

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers are 64.109 and 64.110.

List of Subjects in 38 CFR Part 3

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

Approved: July 3, 2002.

Anthony J. Principi,

Secretary of Veterans Affairs.

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. Section 3.6 is amended by:

A. Removing paragraphs (a)(1) through (a)(3).

B. In paragraph (a), removing “a covered disease which occurred during such training. For purposes of this section, the term ‘covered disease’ is limited to-”, and adding, in its place, “an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident which occurred during such training.”

C. Adding paragraph (e)(3) preceding the authority citation at the end of the section.

The addition reads as follows:

§ 3.6 Duty periods.

* * * * *

(e) * * *

(3) For purposes of this section, the term *covered disease* means any of the following:

- (i) An acute myocardial infarction.
- (ii) A cardiac arrest.
- (iii) A cerebrovascular accident.

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DEPARTMENT OF VETERANS AFFAIRS**38 CFR Part 3**

RIN 2900-AK67

Monetary Allowances for Certain Children of Vietnam Veterans; Identification of Covered Birth Defects

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends the Department of Veterans Affairs (VA) adjudication regulations to provide for payment of a monetary allowance for an individual with disability from one or more covered birth defects who is a child of a woman Vietnam veteran and to provide for the identification of covered birth defects, to implement recent legislation. In addition, this document amends the VA adjudication regulations affecting benefits for Vietnam veterans' children with spina bifida to reflect that legislation, to make conforming changes, and to remove unnecessary or obsolete provisions.

DATES: *Effective Date:* July 31, 2002.

Applicability Date: Benefits are payable in accordance with this rule retroactively to December 1, 2001, the effective date of the applicable statutory provisions.

FOR FURTHER INFORMATION CONTACT:

Carroll McBrine, M.D., Consultant, Regulations Staff (211A), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273-7230.

SUPPLEMENTARY INFORMATION: In a document published in the **Federal Register** on January 2, 2002 (67 FR 200), we proposed to amend the VA adjudication regulations to provide for payment of a monetary allowance for an individual with disability from one or more covered birth defects who is a child of a woman Vietnam veteran and to provide for the identification of covered birth defects, to implement provisions in recent legislation. In addition, we proposed to amend the VA adjudication regulations affecting benefits for Vietnam veterans' children with spina bifida to reflect that legislation, to make conforming changes, and to remove unnecessary or obsolete provisions. Companion proposed rule documents concerning the provision under that legislation of health care (RIN: 2900-AK88) (67 FR 209) and vocational training benefits (RIN: 2900-AK90) (67 FR 215) for eligible children of Vietnam veterans were also set forth in the January 2, 2002, issue of the **Federal Register**.

That legislation, section 401 of the Veterans Benefits and Health Care Improvement Act of 2000, Public Law 106-419, amended chapter 18 of title 38, United States Code, effective December 1, 2001, to authorize VA to provide certain benefits, including a monthly monetary allowance, for children with covered birth defects who are the natural children of women

veterans who served in the Republic of Vietnam during the Vietnam era. We provided a thirty-day period for public comments, which ended on February 1, 2002. We received one comment, from an individual.

The commenter felt that the U.S. government is displaying a bias in favor of women veterans in this regulation and that the hidden effect of Agent Orange may also have remained dormant in men's systems and produced chromosomal disorders in their children. No changes are made based on this comment. Public Law 106-419, which was based on a comprehensive health study conducted by VA of 8,280 women Vietnam-era veterans (as discussed in the **SUPPLEMENTARY INFORMATION** section of the proposed rule), provides benefits specifically for women Vietnam veterans' children with certain birth defects. We have no legal authority to award the new benefits to children of male Vietnam veterans.

VA appreciates the comment submitted in response to the proposed rule. Based on the rationale set forth in the proposed rule and in this document, we are adopting the provisions of the proposed rule as a final rule without change, except for nonsubstantive changes for purposes of clarity.

Administrative Procedure Act

Because this rule solely provides for new benefits and makes nonsubstantive changes, there is under 5 U.S.C. 553 no need for a 30-day delay of the effective date of this rule.

Applicability Date

Benefits are payable retroactively in accordance with this rule to December 1, 2001, the effective date of the new benefit programs enacted by section 401 of Public Law 106-419.

Paperwork Reduction Act of 1995

This rule removes the approved information collection provisions contained in 38 CFR 3.814 as unnecessary or obsolete. This rule contains no provisions constituting new collections of information under the Paperwork Reduction Act.

Executive Order 12866

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that these regulatory amendments will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. The

reason for this certification is that these amendments will not directly affect any small entities. Only individuals could be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), these amendments are exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any given year. This rule will have no consequential effect on State, local, or tribal governments.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers for benefits affected by this rule are 64.104, 64.109, 64.127, and 64.128.

There are no Catalog of Federal Domestic Assistance program numbers for other benefits affected by this rule. 2

List of Subjects in 38 CFR Part 3

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

Approved: May 13, 2002.

Anthony J. Principi,
Secretary of Veterans Affairs.

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 § 3.27, paragraphs (c) and (d) are revised to read as follows:

§ 3.27 Automatic adjustment of benefit rates.

* * * * *

(c) *Monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans.* Whenever there is a cost-of-living increase in benefit amounts payable under section 215(i) of Title II of the

Social Security Act, VA shall, effective on the dates such increases become effective, increase by the same percentage the monthly allowance rates under 38 U.S.C. chapter 18.

(Authority: 38 U.S.C. 1805(b)(3), 1815(d), 5312)

(d) *Publishing requirements.* Increases in pension rates, parents' dependency and indemnity compensation rates and income limitation, and the monthly allowance rates under 38 U.S.C. chapter 18 made under this section shall be published in the **Federal Register**.

(Authority: 38 U.S.C. 1805(b)(3), 1815(d), 5312(c)(1))

3. In § 3.29, paragraph (c) is revised to read as follows:

§ 3.29 Rounding

* * * * *

(c) *Monthly rates under 38 U.S.C. chapter 18.* When increasing the monthly monetary allowance rates under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans, VA will round any resulting rate that is not an even dollar amount to the next higher dollar.

(Authority: 38 U.S.C. 1805(b)(3), 1815(d), 5312)

§ 3.31 [Amended]

4. Section 3.31 is amended by:
a. In the introductory text, removing "the monetary allowance under 38 U.S.C. 1805 for a child suffering from spina bifida" and adding, in its place, "a monetary allowance under 38 U.S.C. chapter 18 for an individual".

b. In paragraph (c)(4)(ii), removing "the monetary allowance for children suffering from spina bifida" and adding, in its place, "a monetary allowance under 38 U.S.C. chapter 18".

c. Revising the authority citation. The revision reads as follows:

§ 3.31 Commencement of the period of payment.

* * * * *

(Authority: 38 U.S.C. 1822, 5111)

5. In § 3.105, paragraph (g) is revised to read as follows:

§ 3.105 Revision of decisions.

* * * * *

(g) *Reduction in evaluation—monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans.* Where a reduction or discontinuance of a monetary allowance currently being paid under 38 U.S.C. chapter 18 is considered warranted, VA will notify the beneficiary at his or her latest

address of record of the proposed reduction, furnish detailed reasons therefor, and allow the beneficiary 60 days to present additional evidence to show that the monetary allowance should be continued at the present level. Unless otherwise provided in paragraph (i) of this section, if VA does not receive additional evidence within that period, it will take final rating action and reduce the award effective the last day of the month following 60 days from the date of notice to the beneficiary of the proposed reduction.

(Authority: 38 U.S.C. 1822, 5112(b)(6))

* * * * *

§ 3.114 [Amended]

6. Section 3.114 is amended by:
a. In the introductory text of paragraph (a), removing "the monetary allowance under 38 U.S.C. 1805 for a child suffering from spina bifida" each place it appears and adding, in its place, "a monetary allowance under 38 U.S.C. chapter 18 for an individual".

b. Revising the authority citation at the end of paragraph (a).

The revision reads as follows:

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

* * * * *

(Authority: 38 U.S.C. 1822, 5110(g))

* * * * *

§ 3.158 [Amended]

7. In § 3.158, paragraphs (a) and (c) are amended by removing "1805" and adding, in its place, "chapter 18".

§ 3.216 [Amended]

8. Section 3.216 is amended by:
a. Removing "or the monetary allowance for a child suffering from spina bifida who is a child of a Vietnam veteran under § 3.814 of this part" and adding, in its place, "a monetary allowance under 38 U.S.C. chapter 18".

b. Revising the authority citation.

The revision reads as follows:

§ 3.216 Mandatory disclosure of social security numbers.

* * * * *

(Authority: 38 U.S.C. 1822, 5101(c))

* * * * *

9. In § 3.261, paragraph (a)(40) is revised to read as follows:

§ 3.261 Character of income; exclusions and estates.

* * * * *

(a) * * *

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—
*	*	*	*	*	*
(40) Monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans (38 U.S.C. 1823(c)).	Excluded	Excluded	Excluded	Excluded	§ 3.262(y)

* * * * *
 10. In § 3.262, paragraph (y) is revised to read as follows:

§ 3.262 Evaluation of income.

* * * * *
 (y) *Monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans.* There shall be excluded from income computation any allowance paid under the provisions of 38 U.S.C. chapter 18 to or for an individual who is the child of a Vietnam veteran.

(Authority: 38 U.S.C. 1823(c))

11. In § 3.263, paragraph (g) is revised to read as follows:

§ 3.263 Corpus of estate; net worth.

* * * * *
 (g) *Monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans.* There shall be excluded from the corpus of estate or net worth of a claimant any allowance paid under the provisions of 38 U.S.C. chapter 18 to or for an individual who is a child of a Vietnam veteran.

(Authority: 38 U.S.C. 1823(c))

12. In § 3.272, paragraph (u) is revised to read as follows:

§ 3.272 Exclusions from income.

* * * * *
 (u) *Monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans.* Any allowance paid under the provisions of 38 U.S.C. chapter 18 to or for an individual who is a child of a Vietnam veteran.

(Authority: 38 U.S.C. 1823(c))

13. In § 3.275, paragraph (i) is revised to read as follows:

§ 3.275 Criteria for evaluating net worth.

* * * * *
 (i) *Monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans.* There shall be excluded from the corpus of estate or net worth of a claimant any

allowance paid under the provisions of 38 U.S.C. chapter 18 to or for an individual who is a child of a Vietnam veteran.

(Authority: 38 U.S.C. 1823(c))

14. In § 3.403, paragraph (b) is revised and paragraph (c) is added, to read as follows:

§ 3.403 Children.

* * * * *
 (b) *Monetary allowance under 38 U.S.C. 1805 for an individual suffering from spina bifida who is a child of a Vietnam veteran.* An award of the monetary allowance under 38 U.S.C. 1805 to or for an individual suffering from spina bifida who is a child of a Vietnam veteran will be effective either date of birth if claim is received within one year of that date, or date of claim, but not earlier than October 1, 1997.

(Authority: 38 U.S.C. 1822, 5110; sec. 422(c), Pub. L. 104–204, 110 Stat. 2926)

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

(Authority: 38 U.S.C. 1815, 1822, 1824, 5110)

15. In § 3.503, paragraph (b) is revised to read as follows:

§ 3.503 Children.

* * * * *
 (b) *Monetary allowance under 38 U.S.C. chapter 18 for certain individuals who are children of Vietnam veterans.* The effective date of discontinuance of the monthly allowance under 38 U.S.C. chapter 18 will be the last day of the month before the month in which the death of the individual occurred.

(Authority: 38 U.S.C. 1822, 5112(b))

16. Section 3.814 is amended by:

- a. Revising the section heading.
- b. Adding a heading to paragraph (a).
- c. In paragraph (a), revising the first sentence and, in the second sentence, removing “other related individual” and adding, in its place, “related person”.
- d. Removing and reserving paragraph (b).
- e. In paragraph (c)(1), removing “an individual” and adding, in its place, “a person” and removing “individual’s” and adding, in its place, “person’s”.
- f. In paragraph (c)(2), removing “§ 3.204(a)(1), VA shall” and adding, in its place, “§ 3.204(a)(1), VA will” and by removing “an individual’s biological father or mother is or was” and adding, in its place, “a person is the biological son or daughter of”.
- g. Add a heading for paragraph (d).
- h. Removing the authority citation at the end of paragraph (d).
- i. In paragraph (e) introductory text, removing “children” and adding, in its place, “an individual”.
- j. Revising the authority citation at the end of the section.
- k. Removing the information collection parenthetical at the end of the section.

The revisions and additions read as follows:

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

(a) *Monthly monetary allowance.* VA will pay a monthly monetary allowance under subchapter I of 38 U.S.C. chapter 18, based upon the level of disability determined under the provisions of paragraph (d) of this section, to or for a person who VA has determined is an individual suffering from spina bifida whose biological mother or father is or was a Vietnam veteran. * * *

* * * * *

(d) *Disability evaluations.* (1) * * *

* * * * *

(Authority: 38 U.S.C. 501, 1805, 1811, 1812, 1821, 1822, 1823, 1824, 5101, 5110, 5111, 5112)

17. Section 3.815 is added to read as follows:

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

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

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

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

respectively, under § 3.814(d), the evaluation of the individual's level of disability under paragraph (e) of this section will be not less than Level II, III, or IV, respectively.

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

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

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

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

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

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

(1) Covered birth defects include, but are not limited to, the following (however, if a birth defect is determined

to be familial in a particular family, it will not be a covered birth defect):

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

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

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

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

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

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

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

- (iv) Turner's syndrome.
- (5) Conditions that are due to birth-related injury are not covered birth defects. These include, but are not limited to, the following:
- (i) Brain damage due to anoxia during or around time of birth;
 - (ii) Cerebral palsy due to birth trauma,
 - (iii) Facial nerve palsy or other peripheral nerve injury;
 - (iv) Fractured clavicle; and
 - (v) Horner's syndrome due to forceful manipulation during birth.
- (6) Conditions that are due to a fetal or neonatal infirmity with well-established causes or that are miscellaneous pediatric conditions are not covered birth defects. These include, but are not limited to, the following:
- (i) Asthma and other allergies;
 - (ii) Effects of maternal infection during pregnancy, including but not limited to, maternal rubella, toxoplasmosis, or syphilis;
 - (iii) Fetal alcohol syndrome or fetal effects of maternal drug use;
 - (iv) Hyaline membrane disease;
 - (v) Maternal-infant blood incompatibility;
 - (vi) Neonatal infections;
 - (vii) Neonatal jaundice;
 - (viii) Post-infancy deafness/hearing impairment (onset after the age of one year);
 - (ix) Prematurity; and
 - (x) Refractive disorders of the eye.
- (7) Conditions that are developmental disorders are not covered birth defects. These include, but are not limited to, the following:
- (i) Attention deficit disorder;
 - (ii) Autism;
 - (iii) Epilepsy diagnosed after infancy (after the age of one year);
 - (iv) Learning disorders; and
 - (v) Mental retardation (unless part of a syndrome that is a covered birth defect).
- (8) Conditions that do not result in permanent physical or mental disability are not covered birth defects. These include, but are not limited to:
- (i) Conditions rendered non-disabling through treatment;
 - (ii) Congenital heart problems surgically corrected or resolved without disabling residuals;
 - (iii) Heart murmurs unassociated with a diagnosed cardiac abnormality;
 - (iv) Hemangiomas that have resolved with or without treatment; and
 - (v) Scars (other than of the head, face, or neck) as the only residual of corrective surgery for birth defects.
- (e) *Disability evaluations.* Whenever VA determines, upon receipt of competent medical evidence, that an individual has one or more covered

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

(1) *Levels of disability.*

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

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

- (A) The individual has residual physical or mental effects that only occasionally or intermittently limit or prevent some daily activities; or
- (B) The individual has disfigurement or scarring of the head, face, or neck without gross distortion or gross asymmetry of any facial feature (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

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

- (A) The individual has residual physical or mental effects that frequently or constantly limit or prevent some daily activities, but the individual is able to work or attend school, carry out most household chores, travel, and provide age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene, and communication, behavior, social interaction, and intellectual functioning are appropriate for age; or
- (B) The individual has disfigurement or scarring of the head, face, or neck with either gross distortion or gross asymmetry of one facial feature or one paired set of facial features (nose, chin, forehead, eyes (including eyelids), ears (auricles), cheeks, or lips).

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

- (A) The individual has residual physical or mental effects that frequently or constantly limit or prevent most daily activities, but the individual is able to provide age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene;
- (B) The individual is unable to work or attend school, travel, or carry out household chores, or does so intermittently and with difficulty;

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

- (A) The individual has residual physical or mental effects that prevent age-appropriate self-care, such as eating, dressing, grooming, and carrying out personal hygiene;
- (B) The individual's communication, behavior, social interaction, and intellectual functioning are not entirely appropriate for age; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) *Effective dates.* Except as provided in § 3.114(a) or paragraph (i)(1) or (2) of this section, VA will award the monetary allowance under subchapter II of 38 U.S.C. chapter 18, for an individual with disability resulting from one or more covered birth defects, based on an original claim, a claim reopened after final disallowance, or a claim for increase, as of the date VA received the claim (or the date of birth if the claim is received within one year of that date), the date entitlement arose, or December 1, 2001, whichever is latest. Subject to the condition that no benefits may be paid for any period prior to December 1, 2001:

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

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

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

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

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

(Authority: 38 U.S.C. 501, 1811, 1812, 1813, 1814, 1815, 1816, 1821, 1822, 1823, 1824, 5101, 5110, 5111, 5112)

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 4

RIN 2900-AF00

Schedule for Rating Disabilities; the Skin

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: This document amends that portion of the Department of Veterans Affairs (VA) Schedule for Rating Disabilities that addresses the Skin. The intended effect of this action is to update the portion of the rating schedule that deals with skin to ensure that it uses current medical terminology and unambiguous criteria, and that it reflects medical advances that have occurred since the last review.

DATES: *Effective Date:* This amendment is effective August 30, 2002.

FOR FURTHER INFORMATION CONTACT: Carol McBrine, M.D., Consultant, Policy and Regulations Staff (211B), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 273-7230.

SUPPLEMENTARY INFORMATION: As part of a comprehensive review of the rating schedule, VA published a proposal to amend 38 CFR 4.118, which addresses disabilities of the skin, in the **Federal Register** of January 19, 1993 (58 FR 4969). Comments were received from the American Legion, Paralyzed Veterans of America, Veterans of Foreign Wars, Disabled American Veterans, and VA employees.

One commenter suggested that VA withdraw the proposed regulations and reissue them based on more objective standards, and also made specific suggestions for changes to many diagnostic codes.

We do not agree that the proposed regulations should be withdrawn.

We made the process of revision as open as possible. For example, prior to publication of the proposed amendment, we published an advance notice of proposed rulemaking in the **Federal Register** to receive public comments about the revision. We also contracted with an outside consultant, who convened a panel of non-VA physician specialists in skin diseases to make recommendations for revisions of this section of the rating schedule. We asked the Veterans Health Administration to review our proposed changes. We published the proposed revision only after reviewing all of these

sources of information. We received several other comments on the proposed rule after it was published in the **Federal Register**, but none of the commenters suggested withdrawing the proposed revision. In response to comments, we have however, made further revisions to some of the criteria for the sake of clarity and more objectivity and have added definitions and explanatory notes under some conditions. These added changes are discussed in more detail below. The same commenter who suggested withdrawing the proposed revision also made specific suggestions for changes to many diagnostic codes. With the additional changes we have made in the final revision, we believe we have made the evaluation criteria for skin conditions reasonably clear and objective.

Under diagnostic code (DC) 7800, disfigurement of the head, face, or neck, the former rating schedule provided evaluation levels of 50, 30, 10, and zero percent based on whether there is repugnant deformity of one or both sides of the face, whether the disfigurement is "severe," producing a marked and unsightly deformity of eyelids, lips, or auricles, and on whether the disfigurement is "moderate" or "slight." Following these criteria was a note stating that each level could be increased to the next higher evaluation level on the basis of marked discoloration or color contrast and that the most repugnant, disfiguring conditions, including scars and diseases of the skin, could be submitted with photographs for central office rating. The proposed amendment added an 80-percent evaluation level and deleted the part of the note that provided authority to elevate evaluations in the presence of marked discoloration or color contrast based on the rationale that these criteria are subject to inconsistent interpretations. The proposed evaluation criteria were based at 80 percent on whether disfigurement is so disfiguring as to preclude occupational interaction with the public, at 50 percent on whether it is repugnant on casual inspection, at 30 percent on whether it is disagreeable on casual inspection, at 10 percent on whether it is noticeable on casual inspection, and at zero percent on whether it is noticeable, but only on close inspection.

One commenter felt that the deleted note should be retained. Another commenter, while offering no alternative language for us to consider, stated that the words "repugnant," "disagreeable," and "noticeable," used to describe degrees of disfigurement, are too subjective to be useful and are not