

number "2" where it appears as the first entry in the column titled "Pounds over" and adding in its place the number "0;" and by revising the source citation at the end of the table to read as follows:

§ 55.218 Table of distances for storage of explosive materials.

* * * * *

Table: American Table of Distances for Storage of Explosives (December 1910), as Revised and Approved by the Institute of Makers of Explosives-July, 1991.

Par. 25. Section 55.221 is amended by revising the section heading and paragraphs (a) and (d) to read as follows:

§ 55.221 Requirements for display fireworks, pyrotechnic compositions, and explosive materials used in assembling fireworks or articles pyrotechnic.

(a) Display fireworks, pyrotechnic compositions, and explosive materials used to assemble fireworks and articles pyrotechnic shall be stored at all times as required by this Subpart unless they are in the process of manufacture, assembly, packaging, or are being transported.

* * * * *

(d) All dry explosive powders and mixtures, partially assembled display fireworks, and finished display fireworks shall be removed from fireworks process buildings at the conclusion of a day's operations and placed in approved magazines.

Par. 26. Section 55.222 is amended by removing "special fireworks" wherever it appears and adding in its place "display fireworks"; by removing "common fireworks" wherever it appears and adding in its place "consumer fireworks"; and by revising footnote 3 at the end of the table to read as follows:

§ 55.222 Table of distances between fireworks process buildings and between fireworks process and fireworks nonprocess buildings.

* * * * *

³ While consumer fireworks or articles pyrotechnic in a finished state are not subject to regulation, explosive materials used to manufacture or assemble such fireworks or articles are subject to regulation. Thus, fireworks process buildings where consumer fireworks or articles pyrotechnic are being processed shall meet these requirements.

* * * * *

Par. 27. Section 55.223 is amended by revising the title heading of the table; by removing "special fireworks" in the table heading and adding in its place "display fireworks"; by removing "common fireworks" in the table heading and adding in its place

"consumer fireworks"; by revising footnote 2 and adding a new footnote 5 at the end of the table to read as follows:

§ 55.223 Table of distances between fireworks process buildings and other specified areas.

Distance from Passenger Railways, Public Highways, Fireworks Plant Buildings used to Store Consumer Fireworks and Articles Pyrotechnic, Magazines and Fireworks Shipping Buildings, and Inhabited Buildings.^{3 4 5}

* * * * *

² While consumer fireworks or articles pyrotechnic in a finished state are not subject to regulation, explosive materials used to manufacture or assemble such fireworks or articles are subject to regulation. Thus, fireworks process buildings where consumer fireworks or articles pyrotechnic are being processed shall meet these requirements.

³ This table does not apply to the separation distances between fireworks process buildings (see § 55.222) and between magazines (§§ 55.218 and 55.224).

⁴ The distances in this table apply with or without artificial or natural barricades or screen barricades. However, the use of barricades is highly recommended.

⁵ No work of any kind, except to place or move items other than explosive materials from storage, shall be conducted in any building designated as a warehouse. A fireworks plant warehouse is not subject to § 55.222 or this section, tables of distances.

§ 55.224 [Amended]

Par. 28. Section 55.224 is amended by removing "special fireworks" wherever it appears and adding in its place "display fireworks", and by adding footnote reference "3" after "2" in the title heading for the third column of the table.

Signed: May 28, 1998.

John W. Magaw,
Director.

Approved: July 14, 1998.

John P. Simpson,
Deputy Assistant Secretary (Regulatory,
Tariff, and Trade Enforcement).
[FR Doc. 98-21867 Filed 8-21-98; 8:45 am]
BILLING CODE 4810-31-M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 3

RIN 2900-AJ04

Additional Disability or Death Due to Hospital Care, Medical or Surgical Treatment, Examination, or Training and Rehabilitation Services

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations concerning awards of compensation or dependency and indemnity compensation for additional disability or death due to VA hospital care, medical or surgical treatment, examination, or training and rehabilitation services. Under this final rule, benefits are payable for additional disability or death caused by VA hospital care, medical or surgical treatment, or examination only if VA fault or "an event not reasonably foreseeable" proximately caused the disability or death. Benefits are also payable for additional disability or death proximately caused by VA's provision of training and rehabilitation services. This final rule is necessary to reflect Congress' recent amendment of 38 U.S.C. 1151, the statutory authority for such benefits.

DATES: Effective Date: October 1, 1997.

FOR FURTHER INFORMATION CONTACT: John Bisset, Jr., Consultant, Regulations Staff, Compensation and Pension Service, Veterans Benefits Administration, 810 Vermont Avenue, NW., Washington, DC 20420, telephone (202) 273-7210.

SUPPLEMENTARY INFORMATION: Section 1151 of 38 U.S.C. previously authorized the award of compensation or dependency and indemnity compensation for any additional disability or death of a veteran which did not result from the veteran's own willful misconduct but which did result from an injury or aggravation of an injury suffered as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation awarded under any of the laws administered by VA or as a result of having submitted to an examination under any such law. 38 CFR 3.358 and 3.800 contain the regulatory provisions implementing those statutory provisions.

Effective for claims filed on or after October 1, 1997, section 422(a) of Pub. L. 104-204, 110 Stat. 2874, 2926 (1996), amended 38 U.S.C. 1151 to authorize an award of compensation or dependency and indemnity compensation for a veteran's "qualifying additional disability" or "qualifying death." Under 38 U.S.C. 1151, as amended, an additional disability or death qualifies for compensation or dependency and indemnity compensation if it (1) was not the result of the veteran's willful misconduct; (2) was caused by hospital care, medical or surgical treatment, or examination furnished the veteran under any law administered by VA, either by a VA employee or in a VA facility; and (3) was proximately caused

by carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on VA's part in furnishing the care, treatment, or examination or by an event not reasonably foreseeable. An additional disability or death also qualifies for benefits if it was not the result of the veteran's willful misconduct and was proximately caused by VA's provision of training and rehabilitation services as part of an approved rehabilitation program under 38 U.S.C. chapter 31. This document adds new 38 CFR 3.361 to implement 38 U.S.C. 1151 as amended, new 38 CFR 3.362 to codify rules concerning the offset of benefits awarded under 38 U.S.C. 1151 if the beneficiary has also recovered damages under the Federal Tort Claims Act, and new 38 CFR 3.363 to consolidate regulatory provisions previously contained in §§ 3.358 and 3.800.

Section 422(b)(2) of Pub. L. 104-204, 110 Stat. 2874, 2927, provides that 38 U.S.C. 1151, as amended, shall govern all administrative determinations of eligibility for benefits under 38 U.S.C. 1151 made for claims filed on or after the effective date set forth in section 422(b)(1), which is October 1, 1996. However, section 422(c) of Pub. L. 104-204, 110 Stat. 2874, 2927, provides that, notwithstanding section 422(b)(1) or any other provision of the act, the amendments shall not take effect until October 1, 1997, unless Congress enacts legislation other than Pub. L. 104-204 to provide an earlier effective date. Congress has not enacted such legislation. Therefore, we apply new §§ 3.361 through 3.363 only to claims received by VA on or after October 1, 1997, and continue to apply §§ 3.358 and 3.800 to claims received by VA before October 1, 1997. These applicability rules are reflected in new §§ 3.358(a), 3.361(a), 3.362(a), 3.363(a), and 3.800(a).

New § 3.361(b), concerning additional disability, is derived from § 3.358(b)(1) with appropriate changes made to reflect the amendments made by section 422 of Pub. L. 104-204 and editorial changes made to improve clarity. Similarly, proposed § 3.361(c), concerning cause, is derived from § 3.358(b)(2) and (c)(1).

As amended by section 422 of Pub. L. 104-204, 38 U.S.C. 1151(a)(1) requires for entitlement that a veteran's additional disability or death be proximately caused either by "an event not reasonably foreseeable" or by "carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault" on VA's part in furnishing the hospital care, medical or surgical treatment, or examination that

caused the additional disability or death. We believe that Congress, by listing several synonymous terms relating to negligence, intended not to provide alternative standards of liability, but rather to establish a single standard which would trigger entitlement to 38 U.S.C. 1151 benefits if not met in VA's furnishing of hospital care, medical or surgical treatment, or examination. We further believe that the single standard Congress intended to establish is tort-variety negligence. We recognize that there is not a single standard of liability governing tort claims under the Federal Tort Claims Act, but rather that the standard applied may vary from state to state. However, we also believe that Congress did not intend entitlement to a veterans' benefit to depend on a claimant's state of residence. Accordingly, we apply a uniform standard in the adjudication of claims under 38 U.S.C. 1151. Therefore, in new § 3.361(d)(1)(i), we interpret 38 U.S.C. 1151 as providing entitlement to benefits if VA, in furnishing hospital care, medical or surgical treatment, or examination, fails to exercise the degree of care that would be expected of a reasonable health care provider in furnishing hospital care, medical or surgical treatment, or examination.

New § 3.361(d)(1)(ii), concerning consent to care, treatment, or examination, is derived from § 3.358(c)(3). However, we include a requirement that consent be informed, in accordance with 38 CFR 17.32. As reflected in new § 3.361(d)(2), we leave to the factfinder in each claim the determination as to whether the proximate cause of a veteran's additional disability or death was an event not reasonably foreseeable, and for the factfinder, in making that determination, to apply the standard of what a reasonable health care provider would have foreseen. New § 3.361(d)(3), concerning proximate cause by the provision of rehabilitation and training services, is derived from § 3.358(c)(5) with appropriate changes made to reflect the amendments made by section 422 of Pub. L. 104-204 and editorial changes made to improve clarity.

The definition of "Department employee" in new § 3.361(e)(1) is derived from 5 U.S.C. 2105(a), which defines "employee" for title 5 (Government Organization and Employees) purposes, modified to refer only to VA employees who are engaged in the furnishing of health care services. The definition of "Department facility" in new § 3.361(e)(2) reflects a provision of 38 U.S.C. 1151(a) as amended by section 422 of Pub. L. 104-204. 38 U.S.C. 1151(a)(1) refers to "a

Department facility as defined in section 1701(3)(A)" of title 38, United States Code. Section 1701(3)(A) defines "facilities of the Department" as facilities over which the Secretary has direct jurisdiction. We therefore define "Department facility" in the same way.

New § 3.361(f)(1) excludes hospital care or medical services furnished pursuant to a contract made under 38 U.S.C. 1703 because, under section 1703's terms, such care or services are furnished in a non-Department facility, and the day-to-day operations of such a facility's employees are not subject to the Secretary's supervision. The exclusion in new § 3.361(f)(2) of nursing home care furnished under 38 U.S.C. 1720 is derived from § 3.358(c)(6). New § 3.361(f)(3) excludes hospital care or medical services provided under 38 U.S.C. 8153 in a facility over which the Secretary does not have direct jurisdiction because care or services under section 8153 are not provided by VA employees, but may or may not be furnished in a VA facility. New § 3.361(f)(3) excludes only such care and services in fact not provided in a VA facility. New § 3.361(g) is derived from § 3.800(b).

New § 3.362(b), concerning the amount of a tort recovery to be offset from a veteran's compensation awarded under 38 U.S.C. 1151(a), is derived from § 3.800(a)(2). New § 3.362(c), concerning the amount of a tort recovery to be offset from a survivor's dependency and indemnity compensation (DIC) awarded under 38 U.S.C. 1151(a), is derived from § 3.800(a)(2) and the Office of the General Counsel precedent opinion (VAOPGCPREC) 79-90. That opinion held that the amount to be offset from a DIC award under 38 U.S.C. 1151 depends on the nature of the damages recovered by the claimant under the Federal Tort Claims Act. Amounts recovered by a claimant as damages under a typical "wrongful-death statute" may be offset from a DIC award under 38 U.S.C. 1151, even if the damages are paid to a nominal party as trustee for the veteran's survivors. Each survivor receiving such damages is subject to offset of DIC under 38 U.S.C. 1151 to the extent of sums included in the tort claim's judgment, settlement, or compromise to compensate for harm suffered by that survivor. On the other hand, amounts recovered by a claimant, acting as personal representative of a decedent veteran's estate, as damages under a "survival statute" may not be offset from a DIC award under 38 U.S.C. 1151.

New § 3.362(d), concerning offset of structured settlements, is derived from the principles espoused in

VAOPGPCREC 79-90. Structured settlements are settlements or compromises in which the Government, rather than simply paying to a plaintiff a sum, in settlement or compromise of a claim under the Federal Tort Claims Act, buys an annuity or otherwise funds payments, which may differ in total amount from the amount expended by the Government, to be made to the plaintiff at some future time. We will offset from a compensation or DIC award only the veteran's or survivor's proportional share of the Government's cost of such a settlement, including the veteran's or survivor's proportional share of attorney fees. Furthermore, the offset begins as soon as compensation or DIC payments are made after the settlement becomes final, not when the settlement payments are actually made to the beneficiary.

New § 3.362, concerning a bar to benefits due to alternative recoveries before December 1, 1962, is derived from § 3.800(a)(3).

This final rule merely restates and interprets statutory provisions. Pursuant to 5 U.S.C. 553, we are dispensing with notice and comment and with a 30-day delay of the effective date.

Because no notice of proposed rulemaking was required in connection with the adoption of this final rule, no regulatory flexibility analysis is required under the Regulatory Flexibility Act, 5 U.S.C. 601-612. Even so, the Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act since it only concerns individuals.

The Catalog of Federal Domestic Assistance program numbers are 64.104 and 64.109.

List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

Approved: May 11, 1998.

Togo D. West, Jr.,
GPA Secretary.

For the reasons set forth in the preamble, 38 CFR part 3 is amended as follows:

PART 3—ADJUDICATION

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

1. The authority citation for part 3, subpart A continues to read as follows:

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

2. In § 3.358, the section heading and paragraph (a) are revised to read as follows:

§ 3.358 Compensation for disability or death from hospitalization, medical or surgical treatment, examinations or vocational rehabilitation training (§ 3.800).

(a) *General.* This section applies to claims received by VA before October 1, 1997. If VA determines that a veteran has an additional disability resulting from a disease or injury or aggravation of an existing disease or injury suffered as a result of training, hospitalization, medical or surgical treatment, or examination, it will pay compensation for such additional disability. For claims received by VA on or after October 1, 1997, see § 3.361.

* * * * *

3. Section 3.361 is added to read as follows:

§ 3.361 Benefits under 38 U.S.C. 1151(a) for additional disability or death due to hospital care, medical or surgical treatment, examination, or training and rehabilitation services.

(a) *Claims subject to this section.* This section applies to claims received by VA on or after October 1, 1997. This includes original claims and claims to reopen, revise, reconsider, or otherwise readjudicate a previous claim for benefits under 38 U.S.C. 1151 or its predecessors. For claims received by VA before October 1, 1997, see § 3.358.

(b) *Determining whether a veteran has an additional disability.* To determine whether a veteran has an additional disability, VA compares the veteran's condition immediately before the beginning of the hospital care, medical or surgical treatment, examination, or training and rehabilitation services upon which the claim is based to the veteran's condition after such care, treatment, examination, or services have stopped. VA considers each involved body part or system separately.

(c) *Establishing the cause of additional disability or death.* (1) *Actual causation required.* To establish causation, the evidence must show that the hospital care, medical or surgical treatment, or examination resulted in the veteran's additional disability or death. Merely showing that a veteran received care, treatment, or examination and that the veteran has an additional disability or died is not sufficient to establish cause.

(2) *Continuance or natural progress of a disease or injury.* Hospital care, medical or surgical treatment, or examination cannot cause the continuance or natural progress of a disease or injury for which the care, treatment, or examination was furnished

unless VA's failure to timely diagnose and properly treat the disease or injury proximately caused the continuance or natural progress. The provision of training and rehabilitation services cannot cause the continuance or natural progress of a disease or injury for which the services were provided.

(3) *Veteran's failure to follow medical instructions.* Additional disability or death caused by a veteran's failure to follow properly given medical instructions is not caused by hospital care, medical or surgical treatment, or examination.

(d) *Establishing the proximate cause of additional disability or death.* (1) *Care, treatment, or examination.* To establish that carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on VA's part in furnishing hospital care, medical or surgical treatment, or examination proximately caused a veteran's additional disability or death, the evidence must show that the hospital care, medical or surgical treatment, or examination caused the veteran's additional disability or death (as explained in paragraph (c) of this section); and

(i) VA failed to exercise the degree of care that would be expected of a reasonable health care provider; or

(ii) VA furnished the hospital care, medical or surgical treatment, or examination without the veteran's or, in appropriate cases, the veteran's representative's informed consent. To determine whether there was informed consent, VA will consider whether the health care providers complied with the requirements of § 17.32 of this chapter. Consent may be express (i.e., given orally or in writing) or implied (i.e., suggested by all the pertinent facts).

(2) *Events not reasonably foreseeable.* Whether the proximate cause of a veteran's additional disability or death was an event not reasonably foreseeable is to be determined in each claim based on what a reasonable health care provider would have foreseen.

(3) *Training and rehabilitation services.* To establish that the provision of training and rehabilitation services proximately caused a veteran's additional disability or death, the evidence must show that the veteran's participation in an essential activity or function of the training or services provided or authorized by VA, as part of an approved rehabilitation program under 38 U.S.C. chapter 31, proximately caused the disability or death. It need not show that VA approved that specific activity or function, as long as the activity or function is generally accepted as being a necessary

component of the training or services VA provided or authorized.

(e) *Department employees and facilities.* (1) A *Department employee* is an individual—

(i) Who is appointed by the Department in the civil service under title 38, United States Code, or title 5, United States Code, as an employee as defined in 5 U.S.C. 2105;

(ii) Who is engaged in furnishing hospital care, medical or surgical treatment, or examinations under authority of law; and

(iii) Whose day-to-day activities are subject to supervision by the Secretary of Veterans Affairs.

(2) A *Department facility* is a facility over which the Secretary of Veterans Affairs has direct jurisdiction.

(f) *Activities which are not hospital care, medical or surgical treatment, or examination furnished by a Department employee or in a Department facility.* The following are not hospital care, medical or surgical treatment, or examination furnished by a Department employee or in a Department facility within the meaning of 38 U.S.C. 1151(a):

(1) Hospital care or medical services furnished under a contract made under 38 U.S.C. 1703.

(2) Nursing home care furnished under 38 U.S.C. 1720.

(3) Hospital care or medical services, including examination, provided under 38 U.S.C. 8153 in a facility over which the Secretary does not have direct jurisdiction.

(g) *Benefits payable under 38 U.S.C. 1151 for a veteran's death.* (1) *Death before January 1, 1957.* The benefit payable under 38 U.S.C. 1151(a) to an eligible survivor for a veteran's death occurring before January 1, 1957, is death compensation. See §§ 3.5(b)(2) and 3.702 for the right to elect dependency and indemnity compensation.

(2) *Death after December 31, 1956.* The benefit payable under 38 U.S.C. 1151(a) to an eligible survivor for a veteran's death occurring after December 31, 1956, is dependency and indemnity compensation.

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

4. Section 3.362 is added to read as follows:

§ 3.362 Offsets under 38 U.S.C. 1151(b) of benefits awarded under 38 U.S.C. 1151(a).

(a) *Claims subject to this section.* This section applies to claims received by VA on or after October 1, 1997. This includes original claims and claims to reopen, revise, reconsider, or otherwise readjudicate a previous claim for benefits under 38 U.S.C. 1151 or its predecessors.

(b) *Offset of veterans' awards of compensation.* If a veteran's disability is the basis of a judgment under 28 U.S.C. 1346(b) awarded, or a settlement or compromise under 28 U.S.C. 2672 or 2677 entered, on or after December 1, 1962, the amount to be offset under 38 U.S.C. 1151(b) from any compensation awarded under 38 U.S.C. 1151(a) is the entire amount of the veteran's share of the judgment, settlement, or compromise, including the veteran's proportional share of attorney fees.

(c) *Offset of survivors' awards of dependency and indemnity compensation.* If a veteran's death is the basis of a judgment under 28 U.S.C. 1346(b) awarded, or a settlement or compromise under 28 U.S.C. 2672 or 2677 entered, on or after December 1, 1962, the amount to be offset under 38 U.S.C. 1151(b) from any dependency and indemnity compensation awarded under 38 U.S.C. 1151(a) to a survivor is only the amount of the judgment, settlement, or compromise representing damages for the veteran's death the survivor receives in an individual capacity or as distribution from the decedent veteran's estate of sums included in the judgment, settlement, or compromise to compensate for harm suffered by the survivor, plus the survivor's proportional share of attorney fees.

(d) *Offset of structured settlements.*

This paragraph applies if a veteran's disability or death is the basis of a structured settlement or structured compromise under 28 U.S.C. 2672 or 2677 entered on or after December 1, 1962.

(1) *The amount to be offset.* The amount to be offset under 38 U.S.C. 1151(b) from benefits awarded under 38 U.S.C. 1151(a) is the veteran's or survivor's proportional share of the cost of the settlement or compromise to the United States, including the veteran's or survivor's proportional share of attorney fees.

(2) *When the offset begins.* The offset of benefits awarded under 38 U.S.C. 1151(a) begins the first month after the structured settlement or structured compromise has become final that such benefits would otherwise be paid.

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

5. Section 3.363 is added to read as follows:

§ 3.363 Bar to benefits under 38 U.S.C. 1151.

(a) *Claims subject to this section.* This section applies to claims received by VA on or after October 1, 1997. This includes original claims and claims to reopen, revise, reconsider, or otherwise

readjudicate a previous claim for benefits under 38 U.S.C. 1151 or its predecessors.

(b) *Administrative awards, compromises, or settlements, or judgments that bar benefits under 38 U.S.C. 1151.* If a veteran's disability or death was the basis of an administrative award under 28 U.S.C. 1346(b) made, or a settlement or compromise under 28 U.S.C. 2672 or 2677 finalized, before December 1, 1962, VA may not award benefits under 38 U.S.C. 1151 for any period after such award, settlement, or compromise was made or became final. If a veteran's disability or death was the basis of a judgment that became final before December 1, 1962, VA may award benefits under 38 U.S.C. 1151 for the disability or death unless the terms of the judgment provide otherwise.

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

6. Section 3.800 is amended by adding introductory text to read as follows:

§ 3.800 Disability or death due to hospitalization, etc.

This section applies to claims received by VA before October 1, 1997. For claims received by VA on or after October 1, 1997, see §§ 3.362 and 3.363.

* * * * *

[FR Doc. 98-22486 Filed 8-21-98; 8:45 am]

BILLING CODE 8320-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[AD-FRL-6145-6]

RIN 2060-AE04

National Emission Standards for Hazardous Air Pollutants From Secondary Lead Smelting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule: amendments to rule.

SUMMARY: This action amends the national emission standards for hazardous air pollutants (NESHAP) for new and existing secondary lead smelters. Changes to the NESHAP are being made to address comments received following promulgation of the final rule. Four changes are being made. Two are minor typographical corrections, while two are substantive corrections. The EPA is making these amendments as a direct final rule without prior proposal because the Agency views this as a noncontroversial