

(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.

CROSS REFERENCE: Dependents' educational assistance. See § 3.707.

[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; 65 FR 12116, Mar. 8, 2000]

**§ 3.668 [Reserved]**

**§ 3.669 Forfeiture.**

(a) *General.* Upon receipt of notice from a Regional Counsel (or in cases under the jurisdiction of the Manila Regional Office, the Veterans Service Center Manager) that a case is being formally submitted for consideration of forfeiture of a payee's rights under § 3.905 of this part 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)

CROSS REFERENCES: Fraud. See § 3.901. Treasonable acts. See § 3.902. Subversive activities. See § 3.903.

[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; 71 FR 52290, Sept. 5, 2006]

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

### § 3.700

### 38 CFR Ch. I (7-1-14 Edition)

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 readjust-

ment payment, subject to recoupment of the readjustment payment. Where payment of readjustment pay was made on or before September 30, 1996, VA will recoup from disability compensation an amount equal to the total amount of readjustment pay. Where payment of readjustment pay was made after September 30, 1996, VA will recoup from disability compensation an amount equal to the total amount of readjustment pay less the amount of Federal income tax withheld from such pay.

(Authority: 10 U.S.C. 1174(h)(2))

(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, or where entitlement to disability compensation was established on or after September 15, 1981, 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 convalescence. Where entitlement to disability compensation was established prior to September 15, 1981,

## Department of Veterans Affairs

## § 3.700

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. Where entitlement to disability compensation was established on or after September 15, 1981, a veteran may receive disability compensation for disability incurred or aggravated by service prior to the date of receipt of the severance pay, but VA must recoup from that disability compensation an amount equal to the severance pay. Where payment of severance pay was made on or before September 30, 1996, VA will recoup from disability compensation an amount equal to the total amount of the severance pay. Where payment of severance pay was made after September 30, 1996, VA will recoup from disability compensation an amount equal to the total amount of the severance pay less the amount of Federal income tax withheld from such pay. For members of the Armed Forces who separated under Chapter 61 of title 10, United States Code, on or after January 28, 2008, no recoupment of severance pay will be made for disabilities incurred in line of duty in a combat zone or incurred during performance of duty in combat-related operations as designated by the Department of Defense.

(Authority: 10 U.S.C. 1174(h)(2) and 1212(d))

(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 and special separation benefits.* (i) Where entitlement to disability compensation was established on or after September 15, 1981, 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 separation pay. Where payment of separation pay was

made on or before September 30, 1996, VA will recoup from disability compensation an amount equal to the total amount of separation pay. Where payment of separation pay was made after September 30, 1996, VA will recoup from disability compensation an amount equal to the total amount of separation pay less the amount of Federal income tax withheld from such pay. The Federal income tax withholding amount is the flat withholding rate for Federal income tax withholding.

(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.

(iii) Where payment of special separation benefits under 10 U.S.C. 1174a was made on or after December 5, 1991, VA will recoup from disability compensation an amount equal to the total amount of special separation benefits less the amount of Federal income tax withheld from such pay. The Federal income tax withholding amount is the flat withholding rate for Federal income tax withholding.

(Authority: 10 U.S.C. 1174 and 1174a)

(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

### § 3.701

### 38 CFR Ch. I (7-1-14 Edition)

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; 67 FR 60868, Sept. 27, 2002; 74 FR 26957, June 5, 2009; 74 FR 36610, July 24, 2009]

#### § 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 pay-

able 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).