l), (m) or (n), or rated under subparagraphs (2)(i), (ii) or (iii) of this paragraph, when accompanied by bilaterial deafness rated at no less than 30 percent, and the hearing impairment in one or both ears is service-connected, will afford entitlement to the next higher statutory rate under 38 U.S.C. 1114, or if the veteran is already entitled to an intermediate rate, to the next higher intermediate rate, but in no event higher than the rate for (o).

(Authority: 38 U.S.C. 1114(p))

(vii) Blindness in both eyes rated under 38 U.S.C. 1114 (l), (m), or (n), or under the intermediate or next higher rate provisions of this subparagraph, when accompanied by:

(A) Service-connected loss or loss of use of one hand, will afford entitlement to the next higher statutory rate under 38 U.S.C. 1114 or, if the veteran is already entitled to an intermediate rate, to the next higher intermediate rate, but in no event higher than the rate for (o); or

(B) Service-connected loss or loss of use of one foot which by itself or in combination with another compensable disability would be ratable at 50 percent or more, will afford entitlement to the next higher statutory rate under 38 U.S.C. 1114 or, if the veteran is already entitled to an intermediate rate, to the next higher intermediate rate, but in no event higher than the rate for (o); or

(C) Service-connected loss or loss of use of one foot which is ratable at less than 50 percent and which is the only compensable disability other than bilateral blindness, will afford entitlement to the next higher intermediate rate or, if the veteran is already entitled to an intermediate rate, to the next higher statutory rate under 38 U.S.C. 1114, but in no event higher than the rate for (o).

(Authority: 38 U.S.C. 1114(p))

(3) *Additional independent 50 percent disabilities.* In addition to the statutory rates payable under 38 U.S.C. 1114 (l) through (n) and the intermediate or next higher rate provisions outlined above, additional single permanent disability or combinations of permanent disabilities independently ratable at 50 percent or more will afford entitlement to the next higher intermediate rate or if already entitled to an intermediate rate to the next higher statutory rate under 38 U.S.C. 1114, but not above the (o) rate. In the application of this subparagraph the disability or disabilities independently ratable at 50 percent or more must be separate and distinct and involve different anatomical segments or bodily systems from the conditions establishing entitlement under 38 U.S.C. 1114 (l) through (n) or the intermediate rate provisions outlined above. The graduated ratings for arrested tuberculosis will not be utilized in this connection, but the permanent residuals of tuberculosis may be utilized.

(4) *Additional independent 100 percent ratings.* In addition to the statutory rates payable under 38 U.S.C. 1114 (l) through (n) and the intermediate or next higher rate provisions outlined above additional single permanent disability independently ratable at 100 percent apart from any consideration of individual unemployability will afford entitlement to the next higher statutory rate under 38 U.S.C. 1114 or if already entitled to an intermediate rate to the next higher intermediate rate, but in no event higher than the rate for (o). In the application of this subparagraph the single permanent disability independently ratable at 100 percent must be separate and distinct and involve different anatomical segments or bodily systems from the conditions establishing entitlement under 38 U.S.C. 1114 (l) through (n) or the intermediate rate provisions outlined above.

(i) Where the multiple loss or loss of use entitlement to a statutory or intermediate rate between 38 U.S.C. 1114 (l) and (o) is caused by the same etiological disease or injury, that disease or injury may not serve as the basis for the independent 50 percent or 100 percent unless it is so rated without regard to the loss or loss of use.

(ii) The graduated ratings for arrested tuberculosis will not be utilized in this connection, but the permanent residuals of tuberculosis may be utilized.

(5) *Three extremities.* Anatomical loss or loss of use, or a combination of anatomical loss and loss of use, of three extremities shall entitle a veteran to the next higher rate without regard to whether that rate is a statutory rate or an intermediate rate. The maximum monthly payment under this provision may not exceed the amount stated in 38 U.S.C. 1114(p).

(g) *Inactive tuberculosis (complete arrest).* The rating criteria for determining inactivity of tuberculosis are set out in § 3.375.

(1) For a veteran who was receiving or entitled to receive compensation for tuberculosis on August 19, 1968, the minimum monthly rate is $67. This minimum special monthly compensation is not to be combined with or added to any other disability compensation.

(2) For a veteran who was not receiving or entitled to receive compensation for tuberculosis on August 19, 1968, the special monthly compensation authorized by paragraph (g)(1) of this section is not payable.

(h) *Special aid and attendance benefit; 38 U.S.C. 1114(r)*—(1) Maximum compensation cases. A veteran receiving the maximum rate under 38 U.S.C. 1114 (o) or (p) who is in need of regular aid and attendance or a higher level of care is entitled to an additional allowance during periods he or she is not hospitalized at United States Government expense. (See § 3.552(b)(2) as to continuance following admission for hospitalization.) Determination of this need is subject to the criteria of § 3.352. The regular or higher level aid and attendance allowance is payable whether or not the need for regular aid and attendance or a higher level of care was a partial basis for entitlement to the maximum rate under 38 U.S.C. 1114 (o) or (p), or was based on an independent factual determination.

(2) *Entitlement to compensation at the intermediate rate between 38 U.S.C. 1114 (n) and (o) plus special monthly compensation under 38 U.S.C. 1114(k).* A veteran receiving compensation at the intermediate rate between 38 U.S.C. 1114 (n) and (o) plus special monthly compensation under 38 U.S.C. 1114(k) who establishes a factual need for regular aid and attendance or a higher level of care, is also entitled to an additional allowance during periods he or she is not hospitalized at United States Government expense. (See § 3.552(b)(2) as to continuance following admission for hospitalization.) Determination of the factual need for aid and attendance is subject to the criteria of § 3.352:

(3) *Amount of the allowance.* The amount of the additional allowance payable to a veteran in need of regular aid and attendance is specified in 38 U.S.C. 1114(r)(1). The amount of the additional allowance payable to a veteran in need of a higher level of care is specified in 38 U.S.C. 1114(r)(2). The higher level aid and attendance allowance authorized by 38 U.S.C. 1114(r)(2) is payable in lieu of the regular aid and attendance allowance authorized by 38 U.S.C. 1114(r)(1).

(i) *Total plus 60 percent, or housebound; 38 U.S.C. 1114(s).* The special monthly compensation provided by 38 U.S.C. 1114(s) is payable where the veteran has a single service-connected disability rated as 100 percent and,

(1) Has additional service-connected disability or disabilities independently ratable at 60 percent, separate and distinct from the 100 percent service-connected disability and involving different anatomical segments or bodily systems, or

(2) Is permanently housebound by reason of service-connected disability or disabilities. This requirement is met when the veteran is substantially confined as a direct result of service-connected disabilities to his or her dwelling and the immediate premises or, if institutionalized, to the ward or clinical areas, and it is reasonably certain that the disability or disabilities and

resultant confinement will continue throughout his or her lifetime.

[26 FR 1587, Feb. 24, 1961, as amended at 27 FR 4739, May 18, 1962; 28 FR 1587, Feb. 20, 1963; 28 FR 5671, June 11, 1963; 40 FR 54245, Nov. 21, 1975; 45 FR 25392, Apr. 15, 1980; 46 FR 47541, Sept. 29, 1981; 48 FR 41161, Sept. 14, 1983; 49 FR 47003, Nov. 30, 1984; 54 FR 34981, Aug. 23, 1989; 60 FR 12886, Mar. 9, 1995]

§3.351 Special monthly dependency and indemnity compensation, death compensation, pension and spouse's compensation ratings.

(a) *General.* This section sets forth criteria for determining whether:

(1) Increased pension is payable to a veteran by reason of need for aid and attendance or by reason of being housebound.

(Authority: 38 U.S.C. 1521(d), (e))

(2) Increased compensation is payable to a veteran by reason of the veteran's spouse being in need of aid and attendance.

(Authority: 38 U.S.C. 1115(1)(E))

(3) Increased dependency and indemnity compensation is payable to a surviving spouse or parent by reason of being in need of aid and attendance.

(Authority: 38 U.S.C. 1311(c), 1315(h))

(4) Increased dependency and indemnity compensation is payable to a surviving spouse who is not in need of aid and attendance but is housebound.

(Authority: 38 U.S.C. 1311(d))

(5) Increased pension is payable to a surviving spouse by reason of need for aid and attendance, or if not in need of aid and attendance, by reason of being housebound.

(Authority: 38 U.S.C. 1541(d), (e))

(6) Increased death compensation is payable to a surviving spouse by reason of being in need of aid and attendance.

(Authority: 38 U.S.C. 1122)

(b) *Aid and attendance; need.* Need for aid and attendance means helplessness or being so nearly helpless as to require the regular aid and attendance of another person. The criteria set forth in paragraph (c) of this section will be applied in determining whether such need exists.

(c) *Aid and attendance; criteria.* The veteran, spouse, surviving spouse or parent will be considered in need of regular aid and attendance if he or she:

(1) Is blind or so nearly blind as to have corrected visual acuity of 5/200 or less, in both eyes, or concentric contraction of the visual field to 5 degrees or less; or

(2) Is a patient in a nursing home because of mental or physical incapacity; or

(3) Establishes a factual need for aid and attendance under the criteria set forth in §3.352(a).

(Authority: 38 U.S.C. 1502(b))

(d) *Housebound, or permanent and total plus 60 percent; disability pension.* The rate of pension payable to a veteran who is entitled to pension under 38 U.S.C. 1521 and who is not in need of regular aid and attendance shall be as prescribed in 38 U.S.C. 1521(e) if, in addition to having a single permanent disability rated 100 percent disabling under the Schedule for Rating Disabilities (not including ratings based upon unemployability under §4.17 of this chapter) the veteran:

(1) Has additional disability or disabilities independently ratable at 60 percent or more, separate and distinct from the permanent disability rated as 100 percent disabling and involving different anatomical segments or bodily systems, or

(2) Is ''permanently housebound'' by reason of disability or disabilities. This requirement is met when the veteran is substantially confined to his or her dwelling and the immediate premises or, if institutionalized, to the ward or clinical area, and it is reasonably certain that the disability or disabilities and resultant confinement will continue throughout his or her lifetime.

(Authority: 38 U.S.C. 1502(c), 1521(e))

(e) *Housebound; dependency and indemnity compensation.* The monthly rate of dependency and indemnity compensation payable to a surviving spouse who does not qualify for increased dependency and indemnity compensation under 38 U.S.C. 1311(c) based on need for regular aid and attendance shall be increased by the amount specified in 38 U.S.C. 1311(d) if

the surviving spouse is permanently housebound by reason of disability. The ''permanently housebound'' requirement is met when the surviving spouse is substantially confined to his or her home (ward or clinical areas, if institutionalized) or immediate premises by reason of disability or disabilities which it is reasonably certain will remain throughout the surviving spouse's lifetime.

(Authority: 38 U.S.C. 1311(d))

(f) *Housebound; improved pension; death.* The annual rate of death pension payable to a surviving spouse who does not qualify for an annual rate of death pension payable under § 3.23(a)(6) based on need for aid and attendance shall be as set forth in § 3.23(a)(7) if the surviving spouse is permanently housebound by reason of disability. The ''permanently housebound'' requirement is met when the surviving spouse is substantially confined to his or her home (ward or clinical areas, if institutionalized) or immediate premises by reason of disability or disabilities which it is reasonably certain will remain throughout the surviving spouse's lifetime.

(Authority: 38 U.S.C. 1541(e))

[44 FR 45939, Aug. 6, 1979]

§ 3.352 Criteria for determining need for aid and attendance and "permanently bedridden."

(a) *Basic criteria for regular aid and attendance and permanently bedridden.* The following will be accorded consideration in determining the need for regular aid and attendance (§ 3.351(c)(3): inability of claimant to dress or undress himself (herself), or to keep himself (herself) ordinarily clean and presentable; frequent need of adjustment of any special prosthetic or orthopedic appliances which by reason of the particular disability cannot be done without aid (this will not include the adjustment of appliances which normal persons would be unable to adjust without aid, such as supports, belts, lacing at the back, etc.); inability of claimant to feed himself (herself) through loss of coordination of upper extremities or through extreme weakness; inability to attend to the wants of nature; or incapacity, physical or mental, which requires care or assistance on a regular basis to protect the claimant from hazards or dangers incident to his or her daily environment. ''Bedridden'' will be a proper basis for the determination. For the purpose of this paragraph ''bedridden'' will be that condition which, through its essential character, actually requires that the claimant remain in bed. The fact that claimant has voluntarily taken to bed or that a physician has prescribed rest in bed for the greater or lesser part of the day to promote convalescence or cure will not suffice. It is not required that all of the disabling conditions enumerated in this paragraph be found to exist before a favorable rating may be made. The particular personal functions which the veteran is unable to perform should be considered in connection with his or her condition as a whole. It is only necessary that the evidence establish that the veteran is so helpless as to need regular aid and attendance, not that there be a constant need. Determinations that the veteran is so helpless, as to be in need of regular aid and attendance will not be based solely upon an opinion that the claimant's condition is such as would require him or her to be in bed. They must be based on the actual requirement of personal assistance from others.

(b) *Basic criteria for the higher level aid and attendance allowance.* (1) A veteran is entitled to the higher level aid and attendance allowance authorized by § 3.350(h) in lieu of the regular aid and attendance allowance when all of the following conditions are met:

(i) The veteran is entitled to the compensation authorized under 38 U.S.C. 1114(o), or the maximum rate of compensation authorized under 38 U.S.C. 1114(p).

(ii) The veteran meets the requirements for entitlement to the regular aid and attendance allowance in paragraph (a) of this section.

(iii) The veteran needs a ''higher level of care'' (as defined in paragraph (b)(2) of this section) than is required to establish entitlement to the regular aid and attendance allowance, and in the absence of the provision of such higher level of care the veteran would require hospitalization, nursing home

care, or other residential institutional care.

(2) Need for a higher level of care shall be considered to be need for personal health-care services provided on a daily basis in the veteran's home by a person who is licensed to provide such services or who provides such services under the regular supervision of a licensed health-care professional. Personal health-care services include (but are not limited to) such services as physical therapy, administration of injections, placement of indwelling catheters, and the changing of sterile dressings, or like functions which require professional health-care training or the regular supervision of a trained health-care professional to perform. A licensed health-care professional includes (but is not limited to) a doctor of medicine or osteopathy, a registered nurse, a licensed practical nurse, or a physical therapist licensed to practice by a State or political subdivision thereof.

(3) The term ''under the regular supervision of a licensed health-care professional'', as used in paragraph (b)(2) of this section, means that an unlicensed person performing personal health-care services is following a regimen of personal health-care services prescribed by a health-care professional, and that the health-care professional consults with the unlicensed person providing the health-care services at least once each month to monitor the prescribed regimen. The consultation need not be in person; a telephone call will suffice.

(4) A person performing personal health-care services who is a relative or other member of the veteran's household is not exempted from the requirement that he or she be a licensed health-care professional or be providing such care under the regular supervision of a licensed health-care professional.

(5) The provisions of paragraph (b) of this section are to be strictly construed. The higher level aid-and-attendance allowance is to be granted only when the veteran's need is clearly established and the amount of services required by the veteran on a daily basis is substantial.

(Authority: 38 U.S.C. 501, 1114(r)(2))

(c) *Attendance by relative.* The performance of the necessary aid and attendance service by a relative of the beneficiary or other member of his or her household will not prevent the granting of the additional allowance.

[41 FR 29680, July 19, 1976, as amended at 44 FR 22720, Apr. 17, 1979; 60 FR 27409, May 24, 1995]

§3.353 Determinations of incompetency and competency.

(a) *Definition of mental incompetency.* A mentally incompetent person is one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation.

(b) *Authority.* (1) Rating agencies have sole authority to make official determinations of competency and incompetency for purposes of: insurance (38 U.S.C. 1922), the discontinuance and payment of amounts withheld because of an estate in excess of $1,500 (§3.557(b)), and, subject to §13.56 of this chapter, disbursement of benefits. Such determinations are final and binding on field stations for these purposes.

(2) Where the beneficiary is rated incompetent the Adjudication Officer will inform the Veterans Services Officer of jurisdiction of that fact. The Veterans Services Officer will develop information as to the beneficiary's social, economic and industrial adjustment and appoint (or recommend appointment of) a fiduciary as provided in §13.55 of this chapter, select a method of disbursing payment as provided in §13.56 of this chapter, or in the case of a married beneficiary, appoint the beneficiary's spouse to receive payments as provided in §13.57 of this chapter. The Adjudication Officer will authorize disbursement of the benefit in the manner selected by the Veterans Services Officer.

(3) If in the course of fulfilling the responsibilities assigned in paragraph (b)(2) the Veterans Services Officer develops evidence indicating that the beneficiary may be capable of administering the funds payable without limitation, he or she will refer that evidence to the rating agency with a statement as to his or her findings. The

rating agency will consider this evidence, together with all other evidence of record, to determine whether its prior determination of incompetency should remain in effect. Reexamination may be requested as provided in § 3.327(a) if necessary to properly evaluate the beneficiary's mental capacity to contract or manage his or her own affairs.

(c) *Medical opinion.* Unless the medical evidence is clear, convincing and leaves no doubt as to the person's incompetency, the rating agency will make no determination of incompetency without a definite expression regarding the question by the responsible medical authorities. Considerations of medical opinions will be in accordance with the principles in paragraph (a) of this section. Determinations relative to incompetency should be based upon all evidence of record and there should be a consistent relationship between the percentage of disability, facts relating to commitment or hospitalization and the holding of incompetency.

(d) *Presumption in favor of competency.* Where reasonable doubt arises regarding a beneficiary's mental capacity to contract or to manage his or her own affairs, including the disbursement of funds without limitation, such doubt will be resolved in favor of competency (see § 3.102 on reasonable doubt).

(e) *Due process.* Whenever it is proposed to make an incompetency determination, the beneficiary will be notified of the proposed action and of the right to a hearing as provided in § 3.103. Such notice is not necessary if the beneficiary has been declared incompetent by a court of competent jurisdiction or if a guardian has been appointed for the beneficiary based upon a court finding of incompetency. If a hearing is requested it must be held prior to a rating decision of incompetency. Failure or refusal of the beneficiary after proper notice to request or cooperate in such a hearing will not preclude a rating decision based on the evidence of record.

(Authority: 38 U.S.C. 501(a))

[36 FR 19020, Sept. 25, 1971, and 40 FR 1241, Jan. 7, 1975, as amended at 42 FR 2069, Jan. 10, 1977; 58 FR 37856, July 14, 1993; 60 FR 55792, Nov. 3, 1995]

§ 3.354 Determinations of insanity.

(a) *Definition of insanity.* An insane person is one who, while not mentally defective or constitutionally psychopathic, except when a psychosis has been engrafted upon such basic condition, exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior; or who interferes with the peace of society; or who has so departed (become antisocial) from the accepted standards of the community to which by birth and education he belongs as to lack the adaptability to make further adjustment to the social customs of the community in which he resides.

(b) *Insanity causing discharge.* When a rating agency is concerned with determining whether a veteran was insane at the time he committed an offense leading to his court-martial, discharge or resignation (38 U.S.C. 5303(b)), it will base its decision on all the evidence procurable relating to the period involved, and apply the definition in paragraph (a) of this section.

[26 FR 1589, Feb. 24, 1961]

§ 3.355 Testamentary capacity for insurance purposes.

When cases are referred to a rating agency involving the testamentary capacity of the insured to execute designations or changes of beneficiary, or designations or changes of option, the following considerations will apply:

(a) Testamentary capacity is that degree of mental capacity necessary to enable a person to perform a testamentary act. This, in general, requires that the testator reasonably comprehend the nature and significance of his act, that is, the subject and extent of his disposition, recognition of the object of his bounty, and appreciation of the consequence of his act, uninfluenced by any material delusion as to the property or persons involved.

(b) Due consideration should be given to all facts of record, with emphasis being placed on those facts bearing upon the mental condition of the testator (insured) at the time or nearest the time he executed the designation or change. In this connection, consideration should be given to lay as well as medical evidence.

(c) Lack of testamentary capacity should not be confused with insanity or mental incompetence. An insane person might have a lucid interval during which he would possess testamentary capacity. On the other hand, a sane person might suffer a temporary mental aberration during which he would not possess testamentary capacity. There is a general but rebuttable presumption that every testator possesses testamentary capacity. Therefore, reasonable doubts should be resolved in favor of testamentary capacity.

[26 FR 1590, Feb. 24, 1961]

§3.356 Conditions which determine permanent incapacity for self-support.

(a) *Basic determinations.* A child must be shown to be permanently incapable of self-support by reason of mental or physical defect at the date of attaining the age of 18 years.

(b) *Rating criteria.* Rating determinations will be made solely on the basis of whether the child is permanently incapable of self-support through his own efforts by reason of physical or mental defects. The question of permanent incapacity for self-support is one of fact for determination by the rating agency on competent evidence of record in the individual case. Rating criteria applicable to disabled veterans are not controlling. Principal factors for consideration are:

(1) The fact that a claimant is earning his or her own support is prima facie evidence that he or she is not incapable of self-support. Incapacity for self-support will not be considered to exist when the child by his or her own efforts is provided with sufficient income for his or her reasonable support.

(2) A child shown by proper evidence to have been permanently incapable of self-support prior to the date of attaining the age of 18 years, may be so held at a later date even though there may have been a short intervening period or periods when his or her condition was such that he or she was employed, provided the cause of incapacity is the same as that upon which the original determination was made and there were no intervening diseases or injuries that could be considered as major factors. Employment which was only casual, intermittent, tryout, unsuccessful, or terminated after a short period by reason of disability, should not be considered as rebutting permanent incapability of self-support otherwise established.

(3) It should be borne in mind that employment of a child prior or subsequent to the delimiting age may or may not be a normal situation, depending on the educational progress of the child, the economic situation of the family, indulgent attitude of parents, and the like. In those cases where the extent and nature of disability raises some doubt as to whether they would render the average person incapable of self-support, factors other than employment are for consideration. In such cases there should be considered whether the daily activities of the child in the home and community are equivalent to the activities of employment of any nature within the physical or mental capacity of the child which would provide sufficient income for reasonable support. Lack of employment of the child either prior to the delimiting age or thereafter should not be considered as a major factor in the determination to be made, unless it is shown that it was due to physical or mental defect and not to mere disinclination to work or indulgence of relatives or friends.

(4) The capacity of a child for self-support is not determinable upon employment afforded solely upon sympathetic or charitable considerations and which involved no actual or substantial rendition of services.

[26 FR 1590, Feb. 24, 1961, as amended at 38 FR 871, Jan. 5, 1973]

CROSS REFERENCE: Basic pension and eligibility determinations. See §3.314.

§3.357 Civil service preference ratings.

For the purpose of certifying civil service disability preference only, a service-connected disability may be assigned an evaluation of ''less than ten percent.'' Any directly or presumptively service-connected disease or injury which exhibits some extent of actual impairment may be held to exist at the level of less than ten percent. For disabilities incurred in combat,

however, no actual impairment is required.

[58 FR 52018, Oct. 6, 1993]

§ 3.358 Determinations for disability or death from hospitalization, medical or surgical treatment, examinations or vocational rehabilitation training (§ 3.800).

(a) *General.* Where it is determined that there is additional disability resulting from a disease or injury or an aggravation of an existing disease or injury suffered as a result of training, hospitalization, medical or surgical treatment, or examination, compensation will be payable for such additional disability.

(Authority: 38 U.S.C. 1151)

(b) *Additional disability.* In determining that additional disability exists, the following considerations will govern:

(1) The veteran's physical condition immediately prior to the disease or injury on which the claim for compensation is based will be compared with the subsequent physical condition resulting from the disease or injury, each body part involved being considered separately.

(i) As applied to examinations, the physical condition prior to the disease or injury will be the condition at time of beginning the physical examination as a result of which the disease or injury was sustained.

(ii) As applied to medical or surgical treatment, the physical condition prior to the disease or injury will be the condition which the specific medical or surgical treatment was designed to relieve.

(2) Compensation will not be payable under 38 U.S.C. 1151 for the continuance or natural progress of disease or injuries for which the training, or hospitalization, etc., was authorized.

(c) *Cause.* In determining whether such additional disability resulted from a disease or an injury or an aggravation of an existing disease or injury suffered as a result of training, hospitalization, medical or surgical treatment, or examination, the following considerations will govern:

(1) It will be necessary to show that the additional disability is actually the result of such disease or injury or an aggravation of an existing disease or injury and not merely coincidental therewith.

(2) The mere fact that aggravation occurred will not suffice to make the additional disability compensable in the absence of proof that it resulted from disease or injury or an aggravation of an existing disease or injury suffered as the result of training, hospitalization, medical or surgical treatment, or examination.

(3) Compensation is not payable for the necessary consequences of medical or surgical treatment or examination properly administered with the express or implied consent of the veteran, or, in appropriate cases, the veteran's representative. ''Necessary consequences'' are those which are certain to result from, or were intended to result from, the examination or medical or surgical treatment administered. Consequences otherwise certain or intended to result from a treatment will not be considered uncertain or unintended solely because it had not been determined at the time consent was given whether that treatment would in fact be administered.

(4) When the proximate cause of the injury suffered was the veteran's willful misconduct or failure to follow instructions, it will bar him (or her) from receipt of compensation hereunder except in the case of incompetent veterans.

(5) Compensation for disability resulting from the pursuit of vocational rehabilitation is not payable unless there is established a direct (proximate) causal connection between the injury or aggravation of an existing injury and some essential activity or function which is within the scope of the vocational rehabilitation course, not necessarily limited to activities or functions specifically designated by the Department of Veterans Affairs in the individual case, since ordinarily it is not to be expected that each and every different function and act of a veteran pursuant to his or her course of training will be particularly specified in the outline of the course or training program. For example, a disability resulting from the use of an item of mechanical or other equipment

is within the purview of the statute if training in its use is implicit within the prescribed program or course outlined or if its use is implicit in the performance of some task or operation the trainee must learn to perform, although such use may not be especially mentioned in the training program. In determining whether the element of direct or proximate causation is present, it remains necessary for a distinction to be made between an injury arising out of an act performed in pursuance of the course of training, that is, a required ''learning activity'', and one arising out of an activity which is incident to, related to, or coexistent with the pursuit of the program of training. For a case to fall within the statute there must have been sustained an injury which, but for the performance of a ''learning activity'' in the prescribed course of training, would not have been sustained. A meticulous examination into all the circumstances is required, including a consideration of the time and place of the incident producing the injury.

(6) Nursing home care furnished under section 1720 of title 38, United States Code is not hospitalization within the meaning of this section. Such a nursing home is an independent contractor and, accordingly, its agents and employees are not to be deemed agents and employees of the Department of Veterans Affairs. If additional disability results from medical or surgical treatment or examination through negligence or other wrongful acts or omissions on the part of such a nursing home, its employees, or its agents, entitlement does not exist under this section unless there was an act or omission on the part of the Department of Veterans Affairs independently giving rise to such entitlement and such acts on the part of both proximately caused the additional disability.

(Authority: 38 U.S.C. 1151, 1720)

[26 FR 1590, Feb. 24, 1961, as amended at 36 FR 7659, Apr. 23, 1971; 39 FR 34531, Sept. 26, 1974; 43 FR 51015, Nov. 2, 1978; 60 FR 14223, Mar. 16, 1995; 61 FR 25788, May 23, 1996]

§3.359 Determination of service connection for former members of the Armed Forces of Czechoslovakia or Poland.

Rating boards will determine whether or not the condition for which treatment is claimed by former members of the Armed Forces of Czechoslovakia or Poland under 38 U.S.C. 109(c) is service connected. This determination will be made using the same criteria that applies to determinations of service connection based on service in the Armed Forces of the United States.

[43 FR 4424, Feb. 2, 1978]

§3.360 Service-connected health-care eligibility of certain persons administratively discharged under other than honorable condition.

(a) *General.* The health-care and related benefits authorized by chapter 17 of title 38 U.S.C. shall be provided to certain former service persons with administrative discharges under other than honorable conditions for any disability incurred or aggravated during active military, naval, or air service in line of duty.

(b) *Discharge categorization.* With certain exceptions such benefits shall be furnished for any disability incurred or aggravated during a period of service terminated by a discharge under other than honorable conditions. Specifically, they may not be furnished for any disability incurred or aggravated during a period of service terminated by a bad conduct discharge or when one of the bars listed in §3.12(c) applies.

(c) *Eligibility criteria.* In making determinations of health-care eligibility the same criteria will be used as is now applicable to determinations of service incurrence and in line of duty when there is no character of discharge bar.

[43 FR 15154, Apr. 11, 1978]

RATING CONSIDERATIONS RELATIVE TO SPECIFIC DISEASES

§3.370 Pulmonary tuberculosis shown by X-ray in active service.

(a) *Active disease.* X-ray evidence alone may be adequate for grant of direct service connection for pulmonary tuberculosis. When under consideration, all available service department

films and subsequent films will be secured and read by specialists at designated stations who should have a current examination report and X-ray. Resulting interpretations of service films will be accorded the same consideration for service-connection purposes as if clinically established, however, a compensable rating will not be assigned prior to establishment of an active condition by approved methods.

(b) *Inactive disease.* Where the veteran was examined at time of entrance into active service but X-ray was not made, or if made, is not available and there was no notation or other evidence of active or inactive reinfection type pulmonary tuberculosis existing prior to such entrance, it will be assumed that the condition occurred during service and direct service connection will be in order for inactive pulmonary tuberculosis shown by X-ray evidence during service in the manner prescribed in paragraph (a) of this section, unless lesions are first shown so soon after entry on active service as to compel the conclusion, on the basis of sound medical principles, that they existed prior to entry on active service.

(c) *Primary lesions.* Healed primary type tuberculosis shown at the time of entrance into active service will not be taken as evidence to rebut direct or presumptive service connection for active reinfection type pulmonary tuberculosis.

[26 FR 1591, Feb. 24, 1961, as amended at 43 FR 45347, Oct. 2, 1978]

§ 3.371 Presumptive service connection for tuberculous disease; wartime and service on or after January 1, 1947.

(a) *Pulmonary tuberculosis.* (1) Evidence of activity on comparative study of X-ray films showing pulmonary tuberculosis within the 3-year presumptive period provided by § 3.307(a)(3) will be taken as establishing service connection for active pulmonary tuberculosis subsequently diagnosed by approved methods but service connection and evaluation may be assigned only from the date of such diagnosis or other evidence of clinical activity.

(2) A notation of inactive tuberculosis of the reinfection type at induction or enlistment definitely prevents the grant of service connection under § 3.307 for active tuberculosis, regardless of the fact that it was shown within the appropriate presumptive period.

(b) *Pleurisy with effusion without obvious cause.* Pleurisy with effusion with evidence of diagnostic studies ruling out obvious nontuberculous causes will qualify as active tuberculosis. The requirements for presumptive service connection will be the same as those for tuberculous pleurisy.

(c) *Tuberculous pleurisy and endobronchial tuberculosis.* Tuberculous pleurisy and endobronchial tuberculosis fall within the category of pulmonary tuberculosis for the purpose of service connection on a presumptive basis. Either will be held incurred in service when initially manifested within 36 months after the veteran's separation from service as determined under § 3.307(a)(2).

(d) *Miliary tuberculosis.* Service connection for miliary tuberculosis involving the lungs is to be determined in the same manner as for other active pulmonary tuberculosis.

[26 FR 1591, Feb. 24, 1961, as amended at 27 FR 6387, July 6, 1962; 31 FR 4681, Mar. 19, 1966; 39 FR 34532, Sept. 26, 1974; 43 FR 45347, Oct. 2, 1978; 54 FR 34981, Aug. 23, 1989]

§ 3.372 Initial grant following inactivity of tuberculosis.

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

[33 FR 16275, Nov. 6, 1968]

§3.373 [Reserved]

§3.374 Effect of diagnosis of active tuberculosis.

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

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

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

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

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

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

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

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

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

§§3.376—3.377 [Reserved]

§3.378 Changes from activity in pulmonary tuberculosis pension cases.

A permanent and total disability rating in effect during hospitalization will not be discontinued before hospital discharge on the basis of a change in classification from active. At hospital discharge, the permanent and total rating will be discontinued unless (a) the medical evidence does not support a finding of complete arrest (§3.375), or (b) where complete arrest is shown but the medical authorities recommend that employment not be resumed or be resumed only for short hours (not more than 4 hours a day for a 5-day week). If either of the two aforementioned conditions is met, discontinuance will be deferred pending examination in 6 months. Although complete arrest may be established upon that examination, the permanent and total rating may be extended for a further period of 6 months provided the veteran's employment is limited to short hours as recommended by the medical authorities (not more than 4 hours a day for a 5-day week). Similar extensions may be granted under the same conditions at the end of 12 and 18 months periods. At the expiration of 24 months after hospitalization, the case will be considered under §3.321(b) if continued short hours of employment is recommended or if other evidence warrants submission.

[43 FR 45348, Oct. 2, 1978]

§3.379 Anterior poliomyelitis.

If the first manifestations of acute anterior poliomyelitis present themselves in a veteran within 35 days of termination of active military service, it is probable that the infection occurred during service. If they first appear after this period, it is probable

that the infection was incurred after service.

[26 FR 1592, Feb. 24, 1961]

§ 3.380 Diseases of allergic etiology.

Diseases of allergic etiology, including bronchial asthma and urticaria, may not be disposed of routinely for compensation purposes as constitutional or developmental abnormalities. Service connection must be determined on the evidence as to existence prior to enlistment and, if so existent, a comparative study must be made of its severity at enlistment and subsequently. Increase in the degree of disability during service may not be disposed of routinely as natural progress nor as due to the inherent nature of the disease. Seasonal and other acute allergic manifestations subsiding on the absence of or removal of the allergen are generally to be regarded as acute diseases, healing without residuals. The determination as to service incurrence or aggravation must be on the whole evidentiary showing.

[26 FR 1592, Feb. 24, 1961]

§ 3.381 Determination of service connection for dental disabilities.

(a) *General.* Service connection for dental conditions will not be considered as having been established when the evidence clearly shows that the disabilities existed or were recorded at the time of enlistment, subject to the provisions of paragraph (b) of this section or originated subsequent to discharge from causes not related to service. Each missing or defective tooth and each disease of the investing tissues will be considered separately, and service connection will be granted for disease or injury of individual teeth and of the investing tissues, shown by the evidence to have been incurred in or aggravated by service.

(b) *Treatment in service.* The furnishing of treatment or prosthesis for noncompensable dental conditions during service will not be considered per se as aggravation of a dental condition shown to have existed prior to entrance into active service. Teeth noted at entry into active service as carious restorable will not be held as service connected, either direct or by aggravation, notwithstanding enlargement of the original cavity or development of additional cavitation on the same or another surface; nor on the basis of the insertion of a filling during service, unless new caries develop after expiration of a reasonable time after the original cavity has been filled, amelioration rather than worsening or aggravation ensuing in such cases. Service connection by aggravation will be conceded in such teeth, carious restorable at entry into service, whether or not filled, but which necessitate extraction after the expiration of a reasonable time after entry into active service. A filling recorded at induction followed by a reasonable period of service and extraction or replacement because of new caries will entitle the veteran to a finding of direct service connection for the new condition. Likewise, aggravation is allowed where pyorrhea is noted at enlistment but after reasonable service necessitates extraction of a tooth or teeth during service. Conversely, service connection by aggravation will not be conceded if the tooth at enlistment was classified as defective but was not restorable.

(c) *Associated diseases.* Effective principles relating to the establishment of service connection for dental diseases and injuries by reason of their relationship to other associated service-connected diseases or injuries will be observed in the adjudication of claims based upon dental conditions where a determination to that effect is properly in order.

(d) *Presumption of soundness.* The statutory presumptions as to soundness of condition at time of entrance into active service will not be applicable, in cases of dental conditions not disabling to a compensable degree.

(e) *Combat, trauma, prisoner-of-war status.* As to each noncompensable service-connected dental condition, a determination will be made as to whether it was due to combat wound or other service trauma. Where service connection is granted for noncompensable dental conditions, it will be determined whether the veteran involved was a prisoner of war, but not which of

such conditions are attributable to the prisoner-of-war experience.

(Authority: 38 U.S.C. 1712(b)(3))

[26 FR 1592, Feb. 24, 1961]

§3.382 Evidence to establish service connection for dental disabilities.

(a) *Requirements.* Service connection for dental disabilities will be established by service records, documentary evidence in the form of reports of examinations (dental or physical), duly certified statements of dentists or physicians, or certified statements of fact from two or more disinterested parties. The disability must be shown to have been incurred in or aggravated by service as provided in this section. Statements certified by dentists or physicians must give the claimant's full name, the date he or she was first examined or treated, the date of subsequent treatments, if any, and contain a complete and detailed statement of the symptoms observed and diagnosis made. The name or number of all defective or missing teeth noted and the character and extent of any pathological condition of the investing tissues observed should be included. If exact dates cannot be given, an approximate date may be used. Certified statements from disinterested parties must show the circumstances under which knowledge of the claimant's disability was obtained and as far as possible describe the symptoms and location of the disability observed.

(b) *Exceptional case.* Where after all sources of information have been exhausted and all variations in the records reconciled, there remains notation of filled teeth at time of release from active service and there was no notation of these teeth as defective or filled at entrance into service, service connection may be granted in exceptional cases for such teeth, notwithstanding there is no record of treatment during service, if the veteran alleges treatment in service, giving the time and place of treatment, and the conditions and circumstances of his or her service support his or her allegation, and inception in service is consistent with sound dental judgment. Exceptional cases contemplated in this category are where the veteran had a considerable period of service, particularly in a combat area where records of treatment may not always have been recorded due to the stress and strain encountered under battle conditions or where extenuating circumstances are shown in those instances where the veteran served in this country or in other than combat.

(c) *Limitations.* Salivary deposits is a type of routine dental condition which has no relation to service. Malposed teeth with no pathology shown will not be service connected. Service connection should not be granted for the 3d molars at any time unless there is a definite record showing such teeth to have been diseased after a reasonable period of service. The 3d molars shown as present at induction and missing at discharge will not be granted service connection unless there is an actual record of extraction for reasons other than malposition or impaction. Vincent's disease should not be granted service connection if the service records are entirely negative. To warrant favorable action on Vincent's disease, chronicity, continuity of treatment, or the residual thereof, that is, periodontoclasia or pyorrhea, should be shown by the service records as chronic. Vincent's disease with infrequent episodes of short duration in the active service should be considered as an acute condition and may not be service connected. Gingivitis is not considered a disease entity and is not ratable. Diagnosis of pyorrhea in service after a reasonable period of service will require confirmation by a Department of Veterans Affairs examination, including X-ray, before grant of service connection, unless examination is contraindicated by factors such as extraction of all pyorrhectic teeth. Pyorrhea shown during service after a reasonable period of service, involving one or more teeth necessitating extraction, is a sufficient basis for grant of service connection for the tooth or teeth involved.

[26 FR 1592, Feb. 24, 1961, as amended at 44 FR 22720, Apr. 17, 1979]

§ 3.383 Special consideration for paired organs and extremities.

(a) *Entitlement criteria.* Compensation is payable for the combinations of service-connected and nonservice-connected disabilities specified in paragraphs (a)(1) through (a)(5) of this section as if both disabilities were service-connected, provided the nonservice-connected disability is not the result of the veteran's own willful misconduct.

(1) Blindness in one eye as a result of service-connected disability and blindness in the other eye as a result of nonservice-connected disability.

(2) Loss or loss of use of one kidney as a result of service-connected disability and involvement of the other kidney as a result of nonservice-connected disability.

(3) Total deafness in one ear as a result of service-connected disability and total deafness in the other ear as a result of nonservice-connected disability.

(4) Loss or loss of use of one hand or one foot as a result of service-connected disability and loss or loss of use of the other hand or foot as a result of nonservice-connected disability.

(5) Permanent service-connected disability of one lung, rated 50 percent or more disabling, in combination with a nonservice-connected disability of the other lung.

(b) *Effect of judgment or settlement.* (1) If a veteran receives any money or property of value pursuant to an award in a judicial proceeding based upon, or a settlement or compromise of, any cause of action for damages for the nonservice-connected disability which established entitlement under this section, the increased compensation payable by reason of this section shall not be paid for any month following the month in which any such money or property is received until such time as the total amount of such increased compensation that would otherwise have been payable equals the total of the amount of any such money received and the fair market value of any such property received. The provisions of this paragraph do not apply, however, to any portion of such increased compensation payable for any period preceding the end of the month in which such money or property of value was received.

(2) With respect to the disability combinations specified in paragraphs (a)(1), (a)(2), (a)(3) and (a)(5) of this section, the provisions of this paragraph apply only to awards of increased compensation made on or after October 28, 1986.

(c) *Social security and workers' compensation.* Benefits received under social security or workers' compensation are not subject to recoupment under paragraph (b) of this section even though such benefits may have been awarded pursuant to a judicial proceeding.

(d) *Veteran's duty to report.* Any person entitled to increased compensation under this section shall promptly report to VA the receipt of any money or property received pursuant to a judicial proceeding based upon, or a settlement or compromise of, any cause of action or other right of recovery for damages for the nonservice-connected loss or loss of use of the impaired extremity upon which entitlement under this section is based. The amount to be reported is the total of the amount of money received and the fair market value of property received. Expenses incident to recovery, such as attorneys' fees, may not be deducted from the amount to be reported.

(Authority: 38 U.S.C. 1160)

[53 FR 23236, June 21, 1988]

§ 3.384 [Reserved]

§ 3.385 Disability due to impaired hearing.

For the purposes of applying the laws administered by VA, impaired hearing will be considered to be a disability when the auditory threshold in any of the frequencies 500, 1000, 2000, 3000, 4000 Hertz is 40 decibels or greater; or when the auditory thresholds for at least three of the frequencies 500, 1000, 2000, 3000, or 4000 Hertz are 26 decibels or greater; or when speech recognition scores using the Maryland CNC Test are less than 94 percent.

[59 FR 60560, Nov. 25, 1994]

EFFECTIVE DATES

§ 3.400 General.

Except as otherwise provided, the effective date of an evaluation and award of pension, compensation or dependency and indemnity compensation based on an original claim, a claim reopened after final disallowance, or a claim for increase will be the date of receipt of the claim or the date entitlement arose, whichever is the later.

(Authority: 38 U.S.C. 5110(a))

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

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

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

(ii) *Claims received on or after October 1, 1984.* (A) Except as provided in paragraph (b)(1)(ii)(B) of this section, date of receipt of claim.

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

(2) *Disability compensation*—(i) *Direct service connection* (§ *3.4(b)*). Day following separation from active service or date entitlement arose if claim is received within 1 year after separation from service; otherwise, date of receipt of claim, or date entitlement arose, whichever is later. Separation from service means separation under conditions other than dishonorable from continuous active service which extended from the date the disability was incurred or aggravated.

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

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

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

(3) *Nonservice-connected death after separation from service.* (i) For awards based on claims received prior to October 1, 1984, first day of the month in which the veteran's death occurred if claim is received within one year after the date of death; otherwise, date of receipt of claim.

(ii) For awards based on claims received on or after October 1, 1984, first day of the month in which the veteran's death occurred if claim is received

within 45 days after the date of death; otherwise, date of receipt of claim.

(Authority: 38 U.S.C. 5110(d))

(4) *Dependency and indemnity compensation*—(i) *Deaths prior to January 1, 1957 (§ 3.702).* Date of receipt of election.

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

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

(d) [Reserved]

(e) *Apportionment* (*§§ 3.450 through 3.461, 3.551, 3.557*). On original claims, in accordance with the facts found. On other than original claims from the first day of the month following the month in which:

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

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

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

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

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

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

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

(h) *Difference of opinion* (*§ 3.105*). (1) As to decisions not final prior to receipt of an application for reconsideration or to reopen, or prior to reconsideration on Department of Veterans Affairs initiative, the date from which benefits would have been payable if the former decision had been favorable.

(2) As to decisions which have become final (by appellate decision or failure to timely initiate and perfect an appeal) prior to receipt of an application for reconsideration or to reopen, the date of receipt of such application or the date entitlement arose, whichever is later.

(3) As to decisions which have become final (by appellate decision or failure to timely initiate and perfect an appeal) and reconsideration is undertaken solely on Department of Veterans Affairs initiative, the date of Central Office approval authorizing a favorable decision or the date of the favorable Board of Veterans Appeals decision.

(4) Where the initial determination for the purpose of death benefits is favorable, the commencing date will be determined without regard to the fact that the action may reverse, on a difference of opinion, an unfavorable decision for disability purposes by an adjudicative agency other than the Board of Veterans Appeals, which was in effect at the date of the veteran's death.

(i) *Disability or death due to hospitalization, etc.* (*38 U.S.C. 5110* (*c*), (*d*)*; Pub. L. 87–825;* § *3.800*)—(1) *Disability*. Date injury or aggravation was suffered if claim is received within 1 year after that date; otherwise, date of receipt of claim.

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

(j) *Election of Department of Veterans Affairs benefits* (*§ 3.700 series*). (1) Unless

otherwise provided, the date of receipt of election, subject to prior payments.

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

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

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

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

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

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

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

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

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

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

(o) *Increases* (*38 U.S.C. 5110*(*a*) *and 5110*(*b*)(*2*)*, Pub. L. 94–71, 89 Stat. 395;* §§*3.109, 3.156, 3.157*)—(1) *General.* Except as provided in paragraph (o)(2) of this section and § 3.401(b), date of receipt of claim or date entitlement arose, whichever is later. A retroactive increase or additional benefit will not be awarded after basic entitlement has been terminated, such as by severance of service connection.

(2) *Disability compensation.* Earliest date as of which it is factually ascertainable that an increase in disability had occurred if claim is received within 1 year from such date otherwise, date of receipt of claim.

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

(q) *New and material evidence* (§*3.156*)—(1) *Other than service department records*—(i) *Received within appeal period or prior to appellate decision.* The effective date will be as though the former decision had not been rendered. See §§ 20.1103, 20.1104 and 20.1304(b)(1) of this chapter.

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

(2) *Service department records.* To agree with evaluation (since it is considered these records were lost or mislaid) or date of receipt of claim on which prior evaluation was made, whichever is later, subject to rules on original claims filed within 1 year after separation from service. See paragraph (g) of this section as to correction of military records.

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

(Authority: 38 U.S.C. 501)

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

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

(u) *Void, annulled or terminated marriage of a child* (*38 U.S.C. 5110* (*a*), (*k*), (*l*)*; Pub. L. 93–527, 88 Stat. 1702;* § *3.55*)—(1) *Void.* Date the parties ceased to cohabit or date of receipt of claim, whichever is later.

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

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

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

(v) *Termination of remarriage of surviving spouse (38 U.S.C. 5110(a), (k); 38 U.S.C. 103(d) and 3010(l) effective January 1, 1971; § 3.55)*—(1) *Void.* Date the parties ceased to cohabit or date of receipt of claim, whichever is the later.

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

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

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

(w) *Termination of relationship or conduct resulting in restriction on payment of benefits (38 U.S.C. 5110(m), effective January 1, 1971; §§ 3.50(b)(2) and 3.55).*

Date of receipt of application filed after termination of relationship and after December 31, 1970. Benefits are not payable unless the provisions of § 3.55(a), as applicable, are met.

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

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

(z) *Claims based on service in the Women's Air Forces Service Pilots (WASP), or on service in a similarly situated group (Pub. L. 95–202).* (1) Original claim: Date of receipt of claim or date entitlement arose, whichever is later, or as otherwise provided under this section (e.g., paragraph (b)(1) of this section) except that no benefits shall be awarded for any period prior to November 23, 1977.

(2) Reopened claim: Latest of the following dates:

(i) November 23, 1977.

(ii) Date entitlement arose.

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

[26 FR 1593, Feb. 24, 1961]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 3.400, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 3.401 Veterans.

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

(a) *Aid and attendance and housebound benefits.* (1) Except as provided in § 3.400(o)(2), the date of receipt of claim or date entitlement arose, whichever is later. However, when an award of pension or compensation based on an original or reopened claim is effective for a period prior to the date of receipt of the claim, any additional pension or compensation payable by reason of need for aid and attendance or housebound status shall also be awarded for any part of the award's retroactive period for which entitlement to the additional benefit is established.

(Authority: 38 U.S.C. 501; 5110(b)(1), (3))

(2) Date of departure from hospital, institution, or domiciliary.

(Authority: 38 U.S.C. 501)

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

(Authority: 38 U.S.C. 501; 5110(b)(1), (2))

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

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

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

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

(2) Date dependency arises.

(3) Effective date of the qualifying disability rating provided evidence of dependency is received within 1 year of notification of such rating action.

(Authority: 38 U.S.C. 5110(f))

(4) Date of commencement of veteran's award. (Other increases, see § 3.400(o). For school attendance see § 3.667.)

(Authority: 38 U.S.C. 5110 (f), (n))

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

(d) *Institutional awards* (§ *3.852*)—(1) *Chief officer of non-Department of Veterans Affairs hospital or institution.* From first day of month in which award is approved or day following date of last payment to veteran, whichever is later.

NOTE: If apportionment under §§ 3.452(c) and 3.454 is in order or payment under § 3.850(a), Personal Funds of Patients account will not be set up but difference withheld for dependents.

(2) *Director of a Department of Veterans Affairs medical center or domiciliary.* From day following date of last payment to veteran where veteran previously received payments. On initial or resumed payments from date of entitlement to benefits subject to any amounts payable to or withheld for apportionments for dependents.

(e) *Retirement pay* (§ *3.750*)—(1) *Election.* Date of entitlement if timely filed. Subject to prior payments of retirement pay.

(2) *Waiver.* Day following date of discontinuance or reduction of retirement pay.

(3) *Reelection.* Day the reelection is received by the Department of Veterans Affairs.

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

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

(h) *Temporary increase ''General Policy in Rating,'' 1945 Schedule for Rating Disabilities*—(1) *Section 4.29 of this chapter.* Date of entrance into hospital, after 21 days of continuous hospitalization for treatment.

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

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

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

§ 3.402 Surviving spouse.

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

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

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

(c) *Aid and attendance and housebound benefits.* (1) Date of receipt of claim or date entitlement arose whichever is later. However, when an award of dependency and indemnity compensation (DIC) or pension based on an original or reopened claim is effective for a period prior to date of receipt of the claim, any additional DIC or pension payable to the surviving spouse by reason of need for aid and attendance or housebound status shall also be awarded for any part of the award's retroactive period for which entitlement to the additional benefit is established.

(Authority: 38 U.S.C. 501; 5110(d))

(2) Date of departure from hospital, institutional or domiciliary care at Department of Veterans Affairs expense. This is applicable only to aid and attendance benefits. Housebound benefits may be awarded during hospitalization at Department of Veterans Affairs expense.

(Authority: 38 U.S.C. 501)

[45 FR 34887, May 23, 1980]

§ 3.403 Children.

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:

(a) *Permanently incapable of selfsupport* (§ *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.

(b) *Majority* (§ *3.854*). Direct payment to child if competent, from date of majority or, date of last payment, whichever is the earlier date.

(c) *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))

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

(e) *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.

[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]

§ 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; 5110(d))

[45 FR 34887, May 23, 1980]

APPORTIONMENTS

§ 3.450 General.

(a)(1) All or any part of the pension, compensation, or emergency officers' retirement pay payable on account of any veteran may be apportioned.

(i) On behalf of his or her spouse, children, or dependent parents if the veteran is incompetent and is being furnished hospital treatment, institutional, or domiciliary care by the United States, or any political subdivision thereof.

(ii) If the veteran is not residing with his or her spouse, or if the veteran's children are not residing with the veteran and the veteran is not reasonably discharging his or her responsibility for the spouse's or children's support.

(2) Where any of the children of a deceased veteran are not living with the veteran's surviving spouse, the pension, compensation, or dependency and indemnity compensation otherwise payable to the surviving spouse may be apportioned.

(Authority: 38 U.S.C. 5307)

(b) Except as provided in § 3.458(e), no apportionment of disability or death benefits will be made or changed solely because a child has entered active duty with the air, military, or naval services of the United States.

(c) No apportionment will be made where the veteran, the veteran's spouse (when paid ''as wife'' or ''as husband''), surviving spouse, or fiduciary is providing for dependents. The additional benefits for such dependents will be paid to

the veteran, spouse, surviving spouse, or fiduciary.

(d) Any amounts payable for children under §§3.459, 3.460 and 3.461 will be equally divided among the children.

(e) The amount payable for a child in custody of and residing with the surviving spouse shall be paid to the surviving spouse. Amounts payable to a surviving spouse for a child in the surviving spouse's custody but residing with someone else may be apportioned if the surviving spouse is not reasonably contributing to the child's support.

(f) Prior to release of any amounts the relationship of the claimant and the dependency of a parent will be fully developed, and the necessary evidence secured.

(g) The provisions of §3.460 are applicable where the surviving spouse is entitled to a higher rate of pension under the circumstances described in that section.

[26 FR 1594, Feb. 24, 1961, as amended at 26 FR 7266, Aug. 11, 1961; 27 FR 6974, July 24, 1962; 32 FR 13226, Sept. 19, 1967; 37 FR 6678, Apr. 1, 1972; 44 FR 45939, Aug. 6, 1979]

§3.451 Special apportionments.

Without regard to any other provision regarding apportionment where hardship is shown to exist, pension, compensation, emergency officers' retirement pay, or dependency and indemnity compensation may be specially apportioned between the veteran and his or her dependents or the surviving spouse and children on the basis of the facts in the individual case as long as it does not cause undue hardship to the other persons in interest, except as to those cases covered by §3.458(b) and (c). In determining the basis for special apportionment, consideration will be given such factors as: Amount of Department of Veterans Affairs benefits payable; other resources and income of the veteran and those dependents in whose behalf apportionment is claimed; and special needs of the veteran, his or her dependents, and the apportionment claimants. The amount apportioned should generally be consistent with the total number of dependents involved. Ordinarily, apportionment of more than 50 percent of the veteran's benefits would constitute undue hardship on him or her while apportionment of less than 20 percent of his or her benefits would not provide a reasonable amount for any apportionee.

[44 FR 45940, Aug. 6, 1979]

§3.452 Veterans benefits apportionable.

Veterans benefits may be apportioned:

(a) If the veteran is not residing with his or her spouse or his or her children and a claim for apportionment is filed for or on behalf of the spouse or children.

(b) Pending the appointment of a guardian or other fiduciary.

(c)(1) Where an incompetent veteran without a fiduciary is receiving institutional care by the United States or a political subdivision, his or her benefit may be apportioned for a spouse or child, or, except as provided in paragraph (c)(3), for a dependent parent, unless such benefit is paid to a spouse (''as wife'' or ''as husband'') for the use of the veteran and his or her dependents.

(2) Where benefits for an incompetent veteran are discontinued under the provisions of §3.557(b), because of hospitalization by the U.S. Government or any political subdivision, there may be paid to his or her dependent parent or parents on the basis of need as determined by the Veterans' Services Officer all or any part of the benefit which would otherwise be payable.

(Authority: 38 U.S.C. 5503(b)(2))

(3) Where a married veteran is receiving section 306 or improved pension and the amount payable is reduced under §3.551(c) because of hospitalization, an apportionment may be paid to the veteran's spouse as provided in §3.454(b).

(Authority: 38 U.S.C. 5503(a))

(d) Where additional compensation is payable on behalf of a parent and the veteran or his or her guardian neglects or refuses to contribute such an amount to the support of the parent the additional compensation will be

paid to the parent upon receipt of a claim.

[26 FR 7266, Aug. 11, 1961, as amended at 27 FR 6974, July 24, 1962; 40 FR 21724, May 19, 1975; 44 FR 45940, Aug. 6, 1979]

CROSS REFERENCES: Institutional awards. See §3.852. Disappearance of veteran. See §3.656. Reduction because of hospitalization. See §3.551. Penal institutions. See §3.666. Incompetents; estate over $1,500 and hospitalized. See §3.557.

§ 3.453 Veterans compensation or service pension or retirement pay.

Rates of apportionment of disability compensation, service pension or retirement pay will be determined under §3.451.

[26 FR 7266, Aug. 11, 1961]

§ 3.454 Veterans disability pension.

Apportionment of disability pension will be as follows:

(a) Where a veteran with spouse, or child is incompetent and without legal fiduciary and is maintained in an institution by the United States or any political subdivision thereof, $25 monthly will be paid as an institutional award to the Director of a Department of Veterans Affairs medical center or chief officer of a non-Department of Veterans Affairs institution for the use of the veteran, and the balance will be paid to the dependent or dependents. If the veteran has no spouse, or child but has a dependent parent, apportionment will be in accordance with §3.451.

(b)(1) Where the amount of section 306 pension payable to a married veteran under 38 U.S.C. 1521(b), as in effect on December 31, 1978, is reduced to $50 monthly under §3.551(c), an apportionment may be made to such veteran's spouse upon an affirmative showing of hardship. The amount of the apportionment generally will be the difference between $50 and the total amount of pension payable on December 31, 1978.

(Authority: 38 U.S.C. 5503(a))

(2) Where the amount of improved pension payable to a married veteran under 38 U.S.C. 1521(b) is reduced to $60 monthly under §3.551(d) or (e)(2), an apportionment may be made to such veteran's spouse upon an affirmative showing of hardship. The amount of the apportionment generally will be the difference between $50 and the rate payable if pension was being paid under 38 U.S.C. 1521(c) including the additional amount payable under 38 U.S.C. 1521(e) if the veteran is so entitled.

(Authority: 38 U.S.C. 5503(a))

(3) Where the amount of improved pension payable to a married veteran under 38 U.S.C. 1521(b) is reduced to $90 monthly under §3.551(e)(1) an apportionment may be made to such veteran's spouse upon an affirmative showing of hardship. The amount of the apportionment generally will be the difference between $90 and the rate payable if pension was being paid under 38 U.S.C. 1521(c) including the additional amount payable under 38 U.S.C. 1521(e) if the veteran is so entitled.

(Authority: 38 U.S.C. 5503(a))

(c) Where section 306 pension for an incompetent veteran is subject both to reduction under §3.551(c), and to discontinuance under §3.557(b) because of hospitalization by the U.S. Government or any political subdivision, the rate authorized for a parent or parents will not exceed $50 monthly.

(Authority: Pub. L. 86–146, 73 Stat. 297; Pub. L. 86–211, 73 Stat. 432; Pub. L. 93–177, 87 Stat. 694; Pub. L. 95–588, 92 Stat. 2497)

(d) Where improved pension for an incompetent veteran is subject both to reduction under §3.551(d) or (e)(2), and to discontinuance under §3.557(b) because of hospitalization by the U.S. Government or any political subdivision, the rate authorized for a parent or parents will not exceed $60 monthly if reduction is under §3.551(d) or (e)(2), or $90 monthly if reduction is under §3.551(e)(1).

(Authority: 38 U.S.C. 5503(a), (b))

[40 FR 36329, Aug. 20, 1975, as amended at 44 FR 45940, Aug. 6, 1979; 56 FR 65850, 65851, Dec. 19, 1991; 57 FR 7847, Mar. 4, 1992]

§ 3.458 Veteran's benefits not apportionable.

Veteran's benefits will not be apportioned:

(a) Where the total benefit payable to the disabled person does not permit payment of a reasonable amount to any apportionee.

(b) Where the spouse of the disabled person has been found guilty of conjugal infidelity by a court having proper jurisdiction.

(c) For purported or legal spouse of the veteran if it has been determined that he or she has lived with another person and held herself or himself out openly to the public to be the spouse of such other person, except where such relationship was entered into in good faith with a reasonable basis (for example trickery on the part of the veteran) for the spouse believing that the marriage to the veteran was legally terminated. No apportionment to the spouse will thereafter be made unless there has been a reconciliation and later estrangement.

(d) Where the child of the disabled person has been legally adopted by another person, except the additional compensation payable for the child.

(e) Where a child enters the active military, air, or naval service, any additional amount will be paid to the veteran unless such child is included in an existing apportionment to an estranged spouse. No adjustment in the apportioned award will be made based on the child's entry into service.

(f)(1) For the spouse, child, father or mother of a disabled veteran, where forfeiture was declared prior to September 2, 1959, if the dependent is determined by the Department of Veterans Affairs to have been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or its allies.

(2) For any dependent of a disabled veteran, or surviving spouse where forfeiture of benefits by a person primarily entitled was declared after September 1, 1959, by reason of fraud, treasonable acts, or subversive activities.

(Authority: 38 U.S.C. 6103(b); 6104(c); 6105(a))

(g) Until the estranged spouse of a veteran files claim for an apportioned share. If there are any children of the veteran not in his or her custody an apportionment will not be authorized unless and until a claim for an apportioned share is filed in their behalf.

[26 FR 7266, Aug. 11, 1961, as amended at 40 FR 21724, May 19, 1975; 44 FR 45940, Aug. 6, 1979]

§3.459 Death compensation.

(a) Death compensation will be apportioned if the child or children of the deceased veteran are not in the custody of the surviving spouse.

(b) The surviving spouse may not be paid less than $65 monthly plus the amount of an aid and attendance allowance where applicable.

[40 FR 21725, May 19, 1975, as amended at 44 FR 45940, Aug. 6, 1979]

§3.460 Death pension.

Death pension will be apportioned if the child or children of the deceased veteran are not in the custody of the surviving spouse. Where the surviving spouse's rate is in excess of $70 monthly because of having been the spouse of the veteran during service or because of need for regular aid and attendance, the additional amount will be added to the surviving spouse's share.

(a) *Civil, Indian and Spanish-American wars.* Where pension is payable under 38 U.S.C. 1532, 1534, or 1536 apportionment will be based on the facts in the individual case in accordance with §3.451.

(b) *Section 306 and old-law death pension.* Appointment of benefits provided under these pension programs will be at rates approved by the Under Secretary for Benefits except when the facts and circumstances in a case warrant special apportionment under §3.451.

(Authority: 38 U.S.C. 5307)

(c) *Improved death pension.* Apportionment of the benefits provided under this program shall be made under the special apportionment provision of §3.451.

(Authority: 38 U.S.C. 5307)

[41 FR 21324, May 25, 1976, as amended at 43 FR 14018, Apr. 4, 1978; 44 FR 45940, Aug. 6, 1979; 61 FR 20727, May 8, 1996]

§3.461 Dependency and indemnity compensation.

(a) *Conditions under which apportionment may be made.* The surviving spouse's award of dependency and indemnity compensation will be apportioned where there is a child or children under 18 years of age and not in the custody of the surviving spouse.

The surviving spouse's award of dependency and indemnity compensation will not be apportioned under this condition for a child over the age of 18 years.

(b) *Rates payable.* (1) The share for each of the chidren under 18 years of age, including those in the surviving spouse's custody as well as those who are not in such custody, will be at rates approved by the Under Secretary for Benefits except when the facts and circumstances in a case warrant special apportionment under § 3.451. The share for the surviving spouse will be the difference between the children's share and the total amount payable. In the application of this rule, however, the surviving spouse's share will not be reduced to an amount less than 50 percent of that to which the surviving spouse would otherwise be entitled.

(2) The additional amount of aid and attendance, where applicable, will be added to the surviving spouse's share and not otherwise included in the computation.

(3) Where the surviving spouse has elected to receive dependency and indemnity compensation instead of death compensation, the share of dependency and indemnity compensation for a child or children under 18 years of age will be whichever is the greater:

(i) The apportioned share computed under paragraph (b)(1) of this section; or

(ii) The share which would have been payable as death compensation but not in excess of the total dependency and indemnity compensation.

[43 FR 14018, Apr. 4, 1978, as amended at 61 FR 20727, May 8, 1996]

REDUCTIONS AND DISCONTINUANCES

§ 3.500 General.

The effective date of a rating which results in the reduction or discontinuance of an award will be in accordance with the facts found except as provided in § 3.105. The effective date of reduction or discontinuance of an award of pension, compensation, or dependency and indemnity compensation for a payee or dependent will be the earliest of the dates stated in these paragraphs unless otherwise provided. Where an award is reduced, the reduced rate will be effective the day following the date of discontinuance of the greater benefit.

(Authority: 38 U.S.C. 5112(b))

(a) *Except as otherwise provided* (*38 U.S.C. 5112*(*a*)). In accordance with the facts found.

(b) *Error; payee's or administrative* (*38 U.S.C. 5112*(*b*), (*9*), (*10*)). (1) Effective date of award or day preceding act, whichever is later, but not prior to the date entitlement ceased, on an erroneous award based on an act of commission or omission by a payee or with the payee's knowledge.

(2) Except as provided in paragraph (r) of this section, and § 3.501 (e) and (g), date of last payment on an erroneous award based solely on administrative error or error in judgment.

(c) *Annual income.* See § 3.660.

(d) *Apportionment* (§§*3.450 series; § 3.556*). (1) Except as otherwise provided, date of last payment when reason for apportionment no longer exists.

(2) Where pension was apportioned under § 3.551(c), day preceding date of veteran's release from hospital, unless overpayment would result; date of last payment if necessary to avoid overpayment.

(e) *Federal employees' compensation* (§*3.708*). The day preceding the date the award of benefits under the Federal Employees' Compensation Act became effective. If children on rolls and surviving spouse has primary title, award to children discontinued same date as surviving spouse's award.

(Authority: 5 U.S.C. 8116)

(f) *Contested claims* §*3.402*(*b*) *and* §*subpart F of part 20 of this chapter*). Date of last payment.

(g) *Death (38 U.S.C. 5112 (a), (b))*—(1) *Payee (includes apportionee).* Last day of month before death.

(2) *Dependent of payee (includes apportionee):*

(i) Death prior to October 1, 1982: last day of the calendar year in which death occurred.

(ii) Death on or after October 1, 1982: last day of the month in which death occurred, except that section 306 and old-law pension reductions or terminations will continue to be effective the last day of the calendar year in which death occurred.

(3) *Veteran receiving retirement pay.* Date of death.

(h) *Dependency of parent (38 U.S.C. 5112; Pub. L. 90–275; §§3.4(a), (b)(2), 3.250, 3.551(b) and 3.660*). See § 3.660.

(i) *Election of Department of Veterans Affairs benefits* (§*3.700 series*). Day preceding beginning date of award under other law.

(j) *Foreign residence* (*38 U.S.C. 5308*(*a*)). See § 3.653.

(k) *Fraud* (*38 U.S.C. 6103*(*a*), (*d*); §§*3.669 and 3.901*). Beginning date of award or day preceding date of fraudulent act, whichever is later.

(l) *Guardian, marriage or divorce of* (§*3.856*). Date of last payment (pending receipt of information as to change of name).

(m) *Incompetency* (§*3.855*). Date of last payment.

(n) *Marriage* (*or remarriage*) (*38 U.S.C. 101*(*3*), *5112* (*b*))—(1) *Payee* (*includes apportionee*). Last day of month before marriage.

(2) *Dependent of payee (includes apportionee):*

(i) Marriage prior to October 1, 1982: last day of the calendar year in which marriage occurred.

(ii) Marriage on or after October 1, 1982: last day of the month in which marriage occurred, except that section 306 and old-law pension reductions or terminations will continue to be effective the last day of the calendar year in which marriage occurred.

(3) *Conduct of surviving spouse.* Last day of month before inception of relationship.

(Authority: 38 U.S.C. 101(4), 501)

(o) *Penal institutions.* See § 3.666.

(p) *Philippines* (*38 U.S.C. 107*(*a*)(*3*); §*3.8*). Date of last payment when recognition of service withdrawn.

(q) *Renouncement* (§*3.106*). Last day of the month in which the renouncement is received.

(r) *Service connection* (*38 U.S.C. 5112*(*b*)(*6*); §*3.105*). Last day of month following 60 days after notice to payee. Applies to reduced evaluation, and severance of service connection.

(s) *Treasonable acts or subversive activities* (38 U.S.C. 6104 and 6105; §§ 3.902, 3.903). (1) *Treasonable acts.* Date of the forfeiture decision or date of last payment, whichever is earlier.

(2) *Subversive activities.* Beginning date of award or day preceding date of commission of subversive activities for which convicted, whichever is later.

(t) *Whereabouts unknown* (§§ 3.158, 3.656). Date of last payment.

(u) *Change in law or Department of Veterans Affairs issue, or interpretation.* See § 3.114.

(v) *Failure to furnish evidence of continued eligibility.* See § 3.652 (a) and (b).

(w) *Failure to furnish Social Security number.* Last day of the month during which the 60 day period following the date of VA request expires.

(x) *Radiation Exposure Compensation Act of 1990 (§3.715).* (Compensation or dependency and indemnity compensation only.) Last day of the month preceding the month in which payment under the Radiation Exposure Compensation Act of 1990 is issued.

(y) *Compensation for certain disabilities due to undiagnosed illnesses (§§3.105; 3.317).* Last day of the month in which the 60-day period following notice to the payee of the final rating action expires. This applies to both reduced evaluations and severance of service connection. (Authority: Pub. L. 103–446; 38 U.S.C. 501(a))

(Authority: 38 U.S.C. 8301)

[26 FR 1596, Feb. 24, 1961]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 3.500, see the List of Sections Affected in the Finding Aids section of this volume.

CROSS REFERENCE: Failure to return questionnaire. See § 3.661(b).

§ 3.501 Veterans.

The effective date of discontinuance of pension or compensation to or for a veteran will be the earliest of the dates stated in this section. Where an award is reduced, the reduced rate will be payable the day following the date of discontinuance of the greater benefit.

(a) *Active service pay* (*38 U.S.C. 5112*(*b*)(*3*); *Pub. L. 87–825;* §*3.700*(*a*)). Day preceding entrance on active duty. See § 3.654.

(b) *Aid and attendance*—(1) *Section 3.552*(*b*)(*1*). Last day of calendar month following month in which veteran is hospitalized at Department of Veterans Affairs expense.

(2) *Section 3.552*(*b*)(*2*). Last day of calendar month following month in which

veteran hospitalized at United States Government expense.

(3) *Aid and attendance for spouse.* End of month in which award action is taken if need for aid and attendance has ceased.

(c) *Disappearance of veteran.* See § 3.656.

(d) *Divorce or annulment (38 U.S.C. 5112(b)(2)):*

(1) Divorce or annulment prior to October 1, 1982: last day of the calendar year in which divorce or annulment occurred.

(2) Divorce or annulment on or after October 1, 1982: last day of the month in which divorce or annulment occurred, except that section 306 and old-law pension reductions or terminations will continue to be effective the last day of the calendar year in which divorce or annulment occurred.

(e) *Employability regained* (*38 U.S.C. 5112*(*b*) (*5*), (*6*)*; Pub. L. 87–825;* § *3.105*)—(1) *Pension.* Last day of month in which discontinuance is approved.

(2) *Compensation.* Last day of month following 60 days after notice to payee.

(f) *Employment questionnaire, failure to return.* Reduce award to the amount payable for the schedular evaluation shown in the current rating as of the day following the date of last payment.

(g) *Evaluation reduced* (*38 U.S.C. 5112*(*b*) (*5*), (*6*)*; Pub. L. 87–825;* § *3.105*)—(1) *Pension.* Last day of month in which reduction or discontinuance is approved.

(2) *Compensation.* Last day of month following 60 days after notice to payee.

(h) *Examination; failure to report.* See § 3.655.

(i) *Hospitalization.* (1) *Section 3.551(b).* Last day of the sixth calendar month following admission if veteran without dependents.

(2) *Section 3.551(c).* (i) Last day of the second calendar month following admission to domiciliary care if veteran without spouse or child or, though married, is receiving pension at the rate provided for a veteran without dependents. (ii) Last day of the third calendar month following admission for hospital or nursing home care if veteran without spouse or child or, though married, is receiving pension at the rate provided for a veteran without dependents. (iii) Upon readmission to hospital, domiciliary, or nursing home care within 6 months of a period for which pension was reduced under § 3.551(c)(1), the last day of the month of such readmission.

(3) *Section 3.552(b)* Upon readmission to hospital care within 6 months of a period of hospital care for which pension was affected by the provisions of § 3.552(b)(1) and (2) or § 3.552(k) and discharge or release was against medical advice or was the result of disciplinary action, the day preceding the date of such readmission.

(4) *Section 3.551(d)* (i) Last day of the second calendar month following admission to domiciliary care if veteran without spouse or child or, though married, is receiving pension at the rate for a veteran without dependents.

(ii) Last day of the third calendar month following admission for hospitalization or nursing home care if veteran without spouse or child or, though married, is receiving pension at the rate for a veteran without dependents.

(iii) Upon readmission to hospital, domiciliary, or nursing home care within 6 months of a period for which pension was reduced under § 3.551(d)(1) or (2), the last day of the month of such readmission.

(5) *Section 3.551(e)* (i) Last day of the third calendar month following admission to domiciliary or nursing home care if veteran without spouse or child or, though married, is receiving pension at the rate for a veteran without dependents. (ii) Upon readmission to domiciliary or nursing home care within 6 months of a period of domiciliary or nursing home care for which pension was reduced under § 3.551(e)(1), the last day of the month of such readmission.

(6) *Section 3.551(h).* (i) Last day of the calendar month in which Medicaid payments begin, last day of the month following 60 days after issuance of a prereduction notice required under § 3.103(b)(2), or the earliest date on which payment may be reduced without creating an overpayment, whichever date is later; or

(ii) If the veteran willfully conceals information necessary to make the reduction, the last day of the month in which that willful concealment occurred.

(Authority: 38 U.S.C. 5503)

(7) *Section 3.557.* Incompetent veteran, admitted for hospital, institutional or domiciliary care, without dependents, whose estate equals or exceeds $1,500: Last day of the month of admission or the last day of the month in which the veteran's estate equal or exceeds $1,500, whichever is later. If the veteran was hospitalized for observation and examination, the date treatment began will be considered the date of admission.

(Authority: 38 U.S.C. 5112(c))

(j) *Institutional award and/or to Personal Funds of Patients* (*§ 3.852*). Date of last payment, when veteran is discharged from hospital, fiduciary appointed, or veteran rated competent.

(k) *Lump-sum readjustment pay.* See § 3.700(a)(2).

(l) *Retirement pay* (*38 U.S.C. 5112*(*b*)(*3*)*; Pub. L. 87–825;* § *3.750*). Day before effective date of retirement pay.

(m) *Temporary increase* (*38 U.S.C. 5112*(*b*)(*8*)*;* § *4.29 of this chapter*). Last day of month in which hospitalization or treatment terminated, whichever is earlier, where temporary increase in compensation was authorized because of hospitalization for treatment.

(n) *Section 3.853. Incompetents; estate over $25,000.* Incompetent veteran receiving compensation, without spouse, child, or dependent parent, whose estate exceeds $25,000: Last day of the first month in which the veteran's estate exceeds $25,000, but not earlier than November 1, 1990.

(Authority: 38 U.S.C. 5505)

[26 FR 1596, Feb. 24, 1961, as amended at 27 FR 11889, Dec. 1, 1962; 29 FR 12368, Aug. 28, 1964; 29 FR 16329, Dec. 5, 1964; 35 FR 2828, Feb. 11, 1970; 37 FR 6679, Apr. 1, 1972; 38 FR 34115, Dec. 11, 1973; 41 FR 55874, Dec. 23, 1976; 44 FR 45941, Aug. 6, 1979; 48 FR 34473, July 29, 1983; 53 FR 23236, June 21, 1988; 56 FR 25045, June 3, 1991; 56 FR 65849, 65853, Dec. 19, 1991]

§ 3.502 Surviving spouses.

The effective date of discontinuance of pension, compensation, or dependency and indemnity compensation to or for a surviving spouse will be the earliest of the dates stated in this section. Where an award is reduced, the reduced rate will be payable the day following the date of discontinuance of the greater benefit.

(Authority: 38 U.S.C. 501)

(a) *Additional allowance of dependency and indemnity compensation for children (38 U.S.C. 5112(b) § 3.5(e)(3).* (1) If marriage occurred prior to October 1, 1982, the day preceding child's 18th birthday or last day of calendar year in which child's marriage occurred (see § 3.500(n) (2) and (3)), whichever is earlier.

(2) If marriage occurred on or after October 1, 1982, the day preceding child's 18th birthday or last day of the month in which marriage occurred (see § 3.500(n) (2) and (3)) whichever is earlier.

(b) *Pay grade; dependency and indemnity compensation* (*38 U.S.C. 1311*(*a*), 5112(*b*)(*10*)*; Pub. L. 91–96, 83 Stat. 144*). Date of last payment when rate is reduced because of new certification of pay grade.

(c) *Legal surviving spouse entitled.* Date of last payment on award to another person as surviving spouse. See § 3.657.

(Authority: 38 U.S.C. 501)

(d) *Marriage.* See § 3.500(n).

(e) *Aid and attendance* (*§ 3.351*(*a*)). (1) Date of last payment, if need for aid and attendance has ceased.

(2) If hospitalized at Department of Veterans Affairs expense as a veteran, the date specified in § 3.552(b) (1) or (3).

(f) *Medicaid-covered nursing home care (§ 3.551(i)).* (1) Last day of the calendar month in which Medicaid payments begin, last day of the month following 60 days after issuance of a prereduction notice required under § 3.103(b)(2), or the earliest date on which payment may be reduced without creating an overpayment, whichever date is later; or

(2) If the surviving spouse willfully conceals information necessary to make the reduction, the last day of the month in which that willful concealment occurred.

(Authority: 38 U.S.C. 5503)

[26 FR 1596, Feb. 24, 1961, as amended at 27 FR 11890, Dec. 1, 1962; 33 FR 2995, Feb. 15, 1968; 35 FR 2828, Feb. 11, 1970; 37 FR 6679, Apr. 1, 1972; 41 FR 55874, Dec. 23, 1976; 48 FR 34473, July 29, 1983; 53 FR 23237, June 21, 1988; 58 FR 32445, June 10, 1993]

§ 3.503 Children.

The effective date of discontinuance 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 the earliest of the dates stated in this section. Where an award is reduced, the reduced rate will be payable the day following the date of discontinuance of the greater benefit.

(Authority: 38 U.S.C. 501)

(a) *Age 18* (*or 23*) (*38 U.S.C. 5112*(*a*); *§3.57*). Day before 18th (or 23d birthday).

(b) *Enters service.* Date of last payment of apportioned disability benefits for child not in custody of estranged spouse. Full rate payable to veteran. No change where payments are being made for the child to the veteran, his (her) estranged spouse, his (her) surviving spouse, or to the fiduciary of a child not in the surviving spouse's custody.

(Authority: 38 U.S.C. 501)

(c) *Permanently incapable of selfsupport* (*38 U.S.C. 5112*(*a*), (*b*)(*6*); *Pub. L. 87–825;* §§*3.57, 3.950*)—(1) *Pension.* Date of last payment.

(2) *Compensation or dependency and indemnity compensation.* Last day of month following 60 days after notice to payee.

(d) *Marriage.* See §3.500(n).

(e) *School attendance.* See §3.667.

(f) *Stepchild no longer member of veteran's household* (§*3.57*). Last day child was a member of household.

(g) *Two parent cases* (§*3.703*). Day preceding beginning date of award based on service of the other parent.

(h) *Dependents' educational assistance* (§§*3.707, 3.807, and §21.3023 of this chapter*). Day preceding beginning date of educational assistance allowance.

(i) *Surviving spouse becomes entitled.* Date of last payment. See §3.657.

(Authority: 38 U.S.C. 501)

(j) *Interlocutory adoption decree or adoptive placement agreement.* Date child left custody of adopting parent during the interlocutory period or during adoptive placement agreement, or date of rescission of the decree or date of termination of the adoptive placement agreement, whichever first occurs.

[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]

§ 3.504 Parents; aid and attendance.

The effective date of discontinuance of an increased award because of the parent's need for aid and attendance will be the day of last payment if need for aid and attendance has ceased. If hospitalized at Department of Veterans Affairs expense as a veteran the date will be specified in §3.552(b) (1) or (3).

(Authority: Pub. L. 92–197, 85 Stat. 660)

[37 FR 6679, Apr. 1, 1972]

HOSPITALIZATION ADJUSTMENTS

§ 3.551 Reduction because of hospitalization.

(a) *General.* Pension is subject to reduction as specified below when a veteran who has neither spouse, child nor dependent parent is hospitalized, unless the veteran is hospitalized for Hansen's disease. The provisions of this section apply to initial periods of hospitalization and to readmissions following discharge from a prior period of hospitalization. If the veteran is hospitalized for observation and examination, the date treatment began is considered the date of admission. Special rules governing discontinuance of aid and attendance allowance are contained in §3.552 and for discontinuance of awards for incompetent veterans in §3.557. Except as otherwise indicated the terms ''hospitalized'' and ''hospitalization'' in §§3.551 through 3.559 mean:

(1) Hospital treatment in a Department of Veterans Affairs hospital or in any hospital at Department of Veterans Affairs expense.

(2) Institutional, domiciliary or nursing home care in a Department of Veterans Affairs institution or domiciliary or at Department of Veterans Affairs expense.

(b) *Old-law pension.* (1) Old law pension in excess of $30 monthly for a veteran who has neither spouse, child nor dependent parent shall continue at the full monthly rate until the end of the

sixth calendar month following the month of admission for hospitalization. The rate payable will be reduced effective the first of the seventh calendar month to $30 monthly or 50 percent of the amount otherwise payable, whichever is greater. The reduced rate will be effective the first day of the seventh calendar month following admission. Payment of the amount withheld may be made on termination of hospitalization, as provided in § 3.556. (Sec. 306(b))

(2) *Readmission following regular discharge.* Where a veteran has been given an approved discharge or release, readmission the next day to the same or any other VA institution begins a new period of hospitalization, unless the veteran was released for purposes of admission to another VA institution.

(3) *Readmission following irregular discharge.* When a veteran whose award is subject to reduction under this paragraph has been discharged or released from a VA institution against medical advice or as a result of disciplinary action, reentry within 6 months from the date of previous admission constitutes a continuation of that period of hospitalization and the award will not be reduced prior to the first day of the seventh calendar month following the month of original admission, exclusive of authorized absences. Reentry 6 months or more after such discharge or release shall be considered a new admission.

(c) *Section 306 pension.* (1) Where any veteran having neither spouse nor child, or any veteran who is married or has a child and is receiving pension as a veteran without dependents, is being furnished hospital, nursing home or domiciliary care by the Department of Veterans Affairs, no pension in excess of $50 monthly shall be paid to or for the veteran for any period after the end of the second full calendar month following the month of admission for such care.

(Authority: 38 U.S.C. 5503(a))

(2) No pension in excess of $50 monthly shall be paid to or for a veteran having neither spouse nor child, or to a veteran who is married or has a child and is receiving pension as a veteran without dependents, for any period after the month in which the veteran is readmitted within 6 months of a period of care for which pension was reduced under paragraph (c) (1) of this section.

(Authority: 38 U.S.C. 5503(a))

(3) Where section 306 pension is being paid to a married veteran at a rate for a veteran without dependents all or any part of the monthly amount of pension withheld in excess of $50 may be apportioned for a spouse as provided in § 3.454(b).

(d) *Improved pension prior to February 1, 1990.* (1) Where any veteran having neither spouse nor child, or any veteran who is married or has a child and is receiving pension as a veteran without dependents, is being furnished domiciliary care by VA, no pension in excess of $60 monthly shall be paid to or for the veteran for any period after the end of the second full calendar month following the month of admission for such care. (38 U.S.C. 5503(a))

(2) Where any veteran having neither spouse nor child, or any veteran who is married or has a child and is receiving pension as a veteran without dependents, is furnished hospital or nursing home care by VA, no pension in excess of $60 monthly shall be paid to or for the veteran for any period after the end of the third full calendar month following the month of admission for such care. (38 U.S.C. 5503(a))

(3) No pension in excess of $60 monthly shall be paid to or for a veteran having neither spouse nor child, or to a veteran who is married or has a child and is receiving pension as a veteran without dependents, for any period after the month in which the veteran is readmitted within 6 months of a period of care for which pension was reduced under paragraph (d)(1) or (2) of this section. (38 U.S.C. 5503(a))

(4) Where improved pension is being paid to a married veteran at the rate prescribed by 38 U.S.C. 1521(b) all or any part of the rate payable under 38 U.S.C. 1521(c) may be apportioned for a spouse as provided in § 3.454(b). (38 U.S.C. 5503(a))

(5) The provisions of paragraphs (d)(1), (2), and (3) of this section are not applicable to any veteran who has a child, but is receiving pension as a veteran without a dependent because it is reasonable that some part of the

child's estate be consumed for the child's maintenance under 38 U.S.C. 1522(b).

(6) For the purpose of paragraphs (d)(1), (2), and (3) of this section, if a veteran is furnished hospital or nursing home care by VA and then is transferred to VA-furnished domiciliary care, the period of hospital or nursing home care shall be considered as domiciliary care. Similarly, if a veteran is furnished domiciliary care by VA and then is transferred to VA-furnished hospital or nursing home care, the period of domiciliary care shall be considered hospital or nursing home care.

(e) *Improved pension after January 31, 1990.* (1) Where any veteran having neither spouse nor child, or any veteran who is married or has a child and is receiving pension as a veteran without dependents, is furnished domiciliary or nursing home care by VA, no pension in excess of $90 monthly shall be paid to or for the veteran for any period after the end of the third full calendar month following the month of admission for such care.

(Authority: 38 U.S.C. 5503(a))

(2) No pension in excess of $90 monthly shall be paid to a veteran having neither spouse nor child, or to a veteran who is married or has a child and is receiving pension as a veteran without dependents, for any period after the month in which the veteran is readmitted within six months of a period of domiciliary or nursing home care for which pension was reduced under paragraph (e)(1) of this section.

(3) Where improved pension is being paid to a married veteran at the rate prescribed by 38 U.S.C. 1521(b) all or any part of the rate payable under 38 U.S.C. 1521(c) may be apportioned for a spouse as provided in § 3.454(b).

(Authority: 38 U.S.C. 5503(a))

(4) For the purposes of paragraph (e)(1) of this section, if a veteran is furnished hospital care by VA and then is transferred to VA-furnished nursing home or domiciliary care, the period of hospital care shall not be considered as nursing home or domiciliary care. Transfers from VA-furnished nursing home or domiciliary care to VA-furnished hospital care then back to nursing home or domiciliary care shall be considered as continuous nursing home or domiciliary care provided the period of hospitalization does not exceed six months. Similarly, if a veteran is transferred from domiciliary or nursing home to a VA hospital and dies while so hospitalized, the entire period of VA care shall be considered as domiciliary or nursing home care. Nursing home or domiciliary care shall be considered as terminated effective the date of transfer to a VA hospital if the veteran is completely discharged from VA care following the period of hospitalization or if the period of hospitalization exceeds six months.

(5) Effective February 1, 1990, reductions of improved pension based on admissions or readmissions to VA hospitals or any hospital at VA expense shall no longer be made except when required under the provisions of 38 CFR 3.552.

(6) The provisions of paragraphs (e)(1) and (2) of this section are not applicable to any veteran who has a child, but is receiving pension as a veteran without a dependent because it is reasonable that some part of the child's estate be consumed for the child's maintenance under 38 U.S.C. 1522(b).

(f) *Computation of period.* For purposes of computing periods of hospitalization in paragraph (c) of this section, authorized absences of 96 hours or less will be included as periods of hospitalization, and those of over 96 hours excluded. Also, for purposes of that paragraph, periods of treatment or care of 60 total days will be considered two calendar months of hospitalization and periods of 90 total days considered three calendar months, exclusive of authorized absences in excess of 96 hours.

(g) *Proof of dependents.* The veteran will be considered to have neither spouse, child nor dependent parent in the absence of satisfactory proof. Statements contained in the claims folder concerning the existence of such dependents will be considered a prima facie showing. If the necessary evidence is not received: (1) Within 60 days after the date of request where the award is subject to reduction under paragraph (b) of this section, or (2) prior to the effective date of reduction under paragraph (c) of this section, the

veteran's award will be reduced on the basis of no dependents. The full rate may be authorized from the date of reduction if the necessary evidence is received within 1 year after the date of request.

(h) *Hospitalization.* (1) *General.* The reduction required by paragraphs (d) and (e), except as they refer to domiciliary care, shall not be made for up to three additional calendar months after the last day of the third month referred to in paragraphs (d)(2) or (e)(1) of this section, or after the last day of the month referred to in paragraphs (d)(3) or (e)(2) of this section, under the following conditions:

(i) The Chief Medical Director, or designee, certifies that the primary purpose for furnishing hospital or nursing home care during the additional period is to provide the veteran with a prescribed program of rehabilitation under chapter 17 of title 38, United States Code, designed to restore the veteran's ability to function within the veteran's family and community; and

(ii) The veteran is admitted to a Department of Veterans Affairs hospital or nursing home after October 16, 1981.

(2) *Continued hospitalization for rehabilitation.* The reduction required by paragraph (d) or (e) of this section shall not be made for periods after the expiration of the additional period provided by paragraph (h)(1) of this section under the following conditions:

(i) The veteran remains hospitalized or in a nursing home after the expiration of the additional period provided by paragraph (h)(1) of this section; and

(ii) The Chief Medical Director, or designee, certifies that the primary purpose for furnishing continued hospital or nursing home care after the additional period provided by paragraph (h)(1) of this section is to provide the veteran with a program of rehabilitation under chapter 17 of title 38, United States Code, designed to restore the veteran's ability to function within the veteran's family and community.

(3) *Termination of hospitalization for rehabilitation.* Pension in excess of $60 monthly or $90, if reduction is under paragraph (e)(1) payable to a veteran under this paragraph shall be reduced the end of the calendar month in which the primary purpose of hospitalization or nursing home care is no longer to provide the veteran with a program of rehabilitation under chapter 17 of title 38, United States Code designed to restore the veteran's ability to function within the veteran's family and community.

(Authority: 38 U.S.C. 5503(a))

(i) *Certain veterans and surviving spouses receiving Medicaid-covered nursing home care.* Effective November 5, 1990, and terminating on September 30, 1998, if a veteran having neither spouse nor child, or a surviving spouse having no child, is receiving Medicaid-covered nursing home care, no pension or death pension in excess of $90 per month shall be paid to or for the veteran or the surviving spouse for any period after the month in which the Medicaid payments begin. A veteran or surviving spouse is not liable for any pension paid in excess of the $90 per month by reason of the Secretary's inability or failure to reduce payments, unless that inability or failure is the result of willful concealment by the veteran or surviving spouse of information necessary to make that reduction.

(Authority: 38 U.S.C. 5503)

[27 FR 7677, Aug. 3, 1962, as amended at 27 FR 8793; Sept. 1, 1962; 37 FR 19133, Sept. 19, 1972; 39 FR 32988, Sept. 13, 1974; 40 FR 45169, Oct. 1, 1975; 41 FR 18412, May 4, 1976; 44 FR 45941, Aug. 6, 1979; 45 FR 35327, May 27, 1980; 46 FR 47541, Sept. 29, 1981; 47 FR 24551, June 7, 1982; 56 FR 25045, June 3, 1991; 56 FR 65849, 65850, Dec. 19, 1991; 57 FR 8578, March 11, 1992; 58 FR 32445, June 10, 1993; 59 FR 62584, Dec. 6, 1994]

CROSS REFERENCES: Time limits. See §3.109. Apportionment. See §3.400(e). Reductions and discontinuances; general. See §3.500. Incompetents; hospitalized. See §3.557. Incompetents; resumption. See §3.558.

§3.552 Adjustment of allowance for aid and attendance.

(a)(1) When a veteran who is already entitled to the aid and attendance allowance is hospitalized, the additional compensation or increased pension for aid and attendance shall be discontinued as provided in paragraph (b) of this section except as to disabilities specified in paragraph (a)(2) of this section. (See paragraph (k) of this section for rules applicable to a veteran who establishes entitlement to the aid and

attendance allowance on or after date of admission to hospitalization).

(2) The allowance for aid and attendance will be continued during hospitalization where the disability is paraplegia involving paralysis of both lower extremities together with loss of anal and bladder sphincter control, or Hansen's disease, except where discontinuance is required by paragraph (b)(2) of this section. In addition, in pension cases only, the aid and attendance allowance will be continued where the pensionable disability is blindness (visual acuity 5/200 or less) or concentric contraction of visual field to 5 degrees or less. Awards are, however, subject to the provisions of § 3.551 (except where the disabling condition is Hansen's disease) and § 3.557.

(3) Additional compensation for dependents under § 3.4(b)(2) is payable during hospitalization in addition to the rates authorized by this section. The rates specified will also be increased by amounts authorized under 38 U.S.C. 1114(k) based on independently ratable disability, subject to the statutory ceiling on the total amount of compensation payable as set forth in § 3.350(a).

(b)(1) Where a veteran is admitted for hospitalization on or after October 1, 1964, the additional compensation or increased pension for aid and attendance will be discontinued effective the last day of the month following the month in which the veteran is admitted for hospitalization at the expense of the Department of Veterans Affairs.

(2) When a veteran is hospitalized at the expense of the United States Government, the additional aid and attendance allowance authorized by 38 U.S.C. 1114(r) (1) or (2) will be discontinued effective the last day of the month following the month in which the veteran is admitted for hospitalization.

(3) Where a veteran affected by the provisions of paragraph (b) (1) and (2) or paragraph (k) of this section is discharged or released from the hospital against medical advice or as the result of disciplinary action, and is readmitted to such hospitalization within 6 months after that date, the allowance, additional compensation, or increased pension will be discontinued effective the day preceding the date of readmission. A readmission 6 months or more after such discharge or release will be considered as a new admission.

(Authority: 38 U.S.C. 5503(e))

(c) Reduction will not be made where the same monthly rate of compensation would be payable without consideration of need for regular aid and attendance. This can only be determined after careful review of the current maximum entitlement without regard to any amount for aid and attendance.

(d) Where entitlement by reason of need for regular aid and attendance is the basis of the monthly rate under 38 U.S.C. 1114(1) the award will be reduced to the rate payable under 38 U.S.C. 1114(s).

(e) Where a veteran is in receipt of section 306 pension, the aid and attendance allowance shall be reduced to the housebound rate of $61 monthly (or $76.25 if the veteran was age 78 or older on December 31, 1978). Where a veteran is in receipt of old-law pension, the total amount payable shall be reduced to $100 monthly. Where a veteran is in receipt of improved pension, the applicable aid and attendance rate shall be reduced to the otherwise applicable rate under 38 U.S.C. 1521(e). No reduction shall be made, however, for any case involving the disabilities specified in paragraph (a)(2) of this section.

(f) Where entitlement to the rate in 38 U.S.C. 1114(o) is based in part on need for regular aid and attendance reduction because of being hospitalized will be to the rate payable for the other conditions shown.

(g) Where a veteran entitled to one of the rates under 38 U.S.C. 1114 (l), (m), or (n) by reason of anatomical losses or losses of use of extremities, blindness (visual acuity 5/200 or less or light perception only), or anatomical loss of both eyes is being paid compensation at the rate under 38 U.S.C. 1114(o) because of entitlement to another rate under section 1114(l) on account of need for aid and attendance, the compensation will be reduced while hospitalized to the following:

(1) If entitlement is under section 1114(l) and in addition there is need for regular aid and attendance for another disability, the award during hospitalization will be at the rate under 38

U.S.C. 1114(m) since the disability requiring aid and attendance is 100 percent disabling.

(Authority: 38 U.S.C. 1114(p))

(2) If entitlement is under section 1114(m), at the rate under 38 U.S.C. 1114(n).

(3) If entitlement is under section 1114(n), the rate under 38 U.S.C. 1114(o) would be continued, since the disability previously causing the need for regular aid and attendance would then be totally disabling entitling the veteran to the maximum rate under 38 U.S.C. 1114(p).

(h) If, because of blindness, a veteran requires regular aid and attendance, but has better vision than ''light perception only'' the award under 38 U.S.C. 1114(m) will be reduced while hospitalized to the rate payable under 38 U.S.C. 1114(1).

(i) If the disability meets the aid and attendance requirements of 38 U.S.C. 1114(l) and the intermediate or next higher rate was assigned for disability independently ratable at 50 percent or 100 percent, the award based on such entitlement will be reduced because of hospitalization to the amount payable under 38 U.S.C. 1114(s).

(j) The section 306 pension aid and attendance allowance authorized by §3.252(f) is subject to reduction for hospitalization under the provisions of this section in the same manner as the regular section 306 pension aid and attendance allowance. The amount payable shall not be reduced to less than the housebound rate of $61 monthly (or $76.25 monthly if the veteran was age 78 or older on December 31, 1978).

(k)(1) This paragraph is applicable to hospitalized veterans who were not entitled to the aid and attendance allowance prior to hospital admission but who establish entitlement to it on or after the date of hospital admission.

(2) If the effective date of entitlement to the aid and attendance allowance is on or after the date of admission to hospitalization, the aid and attendance allowance shall not be paid until the date of discharge or release from hospitalization, unless the aid and attendance allowance is based on a disability specified in paragraph (a)(2) of this section. If the aid and attendance allowance is based on a disability specified in paragraph (a)(2) of this section, the aid and attendance allowance shall be paid during hospitalization.

(3) If the aid and attendance allowance is not payable to a veteran under paragraph (k)(2) of this section, the veteran shall receive the appropriate reduced rate under paragraphs (d) through (j) of this section while hospitalized.

[28 FR 1588, Feb. 20, 1963, as amended at 30 FR 14983, Dec. 3, 1965; 32 FR 13226, Sept. 19, 1967; 37 FR 19133, Sept. 19, 1972; 38 FR 34115, Dec. 11, 1973; 41 FR 55875, Dec. 23, 1976; 44 FR 22721, Apr. 17, 1979; 44 FR 45941, Aug. 6, 1979; 46 FR 31011, June 12, 1981; 46 FR 47541, Sept. 29, 1981]

§§3.553—3.555 [Reserved]

§3.556 Adjustment on discharge or release.

(a) *Temporary Absence—30 days.* (1) Where a competent veteran whose award was reduced under §3.551(b) is placed on non-bed care status or other authorized absence of 30 days or more the full monthly rate, excluding any allowance for regular aid and attendance, will be restored effective the date of reduction. The full monthly rate for an incompetent veteran, or for a competent veteran whose pension was reduced under §3.551(c), will be restored effective the date of departure from the hospital unless it is determined that apportionment for a spouse should be continued. In all instances, any allowance for regular aid and attendance will be restored effective the date of departure from the hospital.

(2) Upon the veteran's return to the hospital, an award which is subject to reduction under §3.551 (b) or (c) will again be reduced effective the date of the veteran's return to the hospital. In all instances, any allowance for regular aid and attendance will be discontinued, if in order, effective the date of the veteran's return to the hospital.

(b) *Temporary absence—less than 30 days.* A temporary absence of less than 30 days, including the day of departure, will not require adjustment of the award. This applies to any approved absence. Any allowance for regular aid and attendance for such periods will be authorized after the veteran has been discharged from the hospital.

(c) *Adjustment based on need.* Where an award of pension was reduced under § 3.551(c), the full rate covering absences of less than 30 days may be restored, subject to prior payments, prior to discharge from hospitalization at the request of the Director of the hospital, center or domiciliary, where this action is necessary to meet the veteran's financial needs, if the veteran has been hospitalized for more than 6 months and the periods of absence exceed a total of 30 days.

(d) *Irregular discharge.* When a competent veteran is given an irregular discharge, the full rate will be restored effective the date of release from the hospital. Payment of any amount withheld under § 3.551(b) will not be authorized until the expiration of 6 months after termination of hospitalization unless the prior release is changed to a regular release. However, amounts not paid under paragraph (c) of this section covering absence of less than 30 days where the award was reduced under § 3.551(c) will be authorized immediately.

(e) *Regular discharge.* When a veteran, either competent or incompetent, is given a regular discharge or release, the full rate, including any allowance for regular aid and attendance will be restored effective the date of release from the hospital, subject to prior payments. The award will be based on the most recent rating and, where the award was reduced under § 3.551(b), will include, in the case of a competent veteran, any amounts withheld because of hospitalization. The amount withheld for an incompetent veteran will not be authorized until the expiration of 6 months following a rating of competency by VA. Any institutional award will be discontinued effective date of last payment, as provided in § 3.501(j). Where an apportionment made under § 3.551(c) is not continued, the apportionment will be discontinued effective the day preceding the date of the veteran's release from the hospital, or, if adjusted, effective the date of the veteran's release from the hospital, unless an overpayment would result. In the excepted cases, the awards to the veteran and apportionee will be adjusted as of date of last payment.

(Authority: 38 U.S.C. 5503)

(f) *Types of discharges.* A discharge is considered regular if it is granted because of having received maximum hospital benefits. A discharge for disciplinary reasons or because of the patient's refusal to accept, neglect of or obstruction of treatment; refusal to accept transfer, or failure to return from authorized absence, is considered irregular.

[27 FR 7678, Aug. 3, 1962, as amended at 27 FR 8794, Sept. 1, 1962; 38 FR 34115, Dec. 11, 1973; 39 FR 34532, Sept. 26, 1974; 40 FR 45169, Oct. 1, 1975; 44 FR 22721, Apr. 17, 1979; 44 FR 45942, Aug. 6, 1979; 50 FR 50616, Dec. 11, 1985]

§ 3.557 Incompetents; estate over $1,500 and institutionalized.

(a) Where a veteran having neither spouse, child, nor dependent, is being hospitalized by VA and is rated incompetent by VA, the pension of such veteran will be subject to reductions as provided in § 3.551.

(Authority: 38 U.S.C. 5503)

(b) Effective December 1, 1959, where a veteran;

(1) Is rated incompetent by VA, and

(2) Has neither spouse nor child, and

(3) Is hospitalized, institutionalized or domiciled by the United States or any political subdivision, with or without charge, and

(4) Has an estate, derived from any source, which equals or exceeds $1,500, further payments of pension, compensation or emergency officer's retirement pay will not be made, except as provided in paragraph (d) of this section, until the estate is reduced to $500. If the veteran is hospitalized for observation and examination, the date treatment began is considered the date of admission.

(Authority: 38 U.S.C. 5503)

(c) For veterans subject to paragraph (b) of this section, the value of the veteran's estate shall be computed under the provisions of § 13.109 of this title.

(Authority: 38 U.S.C. 501)

(d) Payment of pension, compensation or emergency officers' retirement pay to a veteran subject to the provisions of paragraph (b) of this section will be discontinued the last day of the month of admission or the last day of

the month in which the veteran's estate equals or exceeds $1,500, whichever is later. All or any part of the benefit not paid to the veteran may be apportioned for his or her dependent parents on the basis of need as determined by the Veterans Services Officer. If the veteran is not hospitalized by the Department of Veterans Affairs there may be paid out of any remaining amounts so much of the pension, compensation or emergency officers' retirement pay as equals the amount charged the veteran for his or her current care and maintenance in the institution in which the treatment or care is furnished, but not more than the amount determined to be the proper charge.

(Authority: 38 U.S.C. 5503)

(e)(1) When the discontinuance of payments under this section results or would result in financial hardship for the veteran, discontinuance may be waived to avoid or reduce such hardship. Waiver of discontinuance under this paragraph may be granted more than once in any calendar year but may not exceed a total of 60 days in any calendar year.

(2) The veteran, or any person or organization acting on the veteran's behalf, is authorized to request such waiver.

(3) For purposes of this paragraph, financial hardship shall be held to exist for any month in which a veteran's liabilities during that month exceed the sum of the veteran's income and liquid assets during that month.

(4) Waivers under this paragraph are not to be granted as an administrative expediency or where liquid assets are readily available to meet current expenses.

(Authority: 38 U.S.C. 5503)

[26 FR 1598, Feb. 24, 1961, as amended at 27 FR 7678, Aug. 3, 1962; 36 FR 25225, Dec. 30, 1971; 40 FR 45170, Oct. 1, 1975; 45 FR 64910, Oct. 1, 1980; 50 FR 50616, Dec. 11, 1985; 53 FR 23237, June 21, 1988]

CROSS REFERENCES: Veterans disability pension. See §3.454(c). Reductions and discontinuances; general. See §3.500. Reductions and discontinuances; veterans. See §3.501. Amounts withheld or not paid incompetent veteran. See §3.1007. Estate $1,500. See §13.108 of this chapter. Determination of value of estate. See §13.109 of this chapter.

§3.558 Resumption and payment of withheld benefits; incompetents $1,500 estate cases.

(a) Where payment has been discontinued by reason of §3.557(b), it will not be resumed during hospitalization except as provided in §3.557(e) or paragraph (b) of this section until proper notice has been received showing the estate is reduced to $500 or less. Payments will not be made for any period prior to the date of which the estate was reduced to $500 or less.

(Authority: 38 U.S.C. 5503)

(b) Payments for the veteran will be resumed and apportionment awards discontinued under the applicable provisions of §3.556(a), (d), and (e) upon authorized absence from the hospital for 30 days or more or a regular or irregular discharge or release. Care and maintenance payments to an institution will not be made for any period the veteran is not receiving such care and maintenance.

(c) Any amount not paid because of the provisions of §3.557(b), and any amount of compensation or retirement pay withheld pursuant to the provisions of §3.551(b) (and/or predecessor regulatory provisions) as it was constituted prior to August 1, 1972, and not previously paid because of the provisions of §3.557(b), will be awarded to the veteran if he or she is subsequently rated competent by VA for a period of not less than six months.

(Authority: 38 U.S.C. 5503)

[27 FR 7679, Aug. 3, 1962, as amended at 36 FR 25225, Dec. 30, 1971; 38 FR 34116, Dec. 11, 1973; 40 FR 45170, Oct. 1, 1975; 41 FR 18412, May 4, 1976; 50 FR 50617, Dec. 11, 1985; 58 FR 34224, June 24, 1993]

§3.559 Resumption—$1,500 cases where estate includes chose in action.

(a) Where payments have been discontinued because of hospitalization and there exists only a claim against a defunct bank, or other institution, or the entire estate is the subject of litigation, or consists of investments of undetermined value, and there is no income to provide for clothing and other needs, and comforts for the veteran, the Veterans Services Officer may consider the guardian's statement setting

forth the facts and estimating what the said claim or chose in action would sell for in the open market. If the Veterans Services Officer is satisfied that the value of the estate does not exceed $500, he or she will prepare a certificate to that effect. Upon receipt of this certification by the adjudication division, payments will if otherwise in order be authorized effective the first day of the month in which award action is taken.

(b) When the claim is settled or litigation terminated the Veterans Services Officer will again review the case and, if the estate is then $1,500 or more, will forward an appropriate certification to the adjudication division.

(c) Special cases which do not come within this section or where money is urgently needed should be reported to the Office of the Under Secretary for Benefits.

[26 FR 1598, Feb. 24, 1961, as amended at 40 FR 14570, Oct. 1, 1975; 50 FR 50617, Dec. 11, 1985; 61 FR 20727, May 8, 1996]

ADJUSTMENTS AND RESUMPTIONS

§ 3.650 Rate for additional dependent.

(a) *Running awards.* Except as provided in paragraph (c) of this section where a claim is filed by an additional dependent who has apparent entitlement which, if established, would require reduction of pension, compensation or dependency and indemnity compensation being paid to another dependent, payments to the person or persons on the rolls will be reduced as follows:

(1) Where benefits would be payable from a date prior to the date of filing claim, the reduction will be effective from the date of potential entitlement of the additional dependent.

(2) Where benefits would be payable from the date of filing claim, the reduction will be effective the date of receipt of the claim by the additional dependent, or date of last payment, whichever is later.

If entitlement of the additional dependent is not established, benefits previously being paid will be resumed, if otherwise in order, commencing the day following the effective date of reduction.

(b) *New awards.* If the additional dependent is found to be entitled, the full rate payable will be authorized effective the date of entitlement.

(c) *Retroactive DIC award to a school child*—(1) *General.* If DIC (dependency and indemnity compensation) is being currently paid to a veteran's child or children under 38 U.S.C. 1313(a), and DIC is retroactively awarded to an additional child of the veteran based on school attendance, the full rate payable to the additional child shall be awarded the first of the month following the month in which the award to the additional child is approved. The rate payable under the current award shall be reduced effective the date the full rate is awarded to the additional child. The rate payable to the additional child for periods prior to the date the full rate is awarded shall be the difference between the rate payable for all the children and the rate that was payable before the additional child established entitlement.

(2) *Applicability.* The provisions of paragraph (c)(1) of this section are applicable only when the following conditions are met:

(i) The additional child was receiving DIC under 38 U.S.C. 1313(a) prior to attaining age 18; and

(ii) DIC for the additional child was discontinued on or after attainment of age 18; and

(iii) After DIC has been discontinued, the additional child reestablishes entitlement to DIC under 38 U.S.C. 1313(a) based on attendance at an approved school and the effective date of entitlement is prior to the date the Department of Veterans Affairs receives the additional child's claim to reestablish entitlement.

(Authority: 38 U.S.C. 1313(b))

(3) *Effective date.* This paragraph is applicable to DIC paid after September 30, 1981. If DIC is retroactively awarded for a period prior to October 1, 1981, payment for the period prior to October 1, 1981 shall be made under paragraph (a) of this section and payment for the period after September 30, 1981, shall be made under this paragraph.

[29 FR 9564, July 15, 1964, as amended at 47 FR 24551, June 7, 1982]

§ 3.651 Change in status of dependents.

Except as otherwise provided:

(a) A payee who becomes entitled to pension, compensation, or dependency and indemnity compensation or to a greater rate because payment of that benefit to another payee has been reduced or discontinued will be awarded the benefit or increased benefit without the filing of a new claim.

(b) The commencement or adjustment will be effective the day following the reduction or discontinuance of the award to the other payee if the necessary evidence is received in the Department of Veterans Affairs within 1 year from the date of request therefor; otherwise from the date of receipt of a new claim.

(c) The rate for the persons entitled will be the rate that would have been payable if they had been the only original persons entitled.

[26 FR 1598, Feb. 24, 1961, as amended 27 FR 11890, Dec. 1, 1962; 30 FR 133, Jan. 7, 1965]

§3.652 Periodic certification of continued eligibility.

Except as otherwise provided:

(a) Individuals to whom benefits are being paid are required to certify, when requested, that any or all of the eligibility factors which established entitlement to the benefit being paid continue to exist. The beneficiary will be advised at the time of the request that the certification must be furnished within 60 days from the date of the request therefor and that failure to do so will result in the reduction or termination of benefits.

(1) If the certification is not received within 60 days from the date of the request, the eligibility factor(s) for which certification was requested will be considered to have ceased to exist as of the end of the month in which it was last shown by the evidence of record to have existed. For purposes of this paragraph, the effective date of reduction or termination of benefits will be in accordance with §§3.500 through 3.504 as in effect on the date the eligibility factor(s) is considered to have ceased to exist. The claimant will be advised of the proposed reduction or termination of benefits and the date the proposed action will be effective. An additional 60 days from the date of notice of the proposed action will be provided for the claimant to respond.

(2) If the certification is not received within the additional 60 day period, the proposed reduction or termination of benefits will be put into effect.

(b) When the required certification is received, benefits will be adjusted, if necessary, in accordance with the facts found.

(Authority: 38 U.S.C. 501)

[52 FR 43063, Nov. 9, 1987]

CROSS REFERENCES: Employment Questionnaire, failure to return. See §3.501(f). Income and Net Worth Questionnaires. See §3.661.

§3.653 Foreign residence.

(a) *General.* Pension, compensation, or dependency and indemnity compensation is not payable to an alien who is located in the territory of or under the control of an enemy of the United States or of its allies. The benefit may, however, be paid to the dependents of such alien, but not in excess of the amount which would be payable to the dependent if the alien were dead.

(Authority: 38 U.S.C. 5308)

(b) *Retroactive payments.* Any amount not paid to an alien under this section, together with any amounts placed to the alien's credit in the special deposit account in the Treasury or covered into the Treasury as miscellaneous receipts under 31 U.S.C. 123–128 will be paid to him or her on the filing of a new claim. Such claim should be supported with evidence that the alien has not been guilty of mutiny, treason, sabotage or rendering assistance to an enemy, as provided in §3.902(a).

(Authority: 38 U.S.C. 5309)

(c) *Treasury Department list.* This paragraph is applicable to claims for benefits for aliens residing in countries identified on the list established by the Secretary of the Treasury as countries to which checks could not be delivered with reasonable assurance that the payee would actually receive and be able to negotiate a check for full value.

(1) *Evidence requests.* Requests for evidence to establish either basic or continued entitlement will not be made where such evidence would be obtained

from a country on the Treasury Department list unless the claimant requests that checks be sent to him or her in care of a U.S. Foreign Service post in a country which is not on the list.

(2) *Awards.* Payments for a claimant residing in a country included in the Treasury Department list will not be authorized unless the claimant requests that checks be sent to him or her in care of a U.S. Foreign Service post in a country which is not on the list.

(3) *Retroactive payments.* Where award action is authorized under paragraph (c)(2) of this section, or a new claim has been filed after a country has been removed from the Treasury Department list, all benefits to which the payee is otherwise entitled will be paid as provided in paragraph (b) of this section. There is no time limit for filing claim.

(d) *Germany and Japan.* Where payments were discontinued before July 1, 1954, because the payee was a citizen or subject of Germany or Japan, no payments will be made for any period prior to the date of filing a new claim.

(Authority: 38 U.S.C. 5309(b))

[26 FR 1599, Feb. 24, 1961, as amended at 31 FR 13172, Oct. 12, 1966; 47 FR 24551, June 7, 1982]

§ 3.654 Active service pay.

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

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

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

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

[27 FR 11890, Dec. 1, 1962]

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

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

(b) *Original or reopened claim, or claim for increase.* When a claimant fails to report for an examination scheduled in conjunction with an original compensation claim, the claim shall be

rated based on the evidence of record. When the examination was scheduled in conjunction with any other original claim, a reopened claim for a benefit which was previously disallowed, or a claim for increase, the claim shall be denied.

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

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

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

(4) If within 30 days of a pretermination notice issued under paragraph (c)(1) of this section the claimant requests a hearing, action to adjust payment shall be deferred as set forth in § 3.105(h)(1) of this part. If a hearing is requested more than 30 days after such pretermination notice but before the proposed date of discontinuance or reduction, a hearing shall be scheduled, but payment shall nevertheless be discontinued or reduced as of the date proposed in the pretermination notice or date of last payment, whichever is later, unless information is presented which warrants a different determination. When the claimant has also expressed willingness to report for an examination, however, the provisions of paragraph (c)(3) of this section shall apply.

Cross references:

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

(Authority: 38 U.S.C. 501)

[55 FR 49521, Nov. 29, 1990; 58 FR 46865, Sept. 3, 1993]

§ 3.656 Disappearance of veteran.

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

(1) Dependency and indemnity compensation.

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

(b) Where a veteran's whereabouts become known to the Department of Veterans Affairs after an award to dependents has been made as provided in

this section, the award to the dependents will be discontinued effective date of last payment, and appropriate action will be taken to adjust the veteran's award in accordance with the facts found.

(Authority: 38 U.S.C. 1158)

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

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

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

(2) The amount of pension payable to the veteran at the time of disappearance.

(Authority: 38 U.S.C. 1507)

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

§ 3.657 Surviving spouse becomes entitled, or entitlement terminates.

Where a surviving spouse establishes entitlement to pension, compensation, or dependency and indemnity compensation, an award to another person as surviving spouse, or for a child or children as if there were no surviving spouse will be discontinued or adjusted as provided in this section.

(a) *Surviving spouse's awards.* For periods on or after December 1, 1962, where a legal surviving spouse establishes entitlement after payments have been made to another person as surviving spouse, the full rate payable to the legal surviving spouse will be authorized effective the date of entitlement. Payments to the former payee will be discontinued as follows:

(1) Where benefits are payable to the legal surviving spouse from a date prior to the date of filing claim, the award to the former payee will be terminated the day preceding the effective date of the award to the legal surviving spouse.

(2) Where benefits are payable to the legal surviving spouse from the date of filing claim, the award to the former payee will be terminated effective the date of receipt of the claim or date of last payment, whichever is later.

(b) *Children's awards.* (1) Where a surviving spouse establishes entitlement and:

(i) Payments were being made for a child or children at a lower monthly rate than that provided where there is a surviving spouse, the award to the surviving spouse will be effective the date provided by the applicable law, and will be the difference between the rate paid for the children and the rate payable for the surviving spouse and children. The full rate will be payable for the surviving spouse effective the day following the date of last payment for the children;

(ii) Payments were being made for a child or children at the same or higher monthly rate than that provided where there is a surviving spouse, the award to the surviving spouse will be effective the day following the date of last payment on the awards on behalf of the children.

(2) Where a surviving spouse has received benefits after entitlement was terminated and,

(i) The child or children were entitled to a lower monthly rate, the award to the surviving spouse will be amended to authorize payment at the rate provided for the children as if there were no surviving spouse, covering the period from the date the surviving spouse's entitlement terminated to the date of last payment. The award for

the child or children will be made effective the following day.

(ii) The child or children were entitled to a higher monthly rate, the award to the surviving spouse will be discontinued effective date of last payment. The award to the children will be effective the day following the date the surviving spouse's entitlement terminated and will be the difference between the rate payable for the children and the rate paid on the surviving spouse's award. The full rate will be payable for the children effective the day following the date of last payment to the surviving spouse.

[39 FR 20204, June 7, 1974, as amended at 44 FR 45942, Aug. 6, 1979]

§3.658 Offsets; dependency and indemnity compensation.

(a) When an award of dependency and indemnity compensation is made covering a period for which death compensation or benefits under the Federal Employee's Compensation Act, based on military service, have been paid to the same payee based on the same death, the award of dependency and indemnity compensation will be made subject to an offset of payments of death compensation or benefits under the Federal Employees' Compensation Act over the same period.

(b) When an award of dependency and indemnity compensation is made covering a period for which death benefits have been paid to the same payee based on the death of another spouse the award will be made subject to an offset of payments of death pension or compensation, or dependency and indemnity compensation over the same period in the case of the other spouse.

(Authority: 38 U.S.C. 103(d)(2), 5304(b)(3))

[41 FR 17387, Apr. 26, 1976]

§3.659 Two parents in same parental line.

The provisions of this section are applicable for periods commencing on or after January 1, 1957 in cases involving payments of death compensation or dependency and indemnity compensation, and in addition, for periods commencing on or after June 9, 1960, in cases involving payments of death pension based on death on or after that date.

(a) If death pension, compensation or dependency and indemnity compensation is payable based on the service of one parent, an award of such benefits to or on account of a child will be made subject to any payments of these benefits made to or on account of that child over the same period of time based on the service of another parent in the same parental line.

(b) Any reduction or discontinuance of an award to the child or to a surviving spouse will be effective the day preceding the commencing date of death pension, compensation, or dependency and indemnity compensation or, under the circumstances described in §3.707, the commencing date of dependents' educational assistance under 38 U.S.C. ch. 35, to or on account of the child based on the service of another parent in the same parental line. Any increase to a surviving spouse or another child will be effective the commencing date of the award to the child.

[27 FR 4917, May 25, 1962, as amended at 29 FR 9564, July 15, 1964; 41 FR 17387, Apr. 26, 1976]

CROSS REFERENCE: Two-parent cases. See §3.503(g). Two parents in same parental line. See §3.703.

§3.660 Dependency, income and estate.

(a) *Reduction or discontinuance*—(1) *General.* A veteran, surviving spouse or child who is receiving pension, or a parent who is receiving compensation or dependency and indemnity compensation must notify the Department of Veterans Affairs of any material change or expected change in his or her income or other circumstances which would affect his or her entitlement to receive, or the rate of, the benefit being paid. Such notice must be furnished when the recipient acquires knowledge that he or she will begin to receive additional income or when his or her marital or dependency status changes. In pension claims subject to §3.252(b) or §3.274 and in compensation claims subject to §3.250(a)(2), notice must be furnished of any material increase in corpus of the estate or net worth.

(2) *Effective dates.* Where reduction or discontinuance of a running award of section 306 pension or old-law pension

is required because dependency of another person ceased due to marriage, annulment, divorce or death, or because of an increase in income, which increase could not reasonably have been anticipated based on the amount actually received from that source the year before, the reduction or discontinuance shall be made effective the end of the year in which the increase occurred. Where reduction or discontinuance of a running award of improved pension or dependency and indemnity compensation is required because of an increase in income, the reduction or discontinuance shall be made effective the end of the month in which the increase occurred. Where reduction or discontinuance of a running award of any benefit is required because of an increase in net worth or corpus of estate, because dependency of a parent ceased, or because dependency of another person ceased prior to October 1, 1982, due to marriage, annulment, divorce, or death, the award shall be reduced or discontinued effective the last day of the calendar year in which the increase occurred or dependency ceased. Except as noted in this subparagraph for section 306 or old-law pension, where the dependency of another person ceased on or after October 1, 1982, due to marriage, annulment, divorce or death, the reduction or discontinuance shall be effective the last day of the month in which dependency ceased.

(Authority: 38 U.S.C. 5112(b))

(3) *Overpayments.* Overpayments created by retroactive discontinuance of benefits will be subject to recovery if not waived. Where dependency and indemnity compensation was being paid to two parents living together, an overpayment will be established on the award to each parent.

(b) *Award or increase; income.* Where pension or dependency and indemnity compensation was not paid for a particular 12–month annualization period because the claim was disallowed, an award was deferred under § 3.260(b) or § 3.271(f), payments were discontinued or made at a lower rate based on anticipated or actual income, benefits otherwise payable may be authorized commencing the first of a 12–month annualization period as provided in this paragraph. In all other cases, benefits may not be authorized for any period prior to the date of receipt of a new claim.

(1) *Anticipated income.* Where payments were not made or were made at a lower rate because of anticipated income, pension or dependency and indemnity compensation may be awarded or increased in accordance with the facts found but not earlier than the beginning of the appropriate 12–month annualization period if satisfactory evidence is received within the same or the next calendar year.

(Authority: 38 U.S.C. 5110(h))

(2) *Actual income.* Where the claimant's actual income did not permit payment, or payment was made at a lower rate, for a given 12–month annualization period, pension or dependency and indemnity compensation may be awarded or increased, effective the beginning of the next 12–month annualization period, if satisfactory evidence is received within that period.

(c) *Increases; change in status.* Where there is change in the payee's marital status or status of dependents which would permit payment at a higher rate and the change in status is by reason of the claimant's marriage or birth or adoption of a child, the effective date of the increase will be the date of the event if the required evidence is received within 1 year of the event. Where there is a change in dependency status for any reason other than marriage, or the birth or adoption of a child, which would permit payment at a higher rate, the increased rate will be effective the date of receipt of notice constituting an informal claim if the required evidence is received within 1 year of Department of Veterans Affairs request. The rate payable for each period will be determined, as provided in §§ 3.260(f) or 3.273(c). (See § 3.651 as to increase due to termination of payments to another payee. Also see § 3.667 as to increase based on school attendance.)

(d) *Corpus of estate; net worth.* Where a claim has been finally disallowed or terminated because of the corpus of estate and net worth provisions of §§ 3.263 or 3.274 and entitlement is established on the basis of a reduction in estate or

net worth, or a change in circumstances such as health, acquisition of a dependent, or increased rate of depletion of the estate, benefits or increased benefits will not be paid for any period prior to the date of receipt of a new claim.

[30 FR 3354, Mar. 12, 1965, as amended at 44 FR 45942, Aug. 6, 1979; 48 FR 34473, July 29, 1983; 57 FR 59300, Dec. 15, 1992]

§3.661 Eligibility Verification Reports.

(a) *Determination and entitlement.* (1) Where the report shows a change in income, net worth, marital status, status of dependents or change in circumstances affecting the application of the net worth provisions, the award will be adjusted in accordance with §3.660(a)(2).

(2) Where there is doubt as to the extent of anticipated income payment of pension or dependency and indemnity compensation will be authorized at the lowest appropriate rate or will be withheld, as provided in §3.260(b) or §3.271 (f).

(b) *Failure to return report*—(1) *Section 306 and old-law pension*—(i) *Discontinuance.* Discontinuance of old-law or section 306 pension shall be effective the last day of the calendar year for which income (and net worth in a section 306 pension case) was to be reported.

(ii) *Resumption of benefits.* Payment of old-law or section 306 pension may be resumed, if otherwise in order, from the date of last payment if evidence of entitlement is received within the calendar year following the calendar year for which income (and net worth in a section 306 pension case) was to be reported; otherwise pension may not be paid for any period prior to the date of receipt of a new claim.

(2) *Improved pension and dependency and indemnity compensation*—(i) *Discontinuance.* Discontinuance of dependency and indemnity compensation (DIC) or improved pension shall be effective the first day of the 12–month annualization period for which income (and net worth in an improved pension case) was to be reported or the effective date of the award, whichever is the later date.

(ii) *Adjustment of overpayment.* If evidence of entitlement to improved pension or DIC for any period for which payment of improved pension or DIC was discontinued for failure to file an Eligibility Verification Report is received at any time, payment of improved pension or DIC shall be awarded for the period of entitlement for which benefits were discontinued for failure to file an Eligibility Verification Report.

(iii) *Resumption of benefits.* Payment of improved pension and DIC may be resumed, if otherwise in order, from the date of last payment if evidence of entitlement is received within the 12–month annualization period following the 12–month annualization period for which income (and net worth in an improved pension case) was to be reported; otherwise pension or DIC may not be paid for any period prior to receipt of a new claim.

(Authority: 38 U.S.C. 501)

[30 FR 3355, Mar. 12, 1965, as amended at 44 FR 45942, Aug. 6, 1979; 46 FR 55098, Nov. 6, 1981; 57 FR 59300, Dec. 15, 1992]

§§3.662—3.664 [Reserved]

§3.665 Penal institutions—compensation.

(a) *General.* Any person specified in paragraph (c) of this section who is incarcerated in a Federal, State or local penal institution in excess of 60 days for conviction of a felony shall not be paid compensation or dependency and indemnity compensation (DIC) in excess of the amount specified in paragraph (d) of this section beginning on the 61st day of incarceration. A person whose benefits are subject to this reduction shall be informed of the rights of the person's dependents to an apportionment while the person is incarcerated, and the conditions under which payments to the person may be resumed upon release from incarceration. In addition, the person's dependents shall also be notified of their right to an apportionment if the Department of Veterans Affairs is aware of their existence and can obtain their addresses.

(b) *Definitions.* For the purposes of this section the term *compensation* includes disability compensation under 38 U.S.C. 1151. The term *dependency and indemnity compensation* (DIC) includes death compensation payable under 38 U.S.C. 1121 or 1141, death compensation

and DIC payable under 38 U.S.C. 1151, and any benefit payable under chapter 13 of title 38, United States Code. The term *release from incarceration* includes participation in a work release or halfway house program, parole, and completion of sentence. For purposes of this section, a felony is any offense punishable by death or imprisonment for a term exceeding 1 year, unless specifically categorized as a misdemeanor under the law of the prosecuting jurisdiction.

(c) *Applicability.* The provisions of paragraph (a) of this section are applicable to the following persons:

(1) A person serving a period of incarceration for conviction of a felony committed after October 7, 1980.

(2) A person serving a period of incarceration after September 30, 1980 (regardless of when the felony was committed) when the following conditions are met:

(i) The person was incarcerated on October 1, 1980; and

(ii) An award of compensation or DIC is approved after September 30, 1980.

(d) *Amount payable during incarceration*—(1) *Veteran rated 20 percent or more.* A veteran to whom the provisions of paragraphs (a) and (c) of this section apply with a service-connected disability evaluation of 20 percent or more shall receive the rate of compensation payable under 38 U.S.C. 1114(a).

(2) *Veteran rated less than 20 percent.* A veteran to whom the provisions of paragraphs (a) and (c) of this section apply with a service-connected disability evaluation of less than 20 percent (even though the rate for 38 U.S.C. 1114 (k) or (q) is paid) shall receive one-half the rate of compensation payable under 38 U.S.C. 1114(a).

(3) *Surviving spouse, parent or child.* A surviving spouse, parent, or child, beneficiary to whom the provisions of paragraphs (a) and (c) of this section apply shall receive one-half the rate of compensation payable under 38 U.S.C. 1114(a).

(e) *Apportionment*—(1) *Compensation.* All or part of the compensation not paid to an incarcerated veteran may be apportioned to the veteran's spouse, child or children and dependent parents on the basis of individual need. In determining individual need consideration shall be given to such factors as the apportionee claimant's income and living expenses, the amount of compensation available to be apportioned, the needs and living expenses of other apportionee claimants as well as any special needs, if any, of all apportionee claimants.

(2) *DIC.* All or part of the DIC not paid to an incarcerated surviving spouse or other children not in the surviving spouse's custody may be apportioned to another child or children. All or part of the DIC not paid to an incarcerated child may be apportioned to the surviving spouse or other children. These apportionments shall be made on the basis of individual need giving consideration to the factors set forth in paragraph (e)(1) of this section.

(f) *Effective dates.* An apportionment under this section shall be effective the date of reduction of payments made to the incarcerated person, subject to payments to the incarcerated person over the same period, if an informal claim is received within 1 year after notice to the incarcerated person as required by paragraph (a) of this section, and any necessary evidence is received within 1 year from the date of request by the Department of Veterans Affairs; otherwise, payments may not be made for any period prior to the date of receipt of a new informal claim.

(g) *Incarcerated dependent.* No apportionment may be made to or on behalf of any person who is incarcerated in a Federal, State, or local penal institution for conviction of a felony.

(h) *Notice to dependent for whom apportionment granted.* A dependent for whom an apportionment is granted under this section shall be informed that the apportionment is subject to immediate discontinuance upon the incarcerated person's release or participation in a work release or halfway house program. A dependent shall also be informed that if the dependent and the incarcerated person do not live together when the incarcerated person is released (or participates in a work release or halfway house program) the dependent may submit a new claim for apportionment.

(i) *Resumption upon release*—(1) *No apportionment or family reunited.* If there was no apportionment at the time of

release from incarceration, or if the released person is reunited with all dependents for whom an apportionment was granted, the released person's award shall be resumed the date of release from incarceration if the Department of Veterans Affairs receives notice of release within 1 year following release; otherwise the award shall be resumed the date of receipt of notice of release. If there was an apportionment award during incarceration, it shall be discontinued date of last payment to the apportionee upon receipt of notice of release of the incarcerated person. Payment to the released person shall then be resumed at the full rate from date of last payment to the apportionee. Payment to the released person from date of release to date of last payment to the apportionee shall be made at the rate which is the difference between the released person's full rate and the sum of (i) the rate that was payable to the apportionee and (ii) the rate payable during incarceration.

(2) *Apportionment granted and family not reunited.* If there was an apportionment granted during incarceration and the released person is not reunited with all dependents for whom an apportionment was granted, the released person's award shall be resumed as stated in paragraph (i)(1) of this section except that when the released person's award is resumed it shall not include any additional amount payable by reason of a dependent(s) not reunited with the released person. The award to this dependent(s) will then be reduced to the additional amount payable for the dependent(s).

(3) *Apportionment to a dependent parent.* An apportionment made to a dependent parent under this section cannot be continued beyond the veteran's release from incarceration unless the veteran is incompetent and the provisions of § 3.452(c) (1) and (2) are for application. When a competent veteran is released from incarceration an apportionment made to a dependent parent shall be discontinued and the veteran's award resumed as provided in paragraph (i)(1) of this section.

(j) *Increased compensation during incarceration*—(1) *General.* The amount of any increased compensation awarded to an incarcerated veteran that results from other than a statutory rate increase may be subject to reduction due to incarceration. This applies to a veteran whose compensation is subject to reduction under paragraphs (a) and (c) of this section prior to approval of an award of increased compensation as well as to veteran whose compensation is not subject to reduction under paragraphs (a) and (c) of this section prior to approval of an award of increased compensation.

(2) *Veteran subject to reduction under paragraphs (a) and (c) of this section.* If prior to approval of an award of increased compensation the veteran's compensation was reduced under the provisions of paragraphs (a) and (c) of this section, the amount of the increase shall be reduced as follows if the veteran remains incarcerated:

(i) If the veteran's schedular evaluation is increased from 10 percent to 20 percent or greater, the amount payable to the veteran shall be increased from one-half the rate payable under 38 U.S.C. 1114(a) to the rate payable under section 1114(a).

(ii) If the veteran's schedular evaluation was 20 percent or more, none of the increased compensation shall be paid to the veteran while the veteran remains incarcerated.

(3) *Veteran's compensation not subject to reduction under paragraphs (a) and (c) of this section prior to award of increased compensation.* If prior to the approval of an award of increased compensation the veteran is incarcerated in a Federal, State, or local penal institution for conviction of a felony and the veteran's compensation was not reduced under the provisions of paragraphs (a) and (c) of this section, none of the increased compensation shall be paid to the veteran for periods after October 7, 1980, subject to the following conditions:

(i) The veteran remains incarcerated after October 7, 1980 in a Federal, State, or local penal institution for conviction of a felony; and

(ii) The award of increased compensation is approved after October 7, 1980. If the effective date of the increase is prior to October 8, 1980, the amount payable for periods prior to October 8, 1980, shall not be reduced.

(4) *Apportionments.* The amount of any increased compensation reduced under this paragraph may be apportioned as provided in paragraph (e) of this section.

(k) *Retroactive awards.* Whenever compensation or DIC is awarded to an incarcerated person any amounts due for periods prior to date of reduction under this section shall be paid to the incarcerated person.

(l) *DIC parents.* If two parents are both entitled to DIC and were living together prior to the time of the DIC payable to one parent was reduced due to incarceration, they shall be considered as two parents not living together for the purpose of determining entitlement to DIC.

(m) *Conviction overturned on appeal.* If a conviction is overturned on appeal, any compensation or DIC withheld under this section as a result of incarceration for such conviction (less the amount of any apportionment) shall be restored to the beneficiary.

(Authority: 38 U.S.C. 501, 5313)

[46 FR 47542, Sept. 29, 1981]

§ 3.666 Penal institutions—pension.

Where any individual to or for whom pension is being paid under a public or private law administered by the Department of Veterans Affairs is imprisoned in a Federal, State or local penal institution as the result of conviction of a felony or misdemeanor, such pension payments will be discontinued effective on the 61st day of imprisonment following conviction. The payee will be informed of his or her rights and the rights of dependents to payments while he or she is imprisoned as well as the conditions under which payments to him or to her may be resumed on his or her release from imprisonment. Payments of pension authorized under this section will continue until notice is received in the Department of Veterans Affairs that the imprisonment has terminated.

(a) *Disability pension.* Payment may be made to the spouse, child or children of a veteran disqualified under this section:

(1) If the veteran continues to be eligible except for the provisions of this section, and

(2) If the annual income of the spouse or child is such that death pension would be payable.

(3) At the rate payable under the death pension law or the rate which the veteran was receiving at the time of imprisonment, whichever is less.

(4) From the day following the date of discontinuance of payments to the veteran, subject to payments made to the veteran over the same period, if an informal claim is received within 1 year after notice to the veteran as required by this section and any necessary evidence is received within 1 year from the date of request; otherwise payments may not be made for any period prior to the date of receipt of a new informal claim.

(b) *Death pension.* Payment may be made to a child or children where a surviving spouse or child is disqualified under this section:

(1) If surviving spouse is disqualified to child or children at the rate of death pension payable if there were no such surviving spouse; or

(2) If a child is disqualified, to a surviving spouse or other child or children at the rate of death pension payable if there were no such child, and

(3) From the day following the date of discontinuance of payments to the disqualified person, subject to payments made to that person over the same period if evidence of income is received within 1 year after date of request; otherwise payments may not be made for any period prior to the date of receipt of an informal claim.

(4) The income limitation applicable to eligible persons will be that which would apply if the imprisoned person did not exist.

(c) *Resumption of pension upon release from incarceration.* Pension will be resumed as of the day of release if notice (which constitutes an informal claim) is received within 1 year following release; otherwise resumption will be effective the date of receipt of such notice. Where an award or increased award was made to any other payee based upon the disqualification of the veteran, surviving spouse, or child while in prison, such award will be reduced or discontinued as of date of last payment and pension will be resumed to the released prisoner at a rate which

will be the difference, if any, between the total pension payable and the amount which was paid to the other person or persons through the date of last payment and thereafter the full rate.

(d) *Veteran entitled to compensation.* If an imprisoned veteran is entitled to a lesser rate of disability compensation, it shall be awarded as of the 61st day of imprisonment in lieu of the pension the veteran was receiving if the veteran has neither spouse nor child. If the veteran has a spouse or a child, compensation will be awarded only after the veteran has been furnished an explanation of the effect of electing compensation on the amount available for apportionment. If the veteran then requests compensation, it shall be awarded from the date veteran requests the Department of Veterans Affairs to take such action.

[26 FR 1601, Feb. 24, 1961, as amended at 40 FR 6971, Feb. 18, 1975; 40 FR 22254, May 22, 1975; 44 FR 45943, Aug. 6, 1979; 46 FR 47543, Sept. 29, 1981; 62 FR 5529, Feb. 6, 1997]

§3.667 School attendance.

(a) *General.* (1) Pension or compensation may be paid from a child's 18th birthday based upon school attendance if the child was at that time pursing a course of instruction at an approved school and a claim for such benefits is filed within 1 year from the child's 18th birthday.

(2) Pension or compensation based upon a course which was begun after a child's 18th birthday may be paid from the commencement of the course if a claim is filed within 1 year from that date.

(3) An initial award of DIC (dependency and indemnity compensation) to a child in the child's own right is payable from the first day of the month in which the child attains age 18 if the child was pursuing a course of instruction at an approved school on the child's 18th birthday, and if a claim for benefits is filed within 1 year from the child's 18th birthday. In the case of a child who attains age 18 after September 30, 1981, if the child was, immediately before attaining age 18, counted under 38 U.S.C. 1311(b) for the purpose of determining the amount of DIC payable to the surviving spouse, the effective date of an award of DIC to the child shall be the date the child attains age 18 if a claim for DIC is filed within 1 year from that date.

(Authority: 38 U.S.C. 5110(e))

(4) An initial award of dependency and indemnity compensation to a child in its own right based upon a course which was begun after the child's 18th birthday may be paid from the first day of the month in which the course commenced if a claim is filed within 1 year from that date.

(Authority: 38 U.S.C. 5110(e))

(5) Where a child was receiving dependency and indemnity compensation in its own right prior to age 18, payments may be continued from the 18th birthday if the child was then attending an approved course of instruction and evidence of such school attendance is received within 1 year from the 18th birthday. Where the child was receiving dependency and indemnity compensation in its own right prior to age 18 and was not attending school on the 18th birthday but commences an approved course of instruction after the 18th birthday, payments may be resumed from the commencing date of the course if evidence of such school attendance is filed within 1 year from that date.

(b) *Vacation periods.* A child is considered to be in school during a vacation or other holiday period if he or she was attending school at the end of the preceding school term and resumes attendance, either in the same or a different approved school, at the beginning of the next term. If an award has been made covering a vacation period, and the child fails to commence or resume school attendance, benefits will be terminated the date of last payment or the last day of the month preceding the date of failure to pursue the course, whichever is the earlier.

(c) *Ending dates.* Except as provided in paragraph (b) of this section, benefits may be authorized through the last day of the month in which a course was or will be completed.

(Authority: 38 U.S.C. 5112(b)(7))

(d) *Transfers to other schools.* Where benefits have been authorized based upon school attendance and it is shown

that during a part or all of that period the child was pursuing a different course in the same school or a course in a different school, payments previously made will not be disturbed if the course is approved.

(e) *Accrued benefits only.* When a claim for accrued benefits is filed by or on behalf of a veteran's child over 18 but under 23 years of age, who was pursuing a course of instruction at the time of the payee's death and payment of accrued benefits only is involved, evidence of school attendance need not be confirmed by the school. When the payee's death occurred during a school vacation period, the requirements will be considered to have been met if the child was carried on the school rolls on the last day of the regular school term immediately preceding the date of the payee's death.

(Authority: 38 U.S.C. 5112(b)(7))

(f) *Nonduplication.* Pension, compensation or dependency and indemnity compensation may not be authorized:

(1) After a child has elected to receive educational assistance under 38 U.S.C. chapter 35 (see § 3.707 and § 21.3023 of this chapter); or

(2) Based on an educational program in a school where the child is wholly supported at the expense of the Federal Government, such as a service academy.

[26 FR 1601, Feb. 24, 1961, as amended at 30 FR 14983, Dec. 3, 1965; 32 FR 12114, Aug. 23, 1967; 34 FR 839, Jan. 18, 1969; 40 FR 22254, May 22, 1975; 47 FR 24552, June 7, 1982]

CROSS REFERENCE: Dependents' educational assistance. See § 3.707.

§ 3.668 [Reserved]

§ 3.669 Forfeiture.

(a) *General.* Upon receipt of notice from a Regional Counsel the Adjudication Officer in the Manila Regional Office that a case is being formally submitted for consideration of forfeiture of a payee's rights or that the payee has been indicted for subversive activities, payments will be suspended effective date of last payment.

(b) *Fraud or treasonable act*—(1) *Fraud.* If forfeiture of rights is not declared, payments shall be resumed from date of last payment, if otherwise in order. If it is determined that rights have been forfeited, benefits shall be discontinued effective the commencing date of the award or the day preceding the commission of the act resulting in the forfeiture, whichever is later.

(2) *Treasonable acts.* If forfeiture of rights is not declared, payments shall be resumed from date of last payment, if otherwise in order. If it is determined that rights have been forfeited, benefits shall be discontinued the date of the forfeiture decision or date of last payment, whichever is earlier.

(c) *Subversive activities.* If the payee is acquitted of the charge, payments will be resumed from date of last payment, if otherwise in order. If the payee is convicted, benefits will be discontinued effective the commencing date of the award or the day preceding the commission of the act resulting in the forfeiture, whichever is later.

(d) *Pardons.* (1) Where the payee's offense has been pardoned by the President of the United States, the award will be resumed, if otherwise in order, effective the date of the pardon if claim is filed within 1 year from that date; otherwise benefits may not be authorized for any period prior to the date of filing claim. The award will be subject to any existing overpayment.

(2) Payments to a dependent of the person whose benefits were declared forfeited before September 2, 1959, will be discontinued effective the day preceding the date of the pardon.

(Authority: 38 U.S.C. 501)

[27 FR 8616, Aug. 29, 1962, as amended 28 FR 5618, June 7, 1963; 39 FR 28630, Aug. 9, 1974; 46 FR 34801, July 6, 1981]

CROSS REFERENCES: Fraud. See § 3.901. Treasonable acts. See § 3.902. Subversive activities. See § 3.903.

CONCURRENT BENEFITS AND ELECTIONS

§ 3.700 General.

Not more than one award of pension, compensation, or emergency officers', regular or reserve retirement pay will be made concurrently to any person based on his or her own service except as provided in § 3.803 relating to naval pension and § 3.750(c) relating to waiver of retirement pay. Not more than one

award of pension, compensation, or dependency and indemnity compensation may be made concurrently to a dependent on account of more than one period of service of a veteran.

(Authority: 38 U.S.C. 5304(a))

(a) *Veterans*—(1) *Active service pay.* (i) Pension, compensation, or retirement pay on account of his or her own service will not be paid to any person for any period for which he or she receives active service pay.

(Authority: 38 U.S.C. 5304(c))

(ii) Time spent by members of the ROTC in drills as part of their activities as members of the corps is not active service.

(iii) Reservists may waive their pension, compensation, or retirement pay for periods of field training, instruction, other duty or drills. A waiver may include prospective periods and contain a right of recoupment for the days for which the reservists did not receive payment for duty by reason of failure to report for duty.

(2) *Lump-sum readjustment pay.* (i) Where entitlement to disability compensation was established prior to September 15, 1981, a veteran who has received a lump-sum readjustment payment under former 10 U.S.C. 687 (as in effect on September 14, 1981) may receive disability compensation for disability incurred in or aggravated by service prior to the date of receipt of lump-sum readjustment payment subject to deduction of an amount equal to 75 percent of the amount received as readjustment payment.

(Authority: 38 U.S.C. 501)

(ii) Readjustment pay authorized under former 10 U.S.C. 3814(a) is not subject to recoupment through withholding of disability compensation, entitlement to which was established prior to September 15, 1981.

(Authority: 38 U.S.C. 501)

(iii) Where entitlement to disability compensation was established on or after September 15, 1981, a veteran who has received a lump-sum readjustment payment may receive disability compensation for disability incurred in or aggravated by service prior to the date of receipt of the lump-sum readjustment payment, subject to recoupment of the total amount of the readjustment payment.

(Authority: 38 U.S.C. 501)

(iv) The receipt of readjustment pay does not affect the payment of disability compensation based on a subsequent period of service. Compensation payable for service-connected disability incurred or aggravated in a subsequent period of service will not be reduced for the purpose of offsetting readjustment pay based on a prior period of service.

(Authority: 10 U.S.C. 1174(h)(2))

(3) *Severance pay.* Where the disability or disabilities found to be service-connected are the same as those upon which disability severance pay is granted, an award of compensation will be made subject to recoupment of the disability severance pay. Prior to the initial determination of the degree of disability recoupment will be at the full monthly compensation rate payable for the disability or disabilities for which severance pay was granted. Following initial determination of the degree of disability recoupment shall not be at a monthly rate in excess of the monthly compensation payable for that degree of disability. For this purpose the term ''initial determination of the degree of disability'' means the first regular schedular compensable rating in accordance with the provisions of subpart B, part 4 of this chapter and does not mean a rating based in whole or in part on a need for hospitalization or a period of convalescense. There is no prohibition against payment of compensation where the veteran received nondisability severance pay or where disability severance pay was based upon some other disability. Compensation payable for service-connected disability other than the disability for which disability severance pay was granted will not be reduced for the purpose of recouping disability severance pay.

(Authority: 10 U.S.C. 1212(c))

(4) *Improved pension.* If a veteran is entitled to improved pension on the basis of the veteran's own service and is also entitled to pension under any

pension program currently or previously in effect on the basis of any other person's service, the Department of Veterans Affairs shall pay the veteran only the greater benefit.

(Authority: 38 U.S.C. 1521(i))

(5) *Separation pay.* (i) A veteran who has received separation pay may receive disability compensation for disability incurred in or aggravated by service prior to the date of receipt of separation pay subject to recoupment of the total amount received as separation pay.

(ii) The receipt of separation pay does not affect the payment of disability compensation based on a subsequent period of service. Compensation payable for service-connected disability incurred or aggravated in a subsequent period of service will not be reduced for the purpose of offsetting separation pay based on a prior period of service.

(Authority: 10 U.S.C. 1174)

(b) *Dependents*—(1) *Surviving spouse.* Subject to the provisions of paragraph (a)(4) of this section, the receipt of pension, compensation, or dependency and indemnity compensation by a surviving spouse because of the death of any veteran, or receipt of pension or compensation because of his or her own service, shall not bar the payment to the surviving spouse of pension, compensation, or dependency and indemnity compensation because of the death or disability of any other veteran; however, other than insurance, concurrent benefits under laws administered by the Department of Veterans Affairs may not be authorized to a surviving spouse by reason of the death of more than one veteran to whom the surviving spouse has been married. The surviving spouse may elect to receive benefits based on the death of one such spouse and the election places the right to benefits based on the deaths of other spouses in suspense. The suspension may be lifted at any time by another election based on the death of another spouse. Benefits payable in the elected case will be subject to prior payments for the same period based on the death of the other spouse where, under the provisions of § 3.400(c), there is entitlement in the elected case prior to date of receipt of the election.

(Authority: 38 U.S.C. 5304)

(2) *Children.* Except as provided in § 3.703 and paragraph (a)(4) of this section, the receipt of pension, compensation, or dependency and indemnity compensation by a child on account of the death of a veteran or the receipt by the child of pension or compensation on account of his or her own service will not bar the payment of pension, compensation, or dependency and indemnity compensation on account of the death or disability of any other veteran.

(3) *Parents.* The receipt of compensation or dependency and indemnity compensation by a parent on account of the death of a veteran or receipt by him or her of pension or compensation on account of his or her own service, will not bar the payment of pension, compensation, or dependency and indemnity compensation on account of the death or disability of any other person.

(Authority: 38 U.S.C. 5304(b))

[26 FR 1601, Feb. 24, 1961, as amended at 29 FR 11359, Aug. 6, 1964; 29 FR 15207, Nov. 11, 1964; 30 FR 11389, Sept. 8, 1965; 35 FR 10648, July 1, 1970; 40 FR 59346, Dec. 23, 1975; 44 FR 45943, Aug. 6, 1979; 52 FR 27340, July 21, 1987; 56 FR 1111, Jan. 11, 1991]

§ 3.701 Elections of pension or compensation.

(a) *General.* Except as otherwise provided, a person entitled to receive pension or compensation under more than one law or section of a law administered by the Department of Veterans Affairs may elect to receive whichever benefit, regardless of whether it is the greater or lesser benefit, even though the election reduces the benefits payable to his or her dependents. Such person may at any time elect or reelect the other benefit. An election by a veteran controls the rights of all dependents in that case. An election by a surviving spouse controls the claims of all children including children over 18 and children not in the custody of the surviving spouse. The election of improved pension by a surviving spouse, however, shall not prejudice the rights of any child receiving an apportionment

on December 31, 1978. Termination of a marriage or marital relationship which had been the reason for terminating an award of section 306 or old-law pension does not restore to the surviving spouse the right to receive section 306 or old-law pension. The claimant's entitlement, if otherwise established, is under the current provisions of 38 U.S.C. 1541.

(Authority: 38 U.S.C. 501)

(b) *Form of election.* A statement which meets the requirements of an informal claim may be accepted as an election.

(c) *Change from one law to another.* Except as otherwise provided, where payments of pension or compensation are being made to a person under one law, the right to receive benefits under another law being in suspension, and a higher rate of pension or compensation becomes payable under the other law, benefits at the higher rate will not be paid for any date prior to the date of receipt of an election.

[26 FR 1602, Feb. 24, 1961, as amended at 36 FR 12618, July 2, 1971; 44 FR 45943, Aug. 6, 1979]

§3.702 Dependency and indemnity compensation.

(a) *Right to elect.* A person who is eligible for death compensation and who has entitlement to dependency and indemnity compensation pursuant to the provisions of §3.5(b)(2) or (3) may receive dependency and indemnity compensation upon the filing of a claim. The claim of such a person for service-connected death benefits shall be considered a claim for dependency and indemnity compensation subject to confirmation by the claimant. The effective date of payment is controlled by the provisions of §3.400(c)(4).

(b) *Effect on child's entitlement.* Where a surviving spouse is entitled to death compensation, the amount of which is based in part on the existence of a child who has attained the age of 18 years, and elects to receive dependency and indemnity compensation, the independent award of dependency and indemnity compensation to which the child is entitled will be awarded to or for the child without separate election by or for the child. Should such a surviving spouse not elect to receive dependency and indemnity compensation, the independent dependency and indemnity compensation to which a child who has attained 18 years of age is entitled, may be awarded upon application by or for the child. The effective date of award in these situations will be in accordance with §3.400(c)(4)(ii).

(c) *Limitation.* A claim for dependency and indemnity compensation may not be filed or withdrawn after the death of the surviving spouse, child, or parent.

(d) *Finality of election.*

(1) Except as noted in paragraph (d)(2), an election to receive dependency and indemnity compensation is final and the claimant may not thereafter reelect death pension or compensation in that case. An election is final when the payee (or the payee's fiduciary) has negotiated one check for this benefit or when the payee dies after filing an election but prior to negotiation of a check.

(2) Notwithstanding the provisions of paragraph (d)(1), effective November 2, 1994, a surviving spouse who is receiving dependency and indemnity compensation may elect to receive death pension instead of such compensation.

(Authority: 38 U.S.C. 1317)

(e) *Surviving spouse becomes entitled.* A surviving spouse who becomes eligible to receive death compensation by reason of liberalizing provisions of any law may receive death compensation or elect dependency and indemnity compensation even though dependency and indemnity compensation has been paid to a child or children of the veteran.

(f) *Death pension rate.* (1) Effective October 1, 1961, where the monthly rate of dependency and indemnity compensation payable to a surviving spouse who has children is less than the monthly rate of death pension which would be payable to such surviving spouse if the veteran's death had not been service connected, dependency and indemnity compensation shall be paid to such surviving spouse in an amount equal to the pension rate for any month (or part thereof) in which this rate is greater.

(2) Effective June 22, 1966, where the monthly rate of dependency and indemnity compensation payable to a surviving spouse who has children is less than the monthly rate of death pension which would be payable for the children if the veteran's death had not been service connected and the surviving spouse were not entitled to such pension, dependency and indemnity compensation shall be payable to the surviving spouse in an amount equal to the monthly rate of death pension which would be payable to the children for any month (or part thereof) in which this rate is greater.

(Authority: 38 U.S.C. 1312(b))

[35 FR 18661, Dec. 9, 1970, as amended at 39 FR 20205, June 7, 1974; 41 FR 17387, Apr. 26, 1976; 44 FR 45943, Aug. 6, 1979; 60 FR 18356, Apr. 11, 1995; 61 FR 20727, May 8, 1996; 62 FR 5529, Feb. 6, 1997]

CROSS REFERENCE: Deaths prior to January 1, 1957. See § 3.400(c)(3)(i).

§ 3.703 Two parents in same parental line.

(a) *General.* Death compensation or dependency and indemnity compensation is not payable for a child if dependency and indemnity compensation is paid to or for a child or to the surviving spouse on account of the child by reason of the death of another parent in the same parental line where both parents died before June 9, 1960. Where the death of one such parent occurred on or after June 9, 1960, gratuitous benefits may not be paid or furnished to or on account of any child by reason of the death of more than one parent in the same parental line.

(b) *Election.* The child or his or her fiduciary may elect to receive benefits based on the service of either veteran. An election of pension, compensation or dependency and indemnity compensation based on the death of one parent places the right to such benefits based on the death of another parent in suspension. The suspension may be lifted at any time by making another election.

(c) *Other payees.* Where a child has elected to receive pension, compensation, dependency and indemnity compensation or dependents' educational assistance under 38 U.S.C. ch. 35 based on the death of a veteran, he (or she) will be excluded from consideration in determining the eligibility or rate payable to a surviving spouse or another child or children in the case of another deceased veteran in the same parental line. See § 3.659(b).

[27 FR 4993, May 29, 1962, as amended at 39 FR 20205, June 7, 1974]

CROSS REFERENCES: Two-parent cases. See § 3.503(g). Two parents in same parental line. See § 3.659.

§ 3.704 Elections within class of dependents.

(a) *Children.* Where children are eligible to receive monthly benefits under more than one law in the same case, the election of benefits under one law by or on behalf of one child will not serve to increase the rate allowable for any other child under another law in that case. The rate payable for each child will not exceed the amount which would be paid if all children were receiving benefits under the same law. Where a child is no longer eligible to receive pension, compensation or dependency and indemnity compensation because of having elected dependents' educational assistance under 38 U.S.C. chapter 35, the child will be excluded from consideration in determining the rate payable for another child or children.

(b) *Parents.* If there are two parents eligible for dependency and indemnity compensation and only one parent files claim for this benefit, the rate of dependency and indemnity compensation for that parent will not exceed the amount which would be paid to him or her if both parents had filed claim for dependency and indemnity compensation. The rate of death compensation for the other parent will not exceed the amount which would be paid if both parents were receiving this benefit.

[26 FR 1602, Feb. 24, 1961, as amended at 27 FR 4993, May 29, 1962; 34 FR 839, Jan. 18, 1969; 39 FR 20205, June 7, 1974; 54 FR 34981, Aug. 23, 1989]

§§3.705—3.706 [Reserved]

§3.707 Dependents' educational assistance.

(a) *Child.* The conditions applicable to the bar to payment of pension, compensation or dependency and indemnity compensation for a child concurrently with educational assistance allowance under 38 U.S.C. chapter 35 are set forth in §21.3023 of this chapter.

(b) *Spouse or surviving spouse.* There is no bar to the payment of pension, compensation or dependency and indemnity compensation to a spouse concurrently with educational assistance allowance under 38 U.S.C. ch. 35.

[34 FR 840, Jan. 18, 1969, as amended at 41 FR 29120, July 15, 1976]

CROSS REFERENCES: Discontinuance. See §3.503(h). Certification. See §3.807.

§3.708 Federal Employees' Compensation.

(a) *Military service*—(1) *Initial election.* Where a person is entitled to compensation from the Office of Workers' Compensation Programs, under the Federal Employees' Compensation Act (FECA) based upon disability or death due to service in the Armed Forces and is also entitled based upon service in the Armed Forces to pension, compensation or dependency and indemnity compensation under the laws administered by the Department of Veterans Affairs, the claimant will elect which benefit he or she will receive. Pension compensation, or dependency and indemnity compensation may not be paid in such instances by the Department of Veterans Affairs concurrently with compensation from the Office of Workers' Compensation Programs. Benefits are not payable by the Office of Workers' Compensation Programs for disability or death incurred on or after January 1, 1957, based on military service.

(2) *Right of reelection.* Persons receiving compensation from the Office of Workers' Compensation Programs based on death due to military service may elect to receive dependency and indemnity compensation at any time. Once payment of dependency and indemnity compensation has been granted, all further right to FECA benefits is extinguished and only dependency and indemnity compensation is payable thereafter.

(3) *Rights of children.* Where primary title is vested in the surviving spouse, the claimant's election controls the rights of any of the veteran's children, regardless of whether they are in the claimant's custody and regardless of the fact that such children may not be eligible to receive benefits under laws administered by the Office of Workers' Compensation Programs. A child who is eligible for dependency and indemnity compensation or other benefits independent of the surviving spouse's entitlement may receive such benefits concurrently with payment of FECA benefits to the surviving spouse.

(4) *Entitlement based on 38 U.S.C. 1151.* The provisions of this paragraph are applicable also in those cases in which disability or death occurs as a result of having submitted to an examination, medical or surgical treatment, hospitalization or training.

(b) *Civilian employment*—(1) *Same disability or death.* Where a person is entitled to compensation from the Office of Workers' Compensation Programs based upon civilian employment and is also entitled to compensation or dependency and indemnity compensation under laws administered by the Department of Veterans Affairs for the same disability or death, the claimant will elect which benefit he or she will receive. On or after September 13, 1960, an award cannot be approved for payment of compensation or dependency and indemnity compensation concurrently with compensation from the Office of Workers' Compensation Programs in such instances and an election to receive benefits from either agency is final. See §3.958. There is no right of reelection. (5 U.S.C. 8116(b)) A child who is eligible for dependency and indemnity compensation or other benefits independent of the surviving spouse's entitlement may receive such benefits concurrently with payment of FECA benefits to the surviving spouse.

(2) *Not the same disability or death.* There is no prohibition against payment of benefits under the Federal Employees' Compensation Act concurrently with other benefits administered by the Department of Veterans Affairs

when such benefits are not based on the same disability or death.

[39 FR 18099, May 23, 1974, as amended at 41 FR 29120, July 15, 1976; 44 FR 45943, Aug. 6, 1979]

§ 3.710 Civil service annuitants.

Department of Veterans Affairs benefits may be paid concurrently with civil service retirement benefits. However, payments will be considered income as provided in § 3.262 (e) and (h).

[29 FR 15208, Nov. 11, 1964]

§ 3.711 Improved pension elections.

Except as otherwise provided by this section and § 3.712, a person entitled to receive section 306 or old-law pension on December 31, 1978, may elect to receive improved pension under the provisions of 38 U.S.C. 1521, 1541, or 1542 as in effect on January 1, 1979. Except as provided by § 3.714, an election of improved pension is final when the payee (or the payee's fiduciary) negotiates one check for this benefit and there is no right to reelection. Any veteran eligible to make an election under this section who is married to a veteran who is also eligible to make such an election may not receive improved pension unless the veteran's spouse also elects to receive improved pension.

(Authority: Sec. 306(a)(1) of Pub. L. 95–588, 92 Stat. 2497)

[46 FR 11661, Feb. 10, 1981]

§ 3.712 Improved pension elections; surviving spouses of Spanish-American War veterans.

(a) *General.* A surviving spouse of a Spanish-American War veteran eligible for pension under 38 U.S.C. 1536 may elect to receive improved pension under 38 U.S.C. 1541. Except as provided by § 3.714, an election of improved pension is final when the payee (or the payee's fiduciary) negotiates one check for this benefit and there is no right of reelection.

(b) *Aid and attendance.* A surviving spouse of a Spanish-American War veteran who is receiving or entitled to receive pension based on need for regular aid and attendance shall be paid whichever is the greater: The monthly rate authorized by 38 U.S.C. 1536 (a) and (b) and 1544 or the monthly rate authorized by 38 U.S.C. 1541 and 544, as 38 U.S.C. 1541 and 1544 were in effect on December 31, 1978, based on the surviving spouse's current income and net worth. Pension under 38 U.S.C. 1541 and 1544, as in effect on December 31, 1978, is not payable if the current size of the surviving spouse's net worth is a bar to payment under § 3.252(b) or if the surviving spouse's income exceeds the applicable limitation as in effect on December 31, 1978. Elections are not required for this purpose. The change in rate shall be effective the first day of the month in which the facts warrant such change.

(Authority: 38 U.S.C. 1536)

[44 FR 45943, Aug. 6, 1979, as amended at 46 FR 11661, Feb. 10, 1981; 61 FR 67950, Dec. 26, 1996]

§ 3.713 Effective dates of improved pension elections.

(a) *General.* Except as provided in paragraph (b) of this section an election to receive improved pension shall be effective the date of receipt of the election.

(b) *Persons entitled to pension on December 31, 1978.* The effective date of an election to receive improved pension filed before October 1, 1979, by a person entitled to receive either old-law pension or section 306 pension on December 31, 1978, shall be January 1, 1979, or if to the beneficiary's advantage, at any date after January 1, 1979, and before October 1, 1979. The amount of improved pension payable from the effective date of the election shall be reduced by the amount of old-law pension or section 306 pension paid to the beneficiary for such period.

(Authority: Sec. 306(d) of Pub. L. 95–588, 92 Stat. 2497).

[44 FR 45944, Aug. 6, 1979]

§ 3.714 Improved pension elections—public assistance beneficiaries.

(a) *Definitions.* The following definitions are applicable to this section.

(1) *Pensioner.* This means a person who was entitled to section 306 or old-law pension, or a dependent of such a person for the purposes of chapter 15 of title 38, United States Code as in effect on December 31, 1978.

(2) *Public assistance.* This means payments under the following titles of the Social Security Act:

(i) Title I (Grants to States for Old Age Assistance and Medical Assistance to the Aged).

(ii) Title X (Grants to States for Aid to the Blind).

(iii) Title XIV (Grants to States for Aid to the Permanently and Totally Disabled).

(iv) Part A of title IV (Aid to Families with Dependent Children).

(v) Title XVI (Supplemental Security Income for the Aged, Blind and Disabled).

(3) *Medicaid.* This means a State plan for medical assistance under title XIX of the Social Security Act.

(4) *Informed election.* The term ''informed election'' means an election of improved pension (or a reaffirmation of a previous election of improved pension) after the Department of Veterans Affairs has complied with the requirements of paragraph (e) of this section.

(b) *General.* In some States only a person in receipt of public assistance is eligible for medicaid. When this is the case the following applies effective January 1, 1979:

(1) A pensioner may not be required to elect improved pension to receive, or to continue to receive, public assistance; or

(2) A pensioner may not be denied (or suffer a reduction in the amount of) public assistance by reason of failure or refusal to elect improved pension.

(c) *Public assistance deemed to continue.* Public assistance (or a supplementary payment under Pub. L. 93–233, sec. 13(c)) payable to a pensioner may have been terminated because the pensioner's income increased as a result of electing improved pension. In this instance public assistance (or a supplementary payment under Pub. L. 93–233, sec. 13(c)) shall be deemed to have remained payable to a pensioner for each month after December 1978 when the following conditons are met:

(1) The pensioner was in receipt of pension for the month of December 1978; and

(2) The pensioner was in receipt of public assistance (or a supplementary payment under Pub. L. 93–233, sec. 13(c)) prior to June 17, 1980, and for the month of December 1978, and

(3) The pensioner's public assistance payments (or a supplementary payment under Pub. L. 93–233, sec. 13(c)) were discontinued because of an increase in income resulting from an election of improved pension.

(d) *End of the deemed period of entitlement to public assistance.* The deemed period of entitlement to public assistance (or a supplementary payment under Pub. L. 93–233, sec. 13(c)) ends the first calendar month that begins more than 10 days after a pensioner makes an informed election of improved pension. (If the pensioner is unable to make an informed election the informed election may be made by a member of the pensioner's family.) A pensioner who fails to disaffirm a previously made election of improved pension within the time limits set forth in paragraph (e) of this section shall be deemed to have reaffirmed the previous election. This will also end the deemed period of entitlement to public assistance.

(e) *Notice of right to make informed election or disaffirm election previously made.* The Department of Veterans Affairs shall send a written notice to each pensioner to whom paragraph (b) of this section applies and who is eligible to elect or who has elected improved pension. The notice shall be in clear and understandable language. It shall include the following:

(1) A description of the consequences to the pensioner (and the pensioner's family if applicable) of losing medicaid eligibility because of an increase in income resulting from electing improved pension; and

(2) A description of the provisions of paragraph (b) of this section; and

(3) In the case of a pensioner who has previously elected improved pension, a form for the purpose of enabling the pensioner to disaffirm the previous election of improved pensions; and

(4) The following provisons of Pub. L. 96–272, sec. 310(b)(2)(B):

(i) That a pensioner has 90 days from the date the notice is mailed to the pensioner to disaffirm a previous electon by completing the disaffirmation form and mailing it to the Department of Veterans Affairs.

(ii) That a pensioner who disaffirms a previous election shall receive, beginning the calendar month after the calendar month in which the Department of Veterans Affairs receives the disaffirmation, the amount of pension payable if improved pension had not been elected.

(iii) That a pensioner who disaffirms a previous election may again elect improved pension but without a right to disaffirm the subsequent election.

(iv) That a pensioner who disaffirms an election of improved pension shall not be indebted to the United States for the period in which the pensioner received improved pension.

(Authority: Pub. L. 96–272, sec. 310; 94 Stat. 500)

(f) *Notification to the Department of Health and Human Services.* The Department of Veterans Affairs shall promptly furnish the Department of Health and Human Services the following information:

(1) The name and identifying information of each pensioner who disaffirms his or her election of improved pension.

(2) The name and identifying information of each pensioner who fails to disaffirm and election of improved pension within the 90-day period described in paragraph (e)(4)(i) of this section.

(3) The name and identifying information of each pensioner who after disaffirming his or her election of improved pension, subsequently reelected improved pension.

(Authority: 38 U.S.C. 501)

[46 FR 11661, Feb. 10, 1981]

§ 3.715 Radiation Exposure Compensation Act of 1990.

Payment to any individual under the provisions of the Radiation Exposure Compensation Act of 1990 (Pub. L. 101–426 as amended by Public Law 101–510) based upon disability or death resulting from a specific disease shall bar payment, or further payment, of compensation or dependency and indemnity compensation to or on behalf of that individual based upon disability or death resulting from the same disease.

(Authority: 42 U.S.C. 2210 note)

[58 FR 25564, Apr. 27, 1993]

CROSS REFERENCE: See §3.500(x) for effective date of discontinuance.

RETIREMENT

§ 3.750 Retirement pay.

(a) *General.* Except as provided in paragraphs (c) and (d) of this section and §3.751, any person entitled to receive retirement pay based on service as a member of the Armed Forces or as a commissioned officer of the Public Health Service, the Coast and Geodetic Survey, the Environmental Science Services Administration; or the National Oceanic and Atmospheric Administration may not receive such pay concurrently with benefits payable under laws administered by the Department of Veterans Affairs. The term ''retirement pay'' includes retired pay and retainer pay.

(b) *Election.* A veteran entitled to retirement pay or compensation may elect which of the benefits he or she desires to receive. An election of retirement pay does not bar him or her from making a subsequent election of the other benefit to which he or she is entitled. An election filed within 1 year from the date of notification of Department of Veterans Affairs entitlement will be considered as ''timely filed'' for the purpose of §3.401(e)(1). If the veteran is incompetent the 1-year period will begin on the date notification is sent to the next friend or fiduciary. In initial determinations, elections may be applied retroactively if the claimant was not advised of his or her right of election and the effect thereof.

(c) *Waiver.* A person specified in paragraph (a) of this section may receive compensation upon filing with the service department concerned a waiver of so much of his (or her) retirement pay as is equal in amount to the compensation to which he (or she) is entitled. In the absence of a specific statement to the contrary, the filing of an application for compensation by a veteran entitled to retirement pay constitutes such a waiver.

(Authority: 38 U.S.C. 5305)

(d) *Pension*—(1) *Improved pension.* A person specified in paragraph (a) of this section may receive improved pension and retirement pay concurrently without having to waive any portion of the

person's retirement pay. In determining entitlement to improved pension, retirement pay shall be treated in the same manner as countable income from other sources.

(2) *Old-law and section 306 pension.* A person specified in paragraph (a) of this section may not receive old-law or section 306 pension and retirement pay concurrently without waiver of retirement pay as provided in paragraph (c) of this section concerning compensation.

(Authority: 38 U.S.C. 5304(a))

[29 FR 12260, Aug. 27, 1964, and 36 FR 5341, Mar. 20, 1971, as amended at 41 FR 53797, Dec. 9, 1976; 46 FR 47543, Sept. 29, 1981]

CROSS REFERENCE: Concurrent benefits and elections; general. See §3.700.

§3.751 Statutory awards; retired service personnel.

Retired Regular and Reserve officers and enlisted personnel are not entitled to statutory awards of disability compensation from the Department of Veterans Affairs in addition to their retirement pay. However, under §3.750(c), eligible persons may waive an amount equal to the basic disability compensation and any statutory award otherwise payable by the Department of Veterans Affairs.

[41 FR 53797, Dec. 9, 1976]

§3.752 [Reserved]

§3.753 Public Health Service.

Disability compensation may be paid concurrently with retirement pay to an officer of the commissioned corps of the Public Health Service, who was receiving disability compensation on December 31, 1956, as follows:

(a) An officer who incurred a disability before July 29, 1945, but retired for nondisability purposes prior to such date.

(b) An officer who incurred a disability before July 29, 1945, but retired for nondisability purposes between July 4, 1952, and December 31, 1956.

(c) An officer who incurred a disability between July 29, 1945, and July 3, 1952, but retired for nondisability purposes between July 4, 1952, and December 31, 1956.

[26 FR 1604, Feb. 24, 1961]

§3.754 Emergency officers' retirement pay.

A retired emergency officer of World War I has basic eligibility to retirement pay by the Department of Veterans Affairs under Pub. L. 87–875 (sec. 11(b), Pub. L. 85–857) from date of filing application therefor after October 24, 1962, if the following requirements are met:

(a) Emergency officers' retirement pay would have been granted under Pub. L. 506, 70th Congress (Act of May 24, 1928) if application therefor had been filed before May 25, 1929.

(b) Such retirement pay would have continued to be payable under section 10 of Pub. L. 2, 73d Congress, or under section 1 of Pub. L. 743, 76th Congress.

(c) The monthly rate of retirement pay at any time between May 24, 1928 and May 24, 1929, inclusive, would have been lower than the monthly rate of disability compensation payable to the retired emergency officer.

[28 FR 72, Jan. 3, 1963]

CROSS REFERENCE: Emergency officers' retirement pay. See §3.953(b).

SPECIAL BENEFITS

§3.800 Disability or death due to hospitalization, etc.

(a) Where disease, injury, death or the aggravation of an existing disease or injury occurs as a result of having submitted to an examination, medical or surgical treatment, hospitalization or the pursuit of a course of vocational rehabilitation under any law administered by the Department of Veterans Affairs and not the result of his (or her) own willful misconduct, disability or death compensation, or dependency and indemnity compensation will be awarded for such disease, injury, aggravation, or death as if such condition were service connected. The commencing date of benefits is subject to the provisions of §3.400(i).

(Authority: 38 U.S.C. 1151)

(1) Benefits under paragraph (a) of this section will be in lieu of any benefits the veteran may be entitled to receive under the Federal Employees' Compensation Act inasmuch as concurrent payments are prohibited. (See §3.708.)

(2) Where any person is awarded a judgment on or after December 1, 1962, against the United States in a civil action brought pursuant to 28 U.S.C. 1346(b), or enters into a settlement or compromise on or after December 1, 1962, under 28 U.S.C. 2672 or 2677, by reason of a disability, aggravation or death within the purview of this section, no compensation or dependency and indemnity compensation shall be paid to such person for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the total amount of benefits which would be paid except for this provision equals the total amount included in such judgment, settlement, or compromise. The provisions of this paragraph do not apply, however, to any portion of such compensation or dependency and indemnity compensation payable for any period preceding the end of the month in which such judgment, settlement or compromise becomes final.

(Authority: 38 U.S.C. 501)

(3) If an administrative award was made or a settlement or compromise became final before December 1, 1962, compensation or dependency and indemnity compensation may not be authorized for any period after such award settlement, or compromise whether before or after December 1, 1962. There is no bar to payment of compensation or dependency and indemnity compensation and no set-off because of a judgment which became final before December 1, 1962, unless specified in the terms of the judgment.

(b)(1) If death occurred prior to January 1, 1957, the benefit payable will be death compensation. See §§ 3.5(b)(2) and 3.702 as to right of election to dependency and indemnity compensation.

(2) If death occurs on or after January 1, 1957, the benefit payable will be dependency and indemnity compensation.

[26 FR 1604, Feb. 24, 1961, as amended at 27 FR 11892, Dec. 1, 1962; 29 FR 16252, Dec. 4, 1964; 39 FR 34532, Sept. 26, 1974; 53 FR 23237, June 21, 1988]

CROSS REFERENCES: Claims; injury due to hospital treatment, etc. See § 3.154. Effective dates; disability or death due to hospitalization, etc. See § 3.400(i).

§ 3.801 Special acts.

(a) *General.* A special act is one authorizing the payment of benefits to a particular person or persons. If a beneficiary in a special act has no claim before the Department of Veterans Affairs, a formal applicaton must be filed before benefits may be awarded.

(b) *Limitations.* Where the rate, commencement, and duration are fixed by a special act, they are not subject to be varied by the provisions and limitations of the public laws, but where not fixed, the rate and continuance of the benefit is subject to variance in accordance with the public laws.

(c) *Provisions of act.* (1) When pension or compensation is granted by a special act, which fixes the rate and commencement, the rate thereunder cannot be increased nor can any other pension or compensation be paid in the absence of the payee's election, unless the special act expressly states that the benefit granted thereby is in addition to the benefit which the person is entitled to receive under any public law.

(2) If a special act corrects the nature of separation from military service and does not grant pension or compensation directly, the claimant acquries a status so that he or she may apply for and be allowed benefits. The claimant, then, is placed in the same position he or she would have been if originally released under conditions other than dishonorable.

(d) *Service.* A special act of Congress, reciting that a person is considered to have been mustered into the service on a named date and honorably discharged on a subsequently named date, is sufficient regardless of whether the service department has any record of such service.

(e) *Hospitalization.* Pension payable under special acts is subject to reduction pursuant to §§ 3.551 and 3.557.

[26 FR 1605, Feb. 24, 1961, as amended at 39 FR 34532, Sept. 26, 1974]

§ 3.802 Medal of Honor.

(a) The Secretary of the Department of the Army, the Department of the Navy, the Department of the Air Force,

or the Department of Transportation will determine the eligibility of applicants to be entered on the Medal of Honor Roll and will deliver to the Secretary of the Department of Veterans Affairs a certified copy of each certificate issued in which the right of the person named in the certificate to the special pension is set forth. The special pension will be authorized on the basis of such certification.

(Authority: 38 U.S.C. 1560, 1561)

(b) An award of special pension at the monthly rate specified in 38 U.S.C. 1562 will be made as of the date of filing of the application with the Secretary concerned. The special pension will be paid in addition to all other payments under laws of the United States. However, a person awarded more than one Medal of Honor may not receive more than one special pension.

(Authority: 38 U.S.C. 1562)

[26 FR 1605, Feb. 24, 1961, as amended at 32 FR 6840, May 4, 1967; 44 FR 22721, Apr. 17, 1979; 52 FR 34909, Sept. 16, 1987]

§3.803 Naval pension.

(a) Payment of naval pension will be authorized on the basis of a certification by the Secretary of the Navy.

(Authority: 10 U.S.C. 6160)

(b) Awards of naval pension in effect prior to July 14, 1943, or renewed or continued may be paid concurrently with Department of Veterans Affairs pension or compensation; however, naval pension allowance under 10 U.S.C. 6160 may not exceed one-fourth of the rate of disability pension or compensation otherwise payable, exclusive of additional allowances for dependents or specific disabilities.

(c) New awards of naval pension may not be made concurrently with Department of Veterans Affairs pension or compensation.

(Authority: 38 U.S.C. 5304(a))

(d) Naval pension remaining unpaid at the date of the veteran's death is not payable by the Department of Veterans Affairs as an accrued benefit.

[26 FR 1605, Feb. 24, 1961, as amended at 28 FR 2857, Mar. 22, 1963; 44 FR 22721, Apr. 17, 1979]

§3.804 Special allowance under 38 U.S.C. 1312.

(a) The provisions of this section are applicable to the payment of a special allowance by the Department of Veterans Affairs to the surviving dependents of a veteran who served after September 15, 1940, and who died on or after January 1, 1957, as a result of such service and who was not a fully and currently insured individual under title II of the Social Security Act.

(b) The special allowance is not payable: (1) Where the veteran's death resulted from Department of Veterans Affairs hospitalization, treatment, examination, or training;

(2) Where the veteran's death was due to service rendered with the Commonwealth Army of the Philippines while such forces were in the service of the Armed Forces pursuant to the military order of the President dated July 26, 1941, or was due to service in the Philippine Scouts under section 14, Pub. L. 190, 79th Congress.

(c) A claim for dependency and indemnity compensation on a form prescribed will be accepted as a claim for the special allowance where it is determined that this benefit is payable or where a specific inquiry concerning entitlement to the special allowance is received.

(d) Payment of this allowance will be authorized on the basis of a certification from the Social Security Administration. Award actions subsequent to the original award, including adjustment and discontinuance, will be made in accordance with new certifications from the Social Security Administration.

(e)(1) The special allowance will be payable only if the death occurred: (i) While on active duty, active duty for training, or inactive duty training as a member of a uniformed service (line of duty is not a factor); or

(ii) As the result of a disease or injury which was incurred or aggravated in line of duty while on active duty or active duty for training, or an injury which was incurred or aggravated in line of duty while on inactive duty training, as a member of a uniformed service after September 15, 1940, if the veteran was discharged or released

from the period of such duty, under conditions other than dishonorable.

(2) Where the veteran died after separation from service: (i) Discharge from service must have been under conditions other than dishonorable as outlined in § 3.12.

(ii) Line of duty and service connection will be determined as outlined in § 3.1(k) and (m) and the § 3.300 series.

[26 FR 1605, Feb. 24, 1961]

§ 3.805 Loan guaranty for surviving spouses; certification.

A certification of loan guaranty benefits may be extended to surviving spouses based on an application filed on or after January 1, 1959, if:

(a) The veteran served in the Armed Forces of the United States (Allied Nations are not included) at any time on or after September 16, 1940; and

(b) The veteran died in service; or

(c) The veteran died after separation from service and such separation was under conditions other than dishonorable provided the veteran's death was the result of injury or disease incurred in or aggravated by service in line of duty rendered on or after September 16, 1940, regardless of the date of entrance into such service (cases where compensation is payable because of death resulting from hospitalization, treatment, examination, or training are not included); and

(d) The surviving spouse meets the requirements of the term ''surviving spouse'' as outlined in § 3.50; and

(e) The veteran's surviving spouse is unmarried; and

(f) The applicant is not an eligible veteran.

[26 FR 1605, Feb. 24, 1961, as amended at 31 FR 4347, Mar. 12, 1966; 37 FR 24662, Nov. 18, 1972; 40 FR 54245, Nov. 21, 1975, 41 FR 49636, Nov. 10, 1976; 44 FR 22721, Apr. 17, 1979; 62 FR 5529, Feb. 6, 1997]

CROSS REFERENCES: Wife, widow or spouse. See § 3.50(b). Terminated marital relationships. See § 3.55.

§ 3.806 Death gratuity; certification.

(a) Where a veteran dies on or after January 1, 1957, and during the 120-day period which begins on the day following the date of his or her discharge or release from active duty, active duty for training, or inactive training duty, the Department of Veterans Affairs will certify that fact to the Secretary concerned if the Department of Veterans Affairs determines on the basis of a claim filed with it that:

(1) Death resulted from:

(i) Disease or injury incurred or aggravated while on such active duty or active duty for training; or

(ii) Injury incurred or aggravated while on such inactive duty training; and

(2) The deceased person was discharged or released from such service under conditions other than dishonorable.

(b) In all cases, other than listed in paragraph (a) of this section, the certification will be furnished at the request of the Secretary concerned.

(c) For the purposes of this section, line of duty is not a factor. The standards, criteria, and procedures for determining incurrence or aggravation of a disease or injury under paragraph (a) of this section are those applicable under disability and death compensation laws administered by the Department of Veterans Affairs.

(Authority: 38 U.S.C. 1323)

[26 FR 1605, Feb. 24, 1961, as amended at 40 FR 54245, Nov. 21, 1975]

§ 3.807 Dependents' educational assistance; certification.

For the purposes of dependents' educational assistance under 38 U.S.C. chapter 35 (see § 21.3020), the child, spouse or surviving spouse of a veteran or serviceperson will have basic eligibility if the following conditions are met:

(a) *General.* Basic eligibility exists if the veteran:

(1) Was discharged from service under conditions other than dishonorable, or died in service; and

(2) Has a permanent total service-connected disability; or

(3) A permanent total service-connected disability was in existence at the date of the veteran's death; or

(4) Died as a result of a service-connected disability; or (if a serviceperson)

(5) Is on active duty as a member of the Armed Forces and now is, and, for a period of more than 90 days, has been listed by the Secretary concerned as

missing in action, captured in line of duty by a hostile force, or forcibly detained or interned in line of duty by a foreign Government or power.

(b) *Service.* Service-connected disability or death must have been the result of active military, naval, or air service on or after April 21, 1898. (Pub. L. 89–358) Effective September 30, 1966, educational assistance for a child (but not for a spouse or surviving spouse) may be authorized based on service in the Philippine Commonwealth Army or as a Philippine Scout as defined in §3.8(b), (c), or (d) of this part.

(Authority: 38 U.S.C. 3565)

(c) *Service connection.* For purpose of this section, the term ''service-connected disability'' encompasses combinations of disabilities of paired organs or extremities treated as if service-connected under the provisions of §3.383(a) of this part. The standards and criteria for determining service connection, either direct or presumptive, are those applicable to the period of service during which the disability was incurred or aggravated (38 U.S.C. 3501(a)). Cases where eligibility for service-connected benefits is established under §3.800 are not included.

(d) *Relationship*—(1) ''Child'' means the son or daughter of a veteran who meets the requirements of §3.57, except as to age and marital status.

(2) ''Spouse'' means a person whose marriage to the veteran meets the requirements of §3.50(a) of this part.

(3) ''Surviving spouse'' means a person whose marriage to the veteran meets the requirements of §§3.50(b) or 3.52 of this part.

(Authority: 38 U.S.C. 1160, 3501)

[29 FR 9537, July 14, 1964, as amended at 31 FR 4347, Mar. 12, 1966; 34 FR 840, Jan. 18, 1969; 38 FR 8658, Apr. 5, 1973; 40 FR 54245, Nov. 21, 1975; 53 FR 46607, Nov. 18, 1988; 59 FR 62585, Dec. 6, 1994]

CROSS REFERENCES: Discontinuance. See §3.503(h) Election; concurrent benefits. See §3.707 Nonduplication. See §21.3023 of this chapter.

§3.808 Automobiles or other conveyances; certification.

A certification of eligibility for financial assistance in the purchase of one automobile or other conveyance in an amount not exceeding the amount specified in 38 U.S.C. 3902 (including all State, local, and other taxes where such are applicable and included in the purchase price) and of basic entitlement to necessary adaptive equipment will be made where the claimant meets the requirements of paragraphs (a), (b) and (c) of this section.

(a) *Service.* The claimant must have had active military, naval or air service.

(b) *Disability.* (1) One of the following must exist and be the result of injury or disease incurred or aggravated during active military, naval or air service;

(i) Loss or permanent loss of use of one or both feet;

(ii) Loss or permanent loss of use of one or both hands;

(iii) Permanent impairment of vision of both eyes: Central visual acuity of 20/200 or less in the better eye, with corrective glasses, or central visual acuity of more than 20/200 if there is a field defect in which the peripheral field has contracted to such an extent that the widest diameter of visual field subtends an angular distance no greater than 20° in the better eye.

(iv) For adaptive equipment eligibility only, ankylosis of one or both knees or one or both hips.

(Authority: 38 U.S.C. 3902)

(2) Veterans not serving on active duty must be entitled to compensation for the disability. As to any claimant the disability must be service connected in accordance with usual criteria. (See §§3.1 (m) and (n), 3.301–3.310.)

(c) *Claim for conveyance and certification for adaptive equipment.* A specific application for financial assistance in purchasing a conveyance is required which must contain a certification by the claimant that the conveyance will be operated only by persons properly licensed. The application will also be considered as an application for the adaptive equipment to insure that the claimant will be able to operate the conveyance in a manner consistent with safety and to satisfy the applicable standards of licensure of the proper licensing authorities. Simultaneously with the certification provided pursuant to the introductory text of this

section, a claimant for financial assistance in the purchase of an automobile will be furnished a certificate of eligibility for financial assistance in the purchase of such adaptive equipment as may be appropriate to the claimant's losses unless the need for such equipment is contraindicated by a physical or legal inability to operate the vehicle. There is no time limitation in which to apply. An application by a claimant on active duty will be deemed to have been filed with VA on the date it is shown to have been placed in the hands of military authority for transmittal.

(Authority: 38 U.S.C. 3902)

(d) *Additional eligibility criteria for adaptive equipment.* Claimants for adaptive equipment must also satisfy the additional eligibility criteria of §§17.119a through 17.119c of this chapter.

(Authority: 38 U.S.C. 3902)

(e) *Definition.* The term *adaptive equipment,* means generally, that equipment which must be part of or added to a conveyance manufactured for sale to the general public to make it safe for use by the claimant and to assist him or her in meeting the applicable standards of licensure of the proper licensing authority.

(1) With regard to automobiles and similar vehicles the term includes a basic automatic transmission as to a claimant who has lost or lost the use of a limb. In addition, the term includes, but is not limited to, power steering, power brakes, power window lifts and power seats. The term also includes air-conditioning equipment when such equipment is necessary to the health and safety of the veteran and to the safety of others, and special equipment necessary to assist the eligible person into or out of the automobile or other conveyance, regardless of whether the automobile or other conveyance is to be operated by the eligible person or is to be operated for such person by another person; and any modification of the interior space of the automobile or other conveyance if needed because of the physical condition of such person in order for such person to enter or operate the vehicle.

(2) With regard to automobiles and similar vehicles the term includes such items of equipment as the Chief Medical Director may, by directive, specify as ordinarily necessary for any of the classes of losses specified in paragraph (b) of this section and for any combination of such losses. Such specifications of equipment may include a limit on the financial assistance to be provided based on judgment and experience.

(3) The term also includes other equipment which the Chief Medical Director or designee may deem necessary in an individual case.

[36 FR 7588, Apr. 22, 1971, as amended at 38 FR 14370, June 1, 1973; 40 FR 37037, Aug. 25, 1975; 43 FR 4423, Feb. 2, 1978; 47 FR 24552, June 7, 1982; 53 FR 46607, Nov. 18, 1988]

§ 3.809 Specially adapted housing under 38 U.S.C. 2101(a).

A certificate of eligibility for assistance in acquiring specially adapted housing under 38 U.S.C. 2101(a) may be extended to a veteran if the following requirements are met:

(a) *Service.* Active military, naval or air service after April 20, 1898, is required. Benefits are not restricted to veterans with wartime service.

(b) *Disability.* The disability must have been incurred or aggravated as the result of service as indicated in paragraph (a) of this section and the veteran must be entitled to compensation for permanent and total disability due to:

(1) The loss, or loss of use, of both lower extremities, such as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair, or

(2) Blindness in both eyes, having only light perception, plus the anatomical loss or loss of use of one lower extremity, or

(3) The loss or loss of use of one lower extremity together with residuals of organic disease or injury which so affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair.

(4) The loss or loss of use of one lower extremity together with the loss of loss of use of one upper extremity which so

affect the functions of balance or propulsion as to preclude locomotion without the aid of braces, crutches, canes, or a wheelchair.

(c) *Duplication of benefits.* The assistance referred to in this section will not be available to any veteran more than once.

(d) *''Preclude locomotion.''* This term means the necessity for regular and constant use of a wheelchair, braces, crutches or canes as a normal mode of locomotion although occasional locomotion by other methods may be possible.

(Authority: 38 U.S.C. 2101, 2104)

[26 FR 1606, Feb. 24, 1961, as amended at 34 FR 9560, June 18, 1969; 43 FR 14018, Apr. 4, 1978; 46 FR 47543, Sept. 29, 1981]

CROSS REFERENCE: Assistance to certain disabled veterans in acquiring specially adapted housing. See §§36.4400 through 36.4410 of this chapter.

§3.809a Special home adaptation grants under 38 U.S.C. 2101(b).

A certificate of eligibility for assistance in acquiring necessary special home adaptations, or, on or after October 28, 1986, for assistance in acquiring a residence already adapted with necessary special features, under 38 U.S.C. 2101(b) may be issued to a veteran who served after April 20, 1898, if the following requirements are met:

(Authority: 38 U.S.C. 2101(b))

(a) The veteran is not entitled to a certificate of eligibility for assistance in acquiring specially adapted housing under §3.809 nor had the veteran previously received assistance in acquiring specially adapted housing under 38 U.S.C. 2101(a). A veteran who first establishes entitlement under this section and who later becomes eligible for a certificate of eligibility under §3.809 may be issued a certificate of eligibility under §3.809. However, no particular type of adaptation, improvement, or structural alteration may be provided to a veteran more than once.

(b) The veteran is entitled to compensation for permanent and total disability which (1) is due to blindness in both eyes with 5/200 visual acuity or less, or (2) includes the anatomical loss or loss of use of both hands.

(Authority: 38 U.S.C. 2101(b))

(c) The assistance referred to in this section will not be available to any veteran more than once.

(Authority: 38 U.S.C. 2102)

[46 FR 47543, Sept. 29, 1981, as amended at 53 FR 23237, June 21, 1988]

§3.810 Clothing allowance.

(a) Except as provided in paragraph (d) of this section a veteran who has a service-connected disability, or a disability compensable under 38 U.S.C. 1151 as if it were service-connected, is entitled, upon application therefor, to an annual clothing allowance as specified in 38 U.S.C. 1162. The annual clothing allowance is payable in a lump sum, and the following eligibility criteria must also be satisfied:

(1) A VA examination or hospital or examination report from a facility specified in §3.326(c) discloses that the veteran wears or uses certain prosthetic or orthopedic appliances which tend to wear or tear clothing (including a wheelchair) because of such disability and such disability is the loss or loss of use of a hand or foot compensable at a rate specified in §3.350(a), (b), (c), (d), of (f); or

(2) The Chief Medical Director or designee certifies that because of such disability a prosthetic or orthopedic appliance is worn or used which tends to ware or tear the veteran's clothing, or that because of the use of a physician-prescribed medication for a skin condition which is due to the service-connected disability irreparable damage is done to the veteran's outergarments. For the purposes of this paragraph ''appliance'' includes a wheelchair.

(b) Effective August 1, 1972, the initial lump sum clothing allowance is due and payable for veterans meeting the eligibility requirements of paragraph (a) of this section as of that date. Subsequent annual payments for those meeting the eligibility requirements of paragraphs (a) of this section will become due on the anniversary date thereafter, both as to initial claims and recurring payments under previously established entitlement.

(c)(1) Except as provided in paragraph (c)(2) of this section, the application for clothing allowance must be filed within 1 year of the anniversary date

(August 1) for which entitlement is initially established, otherwise, the application will be acceptable only to effect payment of the clothing allowance becoming due on any succeeding anniversary date for which entitlement is established, provided the application is filed within 1 year of such date. The 1-year period for filing application will include the anniversary date and terminate on July 31 of the following year.

(2) Where the initial determination of service connection for the qualifying disability is made subsequent to an anniversary date for which entitlement is established, the application for clothing allowance may be filed within 1 year from the date of notification to the veteran of such determination.

(Authority: 38 U.S.C. 1162)

(d) If a veteran is incarcerated in a Federal, State, or local penal institution for a period of more than 60 days and is furnished clothing without charge by the institution, VA shall reduce the amount of the annual clothing allowance by 1/365th of the amount otherwise payable for each day the veteran was incarcerated during the 12-month period preceding the anniversary date for which entitlement is established. No reduction shall be made for the first 60 days of incarceration.

(Authority: 38 U.S.C. 5313A)

[37 FR 19134, Sept. 19, 1972, as amended at 39 FR 2362, Jan. 21, 1974; 49 FR 28242, July 11, 1984; 56 FR 5756, Feb. 13, 1991; 62 FR 35422, July 1, 1997]

§ 3.811 [Reserved]

§ 3.812 Special allowance payable under section 156 of Pub. L. 97–377.

The provisions of this section apply to the payment of a special allowance to certain surviving spouses and children of individuals who died on active duty prior to August 13, 1981, or who died as a result of a service-connected disability which was incurred or aggravated prior to August 13, 1981. This special allowance is a replacement for certain social security benefits which were either reduced or terminated by provisions of the Omnibus Budget Reconciliation Act of 1981.

(a) *Eligibility requirements.* (1) A determination must first be made that the person on whose earnings record the claim is based either died on active duty prior to August 13, 1981, or died as a result of a service-connected disability which was incurred or aggravated prior to August 13, 1981. For purposes of this determination, character of discharge is not a factor for consideration, and death on active duty subsequent to August 12, 1981, is qualifying provided that the death resulted from a service-connected disability which was incurred or aggravated prior to August 13, 1981.

(2) Once a favorable determination has been made under paragraph (a)(1) of this section, determinations as to the age, relationship and school attendance requirements contained in paragraphs (a)(1) and (b)(1) of section 156 of Pub. L. 97–377 will be made. In making these eligibility determinations VA shall apply the provisions of the Social Security Act, and any regulations promulgated pursuant thereto, as in effect during the claimant's period of eligibility. Unless otherwise provided in this section, when issues are raised concerning eligibility or entitlement to this special allowance which cannot be appropriately resolved under the provisions of the Social Security Act, or the regulations promulgated pursuant thereto, the provisions of title 38, Code of Federal Regulations, are for application.

(b) *Computation of payment rate*—(1) *Basic entitlement rate.* A basic entitlement rate will be computed for each eligible claimant in accordance with the provisions of subparagraphs (a)(2) and (b)(2) of section 156 of Pub. L. 97–377 using data to be provided by the Social Security Administration. This basic entitlement rate will then be used to compute the monthly payment rate as described in paragraphs (b)(2) to (b)(6) of this section.

(2) *Original or reopened awards to surviving spouses.* The monthly payment rate shall be equal to the basic entitlement rate increased by the overall average percentage (rounded to the nearest tenth of a percent) of each legislative increase in dependency and indemnity compensation rates under 38

U.S.C. 1311 which became effective concurrently with or subsequent to the effective date of the earliest adjustment under section 215(i) of the Social Security Act that was disregarded in computing the basic entitlement rate.

(3) *Original and reopened awards to children.* The monthly payment rate shall be equal to the basic entitlement rate increased by the overall average percentage (rounded to the nearest tenth of a percent) of each legislative increase in the rates of educational assistance allowance under 38 U.S.C. 3531(b) which became effective concurrently with or subsequent to the effective date of the earliest adjustment under section 215(i) of the Social Security Act that was disregarded in computing the basic entitlement rate.

(4) *Subsequent legislative increases in rates.* The monthly rate of special allowance payable to a surviving spouse shall be increased by the same overall average percentage increase (rounded to the nearest tenth of a percent) and on the same effective date as any legislative increase in the rates payable under 38 U.S.C. 1311. The monthly rate of special allowance payable to a child shall be increased by the same overall average percentage increase (rounded to the nearest tenth of a percent) and on the same effective date as any legislative increase in the rates payable under 38 U.S.C. 3531(b).

(5) *Amendment of awards.* Prompt action shall be taken to amend any award of this special allowance to conform with evidence indicating a change in basic eligibility, any basic entitlement rate, or any effective date previously determined. It is the claimant's responsibility to promptly notify VA of any change in their status or employment which affects eligibility or entitlement.

(6) *Rounding of monthly rates.* Any monthly rate computed under the provisions of this paragraph, if not a multiple of $1, shall be rounded to the next lower multiple of $1.

(c) *Claimants not entitled to this special allowance.* The following are not entitled to this special allowance for the reasons indicated.

(1) Claimants eligible for death benefits under 38 U.S.C. 1151. The deaths in such cases are not service-connected.

(2) Claimants eligible for death benefits under 38 U.S.C. 1318. The deaths in such cases are not service connected.

(3) Claimants whose claims are based on an individual's service in:

(i) The Commonwealth Army of the Philippines while such forces were in the service of the Armed Forces pursuant to the military order of the President dated July 26, 1941, including recognized guerrilla forces (see 38 U.S.C. 107).

(ii) The Philippine Scouts under section 14, Pub. L. 190, 79th Congress (see 38 U.S.C. 107).

(iii) The commissioned corps of the Public Health Service (specifically excluded by section 156 of Pub. L. 97–377), or

(iv) The National Oceanic and Atmospheric Administration (specifically excluded by section 156 of Pub. L. 97–377).

(d) *Appellate jurisdiction.* VA shall have appellate jurisdiction of all determinations made in connection with this special allowance.

(e) *Claims—formal and informal.* Formal claims for this special allowance must be filed on a form prescribed by the Secretary of Veterans Affairs. When informal claims or inquiries as to eligibility are received, the appropriate application form shall be provided. In such cases, the date of receipt of the informal claim or inquiry will be accepted as the date of claim for this special allowance if a formal claim on the prescribed form is received within one year from that date.

(f) *Retroactivity and effective dates.* There is no time limit for filing a claim for this special allowance. Upon the filing of a claim, benefits shall be payable for all periods of eligibility beginning on or after the first day of the month in which the claimant first became eligible for this special allowance, except that no payment may be made for any period prior to January 1, 1983.

(Authority: Sec. 156, Pub. L. 97–377, 96 Stat. 1830, 1920 (1982))

[49 FR 21709, May 23, 1984, as amended at 54 FR 26030, June 21, 1989; 60 FR 20643, Apr. 27, 1995]

§ 3.813 Interim benefits for disability or death due to chloracne or porphyria cutanea tarda.

(a) *Disability benefits.* Except as provided in paragraph (c) of this section, a veteran who served in the active military, naval or air service in the Republic of Vietnam during the Vietnam era, and who suffers from chloracne or porphyria cutanea tarda which became manifest within one year after the date of the veteran's most recent departure from the Republic of Vietnam during such service, shall be paid interim disability benefits under this section in the same manner and to the same extent that compensation would be payable if such disabilities were service-connected.

(b) *Death benefits.* Except as provided in paragraph (c) of this section, if a veteran described in paragraph (a) of this section dies as a result of chloracne or porphyria cutanea tarda, the veteran's survivors shall be paid interim death benefits under this section based upon the same elgibility requirements and at the same rates that dependency and indemnity compensation would be payable if the death were service-connected.

(c) *Exceptions.* Benefits under this section are not payable for any month for which compensation or dependency and indemnity compensation is payable for the same disability or death, nor are benefits payable under this section (1) when there is affirmative evidence that the disease was not incurred by the veteran during service in the Republic of Vietnam during the Vietnam era, (2) when there is affirmative evidence to establish that an intercurrent injury or disease, which is a recognized cause of the disease for which benefits are being claimed, was suffered by the veteran between the date of the veteran's most recent departure from the Republic of Vietnam during active military, naval or air service and the onset of the claimed disease, or (3) if it is determined, based on evidence in the veteran's service records and other records provided by the Secretary of Defense, that the veteran was not exposed to dioxin during active military, naval or air service in the Republic of Vietnam during the Vietnam era.

(d) *Similarity to service-connected benefits.* For purposes of all laws administered by VA (except chapters 11 and 13 of title 38 U.S.C.), a disease establishing eligibility for disability or death benefits under this section shall be treated as if it were service-connected, and the receipt of disability or death benefits shall be treated as if such benefits were compensation or dependency and indemnity compensation, respectively.

(e) *Effective dates.* Benefits under this section may not be paid for any period prior to October 1, 1984, nor for any period after September 30, 1986.

(Authority: Pub. L. 98–542)

[50 FR 34460, Aug. 26, 1985]

INCOMPETENTS, GUARDIANSHIP AND INSTITUTIONAL AWARDS

§ 3.850 General.

(a) Payment of benefits to a duly recognized fiduciary may be made on behalf of a person who is mentally incompetent or who is a minor; or, payment may be made directly to the beneficiary or to a relative or other person for the use of the beneficiary, regardless of legal disability, when it is determined to be in the best interest of the beneficiary by the Veterans Services Officer.

(Authority: 38 U.S.C. 5502)

(1) Unless otherwise contraindicated by evidence of record payment will be made direct to the following classes of minors without any referral to the Veterans Services Officer:

(i) Those who are serving in or have been discharged from the military forces of the United States; and

(ii) Those who qualify for survivors benefits as a surviving spouse.

(2) Unless otherwise contraindicated by evidence of record, immediate payment of benefits may be made to the spouse of an incompetent veteran having no guardian for the use of the veteran and his or her dependents prior to referral to the Veterans Services Officer. (Sec. 13.57 of this chapter.)

(b) When payments have been discontinued or withheld from a fiduciary, benefits may be temporarily paid to the person having custody of the minor or incompetent.

(c) Where a child is in the custody of a natural, adoptive or stepparent, benefits payable on behalf of such child may be paid to the parent as custodian of the child.

(d) Benefits due a minor or incompetent adult Indian who is a recognized ward of the Goverment, for whom no fiduciary has been appointed, may be paid to the proper officer of the Indian Service designated by the Secretary of the Interior to receive funds for said person.

[26 FR 1606, Feb. 24, 1961, as amended at 27 FR 5431, June 8, 1962; 38 FR 29076, Oct. 19, 1973; 39 FR 34532, Sept. 26, 1974; 40 FR 36329, Aug. 20, 1975; 41 FR 12656, Mar. 26, 1976; 45 FR 27436, Apr. 23, 1980]

§3.851 St. Elizabeths Hospital, Washington, DC.

Benefits due or becoming due any person who is a patient at St. Elizabeths Hospital will be paid to a duly appointed fiduciary of such person. The benefits payable to a veteran who has no spouse, child, or dependent parent will be paid by an institutional award in accordance with §3.852 if there is no such fiduciary. Benefits payable to veterans' dependents who are patients at this hospital will be paid direct or to a fiduciary of such dependent, except that any awards now being paid to the superintendent will be continued while such dependent remains a patient.

[39 FR 34532, Sept. 26, 1974, as amended at 45 FR 27436, Apr. 23, 1980]

§3.852 Institutional awards.

(a) When an incompetent veteran entitled to pension, compensation or retirement pay is a patient in a hospital or other institution, payments on his (or her) account may be made to the chief officer of a Department of Veterans Affairs or non-Department of Veterans Affairs institution:

(1) When no fiduciary has been appointed or when payments to an unsatisfactory fiduciary have been discontinued;

(2) When the Veterans Services Officer certifies that a fiduciary is not furnishing the chief officer funds required for the veteran's comforts and desires not otherwise provided by the institution;

(3) When a fiduciary requests that an institutional award be made or continued, and the Veterans Services Officer approves the request.

(Authority: 38 U.S.C. 5503(b)(3))

(b) In an institutional award of pension, compensation or retirement pay there may be paid to the chief officer of a non-Department of Veterans Affairs institution on behalf of the veteran an amount not in excess of $60 per month. An institutional award of disability pension will not exceed $25 per month if the award is apportionable under §3.454(a).

(Authority: 38 U.S.C. 501)

(1) All sums, otherwise payable in excess of the institutional award, apportionments or awards to fiduciaries, will be deposited in Personal Funds of Patients.

(2) There may be paid on behalf of a veteran, having no spouse, child or dependent parent and receiving care in a non-Department of Veterans Affairs institution, such additional amount, within the limit of the total payable and as may be certified by the Veterans Services Officer, needed for the benefit of the veteran and to pay for his (or her) care and maintenance. Moneys on deposit in Personal Funds of Patients will not be used for this purpose except as authorized by the Veterans Services Officer under §13.72 of this chapter.

(3) If the veteran has dependents, or more is payable under his (or her) rating, or there are funds to his (or her) credit in ''Funds Due Incompetent Beneficiaries,'' such additional amount as may be needed will be allowed on the basis of a certification by the chief officer with respect to need and amount required.

(c) Where there arises a situation as enumerated in paragraph (a)(1) of this section, apportionment to dependents will be under §3.451.

(Authority: 38 U.S.C. 5307)

(d) There will be paid to the chief officer of a Department of Veterans Affairs institution all sums otherwise payable in excess of apportionments or awards to fiduciaries.

(Authority: 38 U.S.C. 5503(b)(3))

(e) Any excess funds held by the chief officer of a non-Department of Veterans Affairs institution, not necessary for the benefit of the veteran, will be returned to the Department of Veterans Affairs or to a fiduciary, if one is serving. Upon death of a veteran with no surviving heirs, excess funds will be returned to the Department of Veterans Affairs.

(Authority: 38 U.S.C. 5502)

[26 FR 1606, Feb. 24, 1961, as amended at 27 FR 5431, June 8, 1962; 38 FR 29076, Oct. 19, 1973; 39 FR 12100, Apr. 3, 1974; 40 FR 36329, Aug. 20, 1975; 45 FR 27436, Apr. 23, 1980]

CROSS REFERENCES: Veterans Benefits Apportionable. See § 3.452. Payment to Chief Officer of Institution. See § 13.61 of this chapter.

§ 3.853 Incompetents; estate over $25,000.

(a) Effective November 1, 1990, through September 30, 1992, where a veteran:

(1) Is rated incompetent by VA, and

(2) Has neither spouse, child, nor dependent parent, and

(3) Has an estate, excluding the value of the veteran's home, which exceeds $25,000, further payments of compensation shall not be made until the estate is reduced to less than $10,000. The value of the veteran's estate shall be computed under the provisions of § 13.109 of this chapter. Payment of compensation shall be discontinued the last day of the first month in which the veteran's estate exceeds $25,000.

(b) Where payment of compensation has been discontinued by reason of paragraph (a) of this section, it shall not be resumed for any period prior to October 1, 1992, until VA has received evidence showing the estate has been reduced to less than $10,000, or any criterion of paragraph (a) (1) or (2) of this section is no longer met. Payments shall not be made for any period prior to the date on which the estate was reduced to less than $10,000, or a criterion of paragraph (a) (1) or (2) of this section was no longer met.

(c) If a veteran denied payment of compensation under paragraph (a) of this section is subsequently rated competent for more than 90 days, the withheld compensation shall be paid to the veteran in a lump-sum. However, a lump-sum payment shall not be made to or on behalf of a veteran who, within such 90-day period, dies or is again rated incompetent.

(d) The compensation payments to an incompetent veteran who is hospitalized, institutionalized, or domiciled by the United States, or any political subdivision thereof, are subject to the provisions of § 3.557 of this part.

(Authority: 38 U.S.C. 5505)

[56 FR 65853, Dec. 19, 1991]

§ 3.854 Limitation on payments for minor.

Benefits will not be authorized to a fiduciary recognized or appointed for a child, by reason of its minority, for any period subsequent to the day preceding the date on which the child will attain its majority under the law of the State in which the child resides. Payments on or after that date, if otherwise in order, will be made direct to the child, if competent, or, if incompetent and direct payment under § 3.850 is not in order, to a fiduciary appointed for the child as a mentally incompetent adult.

[39 FR 34533, Sept. 26, 1974]

§ 3.855 Beneficiary rated or reported incompetent.

(a) *General.* Payments being made directly to a beneficiary who is or may be incompetent will not be routinely suspended pending certification of a fiduciary (or a recommendation that payments should be paid directly to the beneficiary) by the Veterans Services Officer or development of the issue of incompetency.

(b) *Application.* This policy applies to all cases including (but not limited to) the following:

(1) Notice or evidence is received that a guardian has been appointed for the beneficiary.

(2) Notice or evidence is received that the beneficiary has been committed to a hospital.

(3) The beneficiary has been rated incompetent by the Department of Veterans Affairs.

[42 FR 2069, Jan. 10, 1977]

§3.856 Change of name of female fiduciary.

If a female fiduciary receiving benefits in such capacity marries or is restored to her former name by divorce decree, her statement setting forth her present name may be accepted.

[39 FR 34533, Sept. 26, 1974]

§3.857 Children's benefits to fiduciary of surviving spouse.

Where children are separated from the surviving spouse by reason of her (or his) incompetency, no apportionment is required. All amounts payable on behalf of the children may be paid to the fiduciary of the surviving spouse provided the fiduciary is adequately taking care of the needs of the children from the beneficiary's estate voluntarily or pursuant to a decree of court.

[39 FR 12100, Apr. 3, 1974, as amended at 62 FR 5529, Feb. 6, 1997]

FORFEITURE

§3.900 General.

(a) Forfeiture of benefits based on one period of service does not affect entitlement to benefits based on a period of service beginning after the offense causing the prior forfeiture.

(b)(1) Except as provided in paragraph (b)(2) of this section, any offense committed prior to January 1, 1959, may cause a forfeiture and any forfeiture in effect prior to January 1, 1959, will continue to be a bar on and after January 1, 1959.

(Authority: Section 3, Pub. L. 85–857)

(2) Effective September 2, 1959, forfeiture of benefits may not be declared except under the circumstances set forth in §3.901(d), §3.902(d), or §3.903. Forfeitures declared before September 2, 1959, will continue to be a bar on and after that date.

(Authority: 38 U.S.C. 6103(d) and 6105)

(c) Pension or compensation payments are not subject to forfeiture because of violation of hospital rules.

(d) When the person primarily entitled has forfeited his or her rights by reason of fraud or a treasonable act determination as to the rights of any dependents of record to benefits under §3.901(c) or §3.902(c) may be made upon receipt of an application.

(Authority: 38 U.S.C. 6103(b) and 38 U.S.C. 6104(b))

[26 FR 1607, Feb. 24, 1961, as amended at 27 FR 8590, Aug. 28, 1962; 53 FR 17934, May 19, 1988]

§3.901 Fraud.

(a) *Definition.* An act committed when a person knowingly makes or causes to be made or conspires, combines, aids, or assists in, agrees to, arranges for, or in any way procures the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, concerning any claim for benefits under any of the laws administered by the Department of Veterans Affairs (except laws relating to insurance benefits).

(b) *Effect on claim.* For the purposes of paragraph (d) of this section, any person who commits fraud forfeits all rights to benefits under all laws administered by the Department of Veterans Affairs other than laws relating to insurance benefits.

(c) *Forfeiture before September 2, 1959.* Where forfeiture for fraud was declared before September 2, 1959, in the case of a veteran entitled to disability compensation, the compensation payable except for the forfeiture may be paid to the veteran's spouse, children and parents provided the decision to apportion was authorized prior to September 2, 1959. The total amount payable will be the lesser of these amounts:

(Authority: 38 U.S.C. 6103)

(1) Service-connected death benefit payable.

(2) Amount of compensation payable but for the forfeiture.

No benefits are payable to any person who participated in the fraud causing the forfeiture.

(d) *Forfeiture after September 1, 1959.* After September 1, 1959, forfeiture by reason of fraud may be declared only

(1) Where the person was not residing or domiciled in a State as defined in §3.1(i) at the time of commission of the fraudulent act; or

(2) Where the person ceased to be a resident of or domiciled in a State as

defined in § 3.1(i) before expiration of the period during which criminal prosecution could be instituted; or

(3) The fraudulent act was committed in the Philippine Islands.

Where the veteran's rights have been forfeited, no part of his or her benefit may be paid to his or her dependents.

(Authority: 38 U.S.C. 6103)

(e) *Remission of forfeitures imposed prior to September 2, 1959.* Where it is determined that a forfeiture for fraud which was imposed prior to September 2, 1959, would not be imposed under the law and regulation in effect on and after September 2, 1959, the forfeiture shall be remitted effective June 30, 1972. Benefits to which a person becomes eligible by virtue of the remission, upon application therefor, shall be awarded effective as provided by § 3.114.

(Authority: 38 U.S.C. 6103)

[27 FR 8590, Aug. 28, 1962, as amended at 37 FR 19134, Sept. 19, 1972; 53 FR 17934, May 19, 1988]

§ 3.902 Treasonable acts.

(a) *Definition.* An act of mutiny, treason, sabotage or rendering assistance to an enemy of the United States or of its allies.

(b) *Effect on claim.* For the purposes of paragraph (d) of this section, any person determined by the Department of Veterans Affairs to be guilty of a treasonable act forfeits all gratuitous benefits under laws administered by the Department of Veterans Affairs which he or she may be receiving or would have been entitled to receive in the future.

(c) *Forfeiture before September 2, 1959.* Where forfeiture for treasonable acts was declared before September 2, 1959, the Secretary may pay any part of benefits so forfeited to the dependents of the person provided the decision to apportion was authorized prior to September 2, 1959, except that the amount may not be in excess of that which the dependent would be entitled to as a death benefit.

(Authority: 38 U.S.C. 6104(c))

(1) *Compensation.* Whenever a veteran entitled to disability compensation has forfeited his or her right, any part of the compensation payable except for the forfeiture may be paid to the veteran's spouse, children and parents. The total amount payable will be the lesser of these amounts:

(i) Service-connected death benefit payable.

(ii) Amount of compensation payable but for the forfeiture.

No benefits are payable to any person participating in the treasonable act causing the forfeiture.

(2) *Pension.* Whenever a veteran entitled to pension has forfeited his or her right, any part of the pension payable except for the forfeiture provision may be paid to the veteran's spouse and children. The total amount payable will be the lesser of these amounts:

(i) Nonservice-connected death benefit payable.

(ii) Amount of pension being paid the veteran at the time of forfeiture.

No benefits are payable to any person who participated in the treasonable act causing the forfeiture.

(d) *Forfeiture after September 1, 1959.* After September 1, 1959, forfeiture by reason of a treasonable act may be declared only

(1) Where the person was not residing or domiciled in a State as defined in § 3.1(i) at the time of commission of the act; or

(2) Where the person ceased to be a resident of or domiciled in a State as defined in § 3.1(i) before expiration of the period during which criminal prosecution could be instituted; or

(3) The treasonable act was committed in the Philippine Islands.

No part of the benefits forfeited by the person primarily entitled shall be paid to any dependent.

(Authority: 38 U.S.C. 6104)

(e) *Children.* A treasonable act committed by a child or children, regardless of age, who are in the surviving spouse's custody and included in an award to such person will not affect the award to the surviving spouse.

[27 FR 8590, Aug. 28, 1962; 53 FR 17934, May 19, 1988]

§3.903 Subversive activities.

(a) *Definition.* Any offense for which punishment is prescribed: (1) In title 18 U.S.C., sections 792, 793, 794, 798, 2381 through 2385, 2387 through 2390, and chapter 105;

(2) In the Uniform Code of Military Justice, Articles 94, 104 and 106 (10 U.S.C. 894, 904, and 906);

(3) In the following sections of the Atomic Energy Act of 1954: Sections 222 through 226 (42 U.S.C. 2272–2276); and

(4) In section 4 of the Internal Security Act of 1950 (50 U.S.C. 783).

(b) *Effect on claim.* (1) Any person who is convicted after September 1, 1959, of subversive activities shall from and after the date of commission of such offense have no right to gratuitous benefits (including the right to burial in a national cemetery) under laws administered by the Department of Veterans Affairs based on periods of military, naval, or air service commencing before the date of the commission of such offense and no other person shall be entitled to such benefits on account of such person.

(2) The Attorney General will notify the Department of Veterans Affairs in each case in which a person is indicted or convicted of an offense listed in paragraphs (a)(1), (3), and (4) of this section. The Secretary of Defense or the Secretary of the Treasury, as may be appropriate, will notify the Department of Veterans Affairs in each case in which a person is convicted of an offense listed in paragraph (a)(2) of this section.

(c) *Presidential pardon.* Where any person whose right to benefits has been so terminated is granted a pardon of the offense by the President of the United States, the right to such benefits shall be restored as of the date of such pardon, if otherwise eligible.

(Authority: 38 U.S.C. 6105)

[27 FR 8591, Aug. 28, 1962, as amended at 38 FR 4511, Feb. 15, 1973; 38 FR 30106, Nov. 1, 1973; 53 FR 17934, May 19, 1988]

§3.904 Effect of forfeiture after veteran's death.

(a) *Fraud.* Whenever a veteran has forfeited his or her right by reason of fraud, his or her surviving dependents upon proper application may be paid pension, compensation, or dependency and indemnity compensation, if otherwise eligible. No benefits are payable to any person who participated in the fraud causing the forfeiture.

(Authority: 38 U.S.C. 6103(c))

(b) *Treasonable acts.* Death benefits may be paid as provided in paragraph (a) of this section where forfeiture by reason of a treasonable act was declared before September 2, 1959, and such benefits were authorized prior to that date. Otherwise, no award of gratuitous benefits (including the right to burial in a national cemetery) may be made to any person based on any period of service commencing before the date of commission of the offense which resulted in the forfeiture.

(Authority: 38 U.S.C. 6104(c))

(c) *Subversive activities.* Where the veteran was convicted of subversive activities after September 1, 1959, no award of gratuitous benefits (including the right to burial in a national cemetery) may be made to any person based on any period of service commencing before the date of commission of the offense which resulted in the forfeiture unless the veteran had been granted a pardon of the offense by the President of the United States. If pardoned, the veteran's surviving dependents upon proper application may be paid pension, compensation or dependency and indemnity compensation, if otherwise eligible, and the right to burial in a national cemetery is restored.

(Authority: 38 U.S.C. 6105(a))

[27 FR 8591, Aug. 28, 1962, as amended at 38 FR 30106, Nov. 1, 1973; 39 FR 13970, Apr. 19, 1974; 53 FR 16924, May 19, 1988]

§3.905 Declaration of forfeiture or remission of forfeiture.

(a) *Jurisdiction.* At the regional office level, except in VA Regional Office, Manila, Philippines, the Regional Counsel is authorized to determine whether the evidence warrants formal consideration as to forfeiture. In the Manila Regional Office the Adjudication Officer is authorized to make this determination. Submissions may also be made by the director of a service,

the Chairman, Board of Veterans Appeals, and the General Counsel. Jurisdiction to determine whether the claimant or payee has forfeited the right to gratuitous benefits or to remit a prior forfeiture is vested in the Director, Compensation and Pension Service, and personnel to whom authority has been delegated under the provisions of § 3.100(c).

(b) *Fraud or treasonable acts.* Forfeiture of benefits under § 3.901 or § 3.902 will not be declared until the person has been notified by the Regional Counsel or, in VA Regional Office, Manila, Philippines, the Adjudication Officer, of the right to present a defense. Such notice shall consist of a written statement sent to the person's latest address of record setting forth the following:

(1) The specific charges against the person;

(2) A detailed statement of the evidence supporting the charges, subject to regulatory limitations on disclosure of information;

(3) Citation and discussion of the applicable statute;

(4) The right to submit a statement or evidence within 60 days, either to rebut the charges or to explain the person's position;

(5) The right to a hearing within 60 days, with representation by counsel of the person's own choosing, that fees for the representation are limited in accordance with 38 U.S.C. 5904(c) and that no expenses incurred by a claimant, counsel or witness will be paid by VA.

(c) *Subversive activities.* Automatic forfeiture of benefits under § 3.903 will be effectuated by an official authorized to declare a forfeiture as provided in paragraph (a) of this section.

(d) *Finality of decisions.* A decision of forfeiture is subject to the provisions of § 3.104(a) and §§ 20.1103 and 20.1104 of this chapter. The officials authorized to file administrative appeals and the time limit for filing such appeals are set forth in § 19.51 of this chapter.

(e) *Remission of forfeiture.* In event of remission of forfeiture under § 3.901(e), any amounts paid as an apportionment(s) during periods of the previously forfeited beneficiary's reentitlement will be offset.

[28 FR 2234, Mar. 7, 1963, as amended at 29 FR 7547, June 12, 1964; 37 FR 19134, Sept. 19, 1972; 39 FR 13970, Apr. 19, 1974; 53 FR 17934, May 19, 1988; 58 FR 32443, June 10, 1993]

CROSS REFERENCES: Effective dates; forfeiture. See § 3.400(m). Reductions and discontinuances; fraud. See § 3.500(k). Reductions and discontinuances; treasonable acts or subversive activities. See § 3.500(s). Adjustments and resumptions. See § 3.669. Burial benefits. See § 3.1609.

PROTECTION

§ 3.950 Helpless children; Spanish-American and prior wars.

Marriage is not a bar to the payment of pension or compensation to a helpless child under an award approved prior to April 1, 1944. The presumption, arising from the fact of marriage, that helplessness has ceased may be overcome by positive proof of continuing helplessness. As to awards approved on or after April 1, 1944, pension or compensation may not be paid to a helpless child who has married.

[26 FR 1608, Feb. 24, 1961]

§ 3.951 Preservation of disability ratings.

(a) A readjustment to the Schedule for Rating Disabilities shall not be grounds for reduction of a disability rating in effect on the date of the readjustment unless medical evidence establishes that the disability to be evaluated has actually improved.

(Authority: 38 U.S.C. 1155)

(b) A disability which has been continuously rated at or above any evaluation of disability for 20 or more years for compensation purposes under laws administered by the Department of Veterans Affairs will not be reduced to less than such evaluation except upon a showing that such rating was based on fraud. Likewise, a rating of permanent total disability for pension purposes which has been in force for 20 or more years will not be reduced except upon a showing that the rating was based on fraud. The 20-year period will be computed from the effective date of

the evaluation to the effective date of reduction of evaluation.

(Authority: 38 U.S.C. 110)

[34 FR 11970, July 16, 1969, as amended at 57 FR 10426, Mar. 26, 1992]

§3.952 Protected ratings.

Ratings under the Schedule of Disability Ratings, 1925, which were the basis of compensation on April 1, 1946, are subject to modification only when a change in physical or mental condition would have required a reduction under the 1925 schedule, or an increased evaluation has been assigned under the Schedule for Rating Disabilities, 1945 (looseleaf edition), after which time all evaluations will be under the 1945 schedule (loose-leaf edition) only. Such increased evaluations must be of an other than temporary nature (due to hospitalization, surgery, etc.). When a temporary evaluation is involved, the 1925 schedule evaluation will be restored after the period of increase has elapsed unless the permanent residuals would have required reduction under that schedule, or unless an increased evalation would be assignable under a 1945 schedule (looseleaf edition) rating. In any instance where the changed condition represents an increased degree of disability under either rating schedule but the evaluation provided by the 1945 schedule (looseleaf edition) is less than the evaluation in effect under the 1925 schedule on April 1, 1946, the 1925 schedule evaluation and award are protected.

[26 FR 12766, Dec. 30, 1961]

§3.953 Pub. L. 85–56 and Pub. L. 85–857.

(a) *In receipt of or entitled to receive benefits on December 31, 1958.* Any person receiving or entitled to receive benefits under any public law administered by the Department of Veterans Affairs on December 31, 1958, may, except where there was fraud, clear and unmistakable error of fact or law, or misrepresentation of material facts, continue to receive such benefits as long as the conditions warranting such payment under those laws continue. The greater benefit under the previous law or the corresponding section of title 38 U.S.C., will be paid in the absence of an election to receive the lesser benefit.

(Authority: Section 10, Pub. L. 85–857)

(b) *Emergency officers' retirement pay.* Any person who was receiving, or entitled to receive, emergency officers' retirement pay, or other privileges or benefits as a retired emergency officer of World War I, on December 31, 1958, under the laws in effect on that day, will, except where there was fraud, clear and unmistakable error as to conclusion of fact or law, or misrepresentation of material facts, continue to receive, or be entitled to receive, emergency officers' retirement pay at the rate otherwise payable on December 31, 1958, and such other privileges and benefits, so long as the conditions warranting such pay, privileges, and benefits under those laws continue.

(Authority: Section 11, Pub. L. 85–857)

(c) *Service connection established under prior laws.* In the absence of fraud, misrepresentation of material facts or clear and unmistakable error, all cases where compensation was payable on December 31, 1957, for disability service connected under prior laws, repealed by Pub. L. 85–56, including those service connected under the second proviso of section 200 of the World War Veterans' Act, 1924, as amended, are protected by section 2316(b), Pub. L. 85–56 and section 10, Pub. L. 85–857 as to both service connection and rate of compensation, so long as the conditions warranting such status and rate continue. Any disability so service connected may be evaluated under the Schedule for Rating Disabilities, 1945 (looseleaf edition) and benefits awarded on the basis thereof, as well as special monthly compensation under 38 U.S.C. 1114, provided such action results in compensation payable at a rate equal to or higher than that payable on December 31, 1957. Where a changed physical condition warrants reevaluation of service-connected disabilities, compensation will be awarded under the provisions of 38 U.S.C. 1114.

[26 FR 1608, Feb. 24, 1961, as amended at 26 FR 8561, Sept. 13, 1961; 26 FR 12766, Dec. 30, 1961]

§ 3.954 Burial allowance.

When any person who had a status under any law in effect on December 31, 1957, which afforded entitlement to burial benefits dies, the burial allowance will be paid, if otherwise in order, even though such status does not meet the service requirements of 38 U.S.C. ch. 23.

(Authority: 38 U.S.C. 2305)

[26 FR 1608, Feb. 24, 1961]

§§ 3.955—3.956 [Reserved]

§ 3.957 Service connection.

Service connection for any disability or death granted or continued under title 38 U.S.C., which has been in effect for 10 or more years will not be severed except upon a showing that the original grant was based on fraud or it is clearly shown from military records that the person concerned did not have the requisite service or character of discharge. The 10-year period will be computed from the effective date of the Department of Veterans Affairs finding of service connection to the effective date of the rating decision severing service connection, after compliance with § 3.105(d). The protection afforded in this section extends to claims for dependency and indemnity compensation or death compensation.

(Authority: 38 U.S.C. 1159)

[33 FR 15286, Oct. 15, 1968]

§ 3.958 Federal employees' compensation cases.

Any award approved prior to September 13, 1960, authorizing Department of Veterans Affairs benefits concurrently with an award of benefits under the Federal Employees' Compensation Act based on a finding that the same disability or death was due to civilian employment is not affected by the prohibition against concurrent awards contained in 5 U.S.C. 8116(b).

[41 FR 20408, May 18, 1976]

§ 3.959 Tuberculosis.

Any veteran who, on August 19, 1968, was receiving or entitled to receive compensation for active or inactive (arrested) tuberculosis may receive compensation under 38 U.S.C. 1114(q) and 1156 as in effect before August 20, 1968.

(Authority: Pub. L. 90–493; 82 Stat. 809)

[33 FR 16275, Nov. 6, 1968]

§ 3.960 Section 306 and old-law pension protection.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, any person eligible to elect improved pension under § 3.711 or 3.712 who is in receipt of section 306 or old-law pension on December 31, 1978, shall in the absence of an election to receive improved pension, continue to receive such pension at the monthly rate payable on December 31, 1978.

(b) *Termination.* Pension payable under paragraph (a) of this section shall be terminated for any one of the following reasons:

(1) A veteran pensioner ceases to be permanently and totally disabled.

(2) A surviving spouse pensioner ceases to meet the definition of *surviving spouse* in 38 U.S.C. 101(3).

(3) A child pensioner ceases to meet the definition of *child* in 38 U.S.C. 101(4).

(4) A section 306 pensioner's countable annual income, determined under §§ 3.250 to 3.270, exceeds the applicable amount stated in § 3.26(a).

(5) An old-law pensioner's countable annual income determined under §§ 3.250 to 3.270 exceeds the applicable amount stated in § 3.26(c).

(6) A section 306 pensioner has a net worth of such size that it is reasonable that some part of it be consumed for the pensioner's maintenance. Evaluation of net worth shall be made under § 3.263.

(c) *Reduction.* The pension rate payable under paragraph (a) of this section shall be reduced by the amount of any additional pension payable by reason of a dependent upon the loss of such dependent. A veteran or surviving spouse who no longer has any dependents shall not continue to receive either section 306 pension or old-law pension if countable annual income exceeds the appropriate rate in § 3.26(a), (b), or (c).

(d) *Finality of termination.* Termination of section 306 pension or old-law pension for one of the reasons listed in paragraph (b) of this section precludes a person from thereafter establishing

entitlement under any other pension program except the improved pension program.

(Authority: Sec. 306 of Pub. L. 95–588, 92 Stat. 2497)

[44 FR 45944, Aug. 6, 1979, as amended at 56 FR 28824, June 25, 1991]

ACCRUED

§3.1000 Under 38 U.S.C. 5121.

(a) *Basic entitlement.* Except as provided in §§3.1001 and 3.1008, where death occurred on or after December 1, 1962, periodic monetary benefits (other than insurance and servicemen's indemnity) authorized under laws administered by the Department of Veterans Affairs, to which a payee was entitled at his death under existing ratings or decisions, or those based on evidence in the file at date of death, and due and unpaid for a period not to exceed 2 years prior to the last date of entitlement as provided in §3.500(g) will, upon the death of such person, be paid as follows:

(Authority: 38 U.S.C. 5121(a)

(1) Upon the death of a veteran to the living person first listed as follows:

(i) His or her spouse;

(ii) His or her children (in equal shares);

(iii) His or her dependent parents (in equal shares) or the surviving parent.

(2) Upon the death of a surviving spouse or remarried surviving spouse, to the veteran's children.

(3) Upon the death of a child, to the surviving children of the veteran entitled to death pension, compensation, or dependency and indemnity compensation.

(4) In all other cases, only so much of the accrued benefit may be paid as may be necessary to reimburse the person who bore the expense of last sickness or burial. (See §3.1002.)

(b) *Apportionments.* (1) Upon the death of a person receiving an apportioned share of benefits payable to a veteran, all or any part of such unpaid amount is payable to the veteran or to any other dependent or dependents of the veteran.

(Authority: 38 U.S.C. 5121(a)(1))

(2) Where at the date of death of the veteran an apportioned share is being paid to or has been withheld on behalf of another person, the apportioned amount remaining unpaid for periods prior to the last day of the month before the veteran's death is payable to the apportionee.

(3) Where the accrued death pension, compensation or dependency and indemnity compensation was payable for a child as an apportioned share of the surviving spouse's benefit, payment will be made under the provisions of paragraph (a)(4) of this section, on the expenses of such deceased child's last sickness or burial.

(c) *Claims and evidence.* Application for accrued benefits must be filed within 1 year after the date of death. A claim for death pension, compensation, or dependency and indemnity compensation, by an apportionee, surviving spouse, child or parent is deemed to include claim for any accrued benefits. (See §3.152(b)).

(1) If a claimant's application is incomplete, the claimant will be notified of the evidence necessary to complete the application. If such evidence is not received within 1 year from the date of such notification, no accrued benefits may be paid.

(2) Failure to file timely claim, or a waiver of rights, by a preferred dependent will not serve to vest title in a person in a lower class or a claimant for reimbursement; neither will such failure or waiver by a person or persons in a joint class serve to increase the amount payable to another or others in the class.

(Authority: 38 U.S.C. 5121(c); 5112(b))

(d) *Definitions.* (1) *Spouse* means the surviving spouse of the veteran, whose marriage meets the requirements of §3.1(j) or §3.52. Where the marriage meets the requirements of §3.1(j) date of marriage and continuous cohabitation are not factors.

(2) *Child* is as defined in §3.57 and includes an unmarried child who became permanently incapable of self-support prior to attaining 18 years of age as well as an unmarried child over the age of 18 but not over 23 years of age, who was pursuing a course of instruction within the meaning of §3.57 at the time of the payee's death. However, upon the death of a child in receipt of death

pension, compensation, or dependency and indemnity compensation, any accrued will be payable to the surviving child or children of the veteran entitled to death pension, compensation, or dependency and indemnity compensation. Upon the death of a child, another child who has elected dependents' educational assistance under 38 U.S.C. chapter 35 may receive accrued death pension, compensation, or dependency and indemnity compensation, payable on behalf of the deceased child for periods prior to the commencement of benefits under that chapter.

(3) *Dependent parent* is as defined in § 3.59: *Provided,* That the mother or father was dependent within the meaning of § 3.250 at the date of the veteran's death.

(4) *Evidence in the file at date of death,* as used in paragraph (a) of this section, will be considered to have been met when there is on file at the date of the veteran's death:

(i) Notwithstanding § 3.200(b) evidence, including uncertified statements, which is essentially complete and of such weight as to establish service connection or degree of disability for disease or injury when substantiated by other evidence in file at date of death or when considered in connection with the identifying, verifying, or corroborative effect of the death certificate.

(ii) In the case of a veteran whose award is subject to reduction by reason of hospital treatment, institutional or domiciliary care by the Department of Veterans Affairs, and in the case of a veteran whose award is subject to increase by reason of the existence of dependents, prima facie proof of dependents, or of other factors affecting entitlement, such as statements on the claim for benefits, or allied forms, provided satisfactory evidence is furnished in support of the claim for accrued benefits. The provisions of this subdivision are not applicable to original awards of accrued benefits.

(e) *Subsistence allowance.* Subsistence allowance under the provisions of 38 U.S.C. ch. 31 remaining due and unpaid at the date of the veteran's death, is payable under the provisions of this section.

(f) *Dependents' educational assistance.* Educational assistance allowance or special restorative training allowance under 38 U.S.C. ch. 35, remaining due and unpaid at the date of death of an eligible surviving spouse or eligible child is payable to a child or children of the veteran (see paragraphs (a)(2), (a)(3) and (d)(2) of this section), or on the expenses of last sickness and burial (see paragraph (a)(4) of this section.) Benefits due and unpaid at the date of death of an eligible spouse are payable only on the expenses of last sickness and burial (see paragraph (a)(4) of this section).

(g) *Veterans educational assistance.* Educational assistance allowance under 38 U.S.C chapters 30, 32, or 34, and 10 U.S.C. chapter 1606 remaining due and unpaid at the date of the veteran's death is payable under the provisions of this section.

(Authority: 38 U.S.C. 5121)

(h) *Clothing allowance.* Clothing allowance under 38 U.S.C. 1162 remaining due and unpaid at the date of the veteran's death is payable under the provisions of this section.

[26 FR 1608, Feb. 24, 1961, as amended at 27 FR 11892, Dec. 1, 1962; 30 FR 11389, Sept. 8, 1965; 31 FR 4790, Mar. 22, 1966; 34 FR 840, Jan. 18, 1969; 39 FR 15126, May 1, 1974; 56 FR 18733, Apr. 24, 1991; 56 FR 24239, May 29, 1991; 61 FR 67950, Dec. 26, 1996; 62 FR 5529, Feb. 6, 1997; 62 FR 35423, July 1, 1997]

§ 3.1001 Hospitalized competent veterans.

The provisions of this section apply only to the payment of amounts actually withheld on a running award under § 3.551(b) which are payable in a lump sum after the veteran's death.

(a) *Basic entitlement.* Where an award of disability pension for a competent veteran without dependents was reduced because of hospital treatment or institutional or domiciliary care by the Department of Veterans Affairs and the veteran dies while receiving such treatment or care or before payment of amounts withheld, the lump sum is payable to the living person first listed as follows:

(1) The veteran's spouse, as defined in § 3.1000(d)(1);

(2) The veteran's children (in equal shares), as defined in §3.57 but without regard to their age or marital status;

(3) The veteran's dependent parents (in equal shares), or the surviving dependent parent, as defined in §3.1000(d)(3);

(4) In all other cases, only so much of the lump sum may be paid as may be necessary to reimburse a person who bore the expenses of last sickness or burial. (See §3.1002.)

(b) *Claim.* Applications must be filed with the Department of Veterans Affairs within 5 years after the death of the veteran. If, however, any person otherwise entitled is under legal disability at the time of the veteran's death, the 5-year period will run from the date of termination or removal of the legal disability.

(1) There is no time limit on the retroactive period of an award or for furnishing evidence.

(2) Failure to file timely claim, or a waiver of rights, by a preferred dependent will not serve to vest title in a person in a lower class or a claimant for reimbursement; neither will such failure or waiver by a person or persons in a joint class serve to increase the amount payable to another or others in the class.

(c) *Lump sum withheld after discharge from institution.* The provisions of paragraphs (a) and (b) of this section will apply in the event of the death of any veteran prior to receiving a lump sum which was withheld because treatment or care was terminated against medical advice or as the result of disciplinary action.

(Authority: 38 U.S.C. 5503)

[26 FR 1609, Feb. 24, 1961, as amended at 27 FR 5539, June 12, 1962; 27 FR 8177, Aug. 16, 1962; 27 FR 11893, Dec. 1, 1962; 39 FR 15126, May 1, 1974]

§3.1002 Political subdivisions of United States.

No part of any accrued benefits will be used to reimburse any political subdivision of the United States for expenses incurred in the last sickness or burial of any beneficiary. (See §3.1(o)).

(Authority: 38 U.S.C. 5121(b) and 5502(d))

[39 FR 15126, May 1, 1974]

§3.1003 Returned and canceled checks.

Where the payee of a check for benefits has died prior to negotiating the check, the check shall be returned to the issuing office and canceled.

(a) The amount represented by the returned check, or any amount recovered following improper negotiation of the check, shall be payable to the living person or persons in the order of precedence listed in §3.1000(a)(1) through (4), except that the total amount payable shall not include any payment for the month in which the payee died (see §3.500(g)), and payments to persons described in §3.1000(a)(4) shall be limited to the amount necessary to reimburse such persons for the expenses of last sickness and/or burial.

(1) There is no limit on the retroactive period for which payment of the amount represented by the check may be made, and no time limit for filing a claim to obtain the proceeds of the check or for furnishing evidence to perfect a claim.

(2) Nothing in this section will preclude payment to an otherwise entitled claimant having a lower order of precedence under §3.1000(a)(1) through (4), if it is shown that the person or persons having a higher order of precedence are deceased at the time the claim is adjudicated.

(b) Subject to the limitations in §3.500(g) of this part, any amount not paid in the manner provided in paragraph (a) of this section shall be paid upon settlement by the General Accounting Office to the estate of the deceased payee, provided that the estate, including the amount paid under this paragraph, will not escheat.

(c) The provisions of this section do not apply to checks for lump sums representing amounts withheld under §3.551(b) or §3.557. These amounts are subject to the provisions of §§3.1001 and 3.1007, as applicable.

(Authority: 38 U.S.C. 501(a), 5122)

[59 FR 25329, May 16, 1994]

§§ 3.1004—3.1006 [Reserved]

§ 3.1007 Hospitalized incompetent veterans.

Where an award of disability pension for an incompetent veteran without dependents was reduced under § 3.551(b) because of hospitalization, institutional or domiciliary care by the Department of Veterans Affairs, or an award of disability pension, compensation or emergency officers' retirement pay was discontinued under § 3.557(b) because the veteran was hospitalized by the United States or a political subdivision and had an estate which equaled or exceeded $1,500, and the veteran dies before payment of amounts withheld or not paid by reason of such care, no part of such amount will be paid to any person. The provisions of this section are applicable to amounts withheld for periods prior to as well as subsequent to the rating of incompetency. The term *dies before payment* includes cases in which a check was issued and the veteran died before negotiating the check.

(Authority: 38 U.S.C. 5503(b))

[39 FR 30349, Aug. 22, 1974]

§ 3.1008 Accrued benefits payable to foreign beneficiaries.

In case of death of the payee of any check in payment of periodic monetary benefits (other than insurance and servicemen's indemnity) accruing under laws administered by the Department of Veterans Affairs, while the amount thereof remains in the special deposit account established by Pub. L. 828, 76th Congress, such amount will be payable under section 3 of that act. (31 U.S.C. 125) However, the accrued amount will be payable only if the person on whose behalf checks were issued and the person claiming the accrued amount have not been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies.

[26 FR 1609, Feb. 24, 1961]

§ 3.1009 Personal funds of patients.

The provisions of this section are applicable to gratuitous benefits deposited by the Department of Veterans Affairs either before, on, or after December 1, 1959, in a personal funds of patients account for an incompetent veteran who was incompetent at the date of death. Where the veteran died after November 30, 1959:

(a) *Eligible persons.* Gratuitous benefits shall be paid to the living person first listed as follows:

(1) His or her spouse, as defined in § 3.1000(d)(1);

(2) His or her children (in equal shares), as defined in § 3.57 but without regard to their age or marital status;

(3) His or her dependent parents (in equal shares) as defined in § 3.59 or the surviving parent, provided that the parent was dependent within the meaning of § 3.250 at the date of the veteran's death.

(4) In all other cases, only so much may be paid as may be necessary to reimburse a person who bore the expense of last sickness or burial. (See § 3.1002.)

(Authority: 38 U.S.C. 5502(d))

(b) *Claim.* Application must be filed with the Department of Veterans Affairs within 5 years after the death of the veteran. If, however, any person otherwise entitled is under legal disability at the time of the veteran's death, the 5-year period will run from the date of termination or removal of the legal disability.

(1) There is no time limit for the submission of evidence.

(2) Failure to file timely claim, or a waiver of rights, by a preferred dependent will not serve to vest title in a person in a lower class or a claimant for reimbursement; neither will such failure or waiver by a person or persons in a joint class serve to increase the amount payable to another or others in the class.

[27 FR 5539, June 12, 1962, as amended at 28 FR 10487, Sept. 28, 1963; 39 FR 30349, Aug. 22, 1974]

Subpart B—Burial Benefits

AUTHORITY: 105 Stat. 386, 38 U.S.C. 501(a), 2302–2308, unless otherwise noted.

§ 3.1600 Payment of burial expenses of deceased veterans.

For the purpose of payment of burial expenses the term *veteran* includes a person who died during a period

deemed to be active military, naval or air service under § 3.6(b)(6). The period of active service upon which the claim is based must have been terminated by discharge or release from active service under conditions other than dishonorable.

(a) *Service-connected death and burial allowance.* If a veteran dies as a result of a service-connected disability or disabilities, an amount not to exceed the amount specified in 38 U.S.C. 2307 (or if entitlement is under § 3.8 (c) or (d), an amount computed in accordance with the provisions of § 3.8(c)) may be paid toward the veteran's funeral and burial expenses including the cost of transporting the body to the place of burial. Entitlement to this benefit is subject to the applicable further provisions of this section and §§ 3.1601 through 3.1610. Payment of the service-connected death burial allowance is in lieu of payment of any benefit authorized under paragraph (b), (c) or (f) of this section.

(Authority: 38 U.S.C. 2307)

(b) *Nonservice-connected death burial allowance.* If a veteran's death is not service-connected, an amount not to exceed the amount specified in 38 U.S.C. 2302 (or if entitlement is under § 3.8 (c) or (d), an amount computed in accordance with the provisions of § 3.8(c)) may be paid toward the veteran's funeral and burial expenses including the cost of transporting the body to the place of burial. Entitlement is subject to the following conditions:

(1) At the time of death the veteran was in receipt of pension or compensation (or but for the receipt of military retirement pay would have been in receipt of compensation); or

(2) The veteran has an original or reopened claim for either benefit pending at the time of the veteran's death, and

(i) In the case of an original claim there is sufficient evidence of record on the date of the veteran's death to have supported an award of compensation or pension effective prior to the date of the veteran's death, or

(ii) In the case of a reopened claim, there is sufficient prima facie evidence of record on the date of the veteran's death to indicate that the deceased would have been entitled to compensation or pension prior to date of death. If the Department of Veterans Affairs determines that additional evidence is needed to confirm that the deceased would have been entitled prior to death, it shall be submitted within 1 year from date of request to the burial allowance claimant for submission of the confirming evidence. If the confirming evidence is not received by the Department of Veterans Affairs within 1 year from date of request, the burial allowance claim shall be disallowed; or

(3) The deceased was a veteran of any war or was discharged or released from active military, naval, or air service for a disability incurred or aggravated in line of duty, and the body of the deceased is being held by a State (or a political subdivision of a State), and the Secretary determines,

(i) That there is no next of kin or other person claiming the body of the deceased veteran, and

(ii) That there are not available sufficient resources in the veteran's estate to cover burial and funeral expenses; and

(Authority: 38 U.S.C. 2302(a))

(4) The applicable further provisions of this section and §§ 3.1601 through 3.1610.

(Authority: 38 U.S.C. 501, 2302)

(c) *Death while properly hospitalized.* If a person dies from non-service-connected causes while properly hospitalized by VA, there is payable an allowance not to exceed the amount specified in 38 U.S.C. 2303(a) for the actual cost of the person's funeral and burial, and an additional amount for transportation of the body to the place of burial. For burial allowance purposes, the term *hospitalized by VA* means admission to a VA facility (as described in 38 U.S.C. 1701(3)) for hospital, nursing home, or domiciliary care under the authority of 38 U.S.C. 1710 or 1711(a); admission (transfer) to a non-VA facility (as described in 38 U.S.C. 1701(4)) for hospital care under the authority of 38 U.S.C. 1703; admission (transfer) to a nursing home under the authority of 38 U.S.C. 1720 for nursing home care at the expense of the United States; or admission (transfer) to a State nursing home for nursing home care with respect to which payment is authorized

under the authority of 38 U.S.C. 1741. (If the hospitalized person's death is service-connected, entitlement to the burial allowance and transportation expenses fall under paragraphs (a) and (g) of this section instead of this paragraph.)

(Authority: 38 U.S.C. 2303(a))

(d) *Determinations.* Where a claim for burial allowance would be or has been disallowed because the service department holds that the disability was not incurred in line of duty and evidence is submitted which permits a different finding, the decision of the service department is not binding and the Department of Veterans Affairs will determine line of duty. The burden of proof will rest upon the claimant.

(e) *Persons not included.* Except as provided in § 3.1605(c) burial allowance is not payable in the following cases:

(1) A discharged or rejected draftee or selectee.

(2) A member of the National Guard who reported to camp in answer to the President's call for World War I or World War II service, but who, when medically examined was not finally accepted for active military service.

(3) An alien who does not come within the purview of § 3.7(b).

(4) Philippine Scouts enlisted on or after October 6, 1945, under section 14, Pub. L. 190, 79th Congress.

(5) Temporary members of the Coast Guard Reserve.

(f) *Plot or interment allowance.* When a veteran dies from nonservice-connected causes, an amount not to exceed the amount specified in 38 U.S.C. 2303(b) (or if the entitlement is under § 3.8 (c) or (d), an amount computed in accordance with the provisions of § 3.8(c)) may be paid as a plot or interment allowance. The plot or interment allowance is payable to the person or entity who incurred the expenses. (For payment to a State or political subdivision thereof, see § 3.1604(c).) Entitlement is subject to the following conditions:

(1) The deceased veteran is eligible for the burial allowance under paragraph (b) or (c) of this section; or

(2) The veteran served during a period of war and the conditions set forth in § 3.1604(d)(1)(ii)–(v) (relating to burial in a state veterans' cemetery) are met; or

(Authority: 38 U.S.C. 2303(b)(2))

(3) The veteran was discharged from the active military, naval, or air service for a disability incurred or aggravated in line of duty (or at time of discharge has such a disability, shown by official service records, which in medical judgment would have justified a discharge for disability; the official service department record showing that the veteran was discharged or released from service for disability incurred in line of duty will be accepted for determining entitlement to the plot or interment allowance notwithstanding that the Department of Veterans Affairs has determined, in connection with a claim for monetary benefits, that the disability was not incurred in line of duty); and

(4) The veteran is not buried in a national cemetery or other cemetery under the jurisdiction of the United States; and

(5) The applicable further provisions of this section and §§ 3.1601 through 3.1610.

(Authority: 38 U.S.C. 2303(b))

(g) *Transportation expenses for burial in national cemetery.* Where a veteran dies as the result of a service-connected disability, or at the time of death was in receipt of disability compensation (or but for the receipt of military retired pay or nonservice-connected disability pension would have been entitled to disability compensation at time of death), there is payable, in addition to the burial allowance (either the amount specified in 38 U.S.C. 2302 or the amount specified in 38 U.S.C. 2307 if the cause of death was service connected), an additional amount for payment of the cost of transporting the body to the national cemetery for burial. This amount may not exceed the cost of transporting the body from the veteran's place of death to the national cemetery nearest the veteran's last place of residence in which burial space is available. The amounts payable under this paragraph

are subject to the limitations set forth in §§3.1604 and 3.1606.

[26 FR 1620, Feb. 24, 1961, as amended at 44 FR 22721, Apr. 17, 1979; 47 FR 11012, Mar. 15, 1982; 48 FR 41162, Sept. 14, 1983; 52 FR 34909, Sept. 16, 1987; 56 FR 25045, June 3, 1991; 60 FR 18356, Apr. 11, 1995; 62 FR 35423, July 1, 1997]

CROSS REFERENCES: Definitions; veterans See §3.1(d). Protection; burial allowance. See §3.954.

§3.1601 Claims and evidence.

(a) *Claims.* Claims for reimbursement or direct payment of burial and funeral expenses under §3.1600(b) and plot or interment allowance under §3.1600(f) must be received by VA within 2 years after the permanent burial or cremation of the body. Where the burial allowance was not payable at the death of the veteran because of the nature of his (or her) discharge from service, but after his (or her) death the discharge has been corrected by competent authority so as to reflect a discharge under conditions other than dishonorable, claim may be filed within 2 years from date of correction of the discharge. This time limit does not apply to claims for service-connected burial allowance under §3.1600(a) or for the cost of transporting a veteran's body to the place of burial under §3.1600(c) or §3.1600(g).

(Authority: 38 U.S.C. 904)

(1) Claims for burial allowance may be executed by:

(i) The funeral director, if entire bill or any balance is unpaid (if unpaid bill or the unpaid balance is less than the applicable statutory burial allowance, only the unpaid amount may be claimed by the funeral director); or

(ii) The individual whose personal funds were used to pay burial, funeral, and transportation expenses; or

(iii) The executor or administrator of the estate of the veteran or the estate of the person who paid the expenses of the veteran's burial or provided such services. If no executor or administrator has been appointed then by some person acting for such estate who will make distribution of the burial allowance to the person or persons entitled under the laws governing the distribution of interstate estates in the State of the decedent's personal domicile.

(2) Claims for the plot or interment allowance (except for claims filed by a State or an agency or political subdivision thereof, under §3.1604(d)) may be executed by:

(i) The funeral director, if he or she provided the plot or interment services, or advanced funds to pay for them, and if the entire bill for such or any balance thereof is unpaid (if the unpaid bill or the unpaid balance is less than the statutory plot or interment allowance, only the unpaid amount may be claimed by the funeral director); or

(ii) The person(s) whose personal funds were used to defray the cost of the plot or interment expenses; or

(iii) The person or entity from whom the plot was purchased or who provided interment services if the bill for such is unpaid in whole or in part. An unpaid bill for a plot will take precedence in payment of the plot or interment allowance over an unpaid bill for other interment expenses or a claim for reimbursement for such expenses. Any remaining balance of the plot or interment allowance may then be applied to interment expenses; or

(iv) The executor or administrator of the estate of the veteran or the estate of the person who bore the expense of the plot or interment expenses. If no executor or administrator has been appointed, claim for the plot or interment allowance may be filed as provided in paragraph (a)(1)(iii) of this section for the burial allowance.

(3) For the purposes of the plot and interment allowance *plot* or *burial plot* means the final disposal site of the remains, whether it is a grave, mausoleum vault, columbarium niche, or other similar place. Interment expenses are those costs associated with the final disposition of the remains and are not confined to the acts done within the burial grounds but may include the removal of bodies for burial or interment.

(b) *Supporting evidence.* Evidence required to complete a claim for the burial allowance and the plot or interment allowance, when payable, (including a reopened claim filed within the 2-year period) must be submitted within 1 year from date of the Department of

Veterans Affairs request for such evidence. In addition to the proper claim form the claimant (other than a § 3.1604(d) claimant) is required to submit:

(1) *Statement of account.* Preferably on funeral director's or cemetery owner's billhead showing name of the deceased veteran, the plot or interment costs, and the nature and cost of services rendered, and unpaid balance.

(2) *Receipted bills.* Must show by whom payment was made and show receipt by a person acting for the funeral director or cemetery owner.

(3) *Proof of death.* In accordance with § 3.211.

(4) *Waivers from all other distributees.* Where expenses of a veteran's burial, funeral, plot, interment and transportation were paid from funds of the veteran's estate or some other deceased person's estate and the identity and right of all persons to share in that estate have been established, payment may be made to one heir upon unconditional written consent of all other heirs.

(5) *Entitlement under § 3.1600(b)(3).* In addition to the other evidentiary requirements of this subparagraph, there must be written certification over the signature of a responsible official of the State (or political subdivision of the State) where the body was held that—

(i) There is no next of kin or other person claiming the body of the deceased veteran, and

(ii) There are not available sufficient resources in the veteran's estate to cover burial and funeral expenses.

(Authority: 38 U.S.C. 2302(a))

[38 FR 30106, Nov. 1, 1973, as amended at 41 FR 38771, Sept. 13, 1976; 44 FR 58710, Oct. 11, 1979; 48 FR 41162, Sept. 14, 1983; 52 FR 34909, Sept. 16, 1987; 55 FR 50323, Dec. 6, 1990]

§ 3.1602 Special conditions governing payments.

(a) *Two or more persons expended funds.* If two or more persons have paid from their personal funds toward the burial, funeral, plot, interment and transportation expenses, the burial and plot or interment allowance will be divided among such persons in accordance with the proportionate share paid by each, unless waiver is executed in favor of one of such persons by the other person or persons involved. The person in whose favor payment is waived will not be allowed a sum greater than that which was paid by such person. (See § 3.1601(a)(3).)

(b) *Person who performed services.* A person who performed burial, funeral, and transportation services or furnished the burial plot will have priority over claims of persons whose personal funds were expended.

(c) *Partial payment.* Where partial payment of the expenses of the burial, funeral and transportation of the body are made from funds of the veteran's estate and the balance from the personal funds of another person, the claim of the other person has priority.

(d) *Escheat.* No payment of burial allowance or plot or interment allowance will be made where it would escheat.

[26 FR 1621, Feb. 24, 1961, as amended at 38 FR 30107, Nov. 1, 1973; 41 FR 38771, Sept. 13, 1976]

§ 3.1603 Authority for burial of certain unclaimed bodies.

If the body of a deceased veteran is unclaimed, there being no relatives or friends to claim the body, and there is burial allowance entitlement which is not based on § 3.1600(b)(3), the amount provided for burial and plot or interment allowance will be available for the burial upon receipt of a claim accompanied by a statement showing what efforts were made to locate relatives or friends. The question of escheat of any part of such deceased veteran's estate is not a factor in such a claim. Burial allowance may be authorized for cost of disinterment and reburial of unclaimed remains originally accorded pauper burial but not for initial expenses of a burial in a potter's field. Burial in a prison cemetery is not considered a pauper burial.

[48 FR 41162, Sept. 14, 1983]

§ 3.1604 Payments from non-Department of Veterans Affairs sources.

(a) *Contributions or payments by public or private organizations.* When contributions or payments on the burial expenses have been made by a state, any agency or political subdivision of the United States or of a State or the employer of the deceased veteran only the

difference between the entire burial expenses and the amount paid thereon by any of these agencies or organizations, not to exceed the applicable statutory burial allowance, will be authorized. Contributions or payments by any other public or private organization such as a lodge, union, fraternal or beneficial organization, society, burial association or insurance company, will bar payment of the burial allowance if such allowance would revert to the funds of such organization or would discharge such organization's obligation without payment.

(Authority: 38 U.S.C. 2302; 2307)

(1) A contract or policy which provides for payment at death of a specified amount to a designated beneficiary other than the person rendering burial and funeral services will not bar payment of the burial allowance to the beneficiary even though the organization issuing the contract or policy retains an option to make payment direct to the person rendering burial and funeral services.

(2) The provisions of this paragraph do not apply to contributions or payments on the burial and funeral expenses which are made for humanitarian reasons if the organization making the contribution or payment is under no legal obligation to do so.

(b) *Payment by Federal agency.* (1) Where a veteran dies while in employment covered by the United States Employees' Compensation Act, as amended, or other similar laws specifically providing for payment of the expenses of funeral, transportation, and interment out of Federal funds, burial allowance will not be authorized by the Department of Veterans Affairs.

(2) A provision in any Federal law or regulation permitting the application of funds due or accrued to the credit of the deceased toward the expenses of funeral, transportation and interment (such as Social Security benefits), as distinguished from a provision specifically prescribing a definite allowance for such purpose, will not bar payment of the burial allowance. In such cases only the difference between the total burial expense and the amount paid thereon under such provision, not to exceed the amount specified in 38 U.S.C. 2302, will be authorized.

(Authority: 38 U.S.C. 2302(b))

(3) Burial allowance is not payable for deaths in active service, or during the duty periods set forth in § 3.6, or for other deaths where the cost of burial and transportation is paid by the service department.

(c) *Payment of plot or interment allowance by public or private organization except as provided for by §3.1604(d).* Where any part of the plot or interment expenses has been paid or assumed by a state, any agency or political subdivision of a State, or the employer of the deceased veteran, only the difference between the total amount of such expenses and the amount paid or assumed by any of these agencies or organizations, not to exceed the statutory plot or interment allowance, will be authorized.

(Authority: 38 U.S.C. 2303(b))

(d) *Payment of the plot or interment allowance to a State or political subdivision thereof*—(1) *Conditions warranting payment.* All of the following conditions must be met:

(i) The plot or interment allowance is payable based on the service of the deceased veteran. See § 3.1600.

(ii) The deceased veteran is buried in a cemetery or a section thereof which is used solely for the interment of persons eligible for burial in a national cemetery.

(iii) The cemetery or the section thereof where the veteran is buried is owned by the State, or an agency or political subdivision of the State claiming the plot or interment allowance.

(iv) No charge is made by the State, or an agency or political subdivision of the State for the cost of the plot or interment.

(v) The veteran was buried on or after October 1, 1978.

(2) *Claims.* A claim for payment under this paragraph shall be executed by a State, or an agency or political subdivision of a state on a claim form prescribed by the Department of Veterans Affairs. Such claim must be received by the Department of Veterans Affairs

within 2 years after the permanent burial or cremation of the body. Where the burial allowance was not payable at the death of the veteran because of the nature of the veteran's discharge from service, but after the veteran's death the veteran's discharge was corrected by competent authority so as to reflect a discharge under conditions other than dishonorable, claim may be filed within 2 years from the date of correction of the discharge.

(3) *Amount of the allowance.* A State or an agency or political subdivision of a state entitled to payment under this paragraph shall be paid the maximum statutory amount as a plot or interment allowance without regard to the acutal cost of the plot or interment.

(Authority: 38 U.S.C. 2303(b))

(4) *Priority of payment.* A claim filed under this paragraph shall take precedence in payment of the plot or interment allowance over any claim filed for the plot or interment allowance under § 3.1601(a)(2).

(Authority: 38 U.S.C. 2303(b))

[26 FR 1621, Feb. 24, 1961, as amended at 29 FR 9537, July 14, 1964; 38 FR 30107, Nov. 1, 1973; 44 FR 22722, Apr. 17, 1979; 44 FR 58710, Oct. 11, 1979; 52 FR 34909, Sept. 16, 1987]

§ 3.1605 Death while traveling under prior authorization or while hospitalized by the Department of Veterans Affairs.

An amount may be paid not to exceed the amount payable under § 3.1600 for the funeral, burial, plot, or interment expenses of a person who dies while in a hospital, domiciliary, or nursing home to which he or she was properly admitted under authority of the Department of Veterans Affairs. (See § 3.1600(c)). In addition, the cost of transporting the body to the place of burial may be authorized. The amount payable under this section is subject to the limitations set forth in paragraph (b) of this section, and §§ 3.1604 and 3.1606.

(a) *Death enroute.* When a veteran while traveling under proper prior authorization and at Department of Veterans Affairs expense to or from a specified place for the purpose of:

(1) Examination; or

(2) Treatment; or

(3) Care

dies enroute, burial, funeral, plot, interment, and transportation expenses will be allowed as though death occurred while properly hospitalized by the Department of Veterans Affairs. Hospitalization in the Philippines under 38 U.S.C. 631, 632, and 633 does not meet the requirements of this section.

(b) *Transportation.* Except for retired persons hospitalized under section 5 of Executive Order 10122 (15 FR 2173; 3 CFR 1950 Supp.) issued pursuant to Pub. L. 351, 81st Congress, and not as Department of Veterans Affairs beneficiaries, the cost of transportation of the body to the place of burial in addition to the burial and plot or interment allowance will be provided by the Department of Veterans Affairs where death occurs:

(1) Within a State or the Canal Zone (38 U.S.C. 101 (20)) while the veteran is hospitalized by the Department of Veterans Affairs and the body is buried in a State or the Canal Zone; or

(2) While hospitalized within but burial is to be outside of a State or the Canal Zone, except that cost of transportation of the body will be authorized only from place of death to port of embarkation, or to border limits of United States where burial is in Canada or Mexico.

(c) *Extended entitlement.* Entitlement extends to the following persons who die while properly hospitalized by the Department of Veterans Affairs:

(1) Discharged or rejected draftees; or

(2) Members of the National Guard who reported to camp in answer to the President's call for World War I, World War II, or Korean service, but who when medically examined were not finally accepted for active military service; or

(3) A veteran discharged under conditions other than dishonorable from a period of service other than a war period.

(d) *Persons properly hospitalized.* A person properly hospitalized who dies:

(1) While on authorized absence which has not exceeded 96 hours at time of death;

(2) While in a status of unauthorized absence for a period not in excess of 24 hours; or

(3) While absent from the hospital for a period totaling 24 hours of combined authorized and unauthorized absence (all other cases in which such absence arises at the expiration of an authorized absence are not included);

is considered as having died while hospitalized.

(e) *Persons not properly hospitalized.* Where a deceased person was not properly hospitalized, benefits will not be authorized under this section.

[26 FR 1621, Feb. 24, 1961, as amended at 26 FR 7738, Aug. 18, 1961; 31 FR 5757, Apr. 14, 1966; 32 FR 3743, Mar. 4, 1967; 36 FR 22144, Nov. 20, 1971; 38 FR 30107, Nov. 1, 1973; 44 FR 22722, Apr. 17, 1979; 48 FR 41162, Sept. 14, 1983]

§3.1606 Transportation items.

The transportation costs of those persons who come within the provisions of §§3.1600(g) and 3.1605 (a), (b), (c), and (d) may include the following:

(a) *Shipment by common carrier.* (1) Charge for pickup of remains from place hospitalized or place of death but not to exceed the usual and customary charge made the general public for the same service.

(2) Procuring permit for shipment.

(3) *Shipping case.* When a box purchased for interment purposes is also used as the shipping case, the amount payable may not exceed the usual and customary charge for a shipping case. In any such instance any excess amount would be an acceptable item to be included in the burial allowance expenses.

(4) Cost of sealing outside case (tin or galvanized iron), if a vault (steel or concrete) is used as a shipping case and also for burial, an allowance of $30 may be made thereon in lieu of a separate shipping case.

(5) Cost of hearse to point where remains are to be placed on common carrier for shipment.

(6) Cost of transportation by common carrier including amounts paid as Federal taxes.

(7) Cost of one removal by hearse direct from common carrier plus one later removal by hearse to place of burial.

(b) *Transported by hearse.* (1) Charge for pickup of remains from place hospitalized, or place of death and

(2) Charge for one later removal by hearse to place of burial. These charges will not exceed those made the general public for the same services.

(3) Payment of hearse charges for transporting the remains over long distances are limited to prevailing common carrier rates when common carrier service is available and can be easily and effectively utilized.

[26 FR 1622, Feb. 24, 1961, as amended at 36 FR 22144, Nov. 20, 1971; 38 FR 27354, Oct. 3, 1973; 41 FR 55875, Dec. 23, 1976; 42 FR 26205, May 23, 1977]

§3.1607 Cost of flags.

No reimbursement will be authorized for the cost of a burial flag privately purchased by relatives, friends, or other parties but such cost may be included in a claim for the burial allowance.

[26 FR 1622, Feb. 24, 1961]

§3.1608 Nonallowable expenses.

No reimbursement will be allowed for:

(a) *Accessory items.* Such as items of food and drink.

(b) *Duplicate items.* Any item or cost of any item or service, such as casket, clothing, etc., previously provided or paid for by any Federal agency (including the Department of Veterans Affairs).

[26 FR 1622, Feb. 24, 1961]

§3.1609 Forfeiture.

(a) Forfeiture of benefits for fraud by a veteran during his lifetime will not preclude payment of burial and plot or interment allowance if otherwise in order. No benefits will be paid to a claimant who participated in the fraud which caused the forfeiture by the veteran.

(b) Burial and plot or interment allowance is not payable based on a period of service commencing prior to the date of commission of the offense where either the veteran or claimant has forfeited the right to gratuitous benefits under §3.902 or §3.903 by reason of a treasonable act or subversive activities, unless the offense was pardoned by the President of the United

States prior to the date of the veteran's death.

(Authority: 38 U.S.C. 5904(c)(2), 5905(a))

[38 FR 30107, Nov. 1, 1973, as amended at 41 FR 55875, Dec. 27, 1976]

CROSS REFERENCE: Effect of forfeiture after veteran's death. See § 3.904.

§ 3.1610 Burial in national cemeteries; burial of unclaimed bodies.

The statutory burial allowance and permissible transportation charges as provided in §§ 3.1600 through 3.1611 are also payable under the following conditions:

(a) Where burial of a deceased veteran is in a national cemetery, provided that burial in a national cemetery is desired by the person or persons entitled to the custody of the remains for interment and permission for burial has been received from the officers having jurisdiction over burials in national cemeteries; or

(b) Where the body of a deceased veteran is unclaimed by relatives or friends (see § 3.1603), the Director of the regional office in the area in which the veteran died will immediately complete arrangements for burial in a national cemetery or, at his or her option, in a cemetery or cemetery section meeting the requirements of § 3.1604(d)(1)(ii)–(iv), provided that the total amount payable for burial and transportation expenses (including the plot allowance, if entitlement is established) does not exceed the total amount payable had burial been in a national cemetery.

(Authority: 38 U.S.C. 1501(a))

[57 FR 29025, June 30, 1992; 57 FR 40944, Sept. 8, 1992]

§ 3.1611 Official Department of Veterans Affairs representation at funeral.

When requested by the person entitled to the custody of the body of a deceased beneficiary of the Department of Veterans Affairs, official representation at the funeral will be granted provided an employee is available for the purpose and this representation will entail no expense to the Department of Veterans Affairs.

[26 FR 1622, Feb. 24, 1961]

§ 3.1612 Monetary allowance in lieu of a Government-furnished headstone or marker.

(a) *Purpose.* This section provides for the payment of a monetary allowance in lieu of furnishing a headstone or marker at Government expense under the provisions of § 1.631(a)(2) and (b) of this chapter to the person entitled to request such a headstone or marker.

(b) *Eligibility for the allowance.* All of the following conditions shall be met:

(1) The deceased veteran was eligible for burial in a National cemetery (See § 1.620 (a), (b), (c) and (d) of this chapter); or died under circumstances precluding the recovery or identification of the veteran's remains or the veteran's remains were buried at sea.

(2) The veteran was buried on or after October 18, 1978.

(3) The headstone or marker was purchased to mark the otherwise unmarked grave of the deceased veteran or, if death occurred prior to December 18, 1989, the veteran's identifying information was added to an existing headstone or marker.

(Authority: 38 U.S.C. 2306(d))

(4) The headstone or marker is for placement in a cemetery other than a National cemetery or the headstone or marker upon which the veteran's identifying information was added is situated in a cemetery other than a National cemetery.

(c) *Person entitled to request a Government-furnished headstone or marker.* For purposes of this monetary allowance, the term ''person entitled to request a headstone or marker'' includes, but is not limited to, the person who purchased the headstone or marker (or if death occurred prior to December 18, 1989, the person who paid for adding the veteran's identifying information to an existing headstone or marker), or the executor, administrator or person representing the deceased's estate.

(Authority: 38 U.S.C. 2306(d))

(d) *Receipted bill.* A receipted bill describing the headstone or marker (or the services rendered in adding the veteran's identifying information to an existing headstone or marker) date of purchase, purchase price, the amount of payment and the name of the person

who made such payment, shall accompany a claim for this monetary allowance.

(e) *Payment and amount of the allowance.*

(1) The monetary allowance is payable as reimbursement to the person entitled to request a Government-furnished headstone or marker. If funds of the deceased's estate were used to purchase the headstone or marker or, if death occurred prior to December 18, 1989, to have the deceased's identifying information added to an existing headstone or marker, and no executor or administrator has been appointed, payment may be made to a person who will make a distribution of this monetary allowance to the person or persons entitled under the laws governing the distribution of intestate estates in the State of the decedent's personal domicile.

(Authority: 38 U.S.C. 2306(d))

(2) The amount of the allowance payable is the lesser of the following:

(i) Actual cost of acquiring a non-Government headstone or marker or, if death occurred prior to December 18, 1989, the actual cost of adding the veteran's identifying information to an existing headstone or marker; or

(Authority: 38 U.S.C. 2306(d))

(ii) The average actual cost, as determined by VA, of headstones and markers furnished at Government expense for the fiscal year preceding the fiscal year in which the non-Government marker was purchased or the services for adding the veteran's identifying information on an existing headstone or marker were purchased.

(3) The average actual cost of Government-furnished headstones and markers during any fiscal year is determined by dividing the sum of VA's costs during that fiscal year for procurement, transportation, Office of Memorial Programs and miscellaneous administration, inspection and support staff by the total number of headstones and markers procured by VA during that fiscal year and rounding to the nearest whole dollar amount. The resulting average actual cost is published at the end of each fiscal year in the ''Notices'' section of the FEDERAL REGISTER.

(Authority: 38 U.S.C. 2306(d))

(4) The following applies to joint or multiple headstones or markers:

(i) When a joint or multiple non-Government headstone or marker is purchased subsequent to the veteran's death, the amount set forth in paragraph (e)(2)(ii) of this section shall be available as reimbursement for the cost of the veteran's portion of the joint or multiple headstone or marker.

(ii) When a joint or multiple non-Government headstone or marker is existent at the time of the veteran's death, the allowance payable as reimbursement under paragraph (e)(2) of this section shall be determined based on the cost of the services for adding the veteran's identifying information.

(f) *Payment of allowance prohibited.* This monetary allowance shall not be paid when a Government headstone or marker has been requested or issued under the provisions of §1.631 (a)(2) and (b) of this chapter.

(g) *Claims.* There is no time limit for filing claims for monetary allowance in lieu of a Government-furnished headstone or marker.

(Authority: 38 U.S.C. 2306(d))

(h) The monetary allowance in lieu of a Government-furnished headstone or marker is not payable if death occurred on or after November 1, 1990.

(Authority: Pub. L. 101–508)

[44 FR 58711, Oct. 11, 1979, as amended at 47 FR 19131, May 4, 1982; 49 FR 19653, May 9, 1984; 51 FR 17629, May 14, 1986; 52 FR 34910, Sept. 16, 1987; 55 FR 50323, Dec. 6, 1990; 56 FR 25045, June 3, 1991; 56 FR 65851, Dec. 19, 1991; 61 FR 20727, May 8, 1996]

PART 4—SCHEDULE FOR RATING DISABILITIES

Subpart A—General Policy in Rating

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